

**Making Trade and Human Rights Part of the Solution: WTO Strategies to link trade
and Human rights in Conflict Zones**

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Abstract:

In this article, I argue that trade must be part of the solution to advancing human rights in conflict zones. The members of the WTO increasingly recognize that they need to be more flexible to accommodate trade with nations in and recovering from conflict. I show that policymakers have used several avenues under the WTO to discuss and address human rights in member states experiencing conflict or in post-conflict recovery. I then focus on how policymakers might provide WTO consistent incentives to firms to adopt the Guiding Principles on Business and Human Rights. Policymakers can achieve greater coherence among trade, business and human rights policies in conflict zones by linking WTO rules and the new Guiding Principles and by thinking more creatively and coherently about the relationship between trade, human rights and conflict.

Making Trade and Human Rights Part of the Solution: WTO Strategies to link trade and Human rights in Conflict Zones

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Syria has become a case-study in the dilemma governments and corporations face in zones of conflict. Since March 2011, after some Syrian citizens took to the streets to protest the torture of students, the Syrian army has repeatedly shot at, arrested, and tortured non-violent protestors.² Although UN members agreed in 2001 that they have a duty to protect the citizens of another country in such circumstances,³ the UN has not found consensus on strategies to protect Syria's citizens from their own government.⁴ Syrian activists have asked for the world's help, although they don't want other governments to intervene militarily.⁵

¹ I am grateful to Ashley Gabriele and Ian Higham for their research help, and to Swisspeace for their interest and support of this research.

² <http://www.nytimes.com/interactive/2011/08/18/world/middleeast/US-EU-Statements-on-Syria.html?ref=syria>; 10/24/ 2011; and

<http://topics.nytimes.com/top/news/international/countriesandterritories/syria/index.html>

³ International Commission on Intervention and State Sovereignty (2001): *The Responsibility to Protect*. Ottawa: International Development Research Centre: VII, IX; NA, "BRICS urge nonintervention in the Middle East and Northern Africa," *Reuters*, 13 Apr. 2011,

<<http://www.moneyweb.com/mw/view/mw/en/page295022?oid=316559&sn=2009+Detail&pid=312424>>; and Dr. Tim Murithi, 'The African Union's transition from non-intervention to non-

indifference: An ad hoc approach to the responsibility to protect,' IPG, Jan. 2009,

http://library.fes.de/pdf-files/ipg/ipg-2009-1/08_a_murithi_us.pdf

⁴ AP, "China Sends Envoy to Syria Amid Pressure to Reform"

http://www.nytimes.com/aponline/2011/10/25/world/asia/AP-AS-China-Syria.html?_r=1

⁵ Chris Doyle, "Why Foreign Intervention is Not Welcome in Syria, 6/14/2011,

<http://www.guardian.co.uk/commentisfree/2011/jun/14/syria-intervention-west>

In lieu of intervention, many countries are using trade sanctions against Syria.⁶ Thus, trade is not part of the solution to advancing human rights in Syria; policymakers are signaling less trade is the best route to advancing human rights

Although these sanctions are weakening Syria's economy, President Assad remains firmly in control.⁷ Syrian and foreign firms still operate in Syria, and some of these companies may be complicit in continuing the conflict or in violating human rights (Tripathi: 2005). For example, some human rights analysts asserted that Syria uses equipment designed by the US company Blue Coat Systems to block Internet access and repress dissidents.⁸ Others argued that the Canadian company Suncor was exporting natural gas from Syria.⁹ Still others criticized the Dutch/British oil giant Shell for its Syrian oil operations; they note this oil funds the government and fills the tanks that the government uses to fire on its own citizens.¹⁰

Yet if these firms leave, the citizens of conflict affected countries may not experience better human rights conditions. First, firms operating in conflict zones can

⁶ <http://www.bbc.co.uk/news/world-middle-east-14703856> and <http://www.bbc.co.uk/news/world-middle-east-15180732>

⁷ Liz Sly, "Syrian Leaders Foresee victory, *Washington Post*, 10/28/2011, A1.

⁸ Sari Horwitz, "Syrian Censors Aided by American Tool, Experts Say," *Washington Post*, 10/22/2011, A7, http://www.washingtonpost.com/world/national-security/syria-using-american-software-to-censor-internet-experts-say/2011/10/22/gIQA5mPr7L_story.html

⁹ Suncor acquired its Syrian assets during a merger with Petro-Canada in 2009. The \$1.2-billion operation is a natural gas field, hooked to a gas plant, which provides electricity to about 10 per cent of the population in Syria. CBC, "Suncor not Sending Funds to Syria," 8/22/2011, <http://www.cbc.ca/news/world/story/2011/08/19/suncor-syria.html>

¹⁰ Erik Klooster, "Shell Lukewarm About Syria Oil Boycott," *RNW*, 8/16/2011, <http://www.rnw.nl/english/article/shell-lukewarm-about-syria-oil-boycott>

also advance some human rights by providing employment, increasing access to resources and credit, and by pressuring governments to meet their international obligations (Deitelhoff and Dieter Wolf: 2010; De Luca: 2003). These same companies may promote interchange of ideas and perspectives between the leadership and foreign investors and even between the leadership and its citizens.¹¹ If these firms leave, they may be replaced by firms from countries with weaker governance standards and accountability. Such firms may be less amenable to advancing human rights or acting in a transparent accountable manner.¹²

In June 2011, the UN Human Rights Council clarified the human rights responsibilities of firms and states and made them actionable. It approved the Guiding

¹¹ United Nations Inter-Agency Committee, Sanctions Assessment Handbook <http://www.humanitarianinfo.org/sanctions/handbook/chapter1-1.htm>; also list of scholarly assessments of sanctions at <http://www.humanitarianinfo.org/sanctions/handbook/resources.htm#4>. Syria provides a good example, <http://www.slate.com/id/2147058/fr/rss/>; <http://damascus.usembassy.gov/sanctions-syr.html> <http://www.europeanvoice.com/article/2011/august/eu-extends-sanctions-against-syrian-regime/71872.aspx>; Clifford Krauss and Neil MacFarquhar, "Feeling Pinch of Europe's Oil Embargo, Syria Urgently Seeks New Customers," *New York Times*, 9/28/2011, A 10, http://www.nytimes.com/2011/09/28/world/middleeast/europes-oil-embargo-forces-syria-to-urgently-seek-new-customers.html?_r=1 and Nada Bakri, "Facing Backlash, Syria Revokes Week-Old Ban on Imports of Consumer goods," 10/5/2011, http://www.nytimes.com/2011/10/05/world/middleeast/syria-revokes-ban-on-imports.html?_r=3

¹² Robin Mills, "West Needs to Treat Sanctions Against Syria with Caution," *The National*, <http://www.thenational.ae/thenationalconversation/industry-insights/energy/west-needs-to-treat-sanctions-against-syria-with-caution?pageCount=0>

Principles on business and human rights (hereafter the GPs).¹³ But the international system of rules governing trade (the GATT/WTO system) can make it harder for both governments and firms to advance human rights in conflict afflicted countries. In this article, I argue that trade must be part of the solution to promoting human rights in conflict zones. Policymakers can achieve greater coherence among trade, business and human rights policies in conflict zones by linking WTO rules and the new Guiding Principles and by thinking more creatively and coherently about the relationship between trade, human rights and conflict.

The article begins with a brief discussion of the Guiding Principles. I posit that these new Principles are unlikely to have influence unless policymakers educate their home firms regarding their human rights responsibilities and work internationally to provide incentives to firms to advance human rights. Next, I examine the history and role of the WTO related to conflict. The members of the WTO increasingly recognize that they need to be more flexible to accommodate trade with nations in and recovering from conflict. I show that policymakers have used several avenues under the WTO to discuss and address human rights in countries in conflict. I then focus on how

¹³ Human Rights Council, "Report of the special Representative of the Secretary General on the Issue of Human Rights and Transnational corporations and Other business Enterprises, John Ruggie," A/HRC/14/27, p. 7, #26-32.

