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## STRIKING A BALANCE BETWEEN INTERNATIONAL TRADE, SUSTAINABLE DEVELOPMENT AND HUMAN RIGHTS \* \*

### ABSTRACT

*The impact of international trade on the environment, health, labour and human rights has for some time now occupied the centre stage in academic, diplomatic and other international discussions. Human rights, health, the environment and labour rights impinge directly on human welfare. Employing the twin concepts of a rights-based approach to development and sustainable development, this article argues for these concerns to be made an integral part of international trade law policy design and implementation, both at the national and international levels. Trade rules should have as its ultimate and foremost aim the promotion of human welfare.*

### 1. Introduction

Many countries of the world owe their economic growth almost solely to international trade.<sup>1</sup> Historically, after the Second World War, international trade witnessed a great boom and massive expansion, particularly among developed countries. This expansion came after a period of devastating protectionism during the inter-war years.<sup>2</sup> As time went on, several developing countries, especially those in the Asian continent, joined in the race for international trade. The

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<sup>1</sup> See Richard Frimpong Oppong, "Trade and Human Rights: A Perspective for Agents of Trade Policy Using a Rights-based Approach to Development" (2006)6 AHRLJ No. 1, p. 124.

<sup>2</sup> World Bank, *Globalisation, Growth, and Poverty Reduction: Building an Inclusive World Economy*, World Bank Policy Research Report (2002) pp. 23-51.

impressive height recently attained by such Asian countries as India, Thailand, China and Malaysia in terms of economic growth is traceable to their increased interest and participation in international trade. In contrast, African countries continue to experience a reduction in their share of the volume of international trade and deterioration in their economic conditions.<sup>3</sup> It has been estimated that Africa's share of world trade decreased from around 6% in 1980 to around 2% in 2002.<sup>4</sup> It has also been foretold that, unless this trend is reversed, Africa's dream of meeting the Millennium Development Goals will remain a mirage.<sup>5</sup> Apart from providing for access to products and services that are domestically unavailable, providing employment opportunities, and foreign exchange, international trade encourages investment and transfer of technology as well as exchange of cultural values. All these are indispensable factors for economic growth and development.

Notwithstanding these benefits, serious fears and concerns have been expressed regarding the negative socio-economic effects that trade liberalisation is having on countries, especially those countries which have little or no regard for human rights considerations in their mindless pursuit of trade and economic development. According to the United Nations (UN) Commission on Human Rights, unregulated trade liberalisation can lead to variegated human rights abuses, environmental degradation, increased poverty, and deterioration in the health conditions of the individuals in these countries.<sup>6</sup> The World Trade Organisation (WTO) is the

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<sup>3</sup> See United Nations Commission on Trade and Development (UNCTAD), *Trade and Development Report* (2004) pp. 3-41.

<sup>4</sup> Opong, above note 1, p. 124.

<sup>5</sup> For a more detailed discussion on these goals, see P Alston, "Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals," (2005) 27 *Human Rights Quarterly* 755.

<sup>6</sup> See, for example, UN Commission on Human Rights "Globalisation and its Impact on the Full Enjoyment of Human Rights," E/CN.4/2002/54; 'The Impact of the Agreement on Trade Related Aspects of Intellectual Property Rights on Human Rights' E/CN.4/Sub.2/2001/ 13;

international body that regulates international trade through rules and policies. There have been raging controversies over whether or not to integrate social concerns such as human rights, health and environmental considerations into the WTO framework. Ironically, the countries which registered the stiffest resistance against the inclusion of these social concerns were mostly the same developing countries which are most negatively affected by unfriendly international trade policies and ruthless rules. The arguments usually advanced by the developing countries are that such integration will threaten the comparative advantage which they enjoy as well as be a threat to their sovereignty. They also argue that adjustment to, and implementation of the demands of these social concerns will be of immense socio-economic cost on them. They also question the competence of the WTO and the appropriateness of using the trade regime in resolving these concerns.<sup>7</sup> It is proposed in this article that human rights and other social issues should be integrated into international trade policies and rules so as to give international trade a humano-centric image. That way, the apparent incompatibility among the trio of international trade, development and human rights will be removed. Although, trade, development and human rights are

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"Liberalisation of Trade in Services and Human Rights," E/CN.4/Sub.2/2002/9; "Human Rights, Trade and Investment" E/CN.4/Sub.2/2003/9. See also J. A Hall, "Human Rights and the Garment Industry in Contemporary Cambodia," (2000) 36 *Stanford Journal of International Law*, p. 119; K. Kolben "Trade Monitoring and the ILO: Working to Improve Conditions in Cambodia's Garment Factories," (2004) 7 *Yale Human Rights and Development Law Journal* p. 79.

<sup>7</sup> See the following: D.A. Zaheer "Breaking the Deadlock: Why and How Developing Countries Should Accept Labour Standards in the WTO," (2003) 9 *Stanford Journal of Law Business and Finance* pp. 90-92; L.A. DiMatteo "The Doha Declaration and Beyond: Giving a Voice to Non-trade Concerns within the WTO Trade Regime," (2003) 36 *Vanderbilt Journal of Transnational Law* p. 95; M Monshipouri , "Promoting Universal Human Rights: Dilemmas of Integrating Developing Countries," (2001) 4 *Yale Human Rights and Development Law Journal* p. 52; H. Cullen, "The Limitation of International Trade Mechanisms in Enforcing Human Rights: The Case of Child Labour," (1999) 7 *International Journal of Children's Rights* p. 1.

conceptually divergent and parallel in their respective evolution, it is submitted that they are fundamentally coexistent and practically complementary. Applying the twin concepts of rights-based approach to development and sustainable development, this article makes a case for the integration of human rights and other social concerns into the operations of international trade to achieve sustainable development, thereby familiarizing apparently strange bed fellows and balancing the imbalances. The first part of this article presents an analysis of the economic-growth approach and the rights-based approach to development, pointing out the strengths and weaknesses of each. The second part explores the sustainable development-implications to international trade and human rights. Proceeding from the premise that environmental protection is vital for the realisation of other human rights, the article posits that a commitment to integrating environmental considerations into economic and other developmental activities is a very essential and, indeed, indispensable element of the concept of sustainable development. In the third part, the need for the application of the rights-based approach to development in the formulation and use of trade policies is discussed while part four x-rays the roles expected of the various agents of trade policy namely, the developing nations, the developed nations and the World Trade Organisation, towards a successful application of this approach in the formulation of trade policies. The article is then rounded off with a conclusion.

## **2. The Economic-growth Approach Versus Rights-based Approach to Development**

### **(a) *The Economic-growth Approach and Development.***

According to Frimpong Opong, the traditionalist conception of development has been that it simply means increasing the gross domestic product (GDP) of a country.<sup>8</sup> The maximization of GDP is, therefore, seen as the sole basis and objective of all

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<sup>8</sup> Opong, above note 1, p. 125.

development strategies and policies under this (mis?)conception. It was believed, albeit erroneously, that such increase in GDP would ultimately culminate in increased wealth and inevitably result in the general welfare of the people. Social and human developments were regarded as the derived objectives of growth and almost always as functions of economic growth. Under this approach to development, the central object of any development effort, that is the human being, is given a subsidiary place and generally left in an obscure corner in the serious business of formulating economic policies. Additionally, the impact of economic activities on issues such as the environment, labour and health are considered externalities to be dealt with outside the free market.

