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Analytical study of the High Commissioner for Human Rights on the fundamental principle of non-discrimination in the context of globalization

Report of the High Commissioner

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Summary

The present report, submitted at the request of the Commission on Human Rights, considers how globalization has brought new attention to the principle of non-discrimination - on the one hand providing opportunities for increasing commercial and cultural exchange while on the other highlighting inequalities within and between countries. The prohibition of discrimination therefore provides an essential principle for globalization. While the principle of non-discrimination finds expression in many areas of law, the report focuses on the interaction between the principle of non-discrimination in human rights and trade law. The report sets out the principle under both international human rights treaties and World Trade Organization Agreements, discussing, by way of illustration, how the human rights principle and the trade principle interact by reference to government procurement practices, agricultural trade and social labelling.

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Introduction

1. In its resolution 2002/28, the Commission requested the High Commissioner "in cooperation with the United Nations Conference on Trade and Development, the World Trade Organization and other relevant international financial and economic institutions, to study and clarify the fundamental principle of non-discrimination and its application at the global level with a view to recommending measures for its integration and effective implementation in the debate on and process of globalization".

2. In response to the resolution, the High Commissioner wrote to the Secretary-General of UNCTAD and the Director-General of WTO on 7 June 2002 as a first step in the process of cooperation. Subsequently, the Office of the High Commissioner held consultations with UNCTAD and WTO and the report draws on materials and reports from these organizations. A first draft of the report was then shared with representatives of WTO and UNCTAD and other organizations including the World Intellectual Property Organization (WIPO), and the Food and Agriculture Organization of the United Nations (FAO) as well as academics and experts. The High Commissioner then requested further time to consult more widely on the analytical report (E/CN.4/2003/50) and noted that it would be submitted at the sixtieth session of the Commission.

3. By its resolution 2003/23, the Commission took note of the request of the High Commissioner and requested him before the sixtieth session of the Commission "to focus particularly on the need for clarification of the human rights principle of non-discrimination as it relates to the trade rules of the World Trade Organization, especially in the context of the World Trade Organization Agreement on Agriculture". In order to consult more widely on the draft study, the Office of the High Commissioner circulated the draft to human rights and trade experts and representatives of intergovernmental organizations and held a seminar on 31 October 2003 to discuss the draft. The draft was further refined on the basis of that meeting. The views of the United Nations Office of Legal Affairs were also sought in the final stages.

I. THE PRINCIPLE OF NON-DISCRIMINATION

A. Non-discrimination and globalization

4. Globalization has brought a new focus on discrimination. On the one hand, the lowering of borders and improvements in information technology associated with globalization have brought people, products and services closer together, opening up a range of new possibilities for cultural and commercial exchange and for economic growth. On the other hand, globalization has presented its challenges, demonstrating more clearly the stark inequalities both within and between countries. Importantly, the greater flow of people, services and products promoted by globalization has highlighted the need to understand and accommodate difference, diversity and inequality. Clarifying the fundamental principle of non-discrimination in the context of globalization is an important step in doing so.

5. The principle of non-discrimination has found expression across various fields of international law - including human rights, labour, education, migration, investment and trade law. Yet globalization has altered the way those fields of law relate to each other. In particular,

as international trade and investment - the primary engines of globalization - increase, trade rules have expanded to cover wider areas of government authority, including areas that can affect Government's capacity to promote and protect human rights. As a result, the principle of non-discrimination in the fields of human rights law and trade law have a closer relationship. An essential element therefore of clarifying the fundamental principle of non-discrimination in the context of globalization is the examination of how those two principles interrelate.

6. The rest of this section will outline the principle of non-discrimination under human rights law and trade law. Given the specific reference to WTO Agreements in the Commission's resolution, the report limits itself to the principle under these two branches of law, bearing in mind that the principle appears in other fields as well. Section II then considers three cases where the implementation of the principles under human rights law and trade law overlap and suggests ways in which WTO "flexibility" might avoid overlap leading to problems.

B. Human rights law

7. The principle of non-discrimination is perhaps the most powerful and dominant principle of international human rights law. Its inclusion in the Charter of the United Nations and the Universal Declaration of Human Rights (the Universal Declaration) was a reminder and a response to the genocide and carnage of the Second World War - a promise that it would not occur again. The principle has since been restated in all the major human rights instruments and provides the central theme of some of these instruments - the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) as well as to the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. At least certain aspects of the principle are now considered part of customary international law.[1]

8. Article 2 of the Universal Declaration states the principle of non-discrimination as follows: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status."

9. While the formulations of the principle of non-discrimination are not the same across the human rights instruments, they have certain common characteristics. The principle applies to everyone in relation to all human rights and freedoms and it prohibits discrimination on the basis of a list of non-exhaustive categories such as sex, race, colour and so on. Importantly, the principle of non-discrimination is complemented by the principle of equality. Article 1 of the Universal Declaration states that "All human beings are born free and equal in dignity and rights" and common articles 3 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) oblige States to ensure the equal right of men and women to the enjoyment of human rights. Importantly, article 26 of ICCPR creates a right to equality, guaranteeing all persons equality before the law and equal protection of the law.

