HUMAN RIGHTS AND MULTILATERAL TRADE: A PRAGMATIC APPROACH TO UNDERSTANDING THE LINKAGES

Professor Mihir Kanade
The University for Peace

A. INTRODUCTION:

The modern recognition of international human rights largely emerged, as Prof. Boudreau stated earlier, out of the agony and ashes of World War II. The linkages between human rights and multilateral trade have been a subject of considerable debate in the last decade or so. The emergence of the World Trade Organization (WTO) in 1995 as the nodal agency for multilateral trade in goods and services led to its intrusion into many issues that were not until then considered to be normally in the domain of trade policy[1]. These included areas such as intellectual property rights and sanitary and phyto-sanitary measures. 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), to respect, protect and fulfill human rights. The International Covenant on Economic, Social and Cultural Rights (ICESCR), in particular, requires states to pursue policies and strategies aimed at the realization, for every individual of the right to food, health, shelter, education, work, and social security.

In the face of these human rights obligations, it is imperative that International Trade policies must be framed in a manner that would, at the very least, not be in violation of the former and, in fact, would further them. All members of the WTO have ratified at least one core international human rights treaty.[2] States, thus, face the dual task of not only adhering to their commitments under both sets of law, but also harmonizing the same so as to avoid breach of one by the other.

International trade policies adopted by States under the WTO have, however, raised serious human rights concerns, with scholars from the civil

[1] Sampson, Gary (2005) – *The WTO and Sustainable Development*, P. 4, UNU Press, Tokyo
[2] Dine, J and Fagan, A (2006) – *Human Rights and Capitalism*, P. 228, Edward Elgar Publishing, Cheltenham, UK.

society[3] as well as at least one early report of the UN[4] itself branding the WTO as a 'veritable nightmare' for human rights of citizens in the third world. The backlash against economic globalization has at its heart the adverse effects that opening up of markets, along with the trade policies of dumping, subsidizing and distorting liberalized trade, mete out to the third world countries. Even so, the adoption of a 'human rights clause' in the WTO Agreements has been met with severe resistance from the developing countries themselves, primarily because they see its incorporation as a proxy for inflicting neo-colonialist policies on them and an underhand means by which the Developed Countries would impose trade barriers.[5]

The purpose of this paper is to provide a pragmatic perspective to the linkages between human rights and multilateral trade. There are two primary reasons why the approach presented in this paper has been self-labeled as the 'Pragmatic Approach'. Firstly, the starting point for this approach is based on a complete bypassing of the oft cited argument by critics that liberalized trade in general has not led to or cannot lead to economic growth and is, therefore, resultantly bad for human rights. Undoubtedly, some critics of the liberalized trade system have cast doubts over its efficacy in bringing about economic growth;[6] however, the fact of the matter is that opening up of markets is now an irreversible process inasmuch as states are legally bound by WTO agreements for a substantial amount of multilateral trade (indeed, the proliferation of Preferential Trade Agreements has only fortified this proposition). States have invested way too much, both structurally and economically, in transitioning to the liberalized trade regime to permit any retraction now. Whether skeptics like it or not, for good or for bad, protectionism is a bygone option, unless specifically permitted by the WTO Agreements in exceptional circumstances. Pragmatism, therefore, demands that the multilateral trade-human rights linkages be discussed bearing that in mind.

The second reason is concerned more with the approach to finding solutions to the problems related to linkages. The criticisms of WTO

[3] Tandon, Yash (1999) *The World Trade Organization and Africa's Marginalization*, Australian Journal of International Affairs, vol. 53, No. 1 (1999), P. 83-94.

[4] United Nations: Economic and Social Council (2000)- The Realization of Economic, Social and Cultural Rights: Globalization and its impact on full achievement of human rights, E/CN.4/Sub.2/2000/13, Para 15

[5] Kolben, Kevin (2006) – *The New Politics of Linkage: India's Opposition to the Worker's Rights Clause,* Indiana Journal of Global Legal Studies (2006), P. 225-259

[6] Joel R. Paul (2003), *Do International Trade Institutions Contribute to Economic Growth and Development?,* 44 Virginia Journal on International Law (2003-2004), Pp. 283-340.

policies vis-à-vis human rights have been so severe that critiques have tended to brand the WTO itself as being antagonistic to human rights.[7] Proposed solutions have, therefore, varied from a complete abolition of the WTO itself,[8] to entirely overhauling the WTO processes by making human rights a central purpose of the same.[9] The fallacy with most of these arguments lies in the fact that human rights, although indeed affected by international trade policies, are so affected in many and varied ways. Some of them are directly a result of inadequacies in the WTO policies, and therefore, warrant a human rights-based approach. But there are also some human rights which, despite the fact that they succumb during the process of opening up of markets, are not directly caused by WTO obligations of States. As such, they deserve to be addressed in a different manner. A holistic all-inclusive approach to problems which are inherently distinct by their very nature cannot be the solution. The WTO is primarily a trade institution and there is no merit in attempting to convert it into a human rights institution, especially in light of the fact that the UN is the specialized international institution bearing responsibility to promote human rights on the global level. The need, however, is to find approaches that ensure that WTO processes do not adversely affect existing legal obligations to recognize and enforce human rights.

In this factual matrix, effective solutions need to be provided and responsibility clearly fixed on States, the UN and the WTO system to jointly and separately take action and to make them accountable for addressing human rights concerns without venturing into beggar-thy-neighbour policies that protectionism entails. This paper would, therefore, attempt to deconstruct the broad ways in which multilateral trade under the WTO affects human rights and would then examine the pragmatic approaches through which both sets of obligations can be harmonized without disturbing the fundamental ethos underpinning both the WTO and the UN. The stress would be on approaches rather than on specific solutions.

[7] Op. Cit. FN 4

[8] Freedom Socialist Party & Radical Women (1999): *Abolish the WTO: Capitalist trade can never be free or fair*, http://www.class.uidaho.edu/gjmarchive/pdf/Images%20to%20upload/WTO%2099/wto20/wtop113099f.pdf (Retrieved on 14/08/2012)

[9] 3D_Trade - Human Rights - Equitable Economy - Dommen, Caroline (2004): *The WTO, International Trade and Human Rights*, available at http://www.3dthree.org/pdf_3D/WTOmainstreamingHR.pdf (retrieved on 14/08/2012)

B. THE APPROACHES OF THE UN AND THE WTO

The 'scourge of war' evidenced by the world, both during and in the immediate aftermath of World War II, witnessed the prelude to a 'New World Order', according to which, the new post-war international order was to rest on four pillars - peace and human rights on the one hand, and trade and finance on the other.[10] The first two pillars of peace and human rights were conceived to be developed and implemented by a global inter-governmental institution to be known as the United Nations. In order to develop and implement the other two pillars of trade and finance, the two Breton Woods Institutions, namely, the International Monetary Fund and the World Bank, as well as the de-facto predecessor of the WTO – The General Agreement on Tariffs and Trade, 1947 (GATT 1947), were established by the participants of the Breton Woods Conference of 1944.[11]

Before focusing upon the complex interactions between the obligations of States under the UN and the WTO, it would only be apt at this juncture to briefly highlight two essential facts, one historical and the other legal, a proper understanding of which is a *sine qua non* for an intelligible appreciation of this topic.

The first issue concerns the historically different approaches adopted by the UN and the WTO in their functioning - the human rights centric approach of the UN and the economic approach of the WTO - despite both organizations having some shared common objectives. The UN since its inception has incorporated, not only in the UN Charter and other Human Rights Treaties, but also in the functioning of its various subsidiary organs,[12] a human rights centric approach. On the other hand, the WTO, like its predecessor, the GATT 1947, has followed a predominantly economic approach based on the theory of liberalization of trade, as would be evident from the Preamble of the WTO Umbrella Agreement.[13]

[10] Possel, Jens (2008): 'A Human Rights approach to 'sustainable development' within WTO', in *Developing Countries and the WTO,* Edited by Sampson, G and Chambers, B, Pp. 192-228 at P.192, UNU Press, Tokyo.

