

Giga Abuseridze, doktorants
Rīgas Stradiņa universitāte
Gruzija

Sabiedrības veselības politika un darba tiesības Pasaules Tirdzniecības organizācijā

Anotācija. Šis raksts ir sadalīts vairākās sadaļās. Pirmā sadaļa apskata problēmas tirdzniecības attiecību un sabiedrības veselības jomās, bet otrā sadaļa fokusējas uz darba tiesībām un darba pamatstandartiem. Raksta mērķis ir raksturot likumdošanas problēmas tirdzniecības jomā un sabiedrības veselības jomās, lai nodrošinātu sabiedrībai labāku izpratni par saistībām starp tirdzniecības tiesībām, sabiedrības veselībai un ārējai ekonomiskai darbībai. Pētniecības metodes ir tirdzniecības sistēmas funkcionēšanas izpēte un analīze Pasaules Tirdzniecības organizācijā, patērētāju politikās un sabiedrības veselības jomās. Jāpiezīmē, ka tirdzniecības konvencijas var pārkāpt cilvēktiesības, piemēram, tiesības uz veselību, tieši vai netieši. Tādēļ, lai precīzi noteikt diskriminācijas formas darba tiesībās, autors izskata darba pamatstandartus un Vispārēju cilvēktiesību deklarāciju.

Atslēgas vārdi: Pasaules tirdzniecības organizācija, Pasaules Veselības organizācija, Pasaules tirdzniecības, Vispārējais nolīgums par pakalpojumu tirdzniecību.

Giga Abuseridze, doctoral student
Riga Stradins University.
Georgia

Public health policy and labour rights in the World Trade Organization

Abstract. This article is divided into several sections. The first one offers an overview of problems in the sphere of trade relations and public health, the second one focuses on the labour rights and Core labour standards. The goal of the article is to outline the problems of the legislation in the sphere of trade relations, to provide society with greater insights into the relationship between labour rights, public health and International trade. Research methodology includes the study and analysis of operation of the trade system in WTO and trade health policy. It should be noted that the trade convention can also violate human rights, such as the right to health, directly or indirectly. In order to accurately define the forms of labour discrimination the author looks into the Core Labor Standards, the Universal Declaration of Human Rights.

Keywords: World Trade Organization, World Health Organization, International Trade, General Agreement on Trade in Services, the Agreement on Trade-Related Aspects of Intellectual Property Rights.

Introduction

Trade, the exchange of goods, services and information between individuals or groups, is as old as human history. Expanding trade is a central component of the increasing connectedness among countries. The World Trade Organization was established and became operational on 1 January 1995. It is the youngest of all the major international organisation and yet it is, arguably, one of the most influential in these times of globalization. As Marco Bronckers stated, it has 'the potential to become a key pillar of governance' [1]. The WTO is also one of the most controversial international organisations. It has been referred as '*un gouvernement mondial dans l'ombre*' [2].

Sometimes the WTO is described as an international organization governing international trade. However, this description can be misleading. The WTO does not make trade rules. The only makers of rules are national governments. In this sense, then, the WTO does not govern anybody. A better way to think of the WTO is as a club of member

nations. The club's purpose is to monitor each member country's trade policies with respect to the trade agreements that were made in the Uruguay Round. The WTO agreements include thousands of promises for every country, all intending to reduce barriers to trade relative to what the barriers were before the Uruguay Round. The WTO does not represent free trade. At best, the agreements can be described as freer trade [3]. Besides monitoring each member country's trade policies, which the WTO fulfills by conducting periodic trade policy reviews of the member countries, the WTO club was also created to deal with disputes. This is surely the most important "power" of the WTO [4].

The main function of the WTO is as a forum for international cooperation on trade-related policies, the creation of codes of conduct for member governments. These codes emerge from the exchange of trade policy commitments in periodic negotiations [5].

