

INTERNATIONAL ECONOMIC LAW: IS THERE ANY TENSION BETWEEN THE TRADE REGIME AND HUMAN RIGHTS?

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Abstract

It is well-known that being efficiency-oriented and utilitarian, the International Economic Law focuses on the market itself, while the human rights should protect the individual within the global economy. During the first part of the XXth century, human rights experts and their trade policy counterparts ignored each other. There was no interest about how international trade policy could affect protection of fundamental rights. In the 90's the international community started to be more aware of the impact which the international economic agreements may have on public interest concerns such as worker's health and safety or environmental protection as a fundamental right. At that time it has been argued that the world trade regime and human rights are starting to be in a fundamental tension with each other.

KEYWORDS: environment, enterprise, fundamental rights, GATT, human rights, workers' rights, WTO

JEL Classification: F, I, K

Introduction

International economic law and international human rights law are so different in their approaches than for a long period of time there was no interest on how they could affect each other. International economic law focuses on the market itself, on values of wealth and well-being, while international human rights law centers on respect and dignity of human beings.

In the 90's the international community started to be more aware of the impact which the international economic agreements may have on the public interest concerns such as worker's health and safety or environmental protection as a fundamental right. Moreover, there were critique arguments related to the two bodies of law. On the one side, it was stated that if they are not incompatible, than they are in tension because international economic law is based on a set of values which are fundamentally antithetical to the values which the modern human rights approach is promoting. On the other side, some argued that these two bodies of law run in the same direction because the market and human rights can coexist and their norms reinforce each other.

The present paper analyses the conflict between norms of international economic law and human rights, the issue whether trade can be used to promote

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non-economic values such as human rights, as well as the responsibility of any business enterprises to respect fundamental rights.

International economic law and human rights

Although its roots go back to the ancient civilization, nowadays, international economic law regulates international norms concerning economic relations and investments, economic institutions and development, as well as regional economic integration. It covers the conduct of sovereign states placed in international economic relations and the conduct of private parties involved in international business transactions. *Stricto sensu*, international economic law regulates the international economic order which includes the trade law composed of the international law of the World Trade Organization and GATT (Charnovitz, 2011, p. 4).

On the other side, the philosophical origins of human rights are as recent as modernity. International human rights law means a body of international norms designated to promote and protect individual rights at the international, regional and national levels.

Trade regulations and human rights protection form essential parts of the UN Charter which contributed to the development of the international law. Adoption of the General Agreement on Tariffs and Trade (GATT) in 1947 and the Universal Declaration of Human Rights in 1948 put the basis for the evolution of the two bodies of law, which developed in their own ways having their distinctive institutional systems. The separation between trade and human rights is mainly determined by the fact that the first one is based on positive law and the second one on the natural law.

For many decades, the legal relationship between the two kinds of international norms was one of co-existence. The first linkages were created through UN embargoes against the South African's apartheid policies by imposing multilateral trade sanction measures to punish and eliminate the violation of human rights. Also, the concept of good governance put together human rights and trade policies in bilateral or regional agreements.

As a primary organism of international trade, the WTO is both an assembly of state members and a legal apparatus. The creation of World Trade Organization (WTO), which covers three areas: trade in goods, trade in services and intellectual property, expanded the international economic norms, and, in the same time, riced the concern of the human rights experts who expressed their fear that the newly founded organization will promote free trade above human rights protection, leaving legitimate concerns without adequate consideration. Nevertheless, article XX of GATT, article XIV of the General Agreement on Trade in Services (GATS) and article 8 of the Agreement on Trade-Related Intellectual Property Rights (TRIPS) permit trade restrictions based on the need to protect public morals or human life and health, but there is no explicit linkage between human rights and trade rules in WTO law. Member states must nonetheless comply with their

responsibilities under the international human rights law. So, this body of international norms imposes on states three general obligations:

- obligation to respect the rights which individuals enjoy that requires states not to interfere and take any measures that result in preventing such enjoyment;
- obligation to protect these rights from being infringed by the acts of private parties which requires measures to ensure that enterprises and individuals do not deprive human beings of their fundamental rights;
- obligation to fulfill (facilitate, provide) these rights which means that states must proactively engage in activities intended to strengthen people's rights.

