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Declaration

I, Mazharul Islam, hereby declare that this essay is my original work, which is free from any type of plagiarism. The essay has neither published anywhere else, nor submitted for consideration at any other place. If any fact has been taken in the essay from any other work it has been duly acknowledged in the form of footnotes.

With this I request you to consider my entry for the Essay Competition.

Yours Sincerely,
Mazharul Islam,
M.Phil. Semester III,
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The WTO Compatibility of Trade Sanction: An Appraisal

Abstract

The idea of granting developing countries Generalized System of Preferences GSP in the markets of industrialized countries is a key exception to the MFN treatment recognized by the Enabling Clause 1979. However, it has left huge discretion with each developed country to award preferences and each countries GSP program has its own features. The GSP scheme has had limited impact on the economic development of beneficiary countries because the range of products permitted duty free treatment is restricted by political considerations, and the list of recipient countries has been often arbitrary. With regard to these observations, further assessment of the practice of preferential trading arrangements (PTAs) and their functions in the world trading system is required. More specifically, an examination is required about the suitability of unilateral withdrawal of GSP hereinafter trade sanctions by developed states against developing and LDCs. The writer will identify that the legislation regulating preferential arrangements needs to be compatible with the Enabling Clause and other WTO rules, hence the beneficiary member states can challenge the legitimacy of domestic legislations of developed sates before dispute settlement body. But the reluctance of WTO members to confront the legality of unilateral withdrawal of GSP is the problem. Till now no injured country challenged the implementation of GSP hereinafter trade sanction in violation of conditionality put by developed countries. If the legality of the trade sanction is being challenged than it is less likely to be compatible with WTO law. Therefore, developing country must be aware of their 'absolute advantage' and enhance their trade expertise to utilize optimum benefit that has been in the international trade instrument or the jurisprudence developed by the WTO.

The WTO Compatibility of Trade Sanction: An Appraisal

MAZHARUL ISLAM

INTRODUCTION

At its inception in 1947, the GATT was dominated by industrialist countries. Over the years, however, more and more developing countries have joined the GATT, and they now make up a large majority of the WTO's membership.¹ The idea of granting developing countries preferential tariff rates in the markets of industrialized countries was originally presented by Raul Prebisch, the first secretary general of UNCTAD, at the first conference in 1964. The GSP was adopted at UNCTAD II in New Delhi.² In particular, the initiative promoted the idea of lower tariff rates for imports onto industrial countries.³ An important exception to the MFN treatment obligation of Article I: 1 of the GATT 1994 is the 1979 GATT Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries, commonly referred to as 'Enabling Clause'.⁴ The Enabling Clause, which is now an integral part of the GATT 1994,⁵ states in its paragraph 1:

¹ Simon Lester, Bryan Mercurio and Arwel Davies, *World Trade Law: Text, Materials and Commentary* (2nd edn, Hart Publishing 2012) 813

² *ibid* at 831

³ John H. Jackson, *The World Trading System: Law and Policy of international Economic Relations* (2nd edn, MIT Press 1997) 322

⁴ GATT Document L/4903, dated 24 November 1979, BISD 26S/2003. The Enabling Clause was adopted by the GATT Contracting Parties in the context of the Tokyo Round of Multilateral Trade Negotiations. Note that the Enabling Clause replaced, and expanded, a 1971 *waiver Decision on the Generalized System of preferences*, GATT Document L/3545, dated 25 June 1971, BISD 18S/24. This waiver Decision was in turn adopted to give effect to the *Agreed Conclusions* of the UNCTAD Special Committee on Preferences adopted 1970. These *Agreed Conclusions* recognized in para I:2 that preferential tariff treatment accorded

‘Notwithstanding the provisions of Article I of the General Agreement, [Members] may accord differential and more favourable treatment to developing countries, without according such treatment to other [Members]’.

However, it has left to each developed country to define what is developing country for purposes of benefitting from the GSP⁶ program. Generally the preferences are accorded to developing countries in accordance with the Generalized System of Preferences⁷ has been laid down in the preamble of the GSP decision 1971 as the establishment of a mutually acceptable system of ‘*generalized*’, ‘*non-reciprocal*’ and ‘*non-discriminatory*’ preferences beneficial to the developing countries in order to increase the export earnings, to promote the industrialization and to accelerate the rates of economic growth.⁸ Neither Enabling Clause nor any Ministerial Declaration defines these three conditions of granting preferential arrangements⁹.

Thus, the GATT waiver established the GSP framework, a great deal of individual discretion was left to each of the developed nations implementing it.¹⁰ There is no international law requirement to grant GSP, and no particularly detailed requirements as to what should be the shape and framework of GSP. As actually put into effect, each countries GSP program has its own features.¹¹ The degree to which these programs

under a generalized scheme of preferences was key for developing countries (a) to increase their export earnings, (b) to promote their industrialization, and (c) to accelerate their economic growth.

