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Enforcing Global Corporate Social Accountability in Europe

ENFORCING GLOBAL
CORPORATE SOCIAL
ACCOUNTABILITY
IN EUROPE

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ABSTRACT

The economy operates globally but is regulated locally. Local regulation however sometimes fails to enforce fundamental environmental, labour, and human rights. At the same time, due to significant legal hurdles, corporations are rarely held accountable in their home states for overseas violations of basic standards. Against this backdrop, the European Parliament has repeatedly called for a framework on global corporate social accountability in Europe.

After discussing the theoretical background and current regulation in this field, this book examines the legal constraints that the European treaties and international law impose on regulatory instruments that take account of corporate abuse abroad. The analysis explores the legal limits of implementing global corporate social accountability via European measures such as the publication of violations, policies concerning export credits, subsidies, and other financial benefits, public procurement, fines, trade measures, labelling, reporting obligations, and private enforcement.

This cross-cutting examination reveals some of the main obstacles in the fabric of the European and

international system: WTO law restricts the use of trade measures, labelling, and public procurement as means to achieve social or environmental goals; customary international law circumscribes regulation of foreign companies worldwide; and the EU Treaties impose limitations on European labour and human rights legislation. Ultimately, however, the analysis demonstrates that there is considerable scope for global corporate social accountability in Europe.

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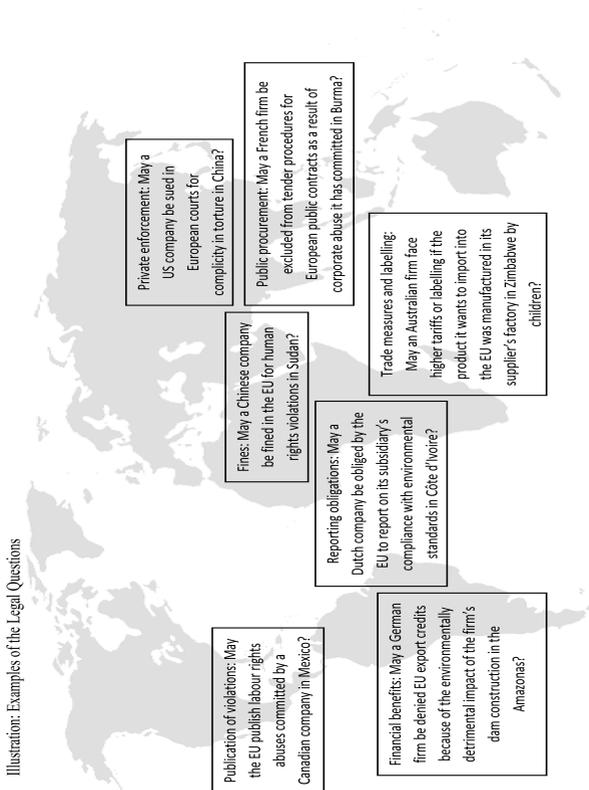
EXECUTIVE SUMMARY

The global legal order is marked by a governance gap. The impact of economic actors and the scope of their activities exceed the reach of institutional frameworks. The economy is global; regulation remains largely local. However, fundamental environmental, labour, and human rights are not always effectively enforced in states hosting economic actors. And home states rarely hold corporations accountable for overseas violations.

Concerned about ‘intense competition for investment and markets and lack of application of international standards’ that have led to ‘cases of corporate abuse’, the European Parliament has called for a European framework on global corporate social accountability (CSA).

This work examines the legal limits of European attempts to narrow the global governance gap. The analysis provides a matrix of regulatory models and explains which of these models are feasible from a legal perspective. The models include the publication of violations, policies concerning export credits, subsidies, and other financial benefits, public procurement, fines, trade measures, labelling, reporting obligations, and private enforcement. This book examines the constraints that the European Treaties and international law impose on regulatory elements when they take account of corporate abuse abroad. The following

illustration shows some examples of the legal questions this book endeavours to answer.



This work is a guide for the European legislator on what is possible in the field of global corporate social accountability. First, it analyses various regulatory models and, second, it examines which of these models

comply with higher-ranking law. Chapter one contains the elements that are fed into the filter of lawfulness in chapter three.

The aim is to provide a comprehensive matrix of the most relevant instruments and techniques available when it comes to global corporate social accountability in Europe. In sum: When the European legislator considers enacting policies on global corporate social accountability, what are the legal strictures? It is this question that this book scrutinises.

The method is cross-cutting: The analysis straddles several means of regulation and various fields of law; it looks at several legal areas from the angle of global corporate social accountability. The method resembles a ‘regulatory tool-kit’ and a ‘legal calculator’—tool x combined with tool y combined with tool z equals which result in law? Different combinations of regulatory models yield different results in different legal areas. The horizontal view makes combinations and results comparable. The following sections explain regulatory options (I.), their background (II.), and the legal challenges they face (III.).¹

I. Content: The Elements of European CSA Measures

Which environmental, labour, and human rights should

¹ For a detailed analysis see chapter 1 (Content: The Elements of European CSA Measures), chapter 2 (Context), and chapter 3 (Limits of Lawfulness).

be respected? Who should be the addressees of these obligations: only European businesses or companies worldwide? Should they be liable for subsidiaries they control and even for the entire supply chain? Where should global corporate social accountability apply: only in developing countries or around the globe? What should happen if basic standards are violated? Should the violation and its perpetrator be published? Should subsidies and export credits be refused or recovered? Should contracts with the state (public contracts) be refused or terminated? Should the transgressing company incur a fine? Should it face international trade restrictions? Should ‘eco’ or ‘fair trade’ labels be refused or withdrawn? Should companies be obliged to report on their performance with regard to global environmental, labour, and human rights? And, finally, should these rights be enforceable in EU Member States’ courts?

This part provides a matrix of regulatory models that deal with these questions. The models are understood as meta-norms *de lege ferenda* (i.e. future law). They are not meant to provide definite and detailed content; rather, they represent broad policy choices and sketch a framework of basic approaches. The matrix of CSA measures defines the subject for the theoretical discussion and demarcates the scope of the legal assessment.

A. Explaining the Matrix

(i) Substantive Provisions: Environmental, Labour, and Human Rights Standards

Model 1: International *jus cogens*

The addressee shall respect international *jus cogens* with regard to environmental, labour, and human rights standards.

Model 2: General international standards

The addressee shall respect customary international law with regard to environmental, labour, and human rights standards.

Model 3: European standards

The addressee shall respect European laws with regard to environmental, labour, and human rights standards.

The catalogue of CSA measures distinguishes three models of substantive standards for which the legislator may wish to opt: international *jus cogens*, general international standards, and EU standards.

Jus cogens is understood as the body of international peremptory norms that cannot be set aside by treaty or acquiescence. There seems to be consensus that the following norms have reached the status of *jus*

cogens: the prohibition of slavery, genocide, and apartheid; the prohibition of massive pollution of the atmosphere and the seas; the prohibition of torture, the worst forms of child labour, discrimination based on religion or sex; basic rules of international humanitarian law; and other core human rights.

The second model of substantive standards refers to customary international law. This is a wider category than *jus cogens*. International custom is defined as evidence of a general practice accepted as law. The prohibition of egregious forms of pollution, waste disposal, dumping, and misuse of toxic and hazardous substances are likely to fall within the realm of international custom. The four core labour standards—freedom of association and the right to collective bargaining; freedom from forced or compulsory labour; the prohibition of child labour; and the elimination of discrimination in respect of employment and occupation—appear to express custom, although this is sometimes disputed.

Finally, it is safe to say that the following rules form part of customary human rights law: Freedom of thought, conscience, and religion; the prohibition of genocide, arbitrary killing, slavery, slave trade, prolonged arbitrary detention, causing disappearance of individuals, torture, and cruel, inhuman, or degrading treatment; discrimination on the basis of race, sex, nation, and religion; and the prohibition of other gross

violations of widely accepted human rights.

Global corporate social accountability may not only be based on *jus cogens* or general international standards but also on European standards. EU legislation and Member States' laws guarantee specific environmental, labour, and human rights. Compared with *jus cogens* and international custom, the European standard is more detailed and demanding. General principles are fleshed out in extensive statutes and case law.

(ii) Addressee

Model 1: European approach

The addressee is a company, firm, or an undertaking formed in accordance with the law of a Member State and having its registered office, central administration, or principal place of business within the European Union.

Model 2: Universal approach

The addressee is a company, firm, or an undertaking.

One of the matrix's salient features is that it contemplates applying international standards directly to private actors. According to the traditional conception, international law is only binding on states: Although international environmental, labour, and

human rights laws also prescribe rules that ultimately private actors must respect, it is the duty of states to set out these rules in detail and to enforce them against individuals and juridical persons on their territory. The CSA measures, in contrast, permeate the state's membrane by enforcing international rules directly against companies with regard to their actions abroad.

Another important aspect of the matrix is that it obliges corporations to respect human rights. The usual starting point is that human rights only bind public power, not private power. The CSA measures go beyond this paradigm.

The matrix envisages two definitions of the addressee the legislator may choose: European companies and companies in general. In the first case, the CSA measures may be described as home jurisdiction regulation: Standards are not set by the host state where the European corporation operates, but by the home jurisdiction, where the company is registered, administered, or has its principal place of business.

Model two, the universal approach, is a much wider category. There is no European nexus anymore. This approach echoes universal jurisdiction in criminal law. Many states claim the power to prosecute genocide, crimes against humanity, and war crimes, regardless of who committed these violations on which territory. In the context of the CSA measures, model two represents universal public or private jurisdiction.

*(iii) Liability***Model 1: Entity approach**

The addressee shall be liable.

Model 2: Enterprise approach (theory of control)

The addressee shall also be liable for business entities it controls.

Model 3: Supply chain responsibility

The addressee shall also be liable for business entities from which it procures goods or services to supply its own goods or services.

The entity approach respects basic tenets of company law: the parent is not responsible for the subsidiary's debt or wrongdoing, and vice versa. The principle of limited liability is safeguarded; the enterprise's juridical division into separate entities is maintained. Tort claims against the parent cannot succeed on the mere ground that the subsidiary has done something wrong.

Model two employs the enterprise approach (theory of control). This method disregards limited liability and juridical separation; what matters is the economic structure. If one company controls another, both are treated as being part of one enterprise. The 'corporate

veil' is pierced. The theory of control is usually employed in competition law, but also in other areas such as environmental and financial regulation, and in anti-corruption laws.

The third model goes even further. It confers supply chain responsibility on the addressee. For example, the addressee may have to forfeit its right to subsidies if it procures goods from suppliers that violate basic standards.

(iv) Field of Application

Model 1: Developing countries

These measures apply to the addressee's operations in developing countries.

Model 2: Worldwide

These measures apply to the addressee's operations worldwide.

The CSA measures employ a structure that may be described as internal jurisdiction to enforce and external jurisdiction to prescribe. Standards are set for conduct in third countries but enforced by the EU.

Model one makes companies accountable for their violations of basic environmental, labour, and human rights in developing countries. The second model

extends the field of application of the CSA measures to the entire globe. For instance, corporations that want to benefit from EU subsidies, export credits, public contracts, etc. have to abide by basic standards around the world.

(v) Public Enforcement

In case of violation,

Model 1: Publication of violations

the violation and the name of its perpetrator may be published;

Model 2: Export credits, subsidies, and other financial benefits

financial benefits such as subsidies or export credits may be refused to or recovered from the addressee;

Model 3: Public procurement

public contracts with the addressee may be refused or terminated;

Model 4: Fines

the addressee may be fined;

Model 5: Trade measures

trade restrictions may be imposed on the addressee;

Model 6: Labelling

a label certifying compliance with the substantive standards may be denied to or withdrawn from the addressee.

Model 7: Reporting obligations

The addressee may be obliged to report on its compliance with the substantive standards.

The public enforcement mechanisms listed in the matrix range from incentive schemes (financial benefits, public contracts, labelling) to traditional command and control regulation (fines). This taxonomy shows a wide array of regulatory systems that all have different advantages and disadvantages in terms of efficiency and costs. They also face different challenges in European and international law.

The first model concerning publication of violations is based on ‘naming and shaming’. Given the official character of publication by a public authority, it may have far-reaching consequences for a company’s reputation.

The second model makes use of financial benefits schemes. EU and Member States’ agencies may have an important impact on corporate behaviour if they

refuse subsidies and export credits in the event that basic standards are not respected.

The third model takes account of environmental, labour, and human rights in public procurement policies. Companies that do not comply with these standards may not win the award, may see their contract rescinded, or may be excluded from the bidding procedure.

The fourth model makes use of fines. This implies that transgressions are treated as a breach of law, and not simply as a failure on moral grounds. Fines are about hard, not soft, law.

The fifth model tries to influence the addressee's behaviour with labelling schemes. Labels that certify compliance with environmental, labour, and human rights obligations can offer a significant competitive advantage in the market.

Model six imposes trade restrictions. For instance, the addressee would face higher customs and tariffs, or trade bans with regard to the products manufactured outside of the EU in violation of fundamental standards.

Finally, model seven requires the addressee to report on its compliance with the substantive standards. This may enhance transparency and comparability of companies' environmental and social performance.

(vi) Private Enforcement

EU Member States shall have jurisdiction for any civil action for alleged violations of the substantive standards by the addressee.

Private enforcement may be a powerful tool. Rights are vindicated in courts by the victims of corporate abuse themselves and not by a public administration that may find it difficult to detect violations. By compensating victims for the harm suffered, private litigation could effectively complement public measures.

B. Overview of the Matrix

The complete matrix looks as follows:

*FIRST ELEMENT: SUBSTANTIVE PROVISIONS:
ENVIRONMENTAL, LABOUR, AND HUMAN RIGHTS
STANDARDS*

Model 1: International *jus cogens*

The addressee shall respect international *jus cogens* with regard to environmental, labour, and human rights standards.

Model 2: General international standards

The addressee shall respect customary international law with

regard to environmental, labour, and human rights standards.

Model 3: European standards

The addressee shall respect European laws with regard to environmental, labour, and human rights standards.

SECOND ELEMENT: ADDRESSEE

Model 1: European approach

The addressee is a company, firm, or an undertaking formed in accordance with the law of a Member State and having its registered office, central administration, or principal place of business within the European Union.

Model 2: Universal approach

The addressee is a company, firm, or an undertaking.

THIRD ELEMENT: LIABILITY

Model 1: Entity approach

The addressee shall be liable.

Model 2: Enterprise approach (theory of control)

The addressee shall also be liable for business entities it controls.

Model 3: Supply chain responsibility

The addressee shall also be liable for business entities from which it procures goods or services to supply its own goods or services.

FOURTH ELEMENT: FIELD OF APPLICATION

Model 1: Developing countries

These measures apply to the addressee's operations in developing countries.

Model 2: Worldwide

These measures apply to the addressee's operations worldwide.

FIFTH ELEMENT: PUBLIC ENFORCEMENT

In case of violation,

Model 1: Publication of violations

the violation and the name of its perpetrator may be published;

Model 2: Export credits, subsidies, and other financial benefits

financial benefits such as subsidies or export credits may be refused to or recovered from the addressee;

Model 3: Public procurement

public contracts with the addressee may be refused or terminated;

Model 4: Fines

the addressee may be fined;

Model 5: Trade measures

trade restrictions may be imposed on the addressee;

Model 6: Labelling

a label certifying compliance with the substantive standards may be denied to or withdrawn from the addressee.

Model 7: Reporting obligations

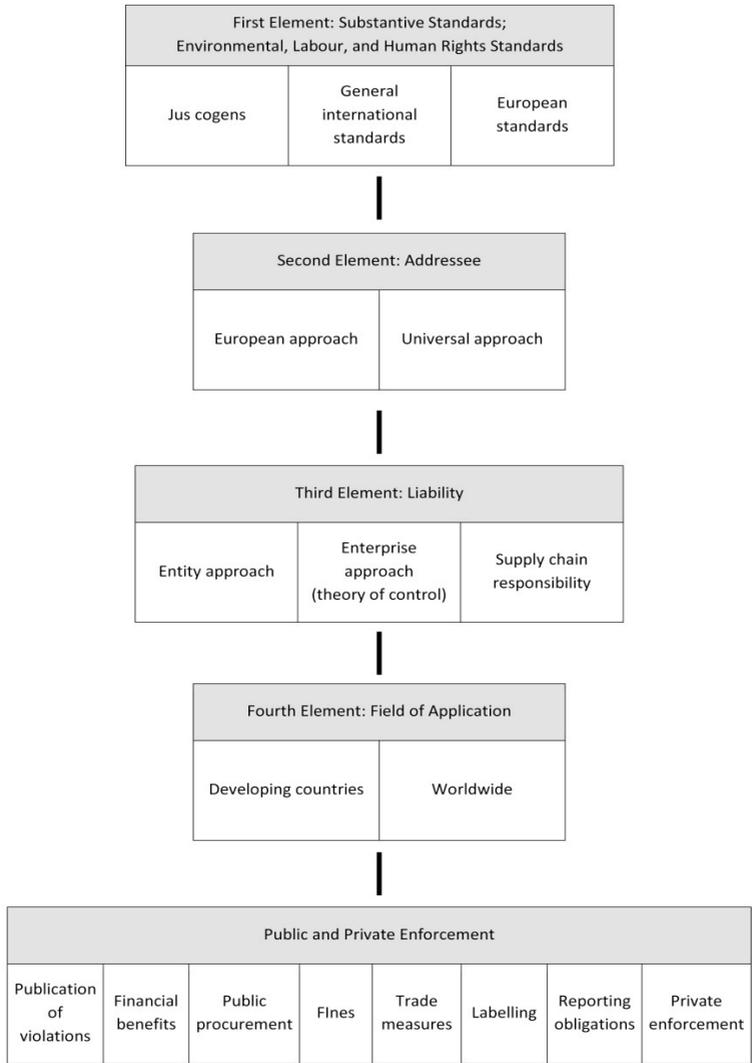
The addressee may be obliged to report on its compliance with the substantive standards.

SIXTH ELEMENT: PRIVATE ENFORCEMENT

EU Member States shall have jurisdiction for any civil action for alleged violations of the substantive standards by the addressee.

The following illustration shows how the regulatory models in the matrix may be combined.

Illustration A: Combining the Elements



II. Context

Several controversies underlie the European enforcement of global corporate social accountability.

A. Is There a Regulatory Deficit?

There are several voices on the international plane that point to a regulatory deficit when it comes to global corporate social accountability. It is argued that there is a mismatch between economic phenomena and regulatory reach. This governance gap can be exploited by corporate abuse.

The present legal order is also marked by a ‘jurisdictional veil’ that often shields corporations from accountability: Effective legal redress is not always available in a world fragmented into many different jurisdictions.

However, not everyone identifies a regulatory deficit. The argument goes that workers in developing countries will lose their jobs if they have to abide by the same labour standards as workers in developed countries; the only ones who profit from stricter global regulation are developed countries.

But allegations of protectionism lose their force when it comes to basic standards. Evidence indicates that businesses are more likely to invest in countries with stricter safeguards and enforcement of fundamental human and worker rights than in those

countries where such rights are absent or poorly enforced. Moreover, apart from these economic considerations, there is the moral argument that rudimentary health and safety requirements, which protect against death and serious bodily harm, cannot be described as protectionist. Global environmental standards may also be necessary to confront the threat of climate change.

B. Decentralised Enforcement of Universal Law?

The CSA measures employ a structure that is marked by extraterritorial jurisdiction to prescribe and internal jurisdiction to enforce: Rules concerning behaviour abroad are enforced within the EU. By applying laws to situations in other countries, the measures seem to be premised on a claim to universalism, i.e. the existence of norms that apply all over the world. The assumption is that the international community has moved away from formal sovereign equality towards a value-oriented conception.

Universal norm construction can be predicated on consensus (*volenti non fit iniuria*). This is precisely the foundation of international customary law, which requires agreement (*opinio juris*) among the international community. *Jus cogens* also contains a consensual element since it is defined as a peremptory norm ‘*accepted and recognised* by the international community of States as a whole as a norm from which

no derogation is permitted’.

If global consensus exists over what to do but there is no centralised international polity to perform the task, existing political structures may step in as vicarious, substitutional authorities. The decentralised enforcement by the EU of international norms may count as an example.

Legitimacy may also be enhanced by a technique that is often employed when legal systems interact with one another: the ‘complementarity’ or ‘subsidiarity’ approach. This technique permits the proper functioning of the system that is primarily concerned but allows at the same time that another system steps in (as *ultima ratio*) if the first system does not function properly. It is a form of checks and balances or separation of powers between legal systems. The CSA measures could use a similar technique by regulating only as a last resort in cases where the first system—i.e. the host state—fails to regulate. Employing narrow normative standards such as *jus cogens* and international customary law may reflect the subsidiarity or complementarity of decentralised regulation by the EU.

III. The Limits of Lawfulness

The European legislator is not free to adopt whatever laws it sees fit. European legislation must conform to higher-ranking norms of European and international

law.

The EU is a system of conferred competences. The exercise of power must be based on an enabling provision. The EU has no *Kompetenz-Kompetenz* (the power to decide on its own powers). Consequently, European CSA measures must find a basis in the EU Treaties. The European Court of Justice, however, interprets the principle of conferral in an extensive manner. For example, the Court has frequently accepted implied powers that stem from an explicit basis in the Treaties.

Furthermore, international law narrows the legislator's margin of manoeuvre. European laws must not infringe World Trade Organization (WTO) agreements and other international treaties. Customary international law also imposes limits on legislation. Extraterritorial jurisdiction may impinge on the sovereignty of other states.

This part presents the results of the legal calculus. Which combinations of regulatory tools listed in the matrix pass the test of legality? What are the legal restraints the EU legislator faces when it comes to global corporate social accountability?

A. Publication of Violations

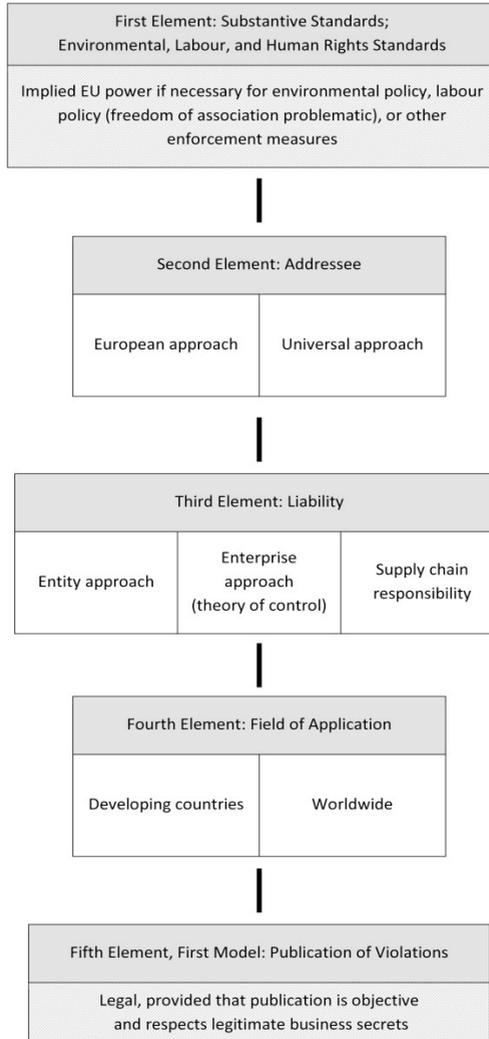
European law: The Publication of corporate abuse by the European Union arguably needs a basis in the European Treaties because of its potentially detrimental

effect on businesses' rights. Such a publication may tarnish a company's reputation and lead to significant loss of revenue. However, there is no stand-alone competence in the EU Treaties for the publication of corporate abuse. Nevertheless, there may be an implied power, annexed to an explicit power: The publication of corporate abuse abroad may be based on EU environmental policy or on the Treaty provisions of anti-discrimination and labour policy (although competence for regulating freedom of association is problematic). Fines for companies may also be accompanied by an official statement. Publication may be necessary to support the deterrent effect of penalties. Likewise, decisions not to grant export aid to a company may be combined with the publication of the corporate abuse. In sum, while there is no explicit EU competence for publicising violations, it is possible to attach such measures to other policy areas.

International law: Human rights law indicates that there is no violation of corporate rights as long as the finding of abuse is true. There is no protection against public statements, as long as they are objective and respect legitimate business secrets.

The following illustration summarises these findings (the shaded boxes indicate the problematic areas; the white boxes show regulatory options that are legal without any qualifications):

Illustration B: Combining the Elements: Publication of Violations



The illustration shows that all combinations of regulatory models are legal, provided that publication of violations is objective, respects legitimate business secrets, and is connected to an explicit legal basis in the EU Treaties. For example, the EU may publish violations of basic standards committed by a Canadian company in Mexico (universal addressee combined with entity approach combined with worldwide field of application).

B. Export Credits, Subsidies, and Other Financial Benefits

European law: The European Union is competent to insert requirements of global corporate accountability into EU and Member States' export credit and subsidies policies. It is possible to make aid for certain business operations contingent on the respect of fundamental standards, since environmental protection, social protection, and human rights are all cross-cutting objectives of the European Treaties that must be taken into account whenever the EU takes action. In *Opinion 1/75* the European Court of Justice made clear that the EU has exclusive competence in the field of export credits in order to forestall distortions of competition in foreign markets.

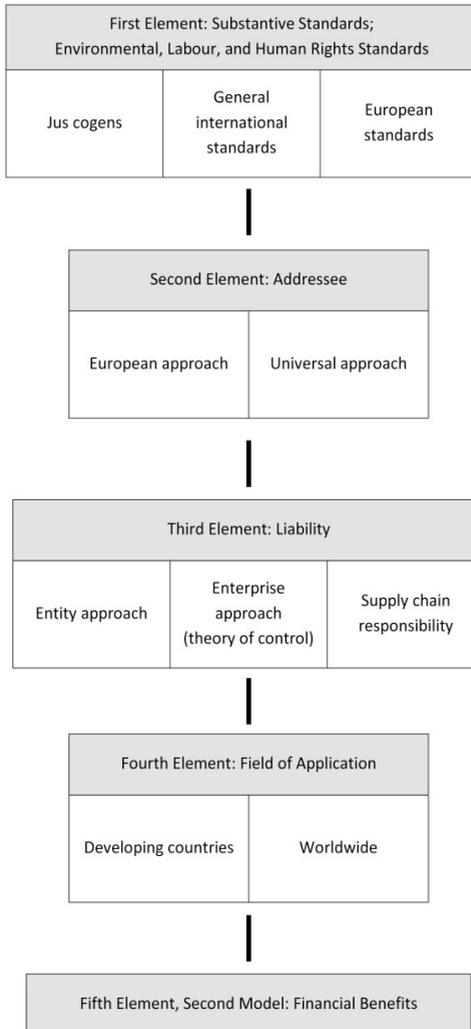
International law: The refusal or recovery of financial benefits in consequence of corporate abuse abroad does not conflict with international law. The

relevant texts of the WTO and Organisation for Economic Co-Operation and Development (OECD) are no bar to legislation that tries to prevent adverse effects of subsidies on the environment and social rights in other countries. Additional self-restrictions are legal under the WTO and OECD frameworks. Such practice is also unlikely to infringe international investment treaties if applied in a non-discriminatory and fair way.

Moreover, human rights law suggests that public money must not finance corporate abuse abroad. Public authorities have an obligation not to take part in violations of basic standards.

The following illustration shows that global corporate social accountability can be introduced into financial benefits policies by using all kinds of elements and models. All combinations pass, in principle, the test of lawfulness (there is no shaded box indicating problematic areas). For instance, the EU may deny a German firm export credits because of the environmentally detrimental impact of the firm's dam construction in the Amazonas (European addressee combined with entity approach combined with worldwide or developing countries as field of application). Higher-ranking European or international law does not pose an obstacle to such regulation.

Illustration C: Combining the Elements: Financial Benefits



C. Public Procurement

European law: The award of public contracts may depend on the respect of basic rights. The current Public Procurement Directives are based on EU internal market provisions. Amendments to the Directives in order to reward compliance with fundamental standards may be based on the same provisions.

International law: The WTO Government Procurement Agreement (GPA) sets limits to public procurement policies aimed at protecting environmental, labour, and human rights abroad against corporate abuse. The GPA's basic idea is that conditions must be contract-specific. Requirements unrelated to the contract, such as a general obligation for companies to respect labour standards in their entire business operations, are unlikely to be legal. Unrelated requirements increase governments' discretion and thereby diminish transparency and market access, which are the cornerstones of the GPA's philosophy.

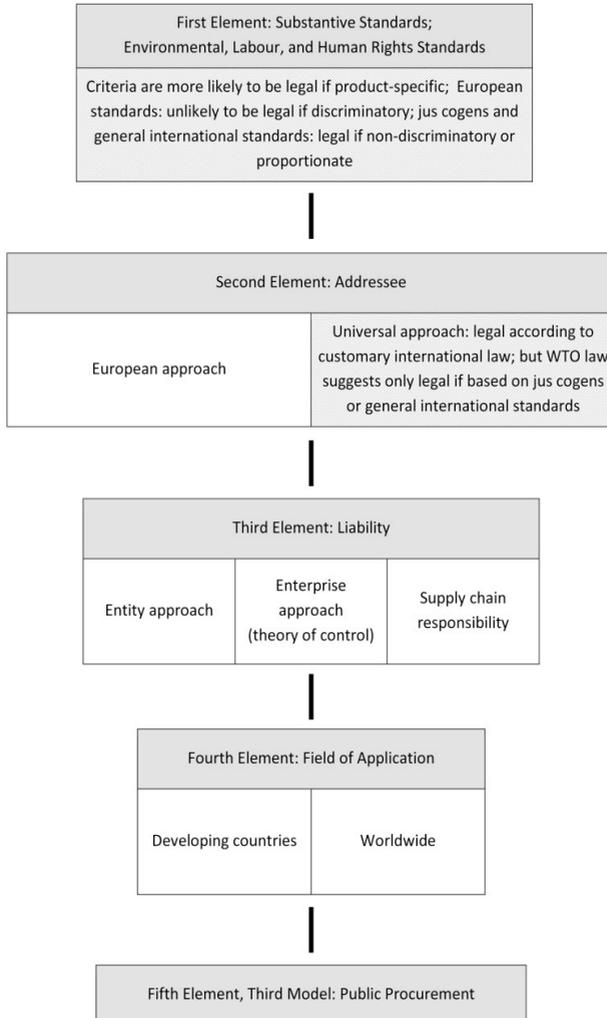
Furthermore, measures must not be discriminatory. The *Dominican Republic – Cigarettes* report of the WTO Appellate Body suggests that there is no discrimination if standards are applied in a way that is unrelated to the origin of the product or service. This indicates that, for example, higher tariffs on carbon intensive products will only be discriminatory if there is a link between the carbon intensiveness and the origin of the product. If a certain public procurement policy is

classified as discriminatory, it can still be legal for environmental or public policy reasons. European standards however are unlikely to be justified. *Jus cogens* and general international standards can be justified if they are applied proportionately.

Public procurement policy that integrates global corporate social accountability does not, in principle, conflict with international custom. Customary international law does not tell public bodies how they should spend their resources. Advantages can be refused to corporations that perpetrate abuses abroad. However, the GPA could alter these general rules. It has been argued that under the GPA a genuine link, a special connection to the regulator, might be necessary in order to exclude a company on account of its extraterritorial actions.

On the other hand, human rights law appears to demand that public bodies must not condone or ‘order’ corporate abuse by procuring goods whose production violates basic standards. The illustration below visualises these results:

Illustration D: Combining the Elements: Public Procurement



D. Fines

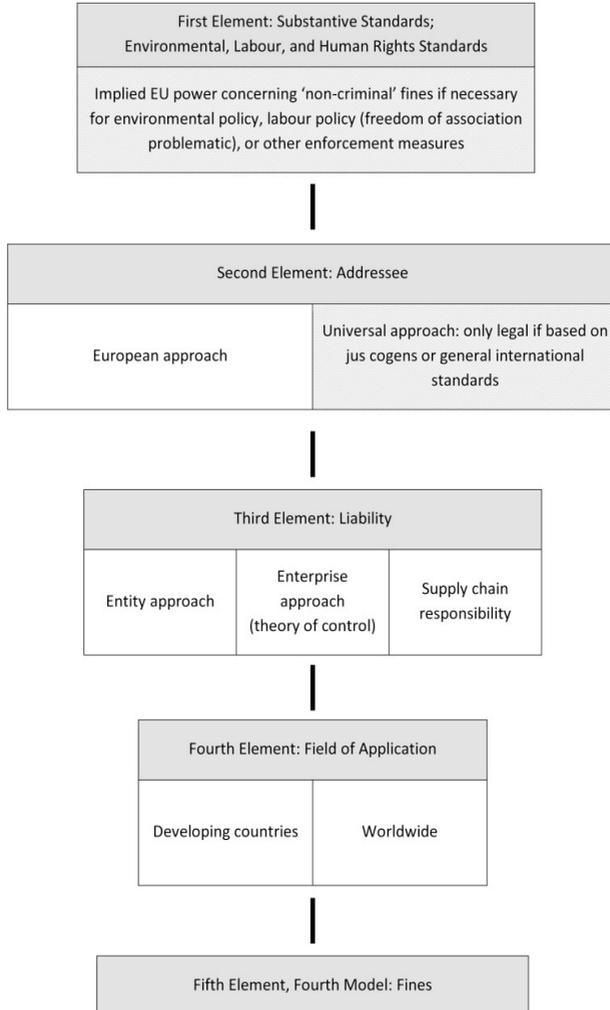
European law: Under the European Treaties, the European legislator may, under certain circumstances, enact laws on fines of a ‘criminal nature’. ‘Administrative’ or ‘non-criminal’ fines may constitute an implied competence. The European Court of Justice has confirmed that fines can be classified as an instrumental power to ensure the effectiveness of an explicit EU policy.

International law: Fines curtail corporate freedom abroad. This may create tensions in international relations. However, if the addressee is a European company that has committed the abuse, the principle of active personality, the connection to the perpetrator, provides the legitimatising link. It is also legal if a European company incurs a fine for the corporate abuse committed abroad by its subsidiary (enterprise approach) or for the violations perpetrated by another company from which it procures products or services (supply chain responsibility). As long as regulation is parent-based, it is lawful.

Fining companies all over the world (universal addressee) by a regional organisation such as the EU is a far-reaching scenario. Targeting companies incorporated in other countries runs the risk of legislation without representation since the legislator does not represent the foreign company but still attempts to rule over it.

Universal norms, however, justify regulation of universal addressees. *Jus cogens* undoubtedly falls within this category, although it remains uncertain which obligations corporations face under *jus cogens* in the area of environmental, labour, and human rights. International custom seems to support universal jurisdiction as well. European standards, on the other hand, do not justify universal regulation. The gap between legislation and representation would not be bridged since foreign companies would have to obey laws they have never ratified. It is a ‘diagonal’, ‘incongruent’ scenario, in which the scope of legislation is broader than the scope of representation, contrary to the principle of *volenti non fit iniuria*.

Illustration E: Combining the Elements: Fines



E. Trade Measures

European law: Import or export restrictions imposed with the intention to combat human rights violations may be based on the EU's common commercial policy. The centre of gravity, taking account of the 'context, aim, and content' of the measure, decides whether trade policy or environmental policy is the correct Treaty basis for environmental measures. Trade measures dependent on the respect for labour rights are feasible, too, although EU regulation of freedom of association is problematic.

International law: Trade measures to protect environmental, labour, or human rights abroad raise intricate problems of WTO law. First, it seems that distinctions based on different production and process methods (PPMs) do not escape the non-discrimination principle. Products produced in a way that is detrimental to the environment and products that are produced in an environmentally friendly manner must not, in principle, be treated differently. The *Dominican Republic – Cigarettes* case however shows that even a measure that is more burdensome for imported products is not discriminatory 'if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product'.

If trade restrictions are classified as discriminatory they can still be justified for public policy reasons. The *US – Shrimp* case however suggests that European

standards as such may not be imposed. Only if they accommodate the particular situation in the exporting states, and only if serious good faith efforts to reach a multilateral solution have already been undertaken, can European standards survive. This shows that WTO law favours international standards; European standards risk being protectionist.

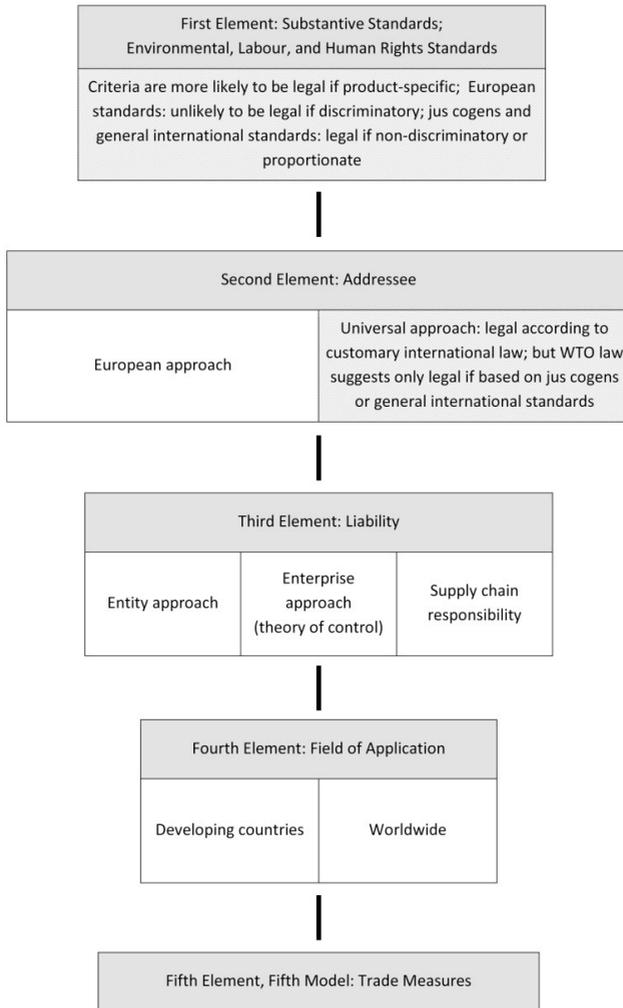
A further question is whether standards may apply extraterritorially. The Appellate Body in *US – Shrimps* declined to decide on an implied jurisdictional limitation but regarded extraterritorial application in any case justified when there is a ‘sufficient nexus’ to the home territory.

Trade restrictions may be blunt tools to prevent exploitative child labour or other violations of labour and human rights. It is therefore not always clear whether they pass the proportionality test, especially if they are not aimed at specific products that were manufactured in an inhumane way but are construed as sanctions targeted at companies with a poor labour or human rights record in general.

The so-called ‘Enabling Clause’ permits WTO members to give differential and more favourable treatment to developing countries. Arguably, refusing trade benefits to corporations that violate basic environmental, labour, or human rights in developing countries is compatible with the Enabling Clause if it is

accepted that such practice responds to a ‘development need’ and is sufficiently objective and transparent. *Jus cogens* and general international standards seem to fulfil these criteria better than European standards. However, since the Enabling Clause was not designed to address global corporate abuse, the question of compatibility remains open.

Illustration F: Combining the Elements: Trade Measures

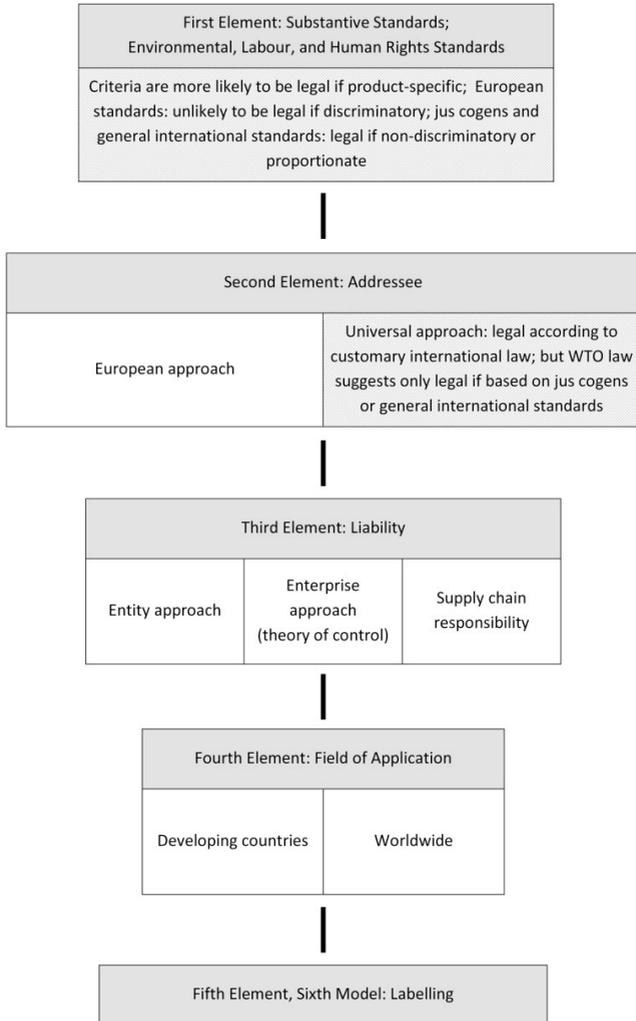


F. Labelling

European law: The analysis of labelling follows the analysis of other trade measures. The centre of gravity decides whether environmental labelling is an EU trade measure or an EU environmental measure. The European legislator may impose labelling that takes labour issues into account but European regulation of freedom of association is problematic under the EU Treaties.

International law: Labelling has an impact on trade. Thus, as with other trade measures, issues of discrimination and justification arise under WTO law. Labelling is however a less trade restrictive measure than an import ban, which might influence the proportionality assessment.

Illustration G: Combining the Elements: Labelling

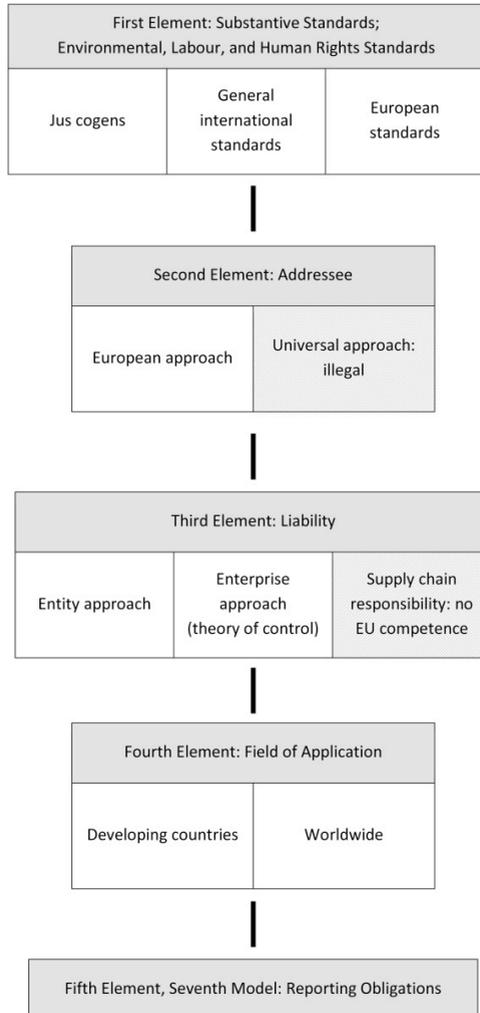


G. Reporting Obligations

European law: Reporting obligations for European companies can be based on the internal market provisions of the European Treaties. The cross-cutting objectives of environmental, social, and human rights protection would buttress such legislation. However, there does not appear to exist EU competence to impose CSA reporting obligations on companies around the world; only covering third country subsidiaries of European parent firms may be justified under the internal market provisions.

International law: Reporting obligations affect law-abiding companies too. For this reason, not even *jus cogens* or general international standards can justify the regulation of foreign companies that do respect these standards. In essence, universal norms cannot render lawful reporting obligations for companies all over the world. The principles of active personality and territoriality only justify reporting duties imposed on European addressees.

Illustration H: Combining the Elements: Reporting Obligations



H. Private Enforcement

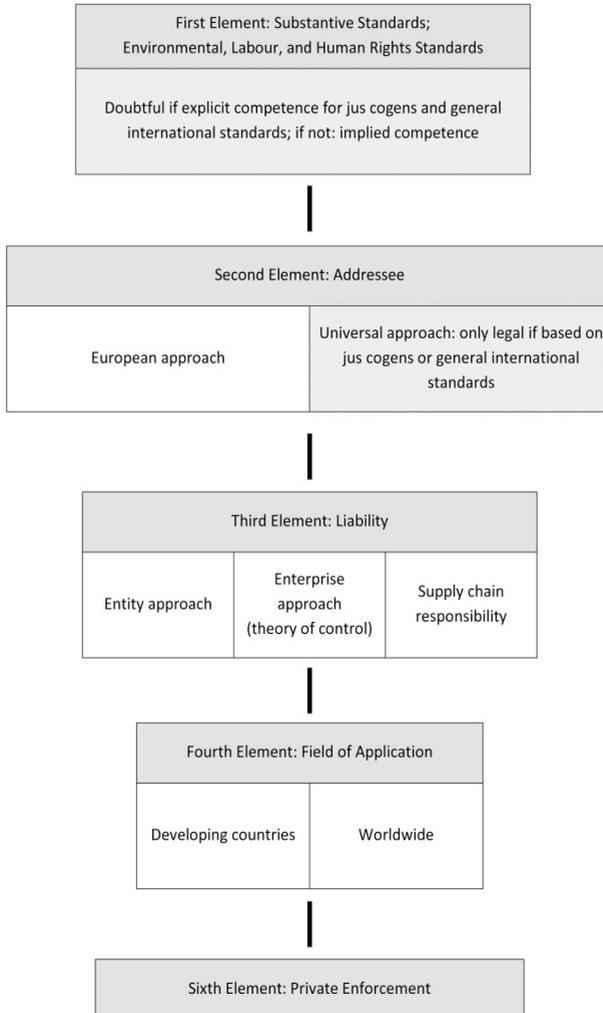
European law: Private enforcement of global corporate social accountability in Europe requires, first, that European courts are open and, second, that they adjudicate according to fundamental environmental, labour, and human rights standards. With regard to the first issue of jurisdiction, the European Treaties provide for EU competence. With regard to the second issue of the applicable law, the matter is more complicated. There is explicit competence to apply European standards but it is questionable whether the same holds true for *jus cogens* or general international standards. In any event, enforcing *jus cogens* or general international standards in courts may constitute an implied power.

International law: International law governing legal forum, the jurisdiction to adjudicate, is not strictly tied to territoriality and nationality. For example, the corporate defendant being domiciled in the forum state is widely regarded to be a sufficient link to render court proceedings in the forum state lawful. On the other hand, merely ‘doing business’ in the forum state is a contested basis for adjudicative jurisdiction.

International law with regard to the applicable law is governed by the following principles: European companies may, in general, be held accountable for breaching European standards abroad. The genuine link of active personality, the perpetrator’s connection to the EU, renders this scenario lawful. International law does

not object to a European company's obligation to abide by European laws in other countries. However, foreign companies cannot be held accountable in court for violations of European laws outside of the EU. A Brazilian company cannot be obliged to respect European standards in Brazil.

Illustration I: Combining the Elements: Private Enforcement



The following table gives an overview of the principal results:

Table: Principal Results

	Lawfulness under European Law	Lawfulness under International Law
Publication of Violations	Competence: implied EU power if necessary for environmental policy, labour policy (freedom of association problematic), or other enforcement measures	Customary international law: legal if objective statement that respects legitimate business secrets
Financial Benefits	Competence: Yes	Legal under WTO, OECD, investment law, and general international law

<p>Public Procurement</p>	<p>Competence: Yes</p>	<p>WTO GPA Agreement: criteria are more likely to be legal if product-specific; European standards are unlikely to be legal if discriminatory; jus cogens and general international standards are legal if non-discriminatory or proportionate</p> <p>Customary international law: legal; but WTO law seems to suggest: European addressee: legal; universal addressee: only legal if based on jus cogens or general international standards</p>
<p>Fines</p>	<p>Competence: Yes for 'criminal' fines; implied EU power concerning 'non-criminal' fines if necessary for environmental policy, labour policy (freedom of association problematic), or other enforcement measures</p>	<p>European addressee: legal; universal addressee: only legal if based on jus cogens or general international standards</p>

Trade Measures	Competence: Yes	<p>WTO law: criteria are more likely to be legal if product-specific;</p> <p>European standards: unlikely to be legal if discriminatory; jus cogens and general international standards: legal if non-discriminatory or proportionate</p> <p>Customary international law: legal; but WTO law seems to suggest: European addressee: legal; universal addressee: only legal if based on jus cogens or general international standards</p>
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Labelling	Competence: Yes	<p>WTO law: criteria are more likely to be legal if product-specific;</p> <p>European standards: unlikely to be legal if discriminatory; jus cogens and general international standards: legal if non-discriminatory or proportionate</p> <p>Customary international law: legal; but WTO law seems to suggest: European addressee: legal; universal addressee: only legal if based on jus cogens or general international standards</p>
Reporting Obligations	Competence: only EU power concerning European addressee according to entity and enterprise approach	European addressee: legal; universal addressee: illegal

Private Enforcement	Competence: in principle, explicit competence; but doubtful if explicit competence for jus cogens and general international standards; if not: implied competence	<p>Applicable law: follows the rules for fines: European addressee: legal; universal addressee: only legal if based on jus cogens or general international standards</p> <p>Jurisdiction: less restrictive rules apply, not strictly tied to territoriality and nationality</p>
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INTRODUCTION

Three Cases: Trafigura, Total, and Yahoo¹

On 19 August 2006 the ship Probo Koala unloaded waste at an open air site near Abidjan, Côte d'Ivoire (Ivory Coast). The ship was chartered by the London office of Trafigura, a Dutch international petroleum trader. The company had previously tried to unload the waste in Amsterdam for treatment, declaring it as 'harmless slops'. When the treatment company demanded a higher price for cleaning the waste, the cargo was shipped to Africa. People living near the discharge sites began to suffer from a range of illnesses: nausea, diarrhoea, vomiting, breathlessness, headaches, skin damage, and swollen stomachs. Sixteen people died, allegedly from exposure to the waste, and more than 100,000 sought medical attention.

On 12 February 2007 the Government of Côte d'Ivoire signed a settlement agreement with Trafigura in which the company agreed to pay \$198 million to the Ivorian government. The company did not admit liability and stressed that this payment was not

¹ The summary of these three cases is largely based on the descriptions published on the website of the Business & Human Rights Resource Centre <<http://www.business-humanrights.org/LegalPortal/Home>>.

‘damages’. Côte d’Ivoire agreed to drop any prosecutions or claims.

In November 2006, the High Court of Justice in London agreed to hear a group action by about 30,000 claimants from Côte d’Ivoire against Trafigura over the alleged dumping of toxic waste from the Probo Koala. Applicants contended that the waste contained high levels of caustic soda, as well as a sulphur compound and hydrogen sulphide which made it hazardous. The oil trading company shipped the untreated chemical waste to Côte d’Ivoire purportedly with knowledge that there were no facilities for adequate treatment. Trafigura maintained that only 69 people suffered significant injury and denied any responsibility, stating that they had entrusted the waste to an Ivorian disposal company. In September 2009 the parties to the UK lawsuit reached a settlement agreement in which Trafigura agreed to pay each of the 30,000 claimants approximately \$1500.

In July 2010 a Dutch court ruled that Trafigura had concealed the dangerous nature of the waste aboard the Probo Koala and fined the company €1 million for breach of criminal laws protecting the environment. The Dutch court also convicted a Trafigura employee and the Ukrainian captain of the Probo Koala.

In April 2002 four Burmese refugees filed a lawsuit against TotalFinaElf (now Total), the chairman of

Total, and the former director of Total's Burmese operations in the Brussels Magistrates' Tribunal. The Burmese refugees brought the lawsuit pursuant to a Belgian law that provides courts with jurisdiction to hear cases for certain serious offences, such as crimes against humanity and war crimes, even when they have been committed outside Belgium. This case was the first to be brought under this law against a company rather than an individual. The plaintiffs alleged that Total and its managers had been complicit in crimes against humanity, such as torture and forced labour, committed by the Burmese military junta in the course of the construction and operation of the Yadana Gas Pipeline in Burma. Total provided moral and financial support to the Burmese military government with full knowledge of the resulting human rights abuses, the plaintiffs contended. While the law had changed in the meantime, Belgian authorities eventually declared the 'case closed' in March 2008, dropping the charges against Total.

