



## GLOBAL ECONOMY & CHILD LABOUR: WHERE DO THEY STAND?

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Participation in the global economy is preceded by various trade related rules. This can be a ground of wrongly assuming that non-trade values also get equal consideration. One such non-trade value is curbing child labour in its worse forms. It is true that at the global level, people agree that child labour is exploitative, but this leads to the wrongful assumption that the global trading system is also sensitive to the cause and is committed to its eradication.<sup>1</sup> World Trade Organisation (WTO) is the global organization symbolic of economic order based on treaty law and universally adopted as a national trade policy by diverse countries from all around the world.<sup>2</sup> In today's age, there is no escape from the free trade doctrine. Since the WTO also acts as an adjudicatory body which hears cases generally dealing with state-imposed trade restrictions against another state, it is plausible that one might come to the conclusion that WTO also uses non-trade values to complement the concept of free trade perpetuated by it. However, this is far from the truth.<sup>3</sup>

Around the end of the 20<sup>th</sup> century, during WTO's early days, the question of how and whether the trade organization should take

into consideration labour standards was being debated upon. There were strong arguments in favour of a requirement of upholding the core labour values from the member states. A striking feature of the WTO is that its rules in respect of the trading system are mainly "negative" in nature, i.e. elimination of restrictions on exports and imports of goods is the only standard which one has to achieve.<sup>4</sup> Apart from that, states are not required to establish any standards in non-trading areas, such as human rights or labour laws. The only step taken towards labour issues by the member states was a formal recognition of the standards of the International Labour Organisation (ILO), but nothing binding has been incorporated into the WTO system.

In this paper, through the analysis of Articles given in the General Agreement to Tariffs and Trade, the author attempts to analyse whether the WTO can impose restrictions on import of products made by exploiting child labour. The author also analyses some landmark cases delivered by the WTO Dispute Settlement Mechanism (WTO DSM) to aid and arrive at the conclusion. Accordingly, the paper is divided into three parts. In Part I, the author discusses about the where the current debate on import restrictions on products made from employing child labour stands. In Part II, the author delves into a discussion and interpretation of Article III (4) of GATT and Article XX(a) of GATT, particularly from the

<sup>1</sup> Sara Dillon, "Child labour and the Global Economy: Abolition or Acceptance?", *Nordic Journal of International Law*, pp. 299 (2015) DOI: 10.1163/15718107-08402007, available at: [brill.com/nord](http://brill.com/nord)

<sup>2</sup> *Ibid*, at 300.

<sup>3</sup> Bilal Tariq, "Trade and Child Labour: A Review of Literature" *Journal of Public Administration and*

*Governance*, Vol. 10, No. 1 (2020) ISSN: 2161-7104, available at: <http://jpgag.macrothink.org>

<sup>4</sup> Tarcisio Gazzini, "The legal nature of WTO obligations and the consequences of their violation", *European Journal of International Law*, Vol. 17, Issue 4 (2006), available at: <https://doi.org/10.1093/ejil/chl024>



lens of the decisions rendered by the WTO DSM in the Asbestos and the Seals case. This is followed by the concluding section.

### PART-I

#### Restricting Import on Products Made from Employing Child Labour: Current Debate

A lack of enforceability of labour standard into the WTO regime also means that in all practicality, state corporations would “race to the bottom” in an attempt to cut prices by reducing the labour costs and going after the jurisdictions with the least restrictions to produce their goods.<sup>5</sup> As already discussed, no special attention has been given to child labour in the WTO. This is largely so because most of the developing nations, especially India, have expressed their indignation towards a ‘conditionality approach’, which would require nations to exemplify improvements in domestic laws related to child labour before being allowed to utilise the benefits which the free trade system have to offer, which would allow member states to challenge other states on their failure to enforce labour standards.<sup>6</sup> However, many developing states have questioned this approach by asking why a penalty should be applicable on poor countries for practicing child labour, when the developed countries have already undergone their “child labour phase” without any restrictions.<sup>7</sup>

Import restrictions would arguably deprive the emerging states of a comparative advantage of goods being produced by less skilled workers at a lower opportunity cost. Opponents of such import restrictions have also opined that imposition of import restrictions by economically developed jurisdictions on products of child labour would not be for purely selfless reasons. They would be profited by taking away the comparative advantage that other influential states, such as Asian hegemonic states have, which is increasing globally. Such restrictions can thus be labelled as “disguised protectionism”.<sup>8</sup> Another argument is that by imposing such restrictions, the economic growth of developing states would be hampered. Additionally, if access to the export market is cut off, it would deprive the working children of income and employment. On the other hand, those who perpetuate a link between child labour and market access scrutinize the idea of free trade leading to overall economic and social development. The outcome of it does not lead to the poor being benefitted. Also, it needs to be acknowledged that child labour that “poverty is not only a cause but also a consequence of child labour”.<sup>9</sup>

Keeping these arguments in mind, during the WTO’s Singapore rounds, most developing countries were against the linkage between human rights protection and free trade and

<sup>5</sup> Ajit Singh and Ann Zammit, “Labour standards and the race to the bottom” *Oxford Review of Economic Policy*, Vol. 20, No. 1, Oxford University Press, pp. 90 (Spring 2004), available at: <https://www.jstor.org/stable/23606675>

<sup>6</sup> Eric V. Edmonds, “International Trade and Child Labour: Cross Country Evidence” *Department of Economics*, Dartmouth (September 2004), available at: <https://www.dartmouth.edu/~eedmonds/clxc.pdf>

<sup>7</sup> P.J. Harvey and L. Riggin, “Trading away the future: Child Labour in India’s export industries” *International Labour Rights and Research Fund*, Washington DC (1994)

<sup>8</sup> Supra 5.

