

Human Rights in Pre WTO Period: Scope for Trade-Human Right linkage

Dr. Shima Zaman*

Introduction

Proponents of economic liberalisation believe that removing trade barriers will lead to welfare and reduce poverty,¹ but this notion has been challenged by increasing poverty, unemployment, hunger and unequal economics. Therefore, the trend is towards building an effective nexus between trade and human rights. In reality, trade agreements have various effects on the ability of countries to protect their social values, including labour and environmental standards and human rights. The World Commission on the Social Dimension of Globalisation said in its 2004 report, 'wisely managed, the global market economy can deliver unprecedented material progress, generate more productive and better jobs for all, and contribute significantly to reducing world poverty'.²

The preamble to the Charter of the United Nation (UN Charter) declares that faith in the dignity of humans, and in the equal rights of men and women, promoting social progress and better standards of living for all are the objectives of the UN. This affirms that economic and social development is an indispensable means to the full realisation of human rights in the modern world. The post-war UN made it a high priority to launch better regimes for both human rights and world trade. Articles 55 and 56 of the UN Charter when read together assert that economic development and human rights are not separate agendas and that their promotion and achievement are interdependent. So by acknowledging the dignity and eliminating the separate existence of trade and human rights the UN Charter asserts that trade and human rights linkage did exist in the pre-WTO era. Linkage was established through the UN embargo aimed at ending apartheid to serve the cause of human rights.³ Similarly efforts to, at least, prevent a race to bottom in labour protection because of global competition have been on the agenda for decades and addressed in the

* Associate Professor, Department of Law, University of Dhaka.

¹ Neoclassical economic theory has long contended that trade enhances welfare and growth. In W Strahan and T Caddell (1776), *An Inquiry into the Nature and Causes of the Wealth of Nations*, Adam Smith stressed the importance of trade as a vent for surplus production and as a means of widening the market, thereby improving the division of labour and the level of productivity.

² World Commission on the Social Dimension of Globalization, *A Fair Globalization -- Creating Opportunities for All* (2004) x.

³ Thomas Cottier, Joost Pauwelyn and Elisabeth Burgi, 'Linking Trade Regulation and Human Rights in International Law: An Overview' in Thomas Cottier, Joost Pauwelyn and Elisabeth Burgi (eds), *Human Rights and International Trade* (2005) 2.

International Labour Organization (ILO), which the multilateral trade agreements failed to materialise.⁴ Most importantly, human rights issues are also present in different regional and multilateral trade agreements though not explicitly.⁵

However, the opponents of trade-human rights linkage claim that trade is for doing business and it has nothing to do with human rights.⁶ They further claim that economic development achieved through trade will automatically lead to implementation of human rights. So the question is what the trade agreements say about human rights. This article argues that the trade human rights nexus has always existed and will always do. It proceeds against the common belief that trade and human rights developed in complete isolation in the post-world war period; and shows how and why human rights concerns emerged in economic planning of recognition and development after the Second World War. Important regional and multilateral trade agreements are also discussed to show how the human rights issues have entered into their legal framework, how far this human rights approach has been implemented within their trade activities; and what impediments there are to the full realisation of human rights issues. This article will help all to understand that trade never denied the existence and importance of human rights and therefore, every future, national/international trade agreements have to insert the human rights issues in the trade activities.

This article analyses the background of trade-human rights debate and seeks to explore the reasons for the stunted growth of the linkage issue. It critically examines both primary and secondary materials with emphasis on the relationship between trade and human rights. The primary materials include the relevant statutes and secondary laws. The secondary materials include scholarly articles as well as articles and other materials appearing in popular magazines, newspapers, and materials obtained websites of the relevant bodies. The readers of this article report should note that while in appropriate cases, references may be made to some specific trade agreements this article would examine only few important trade agreements.

Trade-Human Rights Nexus and the UN

The Universal Declaration of Human Rights (UDHR), the most important statements of the norms of the international human rights adopted on 10 December 1948 by the UN General Assembly, includes a number of rights that are to some extent related to

⁴ Ibid.

⁵ Subsequent discussions on NAFTA, APEC, EU and GATT shows how these trade agreements address the human rights concerns in their different articles.