In 2007 Chinese political activists filed a lawsuit in a US federal court in California against Yahoo and its Chinese subsidiaries under the Alien Tort Claims Act, the Torture Victim Protection Act, and California state law.² Wang Xiaoning and Shi Tao, two of the plaintiffs,

² Complaint for Tort Damage, US District Court for the Northern

had each been sentenced to 10 years' imprisonment in China on respective charges of incitement to subvert state power and of illegally providing state secrets to foreign entities. Wang was found guilty on the basis of having written essays that advocated democratic reform and multi-party democracy in China that he distributed via email through a Yahoo account. Shi was convicted on the basis of an email he had sent from his Yahoo account to an internet forum and which contained his comments on a Chinese government circular prepared in advance of the 15th anniversary of the Tiananmen Square uprising outlining restrictions on the media.

The plaintiffs accused Yahoo of giving information about their online activities to Chinese law enforcement, which had led to their detention. By providing user identification information to the Chinese authorities, Yahoo knowingly and wilfully aided and abetted the commission of torture and other human rights abuses that caused severe physical and mental pain and suffering. The plaintiffs 'have been subjected to grave violations of some of the most universally recognized standards of international law, including prohibitions against torture, cruel, inhuman, or other degrading treatment or punishment, and arbitrary arrest and prolonged detention, for exercising their rights of

District of California, *Wang Xiaoning et al v Yahoo! Inc.*
<<http://online.wsj.com/public/resources/documents/yahoo.complaint0420.pdf>>.

freedom of speech, association, and assembly, at the hands of [Yahoo] through Chinese officials acting under color of law ...³

Yahoo moved to dismiss the complaint arguing that the case would breach standards of international comity. In November 2007, following the testimony of Yahoo's Chief Executive Officer before the US Congress, the parties agreed to a private settlement. Yahoo conceded to bear the plaintiffs' legal costs and to establish a fund 'to provide humanitarian and legal aid to dissidents who have been imprisoned for expressing their views online'.⁴

Regulatory deficit?

According to various commentators, these three cases have one thing in common: They are exceptional. In general, multinational enterprises do not have to face litigation or regulatory action in home forums for corporate wrongdoing abroad. Regulation works locally while corporations operate globally. Ruggie, United Nations Special Representative on business and human rights, says:

[H]istory teaches us that markets pose the greatest risks – to society and business itself – when their scope and power far

³ *Ibid* at 2.

⁴ <<http://yhoo.client.shareholder.com/common/mobile/iphone/releasedetail.cfm?ReleaseID=302980&CompanyID=YHO O&mobileid=>>>.

exceed the reach of the institutional underpinnings that allow them to function smoothly and ensure their political sustainability. This is such a time and escalating charges of corporate-related human rights abuses are the canary in the coal mine, signalling that all is not well.

The root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.⁵

Indeed, on the international plane, the regulatory response to corporate activities has been largely ineffective or absent. International law, with its state-based system, has been struggling for a long time to accommodate the expanding reach and influence of multinational enterprises. In the 1970s developing countries pushed for binding rules under the umbrella of the United Nations. The endeavour utterly failed. Another attempt for a mandatory framework was eventually made in 2003 by a working group of the

⁵ UN Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (7 April 2008) <<http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>> 3.

UN-Sub-Commission on the Promotion of Human Rights that published the draft ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’.⁶ These draft norms never became binding law.

‘Soft law’ instruments enjoyed greater appeal. In 1976 the Organisation for Economic Co-operation and Development (OECD) adopted Guidelines for Multinational Enterprises, and a year later the International Labour Organization (ILO) issued a Tripartite Declaration of Principles Concerning Multinational Enterprises. Each was revised in 2000.⁷ The UN Global Compact, the world’s largest corporate social responsibility initiative on a voluntary basis, became operable in the same year.⁸ Private codes of conduct have become popular, too. However, both soft law and private codes are often rich in principles and

⁶ UN Sub-Commission on the Promotion and Protection of Human Rights, ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ (2003) UN Doc E/CN.4/Sub.2/2003/L.11 <www1.umn.edu/humanrts/links/norms-Aug2003.html>.

⁷ Organisation for Economic Co-operation and Development, ‘OECD Guidelines for Multinational Enterprises’ (revised 2000) <www.oecd.org/dataoecd/56/36/1922428.pdf>; International Labour Organization, ‘Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy’ (revised 2000) <<http://www.ilo.org/public/english/employment/multi/download/english.pdf>>.

⁸ Further information available at <www.unglobalcompact.org>.

weak in enforcement.⁹

Private litigation has also proved to be insufficient to end corporate impunity abroad, according to Ruggie.¹⁰ Access to justice in the multinational enterprise's home country is curtailed by jurisdictional and substantive law barriers, procedural hurdles, and the corporate veil protecting the parent company from liability for foreign subsidiaries.

The European debate

On 15 January 1999 the European Parliament passed a

⁹ O de Schutter, 'The Accountability of Multinationals for Human Rights Violations in European Law' in P Alston (ed), *Non-State Actors and Human Rights* (Oxford, Oxford University Press, 2005) 227; B Hepple, *Labour Laws and Global Trade* (Oxford, Hart Publishing, 2005) 83 and 86; R Jenkins, 'Corporate Codes of Conduct: Self-Regulation in a Global Economy' United Nations Research Institute for Social Development: Technology, Business and Society Programme, Paper No 2 (2001) <www.yorku.ca/hdrnet/images/uploaded/jenkins.pdf> 26-7; World Bank Group 'Corporate Social Responsibility in Practice, Strengthening Implementation of Corporate Social Responsibility in Global Supply Chains' (2003) <www.siteresources.worldbank.org/INTPSD/Resources/CSR/Strengthening_Implementatio.pdf> 2; S Deva, 'Human Rights Violations by Multinational Corporations and International Law: Where From Here?' (2003-2004) *Connecticut Journal of International Law* 1.

¹⁰ UN Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (7 April 2008) <<http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>> 3.

resolution on EU standards for European companies operating in developing countries.¹¹ The Parliament expressed its ‘deep concern’ that ‘intense competition for investment and markets and lack of application of international standards and national laws have led to cases of corporate abuse’. The European Commission was urged to ‘make proposals, as a matter of urgency, to develop the right legal basis for establishing a European framework governing companies’ operations worldwide’. This framework was supposed to include environmental, labour, and human rights standards that are internationally recognised.

In spite of the Parliament’s request, the Commission did not pursue the idea of a legally-binding instrument. On the contrary, it decided to support corporate social responsibility by promoting codes of conduct that are strictly voluntary.¹²

But the debate has not stopped. Various initiatives that aim to hold corporations accountable for their

¹¹ European Parliament, ‘Resolution on EU standards for European enterprises operating in developing countries: towards a European Code of Conduct’ [1999] OJ C104/108, 15.

¹² See, e.g., European Commission, ‘Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility’ (Communication) COM (2006) 136 final, 22 March 2006 <<http://ec.europa.eu/enterprise/csr/policy.htm>>.

abuses worldwide continue to be discussed.¹³

Outline of the analysis

This work examines the legal limits of global corporate social accountability (CSA) in Europe. This study sheds light on the theoretical background and the current European and international regulation in this field, and analyses the legal constraints the European Treaties and international law impose on various enforcement measures, notably on publication of violations, policies concerning export credits, subsidies, and other financial benefits, public procurement, fines, trade measures, labelling, reporting obligations, and private

¹³ See, e.g., European Parliament, ‘European Parliament resolution of 13 March 2007 on corporate social responsibility: a new partnership’ [2007] OJ C 301/45; European Parliament, ‘European Parliament resolution of 25 November 2010 on human rights and social and environmental standards in international trade agreements’ (2009/2219(INI)); UN Human Rights Council, ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie’ (21 March 2011) <<http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>>; European Commission, ‘A renewed EU strategy 2011-14 for Corporate Social Responsibility’ COM (2011) 681 final, 25 October 2011 <http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/newcsr/act_en.pdf>.

enforcement.¹⁴

By way of example: Is it compatible with international law to allow Yahoo America being sued in European courts for violations of human rights in China? May Total be excluded from tender procedures for European public contracts because of corporate abuse in Burma? Do the European Treaties permit reporting obligations for companies like Trafigura concerning their compliance with basic standards in Côte d'Ivoire? This book tries to answer these questions.

The first chapter explores various regulatory means that may be employed to hold corporations accountable for abuses abroad. Several elements of European measures are introduced. These models function as meta-norms, sketching the frame or scaffold. They are not fully-fledged, detailed legal norms but rather

¹⁴ A note on the term 'global corporate social accountability in Europe': *Accountability* (rather than responsibility) indicates that this work examines *legal* obligations and instruments and not merely voluntary codes of conducts. *Social* accountability denotes that the analysis deals with obligations in the field of environmental, labour, and human rights. *Corporate* social accountability designates that we are concerned with obligations imposed on corporations. *Global* corporate social accountability means that obligations which apply abroad are examined. Finally, global corporate social accountability *in Europe* makes clear that the subject is European regulation, or in other words, the enforcement of global corporate social accountability via EU polices.

fundamental regulatory decisions on substantive standards, the addressee, liability, field of application, and public and private enforcement. Chapter one therefore analyses and categorises several regulatory models.

The second chapter examines the context. Existing international and European regulation is summarised briefly. This overview examines the law as it stands, thereby providing guidance on how the law could be. This chapter also explains the theoretical background.

Chapter three explores the boundaries of lawfulness. The models of regulation must conform to European and international law. EU legislation requires a basis in the EU Treaties; fundamental rights and general principles of EU law must be respected. Holding companies accountable in Europe for their actions abroad also raises questions under international law. Thus, the third chapter examines whether the regulatory models analysed in the first chapter comply with higher-ranking law.

Finally, chapter four summarises the results.

This work is a guide for the European legislator on what is legally possible. It first provides a matrix of regulatory models and then explains which of these models are feasible from a legal perspective. Chapter one contains the elements which are fed into the filter of lawfulness in chapter three.

The selection of measures is not based on personal

preference or political agenda. Rather, the aim is to provide a comprehensive matrix of the most relevant instruments and techniques available. The matrix categorises and builds on various proposals and approaches discussed in the European institutions, international forums, and civil society. This work does not try to answer the *ought*-question: Which measures ought to be implemented? The method remains descriptive by analysing regulatory options, their background, and the legal challenges they face. In sum: If the European legislator considers enacting policies on global corporate social accountability, what are the legal strictures? It is this question that this book answers.

The method is cross-cutting: The analysis straddles several means of regulation and various fields of law; it looks at several legal areas from the angle of global corporate social accountability. And the method is flexible: It resembles a ‘regulatory tool-kit’ and a ‘legal calculator’—tool x combined with tool y combined with tool z equals which result in law? Different combinations of regulatory models yield different results in different legal areas.

This cross-cutting and flexible approach aims to blaze a trail through the legal thicket by identifying core issues, differences, and similarities. The horizontal view makes combinations and results comparable and reveals some of the main themes in the fabric of the

European and international system: WTO law restricts the use of trade measures, labelling, and public procurement as means to achieve social or environmental goals; customary international law confines regulation of foreign companies worldwide; and the European Treaties impose limitations on labour and human rights legislation. Ultimately, however, the analysis will demonstrate that there is considerable scope for global corporate social accountability in Europe.

CHAPTER 1

CONTENT: THE ELEMENTS OF EUROPEAN CSA MEASURES

Which environmental, labour, and human rights should be respected? Who should be the addressees of these obligations: only European businesses or companies worldwide? Should they be liable for subsidiaries they control and even for the entire supply chain? Where should global corporate social accountability apply: only in developing countries or around the globe? What should happen if basic standards are violated? Shall the violation and the name of its perpetrator be published? Should subsidies and export credits be refused or recovered? Should public contracts be refused or terminated? Should the transgressing company incur a fine? Should it face international trade restrictions? Should ‘eco’ or ‘fair trade’ labels be refused or withdrawn? Should companies be obliged to report on their performance with regard to global environmental, labour, and human rights? And, finally, should these rights be enforceable in EU Member States’ courts?

This chapter provides an overview of regulatory elements that deal with these questions. The following matrix contains various models of regulation which are understood as meta-norms *de lege ferenda* (i.e. future law). They are not meant to provide definite and detailed content; rather, they represent broad policy choices. In other words, they do not set out extensive legal norms but rather sketch a framework of basic approaches.

The taxonomy is intended to be sufficiently broad and general to encompass important aspects of global corporate social accountability, and precise enough to test the measures for compatibility with European and international law in chapter three. The first part of this chapter summarises the elements of European CSA measures. The second part explains the main concepts.

I. THE MATRIX

FIRST ELEMENT: SUBSTANTIVE PROVISIONS: ENVIRONMENTAL, LABOUR, AND HUMAN RIGHTS STANDARDS

Model 1: International *jus cogens*

The addressee shall respect international *jus cogens* with regard to environmental, labour, and human rights standards.

Model 2: General international standards

The addressee shall respect customary international law with regard to environmental, labour, and human rights standards.

Model 3: European standards

The addressee shall respect European laws with regard to environmental, labour, and human rights standards.

SECOND ELEMENT: ADDRESSEE

Model 1: European approach

The addressee is a company, firm, or an undertaking formed in accordance with the law of a Member State and having its registered office, central administration, or principal place of business within the European Union.

Model 2: Universal approach

The addressee is a company, firm, or an undertaking.

THIRD ELEMENT: LIABILITY

Model 1: Entity approach

The addressee shall be liable.

Model 2: enterprise approach (theory of control)

The addressee shall also be liable for business entities it controls.

Model 3: supply chain responsibility

The addressee shall also be liable for business entities from which it procures goods or services to supply its own goods or services.

FOURTH ELEMENT: FIELD OF APPLICATION

Model 1: Developing countries

These measures apply to the addressee's operations in developing countries.

Model 2: Worldwide

These measures apply to the addressee's operations worldwide.

FIFTH ELEMENT: PUBLIC ENFORCEMENT

In case of violation,

Model 1: Publication of violations

the violation and the name of its perpetrator may be published;

Model 2: Export credits, subsidies, and other financial benefits

financial benefits such as subsidies or export credits may be refused to or recovered from the addressee;

Model 3: Public procurement

public contracts with the addressee may be refused or terminated;

Model 4: fines

the addressee may be fined;

Model 5: trade measures

trade restrictions may be imposed on the addressee;

Model 6: labelling

a label certifying compliance with the substantive standards may be denied to or withdrawn from the addressee.

Model 7: reporting obligations

The addressee may be obliged to report on its compliance with the substantive standards.

SIXTH ELEMENT: PRIVATE ENFORCEMENT

EU Member States shall have jurisdiction for any civil action for alleged violations of the substantive standards by the addressee.

II. EXPLAINING THE MATRIX

This section sheds light on the regulatory models set out in the matrix.

A. FIRST ELEMENT: SUBSTANTIVE PROVISIONS; ENVIRONMENTAL, LABOUR, AND HUMAN RIGHTS STANDARDS

Model 1: International *jus cogens*

The addressee shall respect international *jus cogens* with regard to environmental, labour, and human rights standards.

Model 2: General international standards

The addressee shall respect customary international law with regard to environmental, labour, and human rights standards.

Model 3: European standards

The addressee shall respect European laws with regard to environmental, labour, and human rights standards.

The catalogue distinguishes three models of substantive standards for which the legislator may wish to opt: international *jus cogens*, general international standards, and EU standards. What lies behind these notions?

(i) *International Jus Cogens*

Jus cogens is understood as the body of international peremptory norms that cannot be set aside by treaty or acquiescence.¹ These norms are *jus strictum*, not *jus dispositivum*. Article 53 of the Vienna Convention on the Law of Treaties reads:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.²

Article 64 provides that ‘[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates’. The International Court of Justice (ICJ) has acknowledged the existence of *jus cogens* in several cases³—and so have, e.g., the German Federal Constitutional Court⁴ and the General Court of the

¹ I Brownlie, *Principles of Public International Law*, 7th edn (Oxford, Oxford University Press, 2008) 510.

² Vienna Convention on the Law of Treaties (1969) A/CONF. 39/1 1/Add. 2, 287.

³ See, e.g., *Legality of Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 95, 258; *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 78, 38-39.

⁴ *A in Zürich* BVerfGE 18, 441, 2 BvR 227/64.

European Union in the *Kadi I* judgment, in which it reviewed the lawfulness of Security Council resolutions with regard to *jus cogens*.⁵

What amounts to *jus cogens* in the field of environmental, labour, and human rights standards? There is more authority for the existence of *jus cogens* than for its particular content.⁶ The Vienna Convention recognises peremptory norms without giving examples. In the *Barcelona Traction* case, the ICJ recognised obligations *erga omnes*, ‘towards the international community as a whole’.⁷ These norms are ‘the concern of all States’ for whose protection all States could be held to have a ‘legal interest’.⁸ A breach enables all states to take action.⁹

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression,

⁵ Case T-315/01 *Kadi v Council & Commission* [2005] ECR II-3649, para. 226.

⁶ I Brownlie, *Principles of Public International Law*, 7th edn (Oxford, Oxford University Press, 2008) 512.

⁷ *Case concerning the Barcelona Traction, Light and Power Co Ltd* (New Application 1962) (*Belgium v Spain*) (Second Phase) (‘Barcelona Traction’) [1970] ICJ Rep 3, para. 33; see also ICJ *United States Diplomatic Consular Staff in Teheran* [1980] ICJ Rep 80, paras. 38-42; ICJ *Bosnia and Herzegovina v Yugoslavia* [1996] ICJ Rep 96, 616.

⁸ *Barcelona Traction*, para. 33.

⁹ See also Institut de droit international, *Obligations and Rights Erga Omnes in International Law*, (2005) Krakow Session, *Annuaire de l’Institut de droit international* <http://www.idi-iil.org/idiE/resolutionsE/2005_kra_01_en.pdf> Article 1.

and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination¹⁰

But while obligations under *jus cogens* have the character of *erga omnes* obligations, the reverse is not necessarily true.¹¹

It is widely accepted that the description of an ‘international crime’ in Article 19 of the Draft Articles on State Responsibility refers to the most important rules of *jus cogens*:¹²

(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

¹⁰ *Barcelona Traction*, para. 33.

¹¹ International Law Commission, ‘Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’ (2006) *Yearbook of the International Law Commission*, vol. II, Part Two, para. 38.

¹² International Law Commission, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (2001) *Yearbook of the International Law Commission*, vol. II, Part Two, Article 40, paras. 4-6, Article 26, para. 5; see also ICJ *Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v Rwanda)* [2006] ICJ Rep, para. 64.

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas

Other examples include the prohibition of torture,¹³ the prohibition of discrimination based on religion or sex,¹⁴ and the basic rules of international humanitarian

¹³ ICTY, *Prosecutor v Furundzija* IT-95-17/1-T (Trial Chamber) (10 December 1998), para. 153; US Court of Appeals for the Ninth Circuit, *Siderman de Blake v Republic of Argentina*, 965 F.2d. 699 (1992) 714.

¹⁴ I Brownlie, *Principles of Public International Law*, 7th edn (Oxford, Oxford University Press, 2008) 511; The Inter-American Court of Human Rights, *Juridical Condition and Rights of the Undocumented Migrants* (Advisory Opinion) OC-18/03 /17 September 2003), Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003), para. 101, went even further: '[T]his Court considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to jus cogens, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable. This principle (equality and non-discrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of

law (also known as the law of war).¹⁵ The worst forms of child labour may amount to slavery, which is prohibited by *jus cogens*.¹⁶ The General Court of the EU also considered in *Kadi I* that the arbitrary deprivation of the right to property as well as the violation of the core of the right to be heard and the right to effective judicial review might be regarded as contrary to *jus cogens*.¹⁷

This is a scrawny list. Only massive pollution may constitute a violation, only blatant racial, religious, and sexual discrimination is prohibited, only core human rights are protected. It would require considerable legislative or judicial activism to flesh out these concepts and make them operable.

(ii) *General International Standards*

The second model of substantive standards refers to customary international law. This is a wider category than *jus cogens*. International custom is defined in

equality and non-discrimination has entered the realm of *jus cogens*'.

¹⁵ See Chapter III of the International Law Commission's Articles on state responsibility entitled *Serious breaches of obligations under peremptory norms of general international law*, Commentary, Report of the ILC, GAOR, Supp. No 10 (A/56/10) 208.

¹⁶ F Lenzerini, 'International Trade and Child Labour Standards' in F Francioni (ed), *Environment, Human Rights and International Trade* (Oxford, Hart Publishing, 2001) 285, 308.

¹⁷ Case T-315/01 *Kadi v Council & Commission* [2005] ECR II-3649, paras. 242, 252, 276.

Article 38(1) lit. b of the Statute of the International Court of Justice as ‘evidence of a general practice accepted as law’. Two elements are therefore necessary: *consuetudo* (conduct) and *opinio juris* (conviction). In principle, the practice must be uniform, consistent, and general, and it must be accepted as legal obligation or right.¹⁸ Defining norms of customary international law, however, is no simple task. Opinions may vary as to when the practice is sufficiently uniform, consistent, and general, and as to when the psychological element exceeds motives of mere courtesy, fairness, or morality.

The US Supreme Court has adopted a restrictive stance on custom for the purposes of the Alien Tort Statute (ATS), a US law that allows damage claims based on violations of international law.¹⁹ In *Sosa v. Alvarez-Machain* the Court admonished that

federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted [in 1789].²⁰

The international rule must be ‘specific, universal,

¹⁸ I Brownlie, *Principles of Public International Law*, 7th edn (Oxford, Oxford University Press, 2008) 6-12.

¹⁹ Alien Tort Statute 28 U.S.C. §1350.

²⁰ *Sosa v Alvarez-Machain* 542 U.S. 692 (2004) 732.

and obligatory’ to be actionable under the ATS.²¹ ‘It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern ... that a wrong generally recognized becomes an international law violation’.²²

US courts have decided that infringements of the human right to life attain this status, as well as the prohibition on torture. But the judiciary has faltered to accept claims of cruel and unusual punishment.²³ Arbitrary detention of one day is not covered by the ATS, but prolonged arbitrary detention might be.²⁴ Freedom of expression is not sufficiently defined and universal.²⁵

With regard to labour rights, US courts have unanimously held that the prohibition of forced labour may be invoked. The situation is less clear concerning freedom to associate, freedom from work-related discrimination, and freedom from the most extreme forms of child labour.²⁶

International environmental principles rarely fulfil the ATS criteria. They are marked by hortatory

²¹ *Sosa* at 732.

²² US Court of Appeals for the Second Circuit, *Filartiga v Pena-Irala* 630 F.2d 876 (2nd. Cir. 1980) 881.

²³ See M Koebele, *Corporate Responsibility under the Alien Tort Statute* (Leiden Martinus Nijhoff Publishers, 2009) 120.

²⁴ *Ibid* at 107-110.

²⁵ *Ibid* at 116-119.

²⁶ *Ibid* at 149.

concepts that often leave the formulation of concrete and specific obligations to national legislation. Environmental law's focus on the protection of public goods is also less amenable to tort law, which protects individual rights. And not all environmental damage is capable of reinstatement or has an economically assessable value.²⁷ Still, the right to life and, possibly, the right to health may protect against severe environmental damage in ATS cases.²⁸

However, this interpretation of customary international law must be seen in the particular context of US tort claims. Although the ATS refers to international custom, the courts have in reality created their own, more restrictive test. The ATS standard is more accurately placed in a category of its own, broader than *jus cogens* and narrower than general international custom.

But even under the less rigorous standard of customary international law as it is usually understood, it is hard to find environmental norms that precisely govern conduct.²⁹ Treaties, on the other hand,

²⁷ See P Birnie, A Boyle, C Redgwell, *International Law & the Environment*, 3rd edn (Oxford, Oxford University Press, 2009) 11.

²⁸ M Koebele, *Corporate Responsibility under the Alien Tort Statute* (Leiden Martinus Nijhoff Publishers, 2009) 171-176.

²⁹ LD Guruswamy and KL Doran, *International Environmental Law in a Nutshell* (St. Paul, Thomson/West, 2007) 20, cite as examples the prohibition of transboundary harm and the duty to preserve and protect the marine environment and its natural resources; H von

sometimes do contain specific rules. There exist conventions on biological diversity, climate change, ozone depletion, the Antarctic, pollution, dumping, conservation of marine living resources, and nuclear damage, to name only a few. An example of a particularly successful treaty with concrete rules is the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal³⁰. A party must not permit the export of hazardous waste to another party if the latter has not given ‘prior informed consent’ to the specific import or if it does not have the capacity to dispose of the waste in an environmentally friendly manner.³¹ The *Trafigura* case is set against the background of the Basel Convention.

Case Study: Trafigura

On 19 August 2006 the ship Probo Koala unloaded waste at an open air site near Abidjan, Côte d’Ivoire (Ivory Coast). The ship was chartered by the London

Heinegg in K Ipsen (ed), *Völkerrecht*, 5th edn (Munich, C.H. Beck, 2004) 1050, 1056, mentions the equitable apportionment and utilisation with regard to water.

³⁰ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (22 March 1989), UN Doc. UNEP/IG.80/3 (1989), S.TREATY DOC No. 5, 102d Cong. 1st Sess. (1991).

³¹ *Ibid* at Article 4(1)(c); see also A Aust, *Handbook of International Law*, 2nd edn (Cambridge, Cambridge University Press, 2010) 317.

office of Trafigura, a Dutch international petroleum trader. The company tried to unload the waste in Amsterdam for treatment, declaring it as ‘harmless slops’. When the treatment company demanded a higher price for cleaning the waste, the cargo was shipped to Africa. People living near the discharge sites began to suffer from a range of illnesses: nausea, diarrhoea, vomiting, breathlessness, headaches, skin damage, and swollen stomachs. Sixteen people died, allegedly from exposure to the waste, and more than 100,000 sought medical attention.

On 12 February 2007 the Government of Côte d’Ivoire signed a settlement agreement with Trafigura in which the company agreed to pay \$198 million to the Ivorian government. The company however did not admit liability and stressed that this payment was not ‘damages’. Côte d’Ivoire agreed to drop any prosecutions or claims.

In November 2006, the High Court of Justice in London agreed to hear a group action by about 30,000 claimants from Côte d’Ivoire against Trafigura over the alleged dumping of toxic waste from the Probo Koala. Applicants contended that the waste had high levels of caustic soda, as well as a sulphur compound and hydrogen sulphide which made it hazardous. The oil trading company shipped the untreated chemical waste to Côte d’Ivoire purportedly with knowledge that there

were no facilities for adequate treatment. Trafigura said that only 69 people suffered significant injury and denied any responsibility, stating that they had entrusted the waste to an Ivorian disposal company. In September 2009 the parties to the UK lawsuit reached a settlement agreement in which Trafigura agreed to pay each of the 30,000 claimants approximately \$1500.

In July 2010 a Dutch court ruled that the company had concealed the dangerous nature of the waste aboard the Probo Koala and fined the company €1 million for breach of criminal laws protecting the environment. The Dutch court also convicted a Trafigura employee and the Ukrainian captain of the Probo Koala.³²

This case shows that one might infer from the Basel Convention a global interest in protection from hazardous waste. Proceedings in the United Kingdom and the Netherlands were undertaken with regard to waste dumped abroad. A similar rationale of universal concern may underlie the Rotterdam Convention on dangerous chemicals, which is largely built on the

³² The summary of this case is largely based on the description published on the website of the Business & Human Rights Resource Centre <<http://www.business-humanrights.org/LegalPortal/Home>>.

model of the Basel Convention.³³

Is it thus possible to take such agreements as emanations of general practice and consent, thereby construing customary international law? Since international custom is universally binding, such a method might run the risk of imposing treaty obligations on those who have decided not to become a party to the agreement (contrary to the principle *pacta tertiis nec nocent nec prosunt*).³⁴ In the *North Sea Continental Shelf* and *Nicaragua* cases the International Court of Justice (ICJ) explained how a treaty may codify existing customary law and contribute to the development of new customary law. The Court accepted in the *North Sea Continental Shelf* case that a treaty provision could play a role in the formation of customary law if the practice of a sufficiently widespread and representative selection of non-parties conformed to the treaty rule and there was additional evidence of *opinio juris*.³⁵ According to the *Nicaragua* judgment, practice need not be perfectly consistent or

³³ See JA Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' (Corporate Social Responsibility Initiative, working paper no. 59, 2010) <http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf> 181.

³⁴ See Vienna Convention on the Law of Treaties (1969) A/CONF.39/1 1/Add. 2, 287, Article 34.

³⁵ *North Sea Continental Shelf Case (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 4.

conform rigorously, provided that deviating practice is treated as a breach of the rule.³⁶

However, some treaties give national authorities significant leeway when it comes to implementation. Environmental problems often tend to require flexible solutions to allow for changing scientific evidence, new control technologies, new political priorities, and the differing circumstances of various states. A treaty that casts precise rules in stone may be hard to renegotiate and thus too rigid to respond to changing conditions.³⁷ Flexible treaty regimes, however, do not lend themselves to the formation of hard rules.

Another way of finding specific content in environmental customary law is to identify the ‘green element’ of universally recognised human rights.³⁸ The rights to life, health, private life, and property arguably entail environmental protection to some extent. The African Charter on Human and Peoples’ Rights goes even further. The Convention protects the right of peoples to dispose freely of their own natural resources

³⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14; see also analysis in P Birnie, A Boyle, C Redgwell, *International Law & the Environment*, 3rd edn (Oxford, Oxford University Press, 2009) 24.

³⁷ P Birnie, A Boyle, C Redgwell, *International Law & the Environment*, 3rd edn (Oxford, Oxford University Press, 2009) 11.

³⁸ See, e.g., A Boyle, ‘Environment and Human Rights’ in Max Planck Encyclopedia of Public International Law <<http://www.mpopil.com>>.

(Article 21) and their right to ‘a general satisfactory environment favourable to their development’ (Article 24).³⁹

Case Study: The Ogoniland Case before the African Commission on Human and Peoples’ Rights

In the *Ogoniland* decision the African Commission on Human and Peoples’ Rights required Nigeria to take specific actions, including ‘ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities’.⁴⁰ The Commission demanded, inter alia, a ‘comprehensive cleanup of lands and rivers damaged by oil operations’.

³⁹ African Charter on Human Rights and Peoples’ Rights (Banjul) 21 ILM (1982) 52 (in force since 21 October 1986).

⁴⁰ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, ACHPR, No 155/96 (2002) para 54.

The European Court of Human Rights also takes a progressive stance on human rights and the environment. Judgments such as *Guerra*, *Lopez Ostra*, *Öneryildiz*, *Taskin*, and *Fadeyeva* compel governments to regulate environmental risks, enforce environmental laws, and disclose environmental information.⁴¹ But the European Court also leaves states significant freedom to pursue economic or other aims, provided that the rights to life, health, property, and family life are not disproportionately affected.⁴²

When examining case law under the European Convention on Human Rights and the African Charter on Human and Peoples' Rights, it is important to bear in mind that international custom requires *international* and not merely regional acceptance. Moreover, drawing environmental rules from human rights is an anthropocentric approach: if no human beings are affected, there is no breach. This is why some call this approach 'species chauvinism'.⁴³

Finally, obligations towards the environment may also come from international humanitarian law. For instance, Article 35(3) of Additional Protocol I to the

⁴¹ *Lopez Ostra v Spain* (1994) 20 EHRR 277; *Guerra v Italy* (1998) 26 EHRR 357; *Fadeyeva v Russia* [2005] ECHR 376; *Öneryildiz v Turkey* [2004] ECHR 657; *Taskin v Turkey* [2006] 42 EHRR 50.

⁴² See, e.g., *Hatton v UK* [2003] ECHR.

⁴³ A D'Amato, 'Do We Owe A Duty to Future Generations to Preserve the Global Environment?' (1990) 84 *American Journal of International Law* 190, 195.

Geneva Conventions prohibits forms of warfare that may be expected to cause widespread, long-term, and severe damage to the natural environment.⁴⁴

Customary international labour rights may be reflected in the ILO Declaration on Fundamental Principles and Rights at Work. This declaration covers freedom of association and the right to collective bargaining; freedom from forced or compulsory labour; the prohibition of child labour; and the elimination of discrimination in respect of employment and occupation.⁴⁵ Article 2 declares that

all members, even if they have not ratified the Convention in question, have an obligation, arising from the very fact of membership of the Organization, to respect, promote and to realise ... the principles concerning the fundamental rights which are the subject of those conventions’.

Whether the four core labour standards enunciated in the Declaration amount to customary international law is subject to dispute.⁴⁶ The Declaration is

⁴⁴ Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3.

⁴⁵ ILO Declaration on Fundamental Principles and Rights at Work of 1998 17 ILM 422 (1978) (adopted 16 November 1977; revised version adopted 28 March 2006) <<http://www.ilo.org/public/english/employment/multi/download/english.pdf>>.

⁴⁶ See P Alston, “‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime’ in VA Leary and D Warner (eds.) *Social Issues, Globalisation and International Institutions* (Leiden, Martinus Nijhoff Publishers, 2006) 49.

commonly regarded as a soft law instrument and several Member States have not ratified the underlying conventions. In practice, freedom of association and the right to collective bargaining are not even respected by countries that are parties to the relevant conventions.⁴⁷

However, according to the *Nicaragua* judgment, only *unchallenged* contrary state practice poses a problem to customary law.⁴⁸ Widespread acceptance and incorporation of the four core standards in numerous other international documents may attest to *opinio juris*. The prohibition of forced labour indisputably constitutes international custom.⁴⁹ And there remains the possibility to identify the social component of customary human rights law, to which we turn now.

The US Third Restatement of Foreign Relations Law lists the following prohibitions under customary international law:⁵⁰

- (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other

⁴⁷ See P Muchlinski, *Multinational Enterprises & The Law*, 2nd edn (Oxford, Oxford University Press, 2007) 492-505.

⁴⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14.

⁴⁹ B Hepple, *Labour Laws and Global Trade* (Oxford, Hart Publishing, 2005) 60.

⁵⁰ American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (St. Paul, American Law Institute Publications, 1987) para. 702.

cruel, inhuman or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.

Customary human rights may be gleaned from international instruments. The Universal Declaration of Human Rights, although itself not binding, has acquired the status of customary law at least with respect to the rules prohibiting arbitrary killing, slavery, torture, detention, and systematic racial discrimination. Other rights proclaimed in the Declaration have at least partially—with regard to certain core elements—entered the realm of customary law: the right to self-determination, the right to basic sustenance, freedom of opinion, equality rights, and the right to a fair trial.⁵¹ The same holds true for the right to property, if certain controversial topics such as expropriation are excluded.⁵² Certain economic and social rights in the Declaration are ‘potential candidates for customary international law: the right to free choice of employment; the right to form and join trade unions; and the right to free primary education, subject to a state’s available resources’.⁵³

⁵¹ A Clapham, *Human Rights Obligations of Non-State Actors* (Oxford, Oxford University Press, 2006), 86.

⁵² H Hannum, ‘The Status of the Universal Declaration of Human Rights in National and International Law’ (1995/6) 25 *Georgia Journal of International and Comparative Law* 287, 347.

⁵³ *Ibid* at 349 (footnotes omitted).

Human rights treaties with high numbers of ratifications may also be proof of customary law: The Convention on the Rights of the Child has been ratified by virtually all states; the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Elimination of All Forms of Racial Discrimination have attained high numbers of ratification as well.

Moreover, non-derogable rights in human rights treaties are considered to be part of customary international law. According to Article 4(2) of the International Covenant on Civil and Political Rights (ICCPR), the right to life, the prohibition of torture, cruel, inhuman, or degrading treatment or punishment, slavery and servitude, the prohibition of imprisonment because of the inability to fulfil a contractual obligation, the principle of legality in criminal law, the recognition of everyone as a person before the law, and freedom of thought, conscience, and religion are non-derogable and may therefore constitute customary international law.

But the list does not end with those principles expressly enunciated in Article 4(2) ICCPR. The first paragraph of Article 4 ICCPR adds that measures may not be ‘inconsistent with ... general obligations under international law’.⁵⁴ While dealing with reservations to

⁵⁴ See also M Nowak, *UN Covenant on Civil and Political Rights* -

the Covenant, the UN Human Rights Committee identified several customary human rights which go beyond those listed in Article 4(2) ICCPR:

Although treaties that are mere exchanges of obligations between States allow them to reserve inter se application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would not be.⁵⁵

CCPR Commentary, 2nd rev edn, (Kehl, Engel Verlag, 2005) Article 4, para. 28.

⁵⁵ UN Human Rights Committee, 'General Comment No. 24 (52)' UN Doc CCPR/C/21/ Rev. 1/Add. 6 (4 November 1994) <<http://www.unhchr.ch/tbs/doc.nsf/0/69c55b086f72957ec12563ed004ecf7a?Opendocument>> para. 8; on customary human rights see also: K Doehring, *Völkerrecht*, 2nd

In the context of armed conflict, human rights will often be interpreted based on standards of international humanitarian law.⁵⁶ For instance, in an international armed conflict the human right to life must be interpreted in light of the rules of humanitarian law, which allows attacks on combatants.⁵⁷ Humanitarian law provides specific rules on permissible and prohibited behaviour in times of conflict. The use of anti-personnel land mines, or biological and chemical weapons, for example, is prohibited under all

edn (Heidelberg, C. F. Müller, 2004) para. 975; F Hoffmeister, *Menschenrechts- und Demokratieklauseln in den vertraglichen Außenbeziehungen der Europäischen Gemeinschaft* (Heidelberg, Springer, 1998), 217.

⁵⁶ For a discussion of the relationship between human rights law and humanitarian law see T Stahlberg and H Lahmann, 'A Paradigm of Prevention: Humpty Dumpty, the War on Terror, and the Power of Preventive Detention in the United States, Israel, and Europe' (2011) 59 *American Journal of Comparative Law* 1059, 1081; ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 95, para. 25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 2004, para. 106; see also ICJ, *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)* [2005] ICJ Rep 2005, para. 216; M Sassöli and LM Olson, 'The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts' (2008) 871 *International Review of the Red Cross*, 599; C Droegge, 'Elective affinities? Human rights and humanitarian law' (2008) 871 *International Review of the Red Cross*, 501.

⁵⁷ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 95, para. 25.

circumstances, as are torture, inhuman treatment, rape, and summary executions.⁵⁸

We can now recapitulate the principal findings on general international standards in the sphere of environmental, labour, and human rights. International customary law derives from a general practice accepted as law. Judgments of international and national courts, treaties, and soft law are relevant sources. Determining the precise ambit of customary law is a complex task. As with *jus cogens*, conjuring up the exact definitions would call for some legislative or judicial activism.

For the purpose of sketching the meta-norms of the CSA measures it suffices to say that the prohibition of egregious forms of pollution, waste disposal, dumping, and misuse of toxic and hazardous substances may fall within the realm of international custom.

The four core labour standards listed in the ILO Declaration on Fundamental Principles and Rights at Work—i.e. freedom of association and the right to collective bargaining; freedom from forced or compulsory labour; the prohibition of child labour; and the elimination of discrimination in respect of employment and occupation—may express custom,

⁵⁸ See International Committee of the Red Cross, ‘Business and Humanitarian Law: an introduction to the rights and obligations of business enterprises under international humanitarian law’ (Geneva, 2006) <http://www.icrc.org/eng/assets/files/other/icrc_002_0882.pdf> 21, 25.

although this is not entirely undisputed, notably with respect to freedom of association and collective bargaining.

Finally, it is safe to note that the following rules form part of customary human rights law: freedom of thought, conscience, and religion; the prohibition of genocide, arbitrary killing, slavery, slave trade, prolonged arbitrary detention, causing disappearance of individuals, torture, and cruel, inhuman, or degrading treatment; discrimination on the basis of race, sex, nation, and religion.

(iii) European Standards

Global corporate social accountability may not only be based on *jus cogens* or general international standards but also on European standards. EU legislation and Member States' laws guarantee specific environmental, labour, and human rights. The European standard is more detailed and demanding than international rules. General principles are fleshed out in extensive statutes and case law. National and European environmental and social law is wide-ranging and complex.

However, not all norms can be translated to third countries; not all legal systems of the EU and Member States can be easily applied to a foreign place. Environmental regulation, for instance, ranges from traditional command and control law to incentive schemes and market-based systems. Furthermore,

environmental law often contains a territory nexus: Certain areas are specifically protected for their biodiversity; planning law designates areas in which pollution is allowed to a lesser or greater degree. Thus, whole chunks of environmental regulation are not amenable to being transposed extraterritorially. Even according to the most exacting yardstick of European standards, environmental protection transposed to third countries often comes down to flagrant violations that, for instance, result in poisoned rivers or land.

Similar caveats apply to labour law. It is a complex system with various interlocking regimes and participants such as unions and trade associations. It seems difficult to transfer this system in all its aspects, too.

However, these difficulties are not insurmountable. For instance, it is not unusual in private international law to apply the law of one jurisdiction to the territory of another jurisdiction.⁵⁹ If EU Member States' tort law applies to an accident abroad it may take account of local circumstances and rules to establish negligence, for example. Hence, although European law applies, it integrates to some extent local particularities and

⁵⁹ Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 (Rome I) [2004] OJ L177/6–16; Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2004] OJ L199/40–49.

standards. Similarly, it is conceivable that EU law allows export credits only if health and safety requirements that are equivalent to EU standards apply in developing countries to workers of an EU multinational firm. Or that a company must guarantee that such health and safety standards are respected abroad if it wants to win a public contract. Thus, although neither EU environmental nor EU labour law is suitable to be transposed in its entirety to foreign territories, these examples show that some EU standards can be made operable extraterritorially.

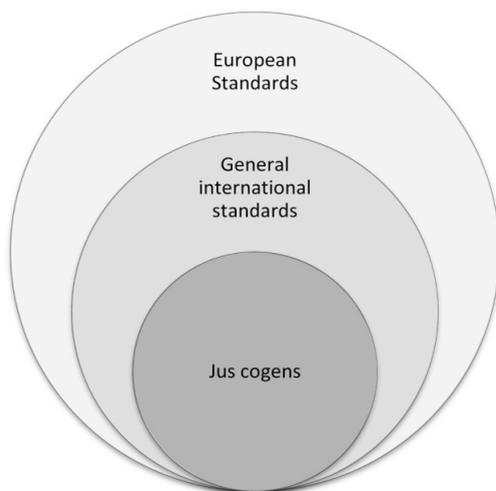
Human rights protection against interference from private actors is set out in detailed European regulations. For instance, a company that discriminates against women workers can be sued for damages according to national tort law.

It is unnecessary to set out here in detail how and which European laws relating to the environment and labour and human rights can be applied to corporate abuse abroad. For the sake of setting out CSA meta-norms it is enough to say that European standards are the most exigent benchmark and that they do not necessarily reflect international consensus.⁶⁰

⁶⁰ There are many other standards imaginable apart from *jus cogens*, international custom, and European standards. For example, EU tariff reductions for products coming from developing countries are conditional on the respect for human rights, labour rights, and the environment, according to the 'Generalised System of

The following graphic illustrates the principal finding of this section: *Jus cogens* is the hard core of international norms, general international standards is a wider category, and European standards represent the most extensive body of rules.

Illustration 1: Substantive Standards



Preferences' (GSP). In case of serious or systematic violations the EU reserves the right to withdraw preferential treatment: Article 15(1)(a) of Council Regulation (EC) 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 [2008] OJ L211/1; see also Article 8(1). The GSP lists various ILO and UN conventions as the relevant standard for assessing violations; thus, the GSP refers to international treaty law that reflects—but also goes beyond—customary international law.

B. SECOND ELEMENT: ADDRESSEE

Model 1: European approach

The addressee is a company, firm, or an undertaking formed in accordance with the law of a Member State and having its registered office, central administration, or principal place of business within the European Union.

Model 2: Universal approach

The addressee is a company, firm, or an undertaking.

One of the matrix's salient features is that it contemplates applying international standards directly to private actors. According to the traditional conception, international law is only binding on states: Although international environmental, labour, and human rights laws also prescribe rules that ultimately private actors should respect, it is the duty of states to set out these rules in detail and enforce them against individuals and juridical persons on their territory. The CSA measures, in contrast, permeate the state's membrane by enforcing international rules directly against companies with regard to their actions abroad.

Another important aspect of the CSA matrix is that it obliges corporations to respect human rights. The usual starting point is that human rights only bind public power, not private power. The CSA measures go beyond this paradigm by imposing a duty to respect on

private actors. According to one way of understanding, this ‘horizontal application’ entails merely a duty to *respect*, not a duty to *protect* and *fulfil* human rights.⁶¹ Viewed from that angle, it is a negative duty to abstain from any participation in human rights violations—a ‘do no harm’-rule, not a positive obligation to advance human rights. Thus, corporations shall not discriminate against women workers and shall not be complicit in human rights violations committed by states; but they are not required to build schools and hospitals to further the human rights to education and health.⁶²

Businesses’ duty to respect human rights is particularly relevant in conflict stricken areas. For instance, amidst civil unrest and armed conflict, private security forces may incur a high risk of being involved in human rights abuses.⁶³

The matrix envisages two definitions of the

⁶¹ See on this distinction J Ruggie, ‘Current Developments: Business and Human Rights: The Evolving International Agenda’ (2007) 101 *American Journal of International Law* 819, 825-827.

⁶² See also on other conceptions of human rights’ horizontal application chapter 2 (Context) II (Theoretical Underpinnings) D. (The Addressee: Subject to Horizontal Human Rights Obligations?).

⁶³ See chapter 2 (Context) II (Theoretical Underpinnings) A. (Is There a Regulatory Deficit?); see also UN Human Rights Council, ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie’ (21 March 2011) <<http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>> 11.

addressee: European companies and companies in general. In the first case the CSA measures may be described as home jurisdiction regulation: Standards are not set by the host state where the European corporation operates, but by the home jurisdiction, where the company is registered, administered, or has its principal place of business.

Model two, the universal approach, is a much wider category. There is no longer a European nexus. The approach echoes universal jurisdiction in criminal law. Many states claim the power to prosecute genocide, crimes against humanity, and war crimes, regardless of who committed these violations on which territory.⁶⁴ In the context of the CSA measures, model two represents universal public or private jurisdiction.

C. THIRD ELEMENT: LIABILITY

Model 1: Entity approach

The addressee shall be liable.

Model 2: Enterprise approach (theory of control)

The addressee shall also be liable for business entities it controls.

⁶⁴ See, e.g., in Germany Code of Crimes Against International Law (*Völkerstrafgesetzbuch*) and Section 153 lit f. of the Criminal Procedure Act (*Strafprozessordnung*).

Model 3: Supply chain responsibility

The addressee shall also be liable for business entities from which it procures goods or services to supply its own goods or services.

The entity approach (model one) respects basic tenets of company law: The parent is not responsible for the subsidiary's debt or wrongdoing, and vice versa. The principle of limited liability is safeguarded; the enterprise's juridical division into separate entities is maintained. Tort claims against the parent cannot succeed on the mere ground that the subsidiary has done something wrong.⁶⁵

Model two employs the enterprise approach

⁶⁵ Company law only allows in the most exceptional cases that the corporate veil is pierced. For example UK law permits the lifting of the corporate veil only if it is a 'mere façade concealing the true facts' (*Woolfsen v Strathclyde* RC 1978 SC (HL) 90, 96 per Lord Keith of Kinkel; *Adams v Cape Industries plc* [1990] Ch. 433, 539-541 per Slade LJ; *Trustor AB v Smallbone* (No. 2) [2001] 3 All ER 987, 995f-h per Sir Andrew Morritt V-C.), if the company has been formed to evade existing legal obligations (*Jones v Lipman* [1962] 1 All ER 442; *Gilford Motor Co. Ltd. v Home* [1933] Ch. 935) if it represents a 'device or sham or cloak' (*Adams v Cape Industries plc* [1990] Ch. 433, 540 per Slade LJ); 'impropriety', 'mala fide', or 'the interests of justice' are not enough to pierce the corporate veil (*Trustor AB v Smallbone* (No. 2) [2001] 3 All ER 987, 995f per Sir Andrew Morritt V-C; *Adams v Cape Industries plc* [1990] Ch. 433, 536-538 per Slade LJ; *Ord v Belhaven Pubs Ltd.* [1998] EWCA Civ 243 [1998] BCC 607, 614-615 per Hobhouse LJ).

(theory of control). This method disregards limited liability and juridical separation; what matters is the economic structure. If one company controls another, both are treated as being part of one enterprise. The ‘corporate veil’ is pierced. The theory of control is usually employed in competition law, but can also be found in other areas such as environmental and financial regulation, and in anti-corruption laws.⁶⁶

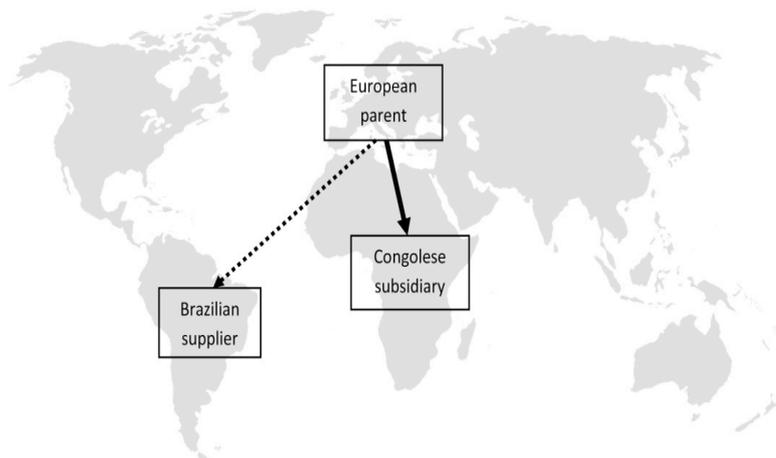
The third model goes even further. It confers supply chain responsibility on the addressee. Under certain circumstances, the addressee could be held liable for violations committed by its suppliers. The third model takes account of common global practice: supply of goods and services is often outsourced to companies in developing countries, frequently operating in export processing zones. These companies usually follow closely the directions of their buyers who often yield considerable market power. In such a constellation the entity that produces the goods or provides the service may not be owned or controlled by the multinational. Nevertheless, it may be reasonable to impose certain duties on the procuring enterprise throughout the value chain. John Ruggie, the UN Special Representative on Business and Human Rights, suggests that, under certain circumstances, an enterprise

⁶⁶ See also chapter 2 (Context) II (Theoretical Underpinnings) E. (Liability: Piercing the Corporate Veil and Supply Chain Responsibility?).

must try to use its leverage over the supply chain entity to stop abuses, or must end contractual relationships.⁶⁷

The following illustration shows the workings of the different models.

Illustration 2: Liability



⁶⁷ UN Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises, 'The Corporate Responsibility to Respect Human Rights in Supply Chains - 10th OECD Roundtable on Corporate Responsibility' (discussion paper, 30 June 2010) <<http://www.oecd.org/dataoecd/17/50/45535896.pdf>>; see also UN Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (21 March 2011) <<http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>> 14, 18.

According to the entity approach, the European company is not accountable for the wrongdoings of its Congolese subsidiary or its Brazilian supplier. The enterprise approach makes the European parent liable for the corporate abuse committed by the African affiliate. Finally, supply chain responsibility implies that, for instance, the European company does not win European public contracts or faces import bans on products that were made by children in the Brazilian supplier's factory.

D. FOURTH ELEMENT: FIELD OF APPLICATION

Model 1: Developing countries

These measures apply to the addressee's operations in developing countries.

Model 2: Worldwide

These measures apply to the addressee's operations worldwide.

The CSA measures employ a structure that may be described as internal jurisdiction to enforce and external jurisdiction to prescribe. Standards are set for conduct in third countries but enforced within the EU. This is decentralised enforcement of international law (in the case of *jus cogens* and general international

standards), or the transposition of European laws to other territories (in the case of European standards). Such a technique may create tension with other states' sovereignty—but not in all cases: Much depends on the enforcement method used and the particular characteristics of the regulation. We will look closely at the compatibility of extraterritorial jurisdiction with international law in chapter three.

