

SOCIO-ENVIRONMENTAL SUSTAINABILITY IN THE WORLD TRADE ORGANIZATION

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ABSTRACT

Social and environmental concerns are provided for in various World Trade Organization documents. However, their effective implementation today to curb socio-environmental dumping, for example, is a challenge. These barriers are often domestic, that is, traditionally subject to the sovereignty of member states and, therefore, outside the scope of WTO's multilateralism. However, there are cases that should be pointed out as indicative of change, and the socio-environmental theme was the subject of several panels of the dispute settlement body, the articulation of thematic discussions and the participation of other agents besides the national States indicate changes, even if indirectly. The article analyzes the practice of technical and regulatory barriers, summarizes some cases that were the subject of a decision by the Dispute Settlement Body, discusses voluntary and mandatory sustainability standards, and ends with the observation that the participation of society has taken place indirectly, through studies, consultancies and participation via *amicus curiae*. The approach was qualitative to describe some exemplary cases to substantiate the possible finding brought here that the WTO faces the structural challenge of inserting socio-environmental concerns in its way of interpreting and applying its rules and, therefore, efforts need to be made to increase its legitimacy to deal with transdisciplinary issues.

Keywords: social and environmental dumping; sustainability standards; technical and regulatory barriers; WTO jurisprudence; WTO sustainability

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SUSTENTABILIDADE SOCIOAMBIENTAL NA ORGANIZAÇÃO MUNDIAL DO COMÉRCIO

RESUMO

A preocupação socioambiental está prevista em vários acordos firmados na Organização Mundial do Comércio. Contudo a sua implementação na atualidade para coibir o dumping socioambiental por exemplo é um desafio. Essas barreiras são muitas vezes internas, ou seja, tradicionalmente submetidas à soberania dos estados membros e, portanto, de fora do âmbito de abrangência do multilateralismo da OMC. Contudo há casos que devem ser apontados como indicativos de mudança e a temática socioambiental foi objeto de diversos painéis do órgão de solução de controvérsias, a articulação de discussões temáticas e a participação de outros agentes além dos Estados nacionais, ainda que de forma indireta indicam mudanças. O artigo analisa a prática das barreiras técnicas e regulatórias, faz um resumo de alguns casos que foram objeto de decisão no Órgão de Solução de Controvérsias, discorre a respeito dos padrões de sustentabilidade voluntários e obrigatórios e termina com a constatação de que a participação da sociedade tem se dado de forma indireta, via estudos, consultorias e participação via amicus curiae. A abordagem foi qualitativa para descrever alguns casos de exemplificativos para fundamentar a possível constatação aqui trazida de que a OMC enfrenta o desafio estrutural de inserir preocupações socioambientais na sua forma de interpretação e na aplicação de suas regras e para tanto esforços precisam ser feitos para o aumento de sua legitimidade para lidar com questões transdisciplinares.

Palavras-chave: barreiras técnicas e regulatórias; dumping socioambiental; jurisprudência da OMC; padrões de sustentabilidade; sustentabilidade na OMC.

INTRODUCTION

International trade is one of the most powerful forces to influence politics and the economy, as well as to leverage the development of countries. Due to the series of benefits it provides, such as a greater variety of products, lower prices for consumers, more efficiency, cultural interactions, peaceful coexistence, etc., international trade cannot be seen as a zero-sum game (where one loses and another wins), nor does it need to be based only on comparative advantages (producing what one has more vocation for, lower opportunity cost), as there are ways to balance different interests, mainly socio-environmental ones and those necessary for the green technological transition, through public policies and national strategies in consonance with international regulations as well.

On the other hand, as it expands (and this has been constant, especially after the World War II), challenges diversify and proliferate, demanding transformations. If for decades the multilateral commercial legal regime of the World Trade Organization was very focused on liberalism and the promotion of product exchanges, today the challenge is to orchestrate a series of complementary and opposing interests in the pursuit of socio-environmental development. Food security, environmental preservation, emissions, biodiversity, ecosystem services, predatory exploitation of resources assume an increasingly important role in the commercial agenda as well.

The approach was qualitative, with the descriptive objective of identifying common characteristics of some decisions of the WTO dispute settlement body that bring the socio-environmental theme, as well as to discuss potential new non-tariff barriers to trade which are the various voluntary standards of sustainability that have been increasingly demanded. The bibliographical and documentary survey discussed here was carried out until mid-2019 and did not intend to exhaust the subject, on the contrary, it also identified several gaps that need to be explored further in subsequent research.

This article is divided into five parts after this introduction: 1) first, it points out some of the challenges that production in global value chains brings to socio-environmental sustainability; 2) then it highlights that barriers to international trade currently tend to be technical and regulatory, therefore often implemented by domestic measures, which increases the complexity in determining whether they effectively aim to protect socio-environmental resources and therefore are fair barriers to trade; 3)

these barriers end up being the object of analysis by the WTO, mainly in the panels, which is why some cases related to socio-environmental sustainability that were the subject of a decision by the Dispute Settlement Body are summarized here; 4) in addition, this text discusses voluntary and mandatory sustainability standards, the benefits and challenges that this type of regulation can bring, including disguising measures that are harmless to the environment and harmful to free trade; 5) noting that the WTO would need to assume a more active role regarding the meta-regulation of these standards, using technology and allowing greater participation by society, which today takes place indirectly, via studies, consultancies and contribution via *amicus curiae*.