⁶ Tarek F Maassarani, 'WTO-GATT, Economic Growth, and the Human Rights Trade-Off' (2005) 28(2) *Environ* 269; F Van Hees, 'Protection v. Protectionism: The Use of Human Rights Arguments in the Debate for and Against the Liberalization of Trade (2004) <<http://web.abo.fi/institut/imr/norfa/floris.pdf>> at 26 September 2012.

trade agreements. Articles 22 to 24 deal with economic rights, which include the rights to work, rest and leisure, and social security; Article 25 deals with subsistence rights, particularly the right to food, and a standard of living adequate for the health and well-being of oneself and one's family; and Articles 26 and 27 address social and cultural rights, especially the right to education and to participate in the cultural life of the community. The International Covenant on Economic, Social and Cultural Rights (ICESCR) further elaborates these rights. Article 11 of ICESCR includes the right of everyone to an adequate standard of living, and Articles 6 to 8 elaborate the right to work. Article 1 of the International Trade Organisation (ITO), the GATT preamble, the World Trade Organisation (WTO) and North American Free Trade Agreements (NAFTA) refer to raising standards of living and full employment as the end goal of trading activities. The similarity of these rights to those enumerated in the UDHR reveals an inherent connection between the principles of economic cooperation and human rights.

This nexus is not new. It started with the inclusion of chapter nine in the UN Charter, which shows, particularly with the heading 'International Economic and Social Co-operation', the UN's determination and commitment to ensuring cooperation between international economic development and human rights for the better realisation of human rights. Article 55 of the Charter states that:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

1. higher standards of living, full employment, and conditions of economic and social progress and development;
2. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
3. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.⁷

In order to make these objectives meaningful and effective, the UN obliges its members in Article 56 to 'take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55'.⁸ Scholars have been divided on the question of how far these two Articles of the Charter impose a legal obligation on the part of the members to respect and promote human rights and to take joint initiatives in achieving human right. Opponents rest their

⁷ Charter of the United Nations, art 55.

⁸ Charter of the United Nations, art 56.

claim that the Charter only sets out a program of action for the UN to pursue, in which members are pledged to cooperate.⁹ Against this view, it is argued that the UN Charter is a treaty that involves obligations, and members of the treaty have a duty to promote and respect human rights.¹⁰ Article 55 is considered a source of obligation with respect to human rights. It is argued that the subsequent adoption of UDHR and other international human rights instruments reflect the potential of the Charter's human rights obligation, and are considered an authoritative interpretation of the Charter's provisions.¹¹

In fact, an undertaking to cooperate in the promotion of human rights does not leave a country free to remain indifferent to these rights. A pledge to take joint and separate actions to achieve universal respect for, and observance of, human rights does not leave countries with discretion. Article 2(2) of the Charter provides that all members shall fulfill in good faith the obligations assumed by them. The obligation that they have accepted voluntarily cannot be avoided on the grounds that it is a non-binding obligation. In this respect, Hersch Lauterpacht said:

There is a distinct element of legal duty in the undertaking expressed in Article 56 in which 'All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55'. The cumulative legal result of this entire pronouncement cannot be ignored. . . . Any construction of the Charter according to which Members of the United Nations are, in law, entitled to disregard-- and to violate--human rights and fundamental freedoms is destructive of both the legal and moral authority of the Charter as a whole.¹²

Thus, the nexus between economic activities and human rights created by Articles 55 and 56 is not a mere declaration but it creates an international obligation. These two articles when read together assert that economic development and human rights are not separate agendas; the promotion and achievement of these are interdependent. This interdependency is also reiterated in the regional and international trade agreements.

⁹ Manley O Hudson, 'Integrity of International Instruments' (1948) 42 *American Journal of International Law* 105–108, cited in Egon Schwelb, 'The International Court of Justice and the Human Rights Clauses of the Charter' (1972) 66 *American Journal of International Law* 337–338; Hans Kelsen, *The Law of the United Nations—A Critical Analysis of Its Fundamental Problems: With Supplement* (Praeger, 1950) 29–32.

¹⁰ Philip C Jessup, *A Modern Law of Nations: An Introduction* (1948) 91.

¹¹ Anthony Cassimatis, *Human Rights Related Trade Measures Under International Law: The Legality of Trade Measures Imposed in Response to Violations of Human Rights Obligations Under General International Law* (2007) 67.

