THE MULTILATERAL TRADING SYSTEM AND HUMAN RIGHTS

A GOVERNANCE SPACE THEORY ON LINKAGES

Mihir Kanade

'The Governance Space theory is a significant contribution to the complex study of trade, globalisation and human rights.'

Juan Carlos Sainz-Borgo, Dean, United Nations–mandated University for Peace (UPEACE), Costa Rica

'A compelling case for a right to development approach to WTO and human rights linkages.'

Makau Mutua, SUNY Distinguished Professor, University at Buffalo School of Law, New York, USA

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This book contributes an original theory to understanding human rights and international trade. It offers the 'governance space' framework for analysing the linkages and normative relationships between the multilateral trading system (MTS) and human rights regimes. Drawing upon key case studies, the author identifies connecting strands as also gaps in linkage issues. He further examines the 'right to development' approach to resolve tensions between these two regimes and demonstrates how the approach may be the most appropriate road map to finding sustainable solutions in balancing human rights and equitable free trade in a complex globalised world.

Presenting new legal analyses informed by current debates drawn from international organisations – the World Trade Organization, United Nations, International Labour Organization – governments, civil society and academia as well as global commitments such as the Sustainable Development Goals, the book proposes a systematic and holistic policy intervention.

This timely and transdisciplinary text will be of great interest to academics, students and scholars of human rights, international trade, international law, development studies, public policy and governance, economics, politics and international relations. It will also be useful to policymakers, think-tanks, human rights advocates, professionals, lawyers, civil society organisations, non-governmental organisations and trade experts.

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ABBREVIATIONS

AB	Appellate Body
ACP	African-Caribbean-Pacific
AFL-CIO	American Federation of Labor and Congress of Industrial Organizations
AfT	Aid for Trade
ATLAS	Agency for Trade and Labor Standards
CIL	Customary International Law
CLS	core labour standards
CTD	Committee on Trade and Development
DC	developed country
DFID	UK Department of International Development
D-LDC	developing and least-developed country
DRTD	Declaration on the Right to Development
DSB	dispute settlement body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Communities
ECOSOC	Economic and Social Council
EU	European Union
FTA	free trade agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	gross domestic product
GSP	generalised system of preferences
HRIA	Human Rights Impact Assessment
IC	indigenous community
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice

ILC	International Law Commission
ILO	International Labour Organization
IMF	International Monetary Fund
ITO	International Trade Organization
LDC	least-developed country
MDG	millennium development goal
MEA	Multilateral Environmental Agreement
MERCOSUR	Mercado Común del Sur
MFA	multi-fibre agreement
MFN	most favoured nation
MNC	multinational corporation
MTS	multilateral trading system
NAFTA	North American Free Trade Agreement
NGO	non-governmental organization
NT	national treatment
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
PCG	PVA, cellulose and glass
PPRCs	Peer and Partner Review Committees
PTA	preferential trade agreement
RtD	right to development
S&D	special and differential
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SDG	sustainable development goal
SPS Agreement	Agreement on the Application of Sanitary and Phyto-Sanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TED	turtle extruding device
TMSA	TradeMark Southern Africa
TPRB	Trade Policy Review Body
TPRM	Trade Policy Review Mechanism
TRILS	Agreement on Trade-Related Aspects of Labour
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
TWAIL	Third World Approaches to International Law
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCHR	United Nations Commission on Human Rights

UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties
WB	World Bank
WTO	World Trade Organization
WWII	World War II

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INTRODUCTION TO THE STUDY OF LINKAGES

This book seeks to explore a relatively untrodden and difficult path in legal scholarship. It seeks to unravel the complex muddle created by the myriads of interactions between the multilateral trade regime and the international human rights regime and bring some order back to this scattered field of study. That multilateral trade has some adverse impacts on human rights is almost trite today. Contemporary scholarship in this field, however, suffers from a somewhat hollow core. It lacks a theory. It is characterised either by isolated analyses of individual human rights issues arising due to linkages with the multilateral trading system (MTS) or by a collective dealing of all human rights issues affected by trade as if they all deserve a common solution. Unfortunately, neither of these extremes and whatever falls within has been able to offer any rational manner by which one can make sense of the complex ways MTS impacts human rights. This field of study is evidently in search of a 'golden thread' that can tie together all the splinters. It is in search of a comprehensive theoretical framework that can coherently connect the normative elements of the different linkage-issues and yet leave room for different solutions to those issues from a policy perspective. This book, thus, seeks to fill that void by offering a new framework – conceived of as the 'governance space' framework – for analysing the linkages, which can in turn form the foundation for developing a human rights approach, specifically a right to development (RtD) approach, to resolving the tensions between the two regimes.

