Scientific report

ESF activity:	Beyond Territoriality: Globalisation and Transnational Human Rights Obligations
Exchange grant:	Public interest concerns and WTO litigation on natural resource exploitation
Grantee:	Claire Buggenhoudt, PhD student, University of Antwerp

1 Purpose of the visit

Proposed project work

Upholding the public interest is traditionally seen to be the core task of the state.[1] The increased power of international organisations has, however, affected the sovereignty of the state in exercising this mission. The state no longer is the sole guardian of the public interest. As a consequence, international judicial bodies are now confronted with claims regarding interests such as public health, environmental protection, etc.

This evolution poses major challenges to the decision-making process of international judicial bodies. When assessing public interest concerns, these specialized instances are bound to reflect on political and economical issues that have implications beyond their regime. How should they deal with such issues? Should they focus on their primary goal, for example the protection of free trade, or should they consider other values as well? Should they take account of public interest concerns raised by third parties, foreign states and civil society organisations?

The proposed research will address these issues with regard to the WTO dispute settlement mechanism. The results will later be included in a PhD dissertation that discusses a wide variety of international dispute settlement bodies[2] and makes a

[1] See for example: ARISTOTLE and W. NEWMAN, *The politics of Aristotle*, New York, Arno, 1973, III.6, 1279a; T. AQUINAS and T. GILBY, *Summa theologiae - Law and Political Theory*, Cambridge, Cambridge University Press, 2006, 90, 2; J. LOCKE and T. PEARDON, *The second treatise of government*, New York, Liberal Arts Press, 1952, ;Marrakesh Agreement Establishing the World Trade Organization of 15 April 1994, *United Nations Treaty Series*, vol. 1867, 154para. 131.

[2] The PhD project, titled *Public Interest Concerns in International Litigation on Natural Resource Exploitation* will investigate whether and how the WTO dispute settlement mechanism, the ICJ, ICSID, the World Bank Inspection Panel and regional human rights courts (IACHR, ACHPR, ECHR) deal with public interest concerns in their natural resource litigation.

functional comparison between the decision-making processes of these bodies when public interest concerns come at play. For pragmatic reasons, the research is limited to litigation concerning the exploitation of natural resources.

Aim of the visit

The research visit to EUI will advance the proposed research in at least three ways. First, by facilitating interaction with experts - such as dr. Martin Scheinin and dr. Ernst-Ulrich Petersmann - working on the issues of (extraterritorial) human rights obligations and WTO dispute settlement. Second, by providing the opportunity to collect materials at the EUI law library, which has a young and extended collection of international law writings. And thirdly, by offering a stimulating research environment.

The primary aim of the proposed project is to study certain aspects of the decision-making process of the WTO in regard to public interest concerns (including human rights). However, given that this research is the first of a series of examinations regarding different international judicial bodies, the influences obtained at this early stage will benefit the whole PhD project.

2 Description of the work carried out during the visit

At the start of the visit I attended a workshop organized by Prof. dr. Ernst-Ulrich Petersmann, titled 'Multilevel Governance of Interdependent Public Goods' (18-19 February 2011). While not directly linked to the subject of my research, the workshop intensively deepened my understanding of the difficulties WTO bodies face when attempting to reconcile the world trade system with global public goods.

I further attended the weekly seminar of Prof. dr. Petersmann, 'Advanced Course on European and International Law', as well as the weekly seminars of Prof. dr. Scheinin and Prof. dr. Francioni on the 'Adjudicatory and Law-making Powers of International Organisations'. The latter was particularly relevant for my research, because it dealt with the doctrine of the margin of appreciation of the European Court of Human Rights, a doctrine that is also referred to in relation to the WTO DSB. Moreover, both the workshop and the seminars allowed me to informally discuss my research with other participants during breaks.

During the visit I had the opportunity to collect copies of academic literature from the extensive (electronic) resources available at the EUI library. Because of the limited duration of the visit, I focused on collecting materials that are not available at my own university library. I took advantage of the EUI's advanced search options and thematically organized library to gather all available books on the topic and found related articles by browsing the collected books as well as using the electronic databases available at EUI. At the time of writing, I completed reading about half of the collected materials, which allows me to answer, albeit incompletely, the two research questions framed in the proposal. Further reading of the collected literature and case law analyses will enable me to refine these answers after the visit.

