

## **The WTO and Human Rights Obligations: Harmonizing Trade Liberalization with Core Labour Standards**

Draft working paper for the NZ Centre for Human Rights Law, Policy and Practice

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**ABSTRACT:** The WTO rules do not supersede the responsibility of States to abide by their other treaty obligations with respect to human rights. An improved coordination between the ILO, the UN human rights committees and the WTO would vastly improve the ability of individual governments to utilize human rights instruments in their attempts to adjust their trade of goods and services that are determined to have violated the fundamental human rights and core labour standards of workers.

**Key words:** WTO, GATT, ILO, core labour standards

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The current system of multilateral trade has been criticized by anti-globalization activists who claim that multinational corporations and developing country producers have conspired to use free trade principles and institutions to exploit poor workers. They argue that the World Trade Organization (WTO) is complicit in this infringement of human rights because its rules fail to explicitly condemn the violation of core labour standards. There is no doubt that worker exploitation and child labour continue to persist throughout the developing world. What is disputed in this essay is that the WTO has deliberately or inadvertently institutionalized the violation of core labour standards while facilitating trade liberalisation.

In this essay, I will demonstrate that core labour standards are universal human rights that could be strengthened through WTO practices. However, I will also stress that the implementation of trade sanctions against violators of core labour standards is ultimately dependent on individual government action, not the WTO. The prospect for strengthening international labour standards lies in the improvement of horizontal coordination between the International Labour Organization (ILO), the WTO, the UN Charter and treaty bodies and relevant governments.

### **Core Labour Standards as Customary International Law**

In 1919, at the conclusion of the Treaty of Versailles, the ILO was created in order to establish international labour standards and investigate labour issues. The ILO was not empowered to impose sanctions on governments for violations of international labour standards. It was designed solely to collect information and register complaints against recognized government violations. The ILO has persisted into the modern era without significant institutional reforms. Although the ILO is not equipped to authorize sanctions, it can inform and advise governments in their individual determination of sanctions. Furthermore, individual governments may wish to utilize existing human rights instruments to further legitimate their use of sanctions. As such, the ILO may also

inform and advise treaty bodies, such as the Committee on Economic, Social & Cultural Rights of the International Covenant on Economic Social & Cultural Rights (ICESCR) and the Human Rights Committee of the International Covenant on Civil & Political Rights (ICCPR) in their determinations of breaches of human rights which could facilitate the coordination of a multilateral effort to impose sanctions on countries that continue to violate core labour standards.

At its inception, the ILO was primarily concerned with the eradication of slavery and other forms of forced labour, but incorporated other standards of social justice as stated in the preamble of its Constitution, including but not limited to: limits on working hours, the provision of an adequate living wage, the protection of children and vulnerable labour groups, equal pay for equal work and freedom of association.<sup>1</sup> Despite the extensive list of labour standards outlined in the ILO Constitution and preamble, five core labour standards emerged. As stated in the ILO's *Declaration on Fundamental Principles and Rights at Work* (1998), the five core labour standards are: the elimination of all forms of forced or compulsory labour (i.e. slavery), abolishment of child labour, elimination of discrimination, freedom of association and collective bargaining (i.e. unions).<sup>2</sup>

These core labour standards encompass both social and political rights and have each been codified in the *Universal Declaration of Human Rights* (UDHR) and the above mentioned *ICCPR* and *ICESCR*. These treaty instruments have since achieved a greater recognition of their status as customary international law.<sup>3</sup> Professors of trade law Michael Trebilcock and Robert House assert that these commitments, "may now be said to meet the standard of *opinio juris sive necessitatis*, a practice that states follow out of a sense of legal obligation."<sup>4</sup> From a legal standpoint, this means that these treaty

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<sup>1</sup> United Nations. International Labour Organisation. *Constitution of the International Labour Organisation*. Geneva, ILO. 2010.

<sup>2</sup> United Nations. International Labour Organisation. *Declaration on Fundamental Principles and Rights at Work*. Geneva, ILO. 1998

<sup>3</sup> Trebilcock, Michael J., and Robert Howse. *The Regulation of International Trade*. 3rd ed. New York: Routledge, 2005. p581.

<sup>4</sup> IBID, p581.

commitments by governments have achieved a greater recognition as pre-emptory norms of international law from which no derogation is permitted.

