Business and Human Rights: the Role of EU Member States in Developing Accountability Mechanisms for Corporations from Developing and Emerging States

by Aleydis Nissen

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This thesis has been examined in partial fulfilment of the requirements for the degree of Doctor of Philosophy at Cardiff University's School of Law and Politics. It has been updated until July 2019.

This work has not been submitted in substance for any other degree or award at this or any other university or place of learning, nor is being submitted concurrently in candidature for any degree or other award.

This thesis is the result of my own independent work and the views expressed are my own. Other sources are acknowledged by explicit references. The thesis has not been edited by a third party beyond what is permitted by Cardiff University's Use of Third Party Editors by Research Degree Students Procedure.

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SUMMARY

Globalisation has created a collective action problem or global 'prisoner's dilemma'. If European Union (EU) Member States took up 'extraterritorial obligations' over 'their' corporate nationals and invested in serious efforts to monitor them, then non-EU competitors that do not have to respect the same standards could easily undercut these responsible companies. In other words, EU Member States would put an economic disadvantage on their transnational corporations if they enforced stricter standards on them than the standards that are applicable to competitors. The most important threat comes from emerging – and, increasingly developing – states. These states have a comparative advantage, significantly fewer capabilities and less political will to install business and human rights requirements compared to economically developed states. They are home to powerful corporations that are capable of deploying economic activities on a global scale under the influence of the rapid pace of technological change and globalisation. Perhaps surprisingly, such corporations have, however, been largely overlooked in the field of business and human rights. If such corporations are included in the literature, then they are mostly studied in supply chain relations, as subsidiaries of corporations from economically developed Western states. This thesis aims to investigate the conditions under which the EU and its Member States are attempting to overcome this prisoner's dilemma by creating an artificial level playing field on which private transnational corporations from developing and emerging countries can be held accountable. Negative measures that impose a requirement as a matter of regulatory compliance, either as a direct obligation formulated in a rule or indirectly by offering corporations the opportunity to defend against civil violations, need to be studied.

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PREFACE

In line with Senate Regulations for the Presentation and Submission of Research Degree Theses (title II), research work already published or submitted for publication has been incorporated in this thesis. It concerns:

In Chapter 2

Can WTO Member States Rely on Citizen Concerns to Prevent Corporations from Importing Goods Made from Child Labour? (2018) 14(2) Utrecht Law Review pp 70-83
Presented at (2017) Accountability and International Business Operations Conference (Utrecht University)

Better Together: A Complementary Approach to Civil Judicial Remedies in Business and Human Rights (2018) 122(48) Penn State Law Review Penn Statim pp 1-15
Presented at (2017) Defending Individual Rights Postgraduate Conference (Durham University)
Included in the course book 'Business and Human Rights' used by the University of Oxford's Master's students in International Human Rights Law.

In Chapter 3

The European Union as a Manager of Global 'Business and Human Rights' Regulation: Country-by-Country Reporting Rules (2019) 8(2) UCL Journal of Law & Jurisprudence pp 141-163
Presented at (2018) Contemporary Issues in Human Rights Law and Practice Conference (University of Brighton)
Presented at (2017) #Taxtalks (University of Nairobi)

ABBREVIATIONS

3TG	Tin, Tantalum, Tungsten and Gold
ACP states	African, Caribbean and Pacific Group of States
AFEP	*Association française des entreprises privées* ('French association of private enterprises')
ATAA	Air Transport Association of America
ATS	Alien Tort Statute (US), 1789
BRICS	Brazil, Russia, India, China and South Africa
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
CBCR	Country-by-Country Reporting
CED	International Convention for the Protection of all Persons from Enforced Disappearance, 2006
CEDAW	UN Committee on the Elimination of Discrimination against Women
CESCR	UN Committee on Social, Economic and Cultural Rights
CRC	UN Committee on the Rights of the Child
COMWEL	Korea Workers' Compensation and Welfare Service Commission
CORSIA	Carbon Offsetting and Reduction Scheme for International Aviation
COTU-K	Central Organization of Trade Unions (Kenya)
CRPD	Convention on the Rights of Persons with Disabilities, 2006
CSR	Corporate Social Responsibility
DAG	Domestic Advisory Group under the EU-Korea FTA
DCK	Dansk Chrysanthemum Kultur
EAC	East African Community
EAC-EU EPA	Economic Partnership Agreement between the EAC and the EU
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEA	European Economic Area
EEAS	European External Action Service
EESC	European Economic and Social Committee
EITI	Extractive Industries Transparency Initiative
EU	European Union
EU-Korea FTA	Free Trade Agreement between the EU and the Republic of Korea
EUR	euro
FLEGT Action Plan	Forest Law Enforcement, Governance and Trade Action Plan (EU)
FRA	EU Fundamental Rights Agency
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade, 1994
GBP	British pound sterling
HRC	UN Human Rights Council
GDP	Gross Domestic Product
GNI	Gross National Income
IASB	International Accounting Standards Board
ICAO	International Civil Aviation Organization
ICCPR	International Covenant on Civil and Political Rights, 1996

ICERD	International Convention on the Elimination of All Forms of Racial Discrimination, 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights, 1966
ICJ	International Court of Justice
ICPRM	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990
ILC	International Labour Conference
ILO	International Labour Organisation
IMF	International Monetary Fund
KEFHAU	Kenya Export Floriculture, Horticulture and Allied Workers Union
KES	Kenyan shilling
KNCHR	Kenya National Commission on Human Rights
KNCP	Korean National Contact Point
Korea	Republic of Korea
KOSHA	Korea Occupational Safety and Health Agency
KPAWU	Kenya Plantation and Agricultural Workers Union
KRW	Korean won
Maastricht Principles	Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, 2011
NAP	National Action Plan on Business and Human Rights
NGO	Non-governmental organisation
NHRCK	National Human Rights Commission of Korea
OECD	Organisation for Economic Co-operation and Development
OHCHR	UN Office of the High Commissioner for Human Rights
OHCHR-Cambodia	UN Human Rights Theme Group in Cambodia
SPDC	Shell Petroleum Development Company of Nigeria
TBT	Technical Barriers to Trade
TFEU	Consolidated Treaty on the Functioning of the EU
TNC-DEM	Transnational corporation from a developing or emerging country
UK	United Kingdom
UN	United Nations
UNCEDAW	Convention on the Elimination of All Forms of Discrimination against Women, 1979
UNCRC	Convention on the Rights of the Child, 1989
UN Guiding Principles	UN Guiding Principles on Business and Human Rights, 2011
US	United States
US SEC	US Securities and Exchange Commission
WTO	World Trade Organization
WTO DSM	WTO Dispute Settlement Mechanism

CHAPTER 1 INTRODUCTION

Human rights violations by corporations that operate in more than one state have attracted the attention of legal scholars over the past four decades. The field of business and human rights has, however, been largely silent on private transnational corporations *from* developing and emerging states (TNC-DEMs).[1] If such corporations are included in the literature, then they are mostly studied in supply chain relations, as subsidiaries of corporations from EU Member States and other economically developed states.[2] In other words, while human rights researchers have focused on issues relating to power diffusion, i.e. the growing influence of corporate non-state actors, they have largely overlooked issues relating to power transfusion, i.e. the rising influence of new – and currently particularly Asian – corporate non-state actors on the global stage.[3] This research gap is surprising for two reasons. First, the continuing context of globalisation makes it necessary to look beyond the Western paradigm. Developing and emerging states have significantly fewer capabilities to install business and human rights requirements compared to economically developed states but TNC-DEMs' impacts can be powerful, as they deploy economic activities on a global scale influenced by the rapid pace of technological change. Second, studying TNC-DEMs can shed new light on the widely documented poor track record of economically developed states to hold 'their' TNCs accountable for human rights violations in developing and emerging states. Globalisation has created a 'prisoner's dilemma' or collective action problem.[4] This is a structure of strategic action between rational actors in which it is individually rational to not cooperate

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[1] Florian Wettstein and others, 'International Business and Human Rights: A Research Agenda' (2019) 54(1) Journal of World Business pp 59–60.
[2] Andrew Clapham, *Human Rights Obligations of Non–State Actors* (2nd edn, Oxford University Press 2013) p 199.
[3] Cf Joseph Nye, *The Future of Power* (Public Affairs 2011) p 204.
[4] See HRC, 'Report of the Special Representative of the Secretary–General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises – Protect, Respect and Remedy: a Framework for Business and Human Rights John Ruggie' (2008) UN Doc A/HRC/8/5 para 22; Olivier De Schutter, 'The Accountability of Multinationals for Human Rights Violations in European law' (2004) Centre for Human Rights and Global Justice Working Paper Nr 1 <http://chrgj.org/wp–content/uploads/2012/07/s04deschutter.pdf> accessed 28 July 2016 p 10.

although all parties would benefit from cooperation.[5] If some states regulate 'their' corporate nationals and invested in serious efforts to protect citizens impacted by them in third states, then competitors that do not have to respect the same standards can easily undercut those responsible companies. While all states are encouraged to hold 'their' private transnational corporations – or corporations in their supply chains – for human rights violations, their current track record in this matter is rather limited.

In particular, this thesis aims to investigate the conditions under which the EU and its Member States are attempting to overcome this prisoner's dilemma by creating an artificial level playing field in which private transnational corporations from developing and emerging states can be held accountable for human rights violations abroad. Both direct and indirect negative measures that impose requirements as a matter of regulatory compliance need to be studied.[6] Direct measures impose obligations formulated in a rule, while indirect measures offer corporations the opportunity to defend against civil violations. Both types of requirement will be examined from three perspectives: the international perspective (Part I; Chapter 2), the perspectives of the EU and a number of EU Member States (Part II; Chapters 3-5), and the perspectives of selected developing and emerging states (that have established trade relations with the EU Member States) (Part III; Chapters 6-7).

Before explaining the contribution and methodology of each chapter, it is necessary to draw attention to two conceptual issues. First, there is currently no international agreement that determines when a corporation can be deemed a 'national' of a state.[7] The criteria to define 'corporate nationality' are set by each sovereign state individually and the criteria of one state can overlap with the criteria of another state. These criteria include the place of incorporation, the place where the day-to-day decisions are made or the nationality of the owners. Second, the concept 'transnational corporations' is used in this thesis to refer to

[5] William Poundstone, *Prisoner Dilemma* (Doubleday 1992) pp 107-116. This theory was originally framed by Merrill Flood and Melvin Dresher in 1950. Albert Tucker formalised the game with prison sentence payoffs and gave it the 'prisoner's dilemma' name.
[6] Cf Olivier De Schutter and others, 'Human Rights Due Diligence: the Role of States' (2012) <www.bhrinlaw.org/documents/human–rights–due–diligence–the–role–of–states.pdf> accessed 29 March 2018 pp 4–5.
[7] See Cedric Ryngaert, 'Extraterritorial Export Controls (Secondary Boycotts)' (2008) 7(3) Chinese Journal of International Law p 627.

business entities that undertake 'transnational' activities. According to the intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (intergovernmental Working group), a business activity is of a 'transnational' character if it

> (a.) is undertaken in more than one national jurisdiction or State; or (b.) it is undertaken in one State through any contractual relationship but a substantial part of its preparation, planning, direction, control, designing, processing or manufacturing takes place in another State; or (c.) it is undertaken in one State but has substantial effect in another State.[8]

The first part of this thesis (Chapter 2) considers the international perspective. This part uses the doctrinal approach to introduce ideas and controversies that surround the legal scholarship on business and human rights. The United Nations Guiding Principles on Business and Human Rights (UN Guiding Principles) – endorsed by the UN Human Rights Council (HRC) in 2011 – are widely recognised as the most comprehensive template to deal with such issues.[9] These principles integrate existing standards and practices under international law and are organised around a three-pillar framework: the state's duty to protect human rights, the corporate responsibility to respect human rights, and access to remedy for those whose rights have been violated. While the UN Guiding Principles have been extremely influential in putting ideas forward, they have also been criticised as not being comprehensive (or far-reaching) enough. In particular, various United Nations (UN) treaty bodies, Special Rapporteurs and legal scholars have argued that there is an emerging consensus that there exist 'extraterritorial obligations' relating 'to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside

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[8] Art 3(2) Open–Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises. Revised Draft' (2019) <www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf> accessed 30 September 2019.

[9] HRC, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. Report of the Special Representative of the Secretary–General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (2011) UN Doc A/HRC/17/31 Annex (endorsed by UN Human Rights Council, Res 17/4 (2011) UN Doc A/HRC/RES/17/4) ('UN Guiding Principles on Business and Human Rights'; 'UN Guiding Principles'); Michael Addo, 'The Reality of the United Nations Guiding Principles on Business and Human Rights' (2014) 14 Human Rights Law Review p 147.

of that State's territory'.[10] The chapter then answers the separate question whether there are legal limitations for the EU and its Member States when regulating and remedying corporate human rights violations committed by TNC-DEMs. Import-restrictive measures may, amongst others, appear an attractive solution for states that are increasingly expected (or obliged) to rein in their corporate nationals when they violate human rights in third states. Such measures allow states to create an artificial level playing field which enforces the same standards across both national and foreign corporations that operate in its market. The issue of a 'social clause' is, however, contested. The separate development of international labour standards in the International Labour Organisation (ILO) and trade regulation in the World Trade Organization (WTO) is symptomatic of this debate. It is explained that EU Member States are all States Parties to the 1994 General Agreement on Tariffs and Trade (GATT) and, therefore, have limited ability under this treaty to impose import restrictions.[11] To add nuance to the existing debates, the attitude-behaviour gap, the behavioural phenomenon of people's actions not correlating with their attitudes, is used as the theoretical lens in this analysis of the GATT regime. Finally, it is explained that each state has acted unilaterally in developing the rules governing the use of civil adjudicative jurisdiction, as their use has not been regulated by international law to any great extent. The two ways in which extraterritorial states can strengthen access to judicial remedies over TNC-DEMs are introduced: extraterritorial litigation and support for local capacity development. A conceptual framework to study local capacity development is proposed. This framework is inspired by the constructivist perspective in the Commentary to UN Guiding Principle 10. It will be used in the third part of this thesis to determine whether bilateral trade relations between the EU and a third state can play a role in developing local remediation mechanisms.

The second part of this thesis (Chapters 3-5) considers the supranational perspective of the EU and the national perspectives of selected EU Member States. The presented analyses are limited to regulations which have been

[10] Olivier De Schutter and others, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights' (2012) 34(4) Human Rights Quarterly p 8.
[11] General Agreement on Tariffs and Trade (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS (GATT).

adopted with specific reference to the UN Guiding Principles since 2011. As a legal analysis, this part does not attempt to engage itself in the international relations debates. It is however, necessary to rely upon the theoretical tools provided by them to investigate the political dynamics at play. Each theoretical lens has its explanatory strengths and weaknesses.[12] The 'power' factor – as theorised by the neo-realist school – is an inescapable factor when reviewing the 'state duty to protect'.[13] Neo-realist theory is complemented by the insights that constructivism, functionalism and political psychology provide (whenever relevant).

Chapter 3 analyses the factors that lead the EU – which exercises the powers, conferred by its Member States – to cooperate in a global prisoner's dilemma. First, the chapter investigates whether competition from TNC-DEMs has been taken into account, and whether – and to what extent – they have been regulated by the EU to minimise a negative impact on EU-based corporations. All three unilateral regulatory initiatives that have been taken in the EU to implement the UN Guiding Principles will be studied: the Non-Financial Reporting Directive, the Country-by-Country Reporting rules and the Conflict Minerals Regulation. The factors that led the EU to adopt these regulatory frameworks and their impact on TNC-DEMs are assessed. To conduct these analyses, a wide variety of documents – such as communications and minutes of debates – of the relevant EU bodies and national actors have been examined. The discourse employed in the impact assessments lends itself particularly well to in-depth analysis of framing processes and strategies, as policy coordination is the prevalent interpretation given to impact assessments within the European Commission.[14] Second, while EU Member States did not agree with a full harmonisation of jurisdiction rules in the Brussels I Regulation, it is useful to analyse the current 'state of affairs' as the Council of the EU requested to put 'access to civil judicial remedies' on the EU agenda in 2016.

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[12] Tomer Broude, 'Behavioral International Law' (2015) 163 University of Pennsylvania Law Review note 26.
[13] Cf David Armstrong, Theo Farrell and Hélène Lambert, *International Law and International Relations* (2nd edn, Cambridge University Press 2012) pp 300–301.
[14] See Emanuela Bozzini and Stijn Smismans, 'More Inclusive European Governance through Impact Assessments' (2016) 14(1) Comparative European Politics p 103.

Chapters 4 and 5 analyse national perspectives. The Netherlands and France are studied because these are the only two EU Member States that have established legislation that proactively addresses human rights supply chain risks (and not just measures that encourage reporting and transparency). France was the first state in the world to adopt such supply chain legislation when it adopted the Law on Parent Corporations' Duty of Care (2017). The Netherlands followed suit with the Child Labour Duty of Care Law (2019). The extent to which competition from TNC-DEMs has had an impact on the stringency and reach of these legislative initiatives is uncovered by evaluating the parliamentary discussions of both laws. The factors that led these states to adopt these laws and their impact on TNC-DEMs are evaluated. It is then explained that the Dutch and French governments prefer supporting local access to judicial remedies in developing and emerging states for victims of corporate abuse over strengthening extraterritorial remediation. A number of opportunities to bring civil claims against TNC-DEMs in France and the Netherlands are, nevertheless, identified. One promising way to obtain for damages in France is, for example, civil remedies directly related to the commission of a criminal offence. Several claims against the South Korean transnational group Samsung have been brought on this ground.

The third part of this thesis (Chapters 6-7) investigates the local perspective of a number of developing and emerging states. The legal basis for collaboration in the bilateral relations between the EU and two of its important trading partners in East Asia and Africa is studied. More specifically, it is assessed what contribution the EU can make to the development of local remedies that benefit victims of both EU corporations and local corporations (on the basis of the conceptual framework set out in the final section of Chapter 2). Such assessment requires an analysis of the extent to which citizens in developing and emerging states are able to use state-based institutions to seek and obtain access to justice when they allege that their human rights have been violated by TNC-DEMs. The focus is on access to civil judicial remedies. Yet, other valuable grievance mechanisms are also identified and examined in order to not measure access to justice through preconceived views. [15]

[15] Cf UN General Assembly, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (2017) UN Doc A/72/162 para 7

Barriers to justice often continue to exist precisely because they are deeply embedded in broader patterns of exclusion and marginalisation.[16] People who cannot enjoy their rights are often struggling to get their rights recognised and protected by legal systems, governments and institutions. Limited protection and limited access to justice are not problematic for everyone.[17] The denial of rights remediation often serves to protect the power of a smaller group of people and their business allies with whom they hold privileged (and profitable) relations.[18] For example, laws can be created and legal lacunae are sometimes left unfilled, precisely because they are functional for serving their interests.

This consideration calls for an interdisciplinary method that can put a spotlight on social forces that impede the enjoyment of rights in context.[19] The case study research methodology is particularly well suited to shed an empirical light on contemporary phenomena within their real-world context, especially when the boundaries between the phenomena and context may be not evident.[20] This mode of inquiry allows the uncovering of the underlying dynamics that can impede the enjoyment of rights in complex and relational contexts.[21] In particular, case studies allow knowing 'how laws are understood, and how and why they are applied and misapplied, subverted, complied with or rejected'.[22] Legal case study researchers submit doctrinal propositions to a 'reality check' 'to see the reality with a more holistic, in-depth and contextual view'.[23] Evidence from the field also allows the identification, via inductive analysis, of issues and concepts that have

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[16] Sonia Cardenas, 'Human Rights in Comparative Politics' in Michael Goodhart (ed), *Human Rights: Politics and Practice* (Oxford University Press 2009) p 81; Roderick Macdonald, 'Access to Civil Justice' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) p 510.
[17] Devika Choudhuri, 'Conducting Culturally Sensitive Qualitative Research' in Madonna Constantine and Derald Sue (eds), *Strategies for Building Multicultural Competence in Mental Health and Educational Settings* (John Wiley & Sons 2005) p 277; Susan Marks, 'Human Rights and Root Causes' (2011) 74 The Modern Law Review p 71.
[18] Cardenas (n 16) p 81.
[19] Robert Cox, 'Social Forces, States and World Orders: Beyond International Relations Theory?' (1981) 10(2) Millennium Journal of International Studies p 149.
[20] Robert Yin, *Case Study Research and Applications. Design and Methods* (Sage 2018) pp 15 and 38.
[21] Lisa Webley, 'Stumbling Blocks in Empirical Legal Research. Case Study Research' (2016) 3 Law and Method pp 12–14.
[22] Ibid p 3.
[23] Aikaterini Argyrou, 'Making the Case for Case Studies in Empirical Legal Research' (2017) 13(3) Utrecht Law Review p 102.

not been considered or theorized in the European and Anglo-American literature.[24]

Legal case study researchers usually rely extensively on interviews with those concerned with law and policy-making.[25] The meaning that these research participants give to their experiences with legal systems can uncover the influence of socio-economic factors on the law, legal processes and legal institutions. The obtained interview data and non-verbal data can capture participants' subjective views and non-verbal behaviour and, through them, convey a true picture of the social fabric in which legal practices are embedded and of the law's impact in local contexts.

An array of other sources and research methods were added to generate a spectrum of rich data.[26] The additional sources that were used are thought-experiment data, researcher observations, court cases, press articles, legal guidelines and other documents handed over by research participants. These documents included notes of lawyers, internal working documents and official standpoints of relevant organisations. When triangulated, they provide a means through which robust, valid and reliable inferences about the law in the contemporary real world can be drawn.[27]

The Kenyan floriculture industry and the South Korean electronics industry have been selected as case studies. The field research in Kenya lasted for a period of four weeks and the field research in the Republic of Korea (Korea) for a period of six weeks. The saturation point was reached after interviewing fifteen participants in Kenya, and after interviewing ten participants in Korea. By reporting the case studies separately in Chapters 6 and 7, it is acknowledged that specified contextual conditions may have more influence on the findings than the conditions that can be found across the two case studies.[28] The Annex to this thesis further describes the data collection and data analysis methods, interview questions and demographics of the participants. It also describes how the

[24] Choudhuri (n 17) p 277.
[25] Webley (n 21) p 102.
[26] Cf Yin (n 20) p 15.
[27] Webley (n 21) p 4.
[28] Ibid p 12; Bent Flyvbjerg, 'Five Misunderstandings about Case–Study Research' (2006) 12(2) Qualitative Inquiry p 7.

researcher tried to conduct research that is as respectful and responsible as possible. It discusses the practical, methodological and ethical challenges that surfaced during the field research.

Chapter 6 presents case study research that has been carried out in the Kenyan floriculture sector. Kenya is the fourth largest exporter of cut flowers in the world (after the Netherlands, Colombia and Ecuador).[29] The floriculture industry contributed around 1.06 per cent to Kenya's Gross Domestic Product (GDP) in 2017.[30] The primary supply and distribution channels of this industry are concentrated along the EU-Africa axis. This industry is almost exclusively occupied by corporations with Kenyan and European owners that produce consumer products sold at auctions or to individual retailers. A minority of corporations are owned by Indians, who have entered the industry since the 1990s. All these corporations tend to produce their products in Kenya, although their supply chains are sometimes moved to Ethiopia and other neighbouring states where production costs are lower. The industry is export-driven, with almost all produced flowers being air-transported to Europe.[31] Two-thirds of exports are distributed via the Dutch auction.[32] From there, they are further distributed to other EU Member States and Russia, Japan and the US. The floriculture industry is labour-intensive. Workers are reportedly expected to work up to sixteen hours a day.[33] It is estimated that floriculture corporations currently directly employ around 100,000 people.[34] The number of floriculture jobs has

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[29] David Whitehouse, 'Kenya's Flower Growers to Share Brexit Pain' *The Africa Report* (Paris, 17 April 2019) <www.theafricareport.com/11976/kenyas-flower-growers-to-share-brexit-pain/> accessed 20 September 2019.
[30] Kenya Flower Council, 'Floriculture in Kenya' (2018) <http://kenyaflowercouncil.org/?page_id=92> accessed 5 December 2018.
[31] Amy Steward, 'Flower Power' (2007) 161 Foreign Policy pp 44–52.
[32] Winnie Mitullah, Paul Kamau and Joshua Kivuva, 'Employment Creation in Agriculture & Agro-Processing Sector in Kenya in the Context of Inclusive Growth: Political Economy & Settlement Analysis' (2017) Partnership for African Social & Governance Research Working Paper Nr 20 <www.pasgr.org/wp-content/uploads/2017/08/Employment-creation-in-agriculture-and-agro-processing-sector-in-Kenya-in-the-context-of-inclusive-growth.pdf> accessed 30 September 2019 p 25.
[33] Kenya National Commission on Human Rights (KNCHR), 'The National Action Plan on Business and Human Rights in Kenya. Report on Stakeholder Consultations held in Nakuru (2017) <http://nap.knchr.org/Portals/0/Reports/Nakuru%20regional%20consultation%20report.pdf?ver=2017-09-04-174649-763> accessed 5 January 2018 p 7.
[34] Whitehouse (n 29).

doubled over the last decade, while the number of jobs in other industries has stagnated.[35]

This case study has been chosen as the 'typical' or 'representative' case, which operates as a reference point.[36] Kenya is a state that has often been the subject of research focusing on 'access to remedies' and business and human rights. For example, the World Bank commissioned various reports on access to remedies for Kenyan citizens.[37] The Kenya National Commission on Human Rights and a number of other local actors also collaborated with the Danish Institute for Human Rights to create the Kenyan National Action Plan on Business and Human Rights (NAP), the first of its kind in Africa.[38]

Chapter 7 presents case study research that has been carried out in the Korean electronics industry. While Korea is not yet recognised as an economically developed state by various indexes, it left the Group of 77, which promotes the collective economic interests of 134 developing and emerging states to join the Organisation for Economic Co-operation and Development (OECD), in 1997 following decades of sustained economic growth.[39] The electronics industry played a major role in this economic success story. Korea is home to some of the largest electronics corporations that sell to individual consumers as well as business customers all over the world, including the EU. The combined revenues of Samsung Electronics, LG Display, LG Electronics and SK Hynix equate to roughly 20 per cent of Korea's GDP.[40] Samsung Electronics alone accounts for

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[35] Mitullah (n 32) p 29.
[36] Cf Yin (n 20) p 50.
[37] World Bank, 'Justice for the Poor' (2009) <http://web.worldbank.org/wbsite/external/topics/extlawjustice/extjusforpoor/0,,contentmdk:21172707~menupk:3282963~pagepk:210058~pipk:210062~thesitepk:3282787,00.html#kenya> accessed 20 March 2018.
[38] Kenya (Government), 'NAP' (2019).
[39] Eg Columbia University (Center on Sustainable Development), 'Emerging Market Global Players Project' <http://ccsi.columbia.edu/publications/emgp/> accessed 30 September 2019; Morgan Stanley Capital International, 'Emerging Markets Index' <www.msci.com/emerging–markets> accessed 30 September 2019.
[40] Sung–Min Park, 'SK Hynix, LG add more to GDP' *Korea JoongAng Daily* (Seoul, 21 June 2016) <http://koreajoongangdaily.joins.com/news/article/article.aspx?aid=3020275> accessed 10 February 2018; Youkyung Lee, 'Behind South Korea's Chip Boom, Worries over Future' *Associated Press* (Seoul, 31 January 2018) <https://apnews.com/5ecdbdaf64624e839ae2f368da84bef2> accessed 10 February 2018; Joon–Hung Park and Jeehyun Cho, 'Top 10 Korean Inc. Revenue Equivalent to Nearly Half of GDP' *Pulse News* (Seoul, 6 September 2018) <https://pulsenews.co.kr/view.php?year=2018&no=562268> accessed 10 December 2018.

half of this percentage.[41] The founding families of these so-called 'chaebols' control the entire business through a complicated web of cross-shareholdings, even though they do not have the majority of shares. While these corporations moved low value added products, such as white goods, to production lines in Southeast Asia in the first half of the 1990s, most high value added products – such as semiconductors, LCD panels and other central electronic components – are still being manufactured in Korea.[42] More than 100,000 people are employed in the electronics industry in Korea alone.[43] Samsung Electronics and SK Hynix produce approximately three quarters of the global market for DRAM semiconductors – used to help gadgets and data centres run faster – and half of the global market for NAND flash memory – used to store digital data. Such products are sourced from Korea by various other transnational corporations, including the France-based Orange and the US-based Apple.[44]

This case study has been chosen as the 'atypical' case, which is in many facets unique. Atypical case studies can give access to rich information clarifying 'the deeper causes behind a given problem and its consequences' rather than to 'describe the symptoms' of the problem.[45] In particular, this case was strategically chosen to falsify some of the doctrinal assumptions that have been made in discourses on the role of EU Member States in business and human rights issues. The revelatory character of this case study heightens this effect; the timing of the project created the opportunity to gather data which might have been previously difficult to access.[46] The field research was carried out in a politically favourable climate at the beginning of 2018, shortly after Korea's

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[41] Lee (n 40).
[42] Aelim Yun, 'Empowering "the Bottom" of Supply Chains to Establish Corporate Responsibility' (2015) <www.global–labour–university.org/fileadmin/GLU_conference_2015/papers/YUN.pdf> accessed 30 September 2019 p 4.
[43] Ifo Institute and Civic Consulting, 'Evaluation of the Implementation of the Free Trade Agreement between the EU and its Member States and the Republic of Korea Interim Technical Report Part 1: Synthesis Report' (2017) <http://trade.ec.europa.eu/doclib/docs/2017/june/tradoc_155673.pdf> accessed 9 January 2018 p 294.
[44] Lu–Hai Liang, 'Apple and Samsung Duke it Out in Korea' *The National* (London, 9 July 2018) <www.thenational.ae/business/technology/apple–and–samsung–duke–it–out–in—korea–1.748165> accessed 30 September 2019; Heekyong Yang and Ju–min Park, 'Seizing on Huawei's Troubles, Samsung Bets Big on Network Gear' *Reuters* (Seoul, 15 February 2019) <www.reuters.com/article/us–samsung–huawei–focus/seizing–on–huaweis–troubles–samsung–bets–big–on–network–gear–idUSKCN1Q40I3> accessed 30 September 2019.
[45] Flyvbjerg (n 28) p 13.
[46] Cf Yin (n 20) p 50.

current President, Moon Jae-in – who is often portrayed as a relatively moderate leader – was elected.[47] Moon was elected after President Park Geun-hye was impeached because of accusations of soliciting bribes from the Samsung group.

