HOME STATE OPTIONS TO CONTROL THE HUMAN RIGHTS RECORDS OF TNCS ACTING ABROAD

Inaugural-Dissertation
zur Erlangung der Doktorwürde
der Juristischen Fakultät
der Eberhard Karls Universität Tübingen
vorgelegt von

Renate Ott
aus Filderstadt

2014
TOBIAS-lib

Dekan:	Prof. Dr. Jörg Kinzig
1. Berichterstatter:	Prof. Dr. Martin Nettesheim
2. Berichterstatter:	Prof. Dr. Jochen von Bernstorff
Tag der mündlichen Prüfung:	21. Juli 2014

Books

Frederick Abbott, Christina Breining-Kaufmann and Thomas Cottier (eds), *International Trade and Human Rights* (Ann Arbor: University of Michigan Press, 2006)

Michael Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague: Kluwer International, 1999)

Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford: University Press, 2005)

Arthur Edmond Appleton, *Environmental Labelling Programmes* (London, The Hague: Kluwer Law International, 1997)

Frank von Auer (ed), *Arbeitnehmerrechte im Welthandel* (Mössingen-Talheim: Talheimer Verlag, 1995)

Mashood A. Baderin and Manisuli Ssenyonjo (eds), *International Human Rights Law: Six Decades after the UDHR and Beyond* (Farnham, Burlington: Ashgate, 2010)

Mashood A. Baderin and Robert McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (Oxford: Oxford University Press, 2007)

Ernest K. Bankas, *The State Community Controversy* (Berlin, Heidelberg: Springer, 2005)

David Barnhizer (ed), *Effective Strategies for Protecting Human Rights* (Aldershot, Burlington: Ashgate Dartmouth, 2001)

Jürgen Basedow and Toshiyuki Kono (eds) *An Economic Analysis of Private International Law* (Tübingen: Mohr Siebeck, 2006)

Jürgen Becker, *Entwicklungskooperation in einem sich wandelnden Weltsystem* (Frankfurt a. M.: Alfred Metzner Verlag, 1982)

Marc Beise, *Die Welthandelsorganisation (WTO): Funktion, Status, Organisation* (Baden-Baden: Nomos, 2001)

Tobias Bender, *Domestically Prohibited Goods* (Berlin: Duncker & Humblot, 2006)

Rudolf Bernhardt (ed), *Encyclopedia of Public International Law* (vol. III, Amsterdam, Lausanne, New York, Oxford, Shannon, Singapore, Tokyo: Elsevier Science, 1997)

Rudolf Bernhardt (ed) *Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit, Menschenrechte: Festschrift für Hermann Mosler* (Berlin, Heidelberg: Springer, 1983)

Jagdish Bhagwati, *Free Trade Today* (Oxford: Oxford University Press, 2002)

Jagdish Bhagwati and Robert E. Hudec, *Fair Trade and Harmonization* (vol. 1, Economic Analysis, Cambridge, Mass., London: MIT Press, 1996)

Jagdish Bhagwati and Robert E. Hudec, *Fair Trade and Harmonization* (vol. 2, Legal Analysis, Cambridge, Mass., London: MIT Press, 1996)

Henry Campbell Black, *Black's Law Dictionary* (6th ed, St Paul, Minnesota: West Group, 1990)

Klaus Bockslaff, *Das völkerrechtliche Interventionsverbot als Schranke außenpolitisch motivierter Handelsbeschränkungen* (Berlin: Duncker & Humblot, 1987)

Wilfried Bolewski, *Diplomacy and International Law in Globalized Relations* (Berlin, Heidelberg: Springer, 2007)

John Borneman (ed), *The case of Ariel Sharon and the fate of universal jurisdiction* (Princeton: Princeton University, 2004)

Frank Braßel and Michael Windfuhr, *Welthandel und Menschenrechte* (Bonn: Verlag J. H. W. Dietz Nachfolger, 1995)

Eva Brems, *Human Rights: Universality and Diversity* (Dordrecht: Springer Netherland, 2001)

Eckart Brödermann and Joachim Rosengarten, *Internationales Privat- und Zivilverfahrensrecht* (4th ed, Köln, München: Carl Heymanns Verlag GmbH, 2007)

Tim Brune, *Der Fall Österreich* (Frankfurt am Main, Berlin, Bern, Bruxelles, New York, Oxford, Wien: Peter Lang)

Michael Brzoska (ed), *Smart Sanctions: The Next Steps* (vol. 6, Baden-Baden: Nomos, 2001)

Nikolaus Buch, Sven Oehme and Robert Punkenhofer, *Firmengründung in den USA* (Berlin, Heidelberg, New York: Springer, 2004)

James Cameron, Paul Demaret and Damien Geradin, *Trade & the Environment: The Search for Balance* (vol. 1, London: Cameron May Ltd., 1994)

Andrew Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1993)

Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006)

Claus Dieter Classen, Armin Dittmann, Frank Fechner, Ulrich M. Gassner, Michael Kilian (eds) *„In einem vereinten Europa dem Frieden der Welt zu dienen..." Liber amicorum Thomas Oppermann* (Berlin: Duncker & Humblot, 2001)

John Bell Condliffe, *The Commerce of Nations* (New York: Norton, 1950)

Paul Conlon, *Die rechtliche Problematik von UN-Sanktionen als Mittel zur Durchsetzung des Völkerrechts* (Walther Schücking-Kolleg 19, Bonn: Europa Union Verlag, 1996)

Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Antwerp, Oxford: Intersentia, 2004)

David Cortright and George A. Lopez, *Sanctions and the Search for Security* (Boulder, CO: Lynne Rienner, 2002)

David Cortright and George A. Lopez (eds), *Smart Sanctions Targeting Economic Statecraft* (Lanham, Boulder, New York, Oxford: Rowman & Littlefield, 2002)

David Cortright and George A. Lopez, *The Sanctions Decade, Assessing UN Strategies in the 1990s* (Boulder, London: Lynne Rienner, 2000)

Thomas Cottier, Olga Nartova and Sadeq Z. Bigdeli, *International Trade Regulation and the Mitigation of Climate Change* (Cambridge: Cambridge University Press, 2009)

Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi Bonanomi (eds), *Human Rights and International Trade* (Oxford: Oxford University Press, 2005)

Brainerd Currie, *Selected Essays on the Conflict of Laws* (Durham: Duke University Press, 1963)

Gerhard Dannecker, *Das intertemporale Strafrecht* (Tübingen: Mohr Siebeck, 1993)

Gráinne de Búrca and Joanne Scott (eds), *The EU and the WTO: Legal and Constitutional Aspects* (Oxford, Portland Oregon: Hart Publishing, 2001)

Olivier de Schutter (ed), *Transnational Corporations and Human Rights* (Oxford, Portland: Hart Publishing, 2006)

Charles de Secondat Montesquieu, *The Spirit of Laws*, (vol. 1, New York: Collier Press, 1900)

Les de Villiers, *In Sight of Surrender: The U.S. Sanctions Campaign against South Africa* (Westport, CT: Praeger Publishers, 1995)

Jost Delbrück, *Allocation of Law Enforcement Authority in the International System*, (Berlin: Duncker und Humblot, 1995)

Luc Demaret (ed), *Corporate Social Responsibility: Myth or Reality?* (Geneva: ILO, 2003)

Jeroen Denkers, *The World Trade Organization and Import Bans in Response to Violations of Fundamental Labour Rights* (Antwerp, Oxford, Portland: Intersentia, 2008)

Detlev Christian Dicke, *Die Intervention mit wirtschaftlichen Mitteln im Völkerrecht* (Baden-Baden: Nomos, 1978)

Klaus Dicke, Waldemar Hummer, Daniel Girsberger, Katharina Boele-Woelki, Christoph Engel and Jochen A. Frowein, *Völkerrecht und Internationales Privatrecht in einem sich globalisierenden internationalen System – Auswirkungen der Entstaatlichung transnationaler Rechtsbeziehungen* (Heidelberg: Müller Verlag, 2000)

Martin Dieckmann, *Das Abfallrecht der Europäischen Gemeinschaft* (Baden-Baden: Nomos, 1994)

Andreas Diem, *Freihandel und Umweltschutz in GATT und WTO* (Baden-Baden: Nomos, 1996)

Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd ed, Ithaca, New York: Cornell University Press, 2003)

Margaret P. Doxey, *International Sanctions in Contemporary Perspective* (2nd ed, London: Macmillan Press Ltd., 1996)

Johann Ludwig Duvigneau, *Handelsliberalisierung und Marktintegration unter dem WTO/GATT-Recht* (Berlin: Duncker & Humblot, 2005)

Asbjørn Eide, Helge Ole Bergesen and Pia Rudolfson Goyer (eds), *Human Rights and the Oil Industry* (Antwerpen, Groningen, Oxford: Intersentia, 2000)

Kimberly Ann Elliott, Richard B. Freeman, *Can Labor Standards Improve Under Globalization?* (Washington: Institute for International Economics, 2003)

Eric Engle, *Private Law Remedies for Extraterritorial Human Rights Violations* (2006) at <http://elib.suub.uni-bremen.de/diss/docs/00010289.pdf> 1 May 2014

Malcolm D. Evans (ed) *International Law* (Oxford: Oxford University Press, 2003)

Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of International and National Courts and the (De-) Fragmentation of International Law* (Oxford, Portland, Oregon: Hart Publishing, 2012)

James J. Fawcett (ed), *Declining Jurisdiction in Private International Law* (Oxford: Clarendon Press, 1995)

Wilfried Fiedler, Eckart Klein, Anton K. Schnyder, *Gegenmaßnahmen*, (Bericht der Deutschen Gesellschaft für Völkerrecht, vol.37, Heidelberg: Müller, 1998)

Raúl Fornet-Betancourt and Hans Jörg Sandkühler (eds), *Begründung und Wirkung von Menschenrechten im Kontext der Globalisierung* (Frankfurt am Main: ISIS 2001)

Jochen A. Frowein and Rüdiger Wolfrum (eds), *Max Planck UN Yearbook* (vol. 4, Leiden: Martinus Nijhoff, 2000)

GATT, *Industrial Pollution Control and International Trade. GATT Studies in International Trade No. 1*, (Geneva: GATT Secretariat, 1971)

GATT, *International Trade 1990-1991* (Vol. 1, Geneva: GATT Secretariat, 1992)

Thomas Geiser, Hans Schmid and Emil Walter-Busch (eds), *Arbeit in der Schweiz des 20. Jahrhunderts. Wirtschaftliche, rechtliche und soziale Perspektiven* (Bern, Stuttgart, Wien: Haupt, 1998)

Harald Ginzky, *Saubere Produkte, schmutzige Produktion* (Düsseldorf: Werner Verlag, 1997)

Edward Goldsmith and Jerry Mander (eds), *The Case Against the Global Economy and for a Turn toward the Local* (San Francisco: Sierra Club Books, 1996)

Mohammed M. Gomaa, *Suspension or Termination of Treaties on Grounds of Breach* (The Hague: Martinus Nijhoff, 1996)

Vera Gowlland-Debbas (ed), *United Nations Sanctions and International Law* (The Hague: Kluwer, 2001)

Stefan Griller (ed) *International Economic Governance and Non-Economic Concerns* (Wien, New York: Springer, 2003)

Harald Großmann, Matthias Busse, Heike Fuchs, Georg Koopmann, *Sozialstandards in der Welthandelsordnung* (vol. 70, Baden-Baden: Nomos, 2002)

Richard N. Haass (ed), *Economic Sanctions and American Diplomacy* (New York: Council of Foreign Relations, 1998)

Michael J. Hahn, *Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie* (Berlin u. a.: Springer, 1996)

Tobias Haller, Annja Blöchlinger, Markus John, Esther Marthaler, Sabine Ziegler (eds), *Fossil Fuels, Oil Companies and Indigenous Peoples* (vol. 1, Berlin, Wien Zürich: Lit Verlag, 2007)

David J. Harris, Michael O'Boyle and Colin Warbrick, *The Law of the European Convention on Human Rights* (London: Butterworths, 1995)

James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007)

Rolf H. Hasse, *Theorie und Politik der Embargos* (Köln: Institut für Wirtschaftspolitik an der Universität Köln, 1973)

Peter Hay, *Internationales Privat- und Zivilverfahrensrecht* (3rd ed, Munich: C. H. Beck, 2007)

Carsten Helm, *Sind Freihandel und Umweltschutz vereinbar? Ökologischer Reformbedarf des GATT/WTO-Regimes* (Berlin: Ed. Sigma, 1995)

Louis Henkin, Stanley Hoffmann, Jeane J. Kirkpatrick & Allan Gerson, William D. Rogers and David J. Scheffer, *Right v. Might, International Law and the Use of Force* (2nd ed, New York: Council on Foreign Relations Press, 1991)

Matthias Herdegen, *Internationales Wirtschaftsrecht* (9th ed, München: C. H. Beck, 2011)

Matthias Herdegen, *Völkerrecht* (11th ed München: C. H. Beck, 2012)

Berta Esperanza Hernández-Truyol, Stephen J. Powell, *Just Trade: A New Covenant Linking Trade and Human Rights* (New York, London: New York University Press, 2009)

Meinhard Hilf and Stefan Oeter (eds), *WTO-Recht* (Baden-Baden: Nomos, 2005)

Almut Hinz, *Sanktionen gegen Libyen* (Frankfurt a. M.: Peter Lang, 2005)

Bernard M. Hoekman, Michel M. Kostecki, *The Political Economy of the World Trading System* (3rd ed, Oxford: Oxford University Press, 2009)

Johannes Hoffmann (ed), *Universale Menschenrechte im Widerspruche der Kulturen* (Berlin: Iko, 1994)

Harald Hohmann, *Angemessene Außenhandelsfreiheit im Vergleich* (Tübingen: Mohr Siebeck, 2002)

Gary Clyde Hufbauer, Jeffrey J. Schott, Kimberly Ann Elliott, *Economic Sanctions Reconsidered: History and Current Policy,* (vol. 1, Washington D. C.: Institute for International Economics, 1985)

International Council on Human Rights Policy, *Beyond Voluntarism: human rights and the developing international legal obligations of companies* (Vernier: Roto Press, 2002)

Knut Ipsen, *Völkerrecht* (5th ed, München: C. H. Beck, 2004)

Douglas Irwin, *Free Trade under Fire* (Princeton and Oxford: Princeton University Press, 2002)

Philipp Jehle, *Harmonisierung im Welthandelsrecht durch Verweis auf internationale Standards* (vol. 46, Baden-Baden: Nomos, 2008)

Sarah Joseph, *Blame it to the WTO? A Human Rights Critique* (Oxford: Oxford University Press, 2011)

Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Oxford, Portland: Hart Publishing, 2004)

Sarah Joseph, David Kinley and Jeff Waincymer (eds), *The World Trade Organization and Human Rights: Interdisciplinary Perspectives* (Cheltenham, UK and Northampton, MA, USA: Edward Elgar, 2009)

Walter Kälin and Jörg Künzli, *Universeller Menschenrechtsschutz* (2nd ed, Basel: Helbing Liechtenhahn, 2008)

Menno T. Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (The Hague, London, Boston: Kluwer Law International, 2000)

Daniel L. M. Kennedy and James D. Southwick (eds), *The Political Economy of International Trade Law* (Cambridge: Cambridge University Press, 2002)

Otto Kimminich (founder) and Stephan Hobe, *Einführung in das Völkerrecht* (9th ed, Tübingen, Basel: A. Francke Verlag, 2008)

Andreas Knorr, *Umweltschutz, nachhaltige Entwicklung und Freihandel* (Stuttgart: Lucius & Lucius, 1997)

Jan Kropholler, *Internationales Privatrecht* (6th ed, Tübingen: Mohr Siebeck, 2006)

Frank Küschner-Pelkmann, *Sanktionen gegen die Apartheid* (Frankfurt a. M.: Lembeck, 1988)

Andrew Lang, *World Trade Law after Neoliberalism* (Oxford: Oxford University Press, 2011)

Michael B. Likosky (ed), *Transnational Legal Processes, Globalisation and Power Disparities* (Cambridge: Cambridge University Press, 2002)

Ronald St. J. MacDonald, Franz Matscher and Herbert Petzold (eds), *The European System for the Protection of Human Rights* (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1993)

Tilman Makatsch, *Gesundheitsschutz im Recht der Welthandelsorganisation (WTO)* (Berlin: Duncker & Humblot, 2004)

Axel Marschik, *Subsysteme im Völkerrecht* (Berlin: Duncker & Humblot, 1997)

Will Martin and L. Alan Winters (eds), *The Uruguay Round and the Developing Countries* (Cambridge: Cambridge University Press, 1996)

Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization* (2nd ed, Oxford, New York: Oxford University Press, 2006)

Jürgen Matthes, *Neuer Protektionismus?* (Köln: Deutscher Instituts-Verlag, 2001)

Ann Elizabeth Mayer, *Islam and Human Rights* (2nd ed, Boulder: Westview Press,1995)

Karl M. Meessen, *Extraterritorial Jurisdiction in Theory and Practice* (London, The Hague, Boston: Kluwer Law International, 1996)

Norbert Melanowski and Christoph Scherrer, *Internationale Handelsvereinbarungen und Sozialstandards* (Düsseldorf: Hans-Böckler-Stiftung, 1996)

Cristoph Menke ans Arnd Pollmann, *Philosophie der Menschenrechte* (Hamburg: Junius Verlag, 2007)

Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff and Brill, 2006)

Nicole Monleón, *Das neue internationale Privatrecht von Venezuela* (Tübingen: Mohr Siebeck, 2008)

Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007)

Martin Nettesheim and Gerald G. Sander (eds), *WTO-Recht und Globalisierung* (Berlin: Duncker & Humblot, 2003)

Math Noortmann, *Enforcing International Law* (Aldershot, Burlington: Ashgate, 2005)

Håkan Nordström and Scott Vaughan, *WTO Special Studies 4: Trade and Environment* (Geneva: WTO, 1999)

Kim Richard Nossal, *Rain Dancing, Sanctions in Canadian & Australian Foreign Policy* (Toronto, Buffalo, London: University of Toronto Press, 1994)

Peter E. Nygh, *Conflict of Laws in Australia* (4th ed, Sydney: Butterworths, 1984)

Robert O'Brien, Anne Marie Goetz, Jan Aart Scholte and Marc Williams, *Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements* (Cambridge: Cambridge University Press, 2000)

Kerstin Odendahl, *Die Umweltpflichtigkeit der Souveränität* (Berlin: Duncker & Humblot, 1998)

OECD, *Trade, Employment and Labour Standards, A Study of Core Workers' Rights and International Trade* (Paris: OECD, 1996)

Obasi Okafor-Obasi, *The Enforcement of State Obligations to Respect and Ensure Human Rights in International Law* (Potsdam: Menschenrechtszentrum der Universität Potsdam, 2003)

Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge: Cambridge University Press, 2003)

Ernst-Ulrich Petersmann (ed), *Reforming the World Trade System, Legitimacy, Efficiency and Democratic Governance* (Oxford: Oxford University Press, 2005)

Olaf Poeschke, *Politische Steuerung durch Sanktionen?* (Wiesbaden: Deutscher Universitätsverlag, 2003)

Sandra Polaski, *Trade and Labor Standards, A Strategy for Developing Countries* (Washington: Carnegie Endowment for International Peace, 2003)

Adelheid Puttler, *Völkerrechtliche Grenzen von Export- und Reexportverboten* (Baden-Baden: Nomos, 1989)

Maurizio Ragazzi, *The Concept of International Obligations* Erga Omnes (New York: Oxford University Press, 2000)

David A. Reidy and Mortimer N. S. Sellers (eds), *Universal Human Rights* (Lanham: Rowman & Littlefield, 2005)

Oscar Schachter, *International Law in Theory and Practice* (Dordrecht, Boston, London: Nijhoff Publishers, 1991)

Bernhard Schäfers (ed), *Grundbegriffe der Soziologie* (8th ed, Opladen: Leske + Budrich, 2003)

Thomas Schelling, *The Strategy of Conflict* (New York: Oxford University Press, 1960, 1980)

Christoph Scherrer, Thomas Greven and Volker Frank, *Sozialklauseln, Arbeiterrechte im Wandel* (Münster: Westfälisches Dampfboot, 1998)

Dieter H. Scheuing, *Grenzüberschreitende atomare Wiederaufarbeitung im Lichte des europäischen Gemeinschaftsrechts* (Baden-Baden: Nomos, 1991)

Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999)

Dieter Senghaas, *Wohin driftet die Welt?* (Berlin: Suhrkamp, 1994)

Richard Senti, *Die WTO im Spannungsfeld zwischen Handel, Gesundheit, Arbeit und Umwelt* (vol. 32, Baden-Baden: Nomos, 2006)

William Shakespeare, *The Tragedy of Hamlet, Prince of Denmark* (1599 to 1602)

Geoff Simons, *Imposing Economic Sanctions. Legal Remedy or Genocidal Tool?* (London, Sterling: Pluto Press, 1999)

Sigrun I. Skogly, *Human Rights Obligations of the World Bank and the International Monetary Fund* (London: Cavendish Publishing, 2001)

Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004)

Martin Söhngen, *Das Internationale Privatrecht von Peru* (Tübingen: Mohr Siebeck, 2006)

Wolfram Spelten, *WTO und nationale Sozialordnungen* (vol.11, Berlin: Duncker & Humblot, 2005)

Henry J. Steiner and Philip Alston, *International Human Rights in Context* (2nd ed, Oxford: Oxford University Press, 2000)

Joseph Straus (ed), *The Role of Law and Ethics in the Globalized Economy* (Berlin, Heidelberg: Springer, 2009)

Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2005)

Terre des Femmes and Petra Schnüll (eds), *Weibliche Genitalverstümmelung Eine fundamentale Menschenrechteverletzung* (1999)

Texte zum kirchlichen Entwicklungsdienst, "Südafrika: Sanktionen in der Diskussion" (Hamburg: Dienste in Übersee, 1988)

Thukydes, *Der Peloponnesische Krieg* (edited by Helmuth Vretska and Werner Rinner, Stuttgart: Philipp Reclam jun., 1966, 2000)

Christian Tietje, *Normative Grundstrukturen der Behandlung nichttarifärer Handelshemmnisse in der WTO/GATT-Rechtsordnung* (Berlin: Duncker & Humblot, 1988)

UN, *Sanctions Against South Africa: The Peaceful Alternative to Violent Change* (New York: United Nations, 1998)

Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge: Cambridge University Press, 2008)

Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures addressing Non-Trade Concerns. A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Process and Production Methods* (The Hague: Ministry of Foreign Affairs of the Netherlands, 2007)

Willem van Genugten and Camilo Perez-Bustillo (eds), *The Poverty of Rights, Human Rights and the eradication of Poverty* (London, New York: Zed Books, 2001)

Wolfgang Graf Vitzthum (ed), *Völkerrecht* (Berlin, New York: Walter de Gruyter, 1997)

Peter Wallensteen and Carina Staibano (eds), *International Sanctions* (London, New York: Frank Cass, 2005)

Birgit Weiher, *Nationaler Umweltschutz und internationaler Warenverkehr* (Baden-Baden: Nomos, 1997)

Joseph H. H. Weiler, *The EU, the WTO and the NAFTA , Towards a Common Law of International Trade* (Oxford: Oxford University Press, 2000)

Wilhelm Wengler, *Internationales Privatrecht* (special ed, of vol. VI, fascicle 1 of BGB-RGRK, 12th ed, Berlin, New York: Walter de Gruyter, 1981)

Wilhelm Wengler, *Völkerrecht* (vol. 1, Berlin, Göttingen, Heidelberg: Springer, 1964)

Sascha Werthes, *Probleme und Perspektiven von Sanktionen als politisches Instrument der Vereinten Nationen* (Münster, Hamburg, London: LIT Verlag, 2003)

WTO, Legal Affairs Division, *WTO Analytical Index: Guide to WTO Law And Practice* (3rd ed, Cambridge: Cambridge University Press, 2012), available at <http://www.wto.org/english/res_e/booksp_e/analytic_index_e/analytic_index_e.htm> 1 May 2014

Gudrun Monika Zagel, *WTO & Human Rights: Examining Linkages and Suggesting Convergence* (Voices of Development Jurists Paper Series vol. 2, no. 2, Rome: International Development Law Organization, 2005)

Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000)

Elisabeth Zoller, *Peacetime Unilateral Remedies* (Dobbes Terry, New York: Transnational Publishers Inc., 1984)

Journals

Susan Ariel Aaronson, "A Match Made in the Corporate and Public Interest: Marrying Voluntary CSR Initiatives and the WTO" (2007) 41 *J.W.T.* 629

Tarik Abdel-Monem, "How far do the lawless areas of Europe extend? Extraterritorial application of the European Convention on Human Rights" 14 (2005) *J. Transn'l L. & Pol'y* 159

Denis Alland, "Countermeasures of General Interest" (2002) 13 *EJIL* 1221

Philip Alston, "'Core Labour Standards' and the Transformation of the International Labour Rights Regime" (2004) 15 *EJIL* 457

Philip Alston, "Linking Trade and Human Rights" (1980) 23 *GYIL* 126

Robert D. Anderson and Hannu Wager, "Human Rights, Development, and the WTO: The Cases of Intellectual Property and Competition Policy" (2006) 9 *JIEL* 707

Salman Bal, "International Free Trade Agreements and Human Rights: Reinterpreting Art. XX of the GATT" (2001) 10 *Minn. J. of Global Trade* 62

Lorand Bartels "Art. XX of GATT and the Problem or Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights" (2002) 36 *JWT* 353

M.Cherif Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*" (1996) 59 *L&CP* 63

Joseph Robert Berger, "Unilateral Trade Measures to Conserve the World's Living Resources: An Environmental Breakthrough For the GATT in the WTO Sea Turtle Case" (1999) 24 *Colum. J. Envtl. L.* 355

Richard B. Bilder, "The Role of Unilateral State Action in Preventing International Environmental Injury" (1981) 14 *VJTL* 51

Robert C. Blitt, "Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance" (2012) 48 *Tex. Int'l. L. J.* 33

Philip I. Blumberg, "The increasing recognition of enterprise principles in determining parent and subsidiary corporation liabilities" (1996) 28 *Conn. L. Rev.* 295

Daniel Bodansky and John R. Crook, "Symposium: The ILC's State Responsibility Articles" (2002) 96 *AJIL* 773

Julie Campagna, "United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Right: the International Community Asserts Binding Law on the Global Rules Makers" (2004) 37 *J. Marshall L. Rev.* 1205

Enzo Cannizzaro, “The Role of Proportionality in the Law of International Countermeasures” (2001) 12 *EJIL* 889

Steve Michael Reiterer, “Das multilaterale Handelssystem und internationaler Umweltschutz“ (1993) *WpolBl* 291

Steve Charnovitz, “Environmental and Labour Standards in Trade” (1992) 15 *World Economy* 335

Steve Charnovitz, "Environmentalism Confronts GATT Rules: Recent Developments and New Opportunities" (1993) 27 *JWT* 37

Steve Charnovitz, “Exploring the Environmental Exception in GATT art. XX“ (1991) 25 *JWT* 37

Steve Charnovitz, “GATT and the Environment, Examining the Issue” (1992) 4 *IEA* 203

Steve Charnovitz, “The Law of Environmental ‘PPMs’ in the WTO: Debunking the Myth of Illegality” (2002) 27 *Yale J. of Int’l Law* 59

Steve Charnovitz, “The World Trade Organization and Social Issues” (1994) 28 *J.W.T.* 17

Brian F. Chase, “Tropical Forests and Trade Policy: The Legality of Unilateral Attempts to Promote Sustainable Development under the GATT“(1993) 14 *TWQ* 749

Cesar Chelala and Alejandro M. Garro, “Corporations Should Be Held Liable for Human Rights Violations” (September 2011) *Aportes DPLF* 17

Danwood Mzikenge Chirwa, “The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights” (2004) 5 *Melb JIL* 1

Sarah H. Cleveland, “Human Rights Sanctions and International Trade: A Theory of Compatibility” (2002) *JIEL* 133

Jonathan Clough, "Not-so Innocents Abroad: Corporate Criminal Liability for Human Rights Abuses" (2005) 11 *AJHR* 1

Jean Combacau, “Sanctions“ (1986) 9 *EPIL* 337

Thomas Cottier, “Trade and Human Rights, A Relationship to Discover” (2002) 5 *JIEL* 111

Eileen M. Crumm, “The Value of Economic Incentives in International Relations” (1995) 32 *JPR* 318

Erika de Wet “Labor standards in the globalized economy: the inclusion of a social clause in the General Agreement on Tariff and Trade/World Trade Organization” (1995) 17 *HRQ* 443

Jost Delbrück, „Globalization of Law, Politics and Markets- Implications of Domestic Law. A European Perspective” 1 *IJGLS* (1993) 9

Surya Deva, „Acting extraterritorially to tame Multinational Corporations for Human Rights violations: Who should 'Bell the Cat'?" (2004) 5 *Melb J. Int'l L.* 37

Janelle M. Diller and David A. Levy, "Child Labor, Trade and Investment: Towards the Harmonisation of International Law" (1997) 91 *AJIL* 663

Karl Doehring, "Die Selbstdurchsetzung völkerrechtlicher Verpflichtungen" (1987) *ZaöRV* 44

David Dollar and Aart Kraay, "Spreading the Wealth" (2002) 81 *Foreign Aff.* 120

Caroline Dommen, "Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies" (2002) 24 *HRQ* 1

Jack Donnelly "Cultural Relativism and Universal Human Rights" (1984) 6 *HRQ* 400

Jack Donnelly "The Relative Universality of Human Rights" (2007) 29 HRQ 281

Daniel W. Drezner, "The Hidden Hand of Economic Coercion" (2003) 57 *IO* 643

Jeffrey L. Dunoff, "Reconciling International Trade with Preservation of the Global Commons: Can we prosper and protect?" (1992) 49 *Wash. & Lee L. Rev.* 1407

Eric Engle, "European Law in American Courts: Foreign Law as Evidence of Domestic Law" (2007) 33 *Ohio N. U. L. Rev.* 99

Eric Engle, "Extraterritorial Corporate Criminal Liability: a Remedy for Human Right Violations?" (2006) 20 *St. John's L. J.* 287

Eric Engle, "Frontiers in International Human Rights Law: The Alien Tort Statute and the Torture Victims' Protection Act: Jurisdictional Foundations and Procedural Obstacles" (2006) *Willamette J. Int'l L. & Dispute Res*, 1

Andrew Farrelly, "Foreign Policy in the Courts – The ATCA in re South African Apartheid Litigation: What Sosa Makes Courts Do" (2006) *Seton Hall Legislative J.* 437

Aaron Xavier Fellmeth, "Wiwa v. Royal Dutch Petroleum Co: A New Standard for the Enforcement of International Law in U. S. Courts?" (2002) 5 *Yale H.R. & Dev. L.J.* 241

Greg Flynn and Robert O'Brien, "An Internationalist Western Labour Response to the Globalization of India and China" (2010) 1 *Global Labour J.* 178

Mary E. Footer, "The (Re)Turn to 'Soft Law' in Reconciling the Antinomies in WTO Law" (2010) 11 *Melb. J. Int'l L* .241

Thomas M. Franck, "On Proportionality of Countermeasures in International Law" (2008) 102 *AJIL* 715

Ingo E. Fromm, "Auf dem Weg zu strafrechtlicher Verantwortung von Unternehmen/Unternehmensvereinigungen in Europa?" (2007) *ZIS* 279

Igor Fuks, “Sosa v. Alvarez-Machain and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability” (2006) 106 *Colum. L. Rev.* 112

Marc Galanter “Legal Tropor: Why So Little Has Happened in India After the Bhopal Tragedy” 20 *Texas J. Int’l L. J.* 273 (1985)

Judy A. Gallant, “Humanitarian Intervention and Security Council Resolution 688: A Reappraisal in Light of a Changing World Order” (1992) 7 *Am. Un. ILR* 881

Johan Galtung, “On the Effects of International Economic Sanctions, with Examples from the Case of Rhodesia”, (1967) 19 W*orld Politics* 378

Frank J. Garcia, “The Global Market and Human Rights: Trading Away the Human Rights Principle” (1999) 25 *Brooklyn J. Int’l L.* 51

Kinka Gerke, “Die unilaterale Versuchung: Die Sanktionen der USA gegen die Handelspartner Kubas, Irans und Libyens und ihre Auswirkung auf das Welthandelsregime” (1997) 2 *HSFK-Report* 1

Kinka Gerke “Unilateral Strains in Transatlantic Relations: US Sanctions against Those Who Trade with Cuba, Iran and Lybia, and their Effects on the World Trade Regime” (1997) 47 *PRIF Report* (Summary) <http://hsfk.de/Publications.9.0.html?&no_cache=1&L=1&detail=193&no_cache=0&cHash=15c3b213e5> 1 May 2014

Mark Gibney and R. David Emerick, “The Extraterritorial Application of United States law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards” (1996) 10 *Temp. Int’l L. J.* 123

Patti A. Goldman, “Resolving the Trade and Environment Debate: In Search for a Neutral Forum and Neutral Principles” (1992) 49 *Wash. & Lee L. Rev.* 1279

Bernard Grossfeld and C. Paul Rogers “A Shared Values Approach to Jurisdictional Conflicts in International Economic Law” (1983) 32 *ICLQ* 931

Andrew T. Guzman and Timothy L. Meyer, “International Soft Law” (2010) 2 *J. of Legal Analysis* 171

Iris Halpern, “Tracing the Contours of Transnational Corporations’ Human Rights Obligations in the Twenty-First Century” (2008) 14 *Buff. HRL Rev.* 129

Jennifer L. Heil, “African Private Security Companies and the Alien Tort Claims Act: Could international Oil and Mining Companies Be Liable?” (2002) 22 *NW J. Int’l L. & Bus* 291

Veijo Heiskanen, “The Regulatory Philosophy of International Trade Law” (2004) 38 *JWT* 1

Laurence E. Helfer, “Overlegalizing Human Rights; International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes” (2002) 102 *Colum. L. Rev*. 1832

Louis Henkin, “The Universal Declaration at 50 and the challenge of Global Markets” (1999) 25 *Brooklyn J. of Int’l L.*17

Christian Hess, “Sind Sozialklauseln im Welthandel berechtigt?“ (1995) 3 *Der Arbeitgeber* 81

Janet Hilowitz, “Social Labelling to combat Child Labour: Some Considerations” (1997) 136 *ILR* 215

Todd Howland, “Evolving practice in the field: informing the international legal obligation to ‘protect’” (2006) 34.1 *Denver J. of Int’l L. & Pol.* 89

Amy Howlett, „Getting ‚Smart’: Crafting Economic Sanctions that Respect All Human Rights“ (2004) 73 *Fordham L. Rev.* 1199

Robert Howse, “Back to court after Shrimp/Turtle? Almost but not quite yet: India’s short lived challenge to labour and environmental exceptions in the European Union’s Generalized System of Preferences” (2003) 18 *Am. U. Int’l L. Rev.* 1333

Robert Howse, “Human Rights in the WTO: Whose Rights, What Humanity?” (2002) 13 *EJIL* 651

Robert Howse, „The World Trade Organization and the Protection of Workers’ Rights“ (1999) 3 *J. Small & Emerging Bus. L.*131

Robert Howse and Jared M. Genser, “Are EU Trade Sanctions on Burma Compatible with WTO Law?” (2008) 29 *Mich. J. Int’l. L* 165

Robert Howse and Donald Regan, “The Product/Process Distinction – An Illusory Basis for Disciplining ‘Unilateralism’ in Trade Policy” (2000) 11 *EJIL* 249

Robert Hudec, “GATT/WTO Constraints on National Regulation: Requiem for An ‘Aim and Effects’ Test” (1998) 32 *The Int’l Lawyer* 619

Nicola Jägers and Marie-José van der Heijden, “Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands” (2008) *Brook. J. Int’l L.* 833

Manoj Joshi, „Are Eco-Labels Consistent with World Trade Organization Agreements?” (2004) 38 *J.W.T.* 69

Naila Kabeer, “Globalization, Labour Standards and Women’s Rights: Dilemmas of Collective (In)Action in an Interdependent World” (2004) 10 *Feminist Economics* 3

Jean-Marie Kamatali, “The New Guiding Principles on Business and Human Rights’ Contribution in Ending the Divisive Debate Over Human Rights Responsibility of Companies: Is it Time for an ICJ Advisory Opinion?” (2012) 20 *Cardozo J. of Int’l & Comp. L.* 437

P. J. Kee, “Expanding the Duties of the Vigilant Doorkeeper: ATS Litigation and the Inapplicability of the Act of State Doctrine and Forum Non Conveniens” (2008) 83 *Tul. L. Rev.* 495

Patrick J. Keenan, "Financial Globalization and Human Rights" (2008) 46 *Colum. J. of Transnat'l L.* 509

Judith Kimerling, "Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, Chevrontexaco and *Aguinda v. Texaco*" 38 (2006) *Int'l. L. & Pol.* 413

Benedict Kingsbury, "The Tuna-Dolphin Controversy, The World Trade Organization and the Liberal Project to Reconceptualize International Law" (1994) 5 *YIEL* 1

David Kinley and Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibility for Corporations at International Law" (2004) 44 *VA J. Int. Law* 931

Stuart Kirsch, "Cleaning up Ok Tedi: Settlement Favors Yonggom People" (1996) 4 (1) *J. Int'l Inst.* <http://hdl.handle.net/2027/spo.4750978.0004.104> 1 May 2014

John H. Knox, "Horizontal Human Rights" (2008) 102 *AJIL* 1

Harold Hongju Koh, "Separating Myth from Reality About Corporate Responsibility Litigation" (2004) 7 *JIEL* 263

Eugene Kontorovich, "Reconciling Political Sanctions with Globalization and Free Trade: The Arab League Boycott and WTO Accession: Can Foreign Policy Excuse Discriminatory Sanctions?" (2003) 4 *Chi. J. Int'l L.* 283

Daniel Marcus Krause and Frank Vogel, "Bestechungsbekämpfung im internationalen Geschäftsverkehr" (1999) *RIW* 488 <http://tldb.uni-koeln.de/php/pub_show_document.php?page=pub_show_document.php&pubdocid=131000&pubwithtoc=ja&pubwithmeta=ja&pubmarkid=938000#ti131000N23> 1 May 2014

Yaraslau Kryvoi, „Enforcing Labor Rights against Multinational Groups in Europe" (2007) 46 *Indus. Rel.* 366

Yaraslau Kryvoi, "Why European Trade Sanctions Do Not Work" (2008) 17 *Minn. J. Int'l L.*209.

J. Troy Lavers "Extraterritorial Offenses and International Law: the Argument for the Use of Comity in Jurisdictional Claims" (2007) 14 *Sw J. L. & Trade Am.* 1

Eddy Lee, "Globalization and Labour Standards: A review of issues" (1997) 136 *IntLabRev* 173

Robert A. Leflar, "Choice- Influencing Considerations in Conflicts Law" 41 *N.Y.U.L. Rev*. (1966) 267

Roemer Lemaître, "Belgium Rules the World: Universal Jurisdiction over Human Rights Atrocities" (2000-2001) 37 *Jura Falconis*, 255

Anja Lindroos and Michael Mehling, "Dispelling the Chimera of 'Self-Contained Regimes': International Law and the WTO" (2005) 16 *EJIL* 857

Richard N. Lock, Karen Roberts and Myron J. Roomkin, "Models of International Labor Standards" (2001) 40 *Indus. Rel.* 258

Carlos Lopez-Hurtado, "Social Labelling and WTO Law" (2002) 5 *JIEL* 719

Su-Ping Lu, "Corporate Codes of Conduct and the FTC: Advancing Human Rights through Deceptive Advertising Law" (2000) 38 *Colum. J. Transnat'l L.* 603

Miriam Mafessanti, "Corporate Misbehaviour & International Law: Are there Alternatives to 'Complicity'?" (2010) 6 *S. C. J. Int'l L. & Bus* 167

Bashar H. Malkawi, "Anatomy of the Case of Arab Countries and the WTO" (2006) *ALQ* 110

Michael P. Malloy, "Human Rights and the Unintended Consequences: Empirical Analysis of International Economic Sanctions in Contemporary Practice" (2013) 21 *B. U. Int'l L. J.* 75

Harlan Mandel, "In Pursuit of the Missing Link: International Worker Rights and International Trade?" (1989) 27 *Columbia JTL* 443

F. Mikis Manolis, Nathaly J. Vermette and Robert F. Hungerford, „The Doctrine of *Forum Non Conveniens*: Canada and the United States Compared" (Fall 2009) *FDCC Quarterly*, 3

Gabrielle Marceau, "WTO Dispute Settlement and Human Rights" (2002) 13 *EJIL* 753

Petros C. Mavroidis, "Remedies in the WTO Legal System: Between a Rock and a Hard Place" (2000) 11 *EJIL* 763

Adam McBeth, "A Look at the Corporate Code of Conduct Legislation" (2004) 33 *Common L. World Rev.* 222

Robert McCorquodale, "Spreading Weeds Beyond Their Garden: Extraterritorial Responsibility of States for Violations of Human Rights by Corporate Nationals" (2006) *ASIL Proceedings, Panel 10, "The Extraterritorial Application of Human Rights"* 11

Christopher McCrudden, "International Economic Law and the Pursuit of Human Rights: A framework for discussion of the legality of 'selective purchasing' laws under the WTO Government procurement agreement" (1999) 2 *JIEL* 3

Phillip S. Meilinger „A matter of Precision. Why air power may be more humane than sanctions" (2001) 123 *Foreign Pol'y* 78

Nina A. Mendelson, "A Control-Based Approach to Shareholder Liability for Corporate Torts" (2002) 102 *Colum. L. Rev.* 1203

Jeffrey Meyer, "Second Thoughts on Secondary Sanctions" (2009) 30 *U. Pa. J. Int'l L.* 905

Lilian Aponte Miranda, "The hybrid state-corporate enterprise and the violations of indigenous land rights: theorizing corporate responsibility and accountability under international law" (2007) 11 *Lewis & Clark L.Rev.* 135

John Mueller and Karl Mueller "Sanctions of Mass Destruction" (1999) 78 *Foreign Aff.* 43

Makau W. Mutua, „The Ideology of Human Rights“ (1996) 36 *VJIL* 589

Smita Narula “The Right to Food: Holding Global Actors Accountable Under International Law” (2006) *44 Colum. J. Transnat'l L.* 691

Martin Nettesheim „Die ökologische Intervention“ (1996) 34 *Archiv des Völkerrechts* 167

Randall E. Newnham, “More Flies with Honey: Positive Economic Linkage in German *Ostpolitik* from Bismarck to Kohl” (2000) 44 *ISQ* 73

Mandiaye Niang, “The Senegalese Legal Framework” (2009) 7 *J Int Criminal Justice,* 1047

Leah Nico, “From Local to Global: Reform of Forum Non Conveniens Needed to Ensure Justice in the Era of Globalization” (2005) 11 *Sw. J.L. & Trade Am.* 345

Harck-Oluf Nissen „Der Helms-Burton-Act vor der WTO: Zum Stand des europäisch-amerikanischen Handelsstreits und der WTO-Konformität des Gesetzes“ (1999) *Recht der Internationalen Wirtschaft* 350

Joel R. Paul, “The transformation of international comity” (2008) 71 *Law and Contemp. Probs.* 19

Joost Pauwelyn, “Recent Book on Trade and Environment: GATT Phantoms Still Haunt the WTO” (2004) 15 *EJIL* 575

Joost Pauwelyn, “The Role of Public International Law in the WTO: How Far Can We Go?” (2001) *AJIL* 535

Joost Pauwelyn, “WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for ‘Conflict Diamonds’” (2003) 24 *Mich. J. Int’l L.* 1177

Jorge F. Perez-Lopez, „Promoting International Respect for Workers Rights Through Business Codes of Conduct“ (1993) *17 Fordham Int’l L. J.* 1

Nancy L. Perkins „World Trade Organization: United States – Import Prohibition of certain Shrimp and Shrimp Products“ (1999) 38 *I.L.M.*, 118

Ernst-Ulrich Petersmann, “Human Rights and International Economic Law” (2012) 4 *TL & D*, 283

Ernst-Ulrich Petersmann, “The ‘Human Rights Approach’ Advocated by the UN High Commissioner for Human Rights and the International Labour Organisation: Is it relevant for WTO Law and Policy?” (2004) 7 *JIEL* 605

Ernst-Ulrich Petersmann, “The WTO Constitution and Human Rights” (2000) 3 *Journal of International Economic Law* 19

Sol Picciotto, “Rights, Responsibilities and Regulation of International Business” (2003) 42 *Colum. J. Transnat’l L.* 131

Kunibert Raffer, “Cotonou: Slowly Undoing Lomé’s Concept of Partnership” (2002) XVIII (2) *JEP* 171, available at <www.edpsg.org/index.pl> 1 May 2014, *DP No. 21*

Anita Ramasastry, “Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and their impact on the liability of MNCs” (2002) 20 *Berkley J. Int’l L.* 91

Steven R. Ratner, “Corporations and human rights: a theory of legal responsibility” (2001) 111 *Yale L. J.* 443

Donald H. Regan, “What are Trade Agreements for? Two conflicting stories told by economists, with a lesson for lawyers” (2006) 9 *JIEL* 951

Rene Reich-Graefe, “Changing Paradigms: The Liability of Corporate Groups in Germany” 37 (2005) *Conn. L. Rev*. 785

Michael Reiterer, „Das multilaterale Handelssystem und internationaler Umweltschutz“ (1993) *WpolBl* 291

Joaquín Roy, “The Helms-Burton Law: Development, Consequences and Legacy for Inter-American and European- US Relations” (1997) 39 *J. Interam. Stud. & World Aff.* 77

John Ruggie, “Business and human rights – treaty road not travelled” (May 2008) *Ethical Corporation* 42 <http://www.ethicalcorp.com/resources/pdfs/content/200856134729_Ruggie.pdf> 2 June 2009

Binda Sahni, “The Interpretation of the Corporate Personality of Transnational Corporations” (2005) 15 *Widener L. J.* 1

Claudia T. Salazar, “Applying International Human Rights Norms in the United States: Holding Multinational Corporations Accountable in the United States for International Human Rights Violations Under the Alien Tort Claims Act” (2004) 19 *St. John’s J.L. Comm.* 111

Razeen Sappideen, “Harmonizing International Commercial Law Through Codification” (2006) 40 *J.W.T.* 425

Hermann Sautter „Sozialklauseln für den Welthandel- wirtschaftsethisch betrachtet“ (1995) 40 *Hamburger Jahrbuch für Wirtschafts- und Gesellschaftspolitik* 227

Pita Schimmelpennick van der Oije and Steven Freeland, “Universal Jurisdiction in the Netherlands – the Right Approach but the Wrong Case? Bouterse and the ‘December Murders’” (2001) *AJHR* 20 <http://www.austlii.edu.au/au/journals/AJHR/2001/20.html> 1 May 2014

Philippe Schneuwly, “Sind Handelssanktionen ein geeignetes Mittel zur Durchsetzung von Arbeitsnormen?” (2003) *Aussenwirtschaft* 121

Thomas J. Schoenbaum, “International Trade and Protection of the Environment: The Continuing Search for Reconciliation“ (1997) 91 *AJIL* 168

Jenny Schultz and Rachel Ball, "Trade as a Weapon? The WTO and Human Rights-Based Trade Measures" (2007) 12 *Deakin L. Rev.* 41

Juli Schwartz, "Saleh v. Titan Corporation: The Alien Tort Claims Act: More Bark than Bite? Procedural Limitations and the Future of ATCA Litigation Against Corporate Contractors" (2006) 37 *Rutgers L. J.* 867

Shaw W. Scott, "Taking Riggs Seriously: The ATCA Case against a Corporate Abettor of Pinochet Atrocities" (2005) 89 *Minn. L. Rev.* 1497

Malcolm Shaw, *International Law* (4th ed, Cambridge: Cambridge University Press, 1997)

Dinah Shelton, "In Honor of the 100th Anniversary of the AJIL and the ASIL: Normative Hierarchy in International Law" (2006) 100 *AJIL* 291

Ajit Singh and Ann Zammat, "Labour Standards and the 'Race to the Bottom': Rethinking Globalization and Workers' Rights from Developmental and Solidaristic Perspectives" (2004) 20 *Oxford Rev. Econ.c Pol'y* 85

Beth Stephens "The Amorality of Profit: Transnational Corporations and Human Rights" (2002) 20 *Berkeley J. Int'l L.* 45

Beth Stephens, "Translating *Filártiga*: A Comparative and International Law Analysis of Domestic Remedies For International Human Rights Violations" (2002) 27 *Yale J. Int'l L.* 1

Milena Sterio, "The Globalization Era and the Conflict of Laws: What Europe Could Learn from the United States and Vice Versa" (2005) 13 *Cardozo J. Int'l & Comp. L.* 161

Alex B. Thiermann and Sarah Babcock, "Animal welfare and international trade" (2005) 24 *Rev. Sci. Tech. (Off. int. Epiz.)* 747

Pierre Trudel, "Jurisdiction Over the Internet: A Canadian Perspective" (1998) 32 *Int'l Law*. 1027

Mary C. Tsai, "Globalization and conditionality: two sides of the sovereignty coin" (2000) 31 *Law & Pol'y in Int'l Bus* 1317

Carlos Manuel Vázquez, "Trade Sanctions and Human Rights - Past, Present, and Future" (2003) 6 *JIEL* 797

Santiago M. Villalpando, "Attribution Of Conduct To The State: How The Rules Of State Responsibility May Be Applied Within The WTO Dispute Settlement System" (2002) 5 *JIEL*, 393

Halina Ward, "Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options" (2001) 24 *Hastings Int'l & Comp. L. Rev.* 451

Halina Ward, "Transnational Litigation 'Joining Up' Corporate Responsibility?"(2000) *CEPMLP Internet Journal* , article 19 <http://www.dundee.ac.uk/cepmlp/journal/html/vol7/vol7-19.html> 4 June 2009

Jason Collins Weida, "Reaching Multinational Corporations: A New Model for Drafting Effective Economic Sanctions" (2006) 30 *Vermont L. Rev.* 303

Jan Wouters and Cedric Ryngaert, "Transnational Corporate Responsibility for the 21st Century: Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction" (2009) 40 *GWILR* 939

Tseming Yang, „International Treaty Enforcement as a Public Good: Institutional Deterrent Sanctions in International Environmental Agreements" (2007) 27 *Mich. J. Int'l L.* 1131

Rex J. Zedalis, „The Environment and the Technical Barriers to Trade Agreement: Did the *Reformulated Gasoline Panel* Miss a Golden Opportunity?" (1997) 44 *NILR* 186

Karl Zemanek, "New Trends in the Enforcement of erga omnes Obligations" (2000) 4 *Max Planck UNYB* 1

Karl Zemanek, "The Unilateral Enforcement of International Obligations" (1987) *ZaöRV* 32

Legislation and guidelines

A Bill for an Act to impose standards on the conduct of Australian corporations which undertake business activities in other countries, and for related purposes [short title: *Corporate Code of Conduct Bill] Cth, 2000.*
<http://www.comlaw.gov.au/Details/C2004B01333> 1 May 2014

A Bill to Make a provision for certain companies to produce and publish reports on environmental, social and economic and financial matters; to consult on proposed operations of the company; to specify certain duties and responsibilities of the directors; to establish a right of access to the information held by companies; to specify the powers and duties of the Secretary of State; to provide for remedies for aggrieved persons; and for related purposes [short title: *Corporate Responsibility Bill*] Bill No129 of 2003 (UK)
<http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmbills/145/2002145.pdf> 1 May 2014

Advisory opinion on Reservations on the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Reports 1951

African (Banjul) Charter on Human and Peoples' Rights 1981

Agreement Establishing the Inter-American Development Bank (1959)

Agreement Establishing the World Trade Organization, ("WTO Agreement" or "Marrakesh Agreement") (1994)

Agreement on Agriculture (1995)

Agreement on Government Procurement (GPA) (1996)

Agreement on Subsidies and Countervailing Measures (SCM) (1994)

Agreement on Technical Barriers to Trade (TBT) (1995)

Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) (1995)

Agreement on Trade-Related Aspects of Intellectual property Right (TRIPS) (1994)

Alien Tort Claims Act (ATCA) (US, 1789)

Amendment of the TRIPS Agreement – Third Extension of the Period for the Acceptance by Members of the Protocol Amending the TRIPS Agreement WT/L/829 (30 November 2011)

American Convention on Human Rights "Pact of San Jose, Costa Rica" (1969)

Articles of Agreement of the International Monetary Fund (1944)

Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (1991)

Belgian Criminal Code (Code Pénale) (1867, latest modification 2013)

Border Tax Adjustments, Report of the Working Party L/3464 (2 December 1970)

Brussels Convention for the unification of certain rules relating to immunity of state-owned vessels (1926)

Charter of the United Nations (1945)

Commission Regulation (EEC) No. 2496/89 on a prohibition on importing raw and worked ivory derived from the African elephant into the Community (1989)

Companies Act 1985 (UK)

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR) (1953)

Convention on the Elimination of All Forms of Discriminations Against Women (CEDAW) (1979)

Convention on the enforcement of judgements in civil and commercial matters (Brussels Convention) (1968)

Convention on the Protection of the Environment Through Criminal Law (CETS No. 172) (1998)

Convention on the Rights of the Child (CRC) (1989)

Council Common Position Concerning Restrictive Measures Against Zimbabwe (18 February 2002) (2002/145/CFSP) O. J. L [Official Journal of the European Communities] 50/1

Council Directive 83/129/EEC concerning the importation into Member States of skins of certain seal pups and products derived therefrom (1983) L 091, 09/04/1983 P. 0030 – 0031

Council Directive 88/146/EEC Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action (1988)

Council Directive 89/370/EEC amending Directive 83/129/EEC concerning the importation into Member States of skins of certain seal pups and products derived therefrom (1989) L 163, 14/06/1989 P. 0037 – 0037

Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (2000)

Council Regulation (EC) No. 978/2012 Generalised System of Preferences

Council Regulation (EC) No. 2501/2001 Scheme of generalised tariff preferences from 2002 to 2005

Council Regulation (EEC) No. 348/81 on common rules for imports of whales or other cetacean products, (1981) L 039, 12/02/1981 P. 0001 – 0003

Council Regulation (EEC) No. 2136/89 Laying down common marketing standards for preserved sardines and trade descriptions (1989)

Council Regulation (EEC) No 3254/91 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards (1991) L 308, 09/11/1991 P. 0001 – 0004

Cuban Liberty and Democratic Solidarity ("Libertad") Act of 1996 ("Helms-Burton Act") (USA)

Dismissal Protection Act (Kündigungsschutzgesetz, KSchG) (1969)

Dutch Criminal Code (Wetboek van Srafrecht) (1881 and 1994)

Economic and Council Resolution ("ECOSOC") 1235 (1967)

Economic and Council Resolution ("ECOSOC") 1503 (1970)

European Convention on state immunity with additional protocol (1972)

Explanatory Note to Annex 1 A to the TBT Agreement

Foreign States Immunity Act (FSIA) (US, 1976)

Forth ACP-EC Convention of Lomé ("Lomé IV Convention") (1989)

French Code of Criminal Procedure (*Code de Procédure Pénale)* (as in 2010)

French Criminal Code (Code Pénale) (1992)

General Agreement on Tariffs and Trade (GATT) (1947)

General Agreement on Trade in Services (GATS) (1995)

General Interpretative Note to Annex 1A of the WTO Agreement

German Administrative Offenses Code (Ordnungswidrigkeitengesetz, OwiG) (1968, 1987)

German Code of Civil Procedure (Zivilprozessordnung) (1897, 2005)

German Criminal Code on International public law (Völkerstrafgesetzbuch) (2002)

German Penal Code (Strafgesetzbuch, StGB) (1871, 1998)

Havana Charter UN Doc. E/Conf.2/78 (1948), identical with Interim Commission for the International Trade Organization, *Final Act of the United Nations Conference on Trade and Employment* (New York, 1948), available at <http://www.wto.org/english/docs_e/legal_e/havana_e.pdf> 1 May 2014

ILA Resolution 5/2008 International Trade Law

ILC Draft Articles "Responsibility of States for Internationally Wrongful Acts" (2001) UN A/RES/56/83

Implementation Law of the German Civil Code (EGBGB) (1994)

*International Convention for the Suppression of the Financing of Terrorism (*now *Terrorist Financing Convention)* (1999)

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1965)

International Covenant on Civil and Political Rights (ICCPR) (1966)

International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)

Internationales Abkommen über das Verbot der Verwendung von weißem (gelbem) Phosphor zur Fertigung von Zündhölzern (26. 09. 1907), Reichstagsprotokolle 1907/09,18, Aktenstück Nr. 555 (Germany)

Iran and Libya Sanctions Act 1996 (US)

ISO Guidelines for Social Responsibility (ISO 26000) (2010)

La Jolla Agreement for the Reduction of Dolphin Mortality in the Eastern Pacific Ocean (1990)

Ley de Derecho International Privado (Venezuela, 1998)

Loi du 5 août 2003 relative à la répression des infractions graves au droit international humanitaire (Belgium)

Loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire (Belgium)

Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997)

Marine Mammal Protection Act 1972 (US)

Montevideo Convention on Rights and Duties of States (1933)

New York Convention on Special Mission (1969)

Norms of Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights ("Draft Norms") (2003) U.N. Doc. E/CN.4/Sub.2/2003/12 (13 August 2003)

OECD Guidelines for International Enterprises (revised in 2000)

OECD Risk Awareness Tools for Multinational Enterprises in Weak Governance Zones (2006) < http://www.oecd.org/daf/inv/corporateresponsibility/36885821.pdf> 1 May 2014

Partnership Agreement ("Cotonou Agreement") (2000, Cotonou), First version O. J. L 317, 15 December 2000

Private International (Miscellaneous Provisions) Act (1995)

Québec Code of Civil Procedure (1994)

Regulation (EC) No. 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II) (2007)

Rome Statute of the International Criminal Court (1998)

Security Council Resolution 569 UN Doc. S/Res/569/1985

Security Council Resolution 1373 (2001) S/RES/1373 (2001)

Spanish Criminal Code (Código Penal) (1987)

Spanish Judicature Act (Ley Orgánica del Poder Judicial) (1985)

Statute of the ICJ (1945)

Swiss Criminal Code (1937)

To require nationals of the United States that employ more than 20 persons in a foreign country to implement a Corporate Code of Conduct with respect to the employment of those persons, and for other purposes [short title: *Corporate Code of Conduct Act*] 106th Congress

2nd session H. R. 4596, 107th Congress 1st session H. R. 2782 and 109th Congress 2nd session H. R. 5377 (2006), <www.opencongress.org> and <http://thomas.loc.gov> 1 May 2014

Treaty Establishing the European Community (TEC) (1992)

Treaty of the European Union (TEU, "Maastricht Treaty") (1993)

UN Convention against Corruption (UNCAC) (2003)

UN Convention on Jurisdictional Immunities of States and Their Property (2004)

Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU Understanding) (1994)

UN General Assembly, *Report of the Secretary-General on the Work of the Organization* A/53/1 (1998)

UN General Assembly *Resolution A/RES/55/56* (29 January 2001)

UN General Assembly *Resolution A/RES/63/179 "Human rights and unilateral coercive measures"* (26 March 2009)

UN Security Council *Resolution S/RES/149* (28 January 2003)

Security Council *Resolution S/RES/1306* (5 July 2000)

UN Security Council *Resolution* S/RES/1343 (7 March 2001)

UN Statute of the International Criminal Tribunal for Rwanda (2007 and 2010) <http://www.unictr.org/Portals/0/English%5CLegal%5CTribunal%5CEnglish%5C2007.pdf> and < http://www.unictr.org/Portals/0/English%5CLegal%5CStatute%5C2010.pdf> 1 May 2014

UN Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (2009) <http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf > 1 May 2014

Understanding on rules and procedures governing the settlement of disputes (Annex 2 of the WTO Agreement = Agreement Establishing the World Trade Oganisation) (1994)

Universal Declaration of Human Rights (UDHR) (1948)

US Trade Act 1974

Vienna Convention on Consular Relations (1963)

Vienna Convention on Diplomatic Relations (1961)

Vienna Convention on the Law of Treaties (VCLT) (1969)

Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (1975)

Cases

Gulf Oil Corp. v Gilbert 330 US 501 (1947)

Habre, Senegal Court of Cassation Dakarm (20 March 2001)

Herrera Rubio v Colombia, Communication No. 161/1983, U.N. Doc. Supp. No. 40 (A/43/40) (1988)

Hugo Princz v Federal Republic of Germany, 26 F.3d 1166 (D. C. Cir. 1994)

In Re Union Carbide Gas Plant Disaster at Bhopal India (Opinion and Order 12 May 1986) 634 F Supp 842 (SDNY 1986), 25 ILM 771 (1986)

India - Measures Affecting the Automotive Sector WT/DS146/R and WT/DS175/R (21 December 2001) and WT/DS146/AB/R and WT/DS175/AB/R (19 March 2002)

Indonesia - Certain Measures Affecting the Automobile Industry WT/DS54/R, WT/DS55/R, WT/DS59/ and WT/DS64/R (2 July 1998)

James Hardie & Co. Ltd. v Hall (1998) 43 NSWLR 554

Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages (L/6216 - 34S/83) GATT Panel Report, adopted 10 November 1987

Japan - Taxes on Alcoholic Beverages (11 July 1996) and WT/DS8/AB/R, WT/DS/10/AB/R, WT/DS11/AB/R (4 October 1996)

Japanese Measures on Imports of Leather, (L/5623 - 31S/94) GATT Panel Report, adopted 15/16 May 1984

Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others [2006] UKHL 26

Joo v Japan 332 F3d 679 (DC Cir. 2003)

Jota v Texaco Inc. 157 F.3d 153 (US App.1998)

Kadic v Karadzic, 70 F.3d 232 (2d Cir. 1995)

Kalogeropoulos v Greece and Germany ECHR No 0059021/00, Judgement on Admissibility for the Prosecution of International Crimes", (12 December 2002)

Kiobel v Royal Dutch Petroleum 06-4800-cv, 06-4876-cv (US App. 2010)

Kiobel v Royal Dutch Petroleum No. 10-1491 (US Supreme Court, decided on 17 April 2013)

Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef ("Korea-Beef"), WT/DS161/R and WT/DS168/R (31 July 2000), WT/DS161/AB/R and WT/DS169/AB/R (11 December 2000)

Korea - Taxes on Alcoholic Beverages WT/DS75/R and WT/DS84/R (17 September 1998) WT/DS75/AB/R and WT/DS84/AB/R (18 January 1999)

Koster v Lumbermens Mutual Casuality Co., 330 US 518 (1947)

Lilian Celiberti de Casariego v Uruguay, Human Rights Committee, Communication No 56/1979, UN Doc CCPR/C/13/D/56/1979 (29 July 1981)

Loizidou v Turkey, E.Ct.H.R. (28 July1998)

Lopez Ostra v Spain ECtHR (Appl. No.16798/90) A-303C (9 December 1994)

Lubbe v Cape plc [2000] UKHL 41

Mayagna (Sumo) Awas Tingni Community v Nicaragua Inter-Am. Ct. H. R. (Ser. C) No 79 (2001)

Nicaragua v United States of America 1986 ICJ 14

Nottebohm (Liechtenstein v Guatemala) ICJ Reports 1953

Öcalan v Turkey [GC], no. 46221/99, ECHR 2005-IV – (12. May 2005)

Owusu v Jackson C-281/02, (ECJ, 1 March 2005)

Patrickson v Dole 251 F.3d 795 (US App. 2001)

Piper Aircraft Co. v Reyno 454 US 235 (1981)

Prefecture of Voiotia v Federal Republic of Germany, Case 11/200, Areiso Pagos Hellenic Supreme Court (4 May 2000)

Prosecutor v Furundzija International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY) Case No.: IT-95-17/1-T, 10 December 1998

Quantitative Restrictions against Imports of certain Products from Hong Kong (L/5511-30S/129) Panel Report, adopted 12 July 1983

R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte ("Pinochet I") 3 WLR 1, 456 (UKHL, 1998)

R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3) ("Pinochet III") [1999] UKHL 17

Re South African Apartheid Litigation, 346 F. Supp. 2d 538 (S.D.N.Y. 2004)

Recherchers Internationales Quebec v Cambior Inc. [1998] Q.J. No. 2554 (Q.S.C)

Regie National des Usines Renault SA v Zhang [2002] HCA 10 (14 March 2002)

Rein v Libya (1999) 38 ILM 447

Reparations for Injuries suffered in the service of the United Nations, Advisory Opinion, ICJ Reports 1949

Republic of Philippines v Marcos, 806 F.2d 344, 346-47 (2d Cir. 1986)

Sampson v Federal Republic of Germany 250 F.3d 1145 (7th Cir. 2001)

Sanchez-Espinoza v Reagan, 770 F.2d 202 (D.C. Cir. 1985)

Saudi Arabia v Nelson, 100 ILR 544

Schmidberger v Austria C-112/00 (ECJ,12 June 2003)

SERAC decision, *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* ACHPR/COMM/A044/1 (Re: Communication 155/96) May 2002 <http://cesr.org/downloads/AfricanCommissionDecision.pdf> 1 June 2009

Simeone v Bombardier Rotax GmbH (US Dist Ct E Dist Penn, decided 9 March 2005)

Sithole & Ors v Thor Chemicals Holdings Ltd & Anor TLR 15/2/1999

Société Group Josi Reinsurance Company SA v Compagnie d'Assurances Universal General Insurance Company C-412/98 (ECJ Opinion of 13 July 2000)

SOS Attentat and Castelnau d'Esnault v Qadaffi, Head of State of Libya, Court of Cassation No. 1414 (13 March 2000)

Sosa v Alvarez-Machain, 542 U.S. 692 (2004)

Spain-Tariff Treatment of Unroasted Coffee, GATT Panel Report (L/5135 - 28S/102), adopted 11 June 1981

Spiliada Maritime Corporation v Cansulex Ltd "The Spiliada" [1986] 3 WLR 972

Stora Kopparbergs Bergslags v Commission of the European Communities AB C-286/98 (ECJ, 16 November 2000)

Tel-Oren v Libyan Arab Republic 726 F.2d 774 (D.C. Cir. 1984)

Texaco Overseas Petroleum Co v The Government of the Libyan Arab Republic, YCA 1979, 177

Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes (DS10/R – 37S/200) ("Thailand-Cigarettes") GATT Panel Report 5 October 1990, adopted 7 November 1990

The Case of the S. S: Lotus (France v Turkey) ("Lotus") 1927 P.C.I.J. (ser. A.) No. 10 (7 September)

Timurtaş v Turkey ECtHR (23531/94)

Torres v Southern Peru Copper Corporation 965 F Supp. 899 (US Dist.1996)

United States - Continued Suspension of Obligations in the EC - Hormones Dispute 3WT/DS320/R (31 March 2008) and WT/DS320/AB/R (16 October 2008)

United States Diplomatic and Consular Staff in Teheran, Judgement, ICJ Reports 1980

United States – Import Bans of Certain Shrimp and Shrimp Products ("Shrimp-Turtle") WT/DS58/R (15 May 1998), WT/DS58/AB/R (12 October 1998)

United States - Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 by Malaysia ("Shrimp-Turtle Malaysia") WT/DS58/RW (15 June 2001) and WT/DS58/AB/RW (22 October 2001)

United States - Measures Affecting Alcoholic and Malt Beverages DS23/R GATT Panel Report (16 March 1992, adopted 19 June 1992)

United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services ("US-Gambling") WT/DS285/R (7 April 2005) and WT/DS285/AB/R (7April 2005)

United States - Measures concerning the importation, marketing and sale of tuna and tuna products ("Tuna-Dolphin III") WT/DS381/R (15 September 2011) and WT/DS381/AB/R (16 May 2012)

United States - Restrictions on Imports of Tuna (DS21/R - 39S/155) ("Tuna-Dolphin I") GATT Panel Report, not adopted, 3 September 1991

United States - Restrictions on Imports of Tuna (DS29/R) ("Tuna-Dolphin II") GATT Panel Report, not adopted, 16 June 1994

United States - Section 337 of the Tariff Act of 1930 (L/6439 - 36S/345) GATT Panel Report, adopted 7 November 1989

United States - Sections 301 -310 of the Trade Act of 1974 WT/DS152/R (adopted 27 January 2000)

United States - Standards for Conventional and Reformulated Gasoline ("US-Gasoline") WT/DS2/R (29 January 1996) and WT/DS2/AB/R (29 April 1996)

United States – Taxes on Automobiles (*DS31/R)* GATT Panel Report, not adopted, 11 October 1994

US v Krauch et al [IG Farben] VIII Trial of War Criminals Before Nuremberg Military Tribunals No 10 (1952)

US v Krupp IX Trial of War Criminals Before Nuremberg Military Tribunals No 10 (1948)

Velásquez Rodríguez v Honduras Inter-Am Ct. H.R. (Ser. C) No. 4 (29 July 1988)

Victor Meier v Sun International Hotels 288 F 3d (US CA 11th Cir, decided 19 April 2002)

Wiwa v Royal Dutch Petroleum 226 F.3d 88 (US App. 2000)

Wood Pulp [1985] 3 CLMR 474

Xuncax v Gramajo and *Ortiz v Gramajo* 886 F. Supp. 162 (Distr. C. Mass., 1995)

Others

Administration of Barack H. Obama "Message to the Congress on Continuation of the National Emergency With Respect to the Actions of the Government of Syria" (7 May 2009) available at <http://www.gpo.gov/fdsys/pkg/DCPD-200900341/html/DCPD-200900341.htm> 1 May 2014

AFP, "Myanmar refugees seek Belgium Trial for TotalFinaElf" (08 May 2002) at <http://www.icai-online.org/xp_resources/icai/oil_companies/myanmar_refugees.pdf> 1 May 2014

African International Courts and Tribunals Website "ACHPR <http://www.aict-ctia.org/courts_conti/achpr/achpr_home.html> 1 May 2014

African International Courts and Tribunals Website "ACJ" <http://www.aict-ctia.org/courts_conti/acj/acj_home.html> 1 May 2014

Farid Ahmed, "Eight killed in Bangladesh garment factory fire" *CNN* (9 May 2013) available at <http://edition.cnn.com/2013/05/08/world/asia/bangladesh-fatal-fire/index.html> 1 May 2014

Aljazeera, "Obama renews Syria sanctions" (8 May 2009) available at <http://www-ak.aljazeera.net/news/americas/2009/05/20095815106605431.html> 1 May 2014

Sarah Anderson and John Cavanagh, "The Top 200: The Rise of Global Corporate Power" (updated version, 2000) available at <http://s3.amazonaws.com/corpwatch.org/downloads/top200.pdf> 1 May 2014

Australian Associated Press, "Court dismisses OK Tedi proceedings" (16 January 2004) <http://www.theage.com.au/articles/2004/01/16/1073878030907.html> 1 May 2014

Vikas Bajaj, "Doing Business in Bangladesh" *The New York Times* (14 September 2013) available at <http://www.nytimes.com/2013/09/15/opinion/sunday/doing-business-in-bangladesh.html> 1 May 2014

BBC News, "Bangladesh Factory collapse toll passes 1,000" (10 May 2013) available at <http://www.bbc.co.uk/news/world-asia-22476774> 1 May 2014

BBC News, "Belgium opens way for Sharon trial" (15 January 2003) <http://news.bbc.co.uk/2/hi/europe/2662635.stm> 1 May 2014

BBC News, "Shell Nigeria Case: Court acquits firm on most charges" (30 January 2013) available at <http://www.bbc.co.uk/news/world-africa-21258653> 1 May 2014

BBC News, "Shell settles Nigeria Deaths case" (9 June 2009) <http://news.bbc.co.uk/2/hi/africa/8090493.stm> 1 May 2014

Bhopal Information Center Website (Chronology) < http://www.bhopal.com/chronology> 1 May 2014

Blacksmith Institute, "La Oroya Lead Pollution" at <http://www.blacksmithinstitute.org/projects/display/36> 1 May 2014

Blacksmith Institute, "The World's Worst Polluted Places" *2006 Annual Report* 4, available at <http://www.blacksmithinstitute.org/files/FileUpload/files/Annual%20Reports/2006ar.pdf> 1 May 2014

Blacksmith Institute, "The World's Worst Polluted Places" *2007 Annual Report* 4, available at <http://www.blacksmithinstitute.org/files/FileUpload/files/Annual%20Reports/2007ar.pdf> 1 May 2014

Gregory Bowman, "A Prescription for Curing U. S. Export Controls" (Working Paper 2013) available at <http://works.bepress.com/gregory-bowman/12> 1 May 2014

Drusilla K. Brown, Alan V. Deardorff and Robert M. Stern, "Pros and Cons of Linking Trade and Labor Standards", *Discussion Paper No 477, University of Michigan* (May 2002)

Nicola Bullard, "Social Standards in International Trade" Report for the *Deutscher Bundestag* commission of enquiry 'Globalization and the World Economy- Challenges and Answers" (July 2001), available at <http://focusweb.org/publications/Research%20and%20Policy%20papers/2001/social%20standards%20in%20International%20trade.pdf> 1 May 2014

Business & Human Rights Website, "Shell Lawsuit", available at <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ShelllawsuitreNigeria> 1 May 2014

Center for Justice & Accountability (CJA) Website "Kiobel v. Shell" at <http://cja.org/section.php?id=510> 1 May 2014

Jan Ceyssens, Nikola Sekler, "Bilaterale Investitionsabkommen der Bundesrepublik Deutschland" (Study at the University Potsdam, 2005) <http://opus.kobv.de/ubp/volltexte/2004/612/> 1 May 2014

China Labor Watch, "Keeping Pressure on Apple to promote Real Change at Apple and Foxconn" at <http://www.chinalaborwatch.org/news/new-412.html> 1 May 2014.

Clean Clothes Campaign, Website at <http://www.cleanclothes.org/about/principles> 1 May 2014

Clean Clothes Campaign, Website, "FAQ about the Bangladesh Safety Accord" at <http://www.cleanclothes.org/issues/faq-safety-accord> 1 May 2014

CNN, "EU slaps new sanctions on Syria" (14 May 2012) <http://articles.cnn.com/2012-05-14/middleeast/world_meast_syria-unrest_1_local-coordination-committees-deir-ezzor-syrian-conflict?_s=PM:MIDDLEEAST> 1 May 2014

Committee on Technical Barriers to Trade, "Minutes of the Meeting held on 30 March 2001" G/TBT/M/23 (8 May 2001)

Communication from the Commission concerning Corporate Social Responsibility: A business contribution to Sustainable Development COM/2002/0347 final <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002DC0347&rid=1> 1May 2014

Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee: Developing countries, international trade and sustainable development: the function of the Community's generalised system of preferences (GSP) for the ten-year-period from 2006 to 2015 COM(2004) 461 final, Brussels 7.7. 2004

Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee implementing the partnership for growth and jobs: making Europe a pole of excellence on Corporate Social Responsibility COM/2006/0136 final < http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006DC0136&rid=1> 1 May 2014

Communication from the European Commission to the European Parliament, the Council, the European Social and Economic Committee and the Committee of the Regions, COM(2011) 681 final. (25 October 2011)

Paul Cook, "Law of Trade in Human Rights: A Legal Analysis of the Intersection of the General Trade Agreement of Tariff's Article XX (b) and Labor Rights of Children" (University of California, Los Angeles, 2012) available at <http://works.bepress.com/paul_cook/3> 1 May 2014

CTE Annual Reports 2005-2011, available at WTO Website <http://www.wto.org/english/tratop_e/envir_e/wrk_committee_e.htm> 1 May 2014

CTE, *Environmental Requirements and Market Access, Recent Work in OECD and UNCTAD* WT/CTE/W/244 (8 december 2006)

Martin Dahms, „Jetzt soll Schluss sein mit universeller Justiz" *Stuttgarter Zeitung* (23 May 2009) front page

Decisions and Recommendations adopted by the Committee since January 1995 G/TBT/1/Rev.8 (23 May 2002)

Daniel del Pino, "España, juez universal" *El Público* (6 May 2009) <http://www.publico.es/internacional/223768/espana/causas/jurisdiccionuniversal/audiencianacional> 1 May 2014

Doe Run Perú, "Doe Run Peru's compliance with PAMA" (2011) at <http://www.doerun.com.pe/images/upload/paginaweb/archivo/15/Logros_Ambientales_de_DoeRunPeru_Ingles.pdf> 1 May 2014

Doe Run Perú, "Doe Run Peru is ready to restart operations on May 1st, 2012" at <http://www.doerun.com.pe/images/upload/paginaweb/archivo/15/20120301_Comunicado_LicenciaSocial_Eng.pdf > 1 May 2014

Doe Run Perú Website <http://www.doerun.com.pe/content/pagina.php?pIDSeccionWeb=1> 1 May 2014

Doe Run Website <http://www.doerun.com> 1 May 2014

Doha Ministerial Declaration WT/MIN(01)/DEC/1 (20 December 2001), available at <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm> 1 May 2014

Jill Dougherty, "U. S. looks to help Syrian civilians, eases sanctions" (Post by CNN Foreign Affairs Correspondent, (12 June 2013), available at <http://security.blogs.cnn.com/2013/06/12/u-s-looks-to-help-syrian-civilians-eases-sanctions/> 1 May 2014

Draft Cancún Ministerial Declaration, available at <http://www.wto.org/english/thewto_e/minist_e/min03_e/draft_decl_rev2_e.htm> 1 May 2014

Dutch Sections of Amnesty International and Pax Christi International, *Report: Multinational Enterprises and Human Rights* (2nd ed, 2000)

ECCHR, "Juristischer Hintergrundbericht" available at <http://www.ecchr.de/index.php/nestle.html> 1 May 2014

ECCHR, "Nestlé has nothing to fear from Swiss legal system" available at <http://www.ecchr.de/index.php/nestle-518.html> 1 May 2014

ECCHR, "Nestlé precedent case: Charges filed in murder of Columbian trade unionist" Newsletter No. 23 (2012) available at <http://www.ecchr.de/index.php/newsletter.328.html > 1 May 2014

ECCHR and Misereor, "Special Newsletter on the criminal complaint against Nestlé" available at <http://www.ecchr.de/index.php/nestle-518.html > 1 May 2014

EcoDiario, "Livni asegura que Moratinos 'le ha prometido' cambiar la ley para evitar más investigaciones" (30 January 2009) <http://ecodiario.eleconomista.es/internacional/noticias/1004870/01/09/Livni-asegura-que-Moratinos-le-ha-prometido-cambiar-la-ley-para-evitar-mas-investigaciones-.html> 1May 2014

Economic, Social and Cultural Rights, Analytical Study of the High Commissioner for Human Rights on the fundamental principle of non-discrimination in the context of globalization E/CN.4/2004/40 (15 January 2004)

Economic, Social and Cultural Rights, Globalization and its Impact on the Full Enjoyment of Human Rights, Report of the High Commissioner for Human Rights submitted in accordance with Commission on Human Rights resolution 2001/32 E/CN.4/2002/54 (15 January 2002)

Economic, Social and Cultural Rights, Human Rights, Trade and Investment, Report of the High Commissioner for Human Rights E/CN.4/Sub.2/2003/9 (2 July 2003)

Economic, Social and Cultural Rights, Liberalisation of Trade and Services and Human Rights, Report of the High Commissioner E/CN.4/Sub.2/2002/9 (25 June 2002)

Economic, Social and Cultural Rights, Mainstreaming the right to development into international law and policy at the World Trade Organisation, Paper prepared by Robert Howse E/CN.4/Sub.2/2004/17 (9 June 2004)

Economic, Social and Cultural Rights, The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights, Report of the High Commissioner E/CN.4/Sub.2/2001/13 (27 June 2001)

El Mundo, "El Congreso limita la jurisdicción universal a casos vinculados a España" (26 June 2009) at <http://www.elmundo.es/elmundo/2009/06/25/espana/1245937500.html> 1 May 2014

El Público, "Carlos Dívar: 'No nos podemos convertir en los gendarmes judiciales del mundo'" (4 May 2009) at <http://www.publico.es/espana/223298/carlos-divar-no-nos-podemos-convertir-en-los-gendarmes-judiciales-del-mundo> 1 May 2014

El Público, "Congreso limita la jurisdicción universal" (20 May 2009) <http://www.publico.es/espana/226606/congreso/limita/jurisdiccion/universal> 1 May 2014

Eric Engle, "Alien Torts in Europe? Human Rights and Tort in European Law", (2005) *ZERP-Diskussionspapier*, 1 available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1020453> 1 May 2014

European Office of Crafts, Trades and Small and Medium sized Enterprises for Standardisation, *NORMAPME User Guide for European SMEs on ISO 26000* (1st ed, 2011) <http://www.26k-estimation.com/User_guide_ISO26000_version_EN_final_22072011.pdf > 1 May 2014

FAZ, "Bangladesch wehrt sich gegen Sanktionen" (6 May 2013)

FAZ, "Fabriken in Bangladesch sollen sicherer werden" (16 May 2013)

Kenneth Freed, "U.S. Eases Sanctions Against Haiti-Embargo: Bush bows to pressure from American businesses, angering OAS leaders" *LA Times* 5 February 1992 <http://articles.latimes.com/1992-02-05/news/mn-1261_1_american-business> 1 May 2014

Howard W. French, "U.S. Sanctions Against Haiti Are Hampering Relief Effort" *NY Times* 11 January 1994 <http://www.nytimes.com/1994/01/11/world/un-sanctions-against-haiti-are-hampering-relief-efforts.html> 1 May 2014

Geneva Ministerial Declaration WT/MIN(98)/DEC/1 (20 May 1998) available at <http://www.wto.org/english/thewto_e/minist_e/min98_e/mindec_e.htm> 1 May 2014

German Bundestag document 13/1079 (6. April 1995)

Global Security, *Syria-Economy*, <http://www.globalsecurity.org/military/world/syria/economy.htm> 1 May 2014

Green Paper on Promoting a European framework for Corporate Social Responsibility COM(2001) 366 final (18 July 2001)

Anne-Christine Habbard and Marie Guiraud, *The WTO and Human Rights* (FIDH Position Paper, 1999) available at <http://www.fidh.org/rapports/wto-fidh.htm> 1 May 2014

Fiona Harvey and Afua Hirsch, "Shell acquitted of Nigeria pollution charges" (January 30 2010) *The Guardian*, available at <http://www.theguardian.com/environment/2013/jan/30/shell-acquitted-nigeria-pollution-charges> 1 May 2014

Ute Hausmann and Rolf Künnemann, "Globalising economic and social human rights by strengthening extraterritorial state obligations- Germany's extraterritorial human rights obligations, Introduction and six Case Studies" (Brot für die Welt, FIAN, EED, No. 6, October 2006)

Knut Henkel, "Blei im Blut", *Amnesty International Journal* (December 2009/January 2010) 57

Michael J. Hiscox and Nicholas Smyth, *Is there Consumer Demand for Improved Labor Standards? Evidence from Field Experiments in Social Product Labeling* (Version: 3/21/08) available at <http://www.people.fas.harvard.edu/~hiscox/SocialLabeling.pdf> 1 May 2014

Hong-Kong Ministerial Declaration WT/MIN(05)/DEC/1 (18 December 2005), available at <http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm> 1 May 2014

Gary Clyde Hufbauer and Barbara Oegg, "Targeted Sanctions: A Policy Alternative?" *Paper for a symposium on Sanctions Reform? Evaluating the Economic Weapon in Asia and the World* (February 23, 2000) <http://www.petersoninstitute.org/publications/papers/paper.cfm?ResearchID=371> 1 May 2014

ILA (ITLC), *Eighth Report of the Committee,* (Rio de Janeiro Conference, 2008), available at <http://www.ila-hq.org/en/committees/index.cfm/cid/24> 1 May 2014

ILO, *Rules of the Game* (Geneva: ILO, 2009)

Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled "Human Rights Council", "Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts" Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises A/HRC/4/035 (9 February 2007)

International Confederation of Free Trade Unions, "Enough Exploitation is Enough: A Response to the Third World Intellectuals and NGOs' Statement Against Linkage" *(TWIN-SAL)* (1999), available at <http://www.hartford-hwp.com/archives/25a/022.html> 1 May 2014

IRENE “Controlling Corporate Wrongs: The Liability of Multinational Corporations” 1 *LGD* (2000), available at <http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2000_1/irene/> 1 May 2014

Kimberley Process Website <http://www.kimberleyprocess.com>1 May 2014

Michael Krennerich, “Menschenrechte ohne Grenzen – welche Pflichten für Deutschland?“ (“Human Rights without borders - which duties for Germany?“) 9 November 2006, discussion report on the symposium, host: Brot für die Welt, Evangelischer Entwicklungsdienst, FIAN Deutschland and FIAN International

Pascal Lamy “The Place and Role of the WTO (WTO Law) in the International Legal Order” *Address before the European Society of International Law* (Paris, 19 May 2006) available at <http://www.wto.org/english/news_e/sppl_e/sppl26_e.htm> 1 May 2014

Lex Mundi Publication, “Criminal Liability of Companies Survey” (2008) Uria Menéndez on Spain, available at <http://www.lexmundi.com/images/lexmundi/PDF/Business_Crimes/Crim_Liability_Spain.pdf> 1 May 2014

Chiara Lombardini-Riipinen, “Time for negative eco-labels?“ (2005) at <http://endogenouspreferences.wordpress.com/2005/06/27/post11/> 1 May 2014

Jufikar Ali Manik and Jim Yardley, “Another Garment Factory Scare in Bangladesh”, *The New York Times* (13 June 2013) available at <http://www.nytimes.com/2013/06/14/world/asia/another-garment-factory-scare-in-bangladesh.html?_r=0> 1 May 2014

Malcolm Moore, “Apple admits using child labour”, *Telegraph* (27 February 2010), at <http://www.telegraph.co.uk/technology/apple/7330986/Apple-admits-using-child-labour.html> 1 May 2014

OCHCHR, “The Human Rights Impact of Economic Sanctions on Iraq” *Background paper prepared by the Office of the High Commissioner for Human Rights for the meeting of the Executive Committee on Humanitarian Affairs* (5 September 2000), available at <http://www.casi.org.uk/info/undocs/sanct31.pdf> 1 May 2014

OECD, *Process and Production Methods (PPMs): Conceptual Framework and Considerations on Use of PPM-Based Trade Measures*, OECD/GD(97)137

Office of the UN High Commissioner for Human Rights, Website, “Human Rights Bodies-Complaints Procedures“ <http://www2.ohchr.org/english/bodies/petitions/index.htm#interstate> 1 May 2014

Opinion following the mandate of the Resolution AG/DOC.337/96 of the General Assembly of the Organization of American States, entitled “freedom of Trade and Investment in the Hemisphere.” CJI/SO/I/doc.67/96 rev. 5, available in English in the Annual Report of 1996, CJI/SO/II/doc.89/96 rev.2, p. 36-41 at <http://www.oas.org/cji/eng/INFOANUAL.CJI.1996.ING.pdf> 1 May 2014

Parliament of the Commonwealth of Australia, "Report on the Corporate Code of Conduct Bill 2000" Parliamentary Joint Statutory Committee on Corporations and Securities (June 2001)

Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development- Report of the Special Rapporteur on the right to food, Olivier de Schutter A/HRC/10/5/Add.2 (4 February 2009)

Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development- Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises A/HRC/8/5/Add.2 (23 May 2008) <http://198.170.85.29/Ruggie-2-addendum-23-May-2008.pdf> 1 May 2014

Anita Ramasastry and Robert C. Thompson, "Commerce, Crimes and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of Sixteen Countries" (2006), *available at* <http://www.fafo.no/pub/rapp/536/536.pdf> 1 May 2014

Judith Raupp, "Streit um Gerichtshoheit" *SZ* (13 March 2010) <http://newsticker.sueddeutsche.de/list/id/959668 > 1 May 2014

Redress "EU Update on International Crimes" (2006) at <http://www.redress.org/downloads/publications/EU%20Report%20vol%201%20June%202006%201%20.pdf> 1 May 2014

Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, (21 March 2011) <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> 1 May 2014

Resolution on EU standards for European enterprises operating in developing countries: towards a European Code of Conduct (A4-0508/98) in C 104/280 (15 January 1999)

Request to all States Parties to the Rome Statute for the Arrest and Surrender of Omar al Bashir ICC-02/05-01/09-7 (2009)

Rio Tinto Website <http://www.riotinto.com> 1 May 2014

Renato Ruggiero, "Defining the Singapore Message", *Speech delivered at 30 September 1996*, printed version in (1996) 12 *WTO FOCUS* 7-8, available at <http://www.wto.org/english/res_e/focus_e/focus12_e.pdf> 1 May 2014

Rouven Schellenberger, "Chef des Ölkonzerns TotalFinaElf droht Prozess in Belgien" *Berliner Zeitung* (10 May 2002)

Carrie Schmizzi, "UK Supreme Court rules orders freezing assets of terror suspects unlawful" *JURIST* (27 January 2010) available at <http://jurist.law.pitt.edu/paperchase/2010/01/uk-supreme-court-rules-orders-freezing.php> 1 May 2014

Singapore Ministerial Declaration WT/MIN(96)/DEC (18 December 1996), available at <http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm> 1 May 2014

Spiegel Online, "EU-Kommissar zu Arbeitsbedingungen: Auch gegen Entwicklungsländer können wir Sanktionen verhängen" (17 December 2012) available at <http://www.spiegel.de/wirtschaft/unternehmen/eu-kommissar-de-gucht-zu-arbeitsbedingungen-in-entwicklungslaendern-a-872050.html> 1 May 2014

Robert M. Stern and Katherine Terrell, "Labor Standards in the World Trade Organisation" *Discussion Paper No 499, University of Michigan* (Aug 2003)

Summaries of Tuna-Dolphin I and II at <http://www.wto.org/english/tratop_E/envir_e/edis04_e.htm> and <http://www.wto.org/english/tratop_E/envir_e/edis05_e.htm >1 May 2014

Peter Sutherland (Chairman) et al, "The Future of the WTO: Addressing institutional challenges in the new millennium" *Report by the Consultative Board to the Director-General Supachai Panitchpadki* (Geneva: WTO, 2004)

Alan O. Sykes, "International Trade and Human Rights: An Economic Perspective" (May 2003) *John M. Olin Law & Economics Working Paper No. 188*, 1

Peer Teuwsen, "Ein lebensbedrohliches Arbeitsumfeld", *ZeitOnline*, 07 March 2012, available at <http://www.zeit.de/wirtschaft/unternehmen/2012-03/nestle-klage-menschenrechtler/> 1 May 2014

The Economist, "Clothing Firms in Bangladesh: Accord, alliance or disunity?" (13 July 2013) available at <http://www.economist.com/news/business/21581752-transatlantic-divide-among-big-companies-may-hinder-efforts-improve-workers-safety> 1 May 2014

The Realization of Economic, Social and Cultural Rights: The impact of the activities and working methods of transnational corporations on the full enjoyment of all human rights, in particular economic, social and cultural rights and the right to development, bearing in mind existing international guidelines, rules and standards relating to the subject-matter-report of the Secretary-General E/CN.4/Sub.2/1996/12 (2 July 1996) < http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G96/130/58/PDF/G9613058.pdf?OpenElement > 1 May 2014

Third World Intellectuals and NGOs' Statement Against Linkage (1999) available at <http://www.cuts-international.org/Twin-sal.htm> 1 May 2014

Total, "Total in Myanmar a sustained commitment" (2010) at <http://s3.amazonaws.com/zanran_storage/birmanie.total.com/ContentPages/2460050005.pd> 1 May 2014

Truth and Reconciliation Commission of South Africa, *Report Vol. 4* (1998), available at <http://www.justice.gov.za/Trc/report/finalreport/Volume4.pdf> 1 May 2014

UN, General Assembly, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, Report of the Study Group if the International Law Commission, Finalised by Martti Koskenniemi, A/CN.4/L.682 (13 Apr. 2006)

UN General Comment No 12: The rights to adequate food (art. 11 ICESC) U. N. Doc. E/C.12/1999/5 (12 May 1999)

UN General Comment No 14: The highest attainable standard of health (art. 12 ICESC) U. N. Doc. E/C.12/2000/4 (11 August 2000)

UN General Comment No. 31 [80]: Nature of the General Legal Obligation Imposed on States Parties to the Covenant CCPR/C/21/Rev.1/Add.13 (26 May 2004)

UN Global Compact Website <http://www.unglobalcompact.org/> 1 May 2014

UN S/RES/232 *Question concerning the Situation in Southern Rhodesia* (16 December 1966)

UNCTAD, *United Nations Conference on Trade and Development, Social Responsibility* UNCTAD/ITE/IIT/22 (New York and Geneva: United Nations, 2001)

UNCTAD, *World Investment Report 2011* at <http://unctad.org/en/docs/wir2011_embargoed_en.pdf> 1 May 2014

UNCTAD, *World Investment Report 2011*, *Web Table 34: "Number of parent corporations and foreign affiliates, by region and economy"* at <http://unctad.org/Sections/dite_dir/docs/WIR11_web%20tab%2034.pdf > 1 May 2014

Ralph Weihemann, (TV documentary) "Blei im Blut- die vergifteten Kinder von La Oroya", *WDR Fernsehen* (2008), summary available at <http://www.wdr.de/unternehmen/presselounge/programmhinweise/fernsehen/2008/12/20081214_tag7_blei_im_blut.phtml> 1 May 2014

Martin A. Weiss, "Arab League Boycott of Israel" (2006) *CRS Report for Congress* (19 April 2006) Order Code RS22424, available at <http://fas.org/sgp/crs/mideast/RS22424.pdf> 1 May 2014

Martin A. Weiss, "Arab League Boycott of Israel" *Congressional Research Service* (19 December 2011) available at <http://www.fas.org/sgp/crs/mideast/RL33961.pdf> 1 May 2014

Craig Whitlock, "'Universal Jurisdiction': Spain's Judges Target Torture" *The Washington Post* (24 May 2009) available at <http://www.commondreams.org/headline/2009/05/24-0> 1 May 2014

World Trade Report 2005, WTO Website, Resources <http://www.wto.org/english/res_e/publications_e/wtr05_e.htm> 1 May 2014

World Trade Report 2007, WTO Website, Resources <http://www.wto.org/english/res_e/publications_e/wtr07_e.htm> 1 May 2014

World Trade Report 2012, WTO Website, Resources, <http://wto.org/english/res_e/publications_e/wtr12_e.htm> 1 May 2014

WTO Annual Reports, available at WTO Website, Resources <http://www.wto.org/english/res_e/reser_e/annual_report_e.htm> 1 May 2014

WTO, “10 common misunderstandings about the WTO” WTO Website <http://www.wto.org/english/thewto_e/whatis_e/10mis_e/10m00_e.htm> 1 may 2014

WTO, “cross-cutting and new issues, environment “ WTO Website <http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm> 1 May 2014

WTO, “labelling” WTO Website <http://www.wto.org/english/tratop_e/envir_e/labelling_e.htm> 1 May 2014

WTO “trade and environment” WTO Website <http://www.wto.org/english/tratop_e/envir_e/envir_e.htm> 1 May 2014

WTO Press Release, “Trade and Environment Bulletin” PRESS/TE/029 (30 July 1999)

WTO Website <http://www.wto.org> 1 May 2014

Yearbook of the International Law Commission 2001 (Vol II, Part 2, New York, Geneva: UN, 2007) A/CN.4/SER.A/2001/Add.1(Part 2)

Abbreviations

AB	(GATT/WTO) Appellate Body
ACP	African, Caribbean and Pacific Group of States
AI	Amnesty International
AIDCP	Agreements on the International Dolphin Conservation Program
ASEAN	Association of South East Asian Nations
ATCA	Alien Tort Claims Act
ATS	Alien Tort Statute = ATCA
AUS	Australia(n)
BHP	Broken Hill Proprietary Company
BIT(s)	Bilateral investment treaty(/ies)
CCC	Clean Clothes Campaign
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
Ch/ch	Chapter
CIA	Central Intelligence Agency
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
Co.	Company
CTE	Committee on Trade and Environment
DSB(s)	Dispute Settlement Body(/ies)
EBRD	European Bank for Reconstruction and Development
EC	European Community(/ies)
ECCHR	European Center for Constitutional and Human Rights

ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ed	editor/edition
eds	Editors
ETP	Eastern Tropical Pacific (Ocean)
EU	European Union
FLO	Fairtrade (Labelling Organizations) International
GATT	General Agreement on Tariffs and Trade
GMO(s)	Genetically modified organism(s)
GSP	Generalized System of Preferences
GWI	GoodWeave International (formerly Rugmark)
HRC	Human Rights Council
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESC(R)	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILA	International Law Association
ILC	International Law Commission
ILO	International Labour Organization
IMF	International Monetary Fund
Inc.	Incorporated
ITO	International Trade Organization
Ltd	Limited

MEA(s)	Multilateral Environmental Agreement(s)
MFN	Most Favoured Nation
MMPA	US Act for the protection of sea mammals
MNE	Multinational Enterprises
MOSOP	Movement for the Survival of the Ogoni People
NAFTA	North American Free Trade Agreement
NGO	Non-governmental organization
NPR	Non-product related
OAS	Organization of American States
OECD	Organisation for Ecomoic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
Ors	Others
Plc./plc.	Public limited company
pp	Pages
PPM(s)	Productions and processing method(s)
RTZ	Rio Tinto-Zinc Corporation (now Rio Tinto Group)
SC	Security Council (UN)
SCM	Agreement on Subsidies and Countervailing Measures
SINALTRAINAL	Sindicato Nacional de Trabajadores del Sistema Agroalimentario
SPS (Agreement)	Agreement on Sanitary an Phytosanitary Measures
TCMD	Transnational Corporations and Management Division
TEU	Treaty on the European Union

TFEU	Treaty on the Functioning of the European Union
TNC	Transnational Corporation
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
UCC	Union Carbide Corporation
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNCTC	United Nations Centre on Transnational Corporations
UNEP	United Nations Environment Programme
US	United States of America
VCLT	Vienna Convention on the Law of Treaties
wfr	With further references
WHO	World Health Organization
WIPO	World Intellectual property Organization
WTO	World Trade Organization

CHAPTER I: INTRODUCTION

Who gets the risks? The risks are given to the consumer, the unsuspecting consumer and the poor work force. And who gets the benefits? The benefits are only for the corporations, for the money makers.
(Cesar Chavez)

As polarizing as this quote may be, it makes a good starting point for this enquiry. This research is a contribution to the discussion on how some of those benefitting from the risks can be prevented from or at least held responsible for putting others on the line. It assesses how home state, *i.e.* usually Western state, TNCs can be influenced and held responsible by these very home states when acting abroad. This enquiry does not, however, claim to have found a panacea or perfect solution to any case within the highly controversial debate on TNCs' human rights responsibilities. Yet it does reveal the manifold options for home states that do exist and the possible future developments of these tools and options, reaching from legislative changes, for example to empower home state courts or broaden parent liability, to political actions like sanctions and trade bans. However, before these different home state options will be assessed in more detail in the succeeding chapters of this work, the following sections will sketch the underlying situation and arguments and mark the starting point and key aspects for the discussion and analysis to follow.

I CURRENT EXAMPLES OF HUMAN RIGHTS VIOLATIONS AND INTERFERENCES BY TNCS

To get an idea of the scope of the issue and the different effects on different human rights TNCs may have and of the different ideas of holding TNCs liable, some examples of recent cases made public by NGOs and media will be sketched in the following. From these cases is can be seen that TNCs may violate and impair different kinds of human rights, like the right to form and join trade unions (art. 8 ICESCR, art. 22 ICCPR, ILO Convention No. 87), the right

to life (art. 6 ICCPR), the right to the enjoyment of the highest attainable standard of physical and mental health (art. 12 ICESC), the rights to health and safety working conditions (art. 7 ICESC), the right to a remuneration which provides as a minimum among other things fair wages (art. 7 ICESC), the right to limited hours of work (ILO Convention No. 1) and weekly rest (ILO Convention No. 14).

A Apple Case

Apple has been criticized for the poor labour standards at Foxconn, one of Apple's major suppliers.[1] There, the employees are working in "super-factories", where they are also living as these factory areas serve as self-contained cities.[2] As China Labor Watch describes the working conditions are those of a sweatshop - little pay, long working hours, not being able to earn enough to live without doing excessive overtime and harsh conditions disregarding the value of human life.[3] It is claimed that Apple is directly benefitting from the sweatshop conditions, by in fact controlling the supplier Foxconn, without being liable for what is happening there.[4] Yet in spite of of its great control and influence over the suppliers, Apple simply states that Apple was not to blame if the suppliers did not adhere to Apple standards.[5] However, without Apple changing their demand or payment for the products provided by the suppliers, nothing is going to change.[6] This is even more so as Apple's

[1] See for example China Labor Watch, "Keeping Pressure on Apple to promote Real Change at Apple and Foxconn" at <http://www.chinalaborwatch.org/news/new-412.html> 1 May 2014; Malcolm Moore, "Apple admits using child labour", *Telegraph* (27 February 2010), at <http://www.telegraph.co.uk/technology/apple/7330986/Apple-admits-using-child-labour.html> 1 May 2014, also including other cases.
[2] Malcolm Moore, "Apple admits using child labour", *Telegraph* (27 February 2010), at <http://www.telegraph.co.uk/technology/apple/7330986/Apple-admits-using-child-labour.html> 1 May 2014.
[3] China Labor Watch, "Keeping Pressure on Apple to promote Real Change at Apple and Foxconn" at <http://www.chinalaborwatch.org/news/new-412.html> 1 May 2014.
[4] For the garment sector the Clean Clothes Campaign, an alliance of NGOs and trade unions, tries to improve labour conditions for the workers and to engage corporations into actively protecting labour law, Clean Clothes Campaign, Website at <http://www.cleanclothes.org/about/principles> 1 May 2014.
[5] China Labor Watch, "Keeping Pressure on Apple to promote Real Change at Apple and Foxconn" at <http://www.chinalaborwatch.org/news/new-412.html> 1 May 2014.
[6] *Ibid.*

guidelines allowed for 60 working hours a week, while Chinese labour law only allows for 49 and even the 60 hours are exceeded in reality.[7] Due to public pressure, Apple has now decided to work with the NGO Fair Labor Association to improve the labour conditions in its Foxconn factories.[8] China Labor Watch beliefs that this would not have happened without the - rather randomly used tool of - public pressure.[9]

B La Oroya Case

In La Oroya in the Peruvian Andes a large polymetallic smelter is operating.[10] According to reports hardly anything is growing there any longer, the air is polluted with sulphur dioxide, lead and arsenic, causing the blood lead levels of the people in La Oroya to rise up to seven times above the limits of the *World Health Organisation (WHO)*.[11] Since 1997 the smelter is run by Doe Run Perú, a subsidiary of the US corporation Doe Run[12] and it is done so in a rather lax way. Instead of fulfilling its environmental obligations in due time, it asked for extensions and the government in Lima granted them.[13] Therefore, several NGOs decided to pressure the corporation to fulfil its standards.[14] Since then the

[7] Malcolm Moore, "Apple admits using child labour", *Telegraph* (27 February 2010), at <http://www.telegraph.co.uk/technology/apple/7330986/Apple-admits-using-child-labour.html> 1 May 2014.

[8] China Labor Watch, "Keeping Pressure on Apple to promote Real Change at Apple and Foxconn" at <http://www.chinalaborwatch.org/news/new-412.html> 1 May 2014.

[9] *Ibid.*

[10] See Blacksmith Institute, "La Oroya Lead Pollution" at <http://www.blacksmithinstitute.org/projects/display/36> 1 May 2014; Doe Run Perú Website, <http://www.doerun.com.pe/content/pagina.php?pIDSeccionWeb=1> 1 May 2014, "Operations".

[11] See Blacksmith Institute, "La Oroya Lead Pollution" at <http://www.blacksmithinstitute.org/projects/display/36> 1 May 2014; Knut Henkel, "Blei im Blut", *Amnesty International Journal* (December 2009/January 2010) 57.

[12] Knut Henkel, "Blei im Blut", *Amnesty International Journal* (December 2009/January 2010) 57; Ralph Weihemann, (TV documentary) "Blei im Blut- die vergifteten Kinder von La Oroya", *WDR Fernsehen* (2008), summary available at <http://www.wdr.de/unternehmen/presselounge/programmhinweise/fernsehen/2008/12/20081214_tag7_blei_im_blut.phtml> 1 May 2014.

[13] Doe Run Perú, "Doe Run Peru's compliance with PAMA" (2011) at <http://www.doerun.com.pe/images/upload/paginaweb/archivo/15/Logros_Ambientales_de_DoeRunPeru_Ingles.pdf> 1 May 2014.

[14] Blacksmith Institute, "La Oroya Lead Pollution" at <http://www.blacksmithinstitute.org/projects/display/36> 1 May 2014.

poor environmental standards and health risks for the people in La Oroya haven been criticized many times by different organisations and the media. In 2006[15] and 2007[16] for example the *Blacksmith Institute*, a US environmental organization, listed La Oroya among the top ten of the "World's Worst Polluted Places", a German public broadcaster did a documentary on La Oroya, aired in December 2008[17] and *AI* Germany published an article in their December 2009/January 2010 edition.[18] In 2008 the smelter was shut down,[19] but operations have been restarted in May 2012 and Doe Run Perú promised to fulfil its environmental obligations, claiming it has been investing already since it took over the smelter.[20] Yet like in the *Apple Case*, public pressure is not a satisfying tool to protect human rights. It is rather an emergency solution, randomly filling small bits of a larger gap.

C Nestlé Case

On September 11th 2005 Luciano Enrique Romero was kidnapped, interrogated, tortured and murdered by paramilitaries in Colombia.[21] He had worked for Cicolac, a subsidiary of Swiss Nestlé and was a trade unionist in the trade union SINALTRAINAL.[22] Only a couple of weeks after he was killed he would have

---

[15] Blacksmith Institute, "The World's Worst Polluted Places" *2006 Annual Report* 4, available at <http://www.blacksmithinstitute.org/files/FileUpload/files/Annual%20Reports/2006ar.pdf> 1 May 2014.

[16] Blacksmith Institute, "The World's Worst Polluted Places" *2007 Annual Report* 4, available at <http://www.blacksmithinstitute.org/files/FileUpload/files/Annual%20Reports/2007ar.pdf> 1 May 2014.

[17] Ralph Weihemann, (TV documentary) "Blei im Blut - die vergifteten Kinder von La Oroya", *WDR Fernsehen* (2008), summary available at <http://www.wdr.de/unternehmen/presselounge/programmhinweise/fernsehen/2008/12/20081214_tag7_blei_im_blut.phtml> 1 May 2014.

[18] Knut Henkel, "Blei im Blut", *Amnesty International Journal* (December 2009/January 2010) 57.

