CORPORATE HUMAN RIGHTS COMPLIANCE

Measures Regulating Domestic Corporations Use of Suppliers and Subcontractors in Other States Based on Human Rights Considerations

Candidate number: 669
Supervisor: Ole Kristian Fauchald
Deadline for submission: 25 April 2009

Number of words: 17 479

24.04.2009
## 1 INTRODUCTION

1.1 Presentation of the Topic

1.2 Structure

1.3 Terminology
   - 1.3.1 Overview
   - 1.3.2 Human Rights Treaties

1.4 Scope of the Thesis

## 2 MEASURES

2.1 Introduction

2.2 Regulations Requiring Human Rights Compliance
   - 2.2.1 Procedural Measures
   - 2.2.2 Substantive Measures

2.3 Ensuring Compliance

2.4 Monitoring Compliance

## 3 SOVEREIGNTY

3.1 Introduction to section

3.2 Human Rights Regulation and the Exclusive Territorial Jurisdiction
   - 3.2.1 Exclusive Territorial Jurisdiction
   - 3.2.2 Procedural Requirements
   - 3.2.3 Substantive Requirements
   - 3.2.4 Human Rights Rationale
3.3 Duty to Cooperate 28
  3.3.1 Sovereign States and the Duty to Cooperate 28
  3.3.2 The Duty to Cooperate on Human Rights 30

3.4 Conclusion 32

4 WTO 33

4.1 Human Rights Concerns Under the WTO 33

4.2 National Treatment principle - GATT 1994 art. III 35
  4.2.1 Introduction to the National Treatment Principle 35
  4.2.2 Like Products 37
  4.2.3 No Less Favourable Treatment 39

4.3 General Exceptions - GATT art. XX 43
  4.3.1 Introduction 43
  4.3.2 Human Rights in GATT art. XX (a), (b) and (e) 44
  4.3.3 Human Rights as General Exceptions 46
  4.3.4 The Degree of Connection 48
  4.3.5 Manner of Application 51

4.4 TBT- Agreement 53
  4.4.1 Introduction 53
  4.4.2 Non-Discrimination 54
  4.4.3 Technical Regulations 55
  4.4.4 Necessity 56
  4.4.5 Human Rights As A Legitimate Objective 57

4.5 Conclusion 58

5 CONCLUSION 60

6 BIBLIOGRAPHY 63

6.1 Legislation 63
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>6.2</td>
<td>Case Law</td>
<td>65</td>
</tr>
<tr>
<td>6.3</td>
<td>Literature</td>
<td>67</td>
</tr>
</tbody>
</table>
1 Introduction

1.1 Presentation of the Topic

The signing of the Universal Declaration of Human Rights (UDHR) in 1948 was a significant moment for general state recognition of human rights, and began an era of increasing worldwide attention to respecting and protecting human rights everywhere. When the UN Charter and the UDHR were written, states were responsible for most international relationships. As the world economy has globalized, non-state actors, such as corporations, have become more active on the international level; indeed, one could argue that most international relations now happen through corporate activity. Because of this, corporate responsibility and accountability have become important issues in international law over the last few decades.1 States have an obligation to promote human rights within their jurisdiction, both by directly respecting them and by ensuring that their subjects respect the rights of one another.2 In addition, the states could go further and protect and promote human rights through enacting regulations on their corporations, requiring that they demonstrate human rights responsibility not only at home but also abroad, by complying with human rights norms and by demanding the same of their subcontractors, suppliers and other business partners.3

The discussion about corporate human rights responsibility and states’ responsibility to protect against corporate violations of human rights at home and abroad has escalated in the past few years. International organizations have developed voluntary codes for transnational corporations, such as the OECD Guidelines for Multi-National Enterprises

---

2 ICCPR art. 2.1, ICESCR art. 2.1
(MNEs) and the UN Global Compact, encouraging MNEs and their subsidiaries to respect and protect human rights, but little attention has been given to the human rights responsibilities of corporations with foreign chains of production, suppliers and subcontractors. In April 2008 the Special Representative of the Secretary-General released a report on the issue of human rights and transnational corporations and other business enterprises. The SRSG urged states to protect against human rights abuses by third parties and to work towards achieving a “corporate culture respectful of human rights at home and abroad (…)”.

The call for better protection of human rights by companies abroad has also been echoed by the Norwegian government. In January 2009, it issued a whitepaper on Corporate Social Responsibility (CSR) in a globalized economy, where it is noted that Norwegian corporations more than ever are involved in states where the human rights protection is challenged or weak. The Norwegian government encourages domestic corporations to be socially responsible and take actions to promote human rights protection beyond what is required by laws and regulations, including by making similar requirements of their suppliers and subcontractors.

Past attempts to regulate the activity of domestic corporations’ contractors abroad, however, have run into legal hurdles. During the Cold War, the U.S. enacted the Helms-Burton Act, which, among other measures, contained a trade embargo against Cuba. The purpose of the embargo was to pressure Cuba to become democratic and renounce communism. In addition to preventing U.S. corporations from trading with Cuban

---

4 Ruggie (2008)
5 Ruggie (2008) at 4-5
6 Ruggie (2008) at 9
7 Whitepaper (2009)
8 ibid at 6
9 ibid at 7-10
10 Hillyard (1998) at 22-23
businesses, the act also prohibited the use of third party suppliers, contractors or other business partners that were engaged in trade relations with Cuba. This extraterritorial effect was not well received by some of the U.S.’ largest trading partner states. The EU and Canada adopted blocking-legislation prohibiting corporations from openly complying with the act, and Canada also joined Mexico in declaring that the act was in violation of international law and the U.S.’ NAFTA obligations. Indeed, the UN General Assembly directed the Inter-American Juridical Committee of the Organization of American States to examine the act and settle the controversies. The Committee concluded that the act violated international law, because the U.S. had failed to recognize the various limitations on its jurisdiction. In the end, the U.S. had to accept that corporations from other states continued to do business with both Cuba and the U.S., while keeping the act in a more limited capacity as a domestic regulation only controlling U.S. legal subjects.

The Helms-Burton Act caused controversies and protests based mainly on arguments concerning jurisdiction and trade obligations. Regulations imposed by a home state requiring a specific level of corporate human rights compliance throughout the chain of production, regardless of location, may have extra-territorial effects similar to the Helms-Burton act, and may face similar objections. However, all states share some obligations to respect and protect the universal human rights, providing a compelling interest for allowing extraterritorial regulation, despite possible violations of jurisdiction and other international obligations.

This thesis considers the situation of a home state that wishes to enact laws to regulate the

11 Hoffman (1998) at 11
13 Rubin (1996) at 2
14 *l.c.*
15 *ibid* at 2-3
16 Rubin (1996) at 1
human rights performance of a domestic corporation throughout the supply chain, including in contractors and subcontractors and other business partners abroad. This thesis will examine the legitimacy of such regulation and address how human rights regulation would affect the relationship between the home and the host states. In particular, the thesis examines whether regulations enacted by the home state would impinge on the host state’s sovereignty, whether it is a violation of the duty to cooperate, and whether the measure is trade restrictive in breach of the home state’s obligations under the WTO.

1.2 Structure
The thesis is divided into five chapters. The purpose of the first two chapters is to present the topic and establish the framework. In the first chapter, the topic, the scope, the terminology and the structure are announced. The second chapter presents the measures that a home state may reasonably want to implement to pursue its intended goal and how these can be monitored and enforced. The next two chapters are the main sections of the thesis, where I will discuss the possible obstacles pursuant to the extraterritorial effects of the home state’s human rights requirement. The third chapter deals with the objection based on state sovereignty: what the domestic measure in the home state means for the sovereignty of the host state, and whether the home state breaches the duty to cooperate when unilaterally enacting a piece of regulation that will have international effects. The fourth chapter looks at the measure in a trade specific context, and evaluates it in terms of the home and the host states’ obligations and rights under the WTO, according to the GATT and the TBT Agreement. The fifth and final chapter contains the conclusions.
1.3 Terminology

1.3.1 Overview

Illustration 1.3.1.1

The above illustration summarizes the terms used in this thesis for relationships between states and corporations. In short, the home state wants to enact a regulation requiring its domestic corporation to adhere to specific human rights measures throughout its chain of production, including its foreign contractors, subcontractors and suppliers. The host state may object to the regulation due to the effect it has in the host state, which can be argued to be contrary to customary law or treaty law that governs the relations between the two states.

The home state refers to the state that wants to enact a domestic regulation requiring its corporations to maintain a certain level of human rights throughout their supply chains. The analysis assumes that the home state respects and protects human rights within its own jurisdiction, and wants to promote them abroad as well, starting by improving the performance of domestic corporations and their contractors.
The *host state(s)* refers to the individual state(s) with territorial jurisdiction over the contractors, suppliers and subcontractors that are part of the domestic corporation’s chain of production. The host states may claim to be adversely affected by the regulations enacted by the home state.

The *domestic corporation/the corporation* is the main corporation with a supply chain abroad, and the subject to the regulation enacted by the home state. The corporation could be any type of business enterprise; private or public, incorporated or personal.

The *contractor, supplier, or subcontractors* are the businesses included in the domestic corporation’s chain of production. Unlike the main corporation, these enterprises are not the home state’s subjects, but they are under the jurisdiction of a host state.

The discussion in this thesis considers what the home state could do to promote human rights in relation to separate entities that manufacture or export products, exclusively or not, to the domestic corporation. Subsidiaries of the domestic corporation have been excluded, as regulation of MNEs relies on other legal justifications. In those cases, the home state is also much freer to enact human rights requirements directly on them.\(^{17}\)

### 1.3.2 Human Rights Treaties

In accordance with the Universal Declaration of Human Rights (UDHR), all human rights are understood as interdependent and of equal importance.\(^ {18}\) The human rights basis for a domestic measure regulating subcontractors and suppliers could be found in international or regional treaties, bilateral agreements or domestic law, and this section will analyze the different potential bases for regulating foreign contractors.


\(^ {18}\) UDHR Art. 28 and 30
As the purpose of the measure is to improve human rights protection, it seems safe to assume that the home state would use the strongest and most stable human rights regime. Human rights treaties contain more clearly defined rights than customary law or peremptory norms, and whenever reasonable and possible, the home state is likely to base its measures on the most basic and widespread human rights regime.

International human rights conventions have an advantage in this respect, as the rights included are common for almost all states, and the treaties have been ratified by most. These treaties are agreements between states, and impose obligations on them to respect and protect the rights of the people. The conventions are common expressions of human rights norms, and the conventions employ comparable definitions and terminology. The International Bill of Rights [UDHR, ICCPR, ICESCR], the CAT, CRC and CEDAW are often used by human rights advocates and states when debating how to ensure and improve human rights protection. These conventions have a lot of practice and supporting arguments surrounding them, such as general comments and committee statements, and many of the basic human rights have also become customary international law.

---

20 ICCPR Preamble and Art. 2.1, ICESCR Preamble and Art. 2.1
21 International Convention on Civil and Political Rights (1966)
23 Convention Against Torture (1984)
26 Nicaragua v. US paras. 268-269
It would also be possible to use regional or bilateral human rights agreements as bases for the measure. Regional human rights agreements, such as the ECHR\textsuperscript{27}, are often less ambiguous than international treaties, as the state parties share one understanding of the treaty text. By basing its human rights measure on a regional agreement, the home state would be referring to a pervasive, yet stable, understanding of the rights, especially if the host state also is a party to the treaty.

The domestic human rights legislation implemented in a home state is presumably rather effective in promoting the respect and protection of its nationals’ human rights. This assumption follows from the concern and interest the home state takes in promoting human rights in a wider context. A home state might consider its own regulation of human rights to be the best base for the human rights measure enacted on corporate chains of production. The domestic corporations’ contractors abroad are presumably not bound by equally stringent demands, so by enacting this regulation the home state could promote human rights and improve the standards abroad through the corporate contracts.

