Journal of International Economic Law 14(3), 553–592
doi:10.1093/jiel/jgr023. Advance Access publication 25 August 2011

FAIR IN FORM, BUT DISCRIMINATORY IN OPERATION—WTO LAW'S DISCRIMINATORY EFFECTS ON HUMAN RIGHTS IN DEVELOPING COUNTRIES

*Gillian Moon**

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

ABSTRACT

There are many points of intersection between the law of the World Trade Organization and international human rights law. This article looks at one such, where WTO law requires developing countries to introduce measures that may have disproportionately adverse impacts on the human rights of individuals or groups who are protected under human rights law from discrimination. Indirect discrimination of this kind usually occurs because prior discriminatory treatment has created social and economic inequalities that subsequent, apparently neutral—or 'fair in form'—measures exacerbate. Country studies of Nicaragua and Ghana provide evidence that indirectly discriminatory impacts might occur as a result of the reductions in agricultural tariffs proposed in the Doha Round for developing countries. While laws which have discriminatory effects may be justifiable, discrimination on the basis of race or sex is anathema to human rights law and will be subjected to intense justificational scrutiny. The article scrutinizes the justifiability of the proposed agricultural tariff reductions, concluding that less damaging alternatives are available and could be adopted at the multilateral level. It is argued that the potential discrimination is best dealt with at this level, since it is the law-making level and the discrimination is unlikely to be corrected through domestic, remedial action within developing countries.

> [Human rights law] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.
>
> *Griggs* v *Duke Power Co*, 401 U.S. 424
> (Supreme Court of the United States 1971, per Burger CJ)

* Senior Lecturer, Faculty of Law, University of New South Wales, Sydney, Australia; Director of the Trade, Human Rights and Development Project, Australian Human Rights Centre, UNSW, Sydney, Australia. E-mail: g.moon@unsw.edu.au.

 © Oxford University Press 2011, all rights reserved

I. INTRODUCTION

In his ground-breaking 1999 article about trade and human rights, Frank Garcia observed that '[s]hort of a trade treaty providing directly for trade in the products of prison and slave labour, it is hard to imagine a direct conflict between trade law and core human rights . . . .'[1] This is a widely held view.[2] Yet it is evident that there are points at which the law of the World Trade Organization (WTO) and international human rights law intersect. A primary concern has been whether WTO law obligations affect performance of the human rights obligations owed by the governments of developing countries to their nationals. For the most part, this concern has focused on WTO law that dictates human development strategies, restricting the options of developing countries seeking to sustain the livelihoods of the poor and to foster equitable access to essential services[3] and pharmaceuticals.[4] The concern is the possibility that these aspects of WTO law might limit developing countries' human rights policy space, with the consequence that they might be held back in the realization of economic and social rights for their nationals.[5] Ordinarily, states introducing trade reforms would be expected to avoid any consequential retrogression in economic and social rights by introducing accompanying social safety net, training, employment, and relocation programmes, but many developing countries lack the public funds or other requirements for comprehensive programmes.

This article deals with a variant on the above concern; specifically, that WTO law may require developing countries to introduce trade measures that have a discriminatory impact on the human rights of certain of their nationals. Human rights law prohibits discriminatory treatment based on such

[1] Frank Garcia, 'The Global Market and Human Rights: Trading Away the Human Rights Principle', 25 Brooklyn Journal of International Law 51 (1999), at 73.

[2] Sarah Joseph begins her analysis of the relationship between human rights and WTO law by observing, 'it is difficult to identify direct conflict between WTO rules and international rules mandating the protection of human rights or other social justice norms. If such conflicts exist, they are confined to discrete areas or are yet to be uncovered by interpretation in trade disputes': Sarah Joseph, 'Human Rights and the World Trade Organisation: Not Just a Case of Regime Envy' (16 December 2008), at 3, http://ssrn.com/abstract=1316760 (visited 26 June 2011).

[3] See the WTO General Agreement on Trade in Services (GATS), General Agreement on Tariffs and Trade (GATT) Secretariat, *The Results of the Uruguay Round of Multilateral Trade Negotiations, the Legal Texts* (Geneva: GATT Secretariat, 1994) 284. GATS has raised particular concerns in this respect, regarding possible future liberalization, privatization, and deregulation of essential services, as well as the so-called 'locking-in' nature of GATS.

[4] The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), in GATT Secretariat, ibid, at 321. TRIPS has also raised widespread concern in that it plays a part in restraining access by the poor to affordable drugs and in 'privatizing' ownership of botanic resources: TRIPS Agreement, Articles 31 and 27.

[5] Gillian Moon, 'The WTO-Minus Strategy', 2 (1) Human Rights and International Legal Discourse 37 (2008).

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

characteristics as race, sex, disability, and religion,[6] although discrimination remains a persistent and virtually universal problem, present in various forms and degrees in all societies.[7] Its existence can sometimes be hard to detect and impoverished and marginalized racial, ethnic, or religious minorities, for example, may merely appear to be economically weak.[8] The United Nations (UN) Division for the Advancement of Women (DAW) has documented the global persistence of women's 'deeply entrenched inequality' that is the result of 'discriminatory norms and practices . . . '.[9] DAW notes that, across the world, '[l]ong-standing inequalities in the gender distribution of economic and financial resources have placed women at a disadvantage relative to men in their capability to participate in, contribute to, and benefit from the broader process of development . . . .'[10]

When international laws and policies, including those of WTO law, are applied within already-discriminatory domestic societal structures, they can easily exacerbate existing disparate levels of enjoyment of economic and social benefits. In such circumstances, states may have human rights law obligations to ensure that discrimination does not occur or is stopped. The article begins by exploring the nature and scope of states' obligations with regard to economic and social rights and proceeds to set out their further obligations as to non-discrimination in the realization and enjoyment of those rights.

[6] Discrimination in relation to human rights and fundamental freedoms is prohibited in international human rights law by: Article 2, Universal Declaration on Human Rights (UDHR), GA Res 217A (III), UN Doc A/810 at 71 (1948); Article 2.1, International Covenant on Civil and Political Rights (ICCPR), GA Res 2200A (XXI), 21 UN GAOR Supp (No. 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976; Article 2.2, International Covenant on Economic, Social and Cultural Rights (ICESCR), GA Res 2200A (XXI), 21 UN GAOR Supp (No. 16) at 49, UN Doc A/6316 (1966), 993 UNTS 3, entered into force 3 January 1976; International Convention of the Elimination of All Forms of Racial Discrimination (ICERD), 660 UNTS 195, entered into force 4 January 1969; International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), GA Res 34/180, 34 UN GAOR Supp (No. 46) at 193, UN Doc A/34/46, entered into force 3 September 1981; International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (CPRD), GA Res 61/106, Annex I, UN GAOR, 61st Sess, Supp No. 49, at 65, UN Doc A/61/49 (2006), entered into force 3 May 2008; and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, GA Res 45/158, annex, 45 UN GAOR Supp (No. 49A) at 262, UN Doc A/45/49 (1990), entered into force 1 July 2003.

[7] International Council on Human Rights Policy, *Review Meeting – Racism: Trends and Patterns in Discrimination*, Geneva 3–4 December 1999, http://www.ichrp.org/en/projects/112?theme=5 (visited 26 June 2011)

[8] For a discussion of this phenomenon, see Rodolfo Stavenhagen, *Structural Racism and Trends in the Global Economy* (International Council on Human Rights Policy), Geneva, 3–4 December 1999, http://www.ichrp.org/files/papers/164/112_-_Structural_Racism_and_Trends_in_the_Global_Economy_Stavenhagen__Rodolfo__1999.pdf (visited 26 June 2011).

[9] Department of Economic and Social Affairs of the United Nations Secretariat, DAW, *2009 World Survey on the Role of Women in Development* (New York, NY: United Nations, 2009) 5.

[10] Ibid.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

II. STATES' OBLIGATIONS UNDER ICESCR

Under the ICESCR, a state party is obliged to 'take steps . . . , to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the Covenant, by all appropriate means . . . '.[11] This obligation tends to be viewed as more flexible and less immediately imposing than that in its companion, the ICCPR,[12] as realization of ICESCR rights may be achieved over time and is recognizably subject to a state's available resources. The UN Committee on Economic, Social and Cultural Rights (CESCR) explains that,

> the concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time . . . . It is . . . a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights.[13]

The obligation of states under ICESCR is, however, a dynamic one under which they must apply whatever resources they can acquire, from whatever sources, to the realization of the rights in the covenant.[14] The CESCR also explains that, even though states may face resource constraints, the only 'deliberately retrogressive measures' they may legitimately make are those that take place 'in the context of the full use of the maximum available resources' and which are 'fully justified by reference to the totality of the rights provided for in the Covenant'.[15]

ICESCR gives states added flexibility in their obligations through a limitations clause.[16] Article 4 permits states to place limitations on their human rights obligations under that Covenant, where the proposed limitations are compatible with the nature of the rights in the Covenant, effected by law and solely for the purpose of promoting the general welfare in a

[11] ICESCR, Article 2.1.

[12] The obligation imposed on states by ICCPR Article 2.1 is 'to respect and to ensure to all individuals . . . the rights recognized in the present Covenant'.

[13] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3, The Nature of States Parties' Obligations* (Fifth session, 1990), UN Doc E/1991/23, annex III at 86 (1990), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev 6 at 14 (2003), at para 9.

[14] Ibid, at paras 10, 11 and 13.

[15] Ibid, at para 9.

[16] Unlike the ICCPR, ICESCR does not contain a derogation clause. Article 4 deals with different limitations from those a state might impose for reasons of shortage of resources: Amrei Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights', 9 (4) Human Rights Law Review 557 (2009), at 569–70, referring to the *travaux préparatoires* for ICESCR. Despite the absence of a derogation clause in ICESCR, in his article Müller describes a tendency of the CESCR to permit states to derogate from certain ICESCR rights in situations of emergency, such as civil conflict or war.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

democratic society.[17] Unlike derogations, limitations may be in place for long periods of time and states are not required to notify other States Parties of their existence.[18] Very few states provide information about Article 4 limitations to the CESCR in their periodic reports, where there is some confusion about the distinction between limitations and derogations.[19] ICESCR permits limitations as a way of highlighting that rights are not absolute or unconditional in all circumstances and that there must be a balance between the interests of the individual and of society as a whole. Limitations also highlight that there will be conflicts from time to time between rights. Müller explains that '[l]imitations are a necessary and normal element in the human rights treaty system, since without them there would be an unworkable system of absolute rights of each individual . . . . Reasonable limitations are part of the "oil" of the human rights system . . . .'[20] The manner in which limitations may be imposed upon the rights in ICESCR is, however, tightly regulated, particularly by the requirement that they must have the sole purpose of 'promoting the general welfare'. The *travaux préparatoires* make clear that Article 4 was deliberately drafted so as to provide a narrower opportunity for exceptional action than a derogations provision, which typically may be invoked for wider purposes such as public order, the public interest or national security.[21]

Despite the flexibilities in the core obligation of states and despite the opportunity to impose limitations, ICESCR should not be misinterpreted as imposing wholly open, or no immediately binding, obligations.[22] First, it requires states to 'take steps', which the CESCR has explained should be understood as requiring states 'to move as expeditiously and effectively as possible' towards the goal of full realization through steps that are 'deliberate, concrete and targeted'.[23] Secondly, it requires states to meet 'minimum core obligations', regardless of resource constraints. The minimum obligations have been defined as ensuring access to 'essential foodstuffs, essential

[17] ICESCR, Article 4. Note also that Article 8(1) permits restrictions to be placed on the right to join or form trades unions, where such restrictions are prescribed by law, necessary in a democratic society and are in the interests of national security, public order, or the protection of the rights of others.

[18] See Müller, above n 16, at 565.

[19] Ibid, at 566–69.

[20] Ibid, at 564.

[21] Ibid, at 573.

[22] In its periodic reviews of Member States, the CESCR has frequently pointed out to states instances of their non-compliance with the immediate obligations. Examples include the request that Benin immediately develop and adopt a plan for the progressive realization of the right to free primary education and that Zambia meet the minimum core obligations under ICESCR, see 'Benin, ICESCR, E2003/22 (2002) 34 at para 199', available at http://www.bayefsky.com/themes/limitations_permissible-limitations_concluding_part2.pdf (visited 26 June 2011); and that Jordan ensure the equitable (non-discriminatory) distribution of its existing economic and social resources, see 'Jordan, ICESCR, E/2001/22 (2000) 49 at para 246', available at http://www.bayefsky.com/themes/limitations_permissible-limitations_concluding-observations.pdf (visited 26 June 2011).