[19] Doe Run Perú, "Doe Run Peru's compliance with PAMA" (2011) at <http://www.doerun.com.pe/images/upload/paginaweb/archivo/15/Logros_Ambientales_de_DoeRunPeru_Ingles.pdf> 1 May 2014.

[20] Doe Run Perú, "Doe Run Peru is ready to restart operations on May 1st, 2012" at <http://www.doerun.com.pe/images/upload/paginaweb/archivo/15/20120301_Comunicado_LicenciaSocial_Eng.pdf > 1 May 2014.

[21] ECCHR and Misereor, "Special Newsletter on the criminal complaint against Nestlé" available at <http://www.ecchr.de/index.php/nestle-518.html > 1 May 2014, 2.

[22] *Ibid.*

testified against Nestlé at the World Conference in Bern.[23] In 2002 disputes arose between Cicolac and SINALTRAINAL concerning payment and other working conditions and Nestlé informed the great land owners and cattle breeders of the region, who are known for their close contacts to the paramilitaries that are supposed to protect the country against left-wing guerrilla fighters.[24] There is even evidence that Cicolac made payments to the paramilitaries.[25] Trade unionists were dismissed and Romero received death threats after Cicolac officials falsely defamed him and others as guerrilla fighters.[26] As during the last 25 years more than 2,500 unionists have been murdered[27] and unionists and other left-wing groups are persecuted by paramilitaries and public officials,[28] it seems falsely defaming Romero was a call to the paramilitaries to commit the murder.[29] Due to insider information from the paramilitary Romero's murderers were finally be found and tried.[30] Even the judge trying them suggested that the prosecutor should also investigate the police, the secret service and the Nestlé management.[31] The *European Center for Constitutional and Human Rights (ECCHR)* and SINALTRAINAL filed a criminal complaint in March 2012 against Nestlé managers and Nestlé itself, which is possible under Swiss law.[32] They claim that the accused "have

[23] Peer Teuwsen, "Ein lebensbedrohliches Arbeitsumfeld", *ZeitOnline*, 07 March 2012, available at <http://www.zeit.de/wirtschaft/unternehmen/2012-03/nestle-klage-menschenrechtler/> 1 May 2014.
[24] *Ibid.*
[25] ECCHR and Misereor, "Special Newsletter on the criminal complaint against Nestlé" available at <http://www.ecchr.de/index.php/nestle-518.html > 1 May 2014, 2.
[26] ECCHR, "Nestlé precedent case: Charges filed in murder of Columbian trade unionist" Newsletter No. 23 (2012) available at <http://www.ecchr.de/index.php/newsletter.328.html > 1 May 2014.
[27] ECCHR and Misereor, "Special Newsletter on the criminal complaint against Nestlé" available at <http://www.ecchr.de/index.php/nestle-518.html > 1 May 2014, 7.
[28] *Ibid*. at 2.
[29] *Ibid*.
[30] Peer Teuwsen, "Ein lebensbedrohliches Arbeitsumfeld", *ZeitOnline*, 07 March 2012, available at <http://www.zeit.de/wirtschaft/unternehmen/2012-03/nestle-klage-menschenrechtler/> 1 May 2014.
[31] *Ibid.*
[32] ECCHR and Misereor, "Special Newsletter on the criminal complaint against Nestlé" available at <http://www.ecchr.de/index.php/nestle-518.html > 1 May 2014, 2; on art. 102 (1) *Swiss Criminal Code* (1937) see p. 11-12 of the Newsletter.

acted with negligence having failed to prevent the crime"[33] by "negligently contributing to the death of Romero through omission of a duty"[34], because Nestlé knew of the behaviour of Cicolac and the overall situation in Colombia and the risk for trade unionists, especially when defamed like this, and even particularly of Romero's case[35]. However, whether Nestlé and/or its managers can be held responsible under Swiss criminal law for the murder of Romero has not been answered. In March 2013 the Swiss Canton of Waadt found the matter had become time-barred and did not to intiate any further investigations.[36] This case shows that it would be easier to hold the parent Nestlé liable if more action had been taken by Switzerland to provide clear legislation for cases like this.

DRoyal Dutch Shell Petroleum Case

In 1994 several members of the *Movement for the Survival of the Ogoni People (MOSOP)* in Nigeria were arrested, tried by a special military court, violating fair trial standards, sentenced to death for murder and executed.[37] Before, *MOSOP* hat protested against the environmental impacts of oil exploration in the Ogoni region in the Niger Delta by the Nigerian subsidiary of the Dutch/U.K. corporation Royal Shell Dutch Petroleum and they had campaigned for increased autonomy of the Ogoni people.[38] The situation for the Ogoni people was and had been tense. In 1993 and 1994 Ogoni villages were systematically targeted by military action, including looting, rape and property destruction.[39] Esther Kiobel, wife of one of the executed activists, filed suit

[33] ECCHR, "Nestlé precedent case: Charges filed in murder of Columbian trade unionist" Newsletter No. 23 (2012) available at <http://www.ecchr.de/index.php/newsletter.328.html > 1 May 2014.
[34] ECCHR and Misereor, "Special Newsletter on the criminal complaint against Nestlé" available at <http://www.ecchr.de/index.php/nestle-518.html > 1 May 2014, 2.
[35] *Ibid.* at 5.
[36] ECCHR, "Nestlé has nothing to fear from Swiss legal system" available at <http://www.ecchr.de/index.php/nestle-518.html> 1 May 2014.
[37] Business & Human Rights Website, "Shell Lawsuit", available at <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ShelllawsuitreNigeria> 1 May 2014.
[38] *Ibid.*; Center for Justice & Accountability (CJA) Website "Kiobel v. Shell" at <http://cja.org/section.php?id=510> 1 May 2014.
[39]Center for Justice & Accountability (CJA) Website "Kiobel v. Shell" available at <http://cja.org/section.php?id=510> 1 May 2014.

against Royal Dutch Shell Petroleum in the US in 2002, arguing that the Nigerian military Junta had been supported by Shell through the corporation's Nigerian subsidiary,[40] therefore Shell were complicit in, amongst other things, extrajudicial killings and torture.[41] After the District Court dismissed the case and the Court of Appeals[42] held that corporations could not be held liable under the *American Tort Claims Act (ATCA)*[43], a law allowing foreigners to sue in the US in cases of a breach of the law of nations, the US Supreme Court finally decided in April 2013 that the case could not be decided by US courts, because there was no sufficient link to the US.[44]

However, this was not the only human rights related suit filed against Shell by people living in the Niger Delta. In January 2013 for example a Dutch Court decided that in one out of five cases brought before it, Shell's responsibility for one of the five oil spills was proven and Shell's Nigerian Subsidiary was liable for the damages because of its negligence and failure to invest in proper safety systems.[45]

E *Bangladesh Garment Industry Case(s)*

In April 2013 the "Rana Plaza", an eight-storey factory building housing garment factories, collapsed in Bangladesh, causing the death of more than 1,000 garment workers inside the building.[46] The building had been evacuated before, but workers were told to return to their working places before the

---

[40] Business & Human Rights Website, "Shell Lawsuit", available at <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ShelllawsuitreNigeria> 1 May 2014.
[41] *Ibid.*
[42] *Kiobel v Royal Dutch Petroleum* 06-4800-cv, 06-4876-cv (US App. 2010).
[43] *Alien Tort Claims Act (ATCA)* (US, 1789).
[44] *Kiobel v Royal Dutch Petroleum* No. 10-1491 (US Supreme Court, decided on 17 April 2013); the decision will be assessed in Chapters II and III of this research in more detail.
[45] See for example *BBC News*, "Shell Nigeria Case: Court acquits firm on most charges" (30 January 2013) available at <http://www.bbc.co.uk/news/world-africa-21258653> 1 May 2014; Fiona Harvey and Afua Hirsch, "Shell acquitted of Nigeria pollution charges" (January 30 2010) *The Guardian*, available at <http://www.theguardian.com/environment/2013/jan/30/shell-acquitted-nigeria-pollution-charges> 1 May 2014.
[46] See for example *BBC News*, "Bangladesh Factory collapse toll passes 1,000" (10 May 2013) available at <http://www.bbc.co.uk/news/world-asia-22476774> 1 May 2014.

building finally collapsed.[47] In this building, workers produced, amongst other things, garments for (international) Western retailers,[48] *i.e.* Western TNCs. In May 2013 eight people died when a fire broke out in a clothing factory in Bangladesh.[49] In June 2013 a fire erupted in another garment factory in Bangladesh and workers were injured when escaping from the building.[50] It was said that the workers there had produced garments for, amongst other things, a US American business.[51] Yet unfortunately these were not the first nor the only incidents of that kind. Labour Rights Groups claim that within the past decade hundreds of workers have died because of fires in factories in Bangladesh.[52] Working conditions, especially safety issues, are a pressing issue in Bangladesh, not least because of Western retailers demanding changes.[53] Bangladesh has promised to implement reforms set out in an ILO statement,[54] however "implementation remains a question".[55]

As could be seen from the sources cited above, Western media covered the current cases broadly, stressing the link to Western companies and retailers and also asking whether these Western corporations were contributing to the bad working conditions by demanding cheap production, thereby bearing

---

[47] *Ibid.*; Jufikar Ali Manik and Jim Yardley, "Another Garment Factory Scare in Bangladesh", *The New York Times* (13 June 2013) available at <http://www.nytimes.com/2013/06/14/world/asia/another-garment-factory-scare-in-bangladesh.html?_r=0> 1 May 2014.
[48] *BBC News*, "Bangladesh Factory collapse toll passes 1,000" (10 May 2013) available at <http://www.bbc.co.uk/news/world-asia-22476774> 1 May 2014.
[49] Farid Ahmed, "Eight killed in Bangladesh garment factory fire" *CNN* (9 May 2013) available at <http://edition.cnn.com/2013/05/08/world/asia/bangladesh-fatal-fire/index.html> 1 May 2014.
[50] Jufikar Ali Manik and Jim Yardley, "Another Garment Factory Scare in Bangladesh", *The New York Times* (13 June 2013) available at <http://www.nytimes.com/2013/06/14/world/asia/another-garment-factory-scare-in-bangladesh.html?_r=0> 1 May 2014.
[51] *Ibid.*
[52] *Ibid.*
[53] Vikas Bajaj, "Doing Business in Bangladesh" *The New York Times* (14 September 2013) available at <http://www.nytimes.com/2013/09/15/opinion/sunday/doing-business-in-bangladesh.html> 1 May 2014.
[54] See Farid Ahmed, "Eight killed in Bangladesh garment factory fire" *CNN* (9 May 2013) available at <http://edition.cnn.com/2013/05/08/world/asia/bangladesh-fatal-fire/index.html> 1 May 2014.
[55] *Ibid.*

responsibility as well.[56] Several suggestions as to how to react were and are discussed in different fora in the Western world. TNCs relying on subcontractors and suppliers from Bangladesh are for example reacting by building an alliance to improve working standards and maintain the job opportunities in the garment industry in Bangladesh.[57] They designed the "Accord on Fire and Building Safety in Bangladesh",[58] a legally binding agreement signed by more than 70, mostly European, brands and retailing companies so far.[59] Several governments were and are at the same time considering implementing trade sanctions as well as positive incentives to pressure or influence the government in Bangladesh to put into effect and implement the promised reforms mentioned above.[60] The US for example have suspended Bangladesh's trade privileges.[61] So it can be said that the Western world's attention has been grabbed by the disasters.[62]

II HUMAN RIGHTS ABUSES - COROLLARY OF A GLOBALISED WORLD?

The examples just mentioned are just a random selection of the many more cases that exist concerning cases of TNCs.[63] Some more examples will be

[56] See for example also Vikas Bajaj, "Doing Business in Bangladesh" *The New York Times* (14 September 2013) available at <http://www.nytimes.com/2013/09/15/opinion/sunday/doing-business-in-bangladesh.html> 1 May 2014.
[57] *FAZ,* "Fabriken in Bangladesch sollen sicherer werden" (16 May 2013).
[58] Information on the Accord is for example available at FAQ about the Bangladesh Safety Accord" at <http://www.cleanclothes.org/issues/faq-safety-accord> 1 May 2014.
[59] *The Economist*, "Clothing Firms in Bangladesh: Accord, alliance or disunity?" (13 July 2013) available at <http://www.economist.com/news/business/21581752-transatlantic-divide-among-big-companies-may-hinder-efforts-improve-workers-safety> 1 May 2014.
[60] On the possibility of EU trade sanctions and positive incentives see for example *FAZ*, "Bangladesch wehrt sich gegen Sanktionen" (6 May 2013); see also *Spiegel Online*, "EU-Kommissar zu Arbeitsbedingungen: Auch gegen Entwicklungsländer können wir Sanktionen verhängen" (17 December 2012) available at <http://www.spiegel.de/wirtschaft/unternehmen/eu-kommissar-de-gucht-zu-arbeitsbedingungen-in-entwicklungslaendern-a-872050.html> 1 May 2014 where Karel de Gucht points out that trade santions should not be applied too easily.
[61] *The Economist*, "Clothing Firms in Bangladesh: Accord, alliance or disunity?" (13 July 2013) available at <http://www.economist.com/news/business/21581752-transatlantic-divide-among-big-companies-may-hinder-efforts-improve-workers-safety> 1 May 2014.
[62] See Vikas Bajaj, "Doing Business in Bangladesh" *The New York Times* (14 September 2013) available at <http://www.nytimes.com/2013/09/15/opinion/sunday/doing-business-in-bangladesh.html> 1 May 2014.
[63] There are many more cases and more human rights that are violated, like for example indigenous people's land rights as in the case of Oil Drilling in the Colombian Andes in the

mentioned in the chapters to come, as due to its very topic the focus of this research is on the existing clashes between human rights and TNCS acting abroad. For all the following chapters of this research it is important to understand the factors contributing to those human rights violations and impairments by TNCs acting abroad, as these are the challenges and questions this research is discussing.

A *Challenges of globalisation in the TNC context*

The first and easiest answer that comes to mind to explain TNCs' behaviour affecting human rights are the internationalized production of goods, the globalised world economy[64] with its trade liberalisation and the increasing power of TNCs in such a world, where they can easily choose to produce in the cheapest places with the lowest standards to maximize their gains. It is claimed that human rights are not exactly a priority for businesses.[65] They are entities with the economic goal of earning money and maximizing profits. This means cheap production methods, often including low-cost labour and lack of safety-standards, causing health risks, environmental damage, etc. However, when an answer to such a complex question comes so easily a second glance may be

---

land of the U'wa by the Colombian subsidiary of the US based Occidental Petroleum, see for this case Lilian Aponte Miranda, "The hybrid state-corporate enterprise and the violations of indigenous land rights: theorizing corporate responsibility and accountability under international law" (2007) 11 *Lewis & Clark L.Rev.* 135; see also *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development- Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* A/HRC/8/5/Add.2 (23 May 2008) <http://198.170.85.29/Ruggie-2-addendum-23-May-2008.pdf> 1 May 2014, where labour and non-labour rights violated by businesses are named.

[64] The term "globalisation" will not be defined in any detail in this research, but is used as a broad expression for the developing internationalization and denationalization of relations among actors, be they state actors or private ones, including those of businesses. On the issue of defining the term see Jost Delbrück, „Globalization of Law, Politics and Markets-Implications of Domestic Law. A European Perspective" 1 *IJGLS* (1993) 9, 10-11; Klaus Dicke, Waldemar Hummer, Daniel Girsberger, Katharina Boele-Woelki, Christoph Engel and Jochen A. Frowein, *Völkerrecht und Internationales Privatrecht in einem sich globalisierenden internationalen System – Auswirkungen der Entstaatlichung transnationaler Rechtsbeziehungen* (Heidelberg: Müller Verlag, 2000)13, 14 and 21; Frank J. Garcia, "The Global Market and Human Rights: Trading Away the Human Rights Principle" (1999) 25 *Brooklyn J. Int'l L.* 51, 52 and 56-62 wfr.

[65] See on the discussion Beth Stephens "The Amorality of Profit: Transnational Corporations and Human Rights" (2002) 20 *Berkeley J. Int'l L.* 45, especially 62-4 wfr.

helpful to capture more of the width and factors contributing to current debates on a topic such as human rights violations by Western TNCs. Therefore, in the following sections, "second glance answers" will provided after sketching "first glance" answers.

1 *Power of TNCs*

TNCs often have great power, an (economic) power that, in some cases, exceeds the power of states, especially of small and developing states,[66] thereby constituting and shaping a "new world order".[67] It was already observed in the mid-nineties that "of the world's 100 biggest economies, only 49 are states, while the remaining 51 economies are corporations."[68] As Bolewski points out: "[O]ne third of the international transactions already take place within transnational companies".[69] TNCs, mostly based in developed states,[70] gained their power due to globalisation, particularly because of the free flow of capital international trade[71] and private foreign investment flow.[72] They also advanced

---

[66] See Wilfried Bolewski, *Diplomacy and International Law in Globalized Relations* (Berlin, Heidelberg: Springer, 2007) 54 referring to the budgets of TNCs; see also UNCTAD, *World Investment Report 2011* at <http://unctad.org/en/docs/wir2011_embargoed_en.pdf> 1 May 2014, p. X, according to which TNCs' production accounts for a quarter of the global GDP.

[67] See Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004).

[68] Sarah Anderson and John Cavanagh, "The Top 200: The Rise of Global Corporate Power" (updated version, 2000) available at <http://s3.amazonaws.com/corpwatch.org/downloads/top200.pdf> 1 May 2014; see also David C. Korten, "The Failures of Bretton Woods", in Edward Goldsmith and Jerry Mander (eds), *The Case Against the Global Economy and for a Turn toward the Local* (San Francisco: Sierra Club Books, 1996) 20, 26.

[69] Wilfried Bolewski, *Diplomacy and International Law in Globalized Relations* (Berlin, Heidelberg: Springer, 2007) 54.

[70] See UNCTAD, *World Investment Report 2011*, *Web Table 34: "Number of parent corporations and foreign affiliates, by region and economy"* at <http://unctad.org/Sections/dite_dir/docs/WIR11_web%20tab%2034.pdf > 1 May 2014, according to which 70,7% of the parent corporations are located in developed states (73.144 in developed countries and 30.209 in developing countries).

[71] Henry J. Steiner and Philip Alston, *International Human Rights in Context* (2nd ed, Oxford: Oxford University Press, 2000); Dutch Sections of Amnesty International and Pax Christi International, *Report: Multinational Enterprises and Human Rights* (2nd ed, 2000) 16.

[72] Philip Alston, "The Not-a-Cat-Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?" in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford: University Press, 2005) 3, 17-8; see also UNCTAD, *World Investment Report 2011* at <http://unctad.org/en/docs/wir2011_embargoed_en.pdf> 1 May 2014, 24-5, according to

globalisation by acting internationally.[73] Globalisation is even defined by some as, amongst other things, the increase in the number of international participants (including TNCs),[74] issues and challenges.[75] This shows that globalisation and TNCs are inseparably interconnected and intertwined and have influenced and strengthened one another. The power of TNCs due to their great budgets and international action is also derived from their economic attractiveness for any country because of TNCs' investments and employment opportunities.[76] That is why both states, the state of domicile, *i.e.* the home state, as well as the state in which a corporation invests, *i.e.* the host state, are under a latent threat that the corporation might move and thereby harm the state if conditions become unattractive.[77] It is claimed the significance of the state is therefore undermined by globalisation[78] and some even suggest that states have waived their control by allowing for changes caused by globalisation in a broad sense of the term.[79] States are losing their powers, it is said, including the power to protect their citizens and other individuals, because for example economic and social rights, particularly civil liberties, are adapted to the market-place demands by the neo-liberal reforms.[80] Yet despite all these suggestions of fading state power one can also argue that states still have a great amount of power as they are the main actors in public international law and politics and that their power and importance may even grow in the light of new non-state actors on the

---

which the international production by TNCs accounts for 40% of the TNCs' added value, while in 2005 it was only 35%, the TNCs in the developed countries being 80% of the TNCs in the world and accounting for 70% of the global foreign direct investment outflow.

[73] Henry J. Steiner and Philip Alston, *International Human Rights in Context* (2nd ed, Oxford: Oxford University Press, 2000) 1349.

[74] Wilfried Bolewski, *Diplomacy and International Law in Globalized Relations* (Berlin, Heidelberg: Springer, 2007) 17.

[75] *Ibid*.

[76] Olivier de Schutter, "The Accountability of Multinationals for Human Rights Violations in European Law" in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford: University Press, 2005) 227, 314.

[77] *Ibid.*

[78] Celia Kay Wells and Juanity Elias, "Catching the Conscience of the King: Corporate Players on the International Stage" in *ibid.* 141, 145.

[79] Dutch Sections of Amnesty International and Pax Christi International, *Report: Multinational Enterprises and Human Rights* (2nd ed, 2000) 16.

[80] Chris Jochnick, "The Human Rights Challenge to Global Poverty" in Willem van Genugten and Camilo Perez-Bustillo (eds), *The Poverty of Rights, Human Rights and the eradication of Poverty* (London, New York: Zed Books, 2001) 159, 164.

international stage with which they might cooperate in new forms.[81] However, whether one agrees that states are losing their power or not, TNCs are gaining power, not only economic but in the wake of it also political power[82] and power over the public sphere in general,[83] which includes human rights and public international law.[84] Yet at a certain point the amount of power an entity bears does not allow for neutrality any longer - and even more so because TNCs do not act neutrally anyway, but often influence governments' tax and trade policies as well as environmental rules.[85] Whether actively engaging or simply condoning grave injustices and rights violations, a position is thereby taken whether the corporation wishes to do so or not.[86] That companies can, and sometimes do make a difference by becoming engaged could be seen in the 1980s in South Africa where some companies stretched the apartheid laws and regulations so far that they were finally contradicting their intended purpose[87] and adopted the *Sullivan Principles*, a voluntary code of conduct to fight apartheid.[88] Others publicly advocated fundamental changes in the government policies.[89] Another example of such an engagement is the refusal of companies to inform countries correctly, where the country may prohibit the importation of

---

[81] Wilfried Bolewski, *Diplomacy and International Law in Globalized Relations* (Berlin, Heidelberg: Springer, 2007) 5.
[82] *Ibid.* and at 20.
[83] Olivier de Schutter, "The Accountability of Multinationals for Human Rights Violations in European Law" in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford: University Press, 2005) 227, 314; Cristoph Menke and Arnd Pollmann, *Philosophie der Menschenrechte* (Hamburg: Junius Verlag, 2007) 31; on different theories for the bargaining of host states and TNCs see Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 104-110.
[84] On the influence on international customary law see Wilfried Bolewski, *Diplomacy and International Law in Globalized Relations* (Berlin, Heidelberg: Springer, 2007) 90 wfr.
[85] Celia K. Wells and Juanita Elias, "Catching the Conscience of the King: Corporate Players on the International Stage" in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 141, 173.
[86] See Dutch Sections of Amnesty International and Pax Christi International, *Report: Multinational Enterprises and Human Rights* (2nd ed, 2000) 53.
[87] *Ibid.* at 54.
[88] Su-Ping Lu, "Corporate Codes of Conduct and the FTC: Advancing Human Rights through Deceptive Advertising Law" (2000) 38 *Colum. J. Transnat'l L.* 603; Jorge F. Perez-Lopez, „Promoting International Respect for Workers Rights Through Business Codes of Conduct" (1993) *17 Fordham Int'l L. J.* 1.
[89] Dutch Sections of Amnesty International and Pax Christi International, *Report: Multinational Enterprises and Human Rights* (2nd ed, 2000) 54.

products from Israel or regarding the employment of Jews.[90] However, many TNCs were criticized by South Africa's Truth and Reconciliation Commission because of their inaction, which effectively supported the state and the apartheid rule.[91] So it seems rather random and up to the good will of the corporations how they in fact treat human rights. As powerful actors TNCs can violate a broader amount and different kinds of human rights than individuals are usually able to, for example the freedom of association with others and the right to join trade unions.[92] The necessary step to go is therefore to link TNC power to responsibility.[93] That is why the suggestion that the duty to protect those rights should be imposed on TNCs lies at hand.[94]

2 *Legal separate entities in home and host state*

The internationalization or globalization and rise of TNCs holds another main challenge. As Steiner and Alston have identified, one of the five problems when it comes to enforcing corporate responsibility by the host state is the complexity of corporate transactions and actions, because it is hard to keep track of or find out afterwards who was doing what when and where and can be held responsible.[95] This is even more so as often the parent company and the subsidiary are legally separate entities, which makes it difficult to "pierce the

---

[90] *Ibid.*

[91] See Truth and Reconciliation Commission of South Africa, *Report Vol. 4* (1998), available at <http://www.justice.gov.za/Trc/report/finalreport/Volume4.pdf> 1 May 2014, 49-54.

[92] Both granted for example in art. 22 *International Covenant on Civil and Political Rights (ICCPR)1966.*

[93] See for example Igor Fuks, "Sosa v. Alvarez-Machain and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability" (2006) 106 *Colum. L. Rev.* 112, 117-18 wfr, stating that TNCs using low-cost labour in a way that is violating human rights and are not being held responsible for these violations are in fact "[c]ollecting monetary awards for violations of those rights"; David Kinley and Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibility for Corporations at International Law" (2004) 44 *VA J. Int. Law* 931, 935; Beth Stephens "The Amorality of Profit: Transnational Corporations and Human Rights" (2002) 20 *Berkeley J. Int'l L.* 45 wfr.

[94] See for example Dutch Sections of Amnesty International and Pax Christi International, *Report: Multinational Enterprises and Human Rights* (2nd ed, 2000), 18; Chris Jochnick, "The Human Rights Challenge to Global Poverty" in Willem van Genugten and Camilo Perez-Bustillo (eds), *The Poverty of Rights, Human Rights and the eradication of Poverty* (London, New York: Zed Books, 2001) 159, 172.

[95] Henry J. Steiner and Philip Alston, *International Human Rights in Context* (2nd ed, Oxford: Oxford University Press, 2000) 1349.

corporate veil" and to attribute the subsidiary's behaviour to the parent TNC and consider it the TNC's action abroad. [96] In 1970 the separate legal entity principle was accepted by the ICJ.[97] Yet this was more than 40 years ago and TNCs, their role and perception has changed since then. In the UK for example, courts did pierce the veil to hold parent corporations liable where there is enough evidence showing both a duty of care and the fact that the enterprise constituted a single integrated business.[98] In Germany parent and subsidiaries may be considered economic entities under the *Stock Corporations Act (Aktiengesetz)*, relying on factual control and management.[99] So holding the parent liable is possible. That there is a need to do so can be seen from the *Nestlé Case* mentioned above and also by the UNCTAD findings, where it was observed that "TNCs increasingly control and coordinate the operations of independent or, rather loosely dependent, partner firms, through various mechanisms"[100] e.g. ownership, contractual clauses or simply bargaining power.[101] Also the HRC report mentioned above found that "the majority of indirect cases made allegations that Western (European and North American) firms were contributing to or benefiting from third-party abuses abroad."[102] That is why it seems unacceptable that they should be treated as absolute separate entities. Therefore different ways

---

[96] See for example Eric Engle, *Private Law Remedies for Extraterritorial Human Rights Violations* (2006) at <http://elib.suub.uni-bremen.de/diss/docs/00010289.pdf> 1 May 2014, 99; Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 115.

[96] Eric Engle, *Private Law Remedies for Extraterritorial Human Rights Violations* (2006) at <http://elib.suub.uni-bremen.de/diss/docs/00010289.pdf> 1 May 2014, 99-100 and 108 wfr.

[97] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgement (Belgium v Spain)*, ICJ Reports 1970; see also Yaraslau Kryvoi, „Enforcing Labor Rights against Multinational Groups in Europe" (2007) 46 *Indus. Rel.* 366, 378.

[98] Yaraslau Kryvoi, „Enforcing Labor Rights against Multinational Groups in Europe" (2007) 46 *Indus. Rel.* 366, 381 wfr; see also Chapter II of this research.

[99] See Yaraslau Kryvoi, „Enforcing Labor Rights against Multinational Groups in Europe" (2007) 46 *Indus. Rel.* 366, 382, wfr and examples.

[100] UNCTAD, *World Investment Report 2011* at <http://unctad.org/en/docs/wir2011_embargoed_en.pdf> 1 May 2014, 124.

[101] *Ibid.* with more examples.

[102] *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development- Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* A/HRC/8/5/Add.2 (23 May 2008) <http://198.170.85.29/Ruggie-2-addendum-23-May-2008.pdf> 1 May 2014, 17, the indirect cases account for 41% of the overall cases (including businesses that are no TNCs) and only took place outside Europe and North America, p. 16, fig. 6 and p. 17.

of attribution have been found already, like the already mentioned one of "piercing the corporate veil" by effectively disregarding the separate legal existence of parent and subsidiary,[103] imputed liability especially in tort law at least where the subsidiary is wholly owned by the parent company.[104] There is a lot of change and development in this area. This issue will be addressed further in Chapter II and III of this research.

B *Potential of globalisation in the TNC context*

As already stated above, it seems too easy to just blame "globalisation" for the violations and impairments of human rights caused by TNCs when having a look at the current discussion.

1 *Positive impacts of globalisation*

One of the promising ideas of globalisation and its free trade, is that it allows each state to specialize in producing what it is best equipped for and to export its goods to all other states.[105] This specialized production allows goods to be sold at lower prices than when each state is producing everything itself in small numbers. So this also means consumers enjoy lower prices.[106] That is why by specializing and producing large numbers of the same or similar goods and exporting them, the exporting state gains in terms of welfare,[107] which (in the end) also promotes human rights.[108] As every state can specialize in those goods it is best equipped to produce, this can in fact result in an increase in welfare in

---

[103] Eric Engle, *Private Law Remedies for Extraterritorial Human Rights Violations* (2006) at <http://elib.suub.uni-bremen.de/diss/docs/00010289.pdf> 1 May 2014, 99 and 100 giving examples of case law.
[104] *Ibid.* at 108; *Stora Kopparbergs Bergslags v Commission of the European Communities* AB C-286/98 (ECJ, 16 November 2000).
[105] Jeffrey L. Dunoff, "Reconciling International Trade with Preservation of the Global Commons: Can we prosper and protect?" (1992) 49 *Wash. & Lee L. Rev.* 1407, 1422 .
[106] *Ibid.*
[107] *Ibid.*
[108] See for example Ernst-Ulrich Petersmann "Bridging Foundations" in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi Bonanomi (eds), *Human Rights and International Trade* (Oxford: Oxford University Press, 2005), 29, 36; Alan O. Sykes, "International Trade and Human Rights: An Economic Perspective" (May 2003) *John M. Olin Law & Economics Working Paper No. 188*, 1, 3.

all states around the world. This welfare is not only welfare of states as a whole, but also of consumers and employers by raising the standard of living, ensuring full employment.[109] Participating in globalisation indeed meant a growth of national economies in the developing countries almost twice as fast as the economies of OECD states in the 1990s and 2000s.[110] Yet, of course, how this increasing wealth is spread within these countries is a different question and that free trade by itself will generate desirable outcomes concerning human rights may be doubted.[111]

However, globalisation can indeed create jobs in areas where they are needed for people who have not had (formal) jobs before. As Kabeer stresses, the garment industry in Bangladesh for example, although far from perfect as far as human rights are concerned, especially when considering issues like wages, irregular payments, fire hazard, long working hours and sexual harassment,[112] is nevertheless providing jobs for women in the formal sector that did not exist before.[113] This opportunity to find a regular job allows the women in Bangladesh employed in the garment sector to enjoy more personal freedom and personal as well as economic liberty.[114] Kabeer also stresses that the closer the link and direct contact of the garment industry factories with international buyers, the better are wages and working conditions.[115] So Western influence and pressure is indeed shaping the working conditions abroad and the great power of TNCs described above also offers great chances and potential for the protection of human rights. For of course power and influence that exist as a threat can be used in a positive way as well, which in this case means although there are more

---

[109] See for example Berta Esperanza Hernández-Truyol, Stephen J. Powell, *Just Trade: A New Covenant Linking Trade and Human Rights* (New York, London: New York University Press, 2009) 277.

[110] See David Dollar and Aart Kraay, "Spreading the Wealth" (2002) 81 *Foreign Aff.* 120, 126; Klaus M. Leisinger, "The Role of Corporations in Shaping Globalization with a Human Face" in Joseph Straus (ed), *The Role of Law and Ethics in the Globalized Economy* (Berlin, Heidelberg: Springer, 2009) 27, 28.

[111] See for example Steve Charnovitz, "The World Trade Organization and Social Issues" (1994) 28 *J.W.T.* 17, 18 wfr; Sarah Joseph, *Blame it to the WTO? A Human Rights Critique* (Oxford: Oxford University Press, 2011), 40-46; Ernst-Ulrich Petersmann, "Human Rights and International Economic Law" (2012) 4 *TL & D*, 283, 292.

[112] See Naila Kabeer, "Globalization, Labour Standards and Women's Rights: Dilemmas of Collective (In)Action in an Interdependent World" (2004) 10 *Feminist Economics* 3, 16-7.

[113] *Ibid.* at 25.

[114] *Ibid.* at 18-21.

[115] *Ibid.* at 15.

potential violators of human rights due to the emergence of new powerful actors, there are also more potential protectors, promoters and defenders of human rights.[116]A 1998 UN Publication for example observed that at first the business community was opposing sanctions against South Africa, arguing that economic growth must not be impeded, because this growth itself would contribute to end apartheid.[117] However, the business community's view changed over time and sanctions were finally supported by the business community, which tried to distance itself from the régime.[118] In the publication it is therefore stressed that "the business community is a specific and aggressive force for change in South Africa".[119] Especially where host states cannot or do not protect human rights properly, however, the responsibility of TNCs is most important and should come into effect.[120]

Yet the impact of globalisation is not limited to welfare and economics and the human rights linked to these areas. Trade as an economic connection, way of communication and sign of interrelatedness and interdependence among states leads to peace among the nations, as observed already by Montesquieu.[121] This was also the underlying idea when creating closer trading relations within Europe after World War II in the 1950s, which then over time developed and transformed into the EU.[122] The EU is - by the way - also a good example that

---

[116] Su-Ping Lu, "Corporate Codes of Conduct and the FTC: Advancing Human Rights through Deceptive Advertising Law" (2000) 38 *Colum. J. Transnat'l L.* 603, 604, pointing out that investment bans confine these possible positive effects in host states at 610; August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors" in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 37, 64.

[117] UN, *Sanctions Against South Africa: The Peaceful Alternative to Violent Change* (New York: United Nations, 1998) 7.

[118] *Ibid.*

[119] *Ibid.*

[120] See Klaus M. Leisinger, "The Role of Corporations in Shaping Globalization with a Human Face" in Joseph Straus (ed), *The Role of Law and Ethics in the Globalized Economy* (Berlin, Heidelberg: Springer, 2009) 27, 29.

[121] See Charles de Secondat Montesquieu, *The Spirit of Laws*, (vol. 1, New York: Collier Press, 1900) 316, yet he also observes that "Commercial laws, it may be said, improve manners for the same reason that they destroy them. They corrupt the purest morals."; on the historical link to Montesquieu see also Andrew Lang, *World Trade Law after Neoliberalism* (Oxford: Oxford University Press, 2011) 32-3.

[122] See for example Jeffrey L. Dunoff, "Reconciling International Trade with Preservation of the Global Commons: Can we prosper and protect?" (1992) 49 *Wash. & Lee L. Rev.*1407, 1426-8.

human rights and trade law do not have to contradict one another. Within the EU free trade as well as a high protection level of human rights go hand in hand.[123]

2 *Other factors influencing the current debate in TNC responsibility*

TNCs are not a new phenomenon. The first transnational corporations can be found in ancient Rome or at least in the East India Company.[124] Yet, of course, their number has grown and, as seen above, so have their power and influence. Yet this is not the only reason why TNC responsibility is a current issue in international law and politics and a growing number of people are focusing on the negative aspects of TNCs. [125] As Leisinger observes "most citizens of modern societies […] expect good financial business results, but *not* in isolation from good social, environmental and political performance."[126] This could also be seen in the Western media coverage of the *Bangladesh Cases* mentioned above. So it seems that people's perception of business may have changed, especially when Western TNCs or consumers are involved. Yet this is not the only change in people's perception. As Hernández-Truyol and Powell stress, " [t]he Second World War was the watershed event for the change of the status of individuals in international law".[127] The Nazi atrocities led to the punishment of individuals in the Nuremberg and Tokyo trials. The idea of holding individuals liable for gross human rights violations is thus a relatively new one. The idea of even holding individuals liable for the impairment of human rights or the non-observation of moral rather than legal human rights responsibilities is an even

[123] See for example Ernst-Ulrich Petersmann, "Human Rights and International Economic Law" (2012) 4 *TL & D*, 283, 297-8.
[124] See for example Robert C. Blitt, "Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance" (2012) 48 *Tex. Int'l. L. J.* 33, 36 wfr.
[125] See Klaus M. Leisinger, "The Role of Corporations in Shaping Globalization with a Human Face" in Joseph Straus (ed), *The Role of Law and Ethics in the Globalized Economy,* Berlin, Heidelberg: Springer, 2009) 27.
[126] Klaus M. Leisinger, "The Role of Corporations in Shaping Globalization with a Human Face" in Joseph Straus (ed), *The Role of Law and Ethics in the Globalized Economy* (Berlin, Heidelberg: Springer, 2009) 27, 30.
[127] Berta Esperanza Hernández-Truyol, Stephen J. Powell, *Just Trade: A New Covenant Linking Trade and Human Rights* (New York, London: New York University Press, 2009) 52; see also Sarah Joseph, *Blame it to the WTO? A Human Rights Critique* (Oxford: Oxford University Press, 2011) 13.

newer and controversial development, let alone the question of whether TNCs can or should be treated as individuals. Only since the 1970s have international codes of social responsibility of TNCs been addressed in different forums.[128] NGOs dealing with human rights and the production of goods like GoodWeave International (GWI), formerly known as Rugmark, Fairtrade International (FLO) and Clean Clothes Campaign (CCC) emerged in the 1980s and 1990s. One of the factors fuelling the current debate on TNC responsibility concerning human rights violations and impairments is a rather new awareness of the human rights responsibility of individuals. A further factor is a new awareness of human rights and their universal character or - put in a more general way- "the notion that moral obligations extend beyond state borders and that the state itself is not always the best instrument for the furtherance of universal goals."[129] Yet the perception of human rights to be universal and the idea that there are human rights and human rights standards that have to be observed all over the world has often been and still is criticized, especially by developing countries as being protectionist, preventing developing countries from competing with developed ones by setting the standards too high for developing countries to reach, thereby protecting the economy of developed countries.[130] All these changing perceptions of business and human rights cannot be read in isolation from one another. They rather supplement and influence one another, forming a coherent progress. Without these new perceptions the debate on how to deal with human rights violations by TNCs would simply not exist. Yet within this progress, the current debate on globalisation and human rights seems an unavoidable step.

---

[128] See Miriam Mafessanti, "Corporate Misbehaviour & International Law: Are there Alternatives to 'Complicity'?" (2010) 6 *S. C. J. Int'l L. & Bus* 167, 170, stating that only in the last 20 years the idea that TNCs could be responsible for human rights violations alongside states has been recognized; Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 113, stating that the concept of corporate self-regulation has been increasingly advocated since the 1980s; UNCTAD, *United Nations Conference on Trade and Development, Social Responsibility* UNCTAD/ITE/IIT/22 (New York and Geneva: United Nations, 2001)1; on the different international codes developed see Chapter III.

[129] Greg Flynn and Robert O'Brien, "An Internationalist Western Labour Response to the Globalization of India and China" (2010) 1 *Global Labour J.* 178, 181.

[130] See for example ibid. at 182-7; see also below at IV.A.2.

III HUMAN RIGHTS - TOO WEAK A TOOL?

As just seen above, human rights violations and impairments are not necessarily the logical consequence of globalisation and neither have they been invented by it. Furthermore, this enquiry does not suggest that all TNCs or their subsidiaries abroad are disrespecting human rights. Yet it is a fact that human rights violations and impairments like the ones mentioned in the very beginning of this research do occur. And it is for these cases that solutions have to be found.

A *Challenges of human rights law*

A main factor not exactly helping to prevent human rights violations committed by TNCs when acting abroad is human rights law itself, because there are many frictions as to how human rights law should be applied and by whom.

1 *Fragmentation of Human Rights Law*

Human Rights law is codified in many different ways in many different types of codes with different legal status, some of them binding and enforceable, some of non-binding or recommendational character. Customary international law, including human rights law, is binding on all states.[131] Whether the UN Charter for example is such customary law, imposing binding obligations is still debated and different states have different views on this issue.[132] The same is true for the *UDHR*.[133] Yet binding obligations are for example provided for in several UN Conventions,[134] such as the *ICESCR*,[135] *ICCPR*,[136] and *CEDAW*.[137] However,

[131] See for example Sarah Joseph, *Blame it to the WTO? A Human Rights Critique* (Oxford: Oxford University Press, 2011), 29-30.
[132] See for example Berta Esperanza Hernández-Truyol, Stephen J. Powell, *Just Trade: A New Covenant Linking Trade and Human Rights* (New York, London: New York University Press, 2009) 55, wfr.
[133] *Universal Declaration of Human Rights (UDHR)* (1948); see Berta Esperanza Hernández-Truyol, Stephen J. Powell, *Just Trade: A New Covenant Linking Trade and Human Rights* (New York, London: New York University Press, 2009) 56; Sarah Joseph, *Blame it to the WTO? A Human Rights Critique* (Oxford: Oxford University Press, 2011) 13 and 30 wfr.
[134] See Berta Esperanza Hernández-Truyol, Stephen J. Powell, *Just Trade: A New Covenant Linking Trade and Human Rights* (New York, London: New York University Press) 56.
[135] *International Covenant on Economic, Social and Cultural Rights (ICESCR)* (1966).
[136] *International Covenant on Civil and Political Rights (ICCPR)* (1966).

for example the obligations in *ICCPR* are "muddier" that those provided for in the *ICESCR*, only demanding states to protect the mentioned rights "to the maximum of its available resources".[138] Yet, while the ILO Conventions are - in contrast to the ILO Resolutions - binding once ratified, their enforcement is rather based on good will, which makes them pretty toothless when it comes to violations of rights provided for in the Conventions.[139] In addition, not all states are bound by the same human rights laws. Apart from *ius cogens*, human right law as part of public international law in treaties and conventions is only binding for the signatory states that ratified the treaty or convention.[140] Furthermore, there are many regional human rights treaties and conventions like the *Banjul Charter*[141] and the *ECHR*[142] and there are other areas of public international law not dealing with human rights (directly), creating own duties and obligations that may nevertheless influence human rights obedience and protection.[143]

2 *States as primary addressees of human rights duties*

Not only are there many sources for human rights law, the easy solution of imposing direct wide ranging human rights duties on TNCs is not provided for under current public international law.[144] This is because states are the ones primarily responsible for the protection against human rights violations committed by private actors, including TNCs.[145] The responsibilities of states

---

[137] *Convention on the Elimination of All Forms of Discriminations Against Women (CEDAW)* (1979).
[138] Art. 2 (1) *ICESCR*; Sarah Joseph, *Blame it to the WTO? A Human Rights Critique* (Oxford: Oxford University Press, 2011) 20-1.
[139] See Miriam Mafessanti, "Corporate Misbehaviour & International Law: Are there Alternatives to 'Complicity'?" (2010) 6 *S. C. J. Int'l L. & Bus* 167, 190-1.
[140] See for example See Berta Esperanza Hernández-Truyol, Stephen J. Powell, *Just Trade: A New Covenant Linking Trade and Human Rights* (New York, London: New York University Press) 56; Sarah Joseph, *Blame it to the WTO? A Human Rights Critique* (Oxford: Oxford University Press, 2011) 18, 31.
[141] *African (Banjul) Charter on Human and Peoples' Rights 1981.*
[142] *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR)* (1953).
[143] See on this issue for example Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of International and National Courts and the (De-) Fragmentation of International Law* (Oxford, Portland, Oregon: Hart Publishing, 2012); see also below in the Chapter V.
[144] See Chapter III for more details
[145] See Chapter III for more details.

for the realization of human rights have been divided into three types of action by Asbjørn Eide: to respect, to protect and to fulfil.[146] Sometimes a fourth type is added - the obligation to promote.[147] Lately John Ruggie developed the *"Protect, Respect and Remedy" Framework*,[148] which clearly states that - at least at the moment - the protection of human rights is the duty of the states, not of private actors like TNCs, because the latter only bear the duty to respect human rights.

3 *Criticism of applying human rights law globally*

As human rights protection is a state duty, every state has its own obligation to fulfil this duty. In the context of TNCs acting abroad, this means the home state as well as the host state bear human rights protection duties. Yet who should be the one protecting human rights in such a situation? The above mentioned examples suggest that sometimes the host states cannot or do not protect human rights sufficiently. Yet against the protection of human rights in the host state by home state action several objections are made.

(a) Human rights and state sovereignty

There is for example an ongoing discussion on whether their application by a single state abroad violates the sovereignty of other states. It is said that on the one hand there is no longer a consensus that human rights are a purely domestic matter, but on the other hand there is not yet a consensus in the international community as a whole concerning human rights and sovereignty.[149]

---

[146] Dutch Sections of Amnesty International and Pax Christi International, *Report: Multinational Enterprises and Human Rights* (2nd ed, 2000) 37-8 wfr.
[147] *Ibid.* at 38.
[148] *Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, A/HRC/17/31, (21 March 2011) <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> 1 May 2014.
[149] Karl Zemanek, "New Trends in the Enforcement of Erga Omnes Obligations" in Jochen A. Frowein and Rüdiger Wolfrum (eds), *Max Planck UN Yearbook* (vol. 4, Leiden: Martinus Nijhoff, 2000) 1.

(b) Imperialism by applying human rights in host states

Steiner and Alston's fifth problem concerning the enforcement of corporate responsibility in the host state deals with this issue as well, as they find it difficult to define a minimum standard of human rights that can be claimed valid in all states.[150] Today there are several conventions, treaties and laws addressing the protection of human rights, usually based on and derived from respect for human dignity of all human beings.[151] Examples are *the UN Declaration*, the *UN Charter*, *ICCPR*, *ICESCR*, *CEDAW*[152] and the conventions and resolutions mentioned above. As the place of origin of written human rights is the "West",[153] the origin of the idea of human rights and their universal protection is discussed vividly,[154] as already mentioned above. Some are therefore claiming the very idea of universal human rights, whether based in natural law[155] or rationalism,[156] is a form of western imperialism, trying to force western laws, morals and perceptions on the world, not caring for other cultures and their uniqueness.[157]

(c) Human Rights application abroad and protectionism

---

[150] Henry J. Steiner and Philip Alston, *International Human Rights in Context* (2nd ed, Oxford: Oxford University Press, 2000), 1349.
[151] See for example Ernst-Ulrich Petersmann, "Human Rights and International Economic Law" (2012) 4 *TL & D*, 283, 286.
[152] *Universal Declaration of Human Rights (UDHR)* (1948)*; Charter of the United Nations* (1945)*; International Covenant on Civil and Political Rights (ICCPR)* (1966)*; International Covenant on Economic, Social and Cultural Rights (ICESCR)* (1966)*; Convention on the Elimination of All Forms of Discriminations Against Women (CEDAW)* (1979).
[153] Makau W. Mutua, „The Ideology of Human Rights" (1996) 36 *VJIL* 589, 641.
[154] See for example for part of the discussion and his way of solving it Jack Donnelly "The Relative Universality of Human Rights" (2007) 29 HRQ 281; Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd ed, Ithaca, New York: Cornell University Press, 2002).
[155] Gertrud Nunner-Winkler, "Moralischer Universalismus- kultureller Relativismus, Zum Problem der Menschenrechte" in Johannes Hoffmann (ed), *Universale Menschenrechte im Widerspruche der Kulturen* (Berlin: Iko, 1994) 79- 100.
[156] David Duquette, "Universalism and Relativism in Human Rights" in David A. Reidy and Mortimer N. S. Sellers (eds), *Universal Human Rights* (Lanham: Rowman & Littlefield, 2005) 59, 65.
[157] See fort the discussion Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd ed, Ithaca, New York: Cornell University Press, 2003).

Another reproach made concerning the application of human rights in the TNC context is protectionism. International social clauses, for example when their introduction into WTO/*GATT* ist under discussion, are often considered to be protectionist[158] in favour of "Western" jobs, employees and working conditions, because non-industrialized states lack the resources to comply and control compliance with such high standards and on the other hand may profit from not imposing these standards, thereby gaining competitive advantages.[159] Some authors argue that the intent or aim of such an international clause is decisive for its protectionist or non-protectionist character.[160] However, although aims can be an indicator, they are subjective and therefore difficult to isolate and determine in an objective way.

B *Potential of Human Rights law*

However, all these reproaches and difficulties do not render human rights a useless tool in the TNC context. On the contrary, some of their seeming weaknesses can also be considered their very strength. Human rights are for example incredibly flexible in forms and enforcement as will be sketched now.

1 *Flexibility in forms*

As seen above, there are binding human rights obligations, some of them contain more rigid rules, some "muddier" ones, that are more flexible, taking into account different developing states and economic and cultural differences.[161] These kind of rules are often called "soft law". The expression is used either because of a soft content of a binding legal rule or because of the non-legal and

[158] Erika de Wet "Labor standards in the globalized economy: the inclusion of a social clause in the General Agreement on Tariff and Trade/World Trade Organization" (1995) 17 *HRQ* 443, Introduction.
[159] *Ibid.* at Historical Background with further references.
[160] Donald H. Regan, "What are Trade Agreements for? Two conflicting stories told by economists, with a lesson for lawyers" (2006) 9 *JIEL* 951, 962-7.
[161] See for example Sarah Joseph, *Blame it to the WTO? A Human Rights Critique* (Oxford: Oxford University Press, 2011) 46, referring to the examples of art. 27 *ICCPR* and art. 15 and art. 11 *ICESCR*.

therefore non-(legally)binding and non-enforceable character of a rule.[162] In this enquiry the terms "non-binding" and "binding" or "enforceable" rules will be used, differentiating human rights rules by their different legal characters rather than the design of their content. Apart from the already above mentioned "muddy" norms, which can be binding nevertheless, there are also non-binding human rights norms that influence the application and interpretation of binding ones. These non-binding rules may be codes of conduct, guidelines, recommendations, resolutions, expert or committee decisions, etc.[163] These examples already suggest that non-binding rules are more flexible and can adapt faster and more easily to new challenges and are at the same time influencing and shaping the application of binding ones.[164] That is why they are considered to have quasi-legal character and therefore are more than "simply politics".[165] In addition, there are moral beliefs and politics or political positions containing human rights issues, but not (yet) having quasi-legal character.[166] These different kinds of human rights norms influence one another and are in constant development and progress. Moral codes and non-binding obligations may be or become valid interpretation tools for enforceable and binding law norms. They may even become binding rules, either by formal codification in treaties or conventions or by becoming customary international law.[167] Yet this does not mean the ultimate aim for all human rights related moral codes or flexible rules is to become binding and enforceable law some day. The very interaction of the

---

[162] For the different terms see Mary E. Footer, "The (Re)Turn to 'Soft Law' in Reconciling the Antinomies in WTO Law" (2010) 11 *Melb. J. Int'l L.*241, 244-8.
[163] See for example on WTO "soft law" *ibid.* at 247; Andrew T. Guzman and Timothy L. Meyer, "International Soft Law" (2010) 2 *J. of Legal Analysis* 171, 172 and 201-222, on human rights in particular 210-3.
[164] See also Mary E. Footer, "The (Re)Turn to 'Soft Law' in Reconciling the Antinomies in WTO Law" (2010) 11 *Melb. J. Int'l L.*241, 258-60; David Kinley and Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibility for Corporations at International Law" (2004) 44 *VA J. Int. Law* 931, 952-61, arguing that "the continuing development of private, soft-law initiatives directed toward private actions in these contexts […] will likely influence the future shape of international human rights regulation of TNCs." (952).
[165] Andrew T. Guzman and Timothy L. Meyer, "International Soft Law" (2010) 2 *Journal of Legal Analysis* 171, 172.
[166] See also Andrew T. Guzman and Timothy L. Meyer, "International Soft Law" (2010) 2 *J. of Legal Analysis* 171, 173.
[167] See also Dinah Shelton, "In Honor of the 100th Anniversary of the AJIL and the ASIL: Normative Hierarchy in International Law" (2006) 100 *AJIL* 291, 321.

more flexible non-binding rules with the binding ones provides human rights protection mechanisms with their very vitality and flexibility.[168]

Yet binding rules can also be flexible. As already mentioned above, the obligations provided for by the *ICESCR* are rather "muddy", only demanding states to "try hard" to fulfil their obligations.[169] Yet this also makes it possible to treat states differently, not imposing obligations on states they cannot fulfil, while still demanding progress and change over time, not allowing states to move backwards.[170] Rich states and poor states can be treated differently whilst the overall goal of promoting the protection of human rights is not dismissed. This is an approach easier to accept for developing states than the provision of rigid "hard law" obligations.[171]

2 *Flexibility in enforcement*

The flexibility of human rights is not only a matter of different forms and appearances, but also of enforcement. As human rights protection is primarily a nation state obligation as seen above, national law is created in order to protect human rights - at least within a state's jurisdiction. National courts can therefore be considered one of the most powerful and most effective bodies to protect human rights. Yet human rights enforcement mechanisms do not stop there. Several regional human rights courts like the ECtHR or the IACtHR exist and even international ones like the ICJ and the ICC. Not only can these different

---

[168] See for example Mary E. Footer, "The (Re)Turn to 'Soft Law' in Reconciling the Antinomies in WTO Law" (2010) 11 *Melb. J. Int'l L.*241, 241-4 who points out that soft law rules were used to resolve the issue of how to deal with the great differences in the economic development when progressing free trade in the multilateral trading system. She also explains that soft law can explain hard law norms with soft content and that they can soften hard law rules, especially to solve conflicts of interests; see also Laurence E. Helfer, "Overlegalizing Human Rights; International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes" (2002) 102 *Colum. L. Rev*. 1832, who argues that and overlegalizing of human rights treaties by developing more and more binding obligations may cause states unable to fulfil these obligations to quit the treaty as a whole.

[169] Sarah Joseph, *Blame it to the WTO? A Human Rights Critique* (Oxford: Oxford University Press, 2011), 21.

[170] See *ibid.* at 23-4.

[171] See for example Mary E. Footer, "The (Re)Turn to 'Soft Law' in Reconciling the Antinomies in WTO Law" (2010) 11 *Melb. J. Int'l L* 241-4 who points out that soft law rules were used to resolve the issue of how to deal with the great differences in economic development when progressing free trade in the multilateral trading system.

courts on different levels enforce human rights law, they can also develop human rights law, contribute to changes in forms and even transform moral demands into enforceable law,[172] in particular where national and international courts cooperate.[173]

Furthermore, there are monitoring mechanisms within the UN to ensure the adherence to UN Conventions. Seven of the nine core human rights treaties provide for bodies that can consider individual complaints,[174] once the nation state has agreed to submit to their jurisdictions.[175] In addition, there are international organisations like the ILO that supervise the respective nation state's obedience to its human rights conventions. However, as already mentioned above, the ILO's enforcement powers are rather weak.[176] Weakness in enforcement power is in fact a reproach made against most international human rights protection mechanisms.[177] As Keenan once put it rather strikingly: "human rights law is gloriously easy to develop and notoriously difficult to enforce."[178] This leads to considering another nation state enforcement mechanism, namely politics. National political decisions, negotiations and pressure may be a tool to enforce human rights even on an international level. The *ultima ratio* of such political influence and pressure is imposing sanctions or trade bans on another state.

---

[172] See for example Ernst-Ulrich Petersmann, "Human Rights and International Economic Law" (2012) 4 *TL & D*, 283, 307, stressing that European economic law was successfully judicially transformed in favour of human rights protection "through the jurisprudence and judicial co-operation of the CJEU, the EFTA Court, the ECtHR and national courts in protecting fundamental rights of citizens" wfr.

[173] *Ibid.* at 314.

[174] Office of the UN High Commissioner for Human Rights, Website, "Human Rights Bodies-Complaints Procedures"
<http://www2.ohchr.org/english/bodies/petitions/index.htm#interstate> 1 May 2014.

[175] See Miriam Mafessanti, "Corporate Misbehaviour & International Law: Are there Alternatives to 'Complicity'?" (2010) 6 *S. C. J. Int'l L. & Bus* 167, 182.

[176] *Ibid.* at 190.

[177] See for example Henry J. Steiner and Philip Alston, *International Human Rights in Context* (2nd ed, Oxford: Oxford University Press, 2000) 592, where it is suggested that enforcing human rights on UN level is more difficult and "less successful than […] setting human rights standards"; on the possibilities and restrictions of the UN monitory bodies see *ibid.*, 597-603.

[178] Patrick J. Keenan, "Financial Globalization and Human Rights" (2008) 46 *Colum. J. of Transnat'l L.* 509, 512; he is also promoting a totally different approach of rating agencies for corporations by international financial institutions or NGOs.

IV FRAMING THE TOPIC AND OUTLINE OF CHAPTERS

The just mentioned flexibility of human rights, their different forms reaching from moral beliefs to enforceable legal rules and the manifold ways human rights can be put into effect are the key note of this research. With a changing world order and a changed perception of the challenges for human rights, human rights protection itself has to change and it is indeed capable of doing so. In the following chapters of this research different options as to how human rights can be protected, how human rights protection may conquer new niches, will be assessed, putting emphasis on the different forms of enforcement. Yet this will not be done in a too general way. As already mentioned above, this enquiry is confined to home state options of holding home state TNCs and their subsidiaries acting abroad liable for human rights violations and impairments. In doing so the full flexibility of human rights, their development and application can be analyzed best, because many of the reproaches and criticisms made concerning human rights protection in a host state in the TNC context can be overcome in the very context of home state subsidiaries acting abroad.

A *Potential of home state action for protecting Human Rights*

States, and in particular powerful Western home states may use many different kinds of human rights obligations and applications to hold their TNCs liable. As Stephens puts it "[w]ether the corporation is a creature created by law, one arising out of a web of individual contractual agreements, or a distinct legal being, it is subject to state regulation."[179]

1 *Home states' capability to act*

As mentioned above, states bare the duty to protect human rights, corporations to respect them. Yet neither corporations with their duty to respect human rights nor host states with their duty to protect human rights are successfully preventing human rights violations. This is confirmed by the data presented in a report of the HRC Special Representative from 2008 that evaluated 320 cases

[179] Beth Stephens "The Amorality of Profit: Transnational Corporations and Human Rights" (2002) 20 *Berkeley J. Int'l L.* 45, 61.

posted on the Business and Human Rights Resource Center web page from 2005 to 2007. The report states that at least 75% of the alleged incidents took place outside Europe and North America.[180] While TNCs have accumulated much power, the mostly non-industrialized host states[181] often lack the power or - like the TNCs - the willingness to use it, for example due to competition reasons.[182] The difference is that the host states are in fact obliged to protect human rights, whereas TNCs as private actors are not. According to Alston and Steiner three of the five problems they are naming concerning the enforcement of corporate responsibility in the host state are the unwillingness of the host state, the economic inability of the host state to enforce corporate responsibility and the attempts of the host state to attract foreign investments by being the cheapest location, which usually means having the lowest human rights standards concerning labour law, environmental law, etc, causing a "race to the bottom".[183] In addition, even where laws etc exist, bribery is a problem.[184] That

---

[180] *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development- Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* A/HRC/8/5/Add.2 (23 May 2008) <http://198.170.85.29/Ruggie-2-addendum-23-May-2008.pdf> 1 May 2014 p. 10. fig. 2: Europe 3%, North America 7% and Global 15%, the rest in Asia and Pacific, Africa, Latin America and Middle East.

[181] See UNCTAD, *World Investment Report 2011*, *Web Table 34: "Number of parent corporations and foreign affiliates, by region and economy"* at <http://unctad.org/Sections/dite_dir/docs/WIR11_web%20tab%2034.pdf > 1 May 2014 according to which 94% of businesses located in developing countries are foreign affiliates (30.209 parent companies and 512.531 foreign affiliates in developing countries); see also UNCTAD, *World Investment Report 2011* at <http://unctad.org/en/docs/wir2011_embargoed_en.pdf> 1 May 2014, stating that due to the crisis developing and transition states are becoming more attractive for foreign direct investment, in 2010 half of the top 20 host economies for foreign direct investment being developing and transition countries, pp. XII, 3-4, 25-6.

[182] See Danwood Mzikenge Chirwa, "The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights" (2004) 5 *Melb JIL* 1,V. B.

[183] Henry J. Steiner and Philip Alston, *International Human Rights in Context* (2nd ed, Oxford: Oxford University Press, 2000)1349; see also Sarah Joseph, "An Overview of the Human Rights Accountability of Multinational Enterprises" in Menno T. Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (The Hague, London, Boston: Kluwer Law International, 2000), 75, 78, stating that relying solely on the host states for human rights protection "is perhaps unrealistic to expect"; Manisuli Ssenyonjo, "Non-State Actors and Economic, Social and Cultural Rights" in Mashood A. Baderin and Robert McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (Oxford: Oxford University Press, 2007) 109, 121-2, who observes that "states where human rights protection is most needed are often those least able to enforce them against NSAs [*i.e.*non-state actors] such as TNCs, who possess much desired investment capital or technology.".

is why it is for example suggested in this research that where the host state is not protecting the human rights it is in fact in charge of protecting, home states, which also have the duty to protect human rights, should fill this gap at least where their TNCs violate human rights abroad.[185] This could also have sped up the environmental and health protection in the *La Oroya Case* mentioned above.

2 *Home state action facing the challenges related to sovereignty, imperialism and protectionism*

As far as the different disputes concerning human rights standards implied abroad that were mentioned above are concerned, they are neither impeding the discussion on home state options nor are they impeding the use of these options. On the contrary, confining the use of home state options to cases of home state TNC involvement may facilitate the acceptance of home state action. Even the issue of fragmentation of human rights law may be overcome when at least the actor is defined clearly.

(a) Home state action and sovereignty

The issue of sovereignty for example is a complex one itself, because protecting human rights globally by intervening for the sake of human rights protection means limiting state's sovereignty, while on the other hand we still need strong states to protect human rights within their territories and also to decide on the mechanisms and prerequisites of when human rights may or even have to be protected within the territories of other states.[186] In addition, to deal with new powerful actors, strong sovereigns are even more important. Yet as seen above,

---

[184]Danwood Mzikenge Chirwa, "The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights" (2004) 5 *Melb JIL* 1, V. B; On bribary as a problem in the host state and TNC context see also Smita Narula "The Right to Food: Holding Global Actors Accountable Under International Law" (2006) *44 Colum. J. Transnat'l L.* 691.

[185] Also favouring home state regulation for those reasons is for example Surya Deva, „Acting extraterritorially to tame Multinational Corporations for Human Rights violations: Who should 'Bell the Cat'?" (2004) 5 *Melb J. Int'l L.* 37 wfr.

[186] Jennifer Moore, "Towards a More Responsive Sovereignty: Confronting Human Rights Violations through National Reconstruction" in David Barnhizer (ed), *Effective Strategies for Protecting Human Rights* (Aldershot, Burlington: Ashgate Dartmouth, 2001) 71.

many host states are not strong enough to deal with this challenge, but may at the same time feel they are losing even more of their sovereignty by home state interference. On the other hand, in many cases host states may not feel this way at all, especially because only those corporations in the host state are concerned that are actually controlled by home state corporations. How possible solutions can be found will be assessed in more detail in Chapter II and III.

(b) Home state action and imperialism

As far as universalism is concerned, considering it as imperialism is just one point of view. Others are convinced that although human rights might have emerged in the "West" in a written form for the first time and now set standards, they emerged not because of but despite "Western" values and forms of life.[187] It is stated that they were and are far from perfect[188] and that at least core human rights exist and should be protected in every culture.[189] Although of course different cultures might approach and interpret human rights differently and although their concept might still be influenced by the "west", they cannot be generally condemned. This is even more so when considering that hardly any culture is isolated in the 21st century and as the modern state is a "western" invention spreading throughout the world, entailing globalisation as well as TNCs, human rights, stemming from the same source, should accompany it.[190] Donnelly for example argues that human rights may be imperfect, but they are the only way to protect human dignity in a globalized world so far,[191] which is supported by the fact that most states have signed human rights treaties and conventions and thereby at least formally share basic values of respect for

[187] See Dieter Senghaas, *Wohin driftet die Welt?* (Berlin: Suhrkamp, 1994) 116; Ann Elizabeth Mayer, *Islam and Human Rights* (2nd ed, Boulder: Westview Press, 1995) 37.
[188] They were for example excluding women, slaves and coloured people, see Dieter Senghaas, "Der aufhaltsame Sieg der Menschenrechte" in Raúl Fornet-Betancourt and Hans Jörg Sandkühler (eds), *Begründung und Wirkung von Menschenrechten im Kontext der Globalisierung* (Frankfurt am Main: ISIS 2001) 165, 169.
[189] For the discussion see Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd ed, Ithaca, New York: Cornell University Press, 2003); Jack Donnelly "The Relative Universality of Human Rights" (2007) 29 HRQ 281.
[190] Eva Brems, *Human Rights: Universality and Diversity* (Dordrecht: Springer Netherland, 2001) 305.
[191] Jack Donnelly "The Relative Universality of Human Rights" (2007) 29 HRQ 281, 288

human dignity and life.[192] A sensible case by case approach in cases where culture might seem to contradict human rights protection is preferred over too easily abandoning the universality of human rights in general.[193] Furthermore, the values, *i.e.* these human rights and the acknowledgement of their importance, are often shared by the host states, but they are too weak to implement and enforce their protection while TNCs may use this to their (economic) advantage.[194] In addition, once universalism is accepted as a basic principle when applied in a sensible manner, this also creates universal obligations to promote and protect human rights[195] for home states.

(c) Home state action and protectionism

Concerning the reproach of protectionism it has to be said that human rights protection should not be sacrificed due to the difficulties that may arise. Solutions supporting developing countries could be found. The ILO Conventions for example try to provide social standards for workers, yet it is up to the states to ratify the conventions.[196] Another idea is allowing developing states to apply lower, but controlled minimal standard of human rights instead of asking them to fulfil a full high level protection. The adequate degree of compliance could be monitored and controlled by the UN and supported by the

---

[192] Jack Donnelly "Cultural Relativism and Universal Human Rights" (1984) 6 *HRQ* 400, 406 and 415.

[193] See for a combined approach of universalism and relativism for example Eva Brems' "inclusive universality" in Eva Brems, *Human Rights: Universality and Diversity* (Dordrecht: Springer Netherland, 2001) 295; see also Donnelly's approach of "relative universalism" in Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd ed, Ithaca, New York: Cornell University Press, 2003) and Jack Donnelly "The Relative Universality of Human Rights" (2007) 29 HRQ 281.

[194] See Celia K. Wells and Juanita Elias, "Catching the Conscience of the King: Corporate Players on the International Stage" in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 141, 172.

[195] See Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd ed, Ithaca, New York: Cornell University Press, 2003) 114-115; Michael Krennerich, "Menschenrechte ohne Grenzen – welche Pflichten für Deutschland?" ("Human Rights without borders - which duties for Germany?") 9 November 2006, discussion report on the symposium, host: Brot für die Welt, Evangelischer Entwicklungsdienst, FIAN Deutschland and FIAN International, 2; Elif Özmen, „Female Genital Mutilation: Eine fundamentale Menschenrechtsverletzung?" in Terre des Femmes and Petra Schnüll (eds), *Weibliche Genitalverstümmelung Eine fundamentale Menschenrechteverletzung* (1999) 195-6.

[196] Jürgen Matthes, *Neuer Protektionismus?* (Köln: Deutscher Instituts-Verlag, 2001) 40.

"Western" states.[197] Concerning the protectionist reproach in the light of the home state TNC context it is - as the reproach of universalism - much weaker, because it does not aim at applying "western" human rights standards in a general way in the host states, but only onto those TNC subsidiaries that are in fact controlled by "western" TNCs.

B *Outline of the following chapters*

As will be pointed out in the following chapters, the ways in which home states may hold their TNCs responsible for human rights violations and impairments abroad are manifold. They may foster international agreements and changes in public international law, they may use domestic law and courts or employ political measures to hold TNCs responsible. All these options will be assessed in more detail in the following chapters. In doing so, the following first two chapters are focusing on legal tools such as legislation and judiciary and the second two are focusing on political means like countermeasures and trade restrictions.

Upcoming chapter II deals with the potential of domestic law to hold TNC subsidiaries and host states liable for human rights abuses. After sketching different approaches in domestic law to hear a case before domestic courts, the applicability of domestic law on such trans-border cases and the challenges faced when creating such law are outlined. It is then shown how these challenges could be overcome in the confined TNC-human rights context and possible future developments and domestic legislation are commented on.

Chapter III assesses the potential of international law to tackle the issue of TNCs harming or affecting human rights abroad. After giving an overview of the primary role of human rights and human rights protection, the relationship of human rights and TNCs is assessed. Then domestic courts using international law to hold TNC subsidiaries liable and international courts and tribunals

[197] Similar approaches exist for example for the fulfilment of art. 12 *ICESC* (the highest attainable standard of health) where state parties have to assist developing states to fulfil core obligations, see *UN General Comment No 14: The highest attainable standard of health (art. 12 ICESC)* U. N. Doc. E/C.12/2000/4 (11 August 2000).

holding TNCs and host states liable are studied, before conclusions on different possible future developments in the TNC context are drawn.

Chapter IV examines whether political sanctions or countermeasures may be an option to answer human rights issues caused by TNCs acting abroad. As the term “sanction” is rather complex, it will be defined in more detail before examples of sanction in human rights contexts are given, the different kinds of sanctions are classified and their requirements under public international law are set out. After that the applicability of sanctions in the TNC context is assessed, including the issue of whether sanctions can be applied on TNCs directly. Lastly a conclusion and outlook on the issue is given.

Chapter V investigates the idea of using trade restrictions like labelling and trade bans to answer human rights issues caused by TNCs acting abroad. After providing for some examples, the challenges for trade restrictions under WTO law are assessed. After sketching the complex relationship between human rights and trade law, developments within WTO law are described and ways to overcome tensions between human rights and trade law are elaborated, before some concluding remarks are given.

Finally, chapter VI delivers a final conclusion and comment on the findings of this research.

CHAPTER II: POTENTIAL OF DOMESTIC LAW TO HOLD TNCS AND HOST STATES LIABLE

As just mentioned in the introductory chapter, human rights protection in the TNC context is manifold concerning the actors as well as the law and the legal systems involved. In the following, the possibility of home states holding TNCs liable by domestic human rights protection law will be assessed. As states create their domestic law themselves, it seems to be the easiest option for a home state to simply create a law that provides for the desired liability. Yet, as will be described below, deciding on harms that occurred abroad in home state courts is neither an easy nor a popular thing to do. Several questions arise, such as why should the case be decided by home state courts at all? Should home state or host state law be applied? An overview of these issues will be given before assessing the question of whether it could be an option to create home state law that is especially designed to cover the trans-border cases of TNCs acting abroad.

I WHO IS TO DECIDE - DETERMINING THE *FORUM*

Whether the domestic courts of a state may hear and decide a case firstly depends on its admissibility rules. Therefore, if a home state wants to be able to decide on a case, it has to provide access to its courts. When considering suing a responsible party over human rights violations by TNCs, one can either think of suing the host state or the TNC (subsidiary) itself. In either case, an action before home state courts may seem more promising than one before host state courts, as the host state is often unable or unwilling to enforce human rights protection as seen above. Therefore the following will examine whether the TNC or the host state may be sued in home state courts. The main admissibility issues in these cases are finding the right *forum*, the immunity of states and state officials, comity and linked to immunity and comity considerations concerning the Act of State Doctrine.

A *When suing TNCs*

Suing the TNC means suing a private actor, which is a common occurrence. That is why numerous rules and laws exist in different states and legal systems to handle such trans-border cases and their main admissibility issues before domestic courts. Different legal systems apply different procedural laws and different rules on the applicable law, which affect the outcome of a court decision. That is why it is important to find out which is the competent court, i.e. the *forum*, that is going to decide on these issues and the case. Yet not only when determining the applicable law, but also when deciding on the appropriate *forum* itself, different benchmarks are used in different legal systems and states. The sources of the rules to determine the competence of a court are manifold, reaching from codes and statutes to multilateral conventions and case law.[198] Some ways to decide on the appropriate *forum* will be sketched in the following, taking into account the differences between private and criminal law.

1 *Private law/ tort law or criminal law?*

Engle observes that, generally speaking, private law remedies are what is mainly used in the US to answer human rights violations whereas criminal law is the main remedy used in Europe for these cases.[199] Whether this is and will be true for cases of TNCs violating human rights abroad will mainly depend on the domestic laws in the different states and their future developments. However, both approaches, the use of torts and criminal law, have their own advantages.[200] Criminal law is graver as far as stigma and moral condemnation is concerned.[201] Tort law on the other hand does not need a state prosecutor with its limited

---

[198] See in general and for examples James J. Fawcett, "General Report" in James J. Fawcett (ed), *Declining Jurisdiction in Private International Law* (Oxford: Clarendon Press, 1995) 1, 3.

[199] Eric Engle, *Private Law Remedies for Extraterritorial Human Rights Violations* (2006) at <http://elib.suub.uni-bremen.de/diss/docs/00010289.pdf> 1 May 2014, 134 wfr; see also Eric Engle, "Alien Torts in Europe? Human Rights and Tort in European Law", (2005) *ZERP-Diskussionspapier*, 1 available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1020453> 1 May 2014, 1.

[200] See Nicola Jägers and Marie-José van der Heijden, "Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands" (2008) *Brook. J. Int'l L.* 833, 868.

[201] Jonathan Clough, "Not-so Innocents Abroad: Corporate Criminal Liability for Human Rights Abuses" (2005) 11 *AJHR* 1, *10.

resources to initiate a proceeding and to investigate.[202] This also means that politically unpopular - because for example costly - complaints can be made, as the political influence is minimized when not needing an official party to trigger the proceedings. [203] Thus Ratner stresses that tort law is therefore of great importance to the enforcement of human rights.[204] That no official prosecutor is needed also means that the victims themselves initiate the proceedings,[205] they can fight back, tell their story and confront the defendants publicly, which may empower the victims.[206] In addition, the negative publicity for the violating corporations may deter future abuses.[207] Even the reactions and consequences due to a tort claim for the defendant in an individual case may be severe. Gramajo for example was banned from the US after being held responsible in a tort claim for summary execution and torture of Guatemalan Indians.[208] Furthermore, civil law is more flexible than criminal law with its rigid rules like *nulla poena sine lege*, legal certainty, etc which for example allows more often for trials *in absentia*[209] and also to respond to a case more individually and may even lead to a greater amount of damages than a criminal proceeding.[210] When suing corporations, the damages might even be paid more often as assets of the

[202]Eric Engle, *Private Law Remedies for Extraterritorial Human Rights Violations* (2006) at <http://elib.suub.uni-bremen.de/diss/docs/00010289.pdf> 1 May 2014, 135; Nicola Jägers and Marie-José van der Heijden, "Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands" (2008) *Brook. J. Int'l L.* 833, 866-7.
[203] Eric Engle, *Private Law Remedies for Extraterritorial Human Rights Violations* (2006) at <http://elib.suub.uni-bremen.de/diss/docs/00010289.pdf> 1 May 2014, 135.
[204] Michael Ratner, "Civil Remedies for Gross Human Rights Violations" in David Barnhizer (ed), *Effective Strategies for Protecting Human Rights* (Aldershot, Burlington: Ashgate Dartmouth, 2001) 249.
[205] Nicola Jägers and Marie-José van der Heijden, "Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands" (2008) *Brook. J. Int'l L.* 833, 866-7.
[206] Michael Ratner, "Civil Remedies for Gross Human Rights Violations" in David Barnhizer (ed), *Effective Strategies for Protecting Human Rights* (Aldershot, Burlington: Ashgate Dartmouth, 2001) 249, 250.
[207] Nicola Jägers and Marie-José van der Heijden, "Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands" (2008) *Brook. J. Int'l L.* 833, 868.
[208] *Xuncax v Gramajo* and *Ortiz v Gramajo* 886 F. Supp. 162 (Distr. C. Mass., 1995); on the ban see Michael Ratner, "Civil Remedies for Gross Human Rights Violations" in David Barnhizer (ed), *Effective Strategies for Protecting Human Rights* (Aldershot, Burlington: Ashgate Dartmouth, 2001) 249, 250.
[209] See David Barnhizer (ed), *Effective Strategies for Protecting Human Rights* (Aldershot, Burlington: Ashgate Dartmouth, 2001) 249, 252 on *Filártiga v Peña-Irala* 630 F.2d 876 (2nd Cir., 1980) which was continued without Peña-Irala.
[210] Nicola Jägers and Marie-José van der Heijden, "Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands" (2008) *Brook. J. Int'l L.* 833, 868.

parent may exist in the *forum* state.[211] In addition, tort law may be the only remedy there is in countries where corporations are not considered criminally liable.[212] As finding the right *forum* is the first step to take before court and the prerequisites are different for tort law and criminal law, both will be assessed in the following, starting with tort law.

2 *Private law/tort law*

As just seen private law remedies are a flexible tool and therefore important in the discussion of human rights violations committed by TNCs abroad. As finding the right *forum* is the first step for a successful tort claim, the ways of determining the right *forum* for civil law remedies will be sketched in the following.

(a) Civil law system approaches

To decide on the right *forum*, *i.e.* whether the domestic court the case was brought before is competent to decide the case, international civil procedural law of the state the court is situated in is used.[213] The procedural law may be derived

---

[211] See Igor Fuks, "Sosa v. Alvarez-Machain and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability" (2006) 106 *Colum. L. Rev.* 112, 116 wfr.

[212] Anita Ramasastry and Robert C. Thompson, "Commerce, Crimes and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of Sixteen Countries" (2006), *available at* <http://www.fafo.no/pub/rapp/536/536.pdf> 1 May 2014, pointing out that among the sixteen nations surveyed five did not recognize the criminal liability of legal persons. These countries are: Argentina, Germany, Indonesia, Spain, and the Ukraine; note: although in Germany corporations are not criminally liable, sanctions in the form of fines can still be imposed on them under the *German Administrative Offenses Code (Ordnungswidrigkeitengesetz, OwiG)* (1968, 1987), including sanctions for actions abroad when explicitly provided for by the law. These sanctions are similar to criminal sanctions for it is not up to the victims to trigger the payment of the fine, rather the fine is imposed by the executive itself, see §§ 5, 30, 35, 46 OwiG, see also Daniel Marcus Krause and Frank Vogel, "Bestechungsbekämpfung im internationalen Geschäftsverkehr" (1999) *RIW* 488 <http://tldb.uni-koeln.de/php/pub_show_document.php?page=pub_show_document.php&pubdocid=131000&pubwithtoc=ja&pubwithmeta=ja&pubmarkid=938000#ti131000N23> 1 May 2014; furthemore, piercing the corporate veil or holding a group of enterprises liable is not alien to German law either, see for an outline Rene Reich-Graefe, "Changing Paradigms: The Liability of Corporate Groups in Germany" 37 (2005) *Conn. L. Rev*. 785.

[213] Peter Hay, *Internationales Privat- und Zivilverfahrensrecht* (3rd ed, Munich: C. H. Beck, 2007) 1.

from domestic law, regional law and bi- and multilateral treaties.[214] Once the *forum* is found, the applicable law is decided upon by using the *forum's* conflict of law rules.[215]

Civil procedural law in civil law systems are for example the *German Code of Civil Procedure (Zivilprozessordnung)*[216] and the *Council Regulation (EC) NO. 44/2001*,[217] which both refer to certain linking factors between the facts of the case and the *forum* to create the competence of domestic courts.[218] As linking factors the *Regulation (EC) No. 44/2001* for example uses the domicile of the respondent,[219] the place where the harmful event occurred,[220] concerning contracts the place of performance[221] and as far as legal persons are concerned the statutory seat, central administration or principal place of business[222] as well as the place where its branch, agency or other establishment is situated.[223] The claimant does not have to be domiciled in an EU member state, so the victims could usually sue in Europe.[224]

Yet in the situation of a TNC subsidiary violating human rights outside the EU, the respondent is the subsidiary with its seat, central administration or principal place of business in the host state, the event occurred in the host state and if

---

[214] *Ibid.* and at 2.
[215] *Ibid.* at 1.
[216] *German Code of Civil Procedure (Zivilprozessordnung)* (1897, 2005).
[217] *Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters* (2000).
[218] There are only a few civil law countries that allow for discretionary decisions concerning the appropriate *forum*, for example Japan and Sweden, see James J. Fawcett, "General Report" in James J. Fawcett (ed), *Declining Jurisdiction in Private International Law* (Oxford: Clarendon Press, 1995)1, 10; furthermore, in addition to the mentioned linking factors, some civil law counties also rely on other connections with the *forum* to decide the domestic *forum* to be *forum conveniens,* such as an urgent interest for granting domestic legal protection (Germany, Quebec) or sufficient connection with the legal sphere of the domestic *forum* (Netherlands), see *ibid.* at 8 and Haimo Schack, "Germany" in James J. Fawcett (ed), *Declining Jurisdiction in Private International Law* (Oxford: Clarendon Press, 1995) 189, 193.
[219] Art. 2 (1) *Council Regulation (EC) No. 44/2001.*
[220] Art. 5 (3) *Council Regulation (EC) No. 44/2001* on tort, delict and quasi-delict.
[221] Art. 5 (1) (a) *Council Regulation (EC) No. 44/2001.*
[222] Art. 60 *Council Regulation (EC) No. 44/2001.*
[223] Art. 5 (5), art. 15 (2) and art. 18 (2) *Council Regulation (EC) No. 44/2001.*
[224] See Yaraslau Kryvoi, „Enforcing Labor Rights against Multinational Groups in Europe" (2007) 46 *Indus. Rel.* 366, 376; Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007), 158; *Société Group Josi Reinsurance Company SA v Compagnie d'Assurances Universal General Insurance Company* C-412/98 (ECJ Opinion of 13 July 2000).

there happened to be a contract with the victims it had to be performed in the host state. Suing the subsidiary at the place of the branch, agency or other establishment, which could be the parent company and therefore the home state, is only possible where the subsidiary itself has its seat, central administration or principle place of business within the EU.[225] So subsidiaries incorporated outside the EU usually cannot be sued within the EU. All these considerations point towards the host state as the appropriate *forum*, not the home state. The only situation where *Regulation 44/2001*[226] allows for suing the EU parent in the home state for violations that occurred at the subsidiary's place abroad, *i.e.* outside the EU, is where the parent company was involved in the violation by an act or omission, decision or lack of supervision of the subsidiary. In such a case the place where the harmful activity (the act, omission, decision or lack of supervision) occurred lies within the EU and the parent company as the defendant is domiciled within the EU.[227] However, as long as parent and subsidiary are acting as two separate legal entities and parent responsibility is not based e.g. on factual control,[228] a lack of supervision will be hard to provide evidence for.[229] Only when the corporate veil is pierced and parent and subsidiary are treated like parent and branch, liability is given more easily in the home state, *i.e.* by the parent. As Engle observes:

> Once the corporate veil is pierced, obtaining jurisdiction under COM 44/2001 would be relatively easy. Thus, at least in theory, it would be possible to impute tort liability to a parent company either for a tort committed by a wholly owned subsidiary.[230]

---

[225] See art. 5 first sentence *Council Regulation (EC) No. 44/2001;* for further information on the issue see Gerrit Betlem "Transnational Litigation Against Multinational Corporations Before Dutch Civil Courts" in Menno T. Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (The Hague, London, Boston: Kluwer Law International, 2000) 283, 286-7.

[226] *Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters* (2000).

[227] Gerrit Betlem "Transnational Litigation Against Multinational Corporations Before Dutch Civil Courts" in Menno T. Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (The Hague, London, Boston: Kluwer Law International, 2000) 283, 286 with examples.

[228] For more on the issue of factual control as a linking factor see below III. A.

[229] See for example the above mentioned *Nestlé Case*, because although this was a criminal complaint, the responsibility of the parent company established there would have to be similar in tort law and is neither easy to prove nor to argue and/or establish.

[230] Eric Engle, *Private Law Remedies for Extraterritorial Human Rights Violations* (2006) at <http://elib.suub.uni-bremen.de/diss/docs/00010289.pdf> 1 May 2014, 108.

This shows that so far suing the subsidiary itself before home state courts is hardly possible[231] and suing the parent is difficult as well.

(b) Common law system approaches

In common law systems such as the US[232] the competence of the court to decide a case is also restricted and different matters are considered to determine the appropriate *forum*. Yet not only connecting factors such as the nationality[233] or the presence in the jurisdiction, for example of corporate officers or potentially harmful products, resulting in personal jurisdiction[234] and protective jurisdiction,[235] are relevant for deciding on the appropriate *forum*. A further criterion used to decide on the *forum* is the *forum non conveniens* doctrine.[236] This doctrine is additionally used to flexibly confine the cases domestic courts have to decide due to an excessively wider base of domestic jurisdiction.[237] Furthermore, when using only the linking factors to decide the *forum*

[231] The jurisdiction of a European court could be given by a choice of law clause, but victims of a human rights violation and the foreign subsidiary will usually not have concluded a contract and even if the victims are employees of the subsidiary and a contract therefore exists the are unlikely to choose home state law to govern their relationship. Jurisdiction can also be accepted according to art. 24 *Council Regulation (EC) No. 44/2001* by answering a claim without contesting the jurisdiction of the court. Yet this is an exception to permit a case to be decided by a court that was actually not competent to decide the case in the first place. Therefore it cannot be assumed that the court will decide the case, it has rather to be presumed that the court will dismiss the case due to the lack of international jurisdiction. Therefore this is no solution which will reliably enable victims to sue foreign subsidiaries before home state courts; see also Jan Wouters and Cedric Ryngaert, "Transnational Corporate Responsibility for the 21st Century: Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction" (2009) 40 *GWILR* 939, 945 stressing that there is no EU case law so far.

[232] Yet also in some civil law systems such as in Japan and Sweden allow for discretionary decisions on the appropriate *forum* which can be used for *forum non conveniens* considerations, see James J. Fawcett, "General Report" in James J. Fawcett (ed), *Declining Jurisdiction in Private International Law* (Oxford: Clarendon Press, 1995) 1, 11; in addition, most civil law countries have a possibility to deny/decline jurisdiction, although in much more restricted ways than the *forum non conveniens* doctrine and usually by showing that the local *forum* is inappropriate rather than *vice versa*, see *ibid.* at, 24-7.

[233] Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 126-7.

[234] *Ibid.* at 140-153.

[235] *Ibid.* at 127.

[236] *Ibid.* at 153.

[237] James J. Fawcett, "General Report" in James J. Fawcett (ed), *Declining Jurisdiction in Private International Law* (Oxford: Clarendon Press, 1995) 1, 19-21.

conveniens, more than one possible *forum* may exist in trans-border cases. That is why a plaintiff may want to choose to sue in the jurisdiction which he or she considers most favourable in terms of for example procedural law or compensations granted. This is called "*forum* shopping".[238] In many civil law countries with their closed systems of strictly confined court competences that do not allow for the kind of discretion applied when using the *forum non conveniens* doctrine, *forum* shopping is either not possible due to the restrictive competence rules of domestic courts, [239] is not considered to be negative,[240] but legitimate[241] or is dealt with by other means, such as refusing the recognition and enforcement of foreign judgements.[242] That is why the *forum non conveniens* doctrine is not referred to in order to tackle this issue in civil law systems.[243] In common law legal systems on the other hand, *forum non conveniens* provides a benchmark for the cases where due to different existing linking factors more than one jurisdiction has the competence to decide the case, confining *forum* shopping. Yet the prerequisites for the discretional[244] *forum non conveniens* decisions vary in different common law states.

(i) US approach

In *Gilbert*[245] the Supreme Court developed a balancing test for *forum non conveniens* decisions in domestic cases, involving more than one US state, taking into account private and public interest factors. The private interest factors are for example:

---

[238] See Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 154.
[239] See James J. Fawcett, "General Report" in James J. Fawcett (ed), *Declining Jurisdiction in Private International Law* (Oxford: Clarendon Press, 1995) 1, 22, referring to Argentina.
[240] See *ibid.*, referring to Germany, Greece and Finland.
[241] Martin Söhngen, *Das Internationale Privatrecht von Peru* (Tübingen: Mohr Siebeck, 2006) 174, referring to Germany where *forum* shopping is considered legitimate, but also criticized bay some authors.
[242] See James J. Fawcett, "General Report" in James J. Fawcett (ed), *Declining Jurisdiction in Private International Law* (Oxford: Clarendon Press, 1995) 1, 22 and 66.
[243] See *ibid.* at 21-3, for further reasons civil law countries reject the *forum non conveniens* approach see *ibid.* at 22-4.
[244] Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 140.
[245] *Gulf Oil Corp. v Gilbert* 330 US 501 (1947).

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action, and all other practical problems that make trial of a case easy, expeditious, and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained.[246]

When considering the public interest factors the following aspects have to be taken into account:

> Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach, rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.[247]

However, the Court also said that it "has repeatedly recognized the existence of the power to decline jurisdiction in exceptional circumstances".[248] The necessity for these "exceptional circumstances" should therefore be kept in mind as an underlying explanatory benchmark when applying the balancing test of the *forum non conveniens* doctrine. So what about trans-border cases involving TNCs and human rights? In *Koster*[249] the rule of favouring the plaintiff's choice of *forum* was established, yet this was abolished later in *Piper*[250] for international cases. These international cases involving foreign plaintiffs became an issue due to certain particularities of US law - as US courts were known for the high damages they granted and the contingency fee system concerning lawyer's fees, plaintiffs thought is was an advantage to sue in the US, especially in cases of

[246] *Ibid.* at 508.
[247] *Ibid.* at 508-9.
[248] *Ibid.* at 504.
[249] *Koster v Lumbermens Mutual Casuality Co.,* 330 US 518 (1947).
[250] *Piper Aircraft Co. v Reyno* 454 US 235 (1981) 255-6.

product liability where US products had caused harm outside the US.[251] Therefore, the *forum non conveniens* doctrine just mentioned was used as a restriction in the 1980s to prevent foreign plaintiffs from filing so many suits in the US.[252] Declining jurisdiction in international cases on the basis of *forum non conveniens* is thus rather the rule than the exception today[253] as can be seen in many cases involving TNCs causing human rights violations by causing environmental damages and health hazards.[254] A striking example of *forum non conveniens* concerning TNCs acting abroad is the 1986 *Bhopal* case[255] brought before US courts under the already mentioned *Alien Tort Claims Act (ATCA)*.[256] In this case, the plaintiffs, victims of a gas leak disaster at a pesticide plant of the US-American Union Carbide Corporation (UCC) in Bhopal, India, argued that the Indian legal system was not adequate to decide on such a case,[257] that the TNC UCC was responsible and liable for its Indian subsidiary because construction, design and operation of the subsidiary were controlled by the US parent[258] and that there was a great public interest in the US for the case due to similar plants in the US and because the US should encourage its TNCs to "protect health and well being of peoples" all over the world.[259] Judge Keenan however rejected the arguments in his decision, which was upheld by the Court

[251] Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 154.
[252] See *ibid.* wfr, in particular fn 142, referring to "*Piper Aircraft v Reyno* 454 US 235 (1981); Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Oxford, Portland: Hart Publishing, 2004) Ch. 4.
[253] See Leah Nico, "From Local to Global: Reform of Forum Non Conveniens Needed to Ensure Justice in the Era of Globalization" (2005) 11 *Sw. J.L. & Trade Am.* 345, 351.
[254] See *ibid.; Aguinda v Texaco* 303 F.3d 470 (2002 US App); *Cabalceta v Standard Fruit Company* 883 F2d 1553 (11th Cir, 1989); *Torres v Southern Peru Copper Corporation* 965 F Supp. 899 (US Dist. 1996).
[255] *In Re Union Carbide Gas Plant Disaster at Bhopal India* (Opinion and Order 12 May 1986) 634 F Supp 842 (SDNY 1986), 25 ILM 771 (1986).
[256] *Alien Tort Claims Act* (US, 1789).
[257] Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 155, referring for further information to Marc Galanter "Legal Tropor: Why So Little Has Happened in India After the Bhopal Tragedy" 20 *Texas J. Int'l L. J.* 273 (1985).
[258] Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 155 wfr.
[259] *Ibid.* wfr.

of Appeals.[260] He argued that Indian tort law was based on English tort law and was therefore able to cope with the case. Yet a condition to *the forum non conveniens* decision was that UCC voluntarily submitted to Indian jurisdiction to allow Indian courts to decide the case in the first place. This shows the *forum non conveniens* decision is used in a very broad way, maybe even overused by dismissing the case even when there is no sufficiently linked alternative *forum*, but further steps to create such a *forum* are necessary.[261] Judge Keenan argued further that India was the place where the accident occurred, the principal witnesses were in India and as Indian jurisdiction had the superior regulatory interest in the case India's public interest in the litigation was outweighing the US interest.[262]

Due to this *forum non conveniens decision*, regarding the case as a mere accident in India, the case was not decided in US courts. Muchlinski therefore concludes that victims of injuries caused by US subsidiaries abroad may have hardly any chance of a decision before a US court "unless there is clear proof of the direct involvement of the parent company in the wrongdoing, and there is a clear US interest in the litigation."[263] This, although more confined, reminds of the dilemma in the civil law systems, where due to a lack of other links an involvement in the causation of a harm by the parent company is necessary to create a sufficient link to access the home state *forum*. Furthermore, the idea of a link is not alien to *ATCA* either. The defendant may claim that it does not fall under US jurisdiction because it is a foreign corporation. Yet in most cases they will not be too successful as Heil points out:

> In cases against corporations, courts generally use the rule that a corporation must have a presence in a state or must be conducting "continuous and systematic business" in a state for jurisdiction in that state. This can sometimes be very simple for the plaintiff, since many states require a corporation to officially register with the Secretary of State of a state to be able to conduct business there. Registering a

[260] *Ibid.* and at fn 150, stating that the Court of Appeals rejected some conditions, but upholding the *forum non conveniens* decision.
[261] *Ibid.* wfr.
[262] On the further developments in the case, the final settlement in India and cases before US courts see Bhopal Information Center Website (Chronology)
< http://www.bhopal.com/chronology> 1 May 2014.
[263] Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 156.

business generally submits a corporation to general jurisdiction in that state.[264]

However, there have been cases since *Bhopal* where a dismissal of jurisdiction was refused or had to be reconsidered like in *Jota*[265] where the Ecuadorian subsidiary of the US corporation Texaco was accused of having dumped toxic by-products into the local rivers, or the *Wiwa* case,[266] where the court decided that the Nigerian victims could sue Royal Dutch Petroleum Co, incorporated in the United Kingdom and the Netherlands, in the US. Although this last example is not exactly the situation examined in this work because the defendant was no subsidiary of a US parent company and it was stressed that two of the plaintiffs were US residents, it is an important example of US cases involving TNCs and human rights violations abroad, brought before US courts under *ATCA*, because in this decision the court "altered the balance of *forum non conveniens*, making it easier to bring claims based on a foreign human rights violation despite the availability of an alternative forum".[267] It did so by stressing the interest of the United States in adjudicating human rights abuses no matter where they occur. Yet the US interest in deciding the case does not automatically override that of the host state because of the mere fact that the action is based on *ATCA*.[268] Furthermore, this is no Supreme Court decision and different courts in the US have taken different approaches towards *ATCA*, arguing in the very opposite way and dismissing foreign cases.[269] In *Kiobel*[270] the US Supreme Court now

---

[264] Jennifer L. Heil, "African Private Security Companies and the Alien Tort Claims Act: Could international Oil and Mining Companies Be Liable?" (2002) 22 *NW J. Int'l L. & Bus* 291, 306 wfr.

[265] *Jota v Texaco Inc.* 157 F.3d 153 (US App.1998).

[266] *Wiwa v Royal Dutch Petroleum* 226 F.3d 88 (US App. 2000); a settlement was reached in the case, see *BBC News*, "Shell settles Nigeria Deaths case" (9 June 2009) <http://news.bbc.co.uk/2/hi/africa/8090493.stm> 1 May 2014.

[267] Aaron Xavier Fellmeth, "Wiwa v. Royal Dutch Petroleum Co: A New Standard for the Enforcement of International Law in U. S. Courts?" (2002) 5 *Yale H.R. & Dev. L.J.* 241.

[268] Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 156; *Wiwa v Royal Dutch Petroleum* 226 F.3d 88 (US App. 2000); opposing the use of *forum non conveniens* in *ATCA* cases is for example P. J. Kee, "Expanding the Duties of the Vigilant Doorkeeper: ATS Litigation and the Inapplicability of the Act of State Doctrine and Forum Non Conveniens" (2008) 83 *Tul. L. Rev.* 495, 516-525.

[269] See P. J. Kee, "Expanding the Duties of the Vigilant Doorkeeper: ATS Litigation and the Inapplicability of the Act of State Doctrine and Forum Non Conveniens" (2008) 83 *Tul. L. Rev.* 495 wfr and examples.

even decided that *ATCA* is not applicable in extraterritorial cases where the only link to the US is corporate presence there. It explicitly stressed that "there is no indication that the *ATS* [*i.e. ATCA*] was passed to make the United States a uniquely hospitable forum for the enforcement of international norms."

Yet already before these decisions the US approach of the *forum non conveniens* doctrine and its different uses by different courts had made it rather difficult for foreign victims of violations caused by foreign subsidiaries of US TNCs to sue these subsidiaries before US courts. Therefore, some suggestions have been made to ease access to US courts. Some of these ideas will be sketched in the following, demonstrating that many had perceived and interpreted *ATCA* in the opposite way than the US Supreme Court. Schwartz for example points out the fact that *ATCA*'s very object is to provide foreign victims with a remedy for extraterritorial torts. Therefore the extraterritorial occurrence of harmful events should not cause a dismissal of the case, especially where TNCs are involved as their complex interactions and structure make it difficult to define where the harmful event was caused in the first place.[271] Fuks refers to the *Sosa*[272] decision, which according to him suggests that the status of the defendant as a corporation eases the admissibility of a case before US courts. [273] Kee generally opposes the application of the *forum non conveniens* doctrine in *ATCA* cases, arguing that in *Sosa*[274] the Supreme Court developed restrictive requirements to sue under *ATCA* so that additional grounds for dismissal are not necessary and rather unfair:

> As both the ATS and Sosa require, only a foreign plaintiff with a tort claim based on a well-settled and well-recognized norm of customary international law can properly come before the court. Under such requirements, if a federal court were to undergo its typical Gilbert/Piper forum non conveniens analysis in ATS litigation, it would strike this author, in the words of Hamlet, as if "time is out of joint." By doing so, the court

---

[270] *Kiobel v Royal Dutch Petroleum* No. 10-1491 (US Supreme Court, decided on 17 April 2013).

[271] See Juli Schwartz, "Saleh v. Titan Corporation: The Alien Tort Claims Act: More Bark than Bite? Procedural Limitations and the Future of ATCA Litigation Against Corporate Contractors" (2006) 37 *Rutgers L. J.* 867 wfr.

[272] *Sosa v Alvarez-Machain,* 542 U.S. 692 (2004).

[273] Igor Fuks, "Sosa v. Alvarez-Machain and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability" (2006) 106 *Colum. L. Rev.* 112, 117-8, 132-143; *Sosa v Alvarez-Machain,* 542 U.S. 692 (2004) 42.

[274] *Sosa v Alvarez-Machain,* 542 U.S. 692 (2004).

> assigns the ATS plaintiff the nearly impossible, Herculean task of proving that the U.S. forum is the more convenient or appropriate forum, without the needed deference to do so. [275]

In addition, he stresses the findings of Davies that a plaintiff who was dismissed in one *forum* usually does not sue again in the "appropriate" forum.[276]
Nico suggests amending the balancing test of the *forum non conveniens* decision by adding social and moral factors and points out that

> courts could do so simply by weighing the responsibility of American companies to their employees in foreign countries in which they manufacture goods. Forum non conveniens is already a multifactor balancing test, and arguably there is room for an additional prong.[277]

A legislative reaction to the broad use of the *forum non conveniens* doctrine in the US is a law in the Dominican Republic that allows for transnational product liability cases to be decided before Dominican courts if they have been dismissed on grounds of *forum non conveniens* elsewhere.[278]

However advantageous it may seem to allow more human rights violation cases to be decided by US courts under *ATCA*, the already earlier mentioned challenges, such as the reproach of imperialism and disrespect of sovereignty, may arise when allowing them to judge foreign cases too easily.[279] To minimize the chances for these reproaches, there are additional admissibility conditions in

---

[275] P. J. Kee, "Expanding the Duties of the Vigilant Doorkeeper: ATS Litigation and the Inapplicability of the Act of State Doctrine and Forum Non Conveniens" (2008) 83 *Tul. L. Rev.* 495, 521-2, referring to William Shakespeare, *The Tragedy of Hamlet, Prince of Denmark* (1599 to 1602) act 1, sc. 5.
[276] P. J. Kee, "Expanding the Duties of the Vigilant Doorkeeper: ATS Litigation and the Inapplicability of the Act of State Doctrine and Forum Non Conveniens" (2008) 83 *Tul. L. Rev.* 495, 524 wfr.
[277] Leah Nico, "From Local to Global: Reform of Forum Non Conveniens Needed to Ensure Justice in the Era of Globalization" (2005) 11 *Sw. J.L. & Trade Am.* 345, 347.
[278] Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 159-60 wfr.
[279] When Texaco, a US corporation, was sued in 1993 due to environmental harm caused in Ecuador, Ecuador lodged a diplomatic protest, because the claim was considered an affront to Ecuador's sovereignty, see Judith Kimerling, "Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, Chevrontexaco and *Aguinda v. Texaco*" 38 (2006) *Int'l. L. & Pol.* 413, 487.

US law apart from the *forum non conveniens* balancing test. When suing private parties these are the Act of State Doctrine and the comity principle, which may be relevant due to host state interests and involvement in the TNC subsidiaries concerned. As Black puts it the Act of State Doctrine "precludes the courts of this country from inquiring into the validity of governmental acts of a recognized foreign sovereign committed within its own country."[280] International comity

> is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation. […] Under the tenets of international comity, United States courts customarily refuse "to review acts of foreign governments and defer to proceedings taking place in foreign countries, allowing those acts and proceedings to have extraterritorial effect in the United States. [281]

In *Patrickson v Dole*[282] for example Peru opposed the case against a mining company being decided in the US as mining provides 50% of the country's export income and 11% of the GDP and is therefore essential for the Peruvian economy. In addition, the Peruvian government was involved in the defendant's activities. Therefore most vital Peruvian interests and even its sovereign interests and consequently Peru's relations to the US were affected by the case. Another example is the *ATCA Apartheid*[283] case where multinational corporations were sued for having benefitted from the Apartheid regime in South Africa and South Africa worried that the US would interfere in the very own domestic matters of South Africa without knowing the background and situation well enough. The unique situation in South Africa of reconciliation and fighting poverty demanded a well-considered approach towards multinational

---

[280] Henry Campbell Black, *Black's Law Dictionary* (6th ed, St Paul, Minnesota: West Group, 1990); see also P. J. Kee, "Expanding the Duties of the Vigilant Doorkeeper: ATS Litigation and the Inapplicability of the Act of State Doctrine and Forum Non Conveniens" (2008) 83 *Tul. L. Rev.* 495, with further examples, arguing that US courts do not seem to be able to agree on the question of whether or not to apply the Act of State doctrine at all when it comes to violations of international law, he is of the opinion that according to *Sosa* not only the *forum non conveniens* doctrine, but also the Act of State Doctrine is not applicable or at least eviscerated in *ATCA* cases on pp. 511-12, yet Kee is opposing the doctrine for *ATCA* cases anyway.

[281] *Jota v Texaco Inc*. 157 F.3d 153 (US App.1998) 159-60.

[282] *Patrickson v Dole* 251 F.3d 795 (US App. 2001).

[283] *Re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

corporations and their role in the Apartheid system which South Africa intended to take itself.[284]

These latter examples show once more the interrelatedness between jurisdiction over foreign cases and politics and inter-state relations. Yet although there are various obstacles and these were imposed for different reasons, some cases make it to US courts and admissibility is granted. However, depending on the particular substantive law applicable, further admissibility issues may arise, as for example under *ATCA*, by requiring a violation of the "law of nations" as will be assessed in more detail below. So access to US courts is not granted easily and the courts are driven by different motives and interests when deciding on the *forum*.

(ii) UK approach

The *forum non conveniens* doctrine approach in the UK is more limited than the US approach[285] and generally based on the *Spiliada*[286] doctrine.[287] In this case Lord Goff states that

> the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum.[288]

Such a more appropriate *forum* is the *forum* with the most substantial connection based

---

[284] Andrew Farrelly, "Foreign Policy in the Courts – The ATCA in re South African Apartheid Litigation: What Sosa Makes Courts Do" (2006) *Seton Hall Legislative J.* 437 wfr.

[285] Eric Engle, "Alien Torts in Europe? Human Rights and Tort in European Law", (2005) *ZERP-Diskussionspapier*, 1 available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1020453> 1 May 2014, 6, stating that public interest or public policy is not considered in the UK; see also Sarah Joseph, "An Overview of the Human Rights Accountability of Multinational Enterprises" in Menno T. Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (The Hague, London, Boston: Kluwer Law International, 2000) 75, 79; *Lubbe v Cape plc* [2000] UKHL 41.

[286] *Spiliada Maritime Corporation v Cansulex Ltd "The Spiliada"* [1986] 3 WLR 972; see also Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 154, fn 142 and p 158 with further examples.

[287] *Ibid.* at 154 with further examples.

[288] *Spiliada Maritime Corporation v Cansulex Ltd "The Spiliada"* [1986] 3 WLR 972, Lord Goff.

