Socio-economic rights in applicable international trade law

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When one starts to look at the protection of socio-economic rights, there is one specific and sensitive question arising. This question is both classical and up-to-date: it relates to commercial relations between states.

From a *practical point of view*, links between trade and social or labour norms have been enlightened a long time ago. This was one of the very reasons for the creation of the International Labour Organisation (ILO) in 1919[1]. Since, this question has become part of the debate in many international negotiations, either on a regional level (European Union, European Cooperation and Development Organisation, North American free trade agreement (NAFTA) or on a universal level (ILO or World Trade Organization (WTO) for instance). Interactions between trade and legal social rules have a twofold economical and ethical dimension. From an ethical point of view, some advocate that freedom of exchange or of movement (of goods, services etc) encourages or excuses social injustice: indeed, it imposes on a state to trade with any other state, including those applying very low standards of social protection, or those applying none. From an economic point of view, links are even more complex and controversial.[2] Amongst the recurring themes, some say that differences between systems of social protection generate competition inequalities. On the one hand, states applying weak or low social standard regulations benefit from a comparative advantage regarded as unfair by other states. These latter view these weak or low standards as being a form of dumping that should be sanctioned (social dumping). On the other hand, states sticking to a high standard of social protection are suspected by others of applying a form of disguised protectionism: by linking trade to high social standards, these states aim at a protectionist objective without saying so. Links between trade and social norms send protagonists back to a debate based on the dynamics between social dumping and protectionism.

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1 See eg Robert 1991 at 148.

2 OECD 2000 at 1.

This question, as one can easily understand, enlightens an important tension, a fundamental breakpoint: the opposition between Northern countries and Southern countries. The sharing line between states having "high standard" and those having "low standard" social legislation is roughly the same as the one dividing Northern and Southern countries. The issues deriving from such a debate on a worldwide basis are then highly politicised and it becomes difficult for states to agree on common legal rules and standards. These concrete economical and ethical interactions between trade and the global environment cannot be easily transformed into a legal rule or standard.

From a *legal point of view*, one can wonder if international trade rules applicable between states take into consideration the protection of socio-economic rights. In other words, does WTO law integrate such a dimension? WTO law constitutes a tough and complex set of international agreements called the *Marrakech Agreement*. There are more than 60 binding texts altogether. The *Marrakech Agreement* includes the agreement instituting the WTO, to which four annexes related to various sectors of international trade are attached: agreement on trade on goods (this is the revised version of the GATT 1947 that still constitutes the core of applicable rules to trade on goods), agreement on trade on services, agreement on dumping and agreement on state aid.

According to the preamble of the WTO Charter, the aim of the organisation is mainly economical ("increase of incomes and demand, increase of production and trade"); but is also social ("increase of life standing, full employment"), and these two objectives should be reached by respecting the objective of "sustainable development". This being said, the preamble, as everybody knows, has no legal binding effect and the terms of the agreements give no competence to WTO organs in the social field. There is no specific legal basis for such a competence in the agreements.

The general logic of WTO law is articulated around one principle and several exceptions. This principle is the one of free trade: objectives defined in the preamble will be achieved through the development and implementation of free trade. Precise legal rules define state obligations in this regard. WTO law nevertheless include several other flexible solutions derogating to the principle: most of these agreements, especially the central agreement on trade on goods (GATT), include some possible derogations when public interests issues are at stake. Then, for instance, WTO members will be entitled to commercial restrictions on behalf of health protection, environmental protection or public policy.[3]

However, one can be struck by the lack of explicit consideration for the protection of socio-economic rights by the texts, whatever is at stake – the principle or the exceptions. The protection of socio-economic rights is moreover not taken into consideration to define trade obligations of member states. Having said so, a number of provisions raise some questions, create grounds for debates, and even sometimes a case law. The

3 See eg art XX, GATT 1994.

analysis of these various aspects leads to a preliminary observation, ie how difficult it is to promote socio-economic rights in the framework of WTO.

This observation will not, however, end the debate. Beyond WTO legal rules and their current implementation, another type of debate arises.