### **Developed Country Arguments: Unfair Advantage and the ‘Race to the Bottom’**

The motivation behind the creation of the ILO in 1919 and the adoption of labour conventions that preceded it (e.g. Berne Convention, 1906), was that the newly industrialized countries of the day (today’s developed countries) feared a worsening of their own economic positions in relation to countries that did not have comparable labour laws. This weakening of comparative advantage was thought to encourage a ‘race to the bottom’ in labour standards.<sup>5</sup> In the absence of common labour standards, the prominent mercantilist mentality of the time could encourage governments to gain an unfair advantage by lowering, or even eliminating, their individual labour standards. Countries affected by this shift in comparative advantage would follow suit, thereby eliminating the trade advantage but resulting in an overall welfare loss to labour. This antagonism has since been softened in the developed country model with the strengthening and expansion of democratic, legal and union institutions in the newly industrialized countries of the early twentieth century.

In the modern era, human rights crusaders view the increasing use of lower-cost labour in today’s developing countries as evidence of sanctioned First World exploitation of the world’s poorest and most desperate people. The WTO, as the leading international trade body, has come under scrutiny by human rights groups for its failure to prevent any and all cases of perceived trade-related labour exploitation in developing countries. What human rights groups tend to overlook is that developed countries have attempted to establish a concrete link between trade and core labour standards, but have been rebuffed by developing countries who claim that the imposition of improved labour standards amounts to nothing more than veiled protectionism.<sup>6</sup>

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<sup>5</sup> *Human Rights Reference Handbook*. 1999. p14.

<sup>6</sup> *Doha WTO Ministerial 2001: Briefing Notes Trade and Labour Standards*. Rep. World Trade Organization, 2001. [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/brief\\_e/brief16\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief16_e.htm)

## Developing Country Arguments: Veiled Protectionism and Development

Developing country governments have consistently resisted attempts in the WTO to establish ministerial meetings and working groups to investigate the alleged link between trade and core labour standards. According to the WTO,

Member governments from the developing world believe attempts to introduce this issue into the WTO represent a thinly veiled form of protectionism which is designed to undermine the comparative advantage of lower-wage developing countries.<sup>7</sup>

Developing country governments maintain that lower labour standards are the key to their development and that conditions will improve alongside economic growth. Developing country governments are wary about introducing core labour standards into the WTO framework because they fear the eventual inclusion of the entire basket of positive and negative socio-economic rights. These governments do not willingly wish to submit to rules and restrictions that would ultimately weaken their control over labour in their respective countries.

Developing country governments also argue that these rights are “luxury goods” that they can not yet afford. However, Nobel Prize economist Amartya Sen has refuted this argument in his book *Development as Freedom* in which he argues that implementing human rights and labour standards is less expensive for developing countries and that the real drivers of economic growth are found in the expansion of individual functionings and capabilities.<sup>8</sup>

## WTO: General Support for Social and Developmental Goals

I now turn to the heart of the debate that alleges that the WTO is complicit in the maintenance of poor labour standards in developing countries. It is important to

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<sup>7</sup> *Doha WTO Ministerial 2001: Briefing Notes Trade and Labour Standards*. Rep. World Trade Organization, 2001. [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/brief\\_e/brief16\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief16_e.htm)

<sup>8</sup> Sen, Amartya. *Development as Freedom*. Oxford: Oxford UP, 2001. p4-6.

distinguish the role of the WTO as a trade body and not a human rights body. The WTO is concerned primarily with the lowering of the barriers to trade (such as tariffs, quotas, duties, non-tariff barriers and others) in an attempt to liberalize trade and expand the multilateral trading system. It may be true that negative externalities and moral hazards have materialized as a result of the expansion of global trade; however, these failures are not evidence of a disguised motivation in the WTO to exploit developing country workers.

As stated in the preamble of the WTO Agreement (Marrakesh Agreement 1995), the objective of the expansion of the multilateral trading system reflects a commitment to:

ensuring full employment and a large and steadily growing volume of real income and effective demand, ... while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development.<sup>9</sup>

The intentions, as well as the social and developmental goals of the WTO, are explicitly stated. Although a social clause does not exist within the main body of the WTO Agreement text that would explicitly condemn the trade of goods and services that utilized unacceptable labour standards in their production processes, there does exist the Article XX: General Exemptions.