> not only [on] factors affecting convenience or expense (such as availability of witnesses), but also [on] other factors such as the law governing the relevant transaction (as to which see Cr dit Chimique v. James Scott Engineering Group Ltd., 1982 S.L.T. 131), and the places where the parties respectively reside or carry on business.[289]

If this test shows that there is a clearly more appropriate alternative *forum*, more factors are taken into account to determine whether stay can be granted or an exception has to be made because the circumstances of the case demand admissibility in spite of a more appropriate *forum* abroad.[290] This was in fact done concerning human rights violations by subsidiaries of British parent companies abroad where the House of Lords allowed for proceedings to take place in the UK, for example in *Connelly v RTZ Corporation plc*[291]and *Lubbe v Cape plc.*[292] In the former case the House of Lords decided that the case should be tried before British instead of Namibian courts due to the need for financial aid and expert evidence, which were both only available in the UK. In *Lubbe v Cape plc*[293] the House of Lords similarly ruled that lack of means in South Africa allowed proceedings in the UK. It is even stated that in contrast to US courts, courts in the UK and Australia are using their discretion under the *forum non conveniens* doctrine in favour of holding parent corporations liable for human rights violations they committed abroad.[294] However, European Law, especially *Regulation 44/2001*,[295] has confined the use of the *Spiliada* doctrine by British courts.[296] The ECJ basically ruled that the Brussels Convention,[297] now *Regulation 44/2001*, precludes courts from declining jurisdiction for reasons not laid down in the Convention, finding that the reason that a court in a

---

[289] *Ibid.*
[290] *Ibid.*
[291] *Connelly v RTZ Corporation plc* [1998] AC 854; later RTZ became Rio Tinto.
[292] *Lubbe v Cape plc* [2000] UKHL 41.
[293] *Ibid.*
[294] See Razeen Sappideen, "Harmonizing International Commercial Law Through Codification" (2006) 40 *J.W.T.* 425, 443.
[295] *Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters* (2000).
[296] James J. Fawcett, "General Report" in James J. Fawcett (ed), *Declining Jurisdiction in Private International Law* (Oxford: Clarendon Press, 1995)1, 11-2; Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 157.
[297] *Convention on the enforcement of judgements in civil and commercial matters (Brussels Convention)* (1968).

non-member state is the more appropriate *forum* cannot be applied, even if no other member state is affected by this decision.[298] This means the doctrine of *forum non conveniens* will not be applied any longer where the Regulation is applicable, *i.e.* when UK-based TNCs are sued either for contributing to human rights violations of their subsidiaries abroad or because of the conduct of their subsidiaries attributed to the UK-based parent as outlined above. Holding the parent liable due to breaches of their duty of care, *i.e.* due to their own conduct, is therefore still possible. UK courts could still do so under *Regulation 44/2001*, thereby maybe even accelerating this approach throughout Europe. Furthermore, regardless of the changes in the UK, non-EU states that have adopted the *Spiliada* doctrine like Canada[299] and New Zealand,[300] are still applying it broadly. In addition, as in the USA, there are also further obstacles to the admissibility of a case, namely the act of state doctrine and comity.[301]

(iii) Canadian Approach

As just mentioned, Canada's *forum non conveniens* application is also based on *Spiliada*, so the moving party has to show that there is a more appropriate *forum*.[302] The factors are quite similar to those used in the UK.[303] In contrast to the US approach, courts wait for the application of one of the parties before they apply the doctrine[304] and judicial economy and similar matters are not used.[305] What is important concerning foreign plaintiffs is that there is no favouring of the local plaintiff's *forum*.[306] Even in Québec, where civil law is applied, the

---

[298] *Owusu v Jackson* C-281/02, (ECJ, 1 March 2005) par. 37-46, stating that *forum non conveniens* is contradicting the legal certainty the Conventions is supposed to provide; see also Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 159.
[299] *Amchem Products Inc. v British Columbia Worker's Compensation Board*, [1993] 1 S.C.R. 897.
[300] *Club Mediterranee NZ v Wendell*, [1989] 1 N.Z.L.R. 216 (C.A.).
[301] Eric Engle, *Private Law Remedies for Extraterritorial Human Rights Violations* (2006) at <http://elib.suub.uni-bremen.de/diss/docs/00010289.pdf> 1 May 2014, 137-9.
[302] See F. Mikis Manolis, Nathaly J. Vermette and Robert F. Hungerford, „The Doctrine of *Forum Non Conveniens*: Canada and the United States Compared" (Fall 2009) *FDCC Quarterly*, 3, 7-8 and also on the special case of Québec that applies civil law, pp. 18-23.
[303] See *ibid.* at 8-10.
[304] See *ibid.* at 30-1.
[305] See *ibid.* at 31.
[306] See *ibid.*

forum non conveniens doctrine exists as it has been included into art. 3135 *Québec Code of Civil Procedure*. Although it is said that this in fact nullified case law approaches concerning the doctrine, the factors involved and used to decide on are very similar to Canada's common law approach[307] when deciding whether "exceptionally"[308] jurisdiction can be declined. In *Cambior*[309], which was decided in Québec, it was found that Guyana was the more appropriate forum to decide on a spill of toxic effluents caused by the subsidiary of a Canadian gold mining company. The reasons the court based its decision on were that the mine was in Guyana as were the victims, witnesses and other elements of proof, the spill happened there, the applicable law was that of Guyana and the victims would not be denied justice if the case was tried in Guyana, where others were already pending.[310] Interestingly the court made a comment on the liability of the parent company, stressing that liability was not automatically excluded because parent and subsidiary were legally two separate entities, because in this case the parent company had financed the study and plans later carried out by the subsidiary.[311] Yet as *forum non conveniens* applied, the liability was not assessed any further.

(iv) Australian approach

The Australian *forum non conveniens* approach is less restrictive than the US and UK ones. It is sufficient that the Australian *forum* is *an* appropriate forum, it does not have to be *the clearly appropriate* forum.[312] In addition, the burden of proof is reversed compared to the *Spiliada* doctrine - a case is dismissed by Australian courts when the Australian *forum* is "clearly inappropriate".[313]As it tends to be easier to show that the foreign *forum* is clearly more appropriate than to show that the local forum is clearly *in*appropriate, this approach facilitates

---

[307] See *ibid.* at 22-3.
[308] Art. 3135 *Québec Code of Civil Procedure* (1994).
[309] *Recherchers Internationales Quebec v Cambior Inc.*1998 Q.J. No. 2554 (Q.S.C) (Can.).
[310] *Recherchers Internationales Quebec v Cambior Inc.* [1998] Q.J. No. 2554 (Q.S.C).
[311] *Ibid.*
[312] For this differentiation, although not concerning Australia see James J. Fawcett, "General Report" in James J. Fawcett (ed), *Declining Jurisdiction in Private International Law* (Oxford: Clarendon Press, 1995) 1, 9.
[313] Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 159 wfr and examples.

trials before Australian courts.[314] Yet facing globalization and *forum* shopping there are supporters also among the deciding judges for a stricter approach, either due to their understanding of international law and extraterritoriality in general or because of a felt need for a more harmonized approach in common law systems, favouring the UK approach.[315] This would of course make it more difficult to bring a case before an Australian court as well. Furthermore, as in the US and the UK *forum non conveniens* is not the only obstacle plaintiffs face when bringing a case before Australian Courts, as the Act of State Doctrine is used in Australia as well.[316]

3 *Criminal law, criminal prosecution*

Usually states hear criminal cases committed abroad only when there is a link between the facts of the case and the state, either under the theory of passive personality principle[317] when a crime was committed against the state's own nationals, under the theory of active personality principle when the state prosecutes one of its own nationals or under the protective principle in cases related to the protection of the state and its sovereignty, for example when its currency is counterfeited.[318] Another example could be the crime of treason where extraterritorial jurisdiction is applied under UK and South African law no matter where the crime was committed or who committed it.[319] As far as TNCs' human rights violations are concerned, as already mentioned above when assessing tort law, a link has to be found. As the victims are usually nationals of

---

[314] See James J. Fawcett, "General Report" in James J. Fawcett (ed), *Declining Jurisdiction in Private International Law* (Oxford: Clarendon Press, 1995) 1, 13.
[315] Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 159; dissenting opinions in *Regie National des Usines Renault SA v Zhang* [2002] HCA 10 (14 March 2002) par. 94, 144, 162 and 193-4.
[316] See *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd.* (1988) 165 CLR 30.
[317] Eric Engle, *Private Law Remedies for Extraterritorial Human Rights Violations* (2006) at <http://elib.suub.uni-bremen.de/diss/docs/00010289.pdf> 1 May 2014, 173; also see §7 *German Penal Code (Strafgesetzbuch, StGB)* (1871, 1998).
[318] See Eric Engle, *Private Law Remedies for Extraterritorial Human Rights Violations* (2006) at <http://elib.suub.uni-bremen.de/diss/docs/00010289.pdf> 1 May 2014, 168, citing a Counterfeiter case.
[319] Richard J. Goldstone, "International Jurisdiction and Prosecutorial Crimes" in David Barnhizer (ed), *Effective Strategies for Protecting Human Rights* (Aldershot, Burlington: Ashgate Dartmouth, 2001) 113, 114-5.

the host state and the direct offenders as well and vital interests of the home state are hardly at stake, indirect action or involvement of the parent is the most promising connecting factor.[320] Yet this is often hard to prove, especially as long as acts of the subsidiary are not attributed to the parent due to factual control and duty to control. In the *Nestlé Case* mentioned above, it was argued by the ECCHR that the parent itself neglected its duties and was therefore responsible because of omission. Whether this is a successful line of argumentation that will convince the prosecutor and the court has not been answered yet.[321] Establishing the link would be much easier, if the action of the subsidiary could be attributed to the parent more easily. Yet current domestic laws do not provide for this possibility, neither in tort not in criminal law.[322]

However, there is an exception to the necessity of a link between the state hearing and deciding the case and the facts of the case as far as the violation of *ius cogens* and possible universal jurisdiction for these crimes are concerned.[323] In France for example article 689 of the Code of Criminal Procedure (*Code du Procédure Pénale*) provides for universal jurisdiction for the wrongs listed in

[320] Indirect involvement of TNCs based in North America and Europe has been found in many cases examined by the Special Representative, see *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development- Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* A/HRC/8/5/Add.2 (23 May 2008) <http://198.170.85.29/Ruggie-2-addendum-23-May-2008.pdf> 1 May 2014, 17; see also Jonathan Clough, "Not-so Innocents Abroad: Corporate Criminal Liability for Human Rights Abuses" (2005) 11 *AJHR* 1, * 10-13, favouring criminal liability of the parent corporation and suggesting different possible links, including functional liability, based on control over the subsidiary.

[321] Investigations were discontinued because the matter had become time-barred, see ECCHR, "Nestlé has nothing to fear from Swiss legal system" available at <http://www.ecchr.de/index.php/nestle-518.html> 1 May 2014.

[322] More on the linking factor of factual control will be discussed below III.A.

[323] See Eric Engle, *Private Law Remedies for Extraterritorial Human Rights Violations* (2006) at <http://elib.suub.uni-bremen.de/diss/docs/00010289.pdf> 1 May 2014, 160; see also *ibid.* at 150, 172-3, where Engle points out that for the crimes with universal criminal jurisdiction there must also be the lesser consequence of universal civil jurisdiction as for example given by *ATCA; Prosecutor v Furundzija* International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY) Case No.: IT-95-17/1-T, 10 December 1998.

international conventions, but the defendant has to be in France to be criminally prosecuted.[324]

Several countries use universal jurisdiction to criminally prosecute grave human rights crimes like crimes against humanity, genocide and war crimes. Some of these countries are France,[325] Germany,[326] the Netherlands,[327] until 2003 also Belgium[328] and until 2009 also Spain.[329] The law they are applying is provided for by domestic law that - like *ATCA* - reproduces and refers to public international law.[330] Spain and Belgium used their universal jurisdiction in a

---

[324] Eric Engle, *Private Law Remedies for Extraterritorial Human Rights Violations* (2006) at <http://elib.suub.uni-bremen.de/diss/docs/00010289.pdf> 1 May 2014, 155-6 and 157 with examples.

[325] Art. 689 *French Code of Criminal Procedure* (*Code de Procédure Pénale)* (as in 2010), but restricted, as for example genocide is defined slightly different in French law than in international law, see Eric Engle, *Private Law Remedies for Extraterritorial Human Rights Violations* (2006) at <http://elib.suub.uni-bremen.de/diss/docs/00010289.pdf> 1 May 2014, 156-157 with examples.

[326] See *German Criminal Code on International public law (Völkerstrafgesetzbuch)* (2002).

[327] See *Bouterse*, Netherlands Supreme Court, LJN AB 1571 (18 September 2001); on this case and general issues see Pita Schimmelpennick van der Oije and Steven Freeland, "Universal Jurisdiction in the Netherlands – the Right Approach but the Wrong Case? Bouterse and the 'December Murders'" (2001) *AJHR* 20 <http://www.austlii.edu.au/au/journals/AJHR/2001/20.html> 1 May 2014; more general on Dutch criminal liability for extra-territorial human rights violations see Nicola Jägers and Marie-José van der Heijden, "Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands" (2008) *Brook. J. Int'l L.* 833, 862-3.

[328] *Loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire* (Belgium); see also Eric Engle, *Private Law Remedies for Extraterritorial Human Rights Violations* (2006) at <http://elib.suub.uni-bremen.de/diss/docs/00010289.pdf> 1 May 2014, 160; Roemer Lemaître, "Belgium Rules the World: Universal Jurisdiction over Human Rights Atrocities" (2000-2001) 37 *Jura Falconis* 255; for an overview see Craig Whitlock, "'Universal Jurisdiction': Spain's Judges Target Torture" *The Washington Post* (24 May 2009) available at <http://www.commondreams.org/headline/2009/05/24-0> 1 May 2014.

[329] See art. 23 (4) *Spanish Judicature Act (Ley Orgánica del Poder Judicial)* (1985); *El Mundo*, "El Congreso limita la jurisdicción universal a casos vinculados a España" (26 June 2009) at <http://www.elmundo.es/elmundo/2009/06/25/espana/1245937500.html> 1 May 2014; for an overview of "high-profile defendants" before Belgian courts see *BBC News*, "Belgium opens way for Sharon trial" (15 January 2003) <http://news.bbc.co.uk/2/hi/europe/2662635.stm> 1 May 2014.

[330] See for example art. 23 (4) h *Spanish Judicature Act (Ley Orgánica del Poder Judicial)* (1985) referring to breaches of Conventions of international humanitarian and human rights protection law; see also Roemer Lemaître, "Belgium Rules the World: Universal Jurisdiction over Human Rights Atrocities" (2000-2001) 37 *Jura Falconis* 255 describing the Belgian law, explaining that the Belgian law is the first one that is referring to the Geneva Conventions including Protocols I and particularly II; see also *German Criminal Code on International public law (Völkerstrafgesetzbuch)* (2002), referring to international public law.

broad way in numerous and rather prominent cases. Spain for example investigated against former Chinese ministers for human rights violations in Tibet and against members of Falun Gong, against the US because of CIA flights in Spain and human rights violations in Guantánamo, against the former Israel Minister of Defense Benjamin Ben-Eliezer and six further military officers and in many more cases, including the genocides in Rwanda and Guatemala.[331] Belgium also investigated against Rwandan genocide perpetrators and in addition against Ariel Sharon, Yasser Arafat, Fidel Castro, Saddam Hussein and President Laurent Gbagbo.[332] Yet not only the broad use of their universal jurisdiction is what both states have in common, but also the intention of changing this broad approach to prevent becoming the "world police" and facing too many diplomatic and political resentments with the foreign states involved.[333] Belgium already changed its law in 2003[334] and although it is still rather broad in terms of crimes that can be prosecuted, a link between Belgium and the facts of the case have to be established now to be able to trigger criminal prosecution. That means universal criminal jurisdiction in its absolute sense, not

---

[331] Daniel del Pino, "España, juez universal" *El Público* (6 May 2009) <http://www.publico.es/internacional/223768/espana/causas/jurisdiccionuniversal/audiencianacional> 1 May 2014.

[332] *BBC News*, "Belgium opens way for Sharon trial" (15 January 2003) <http://news.bbc.co.uk/2/hi/europe/2662635.stm> 1 May 2014; Luc Walleyn, "The Sabra & Shatlia Massacre and the Belgian Universal Jurisdiction" in John Borneman (ed), *The case of Ariel Sharon and the fate of universal jurisdiction* (Princeton: Princeton University, 2004) 54.

[333] *El Público* "Carlos Dívar: 'No nos podemos convertir en los gendarmes judiciales del mundo'" (4 May 2009) at <http://www.publico.es/espana/223298/carlos-divar-no-nos-podemos-convertir-en-los-gendarmes-judiciales-del-mundo> 1 May 2014; as an example for diplomatic consequences see *EcoDiario,* "Livni asegura que Moratinos 'le ha prometido' cambiar la ley para evitar más investigaciones" (30 January 2009) <http://ecodiario.eleconomista.es/internacional/noticias/1004870/01/09/Livni-asegura-que-Moratinos-le-ha-prometido-cambiar-la-ley-para-evitar-mas-investigaciones-.html> 1May 2014; the ICJ ruled in *Democratic Republic of Congo v Belgium* ICJ Reports 2002 that an arrest warrant against a ranking minister had to be cancelled; the Belgium Supreme Courts restricted prosecution of heads of state still in office due to immunity in 2003 and Belgian cases also caused diplomatic and political resentments, see Luc Walleyn, "The Sabra & Shatlia Massacre and the Belgian Universal Jurisdiction" in John Borneman (ed), *The case of Ariel Sharon and the fate of universal jurisdiction* (Princeton: Princeton University, 2004) 54.

[334] *Loi du 5 août 2003 relative à la répression des infractions graves au droit international humanitaire* (Belgium); on the new legislation also see Eric Engle, *Private Law Remedies for Extraterritorial Human Rights Violations* (2006) at <http://elib.suub.uni-bremen.de/diss/docs/00010289.pdf> 1 May 2014, 160 wfr; Luc Walleyn, "The Sabra & Shatlia Massacre and the Belgian Universal Jurisdiction" in John Borneman (ed), *The case of Ariel Sharon and the fate of universal jurisdiction* (Princeton: Princeton University, 2004) 54.

caring for the nationality or residence of the victims and the prosecuted, was abolished in Belgium.[335] There has in fact been an investigation and trials against the French corporation Totalfinaelf (Total) by Belgium beginning in 2002.[336] Total was working on building the Yadana gas pipeline in Myanmar. Total is said to have used Myanmar military as security forces to protect the site, which led to human rights violations such as torture and forced labour.[337] However, as Belgium changed its laws on universal jurisdiction in 2003, the case was dismissed.[338] In Spain parliament voted in favour of confining universal jurisdiction in 2009[339] and the respective law restricting the universal criminal jurisdiction of Spain was passed in the same year.[340]

Yet even when universal jurisdiction is given, because *ius cogens* is concerned several issues may arise in the TNC context, not even to mention the already rather complex issue of defining what is *ius cogens* in the first place. Firstly, it may be difficult to hold corporations liable because corporations are not equal to individuals in terms of criminal law consequences and sanctions. Corporations as private actors have to be treated differently. While many states provide for criminal liability of corporations, some do not and neither does public

---

[335] See Eric Engle, *Private Law Remedies for Extraterritorial Human Rights Violations* (2006) at <http://elib.suub.uni-bremen.de/diss/docs/00010289.pdf> 1 May 2014, 160, wfr; Luc Walleyn, "The Sabra & Shatlia Massacre and the Belgian Universal Jurisdiction" in John Borneman (ed), *The case of Ariel Sharon and the fate of universal jurisdiction* (Princeton: Princeton University, 2004) 54.

[336] See Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Oxford, Portland: Hart Publishing, 2004) 14.

[337] See *AFP*, "Myanmar refugees seek Belgium Trial for TotalFinaElf" (08 May 2002) at <http://www.icai-online.org/xp_resources/icai/oil_companies/myanmar_refugees.pdf> 1 May 2014; Rouven Schellenberger, "Chef des Ölkonzerns TotalFinaElf droht Prozess in Belgien" *Berliner Zeitung* (10 May 2002); on the case and its developments due to the change in Belgian law in 2003 see Redress "EU Update on International Crimes" (2006) at <http://www.redress.org/downloads/publications/EU%20Report%20vol%201%20June%202006%201%20.pdf> 1 May 2014 on Belgium cases.

[338] See Total, "Total in Myanmar a sustained commitment" (2010) at <http://s3.amazonaws.com/zanran_storage/birmanie.total.com/ContentPages/2460050005.pd> 1 May 2014, 51.

[339] See for example Martin Dahms, „Jetzt soll Schluss sein mit universeller Justiz" *Stuttgarter Zeitung* (23 May 2009) front page; *El Público,* "Congreso limita la jurisdicción universal" (20 May 2009) <http://www.publico.es/espana/226606/congreso/limita/jurisdiccion/universal> 1 May 2014.

[340] *El Mundo*, "El Congreso limita la jurisdicción universal a casos vinculados a España" (26 June 2009) at <http://www.elmundo.es/elmundo/2009/06/25/espana/1245937500.html> 1 May 2014.

international law in a general way.[341] They are for example not subject to the ICC.[342]. So the first obstacle is whether corporations can violate *ius cogens* at all. While universal jurisdiction is widely accepted for violations of *ius cogens,* such as piracy and slavery, this law has initially been developed for private individuals. So further objections from the host state may arise, because it does not recognize the criminal liability of corporations at all. Although corporations do not have general legal personality under public international law, the idea of criminal liability and legal personality is accepted in many domestic legal systems today.[343] That is why universal jurisdiction over TNCs acting abroad could be accepted by the majority of states and contradicting home state and host state law might be overcome. It could even be of some help that *ius cogens* breaches are the gravest breaches and most states will not be ready to let them go unpunished where punishment can be achieved. Secondly, the already above mentioned reproaches of disrespecting the host state's sovereignty may arise. Yet as shown above, this is not an insurmountable obstacle. Thirdly, and this can be a strength as just suggested, but also a weakness, *ius cogens* crimes are not exactly the typical human rights violation by a TNC, although it does occur that TNCs are involved, otherwise there would not be any *ATCA* cases sanctioning breaches of the "law of nations" at all. Yet in cases of environmental damage or violations of labour laws or other human rights that do not constitute *ius cogens*, the issue of universal criminal jurisdiction does not arise at all. That means only a limited number of cases fall under the jurisdiction of the home states *via* universal jurisdiction. However, as universal jurisdiction at least covers the most severe breaches of human rights law, universal jurisdiction and criminal prosecution is still a valuable tool in the TNC context, provided criminal liability of TNCs is accepted.

---

[341] This will be set out in more detail below, Ch III, II. B.

[342] See art. 25 *Rome Statute of the International Criminal Court* (1998).

[343] Cristina Chiomenti, "Corporations and the International Criminal Court" in Olivier de Schutter (ed), *Transnational Corporations and Human Rights* (Oxford, Portland: Hart Publishing, 2006) 287, 295; Eric Engle, "Extraterritorial Corporate Criminal Liability: a Remedy for Human Right Violations?" (2006) 20 *St. John's L. J.* 287, 291-7; Olivier de Schutter, "The Challenges of Imposing Human Rights Norms on Corporate Actors" in Olivier de Schutter (ed), *Transnational Corporations and Human Rights* (Oxford, Portland: Hart Publishing, 2006) 1, 30.

For the appropriate *forum* in criminal trials this means that when neither the victims nor the accused are nationals of the *forum* state and the protective principle is not applicable either, jurisdiction may only be obtained *via* universal jurisdiction in cases of *ius cogens* violations.

B *When suing host states*

Apart from suing TNCs, host states could be sued because, as mentioned above, every state has a duty to protect human rights within its territory and jurisdiction according to the rules of due diligence. [344] When a host state is unable or unwilling to exercise this protection with regard to TNCs acting within its jurisdiction, one could think of holding the host state or the respective state official responsible for this omission. Yet this means approaching human rights issues in a more indirect way *via* the host state duties and also on a more general basis than just controlling the human rights records of the state's "own" TNCs. This is because it seems difficult to hold a state or state officials liable for not preventing human rights violations in subsidiaries of their own TNCs, while on the other hand for example allowing for human rights violations in other corporations. The action of the home state may be *triggered* by the human rights violation in their own TNC's subsidiary, but it seems it can hardly be *confined* to it, as this would amount to discrimination against employees and neighbourhoods of other corporations. As the (potential) victims of the human rights abuses are usually not home state nationals and citizens, but host state nationals and citizens, the home state cannot ask for a special protection for these (potential) victims by some sort of consular protection or the like. The home state's interest is rather to try to influence the parent company and to protect the (potential) victims itself due to the - although not generally in a legally relevant sense recognized - link of factual control created by the parent company in the home state. As just sketched, at first glance it would seem rather weird if a home state only criticized the host state for not controlling the human

[344] *Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled "Human Rights Council", "Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts" Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises* A/HRC/4/035 (9 February 2007) Summary, par. 10.

rights observation of its own TNCs' subsidiaries. On the other hand there might be more of an own interest of the home state for the protection of human rights by its own TNCs, which means the call for more control in its own TNCs' subsidiaries could be considered less interfering than a general call for more human rights protection in all kinds of spheres which do not have any connection with the calling state.[345] This again shows the special role of TNC subsidiaries acting abroad where factual control by the parent is actually given.

1 *Suing the host state or its government as a whole*

One could think of holding the host state responsible before domestic courts of the home state by suing the host state or its government as an entity. However, this is not generally provided for in public international law. In contrast, the sovereign power to adjudicate, *i.e.* the *facultas iurisdictionis*, derives from the above mentioned sovereignty principle and is limited by the idea of state immunity based on public international law and the sovereignty principle itself.[346] International laws specifically dealing with state immunity are The *Brussels Convention for the unification of certain rules relating to immunity of state-owned vessels* (1926), the *Vienna Convention on Diplomatic Relations* (1961),[347] the *Vienna Convention on Consular Relations* (1963),[348] the *New York Convention on Special Mission* (1969), the *Vienna Convention on the Representation of States on their Relations with International Organizations of a Universal Character* (1975), the *European Convention on state immunity with additional protocol* (1972)[349] and the 2004 *UN Convention on State Immunity*.[350]

---

[345] See Surya Deva, „Acting extraterritorially to tame Multinational Corporations for Human Rights violations: Who should 'Bell the Cat'?" (2004) 5 *Melb J. Int'l L.* 37, III A.
[346] Peter Hay, *Internationales Privat- und Zivilverfahrensrecht* (3rd ed, Munich: C. H. Beck, 2007); Jan Kropholler, *Internationales Privatrecht* (6th ed, Tübingen: Mohr Siebeck, 2006) § 57 I 3.
[347] Ernest K. Bankas, *The State Community Controversy* (Berlin, Heidelberg: Springer, 2005) 47, 48.
[348] Jan Kropholler, *Internationales Privatrecht* (6th ed, Tübingen: Mohr Siebeck, 2006) 4.
[349] Ernest K. Bankas, *The State Community Controversy* (Berlin, Heidelberg: Springer, 2005) 48.
[350] *UN Convention on Jurisdictional Immunities of States and Their Property* (2004), but not yet in force; see also Ernest K. Bankas, *The State Community Controversy* (Berlin, Heidelberg: Springer, 2005) 301-315.

Granting (absolute) immunity to foreign states is based on comity. It supports the friendly relations between the states, thereby preventing confrontations and conflicts a domestic court decision intending to bind a foreign state could trigger.[351] This suggests that state immunity is not only a legal issue for example due to difficulties in enforcing the court decisions,[352] but also a political issue and matter of foreign policy and diplomacy.[353] This shows once more the interrelatedness of public international law, including human rights law, and policy. Today in many states state immunity is only granted in cases where a state is acting officially or as a sovereign, *i.e.* it carries out *acta iure imperii*, and not as a private person, performing *acta iure gestionis.*[354] The differentiation means whenever a state carries out *acta iure imperii*, no domestic court may rule or decide on its actions.[355] This shift from absolute to restricted or relative state immunity has mainly taken place in the second half of the 19th and in the 20th century[356] for example in Belgium and Italy,[357] Austria, Germany, Greece, Switzerland,[358] the UK[359] and the USA.[360] However, restrictive immunity can not

[351] Ernest K. Bankas, *The State Community Controversy* (Berlin, Heidelberg: Springer, 2005) 42 with examples.
[352] *Ibid.* with examples.
[353] See *ibid.* at 68.
[354] Peter Hay, *Internationales Privat- und Zivilverfahrensrecht* (3rd ed, Munich: C. H. Beck, 2007) wfr; another way of differentiating state actions used in US law is by distinguishing between commercial and non-commercial transactions, see Ernest K. Bankas, *The State Community Controversy* (Berlin, Heidelberg: Springer, 2005) 311.
[355] See Peter Hay, *Internationales Privat- und Zivilverfahrensrecht* (3rd ed, Munich: C. H. Beck, 2007) 5, wfr.
[356] See Ernest K. Bankas, *The State Community Controversy* (Berlin, Heidelberg: Springer, 2005) 52, 59, 69-74, for observations concerning the positions of restrictive immunity of some states see *ibid.* at 319-324.
[357] They were the first according to *ibid.* at 69-72; also note on enforcement measures *Germany v Italy: Greece Intervening* ICJ GL No. 143 (Judgement 3 February 2012) concerning the payment of damages for wrongs during World War II and the enforcement measures taken by Italy to ensure the payment decided upon by Italian and Greek courts; *Kalogeropoulos v Greece and Germany* ECHR No 0059021/00, Judgement on Admissibility for the Prosecution of International Crimes", (12 December 2002).
[358] Ernest K. Bankas, *The State Community Controversy* (Berlin, Heidelberg: Springer, 2005) 26 wfr and examples.
[359] Yet Bankas notes it is a slow development in *ibid.* at 49-58 and 86-94 with examples, pointing out that only in 1977 the fundamental change took place in the UK.
[360] See *ibid.* at 61: "Since the Tate Letter [1952], American courts have followed the relative immunity doctrine." For more on the development in the US see *ibid.* at 77-86, for an overview of more states and their immunity approaches in 2005 see tables in *ibid.* at 327-338.

(yet) be considered customary international law.[361] In addition, the exact reasoning, benchmarks and ways of deciding on immunity may differ from *lex fori* to *lex fori* and therefore from state to state,[362] though now the *UN Convention on State Immunity* could help to harmonize the different approaches.[363] A further issue contradicting the general use of restrictive immunity is that a state which is willing to let its courts decide a case involving a foreign state on the grounds of restrictive jurisdiction is not necessarily also willing to submit itself to foreign jurisdiction in an equivalent case.[364] However, even according to the 2004 *UN Convention* post-judgement measures, *i.e.* enforcement, can only be taken with the consent of the defendant state[365] and there is no state practice that allows for the enforcement and pre-judgement attachment of decisions based on restrictive immunity without such a consent.[366] The following examples illustrate the inconsistent use of state immunity before domestic courts. Immunity was for example granted to Saudi Arabia in the US case *Saudi Arabia v Nelson*[367] where the plaintiff brought an action against the Saudi Arabian government claiming damages for having been illicitly incarcerated and tortured. Immunity was also granted in the US in *Joo v Japan*[368] concerning damages for sexual slavery of women before and in World War II and in *Sampson v Federal Republic of Germany,*[369] and *Hugo Princz v Federal Republic of Germany*[370] where Holocaust survivors claimed compensation from Germany. In the UK case *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya*

---

[361] *Ibid.* at 252, 324-5.
[362] See *ibid.* at 341.
[363] Ernest K. Bankas, *The State Community Controversy* (Berlin, Heidelberg: Springer, 2005) 311.
[364] See *ibid.* at 346 wfr; see also Michael Ratner, "Civil Remedies for Gross Human Rights Violations" in David Barnhizer (ed), *Effective Strategies for Protecting Human Rights* (Aldershot, Burlington: Ashgate Dartmouth, 2001) 249, 256-7, referring to *Sanchez-Espinoza v Reagan*, 770 F.2d 202 (D.C. Cir. 1985) at 207 where the court held that the doctrine of foreign sovereign immunity and domestic sovereign immunity were "quite distinct"
[365] Ernest K. Bankas, *The State Community Controversy* (Berlin, Heidelberg: Springer, 2005) 311, referring to art. 19 *UN Convention* (2004).
[366] See Ernest K. Bankas, *The State Community Controversy* (Berlin, Heidelberg: Springer, 2005) 354.
[367] *Saudi Arabia v Nelson,* 100 ILR 544.
[368] *Joo v Japan* 332 F3d 679 (DC Cir. 2003).
[369] *Sampson v Federal Republic of Germany* 250 F.3d 1145 (7th Cir. 2001).
[370] *Hugo Princz v Federal Republic of Germany*, 26 F3d 1166 (D. C. Cir. 1994).

AS Saudiya (the Kingdom of Saudi Arabia) and others[371] immunity was granted to Saudi Arabia in a case for damages because of torture. In contrast, immunity was for example denied in *Rein v Libya,*[372] a follow-up of the Lockerbie disaster, due to the US *Foreign States Immunity Act* (FSIA) which does not grant immunity to states that sponsor terrorism. In Greece the Hellenic Supreme Court did not consider Germany to be immune in respect of compensation for wrongs in Distomo during World War II.[373]

This short overview of different cases before domestic courts already shows that state immunity is not applied uniformly in different *forums* and even within one *forum* different rules may apply according to each individual case.[374] The one aspect all these cases had in common is that they dealt with claims for damages, *i.e.* torts and not criminal prosecution.[375] This is because one state criminally prosecuting another state would be even more contradicting the principle of state sovereignty than tort claims and furthermore - or because of that - domestic criminal law does not usually include the possibility of sanctioning foreign states.

Concerning the case where the home state wants to hold the host state liable for allowing or not preventing human rights violations by private actors, a reproach of omitting a sovereign function is made. Therefore state immunity is provided for by public international law in those cases, ensuring that no domestic court may rule on a foreign state in those matters. An exception to the absolute immunity for *acta iure imperii* may be granted for acts of states violating those

---

[371] *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others* [2006] UKHL 26.

[372] *Rein v Libya* (1999) 38 ILM 447.

[373] *Prefecture of Voiotia v Federal Republic of Germany*, Case 11/200, Areiso Pagos Hellenic Supreme Court (4 May 2000), but note that Germany did not submit to the judgement and did not grant compensation to the Distomo victims, see *Distomo Massacre Case*, German Supreme Court 2003 BGH-1112R/248/98; *Germany v Italy: Greece Intervening* ICJ GL No. 143 (Judgement 3 February 2012) concerning the payment of damages for wrongs during World War II and the enforcement measures taken by Italy to ensure the payment decided upon by Italian and Greek courts; *Kalogeropoulos v Greece and Germany* ECHR No 0059021/00, Judgement on Admissibility for the Prosecution of International Crimes", (12 December 2002).

[374] As with the use of the detailed US *Foreign States Immunity Act* (FSIA) (1976).

[375] Further examples are cases brought under *ATCA* involving foreign states like *Argentine Republic v Amerida Hess Shipping Corp*., 488 U.S. 428, 431 (1989) and *Frolova v Union of Soviet Socialist Republics,* 761 F.2d 370, 380 (7th Cir. 1985).

erga omnes obligations that are *ius cogens*.[376] This includes grave human rights violations or crimes against humanity where international or universal jurisdiction is accepted. In these cases a domestic court may also decide on acts of foreign states.[377] However, to decide what exactly is *ius cogens* and when a violation of human rights is grave enough to be considered a violation of *ius cogens* is difficult. In addition, the *ius cogens* exception is not generally recognized or at least not used.[378] That means as the performance of host state duties are the controversial subject in cases of TNCs violating human rights abroad, only in cases of a violation of *ius cogens* could there be the appropriate *forum* in the home state as the other cases are covered by immunity. Yet the *ius cogens* exception of immunity is not generally accepted and enforcement measures can only be taken when the host state submits to the home state *forum*. That leaves only a rather small scope of application to the rather indirect state option of holding host states liable for violations of human rights by home state TNCs.

2 *Suing host state officials*

Yet not only suing the host state itself or its government as an entity may be a state option for the home state to influence host state government behaviour and therefore indirectly the human rights record of their own TNCs, but also suing state officials of the host state in domestic home state courts. For a state to perform its political functions and to carry out the official duties of the state, heads of states and senior officials are fundamental. That is why states are

---

[376] Ernest K. Bankas, *The State Community Controversy* (Berlin, Heidelberg: Springer, 2005) 96 and 252.
[377] *Ibid.* at 96.
[378] See the cases already mentioned above *Hugo Princz v Federal Republic of Germany*, 26 F.3d 1166 (D. C. Cir. 1994); *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others* [2006] UKHL 26; *Joo v Japan* 332 F3d 679 (DC Cir. 2003); *Sampson v Federal Republic of Germany* 250 F.3d 1145 (7th Cir. 2001); *Saudi Arabia v Nelson,* 100 ILR 544; the ECtHR observed in *Al-Adsani v The United Kingdom*, 35763/97, ECtHR (21 November 2001) available at: <http://www.unhcr.org/refworld/docid/3fe6c7b54.html> 1 May 2014, par. 23: "States are not entitled to plead immunity where there has been a violation of human rights norms with the character of *jus cogens*, although in most cases the plea of sovereign immunity had succeeded."

reciprocally willing to grant foreign state officials immunity.[379] Yet again an exception can be made in the case of violation of *ius cogens*, the most striking example being the *Pinochet I* case.[380] However, the *ius cogens* exception is not generally accepted when suing host state officials either.[381] There are some exceptions in civil and administrative cases according to art. 31 *Vienna Convention on Diplomatic Relations* (1961). Yet, despite these exceptions it will be difficult to hold individual state officers liable for compliance in human rights violations committed or supported by TNCs. Firstly because of the idea of immunity itself, as holding the state official liable for neglecting or omitting the human rights protection a state is supposed to grant means holding him or her liable for not fulfilling his or her state duties. Yet the state duties and their fulfilment are the very spheres the immunity of foreign state officials is supposed to protect from foreign interference. Therefore immunity will usually be granted. Secondly due to the difficulties relating to *ius cogens* in general concerning its definition and accepting the exceptions it causes on immunity as already mentioned above. In addition, the individual state official has to be identified, his responsibility has to be proven and even if the host state government is willing to pay tribute to the decision, it may simply exchange personnel by replacing the blamed person with another one who will do the same all over again instead of changing its human rights protection policy.

The following examples will provide an idea of the use of state immunity when state officials are sued in domestic courts. Immunity was granted to state officials in the already above mentioned *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others*[382] although *ius cogens* was violated by torturing the plaintiff as opposed to the *Pinochet case*[383] where the former head of state was not immune due to the grave violations of human rights he had committed. Immunity was also granted

---

[379] Ernest K. Bankas, *The State Community Controversy* (Berlin, Heidelberg: Springer, 2005) 255-6 wfr.

[380] *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte ("Pinochet I")* 3 WLR 1, 456 (UKHL, 1998).

[381] See for example *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others* [2006] UKHL 26.

[382] *Ibid.*

[383] *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte ("Pinochet I")* 3 WLR 1, 456 (UKHL, 1998) and *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3) ("Pinochet III")* [1999] UKHL 17.

in the French criminal case *SOS Attentat and Castelnau d'Esnault v Qadaffi, Head of State of Libya*[384] and in the Belgian case *Belgium H. A. S. v Ariel Sharon, Belgium Court of Cassation.*[385] Immunity was even granted by the ICJ in *Democratic Republic of Congo v Belgium*[386] on a Belgian arrest warrant against the Foreign Affairs Minister of the Republic of Congo – the warrant had to be cancelled because the ICJ held that ranking ministers were immune to criminal prosecution for war crimes and crimes against humanity committed during their terms in office. This decision was severely criticized, because in the Tokyo and Nuremberg Trials international law was already used to try state officials for *ius cogens* violations. [387] Due to a lack of legislation some state officials could not be tried for their offences as in 2001 in *Habré*,[388] a case involving crimes against humanity and torture that had to be dismissed due to a lack of legislation in Senegal.[389] In *Bouterse*[390] the principle of no retroactivity hindered further criminal prosecution. However, there is a recent example of denying immunity even to a current head of state, namely the arrest warrant the ICC prosecutor Luis Moreno-Ocampo issued against Omar al Bashir, the current president of Sudan, for war crimes and crimes against humanity in March 2009.[391] It is submitted that this approach might trigger a change in the states' attitude towards granting immunity to state officials who committed international crimes.

Yet as can be seen from the above-mentioned cases at the moment it is the exception for a state official to be tried before foreign courts and held either criminally or civilly liable[392] at the moment. As Engle puts it:

---

[384] *SOS Attentat and Castelnau d'Esnault v Qadaffi, Head of State of Libya*, Court of Cassation No. 1414 (13 March 2000).

[385] *Belgium H. A. S. v Ariel Sharon,* Belgium Court of Cassation (2003) 42 ILM 596.

[386] *Democratic Republic of Congo v Belgium* ICJ Reports 2002.

[387] See Eric Engle, *Private Law Remedies for Extraterritorial Human Rights Violations* (2006) at <http://elib.suub.uni-bremen.de/diss/docs/00010289.pdf> 1 May 2014, 165 wfr.

[388] *Habre*, Senegal Court of Cassation Dakarm (20 March 2001).

[389] Senegal changed its law since then, on the development Mandiaye Niang, "The Senegalese Legal Framework" (2009) 7 *J Int Criminal Justice,* 1047.

[390] *Bouterse*, Netherlands Supreme Court, LJN AB 1571(18 September 2001).

[391] *Request to all States Parties to the Rome Statute for the Arrest and Surrender of Omar al Bashir* ICC-02/05-01/09-7 (2009).

[392] See for tort cases brought against state officials or leaders of a territory under *ATCA* where admissibility was granted *Kadic v Karadzic* and *Republic of Philippines v Marcos*, 806 F.2d 344, 346-47 (2d Cir. 1986); examples of cases that were dismissed due to immunity are

> Practically speaking […], Pinochet's case, like that of *Congo v. Belgium* or *France v. Khaddafy* or Sharon's cases or Habré's case, is evidence of the great reluctance of states to subject the leaders of other states to personal liability for crimes against the law of nations.[393]

This is even more evident in the TNC context as human rights violation like the ones mentioned at the beginning of this research usually do not amount to international crimes.

II WHAT LAW TO USE - DETERMINING THE APPLICABLE LAW

As just seen the admissibility of a tort case in home state courts depends on various aspects and is not easily granted. Furthermore, even when a case is decided before home state courts, this does not necessarily mean that (only) home state law is applicable,[394] because cases with a foreign or international dimension are not necessarily decided upon by using the domestic law of the *forum*. In fact in trans-border cases after deciding on the appropriate *forum*, the applicable law has to be found. Depending on the law of the *forum* state the applicable law can be its own, foreign domestic law or international law. Host state law can for example be applicable in cases where the private international law of the *forum* state refers to the law of the place where the harmful event occurred. Likewise, as the home state *forum* is hard to access, this does not necessarily mean that home state law is not applicable to a case before host state courts. The applicable law depends on the legal system, the domestic law of the *forum* state, the interests of the *forum* state.[395] So the *forum* state has the most influence on the applicable law, as it uses its own rules to define the applicable

---

Frolova v Union of Soviet Socialist Republics, 761 F.2d 370, 380 (7th Cir. 1985) and *Argentine Republic v Amerida Hess Shipping Corp*., 488 U.S. 428, 431 (1989).

[393] Eric Engle, "Alien Torts in Europe? Human Rights and Tort in European Law", (2005) *ZERP-Diskussionspapier*, 1 available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1020453> 1 May 2014, 145, footnotes omitted.

[394] For the example of US courts using European law to interpret US law and the issues that arise see Eric Engle, "European Law in American Courts: Foreign Law as Evidence of Domestic Law" (2007) 33 *Ohio N. U. L. Rev.* 99.

[395] Kirchner for example points out that a relevant state interest to apply its own law in choice-of-law clauses is the protection of "certain groups of actors" Christian Kirchner, „Economic Choice-of-Law and Choice-of-Forum Clauses" in Jürgen Basedow and Toshiyuki Kono (eds) *An Economic Analysis of Private International Law* (Tübingen: Mohr Siebeck, 2006) 33, 35.

law. Some of the approaches to find the applicable law will be sketched in the following.

As far as criminal cases are concerned, applying foreign law is not as common as in tort law. That means each state usually applies its own criminal law.[396]

A *Legislation on the conflict of laws*

It was stated above that the home state *forum* will usually only be available where an action or omission of the parent company can be shown or actions of the subsidiary can be attributed to the parent, which is so far usually only done when they are not separate legal entities. Only in those cases can the home state therefore be considered the place where the harmful event was initiated or took place. Concerning the applicable law, things are similar. The applicable law for torts often is the law of the place where the harmful event occurs. This is the basic rule in for example Switzerland,[397] Canada (Québec),[398] Venezuela,[399] Italy,[400] the UK[401] and the EU.[402] Yet the applicable law for torts may also be the law of the place where the harm was caused or inflicted, as is for example the basic rule in Austria,[403] Liechtenstein,[404]Australia[405] and Germany in cases where the places of the occurrence of the harmful event and the causation differ.[406]

---

[396] Although there may be exceptions, see Gerhard Dannecker, *Das intertemporale Strafrecht* (Tübingen: Mohr Siebeck, 1993) 234 wfr; Pierre Trudel, "Jurisdiction Over the Internet: A Canadian Perspective" (1998) 32 *Int'l Law*. 1027; Wilhelm Wengler, *Internationales Privatrecht* (special ed, of vol. VI, fascicle 1 of BGB- RGRK, 12th ed, Berlin, New York: Walter de Gruyter, 1981) 11-2.

[397] Nicole Monleón, *Das neue internationale Privatrecht von Venezuela* (Tübingen: Mohr Siebeck, 2008) 151.

[398] *Ibid.*

[399] *Ibid.* at 150, referring to art. 32 *Ley de Derecho International Privado* (Venezuela, 1998).

[400] *Ibid.* at 151, referring to art. 62 I IPRG (1995).

[401] *Ibid.* referring to *Private International (Miscellaneous Provisions) Act* (1995).

[402] *Regulation (EC) No 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II)* (2007).

[403] Nicole Monleón, *Das neue internationale Privatrecht von Venezuela* (Tübingen: Mohr Siebeck, 2008) 150, referring to art. 48 IPRG (1978).

[404] Art. 40 I *Implementation Law of the German Civil Code (EGBGB)* (1994).

[405] Peter E. Nygh, *Conflict of Laws in Australia* (4th ed, Sydney: Butterworths, 1984) 287, 188-9, pointing out that the place of the wrong is the place where the negligence or omission occurs, where the wrongful act leading to the damage is committed. To define the place of the wrong is important, because the *lex loci delicti* has to be identified, as the tort can usually only be brought before the court a *forum* differing from the place where the harmful event occurred

Some states acknowledge both laws as applicable under certain circumstances. In Germany for example the plaintiff may according to art. 40 EGBGB choose between the law of the place where the harmful event occurred and the law of the place where the harm was inflicted or caused if those two places differ from one another.[407] However, *Rome II Regulation*[408] has substituted the *EGBGB* for most cases and in art. 4 it is stated that usually the law of "the country in which the damage occurs" is the applicable law. According to art. 7 *Rome II Regulation*[409] the plaintiff may choose between the law of the country where the harmful event occurred and the law of the country where the event giving rise to the damage occurred in cases of environmental damages. [410]

The Peruvian *Código Civil 1984* (Civil Code) for example states in art. 2097 that for liability in torts the place of action or in the case of omission the place where the action should have taken place, is decisive for the applicable law.[411] Yet in cases with action or omission in more than one country it could be argued that the main action or omission is decisive, because this is where there is the strongest link. That means that not only compliancy or responsibility of the parent, usually by omission, has to be shown, but also that this was the main action causing the harm, which makes the application of home state law rather unlikely.

In art. 32 the Venezuelan *Ley de Derecho International Privado* 1998 refers to the law of the place where the harmful event occurred as the applicable law in torts, yet it states that the victim may demand the application of the law of the

---

when the negligence or omission is regarded as a tort under the *lex loci delicti* and under the *lex forum*.

[406] Martin Söhngen, *Das Internationale Privatrecht von Peru* (Tübingen: Mohr Siebeck, 2006) 111, referring to art. 40 I 1 *Implementation Law of the German Civil Code (EGBGB)* (1994) which as a basic rule declares applicable the law of the place which gave rise to the harm, but allowing for exceptions according to 40 I 2 stating the exception of using the law of the state where the harmful event occurred if the plaintiff demands so.

[407] Eckart Brödermann and Joachim Rosengarten, *Internationales Privat- und Zivilverfahrensrecht* (4th ed, Köln, München: Carl Heymanns Verlag GmbH, 2007) 111.

[408] *Regulation (EC) No. 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II)* (2007).

[409] *Ibid.*

[410] *Ibid.,* Art. 7.

[411] Martin Söhngen, *Das Internationale Privatrecht von Peru* (Tübingen: Mohr Siebeck, 2006) 79 wfr.

state where the tort was caused.[412] The latter possibility includes using home state law if a home state responsibility can be shown.

B *Non-legislative ways to identify the applicable law (US approach)*

Apart from the legislative approach to private international law, the applicable law can also be defined by non-legislative approaches like in the US. The doctrine of international comity is an important basis for the domestic approaches in private international law,[413] suggesting that "courts […] should apply foreign law or limit domestic jurisdiction out of respect for foreign sovereignty"[414] and different approaches have shaped and changed it over time.[415] Currie for example suggested an interest analysis approach which provides for the application of the law of the state which has an interest in its laws application.[416] Yet to objectively decide which state has an interest in applying its law and which has not is at least difficult if not impossible in many cases and the results of the governmental analysis test are therefore far from being predictable or consistent,[417] especially in international matters of private law where balancing private interests to achieve justice is the aim of domestic law rather than certain political or economic state interests.[418]

A further idea is the "better law approach", which suggests that the law is applicable which is better equipped to solve the very issue of the individual case or aim for certain ends such as protecting the weak, or both.[419] Yet again, it is difficult to decide which law is "better", especially when foreign law is involved as a thorough knowledge of the conflicting laws is necessary for such a

---

[412] Nicole Monleón, *Das neue internationale Privatrecht von Venezuela* (Tübingen: Mohr Siebeck, 2008) 149.

[413] The comity principle was in this context not considered part of international law, but as a US common-law doctrine, see Joel R. Paul, "The transformation of international comity" (2008) 71 *Law and Contemp. Probs.* 19, 37.

[414] *Ibid.* wfr.

[415] *Ibid.*, on *Restatement First* until Currie's interest analysis approach see p. 28 wfr.

[416] Brainerd Currie, *Selected Essays on the Conflict of Laws* (Durham: Duke University Press, 1963) 183; Jan Kropholler, *Internationales Privatrecht* (6th ed, Tübingen: Mohr Siebeck, 2006) 90 wfr.

[417] Jan Kropholler, *Internationales Privatrecht* (6th ed, Tübingen: Mohr Siebeck, 2006) 91wfr.

[418] *Ibid.* wfr.

[419] *Ibid.* wfr; Robert A. Leflar, "Choice- Influencing Considerations in Conflicts Law" 41 *N.Y.U.L. Rev*. (1966) 267.

decision[420] and again foreign states could feel neglected or disrespected when the *forum* law is considered to be the "better" one. There are many more ideas and suggestions on when to apply foreign law and how to decide on this patchy matter.[421] To shed some light on the various ideas and approaches, Beale and later Reese tried to create rules and benchmarks for the applicable law on the basis of case law and the many ideas and approaches taken. *Restatement First* and *Second*, had little success either due to a rigid or too vague approach, while *Restatement Third* calls for more consensus on the topic than there is at the moment.[422] US courts mainly use *Restatement Second* despite its obstacles and uncertain outcomes.[423]

III EASIER SAID THAN DONE - APPLYING DOMESTIC HOME STATE LAW IN THE TNC CONTEXT

Being applied on trans-border cases is not the most established role of domestic law. Public international law has to be observed when creating and applying such law. That is for example why questions of *forum* and liability of host states and host state officials cannot be determined by domestic home state law, but are left to public international law. Concerning private actors that are not host state officials, home states are quite flexible in their rules determining the *forum* and applicable law in trans-border cases. Yet the content of the applicable domestic law has to be considered carefully. It should for example be kept in mind that (so far) home state law that could provide for parent liability is only applicable in cases where the place of causation of the harm is decisive for the applicable law and not the place where the harmful event occurred. Proving a neglect, omission of aid and assistance by the parent company may be rather difficult depending on the very design of the applicable law. However, enforcing judgements is easiest in the state where they were delivered and - even more so -

[420] *Ibid.* at 92.
[421] See for example Milena Sterio, "The Globalization Era and the Conflict of Laws: What Europe Could Learn from the United States and Vice Versa" (2005) 13 *Cardozo J. Int'l & Comp. L.* 161 wfr; Bernard Grossfeld and C. Paul Rogers "A Shared Values Approach to Jurisdictional Conflicts in International Economic Law" (1983) 32 *ICLQ* 931.
[422] Jan Kropholler, *Internationales Privatrecht* (6th ed, Tübingen: Mohr Siebeck, 2006), 90, 92, wfr.
[423] *Ibid.* at 92-3, wfr.

when also the liable party is situated there. That means holding the parent liable instead of the subsidiary makes it easier for the home state to handle the enforcement, because it does not have to rely on the contribution of a possibly unwilling or unable host state. Furthermore, the existing case law on TNCs' human rights violations abroad suggests that reproaches of imperialism and protectionism seem not to arise as much where the parent is held liable in the home state. In the UK, Australia and Canada for example the "duty of care" principle is used to pierce the corporate veil to hold the parent liable for violations of human rights committed by subsidiaries abroad.[424] According to this principle "[a] private actor will be liable if it is proved that it owed a duty of care to the plaintiffs, breached that duty, and the breach caused the injury complained of."[425] UK examples are *Sithole and others v Thor Chemicals Holdings Ltd*,[426] *Lubbe & Ors v Cape Plc*.[427] and *Connelly v RTZ.*[428] In these cases workers were exposed to harmful substances in Namibia and South Africa such as uranium, asbestos and mercury and suffered health damages. Although it is considered important under UK law that parent and subsidiary are separate entities, the veil was pierced in these cases and the parent was held liable for the harms caused. Whether the duty of care lies with the parent company depends on the control the parent has over its subsidiary, including financial control, whether the subsidiary repatriates its profits to the parent and the knowledge and contribution of the parent about the wrongs. That means

> [i]f the parent company was aware of the dangers caused by its practices, but took advantage of lower safety standards in other countries to expose people to greater risks than would be acceptable in the UK, this is a failure of due care on its part.[429]

---

[424] IRENE "Controlling Corporate Wrongs: The Liability of Multinational Corporations" 1 *LGD* (2000), available at <http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2000_1/irene/> 1 May 2014.
[425] Danwood Mzikenge Chirwa, "The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights" (2004) 5 *Melb JIL* 1.
[426] *Sithole & Ors v Thor Chemicals Holdings Ltd & Anor* TLR 15/2/1999.
[427] *Lubbe v Cape plc* [2000] UKHL 41.
[428] *Connelly v RTZ Corporation plc* [1998] AC 854, RTZ is now Rio Tinto, see Rio Tinto Website <http://www.riotinto.com> 1 May 2014.
[429]IRENE "Controlling Corporate Wrongs: The Liability of Multinational Corporations" 1 *LGD* (2000), available at <http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2000_1/irene/> 1 May 2014, 4.

Australian and Canadian Courts have decided in similar ways. The Australian case *James Hardie & Co. Ltd. v Hall*[430] for example involved two subsidiaries of an Australian company one in Australia, the other one in New Zealand. A former New Zealand employee filed claim due to health damages caused by the asbestos he inhaled when working for the company, handling asbestos cement building products.[431] In first instance the court ruled that due to the close relationship and control of the parent over its subsidiaries, the parent was liable for the harm caused, because parent and subsidiaries were to be treated as one single legal entity. However, this decision was reversed by the appeal court which held that parent and subsidiaries were separate legal entities.[432] A further case, the *BHP* case,[433] dealt with pollutions in Papua New Guinea caused by BHP, an Australian mining company.[434] However, due to Papua New Guinea's opposition to the case being filed in Australia because of sovereignty matters, a secret settlement was reached.[435] Although this may not be a totally satisfying result, it shows that even when the host state does not want the trial to take place, victims may be granted a *forum* and at least some sort of settlement and compensation is possible on a case by case basis so that home states do not have to refrain from dealing with those cases before their courts just because they fear that in some cases host states might oppose. These examples show once more that holding the parent liable is an existing state option, as already sketched above when outlining the admissibility of cases before domestic courts in civil

---

[430] See *James Hardie & Co. Ltd. v Hall* (1998) 43 NSWLR 554.
[431] Halina Ward, "Transnational Litigation 'Joining Up' Corporate Responsibility?"(2000) *CEPMLP Internet Journal*, article 19 <http://www.dundee.ac.uk/cepmlp/journal/html/vol7/vol7-19.html> 4 June 2009.
[432] Halina Ward, "Transnational Litigation 'Joining Up' Corporate Responsibility?"(2000) *CEPMLP Internet Journal*, article 19 <http://www.dundee.ac.uk/cepmlp/journal/html/vol7/vol7-19.html> 4 June 2009.
[433] *Dagi v BHP* [1995] 1 VR 428 (SCt Vic) resulted in friendy settelemt, see Stuart Kirsch, "Cleaning up Ok Tedi: Settlement Favors Yonggom People" (1996) 4 (1) *J. Int'l Inst.* <http://hdl.handle.net/2027/spo.4750978.0004.104> 1 May 2014; see also *Australian Associated Press*, "Court dismisses OK Tedi proceedings" (16 January 2004) <http://www.theage.com.au/articles/2004/01/16/1073878030907.html> 1 May 2014.
[434] IRENE "Controlling Corporate Wrongs: The Liability of Multinational Corporations" 1 *LGD* (2000), available at <http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2000_1/irene/> 1 May 2014, 4; Halina Ward, "Transnational Litigation 'Joining Up' Corporate Responsibility?"(2000) *CEPMLP Internet Journal*, article 19.
[435] IRENE "Controlling Corporate Wrongs: The Liability of Multinational Corporations" 1 *LGD* (2000), available at <http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2000_1/irene/> 1 May 2014, 4.

law systems. The case law just mentioned seems to suggest that there is some acceptance to hold parent companies liable for their human rights violations abroad.

Apart from the already above mentioned advantage of easier enforcement if such liability is approved, some voices even argue that in the human rights context it could actually be a state duty to create and apply human rights protection law extraterritorially.[436] It is argued that domestic and regional law protecting individuals from human rights violations by other private actors already exists[437] and the extraterritorial application of domestic law is not in general alien to public international law either.[438] The idea of expanding state duties to protect human rights derives from the traditional viewpoint that states are primarily responsible for human rights protection,[439] including the duty to prevent private actors from violating the human rights of others,[440] which includes businesses. It is pointed out that although states already bear the obligation to protect individuals from human rights violations by other private actors TNCs can still violate human rights and it is difficult to hold them legally responsible or liable.[441] It is therefore suggested that states "agree upon rules of

[436] See International Council on Human Rights Policy, *Beyond Voluntarism: human rights and the developing international legal obligations of companies* (Vernier: Roto Press, 2002), 3.
[437] There is a great variety reaching from regional international law like the *ECHR* and the corresponding case law to domestic criminal and private law protecting the individual from violations caused by others or the domestic protection of basic rights with *Drittwirkung* like in the German *Grundgesetz* or the Dutch Constitution.
[438] See for example Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 125 -129; on the issue of human rights and transnational corporations and other business enterprises see *Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled "Human Rights Council", "Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts" Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises* A/HRC/4/035 (9 February 2007) Summary par. 15.
[439] International Council on Human Rights Policy, *Beyond Voluntarism: human rights and the developing international legal obligations of companies* (Vernier: Roto Press, 2002), 3.
[440] Olivier de Schutter, "The Challenges of Imposing Human Rights Norms on Corporate Actors" in Olivier de Schutter (ed), *Transnational Corporations and Human Rights* (Oxford, Portland: Hart Publishing, 2006) 1, 19.
[441] See for example Celia Kay Wells and Juanity Elias, "Catching the Conscience of the King: Corporate Players on the International Stage" in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford: University Press, 2005) 141, 172.

international law enabling states to exercise control anywhere, and not only on the territory where an NGO [or TNC] has its seat."[442] Otherwise - it is argued - going international is equal to avoiding national control and states lose this control over their TNCs.[443] Having subsidiaries in states with lower human right standards or less enforcement mechanisms and control can be much cheaper for a TNC and is a good way to escape the home state human rights protection laws.[444] To achieve broader and more effective protection of human rights also by TNCs acting abroad and to avoid legal loopholes, [445] it could therefore help to allow home states to directly apply their law beyond their borders onto "their" TNCs. The HRC and the ICJ have stressed the state duty not to violate human rights abroad and to prevent its private actors from doing so[446] and John Ruggie observed that "[i]ndeed, there is increasing encouragement at the international level, including from the treaty bodies, for home States to take regulatory action

---

[442] Wilfried Bolewski, *Diplomacy and International Law in Globalized Relations* (Berlin, Heidelberg: Springer, 2007) 60.

[443] *Ibid.*

[444] For branches this is slightly different as they are regarded as a legal entity with the parent, which also makes the parent liable for actions of the branch, see Nikolaus Buch, Sven Oehme and Robert Punkenhofer, *Firmengründung in den USA* (Berlin, Heidelberg, New York: Springer, 2004) 56.

[445] See for criticism of the current legal situation as mentioned above Olivier de Schutter, "The Accountability of Multinationals for Human Rights Violations in European Law" in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford: University Press, 2005) 227, 239-40; for examples supporting this approach see for example UN General A/HRC/8/5 *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development- Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* A/HRC/8/5/Add.2 (23 May 2008) <http://198.170.85.29/Ruggie-2-addendum-23-May-2008.pdf> 1 May 2014*, Summary* par. 19; Michael Krennerich, "Menschenrechte ohne Grenzen – welche Pflichten für Deutschland?" ("Human Rights without borders - which duties for Germany?") 9 November 2006, discussion report on the symposium, host: Brot für die Welt, Evangelischer Entwicklungsdienst, FIAN Deutschland and FIAN International 2 wfr.

[446] Danwood Mzikenge Chirwa, "The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights" (2004) 5 *Melb JIL* 1, VI A, referring to the case of *Lilian Celiberti de Casariego v Uruguay*, Human Rights Committee, Communication No 56/1979, UN Doc CCPR/C/13/D/56/1979 (29 July 1981), where the HRC found that states can be held accountable for actions of their agents committed abroad and *Nicaragua v United States of America* 1986 ICJ 14, where the ICJ found that by funding a revolutionary rebel force in Nicaragua, the US were responsible by violations committed by them.

to prevent abuse by their companies overseas."[447] The - not undisputed - practice of humanitarian interventions,[448] as well as the *UN Charter*, especially art. 1 and 55, both stress the importance of human rights protection and the obligation to protect human rights beyond state borders. As already mentioned earlier, the principle of universalism of human rights can lead to the assumption of universal obligations to protect human rights. And because states are the main addressees of duties to protect human rights, at least in current public international law, they would be in charge of such a universal protection as well. Thus, by using extraterritoriality to secure human rights against non-state actors, states might even fulfil their duty to ensure and secure human rights.[449] It is claimed that due to their universality, human rights are "not a territorial concept" and that the state "obligations cannot be restricted to apply human rights protection laws only to people living within a state's territory."[450] Hausmann and Künnemann are of the opinion the principle of universality is even reflected in positive law in art. 2.1 CESC, which is not limited to the territory of the state party:

> A state has to meet its extraterritorial obligations either individually, in cooperation with the state of the possible victim, or in cooperation with other states, for example in the context of specialised UN agencies. While all states parties to the Covenant have the obligation to cooperate, cooperation is not a goal in itself but an instrument to achieve the progressive realisation of the rights recognised in the Covenant.[451]

---

[447] *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development- Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* A/HRC/8/5/Add.2 (23 May 2008) <http://198.170.85.29/Ruggie-2-addendum-23-May-2008.pdf> 1 May 2014*, Summary* par. 19.

[448] Stephan Hobe, "Globalisation: a challenge to the nation state and to international law" in Michael B. Likosky (ed), *Transnational Legal Processes, Globalisation and Power Disparities* (Cambridge: Cambridge University Press, 2002) 378, 385.

[449] August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors" in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford: University Press, 2005) 37, 53- 4.

[450] See Ute Hausmann and Rolf Künnemann, "Globalising economic and social human rights by strengthening extraterritorial state obligations- Germany's extraterritorial human rights obligations, Introduction and six Case Studies" (Brot für die Welt, FIAN, EED, No. 6, October 2006) 7.

[451] *Ibid.* at 10-1.

Krennerich stresses "the logical extension" of universal rights are "corresponding obligations [that are] universal as well" [452] and it cannot matter which state is violating the rights[453] by omission of legislation or actions to prevent human rights violations by private actors. It is even suggested that the legitimacy of a government making decisions which harm the human rights of others may be doubted.[454]

However, creating human rights protection law with extraterritorial application of effect is not easy. The existence of a state duty to do so is not exactly a majority opinion under public international law. The attempts of passing domestic laws with this very content have not been successful so far. Instead the laws were considered to be disrespecting the host states' sovereignties and causing legal uncertainties. Yet this does not mean that creating such laws is not possible now or in the decades to come. In fact, domestic laws that can be applied extraterritorially do already exist under public international law. The current requirements and conditions for such laws will be sketched now, before having a closer look at some legislatory attempts in the TNC context and their potential for possible future developments.

A *Extraterritoriality in public international law – basic ideas and concepts*

As already mentioned above, the idea of extraterritorial application of domestic law is not in general alien to public international law. Yet one of the principles and concepts of public international law is that all states, basically consisting of territory, people and power,[455] are equal and sovereign[456] and therefore each state must be able to exercise its power over its people on its territory in a

[452] Michael Krennerich, "Menschenrechte ohne Grenzen – welche Pflichten für Deutschland?" ("Human Rights without borders - which duties for Germany?") 9 November 2006, discussion report on the symposium, host: Brot für die Welt, Evangelischer Entwicklungsdienst, FIAN Deutschland and FIAN International 2 wfr.
[453] *Ibid.* wfr.
[454] William Nelson, "Rights against institutions: What Governments Should and Can Do" David A. Reidy and Mortimer N. S. Sellers (eds), *Universal Human Rights* (Lanham: Rowman & Littlefield, 2005), 127, 128.
[455] Art. 1 *Montevideo Convention on Rights and Duties of States* (1933).
[456] See Malcolm Shaw, *International Law* (4th ed, Cambridge: Cambridge University Press, 1997) 149-153.

sovereign way without interference of another state,[457] as explicitly laid down in the *Montevideo Convention*[458] and the *UN Charter*[459]. That is why usually host state law is applicable to branches, subsidiaries etc in the host state like environmental and labour law, protecting for example health and safety of workers and the population - and therefore human rights. However, expanding the power beyond state borders always means touching another state and its sovereignty. That raises the question of whether there can be extraterritorial jurisdiction without violating international law. Universal jurisdiction is not generally accepted in public international law.[460] However, the idea of extraterritorial application of domestic law is not alien to public international law and is slightly different from universal jurisdiction. Extraterritorial application of domestic law is generally accepted when there is a connection of the state seeking to exercise jurisdiction and the issue or person involved. In addition, the application of domestic law has to be reasonable.[461] In cases such as *Banković*,[462] *Loizidou v. Turkey*[463] and *Öcalan v. Turkey*[464] the ECtHR, for example, made clear that states and state actors can be bound by the *European*

---

[457] Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007)125-6.
[458] *Montevideo Convention on Rights and Duties of States* (1933).
[459] Art. 2 par. 7 *Charter of the United Nations* (1945).
[460] See Olivier de Schutter, "The Accountability of Multinationals for Human Rights Violations in European Law" in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford: University Press, 2005) 227, 291.
[461] See for example Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 126; *Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled "Human Rights Council", "Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts" Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises* A/HRC/4/035 (9 February 2007) Summary par. 15.
[462] *Banković and Others v Belgium and Others* (dec.) [GC], no. 52207/99, ECHR 2001-XII – (12. December 2001) here the ECtHR decided that there was no sufficient link between the victims who were citizens of the Federal Republic of Yugoslavia (FRY), and the acting NATO states to apply the ECHR, as the Convention was not applicable in the FRY.
[463] *Loizidou v Turkey*, E.Ct.H.R. (28 July1998) here the ECtHR found that Turkey by acting abroad violated the human rights of those Cypriots who were forced to leave their homes during the Turkish invasion and wished to return to their homes in Cyprus later.
[464] *Öcalan v Turkey* [GC], no. 46221/99, ECHR 2005-IV – (12. May 2005) here the ECtHR ruled that Turkey was responsible for human rights violations that occured due to an arrest of a Turkish national at the Nairobi Airport by Turkish officials. In the particular case the way he was transferred back to Turkey and the circumstances of his detention there had amounted to inhuman treatment.

Convention outside their territories, using as the decisive factor the effective control exercised in the foreign territory.[465] ICJ decisions also suggest the need for a genuine connection between the subject matter and the territory of the state seeking to exercise jurisdiction.[466] Jurisdiction can for example be based on nationality, like in criminal law in cases in which the victim is a national or the perpetrator is a national of the applying state.[467] Apart from connecting factors such as the territory, nationality or the effective control, jurisdiction is also accepted once vital interests of the state seeking to exercise the jurisdiction are affected, the so-called protective jurisdiction.[468] So far these traditional links for jurisdiction combined with a reasonableness test seem to be the most commonly accepted way of extraterritorial application of domestic law.[469] This is because the common perception is that despite the broadly accepted universalism of human rights, international law does not require states to exercise extraterritorial jurisdiction over business abuse, but - and this is important for this research - they are not prohibited from doing so either when there is "a recognized basis of jurisdiction […] and the actions of the home State meet an overall reasonableness test."[470] The most important bases to trigger extraterritorial jurisdiction for TNCs due to their special situation and connection to the home state are therefore protective jurisdiction, objective territorial jurisdiction and nationality.[471]

---

[465] See for an analysis of the cases Tarik Abdel-Monem, "How far do the lawless areas of Europe extend? Extraterritorial application of the European Convention on Human Rights" 14 (2005) *J. Transn'l L. & Pol'y* 159.

[466] *Anglo-Norwegian Fisheries Case (United Kingdom v Norway)* ICJ Reports 1951, 116; *Nottebohm (Liechtenstein v Guatemala)* ICJ Reports 1953, 111.

[467] See for example Olivier de Schutter, "The Accountability of Multinationals for Human Rights Violations in European Law" in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford: University Press, 2005) 227, 285.

[468] See Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 127.

[469] *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development- Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* A/HRC/8/5/Add.2 (23 May 2008) <http://198.170.85.29/Ruggie-2-addendum-23-May-2008.pdf> 1 May 2014 *Summary* par. 19.

[470] *Ibid.*; see further Olivier de Schutter, "The Accountability of Multinationals for Human Rights Violations in European Law" in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford: University Press, 2005) 227, 237, 239-40.

[471] See Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 126.

1 *Protective jurisdiction*

Protective jurisdiction, *i.e.* jurisdiction deriving from the idea of protecting the vital interests of the applying state,[472] is mainly mentioned in cases of tax avoidance by the parent company - but this is very debatable, especially when mere economic interests of the applying state are at stake.[473] However, the case of human rights violations by TNCs abroad is not tackled by protective jurisdiction. Even when thinking of human rights as universal, it is difficult to argue that the home state's vital interests as a state are at stake when human rights are violated elsewhere by its TNCs. Furthermore, such a line of argumentation would not be desirable either, as this would cause a lot of instability on the international level when taken seriously.[474]

2 *Objective territorial jurisdiction*

Objective territorial jurisdiction is given when a criminal offence is commenced abroad and completed within the applying state's territory.[475] The problems are different criminal laws in different states, criminalizing or not criminalizing different actions and the interpretation of the causal connection of completion of the crime.[476] However, completing a commenced criminal offence in the home state seems pretty unlikely for TNC-linked human rights issues. The effects of a human rights violation would have to be produced in the home state.[477] Apart from cases of goods and services that harm consumers' human rights, it is thinkable to include cases where goods contain insanitary substances and therefore harm the workers' right to health in the host country as well as the consumers' right to health in the importing country, which may be the home state. The state option to implement corresponding domestic laws is already accepted and a state may furthermore tackle such threats for its own population by its import regulations. For the rare cases of goods or services that violate

[472] *Ibid.* at 127.
[473] *Ibid.*
[474] See also Chapter V; sanctions could be applicable more easily when assuming that vital interests of a state or of all states are at stake.
[475] Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 127-8.
[476] *Ibid.* at 128 wfr.
[477] *Ibid.*; *The Case of the S. S: Lotus (France v Turkey) ("Lotus")* 1927 P.C.I.J. (ser. A.) No. 10 (7 September).

human rights in the home state, home state laws may therefore be applicable. Yet this option is neither confined to home states of TNCs acting abroad nor to TNCs as perpetrators of the human rights violation. However, for cases where human rights are violated abroad by TNCs acting abroad, this is not helpful.

3 *Nationality*

A more compelling commection could be nationality. In the cases of TNCs acting abroad, the nationality of the parent company could constitute the needed link.[478] Although TNCs are not equal to private individuals in many respects as seen above, the nationality link seems applicable, especially since the *Barcelona Traction* decision.[479] There is even a state practice in using domestic regulatory mechanisms on TNCs of their nationality in, for example, competition law, shareholder and consumer protection, [480] and through obligations imposed by international treaties such as the recent *UN Convention against Corruption.*[481] In addition, all the industrialised states agreed to non-binding *OECD Guidelines* which are rules for TNC behaviour and are considered "guides as to best practice in relation to the corporate nationals of those states, wherever they are operating."[482] US law for example even allows for extraterritorial application of domestic law in trade matters in two cases, both linked to nationality: US good related regulations concerning re-imports and regulations concerning the person of the exporter. If corporations abroad are controlled by US natural or legal persons, US law may regulate their behaviour.[483] In cases where the subsidiary of the TNC acting abroad is not incorporated and is therefore still of home state "nationality" home states may apply their human rights laws according to their legislation. Yet concerning foreign or incorporated subsidiaries, the link of

---

[478] See Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 127.
[479] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgement (Belgium v Spain)*, ICJ Reports 1970.
[480] Robert McCorquodale, "Spreading Weeds Beyond Their Garden: Extraterritorial Responsibility of States for Violations of Human Rights by Corporate Nationals" (2006) *ASIL Proceedings, Panel 10, "The Extraterritorial Application of Human Rights"* 11, 15 wfr.
[481] *UN Convention against Corruption (UNCAC)* (2003).
[482]Robert McCorquodale, "Spreading Weeds Beyond Their Garden: Extraterritorial Responsibility of States for Violations of Human Rights by Corporate Nationals" (2006) *ASIL Proceedings, Panel 10, "The Extraterritorial Application of Human Rights"* 11, 15.
[483] Almut Hinz, *Sanktionen gegen Libyen* (Frankfurt a. M.: Peter Lang, 2005) 185-6.

nationality of the parent can in fact be considered disregarding "the legal nationality of the subsidiary as a juristic person incorporated under the law of the host state."[484] Once a subsidiary is incorporated, the dilemma of contradicting legal rules emerges. Home and host state both try to impose their laws onto the party of the TNCs in the respective other state and the obedience to one legal system by the TNC can result in the violation of the other or maybe even standards are applied, which the other state's law does not accept. This can result in serious political problems, as one state might appear to be treating the legal system of the other as inferior or its sovereignty is disregarded.[485] Yet as far as human rights are concerned, most states at least formally share the same principles, so that contradicting laws will not exist in most cases, rather host states are too weak or unwilling to control compliance and to implement human rights obligations. However, host states may still feel they are treated as inferior or disrespected when home state law is applied within their jurisdiction. That means nationality of the parent company is only an accepted linking factor as far as unincorporated subsidiaries are concerned. Incorporated subsidiaries have a "nationality" of their own, namely that of the host state, which means the "nationality" linking factors cannot be applied.

4 *Additional link for TNCs: the factual control of the parent company*

As incorporated subsidiaries are not sufficiently linked to the home state of the TNC by the traditional linking factor "nationality", as already mentioned in the beginning of this research, an additional linking factor could be used with regard to TNCs and their incorporated subsidiaries abroad. Such a link could be the factual control the parent company has over its foreign subsidiary.[486] A similar approach is taken by the UN in different approaches to set up rules for TNC

---

[484] Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 115.
[485] See for further details Muchlinski, *ibid.* at 116.
[486] Jonathan Clough, "Not-so Innocents Abroad: Corporate Criminal Liability for Human Rights Abuses" (2005) 11 *AJHR* 1; Sol Picciotto, "Rights, Responsibilities and Regulation of International Business" (2003) 42 *Colum. J. Transnat'l L.* 131, 148; see generally on shareholder liability according to control Nina A. Mendelson, "A Control-Based Approach to Shareholder Liability for Corporate Torts" (2002) 102 *Colum. L. Rev.* 1203.

behaviour.[487] It is also for example accepted in art. 3 of the German model contract of bilateral investment agreements and different international arbitration cases in this context.[488] It is also similar to the effects doctrine used in US law[489] and the effects theory *(Wirkungstheorie)* established in the aftermath of the *Lotus Case*[490] where the ICJ decided that states were free to apply domestic law outside their territories unless this application violated public international law.[491] According to this - not generally accepted - theory a state may apply or implement domestic law abroad when a foreign action or cause has an effect in the applying or implementing state,[492] namely a serious, direct and predictable impact on the state wishing to apply its domestic law.[493] However, the idea of the factual control as a linking factor is slightly different, as the impact on the home state is hard to find when TNCs as private actors of host state nationality are acting abroad. The home state is not affected as much, nor is the home state directly controlling the subsidiary incorporated abroad in a way that would create state responsibility or liability.[494] Rather a link to the home state is given

---

[487] See *Norms of Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights* (2003) U.N. Doc. E/CN.4/Sub.2/2003/12 (13 August 2003); *Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, A/HRC/17/31, (21 March 2011) <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> 1 May 2014; *UN Global Compact* Website <http://www.unglobalcompact.org/> 1 May 2014; these approaches will be sketched in more detail below in Chapter III.

[488] See Jan Ceyssens, Nikola Sekler, "Bilaterale Investitionsabkommen der Bundesrepublik Deutschland" (Study at the University Potsdam, 2005) <http://opus.kobv.de/ubp/volltexte/2004/612/> 1 May 2014, 94-95 wfr including arbitration cases.

[489] See for further details Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007)133-9.

[490] Klaus Bockslaff, *Das völkerrechtliche Interventionsverbot als Schranke außenpolitisch motivierter Handelsbeschränkungen* (Berlin: Duncker & Humblot, 1987) 124; *The Case of the S. S: Lotus (France v Turkey) ("Lotus")* 1927 P.C.I.J. (ser. A.) No. 10 (7 September).

[491] Klaus Bockslaff, *Das völkerrechtliche Interventionsverbot als Schranke außenpolitisch motivierter Handelsbeschränkungen* (Berlin: Duncker & Humblot, 1987)124, fn 150.

[492] *Ibid.* at 125.

[493] See *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgement (Belgium v Spain)*, ICJ Reports 1970; Kinka Gerke, "Die unilaterale Versuchung: Die Sanktionen der USA gegen die Handelspartner Kubas, Irans und Libyens und ihre Auswirkung auf das Welthandelsregime" (1997) 2 *HSFK-Report* 1, 45; *The Case of the S. S: Lotus (France v Turkey) ("Lotus")* 1927 P.C.I.J. (ser. A.) No. 10 (7 September).

[494] For state responsibility and liability see for example Danwood Mzikenge Chirwa, "The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights" (2004) 5 *Melb JIL* 1, especially III.

as a "national" of the home state, *i.e.* the parent company, has factual control over its subsidiaries of a different nationality, which may ease and support home state law application. The link by factual control of the parent company over the subsidiary in the host state would prevent TNCs from establishing foreign subsidiaries etc to avoid home state control and at the same time would make sure that separated entities are treated separately, whereas only formally or legally separated entities could still be treated as two separate but connected entities that are therefore linked to the home state jurisdiction.[495] This control would have to go beyond the mere ownership of shares and could be similar to the approach developed by the EU when deciding on anti-trust matters according to art. 101 and 102 *TFEU*[496] looking at the substance rather than the form of the corporate nationality.[497] The US takes a similar approach, establishing economic links between the parent and the foreign subsidiary[498] and moving from entity law towards an enterprise principle.[499] However, although the approaches seem to become more liberal and more similar, much depends on the legal system and the legal culture involved when establishing the benchmarks for the necessary links of parent and subsidiary and there is no international consensus on such a connecting factor (yet). This means that the host state could still feel disrespected and humiliated when home state law is applied in spite of the link of factual control. Yet this does not exclude the state option of raising awareness and support for such a linking factor on the bi- and

---

[495] See Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007)140-147; see Jan Wouters and Cedric Ryngaert, "Transnational Corporate Responsibility for the 21st Century: Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction" (2009) 40 *GWILR* 939, 941 arguing that a nexus exists at least where Western headquarters organize the TNC groups' activities.

[496] Former articles 81 and 82 *Treaty Establishing the European Community (TEC)* (1992).

[497] Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 145, mentioning for the reverse case of foreign parent companies with subsidiaries within the EU mainly *Wood Pulp* [1985] 3 CLMR 474.

[498] See Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 143-44, referring to amongst other things to the more recent cases of "alter ego jurisdiction", meaning the subsidiary may be considered as the alter ego of the parent in certain cases, such as *Simeone v Bombardier Rotax GmbH* (US Dist Ct E Dist Penn, decided 9 March 2005); *Victor Meier v Sun International Hotels* 288 F 3d (US CA 11th Cir, decided 19 April 2002) par. 24-35; *Wiwa v Royal Dutch Petroleum* 226 F.3d 88 (US App. 2000).

[499] See Philip I. Blumberg, "The increasing recognition of enterprise principles in determining parent and subsidiary corporation liabilities" (1996) 28 *Conn. L. Rev.* 295.

multilateral level and introducing this approach to the balancing of interests, which could be a core element in finding a way to apply domestic law abroad as will be set out below.

B *Legislatory attempts*

Although the linking factors are limited as just seen, there have been some attempts by some domestic legislators to create laws, *i.e.* binding and enforceable rules to hold TNCs liable that are acting abroad. The three main attempts that will be sketched in the following are the *Corporate Code of Conduct Act*[500] (US Bill) introduced as a bill to the US Congress in June 2000, 2001 and again in 2006,[501] the *Corporate Code of Conduct Bill*[502] (AUS Bill) introduced to the Parliament in Australia in September 2000 and the *Corporate Responsibility Bill*[503] (UK Bill) introduced to the UK House of Commons in 2003.

In sec. 2 (3) US Bill reference is made to a European Code of Conduct passed by the European Parliament, calling on European businesses to comply with European law abroad, yet this is no extraterritorial legislation.[504] Dutch

---

[500] *To require nationals of the United States that employ more than 20 persons in a foreign country to implement a Corporate Code of Conduct with respect to the employment of those persons, and for other purposes* [short title: *Corporate Code of Conduct Act*] 106th Congress 2nd session H. R. 4596, 107th Congress 1st session H. R. 2782 and 109th Congress 2nd session H. R. 5377, <www.opencongress.org> and <http://thomas.loc.gov> 1 May 2014.

[501] The 2006 Bill is almost identical to the 2000 Bill, only some minor changes in formulation have been made in clause 2 (2) (B) clause 2 (4), clause 3 (b) (89) (G) (ii) and clause 6 (a).

[502] *A Bill for an Act to impose standards on the conduct of Australian corporations which undertake business activities in other countries, and for related purposes* [short title: *Corporate Code of Conduct Bill] Cth, 2000.*
<http://www.comlaw.gov.au/Details/C2004B01333> 1 May 2014.

[503] *A Bill to Make a provision for certain companies to produce and publish reports on environmental, social and economic and financial matters; to consult on proposed operations of the company; to specify certain duties and responsibilities of the directors; to establish a right of access to the information held by companies; to specify the powers and duties of the Secretary of State; to provide for remedies for aggrieved persons; and for related purposes* [short title: *Corporate Responsibility Bill*] Bill No129 of 2003 (UK)
<http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmbills/145/2002145.pdf> 1 May 2014.

[504] There is a *Resolution on EU standards for European enterprises operating in developing countries: towards a European Code of Conduct* (A4-0508/98) in C 104/280 (15 January 1999) as well as a *Green Paper on Promoting a European framework for Corporate Social Responsibility* COM(2001) 366 final (18 July 2001) and some communications on the issue

intentions to create an equivalent law are also mentioned,[505] yet no such law exists so far.[506]

The US and the AUS Bill did not become law either, yet their intentions and set-up deserve some attention, especially as for the AUS Bill there is a Parliamentary Report.

1 *US Bill*

The US Bill sets out the following requirement in sec. 3 (a):

> A national of the United States that employs more than 20 persons in a foreign country, either directly or through subsidiaries, subcontractors, affiliates, joint ventures, partners, or licensees (including any security forces of the national), shall take the necessary steps to implement the Corporate Code of Conduct described in subsection (b) with respect to the employment of these persons.[507]

The set out Code of Conduct includes among other things providing a safe and healthy working place, ensuring fair employment and compliance "with internationally recognized worker rights and core labor standards."[508] Environmental protection and minimum human rights standards are also mentioned[509] and treaties and conventions are referred to in clause 3 (c).[510] Incentives to comply with the Code of Conduct are given in clause 4 as the title of this section already discloses: "Preference in award of contracts and provision of certain foreign trade and investment assistance".[511] This preferential

---

see *Communication from the Commission concerning Corporate Social Responsibility: A business contribution to Sustainable Development* COM/2002/0347 final <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002DC0347&rid=1> 1May 2014 and *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee implementing the partnership for growth and jobs: making Europe a pole of excellence on Corporate Social Responsibility* COM/2006/0136 final < http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006DC0136&rid=1> 1 May 2014.

[505] Halina Ward, "Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options" (2001) 24 *Hastings Int'l & Comp. L. Rev.* 451 wfr.

[506] See Nicola Jägers and Marie-José van der Heijden, "Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands" (2008) *Brook. J. Int'l L.* 833.

[507] Clause 3 (a) *Corporate Code of Conduct Act* H. R. 5377 (2006).

[508] *Ibid.* clause 3 (b).

[509] *Ibid.*

[510] *Ibid*. clause 3 (c) (3).

[511] *Ibid.* clause 4.

treatment triggers reporting duties on the part of the business.[512] The compliance with the Code can be investigated according to clause 5[513] and depending on the compliance contracts and assistance can be terminated, withdrawn, suspended and preference can be limited.[514] A civil liability for damages before US courts is granted in clause 8 (b) (2) to the aggrieved individual, "the heirs, estate or legal representatives of the individual."[515]

Despite the broad scope of the Bill,[516] some authors doubt whether it was "robust"[517] enough and suggest that it should have included an "adequate construction of core human rights standards in terms of the applicability to MNCs."[518] It should also have made some statements on parent liability, the adjudication and enforcement of orders and judgements, the *forum non conveniens* issue and the role NGOs, consumers and investors could play.[519] As the Bill never became an Act, it could not be found out whether it was "robust" enough for its use in practice. However, at least some comment on *forum non conveniens* decisions and the enforcement of court orders and decisions seems to be a good idea, as *forum non conveniens* has played a major role in some cases in the US concerning corporations acting abroad as mentioned already.[520]

Others point out that the Bill is only applicable to US "nationals" which again raises the question of how to treat legally separate entities acting abroad such as incorporated subsidiaries.[521] In addition, they remark that the US bill is "more a carrot than a stick" as it uses incentives rather than negative consequences as means of enforcement.[522]

---

[512] *Ibid.* clause 7.
[513] *Ibid.* clause 5.
[514] *Ibid.* clause 6.
[515] *Ibid.* clause 8 (b) (2).
[516] Surya Deva, „Acting extraterritorially to tame Multinational Corporations for Human Rights violations: Who should 'Bell the Cat'?" (2004) 5 *Melb J. Int'l L.* 37, IV A.
[517] *Ibid.* at IV D.
[518] *Ibid.* at IV E.
[519] *Ibid.* wfr explaining the different subjects of her criticism.
[520] See for example *In Re Union Carbide Gas Plant Disaster at Bhopal India* (Opinion and Order 12 May 1986) 634 F Supp 842 (SDNY 1986), 25 ILM 771 (1986); on the issue see also above I. A.
[521] Adam McBeth, "A Look at the Corporate Code of Conduct Legislation" (2004) 33 *Common L. World Rev.* 222, 226.
[522] *Ibid.* at 248.

2 *AUS Bill*

The Australian Bill[523] is "[a] Bill for an Act to impose standards on the conduct of Australian corporations which undertake business activities in other countries, and for related purposes."[524] Its objectives are further laid down in art. 3:

> (1) The objects of this Act are:
>
> (a) to impose environmental, employment, health and safety and human rights standards on the conduct of Australian corporations or related corporations which employ more than 100 persons in a foreign country; and
>
> (b) to require such corporations to report on their compliance with the standards imposed by this Act; and
>
> (c) to provide for the enforcement of those standards.
>
> (2) To avoid doubt, a body corporate to which this Act applies is not required to take any action to meet the requirements of this Act in respect of its operations in a foreign country that it would not be required to take in respect of its operations in Australia.[525]

The Codes of conduct are stipulated in the following part, reaching from environmental,[526] health and safety standards, - for both employees[527] and consumers[528] - to employment standards including "minimum international labour standards"[529] and human rights[530] standards up to tax law[531] obedience and trade practice[532] standards. The corporations have an annually reporting duty,[533] civil penalties may apply according to art. 16[534] and compensation according to art. 17.[535] Civil actions can be brought before the Federal Court of Australia by natural or legal persons aggrieved or *pro bono publico*.[536]

---

[523] *Corporate Code of Conduct Bill (Cth) 2000.*
[524] *Ibid.* subtitle to the Bill.
[525] *Ibid.* art. 3.
[526] *Ibid.* art. 7.
[527] *Ibid.* art. 8.
[528] *Ibid.* art. 12.
[529] *Ibid.* art. 9.
[530] *Ibid.* art. 10.
[531] *Ibid.* art. 11.
[532] *Ibid.* art. 13.
[533] *Ibid.* art. 14.
[534] *Ibid.* art. 16.
[535] *Ibid.* art. 17.
[536] *Ibid.* art. 17.

As Deva observes among other things, the human rights scope is narrower than in the US Bill, mainly referring to non-discrimination. On the other hand, the health and safety standards in the AUS Bill are better defined and, in contrast to the US Bill, not limited to the workplace.[537] The AUS Bill is also wider in scope concerning the beneficiaries, as not only employees are included, but consumers and the public as well and even NGOs may take action.[538]
Nevertheless Deva criticizes the same aspects and makes the same suggestions already mentioned above also for the AUS Bill.[539]

3 *UK Bill*

The UK Bill contains in clause 2 a rather broad request for TNCs to act in accordance with host state law and "international agreements, responsibilities and standards", followed by an open list, referring to environment, public health and safety, sustainable development, employment, human rights and consumer protection.[540] Companies have to prepare reports[541] and information access is to be eased.[542] Parent company liability for compensation is provided for[543] and the duties and responsibilities of the directs are set out.[544] Stakeholders may complain to the Secretary of State if he or she thinks the company is in violation of provisions made in the Act[545] and criminal liability is provided for in clause 11.[546]
In using criminal sanctions to answer any contravention of the Bill, the UK Bill is using criminal sanctions in a much broader way than the Australian Bill, which is only using them in connection with the reporting duty.[547] Yet as the provisions in the Bill are pretty vague as far as the duties for TNCs under

---

[537] Surya Deva, „Acting extraterritorially to tame Multinational Corporations for Human Rights violations: Who should 'Bell the Cat'?" (2004) 5 *Melb J. Int'l L.* 37, at IV B.
[538] *Ibid.* at IV C.
[539] *Ibid.* at IV E.
[540] Clause 2 *Corporate Responsibility Bill* 2003.
[541] *Ibid.* clause 3.
[542] *Ibid.* clause 5.
[543] *Ibid.* clause 6.
[544] *Ibid.* clauses 7 and 8.
[545] *Ibid.* clause 10.
[546] *Ibid.* clause 11.
[547] Adam McBeth, "A Look at the Corporate Code of Conduct Legislation" (2004) 33 *Common L. World Rev.* 222, 245.

international human rights law are concerned, these harsh consequences might be unreasonable.[548] An advantage of the UK Bill is the treatment of TNCs not as different legal entities, but as a corporate group according to the *Companies Act 1985*,[549] which also allows for parent liability. By this approach, not only "nationals" are included, yet the scope is not as wide as in the AUS Bill.[550]

4 *Challenges faced by the Bills*

As already mentioned earlier none of these bills was passed as a law. Why none of the proposed bills was successfully passed will be outlined in this section to be able to find ways of creating and implementing domestic human rights protection law more successfully. Although only the Australian Parliament has commented on the Bill, most of the remarks of the Australian Parliament may be transferred to the US and UK Bills.[551]

The recommendation of the Australian Parliament in its report was "that the Bill not be passed because it is unnecessary and unworkable."[552] As far as relevant for this research concerning the human rights obligations of TNCs acting abroad, the Parliament's findings will be sketched in the following.

The first, so to speak preconditional challenge is the willingness of a legislator to pass an extraterritorially applicable law. The Australian Parliament did not think such a broad extraterritorially applicable law was necessary, because common law was handling most cases already and there was no need for legislation as there was no "systematic failure" of the *status quo* due to the few numbers of human rights violations by TNCs.[553] Yet it is doubtful whether legislators should wait until there is a "systematic failure", because even small numbers of human rights violations should not occur, especially when there is a

---

[548] *Ibid.* at 246.
[549] *Companies Act 1985* (UK).
[550] See Adam McBeth, "A Look at the Corporate Code of Conduct Legislation" (2004) 33 *Common L. World Rev.* 222, 226-7.
[551] See Surya Deva, „Acting extraterritorially to tame Multinational Corporations for Human Rights violations: Who should 'Bell the Cat'?" (2004) 5 *Melb J. Int'l L.* 37 at V.
[552] Parliament of the Commonwealth of Australia, "Report on the Corporate Code of Conduct Bill 2000" Parliamentary Joint Statutory Committee on Corporations and Securities (June 2001) 4.53.
[553] *Ibid.* at 4.12 and 4.44-5.

possibility of preventing or at least sanctioning them by law.[554] However, as this research is meant to reveal state options to control the human rights records of TNCs acting abroad, the willingness of states to act is, although necessary and sometimes instructive concerning underlying problems and concerns, not in itself subject to this research. Therefore, the other arguments put forward by the Australian Parliament will be focused on now.

The Parliament pointed out that some terms in the Bill were vague[555] and in some cases home state law could contradict host state law,[556] which could both cause uncertainties as to which law to apply and how to interpret the applicable law. The latter case of contradicting laws was also seen as to possibly cause frictions with the host state, as the internal matters of another state are interfered with by Australian law.[557] The applicability of the law even to foreign holding companies was also criticized as being too far-reaching,[558] as well as the provision in the Bill that TNCs should observe the tax laws of the host state, as this would interfere with the state duties of the host state and therefore affect its sovereignty.[559] In addition, to oblige TNCs to adhere to Australian law abroad would "be equivalent to encouraging Australian corporations to flout the laws of foreign jurisdictions"[560] and "implying that local standards are inferior"[561] and resentment would be even more likely due to the broad and generic scope of the law.[562]

Furthermore, as McBeth rightly observes, all three Bills have in common that they impose international human rights duties on TNCs by only referring to the international treaties and conventions instead of tailoring specific duties and protection scopes to TNCs. Yet as these treaties and conventions are addressed to states rather than to private actors such as TNCs, the problem of the scope of

---

[554] See Surya Deva, „Acting extraterritorially to tame Multinational Corporations for Human Rights violations: Who should 'Bell the Cat'?" (2004) 5 *Melb J. Int'l L.* 37 at V A.
[555] Parliament of the Commonwealth of Australia, "Report on the Corporate Code of Conduct Bill 2000" Parliamentary Joint Statutory Committee on Corporations and Securities (June 2001) 4.20 and 23.
[556] *Ibid.* at 4.27.
[557] See *ibid.* and at 4.32.
[558] *Ibid.* at 4.17.
[559] *Ibid.* at 4.30.
[560] *Ibid.* at 4.32.
[561] *Ibid.* at 4.47.
[562] *Ibid.* at 4.49.

human rights duties for TNCs remains unresolved, especially with regards to positive duties of promoting and protecting human rights in the host state.[563] This issue cannot be resolved here,[564] but it is important to note that the human rights duties of TNCs should be more specific in extraterritorially applicable laws and should not just be mere references to treaties and conventions dealing with state duties. Here, the already mentioned UN approaches could be of help for this task.[565]

The described challenges faced by the Bills can be summarized as reproaches of imperialism, legal uncertainty and disrespecting sovereignty. As already seen earlier in this research these are typical challenges of human rights protection in the trans-border TNC context, especially when applying domestic laws extraterritorially. They will therefore be dealt with in a more generalized way in the following to find answers for more successful attempts in future.

C *Dealing with the challenges for future attempts*

To be able to make more successful attempts in future, the challenges of the reproaches of imperialism, legal uncertainty and disrespecting the sovereignty principle will be assessed now, followed by suggestions of how to deal with them in future cases of extraterritorial application of domestic human rights protection law.

1 *Understanding the challenges*

First of all the challenges - some of them have already been mentioned in the introductory chapter - will be described more closely within the context of public international law.

---

[563] Adam McBeth, "A Look at the Corporate Code of Conduct Legislation" (2004) 33 *Common L. World Rev.* 222, 236-7.

[564] This issue will be discussed in more detail in Chapter III below.

[565] See Adam McBeth, "A Look at the Corporate Code of Conduct Legislation" (2004) 33 *Common L. World Rev.* 222, 237, referring to the *Norms of Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights ("Draft Norms")* (2003) U.N. Doc. E/CN.4/Sub.2/2003/12 (13 August 2003), which will be presented in more detail in Ch. III below.

(a) Reproach of imperialism

Related to the already sketched principles of sovereignty are reproaches of inferior treatment and disrespect when applying domestic law in or onto another state - it is claimed not only the sovereignty in this particular case concerning the foreign state's territory is being disregarded, but the foreign state and its legal order and values are treated as inferior and are disrespected.[566] This is a strong reminder of the reproaches of cultural and moral imperialism in the discussion on the universality of human rights.[567] It has been pointed out that there have already been numerous extraterritorial applications of domestic law and that the imperialism reproach or rather the fear of the reproach is used as an excuse for not controlling TNCs' actions abroad.[568] Although of course the fact that there have already been extraterritorial applications of domestic law does not mean they were in accordance with international public law or that there were no disputes or conflicts, it has to be taken into account that the host states are often too weak to control and enforce human rights compliance. In those cases home state law application concerning control and enforcement measures can be a means of cooperation rather than friction.[569]

(b) Legal uncertainty

As more than one state can be affected by the same situation[570] and therefore claim authority over an issue,[571] the applicable law may not always be clear.

---

[566] See Mark Gibney and R. David Emerick, "The Extraterritorial Application of United States law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards" (1996) 10 *Temp. Int'l L. J.* 123, 145 arguing that imperialism is not an appropriate reproach when it prevents double standards otherwise used by Western corporations to treat their own workers better than foreign ones; see also Parliament of the Commonwealth of Australia, "Report on the Corporate Code of Conduct Bill 2000" Parliamentary Joint Statutory Committee on Corporations and Securities (June 2001) 4.32 and 4.47.

[567] See Chapter I.

[568] Mark Gibney and R. David Emerick, "The Extraterritorial Application of United States law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards" (1996) 10 *Temp. Int'l L. J.* 123, 144-5.

[569] See Surya Deva, „Acting extraterritorially to tame Multinational Corporations for Human Rights violations: Who should 'Bell the Cat'?" (2004) 5 *Melb J. Int'l L.* 37 at III A.

[570] Klaus Bockslaff, *Das völkerrechtliche Interventionsverbot als Schranke außenpolitisch motivierter Handelsbeschränkungen* (Berlin: Duncker & Humblot, 1987) 127 wfr.

Legal uncertainty may arise, because two states consider their laws applicable on the TNC subsidiary. It is not hard to imagine that home states expect those within their territory to obey home state laws, including human rights protection laws, like environmental protection and labour law. The German *Dismissal Protection Act*[572] for example is applicable on employees of subsidiaries of foreign companies in Germany, although organized as joint ventures by the foreign parent.[573] Another example is the decision on Doc Morris pharmacies in Germany. German law requires that pharmacies are owned by pharmacists due to health protection - and therefore human rights - reasons. Foreign pharmacies operating in Germany *via* branches or subsidiaries have therefore to be owned by pharmacists as well.[574] In the US branches and subsidiaries have to act in accordance with US federal and state law as well.[575] The host states on the other hand expect the same from the subsidiaries on their territories and the TNC subsidiary cannot be sure which law it is supposed to obey. Different principles and standards might be applied by home and host states and the obedience of the one may even result in the violation of the other. This leads to legal uncertainties, for potential wrongdoers as well as for victims concerning the applicable law, legal decisions and law enforcement.[576] In addition, even where it is clear which law is applicable, the law may be vague and cause a the fear of litigation.[577] It seems that this issue cannot be solved as long as there are no accepted rules as to when and where domestic law of the home state is

---

[571] Kinka Gerke, "Die unilaterale Versuchung: Die Sanktionen der USA gegen die Handelspartner Kubas, Irans und Libyens und ihre Auswirkung auf das Welthandelsregime" (1997) 2 *HSFK-Report* 1, 46.

[572] *Dismissal Protection Act (Kündigungsschutzgesetz, KSchG)* (1969).

[573] The applicability is given when there are more than five respectively ten employees of the German according to § 23 KSchG (Dismissal Protection Act).

[574] As the foreign pharmacy DocMorris was from the Netherlands and therefore from within the EU, the European right of establishment preceded German law, because the required health protection can be achieved in other ways as well, see *DocMorris* OVG Saarlouis 3 W 15/06 (22 July 2007), foreign pharmacies and their subsidiaries from third states however have to act according to German law.

[575] See for example Nikolaus Buch, Sven Oehme and Robert Punkenhofer, *Firmengründung in den USA* (Berlin, Heidelberg, New York: Springer, 2004) 56-60.

[576] See for the general interest of businesses in legal certainty of international trade policy to calculate investments Stefan Oeter in Meinhard Hilf and Stefan Oeter (eds), *WTO-Recht* (Baden-Baden: Nomos, 2005) §2, par. 36-7.

[577] Parliament of the Commonwealth of Australia, "Report on the Corporate Code of Conduct Bill 2000" Parliamentary Joint Statutory Committee on Corporations and Securities (June 2001) 4.23.

applicable extraterritorially. Yet again one has to keep in mind that contradicting laws of host and home states will not exist very often as the same core human rights are broadly accepted and while host states may be unwilling or unable to control and enforce them, they are often not lacking the very human rights protection legislation.

(c) Disrespecting the sovereignty principle

The sovereignty principle is, as already mentioned above, an important principle of public international law. The prohibition of intervention is supposed to prevent states from affecting the internal affairs of another state by military force or other means of coercion and thereby protecting the sovereignty of any state.[578] Applying domestic law on foreign cases within the territory of another state means interfering with the other state's domestic law and its application. Not even the UN Charter allows the use of force to protect human rights outside one's territory or jurisdiction. In fact its original intent was "to forbid the use of force even to promote human rights or to install authentic democracy."[579] It is claimed that this original intent is still valid today and that international law cannot permit states to intervene "by force against the political independence and territorial integrity of another on the ground that human rights are being violated, as indeed they are everywhere." [580] On the other hand it is rightly suggested that the prohibition of intervention and therefore sovereignty is not the overall principle to which all other principles and values have to be subordinated. It rather has to be read in context with the other principles and values of public international law. This approach reveals that

[578] Klaus Bockslaff, *Das völkerrechtliche Interventionsverbot als Schranke außenpolitisch motivierter Handelsbeschränkungen* (Berlin: Duncker & Humblot, 1987) 30, 31-7.
[579] Louis Henkin, "The Use of Force: Law and U. S. Policy" in Louis Henkin, Stanley Hoffmann, Jeane J. Kirkpatrick & Allan Gerson, William D. Rogers and David J. Scheffer, *Right v. Might, International Law and the Use of Force* (2nd ed, New York: Council on Foreign Relations Press, 1991) 37, 61.
[580] *Ibid.*

> the norm of sovereignty itself is merely a part [of the values of contemporary international law], just like the prohibition of massive violation of human rights, genocide and crime against humanity are.[581]

Yet as already pointed out above, in certain cases where there is a link between the facts of the case and the applying state, extraterritorial application of domestic law is accepted under public international law. The AUS Bill was, amongst other things, criticized for not providing for such a link as a precondition for the application of the law by including foreign holdings in its scope.[582] However, the accepted linking factors for TNCs and home states are few in number and as all states are sovereign and they are basing their actions on this very quality, the "sovereignties" of two (or more) states may compete when internal affairs are affected. For this conflict public international law provides the limit up to which the action of a state is acceptable.[583] Competing claims of sovereignty may for example occur in international commercial law concerning situations abroad a state wants to regulate such as anti-trust laws, merger control laws, tax laws and export control laws or as examined here human rights law. Similar to international environmental law these issues with their cross-border nature can only be effectively regulated by international cross-border or trans-border legislation.[584] Yet as such international trans-border legislation does not (yet) exist for human rights matters, all seems to come back to balancing the affected state sovereignties against one another.

2 *Approaches to tackle these challenges*

After having sketched the remaining difficulties of applying domestic law extraterritorially, possible approaches to solve them will be outlined in the

---

[581] Obasi Okafor-Obasi, *The Enforcement of State Obligations to Respect and Ensure Human Rights in International Law* (Potsdam: Menschenrechtszentrum der Universität Potsdam, 2003) 85.
[582] Surya Deva, „Acting extraterritorially to tame Multinational Corporations for Human Rights violations: Who should 'Bell the Cat'?" (2004) 5 *Melb J. Int'l L.* 37, V C 1; Parliament of the Commonwealth of Australia, "Report on the Corporate Code of Conduct Bill 2000" Parliamentary Joint Statutory Committee on Corporations and Securities (June 2001) 4.17.
[583] Klaus Bockslaff, *Das völkerrechtliche Interventionsverbot als Schranke außenpolitisch motivierter Handelsbeschränkungen* (Berlin: Duncker & Humblot, 1987) 121.
[584] *Ibid.* at 124.

following section. These are a rather pragmatic approach, the shared values approach and the comity principle.