Where international treaties suffer from vagueness and ambiguity, regional or domestic human rights regulations show perhaps too little appreciation for alternative interpretations based on cultural and social differences when applied outside the intended region. Even regional and domestic regulations might be ambiguous and unclear, and as the international norms are more established, they might provide the best basis for the domestic measure for human rights protection throughout the supply chain.

1.4 Scope of the Thesis

This thesis examines the question: Can a home state enact domestic measures regulating its corporations’ use of suppliers and subcontractors in other states based on human rights concerns without breaching any of its international obligations and without encroaching on the rights of other states? Although the requirements imposed on domestic corporations by

\textsuperscript{27} European Convention on Human Rights (1950)
the home state are internal regulations, they will inevitably affect the corporations’ various contracts and contracting partners abroad. The suppliers and subcontractors might find that the regulations are difficult to implement, and that they cause comparative disadvantages due to the costs associated with efficiently protecting and respecting human rights laws.

As treaties and customary law are the principal sources of international law, the following discussion will be structured around them. The human rights concerns will be addressed by looking on international human rights treaties, in particular the International Bill of Rights, as these are the most common and widely accepted agreements in the field. Customary human rights law has a special standing, in particular as *jus cogens* and *erga omnes* norms, and will therefore also be included.

The basic principles of customary law and the UN Charter will be the main basis for the discussion of the effects on state sovereignty. Furthermore, the discussion concerning the trade restrictiveness of the home state’s human rights regulation will be limited to issues under the WTO Agreements, as the WTO is the most common and extensive trade agreement. For the purposes of this thesis, only the relevant agreements concerning trade in goods, the GATT and the TBT, have been considered. The main focus here is on the chain of production and general trade in goods, with the possibility of limiting trade due to human rights concerns. Therefore other WTO agreements, such as the GATS and the SPS, which deal with other issues, have been excluded from the argument.

---

28 Vienna Convention Art. 38
29 General Agreement on Trade and Tariffs (1994)
30 Agreement on Technical Barriers to Trade (1994)
31 General Agreement on Trade in Services (1994)
32 Agreement on the Application of Sanitary and Phytosanitary Measures (1994)
The ILO Declarations\textsuperscript{33} have also been omitted from further discussion in this thesis. They are highly specialized on labor rights and standards, and promote them through cooperation between states, corporations and workers. These agreements are far less common and universal than the UN human rights treaties, and while many states have ratified them, the argument would require overly detailed arguments and become too state specific for the purposes of the discussion here.

Investment treaties and bilateral treaties have not been implemented into my argument, as that would require a more state specific discussion, while also widening the focus of the thesis to include more areas. Such expansion would jeopardize the in-depth discussion of the individual issues presented in this thesis.

\textsuperscript{33} ILO Declaration on Fundamental Principles and Rights at Work (1998) and the Tripartite Declaration of Principles Concerning Multilateral Enterprises and Social Policy (2000)
2 Measures

2.1 Introduction

When the home state of a corporation with subcontractors and suppliers abroad wants to promote human rights, its most direct option is to implement legislation to ensure effective corporate human rights responsibility throughout the chain of production. The main alternatives to date have been voluntary initiatives and so-called soft-law options. Many argue that such initiatives are insufficient to ensure that corporations conduct their business in a socially responsible manner and have to be supported by hard law.\footnote{Vasquez (2005), Ruggie (2008), Ratner (2001) \textit{et al.}}

All sovereign states have the right to enact legislation within their own jurisdiction over their own subjects.\footnote{Brownlie (2008) at 289} A home state can always encourage its domestic corporations to promote human rights by making conscious and ethical choices and by asking their foreign business relations to do the same.\footnote{Whitepaper (2009) at 10-12} Additionally, unless the internal or domestic legislation constitutes a restriction on the home state’s other international obligations or on the exclusive rights of other states, it may freely implement measures with various policy objectives, such as measures promoting corporate compliance with human rights laws.\footnote{infra sections 3 and 4}

This chapter will look at which measures a home state can implement that will be practical and effective in promoting human rights throughout the domestic corporations’ supply chains abroad. An important consideration is that there are practical and economic
limitations to what a corporation reasonably can affect through its international contracts.\textsuperscript{38} Extensive regulations may be too complicated to implement for corporations, particularly if the business partners and host states object to the demands. In the following sub-sections, practicable measures will be examined and discussed.

2.2 Regulations Requiring Human Rights Compliance

In order to affect the respect of human rights throughout the corporations’ supply chains, a home state will want to implement measures that effectively promote the aim, while being reasonable and practical to handle for corporations. Certain measures would be easily feasible for a corporation to impose on its contractors and suppliers, such as production standards and business practices to achieve good corporate conduct and viable human rights protection.

International initiatives, such as the OECD Guidelines for MNEs\textsuperscript{39} and the UN Global Compact\textsuperscript{40}, propose certain principles that corporations with subsidiaries in other states should abide by. They both reference the UN Human Rights treaties and the ILO Declarations\textsuperscript{41}, and the human rights-related provisions encourage corporations to assume responsibility for their effective implementation. The preamble to the UDHR requires that “[e]very individual and every organ of society” shall promote respect for these rights and secure them.\textsuperscript{42} No one is exempted from the obligations this declaration assigns to all members of the global community.\textsuperscript{43} These measures could be expanded to the subcontractors and suppliers of corporations as well, but consideration should be given to the fact that corporations have less control over supply chains than over subsidiaries.

\textsuperscript{38} Whitepaper (2009) at 36-43
\textsuperscript{39} OECD Guidelines for Multi National Enterprises
\textsuperscript{40} UN Global Compact
\textsuperscript{41} ILO Declarations
\textsuperscript{42} UDHR Preamble
\textsuperscript{43} Henkin (1999) at 25
2.2.1 Procedural Measures

A home state may want to promote human rights compliance throughout the corporate chain of production despite not having direct influence over the corporations’ foreign suppliers and subcontractors. However, the home state could implement procedural measures that focus on the practices surrounding the level of human rights protection in the domestic corporation. The home state could also demand that the corporations abide by specific procedural regulations to address and solve the issues related to the human rights requirements within their sphere of influence.\textsuperscript{44}

One possible procedural measure could be to require the corporations to provide an independent body for grievances, to which the workers and other affected people could turn, such as an ombudsman or a corporate human rights committee. An arbitration system for solving human rights related conflicts could address problems at the workplace or in the surrounding society and environment. The implementation of such systems would give the individuals whose human rights have been violated procedural rights directly against the domestic corporation, and not merely against the host state.

Procedural regulations could also focus on the practices of the corporation and its contractors and suppliers, and demand active monitoring and reporting of the human rights levels, or a more passive information requirement, for instance that the corporation has access to information which can be reported on upon request from the home state.\textsuperscript{45}

Extensive monitoring of existing business partners where concerns have arisen and thorough evaluation of prospective business relations could also be relevant alternatives.

\textsuperscript{44} UN Global Compact

\textsuperscript{45} Environmental Information Act art. 16, Aarhus convention art. 5
2.2.2 Substantive Measures

Another mechanism to regulate the corporations’ human rights performance abroad could be to enact substantive requirements requiring the contracting parties to comply with specific human rights norms. The corporation in the home state has to abide by the regulation the home state enacts, which could include having to ensure that the human rights requirements are met throughout its chain of production in domestic and international contracts.

Corporations and contractors are often criticized for various human rights violations, often related to working conditions and labor rights, but also for being complicit in violations committed by state actors. Indirect complicity is harder to control and easier to justify for the corporate actors, and is therefore considered to be different from direct violations.\(^\text{46}\) To combat both types of violations, substantive requirements can be linked either to the host state’s policy and treaty adoption or to the labor conditions at the suppliers’ and subcontractors’ factories. Regulations demanding corporate human rights compliance could prevent corporations from conducting business in or outsourcing to companies in states that do not live up to specific human rights norms.

International human rights treaties are contracts between states on a horizontal and global level, yet the obligations to respect, protect and fulfill human rights are vertical in relation to their subjects.\(^\text{47}\) Human rights treaties often extend the responsibility to respect and protect human rights to the individual subjects, directly encouraging private initiatives in addition to the state’s obligation.\(^\text{48}\) Additionally, states have human rights obligations according to customary law.\(^\text{49}\) In order to fulfill the duties prescribed by both treaty and customary law, states have to ensure compliance with the human rights norms, for instance

\(^\text{46}\) Trebilcock (2001) at 12
\(^\text{47}\) Ratner (2001) at 470-472
\(^\text{48}\) ICCPR Preamble, ICESCR Preamble
\(^\text{49}\) infra section 1.3.2
by enacting legislation and implementing certain standards to ensure that their subjects respect each other’s rights.\(^{50}\)

Some human rights obligations are easily applied horizontally between private actors, especially when it comes to respecting the rights. Giving human rights obligations horizontal effect entails directly giving the individual subjects responsibilities to respect, protect and fulfill the rights of others to the greatest extent possible. Horizontal duties can be found through interpretation of the human rights norms and treaties or they can be implemented by the states as domestic regulations.\(^{51}\) Although states may be the best entities for ensuring the protection and respect for some human rights, such as *habeas corpus*\(^{52}\) and freedom of expression\(^{53}\), that does not mean that corporations or other actors cannot contribute. However, when discussing corporate human rights responsibilities, the focus is often on human rights that can be directly influenced by the actions of the corporations.

The substantive measures should accommodate the corporate sphere of influence, focusing on labor rights, which are the easiest to ensure and implement, as they are directly relevant to the business, where corporations generally have more clout than in their relations with the host states. The requirements imposed by the home state would be the most efficient if they focused on the typical corporate human rights violations – such as child labor, poor work conditions, banning unions, limiting freedom of speech and restricting freedom of movement.\(^{54}\)

\(^{50}\) General comment 31
\(^{51}\) Vasquez (2005)
\(^{52}\) ICCPR art. 9
\(^{53}\) ICCPR art. 19
\(^{54}\) Ruggie (2008) at 15-16
2.3 Ensuring Compliance

In order to efficiently ensure compliance with the human rights measures, the home state has to enforce them and sanction violations. Domestically, a sovereign state has full jurisdiction to implement a sanctioning mechanism for internal measures, but it cannot enforce the measures’ extraterritorial effects. Naturally, the subcontractors and suppliers will be affected if the domestic corporation is subject to sanctions by the home state. Such effects appear indirect and incidental, but can give the contractors incentive to cooperate with the domestic corporation to ensure that the measures are fulfilled to avoid any negative repercussions. That part of the implementation will be between the domestic corporation and its contractors abroad as according to their contract.

The state may hold the domestic corporations accountable for breaching the regulations, using either financial penalties or other criminal sanctions, such as incarceration or debarment of rights. Monetary sanctions are more commonly used for corporate crimes, as these can be imposed easily and justly on legal persons. Possible financial sanctions can range from simple fines or extra taxes to blacklisting the corporation and freezing its funds.

Blacklisting would involve denying the corporations that fail to implement the requirements access to the markets in the home state.\(^{55}\) While trade embargos are often used by states and organizations to express discontent or conflicting interests concerning politics or other practices, only the domestic corporation could be blacklisted as the subcontractors and suppliers are outside the home state’s jurisdiction and not bound by the regulation. However, the human rights performance of the contractors is what determines whether the domestic corporation meets the required standards throughout the chain of production. The Helms-Burton Act\(^ {56}\) similarly prevented U.S. nationals and its contractors and trade partners from doing business with Cuba, with the threat of blacklisting any

---

\(^{55}\) Hillyard (1998) at 16

\(^{56}\) Helms-Burton Act (1996)
corporation that violated this act,\textsuperscript{57} thus indirectly blacklisting subcontractors not meeting the requirement.

Another provision, similar to blacklisting, could be applied to enforce the compliance with the human rights requirement directly on a contractor: if a domestic corporation is employing a contractor abroad, and it has a branch or a subsidiary located in the home state’s jurisdiction, the contractor could be held responsible for its human rights violations in the host state under the domestic legislation in the home state. Based on information regarding the contractor, the home state could freeze the funds of the branch under its jurisdiction, or it could blacklist anyone who deals with that particular contractor. This, however, requires an effective monitoring system or mechanism.