This approach to development is unsupportable on more grounds than one. In the first place, it fails to focus on the human being as the central object of development with the result that the rights of individuals are often sacrificed in the mindless quest for development. Some developing countries where, according to Osinbajo and Ajayi,<sup>9</sup> many human rights abuses happen in what is seen as a necessary and inevitable prelude to development are particularly guilty of this. Second, the lives of people are seldom enriched by socially arid economic growth that is product of such development efforts. For instance, since this approach gives priority to efficiency considerations and purely economic gains, it may lead to the uneven distribution of the gains of development, or fail to protect vulnerable groups such as children and women. Third, it may also lead to economic policies that take little account of the environmental impact. Environmental impact assessment of projects may not be mandatory, and over-exploitation of natural resources may therefore result. Generally, the focus of this approach to development is narrow. It does not take into consideration all the social, economic, cultural and environmental variables that constitute development.

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<sup>9</sup> See Y. Osinbajo and O. Ajayi, "Human Rights and Development in Developing Countries," (1994) 28 *International Lawyer* p. 727.

### (b) The Rights-Based Approach to Development

Researchers have recently come up with a new approach to development called the rights-based approach,<sup>10</sup> which approach makes the realization of all human rights and fundamental freedoms feasible. Stakeholders in the international human rights domain have described this approach as one sure way of protecting and enhancing development without relegating the interests of the individual to the background.<sup>11</sup> There is no gainsaying that every human being is entitled to this process of development on account of the right to development. It is, however, important to note that there is a difference between the 'process of' development and the 'right to' development. This difference is clearly brought out by Sengupta<sup>12</sup> who notes that a process of development which is carried out in a manner consistent with human rights is rights-based. When that process can be claimed as a right, satisfying the test necessary to make that claim and entailing a binding obligation on the duty holders to enable the fulfilment of the claim, then the process can be the object of the right to development. Sengupta concludes that the right to

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<sup>10</sup> For a discussion of the concept, see M. Darrow & A. Tomas, "Power, Capture, and Conflict: A Call for Human Rights Accountability in Development Co-operation" (2005) 27 *Human Rights Quarterly* p. 471.

<sup>11</sup> See for example the views expressed by the Office of the United Nations Commission for Human Rights to the effect that a rights-based approach to development is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights... . [It] integrates the norms, standards and principles of the international human rights system into the plans, policies and processes of development. Available at <http://www.unhchr.ch/development/approaches-04.html>. Accessed on 25 February, 2011].

<sup>12</sup> "The Human Right to Development" (2004) 32 *Oxford Development Studies* p. 181. See also Declaration on the Rights to Development, adopted 4 December 1986, G A Res 41/28; A Sengupta 'On the Theory and Practice of the Right to Development' (2002) 24 *Human Rights Quarterly* 837; and S Marks 'The Human Rights Framework for Development: Seven approaches' FXB Center Working Paper No 18 (2003) Available at [http://www.hspf.harvard.edu/fxbcenter/research\\_publications.htm](http://www.hspf.harvard.edu/fxbcenter/research_publications.htm). Accessed on 15 September, 2010.

development is a claim to a rights-based process of development. This rights-based approach sees the human being as the central object of development and not merely as its facilitating instrument. It treats individuals as the end, and not merely the means, of development. Under this approach, the design of any policy has to take into consideration its impact on individual freedoms and rights. Thus, for example, policies that may result in the abuse of children will not be protective of the interests of the weak and vulnerable. Also, developmental programmes that may result in adverse environmental impact must be reassessed.

It has to be pointed out that this approach to development in no way disregards the importance of economic growth. The approach does not advocate that it is possible to achieve human development only by following the rights-based approach to development and ignoring policies for economic growth.<sup>13</sup> Economic growth through trade and investment is essential for the realisation of human rights. Indeed, empirical studies suggest that policies that promote real income growth will tend to promote human rights across a broad range of concerns.<sup>14</sup> As a matter of fact, what the rights-based approach advocates is that the growth of resources through trade and investment must be realised in a manner in which all human rights are respected and promoted. Thus, for example, the approach does not advocate that developing countries should not proceed on the path of economic development until all human rights have been realised. Not only will such thinking be inconsistent with the approach, it will indeed be senseless. What the approach advocates is that respect for human rights should be an essential component of all development policies, including trade. Conceived in that way, the approach challenges the theory that economic

<sup>13</sup> See Third Report of the Independent Expert *The Right to Development* E/CN.4/2001/WG.18/2 paras. 14-15.

<sup>14</sup> A. O. Sykes "International Trade and Human Rights: An Economic Perspective" (June 2003 Chicago Law & Economics Olin Working Paper No 188. Available at <http://ssrn.com/abstract=415802>. Accessed 1 18 July, 2010).

development in developing countries, through the vehicles of international trade and investment, must necessarily involve compromises in relation to human rights, including, especially rights that have to do with labour, health, and the environment. An excursion into the archives of history throws up some examples of development that were built on the gross abuse of human, labour and environmental rights. Slave labour and child labour which were prevalent during the Industrial Revolution in Europe and later in the plantations of America remain classical examples of the despicable consequences of development programmes that do not have any regard for the rights of the individual. The mindless and massive exploitation of the natural resources of the colonial territories by the self-aggrandising and economic-minded colonial masters are also cases in point. Those were in the days gone by. No development policy with similar features can be followed today. The rights-based approach makes respect for rights an indispensable part of the development process, without being unmindful of the difficult and complex policy choices that go with it, specially, for developing countries.

The benefits of adopting this approach to development are numerous and varied. This does not in any way suggest, however, that the approach does not have its own shortcomings.<sup>25</sup> First, the approach is consistent with current opinions on the best approach to development which sees development as a comprehensive economic, social and cultural process which aims at the constant improvement and well-being of the entire population and of all individuals on the basis of their active free and meaningful participation in development and the fair distribution of the benefits resulting therefrom.<sup>26</sup> In line with this approach, Sen notes that development must be seen as an expansion of human capabilities and cannot be thought of merely as the provision

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<sup>25</sup> For a critique of the approach, see Alston, above note 5, pp. 804-807; M. Malone & D. Belshaw, "The Human Rights-based Approach to Development: Overview, Context and Critical Issues," (2003) 20 *Transformation* pp. 86-87.

<sup>26</sup> See The Preamble to the Declaration of the Right to Development (1986).

of basic needs.<sup>27</sup> He further states that it must be empowering, focusing on the individual as an end and not merely as the means to development. The central position of importance given to the human being as well as sustainable development in the field of trade is unambiguously captured in the Preamble to the Agreement Establishing the WTO which declares that international trade should be pursued with the object of raising living standards and sustainable development in mind. This provision, it is submitted, puts it beyond any argument that sustainable development and human rights should be at the forefront of the activities of the WTO and its members. It, however, remains to be seen to what extent this provision is adhered to by members of the WTO.

Secondly, greater legitimacy will tend to be afforded to development policies by the right-based approach to development. It is common knowledge that policies that have the human being as their central object are more likely to elicit human attention and participation than those that do not. The principles of non-discrimination, equality of treatment and participation, all of which are essential components of this approach to development, work to give greater legitimacy to government policies. In addition to the above, the approach provides a means by which the policies and programmes of a government can be evaluated to determine how consistent they are with its human rights obligations. In designing development policies under this approach, a government should, therefore, have in mind its commitments under various international and domestic human rights instruments with the view to designing and implementing policies that promote and realise the rights enshrined in these instruments.