The WTO establishes a framework for trade policies; it does not define or specify outcomes. That is, it is concerned with setting the rules of the trade police game, not with the results of the game [6]. Three principles are of particular importance in understanding both the pre-1994 GATT and the WTO: nondiscrimination, trade liberalization, transparency and public health. Trade liberalization can affect health in multiple ways. Sometimes the impact is direct and the effect is obvious, as when a disease crosses a border together with a traded goods. Other times the effects of trade liberalization are more indirect. For example, reducing tariffs may lead to lower prices for medical equipment and health related products, changing international rules concerning patent protection may affect the prices of medicines and vaccines; importantly also, there is a positive link between freer trade and economic growth, which can lead to reduced poverty and higher standards of living, including better health [7].

The preamble of the ILO Constitution notes that 'the failure of any nation to adopt humane conditions of labour is an obstacle in the way of the other nations which desire to improve the conditions in their own countries' [8].

As regards GATT, the General Agreement on Trade in Services (GATS) is one of the most important multilateral trade agreements to emerge from the Uruguay Round negotiations that created the World Trade Organization (WTO). GATS constitutes the multilateral legal framework through which WTO members will approach the progressive liberalization of trade in services, including health-related services. Health policy is an important social endeavor that faces both opportunities and challenges from GATS. Many factors, including the complexity of GATS, the lack of empirical data on international trade in health-related services and on the health effects of liberalized trade in services, and inequalities in resources and power between developed and developing countries create a difficult environment for people in public health and health care who want to understand the actual and potential impact of GATS on their activities. The World Health Organization (WHO) commissioned this Legal Review of GATS from a health policy perspective as part of its efforts to bring the relationship between GATS and health into better focus. Controversies about the impact of GATS on public services, such as health and education, have arisen; and a debate has developed on GATS and health that further complicates discerning how health policy communities should view this WTO agreement. This debate centers on the impact of GATS on the policy flexibility of WTO members in the realm of health [9].

As regards labour rights, The (ILO) formally entered the trade labour interface debate in 1994 at the time of discussion of a possible inclusion of a social clause in the WTO, the establishment of link between trade and labour in differing forms within NAFTA and the EU, and the conditioning of trade preferences and concessions by some developed countries on respect for labour standards. The ILO set up a working party on the social dimensions of the liberalization of international trade, but in 1995 the ILO's governing body concluded that the working party would not pursue the question of trade sanction and that further discussions of a link between international trade and social standards or a sanction-based social clause mechanism would be suspended.

With respect to trade and labour standards linkages in regional trading arrangements, within the EU the social dimension of European integration took concrete form in 1991 when 11 of the 12 Member States (excluding the UK) signed the community's Charter of Fundamental Social Rights. Another important step in the development of EU social policy was the adoption by the 11 member (excluding the UK) of the protocol on Social Policy at Maastricht in 1991. Recently, the debate over trade and labour rights has been extended to human rights more generally an entirely logical development. However, in the case of other human rights, the debate is much less focused on 'linkage', including sanctions, and much more on the effects of trade obligations on the ability of states, especially developing countries, to fulfill economic, social and cultural rights, such as the right to health or to adequate food. Here, developing countries, although wary about sanctions have been generally supportive of efforts to evaluate and interpret trade agreements in human rights terms [10].

Liberalization of trade and health policy perspective

The provision and consumption of services have become an increasingly important part of modern worlds. The incorporation of services into the multilateral trading system through the General Agreement on Trade in Services (GATS) represents one of the most important developments to emerge from the creation of the WTO. Services of many kinds play important roles in the protection of public health (e.g., sanitation services) and the delivery of health care to individuals (e.g., hospital services). GATS affects health-related services in many ways that are essential for health policy makers to comprehend. In addition, GATS establishes a process designed to progressively liberalize trade in services and health policy-makers must be prepared to participate in this process to ensure that such liberalization unfolds in a way sensitive to the needs of national governments in ensuring the provision and regulation of health-related services.

Any liberalization under GATS should aim to produce better quality, affordable, and effective health-related services, leading to greater equity in health outcomes. Liberalization should also ensure the necessary policy and regulatory space governments require to promote and protect the health of their populations, particularly those in greatest need. GATS creates health opportunities and challenges, especially for developing countries. GATS accords countries considerable choice, discretion, and flexibility so that proper management of the process of liberalization of trade in health-related services can adequately protect health. In key areas of GATS, governments face choices about the breadth and depth of liberalization of trade in health related services and the impact of such liberalization on health policy. In fact, countries are free to decide whether liberalization in the health sector should be pursued or not and to what extent. Countries are not obliged to liberalize health services if they do not wish to do so. These choices make it imperative that health officials understand the structure and substance of GATS, collaborate with other government agencies on GATS implementation and liberalization, and act to ensure that the GATS process does not adversely affect national health policy.

