

HUMAN RIGHTS ACCOUNTABILITY OF THE WTO

GUDRUN MONIKA ZAGEL*

Abstract

The aim of this article is to examine ways in which to improve the human rights accountability of the WTO. The study determines whether and what substantive standards enshrined in international human rights law are relevant in the WTO context, and what implementing measures and mechanisms to monitor accountability, stemming from international human rights law, would be feasible in order to improve the human rights accountability of the WTO. Although the article identifies a number of appropriate mechanisms to improve the human rights accountability of the WTO, it must be stressed that the possibilities for the WTO institutions to take expedient action are limited, and that it is mainly the obligation of the WTO Members to take steps to prevent that their obligations stemming from WTO law do not conflict with their human rights obligations.

Keywords: WTO; human rights; accountability

INTRODUCTION: DEFINING THE PROBLEM

In recent years, the World Trade Organization (WTO) has increasingly been subject to criticism from human rights proponents for the negative effects of its activities on the human rights situation in many countries. Although not all reproaches directed against the WTO can be verified, it cannot be denied that globalization and economic liberalism in general and trade liberalization in particular do not only have positive effects on the enjoyment of human rights; in fact, there are numerous linkages between trade rules and human rights, and, *de facto*, trade liberalization and the implementation of WTO rules could unfold negative impacts on the human rights conditions in a country by impeding human rights policies of WTO Members.

* University of Salzburg, Austria.

The United Nations (UN) human rights institutions, under the auspices of the Economic and Social Council (ECOSOC), have examined the interaction between international economic law and human rights in a number of studies. In 1999, the relationship between trade, investment and human rights was first elaborated on in a working paper by Mr. J. Oloka-Onyango and Ms. Deepika Udagama.¹ Hereupon, they were appointed by the UN Human Rights Commission as Special Rapporteurs to undertake a study on the issue of globalization and its impact on the full enjoyment of all human rights.² After two preliminary reports, in 2000 and 2001 respectively,³ they submitted a final report in 2003.⁴ In addition, several reports prepared by the High Commissioner for Human Rights provided a detailed analysis of the trade and human rights relationship.⁵

The reports analyze the effects of various areas covered by the WTO, namely the liberalization of trade in services, the TRIPS Agreement,⁶ trade in agricultural products, and investment liberalization on the human rights situation within WTO Members. Whereas it is undisputed that the liberalization of international trade has increased economic development, the reports show that trade liberalization can have negative consequences on the economic and social well-being of the population in a country, which also affects the enjoyment of their human rights in general. These negative impacts occur primarily because states neglect to consider their human

¹ UN ECOSOC, *The Realization of Economic, Social and Cultural Rights. Human Rights as the Primary Objective of International Trade, Investment and Finance Policy and Practice*. Working Paper submitted in accordance with Sub-Commission resolution 1998/12 (E/CN.4/Sub.2/1999/11) (1999).

² UN Commission on Human Rights, decision 2000/102 (17 April 2000).

³ UN ECOSOC, *The Realization of Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights*. Preliminary Report submitted by J. Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission resolution 1999/8 (E/CN.4/Sub.2/2000/13) (2000), and UN ECOSOC, *Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights*. Progress Report submitted by J. Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission resolution 1999/8 and Commission on Human Rights decision 2000/102 (E/CN.4/Sub.2/2001/10) (2001).

⁴ UN ECOSOC, *Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights*. Final Report submitted by J. Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission decision 2002/105 (E/CN.4/Sub.2/2003/14) (2003).

⁵ UN ECOSOC, *Economic, Social and Cultural Rights: The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights*. Report of the High Commissioner (E/CN.4/Sub.2/2001/13) (2001); UN ECOSOC, *Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights*. Report of the High Commissioner for Human Rights submitted in accordance with Commission on Human Rights resolution 2001/32 (E/CN.4/2002/54) (2002); UN ECOSOC, *Economic, Social and Cultural Rights: Liberalization of Trade in Services and Human Rights*. Report of the High Commissioner (E/CN.4/Sub.2/2002/9) (2002); UN ECOSOC, *Economic, Social and Cultural Rights: Human Rights, Trade and Investment*. Report of the High Commissioner for Human Rights (E/CN.4/Sub.2/2003/9) (2003).

⁶ *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)*, 15 April 1994, 33 ILM 1197 (1994).

rights obligations when implementing trade rules, the disadvantages of which are of particular gravity in developing countries, but also exist in industrialized countries.

Examples for such negative impacts are manifold. Negative effects on the right to health are, for example, caused by the TRIPS rules that require patent protection for medicine, making the products more expensive and therefore restricting access to affordable medicine.⁷ Furthermore, it is conceivable that the liberalization of services envisaged by the current GATS⁸ negotiations entails negative consequences on mainly economic, social and cultural rights, for example the privatization of health care, education, or water supply leading to the problem that many people cannot afford those services any more.⁹ Another difficulty is the control of the quality of the services provided by those privatized enterprises.

In contrast to the WTO, many other international organizations have responded to human rights critique and established an extensive practice in improving their human rights accountability. In the UN framework there is not only an extensive debate on the human rights impact of sanctions imposed by the UN Security Council,¹⁰ but since 1997, Secretary-General Kofi Annan has put human rights at the centre of the UN and has initiated a human rights mainstreaming process throughout the whole organization and its activities.¹¹ As a consequence, many UN organizations have established concepts to integrate human rights into their activities.¹² In this context, ECOSOC has initiated a successful dialogue with the International Monetary Fund (IMF) and the World Bank, resulting in these institutions starting to integrate human rights aspects in their structural adjustment programmes in order to meet the

⁷ UN ECOSOC, *Economic, Social and Cultural Rights: The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights*. Report of the High Commissioner (E/CN.4/Sub.2/2001/13) (2001).

⁸ General Agreement on Trade in Services (GATS), 15 April 1994, 33 ILM 1168 (1994).

⁹ Cf. UN ECOSOC, *Economic, Social and Cultural Rights: Liberalization of Trade in Services and Human Rights*. Report of the High Commissioner (E/CN.4/Sub.2/2002/9) (2002); for criticism cf. also Attac Österreich (ed.), *Die geheimen Spielregeln des Welthandels: WTO-GATS-TRIPS-MAI* (Vienna: Promedia, 2003).

¹⁰ Cf. for example CESCR General Comment No. 8: *The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights*; UN ECOSOC, *The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights*. Working Paper prepared by Mr. Marc Bossuyt (E/CN.4/Sub.2/2000/33) (2000).

¹¹ UN Secretary-General, *Renewing the United Nations: A Proposal for Reform* (A/51/950) (1997); UN Secretary-General, *We, the Peoples: The Role of the United Nations in the 21st Century* (A/54/2000) (2000); UN General Assembly, *United Nations Millennium Declaration* (UNGA Res. 55/2) (18 September 2000); for details on the Millennium Summit see <http://www.un.org/millennium/> (visited on 8 February 2007).

¹² A. Frankovits, *Mainstreaming Human Rights: The Human-Rights Based Approach and the United Nations System* (Paris: UNESCO, 2005); for details on the UNHCHR activities see <http://www.unhchr.ch/development/mainstreaming.html> (visited on 8 February 2007); for UNESCO see *Concept of Integrating a Human Rights-Based Approach into UNESCO Activities (Human Rights Mainstreaming)*, http://www.unesco.org/shs/human_rights_approach (visited on 8 February 2007).

justified criticism on the negative impact of their programmes, that had only focused on economic criteria and had largely ignored the social and human rights situation within their target countries.¹³ Moreover, a possibility of review was created by establishing the World Bank Inspection Panel.¹⁴

On a regional level, the European Union (EU) has been a prominent example for increasingly integrating human rights into its activities. Whereas in its early years, the European Court of Justice (ECJ) did not feel any need to consider human rights in its judgments, it took note of human rights as being relevant for the European Community (EC) as part of the general principles of Community law for the first time in 1969.¹⁵ From then on, the ECJ has established an impressive human rights case-law, and apart from a number of non-binding human rights declarations, human rights are now enshrined in the primary law of the EU.¹⁶ The latest and most comprehensive document, the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 and enshrined as Part II in the Draft European Constitution,¹⁷ is already being referred to in the Court's case-law without yet having the status of a binding instrument.¹⁸ Moreover, the EU has been integrating human rights aspects into its activities through a number of mainstreaming activities.¹⁹

¹³ For further reference see S.I. Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (London, Sydney: Cavendish Publishing, 2001); W. v. Genugten /P. Hunt/S. Mathews (eds.), *World Bank, IMF, and Human Rights* (Nijmegen: Wolf Legal Publishers, 2003); E. Suzuki/S. Nanwani, *Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks*, 27 *Michigan Journal of International Law* 177–225 (2005); M. Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (Oxford, Portland: Hart Publishing, 2003), who still criticizes IMF and World Bank that their required economic reforms lead to increased poverty and dismantling of social structures, at 53 et seq.

¹⁴ Cf. G. Alfredsson/R. Ring (eds.), *The Inspection Panel of the World Bank: A Different Complaints Procedure* (The Hague: Martinus Nijhoff, 2001); A. Orakhelashvili, *The World Bank Inspection Panel in Context: Institutional Aspects of the Accountability of International Organizations*, 2 *International Organizations Law Review* 57–102 (2005); I.F.I. Shihata, *The World Bank Inspection Panel* (Oxford, New York: Oxford University Press, 1994).

¹⁵ ECJ 12 November 1969 Case 29/69, *Erich Stauder v. City of Ulm – Sozialamt*, 1969 ECR 419; for details see A. Rosas, *The Sources of Fundamental Rights of the European Union: A Structural Overview*, in: M. Bergsmo/A. Eide (eds.), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjorn Eide* 719–737 at 719 et seq. (Leiden, Boston, Herndon, VA: Martinus Nijhoff, 2003).

¹⁶ Arts. 6 (1), 7 and 49 of the Treaty on European Union; arts. 13, 136, and 177 of the Treaty establishing the European Community.

¹⁷ Draft Treaty establishing a Constitution for Europe (OJ 2003 C 169/1) (18 July 2003).

¹⁸ Cf. Court of First Instance 13 January 2004 Case T-67/01, *JCB Service v. Commission*, 2004 ECR II-49, paras. 1 and 36.

¹⁹ Cf. O. de Schutter, *Mainstreaming Human Rights in the European Union*, in: P. Alston/O. de Schutter (eds.), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* 37–72 at 43 et seq. (Oxford, Portland: Hart Publishing, 2005).

The WTO, so far, has been quite reluctant in addressing human rights aspects of its work. For a long time, it held the firm position that it is a trade and not a human rights organization, and that human rights should be dealt with by other competent organizations.²⁰ It is true that the WTO's main function is to provide a forum for trade negotiations, implementing trade rules and settling trade disputes,²¹ and that the WTO bodies have only a few formal powers to take binding decisions, decisions adopted by consensus, *i.e.* every Member being able, in theory, to block decisions.²² Moreover, in contrast to decisions and acts of other international organizations,²³ WTO rules and decisions do not have any direct effect for individuals, but are directed to the Members, which are obliged to implement them into their national legal order.

Recently, however, the WTO seems to have become aware that it cannot simply ignore the human rights discussion and since 2003, a WTO representative has participated in the annual meetings of ECOSOC and the international financial institutions.²⁴ Furthermore, a first unofficial dialogue has taken place through an informal visit of the UN Special Rapporteur on the right to health, Paul Hunt, at the WTO Secretariat.²⁵ Moreover, it is remarkable that the current WTO Director-General Pascal Lamy announced that there is a new '*Geneva Consensus*' to '*humanize globalization*' in a recent statement, and that the WTO will contribute its share towards that endeavour.²⁶

Accordingly, it is the purpose of this article to examine ways in which to improve the human rights accountability of the WTO. In the first part, I will determine the substantive human rights standards relevant for improving the human rights accountability, describing principles and concepts of international human rights protection and determining to what extent those rules form part of general international law, and thus oblige the WTO and its Members to consider human rights within the WTO's work. In the second part, I will identify what measures could be taken to improve the human rights accountability of the WTO with a view to mainstreaming human rights into WTO activities, the basis for my proposals being

²⁰ Cf. for example WTO Ministerial Council, Singapore Ministerial Declaration, WT/MIN(96)/DEC, para. IV (13 December 1996).

²¹ Cf. art. III of the Agreement establishing the World Trade Organization (WTO Agreement), 15 April 1994, 33 ILM 1143 (1994).

²² Cf. art. IX of the WTO Agreement; in practice, this has never happened.

²³ For example UN Security Council resolutions, EC regulations.

²⁴ Cf. UN ECOSOC, Summary by the President of the Economic and Social Council of the Special High-Level Meeting of the Council with the Bretton Woods Institutions and the World Trade Organization (New York, 14 April 2003) (A/58/77 - E/2003/62) (9 May 2003).

²⁵ Cf. UN ECOSOC, Economic, Social and Cultural Rights: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health. Report of the Special Rapporteur Paul Hunt. Addendum: Mission to the World Trade Organization (E/CN.4/2004/49/Add.1) (2004).

²⁶ Cf. the speech Pascal Lamy held in Santiago de Chile on 30 January 2006, http://www.wto.org/english/news_e/sppl_e/sppl16_e.htm (visited on 8 February 2007).

implementing measures commonly used in international human rights law. In the third part, I will examine procedural aspects of improving the human rights accountability of the WTO, namely what control mechanisms would be feasible to monitor the implementation of human rights in the WTO.

A. SUBSTANTIVE STANDARDS OF ACCOUNTABILITY: WHAT ARE THE RELEVANT HUMAN RIGHTS OBLIGATIONS?

1. SUBSTANTIVE HUMAN RIGHTS OBLIGATIONS

As the WTO is an international organization with nearly universal membership,²⁷ it is necessary to look at existing human rights instruments and obligations at a universal level to determine the relevant substantive human rights standard for WTO accountability. Article 1 (3), Article 55 (c) and Article 56 of the UN Charter oblige all UN Member States to cooperate internationally to promote respect for and observance of human rights. A catalogue of substantive human rights is enshrined in the 1948 Universal Declaration of Human Rights (UDHR),²⁸ which was adopted by the UN General Assembly with 48 votes and 8 abstentions.²⁹ The substantive rights contained in the UDHR were codified and vested with a monitoring mechanism in the 1966 International Covenant on Civil and Political Rights (CCPR) and the International Covenant on Economic, Social and Cultural Rights (CESCR),³⁰ instruments which are considered to give substance to the human rights provisions in the UN Charter.³¹

²⁷ As of 11 January 2007, the WTO has 150 Members and 29 states involved in accession negotiations, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (visited on 8 February 2007).

²⁸ UN General Assembly, Universal Declaration of Human Rights (UNGA Res. 217 A (III)) (10 December 1948).

²⁹ Cf. UN General Assembly, 183rd Session, Verbatim Records, Item 119, at 933, <http://www.un.org/Depts/dhl/landmark/pdf/a-pv183.pdf> (visited on 8 February 2007).

³⁰ International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (16 December 1966); International Covenant on Civil and Political Rights, 999 UNTS 171 (16 December 1966).