WTO law is not an isolated body of rules. It applies in parallel and simultaneously to other kind of obligations that states must comply with in the international sphere. Socio-economic rights are organised, promoted and protected in other international arenas (United Nations, and mainly ILO); consequently, the issue of articulation between the two bodies of rules – WTO/other international binding rules – should be raised and analysed.

Should not WTO law be applied and interpreted taking into consideration these other rules, and especially those made in the framework of the ILO? This would allow for the incorporation of a social dimension in international trade law.

This paper will be presented through three main points: What is to be found in WTO agreements or, more exactly, what cannot be found and what are the questions deriving from this absence? How are these agreements currently applied? Does this evidence the difficulty to promote socio-economic rights in the framework of WTO? Finally, are there possibilities to defend another interpretation and, if so, what are they?

1 WHAT CANNOT BE FOUND IN WTO AGREEMENTS AND WHAT ARE THE QUESTIONS DERIVING FROM THIS ABSENCE?

There are at least three aspects.

1.1 WTO Agreements do not take Processes and Methods of Production (PMP) into consideration

The promotion of trade is based on a key principle: the principle of non-discrimination between similar products. This principle will have a two-fold consequence. Firstly, this principle implies that all advantages granted by one state to an imported product from another state should be extended to all other *similar products* imported from other states. This is the famous *most favoured nation* clause (article I.1 GATT). Secondly, imported products shall not be treated in a discriminatory manner compared to *similar national products*; this should be respected regarding taxes, excises and custom legal rules (article III.2) but also in applying the rules relating to the sale of these products (article III.4).

The implementation of such rules begs one strategic question: which products would be considered as "*similar*"? Could two products, that would present equal physical characters, be considered as similar if their processes of production are different? More specifically, can one consider that two products are similar if their processes of production do or do not, depending on the case, respect fundamental socio-economic norms? If one answers positively, it would mean that the trade of these two products

is made according to the law and cannot consequently be forbidden or restricted by one state. On the contrary, if the answer to such a question is negative, discriminatory treatment becomes possible and legal restrictions therefore become acceptable.

The question of similarity between products is consequently a key issue and illustrates the fact that state obligations related to trade are linked to the interpretation of such provisions.

However, none of the WTO agreements gives a definition of "similar".[4] The question remains unanswered.

1.2 WTO Agreements include no "social clause"

General exceptions to trade of goods are provided by article XX of the GATT 1994. This article lists ten cases where it is possible to derogate to free trade. None of them deals with the "social clause". Nothing schedules that a WTO member could impose free trade restrictions to promote socio-economic rights. Article XX(a) obviously provides for derogation on behalf of public morality or policy; article XX(e) also allows a state to oppose imports of goods "made in jail", but these are not strictly speaking "social clauses".

If one accepts a wide definition of socio-economic rights, as including components like "health" and "environment", it must be helpful to mention article XXb) and XXg), authorising trade restrictions necessary to protect both. However, the important question to be raised here is whether these clauses have an extra-territorial effect. In other words, could they be used by one state to promote the protection of health and environment outside the sphere of state competencies? Once again the text does not give an answer to this question.

A final question, related to dumping, should be raised regarding the content of WTO agreements.

1.3 The dumping agreement does not explicitly cover social dumping

As far as a low social standard system gives a comparative advantage judged unfair by certain states, the question is whether WTO legal provisions related to dumping are applicable. If the answer is yes, then it would allow a WTO member to apply protection measures by raising anti-dumping duties. Authorised retaliation measures would allow – and only allow – increasing the price of products at stake. This is logical as only dumping on price is taken into consideration, ie selling a product by under-pricing in comparison to its "normal value" (article VI GATT 1994 and article 2 of the anti-dumping agreement). But what is the "normal value or price"? Does the normal value or price include, for example, the normal cost of working? Once again, there is no specific answer in the text.

4 There is however one exception: this is the anti-dumping agreement (art 2.6), giving a definition limited to the needs linked to the implementation of this text.