1 SOME CHALLENGES OF GLOBAL VALUE CHAINS

International trade is an engine for fostering economic development, and needs to be geared towards promoting inclusive economic growth, poverty reduction, raising labor standards and a reasonable and sustainable use of natural resources. Reflecting this demand, socio-environmental sustainability appears in several agreements signed in the WTO: preamble, articles X and XX of the General Agreement on Tariffs and Trade (GATT) (WTO, 1994a), the Agreement on Sanitary and Phytosanitary Measures (SPS) (WTO, 1994c), the Agreement on Trade Aspects of Intellectual Property Rights (TRIPS/TRIPS) (WTO, 1994d) and the Agreement on Agriculture (WTO, 1994b).

Regardless of these various possibilities, historically, the WTO has focused primarily on trade liberalization via the eradication of tariff barriers between countries. However, in the face of contemporary challenges, the main challenge is no longer ostensible protectionism, but the “resurgent ethos of liberal capitalism”² (RUGGIE, 2017, p. 3), which can have harmful measures with a broader impact than classic protectionism and conceal the harmful conduct behind national and subnational norms.

As a result, the WTO faces the great structural challenge of including socio-environmental concerns in its interpretation and application of its rules beyond the merely competitive universe of eradicating tariff barriers,

2 What the author identifies as the “resurgent ethos of liberal capitalism” (RUGGIE, 1982) is the fact that clear protectionist, autarchic and internationally regulated governmental measures are reducing what brings to corporations responsibilities previously thought to be outside the private sector and that today must permeate all stages of production, as guided by the UN Guiding Principles on Business and Human Rights (RUGGIE, 2017, p. 3) in order to form an “embedded liberalism”, that is, the ability to combine the efficiency of markets with broader values.

including more diffuse forms of violation of fair trade (VIEIRA *et al.*, 2016). An example of this type of problem is the social and environmental dumping that has been implemented along the current form of production in global value chains.

The current form of production in global value chains has had a positive effect on the growth of developing countries, the expansion of the middle class and the transfer of global purchasing power to some previously peripheral economies, mainly in Asia (WTO; UIBE; OECD, 2019). Currently, more than two thirds of international trade involves a global value chain, that is, its production crosses at least one national border (and usually several) before being finalized (UNFSS, 2017). The phenomenon stems from two decades of low cost of maritime transport, ease of communication and progressive reduction of barriers to trade (BALDWIN, 2016). However, the benefits of globalization have not been distributed in a balanced way, this justifies, at least to a certain extent, the growth of protectionist measures, the decrease in multilateral or regional negotiations, and the opposition in several places against globalization (WTO; UIBE; OECD, 2019).

One of the main problems is related to socio-environmental resources. Businesses and countries take advantage of places where labor and natural resources can be recklessly exploited to produce cheaper products and services and thus earn more than competitors who meet higher social and environmental standards. This does not mean that these companies necessarily fail to comply with national laws or that production should not be internationalized, exploiting the comparative advantages of developing countries.

This is a relational issue of competitiveness. There is an ethical limit to this equation. *Trade and* issues, so-called issues that are indirectly related to trade (such as human rights, labor and environmental issues) can represent a negative differential that reflects in unfair trade practices when products and services arising from the exploitation of these resources are marketed in a same market and generate a negative spiral of exploitation and fading of protections (COLUMBU, 2017).

It is different to profit from the comparative advantage of production where the minimum wage is lower than to keep the workforce in conditions equivalent to those of slaves. Likewise, the exploitation of natural resources in a sustainable way differs from their exhaustive use. On the other hand, practices to curb extreme situations of exploitation and degradation

also run the risk of disguising a different form of protection for national industry, popularly called “green protectionism”.

In this logic, the challenge of promoting fair trade becomes more difficult. And the WTO, in order to establish this ethical minimum of protection between countries and contain unfair competition, needs to make subsidiary use of what is the subject of guidelines issued by other international organizations, such as the International Trade Organization and treaties and decisions originating from other international legal regimes, such as the climate one and the protection of human rights, for example.

Such collaboration at the domestic level would be relatively easy, because domestic legal regimes tend to be coherent and subject to a hierarchy, but in International Law, legal systems are fragmented, which generates differences in interpretations of similar themes when dealt with by different bodies, which compromises predictability and application. Qualities that set OMC apart. As compared to other international organizations, it is one of the strongest, as its dispute settlement system has coercive tools.

Thus, whenever an understanding originating from another organization is evoked, the discussion arises that the member states, in their constitutive mandate, intentionally left these other institutions weaker and that, therefore, the WTO must adopt very strict interpretations only to questions related to trade international level, otherwise its effectiveness may be compromised.