⁵ The Enabling Clause is one of the ‘Decisions of the Contracting Parties’ within the meaning of Para 1(b) (iv) of Annex IA incorporating the GATT 1994 into the *WTO Agreement*. See Appellate Body Report, EC Tariff Preferences (2004) Para 90.

⁶ Generalized System of Preferences, Decision of 25 June 1971, BISD 18S/24

⁷ Paragraph 2(a) of the Enabling Clause 1979

⁸ Generalized System of Preferences, Decision of 25 June 1971, BISD 18S/24

⁹ The Doha Ministerial Conference reaffirmed that the preferential trade arrangements should be generalized, non-reciprocal and non-discriminatory without adding any details explanations. For details see WTO Ministerial Conference, Implemented Related Issues and Concerns decision of 14 November 2001 para 12.2 WT/MIN (01)17

¹⁰ John H. Jackson (n 3) 323

¹¹ *ibid*

provided actual benefits to the developing countries in somewhat controversial and various estimates come up with various results.¹²

I. TRADE SANCTION UNDER WTO

The Suspension of GSP hereinafter trade sanction is under the Preferential Trade Arrangements PTAs¹³ can fall under four scenarios in WTO law: firstly sanction as a form of retaliation under Article 22 of the Dispute Settlement Understanding, secondly, sanction as a measure to promote legitimate policy goals under Article XX of GATT, thirdly, sanction as a action to protect national security interest of a country in time of international emergency under Article XXI(b)(iii) and finally sanction as a action to maintain international peace and security in pursuance of member states obligations arose from United Nations Charter under Article XXI(c) of GATT. The Member States of WTO are allowed to deviate from two general principles¹⁴ of GATT under some special circumstances.¹⁵ Hence, it lies the essentiality and the significance of the trade sanction.¹⁶

¹² Jagdish Bhagwati, 'The International Crisis and the Developing Countries' (1975) 9 Education Research and Training Foundation 1; Richard Pomfret, 'The Effect of Trade Preference for the developing countries' (1986) 53 Southern Economic Journal 18; Somitro Djojohadikusumo, 'Common Interest of Industrial and Developing countries' (1985) 8 World Economy 325; Tamotsu Takase, 'The Role of Concessions in the GATT Trading System and Their Implications for Developing Countries' (1987) 21 J of World Trade Law 67; See also Drusilla Brown, 'General Equilibrium Effects of the U.S. Generalized System of Preferences' (1985) 237 Institute of Public Policy Discussion Paper

¹³ Preferential Trade Arrangements (PTAs) should not be confused with Preferential Trade Agreements, where the first one covers only the non-reciprocal arrangements under the Enabling Clause and the second one covers reciprocal agreements under article XXIV and paragraph 2(c) of the Clause. Here PTAs would mean preferential arrangements not agreements.

¹⁴ The principle of reciprocity along with the principle of non-discrimination is also one of the twin foundation stones of the GATT. Though the term has not been defined anywhere in the GATT, but it is certainly clear that it applies to negotiations aimed at the mutual reduction of trade barriers between the Contracting Parties. See Hector Gros Espiell, 'The Most Favoured Nation Clause: Its Present Significance in GATT' (1971) 5 Journal of world Trade Law 36; Lorand Bartels, 'The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program' (2003) 6(2) J of Intl Economic Law 527

¹⁵ There can be three kinds of exceptions of these two principles: Firstly, exceptions to MFN under Article XX. XXI. XXIV of GATT and the Enabling Clause; Secondly, exceptions to the principle of reciprocity under Enabling Clause and Chapter four of the GATT; Thirdly, exceptions to both the principles under

Two issues are highly skeptical here, one is the practice of developed states in differentiating among developing states, the other relates to the exercise of unilateral trade sanction to meet certain conditions. The first issue has attracted larger attention in the literature,¹⁷ and the appellate body in *EC-Tariff Preferences Dispute* resolved the issue in favour of the developing countries.¹⁸ The second issue is more critical due to the paucity of existing literature, where very less work has been done that directly relates to the legality of trade sanction in PTAs from the perspective of the WTO. With regard to these observations, further examination of the practice of PTAs and their role in the world trading system is required. More specifically, investigation is required about the permissibility of unilateral trade sanctions by developed states against developing and LDCs.

II. IMPORTANCE OF GSP FOR DEVELOPING AND LDCs

The tailor does not attempt to make his own shoes, but buys them off the shoemaker. The shoemaker does not attempt to make his own cloths, but employs a tailor...What is

Preferential Trading Arrangements (PTAs) including GSP, DFQF market access and other non reciprocal arrangements under the Enabling Clause.