(a) Pragmatic approach

As already explained above and mentioned again in connection with the possible conflict of sovereignty, a link or nexus between the facts of the case and the applying state, *i.e.* the home state, are of importance when applying law extraterritorially. When such a link exists it is not so much an interference with the other state's sovereignty as the situations at issue are not absolutely foreign.[585] Domestic legislation tackling these situations abroad could be considered to have extraterritorial *effect* rather than being "extraterritorial" to the core. However, despite such a link there can be conflicts between the home and the host state, especially where no broadly accepted link exists, as is the case for most situations when TNCs are acting abroad through incorporated subsidiaries. One solution to a conflict would be the consent of the host state concerning the application of home state law on the TNC subsidiary within its territory. Yet another solution to prevent legal uncertainty, the impression of imperial behaviour and disrespect of sovereignty is a "local law defence". This means, although domestic home state law would be generally applicable to TNCs acting abroad and usually the higher human rights standard would be applied, conflicts caused in the rather rare cases of contradicting law could be solved by allowing the TNC to follow host state instead of home state law, where host state law explicitly contradicts home state law and a compliance with host state law leads to a breach of home state law.[586] Yet the situation of explicitly contradicting legislation is rather the exception when it comes to the protection of human rights. Although there is an ongoing discussion on the issue of universalism or cultural relativism of "western" human rights and whether they emerged because of or despite "western" values and traditions, core human rights closely related to dignity can be considered global consensus and in cases of colliding cultural principles, a case by case examination seems more appropriate than denying the

[585] See Surya Deva, „Acting extraterritorially to tame Multinational Corporations for Human Rights violations: Who should 'Bell the Cat'?" (2004) 5 *Melb J. Int'l L.* 37 at III A.
[586] Adam McBeth, "A Look at the Corporate Code of Conduct Legislation" (2004) 33 *Common L. World Rev.* 222, 250.

general universalism of human rights and their protection.[587] As grave contradictions are rather unlikely anyway, this approach seems workable and at the same time minimizes legal uncertainty as well as the appearances of imperialism and disrespecting the host state sovereignty. While it does not go beyond the accepted linking factors, it does provide for a local law defence, taking into account host state law as well as TNCs and their need for legal clarity and certainty.

(b) Shared values approach

A similar approach to the one just described above is the "shared values approach" originally suggested in international economic law.[588] This approach was developed for courts to determine when they should consider mandatory foreign law, which is then applied extraterritorially, such as for example foreign bank secrecy law in US defence discovery orders.[589] This means only those domestic rules are considered extraterritorially applicable that are based on shared values of both states. In such a case the (affected) sovereignty of the host

[587] For the discussion see for example Jack Donnelly "Cultural Relativism and Universal Human Rights" (1984) 6 *HRQ* 400; Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd ed, Ithaca, New York: Cornell University Press, 2003); David Duquette, "Universalism and Relativism in Human Rights" in David A. Reidy and Mortimer N. S. Sellers (eds), *Universal Human Rights* (Lanham: Rowman & Littlefield, 2005) 59, 65; Ann Elizabeth Mayer, *Islam and Human Rights* (2nd ed, Boulder: Westview Press,1995) 37; Makau W. Mutua, „The Ideology of Human Rights" (1996) 36 *VJIL* 589, 641; Gertrud Nunner-Winkler, "Moralischer Universalismus- kultureller Relativismus, zum Problem der Menschenrechte" in Johannes Hoffmann (ed), *Universale Menschenrechte im Widerspruche der Kulturen* (Berlin: Iko, 1994) 79- 100; David Senghaas, "Der aufhaltsame Sieg der Menschenrechte" in Raúl Fornet-Betancourt and Hans Jörg Sandkühler (eds), *Begründung und Wirkung von Menschenrechten im Kontext der Globalisierung* (Frankfurt am Main: ISIS 2001)165, 169; Dieter Senghaas, *Wohin driftet die Welt?* (Berlin: Suhrkamp, 1994) 116; see for a combined approach of universalism and relativism for example Donnelly's approach of "relative universalism" in Jack Donnelly "Cultural Relativism and Universal Human Rights" (1984) 6 *HRQ* 400 and Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd ed, Ithaca, New York: Cornell University Press, 2003) and Eva Brems' "inclusive universality" in Eva Brems, *Human Rights: Universality and Diversity* (Dordrecht: Springer Netherland, 2001) 295.

[588] Bernard Grossfeld and C. Paul Rogers "A Shared Values Approach to Jurisdictional Conflicts in International Economic Law" (1983) 32 *ICLQ* 931; connected to the issue of TNCs and the extraterritorial application of domestic law by Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 175.

[589] Bernard Grossfeld and C. Paul Rogers "A Shared Values Approach to Jurisdictional Conflicts in International Economic Law" (1983) 32 *ICLQ* 931, 937.

state should not be an obstacle to the application of the economic laws of the other state, yet this leaves problems to define the shared values and courts defining these shared values would have a wide discretion.[590] Nevertheless, this approach could be transferred to the above mentioned shared universal core of human rights. *Ius cogens*,[591] *erga omnes*[592] rules[593] and core human rights can be considered "shared values".[594] Yet again the shared values of core human rights are the human rights obligations of states not of private actors. That is why not only the interest in the protection of core human rights has to be shared, but also the idea of protecting of human rights by TNCs. The more similar the ideas and domestic laws about the degree of human rights protection by TNCs are, the more evident are the shared values. Internationally developed standards such as the *Draft Norms*[595] and the *UN Guiding Principles*[596] vested with certain legitimacy due to their being drafted by a Sub-commission of the UN, the UN being almost an embodiment of global values that are shared,[597] can be used.

---

[590] Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 175.

[591] On *ius cogens* and *erga omnes* obligations in general see for example M.Cherif Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*" (1996) 59 *L&CP* 63.

[592] On the terms see for example Joroen Denkers, *The World Trade Organization and Import Bans in Response to Violations of Fundamental Labour Rights* (Antwerp, Oxford, Portland: Intersentia, 2008), 123-5 wfr; see also Karl Zemanek, "New Trends in the Enforcement of erga omnes Obligations" (2000) 4 *Max Planck UNYB* 1; as this research focuses on public international law between all nations, only those rules are considered *erga omnes* rules that are based in *ius cogens*, so the terms are in fact used as synonyms here.

[593] On *ius cogens* and *erga omnes* obligations in general see for example M.Cherif Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*" (1996) 59 *L&CP* 63.

[594] See *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgement (Belgium v Spain)*, ICJ Reports 1970, par. 34, identifying basic human rights as one of the sources to identify *erga omnes* obligations.

[595] *Norms of Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights ("Draft Norms")* (2003) U.N. Doc. E/CN.4/Sub.2/2003/12 (13 August 2003).

[596] *Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, A/HRC/17/31, (21 March 2011) <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> 1 May 2014.

[597] See Su-Ping Lu, "Corporate Codes of Conduct and the FTC: Advancing Human Rights through Deceptive Advertising Law" (2000) 38 *Colum. J. Transnat'l L.* 603; August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors" in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford: University Press, 2005) 37, 55; David Weissbrodt and Muria Kruger "Human Rights Responsibilities of Businesses as Non-State Actors" in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford: University Press, 2005) 315, 349.

They may help to define the shared values and provide a benchmark against which the values and national legislations can be assessed, at least once they are implemented by a majority of states[598] and are shared values themselves. Yet the shared values approach does not only have to be transferred to human rights law to be applicable here, but also to legislation instead of court decisions. This means only those laws are applicable abroad and could be passed by home states for this purpose that are based on shared values of host and home state. In addition, the shared values approach would require that the home state interests are not "demonstrably inferior" to host state interests, otherwise home state law cannot be applied extraterritorially.[599] Furthermore, a link between the facts of the case and the applying state must be given.[600] Here the parallels to the pragmatic approach become evident: a link is needed and an exception for home state law application is given for certain cases. Yet this also shows the weakness of the approach, because home state interests could always be regarded as "demonstrably inferior" when the host state's sovereignty is affected.[601] Nevertheless to a certain degree the shared values approach helps to determine the reasonableness of the use of home state law in the host state and may at least be used as a guideline when deciding on extraterritorial applicability of home state law. It creates the general rule of home state law applicability where shared values and a link exist, amended by an exemption clause where host state interests clearly outweigh home state interests. In addition, stressing the mutual principles and values as is automatically done when applying this approach, could even have a greater impact than just on the conflict in question.

---

[598] Karin Lucke, "States' and Private Actors' Obligations under International Human Rights Law and the Draft UN Norms" in Cottier, Pauwelyn and Bürgi, above n 64, 148, 158.
[599] See Bernard Grossfeld and C. Paul Rogers "A shared values approach to jurisdictional conflicts in international economic law" (1983) *ICLQ* 931, 934.
[600] *Ibid.* at 944.
[601] Peter Muchlinski, *Multinational enterprises and the Law* (2nd ed, Oxford, New York: Oxford University Press, 2007) 175.

(c) The comity principle

To tackle the problems caused by the extraterritorial application of domestic law the comity principle of public international law[602] might help as well. The comity principle is a voluntary self-restraint in public international law that has been used in US American antitrust law.[603] It derives from the non-interference - thus the sovereignty - principle, [604] resulting in a balancing-of-interests test,[605] allowing the state with the greater interest in the issue to handle it.[606] This voluntary restraint of a state's own "right" on an international level always has[607] and still does derive from the changed or changing character of public international law, which is not only state coordination but also cooperation and this latter characteristic calls for broader considerations of interests of other states.[608] This consideration is for example reflected in the way the interests are balanced according to the comity principle, as not only the particular state interests of the affected states at the moment of the conflict have to be considered, but the states involved also have to take into account the long-term consequences for the international system caused by the states' own actions. [609]
However, it is not an easy approach, firstly because the comity principle is a voluntary self-restraint, therefore when domestic law is to be applied abroad and the sovereignty interests of two states have to be balanced, the host state would have to accept the comity principle and act according to it, otherwise it is of no

[602] Kinka Gerke, "Die unilaterale Versuchung: Die Sanktionen der USA gegen die Handelspartner Kubas, Irans und Libyens und ihre Auswirkung auf das Welthandelsregime" (1997) 2 *HSFK-Report* 1, 46.
[603] Klaus Bockslaff, *Das völkerrechtliche Interventionsverbot als Schranke außenpolitisch motivierter Handelsbeschränkungen* (Berlin: Duncker & Humblot, 1987)127 wfr.
[604] Kinka Gerke, "Die unilaterale Versuchung: Die Sanktionen der USA gegen die Handelspartner Kubas, Irans und Libyens und ihre Auswirkung auf das Welthandelsregime" (1997) 2 *HSFK-Report* 1, 46.
[605] Klaus Bockslaff, *Das völkerrechtliche Interventionsverbot als Schranke außenpolitisch motivierter Handelsbeschränkungen* (Berlin: Duncker & Humblot, 1987) 128-9 wfr.
[606] Kinka Gerke, "Die unilaterale Versuchung: Die Sanktionen der USA gegen die Handelspartner Kubas, Irans und Libyens und ihre Auswirkung auf das Welthandelsregime" (1997) 2 *HSFK-Report* 1, 46.
[607] See for the developments from middle ages to globalisation Joel R. Paul, "The transformation of international comity" (2008) 71 *Law and Contemp. Probs.* 19.
[608] Klaus Bockslaff, *Das völkerrechtliche Interventionsverbot als Schranke außenpolitisch motivierter Handelsbeschränkungen* (Berlin: Duncker & Humblot, 1987) 132.
[609] Kinka Gerke, "Die unilaterale Versuchung: Die Sanktionen der USA gegen die Handelspartner Kubas, Irans und Libyens und ihre Auswirkung auf das Welthandelsregime" (1997) 2 *HSFK-Report* 1, 46.

help. Secondly, difficulties remain because interests have to be assessed and benchmarks to be found, which allow for a certain degree of influence on another state whilst prohibiting intervention that jeopardizes the sovereign equality of states.[610] The proportionality principle, which is a general principle of public international law in the sense of art. 38 (1) (c) *Statute of the ICJ,*[611] is used to support the comity principle[612] by confining the content of "domestic affairs" protected by the sovereignty principle individually in each case and thereby modifying the scope of exclusive regulation by one state.[613] Yet it is no panacea either. Therefore although the comity principle may give some guidance as to how sovereignty conflicts may be solved, the dependence on state interests and proportionality only allows for case-by-case-decisions without noteworthy generalizable conditions. The traditional linking factors accepted for extraterritorial application of domestic law can be assumed to regularly outweigh the host state sovereignty claim where conflicts occur.[614] Furthermore, although there cannot be general rules of precedence for further interests states may claim, the existing accepted linking factors can be used as a benchmark to assess and weigh these further state interests produced when balancing state interests according to the comity principle. As far as the above mentioned possible additional linking factor of parental control is concerned, the comity principle therefore only provides a mechanism for case-by-case decisions. However, when taking into account the long-term effects of the state's actions for the international system according to the comity principle, international "soft law" instruments like the already mentioned UN approaches concerning TNC responsibility may be used as a guideline for universal standards, interests and aims of the international system.

After all these considerations, one may conclude that in a given case the reproaches of imperialism and disrespect of sovereignty can be overcome by the mutual voluntary use of the comity principle by host and home state, as it

---

[610] Klaus Bockslaff, *Das völkerrechtliche Interventionsverbot als Schranke außenpolitisch motivierter Handelsbeschränkungen* (Berlin: Duncker & Humblot, 1987) 143.
[611] *Ibid.* at 141.
[612] See *ibid*.
[613] *Ibid.* at 142.
[614] Also addressing a link between comity and the linking factors is J. Troy Lavers "Extraterritorial Offenses and International Law: the Argument for the Use of Comity in Jurisdictional Claims" (2007) 14 *Sw J. L. & Trade Am.* 1.

provides a tool for case-by-case decisions. Yet in general where there is contradicting law in host and home states, legal uncertainties for the parties involved, especially the TNCs, remain. The main advantage of the comity principle is therefore the ideas and benchmarks it is based on and uses, as they provide a general test for additional linking factors. In doing so it allows for links that go beyond the already accepted ones, which is important as most TNC subsidiaries are incorporated in the host state and the accepted linking factors therefore do not work.

D *Lessons from and outlook on extraterritorial application of domestic law*

Having assessed the possible ways to overcome the challenges faced by the bills mentioned above, it becomes clear that states could in fact act, yet they seem reluctant to do so. Therefore, after summarizing the findings of this chapter an outlook of further possible developments will be given in the following.

1 *Potential of the approaches*

As promising as the pragmatic, shared values and comity principles approaches described above seem, they are no panaceas either and although they are minimizing the difficulties they are not completely solving the issues. Yet they can still help to solve possible conflicts. Together the approaches seem to complement one another: The comity principle may provide arguments and facilitate decisions on linking factors apart from the already accepted ones and the shared values approach may raise awareness that many states have many human rights principles and goals in common, thereby arranging for better relations between states on a bi- and multilateral basis while the pragmatic approach allows for specific solutions on the applicable law. Within all the approaches mentioned above international soft law instruments can also help, as they are providing a guideline for human rights duties of TNCs in accordance with public international law deriving from treaties and principles many states share and of course the more similar, *i.e.* harmonized and approximated domestic laws of the states affected are, the easier it is to apply them abroad in the other state. This is because the comity principle, shared values approach and pragmatic approach work best when at least the two states share mutual interests

and points of views on certain rights, principles and developments, as they are more likely to use the comity principle, apply the shared values approach or accept home state application with the exception clause of local law defence in such a case. And where the laws are more similar, the consequences of legal uncertainty and the impression of disrespecting the values of the other state are minimized. In addition, as far as human rights protection in cases of TNCs acting abroad is concerned, contradicting laws of home and host states will be the exception as in most cases similar human rights principles exist.[615]

2 *Possible future developments*

However, that the situation at the moment is not too supportive with regard to the extraterritorial application of domestic human rights protection law abroad does not mean that is has to stay this way. Especially because the discussion on expanding home state legislation is a vivid one and has increased during the last decade since the bills were introduced as can be seen from the quotes at the very beginning of the chapter.

(a) Long-term development: further to full approximation

It can be concluded from the examples and challenges just described that the most effective human rights protection in trans-border cases is given when host and home states agree on the same level of human rights protection and the same duty level of TNCs and their behaviour and the same enforcement mechanisms to pressure TNCs. However, as could also be seen, such general bilateral or international agreements will not be easy to reach.[616] Yet it could also be seen that applying domestic law extraterritorially on a case-by-case basis seems to be a flexible solution, applicable already right now. As far as abstract domestic

[615] See also Greg Flynn and Robert O'Brien, "An Internationalist Western Labour Response to the Globalization of India and China" (2010) 1 *Global Labour J.* 178, 194, arguing that using core ILO norms for extraterritorial application of domestic law solves the reproaches of imperialism, disrespecting sovereignty and legal uncertainty. They also point out that the US, EU and Canada could apply the same core ILO standards, thereby minimizing the threat of disinvestment.

[616] More on the issue of reaching TNC duties on an international level will be presented in the following chapter.

laws dealing with TNC liability are concerned, it seems such laws could be passed already today, as long as they provide for the application of the comity principle, a balancing test, are taking into account linking factors and are based on shared values. These laws may not be applicable in all situations or *vis-à-vis* all states in the same way and acceptance and enforceability may remain difficult, but they have good chances to be applicable in many cases already today. Furthermore, even where they are not (fully) applicable, their mere existence may function as a catalyst for further developments of broader approximation and harmonization of human rights protection laws in cross-border cases, especially when TNCs are involved. Once this is the case, creating even broader domestic laws or binding international rules for TNCs will be easier. Yet whether and when such a development will take place cannot be predicted right now as too many small steps are still needed to even get close to such a situation. Therefore, the focus of home states has to be on the catalyst of domestic law.

(b) Medium-term development: the new connecting factor of factual control

Such domestic law could contribute to accepting a new linking factor. Whereas right now traditional connecting factors are still considered necessary to trigger extraterritorial jurisdiction, a comparison with other extraterritorial jurisdiction such as humanitarian law and international criminal law[617] might shed some light on possible future developments of the topic of human rights protection in TNC cases.[618] According to the *Geneva Convention* for example the traditional connecting factor of territorial or personal link is no longer needed to prosecute crimes committed by anyone, anywhere; it is replaced by the shared interests of the international community in preventing certain acts.[619] As in human rights

[617] August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors" in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford: University Press, 2005) 37, 59.

[618] On universal jurisdiction of civil claims of human rights violations see also Beth Stephens, "Translating *Filártiga*: A Comparative and International Law Analysis of Domestic Remedies For International Human Rights Violations" (2002) 27 *Yale J. Int'l L.* 1, 34-57.

[619] August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors" in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford: University Press, 2005) 37, 59- 60; Beth Stephens, "Translating *Filártiga*: A Comparative and International Law Analysis of Domestic Remedies For International Human Rights

law, universal values exist, as just mentioned, this "new wave" of extraterritorial application of national law is no longer purely based on national policy interests, but is also aiming for ensuring international goals.[620] Several countries have for example at least extended their legislation concerning sex crimes and terrorist related activities committed by own citizens abroad. The prosecution of terrorist activity for example lead to the prosecution of the US incorporated company Chiquita Brands International, Inc. by US officials, because of the company's subsidiaries' cash payments to the illegal paramilitary group "Autodefensas Unidades de Colombia", which had in turn provided "security services" to the company.[621] Where commonly accepted shared principles and ideas are underlying such domestic law extensions, they are accepted more easily and may even be harmonized and developed further to advance extraterritorial application of domestic law. This leads to the conclusion that there is great potential in human rights law for similar changes and developments and it is up to the states how and when these changes may occur. Until this point is reached it should be kept in mind that compliance with extraterritorial obligations requires cooperation on the "closely interwoven" unilateral, bi- and multilateral levels[622] and that developments on bi-and multilateral levels might lead to new non-binding instruments as well as international treaties etc. This once more shows the flexibility and viability of public international law.

Violations" (2002) 27 *Yale J. Int'l L.* 1, 42-4; the issue of *ius cogens* and *erga omnes* obligations and the possibility of universal jurisdiction in such cases will be discussed in more detail in Chapters III and IV.

[620] August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors" in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford: University Press, 2005) 37, 58; see also Gregory Bowman, "A Prescription for Curing U. S. Export Controls" (Working Paper 2013) available at <http://works.bepress.com/gregory-bowman/12> 1 May 2014, suggesting that extraterritorial export control jurisdiction should be based on mutually recognized policy goals.

[621] Greg Flynn and Robert O'Brien, "An Internationalist Western Labour Response to the Globalization of India and China" (2010) 1 *Global Labour J.* 178, 188-9.

[622] Ute Hausmann and Rolf Künnemann, "Globalising economic and social human rights by strengthening extraterritorial state obligations- Germany's extraterritorial human rights obligations, Introduction and six Case Studies" (Brot für die Welt, FIAN, EED, No. 6, October 2006)12; for a closer look on the cooperation needed to fulfil *ICESCR* obligations of external character see Rolf Künnemann, "Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights" in Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Antwerp, Oxford: Intersentia, 2004) 201, 222-8.

(c) Short-term development: maxing the potential of the link

Even easier than establishing a new linking factor may be another - more innovative - way to go. This approach is also using the linking factor of factual control between the home state and the TNC subsidiary acting abroad, but by pressuring the parent company instead of openly and directly applying domestic law extraterritorially.[623] This is similar to the just mentioned extension of liability of own citizens for example in the above mentioned Chiquita case. The interim solution until the link of factual control is more commonly recognized could be to apply home state law more broadly on the parent for aiding and abetting human rights violations by its subsidiary abroad or for neglecting its duty of care, especially when the parent has signed non-binding "soft law" codes.[624] This way the subsidiary is pressured indirectly *via* the parent company to obey the home state human rights protection standards and by in fact "piercing the corporate veil". This is not so far fetched, as in most cases parent companies have managerial and financial influence on their subsidiaries, for example by owing them (partially).[625] In fact, this kind of indirect pressure on subsidiaries is more likely to actually happen within the next decade than accepting the additional linking factor of factual control in such an abstract way as considered above. This was for example also the line of argumentation in the *Nestlé* case already mentioned in introductory chapter where an NGO accused the parent company in Switzerland of negligence concerning the killing of a trade unionist, because Nestlé knew of his highly risky situation and had major influence on its subsidiary, but did not intervene. This was based amongst other things on the *OECD Risk Awareness Tool* as a benchmark for the TNC's due diligence.[626] The *Tool* was developed as an international standard already since

---

[623] On this idea see also Jason Collins Weida, "Reaching Multinational Corporations: A New Model for Drafting Effective Economic Sanctions" (2006) 30 *Vermont L. Rev.* 303, 342-6 wfr.

[624] See for example Jan Wouters and Cedric Ryngaert, "Transnational Corporate Responsibility for the 21st Century: Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction" (2009) 40 *GWILR* 939, 957 wfr.

[625] See Binda Sahni, "The Interpretation of the Corporate Personality of Transnational Corporations" (2005) 15 *Widener L. J.* 1, 2 wfr; on the difficulties of this approach and examples from different jurisdictions see *ibid.* at 3 wfr, pointing out that no uniform approach to "pierce the veil" exists, and alternative forms of subsidiary control are needed.

[626] See ECCHR, "Juristischer Hintergrundbericht" available at <http://www.ecchr.de/index.php/nestle.html> 1 May 2014.

2000,[627] which means it is the result of international discussion and development. Home states could easily contribute to the effective prosecution of such human rights violations for example by making the non-binding *OECD Guidelines*[628] and *Tool* explicitly binding rules for home state TNCs.[629] In doing so, due diligence would be defined more precisely in a binding way for TNCs and negligence, omissions, etc could be proven more easily.

Another way of using the link between parent and subsidiary on a case-by-case basis instead of abstract domestic law rules is including special human rights provisions in bilateral treaties. As far as TNCs working abroad are concerned it could be of help to include human rights clauses in BITs with host states, because these treaties are particularly restricted to the one foreign investment in question. As it seems rather unlikely, however, that the home state will simply call back its investment, *i.e.* the TNC subsidiary, when human rights violations occur, the treaties should contain choice of law and choice of *forum* clauses in favour of the home state *forum* and home state law to decide on human rights violation claims. In order to let the host state deal with its own matters first, the clause could contain time-limits in which the host state may solve the issue in its own courts using its own law before the home state is automatically taking over the case. Yet to prevent any undue delays, the time-limits have to be explicit, providing the limit in years and months without using any vague terms or expressions.

IV CONCLUSION

This chapter revealed the flexibility of home state legislation when dealing with the TNC and human rights issue. However, it also showed that the current developments are not overwhelmingly promising when it comes to broadening extraterritorial application or effects of domestic home state law.

---

[627] See *ibid.*; *OECD Risk Awareness Tools for Multinational Enterprises in Weak Governance Zones* (2006) < http://www.oecd.org/daf/inv/corporateresponsibility/36885821.pdf> 1 May 2014.

[628] *OECD Guidelines for International Enterprises* (revised in 2000).

[629] This has already been suggested by other authors as well, see for example Smita Narula "The Right to Food: Holding Global Actors Accountable Under International Law" (2006) *44 Colum. J. Transnat'l L.* 691, 768-9 wfr.

As far as the question of the *forum* is concerned, it could be seen that the *forum* rules are not definite, but can be altered and additional linking factors such as the factual control of the parent over the subsidiary may be created. Even laws providing for special actions such as *ATCA* or the Belgian law may be passed in order to create a *forum* for certain cases and so could legislation allowing foreign victims to sue the parent company in the home state *forum*. Factual control as a factor to facilitate attribution of subsidiary action to the home state parent could be an acceptable way to go for tort law. Yet at the moment with the *Kiobel* decision in the US and *Regulation 44 /2001* also binding the UK, there seems to be a movement towards restricting the *forum* rather than broadening the admissibility of cases that occur abroad, including those involving TNC action. Criminal law approaches are not likely to go beyond the already existing links due to the stronger need for legal certainty and predictability. Yet the idea of universal jurisdiction at least for *ius cogens* violations by TNCs could be a state option to be taken, especially because the diplomatic tensions that might arise are far less than when suing state officials from the host state and even this has been done before.

As far as suing host states and host states officials are concerned, immunity is the limit provided for by international law, yet nation states may still create legislation for universal jurisdiction in cases of *ius cogens*. However, this approach seems to be diminishing rather than growing as well, at least as far as states are concerned that made broad use of universal jurisdiction of *ius cogens* violations like Belgium and Spain.

With regard to the application of domestic home state law and the creation of such law, the examples evidenced that it might have been too early to convert into abstract law what is already possible on a case-by-case basis as mentioned in the examples on parent liability above. Yet this also means that the case law could help to achieve some change in common as well as civil law countries, easing the path for the acceptance of factual control as an additional link and even for accordant legislation within the next couple of decades if a sufficient number of cases is to be decided. In any case, home states have to become braver when passing laws, whether they deal with abstract rules on extraterritorial application of domestic law or with rules of complicity and responsibility of the parent company within their own territory. The most

promising way to go is holding the parent liable, whether by extraterritorial applicable law like the UK Bill intended to or by maxing the potential of the link, using existing law. The extraterritorial effects when holding the parent liable are only of factual nature, therefore the usual reproaches are minimized,[630] while enforcement of judgements is facilitated, because they are enforceable in the home state and no host state cooperation is needed.
So it seems to be a matter of political will rather than legal options that TNC (parent) liability under domestic home state law is not broadened.

[630] The German government for example expressed its fear that trade could be impeded by claims under *ATCA* against German corporations Daimler and Rheinmetall for human rights violations during the Apartheid Regime in South Africa, see Judith Raupp, "Streit um Gerichtshoheit" *SZ* (13 March 2010) <http://newsticker.sueddeutsche.de/list/id/959668 > 1 May 2014; on ideas how to solve contradicting laws of host and home state see Michael Ratner, "Civil Remedies for Gross Human Rights Violations" David Barnhizer (ed), *Effective Strategies for Protecting Human Rights* (Aldershot, Burlington: Ashgate Dartmouth, 2001) 249, suggesting salvation clauses and diplomatic means.

CHAPTER III: POTENTIAL OF INTERNATIONAL LAW TO HOLD TNCS LIABLE

As just seen domestic law solutions that could cover trans-border cases of TNCs harming or affecting human rights abroad are not easy to create, in particular because the role of TNCs does not seem to be defined yet: neither are they state-like nor are they equal to private individuals. That is why using public international human rights law directly could be a more promising option, given that public international law provides for some sort oft TNC liability. This very issue will be assessed in the following, before sketching the use of public international law before domestic courts and international tribunals and having a look at the alternative option of holding the host state liable.

V PUBLIC INTERNATIONAL LAW AND TNC LIABILITY - A GENERAL SURVEY

To understand the current approach of public international law towards TNC liability it is important to have a look at public international human rights law in a more general way and to envision its role and intentions before moving on and assessing current developments.

A *Primary Role of human rights*

As flexible as human rights are, it is important to keep in mind that their origin is the protection of the individual against state interference and that therefore states are the primary addressees of human rights protection duties, as already mentioned in the introductory chapter.

1 *Protection of the individual against state intervention*

States were the original addressees of human rights protection.[631] They were undoubtedly the most powerful entities, causing the biggest threat to individual

[631] See for example Sarah Joseph, "An Overview of the Human Rights Accountability of Multinational Enterprises" in Menno T. Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (The Hague, London, Boston: Kluwer Law International, 2000), 75.

human rights when human rights were first written down.[632] This could, for example, appallingly be seen in Nazi Germany. Therefore, first of all human rights were meant to protect individuals against the state.[633] Human rights were granted, so the state must not interfere with those rights nor may it violate them. Even individual liability for human rights violations was developed after World War II, but smaller in scope, restricted to international criminal law.[634] Freedom from state actors and state control and interference was sought by the writing down of human rights. However, power and factual roles of states have changed over time; there are new threats to human rights now by new actors as already sketched above. One kind of the new actors are TNCs and the question remains whether and how human rights obligations can be imposed on these new actors.

2 *Protection by the state against violations by private actors*

In addition to the dimension of non-interference and non-violation by the state itself, there is also another dimension to human rights, another duty of the states apart from non-interference with and respect for human rights. This additional dimension is the state duty to protect human rights and is considered to cover not only protection against violations by the state itself, but also by non-state actors.[635] This duty is explicitly mentioned in the *UN Human Rights General Comment No 31 [80]*.[636] Yet although the UN has formulated its view in clear terms, not all states share this opinion. The US for example only acknowledge the state duty to protect its citizens from invasion by private actors in very limited cases.[637] So although there is a strong opinion in favour of such state

---

[632] See also John H. Knox, "Horizontal Human Rights" (2008) 102 *AJIL* 1, 18-9.
[633] See for example David Kinley and Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibility for Corporations at International Law" (2004) 44 *VA J. Int. Law* 931, 937.
[634] See for example John H. Knox, "Horizontal Human Rights" (2008) 102 *AJIL* 1, 27-32.
[635] See *Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, A/HRC/17/31, (21 March 2011) <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> 1 May 2014.
[636] *UN General Comment No. 31 [80]: Nature of the General Legal Obligation Imposed on States Parties to the Covenant* CCPR/C/21/Rev.1/Add.13 (26 May 2004), in particular par. 8.
[637] Jean-Marie Kamatali, "The New Guiding Principles on Business and Human Rights' Contribution in Ending the Divisive Debate Over Human Rights Responsibility of

protection duties, basing future developments on it is ambitious. Nevertheless, as this enquiry deals with all sorts of state options and as there are strong defendants of this view, the ideas, views and developments acknowledging such a duty will not be left aside, but described in the following.

Explicit examples of state responsibilities to protect human rights from violations of private actors can, for example, be found in the General Comments on the *Convention of the Rights of the Child*,[638] which states that the Convention creates indirect obligations on private actors by imposing obligations on the states to ensure that non-state providers, including businesses, operate in accordance with the provisions.[639] In addition, the *CESCR* stressed state duties with regards to the private business sector concerning the right to food.[640] In regional developments, for example in the *American Convention on Human Rights*[641] and the *African Charter of Human and People's Rights*[642] there are special references to private threats to human rights[643] and the Inter-American Commission has made clear that governments must prevent acts of violence whether committed by public officials or private individuals.[644] This duty of "due diligence" to protect against non-state human rights abuses includes the

---

Companies: Is it Time for an ICJ Advisory Opinion?" (2012) 20 *Cardozo J. of Int'l & Comp. L.* 437, 446 wfr.

[638] *Convention on the Rights of the Child (CRC)* (1989).

[639] Karin Lucke, "States' and Private Actors' Obligations under International Human Rights Law and the Draft UN Norms" in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi Bonanomi (eds), *Human Rights and International Trade* (Oxford: Oxford University Press, 2005) 148, 155.

[640] See *UN General Comment No 12: The rights to adequate food (art. 11 ICESC)* U. N. Doc. E/C.12/1999/5 (12 May 1999).

[641] *American Convention on Human Rights "Pact of San Jose, Costa Rica"* (1969).

[642] *African (Banjul) Charter on Human and Peoples' Rights 1981*.

[643] Andrew Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press 1993), 118.

[644] *Ibid.* at 119.

protection against abuses by businesses.[645] In *Velásquez Rodriguez v Honduras*[646] for example the Inter-American Court of Human Rights held that

> [t]he first obligation assumed by the States Parties under Article 1(1) [of the *American Convention on Human Rights*] is " to respect the rights and freedoms " recognized by the Convention. The exercise of public authority has certain limits which derive from the fact that human rights are inherent attributes of human dignity and are, therefore, superior to the power of the State […] The second obligation of the States Parties is to " ensure " the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation. The obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation - it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights.

The UN Human Rights Committee also stressed the state obligation to appropriately prevent and effectively investigate disappearances and killings under art. 6 *ICCPR*[647] and the ECtHR ruled similarly for example in *Timurtaş v Turkey*[648] and *Ergi v Turkey*.[649]

---

[645] *Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled "Human Rights Council", "Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts" Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises* A/HRC/4/035 (9 February 2007) Summary, par. 10.

[646] *Velásquez Rodríguez v Honduras* Inter-Am Ct. H.R. (Ser. C) No. 4 (29 July 1988), the following ist cited from par. 166-7.

[647] *Herrera Rubio v Colombia*, Communication No. 161/1983, U.N. Doc. Supp. No. 40 (A/43/40) (1988) par. 11.

[648] *Timurtaş v Turkey* ECtHR (23531/94); see also Robert McCorquodale, "Spreading Weeds Beyond Their Garden: Extraterritorial Responsibility of States for Violations of Human Rights by Corporate Nationals" (2006) *ASIL Proceedings, Panel 10, "The Extraterritorial Application of Human Rights"* 11; see also the further extension of this obligation *A v UK* ECtHR, 27 EHRR 611 (1999).

[649] *Ergi v Turkey* ECtHR (66/1997/850/1057).

All this reflects the broad obligation of states concerning the protection of human rights at least within their own jurisdictions.[650] Generally speaking, private actors do not have such a duty. Rather they are indirectly bound by the domestic law a state passes to fulfil its human rights protection duties.[651]

B *Developments in the field of human rights and TNCs*

However, the distinction between direct or state duties to protect human rights against violations by any kind of actors and the - under public international law - indirect duties for non-state actors to respect domestic human rights law is not an irrevocable one. Today it is claimed not only states bear obligations deriving from public international law any longer but also non-state actors, especially individuals and also TNCs.[652] Ruggie even stressed that TNC duties and state duties are not defined as much by one another as it often seems when explaining that

> [t]he corporate responsibility to respect [human rights] exists independently of States' duties. Therefore, there is no need for the slippery distinction between "primary" State and "secondary" corporate obligations - which in any event would invite endless strategic gaming on the ground about who is responsible for what.[653]

He goes on pointing out that

---

[650] See for example art. 2 (1) *Convention on the Rights of the Child (CRC)* (1989).
[651] *Velásquez Rodríguez v Honduras* Inter-Am Ct. H.R. (Ser. C) No. 4 (29 July 1988) 165-167.
[652] See for example Dutch Sections of Amnesty International and Pax Christi International, *Report: Multinational Enterprises and Human Rights* (2nd ed, 2000), 18; Igor Fuks, "Sosa v. Alvarez-Machain and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability" (2006) 106 *Colum. L. Rev.* 112, 117-18 wfr, stating that TNCs using low-cost labour in a way that is violating human rights and are not being held responsible for these violations are in fact "[c]ollecting monetary awards for violations of those rights"; Chris Jochnick, "The Human Rights Challenge to Global Poverty" in Willem van Genugten and Camilo Perez-Bustillo (eds), *The Poverty of Rights, Human Rights and the eradication of Poverty* (London, New York: Zed Books, 2001)159, 172; David Kinley and Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibility for Corporations at International Law" (2004) 44 *VA J. Int. Law* 931, 935; Beth Stephens "The Amorality of Profit: Transnational Corporations and Human Rights" (2002) 20 *Berkeley J. Int'l L.* 45 wfr.
[653] John Ruggie, "Protect, Respect and Remedy: The UN Framework for Business and Human Rights" in Mashood A. Baderin and Manisuli Ssenyonjo (eds), *International Human Rights Law: Six Decades after the UDHR and Beyond* (Farnham, Burlington: Ashgate, 2010) 519, 530.

> influence [as in the term "sphere of influence"] can only be defined in relation to someone or something. Consequently, it is itself subject to influence: a government can deliberately fail to perform its duties in the hope or expectation that a company will yield to social pressures to promote or fulfil certain rights - again demonstrating why State duties and corporate responsibilities must be defined independently of one another.[654]

The developments of human rights responsibilities for private actors and their protection duties will be sketched in the following.

1 *Human Rights and individuals as private actors*

There has been a development towards more human rights obligations also for private actors. As individuals have already been there long before TNCs have, the development towards human rights obligations is more apparent in this area.

The ICJ made clear in 1949 that neither all subjects nor all legal personalities of international law have to bear the same rights and acknowledged legal personality for entities other than states.[655] In addition, although it was long held that only states are international legal persons[656] and that individuals and other private actors were mere objects in public international law, this perception has changed over the years. Individuals are bearing rights and responsibilities under public international law,[657] for example with regard to slavery, piracy and genocide as could be seen for example in the Nuremberg Trials and the 1998 *Rome Statute of the International Criminal Court*.[658] There is a consensus that

---

[654] *Ibid.* at 532.
[655] Robert McCorquodale, "The Individual and the International Legal System", in Malcolm D. Evans (ed) *International Law* (Oxford: Oxford University Press, 2003) 300, 301-2, referring for example to the international legal personality of the UN discussed in *Reparations for Injuries suffered in the service of the United Nations,* Advisory Opinion, ICJ Reports 1949, 174, 178-9.
[656] See for example Colin Warbrick, "The Subjects of the International Legal Order" in Malcolm D. Evans (ed) *International Law* (Oxford: Oxford University Press, 2003) 205, 218.
[657] Robert McCorquodale, "The Individual and the International Legal System" in Malcolm D. Evans (ed) *International Law* (Oxford: Oxford University Press, 2003) 300, 305-7.
[658] Olivier de Schutter, "The Challenges of Imposing Human Rights Norms on Corporate Actors" in Olivier de Schutter (ed), *Transnational Corporations and Human Rights* (Oxford, Portland: Hart Publishing, 2006) 1, 29; Chris Jochnick, "The Human Rights Challenge to Global Poverty" in Willem van Genugten and Camilo Perez-Bustillo (eds), *The Poverty of*

the status of the individual has moved from being a mere object to becoming a subject of international law - "a subject whose rights are different and lesser, but a subject nonetheless."[659] This is perfectly in line with the just mentioned decision of the ICJ on the different possible scopes of legal personalities and subjects to international law.

In addition, international conventions and declarations contain duties for private actors to protect human rights. The *Universal Declaration*[660] for example directly refers to private actors and implies human rights duties on them[661] when providing in art. 30:

> Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.[662]

This wording is also used in art. 5 (1.) of *ICCPR*[663] and *ICESC*[664] and is even supplemented by banning any limitations of the rights described that goes beyond those provided for in the document. Another example is the *Convention on the Rights of the Child*[665] which expresses individual duties in art. 3.[666] In *CEDAW*[667] and the *Convention on the Elimination of All Forms of Racial Discrimination*[668] the responsibility of non-state actors is also recognized,[669] but

---

Rights, Human Rights and the eradication of Poverty (London, New York: Zed Books, 2001) 159, 162.

[659] Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff and Brill, 2006) 354; see also for example Wilfried Bolewski, *Diplomacy and International Law in Globalized Relations* (Berlin, Heidelberg: Springer, 2007) 59.

[660] *Universal Declaration of Human Rights (UDHR)* (1948), see preamble and art. 30.

[661] Chris Jochnick, "The Human Rights Challenge to Global Poverty" in Willem van Genugten and Camilo Perez-Bustillo (eds), *The Poverty of Rights, Human Rights and the eradication of Poverty* (London, New York: Zed Books, 2001), 159, 163.

[662] Art. 30 *Universal Declaration of Human Rights (UDHR)* (1948).

[663] *International Covenant on Civil and Political Rights (ICCPR)* (1966).

[664] *International Covenant on Economic, Social and Cultural Rights (ICESCR)* (1966).

[665] *Convention of the Rights of the Child (CRC)* (1989).

[666] Andrew Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1993), 101.

[667] *Convention on the Elimination of All Forms of Discriminations Against Women (CEDAW)* (1979).

[668] *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)* (1965).

[669] Karin Lucke, "States' and Private Actors' Obligations under International Human Rights Law and the Draft UN Norms" in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi Bonanomi (eds), *Human Rights and International Trade* (Oxford: Oxford University Press,

only indirectly by imposing obligations on states to enact adequate legislation to protect individuals from violations by non-state actors.

2 *Human Rights and TNCs*

TNCs like individuals are part of the group of non-state actors, which is very diverse and far from homogeneous.[670] As TNCs are relatively new actors on the international stage, new answers have to be found, because, as was stressed in a UN report:

> Of importance also is the fact that even though each TNC subsidiary is, in principle, subject to its host country's regulations, the TNC as a whole is not fully accountable to any single country. The same is true for responsibilities they fail to assume for activities of their subsidiaries and affiliates. The global reach of TNCs is not matched by a coherent global system of accountability.[671]

(a) Development of Voluntary Instruments

As states were hesitant to imply binding duties on these new non-state actors, a wide range of voluntary law instruments have been developed over time. One of the more specific and most recent is the *Accord on Fire and Building Safety in Bangladesh* which was already mentioned in the introductory chapter. The following section will focus on more general instruments. Since four decades there have been ideas of imposing voluntary or non-binding human rights rules. In addition to those rules and guidelines of international organisations sketched

---

2005) 148, 154; on direct and indirect human rights duties of TNCs under public international law see also Miriam Mafessanti, "Corporate Misbehaviour & International Law: Are there Alternatives to 'Complicity'?" (2010) 6 *S. C. J. Int'l L. & Bus* 167, 174-8.

[670] Philip Alston, "The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?" in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford: University Press, 2005), 3, 5.

[671] *The Realization of Economic, Social and Cultural Rights: The impact of the activities and working methods of transnational corporations on the full enjoyment of all human rights, in particular economic, social and cultural rights and the right to development, bearing in mind existing international guidelines, rules and standards relating to the subject-matter-report of the Secretary-General* E/CN.4/Sub.2/1996/12 (2 July 1996) < http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G96/130/58/PDF/G9613058.pdf?OpenElement > 1 May 2014 par. 72.

below, a number of voluntary codes of conduct adopted by TNCs exist,[672] created by businesses themselves, NGOs, trade unions etc,[673] which show that human rights and their protection are not alien to TNCs in general.

(i) Draft Code of Conduct

In the 1970s a Group of Eminent Persons gathered to study the role of MNEs on development and international relations and recommended setting up a UN Commission on Multinational Corporations and a UN Centre on Multinational Corporations to oversee and develop UN policy in this area. This led to the emergence of UNCTC (United Nations Centre on Transnational Corporations), renamed in 1992 as TCMD (Transnational Corporations and Management Division), which is today part of the UNCTAD (United Nations Conference on Trade and Development), founded to accelerate the New International Economic Order, which basically means giving more weight to interests of developing countries. An internationally agreed code of conduct which should back up national regulations to control abuses of TNCs in developing countries should be developed.[674] A *Draft Code of Conduct on Transnational Corporations* was prepared by the UNCTC by 1992, but has failed to be adopted due to disagreements between industrialized and developing countries, in particular regarding the reference to international law and the inclusion of treatment standards for TNCs.[675]

---

[672] Olivier de Schutter, "The Challenge of Imposing Human Rights Norms on Corporate Actors" in Olivier de Schutter (ed), *Transnational Corporations and Human Rights* (Oxford, Portland: Hart Publishing, 2006) 27.
[673] See for examples David Vogel, *The Market of Virtue, The Potential and Limits of Social Corporate Responsibility* (Washington D. C.: Brookings Institution, 2005).
[674] Peter Muchlinski, *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 4.
[675] Olivier de Schutter, "The Challenge of Imposing Human Rights Norms on Corporate Actors" in Olivier de Schutter (ed), *Transnational Corporations and Human Rights* (Oxford, Portland: Hart Publishing, 2006) 1, 2, 43, 52.

(ii) OECD Guidelines

The *OECD Guidelines*[676] emerged from the same difficulties and disagreements between developing and developed states in the 1970s, when the "Group of 77" (developing) countries insisted on permanent sovereignty over their natural resources and the developed countries feared restrictions for foreign investors - so the OECD adopted the *Guidelines for Multinational Enterprises*, which have repeatedly been revised, to give some security to developing states and the independence of their political processes from MNE interference.[677] The *Guidelines* are rules for TNCs which they are asked to adopt and obey by the member states. To give more weight to the human rights obligations of the TNCs, the *OECD Guidelines* impose a duty on the states to set up National Contact Points to promote the *Guidelines*.[678]

(iii) Tripartite Declaration

In addition, in 2000 the *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* was adopted by the ILO,[679] going even further than the *OECD Guidelines* in stating that even where certain core ILO instruments have not been ratified by the host State, they nevertheless should be "referred to" by these investors "for guidance in their social policy".[680] Yet the Declaration is only a non-binding instrument, although the governments are to report quadriennially to the Governing Body[681] and legal interpretation of the Declaration can be asked for.[682] There is a specific reference to human rights as set down in the *Universal Declaration* and the corresponding international Covenants adopted by the General Assembly.[683] However, both instruments, the

---

[676] *OECD Guidelines for International Enterprises* (revised in 2000).
[677] Olivier de Schutter, "The Challenge of Imposing Human Rights Norms on Corporate Actors" in Olivier de Schutter (ed), *Transnational Corporations and Human Rights* (Oxford, Portland: Hart Publishing, 2006) 1, 3.
[678] *Ibid.* at 8.
[679] *Ibid.* at 4.
[680] *Ibid.* at 6.
[681] *Ibid.* at 6-7.
[682] *Ibid.* at 7.
[683] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006) 213.

OECD Guidelines and the *ILO Declaration* are voluntary[684] and non-binding and where they establish the obligation to create Contact Points or refer to Conventions they impose direct duties on the states rather than TNCs.[685]

(iv) UN Global Compact

The *UN Global Compact,*[686] an initiative of 1999, voluntarily and based on shared values in the areas of human rights, labour and environment, gave the discussions about TNCs and their responsibility further momentum.[687] It asked for support and respect of human rights by TNCs within their "sphere of influence".[688] The "sphere of influence" approach is linked to the three dimensions of human rights obligations to respect, protect and promote human rights[689] mentioned above. In addition, the *Global Compact* uses the complicity concept of corporations contributing to someone else's illegal acts[690] by direct complicity, beneficial complicity and silent complicity.[691] To avoid the latter form of complicity corporations need to raise human rights issues with governments.[692]

(v) UN Draft Norms

In 2003 the UN Sub- Commission for the Promotion and Protection of Human Rights[693] drafted the *Norms of Responsibilities of Transnational Corporations*

---

[684] Olivier de Schutter, "The Challenge of Imposing Human Rights Norms on Corporate Actors" in Olivier de Schutter (ed), *Transnational Corporations and Human Rights* (Oxford, Portland: Hart Publishing, 2006) 1, 9.
[685] *Ibid.* at 8.
[686] *UN Global Compact* Website <http://www.unglobalcompact.org/> 1 May 2014.
[687] Olivier de Schutter, "The Challenge of Imposing Human Rights Norms on Corporate Actors" in Olivier de Schutter (ed), *Transnational Corporations and Human Rights* (Oxford, Portland: Hart Publishing, 2006) 1, 10.
[688] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006) 219.
[689] *Ibid.* at 220.
[690] *Ibid.*
[691] *Ibid.* at 221-2.
[692] *Ibid.* at 224-5.
[693] Olivier de Schutter, "The Challenge of Imposing Human Rights Norms on Corporate Actors" in Olivier de Schutter (ed), *Transnational Corporations and Human Rights* (Oxford, Portland: Hart Publishing, 2006) 1, 11.

and Other Business Enterprises with regard to Human Rights (Draft Norms).[694] These Norms are not creating new binding rules,[695] but are rather referring to already existing international guidelines[696] like the *Universal Declaration*, the *OECD Guidelines* and the *Tripartite Declaration.* They are a restatement of international principles applicable to companies rather than a radically new approach, deriving their authority from their sources in treaties and customary international law.[697] The *Draft Norms* contain the sphere of influence approach[698] as well as the concept of complicity by imposing direct obligations on TNCs. Generally speaking this means that TNCs which let human rights violations by others happen in their sphere of influence and know of it or could have known of it and do not end it, are responsible for these violations. Yet the *Draft Norms* are - as their very name suggests - only a blueprint and have not been commonly accepted so far.[699]

(vi) UN Guiding Principles/ UN Framework

As the *Draft Norms* were not generally accepted, because governments and businesses hesitated to impose the same range of human rights duties on businesses than states held, a mandate for a Special Representative on the issue

---

[694] *Norms of Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights* (2003) U.N. Doc. E/CN.4/Sub.2/2003/12 (13 August 2003).
[695] Jacob Gelfand, "The Lack of Enforcement in the United Nations Draft Norms: Benefit or Disadvantage?" in Olivier de Schutter (ed), *Transnational Corporations and Human Rights* (Oxford, Portland: Hart Publishing, 2006) 313, 315.
[696] *Ibid.*
[697] *Ibid.*; David Weissbrodt and Muria Kruger, "Human Rights Responsibilities of Businesses as Non-State Actors" in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford: University Press, 2005) 315, 328.
[698] It is named in the general obligations in the *Norms of Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights* (2003) U.N. Doc. E/CN.4/Sub.2/2003/12 (13 August 2003); see also Olivier de Schutter, "The Challenge of Imposing Human Rights Norms on Corporate Actors" in Olivier de Schutter (ed), *Transnational Corporations and Human Rights* (Oxford, Portland: Hart Publishing, 2006) 1, 11-2.
[699] See for the discussion for example Julie Campagna, "United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Right: the International Community Asserts Binding Law on the Global Rules Makers" (2004) 37 *J. Marshall L. Rev.* 1205.

of Human Rights and businesses was established in 2005.[700] John Ruggie held the office until 2011 and developed the *UN Guiding Principles* with the *"Protect, Respect and Remedy" Framework (UN Framework)* in a research-based and consultative manner, engaging all stakeholder groups, which led to a widespread positive reception of the *UN Framework*.[701] As explained in Ruggie's final report

> [t]he Framework rests on three pillars. The first is the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. The second is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third is the need for greater access by victims to effective remedy, both judicial and non-judicial. Each pillar is an essential component in an inter-related and dynamic system of preventative and remedial measures: the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business in relation to human rights; and access to remedy because even the most concerted efforts cannot prevent all abuse.[702]

The *Guiding Principles* do not create new or confine traditional international law obligations,[703] but are a "common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments."[704] The *Guiding Principles* with the *UN Framework* are an important means in accelerating further developments, because they are a point of concentration and information at the same time and they are clearly stating that businesses do have human rights responsibilities and that these are independent of the human rights duties states may have.[705]

---

[700] *Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, A/HRC/17/31, (21 March 2011) <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> 1 May 2014, par. 2-f of the report.
[701] *Ibid.* at par. 3 and 8-10.
[702] *Ibid.* at par 6.
[703] *Ibid.* at Annex: General principles of the Guiding Principles.
[704] *Ibid.* at par. 13 of the report.
[705] See *ibid.,* principle 11.

(vii) ISO 26000

Another set of voluntary rules for social responsibility is the *ISO 26000* from 2010, launched by the International Organization for Standardization. Unlike the ISO management system standards it is not certifiable, instead it is supposed to offer guidance for all kinds of organizations.[706] The beginning of clause 4.8 reads: "Respect for human rights - The principle is: an organization should respect human rights and recognize both their importance and their universality",[707] more guidance on human rights contains clause 6.3, referring to the International Bill of Human Rights, consisting of the *UN Universal Declaration of Human Rights*, the *ICCPR*, the *ICESC* and their optional protocols as well as the seven other UN human rights Conventions.[708] The User Guide summarizes that "enterprises should consider their activities and efforts to avoid complicity in the violation of human rights. Moreover, enterprises should inform themselves about the social and environmental conditions under which purchased goods are produced"[709]

(viii) EU CSR

Since 2001[710] the EU is also working on promoting corporate social responsibility, the latest step being the renewed EU strategy 2011-2014 from 2011.[711] It is based on the "global framework for CSR"[712] consisting of the

---

[706] European Office of Crafts, Trades and Small and Medium sized Enterprises for Standardisation, *NORMAPME User Guide for European SMEs on ISO 26000* (1st ed, 2011) <http://www.26k-estimation.com/User_guide_ISO26000_version_EN_final_22072011.pdf > 1 May 2014, 4.
[707] *ISO 26000* clause 4.8.
[708] *ISO 26000* box 6.
[709] European Office of Crafts, Trades and Small and Medium sized Enterprises for Standardisation, *NORMAPME User Guide for European SMEs on ISO 26000* (1st ed, 2011) <http://www.26k-estimation.com/User_guide_ISO26000_version_EN_final_22072011.pdf > 1 May 2014, 8.
[710] *Green Paper on Promoting a European framework for Corporate Social Responsibility* COM (2001) 366 final (18 July 2001).
[711] *Communication from the European Commission to the European Parliament, the Council, the European Social and Economic Committee and the Committee of the Regions*, COM (2011) 681 final. (25 October 2011).
[712] *Ibid.* at par. 3.2.

> OECD Guidelines for Multinational Enterprises, the ten principles of the United Nations Global Compact, the ISO 26000 Guidance Standard on Social Responsibility, the ILO Tri-partite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the United Nations Guiding Principles on Business and Human Rights.[713]

The improvements will be jointly monitored by the Commission and all stakeholders,[714] yet the lead in implementing the rules is to be taken by the businesses, while "public authorities should play a supporting role".[715]

(ix) Valuing the Voluntary instruments

All these instruments show once more that there is a need for rules applicable to TNCs. The soft law instruments are valuable, do make a difference and have risen awareness for TNCs as well as for politicians and the public concerning human rights in a globalized world and are therefore an important contribution to global human rights protection. In addition, they can set the pattern for the content and substance of binding rules to come. Yet despite all these ideas and efforts, human rights have been and are still being violated by TNCs as mentioned earlier in this research. One reason might be that only the large companies with well-known brands will feel the need to comply when under consumer pressure.[716] Yet as already mentioned also large and well-known companies like Nestlé are accused of human rights violations by NGOs. Therefore, in order to provide better protection for human rights the *status quo* has to change. The legal status and lack of direct human rights protection obligations of TNCs still seem to mismatch their factual role and influence. To achieve some change, the statement "[h]ow to comply is a management question; whether to comply is a legal one"[717] has to be taken seriously, which is

---

[713] *Ibid.*
[714] *Ibid.* at par. 5.
[715] *Ibid.* at par. 3.4.
[716] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 183 wfr.
[717] Julie Campagna, "United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Right: the International Community Asserts Binding Law on the Global Rules Makers" (2004) 37 *J. Marshall L. Rev.* 1205, 1229.

difficult when the rules and codes providing human rights protection duties remain voluntary and non-binding.

(b) Developments concerning the legal status of TNCs

TNCs as the new actors are challenging public international and human rights law, the latter being an inseparable part of the former.[718] The traditional perceptions of human rights and public international law are changing when dealing with this challenge. To assess whether a person or entity has legal personality, the rights and duties it bears can be of help, because being a legal person means bearing rights and duties derived from international law.[719] Yet, of course, circular reasoning[720] should be avoided. Using the ICJ and ICC statements on private actors, TNCs can be assessed in this light, although this is a rather hypothetical assessment and caution is advised when generalizing the ICJ and ICC decisions and the developments they triggered.

TNCs bear obligations deriving from international law as well as they are for example[721] liable under the art. 9 *Convention on the Protection of the Environment Through Criminal Law*,[722] the *Convention for the Suppression of the Financing of Terrorism*,[723] the *Security Council Resolution 1373*[724] and - the most far reaching - under the *Convention on the Ban of Import into Africa and*

[718] August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors" in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford: University Press, 2005) 37, 42.
[719] Dapo Akande, "International Organizations" in Malcolm D. Evans (ed) *International Law* (Oxford: Oxford University Press, 2003), 269, 272-3; Robert McCorquodale, "The Individual and the International Legal System" in *ibid.* 300, 301, referring for example to the international legal personality of the UN discussed in *Reparations for Injuries suffered in the service of the United Nations,* Advisory Opinion, ICJ Reports 1949,174, 178-9.
[720] August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors" in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford: University Press, 2005) 37, 72 wfr.
[721] For further examples such as the responsibility for nuclear damages see Iris Halpern, "Tracing the Contours of Transnational Corporations' Human Rights Obligations in the Twenty-First Century" (2008) 14 *Buff. HRL Rev.* 129, 172.
[722] *Convention on the Protection of the Environment Through Criminal Law* (CETS No. 172) (1998).
[723] *International Convention for the Suppression of the Financing of Terrorism (*now *Terrorist Financing Convention)* (1999).
[724] *Security Council Resolution 1373 (2001)* S/RES/1373 (2001).

the Control of Transboundary Wastes within Africa, which according to art. 9 (2.) in connection with art. 1 (16.) obliges governments to impose criminal penalties not only on natural persons but also on legal persons.[725] Furthermore, it is claimed that they bear duties under the *ECHR* due to the horizontal effect or *Drittwirkung* of the Convention, necessary for its effective implementation.[726] TNCs can also even take part in international arbitration as the International Arbitration Tribunal found in 1978[727] and file individual complaints under the *ECHR* according to its art. 34.[728] All these provisions addressing corporate behaviour are much more than what was there at the time of the Nuremberg trials for individual liability and yet it was still acknowledged to exist[729] and strengthened the acceptance of individuals as subjects to public international law.[730] However, as the ICC does not have jurisdiction over "juridical persons" the possibility for TNCs to slowly achieve recognized legal personality in this way is not provided. Yet it is argued that although not companies but individuals where tried, international criminal liability of corporations was already

---

[725] *Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa* (1991).

[726] David J. Harris, Michael O'Boyle and Colin Warbrick, *The Law of the European Convention on Human Rights* (London: Butterworths, 1995) 19-22; see also Willem van Genugten, "The Status of Transnational Corporations in International Public Law" Asbjørn Eide, Helge Ole Bergesen and Pia Rudolfson Goyer (eds), *Human Rights and the Oil Industry* (Antwerpen, Groningen, Oxford: Intersentia, 2000) 71, 79; for further discussion of the concept of *drittwirkung*, see Andrew Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1993) 178-245 and Andrew Clapham "The 'Drittwirkung' of the Convention" in Ronald St. J. MacDonald, Franz Matscher and Herbert Petzold (eds), *The European System for the Protection of Human Rights* (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1993) 163.

[727] *Texaco Overseas Petroleum Co v The Government of the Libyan Arab Republic*, YCA 1979, 177.

[728] Art. 34 *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR)* (1953) reads: "Article 34 – Individual applications The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."; see also Walter Kälin and Jörg Künzli, *Universeller Menschenrechtsschutz* (2nd ed, Basel: Helbing Liechtenhahn, 2008) 257.

[729] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006), 251.

[730] See for the development for example Malcolm Shaw, *International Law* (4th ed, Cambridge: Cambridge University Press, 1997) 182-190.

acknowledged in the Nuremberg Trials *Krupp*[731] and *Farben,*[732] because the court applied the idea of corporate responsibility by referring to the tried conduct as the conduct of the corporation as such and only in a second step determined the guilt of the individual by assessing the individual's knowledge of this conduct.[733] There even seems to be a growing acceptance for the concept of criminal responsibility of corporations in domestic and international law today.[734] Similar developments concerning liability and legal personality are taking place in different legal systems and an international consensus might be reached some day. In addition, it is also pointed out that the terms "any person" or "any individual" in the UN Conventions also include juridical persons and therefore TNCs.[735] Furthermore, direct obligations for businesses to respect human rights are accepted by the *UN Guiding Principles* for

> at a minimum [those internationally recognized human rights] expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.[736]

---

[731] *US v Krupp* IX Trial of War Criminals Before Nuremberg Military Tribunals No 10 (1948) 1327-1449 (judgement).

[732] *US v Krauch et al [IG Farben]* VIII Trial of War Criminals Before Nuremberg Military Tribunals No 10 (1952).

[733] See for example Anita Ramasastry, "Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and their impact on the liability of MNCs" (2002) 20 *Berkley J. Int'l L.* 91, 152; Steven R. Ratner, "Corporations and human rights: a theory of legal responsibility" (2001) 111 *Yale L. J.* 443, 477 and 478.

[734] Olivier de Schutter, "The Challenges of Imposing Human Rights Norms on Corporate Actors" in Olivier de Schutter (ed), *Transnational Corporations and Human Rights* (Oxford, Portland: Hart Publishing, 2006) 287, 295; Eric Engle, "Extraterritorial Corporate Criminal Liability: a Remedy for Human Right Violations?" (2006) 20 *St. John's L. J.* 287, 291-7; however, so far in most cases where businesses can be and are regularly held criminally liable it is not due to human rights violations, but anti-trust and competition law, see Ingo E. Fromm, "Auf dem Weg zu strafrechtlicher Verantwortung von Unternehmen/Unternehmensvereinigungen in Europa?" (2007) *ZIS* 279.

[735] Louis Henkin, "The Universal Declaration at 50 and the challenge of Global Markets" (1999) 25 *Brooklyn J. of Int'l L.*17, 25.

[736] *Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, A/HRC/17/31, (21 March 2011) <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> 1 May 2014, Principle 12.

Yet as already mentioned above, the *UN Guiding Principles* are a mere non-binding "soft law" instrument and do not intend to change the legal status of businesses in public international law.[737]

For all the above mentioned reasons it is therefore claimed that TNCs are not legal persons of public international law in general. Their obligations under public international law are fragmented and rather specific. This becomes clear when, for example, considering that TNCs are criminally liable for their complicity in oil spills and under European law for anti-competitive behaviour, but not for complicity in slavery or genocide.[738] The duties imposed on TNCs, like the ones mentioned above, remain *sui generis*,[739] and although they can be considered indicators of international legal personality and even create international legal personality for particular purposes, they are not strong enough (yet) to create a general one.[740]

VI TNC LIABILITY UNDER PUBLIC INTERNATIONAL LAW BEFORE DOMESTIC COURTS

As mentioned above, once the *forum* and the applicable law - in terms of which state's law is applicable - are identified, the applicable law before domestic courts does not necessarily have to be domestic law. The applicable domestic law may also refer to international law. Therefore some courts also use international law to decide cases involving TNCs and human rights. An advantage when using international law is that it is more likely that there is a

---

[737] See *Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, A/HRC/17/31, (21 March 2011) <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> 1 May 2014, Annex: General Principles of the Guiding Principles, where it is explicitly stated that nothing in these Principles should be read as creating new international law obligations.

[738] Harold Hongju Koh, "Separating Myth from Reality About Corporate Responsibility Litigation" (2004) 7 *JIEL* 263, 264-6; Andrew J. Wilson, "Beyond Unocal: Conceptual Problems In Using International Norms To Hold Transnational Corporations Liable Under The Alien Tort Claims Act" in Olivier de Schutter (ed), *Transnational Corporations and Human Rights* (Oxford, Portland: Hart Publishing, 2006) 43, 52.

[739] Andrew J. Wilson, "Beyond Unocal: Conceptual Problems In Using International Norms To Hold Transnational Corporations Liable Under The Alien Tort Claims Act" in Olivier de Schutter (ed), *Transnational Corporations and Human Rights* (Oxford, Portland: Hart Publishing, 2006) 43, 52.

[740] *Ibid.*

consensus about the law and that the jurisdiction and judgements are therefore also accepted in foreign states, for example the host states.[741] Again, these proceedings may involve TNCs or, because international law is applicable, states as parties and tort as well as criminal law may be used.
As the TNCs are the ones violating human rights, they may be parties of the proceedings before domestic courts either under tort law as for example under *ATCA* in the US or under criminal law like in Belgium, Spain, France and the Netherlands.

A *Tort law (ATCA)*

As sketched above, TNCs have no general personality under public international law and bear no general international duties to protect human rights. Yet as set out above, there are reasons supporting the applicability of international standards and duties on corporations and nation states may impose this liability by according domestic law. The *Alien Tort Claims Act (ATCA)* is such a domestic law.[742]
The *ATCA*[743] was passed in 1789, but was not used very often until 1980 when a court decided in *Filártiga v Pena-Irala*[744] that *ATCA* allows for private suits and customary international law of today may be applied on individuals.[745] In *Kadic v Karadžić*[746] it was further explained that no state action is needed for liability under *ATCA*, but private individuals could be liable for breaches of the "law of nations", given of course that the respective crime can be committed by a private

[741] See Claudia T. Salazar, "Applying International Human Rights Norms in the United States: Holding Multinational Corporations Accountable in the United States for International Human Rights Violations Under the Alien Tort Claims Act" (2004) 19 *St. John's J.L. Comm.* 111, 145 wfr.
[742] See Jennifer L. Heil, "African Private Security Companies and the Alien Tort Claims Act: Could international Oil and Mining Companies be Liable?" (2002) *NW J. Int'l L. & Bus* 291 302 wfr; Harold Hongju Koh, "Separating Myth from Reality About Corporate Responsibility Litigation" (2004) 7 *JIEL* 263, Myth 1.
[743] *Alien Tort Claims Act (ATCA)* (US, 1789).
[744] *Filártiga v Pena-Irala* 630 F.2d 876 (2nd Cir., 1980).
[745] An opinion that was not shared by all courts, see *Tel-Oren v Libyan Arab Republic* 726 F.2d 774 (D.C. Cir. 1984) in particular Bork, J., concurring; also see Igor Fuks, "Sosa v. Alvarez-Machain and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability" (2006) 106 *Colum. L. Rev.* 112, 114-6.
[746] *Kadic v Karadzic*, 70 F.3d 232 (2d Cir. 1995).

person alone at all.[747] From there it did not take long until corporations were held liable under *ATCA*. The first case against a TNC was *Doe v Unocal*[748] in 1997. The defendant in this case was the US Union Oil Company of California ("Unocal") which had a subsidiary in Myanmar, formerly known as Burma, that was building a gas pipeline, using Myanmar military as security forces to control the area. While doing so, human rights violations occured. This case is linked to the *Total* case mentioned above, as Total and Unocal were both working on building the Yadana gas pipeline in Myanmar. The allegations were very similar. They included death of family members, torture, rape, assault, forced labour and the loss of homes and property. Although the case was dismissed later, the reasoning is of importance as corporations as private actors liable for violations of *ius cogens* were generally accepted by the court and since then many similar cases were brought before US courts.[749] The first Supreme Court decision on the new use of *ATCA* was *Sosa v Alvarez-Machain*[750] and it supported the new application.[751] The case was about the US, hiring Mexican nationals to capture the Mexican national Alvarez-Machain in Mexico to bring him to the US because he was involved in the kidnapping, torture and murder of a US special agent and Mexico refused to extradite him. Alvarez-Machain filed suit against the US under *ATCA* and although the case was

---

[747] Torture, disappearances and summary executions for example cannot be committed by a private person alone, but require close cooperation with state actors, see Jennifer L. Heil, "African Private Security Companies and the Alien Tort Claims Act: Could international Oil and Mining Companies Be Liable?" (2002) 22 *NW J. Int'l L. & Bus* 291, 307; Michael Ratner, "Civil Remedies for Gross Human Rights Violations" in David Barnhizer (ed), *Effective Strategies for Protecting Human Rights* (Aldershot, Burlington: Ashgate Dartmouth, 2001) 249, 254; genocide, crimes against humanity, piracy and slavery on the other hand can be committed by a private person, see Eric Engle, *Private Law Remedies for Extraterritorial Human Rights Violations* (2006) at <http://elib.suub.uni-bremen.de/diss/docs/00010289.pdf> 1 May 2014, 147; Richard Herz, "Holding Multinational Corporations Accountable for Human and Environmental Rights Abuses", in David Barnhizer (ed), *Effective Strategies for Protecting Human Rights* (Aldershot, Burlington: Ashgate Dartmouth, 2001) 263, 266; Michael Ratner, "Civil Remedies for Gross Human Rights Violations" in *ibid*. at 249, 254.

[748] *Doe v Unocal* 963 F. Supp. 880 (C. D. Cal. 1997), latest decision *Doe v Unocal* 395 F.3d 932 (9th Cir. 2002).

[749] Richard Herz, "Holding Multinational Corporations Accountable for Human and Environmental Rights Abuses" in David Barnhizer (ed), *Effective Strategies for Protecting Human Rights* (Aldershot, Burlington: Ashgate Dartmouth, 2001) 263, 266 with examples.

[750] *Sosa v Alvarez-Machain,* 542 U.S. 692 (2004).

[751] See Igor Fuks, "Sosa v. Alvarez-Machain and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability" (2006) 106 *Colum. L. Rev.* 112.

dismissed, because the "law of nations" was not found to be violated in the case, the Supreme Court decided that private actors of foreign nationality acting abroad could indeed be held liable under *ATCA*. So now *ATCA* is used to allow for private claims of aliens before US courts against state and private actors in cases of violations of the "law of nations" that occurred abroad. Yet as already seen above, cases are not admitted easily.[752] Concerning the *forum non conveniens* test there has to be some kind of link with the US[753] and a further requirement for admissibility in *ATCA* cases is the violation of the "law of nations". Defining the breach of the "law of nations" by a corporation can be difficult in three ways - defining the "law of nations",[754] the degree of action or omission necessary for a breach and defining the actor able to commit this breach.

"Law of nations" is generally considered to be *ius cogens*[755] or customary international law,[756] which means the prohibition violated must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized".[757] Yet the Supreme Court gave little advice on the exact specificity

---

[752] On both, *forum non conveniens* and "law of nations" obstacles, see Eric Engle, "Frontiers in International Human Rights Law: The Alien Tort Statute and the Torture Victims' Protection Act: Jurisdictional Foundations and Procedural Obstacles" (2006) *Willamette J. Int'l L. & Dispute Res*, 1.

[753] See Michael Ratner, "Civil Remedies for Gross Human Rights Violations" in David Barnhizer (ed), *Effective Strategies for Protecting Human Rights* (Aldershot, Burlington: Ashgate Dartmouth, 2001) 249, 259.

[754] On this issue see Eric Engle, "Frontiers in International Human Rights Law: The Alien Tort Statute and the Torture Victims' Protection Act: Jurisdictional Foundations and Procedural Obstacles" (2006) *Willamette J. Int'l L. & Dispute Res*, 1.

[755] Eric Engle, *Private Law Remedies for Extraterritorial Human Rights Violations* (2006) at <http://elib.suub.uni-bremen.de/diss/docs/00010289.pdf> 1 May 2014, 43; *Doe v Unocal* 395 F.3d 932 (9th Cir. 2002), 945–46; *Kadic v Karadzic*, 70 F.3d 232 (2d Cir. 1995) 240 Claudia T. Salazar, "Applying International Human Rights Norms in the United States: Holding Multinational Corporations Accountable in the United States for International Human Rights Violations Under the Alien Tort Claims Act" (2004) 19 *St. John's J.L. Comm.* 111,140 wfr; *Sosa v Alvarez-Machain,* 542 U.S. 692 (2004).

[756] See Michael Ratner, "Civil Remedies for Gross Human Rights Violations" in David Barnhizer (ed), *Effective Strategies for Protecting Human Rights* (Aldershot, Burlington: Ashgate Dartmouth, 2001) 249, 251 wfr; remarking that ordinary international law is also included is Eric Engle, *Private Law Remedies for Extraterritorial Human Rights Violations* (2006) at <http://elib.suub.uni-bremen.de/diss/docs/00010289.pdf> 1 May 2014, 68-9 wfr.

[757] *Sosa v Alvarez-Machain,* 542 U.S. 692 (2004), 725.

or universality required.[758] What can be derived from the decision is that *ATCA* is not a tool to provide broad human rights protection as it has to be interpreted narrowly, confined to only the gravest violations, accepted among all states. It cannot provide progressively new causes of action nor is the violation of any human rights Convention or treaty sufficient to be considered a breach of the law of nations.[759] Heil for further definition of the term "law of nations" points out that the US Congress and courts have made clear that for example

> torture, extrajudicial killings, cruel, inhuman or degrading treatment, arbitrary detention, war crimes, physical and cultural destruction of peoples, systematic violations of human rights and environmental harms are to be covered under the ATCA as violations of the law of nations.[760]

Concerning the required degree of involvement of a private actor in the violation of international law Judge Sprizzo concluded according to the restrictive use of the aiding and abetting liability demanded for by the Supreme Court in *Sosa* and the District court's *Flores v Southern Peru Copper*[761] that aiding and abetting a violation of the law of nations was not sufficient to constitute such a violation in itself.[762] Yet some authors do not agree with this restrictive approach.[763] Furthermore, as already stated above, parent and subsidiary are considered separate legal entities, therefore it is often difficult to hold the parent liable under current law. This could for example be seen in 2010 in *Bowoto v. Chevron Corp*.[764], dealing with the killing of protestors of Chevron Nigerian Limited (CNL) in Nigeria by Nigerian Government Security Forces called by the CNL.

---

[758] See Igor Fuks, "Sosa v. Alvarez-Machain and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability" (2006) 106 *Colum. L. Rev.* 112, 122-4.
[759] P. J. Kee, "Expanding the Duties of the Vigilant Doorkeeper: ATS Litigation and the Inapplicability of the Act of State Doctrine and Forum Non Conveniens" (2008) 83 *Tul. L. Rev.* 495, 504.
[760] Jennifer L. Heil, "African Private Security Companies and the Alien Tort Claims Act: Could international Oil and Mining Companies be Liable?" (2002) 22 *NW J. Int'l L. & Bus* 291, 301 wfr.
[761] *Flores v Southern Peru Copper* 343 F.3d 140 (2003) 159, holding that courts should not engage in a factual analysis of the egregiousness of the violations to determine whether there are violations of customary international law.
[762] Andrew Farrelly, "Foreign Policy in the Courts – The ATCA in re South African Apartheid Litigation: What Sosa Makes Courts Do" (2006) *Seton Hall Legislative J.* 437, 459; *Re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004) 543-4.
[763] See for example Shaw W. Scott, "Taking Riggs Seriously: The ATCA Case against a Corporate Abettor of Pinochet Atrocities" (2005) 89 *Minn. L. Rev.* 1497, 1535-9.
[764] *Bowoto et al v Chevron Corp.* No. 09-15641 (9th Cir, 2010).

The issue of parent liability was raised but a jury finally decided that Chevron was not liable, which was affirmed by the Court of Appeal.[765]

As mentioned above, individuals and corporations have already been held liable under *ATCA*. Yet as far as the actor able to commit the breach is concerned it should be noted that the Court of Appeals for the Second Circuit ruled in September 2010 in *Kiobel*[766] that *ATCA* was only applicable to individuals, but not to corporations.[767] The defendants argued that corporations are not broadly accepted as possible violators of the law of nations under the very law of nations. The Supreme Court was expected to decide this very issue and to determine whether corporations can still be held liable under *ATCA* in future. Yet, as already mentioned above, the Supreme Court did not even get to assess the issue of corporate liability under *ATCA*, respectively the law of nations when deciding the case.[768] It affirmed the judgement of the Second Circuit Court of appeals by arguing that *ATCA* was not applicable to extraterritorial cases with no further link to the US than corporate presence. The Supreme Court stressed that all parties and relevant conduct had no sufficient ties to the US, dismissing the case according to the doctrine of *forum non conveniens*.
So while *Sosa* restricted the interpretation of the "law of nations", *Kiobel* restricted the applicability of *ATCA* on foreign cases. Developments in the "law of nations" however might be able to once more broaden the application of *ATCA*. Over time more practices and human rights violations could become *ius cogens* and also more linking factors such as factual control or sphere of influence between parent and subsidiary could become internationally accepted, thereby shaping the law of nations and possibly causing a less restrictive use of the doctrine of *forum non conveniens*. For the time being, however, the applicability of *ATCA* in cases involving TNCs has decreased. Yet, as already mentioned above when explaining the US approach to the *forum non conveniens* docrtrine, also before *Kiobel* the different lower federal courts had been at odds

[765] *Ibid.* at par. 4, where the difficulty of linking the act to the defendant is expressed.
[766] *Kiobel v Royal Dutch Petroleum* 06-4800-cv, 06-4876-cv (US App. 2010).
[767] Cesar Chelala and Alejandro M. Garro, "Corporations Should Be Held Liable for Human Rights Violations" (September 2011) *Aportes DPLF* 17, 18.
[768] *Kiobel v Royal Dutch Petroleum* No. 10-1491 (US Supreme Court, decided on 17 April 2013).

as to how *ATCA* has to be applied and when a case should be admitted,[769] *i.e.* *ATCA* has never been an easily applicable remedy on foreign cases. However, the numerous *ATCA* claims showed and still show that there is a demand for remedies like *ATCA*. So - while restricted - *ATCA* is still one of the few existing ways to actually hold TNCs liable for wrongs committed abroad either by suing the subsidiary (sufficiently) linked to the US itself or the parent that neglected its duties *vis-á-vis* the subsidiary. *ATCA* is sometimes even presented as the only gleam of hope, especially where human rights violations of TNCs are concerned, because on the one hand in those cases immunity rules like the Act of State doctrine are not applicable and on the other hand it is often the only promising remedy there is.[770]

B *Criminal law*

As when applying domestic law, not only tort law can be used, but also criminal law. Engle for example points out that some wrongs are so grave, they deserve more than private law sanctions. According to him, grave human rights violations deserve criminal sanctions.[771] Yet of course, as a corporation cannot be deprived of its liberty in the traditional understanding of criminal law, sanctions always remain economic in nature. However, criminal sanctions may go beyond mere payments and can even include closing the business. Therefore criminal sanctions are an important tool alongside the private law remedies to fight human rights violations.[772] Yet it was already sketched above that

---

[769] P. J. Kee, "Expanding the Duties of the Vigilant Doorkeeper: ATS Litigation and the Inapplicability of the Act of State Doctrine and Forum Non Conveniens" (2008) 83 *Tul. L. Rev.* 495, 519.

[770] See for example Igor Fuks, "Sosa v. Alvarez-Machain and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability" (2006) 106 *Colum. L. Rev.* 112, 137 wfr.

[771] Eric Engle, *Private Law Remedies for Extraterritorial Human Rights Violations* (2006) at <http://elib.suub.uni-bremen.de/diss/docs/00010289.pdf> 1 May 2014, 135; on the issue of criminal responsibility of (US) TNCs in general see Eric Engle, "Extraterritorial Corporate Criminal Liability: a Remedy for Human Right Violations?" (2006) 20 *St. John's L. J.* 287.

[772] See Nicola Jägers and Marie-José van der Heijden, "Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands" (2008) *Brook. J. Int'l L.* 833, 868; there are even combinations of criminal and civil law remedies like the French *action civile* and the German *Adhäsionsverfahren*, see Eric Engle, *Private Law Remedies for Extraterritorial Human Rights Violations* (2006) at <http://elib.suub.uni-bremen.de/diss/docs/00010289.pdf>

establishing a *forum* to hear criminal cases is not easy. Once cases have been admitted they have, as can be seen from the examples above, mainly focused on natural persons like heads of states, which also caused a reluctance concerning the use of universal jurisdiction and denying immunity.[773] Yet it should be easier to hold corporate officers liable or even TNCs themselves where domestic law provides for criminal liability of corporations. Criminal liability of corporations is accepted for example in the Netherlands,[774] France[775] and Belgium[776], but not in Germany[777] and Spain.[778] Using criminal law to hold corporations liable for grave human rights violations is therefore an existing state option, although of course in most cases no such grave violations occur. Furthermore, there seems to be a trend towards requiring a linking factor as could be seen above. In addition, the possibility of diplomatic political consequences should be kept in mind. However, these consequences are far less when only holding TNCs liable and not head of states or state officials of other states.

---

1 May 2014, 155; Jonathan Clough, "Not-so-Innocents Abroad: Corporate Criminal Liability for Human Rights Abuses" (2005) 11 *AJHR* 1.

[773] See Eric Engle, "Alien Torts in Europe? Human Rights and Tort in European Law", (2005) *ZERP-Diskussionspapier*, 1 available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1020453> 1 May 2014.

[774] Arts. 47-54 *Dutch Criminal Code (Wetboek van Srafrecht) (1881 and 1994).*

[775] Art. 121-2 *French Criminal Code (Code Pénale) (1992).*

[776] Art. 5 *Belgian Criminal Code (Code Pénale) (1867, latest modificaion 2013).*

[777] In Germany corporations are not criminally liable, but sanctions in the form of fines can still be imposed on them under the *German Administrative Offenses Code (Ordnungswidrigkeitengesetz, OwiG)* (1968, 1987), including sanctions for actions abroad when explicitly provided for by the law. These sanctions are similar to criminal sanctions for it is not up to the victims to trigger the payment of the fine, rather the fine is imposed by the executive itself, see §§ 5, 30, 35, 46 *OwiG*.

[778] In Spain corporations are not criminally liable, but their managers can be held liable and the corporation may be held jointly and severally liable for the payment of fines according to art. 31 II *Spanish Criminal Code (Código Penal)* (1987) and a draft for the implementation of criminal liability of corporations into a new art. 31 of the Criminal Code has been made in 2007, see Lex Mundi Publication, "Criminal Liability of Companies Survey" (2008) Uria Menéndez on Spain, available at <http://www.lexmundi.com/images/lexmundi/PDF/Business_Crimes/Crim_Liability_Spain.pdf> 1 May 2014.

VII TNC LIABILITY UNDER PUBLIC INTERNATIONAL LAW IN INTERNATIONAL PROCEEDINGS, COMMUNICATIONS AND COMPLAINTS

After having examined the possibilities of using international law before domestic courts to hold TNCs liable, the following section will sketch the state options of holding TNCs or host states liable before international courts, commissions or councils such as ICC, ICJ, ECtHR, ECJ, IACtHR, ACHR and the UN.[779] In contrast to domestic law and therefore usually also domestic courts and proceedings, there is no clear division in international law between civil and criminal law,[780] therefore liability under international law could be seen as *sui generis*.[781] Thus exceptions exist, these are the ICC[782] and the Criminal Tribunals for Rwanda[783] and the Former Yugoslavia[784] with their prosecutors and international crimes according to the corresponding Statutes. The prosecutor, crimes listed and the legal consequences already show the similarity to domestic criminal law.

---

[779] A confined claim for individuals against corporations to comply with environmental regulations may also exist under NAFTA, see Harald Hohmann, *Angemessene Außenhandelsfreiheit im Vergleich* (Tübingen: Mohr Siebeck, 2002) 130 wfr, yet it is also claimed NAFTA decisions tend to favour corporations rather than the individual see I IRENE "Controlling Corporate Wrongs: The Liability of Multinational Corporations" 1 *LGD* (2000), available at <http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2000_1/irene/> 1 May 2014, 5.

[780] Olivier de Schutter, "The Challenge of Imposing Human Rights Norms on Corporate Actors" in Olivier de Schutter (ed), *Transnational Corporations and Human Rights* (Oxford, Portland: Hart Publishing, 2006) 1, 51.

[781] Ernest K. Bankas, *The State Community Controversy* (Berlin, Heidelberg: Springer, 2005) 297.

[782] See *Rome Statute of the International Criminal Court* (1998); in addition, the ICC is only prosecuting when the national courts that could trial the suspect are unable or unwilling to do so as domestic law is given primacy, see Richard J. Goldstone, "International Jurisdiction and Prosecutorial Crimes" in David Barnhizer (ed), *Effective Strategies for Protecting Human Rights* (Aldershot, Burlington: Ashgate Dartmouth, 2001)113, 118, referring to art. 17 *Rome Statute of the International Criminal Court* (1998).

[783] *UN Statute of the International Criminal Tribunal for Rwanda* (2007 and 2010) <http://www.unictr.org/Portals/0/English%5CLegal%5CTribunal%5CEnglish%5C2007.pdf> and < http://www.unictr.org/Portals/0/English%5CLegal%5CStatute%5C2010.pdf> 1 May 2014.

[784] See *UN Updated Statute of the International Criminal Tribunal for the Former Yugoslavia* (2009) <http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf > 1 May 2014.

A *Public international law and (host) state liability*

TNCs cannot be held liable by the ICC as it lacks jurisdictions over legal persons[785] as already mentioned above and so do the Criminal Tribunals.[786] Neither can TNCs be held liable before the ICJ,[787] ECtHR,[788] ECJ,[789] IACHR,[790] IACtHR,[791] ACHR[792] nor the UN complaint mechanisms[793] either as only states or - in the case of the ECJ - EU organs according to art. 230 TEC, may be held liable in these proceedings. That is why this section focuses on other parties of the proceedings, namely host states.

B *(Host) states as parties before international tribunals*

As TNCs cannot be held liable in international proceedings, this leaves the indirect way of holding the host state liable. Again one could either think of holding the host state liable as a whole or holding individual state officials liable. The latter is only possible before the ICC under the *Rome Statute* and it could be possible before the Criminal Tribunals. Yet the above said is also true here - the amount of cases where the severe crimes listed in the Statutes have been committed by a state official by not preventing a TNC subsidiary from violating human rights is rather small. Furthermore, the individuals acting for

---

[785] See art. 25 *Rome Statute of the International Criminal Court* (1998).
[786] See art. 5 *UN Statute of the International Criminal Tribunal for Rwanda* (2007 and 2010) <http://www.unictr.org/Portals/0/English%5CLegal%5CTribunal%5CEnglish%5C2007.pdf> and < http://www.unictr.org/Portals/0/English%5CLegal%5CStatute%5C2010.pdf> 1 May 2014 and art. 6 *UN Updated Statute of the International Criminal Tribunal for the Former Yugoslavia* (2009) <http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf > 1 May 2014.
[787] See art. 34 *Statute of the ICJ* (1945).
[788] See art. 1, 33, 34 *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR)* (1953).
[789] See arts. 227, 230 *Treaty Establishing the European Community (TEC)* (1992).
[790] See arts. 1, 48-50 *American Convention on Human Rights "Pact of San Jose, Costa Rica" (1969).*
[791] See arts. 1, 61, 68, 48-50 *American Convention on Human Rights "Pact of San Jose, Costa Rica"* (1969).
[792] See arts. 47-52 *African (Banjul) Charter on Human and Peoples' Rights 1981.*
[793] These are the "individual communications" the "1503 procedure" and the "special procedures", for informations see website of the Office of the UN High Commissioner for Human Rights, "Human Rights Bodies-Complaints Procedures" <http://www2.ohchr.org/english/bodies/petitions/index.htm#interstate> 01 May 2014.

the TNC subsidiary can be held liable before the ICC and the Tribunals as well in these cases. So this double or rather triple indirectness by holding state officials liable for actions or omissions attributable to the state which led to human rights violations by TNC subsidiaries which are not themselves obliged to protect human rights under international law is, although possible, a weak state option. This leaves basically the, also indirect, approach of holding the host state liable. As Ruggie stresses concerning the UN treaties "[host] states that have ratified the existing human rights treaties […] have the obligation to protect individuals within their territory or jurisdiction from corporate-related human rights abuses."[794] As already mentioned above[795] this is also true for the other Charters and Conventions as can be seen from the following examples, all dealing with cases brought to Courts and Commissions by the victims of threats of violations or violations of their human rights by corporations and in which state liability for not preventing the corporations from threatening or violating human rights was affirmed.

1 *Africa*

This first example shows very well that different actors can be held responsible in different proceedings and by different actors for consequences caused by the same occurrence, at least when considered in a wider sense. As mentioned in the introductory chapter, Shell was sued in the US and the Netherlands for harms inflicted on the Ogoni people and others in connection with the oil exploration in Nigeria. The African Commission[796] held in the *SERAC* decision[797] that Nigeria was liable for human rights violations by the private

[794] John Ruggie, "Business and human rights – treaty road not travelled" (May 2008) *Ethical Corporation* 42, 43. <http://www.ethicalcorp.com/resources/pdfs/content/200856134729_Ruggie.pdf> 2 June 2009.
[795] See Chapter II.
[796] The ACtHR and the ACJ are not operating, respectively in force yet, see Website on African International Courts and Tribunals Website "ACHPR <http://www.aict-ctia.org/courts_conti/achpr/achpr_home.html> 1 May 2014
and Website on African International Courts and Tribunals "ACJ" <http://www.aict-ctia.org/courts_conti/acj/acj_home.html> 01 May 2014.
[797] SERAC decision, *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* ACHPR/COMM/A044/1 (Re: Communication

actor NNPC-Shell consortium due to a lack of state protection. The Commission found that art. 2, 4, 14, 16, 18(1), 21 and 24 of the *Banjul Charter*[798] were violated, by not granting sufficient protection of for example the right to the highest attainable standard of health, the right to a clean and healthy environment, the right to free disposal of wealth, the right to housing and protection from forced evictions and the rights to food, human life and integrity. The Commission found that Nigeria was liable, because it had not protected the Ogoni people from these violations caused by environmental damages and destruction of houses and villages by the NNPC-Shell consortium, but supported the consortium with Nigerian security forces in a repressive way.

2 *Americas*

In *Mayagna (Sumo) Awas Tingni Community v Nicaragua*[799] the IACtHR found that Nicaragua violated the right to judicial protection and property due to a lack of demarcation of the Awas Tingni Community's land by granting a concession to the Korean corporation Solcarse that allowed logging on the communal lands inhabited by the Awas Tingni Community. As the logging did not take place in the concession area because the concession was cancelled due to formal reasons, not linked to the lack of demarcation, there was no violation of property rights by the corporation. Yet there was a threat of such a violation due to the failure of the Nicaraguan state to demarcate and protect the Community's land and to provide for appropriate judicial protection.

3 *Europe*

There were also some cases before the ECtHR concerning state liability due to actions of corporations. One of them is *Lopez Ostra v Spain*[800] where the court held that Spain violated art 8 ECHR, the right to private and family life, by allowing a plant for the treatment of liquid and solid waste to be built which

---

155/96) May 2002 <http://cesr.org/downloads/AfricanCommissionDecision.pdf> 1 June 2009.

[798] *African (Banjul) Charter on Human and Peoples' Rights 1981.*

[799] *Mayagna (Sumo) Awas Tingni Community v Nicaragua* Inter-Am. Ct. H. R. (Ser. C) No 79 (2001).

[800] *Lopez Ostra v Spain* ECtHR (Appl. No. 16798/90) A-303C, 9 December 1994.

interfered with the complainant's living conditions and health as it produced fumes, noise and strong smells.

In *Guerra v Italy*[801] the court similarly found that Italy had violated art. 8 ECHR by failing to protect the neighbourhood of a fertiliser factory from the flammable gases and toxid substances it released in its production cycle and the explosion that occurred at that factory, requiring that 150 people suffering from arsenic poisoning had to be hospitalised.

VIII POSSIBLE FUTURE DEVELOPMENTS IN PUBLIC INTERNATIONAL HUMAN RIGHTS PROTECTION IN THE TNC CONTEXT

As TNCs are powerful actors on the international stage but not states nor legally state-like, not even possessing a generally accepted international legal personality, they cannot be held liable under international law in international proceedings (yet). At the same time expansive legally binding human rights protection duties will hardly be imposed on TNCs directly as long as there is no consensus on a changed legal role and status of TNCs in public international law.[802] This is despite the fact that TNCs may have powers over certain individuals that are as great as the powers of a state. As there are only scattered duties to protect human rights imposed on non-state actors directly and indirectly, as already mentioned above, there is a heated debate going on concerning the scope of duties that can be imposed directly on TNCs as there is no clear rule concerning the degree of human rights responsibilities of non-state actors.[803] On the one hand it is pointed out that the primary obligation to protect human rights lies with the states and that states cannot and must not shift and impose this obligation onto private actors.[804] On the other hand it is claimed that the factual changes of power need to be recognized. TNCs, it is argued, should be responsible for the protection of human rights and some suggest relying on the factual participation and role of international actors rather than on traditional

[801] *Guerra and others v Italy* ECtHR (Appl. No. 116/ 1996/735/ 932) Reports 1998-I, 19 February 1998.
[802] See also below.
[803] Todd Howland, "Evolving practice in the field: informing the international legal obligation to 'protect'" (2006) 34.1 *Denver J. of Int'l L. & Pol.* 89, at V.
[804] On the discussion and arguments: Andrew Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1993) 25.

categories of public international law like the public/private sphere and object/subject differentiations.[805] However, over time and by adding up in practice and establishing an *opinio juris* of such a personality, the singular already existing duties could contribute to the creation of a general legal personality for TNCs.[806] One strong indicator of such an existing or at least emerging *opinio juris* are the *UN Guiding Principles* with their clear affirmation of the already existing universal duty for businesses to respect human rights. When legal personality for TNCs under public international law is accomplished and the *Rome Statute* includes the jurisdiction over legal persons, TNCs will also be liable before the ICC. This discussion and suggested perspective seems to verify Goldtschmidt's observation, although this time concerning the "legislators" of public international law, that "[i]n all the great matters relating to commerce, legislators have copied, not dictated."[807] Therefore, possible future ways of such a "copy" will be sketched in the following.

A *Enforceable Human Rights protection duties for TNCs*

One may therefore assume that one day TNCs can have general legal personality, but the scope and content of their rights and duties may - in accordance with the 1949 ICJ statement - differ from those of states and those of individuals, trying to match the special factual role outlined above that powerful TNCs play in public international law. Once again the *UN Guiding Principles* could play a leading role in creating legal persons bound by international human rights law, obliged to respect it, but not to protect individuals against violations by third persons. Yet whichever way more human rights duties will be imposed on TNCs, this may result in, or be consequence of, major changes in public international law. Public international law itself is flexible and always in progress, adapting to changing needs and realities. It has already moved from

[805] Andrew Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1993) 80 and 131-132; Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff and Brill, 2006) 353 wfr.
[806] Andrew J. Wilson, "Beyond Unocal: Conceptual Problems In Using International Norms To Hold Transnational Corporations Liable Under The Alien Tort Claims Act" in Olivier de Schutter (ed), *Transnational Corporations and Human Rights* (Oxford, Portland: Hart Publishing, 2006) 43, 52.
[807] Levin Goldschmidt as cited in John Bell Condliffe, *The Commerce of Nations* (New York: Norton, 1950) 33.

being a "law of coordination" to being a "law of cooperation"[808] and it is suggested to be developing now into being a "law of globalisation"[809] or an "enlightened sovereignty"[810] not giving up state cooperation, but accepting the new non-state actors on the stage of public international law.[811] The shape and extent of these possible changes depend to a large extent on international consensus and therefore universal principles and international guidelines and agreements are highly influential.

B *Ways of implementing possible duties*

As already mentioned above, there are some direct human rights obligations imposed on TNCs, but no legally binding general duty to protect human rights can be derived from them. There seems to be basically one tool but two ways of how globally valid legally binding direct duties can be imposed on TNCs. The only tool to create legally binding duties on a global level is public international law; the two ways are by states alone or by including TNCs in the process. Hypothetically speaking, these two ways could reflect at the same time the possible order in which the general intentional legal personality of TNCs could be recognized. It could happen by either imposing a general duty to respect and protect human rights, causing the recognition of the international legal personality due to the very fact of the scope of the duties. Or the general international legal personality will be recognized first in an appropriate way, according to the ICJ decision - maybe as a new kind of legal personality on the international stage, and then the general duties will be imposed according to the new legal status, maybe even with TNC participation in the drafting process of

---

[808] Stephan Hobe, "Globalisation: a challenge to the nation state and to international law" in Michael B. Likosky (ed), *Transnational Legal Processes, Globalisation and Power Disparities* (Cambridge: Cambridge University Press, 2002) 378, 383 wfr.
[809] *Ibid.* at 385.
[810] *Ibid*. at 388.
[811] *Ibid.*; see also Klaus Dicke, „Erscheinungsformen und Wirkungen von Globalisierung in Struktur und Recht des internationalen Systems auf universaler und regionaler Ebene sowie gegenläufige Renationalisierungstendenzen" in Klaus Dicke, Waldemar Hummer, Daniel Girsberger, Katharina Boele-Woelki, Christoph Engel and Jochen A. Frowein, *Völkerrecht und Internationales Privatrecht in einem sich globalisierenden internationalen System – Auswirkungen der Entstaatlichung transnationaler Rechtsbeziehungen* (Heidelberg: Müller Verlag, 2000) 13, 14, 31-3 and 35-6, who suggests that from the „law of cooperation" a „law of mankind", *i.e*. a constitution for the citizens of the world, may evolve, binding also non-state actors.

the obligations. Here becomes apparent again the rather circular nature of the arguments concerning subjectivity and legal personality of public international law, as human rights obligations of TNCs are used to demonstrate that such duties can be imposed on TNCs which in return is supposed to show the potential legal personality under public international law.[812]

1 *State centred approach*

The state option of imposing more human rights duties on TNCs and thereby possibly advancing a later recognition of their general legal personality, which does not necessarily mean equalizing them with states, is a state-centred approach. The latest attempt by the UN and therefore states, to impose direct general obligations on TNCs directly *via* an international and global approach are the *Draft Norms* as mentioned above. Although they were drafted together with TNCs, the latter were not considered state-like or having legal personality. Yet, although not legally binding and not radically new in either their content or their aim of imposing direct obligations on TNCs, the *Draft Norms* have been criticised for imposing direct obligations at all. It is claimed that, as the states are primarily responsible for the protection of human rights, TNCs should not and could not take their place. Yet the *Draft Norms* do acknowledge the primary duty of the states and apply the "sphere of influence" approach to assess the scope of human rights duties imposed on each individual corporation[813] within the obligations to respect, protect, fulfil and promote human rights – the distinction set out in the *Maastricht Guidelines*.[814] The vagueness[815] of the term "sphere of influence" is reduced to some extent by linking both the liability and responsibility to the more limited[816] concept of complicity[817] deriving from

---

[812] August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors" in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford: University Press, 2005) 37, 72 wfr.
[813] Andrew Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1993) 230.
[814] *Ibid.* at 229*; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997).
[815] Olivier de Schutter, "The Challenge of Imposing Human Rights Norms on Corporate Actors" in Olivier de Schutter (ed), *Transnational Corporations and Human Rights* (Oxford, Portland: Hart Publishing, 2006) 1, 12.
[816] *Ibid.* at 16.

criminal law. The sphere of influence approach can be regarded as a compromise between the two facts[818] already discussed in the previous sections of this research. On the one hand big TNCs are very powerful; their power may exceed the power of states and it is claimed it should therefore include obligations also in the field of human rights. On the other hand the role of TNCs is not equal to states despite the great power they may possess and they are therefore not primary addressees of human rights obligations,[819] but can only be liable in their individual spheres of influence.[820] These considerations put in the context of public international law which already accepts some fragmented human rights duties for TNCs, make the *Draft Norms* seem acceptable and appropriate to respond to the current factual situation.[821] Furthermore, the general advantages of an international global approach by imposing direct rather than indirect duties on TNCs is mainly legal certainty due to one set of rules that would be, at least as a minimum standard, universally applicable, avoiding problems of "*forum* shopping" and those linked to the discretional decisions on *forum non conveniens*.[822]

However, the classic reproach put forward so often against public international law can be made here as well: the implementation might be possible one day *via* treaty,[823] but enforcement and complaint procedures and remedies in general are

---

[817] Jacob Gelfand, "The Lack of Enforcement in the United Nations Draft Norms: Benefit or Disadvantage?" in Olivier de Schutter (ed), *Transnational Corporations and Human Rights* (Oxford, Portland: Hart Publishing, 2006) 1, 12, 313, 327; Olivier de Schutter, "The Challenge of Imposing Human Rights Norms on Corporate Actors" in *ibid.* at 1, 13.

[818] Olivier de Schutter, "The Challenge of Imposing Human Rights Norms on Corporate Actors" in *ibid.* at 1, 12.

[819] *Ibid.*

[820] *Ibid.*

[821] Andre J. Wilson, "Beyond Unocal: Conceptual Problems Using International Norms to Hold Transnational Corporations Liable under the Alien Tort Claims Act" in *ibid.* at 43, 63.

[822] For problems arising in connection with *forum non conveniens* decisions see *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development- Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* A/HRC/8/5/Add.2 (23 May 2008) <http://198.170.85.29/Ruggie-2-addendum-23-May-2008.pdf> 1 May 2014, Summary par. 89.

[823] Jacob Gelfand, "The Lack of Enforcement in the United Nations Draft Norms: Benefit or Disadvantage?" in Olivier de Schutter (ed), *Transnational Corporations and Human Rights* (Oxford, Portland: Hart Publishing, 2006) 313, 318-9.

not as developed as in domestic law.[824] This is even more so when considering the above mentioned fact that TNCs are private actors and although TNCs can take part in some international arbitration procedures and there are individual communication procedures in public international law, the step to introduce either state-like legal personality of TNCs or international complaint procedures and arbitration between two private actors will probably not change in the near future.[825] Therefore the *UN Guiding Principles* ask the states to provide for legal mechanisms and procedures, but they also contain ideas for non-state-based grievance mechanisms, yet they are limited to non-judicial ones.[826]
So while states may impose more obligations of public international law on TNCs by treaties or conventions, these new actors are not and will most likely not be subjects of public international law for quite a while to come.

2 *TNC-based approach*

Another, less traditional and state-centred way to achieve direct TNC obligations to protect human rights would be to recognize their general international legal personality in whatever form seems appropriate[827] and then negotiate their obligations with them, ultimately concluding a treaty or setting up a convention with TNCs as participants in the drafting process. Although to allow TNCs at the international table to draft the very norms that will bind them may sound strange at first, the concept is common in public international law and states are doing this all the time. In addition, TNCs are not generally

---

[824] See also John H. Knox, "Horizontal Human Rights" (2008) 102 *AJIL* 1, 3-18 and 20, stressing the danger for human rights by creating human rights *duties* on an international level for private actors, arguing that in doing so human *rights* of private actors may in fact be limited.
[825] Concerning arbitration see August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors" in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford: University Press, 2005) 37, 85; for legal personality of TNCs see above.
[826] *Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, A/HRC/17/31, (21 March 2011)<http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> 01 May 2014, Principles 28-30.
[827] See John H. Knox, "Horizontal Human Rights" (2008) 102 *AJIL* 1, 19, pointing out that private actors already bear human rights duties and that only practical and political capacity is lacking to enforce them.

opposed to any human rights responsibility as can be seen by the numerous voluntary codes developed and adopted by them. So, although this is an unlikely scenario, this approach could still work. This does not have to result in TNCs bearing as many duties as states.[828] It could for example be a duty level lower than those of states, but higher than those of individuals and designed to complement rather than replace positive state duties, for example by increasing TNC duties where the host state's capabilities to protect are lacking or where TNCs engage in *per se* dangerous activity.[829] Flexibility should also be given by leaving it up to the TNCs as to how to fulfil the protection duty, thereby granting adequate integration into private business models.[830] As a basis negative obligations are suggested, such as refraining from transacting with states with negative human rights records and respecting the right of freedom of speech.[831] However, the reproaches concerning enforceability and remedies for victims can be made here as well.

IX CONCLUSION

The observations made in this chapter are not too promising concerning the imposition of human rights protection duties on TNCs under public international law. As the International Council on Human Rights Policy puts it: "Just as human rights law was initially developed as a response to the power of states, now there is a need to respond to the growing power of private enterprise, which affects the lives of millions of people around the world."[832] Yet there does not seem to be an international consent for such a response by public international law.

TNCs can for example so far not be held liable in international proceedings. Thus, there are cases all over the world dealing with state liability when

---

[828] David Kinley and Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibility for Corporations at International Law" (2004) 44 *VA J. Int. Law* 931, 966 argue TNCs must not bear as many duties as states.

[829] Iris Halpern, "Tracing the Contours of Transnational Corporations' Human Rights Obligations in the Twenty-First Century" (2008) 14 *Buff. HRL Rev.* 129, 184-206 with examples.

[830] *Ibid.* at*, 192, 203*.

[831] *Ibid.* at 200.

[832] International Council on Human Rights Policy, *Beyond Voluntarism: human rights and the developing international legal obligations of companies* (Vernier: Roto Press, 2002) 10.

corporations harm human rights. The idea of holding host states accountable for violations of incorporated subsidiaries is therefore not farfetched. International remedies for the victims already do exist, although of course their use could be more frequent.[833] Home states on the other hand may not be entitled to sue in many cases as only signatory states of the respective Charter or Convention or the victims may bring complaints before the courts and commissions.[834] An exception are the UN state complaint procedures, yet no state has so far made use of this mechanism.[835] A reason might be the fear of the political tensions and the fear that the mechanism could also be used against the home states. These fears could be minimized if TNCs could be parties of the proceedings, as there is not such a great diplomatic and political dimension as when suing state or state officials. Furthermore, it is a rather indirect and roundabout way to hold the corporation liable *via* the host state. Skogly for example criticized that in *SERAC* the Commission did not even consider direct liability of the corporation under the *Banjul Charter*.[836] Yet as could also be seen, so far no general direct human rights duties for TNCs exist under public international law.

However, the issue is not alien to public international law and is vividly discussed. The idea of imposing human rights obligations on TNCs is said to expatiate[837] and it is claimed that with the *Draft Norms* a "clear acceptance"[838] of

---

[833] Others suggest that additional international remedies are required to capture not only *ius cogens* breaches, see Michael Ratner, "Civil Remedies for Gross Human Rights Violations" in David Barnhizer (ed), *Effective Strategies for Protecting Human Rights* (Aldershot, Burlington: Ashgate Dartmouth, 2001) 249, yet this once more raises the issue of TNCs as subjects under public international law as already discussed in this research and where changes within the next couple of years are not very likely to occur.

[834] See for example art. 61 *American Convention on Human Rights "Pact of San Jose, Costa Rica" (1969)*, art. 35 *Statute of the ICJ* (1945), arts. 33, 34 *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR* (1953)*)*, art. 47
African (Banjul) Charter on Human and Peoples' Rights 1981.

[835] See Office of the UN High Commissioner for Human Rights, Website, "Human Rights Bodies-Complaints Procedures"
<http://www2.ohchr.org/english/bodies/petitions/index.htm#interstate> 1 May 2014.

[836] Sigrun Skogly, "Economic and Social Human Rights, Private Actors and International Oblogations" in Michael Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague: Kluwer International, 1999) 239, 244.

[837] International Council on Human Rights Policy, *Beyond Voluntarism: human rights and the developing international legal obligations of companies* (Vernier: Roto Press, 2002) 158.