7 Hugh Williamson, "Time to redraw the battle lines", *Financial Times*, 30 December 2009.

8 A/HRC/11/13, paras. 13–16; and A/HRC/8/5, paras. 18–19 and A/HRC/14/27

policymakers might provide WTO consistent incentives to firms to adopt the Guiding Principles. Finally, I develop several conclusions.

The Guiding Principles on Business and Human Rights

In 2005, UN Secretary General Kofi Annan appointed Harvard Professor John Ruggie to clarify the human rights responsibilities of business. After three years of research and numerous multi-stakeholder consultations held throughout the globe, Ruggie and his team issued *Protect, respect and remedy: a framework for business and human rights*.¹⁴ This framework outlined the *state duty* to protect citizens from human rights abuses, the *corporate* responsibility to respect human rights, and the need for *corporations as well as states* to provide access to effective remedies when companies violate human rights.¹⁵ The 47 members of the UN Human Rights Council (UNHRC) unanimously endorsed *Protect, respect and remedy* in 2008, and extended Ruggie's mandate so that he could report on 'operationalizing' the framework.¹⁶

From 2008-2011, Ruggie and his team focused on implementation of that framework. On 22 November 2010, he released a draft version of *Guiding Principles for the implementation of the United Nations 'Protect, respect and remedy' framework*.¹⁷ The draft was open for public consultation via an online forum (<http://www.srsgconsultation.org>)

¹⁴ A/HRC/17/31, p. 3, 4, 5.

¹⁵ A/HRC/8/5, pp.4-5, #9.

¹⁶ A/HRC/11/13, p. 3, #1.

¹⁷ John Ruggie, *Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework* (Draft), 22 Nov. 2010, <<http://www.reports-and-materials.org/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf>>.

until 31 January 2011.¹⁸ Ruggie released a final version which incorporated these comments, the 'Guiding Principles on business and human rights', on 21 March 2011. The 47 members of the UNHRC formally approved the Guiding Principles (GPs) by consensus on 16 June 2011.¹⁹

The Guiding Principles stress that *states* must do more to ensure that their *firms* (*incorporated within their borders or those that they host*) do not undermine human rights at home and abroad. States should take steps to educate their firms regarding their human rights responsibilities and hold these firms accountable for these practices. In this regard, states should examine how their public policies affect the state duty to respect, protect and remedy human rights violations. Hence, they should examine the effect of trade agreements upon human rights as well as the signals these agreements send to market actors.

The Guiding Principles require firms to take two steps: 1. enact a policy commitment to respect rights that is *approved* by senior management; *informed* by engagement with affected individuals and communities; *communicated* to personnel and business partners; and *reflected* in operational policies and procedures; and 2. Develop a human rights due diligence process to identify and address potential threats to human

¹⁸ <http://www.srsgconsultation.org>.

¹⁹ Office of the High Commissioner for Human Rights, 'New Guiding Principles on business and human rights endorsed by the UN Human Rights Council', United Nations, 16 June 2011, <<http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-endorsed-16-jun-2011.pdf>>.

rights posed by the company's own activities and by business partners associated with those activities. The OECD and the UN Global Compact (among others) have attempted to supplement this effort by providing additional guidelines for how firms should act in conflict zones and avoid contributing to human rights abuse. (UN Global Compact: 2010, 3-4.)

However, the GPs are *voluntary* recommendations to business. As of this writing, (November 2011) few firms have actually adopted human rights policies, performed impact assessments or tracked performance, devised means to ensure that they do not undermine human rights, or developed means to 'remedy' human rights problems. The team of the Special Representative on Business and Human Rights did several surveys of business efforts to advance human rights. They found relatively few multinationals work to advance human rights; have an explicit code, and hold themselves accountable.²⁰ To gain a fuller understanding of what firms are doing in 2011 two scholars drilled down into the practices of the 275 companies with human rights policies as then noted on Business Human Rights Resource Center.²¹ They found that although each of these 275 companies (only 0.34 per cent of all 80,000 multinationals) has a human rights policy, most of them do not meet the minimum

²⁰ A/HRC/4/35/Add.3, p. 21 67-70; Michael Wright and Amy Lehr, 'Business recognition of human rights: global patterns, regional and sectoral variations, iii, and # 6, p. 5, 12 Dec. 2006, <<http://www.business-humanrights.org/SpecialRepPortal/Home/Materialsbytopic/Companyoliciespractices/Companyolicies>>

²¹ The author is an advisor to BHRRC. The list now includes 289 companies.

criteria of Ruggie's framework for the GPs (a publicly available human rights policy and operational policies and procedures that embed such policies throughout the enterprise).²² However, companies with human rights policies may still indirectly undermine human rights. The first empirical study of corporate efforts to curb human rights abuses found that firms with such policies are less likely to directly commit human rights abuses, but these same firms also are learning how to "outsource abuses" to third parties.²³

Policymakers are also ambivalent about their duty to clarify the human rights responsibilities of the firms that are incorporated in their borders and/or that they host as producers or investors. In 2006, the Ruggie team surveyed each of the UN's 192 member states, but only 29 responded. Many of those 29 governments did not respond to all of his questions.²⁴ As a result, the survey provided an incomplete picture of the role of states in advancing business human rights responsibility. Nonetheless, the team

²² A/HRC/17/31, p. 15, #16; and Aaronson and Higham, 23-30.

²³ Fiaschi, Davide and Elisa Giuliani et al., "To Abuse or not to Abuse. This is the Question: On Whether Social Corporate Responsibility Influences Human Rights Abuses of Large Multinational Corporations," (1990-2006), LEM working Paper 13, 2011. The study used the Probit model to examine the behavior of the five largest multinationals in 27 different sectors over the period 1990-2006.

²⁴ Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations... Addendum: Human Rights Policies and management Practices: Results from questionnaire Surveys of Governments and Fortune Global 500 Firms', A/HRC/4/35/Add.3, 28 February 2007, pp. 6-7, # 4-10. The respondents were a good mix: Bahrain, Belgium, Bosnia-Herzegovina, Canada, Chile, Colombia, Croatia, Cyprus, Ecuador, Finland, France, Germany, Guatemala, Honduras, Italy, Japan, Jordan, Lebanon, Mexico, Netherlands, Poland, Portugal, Romania, Rwanda, Spain, Sweden, Switzerland, Tunisia, and the UK. Interesting Norway, which has played a prominent role in assisting Ruggie, did not respond and neither did the US-home to a large percentage of the world's multinationals.

found that most of the responding governments do very little to monitor the human rights practices of home or host firms or to educate home firms as to their human rights responsibilities.²⁵ Some 30 per cent of the states replying did allow the prosecution of firms as legal persons and enabled extraterritorial jurisdiction over human rights violations committed overseas. For example, Australia, Belgium, Canada, France, the U.S. and the United Kingdom allow individuals to sue companies for human rights violations.²⁶

Ruggie's team also asked policymakers why they thought it is so difficult to encourage multinationals to advance human rights. Policymakers cited the nonexistence of an international framework; the absence of an internationally recognized body to monitor violations; the lack of information between states and 'the uneven playing field in this area, resulting in very different national laws and regulations.'²⁷ These findings point to the need to develop international strategies that encourage governments to educate and monitor their firms' human rights activities and encourage firms to implement human rights strategies and monitor the cost and impact of such strategies.

However, some states have worked multilaterally to reinforce the Guiding Principles. In May 2011, 42 countries (the 34 members of the OECD as well as many

²⁵ A/HRC/4/35/Add.3, pp. 14-17, #45-53.

²⁶ A/HRC/4/35/Add.3, p. 2 Summary and p. 12-13, #35-39.