Case studies strive for generalisable theories that go beyond the setting for the specific case that has been studied.[48] The findings of case study research are generalisable to theoretical propositions but they cannot be generalised across populations or universes. Reporting multiple case studies increases the external validity of case study research because a more complete and accurate picture in light of the research question is provided. Replicating findings of a first case study in a second case study makes the analytical implications found in respect of the doctrinal propositions more robust.[49]

Any selection of case studies ultimately depends on whether their investigation provides insights relating to the research aim. The main reason why the Kenyan floriculture industry and Korean electronics industry have been selected is that they seamlessly complement the studies on 'extraterritorial' access to remediation presented in Chapters 4 and 5. It has been noted above that both Dutch and Kenyan entrepreneurs are active in the Kenyan floriculture industry and that most flowers are exported to the Dutch auction. The research results, therefore, provide concrete insights as to how 'local' capacity building might remedy human rights violations by *all* corporations active in this industry. It has also been noted that extraterritorial claims against the Korean corporation Samsung have been brought in France. This made it possible to research the advantages and disadvantages of extraterritorial remediation vis-à-vis support for local remediation. While the presented findings have garnered rich insights, they are also essentially limited. Additional case studies would be useful to further

[47] This thesis follows the convention of putting the Korean family name first, followed by the given name connected by a hyphen, with the exception of references. For reasons of consistency, references indicate the given name (as spelled by the author) followed by the family name.
[48] Yin (n 20) p 37.
[49] Ibid p 55.

refine and strengthen the presented propositions. The mining industry in the DR Congo or adjoining states would be particularly interesting to study, in light of the unilateral regulations that have been taken at the EU level. Such a case study would require sufficient funding to manage the threats to researcher safety. It would also be interesting to collect and interpret data from hegemonic states. For example, the meat industry in Brazil, the automotive industry in India and the electronics industry in China would be valuable additional case studies.

CHAPTER 2 TRANSNATIONAL LAW

This chapter aims to investigate the extent to which the EU and its Member States are allowed to rein in TNC-DEMs by imposing a requirement as a matter of regulatory compliance, either as a direct obligation formulated in a rule (sections 1-2), or indirectly by offering corporations the opportunity to defend against civil violations (section 3). This chapter first introduces the ideas and controversies that surround the legal scholarship on business and human rights. Also described in section 1 of this chapter is whether states are *permitted* or *required* to regulate abuse by corporations – including TNC-DEMs – beyond their own territorial borders. Section 2 deals specifically with the current state of the debate on a social clause. This section studies whether import-restrictive measures are allowed within the WTO regime. Such measures can allow economically developed states to create an artificial level playing field that enforces the same human rights standards across both national and foreign corporations – including TNC-DEMs – that operate in their market. There has, however, been a tenuous and polarised debate on whether the protection of human rights in third states might justify such measures. Section 3 explains that the rules governing the use of civil adjudicative jurisdiction have not been regulated by international law to any great extent. The two ways in which extraterritorial states can strengthen access to judicial remedies over TNC-DEMs are introduced and examined: extraterritorial litigation and support for local capacity development.

1 Introduction

1.1 Extraterritorial obligations

The extension and intensification of cross-border relations between states has played a major role in the expansion of powerful transnational corporations. Such corporations can have a broadly positive impact on the enjoyment of human rights, creating wealth and jobs, providing services, and adding value in developing and emerging states. [1] However, the benefits that economic

[1] Menno Kamminga, 'Holding Multinational Corporations Accountable for Human Rights Abuses: a Challenge for the EC' in Philip Alston (ed), *The EU and Human Rights* (Oxford University Press 2000) p 554.

globalisation bring are highly diffuse.[2] Corporations of all kinds can easily have a devastating impact on vulnerable citizens in developing and emerging states.

It has been proposed that the state-centred organisation of international law should be re-evaluated by imposing human rights 'obligations' on corporate non-state actors.[3] It is outside the scope of this thesis to study such obligations and their relation with state obligations. While there is something to say for shared obligations between state and non-state actors, states remain the principal duty bearers of international human rights law, as laid down in the UN Charter (1945).[4]

International human rights obligations of states are often studied by means of the 'respect, protect and fulfil' prism.[5] The obligation to respect requires that states refrain from interfering in the enjoyment of human rights. The obligation to protect requires that states ensure that non-state (private) parties – such as corporations – do not violate the human rights of individuals. The state has thus the affirmative task to guarantee protection. The obligation to fulfil imposes on a State a duty to actively facilitate, promote and provide for the enjoyment of rights. While this tripartite classification of obligations was first proposed in relation to economic, social and cultural rights, it is now accepted to apply to civil and political rights. Both categories of rights carry both negative (i.e. refraining from interfering with individuals' human rights enjoyment) and positive obligations (i.e. taking steps to ensure human rights enjoyment).

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[2] Zygmunt Bauman, *Globalization: The Human Consequences* (59,025th edn, Columbia University Press 1998) p 18.

[3] UN Sub–Commission on Prevention of Discrimination and Protection of Human Rights, 'Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2. The supervisory UN Commission on Human Rights declined to act on this draft. For an elaborate overview of the development of 'business and human rights initiatives at the UN level see Michael Addo and Jena Martin, 'The Evolving Business and Society Landscape: Can Human Rights Make a Difference' in Jena Martin and Karin Bravo (eds), *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Cambridge University Press 2016) pp 356–368.

[4] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16 (UN Charter). Cf Sigrun Skogly, 'Regulatory Obligations in a Complex World: States' Extraterritorial Obligations related to Business and Human Rights' in David Bilchitz and Surya Deva (eds), *Building a Treaty on Business and human Rights: Context and Contours* (Cambridge University Press 2017) p 336.

[5] UN Economic and Social Council, 'Report by Special Rapporteur on the Right to Food Asbjørn Eide' (1987) UN Doc E/CN.4/Sub.2/1987/23 para 67–69; Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (2nd edn, Princeton University Press 1996) p 52.

Limited 'capacities' to *protect and fulfil* human rights in developing and emerging states are in many respects the product of their subordinate position within the broader international political economy, where they are dependent on resource- and labour-intensive export sectors, are often highly indebted and suffer chronic fiscal shortages. Some economically developed states have started to make use of domestic legislation with extraterritorial implications to *protect* affected people in developing and emerging states. Such legislation influences the behaviour of private corporations abroad in situations where there are sufficiently close connections. Strictly speaking, domestic legislation with extraterritorial implications does not amount to an assertion of direct extraterritorial jurisdiction. Such legislation would be 'analogous' to requiring foreign nationals to respect the laws of the regulating state when visiting that state.[6] Regulating extraterritorial states would, therefore, be less likely to interfere in third states' internal affairs. [7] The principle of non-interference could, nevertheless, be violated if the third state has an overriding sovereign interest in the regulation (or non-regulation) of the individuals' rights.[8] Accordingly, an extraterritorial state should not be authorised and, even more, should not be obliged to protect individuals located in a third state from corporate human rights violations if that state objects to such interference.

It is now generally acknowledged that there is a sufficiently close connection for extraterritorial 'home' states to take regulatory measures that require their corporate nationals to take certain steps in relation to their involvement in human rights violations (through their activities or business relationships) in third states. This has most often been framed as a North-South issue: domestic measures with extraterritorial implications taken by economically developed states provide a practical solution to regulate the human rights impacts of their corporate

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[6] Jennifer Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' (2010) Harvard Corporate Social Responsibility Initiative Working Paper Nr 59 <www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper_59_zerk.pdf> accessed 6 September 2019 p 64.

[7] The International Court of Justice (ICJ) has defined the principle of non-interference in *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14 para 205. It noted that 'a prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely'.

[8] Cedric Ryngaert, 'Jurisdiction: Towards a Reasonableness Test' in Malcolm Langford and others (eds), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013) pp 208–209.

nationals when they operate in low-cost third states with fewer regulations. While third states can – in principle – object to regulation by the extraterritorial home state based on the principle of non-interference, it has also been argued that such objections would not be legitimate when the third state is bound by customary international law, ILO (core) conventions or is a party to the same human rights treaties as the extraterritorial 'home' state.[9]

The UN Guiding Principles on Business and Human Rights (2011) have been extremely influential in putting this idea forward. These principles recommended extraterritorial home states to hold businesses domiciled in their jurisdiction accountable if those corporations are involved in human rights violations abroad.[10] Specifically, it will be demonstrated in the second part of this thesis that the UN Guiding Principles put issues on the legislative table and gave 'norm entrepreneurs' in the EU, France and the Netherlands advocating a minority position, a tool to strengthen their position in domestic debates.[11] Most legal frameworks adopted after 2011 rely upon the umbrella term of 'due diligence', as used in the UN Guiding Principles. This comprises an on-going risk management process that a reasonable and prudent corporation needs to undertake, in light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights.[12] The 2011 update of the OECD Guidelines for Multinational Companies indicated that through this process, enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems.[13]

Various norm entrepreneurs – including civil society organisations and scholars – have scrutinised the UN Guiding Principles because they do not acknowledge that states have extraterritorial *protect* obligations over their corporate nationals when

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[9] Malcolm Langford and others, 'Introduction: an Emerging Field' in Malcolm Langford and others (eds), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013) p 15.
[10] Commentary to UN Guiding Principle 2.
[11] Cf Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52(4) International Organization p 895.
[12] OHCHR, 'The Corporate Responsibility to Respect Human Rights' (2012) <www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf> accessed 6 May 2018 p 6.
[13] OECD, *OECD Guidelines for Multinational Enterprises* (2nd edn, OECD Publishing 2011) para 14.

they are involved in violations of human rights in third states.[14] The Commentary to UN Guiding Principle 2 sets out: 'At present states are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction'. It is said that the UN Guiding Principles clash with other learned interpretations of international law.

It has been argued that obligations for extraterritorial states have always existed (complementary to those of the territorial state) to some extent in some core human rights instruments.[15] Detailed analyses of the existence, reach and understanding of jurisdiction related to extraterritorial obligations have been conducted by others,[16] but it is useful to provide the reader with a gist of the arguments made in favour of such obligations.[17]

The general obligations provisions of four core human rights instruments – including the Convention on the Elimination of All Forms of Discrimination against

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[14] Eg Amnesty International and others, 'Joint Civil Society Statement on the Draft Guiding Principles on Business and Human Rights' (2011) <www.fidh.org/IMG/pdf/Joint_CSO_Statement_on_GPs.pdf> accessed 5 May 2016; ETO Consortium, Maastricht Principles on States' Extraterritorial Obligations in the area of Economic, Social and Cultural Rights (2011) <www. etoconsortium.org/nc/en/main–navigation/library/maastricht–principles/?tx_drblob_pi1% 5BdownloadUid%5D=23> accessed 30 September 2019 ('Maastricht Principles'), Maastricht Principles 9 and 24. Various synonyms have been created to describe such obligations including 'universal obligations', 'external obligations', 'transnational obligations' and 'international obligations'. See Mark Gibney, 'On Terminology: Extraterritorial Obligations' in Malcolm Langford and others (eds), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013) pp 32–47.

[15] Eg CESCR, 'General Comment 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities' (2017) UN Doc E/C.12/GC/24 para 27; Sigrun Skogly, 'Extraterritorial Obligations and the Obligation to Protect' in Martin Kuijer and Wouter Werner (eds), *Netherlands Yearbook of International Law* (TMC Asser Press 2017) pp 225–228.

[16] Eg Fons Coomans and Menno Kamminga, *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004); Sigrun Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Intersentia 2006); Margot Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford University Press 2007); Michal Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersentia 2009); Robert McCorquodale and Penelope Simons, 'Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 The Modern Law Review; Fons Coomans and Rolf Künneman, *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* (Intersentia 2012); Malcolm Langford, Wouter Vandenhole, Martin Scheinin and Willem van Genugten (eds), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013).

[17] This literature overview is mainly based on Wouter Vandenhole, 'Extraterritorial Human Rights Obligations: Taking Stock, Looking Forward' (2013) 5 European Journal of Human Rights; Skogly (n 4) and Skogly (n 15).

Women (UNCEDAW) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) – are expressed without any restriction linked to territory or jurisdiction.[18] For example, Article 2 UNCEDAW explains that States parties agree to pursue to eliminate discrimination against women by all appropriate means, including legislative measures. On this basis, the UN Committee on the Elimination of Discrimination against Women (CEDAW) seems to have indicated that States Parties have positive extraterritorial obligations over corporations in its Concluding Observations for Switzerland. [19] This treaty body recommended the State Party to 'strengthen its legislation governing the conduct of corporations registered or domiciled in the State party in relation to their activities abroad'.[20] Although the CEDAW – like other treaty bodies – is not empowered to make binding interpretations of treaties, its position as primary monitoring body gives its interpretations considerable legal weight.

Similarly, Article 2(1) ICESCR provides that States Parties shall 'take steps, individually and through international assistance and cooperation ... to achieve progressively the full realization' of economic, social and cultural rights. The UN Committee on Economic, Social and Cultural Rights (CESCR) has relied upon Article 2(1) ICESCR to argue that those States Parties that are in a position to offer international cooperation have to do so, while other States Parties have to seek and accept assistance when they are unable to protect the economic, social and cultural rights of their own citizens.[21] Initially, the CESCR's references to extraterritorial obligations were vague and focused exclusively on the context of

[18] Art 2 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195; art 2 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); art 2 Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (UNCEDAW) and art 2 Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 993 UNTS 3 (CRPD). The African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 26 does also not refer to 'territory' or 'jurisdiction'.

[19] CEDAW, 'Concluding Observations: Switzerland' (2011) UN Doc CEDAW/C/CHE/CO/4. The Global Initiative for Economic, Social and Cultural Rights monitors UN pronouncements on extraterritorial obligations. See 'Working Paper Human Rights Law Sources: UN Pronouncements on Extra–Territorial Obligations' (2018) <www.gi–escr.org/latest–news/2018/9/22/updated–working–paper–human–rights–law–sources–un–pronouncements–on–extra–territorial–obligations> accessed 5 November 2018.

[20] CEDAW/C/CHE/CO/4 (n 19) para 41.

[21] Eg CESCR, 'General Comment 3 on the Nature of States Parties Obligations' (1991) UN Doc E/1991/23 para 14.

development cooperation and assistance.[22] This has changed in recent years. The CESCR's General Comment 23, which interprets the Right to Just and Favourable Conditions of Work (2016), refers to the impact of extraterritorial obligations of States Parties with 'advanced labour law systems' to improve labour standards in other States Parties.[23] The CESCR's General Comment 24 on Business and Human Rights (2017), describes that it would be contrary to Article 2(1) ICESCR

> to allow a State to remain passive where an actor domiciled in its territory and/or under its jurisdiction, and thus under its control or authority, harmed the rights of others in other States, or where conduct by such an actor may lead to foreseeable harm being caused[24]

The CESCR reasoned that Members of the UN have pledged 'to take joint and separate action in cooperation with the Organization' to achieve the purposes set forth, including 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion' under Article 55 UN Charter.[25] This article requires states to take 'joint and separate action' for the achievement of universal respect and observance of human rights.[26] The CESCR further noted that customary international law prohibits a state from allowing its territory to be used to cause damage on the territory of another State, a requirement that has gained particular relevance in international environmental law.[27]

The Convention on the Rights of the Child (UNCRC) and the European Convention on Human Rights (ECHR) do also not refer to the concept of territory, but they do

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[22] Eg CESCR, 'General Comment 14 on the Right to the Highest Attainable Standard of Health (2000) UN Doc E/C.12/2000 para 59.
[23] CESCR, 'General Comment 23 on the Right to Just and Favourable Conditions of Work (art 7 ICESCR)' (2016) UN Doc E/C.12/GC/23 para 70.
[24] E/C.12/GC/24 (n 15) para 27.
[25] Ibid referring to art 55 UN Charter.
[26] See also arts 1(3) and 55 UN Charter; art 2(1) ICESCR; art 4 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1989) 1577 UNTS 3 (UNCRC); arts 4 and 32 CRPD. Other core international human rights instruments also refer to the concept of 'international cooperation), but they do this only with regard to specific rights (eg art 32 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (ICERD); art 9(1) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1464 UNTS 85 (CAT); art 34 International Convention for the Protection of all Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (CED). For a discussion, see Skogly (n 15) pp 76–79.
[27] E/C.12/GC/24 referring to HRC, Res 21/11 (2011) UN Doc A/HRC/RES/21/11.

refer to the concept of 'jurisdiction' in their general obligations provisions.[28] First, Article 2(1) UNCRC starts as follows: 'States Parties shall respect and ensure the rights set forth in the present Convention to each child within *their jurisdiction'*.[29] This has notoriously been used as a 'bar' to limit the reach of treaty obligations to the territorial boundaries of States Parties.[30] In its General Comment 16 on State Obligations regarding the Impact of the Business Sector on Children's Rights (2013), the UN Committee on the Rights of the Child (CRC) stressed, however, that States Parties to the UNCRC have 'obligations' to engage in international cooperation for the realisation of children's rights beyond their territorial boundaries. [31] The CRC comments that the preamble and the provisions of the Convention consistently refer to the 'importance of international cooperation for improving the living conditions of children in every country, in particular in the developing countries'.[32] Paragraph 43 of this General Comment indicates that extraterritorial home states have to protect and fulfil obligations in the context of businesses' extraterritorial activities and operations, when there is a 'reasonable link' between the State Party and the conduct concerned.

Second, Article 1 ECHR indicates that States Parties shall secure the ECHR rights and freedoms to 'everyone within their jurisdiction'. This reference was introduced during the drafting process of the ECHR to replace the words 'all persons residing within their territories'.[33] The European Court of Human Rights (ECtHR) has indicated that jurisdiction is often, but not always, territorial.[34] An important case on the extraterritorial application of the ECHR is *Issa v Turkey* (2004) in which the applicants claimed that Turkish soldiers violated their relatives' human rights

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[28] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 (ECHR). See also American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 114 UNTS 123; Inter–American Commission on Human Rights, *Armando Alejandre Jr and others v Cuba* Report Nr 86/99 Case Nr 11.589 (IACHR, 29 September 1999) para 25 discussed in Christina Cerna, 'Extraterritorial Application of Inter–American Human Rights Instruments' in Fons Coomans and Menno Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) pp 157–162.
[29] (emphasis added).
[30] Olivier De Schutter and others, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights' (2012) 34(4) Human Rights Quarterly p 8 (Commentary to Maastricht Principles), Commentary 2 to Maastricht Principle 9.
[31] CRC, 'General Comment 16 on State Obligations regarding the Impact of the Business Sector on Children's Rights' (2013) UN Doc CRC/C/GC/16.
[32] Ibid paras 39–43.
[33] Council of Europe, *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights* (Brill 1976) vol 3 p 260.
[34] *Banković and others v Belgium and others* (2001) ECHR 2001–XII paras 71 and 80.

during Turkey's invasion of Northern Iraq in 1995.[35] The ECtHR reasoned that Article 1 ECHR 'cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory'.[36] Two points need to be highlighted. First, the ECtHR found that human rights violations which take place in a third state that is not a State Party (Northern Iraq) to the ECHR, could fall within the jurisdiction of a state party to the ECHR. Second, the ECtHR found that a state party could be deemed to have exercised jurisdiction in a third state over persons who are found to be under the State Party's 'authority and control' through its agents operating – whether lawfully or unlawfully – in the third state.

In a string of cases against Moldova and Russia, the ECtHR also acknowledged that Russia had positive obligations over a local *non-state actor*, the separatist regime in the territorial state of Moldova.[37] For example, in *Ilaşcu and others v Moldova and Russia* (2004), the ECtHR found that not only Moldova but also Russia had positive obligations over the separatist regime in Moldova. Russia was found to have 'effective authority or at the very least under the decisive influence' over the separatists, as they were said to survive by Russia's military, economic, financial and political support between 1992 and 2004.[38] In addition, the Court found that Russia 'made no attempt to put an end to the applicants' situation brought about by its agents, and did not act to prevent violations committed'.[39] The Court added that it is of 'little consequence' that the agents of the Russian Federation have not participated directly in the events.[40]

The ECtHR has also constructed extraterritorial state obligations over state and non-state in other contexts than disputes over territory. For example, in *Kovačić and others v Slovenia* case (2004), Croatian applicants complained that they were

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[35] *Issa v Turkey* App Nr 31821/96 (ECtHR, 16 November 2014). See also *Al–Skeini and others v United Kingdom* App Nr 55721/07 (ECtHR, 7 July 2011); *Jaloud v the Netherlands* App Nr 47708/08 (ECtHR, 20 November 2014).
[36] *Issa v Turkey* (n 35) para 71.
[37] *Ilaşcu and others v Moldova and Russia* (2004) ECHR 2004–VII para 392–393; *Ivanţoc and others v Moldova and Russia* App Nr 23687/05 (ECtHR, 15 November 2011) para 119; *Catan and others v The Republic of Moldova and Russia* App Nrs 43370/04, 18454/06 and 8252/05 (ECtHR, 19 October 2012) paras 118–122; *Mozer v Moldova and Russia* App Nr 11138/10 (ECtHR, 23 February 2016) paras 101–111 and 153–159.
[38] *Ilaşcu and others v Moldova and Russia* (n 37) para 392.
[39] Ibid para 393. See also ECtHR, *Ivanţoc and others v Moldova and Russia* (n 37) para 119.
[40] *Ilaşcu and others v Moldova and Russia* (n 37) para 393.

prevented by a Slovenian constitutional law with extraterritorial effects from withdrawing funds from their accounts of the Croatian bank after the dissolution of the Socialist Federal Republic of Yugoslavia, but before Croatia became a state party to the ECHR.[41] This law specified that the Slovenian bank kept full liability for its links with banks in other states, which had been a part of the Socialist Federal Republic of Yugoslavia. The ECtHR noted in the admissibility decision that Slovenia could have extraterritorial positive obligations over the Croatian bank because the Slovenian Law 'affected' the Croatian applicants' position outside Slovenian territory as regards their savings with the Croatian bank.[42]

Finally, the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) contain a clause that refers to the concept 'territory'.[43] Article 2(1) ICCPR refers to 'within its territory and subject to its jurisdiction', while Article 2 CAT refers to 'any territory under its jurisdiction'. Nevertheless, the International Court of Justice (ICJ) and the treaty bodies that monitor the implementation of the ICCPR and the CAT seem to have accepted an interpretation of situations that may involve jurisdiction of a State Party outside its borders.