³¹ See R. Hanski/M. Suksi, *An Introduction to the International Protection of Human Rights: A Textbook* at 55 et seq., 83 et seq. and 101 et seq. (Turku: Institute for Human Rights, Abo Akademi University, 1999); C. Tomuschat, *Human Rights. Between Idealism and Realism* at 31 et seq. (Oxford: Oxford University Press, 2003); A. Bleckmann, *Zur originären Entstehung gewohnheitsrechtlicher Menschenrechtsnormen*, in: E. Klein (ed.), *Menschenrechtsschutz durch Gewohnheitsrecht* 29–55 at 47 (Berlin: Berliner Wissenschafts-Verlag, 2003); in addition, there are a number of specialized UN conventions protecting the rights of especially vulnerable groups, such as women or children, see <http://www.ohchr.org/english/law/> (visited on 8 February 2007); for details see R. Hanski/M. Suksi, *An Introduction to the International Protection of Human Rights: A Textbook* (Turku: Institute for Human Rights, Abo Akademi University, 1999); J. Symonides (ed.), *Human Rights: International Protection, Monitoring, Enforcement* (Aldershot, Burlington: Ashgate, UNESCO, 2003).

Despite the division of the human rights catalogue into two covenants, a holistic human rights concept prevails today, where the universality, indivisibility, interdependence and interrelatedness of all human rights is hardly questioned in international law,³² and implementing obligations are considered to be largely the same.³³

The substantive rights enshrined in the UDHR and the two UN covenants are hardly disputed by any state. The general recognition of these rights must, however, be seen in the light of the wide-ranging possibilities for states to limit the substantive content of their human rights obligations. Apart from the possibility to make reservations³⁴ and to suspend human rights in a state of emergency,³⁵ most human rights³⁶ are subject to limitations. All human rights instruments contain limitation clauses,³⁷ the aim of which is to permit the restriction of an individual's rights, if this is necessary for the protection of certain clearly defined public policy interests or for the protection of the rights of other individuals.³⁸ Limitation clauses allow states to impose restrictions, if the unlimited interpretation of a right would lead to absurd

³² Cf. UN General Assembly, Universal Declaration of Human Rights, art. 2 (1) (UNGA Res. 217 A (III)) (10 December 1948); UN General Assembly, Declaration on the Right to Development, art. 1 (1) and art. 6 (UNGA Res. 41/128) (4 December 1986); cf. also International Conference on Human Rights, Proclamation of Teheran, para. 2 (13 May 1968), http://www.unhchr.ch/html/menu3/b/b_tehern.htm (visited on 8 February 2007); UN General Assembly, UN Declaration on Social Progress and Development para. 2 (b) (UNGA Res. 2542 (XXIV)) (11 December 1969); UN, Vienna Declaration and Programme of Action, para. I.5, also para. I.1 and para. I.10 (A/CONF.157/23) (25 June 1993); International Commission of Jurists, The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, paras. 1 et seq. (E/EC.12/2000/13) (2–6 June 1986); see for many E. Brems, *Human Rights: Universality and Diversity* (The Hague: Martinus Nijhoff, 2001); E. Riedel, *Die Universalität der Menschenrechte* at 139 et seq. (Berlin: Duncker & Humblot, 2003); C. Tomuschat, *Human Rights. Between Idealism and Realism* at 81 et seq. (Oxford: Oxford University Press, 2003).

³³ Cf. *infra* at Chapter II.B. General Implementing Obligations and Chapter II.C. Obligation to Prevent Human Rights Violations and to Provide Remedies.

³⁴ Those are however limited, cf. CCPR General Comment No. 24, which outlines a number of reservations that would be null and void, as they contradict the object and purpose of the covenant.

³⁵ Art. 4 of the CCPR; however, there are a number of non-derogable rights, cf. art. 4(1) of the CCPR, and CCPR General Comment No. 29, paras. 7 et seq.; for the CESCR see for example General Comment No. 15, para. 40; CESCR General Comment No. 14, para. 47.

³⁶ Exceptions are a few absolute human rights, such as the prohibition of torture (art. 7 of the CCPR) and the freedom of thoughts and consciousness (art. 18 of the CCPR).

³⁷ Arts. 4, 5, 12 (3), 14 (1), 18 (3), 19 (3), 21, 22 (2), and 25 of the CCPR; arts. 4 and 8 of the UDHR; arts. 29 and 30 of the UDHR.

³⁸ Cf. P. Alston/G. Quinn, *The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*, 9 *Human Rights Quarterly* 156–229 at 194 (1987).

results or if rights would clash with each other or other interests of the state.³⁹ For example, the freedom of association can be restricted to protect national security; freedom of speech is limited by the right to privacy and personal integrity of another person, the criterion for balancing the scope of both rights being the principle of proportionality.

Despite all the possibilities to limit human rights, there is, however, a set of minimum core obligations enshrined in each substantive human right that states must respect, ensure and protect under any circumstances.⁴⁰ This minimum standard, which cannot be excluded, derogated from or otherwise restricted, must be guaranteed irrespective of the flexibilities that are provided for in the human rights concept as such. In particular, the available resources that allow for flexible implementation of economic, social and cultural rights are no excuse for not granting those rights.⁴¹ According to Article 30 of the UDHR and Article 5 of both UN covenants, the threshold for limiting human rights is that *'the essence of the right must not be jeopardized; otherwise the covenant would be largely deprived of its raison d'être'*.⁴² This limit is also contained in Article 4 of the CESCR, which requires all restrictions to be *'compatible with the nature of the right'*,⁴³ a concept similar to the *'Wesensgehalt'* of each human right, as established in the German human rights theory.⁴⁴ Disregard of those minimum core obligations in any case leads to a violation of human rights.⁴⁵

³⁹ Cf. art. 5 of the CCPR and the CESCR; art. 30 of the UDHR; see also P. Alston/G. Quinn, *The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*, 9 *Human Rights Quarterly* 156–229 at 197 (1987).

⁴⁰ CESCR General Comment No. 3, para. 10; CCPR General Comment No. 31, para. 6; cf. also International Commission of Jurists, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, para. 9 (E/C.12/2000/13) (22–26 January 1997); International Commission of Jurists, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, para. 47 (E/EC.12/2000/13) (2–6 June 1986).

⁴¹ Art. 2 (1) of the CESCR; see also CESCR General Comment No. 3, paras. 10 et seq.

⁴² Cf. CCPR General Comment No. 27, para. 13; CCPR General Comment No. 31, para. 6; CESCR General Comment No. 3, para. 10; CCPR General Comment No. 31, para. 6; International Commission of Jurists, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, para. 56 (E/EC.12/2000/13) (2–6 June 1986).

⁴³ As to art. 4 of the CESCR see P. Alston/G. Quinn, *The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*, 9 *Human Rights Quarterly* 156–229 at 201 (1987); M. Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* at 281 et seq. (Antwerpen, Oxford, New York: Intersentia, 2003).

⁴⁴ Cf. M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, art. 5, para. 6 (Kehl, Strasbourg, Arlington: N.P. Engel, 2005 (2nd ed.)); for details see E. Klein, *Wesensgehalt von Menschenrechten. Eine Studie zur Judikatur des Europäischen Gerichtshofs für Menschenrechte*, in: K. Dicke/et al. (eds.), *Weltinnenrecht. Liber amicorum Jost Delbrück* 385–399 (Berlin: Duncker & Humblot, 2005) with further reference.

⁴⁵ International Commission of Jurists, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, para. 8 (E/C.12/2000/13) (22–26 January 1997).

To find out whether those substantive human rights standards are of relevance in a WTO context, it is necessary to determine to what extent the WTO and its Members are bound by international human rights law. Most WTO Members are bound to observe human rights by international treaty obligations and all WTO Members, except the European Communities, Hong-Kong and Chinese Taipei are UN Member States as well, and thus recognize the UDHR and are bound by the general obligation to promote respect for and protection of human rights.⁴⁶ Moreover, most WTO Members have ratified at least one of the two UN covenants,⁴⁷ or any of the specialized UN human rights treaties,⁴⁸ and are thus bound by those treaty obligations when acting in the WTO.

In order to be relevant for the remaining WTO Members and the WTO as an international organization, human rights must form part of general international law, *i.e.* they must constitute customary international law or general principles of law. Many scholars state that the rights enshrined in the UDHR, or at least parts of it, constitute customary international law without providing detailed evidence for this statement.⁴⁹ Examining whether and what human rights constitute customary international law or general principles of law in detail would exceed the scope of this article, particularly as it is necessary to determine the legal nature of human rights on a case by case basis for each right separately. Still, I will bring forward some arguments that suggest that at least the minimum core obligations and the principle of non-discrimination constitute part of customary international law.

⁴⁶ UN Charter, art. 1 (3) and art. 55; see A. Bleckmann, Zur originären Entstehung gewohnheitsrechtlicher Menschenrechtsnormen, in: E. Klein (ed.), Menschenrechtsschutz durch Gewohnheitsrecht 29–55 at 47 et seq. (Berlin: Berliner Wissenschafts-Verlag, 2003).

⁴⁷ The only exceptions of WTO Members not having signed or ratified any of the two covenants are Antigua and Barbuda, Brunei Darussalam, Cuba, Fiji, Malaysia, Myanmar, Oman, Qatar, Papua New Guinea, St. Kitts and Nevis, St. Lucia, Saudi Arabia, Singapore and United Arab Emirates.

⁴⁸ For example the Convention on the Rights of the Child (CRC) 1577 UNTS 3 (20 November 1989) is ratified by all WTO Members but the US, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1249 UNTS 13 (18 December 1979) is ratified by all WTO Members but Qatar, Tanzania and the US.

⁴⁹ This is supported by a number of authors, although many of them do not make the effort to examine the statement in detail, for example J. Carrillo Salcedo, Human Rights, Universal Declaration (1948), in: R. Bernhardt (ed.), Volume II Encyclopedia of Public International Law 922–926 at 925 et seq. (Amsterdam: 1995); A. Eide/et al. (eds.), The Universal Declaration of Human Rights: A Commentary at 6 et seq. (Oslo: Scandinavian University Press, 1992); H. Hannum, The Status of the Universal Declaration of Human Rights in National and International Law, 25 Georgia Journal of International and Comparative Law 287–339 at 289 (1995/6); P. Sands/P. Klein, Bowett's Law of International Institutions at 458 et seq. (London: Sweet & Maxwell, 2001 (5th ed.)) with further reference; American Law Institute, Restatement of the Law (Third), The Foreign Relations of the United States, para. 702; cf. also the references given in B. Simma/P. Alston, The Sources of Human Rights Law: Custom, *Ius Cogens* and General Principles, 12 Australian Yearbook of International Law 82–108 at 84 et seq. (1992).

For determining the customary international law nature of human rights, it is necessary to examine whether there is state practice and *opinio iuris*.⁵⁰ In practice, both elements are not always given equal weight when establishing whether a rule forms customary international law.⁵¹ Moreover, it is often difficult to distinguish between those two elements,⁵² as for example laws, judgments or unilateral declarations do not only constitute state practice, but also express a certain *opinio iuris*.⁵³

Relevant state practice that also expresses an *opinio iuris* would be national constitutions and laws implementing human rights, national court judgments, unilateral declarations of politicians and other state representatives,⁵⁴ or protests against human rights violations occurring in other countries,⁵⁵ acts of state practice that provide ample evidence that states consider themselves to be bound by substantive human rights principles. Moreover, the UDHR is accepted by UN Member States that are not parties to any UN human rights conventions as basis for determining human rights violations in the human rights monitoring procedures based on ECOSOC Resolutions 1503 and 1235.⁵⁶ Furthermore, following the approach of the International Court of Justice (ICJ) in the *Nicaragua case*, in which the ICJ accepted that soft law instruments such as the Friendly Relations Declaration or the CSCE Helsinki Declaration constitute an expression of *opinio iuris* that is sufficient to establish the prohibition of the use of force as customary international law,⁵⁷ a number of soft law instruments, including the UDHR, the 1993 Vienna Declaration⁵⁸ and the UN

⁵⁰ Cf. Art. 38 (1) (b) of the Statute of the International Court of Justice, 1946/47 YBUN 843 (26 June 1945); see also ICJ 20 February 1969 North Sea Continental Shelf Case, Federal Republic of Germany v. Denmark, Federal Republic of Germany v. Netherlands, 1969 ICJ Reports 3, paras. 71 et seq.

⁵¹ Cf. ICJ 27 June 1986, Military and Paramilitary Activities in and against Nicaragua, Nicaragua v. United States of America, Merits, 1986 ICJ Reports 14, paras. 183 et seq., in which the ICJ had to establish that the prohibition of the use of force is customary international law. The court basically ignored the state practice, and based its conclusions merely on the examination of the *opinio iuris*.

⁵² Cf. B. Simma/P. Alston, The Sources of Human Rights Law: Custom, *Ius Cogens* and General Principles, 12 Australian Yearbook of International Law 82–108 at 88 et seq. (1992)

⁵³ See also C. Tomuschat, Human Rights. Between Idealism and Realism at 34 (Oxford: Oxford University Press, 2003); A. Bleckmann, Zur originären Entstehung gewohnheitsrechtlicher Menschenrechtsnormen, in: E. Klein (ed.), Menschenrechtsschutz durch Gewohnheitsrecht 29–55 at 32 (Berlin: Berliner Wissenschafts-Verlag, 2003).

⁵⁴ Cf. for example ICJ 20 December 1974, Nuclear Tests Cases, Australia v. France, New Zealand v. France, 1974 ICJ Reports 252 et seq. and 456 et seq.

⁵⁵ For further reference cf. A. Bleckmann, Zur originären Entstehung gewohnheitsrechtlicher Menschenrechtsnormen, in: E. Klein (ed.), Menschenrechtsschutz durch Gewohnheitsrecht 29–55 at 40 et seq. (Berlin: Berliner Wissenschafts-Verlag, 2003).

⁵⁶ Cf. A. Bleckmann, Zur originären Entstehung gewohnheitsrechtlicher Menschenrechtsnormen, in: E. Klein (ed.), Menschenrechtsschutz durch Gewohnheitsrecht 29–55 at 42 (Berlin: Berliner Wissenschafts-Verlag, 2003); for details on those procedures see C. Tomuschat, Human Rights. Between Idealism and Realism at 117 et seq. (Oxford: Oxford University Press, 2003).

⁵⁷ Cf. ICJ 27 June 1986 Military and Paramilitary Activities in and against Nicaragua, Nicaragua v. United States of America, Merits, 1986 ICJ Reports 14, para. 188.

⁵⁸ UN, Vienna Declaration and Programme of Action (A/CONF.157/23) (25 June 1993).

Millennium Declaration,⁵⁹ that have been adopted by a large majority of states, must be accepted as expression of the *opinio iuris* of states regarding the recognition of substantive human rights.

An argument against the customary international law nature of human rights is that there are a lot of factual human rights violations that prevent the existence of consistent state practice. Interestingly enough, the customary international law nature of the prohibition of the use of force, as well as the rules of the law of war as codified in the 1949 Geneva Conventions, is never disputed, although there is as much 'contradictory' state practice through factual breaches, as in the field of human rights. A counter argument is that in virtually all cases of human rights violations there are either attempts of the responsible state to justify the behaviour, which shows that there is awareness for existing human rights obligations, or to conceal the behaviour, being aware of its illegality.⁶⁰ As long as there is such explanatory justification of the perpetrators, it means that there is *opinio iuris* that the actual behavior is a breach of existing human rights obligations.

One may argue that the WTO as a 'persistent objector'⁶¹ is not bound by international human rights law. However, the WTO does not reject the existence of human rights, or the applicability to its activities, but simply denies that human rights are relevant in the WTO context, or that its function is to protect human rights. Although this may be true for many substantive human rights, human rights may be touched by activities of the WTO in specific cases, which may at least indirectly affect the enjoyment of human rights. Thus, all substantive rights are potentially of relevance in the WTO context, if WTO activities impinge on them, for example the right to education or health being affected by GATS rules if poorer individuals cannot afford schools or health care any more due to the liberalization of educational services, liberalization thus leading to discriminatory treatment of parts of the population in relation to those rights and consequently constituting a human rights violation.⁶² Hence, in the case of actual conflicts between trade rules and human rights obligations, I suggest that the WTO accepts that it is bound to apply the relevant human rights rules and standards, something that can be deduced from the position of the WTO vis-à-vis international law in general and other non-economic concerns in particular.⁶³ Generally, the WTO

⁵⁹ UN General Assembly, United Nations Millennium Declaration (UNGA Res. 55/2) (18 September 2000).