¹⁶ The beneficiaries of the new scheme include all South Asian countries such as India, Pakistan, Nepal, Sri Lanka, Bhutan and Afghanistan. Only Bangladesh remains excluded.

¹⁷ Frank J. Garcia, *Trade Inequality and Justice: Towards a Liberal Theory of Just Trade* (Ardley Transnational Publishers 2003) 156; Frank J. Garcia, 'Trade and Inequality: Economic Justice and Developing World' (2000) 21 Mich. J. Intl. L. 975; Robert Howse, 'Indias WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for 'Political' Conditionality in US Trade Policy' (2003) 4 Chi. J. Intl. L. 385; Peter Lichtenbaum. 'Special Treatment vs. Equal Participation: Striking a Balance in the Doha Negotiations' (2002) 17 AM. U. Intl. L. Rev. 1015; James Harrison, 'GSP Conditionality and Non-Discrimination' (2003) 9(6) Intl. T.L.R 159; James Harrison, 'Incentives for Development: The EC's Generalized System of Preferences, India's WTO Challenge and Reforms' (2005) 42 Common Market Law Review 1663; Shaffer and Aper, 'Institutional Choice in the Generalized System of Preferences Case' (2005) 39 J World Trade 977; Paulette Vander Schueren and Michal Cieplinski, 'EC Generalized System of Tariff Preferences in the Make: Improved Market Access for Developing Countries' (2005) 11(4) Intl. T. L. R. 118

¹⁸ Appellate Body, *European Communities- Conditions for the Granting of Tariff Preferences to Developing Countries* WT/DS246/AB/R. (7 April, 20040) [hereafter EC Tariff Preferences Dispute] Para 190

prudence in the conduct of every private family, can scarcely be folly in that of a great kingdom. If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it off them with some part of the produce of our own industry, employed in a way in which we have some advantages.¹⁹ Smith's Theory of *Absolute Advantage* essentially stated that countries should export those products which they can produce more efficiently than other countries and import those products which they cannot.²⁰ *From that very essence, developing country should take the sole opportunity to export their products to achieve absolute trade advantage as they (developed country) does not have such cheap labour force like developing nations.* David Ricardo's Theory of *Comparative Advantages*²¹ stated that it takes the lawyer's secretary two hours to type a document that lawyers could type in one hour, and that the secretary hourly wage is \$20, and that the lawyer's hourly rate to clients is \$200. It would pay the lawyers to hire the secretary and pay her \$40 to type the document in two hours while the lawyer is able to sell for \$200 hour of his time that would otherwise have been committed to typing the document.²² *Thus, both the lawyers and the secretary gain from this exchange.* In International trade context, this generalizes to the proposition that a country should specialize in producing and exporting goods in which its comparative advantage is greatest, or comparative disadvantage is smallest, and should import goods in which its comparative disadvantage is greatest.²³ *A developed country is receiving much more trade advantage from developing countries never and ever they will go away from developing country because of their comparative trade advantage.* Therefore, Joseph Stiglitz in his book²⁴ continues to defend Special and Differential S&D provisions and its validity argues for strengthening and expanding. In that very line of argument developed

¹⁹ Adam Smith, *The Wealth of Nations* (Methuen & Co Ltd 1776) 424

²⁰ For example, if countries with tropical climates can produce bananas and pineapples more cheaply than countries with temperate climates, the latter should purchase these products from the former.

²¹ David Ricardos, *The Principle of Political Economy* (third edition 1821, Batoche Books 2001) 85

²² P Samuelson and A Scoot, *Economics* (McGraw Hill 1980) 807

²³ Michael J. Trebilcock, *Understanding of Trade Law* (Edward Elgar Publishing 2011) 3

²⁴ Joseph E. Stiglitz and Andrew Carlton, *Fair Trade for All: How Trade Can Promote Development* (Oxford University Press 2005)

country, certainly not go away from their trading with developing countries because of their ‘*comparative advantage*’ similarly the developing country must be aware of their ‘*absolute advantage*’ and enhance their trade expertise to utilize optimum benefit that has been in the international trade instrument or the jurisprudence developed by the WTO.

