Trade liberalisation as facilitated through trade agreements within the Southern African region: An instrument in the realisation of socio-economic rights

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ABSTRACT

Section 27 of the South African Constitution guarantees everyone the right to have access to social security. The state is compelled to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights. Consequently, the realisation of socio-economic rights is intrinsically bound to the availability of these resources.

Within the regional context of the Southern African Development Community (SADC), advantageous commercial considerations form the cornerstone of many of the bilateral and multilateral agreements that on a regional or individual basis have been entered into by member states of SADC. These agreements embody not only provisions of trade liberalisation, but also are indicative of a realisation of the multi-faceted approach that economic growth requires.

The aim of this paper is to explore whether the various bilateral and multilateral trade agreements that currently exist have, through successful implementation, enhanced the accessibility of resources as a direct consequence of the economic growth that could possibly result from these agreements. In addition to this, the aims of the various bilateral and multilateral trade agreements will be analysed in an attempt to appreciate the extent to which the advancement of socio-economic rights is portrayed as a principal objective of these agreements.

For this purpose the various multilateral and bilateral agreements in the Southern African region, and in particular those agreements which include South Africa as a party, will be outlined. In particular, trade relations between the European Union (EU) and member states of the SADC region will be explored. Therefore South Africa participation as a qualified partner in the now Cotonou Agreement[2] and as an eligible country to the African Growth

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2 Renewal of the *Lomé Convention*, agreed upon 3 February 2000, and signed in Benin on 23 June 2000.

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and Opportunity Act (AGOA) will be looked at on an international level. On a regional level, South Africa's membership of the Southern African Customs Union,[3] SADC[4] and the African Union (AU) as well being party to the Trade and Development Cooperation Agreement (TDCA), will be emphasised.

1 INTRODUCTION

The debate on the realisation of socio-economic rights is centred on the availability of resources. Within a South African context, the right of "access to" housing, health-care services, food, water and social security indicates the government's role to create an enabling environment within which it is possible for people to gain access to socio-economic rights, as well as to ensure the progressive realisation of these rights. Consequently, the realisation of socio-economic rights[5] is a process requiring the government to adopt measures of facilitation within its available resources. This qualification realises that resources are not limitless and that the state must do the best it can within the limitation of available resources.[6]

The multilateral trade regime traditionally has been seen as an instrument of advancing economic growth and prosperity. In the context of this project relating to the research of regional socio-economic rights, this paper will in particular concentrate on the proviso of availability of resources and the extent to which participation in the global economy has indeed facilitated the protection and advancement of socio-economic rights within the SADC.[7]

The protection and advancement of socio-economic rights is a complex and multifaceted issue that defies simple solutions. It involves diverse dynamics and factors that include economics and trade as well as the protection of human rights. Accordingly, emphasis on trade liberalisation exclusively, as a means of achieving economic growth, based on a broader global economic participation, is questioned.[8]

A large component of long-term economic development centres on the appreciation that a political environment guaranteeing peace, security and stability, respect for human rights, democratic principles, the rule of law and good governance is essential for development. Hence, a comprehensive and integrated approach to economic growth that alleviates poverty and contributes to sustainable development is required. To successfully

3 Customs union between South Africa and Botswana, Lesotho, Namibia and Swaziland (the BLNS countries). The SACU trade framework provides for free movement of goods between the members and a common external tariff (CETT).

4 Broader regional association which has a membership of 14, including the 5 countries of SACU.

5 S 26 of the South African Constitution Act 108 of 1996 refers to adequate housing. S 27 makes reference to health care, food, water and social security.

6 Ss 26 and 27. (Other socio-economic rights are not qualified in the same manner, eg the right to a healthy environment, the socio-economic rights of children and prisoners, etc.)

7 *Supra* 15

8 This paper will not explore traditional critics of trade liberalisation.

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address poverty, parties need to acknowledge that sound and sustainable economic policies are prerequisites for development. Progress does not exclusively rely upon agreements that enhance free trade. Based on this understanding, this paper argues that the trade system adopted by Southern Africa must be based on the need to ensure real improvement in the lives of people through increased participation in the global economy.

Within the regional context of SADC, advantageous commercial considerations form the cornerstone of many of the bilateral and multilateral agreements that on a regional or individual basis have been entered into by member states of SADC. These agreements embody not only provisions of trade liberalisation, but also are indicative of a realisation of the multi-faceted approach that economic growth requires.

The aim of this paper is to evaluate the probable fulfilment of socio-economic rights, resulting from the economic growth experienced in the SADC region as a direct consequence of regional internal and external trade relations. For this purpose the various multilateral and bilateral agreements in the Southern African region, and especially those agreements in which South Africa participates, will be outlined. In particular, trade relations between the EU and member states of the SADC region will be explored.

In the overview of these agreements emphasis will be made regarding the extent to which these instruments appreciate the multi-faceted approach required, and to which degree this understanding could enhance the furthering of socio-economic rights within the region. Accordingly, the aims and objectives of these regional instruments will be critically evaluated to establish their effectiveness in ensuring that the multilateral trading regime within Southern Africa is interpreted and implemented in accordance with these aims and objectives, maintaining the protection and furthering of socio-economic rights.

As indicated, the protection and advancement of socio-economic rights is directly dependent on the availability of resources. However, the SADC region is characterised by significant diversity regarding resources. This has a direct influence on the level of protection afforded to socio-economic rights within the region. Accordingly, any evaluation of the protection and advancement of socio-economic rights requires an overview of the socio-economic environment.

2 DIVERSITY IN THE SOCIO-ECONOMIC ENVIRONMENT OF THE REGION

Countries within the SADC region have diverse political systems and resulting levels of socio-economic development. These countries display vast differences in population size[9] as well as a wide dispersion in population density.[10] The average income within the countries follows similar

9 South Africa, Tanzania and the DRC have 64% of the population, with the remainder unevenly distributed amongst the other 11 countries.

10 Only Seychelles (63.8%), South Africa (50.4%) and Botswana (50,3%) have urban populations exceeding 50% of their population.

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disparity patterns, with the GNP per capita nearly 90 times different between the highest (Seychelles) and the lowest (Democratic Republic of the Congo (DRC). About 40% of the sub-region's population is estimated to be living in extreme poverty. Poverty is increasing despite higher growth rates in the region due to increasing levels of unemployment. Given the near-absence of official unemployment benefits, unemployed people survive by partaking in the informal subsistence sectors or through support by family and friends, owing to the traditional private social security networks found in Africa. Further influences in the socio-economic arena are factors such as low levels of human development, health and infectious diseases[11] and insufficient infrastructure.[12]

Although the relevance of the universal provision of basic social services is now widely recognised by the donor community, economic adjustment policies promoted by the same donor community over the past 15 years have often had a detrimental effect on social investments. Budgets for education and health services tended to be the first to be cut as part of austerity measures. Privatisation resulting from structural adjustment has often resulted in increased costs for basic social services, which are vitally important for people living in poverty. This includes basic health care, primary education, and access to clean water and fuel.