The context for understanding linkages

The linkages between human rights and multilateral trade have been a subject of considerable debate since the last two decades.[1] The primary cause for the incessant fuelling of these debates relates to the

sudden intrusion, led by the emergence of the World Trade Organisation (WTO) in 1995 as the nodal agency for multilateral trade, into many issues which were not hitherto considered to be normally in the domain of trade policy (Sampson 2005: 4). These included rules regulating such new areas as intellectual property rights, sanitary and phyto-sanitary measures and trade in services. Unsurprisingly, this intrusion has over the last few years brought to limelight various tensions caused by overlapping international obligations of States under different legal regimes and international fora. Human rights, in particular, merit special concern, inasmuch as States have undertaken through numerous international treaties under the auspices of the United Nations (UN) and other regional bodies to respect, protect and fulfil human rights. The International Covenant on Economic, Social and Cultural Rights (ICESCR), in particular, requires States to pursue policies and strategies aimed at the realisation for every individual of the right to food, health, shelter, education, work and social security. It is imperative that in the face of these human rights obligations, MTS, its policies and rules need to be developed in a manner which would, at the very least, not be in violation of the former and, in fact, would further them. All members of the WTO are bound by at least one core international human rights treaty (Dine and Fagan 2006: 228) and are generally bound by universal human rights obligations as part of Customary International Law (CIL) (Sohn 1982: 2–9; Meron 1989: 93; Henkin 1990: 19) or as part of General Principles of Law (Simma and Alston 1989: 102–8; de Schutter 2014: 66–71).[2] States, thus, face the clear responsibility of adhering to their human rights commitments while operating at the WTO.[3]

However, no sooner did the WTO come into existence that it quickly became clear that MTS did not necessarily share a harmonious relationship with human rights. The WTO policies and rules began coming under some serious hammering from scholars (Garcia 1999; Tandon 1999; Klein 2000; Gathii 2001; Gray 2002; Stiglitz 2002) as well as civil society organisations (International Federation for Human Rights 1999; Oxfam 2002; Human Rights Caucus 2005) with respect to their human rights impacts. An early report emerging from the UN Economic and Social Council (ECOSOC) unceremoniously branded the WTO as a 'veritable nightmare' for human rights of citizens in the third world (ECOSOC 2000: Para. 15), reportedly leading to an official protest letter being shot off by the WTO to the then UN High Commissioner for Human Rights, Mary Robinson (Institute for Agriculture and Trade Policy 2000). However, the most explicit manifestation of the backlash against economic globalisation spurred by the

free trade agenda of the WTO came on 30 November 1999, through the so-called Battle of Seattle, where more than 40,000 people protested against the WTO's Ministerial Conference (Yuen, Burton-Rose and Katsiaficas 2001; Smith 2002; Fominaya 2014: 54–59). As if to reinforce an unfortunate stereotype, police retaliated violently against the protesters, and this response came to be epitomised in popular imagination as representative of a supposed antagonism which WTO nurtures towards human rights.[4]

The historical context for the tensions between the two regimes of human rights and multilateral trade stems from the vision of the victors of World War II (WWII) on how the post-war global framework ought to look like. The 'scourge of war' evidenced by the world, both during and in the immediate aftermath of WWII, witnessed the prelude to a 'New World Order', which was to rest on four pillars – peace and human rights, on the one hand, and trade and finance, on the other (Possel 2008: 192). While the pillars of peace and human rights were necessitated in response to the Holocaust and the catastrophic devastation of the war itself, the pillars of trade and finance were deemed essential as part of the new schema in order to avoid a repetition of the economic instability prevalent during the Great Depression of the 1930s, accompanied by the beggar-thy-neighbour policies which had led to both the emergence and the amplification of WWII (Hoekman and Kostecki 1995: 12; Harrison 2007: 7). The first two pillars of peace and human rights were conceived to be developed and implemented by a global inter-governmental organisation – the UN. In order to develop and implement the other pillar of finance, the Bretton Woods Institutions, including the International Monetary Fund (IMF) and the World Bank (WB), were established in 1944 (Possel 2008: 192). With respect to the fourth pillar of trade, world leaders negotiated the 'Havana Charter for an International Trade Organisation' in 1948 (hereafter, Havana Charter 1948). However, the planned International Trade Organisation (ITO) never saw the light of the day due to refusal by the US to ratify it, despite having taken the lead in its negotiations (Narlikar 2005: 11; Kinley 2009: 39). What did come into effect was the General Agreement on Tariffs and Trade, 1947 (hereafter, GATT 1947), which operated as a de facto trade institution (mostly ad hoc, and without a well-defined institutional structure) until it metamorphosed into the WTO in 1994 by virtue of the Marrakesh Agreement Establishing the World Trade Organisation (hereafter, Marrakesh Agreement 1994). It is for this reason that the UN and the WTO, despite sharing some common objectives (although, obviously, not all), have from the outset adopted different approaches in

their functioning – the human rights–centric approach of the UN and the economic approach of the WTO. This difference in approaches of these two institutions since their inception gives us a very good indication of why the two legal regimes of multilateral trade and human rights have developed more or less independently from one another, as against an interdependent and integrated system (Konstantinov 2009: 317–21).