[11] Idem

[12] For instance, see the founding documents of FAO, WHO, UNICEF, UNCTAD, UNHCR etc.

[13] Petersmann, Ernst-Ulrich (2008) – 'The development objectives of the WTO: State-centred versus human rights approaches', in *Developing Countries and the WTO,* Edited by Sampson, G and Chambers, B*,* Pp 169, UNU Press, Tokyo.

This difference in approaches of these two institutions since their inception gives us a very good indication of why the two legal regimes of trade and human rights have developed more or less independently from one another, as against an interdependent and integrated system. This dichotomized development has resulted in a rather ambivalent situation for States since they are legally bound to both the regimes. At the UN, States adopt (or at least are required to adopt) a human rights based approach in compliance with their human rights obligations under the UN Charter and various human rights agreements. In the same breath, under the auspices of the WTO, these very States adopt a predominantly economic approach in order to promote their own economic growth. The ambivalence in approaches results in a problem only when either set of obligations lead to undermining the obligations cast under the other. In other words, if certain policies adopted by States under the WTO result in undermining human rights, then these States are actually breaching their human rights commitments in favour of their trade commitments.

However, what must be stressed is that despite the distinct approaches adopted by States at the two organizations, both, in fact, share some common objectives. Article 55(a) of the UN Charter provides that the United Nations shall promote higher standards of living, full employment, and conditions of economic and social progress and development. These are the very same expressions that are present in the Preamble of the WTO Umbrella Agreement, which reads as follows:

> The Parties to this Agreement,
>
> **Recognizing** that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, 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,…
>
> Agree as Follows:

This only emphasizes the fact that although these organizations were established separately with specialized mandates, it was never the intention that they develop in such remarkable 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.

There are good reasons why these two regimes ought to have developed in a mutually reinforcing manner. The fields of human rights and trade are inter-dependent and in many cases overlapping. The fulfillment of human rights, including both civil and political on the one hand, and economic, social and cultural on the other, depends on generation of wealth and availability of resources, which result from trade. For instance, exercise of right to vote, effective functioning of judiciaries, the right to food, clothing and shelter, the right to health, all need necessary resources and are thus, dependent in part on successful implementation of trade policies. Similarly, a healthy population with necessary basic amenities, medicines, access to justice and effective governance are all pre-requisites of a successful multilateral trading regime. What is apparent is that one cannot exist without the other, especially in the context of today's globalized world.

The second issue that warrants clarity is the legal debate on *interpretation* of WTO rules vis-à-vis human rights treaties. The Vienna Convention on the Law of Treaties, especially Art.31(3)(c) thereof, recognizes the rule of 'Harmonious Construction' of international laws or the rule of 'Systemic Integration'[14]. Quite logically, the interpretative principle of Harmonious Construction means that WTO rules must not be interpreted in a manner that human rights obligations under UN Treaties would be infringed. What is important to remember, though, is that the principle does not mean that human rights provisions should be used to supplement or add a human rights obligation to an existing WTO provision. Also, human rights provisions cannot be used to diminish the operation of provisions under the WTO.[15] In other words, even if it is found that certain human rights are breached because of the *omissions* in WTO agreements, the agreements cannot be added or diminished with human rights obligations under UN Treaties by way of interpretation. This fact is significant because it will be

[14] United Nations: International Law Commission (2006), *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, available at http://untreaty.un.org/ilc/guide/1_9.htm (retrieved on 14/08/2012)

[15] Marceau, Gabrielle (2006), 'WTO Dipute Settlement and Human Rights', in *International Trade and Human Rights*, Edited by Abbott, F et. al., at P.215, University of Michigan Press, USA. This prohibition of 'filling in the gaps' in a provision of law by reading in extraneous requirements, flows from the doctrine of *casus omissus*. See Art.3(2) of the Dispute Settlement Understanding for the interpretative limits on the DSB.

argued in the latter part of this paper that WTO rules generally do not *per se* violate human rights laws. WTO laws, to a large extent, do limit the policy space that States have in order to ensure human rights at home, but that lack of policy space cannot be expanded by recourse to rules of interpretation of treaties. The solution lies elsewhere.

There is another preliminary legal issue that warrants attention. Article 103 of the UN Charter explicitly states that "in the event of a conflict between the obligations of the members of the UN under the Charter and their obligations under any other international agreement, their obligations under the UN Charter shall prevail". Now, Art. 55(3) of the Charter lays down that the UN shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Art. 56 is a pledge by all member States that they will "take joint and separate action in co-operation with the organization for the achievement of the purposes" set forth in the Art. 55. As a result, it has been argued that by virtue of Article 103, the human rights obligations of States as enshrined in Articles 55 (3) and 56 of the UN Charter, enjoy a hierarchical superiority over the obligations of the same States under any other treaty law[16], including WTO law. What follows as a natural corollary from this argument is that in the contingency of a WTO obligation not being capable of being interpreted in a manner consistent with a human rights obligation, the former must be superseded by the latter because of the latter's hierarchical superiority in the normativity of international law.[17]

However, this argument is fraught with dispute. Marceau, for instance, argues that this is a rather expansive interpretation of the aforesaid Charter provisions. According to her, under International Law, only a few human rights are recognized as acquiring the status of 'peremptory norms of international law' (*jus cogens)*, providing them with hierarchical superiority over WTO provisions in cases of conflict. Thus, to say that all human rights including those not enjoying a *jus cogens* status have automatic and unbounded legal primacy over WTO agreements cannot be the correct interpretation of these provisions.[18]

Her arguments do have some merit. Implicit in the argument she rebuts, is a proposition that generally in the normative hierarchy of international law,

[16] Loukaidēs, Loukēs G. (1995) – *Essays on the Developing Law of Human Rights*, Chapter 10, at P.220, Martinus Nijhoff Publishers, Dordrecht, Netherlands.
[17] Federation of International Human Rights (2005), *Understanding Global Trade and Human Rights*, at P.1, available at http://www.un-ngls.org/orf/FIDH.pdf (retrieved on 14/08/2012)
[18] Op. Cit. FN 15

human rights laws stand at a higher pedestal than international trade laws. As stated above and at the risk of necessary repetition, the reason for this proposition is that apparently, human rights obligations are UN Charter Obligations and WTO obligations are not, and therefore, Art.103 settles the issue in favour of the former.

This proposition is, however, not quite accurate. It is indeed possible to trace WTO obligations of States also (i.e. those under the WTO Umbrella Agreement) to the UN Charter itself. As stated hereinabove, Art.56 of the UN Charter says that all Members pledge themselves to take joint and separate action in co-operation with the UN for the achievement of the purposes set forth in Article 55. The pledge by States contained in Art.56 governs the objectives enshrined not only in Art.55 (3), but in Art.55 (1) as well. It would surely be a valid argument to make that the objectives of WTO as enshrined in the Preamble of its Umbrella Agreement, as well as the foundational economic logic underlying the theory of trade liberalization, is to achieve and promote higher standards of living, full employment, and conditions of economic and social progress and development, as is required by Art.55 (1) of the Charter. If that be correct, then what follows is that States under the WTO are actually seeking to fulfill their UN Charter obligations under Art.55(1), which are equally binding as obligations under Art.55(3). In that case, there is no question of human rights obligations under Art.55(3) being hierarchically superior to the obligations of States under Art.55(1). Reliance on Art.103 to confer supremacy to human rights obligations over WTO obligations is then somewhat simplistic in view of the Charter's own corollary purposes to enhance the well-being of the human person..