Based on these international obligations, the WTO Members should have the duties to act under and in conformity with the international human rights law provisions. Anyway, it has been underlined that even if there are different sets of obligations imposed on states under WTO agreements or any other regional and bilateral agreements, the three general obligations under international human rights law should apply with priority.

Is international trade policy used to promote human rights?

Using trade policy to promote non-economic values is a controversial approach. During the last century, there were many voices which called to make more use of trade policy in promoting human rights. The most common measure applied by states as a trade policy regarding the promotion of human rights was the trade sanctions. These restrictions may take the form of import or export bans, quotas, licensing requirements, tariffs, financing assistance, or conditions on government procurement. They have been used to target states that practice widespread genocide or torture, to dismantle apartheid regimes, and to promote the restoration of democracy. Besides the multilateral measure, there are, also, unilateral economic sanctions employed by countries for a variety of other purposes.

The examples of China and conflict diamonds in Africa raised the issue whether trade can be used to promote non-trade values such as human rights. History shows that nations have applied, many times, trade sanctions to promote respect for human rights. In the 19th century, states adopted trade restrictions to abolish slavery and to restrict imports made with other forms of forced labor. Also, the mass violation of human rights during the 20th century engaged trade sanctions for states like Uganda in 1978, Poland in 1982, and Panama in 1980's. So, economic sanctions may be used to punish a foreign state for its human rights practices, to deprive a state of needed goods or foreign currency, to express the state's outrage at human rights atrocities, to prevent a state's own markets from contributing to human rights violations, to morally distance a state from human rights violators, and to generate pressure for the adoption of multilateral actions.

Nevertheless, current WTO jurisprudence raised the question of human rights violations, whether the GATT eliminates the use of trade sanctions to promote compliance with human rights. It was argued that bans on imports made with exploitative child labour are consistent with GATT requirements, while decisions used to target fundamental human rights violations, such as crimes against humanity or genocide, are not trade-related.

However, as had been shown by many trade sanctions, to use trade policy in addressing human rights violations is not efficient because the trade policy is supposed to serve a range of economic and prosperity goals. For example, the trade sanctions imposed on Bangladesh were used to eliminate massive number of child labourers. Their real effect was one of worse forms of child labour in the informal market to which international monitoring institutions have no access. Also, the economic sanctions against Columbia did not achieve their objectives. Although, the net land area under coca cultivation decreased in Columbia in 2009, it increased substantially in Peru and Bolivia, affecting the respect for human rights in other regional countries.

Furthermore, the trade measures that are subject to the GATT non-discrimination provisions may satisfy one of the Article XX or XXI exceptions. For example, tailored measures targeting goods produced with prison labor are expressly allowable under the Article XX (e) exception for goods “relating to ... the products of prison labor.” Limiting the human rights measures allowable under Article XX to those relating to the prison labor, for example, would result in an interpretation that permitted trade sanctions to target prison labor abroad but would not allow for measures targeting slave labor, which is an even more egregious human rights abuse. This irrational result alone suggests that a more systematic and rational approach to the relationship between the GATT and human rights measures is required.

An evolutionary approach could interpret the Article XX (a) which states that public morals exception embraces both the *jus cogens* norms and human rights law that are mutually binding on states by the treaty. These norms could include the prohibitions against systematic racial discrimination; slavery, forced labor, and exploitative child labor (if not encompassed by the human life or prison labor exceptions); the right to freedom of association and possibly evolving norms *erga omnes* such as the right to property and the prohibitions against religious and gender discrimination and the overthrow of democracy (Cleveland, 2001, p. 219). Also, the Article XX (b) which regulates that human life exception could be understood to embrace fundamental human rights values such as the prohibitions against genocide, summary execution, disappearance, crimes against humanity, and the execution of juveniles. It is obvious that a modification of GATT is more difficult to be done than a larger interpretation of the Article XX. So, GATT should be seen as a living treaty and should be interpreted in the conformity with the present reality and requirements.

The business enterprises' responsibility to respect human rights

As stated in both 1966 UN Covenants on civil and political rights and on economic, social and cultural, the human rights derive from the inherent dignity of the human person and are based on the recognition of this dignity, as well as of equal and inalienable rights of all human family's members as the foundation of freedom, justice and peace in the world. These rights exist *erga omnes* and, due to their integration into international *ius cogens*, they require respect, legal protection and fulfillment by any governmental or nongovernmental entity (Petersmann, 2008, p. 771).

