Fundamental human rights at work in international trade

Operational routes

The role that can be played by the WTO

Synopsis

With the financial support of the European Commission, DG Employment, Social Affairs and Equal Opportunities

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Dear Readers,

We are delighted to present you with this study into operational methods of ensuring compliance with labour rights in the framework of the WTO.

The study has been conducted over the first nine months of 2008, by a team of four experts from Syndex: **Olivier Chabrol, Élodie Da Silva, Alain Mestre and Philippe Morvannou**.

Their combined multidisciplinary competences have structured a collective reflection, underpinning a plan which envisages the theme of the study from three complementary angles: the legal, economic and politico-institutional approaches.

The advantage of such a process lies in the coherence of each approach. The point is that this coherence allows the team to highlight the operationality, something that everyone will appreciate, given that this was the prime objective assigned by the European Trade Union Confederation.

The method implemented for the drafting of this study was structured into three stages:

- status of knowledge on the subject via in-depth bibliographical work;
- interviews with institutional players, trade unionists, NGOs and researchers;
- comparisons of the conclusions and recommendations with certain trade union players.

We are therefore indebted to all those people who have given us their time and enriched our ideas in the course of interviews which have always been interesting, or even exciting, for the team members conducting them.

This has particularly been the case for the members of the steering committee chaired by Joël Decaillon, ETUC confederal secretary.

Finally, through the work invested in it, and the conclusions we have reached, we hope to have made the most operational contribution possible towards improving labour rights around the world.

Philippe Morvannou,

Team leader

Summary

Synopsis

The dawn of the 21st century has been marked in economic and political terms by the emergence of new world powers, the main two being the world's two most densely-populated countries, China and India. This historic phenomenon is generating a new international order, symbolised by the Olympic Games being held in Beijing, which above and beyond their sporting importance, raises the global question of the values which will dominate the world stage over the decades ahead.

The World Trade Organization (WTO), which was created in 1995, is the only major global governance institution to have been set up since the end of the Cold War, and is at the heart of this redefinition of the merchant foundations of the international order of the future. While in some emerging countries, although ultimately not very many, poverty has diminished as a result of economic growth, development construed as a source of well-being and improved living conditions for the overwhelming majority of the population, has not occurred; and this is all the more the case when violations of labour rights have persisted and even become more common.

The question of countries' development is certainly a question of resources, but also – and above all – one of political will, as can be seen from a quick look at the ratifications of the eight fundamental conventions of the International Labour Organization (ILO). Regarded as symbolising the level of development achieved by a country or by an economic area, ratification or lack of ratification of the fundamental ILO conventions does not play this role. In fact, it reflects both ideological postures, like that of the United States, and the defence of the interest of certain economic sectors geared towards exports within the developing countries. Europe's posture on this score seems to have more formal coherence, but we should make no mistake: this coherence is a very long way from having been achieved in every area.

Faced with this development issue, core labour rights constitute a major lever in bringing about compatibility and complementarity between a legal approach involving respect for those rights, an economic approach regarding their positive impact for human development, and a political approach which, in addition to the State players, allows the non-governmental organisations (NGOs), notably the trade unions, to participate in the definition of policies negotiated at the global level. If these three dimensions are mobilised simultaneously, we can look forward to having an operational influence on the major redefinitions underway in terms of the rules on the global trade in goods.

1. The legal routes

1.1. The arguments for the inclusion of core labour rights in WTO law

The hierarchy of standards

With the creation of the WTO, we are seeing the judiciarisation of the international commercial system.

When the WTO succeeded to the General Agreement on Tariffs and Trade (the GATT) in 1995, it set itself some fresh objectives and equipped itself with new methods to reinforce the role of the law. These include the switch to a written law and the creation of a binding mechanism for the settlement of disputes. However, the global system still remains very heterogeneous, and sometimes even inconsistent: the same States are undertaking to respect human rights at the United Nations while refusing to integrate such rights into world trade at the WTO, relying on the fact that there is no formal link between the two institutions.

The notion of 'general peremptory law' might mitigate these shortcomings, with core labour rights being a reference. We shall look here at some indices showing the universalisation of core labour rights. Firstly, the ILO declaration in 1998 on fundamental principles and rights at work states in § 1 that the 174 ILO Member States[1] have accepted the principles and rights listed in the ILO constitution and the Philadelphia declaration and pledged to guarantee these fundamental values and work on the realization of the objectives of the whole Organization. The declaration likewise reminds the Member States in § 2 that all Members *'even if they have not ratified the Conventions in question, have an obligation* ***arising from the very fact of membership in the Organization****, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions*[2]*'.*

Human rights like core labour rights have thus acquired a fundamental place in the hierarchy of international standards and might therefore be described as *jus cogens*. Since this idea remains somewhat theoretical and its content is rather vague, the question should thus be referred to the national and international jurisdictions so as to provide a more practical meaning for the idea.

