Reflections

Seeking Compliance with Labour Standards through Trade Sanctions: A Disguised Protectionism or Anything More?

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Introduction

The debate as to whether or not exploitative labour practices be sanctioned through trade restrictions has been on the agenda for several years within the World Trade Organisation. Doumbia-Henry and Gravel trace the origins of this debate as far back as the periods of the industrial revolution stating that in those days 'the charitable urge to impose constraints on appalling working conditions was set against a preoccupation that was economic in nature.'[1] Though initially it emerged in the form of a charitable urge, in the contemporary world those urges are enunciated as claims of minimum labour standards and human rights. Thus, the increasing interest to see a world where the minimum labour rights guarantees are fully respected, on the one hand, and on the other the urge to ensure a fair trade relations have remained on a constant collision course.[2] Arguments abound, both in support and against, on the tenability of using trade sanctions for the purpose of securing compliance with human rights and labour standards by trading partners.

Where particularly countries engage in unilateral or bilateral measures with an attempt to put on task their fellow trading partner countries towards complying human rights and labour standards through trade restrictions, the complication and intensity multiplies. For instance, if state X were to be allowed to integrate trade, investment and labour rights or generally human rights, the mechanism of such connection would assume basically two shapes: sanctioning its investors with foreign operations where they engage in abusive labour practices in their host states;[3] or it could be through banning imports from the country which engages in labour practices that are illegal in its own jurisdiction.[4] The latter may be done as a

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[1]See Doubbia-Henry, Cleopatra & Gravel, Eric, (2006), 'Free Trade Agreements and Labour Rights: Recent Developments,' *International Labour Review*, Vol. 145, pp 185-206, at 185

[2]See generally Trade and Labour Standards: Subject of Intense Debate, available at http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/18lab_e.htm last visited on 22 July 2011

[3]An example of this sort can be the U.S. practices where its tax law, which provides benefits to U.S. corporations in the form of credits on foreign taxes against U.S. tax liability, has been used to penalise corporations doing business in disfavoured countries. Foreign tax benefits were withheld from U.S. corporations on income earned in South Africa during the anti-apartheid era. See Diller, Janelle M., & Levy, David A., (1997), 'Child Labour, Trade and Investment: Toward the Harmonisation of International Law,' *The American Journal of International Law*, Vol. 19, No 2, pp. 663-696, at 693

[4]This might be done, for instance, by invoking the GATT Article XX exceptions (see *infra* note 5) to the MFN (Article I), national treatment obligations (Article III) and limitations on quantitative restrictions (Article XI). Some of the possible candidates from Article XX could

matter of sovereign right[5] so long as it is applied in a non-discriminatory manner and not as a disguised restriction on international trade.[6] These being generally the possible course of actions those countries may follow, this contribution rather examines the arguments forwarded for and against such sanctions that are aimed at compelling a country to respect labour and other human rights standards in engaging in international trade relations. While the first part is devoted to the arguments for and against labour rights-related sanctions, the second part compares the General Agreement on Tariffs and Trade (GATT) rules with that of Generalised System of Preference (GSP) schemes when used as mechanisms to sanction human rights violations of an exporting country. The contribution closes by highlighting on some critical observations on those arguments examined in its first and second parts. As Ethiopia is in the accession process to join the WTO, it is believed that the trade-related issues discussed in this contribution have both currency and relevance.

I. Enforcing labour rights through trade conditionalities?

The dominant trends in the areas of trade conditionalities as means of enforcing labour rights reveal that those who argue in favour of such measures are from the economically affluent global north while those who disagree are from the economic south.[7] In tandem with those contradictory positions, labour standards that obtained a higher level of recognition as being 'core' ones continue to develop. In other words, rather than insisting on the full lists of those heterogeneous labour standards, as described by Philip Alston, 'a new normative hierarchy has been established.'[8] These core labour standards particularly popular within the WTO Member States relate to the two ILO Conventions on freedom of association and the right to organise and bargain collectively,[9] the two Conventions on forced labour,[10] the Convention on child labour that focuses on the minimum age for work,[11] the non-discrimination

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[5] See WTO Appellate Body Report, May 20, 1996, 35 ILM 603, 621; See also supra note 2, p. 682

[6] See General Agreement on Tariffs and Trade, TIAS No. 1700, 55 UNTS 194, Oct. 30, 1947 (henceforth referred as the GATT), Article XX, the Chapeau