Developing countries are especially vulnerable to corporate abuse. They may lack efficient legislation, administration, and judicial system.⁶⁸ Model one holds companies accountable for their violations of basic environmental, labour, and human rights in such environments. Special rules on development policy in European law and WTO law may facilitate such CSA regulation.⁶⁹

The second model extends the field of application of the CSA measures to the entire globe. Corporations that want to benefit from EU subsidies, export credits, public contracts, etc. have to abide by basic standards around the world. This model represents universal public and private jurisdiction.

E. FIFTH ELEMENT: PUBLIC ENFORCEMENT

In case of violation,

⁶⁸ See also chapter 2 (Context) II (Theoretical Underpinnings) A. (Is There a Regulatory Deficit?).

⁶⁹ See for further details chapter 3 (Limits of Lawfulness).

Model 1: Publication of violations

the violation and the name of its perpetrator may be published;

Model 2: Export credits, subsidies, and other financial benefits

financial benefits such as subsidies or export credits may be refused to or recovered from the addressee;

Model 3: Public procurement

public contracts with the addressee may be refused or terminated;

Model 4: Fines

the addressee may be fined;

Model 5: Trade measures

trade restrictions may be imposed on the addressee;

Model 6: Labelling

a label certifying compliance with the substantive standards may be denied to or withdrawn from the addressee.

Model 7: Reporting obligations

The addressee may be obliged to report on its compliance with the substantive standards.

The public enforcement mechanisms listed in the matrix range from incentive schemes (financial benefits, public contracts, labelling) to traditional command and control regulation (fines). This taxonomy shows a wide array of regulatory systems that all have different advantages and disadvantages in terms of efficiency and costs. They also face different challenges in European and international law.⁷⁰

The first model concerning publication is based on ‘naming and shaming’. Given the official character of publication by a public authority, it may have far-reaching consequences for a company’s reputation. On the other hand, if after a full public investigation it is published that no violation was found, a company may be relieved from unjustified allegations (positive effect of ‘knowing and showing’).

The second model makes use of financial benefits schemes. EU and Member States’ agencies may have an important impact on corporate behaviour if they refuse subsidies and export credits in the event that basic standards are not respected. The UN Guiding

⁷⁰ See chapter 3 (Limits of Lawfulness).

Principles on Business and Human Rights (UN Guiding Principles) say that

[w]here these agencies do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk—in reputational, financial, political and potentially legal terms—for supporting any such harm, and they may add to the human rights challenges faced by the recipient State.⁷¹

The third model takes account of environmental, labour, and human rights in public procurement policies. Companies that do not comply with these standards may not win the award, may see their contract rescinded, or may be excluded from the bidding procedure. The UN Guiding Principles recommend that public bodies ‘should promote respect for human rights by business enterprises with which they conduct commercial transactions’.⁷²

The fourth model makes use of fines, following examples such as penalties for competition law infringements. This implies that transgressions are treated as a breach of law and not simply as a failure on moral grounds. Fines are about hard, not soft law.

⁷¹ UN Human Rights Council, ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie’ (21 March 2011) <<http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>> 9.

⁷² *Ibid* at 10.

The fifth model tries to influence the addressee's behaviour with labelling schemes. Labels that certify compliance with environmental, labour, and human rights can offer a significant competitive advantage in the market.

Model six imposes trade restrictions. For instance, the addressee would face higher customs and tariffs, or trade bans with regard to the products manufactured outside of the EU in violation of fundamental standards; or because of its negative record of environmental, labour, or human rights violations in the past.

Finally, model seven requires the addressee to report on its compliance with the substantive standards. This may enhance transparency and comparability of companies' performance. According to the Guiding Principles, companies should be encouraged, and where appropriate required, to communicate how they address their human rights impacts.⁷³

A requirement to communicate can be particularly appropriate where the nature of business operations or operating contexts pose a significant risk to human rights ... Financial reporting requirements should clarify that human rights impacts in some instances may be "material" or "significant" to the economic performance of the business enterprise.⁷⁴

⁷³ *Ibid* at 8.

⁷⁴ *Ibid* at 9.

F. SIXTH ELEMENT: PRIVATE ENFORCEMENT

EU Member States shall have jurisdiction for any civil action for violations of the substantive standards by the addressee.

The UN Guiding Principles speak of an ‘expanding web of potential corporate legal liability arising from extraterritorial civil claims’.⁷⁵ Private enforcement may be a powerful tool. Rights are vindicated in courts by the victims of corporate abuse themselves and not by a public administration that may find it difficult to detect violations. By compensating victims for the harm suffered, private litigation could effectively complement public measures. A similar idea has been influential in EU competition law, which has seen a promotion of private enforcement in recent years.⁷⁶

The sixth element opens Member States’ courts for civil claims based on the violation of *jus cogens* and general international standards. This entails universal private jurisdiction, i.e. private enforcement of *weltrecht*. It thereby resembles the U.S. Alien Tort Statute (ATS), which allows tort claims based on infringements of international law.⁷⁷

⁷⁵ *Ibid* at 21.

⁷⁶ See for various documents of the European Commission on this matter
<<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>>.

⁷⁷ See chapter 2 (Context) I. (Existing International and European

With regard to European standards, the sixth element follows conceptions in international private law. According to current law, European courts may apply European standards to events abroad, albeit in exceptional circumstances. Enforcing European standards extraterritorially may create tension in international relations.⁷⁸

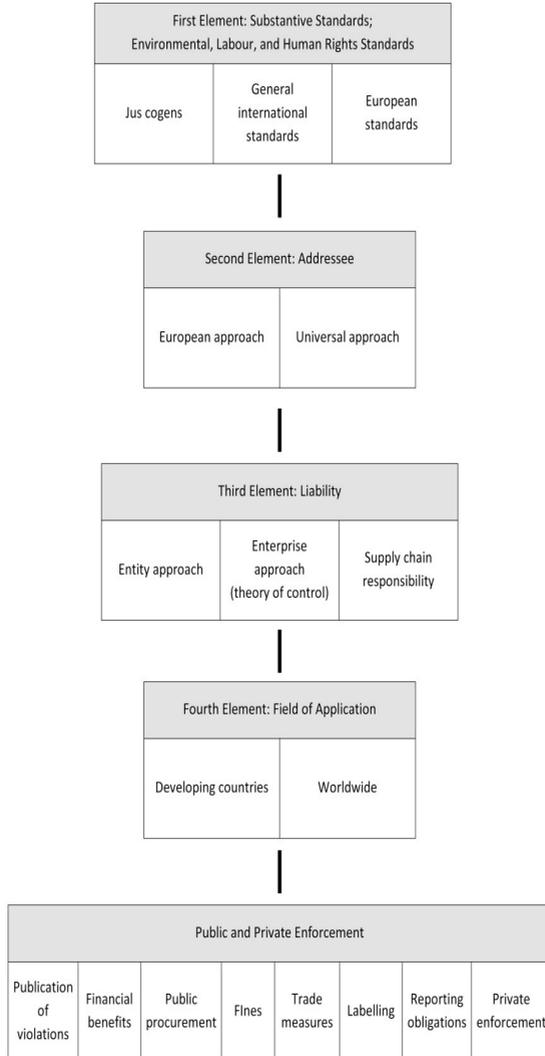
G. COMBINING THE ELEMENTS

The following illustration shows how the regulatory models in the matrix may be combined.

Regulation on Global Corporate Social Accountability) A. (International Law).

⁷⁸ See chapter 3 (Limits of Lawfulness) II. (Lawfulness under International Law) B. (Customary International Law: Lawfulness of Extraterritorial Jurisdiction).

Illustration 3: Combining the Elements



For instance, due to violations of general international norms in developing countries by a European company's supplier, the European company may not win a European public contract for the supply of those products. Another example: As a result of violations of *jus cogens* in developing countries (e.g. complicity in torture), an Australian company may be sued in European courts. Or: A European company may not receive European export credits for the building of a dam by its subsidiaries if these subsidiaries do not respect European human rights standards abroad.

The CSA matrix allows numerous combinations of elements and models. Some combinations yield far-reaching results, others are less intrusive. The legal challenges the elements face vary as well; much depends on the particular combinations of regulatory models. And the theoretical background, the basic ideas behind the matrix, change according to the models—the context differs with the combination scrutinised.

CHAPTER 2

CONTEXT

Global corporate social accountability in Europe is embedded in recent developments of international and European law. Whether corporations have direct international obligations is a contentiously debated topic. Current European law already takes account of global corporate social accountability to some extent. The first section of this chapter tries to shed light on the law as it is, which might be helpful for any future legislative projects. The second part sketches the theoretical background of global corporate social accountability by exploring the economic, political, and philosophical challenges the CSA measures face.

I. EXISTING INTERNATIONAL AND EUROPEAN REGULATION ON GLOBAL CORPORATE SOCIAL ACCOUNTABILITY

A. INTERNATIONAL LAW

This part examines corporate obligations stemming from international environmental law, international criminal law, international human rights law, and international humanitarian law, and takes a look at

corporate accountability under the US Alien Tort Statute.

There are several environmental treaties on nuclear and oil accidents that impose liability upon corporations. For example, the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy states that ‘[t]he operator of a nuclear installation shall be liable’ for loss of life and damage to property’.¹ The 1999 Protocol to the Basel Convention on Liability and Compensation for Damage Resulting from Transboundary Movements of Waste and Their Disposal provides a comprehensive regime for liability and compensation, liability being incurred by any person who is in operational control of the waste. It is

¹ Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960, as amended by the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982, Article 3(a), 956 UNTS 251; see also, e.g., the International Convention on Civil Liability for Oil Pollution Damage holds that ‘the owner of a ship at the time of an incident ... shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident’ International Convention on Civil Liability for Oil Pollution Damage, 29 November 1969, Article 3(1), 26 U.S.T. 765, 973 UNTS 3.; Vienna Convention on Civil Liability for Nuclear Damage, 21 May 1963, Article 2(1), 1063 UNTS 265; Brussels Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, 17 December 1971, 974 UNTS 255; Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, 17 December 1976, ILM 1450.

yet to enter into force.² The 1998 Council of Europe Convention on the Protection of the Environment through Criminal Law requires ‘each Party’ to adopt ‘appropriate measures as may be necessary to enable it to impose criminal or administrative sanctions or measures on legal persons’.³

When implementing international treaties, states may often decide to impose criminal liability on corporations—but they are not obliged to do so. States are free to choose other means.⁴

International criminal law does not itself hold corporations liable. For the purpose of judging individuals, the Military Tribunal in Nuremberg

² The Protocol shall enter into force on the ninetieth day after the date of deposit of the twentieth instrument of ratification, acceptance, formal confirmation, approval, or accession; see status of ratifications <<http://www.basel.int/pub/protocol.html>>.

³ Council of Europe Convention on the Protection of the Environment through Criminal Law, CETS No 172, 4 November 1998, Article 9.

⁴ For example, Article 12(1) of the UN Convention against Corruption, GA Res. 58/4, annex, 31 October 2003, provides: ‘Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures’; Article 5(3) of the UN Convention on the Suppression of the Financing of Terrorism, Ga Res. 54/109, 9 December 1999, demands that states take measures to ensure the liability of legal entities with ‘criminal, civil or administrative sanctions’.

declared four organisations as criminal.⁵ In the *IG Farben* case, twenty-four executives of IG Farben were charged but not the corporate entity itself.⁶ In the Nuremberg judgment the Tribunal held: ‘Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced’.⁷ The International Criminal Tribunals for the Former Yugoslavia and Rwanda and the International Criminal Court are not competent to try legal persons.⁸

It has been contended that humanitarian law does not only bind states, organised armed groups, and soldiers but also business enterprises ‘whose activities are closely linked to an armed conflict’.⁹ In weak

⁵ The Leadership Corps of the Nazi Party, the Gestapo, the SD and the SS, Office of United States Chief of Counsel for Prosecution of Axis Criminality, Nazi Conspiracy and Aggression: Opinion and Judgment, United States Printing Office 1947, 91, 97, 102,

⁶ 7 Trials of War Criminals Before the Nuernberg Military Tribunal Under Control Council Law No. 10 (1952) 11-60.

⁷ The Nurnberg Trial (United States v Goering) 6 FR.D. 69, 110 (International Military Tribunal at Nuremberg 1946); but see also the analysis by SR Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’ (2001) 111 *Yale L. J.* 443, 477-478.

⁸ Statute of the International Tribunal for the Former Yugoslavia, U.N. Doc. S/RES/827 Article 6 (1993); Statute of the International Tribunal for Rwanda, U.N. Doc. S/RES/955 Article 5 (1994).

⁹ International Committee of the Red Cross, ‘Business and Humanitarian Law: an introduction to the rights and obligations of

government zones and in situations of turmoil, social unrest, or warfare, companies may be compelled to hire security forces. If these forces do not respect the rules of humanitarian law, the company may be liable for assisting violations. Enterprises may be accused of pillage if they acquire resources or property without the owner's free consent. Companies may also be complicit in war crimes.¹⁰

According to the Geneva Conventions, it is the duty of the High Contracting Parties to 'enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches'¹¹ (which constitute war crimes under the Rome Statute of the International Criminal Court¹²). Similarly, Additional

business enterprises under international humanitarian law' (Geneva, 2006) <http://www.icrc.org/eng/assets/files/other/icrc_002_0882.pdf> 14.

¹⁰ See A Clapham, *Human Rights Obligations of Non-State Actors* (Oxford, Oxford University Press, 2006), Chapter 7 Non-State Actors in Times of Armed Conflict.

¹¹ See Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287, 314, Article 146; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, T.I.A.S. No. 3364, Article 129.

¹² Rome Statute of the International Criminal Court, 2187 UNTS 90, 94, 17 July 1998, ('For the purpose of this Statute, "war crimes" means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention ...'); R Bismuth, 'Mapping A Responsibility Of

Protocol I stipulates that the ‘High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches’ and that ‘grave breaches of these instruments shall be regarded as war crimes’.¹³

The question therefore arises whether international law, such as environmental treaties or humanitarian law, or international human rights law, directly binds corporations. For instance, does international law place a direct obligation on companies not to engage in slavery? The 1926 Slavery Convention demands members to ‘prevent and suppress the slave trade’ and ‘bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms’.¹⁴ The general human rights conventions also impose duties on states to protect human rights from private

Corporations For Violations Of International Humanitarian Law Sailing Between International And Domestic Legal Orders’ (2010) 38:2 *Denver Journal of International Law and Policy* 203.

¹³ Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, Articles 85(5) and 86(1).

¹⁴ Slavery Convention, September 1926, 212 UNTS 17, Articles 2, 25.

interference.¹⁵ ILO conventions oblige states to guarantee fundamental labour standards. But such language in itself does not mean that corporations are *directly* accountable. Instead, it requires governments to regulate private actors; companies are affected only indirectly by the state's international obligation to protect.

This distinction between direct and indirect duties is not merely semantic. Direct obligations eliminate the state's role as a mediator and translator of international law. In the case of direct regulation, the international community, not the state, exercises prescriptive jurisdiction over private actors. Indirect obligations, in contrast, leave domestic jurisdiction intact.¹⁶

¹⁵ See, e.g., on the International Covenant on Civil and Political Rights, Human Rights Committee, 'General Comment No. 31' UN Doc. CCPR/C/21/Rev.1/Add.13, para 8 (26 May 2004): "[P]ositive obligations on State Parties to ensure Covenant Rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities'; see also European Court of Human Rights, *Z v United Kingdom*, App. No. 29392/95, (2002) 34 Eur. H. R. Rep. 3, para 73: The European Convention 'requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals'; see also Inter-American Court of Human Rights, *Velasquez Rodríguez v Honduras*, Inter-Am. Ct. H. R. (29 July 1988). (ser. C) No. 4, para. 172.

¹⁶ JH Knox, 'Horizontal Human Rights Law' (2008) 102 *American*

However, the difference between indirect and direct duties is arguably less relevant the smaller the margin of appreciation and the scope for transposing international law into domestic law are. It has also been argued that the effectiveness of international human rights law requires acknowledging direct duties of corporations, as they can impinge on the enjoyment of the rights recognised in international human rights instruments. ‘If international law is to be effective in protecting human rights, everyone should be prohibited from assisting governments in violating those principles, or indeed prohibited from violating such principles themselves’.¹⁷

But this seems to be aspirational language rather than an analysis of the law as it is. The UN Human

Journal of International Law 1, 29. Human rights treaties leave the state a margin of appreciation for carrying out its obligation to protect; see, e.g., on the International Covenant on Civil and Political Rights, Human Rights Committee, ‘General Comment No. 31’ (26 May 2004), UN Doc. CCPR/C/21/Rev.1/Add.13, para 8: a violation my result of the state’s ‘permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities’; The European Court of Human Rights has developed baseline standards such as ‘reasonable and appropriate measures’, see, e.g., *Plattform Ärzte für das Leben v Austria*, (1988) 139 Eur. Ct. H.R. (ser. A) para. 34.

¹⁷ A Clapham, *Human Rights Obligations of Non-State Actors* (Oxford, Oxford University Press, 2006), 80; see also P Muchlinski, ‘Corporations in International Law’ in Max Planck Encyclopedia of Public International Law <<http://www.mpopil.com>>.

Rights Committee stated that ‘obligations [stemming from the ICCPR] are binding on States and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law’.¹⁸ Moreover, it seems that international courts have not yet recognised direct human rights obligations of companies. Some commentators therefore conclude that a duty cannot exist if it is not enforced by courts.¹⁹

Others say that such a view confuses ‘the existence of responsibility with the mode of implementing it’.²⁰ By way of comparison they argue that the individuals that stood trial before the tribunals of Nuremberg, former Yugoslavia and Rwanda must have been under some international obligation before the tribunals were created to try them.²¹ The same must hold true today for companies; obligations exist before enforcement. In fact, some argue that direct international obligations of corporations are already enforceable on the national plane—via the US Alien Tort Statute.

¹⁸ Human Rights Committee, ‘General Comment No. 31’ (26 May 2004), UN Doc. CCPR/C/21/Rev.1/Add.13, para 8.

¹⁹ CM Vázquez, ‘Direct v. Indirect Obligations of Corporations Under International Law’ (2005) 43 *Columbia Journal of Transnational Law* 927, 940-41.

²⁰ SR Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’ (2001) 111 *Yale Law Journal* 443, 481.

²¹ A Clapham, *Human Rights Obligations of Non-State Actors* (Oxford, Oxford University Press, 2006), 267.

Case Study: The US Alien Tort Statute and Kiobel v Royal Dutch Petroleum (Shell)

The plaintiffs in this case alleged that Royal Dutch Petroleum Company and Shell Transport and Trading Company, through the subsidiary Shell Nigeria, aided and abetted the Nigerian government in committing human rights abuses in the Ogoniland.

Shell Nigeria has been engaged in oil exploration and production in the Ogoni region of Nigeria since 1958. Residents of the Ogoni region protested the environmental effects of these activities. According to the plaintiffs, the defendants responded in 1993 by enlisting the aid of the Nigerian government to suppress the Ogoni resistance. Throughout 1993 and 1994, Nigerian military forces allegedly shot and killed Ogoni residents and attacked Ogoni villages—beating, raping, and arresting residents and destroying and looting property—all with the assistance of the defendants. Specifically, the plaintiffs maintained that the defendants, inter alia, (i) provided transportation to Nigerian forces, (ii) allowed their property to be utilised as a staging ground for attacks, (iii) provided food for soldiers involved in the attacks, and (iv) provided compensation to those soldiers.

Plaintiffs brought claims against defendants

under the ATS for aiding and abetting the Nigerian government in alleged violations of the law of nations. Specifically, plaintiffs brought claims of aiding and abetting (i) extrajudicial killing, (ii) crimes against humanity, (iii) torture or cruel, inhuman, and degrading treatment, (iv) arbitrary arrest and detention, (v) violation of the rights to life, liberty, security, and association, (vi) forced exile, and (vii) property destruction.²²

The US Court of Appeals for the Second Circuit handed down its landmark judgment on 17 September 2010, essentially dealing with a single question: Are corporations liable under the Alien Tort Statute? Two of three judges said no.

The Alien Tort Statute provides: ‘The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States’. The majority said:

Looking to international law, we find a jurisprudence, first set forth in Nuremberg and repeated by every international tribunal of which we are aware, that offenses against the law of nations

²² The description of the facts is largely taken from *Kiobel v Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) *reh’g en banc denied*, No. 06-4800-cv, 2011 WL 338048 (2d Cir. 4 February 2011).

(i.e., customary international law) for violations of human rights can be charged against States and against individual men and women but not against juridical persons such as corporations. As a result, although international law has sometimes extended the scope of liability for a violation of a given norm to individuals, it has never extended the scope of liability to a corporation.²³

The majority thereby deviated from a district court's 2003 opinion (*Presbyterian Church*).²⁴ In that opinion the court looked at international treaties that impose liability on corporations. 'If corporations can be held liable for unintentional torts such as oil spills or nuclear accidents, logic would suggest that they can be held liable for intentional torts such as complicity in genocide, slave trading, or torture'.²⁵ But the Court of Appeals for the Second Circuit in *Kiobel* rejected the idea that customary law develops through the 'logical' expansion of existing norms. The purpose of the ATS is not to encourage the

²³ *Kiobel*, 621 F.3d, 119.

²⁴ *Presbyterian Church of Sudan v Talisman Energy, Inc.*, 244 F.Supp.2d 289, 316-17 (S.D.N.Y.2003).

²⁵ *Presbyterian Church* 244 F.Supp.2d at 317; see also HH Koh, 'Separating Myth From Reality About Corporate Responsibility Litigation' (2004) 7(2) *Journal of International Economic Law* 263, 265.

unilateral creation of new norms of customary international law.²⁶ The court did not find any rule of corporate liability in international criminal law. And the majority denied that liability is merely a question of remedy, to be determined independently by each state. ‘The subjects of international law have always been defined by reference to international law itself’.²⁷ Corporate liability would impose responsibility for actions ‘on a wholly new defendant—the corporation’.²⁸

Judge Leval, in his concurring opinion, lambasted:

The majority opinion deals a substantial blow to international law and its undertaking to protect fundamental human rights. According to the rule my colleagues have created, one who earns profits by commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victims’ claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form.²⁹

Adoption of the corporate form has always offered important benefits and protections to business—

²⁶ *Kiobel*, 621 F.3d, 140.

²⁷ *Ibid* at 147.

²⁸ *Ibid* at 147.

²⁹ *Ibid* at 149-150.

foremost among them the limitation of liability to the assets of the business, without recourse to the assets of its shareholders. The new rule offers to unscrupulous businesses advantages of incorporation never before dreamed of. So long as they incorporate (or act in the form of a trust), businesses will now be free to trade in or exploit slaves, employ mercenary armies to do dirty work for despots, perform genocides or operate torture prisons for a despot's political opponents, or engage in piracy—all without civil liability to victims. By adopting the corporate form, such an enterprise could have hired itself out to operate Nazi extermination camps or the torture chambers of Argentina's dirty war, immune from civil liability to its victims.³⁰

Where a corporation earns profits by exploiting slave labor, or by causing or soliciting a genocide in order to reduce its operating costs, what objective would the nations of the world seek by a rule that subjects the foot soldiers of the enterprise to compensatory liability to the victims but holds that the corporation has committed no offense and is free to retain its profits, shielded from the claims of those it has abused?³¹

Although embedded in the particular context of the Alien Tort Statute and its restrictive interpretation of customary international law, the dispute between the

³⁰ *Ibid* at 150.

³¹ *Ibid* at 159-160.

majority and minority opinions in *Kiobel* exemplifies the ongoing debate over direct obligations of corporations under international law.

B. EUROPEAN LAW

European law already integrates global corporate social accountability in some ways. The following section analyses current policies on publication, subsidies and export credits, public procurement, fines, trade measures, labelling, reporting obligations, and private enforcement from the perspective of global CSA.

(i) Publication of Violations

The European Commission publishes infringements of EU competition law in order to achieve a deterrent effect. Publications state the names of the parties and the main content of the Commission decision, including any penalties imposed.³² The EU, however, does not publish violations of elementary environmental, labour, and human rights.

(ii) Export Credits, Subsidies, and Other Financial Benefits

Does the EU take social and environmental

³² See Article 30(2) of Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1-25.

considerations into account when it finances companies' operations abroad? All EU Member States have export credit agencies (ECAs), which are public (or publicly mandated) institutions providing loans, guarantees, and insurance to companies doing business in countries where the investment climate is considered too risky. ECAs offer support that the private capital market would not offer since it lacks sufficient information to properly assess the risks. ECAs do not have better information. But they absorb higher risks than private actors because they do not have to pay taxes and usually only seek to recover their operating and financing costs instead of making a profit. Export credit guarantees issued by the ECAs of the EU Member States in the period 2004-2009 amounted to about € 468 billion.³³

However, there are no binding European rules on social or environmental criteria for export credits.³⁴

³³ European Parliament, 'Working document on Application of certain guidelines in the field of officially supported export credits, Committee on International Trade Rapporteur: Yannick Jadot' (24 June 2010) <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/inta/dt/819/819075/819075en.pdf> 3.

³⁴ Council Directive 98/29/EC of 7 May 1998 on harmonisation of the main provisions concerning export credit insurance for transactions with medium and long-term cover [1998] OJ L148/22-32, does not contain any provisions on the refusal or withdrawal of credits in case of violations of environmental, labour, and human rights standards.

There are several voluntary initiatives, at the Member State level³⁵ and also in the framework of the OECD,³⁶ but no legally binding mechanism exists that is effectively enforced.

Also, under general European state aid law, the potentially negative effect of subsidies on the environment or labour standards in third countries is usually not a relevant parameter.³⁷ EU state aid law aims to prevent subsidy wars between European countries. Thus, European law does not prohibit aid on the sole ground that it supports environmentally or socially harmful projects abroad; nor does European law curtail decisions not to grant aid because of

³⁵ See for an overview F Rödl and S Massoud, 'EU Member State Report Germany' University of Edinburgh, Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union <<http://www.law.ed.ac.uk/euenterpriseslf/documents/eumemberstaquestionnaire.aspx>> 9-10.

³⁶ The OECD, 'Council Recommendation on Common Approaches on the Environment and Officially Supported Export Credits adopted by the OECD Council on 12 June 2007' TAD/ECG(2007)9, is a 'Gentleman's Agreement' asking member governments to review projects for their potential environmental impacts and to benchmark them against international standards, such as those of the World Bank Group. It also calls for more public disclosure of information. However, according to Article 13 of the recommendation members may decide not to apply any environmental standards at all.

³⁷ See Article 107 of the Treaty on the Functioning of the European Union (TFEU) [2008] OJ C 115/47 and pertinent secondary legislation.

violations of environmental or social standards in other countries. In sum, there is no EU state aid policy on global corporate social accountability.

(iii) Public Procurement

European law regulates Member States when they procure goods, works, and services. The Procurement Directives require that the company offering the lowest price or the most economically advantageous tender win the contract.³⁸ All companies in Europe shall be treated according to the same transparent standards without undue advantages for local firms. May public authorities also insert social or environmental considerations in their procurement policies?

In general, the answer is yes—but under certain conditions.³⁹ With regard to the ‘most economically

³⁸ Article 55 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L 134/1 and Article 53 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114. These Directives apply if a certain financial threshold is exceeded; the TFEU applies, in principle, even below the thresholds, see Case C-324/98 *Teleaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG* [2000] ECR I-10745.

³⁹ The Directives explicitly allow environmental characteristics as award criteria: Article 55(1)(a) of Directive 2004/17 and Article 53(1)(a) of Directive 2004/18.

advantageous tender’ the Directives include a non-exhaustive list that explicitly mentions environmental characteristics.⁴⁰ But Member States may only use award criteria that are linked to the ‘subject-matter of the contract’.⁴¹ Requirements must relate to the product at issue. For instance, it is prohibited, when procuring furniture, to demand that the furniture manufacturers use recycled paper in their offices.⁴² Such a condition would be unrelated to the contract on furniture. On the other hand, it is permissible to ask for electricity produced from renewable energy sources, although green electricity is physically the same as conventional electricity.⁴³

Similarly, social criteria may be employed if they are linked to the performance of the contract in question.⁴⁴ Contracting authorities may opt for fair trade. They may request the supplier to pay the

⁴⁰ Article 55(1)(a) of Directive 2004/17 and Article 53(1)(a) of Directive 2004/18.

⁴¹ Article 55(1)(a) of Directive 2004/17 and Article 53(1)(a) of Directive 2004/18.

⁴² European Commission, ‘Buying green! A handbook on environmental public procurement’ (2004) <http://ec.europa.eu/environment/gpp/pdf/buying_green_handbook_en.pdf> 23.

⁴³ *Ibid* at 23.

⁴⁴ European Commission, ‘Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement’ (2010) 34; see also Case C-225/98 *Nord Pas de Calais* [2000] ECR I-7445.

producers a price permitting them to cover their costs of production, decent salaries, and labour conditions for the workers that carry out the contract work.⁴⁵ However, the Directives seem to prohibit the requirement that labour standards are respected across the whole business of the supplier.⁴⁶

Case Studies: Concordia Bus Finland and Wienstrom

In 1997 the Community of Helsinki put their bus services out to tender and used economic criteria such as the overall price of operation and the quality of the bus fleet, but also environmental conditions relating to emissions and noise levels. The European Court of Justice (ECJ) considered that the requirements relating to the level of emissions and noise of the buses were linked to the subject-matter of the contract and were therefore legal.⁴⁷

In the *Wienstrom* case, Austrian authorities assessed in the procurement procedure how much green electricity the tenderers supplied to other customers, not only to the authorities

⁴⁵ European Commission, 'Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement' (2010) 34.

⁴⁶ S Arrowsmith and P Kunzlik in S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law* (Cambridge, Cambridge University Press, 2009) 27.

⁴⁷ Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213.

themselves. The ECJ ruled that such an award criterion was not linked to the subject-matter of the contract and was thus prohibited.⁴⁸

In sum, the legality of social and environmental policies depends on whether the government acts as a purchaser that is concerned only with the performance of its own contract or as a regulator that uses procurement as a vehicle to achieve wider goals. The European Directives endorse the ‘government-purchaser’ but distrust the ‘government-regulator’.⁴⁹

More scope for global corporate social accountability may provide the rules on the exclusion of companies from the bidding procedure. The Directives provide that firms shall be disqualified if they have been convicted of corruption, fraud, money laundering, or participation in a criminal organisation.⁵⁰ Member States may exclude tenderers if they have been

⁴⁸ Case C-448/01 *Wienstrom* [2003] ECR I-14527.

⁴⁹ S Arrowsmith and P Kunzlik in S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law* (Cambridge, Cambridge University Press, 2009) 148, 213.

⁵⁰ Article 45(1) of Directive 2004/18.

found guilty of grave professional misconduct.⁵¹ The European Parliament tried to insert in the Directives a provision that explicitly allows exclusion of companies that violate ‘international core labour standards’.⁵² The proposal did not survive the legislative process.

Still, ‘professional misconduct’ may be broad enough to encompass unethical behaviour that is unrelated to the performance of the contract at issue, but rather concerns non-compliance with general regulatory requirements.⁵³ The ECJ stated in *La Cascina* that Member States may decide to apply different criteria than ‘professional honesty, solvency

⁵¹ Article 45(c) and (d) of Directive 2004/18/EC and Articles 53 and 54 of Directive 2004/17/EC; Utilities can even exclude bidders on the basis of mere ‘objective criteria and rules’, Article 53(2) of Directive 2004/17; see also S Arrowsmith and C Maund in S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law* (Cambridge, Cambridge University Press, 2009) 451; European Commission, ‘Buying green! A handbook on environmental public procurement’ (2004) <http://ec.europa.eu/environment/gpp/pdf/buying_green_handbook_en.pdf> 27-28.

⁵² European Parliament, ‘Position of the European Parliament adopted at the first reading on 17 January 2002 with a view to the adoption of European Parliament and Council Directive .../.../EC on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts’ [2002] OJ C271/E/176, Article 53(2)(c).

⁵³ S Arrowsmith in S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law* (Cambridge, Cambridge University Press, 2009) 230.

and reliability'.⁵⁴ However, the Directives do not seem to allow excluding companies on the basis that their subsidiaries or suppliers infringe environmental or social standards.

Furthermore, the general principles of the free movement of goods, the freedom of establishment, and the freedom to provide services, all guaranteed by the Treaty on the Functioning of the European Union (TFEU), constrain governments' discretion. Restrictions of these freedoms are prohibited if they cannot be justified by imperative public interests.

However, not all requirements may be qualified as restrictions to trade. One may argue that decisions concerning the features of products are decisions that establish the market rather than restrict access to it.⁵⁵ Hence, environmental characteristics, even if they are more common in domestic than in imported products, should not be classified as trade obstacles.⁵⁶ Buying decisions should, in general, be treated as decisions that set the market and do not hinder access.⁵⁷ *Concordia Bus Finland* supports this approach, but it remains unclear how the ECJ would characterise decisions

⁵⁴ Joined Cases C-226/04 and C-228/04 *La Cascina v Ministero della Difesa* [2006] ECR I-1347, para. 23.

⁵⁵ S Arrowsmith and P Kunzlik in S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law* (Cambridge, Cambridge University Press, 2009) 60.

⁵⁶ *Ibid* at 60.

⁵⁷ *Ibid* at 61.

concerning production, delivery, or disposal.⁵⁸ *Beentjes*⁵⁹ and *Nord Pas de Calais*⁶⁰ suggest that requirements concerning the contract workforce are hindrances to trade when they are harder to meet for firms from other Member States.⁶¹ *Contse*⁶² indicates that all measures concerning the nature of the supplier, rather than the product or service, are potentially restrictions of trade.⁶³ According to *Wienstrom*, distinctions based on production methods (in the case at hand, electricity from renewable energy sources and not from conventional sources) may not qualify as restrictions. But the European Commission, although accepting the example of renewable energy, is in general more sceptical: ‘Clauses requiring changes to the organisation, structure or policy’ of a company established in another Member State might be considered ‘discriminatory’.⁶⁴ The Commission is wary

⁵⁸ *Ibid* at 65.

⁵⁹ Case 31/87 *Gebroeders Beentjes BV v Netherlands* [1988] ECR 4635.

⁶⁰ Case C-225/98 *Commission v France* [2000] ECR I-7445.

⁶¹ S Arrowsmith and P Kunzlik in S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law* (Cambridge, Cambridge University Press, 2009) 66.

⁶² Case C-234/03 *Contse SA, Visisol Srl & Oxigen Salud SA v Instituto Nacional de Gestión Sanitaria (Ingasa)* [2005] ECR I-9315.

⁶³ S Arrowsmith and P Kunzlik in S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law* (Cambridge, Cambridge University Press, 2009) 66.

⁶⁴ European Commission, ‘Interpretative Communication on the

of conditions relating to production processes and methods (PPMs), fearing their trade restrictive effects.⁶⁵

Even if requirements constitute restrictions they may nevertheless be justified. The TFEU allows derogations from internal market freedoms on the grounds of public policy, public health, or public morality and the ECJ has accepted other overriding public interests such as the protection of the environment.⁶⁶ Arrowsmith argues that requirements for products to be made under fair labour conditions are justifiable by an authority's desire to disassociate itself with exploitative behaviour.⁶⁷ She maintains that policies referring to accepted standards, such as ILO labour standards, will be easier to justify than those that

Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement' COM (2001) 566 final, 18.

⁶⁵ European Commission, 'Buying green! A handbook on environmental public procurement' (2004) <http://ec.europa.eu/environment/gpp/pdf/buying_green_handbook_en.pdf> section 3.4.2.

⁶⁶ It appears that violations of the Directives' provisions cannot be justified. The Directives harmonise exhaustively public procurement in their respective fields of application so that there is no room for general derogations; see S Arrowsmith in S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law* (Cambridge, Cambridge University Press, 2009) 193-194.

⁶⁷ S Arrowsmith in S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law* (Cambridge, Cambridge University Press, 2009) 174.

do not.⁶⁸ Indeed, recitals of the Directives allow that mention may be made of the requirement ‘to comply in substance with the provisions of the basic ILO conventions, assuming that such provisions have not been implemented in national law’.⁶⁹ Even the Commission appears to accept sub-contractors being required to comply with prohibitions of child and forced labour in cases where they are likely to occur in the global supply chain.⁷⁰ German authorities recommend demanding respect for the ILO conventions only in those countries which have ratified and transposed them into national law.⁷¹ However, German authorities find it disproportionate to take account of the entire supply chain in all circumstances. For example, car manufacturers should not be required to guarantee that textiles used in the vehicles were not produced by children. This would be too burdensome. On the other hand, T-shirt producers may well be obliged to show that their T-shirts were not manufactured by children.⁷²

⁶⁸ *Ibid* at 175.

⁶⁹ Recital 44 of Directive 2004/17, Recital 33 of Directive 2004/18.

⁷⁰ European Commission, ‘Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement’ (2010) 54.

⁷¹ Deutscher Städtetag, ‘Die Berücksichtigung sozialer Belange im Vergaberecht – Hinweise für die Kommunale Praxis’ (2009) <<http://www.staedtetag.de/imperia/md/content/schwerpunkte/fachinfos/2009/22.pdf>> 20-21.

⁷² *Ibid* at 21.

In sum, there are possibilities in current public procurement law to integrate global corporate social accountability—but there are important limitations and uncertainties: The requirement of a link to the subject-matter of the contract significantly restricts regulatory leeway; it is doubtful whether the exclusion of firms from the bidding procedure in consequence of violations of basic environmental, labour, and human rights in the global supply chain are allowed under the Directives; it is unclear whether exclusions are justified because of misconduct of associated companies or individuals;⁷³ and it is unsettled how far social and environmental considerations with a global reach may constitute unjustified obstacles to trade.

(iv) Fines

Does the EU impose fines for corporate abuses abroad? Directive 2008/99 requires Member States to ensure that certain export of hazardous waste—especially to developing countries—constitutes a criminal offence.⁷⁴

⁷³ S Arrowsmith in S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law* (Cambridge, Cambridge University Press, 2009) 232; S Williams in S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law* (Cambridge, Cambridge University Press, 2009) 492.

⁷⁴ Article 3 lit. c) of Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law [2008] OJ

Article 7 of Directive 2008/99 demands that legal persons be punishable by effective, proportionate, and dissuasive penalties. The prohibition on export of hazardous waste derives from the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.⁷⁵ The Basel Convention aims to control the export, import, and disposal of hazardous wastes to protect human health and the environment, in particular in developing countries. States must prevent and repress illegal traffic in wastes. The goal is to stop a global division of work according to which developing countries supply the resources that ensure the high standard of living in developed countries and then receive these resources back as poisonous waste.⁷⁶ Apart from this example, however, the EU does not require or impose fines for global corporate abuse.

L328/28, which refers to Regulation 1013/2006, which transposes the Basel Convention on Transboundary Hazardous Waste into European law.

⁷⁵ See K Meßerschmidt, *Europäisches Umweltrecht* (München, C.H. Beck, 2011) 891-905; L Krämer, *EC Environmental Law*, 6th edn (London, Sweet & Maxwell, 2007) 351-389.

⁷⁶ See K Meßerschmidt, *Europäisches Umweltrecht* (München, C.H. Beck, 2011) 894; Buck and Helm, 'Zehn Jahre Baseler Übereinkommen. Internationaler Handel mit gefährlichen Abfällen. Gutachten im Auftrag der FES' (1999) <<http://library.fes.de/fulltext/iez/00701005.htm>> 11.

(v) Trade Measures

Several EU trade measures may further the protection of human and labour rights and the environment in other countries. The European Union unilaterally bans trade of seal products and of pelts caught by leghold traps.⁷⁷ The ‘Forest Law Enforcement, Governance and Trade Scheme’ (FLEGT) bans the importation of illegally produced forest products.⁷⁸

The Regulation implementing the ‘Kimberley Process’ imposes restrictions on trade in ‘blood diamonds’.⁷⁹ The Kimberley Process is an initiative of governments, the diamond industry, and non-governmental organisations to stem the trade in rough diamonds, which fuels wars. Traders must present certificates of origin and Member States have to impose trade controls and ban trade in rough diamonds with

⁷⁷ Regulation (EC) 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products [2009] OJ L286/36; Council Regulation (EEC) No 3254/91 of 4 November 1991 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] OJ L308/1.

⁷⁸ Council Regulation (EC) 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community [2005] OJ L347/1.

⁷⁹ Council Regulation (EC) 2368/2002 of 20 December 2002 implementing the Kimberley Process certification scheme for the international trade in rough diamonds [2002] OJ L358/28.

non-member countries. So far over 70 countries have signed up to the agreement, including all major diamond-producing, trading, and processing countries.⁸⁰

Moreover, the EU prohibits the import and export of goods which have no practical use other than for the purpose of capital punishment, torture or other cruel, inhuman, or degrading treatment or punishment.⁸¹ The EU has also restricted exports to Zimbabwe of products that could be used for the repression of the population.⁸²

The EU's 'General System of Preferences' (GSP) uses tariff reductions to support human rights, labour rights, and the environment in third countries. Developing countries receive reductions in customs duties for some of their products entering the European market. In the event that a beneficiary country commits serious and systematic violations of certain UN or ILO conventions, the EU reserves the right to withdraw preferential treatment.⁸³ For instance, Burma and

⁸⁰ See <<http://kimberleyprocess.com/web/kimberley-process/kp-basics>>.

⁸¹ Council Regulation (EC) 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment [2005] OJ L200/1.

⁸² Council Regulation (EC) 314/2004 of 19 February 2004 concerning certain restrictive measures in respect of Zimbabwe [2004] OJ L55/1.

⁸³ Article 15(1)(a) of Council Regulation (EC) 732/2008 of 22 July

Belarus have lost preferential access to the European market for violating labour rights.⁸⁴

‘Vulnerable countries’ receive additional trade benefits if they ratify and implement human rights and environmental conventions, as listed in the EU Regulation.⁸⁵ Venezuela’s GSP+ preferences were withdrawn in 2009 because it failed to ratify the UN Convention Against Corruption. Sri Lanka forfeited GSP+ benefits in February 2010.⁸⁶ The EU also pursues the ‘Everything But Arms’ programme which provides duty-free and quota-free access for all products excepts arms for the 49 least developed countries.

Finally, most trade agreements between the EU and third countries contain ‘human rights clauses’: Either party may restrict trade if the other party fails to respect human rights.⁸⁷

2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 [2008] OJ L211/1.

⁸⁴ See

<http://trade.ec.europa.eu/doclib/docs/2008/july/tradoc_139988.pdf> 3.

⁸⁵ Article 8(1) in combination with Annex III of Council Regulation (EC) 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 [2008] OJ L211/1.

⁸⁶ University of Edinburgh, ‘Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union’ (2010) <<http://www.law.ed.ac.uk/euenterpriseslf/>> para. 121.

⁸⁷ See, e.g., 2004/483/EC: partnership agreement between the

In spite of these numerous examples of trade policies that take into account environmental, labour, and human rights, there does not exist a specific policy of imposing trade sanctions on particular companies that engage in global corporate abuse.

(vi) Labelling

In 1992, the European Union introduced an ‘ecolabel’, a voluntary scheme. Some 1000 licences in total were issued in 2011.⁸⁸ The ecolabel takes account of the impact of the product or service on the environment throughout its life-cycle on the entire globe, from raw material extraction in the pre-production stage to production, distribution, and disposal (‘from cradle to grave’). The European Commission together with the Member States—after consulting interest groups—sets

members of the African, Caribbean and Pacific group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 [2000] OJ L317/3 (the Cotonou Agreement); see also the EU-Cariforum States Economic Partnership Agreement of 25 March 2009 [2010] OJ C117E/17: The parties commit to implementing core labour rights and other ILO Conventions and multilateral environmental agreements to which they are parties ‘to ensure that foreign direct investment is not encouraged by lowering domestic environmental, labour or occupational health and safety legislation and standards or by relaxing core labour standards or laws aimed at protecting and promoting cultural diversity’ (Article 73).

⁸⁸

<http://ec.europa.eu/environment/ecolabel/about_ecolabel/facts_and_figures_en.htm#licenses>.

up the requirements for specific industries.⁸⁹

According to Article 6(3)(e) of the Ecolabel Regulation, ‘social and ethical aspects’ shall be considered, ‘where appropriate’, ‘e.g. by making reference to related international conventions and agreements such as relevant ILO standards and codes of conduct’. To date, however, the ecolabel does not include social standards, not even in industries prone to abuse such as footwear, textiles, personal computers, televisions, and paper.⁹⁰

In order to control the use of the ecolabel, competent bodies in the Member States shall verify that the products comply with the criteria ‘on a regular basis’, upon complaint, and in the form of ‘random

⁸⁹ See procedure in annex I of Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel [2010] OJ L27/1 (Ecolabel Regulation).

⁹⁰ Commission Decision 2009/563/EC of 9 July 2009 on establishing the ecological criteria for the award of the Community eco-label for footwear [2009] OJ L196/27; Commission Decision 2009/567/EC of 9 July 2009 establishing the ecological criteria for the award of the Community Ecolabel for textile products [2009] OJ L197/70, 29; Commission Decision 2005/341/EC of 11 April 2005 establishing ecological criteria and the related assessment and verification requirements for the award of the Community eco-label to personal computers [2005] OJ L115/1; Commission Decision 2009/300/EC of 12 March 2009 establishing the revised ecological criteria for the award of the Community Eco-label to televisions [2009] OJ L82/3; Commission Decision 2002/741/EC of 4 September 2002 establishing revised ecological criteria for the award of the Community eco-label to copying and graphic paper and amending Decision 1999/554/EC [2002] OJ L237/6.

spot-checks'.⁹¹ False or deceitful advertising of the ecolabel may be challenged as unfair commercial practice. Directive 2005/29 prohibits companies from advertising a label they have not properly obtained.⁹²

In sum, when it comes to global corporate social accountability, the European ecolabel is piecemeal. It lacks a potent enforcement mechanism to supervise compliance throughout the whole supply chain and does not take social issues into account.

(vii) Reporting Obligations

The EU Accounting Directives have harmonised disclosure standards to some extent. Companies must produce an annual report of their financial position that includes an analysis of, 'where appropriate, non-financial key performance indicators relevant to the particular business, including information relating to environmental and employee matters'.⁹³ Neither

⁹¹ Article 10(2) of the Ecolabel Regulation.

⁹² Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 202/65/EC of the European Parliament and the Council and Regulation (EC) 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22 (Unfair Commercial Practices Directive); see also J Bornkamm in H Köhler and J Bornkamm, *Gesetz gegen den unlauteren Wettbewerb* (München, C.H. Beck, 2012) s 5, paras. 4.173-4.174.

⁹³ Article 36(1) of the Seventh Council Directive of 13 June 1983

environmental nor social reporting is clearly defined, although Commission Recommendation 2001/453/EC provides some guidance on environmental issues. The reporting duties are shareholder oriented. Thus, negative impact on social rights, human rights, or the environment is irrelevant if it is not of financial interest to the company. Under the EU's eco-management and audit scheme (EMAS), companies have to produce an environmental performance statement.⁹⁴ But participation in EMAS is voluntary. To summarise, reporting obligations on global environmental and social matters are limited in present law.

(viii) Private Enforcement

May companies be sued in European courts for corporate abuses abroad? To answer this question, two issues have to be distinguished: First, are European courts competent to adjudicate such cases? And second, if they are, which law do they apply?

The Brussels I Regulation determines legal forum in the EU.⁹⁵ Article 2(1) says that (legal) persons shall

based on the Article 54 (3) (g) of the Treaty on consolidated accounts (83/349/EEC) [1983] OJ L193/1.

⁹⁴ Regulation (EC) 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS) repealing Regulation (EC) 761/2011 and Commission Decisions 2001/681/EC and 2006/193/EC [2009] OJ L342/1.

⁹⁵ Council Regulation (EC) 44/2001 of 22 December 2000 on

be sued where they are domiciled. Article 60(1) explains that the place where a legal person is domiciled is the place where it has its statutory seat, central administration, or principal place of business. The Brussels I Regulation does not confer jurisdiction on European courts if the defendant is not domiciled in an EU Member State. This means that pursuant to Article 2(1) third-country subsidiaries of EU companies may not be sued in European courts.

However, Article 4(1) stipulates that jurisdiction over civil law claims against defendants domiciled in third countries may also be determined by Member States ('residual jurisdiction'). Several EU countries provide for jurisdiction of their courts if a company has secondary establishments or assets within their territory.⁹⁶ In tort claims, the place where the event giving rise to the damage occurs—and not only the place where the damage is sustained—may also be a sufficient link to establish jurisdiction.⁹⁷ Some Member States also provide jurisdiction over non-EU defendants if there is no other forum available abroad (*forum necessitates*).⁹⁸

jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L012/1 (Brussels I Regulation).

⁹⁶ See, e.g., Article 23 of the German Civil Procedure Code (*Zivilprozessordnung*).

⁹⁷ *Ibid.*

⁹⁸ See University of Edinburgh, 'Legal Framework on Human Rights

Turning to the second question of the applicable law, the general answer is: The law of the country applies where the corporate abuse takes place. This means that even if a Member State court is competent for adjudicating a claim of corporate abuse abroad it will not, in principle, base its decision on Member State law.

The Rome I Regulation determines the applicable law concerning contractual obligations.⁹⁹ Article 8 is relevant if corporate abuse takes place in the context of an individual employment contract. In general, the law of the country in which or from which the employee habitually carries out the work applies; failing which, the place of business through which the employee is engaged.¹⁰⁰ Parties may also agree to apply the law of a different jurisdiction.¹⁰¹

If corporate malfeasance does not occur in connection with a contract, the Rome II Regulation is the relevant framework.¹⁰² Article 4(1) says that in tort

and the Environment Applicable to European Enterprises Operating Outside the European Union' (2010) <<http://www.law.ed.ac.uk/euenterpriseslf/>> para. 212.

⁹⁹ Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L177/6 (Rome I Regulation).

¹⁰⁰ Article 8(2) and (3) of the Rome I Regulation.

¹⁰¹ Article 8(1) of the Rome I Regulation.

¹⁰² Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations [2007] OJ L199/40 (Rome II Regulation).

claims the law of the country in which the damage occurs (*lex loci damni*) applies. Thus, in cases of misconduct in a third country the law of that country governs.¹⁰³

In the case of environmental damage, the claimant may choose between the law of the country where the damage took place and the law of the country in which the event giving rise to the damage occurred (Article 7). But the term ‘event giving rise to the damage’ is not construed so broadly as to include, for instance, instructions by the European parent directed at its third country factory, which eventually lead to environmental damage.¹⁰⁴ Therefore, in cases of environmental damage too, the law of the third country usually applies.

There are two exceptions to the rule that third country law governs cases of corporate abuse abroad. First, Article 16 stipulates that ‘mandatory provisions’ of the Member State law remain applicable irrespective of the law otherwise applicable to the dispute. ‘Mandatory provisions’ are interpreted as norms being ‘so crucial for the protection of the political, social or economic order in the Member State concerned as to

¹⁰³ Only if the tort is manifestly more closely connected with another country, the domestic law of that country applies: Article 4(3) of the Rome II Regulation.

¹⁰⁴ See A Junker in *MünchKommBGB*, 5th edn (München, C.H. Beck, 2010), VO (EG) 864/2007, Article 7, para. 25.

require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State'.¹⁰⁵ Second, Article 26 of the Rome II Regulation says that the application of foreign law may be refused 'if such application is manifestly incompatible with the public policy (*ordre public*) of the forum'. In *Krombach* the ECJ held that in 'exceptional cases' of a 'manifest breach' of human rights, states may invoke the *ordre public* exception.¹⁰⁶ However, it appears that neither Article 16 on mandatory provisions nor Article 26 on *ordre public* have so far played an important role in cases before EU courts concerning corporate abuse abroad.

A last issue is important to remember in the context of private enforcement: The corporate veil is not pierced. According to Member States' company law, parents are generally not responsible for their subsidiaries' wrongdoing. The principle of limited

¹⁰⁵ Joint Cases C/369/96 and C-376/96 *Arblade* [1999] ECR I-8453, para. 30.