As regards key provisions of GATS, it creates the multilateral legal framework for international trade in nearly every type of service. The Agreement's 29 articles establish the scope of its rules' coverage, impose general obligations, structure the making of specific commitments, construct a process for progressive liberalization of trade in services, and link the treaty to the WTO's dispute settlement mechanism. Although experts acknowledge that GATS has not, to date, significantly affected trade in health-related services, the potential for GATS to do so through the progressive liberalization process is tremendous. In the GATS 2000 negotiations, countries may be receiving requests from and may consider submitting offers to other WTO members for market

access and national treatment commitments in many different health-related service sectors.

Also in this area very interesting subject is WHO's work on GATS and policy. WHO's work on GATS has, to date, focused on collecting evidence on the potential and actual impact of GATS on the functioning of health systems.

These efforts involve:

- Collecting data on trade in health-related services;
- Undertaking a wide range of country-based studies;
- Conducting regional and national training programs;
- Supporting a legal review of GATS from the perspective of health policy;
- Developing a Handbook on Trade in Health-Related Services and GATS; and
- Tracking and disseminating information on the GATS 2000 negotiations.

Identification of Legal Strategies to Strengthen a Health Policy on GATS

Identifying potential legal strategies to strengthen the voice of health policy in interpretation of GATS is important because health policy communities will have to work within the framework of GATS and relevant rules of international law. Although some NGO literature critical of GATS recommends the termination of the treaty or removal of public services, including health, from GATS, the Legal Review proceeds on the premise that WTO members will not abandon GATS or agree to carve health out of the application of GATS rules because of concerns about its effect on health policy. Prudence dictates that health policy experts and organizations formulate legal strategies to work within the international legal framework that GATS and related rules of international law create, without disregarding possible changes to the agreement to respond to public interests or development needs [11]. In addition to interpreting GATS in accordance with the relevant treaty interpretation rules in international law, the Legal Review seeks to identify specific legal strategies that health policy experts and organizations could utilize in strengthening a health policy perspective on GATS. GATS contains ambiguities that WTO members will have to clarify as the GATS process moves forward. Article 31.3(b) of the Vienna Convention contains one such mechanism—subsequent practice of the states parties to a treaty that establishes the agreement of the parties regarding its interpretation [12].

TRIPS is the importance of interpreting WTO treaties from a health policy perspective. Health policy experts and organizations were able to promote the protection of the safeguards in TRIPS for parallel importing and compulsory licensing by stressing that the treaty text accorded WTO members these rights. In addition, health policy activism helped stimulate subsequent state practice in the form of the Doha Declaration on the TRIPS Agreement and Public Health which reinforced WTO members' rights to use TRIPS flexibilities and safeguards for public health purposes. Treaty interpretation from a health policy perspective remains important in other areas of TRIPS as well.

Treaty interpretation from a health policy perspective will not always produce the desired health outcome. In the TRIPS context, for example, controversy has arisen concerning the right of a WTO member to issue compulsory licenses as a strategy to increase access to essential drugs and medicines. Although WTO members have a right under TRIPS to issue compulsory licenses under certain conditions [13], WTO members that lack or have insufficient domestic manufacturing capabilities confront a *de facto* limitation on the ability to use compulsory licenses. The text of TRIPS is not clear as to how WTO members can address this problem. In the Doha Declaration on the TRIPS Agreement and Public Health, WTO members instructed the TRIPS Council to find a resolution to this problem, but controversy and disagreement on how to resolve the issue frustrated the TRIPS Council's progress until the August 2003 adoption of the Agreement on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health. The question arises whether the provisions of GATS may also provide

insufficient flexibility for health policy makers, transferring the issue from the realm of treaty interpretation into treaty implementation or revision. Health concerns often seem to have insufficient weight in decisions many governments make in international forums, such as the WTO. GATS forces WTO members to think about health in connection with the growing role of services in modern economies and the impact of globalization trends, particularly on the poor.