10. While only some treaties explicitly include a definition, it is generally accepted that the principle of non-discrimination prohibits any distinction, exclusion, restriction or preference having the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise by

all persons, on an equal footing of all rights and freedoms. For example, ICERD explicitly includes a definition of racial discrimination in similar terms as does CEDAW in relation to sex discrimination, although CEDAW omits any prohibition of "preferences". While ICCPR and ICESCR do not include a definition in their statement of the principle, the Human Rights Committee (HRC) and the Committee on Economic, Social and Cultural Rights (CESCR) - the expert committees monitoring the Covenants - have accepted similar definitions in their practice.[2]

11. Four elements of this definition of non-discrimination are worth noting:

(a) *The primary concerns of the principle of non-discrimination are State laws, policies and practices, but the principle also applies to private actors*. The definition elaborates the types of differential treatment concerned as "distinctions, exclusions, restrictions or preferences". Both public and private actors differentiate in their treatment of people, and while the principle of non-discrimination is primarily aimed at State policies and practice, States also have responsibilities to ensure that private actors respect the principle. For example, CEDAW obliges States to "take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise" (art. 2);[3]

(b) *The prohibited categories of discrimination are open-ended*. For example, the Universal Declaration prefaces the list of prohibited categories with the words "such as", suggesting that the list is not exhaustive. Since the adoption of the Universal Declaration, States and the expert monitoring committees of human rights treaties have explicitly added new categories of discrimination including "ethnic origin" (ICERD, art. 1, Convention on the Rights of the Child (CRC), art. 2), "disability" (CRC, art. 2) and "economic condition" (the United Nations Educational, Scientific and Cultural Organization Convention against Discrimination in Education, art. 1). Further, the inclusion of "other status" amongst the prohibited grounds of discrimination has provided the flexibility for treaty monitoring bodies to add new grounds. For example, CESCR has accepted new categories of discrimination such as discrimination based on disability or age (see CESCR general comments Nos. 5 and 6);

(c) *There is no requirement to demonstrate discriminatory intention*. The reference to "purpose or effect" in the definition indicates that intention is not a requirement. So long as the effect of a distinction, exclusion, restriction or preference based on one of the categories is discriminatory, a violation has occurred, irrespective of whether this was intended. Thus, in the *South West Africa Cases (Second Phase), 1966* (ICJ Rep. 6), Judge Tanaka stated in relation to racial discrimination that "the arbitrariness which is prohibited, means the purely objective fact and not the subjective condition of those concerned. Accordingly, the arbitrariness can be asserted without regard to motive or purpose";

(d) *The principle of non-discrimination applies to both de jure and de facto discrimination*. In other words, the principle is not only concerned with discrimination in laws and policies, but also discrimination in practice. It is clear that the State prohibition of discrimination must go beyond merely prohibiting discrimination in law.

12. Importantly, the principle of non-discrimination applies to both direct discrimination and indirect discrimination. Forbidding direct discrimination prohibits unjustified differential treatment that is directly connected with a person's association with one of the protected categories - sex, ethnicity and so on - as seen, for example, in different salary rates for men and women for the same work.[4] On the other hand, indirect discrimination occurs when a neutral measure has a disparate and discriminatory effect on different groups of people and that measure cannot be justified by reasonable and objective criteria. Indirect discrimination recognizes that treating unequals equally can lead to unequal results which can have the effect of petrifying inequality. Combating indirect discrimination is an important means of dealing with the institutional and structural biases - often unintentional and unperceived - that result in discrimination and that act as impediments to the achievement of equal human rights for all. Significantly, focusing on the disparate impact of an apparently neutral measure taken with respect to an individual as part of a particular group opens up the possibility of identifying the root causes of discrimination and inequality - a significant step in achieving substantive equality, not simply formal equality. The prohibition on indirect discrimination considerably widens the scope of the principle of non-discrimination and national, regional and international responses to it vary.[5]

13. The principle of non-discrimination does not prohibit all differential treatment and some differential treatment might be justifiable. For example, the Human Rights Committee has stated that "… not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant" (general comment No. 18, para. 13). One author states that the permissibility of differential treatment requires the determination of the following three issues: whether the parties in question can be considered to be in a comparable situation; whether unequal treatment is based on reasonable and objective criteria; and whether the distinction is proportional in the case in question.[6] Thus, in *Broeks v. The Netherlands* (communication No. 172/1984), the Government attempted to justify a distinction on the basis of sex that required married women but not married men to prove they were the "breadwinner" in order to receive certain social security benefits. The Government argued that the origin of the distinction was not discriminatory, but rather based on the need to balance the use of limited public funds with its obligation to provide social security. The Committee rejected the justification of the requirement.

14. States also have obligations to take positive measures to guarantee the equality of rights and prevent discrimination in some cases (HRC general comment No 18, para. 5). Obligations to take positive measures are explicit in ICERD (art. 2 (1) (d)) and 2 (2) and CEDAW (art. 2 (b), (e) and (f)) and implicit in the other treaties.[7] In particular, States should take steps where patterns of discrimination emerge to ensure that discrimination does not become entrenched.[8] For example, a Government might collect statistics on the basis of gender or ethnicity as a means of understanding more fully inequalities and discrimination within society. Similarly, a Government might impose on its contractors conditions directed towards increasing the representation of minorities and of women in the workforce. The focus of positive measures is not just in compensating individual victims but in restructuring institutions and therefore avoiding future discrimination. The need for positive measures can be triggered by evidence of structural discrimination, for example, through chronic under-representation in particular types of work.

15. Affirmative action (temporary special measures) is one form of positive measure that is considered legitimate. For example, a State may grant differential treatment for a period of time in favour of certain people or groups in the form of affirmative action in order to achieve the wider goal of equal human rights for all. An example might be preferential treatment of members of an under-represented ethnic group over other equally qualified candidates in applications for employment. HRC has indicated that "the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination". (HRC general comment No. 18, para. 10). The same position is applicable to economic, social and cultural rights.[9] ICERD and CEDAW in fact contain explicit statements concerning the legitimacy of affirmative action measures (ICERD, art. 1, para. 4, CEDAW, art. 4, para. 1). There are, however, limitations on the acceptability of affirmative action programmes. Importantly, such measures should not lead to the maintenance of separate rights for different groups and they should not be continued after their intended objectives have been achieved[10] (HRC general comment No. 18, para. 10). There is no general rule that States are obliged to implement affirmative action schemes, although common article 3 of ICCPR and ICESCR suggests that States might be obliged to do so in order "to ensure the equal right of men and women to enjoy human rights".