¹² H Lauterpacht, *International Law and Human Rights* (1950), cited in Egon Schwelb, 'The International Court of Justice and the Human Rights Clauses of the Charter' (1972) 66 *American Journal of International Law* 337, 339.

Trade and Human Rights Nexus in the European Union (EU)

The EU, founded on 1 November 1993, was founded to enhance trade, financial, political, economic and social cooperation.¹³ The European Community (EC) policymakers hope that trade will stimulate growth and creates jobs at home. They want trade policies to reduce poverty and secure sustainable development abroad. The EU has made human rights a priority in its Common Foreign and Security Policy (which remains a matter of the EU member states), its foreign aid policy (which supplements the development cooperation policies of individual states), and its trade policy. The commitment of the EU to human rights in its external policy is reflected in the Union's common foreign and security policy provisions and in its development cooperation programme. Every new agreement between the EU and a third country includes a human rights clause allowing for trade benefits and development cooperation to be suspended if abuses are established. Moreover the Union can impose targeted sanctions as it has done against Serbia and Burma. These range from a refusal to give visas to senior members of the regime to freezing assets held in EU countries.¹⁴

The EU's action in the field of external relations is guided by compliance with the rights and principles contained in relating provisions of EU Treaties, in particular Articles 2, 3, 6, 11, 19, 29, 49 of the Treaty on European Union (TEU), Articles 11, 13, 177 of the Treaty Establishing the European Community (EC Treaty), and Articles 6, 7, and 49 of the Treaty of Amsterdam.

Since 1992, the EU has included in all its agreements with third countries a clause defining respect for human rights and democracy as an 'essential element' of its external relationship. This human rights clause is unique to the EU's bilateral agreements and it represents a new model for EU external relation as well as for international cooperation. This human rights clause has been further developed in all agreements concluded with the Conference on Security and Cooperation in Europe (CSCE) countries, including an innovative provision in addition to this essential element clause, the 'additional clause'.¹⁵

¹³ Austria, Belgium, Bulgaria, Cyprus (Greek part), Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, the UK and Northern Ireland.

¹⁴ The European Union and the World (2001) cited in Vaughne Miller, 'The Human Rights Clause in the EU's External agreements' (Research Paper 04/33, International Affairs and Defence, House of Commons Library, 2004) 18.

¹⁵ The additional clause provides a response for non-execution, diverging from the procedure of three-month notification laid down in Article 65(2) of the Vienna Convention on the Law of Treaties. It takes one of two forms: (a) an explicit suspension clause known as the 'Baltic clause', which authorises the suspension of the application of essential provisions. This clause was used in the first agreements with Estonia, Latvia, Lithuania and Slovenia (P Van Elsuwege, 'The Baltic States on the Road to EU Accession: Opportunities and Challenges' (2002) 7 *European Finance Association Review* 171-192); or (b) a general

The essential element clause stipulates that respect for fundamental human rights and democratic principles as laid down in the UDHR underpin the internal and external policies of the parties and constitute an essential element of the agreement. This essential element is enhanced by the additional clause dealing with non-execution of the agreement. Thus, in all new negotiations the directives for EC agreements with third countries, the following clauses and content should be included: (1) the preamble, general references to human rights and democratic values; (2) an article defining the essential elements; (3) an article on non-execution; and (4) an interpretation declaration on article on non-execution.

The human rights clause may cover measures such as development cooperation, trade concessions, financial assistance or consultation procedures. However, the clause is essential for the accomplishment of the purpose or objectives of the agreement. A violation of human rights may allow the EU to terminate the agreement or suspend its operation in whole or in part.¹⁶ Thus, in the EU agreements, the human rights clause is considered an essential rather than an individual ancillary term. The basis may be that 'treaty based human rights clause could offer in essence more accountability, the rights of initiative, the duty of cooperation, and legal certainty for contracting parties'.¹⁷ The EU applies a broad concept of human rights covering three generations of human rights. The first generation refers to civil and political rights; second generation consists of economic, social and cultural rights, and the third generation extends to collective rights such as development and environmental rights.¹⁸