<sup>9</sup> Aleydiss Nissen, “Can WTO member states rely on citizen concerns to prevent corporations from importing goods made from child labour” *Utrecht Law Review*, Vol. 14, No. 2 (2018), available at: [www.utrechtlawreview.org](http://www.utrechtlawreview.org)



refused to legitimize the WTO as a forum which could deal with labour standards.<sup>10</sup> The final declaration document of the Singapore rounds explains that the ILO and WTO should work in tandem, but in reality, this was not attained. Post the Singapore round, this debate re-emerged in the 2016 ILO Resolution concerning Decent Work in Global Supply Chains, which partly focused on whether ILO members states must commit to referring core labour standards in trade/investment agreements. Official records stipulate that apart from the developed states, most of the hegemonic member states, including China, India and Brazil were vocally opposing this referral.<sup>11</sup>

## PART-II

### Imposing Import Restrictions Through Interpretation of GATT Articles

As discussed above, issues with respect to child labour rights and trade law come with resistance. There have been debates on whether measures restricting trade can be justified by using labour issues and also whether the advantages of developing nations are compromised, comparatively, in the global marketplace.<sup>12</sup> Evidently, state parties to the General Agreement to Tariffs and Trade (GATT) do not have much ability to restrict the import of products made by means of child labour. But, some scholars have suggested that interpretations of the WTO

Dispute Settlement Mechanism (WTO DSM) of Article III (4) of GATT and Article XX(a) of GATT in the *Asbestos*<sup>13</sup> and *Seals*<sup>14</sup> cases respectively, can be relied on for imposing import restrictions.

#### *Article III (4) GATT*

The basic principles of GATT, i.e. Most Favoured Nation Principle<sup>15</sup> (a state party cannot discriminate between other state parties) and National Treatment Principle<sup>16</sup> (prohibits discrimination by state party between imported and similar domestic products and imported goods less favourably) have been interpreted by the WTO DSM extensively while interpreting the Article XX GATT exceptions. This can possibly serve as a ground to allow the imposition of trade sanctions for non-trade values, extremely restrictively. There have been suggestions that products made from child labour are not “like” products not made by children under Article III (4) GATT.<sup>17</sup> This aspect was also included in the non-limitative criterion list as described in the 2001 *Asbestos* case which can determine whether a product, within the meaning of Article III (4), is a ‘like’ product. This suggestion implies that the State party importing goods might treat products made by child labour differently under the GATT regime, which would mean that resultant import restrictions could be consistent with the article.

<sup>10</sup> S.A. Aaronson, “Seeping in slowly: How human rights concerns are penetrating the WTO”, *World Trade Review*, Vol. 6, No. 3, pp. 28 (2007), available at: [https://www.usitc.gov/research\\_and\\_analysis/economics\\_seminars/2008/Aaronson.pdf](https://www.usitc.gov/research_and_analysis/economics_seminars/2008/Aaronson.pdf)

<sup>11</sup> Ibid.

<sup>12</sup> Supra 9.

<sup>13</sup> Appellate Body Report, European Communities-*Measures Affecting Asbestos and Asbestos Containing Products* [EC Asbestos Case] WT/DS135/AB/R (2001)

<sup>14</sup> Appellate Body Report, European Communities-*Measures Prohibiting the Importation and Marketing of Seal Products* [EC Seals Products] WT/DS400/AB/R (2014)

<sup>15</sup> Article I (1) GATT

<sup>16</sup> Article III (4) GATT

<sup>17</sup> JM Diller and DA Levy, “Child Labour, Trade and Investment: Towards the Harmonisation of International Law” *The American Journal of International Law*, Vol. 91, No. 4, Cambridge University Press (1997)



However, in all practicality, the assessment employed by WTO DSM with respect to likeness of a product under Article III(4) is limited to assessing consumer preferences without accounting for the broader preferences of child labour concerns of the citizens.<sup>18</sup> This implies that import restrictions on child labour products would be considered to be inconsistent with Article III(4). In the *Japan Alcoholic Beverages II* case, the WTO DSM indicated that it has a margin of appreciation in interpreting ‘likeness’ in different provisions of GATT.<sup>19</sup> Further, the Appellate body in the *Asbestos* case considered that *any* criterion used to gauge ‘likeness’ should be concerned exclusively with relationships of competition in the market, in Article III (4). This current interpretation can be considered as restrictive because it reduces people to merely consumers and does not respect their attitudes while interpreting the National Treatment Principal.<sup>20</sup>

