

Trade and Human Rights

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ABSTRACT: *One could rightly enquire, why should development practitioners, academics and human rights advocates now started to occupy themselves with the issue of linking the trade and human rights all around the world? Putting it in the words of one of the leading non-governmental organizations in this field which says- “over the last ten-years in the history of the World Trade Organization (WTO), distrust and misinformation have been a better mechanism over the relationship between human rights advocates and trade experts². At the same time, it is now becoming evident for both the sides i.e, the trade which has facilitated globalization has profound the human effects, which can be acknowledged in the various “Development Agendas.”³ Therefore, it is in this context, a wealth of an academic literature is emerging as an attempt to explore the true relationship and mutual effects of trade and human rights in the modern development. It must be further noted that, many of the renowned organizations have made an attempt to expand the profession of trade and human rights. Some of the globalists assert that trade is a true blessing for the economy to flourish, (which, according to them, will be subsequently leading to improve the human rights protection.) while the anti-globalists are quite sceptical about it. They often occupy radically opposing positions and regard trade as a true curse for the most impoverished in the developing countries, as well as for the protection of human rights, therefore it being an obstacle to their development. At last but not the least the author would expedite the process for smooth relation between trade and human rights.*

KEYWORDS: *Development, Economy, Globalisation, Human Rights and Trade.*

I. INTRODUCTION

Trade⁴ and human rights are one of the most emerging parts of the public international law. It has emerged a lot during this past 10-15 years. Expansion of trade begins, when the World Trade Organization (WTO) came into being in 1995. It falls at the centre of the global trading system and is one of the most influential international organizations. Its key purpose is to improve “the standards of living” of the people of its Member States by establishing legally binding rules which help trade to flow as freely as possible⁵. The WTO seeks to achieve trade liberalization through a variety of different actions, including the removal of trade barriers and ensuring that all the main participants in the global trading system are aware of the applicable rules. The organization also seeks to serve as a forum for trade negotiations amongst its Members concerning their multilateral trade relations in matters dealt with under the various agreements annexed to the WTO Agreement, and for settling trade disputes. Trade liberalization – the reduction of artificial barriers to international trade in goods and services, has been a key aspect of international trade and is one of the most significant characteristics of globalization in recent years. It is designed to achieve “free trade” – an idea pioneered by Adam Smith (1723–1790), David Ricardo (1772–1823) and other classical economists⁶. There is essentially no conflict between international trade law and international human rights law. Both seek to improve standards of living and the rules of international trade implicitly recognize the significance of human rights. International trade liberalization process, under the flagship of the World Trade Organization system of rules and agreements constitutes as one of the fundamental pillars of the economic globalization without which the International trade Liberalization can't be achieved.

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² 1 FIDH: Understanding Global Trade and Human Rights, 2005. Can be retrieved from www.fidh.org

³ 1 FIDH: Understanding Global Trade and Human Rights, 2005. Can be retrieved from www.fidh.org

⁴ Black's Law Dictionary – the word ‘trade’ means the act or business of exchanging commodities by barter ; or the business of buying or selling for money ; traffic ; barter.

⁵ See the Marrakesh Agreement Establishing the World Trade Organization (“WTO Agreement”) of 15 April 1994, 1867 UNTS 154, Preamble, paragraph 1 and 2.

⁶ For a discussion of the evolution of free trade, see generally, Irwin D Against the Tide: An Intellectual History of Free Trade (1996).

