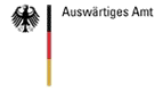


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Trade Instruments for Social Policy: An Overview of New Developments

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Abstract

Consumer concerns are at the heart of enhanced trade *liberalization*. What is the scope, though, for invoking consumer concerns in support of trade *restrictions*? This contribution focuses on concerns that consumers may have in respect of the “social background” of what they buy, that is, concerns about environmental, labor or other policies prevalent in exporting countries. It examines the WTO legality of trade instruments to respond to such concerns in the light of WTO case law and five recent examples: sanctions against Burma; restrictions on conflict diamonds; special EC preferences for developing countries combating drug trafficking; the Belgian law on a social label; and private fair trade labels. Although the WTO has become more tolerant in this respect, the case law remains patchy and unpredictable. Yet, when carefully tailored, most of the examples discussed ought to be accepted as WTO consistent, either because of explicit WTO exceptions or because they are based on other rules of international law to which the WTO must give deference. At the same time, it must be recalled that trade policy is not the first-best response to social problems abroad; nor should governments rely exclusively on consumer choice. At times, regulators *can* and *must* intervene to correct the market.

1. Consumer concerns at the WTO after Cancún

The topic of consumer concerns and the WTO is timely for at least three reasons:

- (1) “*Labeling requirements for environmental purposes*” are part of the Doha negotiations, now in dead-lock after the Cancún meeting;
- (2) in the *developed* world consumer demand for “fair trade” is at its height, even if it is inspired not only by genuine social sensitivity but also by latent and sometimes open protectionism;
- (3) in the *developing* world the opposition to linking trade to social concerns is as vehement as ever; this was most recently expressed in Cancún where even discussion of the Singapore issues (investment, competition, transparency in government procurement and trade facilitation) was categorically rejected.

The current political constellation leaves little hope for a negotiated resolution. As a result, the weight is likely to fall on the judicial branch of the WTO. What are the chances of the WTO Appellate Body upholding trade restrictions to respond to consumer concerns? No straightforward answers can be given. The case law so far remains patchy and it is difficult to predict the WTO compatibility of particular trade policies. In the context of a political deadlock, this creates significant uncertainty both for regulators and traders. It also permits extremism and posturing on both sides of the debate: developed countries pretending as if there is no doubt whatsoever that their initiatives are perfectly consistent with WTO rules¹; while some opponents continue to stick, for example, to the old GATT line of argument that only policies based on inherent product characteristics (not process and production methods) can ever be WTO-consistent.

The purpose of this contribution is to look at five recent examples in the United States and Europe where trade policy was used to give expression to consumer concerns. This will be done in the light of recent WTO case law and other developments in international law. The five examples are:

1. *A complete embargo*: The *2003 Burmese Freedom and Democracy Act* enacted by the United States, banning all imports from Burma/Myanmar with reference, in particular, to a recent ILO recommendation to take action against Burma for gross violations of the prohibition on forced labor.

¹ See the website of the Belgian social label at http://mineco.fgov.be/redir_new.asp?loc=/protection_consumer/social_label/home_nl.htm where the question is raised whether the social label is consistent with WTO rules. The response given is as follows (translated from Dutch):

“No! This would only be the case if the law were to impose a social label on companies or in case it were to prohibit the sale in Belgium of products without a label. This is not the case: everything happens on a completely voluntary basis”.

Obviously, anyone familiar with the WTO Agreement on Technical Barriers to Trade knows that even voluntary labels must comply with the Code of Good Practice and that voluntary labels may have a trade restrictive effect and hence falls also under GATT Article III. Although I think that the Belgian law can eventually be justified under the TBT Agreement, it remains doubtful whether it would pass the GATT test (in any event TBT prevails over GATT). At any rate, rather than rejecting the application of WTO rules in the first place, regulating countries ought to engage in a discussion of why their initiatives meet specific WTO disciplines (see the TBT Committee meetings held in Geneva, G/TBT/M/23 and 24, where very strong criticism was raised, especially by developing countries, against the Belgian law).