⁶⁰ Cf. C. Tomuschat, Human Rights. Between Idealism and Realism at 34 (Oxford: Oxford University Press, 2003).

⁶¹ Cf. ICJ 18 December 1951 Fisheries Case, United Kingdom v. Norway, 1951 ICJ Reports 116 at 131.

⁶² Cf. art. 2 (2) of the CESCR; cf. also CESCR General Comment No. 13, para. 6 (b) and paras. 57 et seq.; CESCR General Comment No. 14, paras. 6 (b) and 35.

⁶³ Cf. regarding environmental protection Appellate Body Report, adopted on 20 May 1996, United States—Standards for Reformulated and Conventional Gasoline, WT/DS2 and WT/DS4 at 29 et seq., http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (visited on 8 February 2007);

considers itself to be bound by international law,⁶⁴ and the dispute settlement institutions apply other sources of international law as source of interpretation,⁶⁵ moreover recognizing the importance of, for instance, environmental protection in its case-law.

To sum up, I suggest that at least the principle of non-discrimination and the minimum core obligations of all human rights, which cannot be derogated from, suspended, or otherwise limited constitute part of customary international law that must be observed by all WTO Members, irrespective of whether they are parties to any human rights treaties, and by the WTO as an international organization.⁶⁶ Although cases of conflicts between WTO activities and human rights obligations have so far been rare, they are conceivable. In such instances, the exact scope of the minimum core obligations that constitute customary international law must be determined on a case-by-case basis regarding each substantive human right.

2. GENERAL IMPLEMENTING OBLIGATIONS

Under general international law, there are hardly any rules relating to the implementation of international legal obligations, confirmed by the fact that the rules on treaty implementation contained in the Vienna Convention on the Law of Treaties (VCLT) are fairly sparse. The only explicit instruction is that treaties must be performed and interpreted ‘in good faith’.⁶⁷ The obligations in international treaties are mostly formulated in an open manner and leave a lot of discretion to the states to determine how to best give effect to the obligations in the national legal systems, even less guidance being given for the implementation of customary international law. Consequently it is necessary to resort to the principles of treaty implementation for determining how those rules must be given effect.

International human rights treaty law contains some further specifications regarding the implementation of substantive human rights, the most important provision at the universal level being Article 2 of both UN covenants. Article 2 (2) CCPR states that each state party undertakes to “*respect and ensure*” the rights

Appellate Body Report, adopted on 6 November 1998, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58 at para. 185, http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (visited on 8 February 2007).

⁶⁴ Appellate Body Report, adopted on 20 May 1996, United States—Standards for Reformulated and Conventional Gasoline, WT/DS2 and WT/DS4 at 17, http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (visited on 8 February 2007).

⁶⁵ For example Appellate Body Report, adopted on 6 November 1998, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58 paras. 130 et seq., http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (visited on 8 February 2007).

⁶⁶ Cf. ICJ 20 December 1980, Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 ICJ Reports 73 at 89 et seq.; H. G. Schermers/N. M. Blokker, *International Institutional Law* § 1339 and § 1579 (The Hague, London, Boston, 2004 (4th ed.)).

⁶⁷ Cf. arts. 26 and 31 of the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.

recognized in the covenant; Article 2 (1) of the CESCRC is formulated in a manner which seems to impose a much weaker obligation, by stating that each state party undertakes to “*take steps [...] with a view to achieving progressively the full realization*” of the rights recognized in the covenant. Although the different wording of these provisions suggests that the general implementing obligations of civil and political rights and economic, social and cultural rights differ, this traditional view that was largely based on the political conflicts during the Cold War,⁶⁸ has been overcome today. Human rights theory, case-law, the General Comments adopted by the Human Rights Committee and the Committee on Economic, Social and Cultural Rights⁶⁹ as well as the human rights mainstreaming activities in the UN framework do not differentiate between the two groups of rights anymore,⁷⁰ thus it is generally recognized that first and second generation rights essentially comprise the same implementing obligations, and that only the level of obligation varies and must be determined for each human right separately.

Accordingly, all human rights impose three types of obligations, namely the obligation to respect, to fulfil/ensure and to protect. A clear differentiation between the different types of obligations is difficult, as all duties are interdependent and

⁶⁸ Cf. E. Riedel, Article 55 (c), in: B. Simma et al. (eds.), *The Charter of the United Nations: A Commentary* 917–941 at 926 et seq. (Oxford, New York: Oxford University Press, 2002); M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary at XXII et seq.* (Kehl, Strasbourg, Arlington: N.P. Engel, 2005 (2nd ed.)); C. Tomuschat, *Human Rights. Between Idealism and Realism* at 31 et seq. (Oxford: Oxford University Press, 2003); M. Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* at 116 et seq. (Antwerpen, Oxford, New York: Intersentia, 2003); see also G. I. Tunkin, *Theory of International Law* at 80 et seq. (Cambridge, Massachusetts: Harvard University Press, 1974).

⁶⁹ For the legal nature and purpose of General Comments see UN, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* at 9 et seq. and at 124 et seq. (HRI/GEN/1/Rev.7) (12 May 2004); see also C. Tomuschat, *Human Rights. Between Idealism and Realism* at 156 et seq. (Oxford: Oxford University Press, 2003); M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary art. 40, paras. 61 et seq.* (Kehl, Strasbourg, Arlington: N.P. Engel, 2005 (2nd ed.)).

⁷⁰ Cf. only International Commission of Jurists, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, paras. 6 and 7 (E/C.12/2000/13) (22–26 January 1997); CESCRC General Comment No. 3, para. 1; CCPR General Comment No. 31, in particular para. 3, 6 and 8; see also M. Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* at 134 et seq. and 157 et seq. (Antwerpen, Oxford, New York: Intersentia, 2003); B. Simma, *Soziale Grundrechte und das Völkerrecht*, in: P. Badura/R. Scholz (eds.), *Wege und Verfahren des Verfassungslebens* 83–94 at 92 et seq. (München: Beck, 1993); M. Nowak, *Civil and Political Rights*, in: J. Symonides (ed.), *Human Rights: Concept and Standards* 69–107 at 72 et seq. (Aldershot, Burlington: Ashgate, UNESCO, 2000).; A. Eide, *Economic and Social Rights*, in: J. Symonides (ed.), *Human Rights: Concept and Standards* 109–174 at 125 et seq. (Aldershot, Burlington: Ashgate, UNESCO, 2000); C. Tomuschat, *Human Rights. Between Idealism and Realism* at 37 et seq. (Oxford: Oxford University Press, 2003).

closely related.⁷¹ The obligation to respect means that states must refrain from interfering with the enjoyment of human rights, unless there are specific exceptions provided for in the convention.⁷² The obligation to ensure or to fulfil⁷³ is a positive obligation of the state to give effect to the rights established in the conventions by all appropriate means,⁷⁴ requiring states to take action to achieve the full realization of rights through the adoption of legislative, administrative, budgetary, judicial or other measures. The obligation to protect is systematically an aspect of the obligation to ensure,⁷⁵ and entails the positive obligation of the state to prevent that human rights of individuals are violated by actions of third parties, *i.e.* other individuals or non-state actors,⁷⁶ an obligation requiring positive measures of the state aimed at encouraging individuals and organizations to respect the rights of others.

⁷¹ M. Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* at 170 et seq. (Antwerpen, Oxford, New York: Intersentia, 2003); E. Klein, *Wesensgehalt von Menschenrechten. Eine Studie zur Judikatur des Europäischen Gerichtshofs für Menschenrechte*, in: K. Dicke et al. (eds.), *Weltinnenrecht. Liber amicorum Jost Delbrück* 385–399 at 300 (Berlin: Duncker & Humblot, 2005).

⁷² Cf. CCPR General Comment No. 31, para. 6; M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, art. 2, para. 18 (Kehl, Strasbourg, Arlington: N.P. Engel, 2005 (2nd ed.)); CESCR General Comment No. 14, para. 34; International Commission of Jurists, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, para. 6 (E/C.12/2000/13) (22–26 January 1997); OHCHR (ed.), *Economic, Social and Cultural Rights. Handbook for National Human Rights Institutions* at 15 et seq. (New York, Geneva: United Nations, 2005).

⁷³ Both terms are used: *ensure* stems from art. 2 of the CCPR, *fulfill* is applied in the CESCR General Comments; see also M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, art. 2, paras. 19 et seq. (Kehl, Strasbourg, Arlington: N.P. Engel, 2005 (2nd ed.)); for the differing terminology used in human rights treaties see also M. Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* at 158 et seq. (Antwerpen, Oxford, New York: Intersentia, 2003).

⁷⁴ Cf. for example International Commission of Jurists, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, para. 6 (E/C.12/2000/13) (22–26 January 1997); CCPR General Comment No. 31, para. 13; CESCR General Comment No. 15, para. 25; M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, art. 2, paras. 19 et seq. (Kehl, Strasbourg, Arlington: N.P. Engel, 2005 (2nd ed.)); E. Klein, *The Duty to Protect and to Ensure Human Rights Under the International Covenant on Civil and Political Rights*, in: E. Klein (ed.), *The Duty to Protect and to Ensure Human Rights* 295–318 at 298 et seq. (Berlin: Berliner Wissenschafts-Verlag, 2000); A. Eide, *Economic, Social and Cultural Rights as Human Rights*, in: A. Eide/C. Krause/A. Rosas (eds.), *Economic, Social, and Cultural Rights: A Textbook* 21–40 at 38 (Dordrecht, Boston, Norwell: Martinus Nijhoff, 1995); OHCHR (ed.), *Economic, Social and Cultural Rights. Handbook for National Human Rights Institutions* at 18 et seq. (New York, Geneva: United Nations, 2005).

⁷⁵ E. Klein, *The Duty to Protect and to Ensure Human Rights Under the International Covenant on Civil and Political Rights*, in: E. Klein (ed.), *The Duty to Protect and to Ensure Human Rights* 295–318 at 300 et seq. (Berlin: Berliner Wissenschafts-Verlag, 2000); M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, art. 2, para. 20. (Kehl, Strasbourg, Arlington: N.P. Engel, 2005 (2nd ed.)).

⁷⁶ The Maastricht Guidelines, paras. 6, 18 and 19; see also M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, art. 2, para. 20 (Kehl, Strasbourg, Arlington: N.P. Engel, 2005 (2nd ed.)); OHCHR (ed.), *Economic, Social and Cultural Rights. Handbook for National Human*

The provisions regulating general implementing obligations are accessory to the specifically mentioned substantive human rights, which means that the obligations exist only relating to each of the substantive rights, and a violation of those provisions cannot take place, but in conjunction with a substantive right.⁷⁷ As they constitute general principles of implementing human rights obligations, they are also applicable in the context of human rights obligations based on customary international law.

It's important that human rights obligations govern the performance of all state functions meaning that they must not only be implemented at a national level, when states exercise their legislative, executive and judicial functions, but also when states are acting in the international arena.⁷⁸ Therefore, states must consider their human rights obligations when entering international agreements and ensure that treaties they conclude do not conflict with their human rights obligations. Furthermore, when states act in an international organization, they must ensure that policies and projects of the organization do not affect the implementation of human rights obligations in the member states. In recent General Comments and state parties reporting procedures performed by the human rights monitoring bodies, these obligations are increasingly stressed.⁷⁹

The international dimension of the obligation to protect is of special importance in the trade and human rights debate. According to Paragraph 19 of the Maastricht Guidelines,⁸⁰ the state's obligation to protect extends '*to their participation in international organizations, where they act collectively*', i.e. in the organs of the organization. This is of particular relevance for rules and policies adopted in the framework of the WTO that may result in the violation of human rights. *In concreto*, it entails the obligation of states, when acting in the WTO, to consider their human rights obligations and to use their influence to ensure that the activities of the organization do not hinder the fulfilment of human rights.⁸¹

Rights Institutions at 17 et seq. (New York, Geneva: United Nations, 2005).

⁷⁷ M. Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, art. 2, paras. 15 et seq. (Kehl, Strasbourg, Arlington: N.P. Engel, 2005 (2nd ed.)), cf., however, para. 17 that shows that a violation of only art. 2 is conceivable in the case where the violation of the substantive rights is denied, for example in the case of discrimination, or if there is no effective remedy.

⁷⁸ Cf. CCPR General Comment No. 31, para. 4; CESCR General Comment No. 2, para. 9.

⁷⁹ Cf. CESCR General Comment No. 3, paras. 14 et seq.; CESCR General Comment No. 12, paras. 36 et seq.; CESCR General Comment No. 14, para. 38 et seq.; CESCR General Comment No. 15, paras. 30 et seq.; see also the survey on concluding remarks provided for in M. Fabre/3D, The Committee on Economic, Social and Cultural Rights. References to Trade-Related Issues. A Compilation (Geneva: 3D, 2006).

⁸⁰ International Commission of Jurists, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, (E/C.12/2000/13) (22–26 January 1997).

⁸¹ See also for example CESCR General Comment No. 14, paras. 38 et seq.; CESCR General Comment No. 15, para. 36; OHCHR, Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies, HR/PUB/06/12 (2006), <http://www.ohchr.org/english/issues/poverty/guidelines.htm> (visited on 8 February 2007); see also M. Sepúlveda, The Nature of the Obligations

The obligation to protect is relevant for all areas of WTO activities. At the negotiating stage, states must consider how their trade obligations might interfere with their human rights obligations an example being the negotiation of GATS commitments, for instance in the area of water supply.⁸² At the implementing stage, states must ensure that they implement their trade obligations in a way that avoids negative impacts on the human rights situation, for example, arbitrary discriminatory effects on the population. Examples for implementing measures are price regulations for food,⁸³ or ensuring the availability and accessibility of medicine and health care at a reasonable price.⁸⁴ Moreover, human rights obligations may play a role in dispute settlement proceedings as a source of interpretation if trade rules conflict with human rights obligations.⁸⁵

The international dimension of the obligation to respect, ensure and protect is also of relevance for the WTO as an international organization. Within its powers, it must ensure that its activities do not interfere with the enjoyment of human rights in its Members. This will be particularly relevant when it comes to dispute settlement, in which case the WTO must ensure that the enforcement of trade rules does not impede Members from fulfilling their human rights obligations.⁸⁶ Moreover, the WTO will have to take preventive action to avoid such conflicts in the first place.

There is also a duty to cooperate internationally⁸⁷ to implement human rights, an obligation that requires the furnishing of economic and technical assistance in particular⁸⁸ and extends to the cooperation of states in the WTO to ensure that human rights are adequately integrated within WTO activities. In addition, the obligation to cooperate internationally is of relevance for the WTO as an international organization that must cooperate with other institutions to achieve the integration of human rights into its activities, in particular in the area of providing technical assistance to developing countries.

under the International Covenant on Economic, Social and Cultural Rights at 370 et seq. (Antwerpen, Oxford, New York: Intersentia, 2003); C. Grabenwarter, Europäische Menschenrechtskonvention at 103 et seq. (München, Wien: Beck, Manz, 2005 (2nd ed.)).

⁸² Cf. CESCR General Comment No. 15, para. 14; regarding health services see CESCR General Comment No. 14, para. 19.

⁸³ Cf. CESCR General Comment No. 12, para. 13.