Furthermore, the successful marriage of the concept of rights with the notion of development (two seemingly incompatible partners), provides a basis for focusing on those with a duty to ensure its realization. By seeing development and the process of development as a right, there arises a tacit acceptance that others have a duty to ensure that this right is

<sup>27</sup> A . Sen, *Development as Freedom* (1999) p. 3 cited in Oppong, above note 1, p. 130.

achieved. For example, the recognition of the process of development as a human right demands the setting aside of national and international resources to help realise this right. It obliges states and other agencies of society, such as civil society groups, corporations and indeed individuals, to implement and adhere to this approach to development. The nature and scope of such a duty may be difficult to determine and may vary with each agency, but these do not negate the existence of the duty. The approach also calls for international co-operation and assistance, both multilateral and bilateral, to ensure its realisation. In the field of trade, this may entail, among others, the supply and transfer of technology, technical assistance, improving and providing market access for developing countries, adjusting the rules of operation of the existing trading and financial institutions for the benefit of developing countries, and reforming existing laws on intellectual property to meet the health and technology needs of developing countries.<sup>28</sup>

Another very important advantage of using a human rights approach to development is that it pays enough attention to protecting the interest of those who lag behind in their enjoyment of rights, for example the poor, sick, children and women. It requires that positive action be taken on their behalf. It calls for the design of policies aimed at improving their position. The eradication of poverty is seen as especially important in this regard. As has been noted, a motivation of the human rights approach to development guides one along the lines of protecting the poorest and the most vulnerable.<sup>29</sup>

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<sup>28</sup> See Fourth Report of the Independent Expert *The Right to Development* E/CN.4/2002/WG.18/2.

<sup>29</sup> A study on the current state of progress in the implementation of the right to development submitted by A. K. Sengupta, Independent Expert, pursuant to Commission Resolution 1998/72 and General Assembly Resolution 53/155 E/CN.4/1999/WG.18/2 para. 31 cited in Oppong, above note 1, p. 131.

### 3. Sustainable Development, International Trade and Human Rights

The concept of sustainable development, like its twin-sister concept, the rights-based approach to development, also focuses on the individual as the central object of development. The first principle in the Rio Declaration on Environment and Development states that human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.<sup>30</sup> Sustainable development has been defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs.<sup>31</sup> It balances the fulfilment of human needs with the protection of the natural environment so that these needs can be met not only in the present, but in the indefinite future. It thus focuses not only on the present and immediate, but also on the future. It has been posited that the concept of sustainable development can be viewed as having three structural components, namely, international human rights law, international environmental law and international economic law. The implication of this learned view is that the concept of sustainable development executes a smooth and compatible marriage of three important legal regimes that have hitherto evolved separately and in isolation from each other.<sup>32</sup>

<sup>30</sup> Rio Declaration on Environment and Development 1992 <http://www.unep.org/Documents/Default.asp?DocumentID=78&ArticleID=1163>. Accessed 22 August, 2010.

<sup>31</sup> World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) p. 43., D. McGoldrick, "Sustainable Development and Human Rights: An Integrated Conception," (1996) 45 *International and Comparative Law Quarterly* p. 796.; The UN, Division of Sustainable Development, [www.un.org/esa/dsd/index.shtml](http://www.un.org/esa/dsd/index.shtml). Accessed on 18/08/2012.

<sup>32</sup> See Oppong, above note 1, p. 128 where he points out that the foundations of the current regime on trade and human rights law date back to the early post-World War II era. International environmental law, on the other hand, started around 1972, when the first UN Conference directly concerned with environmental issues was held leading to the formation of the United Nations Environment Program.

Sustainable development integrates all three into a single policy instrument.

Integrating all these three components into a single policy instrument, however, presents a challenge. For example, economic efficiency considerations may dictate the establishment of a project in a given location. The project may provide employment and income to families in the area, but can come with some adverse environmental and health impacts on the population. Any decision taken must therefore have regard, after consultation with all the relevant stakeholders, for all the interests and rights engaged in such a situation. A commitment to integrating environmental considerations into economic and other developmental activities is a very essential and, indeed, indispensable element of the concept of sustainable development. It is necessary to point out, however, that sustainable development is not just about the environment. It is also concerned with other things people care about, such as poverty, food, health and education, all of which are essential for the well-being of the individual. It provides a foundation for the appreciation of the fact that environmental protection is vital for the realisation of other human rights. Weeramantry of the International Court of Justice aptly captures the inseparable link between environmental protection and other human rights when he notes:

The protection of the environment is ... a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.<sup>33</sup>

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<sup>33</sup> Separate Opinion of Vice-President Weeramantry in the case concerning the Gabčíkovo-Nagymaros Project, *Hungary v Slovakia* (1997) ICJ Reports 91-92.

The Rio Declaration on the Environment and Development recognises environmental protection as an integral part of the development process which must not be considered in isolation from it.<sup>34</sup> The foregoing are clear testimonies and open acknowledgment that environmental considerations should be a key component of any development policy. They represent a challenge to the often-touted but unacceptable notion of 'develop now, clean up later.' Environmental considerations can be made part of the developmental process through, for example, the provision of information on the environment, the conduct of environmental impact assessments and 'green conditionality' for development assistance. Granted that this may entail costs in the short term, the bitter truth is that a development policy or investment that puts priority on growth at the expense of the environment may entail higher costs in the future. Thus, environmental problems and effects must be actively managed as part of policies leading to economic growth. It cannot be deferred until rising incomes make more resources available for environmental protection, as is usually the practice, particularly, in the developing countries.<sup>35</sup>

The notion of sustainable development is integrative in its approach to the issue of the relationship between international trade and environmental protection. It sees trade not as an end in itself, but as a means to an end. The end is sustainable development. Trade liberalization should, therefore, serve the objective of human well-being. A shift in focus is needed. The issue should no longer be whether a particular environmentally protective measure is consistent with existing trade rules. Rather, the concern should be whether a particular measure, be it related to trade or the environment, can assist in achieving the ultimate goal of sustainable development. Environmental and trade concerns have equal weight on the balancing scale of sustainable development; they enjoy equal

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<sup>34</sup> The Rio Declaration on the Environment and Development, Principle Four.

<sup>35</sup> UNDP Human Development Report 2003 Millennium Development Goals: A compact among Nations to End Human Poverty p. 123.

recognition, as both are essential means of achieving, and must serve the all-important goal of, sustainable development.<sup>36</sup> Seen from the above perspective, the notion of sustainable development can, indeed, be deemed an aspect of the rights-based approach to development. This is because the rights-based approach contemplates a kind of development in which all human rights, be they economic, social, political or cultural, are realised. As a matter of fact, it is now generally accepted that sustainable development is impossible without human rights.<sup>37</sup> A notable human rights advocate and scholar<sup>38</sup> has noted that respect for human rights is the bedrock of a wholesome and integrated approach to sustainable development. He further remarks that an inordinate focus on one category [of rights] at the expense of another will obviously produce a truncated human reality.

Sustainable development acts both as an element of, and a restraint on, the rights-based approach to development. As an element, it calls for the protection of human rights, including the right to a healthy environment as an essential right in the process of development. It provides a redefinition of development by seeing it not only in terms of economic development, peace, security and human rights, but also in terms of the extent to which it protects and restores the environment.<sup>39</sup> It acts as a restraint by not only admonishing policy makers to consider the impact of their policies on the present generation, but also the future generation. This is the intergenerational aspect of sustainable development. It imposes limits on the extent to which we are able to pursue

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<sup>36</sup> See E. B. Weiss, 'Environment and Trade as Partners in Sustainable Development: A Commentary' (1992) 86 *American Journal of International Law* 728.

<sup>37</sup> World Bank Group *Development and Human Rights: The Role of the World Bank* (1998) cited in Frimpong Opong, above note 1, p. 130.

<sup>38</sup> J. Oloka-Onyango, "Human Rights and Sustainable Development in Contemporary Africa: A New Dawn or Retreating Horizons?" (2000) 6 *Buffalo Human Rights Law Review* 44.