To begin, the ICJ has held that the ICCPR can be applicable in respect of acts done by a State in the exercise of its jurisdiction outside its territory.[44] The ICJ also indicated that positive extraterritorial obligations might exist. In the *Congo v Uganda* (2005) case, the ICJ stated, for example, that '*international human rights instruments* are applicable "in respect of acts done by a State in the exercise of its

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[41] *Kovačić and others v Slovenia* App Nrs 44574/98, 45133/98 and 48316/99 (ECtHR, 9 October 2003 and 1 April 2004) Admissibility decision pp 29–30 referring to Section 22(b)(iii) Unstavni Zakon o Dopolnitvah Ustavnega Akona za Izvedbo Temeljne Ustavne Listine o Samostojnosti in Neodvisnosti 1994 (Slovenia). The case was struck out in the merits phase due to new facts that came to the ECtH's attention. See also *Tugar v Italy* App Nr 22869/93 (European Commission Human Rights, 18 October 1995) para 1.
[42] *Kovačić and others v Slovenia* (n 41) pp 52 and 56.
[43] Art 2 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); art 2 CAT. See also art 7 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) General Assembly Res 45/158 (ICPRM) (this Convention will not be considered in this thesis).
[44] *Legal Consequences for States on the Continued Presence of South Africa in Namibia (South–West Africa) Notwithstanding Security Council Resolution 276* [1971] ICJ Rep 16 para 131; Legal Consequences of the Construction of a Wall (Advisory Opinion) [2004] ICJ Rep 4 para 111.

jurisdiction outside its own territory", particularly in occupied territories'.[45] This wording has been interpreted as a reference to the interdependence, interrelatedness and indivisibility of all rights.[46] The ICJ further found that the occupying state Uganda could not tolerate human rights violations of 'other actors present in the occupied territory, *including* rebel groups acting on their own account'.[47] This wording has been interpreted as indicating that extraterritorial obligations exist over other non-state actors than rebel groups, such as corporations.[48]

Second, the UN Human Rights Committee held that it is 'not barred (...) by virtue of Article 2(1) Covenant ("... individuals within its territory and subject to its jurisdiction ...") from considering these allegations' even though they 'allegedly took place on foreign territory' in *Celiberti de Caseriego v Uruguay*.[49] In addition, this Committee said in General Comment 31 that 'a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party'.[50] This Committee added that 'the State party is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant through their operations' in its Concluding Observations for Korea and Germany.[51] Similarly, the UN Committee against Torture, in its General Comment

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[45] *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* [2005] ICJ Rep 116 paras 216–217 (emphasis added).
[46] Eg Smita Narula, 'International Financial Institutions, Transnational Corporations and Duties of States' in Malcolm Langford and others (eds), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013) p 124.
[47] Ibid paras 216–217 (emphasis added); John Cerone, 'Out of Bounds: Considering the Reach of International Human Rights' (2006) Center for Human Rights and Global Justice Working Paper Nr 5 <http://chrgj.org/wp–content/uploads/2012/07/WPS_NYU_CHRGJ_Cerone_Final.pdf> accessed 1 August 2016 p 8.
[48] Eg Maarten den Heijer and Rick Lawson, 'Extraterritorial Human Rights and the Concept of "Jurisdiction"' in Malcolm Langford and others (eds), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013) p 168.
[49] UN Human Rights Committee, 'Celiberti de Caseriego v Uruguay' (1981) UN Doc CCPR/C/13/D/56/1979 para 10.1. See also HRC, 'Lopez Burgos v Uruguay' (1981) UN Doc CCPR/C/OP/1 para 12.3.
[50] UN Human Rights Committee, 'General Comment 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) UN Doc CCPR/C/21/Rev.1/Add. 1326 para 10.
[51] UN Human Rights Committee, 'Concluding Observations: Germany' (2012) CCPR/C/DEU/CO/6 para 16; UN Human Rights Committee, 'Concluding Observations: Republic of Korea' (2015) UN Doc CCPR/C/KOR/CO.4 para 11.

2, noted that a state can have jurisdiction in 'all areas where the State party exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control, in accordance with international law'.[52]

This short overview of the arguments in favour of extraterritorial obligations should not be interpreted as an indication that they are generally recognised (as set out in the UN Guiding Principles). Moreover, it is 100 per cent clear that states have not been univocally supportive of such obligations. Some scholars have also objected to such obligations.[53] In their analyses, they can select pronouncements of the same institutions, as the case law is not logically consistent. For example, the ICJ has noted that the absence of a general jurisdictional clause in the ICESCR might be due to the fact that they are 'essentially territorial'.[54] Similarly, in the controversial 2001 *Banković and others v Belgium and others* judgment, the ECtHR made two arguments that are contrary to the two arguments in the above reported *Issa* case.[55] First, the ECtHR introduced the concept 'legal space' to generally limit the applicability of the ECHR to the overall territories of its States Parties in this case. It motivated that the ECHR is a mutual treaty, designed to apply in an essentially regional context and not throughout the whole world, even in respect to conduct of the States Parties to the ECHR. Second, the ECtHR proclaimed that jurisdiction can only be established when the territory in question was one that would be covered as a whole by the ECHR in exceptional circumstances. An individual connection with a person in a third state outside the 'legal space' was not considered to establish jurisdiction under the ECHR. While many commentators have reasoned that this approach has been retired in the *Issa* case and other more recent cases, the ECtHR has not explicitly renounced its *Banković* approach.[56]

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[52] CAT, 'General Comment 2 on Implementation of art 2 by States Parties' (2008) UN Doc CAT/C/GC/2 para 16. See also CAT, 'Concluding Conclusions and Recommendations: USA' (2006) UN Doc CAT/C/USA/CO/2 para 15.
[53] See eg Ralph Wilde, 'Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties' (2013) 12 Chinese Journal of International Law; Lorand Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' (2015) 25(4) The European Journal of International Law.
[54] Wilde (n 53) p 669 referring to Legal Consequences of the Construction of a Wall (Advisory Opinion) [2004] ICJ Rep 4 para para 112.
[55] Wilde (n 53) referring to *Banković and others v Belgium and others* (n 34) para 80.
[56] Erik Roxstrom and Mark Gibney, 'Human Rights and State Jurisdiction' (2017) 18 Human Rights Review p 145.

Arguably, the current polarisation in the scholarly debates on whether extraterritorial obligations over transnational corporations exist is not very constructive. This author concurs Wouter Vandenhole who concluded that 'a sliding scale of completeness as an independent legal norm' would be a more accurate model.[57] He finds support for this constructivist argument in Alan Boyle and Christine Chinkin's famous claim that 'Once soft law begins to interact with binding instruments its non-binding character may be lost or altered'.[58] From a rationalist point of view, it might even be reasoned that extraterritorial obligations will always remain of a 'soft' nature, regardless of whether they are enshrined in an international human rights treaty.

1.2 TNC-DEMs

As indicated in section 1.1, states have been reluctant to recognise extraterritorial obligations. Economically developed states have persistently held that international cooperation is only a moral and not a legally binding obligation. This was most recently repeated during the discussion day of the CESCR's General Comment 24 on Business and Human Rights. The representatives of Switzerland, the UK and the US were, for example, quick to opine that their obligations over private corporations go with their territory and not any further. Emerging and developing states have also perceived a binding duty to cooperate as interference in what they see as their internal affairs.[59] They can, for example, refuse cooperation to prevent assistance being provided in an arbitrary manner.[60]

It is common practice to maintain the 'status quo' and not regulate corporate human rights impacts in all states around the world. The reason is that mandatory compliance with higher business and human rights standards might

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[57] Vandenhole (n 17) p 833.
[58] Ibid p 833 referring to Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007) p 213.
[59] Jens Martens and Karolin Seitz, 'The Struggle for a UN Treaty. Towards Global Regulation on Human Rights and Business' (2016) 9 Global Policy Forum and Rosa Luxemburg Stiftum <https://rosaluxspba.org/wp–content/uploads/2016/09/un_treaty_online18.pdf> accessed 11 May 2018 p 26.
[60] Cf UN Economic and Social Council, 'Report of the Working Group on a Draft Convention on the Rights of the Child' (1989) UN Doc E/CN.4/1989/48 para 173; Rolf Künnemann, 'The International Covenant on Economic, Social and Cultural Rights' in Fons Coomans and Menno Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) pp 201–232; Ben Saul, David Kinley and Jacqueline Mowbray, *The ICESCR Commentary, Cases and Materials* (Oxford University Press 2014) p 864.

stand in the way of realising short-term economic goals. Such measures might be perceived as a barrier to attracting foreign direct investments or as an obstacle that creates a 'competitive disadvantage' for corporations that are home in the regulating state. There is a collective action problem or global prisoner's dilemma. No state individually wishes to impose a heavy burden on their own corporate nationals in order to maintain short-term business opportunities. If some states took up extraterritorial obligations over their corporate nationals and invest in serious efforts to protect citizens impacted by them in third states, then competitors that do not have to respect the same standards can easily undercut those responsible companies.[61]

A notable threat appears to come from emerging – and increasingly also developing – states. These states have a comparative advantage and significantly fewer capabilities to install business and human rights requirements compared to economically developed states. Perhaps remarkably, however, corporations from developing and emerging states have almost exclusively been studied in supply chain relations, as subsidiaries of economic entities from economically developed states in the business and human rights literature.[62] Legal scholars seem to resort mainly to the supply chain configuration as conceptualised by Michael Porter in the 1980s. According to Porter, a business entity's upstream activities (such as inbound logistics and operations) could be relocated to low-cost states with fewer regulations, while downstream activities (such as marketing and sales) should be conducted close to customers, in economically developed Western states.[63] Today's business reality looks, however, very different. A 'Mikado game' is a useful metaphor to describe this new reality. As is the criss-cross pattern that this game forms, so too is the structure of economic entities that operate across states' boundaries. Under the influence of the rapid pace of technological change and globalisation, both upstream and downstream corporate activities are offshored, customers are located all over the world, and corporations from

[61] HRC, 'Report of the Special Representative of the Secretary–General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises – Protect, Respect and Remedy: a Framework for Business and Human Rights John Ruggie' (2008) UN Doc A/HRC/8/5 para 22.
[62] Florian Wettstein and others, 'International Business and Human Rights: A Research Agenda' (2019) 54(1) Journal of World Business pp 59–60.
[63] Michael Porter, *Competitive Advantage: Creating and Sustaining Superior Performance* (Free Press 1985) vol 15; Michael Porter, 'Changing Patterns of International Competition' (1986) 28(2) California Management Review p 16.

developing and emerging states are also capable of deploying economic activities on a global scale.[64]

This issue has created considerable difficulties during the elaboration process of a business and human rights treaty that has been going on in the HRC since 2014, following an initiative of a number of developing and emerging states.[65] According to a controversial footnote on the first page of proposal A/HRC/RES/26/9, this treaty would only include 'transnational corporations and corporations that have a transnational character in their operational activities'. [66] This proposed scope is more limited than the UN Guiding Principles, which are applicable to all corporations. A treaty with such limited scope would create an uneven playing field that disadvantages transnational corporations that operate in such third states. More specifically, it is likely that such a binding instrument would create a competitive disadvantage for corporations based in economically developed states that operate more frequently 'transnationally' in third states where the protection of human rights is weak. With this in mind, it is unsurprising that the EU Member States voted en bloc against Resolution A/HRC/RES/26/9, alongside other economically developed states, including the US.[67] The former UN Special Representative for Business and Human Rights John Ruggie commented that the effects for victims are the same whoever is responsible for human rights violations.[68] Current and former members of the UN Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (UN Working Group on Business and Human Rights) – which has as a

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[64] Alvaro Cuervo–Cazurra, 'How Emerging Market Multinational Enterprises Upgrade Capabilities Using Value–Chain Configuration in Advanced Economies' in Peter Williamson and others (eds), *The Competitive Advantage of Emerging Market Multinationals* (Cambridge University Press 2013) p 175.

[65] UN General Assembly, Res 26/9 (2014) UN Doc A/HRC/RES/26/9.

[66] Ibid.

[67] EU, 'UN Human Rights Council 26th Session – Item 3 Resolution L.22, EU Explanation of Vote' (2014) <www.globalpolicy.org/images/pdfs/GPFEurope/HRC_resolution_Explanation_of_vote_EU.pdf> accessed 11 February 2018; Nicole Tuttle, 'Human Rights Council Resolutions 26/9 and 26/22: Towards Corporate Accountability' (2015) 19 American Society of International Law Insights <www.asil.org/insights/volume/19/issue/20/human–rights–council–resolutions–269–and–2622–towards–corporate> accessed 5 February 2016.

[68] John Ruggie, 'Third United Nations Forum on Business & Human Rights Closing Plenary Remarks' *(James G Stewart,* 2014) <http://jamesgstewartcom/author/john–g–ruggie/> accessed 27 January 2016. See also HRC, 'Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled "Human Rights Council". Addendum Business Recognition of Human Rights: Global Patterns, Regional and Sectoral Variations' (2007) UN Doc A/HRC/4/35/Add.4 para 209.

mandate to disseminate and implement the UN Guiding Principles – have also commented on this issue.[69] Surya Deva noted that a treaty that only covers 'transnational' corporations would be 'indefensible, unworkable and politically unviable'.[70] Previously, Puvan Selvanathan wrote that there is no 'difference in culpability' between 'states that allow domestic businesses to abuse the human rights of their own citizens, and states that tolerate and tacitly protect multinational businesses that abuse the rights of others' citizens'.[71]

1.3 Domestic measures with extraterritorial implications over TNC-DEMs

Now that it has been determined that the EU and its Member States are increasingly expected (or obliged) to rein in their own corporations, it can be hypothesised that they would like to create an artificial level playing field that enforces the same human rights standards across both national corporations and other corporations – including TNC-DEMs – in today's hypercompetitive world. Before testing this hypothesis in the second part of this thesis, it needs to be established here whether EU Member States are entitled to take such measures over foreign corporations under international law.

The compatibility of domestic measures with extraterritorial implications with international law has not been definitively proclaimed. Judge ad hoc Christine Van den Wyngaert in her dissenting opinion to the ICJ case concerning the Arrest Warrant (2000) argued that states are permitted to exercise extraterritorial jurisdiction under their national laws by adopting legislation that seeks to regulate behaviour in other states (and by allowing their courts to adjudicate cases related to such behaviour) as long as they do not send their agents abroad to exercise'enforcement jurisdiction'. [72] . The Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (Maastricht Principles) – a framework proposed by a number

[69] The UN Working Group on Business and Human Rights' mandate has been set out in UN General Assembly, Res 17/4 (2011) UN Doc A/HRC/RES/17/4 and UN General Assembly, Res 26/22 (2014) UN Doc A/HRC/RES/26/22.
[70] Surya Deva, 'Corporate Human Rights Abuses And International Law: Brief Comments' *(James G Stewart,* 2015), <http://jamesgstewartcom/corporate–human–rights–abuses–and–international–law–brief–comments/> accessed 18 January 2016. See also HRC, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (2012) UN Doc A/HRC/20/29 para 19.
[71] Letter from Puvan Selvanathan, Member UN Working Group on Business and Human Rights to Joachim Rücker, President of the HRC (16 December 2015) p 1.
[72] *Arrest Warrant (Democratic Republic of Congo v Belgium)* [2000] ICJ Rep 3 para 61 and 77 (Van Den Wyngaert, dissenting).

of UN Special Procedure Mandate Holders and scholars that tries to contribute to the progressive development of international law by restating it – notes, however, that this was an extreme view formulated in 'an era when the sovereignty of the State was at its apex'.[73]

It is increasingly recognised that two conditions would need to be fulfilled to adopt domestic measures that have implications for foreign corporations. First, it appears that there needs to be a 'reasonable link' between the extraterritorial state and the regulated corporation. The key question is, of course, when a link would be 'reasonable'.[74] Jennifer Zerk has indicated that there is little guidance from international law sources about the reasonableness requirement relating to domestic measures with extraterritorial implications (apart from regulation based on supply chain relations discussed in section 1.1).[75] Paragraph 43 of the CRC's General Comment 16 on the Impact of the Business Sector on Children's Rights, indicates that a reasonable link is not limited to the situation in which a corporation is registered or domiciled in an extraterritorial State Party to the UNCRC, but also when it has its 'centre of activity' or 'main place of business or substantial business activities' in that State Party.[76] The specialised Member agency UN Human Rights Theme Group in Cambodia (OHCHR-Cambodia) referred to this General Comment by opining that the appropriate action in response to any human rights risks identified depends not only on a state's control, power or authority but also on its degree of 'leverage'.[77]

Both the CRC and the OHCHR-Cambodia referred to the Maastricht Principles. The Maastricht Principles propose to interpret the reasonableness requirement with the help of principles on which states assert direct extraterritorial jurisdiction in some other areas of international law, such as anti-trust law: the territoriality principle; the nationality principle; or the more controversial passive personality or universality principles. It is, for example, suggested that a reasonable link

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[73] Commentary to Maastricht Principle 26 (introduced in footnote 30). (The Maastricht Principles have been introduced in footnote 14).
[74] Cf Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8(3) Human Rights Law Review p 447; Vandenhole (n 17) p 820.
[75] Zerk (n 6) p 215.
[76] CRC/C/GC/16 (n 32) para 43 referring to Maastricht Principle 25.
[77] OHCHR–Cambodia, 'Submission to UN Committee on Economic, Social and Cultural Rights on its draft General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities' (2017) <www.ohchr.org/EN/HRBodies/CESCR/Pages/Submissions2017.aspx> accessed 17 February 2017 p 4.

might exist where relevant aspects of a non-state actor's activities are carried out in the extraterritorial state's territory (such as the nationality of its shareholders or assets in that territory).[78] It would also be reasonable to exercise jurisdiction over peremptory norms of international law (under the universality principle).[79] An exact definition of the reasonableness requirement is, however, not formulated in the Maastricht Principles because it would be 'artificial to restrict the exercise of extraterritorial jurisdiction to prescribe certain forms of conduct to a limited range of instances'.[80]

Part two of this thesis identifies situations in which the EU and a number of Member States have asserted that there is a 'reasonable link' to regulate the human rights impacts of foreign corporations including TNC-DEMs. It is useful to refer here to two other domains – outside human rights law – in which the EU has asserted that there is a sufficiently close link to assert jurisdiction over foreign corporations. The EU asserted that it was competent to adopt EC Regulation 1007/2009 on seal hunting, which applies to companies outside the EU, for the reason that such goods would be placed on the EU market or involve conduct that consists of a step in the direction of gaining access to the EU market.[81] Similarly, the EU Data Protection Regulation applies to companies based outside the EU, offering goods or services in the EU, or monitoring behaviour of EU citizens.[82]

Second, the extraterritorial state should not act in violation of the UN Charter or other principles of international law by intervening in the domestic affairs of the third state, interfering with its sovereign rights or the principle of equality of all states.[83] For example, a representative of Korea's Ministry of Interior, initially said that the government is taking 'a wait-and-see approach' toward the EU Data Protection Regulation, which has a considerable impact on its electronics industry, adding that, 'rather than unconditionally following the Regulation, we

[78] Maastricht Principle 25(d); Commentary 4 and 7 to Maastricht Principle 25.
[79] Maastricht Principle 25(e); Commentary 10 to Maastricht Principle 25.
[80] Commentary 7 to Maastricht Principle 25.
[81] European Parliament and Council, Regulation Nr 1007/2009 on Trade in Seal Products [2009] OJ L 286.
[82] European Parliament and Council, Regulation Nr 2016/679 the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119,
[83] See Commentary 7 to Maastricht Principle 25.

will take our time to adjust what's right for us'.[84] The exercise of domestic measures with extraterritorial implications will prove controversial if other states regard it as interference in their sovereign rights to regulate corporations within their own borders and to pursue their own economic, social and cultural interests.[85] Such concerns can be anticipated and minimised by the domestic state by cooperating with other states and making sure that foreign corporations subjected to overlapping or conflicting requirements imposed by different states are sufficiently involved during the law-making process.

While the Maastricht Principles indicate that extraterritorial jurisdiction seeking to promote human rights 'might be *permissible* in conditions it might otherwise not be allowed', [86] it needs to be emphasised here that human rights law has considerable limitations. Unilateral rule-making denies the fiction that all states are equal as much as the reality of different experiences in all states. Criticisms of neo-colonialism and protectionism are apposite. Even when there would be a consensus between states regarding the need to regulate human rights issues, there might be no consensus about the 'right' regulatory approach. Notoriously, developing and emerging states have frequently opposed import-restrictive measures that relate to human rights and threaten key industries. This complex issue requires further examination in section 2 below.

2 ILO and WTO regime

Import-restrictive measures may appear an attractive solution for extraterritorial states that are increasingly expected (or obliged) to rein in 'their' corporations when they violate rights in third states. Such measures allow states to create an artificial level playing field that enforces the same standards across both national and foreign corporations that operate in its market. There has, however, been a long and tedious debate on whether human rights might justify trade-restrictive measures (section 2.1). The separate development of international labour standards in the ILO and trade regulation in the WTO is symptomatic of this

[84] Elaine Ramirez, 'South Korean Companies Aiming for EU Privacy Compliance' (2017) <www.bna.com/south–korean–companies–n73014460821/> accessed 10 February 2018.
[85] Daniel Augenstein, 'Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union' (2010) <https://ec.europa.eu/enterprise/policies/sustainable–business/files/business–human–rights/101025_ec_study_final_report_en.pdf> accessed 5 March 2016 pp 12–13.
[86] Commentary 9 to Maastricht Principle 25.

debate. The arguments made against and in favour of trade-restrictive measures as a means to increase corporate accountability are set out. The current standards set out by the ILO, the relevant international forum to deal with labour standards, are also reviewed. It is explained that only four human rights at work, known as the core labour standards, would be universally applicable. Section 2.2 reviews the compatibility of import restrictive measures to protect core labour standards with the WTO regime. Finally, section 2.3 describes the enabling clause in the GATT that allows for a preferential tariff treatment of products from developing states without violating the Most Favoured Nation Principle.

2.1 Social clause

There has been a long debate on whether human rights concerns might justify trade-restrictive measures. Two issues are central to this debate. First, such measures would deprive developing and emerging states of a comparative advantage in the global marketplace.[87] Jurisdictions that are economically and legally less developed have the advantage that goods can be produced at a lower opportunity cost by less skilled workers. Indeed, it seems likely that those economically developed states that impose import-restrictive measures would not be doing so for purely 'altruistic' motivations.[88] Such states have an interest in taking away the comparative advantage of other states – currently, in particular, Asian hegemonic states – which have a rising influence on the global stage. This activity can at least partly be labelled a form of disguised protectionism. Proponents of a social clause argue that self-serving measures do not necessarily have to be of a bad nature as long as they are aligned with the interests of the most vulnerable people on earth.[89] But, are such measures really aligned with these interests?

This brings us to the second issue. Opponents of a linkage between market access and respect for human rights argue that import-restrictive measures would not be a 'means to an end'. They state that such measures hamper economic

[87] Susan Ariel Aaronson, 'Seeping in Slowly: How Human Rights Concerns Are Penetrating the WTO' (2007) 6(3) World Trade Review p 28.
[88] Kevin Kolben, 'The New Politics of Linkage: India's Opposition to the Workers' Rights Clause' (2006) 13 Indiana Journal of Global Legal Studies pp 245–247.
[89] Eg Rohini Hensman, 'How to Support the Rights of Women Workers in the Context of Trade Liberalisation in India' in Robin Broad (ed), *Global Backlash: Citizen Initiatives for a Just World Economy* (Rowman & Littlefield Publishers 2002) pp 161–162.

growth and development in developing and emerging states.[90] In addition, they find that import restrictions punish rather than help rights holders. Cutting off access to export markets would have a disastrous effect on human rights because this deprives people who live there of employment and an income. For example, in relation to child labour, it has been argued that children in developing and emerging states need jobs to escape from extreme poverty (so the argument goes), and that economically developed states have reached their current level of prosperity because they profited from child labour in the past.[91]

The narrative that free trade inevitably leads to economic and social development lacks nuance. Proponents of a linkage between market access and respect for human rights argue, in this regard, that economic growth explains little about its distribution.[92] The outcome would not necessarily translate into benefits for vulnerable people.[93] The benefits that economic globalisation brings are highly diffuse. In many instances, the holders of power in economically developed states support the ruling elites and middle class in developing and emerging states through trade liberalising decisions.[94] This argument is, indeed, supported by empirical data, which indicate that the poorest people on earth do not live in the poorest states.[95] In relation to child labour specifically, it needs to be reported that such labour might have some merits as a temporary solution for communities in which adult productivity is so low that families struggle to survive without sending children to work. It should be acknowledged, however, that poverty is not only a cause but also a consequence of child labour. Working from

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[90] Eg Joseph Langan, 'Did your Jeans Enslave Children? Child Labour in International Trade' (2002) 2(158) Asper Review of International Business and Trade Law p 170.
[91] Eg Jenny Schultz and Rachel Ball, 'Trade As a Weapon? The WTO and Human Rights–Based Measures' (2007) 12(1) Deakin Law Review pp 64–65.
[92] Aseem Prakash and Jeffrey Hart, 'Globalization and Governance: An Introduction' in Aseem Prakash and Jeffrey Hart (eds), *Globalization and Governance* (2nd edn, Routledge 2004) p 15.
[93] Sarah Joseph, 'Trade to Live or Live to Trade: The World Trade Organization, Development and Poverty' in Mashood Baderin and Robert McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (Oxford University Press 2007) p 403; Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2009) p 44.
[94] Thomas Pogge, *World Poverty and Human Rights* (Polity Press 2002) p 142; James Thuo Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' (2011) 3(1) Trade Law and Development pp 34 and 39.
[95] Linda Beer and Terry Boswell, 'The Resilience of Dependency Effects in Explaining Income Inequality in The Global Economy: a Cross–National Analysis' (2002) VIII(1) Journal of World–Systems Research p 49. See also Andy Sumner, 'Where do the World's Poor Live? A New Update' (2012) Institute of Development Studies Working Paper Nr 393 <www.ids.ac.uk/publication/where–do–the–world–s–poor–live–a–new–update> accessed 5 August 2016 pp 8–11 and 21.

a young age can have a detrimental impact on the overall development of the child.[96] The time and physical and mental demands that working requires cannot be invested in education.[97] Many children work as cheap labour in states where adult unemployment is high. Extremely low legal compliance standards drive people in similarly low-skilled jobs in other developing and emerging states out of their jobs as unconscionable competition plays out.[98]

On balance, it emerges that import-restrictive measures are not per se inefficient at creating a level playing field for human rights protection. It is, for example, understandable that the CRC recommended such measures in a series of 2011 Concluding Observations. Amongst others, the CRC noted in its Concluding Observations for Finland that it 'regrets that there is no prohibition of direct or indirect use of child labour by companies domiciled in Finland *as well as* no restrictions for businesses to import or sell goods produced using child labour'.[99] Two specific types of measures were recommended: measures to prevent imports of products of non-forced child labour, and measures to monitor products that enter the market in order to prevent market access for products of forced child labour. It is important to note, however, that it is regrettable that the CRC did not explicitly add two *essential* conditions that should be fulfilled concerning the design of import-restrictive measures. Both conditions stem from the concept of 'international cooperation'. First, it cannot be overstated that import restrictions can only serve as a mechanism of last resort. Import restrictions (and accompanying measures) to prevent goods produced from child labour or other core labour violations from entering the market of the extraterritorial state can only be imposed if (and sustained as long as) more cooperative measures are not