In any case, even if we assume that there exists a legal primacy of human rights obligations, it would be very important to point out what that entails. Art. 103 would supersede *obligations existing* under WTO Agreements with human rights obligations under UN Charter. If however, it can be shown that human rights obligations are undermined as a result of *absence of obligations* under WTO Rules, Art. 103 may not have application at all. This is indeed the case, as there is no obligation existing in any WTO agreement that requires States to violate human rights. Indeed, as we shall see, several WTO laws do create environments that limit the policy space that States have to adequately address their human rights concerns; but that is somewhat different from arguing that WTO obligations of States are in conflict with their human rights obligations.

Yet, this does not mean that WTO rules and policies can violate human rights. To wit, WTO obligations surely cannot undermine human rights obligations of States, but not because of a presumed hierarchical superiority of the latter under Art. 103. They cannot do so, also because States have undertaken both sets of obligations under two different institutions and obviously, therefore, cannot operate at either one in a manner that they undermine the other.

With this backdrop, let us now analyse the different manners in which human rights are affected while interacting with the process of trade liberalization under the WTO.

C. DECONSTRUCTING MULTILATERAL TRADE-HUMAN RIGHTS LINKAGES

Although there now exists a widespread concern and recognition amongst different actors about the adverse effects of trade policies on human rights, there is no general consensus on how the human rights issues related with trade must be addressed. While some argue that the WTO being primarily a trade organization should not be overburdened with the additional task of handling human rights,[19] others argue that the WTO has not only moral but legal responsibility to make policies that protect human rights and also promote the same.[20] This difference of opinion has also manifested itself in the various solutions proposed to tackle the issue. One of the solutions proposed is strengthening the UN human rights monitoring bodies,[21] 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,[22] which involves the whole gamut of proposed reforms, ranging from incorporation of a 'social clause' in the WTO

[19] Eres, Tatjana (2004) - *The limits of GATT Article XX: a back door for human rights?*, Georgetown Journal of International Law, Vol.35, No. 3. Also See Op.Cit. FN 1

[20] Howse, Robert and Mutua, Makau (2000): *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization*, International Centre for Human Rights and Democratic Development, available at http://www.dd-rd.ca/site/_PDF/publications/globalization/wto/protecting_human_rightsWTO.pdf, (retrieved on 14/08/2012)

[21] Zagel, Gudrun (2005) – *WTO and Human Rights: Examining Linkages and Suggesting Convergence*, International Law Development Organization (IDLO), IDLO Voices of Development Jurists Paper Series, Vol.2, No.2, 2005, at P.20

[22] Robinson, Mary (2000) – 'Making the Global Economy Work for Human Rights', in *The Role of the World Trade Organization in Global Governance,* Edited by Sampson, Gary, Chapter 10, Pp209-222 at P. 218, UNU Press, Tokyo. See Also Op.Cit. FN 10.

Agreements,[23] to changing the objectives of the WTO itself by making human beings the central subject of international trade rather than mere objects,[24] to conducting human rights impact assessments of trade policies,[25] to changing the judicial approach of the Dispute Settlement Mechanism[26]. However, in almost all the proposed solutions, there appears to be a collective dealing of all human rights issues affected by trade, in that, the various facets of human rights being undermined by trade have been treated as a single issue which deserve a common solution. The truth is very much to the contrary. International Trade affects human rights in various ways, directly and indirectly, and no single one-size-fits-all formula can be devised to take care of all the different ways in which WTO policies affect human rights. This calls for a pragmatic deconstruction of these different linkages and this deconstruction, in turn, needs a rational basis for doing so.

Some of the most visible examples of human rights concerns arising out of multilateral trade comprise issues such as lack of access to medicines, subsidies granted in one part of the world affecting livelihoods of producers in another part of the world, trade in products that affect health, labour standards not being adhered to in order to benefit from comparative advantage, amongst others. When it comes to human rights of the citizens of a State, the principal international legal obligation to respect, protect and fulfill those, lies on the State concerned. Therefore, it is obvious, that States need to have adequate 'space' to adopt and implement appropriate 'policies' for respecting, protecting and fulfilling human rights. Their ability to do so can be seriously jeopardized if this 'policy space' is limited due to external

[23] Sterling, Patricia (1996) – The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the WTO, 11 American University Journal of Law and Policy P.1; Sutherland, Johanna (1998) – International Trade and the GATT/WTO Social Clause: Broadening the Debate, 14 Queensland University of Technology Law Journal 1998, P.83.

[24] Op.Cit FN 13

[25] United Nations: *Economic, Social and Cultural Rights: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, Report of the Special Rapporteur Paul Hunt, Addendum: Mission to the World Trade Organization, 1 March 2004, E/EC.4/2004/49/Add.1, para. 53.

[26] Petersmann, Ernst Ulrich (2008) - *Human Rights, International Economic Law and Constitutional Justice*, 19 EJIL (2008) 769. In this article, Petersmann argues that the human rights revolution imports into WTO dispute settlement a conception of constitutional judicial review. For a critique of Petersmann, see Howse, Robert (2008) - *Human Rights, International Economic Law and Constitutional Justice: A Reply,* EJIL 19(5) :945-953. Also see Irish, Maureen (2011), *Special and Differential Treatment, Trade and Sustainable Development,* The Law and Development Review, Vol.4, No.2, Article5, arguing for adoption of a teleological approach by the DSB.

factors, including multilateral trade rules. Because WTO laws are legally binding on all States and because the WTO has a comparatively more robust dispute settlement mechanism than other regimes in international law, they can also shape the limits of the policy space that States have in adopting appropriate domestic laws for promoting human rights. In some instances, WTO laws indeed do limit this policy space whereby they create a limiting environment for States to take protectionist trade measures to safeguard human rights. Examples include WTO laws on subsidies, access to medicines, trade in products that may affect health, amongst others. The solution for these problems obviously lies in amending WTO laws and processes that limit policy space of States to fulfill their human rights obligations.

On the other hand, there are some instances where WTO laws do not necessarily limit policy space of States to fulfill their human rights obligations. Instead, States do so voluntarily in order to take maximum advantage of the liberalized trading system. Examples include lax labour standards adopted by several States in order to benefit from cheap labour and thereby gain comparative advantage on the global market. In this instance, the WTO laws do not create any sort of limiting environment for States to safeguard labour rights of their workers. To the contrary, they create the permissive environment for States to be able to violate labour rights. It is obvious that solutions for problems created by those WTO laws that limit policy space of States and those that do not, cannot be one and the same and there is a need to deconstruct these linkages. On the basis of this framework, we may categorize the linkages between multilateral trade and human rights under two broad heads.

1. Trade Laws that do not limit policy space of States with respect to their human rights obligations:

This category deals with those human rights which are not directly affected by actions of States in *compliance* of their WTO obligations, but are willingly or unwillingly neglected in the process of liberalization and in order to benefit from comparative advantage. In other words, these are cases where in order to address human rights concerns, WTO Agreements need not be amended, tampered with or even revised. As stated above, in this instance, WTO laws do not limit policy space of States to deal with the particular human rights issue at all. This category predominantly includes labour rights, along with all other contextually associated human rights such as gender and child rights.

Many Developing States undermine core labour standards set under the International Labour Organization and other human rights treaties (including working conditions, minimum wages, right to unionize, equal remuneration, prohibition of child labour, gender equality etc.) in order to gain comparative advantage of their products on the world market. For these countries, low wage labour and unrigid working standards constitute their comparative advantage on the global scale since they result in a higher turnover of products and services at lower costs than those prevalent in developed countries. As a result, the incentive for maintaining the status quo with relation to these human rights violations is much more than the obligations under various human rights treaties related to labour standards. In the process, labour rights of actors within developing countries are severely and aversely affected.