<sup>39</sup> J. C. Dernbach, "Making Sustainable Development Happen: From Johannesburg to Albany," (2002-2004) 8 *Albany Law Environmental Outlook* p. 177.

economic and other developmental activities without a concern for the legacy we pass to future generations.

#### **4. The Rights-based Approach and Trade Policy Formulation and Use.**

The adoption of a human rights-based approach to development calls for the design of trade and investment policies aimed at achieving, as its central objective, the improvement of the welfare of the individual both from the economic and human rights perspectives. Such policies must have certain components. The extent to which a country can go in the realization of these components depends on the individual circumstances and context of each country. Resources may have to be devoted to the realisation of certain rights in order to make the enjoyment of other rights meaningful. For example, the right to participate in decision making may not be truly meaningful in the absence of an educated, informed and healthy population. This may, therefore, call for the devotion of more resources to education, promotion of literacy and health. Policies adopting the approach should aim ultimately at the fulfilment of all human rights: civil, political, economic, social and cultural.

In the field of trade, it is likely that more can be done initially in the area of economic rights than in the area of civil and political rights. This does not, however, mean that civil and political rights have no place in the design of trade policy. For example, there must be a right to participate in the decision-making process both at the national and international levels. Indeed, a rights-based approach entails that all the stakeholders must be carried along by ensuring that there is adequate consultation and participation of all affected parties in the design of policies. This is important so that any adverse effect of the policy will be brought to the fore and catered for. It also enriches the policy by virtue of the input from outside, and accords it greater legitimacy. Consultation and participation are also key elements of sustainable development. It needs to be emphasised that under this approach, no right is more

important than the other. The Independent Expert puts this in the proper perspective when he observes:

Because all human rights are inviolable and none is superior to another, the improvement of any one right cannot be set off against the deterioration of another. Thus, the requirement for improving the realisation of the right to development is the promotion or improvement in the realization of at least some human rights, whether civil, political, economic, social or cultural, while no other deteriorates.<sup>40</sup>

The right to development itself is violated whenever any of the other human rights is violated and such a violation is inconsistent with a rights-based approach. By way of illustration, neither can the right to education be sacrificed for the right to work, nor the right to health for the right to property. All rights must be accorded equal importance in the design of trade policies. It is therefore suggested that just as there is an environmental impact assessment (EIA), there should also be what one may call 'human rights impact assessment' (HRIA) of all projects and policies.

It is herein admitted that the above views on the relationship between rights may prove difficult to maintain at the initial stage of the implementation of the rights-based approach to development by countries, especially the developing ones. The relationship may therefore be considered the ultimate goal of this approach. At the initial stages of development, choices have to be made. These choices, however, should be made after due consultation, with the general welfare of the population in mind, and should not be discriminatory, unless the discrimination is aimed at positively improving the welfare of the underprivileged. The eradication of poverty should also be at the heart of any trade policy based on this approach to development. According to Sen,<sup>41</sup> poverty should not be seen to only mean a deprivation of income, but

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<sup>40</sup> See Third Report of the Independent Expert, above note 13, para. 10.

<sup>41</sup> Above note 1, p. 87.

also a deprivation of capabilities. Poverty reduces the capability of individuals to act for themselves, frustrates the materialisation of their potentials and leads to the non-realisation of other rights. It limits human freedoms and deprives a person of dignity. Taking people out of poverty and placing them on the path or ladder of development is, therefore, becoming increasingly an international issue. One effective way of fighting and winning the war against poverty is by improving access to markets. Developed countries must open their markets to products from less developed countries to facilitate economic growth in these countries. In fact, it is arguable that poverty is one of the root causes of several societal ills, including child labour and environmental degradation. This view is re-enforced by the observation of the World Commission on Environment and Development that:

[P]overty itself pollutes the environment . . . Those who are poor and hungry will often destroy their immediate environment in order to survive. They will cut down forests; their livestock will overgraze grasslands, they will overuse marginal land...<sup>42</sup>

Poverty, however, may not be the sole cause of environmental problems; other challenges such as the emission of greenhouse gases, improper disposal of industrial waste and more are relevant. Ensuring access to the basic necessities of life, such as food, health and education, should also be an essential component of trade policy under this approach to development. This is especially important from the perspective of the poor and vulnerable, such as children and women. Policies that restrict access to basic needs for such people would be inconsistent with this approach to development. The approach calls not only for an economic efficiency assessment of trade policies, but, more importantly, looks at the equity and fairness of such policies. With respect to developing countries, there arises a very crucial role for governments. While the

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<sup>42</sup> See World Commission on Environment and Development, above note 16, p. 7.

market may produce efficiency, it often fails to ensure the fair and equitable distribution of gains. Under the rights-based approach, the impact of all trade policies on human rights must be assessed. Many countries now require environmental impact assessments for all development or investment projects. This assessment must be extended to trade policy. The impact of trade liberalisation on the economic, social and cultural rights of people will have to be assessed and taken into account in the design of trade policy. Effective assessment will require adequate information and expertise. Here, civil society groups representing affected individuals can be a valuable source of such information and expertise, but they cannot be a substitute for the views of the affected groups.

## **5. The Roles of Agents of Trade Policy towards a Successful Realisation of the Rights-based Approach to Development**

The adoption of a rights-based approach to development calls for an examination of the parties upon whom a duty is imposed, to ensure that such an approach to development is adopted in the design and implementations of trade policy. The notion of rights cannot be separated from the concept of duties. It is a common legal aphorism that where there is a right, there must be a correlative duty. It is immaterial whether the duty is fulfilled or not. The fact that the duty is not fulfilled - honoured with rhetoric rather than performance — does not negate the existence of the right. The principal agents in ensuring that the rights-based approach is adopted and implemented in the field of international trade are states and the WTO. Corporations, civil society organisations and individuals also have roles to play.<sup>43</sup> The approach demands co-ordination and co-operation among these agents to ensure

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<sup>43</sup> For want of space, a detailed discussion on the roles of each of these entities cannot be done in this article. However on corporations, see generally, J Dine *Companies, International Trade and Human Rights* (2005) 167-221 cited in Oppong, above note 1., Monshipouri et al, "Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities," (2003) 25 *Human Rights Quarterly* 965.

the realisation of the right. The extent of the duty imposed, and the modes for facilitating the realisation of the right, will vary depending on which agent is being discussed. One also has to take into account the peculiar circumstances of each agent, and the context in which performance is demanded

### **(a) *The Role of Developing Countries***

Developing countries have a lot to gain from international trade: employment, foreign exchange, new technologies *et cetera*. However, unless the concerns demonstrated above, especially in the field of labour, human and environmental rights are taken into account, these gains will not be sustainable in the long term, and may fail to achieve the ultimate goal of improving the welfare of their citizens. Thus, the trade policy of developing countries should be pursued within a framework of ensuring and not undermining the realisation of these rights. The development of human capital is the key to any effort to achieve development. A well-trained and skilled population is more likely to take advantage of emerging economic opportunities than an illiterate population. The success of the East Asian economies can be partly attributed to the highly skilled labour force that existed at the time they were opening up their economies. No country can develop by relying on cheap and unskilled labour. While this reliance may present advantages, they may be short-lived. For example, advancement in technology can render unskilled labourers redundant. Their level of productivity may be low. Indeed, the idea of having a comparative advantage in cheap and unskilled labour conjures up images of slavery and the notion that some are 'hewers of wood and drawers of water' consigned to the most basic forms of production and economic activity. Such neglect of human capital will not lead to sustainable development. It fails to recognize and utilise the full capabilities of the population.

