

**INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES**

[ISSN 2581-5369]

Volume 5 | Issue 3

2022

© 2022 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at the **International Journal of Law Management & Humanities**, kindly email your Manuscript at submission@ijlmh.com.

Considerations of Labour Standards in International Trade and their Implications

ADYASHA KAR¹

ABSTRACT

The discourse to find a balance between maintenance of labour standards and non-violation of the principles of GATT is not new. A common consensus in this matter, however, has been that considerations of labour standards should not be used to enforce protectionist practices or to dilute the comparative advantage of a certain country. The Appellate Body of WTO had ruled that GATT inconsistent trade measures directed at other countries have to be justified under any of the exceptions listed in Article XX of GATT. However, there is little available jurisprudence to understand how Article XX is to be interpreted. Article XX lists exceptions to justify trade measures that are inconsistent with the principles of GATT with only two exceptions, namely “public morals” and “products of prison labour” that can be linked to labour standards, unlike its arguable predecessor, the Havana Declaration which expressly called for measures against unfair labour conditions. It is particularly “public morals”, that provides a rather wide but quite ambiguous connotation of Article XX.

What constitutes public morals is itself dynamic in nature, ever adapting to the changing times. At the same time variations in labour conditions are also a result of the economy of a particular nation as well as are culture specific. This poses a challenge to enforcing a universal idea of rights at the backdrop of plausibly inconsistent domestic policies. However, while inconsistencies might exist in tailoring an ideal fair wage or liberty for labour to organise, certain aspects of labour rights remain non-negotiable. The objective of the paper is to explore ways to make sure that labour rights are given due consideration in international trade, by delving into the present framework and connected jurisprudence, existing challenges and rationales and would ultimately suggest plausible policy reforms.

I. INTRODUCTION

The General Agreement on Trade and Tariff (GATT) was signed on 30th October, 1947 and came into effect from 1st January, 1948 with the immediate objective of recovering the economy from the consequent setback of the Second World War by encouraging multilateral trade and envisaging liberalised international trade. GATT subsequently paved the way for the

¹ Author is a student at Symbiosis Law School, Pune, India.

formation of the World Trade Organisation (WTO) in the year 1995. The primary objective of WTO is to aid liberalisation of trade and thereby requires its members to adhere to its laws, regulations, rulings and administrative procedures. There are four principles primary to the idea of free trade and consistent to GATT – the Most Favoured Nation Principle, National Treatment Principle, Non-discrimination and Reciprocity. As of 29th July, 2016, there are 164 members in WTO which accounts for more than 90% of the global trade. All the members, which undoubtedly includes most of the nations, are required to adhere to the provisions of GATT which seek to relinquish discrimination in treatment meted out to imports and importing countries, thereby, endeavouring to dilute protectionist tendencies of states. However, GATT provides for exceptions to its general principles as well. Article XX enlists grounds on which GATT inconsistent measures can be justified.

Several member countries have viewed sanctions justified on the ground of protection of labour rights as incentive for countries with low labour standards or countries where violation of labour rights is rather rampant to improve their labour conditions or at least to secure the core labour rights. The discourse to find a balance between maintenance of labour standards and non-violation of the principles of GATT ensued for long. Whereas the Havana Declaration expressly contained a clause that called for protection of labour rights, no such clause found its presence in GATT. In the 1996 Singapore Conference, the members reaffirmed their commitment to observe core labour standards but recognised the International Labour Organisation (ILO) as the competent body to deal with the same while limiting their role to “promoting” the labour standards set by ILO² The reaffirmation of the commitment of members to promote and observe core labour standards seem rather insincere as no substantial obligation with relation to its observance was placed on the members. At the third Ministerial Conference in Seattle, the issue of core labour standards emerged as arguably the most divisive issue. The United States of America and the European Union proposed to have labour standards addressed within the framework of WTO, however, the proposal was vehemently opposed by developing countries.