²⁷ A/HRC/4/35/Add.3, pp. 17-18, #54.

other middle income countries) endorsed the revised OECD Guidelines for Multinational Enterprises. The Guidelines are voluntary recommendations that governments make to their firms: they state that multinationals should respect human rights in every country in which they operate. The Guidelines build on the GPs, and now state that firms should have appropriate due diligence processes in place. The Guidelines also include a new, tougher process for complaints and mediation.²⁸ In October 2011, the EU announced a new approach to corporate social responsibility with an emphasis on prodding firms to adhere to the GPs. Specifically, the EU promised to develop human rights guidance for a limited number of relevant industrial sectors, as well as guidance for small and medium-sized enterprises, based on the UN Guiding Principles and to publish by the end of 2012 a report on EU priorities in the implementation of the UN Guiding Principles. The European Commission (the EC-the EU Executive Branch) also made it clear that it “expects all European enterprises to meet the corporate responsibility to respect human rights, as defined in the UN Guiding Principles; and invites EU Member States to develop national plans for the implementation of the UN Guiding Principles by year-end 2012.”²⁹

²⁸ ‘New OECD guidelines to protect human rights and social development, *OECD Newsroom*, 25 May 2011, http://www.oecd.org/document/19/0,3746,en_21571361_44315115_48029523_1_1_1_1,00.html. They were also agreed to by Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru, and Romania.

²⁹ European Commission, “Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the

But conflict zones present specific challenges both for firms and policymakers that seek to respect human rights. Until recently, there was no legal and policy framework “specifically designed to deal with problems of business involvement” in such zones.³⁰ In fact, corporations are often “expected to do more to help support human rights” in conflict zones.³¹ In 2011, the members of the OECD and Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru, and Romania also approved a ‘Recommendation on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.’³² This 2011 recommendation was developed to provide guidance to firms that rely on conflict minerals--minerals mined in situations of conflict and human rights abuse. The Recommendation discusses how to identify and reduce use of these conflict minerals to ensure that mineral trade does not encourage human rights abuse or further conflict. But it will all be “pretty words,” unless the trade regime proves supportive of such efforts, as it has with conflict diamonds (see below).

Regions,” Com(2011) 681, 10/25/11; final, 4.8.2, p. 14,

http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/new-csr/act_en.pdf

³⁰ Human Rights Council, “Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Business and Human Rights in Conflict-Affected Regions: Challenges and Options Towards State Responses,” 5/27/ 2011, A/HRC/17/32, p. 4, #12.; and Global Compact, “Responsible Business in High-Risk Areas and Challenging Operating Environments,” 3/ 2011.

³² ‘OECD due diligence guidance for responsible supply chains of minerals from conflict-affected and high-risk areas’, OECD,

http://www.oecd.org/document/36/0,3343,en_2649_34889_44307940_1_1_1_34529562,00.html.

In recent years, policymakers have tried to develop alternative strategies designed to maintain trade as well as to ensure that business activities do not finance or encourage conflict. The Dodd/Frank Wall Street Reform and Consumer Protection Act of 2010³³ may be a good example of this approach; it has sections related to trade in conflict minerals. Conflict minerals--tin, tantalum, tungsten, and gold from the Great Lakes Region of Africa have been traded by armed groups and military units in the Congo. These armed market actors use the funds from such trade to fund violence and instability in the region.³⁴

With this legislation, Congress aimed to prod the US Government to develop “a strategy to address the linkages between human rights abuses, armed groups, mining of conflict minerals and commercial products.”³⁵ The legislation requires all firms publicly traded on US exchanges (hence US and foreign firms) to report to their shareholders the steps they and their suppliers are taking to ensure that revenues from trade in conflict minerals (tantalum, tin, tungsten and gold) don’t finance conflict in the Democratic

³³ H.R.4173.ENR, <http://thomas.loc.gov/cgi-bin/query/D?c111:6:./temp/~c111R2t2NH::#?> Any company the sells securities to the public in the US must disclose on a yearly basis whether the minerals originate from the DRC or an adjoining country and if so, the company has to include a conflict minerals report in its annual report.

³⁴US Department of State, “Industry Representatives Discuss conflict Minerals at the US Department of State, 5/14/2010, <http://www.state.gov/r/pa/prs/ps/2010/05/141880.htm> and Sasha Lezhnev and David Sullivan, “Certification: The Path to Conflict –free minerals from the Congo,” 5/5/2011, Enough, <http://www.enoughproject.org/certification>

³⁵ Dodd Frank, Section 1502 pp. 838-843, <http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf>

Republic of the Congo (DRC)³⁶ and neighboring states.³⁷ It does not mandate any behavior except reporting. The EU executive is currently mulling similar regulation with a broader scope, including not just conflict minerals but sectors such as forestry or consumer goods.³⁸

Although the regulations supporting the legislation are still under review, the legislation has already affected corporate practice and trade, with mixed results. First, many high tech firms have begun to source these minerals outside of the Congo.³⁹ With less trade, some observers note that the planes that once went to rural regions to pick up the conflict minerals stopped delivering goods and merchandise to the people.⁴⁰ So

³⁶ DRC is one of the richest countries in the world in terms of reserves of mineral resources with large deposits of precious stones and diamonds, 80% of the world's columbite-tantalite (coltan) reserves, 49% of its cobalt reserves, and 10% of the world's copper reserves. US Geological Survey, *Minerals Yearbook, Congo (Kinshasa) 1999*, <http://minerals.usgs.gov/minerals/pubs/mcs/2010/mcs2010.pdf>

³⁷ The US Conflict Minerals Law applies to materials originating (or claimed to originate) from the DRC as well as the 9 adjoining countries: Angola, Burundi, Central African Republic, Congo Republic (a different nation than DRC), Rwanda, Sudan, Tanzania, Uganda and Zambia.

³⁸ 'EU to table oil, mining transparency bill', *EurActiv*, 4 Marc. 2011, <http://www.euractiv.com/en/specialreport-rawmaterials/eu-table-oil-mining-transparency-bill-news-502755> and . Andrew Willis, "EU prepares clampdown on conflict minerals," *EU Observer*, 3/11/2011, <http://euobserver.com/19/31972>

³⁹ Mark Drajem et al, "A Rule Aimed at Warlords Upends African Mines," *Bloomberg Business Week*, 9/4/2011, <http://www.businessweek.com/magazine/a-rule-aimed-at-warlords-upends-african-mines-08042011.html>; and Pole Institute, "The Criminalization of the Mining Industry in the DRC," http://www.pole-institute.org/documents/Blood_Minerals.pdf, August 2010, p. 24.

⁴⁰ Congo Siasa, "Interview with Eric Kajemba on Conflict Minerals," and ITRI Tin Supply Chain Initiative, "Technical Challenges Encountered and Solutions Developed in the ITSCI Pilot Project in South Kivu,"

it appears the people of the region have less trade and less access to opportunities and resources.

Despite the negative human rights and trade spillovers, the UN's Coordinator of the Group of Experts concerning the DRC reported to the US Government on October 21, 2011 that the strategy is working. He noted "a higher proportion of conflict minerals is not funding conflict" because production of these minerals has shifted to largely non-conflict areas of the Congo, armed groups have less control over tin mines. However, this strategy has not enhanced human welfare. The Coordinator admitted the effect of this..."unsurprisingly, has been increased economic hardship and more smuggling and general criminalization of the minerals trade. It has also had a severely negative impact on provincial government revenues, weakening governance capacity."⁴¹ Although the legislation was not rooted in trade policies, by reducing trade, without direct intent, policymakers may have indirectly undermined human rights and the ability and funds of these states to advance human rights. These examples illuminate why the trade must be part of the solution—and why the WTO system needs to provide clear signals regarding the role of business in conflict zones.

The WTO, human rights, and conflict

http://www.itri.co.uk/SITE/UPLOAD/Document/Problems_Solutions_and_Lessons_-_iTSCi_Pilot_-_English_-_final_text_comp_pics.pdf

⁴¹ Letter Fred Roberts, Coordinator, Group of Experts on the DRC, to SEC/ Ref S/AC.43/2011/GE/OC.86, at <http://www.sec.gov/comments/s7-40-10/s74010-346.pdf>

The GATT/WTO has an interesting relationship with conflict within and among member states. On one hand, the postwar planners created the GATT during World War II, as a means of trying to foster international cooperation and avoid conflict. So they envisioned greater peace as a spillover of rules-based trade. On the other hand, some observers view the GATT/WTO system as directly perpetuating conflict. They note that the GATT/WTO allows countries to make exceptions to trade rules for security reasons, and does not regulate trade in arms. Today WTO members increasingly try to find ways to use WTO rules to protect human rights and expand trade in conflict zones. Nonetheless, these same trade policymakers have not developed strategies that achieve both goals.