A brief overview of the approach of the UN

Bare perusal of the Charter of the United Nations (hereafter, UN Charter 1945) reveals the importance placed by its drafters on the recognition, protection and advancement of human rights as one of the primary institutional objectives of the UN. The Preamble proclaims that the peoples of the UN are determined 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small' (UN Charter 1945: Preamble, Para. 2) and 'to promote social progress and better standards of life in larger freedom' (UN Charter 1945: Preamble, Para. 4). Similarly, one of the fundamental purposes of the UN is 'to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion' (UN Charter 1945: Article 1, Para. 3). The Charter also specifically mandates the UN as an organisation to promote 'universal respect for, and observance of, human rights and fundamental freedoms' (UN Charter 1945: Article 55(c)).

In order to operationalise these mandates, the UN Charter, among other things, required the ECOSOC to establish a Commission on Human Rights (UN Charter 1945: Article 68), whose work led to the adoption of the Universal Declaration of Human Rights (UDHR) by the United Nations General Assembly (UNGA) in 1948 (UNGA 1948). The Preamble of the Declaration begins with the solemn recognition by member States that the 'inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world' (UNGA 1948: Preamble, Para. 1). It merely declares what is inherently existing in human beings, just by virtue of their human embodiment.

The UDHR was followed by the adoption of two separate legally binding human rights Covenants on 16 December 1966, namely the International Covenant on Civil and Political Rights (ICCPR) and the

ICESCR. These two Covenants along with the UDHR are today collectively termed as the 'International Bill of Human Rights' as observed by the United Nations Office of the High Commissioner for Human Rights (hereafter, OHCHR) (OHCHR 1996) and, over time, have together come to constitute the bedrock of the international human rights system under the UN.

This working of the UN human rights mechanism is implemented through a comprehensive three-pronged system comprising the Charter-based monitoring bodies, the Treaty-based monitoring bodies and the OHCHR.[5] The Charter-based bodies include the principal organs of the UN and the subsidiary bodies created by those organs, including the Human Rights Council (UNHRC) with its elaborate Special Procedures consisting of Special Rapporteurs and Independent Experts, among other processes. The Treaty-based bodies, on the other hand, consist of all the Committees established under the nine 'core' human rights treaties, which, apart from the ICCPR and ICESCR, include the Convention Against Torture (1984), International Convention for Elimination of All Forms of Racial Discrimination (1966), Convention for Elimination of Discrimination against Women (1979), Convention on the Rights of the Child (1989), International Convention on the Protection of the Rights of All Migrant Workers (1990), Convention on the Rights of Persons with Disabilities (2006) and the International Convention for the Protection of All Persons from Enforced Disappearance (2006). The OHCHR, which forms part of the UN Secretariat, coordinates the human rights work of the UN and provides support to the various Charter and Treaty bodies. Additionally, the various UN organs and specialised agencies have also incorporated human rights objectives as the foundational purpose of their working.[6]

Thus, it is clear from what has been synoptically culled out earlier that the UN as an institution is mandated to adopt a predominantly human rights–centric approach to its functioning and, in compliance thereof, has established a relatively spread-out web of human rights mechanisms.

A brief overview of the approach of the WTO

In contrast, the historical events leading to the emergence of the WTO as an institution explain why it has adopted a predominantly economic approach to its functioning. As noted earlier, the ITO which was supposed to be created as the nodal organisation for regulating international trade at the end of WWII, itself remained stillborn. The 23 countries – 12 developed and 11 developing – involved in the

negotiations for exchange of tariff reductions were anxious that implementation of liberalisation not be conditional upon the conclusion of the ITO talks. As a result, they adopted the GATT 1947 as an interim agreement (Hoekman and Kostecki 2001: 38). With the ITO never coming into force, GATT 1947 continued to operate without having an institutional structure, and, over the four decades of its regime, it expanded considerably with many more countries becoming a part of it. However, it also became increasingly fragmented as 'side agreements' or codes were negotiated between subsets of countries (Hoekman and Kostecki 2001: 38). Many new supplementary provisions and special arrangements were added to GATT 1947, yet some important trading sectors like agriculture, textiles and clothing and services were not made subject to MTS.