C. Trade law

16. The principle of non-discrimination has traditionally been an important element of trade and investment treaties and is one of the fundamental principles of the WTO Agreements. The drafters of the original General Agreement on Tariffs and Trade (GATT) incorporated the principle of non-discrimination in the rules governing the trading system partly to respond to the discriminatory practices and preferential treatment that had contributed to the economic and political disasters that led up to the Second World War. As a systematic response to protectionism, the principle of non-discrimination seeks effective equality of opportunity in international trade to compete on similar terms and conditions. It does so by ensuring that Governments apply policies to regulate international commercial transactions regardless of the origin of the goods, services or service supplier. The principle was subsequently brought into the WTO Agreements. As with the human rights principle, the formulation of the principle of non-discrimination in trade law is not uniform across the various Agreements although the formulations display certain common characteristics.

17. Importantly, the principle of non-discrimination under trade law takes two forms. The principle of non-discrimination in the form of most favoured nation (MFN) treatment concerns competition between foreign goods, services and service suppliers. MFN treatment requires each WTO member State to grant to every other member State the most favourable treatment that it grants to any other country with respect to the import and export of "like" goods, services and service suppliers.[11] For trade in goods, the uneven application of customs duties and other trade taxes is the most common form of discriminatory treatment which MFN treatment seeks to avoid. Grain imports are an example. If a Government lowers the tariffs applied to the import of grain from one country, the principle of MFN treatment obliges the Government to offer the same advantageous tariff immediately and unconditionally to the imports of grain from all WTO members. For trade in services, the forms of applicable discriminatory measures tend to be much wider as a substantial amount of trade in services occurs inside a country rather than at the border. Consequently, article II of GATS (General Agreement on Trade and Services) is wide in scope and applies to "any measure covered by this Agreement", which includes regulations taken

by central, regional and local governments. In relation to intellectual property protection, the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement), MFN treatment requires that any advantage, favour, privilege or immunity relating to intellectual property protection (IPP) that is granted by a WTO member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other WTO members.[12]

18. The second form of the principle is national treatment. The principle of non-discrimination in the form of national treatment concerns competition between national and foreign goods, services and service suppliers. National treatment requires each WTO member State to treat foreign goods, services and service suppliers no less favourably than "like" domestic goods, services and service suppliers once they have crossed the border and they are part of domestic commerce. The fundamental purpose of national treatment in relation to trade in goods is to avoid protectionism in the application of internal tax and regulatory measures. The national treatment provision therefore complements the MFN provision by ensuring that the non-discriminatory tariff concessions granted at the border are not frustrated by internal protectionist measures once goods or services are competing on the domestic market. For trade in services, the focus is on avoiding discriminatory regulations that can take many forms, such as a subsidy. For intellectual property protection, national treatment requires each WTO member to accord the nationals of all other WTO members treatment no less favourable than it accords its own nationals with regard to IPP.[13]

19. As with the human rights principle of non-discrimination, MFN treatment and national treatment protect against both de jure and de facto discrimination. Providing the same treatment to goods as they enter the border will generally ensure equal treatment, however, the application of the same regulation will not always ensure the same treatment. The prohibition of de facto discrimination under MFN and national treatment recognizes that the application of formally identical legal provisions can still lead to discriminatory treatment between and against imports in practice. Thus, for example, GATS requires treatment of foreign services and service suppliers to be "no less favourable" than the treatment of other foreign and domestic services and service suppliers, underscoring the need for a qualitative application of the principle of non-discrimination. Therefore, as with human rights law, the trade principle of non-discrimination encompasses indirect discrimination, particularly relevant to national treatment.[14] However, the prohibition of non-nationality-based distinctions that are de facto discriminatory has the potential to open up a whole range of domestic regulations to WTO scrutiny.

20. A key and very complex element in determining whether a measure is discriminatory depends on assessing the "likeness" of the goods, services or service suppliers in question. The wider the definition of "likeness", the greater the number of measures prohibited for being discriminatory. The narrower the definition of "likeness" the greater the number of protectionist measures that are possible. No guidance or definition is given in the various WTO Agreements although case law from inter-State disputes has helped define the meaning of the term. Decisions of GATT and WTO Dispute Panels and the Appellate Body in relation to national treatment have defined "likeness" of goods by examining the competitive relationship between goods - demonstrated by such things as the physical characteristics of the goods, common end uses, tariff classifications and consumers' tastes and habits.[15]

21. In GATS, the issue of "likeness" of services and service suppliers has not yet been clarified.[16]

22. As under human rights law, some discriminatory measures are permitted in certain situations, in recognition that equal treatment will not always be fair in all cases. Such flexibilities include general exceptions and country specific flexibilities.[17] Two forms of general exceptions are relevant. The first exempts some public interest measures from MFN and national treatment. For example, both GATT and GATS ensure that nothing may prevent States from implementing measures that are necessary to protect public morals and to protect human, animal or plant life or health so long as the measures are not applied in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail and do not constitute a disguised restriction on international trade.[18]

23. The second general exception allows developed countries to implement generalized preferences in favour of developing country imports through what is known as the Generalized System of Preferences. The exemption is contained in a decision known as the "Enabling Clause" that allows developed country WTO members to apply tariffs to products from developing and least developed countries that are lower than the MFN level - namely the tariffs applied to products from developed countries.[19] This exception to MFN treatment has been a means of improving market access for developing and least developed countries, and is particularly relevant to agricultural trade. Developed countries may also apply preferential treatment to countries on an ad hoc or exceptional basis, although it must be subject to a WTO waiver on the application of the principle of non-discrimination.

