

# Introduction

It is well known that many human rights advocates are critical of the WTO. Is it possible that this enmity arises from 'regime envy', a mere bemoaning of the effectiveness of the WTO compared to the relative ineffectiveness, for example, of global human rights bodies? Or are the criticisms valid? This book is designed to explain and explore the validity of the main human rights concerns with the WTO.

Free trade advocates claim that free trade (and therefore the WTO given that it promotes free trade) promotes peace, cuts the cost of living, raises incomes, and promotes good government.<sup>1</sup> The WTO Director General, Pascal Lamy, has gone so far as to say: 'one could almost say that trade is human rights in practice'.<sup>2</sup> Lamy's statement echoes the conclusions of an expert panel which was set up to examine the future of the WTO. That report, colloquially known as the Sullivan Report after its chairperson, concluded:

[T]he notion that trade, investment, and the growth of business detracts from non-economic facets of human rights is the contrary of the truth. . . . In the end—and we accept that it may take time—the exposure of governments and citizens to an international institutional framework dedicated to openness will have its effects on much more than commerce.<sup>3</sup>

James Harrison has summarized the panel's conclusions thus:

there is no need directly to address the human rights impact of international trade on the protection and promotion of human rights, because it is in the very nature of the existing trade regime to enhance human rights protection.<sup>4</sup>

In stark contrast to the above rosy picture of the WTO, one of the first assessments of the human rights impact of the WTO by a United Nations human rights body was 'almost entirely negative'.<sup>5</sup> Global Exchange, a human rights non-governmental

<sup>1</sup> WTO, '10 benefits of the trading system' (2008) <[http://www.wto.org/english/res\\_e/doload\\_e/10b\\_e.pdf](http://www.wto.org/english/res_e/doload_e/10b_e.pdf)> accessed 18 September 2010.

<sup>2</sup> Pascal Lamy, 'Towards shared responsibility and greater coherence: human rights, trade and macroeconomic policy' (Speech at the Colloquium on Human Rights in the Global Economy, Co-organized by the International Council on Human Rights and Realizing Rights, Geneva, 13 January 2010) <[http://www.wto.org/english/news\\_e/sppl\\_e/sppl146\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl146_e.htm)> accessed 18 September 2010.

<sup>3</sup> WTO, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (Report by the Consultative Board to the former Director-General Supachai Panitchpakdi) (WTO, Geneva, 2004) 10.

<sup>4</sup> James Harrison, *The Human Rights Impact of the World Trade Organisation* (Hart, Oxford, 2007) 37.

<sup>5</sup> Ibid, 128, commenting on a report for the Sub-Commission on the Promotion and Protection of Human Rights by J Oloka-Onyango and U Deepika, 'The Realization of Economic, Social and

organization (NGO) focused on global economic justice, has asserted the following amongst its 'top reasons to oppose the WTO': it is fundamentally undemocratic, it tramples labour and human rights, it is increasing inequality and hunger, it is destroying the environment, and it is killing people.<sup>6</sup> Lamy recently described the opposition to his organization in the following terms:

For many, trade is a villain. It is a symbol of mercantilism, capitalism, the tool through which powerful multinational corporations impose their law over human beings, impairing their economic, social and cultural rights.<sup>7</sup>

It is true that many human rights criticisms of the WTO are ill-conceived, and based on misunderstandings including a failure to recognize the benefits of free trade. At the same time, many trade experts are overly dismissive of human rights critiques, blindly adhering to a belief in free trade as an undeniable good. As noted by Joseph Stiglitz:

Those who vilify globalization too often overlook its benefits. But the proponents of globalization have been, if anything, even more unbalanced.<sup>8</sup>

This book aims to explain the reasoning behind the main perceived human rights 'problems' with the WTO. These alleged shortcomings are explained and assessed as to their validity. This book also aims to help break down the mutual ignorance that exists in the relationship between trade and human rights. This reciprocal and perhaps wilful ignorance<sup>9</sup> has fostered a relationship that is historically laced with suspicion.<sup>10</sup> Hopefully this book will make some contribution to diminishing that level of mutual misunderstanding.