⁸⁴ Cf. CESCR General Comment No. 14, para. 12.

⁸⁵ Cf. *infra* at Chapter III.C. Human Rights in Dispute Settlement.

⁸⁶ Cf. International Commission of Jurists, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 19, (E/C.12/2000/13) (22–26 January 1997); International Commission of Jurists, The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, paras. 92 et seq. (E/EC.12/2000/13) (2–6 June 1986).

⁸⁷ Cf. art. 56 of the UN Charter and art. 2 (1) and art. 23 of the CESCR; CESCR General Comment No. 15, para. 60; for details cf. M. Sepúlveda, The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights at 370 et seq. (Antwerpen, Oxford, New York: Intersentia, 2003).

⁸⁸ CESCR General Comment No. 3, para. 13; CESCR General Comment No. 2.

3. OBLIGATION TO PREVENT HUMAN RIGHTS VIOLATIONS AND TO PROVIDE REMEDIES

The CCPR as well as the CESCRC both require states parties to *give effect* to the rights recognized within the covenants.⁸⁹ Giving effect to human rights obligations implies two elements, enshrining an obligation to prevent interferences with human rights in the first place, but also obliging to provide for effective remedies for the individuals concerned in the case where human rights violations have occurred.⁹⁰ Preventive measures attempt to identify and address the underlying causes leading to the violations of human rights and thus to promote the enjoyment of human rights,⁹¹ whereas reactive measures only come into play once the human rights violation has already occurred, both positive obligations that require states to take action.

The duty to prevent is expressly contained in some more recent specialized human rights agreements,⁹² whereas the general human rights instruments such as the two UN covenants and regional human rights instruments⁹³ do not mention an obligation to prevent. Nevertheless, there is agreement among scholars that an obligation to prevent human rights violations is ‘inherent in all human rights instruments’.⁹⁴ An inherent obligation to prevent human rights violations is also confirmed by case-law. In the *Velazquez Rodriguez* case, the Inter-American Court of Human Rights (IACtHR) stated that ‘a state has a legal duty to take reasonable steps to prevent human rights violations [...]’.⁹⁵ Similar jurisprudence can be found in the case-law of the European Court of Human Rights (ECtHR), which started in the mid-eighties to

⁸⁹ Art. 2(2) of the CCPR, art. 2(1) of the CESCRC.

⁹⁰ Cf. for example CCPR General Comment No. 20, para. 8.

⁹¹ U. Kriebaum, *Prevention of Human Rights Violations*, 2 *Austrian Review of International and European Law* 155–190 at 157 (1997).

⁹² Art. 2(a) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 10 December 1984, 1465 UNTS 85; art. 3 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 21 December 1965, 660 UNTS 195; arts. 19(2), 23(4), 24(2)(e) and (f), 33, 34 and 35 of the CRC.

⁹³ Cf. art. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by the Protocol No. 11, 11 May 1994, 33 ILM 943 (1994) (ETS No. 155), as from the date of its entry into force on 1 November 1998 (ECHR), 4 November 1950, 213 UNTS 221; art. 1 of the American Convention on Human Rights (ACHR), 21 November 1969, 1144 UNTS 123; art. 2 of the CCPR, art. 2 of the CESCRC; cf., however, art. 11 (2) (c) of the CESCRC that describes as an obligation enshrined in the right to health the obligation to prevent diseases.

⁹⁴ O. Schachter, *The Obligation to Implement the Covenant in Domestic Law*, in: L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* 311–331 at 319 (New York: Columbia University Press, 1981); M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, art. 2, para. 57 (Kehl, Strasbourg, Arlington: N.P. Engel, 2005 (2nd ed.)); T.C. van Boven, *Prevention of Human Rights Violations*, in: K.E. Mahoney/P. Mahoney (eds.), *Human Rights in the Twenty-First Century: A Global Challenge* 937–949 at 944 et seq. (Dordrecht, Boston, London: Martinus Nijhoff, 1993).

⁹⁵ Inter-American Court of Human Rights 29 July 1988 *Velazquez Rodriguez Case*, Judgment, *Velazques Rodriguez v. Honduras*, IACtHR Series C No. 4, paras. 174 et seq.

develop positive human rights obligations of states that aim at the prevention of human rights violations.⁹⁶ The General Comments to both UN covenants also contain a number of recommendations that suggest that there is an obligation to adopt preventive measures.⁹⁷

The obligation to prevent exists regarding all general implementing obligations, although it is mainly mentioned in connection with the obligation to protect. Accordingly, states must adopt positive measures to prevent interference with rights of individuals through state organs or private parties,⁹⁸ and must establish remedies against violations to create a deterring effect.⁹⁹ But also the obligations to ensure and to respect require states not only to provide remedies in case of a breach of that obligation but also to prevent human rights violations.

Whereas a duty to prevent is undisputed, human rights violations occur in spite of all preventive measures, as preventive measures can never provide an absolute guarantee that the given event does not happen. The commentary to Article 14(3) of the ILC Draft Articles on State Responsibility states that obligations to prevent are usually perceived as best efforts obligations. Accordingly, a state must take reasonable or necessary measures to prevent an event, but is not required to guarantee that the event does not occur.¹⁰⁰

A similar approach is applied in human rights case-law. In the *Velazquez Rodriguez* case, the IACtHR stated that the prevention of human rights violations requires due

⁹⁶ For a survey see B. Conforti, *Reflections on State Responsibility for the Breach of Positive Obligations: The Case-Law of the European Court of Human Rights*, XIII Italian Yearbook of International Law 3–10 (2003).

⁹⁷ For example, to prevent violations of the right to life, states must adopt positive measures to prevent the danger of war, arbitrary killings by their own security forces, the deprivation of life by criminal acts and the disappearance of individuals, see CCPR General Comment No. 6, paras. 2 et seq.; CCPR General Comment No. 14, paras. 2 et seq.; regarding the prohibition of torture, states must adopt measures to prevent torture and cruel, inhumane and degrading treatment, for example through training programs, dissemination of information and investigating relevant rules and practices to which arrested persons are subjected, see CCPR General Comment No. 20, paras. 8 et seq.; regarding the prevention of interference with economic, social and cultural rights see CESCR General Comment No. 7, para. 9; CESCR General Comment No. 15, paras. 23 et seq.; CESCR General Comment No. 14, para. 35.

⁹⁸ Cf. H. J. Steiner/P. Alston, *International Human Rights in Context* at 183 (Oxford, New York: 2000); B. Conforti, *Reflections on State Responsibility for the Breach of Positive Obligations: The Case-Law of the European Court of Human Rights*, XIII Italian Yearbook of International Law 3–10 at 3 (2003); see also Inter-American Court of Human Rights 29 July 1988, *Velazquez Rodriguez Case*, Judgment, *Velazques Rodriguez v. Honduras*, IACtHR Series C No. 4, para. 166; CESCR General Comment No. 15, para. 24; CESCR General Comment No. 7, para. 9.

⁹⁹ Cf. ECtHR 26 March 1985, *X and Y v. the Netherlands*, 8978/80, <http://www.echr.coe.int/ECHR/> (visited on 8 February 2007), paras. 25 et seq.

¹⁰⁰ J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries*, art. 14, para. 14. (Cambridge, New York: Cambridge University Press, 2002).

diligence of the state,¹⁰¹ and only in the case of a lack of due diligence responsibility may arise. It follows that states have a legal duty to take *reasonable* steps to prevent violations.¹⁰² Likewise, the ECtHR has established that preventive measures must meet a due diligence standard. The test to be met for preventive measures is two-pronged: The event that is intended to be prevented must be foreseeable and the preventive measures adopted must be reasonable.¹⁰³ Hence, a state is responsible, if it knew or ought to have known about the risk, and if it did not take reasonable steps to prevent the event.¹⁰⁴ When determining whether a state has exercised due diligence, the proportionality test must be applied.¹⁰⁵

The obligation to prevent human rights violations is of particular relevance for improving the human rights accountability of the WTO. It is not only enshrined in human rights treaty law and thus binding for most WTO Members, but, being '*inherent in all human rights obligations*', the obligation to prevent is also relevant for the implementation of human rights obligations based on customary international law. Although direct human rights violations through activities of the WTO have not yet occurred, many possible indirect effects of trade rules on human rights have been pointed out by the UN reports mentioned above.¹⁰⁶ As human rights violations are at least conceivable, and thus foreseeable, the duty to prevent requires the adoption of reasonable measures.

The duty to prevent is primarily relevant for WTO Members when acting in the WTO. It requires Members to take appropriate measures, which include the assessment of the human rights impact of trade rules in the negotiating and implementing stage, to use flexibilities enshrined in the WTO agreements to integrate human rights when implementing WTO obligations and to take other appropriate means to improve the awareness for human rights problems in the WTO. However, the obligation to prevent is also of relevance for the WTO as an international organization, which must adopt,

¹⁰¹ Inter-American Court of Human Rights 29 July 1988, Velazquez Rodriguez Case, Judgment, Velazques Rodriguez v. Honduras, IACtHR Series C No. 4, para. 172.

¹⁰² Inter-American Court of Human Rights, 29 July 1988, Velazquez Rodriguez Case, Judgment, Velazques Rodriguez v. Honduras, IACtHR Series C No. 4, para. 174.

¹⁰³ Cf. for example ECtHR 28 October 1998, Osman v. the United Kingdom, Judgment, 23452/94, <http://www.echr.coe.int/ECHR/> (visited on 8 February 2007), para. 116; see also B. Conforti, Reflections on State Responsibility for the Breach of Positive Obligations: The Case-Law of the European Court of Human Rights, XIII Italian Yearbook of International Law 3–10 at 4 et seq. with further reference (2003).

¹⁰⁴ Cf. B. Conforti, Reflections on State Responsibility for the Breach of Positive Obligations: The Case-Law of the European Court of Human Rights, XIII Italian Yearbook of International Law 3–10 at 6 (2003).

¹⁰⁵ Cf. C. Grabenwarter, Europäische Menschenrechtskonvention at 122 (München, Wien: Beck, Manz, 2005 (2nd ed.)); cf. also C. Dröge, Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention at 352 et seq. (Berlin, New York: Springer, 2003).

¹⁰⁶ Cf. the reports cited *supra* in note 1 et seq.

within its powers, reasonable measures to prevent the occurrence of human rights violations. The failure to take preventive measures would result in responsibility.¹⁰⁷

In addition to preventive measures, the effective implementation of human rights obligations also requires reactive measures in the form of remedies in the case where a human rights violation occurs despite of the adoption of reasonable preventive measures, something explicitly stated for civil and political rights in Article 2(3) of the CCPR. Regarding the rights guaranteed in the CESCRC, the provision of remedies is not expressly provided for, but can be deduced from Article 2(1) of the CESCRC, which contains an obligation to adopt ‘*appropriate means*’ to realize the rights enshrined in the CESCRC.¹⁰⁸

Remedies must be provided for individuals who are directly affected by the violation of human rights.¹⁰⁹ A requirement for judicial remedies is that the human rights guaranteed in the covenants confer a subjective right to individuals. Regarding civil and political rights, it has always been clear that all rights contained in Part III of the CCPR confer subjective rights to individuals and have direct effect; hence there is an obligation to provide remedies in case of violations. However, it had been doubtful whether economic, social and cultural rights are justiciable at all for a long time, as they had been considered to be more programmatic in nature rather than conferring direct rights to individuals. Today, it is acknowledged that at least some aspects of the rights contained in the CESCRC have direct effect and are thus justiciable,¹¹⁰ something that is particularly true for minimum core obligations or for the principle of non-discrimination.¹¹¹

The obligation to provide a remedy is of particular relevance for WTO Members. This is the case not only for WTO Members, who are parties to human rights treaties, but also for all other WTO Members, as the right to an effective remedy against violations of human rights, if the individual is directly affected, constitutes a general principle of international human rights law.¹¹² If national laws implementing WTO obligations impede the enjoyment of human rights of the citizens of a state, the state must provide an effective remedy accessible to individuals directly affected by that

¹⁰⁷ Cf. for example ECtHR 30 November 2004, *Öneryildiz v. Turkey*, 48939/99, <http://www.echr.coe.int/ECHR/> (visited on 8 February 2007), para. 135, which stated a breach of positive obligations, as the state did not do everything within its power to protect the applicants interests, but rather showed gross negligence.

¹⁰⁸ CESCRC General Comment No. 3, para. 5.

¹⁰⁹ Cf. art. 2 (3) (a) of the CCPR; art. 34 of the ECHR; art. 44 of the ACHR.

¹¹⁰ Cf. CESCRC General Comment No. 3, para. 5; CESCRC General Comment No. 9, para. 10.

¹¹¹ This is justiciable in any case due to art. 26 of the CCPR, which grants equality before the law and applies to all national legislative measures, thus also to measures implementing economic, social and cultural rights, cf. M. Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary art. 26, paras. 12 et seq. (Kehl, Strasbourg, Arlington: N.P. Engel, 2005 (2nd ed.)).

¹¹² Cf. D. Shelton, *Remedies in International Human Rights Law* at 113 et seq. (Oxford: Oxford University Press, 2005).

law. For example, if an individual does not have access to clean water any more, because a state liberalized water supply in accordance with its obligations under the GATS and water has become too expensive, the violation of human rights is a direct effect of the implementing legislation of the state who did not take necessary flanking measures to ensure access to affordable water for everyone. The violation cannot, however, be attributed to the WTO, as the WTO obligation only says that water services are to be liberalized, and that, as a consequence, foreign suppliers may enter the market on a non-discriminatory basis.

Thus, the obligation to provide remedies accessible for individuals will hardly be relevant for the WTO as an international organization, as individuals are not directly concerned by WTO activities, but rather by the implementing rules of the WTO Members. WTO obligations are neither directly applicable to individuals, nor do they have direct effect on individuals, but are in fact directed to WTO Members, who are bound to implement them in their national legislation. As opposed to UN Security Council resolutions or EC regulations, which do not leave any margin of discretion to the Members when implementing those obligations, in the case of WTO rules, the obligations generally leave a lot of flexibility to the Members, including flexibilities to consider non-economic concerns, such as human rights.¹¹³

B. MEASURES TO IMPLEMENT HUMAN RIGHTS OBLIGATIONS IN THE WTO

1. IMPLEMENTING MEASURES PROVIDED FOR IN INTERNATIONAL HUMAN RIGHTS LAW

An international human rights law characteristic is that states have a large *margin of discretion* to implement their human rights obligations,¹¹⁴ for example, the UN covenants require states ‘to give effect’¹¹⁵ and ‘to achieve the realization of’¹¹⁶ the rights recognized in the covenants. Hence, the only explicit requirement is that states give effect to human rights obligations, namely that the measures contribute to the realization of human rights and facilitate that human rights are respected, ensured and protected, that human rights violations are prevented and that effective remedies are provided in cases of human rights violations. Likewise, in state reports and

¹¹³ Cf. G. Marceau, WTO Dispute Settlement and Human Rights, 13 *European Journal of International Law* 753–814 at 789 et seq. (2002).

¹¹⁴ Cf. International Commission of Jurists, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 8 (E/C.12/2000/13) (22–26 January 1997); International Commission of Jurists, The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, para. 71 (E/EC.12/2000/13) (2–6 June 1986).

¹¹⁵ Art. 2 (2) of the CCPR.