Two reasons can be ascribed for this situation within the WTO context. Firstly, the existing provisions of WTO agreements do not create any obligations on member states to abide by their labour rights commitments under the ILO Conventions and other treaties. To the contrary, in the specific instance of labour rights, WTO rules indirectly prohibit any distinctions being made on products manufactured without labour rights abuses and those manufactured by violating labour rights standards. For instance, the principle of Most Favoured Nation Treatment enshrined under Article I of the GATT, means that member States cannot discriminate between trading partners while imposing import tariffs, for any reasons whatsoever, including on grounds of labour rights abuses in the exporting country, if the products are 'like'.

According to GATT jurisprudence, the likeness of a product is determined through the quality, function and end-use of the product, tariff classification and consumer habits and preferences.[27] As the Process and Production Methods (PPM's) do not usually influence the quality of the product and the other aforesaid criteria, a different treatment due to PPM's is not allowed, if the quality of a product is the same.[28] In the *Tuna Dolphin II case*, a differentiation between tuna which was caught with dolphin extruding

[27] World Trade Organization, Dispute Settlement Body: *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, (L/6216 - 34S/83), GATT Panel Report, 10 November 1987, para. 5.6; Also see *European Communities – Measures Affecting the Prohibition of Asbestos and Asbestos Products* (WT/DS135), Appellate Body Report, adopted on 5 April 2001, Para 101

[28] Op. Cit FN 21, at P. 14

devices and tuna which was caught without protecting dolphins, was prohibited, as there was no difference in the 'likeness' of the products based on the aforesaid criteria.[29] Arguably, a similar situation occurs concerning labour rights issues such as minimum wages or forced overtime work. There is actually no precedence in WTO jurisprudence directly with respect to whether products manufactured by labour rights violations are 'like' those manufactured without. However, based on the existing jurisprudence on defining 'like products', we can safely come to similar conclusions. Since the quality, function, end-use, tariff classification etc. of products manufactured by violating labour rights are generally the same as those produced without violating them, a State cannot prohibit the import of such products through an import ban or an additional tax as it would violate Art. III or XI of GATT.

Furthermore, Art.XX of GATT allows a state to take certain measures to protect some non-economic concerns such as human, plant or animal life, but only if these protections are required to be put in place within their jurisdiction. There are similar analogous provisions in other WTO Agreements as well, and they are dealt with later in this paper. As a rule, WTO jurisprudence does not allow protectionist measures to be taken by a State as a response to human rights violations in another country. The first US – Tuna case explicitly rejected measures with extraterritorial effects imposed by US to protect dolphins outside their jurisdiction.[30] In the *Shrimp-Turtle case*, the import ban imposed by US on shrimps from other countries that were netted without turtle extruding devices was held valid by the Appellate Body on the ground that sea turtles are migratory species and are found in territories where the US has jurisdiction.[31] This restriction on extra-territoriality principally seeks to address the concerns of the developing countries, that developed countries might start imposing their own unilateral standards as a proxy for protectionism.[32] Apart from this fear of neo-colonialism, there are sound policy reasons why extra-territoriality should be excluded from Art.XX of GATT and the analogous provisions in other WTO agreements. This has to do with the stability of the multilateral

[29] GATT 1947: *United States - Restrictions on Imports of Tuna* (DS29/R), GATT Panel Report, circulated on 16 June 1994, para. 5.9

[30] GATT 1947: *United States - Restrictions on Imports of Tuna* (DS21/R - 39S/155), GATT Panel Report, circulated on 3 September 1991 (not adopted), paras. 5.25

[31] World Trade Organization, Dispute Settlement Body: *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58), Panel Report, circulated on 15 May 1998, paras 133, 164. However, it did not fulfill the criteria of the chapeau of Art. XX, as the conservation measure was again too restrictive.

[32] Op.Cit. FN 21, at P.16

trading system itself. If exceptional protectionist measures based on extra-territoriality are allowed, there is a grave danger of the system sliding down a slippery slope which we may term as 'extra-extra territoriality'. For instance, if an import ban by the US on products from China is allowed because companies in China are violating labour rights, this is an instance of extra-territoriality. This is because the measure is imposed by the US, not to protect rights of US citizens in the US, but to protect rights of Chinese workers in China. If this were permitted, what stops China from imposing an import ban on US products, because US companies may be violating labour rights neither of US citizens in the US nor of Chinese citizens in China, but of Ecuadorian citizens in Ecuador where such companies may be operating? This is not an instance of extra-territoriality, but of extra-extra territoriality, a portentous slippery slope that will only lead to an utterly dysfunctional multilateral trading system where every State can impose import bans on products from virtually every other country for proxy reasons.

What follows is that together, the concept of 'like products' and the prohibition on trade related human rights measures with extraterritorial effects, have resulted in some labour rights issues in developing countries being ignored by such countries.

There is a second reason why WTO laws do not incorporate a specific 'social clause' or 'labour clause' that may allow States to impose import bans on those States that allow labour rights violations. This reason - and indeed a very potent one - is the vehement opposition by Developing States themselves to the incorporation of such clauses in the WTO Agreements, which would make it incumbent upon members to adhere to strict labour rights standards in the course of their multilateral trade. First is the fear of neo-colonialism, which we have talked about earlier. Secondly, developing countries argue that better working conditions and improved labour rights arise through economic growth — sanctions imposed against countries with lower labour standards would merely perpetuate poverty and delay improvements in workplace standards.[33] Moreover, experience has shown that trade-related human rights measures aimed at changing human rights policies often do not have their intended effect and, on the contrary,

[33] World Trade Organization: *The WTO, Misinformation*, available at http://www.wto.org/english/thewto_e/minist_e/min99_e/english/misinf_e/03lab_e.htm (retrieved on 14/08/2012)

aggravate the situation.[34] History has proven that the imposition of certain human rights and social standards from the outside has almost always been a failure, and those that suffer the most due to such external sanctions are the victims of such abuses themselves.[35]

In this backdrop, it is evident that a stalemate of sorts exists with relation to addressing the labour rights abuses permitted by States, indirectly as a result of participation in the process of trade liberalization under the WTO. The crucial question, therefore, is how should the international community approach this problem? Should the WTO bear the brunt of addressing the human rights abuses under this category?

In searching for an answer to this question, it must be borne in mind that the abuses under this category are not a direct result of member states complying with their WTO obligations. The WTO rules nowhere require States to be lax on labour standards for their own workers. In other words, WTO laws do not create a limitation on the policy space that States have in enhancing labour standards domestically. There is, therefore, no real conflict between WTO laws and human rights laws in this category of linkages.

This is precisely what makes this category so distinct from the second category that will be discussed below. Violations of labour and associated rights, unlike other linkages, are *not* caused due to provisions of WTO Agreements. They are caused because States do not follow their human rights and ILO obligations and breach them. In other words, there is no need to amend GATT or GATS to make it illegal for States to violate labour rights. These obligations already exist under labour rights instruments and must be followed in any case. When advocates talk about countering these violations of labour rights by inclusion of 'labour clause' in WTO Agreements, they are really seeking creation of enforcement mechanisms for labour rights through the WTO, an organization created for a completely different purpose, and not through the body that was created to deal with the issue of labour rights – the International Labour Organization. It is true that the provisions of GATT or GATS do not make products manufactured through violations of labour rights illegal. But that not make the violation of labour rights under ILO instruments legal. They

[34] Bal, Salman (2001), *International Free Trade Agreements and Human Rights: Reinterpreting Art. XX of the GATT*, 10 Minnesota Journal of Global Trade, pp. 62 - 108, at P. 64.

