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How Could Prison Products Come into the International Market? Analysis of the Consistency between WTO and ILO Rules

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ABSTRACT

Nowadays, in many countries, a increasing number of private companies resort to prison labor. In fact, inmates work more and more for private undertakings both inside and outside prison. In consideration of private companies generally engaged in international trade, prison labor thus participate in global supply chains. Then under such circumstances, there is a developing trend that prison economy is being marketed internationally. Nevertheless, there are some institutional barriers in international trade policies, such as WTO rules, which in principle prohibit prison labor product coming into international market. This research aims to discuss the possibility of exports of prison products in international trade market within WTO/GATT framework. In terms of prisoners' labor rights protection, by exploring the consistency of WTO rule with ILO standard, the research intends to find the possibility of prison labor product being accepted by the international market. Feasibility analysis is developed in the research to propose constructive suggestion for an open question in the international law.

Keywords: Global market, ILO, Prison product, WTO/GATT.

JEL codes: J47, J53, K33, L23, M31.

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1. Introduction

In 2001 Global Report to the ILO Declaration on Fundamental Principles and Rights at Work, the ILO noted that: *“a number of countries are increasingly resorting to privatized prison labor under various arrangements ... even though the practices are far from new. They are increasing, with private prison*

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services now being marketed internationally.”³ As Sander Levin, a Democratic congressman from Michigan said in 2007: “We believe that putting worker rights into trade agreements is a critical piece of shaping globalization in the world today.”⁴ Thus, working rights and interests of prison workers who are engaged in the chain of the global trade are expected to be guaranteed within international standards as well, which has been widely recognized in international trade market. Based on this background, this article tries to explore the possible way to protect prison workers’ labor rights under ILO standard, so that prison products could be accepted by the international market by following WTO rules.

This article develops in the following structure: firstly, GATT Article XX(e) regarding prison products is analyzed deeply in terms of its application, legislative intent, and legislative background. Thereafter, the problems of its modern application would be presented, involving classification of traditional and non-traditional prison product, interpretation of relevant word, international human rights standard applied beyond the border, and significance of free flow of prison products in international market. Hence, the analysis of modern application of Article XX(e) is developed by making distinction between traditional and non-traditional prison product and at last, how to keep the consistency of WTO Article XX(e) with ILO labor standards is explored.

There are already existing descriptive studies and theoretical discussions of prison economy in global market. But the academic perspective of discussing consistency between ILO and WTO rules to explore the possibility of prison products entering global market is rare. ILO standards applying in global market chains are imperative to guarantee universal human rights protection for workers, especially for inmate workers involved in prison economy for being in a vulnerable employee position. Thus, correspondingly, reasonable work treatments for inmate workers make it possible to allow prison products coming into international market within WTO/GATT framework.

2. Methodology

Firstly, is the Analysis Method? It is necessary to investigate legal standards under WTO and ILO legal framework. So, instruments and policy documents in relation to prison products under these legal frameworks will be explored as the primary sources. Secondly, it will use Literature Method. This method applied in this research is to collect ample information and material to support further theoretical discussions. Then, related books, papers and articles, thesis and electronic materials, are gathered as the secondary sources.

3. GATT Article XX(e)

3.1 Application

Within GATT/WTO legal framework, the only one provision relating to prison labor product is regulated in GATT1994 General Exceptions, Article XX(e). As it reads in below:

“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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ... (e) relating to the products of prison labour; ...”

Article XX of the GATT, the General Exceptions Clause, permits member states to violate other GATT

³ ILO: Stopping forced labour: global report under the follow-up to the ILO Declaration on fundamental principles and rights at work. Report of the Director-General, International Labor Conference, 89th Session, 2001, para. 189. Available at: http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_PUBL_922119483_EN/lang-en/index.htm

⁴ See Steven R. Weisman. (April 21, 2007). “Labor Rights Issues Are Stalling Trade Pacts,” Retrieved From the New York Times website: http://www.nytimes.com/2007/04/21/business/21trade.html?_r=0

obligations in some cases where discrimination towards the products in the exceptions list is necessary and justified.⁵ Actually, as the general exception provision, Article XX provides a privilege, or an exemption clause, to contracting parties during the observation of WTO rules.

Wherein, Article XX(e) offers a right to member states to take restrictive trade measures against imports relating to the products of prison labor.⁶ Hence, Article XX(e) serves as a legal basis for WTO member states to be exempted from general WTO compulsory obligations (such as Most-favored Nation Treatment, National Treatment and so on), when dealing with imports of goods made with prison labor.

For details, if a member state seeks to apply a quantitative restriction to prohibit products of prison labor, it would invoke Article XI of the GATT, Quantitative Restrictions.⁷ The member state could justify the action by showing: (1) The ban does indeed restrict prison product which is prohibited in the Article XX(e); (2) The measure must not involve: (a) "arbitrary discrimination" between countries where the same or similar conditions exist; (b) "unjustifiable discrimination" with the same qualifier; or (c) a "disguised restriction" on international trade;⁸ (3) The measure should be both reasonable and moderate, as far as possible without departing from the fundamental spirit of WTO rules.