[23] CESCR, above n 13, at para 2.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

primary health care, basic shelter and housing, [and] the most basic forms of education'.[24] Thirdly, as previously mentioned, it requires that whatever steps a state does undertake be performed on a basis of non-discrimination, which is defined to include indirect discrimination. The next part explores the nature of the human rights law prohibition on discrimination.

III. THE PROHIBITION ON DISCRIMINATION IN HUMAN RIGHTS LAW

Those exploring whether WTO law constrains performance by developing country governments of their human rights law obligations have usually focused attention on whether it constrains states' ability to meet their core obligation under ICESCR: that is, to take steps towards the 'progressive realization' of the rights in the Covenant, 'to the maximum of available resources'.[25] However, the somewhat deferrable nature of this obligation,[26] its contingency upon shortage of resources and the fact that the Covenant rights themselves are sometimes frustratingly vague mean that attempting to demonstrate a direct, constraining impact by WTO law is difficult. States regularly make choices with regard to economic priorities, economic adjustments, welfare programmes, and the order of social supports, all within the permissible scope of the ICESCR obligation of progressive realization to the maximum of available resources.

Less attention has been given to a central component of the ICESCR core obligation, the requirement that states act on a basis of non-discrimination. The prohibition on discrimination and its inverse, the guarantee of equality, are fundamental principles of human rights law and are of the greatest importance to the achievement of its aims. By preventing some people from participating equally in society and from utilizing their capabilities, discrimination leads to social exclusion and deprivation, directly undermining the aims of human rights law. Discrimination is a powerful negative force and perhaps the principal barrier to the realization of rights. Recognizing this, human rights law requires States Parties to guarantee to all persons equality before the law and equal treatment by the law, as an autonomous human right.[27] It also prescribes that human rights are to be enjoyed without discrimination. The prohibition on discrimination was first stated in the United Nations Charter and the 1948 Universal Declaration of Human Rights.[28] More recently, ICESCR and ICCPR now guarantee that human rights are to

[24] Ibid, at paras 1–2 and 10.
[25] For a discussion of this literature, see Moon, above n 5.
[26] Note that states' obligations in ICESCR are more positive and immediately imposing than is often asserted and there is a growing jurisprudence regarding their enforcement against states: see Malcolm Langford (ed.), *Social Rights Jurisprudence* (Cambridge: Cambridge University Press, 2009).
[27] ICCPR, Article 26.
[28] Charter of the United Nations (1945), Article 55(c); UDHR, Article 2.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

be enjoyed 'without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[29] This is often referred to as the list of prohibited grounds or protected characteristics.

Particularly powerful in international law is the prohibition on racial discrimination. There is a compelling argument, much of it elegantly set out in the 1966 dissenting opinion of Judge Tanaka in the *South West Africa cases*,[30] that the prohibition is a peremptory norm of customary international law. Since then, the two international human rights covenants and the 1965 International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)[31] have become part of international law, each expressly prohibiting discrimination based on race and adding further authority to the now widely held view that the prohibition is indeed a peremptory norm. It may also be that the prohibition on discrimination against women has become, or is over time and by custom becoming, a peremptory norm. In 1990, Anne Bayefsky argued that there is a strong case, based on both treaty law and jurisprudence, that distinctions based on sex, being 'inherently suspect', will always be 'deserving of the highest degree of scrutiny', although she did not argue that the prohibition on sex discrimination is yet a peremptory norm, as such, in international law.[32] The 1976 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has strengthened the position in international law of the prohibition on sex discrimination.[33]

While the prohibition on discrimination is stated in ICESCR and ICCPR, discrimination is not defined there other than in relation to the list of prohibited grounds. The prohibition is, however, expressed more fully in ICERD, as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'.[34]

[29] ICESCR, Article 2.2; ICCPR, Article 2.1. The list of characteristics set out in the international human rights treaties has been augmented in recent years by the addition of disability and the state of being a migrant worker, and by a broadened interpretation of sex to include sexual orientation.

[30] Judge Tanaka (in dissent), *Liberia* v *South Africa; Ethiopia* v *South Africa*, (International Court of Justice 1961), http://www.icj-cij.org/docket/files/47/4969.pdf (visited 14 July 2011).

[31] ICERD Article 2.1 requires State Parties 'to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation'.

[32] Anne Bayefsky, 'The Principle of Equality or Non-Discrimination in International Law', 11 (1–2) Human Rights Law Journal 1 (1990), at 20–23.

[33] Note that CEDAW prohibits discrimination against women, while ICESCR and ICCPR prohibit discrimination on the basis of sex.

[34] ICERD, Article 1.1.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

Discrimination against women is defined in CEDAW in (for present purposes) substantially identical terms. Distinguishing on the basis of race/ethnicity or sex is prohibited because these are elements of human individuality, which either cannot be changed (or should not be required to be changed, where change is possible) in order to realize one's human rights. They are also characteristics that are typically irrelevant to a person's capabilities, for example, in employment. Note that the prohibition on discrimination relates to measures that 'nullify or impair human rights and fundamental freedoms' as set out in the covenants. Measures impairing 'rights' outside this framework will not offend the principle of non-discrimination. To illustrate, there can be no claim under human rights law that a person's 'right' to operate a micro-business has been impaired.

States enacting trade policy measures would not ordinarily set out to discriminate and a domestic trade measure would rarely be drafted so as to directly impair the economic or social rights of particular racial groups or women. However, as is evident from the above definition, human rights law recognizes that laws may discriminate either by their 'purpose' or by their 'effect'. A measure might discriminate *indirectly*, having a discriminatory effect even though it is expressed in neutral terms, with no discriminatory purpose. The concept of indirect discrimination captures what is the more pernicious and probably the more common form of discrimination: when two people are treated in an equal or neutral manner but, due to the possession by one of a protected characteristic (such as minority ethnicity or female sex), the impact on that person is less favourable or is adverse compared to the impact on the person without the characteristic.

A. Indirect discrimination in human rights law

The concept and prohibition of indirect discrimination have well-established places in international human rights law. In 1989, the UN Human Rights Committee (HRC) formally adopted a general definition of discrimination, which is an amalgamation of the ICERD and CEDAW definitions (although extended to the full list of grounds). The definition expressly includes indirect discrimination.[35] The HRC has variously referred to this kind of discrimination as indirect discrimination, *de facto* discrimination and discrimination in effect. The Committee on the Elimination of Racial Discrimination (CERD) has also made clear that the prohibition in ICERD includes indirect discrimination.[36] In its Concluding Comments regarding individual states,

[35] HRC, General Comment No. 18, *Non-Discrimination*, (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev 6 at 146 (2003), at para 6.

[36] UN CERD, General Recommendation 14, *Definition of Racial Discrimination* (Forty-second session, 1993), UN Doc A/48/18 at 114 (1994), reprinted in Compilation of General

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

CERD has referred to indirect discrimination as an instance of non-compliance with ICERD.[37]

Indirect discrimination is also a well-established concept in USA human rights law. The terminology has developed there of 'disparate treatment', referring to direct or intentional discrimination, and 'disparate impact', referring to indirect or effects-based discrimination. The concept of disparate impact discrimination came to the fore in the 1971 Supreme Court decision in *Griggs* v *Duke Power Co*[38] and has been further developed in numerous Supreme Court cases, including in *International Brotherhood of Teamsters* v *United States*, where the seniority system in a freight company was found to perpetuate the effects of past racial discrimination.[39] The Supreme Court in that case described disparate impact discrimination as the use of 'practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another . . . '.[40] The 1964 Civil Rights Act was amended in 1999 to cover disparate impact discrimination expressly.[41] However, the 2009 Supreme Court decision in *Ricci* v *DeStefano*,[42] another dispute involving a test for promotion in employment, may have curtailed the practical scope of actions against disparate impact discrimination. The Court held that declining to use an employment-related test because of the disparately adverse impact it would have on minorities constituted disparately adverse treatment of whites under the Civil Rights Act; the Court also held, however, that an exception existed where 'the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute'.[43] The current, rather complex, situation is that, while disparately adverse treatment of minorities remains prohibited, so too does disparately adverse treatment of white majorities, except where the action is taken to avoid disparate impact against minorities and 'the employers [have thoroughly] assess[ed] the impact, the justifications, and the alternatives of various potential courses of action before proceeding'.[44]

Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev 6 at 203 (2003), at paras 1 and 2.

[37] Kevin Kitching (ed.), *Non-Discrimination in International Law: A Handbook for Practitioners* (London: Interights, 2005) 82.

[38] *Griggs* v *Duke Power Co*, 401 US 424 (Supreme Court of the United States 1971).

[39] *International Brotherhood of Teamsters* v *United States*, 431 US 324, 335 n 15 (Supreme Court of the United States 1977). For a detailed discussion, see Elaine Shoben, 'Disparate Impact Theory in Employment Discrimination: What's Griggs Still Good For? What Not?', 42 Brandeis Law Journal 597 (2004).

[40] Ibid.

[41] *Civil Rights Act 1964* (Pub L 88–352) (Title VII, section 703(k)), as amended.

[42] *Ricci* v *DeStefano*, 129 S Ct 2658 (Supreme Court of the United States 2009).

[43] Ibid, per Justice Kennedy, at para 5.

[44] Charles A. Sullivan, 'Ricci v. DeStefano: End of the Line or Just Another Turn on the Disparate Impact Road?', 104 Northwest University Law Review 201 (2009).

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

In Europe, the prohibition on indirect discrimination has been described as 'a cornerstone in European Community law'.[45] Even though it is not referred to in the European Communities (EC) Treaty, the prohibition 'has been developed by the European Court of Justice through its case law since the 1960s, in order to enhance the effectiveness of EC non-discrimination law'.[46] The Court has developed a line of authority in which indirect discrimination is recognized as a form of unlawful discrimination, explaining in the 1974 landmark case of *Sotgiu* v *Deutsche Bundespost* that,

> the rules regarding equality of treatment forbid not only overt discrimination . . . but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. This interpretation, which is necessary to ensure the effective working of one of the fundamental principles of the Community, is explicitly recognized.[47]

The Court's reasoning has been to view facially neutral policies or measures that exclusively affect a protected group (such as pregnant women or particular ethnic groups) adversely as, in essence, examples of covert direct discrimination.[48] From 2000, however, the Racial Equality Directive has expressly prohibited indirect racial discrimination, defining it as the situation 'where an apparently neutral provision, criterion or practice would put persons [with certain racial characteristics] at a particular disadvantage compared with other persons . . .'.[49] The Court has yet to clarify precisely what 'at a particular disadvantage' means.

The European Convention on Human Rights contains a general prohibition on discrimination on the basis of race but it does not define 'discrimination', nor does it expressly mention indirect discrimination.[50] The European Court of Human Rights has only recently begun to interpret the Convention prohibition as extending to indirect discrimination, although 'references to an effects-based approach could be found early on in its case law'.[51] In the 2007 case of *D.H. and others* v *Czeck Republic*, the Grand Chamber of the European Court of Human Rights held that 'a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it

[45] Christa Tobler, *Limits and Potential of the Concept of Indirect Discrimination* (Utrecht and Brussels: EC, 2008) 5.
[46] Ibid.
[47] European Court of Justice (ECJ), *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153, para 11.
[48] For a list of the cases in which this approach has been adopted by the ECJ, see Kristin Henrard, 'The First Substantive ECJ Judgement on the Racial Equality Directive: A Strong Message in a Conceptually Flawed and Responsively Weak Bottle', *Jean Monnet Working Paper 09/09*, NYU School of Law, at 12, footnote 35.
[49] Directive 2000/43/EC, Article 2.2(b).
[50] European Convention on Human Rights (1853), ETS 5; 213 UNTS 221, Article 14.
[51] See Tobler, above n 45, at 14.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

is not specifically aimed at that group'.[52] Section 19 of the UK Equality Act 2010 defines indirect discrimination as discrimination that 'occurs when a policy which applies in the same way for everybody has an effect which particularly disadvantages people with a protected characteristic'.[53]

Discrimination law in these and other jurisdictions has developed in this way because, for so long as people possess different characteristics that cause them to be affected differently, apparently neutral measures may have discriminatory effects. Prohibiting indirect discrimination has been found necessary to ensure the effective working of one of the fundamental principles of human rights law, the prohibition on discrimination. For example, an apparently fair and neutral rule that promotion will be determined by length of unbroken service is likely to disadvantage women disproportionately relative to others, because of women's role in childbearing.[54] A height requirement for employment may disadvantage Asian and female applicants disproportionately (in Australia and the USA).[55] A rule that employees must wear hard hats will disadvantage Sikh applicants disproportionately, being inconsistent with wearing a turban.[56] Such rules have a disparate impact on certain people *because of* their sex, race, or religion.