2. Product specific restrictions: The 2002 Kimberley Process Certification Scheme regulating the trade in rough diamonds so as to avoid that rebel groups in Africa can profit from so-called conflict or blood diamonds whose proceeds are used to sponsor brutal wars.
3. Country-wide or product-specific preferences: The EC's Scheme of Generalised Tariff Preferences granting extra tariff preferences to developing countries protecting labor rights, complying with standards concerning the sustainable management of tropical forests or combating drug production and trafficking (currently before a WTO panel at the request of India); along the same lines: the EC Commission's proposals on an Integrated Product Policy (allegedly „getting the prices right“ for products not complying with environmental standards).
4. Government-controlled labels: The 2002 Belgian Law to Promote Socially Responsible Production, setting up a voluntary label that companies can obtain if they can demonstrate compliance with the ILO's 8 core labor codes; along the same lines: GMO labels to inform consumer choice.
5. Private fair trade labels: Social Accountability International (SAI8000); Fair Trade Labeling Organizations International (FLO).

2. Think twice before using trade instruments to deal with social problems abroad ...

Firstly, *open* trade is to the benefit mainly of consumers. *Restricting* trade may increase prices and limit consumer choice. Therefore, before imposing trade restrictions regulators ought to think twice whether such restrictions are genuinely in the interest of consumers.

Secondly, trade policy is hardly ever a first-best solution to deal with social problems abroad. Child labor will not be stopped merely by imposing a trade ban; nor will Burma change its social policies simply because it is taken off the list of EU trade preferences. Social problems abroad are better dealt with *at their roots* (e.g. poverty and lack of education in the case of child labor); not by reacting to some of its fringe *consequences* (i.e., cheaper exports; even in South Asia only 5-7 % of children work in the export industry, most of them produce goods that are never exported). At best, trade instruments may provide an incentive to improve social conditions abroad. At worst, however, they can make things worse (children may, for example, be driven out of the better paid export industries and be forced into clandestine labor rather than schools).

Thirdly, before unilaterally deciding what social standards are appropriate in other countries, regulators ought to engage in good faith negotiations to try to reach agreement with exporting countries as to what environmental, labor or other standards ought to be upheld in order to obtain access to export markets. Given the worldwide diversity in natural resources, especially environmental standards may be justifiably different for each country. Only if exporting countries refuse to engage in such cooperation should unilateral alternatives be considered (see *US – Shrimp Turtle*).

Fourthly, if it is really the case that consumers are genuinely concerned about the social background of what they buy, then, in principle, there should be *no need* for the regulator to intervene. In that case, the consumers themselves will sanction goods made with, for example, child labor or coming from countries where human

rights are systematically violated. If consumers thus punish goods out of the market, there is no need for the regulator to intervene so as to correct market forces. On the contrary, intervention by the regulator (say, banning certain imports) may raise the question of whether the regulator *responded* to genuine consumer concerns that existed beforehand or whether these concerns were, rather, *triggered* or *created* only *after* and *because* the government had intervened (for example, would European consumers today be any more worried about hormones in beef than their American counterparts *but for* the European ban on hormone-treated beef as of 1981?).

3. ... Although sometimes trade instruments may be required or useful ...

The above four arguments do not imply, however, that governments should *never* intervene in the market place in response to consumer concerns. At least three situations can be thought of where government intervention is in place:

- (1) Even if the position is taken that we let the consumer decide, that is, let the market punish goods with a questionable social background, consumers *must be informed* of this background. This may call for compulsory negative labels (as in the case of GMOs) or for voluntary positive labels (as the Belgian social label). Importantly, if it is true that such labels are imposed *at the demand of* consumers, then for the regulator to follow suit and distinguish between, for example, GMOs and non-GMOs should not constitute discrimination between „like products“ (as prohibited in GATT Art. III). In that event, the regulator would only treat two types of products differently because *consumers* make the distinction, i.e., the regulator is then *not* discriminating but rather treating different products differently. In this respect, the Appellate Body report on *EC – Asbestos* is crucial. It found that GATT discrimination and likeness is to be decided not simply on the basis of objective product features or physical characteristics, but on