GATT Preface asks member states to obey the international law principle of "good faith."⁹ Although Article XX(e) specifically permits restrictions on products of prison labor, an overprotective ban will violate the spirit of the chapeau, which is considered as unjustifiable under Article XX.¹⁰ For instance, In the *U.S.–Shrimp*, the Appellate Body regarded the chapeaux striking a balance between the WTO Member's right to invoke an Article XX exception and the same Member's duty to respect the rights of other members, as evaluated on a case-by-case basis.¹¹

3.2 Legislative intent

Provisions forbidding the import and export of prison labor products are mainly out of economic and political considerations: first, to protect the importing country's domestic economy from the impact of unfair competition; and second, to protect the labor rights of prison workers in the exporting country. In details, not only market economy in the importing country is involved, but also political and ideological issues in the exporting country, including prisoners' human rights protection and labor treatment standards, are concerned simultaneously. Specifically, related analysis would be developed in the following:

3.2.1 Fair market competition

Article XX(e) is an economic provision which is designed to prevent the State from gaining an unfair

⁵ See Globerson, Micah. (2013). "Using Border Trade Adjustments to Address Labor Rights Concerns Under the WTO." *Labor & Employment Law Forum* 3, no. 1: pp. 48-87. pp. 68-72. Available at: <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1056&context=lelb>

⁶ See Robert Howse & Donald Regan. (2000). *The Product/Process Distinction—An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy*, 11 EUR. J. INT'L L. p. 143.

⁷ See GATT, art. XI.

⁸ Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996). pp.23-25. Available at: https://www.wto.org/english/tratop_e/dispu_e/2-9.pdf; See also Joshua Meltzer.(2012). *Climate Change and Trade –The EU Aviation Directive and the WTO*, 15 J. INT'L ECON. L. pp. 140-144.

⁹ Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998). pp. 61-62. Available at: https://www.wto.org/english/tratop_e/dispu_e/58abr.pdf.

¹⁰ See Globerson, Micah. (2013). "Using Border Trade Adjustments to Address Labor Rights Concerns Under the WTO." *Labor & Employment Law Forum* 3, no. 1: 48-87. pp. 67-72. Available at: <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1056&context=lelb>

¹¹ Appellate Body Report. (12 October 1998). *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R. pp. 60-61. Available at: https://www.wto.org/english/tratop_e/dispu_e/58abr.pdf (According to the Appellate Body, the first step is to evaluate whether the measure in question corresponds to a right listed in Article XX, then the second step is to evaluate whether the measure is applied fairly or abuses the right(s) invoked.)

advantage due to the cheap prison labor.”¹²The basis for the inclusion of Article XX(e) is supposed to be the “distorting effect prison labor has on markets when there is no, or little, money spent on wages in the production.”¹³ In details, on one hand, prison industry generally could get national policy support and tax benefits. On the other hand, wage paid to prison workers is relatively lower than the normal standard. Thereafter, the low cost of prison labor products would result in a price advantage, and then the unfair competition in the importing market. Thus, the primary concern of Article XX(e) is to avoid exporting countries dumping cheap labor products in the importing country, so as to protect their normal economic market order. Virtually, all Member states simply intend to protect themselves against the “unfair competition” resulting from the low cost labor employed in the production of prison labor products.¹⁴

3.2.2 Human rights protection

The inclusion of labor standards in trade agreements has been widely accepted in today’s international community. Then, in view of the apparent willingness of WTO panels to address the growing interface between trade and other issues within the existing GATT/WTO legal framework, Article XX(e) serves potentially as a legal basis for trade restrictions against imports made in violation of workers’ labor rights or other international human rights standards.¹⁵

The interpretation of Article XX(e) concludes labor rights “as covered by customary international law or general principles of law.”¹⁶ So, to achieve recognition of economic, social, and cultural rights, Article XX must “include all fundamental labor rights, as identified by the International Labor Organization.”¹⁷ Thereby, another legislation purpose of GATT Article XX(e) is to ensure prison workers are not imposed on forced and compulsory labor, or torture and other violence. Further, within the meaning of Article XX(e), prison workers are supposed to be treated as normal workers outside, in terms of wage standards and working conditions.

For example, where the WTO Member state is also a Contracting Party to the ICESCR, or the fundamental ILO Conventions¹⁸, it is contextually relevant for a WTO tribunal to examine the relationship between the restrictive measure and the WTO member’s obligations: (1) “respect the right to work by, inter alia, prohibiting forced or compulsory labor and refraining from denying or limiting equal access to decent work¹⁹ for all persons;²⁰ (2) protect the right to work including “the duties of State parties to adopt legislation or to take other measures ensuring equal access to work and training and to ensure that privatization measures do not undermine workers’ rights ... and the responsibility of States parties to prohibit forced or compulsory labor by non-State actors”;²¹ (3) fulfill the right to work “when individuals or groups are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal.”²²

¹² See Sarah Joesph. (2011). *Blame it on the WTO?: A Human Rights Critique*. Oxford University Press. p. 104.