[7] See the WTO, 'Labour Standards: Consensus, Coherence and Controversy,' available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm last visited on 22 July 2011

[8] See Alston, Philip, (2004), 'Core labour standards' and the transformation of the international labour rights regime,' *European Journal of International Law*, Vol. 15, No. 3, pp 457-521, at 458

[9] See ILO, Freedom of Association and Protection of the Right to Organise Convention, adopted Sept. 7, 1948, 68 U.N.T.S. 17 (No. 87)

[10] See ILO, Forced Labour Convention, adopted June 28, 1930, 39 U.N.T.S. 291 (No.29); Abolition of Forced Labour Convention, adopted June 25, 1957, 320 U.N.T.S. (No.105)

[11] See ILO, Minimum Age Convention, adopted June 26, 1973, 1015 U.N.T.S. 297 (No.138); With regard to Child Labour, the new convention is also worth mentioning here, ILO, Worst Forms of Child Labour Convention, 1999

Convention,[12] and an equal pay for work of equal value Convention.[13] It is interesting to note here that, of these so called 'core' labour standard Conventions, the US-the prime advocate of trade-labour rights linkage-has ratified only the two of them, i.e., the Convention on forced labour and the Convention on worst forms of child labour.[14] Nonetheless, the ILO Declaration on Fundamental Principles and Rights at Work that was duly adopted by its 86th General Conference makes it a duty of 'all Members even if they have not ratified the Conventions in question...to respect, to promote and to realise' those rights.[15] Still, there exist schisms on whether or not implementation of labour standards does make a condition in trade relations. This section first discusses those arguments that are in favour and then proceeds to examine those points posed against such restrictive measures to enforce labour rights through trade and investment sanctions.

1.1. Arguments in favour

The first argument propounded by those who favour the use of trade and investment sanctions to enforce labour rights is based on socio-economic ground, which is technically called social dumping.[16] This is one of the GATT underpinning principles whereby it is asserted that 'markets should not be distorted by goods 'dumped' in an importing market at prices below those for like goods in the domestic market of the exporting country or in third-country.'[17] In other words, this is meant that countries that do not guarantee basic labour rights will have lower labour costs thereby reducing their production cost and consequently the price of their products. Blackett puts the consequence of this condition as follows:

> Capital, which is mobile, shops for low cost labour, which enables it to produce, if not more efficiently, at a lower overall cost per unit. Labour is not similarly mobile. To compete with low labour cost countries of the

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[12] See ILO, Discrimination (Employment and Occupation) Convention, adopted June 25, 1958, 362 U.N.T.S. 31 (No.111)

[13] See ILO, Equal Remuneration Convention, adopted June 29, 1951, 165 U.N.T.S. 303 (No.100); and See also generally Blackett, Adelle, (1999), 'Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation, *Columbia Human Rights Law Reveiw*, Vol. 31, pp 1-80

[14] See the ILO ratification information page, available at http://www.ilo.org/ilolex/english/newratframeE.htm last visited on 22 July 2011; the US' refusal to acknowledge binding global standards can be observed from the ILO statistics on ratification of its Conventions that puts it as one of the four Member States that has ratified fewer Conventions. See Alston, *op.cit.*, at 467

[15] See ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, Eighty Sixth Session, Geneva, 18 June 1998, available at http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm last visited 24 July 2011

[16] This is 'a practice of exploiting prison or sweated labour to enable a product to be sold at a price lower than it would command in accordance with a regulated wage structure.' See Diller & Levy, *op.cit.*, at 680

[17] See Diller & Levy, *op.cit.*, at 680

South, where the labour supply is plentiful, states must decrease their labour costs by decreasing labour standards, or harmonising 'down.' This is, simply put, the concern about a race to the bottom.[18]

While stating this same fact, Bhagwati had written that 'if trade shifts activity to where the costs are lower because of lower standards, and if additionally capital and jobs move away to exploit lower standards abroad, then the countries with higher standards may be forced to lower their own.'[19] Whether low wage alone leads to lower production cost and consequently implicates on price is an argument that is open to suspect. Even if one may have a reason to believe that labour is cheaper in the economic south, it does not automatically create the presumption that they produce with lower production cost. This is also proved to be an empirical fallacy because in many occasions, higher labour standards may increase competitiveness and productivity rather than necessarily to low labour costs.[20]

Accordingly, this argument is met with fierce critique on various grounds, some of which shall be raised later while discussing the other side of the contention. In any event, the social-dumping argument tells us that it is legitimate to sanction such acts through the GATT principles as stipulated under its Article VI[21], even though the requirement to show injury to a domestic industry in the territory of the importing Contracting Party might be a hurdle sometimes impossible to overcome.