III. TRADE PREFERENCE IN WTO

Almost all the WTO agreements contain special provisions with respect to developing country members.²⁵ Article XX (h) of the GATT provides a general exception to GATT rules for International Commodity Agreements conforming to criteria set out by the UN Economic and Social Council.²⁶ Article XXVIII of GATT permits developing countries to raise tariffs and use other means to protect infant industries.²⁷ Part IV of the GATT was added in 1965 as the result of the 1958 Haberler Report and the political initiatives of developing countries in the 1960s.²⁸ Article XXXVI sets out the principle that developed countries ‘do not expect reciprocity’ for their commitments to remove or reduce tariffs and other trade barriers.²⁹ This principle is replaced in the Enabling Clause.³⁰ Article XXXVI stated that developed countries should collaborate with developing countries by

²⁵ WTO, Committee on Trade and Development, *Implementation of Special and Differential Provisions in WTO agreements and Decisions*, WT/COMTD/W/77, 25 October 2000. The WTO has classified the so called special and differential (S&D) provisions into the following six categories: (1) provisions aimed at increasing the trade opportunities of developing country Members, (2) provisions under which WTO Members should safeguard the interests of developing country Members, (3) flexibility of commitments, of action and use of policy instruments, (4) transitional time periods, (5) technical assistance and (6) provisions relating to the least developed country Members.

²⁶ Resolution 30 (IV) of 28 March 1947

²⁷ For example Sri Lanka was found to have meet these criteria, see Report of the Panel on Article XXIII Application by Sri Lanka, GATT B.I.S.D. 112 (1958)

²⁸ Protocol Amending the General Agreement on Tariffs and Trade to Introduce a Part IV on Trade and Development and to Amend Annex I, done at Geneva, 8 February 1965, 17 U.S.T. 1977, T.I.A.S. No. 6139, 572 U.N.T.S. 320 (entered into force 27 June 1966).

²⁹ GATT Art XXXVI: 8.

³⁰ Decision of November 28, 1979 on Differential and More Favorable Treatment, Reciprocity and Fuller Participation on Developing Countries, GATT B.I.S.D 203 1980 [*hereinafter Enabling Clause*]

consulting with them before taking action that would adversely affect their interests.³¹ Part IV of the GATT was a disappointment for many developing countries that had hoped to get new provisions allowing preferences. The demand for preferences was finally granted in 1971 when the GATT contracting parties adopted waivers authorizing the Generalized System of Preferences (GSP)³² and the tariff preferences among developing countries.³³ The GSP programs have had limited impact on the economic development of beneficiary countries. The range of products allowed duty free treatment is limited by political considerations, and the list of beneficiary countries has been often arbitrary. Rule of origin criteria are strictly applied to exclude even bona fide products: US courts have held that a double substantial transformation is required before goods made from imported parts qualify.³⁴

As Constantine Michalopoulos stated *'the GSP turned out to be less than it has been touted to be at its inception. It was important for some products, for some countries for some of the time. But it has not served to strengthen the integration of developing countries into the world trading system'*.³⁵

Therefore, in December 2002 India filed a major challenge to the administration of the WTO's GSP programs by challenging the so called 'Drug Arrangements' portion of the GSP program of the European Communities. The Drug Arrangements program provided

³¹ GATT Art XXXVI: 6 and 7. See GATT Panel Report, *European Communities – Refunds on Exports of Sugar – Complaint by Brazil*, L/5011, adopted 10 November 1980, BISD 27S/69, Para 25; GATT Panel Report, *European Economic Community – Restrictions on Imports of Dessert Apples – Complaint by Chile*, L/6491, adopted 22 June 1989, BISD 36S/93, Para 12.32 (nothing that consultations between the EEC and Chile, a less developed country, had not related specifically to the interests of less developed countries in terms of Part IV, but declining to make a finding under Part IV because the panel found the import restrictions to be inconsistent with obligations under Part II).

³² GSP Decision of 1971, 5 June 1971, BISD I 8S/24

³³ Elimma C. Ezeani, *The WTO and Its Development Obligation: Prospects for Global Trade* (Anthem Press 2011) 55

³⁴ *Torrington Co v United States*, [1563] 764 F 2d [1985] Fed Cir T 158

³⁵ Constantine Michalopoulos, *Developing Countries in the WTO* (Macmillan Publishers Limited 2001) 16

incentives to 12 developing countries in the form of duty free access to the EC market in return for efforts to the combat production of illegal drugs and drug trafficking. India compliant the Drug Arrangement program was the discriminatory in violation of the GATT Article 1:1 (most favoured nation's treatment) and the Enabling Clause. The Appellate Body, after considering the complaint, handed down the landmark decision, the GSP case³⁶ that is the first extensive interpretation of the Enabling Clause and the GSP program itself. This ruling clarifies greatly and enhances the WTOs GSP program; in the future, developed countries must observe the objective standards of the nondiscrimination between developing countries.