Importantly, however, indirect discrimination may also occur where historical discrimination on the basis of the characteristics has led to a high level of socio-economic disadvantage, which has then become characteristic of the affected group. Socio-economic disadvantage is likely to be characterized by high levels of poverty, low levels of formal education, widespread ill-health, social marginalization, and political powerlessness. A neutral measure may disproportionately disadvantage an entire group where the group has acquired the characteristics of severe disadvantage as a consequence of historical, and probably on-going, discrimination. In *Griggs* v *Duke Power Co*, black employees at the Duke power plant brought an action challenging the company's imposition of a certain educational requirement as a condition of employment, transfer, or promotion and regardless of the nature of the work involved. It was not disputed in the case that blacks were markedly less able than others to meet these educational requirements because, as Burger CJ explained, being black, 'they . . . have long received inferior education in segregated schools'; the lesser ability of blacks to meet the educational

[52] European Court of Human Rights, *D.H. and others* v *Czeck Republic*, 13 November 2007, 57325/00, at para 175.

[53] Explanatory Notes to the UK Equality Act 2010, http://www.legislation.gov.uk/ukpga/2010/15/notes/division/2/2/2/7 (visited 26 June 2011).

[54] See *Kemp* v *Minister for Education & Another* (1991) EOC paras 92–340 (Western Australian Equal Opportunity Tribunal 1991).

[55] See *Dao and Nguyen* v *Australian Postal Commission* (1987) 162 CLR 317 (High Court of Australia 1987); also see *Officers for Justice* v *Civil Services Commission* 398 F Supp 378 (ND Cal, 1975), at 380.

[56] *Bhinder* v *CN* [1985] 2 SCR 561(Supreme Court of Canada 1985). Note that the rule in this case was found to be a genuine occupation requirement.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

requirements was due to historical, structural discrimination, which had left them differently circumstanced in educational terms and, hence differently affected by a rule that was 'fair in form, but discriminatory in operation'.[57]

ICESCR Article 4 permits states to place limitations on rights, but the obligation not to discriminate is probably not open to limitation in this way. In his 2009 comprehensive study of Article 4, Müller confirms this opinion,[58] which seems incontrovertible as regards the prohibition on racial discrimination, probably now a peremptory norm of international law. Yet Article 4 itself is silent on the point and the CESCR has yet to expressly state that Article 4 may *not* be applied to authorize discrimination. The silence contrasts with the provision regulating derogations from the ICCPR, which states that derogations may 'not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin'.[59] Nonetheless, the preferable view is that Article 4 would not be available to legitimate a directly and purposefully discriminatory measure. First, Article 4 only permits limitations on the Covenant rights, which are set out in Part III of ICESCR, while the prohibition on discrimination is set out in Part II.[60] Secondly, discrimination is unequivocally prohibited in the exercise of progressive realization, and a directly discriminatory measure would not be 'compatible with the nature of the rights in the Covenant', nor could it be characterized as a measure that had the sole purpose of promoting the general welfare, as required by Article 4.

Whether an *indirectly* discriminatory measure might meet the requirements of Article 4 may perhaps be a little less clear, but it must be recalled that the prohibition on discrimination in ICESCR has been interpreted as referring to discriminatory effects, as well as to discriminatory purposes. Müller documents a view emerging in the CESCR, that measures will not be judged as promoting the general welfare (and, hence, as justified under Article 4) where they have indirectly discriminatory effects but their aims are expressed only in very broad terms, such as 'economic development'.[61]

Yet some measures may be lawful under human rights law even though they have indirectly discriminatory impacts and do not obviously meet the requirements of ICESCR. The legal systems mentioned above have developed an analysis applying a set of tests by which an indirectly discriminatory measure may nevertheless be justified. To be justified, a measure must be reasonable and objective, must have a legitimate aim and must be a proportionate response to that aim. This analysis, now widely applied, is

[57] *Griggs* v *Duke Power Co*, above n 38.
[58] Müller, above n 16, at 569.
[59] ICCPR, Article 4.
[60] Müller, above n 16, at 569.
[61] Ibid, at 574.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

discussed in detail in Section VI of this article. Before that, the article explores whether there may be provisions in WTO law which, although fair in form, when implemented domestically in developing countries may have indirectly discriminatory impacts. The first step is to identify in general terms those who, it is predicted, will be adversely affected by trade liberalization and to narrow down the type of trade measure likely to be involved (Section IV). The second step is to investigate whether those who are predicted to be adversely affected tend to belong to the protected groups (Section V) and the third is to explore whether, if some domestic measures imposed in compliance with WTO law are indirectly discriminatory, they are nonetheless justified under human rights law (Section VI).

IV. ADVERSE EFFECTS FROM TRADE LIBERALIZATION IN DEVELOPING COUNTRIES

It is uncontroversial that trade liberalization produces 'winners and losers'.[62] The term 'losers' is frequently used to refer those adversely affected, but this article will instead refer to those 'disadvantaged' by trade liberalization. Documenting exactly who has been disadvantaged is not a straightforward task because the impacts of trade liberalization, and their depth and duration, vary depending on the type and extent of liberalization and on the demographic, economic, and other features of countries and communities. It is usually difficult to trace causal links confidently between particular trade liberalization measures and particular adverse effects. The impacts of trade liberalization also vary between households, given that the households themselves vary greatly in key respects: in their net supply position, their income mix (selling produce, labour, exploiting other factors of production), whether they utilize family or bought-in labour, their access to land and other assets and their fear and risk-taking features.[63]

However, it is possible to make predictions about who is most likely to suffer adverse effects from future trade liberalization, such as measures under negotiation in the current Doha Round. Development economists have suggested a broad framework for identifying the likely disadvantaged. They begin with the broad proposition that trade liberalization typically 'leads to a reshuffling of resources from less competitive, import competing sectors to competitive and expanding export sectors'.[64] Applying this prediction,

[62] WTO, *World Trade Report 2008* (Geneva: World Trade Organization, 2008) 139, http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report08_e.pdf (visited 26 June 2011).

[63] L. Alan Winters, 'Trade Liberalisation and Poverty: What are the Links?', 25 The World Economy 1339 (2002), at 1340–42; and see United Nations High Commissioner for Human Rights, *Globalization and its Impact on the Full Enjoyment of Human Rights*, E/CN.4/2002/54, 15 February 2002, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G02/101/08/PDF/G0210108.pdf?OpenElement (visited 26 June 2011).

[64] WTO, *World Trade Report 2003* (Geneva: World Trade Organization, 2003) 99.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

the disadvantaged are likely to be found in, or associated with, those sectors which are less competitive and import competing. Across developing countries, this would probably cover a wide range of sectors, but a developing country's tariff profile will give a reasonable indication of which of its sectors are less competitive and import competing, tariffs being developing countries' preferred form of protection.

The profile of current developing country tariff levels suggests that, in many, agriculture is relatively uncompetitive. Developing countries' average agricultural tariffs are significantly higher, overall, than those of industrialized countries and than their own non-agricultural tariffs. This is particularly true of their 'bound' agricultural tariffs.[65] Most maintain relatively high bound agricultural tariffs in order to support the economic viability of their farming and rural communities, to ensure they are able to keep domestic prices stable and to raise government revenue. Although the average bound agricultural tariffs of the majority of developing countries are not as high as they were, some are very high. For example, in 2008, the average bound agricultural tariffs of Belize, Grenada, Kenya, Pakistan, Guyana, and Jamaica were about 100 per cent, those of Dominica and India were 112 and 114 per cent, respectively, and those of Nigeria 150 per cent.[66] The very highest tariffs tend to apply to sensitive products, particularly crops such as maize, rice, and other food staples. Importantly, economists have also pointed to a proportional relationship between particularly high tariffs and a particularly high, and more sustained, level of resulting disadvantage flowing from tariff reductions.[67] Of course, the applied—or day-to-day—tariff rates of developing countries are considerably lower much of the time,[68] particularly when world food prices are high, as they have been since 2007–08. For example, in 2008, Jamaica's average bound agricultural tariff was 97.1 per cent but its average applied agricultural tariff in 2008 was only 17.2 per cent.[69] Nevertheless, the tariff profiles of developing countries suggest that at least one of the major groups (although not, presumably, the only one) to be

[65] Once a member country has set a bound, or fixed maximum, tariff for a particular product, it is no longer permitted to raise the tariff above that rate except in tightly controlled circumstances and involving compensation for affected parties. Bound tariff levels are to be distinguished from 'applied' tariff levels: a country's applied tariff is the one it actually levies on a product at any given time, which can be raised or lowered as the world price of the product varies, while the bound tariff is the maximum the country has agreed it will ever levy for that product.

[66] WTO, *World Tariff Profiles* (Geneva: World Trade Organization, 2008) 8–13.

[67] See WTO, above n 64, at 99; see Winters, above n 63, at 1361.

[68] See WTO, above n 66, at 8–13. This gap gives developing countries room to raise and lower applied tariffs when considered necessary to protect important products or sectors from the volatility inherent in the global food and commodities markets, with its consequent price shocks. Once developing countries have lowered their bound rates, the gaps between their bound and applied tariffs will be permanently reduced, leaving them with more limited or no capacity to protect their farmers' livelihoods through this mechanism.

[69] Ibid.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

disadvantage by trade liberalization is likely to be found in their agricultural sectors, where relatively high levels of tariff protection indicate low efficiency in the face of imports.

It is a proposal of the Doha Round that developing countries reduce their average bound agricultural tariffs. In fact, the commitment to reduce agricultural protection generally is a cornerstone in the current Doha Round of international trade negotiations. Since its inception, international trade law has made numerous exceptions for the agricultural sector, to the extent that the 1947 GATT[70] allowed agricultural trade to be kept largely outside its disciplines. Seeking to correct this, the 1995 Agreement on Agriculture (the Agriculture Agreement)[71] began the first real process of liberalizing world agricultural trade. Among other reforms, the Agriculture Agreement required all countries except Least-Developed Countries (LDCs)[72] to reduce their levels of agricultural support, including tariffs, by agreed percentages and agricultural tariffs were subsequently bound at the lower rates. The Agriculture Agreement reductions, however, were not deep enough to prevent most developing countries from maintaining relatively high bound agricultural tariffs. Hence, the current proposal in the Doha negotiations is that they be further reduced by an average of at least 36 per cent.[73]

Upon whom, precisely, would the 36 per cent agricultural tariff reduction have adverse impacts? Would the affected individuals or groups within agriculture be predominantly from the protected groups? Once again, development economists have identified characteristics that enable prediction of those within sectors who are most likely to experience disadvantage from reduction or removal of protections such as tariffs. Markets that are 'inherently inflexible'[74] are particularly susceptible to increased poverty from trade liberalization. This is a reference to the flexibility or ease with which the factors of production—labour and capital—can be transferred from one

[70] 1947 GATT, in GATT Secretariat, above n 3, at 423.

[71] Uruguay Round Agreement on Agriculture (Agriculture Agreement), ibid, at 33.

[72] About 49 countries at any one time are classified as Least-Developed Countries (LDCs) by the United Nations Development Programme (UNDP) and the UN Conference on Trade and Development (UNCTAD), on the basis of their low national incomes, weak human assets and high economic vulnerability.

[73] This figure is based on the proposal that agricultural tariffs will be reduced by an average of at least 50 per cent for industrialized countries and by two-thirds of that for developing countries: WTO Committee on Agriculture Special Session, *Revised Draft Modalities for Agriculture*, TN/AG/W/4/Rev 4, 6 December 2008, at paras 61–63. The agreement excludes LDCs and marginally smaller reductions have been negotiated for Small Vulnerable Economies and Newly Acceded Members. The World Bank has calculated that, in practice, the proposed Doha Round reductions will reduce the average bound agricultural tariff of the majority of non-LDCs by almost 40 per cent: Will Martin and Aaditya Mattoo, 'The Doha Development Agenda: What's on the Table?', *Policy Research Working Paper 4672* (World Bank Development Research Group Trade Team, 2009) 3. Most developing countries are also under pressure through bilateral and regional trade negotiations to reduce their agricultural tariffs.