3 Description of the main results obtained

The main research results can be structured around the two central questions that were formulated in the project proposal.

1 How should the WTO dispute settlement mechanism balance public interest concerns - in particular the protection of human rights - against trade values?

WTO case law is increasingly recognising the need for balancing international trade, environmental, and other treaty obligations. Nevertheless, it is feared that certain interests risk being marginalized by the WTO system, as emphasis shifts to compliance with trade law. Therefore, this first question aims to unravel whether the WTO dispute settlement mechanism has the obligation to respect human rights; and, if so, how this obligation affects, or should affect, its decision-making process.

To establish that the WTO dispute settlement mechanism bears human rights obligations, the obligations of the WTO as an international organisation need to be defined. International organisations, with the exception of the EU, are not bound by human rights treaties as signatories. Nevertheless, the WTO may bear human rights obligations as an international non-state actor. To assess the latter, two question need answering. Whether the WTO has international legal personality and whether an international organisation with international legal personality is responsible for the

human rights impact of its actions.[3] Since the entry into force of the Marrakesh Agreement, little discussion exists on the first question. Article VIII of the Marrakesh Agreement explicitly states that the WTO has legal personality.[4] That international organisations with legal personality are bound by, at least some, international human rights norms is generally accepted.[5]

The real discussion is about the sources and the scope of these obligations. International organisations are bound by *jus cogens*, but only few human rights have reached that status.[6] Concerning the human rights provisions that are not *jus cogens* diverse theories exist. Some claim that certain human rights have customary international law status and therefore apply to all subjects of international law, others state that a number of human rights have become general principles of international law.[7] CLAPHAM argues that the human rights obligations of the WTO do not have to be established through the theory of international legal personality because they were simply acknowledged by the WTO Secretariat.[8] In the context of the UN Commission on Human Rights, GABRIELLE MARCEAU of the Legal Affairs Division of the WTO, stated that 'the member countries of WTO, and thus WTO itself, were bound by customary international law'.[9]

The issue with all these claims is that most human rights provisions are not so widely accepted that WTO panels may be expected to apply them to inform a WTO provision as customary international law or general principles of international law. This is especially true for those human rights that are most likely to intersect with trade law issues.[10] Nevertheless, 'Highlighting the WTO's own human rights obligations under international

[3] J. WOUTERS, E. BREMS and S. SMIS, *Accountability for human rights violations by international organisations*, Antwerp, Intersentia, 2010, 6.
[4] Marrakesh Agreement Establishing the World Trade Organization of 15 April 1994, *United Nations Treaty Series*, vol. 1867, 154.
[5] WOUTERS, BREMS and SMIS, *Accountability for human rights violations by international organisations*, 6.
[6] The prohibition of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination are considered to be *jus cogens* and thus have hierarchical superiority over WTO provisions in cases of conflict. G. MARCEAU, "WTO Dispute Settlement and Human Rights", *European Journal of International Law* 2002, (753) 797-802.
[7] For references, see WOUTERS, BREMS and SMIS, *Accountability for human rights violations by international organisations*, 6-7.
[8] A. CLAPHAM and ACADEMY OF EUROPEAN LAW, *Human rights obligations of non-state actors*, Oxford ; New York, Oxford University Press, 2006, 164.
[9] Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-third session (7 February 2002), *UN Doc.* E/CN.4/Sub.2/2001/SR.13 (2002), para. 40.
[10] S. J. POWELL, "The Place of Human Rights Law in World Trade Organization Rules", *Florida Journal of International Law* 2004, (219) 228.

law may be an approach which could reinforce any tendency by the panels and the Appellate Body to interpret WTO agreements in a way that does not require states to violate their own human rights obligations.'[11]

A second way to establish the relevance of human rights for the WTO dispute settlement mechanism is through the international law rules of treaty interpretation. The theory underlying this statement can be summarized as follows.[12] Article 3.2 of the WTO's Dispute Settlement Understanding states that the provisions of WTO agreements must be clarified in accordance with customary rules of interpretation of public international law. Article 31-32 of the Vienna Convention on the Law of Treaties codifies customary rules of interpretation of public international law.[13] Article 31 (3) (c) of the VCLT states that any relevant rules of international law applicable in the relations between the parties must be taken into account in interpreting a treaty. In conclusion, the WTO dispute settlement bodies should take account of human rights rules that are applicable in the relations between the parties.