[838] See Peter Muchlinski *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 519.

the human rights responsibility of TNCs is expressed, although they have not been accepted. It is rather telling that after not achieving sufficient support for the *Draft Norms* a Special Representative was established and it took him six years of research, consultation and dialogue to develop the *UN Guiding Principles*, of which the Special Representative himself says they are a starting point for "cumulative progress" rather than an exhaustive answer to the human rights challenges by businesses.[839] Therefore, at the moment there is no international consensus in sight within the next decade to impose more human rights duties on TNCs or to even recognize their legal personality under public international law. That is why the examination of a possible increase of human rights protection duties on TNCs had to remain rather hypothetical. There could be such developments in future, and if so, the protectionism reproach should be considered, but such development will only take place if international consensus is reached. Imposing more direct duties onto TNCs is therefore not a short-term state option for individual states acting unilaterally but only for long-time multilateral and global efforts. However, those efforts could be initiated by individual states on the international stage. Not least because states, in particular home states, can still be considered powerful enough to face new challenges such as new powerful actors on the international stage.[840] A gain of power and influence by one actor does not automatically derive another actor from its power. In addition, not all (host) states are weak or willing enough to let TNCs take the lead when negotiating about the conditions for their subsidiaries and assets in the host states.[841] Furthermore, the thought of TNC responsibility is not alien to TNCs themselves and various attempts have been made to create at least voluntary codes. That is why home states could use international law in their courts to hold TNCs liable at least in the restricted cases of the most grave violations of human rights where public international law allows for such action,

---

[839] *Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie,* A/HRC/17/31, (21 March 2011)<http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> 1 May 2014, par. 2-10, 13 of the report.

[840] See Wilfried Bolewski, *Diplomacy and International Law in Globalized Relations* (Berlin, Heidelberg: Springer, 2007) 5.

[841] On different theories for the bargaining of host states and TNCs see Peter Muchlinski *Multinational Enterprises and the Law* (2nd ed, Oxford: Oxford University Press, 2007) 104-110.

i.e. in cases of *ius cogens* violations. Such a course of action could operate as a catalyst for developments on the international stage as already mentioned in the preceding chapter. However, even where such domestic law exists, there seems to be no tendency towards expanding admissibility at the moment. This could be seen from the developments in Belgium and Spain[842] and when assessing current *ATCA* cases, where admissibility was restricted by stricter "law of nations" interpretations and a rather broad *forum non conveniens* interpretation, both allowing for dismissing foreign cases more easily. Therefore, as was already pointed out in the previous chapter – it seems legal potential exists, though is not used.

[842] See above Ch. II.

CHAPTER IV: POTENTIAL OF POLITICAL SANCTIONS TO HOLD TNCS AND HOST STATES LIABLE

As shown so far, legally binding human rights obligations for TNCs do not generally exist in public international law and although the application of national human rights protection laws onto TNCs acting abroad is possible, it remains difficult in practice and there does not seem to be the political will to create such domestic law right now. Yet in the flexible and manifold sphere of human rights as described in the introductory chapter, there might be other tools than (domestic) legislation and judiciary. As human rights law is part of public international law and therefore closely connected to international politics, tools of politics and foreign affairs might also be a way to influence TNCs acting abroad. This could be a promising home state option at least in cases of grave(st) human rights violations. No plaintiffs would be needed and no court decisions, but political action within the legal frame of public international law. Whether this is indeed a way to go and which measures may be taken will be examined in this chapter. After giving an overview about sanctions and their use in connection with human rights, their applicability in the TNC context under public international law will be assessed. Economic sanctions as trade sanctions will not be addressed, as this complex issue is dealt with in chapter V.

I THE TERM "SANCTION"

The term "sanction" is used in a broad way today and its link to human rights protection may not be apparent at first glance. However, a first mutuality is that just like human rights, "sanctions" are an ever-changing tool with many facets and applications. It is therefore essential to understand what is meant when it is used in international law context and how it is used in this enquiry to assess the possible home state options to control TNCs abroad. Therefore a short overview about the term's background and development will be given in the following, to ease the understanding of its different uses in different contexts, its different connotations and manifold meanings, before the term "sanction" will be defined for this enquiry.

A *Background and development of the term*

The noun "sanction" originates from the Latin term "sanctionis" which means "cure, threat of punishment", concerning law "penalty provision" and concerning alliances and treaties "clause, reservation".[843]

Turning away from the different meanings,[844] the term became the technical term we basically still use today in the beginning of the 20th century.[845] Yet the term did- similar to human rights and public international law in general- change and develop over time. Some alterations have for example been made since after World War II the possibilities of the use of military force under public international law was restricted and sanctions did not include war any longer.[846] However, the exact meaning and definition of the term "sanction" is still used with slightly different connotations today.[847]

B *Meaning and definition in public international law today*

So what is a "sanction" in public international law today? Sociologists define "sanction" broadly as the societal response to a behaviour that is either in conformity with norms or deviant.[848] Some consider any response to a behaviour - whether advantages or disadvantages are imposed on the actor - as a sanction, no matter whether the behaviour was according to norms or violating them.[849] This broad understanding of the term sanction in sociology also forms the basis of the term sanction as it is used in public international law context.[850] Within a

---

[843] Almut Hinz, *Sanktionen gegen Libyen* (Frankfurt a. M.: Peter Lang, 2005) 46, wfr.
[844] See *ibid.* at 46-7.
[845] See Tim Brune, *Der Fall Österreich* (Frankfurt am Main, Berlin, Bern, Bruxelles, New York, Oxford, Wien: Peter Lang) 161-2; Almut Hinz *Sanktionen gegen Libyen* (Frankfurt a. M.: Peter Lang, 2005) 49.
[846] Tim Brune *Der Fall Österreich* (Frankfurt am Main, Berlin, Berlin, Bern, Bruxelles, New York, Oxford, Wien: Peter Lang) 162 wfr.
[847] See for example Almut Hinz *Sanktionen gegen Libyen* (Frankfurt a. M.: Peter Lang, 2005) 48.
[848] Sascha Werthes, *Probleme und Perspektiven von Sanktionen als politisches Instrument der Vereinten Nationen* (Münster, Hamburg, London: LIT Verlag, 2003) 21; see also Rüdiger Peuckert „Norm, soziale" in Bernhard Schäfers (ed), *Grundbegriffe der Soziologie* (8th ed, Opladen: Leske + Budrich, 2003) 255.
[849] Olaf Poeschke, *Politische Steuerung durch Sanktionen?* (Wiesbaden: Deutscher Universitätsverlag, 2003) 22.
[850] *Ibid.*

legal system sanctions can be described as *negative* measures, because unlike other systems of norms the legal system works with a firmly established apparatus of sanctions to control the compliance with its norms.[851] Examples are criminal prosecution and punishment, but also punitive damages granted under tort law for example in the US as assessed above. Public international law, however, has no such firmly established apparatus of sanctions as there is no global police or prosecutor. Some of these obligations are transferred to the UN Security Council, but at least in non-security matters the law enforcement remains difficult or at least different from the one in domestic law as already mentioned earlier.[852] The definition of sanctions is therefore different in public international law and for example positive measures working as inducements can be considered sanctions although they are not linked to punishment and prosecution. However, in spite of the frequent use of the term "sanction" there is no clear or uniform definition of it in public international law today. [853] Instead, there are many different definitions, mostly given to confine the meaning of the broad term to achieve some clarity. Due to the many different definitions, however, the term "sanction" can be used as a rather collective term for many kinds of political actions that one state imposes on another for very different reasons and pursuing very different aims.

1 *Different kinds of political action*

As far as the different kinds of political action are concerned, a sanctioning state can either be influenced by its own interests and impose "selfish" sanctions to achieve its own aims of foreign policy[854] or it can impose sanctions as a means

---

[851] Sascha Werthes, *Probleme und Perspektiven von Sanktionen als politisches Instrument der Vereinten Nationen* (Münster, Hamburg, London: LIT Verlag, 2003) 22, Rüdiger Peuckert „Norm, soziale" in Bernhard Schäfers (ed), *Grundbegriffe der Soziologie* (8th ed, Opladen: Leske + Budrich, 2003) 256.

[852] Otto Kimminich (founder) and Stephan Hobe, *Einführung in das Völkerrecht* (9th ed, Tübingen, Basel: A. Francke Verlag, 2008) 432-441; see also Sascha Werthes *Probleme und Perspektiven von Sanktionen als politisches Instrument der Vereinten Nationen* (Münster, Hamburg, London: LIT Verlag, 2003) 22.

[853] Jean Combacau, "Sanctions" (1986) 9 *EPIL* 337-41; see also Tim Brune, *Der Fall Österreich* (Frankfurt am Main, Berlin, Bern, Bruxelles, New York, Oxford, Wien: Peter Lang) 163.

[854] This includes trade; for measures in the form of trade bans, see next chapter.

to protect common interests of public international law, for example to protect core human rights.[855] Home states imposing sanctions on host states to improve human rights protection in the host state are using sanctions as a means of public international law as an international behavioural system and - at least not only - as a means of foreign policy.[856] Yet, of course, sanctions are often triggered by a mix of motives, involving the protection of own interests and the interests of the international community as a whole, because states more easily impose sanctions to protect the common interests of public international law when this is also supporting their own interests.[857] This is also true for the TNC and human rights context examined in this enquiry. There is also a "selfish" motive triggering the sanction, because as the subsidiaries of own TNCs are involved public attention and awareness may operate as pressuring factors and the home state would not impose sanctions if it was not for the rather "personal" link of home state TNC subsidiaries. However, it is the very international behavioural system, namely human rights and their protection, that is (also) aimed at by the sanction. The protection of human rights in the host state as far as the own TNC is involved may become a foreign policy interest so to speak, yet in most cases this foreign policy interest of protecting (core) human rights will generally equal the interests of the international community as a whole. However, the sanctioning state should carefully examine its aims and motives and in particular adhere to the proportionality principle and the equal treatment of equal matters when imposing a measure in order to use sanctions in the least "selfish" way. As already seen above pressuring the host state can easily be considered as

---

[855] See for example Sascha Werthes, *Probleme und Perspektiven von Sanktionen als politisches Instrument der Vereinten Nationen* (Münster, Hamburg, London: LIT Verlag, 2003) 24-5; Margaret P. Doxey, *International Sanctions in Contemporary Perspective* (2nd ed, London: Macmillan Press Ltd., 1996) 9, giving the example of economic sanctions against South Africa to pressure the government to abandon apartheid.

[856] For this differentiation see Sascha Werthes, *Probleme und Perspektiven von Sanktionen als politisches Instrument der Vereinten Nationen* (Münster, Hamburg, London: LIT Verlag, 2003) 25.

[857] See Denis Alland, "Countermeasures of General Interest" (2002) 13 *EJIL* 1221, 1239; Tseming Yang, „International Treaty Enforcement as a Public Good: Institutional Deterrent Sanctions in International Environmental Agreements" (2007) 27 *Mich. J. Int'l L.* 1131, 1150; Karl Zemanek, "The Unilateral Enforcement of International Obligations" (1987) *ZaöRV* 32, 43; see on sanctions and their discretional implemenation under US GSP Philippe Schneuwly, "Sind Handelssanktionen ein geeignetes Mittel zur Durchsetzung von Arbeitsnormen?" (2003) *Aussenwirtschaft* 121, 127-136.

imperialist or disrespecting the host state's sovereignty. In addition, sanctions used to defend international human rights standards are sanctions used as an (additional) enforcement measure for those human rights standards. However, as seen above, some consider these very standards to be "Western" only. Furthermore, some suggest equivalently to the controversy on the universalism of human rights standards, that the very idea of punishing international wrong-doers by imposing sanctions is a foremost "Western and liberal phenomenon"[858] due to the perception of the universal validity of "western" standards, and that other states impose sanctions "as a response to an injury of their national interests".[859] Yet again, as so many states have at least formally accepted many international human rights standards, wherever they derive from, the observation of the implementation of these standards seems justified. Observing and implementing human rights standards does not generally exclude the tool of sanctions, yet of course the requirements for sanctions provided by public international law have to be met.

2 *Reasons for sanctions*

The reasons for which sanctions are imposed are closely linked to the different kinds of political action. They can for example be triggered by a threat to peace and security by the target state, a breach of public international law or a breach of a bilateral treaty. In this enquiry a breach of the host state's human rights obligations *vis-à-vis* its own population, *i.e.* the duty to protect its citizens from violations by private actors such as TNCs, is what triggers the sanctions. Human rights treaties, however, are no bilateral treaties but multilateral treaties and the obligations owed are not reciprocal.[860] The obligations are not owed to other

[858] Kim Richard Nossal, *Rain Dancing, Sanctions in Canadian & Australian Foreign Policy* (Toronto, Buffalo, London: University of Toronto Press, 1994) 258.
[859] *Ibid.*
[860] That is why the treaty means of breaching or suspending the same treaty obligations to answer their breaches as provided for in the *Vienna Convention* is no solution either, because human rights and their protection are the *raison d'être* of these very treaties; for *raison d'être* see Karl Zemanek, "New Trends in the Enforcement of erga omnes Obligations" (2000) 4 *Max Planck UNYB* 1, 9; see also the *Advisory opinion on Reservations on the Convention on the Prevention and Punishment of the Crime of Genocide,* ICJ Reports 1951, 15, 23.

states but to the state's own citizens and as far as *erga omnes* obligations are concerned to the international community as a whole.

3 *Different aims pursued*

The different aims[861] pursued with the sanction reach from mere symbolism, punishment, deterrence and retribution[862] to compellence to achieve a change in behaviour of the target state[863] as was for example the aim of the sanctions against South Africa and Libya.[864] When a home state aims at stopping human rights violations in the host state and improving the overall human rights situation as far as their TNCs are concerned, a behavioural change of the target

---

[861] For different aims see for example Iain Cameron, "Protecting legal rights" Peter Wallensteen and Carina Staibano (eds), *International Sanctions* (London, New York: Frank Cass, 2005) 181, 184; Kim Richard Nossal, *Rain Dancing, Sanctions in Canadian & Australian Foreign Policy* (Toronto, Buffalo, London: University of Toronto Press, 1994) 9-12; for a theory on the different levels of the aims involved when imposing sanctions see Sascha Werthes, *Probleme und Perspektiven von Sanktionen als politisches Instrument der Vereinten Nationen* (Münster, Hamburg, London: LIT Verlag, 2003) 33 wfr; see also Almut Hinz, *Sanktionen gegen Libyen* (Frankfurt a. M.: Peter Lang, 2005) 79-80, wfr.

[862] See for example Margaret P. Doxey, *International Sanctions in Contemporary Perspective* (2nd ed, London: Macmillan Press Ltd., 1996); Kim Richard Nossal, *Rain Dancing, Sanctions in Canadian & Australian Foreign Policy* (Toronto, Buffalo, London: University of Toronto Press, 1994) 8, 9 and 12; Obasi Okafor-Obasi, *The Enforcement of State Obligations to Respect and Ensure Human Rights in International Law* (Potsdam: Menschenrechtszentrum der Universität Potsdam, 2003) 71-2; Sascha Werthes, *Probleme und Perspektiven von Sanktionen als politisches Instrument der Vereinten Nationen* (Münster, Hamburg, London: LIT Verlag, 2003) 24-5, 31, 45-6.

[863] Geoff Simons, *Imposing Economic Sanctions. Legal Remedy or Genocidal Tool?* (London, Sterling: Pluto Press, 1999) 9; others suggest even further aims, e.g. the entering into a bargaining process see David Cortright and George A. Lopez, "Assessing Smart Sanctions, The Next Step: Arms Embargoes and Travel Sanctions" in Michael Brzoska (ed), *Smart Sanctions: The Next Steps* (vol. 6, Baden-Baden: Nomos, 2001) 31; Sascha Werthes, *Probleme und Perspektiven von Sanktionen als politisches Instrument der Vereinten Nationen* (Münster, Hamburg, London: LIT Verlag, 2003) 125.
Tim Brune, *Der Fall Österreich* (Frankfurt am Main, Berlin, Bern, Bruxelles, New York, Oxford, Wien: Peter Lang) 166; Sascha Werthes, *Probleme und Perspektiven von Sanktionen als politisches Instrument der Vereinten Nationen* (Münster, Hamburg, London: LIT Verlag, 2003) 23.

[864] Kim Richard Nossal, *Rain Dancing, Sanctions in Canadian & Australian Foreign Policy* (Toronto, Buffalo, London: University of Toronto Press, 1994) 9; on the term "compellence" in the context of sanctions to describe hurts imposed on an actor with the intention of compelling that actor to change behaviour, see Thomas Schelling, *The Strategy of Conflict* (New York: Oxford University Press, 1960, 1980) 195-9.

state is the long-term aim,[865] while punishment and retribution may also be objectives. The aims as well as the motives behind the different political actions described above are intertwined and often a bundle of aims and motives triggers a sanction. When imposing negative sanctions to achieve a change in behaviour of the targeted state, retribution, punishment and symbolism are usually already achieved when the sanction is imposed and are therefore so to speak "underlying guaranteed secondary aims" of a sanction aimed at behavioural change.

4 *Definition used in this enquiry*

To be able to examine the possibilities of home states to protect human rights by using sanctions and because exclusively "selfish" sanctions are unlikely in this context as sketched above, a broad understanding of the term "sanction" is used in this enquiry. It is meant to include positive as well as negative measures no matter whether the latter are *per se* lawful or their wrongfulness has to be precluded.[866] A sanction in this enquiry is therefore a measure imposed by one or more states onto another state or ruling élite to influence the target's behaviour concerning international human rights standards. By defining the term like this a broad understanding of sanctions as applied today, *i.e.* against states, is used. Whether sanctions can also be imposed on TNCs will be assessed later on in this chapter.

II EXAMPLES OF SANCTIONS APPLIED

After having defined the term sanction, some examples of sanctions and their effects will be provided for in the following to get an idea of the effectiveness, the advantages and disadvantages of sanctions. Some sanctions are well-known, vividly debated and many have influenced the fate of states by some means or other. Well known current examples are sanctions against terrorism since the 9/11 attacks. *Resolution 1373*[867] of the Security Council for example obliges

[865] The different objectives overlap, see Math Noortmann, *Enforcing International Law* (Aldershot, Burlington: Ashgate, 2005) 17.
[866] Precluding the wrongfulness of negative measures is for example the concept of the countermeasures of the *ILC Draft Articles* "*Responsibility of States for Internationally Wrongful Acts"* (2001) UN A/RES/56/83 Annex.
[867] *Security Council Resolution 1373 (2001)* S/RES/1373 (2001).

states to effectively implement the Convention on the Financing of International Terrorism by binding states to take the necessary measures to criminalize acts of financing international terrorism and to freeze and seize funds used for terrorism.[868] In doing so, financial businesses are also affected by the sanctions, which shows that sanctions can even affect corporations when they are targeted at states. That private actors, including businesses are affected by the sanctions imposed can also be seen from the examples closely linked to human rights that will be sketched now.

A *Rhodesia 1960s*

The denial of free elections, respectively hindering them by a declaration of independence from Great Britain by the white governing minority was what triggered the sanctions in the first place in the 1960s.[869] Great Britain and later the UN imposed economic sanctions on Rhodesia which at first hit the Rhodesian economy - and therefore also corporations - hard, but the economy recovered and resulted in even being blooming.[870] Yet the country was more and more internationally isolated, the standard of living of the white governing élite was reduced and finally the governing élite agreed on free elections.[871] With UN *Resolution 232*[872] the situation in Rhodesia was declared to be a threat to peace and Okafi-Obasi notes that "for the first time the Security Council linked the legitimacy of a regime to its human rights practice.[…] Yet other factors also contributed to the declaration of the regime as illegitimate."[873] The independent

---

[868] *Ibid.,* see also Iain Cameron, "Protecting Legal Rights" in Peter Wallensteen and Carina Staibano (eds), *International Sanctions* (London, New York: Frank Cass, 2005) 181, 183.
[869] See Frank Küschner-Pelkmann, *Sanktionen gegen die Apartheid* (Frankfurt a. M.: Lembeck, 1988) 17-8.
[870] *Ibid.* at 18; on this development see also UN, *Sanctions Against South Africa: The Peaceful Alternative to Violent Change* (New York: United Nations, 1998) 8.
[871] Frank Küschner-Pelkmann *Sanktionen gegen die Apartheid* (Frankfurt A. M.: Lembeck, 1988) 18.
[872] UN S/RES/232 *Question concerning the Situation in Southern Rhodesia* (16 December 1966).
[873] Obasi Okafor-Obasi, *The Enforcement of State Obligations to Respect and Ensure Human Rights in International Law* (Potsdam: Menschenrechtszentrum der Universität Potsdam, 2003) 82; see also on the issue of Security Council and Human Rights Judy A. Gallant, "Humanitarian Intervention and Security Council Resolution 688: A Reappraisal in Light of a Changing World Order" (1992) 7 *Am. Un. ILR* 881, 905-6; see for a different view Michael P. Malloy, "Human Rights and the Unintended Consequences: Empirical Analysis of

states of Africa and the Soviet Union for example both pushed for international action.[874] Generalizations have therefore to be drawn with great care. Nevertheless, in this case the consequent application of sanctions as a supplement to the military and political struggle for freedom within the country were an important means that helped accelerate the change and thereby minimized suffering.[875]

B *South Africa 1980s*

In South Africa racial discrimination, which constitutes a violation of human rights, was not only tolerated but firmly fixed and regulated in many domestic apartheid laws. Military assaults on neighbouring states threatened international peace.[876] By *Resolution 569* of the Security Council[877] states were encouraged to place embargos against the South African Regime to help change the system[878] and end apartheid.[879] This resolution was not based on art. 41 or 42 of the UN Charter, but the reprisals taken were considered to be justified by the resolution

---

International Economic Sanctions in Contemporary Practice" (2013) 21 *B. U. Int'l L. J.* 75, 87, who is "doubtful that the sanctions played any significant role in the resolution of the crisis."

[874] Obasi Okafor-Obasi, *The Enforcement of State Obligations to Respect and Ensure Human Rights in International Law* (Potsdam: Menschenrechtszentrum der Universität Potsdam, 2003) 82 wfr.

[875] Frank Küschner-Pelkmann *Sanktionen gegen die Apartheid* (Frankfurt A. M.: Lembeck, 1988) 18; Elizabeth S. Schmidt, "United Nations Sanctions and South Africa: Lessons from the Case of Southern Rhodesia" in UN, *Sanctions Against South Africa: The Peaceful Alternative to Violent Change* (New York: United Nations, 1998) 21, 26-43.

[876] Frank Küschner-Pelkmann, *Sanktionen gegen die Apartheid* (Frankfurt a. M.: Lembeck, 1988) 11.

[877] *Security Council Resolution 569* UN Doc. S/Res/569/1985; on other sanction measures taken by the Security Council before *Resolution 569*, see Elizabeth S. Schmidt, "United Nations Sanctions and South Africa: Lessons from the Case of Southern Rhodesia" in UN, *Sanctions Against South Africa: The Peaceful Alternative to Violent Change* (New York: United Nations, 1998) 21, 24-5.

[878] Obasi Okafor-Obasi, *The Enforcement of State Obligations to Respect and Ensure Human Rights in International Law* (Potsdam: Menschenrechtszentrum der Universität Potsdam, 2003) 83 wfr; on the possible impact of economic sanctions against South Africa compared to their impact in the Southern Rhodesian case see UN, *Sanctions Against South Africa: The Peaceful Alternative to Violent Change* (New York: United Nations, 1998) 8, 43-6.

[879] On sanctions on the business sector see UN, *Sanctions Against South Africa: The Peaceful Alternative to Violent Change* (New York: United Nations, 1998) 9-20.

itself.[880] Manifold sanctions were imposed, negative and positive ones. Economic and travel sanctions, meant to affect private actors, namely those of the ruling élite, were imposed by the Northern states while the neighbouring states of South Africa were supported to decrease their dependency on South Africa. Furthermore, contacts to South African opposition groups were intensified.[881] Sports and cultural sanctions were imposed, also affecting private actors, and had some effect on South Africa's regime.[882] TNCs were also affected and involved, as already mentioned in the introductory chapter, because disinvestment by selling or closing down TNC subsidiaries in South Africa was supposed to have great impact on the South African economy.[883] However, often the goods remained available on the South African market and after selling subsidiaries, these were no longer bound by the arms embargo. Furthermore, once they were South African corporations they were able to officially support the apartheid regime.[884] This once more shows hat treating parent and subsidiaries as separate legal entities makes it hard to hold TNCs liable. International banks were also reluctant to cut off the relations to South Africa and argued that they did not intend to pursue political goals.[885]According to Kürschner-Pelkmann the biggest grey area of the imposition of sanctions in South Africa by Germany were subsidiaries or German corporations that were located in South Africa and produced and provided military resources in the broad meaning of the term.[886] Many of them infringed upon the arms

[880] Obasi Okafor-Obasi, *The Enforcement of State Obligations to Respect and Ensure Human Rights in International Law* (Potsdam: Menschenrechtszentrum der Universität Potsdam, 2003) 83.
[881] Frank Küschner-Pelkmann, *Sanktionen gegen die Apartheid* (Frankfurt a. M.: Lembeck, 1988) 101-2; on the support of sanctions from black South African leaders see UN, *Sanctions Against South Africa: The Peaceful Alternative to Violent Change* (New York: United Nations, 1998) 5-6.
[882] Frank Küschner-Pelkmann, *Sanktionen gegen die Apartheid* (Frankfurt a. M.: Lembeck, 1988) 133.
[883] See UN, *Sanctions Against South Africa: The Peaceful Alternative to Violent Change* (New York: United Nations, 1998) 12-5.
[884] Les de Villiers, *In Sight of Surrender: The U.S. Sanctions Campaign against South Africa* (Westport, CT: Praeger Publishers, 1995) 136-9; Frank Küschner-Pelkmann, *Sanktionen gegen die Apartheid* (Frankfurt a. M.: Lembeck, 1988) 123-5.
[885] Frank Küschner-Pelkmann, *Sanktionen gegen die Apartheid* (Frankfurt a. M.: Lembeck, 1988) 129-132.
[886] *Ibid.* at 119-123.

embargo,[887] at least one acted against domestic criminal law by exporting military goods to South Africa without the permission according to the Foreign Economy Act.[888] The consequence was a criminal court decision against managers of the corporations, but the sentences were suspended.[889] Furthermore, the case only reached the courts in the first place because the manager violated domestic criminal law as an individual. Not the corporation was sentenced, but the acting manager, which reminds of the conflict in the application of domestic law described above.

C *German Reunification 1990*

A striking example of a positive sanction, although not primarily linked to human rights, but influencing world politics and even the fate of many nations is "the historical deal that lead to the reunification of Germany in 1990". [890] In this deal Germany promised large economic support, once more affecting businesses, including housing in Russia for returning soldiers and in return the Soviet Union agreed to the reunification, thereby allowing for a change of a size that usually is only achieved by wars, conquests or pressure. However, positive sanctions by themselves are no panacea and do not guarantee for major changes and generalizations may once more only be drawn very carefully from this case.[891] Poland or Russia for example didn't consider real changes concerning border revisions in exchange for positive sanctions.[892]

---

[887] *Ibid.*
[888] *Ibid.* at 119.
[889] *Ibid*. at 123.
[890] Peter Wallensteen, "Positive Sanctions" in Peter Wallensteen and Carina Staibano (eds), *International Sanctions* (London, New York: Frank Cass, 2005) 229, 236; on the subject of positive sanctions and the example mentioned see also Randall E. Newnham, "More Flies with Honey: Positive Economic Linkage in German *Ostpolitik* from Bismarck to Kohl" (2000) 44 *ISQ* 73.
[891] Peter Wallensteen, "Positive Sanctions" in Peter Wallensteen and Carina Staibano (eds), *International Sanctions* (London, New York: Frank Cass, 2005) 229, 236 wfr.
[892] *Ibid.* at 236 wfr.

D *Sanctions against Haiti in the 1990s*

Yet sanctions are not always encouraging human rights protection. To the contrary, they may even worsen the human rights situation. From 1991 onwards for example, sanctions were imposed on Haiti to restore democracy[893] after the democratically elected president of Haiti Jean Bertrand Aristide had been overthrown, forced to exile and appealed for help from the OAS and the UN.[894] The sanctions against the *de facto* regime in Haiti are particularly connected to human rights because it was vividly discussed whether the sanctions imposed did not thoroughly and inappropriately affect - in this case *i.e.* worsen - the human rights situation for the population in Haiti.[895] It was for example reported that many poor could not receive sufficient food or medicine from relief agencies due to the lack of fuel, because the sanctions included a fuel embargo.[896] A controversial study of the Center for Population and Development Studies in the School of Public Health at the Harvard University suggested that the sanctions against Haiti had caused 100,000 deaths, but this claim was withdrawn later.[897] However, the claim that the sanctions caused hundreds of people to drown when they tried to flee Haiti in leaky and overcrowded boats to escape the situation caused by the increase of sanctions, was not withdrawn.[898] Whether a link between the worsening human rights situation was proven or not, the case of Haiti raises awareness for negative human rights consequences that can be caused by sanctions. It graphically demonstrates that human rights can be severely harmed by sanctions and especially when the aim is the protection of

---

[893] Olaf Poeschke, *Politische Steuerung durch Sanktionen?* (Wiesbaden: Deutscher Universitätsverlag, 2003) 3.

[894] Kenneth Freed, "U.S. Eases Sanctions Against Haiti-Embargo: Bush bows to pressure from American businesses, angering OAS leaders" *LA Times* 5 February 1992 <http://articles.latimes.com/1992-02-05/news/mn-1261_1_american-business> 1 May 2014.

[895] See for example *ibid.*; Howard W. French, "U.S. Sanctions Against Haiti Are Hampering Relief Effort" *NY Times* 11 January 1994 <http://www.nytimes.com/1994/01/11/world/un-sanctions-against-haiti-are-hampering-relief-efforts.html> 1 May 2014.

[896] Howard W. French, "U.S. Sanctions Against Haiti Are Hampering Relief Effort" *NY Times* 11 January 1994 <http://www.nytimes.com/1994/01/11/world/un-sanctions-against-haiti-are-hampering-relief-efforts.html> 1 May 2014.

[897] See Kim Richard Nossal, *Rain Dancing, Sanctions in Canadian & Australian Foreign Policy* (Toronto, Buffalo, London: University of Toronto Press, 1994) 264 wfr in Ch 12, fn 4.

[898] Kim Richard Nossal, *Rain Dancing, Sanctions in Canadian & Australian Foreign Policy* (Toronto, Buffalo, London: University of Toronto Press, 1994) 264.

human rights, as is the case when discussing sanctions as a state option in this enquiry, human rights consequences and side effects have to be considered carefully.

E *"Helms-Burton Act" in the1990s*

A famous example of sanctions aimed at third parties, including private actors such as officers of corporations, is the so-called *"Helms-Burton Act"* of March 1996.[899] By the *Helms-Burton law* the US tried to prevent foreign private actors, including corporations, from trading with Cuba by threatening them with so called secondary sanctions so that they had to choose between either trading with Cuba or with the USA.[900] After the US reduced and finally stopped the importation of Cuban sugar due to the close relations of Cuba and the Soviet Union in 1960, the latter trading oil for Cuban sugar, Cuba nationalized all US properties, which was followed by a US embargo of US goods in 1961. To intensify the sanctions against Cuba, companies that maintained dealing with Cuba through subsidiaries where threatened with sanctions and ships coming from Cuban ports were denied the use of US harbours.[901] The sanction legislation culminated in the *Cuban Liberty and Democratic Solidarity ("Libertad") Act,* the already mentioned "Helms-Burton law"[902]. The law strengthened the existing embargo by prohibiting any investment of private actors in Cuba involving confiscated property and prohibiting "trafficking" with confiscated property. It even allowed US citizens to sue against anyone who "trafficked" with confiscated property, no matter what his or her citizenship was and when the confiscation had taken place.[903]

---

[899] *Cuban Liberty and Democratic Solidarity ("Libertad") Act of 1996 ("Helms-Burton Act")* (USA).

[900] Kinka Gerke, "Die unilaterale Versuchung: Die Sanktionen der USA gegen die Handelspartner Kubas, Irans und Libyens und ihre Auswirkung auf das Welthandelsregime" (1997) 2 *HSFK-Report* 1.

[901] Joaquín Roy, "The Helms-Burton Law: Development, Consequences and Legacy for Inter-American and European- US Relations" (1997) 39 *J. Interam. Stud. & World Aff.* 77, 80-1.

[902] *Ibid.* at 81.

[903] *Ibid.* at 82; Greg Flynn and Robert O'Brien, "An Internationalist Western Labour Response to the Globalization of India and China" (2010) 1 *Global Labour J.* 178, 191-2; Berta Esperanza Hernández-Truyol, Stephen J. Powell, *Just Trade: A New Covenant Linking Trade and Human Rights* (New York, London: New York University Press, 2009) 269.

In Europe and the Americas, the law was heavily criticized and confronted. The law was considered to violate legitimate interests of US trade partners and to violate international conventions by its extraterritorial character. In 1996 the EU Council adopted a regulation against the application of the *Helms-Burton law*[904] and the Mexican Official Register passed a law to protect trade and investment.[905] In addition, Mexico for example claimed that the *Helms-Burton law* violated Mexican sovereignty, punished countries that did not share the US foreign politics concerning Cuba and was not in accordance with international law in its extraterritorial intent.[906] The Inter-American Juridical Committee also presented an Opinion to the Council stating that the *Helms-Burton law* was not in conformity with international law.[907] Furthermore, opponents claimed that international agreements were violated, such as art. VIII and IX *IMF Agreement*[908], art. II and XI of *Inter-American Development Bank documents,*[909] the entire juridical and trade basis of NAFTA and the scope of the WTO.[910] As a consequence, in the beginning of 1997 legal steps were taken within the new WTO by the EU, claiming that the Law violated WTO principles.[911] The US declared that the *Helms-Burton law* dealt with matters of national security and

---

[904] Joaquín Roy, "The Helms-Burton Law: Development, Consequences and Legacy for Inter-American and European- US Relations" (1997) 39 *J. Interam. Stud. & World Aff.* 77, 92.
[905] *Ibid.* at 87.
[906] *Ibid.*, referring to a Mexican Congress Resolution of 29 May 1996.
[907] *Opinion following the mandate of the Resolution AG/DOC.337/96 of the General Assembly of the Organization of American States, entitled "freedom of Trade and Investment in the Hemisphere."* CJI/SO/I/doc.67/96 rev. 5, available in English in the Annual Report of 1996, CJI/SO/II/doc.89/96 rev.2, p. 36-41 at <http://www.oas.org/cji/eng/INFOANUAL.CJI.1996.ING.pdf> 1 May 2014; see also Joaquín Roy, "The Helms-Burton Law: Development, Consequences and Legacy for Inter-American and European- US Relations" (1997) 39 *J. Interam. Stud. & World Aff.* 77, 88.
[908] *Articles of Agreement of the International Monetary Fund* (1944).
[909] *Agreement Establishing the Inter-American Development Bank* (1959).
[910] Kinka Gerke, "Die unilaterale Versuchung: Die Sanktionen der USA gegen die Handelspartner Kubas, Irans und Libyens und ihre Auswirkung auf das Welthandelsregime" (1997) 2 *HSFK-Report* 1; Joaquín Roy, "The Helms-Burton Law: Development, Consequences and Legacy for Inter-American and European- US Relations" (1997) 39 *J. Interam. Stud. & World Aff.* 77, 83.
[911] Joaquín Roy, "The Helms-Burton Law: Development, Consequences and Legacy for Inter-American and European- US Relations" (1997) 39 *J. Interam. Stud. & World Aff.* 77, 93; for details see Olaf Poeschke, *Politische Steuerung durch Sanktionen?* (Wiesbaden: Deutscher Universitätsverlag, 2003) 61; on the dispute see also Harck-Oluf Nissen „Der Helms-Burton-Act vor der WTO: Zum Stand des europäisch-amerikanischen Handelsstreits und der WTO-Konformität des Gesetzes" (1999) *Recht der Internationalen Wirtschaft* 350.

was therefore not of concern to the WTO,[912] but covered by art. XXI *GATT*, leaving such issues to the member states.[913] The matter was finally not decided by WTO panels, instead the US offered a readjustment of the law in exchange for the withdrawal of the WTO suit brought by the EU and the EU commitment to discourage the investment in confiscated US property in Cuba.[914]

The *Helms-Burton law* affected private actors in particular by travel restrictions implemented on the officers and their families of companies that "trafficked" in confiscated US properties. The denial of entry into the US was carried out for example against the manager of the Canadian corporation *Sherritt* and the president and his family of the Mexican *Grupo Domos*.[915] This means private individuals were aimed at and affected by secondary sanctions, particularly the responsible individuals and their family members, creating a kind of "kin liability" to change the corporation's behaviour towards Cuba. Yet corporations as private actors were also affected more directly by freezing corporation assets abroad (*i.e.* in the US) or preventing foreign investors from investing into confiscated US property in Cuba and allowing US citizens and former Cuban citizens to sue them.[916]

Despite or maybe because of, its width which gave rise to so much criticism and so many confrontations, the success of the law is doubted,[917] thereby granting all parties involved the opportunity to claim some success.[918] Yet "[t]he points of

---

[912] Joaquín Roy, "The Helms-Burton Law: Development, Consequences and Legacy for Inter-American and European- US Relations" (1997) 39 *J. Interam. Stud. & World Aff.* 77, 93; for details see Olaf Poeschke, *Politische Steuerung durch Sanktionen?* (Wiesbaden: Deutscher Universitätsverlag, 2003) 61 wfr.

[913] Berta Esperanza Hernández-Truyol, Stephen J. Powell, *Just Trade: A New Covenant Linking Trade and Human Rights* (New York, London: New York University Press, 2009) 270.

[914] Joaquín Roy, "The Helms-Burton Law: Development, Consequences and Legacy for Inter-American and European- US Relations" (1997) 39 *J. Interam. Stud. & World Aff.* 77, 96; see also Berta Esperanza Hernández-Truyol, Stephen J. Powell, *Just Trade: A New Covenant Linking Trade and Human Rights* (New York, London: New York University Press, 2009) 270.

[915] Kinka Gerke, "Die unilaterale Versuchung: Die Sanktionen der USA gegen die Handelspartner Kubas, Irans und Libyens und ihre Auswirkung auf das Welthandelsregime" (1997) 2 *HSFK-Report* 1, 26 wfr.

[916] See *Cuban Liberty and Democratic Solidarity ("Libertad") Act of 1996 ("Helms-Burton Act")* (USA).

[917] Joaquín Roy, "The Helms-Burton Law: Development, Consequences and Legacy for Inter-American and European- US Relations" (1997) 39 *J. Interam. Stud. & World Aff.* 77, 79.

[918] *Ibid.* at 95.

view can also be summarized as two poles of frustration",[919] the EU stating that Fidel Castro's power was not diminished and the US blaming Europe, its indecisiveness and demand in the WTO.[920] In addition, also US companies are growing impatient "over economic sanctions that interfere with trade."[921]

It is somewhat ironic that the very situation the law was supposed to prevent - namely other states not joining the sanctions against Cuba and US foreign policy - prevented the law itself from being fully implemented.[922] This reminds of the shared values mentioned above[923] that are forming an acceptable consensus for the extraterritorial application of domestic law; to force others to act according to one's values is more likely to fail when the values - in this case the foreign policy concerning Cuba - are not shared. And when they are shared force should not be necessary, because negotiations and mutual acceptance are (more) likely to lead to the goal.

F *"D'Amato Act" in the 1990s*

Another example similar to the *Helms Burton Act* is the *Iran and Libya Sanctions Act*,[924] also called *"D'Amato Act"*. This law also provided for secondary sanction measures aimed at corporations.

The US imposed sanctions on Iran to prevent it from strengthening its power supply industry, because the money earned that way was supposed to support international terrorism and the attainment of weapons of mass destruction.[925] In the wake of the sanctions, Iran invited European and Asian corporations to Teheran to court new investors.[926] Therefore the *D'Amato Act* was introduced, that allowed for secondary sanctions against corporations which helped Iran to

---

[919] *Ibid.* at 96.
[920] *Ibid.*
[921] *Ibid.* at 98.
[922] See also Greg Flynn and Robert O'Brien, "An Internationalist Western Labour Response to the Globalization of India and China" (2010) 1 *Global Labour J.* 178,192 who state that the political controversy caused by the *Helms Burton* an *D'Amato* Acts in fact limited the effectiveness of such measures as a means to achieve international policy goals.
[923] See chapter II.
[924] *Iran and Libya Sanctions Act 1996* (US).
[925] Kinka Gerke, "Die unilaterale Versuchung: Die Sanktionen der USA gegen die Handelspartner Kubas, Irans und Libyens und ihre Auswirkung auf das Welthandelsregime" (1997) 2 *HSFK-Report* 1, 30.
[926] *Ibid.* at 37.

develop its power supply industry. Due to this law many big corporations did not travel to Teheran and fewer corporations than originally intended attended the conference.[927] That means similar to the situation under the *Helms Burton Law*, secondary sanctions aimed at individuals were imposed and secondary sanctions were implemented against third parties, states or private actors and like the *Helms Burton Act* the law was criticized for not being *GATT* consistent.[928]

Libya was the second target state of the newly imposed US sanctions to force it to extradite the alleged criminals of the bomb blast that caused a PanAm plane to crash over Lockerbie, Scotland, in 1988.[929] The sanctions included the ban on goods and services of US imports from Libya and on the export of goods, technology and services from the US into Libya with some humanitarian exceptions concerning food, cloths, medication and medical equipment.[930] Similar to the *Helms-Burton Act* the *D'Amato Act,* provided the possibility of secondary sanctions to pressure those foreign private actors who did not obey the investment ban imposed by the USA.[931] Corporations which did not act according to the US sanctions had to face, amongst other things, the denial of export licenses and export investment, denial of credits from US banks that exceeded 10 Mio US$ and were not allowed to import their products into the US.[932] Once more Europe did not support this approach,[933] and although concerning Iran the European states intensified their laws of export control in 1993[934] the *D'Amato Act* generally strengthened the European determination to take counter measures against the - what they considered - extraterritorial

---

[927] *Ibid.* at 38.
[928] *Ibid.* at 38 wfr.
[929] *Ibid.* at 30.
[930] Almut Hinz, *Sanktionen gegen Libyen* (Frankfurt a. M.: Peter Lang, 2005) 214-5 wfr.
[931] *Iran and Libya Sanctions Act 1996* (US); see also Kinka Gerke, "Die unilaterale Versuchung: Die Sanktionen der USA gegen die Handelspartner Kubas, Irans und Libyens und ihre Auswirkung auf das Welthandelsregime" (1997) 2 *HSFK-Report* 1, 29.
[932] Kinka Gerke, "Die unilaterale Versuchung: Die Sanktionen der USA gegen die Handelspartner Kubas, Irans und Libyens und ihre Auswirkung auf das Welthandelsregime" (1997) 2 *HSFK-Report* 1, 29-30; Almut Hinz, *Sanktionen gegen Libyen* (Frankfurt a. M.: Peter Lang, 2005) 219 wfr.
[933] Kinka Gerke, "Die unilaterale Versuchung: Die Sanktionen der USA gegen die Handelspartner Kubas, Irans und Libyens und ihre Auswirkung auf das Welthandelsregime" (1997) 2 *HSFK-Report* 1, 30.
[934] *Ibid*. at 31 wfr.

American laws.[935] Faced with the serious rejection of the secondary sanctions by the EU, the US, refrained from imposing secondary sanctions when French Total invested in Iran's gas development.[936]

G *Sanctions against Zimbabwe beginning 2002*

An example of human rights-linked sanctions are the sanctions against Zimbabwe from 2002. Among other countries[937] the EC/EU sanctioned Mugabe's government in Zimbabwe because of its massive human rights violations.[938] As the *Cotonou Agreement*[939] effective between Zimbabwe and the EC/EU contained human rights and good governance clauses, financial aid and development assistance, suspension could be based on art. 96 *Cotonou Agreement*.[940] Also other measures, not covered by the *Cotonou Agreement*, were imposed on private actors, like freezing assets of government members.[941]

H *Sanctions against Syria from 2004 onwards*

The US imposed economic sanctions against Syria in 2004 and renewed them in 2009, because they considered Syria a threat to the US interests.[942] They claimed Syria was "supporting terrorism, pursuing weapons of mass destruction and missile programmes, and undermining U.S. and international efforts with respect

---

[935] *Ibid.* at 41 wfr.
[936] Patrick Clawson, "Iran" in Richard N. Haass (ed), *Economic Sanctions and American Diplomacy* (New York: Council of Foreign Relations, 1998) 85, 92.
[937] For an overview see Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2005) 224-5 wfr.
[938] See *Council Common Position Concerning Restrictive Measures Against Zimbabwe* (18 February 2002) (2002/145/CFSP) O. J. L [Official Journal of the European Communities] 50/1.
[939] *Partnership Agreement ("Cotonou Agreement")* (2000, Cotonou), First version O. J. L 317, 15 December 2000.
[940] Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2005) 224 wfr.
[941] *Ibid.* at 224-5 wfr; on US measures on Zimbabwe from 2002 to 2009 see Michael P. Malloy, "Human Rights and the Unintended Consequences: Empirical Analysis of International Economic Sanctions in Contemporary Practice" (2013) 21 *B. U. Int'l L. J.* 75, 92-100.
[942] Administration of Barack H. Obama "Message to the Congress on Continuation of the National Emergency With Respect to the Actions of the Government of Syria" (7 May 2009) available at <http://www.gpo.gov/fdsys/pkg/DCPD-200900341/html/DCPD-200900341.htm> 1 May 2014.

to the stabilisation and reconstruction of Iraq"[943] The imposed sanction measures included prohibitions of arms exports to Syria and - more interestingly in the context assessed in this research - "block[ing] Syrian airlines from operating in the United States".[944] In doing so once more a corporation was affected by sanctions imposed on a state. That the sanctions hit the airline severely is proven by the fact that the airline had to reduce its operational fleet from 15 to 6 aircrafts until 2008.[945] Furthermore, in 2008 and 2011 due to the human rights abuses that had occurred additional sanctions were imposed against those supporting the Assad regime and other countries followed the US example.[946] The EU for example imposed sanctions as well, including measures affecting private actors, like freezing assets, including those of corporations, and travel bans.[947] In June 2013 the US eased the sanctions, "allowing the importation of equipment and technology into liberated areas of Syria."[948]

III SANCTIONS APPLICABLE IN THE TNC-HUMAN RIGHTS CONTEXT

As already seen in the examples given above, sanctions may be used in different ways. They can be imposed as negative or positive sanctions, as primary or secondary sanctions, unilaterally or multilaterally, affecting the target state's economy, diplomatic relations or any other sphere. Some of these measures or ways of imposition may be more promising than others in the TNC-human rights context and some may require further and more particular consideration.

---

[943] Administration of Barack H. Obama "Message to the Congress on Continuation of the National Emergency With Respect to the Actions of the Government of Syria" (7 May 2009) available at <http://www.gpo.gov/fdsys/pkg/DCPD-200900341/html/DCPD-200900341.htm> 1 May 2014.

[944] *Aljazeera,* "Obama renews Syria sanctions" (8 May 2009) available at <http://www-ak.aljazeera.net/news/americas/2009/05/20095815106605431.html> 1 May 2014.

[945] Global Security, *Syria-Economy*, <http://www.globalsecurity.org/military/world/syria/economy.htm> 1 May 2014.

[946] *Ibid.*

[947] *CNN*, "EU slaps new sanctions on Syria" (14 May 2012) <http://articles.cnn.com/2012-05-14/middleeast/world_meast_syria-unrest_1_local-coordination-committees-deir-ezzor-syrian-conflict?_s=PM:MIDDLEEAST> 1 May 2014.

[948] Jill Dougherty, "U. S. looks to help Syrian civilians, eases sanctions" (Post by CNN Foreign Affairs Correspondent, (12 June 2013), available at <http://security.blogs.cnn.com/2013/06/12/u-s-looks-to-help-syrian-civilians-eases-sanctions/> 1 May 2014.

Therefore, the different means and their use for the home state to achieve control over the human rights records of its TNCs acting abroad will be outlined now.

A *UN sanctions or unilateral sanctions?*

As could be seen above, sanctions imposed in order to promote and protect human rights can be multilateral UN sanctions. However, the sanctions imposed by the UN Security Council according to art. 41 and 42 *UN Charter*[949] require a threat to international peace or security according to art. 39 *UN Charter*. In situations of human rights violations caused by TNCs, this will hardly ever be the case as only particular and singled-out human rights violations by one private actor, respectively the omissions to act in response or prevention of that violation by the host state, are the basis for the sanction. Improving the human rights protection by the home state's TNCs acting abroad is an issue of much smaller scale than threats to peace or security. Sanctions answering the latter have to be based on more general grounds than the failure of the host state to provide sufficient human rights protection in one specific context to remain proportional.

Yet the UN also deals with non-security matters, including human rights in its General Assembly. Non-binding[950] resolutions calling member states to impose sanctions on a target state can be passed. However, these resolutions of the General Assembly are rather aimed at fighting gross and systematic violations of human rights than at answering specific singled-out human rights violations in a rather inter-state context. The latter situations are a basis too confined for UN action to be appropriate. The issue of the home state tackling human rights violations in the host state triggered by TNC behaviour is a rather bilateral set-up which other UN member states are usually neither affected by nor interested in.

That leaves unilateral sanctions by the home state the only way to go, including the possibility for the home state to convince other states to join the sanctions against the target state in order to improve the effectiveness of its own sanctions. As the UN hold the monopoly for sanctions using force, the individual states are

[949] *Charter of the United Nations* (1945).
[950] See Frank Küschner-Pelkmann, *Sanktionen gegen die Apartheid* (Frankfurt a. M.: Lembeck, 1988) 13.

restricted to the use of "non-violent" sanctions,[951] such as economic measures, which are the most often used method when unilateral sanctions are imposed.[952] The different kinds of those unilateral sanctions will be outlined now.

B *Positive sanctions*

As economic measures, or plainly put money, are supposed to be an effective measure to influence someone's behaviour, they work in both directions - denying and promising economic advantages, *i.e.* as negative and positive sanctions. Most positive sanctions are imposed in an economic way, for example by promising financial aid for the compliance with certain international standards.[953] Yet they may also be imposed in a non-economic way, for example by holding out the prospects of participation in international organizations, although this may not be an option when rogue states are targeted.[954] The advantage of positive sanctions is that they do not have grave side effects on human rights in the target state, they do not cause hostility towards the sanctioning state, they do usually not cause shortages of goods and third states cannot undermine the sanctions as easily as for example unilateral trade bans.[955] The more targeted and tailored the positive measures are to those in charge in the targeted state and their interests, the more effective they are.[956] As the host state has an interest in home state investments in TNC cases, as shows the mere

---

[951] Tim Brune, *Der Fall Österreich* (Frankfurt am Main, Berlin, Bern, Bruxelles, New York, Oxford, Wien: Peter Lang)165.

[952] See Gary Clyde Hufbauer and Barbara Oegg, "Targeted Sanctions: A Policy Alternative?" *Paper for a symposium on Sanctions Reform? Evaluating the Economic Weapon in Asia and the World* (February 23, 2000) <http://www.petersoninstitute.org/publications/papers/paper.cfm?ResearchID=371> 1 May 2014, 60, 91-116; Sascha Werthes, *Probleme und Perspektiven von Sanktionen als politisches Instrument der Vereinten Nationen* (Münster, Hamburg, London: LIT Verlag, 2003) 30.

[953] In the example above about the German Reunification it was the promise of economic support to achieve policy aims.

[954] Almut Hinz, *Sanktionen gegen Libyen* (Frankfurt a. M.: Peter Lang, 2005) 552-3.

[955] Almut Hinz, *Sanktionen gegen Libyen* (Frankfurt a. M.: Peter Lang, 2005) 183; Olaf Poeschke, *Politische Steuerung durch Sanktionen?* (Wiesbaden: Deutscher Universitätsverlag, 2003) 122.

[956] Peter Wallensteen, "Positive Sanctions" in Peter Wallensteen and Carina Staibano (eds), *International Sanctions* (London, New York: Frank Cass, 2005) 229, 238.

fact that TNC subsidiaries are in the host state, incentives in the respective treaties can be a possible way to go.[957]

Including human rights clauses in treaties concerning trade and development aid are for example economic inducements to promote and protect human rights.[958] The EU, the World Bank, the IMF and the EBRD are for example taking into account human rights issues when concluding treaties.[959] The EC/EU *Lomé IV Convention*[960] with ACP states concerning the cooperation in the fields of economics, finances, culture and development, for example contained a human rights clause for the first time and even the preamble referred to individual freedoms, human dignity and their importance.[961] The *Cotonou Agreement*[962] replacing the *Lomé Convention* is dealing with human rights in an even broader way, providing for a consultation procedure in art. 96[963] that can be invoked when human rights obligations are not fulfilled. That is why the suspension of development assistance and financial aid for Zimbabwe in 2002 could be based on art. 96 *Cotonou Agreement* as sketched above. The World Bank, although neutral to political issues, is taking into account human rights issues through the back door of economic interests and the direct and obvious effects they cause for the World Bank.[964] The US *Generalized System of Preferences* (GSP) is another

---

[957] *Ibid.* and at 234 and 238 pointing out for the use of positive sanctions to secure peace and security that trade-related incentives are not serving the government directly, but businesses and entrepreneurs. It is submitted, however, that in the TNC and human rights context things are different.

[958] See Ilias Bantekas, "Enforcing Human Rights Through the External Use of Local Public Opinion" in David Barnhizer (ed), *Effective Strategies for Protecting Human Rights* (Aldershot, Burlington: Ashgate Dartmouth, 2001) 193, 202.

[959] Obasi Okafor-Obasi, *The Enforcement of State Obligations to Respect and Ensure Human Rights in International Law* (Potsdam: Menschenrechtszentrum der Universität Potsdam, 2003) 97; Mary C. Tsai, "Globalization and conditionality: two sides of the sovereignty coin" (2000) 31 *Law & Pol'y in Int'l Bus* 1317; Peter Wallensteen, "Positive Sanctions" in Peter Wallensteen and Carina Staibano (eds), *International Sanctions* (London, New York: Frank Cass, 2005) 229, 230.

[960] *Forth ACP-EC Convention of Lomé ("Lomé IV Convention")* (1989).

[961] Obasi Okafor-Obasi, *The Enforcement of State Obligations to Respect and Ensure Human Rights in International Law* (Potsdam: Menschenrechtszentrum der Universität Potsdam, 2003) 97-8.

[962] *Partnership Agreement ("Cotonou Agreement")* (2000, Cotonou), First version O. J. L 317, 15 December 2000.

[963] *Ibid.*

[964] Obasi Okafor-Obasi, *The Enforcement of State Obligations to Respect and Ensure Human Rights in International Law* (Potsdam: Menschenrechtszentrum der Universität Potsdam, 2003) 100, 101-2 wfr.

example of protecting human rights, in this case labour rights, in developing countries by inducements. The GSP grants custom-free imports into the US as long as the importing state observes labour rights or at least takes steps to improve their observance.[965] The EC/EU also had a, although lesser used,[966] GSP,[967] providing for tariff reductions according to the development level of the exporting state and the protection of labour rights in their domestic laws.[968] However, these approaches are not unchallenged, because of the way they are invoked and because they do not necessarily treat all like states alike.[969] The new EU GSP model therefore uses internationally recognised standards and mechanisms such as expertises and monitory and review systems of the ILO and UN agencies in its conditionality model.[970] As far as TNCs acting abroad are concerned, the just mentioned treaties and agreements taking into account the overall human rights record of (host) states and other issues, such as economics, rule of law, etc, are too broad.[971] Human rights clauses in the TNC context should therefore rather be included in the bilateral treaties dealing with the very TNC abroad. However, there are still various challenges that have to be faced.

---

[965] Philippe Schneuwly, "Sind Handelssanktionen ein geeignetes Mittel zur Durchsetzung von Arbeitsnormen?" (2003) *Aussenwirtschaft* 121, 124-5.

[966] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 114.

[967] *Council Regulation (EC) No. 2501/2001 Scheme of generalised tariff preferences from 2002 to 2005*; right now GSPs are granted according to *Council Regulation (EC) No. 978/2012 Generalised System of Preferences*; see also James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford , Portland: Hart Publishing, 2007) 113.

[968] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 113, referring to *Council Regulation (EC) No. 2501/2001 Scheme of generalised tariff preferences from 2002 to 2005,* Article 14.

[969] See James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 110-122.

[970] *Ibid.* at 117-19, 121, referring to *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee: Developing countries, international trade and sustainable development: the function of the Community's generalised system of preferences (GSP) for the ten-year-period from 2006 to 2015* COM(2004) 461 final, Brussels 7.7. 2004; on EU GSPs and their challenges including the analysis of three cases where GSP preferences were withdrawn because core labour standards had been violated see Yaraslau Kryvoi, "Why European Trade Sanctions Do Not Work" (2008) 17 *Minn. J. Int'l L.* 209.

[971] The broadness, complexity and as far as the *Cotonue Agreement* is concerned the equal human rights obligations for ACP and EU states have earned some criticism, see Kunibert Raffer, "Cotonou: Slowly Undoing Lomé's Concept of Partnership" (2002) XVIII (2) *JEP* 171, available at <www.edpsg.org/index.pl> 1 May 2014, *DP No. 21*, p. 15-6 of download version.

Firstly, positive sanctions are working best in favour of the promotion and protection of human rights when they are granted under the condition of the promotion and protection of human rights so that they can be denied when this aim is not pursued or not reached in an adequate amount of time.[972] Yet as the home state is usually interested in investing in the host state, the former will hardly be willing to include conditionality clauses obliging it to withdraw its investments, e.g. a whole TNC subsidiary, because of human rights violations in the host state.[973] Secondly, a conditionality promoting and protecting human rights threatening with the denial of further aid and investment equals threatening with the imposition of negative sanctions. The cut off of positive sanctions has therefore to be considered carefully to avoid causing more hardship and human rights violations for the population as is already taking place.[974]

Another possible way to provide positive (indirect) economic sanctions is providing know-how, for example regarding environmental protection and the instruments and means needed for an effective protection, which helps protecting the right to health. Such measures provided to increase the protection of human rights by training, education, etc in areas important for human rights protection are helping the host state to help itself, not creating dependencies and are more targeted than positive economic sanctions. Yet such "practical" aid cannot for example replace investment, but is rather an additional way of providing aid and only in rare cases an alternative able to replace solely economic measures. Practical aid and investments linked to certain conditions seem to be measures that can also work in the TNC and human rights context as TNC subsidiaries abroad are investments in the host state and treaties are concluded anyway before subsidiaries are established. Essential for the

---

[972] This is also the idea of the US GSP examined by Philippe Schneuwly, "Sind Handelssanktionen ein geeignetes Mittel zur Durchsetzung von Arbeitsnormen?" (2003) *Aussenwirtschaft* 121.

[973] As the example about South Africa abroad shows, TNCs are rather reluctant towards disinvestment even when gross and systematic human rights violations like apartheid occur; in the case of GSPs Schneuwly observed that to a large extent the decision of granting inducements or denying them depended on US interests, see *ibid.* at 127-136.

[974] See Obasi Okafor-Obasi, *The Enforcement of State Obligations to Respect and Ensure Human Rights in International Law* (Potsdam: Menschenrechtszentrum der Universität Potsdam, 2003) 100.

credibility and success of positive sanctions, however, is the fair and equal imposition of conditions and possible cut offs.[975]

C *Negative sanctions*

The opposite to positive sanctions are negative sanctions imposed to change the target state's behaviour by compellence. Embargos for example are negative sanctions in the economic sphere, but any other sphere can also be aimed at or affected by negative sanctions as described above.

According to the "naïve theory"[976] negative sanctions were supposed to create an "internal-opposition-effect"[977] by causing sufficient hardship for the population of the target state to create riots and an overthrow of the government from within, because the population was supposed to blame its own government for the misery the sanctions are causing. However, there is no empirical proof for this theory and often the people, instead of overthrowing their government, felt neglected by the sanctioning state and the rally-round-the-flag syndrome made the population support their government and blame the sanctioning states for the misery rather than carry out an overthrow.[978] The rally-round-the-flag phenomenon may be increased by the latent distrust in the "West" and powerful states by small states and those not part of the "West" as already mentioned above. This is supported by the facts that sanctions have mainly been imposed from the North upon the South, may create grave harms for the civilian population, are hard to end and it is feared that some world powers use them according to their own advantage according to their hidden agenda and they

---

[975] A negative example provides the US GSP as examined by Philippe Schneuwly, "Sind Handelssanktionen ein geeignetes Mittel zur Durchsetzung von Arbeitsnormen?" (2003) *Aussenwirtschaft* 121.

[976] Kim Richard Nossal, *Rain Dancing, Sanctions in Canadian & Australian Foreign Policy* (Toronto, Buffalo, London: University of Toronto Press, 1994) 10; see also Johan Galtung, "On the Effects of International Economic Sanctions, with Examples from the Case of Rhodesia", (1967) 19 W*orld Politics* 378, 388-393.

[977] Sascha Werthes, *Probleme und Perspektiven von Sanktionen als politisches Instrument der Vereinten Nationen* (Münster, Hamburg, London: LIT Verlag, 2003) 36.

[978] Kim Richard Nossal, *Rain Dancing, Sanctions in Canadian & Australian Foreign Policy* (Toronto, Buffalo, London: University of Toronto Press, 1994) 10-1; see also Johan Galtung, "On the Effects of International Economic Sanctions, with Examples from the Case of Rhodesia", (1967) 19 W*orld Politics* 378, 388-393.

have impacts on neighbouring states.[979] The variety of different aims and motives may advance this fear by suggesting that sanctions are not imposed evenly onto all wrong-doers as the potential sanctioners have different interests of their own.[980] Yet when using sanctions in a transparent way, treating like cases alike, many of the concerns just mentioned can be diminished. However, this does not mean that the naïve theory is working when these suggestions are followed. Nevertheless, negative sanctions are still used a lot as could be seen in the examples given above, albeit today the focus is on directly pressuring the government rather than the people to achieve change.

1 *Negative side effects*

One reason for this shift of focus are negative side effects. Although negative sanctions may be the first means that come to mind when thinking about effectively answering a violation of human rights because they contain punishment and retribution as their guaranteed underlying secondary aims, their major drawback are the very effects they may have. Since it is known that the naïve theory is not working, the population is not the primary aim of the hardship any longer. Therefore the negative effects sanctions have on the population are mainly *side* effects. Some of these negative side effects were already mentioned above when sketching the sanctions against Haiti and it became clear that negative sanctions may cause severe human rights violations themselves.[981] Sanctions can for example increase the marginalization of economies,[982] which can lead to a collapse in infrastructure that in turn may give raise to disease and malnutrition or even death, but it can also cause mass unemployment and impoverishment[983] which may give raise to civil and

[979] Almut Hinz, *Sanktionen gegen Libyen* (Frankfurt a. M.: Peter Lang, 2005) 85 wfr.
[980] Mark Orkin, „Die Forderung nach umfassenden Sanktionen wird klar“ in Texte zum kirchlichen Entwicklungsdienst, “Südafrika: Sanktionen in der Diskussion” (Hamburg: Dienste in Übersee, 1988) 21, 32.
[981] For Haiti and additional examples see also Amy Howlett, „Getting ‚Smart’: Crafting Economic Sanctions that Respect All Human Rights“ (2004) 73 *Fordham L. Rev.* 1199.
[982] Kim Richard Nossal, *Rain Dancing, Sanctions in Canadian & Australian Foreign Policy* (Toronto, Buffalo, London: University of Toronto Press, 1994) 263 wfr.
[983] Almut Hinz, *Sanktionen gegen Libyen* (Frankfurt a. M.: Peter Lang, 2005) 94 table 5; Kim Richard Nossal, *Rain Dancing, Sanctions in Canadian & Australian Foreign Policy* (Toronto, Buffalo, London: University of Toronto Press, 1994) 263; see also Berta Esperanza

domestic lethal violence.[984] Yet sanctions may not only affect the human rights of health and life. They can also affect the right to education as they cause brain drain, a lack of scientific materials by banning imports and by affecting the infrastructure.[985] The groups most affected by sanctions and their negative impacts are infants, children[986] and women, as it is the latter who line up for food, and have to care for the children who are affected by shortages of health care, education, etc.[987] By causing human rights violations themselves, negative sanctions imposed to end human rights violations "more often than not end up punishing entirely the wrong people",[988] causing a 'double punishment' for them, imposed by their own government and the sanctioner(s).[989] As Vázquez puts it

> […] sanctions thus treat human beings as pawns in a geo-political game. They violate the Kantian injunction that persons be treated as ends and not means, a principle that is arguably the foundation of much of modern human rights law.[990]

Due to the negative effects sanctions may have, the UN condemns the use of unilateral sanctions.[991] Some scholars even suggest that the effects of sanctions

---

Hernández-Truyol, Stephen J. Powell, *Just Trade: A New Covenant Linking Trade and Human Rights* (New York, London: New York University Press, 2009) 265-7.

[984] Almut Hinz, *Sanktionen gegen Libyen* (Frankfurt a. M.: Peter Lang, 2005) 94, table 5 wfr ; Kim Richard Nossal, *Rain Dancing, Sanctions in Canadian & Australian Foreign Policy* (Toronto, Buffalo, London: University of Toronto Press, 1994) 263.

[985] Almut Hinz, *Sanktionen gegen Libyen* (Frankfurt a. M.: Peter Lang, 2005) 94, table 5 wfr.

[986] Kim Richard Nossal, *Rain Dancing, Sanctions in Canadian & Australian Foreign Policy* (Toronto, Buffalo, London: University of Toronto Press, 1994) 263; OCHCHR, "The Human Rights Impact of Economic Sanctions on Iraq" *Background paper prepared by the Office of the High Commissioner for Human Rights for the meeting of the Executive Committee on Humanitarian Affairs* (5 September 2000), available at <http://www.casi.org.uk/info/undocs/sanct31.pdf> 1 May 2014.

[987] Kim Richard Nossal, *Rain Dancing, Sanctions in Canadian & Australian Foreign Policy* (Toronto, Buffalo, London: University of Toronto Press, 1994) 265.

[988] *Ibid.* at 264, referring to economic sanctions.

[989] *Ibid.* at 266; the problem of ending positive sanctions and not causing additional human rights violations is mentioned by Obasi Okafor-Obasi, *The Enforcement of State Obligations to Respect and Ensure Human Rights in International Law* (Potsdam: Menschenrechtszentrum der Universität Potsdam, 2003) 100 wfr.

[990] Carlos Manuel Vázquez, "Trade Sanctions and Human Rights - Past, Present, and Future" (2003) 6 *JIEL* 797, 837.

[991] See UN General Assembly *Resolution A/RES/63/179 "Human rights and unilateral coercive measures"* (26 March 2009); see also UN General Assembly, *Report of the Secretary-General on the Work of the Organization* A/53/1 (1998) par. 64: "…these humanitarian and human rights policy goals cannot easily be reconciled with those of a sanctions regime."

can be as grave and disastrous for the civilian population as war.[992] Some authors even go one step further, claiming that well-aimed military strikes using accurate weapons may not only be more effective but also less harming to the civilian population.[993] Yet - if at all - this is rather true in cases where the sanctioner intends to replace the government or change a regime, but not in singled-out human rights violation cases caused by TNCs and host states. Nevertheless do these comparisons to war and military strikes reflect the lively discussion about the negative effects of sanctions.

2 *Smart sanctions*

Due to the considerations about the grave negative impacts negative sanctions may have and as it is known today that the naïve theory is not working, so-called "smart sanctions" have emerged.[994] They are similar to targeted positive sanctions and are selective in their means and targeted only at those in charge of the situation or violation that is to be changed. In doing so they are trying to change the government's behaviour, whilst harming the civilian population as little as possible. Sanctions may not only consist of economic measures like freezing assets,[995] but may also affect other spheres within the host state[996] as

---

[992] Sascha Werthes, *Probleme und Perspektiven von Sanktionen als politisches Instrument der Vereinten Nationen* (Münster, Hamburg, London: LIT Verlag, 2003) 29 wfr.

[993] Phillip S. Meilinger "A matter of Precision. Why air power may be more humane than sanctions" (2001) 123 *Foreign Pol'y* 78-9; John Mueller and Karl Mueller "Sanctions of Mass Destruction" (1999) 78 *Foreign Aff.* 43-53; Olaf Poeschke, *Politische Steuerung durch Sanktionen?* (Wiesbaden: Deutscher Universitätsverlag, 2003) 44.

[994] Gary Clyde Hufbauer and Barbara Oegg, "Targeted Sanctions: A Policy Alternative?" *Paper for a symposium on Sanctions Reform? Evaluating the Economic Weapon in Asia and the World* (February 23, 2000) <http://www.petersoninstitute.org/publications/papers/paper.cfm?ResearchID=371> 1 May 2014.

[995] The UK Supreme Court affirmed that for such measures a high threshold has to be met, see Carrie Schmizzi, "UK Supreme Court rules orders freezing assets of terror suspects unlawful" *JURIST* (27 January 2010) available at <http://jurist.law.pitt.edu/paperchase/2010/01/uk-supreme-court-rules-orders-freezing.php> 1 May 2014, the decision is available there as well.

[996] The different spheres are mainly divided into the diplomatic and political sphere, the cultural and communication sphere, the economic sphere and the legal sphere, see Tim Brune, *Der Fall Österreich* (Frankfurt am Main, Berlin, Bern, Bruxelles, New York, Oxford, Wien: Peter Lang) 170 wfr, 171; Kim Richard Nossal, *Rain Dancing, Sanctions in Canadian & Australian Foreign Policy* (Toronto, Buffalo, London: University of Toronto Press, 1994) 3, wfr; Sascha Werthes, *Probleme und Perspektiven von Sanktionen als politisches Instrument der Vereinten Nationen* (Münster, Hamburg, London: LIT Verlag, 2003) 26, tab. 2.1, wfr; see

already seen in the examples above. Cultural or diplomatic sanctions or travel bans[997] leave the poor predominantly unmolested.[998] Although this seems to be the perfect middle course, it is of course difficult to exactly predict a sanction's effects and there may not always be effective means to be used as smart sanctions in an effective way.[999] In addition, smart sanctions are also affecting human rights, although not necessarily (only) those of the average population.[1000] Yet if foreign assets of the ruling élite are frozen, they could e.g. try to compensate this by taking more from their citizens.[1001] In other words - smart sanctions are no panacea either. Some criticize them for being too confined to bring about large changes[1002] and consider them to be partial solutions only.[1003] However, as this enquiry deals with the particular issue of TNCs violating human rights abroad, sanctions imposed by home states are not supposed to bring about "large changes". Changing whole regimes, like the sanctions against South Africa and its apartheid regime were supposed to, is not aimed for. Instead particular singled-out situations are meant to be improved. Harming the population of the host state to achieve more human rights

---

also Almut Hinz, *Sanktionen gegen Libyen* (Frankfurt a. M.: Peter Lang, 2005) 52-4 table 4 wfr.

[997] Erica Cosgrove, "Examining targeted sanctions", in Peter Wallensteen and Carina Staibano (eds), *International Sanctions* (London, New York: Frank Cass, 2005) 207; David Cortright and George A. Lopez, *Sanctions and the Search for Security* (Boulder, CO: Lynne Rienner, 2002) 133.

[998] On smart sanctions, how to find the "tender spot" of those in charge, how to identify those in charge, see David Cortright and George A. Lopez "Introduction: Asessing Smart Sanctions: Lessons from the 1990s" in David Cortright and George A. Lopez (eds), *Smart Sanctions Targeting Economic Statecraft* (Lanham, Boulder, New York, Oxford: Rowman & Littlefield, 2002) 1 and 16-9; David Cortright and George A. Lopez, *The Sanctions Decade, Assessing UN Strategies in the 1990s* (Boulder, London: Lynne Rienner, 2000); Sascha Werthes, *Probleme und Perspektiven von Sanktionen als politisches Instrument der Vereinten Nationen* (Münster, Hamburg, London: LIT Verlag, 2003) 127.

[999] See Kimberly A. Elliott, "Analyzing the Effects of Targeted Sanctions" in Peter Wallensteen and Carina Staibano (eds), *International Sanctions* (London, New York: Frank Cass, 2005) 11.

[1000] Iain Cameron, "Protecting Legal Rights" in *ibid.* at181, 186

[1001] Berta Esperanza Hernández-Truyol, Stephen J. Powell, *Just Trade: A New Covenant Linking Trade and Human Rights* (New York, London: New York University Press, 2009) 274.

[1002] See Jeffrey Meyer, "Second Thoughts on Secondary Sanctions" (2009) 30 *U. Pa. J. Int'l L.* 905, 923-4.

[1003] Richard N. Haass, "Conclusion: Lessons and Recommendations" in Richard N. Haass (ed), *Economic Sanctions and American Diplomacy* (New York: Council of Foreign Relations, 1998) 197, 202.

protection by the host state and the TNC in these particular situations only, seems rather disproportionate. In addition, Poeschke when examining smart sanctions and their effectiveness simply observes that there is no prove that smart sanctions are generally more effective that other ones.[1004] However, he does not suggest that they are less effective either. In addition, Schneuwly suggests that threatening with negative sanctions in order to achieve an improvement in labour rights protection can be promising when the overall circumstances are supportive.[1005] Due to these considerations it is submitted that although smart sanctions may not be the best answer to all kinds of human rights violations and to achieve any sanction aim, they are at least the best *negative* sanctions available in the TNC-human rights context.

D *Secondary sanctions*

Another kind of "sanctions" already mentioned above when sketching the examples are secondary sanctions. These are of particular interest for this enquiry, because they are the only ones so far not only targeting states, but also directly targeting corporations. The idea of secondary sanctions is to withhold other actors from counteracting a state's primary sanctions. As UN sanctions can hardly be used in the human rights-TNC context, unilateral sanctions remain as a tool as seen above. That is why the question arises what possibilities exist for the home state to force third states or other actors to sanction the target state as well in order to make its own sanction more effective. An additional reason for secondary sanctions in the case of economic sanctions is those third states may "fill in" where the home state does not trade with the host state any longer and may thereby even economically benefit from the home state's sanctions.[1006] Secondary sanctions were not included in the definition developed above,

---

[1004] Olaf Poeschke, *Politische Steuerung durch Sanktionen?* (Wiesbaden: Deutscher Universitätsverlag, 2003) 104.

[1005] Philippe Schneuwly, "Sind Handelssanktionen ein geeignetes Mittel zur Durchsetzung von Arbeitsnormen?" (2003) *Aussenwirtschaft* 121, 138, yet he also observes that the protection of human rights other than collective labour rights is harder to achieve, because the costs for the target state for such an enforcement are higher and can even be too high.

[1006] On the advantages of Japanese and European corporations because of the high pressure on U.S. corporations during the sanctions against South Africa described above see UN, *Sanctions Against South Africa: The Peaceful Alternative to Violent Change* (New York: United Nations, 1998) 14.

however, because they are different to primary sanctions in several respects. Firstly they are not directly targeted against the actor violating public international law, in this case human rights, but against actors weakening the effect of the primary sanction for example by trading with the boycotted host state. They only indirectly pressure the primary target state by depriving it from the advantages it enjoys by dealing, e.g. trading, with the secondary target. Secondly, the use of secondary sanctions often focuses on private actors, mainly corporations, rather than states, which is understandable as they are often easier to target for example by travel restrictions or asset freezes than a whole state. That makes secondary sanctions a means to make a *state* change its behaviour as long as it is targeted at a third actor that is a state. Yet it makes it a means to change the behaviour of a *foreign private actor* in the cases it is targeted at a private actor. Applied in the former way, however, it is no means to change the behaviour of the very state violating human rights. Applied in the latter way secondary sanctions often are a means of domestic law rather then of foreign policy as could be seen above at the *Helms Burton* and *D'Amato* examples of travel restrictions concerning the US, denying ships to enter US harbours, etc. Due to the differences to primary sanctions just sketched, secondary sanctions are no "sanctions" in the traditional meaning of the term and the meaning used in this enquiry. While they are targeted at third parties including corporations and are therefore of particular interest for this research, they are on the other hand facing additional obstacles for the same reason. As was already sketched above when outlining the *D'Amato Act* and the *Helms Burton Act*, the main criticism by third nations was that the secondary sanctions were violating public international law due to their extraterritorial character.[1007] Blocking statutes were passed and the effectiveness of the secondary sanctions was weakened.

[1007] See for example Joaquín Roy, "The Helms-Burton Law: Development, Consequences and Legacy for Inter-American and European- US Relations" (1997) 39 *J. Interam. Stud. & World Aff.* 77, 78 and 92; on secondary sanctions see for example Almut Hinz, *Sanktionen gegen Libyen* (Frankfurt a. M.: Peter Lang, 2005) 185-6 wfr; Kinka Gerke, "Die unilaterale Versuchung: Die Sanktionen der USA gegen die Handelspartner Kubas, Irans und Libyens und ihre Auswirkung auf das Welthandelsregime" (1997) 2 *HSFK-Report* 1, 50-7; for opponents of the US point of view that extraterritorial application (concerning reexports and exporters controlled by US persons) is allowed under public international law unless there is a specific prohibition see Almut Hinz *Sanktionen gegen Libyen* (Frankfurt a M: Peter Lang, 2005) 186 wfr.

Meyer[1008] examined this argument and came to the conclusion that it is not the extraterritorial *effects* that violate public international law, but that the US went too far when providing for enforcement mechanisms against third state nationals, *i.e.* corporations in the *Helms Burton Act*. He suggests that "terrinational" secondary sanctions are more likely to be in accordance with public international law.[1009] That means a state may prohibit its own nationals within its own territory to trade with the targeted state and with states or corporations that trade with the target state, but the sanctioning state may not directly prohibit actors of foreign nationality or within foreign territory or both, to trade with the target state. By stopping own companies within the sanctioning state's own territory from trading with foreign companies the latter are of course affected, but this is, according to Meyer, not by itself violating public international law, because any bilateral treaty and any primary sanction may have negative effects on third parties.[1010] By not (directly) applying the domestic law of the sanctioning state on corporations of third states, the problem of different domestic laws applying to the same corporation is excluded as well, as already mentioned earlier in this research. These considerations concerning jurisdiction do not, however, answer the question whether secondary sanctions - or their effects - might be violating obligations or other public international law.[1011] Yet while primary sanctions consisting of measures violating public international law can be justified when applied as countermeasures, *i.e.* targeted at the state violating public international law itself,[1012] secondary sanctions are

---

[1008] Jeffrey Meyer, "Second Thoughts on Secondary Sanctions" (2009) 30 *U. Pa. J. Int'l L.* 905-967

[1009] For an example that terrinational measures may still harm public international law see Meyer's example of US nationals burning chemical waste in the US along the Canadian border, *ibid.* at 951-2.

[1010] *Ibid.* at 909, 935-6, 955-6 and 965-7; he concludes that the *Helms Burton Act* was not terrinational only and therefore violating public international law, but that the *D'Amato Act* was terrinational and therefore in accordance with public international law as far as jurisdiction was concerned.

[1011] For an overview of WTO law as part of public international law see Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge: Cambridge University Press, 2003) especially 25-35; for an example of violating treaty obligations by the effects of a terrinational rule see example of US nationals burning chemical waste in the US along the Canadian border in Jeffrey Meyer, "Second Thoughts on Secondary Sanctions" (2009) 30 *U. Pa. J. Int'l L.* 905, 951-2.

[1012] Art. 22 and 49 *ILC Draft Articles* "*Responsibility of States for Internationally Wrongful Acts"* (2001) UN This will be set out below in more detail.

not targeted at the violator of public international law itself but at third actors and therefore there is no such justification or exemption in public international law. That means to be lawful secondary sanction measures have to be in accordance with public international law *per se*. That rules applied extraterritorially face certain challenges has already been discussed earlier in this research. Concerning secondary trade sanctions it is suggested that they violate international trade rules of WTO/*GATT* by many authors[1013] and states,[1014] including the US when the Arab League boycotts against Israel were concerned.[1015] As in the TNC context the aims are not primarily security driven,

---

[1013] As far as Arab league boycotts and *Helms Burton* and *D'Amato* secondary measures are concerned, the question arises whether security exceptions or foreign policy exceptions exist in public international law that would preclude examining these measures concerning their WTO/*GATT* consistency, see for example Eugene Kontorovich, "Reconciling Political Sanctions with Globalization and Free Trade: The Arab League Boycott and WTO Accession: Can Foreign Policy Excuse Discriminatory Sanctions?" (2003) 4 *Chi. J. Int'l L.* 283 wfr who convincingly argues that such exceptions do not exist. More relevant for the TNC context that is not primarily concerned with security matters or general foreign policy concerns are secondary boycotts due to production methods, see for example Kinka Gerke "Unilateral Strains in Transatlantic Relations: US Sanctions against Those Who Trade with Cuba, Iran and Lybia, and their Effects on the World Trade Regime" (1997) 47 *PRIF Report* (Summary) <http://hsfk.de/Publications.9.0.html?&no_cache=1&L=1&detail=193&no_cache=0&cHash=15c3b213e5> 1 May 2014, 2 referring to the *GATT* Panel Reports *United States - Restrictions on Imports of Tuna (DS21/R - 39S/155) ("Tuna-Dolphin I")* GATT Panel Report, not adopted, 3 September 1991 and *United States - Restrictions on Imports of Tuna (DS29/R) ("Tuna-Dolphin II")* GATT Panel Report, not adopted, 16 June 1994, which will be discussed in more detail in the following chapter of this enquiry.

[1014] WTO/*GATT* members were of the opinion that the Arab League boycott harmed WTO/*GATT* rules and Saudi Arabia even agreed to suspend the secondary measures to ease its accession to WTO/*GATT*, see Eugene Kontorovich, "Reconciling Political Sanctions with Globalization and Free Trade: The Arab League Boycott and WTO Accession: Can Foreign Policy Excuse Discriminatory Sanctions?" (2003) 4 *Chi. J. Int'l L.* 283, 295 and Martin A. Weiss, "Arab League Boycott of Israel" (2006) *CRS Report for Congress* (19 April 2006) Order Code RS22424, available at <http://fas.org/sgp/crs/mideast/RS22424.pdf> 1 May 2014, 4; however, the United Arab Republic joined *GATT* while boycotting Israel, including secondary and tertiary sanctions, see Eugene Kontorovich, "Reconciling Political Sanctions with Globalization and Free Trade: The Arab League Boycott and WTO Accession: Can Foreign Policy Excuse Discriminatory Sanctions?" (2003) 4 *Chi. J. Int'l L.* 283, 296 and Bashar H. Malkawi, "Anatomy of the Case of Arab Countries and the WTO" (2006) *ALQ* 110, 124; see also WTO, Legal Affairs Division, *WTO Analytical Index: Guide to WTO Law And Practice* (3rd ed, Cambridge: Cambridge University Press, 2012), available at <http://www.wto.org/english/res_e/booksp_e/analytic_index_e/analytic_index_e.htm> 1 May 2014, 602-03 where it is stated that several members of the working party considered the Arab measures political and not commercial.

[1015] Patrick Clawson, "Iran" in Richard N. Haass (ed), *Economic Sanctions and American Diplomacy* (New York: Council of Foreign Relations, 1998) 85, 96 wfr, see also Martin A.

two, although not adopted,[1016] *GATT* Panels Gerke points out are of special interest.[1017] These *GATT Tuna Panels*[1018] have answered the *GATT*-accordance of secondary embargos in the negative in the case where the US banned imports from third states that did not impose the primary embargos the US had imposed.[1019] In the *Tuna Panel* cases the US wanted to ban the import of yellowfin tuna that was not caught in a dolphin protecting way as provided for in the US law for the protection of Marine Mammals.[1020] Yet the US did not only ban the imports of the states not harvesting yellowfin tuna in accordance with the US dolphin protection, but also the import of yellowfin tuna products from third states which refrained from banning the import of yellowfin tuna from the primarily sanctioned states. The secondary boycott or "intermediary embargo" was supposed to support the direct embargo so that the latter could not be nullified by importing indirectly *via* third countries.[1021] Making primary sanctions more efficient by targeting third states, not directly able to change the objectionable behaviour, because it is committed by the primary target, is the very aim of secondary sanctions as already set out above. Third states are pressured to act in accordance with the primary sanction to increase the pressure on the primary target and thereby enhance the chances of a behavioural change by the primary target. This was also seen to be the aim of the intermediary embargoes in the *Tuna* Panels.[1022] Due to all these considerations it can be

---

Weiss, "Arab League Boycott of Israel" *Congressional Research Service* (19 December 2011) available at <http://www.fas.org/sgp/crs/mideast/RL33961.pdf> 1 May 2014.

[1016] See *Summaries of Tuna-Dolphin I and II* at <http://www.wto.org/english/tratop_E/envir_e/edis04_e.htm> and <http://www.wto.org/english/tratop_E/envir_e/edis05_e.htm>.

[1017] Kinka Gerke "Unilateral Strains in Transatlantic Relations: US Sanctions against Those Who Trade with Cuba, Iran and Lybia, and their Effects on the World Trade Regime" (1997) 47 *PRIF Report* (Summary) <http://hsfk.de/Publications.9.0.html?&no_cache=1&L=1&detail=193&no_cache=0&cHash=15c3b213e5> 1 May 2014, 2.

[1018] *United States - Restrictions on Imports of Tuna (DS21/R - 39S/155) ("Tuna-Dolphin I")* GATT Panel Report, not adopted, 3 September 1991; *United States - Restrictions on Imports of Tuna (DS29/R) ("Tuna-Dolphin II")* GATT Panel Report, not adopted, 16 June 1994.

[1019] *Ibid.* (both) where the US banned fishery product imports from third states that did not ban imports from primary sanctioned states themselves and the imports from intermediary states.

[1020] *Marine Mammal Protection Act 1972* (US).

[1021] *Tuna Dolphin I* par. 5.40.

[1022] See for example "The intermediary nation embargo could achieve its intended effect only if it were followed by changes in policies or practices, not in the country exporting tuna to the

concluded that secondary trade sanctions are usually violating WTO/*GATT*.[1023] Furthermore, the rather loose link between the violation of public international law, *i.e.* the violation of human rights by the host state, that triggered the primary sanction and the target of the secondary sanction, *i.e.* foreign corporations trading with the host state, makes the measure disproportionate in most cases.[1024] This is because the suitability of the secondary measure, *i.e.* for example pressuring business partners of the host state, to achieve the primary sanction's aim, *i.e.* the change in the host state's behaviour, is very doubtful due to its indirectness. The latter derives from the fact that the secondary sanction is used to make the third actor support the primary sanction which in turn is supposed to make the host state change its behaviour. Only in cases where there is a link between the third actor's action and the host state's behaviour that triggered the primary sanction, the secondary measures are less indirect and less disproportionate. Those are for example cases where the third actor targeted by the secondary sanction is contributing to the human rights violation of the host state in some way. This is the case in the situation assessed in this research of home state TNCs violating human rights abroad. However, proportionality is particularly fragile in the singled-out human rights issues in the TNC context where not a whole regime is to be changed, but only some particular government behaviour.

Yet as there has to be a certain link between the violation by the primary target and the third actor, *i.e.* the secondary target, for proportionality reasons and at

---

United States [*i.e.* the third state targeted by the secondary embargo], but in third countries from which the exporting country imported tuna [*i.e.* the primary targeted state harvesting the tuna]." *Tuna-Dolphin II* par. 5.23, similar at par. 5. 36.

[1023] Whether sanctions of public international law using trade restrictions can be applied at all alongside WTO/*GATT* is discussed and a question of self- contained regime or *lex specialis*, for an overview and further references for example Daniel Bodansky and John R. Crook, "Symposium: The ILC's State Responsibility Articles" (2002) 96 *AJIL* 773, 780; Steve Charnovitz, "The World Trade Organization" in Peter Wallensteen and Carina Staibano (eds), *International Sanctions* (London, New York: Frank Cass, 2005)159; Math Noortmann, *Enforcing International Law* (Aldershot, Burlington: Ashgate, 2005) 131-170; Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2005) 251-305, on the terminology used particularly 254.

[1024] Gerke points out that in *Helms Burton* and *D'Amato* the link between the behaviour that triggered the primary sanction and third parties trading with the primarily targeted state is too lose, causing disproportionality, see Kinka Gerke, "Die unilaterale Versuchung: Die Sanktionen der USA gegen die Handelspartner Kubas, Irans und Libyens und ihre Auswirkung auf das Welthandelsregime" (1997) 2 *HSFK-Report* 148.

the same time the secondary target is not or cannot be included into the primary sanction measures, only a small scope of application is left for proportionate secondary sanctions. This scope is further confined by the requirements of terrinationality and *per se* accordance with public international law. All this leaves only a rather narrow scope for secondary sanctions in the TNC context. The home state may only prohibit its own corporations within its own territory to deal and trade with those actors, *i.e.* states and corporations, supporting or supplying the TNC subsidiary in the host state if this support and supply can be considered as contributing to the human rights violation committed by the TNC. As far as host states are concerned a contribution to human rights violations could for example be given due to neglect or omission. Furthermore, the primary sanction has to be in accordance with public international law as well.

E *Evaluating the different kinds of sanctions*

As could be seen various means considered as "sanctions" can be chosen in the TNC and human rights context. Unilateral measures are the ones home states may use. The unilateral measures may be positive and negative sanctions, yet both should be imposed as targeted or smart sanctions to be effective and to avoid undue hardship for the population. Furthermore negative sanctions, whether *per se* lawful or not, should preferably be combined with positive sanctions, particularly to enable the host state to take steps for the promotion and protection of human rights connected to the TNC without causing a withdrawal of resources elsewhere in the host state. Even secondary sanctions, which are measures not covered by the term "sanction" used in this enquiry, can be used when they are *per se* lawful and proportionate and where a primary sanction that is in accordance with public international law exists. However, the conditions concerning addressee and situation that allow imposing sanctions have to be met. Therefore the host states and TNCs as addressees of sanctions and the requirements to impose sanctions are assessed in the following.

IV HOST STATES - TRADITIONAL ADDRESSEES OF SANCTIONS

As could already be seen from the examples provided above, the sanctions imposed, whatever kind the might be, may *affect* corporations, but are primarily

aimed at states. In addition, those "sanctions" targeting TNCs so far, *i.e.* secondary sanctions, can only be imposed when primary ones are used as well. As already outlined above when giving the definition of "sanction" used in this enquiry, it became clear that sanctions are means to influence a state's behaviour. In the TNC context this of course means a rather indirect approach towards controlling the human rights records of TNCs acting abroad, because the host state is the one to be pressured to in turn increase its control over the human rights record of the TNC subsidiary. This somewhat remains of the naïve theory, according to which the population was pressured to change the government, which turned out to be a rather unreliable approach as already described above. Pressuring the host state to pressure the TNC subsidiary may work better as it is the host state's duty to control the behaviour of the subsidiary and to protect human rights from the violation of private actors. It is similar to the approaches of suing the host state or host state officials sketched earlier.[1025] The requirements for the imposition of sanctions on the host state will therefore be assessed in the following.

A *Requirements for unilateral primary sanctions*

Unilateral sanctions can be implied as positive or negative sanctions and negative sanctions may contain means *per se* lawful under public international law and means that have to be justified to be lawful.[1026] Depending on these different ways of imposing sanctions, different requirements have to be met by the sanction in order to be in accordance with public international law and not for example constituting an intervention violating the host state's sovereignty in an unjustified way.[1027] However, *ius cogens* and core human rights must not be affected by any of the sanctions and *lex specialis* is overriding the general rules set out here.[1028]

[1025] See Chapters II and III above.

[1026] See *ILC Draft Articles* "*Responsibility of States for Internationally Wrongful Acts"* (2001) UN A/RES/56/83 Annex.

[1027] The topics of sovereignty and intervention will not be discussed again in this chapter as the remarks made in chapter III apply accordingly where issues remain in spite of the requirements sketched in the following.

[1028] See art. 50 *ILC Draft Articles* "*Responsibility of States for Internationally Wrongful Acts"* (2001) UN A/RES/56/83 and for a reference to the *lex specialis* rule and some remarks on the

1 *Positive sanctions*

Positive sanctions are lawful acts and not like negative primary sanctions or countermeasures wrongful acts that have to be justified or where the wrongfulness has to be precluded in order to make them lawful under public international law.[1029] Therefore, they do not have to meet the same conditions as negative primary sanctions. In fact, they can be imposed any time.[1030] Yet of course, they too have to meet the standards of international conventions[1031] and proportionality.[1032] Furthermore, when cutting them off, for example because human rights conditions in the host state are not as high as agreed upon and the

---

ECHR and WTO/*GATT* in this respect see *Yearbook of the International Law Commission 2001* (Vol II, Part 2, New York, Geneva: UN, 2007) A/CN.4/SER.A/2001/Add.1(Part 2) Commentary on art. 55, particularly par. 3, p. 140; on *lex specialis* or "self-contained regimes" and other public international law see for an overview and further references for example Daniel Bodansky and John R. Crook, "Symposium: The ILC's State Responsibility Articles" (2002) 96 *AJIL* 773, 780; Steve Charnovitz, "The World Trade Organization" in Peter Wallensteen and Carina Staibano (eds), *International Sanctions* (London, New York: Frank Cass, 2005) 159; Math Noortmann, *Enforcing International Law* (Aldershot, Burlington: Ashgate, 2005) 131-170; Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2005) 251-305, on the terminology used particularly 254.

[1029] Countermeasures are wrongful acts, but the wrongfulness is precluded when they are legitimate responses to an international wrongful act, see for example James Crawford, "The Relationship between Sanctions and Countermeasures" in Vera Gowland-Debbas (ed), *United Nations Sanctions and International Law* (The Hague: Kluwer, 2001) 57, 59; positive sanctions however are no wrongful acts that need preclusion of wrongfulness to be justified or in accordance with public international law, see for example Karl Zemanek, "The Unilateral Enforcement of International Obligations" (1987) *ZaöRV* 32, 35 explaining that retorsions are no countermeasures either, because there is no legal duty of friendliness that could be violated by using them.

[1030] Problems may arise when not granting positive sanctions any longer as this may equal negative sanctions, especially when they were granted over a long period of time, for example as development aids, but in the TNC context of interest to this enquiry this is rather unlikely, see for example Karl Doehring, "Die Selbstdurchsetzung völkerrechtlicher Verpflichtungen" (1987) *ZaöRV* 44; Olaf Poeschke, *Politische Steuerung durch Sanktionen?* (Wiesbaden: Deutscher Universitätsverlag, 2003) 23.

[1031] Peter Wallensteen, "Positive Sanctions" in Peter Wallensteen and Carina Staibano (eds), *International Sanctions* (London, New York: Frank Cass, 2005) 229, 234 providing the example of paying a foreign leader to leave his country to achieve the changes desired by the sanctioning state, but at the same time putting the leader from the reach of national law of his or her state by this positive sanction.

[1032] Proportionality is a principle deeply rooted in public international law, see Klaus Bockslaff, *Das völkerrechtliche Interventionsverbot als Schranke außenpolitisch motivierter Handelsbeschränkungen* (Berlin: Duncker & Humblot, 1987) 141.

host state is not making sufficient effort to achieve the standards possible in the individual context, this cut off may cause severe consequences and therefore equal negative sanctions.[1033]

2 *Negative sanctions by using lawful measures*

The distinction between measures that have to be justified and those that are *per se* lawful may be difficult and depend on the particular context.[1034] Yet measures that can be considered *per se* lawful like calling home ambassadors for "consultation" or visa restrictions[1035] are similar to positive sanctions, because they do not violate public international law. Therefore they can be applied any time. However, as positive sanctions, they have to meet the basic standards of public international law, e.g. proportionality.[1036] Schachter for example suggests that reasonableness and good faith should be adhered to exclude inappropriate reactions to minor offences.[1037] Regard should also be given to host state particularities and resources to avoid demands and the application of high "western" standards the host state simply *cannot* fulfil. The basic ideas on proportionality are the same as for those measures that have to be justified and will be outlined below. They should be applied on lawful measures accordingly.

3 *Negative sanctions by using means that have to be justified*

As described above, negative primary sanctions are only one type of sanctions according to the broad meaning of the term used here, but they are an important and a rather delicate one. Furthermore, they are often the primary sanctions secondary sanctions are meant to support. As just mentioned, negative sanctions have to meet some requirements. These general requirements will be set out in

---

[1033] Olaf Poeschke, *Politische Steuerung durch Sanktionen?* (Wiesbaden: Deutscher Universitätsverlag, 2003) 23.
[1034] See Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2005) 208.
[1035] These and more examples in Math Noortmann, *Enforcing International Law* (Aldershot, Burlington: Ashgate, 2005) 19.
[1036] Thomas M. Franck, "On Proportionality of Countermeasures in International Law" (2008) 102 *AJIL* 715, 716; Math Noortmann, *Enforcing International Law* (Aldershot, Burlington: Ashgate, 2005) 43 wfr.
[1037] Oscar Schachter, *International Law in Theory and Practice* (Dordrecht, Boston, London: Nijhoff Publishers, 1991) 199.

the following. Yet they can still be replaced by *leges speciales*.[1038] As far as negative sanction measures that are not always lawful are concerned, the main conditions to be met are that the sanctioning state does usually not only have to be "affected", but "injured" and the sanction has to be proportional.

(a) "Injured state" requirement

Firstly the sanctioning state has to be harmed by the conduct of the target state to prevent sanctions from being triggered by imperialist or protectionist motives only.[1039] Concerning human rights obligations the "injury" is a rather difficult issue, because due to the lack of reciprocity the obligations are not owed to another state in the same way bilateral treaty obligations are owed and violating them does therefore usually not mean that another *state* is legally injured or suffering any harm.[1040]

[1038] Art. 55 *ILC Draft Articles* "*Responsibility of States for Internationally Wrongful Acts"* (2001) UN A/RES/56/83 Annex; whether the WTO is a self-contained regime system of *lex specialis* for any kind of trade restrictions is disputed, but as negative *smart* sanctions that have to be justified do not usually include trade restrictions, but rather freezing assets, barring the target from international organizations etc, the topic is not examined here, but below when assessing WTO law in more detail; see on smart sanctions and their little potential to impact WTO rules James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 72; for general information on possible *lex specialis* or "self-contained regimes" like EC, ECHR and WTO/*GATT* and other public international law see for an overview and further references for example Daniel Bodansky and John R. Crook, "Symposium: The ILC's State Responsibility Articles" (2002) 96 *AJIL* 773, 780; Steve Charnovitz, "The World Trade Organization" in Peter Wallensteen and Carina Staibano (eds), *International Sanctions* (London, New York: Frank Cass, 2005) (London, New York: Frank Cass, 2005) 159; Math Noortmann, *Enforcing International Law* (Aldershot, Burlington: Ashgate, 2005) 131-170; Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2005) 251-305, on the terminology used particularly 254.

[1039] Klaus Bockslaff, *Das völkerrechtliche Interventionsverbot als Schranke außenpolitisch motivierter Handelsbeschränkungen* (Berlin: Duncker & Humblot, 1987) 145.

[1040] Another particularity of human rights treaties due to the lack of reciprocity is that the treaties cannot be suspended or ended because of a human rights violation by another party as this would contradict the very *raison d'être* of these treaties, namely the promotion and protection of human rights, see Karl Zemanek, "New Trends in the Enforcement of erga omnes Obligations" (2000) 4 *Max Planck UNYB* 1, 9; see also *Advisory opinion on Reservations on the Convention on the Prevention and Punishment of the Crime of Genocide,* ICJ Reports 1951,15, 23; Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2005) 57, 61; Zemanek also suggests that art. 60 para. 5 *VCLT* is also applicable for human rights conventions, not only the Geneva Conventions, and is to be used for measures of self-protection as well as for

Yet another state might be entitled to impose countermeasures when *erga omnes* obligations are violated by the target state. Whether in those cases an injury of all states of the international community is assumed[1041] or *erga omnes* obligations violations are considered an exception[1042] from the rule that only the injured state(s) is/are entitled to impose countermeasures has no effect on the result. In either case the home state might be entitled to impose countermeasures or reprisals on the host state. Reasons and arguments in support of this approach are numerous and not undisputed. One of the main opposing arguments is the subjectivity of countermeasures and in cases of state responses to *erga omnes* obligation violations the sanctioning state decides on the violation unilaterally without an organization or collective opinion making. Due to the unilateral decision on countermeasures when answering *erga omnes* obligation violations it is claimed that the particularly collective character of the *erga omnes* obligations is not taken into account, but rather degraded to bilateral or

---

enforcement measures Karl Zemanek, "The Unilateral Enforcement of International Obligations" (1987) *ZaöRV* 32, 39; however, his opinion about art. 60 para. 5 *VCLT* is not undisputed, see Mohammed M. Gomaa, *Suspension or Termination of Treaties on Grounds of Breach* (The Hague: Martinus Nijhoff, 1996) 112; see on the special issue of human rights violations, external pressure and sovereignty issues also Martin Nettesheim „Die ökologische Intervention" (1996) 34 *Archiv des Völkerrechts* 167, 193 referring to *Economic and Council Resolution ("ECOSOC") 1235* (1967) and *1503* (1970), which limit the competence of the United Nations Human Rights Committee, only allowing it to hear human rights complaints where a pattern of gross and documented human rights violations exists.

[1041] Zemanek for example considers a violation of *erga omnes* obligations a violation of the common purpose of the according treaties and additional protocols, *i.e.* a violation of the common purpose and therefore of all contracting parties, see Karl Zemanek, "New Trends in the Enforcement of erga omnes Obligations" (2000) 4 *Max Planck UNYB* 1, 5-6.

[1042] The *ILC Draft Articles* "*Responsibility of States for Internationally Wrongful Acts"* (2001) UN A/RES/56/83 Annex treat this case as an exception, see art. 48: "Any State other than the injured State is entitled…" and *Yearbook of the International Law Commission 2001* (Vol II, Part 2, New York, Geneva: UN, 2007) A/CN.4/SER.A/2001/Add.1(Part2) Commentary on Part Three, Chapter I par. 2 p. 116: "Indeed, in certain situations, all States may have such an interest [in invoking responsibility and ensuring compliance with the obligation in question], even though none of them is individually or specially affected by the breach" referring to *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgement (Belgium v Spain)*, ICJ Reports 1970, par. 32-3 which paraphrased *erga omnes* oblogations as "obligations towards the international community as a whole"; In *Yearbook of the International Law Commission 2001* (Vol II, Part 2, New York, Geneva: UN, 2007) A/CN.4/SER.A/2001/Add.1(Part2) Commentary par. 12 on art. 48, p. 127 is further statet that "[i]n case of breaches of obligations under article 48, it may well be that there is no State which is individually injured by the breach, yet it is highly desirable that some State or States be in a position to claim reparation, in particular restitution.".

bilaterisable multilateral obligations.[1043] Yet as Tams observes: "…the real question in not whether international law *should* incorporate a requirement of collective conduct, but whether practice suggests that it actually *does*." Yet neither when examining countermeasures taken to answer *erga omnes* obligation violations by uninjured states nor when considering the famous *Barcelona Traction* Judgement[1044] could such a requirement be found.[1045] The *Barcelona Traction* case was the case that for the first time dealt with *erga omnes* obligations, although in an *obiter dictum* only.[1046] It was about a Canadian corporation, doing business in Spain, owned mainly by shareholders from Belgium. As the corporation was declared bankrupt in Spain, Belgium sought reparation from Spain, because Spain had caused the bankruptcy by violating international law. Yet the Court held that Belgium was not entitled to do so, because the corporation was of Canadian nationality, and causing the bankruptcy was an act committed against the rights of the corporation rather than the shareholders. According to the court, diplomatic protection of the Canadian corporation was only possible by Canada, because it was only Canada's right to protect the Canadian corporation. The Court declared that there were obligations towards the international community as a whole, but diplomatic protection was not one of them.[1047] Yet the decision of the Court did not go any further and did not concern sanctions. There are many pragmatic and "political" arguments supporting the idea that states may impose countermeasures in cases of *erga omnes* obligation violations. It is for example claimed that in cases of the most sever wrongs, *i.e.* when violating *erga omnes* obligations, there would be no state authorized to impose countermeasures

[1043] See Daniel Bodansky and John R. Crook, "Symposium: The ILC's State Responsibility Articles" (2002) 96 *AJIL* 773, 786; James Crawford, "The Relationship between Sanctions and Countermeasures", in Vera Gowlland-Debbas (ed), *United Nations Sanctions and International Law* (The Hague: Kluwer, 2001) 57, 60 and 64.
[1044] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgement (Belgium v Spain)*, ICJ Reports 1970.
[1045] Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2005) 240 and 173-6.
[1046] See Maurizio Ragazzi, *The Concept of International Obligations* Erga Omnes (New York: Oxford University Press, 2000) Chapter 1.
[1047] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgement (Belgium v Spain)*, ICJ Reports 1970 par. 33-4

whereas when bilateral or "bilateralisable"[1048] obligations beneath *erga omnes* character are violated, countermeasures may be imposed, which is considered inappropriate.[1049] Furthermore, supportive arguments are based on the *ILC Draft Articles*,[1050] which in art. 48 provide for the possibility of uninjured states to invoke responsibility of another state when *erga omnes* obligations are violated. Yet as can be seen directly from art. 48 par. 2, invoking responsibility in the *ILC Draft Articles* does not mean being entitled to impose countermeasures, but to claim cessation, non-repetition and "performance of the obligation of reparation… in the interest … of the beneficiaries of the obligation in breach", which in case of human rights violations would be the individuals violated.[1051] However, whether countermeasures[1052] may be imposed by uninjured states is not answered by the *ILC Draft Articles.*[1053] This can be seen in art. 54, which reads:

> This chapter does not prejudice the right of any State, entitled under article , paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.[1054]

The commentary does not provide an answer either. Instead, the issue os deliberately left open to further development in public international law.[1055] According to Tams the current status of this development in public international law can be assumed to be in favour of individual states imposing countermeasures in cases of gross and systematic *erga omnes* obligation

---

[1048] Examples of bilateralisable obligations deriving from multinational treaties exist in diplomatic and consular law, extradition etc, see Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2005) 45 wfr.
[1049] See Denis Alland, "Countermeasures of General Interest" (2002) 13 *EJIL* 1221, 1239.
[1050] *ILC Draft Articles* "*Responsibility of States for Internationally Wrongful Acts"* (2001) UN A/RES/56/83 Annex.
[1051] See *Yearbook of the International Law Commission 2001* (Vol II, Part 2, New York, Geneva: UN, 2007) A/CN.4/SER.A/2001/Add.1(Part2) Commentary par. 3 on art. 33. p. 95 concerning the ultimate beneficiaries and referred to in Commentary par.12 on art. 48, p. 128 fn 734.
[1052] In the *ILC Draft Articles* the term "countermeasure" is used as a synonym for "reprisal".
[1053] *ILC Draft Articles* "*Responsibility of States for Internationally Wrongful Acts"* (2001) UN A/RES/56/83.
[1054] Art. 54 ILC Draft Articles *Responsibility of States for Internationally Wrongful Acts* (2001) UN A/RES/56/83 Annex.
[1055] *Yearbook of the International Law Commission 2001* (Vol II, Part 2, New York, Geneva: UN, 2007) A/CN.4/SER.A/2001/Add.1(Part2) Commentary par.6 and 7 on art. 54.

violations abroad, including human rights violations.[1056] Tams reaches this conclusion after an in-depth analysis of international practice[1057] and the fact that the commentary on art. 54 *ILC Articles* in par. 3 and 4 is based on the same cases.[1058] Yet the ILC also points out the uncertainty concerning the current situation.[1059] This is where Tams does not agree for " the case of systematic or large-scale breaches of international law"[1060] and in contrast argues that in those cases "there seems to exist a settled practice of countermeasures by States not individually injured."[1061] When examining the counter-arguments he convincingly points out that there has been an increasing number of states adopting countermeasures although they were not individually injured since the *Barcelona Traction* Judgement. In addition, the violations triggering these countermeasures were *erga omnes* or in some cases "obligations that count among the candidates most likely to have acquired *erga omnes* status."[1062] These obligations also include other human rights than for example the prohibition of racial discrimination, torture and genocide, which are already included in the recognized *erga omnes* obligations.[1063] He convincingly argues that this practice is neither too selective nor too "western" to reflect the overall development in

[1056] Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2005) 230, 249-251.
[1057] *Ibid.* at 207-251.
[1058] Examples from international practice examined *ibid.* 210-230.
[1059] *Yearbook of the International Law Commission 2001* (Vol II, Part 2, New York, Geneva: UN, 2007) A/CN.4/SER.A/2001/Add.1(Part2) Commentary par.3, 4 and 6 on art. 54, p. 137-9.
[1060] Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2005) 231.
[1061] *Ibid.*
[1062] *Ibid.* at 233.
[1063] *Ibid.*; also, although reluctantly, stating that human rights could become part of the *erga omnes* obligations is Jochen Abr. Frowein, "Die Verpflichtungen erga omnes im Völkerrecht und ihre Durchsetzung" in Rudolf Bernhardt (ed) *Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit, Menschenrechte: Festschrift für Hermann Mosler* (Berlin, Heidelberg: Springer, 1983) 241, 245-6; see also Robert J. Currie and Hugh M. Kindred, „Flux and Fragmentation in the International Law of State Jurisdiction: The Synecdochal Example of Canada's Domestic Court Conflicts over Accountability for Interntational Human Rights Violations" in Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of International and National Courts and the (De-) Fragmentation of International Law* (Oxford, Portland, Oregon: Hart Publishing, 2012) 217, 232, arguing that at least the freedom from torture, "if not the whole body of human legal protection" are obligations *erga omnes*.

public international law.[1064] Tams also stresses that an accompanying *opinio juris* exists and cannot be excluded only because the acting states may also be influenced by political considerations, when explicitly acting to defend international law and responding to a breach of international law.[1065] It can therefore be concluded for this research that in cases of large-scale or systematic breaches of *erga omnes* obligations uninjured states are entitled to impose countermeasures.[1066] Yet of course the further requirements for countermeasures have to be met.