The multilateral trade regime traditionally is seen as an instrument of economic growth. Africa's share of world trade has declined steadily over time, increasing its isolation from the global economy and its disengagement from growing world prosperity. Over the last decade, sub-Saharan Africa's trade has grown 39% while world trade has grown 85%. In the same period Africa's GDP grew by less than 8.5% compared to the global figure of more than 44%.[13]

Equally dismal is Africa's share of the export and import market. Sub-Saharan Africa accounts for less than 1% of US exports and less than 2% of US merchandise imports. Proportions are slightly higher for the EU, where sub-Saharan Africa represents 3.5% of total exports and 4% of total imports. The EU absorbed nearly 45% of the sub-Saharan exports in 2001, indicating an increased growth rate from 40.7% in 2000. Conversely, the United States is Africa's largest single-country market, purchasing 26% of the region's exports in 2001. However, the total trade between the US and sub-Saharan States fell substantially in 2002, as both exports and imports declined. The African Growth and Opportunity Act (AGOA)[14] prevented an even sharper drop in US imports. Crude oil dominates US

11 Almost 90% of deaths from infectious diseases are caused by a handful of diseases: acute respiratory infections, diarrhoeal diseases, HIV/AIDS, malaria, measles, tuberculosis and sexually transmitted infections – World Bank 2000 *Can Africa claim the 21st Century* A World Bank Report Washington DC 2000 at 109.

12 Water, sanitation, transport, communication and energy.

13 US-African Trade Profile. Prepared by G Feldman, Office of Africa, March 2003, United States Department of Commerce, International Trade Administration Washington DC 3.

14 *Supra* 10.

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imports; apparel surpasses unwrought platinum as the second largest leading US import, followed by diamonds and motor vehicles.[15]

Trade between the US and sub-Saharan Africa is highly concentrated, with a small number of countries accounting for an overwhelming share of the total for both imports and exports.[16] US exports remain highly concentrated among the top four markets with South Africa claiming 42%, Nigeria 18%, Angola 6.2% and Kenya 4.5%. EU exports to Africa are also highly concentrated among a small number of countries; South Africa, Nigeria, Liberia, Cote d'Ivoire, Angola and Senegal account for over 64% of EU exports to sub-Saharan Africa. Nigeria and South Africa have a disproportionate effect on the performance of the region due to the dominant size of their economies.

To overcome their limited development and economic potential, regional integration and participation in international trade have been pursued as the means of creating larger markets and consolidating the resources and potential of these poor economies.

3 DIVERSE MEMBERSHIP OF REGIONAL INTEGRATION AGREEMENTS

Membership of a regional grouping is the individual choice of any country, based on, amongst other factors, political, social or economic points of consideration. As the states within the realm of Southern African form part of various regional groupings, one of the significant areas for deliberation is the existence of overlapping regional integration agreements.

Certain clusters are directly related to their regional proximity, such as SACU[17] together with the Common Market for Eastern and Southern Africa (COMESA),[18] whereas other groupings are a direct result of multilateral agreements. The African, Caribbean and Pacific (ACP) grouping exists as a consequence of the relationship between the EU and the developing countries of Africa, the Caribbean and the Pacific, which where previously colonialised by EU member states.[19]

Most of the SADC countries belong to at least two of these regional integration agreements; some are party to more. Although a number of these agreements have similar objectives, their approaches in achieving these objectives differ to a greater or lesser extent.[20] Currently dual membership

15 US-African Trade Profile. Prepared by G Feldman, Office of Africa, March 2003, United States Department of Commerce, International Trade Administration Washington DC 11.

16 South Africa and Nigeria accounted for more than 41% of sub-Saharan Africa's total imports.

17 *Supra* 18.

18 *Supra* 14.

19 See *Cotonou Convention supra* 6.

20 Two of the most significant regional integration instruments in terms of membership, COMESA and SADC, are following different approaches to integration. COMESA's perspective is that the benefits of regionalisation are derived from a trade perspective, and accordingly the programmes of COMESA are centred on a trade perspective. In contrast, SADC has a developmental approach to regional integration, relying upon issues other than mere trade.

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of COMESA and SADC presents a problem when deciding which regional configuration to take when negotiating new regional Economic Partnership Agreements (EPAs)[21] with the EU under the *Cotonou Agreement*. In most cases a political decision is taken and the decision of this regional configuration presents a challenge.[22]

Within the context of this paper only those regional agreements to which South Africa, as a member of SADC, is party will be discussed. South Africa is party to various international agreements regarding international trade, namely an original contracting party to the General Agreement on Tariffs and Trade (GATT) and a member of the World Trade Organisation (WTO), a qualified partner in the now *Cotonou Agreement*[23] and an eligible country to the African Growth and Opportunity Act (AGOA). On a regional level South Africa is a member of the SACU,[24] SADC[25] and the African Union (AU) as well as a party to the Trade and Development Cooperation Agreement (TDCA).

In outlining the various multilateral and bilateral agreements in the Southern African region a concentric approach is pursued. In this manner, the larger regional groupings will initially be explored, concluding with the smaller groupings, as well as trade agreements entered into on an individual level between states.

3.1 African, Caribbean and Pacific Groupings (ACP)

The EU has negotiated various bilateral and multilateral agreements with countries on a regional or individual basis, eg links with ACP countries[26] in the *Lomé Convention*. The *Lomé Convention*, a comprehensive development co-operation regime between the EU and members of the ACP, was once again renegotiated, at the expiry of the *Lomé IV bis* in February 2000.[27] Building on more than 25 years of cooperation, the *Cotonou Agreement* sets ambitious goals for the next 20 years, centred on the reduction of poverty, the prevention of violent conflicts and improved governance. It aims at making ACP-EU development cooperation more efficient and acknowledges mutual responsibilities.

21 *Supra* 7.

22 *SADC today* vol 6 no 1 April 2003. This article is adapted from recent presentations by Fudzai Pamachiche, supervisor of the SADC directorate of Trade, Industry, Finance and Investment (TIFI).

23 Renewal of the *Lomé Convention*, agreed upon 3 February 2000, and signed in Benin on 23 June 2000.

24 Customs union between South Africa and Botswana, Lesotho, Namibia and Swaziland (the BLNS countries). The SACU trade framework provides for free movement of goods between the members and a common external tariff (CETT).

