Labour Standards in the Era of International Trade: A Task 'Unfinished or Unwanted' for the WTO?

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I. Introduction--- Trade Liberalization v. Labour Standards:

The growth of international trade is the direct consequence of the sixteenth and seventeenth century industrialization coupled with the development of means of transportation. However, the growing international trade started to threaten the domestic production of different commodities, which were traded at competing rates by the foreign traders. The States, in order to protect their economy and domestic industries, started imposing restrictions to such transborder trade with both tariff and non-tariff barriers.[2] With the mounting restrictions, a point was reached in the twentieth century wherein the international trade almost became stagnant. Consequently, it was realised that a delicate balance needs to be struck between the domestic (producers') interest and the international trade interest. This resulted in the intense efforts to liberalize the international trade, first under the General Agreement on Tariffs and Trade (GATT) 1947 and later under the more inclusive WTO regime.[3]

The eight rounds of multilateral trade negotiations under GATT 1947 have reduced both the tariff and nontariff barriers to international trade. The effect of such liberalization is witnessed in the present day world with the tremendous increase in the international trade not only in goods but also in services. Undoubtedly, it is a great achievement of the twentieth century, which is also continuing in the twenty first century. However, in the zeal to liberalize international trade, certain interrelated aspects of the international trade could not get due recognition. The impact of trade liberalization on the factors of production, especially the labour, is said to be one of the major

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[2] Daniel A. Sumner, Vincent H. Smith and C. Parr Rosson, 'Tariff and Non-Tariff Barriers to Trade', available at <http://www.farmfoundation.org/news/articlefiles/816-sumner.pdf> Last visited, 04 November 2013.

[3] See generally <http://www.unescap.org/ttdw/Publications/TPTS_pubs/pub_2307/pub_2307_ch14.pdf> Last visited, 04 November 2013.

areas of concern in this regard.[4] According to the critics, the trade liberalization has resulted in 'race to the bottom', since the producers search for lower labour standards and wages.[5]

Every human being is vested with certain human rights, which are inalienable until the last breath. The human rights of the labourers are recognised both in the international and domestic levels. In the international level, the United Nations has been instrumental in bringing the general human rights' standards, and ILO, in particular, has been the nodal agency in developing and elaborating the labour standards. Since its establishment in 1919, ILO has drafted more than 180 conventions for implementation in the municipal level by the respective States. However, a major area of concern is their limited implementation. An analysis of State practices clearly indicates that almost every State in the world is in violation of one or more ILO conventions.[6]

Realizing the implementation problems, the ILO has resorted to identify following four major labour principles as 'core labour standards' to be implemented by all the member States.[7] (a) Freedom of association and the effective recognition of the right to collective bargaining. (b) Elimination of all forms of forced and compulsory labour. (c) Effective elimination of child labour. (d) Elimination of discrimination in respect of employment and occupation.

Despite the more intensive ILO efforts to protect the labour standards, the situation remains far from satisfactory. The implementation problem continues due to the absence of legal remedies against the States' failure to implement.[8] The mere 'name and shame' policy towards non-

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[4] See generally Christopher Mccrudden and Anne Davis, 'A Perspective on Trade and Labour Rights', in Francesco Francioni (ed.), *Environment, Human Rights and International Trade*, (Oregon: Hart Publishing, 2001) pp. 179 - 198.

[5] Ajit Singh and Ann Zammit, 'Labour Standards and the "Race to the Bottom": Rethinking Globalisation and Workers Rights from Developmental and Solidaristic Perspectives', available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.167.5606&rep=rep1&type=pdf> Last visited, 04 November 2013.

[6] Sean Turnell, 'Core Labour Standards and the WTO', available at <http://www.businessandeconomics.mq.edu.au/contact_the_faculty/staff/alphabetical_list_of_staff/sean_turnell/publications/?a=15246> Last visited, 04 November 2013.

[7] These principles are codified in the ILO Declaration on Fundamental Principles and Rights at Work, entered in 1998.