\subsection*{2.4 Monitoring Compliance}

Before any steps can be taken against domestic corporations that fail to adhere to the regulation, their non-fulfillment must be demonstrated. The home state cannot sanction violations of the human rights requirement without proof. According to the principle of the burden of proof, as well as the findings of several international tribunals, such as the AB and the ICJ, the burden of proof rests upon whoever asserts the affirmative of a particular claim.\textsuperscript{58} This implies that the home state will have the burden of proof regarding a corporation’s failure to maintain the required level of human rights compliance throughout its chain of production.

If the home state enacts a procedural requirement that demands that the corporation gathers information about the human rights levels or even submits reports, it becomes fairly easy to demonstrate the lack of adherence. If the corporation fails to meet the procedural requirement, it is already in violation of the measure and this is easily discovered due to the

\textsuperscript{57} Hoffman (1998) at 11
\textsuperscript{58} e.g. US – Wool Shirts and Blouses (AB) pp. 15–16
missing information. For substantive measures, a more developed monitoring and enforcement system is required, and both the home state and the corporations would have to invest time and money to implement trustworthy and solid methods. The corporation would also have less bargaining power when negotiating the terms of the contracts, as it has to ensure that human rights compliance is included, a term which the contractor might not appreciate. As it is beyond the home state’s reach to monitor and check up on the reports issued by the corporations, it could be tempting for many to save time and money and falsify the monitoring and issue fake reports. However, the home state is also able to obtain information from other sources such as various NGOs and intergovernmental organizations.

In regions where treaty bodies and international organizations already have mechanisms for complaints and monitoring in place, these can be used to monitor human rights standards and report on them too. If the home state has embassies and consulates in the host states, those can also be used\textsuperscript{59}, but only to monitor the home state’s legal subjects. As the interest in human rights friendly merchandise has increased, certification organizations have become common and fairly useful, and such organizations could also provide the needed insight to determine whether corporations adhere to the human rights regulations.

While enacting human rights measures for corporations may improve human rights compliance throughout the supply chain, the additional obligations for corporate actors and the expenses involved could cause them to flag out. By relocating their business and registering in another state where the human rights regulation is more lenient, they would not be under the same requirements and regulations, enabling them to cut costs and to continue using their subcontractors regardless of the human rights performance. However, this approach would still prevent the corporation from doing business in the home state, as the measures are applicable to all corporate actors in the home state: suppliers and other business partners as well.

\textsuperscript{59} Whitepaper (2009) at 85-88
3 Sovereignty

3.1 Introduction to section

A nationally enacted measure requiring human rights compliance and protection by corporate actors will have consequences beyond the home state’s national borders and territorial jurisdiction. Domestic corporations are involved with contractors and other enterprises abroad: corporate entities that are considered part of the domestic corporation’s supply chain, and that will be affected by the human rights requirements.

Such development could be of grave concern to not only the contractors and suppliers, but to the host state itself. The effects the home state’s regulation has in the host state may be conceived as intrusive and disrespectful of the host state’s sovereign rights. Using economic measures to influence foreign governments’ politics can be a questionable practice. Procedural measures could encroach on confidential and privileged information, causing worries of espionage and infiltration. Substantive regulations might be perceived as directly challenging and impinging on the host state’s sovereignty as it undertakes to control the nationals of the host state, as well as the host state’s implementation of and adherence to various international human rights obligations.

This chapter will examine how these procedural and substantive human rights measures might affect the sovereignty of a host state. In the first section, it will be discussed whether the measure impinges on the exclusive territorial jurisdiction, and in the second, whether the measure is a violation of the duty to cooperate.

Cassimatis (2007) at 391
3.2 Human Rights Regulation and the Exclusive Territorial Jurisdiction

3.2.1 Exclusive Territorial Jurisdiction

Public international law is based on the fundamental legal principles of state sovereignty and the equality of sovereign states. These principles have evolved in customary international law, and have later also been codified in international treaty law.61 State sovereignty consists of certain elements; the power each state has in terms of jurisdiction over its territory and subjects; the right of non-intervention by other states; and the ability to be bound to customary international law and to consent to being bound by treaties.62

The territorial jurisdiction of a sovereign state is exclusive; other sovereign states cannot exercise their own sovereign powers on its territory. From the principle of exclusive territorial jurisdiction, it follows that all sovereign states have the power to enact legislation and to impose performance requirements on their subjects, including corporations, within their own jurisdiction. Deliberately attempting to legislate on the host state’s territory and under its jurisdiction would clearly be different from implementing a domestic measure that might have international repercussions.63 Human rights regulations enacted in relation to domestic corporations and their supply chains may have consequences for the contractors in the host state, but the human rights argument represents a valid objective for the regulation. The fact that the host state too has an obligation to protect the same rights, may make it difficult for it to make a solid argument against the measure.

The states referred to are assumed to be functioning states that maintain the needs of their citizens and that are in control of their jurisdiction or at least persuasively claim to be. Failed states however are unable to sufficiently exercise control over their territory and care for their nationals, imposing a duty on other states to collectively assist and help protect the people of the failed state, giving other states a right and an obligation to provide assistance

61 UN Charter art. 2, Vienna Convention Preamble
62 Brownlie (2008) at 289
63 Joseph (2004) at 11-13
to the failed state and the citizens under its jurisdiction.\textsuperscript{64} This particularly concerns ensuring that their human rights are being respected and protected.\textsuperscript{65}

When dealing with other functioning states, however, the home state has to respect the exclusive territorial jurisdiction of the host states. Consequently, as the domestic human rights regulations enacted by the home state impact legal areas under the exclusive jurisdiction of the host state, it could be claimed that the regulations represent an impingement on the host state’s sovereignty. The measure may be directly opposing legislation or directives enacted by the host state; a substantive measure requiring better human rights conditions in factories could be incompatible with regulations in the host state allowing human rights violations in so called sweatshops and “export zones” in order to promote economic development.\textsuperscript{66} Procedural measures demanding information on conditions could interfere with confidentiality and non-disclosure provisions in the host state.

### 3.2.2 Procedural Requirements

The host state could argue that the procedural requirements the home state enacts represent an impingement of its sovereignty due to the imposition on the exclusive territorial jurisdiction. The domestic corporation is required to implement procedures for information gathering and reporting throughout the supply chain, and the measure could also demand that a complaints mechanism is established to allow workers to complain if they believe that their rights are violated.\textsuperscript{67}

Procedural measures demanding recourse for workers and other affected persons with human rights grievances could be directly interfering with the exclusive jurisdiction of the host state.

\textsuperscript{64} UN Charter arts. 1.1, 1.3 and 2.1
\textsuperscript{65} Nicaragua v. US at 14, 122
\textsuperscript{66} Kristof (2009)
\textsuperscript{67} infra section 2.2
host state, as it has the executive, legislative and judicial powers on its territory.\(^\text{68}\)

Regulations from the home state on the domestic corporation to ensure that disputes are solved in an independent organ might easily be interpreted as a failure to recognize the powers of the host state.

The principle of exclusive territorial jurisdiction makes it clear that only the host state can implement regulations on its own territory in relation to its subjects. When the home state enacts legislation with procedural requirements on the domestic corporation, the host state could see the information demands as intrusive, especially if they conflict with existing regulations, such as legislation concerning confidential information. Even though the human rights measure is only directed at the domestic corporation, the effects it has on the contractors and suppliers in the host state are intentional.

However, a lot of information regarding the human rights adherence is freely available from NGOs, certification organizations and intergovernmental organizations, such as the UN and the WTO. Inquiries could also be made directly of the host state and the contractors concerning their human rights level, yet they are not obligated to provide the information sought. If the home state or the domestic corporation makes use of these voluntary and freely available sources to gather information, their actions cannot be claimed to violate the sovereign rights of the host state.

Which information is restricted and which is freely available to the public will vary from state to state. Home states and domestic corporations seeking facts have to abide by the regulations in the host state, as it has the legislative power within its jurisdiction. If the host state restricts access to corporate information about state policies or on corporate affairs, including on human rights and labor conditions, the domestic corporation will not be able to fulfill the requirement imposed by the home state. The measure would thereby cause the domestic corporation to end its engagement with the subcontractors and suppliers in the host state.

---

\(^\text{68}\) Brownlie (2008) at 289
host state so as not to be in violation of the regulation. Attempts made by the home state to overrule the legislation in the host state by implementing its own will be void, as it is outside the jurisdiction of the home state, and such efforts could be perceived as impinging on the host state’s sovereign right to exclusive territorial jurisdiction.

3.2.3 Substantive Requirements

Regulations that require specific material measures for human rights protection throughout the corporate chain of production can seem very intrusive in relation to the host state. The home state may demand that domestic corporations only employ the services of contractors and suppliers that respect and protect human rights; and only do business in host states that have adopted international human rights treaties and that seek to fulfill their duties under these treaties.  

Substantive measures may impinge on the exclusive territorial jurisdiction of the host state because the home state attempts to exercise its powers on the sovereign jurisdiction of the host state. If the host state has implemented the human rights treaties and ensures that human rights are respected and protected, the effect of the measure is of little consequence. On the other hand, if the host state is uninterested and unwilling to implementing human rights treaties and norms, the home state’s regulation could be directly contrary to the host state’s, thereby imposing on its jurisdiction.

The home state could argue that the substantive measure it wishes to impose is based on universal human rights. Human rights are considered to be basic and inherent universal and interdependent rights and freedoms to which all human beings are entitled. All states have adopted the UDHR, in addition to at least one other human rights treaty, meaning that the host state too has accepted their existence. Treaties typically restrict the sovereign power of the state parties, by giving them obligations in relation to each other and to their subjects. A

69 infra section 1.3.2

70 UDHR Preamble and Art. 1, ICCPR Preamble, ICESCR Preamble
treaty only binds the states that have agreed to it,\textsuperscript{71} whereas customary law is binding on all states.\textsuperscript{72} The home state could argue that based on the interdependency of the rights, the host state has to accept the existence of the other rights as well.

### 3.2.4 Human Rights Rationale

The general obligation on states to respect and promote human rights within their territory and jurisdiction is one of interest to all states.\textsuperscript{73} It is often interpreted to be an obligation of domestic value and interest only, due to the principle of state sovereignty.\textsuperscript{74} However, human rights duties and responsibilities cannot be sufficiently covered if restricted by territorial limits – especially when legal actors have a much wider \textit{sphere of influence} due to international trade and globalization.\textsuperscript{75}

In order to establish the rules in any given area, all sources of international law treaties and agreements, custom, general principles and judicial decisions, must be examined and balanced against each other.\textsuperscript{76} While human rights law to some extent does limit the sovereign power of states, it does not directly contradict the rights and obligations states have as sovereign.\textsuperscript{77} Customary international law also reaches beyond the states’ sovereign protection, as their ability to be bound by customary law is one of the elements of their sovereign power.\textsuperscript{78} Several basic human rights have become part of customary international law.

---

\textsuperscript{71} Vienna Convention art. 34  
\textsuperscript{72} Brownlie (2008) at 289  
\textsuperscript{73} UDHR Preamble, ICCPR Preamble and Art. 2, ICESCR Preamble and Art. 2, General Comment No. 31  
\textsuperscript{74} Skogly (2002) at 13  
\textsuperscript{75} Ruggie (2008) at 13-14  
\textsuperscript{76} ICJ Statutes art. 38  
\textsuperscript{77} Howse and Mutua (2000) at 11  
\textsuperscript{78} Brownlie (2008) at 289
law, while remaining in the treaties too. Amongst these are the right to be free from slavery, the right not to be tortured, the right not to be discriminated against, *habeas corpus*, the freedom from forced labor, et al. The home state could argue that the host state is bound by these norms despite not ratifying the treaties, and that it must accept the substantive measures based on the universal human rights in customary law.

Despite the argument that human rights are universal and part of customary law, the host state can claim not to be bound by them under the principle of *persistent objector*. The states that claim to not be bound by customary law must have categorically refused to see eye to eye with the international community regarding the existence of a specific rule. This doctrine nullifies the standing of human rights as customary international law in relation to the persistent objector state – although other states are still bound by the norm – which could make the argument above useless in relation to a host state.