[74] See Winters, above n 63, at 1353.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

part to another of an economy as changes occur following trade liberalization. An inflexible labour market will, for example, be less able to take advantage of such new work opportunities as may arise, and those within that market who have particularly narrow skills and few resources will be inflexible in this sense.[75] By contrast, individuals in a highly tariff-protected industry who possess a range of skills and access to capital may well be sufficiently resilient, or flexible, to avoid particular or prolonged disadvantage from a reduction in the protection.

Continuing the agricultural focus, inflexibility appears to be a characteristic of the agricultural markets of many developing countries, in the sense that their rural labour forces are dominated by poor farmers with low levels of formal education and narrow, mainly agricultural, skills. Such people are less likely to be able to transfer to (new) industries in a more liberalized economic environment. The ability to transfer to jobs demanding different, often more technical, skills is central to labour flexibility. Yet UNESCO notes that '[o]ne in five children in the [developing world] still does not attend primary school and, while rural-urban statistics on education are scarce, many countries report that non-attendance in school, early dropout of students, adult illiteracy and gender inequality in education are disproportionately high in rural areas . . . .'[76] Scores from a small sample of tests of literacy achievement show that, 'in the vast majority of countries, the mean scores in urban areas exceeded those in rural locations . . .'.[77]

Also central to flexibility in markets is access to capital or credit. Poor farmers in developing countries have low access to capital, which constrains their ability to adapt or to take advantage of new opportunities. A 2006 report prepared for the World Bank looked at tariffs protecting sensitive, staple foodstuffs in Central America and confirmed that very poor, agriculture-dependent rural households will be the most vulnerable to adverse impacts from agricultural trade liberalization.[78] The report referred to research demonstrating that poorer (rural) households 'seem to have fewer instruments available—and are less successful—in insuring themselves against . . . adverse income shocks'.[79] The former United Nations High Commissioner for Human Rights also identified low ability to adapt to

[75] Ibid, at 1351.

[76] UNESCO, 'Rural Transformation: Education for Rural People', *Key Themes in Education for Sustainable Development*, http://www.unesco.org/education/tlsf/TLSF/decade/uncomESDt08.htm (visited 26 June 2011).

[77] Jeffrey James, 'Productivity Indicators for the Rural Poor in Developing Countries', 80 (3) Social Indicators Research 535 (2007), at 542.

[78] Carlos Felipe Jaramillo and Daniel Lederman, 'Policy Approaches to Managing the Economic Transition: Ensuring that the Poor Can Benefit from DR-CAFTA', in World Bank, *Challenges of CAFTA: Maximising the Benefits for Central America* (Washington, DC: The International Bank for Reconstruction and Development/World Bank, 2006).

[79] Ibid, at 124.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

change, due to low skills transferability and/or lack of access to capital, as a characteristic of concern in the context of liberalization of trade in agriculture.[80] This led her to warn about adverse impacts of trade liberalization on the 'rural poor', especially 'resource-poor farmers', 'farm labourers' and 'small farmers'.[81] Although poor farmers may not be the only ones to experience adverse impacts as a result of agricultural tariffs being lowered, they are of particular concern to human rights authorities because their lack of key economic assets, especially capital and industrial skills, renders them particularly vulnerable to increased poverty.

To summarize, adverse impacts from agricultural trade liberalization are likely to be experienced by small and resource-poor farmers in developing countries, who have been tariff-protected and who possess low levels of education, narrow skills that are not transferable to the new industries and low access to resources (such as capital or credit) that would assist them to transfer to new income sources. Moreover, the more 'unskilled', the more vulnerable they will be to the adverse impacts of trade liberalization.[82] Knowing this, is it possible to discover whether individuals or groups with the protected characteristics predominate amongst these disadvantaged farmers and, if so, whether such individuals are likely to be disproportionately affected *because* they have those characteristics? In other words, might a WTO law provision requiring average agricultural tariff reductions of at least 36 per cent by developing countries, when implemented at the domestic level, indirectly discriminate against protected groups? The next part explores these questions through country studies.

V. THE DISADVANTAGED AND DISCRIMINATION

Most developing countries do not keep detailed demographic and ethnographic information about their small and resource-poor farming populations. Of the protected characteristics, data is most likely to be available about race/ethnicity, religion, and gender. In the following pages, case studies of racial minorities in Nicaragua and women in Ghana are presented, providing an indication that racial minorities and women may predominate amongst those disadvantaged by trade liberalization and that the disproportionate impact may occur *because* they are racial minorities or women.

[80] United Nations High Commissioner for Human Rights, above n 63, at paras 34–39.

[81] Ibid, at paras 34–35. The High Commissioner also raised concerns about this group, including in the context of disparately adverse impacts on women, in her submission to the 5th WTO Ministerial Conference, Cancun, *Human Rights and Trade*, September 2003, http://www2.ohchr.org/english/issues/globalization/trade/docs/5WTOMinisterialCancun.pdf (visited 26 June 2011).

[82] See Winters, above n 63, at 1351.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

A. Race/ethnicity in Nicaragua

The ethnic composition of Nicaragua is predominantly mestizo and white, with people of African descent comprising 9 per cent, and Amerindians 5 per cent of the total population. As a general observation, people of African descent in Latin America 'face a significant number of challenges, including discrimination in employment and housing, economic exclusion, and under-representation in government', are 'overrepresented amongst the poor' and 'have little access to education'.[83] Indigenous people experience similar marginalization. Minority Rights Group International refers to a 2004 World Bank study on indigenous peoples and poverty which emphasized that 'indigenous peoples in Latin America have made little economic and social progress in the last decade, and continue to suffer from higher poverty, lower education and a greater incidence of disease and discrimination than other groups'.[84] This portrait is consistent with the fact that indigenous people, although only 5 per cent of the world's population, make up 15 per cent of its poor.[85]

Nicaragua is a low- to middle-human development country of about 6 million people, a little under half of whom live in rural areas.[86] Average life expectancy is 72 years[87] and GDP per capita was US$850 per annum in 2005.[88] After Haiti, it is the poorest country in Latin America.[89] The majority of Nicaraguans who are in formal employment work in industry or services, but the country has a relatively high rate of unemployment, and underemployment was estimated at 46.5 per cent in 2008.[90] Eighty per cent of the population live on less than US$2 per day[91] and, even where people are in employment, nearly 20 per cent of those live on less than US$1.25 per day.[92]

[83] Minority Rights Group International, *State of the World's Minorities 2006: Events of 2004–2005* (London: MRGI, 2005) 71.
[84] Ibid, at 79.
[85] Rural Poverty Portal, 'Statistics and Key Facts about Indigenous People', http://www.ruralpovertyportal.org/web/guest/topic/statistics/tags/indigenous%20peoples (visited 26 June 2011).
[86] United Nations Development Program (UNDP), Table 11 'Demographic Trends', in UNDP, *Human Development Report 2010: The Real Wealth of Nations: Pathways to Human Development* (Geneva: UNDP, 2010).
[87] US Central Intelligence Agency (CIA), *The World Factbook: Nicaragua*, https://www.cia.gov/library/publications/the-world-factbook/geos/nu.html (visited 26 June 2011).
[88] Matias Berthelon, Diana Kruger, and Diana Saavedra, 'Distortions to Agricultural Incentives in Nicaragua', *Agricultural Distortions Working Paper 18*, World Bank Development Research Group (2007) 1.
[89] Rural Poverty Portal, 'Nicaragua', http://www.ruralpovertyportal.org/web/guest/country/home/tags/nicaragua (visited 26 June 2011).
[90] See CIA, above n 87.
[91] UNDP, Table 3: 'Human and Income Poverty: Developing Countries', in *Human Development Report 2007–2008: Fighting Climate Change* (Geneva: UNDP, 2008) 239.
[92] See UNDP, above n 86, Table 12, 'Decent Work'.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

Poverty is, however, particularly a rural problem in Nicaragua: 'two of every three rural Nicaraguans are poor'.[93] Agricultural producers in Nicaragua grow coffee, especially for export, but they also grow staple foods, including their central staples of maize, beans and rice. The majority of agricultural producers are 'small (usually poor) farmers', with 'approximately 80 per cent of all agricultural land [being] devoted to the production of . . . corn, beans, rice and sorghum', compared with only 20 per cent of land used to grow export crops, such as coffee.[94] The dependence of most farmers 'on just a few crops . . . makes them very vulnerable to market variations and climatic conditions'[95]—hence, the importance of tariff protection that is responsive to both world prices and local supply.

Nicaragua has reduced its overall tariffs substantially in recent years, largely due to 'conditionality clauses from international financial institutions [or] . . . foreign pressure'.[96] It now has average bound agricultural tariffs of 43.4 per cent and, in a period of high global food prices, average applied agricultural tariffs of 11 per cent. However, bound tariffs for sensitive foodstuffs, such as maize and rice, remain high. In 2009, Nicaragua's bound tariffs for maize and rice were between 50 and 60 per cent, while its applied tariff for maize averaged 11 per cent and for rice varied between 22 to 60 per cent.[97] The domestic price of maize has consistently been held above the world price; for example, in the period 2001–04 it was an average of 12.3 per cent higher than the border price. The domestic price of rice for the same period was, on average, 44 per cent higher than the border price; although that is relatively high, protection for rice has been at least as high or considerably higher throughout much of the preceding decade.[98]

The purpose of the tariffs is to shield local producers from competition from imports in their domestic markets.[99] The strategy appears to have been effective, with only 18 per cent of Nicaragua's imports being

[93] See Berthelon et al., above n 88, at 1.
[94] Ibid, at 6.
[95] See Rural Poverty Portal, above n 89.
[96] See Berthelon et al., above n 88, at 19.
[97] WTO Tariff Analysis Online (2009), http://www.wto.org/english/tratop_e/tariffs_e/tariff_data_e.htm (visited 26 June 2011). The actual structure of the protection is, however, a little more complex than it appears. Since 1997, Nicaragua has had an agricultural tariff-quota system, with quotas 'being negotiated and defined for each agricultural cycle', depending on the capacity of local producers to meet demand: Berthelon et al., above n 88, at 7. Under this system, the purchase prices of maize and rice are subject to considerable control, with tariffs and quotas being set and altered by government/producer committees responding to circumstances. A further complexity is that about 25 per cent of Nicaragua's agricultural imports enter duty-free from a handful of neighbouring countries with which it has entered into free trade agreements: Berthelon et al., above n 88, at 19.
[98] See Berthelon et al., above n 88, Appendix Table 1, at 35.
[99] Nicaragua also points to the fact that such competition would be of an unfair kind, since production of these foodstuffs is subsidized in industrialized countries: ibid, at 19.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

agricultural[100]—it imports barely one per cent of the maize, and only about one-quarter of the rice, it consumes.[101] If Nicaragua were to reduce by 36 per cent, or to remove entirely, the tariff protection it currently provides for maize, beans, and rice, a range of relatively predictable changes would take place. The report referred to earlier, prepared for the World Bank on trade liberalization between Central America and the USA, identified these as including lower food prices, changed employment, and incomes and increased exposure to external shocks.[102] The report concluded that around 20 per cent of rural households in Nicaragua would be worse off in overall terms if the tariffs were removed entirely in relation to trade with the partner countries to the agreement.[103] While not all of these would be poor households, where they were poor, they would be likely to experience deeper and stronger adverse effects, being in general less flexible, less able to protect themselves from such effects.[104]

The report cited as an example the region of Nicaragua known as the Atlantic Lowlands, where it predicted that around 34 per cent of households would be adversely affected by the removal of the tariff/quota protections for maize, beans, and rice.[105] This is a particularly poor area: while 50 per cent of Nicaraguans suffer from a food deficit, a Nicaraguan Government Food Consumption Survey in 2004 showed that the sub-regions with the highest deficits per capita were the North Atlantic Autonomous Region and the South Atlantic Autonomous Region.[106] The households in this region tend to possess the inflexibility identified by Winters as indicative of people likely to be disadvantaged from trade liberalization:[107] many communities are geographically isolated, literacy is only 60 per cent (compared to a national average of 77 per cent), there are few schools and little technical training, and work skills are primarily restricted to fishing, farming, and artisanal mining.[108]

[100] WTO 2009 Country Profiles: 'Nicaragua', http://stat.wto.org/CountryProfiles/NI_e.htm (visited 26 June 2011).