II. CONCEPT OF A FREE TRADE AND TRADE LIBERALIZATION

Free trade is a market model in which trade of goods and services between countries flows unimpeded by government-imposed tariff and non-tariff barriers. It also encompasses the absence of policies or factors (such as taxes, subsidies or regulations) which tend to distort trade by giving domestic businesses, households or factors of production an advantage over foreign ones. Free trade has been defined as a “general openness to exchange goods and information between and among nations with few-to-no-barriers-to-trade”⁷. This argument resonates with economists, many of whom support the view that free trade is a net gain to both parties involved in international trade and that the benefits derived from free trade far outweigh the losses⁸. They contend that trade liberalization significantly contributes to poverty alleviation and improving the living standards of people. Trade liberalization, it is argued, increases average incomes and thereby provides states with more resources with which to address poverty⁹. It is important to acknowledge that international trade can make a positive contribution to the realization of human rights by increasing access to employment, higher income and access to a range of economic and social rights¹⁰. Indeed, the United Nations (UN) Committee on Economic, Social and Cultural Rights (“the ESCR Committee”) has acknowledged “the advantages of an international trading system” underpinned by the WTO which aims, inter alia, to achieve “higher living standards, steady growth of real income, full employment and economic growth compatible with sustainable development” and has recognized “the wealth-generating potential of trade liberalization”. Nevertheless, the ESCR Committee has also cautioned that “liberalization in trade, investments and finances does not necessarily create and lead to a favourable environment for the realization of economic, social and cultural rights.”¹¹ Trade liberalization must be understood as a means, not an end. The end which trade liberalization should serve is the objective of human well-being to which the international human rights instruments give legal expression.¹² With this regard the Committee wishes to remind WTO members of the central and also fundamental nature of human rights obligations to them. During the World Conference on Human Rights held in 1993 at Vienna, 171 States declared that the promotion and protection of human rights is the first responsibility of Governments¹³. Consequently, the ESCR Committee has urged the WTO to undertake a review of international trade and investment policies and rules in order to ensure that these are consistent with human rights. In similar vein, in 1999, the UN Sub-Commission on the Promotion and Protection of Human Rights called for measures to be taken “to ensure that human rights principles and obligations are fully integrated in future negotiations in the World Trade Organization”.¹⁴ These entreaties itself says that the UN human rights bodies clearly indicate concern about the human rights implications of WTO trade policies and rules. The ESCR Committee has expressed the view that trade liberalization “must be understood as a means, not an end” and that the end which it should serve is “the objective of human well-being to which the international human rights instruments give legal expression”.¹⁵

III. PROVISIONS OF THE U.N CHARTER AND ITS EFFECT ON THE TRADE AND HUMAN RIGHTS ASPECT

Article 1(3) of the Charter sets human rights as the cornerstone for the achievement of the purposes of the United Nations. Article 55 provides that the UN will encourage “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion”¹⁶, while

⁷ Eisenberg J Free Trade versus Fair Trade available at <http://www.aworldconnected.org/article.php?id=560&print=1> (access confirmed: 12 July 2006).

⁸ See Friedman and Friedman “The Case for Free Trade” (1997) 4 Hoover Digest available at <http://www.hoover.org/publications/digest/3550727.html> (access confirmed: 30 January 2007). See also Irwin Free Trade under Fire, 2 ed (2005); Wolf Why Globalization Works (2004); Bhagwati In Defense of Globalization (2004).

⁹ The World Bank defines poverty as comprising three key factors: lack of opportunity, insecurity and vulnerability, and powerlessness. See World Bank Attacking Poverty: World Development Report 2000/2001 (2001).

¹⁰ See Skogly Beyond National Borders: States’ Human Rights Obligations in International Cooperation (2006) 190.

¹¹ Resolution 1999/30, 26 August 1999, paragraph -6.

¹² Resolution 1999/30, 26 August 1999, paragraph -6.

¹³ Statement of the UN Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organization, Seattle, 30 November to 3 December 1999 (26 November 1999) UN Doc.E/C.12/1999/9, paragraph 6.

¹⁴ Resolution 1999/30, 26 August 1999, paragraph -3.

¹⁵ See paragraph-6 of the UN Committee on Economic, Social and Cultural Rights

¹⁶ Article 55(c) of the UN Charter

article 56 imposes an obligation on UN Member States “to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in article 55 of the UN charter”¹⁷. It is therefore clearly confirmed that the UN Member States are obliged to respect human rights. The pre-eminence of this obligation is confirmed by article 103 of the UN Charter: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”¹⁸ The import of this provision is that, while states are bound to fulfill their obligations under the treaties establishing international organizations such as the WTO and others, they must do so in a manner consistent with their obligations as members of the UN, including the obligation to cooperate with the organization in its quest to promote universal respect for human rights. As Skogly argues, that states cannot establish international obligations in order to avoid their obligations under international law¹⁹. There is essentially no conflict between international trade law and international human rights law. Both seek to improve standards of living and the rules of international trade implicitly recognize the significance of human rights.