¹³ See Laura Nielsen. (2007). *The WTO, Animals and PPMs*. Brill. p. 110.

¹⁴ See Arthur E. Appleton and Michael G. Plummer (eds). (2007). *The World Trade Organization: Legal, Economic and Political Analysis*. International Trade Law Center, Springer Science & Business Media. pp. 586-587.

¹⁵ See Arthur E. Appleton and Michael G. Plummer (eds). (2007). *The World Trade Organization: Legal, Economic and Political Analysis*. International Trade Law Center, Springer Science & Business Media. pp. 586-587.

¹⁶ See Arne Daniel Albert Vandaele. (Cameron May, 2005). *International Labour Rights and the Social Clause: Friends Or Foes*. p. 733; See also Sarah H. Cleveland. Human Rights Sanctions and International Trade, pp. 199-262, p. 233, in Francesco Fanconi (ed.). (2001). *Environment, Human Rights, And International Trade*, Hart Publishing.

¹⁷ See Koen De Feyter. (2001). *World Development Law: Sharing Responsibility for Development*. Intersentia. p. 280.

¹⁸ Including: ILO Convention No. 87; ILO Convention No. 98; ILO Convention No. 29; ILO Convention No. 105; ILO Convention No. 138; ILO Convention No. 182; ILO Convention No. 100; ILO Convention No. 111.

¹⁹ For example, “work that respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration ... [and] also provides an income allowing workers to support themselves and their families” (CESCR General Comment No. 18).

²⁰ CESCR General Comment No. 18, *The Right to Work (Art. 6 of the Covenant)*, E/C.12/GC/18, February 6, 2006, paras 7 and 23.

²¹ CESCR General Comment No. 18, para. 25.

²² CESCR General Comment No. 18, para. 26.

3.3 Legislative background

GATT Article XX(e) reflects the drafters' concerns with workers' rights by listing exception from GATT commitments and obligations. Considering the GATT was drafted in 1947 when forced labor was the only form of prohibited international human rights, it is understandable that the inclusion of Article XX(e) was out of the original drafters' awareness that it is necessary to set an exception to prohibit violation norms of human rights of the time, when it comes to assess the observation with the GATT.²³ Therefore, such interpretation supports the view that the GATT should be compatible with prevailing human rights norms.²⁴

4. Problems of modern application

4.1 Classification of traditional and non-traditional prison product

4.1.1 Outdated form of prison industry

Most countries worldwide still preserve such traditional form of prison industry. In the traditional prison industry, prison authority is in charge of the whole process of industry management. Prison workers' engagement in industrial production serves for their rehabilitation effects. Such conventional prison production is essentially a special producing activity, and prison products made from traditional type of prison industry fall within the scope of "the products of prison labour" regulated in Article XX(e). In details, such kind of pure prison product is organized by Prison Administration itself. And outlay of prison production is supported by state finance. Meanwhile, in the traditional prison industry system, prison product is granted preferential policy and tax benefits by the state, which further reduces the cost of prison product. Therein, such prison products are deemed as pure prison product, which should be forbidden by Article XX(e).

To identify pure prison products, conditions in the following should be met: (1) The production process is wholly organized and managed by the Prison Authority. Since the major aim of prison work serves for prisoners' rehabilitation effects, prison administration discharges its duty by organizing prison industry for prisoners. Thus, in traditional prison industry system, Prison Authority is in charge of the whole process of prison production; (2) Production capital is completely or partially supported by state finance. In some cases, tax breaks or preferential policy would be provided to prison industry and products by the state, for the final purpose of mitigating the fiscal burden of the government; (3) Wage paid to prison workers is usually much lower than normal standard. Then, low-cost prison labor grants price advantage to prison products in the market competition.

Therefore, resulting from the above factors, the cost of prison product is lower than that of similar products in the free market, which constitutes unjustifiable competitive edge. Therefore, traditional prison products totally fall within the range of Article XX(e), which should be boycotted in the international trade market.

4.1.2 Modern form of prison industry

In fact, with the socialization of penalty execution, which influences prison labor as well, there is an increasing trend in the marketization of the prison economy. Then, one ascertains an increasing phenomenon that inmates work more and more for private undertakings both inside and outside

²³ See Sarah Cleveland. (2002). *Human Rights Sanctions and International Trade: A Theory of Compatibility*, 5 J. INT'LECON. L.: 133-189. p. 161.