24. Similarly, WTO members may sometimes exclude certain sectors from the application of national treatment using country-specific flexibilities. While national treatment in relation to trade in goods and the grant of intellectual property protection is a principle of general application, national treatment in relation to trade in services applies only in relation to the specific service sectors specified by each WTO member in schedules annexed to GATS. Thus, GATS allows WTO members to make specific commitments to provide national treatment in relation to particular service sectors it is ready to open up to international competition while excluding sensitive sectors where protection of domestic services might be necessary. A full commitment on national treatment prohibits a State from discriminating between domestic and foreign "like" services and service providers, while if a country makes "no commitment", the Government may still introduce restrictions to trade in services, subject to its general obligations under GATS (E/CN.4/Sub.2/2002/9, para. 23).

II. NON-DISCRIMINATION IN THE CONTEXT OF GLOBALIZATION

A. Clarifying the principle of non-discrimination

25. The brief outline of the human rights principle of non-discrimination and the trade principles of national treatment and most-favoured-nation treatment indicates how the two principles have elements in common. For example, both apply to de facto as well as de jure discrimination and both justify differential treatment in some cases where formal equality might not achieve the purposes of the prohibition on discrimination. While the trade principle has traditionally dealt with discrimination against goods, the inclusion of rules concerning trade in

services and intellectual property protection has extended such protection to individuals and corporations - service suppliers and authors. Thus, the trade principle can apply to individuals in some cases, as does the human rights principle.

26. Nonetheless, the two principles should not be confused. In this respect, it is important to highlight the fact that the goals of the two principles are, in many ways, quite different. The human rights principle of non-discrimination is intrinsically linked with the principle of equality. As two sides of the same coin, non-discrimination and equality provide the foundations for the free and equal enjoyment of human rights. The equality referred to is not restricted to formal equality but extends to achieving substantive equality. This is illustrated by the fact that States carry obligations under human rights treaties to take positive measures to redress the structural biases that lead to discrimination. The trade principle of non-discrimination is primarily directed towards reducing trade protectionism and improving international competitive conditions rather than achieving substantive equality. For example, the trade principle of national treatment does not prohibit discrimination against nationals even if the national good, service or service provider might be in a weaker position comparatively.

27. While many measures to prohibit discrimination and promote equality can be achieved outside the scope of international trade, the question arises whether there might be situations where a human rights measure guaranteed to prohibit discrimination and promote equality might be contradicted by a trade measure guaranteed to reduce protectionism and promote international competition. As WTO rules expand into new areas - such as services and intellectual property protection - and to all levels of government regulation - local, provincial and national - the room for overlap and conflict between trade obligations and human rights obligations increases. The rest of this section considers three cases where there is overlap and discusses ways in which WTO flexibilities might avoid overlap leading to conflict. The first deals with the use of government procurement to promote affirmative action. The second illustration considers the application of the principle of non-discrimination in the context of agricultural trade. The third example examines the question of social labelling.

B. Government procurement

28. The first example illustrates how WTO general exceptions might provide greater flexibility to trade rules to protect measures - in this case, government procurement - aimed at reducing discrimination and promoting equality. Governments often use their purchasing power as a means of achieving a range of public interest goals, including the promotion of the rights of disadvantaged or marginalized people. For example, Governments use their purchasing power to promote indigenous businesses, to promote businesses located in outlying areas or areas with high unemployment rates, or to advance opportunities for ethnic majorities that have traditionally suffered discrimination.[20] At the same time, government procurement has also been used to confer economic privileges or political patronage and has therefore raised concerns of domestic protectionism, cost inefficiencies, a lack of transparency, and corruption. Reform of government procurement focuses on reducing such protectionism and lack of transparency, but from a human rights perspective, it is important that this reform process not lose sight of the social functions of procurement.

29. The WTO Agreement on Government Procurement (AGP) as well as the North American Free Trade Agreement (NAFTA) and European Community law establish

rules concerning government procurement, including national treatment.[21] AGP is a plurilateral agreement - in other words, it is not part of the single undertaking and only 28 WTO members are currently parties to the Agreement. However, work continues on developing elements that could be included in a possible future agreement on transparency in government procurement, and GATS article XIII mandates multilateral negotiations on government procurement in services. Further, government procurement reform is an issue in bilateral and regional trade negotiations such as the negotiations on a Free Trade Agreement of the Americas.

30. The application of the trade principle of national treatment would help to reduce protectionism by ensuring no less favourable treatment to foreign government suppliers. However, to what extent is such reform compatible with the use of government procurement to promote opportunities for disadvantaged groups? Take the following example: a member of AGP has a policy that favours indigenous-run businesses in government procurement. The Government designed the policy as a special and concrete measure to ensure the adequate development and protection of indigenous communities that have suffered discrimination in the past (ICERD, art. 2 (2)). The policy is, however, potentially protectionist as it gives more favourable treatment to some domestic suppliers, although the objective of the policy is to reduce discrimination rather than encourage protectionism.

31. The example raises many questions and issues. For instance, had Government already excluded such measures from the application of AGP in a country-specific schedule? Similarly, does AGP apply at all (the Agreement does not apply to government procurement under certain amounts)? What role could the regulatory purpose of the measure have in determining whether the measure is in fact protectionist - and therefore a violation of national treatment? At a wider policy level, the example highlights the different (but not necessarily opposed) expectations and assumptions that motivate human rights practitioners on the one hand (the need for greater equality and social justice) and trade practitioners on the other (the need to create a rules-based trading system and reduce protectionism - both overt and covert).

32. Another important issue to consider is whether the human rights measure might come within the general exceptions to government procurement rules (including national treatment) and thus be reconciled with AGP. The AGP provides for a general exception that gives States flexibility to take measures necessary to promote public morals, public order or safety as well as to protect a range of public interest concerns including human life or health or the products or services of handicapped persons - subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.[22] This requires a two-level examination. First, the measure should fall within one of the headings - “public morals”, “public order” and so on. Second, the requirement should not be
(a) an arbitrary discrimination between countries where the same conditions prevail;
(b) unjustifiable discrimination between countries where the same conditions prevail;
(c) a disguised restriction on trade.