¹⁰⁶ Case C-7/98 *Krombach* [2000] ECR I-1935, para. 44; see also University of Edinburgh, 'Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union' (2010) <<http://www.law.ed.ac.uk/euenterpriseslf/>> para. 224.

liability is safeguarded.¹⁰⁷ Thus, there is no claim against the Belgian parent if its Congolese subsidiary orders the use of a poisonous chemical in a Congolese factory.

II. THEORETICAL UNDERPINNINGS

The following sections deal with the ideas that underlie the European enforcement of global corporate social accountability.

A. IS THERE A REGULATORY DEFICIT?

The economist Friedman once famously held that businesses have no ‘social responsibility other than to

¹⁰⁷ Company law only allows in the most exceptional cases that the corporate veil is pierced. For example UK law permits the lifting of the corporate veil only if it is a ‘mere façade concealing the true facts’ (*Woolfson v Strathclyde* RC 1978 SC (HL) 90, 96 per Lord Keith of Kinkel; *Adams v Cape Industries plc* [1990] Ch. 433, 539-541 per Slade LJ; *Trustor AB v Smallbone* (No. 2) [2001] 3 All ER 987, 995f-h per Sir Andrew Morritt V-C.), if the company has been formed to evade existing legal obligations (*Jones v Lipman* [1962] 1 All ER 442; *Gilford Motor Co. Ltd. v Home* [1933] Ch. 935) or if it represents a ‘device or sham or cloak’ (*Adams v Cape Industries plc* [1990] Ch. 433, 540 per Slade LJ); ‘impropriety’, ‘*mala fide*’, or ‘the interests of justice’ are not enough to pierce the corporate veil (*Trustor AB v Smallbone* (No. 2) [2001] 3 All ER 987, 995f per Sir Andrew Morritt V-C; *Adams v Cape Industries plc* [1990] Ch. 433, 536-538 per Slade LJ; *Ord v Belhaven Pubs Ltd.* [1998] EWCA Civ 243 [1998] BCC 607, 614-615 per Hobhouse LJ).

make as much money as possible for their stockholder'.¹⁰⁸ Not everyone shares Friedman's opinion, though. There are several voices on the international plane that point to a regulatory deficit. It is argued that there is a mismatch between economic phenomenon and regulatory reach. The following excerpts may illustrate these concerns. For instance, Ruggie, the UN Special Representative for Business and Human Rights, says:

[H]istory teaches us that markets pose the greatest risks—to society and business itself—when their scope and power far exceed the reach of the institutional underpinnings that allow them to function smoothly and ensure their political sustainability. This is such a time and escalating charges of corporate-related human rights abuses are the canary in the coal mine, signalling that all is not well.

The root cause of the business and human rights predicament today lies in the governance gaps created by globalization—between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.¹⁰⁹

¹⁰⁸ M Friedman, *Capitalism and Freedom* (Chicago, University of Chicago Press, 1962).

¹⁰⁹ UN Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and

According to Ruggie,

[t]he last two decades of the 20th century witnessed perhaps the most dramatic implosion of space and time in all of economic history. The integration of China into the world economy, the collapse of the Soviet empire, and privatization and deregulation everywhere created the conditions for vast offshore production networks, sometimes including ‘dark satanic mills’ of their own. At the same time, extractive companies, such as oil and gas, were pushing into ever-more remote areas, often inhabited by indigenous peoples resisting their incursion, or operating in host countries engulfed by the civil wars and other forms of serious social strife which marred that decade, and in some areas continue today.¹¹⁰

Other voices allege that

[i]n reality, multinational corporations not infrequently escape effective accountability for their activities, especially in those countries where regulation is weak, enforcement lax, the judicial system ineffective, the government corrupt, or simply inadequate. But even where none of these problems exist, in order to encourage and protect foreign direct investment, developing states may have to conclude bilateral investment treaties which restrict their ability to regulate foreign investors, who can if necessary resort to

transnational corporations and other business enterprises, John Ruggie’ (7 April 2008) <<http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>> 3.

¹¹⁰ J Ruggie, ‘Sir Geoffrey Chandler Speaker Series, The Royal Society for the Encouragement of Arts, Manufacture and Commerce’ (Speech, London, 11 January 2011) <http://www.ohchr.org/Documents/Press/ChandlerLecture_Final.pdf> 1-2.

binding arbitration in case of breach. ... It is clear that international efforts to promote corporate environmental accountability are underdeveloped and frequently ineffective against powerful multinationals.¹¹¹

Moreover, international law cannot work without effective regulation. Human rights protection, for instance, presupposes a functioning judiciary.¹¹²

The preface of the OECD Guidelines on Multinational Enterprises acknowledges that

[t]oday's competitive forces are intense and multinational enterprises face a variety of legal, social and regulatory settings. In this context, some enterprises might be tempted to neglect appropriate standards and principles of conduct in an attempt to gain undue competitive advantage.¹¹³

Muchlinski has identified a 'jurisdictional veil' that often shields corporations from accountability: effective legal redress is not always available in a world fragmented into many different jurisdictions.

The globalisation of business activity through the operations

¹¹¹ P Birnie, A Boyle, C Redgwell, *International Law & the Environment*, 3rd edn (Oxford, Oxford University Press, 2009) 326, 329.

¹¹² See, e.g., S Oeter, 'The global legal order: an international lawyers' perspective inspired by institutionalism' (TransState working papers, No. 109, 2009) <<http://hdl.handle.net/10419/29687>> 23.

¹¹³ Organisation for Economic Co-operation and Development, 'OECD Guidelines for Multinational Enterprises' (revised 2000) <www.oecd.org/dataoecd/56/36/1922428.pdf>.

of integrated [multinational enterprises] ... allows for a further method of externalising risk away from the group, using not only corporate separation but the separation of the global legal order into discrete national and sub-national jurisdictions. In effect the ‘corporate veil’ is being supplemented by a ‘jurisdictional veil’ that can be used to limit risk by reason of corporate separation.¹¹⁴

Access to justice in the multinational enterprise’s home country is often curtailed by jurisdictional and substantive law barriers, procedural hurdles, prohibitive costs, and the corporate veil protecting the parent company from liability for foreign subsidiaries.¹¹⁵

Especially in conflict zones environmental, labour, and human rights are supposedly vulnerable to corporate abuse. The former UN Secretary-General Annan found that

[t]he impact of the pursuit of economic interests in conflict areas has come under increasingly critical scrutiny. Corporations have been accused of complicity with human

¹¹⁴ P Muchlinski, ‘Limited liability and multinational enterprises: a case for reform?’ (2010) 34 *Cambridge Journal of Economics* 915, 920.

¹¹⁵ See also UN Human Rights Council, ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie’ (7 April 2008) <<http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>>; University of Edinburgh, ‘Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union’ (2010) <<http://www.law.ed.ac.uk/eenterpriseslf/>> para. 19, see also para. 23.

rights abuses, and corporate royalties have continued to fuel wars. It has become common knowledge that by selling diamonds and other valuable minerals, belligerents can supply themselves with small arms and light weapons, thereby prolonging and intensifying the fighting and the suffering of civilians.¹¹⁶

All these appraisals make the case for a regulatory deficit: There is a regulatory gap in the world economy, incongruence between law and fact, and a jurisdictional veil protecting companies from effective accountability.

Indeed, on the international level, the regulatory response to global corporate activities has been largely ineffective or absent. International law has been struggling for a long time to accommodate the expanding reach and influence of multinational enterprises. In the 1970s developing countries pushed for binding rules under the umbrella of the United Nations. But the endeavour failed. Another attempt for a mandatory framework was eventually made in 2003 by a working group of the UN Sub-Commission on the

¹¹⁶ UN Security Council, 'Report of the Secretary-General to the Security Council on the protection of civilians in armed conflict' (2001) S/2001/331 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/300/30/PDF/N0130030.pdf?OpenElement>> para. 61; see also UN Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (21 March 2011) <<http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>>; 11.

Promotion of Human Rights that published the draft ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’.¹¹⁷ However, the draft norms never became binding law.

We have also seen above that direct international obligations for corporations are rare.¹¹⁸ The *Kiobel* judgment suggests that enterprises fly beneath the international radar; they may be the machines that organise violations—however, without being themselves accountable under international law.¹¹⁹

‘Soft law’ instruments have enjoyed greater appeal than binding international rules. In 1976 the OECD adopted Guidelines for Multinational Enterprises, and a year later the ILO issued a Tripartite Declaration of Principles Concerning Multinational Enterprises. Each document was revised in 2000.¹²⁰ The UN Global

¹¹⁷ UN Sub-Commission on the Promotion and Protection of Human Rights, ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ (2003) UN Doc E/CN.4/Sub.2/2003/L.11 <www1.umn.edu/humanrts/links/norms-Aug2003.html>.

¹¹⁸ See chapter 2 (Context) I (Existing International and European Regulation on Global Corporate Social Accountability) A. (International law).

¹¹⁹ *Kiobel v Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) *reh’g en banc denied*, No. 06-4800-cv, 2011 WL 338048 (2d Cir. 4 February 2011).

¹²⁰ Organisation for Economic Co-operation and Development, ‘OECD Guidelines for Multinational Enterprises’ (revised 2000) <www.oecd.org/dataoecd/56/36/1922428.pdf>; International

Compact, the world's largest corporate social responsibility initiative on a voluntary basis, was launched in the same year.¹²¹

Private codes of conduct have spread as well. They often contain general principles and more detailed instructions and set out compliance mechanisms. These codes decide where the decision-making power should be located, how violations should be handled, and how third parties can participate.¹²² Teubner argues that such private codes are *legal* orders without a state: They must be classified as transnational hard law that is not subordinate to the soft law emanating from the international public sphere, which is diffuse and

Labour Organization, 'Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy' (revised 2000) <<http://www.ilo.org/public/english/employment/multi/download/english.pdf>>.

¹²¹ Further information available at <www.unglobalcompact.org>.

¹²² G Teubner, 'Selbst-Konstitutionalisierung transnationaler Unternehmen? Zur Verknüpfung „privater“ und „staatlicher“ Corporate Codes of Conduct' in S Grundmann et al (eds), *Unternehmen, Markt und Verantwortung: Festschrift für Klaus Hopt* (Berlin, De Gruyter, 2010) 8; O Dilling, M Herberg and G Winter, 'Introduction: Private Accountability in a Globalising World' in O Dilling, M Herberg and G Winter (eds), *Responsible Business: Self-Governance and Law in Transnational Economic Transactions* (Oxford, Hart Publishing, 2008) 8.

without enforcement mechanisms.¹²³

This looks like a topsy-turvy world: The regulated becomes the regulator.¹²⁴ Teubner acknowledges that the public sphere has an important role to play in placing pressure on the private sphere.¹²⁵ Indeed, evidence suggests that without public influence private codes deteriorate to little more than exercises in public relations.¹²⁶

Not everyone can identify a regulatory deficit in

¹²³ G Teubner, 'Selbst-Konstitutionalisierung transnationaler Unternehmen? Zur Verknüpfung „privater“ und „staatlicher“ Corporate Codes of Conduct' in S Grundmann et al (eds), *Unternehmen, Markt und Verantwortung: Festschrift für Klaus Hopt* (Berlin, De Gruyter, 2010) 8.

¹²⁴ See also LC Backer, 'Multinational Corporations as Objects and Sources of Transnational Regulation' (2008) 14 *ILSA Journal of International & Comparative Law* 26.

¹²⁵ G Teubner, 'Selbst-Konstitutionalisierung transnationaler Unternehmen? Zur Verknüpfung „privater“ und „staatlicher“ Corporate Codes of Conduct' in S Grundmann et al (eds), *Unternehmen, Markt und Verantwortung: Festschrift für Klaus Hopt* (Berlin, De Gruyter, 2010) 18-22.

¹²⁶ See, e.g., O de Schutter, 'The Accountability of Multinationals for Human Rights Violations in European Law' in P Alston (ed), *Non-State Actors and Human Rights* (Oxford, Oxford University Press, 2005) 227; B Hepple, *Labour Laws and Global Trade* (Oxford, Hart Publishing, 2005) 83, 86; S Deva 'Human Rights Violations by Multinational Corporations and International Law: Where From Here?' (2003/2004) 19(1) *Connecticut Journal of International Law* 1; T Bartley 'Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions' (2007) 113 *American Journal of Sociology* 297, 327.

this scenario of weak global public regulation. Host states are often wary that high standards may deter inward investment and hamper economic growth.¹²⁷ The WTO members declared at the Ministerial Conference in Singapore in 1996:

We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question.¹²⁸

The argument goes that workers in developing countries lose their jobs if they have to abide by the same labour standards as workers in developed countries; the only ones who profit from stricter global regulation would be developed countries.

However, allegations of protectionism lose their force when it comes to basic standards. The OECD suggests that non-discrimination and the elimination of forced and child labour might raise economic

¹²⁷ See J Wouters and C Ryngaert, 'Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction' (2009) 40 *George Washington International Law Review* 939, 953-954; O de Schutter, 'L'Incrimination Universelle de la Violation des Droits Sociaux Fondamentaux' (2004) 64 *Annales de Droit de Louvain* 209, 211.

¹²⁸ Singapore Ministerial Declaration (13 December 1996) WTO-Doc WT/MIN(96)/DEC
<http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm> para. 4.

efficiency.¹²⁹ Concerns that freedom of association and the right to collective bargaining would negatively affect economic performance seem unfounded.¹³⁰ Evidence indicates that businesses are more likely to invest in countries with stricter safeguards and enforcement of basic human and worker rights than in those countries where such rights are absent or poorly enforced.¹³¹ Moreover, apart from these economic considerations, there is the moral argument that rudimentary health and safety requirements, which protect against death and serious bodily harm, cannot be described as protectionist.

Environmental standards are subject to a contentious debate, too. Developing countries often reject demands by developed countries to pay for the conservation of the earth, since in the past it was developed countries that caused significant environmental damage that the whole world has to live

¹²⁹ OECD, 'Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade' (1996) <<http://browse.oecdbookshop.org/oecd/pdfs/free/2296031e.pdf>> 248.

¹³⁰ *Ibid* at 248; J Vandenberghe, 'On Carrots and Sticks: The Social Dimension of EU Trade Policy' (2008) 13(4) *European Foreign Affairs Review* 564–565; B Hepple, *Labour Laws and Global Trade* (Oxford, Hart Publishing, 2005) 57.

¹³¹ See OECD, 'International Trade and Core Labour Standards' (2002) <http://www.oecd.org/document/20/0,3343,en_39048427_39049464_42744852_1_1_1_1,00.html>.

with today.¹³² Double standards are alleged when developed countries ask for the respect of environmental laws that they have not respected during their own economic development.¹³³

The counter-argument: It is hardly convincing to allow even more devastating pollution and environmental destruction when climate change is threatening the entire globe. There is no equal right to violations—the transgression of one does not give another the right to do the same. Rather, this situation might call for developed countries to assume additional responsibility by, for example, refraining from financing environmental damage abroad and using their regulatory clout to prevent companies from harming the environment.¹³⁴

¹³² LD Guruswamy and KL Doran, *International Environmental Law in a Nutshell* (St. Paul, Thomson/West, 2007) 36.

¹³³ See D Bodansky and JC Lawrence, ‘Trade and Environment’ in D Bethlehem, D McRae, R Neufeld and I Van Damme, *The Oxford Handbook of International Trade Law* (Oxford, Oxford University Press, 2009) 507; see also P Driessen, *Eco-Imperialism: Green Power, Black Death* (Bellevue, Merril Press, 2003).

¹³⁴ See also the notion of ‘shared but differentiated responsibility’ in international environmental law, especially in the Kyoto Protocol to the United Nations Framework Convention on Climate Change (1998) 37 ILM 22 (10 December 1997) UN Doc. FCCC/CP(1997/7/Add.1.

B. ENFORCEMENT MEASURES: REMEDIES FOR THE REGULATORY DEFICIT?

With great power comes great responsibility. The CSA measures may contribute to holding businesses responsible for the global power it wields. The measures may be conceived as a means to bridge the regulatory gap in the world economy, a means to achieve congruence between law and fact, and to lift the jurisdictional veil.

European CSA enforcement may also provide guidance that is needed by companies for managing the environmental, labour, and human rights impact of their activities, especially in zones of weak governance.¹³⁵ Legal certainty is enhanced if companies know how they should behave in situations in which the host states' laws and practices breach fundamental rights.

But can European CSA measures really protect basic standards abroad? Are they capable of bridging the regulatory gap, achieving congruence between law and fact, and lifting the jurisdictional veil? In other words, are they effective?

One obvious problem is fact-gathering. It might not be easy to prove corporate abuse abroad. European

¹³⁵ J Ruggie, 'Sir Geoffrey Chandler Speaker Series, The Royal Society for the Encouragement of Arts, Manufacture and Commerce' (Speech, London, 11 January 2011) <http://www.ohchr.org/Documents/Press/ChandlerLecture_Final.pdf> 10.

administrations have, in general, no investigatory powers in third countries. On the other hand, these difficulties are not new as laws with extraterritorial dimensions, such as those prohibiting tax evasion, anti-competitive behaviour, corrupt practices, and sex tourism, already exist. European competition law, for instance, employs a sophisticated system of whistle-blowing, leniency, settlement mechanisms, international cooperation between law enforcement agencies, and private enforcement in order to detect cartel agreements which harm European markets but are concluded anywhere in the world.¹³⁶ In the context of corporate social accountability, facts collected by non-governmental organisations may help investigating violations. In addition, companies may themselves be obliged, to some extent, to disclose evidence on their performance. While fact-finding is a common difficulty, challenges of effectiveness vary according to the particular enforcement measure employed.

(i) Publication of Violations

Publication of violations may be an efficient tool. Multinational enterprises invest heavily in the advertisement of global brands and trademarks and may be particularly sensitive to negative publicity.

¹³⁶ See for an overview <http://ec.europa.eu/competition/antitrust/overview_en.html>.

Companies may also benefit if, after a formal procedure, it is confirmed that there had been no violation.

(ii) Export Credits, Subsidies, and Other Financial Benefits

Public policy on financial benefits may significantly influence the behaviour of economic actors. Export credit agencies are ‘strategic development linchpins’ that may play ‘an enormous part in the environmentally harmful impacts of corporate activity’.¹³⁷

(iii) Public Procurement

Social or environmental considerations often raise the price of the procured product. Additional contract conditions may create additional production costs and reduce competition if some companies are unable to meet them. In addition, administrations may have difficulties in controlling compliance with social and environmental standards. Companies may circumvent exclusion criteria by setting up new companies as mere

¹³⁷ European Parliament, ‘Working document on Application of certain guidelines in the field of officially supported export credits, Committee on International Trade Rapporteur: Yannick Jadot’ (24 June 2010) <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/inta/dt/819/819075/819075en.pdf> 3.

shells to obfuscate entanglements in corporate abuse.¹³⁸ Inserting social and environmental criteria may also lead to more discretion on the part of authorities, which in turn may be abused for non-transparent and discriminatory policies.¹³⁹ On the other hand, additional requirements can sometimes enhance efficiency in the long run (e.g. wood from sustainable forests).¹⁴⁰ Given the volume of EU public markets, public procurement policies are also likely to have a significant impact.¹⁴¹

(iv) Fines

This is traditional command and control regulation. It requires high standards of judicial review and procedural rights for the company concerned, which may be expensive.¹⁴² On the other hand, formal legal proceedings may help companies by refuting unfounded and vexatious claims.

¹³⁸ See S Arrowsmith in S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law* (Cambridge, Cambridge University Press, 2009) 129.

¹³⁹ *Ibid* at 128-129.

¹⁴⁰ *Ibid* at 128.

¹⁴¹ PwC, London Economics and Ecorys, 'Public Procurement in Europe – Cost and Effectiveness' (Study prepared for the European Commission, 2011) <http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/cost-effectiveness_en.pdf> 4, assumes that public purchasing is valued at 3.5 percent of the EU's GDP.

¹⁴² See below chapter 3 (Limits of Lawfulness) I. (Lawfulness under European Law) B. (Fundamental Rights and Other General Principles of EU Law).

(v) Trade Measures

Trade measures are often criticised for being blunt and even counterproductive: Barring imports of products manufactured by child labour might, for example, drive child employees out of export trades. These same children may not then find themselves in school. Instead, they may be displaced to even less salubrious occupations, such as prostitution.¹⁴³ Trade sanctions, it is also argued, ‘merely keep poor countries poor’.¹⁴⁴

On the other hand, given the size of international trade, sanctions targeted at individual companies that have committed abuses may lead to a significant improvement of working conditions and environmental performance.¹⁴⁵

(vi) Labelling

‘Eco’ or ‘fair trade’ labelling can raise transaction costs and reduce economies of scale and scope if different

¹⁴³ C Forcese, ‘Regulating Multinational Corporations’ in D Bethlehem, D McRae, R Neufeld and I Van Damme, *The Oxford Handbook of International Trade Law* (Oxford, Oxford University Press, 2009) 738.

¹⁴⁴ The Economist, ‘Environmental Imperialism: GATT and Greenery’ (15 February 1992) 78.

¹⁴⁵ C Forcese, ‘Regulating Multinational Corporations’ in D Bethlehem, D McRae, R Neufeld and I Van Damme, *The Oxford Handbook of International Trade Law* (Oxford, Oxford University Press, 2009) 736.

criteria have to be fulfilled for different markets.¹⁴⁶ However, the opposite may be true for harmonised labelling throughout Europe. There are few international eco-labels and many different national systems.¹⁴⁷ An effective European-wide label may in fact facilitate economies of scale and scope and reduce distortions of competition.

(vii) Reporting Obligations

Reporting obligations create significant costs for business. They may be disproportionate for small and medium-sized companies. On the other hand, human rights reporting in zones of weak governance may help to assess and prevent significant financial risks. Ruggie argues that

[s]uch risks to companies include delays in design, siting, granting of permits, construction, operation and expected revenues; problematic relations with local labour markets; higher costs for financing, insurance and security; reduced output; collateral impacts such as diverted staff time and reputational hits; and possible project cancellation, forcing a company to write off its entire investment and forgo the value of its lost reserves, revenues and profits, which can run into several billion dollars in the latter case.

¹⁴⁶ D Wilsher in S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law* (Cambridge, Cambridge University Press, 2009) 413-414, 421.

¹⁴⁷ *Ibid* at 409.

What appears to be happening is that such costs are atomized within companies, spread across different internal functions and budgets and not aggregated into a single category that would trigger the attention of senior management and boards. However, when added up, some of these risks could well count as being “material” even according to the narrowest definitions and, if unaddressed, could require disclosure under existing law.¹⁴⁸

Specifying global reporting obligations in the field of environmental, labour, and human rights may therefore enhance legal certainty and transparency and protect shareholders’ interests.

(viii) Private Enforcement

Private enforcement, i.e. rights being vindicated in courts by private persons, may provide for an efficient allocation of resources. If fundamental environmental, labour, and human rights are directly enforceable in EU Member States’ courts, those who suffer damage will enforce the law—and not only public administrations with limited resources and information. This may help to detect violations, empower victims, and deter companies from committing abuses. Private enforcement may save public resources if procedural

¹⁴⁸ J Ruggie, ‘Business and Human Rights: Further steps toward the operationalization of the protect, respect and remedy framework’ (9 April 2010) A/HRC/14/27 <<http://www.reports-and-materials.org/Ruggie-report-2010.pdf>> paras. 70, 72.

costs are borne by the litigant who loses the case. Similar ideas have been influential in EU competition law.¹⁴⁹

Private enforcement however requires that ‘market failures’ are addressed. Cumbersome procedures and lack of financial means may hamper private enforcement. Non-governmental organisations or public administrations may have to step in where there is no immediate damage to individuals that is amenable to monetary compensation (as is often the case with environmental damage).¹⁵⁰

(ix) Why should the EU harm European business?

All enforcement measures, from publication of violations to private enforcement, raise one central issue: What interest would the European Union have in implementing global corporate social accountability in Europe? To put it bluntly: Why should the EU harm European business?

One argument could be that the CSA measures might play a part in levelling the playing field of regulation and preventing a race to the bottom. For

¹⁴⁹ See for an overview <<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>>; see also Case C-453/99 *Courage* [2001] ECR I-6297.

¹⁵⁰ The rationale of empowering non-governmental organisations with legal standing in court proceedings underlies the Aarhus Convention 1998, 2161 UNTS 450 (No. 37770) and European and national legislation that transposes the Aarhus Convention.

example, the export credit agencies of EU Member States compete fiercely against each other to open up foreign markets for their companies.¹⁵¹ This has already led to some harmonisation of export credit policies on the European level in order to prevent subsidy wars but there is no European harmonisation of social or environmental criteria for export credits.¹⁵² This situation risks encouraging EU Member States to support projects with weak or no environmental or social safeguards.¹⁵³ A European CSA policy on export credits stops this race to the bottom among EU Member States.

Admittedly, the race to the bottom is only stopped so far. The playing field is levelled between EU

¹⁵¹ European Parliament, ‘Working document on Application of certain guidelines in the field of officially supported export credits, Committee on International Trade Rapporteur: Yannick Jadot’ (24 June 2010) <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/inta/dt/819/819075/819075en.pdf> 3.

¹⁵² Council Directive 98/29/EC of 7 May 1998 on harmonisation of the main provisions concerning export credit insurance for transactions with medium and long-term cover [1998] OJ L148/22 does not contain any provisions on refusal or withdrawal of credits in case of violations of environmental, labour, and human rights standards.

¹⁵³ European Parliament, ‘Working document on Application of certain guidelines in the field of officially supported export credits, Committee on International Trade Rapporteur: Yannick Jadot’ (24 June 2010) <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/inta/dt/819/819075/819075en.pdf> 3.

Member State credit agencies, not between all credit agencies worldwide. This does not mean that the goal of preventing destructive competition is thwarted altogether—for instance, general EU subsidy discipline also functions even though there is no complete legal framework for subsidies in place on the international level.¹⁵⁴

European CSA measures may still encourage best practices and invite other states to follow. They may produce short-term costs but may save substantial sums in the long run if they contribute to sustainable development and to preventing climate change. Furthermore, other CSA measures may well achieve a global level playing field. For instance, if all companies in the world can be sued in European courts for fundamental violations, then European companies are not treated unfavourably. Such sweeping regulation may however engender problems under international law.¹⁵⁵

Finally, penalising forced labour, child labour, and great environmental damage might be a moral decision worth the costs. It might even amount to a legal

¹⁵⁴ The WTO subsidies regime is far from universal; see for more information http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm#subsidies.

¹⁵⁵ See below chapter 3 (Limits of Lawfulness) II. (Lawfulness under International Law) B. (Customary International Law: Lawfulness of Extraterritorial Jurisdiction).

obligation. Case law of the European Court of Human Rights suggests that domestic measures with extra-territorial effects must not infringe human rights.¹⁵⁶ This duty is especially relevant in the context of subsidies, export credits, and public contracts. Public money must not finance corporate abuses abroad. Authorities may incur liability if they knowingly buy products from a company that makes use of forced labour.

C. SUBSTANTIVE STANDARDS: DECENTRALISED ENFORCEMENT OF UNIVERSAL LAW?

(i) The Paradigm of Universalism

The CSA measures employ a structure that is marked by extraterritorial jurisdiction to prescribe and internal jurisdiction to enforce: Rules concerning behaviour abroad are enforced within the EU. By applying rules to situations in other countries the measures seem to be premised on a claim to universalism, i.e. the existence of norms that apply all over the world, the existence of a global public order.¹⁵⁷ The assumption is that the

¹⁵⁶ *Soering v United Kingdom* (1998) 11 Eur. Ct. H. R. para. 91; see also *Drozd & Janousek v France & Spain* (1992) 14 EHRR 745, paras. 91, 97.

¹⁵⁷ See also A von Bogdandy/S Dellavalle, 'Universalism and Particularism as Paradigms of International Law' (International Law and Justice Working Papers, IILJ Working Paper 2008/3)

international community has moved away from formal sovereign equality towards a value-oriented conception. The International Tribunal for the Former Yugoslavia has put it like this:

A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.¹⁵⁸

Tomuschat contends that

protection is afforded by the international community to certain basic values even without or against the will of individual States. All of these values are derived from the notion that States are no more than instruments whose inherent function it is to serve the interests of their citizens

<<http://www.iilj.org/publications/documents/2008-3.Bogdandy-Dellavalle.pdf>>.

¹⁵⁸ *Prosecutor v. Dusko Tadic*, Appeals Chamber Judgment, IT-94-1-A, 15 July 1999. A von Bogdandy/S Dellavalle, 'Universalism and Particularism as Paradigms of International Law' (International Law and Justice Working Papers, IILJ Working Paper 2008/3) <<http://www.iilj.org/publications/documents/2008-3.Bogdandy-Dellavalle.pdf>> 41, point out that Thomas Hobbes was the first political philosopher who overturned the hierarchy between individual and community; the centre stage of political life has to be taken by individuals, according to Hobbes, they are the starting point of any legitimation of authority: 'Like Copernicus reversed the position between earth and sun, giving for the first time centrality to the second, so turned the "Copernican revolution in political thought" the order of society upside down'. (citing Norberto Bobbio, Michelangelo Bovero, *Società e stato nella filosofia politica moderna*, Il Saggiatore, Milano 1979).

as legally expressed in human rights¹⁵⁹

Universalism understood in this way is based on public bodies as agents of a common law of humankind.

(ii) Particularism as a Challenge to Universalism

The concept of universal norms is subject to a number of critiques. First of all, the epistemological foundations may be criticised. Natural law theories assume eternal rules for all human beings anywhere at any time, i.e. norms that are independent of history, culture, society, etc. But where these universal norms come from and how they can be recognised and distinguished from other rules is far from clear.¹⁶⁰ Even the European Court of Human Rights understands the European Convention on Human Rights as a ‘living instrument’ to be interpreted ‘in the light of present-day conditions’.¹⁶¹ The US Supreme Court acknowledges that the law has lost its ‘metaphysical cachet on the road to modern realism’.¹⁶²

If we take for example the principle of non-discrimination, which is part of general international

¹⁵⁹ C Tomuschat, ‘International law: Ensuring the survival of mankind on the eve of a new century’ (2001) 281 *Recueil des Cours* 13, 161-162.

¹⁶⁰ See, e.g., JLM Mackie, *Ethics: Inventing Right and Wrong* (London, Penguin Books, 1977).

¹⁶¹ *Tyrer v United Kingdom* (1978) 2 EHRR 1, para. 31; *Loizidou v Turkey* 310 Ezr. Ct. H. R. (ser. A), para. 71.

¹⁶² *Sosa v Alvarez-Machain* 542 U.S. 692 (2004) 730-731.

law (and, at least to some extent, of *jus cogens*):¹⁶³ Although it is widely embraced today, its definite and concrete contours seem far from clear. Advocate General Sharpston explained in *Bartsch*:

A classic formulation of the principle of equality, such as Aristotle's 'treat like cases alike' leaves open the crucial question of which aspects should be considered relevant to equal treatment and which should not. Any set of human beings will resemble each other in some respects and differ from each other in others. A maxim like Aristotle's therefore remains an empty rule until it is established what differences are relevant for the purposes at hand. For example, if we criticise a law banning redheads from restaurants as being unjust, that is based on the premiss that, as regards the enjoyment of a meal in a restaurant, hair colour is irrelevant. It is therefore clear that the criteria of relevant resemblances and differences vary with the fundamental moral outlook of a given person or society.

A moment's historical reflection will show that statements about 'equality', when deconstructed, have often meant 'equality of treatment, in particular respects, for those inside the magic circle' rather than 'equality of treatment in every relevant respect for absolutely everyone'. In the Athens of Pericles, citizens of the polis might claim a right to equal treatment in respect of access to justice or civic advancement; but the concept of equality excluded equal

¹⁶³ See above chapter 1 (Content: The Elements of European CSA Measures) II. (Explaining the Matrix) A. (First Element: Substantive Provisions; Environmental, Labour, and Human Rights Standards).

treatment with citizens in those respects for metics or slaves. Spartan equality – a rather different model – similarly excluded Helots and slaves. Both (naturally) excluded women. Nearer to our times, the Declaration of Independence of the United States of America may have proclaimed that ‘all men are created equal’, but it took the Civil War and a rather long aftermath before truly equal treatment began to extend to the descendants of black slaves. Discrimination on grounds of religion seemed perfectly natural – indeed, ordained by God – during large portions of the history of Europe and the Mediterranean basin.¹⁶⁴

In short: Enforcing the European understanding of non-discrimination all over the world, using European political power like an Archimedian lever to influence behaviour worldwide, may be subject to claims of new imperialism.¹⁶⁵

(iii) Fragmentation as a Challenge to Universalism

Universalism is not only criticised as a natural law concept; it is also criticised in positive international law. The assumption of a global public order as a coherent normative body is contested. Rosas observes that this is a ‘confusing world order full of

¹⁶⁴ Sharpston AG in Case C-427/06 *Bartsch* [2008] ECR I-7245, paras. 44-45 (footnotes omitted).

¹⁶⁵ See also M Koskeniemi, ‘International Legal Theory and Doctrine’ in Max Planck Encyclopedia of Public International Law <<http://www.mpepil.com>>.

inconsistencies, anomalies and weaknesses'.¹⁶⁶ The International Law Commission concludes that 'no homogenous, hierarchical meta-system is realistically available'.¹⁶⁷ According to some observers, the seminal *Kadi* judgment of the ECJ confirms a vision of the global regime that is horizontal, heterarchical, and segregated.¹⁶⁸ The ECJ declared that neither the UN Charter nor any other international agreement can 'affect ... the autonomy of the Community legal system'; the EU is an 'internal' and 'autonomous legal system which is not to be prejudiced by an international agreement'.¹⁶⁹

The system theory extends the concept of

¹⁶⁶ A Rosas, 'The Death of International Law?' (2009) 20 *Finnish Yearbook of International Law*, 115, 120.

¹⁶⁷ International Law Commission, 'Fragemtnation of Fragmentation of International Law: Difficulties Arising form the Diversification and Expansion of International Law' A/CN.4/L682 <http://untreaty.un.org/ilc/documentation/english/a_cn4_l682.pdf> 249 (italics omitted); see also International Law Commission, 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties Arising form the Diversification and Expansion of International Law' (2006) II/2 *Yearbook of the International Law Commission* <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf>.

¹⁶⁸ G de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*' (Jean Monnet Working Paper 01/09) <<http://centers.law.nyu.edu/jeanmonnet/papers/09/090101.pdf>> 34.

¹⁶⁹ Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-6351, paras. 282, 316, 317.

fragmentation: Neither global, nor regional, nor national political systems enjoy supremacy over other societal spheres. It is not a world society under the leadership of interstate politics that has emerged but a fragmented process in which politics do not inhabit the leading role.¹⁷⁰ The political system is only one among other systems of society without having full control or power over them. Schütz augurs that all order possibly hoped for, in the politics and law of a world society, ‘is of the precarious, future exposed, contingent and ultimately uncontrollable kind: order produced by noise’.¹⁷¹

(iv) Sublating Particularism and Fragmentation

While particularism questions natural law foundations of universalism, it cannot explain persuasively why normativity should stop at the border. This seems to be an antiquated position in an era of global interdependence. Also, while universalism can be linked to disputable natural law theories it must not necessarily be so; other sources of legitimacy are conceivable. Universal norm construction can also be

¹⁷⁰ G Teubner, ‘Global Bukowina: Legal Pluralism in the World Society’ in G Teubner (ed), *Global Law Without A State* (Dartmouth, Aldershot, 1997) 5.

¹⁷¹ A Schütz, ‘The Twilight of the Global *Polis*: On Losing Paradigms, Environing Systems and Observing World Society’ in G Teubner (ed), *Global Law Without A State* (Dartmouth, Aldershot, 1997) 286.

predicated on consensus (*volenti non fit iniuria*). This is precisely the foundation of international customary law, which requires agreement (*opinio juris*) among the international community.¹⁷² *Jus cogens* also contains a consensual element since it is defined as a peremptory norm ‘*accepted and recognised* by the international community of States as a whole’.¹⁷³

While fragmentation questions the existence of a consistent global public order, it may also lend itself to different modes of global regulation, such as decentralised enforcement of international law. If global consensus exists over what is to be done but there is no centralised international polity to perform the task, existing political structures may step in as vicarious, substitutional authorities. The *US – Shrimp* case may exemplify how domestic agencies take decisions on issues of global concern.¹⁷⁴ In that case, the United States banned shrimp that was harvested in a way that harmed sea turtles. The government required

¹⁷² See above chapter 1 (Content: The Elements of European CSA Measures) II. (Explaining the Matrix) A. (First Element: Substantive Provisions; Environmental, Labour, and Human Rights Standards).

¹⁷³ Vienna Convention on the Law of Treaties (1969) A/CONF. 39/1 I/Add. 2, 287, Article 53.

¹⁷⁴ See also below chapter 3 (Limits of Lawfulness) II. (Lawfulness under International Law) B. (World Trade Agreements and other International Agreements); B Kingsbury, N Krisch, RB Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15, 21.

all US shrimp trawl vessels to use turtle excluder devices and the exporting countries had to have in place virtually identical regulations. According to the WTO Appellate Body, such regulation with an extraterritorial dimension can be lawful if based on international consensus or if international consensus has been at least sought in good faith.

Global consensus may also sublate conflicts between democratic principles and transnational regulation. The German Federal Constitutional Court held in the *Lisbon* judgment that supranational polities must not amount to an ‘inescapable political power’ that the people subject to it are ‘fundamentally incapable of freely determining’; it must derive from the ‘self-determination of the people in freedom and equality’.¹⁷⁵ Global consensus may reflect self-determination.

Legitimacy may also be enhanced by a technique that is often employed when legal systems interact with one another: the ‘complementarity’, ‘subsidiarity’, or ‘Solange’ approach. According to the Rome Statute of the International Criminal Court, states have the primary responsibility to prosecute international crimes. The International Criminal Court is only competent if states are unable or unwilling to genuinely carry out the

¹⁷⁵ *Lisbon judgment*, 2 BvE 2/08, para. 212.

investigation or prosecution.¹⁷⁶ The German Federal Constitutional Court said in the second *Solange* judgment that it will not review acts of the European Union so long as (*solange* in German) the EU effectively guarantees fundamental rights.¹⁷⁷ The European Court of Justice decided in the *Kadi* judgment that so long as the UN system does not offer sufficient judicial protection, the EU must do so.¹⁷⁸

The *Solange* technique permits the proper functioning of the system that is primarily concerned but allows at the same time that a second system steps in, as *ultima ratio*, if the first system does not function properly: The German system does not intervene in the EU system as long as it respects basic legal standards; the EU system does not intervene in the UN system as long as it respect basic legal standards. It is a form of checks and balances or of separation of powers between legal systems.

The CSA measures could use a similar technique by regulating only as a last resort in case that the first

¹⁷⁶ Final Act of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, ILM 999 (Rome Statute), Article 17.

¹⁷⁷ *Solange II judgment*, 2 BvR 197/83, 73, BVerfGE 339 [1987] 3 C.M.L.R. 225.

¹⁷⁸ Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-6351; see also T Stahlberg, 'Case T-85/09, *Kadi II*' (blog entry, 2010) <<http://courtofjustice.blogspot.com/2010/10/case-t-8509-kadi-ii.html>>.

system—i.e. the host state—fails to regulate. Employing basic normative standards such as *jus cogens* and international customary law may reflect the subsidiarity or complementarity of decentralised regulation by the EU.

This, however, does not imply that European standards always lack legitimacy. Not all enforcement measures represent extraterritorial regulation in the strict sense. They also contain decisions about which corporation shall receive EU money or contracts, or which products may enter the EU market. The analysis of lawfulness shows that there is scope for European standards under certain circumstances.¹⁷⁹

D. THE ADDRESSEE: SUBJECT TO HORIZONTAL HUMAN RIGHTS OBLIGATIONS?

The CSA measures are designed to ensure that companies respect human rights. According to the traditional understanding, however, human rights create obligations for public power, not for private power. Human rights are aligned vertically, not horizontally.

Natural law theory in the tradition of Kant and Locke does not start with this distinction but with the basic postulate that individuals have rights—which must be respected by everyone, public and private. It is

¹⁷⁹ See below chapter 3 (Limits of Lawfulness).

conventional wisdom in most legal orders that private persons must respect other persons' rights to life, physical integrity, etc. Hence, human rights do play a role horizontally. In many legal systems, however, they are not applied directly against private actors; instead, they are spelled out in detailed laws and regulations. Thus, tort law regulates in which cases persons may claim damages from others because of violations of their rights to physical integrity, etc.

International human rights law does not impose duties directly on private actors either.¹⁸⁰ But human rights conventions oblige states to protect human rights

¹⁸⁰ See above chapter 2 (Context) I. (Existing International and European Regulation on Global Corporate Social Accountability) A. (International Law).

from private interference.¹⁸¹ This makes clear that international human rights can be harmed by private actions, too.

In sum, while national and international law do not, in general, apply human rights directly against private actors, they both recognise that human rights must be protected from private actions as well. The horizontal impact of human rights is therefore, in reality, trite law.

Impetus for horizontal human rights may also stem from the system theory. According to this theory, world society is characterised by several competing societal sub-systems among which the public system is only one.¹⁸² Indeed, current law bestows rights on (sub-)

¹⁸¹ See, e.g., on the International Covenant on Civil and Political Rights, Human Rights Committee, ‘General Comment No. 31’ (26 May 2004), UN Doc. CCPR/C/21/Rev.1/Add.13, para 8: ‘[P]ositive obligations on State Parties to ensure Covenant Rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities’; see also European Court of Human Rights, *Z v United Kingdom* (2002) 34 Eur. H. R. Rep. 3, para 73: The European Convention ‘requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals’; see also Inter-American Court of Human Rights, *Velasquez Rodríguez v Honduras* (29 July 1988) Inter-Am. Ct. H. R. (ser. C) No. 4, para. 172.

¹⁸² G Teubner, ‘Global Bukowina: Legal Pluralism in the World

systems as well. To give one example, the free movement of goods is protected by EU law, to some extent, against individuals' fundamental freedom to assemble.¹⁸³ In other words, a state-based approach has not only been supplemented by an individual-based approach, but also by a system-based approach. In such a scenario it seems evident that human rights can also be restricted by other sub-systems, such as the economic sphere, not only by the State. Teubner argues that human rights must be protected in 'system/environment conflicts' from damaging effects of 'anonymous matrices of an autonomous communicative medium'.¹⁸⁴

Apart from the theoretical foundations of the horizontal application of human rights another issue arises: Which human rights apply horizontally? The draft 'Norms on the Responsibilities of Transnational

Society' in G Teubner (ed), *Global Law Without A State* (Dartmouth, Aldershot, 1997) 5.

¹⁸³ See Case C-265/95 *Commission v France* [1997] ECR I-6959; Case C-112/00 *Schmidberger* [2003] ECR I-5659.

¹⁸⁴ G Teubner, 'Die anonyme Matrix: Zu Menschenrechtsverletzungen durch "private" transnationale Akteure' (2006) 44 *Der Staat: Zeitschrift für Staatslehre und Verfassungsgeschichte, deutsches und europäisches Recht* 161, 179; see also: A von Bogdandy/S Dellavalle, 'Universalism and Particularism as Paradigms of International Law' (International Law and Justice Working Papers, IILJ Working Paper 2008/3) <<http://www.iilj.org/publications/documents/2008-3.Bogdandy-Dellavalle.pdf>> 27.

Corporations and Other Business Enterprises with Regard to Human Rights'¹⁸⁵ contemplate that '[w]ithin their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect' human rights.¹⁸⁶

Ruggie argues that corporations should face only a duty to *respect* human rights, not a duty to *protect* or *fulfil* human rights.¹⁸⁷ In his view business has a negative duty to abstain from any participation in human rights violations (a 'do no harm' rule), not a positive obligation to advance human rights. Thus, corporations may not discriminate against women

¹⁸⁵ UN Sub-Commission on the Promotion and Protection of Human Rights, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) UN Doc E/CN.4/Sub.2/2003/L.11 <www1.umn.edu/humanrts/links/norms-Aug2003.html>; see also D Weissbrodt and M Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97 *American Journal of International Law* 901; JH Knox, 'Horizontal Human Rights Law' (2008) 102 *American Journal of International Law* 12.

¹⁸⁶ UN Sub-Commission on the Promotion and Protection of Human Rights, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) UN Doc E/CN.4/Sub.2/2003/L.11 <www1.umn.edu/humanrts/links/norms-Aug2003.html> para. 1.

¹⁸⁷ J Ruggie, 'Current Developments: Business and Human Rights: The Evolving International Agenda' (2007) 101 *American Journal of International Law* 819, 825-827.

workers and may not be complicit in human rights violations committed by states; but they are not required to build schools and hospitals to further the human rights to education and health. Guaranteeing services of general public interests is the task of states, not of private actors with no democratic legitimacy. If corporations had positive obligations to organise public services on their own, they would effectively usurp the state's role. Ruggie maintains that companies are only specialised organs of society which do not have such a broad mandate independent of the state.

E. LIABILITY: PIERCING THE CORPORATE VEIL AND SUPPLY CHAIN RESPONSIBILITY?

The CSA measures contemplate that the company is not only accountable for its own actions but also for the violations perpetrated by its subsidiaries or suppliers. This contrasts with basic legal tenets. The US Supreme Court held in *Bestfoods*: 'It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation ... is not liable for the acts of its subsidiaries'.¹⁸⁸ Limited liability encourages investment and accordingly speeds up

¹⁸⁸ *United States v Bestfoods*, 524 US 51 (internal quotation marks omitted).

economic development.¹⁸⁹ Investors, especially those who do not take part in the management of the corporation, might be deterred if their personal assets were potentially threatened by creditor claims.¹⁹⁰ With limited liability, capital markets are more likely to be adequately funded. The separation of corporate assets and those of its owners stimulates entrepreneurship.¹⁹¹ Thus, it is a common principle of corporate law around the world that the corporate veil is not pierced, except in the most unusual circumstances.¹⁹²

¹⁸⁹ DH Barber, 'Piercing the Corporate Veil' (1981) 17 *Williamette Law Review* 371, 373.

¹⁹⁰ RB Thompson, 'Piercing the Corporate Veil' (1991) 76 *Cornell Law Review* 1036, 1040.

¹⁹¹ P Muchlinski 'Limited liability and multinational enterprises: a case for reform?' (2010) 34 *Cambridge Journal of Economics* 915.

¹⁹² Company law only allows in the most exceptional cases that the corporate veil is pierced. For example, UK law permits the lifting of the corporate veil only if it is a 'mere façade concealing the true facts' (*Woolfson v Strathclyde* RC 1978 SC (HL) 90, 96 per Lord Keith of Kinkel; *Adams v Cape Industries plc* [1990] Ch. 433, 539-541 per Slade LJ; *Trustor AB v Smallbone* (No. 2) [2001] 3 All ER 987, 995f-h per Sir Andrew Morritt V-C.), if it represents a 'device or sham or cloak' (*Adams v Cape Industries plc* [1990] Ch. 433, 540 per Slade LJ) or if the company has been formed to evade existing legal obligations (*Jones v Lipman* [1962] 1 All ER 442; *Gilford Motor Co. Ltd. v Home* [1933] Ch. 935); 'impropriety', 'mala fide', or 'the interests of justice' are not enough to pierce the corporate veil (*Trustor AB v Smallbone* (No. 2) [2001] 3 All ER 987, 995f per Sir Andrew Morritt V-C; *Adams v Cape Industries plc* [1990] Ch. 433, 536-538 per Slade LJ; *Ord v Belhaven Pubs Ltd.* [1998] EWCA Civ 243 [1998] BCC 607, 614-615 per Hobhouse LJ); *Amoco Cadiz* [1984] 2 Lloyd's Law Reports 304,

This principle has been occasionally criticised as being unfair to ‘involuntary creditors’. While contract creditors can choose freely their business partners and protect themselves against limited liability by demanding higher prices or more security, tort creditors cannot. They are victims of corporate wrongdoing without having accepted limited liability.¹⁹³ Therefore, in the European context, laws often require that limited liability corporations maintain a certain amount of capital.¹⁹⁴ Additionally, dangerous activities are governed by many different regulations designed to prevent harm to persons and the environment.

This may be different when multinationals operate in zones of weak governance. In such a scenario insufficient regulation combined with limited liability may leave victims of corporate abuse without compensation and multinational companies unaccountable: The subsidiary may not have enough assets to compensate for injuries and the parent

338; see also Judge Seth in *Union Carbide v Union of India* (4 April 1988) Decision of the Madhya Pradesh High Court at Jabalpur, Civil Revision No. 26 of 88.

¹⁹³ See P Muchlinski ‘Limited liability and multinational enterprises: a case for reform?’ (2010) 34 *Cambridge Journal of Economics* 915, 918; M Koebele, *Corporate Responsibility Under the Alien Tort Statute: Enforcement of International Law through US Torts Law* (Leiden, Martinus Nijhoff, 2009) 283, fn 20.

¹⁹⁴ See, e.g., in Germany Section 5(1) of the Law on Private Limited Liability Companies (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung, GmbHG*).

company may be protected due to its legal separation from the subsidiary.¹⁹⁵

While limited liability is usually respected in civil law, public law knows many exceptions to the rule. The theory of control is used in competition law, in environmental and financial regulations, and in anti-corruption laws. The European Court of Justice has confirmed that the parent company may be fined for the anti-competitive behaviour of its wholly owned

¹⁹⁵ See also P Muchlinski, ‘Limited liability and multinational enterprises: a case for reform?’ (2010) 34 *Cambridge Journal of Economics* 915, 918-919; *Case concerning the Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)* (Second Phase) (*Barcelona Traction*) [1970] ICJ Rep 3, Separate Opinion of President Bustamante y Rivero, 55, 58 (translation); J Wouters and C Ryngaert, ‘Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction’ (2009) 40 *George Washington International Law Review* 939.

subsidiary.¹⁹⁶ Article 2(6) of the European Environmental Liability Directive also employs a theory of control:

‘operator’ means any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity.¹⁹⁷

¹⁹⁶ Case C-286/98 P *Stora v Commission* [2000] ECHR I-9925, para. 29; see also: General Court, Joined Cases T-71, 74, 87 and 91/03 *Tokai Carbon Co Ltd and others v Commission* [2005] ECR II-10, paras 59-60; see also for a discussion of this issue, A Montesa and A Giraja, ‘When Parents Pay for their Children's Wrongs: Attribution of Liability for EC Antitrust Infringements in Parent Subsidiary Scenarios’ (2006) 29(4) *World Competition: Law and Economics Review* 555; WPJ Wils, ‘The Undertaking as Subject of E.C. Competition Law and the Imputation of Infringements to Natural or Legal Persons’ (2000) 25 *European Law Review* 99; A Jones and B Sufirin, *EC Competition Law: Text, Cases and Materials*, 3rd edn (Oxford, Oxford University Press, 2008) 144-146; A Scheidtmann, ‘Schadensersatzansprüche gegen eine Muttergesellschaft wegen Verstößen einer Tochtergesellschaft gegen Europäisches Kartellrecht?’ (2010) *Wettbewerb in Recht und Praxis*, 499-505; the theory of control is also used in merger control: Article 3(2) of Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1.

¹⁹⁷ Directive (EC) 2004/35 of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L143/56, amended by Directive 2006/21/EC; see also A Aust,

The Seventh Company Directive on Consolidated Accounts provides another example of the enterprise approach (or ‘theory of control’).¹⁹⁸ The parent company must produce annual accounts consolidating financial information about its subsidiaries irrespective of where they are established. A ‘subsidiary undertaking’ is considered relevant where the parent has controlling ownership of shares, or other rights to exercise dominant influence over the subsidiary, or if it actually exercises such influence.¹⁹⁹ According to the UK Bribery Act the parent company may be liable if it fails to prevent criminal offences committed by its subsidiaries and sub-contractors, even outside the United Kingdom.²⁰⁰ These examples demonstrate that public policies may well resort to the theory of control in order to be effective.

The same may even hold true for supply chain

Handbook of International Law, 2nd edn (Cambridge, Cambridge University Press, 2010) 316.

¹⁹⁸ European Seventh Company directive on Consolidated Accounts Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54 (3) (g) of the Treaty on consolidated accounts [1983] OJ L193/1.

¹⁹⁹ See Art. 1 and 2 of the European Seventh Company directive on Consolidated Accounts Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54 (3) (g) of the Treaty on consolidated accounts [1983] OJ L193/1.