25 Broader regional association which has a membership of 14, including the 5 countries of SACU.

26 The SADC region forms a component of the 77 countries in the ACP group who are party to the *Lomé Conventions*. South Africa's qualified status with regard to the Agreement is outlined in Protocol 3 on South Africa.

27 Entering into force on 1 April 2003.

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For the EU the *Lomé Convention*, embodying provisions of non-reciprocal trade preferences, was no longer seen as an appropriate framework for assisting the ACP group in the new global economy. It was hoped that *Lomé* would encourage the ACP countries to divserify their exports and increase their market share. However, the favourable provisions of *Lomé*[28] had a limited impact on the ACP group. In terms of the *Cotonou Agreement*, the non-reciprocal trade benefits[29] of the *Lomé Convention* will be replaced over a transitional period[30] with several new WTO compatible trade regimes between the EU and the ACP countries on either a regional or individual basis,[31] consequently opening the ACP markets to European products.

Trade liberalisation has become imperative in the face of challenges presented by globalisation. The entire concept of special and differentiated treatment (SDT) for Developing Countries (DCs) and Least Developing Countries (LDCs) has come under review. Greater emphasis is put on reciprocity in trade liberalisation in order to achieve fuller participation of these countries in the world economy. Developing countries should not expect special treatment under the WTO system, although provision is made to accommodate such countries.[32]

The *Cotonou Agreement* foresees Economic Partnership Agreements that will set up an entirely new framework for trade and investment flows between the EU and the ACP. This agreement sets out a comprehensive and integrated approach to alleviating poverty, contributing to sustainable development and assisting ACP countries to integrate into the global economy. The EU's proposal was based on the premise that Regional Economic Partnerships Agreements (REPAs) will in all probability confront

28 Granting trade preferences, with no duty of reciprocity, derogating from the rules governing world trade.

29 Under the *Lomé Convention* system of trade preferences there was no reciprocal clause: ACP countries were given duty-free access into the EU for industrial goods, with the ACP being able to put duties on EU imports so as to protect their infant industries. The ACP states were merely obliged to apply the most-favoured-nation clause to the Union and to refrain from discriminating between countries of the Union. Specific provisions applied to products of vital importance for the economy of several states, such as bananas, rice and sugar.

30 This agreement includes a transitional period of 8 years. ACP countries will continue to benefit from current trade preferences without disruptions during the 8-year "preparatory" period.

31 Based on the understanding of the ACP's rather heterogeneous nature, the *Cotonou Agreement* is aimed at tailoring the structure of the co-operation agreement to a specific country's level of development for purposes of improved economic and trade co-operation. Differentiation could divide the ACP group into geographical areas and/or levels of development. Founded upon the uneven development and democratisation among ACP countries, different ACP countries will be receiving different treatment from the EU. The 39 ACP least developed countries (LDCs) can 'keep *Lomé*' (or even a slightly better version of it) without having to reciprocate by opening their markets to EU products before 2008. The non-LCDs are transferred to a non-reciprocal system of preferences less generous than *Lomé*.

32 These measures include extension of timeframes, total or partial exemption of commitments, promise of technical assistance and so-called "less than binding" commitments.

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the exclusion faced by the developing countries as a result of globalisation.[33] The Commission is convinced that trade and regional integration can make an important contribution to poverty reduction, sustainable growth and beneficial integration into the world economy.

3.1.1 *Aims and objectives*

One of the pivotal aims of the *Cotonou Agreement* is to reduce and eventually eradicate poverty. This is of particular relevance regarding the advancement of socio-economic rights. The nature of poverty can be appreciated for its multidimensional features. Accordingly, the *Cotonou Agreement* sets out a comprehensive and integrated approach to alleviate poverty contributing to sustainable development and assisting ACP countries integrate into the world economy. Economic development is structured around private sector development and investment, macroeconomic policies and reforms as well as sectoral policies directed towards social and human development.

Objectives of the partnership[34] indicate that the Agreement has been concluded promoting and expediting economic, cultural and social development of the ACP states. Dialogue between the parties is set to encompass a regular assessment of the developments concerning respect for human rights, democratic principles, the rule of law and good governance.[35] Moreover, respect for human rights and fundamental freedoms, including respect for fundamental social rights, is seen as an essential and fundamental element of the Agreement.[36] The protection of human rights is expressively referred to in that the specific international instruments protecting human rights are individually mentioned in the preamble.[37]

33 Founded upon the uneven development and democratisation among ACP countries, different ACP countries will be receiving different treatment from the EU. The ACP group was successful in maintaining the 3 protocols on sugar, veal and beef, and bananas until December 2007. From 2008, a set of EPAs will replace the current all-ACP non-reciprocal tariff preferences by introducing reciprocal free trade agreements. These free trade agreements would be WTO-compatible. The 39 ACP least developed countries (LDCs) can 'keep *Lomé*' (or even a slightly better version of it) without having to reciprocate by opening their markets to EU products before 2008. The non-LCDs are transferred to a non-reciprocal system of preferences less generous than *Lomé*.

34 Art 1, Part 1 – General Provision Cotonou Agreement, available at http://www.acpsec.org/gb/cotonou/accord1.htm#PART 1: GENERAL PROVISIONS.

35 Art 8 of the *Cotonou Agreement* covers a wider range of political issues that was not included in the ambit of *Lomé*. The *Cotonou Agreement* realises that a political environment guaranteeing peace, security and stability, democratic principles and the rule of law, and good governance is essential. (art 9(3)).

36 Art 9.

37 Referring to the principles of the UN Charter, and recalling the Universal Declaration of Human Rights, the conclusions of the 1993 Vienna Conference on Human Rights, the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Elimination of all forms of Discrimination against Women, the International Convention on the Elimination of all forms of Racial Discrimination, the 1949 Geneva Conventions and the other instruments of international humanitarian law, the 1954 Convention relating to the status of stateless persons, the 1951 Geneva Convention relating to the Status of Refugees and the 1967 New York Protocol relating to the Status of Refugees, considering the Convention

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Violation of these principles could lead to the suspension of the benefits granted by the *Cotonou Agreement*, as parties to the *Agreement* have to treat these obligations in earnest. In past conventions, references to human rights were regarded more as declaratory statements than compulsory obligations.