In addition to the challenge of seeking subsidiarity with other international regimes, the origin of the problems has also changed. If in the past the barriers to free trade were applied at the borders, now they can provide for the most varied domestic rules such as the national labor and environmental laws of a country and even subnational policies such as practices adopted by a city or state, not necessarily by the countries.

These numerous regulations within national borders add even more complexity to the multilateral trading system whose function is to promote a continuous comprehensive monitoring policy, encourage open, transparent, predictable, inclusive, non-discriminatory and equitable rules, in addition to serving as a forum for discussion and continuing trade liberalization and promotion of ethics (WTO, 2016). The Green Economy paradigms (UNEP, 2011) to be implemented depend on this and the capacity of the commercial system to encourage long-term investments, cleaner productive capacities and decent work (DENNY; CASTRO; YAN, 2017; DENNY; JULIÃO, 2017).

The WTO model of trade disputes needs to be improved in order to have legal tools that are effective enough to analyze cases of positive regulation in the relationship between trade and the environment, which are still few, “rarely [...] have the paths of the international trade and preservation of the environment crossed each other” (JÚNIOR, 2011, p. 137). Making the reservation here that labor relations and human rights standards are also part of this concept of environment.

Many measures without socio-environmental commitment focused only on economic returns have emerged, contrary to the logic of the multilateral system of international trade, mainly based on bilateral or unequal negotiations such as mega-preferential trade agreements, such as the Trans-Pacific Partnership (TPP)³, the Transatlantic Trade and Investment Partnership (TTIP)⁴ and the Association of Southeast Asian Nations (EU-ASEAN) Free Trade Agreement. These initiatives are outside the scope of the WTO, do not follow the logic of regional agreements and can be very unbalanced, including from a socio-environmental point of view.

In view of this, it is evident that the international trade of the twenty-first century is different from that of twentieth century, whose main theme was trade liberalization via the overthrow of tariff barriers and the articulation via great auspicious international treaties with mandatory goals that proved to be difficult to achieve. Bilateral, plurilateral and preferential agreements create specific privileges and weaken the model of multilateral negotiations and the concern with liberalization. Thus, the removal of barriers can no longer be focused on taxation and national policies, nor depend on large multilateral negotiations. Other forms of trade barriers need to be analyzed.

2 TECHNICAL AND REGULATORY BARRIERS

These other impediments to free trade, much more complex and difficult to negotiate, do not even necessarily present themselves as international trade measures, they are within national legal systems, they are administrative measures adopted within borders, also called “behind borders measures” (THORSTENSEN; MESQUITA, 2016). And each country in the exercise of its sovereign power can use its public policies in the way

³ Free trade agreement established in 2015 between twelve countries bordering the Pacific Ocean and deals with political and economic issues.

⁴ Proposed free trade agreement between the US and the European Union in the form of an international treaty.

it deems most convenient. Thus, in the context of technical and regulatory barriers, the fusion of legal, political and economic issues is increasingly commonplace, which demands an increasingly creative and coordinated public policy articulation with civil society and companies.

Mainly related to public health and the environment, technical and regulatory barriers are abundant and therefore international trade rules should seek to implement coherence, convergence and cooperation for the trade regulation system (THORSTENSEN; MESQUITA, 2016). Regulatory gaps, unbalanced articulations and misaligned incentives risk financial stability and compromise the implementation of the Sustainable Development Goals (UN, 2015). As a programmatic and intervention content in the economic domain, legal systems can be used as a regulative instrument, becoming “a technology that can be fine-tuned and optimized to reach a stated purpose” (VINUALES, 2015, p. 63).

The current abrupt empirical technological and environmental transformations require consistent political and legal changes, given that monitoring and forms of investment, national policies and financing are indispensable mainly to favor the “emergence, experimentation and improvement” (VINUALES, 2015, p. 63) of new technologies and processes. And this type of adaptive socio-environmental regimes are deeply based on investment policies. Therefore, incentives are fundamental, especially when the objective is to cut steps through capacity building, making those who do not have access to energy, water or sanitation gain access directly with the latest technologies, the most socio-environmentally efficient.

Ideally, the multilateral trade body itself should carry out the meta-regulation activity and, therefore, contribute to the establishment of homogeneous and internationally accepted criteria for calculating the values to be used to equalize the socio-environmental cost of the global production of value, as in the case of the application of border carbon adjustments (DENNY; GRANZIERA, 2016). However, the WTO has been reluctant to act on the environmental issue, which has only been included in the agenda via panels. Some panels were remarkable for dealing with the socio-environmental theme in a very direct way.

3 JURISPRUDENCE RELATED TO THE ENVIRONMENT

The WTO dispute settlement mechanism will be increasingly called upon to decide issues related to public health, nature and working

conditions, as these issues increasingly impact the competitiveness of companies producing in global value chains and competing directly in the most varied markets (UNFSS, 2017).