²⁴ See Chartres, Renee L. and Mercurio, Bryan Christopher. (May 23, 2012). A Call for an Agreement on Trade-Related Aspects of Labor: Why and How the WTO Should Play a Role in Upholding Core Labor Standards. *North Carolina Journal of International Law and Commercial Regulation*, Vol. 37, pp. 665-724. pp. 696-697. Available at SSRN: <http://ssrn.com/abstract=2065621>.

prison.²⁵ The increased use of privatized prison labor is explained with such reasons as the reduction of incarceration costs resulting from increasing numbers of prisoners, the promotion of the inmates' professional skills or the provision of income to prisoners helping them to support their family members or to indemnify their victims.²⁶

The reality of privatized prison labor is that inmates are engaged in productive work resulting in profits for private entities involved in agriculture and stock-breeding, textile manufacture, high-tech sectors and qualified services such as airline booking operators.²⁷ Actually, many transnational corporations whose products or services we make use of in daily life, have learned that prison labor can be as profitable as cheap labor in developing countries.²⁸ For example, in the U.S., at least 37 states have legalized the contracting of prison labor to private corporations and allow them to bring their production line into prisons. The list of companies using prison labor nearly covers the full scope of U.S. corporate society: IBM, Boeing, Motorola, Microsoft, AT&T, Wireless, Texas Instrument, Dell, Compaq, Honeywell, Hewlett-Packard, Nortel, Lucent Technologies, 3Com, Intel, Northern Telecom, TWA, Nordstrom's, Revlon, Macy's, Pierre Cardin, Target Stores, and many more.²⁹

In such form of prison industry, prison product is produced by prison enterprises cooperating with private market entity. Cooperation form might involve joint ventures, sole investment or leasing. In essence, through injecting private capital and private management mode in prison production, the nature of traditional prison industry has been changed to some extent, which facilitates market liquidity of prison product. In this condition, such prison labor product could be considered as non-traditional prison product.

Where judging non-traditional prison product, conditions concerned conclude: (1) The state shall not participate in the organization and management of the prison industry. Prison enterprises hold an independent position in the market and must shoulder corresponding independent liability. The state shall not provide production material, financial support, preferential policy, tax benefits, or government subsidies, to prison industry and product; (2) Prison production is undertaken in the cooperation with outside private entities in forms of joint venture, leasing and other approaches. Prison would supply labor force while outside enterprises provide production material, technical support, and approach of marketing sales and so on. Meanwhile, private enterprises shall provide a quality working environment and good welfare to prison workers; (3) Traditional elements of prison industry shall not play a decisive role in prison production. So to speak, labor cost of prison product would not be lower than competent product in the free market, which implies payment to prison workers should achieve the general standard. Hence, without the price advantage, prison product would not bring in unfair competition in the free market.

4.2 Interpretation of “relating to”

Article XX(e) provides an exception “relating to the products of prison labour.”The “relating to” clause

²⁵ ILO: Report III (Part 1B). General Survey concerning the Forced Labour Convention, 1930 (No. 29) and the Abolition of Forced Labour Convention, 1957 (No. 105), International Labour Conference, 96th Session, 2007, para. 61. Available at: http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_089199.pdf

²⁶ ILO: Report of the Committee of Experts, General Report, International Labour Conference, 89th Session, 2001, para. 144. Available at: <http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/meetingdocument/kd00014.pdf>

²⁷ ILO: Report III (Part 1B). General Survey concerning the Forced Labour Convention, 1930 (No. 29) and the Abolition of Forced Labour Convention, 1957 (No. 105), International Labour Conference, 96th Session, 2007, para. 101. Available at: http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_089199.pdf

²⁸ See Courtesy of Daily Bruin. (2001). Prison labor cheats society. *A Publication of the Newspeak Association*, No. 66, Issue 8. Available at: <http://www.wpi.edu/News/TechNews/010327/prisonlabor.shtml>

²⁹ See Vicky Pelaez. (August 28, 2016). *The Prison Industry in the United States: Big Business or a New Form of Slavery?* Retrieved From the Global Research website: <http://www.globalresearch.ca/the-prison-industry-in-the-united-states-big-business-or-a-new-form-of-slavery/8289>

is generally interpreted broadly by the WTO Appellate Body.³⁰ However, the provision of Article XX(e) for measures “relating to products of prison labor” has not yet been clearly interpreted in any WTO decision adopted by the DSB.³¹ While it is relatively easy to identify the objective fact that a product is made with prison labor, the interpretation of measures “relating to” the products of prison labor seems to be more ambiguous.³²

In today’s international trade market, all products from prison enterprises, whether direct relation or indirect relation to prison production, would be regarded as prison products that fall within the scope of Article XX(e), and then be taken restrictive measures. In fact, considering the context of modern prison industry system, it is unreasonable for the non-traditional prison product to be classified into the scope prohibited in Article XX(e), as such kind of prison product essentially involves in the interests of private companies. While considering taking challenged measures, legitimate interests of private entities should be concerned as well. Thereof, relatedness of products from prison enterprises to the provision would be identified primarily.