¹¹⁶ Art. 2 (1) of the CESCR.

concluding remarks, the committees scarcely focus on specific measures, but rather on the effectiveness of the measures taken.¹¹⁷

Regarding the type of implementing measures adopted, states are free to choose the measures they consider appropriate under the circumstances.¹¹⁸ Although legal measures are mentioned in Articles 2 of both covenants, they are not necessarily required, and all other administrative, political, financial, or other measures may be taken to implement human rights, as long as they are effective to achieve the realization of human rights. Thus, appropriate measures include the adoption of legislation, administrative practices, human rights impact assessment procedures, monitoring of implementation, the creation of effective remedies to provide redress to persons violated in their human rights, information campaigns and training programs for public officials and international cooperation.¹¹⁹ Important objectives of those implementing measures are not only to create a climate conducive to the enjoyment of human rights, but also to raise awareness for human rights, not only with state officials and staff of international organizations, but also with the civil society.¹²⁰

The principles on adopting implementing measures are also applicable for human rights obligations based on customary international law. For the WTO and human rights debate this means that the WTO Members as well as the WTO itself are free to choose the measures they adopt to implement their human rights obligations, the only important thing being that the measures are appropriate under the circumstances to give effect to the relevant human rights obligations. The responsibility to adopt implementing measures to mainstream human rights into the WTO and to improve the human rights accountability of the WTO is shared between the WTO and its Members.

The main responsibility to integrate human rights in the WTO bear the Members who are represented in WTO councils and committees and have the power to adopt binding decisions, in which context the Members must consider their own human rights obligations that must not be impeded by the decisions adopted in the WTO, an institution that has only few powers on which to act. The WTO agreements only confer

¹¹⁷ M. Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* at 337 et seq. (Antwerpen, Oxford, New York: Intersentia, 2003).

¹¹⁸ Cf. CESCR General Comment No. 3, para. 4; CESCR General Comment No. 9, paras. 1 and 2; see also P. Alston and G. Quinn, *The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*, 9 *Human Rights Quarterly* 156–229 at 166 et seq. (1987).

¹¹⁹ Cf. for many A. Seibert-Fohr, *Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to its Article 2 Para. 2, 5 Max Planck Yearbook of United Nations Law* 399–472 at 453 et seq. (2001); M. Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* at 339 et seq. (Antwerpen, Oxford, New York: Intersentia, 2003); M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, art. 2, paras. 56 et seq. (Kehl, Strasbourg, Arlington: N.P. Engel, 2005 (2nd ed.)).

¹²⁰ Cf. CCPR General Comment No. 31, para. 7.

few express powers to the Secretariat,¹²¹ although it does have considerable factual influence on the performance of the WTO, for instance through the preparation of negotiations and meetings of the various councils and committees dealing with the implementation of the WTO agreements, assisting the Panels in dealing with the pending disputes, providing legal advice for Members upon their request, the provision of training courses to all interested Members, or informal consultations with delegations. Moreover, the Panels and the Appellate Body have considerable powers in the adjudication of WTO disputes, and can *de facto* take binding decisions, which the Dispute Settlement Body hardly can reverse due to the principle of reverse consensus.

Since conflicts between trade rules and human rights obligations are conceivable, the WTO within its powers and its Members must take appropriate preventive measures to avoid that the implementation of human rights obligations through the Members is hampered by WTO activities and obligations. Such preventive measures must meet the due diligence standard, namely they must be reasonable to prevent foreseeable events.¹²² The failure to take such preventive measures at all would constitute a breach of the human rights obligations of the WTO and its Members.

2. HUMAN RIGHTS IMPACT ASSESSMENT

A measure to avoid that trade regulations have negative impacts on the human rights situation in the Members is to conduct a human rights impact assessment of WTO decisions and rules.¹²³ The impact assessments of their policies on specific side effects have a longstanding practice in other international organizations. The EU has pursued a policy of mainstreaming gender, environmental or sustainability aspects in its activities for quite some time.¹²⁴ The UN has started to examine the human rights impacts of the activities of its special organizations during the nineties.¹²⁵ Moreover, World Bank and IMF, as well as organizations dealing with development projects, have established a large number of procedures to assess the impact of such projects on

¹²¹ For example to submit proposals for composing the Panels, which may be refused by the parties to the dispute only in exceptional circumstances (art. 8.6 of the Dispute Settlement Understanding (DSU), 15 April 1994, 33 ILM 1226 (1994)); to prepare reports on the state reports submitted to the Trade Policy Review Body (art. C (v) (b) of the Trade Policy Review Mechanism (TPRM), 14 April 1994, http://www.wto.org/english/docs_e/legal_e/legal_e.htm (visited on 8 February 2007)).

¹²² Cf. *supra* at Chapter II.C. Obligation to Prevent Human Rights Violations and to Provide Remedies.

¹²³ Cf. UN, Economic, Social and Cultural Rights: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health. Report of the Special Rapporteur Paul Hunt. Addendum: Mission to the World Trade Organization, para. 53 (E/EC.4/2004/49/Add.1) (2004).

¹²⁴ Cf. O. de Schutter, Mainstreaming Human Rights in the European Union, in: P. Alston/O. de Schutter (eds.), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* 37–72 at 51 et seq. (Oxford, Portland: Hart Publishing, 2005).

¹²⁵ Cf. the references *supra* in note 12.

sustainability, environment, or the social situation in the countries concerned.¹²⁶ The experience gained and the techniques applied may be used to establish a comparable impact assessment procedure for the WTO.

Human rights impact assessments of trade rules are a feasible measure to implement the obligation to prevent negative effects of WTO rules and policies on the human rights situation in its Members.¹²⁷ The purpose of that procedure is to explore and understand linkages between trade and human rights generally, and to raise awareness for possible impacts of trade rules or prospective trade reforms on human rights. Human rights impact assessment can be conducted *ex ante* at the negotiating or renegotiating stage of trade agreements, but also *ex post* at the implementing stage. Whereas *ex ante* assessments during the negotiating stage help to identify possible negative effects of trade rules before a rule comes into existence, *ex post* assessment serves to determine what negative effects occur during the implementation of trade rules. The results will assist WTO Members in taking decisions that will avoid the trade rules that impede the fulfilment of their human rights obligations or in considering necessary flanking measures in order to counteract such effects.¹²⁸

A complex topic is the methodology of conducting human rights impact assessment, the necessary steps of which include mapping the framework, namely identifying the legal and policy framework of trade and human rights, establishing the human rights indicators that will be the basis for conducting the impact assessment and choosing the techniques of conducting the assessment.¹²⁹ The human rights obligations of the WTO and its Members may serve as standard for evaluating the human rights impact of trade rules. Human rights indicators must be established for all substantive human rights separately.¹³⁰ For the right to health this could be the availability, accessibility and quality of health goods, services and facilities that should be considered when

¹²⁶ Cf. World Bank Operational Manual, Operational Policy 4.00 on Piloting the Use of Borrower Systems to Address Environmental and Social Safeguard Issues in Bank-Supported Projects, and 4.01 on Environmental Assessment (2005), <http://wbln0018.worldbank.org/institutional/manuals/opmanual.nsf/284229c803270fad8525705a00112597/4f259df5b66ff0ee8525705c0022f931?OpenDocument> (visited on 8 February 2007); for details see S.I. Skogly, *The Human Rights Obligations of the World Bank and the IMF*, in: W. van Genugten, P. Hunt and S. Mathews (eds.), *World Bank, IMF, and Human Rights 45–78* at 61 et seq. (Nijmegen: Wolf Legal Publishers, 2003).

¹²⁷ Cf. also CESCR General Comment No. 1, para. 3; CESCR General Comment No. 3, para. 11; CESCR General Comment No. 13, para. 49.

¹²⁸ Cf. S. Walker, *Human Rights Impact Assessments of Trade-Related Policies*, in: M. W. Gehring/M.-C. Cordonier Segger (eds.), *Sustainable Development*, in: *World Trade Law 221–255* at 225 et seq. (The Hague, Frederick: Kluwer Law International, 2005); see also European Commission, *Impact Assessment Guidelines*, SEC(2005) 791 (2005), at 4.

¹²⁹ S. Walker, *Human Rights Impact Assessments of Trade-Related Policies*, in: M. W. Gehring and M.-C. Cordonier Segger (eds.), *Sustainable Development in World Trade Law 221–255* at 229 et seq. (The Hague, Frederick: Kluwer Law International, 2005).

¹³⁰ Cf. OHCHR, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, HR/PUB/06/12, paras. 106 et seq. (2006), <http://www.ohchr.org/english/issues/poverty/guidelines.htm> (visited on 8 February 2007).

new regulations, for instance the GATS regulations regarding trade in services, are negotiated.¹³¹ The know-how necessary to develop a methodology for human rights impact assessment of trade rules and a tool kit to be used in the WTO may be gained from other international organizations that have experience in conducting human rights impact assessment,¹³² such transfer of expertise corresponding to the obligation to cooperate internationally, in particular through technical assistance, to achieve the realization of human rights obligations.¹³³

The implementation of human rights impact assessment in the WTO requires the participation of WTO Members and WTO institutions. Assessments must be carried out at a national level to examine how trade-related policies affect the human rights situation in a specific country. Moreover, an assessment of all country situations is necessary to get a picture of the overall effect of trade rules.¹³⁴ The results of those assessments can then serve as a basis for integrating human rights aspects in decision-making.

An important aspect regarding the feasibility of introducing human rights impact assessments in the work of the WTO is the existing institutional structure of the WTO that allows integration in the existing operations without a lot of additional efforts or changes. The mandates of the WTO councils and committees established to administer the various agreements are broad enough to cover such impact assessment procedures.¹³⁵ The task of the Secretariat could be to provide technical assistance for conducting human rights impact assessment in the Members, to undertake overall impact assessment studies, to ensure that the results are available in the relevant meetings and to provide technical assistance in adequately considering the results in the decision-making processes.

¹³¹ Cf. OHCHR, Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies, HR/PUB/06/12, paras. 171 et seq. (2006), <http://www.ohchr.org/english/issues/poverty/guidelines.htm> (visited on 8 February 2007); CESCR General Comment No. 14, paras. 7 et seq.; UN, Economic, Social and Cultural Rights: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health. Report of the Special Rapporteur Paul Hunt. Addendum: Mission to the World Trade Organization, para. 53 (E/EC.4/2004/49/Add.1) (2004).

¹³² Cf. for example UNDP (ed.), Reference Manual for the Integrated Assessment of Trade-Related Policies (New York, Geneva: United Nations, 2001); OHCHR, Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies, HR/PUB/06/12 (2006), <http://www.ohchr.org/english/issues/poverty/guidelines.htm> (visited on 8 February 2007).

¹³³ Cf. CESCR General Comment No. 3, para. 13 and *supra* at Chapter II.B. General Implementing Obligations.

¹³⁴ Cf. UN ECOSOC, Economic, Social and Cultural Rights: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health. Report of the Special Rapporteur Paul Hunt. Addendum: Mission to the World Trade Organization, paras. 54 et seq. (E/CN.4/2004/49/Add.1) (2004).

¹³⁵ For example art. 12 (7) of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), 15 April 1994, http://www.wto.org/english/docs_e/legal_e/legal_e.htm (visited on 8 February 2007); art. 68 of the TRIPS Agreement; art. XIX of the GATS.

The *ex ante* assessment of trade rules can be performed under the survey of the relevant committees that negotiate new agreements or renegotiate existing agreements.¹³⁶ The results may be considered during the negotiations, in which human rights aspects must be brought forward by the Members, if prospective trade regulations would impede the performance of their human rights obligations. This conduct is required by the human rights obligations of WTO Members to ensure that international agreements they conclude do not conflict with their human rights obligations.¹³⁷ At the negotiating stage, it is still possible to incorporate the necessary flexibilities in the new agreements that allow for exceptions to pursue human rights policies, but that equally ensure that WTO principles are observed. An example is the current services negotiations. When liberalizing the health care sector, Members must, for instance, ensure that the trade rules allow for price regulations to guarantee that medical services are available and affordable to everyone.

For *ex post* assessment of the human rights impact of trade rules, the existing Trade Policy Review Mechanism (TPRM) could be used. The task of the TPRM is to assess the impact of a Member's trade policies and practices on the multilateral trading system with a view to better understand the national trade policies and practices of the Members.¹³⁸ The assessment is to be carried out '*against the background of wider economic and developmental needs, policies and objectives of the Member concerned*'.¹³⁹ During the procedure, Members have to present policy statements on their national trade policies. For developing countries and least developed countries, the Secretariat is explicitly called to provide technical assistance.¹⁴⁰ Thereafter the Secretariat prepares a report assessing the Member's statement. Based on those two reports and a debate in the Trade Policy Review Body, the Trade Policy Review Body issues concluding remarks in which it assesses the impact of the Member's trade policy on the functioning of the world trading system.

The policy statement prepared by the Member, as well as the report prepared by the Secretariat could include an assessment of the human rights impacts of trading rules. The Trade Policy Review Body could then examine how the national trade policies contribute to the creation of a fair and transparent trading system, especially whether those trading rules contribute towards the achievement of sustainable development and the raising of standards of living in the Members, which arguably

¹³⁶ A survey on existing councils and committees can be found at the organizational chart of the WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm (visited on 8 February 2007).

¹³⁷ Cf. International Commission of Jurists, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 19 (E/C.12/2000/13) (22–26 January 1997).

¹³⁸ Art. A. i) of the TPRM.

¹³⁹ Art. A. ii) of the TPRM.

¹⁴⁰ Art. D of the TPRM.

include the enjoyment of human rights.¹⁴¹ The results of the Trade Policy Review could serve as a basis for renegotiation and adaptation of trading rules to avoid negative human rights impacts.

3. HUMAN RIGHTS IN DISPUTE SETTLEMENT

Implementing human rights obligations through trade measures that do not comply with WTO rules could give rise to complaints at the WTO dispute settlement institutions. In this context, the question arises as to what role international human rights law can play in WTO dispute settlement proceedings.¹⁴² Characteristic for the dispute settlement in the WTO is that the Dispute Settlement Understanding (DSU)¹⁴³ contains very strict provisions on the proceedings and gives hardly any flexibility to the Panels and the Appellate Body (AB). The jurisdiction of the Panels and the AB, namely the power to adjudicate, is strictly limited to disputes arising out of the covered agreements, as listed in Annex I of the DSU,¹⁴⁴ and '*serves to preserve the rights and obligations of the Members under the covered agreements and to clarify the existing commitment under the covered agreements*'.¹⁴⁵ This means that WTO Members may only bring complaints against other Members, if a benefit under the WTO agreements is nullified or impaired.¹⁴⁶

¹⁴¹ For details compare UN, Economic, Social and Cultural Rights: Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization, paras. 26 et seq. (Study by Robert Howse) (E/CN.4/Sub.2/2004/17) (2004); UN, Economic, Social and Cultural Rights: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health. Report of the Special Rapporteur Paul Hunt. Addendum: Mission to the World Trade Organization, paras. 64 et seq. (E/EC.4/2004/49/Add.1) (2004).

¹⁴² Cf. for the extensive discussion on the role of international law in WTO dispute settlement proceedings only J. Pauwelyn, The Role of Public International Law in the WTO: How far can we go?, 95 American Journal of International Law 535–578 (2001); J. Pauwelyn, Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law (Cambridge, 2003); G. Marceau, Conflicts of Norms and Conflicts of Jurisdictions: the Relationship between the WTO Agreement and MEAs and other Treaties, 35 Journal of World Trade 1081–1131 (2001); G. Marceau, WTO Dispute Settlement and Human Rights, 13 European Journal of International Law 753–814 (2002).

¹⁴³ Dispute Settlement Understanding (DSU), 33 ILM 1226 (1994) (15 April 1994).