IV. LEGAL ANALYSIS OF THE TRADE SANCTION

A developed country can place two sets of arguments to invoke Suspension of GSP hereinafter trade sanctions under PTAs, one stems from the Enabling Clause itself and the other originates from general and security exceptions under GATT article XX and XXI. Firstly, the traditional claim of developed country that PTAs are voluntary in nature and they have full discretion to condition or suspend preferences, which is perhaps no more valid after the decision of the appellate body in *EC-Tariff Preference dispute*,³⁷ and a clear distinction has been made between the obligation to install the preferences and the obligation to maintain that in accordance with WTO law.³⁸ Furthermore, the nature of the

³⁶ *European Communities- Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (AB-2004-1), Report of the Appellate Body, 7 April 2004.

³⁷ *EC- Tariff Preferences Dispute*, where the EC has been held liable for the violation of the general obligation of GATT and which was found unjustified under the Enabling Clause and also under article XX. For details see. Robert Howse, 'India's WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for Political Conditionality in US Trade Policy' (2003) 4 Chi. J. Intl. L. 385; Steve Charnovitz, Lorand Bartels, Robert Howse, Jane Bradley, Joost Pauwelyn and Donald Regan, 'The Appellate Body GSP Decision' (2004) 3 World Trade Review 239

³⁸ Lorand Bartels, 'The WTO Legality of the EU's GSP+ Arrangement' (2007) 10 J. of International Economic Law 869; Kevin Moss, 'The Consequences of the WTO Appellate Body Decision in EC-Tariff

preferences has been possibly changed after the Hong Kong Ministerial Conferences, which obliged developed countries to provide DFQF market access for all the products arising from LDCs.³⁹ Annex F of Paragraph 36 of the Sixth Ministerial Declaration of WTO held in Hong Kong laid down the legal framework of DFQF market access in favour of LDCs:

'We agree that developed-country Members shall, and developing-country Members declaring themselves in a position to do so'.

Here for the first time in the history of PTAs in WTO/GATT the word 'shall' has been invoked to oblige developed countries, which signals the fundamental change in the attitude of developed member states towards LDCs. The Ninth Ministerial Conference 2013 held in Bali restated almost the same commitment as it was in the Hong Kong Ministerial Declaration and in furtherance the Declaration added that⁴⁰:

'Developed-country Members that do not yet provide duty-free and quota-free market access for at least 97% of products originating from LDCs, defined at the tariff line level, shall seek to improve their existing duty-free and quota-free coverage for such products, so as to provide increasingly greater market access to LDCs, prior to the next Ministerial Conference;

Preferences for the African Growth Opportunity Act and Sub-Sahara Africa' (2006) 13 New York University of International Law and Politics 665

³⁹ WTO, Hong Kong Ministerial Declaration. WTO Doc WT/MIN (05)/DEC (22 December 2005).

⁴⁰ The Ninth World Trade Organisation Ministerial Conference (3 to 7 December 2013) <https://www.wto.org/english/thewto_e/minist_e/mc9_e/mc9_e.htm> accessed 5 November 2016

Furthermore, Tenth WTO Ministerial Conference, Nairobi, 2015, Preferential Rules of Origin for LDCs refers⁴¹

‘Preference-granting Members shall, to the extent possible, avoid requirements which impose a combination of two or more criteria for the same product. If a Preference-granting Member still requires maintaining a combination of two or more criteria for the same product, that Preference granting Member remains open to consider relaxing such requirements for that specific product upon due request by an LDC.’

The second set of arguments, possibly derives from the exceptions of the GATT, where a developed country will have to prove that measure of trade sanction to promote social concerns falls under any of the criteria of article XX or under article XXI and they will also have to show that the measure has not created arbitrary or unjustifiable-discrimination between countries or a disguised restriction of international trade, in other word it will have to undergo through *chapeau*⁴² test of article XX.

A number of authors have argued that these two exceptions could possibly be the close options to legalize trade sanction under PTAs as well as under WTO law.⁴³ But, all pre requirements developed by the WTO jurisprudence which are essential to be satisfied to invoke a trade sanction measure to promote non trade goals,⁴⁴ and it outlines that it is

⁴¹ The 10th World Trade Organisation Ministerial Conference (15 to 19 December 2015) <https://www.wto.org/english/thewto_e/minist_e/mc10_e/nairobipackage_e.htm> accessed 5 November 2016

⁴² Chapeau is a French term meaning hat or cap, here it denotes to describe the introductory clause to Art XX of its position in the text. The text of the chapeau is as follows, ‘Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade’.