During the Uruguay Round of negotiations in the 1980s, States deliberated upon a more comprehensive global trading regime bearing an institutional structure. Thus, the WTO was created in order to substitute the hitherto operational GATT 1947. Unlike the latter, the WTO encompassed not only liberalisation of trade in goods (GATT 1947 became part and parcel of General Agreement on Tariffs and Trade 1994; hereafter, GATT 1994) but also trade in services (General Agreement on Trade in Services 1994; hereafter, GATS 1994) and established rules for regulating trade-related aspects of intellectual property rights (Agreement on Trade-Related Aspects of Intellectual Property Rights 1994; hereafter, TRIPS 1994), technical barriers to trade (Agreement on Technical Barriers to Trade 1994; hereafter, TBT 1994), sanitary and phyto-sanitary measures (Agreement on the Application of Sanitary and Phyto-Sanitary Measures; hereafter, SPS 1994), among others. It also created a new and fairly sophisticated system for settlement of multilateral trade disputes (Understanding on Rules and Procedures Governing the Settlement of Disputes 1994; hereafter, DSU 1994) and for periodic review of members' trade policies (Agreement on Trade Policy Review Mechanism 1994). Pertinently, the WTO was not made a part of the UN system and was conceived to operate as an independent international institution.[7]

The WTO proclaims that the economic case for an open trading system based on multilaterally agreed rules rests largely on 'commercial common sense' but is also supported by evidence emerging from the experience of world trade and economic growth since WWII (WTO 2015a: 13). Thus, it points out that tariffs on industrial products have fallen steeply and now average less than 5% in industrial countries. It also points out that during the first 25 years after WWII, world economic growth averaged about 5% per year, a high rate that was partly

a consequence of lower trade barriers. It further observes that world trade grew even faster, averaging about 8% during the period.

The 'commercial common sense' case for liberalisation of trade internalised by the WTO finds its genesis in the economic theory of 'comparative advantage' propounded by the classical economist David Ricardo (1817). In its basic form, it simply means that there are gains from trade associated with minimising opportunity costs through the division of labour, that is specialisation (Hoekman and Kostecki 2001: 33). An illustration at the international level may best explain the theoretical underpinnings of comparative advantage. Suppose that the US is better than Costa Rica at making automobiles, while Costa Rica is better than the US at producing coffee. It is clear that both would benefit if the US specialised in automobiles and sold them to Costa Rica, while Costa Rica specialised in producing coffee and traded it with the US. Now, this is a case where both the US and Costa Rica have absolute advantage over each other in the respective products.[8] But what if we assume now that Costa Rica is worse than the US at producing both automobiles and coffee? The theory of comparative advantage states that even in such situation Costa Rica must specialise and produce in what it comparatively does best, which is producing coffee even if it is not as efficient as the US in doing so, and the US must still specialise in what it comparatively does best, which is manufacturing automobiles. This way both can trade in these products and benefit from such international trade.[9] The comparison here is between Costa Rica's relative efficiency in producing coffee versus producing automobiles, compared to the US's relative efficiency in producing the same products. The theory of comparative advantage builds on the proposition that a country does not have to be best at anything to gain from trade (WTO 2015a: 14). It must simply concentrate and invest in what it does better.

This theory can, however, work only if the conditions necessary for ensuring the effective use of comparative advantage of States are guaranteed. Among other things, these conditions require that States enter into reciprocal commitments to reduce trade barriers. For instance, if the US is to enjoy from its comparative advantage in automobiles in the Costa Rican market, it is important that Costa Rica does not create trade barriers which inhibit the access by the US producers to its markets. Similarly, Costa Rica can benefit from its comparative advantage in coffee only if the US allows easy access to its markets to Costa Rican coffee producers. The theory, therefore, suggests that countries desiring to maximise their wealth must not impose trade barriers and that policies which allow the unrestricted flow of goods and services

'sharpen competition, motivate innovation and breed success' (WTO 2015a: 13). Liberalisation is assumed to 'multiply the rewards that result from producing the best products, with the best design, at the best price' (WTO 2015a: 13). This rationale of reciprocal anti-protectionism commitments lies at the heart of the MTS.[10] Indeed, one of the frequently stated objectives of the WTO is for MTS to bring stability and predictability to world commerce, as well as to improve access to markets through the progressive liberalisation of world trade (Robinson 2001: 211).

The WTO's legal architecture is built upon four basic rules which seek to ensure the permissive environment necessary for the theory of comparative advantage to work. The first such rule applicable to trade in goods is that WTO members must 'bind' themselves, pursuant to periodic negotiations, to the maximum tariffs they may charge other WTO members on a particular product (GATT 1994: Article XXVIII bis (1)). These agreed-upon tariff concessions then become 'tariff bindings', which are set out in an Annex to GATT 1994 in the relevant members' tariff schedules. Article II of GATT 1994 requires all members to adhere to their tariff bindings and not impose customs duties exceeding what they have committed to in their schedules. This rule is considered indispensable for the theory of comparative advantage to work because without the predictability it brings with it, no country will know which other country's market it can access.