During World War II, government officials in both the US and Great Britain worked to build institutions that could preserve peace and promote political and economic stability. These postwar planners devised an international institution, the International Trade Organization (ITO), to govern trade, employment, investment and cartels, but it never came into existence. However, the GATT, the part of the ITO that governed commercial policy, tariffs and quotas, went into force in 1948 (Aaronson: 1996, Irwin, Mavroidis and Sykes: 2008). The GATT was superseded by the WTO in

1995. In this article, I focus on GATT 1994, which delineates the basic norms and obligations of the world trading system.⁴²

The postwar planners thought that by reducing barriers to trade, the ITO/GATT would increase economic growth and employment. They hoped that these actions would gradually enhance human welfare.⁴³ Yet neither the GATT nor the WTO mentions human rights; and neither organization has any human rights or democracy criteria for membership (Aaronson: 2007). The GATT/WTO also never mentions conflict or how conflict can make it harder for states to enhance human welfare. Ironically, the WTO Secretariat argues that one of the “results” of the WTO is that it can promote peace through “a more prosperous, peaceful and accountable economic world....Trade friction is channeled into the WTO’s dispute settlement process where

⁴² General Agreement on Tariffs and Trade 1994, http://www.wto.org/english/docs_e/legal_e/06-gatt.pdf

⁴³ The Preamble for the GATT states, “Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods,”

<http://find.galegroup.com/gic/infomark.do?contentSet=EBKS&docType=EBKS.Article&idigest=f b720fd31d9036c1ed2d1f3a0500fcc2&type=retrieve&tabID=T0011&prodId=GIC&docId=CX3447600460&userGroupName=itsbtrial&version=1.0&searchType=BasicSearchForm&source=gale>.

The Preamble for the WTO states, the “Parties to this Agreement...Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development.”

http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_01_e.htm

the focus is on interpreting agreements and commitments, and how to ensure that countries' trade policies conform with them. That way, the risk of disputes spilling over into political or military conflict is reduced."⁴⁴

But arguing that a spillover of the GATT/WTO is to prevent conflict doesn't mitigate the fact that the WTO does not govern trade in arms. Member states can subsidize their military sectors without being seen as distorting trade. As a result, some observers view the GATT/WTO system as facilitating conflict (Henrickson: 2007)

The WTO does not explicitly prohibit countries from protecting human rights at home or abroad, but its rules do constrain the behavior of governments. When member states seek to promote human rights, at home or abroad, they must not unnecessarily or unduly distort trade. The GATT and the WTO have 3 key principles. First, member states must automatically extend the best trade conditions granted to goods and services of any one member to the goods and services of every other nation that belongs to the WTO (the MFN most favored nation principle) Secondly, these countries must treat products of foreign firms in the same way they treat local firms (the national treatment principle.). Finally, policymakers cannot discriminate between products

⁴⁴ WTO, "The World Trade Organization," 2009, 2.

originating in different countries nor between imported goods and like domestically produced goods.⁴⁵

The GATT and the WTO do not directly address how governments relate to their own citizens, and they say very little about human rights.⁴⁶ But discussions of conflict and human rights are seeping into the workings of the WTO (Aaronson 2007). And as they discuss these issues in the day to day business of the WTO, trade diplomats from member states gradually learn that they can improve governance and make their trade and human rights objectives more coherent, even in zones of conflict (Lang: 2006; Aaronson and Abouharb: 2011; Hafner-Burton: 2009; and Simmons, Dobbin and Garrett: 2008).

Avenues where member states discuss the behavior of states and firms in conflict and trade

⁴⁵ WTO, Principles of the Trading System at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm; and <http://www.meti.go.jp/english/report/downloadfiles/gCT0002e.pdf>

⁴⁶ *Some* WTO agreements require governments to accord due process rights (such as the right to recognition before the law) to importers as well as exporters. Interpretation and Application of Article 1 of the WTO Agreement on Safeguards, http://www.wto.org/english/res_e/booksp_e/analytic_index_e/safeguards_02_e.htm#). The Agreement on Technical Barriers to Trade requires governments to publish standards and technical regulations and allow interested parties (whether foreign or domestic) to become acquainted and respond to the regulation (http://www.wto.org/english/res_e/booksp_e/analytic_index_e/tbt_01_e.htm#p). The Customs Valuation Agreement requires governments to establish in law the right of the importer to appeal a determination of customs value. Appeal may first be to a higher level in the customs administration, but the importer shall have the right in the final instance to appeal to the judiciary (Text of Interpretive Note to Article XI, http://www.wto.org/english/res_e/booksp_e/analytic_index_e/cusval_02_e.htm#article11A).

Member states increasingly discuss conflict and post conflict recovery in the day to day workings of the WTO.⁴⁷ Some trade diplomats use these discussions to remind other member states of their difficulties recovering from conflict. For example, at the 2007 WTO public forum, the foreign minister of Liberia H.E. MS. Olubanke King-Akerele wanted her fellow trade ministers to understand that trade alone cannot encourage peace if all countries in her region did not benefit. “Increased trade has an equally important role to play in solidifying peace in post-conflict situations... All the efforts at peace building in Liberia will mean nothing, ladies and gentlemen, if it doesn’t take place within the regional context of the Mano River Union Basin... We have the same people and instability in Guinea, or Côte d’Ivoire, flowing right into Liberia and Sierra Leone. We may have achieved the democratic process in Sierra Leone and Liberia but if we have instability on the border region we are going nowhere.” She concluded by saying, “to those of us from conflict countries like mine, trade and export promotion facilitates the transformation of the lives of our people, and is critical to sustain our still fragile peace, and this again, as I said, within a regional context.”⁴⁸

⁴⁷ A search of WTO and conflict finds 949 results, but conflict may also refer to conflict between WTO norms or trade and other objectives. Last searched 10/5/2011.

http://search.wto.org/search?q=trade++conflict&site=English_website&btnG=Search&entqr=0&output=xml_no_dtd&sort=date%3AD%3AL%3Ad1&client=english_frontend&numgm=5&ud=1&oe=ISO-8859-1&ie=ISO-8859-1&proxystylesheet=english_frontend&proxyreload=1

⁴⁸ Statement by H.E. Ms. Olubanke-King-Akerele, Minister for Foreign Affairs, Liberia, at WTO Public Forum, www.wto.org/english/forums_e/public_forum2007_e/plenary_session_kingakerelle_e.pdf

These countries tried to remind their counterparts that they wanted the current trade negotiations- the Doha Round of trade talks-to truly focus on their needs. And what they need is greater market access. As Sierra Leone's trade minister stressed, "Whilst Sierra Leone has made tremendous political and macroeconomic progress in less than two years following the end of the war, the country...faces peculiarly serious trade-related post-conflict constraints of reconstructing the devastated infrastructure and building human and other supply capacity." He then said while some countries are offering capacity building, what the country really needed is market access for its agricultural goods.⁴⁹ But his plea seemed to fall on deaf ears. Although some WTO member states provide capacity building funds and training to developing country members, many of the same countries don't acknowledge the relationship between full market access for countries such as Sierra Leone and post-conflict recovery.⁵⁰

Accessions:

Of the 30 states seeking to accede to the WTO, some 17 countries are currently experiencing or recovering from conflict.⁵¹ These nations have significant obstacles to

⁴⁹ WTO Ministerial Conference, H.E. Dr. Kadi Sesay, Minister of Trade and Industry, Fifth Session, 9/13/2003, WT/MIN(03)ST/115.

⁵⁰ http://www.wto.org/english/tratop_e/devel_e/build_tr_capa_e.htm; and www.wto.org/english/tratop_e/devel_e/teccop_e/financing_trta_e.htm

⁵¹ I evaluated all the acceding states based on the World Bank's definition of conflict and post conflict states at

<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/STRATEGIES/EXTLICUS/0,,contentMDK:22230573~pagePK:64171531~menuPK:4448982~piPK:64171507~theSitePK:511778,00.html>

as well as global security.org's evaluation of ongoing conflicts, including civil conflicts at <http://www.globalsecurity.org/military/world/war/index.html>

surmount both to join the WTO. They are required to show existing WTO members that they follow the rule of law, are transparent, and have clear and fair processes for trade policymaking. Thus these countries make major changes to their laws and governance processes (Mansfield et al., 2002; Aaronson and Abouharb: 2011).

