

Human Rights – the Road Ahead

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ABSTRACT

The authors present the relationship between trade liberalization and the impact on human rights. Though there have been many initiatives to alleviate the negative impacts of trade liberalization, all of these do not necessarily improve the relationship between trade and human rights. The crux of the issue is when trade is used to enforce social standards in a specific country. As a substitute to this approach can be the human rights approach as enunciated by the U.N. human rights body. The W.T.O. alone may not be able to improve human rights situation but should be supported by a number of other organizations. The issue of human rights must be considered pivotal by the W.T.O. if it were to continue as a reliable organization in improving trade.

Member States have to shoulder the responsibility of human rights then and do so because human rights and economic growth are complementary. The authors begin with assessing the impact of the trading system on human dignity and human rights. It is opined that trade should not push the poor into deeper poverty and that trade must ensure that the least well-off must get a fair share of gains of trade. The authors also analyze the negative distributional impact of unbridled trade and at the same time bring forth the positive effects that freer trade ushers in for the economically worst off. The authors also present the need for more room within trading mechanisms for countries to derogate from free-trade obligations. There is also the necessity and possibility to counteract trade protections that are harmful to human rights and human welfare. The role of the W.T.O. as a robust mechanism to protect human rights cannot be undermined. It is suggested here that the processes and procedures of the trading system need basic rights protection. It is also a major concern that the trading system should take into account distributional concerns that cannot be secured in bargaining among nations. A rationale to move ahead and improve things for better human rights protection is discussed.

INTRODUCTION

The issue of human rights has assumed great significance in the context of international trade-off late. W.T.O. principles seem to have interfered in numerous instances as in the case of right to health in the Thai Cigarettes case, the Hormone Beef case and the Asbestos case. The TRIPS has also infringed the poor's right to affordable medicine.

It is to be assessed whether trade related measures are supportive of human rights in a target country. For instance, prohibition of the import of goods using child labor seemingly is justified. However, this clause usually affects the target country and does in no way improve human rights. The industrialized and the developing countries are then at loggerheads at the W.T.O. Industrialized countries feel it necessary to have a social clause to protect human rights, to discourage social dumping, and to safeguard social standards. This is, however, seen as an excuse from the industrialized world to protect its own job market.

Presented in this paper are the existing trade related human rights measures, the legal framework of W.T.O., and the possibility of trade-related measures acting as catalysts in improving human rights situation. The U.N. framework of human rights approach is presented along with some measures to human rights.

HUMAN RIGHTS--THE CONCERN:

Most member countries have in place certain measures concerning human rights that may contradict W.T.O. agreements and influence international trade. These also impact countries internally and thereby affecting trans-national trade. Human rights are referred to all those rights enshrined in the International Bill of Rights that ensure social standards and are secured by the International Labour Organization (I.L.O.).

Measures may be initiated through restrictive economic relations and may be imposed as a good related measure to a specific human rights violation or those that address human rights situation as a whole in the specific country. (1)

Trade restrictions are authorized as economic sanctions by the U.N. Security Council within the system of collective security under Chapter VII of the U.N. Charter, or they can be imposed unilaterally. Instances of such sanctions initiated by the U.N. Security Council are sanctions issued against Iraq, Sierra Leone, or Somalia. (2) Human Rights violations on a large scale were specifically targeted by the sanctions against Haiti, Rwanda, and Congo. (3) Under W.T.O. law, such sanctions would qualify as discriminatory trade restrictions, which are prohibited according to Art. I and XI GATT. (4) They are however covered by Art. XXI (c) GATT, which allows deviating from GATT obligations, if in pursuance of a Member State's obligations under the UN Charter. (5)

The other possibility is that trade-related human rights measures are imposed unilaterally. This can be a unilateral trade embargo against a country where severe human rights violations take place. (6) In such cases, the overall human rights situation is assessed and addressed specific to the target country. The Burma Law is maybe the most appropriate example of such unilateral sanctions where the State of Massachusetts enacted the law in 1996 as a reaction to the long history of violence and severe human rights violations by the Burmese Government (now Myanmar). (7) The law restrained the acquisition of goods or services by Massachusetts public authorities from any person--whether the U.S. or foreign national--doing business with Myanmar. This restriction on government procurement violated various