The second and third rules which form the preconditions for the theory to work are the two limbs of the non-discrimination principle. These are the most favoured nation (MFN) principle and the national treatment (NT) principle, which collectively are viewed as the cornerstone of MTS (Trebilcock 2011: 18). The MFN principle requires that customs duties and charges of any kind imposed by any country on any other member country or any advantage, favour, privilege or immunity granted by such country to any product originating in any other country should be accorded immediately and unconditionally to a 'like' product originating in the territories of all other members (GATT 1994: Article 1).[11] Thus, MFN captures the idea that as part of MTS, countries cannot normally discriminate between their trading partners, and, therefore, no WTO member should be charged a higher customs duty and charges of any kind by a particular country than another WTO member with respect to 'like' products. This principle is considered fundamental to the successful implementation of the comparative advantage theory. For instance, without the MFN principle, the US may be allowed to charge Nicaragua a lower customs duty on its coffee in comparison with what Costa Rica is charged, resulting in a situation where

Costa Rica will not be able to benefit from its comparative advantage, thereby defeating the underlying economic logic behind liberalisation. The second limb of non-discrimination, NT principle, requires that once the customs duties have been paid off by foreign exporters at the border, then no additional burdens may be imposed on them in the domestic market through internal taxes, charges, laws, regulations and so on, if the domestic producers of like products do not bear the same burden (GATT 1994: Article III).[12] Again, this principle seeks to ensure that comparative advantage theory works. For instance, in its absence, the Costa Rican coffee producer who has exported his or her coffee to the US may be unable to benefit from comparative advantage if his or her coffee is charged an internal value added tax in the US, while the domestically produced coffee in the US is not.

The fourth important essential rule, especially in the context of trade in goods, is elimination of quantitative restrictions. Article XI of GATT 1994 prohibits the use of quotas or import or export restrictions on the importation or exportation of goods into or out of any member State. Again, the idea here is that unless such quotas are prohibited, Costa Rica may not be able to benefit from its comparative advantage, if Nicaragua is guaranteed a particular quota in terms of the total imports of coffee into the US or if Costa Rica is prohibited from exporting to the US coffee beyond a particular quantity.

It is in the aforesaid background that Petersmann (2008a: 169) has rightly pointed out that the approach of the WTO as well as its objectives are predominantly economic.

Different approaches, shared objectives and unfortunate tensions

This dichotomised structure has resulted in a rather ambivalent situation for States since they are legally bound to both regimes. At the UN, States adopt (or at least are required to adopt) a human rights–based approach in compliance with their obligations under the UN Charter and various human rights treaties. In the same breath, under the auspices of the WTO, these very States adopt a predominantly economic approach in line with the WTO agreements. The ambivalence in approaches obviously can result in tensions if the WTO obligations lead to undermining the obligations on States cast under international human rights law. In other words, if certain policies or rules adopted by States under the WTO result in undermining human rights, then those States can end up undermining or even breaching their human rights commitments in favour of their trade commitments.

The fact that existing tensions between the two regimes of human rights and multilateral trade can be explained by the initial adoption of different approaches by States at the UN and the WTO, does not either mean that this was inevitable or that it was appropriate. Despite the distinct approaches adopted by States at the two organisations, both, in fact, do share some common objectives. Article 55(a) of the UN Charter provides that the UN 'shall promote higher standards of living, full employment, and conditions of economic and social progress and development'. These are very similar to the expressions present in the Marrakesh Agreement which states that the Parties to the Agreement recognise:

> that their relations in the field of trade and economic endeavour 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, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.
>
> (Marrakesh Agreement 1994: Preamble, Para. 1)

This similarity in language of the two provisions is no sheer coincidence. The Havana Charter of the stillborn ITO made express reference to Article 55 of the UN Charter, wherein it was recognised that the first purpose and objective for the creation of the ITO was 'the aims set forth in the Charter of the United Nations, particularly the attainment of the higher standards of living, full employment and conditions of economic and social progress and development, envisaged in Article 55 of that Charter' (Havana Charter 1948: Article 1). Almost identical words found expression in GATT 1947 which recognised that the relations of members in the field of trade and economic endeavour 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' (GATT 1947: Preamble, Para. 2). Although specific reference to Article 55 of the UN Charter was not made in GATT 1947, the context in which those expressions were mentioned is obvious. As we

have seen earlier, these expressions eventually found their way into the Marrakesh Agreement of the WTO as well.[13]

The shared objectives of both MTS and human rights can also be traced to Article 28 of the UDHR, which states that 'everyone is entitled to a social and international order in which the rights set forth in this Declaration can be fully realised' (Possel 2008: 192). This acknowledgement, therefore, captures the intention of the drafters at the time that the international order related to trade as well ought to have been such that the human rights enshrined under the UDHR could be fully realised. This is all the more evident if we consider that the UDHR was proclaimed almost around the same time that GATT 1947 came into effect.