¹⁴⁴ Art. XXIII of the General Agreement on Tariffs and Trade (GATT 1947), 55 UNTS 194 (30 October 1947); art. 1 (1), art. 3 (2) and art. 23 of the DSU; for details see G. Marceau, WTO Dispute Settlement and Human Rights, 13 European Journal of International Law 753–814 at 757 et seq. (2002); M. Oesch, Standards of Review in WTO Dispute Resolution at 207 et seq. (Oxford, New York: Oxford University Press, 2003); J. Pauwelyn, The Role of Public International Law in the WTO: How far can we go?, 95 American Journal of International Law 535–578 at 554 et seq. (2001); L. Bartels, Applicable Law in WTO Dispute Settlement Proceedings, 35 Journal of World Trade 499–519 at 502 et seq. (2001).

¹⁴⁵ Art. 3 (2) of the DSU.

¹⁴⁶ Art. XXIII (1) of the GATT.

The applicable law in a specific case is determined by the claims submitted by the parties, who must provide a description of the measures at issue and a brief summary of the legal basis of the complaint.¹⁴⁷ Moreover, the terms of reference that are agreed by the parties contain the relevant provisions in the covered agreements on which the Panel must base its analysis.¹⁴⁸ It follows that the dispute settlement institutions are limited to apply and enforce WTO law, and that they have no power to establish breaches of general international law, such as that of international human rights.¹⁴⁹

International human rights law may, however, play a role in the interpretation of WTO law. According to Article 3.2 of the DSU, the customary rules of interpretation of international law must be applied by the dispute settlement institutions when interpreting WTO law.¹⁵⁰ In their case-law the Panels and the AB recognized that these are the rules enshrined in the VCLT, in particular Articles 31 to 33 relating to the interpretation of treaties.¹⁵¹ Pursuant to Article 31(3)(c) of the VCLT, international human rights law could be of relevance as ‘*relevant rules of international law applicable in the relations between the parties*’.¹⁵² In the practice of the dispute settlement institutions, this can be observed for example in the *US-Shrimp* case, in which the AB interpreted Article XX of the General Agreement on Tariffs and Trade (GATT)¹⁵³ by ‘*seeking additional interpretative guidance, as appropriate, from general principles of international law*’; thereby, the AB explicitly referred to Article 31(3)(c) of the VCLT.¹⁵⁴ It follows that the dispute settlement institutions will consider international human rights law as a source of interpretation when faced with the question of whether a trade measure to implement human rights obligations may be justified under Article XX of the GATT. The relevant provisions may be Article XX(a) GATT allowing

¹⁴⁷ Art. 6 (2) of the DSU.

¹⁴⁸ Art. 7 (1) of the DSU.

¹⁴⁹ Cf. G. Marceau, A Call for Coherence in International Law, 33 *Journal of World Trade* 87–152 at 109 et seq. (1999).

¹⁵⁰ Cf. G. Marceau, A Call for Coherence in International Law, 33 *Journal of World Trade* 87–152 at 115 et seq. (1999).

¹⁵¹ Cf. Appellate Body Report, adopted on 20 May 1996, United States—Standards for Reformulated and Conventional Gasoline, WT/DS2 and WT/DS4 at 17 et seq., http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (visited on 8 February 2007); for further reference see GATT, GATT Analytical Index: Guide to GATT law and practice, art. 3 of the DSU, paras. 15 et seq. (Geneva: GATT, 1994 (6th ed.)).

¹⁵² Art. 31(3)(c) of the Vienna Convention on the Law of Treaties, 1155 UNTS 331 (23 May 1969); for details see G. Marceau, WTO Dispute Settlement and Human Rights, 13 *European Journal of International Law* 753–814 at 783 et seq. (2002).

¹⁵³ General Agreement on Tariffs and Trade (GATT 1947), 55 UNTS 194 (30 October 1947).

¹⁵⁴ Appellate Body Report, adopted on 6 November 1998, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58, para. 158, http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (visited on 8 February 2007).

measures to protect public morals, or Article XX(b) GATT allowing measures to protect human life or health.¹⁵⁵

It is remarkable that, although the dispute settlement institutions have some leeway to take human rights considerations into account within the existing legal framework, no complaining party or defendant so far has ever brought up human rights as a justification for trade measures, although human rights arguments could have been made in a number of cases.¹⁵⁶ In the *Thailand – Cigarettes* case,¹⁵⁷ for example, Thailand could have argued that the import restrictions on US cigarettes that are more addictive than Thai cigarettes constitute a measure to implement the right to health, namely to protect the health of smokers; a similar argument could have been made in the *EC – Hormone Beef* case,¹⁵⁸ where guaranteeing food safety and avoiding negative effects of hormone beef on the health of people through an import ban can be viewed as an appropriate measure to ensure the right to health of the population. In the case where their trade obligations actually conflict with their human rights obligations, however, the obligation to protect human rights would require WTO Members to actually bring up this conflict in WTO dispute settlement proceedings.

Thus, in the case of conflicts between international human rights and WTO obligations, I suggest that the obligation of states to prevent breaches of international human rights law and to protect human rights requires states to bring forward human rights arguments as a defense of trade measures. The rules of the DSU would enable the dispute settlement institutions to interpret trade measures in a manner consistent with human rights, thus reconciling the rules of international human rights law with WTO principles. Hence it could be ensured that trade measures necessary to protect human rights could be adopted, but also that trade-related human rights measures would not be abused for protectionist purposes. An example where such a non-economic concern was recognized without a lot of discussion was the *EC – Asbestos* case, where an import prohibition of asbestos-containing substances for public health reasons was accepted by the Panel without thoroughly examining whether the

¹⁵⁵ For details see OHCHR (ed.), *Human Rights and World Trade Agreements. Using General Exception Clauses to Protect Human Rights* at 4 et seq. (New York, Geneva: United Nations, 2005); see also G. Marceau, *WTO Dispute Settlement and Human Rights*, 13 *European Journal of International Law* 753–814 at 779 et seq. (2002).

¹⁵⁶ For other examples see G. Marceau, *WTO Dispute Settlement and Human Rights*, 13 *European Journal of International Law* 753–814 at 786 et seq. (2002).

¹⁵⁷ GATT Panel Report, adopted on 7 November 1990, *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R–37S/200, http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (visited on 8 February 2007).

¹⁵⁸ *European Communities—Measures Affecting Meat and Meat Products (Hormones)*, WT/DS26 and WT/DS48, http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (visited on 8 February 2007).

restriction would be justified under Article XX.¹⁵⁹ Although a human rights argument was not brought forward, the decision can be viewed from the human rights perspective. Accordingly, the decision favours a Member's implementation of the right to health, *i.e.* to protect its inhabitants from dangers to their health. Similarly, the dispute settlement institutions could consider human rights concerns when interpreting other disputes.¹⁶⁰

An argument often submitted in the context of international human rights law is that the obligations are formulated in a fairly vague manner;¹⁶¹ thus interpreting them requires human rights expertise. Hence, the consideration of human rights in the dispute settlement procedure could be difficult for the dispute settlement institutions, if they do not have sufficient expertise to apply or interpret international human rights law.¹⁶² The lack of proficiency in a specific area of law cannot, however, be accepted as an excuse for not applying it. Moreover, the DSU provides for a possibility to acquire the necessary expertise. According to Article 13 of the DSU, the dispute settlement institutions may seek information from any relevant source and also request expert opinions. Regarding the interpretation of human rights instruments, the UN human rights institutions could be involved.¹⁶³

4. TECHNICAL ASSISTANCE FOR DEVELOPING COUNTRIES

Providing technical assistance through international cooperation is not only a measure to implement human rights.¹⁶⁴ It also constitutes a central task of the WTO to provide technical assistance and capacity-building for the implementation of trade

¹⁵⁹ Cf. Panel Report, circulated on 18 September 2000 (appealed), European Communities—Measures Affecting the Prohibition of Asbestos and Asbestos-Containing Products, WT/DS135, paras. 8.186–1.893, http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (visited on 8 February 2007), regarding the necessity test, the panel found that 'controlled use' is no reasonable alternative to reach the intended effect, cf. paras. 8.217 and 8.222.

¹⁶⁰ Cf. for an example UN, Economic, Social and Cultural Rights: Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization, paras. 47 et seq. (Study by Robert Howse) (E/CN.4/Sub.2/2004/17) (2004).

¹⁶¹ Cf. G. Marceau, WTO Dispute Settlement and Human Rights, 13 *European Journal of International Law* 753–814 at 788 et seq. (2002).

¹⁶² Cf. G. Marceau, WTO Dispute Settlement and Human Rights, 13 *European Journal of International Law* 753–814 at 765 et seq. (2002).

¹⁶³ An example for requesting such expertise in a case is the GATT Panel Report, adopted on 7 November 1990, Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes, DS10/R-37S/200, http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (visited on 8 February 2007), in which the Panel requested an expert opinion of the WTO.

¹⁶⁴ Cf. CESCR General Comment No. 3, paras. 13 et seq. and *supra* at Chapter II.B. General Implementing Obligations.

rules.¹⁶⁵ Such programs are an important feature of the WTO's work, for developing countries in particular, who get support in implementing the WTO legal obligations and creating the necessary national institutions in order to administer the rules.¹⁶⁶

At the implementation stage of trade rules, negative effects on the human rights situation can be prevented through the incorporation of trade-related human rights aspects in technical assistance programs.¹⁶⁷ Human rights considerations must be integrated in the drafting of national trade policies and regulations. Moreover, courses could convey know-how on the *ex ante* and *ex post* human rights impact assessment of trade rules. The needs of specific countries could be obtained from the results of the Trade Policy Reviews of the respective state. Addressees of this technical training should not only be national civil servants dealing with trade issues, but also civil servants dealing with human rights issues, something that will enhance cooperation and linkages of the two policy areas on a national level, which is a prerequisite for effectively addressing trade-related human rights issues in the framework of the WTO.

As to the substance of human rights training, this should mainly focus on trade-related human rights aspects and limit international human rights law to the basic structures that are required to understand trade-related human rights issues. Some of the principles enshrined in the WTO agreements are very similar to human rights concepts, and can serve as a starting point. The principle of transparency, the principle that all trade rules should be published and accessible for everyone, and that all countries should provide for a fair and impartial court procedure, reflect some of the basic civil and political rights contained in the CCPR.¹⁶⁸ In addition, the principle of

¹⁶⁵ Cf. WTO Ministerial Conference, Doha Ministerial Declaration, adopted on 14 November 2001, http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (visited on 8 February 2007), paras. 38 et seq.; for details see http://www.wto.org/english/tratop_e/devel_e/teccop_e/tct_e.htm (visited on 8 February 2007).

¹⁶⁶ UN, Economic, Social and Cultural Rights: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health. Report of the Special Rapporteur Paul Hunt. Addendum: Mission to the World Trade Organization, paras. 59 et seq. (E/EC.4/2004/49/Add.1) (2004); UN, Economic, Social and Cultural Rights: Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization, paras. 31 et seq. (Study by Robert Howse) (E/CN.4/Sub.2/2004/17) (2004).

¹⁶⁷ Cf. also UN ECOSOC, Economic, Social and Cultural Rights: Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization, paras. 31 et seq. (Study by Robert Howse) (E/CN.4/Sub.2/2004/17) (2004); UN ECOSOC, Economic, Social and Cultural Rights: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health. Report of the Special Rapporteur Paul Hunt. Addendum: Mission to the World Trade Organization, paras. 59 et seq. (E/CN.4/2004/49/Add.1) (2004).

¹⁶⁸ Art. X of the GATT 1947; art. 14–16 of the CCPR.

non-discrimination, which is the core principle of the WTO, is also one of the core principles of human rights protection.¹⁶⁹

5. CAPACITY-BUILDING IN THE WTO SECRETARIAT

A central measure to prevent human rights violations is to raise awareness for human rights and potential human rights problems through information campaigns and educational programs.¹⁷⁰ In the WTO context, capacity-building and awareness-raising for human rights concerns within the staff of the WTO Secretariat would constitute an appropriate measure to prevent human rights violations through trade rules, and to create sensitivity for potential human rights impacts of trade rules.

Such training programs should be operated for the officials in the Secretariat who act for the WTO and may thus be required to ensure that WTO activities are compatible with WTO human rights obligations. Although the Secretariat has mainly administrative functions, such as preparing meetings or assisting the dispute settlement institutions in dealing with pending disputes, the factual influence of the Secretariat on the activities of the WTO must not be underestimated. Moreover, the Secretariat also performs activities for which human rights are of direct relevance, some examples being the delivery of training courses for developing countries, giving legal advice in dispute settlement proceedings and preparing reports on the Members' trade policies in the TPRM framework. To provide for training on trade-related human rights issues would raise awareness for potential problems and thus contribute in order to prevent trade rules having negative effects on human rights obligations of the Members.

6. INSTITUTIONAL ADJUSTMENTS: ESTABLISHING A HUMAN RIGHTS DIVISION IN THE SECRETARIAT

To implement the measures proposed in the preceding sections, it appears advisable not only to resort to existing WTO structures, but to establish institutional support to coordinate the integration of human rights into the activities of the WTO. From a human rights perspective, creating the necessary institutional framework is considered

¹⁶⁹ Cf. for a comparative study of the principle of non-discrimination in WTO law and in human rights law UN ECOSOC, Economic, Social and Cultural Rights: Analytical Study of the High Commissioner for Human Rights on the Fundamental Principle of Non-Discrimination in the Context of Globalization (E/CN.4/2004/40) (2004).

¹⁷⁰ Cf. CESCR General Comment No. 3, para. 7; CCPR General Comment No. 31, para. 7; see also M. Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* at 359 et seq. (Antwerpen, Oxford, New York: Intersentia, 2003); A. Seibert-Fohr, *Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to its Article 2 Para. 2, 5* Max Planck Yearbook of United Nations Law 399–472 at 464 et seq. (2001).

to be an appropriate measure to implement human rights obligations as well.¹⁷¹ Many states have created national human rights institutions that are mandated to monitor the human rights implementation and to adopt measures to promote and protect human rights.¹⁷² Similarly, the creation of such an institution within the WTO Secretariat would be an appropriate measure to improve the human rights accountability of the WTO.

This institutional framework could be easily set up through establishing a ‘*Trade and Human Rights Division*’, consisting of human rights experts, within the WTO Secretariat. The mandate of such a division could be drafted according to the pattern proposed for national human rights commissions.¹⁷³ It should include the administration of information and education programs, the technical assistance in conducting human rights impact assessment of trade rules on the national level, the preparation of a global human rights impact assessment of the WTO rules, the evaluation of the human rights impacts of trade disputes, and the coordination of international cooperation with human rights institutions to the extent their expertise is required.¹⁷⁴

Establishing a Trade and Human Rights Division would have the benefit of giving a signal that the importance of human rights is not a mere lip-service,¹⁷⁵ but that the WTO actively takes measures to improve its human rights accountability. A specific Trade and Human Rights Division would ensure that human rights activities within the WTO are coordinated, and thus more effective. The frequent argument that there is a lack of resources to finance additional staff can be rebutted easily. First of all, such a division only needs a small number of human rights experts. Moreover, the lack of resources is generally no valid argument not to implement human rights obligations.¹⁷⁶ Through the shift of resources for training and technical assistance within the WTO, as well as a comparatively small additional financial contribution of the Members, the monetary question should not be an insurmountable obstacle.

7. INTERNATIONAL COOPERATION

An important aspect of integrating human rights in the WTO is international cooperation with other relevant institutions. Human rights standard setting and monitoring of implementation is the main task of the UN human rights bodies and of the International Labour Organization (ILO). The elaboration of standards to

¹⁷¹ Cf. CESCR General Comment No. 10, para. 1.