4.3 International human rights standard applied beyond the border

Article XX(e) allows the member states to take trade measures relating to the products of prison labour, which is probably the only exception under Article XX where members could take trade measures to cope with problems outside their territory. This implies that WTO member states are in a position to adopt trade measures to address human rights concerns within general and labour standards in other countries.³³ Such an outcome is fairly troublesome in the contemporary global environment, with concern for the protection of international human rights beyond borders are already widespread and systematic. Additionally, an existing international commitment to improve, protect, and fulfill fundamental human rights and labor standards already comes into being.³⁴

At the Singapore Ministerial Conference, given the good faith obligation to comply with international commitments and the WTO’s recognition of Core Labor Standards, the Counselor at the Legal Affairs Division of the WTO, Gabrielle Marceau summarized: “[A]ll WTO members must comply with their human rights obligations and with their WTO obligations at the same time without letting a conflict arise between the two sets of legislations. Hence, it is only reasonable to expect that the WTO adjudicating bodies would interpret WTO provisions taking account all relevant obligations of WTO disputing states.”³⁵ Indeed, if the WTO refuses to take into account legitimate non-trade rules when assessing the validity of a restrictive trade measure, it would in fact play a role in constraining the enforcement of a key global norm.³⁶ Nevertheless, “it is suggested that a good faith interpretation of the relevant WTO and human rights provisions should lead to a reading of WTO law coherent with human rights law.”³⁷

³⁰ See Joost Pauwelyn. (Apr. 2007). Working Paper, *U.S. Federal Climate Policy and Competitiveness Concerns: The Limits and Options of International Trade Law*, NICHOLAS INST. FOR ENV’T POL. SOL. 27. at fn. 93.

³¹ See Friedl Weiss, *Trade and labor I*. Appleton and Plummer Vol. II: pp. 571-596. p. 586. (“... the Panel observed that the example of Article XX(e) GATT relating to products of prison labor showed that the GATT did not proscribe in an absolute manner measures that related to things or actions outside the territorial jurisdiction of the party taking the measure.”)

³² See Diane Desierto. (2015). *Public Policy in International Economic Law: The ICESCR in Trade, Finance, and Investment*. OUP Oxford. pp. 198-199.

³³ See Tilahun Weldie Hindeya. (2013). Unilateral Trade Sanctions as a Means to Combat Human Rights Abuses: Legal and Factual Appraisal. *Mizan Law Review*, Vol. 7, No. 1. pp. 108-109. Available at: <http://www.ajol.info/index.php/mlr/article/view/100558>.

³⁴ See Jan Nederveen Pieterse. (Jan., 1997). Sociology of Humanitarian Intervention: Bosnia, Rwanda and Somalia Compared, *18 INT’L POL. SCI. REV.* 71-93. pp. 79-83.

³⁵ See Gabrielle Marceau. (2002). WTO Dispute Settlement and Human Rights. *13 EUR. J. INT’L L.* p. 234; see also Gabrielle Marceau, Trade and Labor, pp. 541-542, in Daniel Bethlehem, Donald McRae, Rodney Neufeld, & Isabelle Van Damme (eds.), (2009). *The Oxford Handbook of International Trade Law*.

³⁶ See Gabrielle Marceau. (2002). WTO Dispute Settlement and Human Rights. *13 EUR. J. INT’L L.* p. 202.

³⁷ See Gabrielle Marceau. (2002). WTO Dispute Settlement and Human Rights. *13 EUR. J. INT’L L.* pp. 753-754.

5. Significance of free flow of prison products in international market

Prison economy contributes to the national economy and social stability. Firstly, as prisoners need to prepare themselves for the post-release life, they should majorly focus on after-incarceration employment prospects. Prison industry is set for rehabilitation primarily by contributing to the prisoners' vocational skills, responsible habits and money saving.³⁸ Actually, prison enterprises provide a platform for prisoners to exercise their labor rights and fulfill their own labor value; Secondly, following the booming tendency of prison industry in national economies, viewing from an economic perspective, the existing prison industry system is far from efficient. It relies too heavily on imprisonment. And prisoners commonly lack motivation to work. Then promoting economic productivity is a challenge for prison industry reform today.³⁹

However, as prison product is forbidden in the international trade market, it poses pressure to the development of prison industry in countries worldwide. Thus, to protect and further develop national prison industry in the global market, countries try to avoid prohibitive regulations especially GATT Article XX(e) by cooperating with private entities. Then, analysis in a unified application of standard enshrined in GATT Article XX(e) corresponding to the demands of the times is necessary and urgent.

Within the whole WTO legal framework, there is only one provision dealing with products of prison labor. And, the provision itself is non-specific and overwhelmingly general. Detailed and united interpretations regarding definition of prison product, exact application conditions, and procedural requirements are lacked. As a result, in reality, so many conflicts and disputes occurred when applying Article XX(e). Thus, as a sensitive issue, if there is not an unified and appropriate set of processing rule, measures adopted in light of Article XX(e) would be likely to be abused by some countries to take unjustified political and economic interventions in other countries.

6. Analysis of modern application of Article XX(e)

6.1 Distinction between traditional and non-traditional prison product

In the context of internationalization of prison production, given the legislative intent mentioned above, the provision "relating to the products of prison labor" should be interpreted from the economic and political perspective, while taking ratio of prison labor engagement, product cost and production mode into account. Distinction of definition standard for "prison-produced product" and "product of prison labor" is essential. Purpose of the restrictive measures should comply with the purposes of Article XX(e), including economic and political aim. Detailed consideration embody: (1) Prison workers engaging in the production is treated fairly, in terms of reasonable payment and safe working conditions; (2) Neither preferential policy or tax benefits are entitled to the products; (3) Importing countries should not virtually intend to protect national market but on the excuse of protecting human rights of prison workers in exporting countries. In this case, the citation of Article XX(e) is unjustified for lack of consistency in purpose.