The WTO cannot remain on the sidelines, especially given that the interpretive procedure of the judging bodies makes it possible to place global trade law within a wider setting than the international legal system.

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[1] As at 17 March 2005, figures obtained on the ILO Internet site.

[2] Conventions n° 87 and 98 (Freedom of association and collective bargaining), n° 138 and 182 (Effective abolition of child labour), n° 29 and 105 (Abolition of forced labour), and n° 110 and 111 (Elimination of discrimination in respect of employment and occupation).

WTO law is not clinically isolated

The interpretative procedure of the WTO judge is well established and is a guarantee of legal security; this makes it to a large extent predictable. The main rules of interpretation used by the Appellate Body (AB) have allowed the judge to take the whole of general international law into account, notably the objective of sustainable development. The AB has decided, from its first report[3], not to clinically isolate WTO law from the rest of international law. According to Pascal Lamy, ***'this meant that the WTO is no more than one element in a more global system which includes several sets of rights and obligations. No priority is given to the norms of the WTO compared to other norms. Hence the necessity to ensure global coherence in the interpretation and application of all the values, all the rights and all the obligations***[4]*'*. Thus, not only has the AB framed a method of interpretation of WTO law based on the methods and principles codified in the 1969 Vienna Convention on the Law of Treaties, but *'it has, in that context, referred to substantial rules under international law in the light of which it has determined the meaning to be placed on provisions or parts of provisions in WTO law*[5]*'*.

Coherence is a recurrent theme in WTO law. The States have a duty to be coherent in their commercial policies: in fact this is a measure of their good faith. However, it seems that in the relationship between core labour rights and international trade, this coherence is lacking. This means that the deciding advice mechanism would make it possible to improve global governance. So the idea is to set in place a procedure that would enable the panels and the AB – where the latter are faced with a question outside their field of competence – to call upon the competent international organisation, in the event the ILO, for questions relating to core labour rights.

Recourse to exceptions

Article XX of the GATT allows members to impose restrictions on trade so as to protect their interests other than commercial interests. The States have already used the exceptions in Article XX to protect public health, the environment or public morals.

Concerning human rights, we shall concentrate on Article XX-b (protection of human health and life), Article XX-e (products of prison labour) and Article XX-a (protection of public morals).

The first seems to be at the very least uncertain, and the second and third need to be explored.

a) Article XX-b demands a relationship of necessity between the measure and the objective pursued. Allegations thus have to be based upon the existence of a scientific risk in light of all the scientific evidence available. In the case of core labour rights, it is necessary to demonstrate by surveys that the rate of illness or death is abnormally high in

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[3] AB report, WT/DS2/AB/R, *United States – Standards for reformulated and conventional gasoline,* adopted by the DSB on 20 May 1996, p.18.

[4] Pascal Lamy, 'Vers une gouvernance mondiale?', speech at the inauguration of a master at the Institut d'études politiques de Paris, 21 October 2005.

[5] Hélène Ruiz Fabri, 'Concurrence ou complémentarité entre les mécanismes de règlement des différends du protocole de Carthagène et ceux de l'OMC?', in J. Bourrinet, S. Maljean-Dubois, *Le commerce international des OGM: quelle articulation entre le Protocole de Carthagène sur la biodiversité et le droit de l'OMC?*, Paris, la Documentation française, 2002, pp. 149-176.

one of the production branches in a State in order to apply restrictive measures on the trade in products coming from that State. Added to this is the difficulty in protecting workers in another State, which seems to be at odds with the principle of non-interference in the internal affairs of another State. This all makes for a very uncertain route!

So if Article XX-b is to be invoked, it would therefore be preferable for the protective measure to be limited to a non-binding standard, such as labels, an arrangement which does not prohibit the entry of the products on to the territory issuing the measure.

b) As to Article XX-e on products of prison labour, the idea of incarceration, which is characteristic of prison work, is lacking from the definition of forced labour. However, many times, where forced labour practices have been unearthed, workers were imprisoned in the workplace. Today, the boundary between prison work and forced labour is more fluid, and the WTO judge might perhaps have an extensive interpretation of the term 'prison', especially when the exceptions are not of strict interpretation and the WTO judge tends to adopt a flexible, evolving interpretation of the exception clauses. In addition, a State enacting a measure designed to prohibit the import on to its territory of articles manufactured thanks to forced labour practices is supposed to give equal treatment to the countries in similar situations. So we need to rely on surveys to establish non-compliance with the conditions set out by convention n° 29[6] in order to see, for each commercial partner, the types of products on which commercial restrictions are to be imposed in order to be able to abide by the obligation of coherence. This makes these conditions hard to satisfy, but this path is unquestionably worth exploring.

c) Article XX-a relates to the protection of public morals. Each society can define its own moral rules. For instance, some countries have been able to close their borders to imports of alcohol. Why, then, might other members not be able to impose restrictions on imports of products manufactured under degrading working conditions for the sake of protecting their public morals? It is hard to see how it would be possible to limit the sovereign discretion of the Member States of the WTO regarding the definition of an affront to their public morals. The only condition is the obligation of coherence in how to treat countries finding themselves in identical situations and in the definition of national public morals. The objective, if it is to be considered legitimate, must be embedded in the culture and the sociological and historical realities of the country issuing the measure restricting trade. Yet this is the case with core labour rights in Europe.