Among the issues that have already been the subject of panels is the possibility of countries blocking the entry of foreign products that are proven to cause diseases, such as asbestos tiles, serve as breeding grounds for disease vectors, such as retreaded tires, or whose risks are unknown, such as the consumption of genetically modified grains. Measures aimed at protecting endangered species such as sea turtles and dolphins have also been decided upon (BERNASCONI-OSTERWALDER *et al.*, 2012). Only some of these disputes will be detailed below.

3.1 Shrimp–Turtle case

There are around seven species of sea turtles distributed mainly in subtropical and tropical zones. In early 1997, India, Malaysia, Pakistan and Thailand contested a US ban on importing shrimp from these countries (MENEZES *et al.*, in press). The US Endangered Species Act of 1973 listed five endangered or threatened sea turtle species prohibiting their capture in the US. According to the law, the United States required that the nets used for shrimp fishing have escape devices for the turtles. Thus, countries that have in their waters any of the five species of sea turtles and that fish for shrimp with nets should impose the same devices required of North American fishermen, if they wanted to obtain the certificate and thus export such products to the USA.

When examining the issue, the WTO Appellate Body made it clear that, under WTO rules, countries are entitled to take trade measures to protect the environment (especially to protect the health and life of people and animals or to preserve plants, and to protect endangered species). It also mentioned that measures to protect sea turtles would be legitimate, in accordance with Article XX of the General Agreement of the WTO, which establishes different exceptions to the general trade rules of the WTO, provided that certain criteria such as non-discrimination are met.

However, the United States was not successful in its defense, not because it intended to protect the environment, but because it discriminates against some WTO members. This is because at the same time they offered countries in the Western Hemisphere, mainly in the Caribbean, technical and financial assistance, as well as some ample transition periods for their

fishermen to start using turtle protection devices. On the contrary, however, they did not offer the same advantages to the Asian countries complaining at the WTO.

The great differential of the Shrimp-Turtle case was to bring to the center of the competition discussion the negative externalities resulting from the asymmetry of levels of environmental protection and trade liberalization. The dispute settlement body has undertaken the delicate task of drawing the balance between the members' right to invoke the exceptions of Art. XX and the right of the other members to claim the other articles that prohibit the application of barriers to international trade. One right does not cancel the others, so a balance point needs to be established on a case-by-case basis.

In addition, another paradigmatic point of the case was the recognition of the need to seek subsidiarity between the WTO and other international regimes. The dispute settlement body looked to the Convention on the Law of the Sea and the Rio Declaration on Environment and Development to determine that natural resources are also living organisms and that, therefore, the exceptions of art. XX also apply to the imminence of biodiversity scarcity. And to decide whether turtle was a non-renewable resource, it used the Convention on International Trade in Endangered Species of Wild Flora and Fauna.

Prior to this case, scarce and non-renewable natural resources were just minerals and other non-living resources, as was understood by the term at the time the treaty was constituted (LAGOMARSINO, 2010). Thus, the dispute settlement body demonstrated that based on the preamble and technical conceptualizations it is possible to modernize the concepts contained in the WTO regulation. Mainly because of this, the Shrimp-Turtles case is considered a milestone towards a more sustainable international trade regime in which the WTO has legitimacy to deal with socio-environmental issues as well (LAGOMARSINO, 2010).

3.2 Asbestos case

Canada has complained at the WTO about the ban imposed by France on the import of asbestos and products containing this highly toxic substance that poses serious risks to human health, such as lung cancer. Those most affected are workers who handle construction materials containing the product. Canada, in its request, did not deny the probable risks to human health that the product generates, but the disproportionality of the

measures applied in view of other similar products (MENEZES *et al.*, in press).

Despite the decision, the banning of asbestos-containing materials and their use did not result from the initiative of the states, or from international prohibitions, on the contrary, even today in some places its use is allowed, where there was a ban due to “strong and long pressure from union organizations, victims and representatives of victims who suffered damage directly or indirectly” (MARTIN-CHENUT *et al.*, 2016). Diffuse interests such as those of an environmental nature have this complexity when put into practice.

The undeniable internal commitments assumed by government officials and legislators keep them tied to the “invisible hand” of the market, which, evidently, does not intend to free them. It remains for the Judiciary to decide on these issues, taking into account, above all, the right to a dignified and healthy life. [...] While, in Brazil, disputes are concentrated on constitutional issues, and, in France, the accountability of employers was weak – since the demands were not criminal –, Italy differs in that it deals with the problem only in the criminal law sphere, which, likewise, presented weaknesses. [...] Even if, theoretically, national jurisdictions should be able to deal with the asbestos case and consider its production and consumption a violation of human rights, since most countries insert in their constitutional charter the right to health and the right to healthy environment in the list of human rights or fundamental rights, the possibility of inserting such rights in what is understood by international *jus cogens* is raised (MARTIN-CHENUT *et al.*, 2016).

In short, Europe (France) has banned the importation of asbestos from Canada for public health reasons (asbestos dust causes cancer and other diseases that can take decades to manifest). That is, it raised a justifiable technical barrier to trade based on the exceptions of Art. GATT. XX (b) (general exceptions – necessary to protect human life or health): it was understood that the measures adopted by Europe are intended to “protect human life or health” and that “no reasonably available alternative measures” existed. Thus, the outcome of the case was that the WTO understood that the asbestos prohibition measures did not lead to arbitrary or unjustifiable discrimination, nor constituted a disguised restriction on international trade and could, therefore, continue to be applied.