33. The legal scope of this and similar exceptions is still relatively unclear. Many issues arise, including the scope of the terms “public morals”, “public order”, “human life and health”, as well as the assessment of what measures are “necessary” to achieve these goals or whether they give rise to unjustified or arbitrary discrimination between countries where the same conditions prevail. From a human rights perspective, given the central role that the principle of

non-discrimination has in domestic legal systems and international law, respect for the principle of non-discrimination might well be considered a basic value of the domestic legal system in question and a contemporary concern of the international community that is relevant to protect public morals and public order. The existence of concurrent legal obligations under ICERD to take positive measures to reduce discrimination would strengthen this claim and also provide evidence of this, as well as evidence that a measure calculated to promote the economic interests of disadvantaged groups is indeed "necessary".

34. The answer is still open. Relevant human rights bodies could therefore study those elements of international human rights law that are "necessary" to promote "public morals" and "public order" as well as "human life and health", bearing in mind the use and interpretation of such terms domestically, regionally and internationally. Not only would such a study help clarify legal interpretations of international rules, it could also be a means of promoting policy dialogue between trade practitioners and human rights practitioners - domestically, regionally and internationally. In view of this, the Commission could also encourage institutional dialogue - at the ministry level, intergovernmental organization level, expert body level and so on - on the competing expectations of human rights and trade practitioners as a means of developing appropriate strategies for ensuring the concurrent implementation of human rights norms and standards and the development of a rules-based international trading system.

C. Agricultural trade

35. The second example illustrates how WTO exceptions to the MFN principle could help reduce inequalities and discrimination at both the national and international levels in agricultural trade. Small farmers and the rural poor continue to suffer from inequality and discrimination. Current estimates indicate that the rural poor outnumber the urban poor in most developing countries, at times by a factor of two, and rural poverty tends to be deeper than urban poverty, with the rural poor suffering from lower levels of access to basic services such as drinking water, health and sanitation services and primary education. Further, in many countries, the income gap is widening between urban and rural areas and the rural poor face overwhelming obstacles in breaking the poverty cycle.[23] Within rural populations, discrimination also sometimes exists, for example, against rural women or indigenous communities living in rural areas. Specifically, women can suffer as a result of intra-household relations that lead to incomplete pooling of household resources between men and women. Further, women face difficulties in gaining access to credit and traditional gender biases can distance women from development opportunities.[24]

36. Not only do these inequalities exist within countries - they exist between countries as well. A recent study commissioned by FAO highlights the current global inequality in agricultural production and trade.[25] As an example, the study illustrates inequalities in grain production, noting that only a few million farmers - able to take advantage of agricultural technology, the green revolution and government subsidies - can produce 1,000 tonnes of grain per worker per year; a few hundred million farmers are able to produce between 10 and 50 tonnes of grain per worker; and some hundreds of millions of small farmers with only basic hand tools can produce at the most 1 tonne of grain per worker per year.

37. The inequalities weighing against poor farmers and rural populations may result from explicit legal inequalities in status and entitlements, deeply rooted social distinctions and

exclusions, and the application of neutral policies - including trade rules and policies - to the products of farmers with different resources and capacities. Trade rules and policies have a key role to play in alleviating rural poverty. Trade offers opportunities to promote growth which, if managed by appropriate policies, could help reduce global inequalities, rural poverty and discriminatory practices that affect rural populations. However, trade rules that do not take into account the need to alleviate rural poverty can increase the vulnerability of rural populations to external price fluctuations, expose poorer farmers to competition for which they are ill-prepared and reduce crop diversity and subsistence farming by focusing disproportionately on export crops (E/CN.4/2002/54, paras. 35-38). It should also be noted that market distortions due to market access barriers to the agricultural exports of developing countries and subsidized competition from developed countries can affect rural development in poorer countries by constraining agricultural growth and even reducing agricultural growth as small farm incomes are reduced by decreasing agricultural commodity prices.[26] Indeed, the study commissioned by FAO concluded that the root cause of the massive crisis of small farming communities, of rural poverty and hunger in poor agricultural countries lies in the exposure of poorly equipped and unproductive small farming communities to competition from far more productive agricultural systems.[27] Another FAO report has recently concluded that the incidence of external shocks in the form of depressed prices and import surges is expected to rise as agricultural trade is increasingly open, which can further undermine domestic production.[28]

38. In recognition of the fact that the application of the same trade rules to agricultural products irrespective of the level of development of the producing country could result in indirect discrimination, WTO rules include, amongst other measures, an exception to the trade principle of non-discrimination - MFN treatment - in the form of the “Enabling Clause”. The Enabling Clause gave formal recognition to the concept of special and differential treatment by allowing developed countries to grant tariff preferences (market access) in favour of developing countries on a non-reciprocal basis that would otherwise have violated MFN treatment (as a distinction between goods from developed countries and goods from developing countries). To use an analogy with the human rights principle of non-discrimination, the provision of trade preferences could be a positive measure to reduce global inequalities which in turn could provide a means of reducing inequality and discrimination at the national level.