the *competitive relationship in the marketplace* between allegedly ‚like‘ products ... [based *inter alia* on] the extent to which *consumers* are willing to use the products to perform [certain end-use] functions (consumers’ tastes and habits) ... If there is – or could be – *no* competitive relationship between products [for example, because EU consumers treat GMOs very differently from non-GMOs] a Member cannot intervene, through internal taxation or regulation, to protect domestic production. Thus, evidence about the extent to which products can serve the same end-uses, and *the extent to which consumers are – or would be – willing to choose one product instead of another to perform those end-uses*, is highly relevant evidence in assessing the ‘likeness’ of those products under Article III:4 of the GATT 1994.²

As a result, whether a specific policy is discriminatory in GATT terms will depend on the *particular market we are talking about*: in the EU GMOs and non-GMOs may not be in a sufficient degree of competition so that the regulator *can* treat them differently; in the United States, consumers may *not* make this difference so that any intervention by the regulator against GMOs

² Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (“*EC – Asbestos*”), WT/DS135/AB/R, adopted 5 April 2001, paras. 115 and 117.

would alter the competitive relationship to the detriment of GMOs (and we could therefore talk of discrimination in the US).

- (2) In certain cases consumer concerns may relate to *actual risks* when consuming or using the goods in question. If those health risks are real, then it may not always be enough for regulators to *inform* consumers of those risks (e.g. by means of a label). In most cases, responsible governments will then *ban* the marketing of those products (be it beef from mad cows or products containing asbestos). In these situations the choice *cannot* be left to consumers and the regulator must intervene to protect consumers (albeit sometimes against the consumers' own ignorance or indifference). GATT Art. XX as well as the WTO agreements on sanitary and phytosanitary (SPS) measures and technical barriers to trade (TBT) grant an explicit right to WTO members to impose trade restrictions in such cases (see *EC – Hormones* and *Australia – Salmon* disputes, upholding even a zero-tolerance level of acceptable risk).
- (3) Even when it comes to consumer concerns that have nothing to do with risks inherent in the product itself, trade restrictions may still be called for, for example, in the event the exporting country agreed to uphold certain minimum standards but was found to persistently violate these standard (as is the case with Burma in respect of ILO standards against forced labor); or in the event good faith negotiations with the exporting country failed and the importing country feels obliged to resort to unilateral action so as to uphold certain minimum standards (although in this latter event it is important to take non-discriminatory and tailor-made action, as discussed below, see *US – Shrimp Turtle*). In this respect, the following statement by the Appellate Body in *US – Shrimp Turtle* is crucial:

It appears to us ... that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies *unilaterally prescribed* by the importing Member may, to some degree, be a common aspect of measures falling within the scope [of the GATT Art. XX exceptions permitting trade restrictions]³

4. ... But even then guard for discriminatory or unnecessary trade barriers

Even in the above situations where trade instruments may be warranted to deal with consumer concerns, regulators ought to be careful not to act out of protectionism or in a discriminatory way or to use instruments that restrict trade more than necessary.

Two common pitfalls can be pointed at:

- (1) Even the *ILO Declaration on Fundamental Principles and Rights at Work* warns that labor standards „should not be used for protectionist trade purposes, or to call into question a country's comparative advantage“.⁴ Especially in the current US climate – where 3 million jobs were lost in 3 years time – the argument of „leveling the playing field“ or trading only with nations that have standards in place similar to those in the US is often

³ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ("US – Shrimp"), WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, at para. 121.

⁴ Art. 5, ILO Declaration, International Labour Conference, 86th Session, Geneva, June 1998.

heard. Although consumers in the US may be genuinely concerned about labour practices abroad, to ban trade based on differences with US standards would amount to blatant protectionism in so far as it is aimed purely at preventing that other countries take advantage of their comparative edge in labor costs, natural resources, etc.