The host state may see human rights norms as an obstacle to other aims that it finds more pressing and important. It is not uncommon in developing countries to have so-called sweatshops and export zones, where people come to do nothing but work and hopefully save up some money. The conditions in these zones typically violate basic human rights, but it could be considered a better alternative for the workers than scavenging or going into prostitution to survive. A human rights requirement could end the profitability for the corporation in the export zones, and the workers could end up in even worse conditions. Similarly, the host state may implement security measures that restrict human rights of certain groups, such as the freedom of speech, freedom of movement, right to vote, freedom of religion and association, justified as protection against violent liberation.

**References**

79 Nicaragua v. U.S, paras. 267-268
80 General Comment No. 29
81 UK v. Norway pp. 116 and 131
82 Brownlie (1998) at 50-51
83 Kristof (2009)
movements or terrorist groups. These types of objections to the home state’s domestic requirements of human rights are typically presented as valid objections in the name of protecting other state interests, such as economic development and security.

However, the universality and inseparability of human rights can be argued to make such arguments void and also incompatible with the principle of persistent objector. Working in export zones is not inherently bad, but human rights should be respected and promoted according to the same standards regardless of the background of the individual person. The values protected by human rights may affect the absolute character of the doctrine, as it could be argued that the basic human rights are more important than the sovereign ability of states to choose whether or not to be bound by certain principles of customary law.

While both states are bound by the human rights rules, whether by treaty or custom, that does not necessarily mean that one state can enforce the obligations on the others. Obligations *erga omnes* are duties of one state towards the international community as a whole, because their existence is of interest to all. In a dictum by the ICJ in Barcelona Traction “the principles and rules concerning the basic rights of the human person” were found to be among the obligations *erga omnes* in international law. Accordingly, these duties give the state parties legal procedural rights in relation to each other, enabling them to enforce the compliance with the obligations.

There is no hierarchy of legal sources in public international law, with the exception of the UN Charter and *jus cogens*, which are peremptory norms. However, while several human rights have become customary international law, very few have achieved the status of *jus

---

84 Holning (2005)
85 Belgium v. Spain paras. 33 - 34
86 Belgium v. Spain para. 34
87 DASR art. 48
The persistent objector doctrine does not apply for *jus cogens* norms. Their status as peremptory indicates that all states have to respect and protect them, and that they will override any other international or domestic laws that could interfere with the purpose of the *jus cogens* human rights.

As all states have these obligations, a domestic regulation regarding human rights protection in accordance with the *jus cogens* norms could be assumed to be compatible with the host state’s legislation and practice. Similarly, would one expect that regulations enacted in line with a human rights treaty or customary law to be in harmony with other state parties’ legislation and practices, as they are bound by the same international obligations. A doctrine similar to the *margin of appreciation* applied by the European Court of Human Rights could also be taken into consideration, as the states may interpret the same human rights differently depending on their traditions and existing systems, causing dissonance between the enactments. However, the core meaning of the rights can be determined more easily, based on the phrasing of the articles and the treaties, the *travaux preparatoires*, general comments and case law.

The various state parties to the human rights agreements, both the host and the home state, have obligations towards each other to adhere to the articles in the covenant in relation to the individuals subject to their jurisdictions. The rules in the agreements neither require nor prohibit the states from regulating human rights protection in corporate relations abroad – in fact, by interpreting the treaties one may find that the host state might be bound by the treaty to permit such cross-border regulation when it benefits the level of human rights promotion.

---

88 Howse and Mutua (2000) at 9
89 ICJ Statutes art. 38
90 Ruggie (2008) at 7
91 General Comment 15 s. III and IV
The horizontal effects that human rights are often given, relate first and foremost to the human rights obligations between individuals.\textsuperscript{92} However, as established above, the human rights treaties are between states and the obligations are therefore also between them. A number of academics subscribe to the use of a general national treatment principle in such cases.\textsuperscript{93} According to this principle, measures that are non-discriminatory and related to the efficient functioning of the state should be regarded as acceptable. Domestic human rights legislation throughout the chain of production with effects in the host states would presumably be considered justifiable, due to the importance and the universality of the rights.

### 3.3 Duty to Cooperate

#### 3.3.1 Sovereign States and the Duty to Cooperate

The \textit{duty to cooperate} is at the very core of public international law, as a basic principle of customary law to achieve peaceful coexistence.\textsuperscript{94} In the UN Charter it became a regulation symbolic of the states’ cooperation and mutual respect,\textsuperscript{95} and it has been reiterated and strengthened in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, also known as the Friendly Relations Declaration [FRD]\textsuperscript{96}. The obligation urges states to work together to solve problems, to prevent disagreements and to promote human rights.

\textsuperscript{92} Vasquez (2005) at 930

\textsuperscript{93} Brownlie (1998) at 538

\textsuperscript{94} UK v. Iceland para. 78

\textsuperscript{95} UN Charter Preamble and Art. 1.3

\textsuperscript{96} Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UN General Assembly Resolution 2625
The human rights measure implemented by the home state, while domestic, concerns an area of interest to the international community. In domestic matters, states make independent internal decisions all the time and it is their prerogative as sovereign states to do so. If states unilaterally make decisions that will affect everyone, they do not only risk conflicts, but they also disregard the other sovereign states by not including them in the decision of international and multilateral consequence. The host state could therefore argue that the home state is in violation of the duty to cooperate. Sovereign states are equal and should respect each other 97, and in doing so they should bear in mind their common right to exclusive territorial jurisdiction, and also to non-intervention and the ability to be bound by treaties. 98

On the other hand, multilateralism and international agreements require a much more extensive and drawn-out process than a national regulation. While the benefit of following the procedure for international agreements is that the states will have reached a consensus on how to manage the problem; the disadvantage is that the solution will be based on compromises and vague terminology, and reaching an agreement will require ample time and resources.

State sovereignty and the duty to cooperate could be treated as completely separate arguments as they are based on separate principles, yet due to the strong linkages between them, such distinction would seem artificial for the purposes here. States only have a duty to cooperate with other sovereign states. 99 The host state could argue that the home state is disregarding its sovereignty by refraining from deliberating the measure with it before implementing it. On the other hand, if they refrain from cooperation, and instead single-handedly implement regulations that will affect other states as well, this may be perceived as disrespectful and intrusive by the other states in question.

97 FRD, *The principle of sovereign equality of states (c)*
98 Brownlie (2008) at 289
99 FRD *The duty of States to co-operate with one another in accordance with the Charter*
3.3.2 The Duty to Cooperate on Human Rights

In relation to human rights, the duty to cooperate may have an even stronger foundation than usually. The obligation to cooperate does not merely require compliance from the various individual actors, but it demands that everyone, states and persons alike, strive to promote and secure these rights by implementing progressive measures both domestically and internationally. According to the FRD the measure as enacted by the home state to promote human rights throughout the supply chain regulation in the spirit of the UDHR.  

Although human rights requirements are enacted according to the purpose of these declarations, the manner in which it is sought implemented by the home state can arguably be challenged under the same declarations.

According to the UDHR, the FRD and customary law, states are obligated to cooperate with one another. The customary principle is more general than the others, and it aims to prevent states from hindering contracts and other mutually beneficial relations. The FRD mostly focuses on cooperation concerning peaceful and neighborly relations, as well as respect for human rights and freedoms. Naturally, the customary principle and the declarations also take the principles of sovereign equality and non-intervention into consideration. These principles are all fundamental and important for the co-existence of states and peoples, and they are complimentary. However, in some cases, such principles collide, as one may cut into the other: the sovereignty of the host state may be affected by the home state’s desire to promote human rights in the supply chains of its corporate actors.

Although the FRD chiefly advocates cooperation, unilateral action in order to promote “respect for and observance of human rights and fundamental freedoms in accordance with

100 FRD Preamble
101 UK v. Iceland para. 72 and section II
102 FRD Preamble
103 FRD, The duty of States to co-operate with one another in accordance with the Charter
the Charter” is encouraged in some situations. If the home state doubts that the host state will be willing to cooperate to promote human rights, this section of the FRD allows an exception from the duty to cooperate. The measure enacted by the home state is a domestic measure, intending to regulate and influence the actions of the domestic corporation, thereby improving the general human rights performance of the home state and its actors. Cooperation would not only promote greater unity and respect among states, but it could also make the international human rights protection more effective, as the substantive and procedural measures are products of combined efforts and negotiations.

Human rights treaties often call for international cooperation to achieve full realization of the human rights recognized in the treaty. The cooperation demanded by the human rights treaties particularly and explicitly requires positive assistance in ensuring full enjoyment of the rights. The host state may also be obligated to accept assistance to respect and protect human rights, even if the enacting state by doing so, encroaches on its sovereignty. The importance of this cross-border cooperation has been expressed repeatedly, particularly in relation to economic, social and cultural rights and human rights standards. In fact, failing to allow such cooperation would be a violation of the treaty duties towards the other states. As for regulating corporate activities abroad, it is not only permitted but also strongly encouraged, as long as the actions taken are consistent with the UN Charter and other relevant principles of international law.

Nevertheless, by including the other affected states in the legislation process for human rights regulations, future disagreements and problems could be avoided. By adhering to the duty to cooperate, the home state could perhaps avoid enacting measures with adverse effects on the host state and the contractors, assuming that a multilateral regulation would

104 FRD, The principle of equal rights and self-determination of peoples
105 ICESCR Art. 2, ICCPR Preamble, UN Charter Preamble and Art. 1
106 General Comment No. 12 para. 36, General Comment No. 15 paras. 30, 31 and 38
107 Report for the SRSG (2007) at 8-9
find a way to avoid such problems without making the human rights requirements more lenient. The measure might cause difficulties and hardship in the host state, which the home state might fail to consider when implementing the measure on its own. The contractors in the host state may experience economic problems, as the requirements could lead to disinvestment and less corporate activity in the host state. Undermining enterprises will in turn cause less financial development, which is likely to inhibit other development and the general economical progress of the host state.

3.4 Conclusion

In this chapter, the extra-territorial effects the procedural and substantive measures will have in host states were addressed. These may be perceived as intrusive and in some cases even as in violation of the exclusive territorial jurisdiction and sovereignty of the host state. However, the objective of the measure is to promote human rights protection, which is a shared obligation and of interest to all states.

According to the duty to cooperate, international and important decisions and regulations should be discussed with the other states. Yet, if it is likely that the measure will not be accepted by host states, the home state is permitted to take unilateral actions to promote fundamental human rights, in spite of the duty to cooperate.
4 WTO

4.1 Human Rights Concerns Under the WTO

Domestic regulations in the home state regarding the respect and protection of human rights throughout the corporate chain of production will naturally have effects on its trade relations with other states. If the suppliers and subcontractors in a host state are unable to meet the requirements demanded by the domestic corporation due to measures imposed by the home state, the domestic corporation might terminate or restrict its business with them in order to fulfill the regulations at home. The effect of this is obvious; international trade between the corporations in the two states will be limited and the human rights levels in the host state will soon deteriorate, along with its rate of social and economic development. This effect stands in stark contrast to the objective of the WTO, which is to achieve economic efficiency and equality between states and “optimal use of the world’s resources”.