[8] Nicholas Keresztesi, 'Linking Labour Rights and International Trade: Evaluating the NAALC Model', in Maureen Irish (ed.), *The Auto Pact: Investment, Labour and the WTO*, (The Hague: Kluwer Law International, 2004) pp. 197 - 241 at p. 201.

implementation adopted by the ILO has lost its significance in the present economics driven world. Due to this, the critics are of the opinion that the ILO is not even competent to ensure the adherence to core labour standards. It clearly leads to an obvious conclusion that the ILO alone is not sufficient to take care of the labour concerns,[9] especially in the light of ever-increasing new forms of problems in the deteriorating labour standards. Thus, it is justified to look at the WTO to step-in to address the labour concerns, though in a limited manner.

II. Labour Concerns in the Existing WTO Regime:

Historically when the International Trade Organization (ITO) was proposed to be established during 1940s[10], the Havana Charter of 1948 included a fair labour standards clause for incorporation in the Charter of ITO. However, the labour rights under the trade law had a setback with the failure to kick-start the ITO and gradual increase in the negotiations concentrating solely on trade liberalization. Interestingly, the present major contender for the labour standards in the WTO regime, the United States, was opposed to the trade-labour linkage during the ITO negotiations, which also was a reason for its refusal to ratify the ITO Charter.[11] Later, in the WTO Agreement (Marrakesh Agreement), the Preamble recognise that the international "relations in the field of trade and economic endeavour should be conducted with a view to raising standard of living, ensuring full employment and a large and steadily growing volume of real income and effective demand."

Despite the preambular recognition of raising labour standards, the Marrakesh Agreement could not supplement it with any affirmative obligation to uphold labour standards. The Agreement is only said to have left some room to the WTO members to restrict trade with an objective to implement social welfare measures including labour standards. But again the moot question is how much room exists under the provisions of the

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[9] See Chantal Thomas, 'The WTO and labour rights: strategies of linkage', in Sarah Joseph, David Kinley and Jeff Waincymer (ed.s), *The World Trade Organization and Human Rights*, (Cheltenham: Edward Elgar, 2009) pp. 257 - 284 at p. 260.

[10] The ITO was proposed to be established along with the International Monetary Fund (IMF) and International Bank for Reconstruction and Development (IBRD) during the Bretton Woods Conference of 1944. The idea behind ITO was same as that of WTO, that is, to create a nodal agency in the international level to promote sustained international trade. However the dream of ITO was not realized due to the absence of agreement between the States.

[11] Kevin R. Gray, 'Labour Rights and International Trade: A Debate Devolved', in Maureen Irish (ed.), *The Auto Pact: Investment, Labour and the WTO*, (The Hague: Kluwer Law International, 2004) pp. 277 - 300 at pp. 278 & 279.

Agreement? In addition, how to regulate the misuse of such liberty by the States? These two questions are prominent in practice, as the WTO members have often resorted to the testing of WTO regime with plethora of trade restrictive measures.

One of the major provisions used for justifying trade restrictions for the protection of labour standards is Article XX of the GATT. The ten general exceptions available under Article XX are invoked for justifying wide variety of trade restrictive measures. The three exceptions relevant to implement labour standards are clauses (a), (b) and (e) of Article XX. Among them, Article XX (e) seems to be more direct in the protection of labour rights, since it justifies a restrictive measure relating to the products of prison labour. However, the drafting history of Article XX (e) reveals that it is not drafted for the protection of rights of the prisoners. Instead, the intention behind the provision was to eliminate the possibility of trade distortion by the cheap prison labour products.

In the light of above factor, Article XX (a) and (b) are more debated by the scholars as the possible safeguards against the falling labour standards.[12] While Article XX (a) allows trade restrictions necessary to protect public morals, Article XX (b) justifies the measures necessary to protect human, animal or plant life or health. It is also supplemented by a separate agreement, Agreement on Sanitary and Phytosanitary Measures. The public morals exception is subjected to the dynamic interpretation by stating that the human rights are intrinsic element of public morality in the modern welfare societies. Similarly, the ambit of Article XX (b) is stretched to include the protection of health or life of labourers.[13] Therefore, the core labour rights are argued to be the part of Article XX.