[35] Stern, R.M. and Terrell, K. (2003) - *Labor Standards and the World Trade Organization*, at P. 8, available at http://www.fordschool.umich.edu/rsie/workingpapers/Papers476-500/r499.pdf (retrieved on 14/08/2012)

are illegal anyway. Just by making them illegal under the WTO will not make the violations *more* illegal. As such, WTO Agreements do not really need to be amended to hold States accountable for violation of labour rights.

It is apparent that not much can be achieved by thrusting additional responsibility on the WTO to address this category of human rights abuses. WTO clearly does not have the mandate, resources or expertise to follow up on these issues. This job can be best done by the International Labour Organization itself, and must not be transferred to the WTO. For instance, nothing prevents the UN agencies, including the ILO, from asking States to enforce the labour standards set by various treaties, while conducting trade as per WTO rules. In fact, it is their job to do so. As Zagel puts it, "if the human rights community wanted the enforcement of standards through trade restrictions, this would have been established through the existing human rights instruments, not in an entirely different organization - whose task is to promote free trade".[36] The UN and its specialized agencies are charged with advancing human rights, and a case can be made that these institutions should be strengthened and given the resources they need to carry out their tasks successfully, so that the WTO does not have to deal with the wider agenda that it now seems to be acquiring.[37] Unfortunately, many of the relevant UN treaty bodies (viz. Committee on Economic, Social and Cultural Rights, Human Rights Committee etc.) as well as the Charter bodies (the Human Rights Council etc.) do not have the enforcement mechanisms necessary to effectively hold State actors to their obligations.[38] As such, the approach for this category should really be to strengthen the UN human rights system and the ILO mechanisms, and not additionally burden the WTO.

Referring back to the theme of pragmatism emphasized in this paper, the approach urged above is also necessary, because amending GATT Art.XX to incorporate a new 'labour clause' is an extremely complex process. Art.X of the Agreement Establishing the WTO requires a consensus to be built within the Ministerial Conference, or in its absence, a two-thirds majority, for even tabling the amendment proposal for consideration of the Members. It is highly unlikely that a proposal for amending Art. XX or analogous WTO provisions to include a 'labour clause' would find a two-thirds majority at the WTO under the prevailing circumstances. Given the

[36] Op. Cit. FN 21, P. 20

[37] Op. Cit FN 1, at P. 11

[38] International Federation for Human Rights (2005), *Understanding Global Trade and Human Rights*, Report No. 432/2, available at www.fidh.org/IMG/pdf/wto423a.pdf, at P. 8,9 (retrieved on 14/08/2012)

stands adopted by various States, the possibility of such incorporation is practically nil. It would in fact be more pragmatic to advocate for amending the ILO Constitution in accordance with Art.36 thereof, in order to put in place strong enforcement and supervisory mechanisms. Advocacy strategists must realize that it is a significantly easier process to amend the ILO Constitution than amending a WTO Agreement.

2. Trade Laws that directly limit policy space of States with respect to their human rights obligations:

This category deals with those human rights violations which result directly from the inadequacies in WTO Agreements and corresponding trade policies adopted by members of the WTO. These cases result in limiting the policy space that States have in order to attend to their human rights obligations. This issue is connected intrinsically with the process of liberalization itself, inasmuch as, opening up markets in terms of specific WTO Agreements, entails major structural changes within a society, which in turn ensues in human rights implications. Although structural changes of this kind will inevitably occur within any economy in its normal course of evolution, globalization tends to have both an accentuating and a distorting effect on structural changes.[39] Because WTO agreements necessitate these structural changes, it is imperative that these agreements must be framed in a manner compatible with human rights.

It has become commonplace for critics to argue that existing WTO rules contravene human rights. But a closer scrutiny would suggest that it is not the WTO rules *per se*, but the *inadequacies* in them that lead to human rights being violated. If trade laws limit policy spaces of States to adequately deal with human rights concerns at home, that is because the existing WTO laws create that limiting environment for States, not because WTO provisions are directly contrary to human rights law. Let us test this with three illustrations, which by no means are exhaustive, but are useful to highlight the distinction between the misplaced argument that WTO rules violate human rights and the correct position that the inadequacies in WTO rules result in limiting policy spaces of States to adequately deal with their human rights obligations.

[39] United Nations, Economic and Social Council (2004), *Study on Policies for Development in a Globalizing World: What can the Human Rights Approach Contribute*, E/CN.4/Sub.2/2004/18 of 7 June 2004

The first example is the harmful effect of the inadequate WTO policies enshrined under the Dispute Settlement Understanding (DSU) relating to economic compensations. This example is borrowed from Magda's work,[40] albeit in a different context and to raise a different argument. Cotton is a strategic crop for the four least developed Western and Central African (WCA) countries of Burkina Faso, Benin, Mali and Chad. As over 90% of the cotton produced in this quad is for export, cotton accounts for upto 75% of the export earnings and is thus vital for the poverty reduction strategies in these countries.[41] However, plagued with extreme poverty and malnutrition, these countries are fighting against illegal cotton subsidies by USA and EU, who have continued to provide billions in subsidies for domestic producers, dumping overproduced cotton at 61% below the cost of production between 1997 and 2002.[42] These cotton subsidies by the EU and USA have resulted in substantial reduction of cotton prices, from an average of 72 US cents per pound, to 42 US cents per pound in 2001-02.[43] Such a collapse has unabatedly till today caused havoc to the already fragile economies of these countries and generated substantial losses in their hard currency earnings.

The right to life is guaranteed under Art.6 of the International Covenant on Civil and Political Rights (ICCPR). Similarly, the ICESCR guarantees to all human beings the right to work, including the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, as well as the right to just and favourable conditions of work (Art.6, 7). The illegal subsidies by US have infringed on these rights of farmers in WCA countries. However, assuming that the four countries were to approach the DSB as complainants challenging the illegal subsidies, there is no way in which they could be compensated reasonably for their losses, thereby permitting violating states (in this case the US) to adopt "hit and run"

[40] Shahin, Magda (2008), 'The Cotton Initiative', in *Developing Countries and the WTO: Policy Approaches*, Edited by Sampson, G and Chambers, B, Pp.41-61, UNU Press, Tokyo.

[41] Goreux, L (2004), *Prejudice Caused by Industrialized Countries Subsidies to Cotton Sectors in Western and Central Africa*, available at http://www.fao.org/es/esc/common/ecg/306/en/Goreux_Prejudicef.pdf (retrieved on 14/08/2012)

[42] 3D-->Trade—Human Rights—Equitable Economy & Ethical Globalization Initiative (2004), *US and EU Cotton Production and Export Policies and their impact on West and Central Africa: Coming to grips with international human rights obligations*, www.3dthree.org/en/page.php?IDpage=27&IDcat=5, (retrieved on 14/08/1012)

[43] Oxfam (2002), *Cultivating Poverty: The impact of US cotton subsidies on Africa*, available at http://www.oxfamamerica.org/publications/cultivating-poverty (retrieved on 14/08/2012)

practices.[44] This is because financial compensation falls outside of the WTO mandate and is as such not a permitted solution for the aggrieved party. As Magda rightly points out, under Art.22 of the DSU, compensation can be granted to the successful litigant only by two instruments. Firstly, this can be done by offering supplementary concessions for other products. This mechanism cannot apply to these four countries because they only have a few other exports, and in most cases, these already receive preferential access (on account of special and differential treatment). Second, customs tariffs can be increased on imports by these four countries. This is also of little use to the four countries as it will backfire on their consumers. Also, these countries do not import sufficiently from the US to offset their loss in cotton exports. The only way in which the cotton producers from the WCA countries can be compensated for the severe losses they have incurred is through economic compensation, which is not provided for by the DSU.