3.3 Tuna–Dolphins Case

Dolphins usually swim together with tunas. A sign that there are large fish to be caught is precisely to follow the school of dolphins, so one of the

fishing techniques used is to surround these fish with two boats and then throw a net. This tuna fishing technique often leads to the unintentional death of dolphins that are on the surface.

To curb this, the US implemented an import ban on tuna caught this way. Mexico took a complaint to the WTO against US rules on tuna fished without harm to dolphins (dolphin safe).

The first incidental question was about whether the negotiations could be discussed at the multilateral level or had to be taken to regional dispute mechanisms since the two countries were part of the North American Free Trade Agreement. It was decided that concern for nature has a global interest, not just a regional one.

The heart of the problem is the US refusal to allow Mexican tuna to receive the dolphin safe seal, on the grounds that the country's fishermen are allowed to use the fencing technique, or "pocket net", which usually traps dolphins along with fish.

Mexico defended that its fishing practices were sustainable and complied with the guidelines accepted by the Inter-American Tropical Tuna Commission, which includes the US among its members. Without the specific seal, the Mexican product would no longer have access to the American market, it would lose revenue and eventually the fishing companies could even close.

In the second trade dispute Mexico won (VIEIRA, 2010), as the panel understood that there were other measures less harmful to competition to be implemented, so the case did not meet the criterion of necessity. The measure must pursue a legitimate objective and it cannot be more restrictive than necessary to achieve its objective. However, in the case at hand, there were less trade-restrictive measures that could be implemented, instead of the embargo, an international treaty for dolphin protection could be made, for example.

Mexico's suggestion to combine the standards of the US government with those recommended by the Inter-American Commission (AIDCP 'dolphin safe' labeling) was seen as positive in contributing to greater dolphin protection and also to better consumer information.

3.4 Retreaded tires case

The European Community considered that the ban on imports of re-treaded tires imposed by Brazil were restrictive and therefore constitute

obstacles to free trade between countries and therefore discriminatory, and should be considered measures to protect the internal market and contrary to the following articles of GATT 94: I:1 (most favored nation general treatment); III.4 (national treatment – domestic laws and regulation), XI:1 (prohibition of trade-restrictive quotas) and 13.4 (non-discriminatory application of quantitative restrictions – prior consultation with the affected party) (MENEZES *et al.*, in press).

Brazil invoked article XX, item “b” of GATT 94 (necessary exceptions to protect people’s health and life), to justify the application of the measure. The ban on the import of retreaded tires would therefore be an exception to the principle of non-discrimination, as they arise from the imminent risk of damage to the environment and the spread of diseases that these products cause in the country.

Since the early 1990s, Brazil has prohibited imports of both used and retreaded tires. However, an exception was applied for remolded tires from Mercosur, given that in 2004 Brazil was condemned to accept this import by decision of the Mercosur dispute settlement system.

In 2005, the European Union questioned the Brazilian measures prohibiting the import of retreaded tires (the ban on the import of used tires was not part of this trade dispute at the WTO) and Brazil claimed that this prohibition was allowed, for environmental and public health reasons, in accordance, therefore, with the exceptions of Article XX (b) of the GATT 1994 (WTO, 1994a).

The most important incidental issue in the case was the “necessity test” to identify whether the exceptions under Article XX item “b” of the GATT were applicable. Another point was the questioning of hierarchy, that is, whether the Brazilian State should submit to an international or regional decision.

Occasional court rulings can distort trade. At the time of the litigation there were injunctions granted by the Brazilian Federal Court that allowed imports of used tires, including from Europe. Brazil sought to demonstrate throughout the dispute that the “injunctions were exceptional, not representing the position of the Brazilian Government – or even of the national Judiciary” (BENJAMIN, 2013, p. 161).

The Panel understood that either Brazil prohibits it completely or it does not prohibit it. That is, it decided that the import license of Ordinances SECEX 14/2004 and DECEX 8 were inconsistent with Article XI:1 of GATT 1994 (prohibition of trade-restrictive quotas) and that judicial injunctions

and state legislation of Rio Grande do Sul (State Law RS 12.114/2004 and 12.381/2005), which refers to the import of retreaded tires violated III.4 (national treatment – domestic laws and regulation). However, regarding CONAMA Resolution 23/1996, the measure being environmental and general, was considered in accordance with the exceptions of article XX, item “b” of GATT 94 (exceptions necessary to protect people’s health and life). Europe has not been able to prove that other, less harmful measures for trade were possible alternatives.