[96] CRC/C/GC/16 (n 32) para 43; Soumya Sahin and Amber Nath Ghosh, 'Effect of Ban on Exports Containing Child Labour in a Dynamic Model in Presence of Imperfect Monitoring' (2016) 51(1) Foreign Trade Review p 26.
[97] Lee Swepston, *A Commentary on the United Nations Convention on the Rights of the Child, Article 32* (Martinus Nijhoff Publishers 2012) paras 66, 87 and 90.
[98] Jean–Marie Baland and James Robinson, 'Is Child Labour Inefficient?' (2000) 108(4) Journal of Political Economy p 667; Drusilla Brown, 'International Trade and Core Labour Standards: A Survey of the Recent Literature' (2000) OECD Labour Market and Social Policy—Occasional Paper Nr 43 <www.oecd–ilibrary.org/social–issues–migration–health/international–trade–and–core–labour–standards_677200103808> accessed 3 November 2016 para 264.
[99] CRC, 'Concluding Observations: Finland' (2011) UN Doc CRC/C/FIN/CO/4 para 23 (emphasis added). See also CRC, 'Consideration of Reports submitted by States Parties under Art 44 of the Convention Concluding Observations: Italy' (2011) UN Doc CRC/C/ITA/CO/3–4 paras 20–21; CRC, 'Consideration of Reports submitted by States Parties under Art 44 of the Convention. Concluding Observations Republic of Korea' (2011) UN Doc CRC/C/KOR/CO/3–4 paras 26–27.

feasible.[100] Second, any import restriction should be accompanied by a proposal relating to the appropriate accompanying measures to be taken. Why is this the case? The empirical evidence regarding the correlation between core labour violations and export sectors is too inconclusive to assert that bans on products alone would protect these rights beyond their territorial borders. Import restrictions without appropriate accompanying measures can have various undesirable effects. They can, for example, reinforce the power of oppressive elites.[101] In addition, children who are no longer permitted to take employment might move to the shadow economy or to sectors that are not involved in export.[102] Economics scholars have proven that it is possible to design such measures. Import sanctions can be effective if they are accompanied by appropriate additional measures, such as educational subsidies and incentives for parents to have small families.[103]

Against the background of the heated debate on a social clause, most developing and emerging states were strong opponents of a linkage between trade and the protection of human rights in the WTO's Singapore Round (1996).[104] They refused to legitimise the WTO as the dedicated forum to deal with human rights. The outcome document of the Singapore Round indicates that the ILO is the relevant international forum to deal with labour standards.[105] The debate on the linkage between trade and human rights does not yet appear settled. It re-emerged in 2016 during the discussion of the ILO Resolution concerning Decent Work in Global Supply Chains.[106] This discussion focused on whether ILO Member States should commit to a reference to labour standards in trade and investment

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[100] Eg Francisco Villanueva, 'Le Champs d'Application de l'Article XX(a) du GATT' (2012) 58(2) Revue de Droit de McGill p 430.
[101] See CESCR, 'General Comment 8 on the Relationship between Economic Sanctions and Respect for Economic, Social And Cultural Rights' UN Doc E/1997/8 (1997) para 4; CESCR, 'Concluding Observations: Israel' UN Doc E/C/.12/1/Add.27 (1998) para 39.
[102] Eg Dexter Samida, 'Protecting the Innocent or Protecting Special Interests? Child Labor, Globalization and the WTO' (2005) 34 Denver Journal of International Law and Policy pp 421–422.
[103] Eg Kaushik Basu and Hoang Van Pham, 'The Economics of Child Labour' (1998) 88(3) The American Economic Review p 425; Moshe Hazan and Binyamin Berdugo, 'Child Labour, Fertility and Economic Growth' (2002) 112(482) Economic Journal p 825; Matthias Doepke and Fabrizio Zilibotti, 'The Macroeconomics of Child Labour Regulation' (2005) 95(5) American Economic Review p 1515; Krisztina Kis–Katos, 'Does Globalization Reduce Child Labor?' (2007) 16(1) Journal of International Trade & Economic Development p 71.
[104] Aaronson (n 87) p 28.
[105] WTO, Singapore Ministerial Declaration (1996) WT/MIN(96)/DEC/W para 4.
[106] ILO, Resolution concerning Decent Work in Global Supply Chains (105th ILC Session Geneva 8 July 2016).

agreements.[107] The official record indicates that a number of hegemonic Member States – India, China, Brazil and the United Arab Emirates – were, vocal against a reference to a social clause in this Resolution.[108] The Netherlands – speaking on behalf of the EU and its Member States – and other economically developed states, such as Norway and New Zealand, supported a reference to labour standards in the discussed Resolution. One remarkable development since the Singapore Round is that so-called 'counter-hegemonic' Member States of the Global South are generally supportive of a reference to labour standards. Amongst others, Member States from the African Group and the Latin American and Caribbean Group have expressed their support.[109]

To date, the ILO has issued two major declarations that explicitly consider the link between trade and labour. These are the Declaration on Fundamental Principles and Rights at Work (1998) and its follow-up the Declaration on Social Justice for a Fair Globalization (2008).[110] These declarations commit ILO Member States to respect and enforce four human rights at work that are enshrined in eight core labour conventions. It concerns the freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.[111] These

[107] ILO, Fourth Item on the Agenda: Decent Work in Global Supply Chains. Reports of the Committee on Decent Work in Global Supply Chains: Summary of Proceedings (105th Conference Session Geneva 30 May 2016).
[108] Ibid paras 430–431, 437, 451 and 458–461.
[109] Ibid paras 428, 440, 441 and 457.
[110] ILO, Declaration on Fundamental Principles and Rights at Work (86th International Labour Conference (International Labour Conference (ILC) session Geneva 18 June 1998) para 2; ILO, Declaration on Social Justice for a Fair Globalization (97th ILC session Geneva 10 June 2008) pp 6–7.
[111] ILO, Convention C029: Forced Labour Convention (Convention concerning Forced or Compulsory Labour) (14th ILC session Geneva 28 June 1930) (ILO Convention 29) and its Protocol P029 (103rd ILC session Geneva 11 June 2013); ILO Convention C087: Freedom of Association and Protection of the Right to Organise Convention (Convention concerning Freedom of Association and Protection of the Right to Organise) (31st ILC session San Francisco 9 July 1948) (ILO Convention 87); ILO Convention C098: Right to Organise and Collective Bargaining (Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively) (32 ILC session Geneva 1 July 1949) (ILO Convention 98); ILO, Convention C100: Equal Remuneration Convention (34th session Geneva 29 June 1951) (ILO Convention 100); ILO, Convention C105: Abolition of Forced Labour Convention (Convention concerning the Abolition of Forced Labour) (40th ILC session Geneva 25 June 1957) (ILO Convention 105): ILO, Convention C111: Discrimination (Employment and Occupation) (Convention concerning Discrimination in Respect for Employment and Occupation) (42nd ILC session ILO), Geneva 25 June 1958) (ILO Convention 111): ILO, Convention C138: Minimum Age Convention (Convention concerning Minimum Age for Admission to Employment) (58th ILC Session Geneva 26 June 1973) (ILO Convention 138);

standards would be morally salient, not politically arbitrary and therefore universally applicable.[112] ILO Member States are said to be bound to ensure that these labour standards are protected, regardless of whether or not they have ratified the relevant ILO Conventions. In apparent consideration of the Singapore consensus, these declarations also stress that core labour standards should not be used for protectionist trade purposes and that the comparative advantage of any state should in no way be called into question.

The ILO has a regular system of supervision, which examines periodic reports submitted by Member States and there are special procedures based on the submission of a 'representation' or a 'complaint'. The ILO Committee on Freedom of Association has specifically been set up to deal with complaints of violations of trade union rights, whether or not the country concerned had ratified the fundamental Convention 87 on Freedom of Association and Protection of Union Rights and Convention 98 on the Right to Organise and Collective Bargaining. The Committee is composed of an independent chairperson and six representatives each of governments, employers and workers. The aim of this procedure is not to criticize governments, but rather to engage in a tripartite dialogue to promote such rights in law and practice.

The outcome document of the Singapore Round explains that the WTO and the ILO should align their work.[113] However, in reality, they do not collaborate to a great extent.[114] States Parties to the GATT – including all EU Member States – have to deal with the WTO regime when they aim to improve corporate accountability through imposing import restrictive measures. The Most Favoured Nation Principle (Article I:1 GATT) and the National Treatment Principle (Article III:4 GATT) are the foundation of the WTO's multilateral trading system. The former principle prescribes in essence that a State Party to the GATT cannot discriminate between other States Parties. This means that a State Party which treats the goods of one State Party in a particular way has to grant the same

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ILO, Convention C182: Worst Forms of Child Labour Convention (Convention concerning the Prohibition and Immediate Actin for the Elimination of the Worst Forms of Child Labour) (87th ILC session Geneva 17 June 1999) (ILO Convention 182).

[112] See Brian Langille, 'Core Labour Rights – The True Story (Reply to Alston)' (2005) 16 European Journal of International Law pp 411 and 430.

[113] Ibid para 4.

[114] Philippe Alston, 'Facing Up the Complexities of the ILO's Core Labour Standards Agenda' (2005) 16(3) European Journal of International Law p 480.

treatment to the goods of all other States Parties. The latter principle prohibits discrimination by a State Party between similar domestic and imported products in a way that treats imported products less favourably. This principle obliges a State Party to the GATT to treat the goods of other States Parties the same as its own 'like' goods. There is, in itself, nothing wrong with these principles. The motivation behind these principles is the avoidance of protectionism. Free trade contributes to competition and innovation all over the world. Trade opportunities can in many ways also enhance development and economic growth in developing and emerging states. However, the WTO Dispute Settlement Mechanism (WTO DSM) used to interpret Articles I:1 and III:4 GATT in an extensive manner, while interpreting the exceptions of Article XX GATT – which can serve as grounds to allow trade sanctions for non-trade public values – in an extremely restrictive way.[115] By doing so, the WTO DSM has restricted the ability of GATT States Parties to protect alleged victims of corporate abuse.

2.2 Import-restrictive measures relating to labour standards

Section 2.2.1 determines that import restrictions are likely to be inconsistent with the imposing states' obligations under the WTO Dispute Settlement Mechanism's interpretation of the National Treatment Principle. Section 2.2.2 assesses whether such restrictions would be allowed if they were framed as measures to protect the public morals of the population in the imposing State Party under Article XX(a) GATT. The *Seals* case (2014) – the first substantive interpretation of this exception clause – is analysed to this end. This analysis refers to the attitude-behaviour gap, a behavioural phenomenon that indicates that there is an inconsistency between what people value or believe and what they actually do.[116] Applying this behavioural lens ensures that legal nuances are not overly

[115] Sarah Joseph, *Blame It on the WTO? A Human Rights Critique* (2nd edn, Oxford University Press 2013) pp 117–120.
[116] Ken Peattie, 'Sustainability Marketing' in Lucia Reisch and John Thøgersen (eds), *Handbook of Research on Sustainable Consumption* (Edward Elgar 2015) p 107. See also Robert Caruana, Michal Carrington and Andreas Chatzidakis, 'Beyond the Attitude–Behaviour Gap: Novel Perspectives in Consumer Ethics': Introduction to the Thematic Symposium' (2015) 136(2) Journal of Business Ethics p 215 for an overview of behavioural studies documenting the attitude behaviour gap.

simplified.[117] It can determine whether citizen concerns that are not reflected in consumption decisions justify import restrictions under the WTO regime.

2.2.1 Violation of Article III:4 GATT

In apparent consideration of the described debate on a social clause, Olivier De Schutter has suggested that products complying with certain labour standards that consumers care about are not necessarily to be treated as substitutable for products that do not comply with such standards (for example, because they are produced by children). They might not be 'like' products under Article III:4 GATT.[118] They would not satisfy consumers' same wants and demands about the way in which the product is produced.[119] This suggestion relies on the criterion of 'the extent to which consumers perceive and treat the products as alternative means of performing a particular want or demand', which can be used to determine if a product is 'like' in the sense of Article III:4 GATT.[120] This criterion was included in a list of non-limitative criteria described in the *Asbestos* case (2001), which can be employed to determine whether a product is 'like' in the sense of Article III:4 GATT.[121]

If there were such a distinction based on consumers' perception of production or process methods, then the implication would be that the importing State Party might treat them differently under the GATT regime.[122] This would mean that import restrictions (and accompanying measures) on products of child labour would be considered as being consistent with Article III:4 GATT.

However, the insights from behavioural economics indicate that it is more likely that products from labour rights violations would be considered as substitutable for products that do not comply with such standards under the GATT regime. The

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[117] Cf Anne van Aaken, 'Behavioral International Law and Economics' (2014) 55(2) Harvard International Law Journal p 480; Tomer Broude, 'Behavioral International Law' (2015) 163 University of Pennsylvania Law Review p 1112.
[118] Olivier De Schutter, *Trade in Service of Sustainable Development: Linking Trade to Labour Rights and Environmental Standards* (Hart Publishing 2015) pp 50–51.
[119] Ibid pp 50–51.
[120] Ibid pp 50–51 referring to WTO, *European Communities: Measures Affecting Asbestos and Products Containing Asbestos – Report of the Appellate Body* (12 March 2001) WT/DS135/AB/R para 102.
[121] *Asbestos* (n 120) paras 101–103 and 113–117.
[122] Cf De Schutter (n 119) pp 50–51

WTO DSM's assessment of the 'likeness' of products under Article III:4 GATT limits itself to an assessment of consumer preferences and does not take into account the broader preferences of citizens. The implication is that import restrictions (and accompanying measures) on products from labour rights violations would be considered inconsistent with Article III:4 GATT. This argument needs to be broken down into two parts to better understand it.

The first part of this argument considers that 'particular wants or demands' that people might have regarding labour rights violations are generally not reflected in their consumption behaviour. People generally treat products that comply with certain labour standards as products that do not comply with such standards *while they are performing the act of consumption*, regardless of whether they might have any wants and demands about the way in which the product is produced.

Although some people urge companies to change, they themselves do not always take human rights into account as much as they might intend to. The route from attitudes to actual consumption behaviour is flexible. For example, a person who has ethical concerns regarding child labour might still consume chocolate made by child labour because they are not aware that child labour exists in the chocolate industry. Therefore, despite their ethical concerns, these people treat products made by child labour as alternatives for products that are not made by child labour when they are performing the act of consumption.

Such behaviour can be explained by the behavioural phenomenon of people's actions not correlating with their attitudes.[123] This 'gap' indicates, in essence, that people do not follow through with all their attitudes because many different activities and goals compete for their limited resources: people's information, finances, time, energy, knowledge and cognitive capacities are only available in limited quantities. People behave flexibly, according to the context.

Cass Sunstein and Richard Thaler popularised the attitude-behaviour gap in legal and policy studies.[124] Similarly, Anne van Aaken and Tomer Broude have called to

[123] Caruana (n 116) p 215; Peattie (n 116) p 107.
[124] Eg Cass Sunstein, 'Endogenous Preferences, Environmental Law' (1993) 22(2) Journal of Legal Studies p 217 and 242; Cass Sunstein and Richard Thaler, Nudge (Yale University Press 2008).

apply insights from behavioural economic analysis to international law.[125] These authors relied on studies conducted by psychologists Daniel Kahneman and Amos Tversky in the 1970s that listed systematic heuristics and biases that influence how people form intuitive beliefs and choices based on incomplete and imperfect information.[126] They relied, in turn, on Herbert Simon's theory of 'bounded rationality', for which he received the 1978 Nobel Prize in economics.[127] He became famous for substituting the concept of the rational 'economic man' in classic organisational theory with a choosing 'human' organism of limited capabilities.[128]

In terms of the second part of the argument, it is credible to argue that the criterion used in the *Asbestos* case – which was cited above – does not take the attitude-behaviour gap into account. This criterion refers to the limited concept of consumer perceptions and behaviour, as opposed to the broader concept of people's or citizens' perceptions and behaviour.

This reference to consumer preferences to assess 'likeness' under Article III:4 GATT has been carefully chosen by the WTO DSM. The Appellate Body had indicated in the *Japan – Alcoholic Beverages II* case that it has a considerable margin of appreciation in interpreting 'likeness'.[129] It used the metaphor of an accordion, 'which stretches and squeezes in different places', to describe how it interprets the concept of 'likeness' in the different provisions of the GATT.[130] In the *Asbestos* case, the Appellate Body stressed that health risks that could influence consumer preferences in the importing State Party could contribute to a competitive relationship between the products at issue in the market. The Appellate Body considered that *any* criterion employed to assess 'likeness' in the

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[125] Van Aaken (n 117) p 480; Broude (n 117) p 1112.
[126] See Daniel Kahneman, 'Maps of Bounded Rationality: Psychology for Behavioral Economics' (2003) 93(5) The American Economic Review p 1149.
[127] Herbert Simon, *Administrative Behavior: a Study of Decision–Making Processes in Administrative Organization* (The Free Press 1947); Herbert Simon, 'A Behavioral Model of Rational Choice' (1955) 64 Quarterly Journal of Economics pp 99–118.
[128] Simon 1955 (n 127) p 114.
[129] Isabelle Van Damme, 'Treaty Interpretation by the WTO Appellate Body' (2010) 21(3) European Journal of International Law p 622 referring to WTO, *Japan – Taxes on Alcoholic Beverages Report of the Appellate Body* (12 March 2001) WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, p 23.
[130] *Alcoholic Beverages* Appellate Body (n 137) p 23.

sense of Article III:4 GATT should be exclusively concerned with competitive relationships in the marketplace.[131]

The current interpretation of 'likeness' to assess Article III:4 GATT can be considered as restrictive. The WTO DSM has relied on people's consumption behaviour – which is inevitably inconsequential – to not respect their attitudes in its interpretation of the National Treatment Principle. This interpretation reduces people to consumers. Arguably, the chosen interpretation also goes further than the customary principles of interpretation of international law, which are reflected in Article 3.2 Dispute Settlement Understanding.[132] This article indicates that the WTO DSM cannot add to or diminish the rights and obligations in the covered agreements. The WTO DSM might consider the attitude-behaviour gap in its future interpretation of 'likeness' in the sense of Article III:4 GATT.

2.2.2 Exception under Article XX(a) GATT

If import restrictions on products of labour rights violations can be considered inconsistent with the National Treatment Principle, then the question arises whether such restrictions can be justified under the exceptions of Article XX GATT. In the *Shrimp* case (1998), the Appellate Body argued that requirements put in place by importing States Parties are not a priori incapable of justification under Article XX GATT.[133] Over time, the WTO DSM has given more consideration to non-trade public values considerations that are embedded in Article XX GATT.

The academic literature identified the following paragraphs of Article XX GATT as being relevant to protect human rights, including labour standards: necessary to protect public morals (paragraph (a)); necessary to protect human life or health (paragraph (b)); and relating to the conservation of exhaustible natural resources (paragraph (g)). It has initially mainly focused on the case law relating to Article XX(b) and Article XX(g) GATT. A broad interpretation of Article XX(b) GATT might permit measures that protect rights that concern physical and mental health and

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[131] *Asbestos* (n 120) para 117.
[132] Art 3.2 Understanding on Rules and Procedures Governing the Settlement of Disputes (1994). These Principles can be found in arts 31–33 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
[133] WTO, *US: Import Prohibition of Certain Shrimp and Shrimp products – Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R para 121.

security.[134] Article XX(g) GATT might be useful to protect the right to an adequate standard of human health as well as the rights to food and water.[135] This scholarly focus can be explained by the fact that there used to be no substantive case law under Article XX(a) GATT.[136] The WTO DSM explained that this Article protects 'the standards of right and wrong conduct maintained by or on behalf of a community or nation' under the GATT.[137] A substantive interpretation had, however, been effectively outmanoeuvred by the WTO DSM employing the necessity condition, which is part of Article XX(a) GATT. It has been discussed extensively by others that the WTO DSM seems to be somewhat arbitrary in its appreciation of the necessity of an import restriction to reach the desired end.[138] According to this condition, a measure must be 'necessary' to protect public morals. This condition relates to the need for a means to protect public morals. The WTO DSM determines whether an alternative measure – which is less trade-restrictive – could have been reasonably employed by the imposing party to achieve the desired objective by a holistic 'weighting and balancing' test.[139] This test assesses a series of factors, including the importance of the objective, the contribution of the measure to that objective and the trade-restrictiveness of the measure.

In 2004, Office of the UN High Commissioner for Human Rights (OHCHR) suggested, in its analysis on Human Rights and World Trade Agreements (2005), that Article XX(a) GATT might be of greater relevance than had been considered at the time.[140] The OHCHR relied mainly on a textual analysis to argue that the very idea of public morality has become inseparable from human rights and to

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[134] Joseph (n 115) p 110.
[135] Eg Diane Disierto, *Public Policy in International Economic Law: the ICESCR in Trade, Finance* (Oxford University Press 2015) p 202.
[136] Frank Garcia and Soohyun Jun, 'Trade–Based Strategies for Combatting Child Labour', in Burns Weston (ed), *Child Labor and Human Rights: Making Children Matter* (Lynne Rienner Publishers 2006) p 20.
[137] WTO, *US: Measures Affecting the Cross–border Supply of Gambling and Betting Services – Report of the Panel* (10 November 2004) WT/DS285/R para 6.4-6.6.
[138] Eg Joseph (n 115) pp 111–114.
[139] WTO, *China: Measures affecting Trading Rights and Distribution Services for Certain Publication and Audiovisual Entertainment Products* (14 March 1997) WT/DS31/AB/R and AB–1997–2 interpreting *Gambling* (n 137) para 6.465.
[140] OHCHR, 'Human rights and World Trade Agreements. Using General Exception Clauses to Protect Human Rights' UN Doc HR/PUB/05/5 (2005) pp 6–12. See also Steve Charnovitz, 'Exploring the Environmental Exceptions in GATT Article XX' (1991) 25(5) Journal of World Trade p 33.

express that the full range of codified human rights could fall within the ambit of Article XX(a) GATT.[141]

The OHCHR interpreted that inward measures to implement States Parties' obligations to protect the public morals of their own populations could fall within the compass of Article XX(a) GATT. The OHCHR described that States Parties can rely upon the perceptions that people in the importing market have regarding products produced by human rights violations.[142] Under this exception, inward measures aiming to protect the public morals of the population of the importing State Party were, thus, proposed to be easier to justify than measures that protect people who directly suffer human rights abuses in exporting States Parties.

In the 2005 *Gambling* case, the Appellate Body found that morals vary in time and space, depending on prevailing social, cultural, ethical and religious values.[143] It appears that this interpretation leaves the scope of what constitutes a 'public moral' to the discretion of individual GATT States Parties.[144] Indeed, according to the Appellate Body, States Parties should be given some scope to define and apply them for themselves 'in their respective territories, according to their own systems and scales of values'.[145] This approach accounts for the fact that morals are to a large extent embedded in the legal culture of a nation.

In addition, the Appellate Body seems to have followed the same reasoning as the OHCHR when it adopted the *Seal* report, its first substantial interpretation of Article XX(a) GATT, in 2014.[146] In it, the Appellate Body considered EU Regulation 1007/2009 (and the European Commission's implementing Regulation) on seal hunting. These regulatory measures prohibited placing on the market seal

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[141] HR/PUB/05/5 (n 140) p 5.
[142] Ibid p 12. See Laurens Ankersmit, Jessica Lawrence and Gareth Davies, 'Diverging EU and WTO Perspectives on Extraterritorial Process Regulation' (2012) 21 Melbourne Journal of International Law.
[143] *Gambling* (n 137) paras 6.461 and 6.465–6.468.
[144] Pascal Lamy, 'Towards Global Governance?' (2005) WTO <www.wto.org/english/news_e/sppl_e/sppl12_e.htm> accessed 1 April 2017.
[145] *Gambling* (n 137) paras 6.461 and 6.465–6.468.
[146] WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Report of the Panel* (25 November 2013) WT/DS400/R and WT/DS401/R; WTO, *European Communities: Measures prohibiting the Importation and Marketing of Seal Products Report of the Appellate Body* (22 May 2014) WT/DS400/AB/R and WT/DS401/AB/R.

products in the territories of the EU Member States as inward measures.[147] They aimed to protect EU citizens and consumers (and not seals directly). In particular, they had been adopted in response to concerns of citizens and consumers about the welfare of seals anywhere in the world, and about exposure to economic activity that sustains the market for seal products obtained from animals killed and skinned in a way that causes pain, distress, fear and other forms of suffering.[148] By overturning a part of the Panel's decision, the Appellate Body explicitly left unanswered the question about whether purely 'outward measures', which protect the methods of production and process, would be allowed under Article XX(a) GATT.[149]

Closely related to this is the observation that the WTO DSM did not elaborate in-depth on the issue of extraterritoriality. The Appellate Body held that the disputed Regulation did not impose obligations extraterritorially, as it was designed to address seal hunting activities 'within and outside the Community' and the seal welfare concerns of European citizens.[150] The Appellate Body refrained from commenting further on the issue of extraterritoriality because the complaining and interfering parties had not questioned it.

The WTO DSM's pronouncements in the *Seal* case can be used to assess to what extent import restrictions (and accompanying measures) on products of labour rights violations would be allowed under Article XX(a) GATT. This could be done insofar as such import restrictions would be considered inward measures admissible under the necessity condition. The WTO DSM would apply its 'weighting and balancing' test – which was described above – to determine whether any reasonably available alternatives to unilateral import restrictions appear to be sufficiently effective to protect public morals. It might, amongst other things, take into consideration which forms of child labour are covered by import restrictions (and accompanying measures). The Panel might also consider

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[147] European Parliament and Council, Regulation Nr 1007/2009 on Trade in Seal Products [2009] OJ L 286; European Commission, Regulation Nr 737/2010 Laying Down detailed Rules for the Implementation of Regulation 1007/2009 of the European Parliament and of the Council on Trade in Seal Products [2009] OJ L 216/1.
[148] Regulation 1007/2009 paras 5–6.
[149] *Seal* Appellate Body (n 146) paras 5.60 and 5.64. Outward measures would fall under art 2.2 Agreement on Technical Barriers to Trade (adopted 15 April 1994, entered into force 1 January 1995) 1868 UNTS 120 (TBT Agreement).
[150] *Seal* Appellate Body (n 146) para 5.173.

that alternative measures were not reasonably available without international cooperation.

The Appellate Body confirmed a two-step test, which was introduced by the Panel to determine whether import restrictions can be successfully defended under the morals exception of Article XX(a) GATT in the *Seal* case.[151] Evidence of public concerns is taken into account as a whole in both steps.[152] The Panel considers all evidence placed before it in establishing that a policy objective is within the scope of the exception. This includes the texts of statutes, legislative history and other evidence regarding the structure and operation of the measure at issue.