In addition to the explicit referral regarding the respect for fundamental human rights, a further commitment to social development and therefore socio-economic rights is found in article 25 under social sector development. The *Cotonou Agreement* takes into due consideration the crucial role of social investments.[38] The primary objective of development co-operation should be the eradication of poverty. It is now widely recognised that providing access to social services for people living in poverty in developing countries is a key element of policies aimed at eradicating poverty. In addition, access to income, education and health care are fundamental human rights. Investing in people, for instance, investing in primary education for girls, also increases the economic potential of a country. Literacy and good health are fundamental prerequisites for people living in poverty to be able to participate in development and in democratisation processes.

Co-operation in the formulation of social policy regarding infrastructure and services, with specific reference to the need of vulnerable and disadvantaged groups, is required.[39] Special attention in ensuring adequate levels of public spending in the social sector is indicative of a progressive realisation towards socio-economic rights. Improved health systems,[40] adequate and affordable shelter;[41] as well as increased security of household water and sanitation is required.[42] In addition to these specific measures a blanket petition for the respect of basic social rights is made in article 25 (g):

> encouraging the promotion of participatory methods of social dialogue as well as respect for basic social rights.

To achieve this, it provides financial and technical support for economic development, regional co-operation and social and human development. Equity between men and women, strengthening of institutions and environmental sustainability are promoted in all initiatives. EU assistance has

for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe, the African Charter on Human and Peoples' Rights and the American Convention on Human Rights as positive regional contributions to the respect of human rights in the EU and in the ACP states.

38 Partnership 2000: Eurostep's Proposals on Social Development, Investing in Social Development for the Eradication of Poverty August 1997 http://www.eurostep.org/pubs/position/social_development/socdev.htm.

39 Art 25 of the Treaty.

40 Social sector development: art 25(b) includes improving health systems and nutrition, eliminating hunger and malnutrition, ensuring adequate food supply and security.

41 Social sector development: art 25(f) includes improving the availability of affordable and adequate shelter for all through supporting low-cost and low-income housing programmes and improving urban development.

42 Social sector development: art 25(e) includes increasing the security of household water and improving access to safe water and adequate sanitation.

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been provided for a number of social investments, including the fight against AIDS, socio-economic infrastructure in rural areas and assistance in controlling drug-trafficking.

The objective of enhancing social development is clearly enshrined in the agreement between the EU and the ACP. Further to this commitment, the European Council have adopted several resolutions in which the European Commission and the member states are called upon to enhance their efforts to achieve social development. In a resolution on Human and Social Development[43] adopted in 1996, the Council asked for social development to be placed at "the very core of development co-operation".

3.1.2 *South Africa as party to the Cotonou Agreement*

South Africa joined the *Lomé Convention* in June 1998 as a qualified member. Although essentially excluded from the trade regime of the *Lomé Agreement* as well as its provisions on development assistance, South Africa, however, could tender for projects in all ACP countries, financed from the 8th European Development Fund (EDF). South Africa could also participate fully in the political institutions of the Convention. South Africa's accession to the *Cotonou Convention* is consequently in accordance with a protocol defining its qualified status. South Africa remains excluded[44] from most of the trade and aid provisions of the new Convention, but benefits in its own way in these same areas, by means of the implementation of the SA-EU Trade, Development and Cooperation Agreement (TDCA).[45]

The admission of South Africa as a qualified member of the *Lomé Convention* created a special relationship between the EU and South Africa, but with other the ACP countries as well. At this time the so-called two pillars approach[46] was adopted. Article 1(2)[47] makes clear the applicable hierarchy between the two agreements.

3.2 The African Growth and Opportunity Act (AGOA)

The African Growth and Opportunity Act (AGOA), a unilateral trade regime set up by America to stimulate and regulate trade links with Africa, was signed into law on 18 May 2000 as Title 1 of the Trade and Development Act of 2000. The Act offers tangible incentives for African countries[48] to

43 Council Resolution, Human and Social Development and European Union Development Policy, 22.XI.1996.

44 South Africa's qualified status with regard to the Agreement is outlined in Protocol 3 on South Africa.

45 *Supra* 18

46 The two pillars approach is represented by the qualified membership of South Africa *vis-à-vis* the *Lomé/Cotonou Conventions* and by the Trade, Development and Co-operation agreement between South Africa and the EU.

47 The provisions of the bilateral Agreement on Trade, Development and Cooperation between the European Community, its member states and South Africa, signed in Pretoria on 11 October 1999, shall take precedence over the provisions of this Agreement.

48 President Clinton issued a proclamation on 2 October 2000 designating 34 countries in Sub-Saharan Africa as eligible for the trade benefits of AGOA. As from 1 January 2004 there are 37 eligible countries, namely: Angola; Benin; Botswana; Cameroon; Cape Verde;

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continue their efforts in opening their economies and building free markets. AGOA facilitates the export of a wider range of African products into the US on a duty-free basis in accordance with the objectives of AGOA that grant preferential treatment to African states that utilise good governance policies.

AGOA II[49] substantially expands preferential access for imports from beneficiary sub-Saharan African countries by increasing the amount of products which eligible sub-Saharan African countries may export to the US subject to zero import duty under the Generalized System of Preferences (GSP). While general GSP covers approximately 4600 items, AGOA GSP applies to more than 6400 items. Although GSP eligibility does not imply AGOA eligibility, 45 of the 48 sub-Saharan African countries are currently GSP-eligible. In addition to the extent of products covered by AGOA, AGOA GSP provisions are effective for longer.[50]

Product-eligibility for AGOA includes duty-free and quota-free access to the US market without limits being made for apparel produced in eligible sub-Saharan African countries from US fabric, yarn and thread. It also provides for substantial growth of duty-free and quota-free apparel imports made from fabric produced in beneficiary countries in sub-Saharan Africa. Under a Special Rule for Lesser Developed Beneficiary Countries, those with a per capita GNP under $1 500 in 1998 will until 30 September 2004 enjoy duty-free access for apparel made from fabric originating anywhere in the world. This Act authorises the US President to designate countries as eligible to receive the benefits of AGOA if they are determined to have established, or are making continual progress toward establishing, the following:

> market-based economies; the rule of law and political pluralism; elimination of barriers to U.S. trade and investment; protection of intellectual property; efforts to combat corruption; policies to reduce poverty, increasing availability of health care and educational opportunities; protection of human rights and worker rights; and elimination of certain child labor practices.[51]

The majority of African nations that are striving to achieve the objectives have welcomed these criteria, whether or not they have expectations to fully implement the entire list. Amongst these criteria and of particular relevance to this paper is the emphasis placed on the existence of policies to reduce poverty, increase the availability of health care and educational

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Chad; Republic of Congo; Côte d'Ivoire; Democratic Republic of Congo; Djibouti; Ethiopia; Gabon; The Gambia; Ghana; Guniea; Guinea-Bissau; Kenya; Lesotho; Madagascar; Malawi; Mali; Mauritania; Mauritius; Mozambique; Namibia; Niger; Nigeria; Rwanda; Sao Tome and Principe; Senegal; Seychelles; Sierra Leone; South Africa; Swaziland; Tanzania; Uganda; Zambia.