The second argument in favour is based on subsidies as one form of non-tariff barriers to trade. 'Non-tariff barriers are broadly understood to include anything from quantitative restrictions on the import of certain products to domestic subsidies or "distortions" that enable an exporter to decrease the cost of production, and therefore the export price.'[22] As is the case with the 'social-dumping' argument, here too, 'the requirement to show injury to domestic industry as a consequence of imports [of commodities produced through abusive labour practices] may present a significant limitation in many cases.'[23] Both 'social-dumping' and subsidies are arguments that advocate abusive labour practices as against the principles of fair trade and relate more to the economic aspects of the argument in favour. This second

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[18] See Blackett, *op.cit.*, at 48-49

[19] See Bhagwati, J., *'Trade Liberalization and 'Fair Trade' Demands: Addressing the Environmental and Labour Standards Issues,'* Blackwell Publishers, (1995), p.746

[20] See Blackett, *op.ct.*, at 49

[21] Article VI of the GATT provides for the right of Contracting Parties to apply measures against imports of a product at an export price below its 'normal value (usually the price of the product in the domestic market of the exporting country).

[22] See Blackett, *op.cit.*, at 52

[23] See Diller & Levy, *op.cit.*,, at 681

argument is grounded on the idea of regarding labour deregulation as an act of subsidy and thus a distortion of trade.[24]

The third argument is grounded on a moral reason. It goes on to say that 'a country that adheres to higher labour standards within its national boundaries has the moral right to suspend trade with another country that does not adhere to equally higher labour standards.[25] For instance, if the US considers itself to have subscribed to values that do not admit child labour and has itself outlawed the practice, it should also have the right to suspend imports made by child labour in other countries. Why should US citizens have to compromise their values to accommodate the imports from abroad?'[26] It is claimed also that 'if labour standards elsewhere are different and unacceptable morally, then the resulting competition is morally illegitimate and 'unfair'.'[27]

Even if this point, too, faces a critique basically on the grounds of cultural relativism,[28] it remains to be one of the appealing arguments in favor of trade and investment sanctions for the enforcement of 'core' labour standards. However, insisting cultural reciprocity is, no doubt, too protectionist when applied in the realms of trade relations. Saying these basic arguments in favor from the moral as well as economic points of views, now we resort to the arguments against the use of trade and investment sanctions to enforce labour rights.

1.2. Arguments Against

One fundamental argument that resists the measures of trade sanctions as a means of enforcing labour standards relates to the principle of comparative advantage. This argument is succinctly described by Blackett as follows:

> The first premise of trade theory is that states should be permitted to rely on the source of that comparative advantage to exchange what they produce efficiently for what others produce efficiently. Trade would

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[24]See generally Barenberg, Mark, 'Federalism and American labour law: Toward a critical mapping of the 'social damping' question,' in Pernice, Ingolf, (Ed.), (1996), *Harmonisation of legislation in federal systems*, (USA: JURIS Publishing, Inc)

[25]See Panagariya, A., Trade-Labour Link: A Post-Seattle Analysis,' available at http://www.columbia.edu/~ap2231/Policy%20Papers/zdenek-PANAGARYAYA%20(Chapter%203.doc).pdf last visited on 22nd July 2011

[26]See Panagariya, *op.cit.*

[27]See Bhagwati, *op.cit.*, at 753

[28]This is usually considered as a disguised attempt to impose the western values on the other parts of the world, and blamed for going against the theories of cultural pluralism. For instance, Bhagwati has written 'diversity of labour practice and standards is widespread and reflects, not necessarily venality and wickedness, but rather diversity of cultural values, economic conditions and analytical beliefs and theories concerning the economic (and therefore moral) consequences of specific labour standards. See Bhagwati, *op.cit*, at 754

enable parties to maximize their returns by using their advantages efficiently.[29]

It is a direct attack on the argument of 'social dumping' in the sense that it rejects the proposal for harmonization of labour standards internationally. The argument goes, 'international differences in wages and social conditions reflect differences in productivity and social preferences.'[30] And any attempt to harmonize such labour standards internationally would 'artificially eliminate' the comparative advantages reflected in the cost of production and, 'hence, reduce international trade opportunities'[31] as the latter is basically dependent upon trading countries' comparative advantages.