A rights-based approach to development requires that people should be empowered. Education provides the most potent channel for such empowerment. Thus, developing countries, particularly those in Africa, should invest in the

education of their people, especially women and children. They should be taken away from the 'sweatshop factories' and streets and given education. It is regrettable to note, however, that many developing countries do not seem to properly appreciate the central role that education plays in development. In Nigeria, for example, the education sector does not receive the required attention it deserves from policy planners.<sup>44</sup> The United Nations Committee on Economic, Social and Cultural Rights in its Conclusions and Recommendations on Nigeria's 1998 Report of Compliance with the Provisions of the International Covenant on Economic, Social and Cultural Rights noted with regrets that Nigeria had failed to fulfil its obligations under the Covenant, pointing out that the educational system at all levels was characterized by inadequate funding, decaying infrastructures, obsolete teaching and research facilities and infrequent payment of salaries. All of these have led to incessant strikes and school closures.<sup>45</sup> There is no substitute for education in the struggle for development, and developing countries must invest unreservedly in that industry. There is no doubt that this may cause problems in the short run, in the form of preferential budgetary expenditure in favour of the education sector and to the disadvantage of the other sectors. However, in the long run, it will be for the benefit of these countries in terms of enhancing productivity and social stability. Equally important for the enhancement of the productivity of labour are favourable working conditions in the form of decent wages, job security, freedom of association in the form of trade unions, and effective retirement schemes. Ensuring this does not only demand effective legislation, but also active efforts on the part of the government to ensure compliance by the relevant stakeholders. This, again, is one area where many developing

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<sup>44</sup> See Alade Aromashodu, "Nigeria at 50: Education Nose-dives", *Vanguard*, September 30, 2010 p. 49.

<sup>45</sup> See Observations 30, 31 and 32 of "Concluding Observations of the Committee on Economic, Social and Cultural Rights: Nigeria 05/13/1998" UN Doc.No.E/C.12/1/Add.23. Available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/E.12.1.Add.23En?Op](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.12.1.Add.23En?Op). Accessed on 13/01/2011.

countries score low. In Nigeria, it has been noted that well over 50% of the employable population is unemployed and those with jobs are incapable of meeting their basic survival needs because of the appallingly low salary structure and poor conditions of service in the country,<sup>46</sup> which has, in turn, led to frequent demands for increased minimum wage.<sup>47</sup>

Granted that investors may be concerned about the cost implications of complying with these requirements, it also has to be noted that they are equally concerned about productivity. The cost of compliance may indeed not be excessive. J. L Johnson<sup>48</sup> observes that in 1992, it was estimated that it cost Nike \$5,60 to produce a pair of shoes in Indonesia which it sold for \$45,80 in the United States. Thus, increases in cost for the purpose of improving labour conditions could have been accommodated without adversely affecting the investment opportunities in Indonesia. Improved labour conditions will enhance the welfare of workers and productivity. The fear of losing investors will be minimised if there is a degree of uniformity in the standards across nations and if they are applied non-discriminatorily to all investors. A study undertaken by the Organisation for Economic Co-operation and Development (OECD) came up with the finding that respect for basic labour standards similar to those found in the International Labour Organisation (ILO) Declaration supports rather than undermines open- trade-oriented growth policies in developing countries.<sup>49</sup>

<sup>46</sup> M. Nweke, "Urban Unemployment Now 49.9%", *Daily Sun*, July 19, 2010 p. 49.

<sup>47</sup> O. Ezigbo, "Minimum Wage: FG Gives Condition for Pay Rise", *This Day*, May 18, 2010 p. 7., Daily Sun Editorial, "The New Minimum Wage", *Daily Sun*, July 19, 2010. p. 18.; Igbonekwu Ogazimora, "When Governors Minimise the Minimum Wage", *Saturday Sun*, July 9, 2011 p. 48.

<sup>48</sup> J. L. Johnson "Private-public Convergence: How the Private Actor Can Shape Public International Labour Standards" (1998-1999) *Brooklyn Journal of International Law* p. 330.

<sup>49</sup> OECD, *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade*(1996). Available at [books.google.com.ng/books/about/Trade-Employment-and-Labour-Standards.html](http://books.google.com.ng/books/about/Trade-Employment-and-Labour-Standards.html). Accessed 28/03/2013.

A shift in emphasis with respect to the export promotion efforts of developing countries, from primary commodities to manufactured products and services, is also called for by the rights-based approach to development and the goal of achieving sustainable development. Reliance solely on the exportation of primary commodities does not sustain the economic growth of any country. In fact, few countries have developed relying on the export of primary commodities. A clear illustration of the glaring difference between basically primary-commodities-exporting economies and manufacturing economies can be seen in the contrast between the Asian developing economies and Africa. Manufacturing creates multiple avenues of demand and job opportunities that exist only to a limited degree with reliance on primary production. While African countries continue to rely on exports of primary commodities, the Asian economies have moved into manufacturing and services. An erudite scholar<sup>50</sup> has rightly remarked that although export promotion is relevant for development, the kind of thing being exported is of utmost significance. It is humbly submitted that the view that the 'curse' of developing countries, especially in Africa, appears to be the abundance of natural resources is unimpeachable.<sup>51</sup> By consigning themselves to the provision of the basics; cheap and unskilled labour, primary commodities and natural resources, developing countries risk being perpetually at the mercy of the developed economies.

The importance of a favourable political climate in the struggle to integrate human rights in the development process can hardly be overemphasized. It is only in a politically favourable climate that the integration of human rights in the development process, as well as the need for accountability, will be realised and respected. Political instability results in human rights abuses. It does not make for effective long-term planning, drives away investment and generally creates an

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<sup>50</sup> C. Thomas, "Poverty Reduction, Trade and Human Rights," (2002-2003) 18 *American University International Law Review* pp. 404-408.

<sup>51</sup> See *Our Common Interest*, Report of the Commission for Africa (2005) p. 21.

unfavourable climate for development. Africa and other developing countries have more than enough cases in this regard. Political stability makes for long-term planning, while a respect for basic human rights and freedoms helps people to realise their full potentials and capabilities. There is a mutually reinforcing relationship between economic and political development. They are two mutually inclusive and mutually dependent variables. Again, erudite Sen notes that there is a:

remarkable empirical connection that links freedoms of different kinds with one another. Political freedoms (in the form of free speech and elections) help promote economic security. Social opportunities (in the form of education and health facilities) facilitate economic participation. Economic facilities (in the form of opportunities to participate in trade and production) can help to generate personal abundance as well as public resources for social facilities. Freedoms of different kinds can strengthen one another.<sup>52</sup>

An important right that may be classified as a political right, and a key element of the rights-based approach to development, is the right of participation in decision making in general and, specifically, in the design of trade policy. While environmental impact assessment(EIA) is often done to assess the impact of development activities on the environment, no such assessment is done to know the impact of trade policy on the rights and living conditions of individuals. Trade deals are often done behind closed doors, outside the view of the public and without much input from individuals. Developing countries must offer more opportunities for citizens to debate and give input into the design and implementation of trade policies. This will allow for all affected interests to be appreciated and catered for. This is especially so under the rights-based approach where all rights are deemed equally important, interdependent, and must be accorded the needed attention in designing policies. Recently, against the popular opinions of the Nigerian public, the government of Nigeria

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<sup>52</sup> See A. Sen, above note 27, p. 11.

increased by 18% the tariff payable for the consumption of electricity. The reason advanced for such an unreasonable increase was that it would encourage investors, both local and foreign, and improve the country's foreign direct investment (FDI). It has to be noted that electricity supply in Nigeria has been one of the most irregular and most epileptic in the whole world. The combined effect of this mindless increase and the already-customary irregular supply of the commodity is that citizens, including artisans, technicians, and other professionals will be denied the use of this very essential item for development. The negative impacts of this act on the enjoyment of the rights by the citizens can only be imagined. The foregoing discussions go to show that governments of developing countries have very crucial roles to play in ensuring that international trade, as being conducted under the auspices and control of the WTO, is managed and not left entirely to 'the market'. Indeed, economic theory does not teach that unfettered operation of the market is always desirable. The presence of externalities, such as environmental pollution, human and labour rights abuses, calls for governmental intervention.