[101] See Berthelon et al., above n 88, at 4–5.

[102] See Felipe Jaramillo et al., above n 78, at 156. These predicted changes were calculated by reference not only to tariff reductions but also to removal of the quota component of Nicaragua's agricultural protection, referred to in n 97, above. The report based its prediction on the degree to which households are net producers and net consumers of these staple foodstuffs: those who produce more of these goods than they consume will experience a loss of production income that will exceed the financial benefit to them of lower consumer prices and, hence, will suffer a net detriment.

[103] Ibid, at 168.

[104] Ibid, at 164.

[105] Ibid, at 168.

[106] World Food Program, *Country Program – Nicaragua 2008–2012*, http://www.wfp.org/content/country-programme-nicaragua-2008-2012 (visited 26 June 2011).

[107] See Winters, above n 63, at 1351.

[108] Minority Rights Group International, *World Directory of Minorities and Indigenous Peoples – Nicaragua : Overview*, 3 June 2008 (Minority Rights Group International, 2008), http://www.unhcr.org/refworld/docid/4954ce1bc.html (visited 26 June 2011).

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

A point which the World Bank report did not draw out is that the Atlantic Lowlands region has a very high density of indigenous tribes and black communities descended from African people.[109] This suggests that reducing or removing tariff protection for these core, staple foods would be likely to have a disparately adverse impact on indigenous and black Nicaraguans. Although tariff reform would not have been intended to disadvantage racial minorities disproportionately, that would be its likely effect.

But can it confidently be said that this disproportionate impact would occur *because* the affected people are indigenous or black? As previously mentioned, facially neutral measures may operate to disadvantage minorities when they are applied in societies where there has been historical discrimination against those groups. Even neutral measures must act within the structure of the society to which they are applied and if that structure is discriminatory, the measure may also operate in a discriminatory manner. As Burger CJ said in *Griggs* v *Duke Power Co*, measures that are 'neutral on their face, and even neutral in terms of intent, [may] . . . operate to "freeze" the status quo of prior discriminatory . . . practices'.[110] This would appear to be the case for Nicaragua. Entrenched and structural discrimination has been an on-going problem for racial minorities living in the Atlantic region, manifested strikingly in a protracted official failure to promote and finance human development in the area. The non-government organization Minority Rights Group International points out that,

> [t]here has been a marked increase in the levels of deprivation [in the Atlantic Lowlands]. While the rate of extreme poverty in the rest of the country has fallen by up to 14 per cent in the past five years, during the same period it has increased by 11.1% among minority and indigenous Caribbean coast populations. Residents have very low rates of formal employment and are mainly engaged in subsistence fishing, farming, and mining. The unemployment level in the region is estimated to be running at close to 90% compared to 6.9% in the country as a whole.[111]

The circumstances that might render a trade law provision indirectly discriminatory in its impacts within a developing country are not limited to Nicaragua. Panama, for example, has a minority population of Amerindians and people of African descent who are principally very poor, subsistence farmers, relying on the tariff-protected staple foods of maize and rice.[112] They have little access to resources and capital and have experienced historical discrimination, including government neglect of infrastructure and

[109] Ibid.
[110] See *Griggs* v *Duke Power Co,* above n 38.
[111] See Minority Rights Group International, above n 108.
[112] Panama has reduced its agricultural tariffs since the introduction of the Agriculture Agreement, but has maintained relatively high tariffs for the food staples maize and rice. The bound tariff for rice is currently between 52 and 90 per cent, while its applied tariff is

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

basic services. This is strikingly illustrated by literacy rates in Panama: while the non-indigenous literacy rate is now about 94 per cent, it is only around 65 per cent in the indigenous population.[113] Nor are the circumstances under which indirect discrimination can occur limited to the Latin American region or, in fact, to racial minorities, as the next country study illustrates.

B. Gender in Ghana

As with racial minorities, women are strongly represented among the poor.[114] It is often claimed that '70% of the world's poor are women'.[115] However, at least one study has concluded that the general claim of over-representation of women among the poor is only 'weakly' true.[116] A 2005 report for the UN Educational, Scientific and Cultural Organization (UNESCO) went so far as to say that 'the claim that the majority of the world's poor are women cannot be substantiated'.[117] Of course, poverty is definable in many ways and conceptions that confine it to income levels alone are probably the least useful. As the UNDP has explained, human poverty is 'more than income poverty—it is the denial of choices and opportunities for living a tolerable life'; the multiple dimensions of poverty include 'a short life, illiteracy, exclusion, and lack of material means'.[118] Understanding of relative poverty between men and women in developing countries is limited by a shortage of gender-disaggregated data,[119] but the UNESCO report above concluded firmly that, in the wider sense, 'the disadvantaged position of women is incontestable',[120] and this seems to be the overwhelming consensus.

The general disadvantage experienced by women is partly the result of cultural practices in which men and women have different roles in societies, economies, and households, and in which there is often a strict division of labour. This is particularly true of agriculture: '[i]n most [developing]

between 45 and 90 per cent; the bound tariff for maize is 25 per cent and its applied tariff is 20 per cent: WTO Tariff Analysis Online (2009), above n 97.

[113] International Working Group for Indigenous Affairs, *Panama: Country Facts*, http://www.iwgia.org/sw32474.asp (visited 26 June 2011).

[114] Thomas Pogge (ed.), *Freedom from Poverty as a Human Right* (Oxford: Oxford University Press, 2002) 13; Winters, above n 63, at 1355.

[115] Valentine M. Moghadam, 'The "Feminization of Poverty" and Women's Human Rights', SHS Paper No. 2, *UNESCO Women's Studies/Gender Research* series, UNESCO, France (2005) 2, http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SHS/pdf/Feminization_of_Poverty.pdf (visited 26 June 2011).

[116] Agnes Quisumbing, Lawrence Haddad, and Christine Pena, 'Are Women Overrepresented Among the Poor? An Analysis of Poverty in 10 Developing Countries', 66 Journal of Development Economics 226 (2001), at 261. The two exceptional countries were Ghana and Bangladesh.

[117] See Moghadam, above n 115, at 1

[118] UNDP, *Human Development Report 1997* (New York, NY: UNDP, 1997) 2.

[119] Moghadam, above n 115, at 26.

[120] Ibid, at 31.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

economies, responsibility for different types of commodities, or for processes involved in producing them, is ascribed fairly exclusively to either women or men.'[121] The disadvantage is also, however, typically the result of historical discrimination involving the subordination of women. As the World Bank has explained, women 'have traditionally had limited access to crucial . . . opportunities because of persistent cultural, social, and political biases'.[122] The Bank reports that, for example, women in Latin America and sub-Saharan Africa face many obstacles, compared to their male counterparts: '[s]ignificant gender inequalities can be found in peoples' access to . . . key productive assets and services: land, labor, financial services, water, rural infrastructure, technology, and other inputs. Available evidence indicates that the distribution of land ownership is heavily skewed toward men.'[123]

Not only are women overrepresented among people experiencing poverty (comprehensively defined), they also make up a disproportionately large number of those engaged in agriculture, especially in low-income countries, where agriculture is said to have become increasingly 'feminized'.[124] While the proportion of the global labour force working in agriculture has steadily fallen since the 1980s, 'the proportion of women working in agriculture has increased, particularly in developing countries'.[125] The World Bank adds that,

> [i]n many parts of the world—for example, sub-Saharan Africa (SSA) and South Asia — women [are] the main farmers or producers . . . . In Uganda, broadly illustrative of SSA, 75 percent of agricultural producers are women. In other areas, where migration and HIV and AIDS are affecting rural demographics, agriculture is becoming feminized as women increasingly become major actors in the sector.[126]

However, the portrait of women in agriculture in developing countries is varied, complex and often dynamic. Cultural differences, variations in the type and pace of changes in women's economic roles and differing state

[121] Gabrielle Koehler, *Agriculture and Commodities: Gender Issues Proposed for Research* (Geneva: UNCTAD Division on Investment, Technology and Enterprise Development, 1999) 293, available at http://www.unctad.org/en/docs/poedm_m78.en.pdf (visited 26 June 2011).

[122] The World Bank, Food and Agriculture Organization (FAO) of the United Nations and International Fund for Agricultural Development (IFAD), *Agriculture and Rural Development: Gender in Agriculture Sourcebook* (Washington, DC: World Bank, 2009) 1–2, available at http://www.reliefweb.int/rw/lib.nsf/db900sid/EGUA-85SLGM/$file/WB_Gender_in_Agriculture_Source_Book_2009.pdf?openelement (visited 26 June 2011).

[123] Ibid, at 2.

[124] Rural Poverty Portal, *Gender and Rural Poverty,* http://www.ruralpovertyportal.org/web/guest/topic/home/tags/ (visited 26 June 2011).

[125] Susana Lastarria-Cornhiel, *Feminization of Agriculture: Trends and Driving Forces* (University of Wisconsin-Madison, Wisconsin: RIMISP-Latin American Centre for Rural Development, 2006) 2, available at http://www.sarpn.org.za/documents/d0002435/index.php (visited 26 June 2011).

[126] See World Bank, above n 122, at 2.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

economic policies (including trade-related policies) make it hazardous to generalize. Women can and do benefit from trade agreements that result in new jobs and higher incomes. Where women are able to move from subsistence agriculture and unpaid household work into better-paying employment, studies confirm that their status tends to improve socially as well as economically.[127] Many women working in agriculture are now employed by large agribusiness in fieldwork, processing, and packing, albeit usually as casual, seasonal workers who are paid at much lower rates than men.[128] The situation is made more complex by variations in such crucial factors as the intra-household inequality of farming women.[129]

Yet there is reliable evidence that the proportion of smallholding farms which are under female heads, as opposed to male, has increased over recent decades, not only in SSA and South Asia but also in the southern Americas.[130] This has occurred as men have moved away to find work or, in some areas, as HIV/AIDS has reduced the number of working men. While this aspect of the feminization of agriculture may represent a rise in the relative status of women, the principal reason for the change is that, over much the same period, it has become increasingly difficult to derive an adequate standard of living from smallholder farms. Reduced agricultural tariffs in many developing countries have meant lower farmgate prices and many states have scaled back other support, such as agricultural extension services and subsidized credit, for staple food production by small producers.[131] In Ghana, for example, benefits from new government support programmes 'have largely accrued to medium- and large-scale farmers in the cocoa sector, where few women are employed'.[132]

Men still outnumber women as a percentage of the total agricultural labour force in developing countries but women tend to be the poorest of those engaged in agriculture, concentrated in the least profitable (and often, for the present, most highly tariff-protected) sectors of agricultural production. Generally speaking, food crops for household consumption or for the domestic market tend to be produced by women, while commercial or industrialized crops for export 'are more frequently the economic domain of men'.[133] The situation suggests that adverse effects from agricultural tariff

[127] Simon Walker, *The Future of Human Rights Assessment of Trade Agreements* (University of Utrecht, Netherlands: School of Human Rights Research Series, 2009) 35, at 63, available at http://igitur-archive.library.uu.nl/dissertations/2009-1111-200128/walker.pdf (visited 26 June 2011).

[128] See Lastarria-Cornhiel, above n 125, quoting Whitehead, at 6. Whitehead notes that women's employment of this kind often indicates extreme poverty, particularly for those women who are clustered in low-entry, unskilled and low-return activities.

[129] See Moghadam, above n 115, at 1.

[130] See Lastarria-Cornhiel, above n 125, at 8.

[131] Ibid, at 17.

[132] FAO, *Agriculture, Trade Negotiations and Gender* (Rome: FAO, 2006) 11.

[133] See Koehler, above n 121, at 293.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

reform are likely to be felt not only by more women than men but also more intensely by women.[134]

Although Ghana has a relatively high rate of urbanization,[135] its domestic economy is still very reliant on agriculture, which employs more than half the workforce, mainly as small landholders, and contributes about one-third of its GDP.[136] Its relatively lucrative cash crops for export, cultivated typically by men, are cocoa and nuts for the European markets, while the largely unprofitable crops of cassava, vegetables, and staple grains, cultivated usually by women, are widely grown for domestic consumption.[137] Ghana's average bound agricultural tariff is 97 per cent, while its applied tariffs in 2007 were between 10 and 20 per cent for cassava and 20 per cent for maize and barley.[138] Tariffs are Ghana's main trade policy instrument in the agricultural sector[139] and its comparatively low bound tariff levels for non-agricultural products indicate that its agricultural sector may correctly be described as highly tariff protected[140] and, thus, sensitive to competition.