49 President Bush signed amendments to AGOA, also known as AGOA II, into law on 6 August 2002 as s 3108 of the Trade Act of 2002.

50 Until 30 September 2008, nearly 2 years longer than general GSP.

51 Laudable as the objectives of AGOA may be, this initiative is still premised on conditionalities, both political and economic. The US still retains discretion in the sense that should a particular product from beneficiary-countries such as South Africa be seen as competing with the local industry, the product stands the risk of being excluded. This is in itself does not encourage export growth as countries fear to "graduate".

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opportunities as well as encourage the protection of human rights and worker rights.

In appreciating the impact that AGOA provisions has had in advancing economic growth and prosperity, it is essential that the extent of AGOA utilisation be inspected. AGOA utilisation is dominated by a small number of eligible countries with Nigeria, South Africa, Gabon, Lesotho and Kenya accounting for more than 93% of AGOA duty-free benefits. This domination is linked to the availability of the principal products that are exported to the US. AGOA imports valued at $6.8 billion remain petroleum products, principally from Nigeria and Gabon. Textile and apparel accounted for $803.3 million and other good performers include agricultural products.[52]

3.3 The African Union (AU)

The introduction of the African Union (AU) can be described as an event of vast development for the continent. On 9 September 1999, the member states of the OAU issued a Declaration[53] calling for the establishment of an African Union. The AU replaces the OAU as the new continental body of Africa. The Constitutive Act of the African Union, adopted in 2000 at the Lomé Summit (Togo), entered into force in 2001,[54] thirty days after the deposit of the instruments of ratification by two-thirds of the member states of the OAU.[55] The New Partnership for Africa's Development (NEPAD)[56] was adopted as a Programme of the AU at the Lusaka Summit (2001). The Durban Summit (2002) launched the AU and convened the 1st Assembly of the heads of states of the AU.

3.3.1 *Aims and objectives*

The formation of the AU marks an institutional shift from liberation to consolidation, and focuses on empowerment and development of all African people. The Constitutive Act of the AU promotes principles of democracy, human and peoples' rights, peaceful resolution of conflicts and respect for the rule of law.[57]

The Constitutive Act of the AU integrates the African Charter on Human and Peoples' Rights and other relevant human rights instruments regarding

52 http://www.dti.gov.za/fta/article.htm.

53 The Sirte Declaration.

54 On 26 April 2001 Nigeria became the 36th member state to deposit its instrument of ratification. This concluded the two-thirds requirement and the Constitutive Act entered into force on 26 May 2001. The OAU Secretary-General on 9 July 2001 during the opening of the Lusaka Summit informed member states that the Constitutive Act had been signed by all OAU member states and had, to date, been ratified by 51 countries.

55 Art 28 of the African Union Treaty ie 27 of the 53 (or 54) countries.

56 NEPAD is a merger of the Millennium Partnership for the African Recovery Programme (MAP) and the OMEGA Plan. The merger was finalised on 3 July 2001. Out of the merger, the New Africa Initiative (NAI) was born. The OAU Summit heads of state and government on 11 July 2001 approved NAI. The leaders of G8 countries endorsed the plan on 20 July 2001. The Heads of State Implementation Committee (HSIC) finalised the policy framework on 23 October 2001, and NEPAD was formed.

57 Arts 3 and 4 of the Constitutive Act of the AU.

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the promotion and protection of human and peoples' rights.[58] The promotion of human and peoples' rights is set out as one of the objectives of the AU and clear reference is made to these human rights instruments in the objectives of the Act, as stated in article 3.

In addition the AU sets among its objectives the promotion of sustainable development at economic, social and cultural levels[59]; likewise the promotion of co-operation in all fields of human activity to raise the living standards of African people is stated amongst the objectives.[60]

The AU's vision is the promotion of accelerated socio-economic integration for the continent, which will lead to greater unity and solidarity between African countries and Africa's people.[61] Amongst the main aims of the AU is its ability to address social, economic and political problems, as exacerbated by certain negative aspects of globalisation.

The Executive Council, composed of the ministers of foreign affairs or their designated counterparts,[62] is directed to co-ordinate and take decisions regarding food,[63] water resources,[64] environmental protection, humanitarian action,[65] education, culture, health and human resource development,[66] social security, including the formulation of mother and child care policies, as well as policies relating to the disabled and the handicapped.[67]

The preamble recognises the Treaty Establishing the African Economic Community (AEC).[68] It also perpetuates the institutional arrangement

58 The objectives of the AU (art 3):
(e) To promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.

59 The objectives of the AU (art 3):
(j) To promote sustainable development at the economic, social and cultural levels as well as the integration of African economies.

60 The objectives of the AU (art 3):
(k) To promote co-operation in all fields of human activity to raise the living standards of African peoples.

61 http://www.africa-union.org/About_AU/Constitutive_Act.htm#Article3.

62 Art 10 (1): the Executive Council shall be composed of the Ministers of Foreign Affairs or such other Ministers or Authorities as are designated by the Governments of Member States.

63 Art 13(1)(c): food, agricultural and animal resources, livestock production and forestry.

64 Art 13(1)(d): water resources and irrigation.

65 Article 13(1)(e): environmental protection, humanitarian action and disaster response and relief.

66 Article 13(1)(h): education, culture, health and human resources development.

67 Article 13(1)(k): social security, including the formulation of mother and child care policies, as well as policies relating to the disabled and the handicapped.

68 The Treaty establishing the AEC was signed at Abuja by representatives of member states of the OAU on 3 June 1991. It entered into force on 12 May 1994, after receiving the required number of ratifications. The AEC Treaty was negotiated and entered into force just as the UMR drew to a close. The objective of the treaty is to establish a timetable towards the creation of the AEC by 2025. Motives for the establishment of such an entity are not hard find. Africa needs to respond to the challenges of an emerging world of trading blocs, globalisation of factors of production, liberalisation of world trade and rapid technology expansion.

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whereby the AEC shared the organs[69] of its predecessor. Existing regional economic communities (RECs)[70] hold a special place in the realisation of the AEC. RECs may be seen as the building blocks of the future AEC, without which the effective attainment of a pan-African economic bloc is impossible. For this reason the objectives and activities of the RECs must be consistent with those of the AEC.[71]

3.3.2 *NEPAD as a programme of the AU*

The long-term objective of NEPAD (the development framework of the African Union) is to "eradicate poverty" and to "place African countries, both individually and collectively, on a path of sustainable growth and development".