(b) Proportionality

The second requirement a primary negative sanction, whether lawful or to be justified, has to meet to be in accordance with public international law is proportionality. The proportionality principle is deeply seated in public international law[1067] and is therefore also to be considered when implying sanctions[1068] to exclude their exaggerative and disproportionate use. Yet

---

[1064] Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2005) 234-7 and 249.
[1065] *Ibid.* at 239.
[1066] This is also in line with Tim Brune, *Der Fall Österreich* (Frankfurt am Main, Berlin, Bern, Bruxelles, New York, Oxford, Wien: Peter Lang) 169; see also Jost Delbrück, *Allocation of Law Enforcement Authority in the International System*, (Berlin: Duncker und Humblot,1995) 152-3; Wilfried Fiedler, Eckart Klein, Anton K. Schnyder, *Gegenmaßnahmen*, (Bericht der Deutschen Gesellschaft für Völkerrecht, vol.37, Heidelberg: Müller, 1998) 51 wfr; Knut Ipsen, *Völkerrecht* (5th ed, München: C. H. Beck, 2004) § 59, Rn. 46; Jochen Abr. Frowein, "Die Verpflichtungen erga omnes im Völkerrecht und ihre Durchsetzung" in Rudolf Bernhardt (ed) *Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit, Menschenrechte: Festschrift für Hermann Mosler* (Berlin, Heidelberg: Springer, 1983) 241, 246-250; Wilhelm Wengler, *Völkerrecht* (vol. 1, Berlin, Göttingen, Heidelberg: Springer, 1964) 580; Elisabeth Zoller, *Peacetime Unilateral Remedies* (Dobbes Terry, New York: Transnational Publishers Inc., 1984) 113-8;
See also Klaus Bockslaff, *Das völkerrechtliche Interventionsverbot als Schranke außenpolitisch motivierter Handelsbeschränkungen* (Berlin: Duncker & Humblot, 1987) 145-6, stating that the affectedness (he means "harm" in the sense used here) needed to impose sanctions is given when the aim of the sanction is to achieve compliance with *erga omnes* obligations.
[1067] Klaus Bockslaff, *Das völkerrechtliche Interventionsverbot als Schranke außenpolitisch motivierter Handelsbeschränkungen* (Berlin: Duncker & Humblot, 1987) 141.
[1068] See for example see Tim Brune, *Der Fall Österreich* (Frankfurt am Main, Berlin, Bern, Bruxelles, New York, Oxford, Wien: Peter Lang) 169, 175 and 177 wfr; Enzo Cannizzaro, "The Role of Proportionality in the Law of International Countermeasures" (2001) 12 *EJIL* 889, 910-1 suggesting that "weak" sanctions may be imposed on slight breaches of public

proportionality is a rather vague term, an indefinite legal concept needing more specific clarification to be applicable on a case-by-case basis. Concerning sanctions the proportionality principle can even be used twice.

(i) Violation-answer proportionality

Firstly, the relation between the violation of public international law by the target state and the measure taken to answer the violations by the sanctioning state has to be proportionate, which generally means the graver the violation the broader or more severe may be the response. Yet although using a quantitatively equivalent act for answering a wrongful act may be sufficient for retributive sanctions, such means may not be sufficient to achieve a change in the target state's behaviour. For the latter it may rather be necessary to impose measures quantitatively exceeding the violation by the target state, but qualitatively lower than the breach committed to induce the target state to change its behaviour.[1069] This is also in line with art. 51 *ILC Draft Articles*.[1070]

(ii) Means-ends proportionality

Therefore, secondly, the relation between the aim focused on by the sanctioning state and the measure taken in order to achieve this aim has to be proportionate, too. As just set out, the means has to be proportionate to the end the sanctioning state is trying to achieve. To be proportionate, end and means have to be appropriate.[1071] In human rights violation cases the aim is appropriate, as the promotion and protection of human rights is an aim in accordance with public

---

international law and grave sanctions as an answer to grave braches; Sascha Werthes, *Probleme und Perspektiven von Sanktionen als politisches Instrument der Vereinten Nationen* (Münster, Hamburg, London: LIT Verlag, 2003) 75, examples given in Annex II, pp. 182-6.

[1069] Enzo Cannizzaro, "The Role of Proportionality in the Law of International Countermeasures" (2001) 12 *EJIL* 889, 910.

[1070] According to this article countermeasures must be proportional, taking into account the injury suffered, but also the harmed right in question and the gravity of the wrongful act, which is "partly independent of the question whether the countermeasure was necessary to achieve the result of ensuring compliance.", *Yearbook of the International Law Commission 2001* (Vol II, Part 2, New York, Geneva: UN, 2007) A/CN.4/SER.A/2001/Add.1(Part2) Commentary par.10 on art. 51, p. 135, in par. 2 and 3 (p. 134) wfr and examples.

[1071] Enzo Cannizzaro, "The Role of Proportionality in the Law of International Countermeasures" (2001) 12 *EJIL* 889, 897-9.

international law. This is even more so in cases where an *erga omnes* obligation was violated and a particular singled-out situation is focused on to achieve a change in behaviour. As far as the appropriateness of the means is concerned, things seem slightly less obvious. The means has to be suitable to achieve the aim.[1072] Yet although there is an ongoing discussion about the effectiveness of unilateral sanctions,[1073] it cannot be concluded that unilateral sanctions are *per se* not suitable to achieve a change in behaviour. Hufbauer, Scott and Elliott have examined unilateral US sanctions and found that the success of unilateral sanctions is enhanced when, amongst other things, (1) the political goal is defined clearly and the sanctions are aimed at this goal, (2) the sanctioner has substantial economic leverage on the target state and the target state cannot substitute the denied good, which includes a fast implication of the sanction on the target state so it cannot adapt its economy to the new situation,[1074] (3) the target state and the sanctioning state had good relations in the past, (4) there are about to be domestic riots and civil commotions as well as domestic economic difficulties in the target state and (5) the sanction costs for US corporations is not as high as to strengthen the opponents of the sanctions within the US so that the political support for the sanction diminishes.[1075] Of course there are many more factors influencing the effectiveness of (unilateral) sanctions, some of them beyond the sanctioning state's reach like the reaction of third states[1076] or

---

[1072] *Ibid.* at 899.

[1073] See Kimberly Ann Elliott, "Trends in Economic Sanction Policy" in Peter Wallensteen and Carina Staibano (eds), *International Sanctions* (London, New York: Frank Cass, 2005) 3, 8 table 1. 2 suggesting that unilateral economic sanctions imposed by the US between 1970 and 1999 were less successful than multilateral ones; Olaf Poeschke, *Politische Steuerung durch Sanktionen?* (Wiesbaden: Deutscher Universitätsverlag, 2003) 58-9.

[1074] Gary Clyde Hufbauer, Jeffrey J. Schott, Kimberly Ann Elliott, *Economic Sanctions Reconsidered: History and Current Policy,* (vol. 1, Washington D. C.: Institute for International Economics, 1985) 81-106; Sascha Werthes, *Probleme und Perspektiven von Sanktionen als politisches Instrument der Vereinten Nationen* (Münster, Hamburg, London: LIT Verlag, 2003) 58.

[1075] Kinka Gerke, "Die unilaterale Versuchung: Die Sanktionen der USA gegen die Handelspartner Kubas, Irans und Libyens und ihre Auswirkung auf das Welthandelsregime" (1997) 2 *HSFK-Report* 1, 35-6; Gary Clyde Hufbauer, Jeffrey J. Schott, Kimberly Ann Elliott, *Economic Sanctions Reconsidered: History and Current Policy,* (vol. 1, Washington D. C.: Institute for International Economics, 1985) 81-106.

[1076] For motives of non-great powers to support or not support unilateral sanctions imposed by other states see Kim Richard Nossal, *Rain Dancing, Sanctions in Canadian & Australian Foreign Policy* (Toronto, Buffalo, London: University of Toronto Press, 1994) 15, 19, 21, 23; see also Paul Conlon, *Die rechtliche Problematik von UN-Sanktionen als Mittel zur*

the political system of the target state,[1077] but unilaterally imposed sanctions cannot be considered unsuitable *per se*.[1078] Furthermore, it can neither be said that negative sanctions are not working when trying to achieve behavioural change. [1079] In addition, Drezner points out that the success rate of sanctions in many studies appears to be lower than it in fact is. This is because in those cases where the imposition of negative sanctions is most likely to succeed, the sanctions do not have to be imposed at all. In fact, a credible threat to impose a sanction is sufficient to change the target state's behaviour in those cases. The success rate of the "threatening phase", however, is difficult to examine and has therefore not been included in most research.[1080] That means in spite of the discussion concerning the effectiveness of sanctions they can be an appropriate means to achieve the aim of a behavioural change of the host state.

After examining their aim and means and their appropriateness in particular for the TNC-human rights context, the last condition for the means-end proportionality is the relation between means and end. This relation is usually measured either by a "necessity" test, asking whether the means is necessary to

---

Durchsetzung des Völkerrechts (Walther Schücking-Kolleg 19, Bonn: Europa Union Verlag, 1996) 25-7 referring to art. 50 UN Charta and its issues; Almut Hinz, *Sanktionen gegen Libyen* (Frankfurt a. M.: Peter Lang, 2005) 97; the reaction of the minorities from the target state in the sanctioning state as Prévost describes them in Kim Richard Nossal, *Rain Dancing, Sanctions in Canadian & Australian Foreign Policy* (Toronto, Buffalo, London: University of Toronto Press, 1994) 26 wfr, are no great factor in TNC cases where the target is not pressured in order to achieve a regime change.

[1077] Sanctions work best when imposed by democracies on targets with a democratic structure of government, because they are only applied when there is a high chance of success, their legitimate reasons can be explained and therefore they do not automatically harden the dispute between the states; in addition the opposition within the target state in favour of the changes is supported, see Olaf Poeschke, *Politische Steuerung durch Sanktionen?* (Wiesbaden: Deutscher Universitätsverlag, 2003) 115.

[1078] Kimberly Ann Elliott, "Trends in Economic Sanction Policy" in Peter Wallensteen and Carina Staibano (eds), *International Sanctions* (London, New York: Frank Cass, 2005) 3, 8 table 1. 2 showing that there have been some successful unilateral economic sanctions imposed by the US between 1970 and 1999.

[1079] Positive and negative sanctions are said to have similar effects as far as the change of behaviour in the target state is concerned, because the concessions a state is willing to make in order to stop or avoid negative sanctions and those it offers to gain economic benefits may be rather similar, see Peter Wallensteen, "Positive Sanctions" in Peter Wallensteen and Carina Staibano (eds), *International Sanctions* (London, New York: Frank Cass, 2005) 229, 236; on the topic of positive sanctions and their effectiveness see also Eileen M. Crumm, "The Value of Economic Incentives in International Relations" (1995) 32 *JPR* 318.

[1080] Daniel W. Drezner, "The Hidden Hand of Economic Coercion" (2003) 57 *IO* 643 yet he refers to economic sanctions only.

achieve the aim, *i.e.* that there is no other way to achieve it,[1081] or the idea that the "least intrusive means" is to be used, suggesting that there is more than one means that can achieve the aim.[1082] As sanctions may have severe side effects as already sketched above, it is submitted that the least intrusive means able to achieve the aim of human rights protection through a behavioural change of the host state is to be used. Thereby consequences or effects caused that are inconsistent with the aim of human rights protection are reduced.[1083] This means negotiation and other means than sanctions will usually be the way to go.[1084] However, even where sanctions are considered to be the least intrusive means, the least intrusive sanction has to be chosen. These will often be diplomatic sanctions as the "weakest" sanctions to be used.[1085] Yet where more intrusive sanctions are considered appropriate, for example because all other less intrusive means have been unfruitful,[1086] the measures to use will be smart sanctions, avoiding side effects on the population as far as possible, while pressuring those in charge and those supposed to change their and/or the state's behaviour.
However, as the sanctioning states themselves choose the aim and the measure to achieve it, the means-end proportionality seems to be a rather useless condition to protect the target state from disproportionate sanctions, as this would allow for the most severe sanctions as long as the aim is far-reaching or

[1081] Math Noortmann, *Enforcing International Law* (Aldershot, Burlington: Ashgate, 2005) 58-9 wfr Noortmann is treating the requirement of "necessity" separately and not within the requirement of proportionality.
[1082] See for example Thomas M. Franck, "On Proportionality of Countermeasures in International Law" (2008) 102 *AJIL* 715, 744- 751, providing WTO examples of *DSU* and *SCM*.
[1083] See also Enzo Cannizzaro, "The Role of Proportionality in the Law of International Countermeasures" (2001) 12 *EJIL* 889, 910.
[1084] See for similar result on the question of necessity under art. XX *GATT* and the necessity requirement Jenny Schultz and Rachel Ball, "Trade as a Weapon? The WTO and Human Rights-Based Trade Measures" (2007) 12 *Deakin L. Rev.* 41, 62.
[1085] On diplomatic sanctions in general see Klaus Bockslaff, *Das völkerrechtliche Interventionsverbot als Schranke außenpolitisch motivierter Handelsbeschränkungen* (Berlin: Duncker & Humblot, 1987) 141; Wilfried Bolewski, *Diplomacy and International Law in Globalized Relations* (Berlin, Heidelberg: Springer, 2007) 36; Kim Richard Nossal, *Rain Dancing, Sanctions in Canadian & Australian Foreign Policy* (Toronto, Buffalo, London: University of Toronto Press, 1994) 3 wfr.
[1086] Less intrusive means have to be taken before using the more intrusive ones, see on *ILC Draft Articles* Karl Zemanek, "The Unilateral Enforcement of International Obligations" (1987) *ZaöRV 32*, 37.

ambitious enough.[1087] This is why - additionally - the proportionality between the means taken and the violation caused by the target state, is considered, but not in terms of equivalence due to the considerations sketched above, but in terms of appropriateness.[1088] Thereby the proportionality, *i.e.* appropriateness, of the response, may function as a corrective for the rather unlimited means-end proportionality needed to determine the means to be taken in order achieve the specific aim of behavioural change. The breach-response corrective is of special importance when either the aim or the side-effects of the least intrusive means are out of proportion to the breach committed by the target state. That allows for answering milder breaches of public international law as well, although by means less harmful than the means used when answering serious breaches of essential collective interests, but the aim pursued can still be coercion to achieve a behavioural change.[1089]

(c) Further requirements

Closely linked to the proportionality principle are the requirements of giving notice to the target state that sanctions will be implied and only imposing the sanction as long as the violations continues or in the case of the aim being the payment of reparations or another action, as long as the action has not been completed.[1090] This means when the human rights violation does not exist any longer or the behavioural change is provided for example by more protection or prosecution in the specific circumstances criticized, the sanctions has to be lifted.[1091]

[1087] Denis Alland, "Countermeasures of General Interest" (2002) 13 *EJIL* 1221, 1235; Enzo Cannizzaro, "The Role of Proportionality in the Law of International Countermeasures" (2001) 12 *EJIL* 889, 895.
[1088] Enzo Cannizzaro, "The Role of Proportionality in the Law of International Countermeasures" (2001) 12 *EJIL* 889, 909.
[1089] *Ibid.* at 910-1.
[1090] See Karl Zemanek, "The Unilateral Enforcement of International Obligations" (1987) *ZaöRV* 32, 42.
[1091] On lifting sanctions and sunset clauses see also Kim Richard Nossal, *Rain Dancing, Sanctions in Canadian & Australian Foreign Policy* (Toronto, Buffalo, London: University of Toronto Press, 1994) 219 wfr.

B *Requirements met in the TNC context?*

After having sketched the requirements of unilateral negative sanctions in the human rights context, it will be assessed now whether these are a workable home state tool in the human rights-TNC context.

1 *Erga omnes breaches by the host state*

As outlined above, human rights violations can usually only be answered by sanctions when they violate *erga omnes* obligations. In the TNC-human rights context, violation of obligations *erga omnes* by the host state will rather be the exception, as already seen above. Working conditions amounting to slavery as acknowledged under *ATCA* are the exception and the concept is not (yet) acknowledged in public international law. Usually "small-scale" human rights violations or violations concerning those obligations only "candidates" for *erga omnes* obligations are violated, for example when denying the freedom of association, harming the rights to health and life, etc.[1092] Furthermore, in many cases the host state is violating the obligations by omission or neglect, because it is not providing sufficient protection or prosecution, usually not amounting to large-scale human rights violations.[1093] Yet this does not mean that the development in public international law cannot be supportive of an increased protection of human rights *via* countermeasures. Additional human rights, such as the right to life, are already said to be possible candidates for becoming subject to *erga omnes* obligations.[1094] In addition, public international law could allow for countermeasures in more cases of *erga omnes* obligation violations, including those that are not systematic or large-scale.[1095] Although this seems

[1092] On labour rights and their *erga omnes* status see Jeroen Denkers, *The World Trade Organization and Import Bans in Response to Violations of Fundamental Labour Rights* (Antwerp, Oxford, Portland: Intersentia, 2008) 128-140 concluding that the prohibition of forced and child labour amounting to forms of traditional slavery have required *ius cogens* status.

[1093] *Erga mones* oblgations can also be violated by omission, see M.Cherif Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*" (1996) 59 *L&CP* 63, 69.

[1094] Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2005) 233.

[1095] Developments and changes finally leading to the emergence of a new practice seem to be more likely in the unilateral countermeasure context than a similar development concerning resolutions to protect human rights and sanctions by the collectively acting UN General Assembly.

far-fetched at first glance, it has to be noted that the *ILC Articles* were supposed to contain the possibility of any state taking countermeasures to answer serious *erga omnes* breaches.[1096] This was even approved of, but then art. 54 was only included last minute[1097] due to the concerns of some governments, while the majority of governments had accepted the possibility for countermeasures in cases of serious *erga omnes* obligation violations.[1098] That means there was no general rejection of the idea of allowing rather broad countermeasures in cases of *erga omnes* breaches.[1099] Furthermore, the *erga omnes* concept and ideas of its possible development does not stop there. Other contexts of *erga omnes* breaches have to be considered as well. Standing before the ICJ in cases of *erga omnes* breaches has developed since the *Barcelona Traction* case,[1100] suggesting that a broad approach has emerged, allowing all states to "institute proceedings against States principally responsible for violations of obligations *erga omnes*."[1101] This is also in line with the parallel development of provisions in several international treaties involving human rights, which are "recognising the right of States to institute inter-State proceedings irrespective of individual injury"[1102] as for example in the *Banjul Charter*[1103] or *CEDAW.*[1104] It is therefore claimed that the broad approach concerning reactions to *erga omnes* braches have become the rule in treaties protecting general interests.[1105] After having sketched these developments, it becomes clear that although countermeasures are not the same as the standing before the ICJ and *Barcelona Traction* did not include countermeasures in its judgement,[1106] the general trend towards a broader approach concerning reactions to *erga omnes* breaches triggered by *Barcelona Traction* cannot be denied. Be it treaties, ICJ decisions

---

[1096] Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2005) 245.
[1097] *Ibid.* at 242.
[1098] *Ibid.* at 245-7.
[1099] *Ibid.* at 247.
[1100] *Ibid.* at 158-197.
[1101] *Ibid.* at 197.
[1102] *Ibid.* at 195.
[1103] *African (Banjul) Charter on Human and Peoples' Rights 1981.*
[1104] *Convention on the Elimination of All Forms of Discriminations Against Women (CEDAW)* (1979).
[1105] Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2005) 196.
[1106] *Ibid.* at 198-204.

or countermeasures when systematic or large-scale *erga omnes* braches occurred, there has been a development since the 1970s. All these developments that have already taken place make an even broader approach in the context of countermeasures that does not only depend on large-scale or systematic violations more likely than not.

2 *Proportionality issues*

Even when *erga omnes* breaches by host states are given, proportionality issues are a further challenge, also in the TNC context.

(a) Means-end proportionality

In the context of human rights and TNCs the latter means that the measures taken by the home state have to be appropriate for achieving a change in the host state behaviour to increase the human rights protection from violations by TNCs. As far as sanctions in response to *erga omnes* obligation violations are concerned, no mere "selfish" sanctions are imposed, as already explained above. Instead the aims of coercion or compellence are of interest to the international community as a whole. That makes them *per se* more appropriate than the same aims in a solely bilateral context.[1107] To assess the appropriateness further, most of the above mentioned factors that enhance the success of unilateral sanctions are also applicable in the TNC context. Although the forth criterion of domestic riots and civil commotions shows that the sanctions examined by Hufbauer, Scott and Elliott were aimed at regimes as a whole rather than particular singled-out issues like in the TNC and human rights context, the other criteria can be used in the TNC context as well and seem to be rather promising. This is because the goal of ending human rights violations or increasing human rights protection in singled-out situations can be defined rather clearly. In addition, the costs involved for the sanctioner's own corporations are usually focused on the parent[1108] and even where this is not the case, there may be some support for the sanctions as human rights protection is an issue of public interest. If, in addition,

[1107] Enzo Cannizzaro, "The Role of Proportionality in the Law of International Countermeasures" (2001) 12 *EJIL* 889, 895-6 and fn 59.
[1108] For example when the products are exported to the home state to be used by the parent company for further manufacturing.

the target state is economically dependent on the sanctioner in some way and the two states had good relations in the past, unilateral sanctions can therefore be quite promising.

*(b) Corrective of appriopratenes*s

Like in other any case, the aim or the side-effects of the least intrusive means can also be inappropriate in relations to the breach of the target state. In the TNC context, when the home state is imposing smart sanctions to achieve a change in the host state's behaviour with regard to the compliance of *erga omnes* obligations connected to the TNC subsidiary as an answer to a violation of *erga omnes* obligations in connection with the very TNC subsidiary, the corrective might usually not be needed. Yet the singled-out cases may call for a corrective in spite of the seriousness of the breach the host state committed in some cases, because the approach *via* the host state is a rather indirect one to control the TNC as already set out above. Disproportionate side-effects may be caused by the least-intrusive means in different ways in the TNC-human rights context. Where resources to protect human rights are scarce, be it know-how, tools and materials or personnel, pressure from the home states to increase control in the TNC subsidiary context may e.g. entail withdrawal of control from other places in the host state to be able to provide the requested control in the TNC subsidiary's surrounding. This, however, may worsen the overall human rights situation in the host state and effects inconsistent with the aim of human rights protection are caused, which can render the measures disproportionate to the violation as well. A similar example can be seen where child labour is fought without providing for income alternatives for the children's families in need so that the children are then working in areas not getting so much attention by the importing "western" countries or in the black economy under even worse conditions.[1109] Whether court decisions, sanctions or other pressure from the home state, a host state that is not un*willing* but un*able* to enforce its human rights protecting laws properly needs help, *i.e.* for example positive sanctions,

[1109] See Philippe Schneuwly, "Sind Handelssanktionen ein geeignetes Mittel zur Durchsetzung von Arbeitsnormen?" (2003) *Aussenwirtschaft* 121, 139 wfr.

and not pressure in order to improve its human rights protection.[1110] In these cases the corrective for primary negative sanctions may be the use of positive sanctions as a supportive means.

V TNCs AS POSSIBLE DEVELOPING ADDRESSEES?

As already pointed out earlier in this enquiry, controlling TNCs abroad *via* the host state is a very indirect way of control entailing problems of applicability and effectiveness This can for example be seen in the more radical inter-state measures examined, *i.e.* suing the host state, its officials and using negative sanctions that have to be justified, which require *jus cogens* or *erga omes* breaches to justify the violation of the host state's sovereignty. In addition, it may worsen the overall human rights situation in a host state when the state is pressured to improve the situation in a TNC subsidiary and its neighbourhood and scarce resources are withdrawn from other parts of the host state. Pressure on host states in singled-out cases of home state interests are therefore at least problematic. Due to these considerations more direct ways of control of TNCs abroad seem preferable. Yet as seen above, primary sanctions are inter-state measures that one state imposes on another state as a means of self-defence or enforcement. However, an intra-state dimension has been added by including ruling élites, rebel groups, etc as possible targets due to their similarity to governments in that they "reign" over certain territories. Furthermore, private individual actors have been targeted by sanctions as well, for example members of government by visa restrictions or freezing of their assets. The non-governmental opposition in the host state can be supported by positive sanctions.[1111] Corporations have also felt the consequences of sanctions as could already be seen above. The home state assets of corporations can also be frozen and travel restrictions might affect corporate officials as well. However, all the measures imposed on private actors as sanctions, be they negative or positive, are imposed to change the host *state* behaviour, to change the behaviour of the *government*, not of the private actors themselves. They are only a tool to achieve the government change much like the population is according to the naïve

[1110] *Ibid.* at 140.
[1111] Peter Wallensteen, "Positive Sanctions" in Peter Wallensteen and Carina Staibano (eds), *International Sanctions* (London, New York: Frank Cass, 2005) 229, 239 table 15.2.

theory, the difference being that those pressured are closer to the government and the decisions needed to achieve the required change. That means private actors may be *affected* by primary sanctions, but the *target* of the sanction is the host state and its government. However, this does not mean that it has to stay this way. As TNCs are gaining power and have more power and influence and may therefore affect human rights in many situations, as outlined above, it seems their behaviour should also be targetable by sanctions. The home state could for example directly aim at changing the TNC's behaviour abroad, sanctioning the TNC subsidiary and pressuring the parent at home. Yet should it really be possible to directly *target* TNCs by primary sanction such as the freezing of assets, travel bans and trade restrictions? Or put differently- could sanctions be used to change the behaviour of private actors themselves as well? This second question already provides the simple answer, at least for the next couple of decades: no. This has to do with corporations' legal status under public international law as described earlier in this research. They are not treated as states yet, not even as private individuals and this is not likely to change within the next few years. A state intending to change another state's behaviour uses public international law containing the rules for sanctions as set out above, because public international law is governing the relation between states, international organisations and other subject of public international law.[1112] Yet as already discussed above, TNCs are no such subjects (yet). The very idea of countermeasures as a means of states set out above derives from the underlying principles of public international law of the equality of states, *i.e.* equality of actors using sanctions and being possible targets of sanctions. Closely linked to the equality principle is the fact that no enforcement mechanisms for public international law exist that are comparable to domestic law mechanisms. Countermeasures are filling this gap to some extent. TNCs, however, are no state-like equal actors, as seen above. TNCs have neither a territory nor a people and - plainly put - they cease to exist when they stop doing business. Their great power and influence is purely economic-based and dependent. Whether they can violate *erga omnes* rules at all is still disputed, which can for example be seen from the latest *ATCA* cases before the US Supreme Court. The answer to this questions once more depends on the understanding of the legal personality and

[1112] See for example Matthias Herdegen, *Völkerrecht* (11th ed München: C. H. Beck, 2012) 2.

status TNCs have under public international law as assessed earlier in this research and where it was concluded that no broadly accepted base for holding corporations internationally liable exists (yet). To be able to apply sanctions directly at TNCs, a whole different system of sanctions would have to be introduced. Yet that this will happen soon is rather unlikely, because as could be seen above, the legal status of corporations under public international law is highly disputed, binding rules for them could not be established and there are easier ways more likely to be implemented to hold TNCs liable. International enforcement measures like these new sanctions could only be created and used once international direct obligations are created, which is not likely to happen, as set out above.

In contrast to influencing state behaviour, a state intending to change the behaviour of private individuals uses its domestic law. That means the home state may create laws and regulations to influence the behaviour of private actors, yet, of course, only as long as these laws and regulations do not violate public international law. The latter is of particular importance in cross-border situations like the TNC context as already examined above. This once more shows the complexity of the issue and the unsatisfying situation of TNCs acting globally without corresponding enforceable rules. The home state may use its criminal, private and administrative law to influence the behaviour of private actors, yet not exceeding the confinements provided by public international law like *ius cogens*, jurisdictional rules and WTO/*GATT*. In other words, public international law is the limit instead of being the base for measures targeted at private actors at the moment and the next decades to come. In chapters II and III the restrictions of criminal liability of foreign private actors acting abroad was already sketched, concluding that only when *ius cogens* is violated the home state could claim jurisdiction over the foreign private actor. In private law the scope was a little broader as the example of *ATCA* showed, as court and Congress interpreted and developed the "law of nations" so that it already now includes more than *ius cogens* only. The freezing of assets of the foreign subsidiary when a lawsuit is filed for example could be regulated in the domestic law of the home state and although *ius cogens* violations of TNCs will be rare, domestic criminal sanctions could include travel bans and trade restrictions as far as consistent with WTO/*GATT*. Travel bans or visa restrictions

and trade restrictions for foreign TNC officials or TNC products could also be created by administrative law in cases of violations of core human rights, yet again public international law like WTO/*GATT* has to be observed. Where the parent has factual control over the subsidiary acting abroad, it is not precluded that assets of the subsidiary exist in the home state, that officials of the subsidiary want to enter the home state for meetings and conferences with officials of the parent or that products of the subsidiary are imported into the home state to be used by the parent for manufacturing its own products. Therefore even small-scale measures like travel bans and the others just mentioned are not necessarily lacking any effectiveness. Yet they cannot be applied on TNCs under public international law.

These findings of sanctions being a tool for inter-state relations only is perfectly in line with the definition of the term "sanction" provided above as being a means of *states* to change the behaviour of other *states* with regard to international human rights standards. Furthermore, it is also in accordance with the idea of secondary sanctions provided above. When imposed against private actors secondary sanctions have to be terrinational, because they are often measures governed by the domestic law of the sanctioning state which is of limited jurisdiction depending on the links of territoriality or nationality. However, when secondary sanctions are imposed on states to change the behaviour of the state targeted by the *secondary* measure, further requirements have to be met, because secondary sanctions are not targeted at the violator of public international law. The measures are only lawful when public international law like diplomatic law or WTO/*GATT* law is met. It is therefore submitted that TNCs may be *affected* by primary sanctions and *targeted* by measures according to the domestic law of the home state, which again is limited by public international law. These findings are of course also valid for positive sanctions, which means that for changing a TNC's behaviour incentives may for example be given directly to the subsidiary or be granted in a treaty concluded between the home state and the subsidiary, whereas treaties concluded between the home and the host state on development aid, etc, are intended to influence the host state's behaviour and not addressed to the TNC.

VI CONCLUSION AND OUTLOOK CONCERNING SANCTIONS AS A HOME STATE MEANS TO INFLUENCE TNC BEHAVIOUR ABROAD

As outlined in this chapter, sanctions can be applied for different reasons to pursue manifold aims and in selfish ways as well as serving more common interests like the protection of human rights. Targeted positive as well as smart negative and "secondary sanctions" may be applied unilaterally in the TNC context. All sanctions have to be in accordance with public international law. For positive and lawful negative sanctions that basically means that they have to be proportionate and in accordance with international conventions and of course *ius cogens*. For unlawful negative measures that have to be justified or of which the wrongfulness has to be precluded this means they are restricted to situations where the target state violates *erga omnes* obligations. Furthermore, this violation has to be systematic and large-scale according to current state practice, yet chances are that other serious violations of *erga omnes* obligations are included in this requirement as well within the next decades. In addition, the measures have to be proportionate as well in the sense of appropriate concerning the breach committed by the host state and suitable and appropriate in order to achieve the intended change of behaviour of the target state. Often a "sticks and carrots" [1113] combination of targeted positive and negative measures might be best apt to effectively change the host state's behaviour without causing too many negative side-effects while still increasing effectiveness.[1114] However, the indirectness of sanctioning the host state for its neglect or omission concerning the human rights violation caused by the TNC acting abroad is rather unsatisfying. TNCs on the other hand can only be affected, but not targeted by the sanctions used against states as they are neither states nor international organisations but private actors and it is not very likely that their status under

[1113] Peter Wallensteen, "Positive Sanctions" in Peter Wallensteen and Carina Staibano (eds), *International Sanctions* (London, New York: Frank Cass, 2005) 229, 236; see also Randall E. Newnham, "More Flies with Honey: Positive Economic Linkage in German *Ostpolitik* from Bismarck to Kohl" *International Studies Quarterly* 44 (2000) 73 wfr; David Cortright and George A. Lopez, "Assessing Smart Sanctions, The Next Step: Arms Embargoes and Travel Sanctions" in Michael Brzoska (ed) *Smart Sanctions: The Next* Step (vol. 6, Baden-Baden: Nomos, 2001) 31.

[1114] See Randall E. Newnham, "More Flies with Honey: Positive Economic Linkage in German *Ostpolitik* from Bismarck to Kohl" (2000) 44 *ISQ* 73; Peter Wallensteen, "Positive Sanctions" in Peter Wallensteen, Carina Staibano (eds), *International Sanction* (London, New York: Frank Cass, 2005) 229, 236 and 238.

public international law is going to change soon as assessed earlier in this enquiry. This means their behaviour is to be governed by domestic law instead of public international law. Yet this does not mean that domestic law cannot provide for similar consequences for private actors as sanctions do for states or ruling élites. However, the limits for domestic law, especially when applied on foreign nationals acting abroad, is public international law. The issues that arise when applying domestic law in such a way have already been sketched in the preceding chapters. So due to the confined measures that are *per se* lawful and the unlikeliness of serious breaches of *erga omnes* obligations by host states in the TNC-human rights context, the scope of application for negative sanctions is rather confined. This makes secondary sanctions rather unusual as well. Only positive sanctions regularly remain applicable in a broader scope as their proportionality is not as restrictive, because incentives are granted rather than restrictions made. This suggests that negative sanctions are not exactly perfectly apt for tackling the TNC-human rights issue, which is in line with the usually broader use of sanctions as measures to for example secure or restore peace and security, overthrowing regimes, etc. It affirms once more the impression that sanctioning the host state is too indirect a means to be satisfying and that other, more direct or at least less coercive, ways as outlined in the preceding chapters are preferable and more likely to (soon) be already applicable. However, less invasive, more corporation-targeted and therefore "smarter" measures in the TNC context than sanctions could be trade bans, directly affecting TNCs. This option will therefore be assessed in the next chapter of this research.

CHAPTER V: POTENTIAL OF TRADE RESTRICTIONS TO HOLD TNCS LIABLE

As just mentioned, the more direct and more trade-centred and therefore also TNC-centred approach of trade restrictions as a means to control TNCs acting abroad will be examined in this chapter. The underlying idea is the imposition of trade restrictions on products manufactured by the TNC subsidiary that is violating human rights abroad. This means referring to the product itself as well as the production and processing methods (PPM) applied by the subsidiary. One sort of trade restrictions affecting TNCs was already assessed in the preceding chapter when examining economic sanctions.[1115] As seen above, smart sanctions aimed at ruling élites and governments are not suitable for TNCs, because TNCs cannot be the targets of sanctions and even when sanctions are used that affect TNCs, smart sanctions do not seem capable of affecting TNC subsidiaries in a well-tailored way. Therefore some kind of "smart" or "tailored" measures affecting TNCs more severely have to be found. These could be so-called "tailored trade restrictions" or "tailored sanctions",[1116] which "apply to goods where [human rights] violation occurred during production".[1117] Yet it is important to note that the measures assessed in the present chapter are not equal to "sanctions" as defined earlier in this enquiry, but an additional, more flexible and easier applicable means to tackle the human rights and TNC issue for cases

[1115] These include cancelling, aid, freezing assets and banning the movement of goods, services or capital, see Kim Richard Nossal, *Rain Dancing, Sanctions in Canadian & Australian Foreign Policy* (Toronto, Buffalo, London: University of Toronto Press, 1994) 3 wfr; they were used already as early as 445 B.C. when Athens imposed an embargo on Megara to induce it to end its alliance with Sparta, see Thukydes, *Der Peloponnesische Krieg* (edited by Helmuth Vretska and Werner Rinner, Stuttgart: Philipp Reclam jun., 1966, 2000) book 1, Ch 139; for more about early embargoes see Rolf H. Hasse, *Theorie und Politik der Embargos* (Köln: Institut für Wirtschaftspolitik an der Universität Köln, 1973) 3-84.

[1116] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford , Portland: Hart Publishing, 2007) 71 incl. fn 4, 76 yet note that this expression will not be used here due to the confined use of the term "sanction" as defined above.

[1117] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford , Portland: Hart Publishing, 2007) 76, also note p. 72: The "smart sanctions" introduced in the preceding chapter are "semi-tailored measures" according to Harrison's terminology, as they are not general, but not focusing on the human rights performance of the production of the good either. Instead they are focusing on those in charge of the violations, which provides for some kind of link between the specific good and the measure.

where the subsidiary exports its goods to the home state.[1118] This means they are supposed to be a home state option to take unilateral approaches to answer violations of human rights that do not amount to breaches of *ius cogens* or obligations *erga omnes*. So while the preceding chapter focused on public international law on sanctions as a means, this chapter will focus on trade law, particularly WTO law.[1119] It is submitted that not only violations of labour rights[1120] can be answered by tailored trade restrictions, but a broader scope of human rights violations linked to the production of the particular goods, such as the violation of the right to health caused by the production, but affecting not only the workers, but also other people, for example in the neighbourhood of the TNC subsidiary. Even supporters of positive measures like the clauses in GSPs mentioned above, acknowledge that trade restrictions imposed directly on the goods manufactured in a way that violates human rights, can be more effective than GSP incentives (alone).[1121] To examine this home state option some examples of trade restrictions affecting TNCs will be given. These will once more show the close relation to sanctions as assessed in the previous chapter, yet regarded from the trade law angle. As WTO law provides limitations for the use

[1118] For the use of a different term for a „sanction" in trade context see for example also Steve Charnovitz, "Environmentalism Confronts *GATT* Rules: Recent Developments and New Opportunities" (1993) 27 *JWT* 37, 43, differentiating between "sanctions" and "environmental trade measures".

[1119] The issue of "countermeasures" within the WTO as answers to breaches, nullification or impairment of WTO obligations is *not* the subject of this chapter, as a TNC subsidiary manufacturing goods abroad violating human rights and exporting them to the home state is not violating WTO obligations, nor is the host state. This is rather a host state option when it considers the home state measure a violation, impairment or nullification of its WTO obligations. See on the issue of such countermeasures for example Thomas M. Franck, "On Proportionality of Countermeasures in International Law" (2008) 102 *AJIL* 715; Petros C. Mavroidis, "Remedies in the WTO Legal System: Between a Rock and a Hard Place" (2000) 11 *EJIL* 763; Santiago M. Villalpando, "Attribution Of Conduct To The State: How The Rules Of State Responsibility May Be Applied Within The WTO Dispute Settlement System" (2002) 5 *JIEL*, 393; another aspect that is not covered here are non-violation complaints, because these do not cover human rights violations, as human rights obligations existed already at the time of negotiation, see Gabrielle Marceau, "WTO Dispute Settlement and Human Rights" (2002) 13 *EJIL* 753, 768.

[1120] Harrison suggests that mainly labour rights will be the rights involved in the production, see James Harrison, "The Human Rights Impact of the World Trade Organisation" (Oxford, Portland: Hart Publishing, 2007) 76.

[1121] Kimberly Ann Elliott, Richard B. Freeman, *Can Labor Standards Improve Under Globalization?* (Washington: Institute for International Economics, 2003) 80; James Harrison, "The Human Rights Impact of the World Trade Organisation" (Oxford, Portland: Hart Publishing, 2007) 112.

of trade restrictions, the relationship between the flexibile, shifting and always developing areas of human rights and WTO law will be examined in more detail in the following sections, pointing out developments in the WTO system. Possible solutions for the tensions between human rights and trade law will be presented after giving reasons why human rights and trade law should be linked.

I EXAMPLES OF TRADE RESTRICTIONS AS A MEANS TO DIRECTLY INFLUENCE TNC BEHAVIOUR

Any corporation manufacturing goods for export is affected when its goods are not allowed into an importing state, e.g. because of its production methods or where labelling is required. By banning the import of (unlabelled) products that are not produced in accordance with human rights standards abroad, home states could therefore directly influence the human rights records of their TNCs acting abroad. Yet of course for the topoic assessed in this enquiry this approach is restricted to TNCs manufacturing goods for exportation into the home state.

There have been approaches to protect certain rights by using trade restrictions before. Concerning the global issue of environmental protection there have been different trade restrictions. The best known ones of *GATT*/WTO are the partly already mentioned *Tuna-Dolphin*[1122] and the *Shrimp-Turtle*[1123] cases dealing with environmental issues, which will be assessed in further detail below. Yet there is also an early example concerning social standards for workers. In 1906, *i.e.* far pre-*GATT*, the manufacturing and importation of matches produced with white phosphor, a substance that caused grave lunge diseases among workers, was prohibited.[1124] All these cases have in common that states want to protect certain standards globally and do not want to indirectly participate in violations of these standards and rights. As already mentioned earlier in this research, core

---

[1122] *United States - Restrictions on Imports of Tuna (DS21/R - 39S/155) ("Tuna-Dolphin I")* GATT Panel Report, not adopted, 3 September 1991; *United States - Restrictions on Imports of Tuna (DS29/R) ("Tuna-Dolphin II")* GATT Panel Report, not adopted, 16 June 1994.
[1123] *United States – Import Bans of Certain Shrimp and Shrimp Products ("Shrimp-Turtle")* WT/DS58/R (15 May 1998), WT/DS58/AB/R (12 October 1998).
[1124] *Internationales Abkommen über das Verbot der Verwendung von weißem (gelbem) Phosphor zur Fertigung von Zündhölzern* (26. 09. 1907), Reichstagsprotokolle 1907/09, 18, Aktenstück Nr. 555 (Germany).

human rights can be considered universal standards. Their global protection should therefore be possible.

However, assessing the "human rights options" under *GATT*/WTO law faces some difficulties, because WTO law does not provide for a general "human rights exception". What is does offer, however, are several possible connections for human rights exceptions.[1125] So while there is only limited case law concering "human rights" exceptions to free trade, the underlying arguments of the existing cases in which *GATT* and WTO Panels have dealt with possible conflicts between WTO law and other areas of public international law are of importance for this enquiry.[1126] Furthermore, the other ares of public international law assessed by the Panels include areas of human rights law, as for example environmental law.[1127] Therefore, these existing cases will be summarized in the following as they present an important base for the relationship of WTO law and those human rights they deal with, as well as for the discussion of the relationship between other human rights and WTO law. The relevance and impact of these cases on developments in WTO law will be assessed in more detail below.

A *Cases of existing trade restrictions*

In the following some of the cases dealing with the protection of (certain) human rights or other interests protected by domestic law will be sketched in chronological order. Most of the cases are dealing with environmental and human and animal life and health issues.

[1125] Frank J. Garcia, "The Global Market and Human Rights: Trading Away the Human Rights Principle" (1999) 25 *Brooklyn J. Int'l L.* 51, 79.
[1126] See also Sarah Joseph, *Blame it to the WTO? A Human Rights Critique* (Oxford: Oxford University Press, 2011) 50-5.
[1127] On the issue of environmental law as part of human rights law see for example Berta Esperanza Hernández-Truyol, Stephen J. Powell, *Just Trade: A New Covenant Linking Trade and Human Rights* (New York, London: New York University Press, 2009) 85-8, stating on p. 87 that "a healthy environment is certainly as much a human right as are prevention of torture and assurance of religious freedom."

1 *Tuna - Dolphin I and II*

One of the most well-known cases concerning the protection of environmental issues under *GATT* are the already above mentioned *Tuna-Dolphin* decisions.[1128]

In *Dolphin-Tuna I* the US imposed import bans on tuna that was not caught dolphin-friendly and the US "dolphin-safe" label was challenged by Mexico. Although this pre-WTO decision was not adopted[1129] and has therefore no legal status in the WTO, it is still relevant for guidance in new disputes and therefore for the development of WTO jurisprudence.[1130]

In its decision the Panel rejected the application of art. III:4 *GATT*, which reads

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

The Panel argued that art. III:4 did not cover production and processing methods (PPM), but only product regulations. It based this interpretation of art. III:4 on the parallel to art. III:2 *GATT*[1131] and the Ad Art. III *GATT*, which explicitly only refer to regulations, requirements, etc concerning the *product*, not the non-

---

[1128] *United States - Restrictions on Imports of Tuna (DS21/R - 39S/155) ("Tuna-Dolphin I")* GATT Panel Report, not adopted, 3 September 1991; *United States - Restrictions on Imports of Tuna (DS29/R) ("Tuna-Dolphin II")* GATT Panel Report, not adopted, 16 June 1994.

[1129] On this issue and the adoption procedure before and under WTO see Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 34.

[1130] See Joseph Robert Berger, "Unilateral Trade Measures to Conserve the World's Living Resources: An Environmental Breakthrough For the GATT in the WTO Sea Turtle Case" (1999) 24 *Colum. J. Envtl. L.* 355, 368; these unadopted reports have the status of soft law, see Mary E. Footer, "The (Re)Turn to 'Soft Law' in Reconciling the Antinomies in WTO Law" (2010) 11 *Melb. J. Int'l L.*241, 247.

[1131] Art. III:2 *General Agreement on Tariffs and Trade (GATT)* (1947): 2."The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1."

incorporated PPM.[1132] The Panel went on setting out that the *US Act for the protection of sea mammals (MMPA)*, was a PPM-based act and even went further stating that even when the *MMPA* was considered to be product-based, tuna caught dolphin-friendly and tuna that was not caught dolphin-friendly were "like products" and therefore unequal treatment was not permissible under art. III:4 *GATT*. The Panel held that art. XI *GATT* (General Elimination of Quantitative Restrictions) was applicable and violated by the import bans. [1133] It also found that the import bans were not justified under the general exceptions of art. XX *GATT*. It argued that regulations, although consistent with an objective named in art. XX *GATT*, were not permissible under *GATT* when they were establishing rules valid outside the regulating state's territory, because otherwise any state could determine the standards for the protection of the objectives in art. XX *GATT* for its imports and thereby force its standards upon other states. This would cause legal uncertainty and deprive the *GATT* of its multilateral character.[1134] The Panel also argued that the measures were not "necessary" in the sense of art. XX (b),[1135] because the US had not sufficiently tried to negotiate a multilateral solution with the other states involved.[1136] In addition, the measure was not sufficiently predictable as the amount of incidental takings of US fishermen was decisive for the import ban, yet this amount could not be known by Mexican fishermen.[1137]

In *Dolphin-Tuna II* , which was also not adopted, the EC/EU and Netherlands challenged the US import bans on tuna from third states that did not themselves impose the US import ban on tuna that was not caught according to US regulations to protect dolphins. These "intermediary nation embargos" or

---

[1132] *United States - Restrictions on Imports of Tuna (DS21/R - 39S/155) ("Tuna-Dolphin I")* GATT Panel Report, not adopted, 3 September 1991; Ad Art. III *GATT*, available at WTO Website "The General Agreement of Tariffs and Trade (GATT 1947)" Annex I <http://www.wto.org/english/docs_e/legal_e/gatt47_03_e.htm#annexi> 1 May 2014.
[1133] *United States - Restrictions on Imports of Tuna (DS21/R - 39S/155) ("Tuna-Dolphin I")* GATT Panel Report, not adopted, 3 September 1991.
[1134] *Ibid*.
[1135] Art. XX (b) *GATT* deals with the protection of human, animal or plant life or health.
[1136] On the decision, including the issue of negotiations see for example Steve Charnovitz, "Environmentalism Confronts GATT Rules: Recent Developments and New Opportunities" (1993) 27 *JWT* 37.
[1137] *United States - Restrictions on Imports of Tuna (DS21/R - 39S/155) ("Tuna-Dolphin I")* GATT Panel Report, not adopted, 3 September 1991 par. 5.28.

"secondary sanctions" were already mentioned in the preceding chapter and it was already sketched there that such measures are highly disputed and their accordance with international trade law was questioned by many states. The Panel held that art. XI *GATT* was violated and that art. III *GATT* was not applicable, because the measures in question were PPM- and not product-based. Like in *Tuna-Dolphin I* the Panel did not find any justification according to art. XX *GATT* either. Although it did not agree with *Tuna-Dolphin I* that domestic laws and regulations having an extraterritorial effect would be impermissible under *GATT*, which could be derived from the existence of art. XX (e)[1138] *GATT*,[1139] it only held that *own* nationals or vessels may be bound by extraterritorial laws.[1140] The Panel further held that not taking into account whether the importing state had itself imposed measures to protect dolphins made the measure not "least *GATT*-inconsistent" and thereby not "necessary". Furthermore it argued that the intermediate nation embargoes were not directly ("primarily") aimed at protecting the objective set our in art. XX (g)[1141] as only when the exporting state changes its policy the exhaustible natural resource, *i.e.* dolphins, are protected, but not by the import ban itself. According to this decision the use of trade restrictions to change a state's behaviour, the very aim of sanctions as set out above, is not permissible under *GATT*. The Panel also pointed out that multilateral treaties and agreements like CITES and the Stockholm Declaration could not be referred to when interpreting *GATT* rules, because not all states that adopted *GATT* had also adopted the Stockholm Declaration.

[1138] Art. XX (e) *GATT* covers measures relating to products of prison labour.

[1139] Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 93: the counter argument is that the objective of art. XX (e) is the protection of the domestic economy from competition of cheaply produced goods rather than extraterritorial human rights, because ILO Convention No. 29 does not hold any prison labour to be socially unacceptable, but provides for certain requirements that have to be met in order so be socially acceptable.

[1140] On the incoherency of this reasoning see Sarah Joseph, *Blame it to the WTO? A Human Rights Critique* (Oxford: Oxford University Press, 2011) 107, pointing out that extraterritorial effects coercing the policies of other states may also be given when only the state's own nationals are bound.

[1141] Art. XX (g) *GATT* covers measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption".

The *Tuna-Dolphin* decisions are also considered to be an example for the effectiveness of unilateral trade restrictions based on the production methods of a good by showing its long-term effect and its ability to raise awareness and work as a catalyst for multinational agreements. After the already above mentioned *Tuna-Dolphin* decisions, for example the *International Agreement for the Reduction of Dolphin Mortality* was concluded in 1992 and signed by 12 states, among them USA and Mexico.[1142] However, the effectiveness of targeted trade restrictions is not unchallenged.[1143]

2 *Gas Guzzler Tax Case*

The *Gas Guzzler Tax Case*[1144] was a pre-WTO case on extraterritorial protection of environmental rights. The US taxed the import of cars according to the cars' fuel consumption, taxing those with a higher consumption higher than those with a low consumption. The EU opposed this measure, claiming that the equal treatment clause of art. III:2 *GATT* (National Treatment on Internal Taxation and Regulation) was violated and no justification was given by art. XX (g) or (d) *GATT*. The Panel rejected this reasoning, stating that when the tax was first implemented, most domestic automobiles could not meet the threshold provided for in the Gas Guzzler law, so the target was not on foreign automobiles and neither was the effect a change of conditions of competition. Foreign producers could esasily adhere to requirements of the Gas Guzzler law. Furthermore, it held that *GATT* only prevented protectionist measures but not measures in

---

[1142] Thomas J. Schoenbaum, "International Trade and Protection of the Environment: The Continuing Search for Reconciliation" (1997) 91 *AJIL* 168, 300; for further examples see Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 37-8.

[1143] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford , Portland: Hart Publishing, 2007) 120; on the ineffectiveness of Special and Differential Treatment and options for a new framework see Bernard Hoekman, "Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment" in Ernst-Ulrich Petersmann (ed), *Reforming the World Trade System, Legitimacy, Efficiency and Democratic Governance* (Oxford: Oxford University Press, 2005) 223-245; Peter Sutherland (Chairman) et al, "The Future of the WTO: Addressing institutional challenges in the new millennium" *Report by the Consultative Board to the Director-General Supachai Panitchpadki* (Geneva: WTO, 2004) par. 94 concerning GSPs and "developed country lobbying agendas".

[1144] The Gas Guzzler Tax was one of three measures examined in *United States – Taxes on Automobiles* (*DS31/R)* GATT Panel Report, not adopted, 11 October 1994.

accordance with national environmental protection laws.[1145] Therefore art. III *GATT* was not violated.

3 *EC - Hormones Cases*

A more inwardly oriented case, concering the protection of the right to health of the importing state's population, yet still affecting corporations abroad was the *EC-Hormones Case*.[1146] The effects on the right to health by new developments in WTO law are reflected in the decisions concerning this case. Already before the foundation of the WTO the US and Canada brought a case before a *GATT* Panel against the EC, because they were of the opinion that the EC import ban of meat from beef treated with hormones violated *GATT* law. In this first dispute the US and Canada were not successful. It was only due to the stricter rules of the new *SPS Agreement*[1147] that later allowed the DSB to find that the import ban violated WTO law by not being consistent with art. 5.1 *SPS*.[1148]

The *Hormones* cases[1149] dealt with EC import bans on US and Canadian meat and meat products, because the EC had passed the *Council Directive 88/146/EEC Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action.*[1150] The US and Canada considered this to be a breach of Articles III or XI of the *GATT*, dealing with National Treatment on Internal Taxation and Regulation and the General Elimination of Quantitative

---

[1145] See also Richard Senti, *Die WTO im Spannungsfeld zwischen Handel, Gesundheit, Arbeit und Umwelt* (vol. 32, Baden-Baden: Nomos, 2006) 39, 49; the case is also examined in Andreas Diem, *Freihandel und Umweltschutz in GATT und WTO* (Baden-Baden: Nomos, 1996) 46-8.

[1146] *European Communities - Measures Concerning Meat and Meat Products ("Hormones")* WT/DS26/R/USA (26 January 1996) WT/DS48/R/CAN (18 August 1997) WT/DS26/AB/R and WT/DS48/AB/R (16 January 1998).

[1147] *Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)* (1995).

[1148] Wolfram Spelten, *WTO und nationale Sozialordnungen* (vol.11, Berlin: Duncker & Humblot, 2005) 217-9; on the stricter rules of *SPS* than *GATT* see also Caroline Dommen, "Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies" (2002) 24 *HRQ* 1, 17 and 22, stating that in *European Communities - Measures Affecting Asbestos and Products Containing Asbestos ("Asbestos")* WT/DS135/R (18 September 2000) and WT/DS135/AB/R (12 March 2001) the Panel did not require scientific proof for the health risks, but only applied a sort of reasonableness test.

[1149] *European Communities - Measures Concerning Meat and Meat Products ("Hormones")* WT/DS26/R/USA (26 January 1996) WT/DS48/R/CAN (18 August 1997) WT/DS26/AB/R and WT/DS48/AB/R (16 January 1998).

[1150] *Council Directive 88/146/EEC Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action* (1988).

Restrictions, and a breach of Articles 2, 3 and 5 of the *SPS* Agreement, dealing with Basic Rights and Obligations, Harmonization and the Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection, as well as a breach of Article 2 of the *TBT Agreement*,[1151] dealing with the Preparation, Adoption and Application of Technical Regulation by Central Government Bodies and of Article 4 of the *Agreement on Agriculture*,[1152] dealing with Market Access.

The Panel found that the import ban violated art. 3.1 and 5.1 and 5.5 *SPS*. They read as follows:

> Art. 3
>
> 1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.
>
> Art. 5
>
> 1. Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.
>
> 5. With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. Members shall cooperate in the Committee, in accordance with paragraphs 1, 2 and 3 of Article 12, to develop guidelines to further the practical implementation of this provision. In developing the guidelines, the Committee shall take into account all relevant factors, including the exceptional character of human health risks to which people voluntarily expose themselves.

The AB reversed the Panel's findings on art. 3.1 and 5.5 *SPS*, but upheld the finding that the import ban violated art. 5.1 *SPS*. The EC requested a reasonable period of time for the implementation of the findings. Retaliatory measures were

[1151] *Agreement on Technical Barriers to Trade (TBT)* (1995).
[1152] *Agreement on Agriculture* (1995).

imposed by the US because the EC did not implement the findings within the given period of time. In 2003 the EC introduced a new Directive, yet the US did not consider the new rules to be based on scientific grounds and claimed that it was still violating *SPS*. Several requests for consultation were filed in the following[1153] before a mutual acceptable solution was notified in 2009.[1154]

4 *Shrimp-Turtle*

Shrimp-Turtle[1155] dealt with similar issues as the *Tuna-Dolphin* panels described above, yet they are not pre-WTO and were adopted by the DSB. The requirement of a certificate that shrimp was caught turtle-friendly to be able to import shrimps and shrimp products into the US was held to violate art. XI *GATT* by both, the Panel and the Appellate Body. The most striking part for human rights triggered trade restrictions is the assessment of art. XX *GATT* by the Panel and the Appellate Body. Import bans on shrimp and shrimp products were imposed by the US to protect sea turtles. Only the states providing a certificate on their turtle-friendly harvesting methods were allowed to import shrimp and shrimp products into the US. The panel held that although the *GATT* preamble referred to "sustainable development" as being an aim of the WTO/*GATT*, the main aim was still the encouragement of free trade.[1156] Furthermore, it pointed out that a general preference for a multilateral approach was given as could be seen from art. III:2 *WTO Agreement*[1157] and art. 23.1 *DSU*

[1153] These were *United States - Continued Suspension of Obligations in the EC - Hormones Dispute* 3WT/DS320/R (31 March 2008) and WT/DS320/AB/R (16 October 2008) and *Canada - Continued Suspension of Obligations in the EC - Hormones Dispute* WT/DS321/R (31 March 2008) and WT/DS321/AB/R (16 October 2008).

[1154] See WTO Website, "Dispute Settlement: DS26" <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm> 1 May 2014.

[1155] *United States – Import Bans of Certain Shrimp and Shrimp Products ("Shrimp-Turtle")* WT/DS58/R (15 May 1998), WT/DS58/AB/R (12 October 1998).

[1156] Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 95.

[1157] Art. III:2 *Agreement Establishing the World Trade Organization, ("WTO Agreement" or "Marrakesh Agreement")* (1994) reads: "The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference."

Understanding.[1158] Therefore art. XX had to be interpreted narrowly. Like already in *Tuna I* the Panel found that only where the credible approaches of creating a multinational solution failed, a state may impose unilateral measures. Just like in *Tuna II* the Panel therefore argued that, if other states began to impose unilateral measures like the US did, this would undermine the world trade system by creating domestic laws contradicting one another and the aims of WTO/*GATT* by making world trade far less predictable instead of enhancing its predictability. The Panel found that domestic law of this kind was unduly influencing the policy of other states, thereby violating the sovereignty of the other states as defined in the *Rio Convention*.[1159] Not taking into account the measures individual states may have imposed to protect turtles and just to rely on a certain certificate issued by the US was a an unjustifiable discrimination.
As the Panel had begun its assessment of art. XX *GATT* with the *chapeau*,[1160] the Appellate Body had to assess the objectives of art. XX (b) and (g) itself, after criticizing the reverse order the Panel had used to determine whether a justification according to art. XX was given. According to the Appellate Body Art. XX (g) was fulfilled and therefore (b) did not have to be assessed. When examining art. XX (g) the Appellate Body explicitly referred to CITES and stressed that the term "resources" had to be interpreted dynamically, including the use of soft law sources.[1161] As far as the possible extraterritorial character of the US measures were concerned, the Appellate Body held that there was a sufficient link between the US and the subject of protection, *i.e.* the turtles, because the turtles in question were *migratory* turtles and occurred and/or

[1158] Art. 23.1 *Understanding on rules and procedures governing the settlement of disputes (Annex 2 of the WTO Agreement)* reads: "When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding."
[1159] This leads to the issues already examined in Chapter II and III of this inquiry on state sovereignity in extraterritorial contexts. The principle in *dubio pro mitius* is of no help where the sovereignties of two states are facing one another, but only for the interpretation of treaties and conventions in relation to the signatory states.
[1160] The *chapeau* is the preamble of art. XX that reads: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures"
[1161] See Mary E. Footer, "The (Re)Turn to 'Soft Law' in Reconciling the Antinomies in WTO Law" (2010) 11 *Melb. J. Int'l L.* 241, 262.

moved through waters under US jurisdictions as well. By referring to this link, the Appellate Body did not generally allow measures having extraterritorial effects, but only those where a sufficient link can be established.[1162] The Appellate Body then went on to assess the *chapeau*. It argued, similar to the Panel and *Tuna I* that unjustifiable discrimination was given for example because local protection measures were not taken into account when issuing the certificates and because of the lack of multinational negotiations to find multilateral solutions before imposing unilateral measures.[1163] The Appellate Body concluded that unilateral measures to protect endangered species were not generally *GATT*-inconsistent.

In 1997 Malaysia claimed under art. 21.5 *DSU* that the US had not properly implemented the findings of the *Shrimp-Turtle* decision.[1164] Malaysia was of the opinion that the US had to lift the import bans in order to adhere to the AB ruling, while the US was of the opinion that the *Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations* were sufficient to justify the remaining trade restrictions under art. XX (g) *GATT*. The *Shrimp-Turtle (Malaysia)* implementation Panel affirmed the US opinion, stressing that the obligation to negotiate multilateral agreements before implementing unilateral measures did not entail the obligation to conclude such an agreement, but to negotiate in good faith with the parties of the dispute. The AB upheld this ruling in Malaysia's appeal.[1165]

[1162] Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 152.

[1163] The other reasons given are more related to the individual case and therefore not mentioned or assessed any further in this enquiry. For their analysis and on reactions on the *Tuna-Dolphin* and *Shrimp-Turtle* decisions see for example Joseph Robert Berger, "Unilateral Trade Measures to Conserve the World's Living Resources: An Environmental Breakthrough For the *GATT* in the WTO Sea Turtle Case" (1999) 24 *Colum. J. Envtl. L.* 355, 371-388.

[1164] This amendment of the *United States - Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 by Malaysia ("Shrimp-Turtle (Malaysia)")* WT/DS58/RW (15 June 2001) and WT/DS58/AB/RW (22 October 2001).

[1165] *United States - Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 by Malaysia ("Shrimp-Turtle Malaysia")* WT/DS58/RW (15 June 2001) and WT/DS58/AB/RW (22 October 2001).

5 *EC - Asbestos*

The *Asbestos*[1166] case dealt with French measures - including an import ban - concerning asbestos and products containing asbestos. Canada was of the opinion that these measures violated *SPS* Agreement art. 2 (Basic Rights and Obligations), 3 (Harmonization) and 5 (Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection), *TBT* art. 2 (Preparation, Adoption and Application of Technical Regulation by Central Government Bodies) and *GATT* arts. III (National Treatment on Internal Taxation and Regulation), XI (General Elimination of Quantitative Restrictions) and XIII (Nullification or Impairment).

As Canada had not made sufficient claims concerning the exceptions under *TBT*, the Panel did not decide on those, but focused on *GATT* art. III:4 and XX (General Exceptions).

Art. III:4 *GATT* reads:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

The Panel held that asbestos fibres and fibres that could be substituted for them as such were like products in the sense of art. III:4 *GATT* and so were asbestos-cement products, and the fibro-cement products. Therefore, concerning these like products art. III:4 *GATT* was violated by the French Decree, because it discriminated against those products from Canada containing asbestos. However, this violation was justified under the introductory clause of art. XX and art. XX (b) *GATT*. They read as follows:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

[1166] *European Communities - Measures Affecting Asbestos and Products Containing Asbestos ("Asbestos")* WT/DS135/R (18 September 2000) and WT/DS135/AB/R (12 March 2001).

[…]

(*b*) necessary to protect human, animal or plant life or health;

In essence it was held that asbestos was a danger to the health of employees and consumers and that therefore no other more *GATT* friendly measure than banning production, import, export, processing and sale was given. That is why the measures were justified under art. XX (b) *GATT*.[1167]

The AB upheld the Panel's decision on art. XX *GATT*, but reversed the Panel's ruling on the likeness of products containing asbestos and those not containing asbestos. The AB argued that the health risks had to be considered as well when assessing the physical properties to determine the likeness of the products. It held that Canada had not sufficiently established that the products were like products and that therefore a violation of art. III:4 *GATT* could not be found.

6 *EC - Sardines*

In *EC-Sardines*[1168] Peru claimed that *EC Council Regulation (EEC) No. 2136/89*[1169] prevented Peruvian exporters from exporting products of the species *sardinops sagax sagax* as "sardines", although this species was listed among the species considered as sardines in the *Codex Alimentarius* standards. Therefore Peru claimed that the *Regulation* violated *TBT*'s arts. 2 (Preparation, Adoption and Application of Technical Regulations by Central Government Bodies) and 12 (Special and Differential Treatment of Developing Country Members) and *GATT* arts. I (General Most-Favoured-Nation Treatment), III (National Treatment on Internal Taxation and Regulation) and XI:1 (General Elimination of Quantitative Restrictions). Both, the Panel and the AB found that the *Regulation* violated art. 2.4 *TBT*, which reads:

> Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them,

---

[1167] See also Richard Senti, *Die WTO im Spannungsfeld zwischen Handel, Gesundheit, Arbeit und Umwelt* (vol. 32, Baden-Baden: Nomos, 2006) 17.

[1168] *European Communities - Trade Description of ("EC – Sardines")* WT/DS231/R (29 May 2002) and WT/DS231/AB/R (26 September 2002).

[1169] *Council Regulation (EEC) No. 2136/89 Laying down common marketing standards for preserved sardines and trade descriptions* (1989).

> as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

The Panel and the AB found that the *Codex Alimentarius* standards on sardines are neither ineffective nor inappropriate to fulfil the EC's legitimate perspectives of market transparency, consumer protection, and fair competition. This was because it had not been established that European consumers expect sardines not to be *sardinops sagax sagax* and because the very aim of the labelling of "sardines" provided for in the *Codex Alimentarius* standards was to enhance market transparency.[1170] The AB did not address further violations of art. 2 *TBT* or art. III *GATT* and the Parties found a mutually agreed solution in 2003.[1171]

7 *The* Kimberly Process Certification Scheme

An example for multilateral trade restrictions for the protection of human rights[1172] is the *Kimberly Process Certification Scheme* concerning conflict diamonds. It is a set of non-binding soft-law rules[1173] that were developed by governments, the international diamond industry and civil society organizations.[1174] In this case import bans are an example of smart sanctions as set out above, because they are intended to cut off non-state, but *de facto* ruling war parties in Sierra Leone from their main source of income, in this case the selling of diamonds.[1175] Human rights groups supported the idea of banning conflict diamonds, many diamond traders agreed on an obligatory certification for "conflict free" diamonds to support the sanction[1176] and the UN passed

---

[1170] See particularly *European Communities - Trade Description of ("EC – Sardines")* WT/DS231/R (29 May 2002) and WT/DS231/AB/R (26 September 2002) par. 287-290.
[1171] See WTO Website, Dispute Settlement: dispute DS231 <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds231_e.htm.> 1 May 2014.
[1172] See for example Susan Ariel Aaronson, "A Match Made in the Corporate and Public Interest: Marrying Voluntary CSR Initiatives and the WTO" (2007) 41 *J.W.T.* 629, 630 and 642-4.
[1173] Mary E. Footer, "The (Re)Turn to 'Soft Law' in Reconciling the Antinomies in WTO Law" (2010) 11 *Melb. J. Int'l L* .241, 274.
[1174] See Kimberley Process Website <http://www.kimberleyprocess.com>1 May 2014.
[1175] Olaf Poeschke, *Politische Steuerung durch Sanktionen?* (Wiesbaden: Deutscher Universitätsverlag, 2003) 85.
[1176] *Ibid.*

Resolutions A/RES/55/56[1177] and *S/RES/1459*[1178] to make sure the certification procedures were established and trade with uncertificated diamonds was banned worldwide.[1179] The WTO granted a waiver,[1180] putting an end to doubts concerning the accordance of the trade bans with WTO law.[1181] Needless to say that the unilateral imposition of such a broad-scale and worldwide embargo is not possible, but that these measures have to be confined to import or export bans of a smaller scale.

8 *GMO Cases*

"GMO" is the abbreviation for "genetically modified organism". The so-called *GMO-Cases*[1182] dealt with the import of such modified organisms into the EC. The EC did not allow the import of food containing GMOs due to a moratorium applied in 1998. The US, Canada and Argentina were of the opinion that this violated *SPS*; *TBT*, *GATT* and the Agricultural Agreement.

The Panel found that the moratorium itself was not an *SPS* measure, because it was no procedural requirement itself, but influenced the implementation of such requirements.[1183] Therefore the benchmark for the moratorium's *SPS* conformity was not art. 2 or 5, but art. 8 in connection with Annex C no. 1 (a) *SPS*,[1184]

[1177] UN General Assembly *Resolution A/RES/55/56* (29 January 2001).
[1178] UN Security Council *Resolution S/RES/149* (28 January 2003).
[1179] See UN General Assembly *Resolution A/RES/55/56* (29 January 2001); see also UN Security Council *Resolution S/RES/1306* (5 July 2000) especially A.2.3. and A.5.; UN Security Council *Resolution S/RES/1343* (7 March 2001) especially B.2. and B.6.
[1180] See WTO Website, WTO News: 2003 <http://www.wto.org/english/news_e/news03_e/goods_council_26fev03_e.htm> 1 May 2014.
[1181] Whether the waiver was in fact necessary to achieve WTO compatibility is doubted, see James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 94; on the issue of the *Kimberly Process Scheme* and WTO see also Krista Nadakavukaren-Schefer, "Stopping Trade in Conflict Diamonds: Exploring the Trade and Human Rights Interface with the WTO Waiver for the Kimberley Process" Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi Bonanomi (eds), *Human Rights and International Trade* (Oxford: Oxford University Press, 2005) 391; Joost Pauwelyn, "WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for 'Conflict Diamonds'" (2003) 24 *Mich. J. Int'l L.* 1177.
[1182] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products ("GMO")* WT/DS291/R, WTO/DS/292/R and WT/DS293/R (29 September 2006).
[1183] On the case see also Philipp Jehle, *Harmonisierung im Welthandelsrecht durch Verweis auf internationale Standards* (vol. 46, Baden-Baden: Nomos, 2008) 51-2.
[1184] Annex C of *SPS* dealing with Control, Inspection and Approval Procedures reads "Members shall ensure, with respect to any procedure to check and ensure the fulfilment of

because the approval procedures were not carried out with undue delay. Concerning the product-specific measures, the Panel reached the same conclusion. With regard to the EC's safeguard measures a violation of art. 5.1 and 2.2 *SPS*[1185] was found by the Panel, because the measures were not based on a risk assessment according to the requirements of *SPS* and were therefore considered to be applied without sufficient scientific evidence. Once more the EC asked for a reasonable period of time to implement the findings. After the period of time hade expired after extension, an agreement between the US and the EC was reached in 2008, and in 2009 a mutually agreed solution was found with Canada and in 2012 with Argentina.[1186]

9 *Tuna-Dolphin III*

In contrast to the earlier *Tuna-Dolphin* cases already mentioned, *Tuna-Dolphin III*[1187] did not deal with import bans by the US, but a label that was not mandatory for imports in the US. That dolphin-safe label was issued by the US Department of Commerce. The Act on the label provides that no matter where tuna is harvested, it must not be caught by "setting on"[1188] dolphins, otherwise

---

sanitary or phytosanitary measures, that: (a) such procedures are undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products".

[1185] Art. 2.2 *SPS* reads: "Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5."

[1186] See WTO Website, Dispute Settlement: DS291, DS292, DS293 at <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm> <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds292_e.htm> <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds293_e.htm> all 1 May 2014.

[1187] *United States - Measures concerning the importation, marketing and sale of tuna and tuna products ("Tuna-Dolphin III")* WT/DS381/R (15 September 2011) and WT/DS381/AB/R (16 May 2012).

[1188] As tuna associate with dolphins, particularly yellowfin tuna in the Eastern Tropical Pacific Ocean (ETP), "fishermen locate schools of underwater tuna by finding and chasing dolphins on the ocean's surface and intentionally encircling them with purse seine nets to harvest the tuna underneath. In the early years of fishing by setting on dolphins there was considerable incidental dolphin mortality." and "In contrast, because only mature yellowfin tuna are able to swim fast enough to "associate" with dolphins, the method of fishing by setting on dolphins produces a large catch of mature tuna appealing to the marketplace…" both from Mexico's written submission in *United States - Measures concerning the*

the tuna is not eligible for the dolphin-safe label. Within the Eastern Tropical Pacific Ocean (ETP), where Mexico is harvesting tuna, stricter rules for the protection of dolphins are applied. Depending on where the tuna is caught and which fishing method is used, different certificates have to be presented to be eligible for the label. The Act also prohibits any reference to dolphins on labels of tuna products in case the tuna is not caught in accordance with the requirements of the dolphin-safe label. Mexico was of the opinion that the requirements for the dolphin-safe label set out by the US Act violated *TBT* and *GATT*, because they were discriminatory and unnecessary. The Panel considered the label to be a technical regulation and that therefore *TBT* was applicable on the case, particularly art. 2.1, 2.2 and 2.4. The Panel also considered the label to be a *de facto* mandatory technical regulation as other labels referring to dolphins and the information that they were not harmed were not allowed under the US Act. However, the Panel found that Mexico had not established that Mexican tuna products were discriminated against, which means art. 2.1 *TBT* was not violated.Yet the Act was found to violate art. 2.2 *TBT*, because it was more trade-restrictive than necessary to accomplish the legitimate US objectives, *i.e.* to protect dolphins and to prevent misleading consumer information. The Panel found that a co-existence between the US Act and the *Agreement on the International Dolphin Conservation Program (AIDCP)* as suggested by Mexico was a less trade restrictive equivalent. As far as art. 2.4 *TBT* was concerned, the Panel ruled that the international standards referred to by Mexico were not appropriate or effective to achieve the perspectives the US was aiming for with its Act. That is why the US did not have to base its measures on these standards and therefore art. 2.4 was found to be not violated. *GATT* issues were not decided on by the Panel.

The AB decided in May 2012 that the US measures did in fact violate art. 2.1 *TBT*, because most Mexican tuna products were excluded from the dolphin-safe label, which was a big competitive disadvantage on the US market. In addition, the label did not take into account different fishing techniques in different areas of the ocean, addressing dolphin mortality outside the ETP only by prohibiting the setting on dolphins, while the use of other fishing techniques harming

---

importation, marketing and sale of tuna and tuna products ("Tuna-Dolphin III") WT/DS381/R (15 September 2011) par. 4.7. and 4.11.

dolphins did not prevent the tuna from being eligible for the dolphin-safe label. The AB argued that in doing so, the label did not address the risks for dolphins even-handedly. The AB also reversed the Panel's findings on art. 2.2, stating that other measures proposed by Mexico were not equivalent to the challenged one with regard to the objectives, because the dolphin protection within the ETP would be lowered. It also found that the *Agreement on the International Dolphin Conservation Program (AIDCP)* was not an international standard in the sense of art. 2.4 *TBT*, because new members could only accede by invitation. It also criticized that the Panel had not decided on art. I:1 and III:4 *GATT*.

B *Challenges for trade restrictions implemented by WTO member states*

As just seen from the examples mentioned, protecting rights - be they internationally recognized or not - by using the means of trade restrictions may be difficult, because international trade is governed by WTO law. On the other hand, trade bans and labelling schemes seem not far-fetched when tackling the issue of human rights and TNCs acting abroad, at least when the products are finally imported into the home state. Therefore a closer look on trade bans and labelling schemes as a possible state option and the main challenges they face under WTO law will be provided in the following, before the relationship of WTO law and human rights will be assessed in more detail below.

1 *Trade bans*

As already mentioned in the beginning of this chapter, trade bans can be considered "tailored trade restrictions", being like a more TNC-focused, more flexible, broader and easier applicable version of sanctions as assessed in the preceding chapter. At least where the foreign subsidiaries of home state TNCs export their products into the home state, trade bans could therefore be an adequate state option to tackle the human rights issue. Yet as could be seen from the examples above, trade bans are challenged by WTO law in various aspects. Mainly the compatibility with art. III, XI and XX *GATT*, art. 2, 3, 5 *SPS* and art. 2 *TBT* is challenged as could be seen above.

2 *Labelling*

A less restrictive alternative to trade bans could be labelling. There are different labelling schemes, imposed by private actors only, sponsored by governments, linked to codes of conduct, etc, so general observations are hardly possible.[1189] A major NGO in this area many consumers may know is Fairtrade Labelling (FLO) with 17 sections in 40 states, labelling for example coffee, rice, tea and fruits.[1190] Yet as this enquiry deals with home state options to control the human rights record of its TNCs acting abroad, only state sponsored labelling is assessed here. Labels that come to mind are positive labels, *i.e.* that PPM standards are in accordance with human rights, as well as negative ones,[1191] *i.e.* that human rights were violated and even a combination of these labels - most likely the positive label - with an "absence label", a label stating that no proof of human rights conformity was produced. These labelling schemes may be voluntary as well as mandatory. Of course labelling measures may be import restrictions, for example when banning the import of non-labelled products,[1192] as already sketched above. Yet when using labels as a less restrictive means to import bans, only allowing for informed consumer choice, there might be less issues arising concerning the compatibility with WTO law.[1193] However, this, at least at first glance, may also be a flaw. Due to being less trade restrictive, labels not amounting to trade bans are often considered rather ineffective.[1194] As

[1189] See Carlos Lopez-Hurtado, "Social Labelling and WTO Law" (2002) 5 *JIEL* 719, *2.
[1190] Richard Senti, *Die WTO im Spannungsfeld zwischen Handel, Gesundheit, Arbeit und Umwelt* (vol. 32, Baden-Baden: Nomos, 2006) 32; on labels dealing with child labour see Janet Hilowitz, "Social Labelling to combat Child Labour: Some Considerations" (1997) 136 *ILR* 215.
[1191] On the effectiveness of positive and negative labels see for example Chiara Lombardini-Riipinen, "Time for negative eco-labels?" (2005) at <http://endogenouspreferences.wordpress.com/2005/06/27/post11/> 1 May 2014, wfr.
[1192] See Carlos Lopez-Hurtado, "Social Labelling and WTO Law" (2002) 5 *JIEL* 719, *9, referring to *India - Measures Affecting the Automotive Sector* WT/DS146/R and WT/DS175/R (21 December 2001) and WT/DS146/AB/R and WT/DS175/AB/R (19 March 2002) paras 7.223 and 7.224.
[1193] In the *World Trade Report 2012* the issue of non-tariff measures, including labelling, is addressed, see *World Trade Report 2012*, WTO Website, Resources, <http://wto.org/english/res_e/publications_e/wtr12_e.htm> 1 May 2014; on mandatory and voluntary labelling under *TBT* and *GATT* see also Jeroen Denkers, *The World Trade Organization and Import Bans in Response to Violations of Fundamental Labour Rights* (Antwerp, Oxford, Portland: Intersentia, 2008) 55-64.
[1194] See on the issue of labelling compared to trade bans also Robert Howse and Donald Regan, "The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism'

Harrison puts it the effectiveness of labelling "is likely to be limited", because labelled products are usually more expensive than unlabelled ones, their market therefore limited and a large-scale use of labelling unrealistic in the near future.[1195] Yet a 2008 field experiment achieved different results, suggesting that consumers are willing to pay higher prices for products produced under good working conditions[1196] and other surveys had similar outcomes.[1197] This suggests that enabling consumers to make an informed choice could make human rights issues an immediate economic factor for TNCs. That large-scale or global labelling is rather unrealistic can on the other hand be seen when considering that Belgium's attempt to create a voluntary social labelling scheme has been criticized as violating WTO law and interfering with the ILO's authority by the Association of South East Asian Nations (ASEAN)[1198] and that a global social

---

in Trade Policy" (2000) 11 *EJIL* 249, 273-4, arguing that labels are not equally effective to trade bans in many situations; note however that they are not claiming labelling *as such* to be ineffective.

[1195] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 183; see also Paul Cook, "Law of Trade in Human Rights: A Legal Analysis of the Intersection of the General Trade Agreement of Tariff's Article XX (b) and Labor Rights of Children" (University of California, Los Angeles, 2012) available at <http://works.bepress.com/paul_cook/3> 1 May 2014, 33.

[1196] The demand even increased when the price was raised, see Michael J. Hiscox and Nicholas Smyth, *Is there Consumer Demand for Improved Labor Standards? Evidence from Field Experiments in Social Product Labeling* (Version: 3/21/08) available at <http://www.people.fas.harvard.edu/~hiscox/SocialLabeling.pdf> 1 May 2014.

[1197] See Alex B. Thiermann and Sarah Babcock, "Animal welfare and international trade" (2005) 24 *Rev. Sci. Tech. (Off. int. Epiz.)* 747, 750-1 on eggs; Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures addressing Non-Trade Concerns. A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Process and Production Methods* (The Hague: Ministry of Foreign Affairs of the Netherlands, 2007) 64.

[1198] Committee on Technical Barriers to Trade, "Minutes of the Meeting held on 30 March 2001" G/TBT/M/23 (8 May 2001) para. 9-18, particularly par. 15 other labelling schemes are also mentioned and challenged by WTO members in this Report; Jeroen Denkers, *The World Trade Organization and Import Bans in Response to Violations of Fundamental Labour Rights* (Antwerp, Oxford, Portland: Intersentia, 2008) 54-8; James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 183; giving a short overview on the restistence is Christine Breining-Kaufmann, "The Legal Matrix of Human Rights and Trade Law: State Obligations versus Private Rights and Obligations" in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi Bonanomi (eds), *Human Rights and International Trade* (Oxford: Oxford University Press, 2005) 95, 111; on the Belgian law see also Bruno Melckmans, "Strengths and weaknesses of Belgium's social label" in Luc Demaret (ed), *Corporate Social Responsibility: Myth or Reality?* (Geneva: ILO, 2003) 41.

label suggested by the ILO was opposed by ILO member states.[1199] This is regrettable, as broad-scale labelling could indeed allow the consumers to make an informed choice, and in some sectors, where there are hardly any labels so far enable choices at the first place.[1200] Yet although broad-scale labelling might not be realised in the near future, unilateral approaches could be strengthened. In *Tuna-Dolphin I* mentioned above, the Panel, after rejecting the application of art. IX,[1201] held that voluntary "dolphin-safe" labels were not violating art. I:1 *GATT* once they met the MFN treatment, because they did not make PPM standards a requirement for sale in the importing state nor did they grant government benefits. It is solely the free choice of the consumer - enabled by the label - that could cause a disadvantage for non-labelled products.[1202] In *Thailand-Cigarettes* the Panel proposed labelling as a less trade restrictive means than import bans under art. XX *GATT*.[1203] Labels, particularly eco-labels have also been subject to WTO assessment by the Special Committee on Trade and Environment as well as the *TBT* Committee[1204] and have been subject of the *2005 World Trade Report*.[1205] Yet so far no clear or generally accepted results

---

[1199] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 183; Robert O'Brien, Anne Marie Goetz, Jan Aart Scholte and Marc Williams, *Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements* (Cambridge: Cambridge University Press, 2000) 97-9, 104-5 this shows that no change is in sight as the ASEAN states when opposing the Belgian law just mentioned argued that the ILO was the authority to deal with labour rights and that the unilateral Belgian approach was bringing issues to the WTO that did not belong there, see Committee on Technical Barriers to Trade, "Minutes of the Meeting held on 30 March 2001" G/TBT/M/23 (8 May 2001) par. 15.

[1200] See Carlos Lopez-Hurtado, "Social Labelling and WTO Law" (2002) 5 *JIEL* 719, *3.

[1201] *United States - Restrictions in Imports of Tuna (DS21/R - 39S/155) ("Tuna-Dolphin I")* GATT Panel Report, not adopted, 3 September 1991, para.5.41.

[1202] *United States - Restrictions on Imports of Tuna (DS21/R - 39S/155) ("Tuna-Dolphin I")* GATT Panel Report, not adopted, 3 September 1991, par. 5.42; see also James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 182 -3; on the advantages of labelling see also Robert M. Stern and Katherine Terrell, "Labor Standards in the World Trade Organisation" *Discussion Paper No 499, University of Michigan* (Aug 2003) 10; on labelling in the context of child labour see Janelle M. Diller and David A. Levy, "Child Labor, Trade and Investment: Towards the Harmonisation of International Law" (1997) 91 *AJIL* 663.

[1203] *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes (DS10/R – 37S/200) ("Thailand - Cigarettes")* GATT panel Report 5 October 1990, adopted 7 November 1990, par. 77.

[1204] Carlos Lopez-Hurtado, "Social Labelling and WTO Law" (2002) 5 *JIEL* 719.

[1205] *World Trade Report 2005*, WTO Website, Resources <http://www.wto.org/english/res_e/publications_e/wtr05_e.htm> 1 May 2014.

concerning social labelling have been produced. Nevertheless some argue that labels may be the very link to make PPMs a product-related criterion.[1206] Although *Tuna-Dolphin III* brought some clearance concerning the *TBT Agreement*, the subject still remains a complex one, particularly where non-incorporated PPMs are the issue,[1207] because these PPM are only of indirect matter for trade and therefore difficult to deal with under trade law.[1208] Therefore when dealing with WTO law in more detail below, the focus is not on trade bans but broader, to include labelling as well when assessing on art. III and XX *GATT* and art. 2 *TBT*.[1209]

II RELATIONSHIP OF HUMAN RIGHTS LAW AND WTO LAW

As just seen labels as well as trade bans have already been assessed by the *GATT* panels and the DSB, mainly concerning the domestic protection of health and environmental issues, and in most cases the measures adopted by the member states were not found to be inconsistent with *GATT*/WTO law. One could therefore jump at the conclusion that human rights protection and free trade are mutually exclusive and trade law is not allowing for any human rights protection. The reason for this could be that although the trade law and human rights law systems deal with similar situations,[1210] they were created as two separate areas of law and have also developed separately.[1211] Human rights for

[1206] See for example Jeroen Denkers, *The World Trade Organization and Import Bans in Response to Violations of Fundamental Labour Rights* (Antwerp, Oxford, Portland: Intersentia, 2008) 54-67 wfr.
[1207] WTO, "labelling" WTO Website <http://www.wto.org/english/tratop_e/envir_e/labelling_e.htm> 1 May 2014.
[1208] *World Trade Report 2005*, WTO Website, Resources <http://www.wto.org/english/res_e/publications_e/wtr05_e.htm> 1 May 2014, 34.
[1209] See for the approach of assessing art. III, XX *GATT* and art. 2 *TBT* when assessing labelling also for example Carlos Lopez-Hurtado, "Social Labelling and WTO Law" (2002) 5 *JIEL* 719; see also *Economic, Social and Cultural Rights, Analytical Study of the High Commissioner for Human Rights on the fundamental principle of non-discrimination in the context of globalization* E/CN.4/2004/40 (15 January 2004) par. 43-50.
[1210] Thomas Cottier, "Trade and Human Rights, A Relationship to Discover" (2002) 5 *JIEL* 111, 112, referring to slavery.
[1211] Caroline Dommen, "Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies" (2002) 24 *HRQ* 1, 3; Iris Halpern, "Tracing the Contours of Transnational Corporations' Human Rights Obligations in the Twenty-First Century" (2008) 14 *Buff. HRL Rev.* 129, 131; James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 34.

example have been in the focus of development of public international law after World War II and the holocaust, while trade law has not.[1212] However, it would be too rash to conclude that the two areas of law cannot be linked. Why the two areas should be linked and how this could be done within the next couple of decades based on the developments already taking place, will be assessed in the following, after sketching the reasons for the differences of the two systems in more detail.

A *WTO: core principles*

To be able to understand the differences between the two areas of law, not only human rights law that has already been examined in more detail in this enquiry, but also trade law has to be understood. As this chapter focuses on WTO law, an overview about its core principles will be given in the following. However, it would go beyond the scope of this research to give more than a short overview over the principles relevant for trade bans and labelling as a means of human rights protection. Some rules relevant for this enquiry will be assessed in more detail below.

Two core principles of the WTO that can be found in all three agreements assessed in more detail in the following, *i.e. GATT*, *SPS* and *TBT*, are the Most-Favoured-Nation status, prohibiting discrimination based on the origin of products and the National Treatment requirement, a non-discrimination rule, prohibiting less favourable treatment of foreign products compared to "like" domestic products.[1213] The *SPS* Agreement contains further basic provisions like the necessity requirement, demanding that the trade restriction must not be more trade restrictive than necessary, the scientific disciplines, requiring that measures are based on scientific evidence, the goal of harmonization by the use of international standards and the obligation not to arbitrarily or unjustifiably

[1212] Thomas Cottier, "Trade and Human Rights, A Relationship to Discover" (2002) 5 *JIEL* 111, 112.

[1213] For *GATT* see for example Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization* (2nd ed, Oxford, New York: Oxford University Press, 2006) 3; for *SPS* and *TBT* see for example Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge: Cambridge University Press, 2008) 842 and 817.

discriminate or use disguised trade restrictions.[1214] Other basic substantive provisions of the *TBT Agreement* apart from MFN and National Treatmen are also the necessity requirement, and the use of international standards as a base for the restrictions.[1215]

A further core principle of *GATT* is the prohibition of quantitative restrictions in art. XI *GATT*.[1216] As Harrison puts it "[t]he fundamental aim of the *GATT* system is therefore to attempt to ensure equality in terms of equal treatment of products from all WTO Member States, whatever their origin or destination."[1217]

As far as the human rights protection in the TNC context, *i.e.* by trade bans and labelling, is concerned, art. III (National Treatment) as well as XI may be violated, depending on whether the restriction is implemented and applied as a border measure, or an internal measure. The former are affecting the importation of the product, whilst the latter are affecting the imported product.[1218] This already shows that the nature of the restriction may depend on its particular implementation and application in the very case at issue. Trade bans for example are usually border measures and are therefore covered by art. XI *GATT* as could be seen in the *Tuna-Dolphin* and *Shrimp-Turtle* cases above, dealing with import bans. Prohibitions of sale or labelling requirements not being required for the importation itself are usually internal measures and covered by art. III *GATT* as could be seen in *EC-Asbestos* and also a little at *Tuna-Dolphin III*.[1219] Yet there

---

[1214] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge: Cambridge University Press, 2008) 842.

[1215] *Ibid.* at 817.

[1216] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford , Portland: Hart Publishing, 2007) 11-2; on the issue whether the intent of the legislator and regulator is relevant when deciding whether a measure is protectionist or not see *Japan - Taxes on Alcoholic Beverages* (11 July 1996) and WT/DS8/AB/R, WT/DS/10/AB/R, WT/DS11/AB/R (4 October 1996), 27*; Canada - Certain Measures Concerning Periodicals* WT/DS31/R (14 March 1997) and WT/DS31/AB/R (30 June 1997) 30-2.

[1217] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 12.

[1218] For the matter of distinguishing art. III and art. XI see *Argentina-Measures Affecting the Export of Bovine Hides and the Import of Finished Leather* WT/DS155/R (19 December 2000); *European Communities - Regime for the Importation, Sale and Distribution of Bananas ("EC-Bananas III")* WT/DS27/R (22 May 1997) and WT/DS27/AB/R (9 September 1997); *India - Measures Affecting the Automotive Sector* WT/DS146/R and WT/DS175/R (21 December 2001) and WT/DS146/AB/R and WT/DS175/AB/R (19 March 2002).

[1219] See also Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures addressing Non-Trade Concerns. A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of*

are also cases where one measure may fall into the scope of both articles, depending on its different specific effects.[1220] As this distinction can only be drawn properly by single case analysis and this enquiry deals with state options in a more general way, to assess the issue of how to distinguish between art. III and art. XI would go beyond the scope of this research. It should be sufficient to keep in mind that the admissibility under *GATT* may depend on the particular implementation of a measure.

Furthermore, it should be noted that even if art. III or XI are violated, there is still the possibility of an exception under *GATT*, for example when fulfilling certain domestic policy objectives or protecting the national security, as provided for in art. XX and XXI *GATT*.[1221] There are also other exceptions to the core principles of *GATT*. For example according to art. XIII *GATT* a waiver can be sought, allowing for temporary deviation from *GATT* duties as has been done for the *Kimberley Scheme*. Such waivers have also been used for permitting for example GSPs[1222] with human rights clauses under certain conditions.[1223] Art. XXI (c) allows for deviations from *GATT* in cases of UN SC decisions and art. XIX allows a state to protect its domestic producers from "serious injury"[1224], yet the latter is not a likely scenario for trade restrictions in the TNC context[1225] as has been outlined in earlier chapters of this enquiry. So at least as far as measures going beyond countermeasures as assessed in the preceding chapters are concerned, art. XX seems to be more promising than arts.

Measures concerning Non-Product-Related Process and Production Methods (The Hague: Ministry of Foreign Affairs of the Netherlands, 2007) 54-5 stating that case law suggests that laws and regulations dealing with unincorporated PPMS do not fall automatically under art. XI *GATT*, but are concerned internal measures under art. III *GATT*.

[1220] See *India - Measures Affecting the Automotive Sector* WT/DS146/R and WT/DS175/R (21 December 2001) and WT/DS146/AB/R and WT/DS175/AB/R (19 March 2002) especially par. 7.224.

[1221] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 12.

[1222] See *ibid.* at 108; see for the issues connected to such a use Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization* (2nd ed, Oxford, New York: Oxford University Press, 2006) 773-4.

[1223] These are binding requirements, see *European Communities - Conditions for Granting of Tariff Preferences to Developing Countries* Report of the AB WT/DS246/AB/R adopted 4 April 2004 there it was also held that different levels of development require different treatment, see par. 163-173.

[1224] Art. XIX:1 *GATT*.

[1225] On this issue see Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 100.

XXI and XIX.[1226] The issue that arises for the topic of this enquiry is whether and to what extent human rights issues as part of public international law and binding principles imposing obligations on the signatory states are taken into account when assessing and applying these exceptions.[1227]

B *Tensions between human rights law and WTO law*

While trade and human rights cannot be considered as contradicting each other *per se* as already sketched above,[1228] the issue assessed in this enquiry shows that tensions do exist. Different underlying principles and aims, the legal relationship of human rights law and trade law and the role of the DSB are factors that suggest human rights and trade law do not have much common ground. These factors will be outlined in the following.

1 *Different underlying principles and aims*

One of the most striking reasons given why trade and human rights law are said to not have been linked for a long time is the perception of the two areas of law as treating absolutely different issues and as trade law dealing with private law rather than public international law, because it deals with transactions of private actors.[1229] While WTO law grants rights and duties to member states, thereby affecting private actors, human rights law grants rights to individuals, obliging

[1226] On measures as answers to *erga omnes* obligations violations and *ius cogens* violations under art. XXI see below and Michael J. Hahn, *Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie* (Berlin u. a.: Springer, 1996) 363-373.
[1227] See James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 13-4.
[1228] See also for example Sarah Joseph, *Blame it to the WTO? A Human Rights Critique* (Oxford: Oxford University Press, 2011) 137-140 arguing that WTO law may in fact protect human rights by promoting trade that is "good" for human rights, referring to the example to the "Great Firewall of China" violating the freedom of expression.
[1229] For this and more reasons, see James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 34-5; for a detailed view on this issue also see Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge: Cambridge University Press, 2003) 30; see also Berta Esperanza Hernández-Truyol, Stephen J. Powell, *Just Trade: A New Covenant Linking Trade and Human Rights* (New York, London: New York University Press, 2009) 64 arguing that the Bretton Woods entities were "the private, economic arm to the public political United Nations".

states to fulfil their respective duties.[1230] That means there is a different means-end rationale. In addition, once more the debate on private actors and public international law is triggered. Another difference is the direction of protection granted by the different areas of law. Trade law tends to protect from non-discrimination by foreign countries while human rights are supposed to protect individuals against interference by their own governments.[1231] Therefore, human rights law is usually, at least in its traditional sense, somewhat more inwardly oriented that trade law.[1232] Furthermore, the moral reasoning underlying trade law is traditionally perceived as utilitarian and consequentalist, focusing on outcomes of individual utility rather than precedurs or acts on their own terms.[1233] The underlying moral reasoning of human rights law on the other hand is non-utilitarian, but liberal and deontological, focusing on the nature of an act itself with regard to its effect on the equal and moral worth and dignity of each individual instead focusing on the act's consequences and utility.[1234] Human rights law morals value the person as an end in itself rather than a means to ends of others or his own.[1235] So, once more, a different means-end rationale comes to notice.

[1230] Sarah Joseph, *Blame it to the WTO? A Human Rights Critique* (Oxford: Oxford University Press, 2011) 36; see also Berta Esperanza Hernández-Truyol, Stephen J. Powell, *Just Trade: A New Covenant Linking Trade and Human Rights* (New York, London: New York University Press, 2009) 65-6.

[1231] See Ernst-Ulrich Petersmann, "The WTO Constitution and Human Rights" (2000) 3 *Journal of International Economic Law* 19, 22.

[1232] See also Berta Esperanza Hernández-Truyol, Stephen J. Powell, *Just Trade: A New Covenant Linking Trade and Human Rights* (New York, London: New York University Press, 2009) 65-6 pointing out that WTO law accepts any state's titular leader as the state's appropriate representative, whereas human rights law accepts only those leaders as legitimate that act in accordance with basic human rights law.

[1233] See for example Frank J. Garcia, "The Global Market and Human Rights: Trading Away the Human Rights Principle" (1999) 25 *Brooklyn J. Int'l L.* 51, 67-9 wfr.

[1234] See for example *ibid.* at 69-72.

[1235] Iris Halpern, "Tracing the Contours of Transnational Corporations' Human Rights Obligations in the Twenty-First Century" (2008) 14 *Buff. HRL Rev.* 129, 137, referring to the "Kantian dignity"as for example also described in Carlos Manuel Vázquez, "Trade Sanctions and Human Rights - Past, Present, and Future" (2003) 6 *JIEL* 797, 837.

That for example environmental protection and free trade may have a challenging relationship was also addressed by the WTO secretariat in 1999.[1236] Harrison describes the main difference of trade and human rights law as follows:

> [I]nternational trade law is based on the commercial need for predictable rules that allow effective competition between equally treated market participants. Protection and promotion of human rights, on the other hand, requires the flexibility to take measures to stop abuses occurring, particularly with regard to the vulnerable or disadvantaged.[1237]

He goes on to explain that the principle of non-discrimination is inherent in both areas of public international law - trade law as well as human rights law, but that it has a different connotation or meaning in the two areas of law. While in trade law non-discrimination means "not to discriminate between nationals and non-nationals and to treat both equally in terms of market access in order to remove unnecessary barriers to trade",[1238] human rights law considers non-discrimination to be the tool "to achieve 'justice and equality between all individuals, whatever their status'."[1239] Non-discrimination in human rights law "is intrinsically linked with the principle of equality"[1240] and may require affirmative action, which can be considered a violation of the non-discrimination principle of international trade law.[1241] Furthermore, freedoms granted by human rights law are usually limited by rights of other individuals. In WTO law countervailing rights are not an acknowledged exception to foreign traders' freedoms.[1242] Yet this on the other hand shows, that human rights law is not immune to trade-offs and trade law's utilitarism and human rights law's

---

[1236] Håkan Nordström and Scott Vaughan, *WTO Special Studies 4: Trade and Environment* (Geneva: WTO, 1999).
[1237] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 141.
[1238] *Ibid.*
[1239] *Ibid.*
[1240] *Economic, Social and Cultural Rights, Analytical Study of the High Commissioner for Human Rights on the fundamental principle of non-discrimination in the context of globalization* E/CN.4/2004/40 (15 January 2004) par. 26
[1241] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 141-3 wfr; see also *Economic, Social and Cultural Rights, Analytical Study of the High Commissioner for Human Rights on the fundamental principle of non-discrimination in the context of globalization* E/CN.4/2004/40 (15 January 2004) par. 26
[1242] Sarah Joseph, *Blame it to the WTO? A Human Rights Critique* (Oxford: Oxford University Press, 2011) 38.

idealism might be reconciled "to indeed make the world a better and more prosperous place."[1243] In EU law human rights may for example confine economic freedoms and free trade.[1244]

2 *Application of overriding law rules?*

Due to these different perceptions of the same principle the question may arise which set of rules is more apt to deal with trade restrictions triggered by human rights violations abroad, WTO law or human rights law, particularly special human rights law like ILO Conventions.[1245] Although the *lex posterior* and *lex specialis* rules are widely accepted in public international law, and art. 3(2) *DSU* requires the DSB to interpret WTO treaties in accordance with costumary rules of interpretation of public international law, these rules are not of much help in this case to decide which law is overriding the other.[1246] This is because for the *lex posterior* rule, codified in art. 30 *Vienna Convention on the Law of Treaties,*[1247] it could be referred to various dates, for example the date of signing the Convention by the targeted state or the sanctioning state or the recommendation of the ILO to impose trade sanctions, depending on the point of view and interests in the issue.[1248] Furthermore, the application of the rule on customary law seems to be difficult as these rules and norms emerge

[1243] Berta Esperanza Hernández-Truyol, Stephen J. Powell, *Just Trade: A New Covenant Linking Trade and Human Rights* (New York, London: New York University Press, 2009) 63.
[1244] See for example *Schmidberger v Austria* C-112/00 (ECJ, 12 June 2003) and now also art. 6 (3) *Treaty of the European Union (TEU, "Maastricht Treaty")* (1993); see also Ernst-Ulrich Petersmann, "International trade law, human rights and the costumary international law on treaty interpretation" in Sarah Joseph, David Kinley and Jeff Waincymer (eds), *The World Trade Organization and Human Rights: Interdisciplinary Perspectives* (Cheltenham, UK and Northampton, MA, USA: Edward Elgar, 2009) 69, 75 wfr.
[1245] See James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 91.
[1246] See also Berta Esperanza Hernández-Truyol, Stephen J. Powell, *Just Trade: A New Covenant Linking Trade and Human Rights* (New York, London: New York University Press, 2009) 69; Sarah Joseph, *Blame it to the WTO? A Human Rights Critique* (Oxford: Oxford University Press, 2011) 49 wfr.
[1247] *Vienna Convention on the Law of Treaties (VCLT)* (1969).
[1248] See James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 90.

gradually.[1249] Similarly, the *lex specialis* rule, for example mentioned in art. 55 of the *ILC Draft Articles*[1250] mentioned earlier in this enquiry, will produce different results as to which set of rules is more specifically applicable depending on whether this issue is assessed from a trade law or human rights point of view. As trade law is supposed to deal with any kind of trade restrictions to overcome obstacles of free trade and create a multilateral framework providing for transparency and legal certainty it can be argued that not applying trade law to the cases of trade restrictions triggered by human rights violations would contradict the ideas of the WTO and foster circumventing WTO rules and DSB by simply referring to human rights norms and standards as the base for trade restrictions.[1251] Human rights law on the other hand tries to provide all human beings with their basic needs and rights deriving from their dignity, including labour standards, the right to health, which includes environmental protection, labour and property rights. While the competent authorities to decide on human rights violations and the consequences are UN agencies and procedures provided for in human rights treaties,[1252] trade restrictions are so to speak merely a by-product of the unilateral approach to enforce human rights.[1253] Not applying human rights law and relying on trade law instead can impede effective human rights protection, because it is claimed trade law panels are not taking into account human rights concerns properly and neither are they equipped or authorised to do so.[1254] So no set of rules can in this

---

[1249] Jeroen Denkers, *The World Trade Organization and Import Bans in Response to Violations of Fundamental Labour Rights* (Antwerp, Oxford, Portland: Intersentia, 2008) 150 wfr.

[1250] *ILC Draft Articles* "*Responsibility of States for Internationally Wrongful Acts"* (2001) UN A/RES/56/83.

[1251] See James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 189.

[1252] *Ibid.*

[1253] See *ibid.* at 188-9 explaining that human rights violations cannot be brought before WTO DSB, but they can be considered when trade restrictions answering these violations are assessed by WTO DSB.