The poverty and discrimination portrait of women in Ghana is similar to the broad, global one. The 2001 meta-study referred to earlier found that both females *per se* and female-headed households in Ghana lived in consistently deeper poverty than male equivalents.[141] During the period covered by the study, 29 per cent of households were headed by women[142] and a statistically significant greater number of those lived below the US$1 per person per day poverty line than male-headed households.[143] Quisumbing suggests that cultural and institutional factors are probably responsible for the higher poverty among women in Ghana. The World Bank emphasizes that women and men in Ghana play different economic roles, under different economic,

[134] A 2006 study of Niger, for example, found that poor women agricultural producers were especially vulnerable to adverse impacts from trade liberalization because they were already disproportionately affected by hunger and food insecurity: UNDP, *Human Development Statistics 2007–2008,* http://hdr.undp.org/en/statistics (visited 26 June 2011); and 3DThree, *Niger: Agricultural Trade Liberalisation and Women's Rights* (Geneva: 3DThree, 2006) 1–2, available at http://www.3dthree.org/pdf_3D/3DCEDAWNigerAg.pdf (visited 26 June 2011).

[135] US CIA, *The World Factbook: Ghana*, https://www.cia.gov/library/publications/the-world-factbook/geos/nu.html (visited 26 June 2011).

[136] Ibid.

[137] See FAO, above n 132, at 10; and see World Bank, *Ghana: Gender Analysis and Policymaking for Development*, Discussion Paper 403 (1999) 11, quoting J. Bukh, *The Village Woman in Ghana* (Uppsala: Centre Churches, 1979), who concluded that 'the introduction of cash crops in Ghana, involving mostly men, was one of the most important reasons for the growing inequality between men and women'.

[138] WTO, *Tariff Download Facility* (Ghana: WTO, 2011), http://tariffdata.wto.org/Default.aspx?culture=en-US (visited 26 June 2011).

[139] WTO, *Trade Policy Review – Ghana* (Geneva: WTO, 2008), 45, http://www.wto.org/english/tratop_e/tpr_e/tp294_e.htm (visited 26 June 2011).

[140] WTO, *World Tariff Profiles 2008* (Ghana: WTO, 2008), 84, http://www.wto.org/english/res_e/booksp_e/tariff_profiles08_e.pdf (visited 26 June 2011).

[141] See Quisumbing et al., above n 116, at 242–43.

[142] Ibid, at 236.

[143] Ibid, at 242.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

social, and cultural conditions and that 'gender-based differences are often fundamental to men and women's livelihoods'.[144] Women in rural areas 'have relatively poor access to, and control of, agricultural inputs, including land, fertilizer, machinery, and labour (including their own). They have extremely limited access to agricultural extension services ... [and] less access to credit from formal channels than men do....'[145] To this portrait of sizeable tariff protection, high levels of female rural poverty and historical discrimination against women can be added typically lower levels of education. Only 34 per cent of women over the age of 25 years in Ghana have secondary education, compared to 83 per cent of men. Although the percentage is now higher for females in the 15- to 24-year age group, the overall female illiteracy rate is almost double that of men.[146]

What emerges is a picture of a protected group, women, likely to experience disparately severe disadvantage from a Ghanaian reduction in tariffs for food staples. The reduction would have an indirectly discriminatory effect because of the disadvantaged position of women in Ghana to begin with, particularly in rural areas. The circumstances that might render a trade law provision indirectly discriminatory in its impacts on women within a developing country are not, of course, limited to Ghana. As the FAO observed in a 2006 report on the gender-differentiated impacts of trade liberalization and adjustments, 'seemingly neutral market mechanisms and macroeconomic policies can reinforce social biases and inequalities'[147] wherever they exist.

The above country studies are presented as evidence that, in some developing countries, a disproportionately large number of those who will be disadvantaged by agricultural tariff reductions may be found among racial or ethnic minorities and women. As mentioned in Section III above, international human rights law guarantees equality before the law and equal treatment by the law, a guarantee that has been repeated in African and American regional human rights instruments as well as in the domestic law of many developing countries, and even in the constitutions of some.[148] If the disproportionate disadvantage experienced involves nullification or impairment of human rights, the general prohibition on discrimination also becomes involved. The particular human rights of individuals within these groups that might be nullified or impaired would include the right to life, the right to work, the right to an adequate standard of living (including food,

[144] World Bank, *Ghana: Gender Analysis and Policymaking for Development*, Discussion Paper 403 (1999) 8.
[145] Ibid, at 12.
[146] World Bank, *Data by Indicators: Ghana*, http://data.worldbank.org/indicator/SE.ADT.1524.LT.FE.ZS/countries/GH?display=graph (visited 26 June 2011).
[147] See FAO, above n 132, at 2.
[148] ICCPR, Article 26; African Charter on Human and Peoples' Rights (1981), Article 3; American Convention on Human Rights (1969), Article 24. Constitutional guarantees include Constitution of India, Article 14, and Constitution of South Africa, Section 9.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

water, and shelter), as well as the derivative rights to health and education. Note that the vast majority of WTO Member States have ratified ICESCR and ICCPR, creating binding obligations under international law. While few have followed this up by enacting domestic laws guaranteeing the right to an adequate standard of living, domestic anti-discrimination laws typically prohibit discrimination based on race or sex in the exercise of the broad range of government executive functions.

However, this article is not arguing that agricultural tariff reductions with discriminatory impacts in a particular developing country will necessarily give rise to an actionable case under the domestic discrimination laws of that country (although that may be the case). Rather, it is argued that tariff reductions that have these effects may contravene the core international human rights law principle of non-discrimination. The High Commissioner for Human Rights has previously warned that there may be discriminatory impacts resulting from WTO law requirements and the above country studies support this proposition, although more detailed investigation will test the extent of the phenomenon. The prospect of a disproportionate impact on these groups should not, perhaps, cause surprise: those who have little economic and social strength, having become marginalized as the result of historical and ongoing discrimination, are particularly likely to have a lower capacity to take advantage of new economic opportunities or to sustain themselves through periods of economic transition. It is the unique vulnerability of such groups that has given rise to their special level of protection under human rights law.

However, the fact that a domestic measure implementing a WTO law requirement of a 36 per cent average agricultural tariff reduction by developing countries causes indirectly discriminatory impacts will not necessarily mean that it is unlawful under human rights law. The next section analyses the justifiability of a discriminating measure of this kind against human rights law principles.

VI. JUSTIFIABLE DISCRIMINATION

The core obligation of states under ICESCR, the progressive realization of the rights in the Covenant to the maximum of available resources, is a relatively flexible one. It enables states to adopt incomplete programmes and to satisfy some rights while deferring the satisfaction of others, thus 'reflecting the realities of the real world' and 'constitut[ing] a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time'.[149] This flexibility is curtailed, however, by the immediate obligations that ICESCR imposes: states must at all times be taking concrete steps towards full realization of

[149] See CESCR, above n 13, at para 9.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

the rights, they must be meeting minimum core needs and, importantly for present purposes, they must be acting on a basis of non-discrimination. None of these immediate obligations is open to the flexibility of progressive realization nor to limitation under Article 4.

However, a measure with a legitimate purpose might *indirectly* discriminate, yet be lawful, under human rights law. As mentioned in Section III, to be lawful, a measure that indirectly discriminates will need to pass certain analytical tests. The UN HRC explained in General Comment No. 18 that a discriminatory measure may be lawful where 'the criteria for . . . differentiation are reasonable and objective and . . . the aim is to achieve a purpose which is legitimate under a [human rights] Covenant'.[150] Applying this in its conclusion in the case of *Bhinder Singh* v *Canada* and using 'criteria now well established in the jurisprudence of the Committee', the HRC found that a rule requiring employees to wear hard hats, disadvantaging Sikh applicants disproportionately, was justified because it was 'reasonable and directed towards objective purposes'—the protection of workers from injury—'compatible with the [ICCPR]'.[151]

Regional and municipal courts have developed similarly phrased tests of legitimacy of purpose for state measures that infringe rights, including indirect infringements of the guarantees of equality and non-discrimination. Although the tests vary between jurisdictions, there are common elements to them: courts have upheld discriminatory laws where they are objective and reasonable, have legitimate aims and possess a relationship of proportionality between the means employed and the aims sought to be realized. For example, the European Court of Human Rights in the *Belgian Linguistics* case held that a measure that has a discriminatory impact may nonetheless be legitimate if it has,

> . . . an objective and reasonable justification. The existence of such a justification must be assessed in relation to the aims and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference in treatment . . . must not only pursue a legitimate aim, . . . [the principle of non-discrimination] is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.[152]

[150] See HRC, above n 35, at para 13.

[151] *Karmel Singh Bhinder* v *Canada*, Communication No. 208/1986, UN Doc CCPR/C/37/D/208/1986 (Geneva: HRC 1989), at para 6.2. See also *Althammer et al.* v *Austria*, Communication No. 998/2001, CCPR/C/78/D/998/2001 (Geneva: HRC 2003) and *Simunek* v *Czech Republic, Communication* No. 516/1992, ICCPR, UN Doc CCPR/C/54/D/516/1992 (HRC 1995).

[152] See European Court of Human Rights, *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (Merits)*, 23 July 1968, Volume 6, Series A, at 10.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

Before turning to the test as a whole, it is important to mention that the last element of the test—the concept of proportionality—developed as a 'decision-making procedure and analytical structure',[153] 'emerg[ing] and then diffus[ing] as an unwritten, general principle of law through judicial recognition and choice'.[154] It has since become 'a legislative doctrine for . . . political institutions to observe in their decision-making functions'.[155] Even though the specific term is not found in all human rights law frameworks, the concept of proportionality is present in almost all, as well as 'featur[ing] prominently in the framework of international law and international relations' generally.[156] From largely German origins, 'the proportionality analysis spread across Europe and into Commonwealth systems,'[157] as well as 'to international treaty-based regimes, including the European Union, the WTO, the Council of Europe and the international system of human rights'.[158]

A. Applying the test

Applying the first elements of the test, would a WTO law requiring a 36 per cent average agricultural tariff reduction by developing countries generally be considered objective and reasonable and as having legitimate aims? As the product of a multilateral, negotiated, and consensual endeavour to strengthen developing countries' economies using such established, neo-classical economic tools as tariff reductions, one would expect the measure to satisfy the tests of reasonableness and objectivity. For the same reasons, domestic laws implementing the WTO law obligation at the country level would be considered objective and reasonable. These laws would also generally be considered to have legitimate aims, although there might be disagreement as to how such aims should be expressed in this context. The aims could be expressed in various ways and at varying levels of generality. At the general level, and referring to the Agreement Establishing the World Trade Organization (WTO Agreement),[159] the aims of the measure could be

[153] Christopher Michaelsen, 'The Proportionality Principle, Counter-Terrorism Laws and Human Rights: A German-Australian Comparison', 2 (1) City University of Hong Kong Law Review 19 (2010), at 25. See also Sandra Fredman, *Discrimination Law* (New York, NY: OUP, 2002) 116. Chapter 4 contains a discussion of the context, evolution, content, and application of proportionality testing: 116–19.

[154] Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism', 47 Columbia Journal of Transnational Law 72 (2008–09), at 74.

[155] Michaelsen, above n 153, at 26. For a discussion of the German and Canadian jurisprudence, see David Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review* (Princeton: Princeton University Press, 2010) 301 and 333–35.

[156] Ibid. See also Benedict Kingsbury, 'The Concept of "Law" in Global Administrative Law', 20 (1) European Journal of International Law 23 (2009), at 33.

[157] Ibid, at 27.

[158] Ibid.

[159] WTO Agreement, in GATT Secretariat, above n 3, 3.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

described as those of trade liberalization broadly: raising standards of living and ensuring full employment.[160] Alternatively, drawing on the language of the Agriculture Agreement, which imposed the initial set of mandatory agricultural tariff reductions following the Uruguay Round, the general aims could be expressed as 'to establish a fair and market-oriented agricultural trading system'[161] or to achieve 'substantial progressive reductions in support and protection resulting in fundamental reform'.[162] At the more specific level, the aims might variously be described as increasing real incomes, as reducing poverty in rural areas or as reducing food prices. Perhaps the least contestable statement of the general aims of the tariff reduction proposal is that to which the Members (re)committed themselves (echoing the Preamble to the Agriculture Agreement) in the agriculture paragraphs of the 2001 Doha Ministerial Declaration '[t]o establish a fair and market-oriented [agricultural] trading system, through a programme of fundamental reform encompassing strengthened rules and specific commitments on support and protection, in order to correct and prevent restrictions and distortions in world agricultural markets.'[163]

Also in the Doha Declaration, the Members committed to the subsidiary aim (similarly present, although slightly differently worded, in the Agriculture Agreement preamble) of ensuring,

> that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including food security and rural development.[164]

Once again, although there might be disagreement about whether a market-oriented agricultural trading system will be as beneficial to developing countries as more protective systems might be, these aims would widely be considered to be legitimate ones.