Although many of the working party discussion documents are not readily accessible to the public, the WTO web site reveals that countries that are recovering from conflict do use the accession process to ask fellow member states for their help. As example, Iraqi Trade Minister Mohammed Mustafa Al-Jibouri noted, "The new Iraq looks with great optimism at achieving political stability, economic prosperity and social development ... we believe that our reintegration into the world trading system is an essential element to fulfill those aims."⁵² And trade diplomats from other member states say they are receptive to the needs of these states. During the deliberations over the steps that Afghanistan must take to join the WTO, The Working Party Chair, Ambassador Boudewijn J. Van Eenennaam (Netherlands) said that trade co-operation can enhance peace and security. He stated that Afghanistan faced particular challenges as a landlocked least-developed country rebuilding itself after decades of conflict and added that it was essential to take full account of these factors in the negotiations.⁵³

⁵² WTO General Council, "Accession working parties established for Afghanistan, Iraq," 12/13/2004, http://www.wto.org/english/news_e/news04_e/gc_afghanistan_iraq_13dec04_e.htm

⁵³ WTO, "WTO Shows Strong Support for Afghanistan's Membership, 1/31/2011, http://www.wto.org/english/news_e/news11_e/acc_afg_31jan11_e.htm

However, I could find no direct evidence that member states gave additional concessions because a member state was in conflict or was recovering from conflict.

Trade Policy Reviews

Member states monitor each other's performance during trade policy reviews. If a WTO member does not adhere to their accession commitments and WTO norms, a member state or states may use the trade policy review process to criticize that behavior and they may even challenge its practices in a trade dispute. These reviews covered trade related policies and at times, even non-trade related issues such as labor rights and public participation. So, member states are closely monitored for their governance practices and their trade spillovers. Some members (in particular the US and the EU) also use the trade policy reviews to praise countries that have made governance progress and to name and shame countries that continue to have problems. But trade policy reviews cannot force nations to live up to their accession or WTO agreement commitments. Hence while the trade policy review process is useful as a means of "outing" bad or inadequate behavior, it cannot stop such behavior (Aaronson and Abouharb: forthcoming 2011).

During Angola's review, other WTO members acknowledged how hard it is for conflict-afflicted states such as Angola to recover from conflict. But they also made clear that it did not absolve that country's leaders of their WTO obligations.⁵⁴ Members

⁵⁴ Trade Policy Review, Angola, http://www.wto.org/english/tratop_e/tpr_e/tp259_e.htm

acknowledged the legacy of the conflict in Rwanda during Rwanda's review; but the members offered no concessions or plan to help.⁵⁵ Croatia was lauded for its resilient recovery from war damage.⁵⁶ However, during Nigeria's trade policy review, no other member state mentioned that country's internal conflicts.⁵⁷

Trade diplomats discussed the relationship between human rights and domestic conflict in an oblique manner during Zimbabwe's trade policy review. The WTO secretariat wrote "Zimbabwe's Constitution guarantees legal protection for all investors... It prohibits expropriation of private property without compensation. However, events in the last decade, whereby private commercial land has been seized without compensation would appear to indicate that the authorities have not always complied with the letter and spirit of the Constitution....A fractious socio-political environment, combined with a controversial land reform and measures in favor of indigenization, has triggered the withdrawal of support from the international community and cast a shadow over property rights."⁵⁸ The Secretariat noted that Zimbabwe's "problems were exacerbated in the run-up to the last elections in 2008, which were also characterized by violence, and an atmosphere of political intolerance."

⁵⁵ WTO, Trade Policy Review, Rwanda: Report by the Secretariat, 4/13/2004, WT/TPR/129, viii, #8.

⁵⁶ WTO, Trade Policy Review, Croatia, WT/TPR/S/227, vii, 1.

⁵⁷ WTO, Trade Policy Review, Nigeria, 6/28-6/30, 2011, WT/TPR/M/247.

⁵⁸ WTO Trade Policy Review, Zimbabwe, October 19-21, 2011, WT/TPR/S/252, quotes p. vii, p. 1, # 1, # 2, # 4, 20. #19, p. 18, #29. http://www.wto.org/english/tratop_e/tpr_e/tp352_e.htm

The WTO mentions the land tenure system as a source of conflict three times.⁵⁹ The Secretariat concluded that this internal conflict made economic growth “uncertain.”⁶⁰ But the members did not discuss how trade might help Zimbabwe make respect for specific human rights a priority. Nor did they discuss their own human rights responsibilities in relation to Zimbabwe.

Thus, to some extent concerns about how conflict could affect specific member states are being discussed during trade policy reviews. Nonetheless, WTO members appear to have put little thought into developing strategies (including capacity building) that might be helpful to facilitate trade and advance human rights in conflict zones or rules to guide business.⁶¹ Nor have they devised strategies to use the trade policy review process as a means of discussing the trade/conflict/recovery relationship.

Waivers

Waivers are temporary exceptions to WTO rules. WTO members may waive an obligation imposed on a member, provided that any such decision is approved by three-quarters of the other members. These waivers were supposed to be limited to exceptional circumstances and in fact such waivers are rare.

The members of the WTO have never used a waiver to assist a country that can't meet its WTO obligations due to conflict or post-conflict recovery. However, WTO

⁵⁹ WT/TPR/S/252/ p. 66, #19; also see p. 64, #10, 11, and fn 2 and #15, p. 65.

⁶⁰ WTO Trade Policy Review, Zimbabwe, October 19-21, 2011, WT/TPR/S/252, quotes p. vii, p. 1, # 1, # 2, # 4, 20. #19, p. 18, #29. http://www.wto.org/english/tratop_e/tp_r_e/tp352_e.htm

⁶¹ Zimbabwe is a good example, WT/TPR/S/252, pp. 117-121.

Members have used a waiver to address the problem of trade in conflict diamonds. The WTO acted at the UN's behest. According to the UN, conflict diamonds "originate from areas controlled by forces or factions opposed to legitimate and internationally recognized governments, and are used to fund military action in opposition to those governments or in contravention of the decisions of the Security Council."⁶² WTO member states called for and eventually agreed upon a waiver under the WTO for such a ban.⁶³ Under the waiver, nations are allowed to trade only those diamonds certified under the Kimberley Process Certification Scheme. Members applying for the waiver had to commit to ensure that the measures taken were consistent with international trade rules. The Kimberley Process Certification Scheme is a way for consumers and producers to ensure that they do not trade diamonds that indirectly fund wars in Sierra Leone or the Democratic Republic of the Congo.⁶⁴ Rough diamonds must be shipped in sealed containers and exported with a Kimberley Process Certificate that certifies that the diamonds are conflict free. Seventy five countries are involved in the Kimberley Process; but not all trade diamonds.⁶⁵ This was the first time that the members of the

⁶² UN Conflict Diamonds-Sanctions and War, <http://www.un.org/peace/africa/Diamond.html>

⁶³ For a good overview, see Joost Pauwelyn, "WTO Compassion or Superiority Complex? What to Make of the WTO Waiver for Conflict Diamonds," Michigan Journal of International Law Vol. 24 (2003): pp. 1184–1191.

⁶⁴ <http://www.kimberleyprocess.com>. Also see WTO, "Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds," Decision of 15 May, 2003. 2003, WT/L/518, 5/27/2003.