[1254] See *ibid.* at 189; Gabrielle Marceau, "WTO Dispute Settlement and Human Rights" (2002) 13 *EJIL* 753, 777-8; Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization* (2nd ed, Oxford, New York: Oxford University Press, 2006) 924; Gudrun Monika Zagel, *WTO & Human Rights: Examining Linkages and Suggesting Convergence* (Voices of Development Jurists Paper Series vol. 2, no. 2, Rome: International Development Law Organization, 2005) 22.

context necessarily be considered to prevail over the other one.[1255] An easy answer for situations where both set of rules are applicable can therefore not be given.[1256]

3 *Role of the DSB*

A difficulty of human rights and trade law is that the DSB as the best functioning arbitral body in public international law is a trade law body only and there is no international equivalent for human rights.[1257] That there exists a better equipped dispute settlement mechanism for trade law than for human rights law can be explained by one of the main differences between the two areas of law - whereas rights and obligations under trade law are bilaterisable and "trade rulings can be enforced through the withdrawal of concessions by the wounded party",[1258] this is not the case for human rights as already set out in the preceding chapter. As Harrison explains, "human rights violations require a form of reparation that is far more intrusive into national jurisdiction"[1259] while trade law enforcement does not affect a state's sovereignty and domestic policies to the same extent.[1260] Its unique role means that all disputes involving trade law in some way will automatically be brought before the DSB. This is

---

[1255] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 91.
[1256] See Gabrielle Marceau, "WTO Dispute Settlement and Human Rights" (2002) 13 *EJIL* 753, 779-789 on the *Vienna Convention* and the issue of human rights and WTO law.
[1257] Regional courts are left aside here as the DSB is not restricted to regional action either; Paul Cook, "Law of Trade in Human Rights: A Legal Analysis of the Intersection of the General Trade Agreement of Tariff's Article XX (b) and Labor Rights of Children" (University of California, Los Angeles, 2012) available at <http://works.bepress.com/paul_cook/3> 1 May 2014, 9; Frank J. Garcia, "The Global Market and Human Rights: Trading Away the Human Rights Principle" (1999) 25 *Brooklyn J. Int'l L.* 51, 63; James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 182, 184; Pascal Lamy "The Place and Role of the WTO (WTO Law) in the International Legal Order" *Address before the European Society of International Law* (Paris, 19 May 2006) available at <http://www.wto.org/english/news_e/sppl_e/sppl26_e.htm> 1 May 2014.
[1258] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 184.
[1259] *Ibid.*
[1260] *Ibid.* and at 250.

also supported by the wording of Art. 23 *DSU Agreement*[1261] and XXIII *GATT*[1262] which provide authority for the WTO/*GATT* Panels and Appellate Bodies to assess *any* violations or impairments of *GATT* benefits and *any* impediments of attaining any objectives of WTO/*GATT*. Yet of course, the DSB is best equipped and authorised to approach cases from a *trade* law perspective. As Pauwelyn has put it so figuratively claiming that the WTO is not increasing the protection of non-trade issues "is very much like being disappointed that a bakery does not sell meat."[1263]

C *Developments taking place in WTO law*

So as just seen the relationship between human rights and trade law is a complex one. Yet this does not necessarily mean that there are insurmountable differences and that trade restrictions cannot be used at all to pressure compliance with human rights law. As will be set out in more detail in the following, the developments throughout *GATT* and WTO history and particularly recent case law suggest that the WTO is not generally opposed to taking into account other issues than solely trade.

1 *From* GATT *to WTO - broader integration*

The idea that at least environmental and labour rights should be considered when dealing with international trade law is not a new one. Environmental rights and the possibility to impose trade restrictions once resources like the atmosphere or a lake are polluted by a foreign producer in certain circumstances have been mentioned in 1971 by *GATT*, but then never again.[1264] Labour

[1261] Art. 23 *Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU Understanding)* (1994) mentions "violation of obligations or *other* nullification or impairment of benefits under the covered agreements" (emphasis added) and "impediment to the attainment of any objective of the covered agreements".

[1262] Art. XXIII *GATT* mentions nullification or impairment of benefits directly or indirectly accrued by the Agreement as the result of "the application by another contracting party of *any* measure, *whether or not* it conflicts with the provisions of this Agreement" (emphasis added) and "attainment of any objective of the Agreement is being impeded".

[1263] Joost Pauwelyn, "Recent Book on Trade and Environment: GATT Phantoms Still Haunt the WTO" (2004) 15 *EJIL* 575, 591.

[1264] GATT, *Industrial Pollution Control and International Trade. GATT Studies in International Trade No. 1*, (Geneva: GATT Secretariat, 1971) 15-18; Lorenz Khazaheh, "Oil

standards on the other hand have been an issue several times so far. Already when drafting the ITO-Charta fair labour conditions were referred to.[1265] During the Uruguay Round from 1986-1994 the idea was introduced again, but no social clause or reference to labour rights was included.[1266] In Singapore in 1996 the general director of the ILO was invited as a speaker on the issue of labour rights, but was disinvited again due to pressure by the Group of 15, which consists of developing states,[1267] and the ASEAN states.[1268] The ministers could only agree on stressing the importance of core labour rights, while expressing their opposition to protectionist use of a social clause and stating that the ILO was the organization in charge for labour matters.[1269] The latter was stressed once more for example in Geneva (1998),[1270] Doha (2001)[1271] and Hong-Kong

---

and the World Trade Organisation (WTO)" in Tobias Haller, Annja Blöchlinger, Markus John, Esther Marthaler, Sabine Ziegler (eds), *Fossil Fuels, Oil Companies and Indigenous Peoples* (vol. 1, Berlin, Wien Zürich: Lit Verlag, 2007) 469, 477.

[1265] See *Havana Charter* UN Doc. E/Conf.2/78 (1948), identical with Interim Commission for the International Trade Organization, *Final Act of the United Nations Conference on Trade and Employment* (New York, 1948), available at <http://www.wto.org/english/docs_e/legal_e/havana_e.pdf> 1 May 2014; see also Richard Senti, *Die WTO im Spannungsfeld zwischen Handel, Gesundheit, Arbeit und Umwelt* (vol. 32, Baden-Baden: Nomos, 2006) 25-27 wfr.

[1266] Wolfram Spelten, *WTO und nationale Sozialordnungen* (vol.11, Berlin: Duncker & Humblot, 2005) 43-5 wfr.

[1267] Robert Howse, „The World Trade Organization and the Protection of Workers' Rights" (1999) 3 *J. Small & Emerging Bus. L.*131, 166; Christoph Scherrer, Thomas Greven and Volker Frank, *Sozialklauseln, Arbeiterrechte im Wandel* (Münster: Westfälisches Dampfboot, 1998) 24-5.

[1268] Richard Senti, *Die WTO im Spannungsfeld zwischen Handel, Gesundheit, Arbeit und Umwelt* (vol. 32, Baden-Baden: Nomos, 2006) 78.

[1269] *Singapore Ministerial Declaration* WT/MIN(96)/DEC (18 December 1996), available at <http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm> 1 May 2014, par. 4; see also Richard Senti, *Die WTO im Spannungsfeld zwischen Handel, Gesundheit, Arbeit und Umwelt* (vol. 32, Baden-Baden: Nomos, 2006) 57; Wolfram Spelten, *WTO und nationale Sozialordnungen* (vol.11, Berlin: Duncker & Humblot, 2005) 44.

[1270] *Geneva Ministerial Declaration* WT/MIN(98)/DEC/1 (20 May 1998) available at <http://www.wto.org/english/thewto_e/minist_e/min98_e/mindec_e.htm> 1 May 2014 ,par. 2 with a general reference to the Singapore Declaration.

[1271] *Doha Ministerial Declaration* WT/MIN(01)/DEC/1 (20 December 2001), available at <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm> 1 May 2014, par. 8, reaffirming the *Singapore Declaration* concerning core labour standards; see on these developments also Richard Senti, *Die WTO im Spannungsfeld zwischen Handel, Gesundheit, Arbeit und Umwelt* (vol. 32, Baden-Baden: Nomos, 2006) 27.

(2005),[1272] while the discussion about a social clause were withdrawn from the agenda[1273] due to pressure by India and other developing countries.[1274] Yet there has been a shift from the rather policy and negotiation-based *GATT* towards more juridification, a more rule-oriented WTO[1275] and autonomy of WTO bodies such as the newly introduced DSB and the Secretariat with is General Director.[1276] In addition, new Agreements have been added to *GATT*. Two of them broadening the integration are the *TBT* and the *SPS Agreements*, which not only deal with non-discrimination, but also the ban on restrictions.[1277] The idea behind those new Agreements was to prevent states from using non-tariff trade barriers for protectionist means while at the same time allowing for a better application of health-related *GATT*/WTO law.[1278] Yet by imposing a ban on trade restrictions, more interference with national law for example protecting the

---

[1272] *Hong-Kong Ministerial Declaration* WT/MIN(05)/DEC/1 (18 December 2005), available at <http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm> 1 May 2014, referring to the *Doha Declaration*.

[1273] *Singapore Ministerial Declaration* WT/MIN(96)/DEC (18 December 1996), available at <http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm> 1 May 2014.

[1274] Richard Senti, *Die WTO im Spannungsfeld zwischen Handel, Gesundheit, Arbeit und Umwelt* (vol. 32, Baden-Baden: Nomos, 2006) 79, he also explains that the fear of protectionism may not bet the only reason for the opposition by the developing states, but that corruption and corporations owned by politicians and influential persons who do not want higher levels to apply due to the costs caused might be a reason as well; Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures addressing Non-Trade Concerns. A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Process and Production Methods* (The Hague: Ministry of Foreign Affairs of the Netherlands, 2007) 91.

[1275] See Marc Beise, *Die Welthandelsorganisation (WTO): Funktion, Status, Organisation* (Baden-Baden: Nomos, 2001) 258; Martin Nettesheim, "Von der Verhandlungsdiplomatie zur internationalen Verfassungsordnung. Zur Entwicklung der Ordnungsformen des internationalen Wirtschaftsrechts" in Claus Dieter Classen, Armin Dittmann, Frank Fechner, Ulrich M. Gassner, Michael Kilian (eds) *„In einem vereinten Europa dem Frieden der Welt zu dienen..." Liber amicorum Thomas Oppermann* (Berlin: Duncker & Humblot, 2001) 381, 386-9 and 392-3; Christian Tietje, *Normative Grundstrukturen der Behandlung nichttarifärer Handelshemmnisse in der WTO/GATT-Rechtsordnung* (Berlin: Duncker & Humblot, 1988) 113-125.

[1276] See on the development Wolfram Spelten, *WTO und nationale Sozialordnungen* (vol.11, Berlin: Duncker & Humblot, 2005)193-210 wfr; on the development from GATT to WTO WTO see Website, *World Trade Report 2007*, WTO Website, Resources <http://www.wto.org/english/res_e/publications_e/wtr07_e.htm> 1 May 2014.

[1277] Wolfram Spelten, *WTO und nationale Sozialordnungen* (vol.11, Berlin: Duncker & Humblot, 2005) 211 and 212-3 referring in particular to art. 2.2 *TBT* and art. 3.1 *SPS*.

[1278] Richard Senti, *Die WTO im Spannungsfeld zwischen Handel, Gesundheit, Arbeit und Umwelt* (vol. 32, Baden-Baden: Nomos, 2006) 16-20 wfr.

environment, may occur, because nation states are not only prevented from imposing tariffs, but also in the application of their national law as far as this application may be trade restrictive.[1279] In doing so, *TBT* and *SPS* are increasing the degree of integration by imposing more detailed rules and obligations, calling for harmonization in art. 2.4 *TBT* and art. 3.1 *SPS*.[1280] On the other hand, the *TBT Agreement* for the first time refers to PPM instead of only considering the characteristics of the final product[1281] and so does the *TRIPS*.[1282] After all this, it can be concluded that WTO law is regulating more areas of law now, some of which have been solely national law so far[1283] and that competences also including those formerly not treated by *GATT* law have shifted slowly from the member states to the WTO.[1284] Furthermore, the WTO is still open for changes and developments as can be derived for example from art III:2 WTO Agreement, where it is set our that "[t]he WTO may also provide a forum for further negotations among its Members".[1285] Yet the *SPS* and *TBT Agreements* are not only showing the growing influence of WTO law on national law, but also the opening up of WTO law towards other international law systems. *TBT* and *SPS* link WTO law to those international organisations that are relevant for

[1279] Wolfram Spelten, *WTO und nationale Sozialordnungen* (vol.11, Berlin: Duncker & Humblot, 2005) 162 referring to the development in the EC/EU from fundamental freedoms to bans on restrictions and at 219 referring to possible parallel developments in WTO law.
[1280] *Ibid.* at 212-3.
[1281] Tilman Makatsch, Gesundheitsschutz im Recht der Welthandelsorganisation (WTO) (Berlin: Duncker & Humblot, 2004) 88.
[1282] *Agreement on Trade-Related Aspects of Intellectual property Right (TRIPS)* (1994); Harald Großmann, Matthias Busse, Heike Fuchs, Georg Koopmann, *Sozialstandards in der Welthandelsordnung* (vol. 70, Baden-Baden: Nomos, 2002) 69; see also Bernard M. Hoekman, Michel M. Kostecki, *The Political Economy of the World Trading System* (3rd ed, Oxford: Oxford University Press, 2009) 630.
[1283] Wolfram Spelten, *WTO und nationale Sozialordnungen* (vol.11, Berlin: Duncker & Humblot, 2005) 213; see also Philipp Jehle, *Harmonisierung im Welthandelsrecht durch Verweis auf internationale Standards* (vol. 46, Baden-Baden: Nomos, 2008) 36.
[1284] Martin Nettesheim, "Von der Verhandlungsdiplomatie zur internationalen Verfassungsordnung. Zur Entwicklung der Ordnungsformen des internationalen Wirtschaftsrechts" Claus Dieter Classen, Armin Dittmann, Frank Fechner, Ulrich M. Gassner, Michael Kilian (eds) *„In einem vereinten Europa dem Frieden der Welt zu dienen..." Liber amicorum Thomas Oppermann* (Berlin: Duncker & Humblot, 2001) 381, 392; on the shift in non-trade areas see Wolfram Spelten, *WTO und nationale Sozialordnungen* (vol.11, Berlin: Duncker & Humblot, 2005) 214 and 295.
[1285] Art. III *Agreement Establishing the World Trade Organization, ("WTO Agreement" or "Marrakesh Agreement")* (1994); see also Wolfram Spelten, *WTO und nationale Sozialordnungen* (vol.11, Berlin: Duncker & Humblot, 2005) 214.

health and technical issues. The new Agreements do not establish own standards, but refer to and rely on standards developed by other international organisations.[1286] The openness of the WTO can also be found in other parts. Art XXIII. 1 (c) *GATT* for example allows for written representation or proposals in cases of nullification or impairment of benefits deriving from the Agreements not only in cases of failures to comply with *GATT* or the application of any measure, but also in the case of "the existence of any other situation".[1287] Furthermore, art. 14.2 *TBT* and art. V:1 and V:2 *WTO Agreement* support the consultation of non-trade experts in DSB cases.[1288]

2 *Developments in* GATT*/WTO case law*

As the DSB[1289] formulates and thereby defines "the precise nature of WTO obligations",[1290] it is decisive for this enquiry how Panels and the Appellate Body have taken into account non-trade matters so far and which *GATT*/WTO articles were used to do so. When having a look at the changes in WTO law and the higher degree of integration it becomes clear that for the DSB this may be help and hurdle at the same time. As just seen WTO has enlarged its scope[1291] and is regulating many different areas, including agriculture, product safety, industrial standards and is even asking for positive measures for example in the context of intellectual property.[1292] Overlaps or even interferences with non-

---

[1286] Richard Senti, *Die WTO im Spannungsfeld zwischen Handel, Gesundheit, Arbeit und Umwelt* (vol. 32, Baden-Baden: Nomos, 2006) 55-6.
[1287] *Ibid.* at 52-3.
[1288] *Ibid.* at 54-5.
[1289] On the development from *GATT* to WTO including the Panels and the DSB, see for example Wolfram Spelten, *WTO und nationale Sozialordnungen* (vol.11, Berlin: Duncker & Humblot, 2005) 41-3 wfr.
[1290] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 187.
[1291] *Ibid.* at 43-4; Ernst-Ulrich Petersmann, "The 'Human Rights Approach' Advocated by the UN High Commissioner for Human Rights and the International Labour Organisation: Is it relevant for WTO Law and Policy?" (2004) 7 *JIEL* 605, 610.11; on detractors of free trade see Jagdish Bhagwati, *Free Trade Today* (Oxford: Oxford University Press, 2002) 48.
[1292] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 44; on the developments in trade law and regulatory diversity under WTO see Veijo Heiskanen, "The Regulatory Philosophy of International Trade Law" (2004) 38 *JWT* 1.

trade regulations and interests, including human rights, may occur.[1293] Therefore a decision involving human rights could be asked from WTO Panels and the Appellate Body any time.[1294] How the DSB is will handle such a situation could be derived from cases dealing with non-trade issues like the ones outlined above. The DSB is neither equipped nor authorised to decide on non-trade issues, so that just like bringing cases obviously involving foreign policy matters before the DSB, the human rights cases also mean burdening the DSB with a position somewhere between a mediator of public international law and its court-like role in the WTO.[1295] Yet a mediator has to keep in mind a system as a whole and its protection as a whole when deciding individual cases.[1296] This may result in decisions like *Shrimp-Turtle* where the Panel argued that allowing for measures with extraterritorial *effect* would mean that all states might impose their own laws with extraterritorial effect, thereby undermining the multilateral system of *GATT*. This argument was rejected by the Appellate Body, because the Panel had not treated the case before it as an individual case only, but based its conclusion of enabling an undermining of *GATT* on the presumed action of *all* states.[1297] Likewise, the argument that allowing unilateral standards to force other states to adopt the same standards or to act in accordance with these standards would undermine the competitive effects given by different standards

[1293] See Frank J. Garcia, "The Global Market and Human Rights: Trading Away the Human Rights Principle" (1999) 25 *Brooklyn J. Int'l L.* 51, 67 arguing that "there is no such thing as a pure trade issue."; Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge: Cambridge University Press, 2003) 20.

[1294] ILA (ITLC), *Eighth Report of the Committee,* (Rio de Janeiro Conference, 2008), available at <http://www.ila-hq.org/en/committees/index.cfm/cid/24> 1 May 2014, par.42: Draft Proposal for a 2008 ILA Resolution on "International Trade Law and Human Rights"; Gabrielle Marceau, "WTO Dispute Settlement and Human Rights" (2002) 13 *EJIL* 753, 755 and 758.

[1295] See on foreign policy cases Kinka Gerke "Unilateral Strains in Transatlantic Relations: US Sanctions against Those Who Trade with Cuba, Iran and Lybia, and their Effects on the World Trade Regime" (1997) 47 *PRIF Report* (Summary) <http://hsfk.de/Publications.9.0.html?&no_cache=1&L=1&detail=193&no_cache=0&cHash=15c3b213e5> 1 May 2014.

[1296] Kinka Gerke, "Die unilaterale Versuchung: Die Sanktionen der USA gegen die Handelspartner Kubas, Irans und Libyens und ihre Auswirkung auf das Welthandelsregime" (1997) 2 *HSFK-Report* 1, 56.

[1297] *United States – Import Bans of Certain Shrimp and Shrimp Products ("Shrimp-Turtle")* WT/DS58/AB/R (12 October 1998) par. 116.

and "the trading system would start down a very slippery slope"[1298] would be such a mediator decision.[1299] In addition it becomes clear from these examples that the decision on what exactly *is GATT* law may be more important to the parties and WTO members than the dispute at issue in the particular case.[1300] That the WTO/*GATT* Panels have repeatedly expressed that they will only assess WTO/*GATT* provisions and will not take into account historical or socio-economic arguments produced by the parties[1301] is of no help for the latter issue, because as in the context of human rights triggered trade restrictions, clarifying what the applicable WTO law *is* and how it is to be interpreted is the very issue and complexity of the case. Once a case demands for such a decision, the DSB will have to clarify the relation of WTO and the respective non-trade issues in some way. Yet the Panels have not always done so in a satisfactory way. In the *Tuna-Dolphin I* decision for example the Panel's reasoning concerning art. XX *GATT* is somewhat circular.[1302] To simply argue that unilateral measures deprive other states from their rights under *GATT* is neither legally conclusive nor satisfactory or sufficient, as art. XX *GATT allows* for deviations from rights normally provided under *GATT*.[1303] It is the very article to *determine* the *degree* of such an allowed deviation. Yet still this decision is of importance as far as non-trade issues are concerned and reflects *GATT* openness already before *SPS* and *TBT Agreements* were in force. In *Dolphin-Tuna I* for example the Panel referred to multilateral agreements on the protection of species when considering whether the unilateral measure was covered by art. XX *GATT*. In doing so the Panel somewhat contradicted its own argument that it had no

---

[1298] GATT, *International Trade 1990-1991* (Vol. 1, Geneva: GATT Secretariat, 1992) chapter II "Trade and Environment" 22.

[1299] See Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 139.

[1300] Kinka Gerke, "Die unilaterale Versuchung: Die Sanktionen der USA gegen die Handelspartner Kubas, Irans und Libyens und ihre Auswirkung auf das Welthandelsregime" (1997) 2 *HSFK-Report* 1, 57.

[1301] See for example *Japanese Measures on Imports of Leather,* (L/5623 - 31S/94) GATT Panel Report, adopted 15/16 May 1984, par. 44; *Quantitative Restrictions against Imports of certain Products from Hong Kong (L/5511-30S/129)* Panel Report, adopted 12 July 1983, par. 27.

[1302] See also Steve Charnovitz, "GATT and the Environment, Examining the Issue" (1992) 4 *IEA* 203, 211.

[1303] See for example also Lorand Bartels "Art. XX of GATT and the Problem or Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights" (2002) 36 *JWT* 353, 383.

authority do decide whether the aim pursued by the unilateral measure within the scope of one of the objectives of art. XX *GATT* was legitimate.[1304] In addition, this means a restriction of the sovereignty of the state imposing the unilateral measure[1305] which could violate the *in dubio mitius* principle. Yet as the sovereignty of the *other* state involved and affected by the unilateral measures has to be taken into account as well, using multilateral agreements to decide on the justification of unilateral measures could be a way to go.[1306] A similar approach was taken in *Tuna-Dolphin II.* The decision referred to multilateral treaties like CITES and rejected their application, because not all *GATT* states had adopted them. Yet core human rights have to be observed by any state and core human rights treaties have been signed by all states.[1307] Their use is therefore not precluded like the use of CITES or the Stockholm Declaration. This shows the general openness of WTO law towards human rights law. In *Gas Guzzler Tax* the openness towards domestic protection measures concerning non-trade interests was also affirmed. The Panel decided that even in cases where domestic measures affect foreign products more

[1304] Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 115.
[1305] *Ibid.* at 116; Jeffrey L. Dunoff, "Reconciling International Trade with Preservation of the Global Commons: Can we prosper and protect?" (1992) 49 *Wash. & Lee L. Rev.* 1407, 1437.
[1306] The issue of the sovereignty of two states being in conflict with one another was already adressed earlier in this research in chapters II and III.
[1307] See the Renato Ruggiero, "Defining the Singapore Message", *Speech delivered at 30 September 1996*, printed version in (1996) 12 *WTO FOCUS* 7-8, available at <http://www.wto.org/english/res_e/focus_e/focus12_e.pdf> 1 May 2014; see also Joseph Robert Berger, "Unilateral Trade Measures to Conserve the World's Living Resources: An Environmental Breakthrough For the GATT in the WTO Sea Turtle Case" (1999) 24 *Colum. J. Envtl. L.* 355, 370, arguing that the AB in *Tuna-Dolphin II* affirmed the relevance of international treaties within *GATT*, giving guidance for future challenges of such treaties; *Economic, Social and Cultural Rights, Liberalisation of Trade and Services and Human Rights, Report of the High Commissioner* E/CN.4/Sub.2/2002/9 (25 June 2002) par. 5; Robert Howse and Ruti G. Teitel, "Beyond the divide; the International Covenant on Economic, Social and Political Rights and the World Trade Organization" in Sarah Joseph, David Kinley and Jeff Waincymer (eds), *The World Trade Organization and Human Rights: Interdisciplinary Perspectives* (Cheltenham, UK and Northampton, MA, USA: Edward Elgar, 2009) 39, 40; ILA (ITLC), *Eighth Report of the Committee,* (Rio de Janeiro Conference, 2008), available at <http://www.ila-hq.org/en/committees/index.cfm/cid/24> 1 May 2014, par. 38 and 42 the latter being the Draft Proposal for a 2008 ILA Resolution on "International Trade Law and Human Rights"; Richard Senti, *Die WTO im Spannungsfeld zwischen Handel, Gesundheit, Arbeit und Umwelt* (vol. 32, Baden-Baden: Nomos, 2006) 46.

severely than national products, these measures can be *GATT* consistent.[1308] Similarly, the WTO stresses on its website that in *Tuna-Dolphin II* the panel found that the "dolphin-safe" label also at issue was not violating *GATT*, because it was applied to all tuna products, "whether imported or domestically produced".[1309] Yet the decision also emphasises that using trade restrictions to change a state's behaviour is not permissible under *GATT*. However, as far as the use for the TNC context is concerned, this does not preclude the use of trade restrictions to change the behaviour of private actors like the TNCs subsidiary. In addition the panel opinion was overruled in a later decision. In contrast to *Tuna-Dolphin II* the Appellate Body stressed in *Shrimp-Turtle* that all measures imposed under art. XX *GATT* are aiming at a change in policy or behaviour of the state affected, thereby acknowledging this aim as *GATT*-consistent[1310] at least where a "sufficient nexus" exists. This suggests that unilateral measures, including import bans, may be imposed to protect exhaustible natural resources - and possibly also other objectives of art. XX *GATT* - where serious multinational negotiations failed and protection measures and standards by the individual states involved are taken into account when implementing the measure to avoid unjustifiable discrimination.[1311] In addition, the measure has to be applied in a transparent way, granting hearing to the state affected and providing appropriate time-limits to achieve the required protection standards.[1312] It is also indicative for the Appellate Body's openness towards unilateral protection measures that although the US measures were considered to be *GATT* inconsistent, the US was pleased with the decision, whereas the appellees were disappointed.[1313] So it can be concluded that the decisions of

[1308] On the case see Andreas Diem, *Freihandel und Umweltschutz in GATT und WTO* (Baden-Baden: Nomos, 1996) 46-8.
[1309] WTO, "cross-cutting and new issues, environment " WTO Website <http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm> 1 May 2014 referring to *United States - Restrictions on Imports of Tuna (DS29/R) ("Tuna-Dolphin II")* GATT Panel Report, not adopted, 16 June 1994.
[1310] Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 145 stating that whether indirect measures like intermediary embargoes are *GATT*-consistent remains doubtful.
[1311] See *ibid.* at 99 and 144.
[1312] *Ibid.* at 144-5.
[1313] On the US reaction see Nancy L. Perkins „World Trade Organization: United States – Import Prohibition of certain Shrimp and Shrimp Products" (1999) 38 *I.L.M.*, 118, 120; on the

Tuna -Dolphin II and *Shrimp-Turtle* mean a change in the interpretation of art. XX *GATT* concerning extraterritorial measures,[1314] because the location of the protected resources was not limited by art. XX (g).[1315] In addition, *Shrimp-Turtle*, including *Shrimp-Turtle (Malaysia)* broadened the application of art. XX (g) by including biological and renewable resources as well[1316] and unincorporated PPMs.[1317] The latter was affirmed in *Tuna-Dolphin III*. Furthermore, the AB particularly stressed that it had *not* decided

> that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have not decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have not decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.[1318]

US and EC reaction and the contrary reaction of many developing states see WTO Press Release, "Trade and Environment Bulletin" PRESS/TE/029 (30 July 1999).

[1314] Richard Senti, *Die WTO im Spannungsfeld zwischen Handel, Gesundheit, Arbeit und Umwelt* (vol. 32, Baden-Baden: Nomos, 2006) 39; for more lessons to be learned from the environmental cases see Douglas Irwin, *Free Trade under Fire* (Princeton and Oxford: Princeton University Press, 2002) 200-4.

[1315] On *Tuna-Dolphin* see Gudrun Monika Zagel, *WTO & Human Rights: Examining Linkages and Suggesting Convergence* (Voices of Development Jurists Paper Series vol. 2, no. 2, Rome: International Development Law Organization, 2005) 16; on *Shrimp-Turtle* see Richard Senti, *Die WTO im Spannungsfeld zwischen Handel, Gesundheit, Arbeit und Umwelt* (vol. 32, Baden-Baden: Nomos, 2006) 50 referring to *United States – Import Bans of Certain Shrimp and Shrimp Products ("Shrimp-Turtle")* WT/DS58/AB/R (12 October 1998) par. 5.15 and 5.18; see also Joost Pauwelyn, "Recent Book on Trade and Environment: GATT Phantoms Still Haunt the WTO" (2004) 15 *EJIL* 575, 586.

[1316] Richard Senti, *Die WTO im Spannungsfeld zwischen Handel, Gesundheit, Arbeit und Umwelt* (vol. 32, Baden-Baden: Nomos, 2006) 49.

[1317] Bernard M. Hoekman, Michel M. Kostecki, *The Political Economy of the World Trading System* (3rd ed, Oxford: Oxford University Press, 2009) 630 Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization* (2nd ed, Oxford, New York: Oxford University Press, 2006) 241; Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures addressing Non-Trade Concerns. A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Process and Production Methods* (The Hague: Ministry of Foreign Affairs of the Netherlands, 2007) 94.

[1318] WTO, "cross-cutting and new issues, environment " WTO Website <http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm> 1 May 2014 citing *United States – Import Bans of Certain Shrimp and Shrimp Products ("Shrimp-Turtle")* WT/DS58/R (15 May 1998), WT/DS58/AB/R (12 October 1998) par. 185.

This stresses the awareness the AB has concerning non-trade issues and their relatedness to trade law.

Other cases dealt with the changing criteria to differentiate products. The *Asbestos* case has for example shown that the WTO is open to accept an (incorporated) PPM as a criterion for trade restricting measures when the environmental concerns can be based on "global public good grounds".[1319] From *Gas Guzzler Tax* it can be concluded that different consumption characteristics may result in products that cannot be considered equal any longer.[1320] From *Tuna-Dolphin III* it can be concluded that that domestic laws on unincorporated PPMs, like the fishing method of tuna, may in fact be a technical regulations according to Annex 1.1 to the *TBT Agreement*.[1321] It can also be derived from the latter decision that state-run labels may be imposed in a non-discriminatory way when they are not more trade-restrictive than necessary to achieve the domestic law objectives according to 2.4 *TBT*. The latter allows for a certain amount of influence and control on domestic law issues and interests. *Shrimp-Turtle* and *Shrimp-Turtle (Malaysia)* demonstrated that even trade bans based on unincorporated PPMs may be admissible under WTO law.

However, the cases also showed that there are clear limits and restrictions concerning domestic law approaches to protect non-trade interests by using trade law. The *GMO cases* show that it is difficult to apply a higher level of protection if this protection cannot be based on a scientific base in accordance with *SPS* and this is a pretty strict one. *EC-Sardines* demonstrated the impact of international standards on WTO law and therefore also on the domestic law of the member states. *EC-Hormones* showed that the broader integration by introducing the *SPS* agreement made measures incompatible with WTO law that had been allowed before.[1322]

[1319] Bernard M. Hoekman, Michel M. Kostecki, *The Political Economy of the World Trading System* (3rd ed, Oxford: Oxford University Press, 2009) 630.

[1320] Richard Senti, *Die WTO im Spannungsfeld zwischen Handel, Gesundheit, Arbeit und Umwelt* (vol. 32, Baden-Baden: Nomos, 2006) 50.

[1321] *World Trade Report 2005*, WTO Website, Resources <http://www.wto.org/english/res_e/publications_e/wtr05_e.htm> 1 May 2014, 158.

[1322] See Joost Pauwelyn, "Recent Book on Trade and Environment: GATT Phantoms Still Haunt the WTO" (2004) 15 *EJIL* 575, 580, who states that by introducing the *SPS* and *TBT Agreements* non-discriminatory policies can now be challenged under WTO law.

Yet none of the cases dealt with labour standards and there is no such link for human rights, including labour rights, as there is for environmental and health issues in art. XX (g) *GATT* or *TBT* and *SPS*, so the protection of human rights is not possible in the same way.[1323] However, the WTO/*GATT* has already dealt with human rights issues. Although the *Kimberley Process Certification Scheme* is a rather unique example and not a "case", because it was not decided by a Panel or the AB and although it is disputed whether the waiver was in fact necessary to achieve *GATT*/WTO compatibility, it is nevertheless important concerning the WTO and human rights. For the first time the link between trade bans and human rights protection by a voluntary set of rules has officially been established and the WTO approved this approach.[1324] This shows the early awareness of WTO member states concerning human rights and trade and the willingness to reconcile the two areas of law once there is clearly no link to protectionism.[1325]

3 *Developments addressed within the WTO system*

As could already be seen in the preceding sections WTO law and the WTO itself are constantly developing, trying to cope with new issues, including domestic laws on environmental and health protection as well as labour rights.[1326] Most of these discussions and developments, like committees and council decisions, are in the non-binding "soft law" state.[1327]

The awareness of its rather negative perception by many citizens of the world is also reflected on the WTO website. Even a section called "10 common misunderstandings about the WTO", dealing, amongst other things, with the

---

[1323] See Bernard M. Hoekman, Michel M. Kostecki, *The Political Economy of the World Trading System* (3rd ed, Oxford: Oxford University Press, 2009) 621.
[1324] Susan Ariel Aaronson, "A Match Made in the Corporate and Public Interest: Marrying Voluntary CSR Initiatives and the WTO" (2007) *Journal of World Trade* 629, 643.
[1325] Susan Ariel Aaronson, "A Match Made in the Corporate and Public Interest: Marrying Voluntary CSR Initiatives and the WTO" (2007) 41 *J.W.T.* 629, 643-4.
[1326] See for example WTO Website Who we are, WTO, "cross-cutting and new issues, environment " WTO Website <http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm> 1 May 2014; see also WTO, "10 common misunderstandings about the WTO" WTO Website <http://www.wto.org/english/thewto_e/whatis_e/10mis_e/10m00_e.htm> 1 may 2014, misunderstandings 4 and 5.
[1327] Mary E. Footer, "The (Re)Turn to 'Soft Law' in Reconciling the Antinomies in WTO Law" (2010) 11 *Melb. J. Int'l L* .241, 247.

reproaches of being anti-green and anti-health can be found.[1328] The central themes in the WTO statements seem to be that (1) the WTO is not preventing member states from adopting measures protecting the environment and health as long as they are not discriminatory and that (2) the WTO is not the agency to define standards of environmental or health ptotection.

On the WTO Website it is stressed that environmental issues are considered to be "a specific concern"[1329] and the WTO emphasises the importance of the issue stating that "[t]he objectives of sustainable development and environmental protection are important enough to be stated in the preamble to the Agreement Establishing the WTO."[1330] Particularly in 2010 there have been a lot of workshops, conferences, etc on the subject of trade and environment as can be seen from the list provided on the WTO Website.[1331] Furthermore, "green provisions" of WTO law are listed e.g. art. XX *GATT*, *TBT* and *SPS* and the work of the Trade and Environment Committee (CTE) established in 1995 is described whose "duties are to study the relationship between trade and the environment, and to make recommendations about any changes that might be needed in the trade agreements."[1332] The basic findings of the CTE are summarized like this:

> Briefly, the WTO's committee says the basic WTO principles of non-discrimination and transparency do not conflict with trade measures needed to protect the environment, including actions taken under the environmental agreements. It also notes that clauses in the agreements on goods, services and intellectual property allow governments to give priority to their domestic environmental policies.
>
> The WTO's committee says the most effective way to deal with international environmental problems is through the environmental agreements. It says this approach complements the WTO's work in seeking internationally agreed solutions for trade problems. In other words, using the provisions of an international environmental agreement is better than one country trying on its own to change other

[1328] WTO, "10 common misunderstandings about the WTO" WTO Website <http://www.wto.org/english/thewto_e/whatis_e/10mis_e/10m00_e.htm> 1 may 2014, misunderstandings 4 and 5.

[1329] WTO, "cross-cutting and new issues, environment " WTO Website <http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm> 1 May 2014.

[1330] WTO, "cross-cutting and new issues, environment " WTO Website <http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm> 1 May 2014.

[1331] WTO "trade and environment" WTO Website <http://www.wto.org/english/tratop_e/envir_e/envir_e.htm> 1 May 2014.

[1332] WTO, "cross-cutting and new issues, environment " WTO Website <http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm> 1 May 2014.

countries' environmental policies (*see shrimp-turtle and dolphin-tuna case studies*).[1333]

It is also emphasized that the CTE finds that often there are other more effective solutions for environmental protection than trade restrictions, like financial assistance or training and that there has not yet been a case of an action taken under international environmental agreements challenged in the *GATT*/WTO system.[1334] The CTE is even of the opinion that actions taken under such international agreements "are unlikely to become a problem in the WTO if the countries concerned have signed the environmental agreement".[1335] Yet it admits that this issue has not yet been answered completely. Another issue where further discussion in the CTE is needed according to the WTO is the issue of labelling as far as non-incorporated PPMs are concerned, because eco-labelling is an important environmental policy instrument for the member states. Yet so far only labels concerning the product itself and which adhere to MFN and national treatment are considered to be fully WTO compatible.[1336] However, in the *2005 World Trade Report* the WTO suggests itself that while "[t]he multilateral trading system has long be hesitant to deal with non-incorporated PPMs," this may have changed, as "with the *US-Shrimps* decision, such measures may be argued to have become part of the system."[1337] Yet it is also stressed by the CTE that many countries may consider eco-labels referring to non-incorporated PPMs as not being consistent with WTO law.[1338]

Yet as already mentioned above, this is not a totally opening up of WTO law, integrating all kinds of other issues and objectives. Rather, it is also stressed that the CTE principles include the idea that free trade itself is contributing to environmental protection and that the WTO is no environmental agency, but only competent to deal with trade. It is particularly expressed that "[i]ts members do not want it to intervene in national or international environmental

---

[1333] *Ibid.*
[1334] *Ibid.*
[1335] *Ibid.*
[1336] *Ibid.*
[1337] *World Trade Report 2005*, WTO Website, Resources <http://www.wto.org/english/res_e/publications_e/wtr05_e.htm> 1 May 2014, 158.
[1338] WTO, "labelling" WTO Website <http://www.wto.org/english/tratop_e/envir_e/labelling_e.htm> 1 May 2014.

policies or to set environmental standards" and that "[o]ther agencies that specialize in environmental issues are better qualified to undertake those tasks." Scott Vaughan of the WTO Trade and Environment Division stated that standards of production methods should not be defined by the WTO but by UNCTAD or UNEP.[1339] That the issue of international standards is not an easy one shows the amount of effort the WTO is putting in to further examining it. There is for example a *GATT* Council and amongst other things *SPS* and *TBT* Committees dealing with the issue of international standards.[1340] Standards were also the topic of the *2005 World Trade Report* titled "Trade, standards and the WTO".[1341] Another hint as to how little competence the WTO should demand in environmental issues is the CTE's recommendation that once a dispute arises between WTO member states concerning a trade action taken under an environmental agreement both states have signed, they should try to use the environmental agreement to solve the dispute rather than WTO agreements.[1342] In stressing the different competences the WTO acknowledges the difficulties that may arise between different overlapping interests of different international organizations. Yet the WTO also stresses that it is cooperating with other international organizations like UNCTAD and OECD[1343] for in-depth assessments of certain overlapping issues. In a 2006 Secretariat note for example OECD and UNCTAD studies concerning trade and environment were examined.[1344] This cooperation is important for the WTO. In the Draft Cancún Ministerial Declaration it is stressed that the CTE should continue to

---

[1339] Lorenz Khazaheh, "Oil and the World Trade Organisation (WTO)" in Tobias Haller, Annja Blöchlinger, Markus John, Esther Marthaler, Sabine Ziegler (eds), *Fossil Fuels, Oil Companies and Indigenous Peoples* (vol. 1, Berlin, Wien Zürich: Lit Verlag, 2007) 469, 473.
[1340] Bernard M. Hoekman, Michel M. Kostecki, *The Political Economy of the World Trading System* (3rd ed, Oxford: Oxford University Press, 2009) 632.
[1341] *World Trade Report 2005*, WTO Website, Resources <http://www.wto.org/english/res_e/publications_e/wtr05_e.htm> 1 May 2014, see report as a whole dealing with the issue and see also for example p. 156 where the efforts of the Director-General on the issue are described.
[1342] WTO, "cross-cutting and new issues, environment " WTO Website <http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm> 1 May 2014.
[1343] See CTE Annual Reports 2005-2011, available at WTO Website <http://www.wto.org/english/tratop_e/envir_e/wrk_committee_e.htm> 1 May 2014.
[1344] CTE, *Environmental Requirements and Market Access, Recent Work in OECD and UNCTAD* WT/CTE/W/244 (8 december 2006).

> invite to its meetings […] secretariats of the multilateral environmental agreements (MEAs) invited thus far and of the United Nations Environment Programme (UNEP) and the United Nations Conference on Trade and Development (UNCTAD).[1345]

The work and information on labour standards is much briefer, essentially stressing that the ILO is the organization in charge.[1346] However, it is also stressed that

> [t]here is a clear consensus: all WTO member governments are committed to a narrower set of internationally recognized "core" standards - freedom of association, no forced labour, no child labour, and no discrimination at work (including gender discrimination).[1347]

It is also referred to the Ministerial Conferences in Singapore (1996), Seattle (1999) and Doha (2001), where the importance of core labour standards was stressed, but no further agreement reached.[1348] Similar to emphasizing the cooperation with international organizations concerning environmental protection, the WTO stresses its cooperation with other international organizations like the UN and the ILO in its Annual Reports of the last years.[1349]

D *Reasons to overcome the contradictions and tensions*

There is now an ongoing discussion on linking human rights and trade law and the way this linkage should be achieved.[1350] The issue assessed in this research, the examples of WTO cases provided above and the developments taking place

---

[1345] *Draft Cancún Ministerial Declaration*, available at <http://www.wto.org/english/thewto_e/minist_e/min03_e/draft_decl_rev2_e.htm> 1 May 2014, par. 9.
[1346] WTO, "cross-cutting and new issues, environment " WTO Website <http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm> 1 May 2014.
[1347] *Ibid.*
[1348] *Ibid.*
[1349] See *WTO Annual Reports* 2005-2013, *WTO Annual Reports*, available at WTO Website, Resources <http://www.wto.org/english/res_e/reser_e/annual_report_e.htm> 1 May 2014, see in particular 2007 Report.
[1350] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 25; for some of the most important recent literature on the subject see Gabrielle Marceau, "WTO Dispute Settlement and Human Rights" (2002) 13 *EJIL* 753, fn 1; see also Frederick Abbott, Christina Breining-Kaufmann and Thomas Cottier (eds), *International Trade and Human Rights* (Ann Arbor: University of Michigan Press, 2006); Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi Bonanomi (eds), *Human Rights and International Trade* (Oxford: Oxford University Press, 2005).

suggest that some changes are required to improve human rights protection in trade-related situations. Although it is argued that international trade law with its trade liberalization *itself* enhances human rights promotion and protection,[1351] this is not really conclusive and might just not be enough as the current situation demonstrates[1352] and was already sketched in the introductory chapter. That is why it is also argued that the development of free trade alone is not protecting human rights, e.g. labour standards, properly,[1353] but may even harm human rights and that human rights and trade law have therefore to be linked in some way.[1354] Such a linkage can be based on the understanding that free trade and

[1351] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 37; see also Robert D. Anderson and Hannu Wager, "Human Rights, Development, and the WTO: The Cases of Intellectual Property and Competition Policy" (2006) 9 *JIEL* 707; Peter Sutherland (Chairman) et al, "The Future of the WTO: Addressing institutional challenges in the new millennium" *Report by the Consultative Board to the Director-General Supachai Panitchpadki* (Geneva: WTO, 2004); it is also argued that free trade is promoting peace, see Eugene Kontorovich, "Reconciling Political Sanctions with Globalization and Free Trade: The Arab League Boycott and WTO Accession: Can Foreign Policy Excuse Discriminatory Sanctions?" (2003) 4 *Chi. J. Int'l L.* 283, 299 wfr.

[1352] That continuing efforts are clearly needed is also acknowledge by authors considering free trade as promoting human rights, see for example Robert D. Anderson and Hannu Wager, "Human Rights, Development, and the WTO: The Cases of Intellectual Property and Competition Policy" (2006) 9 *JIEL* 707, 708-9.

[1353] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 41; on the only small impact of trade liberalisation on increasing prosperity see *ibid.*, stating that the Uruguay Round lead to an increase of the global GDP of 0.7% according to the "most expansive figures" and stating that reducing poverty alone is not equal to increasing human rights protection in general and on other policies that therefore have to be tied to free trade see *ibid.* at 42 wfr; see also Robert D. Anderson and Hannu Wager, "Human Rights, Development, and the WTO: The Cases of Intellectual Property and Competition Policy" (2006) 9 *JIEL* 707, 717, stressing that trade is no panacea; Glenn W. Harrison, Thomas F. Rutherford and David G. Tarr, "Quantifying the Uruguay Round" in Will Martin and L. Alan Winters (eds), *The Uruguay Round and the Developing Countries* (Cambridge: Cambridge University Press, 1996); Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999) in particular 3-6.

[1354] Philip Alston, "'Core Labour Standards' and the Transformation of the International Labour Rights Regime" (2004) 15 *EJIL* 457 471-6 on the different perception of this linkage; Caroline Dommen, "Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies" (2002) 24 *HRQ* 1; James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 76 and 77; Richard N. Lock, Karen Roberts and Myron J. Roomkin, "Models of International Labor Standards" (2001) 40 *Indus. Rel.* 258;Carlos Manuel Vázquez, "Trade Sanctions and Human Rights - Past, Present, and Future" (2003) 6 *JIEL* 797, 817; from an economic perspective see Drusilla K. Brown, Alan V. Deardorff and Robert M. Stern, "Pros and Cons of Linking Trade and Labor Standards", *Discussion Paper No 477, University of Michigan* (May 2002); from a policy perspective compare Nicola Bullard, "Social Standards in International Trade" Report for the *Deutscher Bundestag* commission of enquiry

human rights are not contradicting one another *per se*.[1355] Human rights protection does not require the abolition of free trade and neither does trade liberalization require the violation of human rights. Trade law can indeed benefit human rights,[1356] yet, as just mentioned, this does not mean that trade liberalization alone is sufficient to ensure due human rights promotion and protection. For example reducing poverty is not equal to protecting human rights, let alone the issue whether free trade is in fact reducing poverty on a broad scale, which is not clear either.[1357] In addition, human rights like free

---

'Globalization and the World Economy- Challenges and Answers" (July 2001), available at <http://focusweb.org/publications/Research%20and%20Policy%20papers/2001/social%20standards%20in%20International%20trade.pdf> 1 May 2014; Sandra Polaski, *Trade and Labor Standards, A Strategy for Developing Countries* (Washington: Carnegie Endowment for International Peace, 2003).

[1355] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 40 for the observance that free trade is not violating human rights protection *per se*; see also on the complex interrelation of environmental protection and free trade Joost Pauwelyn, "Recent Book on Trade and Environment: GATT Phantoms Still Haunt the WTO" (2004) 15 *EJIL* 575, 578.

[1356] On this argument and particular positive effects trade has on human rights see James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 38-41; see also Robert D. Anderson and Hannu Wager, "Human Rights, Development, and the WTO: The Cases of Intellectual Property and Competition Policy" (2006) 9 *JIEL* 707; Thomas Cottier, "Trade and Human Rights, A Relationship to Discover" (2002) 5 *JIEL* 111,121; *Economic, Social and Cultural Rights, Globalization and its Impact on the Full Enjoyment of Human Rights, Report of the High Commissioner for Human Rights submitted in accordance with Commission on Human Rights resolution 2001/32* E/CN.4/2002/54 (15 January 2002) par. 33, but also stressing that trade liberalization is also creating losers in par. 34; *Economic, Social and Cultural Rights, Human Rights, Trade and Investment, Report of the High Commissioner for Human Rights* E/CN.4/Sub.2/2003/9 (2 July 2003) par. 31 on the state duty to regulate in order to adequately protect human rights; *Economic, Social and Cultural Rights, Liberalisation of Trade and Services and Human Rights, Report of the High Commissioner* E/CN.4/Sub.2/2002/9 (25 June 2002) par. 39 on positive as well as negative effects of trade liberalization; *Economic, Social and Cultural Rights, The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights, Report of the High Commissioner* E/CN.4/Sub.2/2001/13 (27 June 2001) par. 20, but the Report is also stressing that a balance is needed between *TRIPS* and human rights.

[1356] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 40.

[1357] On the only small impact of trade liberalisation on increasing prosperity see James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 41, stating that the Uruguay Round lead to an increase of the global GDP of 0.7% according to the "most expansive figures" and stating that reducing poverty alone is not equal to increasing human rights protection in general and on other policies that therefore have to be tied to free trade see *ibid.* at 42 wfr; see also Robert D. Anderson and Hannu Wager, "Human Rights, Development, and the WTO: The Cases of Intellectual Property and

speech, fair trial and property rights can have a positive impact on trade liberalization,[1358] yet these human rights should not be degraded to mere instruments of trade law, nor should different human rights be taken into account by trade law differently, depending on their functionality for trade.[1359] As Harrison remarks, data and research on this topic are not providing any clear results or allowing to draw clear conclusions[1360] and the same is true for the argument that if no international standards were applied, a "race to the bottom" would take place, because disregarding human rights standards means competitive advantage.[1361] All the above mentioned shows that the issue is simply too complex for easy solutions and answers.[1362] Yet it becomes clear that

---

Competition Policy" (2006) 9 *JIEL* 707, 717, stressing that trade is no panacea; Glenn W. Harrison, Thomas F. Rutherford and David G. Tarr, "Quantifying the Uruguay Round" in Will Martin and L. Alan Winters (eds), *The Uruguay Round and the Developing Countries* (Cambridge: Cambridge University Press, 1996); stressing the complexity of the relationship of human rights and free trade is also Robert Howse, "Human Rights in the WTO: Whose Rights, What Humanity?" (2002) 13 *EJIL* 651; Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999) in particular 3-6; Ajit Singh and Ann Zammat, "Labour Standards and the 'Race to the Bottom': Rethinking Globalization and Workers' Rights from Developmental and Solidaristic Perspectives" (2004) 20 *Oxford Rev. Econ.c Pol'y* 85, 95.

[1358] For the incorrectness of the assumption that increases in exports automatically lead to an improvement of worker's rights see Steve Charnovitz, "Environmental and Labour Standards in Trade" (1992) 15 *World Economy*, 335, 347; on social sandards and foreign investment see Eddy Lee, "Globalization and Labour Standards: A review of issues" (1997) 136 *IntLabRev* 173, 181; on different opinions on social standards and free trade and their relationship see Norbert Melanowski and Christoph Scherrer, *Internationale Handelsvereinbarungen und Sozialstandards* (Düsseldorf: Hans-Böckler-Stiftung, 1996) 38 and 24-42; OECD, *Trade, Employment and Labour Standards, A Study of Core Workers' Rights and International Trade* (Paris: OECD, 1996) 112-124.

[1359] Patti A.Goldman, "Resolving the Trade and Environment Debate: In Search for a Neutral Forum and Neutral Principles" (1992) 49 *Wash. & Lee L. Rev.* 1279, 1280; James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 46-7 wfr.

[1360] Steve Charnovitz, "The World Trade Organization and Social Issues" (1994) 28 *J.W.T.* 17, 21; James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 77-8.

[1361] Jeffrey L. Dunoff, "Reconciling International Trade with Preservation of the Global Commons: Can we prosper and protect?" (1992) 49 *Wash. & Lee L. Rev.* 1407, 1437; Patti A. Goldman, "Resolving the Trade and Environment Debate: In Search for a Neutral Forum and Neutral Principles" (1992) 49 *Wash. & Lee L. Rev.* 1279, 1291; James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 78-80 wfr.

[1362] See James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 42; on the complexity of the issue of human rights and trade see *Economic, Social and Cultural Rights, Mainstreaming the right to development into*

the two areas of law are interrelated, in particular by the changes taking place within the WTO shown above concerning the new Agreements also dealing with non-trade issues. [1363] As this factual linkage cannot be denied, a way to deal with it and the responsibility that flows from it has to be found.

This is even more so when considering the findings from above that none of the sets of laws is overriding the other and that WTO member states are bound by human rights treaties and constantly try to adhere to both areas of law,[1364] whilst the unclear position of WTO law on trade restrictions triggered by human rights violations causes a "regulatory chill" [1365] or "chilling effect"[1366] to the disadvantage of human rights protection, although the measures *could* be considered WTO-consistent by the DSB.[1367] A striking example of the difficulty for member states to adhere to both areas of law is that the ILO may in fact recommend economic sanctions to be imposed against a member that does not comply with ILO recommendations according to art. 33 *ILO Constitution*,[1368] but the WTO lacks an exemption clause similar to the one for UN Security Council decisions.[1369] For these cases a solution has to be found. As the WTO members explicitly stated in the *Singapore Declaration* that the competent body

---

international law and policy at the World Trade Organisation, Paper prepared by Robert Howse E/CN.4/Sub.2/2004/17 (9 June 2004) in particular par. 3.

[1363] See Wolfram Spelten, *WTO und nationale Sozialordnungen* (vol.11, Berlin: Duncker & Humblot, 2005) 291-5 and 298-309, referring to the examples of *General Agreement on Trade in Services (GATS)* (1995) and *Agreement on Subsidies and Countervailing Measures (SCM)* (1994).

[1364] See Jeffrey L. Dunoff, "Reconciling International Trade with Preservation of the Global Commons: Can we prosper and protect?" (1992) 49 *Wash. & Lee L. Rev.* 1407, 1437; Iris Halpern, "Tracing the Contours of Transnational Corporations' Human Rights Obligations in the Twenty-First Century" (2008) 14 *Buff. HRL Rev.* 129,142-3 wfr.; James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 223-4.

[1365] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 236; Sarah Joseph, *Blame it to the WTO? A Human Rights Critique* (Oxford: Oxford University Press, 2011) 50.

[1366] *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development- Report of the Special Rapporteur on the right to food, Olivier de Schutter* A/HRC/10/5/Add.2 (4 February 2009) par. 35.

[1367] So far it is claimed that there have not been cases identifying concrete conflicts between WTO/*GATT* law and human rights, see ILA (ITLC), *Eighth Report of the Committee,* (Rio de Janeiro Conference, 2008), available at <http://www.ila-hq.org/en/committees/index.cfm/cid/24> 1 May 2014, par. 38.

[1368] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 87.

[1369] See *ibid.* at 92.

to deal with labour rights is the ILO,[1370] the DSB could for example interpret WTO law in a way that allows for the sanctions recommended by the ILO, parallel to the proceeding concerning measures of the UN Security Council according to art. XXI (c) *GATT*.[1371] This is because WTO/*GATT* regulations are part of public international law.[1372] Yet operating within one framework of international rules, such as WTO/*GATT* does not automatically suspend the obligations deriving from other frameworks of public international law, like human rights.[1373] This was also stressed by the *ILA Declaration on International Trade Law and Human Rights* 2008[1374] and the resulting *ILA Resolution 5/2008*. It is even argued that for example the ICESC contains the obligations for all signatory states to protect the rights granted in this Convention *worldwide*.[1375] This is similar to the idea of an obligation to globally protect human rights due to their universal character mentioned above. Yet whether such an obligation is presumed or not, to avoid conflicts between the different areas of public

[1370] *Singapore Ministerial Declaration* WT/MIN(96)/DEC (18 December 1996), available at <http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm> 1 May 2014 par. 4.
[1371] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 92.
[1372] See art. 3.2 *Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU Understanding)* (1994); see also decisions of WTO Dispute Settlement Bodies e.g. *United States - Standards for Conventional and Reformulated Gasoline ("US-Gasoline")* WT/DS2/R (29 January 1996) and WT/DS2/AB/R (29 April 1996) stating that *GATT* cannot be read "in clinical isolations from public international law"; see also Lorand Bartels "Art. XX of GATT and the Problem or Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights" (2002) 36 *JWT* 353, 354 wfr; James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 13-4; Gabrielle Marceau, "WTO Dispute Settlement and Human Rights" (2002) 13 *EJIL* 753, 766-779; Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge: Cambridge University Press, 2003) 25-6 and 29; Sigrun I. Skogly, *Human Rights Obligations of the World Bank and the International Monetary Fund* (London: Cavendish Publishing, 2001) 80-1 on EC and public international law and 106-8 on World Bank and IMF and public international law, in particular human rights obligations.
[1373] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 14; referring to intergovernmental human rights organisations and their views like in *Economic, Social and Cultural Rights, Liberalisation of Trade and Services and Human Rights, Report of the High Commissioner* E/CN.4/Sub.2/2002/9 (25 June 2002) in particular par. 5.
[1374] ILA (ITLC), *Eighth Report of the Committee,* (Rio de Janeiro Conference, 2008), available at <http://www.ila-hq.org/en/committees/index.cfm/cid/24> 1 May 2014, par. 38.
[1375] Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 137.

international law and create coherence,[1376] the WTO has to take into account human rights when creating rules or deciding on trade issues.[1377] This is supported by the WTO preamble that states that "allowing for the optimal use of the world's resources in accordance with the objective of sustainable development" is one of the WTO aims, as the "sustainable development" has been claimed to be an at least indirect way to include human rights into the WTO.[1378] Yet so far no clear answer has been provided by the WTO in practice.
A further example of the regulatory chill caused by the uncertainty concerning WTO law is reflected in the already above mentioned way the *Kimberley Scheme* was imposed. A waiver was granted although many commentators and for example the EC/EU were of the opinion that this was not needed, because an interpretation of WTO/*GATT* was possible that allowed for the trade ban on conflict diamonds, particularly when using art. XX *GATT*.[1379] Furthermore, a UN Security Council Resolution demanding all states to ban the trade with conflict diamonds in order to help to put an end to the armed conflict in Liberia had been passed already in 2001.[1380] So whether the waiver was in fact necessary to *achieve* WTO/*GATT* compatibility may be doubted, but it certainly helped to *ensure* WTO/*GATT* compatibility and to bring the US and Canada on board which had declared that they would not impose the *Kimberly Scheme*

[1376] See on the aspect of coherence Carlos Lopez-Hurtado, "Social Labelling and WTO Law" (2002) 5 *JIEL* 719, *14.
[1377] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 14.
[1378] See for example Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 151; yet as this is only a rather indirect reference to human rights and the DSB does not have the authority to decide on human rights protection as such as can be derived for example from art. 7 *DSU*, the idea of using WTO procedures and measures due to a violation of the "sustainable development" clause via art. 23 *DSU* or XXIII *GATT* is not assessed here, see on this topic for example *ibid.* at 186-190.
[1379] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 94; Joost Pauwelyn, "WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for 'Conflict Diamonds'" (2003) 24 *Mich. J. Int'l L.* 1177; on the *Kimberly Process Scheme* and WTO, including the different approaches of different states see also Krista Nadakavukaren-Schefer, "Stopping Trade in Conflict Diamonds: Exploring the Trade and Human Rights Interface with the WTO Waiver for the Kimberley Process" in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi Bonanomi (eds), *Human Rights and International Trade* (Oxford: Oxford University Press, 2005) 391, in particular 394.
[1380] UN Security Council *Resolution* S/RES/1343 (7 March 2001) particularly par. 6.

without a waiver.[1381] Although the waiver shows that there are WTO mechanisms allowing for trade bans to protect human rights, it also shows that there is great uncertainty as to which trade restricting actions to promote and protect human rights are *GATT*/WTO consistent and which are not.[1382] This at the same time shows that the WTO/*GATT* is in fact dealing with non-trade matters as well and that it is ready to find solutions.

Where states are acting unilaterally, without UN Resolutions and international consensus, these uncertainties are even more striking and may lead to inaction and a factual prevention of unilateral measures because of the *assumed possibility* of a WTO violation.[1383] Such unilateral examples of inaction include domestic measures restricting the trade in tropical woods [1384] and measures with regard to social standards,[1385] particularly child labour[1386] that were not implemented due to the fear of WTO-inconsistency. Others still impose measures, for example the EU to internationally protect the environment *via* trade restrictions concerning whale products, sealskins, ivory, etc.[1387] Some

---

[1381] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 94; Krista Nadakavukaren-Schefer, "Stopping Trade in Conflict Diamonds: Exploring the Trade and Human Rights Interface with the WTO Waiver for the Kimberley Process" in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi Bonanomi (eds), *Human Rights and International Trade* (Oxford: Oxford University Press, 2005) 394; Joost Pauwelyn, "Recent Book on Trade and Environment: GATT Phantoms Still Haunt the WTO" (2004) 15 *EJIL* 575, 590, stressing that only for trade restrictions on non-participants of the *Kimberly Scheme* the waiver is needed.

[1382] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 94-5.

[1383] *Ibid.* at 94-6.

[1384] See for example Brian F. Chase, "Tropical Forests and Trade Policy: The Legality of Unilateral Attempts to Promote Sustainable Development under the GATT"(1993) 14 *TWQ* 749; see for further examples also Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 39 and 83.

[1385] This was asked for in the Tokyo Round, see Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 42.

[1386] See for example *German Bundestag* document 13/1079 (6. April 1995) in particular 11-23 where trade bans and their compatibility with *GATT* and WTO law is discussed.

[1387] See for example *Commission Regulation (EEC) No. 2496/89 on a prohibition on importing raw and worked ivory derived from the African elephant into the Community* (1989); *Council Directive 83/129/EEC concerning the importation into Member States of skins of certain seal pups and products derived therefrom* (1983) L 091, 09/04/1983 P. 0030 – 0031, amended by *Council Directive 89/370/EEC amending Directive 83/129/EEC concerning the importation into Member States of skins of certain seal pups and products derived therefrom* (1989) L 163, 14/06/1989 P. 0037 – 0037; *Council Regulation (EEC) No. 348/81 on common rules for imports of whales or other cetacean products,* (1981) L 039,

clarification by the DSB would nevertheless be helpful to provide clear guidance for governmental and parliamentary action in this context, in particular concerning human rights, which are still more "internal" than environmental right and "physical spillovers" or sufficient linkages are therefore not possible to prevent inaction at the expense of human rights.[1388] For doing so the DSB would have to take a position concerning the measures in question, triggered by human rights violations, and their WTO compatibility.

That free trade and human rights do not contradict one another *per se* can be seen very well when looking at the way the EU, which also provides for free trade among its members, is dealing with human rights.[1389] There the broad interpretation of fundamental freedoms as limits to free trade had caused the penetration of domestic law with EU law in an increasing number of areas of domestic law, including social law.[1390] To antagonize this trend and to take into account the interests covered by domestic social law, a common EU social policy has been introduced and fundamental rights have been used and are now established in various ways within EU law[1391] as can for example be seen in art. 6 (3) *Treaty on the European Union (TEU).*[1392] Of course, this development cannot simply be transferred to the WTO, because the EU is far more than a trade organization by now and its members are more homogenous than those of

---

12/02/1981 P. 0001 – 0003; *Council Regulation (EEC) No 3254/91 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards* (1991) L 308, 09/11/1991 P. 0001 – 0004.

[1388] Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 150.

[1389] ILA (ITLC), *Eighth Report of the Committee,* (Rio de Janeiro Conference, 2008), available at <http://www.ila-hq.org/en/committees/index.cfm/cid/24> 1 May 2014, par. 42: Draft Proposal for a 2008 ILA Resolution on "International Trade Law and Human Rights"; Ernst-Ulrich Petersmann, "The WTO Constitution and Human Rights" (2000) 3 *Journal of International Economic Law* 19, 21.

[1390] Wolfram Spelten, *WTO und nationale Sozialordnungen* (vol.11, Berlin: Duncker & Humblot, 2005) 162.

[1391] *Ibid.* at 170-1.

[1392] Art. 6 (3) *TEU* reads: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.", thereby acknowledging a triple source for human rights for EU law.

the WTO.[1393] Yet it does show that free trade and human rights can be joined. There are even several studies on the issue of foreign direct investment and human rights or environmental regulations that suggest that such regulations do not reduce foreign direct investment,[1394] cause relocation of corporations[1395] or influence international competitiveness in a significant way.[1396] Of particular interest for this enquiry is also the finding that home state corporations are often operating environmentally friendlier than domestic ones. [1397] This suggests that although WTO members are much more heterogenic and this for sure constitutes a challenge, increased human rights protection in home state TNCs operating in developing countries is already taking place and not harming them.

Due to all the reasons just provided the question is not whether human rights have to be linked and whether "an explicit human rights discourse is required",[1398] but how this factual linkage can be supported.

E *Ideas to overcome the (remaining) tensions and contradictions*

There are many different suggestions as to how human rights and trade law should be linked most effectively, reaching from a broader interpretation of existing trade law norms[1399] to changing WTO law by adding a social clause[1400]

[1393] The heterogeneity of WTO members as a new challenge to trade, including environmental issues, is stressed in the *World Trade Report 2007*, WTO Website, Resources <http://www.wto.org/english/res_e/publications_e/wtr07_e.htm> 1 May 2014; see also Joost Pauwelyn, "Recent Book on Trade and Environment: GATT Phantoms Still Haunt the WTO" (2004) 15 *EJIL* 575, 582, pointing out that due to the heterogeneity of WTO members they cannot and do not want to discuss further exceptions from *GATT* principles.

[1394] *World Trade Report 2005*, WTO Website, Resources <http://www.wto.org/english/res_e/publications_e/wtr05_e.htm> 1 May 2014, 71.

[1395] Hermann Sautter „Sozialklauseln für den Welthandel- wirtschaftsethisch betrachtet" (1995) 40 *Hamburger Jahrbuch für Wirtschafts- und Gesellschaftspolitik* 227, 231.

[1396] OECD, *Trade, Employment and Labour Standards, A Study of Core Workers' Rights and International Trade* (Paris: OECD, 1996) 112 and 123-4; Gudrun Monika Zagel, *WTO & Human Rights: Examining Linkages and Suggesting Convergence* (Voices of Development Jurists Paper Series vol. 2, no. 2, Rome: International Development Law Organization, 2005) 24.

[1397] *World Trade Report 2005*, WTO Website, Resources <http://www.wto.org/english/res_e/publications_e/wtr05_e.htm> 1 May 2014, 71.

[1398] See James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 47.

[1399] See for example Ernst-Ulrich Petersmann, "The WTO Constitution and Human Rights" (2000) 3 *Journal of International Economic Law* 19, favouring broader interpretation as well

and different ways of enhancing the cooperation between the UN, mainly the ILO, and the WTO. [1401]

1 *Solutions by changing the WTO and human rights law systems*

The idea of changing the WTO and human rights law systems derives from the idea that trade panels are not the appropriate bodies to decide on human rights issues[1402] and therefore human rights bodies should be involved[1403] on equal terms, the latter focusing on the human rights aspects, the former on the trade aspects. This would also provide for more legal certainty concerning both areas of law.[1404] Furthermore, approaches considering human rights issues not *within* trade law, but - at least also - from a human rights respective could grant that the

---

as constitutional reforms of WTO law; see also *ILA Resolution 5/2008 International Trade Law*.

[1400] See for example James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 238-242 wfr; Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 217-8.

[1401] Virginia A. Leary, "Workers' Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, U.S. Laws)" in Jagdish Bhagwati and Robert E. Hudec, *Fair Trade and Harmonization* (vol. 2, Economic Analysis, Cambridge, Mass., London: MIT Press, 1996) 177, 194; see also Thomas Cottier and Alecandra Caplazi, "Labour Standards and World Trade Law: Interfacing Legitimate Concerns" in *Thomas Geiser, Hans Schmid and Emil Walter-Busch (eds), Arbeit in der Schweiz des 20. Jahrhunderts. Wirtschaftliche, rechtliche und soziale Perspektiven* (Bern, Stuttgart, Wien: Haupt, 1998) 469-508 including cooperation on labelling; Richard N. Lock, Karen Roberts and Myron J. Roomkin, "Models of International Labor Standards" (2001) 40 *Indus. Rel.* 258 in particular 286 where a "potential reconciliation" is described.

[1402] See James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 121, 182.

[1403] See for example Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 209, pointing out that in *EC-Bananas III* WTO/*GATT* Panel and AB assessed the accordance with the *Forth ACP-EC Convention of Lomé ("Lomé IV Convention")* (1989), because the preferences granted in this Conventions were only possible due to a WTO/*GATT* waiver, *European Communities - Regime for the Importation, Sale and Distribution of Bananas (EC-Bananas III)* WT/DS27/R (22 May 1997) par. 7.79 and WT/DS27/AB/R (9 September 1997), par. 167, 169.

[1404] See James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 121 and 182; see also *Third World Intellectuals and NGOs' Statement Against Linkage* (1999) available at <http://www.cuts-international.org/Twin-sal.htm> 1 May 2014 and the response of the International Confederation of Free Trade Unions, "Enough Exploitation is Enough: A Response to the Third World Intellectuals and NGOs' Statement Against Linkage" *(TWIN-SAL)* (1999), available at <http://www.hartford-hwp.com/archives/25a/022.html> 1 May 2014, yet note that in this statement only voluntary approaches like reporting mechanisms etc in the ILO are suggested.

experts of the respective areas of laws stick to their specialised areas and cooperate on equal terms where intersections exist. At the same time this could also prevent that presumptions of guilt and the burden of proof are with the state imposing trade restrictions to protect human rights as is the case when art. XX *GATT* is used for justifications of such measures.[1405] Such an approach would not be totally alien to the WTO as the Codex Alimentarius Commission and the WTO work similarly, the Commission setting the standards and the WTO watching their adherence.[1406] A more radical change, banning cases involving human rights from WTO DSBs altogether would be rather counterproductive to the promotion and protection of human rights as well, because due to the just mentioned lack of equally effective enforcement mechanisms and dispute settlement bodies in human rights law, these cases would usually not be assessed at all and any trade restricting measures, including protectionist measures, could be based on human rights law to avoid control.[1407] Such an approach could therefore only be taken when accompanied by an accordingly equipped human rights panel, yet the latter as well as the embrace of such an approach by the WTO and its members it doubtful. Changes in WTO law are hard to achieve,[1408] particularly when human rights protection is involved as the developing states usually oppose such approaches,[1409] because they fear a loss of sovereignty,

---

[1405] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 215-6; Christopher McCrudden, "International Economic Law and the Pursuit of Human Rights: A framework for discussion of the legality of 'selective purchasing' laws under the WTO Government procurement agreement" (1999) 2 *JIEL* 3, 44 on the burden of proof under art. XX *GATT*.

[1406] Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 217.

[1407] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 119-120 and 251.

[1408] See Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 209.

[1409] See Jenny Schultz and Rachel Ball, "Trade as a Weapon? The WTO and Human Rights-Based Trade Measures" (2007) 12 *Deakin L. Rev.* 41, 43; see also *Third World Intellectuals and NGOs' Statement Against Linkage* (1999) available at <http://www.cuts-international.org/Twin-sal.htm> 1 May 2014, yet not all developing countries are agreeing to this strong and general refusal, see International Confederation of Free Trade Unions, "Enough Exploitation is Enough: A Response to the Third World Intellectuals and NGOs' Statement Against Linkage" *(TWIN-SAL)* (1999), available at <http://www.hartford-hwp.com/archives/25a/022.html> 1 May 2014, favouring a solution of collaboration between WTO and ILO and other UN agencies.

protectionism and a loss of their competitive advantage.[1410] These issues have already been mentioned in the preceding chapters. Yet even in states in favour of a social clause trade sanctions are not necessarily considered to be an appropriate means of enforcement by all parties involved.[1411] While the OHCHR suggested a social clause in its first two reports,[1412] it deterred from doing so in the later reports[1413] due to the realisation of complications and difficulties such a reference entails, like lacking political will and the negative impact of a failure of negotiations of such a clause,[1414] the fear that the DSB might feel appointed to *interpret* human rights[1415] and the uncertainty of the content of human rights obligations.[1416] The WTO is not considered to be authorised to deal with human rights issues[1417] and a further obstacle is that the WTO member states are far from homogenous in their human rights protection levels[1418] as already noted above. All this is why the introduction of a social clause into WTO law, explicitly referring to human rights and their protection is not likely to be attained either.

[1410] Philip Alston, "Linking Trade and Human Rights" (1980) 23 *GYIL* 126,137-151, particularly poiting out that the standards are chosen arbitrarily and to the economic advantage of the EEC; Jürgen Becker, *Entwicklungskooperation in einem sich wandelnden Weltsystem* (Frankfurt a. M.: Alfred Metzner Verlag, 1982) 217; Christoph Scherrer, Thomas Greven and Volker Frank, *Sozialklauseln, Arbeiterrechte im Wandel* (Münster: Westfälisches Dampfboot, 1998) 20-5.

[1411] Frank von Auer (ed), *Arbeitnehmerrechte im Welthandel* (Mössingen-Talheim: Talheimer Verlag, 1995) 107-8.

[1412] *Resolution on EU standards for European enterprises operating in developing countries: towards a European Code of Conduct* (A4-0508/98) in C 104/280 (15 January 1999) par.45; *Economic, Social and Cultural Rights, The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights, Report of the High Commissioner* E/CN.4/Sub.2/2001/13 (27 June 2001) par.68.

[1413] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 239.

[1414] Frank J. Garcia, "The Global Market and Human Rights: Trading Away the Human Rights Principle" (1999) 25 *Brooklyn J. Int'l L.* 51, 87-88, stressing that political support for such a clause is unlikely; James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 239-240 wfr.

[1415] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 240.

[1416] *Ibid.*

[1417] See Gabrielle Marceau, "WTO Dispute Settlement and Human Rights" (2002) 13 *EJIL* 753, 766.

[1418] See Wolfram Spelten, *WTO und nationale Sozialordnungen* (vol.11, Berlin: Duncker & Humblot, 2005) 312-8.

Due to the lack of workable overriding law rules as mentioned above it has also been suggested that human rights and trade rights should be directly balanced against one another and that the "integral" human rights norms with their collective effect should override trade law in the case of a conflict of rules.[1419] Yet it seems unlikely that such an approach will be taken by the DSB should human rights issues arise there within the next years as can be derived from cases already decided by the DSB that involved non-trade issues.[1420]

2 *Solutions within the existing WTO law*

So as desirable as the just sketched approaches may be, it is rather unlikely that major change in trade law will occur during the next years, because the positions and arguments of developing and developed states seem rather gridlocked and the institutions affected will not embrace any fundamental changes either.[1421] Therefore, and because human rights issues will sooner or later arise under WTO DSBs[1422] simply because there is currently no equivalent supervising body for human rights law, approaches within the *existing* WTO law are a possible solution[1423] and the most likely approach to be taken within the next years.[1424]

[1419] See Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge: Cambridge University Press, 2003) 491.

[1420] James Harrison, The Human Rights Impact of the World Trade Organisation (Oxford, Portland: Hart Publishing, 2007) 191; see also *European Communities - Measures Affecting Asbestos and Products Containing Asbestos ("Asbestos")* WT/DS135/R (18 September 2000) and WT/DS135/AB/R (12 March 2001); *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes (DS10/R – 37S/200) ("Thailand - Cigarettes")* GATT panel Report 5 October 1990, adopted 7 November 1990.

[1421] James Harrison, The Human Rights Impact of the World Trade Organisation (Oxford, Portland: Hart Publishing, 2007) 185.

[1422] See for example Ernst-Ulrich Petersmann, "The 'Human Rights Approach' Advocated by the UN High Commissioner for Human Rights and the International Labour Organisation: Is it relevant for WTO Law and Policy?" (2004) 7 *JIEL* 605, 608-9; *ILA Resolution 5/2008 International Trade Law.*

[1423] See the previous chapter on sanctions and their negative impact; see also Gabrielle Marceau, "WTO Dispute Settlement and Human Rights" (2002) 13 *EJIL* 753, 779-791; Gudrun Monika Zagel, *WTO & Human Rights: Examining Linkages and Suggesting Convergence* (Voices of Development Jurists Paper Series vol. 2, no. 2, Rome: International Development Law Organization, 2005) 31-4 including also the WTO challenges of GSPs.

[1424] See James Harrison, The Human Rights Impact of the World Trade Organisation (Oxford, Portland: Hart Publishing, 2007) 185; Chantal Thomas, "The WTO and labor rights: strategies of linkage" in Sarah Joseph, David Kinley and Jeff Waincymer (eds), *The World Trade Organization and Human Rights: Interdisciplinary Perspectives* (Cheltenham, UK and Northampton, MA, USA: Edward Elgar, 2009) 257.

When cases on trade restrictions imposed to protect human rights are brought before the DSB, the Panels and the Appellate Body should apply trade law in conformity with other public international law, not fostering conflicts in international law.[1425] It should for example use appropriate human rights expertise, which is provided for in art. 13 (2) *DSU*.[1426] Human rights experts could assess the question whether there was a substantial human rights issue and whether the measure taken addressed this issue,[1427] preventing WTO Panels from interpreting human rights and human rights obligations.[1428] Expert consultancy has been used by the DSB before. Concerning human health the WTO consulted the WHO in *Thailand-Cigarettes*[1429] and in other cases the World Intellectual property organisation (WIPO) and the IMF were consulted.[1430] This is perfectly in line with the *ILA Resolution 5/2008*, declaring that "WTO members and bodies are legally required to interpret and apply WTO rules in conformity with the human rights obligations of WTO members under international law."[1431]

[1425] Jeroen Denkers, *The World Trade Organization and Import Bans in Response to Violations of Fundamental Labour Rights* (Antwerp, Oxford, Portland: Intersentia, 2008) 170-4 wfr; Sarah Joseph, *Blame it to the WTO? A Human Rights Critique* (Oxford: Oxford University Press, 2011) 47, referring to art. 31 (3) (c) *Vienna Convention on the Law of Treaties* (1969).

[1426] See Thomas Cottier, "Trade and Human Rights, A Relationship to Discover" (2002) 5 *JIEL* 111, 130-131; Sarah H. Cleveland, "Human Rights Sanctions and International Trade: A Theory of Compatibility" (2002) *JIEL* 133; Anne-Christine Habbard and Marie Guiraud, *The WTO and Human Rights* (FIDH Position Paper, 1999) available at <http://www.fidh.org/rapports/wto-fidh.htm> 1 May 2014 in particular FIDH Recommendation 15, which reads "The FIDH calls for panel members systematically to resort to an expert specializing in human rights law, with a view to assessing the impact of the offending measure on fundamental, and especially economic and social, rights"; Christopher McCrudden, "International Economic Law and the Pursuit of Human Rights: A framework for discussion of the legality of 'selective purchasing' laws under the WTO Government procurement agreement" (1999) 2 *JIEL* 3, 43.

[1427] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 219.

[1428] *Ibid.* at 220.

[1429] *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes (DS10/R – 37S/200) ("Thailand-Cigarettes")* GATT Panel Report 5 October 1990, adopted 7 November 1990, par. 72-81.

[1430] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 220; see also Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge: Cambridge University Press, 2003) 118-9; more generally Sarah H. Cleveland, "Human Rights Sanctions and International Trade: A Theory of Compatibility" (2002) *JIEL* 133, fn 216.

[1431] *ILA Resolution 5/2008 International Trade Law.*

This also stresses that the interpretational approach is the most likely of the suggestions made for linking human rights and trade in a way that allows for trade restrictions triggered by human rights violations. However, it has to be stressed that although this may solve some of the difficulties that arise when assessing human rights *within* the framework of trade law, this is a merely pragmatic solution and different approaches, allowing human rights bodies to decide on human rights issues and a cooperation where trade and human rights obligations are involved, would be preferable,[1432] but they do not (yet) exist and their coming into existence is rather unlikely at the present.[1433]

From a trade law perspective this approach has the advantage of allowing the WTO to signal that trade law and trade liberalization is not necessarily fostering the oppression of the poor, disadvantaged and vulnerable, a critique that has been claimed by many opponents of the WTO and "globalisation" until now.[1434] As Harrison puts it: "The WTO needs to demonstrate it has the ability to systematically deal with the issues raised by a human rights approach if it is to ensure the support it needs for its own well-being and survival."[1435]

To find out how such an interpretation of WTO law according to human rights might work out for the TNC context, the human rights potential of the norms closely linked to the present issue of trade restrictions triggered by human rights violations during the processing and production of the good will be assessed more closely. As the most striking and most discussed articles to take into account human rights of *GATT* law are art. III and XX, these will be the focus of examination in the following,[1436] after assessing the relevant articles of the *SPS* and *TBT Agreements*.

[1432] See James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 220, 251.
[1433] *Ibid.* at 241 -2 wfr.
[1434] *Ibid.* at 224; Ernst-Ulrich Petersmann, "Constitutional Primacy and 'Indivisibility' of Human Rights in International Law? The Unfinished Human Rights Revolution and the Emerging Global Integration Law" in Stefan Griller (ed) *International Economic Governance and Non-Economic Concerns* (Wien, New York: Springer, 2003) 257-9 on the need to balance human rights and trade law and the broad discretion provided by WTO norms.
[1435] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 252.
[1436] *Ibid.* at 144-5.

(a) SPS *and non-trade issues related to human rights*

As the *SPS* Agreement is the stricter one of *TBT* and *SPS* and according to art. 1.5 *TBT* only *SPS* is applicable on *SPS* measures, the *SPS* Agreement will be assessed first. The *SPS* Agreement covers sanitary and phytosanitary measures concerning the protection of human, animal or plant life or health. This means they are aiming at the protection of the aforementioned interests from food-borne risks or risks from pests and diseases.[1437] Already here it becomes clear that the *SPS* Agreement may not be the one best apt to tackle the human rights and TNC issue assessed in this enquiry.[1438] Yet still the existence of the *SPS* Agreement and its openness to non-trade issues and state sovereignty in pursuing them are worth mentioning. The aim of the *SPS* Agreement is

> balancing the need to increase market access for food and agricultural products, on the one hand, with the recognition of the sovereign right of governments to take measures to protect human, animal and plant life and health in their territories, on the other.[1439]

In doing so, the WTO acknowledges the importance of domestic measures in the area of life and health protection, while it wants to prevent protectionist measures.[1440] The importance of environmental protection has also been stressed in the *GMO Cases* where the Panel found that the *SPS* Agreement covers risks to the environment in general.[1441] However, several obligations are imposed on

---

[1437] See Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge: Cambridge University Press, 2008) 898-9.

[1438] *World Trade Report 2005*, WTO Website, Resources <http://www.wto.org/english/res_e/publications_e/wtr05_e.htm> 1 May 2014, 158, asking what happens if a measure is triggered by health protection, but also by consumer concerns or moral standards, asking whether the *TBT Agreement* with less stringent rules on scientific justification might be applicable in those cases. This is in line with the findings in *European Communities – Measures Affecting the Approval and Marketing of Biotech Products ("GMO")* WT/DS291/R, WTO/DS/292/R and WT/DS293/R (29 September 2006) where it was held that one measure may constitute an *SPS* measure and a non-*SPS* measure and that only to the former extent it was covered by the *SPS Agreement*.

[1439] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge: Cambridge University Press, 2008) 841.

[1440] Robert Hudec, "GATT/WTO Constraints on National Regulation: Requiem for An 'Aim and Effects' Test" (1998) 32 *The Int'l Lawyer* 619, 645-6; Philipp Jehle, *Harmonisierung im Welthandelsrecht durch Verweis auf internationale Standards* (vol. 46, Baden-Baden: Nomos, 2008) 27; Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge: Cambridge University Press, 2008) 833.

[1441] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge: Cambridge University Press, 2008) 836, drawing this conclusion from *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*

the member states when imposing sovereign protection measures. This can for example be seen in art. 2 *SPS* that provides the basic threshold *SPS* measures have to meet. There domestic protection measures and trade law are balanced by using the benchmark of necessity for the protection measure. Furthermore, it is required that the measure "is based on scientific principles and is not maintained without scientific evidence", the so-called "scientific disciplines".[1442] These requirements are regulated in more detail in art. 5 and 7 and considered to be stricter than those in other international standards[1443] as could already be seen in the examples above. Art. 2 further expresses the obligation to refrain from measures that arbitrarily or unjustifiably discriminate or constitute a disguised trade restriction and is interpreted somewhat stricter than the equivalent in the *chapeau* of art. XX *GATT*.[1444] Art. 3 introduces the goal of harmonization, obliging member states to base *SPS* measures on international standards, including soft law ones,[1445] except where there is scientific justification for not doing so.[1446] This is of particular interest for the idea of this research to use universal human rights and international human rights standards to protect human rights abroad. Whether the measure was imposed before or after the *SPS* agreement entered into force is not relevant as was decided in *EC-Hormones*, so human rights treaties already signed decades ago or for example standards developed by the ILO already in the beginning of its work could be applicable. Yet as already mentioned above when explaining the aim of the Agreement, it only covers protection measures concerning life and health within the applying

---

("GMO") WT/DS291/R, WTO/DS/292/R and WT/DS293/R (29 September 2006) par. 7.197-7.211.

[1442] Robert Hudec, "GATT/WTO Constraints on National Regulation: Requiem for An 'Aim and Effects' Test" (1998) 32 *The Int'l Lawyer* 619, 648; Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge: Cambridge University Press, 2008) 842.

[1443] See on the issue of the precautinary principle and the *SPS* for example Richard Senti, *Die WTO im Spannungsfeld zwischen Handel, Gesundheit, Arbeit und Umwelt* (vol. 32, Baden-Baden: Nomos, 2006) 45-6; Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge: Cambridge University Press, 2008) 862-6.

[1444] For details see Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge: Cambridge University Press, 2008) 847-8.

[1445] Mary E. Footer, "The (Re)Turn to 'Soft Law' in Reconciling the Antinomies in WTO Law" (2010) 11 *Melb. J. Int'l L* .241, 267.

[1446] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge: Cambridge University Press, 2008) 842.

state's own territory.[1447] This is explicitly stated in par. 1 of *Annex A* of the Agreement.[1448] However, the adherence to non-trade standards related to human rights and protection of human rights in the host state, not the home state, is the very topic of this research and the situation for which home state options are assessed. That is why it is not much help either, that PPM measures are also covered by the *SPS* Agreement. Covering PPMs and allowing the protection of life and health rights in a member state's own territory only, means only covering incorporated PPMs.[1449] So with regard to the topic covered by this enquiry, the *SPS* Agreement is only of limited interest. As long as PPMs are product-related and cause threats to life or health in the home state, *SPS* measures can be applied. The same is true for measures under *TBT* and *GATT*. This is the case in situations like *EC-Asbestos*, where the manufacturers in the host state as well as the sellers and consumers in the home state are affected by the risks to health. The more interesting part, because it is covering more of the cases assessed in the TNC context of this research and it is highly debated, is the case of unincorporated PPMs. Due to these considerations and the limited scope of this enquiry which assesses many different kinds of state options, the focus will be on unincorporated PPMs in the following. For *SPS* measures the answer to the question whether it is covering unincorporated PPMs is pretty clear given the just mentioned territorial scope - it does not. Therefore, only the *TBT* and *GATT* Agreements will be assessed in more detail below and the *SPS* Agreement will only be referred to where helpful for their interpretations.

[1447] *Ibid.* at 834.

[1448] Annex A of the *Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)* (1995).

[1449] On this conclusion see also Philipp Jehle, *Harmonisierung im Welthandelsrecht durch Verweis auf internationale Standards* (vol. 46, Baden-Baden: Nomos, 2008) 57; see also Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 62; see for the terms "incorporated PPM" and "unincorporated PPM" for example Manoj Joshi, „Are Eco-Labels Consistent with World Trade Organization Agreements?" (2004) 38 *J.W.T.* 69, 74; *World Trade Report 2005*, WTO Website, Resources <http://www.wto.org/english/res_e/publications_e/wtr05_e.htm> 1 May 2014; 150; using the terms "product-related PPM" and "non-product related PPM" is for example Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge: Cambridge University Press, 2008) 808.

(b) Human rights in the context of "legitimate objective" and "necessity" according to art. 2.2 TBT

The *TBT Agreement* covers technical barriers to trade that do not fall under the *SPS Agreement* or the *Agreement on Government Procurement*.[1450] Like *GATT* the *TBT Agreement* contains as a basic provision the MFN treatment and the national treatment already mentioned above. Yet the *TBT* also provides for the possibility to imply technical regulations, *i.e.* mandatory rules, that may discriminate against foreign products in cases where such regulations are not

> more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia:* national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia:* available scientific and technical information, *related processing technology* or intended end-uses of products.[1451]

Art. 2.2 is accompanied by art. 2.5 *TBT* which in its second sentence states:

> Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.

So the necessity test is automatically met when the regulation is for example based on human health or safety, thereby including human rights concerns in these areas, at least where international standards of human rights exist.[1452]

Furthermore, the non-exclusive list of legitimate objectives goes beyond the exclusive list of art XX *GATT*. This means the DSB could find that other interests, including human rights, like "fair labour practices, are, in a particular

---

[1450] *Agreement on Government Procurement (GPA)* (1996); Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge: Cambridge University Press, 2008) 815.
[1451] Art. 2.2 *Agreement on Technical Barriers to Trade (TBT)* (1995), emphasis added.
[1452] See Jeroen Denkers, *The World Trade Organization and Import Bans in Response to Violations of Fundamental Labour Rights* (Antwerp, Oxford, Portland: Intersentia, 2008) 59.

case, legitimate policy objectives within the meaning of art. 2.2."[1453] The non-exhaustive list is of particular interest for this enquiry because the legitimate objectives are not limited to those within the member states own territory.[1454] That means in contrast to the *SPS Agreement*, the *TBT Agreement* is more apt to tackle the situation of TNCs violating human rights abroad. Furthermore, art. 2.2 explicitly states that the risks of not fulfilling the legitimate objective have to be taken into account when assessing the necessity of the trade restrictive measure. This suggests that some sort of balancing of interests, similar to the one already developed for art. XX *GATT*[1455] has to take place.[1456] In this process of balancing of interests, human rights, once they are accepted as a legitimate objective, can - or even have to - be taken into account.[1457]

(c) Human rights and "international standards" according to art. 2.4 TBT

A further basic provision of the *TBT* is the use of international standards,[1458] because they offer a good way to harmonize technical barriers to ease international trade.[1459] As could already be seen when sketching the example of the *Tuna-Dolphin* decisions, the idea of using other international agreements or treaties when examining a member state's trade restricting measures is not a new one. Yet in *TBT* and *SPS* this was laid down in more detail. Art. 2.4 *TBT* reads:

> Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or

[1453] Peter Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge: Cambridge University Press, 2008) 819.
[1454] See *ibid.* at 819, emphasis in the original; on the non-exhaustive character see also Robert Hudec, "GATT/WTO Constraints on National Regulation: Requiem for An 'Aim and Effects' Test" (1998) 32 *The Int'l Lawyer* 619, 643.
[1455] For the test under art. XX *GATT* see below.
[1456] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge: Cambridge University Press, 2008) 820; see also Robert Hudec, "GATT/WTO Constraints on National Regulation: Requiem for An 'Aim and Effects' Test" (1998) 32 *The Int'l Lawyer* 619, 643-4; *World Trade Report 2005*, WTO Website, Resources <http://www.wto.org/english/res_e/publications_e/wtr05_e.htm> 1 May 2014,140 wfr.
[1457] Carlos Lopez-Hurtado, "Social Labelling and WTO Law" (2002) 5 *JIEL* 719, *7; Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 61-2.
[1458] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge: Cambridge University Press, 2008) 817.
[1459] *Ibid.* at 820.

> relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.[1460]

In contrast to art. 3 *SPS Agreement* no specific international standards or international bodies providing such standards are listed and the exception is rather broad. Therefore, human rights standards could be relevant under *TBT* as well. The ILO for example is setting international labour standards.[1461] The impact of the provision to use international standards where available could be seen in *EC-Sardines* sketched above, where it was held to be a trade-restriction not permissible under *TBT* that the EC had not implemented its own law in accordance with the corresponding Codex Alimentarius standards, which pursued the same objectives. In *EC-Sardines* the Panel affirmed the explanatory note concerning international standards in Annex 1 A to the *TBT Agreement*, which explains that international standards do have to be based on consensus.[1462] Yet human rights could also be considered in another way. There is an exemption to the obligation to use international standards already within art. 2.4 *TBT*. This is the case when a legitimate objective according to art. 2.2 is pursued by the measures and the international standard is an inappropriate or ineffective means to achieve that objective.[1463] This leaves some space for domestic protection of non-trade interests that is for example of higher level than the international standard provides for. In addition, the burden of proof for the appropriateness and effectiveness is with the complainant as the AB decided in *EC-Sardines*. So as human rights could be legitimate objectives as seen above, technical barriers to trade could be based on them. Where no human rights

---

[1460] *Explanatory Note to Annex 1 A to the TBT Agreement.*

[1461] For an overview see for example ILO, *Rules of the Game* (Geneva: ILO, 2009) in particular 14-9.

[1462] See WTO, Legal Affairs Division, *WTO Analytical Index: Guide to WTO Law And Practice* (3rd ed, Cambridge: Cambridge University Press, 2012), available at <http://www.wto.org/english/res_e/booksp_e/analytic_index_e/analytic_index_e.htm> 1 May 2014 art. 2.4 *TBT*, referring to *EC-Sardines* and pointing out why consensus is not always required; see also Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge: Cambridge University Press, 2008) 822 wfr pointing out that the consensus requirement was laid down as one of the principles by the CTE.

[1463] That the legitimate objective of 2.4 has to be interpreted in the context of art. 2.2 was decided in *European Communities - Trade Description of ("EC – Sardines")* WT/DS231/R (29 May 2002) and WT/DS231/AB/R (26 September 2002).

standards exist or where they are ineffective or inappropriate to achieve the pursued level of human rights protection, the member state is not prevented from imposing the measures in spite of this. Yet of course, MFN and national treatment have also to be observed under *TBT* and *GATT* is applicable complementarily, although usually prevails in cases of conflicts between WTO agreements.[1464] Furthermore, art. 2.9 *TBT* has to be observed in such cases to inform other member states and allow for a discussion of the intended measure. This does also apply to mandatory labelling schemes according to the *TBT* Committee.[1465]

(d) PPMs under the TBT

As sketched above in the TNC-human rights context it is PPMs rather than the products themselves that affect human rights. So all the possible gateways for human rights protection under *TBT* can in many cases only be used if PPMs are an accepted benchmark.

TBT Annex 1 defines the term "technical regulation" as a

> [d]ocument which lays down product characteristics or their *related processes and production methods*, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal *exclusively* with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.[1466]

This definition refers to characteristics of the product or their *related* processes and is therefore predominantly understood as only including those processes and production methods that affect the product itself,[1467] *i.e.* incorporated PPMs. Yet

---

[1464] See *General Interpretative Note to Annex 1A of the WTO Agreement.*

[1465] See *Decisions and Recommendations adopted by the Committee since January 1995* G/TBT/1/Rev.8 (23 May 2002) 18; WTO, Legal Affairs Division, *WTO Analytical Index: Guide to WTO Law And Practice* (3rd ed, Cambridge: Cambridge University Press, 2012), available at <http://www.wto.org/english/res_e/booksp_e/analytic_index_e/analytic_index_e.htm> 1 May 2014, *TBT* art. 2.9.

[1466] *Agreement on Technical Barriers to Trade (TBT)* (1995) Annex 1 No.1, emphasis added.

[1467] See Arthur E. Eppleton "Private climate change standards and labelling schemes under the WTO Agreement on Technical Barriers to Trade" in Thomas Cottier, Olga Nartova and Sadeq Z. Bigdeli, *International Trade Regulation and the Mitigation of Climate Change* (Cambridge: Cambridge University Press, 2009) 131, 137-141; OECD, *Process and Production Methods (PPMs): Conceptual Framework and Considerations on Use of PPM-*

as the second sentence does not use the expression "related", but instead mentions process and production methods alongside the term "product", the *TBT* can also be understood as including unincorporated PPM standards.[1468] Therefore the conclusion can be drawn, that at least

> concerning 'labelling requirements' relating to NPR-PPMs [*i.e.* non-product related PPMs] are TBT measures within the meaning of Annex 1 to the *TBT Agreements* and thus fall within the scope of application of the *TBT Agreement*.[1469]

As already mentioned above, unlike the *SPS Agreement*, the *TBT Agreement* is not preventing the protection of legitimate objectives outside a member states's territory. Therefore, unincorporated PPMs may be considered to be included more easily in the *TBT*. Yet whether the DSB would share this opinion is not yet clear, particularly because developing countries have been opposed to introducing labour issues into the WTO and including unincorporated PPMs into the *TBT* would also mean including them into art. III *GATT*.[1470] Many member

---

Based Trade Measures, OECD/GD(97)137, 11; on the uncertainty whether unincorporated PPMs are covered see Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures addressing Non-Trade Concerns. A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Process and Production Methods* (The Hague: Ministry of Foreign Affairs of the Netherlands, 2007) 143-7.

[1468] See Rex J. Zedalis, „The Environment and the Technical Barriers to Trade Agreement: Did the *Reformulated Gasoline Panel* Miss a Golden Opportunity?" (1997) 44 *NILR* 186, 191-4 who argues that the explicit inclusion of PPMs into the *TBT* "was purposeful and deliberate" on p. 192; for labelling see Harald Ginzky, *Saubere Produkte, schmutzige Produktion* (Düsseldorf: Werner Verlag, 1997) 193; on the possibility to read the *TBT* provisions both ways see Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures addressing Non-Trade Concerns. A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Process and Production Methods* (The Hague: Ministry of Foreign Affairs of the Netherlands, 2007) 143-7.

[1469] Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge: Cambridge University Press, 2008) 808; see also Arthur E. Eppleton "Private climate change standards and labelling schemes under the WTO Agreement on Technical Barriers to Trade" in Thomas Cottier, Olga Nartova and Sadeq Z. Bigdeli, *International Trade Regulation and the Mitigation of Climate Change* (Cambridge: Cambridge University Press, 2009) 131, 139; Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures addressing Non-Trade Concerns. A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Process and Production Methods* (The Hague: Ministry of Foreign Affairs of the Netherlands, 2007) 143-7, in paricular 145.

[1470] Manoj Joshi, „Are Eco-Labels Consistent with World Trade Organization Agreements?" (2004) 38 *J.W.T.* 69, 86.

states were already opposed to including them when drafting the Agreement and the final text was not supposed to include them.[1471] Yet the Agreements and its Annex 1 can be understood in both ways. In addition, as already seen above, dynamic interpretation of WTO norms is possible and the DSB has done so for example concerning art. XX (g) *GATT*.[1472]

(e) Human rights and TBT *standards according to art. 4* TBT

Using voluntary measures, *i.e.* standards instead of technical regulations, could be a way to consider human rights in an even broader scope, possibly including PPMs.

Annex 1 A to the *TBT Agreement* defines the term international standard in more detail as:

> Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.[1473]

In the explanatory note to this definition it is set out that standards are voluntary whereas technical regulations are mandatory and that documents not based on consensus are also covered by the *Agreement*, as could already be seen above.

While art. 2 *TBT* only applies to technical regulations, art. 4 deals with the "Preparation, Adoption and Application of Standards." Art. 4 basically refers to Annex 3 to the *TBT Agreement*, titled "Code of Good Practice for the Preparation, Adoption and Application of Standards". Annex 3 D. contains rules on notification, discussion etc, yet it also contains the MFN and national treatment principles. Furthermore, it is set out in Annex 3 E. and F. that

---

[1471] *Ibid.* at 75.

[1472] See Arthur E. Eppleton "Private climate change standards and labelling schemes under the WTO Agreement on Technical Barriers to Trade" in Thomas Cottier, Olga Nartova and Sadeq Z. Bigdeli, *International Trade Regulation and the Mitigation of Climate Change* (Cambridge: Cambridge University Press, 2009) 131, 140 pointing out, however, that *United United States – Import Bans of Certain Shrimp and Shrimp Products ("Shrimp-Turtle")* WT/DS58/R (15 May 1998), WT/DS58/AB/R (12 October 1998) and *United States - Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 by Malaysia ("Shrimp-Turtle Malaysia")* WT/DS58/RW (15 June 2001) and WT/DS58/AB/RW (22 October 2001) are no direct guidance for *TBT* interpretation.

[1473] *Annex 1 A to the TBT Agreement.*

standards must not create "unnecessary obstacles to international trade" and that standards should be based on international standards unless these are inappropriate or ineffective. In this respect the Annex is similar to arta. 2.2 and 2.4 *TBT*. Yet it does not list legitimate interests and therefore the necessity requirement is not set out in that much detail either, leaving open as to how the necessity of an obstacle to trade has to be assessed exactly. A risk assessment is not mentioned either. That is why it could be argued that standards may be used to achieve an even broader range of legitimate interests. Therefore human rights protection by using standards could be easier. Yet as the list in art. 2.2 is an open one and MFN and national treatment still have to be observed under Annex 3, the requirements for voluntary and mandatory measures seem to be pretty similar in this respect. Furthermore, the sixth recital of the *TBT* preamble referring to the whole Agreement, including technical regulations and standards, speaks of to the "protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices" and is thus similar to the legitimate objectives set out in art. 2.2 *TBT*.

As far as unincorporated PPMs are concerned, the considerations already made above can be used, as the definitions of "technical regulation" and "standard" are the same concerning PPMs. That means that using standards instead of regulations is not an option allowing for more human rights protection under *TBT*.

(f) PPMs and"like" products according to art. III GATT

Art. III *GATT* demands for equal treatment. "Like" products have to be treated alike and foreign "like" products may not be discriminated against by domestic charges, regulations, etc in order to protect domestic production.[1474] As can be seen from art. III:1, the very aim of art. III is to prevent internal mere protectionist measures.[1475] The protectionist intent is either inherent in the

[1474] Art. III *General Agreement of Tariffs and Trade (GATT)* (1947).

[1475] On this aim see also WTO, Legal Affairs Division, *WTO Analytical Index: Guide to WTO Law And Practice* (3rd ed, Cambridge: Cambridge University Press, 2012), available at <http://www.wto.org/english/res_e/booksp_e/analytic_index_e/analytic_index_e.htm> 1 May 2014, art. III *GATT* referring to *Japan - Taxes on Alcoholic Beverages* (11 July 1996) and WT/DS8/AB/R, WT/DS/10/AB/R, WT/DS11/AB/R (4 October 1996), *Korea - Taxes on Alcoholic Beverages* WT/DS75/R and WT/DS84/R (17 September 1998) WT/DS75/AB/R

measure described in one of the more specific paragraphs of art. III or has to be positively shown.[1476] The fundamental aim of art. III *GATT* is according to the Appellate Body "to ensure equality of competitive conditions between imported and like domestic products."[1477] The question that arises in the context of human rights is whether a product not produced in accordance with human rights norms is a "like" product compared to a product produced in accordance with human rights. If products manufactured under different PPMs are considered "like" and domestic products are regularly manufactured in accordance with the PPM standards required for sale while those of the host state are not, a factual "less favourable" treatment is given. Such a *de facto* discrimination is sufficient for a discrimination according to art. III *GATT*[1478] and may be caused by the design and application of a law or regulations when exclusively or mainly foreign products are affected by it.[1479]

When the products are considered "unlike" in the sense of art. III *GATT*, however, they may be treated differently. Therefore the question that will be assessed in the following section is whether PPMs, particularly unincorporated ones, may be referred to for determining "likeness" under art. III *GATT*. To determine the "likeness" of a product under art. III:4[1480] four criteria have been developed by WTO/*GATT* Panels so far, yet this is not being a closed list

---

and WT/DS84/AB/R (18 January 1999) and *Canada - Certain Measures Concerning Periodicals* WT/DS31/R (14 March 1997) and WT/DS31/AB/R (30 June 1997).

[1476] On the issue whether the intent of the legislator and regulator is relevant when deciding whether a measure is protectionist or not see *Japan - Taxes on Alcoholic Beverages* (11 July 1996) and WT/DS8/AB/R, WT/DS/10/AB/R, WT/DS11/AB/R (4 October 1996) 27*;* but *Canada - Certain Measures Concerning Periodicals* WT/DS31/R (14 March 1997) and WT/DS31/AB/R (30 June 1997) 30-2.

[1477] *Canada - Certain Measures Concerning Periodicals* WT/DS31/R (14 March 1997) and WT/DS31/AB/R (30 June 1997) 18.

[1478] Carlos Lopez-Hurtado, "Social Labelling and WTO Law" (2002) 5 *JIEL* 719, *11; see also Wolfram Spelten, *WTO und nationale Sozialordnungen* (vol.11, Berlin: Duncker & Humblot, 2005) who is drawing a parallel to the prohibition of restrictions in EC law from *United States - Section 337 of the Tariff Act of 1930 (L/6439 - 36S/345)* GATT Panel Report, adopted 7 November 1989.

[1479] Carlos Lopez-Hurtado, "Social Labelling and WTO Law" (2002) 5 *JIEL* 719, *12.

[1480] As the scope of this enquiry is limited, the focus is on art. III: 4 *GATT* here, because labelling schemes will mainly fall under art. III:4: "regulations and requirements affecting their internal sale,…", although of course their costs could also be considered a tax. Furthermore, art. III:4 can also be considered to cover non-mandatory measures as decided in *Canada - Certain Measures Affecting the Automotive Industry* WT/DS139/R and WT/DS/142/R (11 February 2000), WT/DS139/AB/R and WT/DS142/AB/R (31 May 2000).

according to them.[1481] The criteria of which usually all four have to be considered[1482] are (1) the properties of the product itself, its nature and quality, (2) its end-use, (3) consumers' tastes and habits and (4) the tariff classification.[1483]

These criteria already show that unincorporated PPMs are not exactly the main issue when considering the likeness of products. It is argued by some that PPMs are part of every (importing) state's sovereignty and should therefore not be intervened with by WTO/*GATT*.[1484] Yet this is not very convincing as the product standards themselves also affect the exporting state's sovereignty.[1485] A striking example for the latter is *US-Gasoline*[1486] where the Panel demanded Venezuelan refineries to adhere to US product standards, which demanded large

---

[1481] See Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures addressing Non-Trade Concerns. A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Process and Production Methods* (The Hague: Ministry of Foreign Affairs of the Netherlands, 2007) 58, referring to *European Communities - Measures Affecting Asbestos and Products Containing Asbestos ("Asbestos")* WT/DS135/R (18 September 2000) and WT/DS135/AB/R (12 March 2001).

[1482] See *European Communities - Measures Affecting Asbestos and Products Containing Asbestos ("Asbestos")* WT/DS135/R (18 September 2000) and WT/DS135/AB/R (12 March 2001).

[1483] These criteria were first set out in *Border Tax Adjustments, Report of the Working Party L/3464* (2 December 1970) par.18; see also case law, such as *European Communities - Measures Affecting Asbestos and Products Containing Asbestos ("Asbestos")* WT/DS135/R (18 September 2000) and WT/DS135/AB/R (12 March 2001); *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages (L/6216 - 34S/83)* GATT Panel Report, adopted 10 November 1987; see also James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007); Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures addressing Non-Trade Concerns. A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Process and Production Methods* (The Hague: Ministry of Foreign Affairs of the Netherlands, 2007) 58.

[1484] See Steve Charnovitz, "Environmental and Labour Standards in Trade" (1992) 15 *World Economy* 335, 346; Michael Reiterer, „Das multilaterale Handelssystem und internationaler Umweltschutz" (1993) *WpolBl* 291, 294; Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 65.

[1485] Steve Charnovitz, "Environmental and Labour Standards in Trade" (1992) 15 *World Economy*, 335, 347.