HARRISON argues that 'the parties' in the latter provision may not be understood as all parties to the WTO, because in that interpretation even nearly universal treaties may not be relevant; nor may it mean all the parties to the dispute, because states have human rights obligations to their own population, regardless whether the other party to the dispute has ratified the relevant treaty.[14] He therefore suggests to interpret WTO terms in light of broadly ratified human rights treaties on the same subject-matter, even if not all parties are signatories.[15]

Under this theory it can be assumed that the WTO dispute settlement bodies should - at least in certain circumstances - take account of human rights provisions in their decisions. It is, however, difficult to predict how this will affect the decision-making process. While the WTO and human rights debate is popular with international law

[11] CLAPHAM and ACADEMY OF EUROPEAN LAW, *Human rights obligations of non-state actors*, 165.
[12] See, amongst others, A. PANDAY, "The Role of International Human Rights Law in WTO Dispute Settlement", *U.C. Davis Journal of International Law & Policy* 2009, (245) 253-256.
[13] Appellate Body Report, US Gasoline, *DSR* 1996:I, 3, p. 23; Appellate Body Report, Japan - Alcoholic Beverages II, *DSR* 1996:I, 97, p. 104.
[14] J. HARRISON, *The Impact of the World Trade Organisation on the Protection and Promotion of Human Rights*, Oxford, Hart Publishing, 2007, 200-203.
[15] Ibid., 204.

scholars, WTO parties have not yet introduced human rights arguments before the dispute settlement bodies.[16] If a human rights argument would be brought before the mechanism, it is likely that the WTO dispute settlement bodies would read the relevant WTO provision in light of the human right, just as they have done with multilateral agreements on other non-economic concerns in the past.[17]

When a (non-*jus cogens*) human right and trade conflict cannot be solved through interpretation, it is unclear which interest would prevail.[18] MARCEAU states that the WTO dispute settlement bodies may not directly balance human rights versus WTO agreements in that instance, because Article 3 of the DSU prohibits the dispute settlement bodies to 'add to or diminish the rights and obligations provided in the covered agreements.'[19] MARCEAU explains that 'WTO Members maintain their rights and obligations under the rules of state responsibility in situations where a measure (presumed consistent with WTO law) is inconsistent with human rights law and the benefits obtained in one forum may be nullified by the consequences of the violation in another forum.'[20]

In practice, however, trade rules are enforced more effectively than human rights treaties and this enforcement may undermine human rights. PETERSMANN therefore regrets that the political WTO bodies leave it to the judicial body to clarify impact of human rights law on WTO rules.[21] Because the WTO mechanisms will inevitably have to address the impact of human rights law when enforcing WTO agreements, HARRISON suggests that the dispute settlement bodies seek evidence by human rights experts or expert advice of human rights treaty bodies.[22] This approach would avoid that WTO panels need to give own interpretation of the relevant human rights obligations.

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[16] AARONSON states that most human rights violators will not challenge the measure judicially, because they do not want their human rights obligations to be discussed at the WTO. S. A. AARONSON, "Seeping in slowly : how human rights concerns are penetrating the WTO", *World Trade Review* 2007, 432.
[17] PANDAY, "The Role of International Human Rights Law in WTO Dispute Settlement", 271
[18] POWELL, "The Place of Human Rights Law in World Trade Organization Rules", 225-228.
[19] MARCEAU, "WTO Dispute Settlement and Human Rights", 778.
[20] Ibid., 805.
[21] E.-U. PETERSMANN, "Human Rights , Constitutionalism and the World Trade Organization : Challenges for World Trade Organization Jurisprudence and Civil Society", *Leiden Journal of International Law* 2006, 633-667.
[22] HARRISON, *The Impact of the World Trade Organisation on the Protection and Promotion of Human Rights*, 220.