It is hard to see how it would be possible to limit the sovereign discretion of the Member States of the WTO regarding the definition of an affront to their public morals. Accordingly, '*a conception of public morals excluding the notion of core rights would quite simply run counter to the meaning customarily attributed today to that concept*"[7]. The report by the United Nations High Commission on Human Rights[8] issued in 2005 states that the virtual absence of debate around the idea of public morals during the negotiations which led to the GATT means that there was some sort of common definition of public morals based

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[6] Remember: if it is not to be considered as forced labour, prison work must be *'carried out under the supervision and control of a public authority'*, and prison workers must not be *'hired to or placed at the disposal of private individuals, companies or associations'.*

[7] Robert Howse, 'Back to Court After Shrimp/Turtle? Almost But Not Quite Yet: India's Short-Lived Challenge to Labor and Environmental Exceptions in the European Union's Generalized System of Preferences', *American University International Law Review*, 2003, vol. 18, n° 6, p. 1368.

[8] UN High Commission for Human Rights, '*Les droits de l'Homme et les accords commerciaux internationaux, utilisation des clauses d'exception générales pour la protection des droits de l'Homme*', United Nations, New York and Geneva, 2005, 33 p. (p.13).

upon similar clauses inserted in the other commercial treaties. The report thus concludes that *'in that context, the expression 'public morals' might extend to human rights'.* The UN definition of human rights, via the Universal Declaration of Human Rights, dated December 1948, of which we will shortly be marking the 60th anniversary, includes core labour rights. By invoking Article XX-a and that universal declaration, any WTO Member State would thus have the right to include core labour rights in its external trade policy. Might this be an operational route in the near future? In any event, it remains to be explored.

1.2. How, and under what conditions, trade union actors can make their voices heard at the WTO

Global governance is a work in progress. Civil society cannot be sidelined from this process. The need to take account of the demands of civil society and to democratise international organisations is pressing today.

Trade unions have a low profile in the WTO for various reasons: shortage of resources, training and expertise, as well as strategy problems. Yet an international organisation like the WTO takes decisions which have a serious bearing upon the labour market and core labour rights. Despite the opaqueness of the system, mechanisms do exist which might allow the trade unions to make their voices heard either formally or informally. Some non-governmental organisations (NGOs) have grasped this and are present at various levels. The wording of the agreements allows openings to civil society.

The exceptional example of the Kimberley process

The Kimberley process certification system is a unique initiative by certain government authorities, the international diamond industry and civil society designed to combat conflict diamonds. It is a procedure under which members are asked for a temporary authorization not to comply with certain common disciplines in exceptional circumstances and for a longer or shorter period.

The waiver granted to the Kimberley process forms an important precedent, as it is the first time that the WTO has approved a waiver for the sake of protecting human rights.

The influence allowed by the *amicus curiae* procedure

Aside from this exceptional procedure, non-State organizations can be consulted by the Secretariat or the specific committees at the WTO on no more than an informal basis. Article V-2 of the agreement setting up the WTO, entitled 'Relations with Other Organizations', might, however, make it possible to establish an accreditation system, as is the case in certain UN bodies. It is possible to set up a comparable system at the WTO: this would also facilitate the *amicus curiae* procedure, preventing the panels from being clogged up.

As things stand, civil society does not intervene in the routine review of trade policies by the WTO. It is not consulted, and cannot attend the debates. The reports are published after the final meeting. Several proposals can be put forward to make it possible to include the civil society players in this review at best: for example, consulting the non-State players from the countries being reviewed during trips or giving non-State players the right to

attend the final meeting. This idea has the backing of the European Commission, which has already framed demands to the General Council, which have gone unanswered.

Before the DSB, the procedure takes place on an inter-State basis. Accordingly, *amicus curiae* (written submissions from non-State organizations or private individuals) is *'the procedural loophole through which an individual, company or association can dive in when the status of a party is the preserve of the States'* [9]. The WTO agreements did not specifically provide for such a procedure.

Although it is not a legal right, but a possibility which relies on the discretion of the arbiters, the possibility of making *amicus curiae* submissions allows civil society to make its opinions heard both by the WTO judge and by the States parties to the dispute. Even if the judgement groups often say that they do not take account of such submissions in their final decision, they have still read them and heard the arguments thus adduced. This makes for a real issue for the trade unions, particularly where an examination of the various *amicus curiae* submissions filed before the AB or before the panels shows that it is mainly the players in the economic sector concerned by the decision which are filing written submissions. So the employers (particularly multinationals) are over-represented in this procedure.