Trade, generally, and international trade deals and investment flows are profit-driven. They are not motivated by altruism nor by the spirit of charity. Investors move to developing countries to access cheap labour, take advantage of low production costs, and to escape from the usually strict and costly environmental and labour standards obtainable in more developed countries. The rights-based approach requires mechanisms for ensuring that international human rights, labour and environmental standards are upheld even as developing countries strive to secure increased trade and investment. This demands governmental intervention and involvement. Resigned reliance on market forces alone is an indication of governmental ineptitude and portends a great danger to the wellbeing of the citizenry. Trade and investment must be 'managed' for its full benefits to be realised. For example, governmental intervention may be necessary to

protect affected groups in the transition period from a closed to a liberalised economy. According to Stiglitz:

The most successful developing countries, those in East Asia, opened themselves to the outside world but did so slowly and in a sequenced way. Those countries took advantage of globalisation to expand their exports and grew faster as a result. But they dropped protective barriers carefully and systematically, phasing them out only when new jobs were created. They ensured that there was capital for new jobs and even took an entrepreneurial role in promoting new enterprises.<sup>53</sup>

This is a worthy lesson for many African and developing economies, including Nigeria, currently pursuing trade liberalisation policies. The governments of developing countries need to enact laws to protect the labour force from abuse, to regulate competition to mitigate its effect on individuals, to ensure sustainable exploitation of natural resources, and to promote a respect for human rights. The multinational corporations in Nigeria, particularly those in the oil and gas sector have severally been accused of abusing the labour and environmental rights of Nigerians in many respects, including casualisation of labour and environmental degradation.<sup>54</sup> Governments should see the call to integrate social concerns into their trading policies not as a threat to their competitiveness or development. Contrariwise, it should be seen as an invitation to change the character of trade policies to one which places the human being at the centre of the process, takes due account of the environment, and emphasises sustainability.

<sup>53</sup> J.E. Stiglitz, *Globalisation and its Discontent* (2003) p. 60, cited in Oppong, above note 1, p. 138.

<sup>54</sup> See K.S.A. Ebeku, "The Right to a Satisfactory Environment and the African Commission" (2003) 3 *African Human Rights Law Journal*, pp. 156-160., J. P. Eaton, "The Nigerian Tragedy, Environmental Regulation of Trans-national Corporations, and the Human Right to a Healthy Environment" ( 1997) 15 *Boston University International Law Journal* p. 267.

**(b) The Role of Developed Countries**

To ensure the realization of the enormous advantages of the rights-based approach in the design and implementation of trade policies, the developed countries are also expected to play a very vital role. In this respect, developed countries should give special attention to trade policies that can facilitate the eradication of, or at least a reduction in, the level of poverty in the developing world. As stated earlier, poverty implicates many of the social concerns relating to the activities of the WTO. One thing which has the capacity to assist in the reduction of poverty in developing countries through the instrumentality of international trade is the provision of enhanced market access. Enhanced market access by developed countries to products from developing countries, such as agricultural produce, textiles and other tropical and primary products, will go a long way in improving the living conditions of people in the developing world by providing employment and income to families. In addition to this, the flow of Foreign Direct Investment (FDI) into developing countries will be greatly enhanced as investors try to take advantage of the generous market opportunities available in such countries.

Currently, the Enabling Clause of the WTO as well as the various Generalised System of Preferences (GSP) schemes established and adopted by the various developed countries, provide them enhanced market access to developing countries.<sup>55</sup> Usually, the developed countries make access to these schemes subject to the pursuit of certain social policies by the beneficiary country. A case for illustration is the European Union. Under the EU Generalised System of Preferences (GSP) schemes, five different arrangements are made available to the beneficiary countries.<sup>56</sup> First, all

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<sup>55</sup> See Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (Enabling Clause) 1979.

<sup>56</sup> Council Regulation (EC) No 2501/2001; Council Regulation 416/2001. See generally, L . Bartels 'The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program' (2003) 6 *Journal of International Economic Law* 507.

beneficiaries enjoy the benefit of a general arrangement. Second, there is a special arrangement for the least developed countries, also known as the 'Everything but Arms Initiative', which grants duty-free access to imports of all products from such countries without quantitative restrictions, except for arms and ammunition. Third, there is a special arrangement to combat drug production and trafficking. The primary aim of this particular arrangement is to assist beneficiaries in their fight against drugs. There are also special arrangements for the protection of labour rights and environmental rights.

The United States scheme deserves a special mention. This is because under the US scheme, the protection of internationally recognised workers' rights, respect for human rights, the rule of law, political pluralism, the right to due process and combating bribery and corruption, are some of the conditions precedent for beneficiary countries to qualify for the benefits of the scheme.<sup>57</sup> It can therefore be safely asserted that apart from providing enhanced market access, these GSP schemes are also designed to act as change agents with respect to perceived adverse social conditions within the beneficiary countries. Some commentators have argued against the use of GSP schemes to promote objectives that are not trade-related.<sup>58</sup> The Enabling Clause provides that these preferences should be designed to 'respond positively to the development, financial and trade needs of beneficiaries'.<sup>59</sup> The specification under this clause to the extent that the preferences should be ones that will positively address the development, financial and trade needs of the beneficiary country is very important. This is because, in the humble view of this article, any

<sup>57</sup> Trade Act of 1974, 19 USCA 246, Trade and Development Act 2000, 114 Stat 251.

<sup>58</sup> See generally J.L Stamberger 'The Legality of Conditional Preferences to Developing Countries Under the GATT Enabling Clause' (2003) 4 *Chicago Journal of International Law*, p. 607; R. Howse, "India's WTO Challenge to Drug Enforcement Conditions in the European Community Generalised System of Preferences: A Little Known Case with Major Repercussions for 'Political' Conditionality in US Trade Policy" (2003) 4 *Chicago Journal of International Law*, p. 385.

<sup>59</sup> Enabling Clause, para. 3(c).

preference that appears to address or aim at responding to any other need than the ones provided under the clause is outside the purview of the clause. It is submitted therefore that developed countries should not be allowed to include such preferences as pre-condition for any beneficiary country to benefit from such a scheme. Sometime ago, India challenged such a preference. The Appellate Body, in its decision on India's challenge to the Drug Arrangement under the EU GSP scheme, found the inability of the EU to provide any indication as to how it would assess whether the Drug Arrangements provide an adequate and proportionate response to the needs of developing countries suffering from the drug problem fatal to the requirements of the Enabling Clause.<sup>60</sup> It was the reasoned view of the Appellate Body that paragraph 3(c) of the Enabling Clause did not authorise any kind of response to any claimed need of developing countries.<sup>61</sup> According to the Body, the types of needs to which a response was envisaged were limited to 'development, financial and trade needs. The Body is also of the view that the existence of these needs will have to be assessed according to an objective standard and that the response of a preference-granting country must be taken with a view to improving the development, financial or trade situation of a beneficiary country, based on the particular need at issue and a sufficient nexus should exist between the preferential treatment and the likelihood of alleviating the identified need.<sup>62</sup> Based on this decision of the Appellate Body, Oppong<sup>63</sup> is of the learned view that there is a limit on the extent to which developed countries can use these schemes to promote non-trade concerns. This limitation is important to prevent a situation where trade benefits are conditioned on the pursuit of policies that are ultimately for the benefit of the preference-granting country. For example, one may, like

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<sup>60</sup> European Communities — Conditions for Granting Tariff Preferences to Developing Countries, WTO Appellate Body Report WT/DS246/AB/R 7 April 2004.