In the event of conflict between a universally recognized human right and a commitment under international trade agreement, the latter must be interpreted so as to be consistent with the former. In this regard, since the WTO Agreement and its Annexes do not explicitly contract out of general standards of human rights law, it has been asserted that the WTO is bound by the general international standards of human rights and, in the event of a contradiction between WTO law and international human rights standards, the WTO is bound by the latter where these have attained the status of *jus cogens*.²⁰ Article 53 of the Vienna Convention on the Law of Treaties clearly states that treaties in conflict with peremptory norms (i.e. norms that have the character of *jus cogens*) are void: “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of international law. For the purposes of the present Convention, a peremptory norm of international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.²¹ International judicial decisions also reaffirms that the peremptory (or absolute) character of some human rights, such as the right to life and the prohibitions of torture, slavery, genocide and racial discrimination²². Thus, it is clear that the human rights movement has at least the potential to counter-act these tendencies, and to help create an environment in which reflection on the trade policy goals is facilitated and encouraged. One of the most obvious characteristics of human rights interventions into trade debates is their preoccupation with the ultimate ends to which the international trading system is directed, and in particular the claim that trade liberalization ought not be pursued as if it were ‘an end in itself’. Human rights advocates have often expressed concern about the human rights implications of developments within the WTO. Among the rights mentioned in this regard are right to health, right to food, labour rights, right to education, women’s rights and indigenous people’s right²³. Therefore, the actual practical advancements in this area will only be possible if both, pro-trade globalists as well as human rights proponents takes the standpoint of one another more seriously, considering each-other’s view in a more constructive manner. Also, the decision-making process on the level of the UN and the WTO is a predominantly states single minded process. Therefore, when we talk about linking between the trade and human rights and resistance from the part of the WTO, it is wise to remind ourselves that it is the States who themselves are constantly demonstrating the resistance to stronger enforcement of international human rights (for various reasons). And the WTO is not exception to it.

¹⁷ Article 56 of the UN Charter

¹⁸ Article 103 of the UN Charter

¹⁹ Skogly *The Human Rights Obligations of the World Bank and the International Monetary Fund* (2001) ch 5.

²⁰ See Orakhelashvili *Peremptory Norms in International Law* (2006) 8.

²¹ Article 53 of the Vienna Convention on the Law of Treaties, 1969

²² See, for example, *Prosecutor v Furundzija*, Case No IT-95-17/I-T, pars 147-155, Judgment of 10 December 1998 (ICTY); *Prosecutor v Kunarac*, Case No IT-96-23-T, par 454, Judgment of 22 February 2001 (ICTY); *Juridical Condition & Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03 of 17 September 2003, paragraph 101 (IACHR).

²³ see Clapham *Human Rights Obligations of Non-State Actors* (2006) pp. 161-163.