2. The economic routes

2.1. Can social dumping be justified in economic terms?

The dichotomy between the lack of labour standards/disguised protectionism is part of the debate that has been in stalemate for over ten years, the two sides of the coin being:

- on the one hand, any entrepreneur obviously benefits from paying his staff less and being able to run his business from his own perception of the needs being expressed by his clients;
- on the other, the country needs infrastructures, an education and health system, or in a nutshell, collective goods so that all businesses can both thrive and find the goods and services necessary for the operation of the internal market, be it in terms of goods and services or labour.

The two approaches which, in a Keynesian economy, are organized in such a way that the labour market regulations reconcile the two aspects (supply and demand) within a given national area, have been blown into a global area enlarged by the aptly-named 'globalization'.

This revamp consists of focusing first and foremost on labour and wage conditions, and thus labour rights, from the point of view of simple price competition, and to the detriment of an approach incorporating productivity and capital formation. It is consistent with the method of development through exports on the global market as it has been

[9] Hervé Ascencio, 'L'*amicus curiae* devant les juridictions internationales', *Revue générale de droit international public*, 2001, pp. 897-929.

going on over the last thirty years in some countries. In fact it is thanks to access to solvent markets in the developed countries that the emerging countries have gradually improved productive channels and built up a national economy.

Yet while some goods traded on the global market have indeed been produced under conditions which do not respect labour rights, it is not the differential in the production cost stemming from the violation of human rights that gives them a decisive comparative advantage, but the differences in standards of living and purchasing power between countries. The point is that the gap in the price to the consumer between goods from producers which do respect labour rights and those which do not is residual when set against the gap in the price of labour between the developed countries and the emerging countries, which, depending on the criteria, varies from 1 to 10 in all cases. We can thus see that social dumping construed as an approach designed to make international competitiveness reliant upon a devaluation of the cost of labour achieved through non-compliance with core labour rights is in no way justified from an economic and financial point of view.

The additional benefit is shared between the local Mr Big and the distributor who has access to the global markets. The violation of labour rights is therefore an additional obstacle to development through the passing on of the producers' margins to the distributors.

2.2. *A development method in search of new regulatory tools*

It was in a bid to escape from this situation that between 1930 and the end of the 1960s, strategies for industrialization by substitution of imports arose in many Third-World countries. In order to industrialize, these countries had initially to shield themselves from the global market dominated by the imperialist powers in order to allow their emerging industries to establish themselves before facing up to international competition. For the countries producing raw materials, what this meant first of all was the nationalization of the firms producing the primary goods. The road was littered with failures, primarily because of the constitution of rent economies lacking in dynamism or innovation.

In addition, the development during the 1980s of the Asian dragon economies – South Korea, Taiwan and to a lesser extent Singapore and Hong Kong, backed by the United States of America – tended to demonstrate that it was possible to escape from under-development not only through the substitution of imports, but also through the development of exports. In parallel, the process of globalization has its roots, during the 1980s and 1990s, in the process of privatization marking the strategic starting point for the transnationalization of the national economies. As a contemporary of the liberalization of trade, world economic growth is now pegged to the growth in world trade, and of transnational investment.

If China has done no more than to replicate at its own level the positive experience of the Asian dragon economies, namely the promotion of exports coupled with a political determination to boost the industrial sectors through active management of technology transfers, it would be wrong to reduce the strategy behind China's development simply to this one dimension. The bulk of China's industrial dynamism has its own sources which do not boil down just to foreign investments in the free areas. The transformation of

peasants into workers actually leads to an extension of the country's internal market, fuelled by the monetary productivity increases deriving from the shift for many migrants from the interior from the subsistence economy to being wage-earners.

The emergence on the scene of the Chinese economy: a major source of commercial and financial imbalance

China has gone from 3.5% of the global trade in manufactured products in value terms in 1995 to 10.3% ten years later, occupying the number two spot just behind Germany. The process being pursued by China includes a strategy of domination in certain sectors regarded as strategic, such as electronic products, shipbuilding and car manufacturing, fuelled upstream by a steel industry whose growth has thrown the sector at the global level into disarray since 2004. Public and private Chinese companies have constructed almost 400 million tonnes of steel production capacity, which is the equivalent of two European steel industries in less than ten years. One of the major consequences of this booming industrial and commercial development has been the appearance of major imbalances in trade with the United States and Europe: commercial deficits vis-à-vis China in 2007 stood at 160 billion euro for the European Union and 256 billion dollars for the United States, and at present, we cannot see how anything can stop these figures plunging even deeper – quite the reverse, in fact.