The Cotonou Agreement, signed on 8 June 2000 and entered fully into force on 1 April 2003, links 78 African, Caribbean and Pacific (ACP) countries and the EU contains this human rights clause. Article 9 reiterates human rights as essential and fundamental elements of the Cotonou Agreement. Article 9 (2) provides that '[r]espect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement'. Article 9 (3) provides that '[g]ood governance, which underpins the ACP-EU Partnership, shall underpin the domestic and international policies of the parties and constitute a fundamental element of this Agreement'. Breaches of any essential

non-execution clause known as the 'Bulgarian Clause'; which provides for appropriate measures should the parties fail to meet their obligations following a consultation procedure, except in cases of special urgency. This clause was used in agreements with Romania, Bulgaria, the Russian Federation, the Ukraine, Kyrgyzstan, Moldavia, the Czech Republic, Slovakia, Kazakhstan and Belarus.

¹⁶ H Der-Chin, 'The Human Rights Clause in the European Union's External Trade and Development Agreements' (2003) 9(5) *European Law Journal* 677-78.

¹⁷ Van Boven, 'General Courses on Human Rights', in Academy of European Law (ed), *Collected Courses of the Academy of European Law* (1995) IV(2) 65, 66.

¹⁸ S Marks, 'Human Rights, Democracy and Ideology' in Academy of European Law (ed), *Collected Courses of the Academy of European Law* (2000) VIII(2) 57-89.

elements or fundamental element may ultimately lead to a country facing suspension as a measure of last resort provided in Articles 96 and 97 of the Agreement respectively. The ACP-EU cooperation is directed towards sustainable development centred on human person, who is the main protagonist and beneficiary of development, which entails respect for and promotion of all human rights. The Cotonou Agreement represents an elaborate model of North-South cooperation.¹⁹

Europe's view that human rights and trade objectives can and should be linked is not new. Throughout the history of GATT, some European countries tried to include labour rights. The EU argues that the ILO needs greater authority to work with its members and the WTO on the promotion and supervision of core labour standards.²⁰ The EU also funds specific labour rights capacity building projects to attempt to improve workplace conditions in global supply chains.²¹ However, the EU's effort to promote human rights is not limited to particular groups of rights, as the policymakers believe that human rights are universal and indivisible. Its GSP program aims to stimulate developing countries to promote a wide range of human rights stated in international conventions. The EU has developed several different approaches to GSP which allow developing countries to export to the EU without duties or with lower duties.²² The EU hopes this will be a strong incentive to these countries to respect and promoting human rights. Besides, the GSP-Plus arrangements grants additional market access to 'dependent and vulnerable' countries that have ratified and effectively implemented key international conventions on human and labour rights, environmental protection, and good governance.²³

In sum, the EU is committed to using trade policies and agreements to promote human rights nationally, regionally and internationally. EC policymakers have introduced human rights clause into more than 50 trade agreements, which apply to more than 120 countries, and since 1995, the EU has invoked the human rights

¹⁹ M Holland, *The European Union and the Third World* (2002) 199–201.

²⁰ European Commission, 'Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee—Promoting Core Labour Standards and Improving Social Governance in the context of Globalization' (COM, 2001) 416, 13–16.

²¹ European Union, *Human Rights Report* (2005) 58.

²² The EU Generalized System of Preferences (GSP), <http://europa-cu-un.org/articles/en/article_4337_en.htm>at May 25 2009.

²³ A country is 'dependent and vulnerable' when the five largest sections of its GSP-covered exports to the community represent more than 75 per cent of its total GSP-covered exports. In addition, GSP-covered exports from that country must represent less than 1 per cent of total EU imports under the GSP. In December 2005, the European Commission granted GSP-Plus benefits to Bolivia, Columbia, Ecuador, Peru, Venezuela, Georgia, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Moldova, Mongolia and Sri Lanka for the period 2006 to 2008, <http://europa-cu-un.org/articles/en/article_4337_en.htm>at 24 May 2009.

clause in 12 cases.²⁴ As part of its external policy the EU engaged in ‘Dialogue’ based on human rights with many countries, e.g., China, Cuba, Iran, Sudan, the US and Canada. The basic principles of EU human rights dialogue are as follows:

- Mainstreaming or integrating human rights in all aspects of its external relation with third parties; and
- Initiation of human rights-specific dialogue with a particular third country if necessary, in order to examine human rights issue in greater depth.²⁵

Despite this unique effort of the EU in linking trade and human rights it is often criticised for failing to consistently use the human rights tools embedded in trade agreements. The European Parliament noted that, in general, the EU has invoked the human rights clause mainly in response to undemocratic changes of government but did not use it where it might be equally useful. For example, the EU has never used the human rights clause in response to violations of economic, social, or cultural rights in countries such as Egypt and Tunisia.²⁶ In November 2005, the EU office of Amnesty International noted that although human rights are violated ‘in most of the Mediterranean partner countries’, policymakers have failed to intervene and to effectively apply the human rights clause.²⁷ It is argued that the failure of the EU stems not from their lack of will but from the collective decision making process at the EU level.²⁸

²⁴ Andrew Bradley, ‘An ACP perspective and Overview of Article 96 Cases’ (Discussion Paper 64D, ECDMP, 2005), <http://www.ecdpm.org/Wcb_ECDPM/Wcb/Content?Contentnsf/ww/print/>at 21 May 2009.

²⁵ European Union Guidelines on Human Rights Dialogues: The European Union undertakes to intensify the process of integrating human rights and democratisation objectives (‘mainstreaming’) into all aspects of its external policies. Accordingly, the EU will ensure that the issue of human rights, democracy and the rule of law will be included in all future meetings and discussions with third countries and at all levels, whether ministerial talks, joint committee meetings or formal dialogues led by the Presidency of the Council, the Troika, heads of mission or the Commission. It will further ensure that the issues of human rights, democracy and the rule of law are included in programming; 3.2. However, in order to examine human rights issue in greater depth, the European Union may decide to initiate a human rights-specific dialogue with a particular third country. Decisions of that kind will be taken in accordance with certain criteria, while maintaining the degree of pragmatism and flexibility required for such a task. Either the EU itself will take the initiative of suggesting a dialogue with a third country, or it will respond to a request by a third country.

²⁶ *European Parliament—Committee on Foreign Affairs, Report on the Human Rights and Democracy Clause in European Agreements* (2005) 17.

²⁷ Amnesty International, *Ten Years of EUROMED: Time to End the Human Rights Deficit* (Amnesty International EU Office, 2005).

²⁸ Hadewych Hazelzet, ‘Suspension of Development: An Instrument to Promote Human Rights and Democracy’ (Discussion Paper 64B, ECDPM, 20 September 2005).

In spite of the criticism, the EU, probably more than any other case study, is willing to link trade and human rights as part of its larger objective of promoting human rights. The dialogue based on human rights with different countries show how the EU concept of mainstreaming human rights in trade liberalisation is getting acceptance from the world trading community. The criticisms discussed above shows how the reluctance and inconsistency to use all the tools can send conflicting signals to the trade partners about the importance of human rights. Increasingly, it uses market access as a bargaining chip to obtain changes in the domestic arena of its trading partners from labour standards to development policies, and in the international arena from global governance to foreign policy.²⁹

Trade and Human Rights Nexus in the North American Free Trade Agreement (NAFTA)

NAFTA came into effect on January 1, 1994, encompasses the US, Canada, Mexico and Chile, a combined market of some 390 million consumers.³⁰ Not only did NAFTA liberalise trade flows in a broad range of sectors, it introduced a unique dispute settlement mechanism that included side agreements on labour and environmental issues with human rights implications. As per the preamble, apart from its trade-related objectives, NAFTA requires each country to create employment, protect workers' rights and improve working conditions, to promote sustainable development and to protect the environment.³¹ In addition, NAFTA was accompanied by two side agreements: The North American Agreement on Labour Cooperation (NAALC), aiming to promote effective enforcement of domestic labour laws, and the North American Agreement on Environmental Cooperation (NAAEC) to ensure that trade liberalisation and efforts to protect the environment were mutually supportive.

A fundamental objective of the NAALC is to 'promote, to the maximum extent possible, eleven labour law principles mutually embraced by each of the parties'.³² The 11 principles include labour protection for children, equal pay for women and men, prohibition of forced labour, assurance of minimum labour standards, elimination of employment discrimination, and protection for migrant workers.³³ In

²⁹ Sophie Meunier and Kalypso Nicolaidis, 'The European Union as a Conflicting Trade Power' (2006) 13(6) *Journal of European Public Policy* 906, 907.