6.2 Consistency of WTO Article XX(e) with ILO labor standards

The discussion above indicates that the General Exception provision could be applied to justify a trade ban based on non-trade concerns, such as labor rights in the workplace.⁴⁰ The Singapore Ministerial Declaration refers to "Core Labour Standards," involving working conditions.⁴¹ Under the Singapore

³⁸ See Susan Turner and Joan Petersilia. (1996). *Work Release: Recidivism and Corrections Costs in Washington State*. U.S. National Institute of Justice. Available at: http://www.indiana.gov/idoc/files/Work_Release1.pdf.

³⁹ See S. P. GARVEY. (1998). Freeing prisoners' labor. *Stanford Law Review*, Vol.50, No. 2, pp. 339-398. pp. 396-397.

⁴⁰ See Daniel C. K. Chow. (2014). Why China Opposes Human Rights in the World Trade Organization. *35 J. Int'l L.* issue 1, pp. 61-111. pp. 92-93. Available at: <http://scholarship.law.upenn.edu/jil/vol35/iss1/2>.

⁴¹ See Ministerial Conference, *Singapore Ministerial Declaration of 13 December 1996*, WT/MIN(96)/DEC (18 December 1996). para. 4. Available at: https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm.

Ministerial Declaration, the appropriate forum in which to assert these concerns is the ILO, not the WTO.⁴² As a matter of fact, looking through the ILO definition of forced and compulsory labor, it is worth noting that the ILO does not regard all forms of prison labor as labor rights abuses. Thus, whether the WTO would apply Article XX(e) where a private company meets all of the ILO indicators that make prison labor relationship resembling that of a free labor relationship. Further, will the WTO perceive Article XX(e) to justify a trade ban on any product of prison labor? Considering the intent of the rule, could be the modern prison industry be universally accepted by the international trade community and then be exempted from the scope of the Article XX exception? Lastly, is it possible that the WTO will find the Article XX(e) constitute arbitrary and unjustifiable discrimination if it bans all forms of prison labor, especially where the Member state itself allows certain forms of prison labor product by following certain widely-agreed labor standards (inter alias, the ILO standard).⁴³

The ILO Committee of Experts insisted that the approximation of a free labor relationship “was the most reliable indicator”⁴⁴ and has listed certain conditions resembling to free labor as direct indicators to assess the level of voluntariness from inmate workers. These criteria to measure free consent majorly lie on two perspectives: first, whether working conditions in prison resemble to free labor outside prison and, second, how much remuneration and other advantages are granted to inmate workers.⁴⁵ Therefore the specific conditions required for private employment of prisoners under Convention 29, must be analyzed.⁴⁶

6.2.1 Free consent

Inmate workers have the right to express their consents out of initiative request. That is to say, only when inmates voluntarily show their will to work for private companies, it is possible to establish an employment relationship between inmate workers and private enterprises. Due to the captive circumstances, the question arises how prisoners could voluntarily express their consent to work for the private economy, without being threatened with any penalty or loss of a right or privilege.⁴⁷ Correspondingly, how can the prisoner’s free consent be identified by referring to objective standards? Then, the formal norm of prisoners’ willingness is needed.⁴⁸

“[E]ach worker receives and signs a standardized consent form from the enterprise indicating that they agree to work. The form indicates the wages and conditions of work formal, preferably written, Consent should be attained by each individual prisoner before engaging him or her to work.”⁴⁹

However, formal consent does not necessarily avoid the menace of a penalty or the loss of a right or

⁴² Ibid. (saying “The International Labour Organization is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them”).

⁴³ See Globerson Micah. (2013). *Using Border Trade Adjustments to Address Labor Rights Concerns Under the WTO.* Labor & Employment Law Forum 3, no. 1: 48-87. pp. 67-72. Available at: <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1056&context=lelb>.

⁴⁴ ILO: Report III (Part 1B). General Survey concerning the Forced Labour Convention, 1930 (No. 29) and the Abolition of Forced Labour Convention, 1957 (No. 105), International Labour Conference, 96th Session, 2007, para. 119. Available at: http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_089199.pdf

⁴⁵ ILO: Report of the Committee of Experts, Report III (Part 1A), International Labour Conference, 91st Session, 2003, pp. 103-104. Available at: <http://www.ilo.org/public/english/standards/relm/ilc/ilc91/pdf/rep-iii-1a.pdf>

⁴⁶ See Milman-Sivan, Faina. (March 1, 2013). Prisoners for Hire: Towards a Normative Justification of the ILO's Prohibition of Private Forced Prisoner Labor. *Fordham International Law Journal*, Vol. 36, No. 6. pp.1620-1621. Available at SSRN: <http://ssrn.com/abstract=2408864>