All these factors are issues in the current phase which, after establishing China as the world's workshop, must lay the foundations for a new world economic order. Would we be a long way from labour rights? Not at all if we consider that they can be a tool for the refocusing of Chinese efforts towards its internal market, a strategic orientation both for its stability and for the controlled evolution of globalization. For such commercial imbalances are not sustainable, either for the United States or for the European Union.

The emergence of competitive advantages demands deeper negotiations, which have to address the risk of interference

Putting the creation of the WTO, completed by the 28 agreements emerging from the Uruguay Round, following the GATT, back into the context of world political and economic history, illustrates that this development first made it possible to envisage the integration of some of the most populous countries into the world economy, via their participation in global trade. The point is that as well as the biggest, China, with its 1.3 billion inhabitants, the trajectory of India, with over one billion, is uppermost in everyone's mind.

This economic restructuring in the South is a major development for the global economy, and in parallel with financiarisation, represents one of its original historic features at the beginning of the 21st century. This trend means going beyond the simple comparative advantages as the result of the liberalization of trade in a world where it is accepted that multinationals have profoundly changed the landscape of world trade.

Taking into account the existence of imperfect competition, we need to point up the competitive advantages deriving from the current phase of globalization, such as:

- economies of scale, which mean that a single productive base can feed bigger markets, with increased returns;
- economies of size, which mean that it is possible to spread fixed costs such as marketing, R&D and administrative costs to a certain extent over a bigger production;

- the variety effect, whereby consumers can be offered a wider range of qualities and models.

This means increases in competitiveness which take the form of the downgrading of the least effective companies, but also those which only suffer from being too small. This shift from the comparative to the competitive reinforces the multinationals as the players with an ever greater impact on the evolution of the rules of international trade.

The demonstration given on the classic example of drugs since the Doha meeting is a perfect illustration of the limits encountered by the institution of the WTO in getting beyond the current stalemate. On the one hand, the developed countries want to get these new themes brought into the negotiations, such as international trade and foreign investments, trade and competition policy, the transparency of public contracts or the facilitation of exchanges from the regulatory point of view, whereas on the other, the developing countries and the least developed countries are taking a stand on the contrary to get the international commercial negotiations to continue to focus on questions of trade and its international liberalization, notably in the vexed area of agriculture. What has been dubbed the 'South's opposition' to the so-called 'Singapore questions' has run up headlong against what the States in the developing countries and the LDCs interpret as interference in their public policies.

Not forming part of the Doha agenda, core labour rights have remained in the shadow of the negotiations, even though they remain one of the main keys to the transformation of a country through economic growth.

In the face of such obstacles, a number of avenues have been recently opened up to the international negotiations by State and non-State players: international framework agreements signed within multinationals, labels and standards applied to consumer products and bilateral or plurilateral agreements signed among several States.

The contractual route: scope and limits of the international framework agreements (IFAs)

By the end of 2007, sixty IFAs had been signed, including 57 by businesses with their international headquarters in Europe. These tools in some sense represent a way of disseminating the European social model. The major advantage recognised by the ILO in this contractual corporate tool is that it makes it possible to lay down a reference regarding core rights, relying specifically on the texts of the ILO conventions, in industrial sites where such rights would be poorly protected by the local public authorities and possibly flouted by local company managements.

In addition, not only do IFAs pave the way for transnational corporate collective negotiations at global level, but certain trade union organizations see them as mechanisms acting as a precursor to the establishment of international collective agreements. So the existence of an IFA gives trade unionists a way of participating in the control of respect for the commitments entered into by a company or a group of companies bound by that agreement. So much for the positive aspects!

However, if social regulation is entrusted on a large scale to players whose main function is a commercial activity, then this raises a deeper political question: to what extent must the economic players mitigate the public governance deficit?

Standards and labels: a promising avenue

Faced with the failings of the United Nations system in terms of ensuring universal respect for core labour rights, and the recorded lack of a truly binding mechanism, another driver of progress can be promoted as a complement – or ahead – with a view to influencing the practices of the economic players and laying down some 'good governance' markers for them. The promotion of virtuous standards with regard to the management of sectors in international trade in social terms is actually a complementary method which might help in the development of a set-up taking greater and more systematic account of respect for labour rights. In that case, the explicit demand for the guarantee of better respect for rights would come not from the workers concerned themselves, but from the economic players downstream of the sectors, i.e. the citizens as consumers.

Standards and labels deriving from private initiatives, containing social criteria, are developing. Any dispute at the WTO regarding their use is liable, however, to trigger a debate on the interpretation of the TBT agreement. So it is advisable to back the use of such private labels only where they are genuinely more stringent than compliance with core labour rights alone. On the other hand, the standards and labels in which the States are involved can be used directly (the TBT agreement cannot be invoked to challenge their use); these are the public labels and standards most deserving further development.

On this latter point, the European Union may show a real political will, and establish a social label of this kind. Belgium has already set an example.