³⁰ NAFTA Preamble and art 102.

³¹ NAFTA Preamble. The Preamble states that: The Government of Canada, the Government of the United Mexican States and the Government of the United States of America resolved to: CREATE new employment opportunities and improve working conditions and living standards in their respective territories; UNDERTAKE each of the preceding in a manner consistent with environmental protection and conservation; PRESERVE their flexibility to safeguard the public welfare; PROMOTE sustainable development; STRENGTHEN the development and enforcement of environmental laws and regulations; and PROTECT, enhance and basic workers' rights.

³² NAALC (14 September 1993) Can-Mex-US, 32 I.L.M 1499 (NAALC), art 1(b), 1503.

³³ *Ibid*, 1515-1516.

addition it has two other objectives: to ‘promote compliance with, and effective enforcement’ of each party’s labour law by that party,³⁴ and to ‘foster transparency in the administration of labour law’.³⁵

However, the limited power of the administrative apparatus,³⁶ established by the NAALC is a bar to rectifying violations of these guiding principles. Furthermore, it provides no enforcement mechanisms for the majority of the labour principles.³⁷ The absence of definiteness, enforceability and remedy render the apparent ‘obligations’ undertaken voluntary rather than binding.³⁸ Under the NAALC, violations of labour principles concerning child labour standards, sex discrimination, occupational safety and health and protection of migrant workers may lead to investigation by experts, arbitration and, in very exceptional cases, fines. The labour side agreement cannot even judge or sanction private companies as a result of complaints about their labour practices.

The NAALC does not seek to develop common labour standards for the three NAFTA countries. Rather, it recognises ‘the right of each party to establish its domestic labour standards’ and supports the principle of ‘due regard for the economic, social, cultural and legislative differences between the parties’.³⁹ The ambiguity concerning uniform labour standards applicable to all the member countries might give rise to different questions regarding enforcement, but it is not altogether surprising. The underlying reason may be that NAFTA is an agreement between developed and developing countries, so developing a common labour standard may result in hardship for the latter considering the difference between their socio-economic structures. As a result, the NAALC provides no content for substantive labour law other than the general commitment to maintain high standards in each of the 11 covered labour law areas. Thus, NAFTA tries to balance the labour standards of developed and developing countries instead of imposing higher labour standards. NAFTA incorporates GATT Article XX in its Article 2010, meaning that the scope for human rights intervention is possible whenever it is necessary within the limits provided in Article 2010.

Despite NAFTA’s efforts to address environmental and labour issues, it is often criticised for failing to ensure some other important human rights issues. Some argue that instead of supporting a thriving food system that keeps people on the land and

³⁴ Ibid, art 1(f), 1503.

³⁵ Ibid, art 1(g), 1503.

³⁶ The Trilateral Commission for Labor Cooperation and National Administrative Offices (NAOs) in each of the three NAFTA countries: NAALC, arts 8–19, 1504–1507.

³⁷ For a different view, see L Compa, *Another Look at NAFTA* (1997) *Winter Dissent Magazine* 45–50.

³⁸ Marley S Weiss, ‘Two Steps Forward, One Step Back--Or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America, and Beyond’ (2002–2003) 37 *University of San Francisco Law Review* 689, 799.

³⁹ NAALC, above n 131, art 2, 1503.

communities eating healthy, local food, NAFTA has empowered global food corporations, increased market concentration and consolidated market power within and across sectors. As a small number of unaccountable corporate leaders now exercises unprecedented control over the availability and price of food, people are deprived of adequate food because farmers cannot get a fair price at the farm gate and consumers are gouged by rising food prices at grocery stores. NAFTA has greatly benefited translational agribusiness at the expense of farmers, consumers and a sustainable food system.⁴⁰

It is also argued that NAFTA has failed to create employment opportunities to satisfy the demand of Mexican people and, poverty increased to 80 per cent since 1984.⁴¹ Most importantly, NAFTA fails to ensure cross-border movement of unskilled and semi-skilled labour. NAFTA does not provide for the free, intra-regional movement of labour as the EU does.⁴² Nevertheless, it provides scope for the temporary entry of business persons.⁴³ The conclusion stems from the exclusion is that such a provision would invite massive northbound migration from low wage, developing Mexico to higher-wage Canada and the US.