Article XX does not expressly mention maintenance or protection of labour rights as one of the exceptions but it may be safe to presume that the said ground can be covered under Article XX(a) of GATT which relates to protection of public morals and in certain cases. Article XX(b) of GATT which allows GATT inconsistent measures necessary to protect human, animal, plant life or health can also be used to justify measures directed against child labour and inhumane

² *Singapore Ministerial Declaration, WORLD TRADE ORGANISATION,* https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm#core_labour_standards.

or dangerous working conditions. Besides, article XX(e) justifies GATT inconsistent measures on products of prison labour. Article XX while allowing for the general exceptions, stipulates that the grounds related thereunder must not be applied in a manner that would lead to “arbitrary or unjustifiable discrimination”, between countries with similar prevailing circumstances.

II. SCOPE OF WTO WITH RELATION TO LABOUR STANDARDS

(A) Ambit of Article XX

GATT, by virtue of Article XX, identifies certain circumstances necessitate the adoption of otherwise GATT inconsistent measures. However, the existence of “protection of labour rights” has encouraged opinions prompting that the absence of the said clause in the backdrop of presence of “products of prison labour” as one of the grounds coupled with the non-adoption of a social clause similar to the provision for measures against unfair labour conditions which was a part of the failed Havana Convention, suggest that the inclusion of the same as one of the exceptions was never intended and consequently none of the grounds may result in a connotation wide enough to embrace the cause for labour rights.³

I argue that the aforementioned argument is only partially correct. Firstly, Article XX(e) is specific in nature with hardly any scope for a dynamic understanding as opposed to the nature of labour rights. It will further be pointed out how variations of labour considerations at the global level and at the domestic level has acted as an impediment to sufficiently protect labour rights in international trade. The inclusion of the said provision cannot necessarily mean to exclude every other aspect of labour rights. Article XX(b), for instance, can be connoted in a manner wide enough to bring within its ambit child labour particularly in hazardous environment and inhumane working conditions. However, to give due consideration to other core labour rights such as the right to organise, the right to collective bargaining, bonded labour, fair wage and non-discrimination, it is vital to rely on the provision of public morals. Moreover, there has been a consensus among the members on the essentiality to preserve labour rights with the only drawback that the members have vested this responsibility on the International Labour Organisation (ILO). Additionally, the ILO in its declaration on fundamental principles and rights at work, prohibits the use of labour standards in enforcing protectionist trade practices or to call into question the comparative advantage of a country. This establishes that protection of labour rights qualifies to be a valid exception but the same must not be used as a garb to justify protectionist measures or to call into question the comparative advantage of a

³ S.M. Hassan Razavi, *Labour Standards and WTO- Dilemma of Legitimacy and Efficacy*, 11 T.J.W.I.T. 879, 880 (2010).

country. Hence, while I agree with the aforementioned argument that the present provisions may fail to adequately deal with labour standards in a comprehensive manner, nonetheless, Article XX still reserves scope to presently deal with the same.

(B) Interpretation of Article XX

The test of necessity has been identified as the correct test to determine if a measure sought to be justified under Article XX is directed towards a legitimate objective. In the *Brazil Retreaded Tyres Case*,⁴ the appellate body found that the import ban was justified as “necessary” within the meaning of Article XX(b) and held that the assessment as to whether a discriminatory measure is arbitrary must be based on the objectives intended to be secured by the measure. In the *US-Tuna II case*⁵, the AB held that the legitimate object to be achieved by way of the measure must be considered to determine if it is justified under Article XX. In the *EC Seal Case*⁶, the AB emphasised on the need to conduct independent analysis of the measure which must be holistic in its approach by way of balancing a number of factors such as the objective of the measure, the consequences as well as the restrictiveness of the measures with regard to trade in order to assess the consistency of the EU Seal Regime with “specific terms and requirements of the chapeau” of Article XX.