#### **Article XX (a) GATT**

The immediate next question which arises is whether restrictions on products of child labour can be justified under Article XX GATT exceptions. Some paragraphs have been identified by academicians as holding relevance in protection of human rights, including labour standards. These are- Article XX (a) [necessary to protect public morals], Article XX (b) [necessary to protect

human life or health] and Article XX (g) [conservation of exhaustible natural resources].<sup>21</sup>

The WTO DSM has previously been seen as ‘arbitrary’ while appreciating the necessity of restricting import for reaching a desired end.<sup>22</sup> The necessity condition demands for a measure to be ‘necessary’ for protection of public morals. The ‘weighing and balancing test’ is also used to determine whether the imposing party could reasonably employ a less trade restrictive measure to achieve the desired objective. The Office of UN High Commissioner for Human Rights (OHCHR) has interpreted that in order to protect public morals of their population, the measures implemented by State parties could fall within Article XX (a) GATT.<sup>23</sup>

The *Seals* case of 2014 is important for being the “first substantial interpretation of Article XX (a), GATT”, whereby with the aim to protect EU consumers and citizens, the appellate body considered measures to prohibit selling seal products in the market in the EU member state territories as inward measures.<sup>24</sup> These measures can be used to assess import restrictions on child labour products under Article XX (a), which can be considered as inward measures permissible under the necessity condition. The ‘weighing and balancing test’ can be applied to assess whether to protect public morals, any reasonable alternatives to unilateral trade

<sup>18</sup> Supra 7.

<sup>19</sup> I. Van Damme, “Treaty interpretation by the WTO appellate body”, *European Journal of International Law*, Vol. 21, No. 3, pp. 622. (2010)

<sup>20</sup> *Ibid.*

<sup>21</sup> Supra 9.

<sup>22</sup> S. Joseph, “Blame it on the WTO? A Human Rights Critique” *Oxford University Press*, pp. 117-120 (2013), available at:

<https://library.oapen.org/viewer/web/viewer.html?file=/bitstream/handle/20.500.12657/33838/454396.pdf?sequence=1&isAllowed=y>

<sup>23</sup> OHCHR, “Human Rights and World Trade Agreements” United Nations: New York and Geneva (2005), available at:

<https://www.ohchr.org/Documents/Publications/WTOen.pdf>

<sup>24</sup> Supra 9.



restrictions seem to be effective.<sup>25</sup> The WTO DSM can also consider any other alternatives available with international cooperation.

In the *Seals* case, the panel also introduced a ‘two-step’ test to determine whether under the morals exception in Article XX (a) GATT, import restrictions can be successfully applied. In the first step, it has to be determined whether public concerns exist in actuality in the importing state’s society. If yes, then in the second step, it has to be determined whether according to its own values and systems, there exists a connection between these concerns and the scope of “public morals as defined and applied by a regulating member in its territory”.<sup>26</sup> Evidently, both these steps take public concerns into account. With respect to restricting products of child labour, it would first be assessed whether public concerns with respect to it truly exist in the within the importing State, by collecting evidence. In the next step, the panel may take into account the national legislation of the importing State party prohibiting child labour.

However, it is true, that morals vary from time to time, and this interpretation leaves a lot of discretion on GATT state parties to determine what constitutes public morals in the exceptions given in Article XX (a). Specifically, it does not take into account the impact that information manipulation and information asymmetries would have on trade restrictive measures which might come

close to the importing state’s morals, which would end up not being considered.<sup>27</sup>

There is another *Chapeau* test under Article XX GATT, which must be passed if an import restriction passes the necessity and two step test. Under this, unjustifiable or arbitrary discrimination and disguised restrictions on trade where similar conditions exist between state parties are forbidden.<sup>28</sup> This rest has also been used arbitrarily by the WTO DSM.

### CONCLUSION

Since resorting to cooperative methods in curbing child labour does not seem to be attainable, corporations can be held accountable for child labour by imposition of import restrictions by state parties to the GATT. With respect to Article III(4), the WTO DSM only takes into consideration consumer preferences and does not observe attitudes of citizens towards child labour, which shows that these restrictions will be hard to impose under this provision. Next, Article XX (a) of GATT is assessed, where the two step test which evaluates public morals is seen to manifest arbitrariness. The other two, namely chapeau test and weighing and balancing test have been used capriciously by the WTO DSM. The interpretation of National Treatment Principle by the WTO DSM must take other factors apart from consumer preferences into account. Further, public morals need to be assessed under international trade norms to

<sup>25</sup> Supra 7.

<sup>26</sup> Supra 14.

<sup>27</sup> Supra 22.

<sup>28</sup> Charlotte Gasser, “Testing the Chapeau tests on special and differential treatment: how case law could inform Flexibilities WTO Law” *WTO Law and*

*Developing Countries* (2017) DOI:

10.13140/RG.2.1.2600.4087, available at:

<https://www.researchgate.net/publication/304245992>

Testing the Chapeau-

Tests on Special and Differential Treatment How

Case-Law Could Inform Flexibilities WTO Law



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take into account and curb child labour by the  
WTO regime.

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