The WTO and the UN human rights agreements have their roots from the very beginning of the post-WWII era, and they have developed side by side since then, yet they make little or no notice of each other. In the discussion of the relationship between trade and human rights, many have focused on the lack of hierarchy in international law, on the equality of fundamental principles in trade law and in human rights law, and on the major impact they have had on international relations and development, albeit mainly in separate areas. The challenge of combining trade and human rights lies in tangling out which principles should be prioritized when the interests conflict. While different, the two areas represent aims

\[\text{108 WTO Agreement Preamble}\]
\[\text{109 Cottier (2002) at 114-115}\]
from the UN Charter,\textsuperscript{110} and legally, neither has an inherently stronger or more superior position than the other. Additionally, the fragmentation of international law affects them and the basic principles in the two areas differ significantly.\textsuperscript{111}

However, as both systems govern the relations and regulations of inter-state activity, there is bound to be some interaction between the two areas of law, especially considering that all WTO members are party to one or more human rights treaties.\textsuperscript{112} Both human rights treaties and the trade agreements continue to grow and evolve as their environment changes.\textsuperscript{113} International human rights standards, such as labor rights, and international trade policy can potentially be combined in the WTO trading system without dealing with fair trade or race to the bottom rationales.\textsuperscript{114} The WTO recognizes that when states enter into “reciprocal and mutually advantageous arrangements” to reduce major barriers to and discriminatory treatment in international trade relations, the arrangement is likely to be beneficial to several areas of international cooperation and co-existence.\textsuperscript{115}

In this chapter, the possible trade restrictive effects of a procedural or substantive measure will be examined. The measure will be examined under the National Treatment principle in GATT art. III, and also under the general exceptions clause in GATT art. XX. Finally, the regulation will be examined according to the Agreement on Technical Barriers to Trade (TBT).

\textsuperscript{110} UN Charter Preamble
\textsuperscript{111} Cottier (2002) at 113
\textsuperscript{112} Understanding The WTO: The Organization Members and Observers (2008), Office of the UNHCHR: UN List of Member States (2004)
\textsuperscript{113} Howse and Mutua (2000) at 7-8
\textsuperscript{114} Trebilcock (2001) at 6
\textsuperscript{115} WTO Agreement Preamble
4.2 National Treatment principle - GATT 1994 art. III

4.2.1 Introduction to the National Treatment Principle

The National Treatment (NT) principle\textsuperscript{116} prohibits differential treatment of domestic and foreign like products through internal taxes and regulatory measures so as to afford protection\textsuperscript{117} to the domestic products. Treating imports consistently and equally with domestic products is a fundamental principle in international trade law, and can be achieved by avoiding protectionist and discriminatory behavior with minimal restrictions and limitations on international trade.\textsuperscript{118}

According to the NT, WTO member states cannot impose any internal tariffs or other domestic barriers to trade, such as internal regulations, that might restrict or limit international trade in a discriminatory manner, unless such regulation is necessary to achieve a justifiable goal.\textsuperscript{119} A domestic measure imposing an obligation on domestic corporations to require specific human rights standards from their supply chains could interfere with the realization of this principle, as the consequences of the measure could be very different for foreign and national manufacturers. The NT promotes free trade by ensuring equal trade conditions and the same treatment for all member states, judging compliance by comparing the treatment given to domestic and foreign like products. The focus in this thesis is on a domestic regulation possibly causing differential treatment of foreign products, excluding internal taxes and other charges from the discussion.\textsuperscript{120}

Under the NT equal or better treatment of foreign products would also be acceptable. Art. III: 4 requires that all national or imported like products, regardless of their origin, “shall be accorded treatment no less favourable to that of national products (...)”; the laws,

\textsuperscript{116} GATT art. III
\textsuperscript{117} GATT art. III:1
\textsuperscript{118} Japan – Alcoholic Beverages (AB), pp. 16-17
\textsuperscript{119} infra section 4.4
\textsuperscript{120} infra section 2
regulations and requirements in the importing state should not obstruct such treatment.\textsuperscript{121}

The human rights requirement imposed on the domestic corporations by the home state does not differentiate between products from foreign or national chains of production, and seems to be in accordance with the NT. However, there is a line to be drawn between \textit{de jure} and \textit{de facto} discrimination; a measure can be discriminatory despite making the same demands of corporations with national and foreign supply chains, as the same measure could have different effects due to dissimilar situations in the states.

In \textit{US – Gasoline}, the Panel responded to an argument made by the US that a measure already found to be inconsistent with the NT in art. III: 4, does not have to be re-examined under the general provision in art. III: 1 to be deemed in violation of the principle.\textsuperscript{122} This specific provision in art. III: 4 concerns products from different territories, and as applicable, it should be considered first. The term “less favourable treatment” in art. III: 4 was later interpreted by the Appellate Body [AB] to be a reiteration of the principle in art. III:1 requiring that domestic measures should not be implemented “so as to afford protection” to domestic products, and a separate analysis is therefore not required.\textsuperscript{123} The argument will presume that the enacted human rights requirement is origin-neutral, as origin-based regulations are clear violations of the non-discrimination principles.

The following discussion will be structured according to art. III: 4. As the provision is applicable only if a regulation differentiates between “like products”, it must first be established whether the products affected by the human rights measure are “like”. The next step will be to determine whether the measure implements “less favorable treatment” for like products originating in a host state compared to national products. Procedural and substantive measures demand different standards, constituting differential treatment on different bases, and will therefore be examined individually.

\textsuperscript{121} GATT art. III:4
\textsuperscript{122} US – Gasoline (Panel) para. 6.17
\textsuperscript{123} EC – Asbestos (AB) para. 100
4.2.2 Like Products

In order to determine whether domestic regulations regarding human rights in suppliers and subcontractors are in conflict with GATT art. III: 4, it is necessary to determine whether the products from corporations with foreign or domestic supply chains are “like products”, and whether the levels of human rights protection affect this likeness. The term “like products” is used in many of the GATT provisions, and in each article it must be interpreted contextually and according to the object and purpose of the article. Although the likeness of products is determined on a case-by-case basis, the similar terminology in GATT art. I and art. III: 4 allow for a comparable general interpretation of “like products”.

In the findings of the AB in EC-Asbestos, four general criteria were applied to analyze likeness between products: their physical properties, their end uses, consumers’ habits and tastes in relation to them, and their tariff classification. This is not a closed list of applicable characteristics, but merely a list of acknowledged tools for analyzing and applying the provision. For the purposes here, most of these criteria will be inapplicable, as the regulation focuses on products that are otherwise like, but that come from contractors with divergent human rights protection.

The physical properties of the product will not be altered by varying degrees of regulation, and here it is assumed that they are such that they will not render the products unalike. Nor will differences between the products be expressed by the products’ end uses, as the human rights regulation is unlikely to have any effect on this. A similar assumption must be made in relation to the tariff classification, which will also be excluded from the following discussion of whether the products are like.

---

124 EC – Asbestos (AB) paras. 88, 101, 102
125 Japan – Alcoholic Beverages (AB) p. 12, EC – Asbestos (AB) para. 101
126 EC – Asbestos (AB) para. 85
127 EC – Asbestos (AB) para. 102
Varying levels of human rights protection in the supply chains may, however, affect the consumers’ tastes and habits in relation to the products. Two products in a competitive relationship in the marketplace usually remain alike even if they have gone through different production processes, especially if these are not related to the product.\textsuperscript{128} However, this may not be the case with human rights regulations, due to the compelling reasoning behind the regulation of the process and the moral differences between products manufactured under human rights friendly or violating conditions.\textsuperscript{129} A product from a chain of production where human rights are respected and protected could be considered significantly different from another produced under abhorrent conditions, and the two would no longer be considered “like products”.

In order for consumers to consider such circumstances when developing their preferences, knowledge or easy access to information about the differences is required. Especially where serious safety, health or life concerns arise, consumer awareness of differences between otherwise like products has increased.\textsuperscript{130} Although the concerns in earlier cases were directly related to the product, they are representative of a general trend. In addition, attempts made to distinguish between the product and the production methods have been subject to much criticism, as a limitation based on process and production methods [PPMs] can be just as discriminatory and trade restrictive as limitations based on the product itself.\textsuperscript{131}

Information about the human rights conditions in the various supply chains may also affect the consumers’ tastes and habits. The knowledge that one product was made using child labor or manufactured under very poor working conditions may easily affect the consumers’ choices, causing them to take ethical differences and social costs into

\begin{flushright}
\textsuperscript{128} EC – Bananas III (AB), US – Shrimp (AB) \\
\textsuperscript{129} Francioni (2001) at 17-18 \\
\textsuperscript{130} EC – Asbestos (AB), EC – Hormones (AB) \\
\textsuperscript{131} Howse and Reagan (2000) at 269-272
\end{flushright}
consideration. A good approach to promote consumer awareness could be to implement a mechanism that certifies corporations, their supply chains and the products that fulfill certain standards.

By certifying and labeling products manufactured according to regulations concerning human rights protection and promotion, consumers will be better informed and their tastes and habits may be influenced. However, the preferences of the consumers might not be influenced to the degree of affecting or changing the likeness of the products, and it is unclear exactly how clear the consumers’ tastes and habits must be. The consumers may not agree on the same preferences, making it difficult to determine whether the products are like or not.\(^\text{132}\) However, if there is no clear tendency regarding the likeness of otherwise like products based on the different human rights regulation, the products must be assumed to remain like. When discussing the consumers’ tastes and habits, the focus is on the current situation, but possible latent alterations are also of interest.\(^\text{133}\) Such latent preferences may surface if information becomes more freely available to the consumers.

4.2.3 No Less Favourable Treatment

4.2.3.1 General

The NT prohibits differential treatment of otherwise like products of national or foreign origin.\(^\text{134}\) Having established the limits of like and unlike products, the next step is to determine whether a human rights measure will amount to “less than favourable treatment” in relation to like products from foreign supply chains compared to products from national supply chain.

\(^{132}\) EC – Asbestos (Panel) para. 8.139.

\(^{133}\) Korea - Alcoholic Beverages (AB), para. 116.

\(^{134}\) GATT art. III: 4
Regulations explicitly based on the origin of the products are clear violations of the non-discrimination principle. Otherwise, a procedural requirement could freely be imposed on domestic corporations, but waived for those with national supply chains. The home state could base this on its assumed knowledge regarding the human rights standards in national corporations, or it could base the waiver on a pre-existing reporting requirement for national corporate actors.\textsuperscript{135} A real dispensation would be in conflict with the NT, as it would complicate having foreign supply chains compared to getting products from domestic contractors and suppliers.

In the following, the assumption will therefore be that the procedural and substantive regulations\textsuperscript{136} are origin-neutral measures. The human rights measures should accord “no less favourable” treatment to domestic corporations with foreign chains of production than those with national supply chains. However, such differential treatment does not have to be intentional or explicit; requirements enacted by the home state regarding the human rights levels in subcontractors and suppliers may be origin-neutral, treating like products with different origins the same, yet the effect could be discriminatory due to unlike human rights conditions in the host and home states, causing the measures to be considered \textit{de facto} discriminatory.\textsuperscript{137}

\textbf{4.2.3.2 Procedural Requirement}

The suggested procedural human rights measures impose the same duties on domestic corporations with foreign supply chains and on domestic corporations with domestic suppliers and contractors, and do not explicitly discriminate between them. Procedural measures that require corporations to obtain information from their suppliers and subcontractors regarding the human rights performance, would not represent any particular problems for those with national supply chains, as the domestic subcontractors and suppliers would also be required to abide by the same regulation.

\begin{itemize}
  \item\textsuperscript{135} \textit{e.g.} Norway’s Accounting Act paras. 3-3 and 3-3 A
  \item\textsuperscript{136} \textit{infra} section 2.2 and 2.3
  \item\textsuperscript{137} Potts (2008) at 4
\end{itemize}
However, for domestic corporations with foreign supply chains, the implementation of the measure could be demanding and difficult, as information may be less accessible in the host state. The contractors and suppliers may be unwilling or unable to comply with the requirements due to the costs involved, or due to conflicting legislation in the host state.\textsuperscript{138} The enacted treatment could thus be \textit{de facto} discriminatory\textsuperscript{139} in favor of national products as the regulation disregards the differences between the pre-existing human rights protection in the host and home states, making the obligation more demanding on corporations with foreign supply chains. Whether this measure amounts to differential treatment will also depend on the exact nature of the regulation, as it could range from requiring that the domestic corporations request information from their subcontractors, to requiring that they make their “best effort” to obtain information, or to demanding specific information and reports concerning the observance of human rights.