I reiterate my doubts as to the efficacy of Article XX(a) to comprehensively deal with labour standards. The connotation of “public morals” under Article XX(a) is wide and raises a doubt on its efficacy to protect labour rights. It was not until the EC Seal case⁷ that the panel had defined “public morals”. In the said case, public morals were defined as, “standards of right and wrong conduct” and such standards were to be deduced with respect to the notions of a community or nation. In the case of *US-Gambling*,⁸ the Panel report expressly mentioned that public morals vary with space and time. Hence, the absence of definite wordings that spell out labour standards casts a doubt upon the extent till which the same will be considered by WTO. Inclusion of a clause relating to labour standard in TBT agreements has also been viewed as an effective way of addressing labour standards whereby the contracting parties can mutually agree upon standards based on their social, religious, ethical and cultural values.⁹ However,

⁴ *Brazil- Measures Affecting Import of Retreaded Tyres*, WT/DS332/19/Add. (15th September, 2019).

⁵ *United States- Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/15 (15th June, 2012).

⁶ *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/13 (19th June, 2014).

⁷ *Ibid.*

⁸ *United States: Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (10th November, 2004).

⁹ *Ibid.*

*Guanglin*¹⁰ affirms examination of series of factors is understandable for the application of Article XX(a) but also argues that the same must not deter setting up of pre-determined thresholds in respect of the concerned factors for flexibility of adjudication of the AB may result in uncertainties for the contracting parties while designing their trade measures.

III. GENERAL IMPEDIMENTS TO THE INCLUSION OF LABOUR RIGHTS

One of the notable impediments to substantial inclusion of labour rights within GATT and under the ambit of WTO is the apprehension that protectionist practices will flourish undeterred under the garb of positive steps to protect labour rights. In fact, one of the primary roles of the formation of WTO is to ensure liberalisation of trade which inevitably involves reduction of protectionist practices. The primary principles pertaining to trade relations between nations, contained in GATT, such as the most favourite nation principle or the national treatment principle, aim at the decline of protectionist practices. Hence, measures that are inconsistent to GATT need to be justified on considerations reasonable enough to sustain the same.

Advocates of free trade have oft resorted to the argument that owing to distributive justice, the continuation of trade even in the presence of deplorable labour conditions, will lead to the economic development of the concerned nation which would eventually benefit the labour class.¹¹ The same message is conveyed when it was asserted in the 1996 Singapore Declaration that increased trade will lead to greater economic growth and it is only by way of facilitation of trade liberalisation that labour standards can be fostered.¹² This stance is also considered to be harmonious to the Marrakesh Declaration wherein the preamble stated that relations in the field of trade and economic endeavours should be conducted with the view to improving standard of living and ensuring full employment.¹³

Another impediment to inclusion of labour considerations is the alleged varying nature of what constitutes labour rights. It has been argued that developed nations may aim for greater labour standards, much akin to their own and the developing nations as well as LDCs may fail to comply with the same.¹⁴ This, it has been commonly averred, also raises the possibility that labour standards may vary with the target markets. Hence, it will land the exporting nations in

¹⁰ Qiaozi Guanglin, *The Balance between 'Public Morals' and Trade Liberalisation: Analysing the Importance of Article XX(A) of GATT and its Application*, 10 A.L.F. 20, 25 (2018).

¹¹ Robert Howse, *The World Trade Organisation and the Protection of Workers Rights*, 3 J. SMALL & EMERGING BUS. L. 131, 132 (1999).

¹² *Singapore Ministerial Declaration*, WORLD TRADE ORGANISATION, https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm#core_labour_standards.

¹³ *Doha WTO Ministerial Conference 2001: Briefing Notes: A difficult issue for many WTO member governments*, WORLD TRADE ORGANISATION, [HTTPS://WWW.WTO.ORG/ENGLISH/THEWTO_E/MINIST_E/MIN01_E/BRIEF_E/BRIEF16_E.HTM](https://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief16_e.htm).