The import ban on retreaded tires was necessary to protect the environment and public health in Brazil, but which, to be maintained, should: i) be applied in conjunction with the full import ban, so Brazil should: (the) eliminate all imports of used tires permitted by injunctions; and (b) make the treatment of imports of retreaded tires from Mercosur justifiable in light of public health and the environment. The Attorney General’s Office filed a claim for Non-compliance with a Fundamental Precept (ADPF 101), to revoke all court authorizations granted to national retreaders for the import of used tires. ADPF 101 was processed in the STF until the final decision adopted in the Plenary Session, on June 24, 2009. Condemnation to close the Brazilian market for imports of remolded tires from Mercosur or to adopt a common regional policy on waste tires that would involve the prohibition of imports of used and retreaded tires outside the region by all Member States of the bloc.

The case is paradigmatic from the point of view of International Environmental Law. “It was the first time that a jurisdiction, in this case the WTO, recognized that the restrictive measure taken by Brazil was necessary to protect the environment and public health” (SAVIO, 2011, p. 334).

Another point is that the legal analysis of the case depends on prior knowledge of Brazilian regulation and jurisprudence, as well as the measures applied at the Mercosur regional level that gave rise to the panel.

3.5 Flavored or aromatic cigarettes case

American legislation prohibited the production and sale of cigarettes with clove, cinnamon, strawberry and cherry aromas, but left free the production and sale of menthol cigarettes (MENEZES *et al.*, in press). The most relevant technical discussion was about what a similar product would be. Aromatic cigarettes were not considered similar to menthol cigarettes from a commercial point of view, because they do not compete with each

other, do not have the same physical characteristics, do not meet the same consumer habits interchangeably and do not receive the same tariff treatment. However, they were considered similar from a regulatory point of view. The objectives of banning the import of clove cigarettes from Indonesia were also present in American menthol cigarettes. From this point of view, the American legislation violated the principle of treatment no less favorable than that granted to similar products of national origin to similar products originating in any other country, provided for in TBT: art. 2.

The entry into force of a technical barrier in less than six months of its publication, without giving other countries time to adapt and in disagreement with the provisions of the TBT. And without taking into account that Indonesia is a developing country.

The Panel considered that the measure contested by Indonesia was inconsistent with Article 2.1 of the TBT Agreement (treatment no less favorable) and that the process for its adoption failed to comply with the obligations contained in Articles 2.9.2 and 2.12 of the said Agreement (less than 6 months for adaptation and without taking into account the fact that Indonesia is a developing country). The Appellate Body disagreed with the similar product concept but reached the same conclusions as the panel.

Thus, the United States could only continue to ban clove cigarettes as long as it complies with the TBT agreement, applying the same measures to other tobacco products. Likewise, other States could also prohibit tobacco products or implement other public health policies that do not represent a violation of the principle of no less favorable treatment.

Technical standards, compliance checks, as well as technical regulations cannot create obstacles to trade. They must be part of a legitimate and objective policy regarding the characteristics of a product, they must not provide less favorable treatment to an imported product compared to the treatment given to a similar domestic product.

4 VOLUNTARY AND MANDATORY SUSTAINABILITY STANDARDS

In addition to commercial litigation, as in the cases cited above, some initiatives undertaken voluntarily by companies, governments, intergovernmental organizations, large groups and other interested parties, can contribute more to the implementation of the sustainable development goals than legally binding commitments around norms of command and control.

Also in this context, standards are essential to assess the quality and comparability of actions.

The package of environmental standards called ISO 14000, notably ISO 14001, establishes a set of guidelines and requirements related to a corporate environmental management system, helping to formulate initiatives that take into account legal requirements and significant environmental impacts during its production process, so that it is possible to mitigate the environmental impacts that can be controlled by organizations (ISO, 2005).

This environmental management standard is presented by the business sector as an environmental guarantee policy for its products, and as an alternative that provides sustainable development, building links between stakeholders, in this case industry, government and consumers (PIACENTE, 2005).

The ISO 14000 package is divided into four groups: the first with standards referring to the Environmental Management System-EMS (14001 and 14004); a second on Audit and Environmental Performance-ADA (14010, 14011, 14012, 14014, 14015, 14031 and 14032); the third on environmental labeling procedures (14020, 14021, 14022, 14023, 14024); and the fourth on life cycle analysis and products (14040, 14041, 14042, 14043 and ISO Guide 64) (ISO, 2005). In the case of Brazil, the Associação Brasileira de Normas Técnicas – ABNT is the body that represents the country as a founding member of the Superior Council of ISO. ABNT created in 1994 a specific study group to deal with the environmental theme (ABNT, 2017).

From the point of view of technical barriers in Brazil, the Instituto Nacional de Metrologia, Qualidade e Tecnologia (INMETRO) is responsible for notifying technical regulations and evaluation procedures so that standards are submitted to WTO analysis, to avoid problems of technical barriers to trade and other distortions in international trade (ROSA; CESAR; MAKIYA, 2018).

The concept of what a technical barrier is is broad and purposefully ambiguous. Such barriers arise from the application of technical standards (TS), technical regulations (TR), conformity assessment procedures (CAP) and the non-acceptance or non-existence of recognition agreements on the use of these requirements [...] Technical Barriers to Exports are non-tariff trade barriers arising from the use of non-transparent standards or technical regulations or that are not based on internationally relevant standards, or even arising from the adoption of non-transparent and/or overly expensive conformity assessment procedures, as well as excessively rigorous

or time-consuming inspections and that are in disagreement with the rules and principles set forth in the WTO TBT Agreement (Inmetro) (INMETRO, 2017).