39. While the Enabling Clause ensured that the granting of preferential treatment to goods from developing countries did not violate the trade principle of non-discrimination, it did not create any legally binding obligations to grant such measures. Thus, countries awarding preferences decide unilaterally the precise scope and coverage of the preferential treatment. For example, in 1992, the European Union’s scheme applied to 168 beneficiary countries and included 530 agricultural products, the United States offered preferential treatment to 133 countries over 467 agricultural products while Japan’s scheme applied to 151 beneficiary countries and covered 289 agricultural products. The preferences amounted to 14 per cent of the value of imports in the European Union, 6 per cent in the United States and 16 per cent in Japan.[29] In addition to these schemes permitted under the Enabling Clause, WTO members may also apply for a “waiver” for additional preferential trade schemes provided to only selected groups of developing countries. Examples of preferential agreements granted such waivers include the EU-ACP (African, Caribbean and Pacific countries) Cotonou Agreement and the United States Caribbean Basin Initiative. The schemes give deeper preferences and cover some products that are sensitive for developing country trade such as bananas and sugar.

40. Thus the Enabling Clause and "waiver" exceptions to MFN treatment provide a means of supporting developing countries which could, with additional policies at the national level, promote the right to development and other human rights of poorer people. Preferential treatment can supplement economic transfers from developed to developing countries, such as overseas development assistance (ODA) and foreign direct investment (FDI), and preferential treatment can provide developing countries with better access to developed country markets, increased export volumes and prices, improved economic welfare, higher employment levels and the potential for more economic growth, a more outward-oriented economy, new business alliances and greater familiarity with more sophisticated markets and quality controls.[30] Few empirical studies exist to measure the actual benefits flowing from preferential trade agreements, however, available estimates suggest that preferences can amount to significant shares of the value of exports from the countries concerned. Further, trade preferences are probably most important for the poorest countries as well as vulnerable countries such as small, island and landlocked countries.[31]

41. However, preferential trade agreements also carry costs. Most significantly, the gradual reduction in tariffs generally - on an MFN basis - means that the preferential treatment is constantly being reduced and will eventually be cancelled out completely when tariff levels reach zero as the logical end of trade liberalization. Furthermore, assuming that the value of preferential trade agreements will eventually fade away, the continuation of preferences might result in unsustainable production structures in the beneficiary countries. Similarly, as there is no legal commitment to provide trade preferences, existing preferences can always be withdrawn unilaterally or be made subject to conditionalities which can diminish the potential of the preferential treatment to promote the right to development according to national needs. Also, some preferential treatment can lead to discrimination between countries where some least developed countries or net-food-importing countries are not party to the preferential trade agreement.

42. Consequently, preferential trade agreements alone might not necessarily reduce discrimination in and against rural populations and complementary measures at both the international and national levels might be necessary to supplement gains provided by preferential trade agreements. An example might be allowing, or even encouraging some forms of domestic support that favour vulnerable groups, such as a special subsidy for female-headed households or measures to protect food-security crops. Other forms of special and differential treatment for developing countries in the area of agricultural trade are dealt with in greater detail in the report of the High Commissioner on globalization and its impact on the full enjoyment of human rights (E/CN.4/2002/54), which focuses specifically on the WTO Agreement on Agriculture. Importantly, paragraph 13 of the Doha Declaration calls for special and differential treatment for developing countries to be an integral part of all elements of the current trade negotiations and for special and differential treatment to be embodied so as to be operationally effective to enable developing countries to effectively take account of their development needs, including food security and rural development. Given that the application of the same trade rules to agricultural products irrespective of the level of development of the producing country could result in indirect discrimination that could exacerbate existing inequalities within and between rural populations, implementation of paragraph 13 will be instrumental in combating discrimination within and against rural populations and in alleviating current global inequalities.

D. Social labelling

43. This third example considers the compatibility of social labelling with national treatment. Social labelling - either Government- or NGO-sponsored - is increasingly being used to inform consumers and to promote corporate accountability. Labels can help consumers identify characteristics of the product and its production and can be particularly relevant to promote fair trade - for example, by demonstrating that an agricultural producer has received a fair price; to promote workers' human rights in the process of production - such as equal pay for men and women; and to identify businesses that adopt corporate social responsibility codes. However, social labelling also presents challenges. In particular, social labelling might unfairly discriminate against goods not carrying the label that nonetheless respect high social standards. Similarly, the use of a social label does not necessarily mean that the producer adheres to the standards or that those standards meet internationally recognized human rights or International Labour Organization standards. Further, social labels alone might not always be sufficient to treat the root causes of discrimination and inequality in production processes. Nonetheless, social labelling has also been effective and its growing popularity is putting Governments under increasing pressure to adopt mandatory social labelling schemes.

44. While social labels provide a means of promoting human rights and non-discrimination in the context of trade, social labelling schemes could be challenged as restrictions to trade under national treatment and other provisions in both GATT and the WTO Agreement on Technical Barriers to Trade (TBT). Take, for example, a government-sponsored compulsory labelling scheme that does not specify the origin of goods and that is calculated, amongst other things, to promote fair trade and respect for gender equality in the workplace.

45. Under GATT, the first issue relevant to determining the compatibility of the social label with the principle of national treatment is a determination of whether the social label distinguishes two "like" products - one bearing the label and the other not. The determination of "likeness" in relation to national treatment examines, first, the competitive relationship between the goods and second, an assessment of whether imported products have been accorded treatment "no less favourable" than domestic products.

46. In relation to the first issue, competitive relationship is determined by reference to such things as goods' physical characteristics, common end uses, tariff classification, and consumers' tastes and habits. Importantly, the promotion of fair trade and equal pay are often of concern to consumers' tastes and habits and can sometimes affect the competitive relationship between two goods. This might suggest that those products bearing the label are "unlike" those without the label. However, these concerns are closely related to the process of production of the goods rather than the products themselves. WTO jurisprudence is unclear whether GATT covers measures relating to product and process methods (PPMs).[32] If measures relating to non-product-related PPMs fall within the scope of national treatment, the PPM indicated by the social label - respect for fair trade and gender equality in the workplace - might be relevant to a determination of whether goods carrying the label and other goods are in fact "unlike". However, even if PPMs could be indications of unlikeness - thus demonstrating that the social labels are not discriminatory - this factor would have to be considered along with other characteristics of the products in the overall assessment of likeness.