⁴³ Peter Hipold, ‘Human Rights and WTO law: From Conflict to Coordination’ (2007) 45 *Archiv des Volkerrechts* 484; Gabrielle Marceau, ‘WTO Dispute Settlement and Human Rights’ (2002) 13 *European J of Intl Law* 753

⁴⁴ Appellate Body, *European Communities- Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R. (7 April, 2004) [hereafter EC Tariff Preferences Dispute]; WTO, Appellate Body Report, *United States Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R. (6 November 1998); Panel Report, *European Communities-Measures Affecting Approval*

highly unlikely to justify the measure of trade sanction in PTAs as an exception to GATT unless it is being invoked for the violation of any *jus cogens* norms,⁴⁵ or any other fundamental violation of human rights such as forced labour, child labour, child soldiers etc.

As a general proposition any type of suspension or withdrawal of the preferences to promote some non trade social objectives, which otherwise known as trade sanction could potentially be inconsistent with several provisions of the GATT, including Article 1⁴⁶ Article XI⁴⁷ and Article III:4⁴⁸. It has become a continuing source of confusion among

and Marketing of Biotech Products, WTO Doc WT/DS292/R. (21 November 2006); Appellate Body, United States-Measures Affecting the Production and Sale of Clove Cigarettes, WTO Doc WT/DS406/AB/R. (24 April 2012). For details see Kati Kulovesi, *The WTO Dispute Settlement System: Challenges of the Environment, Legitimacy and Fragmentation* (Kluwer Law International 2011); Steve Charnovitz, 'The WTO'S Environmental Progress' (2007) 10(3) JIEL 695. Though WTO jurisprudence largely deals with the justification of trade sanction to protect environment, still almost same analogy would be applicable to justify any other non-trade social goal in PTAs.

⁴⁵ Jus cogens are the peremptory norm of international law, which hold the highest hierarchical position among all other norms and principles and considered as overriding principles of international law. For details See, Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press 2006)10; Teraya Koji, 'Emerging hierarchy in international human rights and beyond: from the perspective of non derogable right' (2001) 12 EJIL 917. It is important to mention that the grounds of imposing trade sanctions hardly derive from the violation of *jus cogens* norms, yet there exists no conclusive list of this norm.

⁴⁶ GATT article 1.1, which prevents member states from imposing trade sanctions on other WTO member states to the extent which entails less favourable treatment of like products from sanctioning state without a valid exception, in other words a member state, remains under an obligation not to restrict or suspend the trade with other member states without similarly reducing the benefits to all other member states.

⁴⁷ GATT article XI states that: 'No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party'. This article prevents a WTO member from imposing trade sanctions that would limit exports to another member state or sanctions that would restrict the importation of goods originating from another member states.

⁴⁸ GATT article III:4 states that: 'The products of the territory of any contracting party imported into the territory of any' other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.' National treatment standards might prohibit the imposition trade sanctions and according to this principle a member state is permitted to exercise regulatory powers on imported goods provided that these goods are treated no less

WTO members and a matter of huge controversy, whether the Enabling Clause permits donor countries to impose trade sanctions to uphold their own values and policies through conditioning PTAs. Developed countries tend to use trade sanctions for promoting social concerns through PTAs, which otherwise would directly contradict WTO law.

Moreover, the establishment of Transparency mechanism⁴⁹ separated reciprocal agreements from the non reciprocal preferential schemes and the Council's Decision of 2010 mandates the legal relationship of non reciprocal PTAs with WTO laws.⁵⁰ So the role which Committee on Trade and Development⁵¹ plays is nowhere different from that of the Committee on Regional Trade Agreements.⁵² The formation of preferential trade arrangements would be notified to the committee on trade and development under 2010 transparency mechanism of PTAs.

The subsequent avenue which hints that PTAs are not beyond the scrutiny of WTO rules originates from the jurisprudential development of the GATT/WTO dispute settlement

favourably than the like domestic products. This is another debate whether goods would be considered unlike by virtue of lower and higher labour standards. For details see, Robert Howse, Brain Langille and Julien Burda, 'The World Trade Organization and Labour Rights: Man Bites Dog', in Virginia A. Lear and Daniel Warner (eds), *Globalization and International Institutions: Labour Rights and the EU, ILO, OECD and WTO* (Martinus Nijhoff 2006) 157

⁴⁹WTO, General Council Decision, Transparency Mechanism for Preferential Trade Arrangements, WTO Doc WT/L/806, (16 December 2010), (hereafter Transparency Mechanism for PTAs) see < https://www.wto.org/english/tratop_e/region_e/region_e.htm > accessed 11 October 2016 .See also; Jurgen Bering /Karsten Nowrot, 'The 2010 WTO Transparency Mechanism for Preferential Trade Arrangements: As Good as it Currently Realistically Gets' (2010) 35 Policy Paper on Transnational Economic Law < [http://tietje.jura.uni-halle.de/sites/default/files/telc/Policy Paper35.pdf](http://tietje.jura.uni-halle.de/sites/default/files/telc/Policy%20Paper35.pdf)> accessed 11 October 2016

⁵⁰ *ibid*, paragraph 2 says 'The purpose of this Mechanism is to enhance transparency of the PTA under consideration. These procedures do not prejudge the substance of the relevant provisions of the Enabling Clause or any other instrument as referred in 1(a), (b) or (c), nor affect Members' rights and obligations under the WTO Agreements in any way'.

