Chapter 6

Human Rights Related Trade Measures under the Marrakesh Agreement Establishing the World Trade Organization

1. Introduction
This chapter examines how trade measures imposed to secure respect for human rights might be justified under existing provisions of the Marrakesh Agreement Establishing the World Trade Organization (“the WTO Agreement”). The chapter is important for two reasons. First, it will demonstrate that the existing provisions of the WTO Agreement do provide some basis for legally justifying human rights related trade measures under the WTO Agreement. The identification of the precise types of trade measures countenanced is an important aim of this book. The second reason that this chapter is important is that consideration of calls for reform regarding human rights related trade measures can only be properly undertaken once the contours of the existing WTO rules that impact on such measures have been carefully mapped out.

Examination of the impact of existing WTO rules on trade measures with a human rights focus will proceed on the following basis. The analysis will begin with a consideration of the WTO most favoured nation (“MFN”) and non-discrimination rules. It will identify the obstacles that these rules pose for human rights related trade measures. One significant obstacle is that posed by the phrase “like products”, which appears in a number of provisions of the WTO Agreement. Once the question of “like products” and related questions have been addressed, the focus of the chapter will move to an examination of the following areas of WTO discipline:


2. In the General Agreement on Tariffs and Trade 1994, which is an annexure to (see Annex 1A) and an integral part of the WTO Agreement, ibid, there are at least 10 references to the term – Articles I, III:4, IV:1(a), VI:1(b)(i), VI:4, IX:1, XI:2(c), XIII:1, XVI:4.
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- The regulation of subsidies and dumping;
- The rights of a party to the WTO Agreement to invoke WTO dispute resolution mechanisms when any benefit accruing to the party under the WTO Agreement is being nullified or impaired or where the attainment of any objective of the WTO Agreement is being impeded;
- The entitlement to take safeguard action;
- The exception for trade measures taken for security purposes;
- The general exceptions to WTO obligations that find their principal expression in Article XX of the General Agreement on Tariffs and Trade 1994 (“GATT 1994”);
- Waivers of obligations under the WTO Agreement; and
- Technical barriers to trade and the regulation of product labelling standards.

Whilst subsidies rules and the dispute resolution system offer potential legal justifications for human rights related trade measures, it is the general exceptions in Article XX of GATT 1994, in particular Article XX, paragraphs (a) and (b), that offer the greatest potential for justifying such trade measures under the WTO Agreement. Given the importance of Article XX, it will be subjected to the closest scrutiny.

2. Most Favoured Nation Obligation and National Treatment

– Obstacles in the way of Human Rights Related Trade Measures

In a 1952 report of a “Panel on Complaints”,\(^3\) consideration was given to a complaint by Norway and Denmark that the application of a Belgian law was inconsistent with provisions of the original General Agreement on Tariffs and Trade (“GATT 1947”).\(^4\) The Belgian law in question imposed a 7.5% levy on products purchased by government bodies in Belgium where the products “originated in a country whose system of family allowances did not meet specific requirements.”\(^5\) Belgium did not apply the levy to products from GATT parties adjudged by Belgium to have systems of family allowance requiring the payment of contributions to the systems by manufacturers within those parties. The complainants argued that if the levy was not payable in respect of products from some GATT parties, the MFN principle in Article I:1 of GATT 1947 required the unconditional granting of the same benefit to all other GATT parties. The panel in paragraph 3 of its report observed that:

\(^3\) Belgian Family Allowances (Allocations Familiales), adopted on 7 November 1952, GATT BISD, First Supplement, 59.
\(^4\) Entered into force on 1 January 1948 through the Protocol of Provisional Application of the General Agreement on Tariffs and Trade, done at Geneva, 30 October 1947, 55 UNTS 308 (1950).
\(^5\) Belgian Family Allowances (Allocations Familiales), note 3 above, 59, para 1.