¹⁴ Jagdish Bhagwati, *Free Trade and Labour*, FINANCIAL TIMES (29th August, 2002).

a difficult situation as their products may be suitable for labour standards required by one market and may fall short of being adequate for another market. If we take into consideration the instance of child labour, we see that laws across countries do not have same standards. In most of the nations the minimum age requirement is 15 years while in some nations it is 14 years and 12 years in others. Similarly, few nations permit child labour in agricultural context.¹⁵

IV. NON-COMMERCIAL FAIRNESS RATIONALES

(A) The Rights Based Argument

Human Rights are inalienable rights that every human is entitled to by virtue of being a human. Labour rights come within the larger ambit of human rights which are universal in character. However, albeit the universality of labour rights, it has failed to acquire absoluteness which is attributable to grey areas within ILO declarations which do not prescribe definite standards as to the exercisable extent of the rights.¹⁶ For instance, it mostly rests on domestic governments to ascertain the facets of unionisation such as on the nature of funds collected or registration of the union or the representative character of a union. Another example would be if right to collective bargaining includes the right to strike and even the jurisprudence of use of force during strike largely rests on domestic laws.

Howse argues that the consistencies of labour policies across nations as well as the wide wordings of ILO declarations that do not proscribe obvious violations of labour rights is a plausible reason for the non-ratification of the declarations and also influences the lack of consensus on the issue of inclusion of labour rights.¹⁷

Inclusion of human rights within the framework of WTO and GATT directly addresses human rights violations, for instance, in cases of child labour, forced labour or inhumane conditions of work that directly poses a threat to human life and health. In 1999, when ILO members agreed to take steps to abolish worst forms of child labour notwithstanding if they had ratified the convention or not, they also acknowledged that child labour is a consequence of poverty and can be necessarily alleviated by sustained economic growth.¹⁸

I am of the strong opinion that in a scenario where basic labour rights are suppressed; it is not limited to being an effect of poverty but it also reflects the importance placed on labour rights

¹⁵ HOWSE, *supra* note 11 at 139.

¹⁶ HOWSE, *supra* note 11 at 142.

¹⁷ HOWSE, *supra* note 11 at 143.

¹⁸ *Understanding The WTO- Labour Standards: Consensus, Coherence and Controversy*, WORLD TRADE ORGANISATION, [HTTPS://WWW.WTO.ORG/ENGLISH/THEWTO_E/WHATIS_E/TIF_E/BEY5_E.HTM#:~:TEXT=THERE%20IS%20A%20CLEAR%20CONSENSUS,WORK%20\(INCLUDING%20GENDER%20DISCRIMINATION\)](https://www.wto.org/english/thewto_e/whatis_e/tif_e/be/y5_e.htm#:~:text=There%20is%20a%20clear%20consensus,work%20(including%20gender%20discrimination).).

by the concerned nation. In a nation where labour is exploited to the extent that even core labour rights are non-existent, I find it difficult to agree with the argument that continuation of the same for a future objective of economic growth is justified. It is reprehensible on a moral argument and turning a blind eye to such violations, in my opinion, with the hope that they will disappear when the nation reaches a certain degree of economic growth is dubious as the inherent lack of respect for labour rights may make it the last avenue where distributive justice will reach.

(B) The perceived role of WTO – an argument on the lines of trade linkage

WTO, in its current role and structure, justifies a frequent argument that it has the potential to take over global governance. This also becomes the underlying reason why solutions to issues of labour rights are sought within the framework of WTO.¹⁹ The current framework, however, does not provide any kind of trade linkage. In the *Belgian Allowances case*²⁰ as well, care was taken not to adopt a stance which results in linkage between trade and social issues. However, the Belgian allowances case pertained to the policy of family allowance which is not directly related to trade. On the contrary, when we consider the issue of labour rights, it is difficult to divorce it from international trade.