²⁰⁰ University of Edinburgh, ‘Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union’ (2010) <<http://www.law.ed.ac.uk/euenterpriseslf/>> paras. 180, 184.

responsibility. Ruggie maintains that businesses should ‘seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts’.²⁰¹ Ruggie suggests that, under certain circumstances, an enterprise must try to use its leverage over the supply chain entity to stop abuses, or must end contractual relationships.²⁰² Distributive policies in particular might legitimately expect supply chain responsibility: It is conceivable that public entities require that only those companies that can guarantee the respect for fundamental standards across the entire value chain receive financial support or public contracts.

²⁰¹ UN Human Rights Council, ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie’ (21 March 2011) <<http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>> 14.

²⁰² UN Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises, ‘The Corporate Responsibility to Respect Human Rights in Supply Chains - 10th OECD Roundtable on Corporate Responsibility’ (discussion paper, 30 June 2010) <<http://www.oecd.org/dataoecd/17/50/45535896.pdf>>; see also UN Human Rights Council, ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie’ (21 March 2011) <<http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>> 14, 18.

However, regulation of global magnitude may encounter limitations in European and international law. Extending rules to third country subsidiaries and suppliers may interfere with other countries' legal systems and go beyond EU competence. The following chapter discusses the limits of lawfulness.

CHAPTER 3

LIMITS OF LAWFULNESS

The European legislator is not free to adopt whatever laws it sees fit. European legislation must conform to higher-ranking norms of European and international law: EU law-making must be based on specific provisions in the European Treaties and must respect fundamental rights and general principles of EU law. Furthermore, international law narrows the legislator's margin of manoeuvre. European laws must not infringe WTO agreements and other international treaties. Customary international law also imposes limits on European legislation. This chapter looks at the legal restraints the EU legislator faces when it comes to global corporate social accountability.

I. LAWFULNESS UNDER EUROPEAN LAW

A. COMPETENCE

This section briefly explains the doctrine of competence before discussing the legal bases for the CSA measures: Is the EU competent to prescribe environmental, labour, and human rights standards abroad? Is there competence to introduce global

corporate social accountability into policies concerning the publication of violations, policies concerning export credits, subsidies, and other financial benefits, public procurement, fines, trade measures, labelling, reporting obligations, and private enforcement?

(i) Doctrine of Competence

Principle of Conferral

Article 5(1) and (2) of the Treaty on European Union (TEU)¹ is the starting point:

1. The limits of Union competences are governed by the principle of conferral. ...
2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

At first sight, this seems to be a clear provision. The European Union is a system of ‘attributed’ or ‘conferred’ competences (*compétences d’attribution*). The exercise of power must be based on an enabling

¹ The Lisbon Treaty, signed on 13 December 2007, entered into force on 1 December 2009 and amended the Treaty on European Union (EU Treaty) and the Treaty establishing the European Community (EC Treaty). In this process, the EC Treaty was renamed Treaty on the Functioning of the European Union (TFEU).

provision. The EU has no *Kompetenz-Kompetenz* (the power to decide on its own powers).

The principle of conferral is a general rule of international organisations. Their powers can only be derived from their Member States and must therefore be enumerated in the founding document or implied by express provisions.² But there is also an important difference between the EU and other international organisations. Member States cannot derogate from the provisions of the EU Treaties by agreement or persistent practice.³ In the absence of a formal amendment, the rules of the Treaties prevail and cannot be circumvented by unanimity.⁴

Nonetheless, as with the question about the true nature of the EU (Is it an international organisation, a federal state, or a system *sui generis*?), the question about the boundaries of the Treaty bases is not easy to answer. In 1963, the European Court of Justice (ECJ) delivered the seminal judgment *Van Gend & Loos* and held that ‘the Community constitutes a new legal order

² G de Búrca and B de Witte, ‘The Delimitation of Powers between the EU and its Member States’ in A Arnall and D Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford, Oxford University Press, 2002) 201, 202.

³ Joined Cases 90 & 91/63 *Commission v Belgium and Luxembourg* [1964] ECR 1329, 1345; Case 68/86 *United Kingdom v Council* [1988] ECR 855, para 24; Case C- 271/94 *Parliament v Council* [1996] ECR I-1689, paras. 24 and 34.

⁴ Case 38/69 *Commission v Italy* [1970] ECR 47, paras. 12-13.

of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields'.⁵ But the question remains where these limited fields are today. Weiler doubts that there are any restrictions at all to the potential reach of EU law. He refers to the judgment in *Casagrande* in which the ECJ concluded:

Although educational and training policy is not as such included in the spheres which the Treaty has entrusted to the Community institutions, it does not follow that the exercise of powers transferred to the Community is in some way limited if it is of such a nature as to affect the measures taken in the execution of a policy such as that of education and training.⁶

Weiler calls this the 'doctrine of absorption', the spill-over of European policy into fields originally reserved for the Member States.⁷ In *Casagrande* it was not the EU that was encroaching upon national educational policy; rather, it was the national educational policy that was impinging on EU policy and thus had to give way. ECJ Judge Lenaerts even said apodictically: 'There simply is no nucleus of

⁵ Case 26/62 *Van Gend & Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

⁶ Case 9/74 *Casagrande v Landeshauptstadt München* [1974] ECR 773.

⁷ JHH Weiler, 'The Transformation of Europe' in JHH Weiler, *The Constitution of Europe* (Cambridge, Cambridge University Press, 1999) 47 and 49.

sovereignty that the Member States can invoke, as such, against the Community'.⁸ The Court has also modified its *Van Gend & Loos* phraseology: In the more recent *Opinion 1/91* it referred to the Member States as having limited their sovereign rights 'in ever wider fields' (instead of 'within limited fields' as in *Van Gend & Loos*).⁹

One has to concede that the ECJ has developed certain areas of EU policy—such as the free movement rules—in a very dynamic and expansive way. In *Casagrande*, the Court did not try to find a balance between EU powers on the one hand and national competences on the other. Instead, it seemed to focus solely on the free movement rules, pondering their possible scope and meaning, averting its gaze from the fact that the actual field of application, educational policy, did not belong to competences of the EU.

This methodology may also be termed the 'implied powers' doctrine. According to this theory, the existence of a given power also implies the existence of any other power which is necessary to effectively exercise the former.¹⁰ The ECJ found implied powers not only in *Casagrande* but also in other cases, such as

⁸ K Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205 at 220.

⁹ *Opinion 1/91* [1991] ECR 6079, para. 21 (emphasis added).

¹⁰ See TC Hartley, *The Foundations of European Community Law*, 5th edn (Oxford, Oxford University Press, 2003) 106.

the *Environmental Crime* case:

As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence ... However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.¹¹

In *Germany v Commission* the Court held:

[I]t must be emphasized that where an article of the [TFEU] confers a specific task on the Commission it must be accepted, if that provision is not to be rendered wholly ineffective, that it confers on the Commission necessarily and per se the powers which are indispensable in order to carry out that task.¹²

The principle of conferral is not only qualified by the doctrines of absorption and implied powers but also by the 'centre of gravity' approach. The Court's starting point is the following:

[t]he choice of a legal basis for a measure may not depend

¹¹ Case C-176/03 *Commission v Council* [2005] ECR I-7879, paras. 47-48.

¹² Joined cases 281, 283, 284, 285 and 287/85 *Germany and Others v Commission* [1987] ECR I-3203, para. 28.

simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review. Those factors include, in particular, the aim and content of the measure.¹³

But in *British American Tobacco* the ECJ said:

If examination of a Community act shows that it has a twofold purpose or twofold component and if one of these is identifiable as main or predominant, whereas the other is merely incidental, the act must be founded on a sole legal basis, that is, the one required by the main or predominant purpose or component. Exceptionally, if it is established that the act simultaneously pursues a number of objectives, indissociably linked, without one being secondary and indirect in relation to the other, such an act may be founded on the various corresponding legal bases.¹⁴

The 'centre of gravity' theory (also called the theory of 'predominant purpose or component') has been subject to some criticism: It allows legislating 'along the way' or 'accidentally' on a specific matter even when there might not be a stand-alone competence to legislate on it, or when there is a prohibition on

¹³ Case C-300/89 *Commission v. Council (Titanium Dioxide)* [1991] ECR I-2867, para. 10; see also Case C-84/94 *United Kingdom v Council (Working Time Directive)* [1996] ECR I-5755, para. 25.

¹⁴ Case C-491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco* [2000] ECR I-11543, para 94.

harmonisation pertaining to that policy area.¹⁵

This also entails that competence for the CSA measures depends on the legislative package that is cobbled together: The centre of gravity differs if all measures are included in one proposal or if only some of them are proposed.

The Lisbon Treaty has tried to clarify the boundaries of EU powers. It has introduced Title I into the TFEU which sets out ‘categories and areas of EU competence’. However, this does not alter the basic structure of the European Treaties. They are still constructed along functional lines, with a view to the EU’s achievement of various objects. And they are still *traités cadres*, drafted in general terms that are incomplete and imprecise, leaving several gaps open for the ECJ and the other European institutions to fill. It is thus difficult to see how Title I of the TFEU may put an end to the doctrines of absorption and implied powers, and to the ECJ’s expansive interpretation of Treaty articles.

¹⁵ See E Lenski ‘Article 2 TFEU’ in C-O Lenz, K-D Borchardt (eds), *EU-Verträge Kommentar nach dem Vertrag von Lissabon*, 5th edn (Berlin, Bundesanzeiger, 2010), para. 38; S Arrowsmith in S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law* (Cambridge, Cambridge University Press, 2009) 27 argues that even according to the centre of gravity-approach the incidental matter must have a potential basis in the Treaties. However, there is no indication that the ECJ follows such a narrow understanding.

Interpretation

There are some peculiarities in the Court's way of interpreting the Treaties which might be helpful to recall. In *Van Gend & Loos* the Court, confronted with the question of whether the provisions of the then EC Treaty (now TFEU) have direct effect, said that 'it is necessary to consider the spirit, the general scheme and the wording of those provisions'.¹⁶ This is a remarkable phrase: The Court mentioned the purposive or teleological method of interpretation first (the 'spirit', in French: *l'esprit*) and only afterwards the 'general scheme' and the 'wording'. The preparatory work (*travaux préparatoires*) as a source of interpretation is not mentioned at all (although it may be part of the 'general scheme' of the Treaty). The teleological approach is the characteristic element in the Court's interpretative method. The ECJ has never had a reputation for narrow construction and doctrinaire textualism.

Several reasons might explain this.¹⁷ To begin with, the functional structure and the general wording of the Treaties favour teleological reasoning. In the

¹⁶ Case 26/62 *Van Gend & Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

¹⁷ See N Fennelly, 'Legal interpretation at the European Court of Justice' (1997) *Fordham International Law Journal* 656 and K Lenearts, 'Interpretation and the Court of Justice: A Basis for Comparative Reflection' (2007) *The International Lawyer* 1011.

CILFIT judgment,¹⁸ the Court gave some further explanations for attributing less weight to the textual analysis and putting more emphasis on the objective or purpose of a provision: The multi-lingual nature of EU Law, with all language versions being equally authentic, creates an uncertainty concerning the literal meaning of a term. For the sake of uniform application in all Member States, EU law cannot rely on particular national terminology but has to create its own independent legal concepts.¹⁹

The following remarks by Advocate General Ruiz-Jarabo Colomer sum up the ECJ's methodology:

According to a Latin American jurist, there are three kinds of judge: the artisan, a veritable automaton who, using only his hands, produces mass judgments in industrial quantities, without lowering himself to consider the human aspects or the social order; the craftsman, who uses his hands and his brain, using traditional interpretative methods, which inevitably lead him merely to represent the legislature's intention; and the artist, who, using his hands, his head and his heart, broadens the horizon for citizens, without losing sight of reality or of specific circumstances.

¹⁸ Case 283/81 *SrL CILFIT & Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415, paras. 17-20.

¹⁹ *Ibid* at para 20: '[e]very provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied'.

Although they are all needed in the fulfilment of the judicial function, the Court of Justice, in the exercise of its proper role, has always identified itself with the last kind ...²⁰

Judicial Review

A further important issue to consider is the intensity of judicial review the European Court of Justice actually exercises in disputes on competence. In the first *Tobacco Advertising* case, the ECJ expressly referred to (now) Article 5 of the TEU and the principle of conferral and struck down a Directive on tobacco advertising because of lack of competence.²¹ Likewise, in the *Air Passenger Records* case, the Court decided that the disputed decision could not have been validly adopted under the Treaty.²²

The general approach of the ECJ on questions of law seems to be to substitute their judgment for that of the legislature.²³ The courts will lay down the meaning

²⁰ Ruiz-Jarabo Colomer AG in Joined Cases C-11/06 and C-12/06 *Morgan* [2007] ECR I-9161, paras. 1-2 (footnote omitted). Ruiz-Jarabo Colomer AG refers to the Latin American jurist Nanclares Arango, A., *Los jueces de mármol* (Medillín, La Pisca Tabaca Editores, 2001) 14.

²¹ Case C-376/98 *Germany v European Parliament and Council* [2000] ECR I-8419, paras. 83 and 107.

²² Joined Cases C-317 and 318/04 *European Parliament v Council and Commission (Air Passenger Records)* [2006] ECR I-4721, para. 69.

²³ P Craig, *EU Administrative Law* (Oxford, Oxford University Press, 2006) 435.

of a provision and annul the measure if it does not conform to its interpretation of the provision. On the other hand, when the case involves complex social and economic assessments, the ECJ usually exercises judicial restraint and reviews the measure only with a ‘manifest error’ standard.²⁴ This means that the ground of lack of competence is, in principle, subject to full judicial scrutiny as it is primarily concerned with issues of legal interpretation. However, one has to bear in mind that, to date, the ECJ has rarely declared legislation to be invalid on this ground.

Ultimate Umpire

Before turning to the CSA measures and the relevant legal bases in detail, there is one preliminary issue left to consider: Is the European Court of Justice really the ‘ultimate umpire’ of competence? As *Weiler* points out,

since the jurisdictional limits laid down in the European Treaties are notoriously difficult to identify with precision, the question of who gets to decide is of tremendous political importance for the relationship between the Community and the Member States.²⁵

Strikingly, the ECJ and the German Federal

²⁴ Case 730/79 *Philip Morris v Commission* [1980] ECR 2671.

²⁵ JHH Weiler, ‘The autonomy of the Community legal order: through the looking glass’ in JHH Weiler, *The Constitution of Europe* (Cambridge, Cambridge University Press 1999) 286 at 288.

Constitutional Court are at loggerheads on this very question. The *Foto-Frost* judgment stated unequivocally that the Treaties give the ECJ exclusive jurisdiction to declare void an act of an EU institution. National courts are not in a position to annul an EU act.²⁶

The German Court disagrees. On the basis of the German constitution, it asserts that it has, in principle, the power to declare inapplicable EU legislation in Germany. In the *Lisbon* judgment, the German Court vowed to exercise an ‘ultra vires’ and an ‘identity’ review of last resort.²⁷ If legal protection cannot be obtained at EU level, the Federal Constitutional Court examines whether ‘legal instruments of the European institutions and bodies keep within the boundaries of the sovereign powers accorded to them by way of conferral’.²⁸ The German Court also reviews ‘whether the inviolable core content of the constitutional identity’ is respected.²⁹

²⁶ Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199, para. 17.

²⁷ *Lisbon judgment*, 2 BvE 2/08; see also BVerfGE 155, 187, English translation in ILM 33 (1994), 388 at 422-3.

²⁸ *Lisbon judgment*, 2 BvE 2/08, para. 240.

²⁹ *Ibid* at para. 240.

(ii) *Substantive Provisions: Environmental, Labour, and Human Rights Standards*

Turning to the CSA measures, the first question that arises is whether the EU is competent to legislate on environmental, labour, and human rights.

Environmental Policy

Environmental standards can be based on Article 192 TFEU without any difficulty. This provision allows the EU to take action in order to achieve the objectives mentioned in Article 191(1) TFEU:

- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilisation of natural resources,
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

Moreover, Article 11 TFEU demands that the EU take environmental protection into account in all policy areas. This ‘integration clause’ is not merely programmatic; it prescribes legal obligations.³⁰ Article 3(5) TEU sets out: ‘In its relations with the wider world, the Union shall uphold and promote its values

³⁰ Jacobs AG in Case C-379/98 *PreussenElektra AG v Schleswig AG* [2001] ECR I-2099, para. 231.

and interests ... It shall contribute to ... the sustainable development of the Earth'. Article 21(2)(f) TEU, setting out the objectives of external action, stipulates that the EU shall 'help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development'. Thus, the Treaties seem to support legislation on the environmental dimension of global corporate social accountability.

Labour Policy

Competence for labour policy is a more complex issue. Article 19(1) TFEU allows the EU to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation. Article 153(1)(b) TFEU gives the EU competence to regulate working conditions. This term is mostly understood in a broad way, as a residual provision encompassing labour law in general,³¹ or as having the same meaning as in Article 45(2) TFEU and Article 7(4) of Regulation 1612/68 ('eligibility for employment, employment, remuneration and other

³¹ See M Kotzur, 'Article 153' in R Geiger, D-E Khan and M Kotzur, *EUV/AEUV Kommentar*, 5th edn (München, C.H. Beck Verlag, 2010) para. 5.

conditions of work’).³² In light of this extensive interpretation, it appears that, for instance, the prohibition on forced or compulsory labour falls under the rubric of Article 153(1)(b) TFEU.³³

The respect for the rights of children to be protected from economic exploitation may also come under this provision, as well as under Article 153(1)(a) TFEU, which mentions the protection of workers’ health and safety. The ECJ has given the term ‘health’ an extensive meaning by referring to the ‘complete physical, mental and social well-being’.³⁴ Article 153(1)(a) TFEU also constitutes the basis for prescribing other rules concerning the working environment. Sub-paragraph (i) again mentions equality between men and women.

However, Article 153(5) TFEU says that the ‘provisions of this Article shall not apply to pay, the

³² Council Regulation (EEC) 1612/68 on freedom of movement for workers within the Community [1968] OJ L257/02; see also S Krebber, ‘Artikel 137’ in C Callies and M Ruffert, *EGV/EUV Kommentar* (München, C.H. Beck Verlag, 2007) para. 24; Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work [2008] L327/9.

³³ See T Novitz, ‘Promoting Core Labour Standards and Improving Global Social Governance: An Assessment of EU Competence to Implement Commission Proposals’ (EUI Working Papers No. 2002/59) <<http://www.eui.eu/RSCAS/Publications/>> 25.

³⁴ Case C-84/94 *United Kingdom v Council (Working Time Directive)* [1996] ECR I-5755, para. 15.

right of association, the right to strike or the right to impose lock-outs'. It appears to follow that the EU has no competence to prescribe the respect of the right to association, one of the four ILO core labour standards.

According to another interpretation, Article 153(5) TFEU bars the EU only from interfering with Member States' competence internally and not from prescribing these standards extraterritorially. It has to be acknowledged, however, that such reading is not very convincing due to the principle of parallelism: external EU competence would give it internal powers as well, and Member States would be precluded from acting.³⁵ This appears to be the opposite of what the authors of the Treaties had in mind when they wrote Article 153(5) TFEU.

Nevertheless, institutional practice does not seem concerned about the limits imposed by Article 153(5) TFEU. Directive 2008/104 concerning temporary agency work (based on what is now Article 153 TFEU) requires equal treatment, also with regard to pay, although Article 153(5) TFEU does exclude EU rules on pay.³⁶ Moreover, freedom of association is enshrined in Article 12(1) of the Charter of

³⁵ See *Opinion I/76 (European Laying-up Fund for Inland Waterway Vessels)* [1977] ECR 741.

³⁶ See Articles 5(1), 3(1)(f) of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work [2008] L327/9.

Fundamental Rights, which binds EU institutions. It makes little sense to demand EU organs to respect the right to association if they don't have any power to legislate on it.³⁷

Whether collective bargaining (which also forms part of the ILO core labour standards) is removed from the scope of Article 153(1) TFEU pursuant to Article 153(5) TFEU, as a part of freedom of association, is a contentious issue.³⁸ The general rule that exceptions to the Treaty have to be construed narrowly militates against exclusion. Furthermore, collective bargaining is guaranteed by Article 28 of the Charter of Fundamental Rights.

But even if freedom of association and, possibly, collective bargaining are outside the scope of Article 153 TFEU, this does not imply that the EU has no powers at all in that field. Negative competence provisions such as Article 153(5) TFEU only have a limited reach. As explained above, there are, in principle, no areas that are hermetically sealed off from EU influence. The wording of Article 153(5) TFEU ('The provisions of this Article shall not apply ...') makes clear that it only limits the powers under this

³⁷ See also Coen, 'Article 154' in C-O Lenz, K-D Borchardt (eds), *EU-Verträge Kommentar nach dem Vertrag von Lissabon*, 5th edn (Berlin, Bundesanzeiger, 2010), para. 44.

³⁸ ACL Davies, 'Collective Labour Rights in the EU' in P Alston (ed), *Labour Rights as Human Rights* (Oxford, Oxford University Press, 2005) 193-199.

specific norm, but does not curtail competence derived from other legal bases.³⁹ As the reasoning in *Casagrande* or the *Environmental Crime* case has shown, freedom of association and collective bargaining may be regulated if necessary for the pursuit of other EU policies. Indeed, the Lisbon Treaty has introduced a cross-cutting social clause in Article 9 TFEU, which demands that the EU ensure ‘adequate social protection’ whenever it takes action. For instance, freedom of association and collective bargaining may also come under the heading of human rights policy.

Human Rights Policy

Is there competence to prescribe rules for the protection of human rights? In 1996, *Opinion 2/94* made clear that, without amendment of the Treaty, the EU lacks competence to accede to the European Convention on Human Rights. The European Court of Justice put it bluntly: ‘No Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field’.⁴⁰

The Court went on to say that, ‘in the absence of express or implied powers for this purpose’, it was

³⁹ *Ibid* at 193.

⁴⁰ *Opinion 2/94 (Accession by the Community to the ECHR)* [1996] ECR I-1759, para. 27.

necessary to turn to (current) Article 352 TFEU, the ‘flexibility clause’, which was also eventually rejected as a legal basis. The Court summarised its reasoning as follows:

Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance ... It could be brought about only by way of Treaty amendment.

Such amendment has now taken place. The Lisbon Treaty inserted into Article 6 TEU a new paragraph two which says that the ‘Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms’ (ECHR). At the same time, the second sentence of that paragraph makes clear that ‘such accession shall not affect the Union’s competences as defined in the Treaties’.

Therefore, accession to the ECHR is not meant to give the EU new powers to review Member States’ actions. Such scrutiny would transform the EU into a human rights organisation. In that hypothetical case, a general EU power concerning human rights would supersede national constitutional provisions on human rights due to the principle of supremacy of EU law.⁴¹

⁴¹ See A von Bogdandy, ‘The European Union as a Human Rights Organization? Human Rights and the Core of the European Union’ (2002) 37 CMLR 1307, 1316; P Eeckhout, *External Relations of the European Union* (Oxford, Oxford University Press, 2004) 470;

This would indeed entail ‘fundamental institutional implications’ of ‘constitutional significance’. The Lisbon Treaty is anxious to avoid such a scenario. Accession to the ECHR is supposed to lead to direct accountability of the EU organs before the Strasbourg Court; it is not meant to confer new powers on them.

However, Member States are already under human rights scrutiny by the ECJ whenever their actions fall within the scope of EU law.

Case Studies: Wachauf, Kremzow, and Carpenter

One of the first cases that provides authority for that proposition is the *Wachauf* case.⁴² Mr Wachauf farmed under a tenancy agreement concluded with the Prinzessin zu Sayn-Wittgenstein. On expiry of the lease it seemed that the benefits of the European milk quota would accrue only to the Prinzessin and not to him. The ECJ held that Member States must respect fundamental rights when they implement EU rules. Hence, Mr Wachauf had a right to compensation even though the regulation did not specifically provide for it.

The case law has developed significantly since *Wachauf*. The ECJ has started to review

Case 6/64 *Costa v ENEL* [1964] ECR 585.

⁴² Case 5/88 *Wachauf v Germany* [1989] ECR 2609.

Member States' actions not only when they implement EU law, but also when they derogate from it.⁴³ In *Kremzow*, however, the Court was careful to limit the application of this jurisprudence. The case concerned a retired judge of Austrian nationality, Mr Kremzow, who confessed to the murder of an Austrian lawyer. He subsequently withdrew his confession, but was convicted nonetheless. Mr Kremzow argued that the prison sentence restricted his freedom of movement in an unjustifiable way because the process and his imprisonment violated human rights. The ECJ refused to accept jurisdiction in this case because Mr Kremzow's situation 'was not connected in any way with any of the situations contemplated by the Treaty'.⁴⁴

Carpenter, on the other hand, is an example of a more extensive interpretation.⁴⁵ Mrs Carpenter, a national from the Philippines living in the United Kingdom, was facing deportation. She argued that her husband, a British citizen, was doing business in other Member States and that she facilitated Mr Carpenter's exercise of his freedom to provide services under Article 56

⁴³ See Case C-260/89 *ERT* [1991] ECR I-2925.

⁴⁴ Case C-299/95 *Kremzow* [1997] ECR I-2629, para. 16.

⁴⁵ Case C-60/00 *Carpenter v Home Secretary* [2002] ECR I-6279.

TFEU by homemaking and taking care of the children while he was working abroad. The Court held that the deportation of Mrs Carpenter would be detrimental to family life and to Mr Carpenter's exercise of his freedom to provide services according to Article 56 TFEU. EU law was therefore applicable—and violated, because of the disrespect for the right to family life.

One might wonder whether the case would have had the same outcome if Mrs Carpenter had been doing the childcare and housework so that Mr Carpenter could peacefully watch a football match provided by a French television channel, thus exercising his freedom to receive services under Article 56 TFEU. Be that as it may, this controversial case shows that Member States are already under wide EU scrutiny with respect to human rights.

More to the point, one might argue that even private actors are already under a duty to comply with human rights standards when EU law is applicable. This is evident in Article 157 TFEU on equality between men and women and in Article 19 TFEU, the provision which allows the EU to combat discrimination. Equal treatment between men and women and general non-discrimination obligations address not only the state but also employers.

Moreover, even in the spheres of the free movement of workers, freedom of establishment, and freedom to provide services, human rights duties might be applicable to private actors. According to settled case law, Articles 45, 49, and 56 TFEU do not apply solely to the actions of public authorities but extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment, and the provision of services.⁴⁶ In *Angonese*, the Court held the free movement of workers to be applicable to a private bank because Article 45 TFEU ‘must be regarded as applying to private persons as well’.⁴⁷ In *Viking* the Court held a trade union to be under the duty to comply with Article 49 TFEU (freedom of establishment), rejecting the view that only states and quasi-public organisations or associations exercising a regulatory task and having quasi-legislative powers are addressed by that provision.⁴⁸

At this point, one simply has to put the two streams of jurisprudence together. A combination of, on the one hand, the *Wachauf/Carpenter* case law and, on the other hand, the *Angonese/Viking* case law portends that

⁴⁶ See Case 36/74 *Walrave and Koch* [1974] ECR 1405, para 17; Case C-415/93 *Bosman* [1995] ECR I-4921, para 82; Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, para 47; Case C-281/98 *Angonese* [2000] ECR I-4139, paragraph 31; Case C-309/99 *Wouters and Others* [2002] ECR I-1577, para 120.

⁴⁷ Case C-281/98 *Angonese* [2000] ECR I-4139, paragraph 31.

⁴⁸ Case C-438/05 *Viking* [2007] ECR I-10779, para. 64.

even private actors are accountable according to human rights standards whenever EU law is applicable to them. In sum, the ECJ would be competent to review actions of companies according to human rights standards whenever EU law applies.

There are two caveats to this juridical sleight of hand: First, while the ECJ has occasionally recognised the horizontal dimension of the four freedoms (*Angonese/Viking*), it has not generally acknowledged the horizontal application of human rights. Apart from non-discrimination policy, which is also directed at private actors, the ECJ takes human rights as they are generally understood: individual rights limiting the power of public organs. The ECJ has not engaged in a general transposition of human rights from the public to the private sphere. The second caveat is that, even if human rights review seems to be possible whenever EU law applies, it does not follow that the EU has competence to regulate on human rights as such, on a stand-alone basis.

Each time the EU enacts laws, it potentially legislates on human rights, too. Eeckhout provides the example of an anti-dumping Regulation that must include provisions on the right to be heard.⁴⁹ Without such provisions, it would be annulled by the ECJ

⁴⁹ P Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 CMLR 945, 983.

because the respect for fundamental rights is a condition for its lawfulness. But the EU cannot set out rules on the right to be heard as such. Human rights regulation is merely ancillary to other policy matters.

Thus, human rights protection can (only) be construed as a cross-cutting, horizontal objective, similar to environmental protection in Article 11 TFEU and social protection in Article 9 TFEU. Several provisions in the Treaties reinforce this view: The preamble to the TEU confirms the ‘attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms’. Article 2 TEU proclaims that the ‘Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights’. Article 3(5) TEU stipulates that, ‘in its relations with the wider world’, the Union shall contribute to the ‘protection of human rights’. Article 21(1) TEU says:

The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: ... the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity ...

Finally, Article 21(2)(b) TEU mentions as one objective of EU external action to ‘consolidate and support ... human rights ...’.

These provisions make the case for a horizontal

clause. But they also show the limits of EU human rights policy. A horizontal clause means only that human rights must be integrated in all other policies of the EU; it does not give an independent power to legislate. The protection of human rights does not constitute a stand-alone competence. Human rights must always be connected to an existent legal basis in the Treaty. In sum, *Opinion 2/94* remains good law: There is ‘no general power to enact rules on human rights’. Still, human rights considerations have to be integrated into all other policies. The only exception to the general rule is the specific human rights competence contained in the anti-discrimination policy pursuant to Articles 19 and 157 TFEU.

(iii) Developing Countries as Field of Application

The taxonomy of the CSA measures explained in chapter one envisages two models for the field of application: Developing countries and worldwide application. If the field of application were confined to developing countries, Article 208 TFEU on development policy could provide a legal basis. This provision sets out that development policy ‘shall be conducted within the framework of the principles and objectives of the Union’s external action’.⁵⁰ Article

⁵⁰ Article 209 TFEU says that the ordinary legislative procedure (Articles 289, 294 TFEU) shall be used to implement the EU's

21(1) TEU lists the EU's foreign policy principles and objectives:

the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity ...

According to Article 21(2) TEU, the Union shall in its external actions 'consolidate and support ... human rights ...' (lit. (b)), 'foster the sustainable economic, social and environmental development of developing countries ...' (lit. (d)), and 'help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development' (lit (f)).

The open-textured terms of Article 21 TEU, combined with Article 208 TFEU, may at first sight appear to provide for an all-embracing legal basis for the CSA measures if they target developing countries. In its second paragraph, Article 21 TEU repeatedly mentions human rights. The expression 'sustainable economic, social and environmental development' arguably encompasses core labour rights, which may also be framed as human rights. Furthermore, the goals of 'environmental development', 'sustainable development', and the preservation and improvement of the quality of the environment all reflect the

development policy.

environmental dimension of development policy.

A broad understanding of the notion of development also underlies the Opinion of Advocate General La Pergola in the first case in which the ECJ dealt with the scope of the old development policy provision in the EC Treaty, *Portugal v. Council*.⁵¹ La Pergola said it was clear that the EU development policy reflects ‘a complex vision of development, the product of interaction between its economic, social and political aspects’, also taking into account the environment.

The Court itself adopted a more restrictive approach. The judgment in *Portugal v. Council* can be read as ruling out that human rights may be a specific policy or the main object and purpose of development co-operation.⁵²

In a more recent case the ECJ dealt with a Commission decision concerning aid to the Philippines border security in order to fight terrorism and international crime.⁵³ The Court said that the EU’s development policy

refer[s] not only to the sustainable economic and social

⁵¹ Case C-268/94 *Portugal v Council* [1996] ECR I-6177.

⁵² *Ibid* at para. 4 of the summary; JHH Weiler and SC Fries, ‘A Human Rights Policy for the European Union: The Question of Competences’ (Harvard Jean Monnet Working Paper 4/99, 2000) <<http://www.jeanmonnetprogram.org/papers/99/990402.html>> 3, criticise the reasoning of the Court.

⁵³ Case C-403/05 *Parliament v Commission* [2007] ECR I-9045.

development of those countries, their smooth and gradual integration into the world economy and the campaign against poverty, but also to the development and consolidation of democracy and the rule of law, as well as to the respect for human rights and fundamental freedoms, whilst complying fully with [the] commitments in the context of the United Nations and other international organisations.⁵⁴

The Court also argued that

there can be no sustainable development and eradication of poverty without peace and security and that the pursuit of the objectives of the Community's new development policy necessarily proceed via the promotion of democracy and respect for human rights.⁵⁵

In the *Small Arms* judgment, however, the ECJ held:

While the objectives of current Community development cooperation policy should therefore not be limited to measures directly related to the campaign against poverty, it is none the less necessary, if a measure is to fall within that policy, that it contributes to the pursuit of that policy's economic and social development objectives ...⁵⁶

The case law on development policy shows the Court meandering between, on the one hand, a dynamic and elusive concept of development policy, and, on the

⁵⁴ *Ibid* at para. 56.

⁵⁵ *Ibid* at para. 57.

⁵⁶ Case C-91/05 *Commission v Council* [2008] ECR I-3651, para. 67.

other hand, the firm statement that the core of the policy must be economic and social development.

The Lisbon Treaty reinforces the more restrictive position. Sub-paragraph 2 of Article 208(1) TFEU now reads: ‘Union development cooperation policy shall have as its primary objective the reduction and, in the long term, the eradication of poverty’.

Furthermore, the Lisbon Treaty has introduced Article 40(2) TEU which essentially provides that other EU policies shall not affect the Common Foreign and Security Policy (CFSP). Prior to the Treaty amendment there was only a provision that is now Article 40(1) TFEU which says that the CFSP shall not affect other EU policies. Article 40(1) and (2) TFEU seems to suggest that an extensive reading of other EU policies – such as development policy – at the expense of the CFSP should be avoided, and vice versa; the CFSP and other policy areas should now stand on an equal footing. This might entail development policy must be construed more restrictively than in the past.⁵⁷

On the other hand, in spite of the changes brought about by the Lisbon Treaty, the CFSP remains intergovernmental (see Article 24 TEU), and development policy supranational (i.e. more integrationist, see Article 209 TFEU). It is hard to

⁵⁷ See also R Geiger, ‘Article 40 EUV’ in R Geiger, D-E Khan and M Kotzur, *EUV/AEUV Kommentar*, 5th edn (München, C.H. Beck Verlag, 2010) paras. 2-7.

conceive that, in consequence of an enigmatic provision such as Article 40 TEU, the ECJ will change the supranational-biased course it has taken since its inception.

While the hermeneutics of Article 40 TEU remain rather inconclusive, it seems that the CSA measures go well beyond traditional development cooperation such as financial aid and technical assistance, and that their primary objective is not the reduction of poverty. All in all, the centre of gravity of the CSA measures does not seem to lie in development policy, despite its field of application being restricted to developing countries. It may nonetheless be a supporting legal basis for CSA measures.

(iv) Public Enforcement

EU Competence may not stem only from the environmental, labour, and human rights set out in the EU Treaties; competence may also derive from the means of enforcement employed to further these policies. The following sections examine the issue of competence from the angle of enforcement.

Publication of Violations

Model one of the public enforcement measures envisages the publication of corporate abuse. Does mere publication need a legal basis, even though it does not create rights or duties?

Article 5 TEU, which sets out that the EU shall act only within the limits of the Treaties, does not specify which kind of actions of the EU need a Treaty basis. In the case *France v Commission*, which concerned a Commission ‘communication’ on an ‘internal market for pension funds’, the ECJ held that all measures adopted by the European institutions, whatever their nature or form, that are intended to have legal effects, require a basis in the Treaty.⁵⁸ This is the case with a communication that lays down obligations for the Member States that are not inherent in the Treaty itself.⁵⁹ But publication of corporate abuse as such does not lay down obligations; it is rather an opinion on law and fact.

Article 211, second indent of the EC Treaty stipulated that the Commission shall ‘formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or *if the Commission considers it necessary*’ (emphasis added). At first glance, it seems that, according to this provision, the Commission could have issued opinions if and when it saw fit.⁶⁰ But on a closer look Article 211 shows that this was only the case *on matters dealt*

⁵⁸ Case C-57/95 *France v Commission* [1997] ECR I-1627.

⁵⁹ *Ibid*; see also Case 310/85 *Deufil* [1987] ECR 901, para. 22.

⁶⁰ See also M Ruffert, ‘Article 211’ in C Calliess and M Ruffert, *Das Verfassungsrecht der Europäischen Union*, 3rd edn (München, C.H. Beck, 2007) para. 8.

with in this Treaty. Thus, the Commission was not free to pronounce its opinion on policies that were not EU policies.

The Lisbon Treaty has replaced Article 211 of the EC Treaty with Article 17(1) TEU. The new provision announces in its fifth sentence: The Commission ‘shall exercise coordinating, executive and management functions, *as laid down in the Treaties*’ (emphasis added). This wording appears more restrictive: The Commission may only exercise executive functions if the Treaty says so. In practice, however, it does not appear that this new phrasing has curtailed the Commission’s power to issue opinions. It also remains doubtful whether the Court will adopt a narrow interpretation of Article 17(1) TEU.⁶¹

Two judgments are relevant here: In the *Phoenix-Rheinrohr* case the High Authority (the predecessor of the Commission under the European Treaty on Coal and Steel) sent a letter in 1957 to the *Office Commun de Consommateurs de Ferraille* (Joint Bureau of Ferrous Scrap Consumers) concerning the concept ‘own resources scrap’ as defined in certain decisions.⁶² The High Authority also ordered the Bureau to demand

⁶¹ See also C-230/81 *Luxemburg v Parliament* [1983] ECR I-255, para. 39: The European Parliament has an ‘inherent right’ to ‘discuss any question concerning the communities, to adopt resolutions on such questions and to invite the governments to act’.

⁶² Case 20/58 *Phoenix-Rheinrohr AG v High Authority of the European Coal and Steel Community* [1959] ECR 163.

payment from the companies concerned on the basis of the concept of ‘own resources scrap’ thus defined. The letter was published in the Official Journal. The Court held, contrary to the Opinion of the Advocate General, that the letter of the High Authority did not constitute a decision producing legal effects on the companies using ferrous scrap.⁶³ It was merely a ‘directive of an internal character’ to another public entity.⁶⁴

Société pour l’Exportation des Sucres was about a ‘telex message’ sent by the Commission in 1977 to the French authorities, indicating its views on certain legal questions, which led the French authorities to deny an exemption of levies imposed on certain corporations.⁶⁵ The ECJ decided that the French authorities were responsible for the denial of exemption, not the Commission. The telex message could not be attacked directly in an action for annulment.

These judgments seem to suggest that the publication of an opinion on law and fact might not produce legal effects and therefore does not need a legal basis in the Treaties. However, both *Phoenix-Rheinrohr* and *Société pour l’Exportation des Sucres* concerned statements that were not addressed to the relevant companies but to other public bodies. The

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ Case 88/76 *Société pour l’Exportation des Sucres* [1977] ECR 709.

publication of corporate abuse, however, would directly concern companies.

Moreover, fundamental rights may require a specific legal basis in the Treaty. Article 16 of the Charter of Fundamental Rights of the European Union guarantees the freedom to conduct a business. Negative publicity can have a considerable effect on this freedom, since it may tarnish a company's reputation and lead to significant loss of revenue. The first sentence of Article 52(1) of the Charter of Fundamental Rights enunciates that 'any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided by law ...' This provision is inspired by the jurisprudence of the European Court of Human Rights (ECtHR).⁶⁶ In *Leela Förderkreis* the ECtHR dealt with warnings issued by the German federal government that described religious associations belonging to the Osho movement as 'sects'.⁶⁷ The Court was satisfied that the warning's interference with the freedom of religion was 'prescribed by law'. The German constitution provided the legal basis for such warnings.⁶⁸ This case suggests that, while detailed legislation may not always be necessary, there must be at least a basis in the Treaty

⁶⁶ M Borowsky, 'Article 52' in J Meyer, *Kommentar zur Charta der Grundrechte der Europäischen Union*, 3rd edn (Heidelberg, Nomos, 2010) para. 20.

⁶⁷ *Leela Förderkreis e.V. v Germany* [2008] Eur. Ct. H. R.

⁶⁸ *Ibid* at paras. 89, 90.

when fundamental rights are restricted.⁶⁹

In the same vein, von Bogdandy argues that all official action (*hoheitliches/amtliches Handeln*) needs a legal basis; not only legislation but also other forms of official actions which have legal or factual effects.⁷⁰ Only a Treaty basis may legitimise official action of a public body such as the Commission, which is not endowed with unlimited powers.⁷¹

At least with regard to publication of law infringements the European institutions seem to agree. According to Article 30 of Regulation 1/2003⁷² the Commission shall publish its decisions in the field of

⁶⁹ In Case C-470/03 *A.G.M-Cos.MET* [2007] ECR I-2749, a Finnish official made a negative public statement on a company's vehicle lifts. The Court held that 'since the statements at issue described the vehicle lifts, in various media and in widely circulated reports, as contrary to standard EN 1493:1998 and dangerous, they are capable of hindering, at least indirectly and potentially, the placing on the market of the machinery' (para 65). Thus, the free movement of goods was restricted; see also Kokott AG, para. 103 in this case and Case 249/81 *Commission v Ireland* ('Buy Irish') [1982] ECR 4005.

⁷⁰ A von Bogdandy and J Bast, *Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge* (Berlin, Gabler, 2003) 428; see also A von Bogdandy and J Bast, 'The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform' (2002) 39 CMLR 227, 232.

⁷¹ A von Bogdandy and J Bast, 'Article 5' in E Grabitz and M Hilf, *Das Recht der Europäischen Union*, 40th edn (München C.H. Beck, 2009) para. 19.

⁷² Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty [2003] OJ L1/1.

competition law. Article 30(2) sets out that publication shall state the names of the parties and the main content of the decision, including any penalties imposed. The legal basis for Regulation 1/2003 is the current Article 103 TFEU, the enabling provision for competition policy.

In sum, the more convincing view is that the publication of corporate abuse needs a basis in the Treaty. However, there is no stand-alone EU competence. Nevertheless, the example of Article 30 of Regulation 1/2003 shows that publication may be a means to pursue a given policy and therefore be covered by the competence provision of that particular policy. Publication of competition law infringements is necessary to ensure transparency and a deterrent effect. Article 103 TFEU on competition policy therefore allows such publication. A similar argument can be made with regard to the publication of violations of basic environmental, labour, and human rights. Thus, competence on publication can be construed as an ‘annexed’ or implied power to another power. For instance, publication of corporate abuse abroad may be based on environmental policy according to Article 192 TFEU; or on the provisions of anti-discrimination and labour policy.

However, we have seen that EU competence concerning freedom of association is problematic. And the ECJ has denied a general power to enact rules on

human rights.⁷³ Publication of human rights transgressions or violations of freedom of association may still be an implied power of explicit EU powers concerning other enforcement measures. For example, fines for companies may be accompanied by the publication of the violation. Publication may be necessary to support the deterrent effect of penalties. Likewise, decisions not to grant export aid to a company that has been found to have violated human rights may be combined with the publication of the corporate abuse.

Export Credits, Subsidies, and Other Financial Benefits

The second model of public enforcement measures described above contemplates the refusal of financial benefits such as subsidies or export credits.⁷⁴ The EU is competent to review aid granted by Member States (Article 108 TFEU). Member States must inform the Commission of any plans to grant or alter aid (Article 108(3) TFEU). Article 109 TFEU allows the EU to prescribe rules on Member States' aid policies. Thus, it is possible to make state aid for certain business operations contingent on the respect of fundamental

⁷³ *Opinion 2/94 (Accession by the Community to the ECHR)* [1996] ECR I-1759.

⁷⁴ See chapter 1 (Content: The Elements of European CSA Measures) II. (Explaining the Matrix) E. (Fifth Element: Public Enforcement).

environmental, labour, and human rights. Admittedly, Article 107(1) TFEU indicates that EU state aid review was designed to prevent distortion of competition in the EU internal market, not to police compliance with standards of corporate social accountability. But, as discussed above, environmental protection, social protection, and human rights are all cross-cutting objectives that must be taken into account whenever the EU takes action.⁷⁵ Accordingly, these issues can be integrated in the economic review of state aid.

As with Member State aid, EU aid may also be conditioned on the respect of corporate social accountability. Treaty provisions on aid schemes also permit inserting eligibility criteria.⁷⁶ Again, the cross-cutting objectives of environmental, social, and human rights protection may justify refusing or recovering aid from companies that do not respect fundamental standards.

Article 207 TFEU on the common commercial policy allows for the integration of environmental and social policies into the EU export credit framework. ‘Export policy’ is expressly mentioned in Article

⁷⁵ See chapter 3 (Limits of Lawfulness) I. (Lawfulness under European Law) A. (Competence) (ii) (Substantive Provisions: Environmental, Labour, and Human Rights Standards).

⁷⁶ Examples of provisions which permit the EU to grant aid are: Articles 40(2), 42, 43(3) TFEU (common agricultural policy); Articles 208, 209 TFEU (Development policy); Article 214 TFEU (humanitarian aid).

207(1) TFEU. In *Opinion 1/75* the ECJ made clear that the EU has exclusive competence in the field of export credits in order to forestall distortions of competition:

In fact any unilateral action on the part of the Member States would lead to disparities in the conditions for the grant of export credits, calculated to distort competition between undertakings of the various Member States in external markets. Such distortion can be eliminated only by means of a strict uniformity of credit conditions ...⁷⁷

It is worth emphasising that the Court referred to the aim of preventing distortion of competition between European companies in *external markets*. It is this very idea that underpins the CSA measures.

Moreover, the second sentence of Article 207(1) TFEU provides that the ‘common commercial policy shall be conducted in the context of the principles and objectives of the Union’s external action’. Article 21 TEU sets out the objectives of the EU’s external policy, mentioning ‘the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity’ (Article 21(1) TFEU), as well as the goal of improving ‘the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development’ (Article 21(2)(f) TEU). Additionally, social protection, environmental

⁷⁷ *Opinion 1/75* [1975] ECR 1355.

protection, and human rights are all cross-cutting objectives.⁷⁸ To sum up, there is competence to integrate global corporate social accountability into EU and Member States' aid and export credit schemes.

Public Procurement

Global corporate social accountability could be inserted into the Public Procurement Directives in several ways. For instance, a definition of 'grave professional misconduct'—which is a ground for excluding firms from the tendering procedure⁷⁹—could take into account violations of fundamental standards in third countries. Or social and environmental contract conditions and award criteria could be prescribed.

The current Public Procurement Directives are based on the provisions on freedom to provide services, current Articles 62 and 53 TFEU, and on Article 114 TFEU, which concerns approximation of laws. An amendment to these Directives in order to strengthen corporate accountability could thus make use of the same legal bases. Although such changes would further the environmental and social dimension of public procurement, the centre of gravity would arguably

⁷⁸ See chapter 3 (Limits of Lawfulness) I. (Lawfulness under European Law) A. (Competence) (ii) (Substantive Provisions: Environmental, Labour, and Human Rights Standards).

⁷⁹ See Article 45 of Directive 2004/18/EC and Articles 53 and 54 of Directive 2004/17/EC.

remain internal market regulation. Arrowsmith argues that such ‘ancillary’ or ‘annex amendments’ need a (potential) basis in the Treaty.⁸⁰ However, as argued above, the case law of the ECJ seems to indicate that only the centre of gravity needs a legal basis, not the ancillary matter.⁸¹ Therefore global corporate social accountability via public procurement can be based on the internal market provisions of the Treaty.

Fines

Is the EU competent to impose fines on companies for corporate abuse abroad? Article 103(2)(a) TFEU stipulates that the EU is competent to impose fines for infringements of competition law. But the CSA measures are not about competition law. Therefore, Article 103(2)(a) TFEU is not a suitable basis.

Article 83(1)(1) TFEU, introduced by the Lisbon Treaty, empowers the European Union to establish ‘minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension ...’ Article 83(1)(2) enumerates terrorism, trafficking in human beings and sexual exploitation of women and children,

⁸⁰ S Arrowsmith in S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law* (Cambridge, Cambridge University Press, 2009) 27.

⁸¹ See chapter 3 (Limits of Lawfulness) I. (Lawfulness under European Law) A. (Competence) (i) (Doctrine on Competence).

illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime, and organised crime as ‘particularly serious crimes with a cross-border dimension’. This list is not exhaustive.⁸² Some of the crimes mentioned in Article 83(1) TFEU may well be termed severe human rights violations in which companies may be implicated.

Furthermore, the Lisbon Treaty inserted a related competence in criminal law for all areas which have ‘been subject to harmonisation measures’ to the extent that ‘the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy’ in these areas (Article 83(2) TFEU).

The crucial question however is whether fines imposed on companies for violations of basic environmental, labour, and human rights standards are sanctions of a *criminal* nature within the meaning of Article 83(1) and (2) TFEU. Certainly, ‘criminal law’ must be an autonomous concept that does not merely refer to definitions in Member States’ laws. While notions of national laws can be influential, the interpretation of Treaty provisions cannot depend on them.⁸³

⁸² The list can be extended by a unanimous vote in the Council and consent by the Parliament (Article 83(1)(3) TFEU).

⁸³ See above chapter 3 (Limits of Lawfulness) I. (Lawfulness under

One may try to shed light on the question by making an analogy to the case law under Article 6 of the European Convention on Human Rights, which protects in paragraphs 2 and 3 procedural rights specific to criminal procedure.⁸⁴ Also in the context of Article 6, the Strasbourg Court has been faced with the question of what ‘criminal’ means. In *Engel v Netherlands*,⁸⁵ three criteria are mentioned: the classification under national law, the nature of the proscribed act, and the measure’s severity.⁸⁶ While the classification under domestic law has only a ‘relative value’ because Convention terms must be understood ‘within the meaning of the Convention’,⁸⁷ the nature of the act is a ‘factor of greater import’.⁸⁸

The ‘criminal’ sphere according to the European Convention on Human Rights goes beyond criminal law as it is traditionally understood. In *Jussila v*

European Law) A. (Competence) (i) (Doctrine on Competence).

⁸⁴ See also T Stahlberg and H Lahmann, ‘A Paradigm of Prevention: Humpty Dumpty, the War on Terror, and the Power of Preventive Detention in the United States, Israel, and Europe’ (2011) 59 *American Journal of Comparative Law* 1059, 1081; B Hecker, *Europäisches Strafrecht* (Berlin, Springer, 2010) 144.

⁸⁵ *Engel v Netherlands* (1976) 22 Eur.Ct.H.R (ser. A).

⁸⁶ *Ibid* at para. 82. See also the analysis in *Secretary of State for the Home Department v AF and Secretary of State for the Home Department v MB* [2007] UKHL 46.

⁸⁷ *Ibid* at paras. 81-82.

⁸⁸ *Campbell and Fell v United Kingdom* (1984) 233 Eur.Ct.H.R (ser. A), para. 71.

Finland the ECtHR observed that

the Engel criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties ..., prison disciplinary proceedings ..., customs law ..., competition law ... and penalties imposed by a court with jurisdiction in financial matters ...⁸⁹

Such a wide definition of ‘criminal’ sits uneasily with EU law. According to Article 23(5) of Regulation 1/2003, fines for competition law infringements ‘shall not be of a criminal law nature’.⁹⁰ The specific provision of Article 103(1)(a) TFEU, which mentions a policy of antitrust fines, makes little sense if such fines already come under the heading of criminal law in Article 83 TFEU. In sum, the ECtHR definition of ‘criminal’ seems to be broader than the concept underlying Article 83 TFEU.

It follows that fines for violations of basic environmental, labour, and human rights standards that must be categorised as ‘criminal’ come under the scope of Article 83 TFEU, whereas ‘non-criminal’ fines of a nature comparable to antitrust penalties fall beyond that

⁸⁹ *Jussila v Finland* (2007) 39 Eur.Ct.H.R., para. 43; see also Sharpston AG in Case C-272/09 P *KME* [2011] ECR I-000, paras. 63-67.