Applying the final component of the test—whether there is a reasonable relationship of proportionality between the means employed and the aim

[160] Ibid. The preamble to the WTO Agreement commits the Member countries to an 'open trading system' that would contribute to the objectives (among others) of 'raising standards of living [and] ensuring full employment . . . '. These objectives are strikingly similar to the objectives in Article 55(a) of the UN Charter, of 'higher standards of living, full employment and conditions of economic and social progress and development'.

[161] Agriculture Agreement, Preamble.

[162] Agriculture Agreement, Article 20.

[163] WTO, Ministerial Declaration, WT/MIN(01)/DEC/1, Adopted on 20 November 2001, para 13 (visited 26 June 2011).

[164] Ibid.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

sought to be realized—raises particularly probing questions about the WTO law provision and its domestic equivalents, including the impact on human rights and the justifiability of the indirect consequences. Broadly speaking, establishing proportionality involves ensuring that there is a rational or reasonable connection between the means (with its effects) and the aims, as well as ascertaining that any likely detriment is not out of proportion to the benefit that the measure will bring and that no less damaging means are available (so that the means are no more damaging to affected rights than is necessary for achieving the aims).

It seems incontrovertible that the WTO law proposal to reduce agricultural tariffs has a rational and reasonable connection to the general aim of establishing a fair and market-oriented agricultural trading system. Indeed, for a number of decades, tariff reductions were the primary instrument by which states worked towards creating the fair and market-oriented trading system envisioned by GATT. The synchronized tariff reductions proposed in the Doha Round are a rational and reasonable way of bringing greater competitive fairness into the international trading system and of enhancing the role of markets in decision-making. It is implied in this aim that a fair and market-oriented trading system will be beneficial for the countries that participate. The dominant view amongst economists is that, as a key part of the broad liberalization that will release gains from trade to all, reductions in agricultural tariffs by developing countries will contribute in a substantial degree to their economic growth and higher standards of living. Although this view is strongly contested by some schools within development economics, it is a view that is based on established economic theory, much of it substantiated by modelling and mathematical proofs, and on historical illustration, and could not sensibly be judged as irrationally or unreasonably connected to raising standards of living and ensuring full employment simply because of this difference of views. The same is probably true of the connection between the proposal and the subsidiary aim of accommodating the special development needs of developing country Members. This aim exists within the larger aims, above, of creating a fair and market-oriented trading system and of raising standards of living and ensuring full employment. There is a rational and reasonable connection between the lower tariff reductions required of developing countries, to be implemented over a longer period than that allowed for industrialized countries, and the special development needs that they have by virtue of the relative weaknesses of their economies.

Is the damage the proposal is likely to cause out of proportion to the benefit that would be achieved? From a WTO law perspective, the answer would probably be negative. WTO law is theoretically premised on an utilitarian, consequentialist economic approach that measures improvements to welfare in aggregate outcomes across an identified community, even the

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

global community.[165] It recognizes that the results will not be uniform but this is a collateral consideration. The fact that there is detriment as well as benefit from a tariff reduction measure is predictable and, where there is sufficient benefit to allow those disadvantaged to be compensated, largely irrelevant to the measure's welfare value. In the present context, so long as the larger benefits will outweigh the smaller losses and so long as those losses will be compensable, the measure will be proportionate to the aims. The theoretical basis of WTO law is also teleological, with a focus on the resulting good or benefit, rather than on the impacts of the steps taken to achieve the benefit. Although there are considerable differences of opinion, economic orthodoxy predicts that the benefits to countries from liberalizing their trade rules will be considerable. Economic opportunities will increase as resources are used more efficiently, leading to rising standards of living, and consumers will gain as prices fall and choice expands.[166] As prices move towards global levels, so too should wages in developing countries tend towards global rates.[167] The orthodoxy concludes that the greater prosperity which these changes will engender will be sufficiently substantial to fund compensation for those adversely affected and to render the changes beneficial.

For human rights law, non-discrimination is a core principle. A law that has differential effects, which impacts adversely on a protected group, must be positively justified. In contrast to WTO law, human rights law is deontological in its theoretical approach. Broadly, the benefits that are the ultimate goal of trade liberalization cannot be used to justify adverse human rights impacts along the way. Indeed, 'development' itself has been defined within human rights law not as a final destination but as the process of realizing human rights.[168] Discrimination law, in particular, rejects the idea that an individual's or a minority's rights can be overridden through the more-or-less quantitative process adopted in the economic theory on which WTO law is based. It is in order to resist exactly such majoritarian tendencies that many countries have constitutional guarantees of equality before the law and equal treatment by the law. From a human rights law perspective, then, the answer to the question about lack of proportionality would probably be in the affirmative.

In practice, it is not clear that WTO law is always strictly utilitarian, consequentialist or teleological in its approach; the theoretical premise

[165] Dan Seymour and Jonathan Pincus, 'Human Rights and Economics: The Conceptual Basis for their Complementarity', 26 (4) Development Policy Review 387 (2008), at 389.

[166] See, for example, WTO, *10 Benefits of the WTO Trading System*, http://www.wto.org/english/res_e/doload_e/10b_e.pdf (visited 26 June 2011).

[167] The Factor–Price Equalization Theorem of economics states that when prices of goods equalize between countries as they move to free trade, the prices of the factors of production, including labour, will also equalize.

[168] UN, *Declaration on the Right to Development* 1986, GA Res 41/128, annex, 41 UN GAOR Supp (No. 53), at 186, UN Doc A/41/53 (1986), Preamble.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

sketched above, for example, does not fully describe the complex decision-making process engaged in within the Doha negotiations. From its inception, WTO law has been replete with exceptions to, and even contradictions of, its own theoretical foundations. For example, it routinely excludes LDCs from its disciplines, however right those disciplines may be considered to be for the ultimate prosperity of LDCs, in order to avoid the adverse impacts that trade liberalization would cause, particularly in the short term. In fact, the entire system of Special and Differential Treatment within WTO law may be seen as a rejection of a purely utilitarian, teleological approach. It would be a mistake to accept too readily claims that WTO law is so closely tied to its underlying theory that there is no practical possibility it could accommodate other perspectives on its aims,[169] including viewing the damage as being out of proportion to the benefits in this instance. Thus, there may be no single WTO law response to the question of whether the likely damage that the proposal may cause will be out of proportion to the benefit.

Similarly, it is not clear that human rights law is always strictly deontological in its approach. An example is the inclusion of a derogation provision in the ICCPR, under which countries may suspend at least some of their obligations in times of public emergency.[170] Nevertheless, the derogation provision does not permit 'discrimination solely on the ground of race, colour, sex, language, religion or social origin'.[171] The guarantee of non-discrimination is so fundamentally important to human rights law that it will not generally be considered an acceptable form of damage in pursuit of a broad benefit. This is particularly the case with racial discrimination, given the particular abhorrence with which it is regarded under international law, and a Nicaraguan measure that disproportionately disadvantages racial minorities would likely be considered as causing damage out of proportion to the benefit that would be achieved.

B. Exploring less disadvantaging means

Are less disadvantaging means available to achieve the aims or is the damage necessary? The task of exploring whether less damaging means are available could take place at either the multilateral or the domestic level and would involve different considerations at each level. If undertaken at the domestic level, the availability of less damaging options will be constrained by the terms of the WTO law obligation. If that obligation were that developing countries reduce their average agricultural tariffs by 36 per cent, unless substantial flexibility were also given by WTO law within this exercise, developing countries with affected protected groups would be obliged to turn to domestic compensation models, such as social security programmes, to

[169] For a further discussion of this topic, see Seymour and Pincus, above n 165.
[170] ICCPR, Article 4.
[171] Ibid.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

mitigate damage. This approach would appear to enable the tariff reduction measure to achieve its aims of establishing a fair and market-oriented agricultural trading system, with special accommodation for developing countries, while also offsetting the damaging impacts of reform. Unfortunately, simple income support might not be adequate to offset the damage for those affected. For example, income support alone might be inadequate to sustain the viability of a community or to compensate members of a racial minority for the loss of their community and its way of life. State income support programmes can also act to systematize and entrench disadvantage, exacerbating rather than ameliorating discrimination. Aboriginal people in Australia, for example, often refer to social security payments as 'sit down money', engendering passivity and systematizing disadvantage. In societies where the position of women is so subordinate as to have created entrenched disadvantage, income support to families will not necessarily reach women. In the face of entrenched disadvantage from historical and ongoing discrimination against women, mere income support programmes could readily be thwarted.

To be effective, domestic policies in genuine mitigation of discriminatory impacts would probably need to extend beyond income support, to include a broad range of policies that sustain economic, social, cultural, civil, and political rights.[172] There is obvious value in attempting to address the problem of indirectly discriminatory impacts at the level at which the underlying problem of discrimination is being generated. However, there are two weaknesses in relying on developing countries to introduce comprehensive programmes of this kind such as could, as it were, render the tariff reduction measures proportionate. First, limited finances will generally constrain what they are able to do, and this might particularly be the case during the period immediately following tariff reductions, when government revenue will be reduced. Secondly, given that there is already a problem of entrenched, historical discrimination in the affected countries, it is likely that the political will to introduce comprehensive support programmes for minorities or women will be weak. Such programmes may also be opposed by broader populations as unfair, in that they appear to privilege one sector of society over other sectors.

It might be more effective if the task of exploring whether there are less damaging, more proportionate options available were to be undertaken at the multilateral level. Two advantages of acting at this level are that it is the trade law-making level, whereas responsive action at the domestic level would be subsequent and remedial, and WTO lawyers are familiar with applying

[172] These could include relatively sophisticated economic policy initiatives to keep markets and small farmers' incomes stable, such as compensatory stock-piling, which 'can completely block transmission of [price] shocks to the household level', and programmes to increase the flexibility of the response of smallholding farmers: see Winters, above n 63, at 1345.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

necessity tests and searching for less damaging options.[173] In fact, an alternative is already under discussion in the agriculture negotiations in the Doha Round and is in two parts. First, it is proposed that the tariff reductions proposal should go ahead but that all Member countries should be entitled to smaller reductions on a limited number of agricultural products they class as being 'sensitive' for domestic political reasons.[174] Secondly, developing countries are proposing that, despite the tariff reductions commitment, they be permitted to self-designate a set of Special Products, identified as those which are important for 'food security, livelihood security and rural development', which would be subject to smaller tariff reductions or no reductions at all.[175] In the current draft text, a maximum of 12 per cent of tariff lines would be available for self-designation, and up to five per cent of tariff lines could be free from any reductions.[176] The staple foods usually sustaining small and resource-poor farmers could be included within a developing country's Special Products. These percentages are still the subject of negotiation, with a number of developing countries pressing for a higher maximum percentage of tariff lines to be available for self-designation and a higher proportion of products to be free from any reductions.

If it succeeded in neutralizing damaging impacts on protected groups, this alternative package would probably avoid the indirect discrimination predicted from the tariff reductions, although whether the package would still support the original aims is debateable. It has been calculated by the former Chair of the Doha Round Negotiating Group on Agriculture that adoption of the Sensitive Products and Special Products proposals may 'almost completely eliminate reductions in [the] applied agricultural tariffs of developing countries'.[177] The package of both tariff reductions and Sensitive and Special Products exceptions cannot rightly be characterized as a less damaging, alternative means to achieve the aims of creating a fair and market-oriented trading system if it, in fact, frustrates those aims. However, the calculation is that the alternative proposal would 'almost', not entirely, eliminate reductions in *applied* agricultural tariffs. By reducing many of their bound

[173] WTO law contains numerous necessity tests, including Articles XI and XX of GATT, above n 3, at 423; Articles XIV, VI:4 and XII:2(d) of the GATS and 5(e) of its Annex on Telecommunications, in GATT Secretariat, above n 3, at 284; Articles 2.2 and 2.5 of the Agreement on Technical Barriers to Trade (TBT Agreement), in GATT Secretariat, above n 3, at 121; Articles 2.2 and 5.6 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), in GATT Secretariat, above n 3, at 59; Articles 3.2, 8.1, and 27.2 of the TRIPS Agreement, above n 3, at 321; and Article 23.2 of the Agreement on Government Procurement, in GATT Secretariat, above n 3, at 383.