Africa is a far cry for the EU, despite the fledging AU. Some African nations lack credible constitutions and are plagued by rampant corruption and conflict. But NEPAD is closer to the EU's democratic spirit, seeking to reduce poverty by more equitable and global economic co-operation.[72]

NEPAD is a programme which the AU intends using to develop values and monitor their implementation within the framework of the AU. The success of NEPAD will rely significantly on the strength and performance of regional integration organisations such as COMESA and SADC, which are the building blocks of the continental framework.

3.4 Other prominent regional integrations

The common market for Eastern and Southern Africa (COMESA): As indicated previously, only regional integration agreements to which South Africa is party will be dealt with within the context of this paper. South Africa is not a member of COMESA but, nonetheless, shares relationships with many other member countries by means of SADC. Accordingly, a mere overview of the role of COMESA is provided.

The Treaty setting up the Preferential Trade Area (PTA) for Eastern and Southern Africa was signed in 1981 but was later transformed into the Common Market of Eastern and Southern Africa (COMESA). COMESA was established as an organisation of free independent sovereign states that

69 The institutional arrangement as described above, does in fact create a single bureaucracy for both organisations along the lines of the EU, which had to be effected by the Merger Act.

70 6 RECs deposited the protocol and all instruments of accession, which include the Intergovernmental Authority for Development (IGAD), Economic Community of West African States (ECOWAS), Economic Community of Central African States (CEEAC), Southern African Development Community (SADC), Common Market of Eastern and Southern Africa (COMESA) and the Maghreb Arab Union (UMA).

71 In the case of Southern Africa, compliance with art 4 of the treaty is almost impossible as far as SADC and COMESA are concerned. A further concern here is the upcoming negotiation for Cotonou EPAs. This process may result in even greater overlap in Southern Africa.

72 John Stremlau "Teamwork in the EU, AU is a win-win for all sides" *Business Day* 18 June 2003.

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have agreed to co-operate in developing their natural and human resources for the good of all their people and it accordingly has objectives which include in its priorities the advancement of socio-economic rights. The approach of COMESA can best be formulated as "economic prosperity through regional integration".[73]

The COMESA Free Trade Agreement has existed since July 1984, and with its 20-member state[74] population of over 385 million and annual import bill of around US$32 billion, COMESA forms a major marketplace for both internal and external trading. The Treaty contains similar and parallel provisions to GATT. Thus countries negatively affected by implementation of the treaty obligations have remedies available.[75]

The COMESA treaty calls for the establishment of a customs union through removal of all trade barriers and the establishment of a common external tariff and rules of origin. It anticipates co-ordination of macroeconomic policies as the countries move towards the movement of services and capital as well as convertibility of currency. COMESA plans to achieve this through special programmes to provide development of LDCs in the region in order to achieve balanced development in the common market.

3.5 Southern African Development Community (SADC)

The Southern African Development Coordination Conference (SADCC),[76] the forerunner of SADC,[77] was formed in Lusaka, Zambia, on 1 April 1980, following the adoption of the Lusaka Declaration. The Declaration and Treaty establishing the Community was signed at the Summit of Heads of State or Government on 17 August 1992, in Windhoek, Namibia.

The development-orientated strategy of SADC still emphasises the role of trade. In the SADC Treaty, protocols[78] and programmes, the economic

73 http://allafrica.com.

74 Angola, Burundi, Comoros, DR Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, Zimbabwe.

75 Allowing countries to impose quota restrictions or temporary prohibitions on similar goods from member states or to take safeguard measures where its own domestic industries are negatively impacted by the imports.

76 SADCC, the forerunner of SADC, was established by the governments of the 9 Southern African countries of Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe.

77 SADC has 14 member states, namely: Angola, Botswana, Democratic Republic of the Congo (DRC), Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

78 At present SADC sets policy through protocols which must be ratified by two-thirds of member states to bring them into effect. SADC's most ambitious protocol to date is its Trade Protocol, signed in August 1996 by 11 member states. The Trade Protocol calls for the reduction and elimination of tariff and non-tariff barriers between member states. As a progression of the Trade Protocol, SADC launched the SADC Free Trade Agreement on 1 September 2000 and aims at establishing a SADC free trade area within 8 years. Under the SADC Free Trade Protocol, tariffs will be abolished on 85% of trade between 11 of the 14 states by 2008. The remaining tariffs are scheduled for elimination by 2010. Member states will later agree on a timetable for the elimination of non-tariff barriers to regional trade, such as export subsidies. The SADC Free Trade

[continued on next page]

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objectives of SADC are trade-oriented and are premised on the increase of regional and international trade for the achievement of economic growth.[79] The preamble notes of the SADC Treaty states: "duty to promote interdependence and integration of [their] national economies for the harmonious, balanced and equitable development of the Region"[80] and of "the need to mobilise . . . resources to promote . . . economic integration".[81]

The treaty establishing SADC departed considerably from the confined conception of co-operation pursued by its predecessor and adopted a comprehensive development-oriented strategy.[82]

3.5.1 *Aims and objectives*

The SADC Treaty anticipates a wider context of co-operation, and therefore sets out interrelated objectives which include the economic, social and political fields. Within the context of this paper the social objectives will be accentuated.

The Treaty identifies the promotion of human rights as one of the core principles of the integration mechanism[83] and proclaims the observance of human rights as critical in ensuring people's participation in the initiative.[84]

This position is born out of the acknowledgement that trade arrangements such as the SADC integration mechanism are but processes that enable persons to fully enjoy all economic, social, cultural and political rights.[85] Increasingly, it is being accepted that it is unrealistic to measure development purely on economic criteria, while ignoring the human dimension of development. Economic growth must translate into the qualitative improvement of the lives of people.

Consequently, it is critical that the SADC integration mechanism does more than merely mention the promotion and protection of human rights if its goal of integrated development is to be reached.[86] The promotion and protection of human rights must not be viewed as a mere ingredient to the integration initiative, but rather as its central or core purpose.

The aims and objectives of the Community as stated in the Treaty[87] are, amongst others, to achieve development and economic growth, alleviate

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Agreement will also reduce barriers to imports into the SACU area, as well as provide improved access for exports to the SADC markets.

79 See SADC Treaty, arts 5(1)(a), (d), (e), (f), (h) and 5(2)(a), (b), (d), (f), (g), (i).

80 SADC Treaty, preamble, par 4.

81 SADC Treaty, preamble, par 5.

82 SADC "Towards the Southern African Development Community, a Declaration by the Heads of State and Government of Southern African states" in SADC.