## The WTO in the global economy

The WTO is one component in the matrix of organizations and rules which regulate the global economy. It is not to be confused with the many other component parts, which have also been accused of generating deleterious effects on human rights. It is not, for example, responsible for the harm that has allegedly been caused to client States by onerous loan conditions from the International Monetary Fund (IMF), or the alleged funding for ill-conceived projects by the World Bank.<sup>11</sup> It is not responsible for the behaviour of multinational corporations (MNCs) when they

Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights', UN doc. E/CN.4/Sub.2/2000/13 (15 June 2000).

<sup>6</sup> Global Exchange, 'Top Reasons to Oppose the WTO' (2008) <<http://www.globalexchange.org/campaigns/wto/OpposeWTO.html>> accessed 18 September 2010.

<sup>7</sup> Lamy, above n 2.

<sup>8</sup> Joseph Stiglitz, *Globalization and its Discontents* (Penguin, London, 2002) 5.

<sup>9</sup> Lamy has suggested that this ongoing ignorance is deliberate at Lamy, above n 2.

<sup>10</sup> Ibid.

<sup>11</sup> See, generally, on human rights and these international financial institutions: Adam McBeth, *International Economic Actors and Human Rights* (Routledge, London, 2009); Mac Darrow, *Between Light and Shadow* (Hart, Portland, 2003); and Sigrun Skogly, *Human Rights Obligations of the World Bank and the International Monetary Fund* (Cavendish, London, 2001).

are accused of perpetrating grave human rights abuses with impunity.<sup>12</sup> It is not responsible for the rights conferred directly on foreign investors, largely MNCs, under the many hundreds of bilateral investment treaties (BITs) that criss-cross the world; it is feared that these rights constrain the ability of States to regulate foreign investors so as to protect human rights.<sup>13</sup> It is not responsible for the proliferation of bilateral and regional free trade agreements (FTAs), which impose more onerous obligations than the WTO agreements, allegedly to the detriment of human rights.<sup>14</sup> It is not responsible for the crippling debt loads, which in some cases force more money to flow from poor to rich countries than vice versa.<sup>15</sup> Finally, it is not responsible for the continual failure by rich States to honour their commitments in aid to poorer countries.<sup>16</sup>

However, just as the WTO cannot be directly blamed for the impact of other major actors or legal systems within the global economy, it cannot be viewed as an island with no connections to those other actors and systems.<sup>17</sup> For example, the WTO, in promoting foreign trade and in protecting intellectual property, undoubtedly enhances the power of MNCs, the major engines of free trade,<sup>18</sup> thus contributing to an environment that promotes 'permissive conditions for business-related human rights abuse',<sup>19</sup> especially if they are endowed with enforceable rights under BITs and FTAs. The constraints placed by WTO rules on the policy

<sup>12</sup> See, generally, on the relationship between human rights and the conduct of multinational corporations: the Business & Human Rights Resource Centre website at <<http://www.business-humanrights.org>> (which also maintains the portal for materials relating to the work of the United Nations Secretary General's Special Representative on Business and Human Rights); International Commission of Jurists (ICJ), *Report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes: Corporate Complicity & Legal Accountability* (2008) Vols 1–3. See also Michael Kerr, Richard Janda, and Chip Pitts in Chip Pitts (ed), *Corporate Social Responsibility: A Legal Analysis* (Butterworths/Lexis-Nexis, Canada, 2009).

<sup>13</sup> See, eg, Howard Mann, 'International Investment Agreements, Business and Human Rights: Key Issues and Opportunities' (Report prepared for Prof John Ruggie, UN Special Representative to the Secretary General for Business and Human Rights (International Institute for Sustainable Development, February 2008)) <[http://www.iisd.org/pdf/2008/iaa\\_business\\_human\\_rights.pdf](http://www.iisd.org/pdf/2008/iaa_business_human_rights.pdf)> accessed 18 September 2010.