V. ROLE OF MULTI-NATIONAL CORPORATIONS (MNCs)

The role of MNCs in maintaining labour rights has been lately called into question. It has been considered essential for MNCs to be guided by labour standards and not take advantage of easy or cheap labour available in certain nations. For instance, in Ghana's cocoa farming, child labour is rampant as farmers employ children to cut down labour costs owing to the high demand of MNCs which high up in the supply chain, concern themselves only with quality and quantity and not labour rights.²¹ Another example will be that of the labour-intensive gold mining in Burkina Faso where labour rights are abysmal. Not only are children employed in gold mining but adult labourers also work in inhumane conditions with no protective gears. Similar is the situation in the gold mines of Ghana where labourers are mostly unskilled and this industry is poverty driven wherein illegal labourers operate on concessions received by foreign companies.²² Ghana had been extensively liberalised, however, owing to large foreign

¹⁹ RAZAVI, *supra* note 2 at 886.

²⁰ *Belgian Family Allowances (Allocations Familiales)*, G/32-IS/59 (7th November, 1952).

²¹ DGAM Wangusa, *Multinational Corporations, Human Rights and Child Labour in Ghana*, UNIVERSITY OF PRETORIA (4th December, 2013), http://humantraffickingsearch.org/wp-content/uploads/2017/07/Wangusa_Multinational_2014.pdf.

²² James Haselip, *Ghana's gold enriches MNCs, not its own people*, DOWN TO EARTH (15th November, 2006), <https://www.downtoearth.org.in/coverage/ghanas-gold-enriches-mncs-not-its-own-people-8658>.

investment, the beneficiaries mostly are foreign companies and not the people²³ which again resists the argument in favour of distributive justice.

Now, MNCs operate across various countries and the question and the variation of labour standards among such nations catches our attention. In this scenario, the proposed solution will be for MNCs to have their own labour standards. However, opportunistic tendencies may dilute such labour standards. Moreover, there also lies indecisiveness on the domestic policies which must be taken into consideration for construing such standards and also which country's domestic policy is to be given precedence. This issue has been addressed in the recommendations provided below.

VI. CONCLUSION AND RECOMMENDATIONS

It cannot be stressed enough that it is imperative to include considerations of labour rights within the framework of WTO and GATT. Article XX, in its existing form, may plausibly fail to address labour concern effectively. On the same lines, it becomes essential to adopt a broader view while dealing with problems so that all aspects can be effectively addressed and only then can consensus among WTO members be expected. There already exists consensus among the members that pertinence of protection of labour rights, particularly the core labour rights, such as, abolition of child labour, abolition of forced labour, right to collective bargaining, right against discrimination, fair wage and right to unionize. The obstacle is the lack of assurance that policies or measures directed towards protection of labour rights will not override GATT obligations to enforce protectionist practices. The following recommendations seem feasible:

1) **Setting up a working group:** Members have often proposed a working group which may also include members from other international organisations to extensively study the link between international trade and labour standards. I stand by this proposal. It is essential for a working committee to list out the various considerations that come into play to understand the terms on which labour standards must be included and the report of such working group will lay the foundation of an evolving framework of labour considerations within WTO.

2) **Harmonious operation of WTO and ILO:** It is essential for WTO and ILO to play a joint role in ensuring protection of labour rights. In promoting liberalisation of trade, WTO cannot turn a blind eye to the underlying exploitation of labour which not only offends public morals which may be considered abstract in nature but offends the causes that ILO stands for. I understand the stance of the members when they acknowledged ILO as the competent body to deal with labour rights and the same is not refuted. However, if ILO does not have the

²³ *Ibid.*

jurisdiction to deal with international trade, its function in protecting labour rights in international trade will remain unfulfilled. It is important to understand that considerations of labour standards vary in domestic context and in the international context. Hence, there still exists distinction between the roles of ILO and WTO and the inclusion of labour rights within WTO's framework will not result in the encroachment upon the functions of ILO.