One way would be to apply more favourable commercial treatment (tariff advantage) to products and services delivering proof of effective respect for core labour rights in their design, their production and/or their distribution. Those States could use a standard for this purpose making explicit reference to the eight fundamental ILO conventions. Effective respect for the standard, or the label used, would depend upon the reliability of the system to control the standard or the label to which reference would be made.

Likewise, we might think that standards or labels containing social criteria would now be better accepted at the WTO if they contributed to the emergence of sustainable development labels.

With similar approaches regarding the social criteria and the environmental criteria for traceability and validation of the respect of the standards for a product, we should come close to the possibility of satisfying a widespread demand to see the development in the short term of tools making it possible to identify sectors with regard to the larger issues of sustainable development. In 2004, the ISO (International Organization for Standardization) launched an international process for the framing of the future standard ISO 26000 which should provide the guidelines for corporate responsibility. Obviously, the concepts used for the framing of these ISO standards are solid and the international consensus on their value grows day by day. However, their wholesale application by the economic players in isolation raises a raft of questions. The most knotty relates to the operationality of a verification system, and thus the guarantee of respect for the standard or the label.

Yet while within businesses there are organizations which are constantly on hand, and which are concerned with respect for labour law, they are actually the institutions which represent the staff, or the company trade union sections. So it seems natural to rely on these organizations and to team up with them to build reliable and quasi-permanent

monitoring systems. The federations of regional, national and international trade union movements, which themselves also have a role as permanent observers of labour conditions in their home regions, might, for their part, get actively involved in verification systems or multipartite certification trials. In this way, the trade unions would be helping to improve and give credibility to the social monitoring and verification mechanisms with a view to more effective regulation by 'soft law'.

In order for standards or labels containing labour criteria to be accepted and recognised at the WTO as not setting up fresh barriers to international trade, the States promoting them will doubtless be well advised to show in parallel that they will help the countries in the South to take them on board (through specific co-operation programmes for the use of these tools in the countries in the South, for instance). These States might thus show that they do not intend to promote these tools as instruments for disguised protectionism.

Decent work

The concept of decent work introduced by the ILO combines respect for fundamental rights with a development process. It might make it easier for the various UN mechanisms to take account of the essential principles detailed in the fundamental ILO conventions. Its ambition is to be applicable and applied, not only in the developed countries, but also in the poor or emerging economies.

To put it another way, the implementation by a State of an economic and social policy that incorporates the concept of decent work does not immediately require the formal ratification of the conventions. This flexibility in the process is likely to facilitate the adoption of the concept within multilateral commercial negotiation circles. So we have moved from a debate about labour standards to a debate about the strategy to be followed in order to progress in getting labour rights taken into account.

3. The political and institutional routes

Inter-institutional coherence between the WTO and the ILO can be secured only through the promotion of a system of common founding values which offer all the social exception rules a homogeneous paradigm.

3.1. Sustainable development: a demanding concept which calls for fresh coherence at the global governance institutions

Nowadays, only the UN concept of sustainable development defined and launched at the Rio Summit in 1992, then formalized and implemented by the UN's Commission on Sustainable Development, can offer the opportunity to clear a space for core labour rights in the multilateral trade system.

Institutional mechanisms for co-operation between the WTO and the ILO should be put in place, along the lines of those currently in force between the WTO and UNCTAD (the

creation of a common instrument, the international trade centre, whose headquarters is likewise in Geneva) or the WTO-IMF liaison committee. A permanent liaison committee between the WTO and the ILO should thus, along the same lines, be set up to look at management of the multilateral commercial scheme for social exceptions linked to the protection of core labour rights. Co-operation between the WTO and the ILO is required in particular with regard to the control of the timeliness of the exception measures, a role currently entrusted to the dispute settlement bodies, which exercise that control when they examine the need for measures taken on the basis of the exception scheme.

The suggestion made by the G8 Labour Ministers in December 2003 for the creation of a dialogue forum involving the ILO, the WTO, UNCTAD, the World Bank and the IMF, should likewise be given consideration. Such a forum would make it possible, within an integrated sustainable development approach, to jointly promote balanced development projects, the growth of world trade and the recognition of protection for core labour rights.

Trade unionism might specifically play an institutional role within the WTO by promoting and optimising its capacity to provide expertise and make proposals in the framework of consultative bodies similar to the one set in place at the Organisation for Economic Co-operation and Development (OECD) with its Trade Union Advisory Committee (TUAC).

3.2. *The issues in the Cotonou agreement in terms of governance and the recognition of the three pillars of sustainable development*

The Cotonou commercial agreement (signed on 23 June 2000) is an Economic Partnership Agreement (EPA) designed to follow on from the Lomé Convention. Its objective is *'reducing and eventually eradicating poverty consistent with the objectives of sustainable development and the gradual integration of the ACP countries into the world economy'*. The agreement rests upon an *'integrated approach taking account at the same time of the political, economic, social, cultural and environmental aspects of development'* (Article 1). The text provides that respect for human rights[10] (in the broad sense of the 1948 universal declaration) and democratic principles and the State of law constitutes an *'essential element'* in the partnership. The agreement thus falls within a pattern of conditionality, since complementary clauses provide explicitly for a penalty mechanism in the event of non-respect for human rights.