All these questions have been explored in judicial and diplomatic practices. This is the second point we will now raise.

2 THE CURRENT APPLICATION OF WTO AGREEMENTS DOES NOT ALLOW FOR THE CONSIDERATION OF SOCIO-ECONOMIC RIGHTS

One could summarise the situation in the following manner: Processes and Methods of Production are not taken into consideration; the integration of a social clause is not on the agenda and the dumping agreement does not cover social dumping.

2.1 *Processes and methods of production are not taken into consideration*

From 1952 onwards, the issue of whether a state can subordinate its import to respect the social norms of the country of origin has been raised. The panel of experts presiding over such a dispute between Belgium (defendant) and Denmark and Norway gave a negative answer, but without giving the reasoning leading to that solution[5].

The question was then raised in two similar cases in 1990 and 1994: the *Dolphin/Tuna* cases, between the United States and Mexico in 1991 and the United States and the European Community in 1994[6]. In these two cases, the issue at stake was related to the US decision not to import tuna from Mexico and the European Community any longer, because these fish were deemed not to be caught according to environmental protection standards (the techniques used were regarded as harmful to dolphins, which mammal is protected by US legislation).[7] The United States considered the GATT provisions as non-binding on them, as the imported tuna fish was not a similar product to the American tuna fish. (In one case, the production process is regarded as environmentally harmless, while in the other it is not.)

The panel of experts in these two cases rejected the US argument, using a textual interpretation of the GATT. The panel considered GATT article III as only looking at products and not Processes and Methods of Production. One state cannot grant a less favorable treatment to similar products after only taking into consideration a non-compatible process of production with municipal policies of the import country.

Behind this technical debate, and beyond the neutral and soft justification put forward by the panel of experts in the two reports, there is a fundamental issue, especially evidenced by Venezuela in the first case (Venezuela intervened in the procedure as a third party): accepting the US

5 *Allocations familiales belges, rapport du sous-groupe des réclamations adopté le 7 novembre 1952.*

6 US v. Mexico *Dolphin/Tuna Case (case I)* 3 September 1991 (DS21/R - 39S/174); US v. EC *Dolphin/Tuna Case (case II)* 16 June 1994 (DS29/R).

7 Hurlock 1992 at 1; Parker 1999 at 1.

argument would have meant accepting that any state could use the "faculty to justify its unilateral economic and social or employment norms as criteria to accept or not imports".[8] It is also obviously noteworthy to mention that, one year after the first of the two cases, the GATT will adopt the conclusions presented by Venezuela:

> The GATT system imposes no constraints on the right that member states have to protect their own environment against any damage deriving from either their methods of production or the consumption of imported products . . . however, when environmental problems derive from methods of production and consumption observed by another state, the GATT entails more constraints because it prohibits to set up conditions to get access to markets, or to make it dependent from political changes or from national practices in the export country. *Admitting the opposite solution would lead to authorise one state to impose its own social, environmental, economic policies, or to use them in a manner that would reduce the competition between imported and national product*[9].

One can see that such a problem is a very difficult one as the sovereignty of the state of origin (of the product) is here at stake. Admitting the US argument would equate to recognising that Northern states have universal jurisdiction over these standards, allowing them to export their social standards to Southern countries. Neither the WTO law, nor public international law would admit such a possibility.

This case law very interestingly evolved in 2001, within the framework of the second *Shrimps* case.[10] Facts and implicated states were quite similar to those in the *Tuna/Dolphins* cases. What was at stake in this case was also an American trade restriction, but based on shrimps and turtles, in a dispute between the US and Malaysia (once again a Northern/Southern dispute). The contentious trade measure imposed a certain fishing method on shrimp imported from America: the importing state had to prove that its fishing method was harmless for turtles, these animals being protected by several international agreements because of their scarcity.

The US won their case but the adopted legal reasoning is cautious and sets up conditions. The US measure is only accepted because it fulfils two conditions: firstly, it is a flexible measure, which imposes on exporting states not the adoption of the American fishing methods (that would be an obligation of using certain means) but the adoption of ecological fishing methods (ie an obligation to reach a certain result, leaving a more significant margin of appreciation to exporting states); Secondly, the measure was accompanied by international negotiation which led to an international regional convention protecting turtles. The US measure was consequently not strictly unilateral.