Trade liberalisation aims to ensure free movement of capital, goods and services. Yet, restricting the free cross-border movement of huge unskilled or semi-skilled workforce on the one hand, and creating opportunities for the skilled worker (mostly from developed countries) on the other, raises the question of whether the system is discriminating between them. As most of the unskilled labour belongs to developing countries, the discrimination casts doubt regarding the objective of trade liberalisation in general and trade agreements in particular whether trade is for developed countries only. The tension between developed and developing countries regarding the benefit of integrating human rights issues in multilateral trade liberalisation has compelled developing countries to deny and protest against any question of integration. However, with all its loopholes, NAFTA successfully brings developed and developing countries together and includes some of the human rights concerns within the trade agenda.

⁴⁰ Institute for Agriculture and Trade Policy, Commentary by Dennis Olson, *Lessons from NAFTA: Food and Agriculture* (2 December 2008), <<http://www.iatp/commentaries.cfm?refID=104574>> at 18 February 2009.

⁴¹ Kevin P Gallagher and Timothy A Wise, *NAFTA: A Cautionary Tale—Written Testimony on the Free Trade Area of the Americas* (Global Development and Environment Institute, Tufts University, 2002), <http://ase.tufts.edu/gdae/policy_research/FTAA_TestimonySept02.PDF> at 15 February 2009.

⁴² Citizens of an EU country are allowed to work in another EU country. See EC Treaty Article 48.

⁴³ Chapter 16 of NAFTA provides for the temporary entry of businesspersons and the resolution of some questions of immigration.

Trade and Human Rights Nexus in Asia-Pacific Economic Cooperation (APEC)

APEC, founded in 1989, is a forum for facilitating economic growth, cooperation, trade and investment in the Asia-Pacific Region.⁴⁴ APEC is the only regional trading bloc in the world committed to reducing barriers to trade and investment without requiring its members to enter into legally binding obligations. The objectives for APEC as set in the 1991 Seoul APEC Declaration,⁴⁵ emphasises on economic issues and mentions nothing on human right.⁴⁶ Nevertheless, it is argued that although APEC seems to confine its agenda to economic issues, the concern regarding human rights and social impacts of free trade were never totally outside the discussion of APEC leaders.⁴⁷ The APEC declarations contain some aspirations of human rights. For the first time in 2007, APEC member economies issued a declaration on climate change, energy security and human security in addition to its prime objectives of closer regional economic integration among its members.⁴⁸ In addressing the issue of enhancing human security agenda, they put emphasis on the need to further strengthen APEC's preparedness and ability to fight infectious diseases.⁴⁹ The APEC Declaration 2008 focuses on the social dimensions of trade and on reducing the gap between developing and developed members, in accordance with the theme: 'A New Commitment to Asia-Pacific Development'.⁵⁰ The leaders express their concern about food security and the social dimension of globalisation in their

⁴⁴ APEC began in 1989 as an Australian initiative in recognition of the growing interdependence among Asia-Pacific economies and in response to the free-trade areas that had developed in Europe and North America.

⁴⁵ The declaration was adopted at a ministerial level meeting held in Seoul (12–14 November 1991), http://www.ioc.u_tokyo.ac.jp/~worldjpn/documents/texts/APEC/19911114.D2E.htm/ at 11 June 2009.

⁴⁶ APEC. The members agreed on the following objectives:...to sustain the growth and development of the region for the common good of its peoples and, in this way, to contribute to the growth and development of the world economy; to enhance the positive gains, both for the region and the world economy, resulting from increasing economic interdependence, including by encouraging the flow of goods, services, capital and technology; to develop and strengthen the open multilateral trading system in the interest of Asia-Pacific and all other economies; to reduce barriers to trade in goods and services and investment among participants in a manner consistent with GATT principles, where applicable, and without detriment to other countries.

⁴⁷ Dick K Nanto, *Asia Pacific Economic Cooperation (APEC), Free Trade, and the 2002 Summit in Mexico* (Congressional Research Service, Library of Congress, 11 December 2002).