These facts emphasise that although the two organisations were established separately with specialised mandates, it was never the original intention that they develop in 'splendid isolation' from each other. To the contrary, what was sought to be obtained was a unified international social order based on respect for human rights, sovereign equality of states and international cooperation in trade and finance, such that States do not revert back to the circumstances that led to, and escalated, WWII. Indeed, as Howse (2002a: 97) points out, initially, trade liberalisation was embedded within a political commitment to the progressive, interventionist welfare state. Gradually, however, he notes that the 'new trade policy elite' with the bent of 'managers and technical specialists' tended to understand the trade system in terms of the policy science of economics, rather than the original grand normative political vision, leading to systematic isolation of MTS as a regime (Howse 2002a: 98).[14]

There are also good reasons why these two regimes *ought to have* developed in a mutually reinforcing manner. The fields of human rights and trade are interdependent and in many cases overlapping. The fulfilment of human rights depends on generation of wealth and availability of resources, which can result from trade. For instance, exercise of the right to vote, effective functioning of judiciaries, the right to food, clothing and shelter and the right to health all need necessary resources and are thus dependent on successful implementation of trade policies that are aimed at the generation of wealth. Similarly, a healthy population with necessary basic amenities, medicines, access to justice and effective governance are all pre-requisites of a successful MTS.

Yet, as things have developed, WTO policies vis-à-vis human rights have often been severely criticised, including by some who conclude that the WTO itself is antagonistic to human rights (ECOSOC 2000:

Para. 15). Proposed solutions have, therefore, varied from a complete abolition of the WTO (Bello and Legrain 2000), to entirely overhauling the WTO processes by making human rights a central purpose of the same (Dommen 2004). A mapping of the vast landscape of literature on this issue shows that today there definitely exists a widespread concern and recognition among different actors about the adverse effects of MTS and some of its policies on human rights. However, there is no general consensus on how the human rights issues related with MTS must be addressed. There are differences on the role of the WTO itself. There are those who argue that the WTO, being primarily a trade organisation, should not be overburdened with the additional task of handling human rights (Eres 2004; Sampson 2005: 4), while others argue that the WTO has not only moral but legal responsibility to make policies that protect human rights and also promote the same (Howse and Mutua 2000).

On the normative side also, legal scholars differ significantly on how any possible 'conflicts' between trade obligations and human rights obligations of States ought to be resolved.[15] There are scholars who insist that human rights obligations of States 'trump' their WTO obligations in case of a conflict (Howse and Mutua 2000; de Schutter 2011: 176–77; 2014: 72), while others argue that there is no such general normative superiority of human rights in the hierarchy of international legal obligations (Alvarez 2001: 6–7; Marceau 2002: 798). Also, while some scholars argue that the WTO's dispute settlement system is the appropriate forum for States to invoke their human rights obligations to justify breaches of WTO obligations (Pauwelyn 2003a; b), others argue that the DSU prohibits any such invocation of non-WTO law in multilateral trade disputes (Marceau 2001; 2002).

These differences in the moral, legal and political opinions among scholars and policy makers on the role of the WTO in the global society have also manifested themselves in the various solutions proposed to tackle the issue. One of the solutions proposed is strengthening the UN human rights monitoring bodies (Zagel 2005), which do not enjoy the same judicial authority that WTO Dispute Settlement Bodies enjoy. Other solutions include developing a human rights–based approach to the WTO (Petersmann 2001; Robinson 2001; Kong 2005: 232–35; Possel 2008), which involves the whole gamut of proposed reforms, ranging from incorporation of a 'social clause' in the WTO Agreements (Stirling 1996; Sutherland 1998), to changing the objectives of the WTO itself by making human beings the central subject of international trade rather than mere objects (Petersmann 2008a), to conducting human rights impact assessments of trade

policies (ECOSOC 2004: Para. 53; UNHRC 2011a), to changing the judicial approach of the Dispute Settlement Mechanism (Howse 1999; Trebilcock and Howse 2005; Harrison 2007; Howse 2008; Petersmann 2008b; Irish 2011), to adopting a Multilateral Agreement on Trade and Human Rights to be annexed to the Marrakesh Agreement (Choudhury *et al*. 2011).

As spelt out at the outset, these proposed solutions suffer from either a complete issue-by-issue segregation so that there is no coherent theoretical framework for analysing the linkages or from a collective dealing of all human rights issues affected by MTS as if they were a single issue which deserve a common solution. What is lacking, therefore, is a comprehensive framework which will coherently link the normative elements of all the different issues and yet leave room for different solutions from a policy perspective.