To meet their NT obligation, states must not only refrain from imposing explicitly discriminatory regulations, but also ensure that the imported and domestic like products have equal competitive conditions.\textsuperscript{140} Procedural measures should not cause extensive difficulties or result in domestic corporations choosing national suppliers and contractors over contractors in a host state, as the measures will rely mainly on the domestic corporation and less on the situation and regulations in the various host states.

Depending on the nature of the human rights measure, the effort and resources required to meet the information requirement will vary. The concern is that the procedural requirement will demand too much of a corporation with a foreign supply chain, where information is no easily available, making the requirement problematic and burdensome. This could cause

\textsuperscript{138} \textit{infra} section 3.2
\textsuperscript{139} Canada – Autos (AB) para. 140
\textsuperscript{140} Japan – Alcoholic Beverages (AB) p. 10
the domestic corporation to choose national contractors instead, amplifying that the treatment favors national chains of production in violation of art. III: 4.

4.2.3.3 Substantive Requirements

If a home state demands that certain human rights standards and specific regulations are maintained by domestic corporations in contracts with suppliers and subcontractors abroad, the NT requires that the same standards and other requirements should be imposed on corporations with domestic supply chains. In order to accord “no less favourable treatment” to the products from the foreign supply chain, the home state cannot demand a higher degree of human rights compliance from domestic corporations with foreign chains of production than from those who have domestic contractors and suppliers. For instance, in order to prohibit the use of child labor throughout the chains of production abroad, the home state must also abolish child labor domestically.

A substantive requirement could entail that the home state imposes a prohibition on using subcontractors and suppliers that violate human rights. In order to comply with art. III: 4, the same regulation would have to be imposed in relation to both domestic and foreign subcontractors. For a domestic corporation without any foreign contractors, a substantive human rights measure will presumably be fairly straightforward to implement, as the home state is likely to already have control over the human rights standards adhered to by corporate actors within its jurisdiction. The human rights requirement will be binding for both small and big businesses, indicating that the contractors and suppliers too are responsible for respecting and protecting the same human rights as the domestic corporation.

The effort required for a corporation with foreign suppliers and contractors to meet the substantive requirements, will often demand far more resources than from a corporation

---

141 GATT art. III:4  
142 Howse and Reagan (2000) at 259
with a domestic supply chain, especially when the suppliers and subcontractors are located in host states with poor human rights protection. Such substantive human rights requirements throughout the chain of production could easily constitute differential treatment if the required human rights standards and norms are too peripheral or specific for the home state, while requirements based on fundamental and basic human rights norms, which all states agree to or are bound by, might more easily be accepted as “no less favourable treatment”.

4.3 General Exceptions - GATT art. XX

4.3.1 Introduction

Internal regulation of corporate adherence to human rights norms throughout the chain of production could be a violation of the non-discrimination principles under the WTO. However, such regulation might still be permissible according to the GATT art. XX. The general exceptions clause permits the adoption of some regulations despite trade restrictiveness, as long as the policy is legitimate according to the provisions in art. XX, and not applied in a discriminatory manner.

A two-tiered system has to be followed when applying art. XX: first, the regulation has to satisfy the exact provision in paragraph (a)-(j), and the connection between the regulation and the aim must also meet the standard of the provision. Second, the regulation must be applied in a manner consistent with the chapeau. The following argument will be structured according to this system, discussing the applicability of human rights regulations as general exceptions according to art. XX.

143 GATT arts. I and III
144 infra section 4.2
145 US – Shrimp (AB) para. 121.
146 US – Gasoline (AB) p. 22
4.3.2 Human Rights in GATT art. XX (a), (b) and (e)

The exceptions listed in art. XX are based on objectives considered to be of particular importance to the member states. States usually want to maintain domestic control over certain issues in dealings with other states. Some of the general exceptions may be applicable to the home state’s human rights requirement for domestic corporations and their suppliers and subcontractors. In US – Gasoline, the AB gave a broad interpretation of the measures that could be protected under art. XX (g), which has been applied in later cases under the same paragraph, and which could probably be extended to the other paragraphs under art. XX.

Art. XX (a) allows states to implement measures that would otherwise be inconsistent with WTO principles of non-discrimination, such as the MFN or the NT, if the regulation adopted is “necessary to protect public morals.” This provision has never been interpreted in the context of a dispute settlement under the GATT, and many fear that the vagueness of the paragraph would enable states to disguise protectionist measures as valid regulations. It may be applied to prohibit imports in conflict with common perceptions of moral, such as weapons, drugs, child pornography, and other products that rely on the exploitation of children or others. A more normative interpretation of the term “public morals” leads to the fundamental norms of society, many of which are established in human rights laws, such as the right to life, liberty and security of person, freedom of expression. As the basic human rights treaties and the human rights that have become

\[\text{References}\]

147 US – Gasoline (AB) pp. 30-31
148 US – Gasoline (AB) p.18
149 US – Shrimp (AB) paras. 141-142
150 GATT Art. XX (a)
151 Howse and Mutua (2000) at 10-11
152 ICCPR art. 6
153 ICCPR art. 9
154 ICCPR art. 19
customary law or *jus cogens* represent standards that very nearly all states agree on, it seems feasible to incorporate them into the exception in art. XX (a). It is often assumed that human rights are implicitly included under “public morals”,\(^{155}\) and the indivisibility of fundamental human rights invites the inclusion of all human rights.\(^{156}\)

The general exception in art. XX (b) permits states to implement otherwise trade restrictive measures, if these are “necessary to protect human (...) life or health”. Like art. XX (a), XX (b) is also a little vague and ambiguous concerning the exact content of an acceptable measure. The case law surrounding art. XX (b) demonstrates how the issues can be addressed.\(^{157}\) States have called upon the provision in several disputes, most of which concerned the use of specific materials or chemicals, creating risks and causing environmental and health related concerns in other member states.\(^{158}\)

Many human rights are directly related to human life or health, and will often be a natural part of the exceptions allowed under art. XX (b). The right to life\(^{159}\), the right not to be subjected to torture\(^{160}\), the right to liberty and security of person\(^{161}\), the right to food\(^{162}\) and the right to health\(^{163}\) are only some of the human rights that could be used in national human rights requirements in relation to the suppliers and subcontractors of the domestic corporations consistent with art. XX (b). These rights are imperative for the protection and promotion of human life and health, and trade restrictive measures requiring adherence to


\(^{156}\) UDHR Preamble

\(^{157}\) EC – Asbestos (AB) paras. 155 - 163

\(^{158}\) EC – Asbestos (AB), EC – Hormones (AB)

\(^{159}\) ICCPR art. 6

\(^{160}\) ICCPR art. 7

\(^{161}\) ICCPR Art. 9

\(^{162}\) ICESCR Art. 11

\(^{163}\) ICESCR Art. 12
these rights should therefore be acceptable under art. XX(b).\textsuperscript{164} Other norms that are concerned with different aspects of human rights are more difficult to include under the same provision.\textsuperscript{165} Despite the differences between the pronounced aims of the various human rights, they are considered to be indivisible and interdependent, as the full protection and enjoyment of the individual right is closely linked to the enjoyment of other rights.\textsuperscript{166}

National regulations regarding the level of human rights in the subcontractor and suppliers of domestic corporations could also be allowed based on art. XX (e). The provision approves trade restrictive measures “relating to the products of prison labour”. This exception can be applied to prohibit the use of prison labor throughout the chain of production, or to demand certain guaranteed rights and freedoms for the prisoners, such as the right to water, food and health and freedom from slavery and forced labor. It can also be used to promote human rights in prisons generally, and to improve poor conditions and prohibit practices such as enslavement, political persecution and other human rights abuses.\textsuperscript{167}

4.3.3 Human Rights as General Exceptions

All WTO members are party to one or more human rights treaties, and they have to abide by the various obligations, in addition to the applicable customary international law.\textsuperscript{168} The WTO dispute settlement bodies should take this into consideration when determining whether the trade restricting regulations are necessary and the objectives legitimate.\textsuperscript{169}

\textsuperscript{164} WTO Preamble
\textsuperscript{165} ICCPR Art. 12, 18, 19 \textit{et al.} and ICESCR Art. 6, 8, 13 \textit{et al.}
\textsuperscript{166} UDHR Preamble
\textsuperscript{167} Francioni (2001) at 11-13
\textsuperscript{168} Understanding The WTO: The Organization Members and Observers (2008), Office of the UNHCHR (2004)
\textsuperscript{169} DSU art. 3.2
giving additional support to exceptions based on non-WTO obligations. The human rights obligations of the states could be applied as arguments in a dispute on whether the state’s trade obligations are being fulfilled or violated.\textsuperscript{170}

A few basic human rights norms have become \textit{jus cogens}, such as the prohibition of slavery, genocide, and child labor to mention some, and more human rights will presumably be recognized as \textit{jus cogens} in the future.\textsuperscript{171} \textit{Jus cogens} rules are peremptory customary international laws, which prevail over all customary law and treaty norms.\textsuperscript{172} Accordingly, a state cannot refrain from complying with \textit{jus cogens} norms even under WTO laws, and a domestic regulation to enforce peremptory human rights norms throughout the chain of production should be accepted as an exception to the non-discrimination principles in the WTO.

It can also be argued that basic human rights have achieved the status of obligations \textit{erga omnes},\textsuperscript{173} as discussed above.\textsuperscript{174} “The principles and rules concerning the basic rights of the human person” were found to be obligations \textit{erga omnes}, such as rights derived from “the outlawing of acts of aggression, and of genocide, and also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”.\textsuperscript{175} In principle, all human rights are equal and interdependent, yet some rights are considered to be of a more fundamental character,\textsuperscript{176} and states are given a right to prosecute inconsistencies and violations.\textsuperscript{177} These fundamental human

\begin{thebibliography}{9}
\bibitem{170} Petersmann (2005) at 360
\bibitem{171} Howse and Mutua (2000) at 9 and 17
\bibitem{172} Vienna Convention art. 53 and 64
\bibitem{173} General Comment No. 31 para. 2
\bibitem{174} infra section 3.2.3
\bibitem{175} Belgium v. Spain paras. 33-34
\bibitem{176} General Comment No. 12 and General Comment No. 15
\bibitem{177} DASR art. 48
\end{thebibliography}
rights could be given preferential treatment in international disputes over conflicting provisions of treaties, such as trade agreements.

Although there are many arguments in favor of allowing trade restrictive measures based on human rights, the exclusion of rights terminology from the WTO was intentional. In US – Shrimp, the AB found that the chapeau to art. XX does not allow exclusions for unilateral trade measures aiming to protect the global environment. Exceptions must be based in the provisions provided under GATT art. XX, and while not explicitly mentioned human rights may be implicitly included as relevant and within the scope of the general exceptions provisions. Accepting exceptions based on concerns beyond the jurisdiction of the states might lead to abuses of the general exceptions provision. Additionally, unilateral trade restrictive measures based on human rights requirements would be problematic because they will shift the focus from the important common values and objectives to fears of protectionism and discrimination.

4.3.4 The Degree of Connection

The ten general exception provisions in art. XX require a certain level of connection between the objective pursued and the trade restrictive measure enacted, albeit the terminology and the degree of connection may vary. The different terms used in the various paragraphs of the article relate to different relationships between the regulation and the pursued policy.

Art. XX (e) merely demands that the measure must be “related to prison labour” [emphasis added], a lesser degree of connection than what is found in the other paragraphs examined

---

179 US – Shrimp (AB) paras. 115-116, 168
180 US – Gasoline (AB) p.17
181 US – Gasoline (AB) p. 22
Trade restrictive measures related to prison labor will therefore generally be accepted, as long as they are also consistent with the *chapeau* to art. XX. Incorporating human rights requirements into this exception should not cause any particular difficulties. Whether the enacted measure constitutes a procedural or a substantive regulation, the connection to the aim will be as close as required by the provision and the measure should be acceptable.