⁴⁷ ILO: Report of the Committee of Experts, Report III (Part 1A), ILC, 89th Session, 2001, General Report, para. 128. Available at: <http://www.ilo.org/public/english/standards/relm/ilc/ilc89/rep-iii-1a.htm>

⁴⁸ ILO: Report of the Committee of Experts on the Application of Conventions and Recommendations, General Survey of 1979 on the abolition of forced labour, International Labour Conference, 65th Session, 1979, para. 97. Available at: [http://www.ilo.org/public/libdoc/ilo/P/09661/09661\(1979-65-4B\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09661/09661(1979-65-4B).pdf)

⁴⁹ ILO: Q&As on Business and Forced Labour, Answer for “question: when is it ok to use prison labour?”, Retrieved From the ILO website: http://www.ilo.org/empent/areas/business-helpdesk/faqs/WCMS_DOC_ENT_HLP_FL_FAQ_EN/lang-en/index.htm

privilege imposed on prisoners.⁵⁰ Prisoners must still have the freedom to reject employment positions, without the menace of any penalty, any loss of privileges or any unfavorable assessments on commutation of sentence.⁵¹ In addition, working inmates also should be entitled on the freedom to withdraw their consent at any time.

6.2.2 Full employment relationship

In the case of privatization of prison labor, the relationship between the prison authority, private enterprises and working inmates is triangular. As a general rule, there is a direct contractual relationship between the prison authority and the private undertakings. However, the relationship between private companies and working inmates is not clear, since no employment contract exists between them.⁵² The ILO Committee of Experts recognized a free employment relationship is compatible with Article 2(2)(c) of the Convention. With respect to the contract form, given the massive number of inmate workers, a collective agreement would be more feasible.⁵³

Moreover, general employment law should apply to inmate workers working for private entities. According to the *Direct Request (CEACR) concerning Hungary*, the ILO Committee of Experts noted that prisoners' labor related rights in Hungary is regulated by the general provisions under the Labor Law with certain deviations though. The Committee approved such legal arrangements for prison labor.⁵⁴ The Committee again emphasized in the *2001 ILO General Report and General Observation*, that it is only when work or service is performed in conditions resembling to a free employment relationship that prison work for private companies can conform to Convention 29.⁵⁵ In turn such practice requires that the inmates concerned are awarded with the substantial employment-related benefits contained in a free labor relationship, including wages and social security, etc.⁵⁶

6.2.3 Quality working conditions

In line with the Convention, inmates working for private entities must be treated similarly to free workers.⁵⁷ Indeed, working conditions resembling to the social industry are requisite. This could assure that inmate workers are working in a "real work situation" as in the free labor market, and could facilitate them to learn or maintain up-to-date professional skills. Since a fully identical situation is impossible due to the nature of incarceration in itself. The question arises to what extent prison working conditions could be similar to general working conditions outside prison. According to the ILO Committee of Experts, the following criteria can be used to assess the level of voluntariness on the part

⁵⁰ ILO: Report of the Committee of Experts, General Report, International Labour Conference, 89th Session, 2001, paras. 129-130. Available at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_publ_9221119483_en.pdf

⁵¹ ILO: Q&As on Business and Forced Labour, Answer for "question: when is it ok to use prison labour?", Retrieved From the ILO website: http://www.ilo.org/empent/areas/business-helpdesk/faqs/WCMS_DOC_ENT_HLP_FL_FAQ_EN/lang-en/index.htm

⁵² ILO: Report of the Committee of Experts, General Report, International Labour Conference, 89th Session, 2001, para. 130. Available at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_publ_9221119483_en.pdf

⁵³ Para. 4(e), ILO Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203), 103rd ILC session, 11 June 2014. Available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:3174688:NO

⁵⁴ Direct Request (CEACR) - adopted 2005, published 95th ILC session (2006) Forced Labour Convention, 1930 (No. 29) - Hungary (Ratification: 1956). Available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:P13100_COMMENT_ID:2261033

⁵⁵ International Labour Conference. 89th Session, 2001. General Report of the Committee of Experts on the Application of Conventions and Recommendations. Geneva: International Labour Office, 2001. paras. 128-143; International Labour Conference. 89th Session, 2001. General Observation under the Convention, points 5 to 11.

⁵⁶ Direct Request (CEACR) - adopted 2005, published 95th ILC session (2006) Forced Labour Convention, 1930 (No. 29) - Hungary (Ratification: 1956). Available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:P13100_COMMENT_ID:2261033

⁵⁷ Observation (CEACR) - adopted 2003, published 92nd ILC session (2004) Forced Labour Convention, 1930 (No. 29) - Germany (Ratification: 1956). para. 2. Available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2230568

of working inmates: remuneration levels, social security coverage and industrial safety.⁵⁸

6.2.4 Reasonable wage level

As for free workers, labor remuneration is the inmate workers' first concern. Convention 29 however does not mention the issue of remunerating prison labor, for neither state institutions nor private enterprises. Nevertheless, the ILO Committee of Experts approved that inmate workers under a free employment relationship could receive normal wages, while some deductions for covering incarceration costs are made in a reasonable ratio. With regards to the wage standard, the Committee advised that the same standard as under a free employment relationship should be respected.⁵⁹ So, prisoners should earn normal wages, which might be deducted for incarceration cost and victim compensation at a proportionate rate.