The human rights clause system represents a mechanism for the indirect implementation by contracting third States of their regional or universal commitments relating to the protection of human rights. Article 50-1 refers to core labour standards as they have been defined in the ILO conventions. On the other hand, Article 6 of the new agreement seeks to promote better participation by the economic and social players and civil society in the process of development. So the idea is to get civil society involved in the framing of public policies. Article 6 also identifies the players: the private sector; economic and social

[10] Article 9 defines the 'essential elements' and stipulates that the term 'human rights' is to be construed as defined by general international law, namely that the concept includes civil and political rights as well as economic, social and cultural rights.

partners, including trade union organizations; civil society in all its forms, according to national characteristics (not just NGOs).

This provision marks a major step forward, since it 'decentralizes' the co-operation towards the players on the ground: territorial authorities, civil society (NGOs, associations) and the private sector. These new players intervene in the framing and in the evaluation of the results. However, this is no more than a start, and everything still remains to be done depending on the characteristics of each State. West African trade union organizations have deplored the fact, for instance, that *'in contrast to the objective of development affirmed in the Cotonou agreement, the negotiations of the EPAs are essentially angled towards questions such as the liberalization of access to markets, the liberalization of services, the setting up of an agreement on investments, competition and public contracts, which on their own do not lead to development'*[11]. Thus they would rather have the 'GSP plus' system, which would be compatible with WTO law, than the EPAs.

Accordingly, the participation of the new actors is far from guaranteed, even if some experiences (Benin) have shown that this process might succeed to some extent. One thing is for sure at any event: there is no single model, and every country has to find the resources and competences to allow it to influence the planning of its development strategy. However, this agreement does have the advantage of setting in place a punitive approach and an incentive approach..

3.3. The generalized system of preferences

The generalized system of preferences (GSP) is a system devised by the UNCTAD which involves granting reduced or zero duties compared to the most favoured nation rates granted by the States to certain products from developing countries. This mechanism was adopted by the GATT in 1979 in the form of an enabling clause for the beneficiary countries.

The aim of the GSP is to favour exports from the developing countries with a view to stimulating their growth, reducing or eliminating customs duties for a certain number of products of relevance to the developing countries, and applying non-tariff measures more favourably in the territory of the industrialized countries. The enabling clause is an evolving clause, in other words one that provides for a return to the normal scheme as the country develops. This system was not questioned in 1995 when the WTO was created. In simple terms, the GSP becomes less interesting as customs duties fall. In addition, the GSP does not apply to agriculture, even though the developing countries would benefit greatly from it.

GSP+, a system that has existed since January 2002, is a special scheme offering extra commercial preferences to vulnerable countries and those with dependent economies committed to sustainable development and good governance, including fundamental human rights and labour standards. It is thus a system of 'positive' sanctions (additional advantages are granted to countries demonstrating their respect for the ILO conventions). Negative sanctions can likewise be adopted in the event of serious violations (such as

[11] Accra declaration by the West African trade union organizations (June 2007). Speech during the negotiations of the EPA between ECOWAS and the European Union.

forced labour) going as far as the withdrawal of the preferences (as was the case with regard to Burma). Unfortunately, the too-recent signature by the European Union of the GSP+ agreements with certain partners does not allow for an exact answer to the many questions raised by their implementation.

3.4. Sustainable development as a lever for respect for core labour rights

The sustainable development dimension, in its UN definition incorporating the three pillars, has begun to be taken into account by the WTO. It has been incorporated and recognized, in the framework of the Marrakech agreement, in the preamble to the setting up of the WTO. It has been included in many commercial agreements (bilateral, regional or unilateral) concluded or under negotiation (United States and Latin America, EPA between the EU and the ACP countries, FTA between the EU and South Korea, China, India, Ukraine, the Mediterranean area, etc). It has been the subject of several disputes handled by the Dispute Settlement Body (DSB) and the AB at the WTO.

Sustainability impact assessments (SIAs) are a basic political instrument for measuring the consequences of the liberalization of world trade on the three pillars of sustainable development. They have been conducted and instrumentalized by the European Commission and by the United States in the framework of plurilateral and multilateral commercial negotiations, as well as in the framework of unilateral commercial conventions (GSP, GSP+) and represent a substantial issue in terms of consultation and account of the positions and demands of the civil society actors, which include the trade unions. However, they confirm that commercial liberalization purely and simply is not automatically beneficial to development, which is the central plank of the Doha negotiation round: it needs to be managed and progressive. The studies show that the effects of opening up vary depending on the level of development in the countries and that differentiation within the developing countries is indispensable, whether the emerging countries like it or not.