Core labour standards (CLS) as human rights

Various CLS have been characterized as human rights the UN Universal Declaration of Human Rights, the subsequent international Covenant on Civil and Political Rights, and International Covenant on Economics, social and Cultural rights. The ILO's 1998 Declaration of Fundamental Principles and Rights at Work enumerates a short list of core international labour standards that are defined more fully in eight background Covenants incorporated by reference, namely, freedom of association and collective bargaining, the elimination of forced labour, the elimination of child labour, and the elimination of discrimination in employment, which is also consistent with the characterization of certain core labour standards or rights as human rights, especially that guarantee basic freedom of choice in employment relations [14]. Labour standards have been used in the Generalized System of Preferences a preferential system to provide duty free access to exports of developing countries by (most notably) the European Union and the United States of America. Currently, there is a revision of the EU's GSP scheme, the potential implications of which may be considerable given that the new GSP plus scheme appears to target not only ratification of the fundamental Conventions, but also application of Conventions in line with comments from the ILO supervisory bodies. This has the potential to be very problematic for employers.

Anartya Seb argues in his book *Development as Freedom* [15] that basic goals of development can be conceived of in universalistic terms where individual well-being can plausibly be viewed as entailing certain basic freedoms irrespective of cultural context:

- Freedom to engage in political criticism and association;
- Freedom to engage in market transactions;
- Freedom from the ravages of preventable or curable disease;
- Freedom from the disabling effects of illiteracy and lack of basic education;
- Freedom from extreme material privation.

According to Sen, these freedoms have both intrinsic and instrumental value. Importantly, in contrast to the unfair competition and race to the bottom rationales for linking international trade policy and international labour standards, the human rights perspective focuses primarily on the welfare of citizens in exporting, not importing countries. The assumption underlying this concern for basic or universal human rights is that failure to respect them in any country is either a reflection of the decision of unrepresentative or repressive governments rather than the will of the citizens or a sign of the majoritarian oppression of minorities, for example, children, women or racial religious minorities; alternatively, there may be paternalistic concerns that citizens in other countries have made uninformed or ill-advised choices to forgo these basic rights.

In my view, the linkage of international trade policy, including trade or other economic sanctions, with CLS that reflect basic or universal human rights is a cogent one. When citizens in some countries observe gross or systematic abuses of human rights in other countries, the possible range of reactions open to them include diplomatic protests, withdrawal of ambassadors, cancellation of air landing rights, trade sanctions or more comprehensive economic boycotts, or at the limit, military intervention.

Arguing that doing nothing is always or often the most appropriate response is inconsistent with the very notion of universal human rights. In extreme cases, such as war crimes, apartheid, the threat of chemical warfare in the case of Iraq, genocide in the case of Serbia, or the Holocaust in the case of Nazi Germany, excluding a priori economic sanctions from the menu of possible options seems indefensible. Whether it is the most appropriate option may, of course, be context specific and depend both on the seriousness of the abuses and on the likely efficacy of the response choice of instrument, issues to which we turn next. But it is sufficient for present purposes to restate the point that to the extent that CLS are appropriately characterized as basic or universal human rights, a linkage between trade policy and such labour standards is not only defensible but arguably imperative, in contrast to the other two rationales for such a linkage which, despite their much longer historical lineage, are largely spurious and inconsistent with the central predicates of a liberal trading system. However, CLS viewed as basic or universal human rights, by promoting human freedom of choice, are entirely consistent with a liberal trading regime that seeks to ensure other human freedoms, in particular the right of individuals to engage in market transactions with other individuals without discrimination on the basis of country of location [16]. Having said this scope and definition of the class human rights viewed as sufficiently universal as to warrant potentially the imposition of trade sanctions for their violation is problematic in various respect. Even CLS are not susceptible to uncontentious understandings of their scope. The scope of many economic, social and cultural rights is controversial [17]. These controversies do not obviate the normative force of the rights themselves, but do have implications for the choice of instrument and choice of institutional arrangement for addressing the trade policy-labour standards linkage, to which we now turn. As regards developing country: From a developing country perspective, the conventional wisdom is that unlike the case with developed countries, increased integration with the world economy will be beneficial to less skilled workers. But this does not seem to be supported by the available empirical evidence, which suggests that many developing countries experienced rising wage inequality after opening to international trade. It appears possible that there is a pervasive skill bias in globalization. It is also uncertain what prospects international trade offers in creating jobs in developing countries, particularly those located in Africa and Latin America [18].