83 SADC Treaty, art 4(1)(c).

84 SADC Treaty, preamble, par 7.

85 UN Declaration on the Right to Development, adopted 4 December 1986, art 1, UN GA Res 48/128 (1986), Copenhagen Declaration and Programme of Action, Report of the World Summit for Social Development, Copenhagen, 6 12 March 1995 (1995) ch I, res.1, annex I and II, UN Doc.A/CONF.166/9 (1995).

86 V Seymour "Regional economic integration and human rights: SADC and South Africa" in N Steytler (ed) *Democracy, human rights and economic development in Southern Africa* (1997) 377.

87 Art 5 of the Treaty

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poverty and enhance the standard and quality of life of its members. It also seeks to promote self-sustaining development on the basis of collective self-reliance and the inter-dependence of member states.[88] The preamble[89] of the SADC Treaty is mindful of the need to involve people of the Region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law.[90]

In order to achieve the objectives set out, SADC member states agree to harmonise political and socio-economic policies and plans and undertake to adopt adequate measures to promote the achievement of the objectives. They should also refrain from taking any measure likely to jeopardise the sustenance of the Treaty's principles, the achievement of its objectives and the implementation of its provisions. A further obligation to socio-economic co-operation is found in article 21(3) f of the Treaty, wherein member states agree to co-operate in the area of social welfare.

Largely, said harmonisation is shaped through the creation of the Directorate of Social and Human Development and Special Programmes (SHDSP), launched in September 2002.[91] Its main functions include:[92] the development, promotion and harmonisation of policies and programmes to ensure sustainable human development; gender development; human resources development; the promotion of employment creation and efficient human resources utilisation; employment policies and labour standards; social welfare policies for vulnerable groups; health care policies and standards, including policies to effectively combat the HIV/AIDS pandemic and all other communicable diseases.

3.5.2 *European Union support*

The financial involvement of the EU in the SADC region is intended to advance these objectives. 13 of SADC's 14 member states, Angola, Botswana, Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, Swaziland, Tanzania, Zambia and Zimbabwe, are covered by this programme. The fourteenth member state (South Africa) has its own Trade and Development Cooperation Agreement with the EU, which co-finances joint programmes with SADC.

In terms of the Regional Strategy Paper (RSP) for SADC, signed at the EU-SADC Ministerial Meeting on 7 November 2002, a comprehensive

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88 Mbendi "History of SADC". Available at http:www.mbendi.co.za/orsadc.htm, accessed on 14/05/03.

89 http://www.sadc.int/index.php?lang = english&path = legal/treaties/&page = declaration_and_treaty_of_sadc.

90 This commitment to the observance of human rights is conveyed yet again in art 4, where the principles in accordance with which the member states shall act incorporate the principles of human rights, democracy and the rule of law.

91 The new Directorate centralised the sectors of Human Resources Development, Employment and Labour, Culture, Information and Sport, and Health, previously coordinated by the Kingdom of Swaziland and the Republics of Zambia, Mozambique and South Africa respectively.

92 http://www.sadc.int/shdsp.php?lang = english&path = shdsp&page = index.

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framework for EU-Southern Africa co-operation totaling an initial €101 million contribution was made available for attaining joint objectives for the next five years (2002–2007). These non-repayable funds have been allocated from the 9th European Development Fund (EDF), which is the financial instrument of the EU-ACP Partnership Agreement signed in Cotonou in June 2000.[93]

As several members of SADC are also members of COMESA, the East African Community (EAC) and the Indian Ocean Commission (IOC), sharing a separate RSP, close co-ordination takes place between SADC and these organisations when drafting their respective strategies. Furthermore, an Inter-Regional Co-ordinating Committee (IRCC) has been established to co-ordinate the implementation of related programmes in the two regions.

Both the SADC and the EU have identified the field of economic integration and trade[94] and programmes in transport and communication[95] as priority areas for EU support, which address the major obstacles of economic development and poverty reduction. Up to €20 million of the EU allocation will be used to support programmes in other areas such as peace and security and further support ongoing programmes, the fight against HIV/AIDS and drugs control in the region.

3.6 Southern African Customs Union (SACU)

The SACU members are Botswana, Namibia, Lesotho, Swaziland and South Africa. The Agreement provides for duty-free movement of goods within the Union, although a common external tariff applies to all foreign goods entering the SACU market. The aims and objectives of the Union accordingly focus on trade and the financial benefits that accrue from trade. The interrelated aspects of economic growth that impact on the social and political fields are not seen as the main ambit of this Union.

SADC countries, however, stand to lose a great deal of their revenue through free-trade agreements proposed with the US, South American members of Mercosur, India, Nigeria and other regions. SACU members, including South Africa, Swaziland, Lesotho, Namibia and Botswana, are

93 http://www.reliefweb.int/w/rwb.nsf/0/ff99c75036815254c1256c6a004ba6e0?OpenDocument.

94 Support in the field of Economic Integration and Trade (€35 to €45 million of the allocation) allows the countries in the region to continue to move towards a larger and more unified market. The fostering of the free trade area and the future creation of a customs union will increase the region's competitiveness and help to attract more investment into the productive sectors. Economic Partnership Agreements (EPAs) are given a high priority in the co-operation strategy as a means of assisting the region to more successfully integrate itself into the global trading system and at the same time strengthen its own regional integration process. The EPA negotiations were launched in Brussels on 27 September 2003.

95 Programmes in Transport and Communication (€35 to €45 million) aim at reducing costs of transport and communication mainly through improved utilisation of existing infrastructure and services and through the continued development of a regional transport and communications policy and regulatory framework.

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experiencing erosion of customs revenue through the free-trade agreement between South Africa and the EU, as customs fees are shared among SACU members. This common pool is being reduced as the free-trade agreement with the EU, South Africa's largest trading partner, is reducing customs duties on certain goods and services over time. The benefit derived from revenue-sharing that could be applied to the advancement of socio-economic rights consequently requires other approaches.

3.7 The Trade and Development Cooperation Agreement (TDCA)

Following intensive negotiations, the Trade, Development and Cooperation Agreement between the EU and South Africa was finally signed in Pretoria on 11 October 1999.[96] This Agreement establishes a free trade area between the parties over the following 12 years, liberalising about 95% of trade, and will have long-term benefits and commercial advantages for both sides. As part of the deal, EU goods will have access to the five-nation SACU markets. In particular, providing South Africa preferential access to the world's largest market, opening up important opportunities for South African companies in sectors such as textiles and clothing, chemicals and food.