The Singapore Ministerial Declaration seems to partially reflect this issue especially from the perspective of 'low-wage developing countries.' In Paragraph 4 it is stated as follows:

> We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. *We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question...*[32](emphasis supplied.)

According to this Declaration, therefore, countries must operate in trade matters in such a way that they exploit their comparative advantages. One area where countries of the South claim to have uncontested advantage being low-wage-paying conditions of labour, the Declaration rejects any unilateral or bilateral invocation of labour standards in this regard as protectionist. Again the fact that there is lower wage must not be conflated with low labour standards. Generally, as an aspect of social protection, equalisation of wages may not be considered as an end in itself when social clauses like labour standards are discussed. Rather, as pointed out in the ILO Governing Body report, any social protection 'should as far as possible reflect

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[29]See Blackett, op.cit., at 50

[30]See Sapir, A., *'The Interaction Between Labour Standards and International Trade,'* Blackwell Publishers, 1995, p.792

[31]Ibid

[32] 1996 Singapore Ministerial Declaration, available at http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm#core_labour_standards last visited on 22nd July 2011

the free choice of the social partners rather than the 'diktat', however well intentioned, of the international community.'[33]

The second argument is rather pragmatic in the sense that it says linking trade with labour will have a negative effect rather than a win-win end as advocated by those who argue in favor of such a link. If we consider, for instance, child labour and where, as is often true than not, countries will fail to meet the required standard as might be set by trading-partners, it will lead inevitably to trade sanctions. 'If so, no improvement in labour standards will be achieved and [at the same time] the gains from trade will be reduced.'[34] This also turns out to be an ethical question in the sense that children of the impoverished South need world community's unfettered attention and it is difficult to understand how advocating the labour standards through trade restrictions, rather than improved market access, would help. Again I quote Bhagwati here in support of this point:

> 'Whether child labour[35] should be altogether prohibited in a poor country is a matter on which views legitimately differ. Many feel that children's work is unavoidable in the face of poverty and that the alternative to it is starvation which is a greater calamity, and that eliminating child labour would then be like voting to eliminate abortion without worrying about the needs of the children that are then born.'[36]

The third and the final point is institutional, and in a way a continuation of the second argument in a different tone. This is best explained by Panagariya as follows:

> What the trade-labour link tries to accomplish is to kill two birds with one stone: use the WTO to achieve both free trade and higher labour standards. In technical terms, the link seeks to hit two targets with one instrument. But...in order to be successful, one would normally require at least as many instruments as he/she would targets. [Thus], the best course to promote labour standards is to pursue them through an alternative institution, the ILO, and leave [for] the WTO the task to promote free trade. This is also consistent with the Singapore Declaration.[37]

The above quote from the 1996 Ministerial Conference has a clear message as far as this point is concerned and to strengthen this line of argument. The then Trade and Industry Minister of Singapore, Mr. Yeo Cheow Tong, who also presided over that meeting said in his concluding speech, 'some delegations had expressed the concern

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[33]See ILO, Governing Body, *The social dimension of the liberalisation of world trade*, Nov 1994, cited in Blackett, *op.cit.* 50

[34]See Panagariya, *op.cit.*, at 9

[35]Bhagwati uses 'child labour' just as an example to demonstrate most of the 'core' labour standards by taking what he considers as most condemned.

[36]Bhagwati, supra note 15, p.755

[37]Panagariya, supra note 20, 10

that this text may lead the WTO to acquire a competence to undertake further work in the relationship between trade and core labour standards...I want to assure these delegations that this text will not permit such a development.'[38]

Thus, it remains to be a moot question as to whether trade and investment sanctions be used to enforce labour standards with the ultimate aim of harmonization together with trade liberalization. On balance, however, one could have a reasonable doubt on the tenability of the arguments favouring sanctions as a stick to obtain a dividend of the carrot that the international commerce provides.