A perfunctory perusal of the aforesaid might lead one to conclude on first blush that the existing provisions of the DSU are in violation of human rights. However, a closer scrutiny would reveal that this is not so. The legality of a provision is tested on what it says and not on what it does not say. The provision under consideration actually permits compensation by way of tariff modifications and cannot, therefore, be said to violate human rights *per se*. What inures serious human right issues for the four WCA countries is what is absent from the provision – *the inadequacies* - namely economic compensation. This is an example of how WTO laws can limit the policy space that the WCA countries have in order to attend to their obligations to protect human rights of their citizens.

Similarly, one of the oft cited arguments of a WTO law breaching human rights relates to the provisions of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) in the context of patenting of pharmaceutical products by drug companies in the developed world, which results in predatory prices beyond the reach of the poor in the third world. This is again a misplaced argument. None of the existing provisions of the TRIPS Agreement by themselves can be said to breach human rights, including the right to health. There are after all certain waivers that have been incorporated in the original text of the agreement by virtue of the Declaration on the TRIPS Agreement on Public Health in November

[44] Georgiev, Dencho; van der Borght, Kim (2006), *Reform and Development of the WTO Dispute Settlement System*, P.42, Cameron May, London. The authors describe the practice of States to blatantly violate WTO provisions for the entire period till implementation of DSB judgements as "hit and run" practice.

2001[45] and later by virtue of, what is known as the August 30 Decision[46]. Thus, these provisions consist of procedures for compulsory licensing and contain certain waivers for the benefit of public health in developing and least developed countries. Test these provisions on what they explicitly say, and no argument can be raised that the same are contrary to the human right to health. The waivers may be inadequate to address the right to health (Art.12 ICESCR) and right to life (Art.6 ICCPR) of citizens in the third world (as perhaps can be evidenced by the fact that till date only Rwanda has formally taken benefit of the existing waivers by notifying the WTO[47]), but even then, the existing waivers being in the nature of flexibilities to the strict patent regime cannot be said to violate human rights *per se*. When critics say that provisions of TRIPS Agreement are harmful to public health concerns of third world, and in most cases rightly so, what they really mean is that lack of additional waivers or flexibilities – *the inadequacies* – lead to human rights concerns. In other words, there is a need for more safeguards and if there were certain additional flexibilities which are presently absent, then some of the human rights concerns of the third world countries could be addressed more efficaciously. It is the lack of these additional flexibilities that limit the policy space that States have in order to attend to their oligation to protect and fulfil the human right to health and life.

The third example of how human rights are affected directly by provisions of WTO Agreements by limiting policy space of States is Art. XX of GATT, a provision we have already discussed above in a different context. This is related to the rigours of trade rules to take measures affecting human rights *within* ones' own borders. As discussed while dealing with the first category, extraterritorial measures to protect human rights are prohibited under WTO agreements. However, insofar as territorial measures are concerned, Art. XX of GATT which lists specific public policy reasons that justify deviation from GATT principles. Those directly relevant for trade-related human rights measures are protection of public morals (paragraph a) and protection of human, animal or plant life or health (paragraph b). In addition to fulfilling the requirements of the specific policy goals, the protective measure has to fulfill the general requirements of Art. XX

[45] World Trade Organisation: WTO Document No. - WT/MIN(01)/DEC/2 dated 20/11/01 – adopted on 14/11/01

[46] World Trade Organisation: WTO Document No. WT/L/540 and Corr.1, 30/08/2003.

[47] World Trade Organisation: http://www.wto.org/english/tratop_e/trips_e/public_health_notif_import_e.htm (retrieved on 14/08/2012), whereby Rwanda notified its intention to import the triple combination AIDS therapy drug, TriAvir, under compulsory licence from Canadian drug company, Apotex, Inc.

('chapeau') viz. it must comply with the principle of non-discrimination, and must not constitute a disguised restriction to international trade. The purpose of the requirements in the chapeau is to avoid abuse of the exceptions of Art. XX. Demonstrating that the requirements of the chapeau have been fulfilled is generally a difficult task and existing case law regarding environmental matters and public health concerns shows that the DSB has so far been quite restrictive in its jurisprudence. For instance, in the *Brazilian Retreaded Tyres Case*,[48] Brazil's action to impose a global ban on its import of retreaded tyres under Art.XX(b) on the ground that the same affected the right to health of its citizens was challenged by the EU. Brazil had been forced to grant exemption from its global import ban to the members of the MERCOSUR (Regional Trade Agreement between Brazil, Argentina, Paraguay and Uruguay), who had successfully obtained the said exemption in a judicial proceeding before the MERCOSUR Tribunal. The challenge by EU thus proceeded on the ground that the import ban had been applied to EU by Brazil in a manner that constituted arbitrary or unjustifiable discrimination and a disguised restriction on international trade within the meaning of the chapeau of Art. XX, since it excluded MERCOSUR members. It did not matter that the Brazil did not even want to exempt the MERCOSUR members from the global ban; it was forced to do so by a judicial tribunal. The DSB accepted the contentions of EU by adopting a strict interpretation of the Chapeau, despite agreeing with Brazil that the ban on import of retreaded tyres had a nexus with protection of public health.

The only case in which an action by a State under Art.XX(b) was accepted as valid by the DSB, is the *EC – Asbestos case*.[49] In that case, the DSB did uphold the right of France to impose an import ban on substances containing asbestos on the grounds of protecting public health of its citizens. The DSB also held that the action by France satisfied all the requirements incorporated under the Chapeau to Art.XX. What this signifies is that it is not easy at all for a State to take measures under Art.XX to protect human rights of their citizens, particularly the right to health. In other words, the Chapeau and the clauses of Art.XX create a serious limiting environment for States to have the policy space for addressing human rights concerns.

[48] World Trade Organization, Dispute Settlement Dispute: *Brazil – Measures affecting import of retreaded tyres,* DS/332, Appellate Body Report adopted on 17 December 2007.

[49] World Trade Organization, Dispute Settlement Body: *European Communities – Measures Affecting the Prohibition of Asbestos and Asbestos Products* (WT/DS135), Appellate Body Report, adopted on 5 April 2001, Para 101

Other WTO instruments like the SPS Agreement (Art. 2), TBT Agreement (Art. 2.2) and GATS (Art. 15) also contain similar provisions permitting States to derogate from their trade commitments in order to protect human health and safety, under strict fulfillment of certain requirements. An illustration under the SPS Agreement is the *Hormone Beef Case,*[50] where the EU action of imposing a ban on import of hormone treated beef was challenged by the United States and Canada before the DSB. While EU contended that it had imposed the ban in order to protect the health of its citizens on the basis of perceived adverse effects of hormone treated beef, the US and Canada argued that the requirement under Art.5 of the Agreement of carrying out a prior risk assessment of the effect of hormone treated beef on human health, were not fulfilled. The Appellate body observed that although there was evidence that there were genuine anxieties concerning the safety of hormone treated beef, the EU ban could not be sustained since it was not based on a risk assessment as is required by Art. 5.

This case again confirms the fact that while WTO agreements do permit States to make certain deviations from their trade obligations in order to protect human health and safety within their territories, the provisions operate in a manner that do not serve the purpose of creating such flexibilities. The policy space of States that is sought to be safeguarded by introduction of the Exception Clauses is, in fact, quite limited, as the empirics show.

It is clear from all three examples above that some WTO rules clearly tie up States and their policy spaces in ways that do not allow them to take the necessary measures to sufficiently address human rights concerns of their citizens.