⁹⁰ This is merely a Magrittean ‘Ceci n’est pas une pipe’ for the ECtHR: As explained above, domestic categorisation is not a factor of great import for the autonomous concept of ‘criminal’ under the ECHR.

provision.⁹¹ The Treaty seems to envisage a system in which some fines may be termed ‘criminal’ and others may not. Wherever the demarcating line between the two categories exactly lies,⁹² the question arises whether ‘non-criminal fines’—which do not fall under Article 83 TFEU—are outside the scope of EU competence.

Several judgments of the ECJ indicate that this is not the case:

It should be observed that where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions ... the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law.⁹³

The first part of the sentence indicates that the EU has power to impose sanctions for infringements of EU law. In fact, before the Lisbon Treaty’s entry into force,

⁹¹ Occasionally, the EU’s competence to legislate on criminal law is challenged, or at least interpreted narrowly due to the EU’s insufficient democratic legitimacy. Ruiz-Jarabo Colomer AG, rejected this position in Case C-176/03 *Commission v Council* [2005] ECR I-7879, para. 77.

⁹² B Hecker, *Europäisches Strafrecht* (Berlin, Springer, 2010) 145-147.

⁹³ Case 68/88 *Commission v Greece* [1989] ECR 2965, para. 23; Case C-326/88 *Anklagemyndigheden v Hansen & Soen I/S* [1990] ECR I-2911, para 17; Case 50-76 *Amsterdam Bulb BV v Produktschap voor Siergewassen* [1977] ECR 137, para. 4.

the ECJ found an *implied* power to prescribe sanctions. Advocate General Ruiz-Jarabo Colomer held that ‘the power to impose civil, administrative or criminal sanctions must be classified as an instrumental power in the service of the effectiveness of Community law’.⁹⁴ And the Court followed him.⁹⁵ This case law shows that, even though there is no specific norm allowing to impose fines for corporate abuse abroad (as there is for violations of competition law in Article 103(1)(a) TFEU), ‘civil’ or ‘administrative’ fines may still be annexed to another policy as an implied power. For example, ‘non-criminal’ fines may be based on environmental policy according to Article 192 TFEU or on the Treaty provisions of anti-discrimination and labour policy. Issuing fines may also constitute an implied power of another explicit EU power regarding enforcement measures.

To conclude, fines may be based on Article 83 TFEU, provided that they are of ‘criminal’ nature and that the other conditions in Article 83 TFEU are fulfilled. Fines constitute an implied power of an explicit power if they are ‘non-criminal’.

⁹⁴ Ruiz-Jarabo Colomer AG in Case C-176/03 *Commission v Council* [2005] ECR I-7879, para. 84 (footnote omitted).

⁹⁵ Case C-176/03 *Commission v Council* [2005] ECR I-7879, paras. 47, 48; see also Case C-440/05 *Commission v Council* [2007] ECR I-9097, particularly para. 70.

Trade measures

The first sentence of Article 207(1) TFEU sets out:

The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.

The wording of this provision seems to make clear that import or export restrictions and other trade measures fall within the scope of Article 207(1) TFEU.

However, the issue is not as simple as that. Trade measures may be a means to pursue another goal, such as environmental or development policy, for which the TFEU provides specific legal bases. Whereas Article 206 TFEU mentions traditional liberalisation goals ('the progressive abolition of restrictions on international trade', 'the lowering of customs and other barriers'), the second sentence of Article 207(1) TFEU demands that the 'common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action'. According to Article 21 TEU, which sets out the external policy, the EU shall aim to 'foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty'

(Article 21(2)(d) TEU) and ‘improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development’ (Article 21(2)(f) TEU). One has to go back to the case law of the ECJ to fathom the CCP’s demarcation from other policies.

Opinion 1/78 is a textbook example of the Court’s dynamic approach to legal construction:

Although it may be thought that at the time when the Treaty was drafted liberalization of trade was the dominant idea, the Treaty nevertheless does not form a barrier to the possibility of the Community’s developing a commercial policy aiming at a regulation of the world market for certain products rather than at a mere liberalization of trade.

Article [207] empowers the Community to formulate a commercial ‘policy’, based on ‘uniform principles’ thus showing that the question of external trade must be governed from a wide point of view and not only having regard to the administration of precise systems such as customs and quantitative restrictions. The same conclusion may be deduced from the fact that the enumeration in Article [207] of the subjects covered by commercial policy ... is conceived as a non-exhaustive enumeration which must not, as such, close the door to the application on the Community context of any other process intended to regulate external trade. A restrictive interpretation of the concept of Common Commercial Policy would risk causing disturbances in intra-Community trade by reason of the disparities which would then exist in certain sectors of

economic relations with non-member countries.⁹⁶

The objective of preventing disturbances in intra-EU trade requires some explanation.⁹⁷ The argument goes that in the absence of an EU-wide external trade policy, deflections of trade are likely to arise. Imported products would enter the European Union through the Member State with the most liberal trade policy and would then, benefiting from free movement in the internal market, flow to the less liberal Member States, undermining their trade policies. An internal market—in which third country products are assimilated and therefore benefit from free movement—thus requires a uniform external trade policy. This may justify an extensive interpretation of Article 207 TFEU that encompasses all measures that have an effect on the flow of trade into the European Union.

The *Tariff Preferences*⁹⁸ case concerned the General System of Preferences (GSP), a scheme that accords developing countries favourable trading terms. Pursuant to the ‘subjective/purposive approach’ put forward by the Council, commercial policy covers any

⁹⁶ *Opinion 1/78 (International Agreement on Natural Rubber)* [1979] ECR 2871, paras. 44-45.

⁹⁷ See in detail P Eeckhout, *External Relations of the European Union* (Oxford, Oxford University Press, 2004) 15 and 349.

⁹⁸ Case C-45/86 *Commission v Council (Tariff Preferences)* [1987] ECR 1493.

measure which aims exclusively, and not only in conjunction with one or more other aims, to influence the flow of trade. In contrast, the Commission favoured the ‘objective/instrumental approach’ and considered that a trade measure is at issue whenever trade is objectively influenced, regardless of the aims.⁹⁹ The distinction is probably better explained in terms of means and ends: The Commission argued that it is sufficient that trade is used as an instrument, whereas the Council maintained that trade must be the only aim.

The ECJ affirmed that the GSP is an instrument of trade, concerning ‘changes in tariff rates’ within the meaning of Article 207 TFEU. It seems as if the Court combined in this opinion—as in *Opinion 1/78*—the means and ends approaches. The ECJ held, first, that a trade instrument was involved and, second, that the objectives of the instrument come into the realm of a modern common commercial policy.

There are certain judgments, however, which point in the direction of the ‘means’ or ‘instrumental’ approach: Cases dealing with the link between trade and foreign policy, e.g. *Werner v. Germany*,¹⁰⁰ *Leifer and Others*,¹⁰¹ and *Centro-Com*¹⁰² stand for the

⁹⁹ See Lenz AG in Case C-45/86 *Commission v Council (Tariff Preferences)* [1987] ECR 1493, paras. 54, 55.

¹⁰⁰ Case C-70/94 *Werner v Germany* [1995] ECR I-3189.

¹⁰¹ Case C-83/94 *Leifer and Others* [1995] ECR I-3231.

¹⁰² Case C-124/95 *The Queen, ex parte Centro-Com v HM Treasury*

proposition that trade instruments, such as import or export measures, can be adopted under Article 207 TFEU even if their objectives are solely related to foreign and security policy.¹⁰³

Opinion 2/00 concerning the Cartagena Protocol to the Convention on Biological Diversity seems to have inaugurated a more restrictive reading of the CCP. The Court put forward the question whether:

the Protocol, in the light of its context, its aim and its content, constitutes an agreement principally concerning environmental protection which is liable to have incidental effects on trade in LMOs [living modified organisms], whether, conversely, it is principally an agreement concerning international trade policy which incidentally takes account of certain environmental requirements, or whether it is inextricably concerned both with environmental protection and with international trade.¹⁰⁴

The ECJ concluded that ‘in the light of its context, aim and its content’ the Protocol is essentially intended to improve biosafety.¹⁰⁵ Hence, the correct legal basis for the shared agreement was Article 192 TFEU on environmental policy and not Article 207 TFEU, as the

and Bank of England [1997] ECR I-81.

¹⁰³ See P Eeckhout, *EU External Relations Law*, 2nd edn (Oxford, Oxford University Press, 2011) 35-39; see also: Case C-62/88 *Greece v Council (Chernobyl)* [1990] ECR I-1527.

¹⁰⁴ *Opinion 2/00 (Cartagena Protocol)* [2001] ECR I-9713, paras. 23 and 25.

¹⁰⁵ *Ibid* at para. 37.

Commission had argued. In this case the Court appeared to drop the extensive means approach for a more restrictive centre of gravity approach which involves an overall assessment of the context, aim, and content of the measure.

However, it is unconvincing to assume that the Court completely buried the ‘means-based’ conception. The shift in legal methodology in *Opinion 2/00* seems to be driven by the aim to leave a field of application to the then recent Treaty provision on environment. The Court said:

The Commission’s interpretation, if accepted, would effectively render the specific provisions of the Treaty concerning environmental protection policy largely nugatory, since, as soon as it was established that Community action was liable to have repercussions on trade, the envisaged agreement would have to be placed in the category of agreements which fall within commercial policy.¹⁰⁶

But this reasoning does not apply to the cases on foreign policy, discussed above, where there was no

¹⁰⁶ *Opinion 2/00 (Cartagena Protocol)* [2001] ECR I-9713, para. 40; see also Case C-281/01 *Commission v Council (Energy Star)* [2001] ECR I-12049, paras. 40-41; Case C-178/03 *Commission v Parliament (Rotterdam Convention)* [2006] ECR I-107, para. 51; Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-6351, para. 183; Case C-347/03 *Regione autonoma Friuli-Venezia Giulia and ERSA* [2005] ECR I-3785, paragraph 75 and the case law cited.

other legal basis in the TFEU. Indeed, it is rather unlikely that the Court would revise that case law, annul Regulations based on Article 207 TFEU, and give Member States complete freedom to adopt import or export restrictions because their exclusive purpose and context and, presumably, their centre of gravity relate to foreign policy. On the contrary, it is more plausible that in those cases where there is no alternative legal basis in the Treaty the Court would retain its case law essentially predicated on the means approach. This ultimately leads to a two-pronged method: The Court employs the centre of gravity approach when ruling on two alternative EU competences but uses the extensive means approach when deciding between EU and Member States' competences.

Such a methodology might be justified by the underlying principle of the CCP that deflections of trade have to be avoided and the unity of the external trade relations preserved. *Opinion 2/00* seems to remain consistent with this initial teleological interpretation of the Court and continues to defend the basic principle of the CCP, albeit under a different legal basis. It is clear from *Opinion 2/00* that the EU retains the exclusive competence on all external trade related issues, even under the umbrella of the environmental provision. Member States therefore cannot impinge on the uniformity of the CCP. As long as the EU regulates

trade matters, a catch-all interpretation of Article 207 TFEU is not necessary and a centre of gravity approach can be adopted.

This review of case law shows the way for the CSA measures: Import or export restrictions imposed with the intention to combat human rights violations fall under Article 207 TFEU. There is no specific Treaty basis which allows legislating on human rights on a stand-alone basis.¹⁰⁷ Thus, Article 207 TFEU is the only means to avoid trade deflections by human rights infused trade restrictions.

The matter is different with regard to the environment. Article 192 TFEU grants the EU competence to enact environmental policies. Here, the analysis has to follow the reasoning of *Opinion 2/00* and subsequent case law on environment and trade (notably the *Energy Star* and *Rotterdam Convention* judgments¹⁰⁸): The centre of gravity, taking account of the ‘context, aim, content’ of the measure, decides the correct legal basis.

Trade measures dependent on the respect for labour rights yield yet another result. There is a specific provision in the Treaty on labour policy (Article 153

¹⁰⁷ See chapter 3 (Limits of Lawfulness) I. (Lawfulness under European Law) A. (Competence) (ii) (Substantive Provisions: Environmental, Labour, and Human Rights Standards).

¹⁰⁸ Case C-281/01 *Commission v Council (Energy Star)* [2001] ECR I-12049,

TFEU) which suggests that the centre of gravity approach would be applied. However, Article 207(6) TFEU stipulates that ‘the exercise of the competences ... in the field of the common commercial policy ... shall not lead to harmonisation ... in so far as the Treaties exclude such harmonisation’. Is this a reference to Article 153(5) TFEU which says: ‘The provisions of this Article shall not apply to ... the right of association’? Does this mean that import or export restrictions, employed in order to ensure the respect of freedom of association, are not allowed? Article 153(5) TFEU does not explicitly refer to the exclusion of ‘harmonisation of Member States’ laws or regulations’. However, in spite of the different phraseology, Article 153(5) TFEU is meant to prohibit harmonisation, too, and therefore seems to constitute a provision referred to by Article 207(6) TFEU.

Not all regulation is harmonisation, however. The EU’s General System of Preferences, based on (current) Article 207 TFEU, makes certain trade benefits conditional on the ratification and effective implementation of the ILO Convention concerning Freedom of Association and Protection of the Right to Organise.¹⁰⁹ Similarly, one might argue that trade

¹⁰⁹ Article 8(1)(b) in combination with Annex III, A(14) of Council Regulation (EC) 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 [2008] OJ L211/1.

restrictions imposed because of violations of the freedom of association do not entail harmonisation in the strict sense.

But even if this view is rejected, this does not mean that freedom of association is untouchable. A comparison with the exclusion of harmonisation on public health matters might show this. The ECJ held in the first *Tobacco Directive* case that (current) Article 168(5) TFEU

excludes any harmonisation of laws and regulations of the Member States designed to protect and improve human health.

But that provision does not mean that harmonising measures adopted on the basis of other provisions of the Treaty cannot have any impact on the protection of human health. ...

Other articles of the Treaty may not, however, be used as a legal basis in order to circumvent the express exclusion of harmonisation laid down in Article [168(5) TFEU].¹¹⁰

This is an enigmatic passage: The EU cannot, then can, and then cannot legislate on public health? Properly understood it merely refers to the old *Casagrande* doctrine and the centre of gravity theory. Policies, on which the EU is in principle prohibited to legislate, do come into its realm if necessary to attain another policy, which constitutes the centre and principal aim of the

¹¹⁰ Case C-376/98 *Germany v European Parliament and Council* [2000] ECR I-8419, paras. 77-79.

measure. Thus, the EU may ‘harmonise’ freedom of association, also within the scope of Article 207 TFEU, as an ‘ancillary’ matter.¹¹¹ In sum, the centre of gravity decides whether Article 207 TFEU or Article 153 TFEU is the proper legal basis. Trade measures under Article 207 TFEU may take account of freedom of association if the measures do not involve harmonisation or if freedom of association does not play a predominant role.

Labelling

The discussion on trade measures directs the discussion concerning labelling. In the *Energy Star* case the ECJ applied the centre of gravity approach and concluded that an international agreement on the co-ordination of energy efficient labelling programmes for office equipment required Article 207 TFEU as a single legal basis and not Article 192 TFEU on environmental policy. The Court held that the agreement had a direct impact on trade and only an indirect impact on the environment, such that the trade objective was deemed to be predominant.¹¹² The Court referred in particular to

¹¹¹ This is a circumvention of the prohibition of harmonisation, see chapter 3 (Limits of Lawfulness) I. (Lawfulness under European Law) A. (Competence) (i) (Doctrine of Competence), especially E Lenski ‘Article 2 TFEU’ in C-O Lenz, K-D Borchardt (eds), *EU-Verträge Kommentar nach dem Vertrag von Lissabon*, 5th edn (Berlin, Bundesanzeiger, 2010) para. 38.

¹¹² Case C-281/01 *Commission v Council (Energy Star)* [2001] ECR

the context, the WTO Agreement on Technical Barriers to Trade (TBT), which makes clear that even non-binding labelling provisions may constitute an obstacle to trade.¹¹³ The European Parliament and the Council however refer to Article 192 TFEU for the current Eco-label Regulation.¹¹⁴ In light of the *Energy Star* judgment it remains to be seen whether the ECJ would accept that the centre of gravity of the eco-label is indeed environmental policy.

A CSA label that takes exclusively human rights into account may only rest on Article 207 TFEU. There is no legal basis in the Treaty on human rights as such.¹¹⁵

In contrast, labour rights related labelling may also be tied to Article 153 TFEU. Article 153(5) TFEU, which excludes freedom of association, poses a problem, but the current practice under the GSP Regulation suggests that trade measures may be contingent on the protection of freedom of association in third countries.¹¹⁶

I-12049, paras. 40-41.

¹¹³ *Ibid* at para. 45.

¹¹⁴ Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel [2010] OJ L27/1 (Ecolabel Regulation).

¹¹⁵ *Opinion 2/94 (Accession by the Community to the ECHR)* [1996] ECR I-1759, para. 27.

¹¹⁶ See chapter 2 (Context) I. (Existing International and European Regulation on Global Corporate Social Accountability) B. (European Law) (Trade Measures).

Reporting Obligations

The Consolidated Accounts Directive already includes some rudimentary requirements on environmental, labour, and human rights reporting.¹¹⁷ The legal basis of this Directive is current Article 50 TFEU on the freedom of establishment in the internal market.¹¹⁸ The same provision would allow for an amendment introducing more rigorous standards.¹¹⁹ The cross-cutting Treaty objectives of environmental, social, and human rights protection would buttress such amendment.¹²⁰

This seems all evident with regard to the internal market and companies located in Europe. Far more difficult to argue is the competence to impose CSA reporting on companies outside Europe. A universal

¹¹⁷ See chapter 2 (Context) I. (Existing International and European Regulation on Global Corporate Social Accountability) B. (European Law) (Reporting).

¹¹⁸ See Directive 2003/51/EC of the European Parliament and of the Council of 18 June 2003 amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings [2003] OJ L178/16.

¹¹⁹ See also University of Edinburgh, ‘Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union’ (2010) <<http://www.law.ed.ac.uk/euenterpriseslf/>> para. 201.

¹²⁰ See chapter 3 (Limits of Lawfulness) I. (Lawfulness under European Law) A. (Competence) (ii) (Substantive Provisions: Environmental, Labour, and Human Rights Standards).

approach¹²¹ does not only create tension with international law,¹²² it also looks misplaced if hitched to the *internal* market provision of Article 50 TFEU.

Does the principle of parallelism help? The *Inland Waterways* case has established that the external competence mirrors the internal competence: The EU has implied external powers if (i) the Treaty provides for an internal competence, and if (ii) external competence is necessary to attain the objective of the internal competence.¹²³ Here, however, it looks doubtful whether CSA reporting obligations imposed on companies in third countries are *necessary* to attain the objectives of the internal market—notably removing barriers to intra-European trade and distortions of competition in the EU. The universal model shows no link to the internal market.

This may be different with regard to foreign subsidiaries that are controlled by a European parent company. In order to reflect the true economic power of

¹²¹ Second element, model 2 in the matrix of CSA measures; see above chapter 1 (Content: The Elements of European CSA Measures) II. (Explaining the Matrix) A. (Second Element: Addressee).

¹²² See chapter 3 (Limits of Lawfulness) II. (Lawfulness under International Law) B. (Customary International Law: Lawfulness of Extraterritorial Jurisdiction).

¹²³ See *Opinion I/76 (European Laying-up Fund for Inland Waterway Vessels)* [1977] ECR 741, paras. 3-4; see also P Craig and G de Búrca, *EU Law*, 4th edn (Oxford, Oxford University Press, 2008), 175-176.

the whole enterprise such extraterritorial reach may be justified. The enterprise approach is an established principle in accounting. In fact, the Accounts Directive already employs a theory of control.¹²⁴ Thus, CSA reporting imposed on third country subsidiaries may just edge through the confines of Article 50 TFEU.

In sum, while there is competence for reporting if a European approach is adopted, this seems unlikely with a universal approach. Reporting obligations imposed on the entire international supply chain appear similarly outside of the scope of the internal market, whereas including third country subsidiaries according to the enterprise approach reflects well established reporting practice under Article 50 TFEU.

(v) Private Enforcement

Private enforcement of global corporate social accountability in European courts is premised on two assumptions: first, that European courts are open and, second, that they enforce fundamental environmental, labour, and human rights.

The Brussels I Regulation confers jurisdiction on Member States' courts if the defendant is located there. But the Regulation does not provide for jurisdiction

¹²⁴ Article 1 and 2 of the European Seventh Company directive on Consolidated Accounts Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54 (3) (g) of the Treaty on consolidated accounts [1983] OJ L193/1.

over third country companies (although Member States may choose to provide for this).¹²⁵ The legal basis for Brussels I is current Article 81 TFEU. This provision allows the enactment of legislation on jurisdictional matters (Article 81(2)(c) TFEU). Whereas the pre-Lisbon law required a strong internal market link (measures shall be adopted ‘in so far as necessary for the proper functioning of the internal market’¹²⁶), the condition is more lax now: measures shall be adopted ‘*particularly* when necessary for the proper functioning of the internal market’ (emphasis added).¹²⁷ Therefore, Article 81 TFEU constitutes the correct legal basis for amending Brussels I in order to include jurisdiction over third country companies (the universal approach). An internal market nexus is no longer necessary.

Concerning the applicable law, the Rome I and II Regulations provide that, in principle, the law of the country applies in which the corporate abuse takes place.¹²⁸ Rome I and II could be amended in order to make European standards applicable instead (or

¹²⁵ See chapter 2 (Context) I. (Existing International and European Law on Global Corporate Social Accountability) B. (European Law) (Private Enforcement).

¹²⁶ See former Article 65 TEC.

¹²⁷ Article 81(2) TFEU; see also M Kotzur, ‘Article 81’ in R Geiger, D-E Khan and M Kotzur, *EUV/AEUV Kommentar*, 5th edn (München, C.H. Beck Verlag, 2010) para 2.

¹²⁸ See chapter 2 (Context) I. (Existing International and European Law on Global Corporate Social Accountability) B. (European Law) (Private Enforcement).

additionally). Current Article 81(2)(c) TFEU, the legal basis for Rome I and II, allows changes to private international law.

The situation looks more complicated with regard to international *jus cogens* and custom. These standards generally do not apply directly in private disputes; national law transposes them (or has already incorporated them), but they are not directly enforceable via civil claims. Private international law concerns the question which national law applies; it is not about making applicable a body of law that usually does not have direct effect in civil claims. Thus, Article 81(2)(c) TFEU, which allows the EU to legislate on conflict of laws, does not seem to be a proper basis for making international standards enforceable. Article 81(2)(c) TFEU does not encompass changes to *substantive* law.¹²⁹

Juridical prestidigitation might still suggest the following. Both Rome I and Rome II stipulate that ‘overriding mandatory provisions’ remain applicable irrespective of the law otherwise applicable to the dispute.¹³⁰ Article 9(1) Rome I explains:

Overriding mandatory provisions are provisions the respect

¹²⁹ See M Rossi, ‘Art. 65’ in C Calliess and M Ruffert, *Das Verfassungsrecht der Europäischen Union*, 3rd edn (München, C.H. Beck, 2007) para. 1.

¹³⁰ Article 9 of the Rome I Regulation and Article 16 of the Rome II Regulation.

for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.¹³¹

One way of making international law directly applicable to corporate abuse abroad could be to re-define ‘overriding mandatory provisions’ in order to include a reference to international *jus cogens* or general international standards. The centre of gravity of the Rome I and II Regulations would possibly remain conflict of laws. Thus, Article 81(2)(c) TFEU would be a sufficient legal basis.¹³²

But it is doubtful whether the ECJ would accept this sleight of hand and confirm Article 81(2)(c) TFEU as a basis for such far-reaching legal changes with global repercussions merely as an ‘ancillary matter’ to conflict of laws. Arguably, introducing these standards

¹³¹ This definition is apparently based on the ECJ’s interpretation of ‘overriding mandatory provisions’ in Joint Cases C-369/96 and C-376/96 *Arblade* [1999] ECR I-8453, para. 30: ‘national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State’.

¹³² See on the theory of centre of gravity above chapter 3 (Limits of Lawfulness) I. (Lawfulness under European Law) A. (Competence) (i) (Doctrine of Competence).

is not a question of *referring* to pre-existing, directly applicable law but of *creating* new substantive private law. Article 81(2)(c) TFEU is not a basis for doing so. On the other hand, one might argue that international *jus cogens* and custom only fulfil the function of defining more precisely ‘overriding mandatory provisions’, which is allowed under Article 81(2)(c) TFEU.

Whatever the better view is, even a rejection of Article 81(2)(c) TFEU does not imply that the EU is not competent to legislate on substantive law. Several changes to Member States’ civil codes can be traced back to European legislation based on internal market provisions.¹³³ Are these provisions available in this scenario? Article 114 TFEU on approximation of laws and the respective provisions of the four fundamental freedoms (free movement of goods, services, persons, and capital) are designed to create and facilitate an EU-wide market. The ECJ held in the *Tobacco Advertising* case that a measure can only be based on Article 114 TFEU if it genuinely aims to remove obstacles to the four freedoms or distortion of competition. Such distortion must be appreciable; otherwise ‘the powers of the Community legislature would be practically

¹³³ See V Röben, ‘Art. 65’ in E Grabitz and M Hilf, *Das Recht der Europäischen Union*, 40th edn (München C.H. Beck, 2009) para. 1.

unlimited’.¹³⁴

An internal market link would only exist if the field of application of the substantive standards were not only limited to third countries but included the EU as well. But even then it is hard to argue that the measure’s goal is to remove obstacles and appreciable distortion of competition in the *internal* market.

The principle of parallelism, according to which the internal competence is mirrored externally, may justify extraterritorial jurisdiction under Article 114 TFEU, although it appears difficult to maintain that extraterritoriality is necessary to achieve the objective of Article 114 TFEU.¹³⁵

Another option is the following: Private enforcement may derive *automatically* from the principle of effectiveness of EU law (*effet utile*), once the substantive standards are based on another Treaty article. The CSA measures may follow the example of European competition law. The ECJ has held that competition law’s ‘full effectiveness’ and ‘practical effect’ would be ‘put at risk if it were not open to any individual to claim damages for loss caused to him’.¹³⁶

¹³⁴ Case C-376/98 *Germany v European Parliament and Council* [2000] ECR I-8419, para. 107.

¹³⁵ See *Opinion I/76 (European Laying-up Fund for Inland Waterway Vessels)* [1977] ECR 741, paras. 3-4; see also P Craig and G de Búrca, *EU Law*, 4th edn (Oxford, Oxford University Press, 2008) 175-176.

¹³⁶ Case C-453/99 *Courage* [2001] ECR I-6297, para. 26.

‘[A]ctions for damages before the national courts can make a significant contribution to the maintenance of effective competition’.¹³⁷ Thus, cartels are not only prohibited by European law, they may also be sued in Member State courts for damages.

The EU therefore has an implied power to legislate on private enforcement. Advocate General Ruiz-Jarabo Colomer summarised the case law as follows: ‘[T]he power to impose civil ... sanctions must be classified as an instrumental power in the service of the effectiveness of Community law’.¹³⁸

Private enforcement, as an implied power, may be necessary for ensuring the effectiveness of basic environmental, labour, and human rights abroad. Hence, private enforcement may be based on environmental policy according to Article 192 TFEU or on the Treaty provisions of anti-discrimination and labour policy. Private enforcement may also constitute an implied power of another explicit EU power on enforcement measures.

(vi) Flexibility Clause

Article 352 TFEU is the residual yet notorious competence norm. It comes into play when other Treaty

¹³⁷ Case C-453/99 *Courage* [2001] ECR I-6297, para. 27; Mischo AG in Case C-453/99 *Courage* [2001] ECR I-6297, para. 54.

¹³⁸ Ruiz-Jarabo Colomer AG in Case C-176/03 *Commission v Council* [2005] ECR I-7879, para. 84 (footnote omitted).

provisions are not sufficient. Due to its breadth, it creates tension with the principle of attributed powers. The first sentence of Article 352(1) TFEU reads as follows:

If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.

The Lisbon Treaty has broadened this lacuna-filling competence even further. Whereas the old provision was confined to the attainment of the objectives of the EC treaty, ‘in the course of the common market’, notably excluding objectives of the EU Treaty,¹³⁹ the current stipulation does away with these restrictions. All that is left is the reference to the ‘objectives’ and the ‘framework of the policies defined in the Treaties’¹⁴⁰. The ECJ has even decided that an ‘implicit underlying objective’ is sufficient.¹⁴¹

‘The provision can thus serve to create a competence which makes action on the European level

¹³⁹ See Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-6351, para. 198.

¹⁴⁰ But see Article 352(4) TFEU which excludes the use of Article 352 TFEU in the Common Foreign and Security Policy.

¹⁴¹ Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-6351, para. 226.

possible in almost the entire area of application of the primary law'.¹⁴² The German Federal Constitutional Court repined (but grudgingly accepted) that Article 352 TFEU makes it possible to substantially amend Treaty foundations of the European Union without consent given by Member States' parliaments.¹⁴³ The flexibility clause therefore conflicts with the ban on transferring blanket empowerments or *Kompetenz-Kompetenz* to the EU.

However, Article 352 TFEU is not limitless. The ECJ explained in *Opinion 2/94*:

That provision, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community. On any view, Article [352] cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose.¹⁴⁴

In the case at hand, the Court denied that accession to the European Convention of Human Rights could be

¹⁴² German Federal Constitutional Court (*Bundesverfassungsgericht*), *Lisbon judgment*, 2 BvE 2/08, para. 327.

¹⁴³ *Ibid* at para. 328; Consent by the European Parliament is necessary, though.

¹⁴⁴ *Opinion 2/94 (Accession by the Community to the ECHR)* [1996] ECR I-1759, para. 29, 30.

based on Article 352 TFEU, mainly because of the ensuing constitutional and institutional implications that warrant formal Treaty amendment.¹⁴⁵

Turning to the CSA measures, it is not hard to find the objectives of environmental, labour, and human rights protection in the Treaties. Article 11 TFEU elevates environmental protection to a cross-cutting objective of the EU. Article 3(5) TEU says: ‘In its relations with the wider world, the Union shall uphold and promote its values and interests ... It shall contribute to ... the sustainable development of the Earth’. Article 21(2)(f) TEU, setting out the objectives of external action, refers to the aims of improving the quality of the environment and the sustainable management of global natural resources. Article 9 TFEU is the cross-cutting social clause, which demands that the EU ensures ‘adequate social protection’ whenever it takes action. References in the Treaties to human rights are numerous.¹⁴⁶

What does pose a problem is the third paragraph of Article 352 TFEU: ‘Measures based on this Article shall not entail harmonisation of Member States’ laws or regulations in cases where the Treaties exclude such harmonisation’. This provision seems to refer also to

¹⁴⁵ *Ibid* at para. 34. The Lisbon Treaty has introduced Article 6(2) TEU on accession to the ECHR.

¹⁴⁶ See the preamble of the TEU, Articles 2, 3(5), 21(1), 21(2)(b) TEU,

Article 153(5) TFEU which says: ‘The provisions of this Article shall not apply to ... the right of association’. But we have argued above that not all regulation of freedom of association may be classified as harmonisation and that according to the centre of gravity theory, it may still be regulated as an ancillary matter.¹⁴⁷

In sum, it is possible to hinge the CSA measures on Article 352 TFEU if the more specific legal bases examined previously are insufficient.

(vii) Subsidiarity

The question of the existence of competence is closely connected to the question of the lawful exercise of competence. The principle of subsidiarity, set out in Article 5(3) TEU, demands that

in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The introductory phrase makes clear that the subsidiarity principle does not apply to areas that

¹⁴⁷ See above with regard to the similar provision of Article 207(6) TFEU in trade measures chapter 3 (Limits of Lawfulness) I. (Lawfulness under European Law) A. (Competence) (iv) (Public Enforcement) (Trade Measures).

belong to the EU's exclusive competence. While there was debate about the correct meaning of 'exclusive competence',¹⁴⁸ the Lisbon Treaty has tried to clarify the issue. Title I of the TFEU lays down 'categories and areas of Union competence'. According to Article 3(1)(e) TFEU the EU has exclusive powers over the common commercial policy. Thus, in that area the subsidiarity principle does not apply. All other policy areas examined previously—such as environment, social policy, internal market, or judicial matters—are categorised as 'shared competence' (Article 4 TFEU). In these areas, the subsidiarity principle has to be respected.

The concept of subsidiarity is not easy to grasp. It is probably best understood as a test of comparative efficiency: Should the EU or rather the Member States take action?¹⁴⁹ It involves a 'complex socio-economic calculus concerning the most effective level of government for different regulatory tasks'.¹⁵⁰

This explains why judicial review is not intensive. In the *Working Time Directive* case the United Kingdom argued that subsidiarity was infringed but the ECJ rejected that argument: 'Once the Council has found that it is necessary to improve the existing

¹⁴⁸ P Craig and G de Búrca, *EU Law*, 4th edn (Oxford, Oxford University Press, 2008), 101-103.

¹⁴⁹ *Ibid* at 103.

¹⁵⁰ *Ibid* at 105.

protection as regards the health and safety of workers and to harmonize the conditions in this area, ... achievement of that objective ... necessarily presupposes Community-wide action'.¹⁵¹ In the same vein, Advocate General Geelhoed stated that subsidiarity is a 'dynamic concept which leaves the necessary scope to the appraisal of the European legislature'.¹⁵²

Turning to the CSA measures, the following may be noted. First, trade instruments, as part of the common commercial policy, fall outside the remit of subsidiarity. This holds true for trade restrictions, labelling, and export credits if the centre of gravity is the common commercial policy.

Second, amendments to current legislation are likely to pass the test. State aid law, public procurement, and reporting obligations all have strong

¹⁵¹ Case C-84/94 *United Kingdom v Council (Working Time Directive)* [1996] ECR I-5755, para. 47.

¹⁵² Geelhoed AG in Case C-491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco* [2000] ECR I-11543, para. 285; see also Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079; Cases C-154/04 and C-105/04 *The Queen, on the application of Alliance for Natural Health and Nutri-Link Ltd. v Secretary of State for Health* [2005] ECR I-6451, paras. 99-108; however, apart from this substantive side of the subsidiarity principle, which is reviewed only to a limited extent by the courts, there is also a procedural side, which requires to state reasons and involve national parliaments, see Protocol on the application of the principles of subsidiarity and proportionality (1997) [2006] OJ C321/308; see also Article 5(4)(2) TEU.

repercussions on the internal market. This most likely justifies EU-wide action.¹⁵³ Similarly, amendments to private international law (private enforcement) have an intra-European cross-border element.

This leaves us with the following areas that require more elaborate justification: The publication of violations and imposition of a fine as enforcement measures, and environmental, labour, and human rights as substantive standards. Since the ‘socio-economic calculus’ of subsidiarity is complicated and much depends on the particular circumstances of a final proposal, one can only sketch in the principal points. Most importantly, the level playing field argument may buttress the case for EU action. Enforcing corporate social accountability solely on a Member State level may not provide for sufficient clout and impact in an integrated global economy. National policy would discriminate unfairly against national businesses (reverse discrimination). Although the playing field may not be entirely levelled if only European companies (and not all companies worldwide) are targeted, it may at least be substantially ‘more equal’. Finally, EU legislation provides the opportunity to achieve ‘horizontal coherence’, i.e. to dovetail environmental rights in public procurement with

¹⁵³ See in particular Case C-491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco* [2000] ECR I-11543, paras. 180-183.

environmental rights in trade measures, fining policies, or with regard to the publication of violations.¹⁵⁴

(viii) Conclusions

We have seen that the EU is a system of conferred competences. The exercise of power must be based on an enabling provision. The EU has no *Kompetenz-Kompetenz*. Thus, CSA measures must find a basis in the EU Treaties. The ECJ however interprets the principle of conferral in an extensive manner. For example, the Court has frequently accepted implied powers that stem from an explicit basis in the Treaties.

In order to review the right choice of a Treaty article, the ECJ looks at the context, aim, and content of the measure in order to find out the ‘centre of gravity’. The predominant component of the legislation decides the correct legal basis.

The analysis of the CSA content has shown the following. Article 192 TFEU easily supports all kinds of environmental policies. The EU’s power in that field is sufficiently broad. Moreover, Article 11 TFEU demands that environmental protection is integrated in other policy areas as well.

Labour policy finds its basis in Article 153 TFEU, but the fifth paragraph of that provision does not allow

¹⁵⁴ See also Article 7 TFEU: ‘The Union shall ensure consistency between its policies and activities, taking all of its objectives into account ...’

to legislate on freedom of association (and, possibly, collective bargaining). Article 153(5) TFEU, however, does not exclude freedom of association and collective bargaining to be taken account of in other areas. Indeed, the Lisbon Treaty has introduced a cross-cutting social clause in Article 9 TFEU, which demands that the EU ensures ‘adequate social protection’ whenever it takes action.

The Treaties affirm on numerous occasions that human rights protection is an objective of the EU. Anti-discrimination policy can be based on Articles 19 and 157 TFEU. But apart from that there is no stand-alone competence to regulate human rights as such. As the ECJ said in *Opinion 2/94*, there is ‘no general power to enact rules on human rights’. Nonetheless, human rights still have to be integrated in all other policies, since human rights—like environmental or social protection—can be construed as a cross-cutting horizontal objective.

The CSA measures seem to go beyond traditional development cooperation such as financial aid and technical assistance. And their primary objective is not the reduction of poverty. The centre of gravity of the CSA measures does not seem to lie in development policy, even with a field of application restricted to developing countries. Article 208 TFEU on EU development policy may still be a supporting legal basis.

Competence may not only stem from the environmental, labour, and human rights the CSA measures aim to prescribe; competence can also derive from the means of enforcement employed to further these policies. The analysis of the enforcement measures has yielded the following results.

The publication of corporate abuse arguably needs a basis in the Treaties because of its potentially detrimental effect on businesses' rights. However, there is no stand-alone competence in the Treaties on the publication of corporate abuse. Nevertheless, competence for publication may be an implied power annexed to an explicit power.

The EU is competent to review aid granted to companies by Member States. Article 109 TFEU allows the EU to enact detailed rules on the criteria for the lawfulness of Member States' aid policies. It is possible to make state aid for certain business operations contingent on the respect of fundamental standards, since environmental protection, social protection, and human rights are all cross-cutting objectives which must be taken into account whenever the EU takes action. The same holds true for EU aid schemes. Moreover, Article 207 TFEU on the common commercial policy allows the integration of environmental and social policies into the EU export credit framework. In *Opinion 1/75* the ECJ made clear that the EU has exclusive competence in the field of

export credits in order to forestall distortions of competition in foreign markets.

Global corporate social accountability can be integrated into the EU's public procurement framework. The current Public Procurement Directives are based on current Articles 62 and 53 TFEU, regarding freedom to provide services, and on Article 114 TFEU, which concerns approximation of laws. Amendments to the law in order to reward compliance with basic global standards may be based on the same provisions since the centre of gravity would remain internal market regulation.

Fines for corporate abuse abroad are supported by Article 83 TFEU if they are of a 'criminal nature'. 'Administrative', 'non-criminal', fines may constitute an implied power if necessary for a certain policy. The ECJ has confirmed that fines can be classified as an instrumental power to ensure the effectiveness of an explicit EU policy.

Import or export restrictions imposed with the intention to combat human rights violations fall under the common commercial policy according to Article 207 TFEU. There is no specific Treaty basis which allows legislating on human rights on a stand-alone basis. Thus, Article 207 TFEU is the only means by which to avoid trade deflections by human rights infused trade restrictions.

The matter is different with regard to trade

measures intended to protect the environment. Article 192 TFEU grants the EU competence to enact environmental policies. Here, the centre of gravity, taking account of the ‘context, aim, and content’ of the measure, decides whether Article 207 TFEU on trade policy or Article 192 TFEU on environmental policy is the correct basis.

Trade measures dependent on respect for labour rights encounter difficulties in Article 207(6) TFEU. This provision stipulates that ‘the exercise of the competences ... in the field of the common commercial policy ... shall not lead to harmonisation ... in so far as the Treaties exclude such harmonisation’. Article 153(5) TFEU, which prohibits legislating on freedom of association, seems to constitute a provision referred to by Article 207(6) TFEU. One might however argue that trade restrictions imposed as a result of violations of freedom of association do not entail harmonisation in the strict sense. But even if this view is rejected, freedom of association is not untouchable. The EU may ‘harmonise’ freedom of association, also within the scope of Article 207 TFEU, as an ‘ancillary’ matter.

The analysis of competence for trade measures directs the analysis of competence for labelling. The centre of gravity decides whether environmental labelling is a trade measure according to Article 207 TFEU or rather an environmental measure according to Article 192 TFEU. A CSA label that takes into account

human rights exclusively may only rest on Article 207 TFEU since there is no legal basis in the Treaty on human rights as such. Labour rights related labelling may either be tied to Article 153 TFEU or Article 207 TFEU. Freedom of association may be regulated if no harmonisation is involved or if it is an ‘ancillary’ matter.

Reporting obligations for European companies can be based on Article 50 TFEU concerning the freedom of establishment in the internal market. The Consolidated Accounts Directive already includes some rudimentary requirements on environmental, labour, and human rights reporting, which can be further developed. The cross-cutting Treaty objectives of environmental, social, and human rights protection would buttress such amendment. However, there does not appear to be competence to impose CSA reporting obligations on companies around the world. Only covering third country subsidiaries of European parent firms may be justified under the internal market provision of Article 50 TFEU.

Private enforcement of global corporate social accountability in Europe requires, first, that European courts are open and, second, that they adjudicate according to fundamental environmental, labour, and human rights standards. With regard to the first issue of jurisdiction, Article 81(2)(c) TFEU on jurisdictional matters is the correct basis to include jurisdiction over

third country companies or other amendments. With regard to the second issue of the applicable law, Article 81(2)(c) TFEU seems to be the correct provision since it allows changes to private international law. European standards may therefore be applied. It is however debatable whether making *jus cogens* or general international standards directly applicable in courts is a question of *referring* to a body of law or rather a question of *creating* law. If the latter view is adopted, Article 81(2)(c) TFEU does not appear to be the proper provision. In that case, enforcing *jus cogens* or general international standards in court may constitute an implied power to an explicit policy.

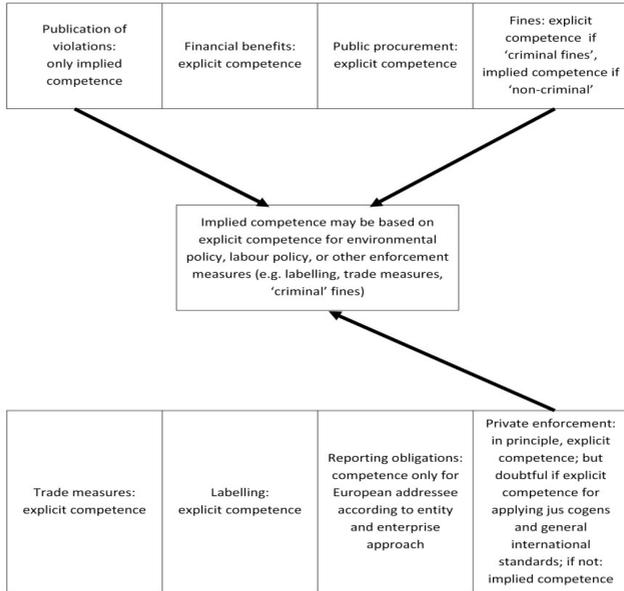
Ultimately, if other Treaty provisions seem insufficient to support EU legislation, Article 352 TFEU comes into play. It is the residual competence norm: ‘If action by the Union should prove necessary ... to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers’, the institutions may adopt appropriate measures according to Article 352(1) TFEU. Since the protection of the environment and of labour and human rights are all aims of the EU, the CSA measures can, as a last resort, be based on Article 352 TFEU. The third paragraph of Article 352 TFEU prohibits harmonisation of areas which are excluded from harmonisation. Freedom of association is such an area according to Article 153(5) TFEU, but regulation may still be

possible if it is an ancillary matter or if it does not involve harmonisation in the strict sense.

Finally, the principle of subsidiarity must be respected where it applies (it does not apply with regard to the common commercial policy). In essence, the principle of subsidiarity demands that the EU must be better placed to regulate than Member States are. This seems evident with all policies with an internal market dimension. Additionally, levelling the playing field and removing distortions of competition for (European) companies may make the case for EU action.

The following illustration simplifies some of the principal conclusions.

Illustration 4: EU Competence



B. FUNDAMENTAL RIGHTS AND OTHER GENERAL PRINCIPLES OF EU LAW

The EU recognises the rights, freedoms, and principles set out in the Charter of Fundamental Rights (Article 6(1) TEU). Furthermore, fundamental rights, as

guaranteed by the European Convention on Human Rights and as they are found in the constitutional traditions common to the Member States, are general principles of the Union's law (Article 6(3) TEU).

This makes clear that European CSA measures must not encroach upon fundamental rights and other general principles such as proportionality and legal certainty.¹⁵⁵ A violation constitutes a ground of annulment.¹⁵⁶

Whose rights can the CSA measures possibly violate? First of all, the rights of businesses. Whether this is the case depends on the particular circumstances in fact and law—nonetheless, the following general remarks may be ventured here.

The Charter of Fundamental Rights recognises, among others, the freedom to conduct a business (Article 16) and the right to property (Article 17). Unjustified penalties or regulation may impinge on these rights. But there are a number of caveats: The freedom to conduct a business and the right to property

¹⁵⁵ See on the principle of proportionality Article 5(4) TEU and, e.g., Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727; Case C-491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco (investments) Ltd. and Imperial Tobacco Ltd.* [2002] ECR I-11453; see on the principle of legal certainty, e.g., Case 98/78 *Firma A. Racke v Hauptzollamt Mainz* [1979] ECR 69; Case 120/86 *Mulder v Minister van Landbouw en Visserij* [1988] ECR 2321.

¹⁵⁶ Article 263(2) TFEU; see also P Craig and G de Búrca, *EU Law*, 4th edn (Oxford, Oxford University Press, 2008) 538 ff.

are subject to important limitations.

First, the case law of the European Court of Justice and the European Court of Human Rights indicates, on the whole, that regulation in the business sphere enjoys discretion.¹⁵⁷ Broadly speaking, human rights have a lesser force in spheres of complex economic regulation.

There is a second qualification: Not all companies in the world may rely on all EU fundamental rights against all kinds of EU legislation. In principle, firms from outside the EU may not rely on EU fundamental rights in order to oppose restrictions of EU markets. Trade measures and labelling may not be challenged by third country corporations on the basis of the EU freedom to conduct a business.¹⁵⁸

Third, the EU enjoys greater leeway when pursuing distributive rather than interventionist policies (see also the distinction in German administrative law between *Eingriffsverwaltung* and *Leistungsverwaltung*). There is no fundamental right for companies to receive subsidies

¹⁵⁷ See, e.g., *Markt Intern Verlag GmbH and Klaus Bermann v Germany* (1990) 12 EHRR 161 (ser. A); Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Roerindustri and Others v Commission* [2005] ECR I-5425.

¹⁵⁸ N Bernsdorff, 'Article 16' in J Meyer, *Kommentar zur Charta der Grundrechte der Europäischen Union*, 3rd edn (Heidelberg, Nomos, 2010) para. 17. However, such measures raise several issues under WTO law, see below chapter 3 (Limits of Lawfulness) II. (Lawfulness under International Law) A. (World Trade Agreements and Other International Treaties) (ii) (Trade Measures) and (iii) (Labelling).

or public contracts; they only have a right to be treated fairly and equally.¹⁵⁹ In contrast, fundamental rights protect fully against unjustified publications of abuses, disproportionate reporting obligations, excessive fines, and other interventionist measures.

The proportionality principle demands that the content and form of EU action shall not exceed what is necessary to achieve the objectives of the Treaties (Article 5(4) TEU). Hence, more intensive intervention is more difficult to justify under the principle of proportionality than less intrusive action. Similarly, judicial review is likely to be more exacting the more severe the measure is.¹⁶⁰

The CSA measures may also create legal uncertainty. For instance, international *jus cogens* and general international standards are elusive concepts, which make it hard for businesses to determine whether they overstep the bounds of law or not.¹⁶¹ However, it is the nature of new legislation to create legal uncertainty to some extent. Administrative practice and case law will provide more certainty over time. Using

¹⁵⁹ Article 20 and 21 of the Charter of Fundamental Rights of the European Union [2000] OJ C364/1.

¹⁶⁰ See P Craig and G de Búrca, *EU Law*, 4th edn (Oxford, Oxford University Press, 2008) 544-551.

¹⁶¹ See above chapter 1 (Content: The Elements of European CSA Measures) II. (Explaining the Matrix) A. (First Element: Substantive Provisions; Environmental, Labour, and Human Rights Standards).

concepts from existing law would enhance legal certainty.

Some enforcement measures raise specific issues which we can touch upon briefly. Publication of abuses must respect legitimate business secrets,¹⁶² and must be objective.¹⁶³ It seems unlikely that defaming, discriminating, or distorting portrayals are lawful.¹⁶⁴ If fines are categorised as criminal law, the principle of legality (*nullum crimen sine lege*) becomes relevant.¹⁶⁵ Where violations are already subject to proceedings in other jurisdictions, the principle of *ne bis in idem* (the right not to be tried or punished twice in criminal proceedings for the same criminal offence) must be respected.¹⁶⁶ Mandatory labelling may restrict the right to property, the freedom to conduct a business, and

¹⁶² Compare in the field of antitrust fines: Article 30(2) of Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1-25.

¹⁶³ See *Leela Förderkreis e.V. v Germany* [2008] Eur. Ct. H. R., paras. 95-101; in German constitutional law: *Glykol* BVerfGE 105, 252; *Osho* BvR 670/91.

¹⁶⁴ See *Osho* BvR 670/91.

¹⁶⁵ Article 49(1) Charter of Fundamental Rights of the European Union; Article 7 ECHR.

¹⁶⁶ Article 4 of Protocol No 7 to the European Convention on Human Rights; Article 50 of the Charter of Fundamental Rights of the European Union; compare also: WPJ Wils, 'The Principle of "Ne Bis in Idem" in EC Antitrust Enforcement: A Legal and Economic Analysis' (2003) 26 *World Competition: Law and Economics Review* 131.

freedom of speech.¹⁶⁷ Labelling requirements for tobacco products are justified by public health reasons, the ECJ has held.¹⁶⁸ Whether this would be the case for CSA labelling has not yet been decided by the courts. Finally, the principle of *nemo tenetur*, emanating from the fair trial guarantee, protects against forced self-incrimination and restricts reporting obligations.¹⁶⁹ Legitimate interests of commercial confidentiality must be respected.¹⁷⁰

In the context of fundamental rights, another question arises: Are there also human rights obligations towards those who are exposed to businesses' abuses abroad? In other words, does the EU even have a duty to regulate the overseas activities of its corporations? For instance, can the EU be held liable if its export credits finance corporate abuse abroad?

In the famous *Soering* case, the Strasbourg Court

¹⁶⁷ As explained above, only firms that have already accessed the EU market may rely on these rights against market restrictions. Fundamental rights do not confer a right for foreign firms to access an unrestricted market.

¹⁶⁸ Case C-491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco* [2000] ECR I-11543, paras 149-150.

¹⁶⁹ Compare Case 374/87 *Orkem v Commission* [1989] ECR 3283.

¹⁷⁰ See also UN Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (21 March 2011) <<http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>> 9.

held that domestic measures with extraterritorial implications may violate human rights.¹⁷¹ Where there is a real risk that an individual will be subjected to torture or inhuman or degrading treatment, extradition is not allowed. In *Kovacic*, the applicants complained in Strasbourg that a Slovenian law prevented them from withdrawing funds from their accounts in the Croatian branch of a Slovenian bank. The Court held that the Slovenian law ‘produce[d] effects, albeit outside Slovenian territory, such that Slovenia’s responsibility under the Convention could be engaged’.¹⁷²

This case law suggests that domestic measures with extraterritorial effects must not infringe human rights. This is the public body’s *negative* duty not to violate human rights through its own actions. This duty is especially relevant in the context of subsidies and export credits. Public money must not finance corporate abuses abroad.¹⁷³ The same seems to apply to public contracts: Public bodies must not condone or ‘order’

¹⁷¹ *Soering v United Kingdom* (1998) 11 Eur. Ct. H. R. para. 91; see also *Drozd & Janousek v France & Spain* (1992) 14 EHRR 745, paras. 91, 97.