II. GATT and GSP compared when used to sanction human rights violations

There are provisions in the GATT that aim to balance free trade needs and non-trade interests of the Contracting Parties such as the respect for human rights. GATT Article XX provides that nothing in the GATT 'shall be construed to prevent the adoption or enforcement by any Contracting Party of measures, *inter alia*, 'necessary to protect public morals,' necessary to protect human, animal or plant life or health,' 'relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production and consumption,' essential to the acquisition of or distribution of products in general or local short supply' and relating to the products of prison labour.'[39] In such circumstances 'a Member State could allege that the maintenance of trade relations with a nation which flagrantly violates certain fundamental rights (e.g., the practice of slavery, child labour, generalized violation of the right of physical and mental integrity) attacks its concept of 'public morals,' or that the adoption of trade restrictions seeks to protect 'human life or health' of people, etc.'[40]

The GSP, the legal basis of which is the 'Enabling Clause'[41] which was adopted under the GATT in 1979, on the other hand, allows 'developed countries to offer non-reciprocal preferential treatment (such as zero or low duties on imports) to products originating in developing countries.'[42] It was a decision primarily aimed at articulating the role of developed countries in the economic progress of developing

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[38]Quoted in Panagariya, Ibid

[39]See also generally Howse, Robert, & Mutua, Makau, 'Protecting Human Rights in a Global Economy: Challenegs for the World Trade Organisation,' in Tostensen, Anne & Stokke, Hugo, (Eds), (2001), *Human rights in development: The millennium edition*, (University of Buffalo Law School), pp 53-82.

[40]See Nogueras, Diego J., & Martinez, Luis M., (2001), 'Human Rights Conditionality in External Trade of the European Union: Legal and Legitimacy Problems,' *Columbia Journal of European Law*, Vol. 7, pp 307-336, p.328.

[41]The Enabling Clause is officially called the 'Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries.' See infra note 35

[42] See 'Enabling Clause' for Developing Countries, available at http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm last visited on 25 July 2011

countries.[43] The decision provides that contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties.[44] The extent to which developed countries may condition the granting of a preference on the developing country's attainment of certain non-trade related goals, such as human rights, is an issue that undoubtedly remains controversial.[45]

Generally, therefore, the GATT and GSP regimes are gateways to integrate non-trade related interests into the international trade policies. Even if they might be used for this similar end, they have many distinguishing features on which this part of the essay is supposed to briefly elaborate. On the basis of some four points of comparison, the later part of this section discusses the features of the two regimes by which a state may prohibit imports due to human rights violations.

2.1. The GATT Article XX exceptions and the GSP

2.1.1. Clarity of contents

The prime candidate under the GATT Article XX for import restriction on the grounds of human rights abuses is section (a), which provides the moral exception to free trade. Charnovitz poses series of questions about the vagueness of this provision:

> First, what type of behaviours implicates public morals...Can public morals differ from country to country or is there a uniform international standard? Second, whose morals can be protected...Can a trade measure be used to protect morals elsewhere? For example, would an import ban against goods made by indentured children be GATT-legal?[46]

He succinctly posits the difficulty of having uniform interpretation of this provision on the basis of theoretical analysis supported by empirical case studies.[47] The same can be said for the GSP scheme, especially considering its being voluntary and based on unilateral decisions of the developed countries. According to Paragraph 3(a) and

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[43] See Stamberger, Jennifer L., (2001), 'The legality of conditional preferences to developing countries under the GATT Enabling Clause,' *Chicago Journal of International Law*, Vol. 4, No 1, pp 607-618, at 608

[44] Ibid

[45] See Stamberger, *op.cit.*

[46] Charnovitz, Steve, (1998), 'The Moral Exception in Trade Policy,' *Virginia Journal of International Law*, Vol. 38, pp 689-746, at 689

[47] A WTO Panel as well as the Appellate Body had affirmed the vagueness of the enabling clause especially in relation to identifying the beneficiary countries as well as the extent to which developed countries can fix conditions for the grant of preferences. See The Panel's decision European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/R, December 1, 2003; and the Appellate Body's decision European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/AB/R, April 7, 2004

(c) of the Enabling Clause, 'any differential and more favourable treatment provided under this clause . . . shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties.'[48] And preferences granted under this clause shall 'be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.'[49] Although the GSP was supposed to represent these purposes, preference granters 'continued to create and operate distinct preferential regimes...[and] these special preference schemes have also been subject to increasing conditions.'[50] The GSP remains in practice to be too subjective to deserve the name 'generalised.' For instance, the African Caribbean and Pacific (ACP) countries have been considered for preferential access to European Union markets based on the Cotonou Agreement. However, the Agreement under Article 96 stipulates for the possibility of suspending that benefit because of the failure by the beneficiary to comply with principles of 'human rights, processes of democratisation, consolidation of the rule of law, and good governance.'[51] A country's failure or compliance to those standards of human rights, and democracy is to a large extent a matter to be determined by the subjective whims of those affluent countries. Thus, both the GATT Article XX as well as the GSP schemes have this problem of vagueness in scope and content.