IV. THE TRADE SYSTEM AND HUMAN RIGHTS; POVERTY AND DEVELOPMENT; AND HUMAN RIGHTS AND TRADE

In January 1941, President Franklin D. Roosevelt demarcated his idea for the world he hoped that would emerge from World War II. "Freedom according to him was the supremacy of human rights present everywhere. He said that we look forward to a world founded upon four essential human freedoms."²⁴ Roosevelt unmistakably understood that the let-down of some countries to protect human rights led ultimately to political and economic instability that endangered the world. Thus, he hoped to generate a global system of governance that would ensure that states would promote and protect these rights. As the international governance institutions took shape, they were negotiated, and finally agreed by legislators, they reflected some of Roosevelt's vision. In 1948, the members of the UN agreed to a Universal Declaration of Human Rights (UDHR), which delineated some twenty-six basic rights that member states were to promote and protect.²⁵ In that same year, eight countries became contracting parties to another cooperative legal system, the General Agreement on Tariffs and Trade (GATT).²⁶ Like the UDHR, the GATT-the precursor organization to the WTO-was based on similar legal values and approaches such as nondiscrimination, the rule of law, and adjudication of disputes.²⁷ In both trade and human rights systems, it is the state, and not the individual, that has obligations under international law. The GATT was not concerned with how a state treats its own citizens, but rather how it treats noncitizens who seek to trade. As per the law professor Steve Charnovitz notes, international trade law "takes as a given responsibilities of a government towards its citizens is a matter to be determined by each government, not by the international community."²⁸ This contrasts dramatically with human rights law, which transcends national sovereignty principles and aims to transmit norms from international law to domestic law. The GATT had no human rights qualifications for participating members, because it was more concerned with relationships between states than with relationships within states. Initially, the bulk of GATT members were democracies. Thus, their human rights practices were rarely an issue.²⁹ The purview of the GATT gradually grew over time, but in contrast with Roosevelt's vision, the GATT said very little about human rights. It did not address the effects of trade (whether trade undermines human rights) or the conditions of trade (how workers, communities, and the environment should be treated as good and services for trade are produced). Nonetheless, the architects of the GATT system were well aware that human rights abuses could distort trade, as in Nazi Germany and in the Soviet Union. They recognized that some nations were willing to export goods produced by slave labor or in unfair working conditions. Thus, they permitted the GATT participants to ban products made by prison labor, or to ban imports to protect public morals, public order, or human life and health. But during forty-eight years of the GATT, no member ever did.³⁰ For the first forty years of the GATT's history, members generally resolved conflicts between human rights and trade in an ad hoc country or sector specific manner. While these solutions may have been politically expedient, they nonetheless often restricted trade (such as trade sanctions or the denial of most favored nation benefits) or required nations to obtain a waiver from their trade obligations.³¹ In the last twenty years, many of the countries that have sought to accede to the GATT (and later the WTO) have been countries with inadequate human rights protection. Some of these countries lacked the will to fulfill these rights; others lacked funds or expertise to enforce their own human rights laws. While the accession of such countries raised some concerns over the years, the issue of the relationship between human rights and trade came to the fore when China, an original GATT member, sought to join the GATT in the 1990s.

²⁴ Franklin D. Roosevelt, The "Four Freedoms" Speech Before Congress (6 Jan. 1941)

²⁵ Ernest-Ulrich Petersmann, *The WTO Constitution and Human Rights*, J. Econ. L. 19 (2000)

²⁶ General Agreement on Tariffs and Trade, 30 Oct. 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.T.N.S. 194. (GATT)

²⁷ Caroline Dommen, *Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies*, 24 Hum. Rts. Q. 4 (2002).

²⁸ Steve Charnovitz, *The Globalization of Economic Human Rights*, 25 Brooklyn J. Int'l L. 51 (1999), available at <http://www.geocities.com/charnovitz/>.

²⁹ Aaron Forsberg, *The Politics of GATT Expansion: Japanese Accession and the Domestic Political Context in Japan and the United States, 1948-1955*, 27 Bus. & Econ. Hist. 185 (1998); Susan Ariel Aaronson, *Taking Trade* 69, 80-82 (2001).

³⁰ GATT, supra note 12, art. XX, permits nations to restrict trade when necessary to protect human, animal or plant life or health, or to conserve human resources. An advisory group to the GATT in 1985 found that countries do not have to accept the products of slave or prison labor. Salman Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT*, 10 Minnesota J. Global Trade 62 (2001).

³¹ Examples of the debate about the link between trade and human rights include the debate over trade sanctions on South Africa in the apartheid era and the debate over most favored nation (in the US normal trade relations) with China.