Moreover, this solution has been adopted in the framework of non-ecological processes of production, but it is doubtful that it would apply to social clauses. The solution is based on the fact that the GATT contains

8 Report, § 4.27.

9 GATT report 1992 at 19.

10 *United States v. Malaysia - Import Prohibition of Certain Shrimp and Shrimp Products* 22 October 2001, WT/DS58/RW.

such an ecological clause (article XX(g)), allowing member states to derogate to free trade on behalf of environmental protection. There is an environmental clause and the *Shrimps* report is based on this clause. There is no equivalent clause in the social field and the adoption of such a clause is no longer on the agenda.

2.2 The integration of a social clause is no longer on the agenda

States in favour of a social clause considered for a while that article XX(e) (prohibiting the import of "items produced in prisons") could be an accurate legal basis for such a clause; a purposive interpretation of article XX(e) could allow, for instance, to extend such a derogation to all kind of goods produced through forced labour or by an exploited and underpaid labour force.

However, article XX(e) has never been used or invoked. In the same way, a purposive interpretation of article XX(a) (related to the protection of public policy or morality) would beg the conclusion that child labour and, more generally, indecent working conditions would be contrary to public morality. Such an interpretation would however be problematic. For instance, in the *Tuna/Dolphins II* case, the European Community and the Netherlands intervened by supporting the idea that a purposive interpretation of article XX(a) would lead to "a partial approach in the name of public morality, such a notion depending to a large extent on specific cultural and religious traditions".[11] Further, it remains doubtful that such a clause would have extraterritorial effect; ie, even if it would allow a WTO member to adopt measures aimed at protecting public morality, such measures would not fall into the state municipal jurisdiction. Finally, such an interpretation would not be consensual, as the inclusion of a social clause is no longer (through regular amendments of the agreements) on the agenda.

The US and the European Community advocated for such an interpretation with different reasoning, especially through the ministerial conferences of Singapore (1996) and Seattle (1999). As the initiative came from two major trade powers, Southern countries saw a new form of protectionism, a threat to their sovereignty and their possibility of development. Developing countries reacted through a radical opposition to such proposal. They refused the creation of an *ad hoc* working group to study links between trade and fundamental social norms. This issue is one of the main reasons for the failure of the Seattle conference.

The debate on this issue is today at a standstill. The declaration adopted by WTO members during the ministerial conference in Doha (November 2001) is clear:

> We reject the use of labour norms with protectionist goals and convene that comparative advantage, especially for developing countries with low salaries, should not be threatened in any manner.

11 *Dolphin/tuna* case I § 3.71.

Finally, concerning the – already existing and more targeted – "health" and "environmental" clauses, could they produce extra-territorial effects?[12] The Dispute Settlement Body of the WTO (DSB) never gave an opinion on this difficult question, which also is, as one can imagine, a source of division between Northern and Southern countries. In its reports *Shrimps I & II*, the Appellate Body did not directly mention the question. It is true that American measures imposing an ecological obligation on trade partners with the US have been certified. However, it is no less important to mention that marine turtles (ie a non-territorialised resource) are a protected resource.

A last question will now be examined: the one related to dumping. Diplomatic practice shows that the dumping agreement does not cover social dumping.

2.3 The dumping agreement does not cover social dumping

States do not accept an interpretation of dumping that does not cover social dumping.

Any contrary solution would probably be difficult to apply on an economical point of view. Taking into consideration social dumping would mean that there is an "abnormal" labour cost, such a cost would affect the "normal value" of the concerned product. But is it possible to evaluate the "normal labour cost"? Moreover, taking into consideration social dumping would also raise ethical questions. It would allow for the setting up of anti-dumping excise duties. However, even if such rights would without any doubt protect undertakings from the importing state, they would have no direct positive effect on workers, who may be victims of social injustice. There is no practice at all in this regard.