⁶⁵ WTO members are allowed to waive an obligation in exceptional circumstances under the approval of three-fourths of the members. Procedures for waivers, http://www.wto.org/english/docs_e/legal_e/11-25_e.htm. See update in Global Witness, "An

WTO approved a waiver of trade obligations based on a human rights rationale. Thus, the Kimberley waiver sets an important precedent. Canadian Trade Minister Pierre Pettigrew stated, "This decision clearly shows that the WTO can be flexible when it comes to human security and development."⁶⁶ However, many NGOs such as Global Witness and Oxfam among others are not happy with the Kimberley process. They argue that attempts at industry self-regulation coupled with the trade waiver can't guarantee consumers that the diamonds they purchase are free from the taint of conflict and human rights abuse. ⁶⁷Representatives of these NGOs believe the Kimberley Process and trade waiver should also address how diamonds enrich authoritarian

Independent Commissioned Review Evaluating the Effectiveness of the Kimberley Process, Submitted to the Ad Hoc Working Group on the Review of the Kimberley Process 2006, at www.globalwitness.org. The waiver was reviewed and maintained in 2006. The following countries applied for the waiver as of 2006. Australia, Botswana, Brazil, Canada, Croatia, India, Israel, Japan, Korea, Malaysia, Mauritius, Mexico, Norway, Philippines, Sierra Leone, Chinese Taipei, Thailand, United Arab Emirates, United States and Venezuela) necessary to prohibit the export of rough diamonds to non-participants in the scheme.

http://www.wto.org/english/news_e/news06_e/ctg_20nov06_e.htm

⁶⁶ Foreign Affairs and International Trade Canada, Press Release, "Pettigrew Welcomes WTO Waiver for Kimberley Process Certification Scheme," 5/22/2003,

http://w01.international.gc.ca/MinPub/Publication.asp?publication_id=380114&Language=E, last searched 8/10/2006.

⁶⁷ <http://www.globalwitness.org/library/global-witness-founding-director%E2%80%99s-statement-ngo-coalition-walk-out-kimberley-process>

regimes and fuel internal conflict.⁶⁸ Nor has it addressed trade leaks and noncompliance in countries such as Venezuela, Guinea, Lebanon and Zimbabwe.⁶⁹

WTO members have also established a waiver for industrialized countries that wanted to provide lower tariffs for developing country exports.⁷⁰ The waiver is called the Generalized System of Preferences or GSP. After that waiver expired in 1981, the contracting parties (members) of the GATT adopted a declaration permanently extending the waiver.⁷¹ Many countries that provide GSP see it as a tool to improve governance and some use that lever to advance specific human rights. But GSP granting nations do not use this waiver to provide additional trade benefits for conflict-afflicted or conflict recovering states per se.⁷²

Trade waivers may not be the most effective tools to use at the intersection of conflict, trade and human rights. Waivers such as the Kimberley Process are temporary

⁶⁸ http://www.thezimbabwean.co.uk/human-rights/54318/diamond-csos-slam-zim-deal.html?utm_source=thezim&utm_medium=homepage&utm_campaign=listarticle&utm_content=readmorelink; and <http://www.globalwitness.org/library/kimberley-process-lets-zimbabwe-hook-again>; and

⁶⁹ Ian Smilie, "Assessment of the Kimberley Process in Enhancing Formalization and Certification in the Diamond Industry – Problems and Opportunities, Study for GIZ, 3/2011, <http://www.ddiglobal.org/login/Upload/Ian-Smillie-GIZ-Kimberley-Process-Problems-and-Opportunities-2011.pdf>

⁷⁰ WTO High Level Symposium on Trade and Development Geneva, 17–18 March 1999. Background document Development Division World Trade Organization, "Developing Countries and the Multilateral Trading System: Past and Present, Background Note by the Secretariat," <http://www.wto.org>, last searched 2/10/2006.

⁷¹ John L Jackson, *The World Trading System: Law and Policy of International Relations*, 2d ed., (Cambridge, MA: MIT Press, 1998), 164, 323.

⁷² EU Generalised System of Preferences, <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/...>, last searched 2/17/2006.

measures and human rights problems generally cannot be solved on a temporary basis. Moreover, these waivers provide little guidance to trade policymakers on how to reconcile trade, human rights and conflict reduction objectives (Pauwelyn: 2003; Schefer: 2007) Finally, while waivers don't signal to business to "get out," these waivers do not fully address the causes of conflict or human rights abuse. Perhaps the best evidence that this trade waiver is not widely seen as a success is that neither states nor civil society groups are calling for a similar waiver for conflict minerals.

The Exceptions Articles XX and XXI

Policymakers have long recognized that at times they must breach their trade obligations to achieve humanitarian objectives. As example, in the early 19th century policymakers used trade bans to reduce the global trade in slaves. In 1940, the US banned trade in airplanes and aviation gasoline destined for any country engaged in bombing attacks on civilians (Charnovitz: 1998, 12-13). The architects of the GATT acknowledged this need in its exceptions. Member states rely on these exceptions to justify their derogations of trade rules in the interest of protecting individuals at home and abroad from human rights abuse in zones of conflict.

Under Article XX, nations can restrict trade when necessary to "protect human, animal, or plant life or health" or to conserve exhaustible natural resources. Governments may also restrict imports relating to the products of prison labor. Although it does not refer explicitly to human rights, some scholars attest that

policymakers can use the public morals clause of Article XX to justify trade bans in the interest of promoting human rights (WTO 2001; Howse 2002; Charnovitz 2005). Others say that because Article XXe bans trade in prison labor, policymakers could use it to ban trade in goods made with slave, trafficked, or abused workers (Stirling: 1996: 38).

The national security exception, Article XXI, states that WTO rules should not prevent nations from protecting their own security.⁷³ Members are not permitted to take trade action to protect another member's security or to protect the citizens of another member per se. If, however, the United Nations Security Council authorizes trade sanctions,⁷⁴ WTO rules allow countries to use such measures to promote human

⁷³ Nothing in this Agreement shall be construed (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (i) relating to fissionable materials or the materials from which they are derived;(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations; or (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security. GATT Analytical Index, Article XXI, http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_07_e.htm#article20.

⁷⁴ Article 39 of the Charter of the United Nations allows the Security Council to take measures such as sanctions only to "maintain or restore international peace and security" following its determination that there exists a threat to or breach of the peace, or an act of aggression. Thus, sanctions may only be imposed upon a Government, "quasi-Government" or other entity that is capable of being a threat to international peace or security or that is in fact threatening international peace and security. While armed groups within a country may pose a threat to international peace and security, a generally unarmed civilian population is, in all likelihood, unable to pose such a threat. Other States not presenting a threat to, or actually breaching, peace and security must not be affected by sanctions imposed on the violating State.

rights, as when sanctions were instituted against South Africa's apartheid regime in the 1980s (Aaronson and Zimmerman 2007, 19). However, if trade restrictions to enforce human rights are imposed unilaterally on a country, such measures have to comply with the MFN, national treatment, and like product rules of the GATT (Zagel: 2006; Garcia: 1999).

The GATT/WTO leaves it to each member to define its essential security interests. No other member can really challenge it. Moreover, a sanctioning Member need not give any prior notice of impending or imposed national security sanctions. Second, the sanctioning Member need not justify the sanctions to the WTO or obtain the prior approval of other members. However it is in that member's interest to have good trade relations with its fellow members and generally members will try to inform their colleagues if they are planning to use Article XXI to adopt such sanctions (Bhala, 1999, 8-11).

As of November 2011, both the US and the EU have adopted trade sanctions to advance human rights in Belarus, Burma, Iran, North Korea, Somalia, South Sudan, Syria and Zimbabwe (among other countries). Many of these states are experiencing or

recovering from conflict.⁷⁵ None of the recipient countries that are the subject of these sanctions have challenged them under the WTO.

When nations such as the US use trade sanctions they rarely attempt to distinguish whether such sanctions will be effective in advancing specific human rights in conflict zones such as protecting individuals from genocide or rape or establishing free speech rights (Stirling: 1996). These officials are not thinking comprehensively. They are focusing on altering policymaker behavior (the supply side of human rights) and they presume that policymakers in repressive countries are sensitive to changes in supply of traded goods. But policymakers should also think about how policy can bolster the local inherent demand for human rights (Aaronson: 2011).