Where the curbing of policy space happens because of inadequacies in WTO rules, can the DSB step in and expand the policy space by way of interpretation? We have already seen that the rule of harmonious construction does not permit adding or diminishing WTO provisions with human rights obligations by way of interpretation. Indeed, to fill up the absence of necessary provisions in the WTO agreements is not an interpretative function which the DSB can assume upon itself. Thus, even if the provisions of WTO agreements are not complete enough to respect,

[50] World Trade Organization, Dispute Settlement Body: *European Communities – Measures Concerning Meat and Meat Products (Hormones),* DS/47 and DS/48, Appellate Body Report adopted on 13/02/1998

protect and fulfill human rights, the rules of interpretation do not permit the DSB to read in human rights obligations into the WTO provisions, to fill up the inadequacies and expand the policy space of States.

Unfortunately, States have tended to compartmentalize their legal commitments - on the one hand as WTO members, and on the other, as States parties to human rights treaties under the UN. The rhetorical and policy disconnect between these areas has led most States to disregard their binding human rights obligations while pursuing trade negotiations.[51] The WTO position itself has for a long time been dominated by the 'watertight compartment's view'[52] i.e., the WTO is a trade organization, not a human rights organization. WTO diplomats and WTO judges have a longstanding preference for avoiding human rights discourse in WTO bodies.[53] Additionally, States themselves do not agree to read into WTO Agreements, human rights treaty obligations exogenous to these Agreements; hence the opposition to incorporation of a human rights clause.

Where then does the obligation on States to address this lack of policy space lie*?* There is clearly a deadlock, and, therefore, a need to find a pragmatic argument which warrants States to take into consideration human rights concerns at all stages of the WTO processes, including pre-negotiation, negotiation and trade policy review, so that this policy space is not unjustly limited by WTO rules, and where these are unjustly so limited, the same are removed by States. However, this lack of policy space has to be addressed not by the DSB's interpretative process, but by some other established procedure.

This approach warrants a search within the WTO Umbrella Agreement itself for an obligation upon States to respect, protect and fulfill human rights. If there does exist such an obligation not exogenous to the WTO Agreements, then it provides legitimacy to the arguments that human rights must be taken into consideration by States while acting at the WTO as a matter of internal WTO obligations. It would also validate arguments that human rights must be the central purpose of international trade, as opposed to purely economic interests. The point of departure would, therefore, be to

[51] Op. Cit FN 17, at P.4

[52] United Nations: *Economic, Social and Cultural Rights: Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization,* Howse, Robert, 9 June 2004,
E/CN.4/Sub.2/2004/17, para. 20.

[53] Op. Cit. FN 13, at P. 180

acknowledge that trade and economic growth are not ends in themselves,[54] but are a means to promote human rights.

This link can be found in the Preamble of the Umbrella Agreement itself, which incorporates 'sustainable development' as one of its principal objectives. Thus, WTO's mandate clearly is to frame all trade policies and agreements in a manner that would achieve sustainable development. In other words, trade policies and agreements cannot be counterproductive to the very institutional objective of achieving sustainable development. It is well established that this concept encompasses three general policy areas: social development, economic development and environmental protection. This has been reiterated by several United Nations texts and many World Summit Outcome Documents.[55]

Right to Development as a Human Right

At the same time, the 1986 Declaration on the Right to Development by the UN General Assembly has also recognized the right to development as a human right.[56] The Declaration was adopted by a vote of 146 to 1 (the US opposing) with 8 abstentions. The Preamble of this Declaration states that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom. This definition of the term 'development' is relatively elastic, but nevertheless a people-centered approach to what is meant by development.

It is also in line with the work of Amartya Sen who explains development as the expansion of freedom of choice for human beings, both in terms of 'processes that allow freedom of actions and decisions, and the actual opportunities that people have, given their personal and social circumstances'.[57]

[54] Op. Cit. FN 17, at P.1

[55] United Nations, World Millennium Summit (2005): GA Doc. No. A/60/L.1, available at http://www.unep.org/greenroom/documents/outcome.pdf (retrieved on 14/08/2012)

[56] United Nations, General Assembly: *Declaration on the Right to Development,* GA/41/128 of 4/12/1986, available at http://www2.ohchr.org/english/law/rtd.htm (retrieved on 14/08/2012)

[57] Sen, Amartya (1999), *Development as Freedom*, P.17, Oxfor University Press, UK. See also United Nations, Economic and Social Council: *The Legal Nature of the Right to Development,* E/CN.4/Sub.2/2004/16 of 1 June 2004

Article 1(1) of the Declaration proclaims that 'the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized'. The human person is the central subject of development and should be the active participant and beneficiary of the right to development [Article 2(1)]. Various provisions of the Declaration oblige States to frame policies which would propagate and further the human right to development of their citizens.

What follows from the aforesaid provisions is that the right to development is a self-standing right. At the same time, it is a composite of all other internationally recognised rights and freedoms. There are strong arguments today that the human right to development has become part of customary international law and States are obliged to ensure the same to their citizens. The *opinio juris* of States is evident from the fact that 146 countries voted in favour of the Declaration. Furthermore, States have consistently and emphatically reiterated thereafter, that the Right to Development is an inviolable human right.[58] States also confirm the same in their practice by acting extensively and uniformly in virtually all fields of international law according to the principles set out in the 1986 Declaration.[59] The Millennium Development Goals and the unequivocal commitment to them by States in their domestic policies is an eloquent example of this. Undoubtedly, sceptics have raised arguments that the 'right to development' is not yet a part of customary international law, and being incapable of judicial enforcement, is therefore, not legally binding upon States; as such it is not a human right at all. However, this argument is fallacious because it erroneously equates human rights with legal rights. In order to be recognized as a human right, the same need not necessarily be a legal right capable of judicial enforcement.[60] There is no doubt, therefore, that the

[58] Vienna Declaration and Programme of Action, World Conference on Human Rights, 48th Session (1993), UN Doc. A/CONF.157/23(1993)

[59] Op. Cit. FN. 10, at P.199. Also see for a detailed analysis of Right to Development as Customary International Law - Aleinikoff, Thomas Alexander and Chetail, Vincent (2003), *Migration and International Legal Norms*, P.260, T.M.C. Asser Press, The Hague, Netherlands. See also Bedjaoui, Mohammed (2008), 'The Right to Development', in *International Human Rights in Context*, Edited by Steiner et.al., P. 1447, Oxford University Press, UK, for the extreme proposition that Right to Development is a jus cogens norm.

[60] See Sengupta, Arjun (2002), *On the Theory and Practice of the Right to Development*, Human Rights Quarterly 24 (2002) 837-889, at P.859, where he explains that in order to be a human right, it is not necessary that it be also recognized as a legal right. See also James Nickel (2007), 'Human Rights as Rights', in *Making Sense of Human Rights*, Pp.22 to 34, Blackwell Publishing.

Right to Development is a human right. The dispute regarding its legally binding nature as part of international human rights law is on-going, but it is neither important nor decisive in the context of the present analysis. Assuming that there is no legal obligation on States to fulfil this right to development as a self-standing right, there can be no doubt that by virtue of the very nature of this right also being an amalgam of all other undisputed human rights, States are legally obliged to respect, protect and fulfil at least the components thereof, and hence in effect, the very right itself.[61] In any case, there can be no doubt that by virtue of the Declaration and individual State practice, this human right, at the minimum, qualifies to be a political and moral obligation of States. This minimum position is sufficient for the purposes of the argument presented hereinunder.