provisions of the W.T.O. Government Procurement Agreement (G.P.A.). (8) The E.C. and Japan brought the case before the W.T.O.; (9) however, the U.S. Supreme Court struck down the Massachusetts law in June 2000 as unconstitutional, in violation of the federal exclusive powers to regulate foreign affairs. These cases illustrate the use of trade-related measures to improve human rights situation. The bigger problem that still goes unaddressed is that international human rights law and international trade law are not congruent though both enunciate rules that set out to achieve higher standards of living for everyone. (10) Globalization has only compounded this problem stemming from increasing globalization and interdependence on all levels, i.e. globalizing markets, but also the globalizing information and civil society, which points its fingers on the issues. (11) Although international human rights instruments generally ensure compliance through monitoring and in some cases through individual complaint mechanisms, there are no strong enforcement measures, let alone trade measures, to make states comply with international standards. (12) However, neither the W.T.O. nor the former GATT mentions human rights.

FRAMEWORK UNDER THE WTO

The W.T.O. aims at establishing a trading system that is consistent, stable and allows transparency and fairness in rules for all member states involved in international trade. W.T.O. does cover goods, services and intellectual property as well. The W.T.O. is based on the economic model that each member state produces what it can do best and then trades with products from other countries doing the same. Such economic activity is eventually supposed to improve the standard of living and ensure employment and increase in income. Thus participating countries in trade should be better off. (13)

W.T.O. aims at reduction of tariffs, reduction of barriers to trade, and other barriers such as quotas, import or export restrictions. The core principle is the principle of non-discrimination, which is enshrined in all W.T.O. Agreements and has two components. The most-favoured-nations treatment mandates that goods from different countries be accorded the same treatment at the border when entering the country. (14) The principle of national treatment also requires that these products must be treated as national products once they enter the country. The GATT also enshrines rules that deter disguised restrictions, i.e. national rules, which are apparently non-discriminatory but are de facto discrimination of foreign products. The technical standards and sanitary standards, which have to comply with the Agreement on

Technical Barriers to Trade (TBT Agreement) and the Agreement on the Application of Sanitary and Phytosanitary Measures (S.P.S. Agreement) are shining examples of this.

The GATT, however, allows some exceptions that enable member states to deviate from the W.T.O. framework to accomplish specific political objectives.

THE LEGAL DIMENSION

In cases where measures are initiated unilaterally, the measures must be within the GATT framework. Art. I of the GATT enunciates that trade measures must not discriminate between products from different countries. A ban on imports of a specific product produced with child labour violates Art. XI that prohibits all trade restrictions except tariffs. It does mean that such products may be allowed but alternately a specific tax may be imposed on specific products from a specific country under certain conditions. However, this kind of tax imposition would violate Art. III of GATT as an equivalent tax is not imposed on similar national products.

The general policy exception of Art. XX may justify unilateral trade embargoes. XX GATT. When member states become inventive in using non-economic reasons for protectionist measures, W.T.O. dispute Settlement Institutions find it difficult to ascertain whether measures are intended to protect the non-economic concern or the national industry. These member states have attempted many a time to fit trade related measures under Art. XX to further certain public policy objectives. As of now, these have been done for environmental or public health measures. To uphold GATT principles, Panels and Appellate Body have interpreted Art. XX in a strict sense and has contributed to the reputation of the W.T.O. of not having done enough in protecting human rights. It is also a pertinent issue if member states could treat products differently based on the process and production methods (P.P.M.s) and if national standards could be applied extraterritorially and what the accepted human rights standard was.

Art. XX and Art. XXIII of the W.T.O. agreements do not provide for any clause for the protection of human rights. However human rights violations could be covered under certain exceptions. Trade measures could be used under the public morals exception (para. a), the protection of human, animal or plant life or health exception (para. b), the prison labor exception (para. e) or measures relating to the conservation of exhaustible natural resources (para. g). Paras (a) Whereas paras. (a) and (e) have hardly been applied or mentioned in any

reports of the Dispute Settlement institutions, paras. (b) and (g) have often been invoked to justify environmental or public health measures. Art. XX para. (e) allows measures relating to the products of prison labor, and covers measures directed at goods produced by prison labor. The public morals exception contained in para (a) could be used to prohibition of pornographic material that is instrumental in the ill-treatment meted out to children and women. Of significance with respect to human rights is also para (b) that ensures the protection of human life and health. This clause could be interpreted to connote to measures for public health. Using this, the import of asbestos was banned to safeguard public health. Under the same clause comes the prevention of hazardous processes and dangerous working conditions. Para (g) is the exception for protecting living and non-living natural resources and be used to justify measures to the right to food.