The above argument is equally opposed by several scholars.[14] According to them the stretching of Article XX exceptions to process and production methods (PPMs) based restrictions, like measures to protect labour standards, was never intended by the drafters of the provision. Such an extension to the PPMs based restrictions may result in a slippery slope of using Article XX as a blank cheque to implement the varying self interests of

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[12] See Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade*, 2nd edn., (London: Routledge, 1999) p. 456.

[13] Chantal Thomas, 'Should the World Trade Organization Incorporate Labour and Environmental Standards?' *Washington and Lee Law Review*, Vol. 61, 2004, pp. 347 - 404 at pp. 369 - 371.

[14] *See Christoph T. Feddersen, 'Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and "Conventional" Rules of Interpretation'*, Minnesota Journal of Global Trade, *Vol. 7, 1998, pp. 75 - 122 at p. 109.*

the States. Such a unilateral measure under Article XX may take away the spirit of multilateralism and compromise the trading interests of the international community.[15]

Whatever may be the arguments in favour of or against liberal interpretation of Article XX, one thing is clear that Article XX is not easy to invoke. This is especially in the light of strict standards of the chapeau, which mandates the States to apply measures "subject to the requirement that such measures are not applied in a manner which constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade..." The difficulty in the successful invocation of Article XX is evidenced in the environmental issues, wherein the series of attempts to invoke Article XX exceptions are simply undone by the rigorous requirements of the chapeau.[16] Moreover, as Appellate Body has correctly observed in *United States - Woven Wool Shirts and Blouses from India*[17], the burden of proof in invoking Article XX exception is on the party invoking the exception. Therefore, the limited exception of Article XX would not be of much help in protecting the variety of labour standards.

Another attempt to bring the labour standards within the WTO regime is in the form of treating the poor labour conditions as subsidy, and as such, the products produced by compromising labour standards may be subject to countervailing measures. According to the scholars banking on subsidy argument, the government's failure to implement the labour standards must be equated to that of the grant by the government for a material input, which results in distorting the competitive conditions.[18] Thus, a right to counter the effect of such subsidy must be conferred to other States.

However, this argument is again too farfetched in the light of restricted meaning of the subsidy under the WTO regime. The Agreement on Subsidies and Countervailing Measure mentions three requirements of

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[15] Keith E. Maskus, 'Should Core Labor Standards be Imposed through International Trade Policy?', The World Bank Development Research Group, 1997, p. 60.

[16] See *United States - Restrictions on Imports of Tuna* DS21/R - 39S/155 (3 September 1991) *United States - Standards for Reformulated and Conventional Gasoline* WT/DS2/AB/R (29 April 1996) and *United States - Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R (12 October 1998).

[17] *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India* WT/DS33/AB/R (25 April 1997).

[18] Robert Howse, 'The World Trade Organization and the Protection of Workers' Rights', *Journal of Small and Emerging Business Law*, Vol. 3, 1999. <www.westlaw.com>

subsidy. They are (a) financial contribution; (b) by a government or any public body; and (c) which confers a benefit. Though the poor labour standard may confer benefit to the producers, equating the failure of the government to implement labour standards as 'financial contribution', which is a positive act, is not acceptable.[19] Even if it is accepted, the determination of the effect of poor labour standards on the competing producer is nearly impracticable task. Therefore, any countervailing measure taken by the States to offset the effect of so called subsidy would be subject to challenge. This would not only open the floodgates of litigation, but also distort the trade relations between the States. Moreover, the States imposing the countervailing duties would be subject to heavy burden of proof.