¹⁷² *Kovacic & Others v Slovenia* (Admissibility Decision of 1 April 2004), para. 34.

¹⁷³ See also UN Human Rights Council, ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie’ (21 March 2011) <<http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>> 9.

corporate abuse by procuring goods whose production violates basic standards. For example, authorities may incur liability if they knowingly buy products from a company that makes use of forced labour.

A different issue is, however, whether there exists a *positive* obligation to become active and regulate companies' overseas activities to prevent *them* from committing all kinds of violations (extraterritorial duty to protect). The majority of commentators indicates that this is not the case.¹⁷⁴

¹⁷⁴ See, e.g., UN Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (21 March 2011) <<http://www.businesshumanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>> 7; UN Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (22 April 2009) UN Doc A/HRC/11/13 <<http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf>>, para 15: 'The extraterritorial dimension of the duty to protect remains unsettled in international law'; J Wouters and C Ryngaert, 'Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction' (2009) 40 *George Washington International Law Review* 939, 954 fn. 57; SI Skogly and M Gibney, 'Transnational Human Rights Obligations' (2002) 24 *Human Rights Quarterly* 781, 788; J. H. Knox, 'Horizontal Human Rights Law' (2008) 102 *American Journal of International Law* 12, 22. On the other hand, some argue for an extraterritorial duty to protect: CESCR, 'General Comment No 12, The Right to Adequate Food' (12 May 1999) E/C.12/1999/5, para. 36; CESCR,

II. LAWFULNESS UNDER INTERNATIONAL LAW

International law is binding upon the EU institutions.¹⁷⁵ Legislation that enforces global corporate social accountability must conform to applicable international treaties and international customary law. In particular, WTO agreements restrict the freedom to use trade measures, labelling, and public procurement as a means to target corporate abuse abroad. Furthermore, international custom imposes limits on extraterritorial jurisdiction.

‘General Comment No 14, The Right to the Highest Attainable Standard of Health’ (11 August 2000) E/C.12/2000/4, paras. 38-41; CESCR, ‘General Comment No 15, The Right to Water’ (20 January 2003) E/C.12/2002/11, paras. 31-6; F Coomans and M Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Antwerp, Intersentia, 2004); R McCorquodale and P Simons, ‘Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law’ (2007) 70(4) *Modern Law Review* 598.

¹⁷⁵ See, e.g. Articles 3(5) and 21(2) of the TEU and Article 216(2) TFEU. For a detailed discussion of the relationship between EU law and international law see: A von Bogdandy and M Smrkolj, ‘European Community and Union Law and International Law’ *Max Planck Encyclopedia of Public International Law* <<http://www.mpepil.com>> para. 2; G de Búrca, ‘The European Court of Justice and the International Legal Order after *Kadi*’ (Jean Monnet Working Paper 01/09) <<http://centers.law.nyu.edu/jeanmonnet/papers/09/090101.pdf>> 53.

A. WORLD TRADE AGREEMENTS AND OTHER INTERNATIONAL TREATIES

(i) Export Credits, Subsidies, and Other Financial Benefits

The WTO Agreement on Subsidies and Countervailing Measures aims to prevent adverse effects on other countries' trade or domestic industries due to unfair subsidies. The OECD arrangements and understandings are also designed to discipline the use of subsidies. These documents are no bar to legislation that tries to prevent adverse effects of subsidies on the environment and social rights in other countries. Such legislation would provide for additional self-restrictions, which are legal under the WTO and OECD frameworks.¹⁷⁶

International investment treaties often contain the standards of non-discrimination and fair and equitable treatment.¹⁷⁷ Subsidies are however often excluded

¹⁷⁶ European Parliament, 'Working document on Application of certain guidelines in the field of officially supported export credits, Committee on International Trade Rapporteur: Yannick Jadot' (24 June 2010) <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/inta/dt/819/819075/819075en.pdf> 2.

¹⁷⁷ See for an explanation of the principles of non-discrimination and fair and equitable treatment in international investment law: P Muchlinski, *Multinational Enterprises & The Law*, 2nd edn (Oxford, Oxford University Press, 2007) 621-647.

from investment protection.¹⁷⁸ But even if they are covered, inserting general CSA policies into subsidies schemes does not appear to be discriminatory, protectionist, or unfair.

(ii) *Trade Measures*

The ‘linkage’ debate on trade and environment, trade and labour, and trade and human rights is one of the most contentious under WTO law and has been covered extensively in academic literature. Here, we will focus on the principal themes that are specific to the CSA measures: Model five mentions trade restrictions, which are imposed on (European or worldwide) companies, to further the cause of the environment, labour rights, and human rights abroad, according to three sources of law (international *jus cogens*, general international standards, and European standards). We will examine the lawfulness of these regulatory models in turn.¹⁷⁹

¹⁷⁸ See, e.g., M Sornarajah, *The International Law on Foreign Investment*, 2nd edn (Cambridge, Cambridge University Press, 2004) 344.

¹⁷⁹ The following sections focus on the compatibility of import restrictions with the GATT; for export restrictions see, e.g., S Puth, ‘WTO und Umwelt’ in M Hilf and S Oeter (eds), *WTO-Recht*, 2nd edn (Baden-Baden, Nomos, 2010) 568-569; for compatibility with SPS, TBT and GATS and TRIMS see respective chapters in M Hilf and S Oeter (eds), *WTO-Recht*, 2nd edn (Baden-Baden, Nomos, 2010).

Trade and Environment

Does WTO law permit trade restrictions in order to protect the environment abroad? The Preamble to the WTO-Agreement recognises the objectives of sustainable development and of protecting and preserving the environment. The WTO Appellate Body held: ‘As this preambular language reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretation’.¹⁸⁰

Discrimination

The first issue to consider is whether import restrictions constitute discriminatory treatment under the General Agreement on Tariffs and Trade (GATT). In principle, the GATT prohibits ‘less favourable treatment’ between two ‘like’ products. The question therefore arises whether a refrigerator that contains ozone-depleting substances is ‘like’ a refrigerator that does not contain such substances. Or whether a refrigerator that was produced using ozone-depleting substances is like one that was produced without them. The former example distinguishes between product characteristics, the latter between ‘process and production methods’ (PPMs).

¹⁸⁰ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, WT/DS58/AB/R (‘US – Shrimp’), para. 153; see also para. 129.

In *US – Tuna I* a WTO panel held that tuna was alike regardless of whether it had been caught using dolphin-safe nets.¹⁸¹ Only the physical characteristics of a product matter; PPMs are irrelevant (unless they leave some physical trace in the final product).

The Appellate Body favours a more nuanced approach. Factors to determine ‘likeness’ include ‘(i) the properties, nature, and quality of the products; (ii) the end-uses of the products; (iii) consumers’ tastes and habits ...; and (iv) the tariff classification of the products’, and other ‘pertinent evidence’.¹⁸² The determination of ‘likeness’ is, ‘fundamentally, a determination about the nature and extent of a competitive relationship between and among products’.¹⁸³

Thus, certain PPMs might make a product ‘unlike’ another; for example, if, in the consumers’ eyes, conventional food is no alternative to organic food. But it is difficult to accept that process and production methods make products different to such an extent that

¹⁸¹ *US-Tuna I*, Panel Report (not adopted), BISD 39S/155, para. 5.15.

¹⁸² *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report, WT/DS135/AB/R (‘EC – Asbestos’), paras. 101-03; see also *Border Tax Adjustment*, GATT Working Party Report, VBISD 18S/97, para. 18. The term’s breadth varies according to the particular provision, context and circumstances: *Japan – Taxes on Alcoholic Beverages II*, Appellate Body Report, WT/DS8, 10, 11/AB/R, para. 21.

¹⁸³ *EC – Asbestos*, para. 105.

they no longer compete with one another. Moreover, the Appellate Body gives physical characteristics more weight than consumers' tastes and habits.¹⁸⁴ In sum, products would rarely escape 'likeness' only because of different PPMs.¹⁸⁵

Next, distinctions of 'like' products must not be discriminatory—that is, protectionist. In the *Dominican Republic – Cigarettes* case the Appellate Body held that even a measure that is more burdensome for imported products is not discriminatory 'if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product'.¹⁸⁶ This language might suggest that, for example, higher tariffs for carbon intensive products will only be discriminatory if there is a specific link between the carbon intensiveness and the origin of the product.¹⁸⁷ But what kind of link must that be? What does 'unrelated' to the origin of the product mean? The Appellate Body's phraseology does

¹⁸⁴ *Ibid* at para. 121.

¹⁸⁵ See also H Hestermayer, 'Article III GATT' in R Wolfrum, P-T Stoll and H Hestermayer (eds), *Max Planck Commentaries on World Trade Law, Trade in Goods* Vol. 5 (Leiden, Martinus Nijhoff, 2011) para. 74.

¹⁸⁶ *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, Appellate Body Report, WT/DS302/AB/R, para. 96.

¹⁸⁷ L Bartels, 'Preliminary Draft Report: Trade Law' (2011) <<http://www.law.ed.ac.uk/euenterpriseslf/documents/expertreports.aspx>> 5.

not draw a bright line.¹⁸⁸

Justification

Less favourable treatment can be justified according to Article XX GATT. Environmental measures may be ‘necessary to protect human, animal or plant life or health’ (lit. b) or may relate to the ‘conservation of exhaustible natural resources’ (lit. g). The *chapeau* (the introductory phrase) of Article XX GATT requires that such measures do not constitute ‘means of arbitrary or unjustifiable discrimination’ or a ‘disguised restriction on international trade’.

But does the WTO system allow the imposition of unilateral measures? Or is it necessary that environmental standards are of a multilateral nature? In other words, are European standards prohibited and only general international standards permissible?

Principle 12 of the Rio Declaration embraces multilateralism: ‘Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be

¹⁸⁸ D Bodansky and JC Lawrence, ‘Trade and Human Rights’ in D Bethlehem, D McRae, R Neufeld and I Van Damme, *The Oxford Handbook of International Trade Law* (Oxford, Oxford University Press, 2009) 587-588.

based on an international consensus'.¹⁸⁹

Case Study: US – Shrimps

In the *US – Shrimp* case the United States banned foreign shrimp that was harvested in a way that harmed sea turtles. The regulation required all US shrimp trawl vessels to use turtle excluder devices. The exporting countries had to have in place virtually identical regulations.

The Appellate Body held that unilateral measures are lawful—as long as certain requirements are met: They must be flexible enough to take into consideration the conditions in other countries, and the regulating country must have sought, in good faith, a multilateral solution before resorting to unilateral action:

It may be quite acceptable for a government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that country. However, it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve

¹⁸⁹ United Nations, 'General Assembly, Report of the United Nations Conference On Environment and Development, Rio de Janeiro, 3-14 June 1992, Annex I Rio Declaration on Environment and Development' (12 August 1992) A/CONF.151/26.

a certain policy goal, as that in force within that Member's territory, *without* taking into consideration different conditions which may occur in the territories of those other Members.¹⁹⁰

[The US regulation], in its application, imposes a single, rigid and unbending requirement that countries applying for certification ... adopt a comprehensive regulatory program that is essentially the same as the United States' program, without inquiring into the appropriateness of that program for the conditions prevailing in the exporting countries. Furthermore, there is little or no flexibility in how officials make the determination for certification pursuant to these provisions. In our view, this rigidity and inflexibility also constitute 'arbitrary discrimination' ...¹⁹¹

Another aspect ... that bears heavily in any appraisal of justifiable or unjustifiable discrimination is the failure of the United States to engage the appellees, as well as other Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members.¹⁹²

¹⁹⁰ *US – Shrimp*, para. 164.

¹⁹¹ *US – Shrimp*, para. 177 (footnotes omitted).

¹⁹² *Ibid* at para. 166.

This tells us that European standards as such may not be imposed. Only if they accommodate the particular situation in the exporting states, and only if serious good faith efforts to reach a multilateral solution have been undertaken, can European standards survive the Article XX GATT test. This shows that WTO law favours international standards.¹⁹³

A further question is whether standards may apply extraterritorially. In *US – Tuna I*, a panel denied that dolphins outside the US territory could be protected.¹⁹⁴ *US – Tuna II* permitted the extraterritorial application of US policies to extend only to US nationals and vessels.¹⁹⁵ Thus, CSA regulation confined to a European addressee as such (entity approach) seems to pass the jurisdictional test in *US – Tuna II*.

The Appellate Body in *US – Shrimps* held:

¹⁹³ The SPS and TBT Agreements provide a safe harbour for international health and technical standards (Article 3.2 of the SPS Agreement, Article 2.4 of the TBT Agreement); a standard does not have to be adopted by consensus to qualify as ‘international’, see *European Communities – Trade Description of Sardines*, Appellate Body Report, WT/DS231/AB/R, para. 227.

¹⁹⁴ *US – Tuna I*, Panel Report (unadopted), BISD 39S/155, paras 5.25-5.26. This report was often caricatured as ‘GATT-zilla v Flipper’ because of the limits it imposes on environmentally infused trade restrictions; see KN Schefer, ‘Stopping Trade in Conflict Diamonds: Exploring the Trade and Human Rights Interface with the WTO Waiver for the Kimberley Process’ in T Cottier, J Pauwelyn, E Bürgi (eds), *Human Rights and International Trade* (Oxford, Oxford University Press, 2005) 436.

¹⁹⁵ *US – Tuna II*, Panel Report (unadopted), DS29/R, paras. 5.31-5.33.

We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).¹⁹⁶

Thus, extraterritorial application is in any case justified when there is a ‘sufficient nexus’ to the home territory. The Appellate Body made clear that extraterritoriality is not ruled out in principle; an interpretation to the contrary ‘would render most, if not all, the specific exceptions inutile’.¹⁹⁷

According to Charnovitz, a territorial limit is not convincing. With regard to Article XX(b) GATT he argues that if the drafters had intended an ‘inward-looking exception’ they could have inserted the adjective ‘national’, as they did in Article XX(f) GATT, which mentions measures ‘imposed for the protection of *national* treasures of artistic, historic or archaeological value’.¹⁹⁸ The wording of the phrase

¹⁹⁶ *US – Shrimp*, para. 133.

¹⁹⁷ *Ibid* at para. 131.

¹⁹⁸ S Charnovitz, ‘A Critical Guide to the WTO’s Report on Trade and Environment’ (1997) 14(2) *Arizona Journal of International & Comparative Law* 341, 354-55; see also KN Schefer, ‘Stopping Trade in Conflict Diamonds: Exploring the Trade and Human Rights Interface with the WTO Waiver for the Kimberley Process’ in T Cottier, J Pauwelyn, E Bürgi (eds), *Human Rights and International Trade* (Oxford, Oxford University Press, 2005) 436.

‘human, animal or plant life or health’ does not suggest limitation to humans, animals, and plants *in one country*. Those arguing against a territorial restriction point to international treaties such as CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora) and the World Heritage Convention, which demonstrate the interest of all States in global commons resources and even in resources found within another state’s territory.¹⁹⁹

However, environmental concepts such as ‘global commons’ and ‘shared resources’ have their limits—they do not encompass all environmental issues in all countries.²⁰⁰ The emphasis on a ‘sufficient nexus’ in *US – Shrimp* may also suggest that a complete lack of connection to the home jurisdiction is not permitted. To sum up, environmental regulation cannot be applied extraterritorially in its entirety.

Trade and Labour

There is no explicit reference in the Preamble to the

¹⁹⁹ See D Bodansky and JC Lawrence, ‘Trade and Environment’ in D Bethlehem, D McRae, R Neufeld and I Van Damme, *The Oxford Handbook of International Trade Law* (Oxford, Oxford University Press, 2009) 525.

²⁰⁰ S Puth, ‘WTO und Umwelt’ in M Hilf and S Oeter (eds), *WTO-Recht*, 2nd edn (Baden-Baden, Nomos, 2010) 564, 566; see also Peter-Tobias Stoll, ‘The International Environmental Law of Cooperation’ in Rüdiger Wolfrum (ed), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?* (Berlin, Springer, 1996) 61.

WTO Agreement to labour concerns. While the environment is specifically mentioned, labour conditions are only alluded to in the goal of ‘increasing standards of living, ensuring full employment’.²⁰¹

Whereas Article 7(1) of the Charter of the International Trade Organization (1948) recognised that ‘unfair labour conditions, particularly in production for export, create difficulties in international trade’,²⁰² the Declaration at the WTO Ministerial Conference in Singapore (1996) intends to keep trade and labour separated: ‘We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question’.²⁰³

However, it is noteworthy that the Declaration rejects the use of labour standards for protectionist *purposes*. This does not cover trade restrictions that truly aim to foster labour standards without any protectionist intentions.

²⁰¹ See also G Marceau, ‘Trade and Labour’ in D Bethlehem, D McRae, R Neufeld and I Van Damme, *The Oxford Handbook of International Trade Law* (Oxford, Oxford University Press, 2009) 134.

²⁰² The Havana Charter never entered into force due to the US Congress’ disapproval.

²⁰³ Singapore Ministerial Declaration (13 December 1996) WT/MIN(96)/DEC
<http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm> para. 4.

Discrimination

Trade measures must not provide less favourable treatment to ‘like’ products. Is a football manufactured by children like a football that is not? Most probably both products remain in a competitive relationship, regardless of their different production and process method, so it is unlikely that they are unlike.

Furthermore, treatment must not be discriminatory. In order to pass this test, labour standards have to be ‘unrelated to the origin of the product’ (*Dominican Republic – Cigarettes*).²⁰⁴ Arguably, trade restrictions that disfavour products manufactured by children will have a worse impact on products from countries where child labour is more prevalent. On the other hand, if the country in question has ratified the relevant ILO conventions,²⁰⁵ or if the prohibition of child labour is accepted as being part of customary international law,²⁰⁶ producers might rightfully be expected to meet its conditions, so that there is no ‘origin specificity’

²⁰⁴ *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, Appellate Body Report, WT/DS302/AB/R, para. 96.

²⁰⁵ ILO Convention No. 138 on the Minimum Age for Admission to Employment and Work 1015 UNTS 297; ILO Convention No. 182 on the Worst Forms of Child Labour 58 ILM 1215 (1999).

²⁰⁶ See above chapter 1 (Content: The Elements of European CSA Measures) II. (Explaining the Matrix) A. (First Element: Substantive Provisions; Environmental, Labour, and Human Rights Standards).

anymore.²⁰⁷

Belgian Family Allowances points into another direction.²⁰⁸ This case concerned a Belgian tax on government procured imports from countries without a system of public allowances. The panel judged the tax to be discriminatory. This case indicates that, in principle, differential treatment based on labour standards is not permitted.

Justification

Three paragraphs of Article XX GATT may justify trade restrictions imposed as a result of labour rights abuses: Paragraph (a) concerning measures ‘necessary for the protection of public morals’; paragraph (b) concerning measures ‘necessary for the protection of human ... life or health’; and paragraph (e) regarding measures ‘relating to the products of prison labour’.

²⁰⁷ D Bodansky and JC Lawrence, ‘Trade and Human Rights’ D Bethlehem, D McRae, R Neufeld and I Van Damme, *The Oxford Handbook of International Trade Law* (Oxford, Oxford University Press, 2009) 588.

²⁰⁸ *Belgian Family Allowances*, Panel Report, GATT BISD 1st Supp, GATT Doc DS/1S/59; see also C Thomas ‘The WTO and labor rights: strategies of linkage’ in S Joseph, D Kinley, J Waincymer (eds), *The World Trade Organization and Human Rights* (Cheltenham, Edward Elgar, 2009) 263.

An ‘evolutionary’ interpretation²⁰⁹ of ‘prison labour’ might also include forced labour, if read ‘in light of contemporary concerns of the community of nations’.²¹⁰ Historical evidence suggests otherwise: At the Havana Conference in 1947 the United States sought to have included in Article XX GATT other ‘involuntary’ forms of labour—without success. The United States’ proposal to include in ILO Convention 105 a prohibition on international trade in goods produced by forced and compulsory labour was rejected, too.²¹¹

²⁰⁹ The Appellate Body held in *US – Shrimp*, para. 130 that the term ‘natural resources’ in Article XX(g) is not ‘static’ in its content or reference but is rather ‘by definition, evolutionary’. In the footnote to this sentence the Appellate Body cited *Namibia (Legal Consequences) Advisory Opinion* (1971) ICJ Rep 31 and added: ‘The International Court of Justice stated that where concepts embodied in a treaty are “by definition, evolutionary”, their “interpretation cannot remain unaffected by the subsequent development of law ... Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.’ It appears that the Appellate Body has also deviated from the principle that exceptions (such as Article XX) are to be construed narrowly, rather embracing a more open approach of balancing on an equal footing trade liberalisation and other societal values, see *United States – Standards for Reformulated and Conventional Gasoline*, Appellate Body Report, WT/DS2/AB/R, para. 18.

²¹⁰ See *US – Shrimp*, para. 129; see also G Marceau, ‘Trade and Labour’ in D Bethlehem, D McRae, R Neufeld and I Van Damme, *The Oxford Handbook of International Trade Law* (Oxford, Oxford University Press, 2009) 552.

²¹¹ B Hepple, *Labour Laws and Global Trade* (Oxford, Hart

Paragraphs (a) and (b) are broader in scope than (e). But some infer from the ‘prison labour’ exception—which is necessarily extraterritorial since it refers to working conditions abroad—that no other head of Article XX GATT may cover production methods in other countries, paragraph (e) being the only exception (*argumentum e contrario*).²¹² Others draw the opposite conclusion: If Article XX(e) GATT allows extraterritoriality then this must be true for all other Article XX GATT exceptions (*a fortiori*).²¹³

The WTO panel in *US – Gambling* said that public morals denote ‘standards of right and wrong conduct maintained by or on behalf of a community or nation’.²¹⁴ Thus, it appears that Article XX(a) GATT takes into account the variety of national

Publishing, 2005) 141.

²¹² C Feddersen, ‘Focussing on Substantive Law in International Economic Relations: The Public Morals of GATT’s Article XX(a) and “Conventional” Rules of Interpretation’ (1998) 7 *Minnesota Journal of Global Trade*, 75, 109.

²¹³ A Nollkaemper, ‘The Legality of Moral Crusades Disguised in Trade Laws: An Analysis of the EC ‘Ban’ from Animals Taken by LEghold Traps (1996) 8 *Journal of Environmental Law*, 237, 248, 252.

²¹⁴ *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Panel Report, WT/DS285/R, para. 6.465, albeit with regard to ‘public morals’ defined in Article XIV(a) GATS; the Appellate Body confirmed this definition in para 300 of its report, WT/DS285/AB/R. See also footnote 5 to Article XIV(a) GATS: ‘The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society’.

understandings of public morality. Imposing moral standards on the territory of other states would arguably undermine the diversity of standards protected by Article XX(a) GATT. But do public morals stop at the border?

The argument of undermining national particularities is weak in the case of general international standards. They reflect states' common ground of understanding.²¹⁵ Therefore, social standards may be invoked if they form part of customary or treaty law binding in the territory where the company subject to the measure operates.²¹⁶ The WTO Appellate Body has already affirmed that WTO provisions cannot be read in 'clinical isolation' from the rest of international law.²¹⁷ Standards based on general international norms may therefore fall under the 'public morals' exception.

It is evident when it comes to *jus cogens*, although a narrow interpretation of Article XX GATT

²¹⁵ N Wenzel, 'Art. XX(a) GATT' in R Wolfrum, P-T Stoll and H Hestermayer (eds), *Max Planck Commentaries on World Trade Law, Trade in Goods* Vol. 5 (Leiden, Martinus Nijhoff, 2011) para. 16.

²¹⁶ *Ibid* at paras 25-26; Office of the UNHCHR, 'Human Rights and World Trade Agreements' UN Doc. HR/PUB/05/5, 8; see also B Hepple, *Labour Laws and Global Trade* (Oxford, Hart Publishing, 2005) 142; S Puth and K Stranz, 'WTO und Sozialstandards' in M Hilf and S Oeter (eds), *WTO-Recht*, 2nd edn (Baden-Baden, Nomos, 2010) 622-623.

²¹⁷ *United States – Standards for Reformulated and Conventional Gasoline*, Appellate Body Report, WT/DS2/AB/R, para. 17.

would not be contrary to the rule of primacy of *jus cogens* in Article 53 of the Vienna Convention on the Law of Treaties (‘[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm’).²¹⁸ Article XX GATT construed narrowly in the sense that it prohibits trade restrictions to protect ‘*jus cogens* labour standards’ does not *conflict* with *jus cogens*. Interpreted in this way, Article XX GATT would not allow what *jus cogens* prohibits. It would merely rule out a certain form of sanction of *jus cogens* violations (i.e. trade measures).

But although a narrow interpretation would escape the primacy clause in Article 53 of the Vienna Convention, the importance of *jus cogens*—as illustrated in that very provision and in its power to create obligations *erga omnes* for whose protection all states could be held to have a ‘legal interest’²¹⁹—militates strongly for a broader interpretation of Article XX GATT that does allow trade restrictions employed to condemn violations of *jus cogens* abroad.

European standards, in contrast, raise the suspicion of disguised protectionism and ‘imperialism’ of values.

²¹⁸ Vienna Convention on the Law of Treaties (1969) A/CONF. 39/1 I/Add. 2, 287, Article 53.

²¹⁹ *Case concerning the Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3, para. 32; *United States Diplomatic Consular Staff in Teheran*, [1980] ICJ Rep, paras. 38-42; *Bosnia and Herzegovina v Yugoslavia* [1996] ICJ Rep, para. 616.

On the other hand, the restriction of imports of products may be justified where they pose a ‘genuine and sufficiently serious threat’ to one of the ‘fundamental interests of society’.²²⁰ The conflict between special domestic standards and free trade was before the European Court of Justice in the *Omega* case. Germany defended a prohibition on playing at killing people with laser beams as being necessary to protect human dignity, a fundamental principle enshrined in the German constitution. The Court accepted that the restrictive measure must not necessarily correspond to a ‘shared conception’. Trade restrictions are not illegal merely because one state has chosen a different level of protection than another state.²²¹ Still, even if this comparison to the European internal market law may have persuasive force under Article XX GATT, it seems likely that special domestic standards are in general more difficult to defend than international ones.

Finally, measures based on paragraphs (a) or (b) of Article XX GATT must be ‘necessary’ or, in other words, able to achieve their purpose. Trade restrictions, however, may be blunt and imprecise tools to prevent

²²⁰ See Footnote 5 to Article XIV(a) GATS: ‘The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society’. This wording seems to echo formulations of the European Court of Justice in Cases 36/75 *Rutili* [1975] ECR 1219 and Case 30/77 *Bouchereau* [1977] ECR 1999.

²²¹ Case C-36/02 *Omega* [2004] ECR I-9609, paras. 37-38.

exploitative child labour or other violations of labour standards.²²² It is therefore not always clear whether they pass this proportionality test.²²³

Trade and Human Rights

The discussions on trade and environment and trade and labour adumbrate the principal themes of trade and human rights. Again, discrimination is likely if those products are treated unfavourably that were manufactured in inhumane conditions or by a company that has participated in human rights violations. European standards will be harder to justify than international standards. And extraterritoriality poses a problem: Trade restrictions directed at European addressees may be easier to maintain than those targeted at companies unconnected with the EU.

Hörmann argues that import bans on products manufactured in inhumane conditions could, in principle, be regarded as ‘necessary to protect public morals’ (Article XX(a) GATT) if violations of applicable international standards are sufficiently

²²² See also above chapter 2 (Context) II (Theoretical Underpinnings) B. (Enforcement Measures: Remedies for the Regulatory Deficit?) (Trade Measures).

²²³ See SH Cleveland, ‘Global Labour Rights and the Alien Torts Claims Act’ (1997) 76 *Texas Law Review* 1533; S Puth and K Stranz, ‘WTO und Sozialstandards’ in M Hilf and S Oeter (eds), *WTO-Recht*, 2nd edn (Baden-Baden, Nomos, 2010) 623.

grave.²²⁴ In such a case an import ban is the only means to prevent products that provoke public outrage from entering the market. The import ban is therefore ‘necessary’ to protect public morals.

On the other hand, Hörmann reasons that trade restrictions as general sanctions for human rights violations in a given country that are unconnected with the product concerned do not survive the proportionality test. In general, exporters should not take the blame for human rights violations of governments.²²⁵ Trade embargoes must be authorised by the UN Security Council and cannot be imposed unilaterally.

In the scenario of CSA measures, however, trade sanctions would target the company that has

²²⁴ S Hörmann, ‘WTO und Menschenrechte’ in M Hilf and S Oeter (eds), *WTO-Recht*, 2nd edn (Baden-Baden, Nomos, 2010) 613; see also KN Schefer, ‘Stopping Trade in Conflict Diamonds: Exploring the Trade and Human Rights Interface with the WTO Waiver for the Kimberley Process’ in T Cottier, J Pauwelyn, E Bürgi (eds), *Human Rights and International Trade* (Oxford, Oxford University Press, 2005) 429.

²²⁴ S Hörmann, ‘WTO und Menschenrechte’ in M Hilf and S Oeter (eds), *WTO-Recht*, 2nd edn (Baden-Baden, Nomos, 2010) 613.

²²⁵ *Ibid* at 613; see also S Charnovitz, ‘The Moral Exception in Trade Policy’ (1998) 38 *Virginia Journal of International Law* 689, 742, 743; N Wenzel, ‘Art. XX(a) GATT’ in R Wolfrum, P-T Stoll and H Hestermayer (eds), *Max Planck Commentaries on World Trade Law, Trade in Goods* Vol. 5 (Leiden, Martinus Nijhoff, 2011) para. 27; SH Cleveland ‘Human Rights Sanctions and International Trade: a Theory of Compatibility’ (2002) 5 *Journal of International Economic Law* 133, 140-145.

participated in human rights violations itself. Arguably, in such a case the link between sanction and violation is closer; whether it is close enough to pass the proportionality test is still unresolved.

The Enabling Clause

The so-called ‘Enabling Clause’ (which is part of the GATT) permits WTO members to give differential and more favourable treatment to developing countries.²²⁶ Could the withdrawal of trade preferences from companies violating basic environmental, labour, or human rights standards in developing countries be justified under the Enabling Clause?

Footnote 3 to the Enabling Clause provides that tariff preferences accorded to products coming from developing countries must be ‘generalized, non-discriminatory and non-reciprocal’. The Appellate Body held in *EC – Tariff Preferences* that ‘non-discriminatory’ does not require identical treatment of all developing countries. Rather, developing countries that share the same ‘development, financial or trade need’ may receive additional preferences.²²⁷ This

²²⁶ See

<http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm#enabling_clause>.

²²⁷ *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, Appellate Body Report, WT/DS246/AB/R, para. 165.

entails that different beneficiaries may be treated differently.²²⁸

The existence of a ‘development, financial or trade need’ must be assessed pursuant to an objective standard. ‘Broad based recognition of a particular need, set out in the WTO Agreement or in multilateral instruments adopted by international organisations, could serve as such a standard’.²²⁹ The identified need ‘must by its nature, be such that it can be effectively addressed through tariff preferences’ and ‘a sufficient nexus should exist between, on the one hand, the preferential treatment provided ... and, on the other hand, the likelihood of alleviating the relevant “development, financial [or] trade need”’.²³⁰

In *EC – Tariff Preferences*, the Appellate Body found the EU’s General System of Preferences to be inconsistent with the Enabling Clause because of using a ‘closed list’ of beneficiaries instead of including standards or criteria by which eligibility was assessed.²³¹

²²⁸ *Ibid* at para. 162.

²²⁹ *Ibid* at para. 163.

²³⁰ *Ibid* at para. 164.

²³¹ *Ibid* at paras. 183, 188. On this case see also L Bartels, ‘The WTO Legality of the EU’s GSP+ Arrangement’ (2007) 10(4) *Journal of International Economic Law* 869; S Charnovitz, R Howse, J Bradley, J Pauwelyn and D Regan, ‘The Appellate Body’s GSP Decision (Internet Roundtable)’ (2004) 3 *World Trade Review* 239; L Bartels, ‘The WTO Ruling on EC—Tariff Preferences to Developing Countries and its Implications for Conditionality in

Turning to the CSA measures, it is clear that the focus on corporate abuse would be a change of paradigm in the state-based system of the Enabling Clause. Nonetheless, due to the broad language, and also taking into account theories of regulatory deficit, it is arguable that refusing trade benefits to companies that violate basic environmental, labour, or human rights in developing countries responds to a ‘development need’. Moreover, the CSA measures work according to ‘objective standards’ without employing ‘closed list’. The Appellate Body seems to favour general international standards, though, and, presumably, would view European standards more critically. Is there also a sufficient nexus between the need and the trade instruments? This is at least what the EU claims in the case of Burma, Belarus, Venezuela, and Sri Lanka, countries which forfeited trade benefits as a result of prevalent abuses.²³² However, since the Enabling Clause was not designed to address global corporate abuse, the question of compatibility remains open.

GSP Programmes’, G Shaffer and Y Apea, ‘GSP Programmes and Their Historical-Political-Institutional Context’, J Bradley, ‘The Enabling Clause and Applied Rules of Interpretation’, in T Cottier, J Pauwelyn, E Bürgi (eds), *Human Rights and International Trade* (Oxford, Oxford University Press, 2005).

²³² See above chapter 2 (Context) I. (Existing International and European Regulation on Global Corporate Social Accountability) B. (European Law) (Trade Measures).

(iii) Labelling

Mandatory labelling restricts trade and therefore falls under the GATT regime discussed above.²³³ However, mere labelling is less trade restrictive than an outright import ban; the proportionality assessment may thus be different.

In proceedings before the European Court of Justice, mandatory labelling for tobacco products was also challenged as being contrary to the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).²³⁴ Article 20 TRIPS demands that a trademark shall not be ‘unjustifiably encumbered’. Again, prevailing public interests may justify restrictions of intellectual property rights.²³⁵

Whether mandatory labelling falls under the Agreement on Technical Barriers to Trade (TBT) is a complex issue. Regulation based on process and production methods (PPMs), which are product related, is indisputably within the reach of this agreement. This means that distinctions between recycled paper and

²³³ Chapter 3 (Limits of Lawfulness) II. (Lawfulness under International Law) A. (World Trade Agreements and other International Treaties) (ii) (Trade Measures).

²³⁴ Case C-491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco* [2000] ECR I-11543, paras 142-156; since, in general, TRIPS lacks direct effect in European Union law, the ECJ declined to decide on the substance of the argument, see para. 154.

²³⁵ See also Article 8 TRIPS.

unrecycled paper would be covered by the TBT Agreement if recycled paper is darker than unrecycled paper (because it would mean that the PPM leaves a physical trace in the product).

However, it is disputed whether criteria linked to PPMs which are *not* product related are covered by the TBT (e.g. labelling that distinguishes between a football that was manufactured by children and a football that was not; no physical trace of the different PPMs can be observed).²³⁶

The *travaux préparatoires* indicate that the drafters intended to exclude product unrelated PPMs, although the negotiation materials may be of limited significance.²³⁷ Furthermore, CSA labelling would possibly take account both of product related and product unrelated PPMs. In such a case, Puth argues, an interpretation in *dubio mitius* (the principle of restrictive interpretation of treaty obligations) removes labelling altogether from the scope of the TBT Agreement.²³⁸ But the principle of effectiveness

²³⁶ M Koebele, 'Article I and Annex I TBT' in R Wolfrum, P-T Stoll and A Seibert-Fohr (eds), *Max Planck Commentaries on World Trade Law* Vol. 3 (Leiden, Martinus Nijhoff, 2007), paras. 30-36.

²³⁷ *Ibid* at paras 33-34.

²³⁸ S Puth, 'WTO und Umwelt' in M Hilf and S Oeter (eds), *WTO-Recht*, 2nd edn (Baden-Baden, Nomos, 2010) 572; in contrast, B Hepple, *Labour Laws and Global Trade* (Oxford, Hart Publishing, 2005) 139-140 has no quarrel with applying the TBT Agreement to social labels.

demands that the TBT Agreement would apply at least with regard to the product related PPMs.²³⁹

Assuming that the TBT Agreement applies, the question of less favourable treatment arises.²⁴⁰ Furthermore, Article 2.1 TBT Agreement requires that ‘technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective’. Article 2.1 mentions a non-exhaustive list including the ‘protection of human health or safety, animal or plant life or health, or the environment’. Proportionality is the litmus test. In the *Korea – Beef* case, the Appellate Body spoke of a process of weighing and balancing of a series of factors, including the measure’s effectiveness, the importance of the common interests or values protected, and the restrictive impact on trade.²⁴¹

Mandatory CSA labelling is therefore more likely

²³⁹ M Koebele, ‘Article I and Annex I TBT’ in R Wolfrum, P-T Stoll and A Seibert-Fohr (eds), *Max Planck Commentaries on World Trade Law* Vol. 3 (Leiden, Martinus Nijhoff, 2007), para. 40; see also B Hepple, *Labour Laws and Global Trade* (Oxford, Hart Publishing, 2005) 139-140; on the principles of *in dubio mitius* and effectiveness in the case law of the Appellate Body see I Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford, Oxford University Press, 2009) 61-65, 275-304.

²⁴⁰ See the discussion on discrimination under GATT law above Chapter 3 (Limits of Lawfulness) II. (Lawfulness under International Law) A. (World Trade Agreements and other International Treaties) (ii) (Trade Measures).

²⁴¹ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report, WT/DS135/AB/R (‘EC – Asbestos’), para. 172

to pass the proportionality test if it is based on general international standards or even *jus cogens*. Labelling—compared to an import ban—is a less restrictive measure but, on the other hand, its capacity to protect basic environmental, labour, and human rights may be contested.

Voluntary CSA labelling (i.e. a label offered to market participants, but not imposed on them) also comes under the TBT regime, albeit as a ‘standard’ according to Article 4 and Annex 3 and not as a ‘technical regulation’ according to Article 2.²⁴² Again, there is a requirement of non-discrimination and a prohibition of ‘unnecessary obstacles to international trade’. Though different in formulation, the substance is similar to the requirement in Article 2.²⁴³ Voluntary labelling, as the less restrictive measure, may be easier to justify than mandatory labelling.

Is the GATT applicable to voluntary labelling? Conditions an enterprise voluntarily accepts in order to gain an advantage from the government are covered by the GATT.²⁴⁴ But the panel in *US –Tuna I* rejected the

²⁴² See also Case C-281/01 *Commission v Council (Energy Star)* [2001] ECR I-12049, para. 45.

²⁴³ M Koebele and Y La Fortune, ‘Article 4 and Annex 3 TBT’ in R Wolfrum, P-T Stoll and A Seibert-Fohr (eds), *Max Planck Commentaries on World Trade Law* Vol. 3 (Leiden, Martinus Nijhoff, 2007) para. 9.

²⁴⁴ *EEC – Regulation on Imports of Parts and Components*, GATT-Panel Report (adopted), L/6657 – 37S/132, para. 5.21; *Japan –*

GATT's application to the voluntary label 'dolphin safe'.²⁴⁵

(iv) Public Procurement

The EU is a party to the WTO Government Procurement Agreement (GPA).²⁴⁶ It is a plurilateral treaty; not all WTO members are GPA signatories.²⁴⁷ The GPA's scope of application is restricted since members have not opened up all sectors and have not subjected all government entities to the regime. Where the GPA applies, public procurement aimed at protecting environmental, labour, and human rights abroad against corporate abuse must respect the specific requirements on award procedures and the general prohibition of discrimination, or otherwise be justified by overriding public interests.

Restrictions on Imports of Certain Agricultural Products, GATT-Panel Report, L/6253 – 35S/163, para. 8.111; see also H Hestermayer, 'Article III GATT' in R Wolfrum, P-T Stoll and H Hestermayer (eds), *Max Planck Commentaries on World Trade Law, Trade in Goods* Vol. 5 (Leiden, Martinus Nijhoff, 2011) para. 76-78.

²⁴⁵ *US – Tuna I*, Panel Report (unadopted), BISD 39S/155, para. 5.42 with respect to the voluntary label 'dolphin safe'. See also S Puth, 'WTO und Umwelt' in M Hilf and S Oeter (eds), *WTO-Recht*, 2nd edn (Baden-Baden, Nomos, 2010) 563.

²⁴⁶ Procurement is excluded from the GATT and GATS, see Article III:8(a) GATT, Article XIII GATS.

²⁴⁷ See for a list of current members <http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm#parties>.

Specific Rules on Award Procedures

According to Article XIII.4(b) GPA the ‘lowest’ or ‘the most advantageous’ tender shall win the award. ‘Most advantageous’ leaves room for ‘non-economic’ aims.²⁴⁸

Therefore, conditions related to the environment or to labour and human rights do not appear to be excluded from the outset. The GPA does not seem to follow a ‘purity principle’ that accepts only economic aspects such as efficiency and price as valid parameters.²⁴⁹

Rather, the underlying general idea appears to be that governments are free to decide *what* they want to procure; the WTO regime only regulates *how* they procure.

Article VI.1 GPA says that ‘technical specifications laying down the characteristics of the products or services to be procured ... or the processes

²⁴⁸ S Arrowsmith, *Government Procurement in the WTO* (London, Kluwer Law International, 2003) 343; GJ Götsche, ‘Öffentliches Beschaffungswesen’ in M Hilf and S Oeter (eds), *WTO-Recht*, 2nd edn (Baden-Baden, Nomos, 2010) 530; see Article X.6 and 9 of the provisionally agreed revised GPA text which recognise environmental criteria
<http://www.wto.org/english/news_e/news11_e/gpro_15dec11_e.htm>.

²⁴⁹ S Arrowsmith, *Government Procurement in the WTO* (London, Kluwer Law International, 2003) 331-332; McCrudden, ‘International Economic Law and the Pursuit of Human Rights: a Framework for Discussion of the Legality of “Selective Purchasing” Laws under the WTO Procurement Agreement’ (1999) 2 *Journal of International Economic Law* 30.

and methods for their production ... shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade'. One may argue that, for example, health and safety requirements or environmental requirements do constitute trade obstacles. However, it is unconvincing to treat all descriptions of a product or all production methods per se as unnecessary barriers to trade. The better view is that Article VI.1 GPA merely prevents governments from rejecting companies that can provide products that are functionally equivalent but have different characteristics or were produced using a different process (e.g. companies that offer a different type of bus that is nevertheless as environmentally friendly as the type mentioned in the technical specifications).²⁵⁰

The provisionally agreed revised GPA text affirms that members may apply technical specifications 'to promote the conservation of natural resources or protect the environment'.²⁵¹ Silence on labour or human rights may however indicate that requirements relating to these issues qualify as trade restrictions.

The GPA narrows members' discretion to exclude bidders from the tendering procedure. Article VIII(b) GPA requires conditions to be limited to those

²⁵⁰ S Arrowsmith, *Government Procurement in the WTO* (London, Kluwer Law International, 2003) 313, 335.

²⁵¹ Article X.6 of the provisionally agreed revised GPA text.

‘essential to ensure the firm’s capability to fulfil the contract’. This phrasing seems to indicate that conditions unrelated to the contract (such as a general obligation for companies to respect labour standards in their entire business operations) are not allowed.²⁵² Article VIII(b) GPA seems to imply the general theme that criteria must be contract-specific.²⁵³ Unrelated requirements increase governments’ discretion and thereby diminish transparency and market access, which are the cornerstones of the GPA’s philosophy.²⁵⁴

But Article VIII(h) GPA stipulates that suppliers can be excluded on grounds ‘such as bankruptcy and false declarations’. Arrowsmith argues that this provision should be interpreted in a broader sense, permitting exclusions of suppliers for unlawful and unethical behaviour that is not contract-specific.²⁵⁵ Following that reading, companies may be rejected for disrespect of basic environmental, labour, and human rights standards. The provisionally agreed revised GPA

²⁵² S Arrowsmith, *Government Procurement in the WTO* (London, Kluwer Law International, 2003) 338.

²⁵³ *Ibid* at 336-337, 341, but see 344; JC Gaedtke, *Politische Auftragsvergabe und Welthandelsrecht* (Berlin, Duncker & Humblot, 2006) 122.

²⁵⁴ See the Preamble of the GPA: ‘Recognizing the need for an effective multilateral framework ... with a view to achieving greater liberalization and expansion of world trade ...’; ‘Recognizing that it is desirable to provide transparency ...’

²⁵⁵ S Arrowsmith, *Government Procurement in the WTO* (London, Kluwer Law International, 2003) 339.

text supports this position: The new Article VIII.4(e) recognises that a supplier may be excluded because of ‘professional misconduct or acts or omissions that adversely reflect on the commercial integrity of the supplier’.²⁵⁶

Discrimination

Article III GPA contains a general non-discrimination clause.²⁵⁷ Members must not accord less favourable treatment to the products, services, and suppliers of any other member. Article III GPA encompasses, most notably, policies directed at supporting non-competitive domestic industries.²⁵⁸ But environmental or social requirements may also have a discriminatory effect if suppliers from other countries find it harder to fulfil them. With regard to the GATT, the Appellate Body held in *Dominican Republic – Cigarettes* that even a measure that is more burdensome for foreign products is not discriminatory ‘if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product’.²⁵⁹ Award criteria or

²⁵⁶ Article VIII.4(e) of the provisionally agreed revised GPA text.

²⁵⁷ Article I.3 GPA forbids discrimination against sub-contractors and other entities in the supply chain. Appendix I GPA contains ‘General Notes and Derogations from the Provisions of Article III’.

²⁵⁸ S Arrowsmith, *Government Procurement in the WTO* (London, Kluwer Law International, 2003) 328.

²⁵⁹ *Dominican Republic – Measures Affecting the Importation and*

contract conditions that disfavour products manufactured by children disadvantage suppliers from countries where child labour is ubiquitous. However, as has been argued above,²⁶⁰ the exclusion of products made by children may not be judged ‘discriminatory’ if child labour is prohibited in the country of origin by national law or by applicable ILO conventions, or by customary international law.

Moreover, ILO Convention No. 94 on labour clauses in public contracts provides for procuring entities to include contract clauses that refer to the wages, hours, and other working conditions in the workers’ home states.²⁶¹ Such contract clauses are likely to escape the prohibition of discrimination, too, since they originate in an international treaty.

Finally, according to another line of thought, criteria may be regarded as part of the definition of the product (such as the quality of materials to be biodegradable or of buses to be low-polluting); if they are part of the definition, criteria do not restrict competition (and hence are not discriminatory) but

Internal Sale of Cigarettes, Appellate Body Report, WT/DS302/AB/R, para. 96.

²⁶⁰ Chapter 3 (Limits of Lawfulness) II. (Lawfulness under International Law) A. (World Trade Agreements and Other International Treaties) (ii) (Trade Measures) (Trade and Environment).

²⁶¹ S Arrowsmith, *Government Procurement in the WTO* (London, Kluwer Law International, 2003) 330.

define the market that is *then* subject to competition.²⁶²

Justification

A violation of the non-discrimination clause or the specific rules on award procedures remains compatible with the GPA if justified by overriding public interests. Article XXIII.2 GPA allows that parties impose measures that are, among other things, necessary to protect ‘public morals, order or safety’ or ‘human, animal or plant life or health’.

Environmental requirements may fall under the latter category although it is surprising that Article XXIII.2 GPA does not contain the exception of ‘conservation of exhaustible natural resources’ listed in Article XX(g) GATT. However, the wording of ‘human, animal or plant life or health’ is sufficiently wide to make an Article XX(g) GATT exception superfluous.²⁶³ After all, environmental protection is recognised in the Preamble to the WTO Agreement.

With regard to ‘public morals, order or safety’ and other issues of justification, similar problems arise in the context of the GATT: There, international standards seem to be easier to justify than domestic standards; and extraterritoriality may be permitted at least if there

²⁶² *Ibid* at 331, 334.

²⁶³ See also J-C Gaedtke, *Politische Auftragsvergabe und Welthandelsrecht* (Berlin, Duncker & Humblot, 2006) 176-179.

is a *sufficient link*.²⁶⁴ It seems likely that a similar doctrine applies under Article XXIII.2 GPA.

Case Study: Massachusetts-Burma Law

In 1996, the US federal state Massachusetts passed a law²⁶⁵ barring state entities from buying goods or services from companies doing business with Burma. The aim of the statute was to put pressure on Burma's military dictatorship to end gross human rights violations.

The EU commenced WTO proceedings against the United States, alleging that awards were not being made on the basis of the 'lowest' or 'most advantageous' tender (Article XIII:4(b) GPA); that conditions for participation in tender proceedings were not contract-specific (Article VIII(b) GPA); and that criteria were discriminatory (Article III GPA).²⁶⁶

A violation of the principles of contract-specificity and non-discrimination seems likely:

²⁶⁴ See chapter 3 (Limits of Lawfulness) II. (Lawfulness under International Law) A. (World Trade Agreements and Other International Treaties) (ii) (Trade Measures) (Trade and Environment).

²⁶⁵ Massachusetts Act of 25 June, 1996, chapter 130, §1, 1996 Mass. Acts 210, codified at Mass. Gen. Laws, ch.7, §§ 22G-22M.

²⁶⁶ *US – Measure Affecting Government Procurement*, Request for Establishment of a Panel by the European Communities, WT/DS88/3.

The requirement of not doing business with Burma is not 'essential' to ensure the firm's capability to fulfil the contract; it also discriminates against firms that are active in Burma.²⁶⁷ An infringement of Article XIII:4(b) GPA depends on how broad the phrase 'most advantageous tender' is interpreted.

Doing business with Burma's dictatorship may be regarded as unethical behaviour so that exclusions of firms would be covered by Article VIII(h) GPA. Discrimination may be necessary to protect the (global) public order according to Article XXIII:2 GPA. After all, the ILO had already found severe labour rights violations in Burma.²⁶⁸ Justification under Article XXIII:2 GPA however presupposes a broad understanding of public order that allows protection of fundamental values worldwide. The issues remain unresolved since the WTO proceedings were discontinued after

²⁶⁷ S Arrowsmith, *Government Procurement in the WTO* (London, Kluwer Law International, 2003) 338.

²⁶⁸ International Labour Organization, 'Forced Labour in Burma: Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the International Labour Organization to examine the observance by Burma of the Forced Labour Convention, 1930 (No. 29)' (2 July 1998) <<http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm>>.

the Massachusetts law was found unconstitutional by US courts.²⁶⁹

(v) Conclusions

The preceding sections have shown that enforcing global corporate social accountability in Europe by means of financial benefits, trade measures, labelling, and public procurement encounters several restrictions in world trade agreements and other international treaties. The analysis may be summarised as follows.

The refusal or recovery of financial benefits as a result of corporate abuse abroad does not appear to conflict with international treaty law. The relevant WTO and OECD texts, mainly aiming to prevent adverse effects on other countries' trade and industries due to unfair subsidies, are no bar to legislation that tries to prevent adverse effects of subsidies on the environment and social rights in other countries. Such practice is also unlikely to infringe international investment treaties if applied in a non-discriminatory and fair way.

Trade measures to protect environmental, labour, or human rights abroad raise intricate problems of

²⁶⁹ *US – Measure Affecting Government Procurement*, Lapse of Authority for Establishment of the Panel, Note by the Secretariat, WT/DS88/6 and WT/DS95/6.

WTO law. First, it seems that distinctions based on different production and process methods (PPMs) do not escape the non-discrimination principle. Products produced in a way that is detrimental to the environment and products that are produced in an environmentally friendly manner must not, in principle, be treated differently. The *Dominican Republic – Cigarettes* case however shows that even a measure that is more burdensome for imported products is not discriminatory ‘if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product’. This language might suggest that, for example, higher tariffs on carbon intensive products will only be discriminatory if there is a link between the carbon intensiveness and the origin of the product.

If trade restrictions are classified as discriminatory they can still be justified for public policy reasons according to Article XX GATT. The *US – Shrimp* case however suggests that European standards as such may not be imposed. Only if they accommodate the particular situation in the exporting states and only if serious good faith efforts to reach a multilateral solution were undertaken before, can European standards survive the Article XX GATT test. This shows that WTO law favours international standards.

A further question is whether standards may apply extraterritorially. In *US – Tuna I*, a panel denied that dolphins outside the US territory could be protected.