THE PPM PROPOSITION

Violation of human rights is most prevalent through working conditions through Process and Production Method (P.P.M.). The case where child labour is employed in inhospitable conditions in the manufacture of products and services is a case of such violation. This could be curtailed only through restrictions of imports manufactured under such conditions. The process and production methods are then specified that conform to international production norms. However, as per GATT jurisprudence P.P.M.s violate the basic tenet of non-discrimination that is applicable to 'like products'.

There exist quite some stringent clauses under the W.T.O. Dispute Settlement institutions that are restrictive to extraterritorial measures. In the U.S.--Tuna case I measures of with exterritorial effects are prohibited which would allow member countries to determine unilaterally determine the life and health policies for other member states. However, no law grants human rights protection extraterritorially. Thus, the prohibition of child labor is applicable for all children on the territory of the Member State. It must also be noted that the extraterritorial application of national laws can pose problems of sovereignty. Addressing this concern, some conventions promote human rights through internal cooperation. A point in case here is that of the U.N. Declaration on the Right to Development that has an obligation to promote the protection of human rights internationally through worldwide cooperation of international organizations.

Human rights standards It then is imperative to decide what the standard is for human rights when trade-related measures are to be used. As in the case extraterritoriality, the standards must be internationally accepted. There are many treaties on human rights that each member has ratified, but all members are not parties to the same convention.

The Universal Declaration of Human Rights 1948 and the two 1966 U.N. Covenants are the existing conventions on human rights along with others protecting the rights of women and children.

Human rights may be restricted through reservations to human rights treaties, which are often quite far-reaching. (15) In addition, the treaties themselves allow for the restriction of most human rights in states of emergencies. (16) Further, many human rights provisions have a built-in exception that permits the restriction of the rights where necessary for the protection of certain public policy interests. (17) Furthermore, the enjoyment of human rights may be restricted by other peoples' enjoyment of human rights. For example, the freedom of speech is limited by the right to privacy and personal integrity of another person. The criteria for balancing the scope of both rights are the principle of proportionality.

The next logical point in contention is the method that may be adopted to enforce human rights. Even if the obligations for all states are just the same, the monitoring, control and evaluation differ for every state that has different civil and political rights. All measures require states to take in periodic reports and then initiate steps to implement the same. This approach is to create awareness of human rights rather than act as an enforcement mechanism.

An Individual complaint mechanism does exist for civil and political rights violation after having used all local means of redressal. These mechanisms are created by the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (C.R.C.). There is also the International Covenant on Economic, Social and Cultural Rights (CESCR). It is thus evident that the W.T.O. should recognize agreed-upon standards for human rights.

SUMMARY

It is evident that there is a limited scope under the W.T.O. to apply trade-related measures. The problem of like products and extraterritoriality only compound the issue. It could be only solved

with the amendment of the W.T.O. which is highly unlikely. Also, to be answered is whether there should be a broader legal framework.

Political and Economic Aspects of Trade-related Human Rights Measures

Prohibition of import of products produced using child labor may be right ethically, but the true motives are most times political and economic and human rights merely camouflage measures that serve other goals.

Developing countries support their low labour costs which developed countries oppose in the name of human rights, a hidden form of protectionism. What developing countries need is economic development which leads to a higher income and produces a positive effect on the standard of living and enjoyment of human rights. Enforcement of human rights from outside only dampens the human rights situation and impedes economic development.

Herman Sautter, in his study, enunciates that the increase in actual costs in labour costs when social standards are met is only insignificant in the overall production costs. He also reiterates that this would have little or no influence on the competitiveness of the products internationally.

The industrialized countries argue that Foreign Investment flows in due to low social standards resulting in loss of jobs in the developed countries. Political stability, infrastructure, legal certainty, as well as the education of workers are decisive for foreign investment working standard, and therefore foreign investors accept higher wages and standards for workers improving productivity and satisfaction levels.

The second issue which needs to be addressed is whether trade related measures are feasible or not to improve the human rights situation. The contrary has been found to be true in reality. The instances of embargos are detrimental to the population of the target nation, reducing the supply of their economic needs. The political elite that is responsible for such embargoes stays unaffected. Another case is that of child labour and the ban on goods produced using child labour.

A different example is the restriction of the import of goods produced by child labor. Intended to reduce child labour, it reduces the earning capacity of the family that help send

other children of the family to school. Without commensurate schooling programs, such prohibitions can lead to more poverty.

The target country's institutions and initiated programs are essential if measures to improve human rights situation need to be successful.

The above considerations show that trade-related human-rights measures are neither a suitable instrument to improve the human rights situation in a country, nor are they apt to protect the economy of the state imposing the trade sanction.