While there are many studies showing sanctions are ineffective (Hufbauer et al, 1990; Petrescu: 2010); few of these studies have examined their effect on *particular human rights* conditions or *more specifically human rights conditions in conflict zones*. One prominent exception is Michael Ewing-Chow's study of trade sanctions against Myanmar. He argues that these sanctions both violate America's WTO obligations and do little to improve human rights conditions. He notes that the military government has been able to compensate for the impact of the sanctions by expanded trade with India and China. He concludes that while the people suffer from the lost trade, the benefits

⁷⁵ US Department of the Treasury, Sanctions Program and Country Information, <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx>; European Union, "Restrictive Measures (Sanctions in force)" Updated 6/10/2011,

from increased trade with India and China accrue to the military government and not to the people (Ewing-Chow: 2007, 177-179)

Taken in sum, although the WTO has become more sensitive to human rights conditions in conflict, the WTO provides little guidance to market actors regarding how to behave in conflict zones. Some strategies such as the Kimberley Process waiver signal business to stay as long as executives adhere to the Kimberley process procedures. But sanctions, the most used tool, signals business to get out of conflict afflicted regions and tell firms that they can't act responsibly in such markets. Moreover, there is little evidence that either strategy—trade waivers or trade sanctions actually improve specific human rights outcomes for citizens in conflict zones.

Avenues to Promote the Guiding Principles in concert with the Trade Regime

As noted above, under international law, policymakers have a responsibility to respect, protect and remedy human rights. But firms also have responsibilities to respect and remedy human rights conditions. As part their responsibility policymakers should educate firms regarding their human rights responsibilities and provide incentives to firms to act responsibly. They should also ensure that their trade and human rights are coherent and supportive of achieving both goals. Finally, they should root these strategies and policies in research. By so doing, trade and human rights strategies will gradually become more consistent.

Thus, policymakers that seek to promote human rights in conflict zones should first focus on obtaining a better understanding of what works. Under WTO procedures, a member(s) can request that the Secretariat do research on the history of trade sanctions and their record in advancing specific human rights. Secondly, a member state should request that the WTO develop procedures as to how member states should behave in conflict zones where trade might enhance and/or undermine specific human rights that the government is not respecting. The Secretariat should also examine how trade strategies can empower citizens to demand their rights. The Secretariat should also provide guidance to member states based on recent trade disputes. None of these disputes related to human rights violations with conflict zones specifically but cases (such as the Internet Gambling Case between the US and Antigua and the Brazil tires case between Brazil and the EC provide limited guidance to member states that seek to use Article XX to protect individuals from human rights harm (Wu: 2007). Finally, the WTO could set up a Working Group to examine trade in conflict zones and find ways to link the trade regime to the Guiding Principles.

Policymakers will also need to provide incentives to firms to act responsibly in conflict zones. They should develop strategies to encourage more firms to implement the GPs. One possible route is procurement policies: many states use such policies not only to buy needed goods and services but to achieve other important policy objectives such as energy efficient production.

Policymakers should adopt a coordinated multilateral approach to using procurement as an incentive to adopting the GPs around the world. Government procurement activities comprise some 10-30% of the GNP in many states.⁷⁶ Because this is such a large share of GNP, coordinated government policies could have a major effect on the practices of suppliers and the companies that supply them (Aaronson: 2007; Zeisel: 2005; McCrudden: 2006). However, procurement policies are admittedly an indirect route to protecting human rights (Zeisel: 2005) or business behaviour (Bolton and Quinot: 2010). Nonetheless, they represent a growing understanding that when a government purchases goods and services, it does so for its citizens and in so doing; these purchases should reflect local norms and expectations. It is a way for policymakers to lead by example and by using market forces (McCrudden: 2006). It is also a strategy that allows public bodies “to take account of, and discount, any competitive advantage acquired as a result of...inequitable treatment,” such as the use of slave labor (McCrudden: 1999, 10).

Public procurement rules establish specific contract award procedures to ensure that public purchases are made in a transparent and fair manner and provide the best

⁷⁶ In 2002, using 1998 data, the OECD estimated the ratio of total procurement (consumption and investment expenditure) for all levels of government at 19.96% or USD 4 733 billion, and for the non-OECD countries it is estimated at 14.48% or USD 816 billion. Total government procurement worldwide is estimated to be roughly equivalent to 82.3% of world merchandise and commercial services exports in 1998. OECD, “The Size of government Procurement Markets, 2002, http://www.oecd.org/document/14/0,3746,en_21571361_44315115_1845951_1_1_1_1,00.html

value for taxpayers' money.⁷⁷ The WTO Government Procurement Agreement opens up the public procurement markets of each of the Parties that are signatories. Only 41 of the 153 WTO members are signatories and some 8 countries seek to accede.⁷⁸ Non-signatories are *not bound* to comply with the GPA.

GPA rules indicate which market access opportunities must be open to international tendering.⁷⁹ Moreover, the GPA states that governments need not necessarily comply with or directly adopt existing international standards, but should use elements of relevant international standards. However, it does not define what relevant means in the context of human rights (Bernstein and Hannah: 2007, 19-20; Zeisel:2005).

Some procurement scholars argue that using procurement to reward certain types of behavior is contradictory to the intent of the GPA. Law professor McCrudden notes that the GPA aims to reinforce nondiscrimination; establish a regime to further transparency and openness and to reduce the insertion of non-economic criteria into the procurement process (McCrudden: 1999, 30). Law Professors Arrowsmith and Davies argue that the GPA's reason for existence is to "prevent support for national industry against foreign competition." But these same scholars also note that the GPA does not

⁷⁷ http://ec.europa.eu/internal_market/publicprocurement/rules/gpa-wto/index_en.htm

⁷⁸ http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm

⁷⁹ http://www.wto.org/english/tratop_e/gproc_e/overview_e.htm. The GPA has only 41 signatories. http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm

exclude the possibility of reaching procurement decisions on other noncommercial criteria (Arrowsmith and Davies, 1998: 17). In an extensive study of the GPA, political scientist Brown-Shafil notes, “its procedural obligations do not, per se, dictate the substantive or regulatory ends” of a domestic procurement regime (Brown-Shafil: 2011, 15-16).

The WTO requires the signatories of its procurement agreement (the government procurement agreement) to use procurement policies in a manner that does not distort trade among WTO members.⁸⁰ Article VI.1 of the GPA says technical specifications should not create unnecessary obstacles to international trade. But are human rights conventions and treaties technical specifications? The GPA has exceptions in Article XXXIII, which note that members can continue to institute measures that are “necessary to protect public morals, order or safety, human, animal or plant life or health or intellectual property...”⁸¹ However, the exact meaning of public morals and public order are not defined in either the WTO or the GPA specifically.

In recent years, states and international institutions have tailored their procurement regulations to address issues of human rights, including human rights in conflict zones. US President William Clinton banned federal agencies from purchasing

⁸⁰ For a good bibliography of WTO procurement issues, see <http://www.unpcdc.org/media/21934/wto.pdf>

⁸¹ GPA, Art. XXIII:2

goods made with exploitive child labor; to facilitate that process, the US Department of Labor publishes a list of such goods and the countries where they are manufactured.⁸² In 2004, the EC declared that the awarding of contracts by member states is subject to principles of free movement of goods equal treatment, non-discrimination, proportionality and transparency, but “nothing in this directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality, public security, health...provided that these measures are in conformity with the Treaty.”⁸³ The EC is currently revising its procurement policies and prepared several documents examining selective procurement to achieve social and environmental goals.

⁸⁴ Canada, Australia, Malaysia also adopted “set asides” in the interest of promoting minority business and economic development; Switzerland requires that entities provide equal pay for men and women as a condition for performance of public contracts (McCrudden: 2007, 8-9). South Africa uses procurement as an important tool towards wealth redistribution within the South African economy as well as developing

⁸² Fact Sheet on Abusive child labor, <http://archives.clintonpresidentialcenter.org/?u=061299-fact-sheet-on-abusive-child-labor.htm>; and 2011 list of goods made with exploitive child labor at <http://www.dol.gov/ilab/programs/ocft/PDF/2011TVPRA.pdf>

⁸³ <http://eca.europa.eu/portal/pls/portal/docs/1/7232735.PDF>. For an interpretation, See commission of the European Commission, “Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for Integrating Social Considerations into Public Procurement,” Com(2001)566, 10/15/2001, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0566:FIN:EN:PDF>

⁸⁴ http://ec.europa.eu/internal_market/publicprocurement/other_aspects/index_en.htm

local skills, fighting corruption and to promote fair labor practices (Bolton and Quinot: 2010, 459, n. 1; 464, n. 29; 479).