<sup>14</sup> See below Chapters 5 and 9.

<sup>15</sup> David Kinley, *Civilising Globalisation* (Cambridge University Press, Cambridge, 2009) 114–15. See, generally, on the key issues relating to the international debt crisis: the documents produced by the Debt and Finance Analysis Unit of the United Nations Conference on Trade and Development (available at <<http://www.unctad.org>>); the documents produced by the United Nations Secretary-General's Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social, and cultural rights (available at <<http://www2.ohchr.org/english/issues/development/debt/index.htm>>).

<sup>16</sup> Less than six years away from the 2015 deadline to achieve the Millennium Development Goals, the United Nations warned that, despite many successes, overall progress has been too slow for most of the targets to be met by 2015; see United Nations, *Millennium Development Goals Report 2009* (DESA, New York, 2009) 4.

<sup>17</sup> See also UNGA, 'Report of the Special Rapporteur on the Right to Food, Olivier De Schutter', UN doc. A/63/278, 21 October 2008, para 23.

<sup>18</sup> Kinley, above n 15, 37–8. See also Mehdi Shafaeddin, 'Is Industrial Policy Relevant in the 21st Century?', *Third World Network Trade & Development Series No. 36* (TWN, Malaysia, 2008) 7.

<sup>19</sup> Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business entities: Business and human rights: mapping international standards of responsibility and accountability for corporate acts', UN doc. A/HRC/4/035, 19 February 2007, para 82.

space of developing States, that is the space in which they may flexibly choose among various strategic and tactical options to achieve the economic development, human rights, and other objectives affecting their people, are exacerbated if those same States are also subjected to arduous loan conditions by the IMF or onerous debt burdens. In short, the WTO is a key part of the governance of the global economy. Therefore, its human rights impact cannot be fairly assessed in isolation from that system of governance.<sup>20</sup>

### Types of human rights arguments against the WTO

There are various types of human rights arguments raised against the WTO. The first is the risk that WTO law imposes obligations upon a State which conflict with its human rights obligations. In such a circumstance, compliance with WTO law would result in a breach of human rights law. On the basis of existing case law, it is difficult to identify such direct conflicts between the two areas of law. Indeed, the WTO dispute resolution bodies have addressed few cases of relevance to human rights. The relevant cases are addressed in this book, largely in Chapter 4. One area where human rights breaches might be mandated concerns the implementation of the Agreement on Trade Related Aspects of Intellectual Property (TRIPS), which is discussed in Chapter 7.

WTO case law has elaborated only the tip of the iceberg in terms of WTO obligations. For example, there are very few cases on a number of the WTO agreements, such as TRIPS, the Agreement on Technical Barriers to Trade (TBT), and the General Agreement on Trade in Services (GATS). Given the uncertainties that remain over the scope of WTO obligations, there is a danger of 'regulatory chill', in that a State might fear that the adoption of certain human rights measures will breach WTO law, and it may therefore fail to adopt them even if such a failure breaches its human rights obligations.<sup>21</sup> This second type of concern is addressed in Chapters 4 to 7.

Thirdly, WTO laws might constrain the ability of States to punish other States for violating human rights obligations through the use of trade sanctions. This concern is addressed in Chapter 4.

Fourthly, WTO laws might prompt abuses of human rights, even if they do not mandate them. As WTO law promotes the abolition of trade barriers, States might be tempted to adopt unconscionable methods to boost the competitiveness of their industries. Such a temptation could arise, for example, in the field of labour rights, where States might be tempted to attract foreign investment and boost competition by driving down labour costs.<sup>22</sup> This concern is addressed in Chapter 4.

<sup>20</sup> See also Joseph E Stiglitz and Andrew Charlton, *Fair Trade for All* (Oxford University Press, New York, 2005) 81.

<sup>21</sup> Olivier De Schutter, *International Trade and Agriculture and the Right to Food* (Dialogue on Globalization Occasional Paper No 46) (Friedrich Ebert Stiftung, Geneva, November 2009) 21; Harrison, above n 4, 180.