To avoid problems with technical barriers to international trade and prove compliance with international quality standards, there are several independent certifications, created by stakeholders, aiming to overcome the lack of government action in this regard (PIACENTE, 2005).

The standardization methodology has proved to be useful mainly because it allows greater ease for national, international, public and private interaction. In this context, rules need to be agile and pragmatic to be effective, as gains in regulatory convergence, coherence and cooperation (THORSTENSEN; MESQUITA, 2016) are essential to ensure competitiveness in this context in which the efficient administration of global logistics represents the strategic differential between companies.

The governmental ones that have mandatory subjection are legally classified as technical regulations, being, therefore, submitted to the criteria of the Agreement on Technical Barriers to Trade (TBT) (WTO, 1994e). In turn, voluntary compliance initiatives manifest themselves through technical standards and conformity assessment procedures and can be called voluntary sustainability standards. Both technical regulations and technical standards have the function of guiding sustainable production

However, to be actionable within the legal regime of the World Trade Organization, as per the TBT, these initiatives must be mandatory or be supported by the public authorities of the Member States of the WTO, as admissibility criteria.

Private initiatives can be called private standards or market standards when designating those originating from companies or non-governmental organizations that are different from international private standards developed by institutions recognized by governments such as ISO. They can also be called sustainability standards when they contribute to a more efficient management of production and distribution, putting more sustainable methods into practice.

Despite being officially voluntary, since no governmental or international entity requires compliance, they can, in practice, have a lot of applicability and represent a type of barrier to entry in more regulated markets. This characteristic, in the sense of Terence C. Halliday and Gregory Shaffer (HALLIDAY; SHAFFER, 2015), would make it mandatory, as if it were achieved by virtue of a transnational norm.

In this way, private standards are efficient to articulate the new

institutionalism (HALL; TAYLOR, 1996), focused on governance. They play three roles simultaneously: replacing inadequate public regulation, creating increasingly rigorous regulations in areas such as the environment, for example, overcoming public regulations and providing systematized bases for product differentiation (VIEIRA; THORSTENSEN, 2016), that is, forms of uniform comparison to allow distinguishing one product from the others.

In large part, the escalation in developing private standards and adopting sustainability standards is a response to regulatory measures implemented by Europe, the US and California. However, they are also part of broader trends in value chain coordination in the context of ongoing changes and trends in regulatory controls, consumer demand, and the multistakeholder and pragmatic governance that is needed in the context of international trade.

Private standards are one of four possible combinations between public/private and mandatory/voluntary forms of regulation (HENSON; HUMPHREY, 2010, p. 1630). The four types are: mandatory public standards: called regulations, mandatory by internal law; voluntary public standards: standards that are created by public bodies, but whose adoption is voluntary, may be a condition for achieving some type of advantage or market access; standards developed by the private sector that are then made mandatory by the public authorities, as they are considered requirements for proving a certain quality; and voluntary private standards: developed and approved by private bodies and which are required only by these private entities, but which, however, can be quite effective if that private company is a large transnational company that holds a substantial share of the market.

In addition, voluntary private standards have five functions to perform (HENSON; HUMPHREY, 2010): formulate the operational procedures of a standard; decide on whether or not to adopt a standard; implement the envisaged rule from adequacy procedures, conformity assessment to verify that those who claim to comply with the standard can provide documentary evidence to prove compliance with the standards; certification, recommending corrective measures or discrediting in case of non-compliance.

It is noteworthy the existence of a thematic division (THORSTENSEN; VIEIRA, 2015) between: standards related to food safety; regulations requiring compliance with environmental and social standards; technical and quality standards; and, finally, meta-regulatory normative frameworks,

regarding best practices for developing voluntary private standards.

In practical terms, the various stakeholders, including consumers, are increasingly demanding certifications from production chains, especially agro-industrial ones, that attest to the compliance of products with standards on how they are produced, processed and distributed (DENNY; JULIÃO, 2017). Examples include organic, locally grown, GMO-free and sustainable products. Despite this attesting to sustainability, it can be considered the most complex of all possibilities, as it encompasses a set of the most varied and interdependent factors that can be seen as beneficial for some while for others, the opposite.

5 FOOTNOTE META-REGULATION, TECHNOLOGY AND DIPLOMACY

In this sense, the WTO could assume the role of meta-regulating these standards or implementing technology (DENNY; PAULO; CASTRO, 2018) for publicizing criteria and compliance verification mechanisms. The establishment of meta-regulatory normative frameworks regarding best practices to be elaborated mainly by voluntary private standards, and the promotion of homogeneous and internationally accepted criteria for metrics on negative socio-environmental externalities can strongly contribute to fair international trade, even in a very pragmatic way as with the calculation of values to be used in possible modulations and price adjustments practiced to internalize the socio-environmental cost of products and services.