The Right to Development and Sustainable Development

The concept of right to development incorporates the notion of sustainable development and all of its three pillars. Similarly, sustainable development is inherently wedded to human rights and cannot be fulfilled without also fulfilling the *specific* human right to sustainable development. One cannot survive without the other since both are interdependent and mutually overlapping. This is irrespective of whether the right to development is part of customary international law and is therefore a legal obligation, or whether it is just a political or moral obligation. In a report prepared for the OHCHR in 2004, Gutto has rightly noted that the Right to Development very well includes the notion of sustainable development and that the former actually translates as the 'Right to Sustainable Development'.[62]

Bringing WTO Into the Picture

It is in this factual matrix that the link between human rights and trade can be found through the objective of 'Sustainable Development' in the WTO Agreement itself and not in extraneous human rights treaties. States are obliged to take into consideration human rights while operating at the WTO because the *institutional objective* of the WTO to ensure sustainable

[61] See United Nations, Economic and Social Council: *Study on the current state of implementation of the Right to Development*, E/CN.4/1999/WG.18/2, Arjun Sengupta, Independent Expert on the Right to Development, 27 July 1999. In this report Sengupta describes Right to Development as a vector, where the vector itself is a self-standing human right; at the same time the vector is also composed of all other human rights. In order, therefore, for States to improve the Right to Development, it is important that at least one of the components of the Vector is enhanced, while none others deteriorate.

[62] United Nations, Economic and Social Council: *The Legal Nature of the Right to Development,* E/CN.4/Sub.2/2004/16, Gutto, Shadrack, 1 June 2004.

development, as enshrined in its Preamble, mandates so. Human rights are inextricably linked to development, whilst development is inseparably linked to trade. It may be worthwhile to point out, in particular, the provisions of paragraph 3(3) of the 1986 Declaration which mandates States to realize their rights and fulfil their duties in such a manner as to promote 'a new international economic order' based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights. This clause in particular has utmost significance inasmuch as States knew throughout the Uruguay round of negotiations around the same time and while establishing the WTO almost a decade later, that they had committed to establishing a 'new international economic order' in terms of what paragraph 3(3) of the 1986 Declaration conceived.

In sum, the concept of the right to development suggests that the 'appropriate' development strategy is one that conforms to the international human rights framework. By finding this link of development between the human rights regime and the international trade regime, we cull out a pragmatic approach which should rest to calm all the opposition of States for bringing in exogenous human rights treaties into the WTO processes.

Now, it needs to be acknowledged that this human right to development approach does not permit a claim to be made before the DSB by any party that the trade policies of another party are illegal because they breach the human right to development. This is because the obligation of States to formulate WTO policies with the aim of furthering the human right to development is borne in the concept of sustainable development enshrined in the Preamble of the WTO Umbrella Agreement. Canons of interpretation of treaties do not accord the same value to Preambles as they do to substantive provisions themselves. A substantive provision can be breached and the same can be challenged before the DSB. On the other hand, the Preamble has a role limited to the interpretation of WTO Agreements viz. only to provide the context for interpreting substantive provisions. However, the fact still remains that the Preamble of the WTO Umbrella Agreement asserts the purposes and objectives of the WTO in no uncertain terms and therefore, even if the same cannot be enforced through the DSB, States are obliged to take them into consideration while negotiating and acceding to WTO Agreements. Similarly, if any inadequacies are found in the existing Agreements whereby human rights concerns remain unprotected, or if the policy space of States to adequately deal with their human rights concerns is found lacking as a result of WTO obligations, the objective of sustainable development obliges States to

remove them by subsequent negotiations. Given this position, this human right to development-based approach needs to be incorporated at all stages of the WTO process, including the stages of pre-negotiation, negotiation and trade policy review.

To put this into context, the inadequacies in the DSU relating to economic compensations and in the TRIPS Agreement relating to additional waivers need to be rectified by way of negotiations, because the objective of sustainable development obliges so. Similarly, the lack of policy space created by the manner in which Art.XX of the GATT operates needs to removed, because the objective of sustainable development obliges so. One way to avoid negative impacts of trade regulations on the human rights situation in the Member States is through a 'human rights impact assessment' of WTO Agreements, policies and decisions. Human rights impact assessments, at the very least, facilitate an informed negotiating and trade policy review process at the WTO. This mechanism has been explored before and as such will not be developed in this paper.[63] The purpose here is to clearly identify this second category and to find a pragmatic approach to addressing it. The approach essentially calls for undoing the limiting environment that some WTO laws create, with respect to the policy space of States to address their own human rights concerns. States need to do so because the institutional objective of the WTO is sustainable development, which cannot be achieved without ensuring that all human rights are respected, protected and fulfilled. This revisiting of the WTO provisions that limit policy space of States cannot be done by the DSB, but must be done collectively by States themselves at the WTO. They need to do so as part of their international law obligations, through negotiating amendments to the already existing WTO laws. Similarly, while negotiating new WTO agreements, States must essentially take into account the impacts that trade laws may have on their policy space to address their human rights concerns.

D. CONCLUSION

In conclusion, it may be said that economic globalization in general and liberalization of trade in particular, are seemingly irreversible processes. Barring global catastrophes such as world war or climate change, they are

[63] For a detailed analysis of HRIA methods, see http://www.humanrightsimpact.org/introduction-to-hria/hria-tutorial/introduction/ (retrieved on 14/08/2012). See also Harrison, James and Goller, Alessa (2008), *Trade and Human Rights: What does 'impact assessment' have to offer*, (2008) Human Rights Law Review 8 (4), 587.

here to stay and in my judgment there is simply no going back now. All WTO members have invested massively in creating structural changes to their economies in order to adhere to the New World Order. India, China, Brazil and South Africa are eloquent examples of Developing Countries benefiting from the liberalized trading regime in general. However, it is a fact that these countries, along with other Developing Countries, also face significant human rights challenges in adjusting to this relatively new multilateral trading regime. The right to employment, work and health, amongst others, are casualties in the process for many of the poorer States. Even so, the fact of the matter is that States have legally bound themselves to the liberalized trading regime, on the economic logic that these casualties should be transitory, and eventually comparative advantages would adjust themselves along with the citizens working within these economies. In view of the fact that liberalization is probably irreversible, a pragmatic approach is needed to handle the complex multilateral trade-human rights linkages. The appropriate manner, therefore, in which these concerns should be addressed, is through a human right to development approach as discussed above. There is a growing literature orientating towards this approach, and methods to embed this culture in the WTO so that it permeates through all its processes, should be the vision for further action. Human Rights Impact Assessments provide a good starting point in this context; however, other means could also be developed. In the same breath, it is important to realize that the complexities and multidimensional nature of the multilateral trade-human rights linkages should not be a concern of States under only the WTO. The deconstruction of these linkages carried out in this Paper demonstrates that in some areas, the UN and in particular, its specialized agency - the ILO, must also take on the responsibility. Pragmatism mandates that methods to address concerns arising from these linkages must be developed within the existing systems themselves. Thus, cooperation from all actors involved in these linkages - the States, the UN and the WTO - is inevitable for both the human rights regime and the international trade regime to co-exist. In the last few years, steps have been taken by the UN, the WTO and the Breton Woods Institutions to constitute Annual High-Level Meetings comprising of representatives from all the institutions to work progressively towards achieving their respective mandates.[64] This is again a good starting point and an acknowledgement of the fact that the issue of multilateral trade-human rights linkages demands a pragmatic approach to be addressed. This is ultimately the only way in

[64] See for more information- World Trade Organization: *The WTO and United Nations*, available at http://www.wto.org/english/theWTO_e/coher_e/wto_un_e.htm (retrieved on 14/08/2012)

which the solemn objectives enshrined in the Preambles of both the UN Charter and the WTO Umbrella Agreement can be fulfilled, without these institutions condemning each other or without States compartmentalizing their international law obligations into two separate camps that are completely isolated from each other. In contrast, the pragmatic approach proposed here could insure international integration and linkages between the existing legal obligations of states in both the WTO and human rights.