3) ***Evolution of labour standards for International Trade:*** At the backdrop of the aforementioned point, it is essential for WTO and ILO to evolve labour standards in case of international trade, mostly- of course the core labour rights – but in a more definite manner that would result in both absoluteness as well as universality of the rights thus spelled out. For coming up with uniform labour standards, it is pertinent to take into consideration the labour standards of all nations by giving due regard to universal as well as contextual dimensions of such rights. The standards so evolved must also be made binding on MNCs in order to prevent exploitation of labour. This also envisages expansion of the role of WTO and may necessitate the inclusion of a separate clause or a separate agreement for including labour standards.

While envisaging expansion of the role of WTO, it may be debated if WTO can be a valid body for individuals, or unions or workers to reach out to for imposition of sanctions on a country with policies that violate trade law. I am of the opinion that it will lead to an expansion of the jurisdiction of WTO beyond what was intended. The competent body in hearing such matters must be the ILO since such issues predominately relate to domestic laws of the countries.

Another long-standing argument has been that if labour rights are a valid consideration, then nations with lower labour standards may have undue advantage. In the same context, another question that arises is whether in such scenario trade must be conducted among nations with similar labour standards which would definitely act as an impediment to free trade. Hence, it is again emphasised why it becomes essential to spell out definite labour standards in the case of international trade.

VII. REFERENCES

(A) Articles, Documents and Blogs

1. *Singapore Ministerial Declaration*, WORLD TRADE ORGANISATION, https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm#core_labour_standards.
2. M. Hassan Razavi, *Labour Standards and WTO- Dilemma of Legitimacy and Efficacy*, 11 T.J.W.I.T. 879, 880 (2010).
3. Qiaozi Guanglin, *The Balance between 'Public Morals' and Trade Liberalisation: Analysing the Importance of Article XX(A) of GATT and its Application*, 10 A.L.F. 20, 25 (2018).
4. Robert Howse, *The World Trade Organisation and the Protection of Workers Rights*, 3 J. SMALL & EMERGING BUS. L. 131, 132 (1999).
5. *Singapore Ministerial Declaration*, WORLD TRADE ORGANISATION, https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm#core_labour_standards.
6. *Doha WTO Ministerial Conference 2001: Briefing Notes: A difficult issue for many WTO member governments*, WORLD TRADE ORGANISATION, [HTTPS://WWW.WTO.ORG/ENGLISH/THEWTO_E/MINIST_E/MIN01_E/BRIEF_E/BRIEF16_E.HTM](https://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief16_e.htm) TM.
7. Jagdish Bhagwati, *Free Trade and Labour*, FINANCIAL TIMES (29th August, 2002).
8. *Understanding The WTO- Labour Standards: Consensus, Coherence and Controversy*, WORLD TRADE ORGANISATION, [HTTPS://WWW.WTO.ORG/ENGLISH/THEWTO_E/WHATIS_E/TIF_E/BEY5_E.HTM#:~:TEXT= THERE% 20IS% 20A% 20CLEAR% 20CONSENSUS,WORK% 20\(INCLUDING% 20GENDER% 20 DISCRIMINATION\)](https://www.wto.org/english/thewto_e/whatis_e/tif_e/be5_e.htm#:~:text=There%20is%20a%20clear%20consensus,work%20(including%20gender%20discrimination)).
9. DGAM Wangusa, *Multinational Corporations, Human Rights and Child Labour in Ghana*, UNIVERSITY OF PRETORIA (4th December, 2013), http://humantraffickingsearch.org/wp-content/uploads/2017/07/Wangusa_Multinational_2014.pdf.
10. James Haselip, *Ghana's gold enriches MNCs, not its own people*, DOWN TO EARTH (15th November, 2006), <https://www.downtoearth.org.in/coverage/ghanas-gold-enriches-mncs-not-its-own-people-8658>.

(B) Cases

1. *Brazil- Measures Affecting Import of Retreaded Tyres*, WT/DS332/19/Add. (15th September, 2019).
2. *United States- Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/15 (15th June, 2012).
3. *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/13 (19th June, 2014).
4. *United States: Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (10th November, 2004).
5. *Belgian Family Allowances (Allocations Familiales)*, G/32-IS/59 (7th November, 1952).