"[T]he conditions of work the enterprise offers are similar to work outside the prison, namely: Wages are comparable to those of free workers with similar skills and experience in the relevant industry or occupation, taking into account factors such as productivity levels and any costs the enterprise incurs for prison security supervision of the workers; Wages are paid directly to workers. Workers receive clear and detailed wage slips showing hours worked, wages earned and any deductions authorized by law for food and lodging."⁶⁰

Then, one has to ask what the reasonable ratio of such deductions for incarceration cost could be. Article 10 Paragraph 2 of the ILO Convention 95 concerning the Protection of Wages⁶¹ provides: "wages shall be protected against attachment or assignment to the extent deemed necessary for the maintenance of the worker and his family." The provision for general workers suggests that even after a deduction, the wage level should allow the worker to have a normal living. Hence, based on this requirement, wage rate should be evaluated fairly, with only necessary deductions being allowed.⁶² For example, according to the *Direct Request (CEACR) concerning Hungary*, minimum remuneration for inmate workers in Hungary is only one-third of the general minimum wage and no pension rights are entitled to them under the existing national legislation, which is denied and inquired by the ILO Committee of Experts.⁶³ In another case, the Committee noted that the wages paid by private enterprises to the prisons at the level fixed by collective agreements were passed on to the prisoners only up to their statutory remuneration. The Committee concluded that the hiring of prison labor to private employers under these circumstances is prohibited by Article 2(2)(c) of Convention 29. Even though the Convention 29 does not deal with the level of prison remuneration in state prison workshops, it doesn't, however, in the opinion of the Committee, forbid that a normal wage system is applied by private enterprises.⁶⁴

6.2.5 Inclusion of social security system

⁵⁸ ILO: Report of the Committee of Experts, General Report, International Labour Conference, 89th Session, 2001, paras 128-143. Available at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_publ_9221119483_en.pdf

⁵⁹ Observation (CEACR) - adopted 2003, published 92nd ILC session (2004) Forced Labour Convention, 1930 (No. 29) - Germany (Ratification: 1956). paras. 10-11. Available at:

http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2230568

⁶⁰ ILO: Q&As on Business and Forced Labour, answer for "what is forced labour?". Retrieved From the ILO website: http://www.ilo.org/empent/areas/business-helpdesk/faqs/WCMS_DOC_ENT_HLP_FL_FAQ_EN/lang--en/index.htm

⁶¹ This convention was adopted on 1 July 1949 and came into force on 24 September 1952.

⁶² See Lee Swepston. (2001). *Prison Labour and International Human Rights*, 53 INDUS. REL. RES. ASS' N. PROC. 359 (2001). Available at: <http://www.leeswepston.net/prison.htm>

⁶³ Direct Request (CEACR) - adopted 2005, published 95th ILC session (2006) Forced Labour Convention, 1930 (No. 29) - Hungary (Ratification: 1956). Available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:2261033

⁶⁴ Observation (CEACR) - adopted 2003, published 92nd ILC session (2004) Forced Labour Convention, 1930 (No. 29) - Germany (Ratification: 1956). paras. 9-10. Available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2230568

Inmate workers engaged in a private employment should also be concluded in a social security scheme for accident and health coverage.⁶⁵ According to the ILO Committee of Experts measures both in legislation and practice should be taken to guarantee a free employment relationship for inmate workers performing any work or service for private entities. And, normal employment necessarily concludes relevant and substantive employment advantages including social security benefits.⁶⁶ In my view, as some social risks happen to inmate workers in the same chance as to free workers, some basic social security systems ought to cover them and accord them old-age pensions, industrial accident benefits and disability benefits.

7. Conclusion

WTO/GATT Article XX(e) forbids imports of products relating to prison labor. Considering the article was drafted in 1947, the historical background of that period has changed. Norms of human right protection are enhanced, and modern form of prison industry appears. So, the original intent of Article XX(e) is necessary to keep pace with the need of the contemporary development. Analysis of innovative application of Article XX(e) is developed in the research. By incorporating non-trade rules in trade rules, international labor standards, especially ILO standards, would be applied in the supply chain of world trade. Consistency between ILO and WTO rules is imperative to guarantee international human rights standards shed light universally. Specifically, within the WTO/GATT framework, when dealing with imports of product relating to prison labor, the efforts to respect human and labor rights of prison workers and improve the working conditions should be made.

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⁶⁵ ILO: Q&As on Business and Forced Labour, Answer for “question: when is it ok to use prison labour?”. Retrieved From the ILO website: http://www.ilo.org/empent/areas/business-helpdesk/faqs/WCMS_DOC_ENT_HLP_FL_FAQ_EN/lang-en/index.htm

⁶⁶ Direct Request (CEACR) - adopted 2005, published 95th ILC session (2006) Forced Labour Convention, 1930 (No. 29) - Hungary (Ratification: 1956). Available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:2261033

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