Improving Human Rights Using Trade

The topic of human rights has not been significantly taken up by the W.T.O. However, the U.N. human rights bodies under the aegis of the Economic and Social Council (ECOSOC) have deliberated human rights with greater emphasis. Studies researching this issue of human rights prescribe other than trade-restrictive means to imbibe human rights into the work of the W.T.O. The Vienna Human rights Conference of 1993 is where it all began when the indivisibility and interdependence of human rights were recognized. The office of the U.N. High Commissioner of Human Rights was created to bring together human rights perspective into the functioning of U.N. institutions. Neo-liberalism saw international economic integration and the increasing interdependence of states. Such liberalism also brought with it environmental, social and human rights shortcomings. As a reaction to sharp criticism worldwide, I.M.F. and World Bank drafted human rights, social and environmental standards in their lending and structural adjustment programs. The anti-globalization movement took a serious turn with the failure of the Multilateral Agreement of Investment in 1998, negotiated within the framework of OECD. The Seattle summit of the W.T.O.'s Ministerial Conference proved that the existing trading regime produces negative effects on the poor, especially in developing countries, and that the W.T.O. legal framework, to a certain extent, restricts economic and social policies. After the Seattle summit, W.T.O. has been targeted even more strongly by the international community.

Pioneers of studying the relationship between trade, investment and human rights Mr. J. Oloka-Onyango and Ms. Deepika Udagama were appointed by the U.N. Human Rights Commission as Special Rapporteurs to undertake a study on the issue of globalization and its impact on the full enjoyment of all human rights. The objective was to find ways and methods through which human rights could be incorporated in international trade, investment and

financial policies. Reports submitted in 2003 indicated that though liberalization improved economic development, trade liberalization adversely affected the enjoyment of human rights. It meant the states had to liberalize in ways that respected and protected human rights. Robert House (18) concludes in his study that the right to development cannot be achieved through judicial or centralized enforcement but by initiating public policies at the domestic and the international level. The same method is applicable for achieving improved human rights too. This debate has compelled the I.M.F. and the World Bank to incorporate the human rights standards in their work. However, the W.T.O. still poses to be only trade organization and not a human rights organization. It then becomes evident that member states must ensure that the W.T.O. decisions do not adversely affect the human rights situation in W.T.O. member states.

Negotiation and Implementation:

The impact of human rights must be assessed in both the negotiation and implementation phase of the W.T.O. decisions. All human rights must be assessed on certain well-defined criteria. If health is to be taken, aspects such as the availability, accessibility and quality of health goods, services and facilities, must be considered in negotiations as in the GATS regulations regarding trade in services. Art. XIX of GATS authorizes the Council for Trade in Services to assess the trade rules. Such other assessments may be carried out by other Councils and Working Groups for other agreements taken under the auspices of the W.T.O.

The Trade Policy Review Mechanism (TPRM) allows member states to present their nations trade policies for it to assess the impact of these on the world trading system. The W.T.O. preamble enshrines the objective of raising the standard of living and sustainable development. It must be noted here that the right to development encompasses the enjoyment of basic human rights standards. Therefore, it can be safely deduced that W.T.O. mandates economic development that doesn't impair human rights in a member state. The Trade Policy Review Mechanism should hence include the human rights impact of trading rules in its review.

In order to avoid a conflicting situation in exceptional circumstances, it is possible to interpret W.T.O. rules in conformity with Member States' human rights obligations. (19) Then the Dispute Settlement Institutions would allow only those trade measures which are not detrimental to the cause of human rights. An example where such a non-economic concern

was accepted without much discussion was the E.C.--Asbestos case, where the Panel accepted the import prohibition of asbestos-containing substances for public health reasons without thoroughly examining whether the restriction would be justified under Art. XX. Seen from a human rights angle, this decision favors a Member State's implementation of the right to health, i.e. to protect its inhabitants from dangers to their health.

Another way to promote human rights is through trade incentives. This method has been pursued for years by the E.U. and the U.S.. The practice of adding a human rights clause in agreements with developing countries has been practiced by the European Union. These clauses allow for voluntary compliance to human rights standards than through coercion and are rewarded with preferential status accorded to such members.