<sup>61</sup> *Ibid*, paras. 163-164.

<sup>62</sup> *Ibid*.

<sup>63</sup> Above, note 1, p. 140.

Oppong, confidently view the EU Drug Arrangement as an attempt to solve the drug problem in Europe rather than a genuine desire to assist in solving the drug problem in developing countries. Whilst this is not a defence of drug production, it serves to illustrate the potential for abuse under the GSP schemes in the absence of objective limitations on its use.

Some people may fall into the temptation of believing that making respect for human, environmental and labour rights a pre-condition for access to market, and the consequent exclusion of countries which do not meet this criterion from enjoying the benefits of the scheme is an attractive and effective approach to entrenching the rights-based approach to development. It is submitted that this may not be wholly facilitative of the rights-based approach to development. Apart from the fact that the objectivity of the criteria for determining which countries benefit from the schemes may be questionable, the argument can also be advanced that if development is truly a right, then the denial of instruments or access to policies—in this instance, trade—that will facilitate the enjoyment of that right can rightly be deemed a violation of the right. It has been suggested that a better approach in this instance, would be to provide some minimum level of access irrespective of the social conditions in a country, but to provide enhanced access in case of improvement in the social conditions in the beneficiary country.<sup>64</sup> Taking into account the enormity of the developmental needs of developing countries, this minimum level of access should go beyond that provided by the ordinary rules of most favoured nation and national treatment under the WTO. Those rules, it is submitted, are only meaningful for competition among equals. It will amount to socio-economic injustice to force developing countries into some competition with the developed countries. Definitely the former cannot effectively compete with the latter under the regime, for obvious reasons. Some minimum level of mandatory special and differential treatment is, therefore,

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<sup>64</sup> *Ibid.*, p. 141.

needed. It, however, is not being suggested that such social concerns should not be given the required attention in the municipal policies of the developing countries.

There are other limitations on the utility of current schemes for developing countries. First, they are voluntary and hence provide no security of access. Second, they apply to only a limited number of countries. Third, they cover only a defined category of products with stringent rules of origin. These products are often primary products that suffer from fluctuating prices and, as stated earlier, perpetuate a cycle of the developing countries' dependency on the developed world. In addition, these schemes are grossly underutilised by the beneficiary countries. This underutilization is as a result of the fact that exporters in the beneficiary countries know next to nothing about the existence of the schemes. Another reason is the absence of efficient institutions to administer and promote exports under existing preferential arrangements. The implementation of these schemes is also often influenced by political consideration rather than economic need.

It must be admitted, however, that irrespective of these limitations, GSP schemes offer a potential for development and poverty reduction in the developing world through the provision of access to the markets of the developed world.<sup>65</sup> Objectively managed, it offers an avenue for linking trade policy with human rights. Improved market access alone will, however, not be sufficient to meet all the development challenges facing the developing world. It must be coupled with financial aid and technical assistance. Such assistance should be demand-driven. Such assistance should be aimed at meeting the needs of the receiving countries rather than an opportunity for the developed countries to offload a surplus or the unwanted of their products. There should be proper monitoring of such financial aid and technical assistance. This is to ensure accountability. In addition, they should be aimed at enhancing the economic lot of people and empowering especially the vulnerable groups, namely, women and children.

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<sup>65</sup> UNCTAD, Improving Market Access for Least Developed Countries (2001).

In the field of trade, they should be aimed at enhancing the capacity of developing countries to take advantage of the opportunities offered by the international trading system. Additionally, they should focus on assisting developing countries in diversifying their exports by placing greater emphasis on the manufacturing sector and the provision of services.

Another area where the developed countries should play a vital role is with respect to the activities of multinational companies incorporated in their jurisdiction, but operating in developing countries. The activities of these corporations should be effectively monitored to ensure that their operations are in line with global best practices and to ensure that they do not violate the rights of the citizens of their host communities.<sup>66</sup> The developed countries should make laws providing for stricter standards for companies originating from their jurisdiction, but operating in the developing world. The linking of rights to the development process provides a basis for such legislation. Developed countries should also encourage strict adherence to the various voluntary codes of conduct such as the UN Global Compact of 1999 and others developed by multinationals. More importantly, there should exist in the developed countries criminal and civil liability for multinational corporations that engage in human rights violations or environmental damage, even if such violations or damage are committed in far away developing countries. These are especially important and necessary, since developing countries do not have the economic might to challenge these super-rich and powerful multinationals that engage in rights abuses. The wanton environmental degradation and abuse of the rights of the oil-rich but impoverished indigenes of Nigeria's Niger Delta Region is a clear case to illustrate the unwholesome activities of

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<sup>66</sup> R. Klein, "Cultural Relativism, Economic Development and International Human Rights in the Asian Context," (2001) 9 *Touro International Law Review* pp. 50-57.

multinational corporations.<sup>67</sup> Notwithstanding any debate as to the propriety of its extraterritorial implications, the US Alien Torts Claim Act<sup>68</sup> presents an example of legislation under which a foreign corporation operating in a developing country can be held liable in the United States for human rights and environmental abuses committed there. As Abadie notes:

By providing a basis for liability, business as usual, may not always prevail. Brandishing the [Alien Torts Claim Act] as a legal weapon to break the power of impunity, lawyers with imagination and courageous judges will find a way to ensure that equal protection from risk across national boundaries can be guaranteed.<sup>69</sup>

According to Oppong, while it may be an exaggeration to place so much hope on the ability of the Act to offer protection, especially given the difficult jurisdictional hurdles a litigant has to surmount,<sup>70</sup> it is nonetheless true that the threat of a lawsuit with its potential monetary liability is more likely to induce compliance than mere exhortations to adhere to voluntary codes which are vague and lack enforcement mechanisms. This paper respectfully shares this learned view.

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<sup>67</sup> See Morne van der Linder, "Considering the Interpretation and Implementation of Article 24 of the African Charter on Human and Peoples' Rights in Light of the SERAC Communication," (2003) 3 *African Human Rights Law Journal* p. 168.

<sup>68</sup> 28 USC 1330. The Act provides that the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

<sup>69</sup> P. Abadie "A New Story of David and Goliath: The Alien Tort Claims Act Gives Victims of Environmental Injustice in the Developing World a Viable Claim against Multinational Corporations" (2004) 34 *Golden Gate University Law Review* p. 748. See also R. Shamir "Between Self-regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility" (2004) 38 *Law and Society Review* p. 635; C. Salazar "Applying International Human Rights Norms in the United States: Holding Multinational Corporations Accountable in the United States for International Human Rights Violations under the Alien Tort Claims Act" (2004) 19 *St John's Journal of Legal Commentary* p. 111.

<sup>70</sup> Oppong, above. note 1 p. 143.