The first step consists of determining whether the public concerns in question truly exist in the importing State Party's society. In this particular case, the existence of EU citizens' public concerns regarding 'the incidence of inhumane killing of seals' and 'their individual and collective participation as consumers in, and exposure to the economic activity which sustains the market for seal products derived from inhumane hunts' were assessed. Amongst others, the Panel reviewed the European Commission's proposal for Regulation and its accompanying impact assessment.[153] Particular attention was paid to the reference in the Commission's proposal to a 'massive number of letters and petitions on the issue expressing citizens' deep indignation and repulsion regarding the trade in seal products in such conditions'.[154] A Recommendation of the Parliamentary Assembly of the Council of Europe was also taken into account.[155] Although the concerns about seal welfare were found not to be univocal, the Panel considered that 'a majority of comments and statements documented' in these exhibits show an overall support for the measure in light of

[151] *Seal* Panel (n 146) paras 7.32 and 7.383; *Seal* Appellate Body (n 146) para 5.135 and 5.167.
[152] *Seal* Panel (n 146) para 7.383; *Seal* Appellate Body (n 146) para 5.144.
[153] *Seal* Panel (n 146) paras 7.23–7.25 and 7.394–7.395 referring to European Commission, 'Staff Working Document Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council Concerning Trade in Seal Products – Impact Assessment on the Potential Impact of a Ban Of Products Derived from Seal Species' (2008) COM(2008)469 final (Panel Exhibit JE–16) Explanatory Memorandum p 2; *Seal* Appellate Body (n 146) para 5.153.
[154] *Seal* Panel (n 146) para 7.24.
[155] Ibid para 7.25.

the wishes of EU citizens to ban seal products from the EU market based on their concerns for seal welfare.[156]

If public concerns are deemed to exist, then the second step consists of determining whether a connection exists between such concerns and the scope of 'public morals' as 'defined and applied' by a regulating member in its territory according to its own systems and values. In this particular case, the Panel tested the various actions taken by the EU as well as its Member States concerning animal protection in general. The Lisbon Treaty, as well as EU rules regarding animal protection, were considered.[157]

The two-step test would be applied as follows to import restrictions on products of labour rights violations. In the first step, it would be determined whether public concerns regarding the violation truly existed in the importing State Party's society. Letters of citizens might, amongst other things, be taken into account.[158] It is not necessary for the evidence to be univocal.[159] It would be sufficient if a majority of the evidence indicated that such concerns existed. In the second step, the Panel would determine whether a connection existed between such concerns and the scope of 'public morals' as 'defined and applied' by a regulating member in its territory, according to its own systems and values. The Panel might resort to national legislation in the importing State Party that prohibits the labour rights violation.

The WTO DSM has taken the attitude-behaviour gap into account to a considerable extent in its assessment of Article XX(a) GATT in the *Seal* case. It referred to concerns of 'citizens' individual and collective participation as consumers in, and exposure to the economic activity' to interpret this article. It was indicated above that citizen concerns are broader than consumer concerns. Indeed, the employed standard takes into account certain attitudes that are not translated into actual consumption behaviour.

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[156] Ibid para 7.26.
[157] Ibid para 7.34 referring to Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306.
[158] Cf *Seal* Panel (n 146) para 7.395.
[159] Cf ibid para 7.397

The reason for this interpretation seems to be, of course, that the exception of Article XX(a) GATT is not concerned with competition in consumption. Rather, it is concerned with assessing whether a State Party has a sufficient basis for 'adopting and enforcing' a WTO-inconsistent measure to protect the standards of right and wrong conduct maintained by or on behalf of a community or nation.[160]

Yet, it is credible to say that the WTO DSM's interpretation of the public morals exception does currently not embody sufficient guarantees against arbitrariness. A range of issues, which relate to the standards of right and wrong but are mitigated by some of the barriers that create the attitude-behaviour gap, are not taken into account. Specifically, it concerns those issues that are impacted by information asymmetries and information manipulation.[161] Amongst others, issues that are not subject to deliberate judgments of citizens, issues that are not raised in public and issues that are misunderstood cannot be assessed under the WTO DSM's interpretation of Article XX(a) GATT that was proposed in the *Seal* case. While non-governmental organisations (NGOs) and public opinion firms can often be credited with empowering and educating people about the intricacies of participatory democracy, such as the ability to question, discuss and reflect on consumption choices, their agenda has also been limited.

Interestingly, even import restrictions relating to some core labour standards will likely not pass the two-step test because they might not raise concerns amongst citizens. Frank Hendrickx and his co-authors aptly analysed in this regard that there is a 'selectivity' in relation to the enforcement of core labour standards, even though they have all been declared morally salient, and not politically arbitrary.[162] For example, citizens are less likely to be informed and raise concerns about violations of the freedom of association and collective bargaining in comparison with child labour.

The WTO DSM could probably correct this arbitrary approach in future case law by integrating international standards in the two-step test. It seems that the WTO

[160] Cf *Asbestos* (n 120) para 115.
[161] Cf Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Routledge 2012) p 142.
[162] Frank Hendrickx and others, 'The Architecture of Global Labor Governance' (2016) 155(3) International Labour Review p 10.

DSM leaves the door ajar for such broader interpretation. In the *Seal* case, the Appellate Body referred to 'international doctrines and measures of a similar nature in other WTO Members' in its assessment of the two-step test.[163] While explaining that international doctrines and measures of other WTO Member States were not necessarily relevant to identify the EU's chosen objective to protect public morals, the Appellate Body opined that such documents 'illustrate that animal welfare is a matter of ethical responsibility for human beings in general'.[164] In relation to measures of other WTO Member States, the Appellate Body furthermore highlighted the following comment, which was made by the US as a third participant in its report

> while the focus must be on the responding Member's system and scale of values, what Members other than the responding Member consider to be public morals can offer confirmation of a Panel's determination as to what constitutes a public moral within the system of the responding Member.[165]

The WTO DSM did, however, not give any specific details as to which 'international doctrines' were taken into account. An older case under Article XX(g) GATT, the *Shrimp* case, seems to indicate that not only formally binding treaties are relevant in this regard. In this case, the Appellate Body cited international environmental norms enshrined in declarations and a ministerial decision rather than in formally binding documents, as a basis to justify unilateral trade measures aimed at providing extraterritorial environmental protection.[166] This finding seems to indicate that the WTO DSM might in the future refer in the same way to the core labour standards which are embedded in the Declaration on Fundamental Principles and Rights at Work, and its follow-up the Declaration on Social Justice for a Fair Globalization.

A final question which concerns the *chapeau* of Article XX GATT needs to be addressed. If an import ban on products that were produced by violating labour standards would survive the necessity test and the two-step test of Article XX(a) GATT, then it must also pass the chapeau test. According to this test, measures which constitute an arbitrary or unjustifiable discrimination between States

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[163] *Seal* Appellate Body (n 146) para 7.409.
[164] Ibid para 7.409.
[165] *Seal* Panel (n 146) note 674 referring to US third–party submission para 4.
[166] *Shrimp* (n 133) paras 154–158.

Parties where the same conditions prevail or a disguised restriction on international trade are forbidden.[167]

The chapeau test failed in the *Seal* case because the EU did not impose like sanctions on all states with a similar record. The EU had included an exception for Inuit and other indigenous communities in its *Seal* regime.[168] The EU had provided evidence to demonstrate that concerns to protect Inuit and other indigenous communities should prevail over the welfare of seals in the proceedings before the WTO DSM.[169] This evidence consisted of EU documents that concerned EU citizens and the UN Declaration on the Rights of Indigenous Peoples.[170] The WTO DSM did, however, not consider this evidence. The Panel concluded that 'the EU public concerns on seal welfare appear to be related to seal hunts in general, not any particular type of seal hunts'.[171] Elizabeth Whitsitt has argued that the WTO DSM actually second-guessed the moral preferences of people in the importing state.[172] It has arbitrarily chosen not to consider the moral considerations that were brought forward by the EU concerning the protection of the traditional and cultural practices of Inuit and other indigenous communities that have been hunting seals as a way of life for centuries. This arbitrary interpretation can have drastic consequences. The European Commission has, for example, referred to the WTO DSM's interpretation of Article XX's chapeau test as a reason why import restrictions (alongside accompanying measures) on products of child labour would be undesirable as a mechanism of last resort.[173]

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[167] WTO, *US: Standards for Reformulated and Conventional Gasoline – Report of the Appellate Body* (29 April 1996) WT/DS2/AB/R para 20; *Shrimp* (n 133) paras 119–120.
[168] Art 2(4) European Parliament and Council, Regulation Nr 1007/2009 on Trade in Seal Products [2009] OJ L 286.
[169] *Seal* Panel (n 146) paras 7.292–7.2949; *Seal* Appellate Body (n 146) para 5.143.
[170] *Seal* Panel (n 146) para 7.293 referring to Council, Directive Nr 83/129/EEC concerning the Importation into Member States of Skins of certain Seal Pups and Products Derived Therefrom [1983] OJ L 91 pp 30–31; European Parliament Declaration on Banning Seal Products in the European Union (2006) P6_TA(2006)0369 <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P6-TA-2006-0369+0+DOC+PDF+V0//EN> accessed 3 April 2017 and HRC, 'United Nations Declaration on the Rights of Indigenous People' (2006) UN Doc A/61/53.
[171] *Seal* Panel (n 146) para 4.377.
[172] See Elizabeth Whitsitt, 'A Comment on the Public Morals Exception in International Trade and the EC–Seal Products Case: Moral Imperialism and Other Concerns' (2014) 3(4) Cambridge Journal of International and Comparative Law pp 1379–1380.
[173] European Commission, 'Staff Working Document Trade and Worst Forms of Child Labour' (2013) SWD(2013)173 final p 12. This Staff Working Document will be further analysed in chapter 4 section 1.3.

2.3 Enabling clause

The enabling clause allows for a preferential tariff treatment of products from developing States Parties to the GATT without violating the Most Favoured Nation Principle.[174] Such a preferential trade scheme can serve to enhance economic growth and the right to development in these States Parties. Under this clause, identical treatment must be available to all similarly situated beneficiaries, that is, to all states that have the 'development, financial and trade needs' to which the treatment in question is intended to respond. According to the WTO, conditionality – which requires the compliance with (certain) human rights – is permitted as long as the conditions have the potential to be fulfilled.[175]

The EU's preferential trade system – which reflects an institutional belief in the developmental power of trade liberalisation and represents a material interest-driven policy – relies upon this clause.[176] For example, the IVth Lomé Convention, was an attempt by EU Member States to support and partner with their former colonies, the African, Caribbean and Pacific (ACP) group of states. [177] This system was, however, against the Most Favoured Nation Principle because preferential treatment granted to the ACP group of states should have been granted to other GATT States Parties with a similar level of development. In 2000, to make the new ACP-EU Agreement (the Cotonou Agreement) compliant with WTO rules, a new provision was included, making it possible to negotiate different economic partnership agreements with regional groupings.[178]

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[174] WTO, Tokyo Decision on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (1979) L/4903, GATT BISD 26S/203. The Appellate Body confirmed that the Enabling Clause is an exception to art I:1 GATT in WTO, *European Communities: Conditions for the Granting of Tariff Preferences to Developing Countries – Report of the Appellate Body* (7 April 2004) WT/DS246AB/R para 99.
[175] WT/DS246AB/R (n 174) para 190.
[176] Maria Garcia, 'From Idealism to Realism? EU Preferential Trade Agreement Policy' (2013) 9(4) Journal of Contemporary European Research pp 522–541.
[177] Fourth ACP–EEC Convention (signed 15 December 1989, entered into force 1 September 1991) *The Courier Nr 120*.
[178] Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States of the other part (signed 22 June 2000, revised 25 June 2005 and 22 June 2010) OJ L 287 (the Cotonou Agreement). Chapter 6 section 2 discusses the current negotiations with the East African Community to establish a WTO compliant trade agreement.

3 Civil judicial remedies

Negative business and human rights measures requiring regulatory compliance can not only be imposed as a direct obligation formulated in a rule, but also indirectly by offering corporations the opportunity to defend against civil violations.[179] Corporate human rights protection can be rendered weak or even meaningless, unless states take appropriate steps to redress corporate human rights abuses when they do occur.[180] Section 3.1 discusses that the rules governing the use of civil adjudicative jurisdiction have not been regulated by international law. Each state has acted unilaterally; free to shape such rules. Section 3.2 explains that extraterritorial litigation over TNC-DEMs would be categorised as litigation over 'foreign-cubed cases', a concept introduced by the OHCHR to describe cases in which a foreign claimant brings a claim in respect of foreign activities against a foreign defendant. Such cases have been frequently brought before US federal courts on the basis of the Alien Tort Statute (ATS).[181] While such cases raise a number of concerns, they do not seem to be prohibited (as long as they do not concern state-owned corporations). Lastly, section 3.3 discusses support by extraterritorial states for local capacity building in third states; a topic that has not often been studied in the literature on business and human rights. A conceptual framework is introduced. This framework guides the case studies reported in part three of this thesis.

3.1 Access to civil judicial remedies

The right to an effective remedy is at the heart of human rights law. Article 8 of the Universal Declaration of Human Rights states: 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law'.[182] Many international human rights instruments, including Article 2(3) ICCPR, Article 39 UNCRC and Article 6(1) ECHR refer to similar commitments.[183]

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[179] Cf Olivier De Schutter and others, 'Human Rights Due Diligence: the Role of States' (2012) <www.bhrinlaw.org/documents/human–rights–due–diligence–the–role–of–states.pdf> accessed 29 March 2018 pp 4–5.
[180] Commentary to Guiding Principle 25(d).
[181] Alien Tort Statute 1789 (US).
[182] Art 8 Universal Declaration of Human Rights (adopted 10 December 1948) UN Doc UNGA Res 217 A(III).
[183] Art 2 ICERD; art 14(1) CAT. Although the ICESCR makes no express provision regarding remedy, the CESCR has reaffirmed on numerous occasions that an obligation to provide

The Commentary to UN Guiding Principle 26 explains that civil judicial remedies should form the backbone of a wider package of remedies that include non-judicial remedies at the state, industry and company level.[184] To be effective, such remedies must be capable of leading to a prompt, thorough and impartial judgment, cessation of the violation (if it is on-going) and reparations. They can also act as an essential incentive for all corporations to investigate and address any harmful behaviour in which they might be involved through their business relationships. UN Guiding Principle 26 provides that states should take appropriate steps to ensure the effectiveness of judicial mechanisms when addressing business-related human rights abuses, including the consideration of ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.

Each state acts unilaterally in developing the rules governing the use of civil adjudicative jurisdiction. A previous attempt to develop a multilateral framework that would ensure reciprocity at the international level has failed. Negotiators at the 2001 Hague Conference on Private International Law put forward a number of proposals – based on existing domestic laws – regarding a convention on foreign judgments in civil and commercial matters.[185] They proposed three distinct categories in which adjudicative jurisdiction would be mandatory or prohibited or optional (and therefore left to the domestic law of States Parties). Civil society organisations were reportedly concerned that the proposed 'black list' in which jurisdiction would be prohibited could restrict potential opportunities to file claims in extraterritorial courts.[186] The European Commission tried to relaunch the negotiations in 2010, but various states – including the US, Canada, Japan and Australia – were reluctant to resume this work.[187]

Various problems arise when the state where the alleged corporate human rights violation takes place is not able or willing to remedy this violation. Other states

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remedies is inherent in this treaty. Eg CESCR, 'General Comment 9 on the Domestic Application of the Covenant (3 December 1998) UN Doc E/C.12/1998/24 para 2.

[184] See HRC, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (2014) UN Doc A/HRC/26/25 para 36.

[185] Draft Hague Convention on Jurisdiction and Enforcement of Civil Judgments (2005) <www.cptech.org/ecom/jurisdiction/hague.html> accessed 30 September 2019.

[186] Zerk (n 75) p 156.

[187] Andrew Strauss, '"Where America Ends and the International Order Begins": Interpreting the Jurisdictional Reach of the U.S. Constitution in Light of a Proposed Hague Convention on Jurisdiction and Satisfaction of Judgments' (1998) 61 Albany Law Review p 1238.

may contribute to ensuring that claimants can have access to remedy if the right to access to a civil judicial remedy is found to be unavailable or ineffective locally.[188] They can take two approaches: they can encourage their own courts to open their doors to victims of such abuse and they can support the state where the violation occurred to develop local access to justice strategies. The Council of Europe's Committee of Ministers has, for example, supported both approaches in its Recommendation on Business and Human Rights (2016).[189] It recommended that EU Member States review their policies regarding extraterritorial litigation for foreign victims at home, as well as partner with third states and strengthen access to justice locally.

Nevertheless, the academic literature has studied extraterritorial litigation in business and human rights matters more extensively than support for local capacity building. There seem to be at least three important reasons for this. First, extraterritorial remedies can ensure access to justice for claimants that currently have no access to remedies. Local capacity building in developing and emerging states is a long-term operation. While the state where the violation occurred is under no obligation to ensure that its courts recognise and enforce judgments given by the courts of an extraterritorial state (unless there is an international treaty between the states concerned), victims and their representatives often seek the benefit of a more flexible judicial process outside their country. The benefits include relatively short proceedings and more checks and balances to control governments that want to line their own pockets and judiciaries that are not independent. Extraterritorial remedies also often offer better prospects of out-of-court settlements and higher financial compensation.

Second, extraterritorial human rights lawsuits belong to a public interest tradition that aims to bring legal reform.[190] As explained in section 1, most economically developed states prefer to behave according to their perceived economic self-interests instead of acknowledging extraterritorial obligations. Human rights cases may be filed with the direct aim of contributing to the development of

[188] E/C.12/GC/24 (n 15) para 30.
[189] Council of Europe (Committee of Miniters), 'Recommendation to Member States on Human Rights and Business' (2016) CM/Rec(2016) paras 7 and 34–36.
[190] Beth Stephens, 'Individuals Enforcing International Law: The Comparative and Historical Context' (2002) 52 DePaul Law Review p 434.

international human rights law via a bottom-up approach. Independent judges in remote courts who are able and willing to litigate human rights lawsuits have the potential to contribute to the acknowledgment of obligations of one state in relation to corporate human rights abuses endured by individuals in another state.

Third, extraterritorial litigation might increase awareness of human rights violations amongst citizens in export markets. Most human rights violations by transnational corporations never capture the attention of citizens in export markets. More transparency would allow determining if public concerns exist over (exposure to) global economic activity that sustains human rights abuses in the export market. It was explained in section 2.2.2 that public concerns are a crucial factor to allow non-trade measures under the current WTO regime. Increased awareness may, in some instances, also result in changes in citizens' buying and investment attitudes. It might even permit citizens in export markets to influence foreign policy decisions that the executive branch would prefer to decide based on political and diplomatic concerns.[191] This is particularly true in cases where governments and corporations are sensitive to their reputation.[192]

3.2 Extraterritorial remedies

In most states – both common law and civil law – a person has, in principle, the right to bring a civil claim in the state where the defendant is domiciled or residing. This means that the court will exercise its jurisdiction over the dispute and determine the matter, unless some other doctrine applies that permits it to decline jurisdiction, such as *forum non conveniens*, objections based on non-justiciable political questions or the broader principle of non-interference in third states' internal affairs.[193] Procedural barriers to justice, such as cost of litigation, restriction on the right to institute class actions and evidentiary problems, as well

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[191] Ibid p 457; Gwynne Skinner and others, 'The Third Pillar Access to Judicial Remedies for Human Rights Violations by Transnational Business' (2013) <http://accountabilityroundtable.org/wp–content/uploads/2013/02/the–third–pillar–access–to–judicial–remedies–for–human–rights–violation–by–transnational–business.pdf> accessed 5 March 2016 pp 54–56.

[192] See Jennifer Hillman, 'An Emerging International Rule of Law? The WTO Dispute Settlement System's Role in Its Evolution' (2010) 42 Ottowa Law Review p 273; Edward Reilly, John Klick and Neal Hochberg, 'What Companies Have Learned From Losing Billions In Emerging Markets' (2015) Harvard Business Review.

[193] Zerk (n 75) p 148.

as barriers created by the notions of separate 'juridical personality' and 'limited liability', often obstruct such adjudicatory jurisdiction in practice.[194] Policymakers sometimes also reject extraterritorial remedies that are exclusively available to victims of corporations 'at home' in the forum state, with the argument that they create a competitive disadvantage in the form of litigation risk. The very existence of such risk makes indemnity no longer dependent upon their goodwill. For example, the French NAP sets out that care should be taken that extraterritorial civil judicial remedies that are exclusively available to victims of French corporations do not create 'an uneven playing field for French corporations'.[195]

Compared to courts of civil law states, the courts of common law states have traditionally enjoyed more discretion as to whether or not to take jurisdiction over foreign defendants. In particular, cases in which foreign claimants bring foreign defendants before court in respect of foreign human rights violations ('foreign-cubed cases') have mostly been brought in the US federal courts on the basis of the Alien Tort Statute.[196] This Statute provides that the federal courts in the US – in principle – have civil jurisdiction over any action taken by a foreigner for damage committed in violation of 'the law of nations or a treaty of the United States'.[197] Lawyers in the 1980s initially relied upon this Statute – which was originally intended to combat piracy – as a basis to provide universal civil jurisdiction for claims against persons representing the state of international human rights violations or international crimes.[198] In 1995, the US Court of Appeals for the Second Circuit also recognised that certain forms of conduct by 'private individuals' violated this Statute.[199] Subsequently, the ATS has been used to bring claims against corporations based or at least with a presence in the US, for their alleged involvement in international human rights violations perpetrated in states around the world including South Africa, Ecuador, Nigeria and Sudan.[200]

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[194] Kasey McCall–Smith and Andreas Rühmkorf, 'Reconciling Human Rights and Supply Chain Management through Corporate Social Responsibility' in Verónica Ruiz Abou–Nigm, Kasey McCall–Smith and Duncan French (eds), *Linkages and Boundaries in Private and Public International Law* (Hart Publishing 2018) pp 151–153.
[195] France (Government), 'NAP' (2017) implementation GP 26.
[196] Alien Tort Statute 1789 (US).
[197] Title 28 US Code s 1350 ibid.
[198] *Filartiga v Pena–Irala* 630 F.2d 876 (2nd Cir 1980).
[199] *Kadic v Karadzic* 70 F.3d 232 (2nd Cir 1995). See also *Wiwa v Royal Dutch Petroleum (Shell)* 266 F.3d 88 (2nd Cir 2000).
[200] Anna Triponel, 'Business & Human Rights Law: Diverging Trends in the United States and France' (2007) 23 American University International Law Review p 905.

Many of these cases were settled out of court, including *Doe v Unocal* (1997), against US oil company Unocal (Chevron) and the French corporation Total for allegedly knowingly using forced labour to construct a pipeline in Myanmar.[201]

The landmark foreign-cubed case *Kiobel v Royal Dutch Petroleum Co.* (2013), concerned the Anglo-Dutch oil company Royal Dutch Shell and its subsidiary Shell Petroleum Development Company of Nigeria (SPDC) for their alleged complicity in grave human rights abuses in Nigeria. The US Court of Appeals for the Second Circuit held that the ATS does not apply to corporations.[202] Second Circuit Judge Pierre Leval, however, filed a separate opinion.[203] He concurred in the judgment on other grounds but disagreed with the proposition that a corporation was not subject to suit under the ATS. Later decisions by the Seventh, Ninth and District of Columbia Circuits agreed with Judge Leval and held that corporations can be subject to suit under this Statute. The US Supreme Court did not answer the question of corporate liability under the ATS in the *Kiobel* case. Instead, the Supreme Court installed a presumption against extraterritoriality to claims under the ATS based on the universality principle. A claimant can only rebut the presumption with a claim that 'touches and concerns' the US with 'sufficient force'. The Supreme Court found, in this case, that the enlistment of Royal Dutch Shell on the New York Stock Exchange did not amount to a sufficient connection with the US. The judges noted that recognition of an extraterritorial scope to the ATS could have the effect of impinging on the jurisdictional competence of other states.[204] They also stated that their decisions carried significant foreign policy implications.[205]

In *Jesner v Arab Bank PLC* (2018), claimants filed suits under the ATS, alleging that they (or the persons on whose behalf they asserted claims) were injured or killed by terrorist acts committed in Israel, the West Bank and the Gaza Strip between 1995 and 2005, and that those acts were in part caused or facilitated by Arab

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[201] *Doe v Unocal Corp* 963 F Supp 880 (CD Cal 1997).
[202] *Kiobel v Royal Dutch Petroleum Co et al*, Nr 06– 4800, 2010 US App Lexis 19382, *1 (2d Cir. 2010)
[203] *Kiobel v Royal Dutch Petroleum Co et al*, Nr 06– 4800, 2010 US App Lexis 19382, *1 (2d Cir. 2010) (Leval, concurring) 196.
[204] *Kiobel v Royal Dutch Petroleum Co*, 133 SCt 1659 (2013) p 5.
[205] Ibid p 2.

Bank PLC, a Jordanian financial institution with a branch in New York.[206] The only alleged connections to the US were transactions in this branch and a brief allegation about a charity in Texas. The (divided) US Supreme Court noted that the 'relatively minor connection between the terrorist attacks and the alleged conduct in the United States illustrates the perils of extending the scope of ATS liability to foreign multinational corporations'.[207] Finally, the US Supreme Court expressed doubt over the ability of courts to make the required policy judgments implicated by foreign corporate liability.[208] It found that it should defer to the political branches of the US government to determine, referring to international law to the extent they deem proper, whether to impose liability for human rights violations upon foreign corporations.[209] The Court therefore held that 'foreign corporations may not be defendants in suits brought under the ATS'.[210]

In 2015, the OHCHR studied 44 amici curiae briefs and other interventions of twelve states in fifteen Alien Tort Statute cases in US courts as part of its project to improve accountability and access to remedy for victims of business-related human rights abuse.[211] While this study cannot be taken to represent the views of the wider international community, it did show that there is no evidence of state practice suggesting that extraterritorial jurisdiction in human rights cases is required. The OHCHR identified a number of other possible scenarios that fall elsewhere on the spectrum of admissibility, between 'prohibited' and 'tolerated'. There were particular concerns about the willingness of some US courts to assert jurisdiction over foreign-cubed cases.[212] Nevertheless, the study pointed out that extraterritorial litigation over foreign-cubed cases would not per se be out of bounds.[213] Such litigation would only be prohibited if questions were raised about

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[206] *Jesner v Arab Bank*, 137 S.Ct. 1432 (2018).
[207] Ibid p 3.
[208] Ibid p 3.
[209] Ibid p 27.
[210] Ibid p 1.
[211] OHCHR, 'State Positions on the Use of Extraterritorial Jurisdiction in Cases of Allegations of Business Involvement in Severe Human Rights Abuses: a Survey of Amicus Curiae Briefs filed by States and State Agencies in ATS Cases (2000–2015)' (2015) <www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StateamicusATS–cases.pdf> accessed 24 March 2016 p 16. This project studied the positions of Argentina, Australia, Colombia, Ecuador, Germany, the Netherlands, South–Africa, Switzerland, the UK, US, Papua New Guinea and the EU.
[212] Ibid p 7.
[213] UN General Assembly, 'Progress Report of the United Nations High Commissioner for Human Rights on Legal Options and Practical Measures to Improve Access to Remedy for Victims of Business–related Human Rights Abuses' (2015) UN Doc A/HRC/29/39 paras 36–37.

state-owned corporations. Extraterritorial litigation tends to be more likely to be viewed as tolerable by affected states if no other state with a closer factual nexus exists.[214] Other factors that might contribute to the justification of extraterritorial adjudicative jurisdiction are the authorisation by bilateral or multilateral treaties, the consultation of other states, and the resolution of competing jurisdictional claims.[215]

While 'home states' of Western transnational corporations – including the Netherlands and France – have frequently objected to foreign-cubed litigation of their corporate nationals in the US, the foreign states where the alleged violations have taken place have not often (at least not publicly) commented on such litigation.[216] There are a few exceptions.