### **General Agreement on Tariffs and Trade (GATT) Article XX General Exemptions**

The Article XX: General Exemptions are a list of criteria that authorize individual country governments to restrict the trade of goods and services that have been found to threaten public morals, human, animal or plant life or health, cultural treasures, or exhaustible natural resources, among others.<sup>10</sup> As previously discussed, the five core labour standards have achieved a greater recognition of universality and therefore an importing country could make the argument that violations of core labour rights

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<sup>9</sup> United Nations. *Marrakesh Agreement Establishing the World Trade Organization*. Marrakesh, 1 Jan. 1995.

<sup>10</sup> United Nations. *The General Agreement on Tariffs and Trade: Article XX*. Geneva, 1986.

constitutes a threat to “public morals” under Art XX(a) or “human health” under Art XX(b).<sup>11</sup>

However, despite a seemingly clear line of reasoning in establishing human rights and core labour standards as safeguarding universal public morals or human health, there has yet to be a WTO ruling on the interpretation of Art XX(a)<sup>12</sup> and Art XX(b) in regard to preserving public morals or human health as a result of poor labour standards.

Nevertheless, just because there is an absence of case law interpreting Art XX(a) or Art XX(b) in regard to violations of core labour standards, one need not argue that the Article is void of potential. Furthermore, it is plausible that no case has arisen because no Member State has complained for fear of establishing a negative precedent. This observation is the purpose of this essay.

### **Caveat: Limits of the Use of GATT Article XX**

Despite the potential of Art XX, the ability of governments to depart from their WTO obligations under a general exemption is conditional on the preamble or ‘*chapeau*’ of Article XX. The *chapeau* states that the measures taken should not “constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail”.<sup>13</sup> This means that Country A can not simply ban a tradable good that utilized forced labour from Country B without applying the ban to all like-products (similar goods) from all countries. Under the principle of non-discrimination outlined in Articles I and III of the GATT, a potential ban on forced labour goods must be applied in an origin-neutral fashion.<sup>14</sup> The ban can not single out a target country when similar

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<sup>11</sup> United Nations. *The General Agreement on Tariffs and Trade: Article XX*. Geneva, 1986. [Slightly abridged by the author]

<sup>12</sup> Trebilcock, 2005. p572.

<sup>13</sup> United Nations. *The General Agreement on Tariffs and Trade*. Geneva, 1986.

<sup>14</sup> Trebilcock, 2005. p571.

conditions might exist in other countries. This origin-neutral condition was adjudicated by the Appellate Body in the *WTO: Shrimp-Turtles* case.<sup>15</sup>

Another obstacle to attempts by reformist members of the WTO to introduce core labour standards into the WTO rules and processes is the fact that these reforms have been firmly rebuffed by developing country members, fearful of losing their competitive advantage in low-cost labour.<sup>16</sup>

## Conclusion

To argue that the WTO has failed explicitly to outlaw the trade of goods and services that impinges on core labour standards is misguided. Contrary to the belief of critics, the WTO rules do not supersede the responsibility of States to abide by their other treaty obligations with respect to human rights, including core labour standards.

In the end the onus is on individual governments to decide which human rights instruments or institutional arrangements are best suited to advance core labour standards. And the ILO should continue to investigate alleged violations of core labour standards and advise individual governments, WTO member States, and UN human rights committees on best practices. The UN Human Rights Council and other human rights treaty committees should continue to investigate and call to governments' attention violations of human rights.

The WTO should continue pursuing its mandate to lower the barriers to trade and liberalize the multilateral trading system. But this does not preclude the WTO members from seeking to promote human rights and core labour standards. Improved consultation between the ILO, the UN Human Rights Council, human rights treaty

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<sup>15</sup> World Trade Organization. Appellate Body. *India Etc versus US: 'Shrimp-Turtle'*. Geneva, 6 Nov. 1998. [http://www.wto.org/english/tratop\\_e/envir\\_e/edis08\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/edis08_e.htm)

<sup>16</sup> *Doha WTO Ministerial 2001: Briefing Notes Trade and Labour Standards*. Rep. World Trade Organization, 2001. [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/brief\\_e/brief16\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief16_e.htm)



committees and the WTO member governments could improve the ability of each and all to implement policies that can reduce barriers to trade of goods and services and simultaneously avoid undermining the fundamental human rights of workers.

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