⁴⁸ 2007 Leaders' Declaration, *Fifteenth APEC Economic Leaders' Meeting: 'Strengthening Our Community, Building a Sustainable Future'* (9 September 2007), <http://www.apcc.org/apcc/leaders_declarations/2007.html> at 10 June 2009.

⁴⁹ *Ibid.*, [16].

⁵⁰ 2008 Leaders' Declaration, *Sixteenth APEC Economic Leaders Meeting: 'A New Commitment to Asia-Pacific Development'* (22–23 November 2008), http://www.apcc.org/apcc/leaders_declarations/2008.html at 10 June 2009.

declaration. Its emphasis on the fact that ‘globalization based on economic, social and environmental progress can bring sustainable benefits to all APEC economies, their business sectors and their people’ further shows how the human rights issues are entering into the thinking process of APEC members. In fact in the recent leaders’ declarations reveal how these concerns are seeping slowly in the activities of APEC. The reiterating of their confidence that economic growth will continue, and the determination to make future progress in their goal to reduce poverty and increase living standards makes it clear that economic growth is not an end itself rather a means of attaining further goals of reducing poverty and increasing standards of living of human lives.

APEC initially said very little about human rights agenda. It has started taking human rights or social aspects of trade into consideration recently. Although very insignificant and indirect in nature, it may be a restatement of the fact that trade and its social aspects are closely related and achievement of one without considering the other is not possible. The fact that APEC decisions are not legally binding on its members may pose doubt regarding the implementation of social issues. The APEC work programs are conducted on the basis of open dialogue with equal respect for the views of all participants – both the member countries and, to a certain extent, private business interests. This consensus-based decision making may result in slow, cumbersome and even ineffective implementation.

Concluding Remarks

The trade agreements envisioned the realisation of some aspect of human rights as an ultimate end of their actions. This may be because of the period of development or particular interests of the countries joined in the agreement. It is true that except the EU with all the criticism, very few invoked actual mechanism to use trade to implement and promote human rights. The use of human rights as sanction or protectionism or emphasising of particular human rights issue has raised doubt among the member countries regarding the intention behind the trade-human rights integration. Yet, the inclusion to some extent proves that human rights have both moral and legal standing in the trade-induced economic development process. This presumably explains why the synergy between trade, economic growth and human rights is recognised, directly or indirectly in a number of trade agreements with preambular references to social issues, often in the absence of any follow up normative provisions, and this may well lead to operative provisions at a later stage.⁵¹

The inclusion of non-trade issues in multilateral and regional trade agreements though scant in nature may be a clear indication that trade agreements do not consider the non-trade values absolutely out of context. It reiterates the fact that without trade economic growth is not possible and in the absence of a healthy

⁵¹ The EU’s human rights clause evolved in this way from Lome III (1985) to IV bis (1995).

economy the enjoyment of human rights is impossible. Similarly attaining economic growth at the cost of human rights is meaningless for those who are the ultimate beneficiaries of economic globalisation. All trade agreements whether regional or multilateral, took this reality into consideration. WTO explicitly accommodated the human rights issues though due to the US non-ratification it was doomed in the very beginning. Likewise the EU has made human rights an essential part of its external relation. NAFTA included labour and environment issue. APÉC is still grappling with the issues of human right on a continuing basis.

There are controversies regarding the implementation of human rights issues under these agreements. In spite of the tension between developed and developing countries about trade-human rights integration the relationship between trade and human rights has become both more obvious and more sensitive over the past decades. The trend seems to favour a gradual acceptance of the role of social issues in regional agreements. More generally, this trend fits with broader changes in international relations. Recent trend in the multilateral and regional trade agreements to cover social issues is a development no doubt related to the increasing willingness of countries to use international law as a means of regulating matters previously left to domestic discretion.⁵² It is certainly an improvement on the stalemate presently gripping the multilateral stage. The conclusions that lead from the above discussion is that references of non-trade values in multilateral and regional trade agreements reveal the fact that there exists a nexus between trade and human rights and that trade and human rights are not altogether different issues to be addressed separately.

⁵² This phenomenon is sometimes referred to as the 'Europeanisation' of international law. Joost Pauwelyn, *Europe, America and the 'Unity' of International Law* (2005).