The Argentine Republic presented the rather extreme view that held that it is unequivocally in favour of extraterritorial jurisdiction in human rights cases (including foreign-cubed cases) in its brief in the *Kiobel* case.[217] This government explained that such jurisdiction is important for oppressed regions of the world today because it can end the impunity of human rights abusers. Reference was made to extraterritorial jurisdiction as an 'important source of international assistance for victims during the darkest days of Argentina's dictatorship and during its transition to democracy'.

In the *Jesner* case, Jordan objected to ATS litigation on sovereignty grounds, which were raising non-justiciable political questions and diplomatic tensions between Jordan and the US. First, Jordan stated that the assertion of extraterritorial jurisdiction 'would be a direct affront to Jordan's sovereignty'.[218] Specifically, the Jesner case would '[demean] Jordan by usurping its sovereign authority to regulate the conduct of its own nationals on its own soil'. This demonstrates that the lawfulness of jurisdiction over foreign-cubed cases is a function of objections concerning interference. Second, Jordan noted that the

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[214] Ibid paras 36–37; OHCHR (n 212) p 16
[215] OHCHR (n 212) p 19.
[216] See Beth Stephens, 'The Curious History of the Alien Tort Statute' (2014) 89(4) Notre Dame Law Review pp 1502–1503.
[217] Argentine Republic (Government), 'Brief as Amicus Curiae in Support of Petitioners in Kiobel v Royal Dutch Petroleum Co. and others' (13 June 2012) Nr 10–1491 p 2.
[218] Hashemite Kingdom of Jordan (Government), 'Brief as Amicus Curiae supporting Respondent in Jesner v Arab Bank' (August 2017) Nr 16–499 p 6.

Jesner case risks destabilising Jordan's economy, as the bank provides a substantial number of services to shareholders and beneficiaries of the pension fund and US foreign aid programmes.[219] Moreover, it would undermine the 'stable and productive' American-Jordanian cooperation, 'diminishing U.S. influence in one of the world's most volatile regions'.[220] More generally, ATS claims have often been objected because they have adverse foreign policy consequences. The non-justiciable political question directs extraterritorial courts to take account of the views of the political branches of government, and to decline a case when there is a risk that the dispute presents issues constitutionally assigned to those branches.[221]

The non-justiciable political question has also been called upon in a string of cases concerning (relatives of) victims of the South African apartheid regime. They sued several foreign corporations for their involvement in that regime between 1948 and 1994. For example, in *Khulumani et al v s National Bank*, the South African government objected to litigation in the US, noting that 'Another country's courts should not determine how ongoing political processes in South Africa should be resolved'.[222] Such jurisdiction would conflict with South Africa's reconstruction, reparation and goodwill programme, including the right of the government to 'define and finalise issues of reparations'.[223] Singling out certain corporations would interfere with the reconciliation efforts in South Africa and undercut the government's approach of avoiding 'victor's justice'.[224] However, these objections by the South African government were withdrawn following the decision of the US District Court to dismiss the claims against corporations that were 'merely doing business' in South Africa during the apartheid regime in the class action.[225] The then Minister of Justice, Jeffrey Thamsanga Radebe, stated that, in the view of the government of South Africa, the US court was the

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[219] Ibid pp 6 and 9.
[220] Ibid pp 9 and 12.
[221] Zerk (n 75) p 152.
[222] *Khulumani v Barclay National Bank Ltd,* 504 F 3d 254 (2nd Cir 2007); Republic of South Africa (Ministry of Justice and Constitutional Development), 'Declaration by Justice Minister Penuell Maduna on Apartheid Litigation in the United States' (2003) <www.gov.za/sites/default/files/gcis_document/201409/apartheid1.pdf> accessed 30 September 2019 para 11.
[223] Republic of South Africa (Ministry of Justice and Constitutional Development) (n 222) para 7.
[224] Ibid para 3.2.1.
[225] *Lungisile Ntsbeza et al v Daimler AG et al, and Khulumani et al v Barclay National Bank et al*, 617 FSupp 2d 228 (SDNY 2009)

appropriate forum for the remaining claims that were based on 'aiding and abetting very serious crimes, such as torture, [and] extrajudicial killing committed in violation of international law by the apartheid regime'.[226]

The European Commission based its brief (on behalf of the EU) in the *Kiobel* case on this intervention by the South African government.[227] It put forward a theory of universal *civil* jurisdiction in which there would not need to be a territorial link between the case and the forum state.[228] The universality principle is an established basis of extraterritorial c*riminal* jurisdiction under international law, under which States may prosecute offenders in respect of a limited number of particularly serious offences deemed so repugnant that all states are said to have a legitimate interest and therefore the authority to suppress and punish them. While the EU acknowledged that universal civil jurisdiction is less established than its criminal counterpart, it noted that it is consistent with international law.[229] To illustrate this, it claimed that such interpretation applies to those states (such as the Netherlands, France, Germany, Argentina and China) that currently permit victims of crime to seek monetary compensation in 'civil actions' within criminal proceedings based on universal civil jurisdiction. This theory is, however, not generally accepted. The distinction between private and public enforcement remains important for many states.[230] The Netherlands, the UK and Germany indicated in their briefs in the *Kiobel* case that they did not agree that adjudicative jurisdiction can be asserted when there is no link with the forum state.[231]

While acknowledging that foreign policy would not be a sufficient basis for dismissal in the Apartheid cases, the George W Bush Administration alleged that such lawsuits might stand in the way of trade and investment opportunities which

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[226] Letter from Jeffrey Thamsanqa Radebe, Minister of Justice and Constitutional Development of the Republic (SA) to Shira A Scheindlin, Judge District Court (US) (1 September 2009).
[227] European Commission (on behalf of the EU), 'Brief as Amicus Curiae in Support of Neither Party in Kiobel v Royal Dutch Petroleum Co' Nr 10–1491 (13 June 2012).
[228] Ibid p 18.
[229] Ibid p 23.
[230] Zerk (n 75) p 153.
[231] Germany (Government),'Brief as Amicus Curiae in *Kiobel v Royal Dutch Petroleum* Nr 10–1491(February 2012) p 13; The UK (Government) and The Netherlands (Government), 'Joint Submission of United Kingdom and Netherlands in Kiobel v Royal Dutch Petroleum' Nr 10–1491 (June 2012) will be discussed further in Chapter 4 section 2.

would be 'in the long run, the best way to lift people out of poverty'.[232] Somewhat unsurprisingly, the US government has often referred to foreign policy interests and objectives to object to ATS cases. The Barack Obama Administration noted, for example, that extraterritorial jurisdiction could cause 'diplomatic frictions'.[233] In another case, this Administration held that ATS claims 'discourage foreign commercial enterprises from establishing channels for the distribution of their goods and services' or investing in the US.[234]

3.3 Support for local capacity building

The extraterritorial state can support the developing or emerging state where corporate human rights violations take place by developing access to justice strategies. Local litigation has various advantages that courts in other states cannot offer to the same degree. Most importantly, local remedies do not distinguish between corporations with transnational activities and corporations with local activities. In addition, they might have a regulatory effect on all corporations that operate in the state where the violation occurs and, in doing so, effectively contribute to a culture of compliance.

In addition, local remedies can inspire a sense of ownership in developing and emerging states, while extraterritorial remedies can be perceived as being determined by Western imperial infringement upon the sovereignty of developing and emerging states.[235] Economically developed states can unilaterally determine which human rights deserve protection if there are not sufficient investments in local capacity building.[236] Particularly, the risk exists that extraterritorial courts might take protectionist measures – whether consciously or not – against TNC-DEMs that do not apply to national corporations. Authority exercised in remote courts in extraterritorial states can therefore easily be considered invalid by the

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[232] US (Government), 'Brief as Amicus Curiae in Support of Petitioners in American Isuzu Motors v Lungisile Ntsebeza et al' Nr 07–919 p 20.
[233] US (Government), 'Brief as Amicus Curiae in Support of Petitioner in Daimler AG v Bauman' Nr 11–965 (July 2013) p 2.
[234] US (Government), 'Brief as Amicus Curiae supporting Rehearing en Banc in Alexis Holyweek Sarel et al v Rio Tinto Plc' Nrs 02–56256 and 02–56390 (August 2004) p 8.
[235] Jan Wouters, Leen De Smet and Cedric Ryngaert, 'Tort Claims Against Multinational Companies for Foreign Human Rights Violations Committed Abroad: Lessons from the Alien Tort Claims Act?' in Piet Jan Slot and Mielle Bulterman (eds), *Globalisation and Jurisdiction* (Kluwer Law International 2004) pp 192–193.
[236] August Reinisch, 'The Changing International Legal Framework' in Philip Alston (ed), *Non–state Actors and Human Rights* (Oxford University Press 2005) pp 60–61.

state where the violation occurred. Because of this, victims may face various difficulties in obtaining recognition and execution of judgments that allow them to receive damages.

A further advantage is that settling a dispute as close as possible to its source is more practical and efficient.[237] Local remedies are less time- and cost-consuming and facilitate the disclosure of evidence to a larger extent.[238] Moreover, a range of practical challenges might obstruct effective cooperation between the territorial state and other states in extraterritorial proceedings, including language barriers and differences of approach regarding the protection of sensitive information.[239] In particular, the willingness to provide such information in developing and emerging market states regarding TNC-DEMs might be limited. It is realistic to suggest that developing and emerging states would perceive such cooperation as an undesired interference.

In addition, local judges might be more capable of addressing the consequences of harm than remote judges. Local remedies tend to be better suited to the gravity of the abuse and the extent and nature of the harm suffered. There are three reasons for this: local judges can ensure victim participation and dialogue with affected local communities to a greater extent than remote judges; they are better placed to provide interim relief; and local remedies are more varied, whereas extraterritorial remedies tend to be confined to financial compensation and fines.[240] Victimologists have pointed out that a plethora of non-monetary remedial measures need to be considered, such as acknowledgment of the truth,

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[237] HRC, 'Report of the United Nations High Commissioner for Human Rights – Improving Accountability And Access to Remedy for Victims of Business–Related Human Rights Abuse' (2016) UN Doc A/HRC/32/19 para 5.
[238] International Organization of Employers, 'Comments on the draft General Comment No 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (2016) <www.ohchr.org/EN/HRBodies/CESCR/Pages/Submissions2017.aspx> accessed 9 January 2017 para 7.
[239] A/HRC/32/19 (n 237) paras 26 and 27; Salil Tripathi, 'A Business and Human Rights Treaty? More Immediate Actions Would Make a Bigger Difference' (2014) <www.ihrb.org/commentary/business–and–human–rights–treaty–more–immediate–actions–required.html> accessed 15 January 2016.
[240] A/HRC/32/19 (n 237) para 19.2; Fons Coomans and Rolf Künneman, *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* (Intersentia 2012) p 227; Lawrence Friedman, 'The Level Playing Field: Human Rights and Modern Legal Culture' (2014) 44 Hong Kong Law Journal p 403.

public apologies, changes to the law, restitution, rehabilitation, injunctions, and guarantees of non-repetition, in order to bring appropriate closure to victims.[241]

A further advantage is that effective local litigation enhances legal certainty and predictability to a larger extent.[242] Local litigation allows corporations to know in advance when they can be sued if such proceedings are available. Linked to this, is the advantage that local litigation prevents claimants from 'forum shopping' in the (hypothetical) situation of several extraterritorial states offering subsidiary remedies.[243]

Finally, local remedies can increase awareness about the behaviour of corporations in the places where misconduct occurs. Local proceedings are more visible to the involved communities in which the defending TNC-DEMs or subsidiaries of Western corporations are embedded. Ensuring access to effective remedies requires not only transformative changes in legal frameworks in their enforcement, but also in societal structures in which they are embedded. It will be demonstrated that barriers to justice often represent exercises of power in the third part of this thesis. This means that the denial of rights enjoyment to the vulnerable usually serves to protect the power of a smaller privileged group of people and their business allies.[244] Courageous efforts of local judges can inform and empower local communities to demand structural solutions.

Taking into account these arguments, it is understandable that – as discussed in part two of this thesis – the European Commission, the Netherlands and France have demonstrated a strong preference for local capacity development over extraterritorial remedies. In reality, there has, however, been relatively limited discussion regarding collaboration with developing and emerging states to strengthen access to justice locally. The literature on this topic is also limited. The remainder of this section, therefore, sets out a conceptual framework on

[241] Commentary to Guiding Principle 25; William Doerner and Steven Lab, *Victimology* (6th edn, Routledge 2012) p 152.
[242] Ilaria Pretelli, 'Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)' (2011) <www.europarl.europa.eu/RegData/etudes/STUD/2011/453205/IPOL–JURI_NT(2011)453205_EN.pdf> accessed 30 September 2019 pp 9 and 27.
[243] OHCHR (n 214) p 10.
[244] Sonia Cardenas, 'Human Rights in Comparative Politics' in Michael Goodhart (ed), *Human Rights: Politics and Practice* (Oxford University Press 2009) p 81.

support for local capacity building. This framework guided the collection of empirical evidence and reporting of the cases studies in the third part of this thesis.

Support for local capacity building would fall under the *fulfil* dimension of human rights obligations, i.e. positive actions to facilitate, promote and provide for the enjoyment of rights. Judicial, promotional and other measures are valuable steps for the full realisation of rights.[245] There is an on-going legal debate as to whether or not states carry fulfil 'obligations' to support particular states or rights-holders in other states. Such obligations would follow from the concept of international cooperation and states' obligation to create 'an international enabling environment conducive to the universal fulfilment of economic, social and cultural rights'.[246] It has been explained in section 1 that economically developed states have been reluctant to acknowledge that there is a legal obligation underpinning human rights responsibility for international cooperation and assistance. The articulation of extraterritorial obligations to fulfil rights is, however, even more controversial than extraterritorial *protect* obligations. It has been met with a great deal of political resistance because states do not wish to cast their aid-giving in legal obligation terms.

If it were acknowledged that other states than the territorial state have to *fulfil* human rights obligations, then they do not bear 'strict' *fulfil* obligations.[247] The scope of any extraterritorial obligation to fulfil is limited to a contribution to the realisation of rights. This is important, because only such limited contribution is realistic and feasible from a political point of view.[248] For extraterritorial states, it would therefore be more appropriate to talk about 'duties' to 'help fulfil' the rights of persons outside their national territories. This is the wording used by the CESCR in General Comment 24 on Business and Human Rights.[249]

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[245] E/C.12/2000/4 (n 22) para 33.
[246] E/C.12/GC/24 (n 15) para 36; Maastricht Principles 28–29.
[247] UN Economic and Social Council, 'Report of the Special Rapporteur on the Right to Food Jean Ziegler' (2003) UN Doc E/CN.4/2005/47 para 47; Vandenhole (n 17) p 826.
[248] Fons Coomans, 'Situating the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 6(2) Zeitschrift für Menschenrechte pp 27–47.
[249] E/C.12/GC/24 (n 15) para 36.

Which states can *help to fulfil*? The CESCR has stated that this 'is particularly incumbent upon those States which are in a position to assist'.[250] Such 'position to assist' refers to the availability of capacity and resources.[251] Creating an international enabling environment extends beyond the provision of development assistance, and includes technical and technological capacities and influence in international decision-making processes. Discharging such obligations would also require the mobilisation of resources. In 1970, the UN General Assembly adopted a resolution including the goal that states will 'progressively increase' their official development assistance and 'exert' their 'best efforts to reach a minimum net amount of 0.7 per cent of its GDP by the middle of the Decade'.[252] Until 1993, GDP was used as the key performance indicator, but a change to international economic accounting saw this substituted with gross national income (GNI). Most members of the OECD Development Assistance Committee – such as the Netherlands and France – generally accepted the 0.7 per cent target, at least as a long-term aim. The European Council is also committed to this target.[253] The CRC has a policy of asking States Parties to the UNCRC to justify their total amount of official development assistance as well as the internal allocations of development assistance – to give sufficient priority to certain issues and particular groups or to consider new policies – in its Concluding Observations.[254] Part two of this thesis will not attempt to examine internal allocations of development assistance. It limits itself to assessing whether the 0.7 per cent commitment was met.

Beneficiaries are not limited to those states that can be beneficiaries of special and differential treatment provisions under the WTO agreements.[255] Trade agreements can seriously affect the domestic policy space of governments. Human rights principles and obligations should be fully integrated in trade negotiations. States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements.[256] Prior

[250] CESCR, General Comment 3 on the Nature of States Parties Obligations UN Doc E/1991/23 Annex III para 14.
[251] Maastricht Principle 31.
[252] UN General Assembly, 'International Development Strategy for the Second United Nations Development Decade' Res 2626 (XXV) (1970) para 43.
[253] European Commission, 'European Development Assistance Reaches Highest Ever' (2017) IP/17/916.
[254] CRC, General Comment 5 General measures of implementation of the Convention on the Rights of the Child (2003) UN Doc CRC/GC/2003/5 para 6.
[255] Cf Maastricht Principle 31.
[256] Commentary to UN Guiding Principle 9.

impact assessments that accompany trade agreements can inform states of measures they must adopt to ensure effective remedies, if the risk of nullifying or impairing the enjoyment of economic, social and cultural rights is a foreseeable result of their conduct.[257] Multilateral institutions can also play a vital role in 'capacity-building and awareness-raising to help parties to fulfil their duty to protect, including by enabling the sharing of information about challenges and best practices, thus promoting more consistent approaches'. This essentially constructivist perspective is set out in the Commentary to UN Guiding Principle 10.

According to this perspective, trade institutions and agreements can provide a framework to embed transnational social network relations connecting a variety of actors, including actors outside official capacities to contribute to the creation of a 'thick' stakeholder consensus.[258] Operating within such transnational regulatory networks has two main functions. First, it serves to increase transparency and reduce transaction costs related with information exchange and knowledge dissemination.[259] Second, it can facilitate the internalisation of new norms of proper behaviour. Through repeated engagement in the processes, principles and practices 'of persuasion, norm internationalisation or acculturation', the partners to such structures can reconfigure the very nature of their identities and interests in such a way that they reflect their status of being a party to the structure.[260] Such reconfigurations may promote consistent approaches that are 'normatively superior' to the validation requirements of traditional international law, precisely because they are the result of broad stakeholder involvement.[261]

This constructivist lens will be used in the third part of this thesis to study whether bilateral trade relations between the EU and its important trading partners can play a role in deploying local capacity building. The two case studies will first describe the specific context in which the studied TNC-DEMs – Kenyan floriculture corporations and Korean electronics corporations – became so

[257] Commentary 7 to Maastricht Principle 14.
[258] Axel Marx and others, 'EU–Korea Relations in a Changing World Project: Main Results and Recommendations' (2014) 12 Asia Europe Journal p 248.
[259] Cf ibid pp 244 and 248.
[260] Thomas Risse and Kathryn Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices' in Thomas Risse, SC Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press 1999) p 1.
[261] Marx (n 258) pp 244 and 248.

economically successful. This is done because the institutional arrangements that explore tailor-made cooperation activities should fully acknowledge contextual social forces that can impede the enjoyment of rights and access to remedies.[262] The case studies then discern the legal commitments in relation to human rights and the clauses that are relevant to remediation in the Economic Partnership Agreement between the East African Community (EAC) and the EU and the Free Trade Agreement between the EU and the Republic of Korea. Empirical evidence is used to identify the main stakeholders and opportunities in transnational social network relations that can contribute to local capacity development.

4 Conclusions

While the debates on the existence and reach of extraterritorial obligations over transnational corporations are not yet settled, this chapter has explained that EU Member States can take domestic measures with extraterritorial implications over TNC-DEMs under two cumulative conditions under international law. The first condition is that there needs to be a 'reasonable link' between the extraterritorial state and the TNC-DEM. While there is no single verbal formula to determine this element of 'directness' or 'immediacy', the second part of this thesis will point out how the EU, the Netherlands and France have assessed this nexus when they have tried to overcome the collective action problem in the field of business and human rights. The second condition is that domestic measures with extraterritorial implications in relation to human rights may not be opposed by affected states. It will be explained that the existing EU, Dutch and French measures do not appear to have generated much opposition from affected states to date. Instead, the main opposition appears to have come, not from other states, but from companies. The current chapter has further examined whether import restrictive measures to protect labour standards are allowed under the WTO regime. To present an accurate interpretation of the GATT by WTO DSM, the attitude-behaviour gap was used as the lens for interpretation. On balance, it has been found that the WTO DSM do not take the attitude-behaviour gap sufficiently into account in their interpretation of both Article III(4) and Article XX(a) GATT. On the one hand, Article III(4) GATT only renders account of attitudes that are

[262] Cf Joost Pauwelyn, Ramses Wessel and Jan Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Law Making' (2014) 25(3) The European Journal of International Law p 734.

reflected in consumption decisions. This extensive interpretation reduces people to consumers. On the other hand, the two-step test that has been developed in the *Seal* case to assess public morals of citizens in the importing State Party in the sense of Article XX(a) GATT embodies a degree of arbitrariness. In particular, information asymmetries and information manipulation cannot be taken into account under this test. Issues that are not subject to deliberate judgments of citizens in the importing State Party, issues that are not raised in public and issues that are misunderstood cannot be assessed under the WTO DSM's interpretation of Article XX(a) GATT. The implication is that some core labour standards that have been declared as universal by the ILO – such as the freedom of association – will likely not be protected under this test. It can be, hypothesised, however, that concerns amongst citizens in EU Member States about child labour might be placed in the same category as the inhuman killings of seals. Citizens have regularly voiced their concerns about child labour. It is on this basis that the Netherlands has, for example, adopted its Child Labour Duty of Care Law in 2019. Finally, this chapter has presented arguments in favour of a mixed approach consisting of both extraterritorial litigation and support for local capacity development. On the one hand, it was explained that extraterritorial litigation over TNC-DEMs would be categorised as litigation over 'foreign-cubed cases' according to the OHCHR. Such claims have mostly been brought in the US federal courts on the basis of the Alien Tort Statute. Objections to such litigation have been brought by states where violations have taken place in amicus curiae brief in US courts based on the principle of non-justiciable political question and the broader principle of non-interference in third states' internal affairs. It is, however, likely that victims will continue to file such claims. Victims and their representatives file such claims to obtain a remedy when they are wronged and to increase awareness amongst citizens in export markets. They are also often filed with the direct aim of contributing to the development of international human rights law via a bottom-up approach. On the other hand, it has been explained that bilateral trade agreements can provide a framework to embed transnational social network relations that can create opportunities for local capacity building. This framework will be used in the case studies in the third part of this thesis.

CHAPTER 3 THE EU

It was established in the first part of this thesis that the EU has been reluctant to engage in the ongoing negotiations for a UN treaty on business and human rights because this treaty would have an impact on the competitiveness of transnational EU-based corporations in the global marketplace, in particular vis-à-vis competitors from developing and emerging states. While the EU finally started engaging in the treaty elaboration process in 2016 under pressure from the European Parliament,[1] the EU's participation remained largely restrained.[2] Since the treaty negotiations started in 2014, the European Commission has criticised the intergovernmental Working Group leading the treaty elaboration process because it had not facilitated a broad and constructive dialogue regarding the scope of application of the future treaty, including the meaning of 'having a transnational character'.[3] As recently as 2018, the EU and its Member States were not prepared to exchange views with civil society on how the future treaty could build on existing EU initiatives in the area of business and human rights. It remains to be seen whether it will change this stance after the intergovernmental Working Group finally proposed, in July 2019, that the future treaty would not only apply to transnational corporate activities – contrary to Resolution A/HRC/RES/26/9.[4] Bearing in mind these observations relating to the EU's position in the ongoing treaty process, this chapter aims to assess whether the EU has been able to mitigate the effects on the competitiveness of EU-based corporations in mandatory unilateral initiatives, which fit in with its approach to business and human rights issues. Section 1 indicates that three regulatory

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[1] European Parliament, Resolution of 21 January 2016 on the EU's Priorities for the HRC Sessions in 2016 (2015) 2015/3035(RSP) para 28; European Parliament, Resolution of 25 October 2016 on Corporate Liability for Serious Human Rights Abuses in Third Countries (2016) 2015/2315(INI) para 12; European Parliament, Resolution of 14 December 2016 on the Annual Report on Human Rights and Democracy in the World and the European Union's policy on the Matter (2016) 2016/2219(INI) para 84.

[2] Ionel Zamfir, 'Towards a Binding International Treaty on Business and Human Rights' (2018) <www.europarl.europa.eu/RegData/etudes/BRIE/2018/630266/EPRS_BRI(2018)630266_EN.pdf> accessed 30 September 2019 p 11.

[3] Ibid p 11.

[4] Art 3 Open–Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises. Revised Draft' (2019) <www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf> accessed 30 September 2019.

frameworks imposing direct obligations on corporations have been adopted under public pressure and the EU's own geopolitical interests. It concerns the sector-wide Non-Financial Reporting Directive and two initiatives that relate to the exploitation of natural resources: the Country-by-Country Reporting (CBCR) rules and the Conflict Minerals Regulation. Sections 2 and 3 of this chapter investigate to what extent competition from non-EU corporations and, in particular, TNC-DEMs, is a factor that has been taken into account during the drafting process of these regulatory initiatives, and to what extent these initiatives have a regulatory impact on TNC-DEMs. Finally, section 4 discusses negative measures that impose a requirement as a matter of regulatory compliance *indirectly*, by offering TNC-DEMs the opportunity to defend themselves against civil violations. While no regulatory changes have been made in the EU to strengthen access to civil judicial remedies in light of its business and human rights policy, the Council of the EU has initiated some steps to bring about change.