Art. XX (a) and (b) both demand that the measure is *necessary* to achieve the intended aim. If the human rights measure fulfills the necessity requirement, it must also be consistent with the *chapeau* to art. XX.\(^\text{182}\) In *EC-Asbestos*, the AB discussed the necessity requirement in relation to the protection of human life and health. The AB declared that “the more vital or important the common interests or values pursued, the easier it would be to accept as ‘necessary’ measures designed to meet those ends.”\(^\text{183}\) *EC-Asbestos* focused on the protection of human life and health in relation to the use of certain chemicals and material. Nevertheless, the findings could also be applied to a case where the concern is related to other vital common interests or values such as human rights.

Domestic human rights regulation regarding the compliance of subcontractors throughout the chain of production might not be easily accepted, as the aim of the regulation is to improve corporate human rights compliance. The measure is effective only if such changes do occur. The human rights measures do not necessarily work the way the home state planned, and instead of eliminating or reducing poor human rights practices, these measures simply cause a redistribution of production within the host country.\(^\text{184}\) The contractors with good human rights records will contract with corporations from the regulating country, while the other contractors with bad or insufficient adherence to human rights norms will supply companies in other less concerned states instead.\(^\text{185}\)

---

\(^{182}\) US - Gasoline (AB) p. 22 and US – Shrimp (AB) paras. 118-120  
\(^{183}\) EC – Asbestos (AB) paras. 164-175  
\(^{184}\) Dine (2005) at 191-198  
\(^{185}\) Howse and Reagan (2000) at 271
In necessity discussions the focus is generally on the home state and the effectiveness of the trade restrictive measure there. However, the human rights measures have a different objective, as they aim to affect the human rights protection through the horizontal application between the domestic corporation and its contractors. The states’ obligation to respect and protect human rights includes ensuring that its subjects respect the rights of one another. This horizontality is not limited by the borders of the states, but by the relationships between the various actors, and in order to enforce it efficiently, internal measures regarding the human rights level throughout the supply chain may be required. The AB in EC – Asbestos conditioned the necessity of a measure on the lack of a “reasonably available alternative”\(^\text{186}\) that could protect the same interests and values in a less trade restrictive manner.

Procedural regulations requiring that the domestic corporations obtain and provide information on the human rights conditions throughout the supply chain are only moderately trade restrictive. These measures may not directly protect the aims provided in the general exceptions in art. XX (a) and (b), but through their implementation the home state is able to prohibit human rights violations by its corporate actors, which perhaps will lead to improvements in the human rights situation.

Substantive measures impose distinct and explicit human rights standards on the domestic corporations and their suppliers and subcontractors. Such standards demand that the individual contractor maintains a certain level of human rights protection, a requirement that can easily become trade restrictive, quite possibly more than necessary.\(^\text{187}\) Procedural measures would presumably be less trade restrictive, however, they would also be less effective in protecting human rights. It could also be argued that trade regulation is an inappropriate application for human rights regulations, and that it would be better to pursue

\(^\text{186}\) EC - Asbestos (AB) para. 175
\(^\text{187}\) infra section 4.2
these aims through treaties and human rights organizations where they might be less trade restrictive. However, despite the long tradition of keeping trade and human rights separate, it could also be argued that their objectives and basic principles must be examined together in order to achieve a satisfactory solution to the conflicting issues.

An alternative approach could be to allow states to implement domestic regulations regarding their companies’ use of contractors, despite the trade restricting effects, for instance by amending Article XX of the GATT to include a universal human rights exception or by an expansive interpretation of the public morals exception. Upon fulfilling the necessity requirement, the *chapeau* of Article XX prohibiting arbitrary or unjustifiable discrimination or disguised restrictions on trade, will also have to be satisfied.

4.3.5 Manner of Application

The final analysis of the measure can be found in the preamble to art. XX. It demands that the trade restrictive measure, upon having fulfilled the demands regarding the scope and connection in the individual provision, should not be “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade”.

Trade regulations based on only one state’s legislation carry a high risk of constituting a disguised form of protectionism; such as in *Japan - Alcoholic Beverages*, where the internal regulations were used to create separate origin-neutral tax categories for imported alcoholic beverages. The regulations were based on the ingredients and alcohol content, adapted to differentiate between Japanese and imported liqueurs. The taxes were found to be in violation of NT, demonstrating the importance of being clear on the legitimacy of

\[188 \text{ Trebilcock (2001) pp. 20-24} \]
\[189 \text{ GATT art. XX } \textit{chapeau} \]
\[190 \text{ Japan – Alcoholic Beverages (AB) } \]
the reasoning behind any such regulation.\textsuperscript{191} With a human rights argument supporting the measures, this is particularly important, as it can be very difficult to contradict, giving the home state an additional incentive to use human rights concerns not due to real interest and aims, but merely as a pretext for limiting trade.

On the other hand, states tend to take issue with measures that are imposed unilaterally by one state, especially since they typically concern matters of international importance, which governments often desire to have some input on before a multilateral decision is reached.\textsuperscript{192} Developing countries are particularly concerned about developed states invoking human rights as a rationale for their trade restrictive measures, as it strips them of their advantage of having low labor costs, and instead imposes additional requirements on them demanding human rights adherence if they want to continue trading with the developed states.\textsuperscript{193} By using human rights regulations, a home state can easily discriminate against a number of host states with cheap labor and products, based on their poor human rights protection. This will especially affect developing countries where the budgets are limited, forcing them to choose between human rights protection and economic development.

In \textit{US – Shrimp}, the AB interpreted the preambular text of art. XX to contain an important balancing requirement for general exceptions. When interpreting and applying the exceptions in art. XX, it found that a balance should be maintained between a member state’s right to invoke a legitimate exception and its duty to respect the treaty rights and trade concessions of other states.\textsuperscript{194} The decision in \textit{US – Shrimp} emphasizes that any differential treatment should reflect the rationale for the regulation, so as to prove that the measure is not merely disguised protectionism.\textsuperscript{195} The human rights regulation might be an

\textsuperscript{191} Trebilcock (2001) at 20
\textsuperscript{192} Howse and Reagan (2000) at 251-252
\textsuperscript{193} Howse and Mutua (2000) at 15
\textsuperscript{194} US – Shrimp (AB) paras. 156 and 159
\textsuperscript{195} US – Shrimp para. 149-150
attempt by the home state to ensure that the domestic suppliers and subcontractors remain realistic competitors to the foreign subcontractors, protecting the domestic supply chains from the low costs and labor standards in the foreign supply chains, under the guise of promoting human rights. This would constitute a disguised restriction on trade, and would be inconsistent with the *chapeau* in art. XX.

The balance between the measure and the trade restrictiveness has to be determined on a case-by-case basis, according to the aim and scope of the measure and the limitation to the other states’ rights, ensuring an even-handed application of such measures.\(^\text{196}\)

### 4.4 TBT- Agreement

#### 4.4.1 Introduction

The Agreement on Technical Barriers to Trade (TBT) regulates which important measures a state can implement, trying to ensure that they are not arbitrary or unnecessary obstacles to trade in goods.\(^\text{197}\) In *EC – Asbestos*, the AB noted that “although the *TBT Agreement* is intended to ‘further the objectives of GATT 1994’, it does so through a specialized legal regime that applies solely to a limited class of measures. For these measures, the *TBT Agreement* imposes obligations on Members that seem to be different from, and additional to, the obligations imposed on Members under the GATT 1994.”\(^\text{198}\) (Emphasis in original) This observation demonstrates that the two agreements are not exclusive, and can be applied to the same measures.

While the TBT is considered *lex specialis*, and will prevail in the case of a conflict with the GATT, another conclusion that can be drawn from *EC – Asbestos* is that a measure found to be inconsistent with either one, will not be repaired with consistency in the other, as they

---

\(^{197}\) TBT Preamble  
\(^{198}\) EC – Asbestos (AB) para. 80
are cumulative and impose different obligations on the states.\textsuperscript{199} The TBT preamble acknowledges the importance of technical regulations and standards to ensure efficient and consistent production systems and to “facilitate the conduct of international trade.”\textsuperscript{200} The technical regulations enacted by the states should not be more trade restrictive than necessary to fulfill a legitimate objective.\textsuperscript{201} However, the TBT does not contain a general exception provision like GATT, but is presumed that the connection between of the two allow for a similar exception to be added to the TBT by interpretation.

The following subsections will examine whether the suggested human rights measures are in violation of the national treatment principle, whether they constitute technical regulations, and whether they are necessary obstacles to trade, and finally whether they protect a legitimate objective.

### 4.4.2 Non-Discrimination

Possible conflicts between the human rights regulation imposed by the home state and the rules in the TBT will, as under the GATT, arise in relation to the NT and the MFN principles. As above, the focus here will remain on the NT, as the measure enacted by the home state must require the same human rights protection from the domestic corporations, regardless of whether the product was produced in a domestic or foreign supply chain.\textsuperscript{202} The discussion of whether the measure is discriminatory or not, will not be considered further here, as it would be nearly identical to the discussion under GATT art. III: 4.\textsuperscript{203}

The regulation imposed on domestic corporations to promote human rights throughout their chain of production could restrict the imports of the home state, causing an obstacle to

\begin{flushleft}
\textsuperscript{199} Bermann (2006) 74-75 \\
\textsuperscript{200} TBT Preamble \\
\textsuperscript{201} TBT Art. 2.2 \\
\textsuperscript{202} TBT Art 2.1 \\
\textsuperscript{203} infra section 4.2
\end{flushleft}
trade. However, not all barriers to trade should be hindered, as there are certain objectives of greater importance than restrictions on trade.\textsuperscript{204}

4.4.3 Technical Regulations

Domestic regulations requiring human rights compliance throughout the chain of production might not sound like typical “technical regulations”. Most of the regulations examined under this provision, concern classic technical issues, such as the type and amount of chemicals used in a product, and the impact this has on the environment during and after production.\textsuperscript{205} However, the definition of technical regulations found in Annex 1 to the TBT calls for a “[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory.”\textsuperscript{206}

The human rights requirement enacted by the home state is a mandatory regulation imposed on the domestic corporations and their supply chains, as opposed to the existing voluntary initiatives for corporations.\textsuperscript{207} If the regulation is not complied with, the product in question will not be allowed access to the markets in the home state. The human rights measures, whether procedural or structural, impose certain processes and production methods in terms of human rights standards on the corporations, but do not demand that the products have any other specific characteristics.

The definition of technical regulations in Annex 1 explicitly allows technical regulations that prescribe specific PPMs that are related to the product. There is, however, no mention of non-product related process and production methods [NPR-PPMs], and the TBT has been presumed to be inapplicable in relation to these regulations. It has been argued that there is some ambiguity in the definition that may permit NPR-PPMs in certain instances,

\textsuperscript{204} TBT Preamble
\textsuperscript{205} EC – Asbestos (AB), EC – Hormones (AB), EC – Sardines (AB)
\textsuperscript{206} TBT Annex 1 art. 1.1
\textsuperscript{207} OECD Guidelines and UN Global Compact
as administrative provisions are included with the PPMs. A technical regulation should normally refer to an identifiable product or PPM, as the technical requirements will vary depending on the character of the product. However, the AB in EC Asbestos found a general regulation concerning “all products” to be unproblematic. Accordingly, the fact that the human rights measure imposed by the home state on all supply chains does not differentiate between various products, will not affect the regulation’s character.

4.4.4 Necessity

Art. 2.2 of the TBT requires that the technical regulation does not create an unnecessary obstacle to international trade. Unlike the prerequisite concerning connection in the various provisions of GATT art. XX, the necessity requirement in TBT art. 2.2 is an additional positive obligation that must be present for a measure to be acceptable under the NT.

Regulations that require corporations to demonstrate compliance with human rights norms throughout the supply chain represent a type of regulation that can easily be trade restrictive if it becomes too demanding. In order to determine whether the domestic measure to protect and promote human rights is an unnecessary obstacle to trade, alternative approaches that might be less-trade restrictive should be considered.

A relevant concern is whether trade regulations are the right legal instruments for addressing cross-border human rights, as advancing human rights protection through the corporate chain of production may seem somewhat inappropriate compared to using international human rights treaties or other voluntary initiatives.