47. Second, even if it is found that the social label applies to "like" goods, there is a further issue of whether the design, structure and application of the measure have led to "less favourable treatment" for imported goods. Distinctions can still be made between "like" imported and domestic goods without according to the group of "like" imported goods, for this reason alone, "less favourable treatment".[33] This emphasizes the importance of preventing trade protectionism as the overall objective of the trade principle of non-discrimination. While the situation is not clear in WTO jurisprudence, the fact that a Government-sponsored social labelling scheme aims to promote gender equality and fair trade rather than afford protection to domestic production could be relevant to indicating that there has not been "less favourable treatment" to imported goods. The further issue of whether the social labelling measure might be saved under the public morals exceptions under article XX of GATT will not be discussed further here.

48. Alternatively, the Government-sponsored compulsory labelling scheme might be treated as a technical regulation and therefore be considered under the TBT Agreement. The TBT Agreement seeks to ensure that the preparation, adoption and application of technical regulations and standards as well as testing and certification procedures do not create unnecessary barriers to trade. The TBT Agreement includes the principle of non-discrimination in the form of MFN and national treatment with regard to the preparation, adoption and application of technical regulations and standards. Importantly, instead of treating questions of protection of human life and health as general exceptions, the TBT Agreement incorporates these concerns into the determination of whether a measure is discriminatory. Thus, under article 2.2 of the TBT Agreement, WTO members undertake to ensure "that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective". The Agreement provides a non-exhaustive list of "legitimate objectives" such as the protection of human life and health. The open-ended nature of the legitimate objectives of a regulatory measure could provide the flexibility to support a social labelling scheme directed to the legitimate objective of respecting the human rights principle of non-discrimination. However, while the TBT Agreement explicitly includes within its scope measures relating to product-related PPMs, it is unclear whether the Agreement includes a measure concerning non-product-related PPMs such as the present case concerning a distinction based on respect for fair trade and gender equality in the process of production.

49. Assuming that a social label applied to promote fair trade and reduce discrimination was considered a "legitimate objective", the measure would still have to pass a "necessity test". In other words, a social label designed and applied in order to promote human rights would still have to pass the test of being no more trade-restrictive than necessary to fulfil that objective. Thus, the design of a measure to combat discrimination against one of the recognized categories might have to consider its trade restrictiveness. The question arises whether this would have the effect of subordinating human rights obligations to trade rules. Conversely, the clear legitimacy of a measure based on fundamental international human rights principles and ILO standards might itself prove the measure to be "necessary".

50. While the outcome is far from clear, the above example seeks to illustrate a way that human rights concerns of combating discrimination and inequality could eventually be reconciled with the interpretation of national treatment provisions. On a final note, it is important to stress that, although social labelling can be an effective way to combat discrimination, achieve fair trade and greater corporate responsibility, and promote a greater

awareness among consumers of global values, it should not replace financial and technical assistance to countries so that they can meet those standards. States have agreed to cooperate internationally in order to promote economic, social and cultural rights. Overseas development assistance directed towards poverty alleviation is an important complement to social labelling and essential to eradicating intergenerational poverty that can itself lead to or exacerbate discrimination.

III. CONCLUSIONS AND RECOMMENDATIONS

51. **Respect for the principle of non-discrimination is a fundamental means of promoting a more inclusive globalization that reduces inequalities within and between nations. Not only is the principle of non-discrimination a justifiable goal in itself, but combating discrimination and promoting equality can influence positively the dynamics of growth and poverty reduction. As the World Bank stated in its *World Development Report 2000/2001: Attacking Poverty*, "lower inequality can increase efficiency and economic growth through a variety of channels".[34] While the principle of non-discrimination exists under both human rights law and trade law, the objectives are quite different. While the principle under human rights is directed towards protecting the weak and vulnerable and removing the structural barriers to achieving greater equality in society, the principle under trade law is focused more closely on combating trade protectionism and improving international competitive conditions. As international trade rules expand their scope into new areas of government regulation, understanding how the human rights imperatives of reducing the structural biases that lead to discrimination and promoting substantive equality within the trade principle of non-discrimination is a crucial question in the debate on globalization. The present report has sought to illustrate ways in which this could be possible. The following brief recommendations are offered as indications of how to integrate and effectively implement the principle of non-discrimination in the debate on globalization.**

52. ***Understanding the human rights implications of general exceptions to trade rules*. The pertinent bodies could examine the potential, from a human rights perspective, of public moral exceptions such as article XX of GATT and similar articles in other WTO Agreements.**

53. ***Recommendations on agriculture*. Given the importance of rural development as a fundamental step in achieving national development in other fields and the significance of agricultural trade as an engine for economic growth and rural development, WTO members would be well advised to make progress on implementation of the Doha Declaration, in particular paragraph 13. Essential measures include targeting assistance for women and vulnerable individuals and groups; enhancing access to export markets for products from poorer countries; promoting assistance to raise productivity and production for small farmers; targeting support for food security crops; increasing investment in the sector; and establishing social safety nets for vulnerable individuals and groups to promote food security.[35]**

54. ***Promoting institutional coordination*. The pertinent bodies could consider appropriate means of promoting institutional dialogue - between the WTO General Council and the Commission, between treaty bodies and the WTO Appellate Body, and**

nationally between social and trade ministries and between civil society and Government on social/trade-related issues such as government procurement, agriculture and poverty, and social labelling.