[1486] *United States - Standards for Conventional and Reformulated Gasoline ("US-Gasoline")* WT/DS2/R (29 January 1996) and WT/DS2/AB/R (29 April 1996).

adjustments by the said refineries.[1487] Furthermore, the issue of protectionism art. III is seeking to prevent is an issue that occurs wherever differential treatment of imported and domestic products is given, no matter whether the distinction is based on product or production standards.[1488] So non-discrimination and the prohibition of protectionist measures could be sufficient for unincorporated PPM standards to be consistent with art. III *GATT* as well.[1489] Whether this is the case and whether unincorporated PPMs can be considered under art. III:4 *GATT* at all will be assessed now.

(i) Using PPMs directly

While in the *Tuna-Dolphin* decisions, the use of PPMs as a differentiation criterion under art. III was rejected, this may not always be the case,[1490] especially after the manifold criteria used in *EC-Asbestos* mentioned above[1491] and the reference to PPMs in *SPS* and *TBT*.[1492] Whilst cultivation and processing methods were also rejected as a criterion to determine the likeness of products in *Spain-Unroasted Coffee*,[1493] the Panel referred to "manufacturing processes of products" and "consumers' viewpoint" to determine likeness in *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*,[1494] yet the panel did not explain in any detail what was meant by

[1487] *European Communities - Measures Affecting Asbestos and Products Containing Asbestos ("Asbestos")* WT/DS135/R (18 September 2000) par. 3.14.
[1488] Andreas Knorr, *Umweltschutz, nachhaltige Entwicklung und Freihandel* (Stuttgart: Lucius & Lucius, 1997) 30-1.
[1489] See Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 65.
[1490] See for example Robert Howse and Donald Regan, "The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy" (2000) 11 *EJIL* 249 who argue that non-protectionist origin-neutral measures based on unincorporated PPMs are permissible under art. III *GATT*.
[1491] See also Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures addressing Non-Trade Concerns. A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Process and Production Methods* (The Hague: Ministry of Foreign Affairs of the Netherlands, 2007) p. XXXIII.
[1492] See also Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization* (2nd ed, Oxford, New York: Oxford University Press, 2006) 241.
[1493] *Spain-Tariff Treatment of Unroasted Coffee*, GATT Panel Report (L/5135 - 28S/102), adopted 11 June 1981, par. 4.6.
[1494] *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages (L/6216 - 34S/83)* GATT Panel Report, adopted 10 November 1987.

these criteria.[1495] This means it is not impossible that PPMs themselves are used as an additional criterion to determine "likeness". As a supportive argument art. XX (e) *GATT* is sometimes used which allows for discrimination against products manufactured by prison labour.[1496] Yet it is also argued that art. XX (e) is not protecting the prisoners, but the domestic products of importing states, as prison labour is cheap labour for the exporting state.[1497] That art. XX (e) is not intended to protect prisoners can for example be derived from the fact that prison labour is not *per se* violating human rights or other international standards and that such a violation is no requirement of a justification according to art. XX (e) *GATT* either. [1498] Yet the *TBT* and *SPS Agreements* could also be supportive of using PPMs when assessing the likeness of products. The Agreements *TBT* and *SPS* have modified art. III *GATT* and are *leges speciales* overriding *GATT*[1499] as already outlined above. Therefore *TBT* and *SPS* have to be considered when assessing art. III *GATT*. Yet as seen above unincorporated PPMs are not covered by the *SPS Agreement* and in the *TBT* it is an unsettled question whether unincorporated PPMs may be considered or not.[1500] That means unincorporated PPMs could be used by future DSBs as an additional criterion themselves when assessing the "likeness" of products, but this is not

---

[1495] *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages (L/6216 - 34S/83)* GATT Panel Report, adopted 10 November 1987, par. 5.7.

[1496] Paul Cook, "Law of Trade in Human Rights: A Legal Analysis of the Intersection of the General Trade Agreement of Tariff's Article XX (b) and Labor Rights of Children" (University of California, Los Angeles, 2012) available at <http://works.bepress.com/paul_cook/3> 1 May 2014, 23; Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 67.

[1497] See for example Christian Hess, "Sind Sozialklauseln im Welthandel berechtigt?" (1995) 3 *Der Arbeitgeber* 81, 82-3, fn 15; Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization* (2nd ed, Oxford, New York: Oxford University Press, 2006) 922; Gudrun Monika Zagel, *WTO & Human Rights: Examining Linkages and Suggesting Convergence* (Voices of Development Jurists Paper Series vol. 2, no. 2, Rome: International Development Law Organization, 2005) 15.

[1498] On art. XX (e) see Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 93.

[1499] *General Interpretative Note to Annex 1A of the WTO Agreement*: "In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the "WTO Agreement"), the provision of the other agreement shall prevail to the extent of the conflict.".

[1500] Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 62.

compulsory. Due to the predominant perception of the *TBT* not including unincorporated PPMs, although this *Agreement* is broader than the *GATT* in this respect, it seems rather unlikely that PPMs will be included when determining "likeness" in the near future. Yet it should be kept in mind that the *Agreement on Subsidies and Countervailing Measures* (*SCM)*[1501] as well as the *TRIPS* are both taking into account certain actions during the production process, although in a rather particular and confined context.[1502] So changes in *TBT* and *GATT* interpretation could occur, although most likely not within the next few decades.

(ii) PPMs as part of "consumers' tastes and habits"

Apart from including unincorporated PPM standards explicitly as an additional factor when determining likeness, PPM standards could also be included through the already existing criterion of consumers' taste and preferences.[1503] The AB in *EC-Asbestos* stressed that this criterion and the one concerning the product's end-use are the "key elements relating to the competitive relationship between products".[1504] Yet consumers may not only take into account incorporated PPMs. The price of a product has for example been considered a factor influencing consumers' preferences and the price of a product is not

[1501] *Agreement on Subsidies and Countervailing Measures (SCM)* (1994).
[1502] See *ibid.* at 68 referring to art. 27 *TRIPS*.
[1503] Carsten Helm, *Sind Freihandel und Umweltschutz vereinbar? Ökologischer Reformbedarf des GATT/WTO-Regimes* (Berlin: Ed. Sigma, 1995) 96; Henry L. Thaggert, „A closer look at the Tuna-Dolphin Case: 'Like Products' and 'Extrajurisdictionality' in the Trade and Environment Context" in James Cameron, Paul Demaret and Damien Geradin, *Trade & the Environment: The Search for Balance* (vol. 1, London: Cameron May Ltd., 1994) 69, 72; Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures addressing Non-Trade Concerns. A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Process and Production Methods* (The Hague: Ministry of Foreign Affairs of the Netherlands, 2007) 63-4; see also Robert Howse and Donald Regan, "The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy" (2000) 11 *EJIL* 249, 268 who argue that as the list of criteria to determine likeness is an open one, the purpose of the measure could also be taken into account to make sure that protectionist measures are excluded.
[1504] *European Communities - Measures Affecting Asbestos and Products Containing Asbestos ("Asbestos")* WT/DS135/R (18 September 2000) and WT/DS135/AB/R (12 March 2001), par. 117.

necessarily solely product-based.[1505] Now when considering the *Tuna-Dolphin* case above, it was due to ecology groups, *i.e.* the population[1506] and therefore the consumers themselves, that tuna that was not caught dolphin-friendly was banned. Another WTO example where it was assumed that consumers' tastes and habits were influenced is *EC-Asbestos* - where the Appellate Body relied upon physical properties of the bricks containing asbestos and those that did not contain asbestos, but it also relied on consumer habits, arguing that they wanted to purchase bricks that did not represent health risks and came to the conclusion that the bricks were not "like" products.[1507] The Appellate Body in this case decided in favour of public health and its protection by domestic measures. It has therefore been argued that other social concerns could also cause "unlikeness", particularly when linked to consumers' habits so that when consumers want to purchase products manufactured in accordance with international human rights standards, products produced that way and those that are not produced in such a way might be "unlike" as well.[1508] However, this idea is highly contentious[1509] and so far the DSB has not decided on this matter. Yet of course this does not mean that at least in cases of "the most uncomplicated human rights measures"[1510] imposed or where clear human rights violations are

[1505] See *United States – Taxes on Automobiles* (*DS31/R)* GATT Panel Report, not adopted, 11 October 1994; see also Andreas Diem, *Freihandel und Umweltschutz in GATT und WTO* (Baden-Baden: Nomos, 1996) 100, who points out that the Panels themselves are already turning away from mere physical criteria since *US-Taxes on Automobiles*.

[1506] Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 67.

[1507] *European Communities - Measures Affecting Asbestos and Products Containing Asbestos ("Asbestos")* WT/DS135/R (18 September 2000) and WT/DS135/AB/R (12 March 2001).

[1508] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 194; Berta Esperanza Hernández-Truyol, Stephen J. Powell, *Just Trade: A New Covenant Linking Trade and Human Rights* (New York, London: New York University Press, 2009) 94.

[1509] See Sarah H. Cleveland, "Human Rights Sanctions and International Trade: A Theory of Compatibility" (2002) *JIEL* 133, * 11; James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 194-5; Carlos Manuel Vázquez, "Trade Sanctions and Human Rights - Past, Present, and Future" (2003) 6 *JIEL* 797, 811 arguing that "unlikeness" based on PPMs is unlikely to be compatible with art. III *GATT*; see also Jeroen Denkers, *The World Trade Organization and Import Bans in Response to Violations of Fundamental Labour Rights* (Antwerp, Oxford, Portland: Intersentia, 2008) 42-3, pointing out that consumers' preferences may be shaped by governments, so this element of determining likeness might also be instrumentalized for protectionist aims.

[1510] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 196.

occurring during or are closely linked to the manufacturing process, "likeness" could not be rejected by future DSBs due to consumers' tastes and habits.[1511] Yet home states do not have to wait until the issue is decided by the DSBs. Consumers' tastes and habits are not static, but changing and developing and open to influences by marketing agencies, trends and movements. This gives the home state the chance of influencing the criterion determining the likeness of products by informing and raising awareness among its consumers for the issue of human rights and TNCs acting abroad.

(iii) PPMs as part of an "aim and effects" test under art. III GATT

In addition to determining the likeness of products, an aim and effects test concerning the protectionist intention or effect of the measure implied is sometimes mentioned as a further requirement.[1512] Under this test is was assessed, whether the aim and effect of the measure was applied as to afford protection of domestic products.[1513] Therefore this approach is more open to the consideration of unincorporated PPMs.[1514] It also meets the argument that an undue restriction of state sovereignty is caused by using a wide interpretation of "likeness", which leads to the consequence that not even aims acknowledged by *GATT* could be pursued by internal measures discriminating between foreign and domestic products[1515] or would have to meet art. XX to be justified. This argument is also in line with the idea of in *dubio mitius*, *i.e.* using the interpretation of a norm that is least restrictive for state sovereignty. This principle was for example mentioned by the Appellate Body in the *Hormones*

[1511] *Ibid.*
[1512] See James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 195-6 wfr; Robert Hudec, "GATT/WTO Constraints on National Regulation: Requiem for An 'Aim and Effects' Test" (1998) 32 *The Int'l Lawyer* 619; *United States – Taxes on Automobiles* (*DS31/R)* GATT Panel Report, not adopted, 11 October 1994.
[1513] *Japan -Taxes on Alcoholic Beverages* (11 July 1996) and WT/DS8/AB/R, WT/DS/10/AB/R, WT/DS11/AB/R (4 October 1996).
[1514] See Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 66.
[1515] *Ibid.*

case.[1516] The "aim and effects" test has been developed particularly in *United States-Taxes on Automobiles.*[1517] Yet already before that case, in *United States - Measures Affecting Alcoholic and Malt Beverages*[1518] for example beer with a low alcohol content and beer with a higher alcohol content were considered "unlike" under the "aim and effects" test, because the aim was considered to be the protection of health and public morals and not the own economy as could be seen by the formal equal treatment of both, domestic and foreign products.[1519] The parties' reasoning of protecting public morals and health, which was accepted by the Panel reminds very much of the exceptions mentioned in art XX *GATT*. This already shows some of its difficulties - the rather difficult differentiation between art. III and XX *GATT* resulting from the aim and effects test was one of the issues criticized,[1520] alongside the fact that the wording of art. III *GATT* did not allow for such a test and that an interpretation contradicting the wording of art. III *GATT* was against the rules of treaty interpretation of public international law.[1521] In *Japan-Alcoholic Beverages*[1522] the Panel made the same points, arguing that art XX *GATT* was circumvented by such an extensive use of art. III *GATT* and that the aim and effects test was contradicting the wording of the assessed art. III:2 *GATT*. It also pointed out that in practice the aim of a measure was often hard to determine. The AB upheld this reasoning and the "aims and effects" test was rejected. Yet this rejection by the DSBs does not necessarily mean that it cannot be reconsidered using it again. Howse and Regan argue that although the "aim and effects" test may have been rejected, the AB has not rejected considereing the aims and effects of a measure when examining

---

[1516] *European Communities - Measures Concerning Meat and Meat Products ("Hormones")* WT/DS26/R/USA (26 January 1996) WT/DS48/R/CAN (18 August 1997) WT/DS26/AB/R and WT/DS48/AB/R (16 January 1998) par.165.
[1517] *United States – Taxes on Automobiles* (*DS31/R)* GATT Panel Report, not adopted, 11 October 1994.
[1518] *United States - Measures Affecting Alcoholic and Malt Beverages DS23/R* GATT Panel Report (16 March 1992, adopted 19 June 1992).
[1519] Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 66 wfr.
[1520] Robert Hudec, "GATT/WTO Constraints on National Regulation: Requiem for An 'Aim and Effects' Test" (1998) 32 *The Int'l Lawyer* 619, 628; Birgit Weiher, *Nationaler Umweltschutz und internationaler Warenverkehr* (Baden-Baden: Nomos, 1997) 130-1.
[1521] Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 60, 66.
[1522] *Japan -Taxes on Alcoholic Beverages* (11 July 1996) and WT/DS8/AB/R, WT/DS/10/AB/R, WT/DS11/AB/R (4 October 1996).

it under art. III.[1523] As a basis for the test, art. III:1 instead of art. III: 2 or 4 could be better, because the aim of preventing protectionism is explicitly stated there[1524] and art. III:1 has to be considered when interpreting art. III:4, because it contains the general principle of art. III.[1525] Yet of course such a reconsideration is rather unlikely after the DSBs have explicitly rejected this approach. It could also be that such a reconsideration is not necessary, because there is a further requirement to art. III:4 inconsistency, which will be assessed now.

(iv) Lifesaver "treatment less favourable"?

Even when (unincorporated) PPMs are not included into the determination of likeness a measure can still be considered in accordance with art. III *GATT* when it is not causing a "less favourable treatment" for foreign products as compared to like domestic products. It was stressed in *EC-Asbestos* that the rather broad interpretation of like products in art. III:4 was complemented by the requirement of establishing a "treatment less favourable" and therefore mere differential treatment between like products was not sufficient to violate art. III:4.[1526] The AB explained in several decisions that no "treatment less favourable" is given, when equality in competitive conditions between domestic and imported products is granted.[1527] In *EC-Asbestos* it was stressed that treatment less

[1523] Robert Howse and Donald Regan, "The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy" (2000) 11 *EJIL* 249, 264-6.
[1524] Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization* (2nd ed, Oxford, New York: Oxford University Press, 2006) 255, suggesting that for *de facto* discrimination the "aims and effect" test should be reconsidered.
[1525] See *European Communities - Measures Affecting Asbestos and Products Containing Asbestos ("Asbestos")* WT/DS135/R (18 September 2000) and WT/DS135/AB/R (12 March 2001).
[1526] On this see also WTO, Legal Affairs Division, *WTO Analytical Index: Guide to WTO Law And Practice* (3rd ed, Cambridge: Cambridge University Press, 2012), available at <http://www.wto.org/english/res_e/booksp_e/analytic_index_e/analytic_index_e.htm> 1 May 2014, art. III:4.
[1527] *Indonesia - Certain Measures Affecting the Automobile Industry* WT/DS54/R, WT/DS55/R, WT/DS59/ and WT/DS64/R (2 July 1998); *Japan - Taxes on Alcoholic Beverages* (11 July 1996) and WT/DS8/AB/R, WT/DS/10/AB/R, WT/DS11/AB/R (4 October 1996); *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef ("Korea-Beef"),* WT/DS161/R and WT/DS168/R (31 July 2000), WT/DS161/AB/R and WT/DS169/AB/R (11 December 2000) par. 137; Carlos Lopez-Hurtado, "Social Labelling and WTO Law" (2002) 5 *JIEL* 719, *5; see also Peter Van den Bossche, Nico Schrijver and

favourable of art. III:4 *GATT* had to be read in line with the general principle of art. III:1 *GATT*, so its aim was so prevent protectionism.[1528] This means that only protectionist measures are a "treatment less favourable".[1529] A trade restriction may therefore not be violating art. III *GATT* when the design and application of the measure is not causing a competitive disadvantage.[1530] Labels used for domestic as well as imported products and leaving the choice to the consumer alone could be considered *GATT* consistent under these criteria.[1531] This is in line with the *Tuna-Dolphin I* finding mentioned above. However, the assessment is difficult as *de facto* discrimination is a treatment less favourable as well as already mentioned.[1532] This means where imported products cannot meet the criteria for a label or are mainly or exclusively affected by the measure, the measure itself in its design and application is causing a "treatment less favourable".[1533] Yet as can be seen from case law, the AB is not jumping to

---

Gerrit Faber, *Unilateral Measures addressing Non-Trade Concerns. A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Process and Production Methods* (The Hague: Ministry of Foreign Affairs of the Netherlands, 2007) 28, fn 60.

[1528] See also Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures addressing Non-Trade Concerns. A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Process and Production Methods* (The Hague: Ministry of Foreign Affairs of the Netherlands, 2007) 56-7.

[1529] *Japan - Taxes on Alcoholic Beverages* (11 July 1996) and WT/DS8/AB/R, WT/DS/10/AB/R, WT/DS11/AB/R (4 October 1996); Carlos Lopez-Hurtado, "Social Labelling and WTO Law" (2002) 5 *JIEL* 719, *5 -6; see Robert Hudec, "GATT/WTO Constraints on National Regulation: Requiem for An 'Aim and Effects' Test" (1998) 32 *The Int'l Lawyer* 619; Joost Pauwelyn, "Recent Book on Trade and Environment: GATT Phantoms Still Haunt the WTO" (2004) 15 *EJIL* 575, 584.

[1530] *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages (L/6216 - 34S/83)* GATT Panel Report, adopted 10 November 1987; Carlos Lopez-Hurtado, "Social Labelling and WTO Law" (2002) 5 *JIEL* 719, *5.

[1531] Carlos Lopez-Hurtado, "Social Labelling and WTO Law" (2002) 5 *JIEL* 719, *6.

[1532] See Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures addressing Non-Trade Concerns. A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Process and Production Methods* (The Hague: Ministry of Foreign Affairs of the Netherlands, 2007) 29 wfr to case law; see also Jeroen Denkers, *The World Trade Organization and Import Bans in Response to Violations of Fundamental Labour Rights* (Antwerp, Oxford, Portland: Intersentia, 2008) 44-5, 52-3 arguing that *de facto* discrimination is only prevented in cases where domestic products are produced in the same way and also banned, e.g. where child labour is also used in the importing state.

[1533] Carlos Lopez-Hurtado, "Social Labelling and WTO Law" (2002) 5 *JIEL* 719, *11-2.

conclusions here. In *Dominican Republic - Measures Affecting the Importation and Internal Sale of Cigarettes*[1534] the AB held that it was no treatment less favourable although a detrimental effect on the imported product was given, if the "effect is explained by factors or circumstances unrelated to the foreign origin of the product, such as the market share of the importer in this case."[1535] Yet as far as human rights are concerned a treatment less favourable will usually be given in those cases, where the host state is unable to provide for human rights standards high enough to get a human rights label in the home state,[1536] as this is a factor related to the origin of the product. So the cases in the TNC context where no treatment less favourable is found would be rather limited.

(v) Conclusion on the possible interpretation of art. III GATT

After this short assessment it becomes obvious that although (unincorporated) PPMs could be included into the assessment of "like" products in art. III *GATT* it is not likely that this will happen. A repeating issue are the different "levels" of PPMs or their relation to the physical properties of a good. Those methods that do not affect the good itself, are not inherent in the good, are not included in the *TBT* as *SPS Agreements*' definitions of "process and production methods" according to the prevailing opinion as set out above. It is argued that methods not affecting the product as such, like observing or violating human rights standards, are bearing a higher risk of protectionism than those more related to the product itself.[1537] The "aim and effects" test is not properly substituted by the "treatment less favourable" requirement, as the intention of protectionism is not assessed there. Unincorporated PPMs concerning the human rights situation during the manufacturing or production is rather difficult to use as a differentiating criterion without treating imported product at least *de facto* "less favourable" due to their origin. As the more PPM-friendly "aim and effects" test

[1534] *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes* WT/DS302/AB/R (5 April 2005).
[1535] *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes* WT/DS302/AB/R (5 April 2005) par. 96.
[1536] On the requirement of the ability to comply with the internal measure to achieve compatibility with art. III *GATT* see also Johann Ludwig Duvigneau, *Handelsliberalisierung und Marktintegration unter dem WTO/GATT-Recht* (Berlin: Duncker & Humblot, 2005) 168.
[1537] Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 69.

has been explicitly rejected, a reconsideration within the next decades is rather unlikely. The overall impression, especially when considering the DSB decisions so far, is therefore that it cannot be expected that PPMs involving human rights violations will soon be included into art. III. The only possible state option at the moment to accelerate the inclusion of unincorporated PPMs into art. III is to raise awareness for the human rights issues concerning PPMs, thereby possibly creating a change in consumers' tastes and habits. However, this is an option with an outcome not easy to predict. Yet all this does not mean that human rights cannot be considered. Art XX may provide a means to do so and not only for (internal) competition issues, but more generally, including market access issues as well.

(g) Human rights and art. XX GATT

As including unincorporated PPMS into the interpretation of "likeness" is not likely and because cases exist that would not be included in such an interpretation, for example when already the market access is denied or, depending on the definition of "PPM", when the link between PPMs themselves and human rights violations is not as close, for example in cases of expropriation, art. XX *GATT* may be decisive.[1538] Certain unincorporated PPMs have indeed been admitted by meeting the requirements of art. XX *GATT*.[1539] The first decision where the "Gordian knot" has been cut[1540] and such a measure

[1538] See James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 197; Robert Hudec, "GATT/WTO Constraints on National Regulation: Requiem for An 'Aim and Effects' Test" (1998) 32 *The Int'l Lawyer* 619, 636.
[1539] Steve Charnovitz, "The Law of Environmental 'PPMs' in the WTO: Debunking the Myth of Illegality" (2002) 27 *Yale J. of Int'l Law* 59; Bernard M. Hoekman, Michel M. Kostecki, *The Political Economy of the World Trading System* (3rd ed, Oxford: Oxford University Press, 2009) 630; Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization* (2nd ed, Oxford, New York: Oxford University Press, 2006) 241; Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures addressing Non-Trade Concerns. A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Process and Production Methods* (The Hague: Ministry of Foreign Affairs of the Netherlands, 2007) 94.
[1540] Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization* (2nd ed, Oxford, New York: Oxford University Press, 2006) 811.

was deemed entirely WTO-consistent was *Shrimp-Turtle (Malaysia)*.[1541] So art. XX could provide for ways to control human rights protection in the host state by the home state. Art. XX contains justifications to deviate from *GATT* obligations when certain important state interests and obligations are given.[1542] As a norm dealing with exceptions it must not be interpreted too broadly[1543] to prevent rendering WTO obligations meaningless,[1544] while the main guidance for interpretation is still the "ordinary meaning of the actual treaty words".[1545] For trade restrictions in order to protect human rights, art. XX (a) and (b) *GATT*, which allow for exceptions necessary to protect "public morals" and "human animal or plant life or health" may be the most relevant clauses.[1546] According to

[1541] See Bernard M. Hoekman, Michel M. Kostecki, *The Political Economy of the World Trading System* (3rd ed, Oxford: Oxford University Press, 2009) 630; Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures addressing Non-Trade Concerns. A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Process and Production Methods* (The Hague: Ministry of Foreign Affairs of the Netherlands, 2007) 94.

[1542] See James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 197, referring to *United States - Standards for Conventional and Reformulated Gasoline ("US-Gasoline") WT/DS2/R (29 January 1996) and WT/DS2/AB/R (29 April 1996)* 30-1.

[1543] See for example *United States - Restrictions on Imports of Tuna (DS29/R) ("Tuna-Dolphin II")* GATT Panel Report, not adopted, 16 June 1994 par. 5.20; *United States - Section 337 of the Tariff Act of 1930 (L/6439 - 36S/345)* GATT Panel Report, adopted 7 November 1989.

[1544] Salman Bal, "International Free Trade Agreements and Human Rights: Reinterpreting Art. XX of the GATT" (2001) 10 *Minn. J. of Global Trade* 62, 69-70; James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 198; Christopher McCrudden, "International Economic Law and the Pursuit of Human Rights: A framework for discussion of the legality of 'selective purchasing' laws under the WTO Government procurement agreement" (1999) 2 *JIEL* 3, 41.

[1545] *European Communities - Measures Concerning Meat and Meat Products ("Hormones")* WT/DS26/AB/R and WT/DS48/AB/R (16 January 1998) para. 104 stating that being an exception "does not by itself justify a 'stricter' or 'narrower' interpretation" before concluding what was cited above; see also *United States – Import Bans of Certain Shrimp and Shrimp Products ("Shrimp-Turtle")* WT/DS58/R (15 May 1998), WT/DS58/AB/R (12 October 1998); *United States - Standards for Conventional and Reformulated Gasoline ("US-Gasoline")* WT/DS2/R (29 January 1996) and WT/DS2/AB/R (29 April 1996).

[1546] Paul Cook, "Law of Trade in Human Rights: A Legal Analysis of the Intersection of the General Trade Agreement of Tariff's Article XX (b) and Labor Rights of Children" (University of California, Los Angeles, 2012) available at <http://works.bepress.com/paul_cook/3> 1 May 2014, 3 and 10 on art. XX (b); Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 86 who also mentions art. XX (d), yet as it deals with the objective of securing "compliance with laws or regulations which are not inconsistent

United States-Taxes on Automobiles, US-Gasoline, EC-Asbestos and *Tuna-Dolphin II* the justification of art. XX *GATT* is to be assessed in three steps. Firstly, the measure has to be consistent with one of the objectives named in art. XX *GATT*, secondly, in the case of XX (a) and (b) the measure has to be necessary to protect the objective and, thirdly, it has to meet the *chapeau* of art. XX which prohibits any "arbitrary or unjustifiable discrimination" and "disguised restriction on international trade" to exclude the misuse of art. XX for protectionist measures.[1547] Human rights issues may be taken into account on all three levels of assessment, in particular after in *Shrimp-Turtle* the AB held that effects on the domestic policy of the exporting state are typical for situations in which art. XX justifications are applicable.[1548] How human rights could be considered will be sketched in the following, beginning with the human rights relevant objectives, before necessity and *chapeau* will be assessed. The two most striking objectives named in art. XX that could include human rights are as already mentioned the public morals in art. XX (a) and human, animal or plant life or health in art. XX (b). Art. XX (e) is also sometimes mentioned in this context. All three objectives and their human rights potential will be sketched in this section.

(i) XX (a): Public Morals

Trade restrictions imposed to protect human rights could be based on art. XX (a) *GATT*, the public morals exception.[1549] As no general social clause or human

---

with the provisions of this Agreement" and this enquiry does not deal with a particular case but a more general approach assessing the very *GATT* consistency of possible unilateral measures, including laws and regulations, art. XX (d) will not be assessed here.

[1547] See for example *United States - Standards for Conventional and Reformulated Gasoline ("US-Gasoline")* WT/DS2/R (29 January 1996) and WT/DS2/AB/R (29 April 1996).

[1548] See also Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures addressing Non-Trade Concerns. A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Process and Production Methods* (The Hague: Ministry of Foreign Affairs of the Netherlands, 2007), 93.

[1549] See for example Frank J. Garcia, "The Global Market and Human Rights: Trading Away the Human Rights Principle" (1999) 25 *Brooklyn J. Int'l L.* 51, 79-82; Berta Esperanza Hernández-Truyol, Stephen J. Powell, *Just Trade: A New Covenant Linking Trade and Human Rights* (New York, London: New York University Press, 2009) 146-9; Robert Howse and Jared M. Genser, "Are EU Trade Sanctions on Burma Compatible with WTO Law?" (2008) 29 *Mich. J. Int'l. L* 165 on the issue of public morals see in particular pp. 184-8.

rights exceptions exists, the public morals exception could be the one best apt to cover human rights issues in a broad and general way. This is because the other exceptions are more specific, *i.e.* more restricted to particular rights. Furthermore, protecting the public morals in the home state is not a purely extraterritorially directed measure. Yet one of the main difficulties when relying on public morals is the lack of a definition of that term.[1550] Even when dealing with the term in *United States-Gambling*, a decision on *GATS*,[1551] neither Panel nor Appellate Body gave any detailed guidance.[1552] It was however stressed once more that the member states themselves have the right to determine the level of protection they consider appropriate.[1553] As "public morals" naturally differ from state to state[1554] member states have to be granted broad discretion when using this justification and the DSB should only examine the necessity of the measures to protect the morals mentioned by the home state, but not the morals themselves parallel to the security interests in art. XXI[1555] and the necessity test outlined below. Yet as vague as the term "public morals" may be, fundamental rights must be included in this broad term, that was left open to evolve over time just like moral values do,[1556] because any other perception

[1550] Helge Elisabeth Zeitler *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 140.
[1551] *General Agreement on Trade in Services (GATS)* (1995).
[1552] *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services ("US-Gambling")* WT/DS285/R (7 April 2005) and WT/DS285/AB/R (7 April 2005); see also Jenny Schultz and Rachel Ball, "Trade as a Weapon? The WTO and Human Rights-Based Trade Measures" (2007) 12 *Deakin L. Rev.* 41, 61-3 wfr.
[1553] Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization* (2nd ed, Oxford, New York: Oxford University Press, 2006) 117; *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services ("US-Gambling")* WT/DS285/R (7 April 2005) and WT/DS285/AB/R (7April 2005).
[1554] See also Lorand Bartels "Art. XX of GATT and the Problem or Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights" (2002) 36 *JWT* 353, 356.
[1555] See for example Australia's perception in *United States - Restrictions on Imports of Tuna (DS21/R - 39S/155) ("Tuna-Dolphin I")* GATT Panel Report, not adopted, 3 September 1991, par. 4.4.; see also Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) referring to parallels to ECJ cases; on limits of legal and judicial deference see also Ernst-Ulrich Petersmann, "Human Rights and International Economic Law" (2012) 4 *TL & D*, 283, 296.
[1556] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 205; UN, General Assembly, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*,

would contradict the ordinary meaning of the word in the sense of art. 31.1 *VCLT*.[1557] The vagueness of the term can even be considered the very reason to use human rights and labour rights when trying to interpret it in an internationally valid way.[1558] Another advantage of this exception is, as mentioned above, that it does not necessarily require the inclusion of the protection of extraterritorial rights and interests into art. XX to tackle human rights violations abroad, because the protection of the *domestic* public morals may include these cases.[1559] Although the effect on a state's public morals is more direct when the good *itself* is morally objectionable, like (certain kinds of) pornography, than when a good is not itself morally objectionable but produced in a morally objectionable *way*, at least grave human rights violations may be considered morally objectionable.[1560] Child labour for example may therefore be considered to be contradicting the public moral of the importing state, *i.e.* the home state.[1561] This reminds of the "consumers' tastes and habits" criterion to

---

Report of the Study Group if the International Law Commission, Finalised by Martti Koskenniemi, A/CN.4/L.682 (13 Apr. 2006) at 478 (b).

[1557] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 205; Robert Howse, "Back to court after Shrimp/Turtle? Almost but not quite yet: India's short lived challenge to labour and environmental exceptions in the European Union's Generalized System of Preferences" (2003) 18 *Am. U. Int'l L. Rev.* 1333, 1367-8.

[1558] See Robert Howse, "Back to court after Shrimp/Turtle? Almost but not quite yet: India's short lived challenge to labour and environmental exceptions in the European Union's Generalized System of Preferences" (2003) 18 *Am. U. Int'l L. Rev.* 1333, 1368 stating that "human rights and labor standards would help interpret the content of public morality under Article XX(a). In the modern world, the very idea of public morality has become inseparable from the concern for human personhood, dignity, and capacity reflected in fundamental rights. A conception of public morals or morality that excluded notions of fundamental rights would simply be contrary to the ordinary contemporary meaning of the concept." (footnotes ommitted).

[1559] Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 141-2; see also Robert Howse and Donald Regan, "The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy" (2000) 11 *EJIL* 249, 274-281 who argue that a state may implement trade restrictions because it does not want to be associated with or to encourage processes that it considers to be wicked. Note however, their discussion is on art. III, not art. XX *GATT*.

[1560] See Lorand Bartels "Art. XX of GATT and the Problem or Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights" (2002) 36 *JWT* 353, 375-6; on the issue of morals as a motive for trade restrictions see Robert Howse and Donald Regan, "The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy" (2000) 11 *EJIL* 249, 274-281.

[1561] Lorand Bartels "Art. XX of GATT and the Problem or Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights" (2002) 36 *JWT* 353, 356 wfr;

determine likeness in art. III, as public morals are shaped and influenced by the population itself and its values. As already mentioned above, allowing only dolphin-safe tuna into the US was a consumer-based demand. Yet whilst consumer demands or boycotts cannot be equalized with public morals, the underlying values and developments may be similar, particularly concerning human rights awareness, allowing a justification according to art. XX (a) *GATT*. This is notable, because of the evolutionary interpretation approach used by the Appellate Body in *Shrimp-Turtle* concerning art. XX (g), which suggests that other objectives may be interpreted evolutionary as well.[1562] How the DSB would decide a case of import or sales restrictions based on the public morals exception because of human rights abuses in the exporting state is not clear. Yet at least where grave human rights violations occur public morals of the home state could in fact be protected by a trade restrictive measure. This case-by-case approach could also be more acceptable for developing states opposing the introduction of a social clause or labour standards into WTO law. In any case, necessity and *chapeau* would nevertheless also have to be met.[1563]

(ii) XX (b): Human, animal or plant life or health

Human rights violated in the TNC context, particularly some labour rights,[1564] may be closely related to human health or even life and as far as environmental issues are concerned also animal and plant life. Similar to the public morals objective, generally states themselves define the degree of protection within

---

Berta Esperanza Hernández-Truyol, Stephen J. Powell, *Just Trade: A New Covenant Linking Trade and Human Rights* (New York, London: New York University Press, 2009) 146; Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 140; interestingly Cook does not even mention the public morals exception, but focuses on art. XX (b) for issues of child labour, see Paul Cook, "Law of Trade in Human Rights: A Legal Analysis of the Intersection of the General Trade Agreement of Tariff's Article XX (b) and Labor Rights of Children" (University of California, Los Angeles, 2012) available at <http://works.bepress.com/paul_cook/3> 1 May 2014.

[1562] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 208.

[1563] See below for further details on necessity test and *chapeau*.

[1564] See on child labour rights for example Paul Cook, "Law of Trade in Human Rights: A Legal Analysis of the Intersection of the General Trade Agreement of Tariff's Article XX (b) and Labor Rights of Children" (University of California, Los Angeles, 2012) available at <http://works.bepress.com/paul_cook/3> 1 May 2014.

their jurisdiction.[1565] Yet for measures having extraterritorial effect it seems more suitable to base them on internationally recognized standards. The Panels have referred to multinational treaties and international standards to determine for example whether a species is endangered as seen above. The use of such standards should of course include rules to prevent unilateral measures setting standards developing states cannot achieve.[1566] It would also be helpful to adopt another idea of the *TBT*, namely that unilateral measures that meet international standards are "rebuttably presumed not to create an unnecessary obstacle to international trade".[1567] Yet this is difficult under present *TBT* law as human rights are not "explicitly mentioned" as one of the objectives in art. 2. 2.[1568]

The gateway to including international standards into the WTO law interpretation is Art. 3 (2) *DSU*, which states that the WTO agreements have to be "interpreted in the light of customary rules of interpretation", which suggests that the *VCLT* is applicable. Art. 31. 3. (c) *VCLT* in turn states that "any relevant rules of international law applicable in relation between the parties" should to be taken into account. Human rights treaties and conventions are rules of international law, yet it has been debated whether they are "applicable in relation between the parties" in the cases where they have neither achieved customary international law status nor been ratified by all WTO member states.[1569] "Applicable between the parties" is a difficult expression in connection with human rights obligations anyway as they are no bilateral or bilaterisable obligations[1570] as already sketched earlier in this enquiry. States are still bound by human rights treaties, whether or not the other party or other WTO members are bound by the same norms. To protect its own population, for

---

[1565] This was for example stressed in *United States - Restrictions on Imports of Tuna (DS21/R - 39S/155) ("Tuna-Dolphin I")* GATT Panel Report, not adopted, 3 September 1991, par. 5.27.

[1566] Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 118-9 referring to art. 12.3, 2.12; on critics stating that needs and interests of particular states are not taken into account see for example Steve Michael Reiterer, „Das multilaterale Handelssystem und internationaler Umweltschutz" (1993) *WpolBl* 291, 294; Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 124.

[1567] Art. 5.2 *TBT Agreement.*

[1568] See also Carlos Lopez-Hurtado, "Social Labelling and WTO Law" (2002) 5 *JIEL* 719, *7.

[1569] For an overview see James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 200-5 wfr.

[1570] *Ibid.* at 203.

example under the public morals exception, a state may therefore refer to human rights treaty obligations before the DSB when *GATT* obligations are interpreted, no matter whether others owe the same obligations to their populations.[1571] So art. 31.3 (c) *VCLT* is not of much help in this context.[1572] Yet art. 31. 1 *VCLT*, referring to the "ordinary meaning" of the terms used in treaties, could allow for some consideration of human rights obligations.[1573] International standards have indeed been referred to in cases where not all WTO members nor all parties to the dispute had ratified them as could be seen in *Shrimp-Turtle*[1574] and *EC-Biotech.*[1575] A remaining issue is that art. 3 (2) *DSU* also demands that WTO obligations are neither added to or diminished by DSB rulings,[1576] yet the flexibility of art. III and XX *GATT* may help in this regard.[1577]

However, whether extraterritorial measures in the sense of measures having extra*judicial* effect are covered by art. XX (b) at all is not (yet) clear as the DSB has not yet decided the matter. In *Shrimp-Turtle* the Appellate Body decided that the migratory turtles provided a sufficient link as set out above, yet it stressed

---

[1571] *Ibid.*; on human rights duties of members states before WTO panels see also Ernst-Ulrich Petersmann, "Human Rights and International Economic Law" (2012) 4 *TL & D*, 283, 288.
[1572] See James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 204.
[1573] See *ibid.*
[1574] *United States – Import Bans of Certain Shrimp and Shrimp Products ("Shrimp-Turtle")* WT/DS58/R (15 May 1998), WT/DS58/AB/R (12 October 1998); see also Joost Pauwelyn, "Human Rights in WTO Dispute Settlement" in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi Bonanomi (eds), *Human Rights and International Trade* (Oxford: Oxford University Press, 2005) 203, 209.
[1575] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products ("GMO")* WT/DS291/R, WTO/DS/292/R and WT/DS293/R (29 September 2006); James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 204.
[1576] See for a brief outline on this issue James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 190-1.
[1577] On the flexibility see *ibid.* at 207; see also case law *Canada - Continued Suspension of Obligations in the EC - Hormones Dispute* WT/DS321/R (31 March 2008) and WT/DS321/AB/R (16 October 2008) par. 165; *Japan - Taxes on Alcoholic Beverages* (11 July 1996) and WT/DS8/AB/R, WT/DS/10/AB/R, WT/DS11/AB/R (4 October 1996) stating on p. 31 that "WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and everchanging ebb and flow of real facts in real cases in the real world." and on p. 21 using the image of an accordion for the concept of "liekenss".

that it was not deciding on the extraterritorial use of art. XX (g) *GATT*.[1578] As Marceau puts it, the AB was "hiding behind the fact that the challenged fishing practices had effects in US territorial waters."[1579] Yet such a nexus is not given in cases where unincorporated PPMs like labour standards or human rights are at issue, as these are purely national situations of the exporting state.[1580] The products may cross the border, but, unlike in the case of migratory turtles, the subjects of the protection laws, *i.e.* human rights laws, will not cross the border and enter home state. In the TNC situation the factual link between home state and subsidiary could be a sufficient nexus as already discussed in chapter II of this enquiry. Yet as seen above, this is not an internationally accepted linking factor yet. A context interpretation of art. XX *GATT* does not lead to clear results considering the justification of extraterritorial measures protecting for example the environment.[1581] The preamble of the *SPS Agreement* seems to suggest that at least art. XX (b) was to be defined more precisely by the *SPS Agreement*,[1582] which is confined to health protection within the own territory[1583]

[1578] *United States – Import Bans of Certain Shrimp and Shrimp Products ("Shrimp-Turtle")* WT/DS58/R (15 May 1998), WT/DS58/AB/R (12 October 1998) par. 133; see also Paul Cook, "Law of Trade in Human Rights: A Legal Analysis of the Intersection of the General Trade Agreement of Tariff's Article XX (b) and Labor Rights of Children" (University of California, Los Angeles, 2012) available at <http://works.bepress.com/paul_cook/3> 1 May 2014, 17 stating "The Panel is uncomfortable with establishing law and answering the role the WTO's should play when extraterritorial issues arise."

[1579] Gabrielle Marceau, "WTO Dispute Settlement and Human Rights" (2002) 13 *EJIL* 753, 810.

[1580] Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures addressing Non-Trade Concerns. A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Process and Production Methods* (The Hague: Ministry of Foreign Affairs of the Netherlands, 2007) 96.

[1581] Paul Cook, "Law of Trade in Human Rights: A Legal Analysis of the Intersection of the General Trade Agreement of Tariff's Article XX (b) and Labor Rights of Children" (University of California, Los Angeles, 2012) available at <http://works.bepress.com/paul_cook/3> 1 May 2014, 21; Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 128-9.

[1582] The very end of the preamble of the *SPS Agreement* reads: "*Desiring* therefore to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)".

[1583] Par. 1 (a) Annex A to the *SPS Agreement* provides a definition for "sanitary or phytosanitary measure" and (a) includes "[any measures applied] to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms."

as seen above. Yet as art. XX (b) *GATT* is the more general rule, it can also be broader in scope. Furthermore, as art. XX (f) and (i) for example explicitly mention domestic interests it can be concluded that the other objectives include extraterritorial interests.[1584] In addition, art. XX (e) explicitly refers to extraterritorial interests, so that these interests are not completely alien to *GATT* law.[1585] The, although only supportive,[1586] historic interpretation is not providing clear answers for art. XX *GATT* either.[1587] A clause allowing for the protection of domestic rights only was also discussed but finally not included,[1588] just like a clause preventing the misuse of art. XX. [1589] Yet this can be interpreted both ways, either in the sense that it was not necessary, because extraterritorial measures would be considered an abuse of art. XX anyway[1590] or that a broad reading of art. XX was meant to remain possible, particularly when considering that the US had already imposed measures to protect extraterritorial interests before *GATT* and assumed that such measures were *GATT* consistent.[1591] In addition, it is argued that extraterritorial rights and interests may be protected

[1584] See Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 128.
[1585] See Paul Cook, "Law of Trade in Human Rights: A Legal Analysis of the Intersection of the General Trade Agreement of Tariff's Article XX (b) and Labor Rights of Children" (University of California, Los Angeles, 2012) available at <http://works.bepress.com/paul_cook/3> 1 May 2014, 23; Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 129.
[1586] See art. 32 *Vienna Convention on the Law of Treaties (VCLT)* (1969); see on the *Vienna Convention* and applicability of art. 31 and 32 by the DSB also Anja Lindroos and Michael Mehling, "Dispelling the Chimera of 'Self-Contained Regimes': International Law and the WTO" (2005) 16 *EJIL* 857, 867-873; Gabrielle Marceau, "WTO Dispute Settlement and Human Rights" (2002) 13 *EJIL* 753, 779-789.
[1587] Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 128.
[1588] Steve Charnovitz, "Exploring the Environmental Exception in GATT art. XX" (1991) 25 *JWT* 37, 52.
[1589] Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 127.
[1590] *Ibid.* referring to *United States - Restrictions on Imports of Tuna (DS21/R - 39S/155) ("Tuna-Dolphin I")* GATT Panel Report, not adopted, 3 September 1991, par. 5.26.
[1591] Steve Charnovitz, "GATT and the Environment, Examining the Issue" (1992) 4 *IEA* 203, 209-210; Jeffrey L. Dunoff, "Reconciling International Trade with Preservation of the Global Commons: Can we prosper and protect?" (1992) 49 *Wash. & Lee L. Rev.* 1407, 1416-7; Carsten Helm, *Sind Freihandel und Umweltschutz vereinbar? Ökologischer Reformbedarf des GATT/WTO-Regimes* (Berlin: Ed. Sigma, 1995) 82-6; Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 127.

under art. XX, because art. XXI, which had been part of art. XX *GATT* when drafting the *GATT*, allows for the protection of extraterritorial interests as well.[1592] Harrison who demands a "far greater level of justification"[1593] for measures with extrajudicial effect for example suggests that as extrajudicial measures are possible under the security exception and when a UN Security Council decision exists, they should also be possible when an ILO recommendation as mentioned above exists and in cases of great international consensus like in the *Kimberley Scheme* and also in cases of worst human rights violations. [1594] To achieve this result, the extrajudicial effect of the measures must *per se* not preclude a justification under art. XX. It is also argued that trade restrictions are different from directly applying domestic law extraterritorially, because they have only an extraterritorial *effect*.[1595] Therefore, a nexus as for direct extraterritorial application is not needed, especially because the further requirements like the *chapeau* have to be met, which prevents protectionist measures.[1596]

However, as always when extraterritoriality is involved, even when only effects are caused, sovereignty issues are claimed.[1597] Yet as already sketched earlier in this enquiry, in these cases the sovereignty claims of two states are facing one

---

[1592] Andreas Diem, *Freihandel und Umweltschutz in GATT und WTO* (Baden-Baden: Nomos, 1996) 115.

[1593] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 213.

[1594] *Ibid.* at 214.

[1595] Tobias Bender, *Domestically Prohibited Goods* (Berlin: Duncker & Humblot, 2006) 161-7; similar also Robert Howse and Donald Regan, "The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy" (2000) 11 *EJIL* 249, 274.

[1596] Tobias Bender, *Domestically Prohibited Goods* (Berlin: Duncker & Humblot, 2006) 161-7.

[1597] On the one hand the host state sovereignty and on the other hand the home state sovereignity, see Wolfgang Graf Vitzthum "Raum, Umwelt und Wirtschaft im Völkerrecht" in Wolfgang Graf Vitzthum (ed), *Völkerrecht* (Berlin, New York: Walter de Gruyter, 1997) 393, 463; see also Jeffrey L. Dunoff, "Reconciling International Trade with Preservation of the Global Commons: Can we prosper and protect?" (1992) 49 *Wash. & Lee L. Rev.* 1407, 1437; Harlan Mandel, "In Pursuit of the Missing Link: International Worker Rights and International Trade?" (1989) 27 *Columbia JTL* 443, 457; Kerstin Odendahl, *Die Umweltpflichtigkeit der Souveränität* (Berlin: Duncker & Humblot, 1998) 303-5; Dieter H. Scheuing, *Grenzüberschreitende atomare Wiederaufarbeitung im Lichte des europäischen Gemeinschaftsrechts* (Baden-Baden: Nomos, 1991) 64-5; on mandatory labelling schemes see Arthur Edmond Appleton, *Environmental Labelling Programmes* (London, The Hague: Kluwer Law International, 1997) 35.

another[1598] and have to be reconciled on a case by case basis, particularly taking into account the gravity of the effect on the respective sovereignty where it can be taken into account that economic pressure is no enforcement of domestic law abroad and usually not *violating* the host state's sovereignty.[1599]

Generally it can be remarked that while the "ordinary meaning of the term" is supposed to be the basis for interpretation of WTO law, the exception clauses are still rather flexible so as to take into account the particular circumstances of the individual case. This has also been stressed in various WTO decisions[1600] and is the very idea of a *general* exception - to be flexible enough to deal with the very circumstances of a particular case.[1601] Considering all these issues, it becomes clear that the application of art. XX (b) on home state trade bans or

---

[1598] Tobias Bender, *Domestically Prohibited Goods* (Berlin: Duncker & Humblot, 2006) 163; Robert Howse and Donald Regan, "The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy" (2000) 11 *EJIL* 249, 275 who argue that it can also be claimed to be a violation of the sovereignty of the importing state if trade restrictions for goods produced under PPMs it abhors cannot be invoked.

[1599] Detlev Christian Dicke, *Die Intervention mit wirtschaftlichen Mitteln im Völkerrecht* (Baden-Baden: Nomos, 1978) 111-143, introducing the term „economic sovereignty" to stress the different connotation of sovereignty issues in an economic context; Martin Dieckmann, *Das Abfallrecht der Europäischen Gemeinschaft* (Baden-Baden: Nomos, 1994) 223; Matthias Herdegen, *Internationales Wirtschaftsrecht* (9th ed, München: C. H. Beck, 2011) §6, No 4; Knut Ipsen, *Völkerrecht* (5th ed, München: C. H. Beck, 2004) § 39, No. 13 on gravity and appropraiteness; this is even more so for core human rights that are at least formally accepted globally and those human rights laid down in treaties and conventions signed by the host state. A state cannot on the one hand sign a treaty or convention and on the other hand reject any external pressure concerning the fulfilment of the obligations they set out, see Martin Nettesheim „Die ökologische Intervention" (1996) 34 *Archiv des Völkerrechts* 167, 188-190; Harlan Mandel, "In Pursuit of the Missing Link: International Worker Rights and International Trade?" (1989) 27 *Columbia JTL* 443, 457; Adelheid Puttler, *Völkerrechtliche Grenzen von Export- und Reexportverboten* (Baden-Baden: Nomos, 1989) 51 arguing that there is no right to trade, note however that this was before the WTO, now this is questioned, see for example Lorand Bartels "Art. XX of GATT and the Problem or Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights" (2002) 36 *JWT* 353, 382-3; Meinhard Schröder, "Non-Intervention, Principle of" in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law* (vol. III, Amsterdam, Lausanne, New York, Oxford, Shannon, Singapore, Tokyo: Elsevier Science, 1997) 619, 621.

[1600] See *Canada - Continued Suspension of Obligations in the EC - Hormones Dispute* WT/DS321/R (31 March 2008) and WT/DS321/AB/R (16 October 2008), par. 165; *Japan - Taxes on Alcoholic Beverages* (11 July 1996) and WT/DS8/AB/R, WT/DS/10/AB/R, WT/DS11/AB/R (4 October 1996) p. 31.

[1601] Paul Cook, "Law of Trade in Human Rights: A Legal Analysis of the Intersection of the General Trade Agreement of Tariff's Article XX (b) and Labor Rights of Children" (University of California, Los Angeles, 2012) available at <http://works.bepress.com/paul_cook/3> 1 May 2014, 21-2; Gabrielle Marceau, "WTO Dispute Settlement and Human Rights" (2002) 13 *EJIL* 753, 790.

labelling schemes imposed on goods not produced by observing human rights standards abroad is possible under current WTO law, as far as human, animal or plant life or health are concerned and when the further requirements of art. XX are met.[1602] As the DSB has already decided this way in *Shrimp-Turtle (Malaysia)* where a nexus existed and as the DSB is interpreting WTO law dynamically as could be seen above, the home state option of trade restrictions for the protection of human rights related to human, animal and plant life or health could be taken. Furthermore, as art. XX (a) and (b) are similar in their wordings, protecting public morals of the host state could also be possible, at least where grave human right violations are met.

(iii) XX (e): Prison Labour

As just outlined, using trade restrictions based on unincorporated PPMs for the protection of public morals seems possible under current WTO law at least for grave human rights violations. The same is true for the protection of human rights related to human, animal or plant life or health. As explained above, this includes measures protecting human, animal or plant life or health in the exporting state and is also transferrable to the public morals exception. As a further argument art. XX (e) is sometimes used to stress that the protection of foreign social rights is not alien to art. XX *GATT* and it is even suggested that this idea is also inherent in the other exception clauses of art. XX.[1603] That is why this exception will be sketched briefly in the following. However, using art. XX (e) to support the above findings that trade restrictions to protect foreign environmental rights and foreign public morals may be possible, is not unchallenged, as already mentioned earlier. This is because it can be doubted whether art. XX (e) is supposed to protect foreign prisoners. The objective of art. XX (e) rather seems to be the protection of the domestic economy from competition of cheaply produced goods. This can for example be seen from the

[1602] See also Cook's conclusion on the possible justification of trade bans under art. XX (b) in cases of child labour at Paul Cook, "Law of Trade in Human Rights: A Legal Analysis of the Intersection of the General Trade Agreement of Tariff's Article XX (b) and Labor Rights of Children" (University of California, Los Angeles, 2012) available at <http://works.bepress.com/paul_cook/3> 1 May 2014, 21-2.

[1603] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 214.

fact that ILO Convention No. 29 does not hold all kinds of prison labour to bee socially unacceptable, but provides for certain requirements that have to be met in order so be socially acceptable.[1604] The argument of an "economic spillover" has been used, arguing that a "race to the bottom" takes place where labour rights and other social rights are only protected domestically, as it can be a competitive advantage to violate certain labour and human rights to achieve or maintain cheap labour.[1605] Although this seems conclusive at the first glance, this would be a solely economic argument, using protectionist interests to justify restrictions. Therefore art. XX (e) is rather difficult and also inappropriate as a base for the protection of social rights as this would rather fuel the discussions of protectionism than provide a solution capable of broader human rights protection. Protectionist trade restrictions - apart from those explicitly allowed like those related to prison labour according to art. XX (e) - especially when *designed* and *intended* to be protectionist can and should not be consistent with *GATT* and for example be filtered by the *chapeau* of art. XX *GATT*.

(iv) Necessity

Already under *GATT* the necessity requirement existed. Yet it has developed, providing more flexibility to domestic governments when designing the measures to protect the objectives of art. XX (a) and (b) *GATT*.[1606] The main decisions defining the necessity requirement more closely are *US-Gasoline Korea-Beef*,[1607] *EC-Asbestos* and *US-Gambling*. According to *Korea-Beef* a measure is "necessary" when there is no less trade restrictive measure that can

[1604] Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization* (2nd ed, Oxford, New York: Oxford University Press, 2006) 922; Gudrun Monika Zagel, *WTO & Human Rights: Examining Linkages and Suggesting Convergence* (Voices of Development Jurists Paper Series vol. 2, no. 2, Rome: International Development Law Organization, 2005) 15; Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 93.
[1605] Christian Hess, "Sind Sozialklauseln im Welthandel berechtigt?" (1995) 3 *Der Arbeitgeber* 81, 83 referring to prison labour; Wolfram Spelten, *WTO und nationale Sozialordnungen* (vol.11, Berlin: Duncker & Humblot, 2005) 88.
[1606] Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization* (2nd ed, Oxford, New York: Oxford University Press, 2006) 800.
[1607] *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef ("Korea-Beef"),* WT/DS161/R and WT/DS168/R (31 July 2000), WT/DS161/AB/R and WT/DS169/AB/R (11 December 2000).

reasonably be expected to be employed. In addition, the Appellate Body held in *Korea-Beef* that "necessary" is referring to a state between "indispensable" and "making a contribution to", whilst being closer to "indispensable" than to merely "making a contribution to".[1608] In *Korea-Beef* and *EC-Asbestos* the AB found that not only those trade restrictions can be "necessary" under art. XX *GATT* that are indispensable for achieving the objective in question, but also those that are merely proportional to the objective pursued.[1609] As also stressed in *US-Gambling,* where more than one measure can be applied that can achieve the chosen level of protection, the different measures have to be weighed and balanced mainly taking into account the contribution that is made by the measures to achieve the objective pursued and the restrictions the measures cause for international trade. This means that even import bans can be necessary. In *EC-Asbestos* the AB for example rejected the controlled use of asbestos as a less restrictive means to import and sales bans, because this would not allow France to achieve it chosen level of protection. So alternative measures have to be equally effective in achieving the chosen level of protection.[1610] This allows for taking into account the importance of the objective pursued,[1611] while it is generally still asking for the least trade restrictive measure to be implied.[1612]

[1608] *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef ("Korea-Beef")* WT/DS161/R and WT/DS168/R (31 July 2000), WT/DS161/AB/R and WT/DS169/AB/R (11 December 2000), par. 141.

[1609] See Robert Howse, "Human Rights in the WTO: Whose Rights, What Humanity?" (2002) 13 *EJIL* 651, 657.

[1610] Robert Howse and Elisabeth Türk, "The WTO Impact on Internal Regulations- A Case Study of the Canada - EC Asbestos Dispute" in Gráinne de Búrca and Joanne Scott (eds), *The EU and the WTO: Legal and Constitutional Aspects* (Oxford, Portland Oregon: Hart Publishing, 2001) 283, 323-7; Jan Neumann and Elisabeth Türk, "Necessity Revisited- Proportionality in WTO Law after EC-Asbestos" in Martin Nettesheim and Gerald G. Sander (eds), *WTO-Recht und Globalisierung* (Berlin: Duncker & Humblot, 2003) 103, 121.

[1611] *European Communities - Measures Affecting Asbestos and Products Containing Asbestos ("Asbestos")* WT/DS135/R (18 September 2000) and WT/DS135/AB/R (12 March 2001); *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef ("Korea-Beef"),* WT/DS161/R and WT/DS168/R (31 July 2000), WT/DS161/AB/R and WT/DS169/AB/R (11 December 2000) par. 161-2; *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services ("US-Gambling")* WT/DS285/R (7 April 2005) and WT/DS285/AB/R (7April 2005).

[1612] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 218-9; see also *European Communities - Measures Affecting Asbestos and Products Containing Asbestos ("Asbestos")* WT/DS135/R (18 September 2000) and WT/DS135/AB/R (12 March 2001); *Thailand - Restrictions on Importation of and*

That means the necessity test is still stricter than the "related to" test of art. XX (g) *GATT*, yet human rights can be taken into account as well.[1613] Even "secondary sanctions" like anti-circumvention provisions affecting third states could be "necessary", e.g. for the protection of public morals.[1614] The weighing and balancing explicitly excludes the assessment of the necessity of the policy objective or the protection level the member state has chosen. Only the necessity of the chosen measure in order to achieve the objective is assessed.[1615] In addition, as decided in *Korea-Beef* and stressed once more in *EC-Asbestos* and recently also in *Brazil-Retreaded Tyres*[1616] the more vital or important the policy objective, the easier is a measure considered necessary under art. XX *GATT*.[1617] This means that the DSB to some extent decides on the importance of societal values and alternative measures to achieve their protection,[1618] yet the necessity test is still not a classical proportionality test in the sense that human rights values and interests are directly weighed and balanced with trade rights

---

Internal Taxes on Cigarettes (DS10/R – 37S/200) ("Thailand-Cigarettes") GATT Panel Report 5 October 1990, adopted 7 November 1990.

[1613] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 217 noting that environmental rights have usually been based on the less stringent test of art. XX (g) and can be protected within *GATT* more easily than human rights; Robert Hudec, "GATT/WTO Constraints on National Regulation: Requiem for An 'Aim and Effects' Test" (1998) 32 *The Int'l Lawyer* 619, 637.

[1614] See Robert Howse and Jared M. Genser, "Are EU Trade Sanctions on Burma Compatible with WTO Law?" (2008) 29 *Mich. J. Int'l. L* 165, 194- 196 also suggesting that art. XX (d) *GATT* could be applicable.

[1615] See *Brazil - Measures Affecting Imports of Retreaded Tyres ("Brazil-Retreaded Tyres")* WT/DS332/AB/R (3 December 2007); *European Communities - Measures Affecting Asbestos and Products Containing Asbestos ("Asbestos")* WT/DS135/R (18 September 2000) and WT/DS135/AB/R (12 March 2001); *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef ("Korea-Beef"),* WT/DS161/R and WT/DS168/R (31 July 2000), WT/DS161/AB/R and WT/DS169/AB/R (11 December 2000); *United States - Standards for Conventional and Reformulated Gasoline ("US-Gasoline")* WT/DS2/R (29 January 1996) and WT/DS2/AB/R (29 April 1996).

[1616] *Brazil - Measures Affecting Imports of Retreaded Tyres ("Brazil-Retreaded Tyres")* WT/DS332/AB/R (3 December 2007) par. 182.

[1617] See also Jan Neumann and Elisabeth Türk, "Necessity Revisited- Proportionality in WTO Law after EC-Asbestos" in Martin Nettesheim and Gerald G. Sander (eds), *WTO-Recht und Globalisierung* (Berlin: Duncker & Humblot, 2003) 103, 123.

[1618] Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures addressing Non-Trade Concerns. A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Process and Production Methods* (The Hague: Ministry of Foreign Affairs of the Netherlands, 2007) 102.

interests.[1619] While on the one hand this was criticized for not providing sufficient human rights consideration in trade law,[1620] this is in line with the development described above and the WTO self-concept of leaving human rights issues and the choice of their protection level to the member states, only deciding on their effects on international trade. In doing so, the DSB is dealing as little as possible with human rights by valuing and interpreting them as little as possible, accepting the importance and domestic level of protection the member states have chosen to give them.[1621] This leaves room for domestic policies on human rights protection as well as for the consideration of human rights issues by the DSB without assessing or interpreting them. This is in line with the above sketched arguments that the DSB is neither equipped nor authorised to decide on human rights. Nevertheless, as the DSB does to some extent decide on societal values and *GATT* rules have to be obeyed, it is claimed that the sovereignty of the member states concerning the legislation of their protection laws is restricted.[1622] Once more the sovereignty of the exporting state and the sovereignty of the importing state seem to face one another. Yet while economic pressure is usually not considered a violation of state sovereignty,[1623]

[1619] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 218, 222 on directly weighing human rights obligations against trade obligations; on *TBT* necessity that suggests a balancing of interests test see Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 118-121; on the *SPS Agreement* see *ibid.* at 120; *Note* on par. 5.6 *SPS Agreement* available at WTO Homepage <http://www.wto.org/english/docs_e/legal_e/15sps_01_e.htm#articleVI> 1 May 2014; see also Tobias Bender, *Domestically Prohibited Goods* (Berlin: Duncker & Humblot, 2006) 171-179; Thomas M. Franck, "On Proportionality of Countermeasures in International Law" (2008) 102 *AJIL* 715, 751 who states that the DSB applies a "specialized aspect of the proportionality principle"; Jan Neumann and Elisabeth Türk, "Necessity Revisited- Proportionality in WTO Law after EC-Asbestos" in Martin Nettesheim and Gerald G. Sander (eds), *WTO-Recht und Globalisierung* (Berlin: Duncker & Humblot, 2003) 103, 142-3.

[1620] Frank J. Garcia, "The Global Market and Human Rights: Trading Away the Human Rights Principle" (1999) 25 *Brooklyn J. Int'l L.* 51, 84; James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 218 wfr.

[1621] See Jan Neumann and Elisabeth Türk, "Necessity Revisited- Proportionality in WTO Law after EC-Asbestos" in Martin Nettesheim and Gerald G. Sander (eds), *WTO-Recht und Globalisierung* (Berlin: Duncker & Humblot, 2003) 103, 142-3.

[1622] Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 115-6.

[1623] Martin Nettesheim „Die ökologische Intervention" (1996) 34 *Archiv des Völkerrechts* 167, 188-190 wfr, this is even more so for core human rights that are at least formally accepted globally and those human rights laid down in treaties and conventions signed by the

preventing the home state from passing and enforcing *domestic* laws and regulations that may have extraterritorial effect may indeed be considered a loss of sovereignty.

From all this it can be concluded that human rights can be considered in the necessity test of art. XX *GATT* already to some extent, at least concerning the value of the objectives at stake in the individual case. Human rights could even be included by directly balancing human rights interests against trade interests. Yet such a classical proportionality test would include thorough interpretation of human rights and human rights obligations and would therefore go beyond the WTO's authority and it is doubtful whether such issues should be decided by *trade* experts in *trade* panels.[1624] In addition, it has been argued that trade bans are usually not the least trade restrictive means, as negotiations, diplomatic efforts, etc are less trade restrictive.[1625] It is claimed that trade restrictions are not effective to achieve human rights protection either.[1626] When considering child labour for example, trade bans or labelling alone are not solving the problem. Although they might diminish child labour, they may cause more harm than good, because the children are forced to earn the money to survive by other means such as prostitution or other illegal action, being violated in their human rights to an even greater extent. So the issue of necessity is an obstacle that should not be underestimated in the human rights context, not so much because of trade law interests, but for the sake of human rights.

(v) Chapeau

As mentioned above, the *chapeau* is the third step when examining an exception or justification under art. XX *GATT* and excludes the use of unilateral measures

---

host state. A state cannot on the one hand sign a treaty or convention and on the other hand reject any external pressure concerning the fulfilment of the obligations they set out.

[1624] See for example Gabrielle Marceau, "WTO Dispute Settlement and Human Rights" (2002) 13 *EJIL* 753, 766 and also above.

[1625] See Sarah H. Cleveland, "Human Rights Sanctions and International Trade: A Theory of Compatibility" (2002) *JIEL* 133, *16; Gudrun Monika Zagel, *WTO & Human Rights: Examining Linkages and Suggesting Convergence* (Voices of Development Jurists Paper Series vol. 2, no. 2, Rome: International Development Law Organization, 2005) 13.

[1626] See Gudrun Monika Zagel, *WTO & Human Rights: Examining Linkages and Suggesting Convergence* (Voices of Development Jurists Paper Series vol. 2, no. 2, Rome: International Development Law Organization, 2005) 5, 13, 25.

in an arbitrary way, as an unjustifiable discrimination or a disguised trade restriction. These three concepts may be read side-by-side and are not mutually exclusive.[1627] As was stressed in *US-Gasoline* and *Shrimp-Turtle*, the chapeau's purpose is to avoid misuse and abuse of the exceptions provided for in art. XX. In *Shrimp-Turtle* is was explained that the right of the member state to impose exceptions has to be balanced with the obligations this very member has under *GATT vis-à-vis* the other members.[1628] The benchmarks to find the "line of equilibrium"[1629] are the three limitations set out by the *chapeau* mentioned above. When interpreting the *chapeau* it has to be kept in mind that it has a different aim than the general WTO rules as set out in *US-Gasoline*. "Discrimination" in art. XX for example cannot simply be equated with discrimination under art. III *GATT*, rather the emphasis has to be put on the arbitrary or unjustifiable nature of the discrimination[1630] and the exception at issue.[1631] This kind of discrimination may occur between exporting states, but also between importing and exporting states where the same provisions prevail or where different conditions prevail, but the same measure is applied in an inflexible or rigid manner.[1632] This could be seen in *Shrimp-Turtle*, where the DSB found that arbitrary or unjustifiable discrimination was given, because the appropriateness of the regulatory programmes of the exporting states where not assessed and taken into account before trade restrictions were used to pressure the exporting states to use the same regulatory programme to achieve the policy

---

[1627] See *United States - Standards for Conventional and Reformulated Gasoline ("US-Gasoline")* WT/DS2/R (29 January 1996) and WT/DS2/AB/R (29 April 1996).
[1628] *United States – Import Bans of Certain Shrimp and Shrimp Products ("Shrimp-Turtle")* WT/DS58/R (15 May 1998), WT/DS58/AB/R (12 October 1998) par. 156.
[1629] This expression was used in *ibid*.
[1630] See *United States - Standards for Conventional and Reformulated Gasoline ("US-Gasoline")* WT/DS2/R (29 January 1996) and WT/DS2/AB/R (29 April 1996).
[1631] See Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures addressing Non-Trade Concerns. A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Process and Production Methods* (The Hague: Ministry of Foreign Affairs of the Netherlands, 2007) 127.
[1632] See *United States – Import Bans of Certain Shrimp and Shrimp Products ("Shrimp-Turtle")* WT/DS58/R (15 May 1998), WT/DS58/AB/R (12 October 1998); See Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures addressing Non-Trade Concerns. A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Process and Production Methods* (The Hague: Ministry of Foreign Affairs of the Netherlands, 2007) 123-4.

goal of turtle protection than the importing state. In *Shrimp-Turtle (Malaysia)* the US had taken into account programmes of comparable effectiveness in the exporting states, and so the trade restrictions were deemed *GATT* consistent.[1633] Yet taking into account foreign programmes is not the only requirement that has been established. As seen above, "unjustifiable discrimination" was for example assumed in *Shrimp-Turtle* due to the lack of negotiations to find a multilateral solution. The Panels and the Appellate Body stressed multilateral approaches were preferential to unilateral ones and that states had to undertake the effort to try to achieve multilateral solutions before imposing unilateral ones. A reason for the requirement of multilateral negotiations could be the assumption that multilateral approaches are less likely to be protectionist that unilateral ones.[1634] In addition, multilateral solutions prevent tensions between states, because a consensus is reached instead of one state unilaterally imposing its values upon other states.[1635] In *Malaysia* for example the Panels explicitly acknowledged the difficulty that multinational approaches may not be possible although the unilaterally acting state has seriously tried to negotiate a multilateral consensus. The conclusion of an international agreement was therefore not considered necessary to meet the *chapeau*, and to make a measure *GATT* consistent, rather the good faith approach of negotiations was stressed.[1636] This meets the concern that otherwise, due to the difficulties or even impossibilities of achieving multilateral consensus at all, *inaction* would be the alternative to unilateral

---

[1633] See also Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures addressing Non-Trade Concerns. A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Process and Production Methods* (The Hague: Ministry of Foreign Affairs of the Netherlands, 2007) 124.

[1634] Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 196.

[1635] *Ibid.* at 198.

[1636] On the case see also Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *The World Trade Organization* (2nd ed, Oxford, New York: Oxford University Press, 2006) 801-2 and 805-6; *United States - Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 by Malaysia ("Shrimp-Turtle Malaysia")* WT/DS58/RW (15 June 2001) and WT/DS58/AB/RW (22 October 2001); Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures addressing Non-Trade Concerns. A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Process and Production Methods* (The Hague: Ministry of Foreign Affairs of the Netherlands, 2007) 127.

action.[1637] Yet it is argued that unilateral measures in accordance with international treaties or standards have to be allowed, because multinational solutions can only be achieved slowly, after years of negotiations and only as minimum standards.[1638] This could also be seen earlier in this enquiry when assessing possible future developments on the international level. Before *Tuna-Dolphin I* there had been decades of negotiations to achieve the *La Jolla Agreement*[1639], yet Mexico had dropped out already in 1978.[1640] Furthermore, it is once again argued that whether a strict preference of multilateral approaches is compatible with the unilaterally acting state's sovereignty may be doubted.[1641] In *US-Gambling* the requirement of negotiations to render a measure "necessary" was in fact overturned, because of the uncertain outcome of such consultations.[1642] A narrow interpretation of art. XX might rather contradict the principle of *in dubio mitius* already mentioned above, which the Appellate Body mentioned itself in *EC-Hormones.*[1643] So does the demand for multilateral solutions in the case where a consent can only be achieved on a low level, whereas the state in question wants to achieve a higher level of protection and therefore imposes unilateral measures. Whether or not sovereignty is a suitable argument in this context, it remains unclear whether a solely low-level consensus can be considered a failure of multinational negotiations that allows for unilateral measures of higher protection levels.[1644] Especially where human rights are concerned, the standards are not defined precisely, because the

[1637]Richard B. Bilder, "The Role of Unilateral State Action in Preventing International Environmental Injury" (1981) 14 *VJTL* 51, 91.
[1638] See Patti A. Goldman, "Resolving the Trade and Environment Debate: In Search for a Neutral Forum and Neutral Principles" (1992) 49 *Wash. & Lee L. Rev.* 1279, 1294.
[1639] *La Jolla Agreement for the Reduction of Dolphin Mortality in the Eastern Pacific Ocean* (1990) created by the *Inter-American Tropical Tuna Commission (IATTC).*
[1640] Steve Charnovitz, "Environmentalism Confronts GATT Rules: Recent Developments and New Opportunities" (1993) 27 *JWT* 37, 38-9.
[1641] Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 197.
[1642] On this development see also Sarah Joseph, *Blame it to the WTO? A Human Rights Critique* (Oxford: Oxford University Press, 2011) 113.
[1643] *European Communities - Measures Concerning Meat and Meat Products ("Hormones")* WT/DS26/R/USA (26 January 1996) WT/DS48/R/CAN (18 August 1997) WT/DS26/AB/R and WT/DS48/AB/R (16 January 1998); Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 111-2.
[1644] See on his question Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 116.

situations in the respective states have to be taken into account.[1645] In *GATT* there is no such clause an in art. 3.3 *SPS* that explicitly allows for higher protection levels than provided for by international standards under certain circumstances.[1646] Yet as the *SPS* contains such a clause and dynamic interpretation was used for the objectives of art. XX *GATT* in *Shrimp-Turtle*, an interpretation of art. XX *GATT* allowing for a higher standard of protection by domestic measures is not *per se* precluded.[1647] The DSB has stressed in various cases that it is the member states that decide on the level of protection.[1648] In addition, several cases show that unilateral measures may even contribute to and accelerate the finding of a multilateral solution[1649] as already mentioned above. So while the issue of human rights protection under art. XX (a) and (b) and the *chapeau's* non-discrimination clauses is not easy and more clarification is needed, it is not impossible.

The third limitation beside the two non-discrimination clauses is the requirement that the measure must not be applied in a manner that constitutes a "disguised restriction to international trade".[1650] That makes the *chapeau* basically a threshold to preclude mere protectionist measures, which could actually allow for a broader reading of the objectives and the necessity clause, so that they

---

[1645] See for example Gabrielle Marceau, "WTO Dispute Settlement and Human Rights" (2002) 13 *EJIL* 753, 786-9 wfr.

[1646] Art. 3.3 *Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)* (1995).

[1647] Jan Neumann and Elisabeth Türk, "Necessity Revisited- Proportionality in WTO Law after EC-Asbestos" in Martin Nettesheim and Gerald G. Sander (eds), *WTO-Recht und Globalisierung* (Berlin: Duncker & Humblot, 2003) 103, 139: the AB moved the classical necessity test into the chapeau in *Shrimp-Turtle*.

[1648] See above where the necessity was assessed; see also *European Communities - Measures Affecting Asbestos and Products Containing Asbestos ("Asbestos")* WT/DS135/R (18 September 2000) and WT/DS135/AB/R (12 March 2001); *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services ("US-Gambling")* WT/DS285/R (7 April 2005) and WT/DS285/AB/R (7April 2005).

[1649] Helge Elisabeth Zeitler *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 198 referring to US measures preceding the international Protocols of Montreal and London for the protection of the ozon layer; see also Steve Charnovitz, "GATT and the Environment, Examining the Issue" (1992) 4 *IEA* 203, 207 giving examples from the USA; Francesco Francioni, "Extraterritorial Application of Environmental Law" in Karl M. Meessen, *Extraterritorial Jurisdiction in Theory and Practice* (London, The Hague, Boston: Kluwer Law International, 1996) 122, 143-4; Benedict Kingsbury, "The Tuna-Dolphin Controversy, The World Trade Organization and the Liberal Project to Reconceptualize International Law" (1994) 5 *YIEL* 1, 21-2.

[1650] Art. XX *GATT*.

could include human rights, because protectionist measures could still be filtered by the *chapeau*.[1651] As was stressed for example in *US-Gasoline* and *EC-Asbestos,* the design, architecture and structure of the measure are assessed as indicators to determine whether the measure pursues protectionist objectives. As already stated earlier in this enquiry, human rights protection measures do not have to be more protectionist than any other measure,[1652] so this requirement could be met.

So although the rather flexible *chapeau* is important for trade law and human rights can indeed be taken into account within the *chapeau*, challenges remain:

> [c]oncerning human rights adhering to the chapeau is particularly challenging, because Human rights violations are notoriously difficult to assess and quantify. Further, most states are human rights violators on one level or another. Consequently, an accusation of arbitrariness might easily stick to most country based measures.[1653]

(h) Conclusion on the possible interpretation of art. XX GATT

Having briefly sketched the human rights potential of art. III and XX *GATT* it became clear that the DSB can in fact take into account human rights when deciding on unilateral measures by a home state that imposes trade restrictions on goods not produced in accordance with human rights in its subsidiaries. Yet the decisions assessed suggest that a broader interpretation of art. III that includes unincorporated PPMs as a differentiating criterion is rather unlikely, while art. XX *GATT*, although mainly restricted to human rights concerning human, animal and plant life or health,[1654] has been used in this context several times. In the long term a broader reading of art. XX *GATT* could even lead to a broader reading of the art. III *GATT* likeness criterion as well, allowing for

---

[1651] See Tobias Bender, *Domestically Prohibited Goods* (Berlin: Duncker & Humblot, 2006) 166-7; Helge Elisabeth Zeitler *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 141.

[1652] See Robert Howse and Donald Regan, "The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy" (2000) 11 *EJIL* 249, 275 and 179-181 who argue with regard to art. III that the intent when imposing trade restrictions may simply be to keep one's hands clean and trying to avoid PPMs the state considers wicked, protectionisms not being the purpose for the measure.

[1653] Jenny Schultz and Rachel Ball, "Trade as a Weapon? The WTO and Human Rights-Based Trade Measures" (2007) 12 *Deakin L. Rev.* 41, 69.

[1654] See Robert Hudec, "GATT/WTO Constraints on National Regulation: Requiem for An 'Aim and Effects' Test" (1998) 32 *The Int'l Lawyer* 619, 638; Carlos Lopez-Hurtado, "Social Labelling and WTO Law" (2002) 5 *JIEL* 719, *7.

unincorporated PPM standards to influence the likeness of products.[1655] However, art. XX is not easily applicable to human rights either.[1656] The scope of art. XX (b) *GATT* concerning human rights is limited. While child labour might be a dealt with by trade restrictions as this may be a threat to the child's health,[1657] freedom of association for example is not covered the human life or health of art. XX (b).[1658] Art. XX (a) *GATT* on the other hand may provide broader human rights protection, but has not been used in this respect so far. As there are many opponents concerning the inclusion of labour or social clauses into WTO law, a broad application of the public morals exception, amounting to a human rights clause, seems rather unlikely.[1659] *Shrimp-Turtle* suggests that unilateral measures based on international standards may be *GATT* compatible when imposed in a non-arbitrary way and multinational negotiations have failed. This even allows for import bans like in *Shrimp-Turtle (Malaysia)*. Trade restrictions amounting to coercion are said to be almost always the only means left after diplomatic measures failed and therefore the necessity requirement is usually fulfilled.[1660] The international standards trade restrictions can be based on in such cases should however not only be labour rights as laid down by the ILO, because these do not include property rights of landowners, environmental issues, etc. Rather, a broader scope of human rights has to be used. The General Comments could be of help when assessing their content.[1661]

The overall conclusion concerning the human rights potential of art. III and XX *GATT* is nevertheless positive for trade restrictions imposed to prevent human

---

[1655] See Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 124.

[1656] See on the issue of labour rights for example Robert Howse and Donald Regan, "The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy" (2000) 11 *EJIL* 249, 283-4.

[1657] Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 154 wfr.

[1658] *Ibid.*

[1659] See also Robert Howse, "Human Rights in the WTO: Whose Rights, What Humanity?" (2002) 13 *EJIL* 651, 656-7.

[1660] Robert E. Hudec "GATT Legal Restraints on the Use of Trade Measures against Foreign Environmental Practices" in Jagdish Bhagwati and Robert E. Hudec, *Fair Trade and Harmonization* (vol. 1, Economic Analysis, Cambridge, Mass., London: MIT Press, 1996) 95, 128, who is opposing a broad reading of art. XX *GATT*; on their effectivenss see preceding chapter on sanctions.

[1661] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 131.

rights abroad, as there could be seen a development in the *Tuna-Dolphin* and *Shrimp-Turtle* decisions, including the latest ones of *Tuna-Dolphin III* and *Shrimp-Turtle (Malaysia)*, towards a WTO that is more open for unilateral measures to protect non-trade interests. Trade bans and labelling have both been considered possible by the DSB. Furthermore, the WTO stresses its openness towards non-trade issues, for example by the *TBT* Committee or the WTO's discussion with the ILA.[1662] Yet it has to be stressed again that a mixed panel of human rights and trade experts, or some other sort of cooperation between the UN and the WTO not deciding *within* the WTO system but independently on equal terms would be preferable and broaden the scope to which human rights could be assessed, but the interpretational approach is much more likely to happen.

F *Trade restrictions outside WTO law as a further option?*

As just seen it is very well possible to include human rights issues when interpreting WTO law. Yet there are limits for this approach as well. As seen above, there is no social or labour law clause in WTO law. Only environmental and health issues have entered WTO law so far. That means as far as other human rights issues are concerned there is basically only art. XX (a) *GATT* WTO law that could be interpreted more broadly to grant more human rights protection. However, broad interpretation of WTO law can even cause more restrictions on human rights protection in certain cases. Joshi for example suggests that even governmental voluntary labelling schemes concerning unincorporated PPMs are *outside* the scope of *TBT* and *GATT* and are *therefore* a possible means to be taken that does not violate WTO law.[1663] As seen above, the *TBT Agreement* does not cover regulations and standards concerning unincorporated PPMs. According to Joshi *GATT* art. III:4 only covers measures where the government can be hold responsible for, which, according to him, is

[1662] See ILA (ITLC), *Eighth Report of the Committee,* (Rio de Janeiro Conference, 2008), available at <http://www.ila-hq.org/en/committees/index.cfm/cid/24> 1 May 2014, par. 1.
[1663] Manoj Joshi, „Are Eco-Labels Consistent with World Trade Organization Agreements?" (2004) 38 *J.W.T.* 69, 80 and 90; more reluctant as far as voluntary governmental labelling schemes are concerned is Carlos Lopez-Hurtado, "Social Labelling and WTO Law" (2002) 5 *JIEL* 719, *10 stating that private voluntary labelling schemes are outside the scope of *GATT*, while for government ones the position "may not be so clear".

not the case for voluntary governmental eco-labelling schemes.[1664] Whether voluntary government labelling schemes can be considered outside the scope of *TBT* and *GATT*, especially after *Tuna-Dolphin III,* seems at least doubtful. Yet still a lesson can be learned, namely that by interpreting *TBT* more broadly, in this case by including unincorporated PPMs, *TBT* and *GATT* become applicable on more voluntary labelling schemes. At the same time they are becoming the benchmarks for permissibility of these labelling schemes, factually restricting their applicability. Of course, this is different for 2.2 *TBT* and art. XX *GATT* and rules alike, where exceptions from WTO law are broadened.

Apart from measures that are beyond or outside the scope of WTO law and therefore possible for home states to take, there could be cases where other public international law overrides trade law.[1665] This was already mentioned earlier when assessing whether the overriding law rule is applicable. It was found above that in a general way this rule was not applicable. Yet when sketching the developments within the WTO it became clear that there seems to be international consent, including those opposing the introduction of social clauses or labour law into the WTO, that the institutions in charge for such clauses and standards are the ILO, the UN or other human rights organizations.[1666] Yet this means that WTO members acknowledge that for some trade-related issues other institutions may develop and apply rules, thereby also influencing trade due to the interrelatedness of the areas of law. A reason for this

---

[1664] Manoj Joshi, „Are Eco-Labels Consistent with World Trade Organization Agreements?" (2004) 38 *J.W.T.* 69, 80; similar in his argumentation of when a "state action" is given is Santiago M. Villalpando, "Attribution Of Conduct To The State: How The Rules Of State Responsibility May Be Applied Within The WTO Dispute Settlement System" (2002) 5 *JIEL*, 393.

[1665] On the need to clarify the relationship between trade law and other public international law and the need for "institutional sensitivity"see for example Robert Howse "Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurispridence" in Joseph H. H. Weiler, *The EU, the WTO and the NAFTA , Towards a Common Law of International Trade* (Oxford: Oxford University Press, 2000) 35, 62-8 on; Martin Nettesheim, "Von der Verhandlungsdiplomatie zur internationalen Verfassungsordnung: Überlegungen zum Entwicklungsstand des internationalen Wirtschaftsrechts" in Claus Dieter Classen, Armin Dittmann, Frank Fechner, Ulrich M. Gassner, Michael Kilian (eds) *„In einem vereinten Europa dem Frieden der Welt zu dienen..." Liber amicorum Thomas Oppermann* (Berlin: Duncker & Humblot, 2001).

[1666] See also Bernard M. Hoekman, Michel M. Kostecki, *The Political Economy of the World Trading System* (3rd ed, Oxford: Oxford University Press, 2009) 628.

may be that linking human rights to trade law by somehow including them into trade law entails the connotation of using them as a means in trade law, *i.e.* as a protectionist measure.[1667] When they are linked to trade law outside the WTO, the fear of protectionist uses could be reduced. A further and less promising reason however is that those opposing linking human rights and trade within the WTO are hoping that other institutions will not come up with standards and clauses within near future, thereby opposing the introduction of human rights into WTO law could also be a cheap way out of human rights issues in a more general way. The ILO for example sets standards and even provides for the possibility of trade sanctions in art. 33 *ILO Constitution*, yet no such sanctions have ever been imposed so far.[1668] This is because the ILO is based on a fragile relationship of cooperation of its members, including developing states and compulsory measures could disturb this rather effective system.[1669]

Yet how should cases be dealt with where trade restrictions are implemented in spite of actual WTO law incompatibility? The issue that arises in these cases is whether such measures could still be implied and justified under general public international law as set out above. The "smart sanctions" that were examined in the preceding chapter did usually not include trade restrictions, an exception being luxury goods used by the ruling élite. That is why this chapter focused on trade restrictions and also on WTO law. The decisive issue is whether the WTO has to be considered a "self-contained regime",[1670] not allowing for recourse to

---

[1667] See also Bernard M. Hoekman, Michel M. Kostecki, *The Political Economy of the World Trading System* (3rd ed, Oxford: Oxford University Press, 2009) 631 who argues that deeper integration of non-trade matters into trade law is not possible, because they are not sufficiently trade-related.

[1668] Steve Charnovitz "Should the Teeth be Pulled? An Analysis of WTO Sanctions" in Daniel L. M. Kennedy and James D. Southwick (eds), *The Political Economy of International Trade Law* (Cambridge: Cambridge University Press, 2002) 602, 605; Bernard M. Hoekman, Michel M. Kostecki, *The Political Economy of the World Trading System* (3rd ed, Oxford: Oxford University Press, 2009) 625; Wolfram Spelten, *WTO und nationale Sozialordnungen* (vol.11, Berlin: Duncker & Humblot, 2005) 79-80.

[1669] Wolfram Spelten, *WTO und nationale Sozialordnungen* (vol.11, Berlin: Duncker & Humblot, 2005) 83; on this issue see also Paul Cook, "Law of Trade in Human Rights: A Legal Analysis of the Intersection of the General Trade Agreement of Tariff's Article XX (b) and Labor Rights of Children" (University of California, Los Angeles, 2012) available at <http://works.bepress.com/paul_cook/3> 1 May 2014, 7, 8 wfr.

[1670] On the issue see for example Lorand Bartels "Art. XX of GATT and the Problem or Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights" (2002) 36 *JWT* 353, 394-403; Lukasz Gruszczynski, "Customary Rules of Interpretation in

general public international law, including for example the law on sanctions. The term "self-contained regime" was developed by the ICJ in the *Teheran* case where it held that diplomatic law was a self-contained regime, providing its own sanction mechanisms and not allowing for a fallback on measures outside diplomatic law to answer violations, no matter whether the measure was a response to a violation of diplomatic law or other (general) law.[1671] The ILC differentiated between self-contained regimes not allowing a fallback at all, because they were a separate system of law of their own and those where the measures of the regimes had to be exhausted before a fallback on more general public international law was possible,[1672] the latter rather being a system of *leges speciales.*[1673] That WTO/*GATT* is not isolated from other public international law, but influenced by it could already be seen above when sketching the developments within the WTO.[1674] Furthermore, the Appellate Body explicitly stated that WTO law cannot be read "in clinical isolation from public

---

the Practice of WTO Dispute Settlement Bodies", in Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of International and National Courts and the (De-) Fragmentation of International Law* (Oxford, Portland, Oregon: Hart Publishing, 2012) 35; Anja Lindroos and Michael Mehling, "Dispelling the Chimera of 'Self-Contained Regimes': International Law and the WTO" (2005) 16 *EJIL* 857; Joost Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go?" (2001) *AJIL* 535; UN, General Assembly, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, Report of the Study Group if the International Law Commission, Finalised by Martti Koskenniemi, A/CN.4/L.682 (13 Apr. 2006) par.165-171; Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures addressing Non-Trade Concerns. A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Process and Production Methods* (The Hague: Ministry of Foreign Affairs of the Netherlands, 2007) 191-202 wfr; on the term see also Santiago M. Villalpando, "Attribution Of Conduct To The State: How The Rules Of State Responsibility May Be Applied Within The WTO Dispute Settlement System" (2002) 5 *JIEL*, 393.

[1671] *United States Diplomatic and Consular Staff in Teheran*, Judgement, ICJ Reports 1980, 3.

[1672] *Air-Services Agreement Case (France v United States)* Arbitral Tribunal (1978), summary available at <http://iilj.org/courses/documents/AirServicesCase.pdf> 1 May 2014, pointing out that an arbitration clause does no by itself exclude a fallback on the rules of general public international law; Axel Marschik, *Subsysteme im Völkerrecht* (Berlin: Duncker & Humblot, 1997) 74.

[1673] See on the idea that the WTO is a *lex specialis* system also Gabrielle Marceau, "WTO Dispute Settlement and Human Rights" (2002) 13 *EJIL* 753, 766-779.

[1674] See for example *United States – Import Bans of Certain Shrimp and Shrimp Products ("Shrimp-Turtle")* WT/DS58/R (15 May 1998), par. 7.52 -53 and WT/DS58/AB/R (12 October 1998) par. 168.

international law".[1675] In addition, the Panel in the *United States - Sections 301 - 310 of the Trade Act*[1676] allowed for a fallback on domestic law that provided for trade restrictions in a solely trade-related context[1677] in cases where *DSU* mechanisms were exhausted.[1678] That means WTO law is not excluding the application of other law allowing for trade sanctions, not even where the primary intention of such law is the protection of trade interests.[1679] In addition, it is also pointed out that the *WTO Agreement* preamble itself is providing a link to general public international law by mentioning the objective of "sustainable development".[1680] Yet does this mean that a fallback on the rules about sanctions in public international law is possible e.g. when trade restrictions imposed to protect human rights are violating WTO law? The WTO itself does not exclude a fallback on economic sanctions, but provides for a fallback by the security exception of art. XXI *GATT*. [1681] Whether this explicit fallback is exclusive due to the self-contained character of the WTO, or whether other fallbacks are possible is not entirely clear, but for example Hahn who considers art. XXI *GATT* an exclusive fallback nevertheless concludes that *ius cogens* and *erga*

[1675] *United States - Standards for Conventional and Reformulated Gasoline ("US-Gasoline")* WT/DS2/R (29 January 1996) and WT/DS2/AB/R (29 April 1996); see also James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 190; Joost Pauwelyn, "Recent Book on Trade and Environment: GATT Phantoms Still Haunt the WTO" (2004) 15 *EJIL* 575, 589.

[1676] *United States - Sections 301 -310 of the Trade Act of 1974* WT/DS152/R (adopted 27 January 2000).

[1677] The objective of the US *Trade Act* was the protection of US trade interests and not of (foreign) human rights, see sections 301-310 *US Trade Act 1974.*

[1678] *United States - Sections 301 -310 of the Trade Act of 1974* WT/DS152/R (adopted 27 January 2000) par. 7.109 concluding that the WTO dispute settlement has to be exhausted before applying sections 301-310 of the *Trade Act*, because otherwise the determination of inconsistency of the behaviour of a foreign state with US trade rights could not be based on Panel or Appellate Body findings of the WTO. To base such a determination on WTO findings, however, had been provided for by a US "Statement of Administrative Action".

[1679] See *ibid.*

[1680] *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee: Developing countries, international trade and sustainable development: the function of the Community's generalised system of preferences (GSP) for the ten-year-period from 2006 to 2015* COM(2004) 461 final, Brussels 7.7. 2004; James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 206; Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 189.

[1681] Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 191.

omnes obligation violations are always essential security interests in the sense of art. XXI (b) (iii) *GATT*.[1682] This means that a fallback on general public international law would be possible in cases of *erga omnes* obligation violations and violations of *ius cogens*, which are exactly the cases in which countermeasures could be imposed as assessed in the preceding chapter. This is also in line with Denkers, arguing that WTO law concerning "countermeasures" is only *lex specialis* in cases where these measures are answering viloations of WTO law.[1683] So it can be noted that reprisals are possible and that these measures may even violate WTO law, but only in the restricted cases of *ius cogens* and *erga omnes* obligations violations which are not likely to occur very often in the TNC context as already pointed out in the preceding chapter.
As far as trade restrictions as compulsory measures of ILO or UN are concerned it was already pointed out above, that the ILO has not used this possibility so far. In addition, due to the ILO's special negotiation-based character it is unlikely that it will do so in near future. The UN on the other hand is not equipped to fill this gap and the gap concerning non-labour human rights, because there is for example not even an individual complaints mechanism for ICESC rights.[1684] So the possibilities of using public international law to justify WTO violations in some way are rather restricted.

However, there seems to be another way of using trade restrictions outside the WTO, yet not so much outside WTO law, but outside WTO disputes. For this pragmatic option, nothing - or at least not much - has to change. States have not brought cases to the DSB so far that deal with trade restrictions implemented to protect human rights. Yet in the WTO system the principle of *nullo actore, nullus iudex* applies, so the DSB will not rule on WTO incompatibility of measures as long as no one is challenging the measures. That home state measures might go unchallenged is not totally unlikely. To the opposite - so far trade restrictions concerning human rights have not been decided by the DSB,

[1682] Michael J. Hahn, *Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie* (Berlin u. a.: Springer, 1996) 363-373.
[1683] Jeroen Denkers, *The World Trade Organization and Import Bans in Response to Violations of Fundamental Labour Rights* (Antwerp, Oxford, Portland: Intersentia, 2008) 152-3, 156-168 wfr.
[1684] See Wolfram Spelten, *WTO und nationale Sozialordnungen* (vol.11, Berlin: Duncker & Humblot, 2005) 84.

because in the rare cases that occurred the issue was solved in other ways. When the US imposed an import ban on products from Burma because of the human rights situation there, Japan and the EU took the case before the WTO.[1685] However, the DSB did not decide on the case as a settlement was reached by internal negotiations.[1686] In the case of conflict diamonds, a waiver was passed and a permanent waiver as an amendment to *TRIPS* is aimed for concerning the more general issue of reconciling the protection of public health and Intellectual Property Rights.[1687] In addition, the WTO has proven to be open to non-trade issues and in *Gas Guzzle Tax* and *Shrimp-Turtle* for exampled is was stressed that domestic measures to protect certain interests are not violating WTO law as long as they are not imposed in a protectionist measure. Especially the knowledge of these DSB decisions is important, because it could help getting rid off the regulatory chill mentioned above, even if nothing changes. Yet of course official consensus on the issue, for example by official declarations of the DSB or the WTO or by a member state agreement not to bring such cases before the DSB would be of help. So would more decisions on the issue by the DSB. That is why it might be a good idea of making it a WTO issue, even by implementing measures and letting the DSB decide. Then at least a new basis for discussion would be provided.

[1685] Susan Ariel Aaronson, "A Match Made in the Corporate and Public Interest: Marrying Voluntary CSR Initiatives and the WTO" (2007) 41 *J.W.T.* 629, 636; Lorenz Khazaheh, "Oil and the World Trade Organisation (WTO)" in Tobias Haller, Annja Blöchlinger, Markus John, Esther Marthaler, Sabine Ziegler (eds), *Fossil Fuels, Oil Companies and Indigenous Peoples* (vol. 1, Berlin, Wien Zürich: Lit Verlag, 2007) 469, 472.

[1686] Lorenz Khazaheh, "Oil and the World Trade Organisation (WTO)" in Tobias Haller, Annja Blöchlinger, Markus John, Esther Marthaler, Sabine Ziegler (eds), *Fossil Fuels, Oil Companies and Indigenous Peoples* (vol. 1, Berlin, Wien Zürich: Lit Verlag, 2007) 469, 472; the US law was found to be unconstitutional by the US Supreme Court as it had been passed by Massachusetts, thereby violating exclusive federal powers see Gudrun Monika Zagel, *WTO & Human Rights: Examining Linkages and Suggesting Convergence* (Voices of Development Jurists Paper Series vol. 2, no. 2, Rome: International Development Law Organization, 2005) 8; on the issue of WTO compatibility of trade restrictions because of human rights violations in Burma, see Robert Howse and Jared M. Genser, "Are EU Trade Sanctions on Burma Compatible with WTO Law?" (2008) 29 *Mich. J. Int'l. L* 165.

[1687] Susan Ariel Aaronson, "A Match Made in the Corporate and Public Interest: Marrying Voluntary CSR Initiatives and the WTO" (2007) 41 *J.W.T.* 629, 645-6, the period for acceptance was extended until December 2013 see *Amendment of the TRIPS Agreement – Third Extension of the Period for the Acceptance by Members of the Protocol Amending the TRIPS Agreement* WT/L/829 (30 November 2011).

III CONCLUSION ON TRADE RESTRICTIONS IN THE HOME STATE-TNC CONTEXT

As outlined in this chapter, trade restricting measures such as import bans or labelling can be imposed by importing states in order to protect non-trade interests in the exporting state. Non-trade issues can be taken into account on different levels when assessing unilateral restrictions to international trade. As far as human rights are concerned, those related to the protection of human, animal or plant life or health are covered in more detail by the *SPS* and *TBT Agreements*, which can also cause more obstacles for unilateral protection measures. As far as human rights unrelated to human, animal or plant life or health are concerned, only *GATT* is applicable. The most promising and most likely way for *GATT* compatibility of unilateral trade restrictions because of human rights violations when manufacturing and producing the good is art. XX (a) *GATT*. However, the necessity test and the *chapeau* should not be underestimated in the human rights context. Labelling schemes may be considered "necessary" more easily than trade bans. Yet the TNC context contains further challenges. When using labelling schemes only for those products manufactured by subsidiaries of own TNCs this will most likely be considered as a treatment less favourable of like products, because as outlined above, unincorporated PPMs are not (yet) a criterion when deciding on the likeness of goods. This is even more so for art. XI violations caused by import bans. An exception under art. XX is difficult not only because of the vague term of "public morals" and international standards of human rights often do not exist, but also because the necessity of such trade bans and labelling schemes may be questioned. Pressuring the parent company in the home state by holding it responsible for human rights violations of its subsidiaries abroad for example could be considered a less trade restrictive means. Furthermore, treating goods from home state TNC subsidiaries differently from those produced under the same circumstances, using the same PPMs by other exporters could also be considered arbitrary or unjustifiable discrimination. So while trade restrictions may be a way to protect human rights abroad, at least for singled-out human rights where accepted international standards exist, it is rather difficult to use it in the restricted and confined situation of the TNC context (only). That is why the potential of this home state option is doubtful. This is even more so when considering that - if at all - this option can only work for TNC subsidiaries

exporting their goods into the home state.[1688] Yet the export industry is often the branch that is already better off than many other branches in developing countries.[1689] Again, host states fearing trade bans and a loss of foreign investment could withdraw their personnel and resources from other places and concentrate on the exporting TNC subsidiary only, which could cause a worsening of the overall human rights situation in the state. Focusing on exporting TNC subsidiaries and labour rights only could even be considered a denial of the universalism of human rights and their protection.[1690] Having made all these considerations, it seems that a broader approach of human rights protection, not limited to the TNC context would be a more promising one under WTO law, as could also be seen from *Tuna-Dolphin III* and *Shrimp-Turtle (Malaysia)*. Labelling schemes only used on TNC products for example would be rather ineffective compared to large-scale labelling,[1691] enabling a real consumer choice and thereby creating competitive pressure. Yet whether large-scale compulsive measures should be used for the protection of human rights is a difficult issue, raising once more the issues of protectionism, violations of state sovereignty, the doubts concerning the effectiveness of such measures and cultural imperialism. It is argued that trade restrictions may cause more harm than help for human rights and are therefore inapt for human rights enforcement.[1692] The example of child labour was already set out above

[1688] See James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 80; Helge Elisabeth Zeitler, *Einseitige Handelsbeschränkungen zum Schutz extraterritorialer Rechtsgüter* (Baden-Baden: Nomos, 2000) 221.

[1689] James Harrison, *The Human Rights Impact of the World Trade Organisation* (Oxford, Portland: Hart Publishing, 2007) 80; see also Naila Kabeer, "Globalization, Labour Standards and Women's Rights: Dilemmas of Collective (In)Action in an Interdependent World" (2004) 10 *Feminist Economics* 3, 14-5 arguing that poor conditions in the formal sector are still better than working in the informal sector and Kabeer additionally explaining that those working in garment factories in Bangladesh that deal directly with international buyers enjoy wages and working conditions above average compared to the rest of the export industry and the rest of the economy; Ajit Singh and Ann Zammat, "Labour Standards and the 'Race to the Bottom': Rethinking Globalization and Workers' Rights from Developmental and Solidaristic Perspectives" (2004) 20 *Oxford Rev. Econ.c Pol'y* 85, 96 and 98.

[1690] Frank Braßel and Michael Windfuhr, *Welthandel und Menschenrechte* (Bonn: Verlag J. H. W. Dietz Nachfolger, 1995) 83.

[1691] See Carlos Lopez-Hurtado, "Social Labelling and WTO Law" (2002) 5 *JIEL* 719, *3.

[1692] See the previous chapter on sanctions and their negative impact; see also Gudrun Monika Zagel, *WTO & Human Rights: Examining Linkages and Suggesting Convergence* (Voices of

demonstrating this.[1693]As already stated in the preceding chapter, trade restrictions should also be accompanied by assistance and help for the host state, e.g. by GSPs[1694] to improve the overall situation in the host state. Yet assessing broad-scale human rights protection approaches outside the home state-TNC context would go beyond the scope of this research. Considering all the above said it has to be concluded that trade restrictions are only a rather limited home state option to protect human rights in the TNC subsidiaries abroad.

Development Jurists Paper Series vol. 2, no. 2, Rome: International Development Law Organization, 2005).

[1693] See the previous chapter on sanctions and their negative impact; see also Gudrun Monika Zagel, *WTO & Human Rights: Examining Linkages and Suggesting Convergence* (Voices of Development Jurists Paper Series vol. 2, no. 2, Rome: International Development Law Organization, 2005) 24-5.

[1694] See the previous chapter on sanctions and their negative impact; see also Gudrun Monika Zagel, *WTO & Human Rights: Examining Linkages and Suggesting Convergence* (Voices of Development Jurists Paper Series vol. 2, no. 2, Rome: International Development Law Organization, 2005) 32-3; on the issues of GSPs and WTO/*GATT* see for example Yaraslau Kryvoi, "Why European Trade Sanctions Do Not Work" (2008) 17 *Minn. J. Int'l L.*209.

CHAPTER VI: CONCLUSION AND FINAL REMARKS

As this enquiry has shown, the flexibility in forms and enforcement of human rights is also of advantage in the TNC-human rights context. Understanding human rights not as a rigid, but flexible set of rules, a complex, developing web of norms and codes, binding as well as non-binding, reveals many ways home states may handle the TNC-human rights issues described in the introductory chapter and throughout this work. While this confined situation of home states, human rights and TNCs can be a hurdle, e.g. in the WTO context, because of equal treatment requirements, this very confinement is what makes applicability and enforcement easier in many other situations, e.g. when applying domestic law on trans-border cases, because the reproaches of imperialism, disrespecting sovereignty, etc. are overcome more easily.

As seen in chapter V trade restrictions are only of limited help for home states to handle the TNC-human rights issues. Firstly, because only imports into the home state can be targeted by trade restrictions like labelling or import bans and secondly, because treating only home state TNC products manufactured abroad differently may cause difficulties with regard to the equal treatment clause.

In chapter IV it was found that sanctions can be a valuable tool as far as positive measures are concerned, while the scope of negative measures is actually limited to *erga omnes* obligation violations and TNCs themselves cannot be targeted directly at all.

Chapter III showed that international law is no promising tool so far to handle the human rights and TNC issue, because TNCs cannot be held liable under public international law yet, as they lack a generally accepted legal personality under public international law so far.

This pretty much leaves the home state option of applying home state law, in particular tort law, especially by pressuring the parent company as suggested in chapter II.

However, as the enquiry also outlined, things do not have to stay the way they are. Human rights as well as politics are flexible and able to adapt to new challenges. As the International Council on Human Rights Policy put it

> there is a clear basis in international law for extending international legal obligations to companies in relation to human rights. This basis is particularly strong in regard to indirect obligations. States are under a duty to protect human rights, and increasingly this requires them to prevent private actors, including companies, from abusing rights. Though less solid, there is also some basis for extending direct legal obligations to companies and a trend towards doing so is clearly underway.[1695]

So eventually extraterritorial application of domestic law may become more accepted. In addition, TNCs may someday be accepted as new actors with legal personality and human rights protection obligations under public international law. Furthermore, *erga omnes* obligations can develop and include more human rights obligations, broadening the scope for sanctions and the application of international law as for example in *ATCA* cases and similar domestic law. Such changes can be accelerated by home states taking the already possible unilateral steps such as positive sanctions or applying domestic law with extraterritorial effect.[1696] Bi- and multilateral level agreements and harmonization are also helpful to speed-up changes in human rights protection law, because the more approximation exists among nation states and the more shared values can be felt and found, the more likely are new developments in public international law.

However, a precondition for all these changes is the political will of the home states. Unfortunately it seems that at the moment, with the consequences of the economic crisis still at hand in many home states, pressuring their TNCs to protect human rights abroad more effectively is not a priority on Western states'

[1695] International Council on Human Rights Policy, *Beyond Voluntarism: human rights and the developing international legal obligations of companies* (Vernier: Roto Press, 2002) 158.
[1696] See also Gregory Bowman, "A Prescription for Curing U. S. Export Controls" (Working Paper 2013) available at <http://works.bepress.com/gregory-bowman/12> 1 May 2014, 72-3, stressing the need for and impact of regional approaches for extraterritorial jurisdiction as a starting point for further developments.

agendas. Yet this is where Engle's words should be kept in mind: "The world is getting smaller, so our minds must grow".[1697]

[1697] Eric Engle, "European Law in American Courts: Foreign Law as Evidence of Domestic Law" (2007) 33 *Ohio N. U. L. Rev.* 99.