1 Priorities in the business and human rights agenda

The Consolidated Treaty on the EU establishes that the EU has the duty to promote human rights within the competences attributed by its Member States when it adopts and implements regulations as well as in its relations with the wider world.[5] On this basis, the EU has taken a variety of actions to prevent and remedy human rights violations by corporate actors.[6] However, it was the endorsement of the UN Guiding Principles by the HRC in 2011 that triggered the EU's more formal and focused approach to business and human rights issues.[7] The UN Guiding Principles – which apply to both domestic and transnational corporations – serve as the basis to foster consistency in multilateral as well as

[5] Arts 2, 3.5 and 21.1 Consolidated Version of the Treaty on European Union [2012] OJ C 326/13.
[6] Stephanie Bijlmakers, Mary Footer and Nicolas Hachez, 'The EU's Engagement with the Main Business and Human Rights Instruments' (2015) 50 <www.fp7–frame.eu/wp–content/uploads/2016/09/Deliverable–7.4.pdf> accessed 29 February 2018.
[7] EU (Permanent Delegation to the UN Office and other International Organisations in Geneva), 'Business and Human Rights – Human Rights Council Resolution 17/4' (2012) <www.ohchr.org/Documents/Issues/TransCorporations/Submissions/UNAndIGOs/EuropeanUnion.pdf> accessed 30 September 2019 p 1; European Commission, 'Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights – State of Play' (2015) SWD(2015)144 final p 2.

unilateral initiatives in which the EU is involved in the business and human rights arena.[8]

A number of non-binding multilateral initiatives that have materialised following the adoption of the UN Guiding Principles were fully welcomed by the European Commission and other EU institutions.[9] These include the OHCHR project to improve accountability and access to remedy for victims of business-related human rights abuse (2015), the 2011 update of the OECD Guidelines for Multinational Companies and the Council of Europe's Committee of Ministers Recommendation on Human Rights and Business (2016).[10]

To date, three unilateral EU regulatory frameworks have come into existence that contribute to the implementation of the UN Guiding Principles. These are the sector-wide Non-Financial Reporting Directive (2014) and two regulatory frameworks that specifically target raw materials: the CBCR rules (2013) and the Conflict Minerals Regulation (2017).[11] They have been identified in the European

[8] European External Action Service (EEAS), '2017 United Nations Forum on Business and Human Rights – EU Contribution' (2017) <https://eeas.europa.eu/headquarters/headquarters–homepage/36353/2017–united–nations–forum–business–and–human–rights–eu–contribution_en> accessed 11 February 2018.

[9] Eg SWD(2015)144 final (n 7) para 21; European Parliament, Resolution on the EU's Priorities for the HRC Sessions in 2016 (2016) 2015/3035(RSP) para 27; Council of the EU, Conclusions on EU Priorities at UN HR fora in 2017 (2017) 5689/17 Annex para 27.

[10] OHCHR, 'Background Paper Accompanying Draft Guidance Prepared by OHCHR for the Purposes of Inclusion in its Final Report to the Human Rights Council pursuant to A/HRC/Res/22/26, para 7' (2015) <www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/business_and_human_rights/EN/_2016–02–22__C–362_OHCHR_Bus_Human_Rights_Accountability___Remedy_Project_–_Background_Paper_to_draft_guidance__final_.pdf> accessed 24 March 2016; OECD, *OECD Guidelines for Multinational Enterprises* (2nd edn, OECD Publishing 2011; Council of Europe (Committee of Ministers), 'Recommendation to Member States on Human Rights and Business' (2016) CM/Rec(2016).

[11] European Parliament and Council Directive Nr 2014/95/EU Amending Directive 2013/34/EU as regards Disclosure of Non–Financial and Diversity Information by Certain Large Undertakings and Groups Text with EEA relevance [2014] OJ L 330/1 (Non–Financial Reporting Directive); Art 42.1 Directive Nr 2013/34/EU on the Annual Financial Statements, Consolidated Financial Statements and Related Reports of Certain Types of Undertakings, Amending Directive 2006/43/EC of the European Parliament and of the Council and Repealing Council Directives 78/660/EEC and 83/349/EEC Text with EEA Relevance [2013] OJ L 182/19; Art 6 European Parliament and Council Directive Nr 2004/109/EC on the Harmonisation of Transparency Requirements in Relation to Information about Issuers whose Securities are Admitted to Trading on a Regulated Market [2004] OJ L 390/38 (amended by art 1 European Parliament and Council Directive Nr 2013/50/EU amending Directive 2004/109/EC of the European Parliament and of the Council on the Harmonisation of Transparency Requirements in Relation to Information About Issuers whose Securities are Admitted to Trading on a Regulated Market, Directive 2003/71/EC of the European Parliament and of the Council on the Prospectus to be Published when Securities are Offered to the Public or Admitted to Trading and Commission Directive 2007/14/EC Laying down Detailed Rules for the Implementation of Certain Provisions of Directive 2004/109/EC Text with EEA relevance [2013] OJ L 294/13) (Art 42.1 Directive

Commission's Staff Working Document on implementing the UN Guiding Principles (2016), and the EU External Action Service's contributions to the UN Forum on Business and Human Rights in 2016 and 2017.[12]

These initiatives have been coordinated through the European Commission's Corporate Social Responsibility (CSR) Strategy. The 2011-2014 CSR Strategy is the European Commission's first strategy in which it has stated that *mandatory* regulation might be needed in order to make CSR an integral part of corporations' core strategic thinking.[13] To this end, a new definition of CSR consistent with the UN Guiding Principles (and other CSR principles and guidelines) has been set out by the European Commission. CSR is now understood to be 'the responsibility of enterprises for their impacts on society'.[14] More specifically, 'a smart mix of voluntary policy measures and, where necessary, complementary regulation' would be required to implement CSR, including business and human rights measures.[15] This new approach can be considered a major change, even though the main responsibility to implement the European Commission's CSR Strategy is attributed to corporations. Up until 2011, this Strategy provided a full-blown 'business case' that assumed that there would be sufficient incentives for corporations to adopt CSR measures voluntarily. CSR had previously been defined in the European Commission's Green Paper (2001) as 'a concept whereby companies integrate social and environmental concerns in their business operations and in their interactions with their stakeholders on a voluntary basis'.[16] This proposition had been justified by the European Commission on the basis of the argument that a strategic approach to human rights can result in a

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2013/34/EU and art 6 Directive 2004/109/EC are the 'CBCR rules'); European Parliament and Council, Regulation Nr 2017/821 Laying down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, their Ores, and Gold Originating from Conflict–Affected and High Risk Areas' [2017] OJ L130/1 (Conflict Minerals Regulation).

[12] SWD(2015)144 final (n 7) p 10; EEAS, '2016 United Nations Forum on Business and Human Rights – Contribution of the European Union' (2016) <https://eeas.europa.eu/headquarters/headquarters–homepage/14906/2016–united–nations–forum–business–and–human–rights–contribution–european–union_en> accessed 11 February 2018; EEAS (n 8).

[13] European Commission, A Renewed EU Strategy 2011–14 for Corporate Social Responsibility (2011) COM/2011/0681 p 5; EEAS (n 8).

[14] COM/2011/0681 (n 13) p 6.

[15] Ibid p 10.

[16] European Commission, 'Green Paper – Promoting an European framework for CSR' (2001) COM(2001)366 final p 20.

range of long-term benefits for corporations, including a more committed workforce and a better reputation.[17]

This shift in favour of binding CSR rules makes the European Commission's approach to CSR more congruent with the approach of the European Parliament. The latter body has pressured the European Commission for decades to take binding CSR measures. In the 1990s, it had already contended that 'codes of conduct must not be used as instruments for putting multinational enterprises beyond the scope of governmental and judicial scrutiny'.[18] Corporations are indeed, in many instances, reluctant to voluntarily implement CSR measures, including those relating to human rights. While there is some room for differentiation regarding the impact of respecting or disrespecting CSR on the competitive advantage of corporations, investing in CSR capabilities generally does not 'pay off' immediately. Business organisational behaviour, therefore, tends to be rigid and resistant to change. In the impact assessment of the Non-Financial Reporting Directive it was aptly suggested in this regard that 'the benefits related to non-financial disclosure are often perceived as long-term and uncertain, while short-term costs are relatively high and easily measurable'.[19]

The European Commission indicated that the following three business and human rights objectives would require mandatory measures: to promote transparency, to create market incentives for responsible business conduct, and to ensure corporate accountability.[20] The European Commission promised to share more specific priorities regarding its business and human rights agenda by the end of 2012.[21] However, the Council of the EU has correctly established that such

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[17] Ibid p 24.
[18] Recital F European Parliament, Resolution of 14 April 1999 on EU standards for European Enterprises Operating in Developing Countries: Towards an European Code of Conduct [1999] OJ C 104 180; Jan Wouters and Leen Chanet, 'Corporate Human Rights Responsibility: An European Perspective' (2008) 6(2) Northwestern Journal of International Human Rights pp 272–283.
[19] European Commission, 'Staff Working Document Executive Summary of the Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Council Directives 78/660/EEC and 83/349/EEC as regards Disclosure of Non–Financial and Diversity Information by Certain Large Companies and Groups' (2013) SWD/2013/0128 final para 2.1.
[20] COM/2011/0681 (n 13) p 5; EEAS (n 8).
[21] COM/2011/0681 (n 13) paras 11 and 12.

priorities have not been communicated.[22] The Council of the EU and the European Parliament have requested to put a number of issues on the agenda, including the abolition of child labour and access to civil judicial remedies.[23] For example, the European Parliament has been asking the European Commission for a legislative proposal on an effective traceability mechanism for goods produced through child and forced labour since 2010.[24] Such mechanism could pave the way for a complete ban on the importation of these goods in the EU. The European Parliament also adopted an own-initiative resolution in 2016 that reiterates the 2010 request, calling for a 'balanced and realistic proposal for legislation', including through 'horizontal import prohibitions on products made using child labour'.[25]

These observations relate to the rich literature that discusses whether the EU's role on the international stage has any 'particularity'. In the 1970s, François Duchêne proposed the thesis that the EU and its Member States rely upon 'civilian' forms of influence and action in the world, as opposed to 'military' power due to a number of factors, most notably a population that has been horrified by two wars in the first half of the 20th century.[26] Such civilian 'power' has been used by the EU to bring a 'sense of common responsibility and structures of contractual politics' between state actors in international affairs.[27] Economic strength is credited as the EU's driving force behind its civilian power. Over the years, the EU has often presented itself as a 'civilian' or 'normative' power that

[22] Council of the EU, Conclusions on the Action Plan on Human Rights and Democracy 2015–2019 (2015) 10897/15 action 18b.
[23] Eg 2015/3035(RSP) (n 1) para 27; Council of the EU, Council Conclusions on Child Labour (2016) 10244/16; Council of the EU, Council Conclusions on Responsible Global Value Chains (2016) 8833/16; Council of the EU, 'Conclusions on Business and Human Rights of 20 June 2016' (2016) 10254/16 para 12, 15 and 26. The European Commission's approach towards child labour will be discussed in Chapter 4 section 1.3.
[24] 2009/2219(INI) (n 1). See European Parliament, Resolution of 15 December 2011 on the EC–Uzbekistan Partnership and Cooperation Agreement 2010/0323(NLE)./0323(NLE), Recommendation ix; European Parliament, Resolution of 14 March 2012 on Child Labour in the Cocoa Sector, 2011/2957(RSP) para 11; European Parliament, Resolution of 14 March 2013 on Sustainability in the Global Cotton Value Chain 2012/2841(RSP) paras 14 and 16; European Parliament, Resolution of 12 March 2015 on the Annual Report on Human Rights and Democracy in the World 2013 and the European Union's Policy on the Matter (2014) 2014/2216(INI) para 111.
[25] European Parliament, Resolution of 5 July 2016 on Implementation of the 2010 Recommendations of Parliament on Social and Environmental Standards, Human Rights and Corporate responsibility (2016) 2015/2038(INI) para 12.
[26] François Duchêne, 'The European Community and the Uncertainties of Interdependence' (1973) in Max Kohnstamm and Wolfgang Hager (eds), *A Nation Writ Large? Foreign–Policy Problems before the European Community* (Palgrave Macmillan 1973) pp 19–21.
[27] Ibid pp 19–21.

prioritises the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights over self-interests.[28] Ian Manners argues that this was a way for the EU to legitimise and present itself as more than 'merely' a form of economic government in response to the increasing resistance by its citizens to economic liberalisation after the Cold War.[29] However, the robustness and coherence of this identity in the EU's relations with the wider world has been extensively criticised in the literature.[30] It has been determined that the EU's normative interests are more neo-realist than presented. They are subjugated to or influenced by its economic interests and other strategic interests, such as regional stability and geopolitical gain.[31] Indeed, the EU's normative policy is often limited by these interests and also falls together with its economic policy. The strategic factors which drive or limit the EU's agenda on business and human rights are accounted for in all the analyses in this chapter.

2 Non-Financial Reporting Directive

This section investigates whether competition from TNC-DEMs in the global market place has had an impact on the reach and nature of obligations enshrined in the only mandatory sector-wide initiative that contributes to the implementation of the UN Guiding Principles: the Non-Financial Reporting Directive 2014/95/EU. The obligations are set out first (section 2.1). It is then explained that perceptions about the competition from TNC-DEMs and other competitors have substantially weakened the reporting obligations in the Directive (section 2.2).

2.1 Obligations

The Non-Financial Reporting Directive requires certain corporations to disclose non-financial information relating to respect for human rights and a limited number of related matters, that is, anti-corruption and bribery, and

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[28] Ibid pp 19–21; Ian Manners, 'Normative Power Europe: A Contradiction in Terms' (2002) 40(2) Journal of Common Market Studies p 244.
[29] Manners (n 28) p 244.
[30] Eg Adrian Hyde–Price, 'Normative Power Europe: A Realist Critique' (2006) 13(2) Journal of European Public Policy p 217; Lena Partzsch, 'The New EU Conflict Minerals Regulation: Normative Power in International Relations' (2018) Global Policy p 479.
[31] Eg Erik Oddvar Eriksen, 'The EU – a Cosmopolitan Polity?' (2006) 13(2) Journal of European Public Policy p 252; Chad Damro, 'Market power Europe' (2012) 19(5) Journal of European Public Policy p 682.

environmental, social and employee matters.[32] These issues can all concern human rights and labour rights. For example, the information provided on environmental matters can, amongst others, have an impact on the right to health and the right to water.[33] Similarly, the information provided on social and employee matters can, for example, concern the actions taken to ensure gender equality.[34] Relevant information shall be disclosed to the extent necessary for an understanding of the corporation's development, performance, position and the impact of its activity.[35] Corporations subject to the Directive can opt to use international, European or national guidelines, including the UN Guiding Principles and the OECD Guidelines for Multinational Companies.[36]

The Directive aims to increase the relevance, consistency and comparability of information disclosed by certain large corporations and groups across the EU.[37] The Directive has Article 50 Consolidated version of the Treaty on the Functioning of the EU (TFEU) as a legal basis, which sets out that the EU and its Member States share the competence to install necessary safeguards to protect shareholders and other stakeholders in order to attain the freedom of establishment of companies within Member States.[38] The protection of shareholders under Article 50 TFEU has often been used as a basis to legitimise harmonising measures that enhance transparency and legal certainty in financial information. Shareholders need information such as the identity of other shareholders and the size of their shareholdings in order to make substantiated and well-conceived investment decisions.[39] Relying upon this article to harmonise non-financial measures was, however, a 2013 innovation. The European Parliament acknowledged the importance of corporations divulging CSR information with a view to identifying risks and increasing stakeholder trust in two separate 2013 Resolutions.[40] Additional guidance as regards the minimum

[32] Recital 7 Directive 2014/95/EU.
[33] Recital 7 ibid.
[34] Recital 7 ibid.
[35] Art 19(a) ibid.
[36] Recital 9 ibid.
[37] Recital 21 ibid.
[38] Arts 50(1) and 50(2)(g) Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326 (TFEU).
[39] SWD/2013/0128 final (n 19) para 3.1.B. See Karsten Engsig Sørensen, 'Shareholders' Duty to Disclose' in Hanne Birkmose (ed), *Shareholders' Duties* (Wolters Kluwer 2017) p 308.
[40] Recital 3 Directive 2014/95/EU referring to European Parliament, Resolution of 6 February 2013 on Corporate Social Responsibility: Promoting Society's Interests and a Route to

requirements on disclosure enables various stakeholders – including civil society and consumers – to measure, monitor and manage corporations' performance and their impact on society.[41] Increased public scrutiny and engagement would contribute to mainstreaming the information available and could provide clearer expectations concerning its materiality and completeness. This can, in turn, lead to the development of comprehensive valuation models, including the corporate responsibility to respect human rights.[42] It can also, in the long run, encourage shareholders to assess and account appropriately for all the risks and externalities of firms.[43] Corporations with higher ratings for CSR have lower costs of capital in terms of debt and equity. The Non-Financial Reporting Directive thus attempts to change existing incentive structures to encourage long-term shareholder engagement. In fact, the Directive fits in with the European Commission's agenda to develop a strategy on sustainable finance. This became a priority for the European Commission in the aftermath of the worsening financial crisis following the 2007 meltdown, which had a profound impact on the Eurozone.[44] By failing to account for material non-financial issues, institutional investors and asset managers have in many cases supported corporate managers' excessive short-term risk-taking leading to market volatility and systemic risk.[45]

The Directive takes a 'comply or explain' approach.[46] Corporations subject to the Directive are required to publish a non-financial statement that describes policies pursued in relation to human rights and a limited number of related matters, including information on the due diligence processes implemented by the corporation, and also regarding, 'where relevant and proportionate', its supply and subcontracting chains and the principal risks related to those matters. The information shall be provided 'to the extent necessary for an understanding of

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Sustainable and Inclusive Recovery (2013) 2012/2097(INI) and to European Parliament, Resolution of 6 February 2013 on Corporate Social Responsibility: Accountable, Transparent and Responsible Business Behaviour and Sustainable Growth (2013) 2012/2098(INI).

[41] SWD/2013/0128 final (n 19) para 2.1.

[42] Recital 3 Directive 2014/95/EU.

[43] SWD/2013/0128 final (n 19) para 6.1.4. See European Parliament and Council, Directive Nr 2017/828 amending Directive Nr 2007/36/EC as regards the Encouragement of Long–Term Shareholder Engagement [2017] OJ L 132/1 para 2.

[44] European Commission, 'Press Release Commission Takes Further Steps to Enhance Business Transparency on Social and Environmental Matters' (2017) IP/17/1702.

[45] European Commission, 'Action Plan: European Company Law and Corporate Governance – a Modern Legal Framework for More Engaged Shareholders and Sustainable Companies' (2012) COM/2012/0740 final.

[46] Arts 19(a) and 29(a) Directive 2013/34/EU (amended by Directive 2014/95/EU).

the corporation's development, performance, position and the impact of its activity'. Policies that are not pursued need to be set out in an alternative explanation that explains why those policies have not been developed. This explanation needs to be 'clear and reasoned'. A corporation is exempted from filing a non-financial report if the corporation and its subsidiaries are included in the consolidated management report or the separate report of the parent corporation.[47]

EU Member States must ensure that an audit is carried out to determine whether corporations subject to the Directive have made the non-financial statement or the alternative explanation available to all persons and legal entities having a legitimate interest, in accordance with national law.[48] The content of the statement or explanation does not need to be audited. The statutory auditor or audit firm only needs to check whether the non-financial statement or alternative explanation has been published alongside a brief description of the business model in the management report or in a separate report referenced in the management report (and published alongside the management report or within six months of the balance sheet date) that is made available on the corporation's website. In case of non-compliance, national competent authorities or courts are entitled to impose fines.[49] These penalties would need to be effective, proportionate and dissuasive.

A number of EU Member States had previously introduced non-financial reporting legislation (which may or may not cover a corporation's policies and activities relating to human rights) at the national level.[50] France, the Netherlands, the UK (which had not yet organised a referendum to leave the EU at the time) and

[47] Arts 19(a)(3) and 29(a)(3) ibid.
[48] Arts 19(a)(1), 19(a)(4) and 19(a)(5) ibid; Recital 10 Directive 2014/95/EU.
[49] Art 51 Directive 2013/34/EU.
[50] European Economic and Social Committee (EESC), Opinion on the 'Proposal for a Directive of the European Parliament and of the Council amending Council Directives 78/660/EEC and 83/349/EEC as regards Disclosure of Non–Financial and Diversity Information by Certain Large Companies and Groups' COM(2013)207 final – 2013/0110 (COD) [2013] OJ C 327/10 para 3.5; European Commission, 'Staff Working Document Impact Assessment accompanying the Document Proposal for a Directive of the European Parliament and of the Council amending Council Directives 78/660/EED and 83/349/EEC as regards Disclosure of Non–Financial and Diversity Information by Certain Large Companies and Groups (2013) SWD/2013/0127 final Annex III.

Denmark had done this in response to growing public sensitivity to CSR.[51] These EU Member States were the most supportive during the drafting process of the Non-Financial Reporting Directive.[52] France, which had established stringent CSR obligations for its own corporations by way of the Grenelle II legislation, presented itself as a particularly strong supporter of the Directive. Helen Callaghan refers to such support as a 'constrain thy neighbour' effect.[53] Creating a level playing field across the EU Internal Market is useful for these Member States as far as it enables them to make sure that their respective corporate nationals would no longer suffer (perceived and real) short-term competitive disadvantages that competitors of other EU Member States do not have to bear. The benefit for these corporations is further enhanced by the fact that they have had the chance to develop capabilities to report non-financial information during the time that competitors from other Member States were not constrained.[54]

2.2 Duty-bearers and competition concerns

Just as it is in the said proactive EU Member States' competitive interests to create a level playing field in the EU, it is in the interest of all EU Member States to create a level playing which enforces the same standards across EU corporations and non-EU corporations. However, there is no global regulatory framework on business and human rights reporting. It would also be extremely controversial if the EU were to impose externally applicable rules on non-EU corporations that do not have a connection with the EU. Some Member States – most notably Germany – considered this reality as a sufficient reason to reject the Non-Financial Reporting Directive altogether.[55] The European Commission took a

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[51] Lov om ændring af årsregnskabsloven 2008 (DK); Corporate Governance Code (Frijns) 2008 (NL); art 225 Loi Nr 2010–788 portant Engagement National pour l'Environnement (Grenelle II) 2010 (FR); Corporate Governance Code 2010 (UK) s 99a.

[52] To be complete, it is useful to add here that Belgium was also supportive of the Directive while it had not introduced non–financial reporting obligations. It is not unusual that smaller Member States support regulation at EU level, while they have not created similar national regulation in response to citizen concerns. Intervention at EU level can provide more 'critical mass' – which minimises the burden on national corporations – and leverage at a global level compared to possible action by individual Member States (cf Daniel Kinderman, 'The Struggle over the EU Non–Financial Disclosure Directive' (2015) 6 WSI–Mitteilungen p 8).

[53] Helen Callaghan, 'Constrain–Thy–Neighbor Effects as a Determinant of Transnational Interest Group Cohesion' (2010) Comparative Political Studies p 923.

[54] Robert Bird, 'Law, Strategy, and Competitive Advantage' (2011) 44 Connecticut Law Review p 63.

[55] Felix Schweren and Alexander Brink, 'CSR–Berichterstattung in Europa' (2016) 17(1) Zeitschrift für Wirtschafts– und Unternehmensethik p 180 referring to Bundesministerium für Arbeit und Soziales, 'CSR–Made in Germany' (2012).

more pragmatic approach by proposing to include certain non-EU corporations – and in particular TNC-DEMs – that have a link with the EU in the proposal for the Directive. It was indicated that 'large companies listed in EU-regulated markets, but registered in Third World countries were included' in the initial scope proposed by the European Commission.[56] This option was, however, ultimately not retained, as the Directive is only applicable to public interest entities, in the sense of Article 2 Accounting Directive 2013/34/EU, that meet certain size criteria.[57]

Accordingly, the Non-Financial Reporting Directive is applicable to (1) listed companies incorporated under the law of an European Economic Area (EEA) Member State; (2) listed and unlisted credit institutions and insurance companies authorised to do business in the EEA; and (3) companies that are so designated by Member States because of their activities, size or number of employees. Size criteria were introduced in Directive 2013/34/EU in the aftermath of the financial crisis, with the objective of removing 'red tape' measures to enhance the competitiveness of small and medium-sized enterprises.[58] Only corporations passing a minimum threshold of average number of employees of 500 and either a balance sheet total of over 20 million euro (17, 5 million GBP at GBP 1:EUR 1.14) or a net turnover of over 40 million euro during the relevant financial year, have to comply with the Non-Financial Reporting Directive.[59] This means that only TNC-DEMs authorised to operate as credit institutions and insurance companies that meet the size criteria fall under the Directive.

There may be various reasons why the CBCR rules are not generally applicable to TNC-DEMs listed in the EEA. The most likely reason is that such extensive rules would raise the cost of listing in EU-regulated markets, one of the factors that

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[56] Nicolas Bernier–Abad (Policy Officer of the European Commission) cited in Global Reporting, 'Fast Forward to a Transparent and Sustainable Future' (2014) <www.globalreporting.org/information/news–and–press–center/Pages/fast–forward–to–a–transparent–and–sustainable–future–.aspx> accessed 11 April 2018.
[57] Arts 19a and 29a Directive 2014/95/EU referring to art 2 Directive 2013/34/EU.
[58] Recital 13 Directive 2014/95/EU referring to European Council, 'Council Conclusions' (2014) EUCO 10/11. Exchange rates used in this thesis are the InforEuro exchange rates of February 2019 (European Commission, 'Exchange Rate (InforEuro)' <https://ec.europa.eu/budget/graphs/inforeuro.html> accessed 3 February 2019.
[59] Art 3.4 Directive 2013/34/EU; arts 19a and 29a Directive 2014/95/EU.

determines where a corporation will be listed.[60] Extra EU regulation might make it more difficult to attract TNC-DEMs – who are often credited for their innovative low-cost business strategies – to list (or stay listed) in the EU.[61] This might, in turn, be an incentive for investors to move their money outside the EU. Stock exchange markets must be supported with adequate economic incentives in order to attract investment and maintain vibrancy, as they have reached a sufficiently high level of maturity and internationalisation that they can host companies from anywhere in the world.[62] Whatever the reason might be, the result is that obligations enshrined in the Non-Financial Reporting Directive constitute a competitive threat to listed *large* corporations incorporated under the law of an EEA Member State and other corporations that have to comply with the Directive.

In order to minimise the impact of this competitive threat vis-à-vis TNC-DEMs (and non-listed corporations), the non-financial reporting obligations have been kept fairly limited. The European Commission said that only the most essential points have been brought into uniformity in the Directive, in order to mediate effects on competitiveness, acceptability to stakeholders and compliance costs.[63] In so doing, the Commission claims that it has found a balance 'in terms of legal requirement, scope and flexibility'.[64] Similarly, Commissioner Michel Barnier said that substantial efforts have been made to ensure that the administrative burden on EU companies has been kept to a minimum.[65] These efforts have severely affected the Directive's potential impact. The non-financial reporting obligations contained in the Directive are so lax that they threaten to undermine the Directive's objective, that is, to increase the relevance, comparability and consistency of CSR information disclosed by the targeted companies across the EU. Two points need to be highlighted. First, corporations are free to issue a

[60] Cf Jennifer Zerk, 'Extraterritorial jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' (2010) Harvard Corporate Social Responsibility Initiative Working Paper Nr 59 <www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper_59_zerk.pdf> accessed 6 September 2019 p 88.
[61] Eg Federico Bonaglia, Andrea Goldstein and John Mathews, 'Accelerated Internationalization by Emerging Market Multinationals: The Case of the White Goods Sector' (2007) Journal of World Business p 369.
[62] Mihir Desai, 'The De–Centering of the Global Firm' (2009) 32(9) The World Economy pp 1272–1274.
[63] SWD/2013/0127 final (n 51) Annex VI.
[64] European Commission, 'Frequently Asked Questions: Guidelines on Disclosure of Non–Financial Information' (2017) MEMO/17/1703.
[65] Michel Barnier, 'The EU Transparency and Accounting Directives' (2014) 7(1) Journal of World Energy Law and Business p 18.

financial statement or to give an alternative explanation. If they choose to report, they are not required to use an established reporting framework – such as the UN Guiding Principles – or to exercise supply chain due diligence. Well-defined key performance indicators are also missing. This lack of cohesion of reporting by companies that operate across the EU leads to difficulties in benchmarking.[66] Second, while the European Commission indicated in the accompanying non-binding Guidelines (2017) that acts need to be distinguished from views, that information of both a qualitative and quantitative nature needs to be reported and that misstatements can influence decisions of stakeholders, there are no thorough safeguards to make sure that corporate managers do not report incomplete or inaccurate information.[67] The statutory auditor or audit firm will not verify whether the management report contains any material misstatements and whether it is consistent with the financial statement. Complying with the Directive might therefore simply become a 'tick box' endeavour. Worse, it might serve as a vehicle for corporate managers to publish misleading information, which adds complexity to citizen's consumption decisions and investments, and inflates sustainability indices.