Human rights beyond labour rights

Since the end of the Cold War, two main visions have guided the evolution of international law and institution the visions of human rights and humanity and that of economic globalization. Both visions have offered challenges to traditional and understandings of sovereignty: they have given a new significance to non-state actors in the evolution and implementation of international law. Both have often given rise to demands and aspirations to global politics and constitutionalism as well as new relationship between local, national, regional, and global levels of governance. However, the legal, institutional and policy cultures of international human rights law and of international trade, financial and investment law have developed largely in isolation from one another [19].

As a matter of international law, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the WTO are, in the first instance treaty regimes. A fundamental structural characteristic of the international legal system is that of decentralization without hierarchy. Treaty norms in the ICCPR and ICESCR and other human rights instruments have an equal legal status to those in the WTO (a few such norms, related to prohibitions on torture and slavery have a higher status as *ius cogens* or preemptory norms of International law, trumping treaty obligations to the extent of inconsistency).

A large majority of states are signatories to both the WTO Single Undertaking (the core WTI treaties) and the ICCPR and ICESCR. The principle of decentralization without hierarchy, along with that of giving full effect to international obligations, implies the need to interpret and to develop these regimes in a complementary and consistent fashion to the extent possible. As the Report of the international Law Commission (ILC) on fragmentation of international law notes, 'In international law, there is a strong presumption against normative conflict' [20].

The Declaration on Trade-related Intellectual Property Rights (TRIP) and Public Health and the Kimberly (Conflict Diamonds) waiver reflect an unacknowledged debt to human rights consciousness in the WTO. The current Director-General of the WTO, Pascal Lamy, has written about globalization with a human face, and his conception of the economic sphere, including the international economic sphere, is deeply rooted in the notion of humanity. More recently, a joint study by the ILO and the WTO Secretariat explicitly refers to freedom of association and the right to collective bargaining as 'universally recognized Human Rights', urges their respects as such and not just for instrumental reasons of social peace, and refutes with empirical evidence the notion that respect for such rights harms competitiveness [21].

Sen vigorously challenges the view that human rights are 'luxury goods' that poor countries cannot afford until they have achieved a certain level of prosperity; instead, the improvement of economic welfare depends upon respect for rights in many and complex ways. More recently, Alan Sykes has noted that, generally speaking, there is a positive correlation between a country's openness to trade and its tendency to respect human rights. This puts into question the idea that poor countries should or must sacrifice human rights or postpone their realization for the sake of openness to trade, and an outward-oriented development strategy [22].

Conclusions

Finally, it could be said that, increasingly, discussion in the international policy community on the relationship between liberal trade and labour rights has focused on the issues of compliance with core universal rights, which have a close relationship to the rights contained in general international human rights instruments such as the UN Declaration and the UN Covenant, on Civil and Political Rights.

Competitiveness-based claims about 'social dumping' have become less prominent, and the notion that the objective should be to obtain some kind of 'level playing field' between developed and developing countries is now less and less heard, even from labour rights advocates on the left of the political spectrum. In sum, contrary to the picture still painted by some free traders, the claim for a trade and labour rights link is not some fanatical or protectionist adventure to attempt harmonization of conditions of work across the world, regardless of different economic and cultural conditions.