The current implementation of these agreements indicates that the promotion of socio-economic rights through trade measures is inexistent or inefficient.

The only one way would be to promote another type of interpretation of WTO agreements. This aspect will constitute the third and final point.

3 TOWARDS ANOTHER ROUTE TO INTERPRET WTO AGREEMENTS

WTO law is not an isolated body of rules. It is a field of law integrated in public international law. It is necessary and possible to interpret it taking into consideration fundamental social norms adopted in other international forums. This is not an easy way to go: the DSB of the WTO must first accept it. WTO judicial bodies are to play a key role in this regard. This is a difficult, but possible, route to go.

12 See the *Asbestos* case: *European Communities v. Canada, Measures Affecting the Prohibition of Asbestos and Asbestos Products* WT/DS135 appellate body report, 10 March 2001; see also the *Shrimps/turtles case I: United States v. India, Malaysia, Pakistan and Thailand - Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58 appellate body report, 6 November 1998.

3.1 A difficult route

The DSB has no general competence, but only competencies granted by the Agreements: it accomplishes its duties according to the Dispute Settlement Understanding (DSU). However, the DSU does indicate in a very clear manner that all bodies (panels of experts, Appellate Body) fulfil their duties *according to the relevant provisions* of WTO Agreements (article 7.1 of the DSU). In other words, the aim of the dispute settlement system being to maintain a balance in providing security and predictability to the multilateral trading system, the DSB cannot add or diminish the rights and obligations of WTO Members, as stated in the agreement (article 3.2 & 3.4 of the DSU).

Finally, it goes without saying that the DSB cannot in any manner amend the agreements, this competence being formally and classically granted to the supreme political body, the WTO ministerial conference.

In conclusion, the margin of appreciation of the DSB seems limited. For the DSB, the difficulty lies in the definition of its policy regarding its own case law: what social norms could carry weight in a specialised trade international organisation created to settle trade disputes? What kind of weight could be granted to social norms when WTO members expressed, inside the organisation and outside (through the ILO), their refusal to use social norms as protectionist measures and to challenge the existing comparative advantage between developing and developed countries?

The DSB is consequently in a difficult position. At the same time, WTO is a very attractive organisation as its rules are enforced in a quick and efficient manner, approximating judicial enforcement.[13]

Numerous cases related to the implementation of WTO agreements but concerning other topics – usually linked to general interests matters like health, environment and social norms – are consequently being referred to the DSB. The *Hormones*[14] or *Asbestos* cases, the pending cases related to Genetically Modifidied Organisms (GMO), illustrate this situation. The DSB is referred to and must respond to these questions. In a general context of challenge of globalisation, this is an issue WTO cannot escape; this is not only a question related to the policy of the organisation, but to its survival.

At the same time, there are possibilities to interpret WTO law in accordance with social norms

3.2 A possible route

Several concurring elements can be put forward.

First element: it derives from the methods of interpretation adopted by the DSB. It would deeply influence decisions adopted by the DSB.

The methods of interpretation are today known and well functioning. They derive from article 3.2 DSU, referring to "customary interpretation

13 See eg MARCEAU 2002 at 760.

14 *European Communities v. US and Canada – Measures Affecting Meat and Meat Products (Hormones)* WT/DS26 appellate body report, 16 January 1998.

rules of public international law". There is a clear reference to interpretative rules of the 1969 Vienna Convention on the law of treaties. As a matter of fact, adopted reports since 1996 fully comply with these rules. This entails a two-fold consequence. First of all, the interpretative method adopted by the DSB is perfectly foreseeable. It constitutes a guarantee for legal certainty. Secondly, taking into consideration other rules of public international law is possible: article 31(3c) clearly provides that the interpreter must take into consideration "all relevant rules of international law applicable between the parties". In a number of cases, the DSB effectively took into consideration international agreements not linked with WTO, as well as factual elements that can justify and explain its own solution (The *Lomé* Convention in the *Banana Case*,[15] the regional environmental agreements in the *Shrimps Cases*). The very first report (*US Reformulated Gasoline* in 1996[16]) indicates, in a very general manner, that "WTO law should not be interpreted *by isolating it from public international law*". This kind of wording has been used repeatedly.