---

208 Appleton (2005) at 382
209 EC - Asbestos (AB) para. 72
210 TBT Art. 2.2
211 infra section 4.3.4
212 Bermann (2006) at 28-29
213 Appleton (2005) 394-395
A procedural measure regarding an active or passive information requirement may fulfill the necessity requirement, as it is difficult to imagine a less trade restrictive measure. In addition the transparency requirement in TBT art. 10 demands that all members provide full information on their technical regulations. Human rights regulations could easily be implemented as part of the transparency system, which may make it more feasible for domestic corporations with foreign supply chains to provide information for the home state, which in turn will further reduce the trade restrictiveness.

Next to the procedural measures, it might be difficult to demonstrate that the substantive measures do not constitute unnecessary obstacles to trade, as the procedural measures almost always will be less trade restrictive and less obstructing. However, the substantive measures could be more effective than the procedural measures in achieving substantial improvements in the human rights protection throughout the corporate chains of production.

4.4.5 Human Rights As A Legitimate Objective

The NT in the TBT requires that the trade restrictive regulation enacted by the home state promotes a legitimate objective.\textsuperscript{214} Art. 2.2 includes a list of such objectives, which contains various important public interest objectives that the member states should be allowed to protect independent of their trade obligations.\textsuperscript{215} Human rights are not explicitly included among them, but unlike the general exceptions clause in GATT art. XX, the list of legitimate objectives here is not exclusive, as the words \textit{“inter alia”} demonstrate. States may therefore invoke other legitimate objectives too to justify trade restrictive technical regulations.\textsuperscript{216}

\textsuperscript{214} TBT Art. 2.2
\textsuperscript{215} TBT Art 2.2
\textsuperscript{216} EC - Sardines (AB) para. 286
Due to the similarities between the public interest objectives listed in the provision and human rights concerns, it can be argued that human rights should be considered among the legitimate objectives. On the other hand, human rights regulations were not amongst the technical regulations the members to the WTO intended to regulate when they negotiated the TBT agreement.\textsuperscript{217} The developing state parties to the WTO are also known to be skeptical of implementing human rights norms into international trade regulations, as they fear that it will make them vulnerable to protectionist trade measures disguised as human rights concerns.\textsuperscript{218}

Another option would be to interpret the objectives explicitly listed as legitimate, such as “protection of human health or safety”. It could be interpreted to include certain human rights, and as under GATT art. XX (b), which protects “human (…) life or health”, all human rights could be included here too, due to their universal character and interdependency. This application can be easily defended based on the general theme of the objectives and the growth of human rights consideration in transnational corporate relations.\textsuperscript{219} The position human rights holds in international law, through treaties, customary law, \textit{jus cogens} and \textit{erga omnes}, also supports the argument.\textsuperscript{220} The original intent of the member states seems to include some human rights, although the traditional divide between trade law and human rights law is visible here too.\textsuperscript{221}

4.5 Conclusion

When assessing the impact the human rights regulation will have on the home state’s trade relations, both the GATT and the TBT call for a balance between the trade restrictiveness and the legitimacy and value of the pursued aim. It may be difficult to determine whether

\textsuperscript{217} Appleton (2005) at 392
\textsuperscript{218} Appleton (2005) at 392-393
\textsuperscript{219} \textit{infra} section 1.1
\textsuperscript{220} \textit{infra} section 3.2.3
\textsuperscript{221} \textit{infra} section 4.1
human rights regulations are implemented for protectionist reasons, but even assuming that the intention of the home state is legitimate, the enactment of such regulations can be questionable.

The procedural and substantive measures suggested above \textsuperscript{222} will easily favor domestic products or products from states with similar legislation, and thereby violate the NT and MFN principles. However, the TBT and the GATT allow exceptions for states to enact measures that promote certain worthy objectives, which may also be applicable for the human rights regulations.

\textsuperscript{222} \textit{infra} section 2.2 and 2.3
5 Conclusion

This thesis has examined the situation of a home state that wishes to enact laws to regulate the human rights performance of a domestic corporation throughout the supply chain, including in contractors and subcontractors and other business partners abroad. A domestic regulation with human rights requirements for the corporate chain of production can interfere with the home state’s international relationships and multilateral obligations, particularly in relation to international trade and the host state’s sovereignty. This thesis has analyzed the legitimacy of the measure in relation to the host state’s sovereign rights, the duty to cooperate and the trade obligations of the home state.

The suggested human rights measures are similar to the Helms-Burton Act, as they prohibit domestic corporations’ use of contractors and suppliers with poor human rights standards, giving cross-border application to the measure. Despite the similarities with the Helms-Burton Act, the human rights regulation enacted by the home state does not violate international law.

Usually, host states will not object to domestic regulations in a home state, but the human rights requirement imposed by the home state has intentional extraterritorial effects, aiming to improve the human rights performance of domestic corporations’ in their subcontractors and suppliers abroad. As the Helms-Burton Act example demonstrates, host states might object to regulations with extraterritorial effects adversely affecting their corporate actors, i.e. the suppliers and the subcontractors of the domestic corporation. The extra-territorial effects of the human rights regulation were found to be somewhat intrusive and questionable in relation to the exclusive territorial jurisdiction and sovereignty of the host state. However, the objective of promoting human rights advocates allowing the measure. The issue is of interest to all states, and the host state too has an obligation to promote
human rights. The duty to cooperate also allows exceptions from the duty in order to promote fundamental human rights.

When assessing the impact the human rights regulation will have on the home state’s trade relations, both the GATT and the TBT call for a balance between the trade restrictiveness and the objective pursued. The discussion of the legitimacy of the human rights measure under the WTO principles demonstrated the difficult relationship between international trade regulations and human rights norms. The procedural and substantive measures suggested will easily favor domestic products or products from states with similar legislation, and thereby violate the NT and MFN principles. In fact, the regulation was deemed in violation of the non-discrimination principles of the GATT, as the differences in the PPMs were not enough to render the products from a human rights complying supply chain different from those produced under violations. Under the non-discrimination rules of the TBT, the measures would encounter similar difficulties.

However, the general exceptions article offers opportunities to balance the human rights provisions with the fundamental trade principles. The TBT and the GATT allow exceptions for states to enact measures that promote certain worthy objectives, which may also be applicable for the human rights regulations. The fact that the states all share the human rights obligations under customary law and treaty law was found to give additional support to the argument that human rights regulations should be acceptable despite restricting trade.

There are some limitations to which measures can reasonably be implemented, as the domestic corporation’s sphere of influence is limited, and there are also other issues to be considered before enacting such regulation. The efficiency of these measures and the effects in relation to developing countries are some of the things the home state should examine further before implementing regulations on the domestic corporations and their subcontractors. However, by making the domestic corporations responsible for the human rights conditions in subcontractors and suppliers, the burden on host states might be lightened, while improving the human rights standards for its nationals.
Human rights have traditionally been dealt with as vertical obligations for states, based in international treaties. The horizontal application has much potential, and especially between actors with the ability to influence others, such as organizations and corporations. The voluntary initiatives have not been particularly effective, and national legislation may be a better option if approved on an international level. There are many strong arguments for allowing the domestic human rights regulations, but there are also many considerations opposing such measures. By taking these into account when establishing the scope and content of the measure, the home state’s regulation promoting human rights throughout the domestic corporations’ chains of production will be consistent with its international obligations.
6 Bibliography

6.1 Legislation

International Treaties and Statutes

<table>
<thead>
<tr>
<th>Treaty/Convention</th>
<th>Date and Nature</th>
</tr>
</thead>
<tbody>
<tr>
<td>UN Charter</td>
<td>June 26th 1945</td>
</tr>
<tr>
<td>Statutes of the ICJ</td>
<td>June 26th 1945</td>
</tr>
<tr>
<td>GATT 1947</td>
<td>October 30th 1947</td>
</tr>
<tr>
<td>UDHR</td>
<td>December 10th 1948</td>
</tr>
<tr>
<td>ECHR</td>
<td>November 4th 1950</td>
</tr>
<tr>
<td>ICCPR</td>
<td>December 16th 1966</td>
</tr>
<tr>
<td>ICESCR</td>
<td>December 16th 1966</td>
</tr>
<tr>
<td>Vienna Convention</td>
<td>May 23rd 1969</td>
</tr>
<tr>
<td>FRD</td>
<td>Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 (XXV) October 24th 1970</td>
</tr>
<tr>
<td>CEDAW</td>
<td>December 18th 1979</td>
</tr>
<tr>
<td>CAT</td>
<td>Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, December 10th 1984</td>
</tr>
<tr>
<td>CRC</td>
<td>November 20th 1989</td>
</tr>
<tr>
<td>WTO Agreement</td>
<td>Agreement Establishing the World Trade Organization, April 15th 1994</td>
</tr>
<tr>
<td>GATT 1994</td>
<td>April 15th 1994</td>
</tr>
</tbody>
</table>

Charter of the United Nations, June 26th 1945
Statute of the International Court of Justice, June 26th 1945
General Agreement on Trade and Tariffs, October 30th 1947
Universal Declaration of Human Rights, December 10th 1948
Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocol No. 11, November 4th 1950
International Covenant on Civil and Political Rights, December 16th 1966
International Covenant on Economic, Social and Cultural Rights, December 16th 1966
Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 (XXV) October 24th 1970
Convention on the Elimination of Discrimination Against Women, December 18th 1979
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, December 10th 1984
Convention on the Rights of the Child, November 20th 1989
Agreement Establishing the World Trade Organization, April 15th 1994
General Agreement on Trade and Tariffs 1994, April 15th 1994
GATS  General Agreement on Trade in Services, April 15th 1994
TBT   Agreement on Technical Barriers to Trade, April 15th 1994
SPS   Agreement on the Application of Sanitary and Phytosanitary Measures, April 15th 1994
DSU   Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15th 1994
ILO Declarations ILO Declaration on Fundamental Principles and Rights at Work, adopted by the ILO at its 86th Session, Geneva, June 1998
OECD Guidelines OECD Guidelines for Multinational Enterprises, June 27th 2000
UN Global Compact United Nations Global Compact, July 26th 2000
DASR   Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the ILC at its fifty-third session in 2001

National Legislation
Norway
1998  Act relating to annual accounts, etc. (Accounting Act) 17.7. 1998 No. 56
2003  Act relating to the right to environmental information and participation in decision-making processes relating to the environment (Environmental Information Act) 9.5. 2003 No. 31
U.S.A.
Helms-Burton Act  Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996
6.2 Case Law

**ICJ Decisions**


**WTO Dispute Settlement**


6.3 Literature

General comments and Whitepaper

CCPR/C/21/Rev.1/Add.11


CESCR General Comment no. 12: The right to adequate food (Art.11) : . 12/05/99.
E/C.12/19


Whitepaper on Corporate Social Responsibility in a Globalised Economy:

Books


Potts, Jason. *The Legality of PPMs under the GATT: Challenges and Opportunities for Sustainable Trade Policy*. IISD 2008, at 4


Chapters in Books:


Articles


Holning, Lau. Rethinking the Persistent Objector Doctrine in International Human Rights Law. In: 6 Chicago Journal of International Law 495, 2005


Pauwelyn, J. *The Role of Public International Law in the WTO: How Far Can We Go?* American Journal of International Law, 2001


Vázquez, Carlos M. *Direct vs. Indirect Obligations of Corporations Under International Law.* In: 43 Columbia Journal of Transnational Law 927, 2005


*Documents Online:*

Understanding The WTO: The Organization Members and Observers July 23 2008
[http://www.wto.org/english/theWTO_e/whatis_e/tif_e/org6_e.htm](http://www.wto.org/english/theWTO_e/whatis_e/tif_e/org6_e.htm)


United Nations Member States List of Member States

Contentious Cases – International Court of Justice:

WTO Analytical Index: Guide to WTO Law and Practice - General Agreement on Tariffs and Trade 1994:
[http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_01_e.htm#general](http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_01_e.htm#general)
WTO Analytical Index: Guide to WTO Law and Practice - Agreement on Technical Barriers to Trade:

http://www.wto.org/english/res_e/booksp_e/analytic_index_e/tbt_01_e.htm#p