

ATTRACTION OF HUMAN RIGHTS IN WTO: TRADE-RESTRICTIVE MEASURES TO PROTECT HUMAN RIGHTS

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ABSTRACT

Human rights are inevitable rights of human, which is plays an important role one’s life. There are a number of international standards providing fundamental human rights, most of which are prescribed in this article. Precisely, human rights to life and health are mostly concerned and analyzed. Furthermore, these rights attraction to the World Trade Organization (hereinafter WTO) is illustrated and how rights to life and health can serve as an exception in the agreements of this International Organization. Clearly, General Exceptions of General Agreement on Tariffs and Trade (hereinafter GATT) 1994 and SPS Agreement are scrutinized and would be explained how basic human rights are involved in these WTO Agreements. Furthermore, some arguments are followed with some WTO cases in order to explain how court interpreted the importance of these rights.

Key words: *human right, right life, health, Covenant, WTO, general exception, international trade, restriction, non-discrimination, liberty.*

INTRODUCTION

Human rights are inevitable rights of humans regardless of their sex, nationality or ethnic origin, religion, color, language, or any other status. They vary from the most fundamental – the right to life - to those rights which are nuts and bolts of life, such as the rights to work, health, food and liberty.

The principle document of international human rights is Universal Declaration of Human Rights (hereinafter UDHR), which was adopted by United Nations General Assembly in 1948.¹ UDHR is the initial legal document proclaiming in its preamble and articles about the inherent human rights. UDHR along with two international covenants – the International Covenant for Civil and Political Rights (hereinafter ICCPR), and International Covenant for Economic, Social and Cultural Rights (hereinafter ICSCR) – form the International Bill of Rights.²

¹ Universal Declaration of Human Rights, 10 December 1948, <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

² <https://www.ohchr.org/en/what-are-human-rights>

Public moral and human health are fundamental rights, which are, illustrated in all human rights covenants and beside that, other international agreements and convention have included these rights. The reason is that health is a preliminary condition for the realization of all other political and civil rights as well as economic and social freedom.³ Article 12 (1) of the ICESCR also affirms that “a right of everyone to the highest attainable standard of physical and mental health.”⁴

DISCUSSION AND RESULTS

Moreover, article 12 of ICCPR states that anyone can leave any country, and this right is not restricted except those which are provided by law, is indispensable to protect national security, public order, public health...⁵ Furthermore, article 19 of ICCPR affirms that some restrictions are only accepted on freedom of expression when there is necessity to protect national security ... or public health.⁶

The important point is that the rights of public moral and human health can be the foundation of exception in other international agreements. It can be analyzed in the example of World Trade Organization (hereinafter WTO).

WTO is only international trade organization regulating the trade rules between nations. It plays an important role to the liberalization of trade among member states by helping raising living standards, creating job places, improving people lives, raising real income... and enlarging production of, and trade in, services and goods.⁷ Furthermore, it maintains a stage for member states to negotiate trade issues,⁸ if members cannot come into common agreement, WTO have special dispute resolution system⁹ where members can resolve their trade issues.

The other goal of WTO is providing free trade that is without discriminations. The non-discrimination principle of WTO is illustrated in the rules of most favorite nation¹⁰ (hereinafter MFN) and national treatment (hereinafter NT).¹¹ These rules are prescribed in most in most agreements of WTO. It means that, it does not matter in which fields of the trade; member states should provide to the other members the same condition and trade facilitation.

³ Ilias Bantekas, Lutz Oette, “International Human Rights Law and Practice”, 2nd edition, Cambridge University Press, 2016, p.428

⁴⁴ The same provisions can be founded in art. 12 CEDAW, art.5 ICERD, art. 24 CRC and art. 11 European Social Charter.

⁵ See Article 12 of ICCPR

⁶ See Article 19 of ICCPR

⁷ See the Preamble of WTO Agreement

⁸ Peter Van den Bosshe, Werner Zdouc, “The Law and Policy of the World Trade Organization” Text, cases and Materials, 4th edition, Cambridge, 2017, p. 288

⁹ See Annex 2 of the WTO Agreement, Understanding on rules and procedures governing the settlement of disputes.