⁵¹ Committee on Trade and Development serves as the forum for the notification and review of regional trade agreements (RTAs) between developing countries. It also reviews non-reciprocal preferential schemes favouring developing countries authorized under the Enabling Clause, in particular the Generalized System of Preferences (GSP) - programmes by developed countries granting preferential tariffs to imports from developing countries. For details see WTO Website. <https://www.wto.org/english/tratop_e/devel_e/d3ctte_e.htm> accessed 11 October 2016

⁵² The Council for Trade in Goods has been created by Article IV (5) of the WTO Establishing Agreement and it has been assigned to carry out the functions given by their respective Agreements and General Council.

body.⁵³ The Turkey-Textile panel report¹⁰² records the first time that the issue of consistency of a RTA with WTO was examined. The panel and appellate body also took the same approach in EC-Tariff Preference Dispute rejecting the argument of EC that the WTO incompatible drug arrangements are permitted under PTAs. The findings of the appellate body in EC Tariff Preferences case are significant mainly because it has conformed for the first time that PTAs are subject to WTO multilateral disciplines despite being voluntary in nature.⁵⁴

Now it is evident that the legislation regulating preferential arrangements needs to be consistent with the Enabling Clause and other WTO rules, hence the beneficiary member states always can challenge the legality of national legislations of developed states before dispute settlement body. But the unwillingness of WTO members to challenge the legality of unilateral practice is unlikely to change which makes the global welfare uncertain despite the growing significance of trade liberalization in international trade.⁵⁵

V. OBSERVATION

Developing Country expects a greater degree of special treatment than industrialized countries have afforded them. This demand was expressed comprehensively in the New International Economic Order and the Charter of Economic Rights and Duties of States⁵⁶

⁵³ There is only one case in WTO which directly linked up with the relationship of preferential arrangements with WTO law and that is EC tariff Preferences. Some other cases which were before GATT panel and WTO dispute settlement body related with RTAs clearly subjected these voluntary agreements to stringent scrutiny of WTO rules. For details see Michal Terebilcock, Robert Howse and Antonia Eliason, *The Regulation of International Trade* (Routledge Publications 2013) 100

⁵⁴ Panel Report, *Turkey -Restrictions on Imports of Textile and Clothing Products*, WTO & Doc WT/DS34/R, (31 May 1999) [hereafter Turkey-Textile]

⁵⁵ Michal Terebilcock, Robert Howse & Antonia Eliason (n 53) 135

⁵⁶ The New International Economic Order was the subject two UNGA resolutions: (a) a Declaration and (b) an Action program. See G.A. Res 3201, 3202 (S-IV) May 1, 1974 (adopted without vote) and G.A. Res 3281 (XXIX) Dec. 12, 1974 (vote of 120-6, ten abstentions). See 14 I.L.M. 251; Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979); Abdulqawi A. Yusuf, *Legal*

promoted by the UNCTAD in the 1970s. The Charter called for restitution for the economic and social costs of colonialism, racial discrimination, and foreign domination.⁵⁷ It would have imposed a duty on all states to adjust the prices of exports to their imports.⁵⁸ A second UNCTAD initiative authorized by the both the 1971 GATT waivers and the Enabling Clause⁵⁹ is the so called Global System of Trade Preferences (GSTP), which allows developing countries to maintain preferences in trade with each other on the global basis. The GSTP Agreement⁶⁰ has not, however, had much effect and increased trade among developing countries has failed to materialize.⁶¹

Although, the United Nations has proclaimed the existence of a human right to development.⁶² This right refers not only to economic growth, but also to human welfare, including health, education, employment, social security, and a wide range of other human needs.⁶³ There is common ground between this human right to development and WTO initiatives concerning developing countries. The human right to development is best understood as a ‘right to a particular process of development’ and ‘eliminating obstacles to development’.⁶⁴ In recent years a radical shift has overtaken the developing country almost without exception, developing countries now espouse outwardly oriented economic policies: they seek to promote exports, reduce trade barriers, and attract foreign

Aspects of Trade Preferences for Developing States: A Study in the Influence of Development Needs on the Evolution of International Law (BRIL 1982)

⁵⁷ Article 16

⁵⁸ Article 28

⁵⁹ Decision of 28 November 1979.