International organizations also use their procurement policies to change corporate behaviour. The World Bank claims “As a socially responsible organization, the Bank Group, through its corporate procurement practices, endeavors to integrate socially responsible suppliers into its supply chain. To this end, Bank Group procurement policy addresses supplier activities under the categories of diversity, wages and benefits, health and safety, and accessibility (equipment and facilities). “ After the International Labor Organization and several unions objected that the Bank was undermining international labor rights law, the World Bank agreed to include language on forced labor and child labor in the General Conditions of Contract (GCC) for the Bank’s Standard Bidding Document for Works (SBDW), applying on a mandatory basis to all international competitive bidding (ICB) for works financed under Bank-supported projects. The Bank promised to promote core labor standards and to work to harmonize core labor standards for all multilateral development banks.⁸⁵ I could not find evidence that it was actually doing this. In its September 2011 meeting in Washington, the G-20 agreed to further review and harmonize multilateral

⁸⁵ See World Bank, Socially Responsible Procurement <http://web.worldbank.org/WBSITE/EXTERNAL/OPPORTUNITIES/EXTCORPPROUREMENT/0,,contentMDK:21821083~menuPK:7092641~pagePK:64147231~piPK:64147158~theSitePK:438017,00.html>; and , Trade Union-IRI Interim, March 9, 2010,

development bank procurement policies. But the G-20 states didn't specifically mention human rights, despite activist concerns ⁸⁶

Other international organizations are more attentive to making their procurement policies coherent with international human rights law and humanitarian objectives. The ILO is guided in its procurement practices by its own covenants. Convention 94 requires a linkage between certain fair labor standards and government contracts (McCrudden: 1999). UNICEF will not contract with suppliers that use child labor or those that manufacture land mines or components for land mines. The United Nations Supplier Code of Conduct (and similar Codes established by other UN organizations) is an instrument which can guide the prequalification process. The Supplier Code of Conduct expresses the expectations that the United Nations has of its suppliers and encourages them to register with the UN Global Compact initiative. Suppliers are expected to comply with the Code of Conduct in their dealings with the UN Secretariat. ⁸⁷

The WTO has not yet developed an approach to procurement that reconciles human rights and trade aims. In a 2010 speech about the GPA, Pascal Lamy, Director

⁸⁶ G20 Ministerial Meeting on Development - Communiqué
23 September 2011, Washington DC, USA,

<http://www.g20.org/Documents2011/09/Ministerial%20Declaration-final.pdf>

⁸⁷ UNEP, "Sustainable Procurement in the UN System, Report Prepared for the Environmental Management group, 9/1/2004, p. 9; and UNEP et al "Buying for a Better World - A Guide on Sustainable Procurement for the UN System," 2011.

General of the WTO has noted “the mere removal of obstacles to trade may not...ensure optimal performance if rules are not in place to ensure fair procedures, appropriate transparency of markets, and responsible competitive behavior that is environmentally sustainable...such rules are an essential counterpart to market opening.”⁸⁸ However the WTO says nothing about human rights, labor rights or conflict in its procurement guidelines.⁸⁹ The WTO should be taking a leadership role in ensuring that trade advances human rights, including human rights in conflict zones.

The states and international organizations that are acting have a wide range of reasons to make their procurement more human rights responsible. They argue that they must work to eliminate business practices that are contradictory to the states’ public values; to avoid complicity in human rights violations or to build an environment beneficial for the realization of rights (Zeisel: 2005, 10.) Policymakers are also attempting to meet growing demands among their stakeholders for responsible practices.⁹⁰

⁸⁸ WTO, “Lamy Notes Rising Interest in WTO government procurement Agreement,” 2/11/2010, http://www.wto.org/english/news_e/sppl_e/sppl147_e.htm

⁸⁹ http://www.wto.org/english/thewto_e/procurement_e/terms_conditions_e.pdf; and http://www.wto.org/english/thewto_e/procurement_e/procurement_e.htm

⁹⁰ States and localities are also acting to adopt selective public procurement policies to ban sweatshop labor as example. They include the US cities of San Francisco, Los Angeles, Milwaukee, Portland; Canadian cities of Toronto, Ottawa, and Halifax; and in Europe, Barcelona, Amsterdam, and other Dutch cities. An example of US State action is The California Transparency in Supply Chains Act of 2010, which goes into effect January 1, 2012. It requires retail sellers and manufacturers doing business in the state to disclose their efforts to eradicate slavery and human trafficking from their direct supply chains for tangible goods offered for

Activist governments could avoid breaching their GPA obligations and support the Guiding Principles through award criteria that relate to the supplier as opposed to the product. In fact activist governments should reward firms that have adopted strategies to deal with human rights in conflict and post-conflict regions building on UN and OECD Guidance. However, policymakers will not find it easy to develop such guidance and award criteria.

These governments must make the decision making process and procurement evaluation process fully transparent. They must also clearly delineate who will decide if firms are adhering to the GPs, and how can such performance be measured and validated (McCrudden: 1999, 31).

Policymakers should find common ground on their procurement strategies and find a way to announce such a strategy internationally – perhaps through the OECD? A uniform multilateral approach could be seen as enhancing cost efficiencies as well as human rights. A multilateral approach on procurement could send a mighty market signal to corporate executives. Although it is nontrade distorting, frankly it is an indirect and second best approach.

Conclusion

Private sector activity can be a tool to reduce conflict; but firms can also create or perpetuate conflict and human rights abuse with their activities. Current trade strategies may send confusing signals to executives regarding how their companies should act in conflict zones where individuals desperately need the goods, jobs, and economic growth that firms can bring. However, these individuals can only benefit from trade if leaders of states and firms work to acknowledge and meet their human rights responsibilities and coordinate them with their trade and investment strategies.

The members of the WTO should work to ensure that the WTO plays a leading role in facilitating such coordination. The WTO has become more receptive to waivers or exceptions in the interest of promoting human rights in conflict zones. But WTO member states should challenge the Secretariat to ask and answer the right questions. As noted above, we don't know whether more or less trade is effective in prodding governments to do more to respect specific human rights. We know that sanctions don't improve governance—the supply side of human rights. Nor do they empower citizens—the demand side of human rights. As UN Secretary General Kofi Annan said, “It is not enough merely to make sanctions smarter.” He noted member states must be willing to address “broader political questions of how best we ensure the fullest and broadest compliance with the will of the international community on the part of

recalcitrant States.”⁹¹ The Guiding Principles provide guidance for best practice in such recalcitrant States.

The WTO should also serve as a hotbed for research on best practice. Given that many of the states that seek to accede to the WTO are recovering from conflict, the WTO should examine how it can help these states meet their governance obligations. Moreover, WTO member states already use the Trade Policy Review process to examine the governance context of member states (Aaronson and Abouharb: 2011); they could use the process to examine the trade/conflict recovery human rights relationship. The WTO could also set up a Working Group to examine trade in conflict zones and find ways to link the trade regime to the Guiding Principles. Finally, the WTO should also ensure that its own procurement strategies set an example –reflecting and respecting international human rights agreements. Nonetheless, we must acknowledge that using procurement is, as noted above, an indirect approach to advancing human welfare, as well as trade.

As the UN Special Representative on Business and Human Rights-John Ruggie-noted,” the most egregious business-related human rights abuses take place in conflict zones....The gravity of this situation requires that states respond to it as a matter of urgency. Yet there remains a lack of clarity among governments as to what innovative, proactive and, above all, practical policies and tools have the greatest potential for

⁹¹ UN, “Preventing Conflicts,” <http://cyberschoolbus.un.org/briefing/conflicts/prevention.pdf>

preventing or mitigating corporate-related abuses in situations of conflict.”⁹² If the WTO aims to enhance human welfare, the GATT/WTO system must be part of the solution and not part of the problem.

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⁹² UN Special Representative on Business and Human Rights, “ Business and Human Rights in Conflict-affected Regions: The Roles of States, 2009, <http://198.170.85.29/Ruggie-conflict-project-note-Oct-2009.pdf>

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