2 Should the WTO dispute settlement allow a state to (in)directly interfere in another state by means of a public interest-grounded exception on WTO law?

While the WTO focuses on the protection of free trade, it allows the use of trade measures to achieve non-trade objectives in particular circumstances. Hence, it may be argued that the WTO dispute settlement mechanism should consider human rights arguments when adjudicating trade restrictions. Thus, this second question will deepen the understanding of extraterritorial human rights obligations by focussing on the possibility and desirability of unilateral trade measures grounded on human rights concerns.

Under certain circumstances, trade sanctions based on human rights obligations are allowed in the WTO context. The WTO agreements explicitly provide that their 'provisions may not prevent actions in pursuance of UN obligations regarding international peace and security.'[23] Since the Security Council has considered human rights violations as threats to international peace and security, such actions may include trade limitations based on the enforcement of human rights obligations. The Kimberley Process Waiver is another example of the WTO allowing states to violate the WTO agreements based on human rights concerns. MARCEAU sees these examples as signs that a new international law rule is crystallizing, which authorizes unilateral action in cases of large scale human rights violations.[24]

However, at the moment, it is highly doubtful that a WTO member state may, under the WTO agreements, unilaterally impose trade measures on another member state with the intention of extra-territorially enforcing human rights. When trade sanctions (regarding goods) violate the WTO agreements' provisions on non-discriminations, they have to be justified under one of the exceptions included in Article XX GATT. Although the Appellate Body found that extraterritorial trade measures for the protection of global commons may fall under Article XX (g) GATT, it added that there should be some jurisdictional relationship between the resources and the state that imposes the

[23] See, for example, Art. XXI (c) GATT.
[24] MARCEAU, "WTO Dispute Settlement and Human Rights", 809-812.

measures.[25] Moreover, SCHULTZ AND BALL argue that it is dubious whether extraterritorial human rights measures would pass the requirement of necessity incorporated in Article XX GATT, because import bans are unlikely to be the least trade restrictive measures available.[26]

It is important to add to this discussion that the desirability of imposing human rights, or other public interest norms, through trade sanctions has been questioned. PETERSMANN states that 'trade restrictions are only rarely an efficient instrument for correcting "market failures" and supplying "public goods".'[27] PAUWELYN finds that giving public interest norms *erga omnes* effect, thus allowing unilateral trade sanctions, would be contrary to the principle of *pacta tertiis*.[28]

KELLY adds that allowing such measures poses a tread to the fundamental social policy decisions of other societies and, moreover, only the largest developed nations have the market power to impose social policy on other nations.[29] The latter argument is followed by SCHULTZ AND BALL who focus on the negative effects that such measures could have on the poorest and most defenceless populations.[30] Nevertheless, policy-makers only have a limited numbers of tools available, and trade measures may be the most effective.[31]

4 Projected publications/articles resulting or to result from your grant

As stated in the proposal, the results of the research visit will be partially included in a PhD dissertation regarding *Public Interest Concerns in International Litigation on Natural Resource Exploitation*.

[25] Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R.
, *DSR* 1996:I, 3, p. 23
[26] J. SCHULTZ and R. BALL, "Trade as a Weapon? The WTO and Human Rights-Based Trade Measures", *Deakin Law Review* 2007, (41) 64.
[27] E.-U. PETERSMANN, "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration", *European Journal of International Law* 2002, 645.
[28] J. PAUWELYN, *Conflict of norms in public international law : how WTO law relates to other rules of international law*, Cambridge, UK ; New York, Cambridge University Press, 2006, 101-106.
[29] J. P. KELLY, "The Seduction of the Appellate Body: Shrimp/Turtle I and II and the Proper Role of States in WTO Governance", *Cornell International Law Journal* 2005, (459) 491.
[30] SCHULTZ and BALL, "Trade as a Weapon? The WTO and Human Rights-Based Trade Measures", 73.
[31] R. HOWSE, "Whose Rights , Comment on Petersmann", *Southern California Law Review* 2002, 655.