55. ***Human rights impact assessments*. States should undertake human rights impact assessments of trade rules both during the process of the negotiations as well as post-negotiation. Such assessments should be public and participatory, focus in particular on disadvantaged and vulnerable groups as well as gender effects of trade rules, and States should raise the findings in trade negotiations. Poorer States could consider seeking financial and technical assistance in undertaking human rights impact assessments.**

Notes

[1] See the report of the International Law Commission on its fifty-third session, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), p. 208. See also A. Bayefsky, "The principle of equality or non-discrimination in international law", *Human Rights Journal*, vol. 11, No. 1-2, pp. 18-24.

[2] See Human Rights Committee, general comment No. 18, para. 7. The general comments of the Committee on Economic, Social and Cultural Rights also rely on this definition.

[3] See also article 2 of the "Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights" (E/CN.4/Sub.2/2003/12/Rev.2), concerning business responsibility in relation to the right to equal opportunity and non-discriminatory treatment.

[4] A. Christensen, "Structural aspects of anti-discriminatory legislation and processes of normative change", in Ann Numhauser-Henning (ed.), *Legal Perspectives on Equal Treatment and Non-Discrimination*, Kluwer Law International, the Netherlands, 2001, pp. 39 and 40.

[5] K. Wentholt, "Formal and substantive equal treatment: the limitations and the potential of the legal concept of equality", in *Non-Discrimination Law: Comparative Perspectives*, T. Loenen and R.R. Rodrigues (eds.), Kluwer Law International, The Hague, 1999, pp. 62-64; T. Loenen, "Indirect discrimination: oscillating between containment and revolution", in ibid., p. 195.

[6] M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, N.P. Engel, Kehl, Strasbourg, Arlington, 1993, p. 44.

[7] M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, Clarendon Press, Oxford, 1995, p. 190. Bayevsky, op. cit., p. 29.

[8] Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986), contained in E/C.12/2000/13, at para. 38.

[9] Craven, op. cit., p. 184.

[10] Limburg Principles, op. cit., para. 39.

[11] Article 1 of GATT states that "any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members". Article II of the General Agreement on Trade in Services states the MFN principles as follows: "With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country."

[12] The TRIPS Agreement, art. 4.

[13] Ibid., art. 3.

[14] See, e.g. R. Howse and E. Tuerk, "The WTO impact on internal regulations - a case study of the *Canada-EC Asbestos Dispute*", in *The EU and the WTO: Legal and Constitutional Issues*, G. de Búrca and J. Scott (eds.), Hart Publishing, Oxford and Portland, Oregon, 2001, p. 285 and footnote 9 referring to cases including *EEC-Regime for the Importation, Sale and Distribution of Bananas*, Appellate Body Report, WT/DS27/AB/R, 25 September 1997.

[15] See Report of the Working Party, *Border Tax Adjustments*, BISD 18S/97 (1972), para 18; and Panel Report, *Japan-customs duties, taxes and labelling practices on imported wines and alcoholic beverages*, BISD 34S/83 (1988), para. 5.6, cited in R. Howse and E. Tuerk, ibid., p. 293. See Panel Report of 11 July 1996 (WT/DS8/R, WT/DS10/R, WT/DS11/R) and Appellate Body Report of 4 October 1996 (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R) in the case *Japan-Taxes on Alcoholic Beverages*, cited in M. Bronkers and Natalie McNelis, "Rethinking the 'like product' definition in GATT 1994: anti-dumping and environmental protection", chapter 19 in *Regulatory Barriers and the Principle of Non-Discrimination*, Thomas Cottier and Petros C. Mavroidis (eds.), World Trade Forum, vol. 2, University of Michigan Press, 2000, p. 346.

[16] WTO, "Most-favoured-nation treatment and national treatment", Working Group on the Relationship between Trade and Investment, Note by the secretariat (WT/WGTI/W/118), para. 19.

[17] Ibid., paras. 25-32.

[18] GATT, art. XX and GATS, art. XIV.

[19] See the 1979 Contracting Parties Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (L/4903).

[20] C. McCrudden, "Social aspects of sustainable public procurement: some preliminary comments", paper delivered at the Second Expert Meeting on Sustainable Public Procurement, Kifissia, Greece, 3-4 November 2003.

[21] See, e.g., the WTO Agreement on Government Procurement, art. III.

[22] AGP, art. XXIII. The article is subject to the requirement that the measures not be applied in a manner that would constitute arbitrary or unjustified discrimination between countries where the same conditions prevail or a disguised restriction on international trade.

[23] FAO, "Rural development: some issues in the context of the WTO negotiations on agriculture", *FAO Papers on Selected Issues Relating to the WTO Negotiations on Agriculture*, FAO, Rome, 2002, p. 29.

[24] UNCTAD, *The Least Developed Countries Report 2002: Escaping the Poverty Trap*, UNCTAD, Geneva, June 2002, p. 116.

[25] M. Mazoyer, "Protecting small farmers and the rural poor in the context of globalization", FAO, Rome, 2001.

[26] FAO, op. cit., p. 30.

[27] Ibid., p. 16.

[28] FAO, "Some trade policy issues relating to trends in agricultural imports in the context of food security", Committee on Commodity Problems, Sixty-fourth session, Rome, 18-21 March 2003 (CCP 03/10).

[29] FAO, *The Future of Preferential Trade Arrangements for Developing Countries and the Current Round of WTO Negotiations on Agriculture*, Stefan Tangermann (ed.), Institute of Agricultural Economics, University of Gottingen, FAO, Rome, 2002, chap. 2.

[30] Ibid., chap. 4.

[31] Ibid.

[32] See *United States-Restrictions on Imports of Tuna*, report of the GATT panel (unadopted), 31 ILM 1991, but also *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, report of the Appellate Body, January 2001 (WT/DS161/ab/r, WT/DS169/AB/R).

[33] See Appellate Body report, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 12 March 2001, para. 100.

[34] World Bank, *World Development Report 2000/2001: Attacking Poverty*, Oxford University Press, Oxford, 2001, p. 56.

[35] See FAO (CCP 03/10), op. cit.