<sup>22</sup> De Schutter, above n 21, 21.

Finally, the global implementation of WTO rules may diminish the capacities of certain States to implement human rights.<sup>23</sup> Chapters 5 and 6 examine arguments that WTO rules are eroding the relevant capacities of developing States, for example in relation to the right to food (discussed specifically in Chapter 6). Chapter 3 examines the argument that WTO negotiation and other internal processes further undermine the interests of developing States and other potentially disadvantaged constituencies.

## Outline of the book

Chapter 1 explains the WTO regime and the international human rights regime. Greater attention is paid to the latter, while WTO law is fleshed out more in the following chapters. In particular, economic, social, and cultural rights are explained. In this author's experience, those rights are less well understood in the broader community, including trade lawyers and scholars, than civil and political rights.

In Chapter 2, the philosophical and normative relationship between the two regimes is examined. The philosophical issues essentially concern the extent to which the two regimes are driving towards the same, or different, ends. The normative relationship concerns the issue of how conflicts between the two systems are addressed in international law.

Chapters 3 to 7 then move to an analysis of the main alleged human rights problems with the WTO, and their validity. Chapter 3 focuses on the argument that WTO processes are unfair, and serve to marginalize certain constituencies, namely developing States and social justice interests, thus generating a democratic deficit which undermines human rights and generates unfair rules. Chapter 3 also examines the argument that WTO rules indirectly promote democratic rights and civil and political freedoms.

Relevant WTO provisions and case law are examined in Chapter 4, with a focus on the extent to which WTO law constrains the abilities of States to implement human rights measures. Such measures might consist of: (i) trade sanctions aimed at punishing States which breach human rights; (ii) trade sanctions aimed at products produced in a way that breaches human rights; and (iii) measures that regulate or prevent the entry of goods and services that might otherwise harm the human rights of the State's own population. The chapter focuses on the WTO treaties concerning trade in goods, trade in services, sanitary and phytosanitary standards, and technical standards. The pros and cons of a social clause within the WTO, which could provide extra protection for labour rights, are also discussed in Chapter 4. So too is the potential emancipatory effect of WTO rules, that is their potential to force States to permit trade in goods or services that improve the enjoyment of human rights by their populations. The WTO compatibility of China's internet restrictions is examined in that regard.

<sup>23</sup> Ibid, 22.

Chapter 5 examines the impact of WTO rules on poverty and development, particularly in developing States. The argument will be put that current WTO rules are biased against the interests of developing States. Furthermore, the orthodox argument that free trade alleviates poverty will be challenged. Unfair treatment of, and the prescription of inappropriate rules for, developing States within the WTO is not itself a human rights issue as States per se do not have human rights. However, such issues clearly bear an instrumental relationship with human rights protection as they impact on the capacity of developing States to discharge their human rights obligations.

In Chapter 6, the impact of WTO rules on the right to food is examined, including an analysis of the rules regarding trade in agriculture, as well as the impact of the Agreement on TRIPS. The difficult 'marriage' between trade and agriculture, and reasons for those difficulties, are outlined, along with proposals for reform.

Chapter 7 examines the impact of TRIPS on the right to health, particularly the debate regarding the impact of global patent rules on the prices of essential medicines. The arguments for and against patent regimes in the drug field will also be addressed in this chapter.

In Chapter 8, the issue of extraterritorial human rights obligations is discussed. Much of the material in Chapters 3 to 7 concerns conflicts between the interests of developed and developing States. Chapter 8 examines the extent to which States have duties to the people in other States. Such duties, if they exist, might signal that States have a duty under international human rights law not to enforce WTO rules which might harm the human rights of people in other States, or a duty to amend WTO rules to assist those in other countries, particularly the poor in developing countries.

In Chapter 9, recommendations for reform are summarized in light of Chapters 3 to 8. Current proposals for a new WTO deal are then examined in comparison to those recommendations, as is the advent of the proliferation of bilateral and free trade agreements outside the WTO.

Chapter 10 concludes the book.