Globalization made the transnational corporations and other large business more powerful and, at the same time, more responsible. The last centuries' preoccupation for an international established responsibility of multinational corporations in respect of their human rights abuses was failed.

However, the adoption of Kofi Annan's proposal for a Global Compact in 2000 that support and promote ten universally accepted principles which protect the human rights, the standards of labor and standards of environmental protection, as well as good governance without corruption. So, among the ten principles, six are related to the promotion of individual rights as follows:

- business should support and respect the protection of internationally proclaimed human rights;
- business should make sure that they are not complicit in human rights abuses;
- business should uphold the freedom of association and the effective recognition of the right to collective bargaining;
- business should uphold the elimination of all forms of forced and compulsory labour;
- business should uphold the effective abolition of child labour;
- business should uphold the elimination of discrimination in respect of employment and occupation.

The 2003 United Nations Sub-Commission on the Promotion and Protection of Human Rights' Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (thereinafter "the U.N. Norms") is the first document, which deals with the issue of multinational corporations' responsibility for human rights violation that has been accepted at the international level. It establishes obligations for business referring to human rights law, humanitarian law, international labor law, environmental law, consumer law, and anticorruption law. The U.N. Norms are applicable not only to "transnational corporations", but to any "other business enterprises", too. The basic principle of the U.N. Norms is that this document should be respected by all businesses. Those enterprises that are not in compliance with the U.N. Norms should be encouraged to meet these standards through business retaliations. So, the corporations are obliged under the U.N. Norms to do businesses only with those suppliers and contractors who are following these Norms or similar provisions. Each transnational corporation or other business enterprise shall apply and incorporate these Norms in

their contracts or other agreements and dealing with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons who enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms.

The U.N. Norms does not differentiate among diversity of businesses based on their types of activities, size, domestic or international nature of their operations, and any other factor. They make distinction between corporations with regard to their ability to influence markets, governments, stakeholders, and communities: “states have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights.” Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups. The U.N. Norms recognizes larger businesses that engage in boarder activities and enjoy more influence to have greater responsibility for promoting and protecting human rights. Small enterprises are also accountable to similar human rights standards required under the U.N. Norms. Together, through their responsibility, they can make a positive contribution to the development, adoption, and implementation of human rights principles.

General obligations resulting from these rules state clear that they are not intended to reduce the obligations of the governments. The procedures of implementation may eventually be supplemented by other techniques and processes. The companies are allowed to adopt and implement their own rules, which must be in conformity with the Norms; furthermore, the monitoring procedure is complemented by the right to adequate reparations for anyone harmed by conduct that was inconsistent with the standards of the Norms. So, the Norms intend not only to prevent the violation of human rights, but also to repair past harms.

The U.N. Norms should be implemented first at the level of each company; the internal rules of the corporations should be in conformity with his document and they should be disseminated to the relevant stakeholders. Furthermore, the companies are obliged to do business with partners that are complying with the obligations stated above. Monitoring procedure plays an important role in the Norms implementation. The companies are obliged to “establish legitimate and confidential avenues for workers to file complaints regarding violations” and to “refrain from retaliating against workers that do make complains.” They also have to make periodic reports and to take measures to implement the U.N. Norms fully. The Commentary to the Norms requires the business to include a “plan of action” for reparation and redress in case of human rights violations.

The Norms suggests that the business should be held responsible for human rights violation in front of U.N. treaty bodies, which deals with individual

communications. Also U.N. special rapporteurs and other thematic mechanism, international organizations and international courts may use the Norms and Commentary to raise concerns about business activities with regard to human rights violations.

Conclusions

The dichotomy between trade policy and human rights is a false one. Economic sanctions are an old approach used to promote human rights without any chance of being effective. Imposing sanctions, the trade is politicized and the possibilities of human rights violations are growing. As an attempt to implement trade policy, it should be addressed the respect for fundamental principles of international economic law, among which the respect for human rights and international obligations. Trade policy does not operate by itself; it often reflects the societal concerns. So, it must harness the economic benefits of trade liberalization and, in the same time, promote universal values such as human rights. Trade and human rights are not in a real conflict, but rather they coexist, enforcing each other.

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