Second element: the preamble of WTO agreement. It was earlier mentioned that the preamble of WTO contains social objectives (increased standard of living conditions and full employment realisation) and that these two objectives should be reached with respect to sustainable development. The idea of *sustainable development* includes an environmental, but also a human, dimension. However, the WTO case law takes this preamble into consideration when it is necessary to balance economic objectives with general or public interests (like health or environment). In its report to the *Shrimps I Case*, the Appellate Body clearly states:

> Considering that this Preamble represents the intention of the negotiators to WTO Agreement, it should, according to ourselves, enlighten, organise and mitigate our interpretation of Agreements annexed to WTO Agreement.[17]

Third element: it is linked with the recent evolution of social international law. There is today a wide international consensus on minimum social standards. Several indicators testify to such consensus: the ILO 1998 Declaration, which advocated a wide ratification of ILO conventions mentioned in the Declaration, the development of codes of conduct adopted by multinational companies, etc. WTO would be in a difficult position if it were to resist these evolutions. Accordingly, some notions from the GATT 1947, not amended since its creation, are still applicable and could be interpreted in a dynamic manner. For instance, article XX(a) allows for some trade restrictions based on the protection of public morality. In 1947, the drafters of the GATT certainly had in mind a classical vision of public morality as allowing, for instance, one party to forbid the import of obscene publications. There is consensus today at least on the

15 *European Communities v. Ecuador, Guatemala, Honduras, Mexico and the United States - Regime for the Importation, Sale and Distribution of Bananas* WT/DS27 appellate body report, 9 September 1997.

16 *United States v. Venezuela and Brasil- Standards for Reformulated and Conventional Gasoline* WT/DS2 and WT/DS4 appellate body report, 22 April 1996.

17 *Shrimps case I* § 153.

prohibition of child and forced labour. Does such an evolution influence the content of "public morality"? The Appellate Body of the WTO has already been faced with such a problem in the *Shrimps Cases*. It considered that the interpretation of the notion of "non renewable resources" as mentioned in GATT Article XX(g) should be made taking into account international environmental law. This is why it rejected the argument supported by Thailand, proposing a more purposive interpretation based on the *travaux préparatoires* and the sense of wording as used in 1947. In this case, the Appellate Body considered that the notion was not limited to mineral resources (1947 interpretation) but also included biological resources. Similar reasoning and methodology would then allow for defending the idea of "public morality", including ethical considerations linked to working conditions.

In the same manner, if a WTO member had adopted trade measures, being invited to do so by the ILO, would the DSB be able to declare them incompatible? An example is the sanctions against Myanmar – an exceptional situation – as requested by the International Labour Office, in the framework of a formal procedure. It seems that the answer should be negative.

Fourth element: it derives from article 13 DSU. This provision allows special groups to consult with experts on any kind of technical question. Such a possibility is also offered to the Appellate Body. This provision could perfectly be used to refer a technical question to the ILO, or also to admit the intervention of trade unions or NGOs as *amici curiae*. Dispute settlement organs have a wide discretion in this regard. However, up to now, referral to *amicus curiae* has been scarcely and cautiously used. The ILO has never been consulted, even though the *Abestos Case* could have been an opportunity, where the health risk was only related to workers using this product. The dispute settlement organs are still very cautious regarding the use of such a possibility, but they nevertheless have this technical opportunity as their disposal. This should be followed up.

Fifth and last element: evolution of the case law related to the relationship between trade and environment or trade and health protection. This evolution is observable and quite important. One can notice how the preamble influences interpretations made by the DSB: adopted reports in a number of cases illustrate how the DSB mitigate its interpretations. These are not only words. For instance, it does what it says in the *Shrimps I* report: it takes into consideration public interests goals in defining states economic obligations.

This acknowledgement of environmental and health issues is hopefully the starting point to a further integration of social issues.

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