2.1.2. The Chapeau in Article XX

The existence of the Chapeau in Article XX of the GATT can be taken as one point of comparison as we do not find its counterpart in the Enabling Clause. The invocation of human rights violations for restricting import from that violating state to be successful, it has to pass through 'the filter of the Chapeau of Article XX, which does not allow a measure to "constitute a means of arbitrary or unjustifiable discrimination...or a disguised restriction" on international trade.'[52] Thus, 'measures are considered incompatible with this Chapeau if they are only effective when [They] force the exporting country to change its policy, or when they make the GATT advantages depend on the exporting country adopting a national policy essentially similar in content to one imposed unilaterally by the importing country.'[53]

When we look into the GSP, developed countries would argue that the Enabling Clause permits them to condition promise of preferential market access on domestic standards of developing countries, such as their human rights records, without such

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[48] See Para 3(a) of the Enabling Clause, *op.cit.*

[49] See Para 3(c) of the Enabling Clause, *op.cit.*

[50] See Shaffer, Gregory & Apea, Yvenne, (2005), 'Institutional Choice in the Generalized System of Preferences case: Who Decides the Conditions for Trade Preferences? The Law and Politics of Rights,' *Journal of World Trade*, Vol. 36, No. 6, pp 977-1008, at 982

[51] See the Cotonou Agreement, cited in Shaffer & Apea, *op.cit.* at 983; included in the African Caribbean and Pacific countries are former European countries' colonies.

[52] See Nogueras & Martinez, *op.cit.*, at 329

[53] Ibid

constraint as it exists in the Chapeau of Article XX.[54] Thus, 'proponents of conditional preferences argue that the special nature of the preferential GSP scheme does allow for such conditionality as would otherwise be prohibited by GATT.'[55]

a) Positive/Negative conditionality

When we speak of conditionalities in external trade on various grounds such as human rights, first we refer to the measures of commercial liberalization that are offered to those countries who commit themselves to respect specific fundamental rights, [called positive conditionality].[56] This typically defines the GSP scheme since it grants preferential market access and other concessions to those countries that are considered to have fulfilled the required conditions as might have been provided in the scheme.[57] However, it is not to mean that the GSP cannot be used also negatively. For instance, the U.S. GSP 'primarily employs negative conditionality; instead of granting additional preferences to specific developing countries, it withdraws GSP preferences from countries that do not meet certain conditions which can be classed into three overarching categories: (1) political conditions,[58] (2) human rights conditions,[59] and (3) conditions related to U.S. economic interests.'[60] By negative conditionality we generally refer to conditions that provide for 'withdrawal of unilateral trade concessions, non-compliance of treaty obligations, economic countermeasures and trade sanctions carried out as a reaction to the violation of human rights in a third country.'[61]

By Article XX of the GATT a Contracting Party may adopt or enforce trade restrictive measures that are 'necessary to protect public morals...human, animal or plant life or health...relating to the products of prison labor, etc'[62] which, otherwise, would have made them fall foul of the MFN obligation stipulated under Article I. Thus, in a way this is a negative conditionality as it justifies restrictions on those grounds while the GSP can be applied for both negative as well as positive conditionality.

b) Discretionariness

The GSP system allows granting countries enormous discretion in both the scope and design of preferences. Since the extension of preferential treatment is voluntary

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[54] See Stamberger, *op.cit.*, at 609

[55] Ibid

[56] See Nogueras & Martinez, op.cit., at 309

[57] Ibid, at 323

[58] Political conditions prohibit granting of GSP treatment to countries that are communist, belong to a commodity cartel, or aid terrorists or fail to support U.S. efforts to combat terrorism.