Most recent books on the topic tend to be compilations of different essays on different topics without a theoretical framework which makes the field coherent enough to suggest sensible policy responses (e.g. Francioni 2001; Compa and Diamond 2003; Cottier, Pauwelyn and Burgi 2005; Abbott, Kaufmann and Cottier 2006; Joseph 2009; Drache and Jacobs 2014). In the alternative, they tend to be studies only on specific trade-related issues impacting human rights, such as on patents and access to medicines (Hestermeyer 2007); human rights–related trade measures (Cassimatis 2007); health, trade and human rights (MacDonald 2006); hunger and trade (Gonzalez-Pelaez 2005); and indigenous cultural heritage and international trade (Graber, Kuprecht and Lai 2012), among several others. Very few general and holistic studies on the relations between multilateral trade and human rights have been undertaken at a systemic level (Harrison 2007; Aaronson and Zimmerman 2008; Hernandez-Truyol and Powell 2009; Joseph 2011). But most of these studies also, despite being quite comprehensive in their coverage of the different linkage-issues, stop short of providing an underlying theoretical framework with policy application in terms of approaching solutions to those linkage-issues. In other words, while they analyse several linkage-issues, each of them remains a mutually exclusive analysis. There is no central theory systematically explaining how and why those diverse linkage-issues arise in the first place and how they might be connected to each other. In metaphorical terms, studying individual planets without understanding the solar 'system' within which they exist can only lead to a scattered and fragmented analysis.

The study which comes closest to what is being attempted in this book is a human rights–based methodology for analysing the linkages

between international trade law and human rights law developed by James Harrison (2007). However, the analysis by Harrison is restricted to the ways in which human rights grounds can be raised in legal argumentation within the existing WTO structures, particularly before the dispute settlement body (DSB) of the WTO. His methodology operates very much on the analysis of the 'types of human rights measures which States can take to protect and promote human rights in the trade law context' (Harrison 2007: 61). Thus, his methodology includes dividing the human rights measures which States can legitimately take within existing WTO structures into three typologies, namely conditionality-based, compliance-based and cooperation-based, trade-related measures aimed at the protection and promotion of human rights (Harrison 2007: 62). Unfortunately, this methodology is quite restrictive in terms of analysing the *systemic* linkages between multilateral trade and human rights for three reasons. First, it is by self-proclamation based on a legal positivist approach and, therefore, readily accepts WTO laws and rules as they are without critically questioning their formation or scope (Harrison 2007: 18, 51). The methodology only searches for how human rights arguments can be made compatible with WTO rules as they are. By focusing on WTO laws as they are and not also on how they ought to be, Harrison's methodology does not permit consideration of the linkages at a more holistic level. *Per contra*, the main focus of our study is at the broader level, that is how does the MTS (with the stress on the 'system' and not just its rules) impact human rights adversely, and, therefore, the theoretical framework we need must be capable of analysing WTO laws without binding ourselves to accepting the legitimacy of WTO laws as they are. Additionally, it must permit an analysis of linkages which stem from non-legal aspects of MTS. Second, Harrison's methodology only permits an analysis of which measures can be undertaken by States to protect and promote human rights. The analysis we seek to make is at a more fundamental and, hence, deeper level. We seek not to find only the measures which can be taken by States but also to find the reasons linkage-issues arise in the first place and whether there is any systematic way of categorising them. Third, Harrison's methodology focuses on measures, but only those which are 'trade-related'. Thus, it limits our research to finding measures which can be taken by States within what is permitted by WTO rules. To begin with a framework which restricts us from the outset is not compatible with our objective of a systemic study. Indeed, by focusing on a restricted typology-based methodology, Harrison does not address the underlying need for a very theory on linkages.

Other smaller and more restricted studies have separated human rights issues into those where individuals within a State are affected (inwardly measures) and those where individuals outside a State are affected (outwardly measures) (Charnovitz 1997; Leader 2005). However, for similar reasons mentioned earlier, these methodologies are incapable of permitting systemic analyses of how MTS impacts human rights.

A comprehensive theoretical framework calls for a pragmatic deconstruction of the different linkages between MTS and human rights, and this deconstruction, in turn, needs a rational basis for doing so. These deconstructed linkages then need to be bound together in a systematic theoretical thread which explains the normative, legal and philosophical elements involved in the reconciliation of the two regimes. This book is an attempt to do exactly that. It introduces a new theory – coined here as 'governance space' – for understanding how MTS impacts on abilities of States to fulfil their human rights obligations. The 'governance space' theoretical framework is then used for systematically understanding the broad nature and scope of linkage-issues and how they might be connected. Building on this framework, the book also proposes the way forward to achieve such reconciliation using an approach based on human rights, specifically the RtD approach, and, therefore, is also policy oriented. Indeed, it is aimed at influencing the debates on this topic at the WTO, at the UN and in the civil society and academia with respect to the way forward in this increasingly complex globalised world.