¹⁷² Cf. CESCR General Comment No. 10, para. 2.

¹⁷³ CESCR General Comment No. 10, para. 4.

¹⁷⁴ For the mandate of national human rights institutions see CESCR General Comment No. 10, para. 3.

¹⁷⁵ Cf. for example WTO (ed.), *The Future of the WTO. Addressing Institutional Challenges in the New Millennium* at paras. 11 et seq. (Geneva: WTO, 2005).

¹⁷⁶ Cf. CESCR General Comment No. 3, para. 11.

implement the right of health or the right to food, for instance, are tricky and highly disputed between Members of the relevant organizations and parties to the relevant agreements as well. Similarly, monitoring the implementation of human rights obligations requires a lot of expertise. International cooperation on these questions will not only avoid a duplication of efforts to establish substantive human rights standards and implementing measures, but also provide the WTO with the necessary resources to improve its own human rights capacities, and to acquire additional expertise to the extent needed. Such cooperation corresponds with the obligation to cooperate internationally to implement human rights obligations.¹⁷⁷

The WTO Agreement provides for a legal basis to establish such international cooperation. Art. V (1) of the WTO Agreement gives the General Council the power to ‘*make appropriate arrangements with other international organizations that have responsibilities related to the WTO*’. This article may serve as a basis for formalizing cooperation with the UN human rights institutions relating to capacity-building, technical assistance, and providing expertise in human rights matters. Special needs of the WTO include criteria for human rights impact assessment, assessing possibilities to consider human rights in dispute settlement, drafting and (in the beginning) teaching technical training courses, and providing advice in setting up the proposed human rights division. Although cooperation is also possible on an informal basis, such an agreement would be a sign to the public and WTO-critics that the WTO takes its human rights obligations seriously.

C. ESTABLISHING MECHANISMS OF ACCOUNTABILITY: MONITORING THE HUMAN RIGHTS PERFORMANCE OF THE WTO

1. MONITORING MECHANISMS FOR THE IMPLEMENTATION OF HUMAN RIGHTS

Substantive human rights guarantees are of little value without a mechanism of accountability. Therefore, all human rights instruments provide for an obligation to periodically monitor the implementation of the human rights obligations recognized in the agreements.¹⁷⁸ Monitoring primarily has to take place on a national level. The primacy of national monitoring is also reflected in the requirement to exhaust local

¹⁷⁷ Cf. art. 2(1) of the CESCR; see also CESCR General Comment No. 3, paras. 14 and 15; cf. also *supra* at Chapter II.B. General Implementing Obligations.

¹⁷⁸ Cf. CESCR General Comment No. 1, paras. 1 and 3; CESCR General Comment No. 3, para. 11; CESCR General Comment No. 4, para. 13; for details see for example M. Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* at 360 (Antwerpen, Oxford, New York: Intersentia, 2003).

remedies before international remedies may be invoked.¹⁷⁹ Monitoring may take place through human rights impact assessment, preparing national reports or other appropriate measures, but also through effective remedies, which are not necessarily judicial remedies, but any remedies that effectively prevent the occurrence of human rights violations.¹⁸⁰ Whatever measures are chosen, it is important that they are *effective*.¹⁸¹

Human rights guarantees would be meaningless without international control. Consequently, all human rights instruments also provide for international monitoring mechanisms,¹⁸² although they are criticized for being shaped in a fairly weak manner. International mechanisms merely come into play after national remedies are exhausted, and usually require specific acceptance. However, international bodies and courts only have few powers to take decisions binding for the states parties and even less possibilities to actually enforce breaches of international human rights obligations.

The most common monitoring mechanism, which is enshrined in nearly all human rights instruments,¹⁸³ is the obligation to provide periodic state reports that are examined by expert committees.¹⁸⁴ States must regularly submit reports in which they describe the human rights situation and the measures they have taken to implement their human rights obligations. The respective committees examine those reports and give comments in the Concluding Observations.¹⁸⁵ Although the Concluding Observations are non-binding, the committees have been more explicit

¹⁷⁹ For details on national implementation cf. for example R. Hanski and M. Suksi, *An Introduction to the International Protection of Human Rights: A Textbook* at 417 et seq. (Turku: Institute for Human Rights, Abo Akademi University, 1999).

¹⁸⁰ Cf. M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, art. 2, para. 68 (Kehl, Strasbourg, Arlington: N.P. Engel, 2005 (2nd ed.)).

¹⁸¹ Cf. *supra* at note 117.

¹⁸² Cf. C. Tomuschat, *Human Rights. Between Idealism and Realism* at 112 et seq. (Oxford: Oxford University Press, 2003); R. Hanski and M. Suksi, *An Introduction to the International Protection of Human Rights: A Textbook* at 429 et seq. with further reference (Turku: Institute for Human Rights, Abo Akademi University, 1999).

¹⁸³ An exception is the ECHR, which provides for a mandatory individual complaint mechanism instead (art. 34 of the ECHR).

¹⁸⁴ Cf. art. 40 of the CCPR; for further reference see M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, art. 40, paras. 6 et seq. (Kehl, Strasbourg, Arlington: N.P. Engel, 2005 (2nd ed.)); D. McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* at 62 et seq. (Oxford, New York: Clarendon, Oxford University Press, 1991); art. 16 of the CESC; for details see M. Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* at 34 et seq. (Antwerpen, Oxford, New York: Intersentia, 2003); for other reporting schemes see C. Tomuschat, *Human Rights. Between Idealism and Realism* at 138 et seq. (Oxford: Oxford University Press, 2003); R. Hanski and M. Suksi, *An Introduction to the International Protection of Human Rights: A Textbook* at 430 et seq. (Turku: Institute for Human Rights, Abo Akademi University, 1999).

¹⁸⁵ For details cf. C. Tomuschat, *Human Rights. Between Idealism and Realism* at 136 et seq. (Oxford: Oxford University Press, 2003); all conventions are available at <http://www.ohchr.org/english/law/> (visited on 8 February 2007).

in expressing their views on the human rights situation in the country concerned since 1992, and states must respond to the Concluding Observations in the following report.¹⁸⁶

Despite many shortcomings of the state reporting systems, such as the delay of states in fulfilling their reporting obligations and the lack of power of the committees to take binding decisions,¹⁸⁷ the mechanism has an important function that must not be underestimated: It contributes substantially towards conscience-building and awareness-raising for human rights deficits in the states parties. This awareness is raised not only during the phase of preparing state reports by the states, but also through the system of constructive dialogue between the examining committee and the state representatives.¹⁸⁸

In addition to monitoring through state reports, some treaties provide for actual opportunities to complain about human rights violations. Quite prominent are individual complaint mechanisms, which are, however, mostly restricted to civil and political rights.¹⁸⁹ The application of the individual complaint procedure is usually optional and requires explicit acceptance of the state party.¹⁹⁰ The individual complaint mechanism gives individuals, who are violated in their human rights, the possibility of international review of national decisions. To obtain redress through the individual complaint procedure an individual must be directly affected in its human rights by the measure at issue.

Another international complaint mechanism that is rarely used in practice,¹⁹¹ however, is the inter-state complaint procedure provided for in many international

¹⁸⁶ Cf. C. Tomuschat, *Human Rights. Between Idealism and Realism* at 149 et seq. (Oxford: Oxford University Press, 2003).

¹⁸⁷ Cf. M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, art. 40, paras. 9 et seq. (Kehl, Strasbourg, Arlington: N.P. Engel, 2005 (2nd ed.)).

¹⁸⁸ Cf. M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, art. 40, paras. 33 et seq. (Kehl, Strasbourg, Arlington: N.P. Engel, 2005 (2nd ed.)); M. Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* at 36 (Antwerpen, Oxford, New York: Intersentia, 2003).

¹⁸⁹ Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171; Optional Protocol to the Convention on the Elimination of Discrimination against Women, 6 October 1999, 39 ILM 281 (2000), art. 34 of the ECHR; art. 44 of the ACHR; for details see C. Tomuschat, *Human Rights. Between Idealism and Realism* at 160 et seq. (Oxford: Oxford University Press, 2003); R. Hanski/M. Suksi, *An Introduction to the International Protection of Human Rights: A Textbook* at 437 et seq. (Turku: Institute for Human Rights, Abo Akademi University, 1999).

¹⁹⁰ An exception being the ECHR, where the individual complaint mechanism is mandatory, see art. 34 of the ECHR.

¹⁹¹ Cf. C. Tomuschat, *Human Rights. Between Idealism and Realism* at 160 (Oxford: Oxford University Press, 2003); M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, art. 41, para. 2 (Kehl, Strasbourg, Arlington: N.P. Engel, 2005 (2nd ed.)).

human rights instruments.¹⁹² Most treaties require that states parties explicitly accept this procedure to be applied by them or to be directed against them.¹⁹³ In contrast to individual complaints that require that the complainant is directly affected by the breach of the human rights obligation to obtain redress for the violation, inter-state complaints are considered to have the function of an *actio popularis* with quite different features. A complaint can be brought if the other state party does not fulfill its obligations under the covenant, which means that the complaint may address substantive as well as procedural provisions.¹⁹⁴ The complaining state does not have to prove a specific interest, *i.e.* there is no need to be directly affected by the violation, but the complaint procedure is a means to exercise collective responsibility.¹⁹⁵

While there are a number of international mechanisms to monitor the implementation of human rights, actual enforcement of human rights is alien to the human rights system. Although individual complaint procedures on a regional level have binding effect on the state concerned,¹⁹⁶ and increasingly even award compensation to the victim,¹⁹⁷ an international mechanism for enforcing human rights does not exist, UN Security Council sanctions partly serve the ‘enforcement’ of human rights.¹⁹⁸ However, such human rights enforcement is at the most a by-product of sanctions, whose main purpose is to maintain international peace and security. Unilaterally imposed economic sanctions are not only problematic from the WTO point of view,¹⁹⁹ but also alien to the international human rights system. Moreover, doubts prevail over whether such sanctions have a positive effect on the overall human rights situation.²⁰⁰

¹⁹² For example art. 41 of the CCPR, art. 21 of the CAT, art. 11 of the CERD, art. 33 of the ECHR, art. 45 of the ACHR, but not in the CESC, CEDAW or CRC; cf. also M. Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, art. 41, para. 1 (Kehl, Strasbourg, Arlington: N.P. Engel, 2005 (2nd ed.)); C. Tomuschat, Human Rights. Between Idealism and Realism at 159 et seq. and at 165 (Oxford: Oxford University Press, 2003); R. Hanski and M. Suksi, An Introduction to the International Protection of Human Rights: A Textbook at 439 et seq. (Turku: Institute for Human Rights, Abo Akademi University, 1999).

¹⁹³ An exception is art. 11 of the CERD and art. 34 of the ECHR.

¹⁹⁴ Cf. M. Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, art. 41, para. 16 (Kehl, Strasbourg, Arlington: N.P. Engel, 2005 (2nd ed.)).

¹⁹⁵ Cf. M. Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, art. 41, para. 17 (Kehl, Strasbourg, Arlington: N.P. Engel, 2005 (2nd ed.)).

¹⁹⁶ Cf. art. 46 of the ECHR, art. 68 of the ACHR.

¹⁹⁷ Cf. D. Shelton, Remedies in International Human Rights Law at 291 et seq. (Oxford: Oxford University Press, 2005).

¹⁹⁸ C. J. Le Mon and R. S. Taylor, Security Council Action in the Name of Human Rights, 11 African Yearbook of International Law 263–298 (2003).

¹⁹⁹ Cf. G. Zagel, The WTO and Trade-Related Human Rights Measures: Trade Sanctions vs. Trade Incentives, 9 Austrian Review of International and European Law 119–159 at 127 et seq. (2004).

²⁰⁰ Cf. UN ECOSOC, The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights. Working Paper prepared by Mr. Marc Bossuyt, paras. 48 et seq. and 58 et seq. (E/CN.4/Sub.2/2000/33) (2000); G. Zagel, The WTO and Trade-Related Human Rights Measures: Trade

2. MONITORING THE HUMAN RIGHTS PERFORMANCE OF THE WTO

Improving the human rights accountability of the WTO not only requires establishing substantive standards, but also ensuring that there are mechanisms to hold the organization liable/responsible for breaches of its human rights obligations.²⁰¹ The purpose of this chapter is to determine what monitoring mechanisms stemming from the international human rights system would be feasible to monitor the WTO's compliance with its human rights obligations. Monitoring mechanisms could be modeled following the human rights mechanisms, thereby taking into consideration the requirement of *effectiveness* of monitoring measures.

For improving the human rights accountability of the WTO through adequate monitoring mechanisms, it makes sense to distinguish between the WTO and its Members. As most WTO Members are parties to international human rights instruments, the monitoring mechanisms enshrined in these instruments may also be used to monitor the human rights obligations of states parties relating to their conduct in the WTO. In contrast, establishing mechanisms to monitor the human rights performance of the WTO as an international organization is a more complex endeavour, requiring the creation of new instruments and mechanisms.

a) *WTO Members*

As most WTO Members are also parties to international human rights treaties, the monitoring mechanisms provided for in those instruments are applicable. Firstly, regarding the state reporting systems enshrined in these conventions, the reporting obligations of states extend to the effects of national laws implementing WTO obligations on human rights obligations.²⁰² In the Concluding Observations to those reports, the committees increasingly stress the human rights obligations that states have to consider when acting in international organizations.²⁰³ The committees even address the human rights performance of the international organizations themselves in their General Comments,²⁰⁴ although, strictly speaking, this exceeds their mandate,

Sanctions vs. Trade Incentives, 9 *Austrian Review of International and European Law* 119–159 at 152 et seq. (2004).

²⁰¹ Cf. International Law Association, *Accountability of International Organizations*. Final Report (2004) at 26, http://www.ila-hq.org/html/layout_committee.htm (visited on 8 February 2007).

²⁰² Cf. M. Fabre/3D, *The Committee on Economic, Social and Cultural Rights. References to Trade-Related Issues. A Compilation* (Geneva: 3D, 2006).

²⁰³ For example CESCR General Comment No. 15, paras. 35 and 36 (2002); CESCR General Comment No. 14, para. 39 (2000).

²⁰⁴ Cf. for example CESCR General Comment No. 14, para. 64; CESCR General Comment No. 15, para. 60.

as international organizations are not subject to the obligations in the respective conventions.

Secondly, as regards individual complaint procedures, they allow individuals to complain if they are directly affected in their human rights by a national law implementing WTO obligations. To the extent that the relevant human rights instruments provide for an international individual complaint mechanism, individuals may resort to this procedure after the exhaustion of local remedies. Whereas this has not yet taken place on a universal level, it has happened in a regional context. As the EC/EU is not a party to the ECHR, and the ECtHR does not have jurisdiction *ratione personae*, the individual complaint procedure has been used against EU Member States in a number of cases, because EC obligations conflicted with individual's rights under the ECHR.

In the *Matthews case*,²⁰⁵ for instance, a citizen of Gibraltar claimed that she had been violated in her right to vote, as she could not participate in the elections to the European Parliament. As the relevant legal act was a rule of primary Community law, Matthews could not acquire protection from the ECJ²⁰⁶ and filed a complaint against the United Kingdom with the ECtHR. The United Kingdom argued in defence that it was bound by Community law. The ECtHR held that a Member State may transfer powers to an international organization, but the Member State's responsibility for its obligations under the ECHR continues even after the transfer of powers to the organization,²⁰⁷ implying that the Member State is not responsible for breaches of international law through an act of the organization, but for participating in the creation of this act, and for not preventing an act of the organization that is contrary to its own international law obligations.²⁰⁸

Another example is the *Bosphorus case*,²⁰⁹ in which a company complained against Ireland, because the Irish authorities impounded its aircraft based on an EC regulation implementing UN Security Council sanctions against the Former Republic of Yugoslavia. The ECtHR stated that compliance with the rules of international organizations, in this case the EC regulation, constitutes a legitimate general interest objective that may justify a limitation of human rights, if it meets the proportionality

²⁰⁵ ECtHR 18 February 1999, *Matthews v. The United Kingdom*, 24833/94, <http://www.echr.coe.int/ECHR/> (visited on 8 February 2007).

