

## TRADE VS. HUMAN RIGHTS: GATT ARTICLE XX IN CONTEXT

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### ABSTRACT

*Integrating human rights issues in the trade agreements has always been a question. The proponents of trade-human rights linkage insist that trade have huge impacts on human rights. Therefore, human rights concerns have to be addressed in all trade activities. Whereas, the opponents argue successful trade will automatically result in promotion of human rights situation. Trade is meant for making profit. Therefore, there remains little scope to address human rights concerns in trade activities. This article argues that trade agreements never itself altogether denied the human rights issues though did not use the term human rights specifically. In fact, GATT Article XX leaves scope for countries to protect human rights related issues under the title 'social clause'. Though this Article XX concentrates on restricting trade measures on ground of public morals, human, animal and plant health, this in fact, paves the way for claiming more positive trade activities for promotion and implementation of human rights in general.*

### I. INTRODUCTION

In the debate on trade and human rights, a common point of contention between economists, activists, politicians, and corporate bodies is whether to include or exclude human rights, environmental, and labour considerations from the scope of the World Trade Organization and the General Agreement on Trade and Tariff (WTO-GATT).<sup>1</sup> Supporters of trade liberalization believe

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<sup>1</sup> Compare Petersmann, E., "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration," 13 (2002) *European Journal of International Law*, pp. 622-650, at <<http://ejil.oxfordjournals.org/content/13/3/621.full.pdf>.> (Last visited on November 16, 2015) and Marceau, G., "WTO Dispute Settlement and Human Rights", 13 (2002) *European Journal of International Law*, pp. 753-814, at <<http://ejil.org/pdfs/13/4/1561.pdf>.> (Last visited on November 16, 2015) with Alston, P. "Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann", 13 (2002) *European Journal of International Law*, pp. 815-844 (2002), at <<http://www.ejil.org/pdfs/13/4/1562.pdf>.> (Last visited on November 16, 2015), and Barfield, C., "Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization", (2001) at <<http://www.tulane.edu/~dnelson/PEReformConf/Barfield.pdf>.> (Last visited on November 16, 2015). This debate can also be framed in terms of WTO constitutionalism. See Howse, R. & Nicolaidis, K., 'Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiary?' in Marco Verweij and Tim Josling (eds) *Deliberately Democratizing Multilateral Organization* (2003) at

that the economic growth achieved through trade liberalization will automatically ensure human rights.<sup>2</sup> Advocates of linking human rights in multilateral trade argue that trade devoid of human rights is futile and bears no significance and that multilateral trade liberalization must respect human rights.<sup>3</sup> Opponents of the linkage argue that linking human rights with trade will benefit developed nations, deprive developing countries and Least Developing Countries (LDCs) from benefiting from comparative advantage theory and open opportunities for protectionism, resulting in more human rights violations.<sup>4</sup> The integration of human rights in the WTO is also opposed on the grounds that the linkage will jeopardize the ultimate goal of establishing a freer global trading environment and it is detrimental to the promotion of welfare enhancing free trade.<sup>5</sup> However study of the different pre-WTO period trade agreements show though very scant, these agreements have addressed different human right issues while doing trade.<sup>6</sup> This article argues that trade agreements do show concern about human right issues and Article XX of the GATT is an example. This article argues that by permitting countries to take measures necessary to public morals and human, animal or plant life in the form of general exceptions Article XX has triggered the scope of trade-human rights debate in the WTO Agreements.

## II. GATT ARTICLE XX AND SCOPE FOR HUMAN RIGHTS INTERVENTION

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<[http://www.law.nyu.edu/sites/default/files/ECM\\_PRO\\_060039.pdf](http://www.law.nyu.edu/sites/default/files/ECM_PRO_060039.pdf)> (Last visited on November 16, 2015).

- <sup>2</sup> Maassarani, T., "WTO-GATT, Economic Growth, and the Human Rights Trade-Off" 28 (2005) *Environ*s pp. 269-300, at <<http://environs.law.ucdavis.edu/volumes/28/2/maassarani.pdf>>. (Last visited on November 16, 2015).
- <sup>3</sup> Petersman, E., "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration" 13 (2002) *European Journal of International Law* 597 at <<http://ejil.oxfordjournals.org/content/13/3/621.full.pdf>> (Last visited on November 16, 2015); Marceau, G., "WTO Dispute Settlement and Human Rights", 13 (2002) *European Journal of International Law*, pp. 753-814, at <<http://ejil.org/pdfs/13/4/1561.pdf>> (Last visited on November 16, 2015)
- <sup>4</sup> Hees, F., "Protection v. Protectionism: The Use of Human Rights Arguments in the Debate for and Against the Liberalization of Trade", (2004) at <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.135.4282&rep=rep1&type=pdf>> (Last visited on November 16, 2015).
- <sup>5</sup> Ibid.
- <sup>6</sup> Article 7 provides for Maintaining Fair Labour Standard in trade activities and Article 45 opens scope for protecting human rights issues; also Articles 2, 3, 6, 11, 19, 29, 49 of the Treaty on European Union, Articles 11, 13, 177 of the Treaty Establishing the European Community, and Articles 6, 7 and 49 of the Treaty of Amsterdam; Preamble to North American Free Trade Agreements.

GATT Article XX urges every member to take any measures required for the protection of its public order. Any such measure taken, however, must be necessary and non-discriminatory, and it must not be a disguised restriction on international trade. This Article provides for the rules of general exception, stating:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health ...
- (c) relating to the products of prison labour ...
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

Article XX has two parts: the introductory clause known as ‘chapeau’ and the exceptions provided for restricting trade measures. Chapeau defines the nature of the trade-restrictive measures which may be considered as GATT consistent, and the exceptions refer to the situation when such measures may be taken. Any effort to invoke human rights consideration in Article XX needs to satisfy these two requirements.

### A. GATT Article XX Exception and Human Rights

It is argued that Article XX lays down the groundwork for a human rights body within the GATT.<sup>7</sup> This argument is based on the fact that this Article, which allows the exclusion of products made with prison labour, has never been challenged by the GATT/WTO members.<sup>8</sup> Article XX mentions four circumstances<sup>9</sup> that create the possibility of integrating human rights in the GATT proceedings.<sup>10</sup> The fact is that it does not directly mention ‘human

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<sup>7</sup> Stirling, P., “The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization” 11:1 (1996) *American University Journal of International Law and Policy*, pp. 35–36 at <<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1403&context=auilr>>. (Last visited on November 16, 2015).

<sup>8</sup> Ibid.

<sup>9</sup> Public morals, Human or animal life or health, products of prison labour, conservation of natural resources. (See Article XX of GATT).

<sup>10</sup> Bal, S, ‘International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT’ (2001) 10 *Minnesota Journal of Global Trade* 62. In explaining the main objective of Article XX, human rights activists state that this article opens the path for linking non-trade issues with the GATT.