Such preferential agreements were offered by the European Communities (E.C.) and were challenged by India on the grounds of discrimination for these were accessible to countries chosen by the E.C. and not all countries. India lodged a complaint on the General System of Preferences the G.S.P. scheme that discriminated between different developing countries. The panel also held that the drug arrangement violated Art. I of GATT for it did not extend the most-favoured-nation (M.F.N.) to all member nations but only to select states. However, the E.C. claimed the Enabling Clause and the Appellate authority ruled that the E.C. may grant additional preferences as long as these preferences were consistent with provisions of GATT. However, the Appellate Authority found the E.C.'s drug arrangement not conforming to the W.T.O. norms as long as it could not determine criteria of eligibility for countries being offered these preferences. It means that the G.S.P. must be applied in a non-discriminatory way. Trade Incentives do not interfere with the sovereignty of a state, nor do they interfere with internal affairs. Also, these incentives serve the population's needs than trade sanctions. Human rights conditionality alone cannot improve the human rights situation but require different programs and technical assistance to promote awareness of human rights in a member state.

Technical Assistance programs must incorporate human rights aspects as they are an important feature of the W.T.O. work in developing countries that create necessary institutions to implement them. Human rights considerations are made part and parcel of trade policies and regulations. For the acquisition of the necessary know-how, coordination with

International Labour Organization is pivotal. A beginning can be made using certain principles under the W.T.O. like transparency that requires all trade rules to be published and accessible to everyone and that all countries be fair in court procedures and reflect basic civil and political rights enshrined in the CCPR. Also, the principle of non-discrimination can be significantly leveraged to protect human rights. The principle of sustainable development and raising the standard of living also indicates the human rights element.

Role of International Organizations

The I.L.O. and the U.N. Human rights bodies play an important role in monitoring and implementation for the proposed activities of the W.T.O. But to define clear standards to enforce the right to food, for example, is difficult as differences prevail among member states. This is such a tricky issue that even the W.T.O. cannot be expected to solve it, and the same holds good for monitoring and implementation. The U.N. human rights bodies have initiated steps in this direction to incorporate human rights into the W.T.O. framework. Paul Hunt's study enables the W.T.O. and human rights bodies to assess the impact of trade rules on the right to health.

The W.T.O. requires suitable standards and techniques; assistance is required by the Trade Policy Review Body to include the human rights perspective in their work. The Dispute Settlement Institutions too require expertise to address issues of integrating human rights into their work.

CONCLUSION

Human rights and trade are related in more than one way and there is a plethora of ways to overcome the negative impact of trade on human rights. It must be however added here that all these approaches are not feasible and do not address the present crop of conflicts. Critiques of globalization argue that the W.T.O. does not prohibit the enforcement of human rights by imposing trade sanctions. Apart from this inability, it is also questionable whether trade related measures can improve human rights in the target country. It is also opined that these trade related measures may, in reality, harm the human rights situation rather than improve it.

It then becomes imperative that the only plausible way out is to incorporate the human rights perspective into the work of the W.T.O. The U.N. human rights bodies suggest various ways to achieve sustainable development along with improving the human rights records of the W.T.O. As enunciated earlier, the use of assessment of trade rules both in the negotiation

stage and the examination of TPRM reports is a point of beginning. This must be followed by technical assistance in the member states for W.T.O. initiatives.

One must also emphasize that the W.T.O. must be ably supported by other international organizations. The role of the I.L.O. and U.N. human rights bodies is catalytic for not only assessing standards for human rights but also in monitoring implementation. Further, organizations that possess expertise in labour, human rights and social issues must offer technical assistance, training programs to bolster the initiative by the W.T.O.

It is clear that the W.T.O. is primarily a trade organization and need not transform into a human rights organization; it must incorporate the human rights perspective to improve its credibility. Being a member driven organization, the responsibility lies with member states to infuse human rights framework in the work of W.T.O. Councils and Working Groups. I.T. may be extremely arduous work to arrive at internationally acceptable human rights standards; such a framework would actually make a member state more attractive as a state. Given good conditions to work, education, and health care, the workforce in a member state can improve in productivity and also contribute to a climate of political stability. When a member state ensures fairness, transparency and non-discriminatory administrative and legal procedures, the business environment is more conducive for international trade. The authors thus conclude that economic development and promotion of human rights are not at loggerheads but are complementary.

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- (5) Art. XXI (c) GATT: 'Nothing in this agreement shall be construed ... (c) to prevent any contracting party from taking any action under the pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.'
- (6) E.g. U.S. against Cuba, U.S. against Libya and Iran, EC against Serbia and Montenegro. So far, such cases have not been brought before the W.T.O. dispute settlement organs, although unilateral embargos are not covered by the Art. XXI GATT exception.
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