Within the European Commission, it would be helpful to improve the interaction and co-operation between the closely connected areas of action, such as trade, employment and social affairs, development and the environment; the DGs concerned at the European Commission will need to set up a co-ordination body.

Improving the process for the consultation of the trade unions as civil society actors concerning these SIAs

There are many ways, so great is the marginalisation of the trade union organizations or the NGOs, with the first being the question of the resources in terms of expertise and the genuine possibilities for the involvement of the NGOs. This involvement might be substantially improved through a useful effect of their contributions, which would entail at least two types of actions:

- improving the dissemination of the information, its collection and the processing of contributions from the civil society actors (and thus the trade unions) as well as the

feedback mechanisms. To do this, it is important to ensure transparency in terms of the recognition and utilisation of the contributions from the trade unions as civil society actors and to provide for appropriate feedback of information;

- including the content of the questions raised by the civil society actors in the debates and analyses. The challenge would be to propose a process with a tangible impact on the framing of commercial policies. Many civil society representatives criticise the European Commission for not having clearly signalled, in some cases, how their contribution had changed the process for the framing of policies or political positions.

Conclusions

The danger of challenging the values structured around the Universal Declaration of Human Rights, and more particularly those applying in the exercise of paid work, **seems clear**.

How can we prevent core labour rights from being downgraded and called into question when inequalities in working and remuneration conditions are on such a scale and competing on the global market for goods and services? Should we close our borders? Obviously that is not the right answer, after the experience of the 1930s, a subject on which all analysts tend to link protectionist reactions to the crisis to the slippery slope towards the Second World War. On the contrary, the integration of the emerging countries into the global market for goods, services and capital represents a powerful instrument for economic growth and development, as certain Asian countries have demonstrated.

On the other hand, a problem arises when liberalization serves as the one and only remedy for the ills of the developing countries, as the Doha declaration would indicate.

So it is clear that the instruments, or the institutions, of global governance need to be reformed if the new global system is to be given frameworks and rules giving it fresh legitimacy. The trade union organizations, and in addition to them, some NGOs, represent central strategic players in rising to this challenge.

To do this, we need to assert loudly and clearly that respect for fundamental human rights in the production of goods and services is in no sense a protectionist measure in itself, and that consequently, **respect for labour rights is compatible with free trade**.

According to this reading, the failure of the Doha round lies at the door of the exhaustion of a method which has shown its effectiveness in the liberalization of the trade in goods but which suffers from a lack of consensus concerning the paths of economic development, given that opening up markets is not enough. Faced with that stalemate, putting forward the idea of decent work is a first bid to move beyond that contradiction, but it is still too exposed to divergent interpretations which hamper its implementation.

It is in this context characterized by the successive failures of the rounds of multilateral negotiations that the players from business and the non-governmental organizations have taken over from the States in promoting voluntary measures, such as signing international framework agreements within multinationals or drafting and complying with standards and labels on certain global markets. In both cases, respect for core labour rights is referred to and forms the structure, albeit on a scale which still remains modest, of the relations between producers and consumers. Accordingly, faced with the inaction of the States, civil societies are seizing the initiative, gradually gathering skills and implementing methods to tackle violations of labour rights around the world. This is what is known as ‘soft law’, which definitely has an impact at local level, but which cannot completely plug the gaps in international law.

This ‘soft law’ can also be a tool for the States, in their desire to sign up to the definition of public labels and standards.

In the construction of the legal argument for the WTO to take account of core labour rights, a number of levels need to be considered. Firstly, the foundations need to be consolidated by the pursuit of two objectives simultaneously: the recognition of the fundamental place of labour rights in the hierarchy of international standards, and the promotion of their status as *jus cogens*. As a complement, via the deciding advice mechanism, WTO law needs to reintegrate the international legal system and notably to call on the ILO on questions deriving from labour rights.

A major step forward will then be made in the search for coherence between commercial policy and international commitments by the States in terms of human rights. The UN concept of sustainable development built up on three pillars (economic, social and environmental) may then prove to be a potent tool for establishing coherence between the external policies of the States.

Beyond the basic legal arguments, the trade unions can put their case by reinforcing their presence and their expertise in the WTO through *amicus curiae* submissions, but also vis-à-vis the Member States upstream. From this point of view, there are many convergent paths open for action and for asserting trade unionism and its values of respect for labour rights among the non-negotiable elements of economic and political governance in the 21st century.

We have moved into a new phase of capitalism which calls for respect for new types of coherence by the players, be they State actors or others. In order to achieve this coherence, what the lawyers call 'the deciding advice', which we could translate as the response from the competent forum in the face of the problem raised, is indispensable. Yet how are we to imagine a competent, coherent response to the questions of labour rights without the active participation of the trade union organizations?

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