Structure of the book

The full import and structure of the arguments raised in this book can only be clear to the reader once the theoretical framework has been presented in the next chapter. However, to enable a useful head-start, it may not be out of place to briefly outline the structure of this book. The book is divided into nine chapters, including this introduction as the first. Chapter 2 will present the theoretical framework used in this book for deconstructing the web of diverse linkages between MTS and human rights and will also essentially form the foundation for the analytical edifice that will be constructed in the subsequent chapters of this book. The framework introduces a theory on 'governance space' and builds on it. 'Governance space' is defined as the space necessary for governance. This includes the space required by all the different State and non-State actors who play a role in governance. With respect to States specifically, 'governance space' refers to

the space which States need to carry out their responsibilities effectively, including the obligation to respect, protect and fulfil human rights. The manner in which WTO rules, policies and structures shape governance space of States determines the impacts on human rights in those States. Using 'governance space' as a central theme, the framework develops three 'linkage-categories' under which different 'linkage-issues' can be arranged and analysed. The first linkage-category includes issues where WTO laws and policies limit the governance space of States in fulfilling their human rights obligations. In these cases, states need governance space but do not have it because WTO laws limit the same. The second linkage-category addresses issues where WTO laws and policies do not limit governance space but create the permissive environment for States to abuse that space. Here, States have the necessary governance space, but MTS creates the environment which enables or permits them to abuse it. The third linkage-category includes issues where MTS inherently creates a limiting environment for States to use the governance space they already have by tapping into their unequal capabilities to benefit from the system. Chapters 5, 6 and 7 explain each of these linkage-categories with the help of one major linkage-issue as a case study. The choice of the three linkage-issues as case studies is based on the impacts these issues have on governance space and human rights in the contemporary world. The two chapters tucked between the theoretical framework and the analyses of each of the linkage-categories deal with the normative aspects of the linkages debate. Chapter 3, thus, analyses the oft-cited argument that human rights obligations of States 'trump' trade law obligations in case of a conflict between the two and argues that this proposition is correct only in very limited circumstances. More importantly, it argues that invocation of the normative hierarchy argument is, in fact, hugely distracting to the human rights project because it diverts attention away from finding solutions and gets caught in polarising and incessant debates which, in any case, serve very little policy purpose. The fourth chapter explores the extent to which international human rights laws can be read into WTO laws, particularly by WTO Panels, as part of their judicial functions. This analysis of the abilities or limitations of WTO Panels is important for us in order to explore whether or not they can play a significant role in efforts to find which human rights friendly policy-oriented solutions are appropriate and pragmatic for the tensions within the three linkage-categories. Chapter 8 of the book proposes the way forward to addressing the three linkage-categories. Building on Chapters 5, 6 and 7, it argues that the two regimes share the common objective

of sustainable development and that this commonality necessitates adoption of a RtD approach to reconciling the tensions. Similarly, building on Chapters 3 and 4, Chapter 8 also examines the normative scope of adopting an RtD approach for MTS. Chapter 9 presents the concluding remarks.

Notes

1 The term 'multilateral trade' is consciously preferred in this book since its core analysis pertains to trade within the architecture of the World Trade Organisation. The other commonly used term 'international trade' is avoided since it is capable of including within its fold 'plurilateral trade', 'regional trade' or 'bilateral trade', which are not the foci of this book.
2 A unique feature about WTO as an international organisation is that its members need not be States, but only customs territories. Article XII of the Marrakesh Agreement states that 'any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement'. Similarly, the Explanatory Note to the Agreement clarifies that the terms 'country' or 'countries' as used in this Agreement and the Multilateral Trade Agreements are to be understood to include any separate customs territory member of the WTO. In this book, the terms 'members', 'countries' and 'States' will be used interchangeably.
3 The UN human rights system has been quite emphatic in its insistence that States must ensure adherence to human rights even when they operate outside the UN's organisational structure. See, for instance, OHCHR (2002: Para. 5); the UN Committee on Economic, Social and Cultural Rights has also emphasised the obligation on States to ensure that 'agreements concerning trade liberalisation should not curtail or inhibit a country's capacity to ensure the full realisation of the right to water' (UN Committee on Economic, Social and Cultural Rights 2002: Para. 35).
4 For a detailed overview of the civil society protests at Seattle, see Thomas (2000).
5 For an overview of the UN Human Rights system, see OHCHR (2016a).
6 See, for instance, the founding documents of the Food and Agriculture Organisation, World Health Organisation, United Nations Children's Fund, United Nations High Commission for Refugees etc.
7 Article V of the Marrakesh Agreement states that 'the General Council shall make appropriate arrangements for effective cooperation with other inter-governmental organisations that have responsibilities related to those of the WTO'.
8 The Theory of Absolute Advantage was first popularised by Adam Smith in 1776 in his book *The Wealth of Nations*. He gave the following illustration:

> The tailor does not attempt to make his own shoes, but buys them off the shoemaker. The shoemaker does not attempt to make his