[174] Committee on Agriculture Special Session, *Revised Draft Modalities for Agriculture*, 6 December 2008, TN/AG/W/4/Rev 4, at paras 71–72.

[175] Committee on Agriculture Special Session, ibid, at para 129. Note that these criteria were first adopted in 2004: see WTO General Council, Decision Adopted by the General Council on 1 August 2004 (WT/L/579), Annex A, para 41.

[176] Ibid.

[177] Martin and Mattoo, above n 73, at 3.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

agricultural tariffs and making some, albeit small, reductions in their applied ones too, developing countries would be making a measurable movement towards a fair and more market-oriented trading system. There is scope, too, for debate about what is meant in this context by a 'fair' trading system. A fair system might be one in which developing countries were given precisely these kinds of special rights to protect their small and resource-poor farmers, especially in situations where protected groups predominate amongst those farmers. There is also scope for debate about whether deferring deeper tariff reductions by developing countries is actually in opposition to the creation of a market-oriented system. Deferral could be seen as a move in support of those aims, but as (once again) only a small move, part of a sympathetic but more conservative plan to be carried out over a longer time frame. These arguments are strengthened if it is recalled that it is implied in the aim of establishing a fair and market-oriented agricultural trading system that the reforms will be beneficial, including that they will raise standards of living. In the short term, if not longer, this package could be said to meet those aims more effectively for the protected groups than would the tariff reductions alone. This is not to say that the reverse might not be true for other socio-economic groups in developing countries, such as urban consumers.

At this stage, while it appears that some form of the Sensitive Products proposal will be adopted by the Members, the future of the Special Products proposal is uncertain. The opinion of David Walker, Chair of the Doha Round Negotiating Group on Agriculture, is that, 'at a pinch', Members 'would be able to go with what is in the [current] text' regarding Special Products, but disagreement within the negotiating Group about the current text has remained intransigent for many years.[178] The reality is that the negotiations are complex, with much cross-cutting pressure and deal-making; developing countries cannot realistically negotiate over agricultural tariff reductions and Special Products independently of all the other issues, interests and pressures in which they are involved. Assuming that the single undertaking approach[179] is maintained in the Doha Round, developing countries would be required to implement the entire package when it has finally been settled, whatever its content.[180]

[178] David Walker, Chair, Committee on Agriculture Special Session, *Report of the Negotiating Group on Agriculture*, 21 April 2011 (TN/AG/26), 1.

[179] The term 'single undertaking' means that 'virtually every item of the negotiation is part of a whole and indivisible package and cannot be agreed separately. "Nothing is agreed until everything is agreed"': WTO, *How the Negotiations are Organized*, http://www.wto.org/english/tratop_e/dda_e/work_organi_e.htm (visited 26 June 2011).

[180] For a discussion of issues of consent in trade agreements, see Frank Garcia, 'Is Free Trade "Free?" Is it Even "Trade?" Oppression and Consent in Hemispheric Trade Agreements', Research Paper 117 Boston College Law School Legal Studies Series (January 2007).

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

When evaluated from within the human rights law framework, the addition of the Sensitive and Special Products exceptions to the tariff reductions proposal would seem to be an acceptable way of ensuring that the reductions are no more damaging than is necessary and that the means used to achieve the aims are proportionate. That said, there would be some concern, particularly among development economists, that permitting ongoing tariff protection for agricultural products of importance to the livelihoods of affected protected groups in developing countries would not really benefit them at all. The concern is that it would delay the enjoyment by these groups of the economic development that derives from more efficient production and more competitive trade. However, it is unlikely that broadly stated aims like 'economic development' could successfully be used to justify as necessary and proportionate a measure that has the disparate effect of subjecting protected groups to an indefinite period of disadvantage. Müller explains that the CESCR has previously rejected reliance on broad aims like 'economic development' to justify curtailment of economic or social rights, particularly where the people adversely affected belong to vulnerable groups, such as minorities and women.[181] If it is correct to conclude that a human rights law perspective would view the bare agricultural tariff reductions proposal as not a proportionate measure, what are the implications for the Doha Round?

VII. CONCLUDING REMARKS

The problem of discriminatory impacts in developing countries is representative of the conflicts and competing objectives that beset the Doha Round. Although the problem has not been raised there in discrimination law terms, it is nevertheless present in debates over the nature of the economic development strategy that the poorer WTO Member countries should follow. WTO law proposes an economic development strategy that, in its purer form, would be Dualist in character. In development theory, Dualism argues that successful development requires the creation of a dynamic, modern sector that will be able to take the lead in generating wealth and, as time goes by, will infiltrate underdeveloped sectors of economies through a kind of 'trickle down' process of development.[182] It is characteristic of the Dualist development approach that inequality (and discriminatory impacts) will be tolerated as a necessary by-product of the process of economic development. In putting forward the Special Products proposal in the Doha Round, developing countries are attempting to avoid a Dualist dynamic that would exacerbate inequality; they want to maintain support for their rural

[181] See Müller, above n 16, at 574.

[182] Tony Binns, 'Dualistic and Unilinear Concepts of Development', in Vandana Desai and Robert B. Potter (eds), *The Companion to Development Studies* (Oxford: Oxford University Press, 2008) 81–85, at 82.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

poor, poor farmers, and rural development. Although developing countries have not framed their arguments in human rights terms, they are similar to that perspective. The human rights perspective proposes a development approach that involves 'the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom',[183] with a prohibition on (unjustifiable) discrimination at all points along the way.

The Special Products proposal and the human rights approach also share a common criticism. Ongoing tariff protection for inefficient farmers is not supported by conventional economic development theory as an effective development strategy. Development economists typically argue that, while retaining tariffs may secure the immediate economic circumstances of poor farmers, it will hold back improvement in their economic circumstances and constitute a drag on the economy as a whole.[184] The human rights approach to development similarly lacks support from conventional economic development theory. Despite this, human rights law guarantees equality in enjoyment of economic and social benefits and creates a level of immediate entitlement generally to basic economic well-being. Cottier's view is that there is a poor alignment between the aspirations and implementation of human rights law and that this is one of its principal weaknesses.[185] Realization of economic and social rights is dependent on effective economic policy and economic development, yet human rights law insists that economic development initiatives respect the enjoyment and realization of rights at all times and stages.[186]

[183] United Nations General Assembly, above n 168, Preamble.

[184] See, for example, Kym Anderson and Will Martin, 'Agricultural Trade Reform and the Doha Development Agenda', *World Bank Policy Research Working Paper No. 3607* (May 2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=753573 (visited 26 June 2011).

[185] Thomas Cottier, 'Trade and Human Rights: A Relationship to Discover', 5 (1) Journal of International Economic Law 111 (2002), at 119.

[186] It is disappointing that the CESCR has effectively declined to engage in economic theory, saying that the obligation to take steps by all appropriate means towards progressive realization of the Covenant rights:

> neither requires nor precludes any particular . . . economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. Thus, in terms of . . . economic systems, the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or *laisser-faire* economy, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic . . . systems

See CESCR, above n 13, at para 8. For a more comprehensive discussion, see Seymour and Pincus, above n 165.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

The conflict between WTO law and human rights law over development strategy is not assisted by the fragmented nature of international law, within which the two bodies of law have developed in isolation from one another and in which there is an 'absence of overarching principles [and] . . . of a hierarchy of norms'.[187] Any claim that human rights law will always 'trump' the 'general utilitarian' requirements and merely 'instrumental rights'[188] of WTO law (human rights being essential components of the basic human dignity to which all people are entitled[189]) will be viewed with scepticism by WTO lawyers, some of whom argue that the trading rights guaranteed in WTO law deserve the same level of respect as human rights.[190] Yet, however difficult it may be, WTO law and human rights law must find ways to reconcile the conflicts that will inevitably arise because they will find themselves in ever-closer cohabitation as time goes by. Cottier believes that this is the great challenge ahead for the global trading system:

> [H]istorical experience of economic integration shows that trade rules and human rights inevitably interact as integration proceeds. This can be observed in constitutional systems such as the United States . . . . Foremost, it can be observed within the European Communities . . . Trade liberalization . . . calls for consideration of concurring and competing values at some stage. [This] is true for the global trading system as it advances into the twenty-first century.[191]

Simple statements in new trade agreements about respect for human rights, while welcome in themselves, do not constitute mutually supportive interaction. For example, trade agreements between the USA or the EC and developing countries usually contain a preambular assurance that the agreement is premised on 'respect for human rights'. Yet, as has been seen, it is not practically possible to fulfil this assurance without paying informed attention to the relationship and intersections between trade policy and human rights, which is not being done. The CARIFORUM-EC Economic Partnership Agreement entered into between the EC and Caribbean

[187] See Cottier, above n 185, at 113.

[188] Philip Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann', 13 (4) European Journal of International Law 815 (2002), at 826; and R. Dworkin, *Taking Rights Seriously* (Boston, MA: Harvard University Press, 1978). The general view is that, with the exception of peremptory norms, there is no hierarchy in international law: Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?', 95 The American Journal of International Law 535 (2001), at 536–37.

[189] See Louis Henkin, Gerald L. Neumann, Diane F. Orentlicher and David W. Leebron, *Human Rights* (New York, NY: Foundation Press, 1999) 2–5.

[190] See the debates on these matters that took place between Philip Alston and Ernst-Ulrich Petersmann in the *European Journal of International Law* in 2002 and which have been explored and explained in Thomas Cottier, Joost Pauwelyn, and Elisabeth Bürgi (eds), *Human Rights and International Trade* (Oxford: OUP, 2005).

[191] See Cottier, above n 185, at 113.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014

countries in 2008 contains an assurance of respect for human rights,[192] but it also sets out a plan for dismantling protective measures in the Caribbean countries, including agricultural tariffs, without any reference to considerations of indirectly discriminatory impacts or increased inequality, nor to deficiencies of financial resources and political will in developing countries to avoid or address the discriminatory impacts. Financial assistance from the European Development Fund will not be directed to preventing or correcting these impacts but 'will be used to help implement the [agreement], to build business development programmes and to assist in the reform of the taxation system of the CARIFORUM countries'.[193]

For all the reluctance of some WTO Members to include non-trade concerns in multilateral negotiations, modern international trade law is characterized by a 'high degree of intrusiveness into domestic affairs'[194] and it is perfectly possible for potentially discriminatory domestic impacts to be taken into account in, say, the agriculture negotiations. The alternative, which involves maintaining an unsupported expectation in the negotiations that developing country governments will introduce comprehensive domestic programmes to avoid discriminatory impacts flowing from WTO-mandated reforms, is careless of human rights law principles and of Members' legal obligations. One is not required to subscribe to Pogge's view that the affluent nations have a genitive duty to the world's poor not to uphold a global order that violates human rights,[195] nor to Sen's that affluent nations owe positive obligations of assistance to the world's poor,[196] to see the wisdom of accommodating these concerns and respecting these obligations at the law-making level. Indeed, as the above analysis regarding justification of discriminatory measures and proportionality has revealed, those developing country Members with protected groups likely to be disproportionately adversely affected by agricultural tariff reductions may well be *entitled* to a Special Products mechanism, as a matter of human rights law. While taking steps at the Doha negotiations level to avoid the predicted discriminatory impacts will not, unfortunately, deal with the underlying problems of discrimination and consequent poverty amongst these groups, it would avoid causing further and deeper discrimination.

[192] *Economic Partnership Agreement between the CARIFORUM Countries and the European Community*, signed on 15 October 2008, Preamble.

[193] EC, *The CARIFORUM-EC Economic Partnership Agreement*, MEMO/08/624, Brussels, 15 October 2008, at 2, http://ec.europa.eu/trade/issues/bilateral/regions/acp/pr220208_en.htm (visited 26 June 2011); EC-CARIFORUM Agreement, ibid, Article 8.

[194] See Cottier, above n 185, at 119.

[195] Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge: Polity Press, 2002) 145 and 172.

[196] Polly Vizard, *Poverty and Human Rights: Sen's 'Capability Perspective' Explored* (Oxford : OUP, 2006) 81.

Downloaded from http://jiel.oxfordjournals.org/ at University of New South Wales on January 13, 2014