In light of the above factors, the United States and the European Union started to campaign for the incorporation of labour standards in the WTO regime. In the inaugural Singapore Ministerial Conference of 1996, the United States tried to introduce the so called 'Social Clause' to the multilateral trade agreements, which was defeated by the developing countries. The developing countries viewed this as an attempt for the back door entry of protectionalism by the developed world. It is argued to be the unilateral imposition of labour standards of the developed States on rest of the world with a view to negate the comparative advantage of low-cost labour enjoyed by the developing States. Thus, the Singapore Ministerial Conference ended with the conclusion that the ILO is the only competent body to establish and monitor labour standards across the globe.[20]

The wave of labour rights started in the first Ministerial Conference was reintroduced in the third Ministerial Conference held at Seattle in December 1999. This time, it was more intense with individual proposals being submitted by the United States, European Union and Canada along with the pressure tactics from international labour unions, consumer groups and other nongovernmental organizations. However, the multiple proposals for bringing the linkage between the trade and labour rights were not considered formally before the end of the Seattle Conference. The fourth Ministerial Conference held at Doha put a curtain to the debate by

[19] Drusilla K. Brown, 'International Labor Standards in the World Trade Organization and the International Labor Organization', available at <http://research.stlouisfed.org/publications/review/00/07/0007db.pdf> Last visited, 04 November 2013.

[20] WTO, Singapore Ministerial Declaration, 13 December 1996, available at <http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm> Last visited, 04 November 2013.

reaffirming the Singapore Declaration that the ILO should be the sole competent body to deal with the labour matters.[21]

The outcome of WTO Ministerial Conferences is in favour of those developing countries who were against the labour standards under the WTO regime. Though it seems to be unfair from the perspective of the labour rights, one cannot rule out the scepticism of the developing countries in the implementation of the labour standards under the WTO. In fact, the developed countries' arguments on the labour standards were not based on the humanitarian considerations but principally motivated by the desire to protect the domestic labour interests.[22] This is reflected in the attitude of the current leading contender for labour standards in WTO, the United States, which was dead against the labour standards during 1940s ITO negotiations.

With the defeat in implementing the labour standards at WTO, the developed States have started to resort more and more to Article XXIV of GATT, which provides for the formation of customs unions and free trade areas. In addition, the 1971 Generalized System of Preferences (GSP) is also used for implementing the labour standards in the developing world. Both United States and European Union include labour standards in their bilateral or plurilateral agreements granting special and preferential treatments. One of the best examples in this regard is the North American Free Trade Agreement (NAFTA) between the United States, Canada and Mexico, which includes a parallel accord on labour standards.[23]

III. Conclusion:

The existing link between the trade liberalization and labour standards is certainly unquestionable. The North-South divide in the integration of the labour standards with the WTO regime is never ending. While the developed North advocate for the higher labour standards, which prevail in their domestic level, the developing South is neither willing to adopt nor capable of affording such standards. There is no precise answer between these two extreme arguments, but there can only be a preference towards one or other depending on the background of the person putting

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[21] *Supra* note 10, at pp. 282 & 283.

[22] Drusilla K. Brown, 'Labour Standards and Human Rights', in Amrita Narlikar, Martin Daunton and Robert M. Stern (ed.s), *The Oxford Handbook on the World Trade Organization*, (Oxford: Oxford University Press, 2012) pp. 697 - 718 at p. 698.

[23] See <http://www.worldtradelaw.net/fta/agreements/nafta.pdf> Last visited, 04 November 2013.

forward the views. Understandably, the WTO Ministerial Conferences have also failed to provide any compromised solution, acceptable to all.

In the light of existence of a specialized dedicated body like ILO for developing the labour standards, the WTO's role is found unnecessary by many developing States. However, this cannot be a justifiable reason for keeping WTO away from labour rights' implementation, especially in the wake of ILO's weakness in implementing the labour standards. But again, the author is not advocating for the use of WTO as a tool to unilaterally implement the labour standards of the developed world in the developing world. The situations prevailing in these two parts of the world are different, and therefore, the WTO needs to work in collaboration with the ILO to appreciate the situation and bring in the generalised labour standards acceptable to all. The WTO, once successful in listing the generalised core labour standards, should take up the task of their implementation.

The above-mentioned limited integration of labour standards with the WTO regime would go a long way in bringing clarity and predictability to the WTO regime. It would avoid the testing of variety of trade restrictive measures by the States under different provisions to uplift the labour standards. The clarity in the regime also prevents the WTO dispute settlement bodies adopting too much of judicial activism, and becoming the lawmaking machines over the period of time. More significantly, the growing bilateralism in the international trade, which often goes against the spirit of multilateralism, can be reduced by such integration.