Amnesty International, Human Rights Lookout, and makes the US State Department, among others, found significant human rights abuses in China throughout the 1990s. On 4 June 1989, the Chinese government violently suppressed democracy demonstrations at Tiananmen Square, in Beijing.³² But in this period as well, China was gradually opening its markets to foreign and domestic private investment. Under GATT rules, China could not accede to the GATT unless all existing GATT members granted it most favored nation trade privileges.³³ In the US, China could only achieve most favored nation benefits after a Congressional review of its human rights practices, as required by the Trade Act of 1974. Business interests from the US and Europe generally argued that including China in the framework of multilateral rules and obligations would ensure improvement in China's adherence to the rule of law and prod China to do more to promote human rights. They stressed that by joining the GATT/WTO, China would learn the skills of good governance, which would spill over into other governance institutions and responsibilities; that greater foreign presence of Western firms within China would expose Chinese workers to ideas about their rights; and, that companies would increasingly demand stronger human rights practices of their suppliers, gradually changing China's social and political culture. However, if the US granted most favored nation benefits to China, it could no longer use the annual most favored nation benefits review as a means of political leverage, which many US policymakers were not keen to lose.³⁴ Although the US ultimately agreed to grant China most favored nation privileges, despite its human rights practices, China's accession did not resolve a key question for the members of the GATT/WTO: what should these countries do to ensure that the global trade system does not make it harder for governments to protect human rights? As GATT participants weighed China's accession, they were also negotiating the Uruguay Round of trade talks. On 15 December 1993, 117 nations finally reached agreement, completing the round and creating a new organization—the World Trade Organization.³⁵ Like the GATT, the WTO is built on two key principles to which all members must adhere: most favored nation and national treatment. The most favored nation principle requires that the best trade conditions extended to one member by a nation must also be extended automatically to every other nation that belongs to the WTO. Thus, if a nation undermines human rights of its own citizens or those in other countries, that country must still be granted most favored nation treatment. The national treatment principle means that member states must treat foreign firms in the same way they do local firms. This principle also has major implications for human rights. As noted above, member states cannot discriminate between producers, even if a producer undermines human rights to produce a good or service.

V. CONCLUSION

This article begins with the establishment of world trade organization (WTO) and then it describes the trading system and the purposes of improving it. Further it talks about the process of trade liberalization and making of a free trade policy by supporting the different documents and cases on the given topic. Then it talks about the views of different economist's towards the trade and human rights. Further it tells the inter-link between trade and human rights by supporting some reports of different organization and committees. Further the author has discussed that in cases of conflict between the two (i.e trade and human rights) which one will be taken into consideration, will be understood by going through various articles of the UN Charter. Then it talks about the trade system, poverty, development with respect to trade and human rights and describes the role of WTO and GATT towards it. And at last but not the least the author wants that this trade and human rights can

³² These reports often examine developments over time. Country Reports on Human Rights Practices- China 2003, US Department of State (25 Feb. 2004), available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27768.htm>;

Human Rights Watch, Human Rights News: Tiananmen 16 Years Later (4 June 2005), available at <http://hrw.org/english/docs/2005/06/08/china11103.htm>; Amnesty International, Report 2002-China (2002), available at <http://web.amnesty.org/web/ar2002.nsf/asa/china?Open>.

³³ During this debate, Congress changed the name of the most favored nation review to normal trade relations or NTR. Several members perceived that although most favoured nation was the longstanding diplomatic term, it implied that the country under consideration got special benefits, rather than normal benefits.

³⁴ See The US-China Business Council, China and The WTO, available at [http://www.uschina.org/public/wto/usavalues.html](http://www.uschina.org/public/wto; Ways and Means Subcommittee on Trade, United States China Trade Relations and Renewal of China's Most-Favored Nation Status, 104th Cong., 2d Sess., 11 July 1996, at 4; Business Coalition for US China Trade, China PNTR: Advancing American Values (Apr. 26, 2000), available at <a href=).

³⁵ Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 15 Apr. 1994, Legal Instruments-Results of the Uruguay Round vol. 1 (1994), available at http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#General.

get advanced in the up-coming future and the International judicial decisions have also reaffirms that the peremptory (or absolute) character of some human rights.

For future developments as suggested in this article will help, on one hand by ensure that the WTO does not pose an obstacle in the realization of human rights, and on the other hand it helps to sensitize the organization for human rights consideration.

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