⁶⁰ The Global System of Trade Preferences among Developing Countries (GSTP) is a preferential trade agreement signed on 13 April 1988 with the aim of increasing trade between developing countries in the framework of the United Nations Conference on Trade and Development. Its entry into force was on 19 April 1989 and its notification to the WTO on 25 September 1989.

⁶¹ Michal Terebilcock, Robert Howse & Antonia Eliason (n 53) 379

⁶² UN Declaration on the Right to Development, Res 41/128 (1986). UN General Assembly Resolutions 2542 and 2586 (XXIV 1969) and 2626 (XXV 1970).

⁶³ Oscar Schachter, *International Law in Theory and Practice* (M. Nijhoff Publishers 1991) 348

⁶⁴ *Study on the Current State of Progress in the Implementation of the Right to Development*, U.N. Doc. E/CN. 4/1999/WG. 18/2, 27 July 1999 see Tahmina Karimova, *Human Rights and Development in International Law* (Routledge 2016) 111

investment.⁶⁵ Yet developing countries argue that economic sector of particular interest to developing countries, such as textile, clothing, and agricultural products; remain outside the WTOs drive towards economic liberalization. With respect to the service, they contended that sectors and modes of supply of potential benefit to the developing countries have been ignored.⁶⁶ Thus, enhanced market access is one of the key needs and demands of developing countries.⁶⁷ The Developing countries market access problems when addressing new issues, such as rule of origin, investment competition, the environment and labour.

The developing countries are in the majority, they sometimes lack the administrative and institutional capacities to participate fully in the WTO organization structure. As this is remedied, developing countries are sure to be ever stronger voice within the WTO. Any agreements in these areas must be drafted with developing countries and potential impact on their market access in mind. Developing countries in the WTO have special needs; (a) they often lack the technical and financial resources to participate fully in and implement fully WTO agreements. Thus, the WTO should make available financial and technical assistance so that developing countries can fully participate in WTO affairs, (b) special attention should be given to improving market access for developing countries in certain key economic areas, such as agriculture and textile, (c) although most of the WTO agreements contain 'special and differential' provisions for developing countries, further attention should be given in this matter, (d) there is need for greater coherence between trade policies and other policies aimed at promoting economic growth of developing countries. Thus, specific market access problems of developing countries should be identified and negotiated, (e) the particular concerns of developing countries should be

⁶⁵ Robett Z. Lawrence, *Emerging Agenda for Global Trade: High Stake for Developing Country* (Overseas Development Council 1996) 4

⁶⁶ *ibid*

⁶⁷ Constantine Michalopoulos, *Developing Countries in the WTO* (Macmillan Publishers Limited 2001) 208

respected in the field of intellectual property. Specially, provisions should be made to allow developing countries to respond to health emergencies, traditional knowledge should be given IP protection, and developing countries should share in the economic benefits of patents derived from natural resources, (f) the WTO should cooperate more closely with other intergovernmental organizations such as the IMF and the World Bank in the plans to aid developing countries.

CONCLUSION

As discussed broadly one of the main purposes of WTO rules is to promote trade liberalization. The Preferential Trade Arrangements (PTAs) are meant to include all types of non- reciprocal trade arrangements under WTO. The legal basis of PTAs derives from the Enabling Clause 1979 and which is part of the WTO multilateral agreement and any arrangement made under the Clause whether GSP, DFQF market access or any other non-reciprocal arrangement would be subject to stringent scrutiny of WTO law. A claim is the ideas that trade liberalization policies pushed by rich countries today are a form of ‘neo colonialism’. Some people take the view that rich countries promote this liberalization so that they can take control of the economic resources of the poor countries.⁶⁸ In a limited sense, the claim is probably true.⁶⁹ It is also important to note that any claims of harm to developing countries by trade liberalization may be a bit exaggerated.⁷⁰ The negotiation process allows countries to use an ‘*I will open my market if you open yours*’ approach, which arguably leads to the greatest overall reduction of trade barriers.

Therefore, member states are allowed to challenge the compatibility of PTAs with Enabling Clause like any other RTAs under Article XXIV of GATT. Thus, it is very clear that the developed donor states are not allowed to maintain PTAs at their own discretions, countries are under certain obligations both in granting and continuing the preferences.

⁶⁸ John H. Jackson (n 3) 847

⁶⁹ *ibid*

⁷⁰ *ibid*

From the above discussion, it is clear that the imposition of trade sanction to improve social concerns involving the environment, health and human rights are not positive response to the development, financial and trade needs of developing countries. The measure of trade sanction directly contradicts with the object and purpose of both the Enabling Clause and the GATT. Till now no victim country challenged the implementation of trade sanction in violation of conditionality put by developed countries. If the legality of the trade sanction is being challenged than it is less likely to be compatible with WTO law.