**(c) *The Role of the World Trade Organization (WTO).***

The WTO is an organization that is meant to supervise and liberalise international trade. Established on January 1, 1995 under the Marrakech Agreement, replacing the 1948 General Agreement on Tariffs and Trade (GATT), the WTO regulates trade between participating countries, provides a framework for negotiating and formalizing trade agreements,<sup>71</sup> monitors members' trade policies, and creates a dispute resolution process aimed at enforcing members' adherence to its agreements. By virtue of its significant global operation, this organization has a crucial role in integrating the rights-based approach into the design and implementation of trade policies, municipally and internationally. There is, therefore, the need for a broadening in the outlook of the WTO from the present restricted focus on the economics of trade liberalisation to a wider approach that sees trade not as an end in itself, but as a means to an end. Such an outlook entails consideration of the human rights, labour, health and environmental implications of trade policy with the WTO's framework. In fact, the Preamble to the Agreement Establishing the World Trade Organisation impliedly mandates such a wider inclusion and broadening of scope. The said Preamble contains references to the notions of 'sustainable development' and 'raising standards of living'.<sup>72</sup> Obviously, these are human rights concepts which cannot be truly meaningful outside the human rights framework. The WTO should therefore become more concerned about the impact of its activities on human rights, health, labour and the environment.

For the purpose of monitoring members' trade policies. For the purpose of discharging this function, the WTO established the Trade Policy Review Mechanism. This is one avenue

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<sup>71</sup> See "History and Functions of the World Trade Organisation (WTO)". Available at [en.ria.ru/infographics/20100915/160597169.html](http://en.ria.ru/infographics/20100915/160597169.html). Accessed on 13 August, 2012.

<sup>72</sup> World Trade Organization, *The Legal Text: The Results of the Uruguay Round of Multilateral Trade Negotiation* (1999) cited in Oppong, *loc. cit.*, p. 4.

through which the impact of trade liberalisation on human rights, labour, health and the environment can be exposed and the trade policy of any member in that regard challenged. The current Mechanism allows for periodic review of the trade policies and practices of members to assess 'their impact on the functioning of the multilateral trading system.' It is submitted that the scope allowed under the present regime is grossly limited to only trade and economic issues. The implication is that any issue that is outside trade is not within the contemplation of the review. There is a need to broaden the scope of the reports and the extent of review to cover the impact of trade policies and practices on human rights, labour, health and the environment. This will make members to be careful in the design and implementation of their trade policies because a member who is aware that its policies are going to be reviewed for such impacts will definitely be more careful, even if the review report does not constitute the basis of any enforceable action. The threat and reality of negative publicity that comes with the review may afford enough deterrence. Assuming that such deterrence is not achieved, and violations are such as will demand action<sup>73</sup> by WTO, such action should be a multilateral decision as unilateral measures are susceptible to abuse.

It has also been suggested that the WTO should engage in greater collaboration with other institutional stakeholders in the areas of these social concerns.<sup>74</sup> Since the regulation and control of international trade policy directly affect the lives of citizens of the various member states, it is not a duty the WTO can carry out without any contribution from some vital international institutions.<sup>75</sup> Indeed, the WTO Agreement

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<sup>73</sup> For example sanctions, suspension of membership, denial of organisational privileges.

<sup>74</sup> G.P Sampson "Is There a Need for Restructuring the Collaboration Among the WTO and UN Agencies So As to Harness Their Complementarities?" (2004) 7 *Journal of International Economic Law* p. 717.

<sup>75</sup> A great deal of complementarities exist between the work of the WTO and other institutions, such as the UN Human Rights Council (which recently replaced the Human Rights Commission), the UN Environment

envisages collaborations. Article V thereof mandates the General Council to 'make appropriate arrangements for effective collaboration with other intergovernmental organisations that have responsibilities related to those of the WTO.' The experience and expertise of these institutional stakeholders shall be of great benefit to the WTO as it strives towards integrating these social concerns into trade policy. Civil society groups who work in the areas of these social concerns should be made part of this collaboration. This is because the civil society groups represent these interests and can bring area-specific knowledge to the design and implementation of trade rules. There is the need for reorientation in the WTO so that it can begin to focus on development as understood from a rights perspective. This is in line with The Preamble to the Marrakesh Agreement Establishing the WTO which recognises 'sustainable development' as one of the key objects of the organisation. The WTO should not be concerned with only the designing of rules to facilitate trade, but also ensuring development in which human rights are protected, promoted and respected. Trade liberalization should be pursued with the object of sustainable development in mind and it should be properly understood that trade liberalisation will not necessarily lead to development as currently understood but, indeed, has the potential of producing unpleasant consequences for countries and individuals. Development, which should be the overriding principle that guides the work of the WTO should be central in the design and implementation of trade rules. Trade rules should reflect and adequately protect the interest of the central subject and beneficiary of development, the human being.

The concerns of developing countries should also be given greater attention in the design of trade rules. Developing countries should be part of the talks leading to decisions on trade policy formulation. It is, however, a thing of regret to note that the WTO has failed in the Doha Development

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Programme, the UN Economic and Social Council, the World Bank and the International Monetary Fund.

Agenda<sup>76</sup> to deliver even a minimal package to benefit the least developed countries.<sup>77</sup> It is submitted that if, in addition to the foregoing suggestions, issues relating to technology transfer, technical assistance, capacity building, market access, health, and special and differential treatment are given their deserved attention in international trade, especially as currently being regulated by the WTO, developing countries will be able to take advantage of the potential that international trade has for development and poverty reduction. That way, the WTO would have demonstrated that its main objective is not merely trade liberalisation, but, that developing countries receive fair, just and equitable treatment in the formulation and implementation of trade rules and policies.<sup>78</sup>

## 6. Conclusion

In this article, a modest attempt has been made at examining the place of social concerns, such as labour, health, human and environmental rights in the international trading system. The article found out that some players in the system stoutly oppose the incorporation of these concerns, maintaining the traditional view that trade, generally, and international trade, in particular, and human rights are two incompatible and

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<sup>76</sup> Also known as the Doha Round, this trade negotiation was launched in 2001 to enhance equitable participation of poor countries, which represent a majority of the world's population, in the formulation of WTO trade policies. Unfortunately, this negotiation has been dogged by disagreement between exporters of agricultural bulk commodities and countries with large numbers of subsistence farmers on the precise terms of a 'special safeguard measure' to protect farmers from surges in import.

<sup>77</sup> See Ruth Bergan's report on the WTO in the *Guardian*, 29 July, 2011. Available at [www.guardian.co.uk/world/wto](http://www.guardian.co.uk/world/wto). Accessed on 15 August, 2013. See generally SP Subedi, "The Road from Doha: The Issues for the Development Round of the WTO and the Future of International Trade" (2003) 52 *International and Comparative Law Quarterly* p. 425; I. Haque 'Doha Development Agenda: Recapturing the Momentum of Multilateralism and Developing Countries' (2001-2002) 17 *American University International Law Review* p. 1097.

<sup>78</sup> J.P Trachtman, "Legal Aspects of a Poverty Agenda at the WTO: Trade Law and "Global Apartheid" (2003) 6 *Journal of International Economic Law* p. 3.

mutually exclusive concepts, the variables and elements of which are equally mutually exclusive. Employing the use of the twin concepts of a rights-based approach to development and sustainable development, the article posits that a successful marriage can be brokered between these two seemingly strange bed-fellows. The rights-based approach to development and sustainable development place human rights, labour rights, and environmental concerns at the centre of every developmental effort, including international trade. It has therefore been argued that since the ultimate aim of every developmental effort is to better the overall conditions of the human person, issues which directly affect man must be taken into account in designing any development programme. One of the principal aims of international trade is development. This article has therefore made a case for these concerns to be given greater attention in the formulation and implementation of trade policies both domestically and within the framework of the international trade regime. To this end, the article has identified the various agents and stakeholders in the international trade system and posits that these agents have very crucial roles to play in achieving this all-important integration of the aforementioned social concerns. International trade, designed and pursued for purely economic gains, ironically produces socially-relevant developmental imbalances. The rights-based approach to development and sustainable development are two concepts the use of which in the formulation and implementation of trade policies is one sure step towards balancing these imbalances.