The UN human rights institutions have increasingly addressed themselves to the challenge of ensuring that trade liberalization commitments enhance rather than constrain the ability of states, and particularly developing countries, to realize, in particular, economic and social rights, such as the right to health. So there is the danger that if the issue of labour standards is not discussed in an appropriate multilateral forum such as the ILO, it will be taken up in other contexts such as bilateral, and regional trade agreements. For example, as part of the price to get congressional approval in the US of the North American Free Trade agreement, Mexico and Canada had to agree to a side agreement on labour and environmental standards. Since the start of the Uruguay Round, there was a disturbing and unfortunate increase in the number of discriminatory regional trade agreements concluded, as well as proposed. Contrary to the expectation of some, the successful conclusion of the Round did not stop this trend on the contrary, there is some evidence of acceleration. Many developing countries are already members or eager

to become members of such agreements. This eagerness might lead them to accept side agreements on labour standards that are not necessarily in their interest.

As regards WTO and public health, like other WTO agreements, GATS does not privilege the protection of human health within its architecture for trade liberalization. GAT's has become the process through which health policy in connection with trade in services will be vetted, and the process sometimes places burdens on WTO members seeking to protect and promote health. Further, the GATS process may adversely affect developing countries more than developed countries. And, finally, it should be noted that liberalized trade in health-related services should lead to an optimal balance between preventive and curative services and involvement of both private industry and civil society is important to ensure that liberalization of health related services promotes participatory health policy towards achieving national goals.

References

1. M. Bronckers, 'More Power to the WTO', *Journal of International Economic Law*, 2001, 41 (reproduced by permission of Oxford University Press).
2. M. Khoh, 'un gouvernement mondial dans l'ombre' *Le monde Diplomatique*, May 1997.
3. Steve Suranovic, 'International Trade Theory and Policy', 2013, p.25.
4. Steve Suranovic, 'International Trade Theory and Policy', 2013, p.27.
5. Bernard Hoekman, Aaditya Matto, and Philip English, 'Development Trade and the WTO', 2002, p.41
6. Bernard Hoekman, Aaditya Matto, and Philip English, 'Development Trade and the WTO', 2002, p.42.
7. 'WTO Agreements and public health', a joint study by the WHO and WTO secretariat, published 2002, p.23.
8. International Labour Organization (ILO), *Constitution of the International Labour Organization (ILO)*, 1 April 1919, p.15.
9. David P. Fidler, *Legal Review of the General Agreement on Trade in Services (GATS) from a Health Policy Perspective*, 2004, p.3.
10. See E. Alben, 'GATT and the Fair Wage: A Historical Perspective' (2001) 101 (6) *Columbia Law Review* 1410-47.
11. Chantal Blouin, Nick Drager, Richard Smith *International Trade in Health Services and the GATS: Current Issues and Debates*, 2006, p.185.
12. Article 31.3(b) of the Vienna Convention; accessible at: www.wto.org/english/tratop_e/dispu_e/repertory_e/i3_e.htm
13. TRIPS, article 31; accessible at http://www.wto.org/english/docs_e/legal_e/27-trips_04c_e.htm
14. Michael J. Trebilcock and Robert Howse 'The Regulation of International Trade', published 2005.
15. See A. Sen, *Development as Freedom* (New York: Oxford University Press, 1999) p.132.
16. See Molatlhegi, op.cit., ch.3; McCrudden and Davies op.cit.; S. Cleveland, 'Human Rights and International Trade: A theory of Compatibility' (2002) 5(1) *Journal of International Economic Law* 133-89.
17. M. Ignatieff, *Human Rights as Politics and Idolatry* NJ; Princeton University Press, (2001).
18. *International Trade and Labour Markets*. accessible at: <http://www.odi.org.uk/events/2026-international-trade-labour-markets>.
19. R. Howse and R. Teitel, 'Beyond the Divide: The Covenant on Economic, Social and Cultural Rights and The World's Trade Organization', *Occasional Paper No. 30*, Friedrich Ebert Stiftung, Geneva, Switzerland, April 2007.
20. International Law Commission, 'Fragmentation of international Law: Difficulties Arising from the Diversification and Expansion of International Law', *Report of the Study group of the International Law Commission*, finalized by Martti Koskenniemi, para.37.
21. Ronald A. Cass and Michael S. Knoll 'International Trade Law', Second series, published 2003.
22. A.O. Sykes, "International Trade and Human rights: An Economic Perspective", *University of Chicago Law and Economics Olin Working paper No.188*, May 2003.