US – Tuna II permitted the extraterritorial application of US policies to extend only to US nationals and vessels. Thus, CSA regulation confined to a European addressee as such (the entity approach) seems to pass the jurisdictional test in *US – Tuna II*. The Appellate Body in *US – Shrimps* declined to decide on an implied jurisdictional limitation but regarded extraterritorial application as in any case justified when there is a ‘sufficient nexus’ to the home territory.

Concepts of international environmental law such as ‘global commons’ and ‘shared resources’ show that states have an interest in the environment that goes beyond their borders. On the other hand, these concepts are not limitless—they do not encompass all environmental issues in all countries. Thus, environmental regulation cannot be applied extraterritorially in its entirety.

Discriminatory trade measures based on labour rights or human rights concerns can, in principle, be justified as being ‘necessary for the protection of public morals’ (Article XX(a) GATT) or ‘necessary for the protection of human, animal, or plant life or health’ (Article XX(b) GATT).

General international standards and *jus cogens* are easier to justify than European standards, which risk being protectionist. Trade restrictions may also be blunt tools to prevent exploitative child labour or other violations of labour and human rights. It is therefore not

always clear whether they pass the proportionality test, especially when they are not aimed at specific products that were manufactured in an inhumane way but construed as sanctions targeted at companies with a bad labour or human rights record in general.

The so-called ‘Enabling Clause’ permits WTO members to give differential and more favourable treatment to developing countries. Arguably, refusing trade benefits to corporations that violate basic environmental, labour, or human rights in developing countries is compatible with the Enabling Clause if it is accepted that such practice responds to a ‘development need’ and is sufficiently objective and transparent. *Jus cogens* and general international standards seem to be less contentious. However, since the Enabling Clause was not designed to address global corporate abuse, the question of compatibility remains open.

Labelling has an impact on trade. Thus, similar issues of discrimination and justification arise under various WTO regimes, including the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Agreement on Technical Barriers to Trade (TBT). Labelling is however a less trade restrictive measure than an import ban, which might influence the proportionality assessment.

The WTO Government Procurement Agreement (GPA) sets limits to public procurement policies aimed at protecting environmental, labour, and human rights

abroad against corporate abuse. Such policies must respect the specific requirements of award procedures and the general prohibition of discrimination, or otherwise be justified by overriding public interests.

Conditions related to the environment or to labour and human rights do not appear to be excluded from the outset. The GPA does not seem to follow a ‘purity principle’ that accepts only economic aspects such as efficiency and price as valid parameters. Rather, the underlying general idea appears to be that governments are free to decide what they want to procure; the WTO regime only regulates how they procure.

The GPA’s basic idea seems to be that conditions must be contract-specific. Requirements unrelated to the contract, such as a general obligation for companies to respect labour standards in their entire business operations, are unlikely to be legal. Unrelated requirements increase governments’ discretion and thereby diminish transparency and market access, which are the cornerstones of the GPA’s philosophy.

But Article VIII(h) GPA stipulates that suppliers can be excluded on grounds ‘such as bankruptcy and false declarations’. It has been argued that this provision should be interpreted in a broader sense, permitting exclusions of suppliers for unlawful and unethical behaviour that is not contract-specific. Following this reading, companies may be rejected for disrespect of basic environmental, labour, and human

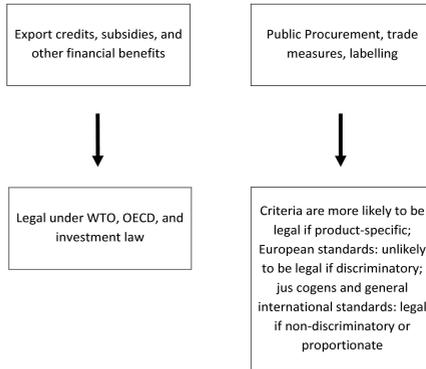
rights standards.

Furthermore, measures must not be discriminatory. *Dominican Republic – Cigarettes* suggests that there is no discrimination if standards are applied in a way that is unrelated to the origin of the product or service. Contract clauses that refer to the wages, hours, and other working conditions in the workers' home states are likely to escape discrimination. Criteria may also be regarded as part of the definition of the product and therefore do not restrict competition (and hence are not discriminatory) but define the market that is then subject to competition.

If a certain public procurement policy is nonetheless classified as discriminatory, it can be justified on environmental or public policy grounds. Here, issues similar to the linkage debate (environment/labour/human rights and trade) under the GATT regime arise.

The following illustration visualises in a simplified manner the principal findings:

Illustration 5: World Trade Agreements and Other International Treaties



B. CUSTOMARY INTERNATIONAL LAW: LAWFULNESS OF EXTRATERRITORIAL JURISDICTION

Extraterritorial jurisdiction is commonly understood as the competence to make, apply, and enforce rules of conduct in respect of persons, property, or events beyond the home territory.²⁷⁰ The exercise of such power is an expression of sovereignty, but at the same time may impinge on the sovereignty of other states. After revisiting some of the basic principles, we will turn to the specific CSA measures and examine their lawfulness.

Case Study: The Lotus Case

The starting point on jurisdiction in international law is the seminal *Lotus* case, decided in 1927 by the Permanent Court of International Justice (the predecessor of the International Court of Justice). The case arose from a collision on the high seas between the French steamer *Lotus* and the Turkish collier *Boz-Kourt*. The Turkish ship sank and eight Turkish nationals drowned. Upon the arrival of the *Lotus* in Istanbul, a Turkish court sentenced the

²⁷⁰ See, e.g., M T Kamminga, 'Extraterritoriality' Max Planck Encyclopedia of Public International Law <<http://www.mpepil.com>> para. 1.

French officer of the watch on board the Lotus for involuntary manslaughter to 80 days of imprisonment and a minor fine. The Permanent Court of International Justice eventually ruled that Turkey had the right to do so. The following three paragraphs set out the Court's theory, which touches the very heart of the international legal order:²⁷¹

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

²⁷¹ See also A von Bogdandy and M Rau, 'The Lotus' Max Planck Encyclopedia of Public International Law <<http://www.mpopil.com>> para. 1.

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.²⁷²

The first paragraph stresses the state's sovereign independence and rejects any presumption of restriction. The second paragraph says that *enforcing* jurisdiction on foreign territory is generally prohibited. In contrast, the third paragraph explains that jurisdiction to *prescribe* rules applicable to persons, property, and acts

²⁷² *Lotus judgment* No. 9. (1927) PCIJ Serie r 4, No 10, 18, 19.

outside the home territory is, in principle, unlimited. The last holding is the famous ‘*Lotus* principle’: Public entities are free to adopt whatever rules they like absent any prohibition by international law.

Following the *Lotus* principle, the CSA measures would enjoy significant leeway. They represent jurisdiction to enforce that remains territorial, thereby respecting the second paragraph cited above, and make use of jurisdiction to prescribe with an extraterritorial element, which is in accordance with the third paragraph.

However, it is questionable whether the judgment is still good law. Its theoretical foundations are disputed today. The *Lotus* world of sovereign and independent states, reminiscent of the late nineteenth and early twentieth centuries, seems to be out of sync with today’s interconnected and multilayered international system,²⁷³ even though there are renewed signs of unilateralism and claims of independence (see, e.g., the ECJ in *Kadi*, proclaiming the EU as an ‘autonomous legal order’²⁷⁴). *Lotus*, by making mere sovereignty the starting point of its argument, also seems to rest on the

²⁷³ See A von Bogdandy and M Rau, ‘The *Lotus*’ Max Planck Encyclopedia of Public International Law <<http://www.mpepil.com>> para. 17.

²⁷⁴ *Ibid.*

assumption of power preceding the law, without explaining how law can result from bare power.²⁷⁵

For these reasons, a *genuine link* (or *critère de rattachement*) between the extraterritorial subject matter and the regulating public body is increasingly demanded.²⁷⁶ Whether there is a sufficient connection depends on the particular interests involved and the nature and characteristics of the regulation. We shall deal with these matters in turn.

(i) *Fines*

Fines curtail corporate freedom abroad. This may create tension in international relations.

European Addressee

The first issue to consider is whether fines would infringe international law if addressed to a European

²⁷⁵ *Ibid* at para. 18; M Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument*, 2nd edn (Cambridge, Cambridge University Press 2006) 220; see also J-J Rousseau, *Contrat Social* (Amsterdam, 1762) Livre I, Chapitre III: ‘La force est une puissance physique ; je ne vois point quelle moralité peut résulter de ses effets. Céder à la force est un acte de nécessité, non de volonté ; c’est tout au plus un acte de prudence. En quel sens pourra-ce être un devoir ?’

²⁷⁶ See, e.g., *Nottebohm Case (Liechtenstein v Guatemala)* [1955] ICJ Reports 4, 24, 26; *Case concerning the Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3, 105; *Anglo-Norwegian Fisheries Case* [1951] ICJ Rep, 116.

company with regard to its own wrongdoing. It is difficult to see a problem in this scenario. Of course, there is an extraterritorial element since it is corporate abuse that was committed abroad that is fined or made public. But the measure remains a domestic one addressed to a domestic company. The principle of active personality, the connection to the perpetrator, provides the genuine link.

The next hypothetical is a European company that receives a fine for the corporate abuse committed abroad by its subsidiary (enterprise approach) or by another company from which it procures products or services (supply chain responsibility). The *Fruehauf* affair exemplifies this scenario.

Case Study: The Fruehauf Case

During the 1960s the US restricted trade with China. Fruehauf France, a company controlled by its American parent, entered into a major contract to supply the French truck maker, Berliet, with trailers that would be exported to China. The US Treasury Department ordered the American parent to stop the sale and the company accordingly ordered its French subsidiary to cancel the contract. Faced with Berliet's threat to sue Fruehauf France for breach of contract, the French directors of the subsidiary—who were in a minority in relation to the American nominees—applied to the courts

claiming that the purported termination was an abuse of rights (*abus de droit*) by the majority of American directors. The Paris Court of Appeals affirmed that a temporary administrator should be appointed to oversee the performance of the contract, as the decision of the board not to perform was indeed not in the interests of the company. The diplomatic incident was finally resolved with the US Treasury Department withdrawing its order.²⁷⁷

The US Third Restatement of Foreign Relations Law acknowledges in principle a state's jurisdiction with respect to the 'activities' and 'interests' of its nationals outside its territory.²⁷⁸ On the other hand, the

²⁷⁷ The description of the case is largely based on P Muchlinski, *Multinational Enterprises & The Law*, 2nd edn (Oxford, Oxford University Press, 2007) 131 and WL Craig 'Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on *Fruehauf v Massardy*' (1970) 83 *Harvard Law Review* 579, 580; see also *Société Fruehauf Corporation v. Massardy et autres*, 14^e Chambre de la Cour d'appel de Paris, 22 mai 1965, D. 1668, jurisprudence, 147-148; J.C.P. 1965, II, 14274 bis, concl. Av. gén. Nepveu, English translation: 5 ILM 476 (1966); M Lizée, *Le droit des multinationales: une impasse juridique?* (1985) *Revue Québécoise du droit international* 271, 277.

²⁷⁸ American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (St. Paul, American Law Institute Publications, 1987) s 402(2); the same opinion holds WL Craig 'Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on *Fruehauf v Massardy*' (1970) 83 *Harvard Law Review* 579.

Restatement stipulates that ‘a state may not ordinarily regulate activities of corporations organized under the laws of a foreign state on the basis that they are owned or controlled by nationals of the regulating state’.²⁷⁹ Only exceptionally may such regulations be permissible: if they are not ‘unreasonable’.²⁸⁰ Accounting and reporting standards for the entire multinational firm may meet the threshold of reasonableness²⁸¹ as may regulation of ‘international transactions, such as export and import, foreign exchange and credits, and transborder investment;’ but extraterritorial laws governing ‘predominantly local activities, such as industrial and labor relations, health and safety practices, or conduct related to preservation or control of the local environment’ generally will not.²⁸²

Following this reasoning, reporting obligations and international trade restrictions may be compatible with customary international law, while fines imposed on the European parent for its foreign subsidiary’s violations of environmental, labour, or human rights abroad will not be.

However, it is more persuasive to argue that the

²⁷⁹ American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (St. Paul, American Law Institute Publications, 1987) s 402(2).

²⁸⁰ *Ibid.*

²⁸¹ *Ibid* at s 414(2)(a).

²⁸² *Ibid* at s 414, Comment c, 271.

link of active personality is, in principle, sufficient to render all fining policies lawful. As mentioned before, the Restatement itself acknowledges active personality.²⁸³ It is an accepted basis of jurisdiction in the criminal law of many states when they prosecute their nationals for crimes committed abroad (e.g. sex tourism).²⁸⁴ Antitrust laws allow the fining of the parent company for the anti-competitive behaviour of a foreign subsidiary.²⁸⁵ Disclosure obligations frequently

²⁸³ *Ibid* at s 414(2); see also The Second Restatement of the Foreign Relations Law of the United States, s 30 (i): ‘A state has jurisdiction to prescribe a rule of law a) attaching legal consequences to conduct of a national of the state wherever the conduct occurs or b) as to the status of a national or as to an interest of a national, wherever the thing or other subject-matter to which the interest relates is located’.

²⁸⁴ American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (St. Paul, American Law Institute Publications, 1987) s 402, Reporters’ Note 1, 242; see also, e.g., Sections 5, 6 and 7 of the German Criminal Code (*Strafgesetzbuch*) <http://www.gesetze-im-internet.de/englisch_stgb/index.html>.

²⁸⁵ Case C-286/98 P *Stora v Commission* [2000] ECHR I-9925, para. 29; see also: General Court, Joined Cases T-71, 74, 87 and 91/03 *Tokai Carbon Co Ltd and others v Commission* [2005] ECR II-10, paras 59-60; see also for a discussion of this issue, A Montesa and A Giraja, ‘When parents Pay for their Children’s Wrongs: Attribution of Liability for EC Antitrust Infringements in Parent Subsidiary Scenarios’ (2006) 29(4) *World Competition: Law and Economics Review* 555; WPJ Wils, ‘The Undertaking as Subject of E.C. Competition Law and the Imputation of Infringements to Natural or Legal Persons’ (2000) 25 *European Law Review* 99; A Jones and B Sufirin, *EC Competition Law: Text, Cases and Materials*, 3rd edn (Oxford, Oxford University Press, 2008) 144-

encompass the environmental impacts of the parent and its subsidiaries abroad.²⁸⁶ Moreover, some even argue that there exists a duty for the home state to prevent multinationals from committing abuses abroad, although it remains doubtful whether this proposition reflects current customary law.²⁸⁷

Importantly, the *Fruehauf* scenario is about regulating the domestic parent, not the foreign subsidiary.²⁸⁸ The US required the American parent to

146; A Scheidtmann, ‘Schadensersatzansprüche gegen eine Muttergesellschaft wegen Verstößen einer Tochtergesellschaft gegen Europäisches Kartellrecht?’ (2010) *Wettbewerb in Recht und Praxis*, 499-505.

²⁸⁶ JA Zerk, ‘Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas’ (Corporate Social Responsibility Initiative, working paper no. 59, 2010) <http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf> 178; UK Companies Act 2006, Part 15, Chapter 5, Sections 415 and 417.

²⁸⁷ See discussion above chapter 3 (Limits of Lawfulness) I. (Lawfulness under European Law) B. (Fundamental Rights and Other General Principles of EU Law).

²⁸⁸ It does not seem entirely clear whether the US Treasury only addressed the US parent or also directly addressed the French subsidiary. P Muchlinski, *Multinational Enterprises & The Law*, 2nd edn (Oxford, Oxford University Press, 2007) 131 and WL Craig ‘Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on *Fruehauf v Massard*’ (1970) 83 *Harvard Law Review* 579 580 seem to suggest that only the US parent was addressed, whereas the American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (St. Paul, American Law Institute Publications, 1987) 343 recounts the facts of the case by affirming a US order directed to the French subsidiary. For the

do something (namely, to order the French subsidiary not to export). But the Treasury Department did not order the French subsidiary directly. This distinction is important since regulation thereby remained domestic, addressed to a domestic entity.²⁸⁹ As long as regulation is parent-based a genuine link arguably persists: the active personality principle.²⁹⁰

The underlying US legislation, the Trading with the Enemy Act, was more sweeping than the Treasury's

sake of analysing the general principles of jurisdiction, we assume here, without deciding on the facts of the case, that only the US parent received an order from the US Treasury.

²⁸⁹ The American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (St. Paul, American Law Institute Publications, 1987) s 414(2)(c) merely admits that 'the burden of establishing reasonableness is heavier when the direction is issued to the foreign subsidiary than when it is issued to the parent corporation'; see also the analysis in JA Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' (Corporate Social Responsibility Initiative, working paper no. 59, 2010) <http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf> 215-216.

²⁹⁰ See also J Ruggie, 'Sir Geoffrey Chandler Speaker Series, The Royal Society for the Encouragement of Arts, Manufacture and Commerce' (Speech, London, 11 January 2011) <http://www.ohchr.org/Documents/Press/ChandlerLecture_Final.pdf> 12; J Ruggie, 'Business and Human Rights: Further steps toward the operationalization of the protect, respect and remedy framework' (9 April 2010) A/HRC/14/27 <<http://www.reports-and-materials.org/Ruggie-report-2010.pdf>> para. 48.

order since it covered foreign corporations, too.²⁹¹ Indeed, regulation of a universal addressee, detached from the principles of territoriality and active personality, is more difficult to defend under international law.

Universal Addressee

The regulation of potentially all companies in the world by a regional organisation such as the EU appears to be unlawful. But two connecting factors, control by an EU parent company and regulation on the basis of universal norms, may provide a genuine link.

Theory of Control as a Genuine Link?

Is it possible to regulate a foreign company because it is controlled by domestic shareholders? In other words, is the theory of control (or the enterprise approach) a genuine link justifying prescriptive jurisdiction? The leading case on this question is *Barcelona Traction*.

Case Study: The Barcelona Traction Case

Before the International Court of Justice, Belgium brought a case against Spain claiming compensation on behalf of Belgian shareholders of Barcelona Traction, an energy company

²⁹¹ See WL Craig ‘Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on *Fruehauf v Massardy*’ (1970) 83 *Harvard Law Review* 579, 585-586.

incorporated in Canada but located in Spain, for damage allegedly incurred due to acts of the Spanish state.²⁹² The Court rejected Belgium's *jus standi*. There is no right for diplomatic protection concerning measures taken against Barcelona Traction since the company is incorporated in Canada and not in Belgium:

In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals. The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments.²⁹³

The Court did recognise that it may be appropriate to lift the corporate veil in exceptional circumstances. Confronted with 'economic realities', the 'independent existence of the legal entity cannot be treated as an absolute'.²⁹⁴ But for the case at hand, the Court rejected the theory of control.²⁹⁵

²⁹² *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)* (Second Phase) [1979] ICJ Rep 3.

²⁹³ *Ibid* at 42.

²⁹⁴ *Ibid* at 39.

²⁹⁵ *Ahmadou Sadio Diallo (Guinea v Democratic Republic of the*

The Court's reasoning, however, is not entirely convincing. The analogy with the nationality of individuals is hardly suitable to refute the theory of control. Individuals are in general not controlled by their parents—but corporations are. The 'economic reality' of a multinational company is more often than not that of one highly integrated firm, acting as one economic enterprise, even though on the legal plane its numerous subsidiaries may be incorporated in other countries. It therefore seems much easier to accept a theory of control as a genuine link for juridical entities than for natural persons.²⁹⁶ *Barcelona Traction* also contrasts to the practice in investment disputes. Arbitral decisions have accepted that shareholders may claim violations of companies' rights.²⁹⁷

Notwithstanding the questionable reasoning in *Barcelona Traction* and diverging decisions in investment litigation, direct regulation of companies

Congo) (Preliminary Objections) [2006–7] ICJ Rep 26 confirmed the *Barcelona Traction* judgment.

²⁹⁶ See also criticism of the *Barcelona Traction* judgment in P-M Dupuy, *Droit international public*, 7th edn (Paris, Dalloz, 2004) 73.

²⁹⁷ *CMS Gas Transmission Company v The Republic of Argentina* (Decision of the Tribunal on Objections to Jurisdiction of 17 July 2003) ICSID Case No ARB/01/8 (2003) 42 ILM 788; see also P Muchlinski, 'Corporations in International Law' in Max Planck Encyclopedia of Public International Law <<http://www.mpopil.com>> para. 21.

incorporated in other countries does raise questions of legitimacy. It runs the risk of legislation without representation since the legislator does not represent the foreign company and yet attempts to rule over it. The fact that the controlling shareholders are represented by the legislator is apparently not enough. States have generally refrained from applying their laws directly to foreign corporations merely on the basis of a theory of control absent any territorial links and have frequently protested against any exceptions to this principle.²⁹⁸ While the theory of control does not seem to provide sufficient legitimacy, regulation on the basis of universal norms might do so.

Universality as a Genuine Link?

It has been submitted that international law has moved from a formal conception founded on the respect of national sovereignty to a content-based construction

²⁹⁸ JA Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' (Corporate Social Responsibility Initiative, working paper no. 59, 2010) <http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf> 51, 55, 85, 109, 138, 201; see also, e.g., the so-called 'Soviet gas pipeline affair'. The US government sought to exercise jurisdiction over foreign subsidiaries of US firms in order to prohibit exports to the Soviet Union. The European Commission opposed this regulation: European Commission, 'Comments on the US Regulations Concerning Trade with the USSR' (12 August 1982) 21 ILM 891 (1981); see also P Muchlinski, *Multinational Enterprises & The Law*, 2nd edn (Oxford, Oxford University Press, 2007) 131-132.

based on the protection of universal human rights.²⁹⁹ While the Permanent Court of International Justice held in the *Lotus* judgment in 1927 that ‘international law governs relations between independent States’,³⁰⁰ in 1999 the International Tribunal for the Former Yugoslavia attenuated the importance of national independence.³⁰¹

A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. ... If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.

Whereas the arbitrator Huber stated in the *Las Palmas* case in 1928 that the ‘principle of the exclusive competence of the State in regard to its own territory’ is the ‘point of departure in settling most questions that concern international relations’,³⁰² in 2002 Judges

²⁹⁹ See also discussion in chapter 2 (Context) II (Theoretical Underpinnings) C. (Substantive Standards: Decentralised Enforcement of Universal Law?).

³⁰⁰ *Lotus judgment* No. 9. (1927) PCIJ Serie r 4, No 10, 18.

³⁰¹ *Prosecutor v. Dusko Tadic*, Appeals Chamber Judgment, IT-94-1-A (15 July 1999).

³⁰² *Island of Palmas Case (Netherlands v United States of America)* (1928) 2 RIAA 829 at 838.

Higgins, Koojimans, and Buergenthal observed in the *Arrest Warrant* case before the International Court of Justice a ‘movement’ towards ‘bases of jurisdiction other than territoriality’.³⁰³

But how far does this shift away from the principle of territoriality and towards a ‘human-being-approach’ justify the regulation of all companies in the world? The ICJ noted in *Bosnia and Herzegovina v Yugoslavia* that the Genocide Convention contains rights and obligations *erga omnes*. ‘[T]he obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention’.³⁰⁴ This judgment indicates that any public actor may enforce *jus cogens* against any company. However, it is not entirely clear which norms in the environmental, labour, and human rights sphere bind corporations as *jus cogens*.³⁰⁵

The US Third Restatement on Foreign Relations Law also recognises universality as a genuine link:³⁰⁶

A state has jurisdiction to define and prescribe punishment for

³⁰³ *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3, 76.

³⁰⁴ *Bosnia and Herzegovina v Yugoslavia* [1996] ICJ Rep, 616.

³⁰⁵ See above chapter 1 (Content: The Elements of European CSA Measures) II. (Explaining the Matrix) A. (First Element: Substantive Provisions; Environmental, Labour, and Human Rights Standards).

³⁰⁶ American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (St. Paul, American Law Institute Publications, 1987) s 404.

certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism ...

These offences are subject to universal jurisdiction ‘as a matter of customary law’,³⁰⁷ without being limited to criminal law.³⁰⁸ This suggests that customary international law, too, justifies universal jurisdiction. Since international custom is predicated on universal consensus, concerns of legitimacy are weak. But a caveat pertains: the contours of international custom applicable to corporate abuse are not clearly demarcated.³⁰⁹

³⁰⁷ *Ibid* at s 404 Comment a; see also the case law under the Alien Tort Claims Act: *Filartiga v. Pena-Irala*, 630 F. 2 d 876, 890 [2d Cir. 1980].

³⁰⁸ American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (St. Paul, American Law Institute Publications, 1987) s 404 Comment b.

³⁰⁹ See above chapter 1 (Content: The Elements of European CSA Measures) II. (Explaining the Matrix) A. (First Element: Substantive Provisions; Environmental, Labour, and Human Rights Standards); JA Zerk, ‘Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas’ (Corporate Social Responsibility Initiative, working paper no. 59, 2010) <http://www.hks.harvard.edu/mrcbg/CSRI/publications/workingpaper_59_zerk.pdf> 189 argues: ‘[I]t is doubtful whether universality would provide a legitimate basis for direct assertions of extraterritorial jurisdiction in the environmental field, except, perhaps, in relation to deliberate and very serious environmental damage tantamount to war crimes or genocide’.

European standards, on the other hand, do not justify universal jurisdiction. The gap between legislation and representation would not be bridged; foreign companies would have to obey laws they have never ratified in any form whatsoever. It is a ‘diagonal’, ‘incongruent’ scenario, in which the scope of legislation is broader than the scope of representation, contrary to the principle of *volenti non fit iniuria*.

(ii) Reporting Obligations

Reporting obligations curtail corporate freedom like fines do. But whereas fines punish corporations that have committed violations, reporting obligations hit law abiding companies as well. For this reason, not even *jus cogens* and general international standards can justify such sweeping regulation of foreign companies that do respect these standards. In essence, universal norms cannot render lawful reporting obligations for companies all over the world.

The principles of active personality and territoriality however justify reporting duties imposed on European addressees. If a European company is under an obligation to report, regulation remains domestic, addressed to a domestic entity. Thus, as long as duties are parent-based, a genuine link exists. This entails that a European company can also be obliged to provide reports concerning its subsidiaries and suppliers. Regulation would remain domestic since the

addressee is still the European company.

(iii) Publication of Violations

The publication of violations committed abroad may also intervene in the affairs of other countries. After all, public statements denouncing corporate abuse may lead to significant loss of sales. However, publication is different from fines and reporting obligations insofar as it does not, strictly speaking, *regulate* the targeted company; it is just a statement on fact and law. Human rights law seems to indicate that portrayals must not be untrue, defaming, discriminating, or distorting.³¹⁰ In broad strokes: Objective statements that respect legitimate business secrets do not infringe international law.³¹¹

(iv) Domestic Market Organisation: Labelling and Trade Measures

Although the CSA measures change labelling and trade policies with regard to corporate abuse abroad, the measures themselves remain domestic. They are about regulating EU markets. The strongest link, the principle

³¹⁰ See *Leela Förderkreis e.V. v Germany* [2008] Eur. Ct. H. R., paras. 95-101; in German constitutional law: *Glykol* BVerfGE 105, 252; *Osho* BvR 670/91.

³¹¹ See in the area of antitrust fines: Article 30(2) of Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1-25.

of territoriality, therefore militates for the legality of all market access restrictions, regardless of the political rationale behind them.³¹² States are, in principle, free to decide which products they let in, to what extent, and for which reasons. The ‘state of nature’ in international law is one of sovereign independence over one’s territory.³¹³

However, WTO law as *lex specialis* to this general rule appears to take a different stance. The trade-liberalising system has restrained states’ sovereignty. As has been discussed above, WTO law also appears to demand a genuine link with regard to the *political rationale* or *reason* that lies behind the domestic trade barriers. This might suggest that rules for interventionist policies such as fines apply, that is: European companies could be targeted because of the genuine link of active personality; in contrast, third country companies could only face trade restrictions and labelling if the measures were based on *jus cogens* or general international standards. The matter is not yet settled.

(v) Distributive Public Policies: Financial Benefits and Public Procurement

In principle, general international law does not tell

³¹² See also S Charnovitz, ‘The Moral Exception in Trade Policy’ (1998) 38 *Virginia Journal of International Law* 689, 719 Fn 179.

³¹³ *Lotus judgment* No. 9. (1927) PCIJ Serie r 4, No 10, 18.

states or international organisations how they should spend their resources. State A does not intervene unlawfully into state B's *domaine réservé* if A decides not to spend its money on a company that violates basic environmental, labour, or human rights standards in state B. In other words: There is no international customary duty to grant advantages to corporations that perpetrate abuses abroad. Absent any special treaty rules, distributive public policies therefore do not pose any problems concerning extraterritoriality.³¹⁴ Again, WTO law—in this case the Government Procurement Agreement (GPA)—could alter these general rules for public procurement in favour of liberalisation. It has been argued that a genuine link might be necessary under the GPA in order to take extraterritorial issues into account.³¹⁵ This could mean that European companies could be targeted because of the genuine link of active personality; in contrast, third country companies could only face restrictions in public procurement policies if the measures were based on *jus cogens* or general international standards.

At the same time it is important to remember that there are international human rights obligations that seem to require that public authorities do not condone

³¹⁴ See also M Herdegen, *Völkerrecht*, 7th edn (München, C.H. Beck, 2008) 182-183.

³¹⁵ S Arrowsmith, *Government Procurement in the WTO* (London, Kluwer Law International, 2003) 346-348.

or ‘order’ corporate abuse by procuring goods whose production violates basic standards. It has been argued above that authorities may incur liability if they knowingly buy products from a company that makes use of forced labour, for instance.³¹⁶ If WTO law is not to be interpreted in a way that conflicts with other international law it must allow public bodies to fulfil their human rights obligations.³¹⁷

(vi) Private Enforcement

Two matters have to be distinguished here: jurisdiction of the court to hear the case and the law that applies. The question of the applicable law is governed under customary international law by the same principles that are valid for fines, discussed above.³¹⁸ Accordingly, the EU may prescribe European laws for a European addressee as the perpetrator of corporate abuse abroad. The principle of active personality justifies such measures. However, absent prior consent, foreign companies cannot be sued for violations of European

³¹⁶ See chapter 3 (Limits of Lawfulness) I. (Lawfulness under European Law) B. (Fundamental Rights and Other General Principles of EU Law).

³¹⁷ See Article 31(3)(c) Vienna Convention on the Law of Treaties: In interpretation, account must be taken of ‘any relevant rules of international law applicable in the relations between the parties’.

³¹⁸ See also American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (St. Paul, American Law Institute Publications, 1987) s 421, Comment a.

laws concerning environmental, labour, or human rights abuses outside of the EU. Only obligations derived from *jus cogens* or international custom (or, as is current practice, obligations stemming from host state law³¹⁹) may be litigated in such cases in EU courts.

Jurisdiction of the courts—jurisdiction to adjudicate, as it is called in the US Restatement—is different. Jurisdiction to adjudicate may be permissible in a case where jurisdiction to prescribe domestic law is not allowed.³²⁰ International law governing the jurisdiction of courts is not strictly tied to territoriality and nationality.³²¹ For example, the domicile of the corporate defendant is widely regarded to be a sufficient link.³²² On the other hand, merely ‘doing business’ in the forum state is a contested basis for adjudicative jurisdiction.³²³

³¹⁹ See chapter 2 (Context) I. (Existing International and European Regulation on Global Corporate Social Accountability) B. (European Law) (Private Enforcement).

³²⁰ American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (St. Paul, American Law Institute Publications, 1987) s 421, Comment a; in such a case foreign law is usually applied.

³²¹ *Ibid* at chapter 2, Introductory Note, 305.

³²² JA Zerk, ‘Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas’ (Corporate Social Responsibility Initiative, working paper no. 59, 2010) <http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf> 172-173.

³²³ *Ibid* at 173; according to the American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (St. Paul,

(vii) Conflict of Laws

The gears of law should mesh, not clash. A dilemma arises when a company is caught between the jaws of two contradicting commands. How can the dilemma be resolved if the European Union aims to enforce global corporate social accountability and the host state's laws conflict? The answer depends on the nature of the laws and measures involved.

Distributive public policies should not raise concerns in international relations. If state A grants an export credit to a company for a construction project in state B solely on the condition that the company does not discriminate against green-eyed workers, and state B, governed by an odd apartheid regime, forbids the employment of green-eyed workers, state A should nevertheless be free to refuse the export credit to the company that abides by state B's discriminatory laws. State B simply cannot tell state A how to spend its money. The distributing state must not concede to differing foreign laws.

Domestic market organisation, i.e. employing trade measures including labelling, appears to follow the rule just mentioned. Customary international law does not oblige a state to open its markets. Other laws in other countries therefore cannot prevail over domestic market

American Law Institute Publications, 1987) s 421(2)(h), 306, 'doing business' is a genuine link.

organisation.

But these considerations appear theoretical since WTO law has largely supplanted customary law on trade policy. However, WTO law's stance on conflict of laws remains open since the issue has not yet been subject to dispute settlement. A variation of the *US – Shrimp* case exemplifies the scenario: If the US bans shrimp harvested in a manner that is harmful to turtles and the complaining states expressly require the use of this turtle-endangering method, is the market restriction justifiable? The Appellate Body has held that there is, in principle, a 'sufficient nexus between the migratory and endangered marine populations involved and the United States'.³²⁴ Arguably, a genuine link should be enough to justify the import ban, even in case of conflicting foreign laws.

The same seems to be true with the publication of violations. One state cannot prohibit another state's objective statements on fact and law. A true statement on the violations committed by one company on the soil of a foreign state is lawful even if the foreign state disapproves of such comments.

The matter is different with fines, reporting obligations, and private enforcement. The US Third Restatement of Foreign Relations says that 'a state may not, absent unusual circumstances, require a person,

³²⁴ *US -Shrimp*, para. 133.

even one of its nationals, to do abroad what the territorial state prohibits'.³²⁵ Preference is accorded to the 'state in which the act is to be done (or not to be done)'.³²⁶ Territoriality prevails.³²⁷ A variation of the *Fruehauf* affair shows the workings of this principle: As described above, in 1965 the US government ordered the US Fruehauf corporation to direct its subsidiary, Fruehauf France, to cancel the contract for the supply of truck trailers to China.³²⁸ If Fruehauf France had followed the directions given by its American parent and had been sued for breach of contract, the French court could have rightfully applied French law and disregarded conflicting US law.³²⁹ And the US authorities would have to accept that, because of the principle of territoriality, French law holds sway.

But the home jurisdiction does not have to refrain from applying its law if there is no genuine conflict with the host jurisdiction. Preference for territoriality

³²⁵ American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (St. Paul, American Law Institute Publications, 1987) s 441 Comment a.

³²⁶ *Ibid.*

³²⁷ *Ibid* at s 402, Comment b. And s 441 Comment b.

³²⁸ See chapter 3 (Limits of Lawfulness) II. (Lawfulness under International Law) B. (Customary International Law: Lawfulness of Extraterritorial Jurisdiction) (i) (Fines) (Case Study: The Fruehauf Case).

³²⁹ See also American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (St. Paul, American Law Institute Publications, 1987) s 441 Comment e.

applies only if one jurisdiction ‘requires what another prohibits’; it does not apply where a person can comply with both laws.³³⁰ The following case illustrates this rationale:

Case Study: The Hartford Fire Insurance Case

Reinsurers in London purportedly had engaged in unlawful conspiracies which affected certain terms of insurance contracts available on the US market. The US Supreme Court held that a US court should only decline jurisdiction where there is a true conflict between the requirements of domestic and foreign law. This was not the case since British law did not require London reinsurers to act in a way prohibited by US law. Compliance with the laws of both countries was possible.³³¹

Thus, the defence of ‘foreign government compulsion’ is only available if there is in fact real compulsion to act contrary to the other state’s law.³³²

³³⁰ *Ibid* at s 403, Comment e.

³³¹ *Hartford Fire Insurance Co. v California* 509 U.S. 764; See also description of the case in P Muchlinski, *Multinational Enterprises & The Law*, 2nd edn (Oxford, Oxford University Press, 2007) 138.

³³² See also American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (St. Paul, American Law Institute Publications, 1987) s 441 Comment c; European Court of Justice, C-198/01 *Conorzio Industrie Fiammiferi (CIF)* [2003] ECR I-8055; *In Re Vitamin C Antitrust Litigation* 584 F

But even if two laws genuinely conflict, are there exceptional situations in which the territorial jurisdiction does not prevail? Do *jus cogens* and international custom allow the conflicting law of the host state to be ignored? A variation of the *Yahoo* case may illustrate this point. In this case democratic activists accused Yahoo of giving information about their online activities to Chinese law enforcement, which led to their detention and torture.³³³ Yahoo thereby knowingly and wilfully aided and abetted human rights abuses, the plaintiffs alleged. If, hypothetically, the US had ordered Yahoo America to direct its subsidiary, Yahoo China, not to divulge user information to the Chinese government, could Yahoo America have pleaded the defence of ‘foreign government compulsion’ before the American authorities? In principle yes, since there is a real conflict of laws and the territorial jurisdiction should enjoy preference. On the other hand, the US order could be justified as enforcement of the prohibition of torture, which has the status of *jus cogens*.³³⁴ The US Third Restatement of Foreign Relations Law

Supp. 2d 546 (2006); *Linde v Arab Bank plc* 384 F. Supp 2d 571 (SDNY 2005).

³³³ See introduction.

³³⁴ See chapter 1 (Content: The Elements of European CSA Measures) II. (Explaining the Matrix) A. (First Element: Substantive Provisions; Environmental, Labour, and Human Rights Standards).

acknowledges that there may be

cases where conduct abroad is so egregious that it is not unreasonable for the state of nationality to insist that the person desist from such conduct, even at the cost of leaving the state where the conduct has taken place.³³⁵

In the *German Border Guard* cases the German Federal Court relied on international human rights in order to set aside contradicting domestic law.

Case Study: The German Border Guard Cases

After the German reunification, East German border guards who had killed fugitives trying to escape to West Germany were charged with homicide. The defendants argued that the shootings were justified by East German law. The German Federal Court, however, upheld the convictions. Domestic law that allows the killing of unarmed fugitives is void because of unbearable and blatant violations of fundamental principles of justice and core human rights. In such a case positive law must give way to justice.³³⁶

These and other cases argue in favour of a core of

³³⁵ American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (St. Paul, American Law Institute Publications, 1987) s 441 Comment b.

³³⁶ BGHSt 39, 1; see also R Geiger, 'The German Border Guard Cases and International Human Rights' (1998) 9 *European Journal of International Law* 540-549.

international norms that supersedes conflicting norms of the territorial jurisdiction.³³⁷ It is, however, a radical scenario: Persons will find themselves caught between the commands of domestic law, possibly enforced by severe penalties, and the conflicting commands of international law, possibly enforced by severe penalties, too. Therefore, it is more persuasive to assume that only *jus cogens* may supplant conflicting foreign law.

(viii) *Conclusions*

Global corporate social accountability in Europe implies extraterritorial jurisdiction to prescribe and territorial jurisdiction to enforce: Standards that are set for behaviour abroad are enforced inside the EU.

³³⁷ See especially the *Erdemovic* case, ICTY (Appeals Chamber), IT-96-22-A, <<http://www.unhcr.org/refworld/country,,ICTY,,BIH,,402761f0a,0.html>>: Erdemovic was sentenced to prison for crimes against humanity because of the execution of unarmed civilians during the Bosnian war. The accused invoked the urgent necessity to obey his military superior who threatened to take his life and the lives of his wife and child in case of disobedience. The ICTY held that these threats do not relieve the accused of his criminal responsibility under international law. See also ICTY, *Prosecutor v. Furundzija*, ICTY Trial Chamber, IT-95-17/1-T, para. 155: ‘In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. As the International Military Tribunal at Nuremberg put it: “individuals have international duties which transcend the national obligations of obedience imposed by the individual State”’.

This type of regulation seems to be in line with the *Lotus* judgment. Public entities are in principle free to prescribe whatever rules they see fit absent any prohibition by international law. However, it is questionable whether this judgment is still good law. Its emphasis on sovereign independence is disputed today.

For these reasons, a *genuine link* between the extraterritorial subject matter and the regulating public body is increasingly demanded. Whether there is a sufficient connection depends on the particular interests involved and the nature and characteristics of the regulation.

Fines imposed for behaviour abroad curtail corporate freedom. This may create tension in international relations. However, if the addressee is a European company that has committed abuses abroad, the principle of active personality, the connection to the perpetrator, provides the genuine link.

The next hypothetical is a European company that incurs a fine for the corporate abuse committed abroad by its subsidiary (enterprise approach) or by another company from which it procures products or services (supply chain responsibility). Again, the link of active personality arguably renders this scenario lawful. Regulation remains domestic, addressed to a domestic entity. As long as regulation is parent-based the genuine link is not severed. International practice supports this proposition: Active personality is an

accepted basis of jurisdiction in the criminal law of many states when they prosecute their nationals for crimes committed abroad. Antitrust laws allow the fining of the parent company for the anti-competitive behaviour of a foreign subsidiary. And disclosure obligations frequently encompass the environmental impacts of the parent and its subsidiaries abroad.

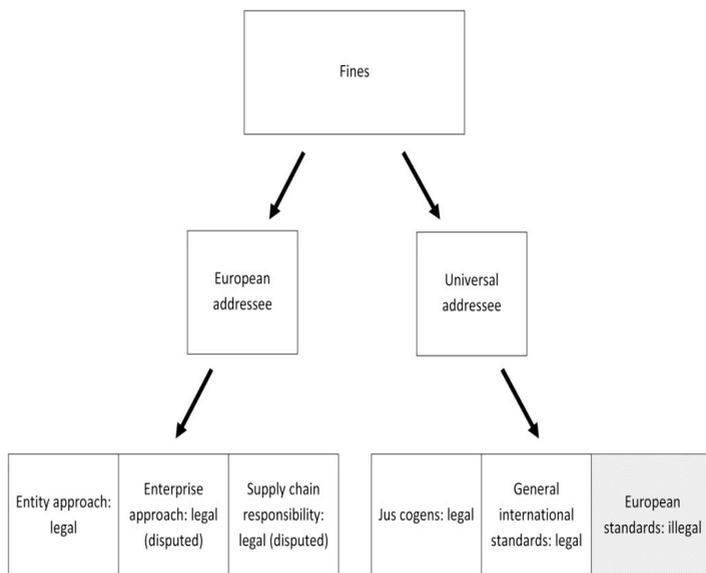
The regulation of potentially all companies in the world (universal addressee) by a regional organisation such as the EU is the most far-reaching scenario. Regulation of companies incorporated in other countries runs the risk of legislation without representation since the legislator does not represent the foreign company yet attempts to rule over it.

The theory of control, the fact that the controlling shareholders are represented by the legislator, is apparently not enough to make universal jurisdiction lawful. States have generally refrained from applying their laws to foreign corporations merely on the basis that the foreign company is controlled by a domestic parent, and have frequently protested against any exceptions to this principle.

Universal norms, however, justify fines for universal addressees. *Jus cogens* undoubtedly falls within this category, although it remains uncertain which obligations corporations face under *jus cogens* in the area of environmental, labour, and human rights. International custom also seems to support universal

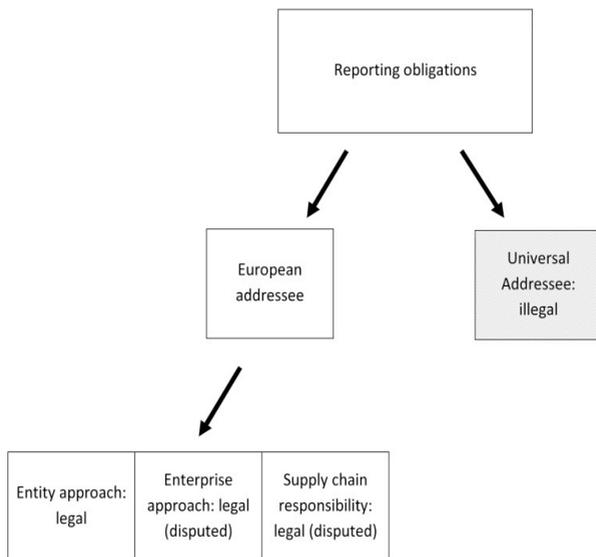
jurisdiction. European standards, on the other hand, do not justify universal regulation. The gap between legislation and representation would not be bridged since companies would have to obey laws they have never ratified. It is a ‘diagonal’, ‘incongruent’ scenario, in which the scope of legislation is broader than the scope of representation, contrary to the principle of *volenti non fit iniuria*. The following illustration visualises these conclusions.

Illustration 6: Fines



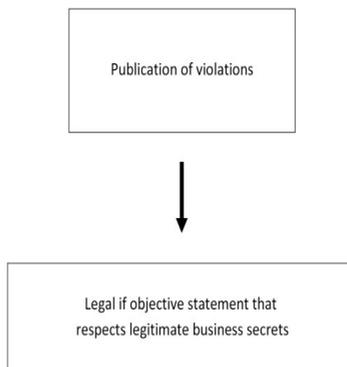
Reporting obligations curtail corporate freedom as fines do. But whereas fines punish corporations that have committed violations, reporting obligations hit law abiding companies as well. For this reason, not even *jus cogens* and general international standards can justify such sweeping regulation of foreign companies that do respect these standards. In essence, universal norms cannot render lawful reporting obligations for companies all over the world. The principles of active personality and territoriality only justify reporting duties imposed on European addressees.

Illustration 7: Reporting Obligations



While the publication of violations committed abroad may also intervene in other countries' affairs, there seems to be no infringement of international law as long as the published statement is true and non-discriminatory. There is no protection against objective comments that respect legitimate business secrets.

Illustration 8: Publication of Violations



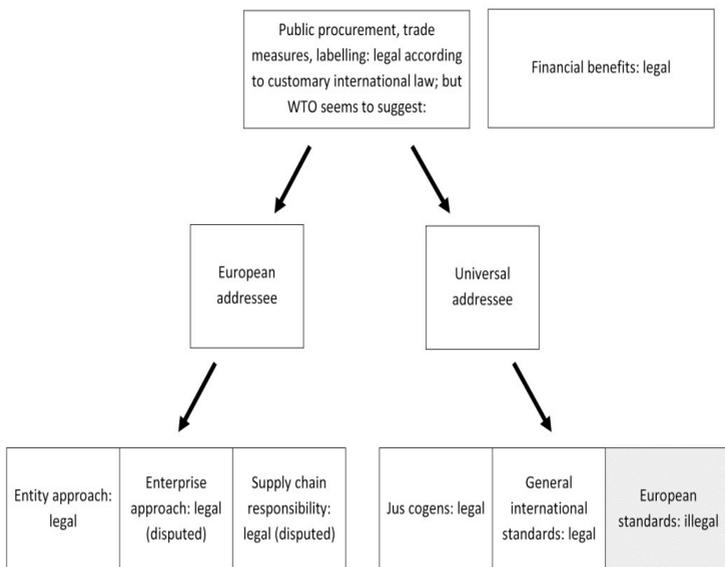
Domestic market organisation, i.e. labelling and trade measures, retains the principle of territoriality as a genuine link. Although the CSA measures change labelling and trade policies with regard to corporate abuse abroad, the measures themselves remain domestic. They are about regulating access to EU markets. States are, in principle, free to decide which products they let in, to what extent, and for which reasons.

However, WTO law as *lex specialis* to this general customary rule appears to take a different stance. The trade-liberalising system has restrained states'

sovereignty. WTO law appears to demand also a genuine link with regard to the *political rationale* or *reason* that lies behind the domestic trade barriers. This might suggest that rules for interventionist policies such as fines apply, that is: European companies could be targeted because of the genuine link of active personality; in contrast, third country companies could only face trade restrictions and labelling if the measures were based on *jus cogens* or general international standards.

Distributive policies, i.e. financial benefits and public procurement, which integrate global corporate social accountability, do not, in principle, conflict with international custom. General international law does not tell public bodies how they should spend their resources. There is no international customary duty to grant advantages to corporations that perpetrate abuses abroad. Again, WTO law—in this case the Government Procurement Agreement (GPA)—could alter these general rules for public procurement in favour of liberalisation. It has been argued that a genuine link might be necessary under the GPA in order to take extraterritorial issues into account. This could mean that European companies could be targeted because of the genuine link of active personality; in contrast, third country companies could only face restrictions in public procurement policies if the measures were based on *jus cogens* or general international standards.

Illustration 9: Domestic Market Organisation and Distributive Policies

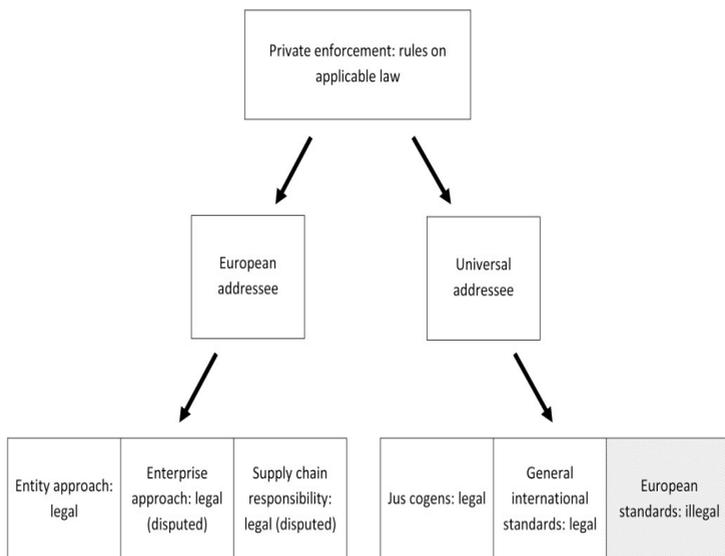


Private enforcement of global corporate social accountability in Europe rests on two assumptions: that European courts are open (i.e. European courts have jurisdiction); and that they enforce environmental, labour, and human rights (i.e. European courts apply *jus cogens*, general international law, or European standards to corporate abuse abroad). The latter

question concerning the applicable law is governed under international law by the principles that are valid for the imposition of fines. Thus, the EU may prescribe European laws for a European addressee as the perpetrator of corporate abuse. However, absent prior consent, foreign companies cannot be sued for violations of European laws outside of the EU. Only obligations derived from *jus cogens* or international custom (or, as is current practice, obligations stemming from host state law) may be litigated in such cases in EU courts.

Jurisdiction of the courts (jurisdiction to adjudicate) is different. International law governing jurisdiction to adjudicate is not strictly tied to territoriality and nationality. For example, the domicile of the corporate defendant is widely regarded to be a sufficient link to render court proceedings lawful. On the other hand, merely ‘doing business’ in the forum state is a contested basis for adjudicative jurisdiction.

Illustration 10: Private Enforcement



Global corporate social accountability in Europe may conflict with the law of other states. How the conflict is to be resolved depends on the nature of the laws and measures involved.

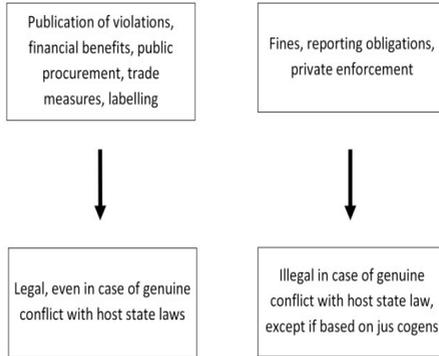
Distributive public policies should not raise concerns under international customary law. One state cannot, in principle, tell another state how to spend its money. The distributing state must not concede to

differing foreign laws. Domestic market organisation, i.e. employing trade measures including labelling, seems to be lawful if there is a genuine link, even in the case of conflicting foreign laws. Similarly, objective publication of violations abroad is lawful even if the host state disapproves.

The matter is different with fines, reporting obligations, and private enforcement. Such regulation must in general concede to conflicting law in the country where the corporate abuse takes place. Territoriality usually prevails. But the home jurisdiction does not have to refrain from applying its law if there is no genuine conflict with the host jurisdiction. Preference for territoriality applies only when one jurisdiction requires what another prohibits; it does not apply where a person can comply with both laws.

But even if two laws genuinely conflict, there might be exceptional situations in which the territorial jurisdiction does not prevail: Arguably, *jus cogens* may supersede conflicting norms of the territorial jurisdiction.

Illustration 11: Conflicts of Laws



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