²⁰⁶ Cf. art. 220 and arts. 230 et seq. of the Treaty Establishing the European Community.

²⁰⁷ ECtHR 18 February 1999, *Matthews v. The United Kingdom*, 24833/94, at para. 32: 'The Court observes that acts of the EC as such cannot be challenged before the Court because the EC is not a Contracting Party. The Convention does not exclude the transfer of competences to International Organisations provided that Convention rights continue to be "secured". Member States' responsibility therefore continues even after such a transfer.'

²⁰⁸ ECtHR 18 February 1999, *Matthews v. The United Kingdom*, 24833/94, at paras. 34 et seq.; cf. also art. 28 of the Draft Articles on Responsibility of International Organizations, UN, Report of the International Law Commission. Fifty-Eighth Session at 283 et seq. (2006).

²⁰⁹ ECtHR 30 June 2005, *Bosphorus Hava Yollari Turizm v. Ticaret AS v. Ireland*, Decision on the Merits, 45036/98, <http://www.echr.coe.int/ECHR/> (visited on 8 February 2007).

test.²¹⁰ As the EC cannot itself be held responsible under the ECHR, the Member States may be held liable, as, according to Article 1 of the ECHR, they are responsible for all acts or omissions of their organs regardless of whether the act is a consequence of domestic law or of the necessity to comply with an international obligation.²¹¹ Nevertheless, transferring power to an international organization is justified, as long as the organization guarantees human rights protection comparable to ECHR standards.²¹²

The conclusion that may be drawn from those cases is that there is a possibility for individuals to complain against states, if their human rights are impeded by acts of international organizations, of which the state is a member, and that states may be held responsible for not considering their human rights obligations when acting within international organizations. The principles are also relevant in the WTO context, although the structure and the powers of the EC to take decisions binding for the Member States is very different from the WTO structures and powers. Whereas EC law is mostly directly applicable in the Member States and has direct effect on individuals without any implementing measures, WTO rules must be implemented in the national law, thereby leaving a lot of flexibilities to the Members. This facilitates implementation of trade rules in a human rights compatible way. However, if a WTO Member ignores its human rights obligations, the existing individual complaint mechanisms in the UN framework, but also on a regional level, may be used by individuals to get redress for human rights violations.

b) The WTO

Establishing mechanisms to monitor the implementation of human rights by the WTO poses a number of difficult problems. First of all, the actual human rights obligations of the WTO as an international organization are fairly limited, with hardly any WTO act conceivable that will constitute a direct breach of human rights of individuals. The relevant human rights obligations of the WTO primarily consist of the obligation to prevent future negative impacts of trade rules on the human rights obligations of the Members. The implementing measures required aim mainly at awareness-raising and capacity-building to enable the WTO Secretariat and Members to avoid conflicts between WTO rules and existing human rights obligations of the Members. Hence, it is questionable whether it is feasible to create a separate monitoring mechanism for the human rights obligations of the WTO. In particular, as the WTO

²¹⁰ ECtHR 30 June 2005, *Bosphorus Hava Yollari Turizm v. Ticaret AS v. Ireland*, Decision on the Merits, 45036/98, at paras. 150 et seq.

²¹¹ ECtHR 30 June 2005, *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, Decision on the Merits, 45036/98, at para. 153.

²¹² ECtHR 30 June 2005, *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, Decision on the Merits, 45036/98, at paras. 155 et seq.

is largely a ‘member-driven’ organization²¹³ with only few powers to act on its own,²¹⁴ a reasonable alternative would be to rely on the monitoring of the human rights obligations of the Members when acting within the WTO.

A second aspect that must be considered when thinking about the establishment of a human rights monitoring mechanism for the WTO is that in international law not only the responsibility of international organizations for breaches of international law²¹⁵ but even more the mechanisms to enforce such responsibility against international organizations are very poorly developed.²¹⁶ Apart from the EU, where the ECJ has the jurisdiction to adjudicate disputes between the EU institutions and its Member States, there is no precedence for institutionalized remedies that allow the monitoring of whether the activities of international organizations are in compliance with the organization’s international law obligations. Existing remedies were ‘voluntarily’ established by international organizations and have been limited to specific aspects. Some organizations have created internal review mechanisms for financial or corruption and fraud matters,²¹⁷ or institutions to settle staff cases.²¹⁸ However, apart from the EU, no other international organization provides for a judicial procedure that enables states or individuals to install proceedings against international organizations because of the alleged non-compliance with their legal obligations. Such procedures have not even been established in areas where the lack of remedies has raised actual concerns, such as in the case of breaches of human rights or humanitarian law by international organizations, as it occurs in the context of UN sanctions or UN peace-keeping operations.²¹⁹ Whereas states may alternatively resort to diplomatic means or political pressure, such possibilities do not exist for injured

²¹³ WTO, *Understanding the WTO* (Geneva: WTO, 2005 (4th ed.)); UN, *Economic, Social and Cultural Rights: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*. Report of the Special Rapporteur Paul Hunt. Addendum: Mission to the World Trade Organization, paras. 7 and 11 (E/EC.4/2004/49/Add.1) (2004).

²¹⁴ Cf. *supra* at Chapter III.A. Implementing Measures provided for in International Human Rights Law.

²¹⁵ Cf. UNGA res. 56/82 of 12 December 2001, mandating the ILC to draft rules on the responsibility of international organizations for breaches of international law, further information available at <http://www.un.org/law/ilc/> (visited on 8 February 2007).

²¹⁶ Cf. G. Hafner, *Accountability of International Organizations—A Critical View*, in: R.S.J. Macdonald and D.M. Johnston (eds.), *Towards World Constitutionalism* 585–630 at 621 et seq. (Leiden, Boston: Koninklijke Brill, 2005); K. Wellens, *Remedies against International Organisations* (Cambridge: Cambridge University Press, 2002).

²¹⁷ For example the UN Joint Inspection Unit, for details see G. Hafner, *Accountability of International Organizations—A Critical View*, in: R.S.J. Macdonald and D.M. Johnston (eds.), *Towards World Constitutionalism* 585–630 at 621 et seq. (Leiden, Boston: Koninklijke Brill, 2005).

²¹⁸ For example, the United Nations Administrative Tribunal or the ILO Administrative Tribunal.

²¹⁹ Cf. A. Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 *American Journal of International Law* 851–872 at 863 et seq. (2001).

individuals.²²⁰ Hence creating such a mechanism to improve the human rights accountability of the WTO would not only be quite unique in international law, but also disproportionate considering the comparatively small likelihood of direct conflicts between WTO activities and human rights.

A third aspect is that not all monitoring mechanisms provided for in international human rights law are relevant for the WTO, the decisive criterion being that the remedy must be *effective* to improve the human rights accountability of the WTO,²²¹ *i.e.* the remedies must be appropriate to achieve their purpose, which is not only to give redress to individuals violated in their rights, but also to ensure the implementation of human rights. It follows that remedies are not necessarily judicial remedies, but that other effective remedies may be provided for,²²² if they are capable of ensuring the compliance of the WTO with its international human rights obligations.

As to an individual complaint procedure, it must be stated that such an instrument would not be appropriate within the WTO framework. WTO rules are implemented by the Members, hence the breach of human rights obligations through the implementation of trade rules is not attributable to the WTO, but to the Members. As WTO rules do not have a direct effect on individuals, their subjective rights would not be affected by those obligations, which means that it does not make sense to create an individual complaint mechanism within the WTO. Alternatively, in the case a WTO measure is implemented in a way that it impedes human rights, such complaints can be directed against the implementing states.²²³

Following the pattern of the inter-state complaint procedures, another conceivable remedy would be to create a possibility for states to complain against the WTO for the non-performance of their human rights obligations. Such procedure could be created through amendment of the existing DSU, providing for jurisdiction to hear cases against the WTO institutions. However, when looking at the WTO structure and functioning, such a mechanism is ineffective in improving the human rights accountability of the WTO. As it is a 'member-driven' organization, virtually all decisions in the various WTO councils and committees, in which all Members are represented, are taken by consensus, and the Secretariat has hardly any independent powers.²²⁴ Thus, it is unlikely that Members would bring complaints against decisions adopted in bodies in which they were represented and consented to the very decision.

²²⁰ Cf. G. Hafner, *Accountability of International Organizations—A Critical View*, in: R.S.J. Macdonald and D.M. Johnston (eds.), *Towards World Constitutionalism* 585–630 at 623 et seq. (Leiden, Boston: Koninklijke Brill, 2005).

²²¹ Cf. art. 2 (3) of the CCPR, see M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, art. 2, paras. 62 et seq. (Kehl, Strasbourg, Arlington: N.P. Engel, 2005 (2nd ed.)); art. 2 (1) of the CESCR only mentions 'appropriate means'.

²²² Cf. CESCR General Comment No. 9, para. 9.

²²³ Cf. *supra* at Chapter IV.B.1. WTO Members.

²²⁴ Cf. *supra* at Chapter III.A. Implementing Measures provided for in International Human Rights Law, note 121.

Hence, such a complaint mechanism is no feasible remedy to improve the human rights accountability of the WTO.

In contrast, a reporting system, as provided for in all human rights instruments, could form a feasible and realistic option for monitoring the human rights conformity of WTO activities. The WTO Secretariat, namely the proposed Trade and Human Rights Division,²²⁵ could prepare reports on the human rights aspects of the WTO's activities on a regular basis. These reports could include impacts of trade rules on the human rights situation in the Members, as they result from the human rights impact assessments prepared by the WTO, and the measures the WTO has taken to prevent possible conflicts between trade rules and human rights obligations. Compiling the report would contribute towards awareness-raising for human rights problems caused by WTO activities, a step not only to prevent conflicts between trade rules and human rights, but also to facilitate the assessment of what additional preventive measures should be taken to improve the human rights performance of the WTO.

Due to the limited human rights obligations of the WTO, the creation of a new formal external monitoring mechanism, for example through the UN human rights institutions, is hardly feasible. Instead, it might be advisable to intensify and probably formalize the already existing informal contacts with the UN human rights institution,²²⁶ something that could be institutionalized through a cooperation agreement on the basis of Article V.1 of the WTO Agreement.²²⁷ In this framework, the suggested human rights reports could form a basis for discussion with UN human rights experts who could submit proposals for possible improvements of the WTO's human rights performance.

CONCLUSION

The WTO is faced with extensive criticism that its activities are in conflict with international human rights standards. In fact, trade liberalization can unfold negative impacts on the human rights situation in WTO Members. However, as WTO rules are not directly applicable for individuals, but are directed to the Members, which are obliged to implement them into their national legal order, actual human rights violations rather occur through implementing legislation of the Members than through WTO activities *per se*. Moreover, due to the fact that the WTO institutions only have few powers to act without involvement of the Members in the decision-making process, it is important to stress that the Members and the WTO are jointly responsible to implement their human rights obligations and to adopt measures to

²²⁵ Cf. *supra* at Chapter III.B.F. Institutional Adjustments: Establishing a Human Rights Division in the Secretariat.

²²⁶ Cf. *supra* at note 24 and 25.

²²⁷ Cf. *supra* at Chapter III.G. International Cooperation.

improve the human rights accountability of the WTO, although the main burden lies with the Members.

To determine what principles and rules of international human rights law are of relevance in the WTO context, this article proceeded in three steps. Firstly, it established the actual substantive human rights standard relevant for improving the WTO's human rights accountability. It appears that apart from a large body of human rights treaty law that binds most of the WTO Members, the minimum core obligations enshrined in all substantive human rights as well as the principle of non-discrimination constitute customary international law that must be observed by all WTO Members, as well as by the WTO as an international organization to the extent that its activities conflict with those obligations. The implementation of substantive human rights requires states to respect, ensure and protect human rights when performing their state functions, but also when acting in international organizations such as the WTO. Moreover, states must take preventive measures to avoid the occurrence of human rights violations, but also provide for remedies to give injured individuals the possibility to claim redress. These general implementing obligations are, in principle, also of relevance for the WTO as an international organization. Of particular importance in the WTO context is the obligation to prevent human rights violations, which requires the WTO as well as its Members to adopt reasonable measures to avoid foreseeable negative impacts of WTO rules on the enjoyment of human rights.

Secondly, the article examined what implementing measures could be taken to improve the human rights accountability of the WTO. Characteristic for human rights obligations is that they provide for a lot of flexibility in choosing the implementing measures, the only requirement being that those measures give effect to the human rights obligations, meaning that the implementing measures to be adopted in the WTO must be assessed based on the criterion of whether they are effective to improve the human rights accountability of the WTO. An appropriate measure is to conduct human rights impact assessments of trade rules, the results of which can serve as a basis for preventing negative impacts of trade rules on human rights in the Members. Human rights may also play a role in dispute settlement, where they can be a source for interpretation of trade-related human rights measures. Other measures include the integration of trade-related human rights aspects in training and technical assistance programs operated by the WTO Secretariat, the education of the staff of the Secretariat on trade-related human rights issues, and international cooperation with relevant human rights institutions to acquire the necessary expertise. Moreover, it might be advisable to improve the institutional framework within the WTO by creating a Trade and Human Rights Division in the Secretariat through which all human rights activities performed in the WTO may be channeled, thus improving the effectiveness of those measures.

Thirdly, the paper examined adequate procedural mechanisms in order to ensure that human rights are implemented in the WTO. The monitoring of the WTO's human

rights accountability must primarily take place by monitoring the Member's human rights obligations through existing monitoring mechanisms in human rights instruments, in which framework state reports and Concluding Observations must address the Members responsibilities with respect to their activities in the WTO, and individual complaints may be used to address national trade rules that implement WTO obligations in disregard of human rights. This corresponds to the fact that Members bear the main responsibilities in improving the human rights accountability of the WTO. In contrast, establishing human rights monitoring mechanisms in the WTO is only of limited value for improving the human rights accountability of the WTO. Creating an individual complaint mechanism for individuals is not feasible, as individuals are not directly affected by WTO rules and establishing a complaint mechanism allowing states to complain against WTO institutions is impracticable as states are unlikely to complain about rules they have adopted themselves. The only conceivable and viable measure is that the WTO Secretariat prepares human rights reports on a regular basis, which would contribute towards awareness-raising of human rights impacts of WTO activities and thus avoid future human rights problems, not only for the Members but also for the WTO Secretariat and the dispute settlement institutions. Moreover, the informal dialogues with the UN human rights institutions could be formalized and such human rights report could be a basis for discussion.

To adopt measures to improve the human rights accountability of the WTO is not only required by international human rights law, but also advisable from a political point of view. Although the WTO frequently is perceived as an obstacle to the enjoyment of human rights, it primarily provides a forum for trade liberalization, and its activities can contribute towards economic development and thereby increase the general standard of living, which is conducive to social development and the enjoyment of human rights. Hence, it should be in the interests of all Members to ensure the continuing functioning of the WTO through addressing pending questions in the WTO that can enhance the achievements of the overall objectives of the WTO. Taking feasible steps to improve the human rights accountability in the WTO will decrease possible points of criticism and raise support of the poorer Members and the international community as a whole, whereas further ignoring of the trade and human rights debate will undermine the credibility of the WTO.