- (2) When restricting trade based on social policies abroad, it is important to maintain a close nexus between the *specific product* that is banned or restricted and the *objective* in mind (for example, the US lost the original *Shrimp Turtle* case *inter alia* because its ban was imposed on a country-wide basis, not on a product-specific basis, so that even shrimp caught with the right nets was banned simply because it came from a country with the wrong policies in place). Without such close relationship to the specific product that is banned, there is a risk of escalating protectionism (for example, one could then think of Europe banning all US imports on the ground that the US upholds the death penalty; or the US could ban all EC imports on the ground that 'old Europe' refused to participate in the war on Iraq).

In addition, a strong nexus is required also between *the country imposing the restriction* and the *object of protection* (e.g. between the US or Belgium, on the one hand, and migratory turtle, workers in Burma, public morals or the prevention of deceptive practices in the regulating country, on the other hand).

Finally, some proportionality must exist also between the *trade instrument used* and the *objective in mind*, ie, the instrument must be tailored to the specific end and not be more trade restrictive than necessary.

All of these conditions are found in GATT Art. XX as interpreted by the Appellate Body in *US – Shrimp Turtle* and *Korea – Beef*.

In addition, even if the above pitfalls can be avoided, it remains important to soften the impact of trade restrictions especially on developing countries. In this respect, international cooperation and harmonization is crucial since it avoids the need to set up as many production units as there are standards imposed by importing countries. To this end, the obligation on WTO members (under the TBT agreement) to use international standards is helpful (although one may have doubts as to who and how these standards are set). Developing countries must also be assisted in their preparation for compliance with different standards and labels (as the Belgian law on a social label sets out to do). Once well-informed and supported, developing countries could even exploit such standards and labels to their *advantage* (to the extent that consumers in the developed world are willing to pay extra for „fair“ trade goods coming from poor countries).

5. Even if WTO rules may not always justify trade restrictions for social policy, sometimes other rules of international law may do so

Finally, even if WTO rules or exceptions (including GATT Art. XX) may not justify the use of trade instruments to pursue social objectives abroad, there may still be other rules of international law in support of such instruments. To the extent both parties

involved are bound by such other rules, WTO panels ought to respect and apply those rules.⁵ Two examples come to mind:

First, the *2003 Burmese Freedom and Democracy Act* enacted by the US Congress earlier this year and banning all imports from Burma into the US market. There are good reasons to think that even under explicit WTO rules such ban should be accepted by the WTO (in particular under GATT Art. XX). However, even if it were not justified under specific WTO exceptions, the ILO recommendation of 2001 calling upon all ILO members (including the US) to take action against Burma on the ground that it had persistently violated core labor standards (to which Burma itself agreed) ought to be taken into account also by a WTO panel and should constitute a valid US defence against any Burmese claim of violation of WTO rules.

Second, most WTO members engaged in the diamond trade have agreed, in the framework of the UN initiated and supported *Kimberley Scheme*, to restrict all trade in rough diamonds that is *not* certified as „conflict free“. Once again, it is very likely that such trade restrictions on diamonds are justified already under GATT exceptions (Art. XXI and/or XX) or the TBT Agreement. However, even if they were not, any WTO member imposing those restrictions who is later challenged before the WTO ought to be permitted to invoke the Kimberley scheme in its defense, at least as against a complainant who has itself agreed to this scheme. When it comes to non-participants to the scheme, it is interesting to note that the WTO enacted an explicit waiver. On the one hand, this seems to confirm the fact that *as between* participants the Kimberley scheme itself justifies the restrictions; on the other hand, it risks sending out a wrong signal in that WTO Members seemed to think that trade restrictions to stop brutal wars in Africa sponsored by the revenues of conflict diamonds would *not* be justified by existing WTO rules.⁶

⁵ See this author's *How to Win a WTO dispute based on non-WTO law: Questions of Jurisdiction and Merits*, JOURNAL OF WORLD TRADE (forthcoming, 2003-6)

⁶ See this author's *What to Make of the WTO Waiver for "Conflict Diamonds": WTO Compassion or Superiority Complex?*, 24 MICHIGAN JOURNAL OF INTERNATIONAL LAW (forthcoming 2003-4).