¹⁰ Art. I of GATT 1994, https://www.wto.org/english/docs_e/legal_e/gatt47.pdf

¹¹ Art. III of GATT 1994, https://www.wto.org/english/docs_e/legal_e/gatt47.pdf

However, these rules and principles of the WTO are not absolute rules when the concern goes about human life and health. The most popular article of the GATT 1994 is article XX, which is known as a General Exceptions. In accordance with this article, nothing in GATT shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- a) necessary to protect public morals;
- b) necessary to protect human, animal or plant life or health;
- c) relating to the importations or exportations of gold or silver;
- d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
- e) relating to the products of prison labour;¹²
and etc....

It should be mentioned that WTO does not give right to members to apply General Exceptions whenever they want. There are preconditions to apply the article XX. The first requirement is not to apply in a way that may constitute a means of arbitrary or unjustified discrimination..., and the second is it should be a disguised restriction on international trade. General Exceptions are applied only to matters including from a to j measures. As it is clear from the Article XX, the main goal intended in this article is to protect human, animal and plant life. The trade should not be the reason of harm to the human life. In other words, general exceptions can be called trade-restrictive measures. WTO intends that even if members apply trade-restrictive measures, they should not constitute a means of arbitrary or unjustified discrimination or not be a disguised restriction on international trade.¹³

Furthermore, it is state responsibility to promote and protect public health, the environment and national security. Therefore, most often states adopt trade-restrictive legislation or take other measures to protect social values and public health, which, unintentionally or deliberately, creates trade barriers. Even if trade restrictive measures is inconsistent with main principles of WTO like trade liberalization and indiscriminate trade, article XX of GATT is legal permission for states to take trade restrictive measures to protect human health. It can be said that article XX gives a residual liberty to states by avoiding from main rules of WTO to protect public moral and health. Interesting point is that article XX is applicable, and will be invoked by a

¹² See art. XX of the GATT 1994, https://www.wto.org/english/docs_e/legal_e/gatt47.pdf

¹³ See chapeau of Article XX

member state only when the measure taken will be considered inconsistent with another GATT provision. The panel also confirmed in *US-Section 337 Tariff Act (1989)*¹⁴ the measures in compliance with conditions settled in Article XX are permitted, even if they are inconsistent with other provision of GATT.

It can be concluded that trade-restrictive measures are not considered WTO rules violation, if such measures are persistent with article XX of the GATT. However, this article is consisted of exhaustive list of measures, that's why two conditions should met by the member. The first of the trade-restrictive measures should in the scope of "a-j" measures' lists, and they should face the requirements of chapeau of Article XX.

Besides Article XX, there is the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter SPS Agreement) that is also considered as a non-tariff barrier in trade.

In the preamble of SPS Agreement is also recognized that any Member is not restricted from adopting or enforcing measures necessary to protect human ...life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination.¹⁵ The main purpose of this Agreement is improving human health, animal health and phytosanitary situation in all Members. SPS measures are defined in paragraph 1 of Annex A to the SPS Agreement. The following measures are considered as SPS measures:

- a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
- b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
- c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
- d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.¹⁶

SPS measures may include all relevant regulations, law, degree, procedures and requirements, as well as, product criteria; inspection, testing, certification and

¹⁴ Panel Report, US – Section 337 Tariff Act (1989), para. 5.9.

¹⁵ See the preamble of SPS Agreement https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm

¹⁶ Paragraph 1 of Annex A to the SPS Agreement

approval procedures. Furthermore, it may incorporate animals or plants transportation, risk assessment methods, and labeling and packaging requirements.

Generally, SPS measures are intended to protect human or animal life or health from spoiled products; or to protect human... life and health from risk coming from pests or diseases; or to prevent or limit other damage from risks origin from pests.

Member states can establish SPS measures when there any one of the mentioned situations. Besides a means arbitrary or unjustifiable discrimination, the measures should be within the territory of the Member state. It means that the extraterritorial application of SPS Agreement is not permitted. Another requirement is that the SPS measure should affect the trade. The panel in EC – Approval and Marketing of Biotech Products (2006) mentioned that article 1.1 permanently requires that the SPS measure may affect international trade. That’s why, there not necessity of proving that the SPS measure has ben effect on trade.¹⁷

Concluding that human life and health are inevitable rights which any state should maintain regardless its WTO membership. There a number of international covenants, that are designed to protect and ensure primary human rights including right to life and health. WTO also permits to its member state to protect and provide human rights when there is a grave harm to their health and life. The clear of example of it is Article XX of the GATT and SPS agreement.

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International Norms

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3. International Covenant for Economic, Social and Cultural Rights.
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¹⁷ Panel Reports, EC – Approval and Marketing of Biotech Products (2006), para. 7.435.