Such externalities can be of different themes, such as food safety, environmental protection, labor conditions and human rights protection. The advantages of regulatory coherence/cooperation/convergence (THORSTENSEN; VIEIRA, 2015), which could be a WTO initiative, would be very positive to establish clear international trade rules related to these transdisciplinary themes. Requiring governments, for example, to promote transparency, notifications and consultations would contribute to the regulatory process being fair, efficient, open and with greater involvement of the parties, contributing to the incorporation of recommendations and fundamental external knowledge to the regulation process.

This, in addition to promoting more effective socio-environmental protection, would lower compliance costs for companies and governments, and “facilitate national economic growth by ensuring that regulations are

understood and efficiently implemented – without creating inadvertent barriers to trade” (THORSTENSEN; VIEIRA, 2015). However, negotiation between regulatory systems has not yet been introduced into the multilateral trade system, and the participation of society and paradiplomatic bodies (FARIAS; REI, 2016) is still incipient.

The WTO has shown a gradual opening to deal with socio-environmental issues related to trade, mainly in matters related to public health justified in the exceptions of article XX of the GATT. In addition, they have allowed the participation of non-state actors such as NGOs, mainly through the *amicus curiae* mechanism, whose performance is quite evident in the footnotes, benefiting the clarification of several technical points necessary for resolution of disputes in the WTO.

Despite this benefit of collaboration, there is no legal instrument at the WTO that guarantees that the concerns of non-state actors are expressed or that studies by non-governmental think tanks are used in the resolution of trade disputes. Likewise, there is no guarantee that Member States will incorporate these actors’ opinions from civil society or the private sector in their manifestations and that they will be the object of analysis in the resolution of international trade disputes.

In the Shrimp-Turtles case, the manifestations of three non-governmental organizations were rejected by the panel for being considered “unsolicited documents” (MENEZES *et al.*, 2018, p. 130). The appellate body in this dispute eventually accepted, but this generated dissatisfaction from several members, including the point of view of the injustice of third parties being able to participate more than the States themselves. After all, according to the WTO procedure, members that are not parties to a dispute or have previously expressed their interest in participating cannot express any position during the process.

In the Asbestos case, the appellate body previously established a procedure for receiving the participation of third parties as *amicus curiae*. But even so, several members were against it for the same reasons as in the previous case and the fact that notifications were not foreseen. This generated a lack of transparency, making it impossible for the parties to clearly identify how many and what were the manifestations of third parties. Another point raised was the asymmetry between developed and developing countries, organizations with more research funding tend to have more capacity to develop specific studies. All these points caused the appellate body to disregard these documents and base its decision only on what was

presented by the parties (MENEZES *et al.*, 2018).

In the Retreaded Tires case there was a great engagement of society, including the launch of a campaign “we reject that Brazil becomes the dump of Europe” signed by 66 Brazilian and 62 international non-governmental organizations (CIEL, 2006). There was even a request for the panel to be transmitted over the Internet. The *amicus curiae* in this case was not officially accepted, but was incorporated into the manifestation of the parties. Brazil mainly built its claims using these studies, which can be seen from the citations made in footnotes.

This discretion in accepting documents produced by third parties denotes the timidity with which the participation of non-members in the decision-making process advances. However, in any case, WTO jurisprudence has shown that advances have been achieved.

As the idea of the environment as the common heritage of humanity grows, on the one hand, the need for integrated and multilateral protection actions increases, involving all countries and weakening the idea of the Nation-State; on the other hand, there is a need to involve the opinion and consensus of civil society in the formulation of treaties, as well as the action of other international organizations not directly linked to environmental issues (PIFFER, 2011, p. 121).

Allowing the participation of *amicus curiae* was, although risky, a necessary step for the WTO dispute settlement system (LAGOMARSINO, 2010, p. 554). Many more steps must be taken to institutionalize scientific participation and the use of non-WTO intellectual property in dispute settlement mechanism decisions, in order to contribute to the legitimacy of the organization and help determine whether national policies or domestic measures are justifiable protections or disguised illegal trade restrictions.

FINAL CONSIDERATIONS

The WTO has shown a gradual opening to deal with trade-related socio-environmental issues, mainly in public health-related matters. However, it thereby finds itself in a conflicting position in which much more is expected of it, while the fragmented legal model of International Law prevents these expectations from being achieved. Thus, despite all efforts to include the sustainability theme, mainly those dissatisfied with globalization make the WTO the bastion of criticism of the currently adopted model of capitalism. At the same time, the fervent defenders of liberalism criticize this twist of modernization of concepts and preach a return to

strict interpretations, limited only to trade without recognizing any interdependence.

In any case, the goals of socio-environmentally sustainable development, which all branches of International Law propose to promote, demand cooperation and therefore the WTO must seek subsidiarity between norms, technical studies and procedures outside its framework. This increased interaction should continue to affect future cases submitted to the dispute settlement body. And in this sense, the ambiguities and dry language of the WTO documents can be a virtue, opening space for interpretations by the judges in a more creative and technical way, updating the documents of two decades to current needs.

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