[59] The human rights conditions exclusively concern labour standards

[60] A country's failure to protect the economic interests of U.S. exporters or investors may trigger mandatory or discretionary withdrawal of GSP benefits. See Mason, Amy M., (2004), 'The De-generalization of the Generalized System of Preferences (GSP): Questioning the Legitimacy of the U.S. GSP,' *Duke Law Journal*, Vol. 54, No 2, pp 513-547, at 524

[61] See also generally Nogueras & Martinez, *op.cit.*

[62] See Article XX(a), (b) and (e) of the GATT

and entirely within the discretion of the developed nation (that allows access to its markets), such commitments depend largely on political considerations.[63] It is true that the GSP mechanism is primarily meant as a scheme of development cooperation, and 'the country that adopts the system has great freedom in its design, usually establishing differences according to distinct criteria (the competitiveness of the products, relative development level of the beneficiaries, etc).'[64] Such discretionary right is somehow invisible, though not totally ruled out, when it comes to justifying trade restrictions based on the general exceptions of GATT Article XX. Specifically the 'moral exception' in the GATT[65] is at best unclear as well as subject to varied interpretations. Moreover, it is unfortunate that 'other than noting Article XX(a) might be applicable to alcohol, the negotiating history from 1945-48 does not provide a clear answer to what morality and whose morality is covered.'[66] However, the level and the nature of discretion in the two obviously do not match.

c) Exception to the GATT?

A side issue to this investigation is also whether the GSP is an exception to the GATT regime or its integral element. This has been enunciated by the Appellate Body's Report in concurrence with the Panel in the India-EC dispute in the following terms:

> Paragraph 1 thus excepts members from complying with the obligation contained in Article I:1 for the purpose of providing differential and more favourable treatment to developing countries, provided that such treatment is in accordance with the conditions set out in the Enabling Clause. As such, the Enabling Clause operates as an 'exception to Article 1:1.[67]

This, in other words, provides a defence for a state implementing preferential access based on the Enabling Clause against a claim by another state to be accorded the same advantage 'unconditionally' to its like products originating in its territories as the one benefiting from the Enabling Clause. And the Appellate Body, being lenient to request the granting state to prove the contents and features of the treatments under the Enabling Clause indirectly encourages the wider use of such measures.[68]

Conclusion

Whether or not labour rights be subjects of conditionalities in bilateral trade relations is a topic highly charged with controversy and largely political. Such rights both as elements of the broader human rights subject and specifically as developed by the

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[63] See Bagwell, Kyle, Mavroidis, Petros C., & Staiger, Robert W., (2002), 'It is a Question of Market Access,' American Journal of International Law, Vol. 96, No. 1, pp 56-76, at 71

[64] See Nogueras & Martinez, *op.cit.*, at 331

[65] By 'moral exception' I am referring to Article XX(a) of the GATT

[66] See Charnovitz, op.cit., at 705

[67] Appellate Body Report, Para 90, quoted in Mathis, James H., (2004), 'Benign Discrimination and the GSP:WTO-Report of the Appellate Body, 7 April 2004,' *Legal Issues of Economic Integration*, Vol. 34, No 4, pp 289-304, at 291

[68] Appellate Body Report, Para 115, in Mathis, *op.cit.*, 292

works of the ILO, are key subjects that to a great extent depend on countries' economic wellbeing. Most of those rights are also aspirations towards which countries would have to progress over time. Claiming that 'sub-standards' in labour conditions constitute social dumping and subsidization of local industries of an exporting country falls short of acknowledging that progressivism. For countries to reach a level that we consider acceptable standard of labour, there is a need for levelling the playing field, part of which is to allow them access the international market.

Moreover, the nexus between lower wages with low cost of production and thus lower price of goods as discussed above is both wrong and unhelpful. Those arguments listed above relating to the comparative advantages in trade relations, pragmatic choices of norms and institutions rather inform the overall discourse to be more of the developed countries' protectionist agenda than genuine concern for standardisation of healthy labour conditions.

The two mechanisms discussed in the second part of this contribution whereby non-trade interests such as human rights could be integrated into trade policies have their own distinct features even if they might be utilized for similar ends. The 'twin pillars' on which the GATT framework was founded, non-discrimination[69] and reciprocity, can be circumvented through the operation of the general exception provisions of Article XX of the GATT as well as the GSP schemes. While the latter has the features, *inter alia*, of discretionary nature and the absence of hurdles such as the one enunciated in the *Chapeau*, the former does not equally share these features.

The GSP system allows granting countries enormous discretion in both the scope and design of preferences. Because the extension of preferential treatment is voluntary and entirely within the discretion of the developed markets, such commitments depend largely on political considerations thereby resulting in high level of subjectivity, arbitrariness and thus reasonably tagged by developing countries as being disguised protectionism than anything more.

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[69]The tenet of non-discrimination is grounded on the Most Favoured-Nation(MFN) clau - of Article I;1 of the GATT which mandates that all advantages granted to one country be accorded immediately and unconditionally to like products from other countries.