South Africa exports to the EU increased by 35% in 2000. Against the backdrop of a slowing global economy, resulting in a 0.3% drop in EU imports by the rest of the world, SA exports to the EU grew by a further 11% in 2001. Conversely, EU exports to SA, after growing by 18% in the year 2000, increased by a further 19% in 2001. Although the evolution of the exchange rates explains part of these developments, it is clear that the implementation of the TDCA's trade provisions have played an important role in boosting bilateral trade flows.[97]

In addition to this quantitative progression, both parties underlined the significance of the structural evolution of their bilateral trade. While EU exports to SA comprise a larger share of capital goods, SA is gradually moving away from primarily commodity exports to a more diversified structure of exports, including more value-added products.

3.7.1 *Aims and objectives*

Besides trade, economic and financial co-operation, the TDCA also covers co-operation on environmental aspects, cultural contacts, information and media as well as social co-operation, human resource development, health, data protection, the fight against drugs and money-laundering. In

96 "EU and South Africa sign a historic Trade and Development Cooperation Agreement", European Parliament Press Release (IP/99/735).

97 Press Release 14 June 2002 Third South Africa EU Co-Operation Council. Brussels 7 June 2002 *Trade figures show strong growth, political dialogue launched. SA and EU happy with overall returns*, available at http://www.eusa.org.za/Content/TradeandEconomic/TDCA.html.

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principle the objectives of the TDCA show similarities to the those found in the *Cotonou Agreement*, namely the respect of fundamental human rights and the observation of rule of law, as well as democratic governance.

The TDCA provides substantial financial assistance to develop activities for the duration of the Agreement. The funding criteria and the implementation of the financial assistance have not been delineated in the TDCA, as these are to be decided in the context of the ongoing dialogue between the Community and the government of South Africa.

The legal base for development co-operation with South Africa is to be found in article 2 of Regulation (EC) No 1726/2000.[98] In accordance with this Regulation, programmes focusing on the fight against poverty, taking into account the needs of the previously disadvantaged communities and integrating gender and environmental dimensions of development, focusing mainly on the improvement of living conditions and delivery of basic social services, are supported.

Both sides have expressed their satisfaction with the successful implementation of Development Co-operation. The European Programme for Reconstruction and Development now disburses around €125 million annually, focusing on poverty alleviation, the promotion of the private sector and human rights. In preparation for the new Multi-annual Indicative Programme for 2003–2006, an evaluation of the previous programmes has been made, showing positive results.

4 CONCLUSION

While the advancement and enforcement of socio-economic rights is a complex issue that demands multifaceted solutions, the enhancement of socio-economic rights remains principally a human rights challenge within the integration initiative. According pre-eminence to human rights, and therefore socio-economic rights, within the scheme is the first step towards eradicating the problem.

This study demonstrates that the SADC regional integration is designed for the achievement of commendable objectives: to secure the sustainable social and economic development of the region and to attain the factual improvement in the lives of the region's citizens. It is intended that change, through economic, social and political integration, will elevate people to a better position enjoying greater levels of economic, social, cultural, civil and political utility.

In investigating the various instruments of regional integration and the means for participation in international trade, it is apparent from the aims and objectives of these instruments that trade demonstrated a primary importance. However, the human-centred conception of development is appreciated and in this manner the protection of human rights was ascribed prominence.

98 Regulation (Ec) No 1726/2000 of The European Parliament And Of The Council of 29 June 2000 on development co-operation with South Africa (Official Journal of the European Communities, No. L 198/1 of 4.8.2000) http://europa.eu.int/comm/development/development_old/south_africa/legalbase_en.htm.

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A comprehensive petition for the respect for basic social rights is made in the *Cotonou Agreement*. In addition, a clear instruction for adequate levels of public spending in the social sector exists. To achieve this, the EU has provided financial assistance in a number of social investments. AGOA eligibility is dependant upon the existence of policies aimed at reducing poverty, increasing the availability of health care and educational opportunities; protecting human rights and worker rights and the elimination of certain child-labour practices. The Constitutive Act of the AU integrates the African Charter on Human and Peoples' Rights and other relevant human right instruments and sets out the promotion of these rights as an objective. SADC equally considers the advancement and protection of human rights as a goal for integrated development. The specific relationship between the EU and South Africa explicitly provides for development co-operation by means of financial and technical assistance, focusing mainly on the improvement of living conditions and delivery of basic social services.

Furthermore, a number of treaties have revolutionised the role of trade agreements, in that a violation of human right principles could lead to the suspension of the benefits granted to the participants. Parties to the *Cotonou Agreement* have to treat these obligations in earnest. In past conventions, these references to human rights were more regarded as declaratory statements than compulsory obligations. The SADC Treaty views the promotion and protection of human rights not merely as ancillary to the integration initiative, but rather as its core purpose.

This explicit recognition of human rights as the fundamental objective of the regional integration initiative is unambiguously translated into the objectives of the SADC policies and programmes. The focus of regional efforts consequently should not only be directed at the achievement of economic growth, but also at the enhancement of the promotion and protection of human rights.

In this regard, the challenge for the regional integration initiative remains the creation of formal connections between its principal driving force (trade) and its primary objective (human rights) and the advancement of socio-economic rights. This approach is critical in ensuring that in the implementation of SADC trade policies, the promotion and protection of human rights, including socio-economic rights, must be the central objective of the integration initiative.

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Socio-economic rights in applicable international trade law

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

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

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1 See eg Robert 1991 at 148.

2 OECD 2000 at 1.

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

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

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

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

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

3 See eg art XX, GATT 1994.

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

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

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

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

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

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

There are at least three aspects.

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

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

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

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

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

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

1.2 WTO Agreements include no "social clause"

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

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

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

1.3 The dumping agreement does not explicitly cover social dumping

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

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

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

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

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

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

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

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

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

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

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

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

7 Hurlock 1992 at 1; Parker 1999 at 1.

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

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

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

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

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

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

8 Report, § 4.27.

9 GATT report 1992 at 19.

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

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

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

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

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

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

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

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

11 *Dolphin/tuna* case I § 3.71.

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

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

2.3 The dumping agreement does not cover social dumping

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

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

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

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

3 TOWARDS ANOTHER ROUTE TO INTERPRET WTO AGREEMENTS

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

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

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3.1 A difficult route

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

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

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

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

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

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

3.2 A possible route

Several concurring elements can be put forward.

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

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

13 See eg MARCEAU 2002 at 760.

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

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

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

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

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

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

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

17 *Shrimps case I* § 153.

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

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

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

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

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

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