3 Sector-specific approaches

Having discussed the only sector-wide mandatory initiative, section 3 now turns to an analysis of the two sector-specific mandatory initiatives that fit into the EU's business and human rights policy, the CBCR rules and the Conflict Minerals Regulation, which both regulate natural resources overseas, mainly in developing and emerging states. Section 3.1 analyses the reason why regulating raw materials industries became a priority for the European Commission. It is determined that it is likely that prioritising regulating human rights in the raw materials sectors coincides with the EU's interests to secure long-term access to raw materials. Sections 3.2 and 3.3 investigate whether the competitiveness of EU-based corporations in the global marketplace has had an impact on the reach and obligations enshrined in the CBCR rules and the Conflict Minerals Regulation, respectively. It is found that the stringency of both initiatives has been influenced by the EU's ability to create a level playing field which enforces the same

[66] Cf SWD/2013/0127 final (n 51) Annex I.1.
[67] European Commission, 'Guidelines on Non–Financial Reporting (Methodology for Reporting Non–Financial Information' (2017) C(2017)4234 final p 9.

standards across certain EU corporations and non-EU corporations that have a linkage with the EU.

3.1 Legal basis and agenda setting

The trade in natural resources is often the cause or catalysing factor in conflicts in resource-rich developing and emerging states.[68] Potential revenues generated from these scarce resources are an important source of income for financing activities of governments, armed groups and security forces. The desire for control over natural resources is often accompanied by struggles over power, influence and related issues, such as access to land and questions of identity and citizenship. Access to natural resources is, for this reason, inseparable from a heightened risk of violence, corruption and human rights violations.[69]

The CBCR rules and the Conflict Minerals Regulation address access to natural resources overseas. First, the CBCR rules require certain companies that are active in the extractive industry or the logging of primary forests, to disclose the total amount of annual corporate payments to each government around the world and the projects concerned. These rules aim to improve the transparency of payments made to governments by oil, gas, mining and logging corporations.[70] Such improvements can indirectly provide affected populations of resource-rich states with information regarding transactions relating to natural resources. The disclosed information might help citizens and civil society organisations in resource-rich states to evaluate whether receipts from exploitation of natural resources deliver adequate value to them, and to demand such value from their government if the evaluation returns a negative result (provided that they have the freedom to do so).[71] Second, the Conflict Minerals Regulation is more ambitious

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[68] For a comprehensive review of the literature on the 'resource curse' see Jeffrey Frankel, 'The Natural Resource Curse: a Survey' (2010) NBER Working Paper Series <www.nber.org/papers/w15836.pdf> accessed 11 September 2018.

[69] European Parliament, Resolution of 26 February 2014 on Promoting Development through Responsible Business Practices, including the Role of Extractive Industries in Developing Countries (2014) 2013/2126(INI) para 43.

[70] EU, 'Public Country–by–Country Reporting' <https://ec.europa.eu/info/business–economy–euro/company–reporting–and–auditing/company–reporting/public–country–country–reporting_en> accessed 11 September 2018.

[71] European Commission, 'Staff Working Document Impact Assessment for Financial Disclosures on a Country–by–Country Basis Accompanying the Document Proposal for a Directive of the European Parliament and of the Council amending Council Directive 2004/109/EC on the Harmonisation of Transparency Requirements and Proposal for a

than the CBCR rules. It sets up a mandatory system for due diligence in supply chains for certain importers in the EEA of ores and concentrates containing tin, tantalum and tungsten or gold (3TG) originating from 'conflict-affected or high-risk areas'.[72] In such areas, the proceeds of extraction of minerals are often offered at a discount in a highly competitive market, fuelling instability and human rights violations, such as child labour, forced labour, the disappearance of people and forced resettlement.[73] The Regulation aims to get one step closer to breaking the link between conflict and the trade in minerals by identifying and mitigating the risk of conflict financing.[74]

The CBCR rules have the same basis as the Non-Financial Reporting Directive: Article 50 TFEU. In this case, the EU Member States had, however, not taken any regulatory initiatives at the national level. EU bodies are, of course, not required to wait until Member States divergent laws actually cause disruption in the internal market when they regulate a shared competence. Rather, they can 'forestall measures which would probably have been taken by the Member States' in order to prevent disruption of the internal market.[75] The UK was particularly eager to push for CBCR obligations at the EU level. Former UK Prime Minister, David Cameron, called on 'Europe' to adopt CBCR rules while addressing the Nigerian population 'so you can hold your governments to account for the money they receive'.[76] The UK had previously also played an important role in the establishment of the Extractive Industries Transparency Initiative (EITI), which aims to promote revenue transparency in oil, gas, mining (and logging) industries, and to reduce tax avoidance and corruption in the extractive sector.[77] The EITI was launched following a conference convened by the UK Government's Department for International Development in 2003 and this state has

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Directive of the European Parliament and of the Council on the Annual Financial Statements, consolidated Financial Statements and Related Reports of Certain Types of Undertakings' (2011) SEC(2011)1289 final p 34.

[72] The concept 'conflict–affected or high–risk areas' is defined in section 3.3.1 below.

[73] Recital 3 Regulation 2017/821.

[74] Recital 1 ibid; WTO, *Trade Policy Review Report of the European Union* (17 May 2017) WT/TPR/G/357 para 4.51.

[75] Case C–58/08 *Vodafone v Secretary of State for Business, Enterprise and Regulatory Reform* (2010) ECR I–4999.

[76] David Cameron, 'PM's Speech on Aid, Trade and Democracy' (Lagos, 19 July 2011) <www.gov.uk/government/speeches/pms–speech–on–aid–trade–and–democracy> accessed 24 August 2018.

[77] EITI, 'The EITI Standard' <https://eiti.org/standard/overview> accessed 11 September 2018. EITI Member States are not required to extend the initiative to the logging industry.

subsequently provided financial and political support to the process internationally and in states with whom it has close relations. This initiative brings together stakeholders from government, civil society, investors and companies into a national multi-stakeholder group, requesting governments to publish the revenues effectively received from companies with activities in exploration and production in extractive activities, thus enhancing transparency and aiming to reduce tax avoidance and corruption.

The Conflict Minerals Regulation has Article 207 TFEU – which confers exclusive competence relating to the Common Commercial Policy to the EU – as a legal basis. This Policy needs to be conducted in the context of the principles and objectives of the EU's external action, including the advancement of the universality and indivisibility of human rights and fundamental freedoms.[78] The Dutch government played a pivotal role during its presidency of the EU Council in 2016 in the establishment of this Regulation by getting involved in talks with representatives of the European Parliament and European Commissioner for Trade Cecilia Malmström, as well as NGOs and the private sector.[79] The Dutch government had previously launched a number of multi-stakeholder initiatives to encourage international sourcing of conflict-free minerals. The Dutch Ministry of Foreign Affairs engaged, for example, in the Conflict-Free Tin Initiative in the eastern part of the DR Congo.[80] This Initiative established a tightly controlled tin supply chain outside the control of armed groups between 2012 and mid-2014. The Dutch government had further expanded its experience in implementing voluntary due diligence schemes in the minerals sector by hosting the secretariat of the European Partnership for Responsible Minerals since its establishment in 2016. This Partnership facilitates information-sharing and learning on due diligence, both along the supply chain and across different sectors that make use of 3TG.[81] Finally, it is worth noting here that various members of the Dutch

[78] Art 21–22 TEU.
[79] The Netherlands (Government), 'EU Presidency Leads to Agreement on Conflict Minerals' (2016) <www.government.nl/latest/news/2016/06/20/eu–presidency–leads–to–agreement–on–conflict–minerals> accessed 11 September 2018; Amnesty International and Global Witness, 'Dear Presidency, We Need Effective Law on Conflict Minerals' (2016) <www.euractiv.com/section/development–policy/opinion/mon–dear–dutch–presidency–we–need–effective–law–on–conflict–minerals/> accessed 11 September 2018.
[80] SEC(2011)1289 final Annex I/2; Solutions Network, 'What was the Free Tin Initiative' <http://solutions–network.org/site–cfti/> accessed 30 September 2019.
[81] European Partnership for Responsible Minerals, 'About EPRM' <https://europeanpartnership–responsibleminerals.eu> accessed 11 September 2018.

Parliament and Senate also referred to child labour associated with the exploration and extraction of gold and metals from mines during the discussions of the Child Labour Duty of Care Law.[82]

More generally, the CBCR rules and the Conflict Minerals Regulation fit into global efforts to regulate the exploitation of raw materials by corporate actors. It will be explained below that the US Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) – which was passed under the Obama Administration in 2010 – was the most important source of inspiration for both regulatory frameworks. [83] Stock exchanges are also, increasingly, setting standards for risk management. The UK Alternative Investment Market – a non-regulated stock market for smaller enterprises within the London Stock Exchange – and the Hong Kong Stock Exchange's Growth Market Enterprises have created CBCR obligations for new applicants that operate in the extractive sector.[84] The London Metal Exchange is now also considering to require that producers that source copper/cobalt from the DR Congo carry out independent audits to prove their material is ethically sourced, following its own investigation regarding the use by listed Chinese electronics companies of copper/cobalt in batteries sourced from Congolese mines where children as young as seven years old work.[85] The Korean-based Samsung SDI, the Japan-based Sondy and the US-based Apple have also funded research that investigates practices in copper/cobalt supply chains.[86]

The described concerns seem to be not sufficient, however, to explain why mandatory initiatives targeting the extractive sectors to increase corporate accountability have come into existence in the EU. Agenda setting involves making highly political choices to deal with some issues while ignoring (at least for the

[82] Eg Attje Kuiken, Henk Overbeek and Petra Stienen in The Netherlands (Senate), Wet Zorgplicht Kinderarbeid 19 December 2017 Dossier 34506 Nr 13.
[83] Dodd Frank Act 2010 (US).
[84] SEC(2011)1289 final pp 10–11.
[85] Henry Sanderson, 'LME to strengthen scrutiny of DRC–sourced cobalt' *Financial Times* (London, 2 July 2018) <www.ft.com/content/efe02b92–7b7f–11e8–8e67–1e1a0846c475> accessed 2 July 2018.
[86] Benjamin Faber, Benjamin Krause and Raul Sanchez De La Sierra, 'Artisanal Mining, Livelihoods, and Child Labor in the Cobalt Supply Chain of the Democratic Republic of Congo' (2017) <http://cega.berkeley.edu/assets/cega_research_projects/179/CEGA_Report_v2.pdf> accessed 15 September 2018.

time being) others.[87] It has been described in section 1 above that a number of other issues relating to corporate accountability for human rights – including child labour – that have already caught the attention of the European Parliament and the Council have made limited progress. The most likely reason why regulatory frameworks regarding raw materials have made the most progress within the EU's business and human rights policy seems to be that the normative interests at stake coincide with the strategic goal to secure access to the materials that are subject to the CBCR rules and the Conflict Minerals Regulation. Both regulatory frameworks refer to the EU's agenda to secure access to raw materials. First, the CBCR rules and their impact assessment refer to the need to secure access to oil and gas.[88] Securing access to oil and gas under the same conditions as industry competitors became a priority for the European Commission after disputes between Russia and transit state Ukraine in 2006 and 2009 left six EU Member States, which depended on Russia as the single external supplier for their gas supply, with severe shortages.[89] The CBCR rules and impact assessment furthermore refer to the EU's Forest Law Enforcement and the Governance and Trade (FLEGT) Action Plan, which installs a licensing scheme designed to guarantee that only legally harvested timber from partner states agreeing to take part in this scheme will enter the EU.[90] This plan is part of the EU's Raw Materials Initiative, adopted in 2008 with a view to promoting access to non-energy materials that are crucial to the long-term sound functioning of EU industries, and hence to economic growth and jobs.[91] Second, all minerals that are subject to the Conflict Minerals Regulation have been identified as (potential) critical raw materials within the Raw Materials Initiative.[92] This means that the EU Member States are highly dependent on them to innovate product value chains

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[87] Sebastiaan Princen, 'Studying Agenda Setting' in Kennet Lynggaard, Ian Manners and Karl Löfgren (eds), *Research Methods in European Union Studies* (Palgrave Macmillan 2015) p 123.
[88] Recitals 44 and 52 Regulation 2013/34/EU; Recital 7 Directive Nr 2013/50/EU; SEC(2011)1289 final (n 71) p 40.
[89] European Commission, 'European Energy Security Strategy' (2014) COM(2014)330 final p 2.
[90] Recitals 44 and 52 Regulation 2013/34/EU; Recital 7 Directive Nr 2013/50/EU; SEC(2011)1289 final (n 71) p 40 referring to European Commission, 'Forest Law Enforcement, Governance and Trade Proposal for an EU Action Plan' (2003) COM/2003/0251 final.
[91] European Commission, 'The Raw Materials Initiative Meeting Our Critical Needs for Growth and Jobs in Europe' (2008) COM(2008)699 final.
[92] COM(2008)699 final (n 91) p 2; European Commission, 'Report lists 14 Critical Mineral Raw Materials' (2010) MEMO/10/263 p 2; European Commision, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Implementation of the Raw Materials Initiative' (2013) COM(2013)442 final pp 3 and 11.

while they display a particularly high risk of supply shortage in the next ten years. The European Commission has stated its ambition to create 'win-win situations where both developed and developing countries benefit from the sustainable supply of raw materials'.[93]

The existing supply risks are mainly caused by resource concentration, in combination with political and economic instability in some of the states of origin.[94] These risks are compounded by low substitutability in the EU and the rise of East and South Asian economies. For example, at the time that the EU started efforts to curb illegal exports of electronics waste that could be a valuable source of critical minerals through recycling,[95] Asian states had already adopted specific incentives to attract investments and commercialise research insights into untapped key enabling technologies that facilitate recycling.[96] A growing concern relates to Chinese measures that ensure privileged access to non-energy materials for their domestic industries, including through export restrictions.[97] China and India have also emerged as major buyers in the global marketplace. In 2017, they bought, for example, the first ever crude oil export from new discoveries in the conflict-affected region of Turkana county in Kenya, with the county shelving plans to export its oil to the EU.[98] China and India also became the largest consumers of new discoveries of 3TG and Liquefied Natural Gas – a gas that can be stocked and transported over long distances in cooled form – and of tropical wood.[99] The increased demand resulted in soaring and fluctuating prices in commodity markets as well as in derivative markets, which are increasingly seen as financial investments.[100]

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[93] European Commission, 'Tackling the Challenges in Commodity Markets and on Raw Materials' (2011) COM(2011)25 final p 15.
[94] COM(2014)330 final (n 89) p 5.
[95] COM(2011)25 final (n 93) p 13.
[96] Birgit Aschhoff and others, 'European Competitiveness in Key Enabling Technologies' (2010) Zentrum für Europäische Wirtschaftsforschung GmbH <http://nanonet.pl/wp-content/uploads/2018/02/European-Competitiveness-in-Key-Enabling-Technologies.pdf> accessed 11 September 2018; Kai Cheng and Jagjit Srai, 'Special Issue on Sustainable Manufacturing and the Key Enabling Technologies' (2012) 226(10) Journal of Engineering Manufacture p 1603.
[97] COM(2008)699 final (n 91) p 5.
[98] Peter Ndege, 'China, India Swoop on First Barrels of Kenyan oil' *Climate Home News* (2 May 2017) <www.climatechangenews.com/2017/05/02/china-india-swoop-first-barrels-kenyan-oil/> accessed 5 December 2017.
[99] SEC(2011)1289 final (n 71) p 8; COM(2014)330 final (n 89) p 15.
[100] COM(2011)25 final (n 93) p 3.

3.2 CBCR rules

The further analysis of the Country-by-Country Reporting rules is organised as follows. Section 3.2.1 describes the CBCR obligations. Section 3.2.2 discusses the duty-bearers of the CBCR rules and, in so doing, sets out the EU's strategy for dealing with competition concerns. It highlights that the CBCR rules are applicable to certain categories of corporations based outside the EEA. Section 3.2.3 shows that the EU aims to 'manage globalisation' by empowering multilateral initiatives. It further highlights that, in achieving this goal, the EU attempts to bypass foreign governments. Section 3.2.4 discusses the Court of Justice of the EU's interpretation of domestic measures with extraterritorial implications. Finally, section 3.2.5 discusses recent developments.

3.2.1 Obligations

The CBCR rules bring within the public domain information on corporate payments made to governments all over the world for exploiting natural resources in the extractive – oil, gas, mining – or logging (of primary forest) sectors. Certain corporations that are active in these sectors are required to disclose the total amount of annual corporate payments to each government as well as the projects concerned. In particular, they have to disclose their material payments to governments passing a de minimis threshold of 100,000 euro (87,341 GBP at GBP 1:EUR 1.14) within a financial year for national resources in a separate report on an annual basis.[101] This regime excludes taxes levied on consumption but includes taxes on income, production and profits; royalties; dividends; and payments for infrastructure improvements.[102] The payments need to be broken down according to type on a country-by-country and project-by-project basis.[103] One project is defined as the operational activities that are governed by a single contract, licence, lease, concession or similar legal agreement, and form the basis for payment liabilities to a government.[104] If multiple agreements are substantially interconnected, then they will also be considered as one project. While this definition is open to interpretation,[105] the preamble determines that

[101] Arts 42–44 Directive 2013/34/EU.
[102] Recital 48, arts 42.1 and 41.5 ibid.
[103] Art 43.2 ibid.
[104] Art 41.4 ibid.
[105] Lucas Porsch and others, 'Study: Review of Country–by–Country Reporting Requirements for Extractive and Logging Industries' (2018) <https://ec.europa.eu/info/publications/181126–

activities that would otherwise fall under the Directive may not be re-characterised, artificially split or aggregated with a view to evading the CBCR requirements.[106]

The information on payments needs to be made publicly available to all stakeholders, either through the stock market information repository or the business registry, in the same way as financial statements are made available. A copy of the whole or any part of the country-by-country report must also be obtainable on application.[107] The responsible bodies of a corporation such as the board of directors and C-level executives need to ensure that, to the best of their ability and knowledge, the report on payments to governments is drawn up and published.[108] In case of non-compliance, national competent authorities or courts are entitled to impose fines.[109] These penalties must be effective, proportionate and dissuasive.

Prior to the EU, the US had already presented itself as a norm innovator in the regulation of raw materials. Under the Barack Obama Administration, the US had questioned the international status quo through the 2010 Dodd-Frank Act. Section 1504 of this Act required corporations, including non-US corporations, operating in the 'commercial development of oil, natural gas, or minerals' that have securities listed on US stock exchanges, to publicly report payments to governments on a country- and project-specific basis.[110] At the time, President Obama's Under Secretary for Economic Growth, Energy and the Environment at the State Department wrote that this legal requirement would allow the US to strengthen its credibility and ability to fight corruption.[111]

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country–by–country–reporting–extractive–logging–industries–study_en> accessed 26 June 2019 pp 27–28.
[106] Recital 49 Directive 2013/34/EU.
[107] Art 45.1 ibid.
[108] Art 45.2 ibid.
[109] Art 42.1 ibid; art 6 Directive 2004/109 EC (amended by art 1 Directive 2013/50/EU).
[110] SEC(2011)1289 final (n 71) pp 10–11.
[111] Letter from Catherine Novelli, Department of State Under Secretary for Economic Growth, Energy and the Environment (US) to Mary Jo White, US Securities and Exchange Commission (21 January 2016) p 1.

3.2.2 Duty-bearers and competition concerns

Just as section 1504 US Dodd-Frank Act is applicable to US listed corporations, the EU's CBCR rules cover a broad scope. The CBCR rules are applicable to corporations that are listed on EEA-regulated markets, even if they are not incorporated under the law of an EEA Member State. To this end, both the Accounting Directive 2013/34/EU and the Transparency Directive 2004/109/EC were changed.[112] All corporations listed in the EEA, regardless of where they are incorporated, would have to comply with CBCR rules. For example, the China Petroleum & Chemical Corporation – which has been simultaneously listed on the Hong Kong, New York and London Stock Exchanges – would have to comply with section 1504 US Dodd-Frank Act and the EU's CBCR rules.

While section 1504 US Dodd-Frank Act is only applicable to listed corporations, the EU's CBCR rules also cover 'large' unlisted corporations in the EEA that pass a de minimis threshold of average number of employees of 500 and either a balance sheet total of over 20 million euro (17,5 million GBP at GBP 1:EUR 1.14) or a net turnover of over 40 million euro during the relevant financial year.[113] Corporations listed in the EEA successfully lobbied to extend the CBCR rules to such corporations in order to ensure a level playing field on which listed and unlisted corporations share the same regulatory burden. It was reasoned that unlisted corporations also engage in cross-border activities and operate in states other than their country of registration through subsidiaries, associates, joint ventures and branches. Not requiring CBCR information of unlisted corporations registered in the EEA might make it less attractive to be listed. This might have the consequence that less additional capital can be raised, which might, in turn, become detrimental for economic growth and job creation.

This broadly defined scope can also indirectly affect companies headquartered in third states. This is because any large subsidiaries of these companies with legal personality in the EEA are subject to the reporting obligation on their behalf. Excluded from the CBCR rules are non-EEA corporations that have no large subsidiaries with legal personality in the EEA (and are not listed in the EEA). This was a key concern during the legislative process. The Danish Minister of

[112] Art 6 Directive 2004/109 EC (amended by art 1 Directive 2013/50/EU); art 42.1 Directive 2013/34/EU.
[113] Arts 3.4, 42.1 and 42.2 Directive 2013/34/EU; SEC(2011)1289 final (n 71) pp 5–6.

Economic and Business Affairs stressed, for example, that: 'Any possible regulation should be done globally – partly to achieve the wanted effect, partly to protect against unfair competition'.[114]

There seems to have been an assumption that the CBCR rules would only be a breach of other states' national sovereignty where disclosure of payments is prohibited by local laws in third states. The European Commission wanted to introduce regulatory flexibility in the CBCR rules that takes account of countries having criminal anti-disclosure in place. It proposed to only disclose the names of such countries (instead of CBCR payments).[115] Following an intervention by the European Parliament, the proposed exemption has been deleted.[116] The European Parliament deemed that such exemption would protect tyrants and, therefore, overshoot the objective of the CBCR rules.[117]

While the European Commission indicated that the ultimate costs for corporations falling under the CBCR rules will depend on the precise nature and duration of the scheme of CBCR to be agreed upon internationally,[118] the impact assessment stressed that the combined effect of the EU and the US rules would have a major impact on corporations falling outside the CBCR rules (including state-owned corporations in developing and emerging states).[119] The significant increase in the total level of data on payments to governments entering the public domain by the complementary efforts of the US and the EU, would put pressure on governments of resource-rich states to account for how all revenues derived from extractive industry and logging of primary forests have been spent. It would also serve as an

[114] Letter from Brian Mikkelsen, Minister for Economic and Business Affairs (DK) to European Commission (DG Internal Market and Services) (22 December 2010).
[115] SEC(2011)1289 final (n 71) pp 39–40 notes, for example, that the Angolan Ministry of Petroleum issued a Directive (Despacho) 385/06 in 2006 which states that 'Companies active (in the petroleum industry) in the country are prohibited from divulging any information without the formal authorisation of the Ministry of Petroleum'.
[116] European Parliament, 'Oil, Gas, Mineral and Logging Firms Obliged to Disclose Payments to Governments' (2013) <www.europarl.europa.eu/news/en/press–room/20130607IPR11387/oil–gas–mineral–and–logging–firms–obliged–to–disclose–payments–to–governments> accessed 12 September 2018.
[117] The 2018 review of the CBCR rules – commissioned by the Commission – explains, for example, that the amounts declared by the country–by–country report of France's largest energy company Total differ by more than GDP 80 million from the data available from the Angolan authorities. The Angolan government reportedly dismissed these inconsistencies by alleging that they are a result of 'incompetence and errors in accounting' (Porsch (n 105) p 5).
[118] European Commission, 'Executive Summary of the Impact Assessment for Financial Disclosures on a Country–by–Country Basis' (2011) SEC(2011)1290 final pp 4–5.
[119] SEC(2011)1289 final (n 71) pp 35–36.

incentive to join the EITI.[120] Strengthening the EITI would ultimately reduce any negative effects vis-à-vis the competitive situation with non-EEA companies. Although the EITI is a voluntary initiative, participation in the process is mandatory for all extractive sector operators (including state-owned enterprises) once a state has endorsed the initiative, thereby creating a level playing field for all extractive operators within the relevant EU Member State.[121]

Closely related is the European Commission's assessment that concerns regarding the impact of the CBCR rules on the competitiveness of EU-based corporations would be less serious than expected. Two concerns have been addressed. First, the risk that there may be instances when commercially sensitive company information would be deduced from CBCR data, including information on levels of turnover, pricing, costs and profit structure in a third country was considered to be minimal.[122] In this regard, the impact assessment sets out that payments to governments represent only one element of a corporation's operating cost base.[123] This seems to be correct, and finds support in the fact that country-by-country reports do not need to be audited under the CBCR rules.[124] There remains, however, a reasonable risk that project-level disclosure can result in disclosure of commercially sensitive information provided in respect of individual mines and oil fields, if a corporation has only one project in a country.[125] Second, the risk that EU corporations would no longer qualify as contract partners for governments around the world was considered as negligible because they possess a number of unique qualities – such as engineering know-how and technical efficiency – that corporations based in developing and

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[120] Ibid pp 35–36.
[121] Ibid pp 26, 35 and 36.
[122] Ibid pp 6, 8 and 38; European Commission (Directorate General for the Internal Market and Services), 'Summary Report of the Responses Received to the Commission's Consultation on Country–by–Country Reporting by Multinational Companies' (2011) <http://ec.europa.eu/finance/consultations/2010/financial–reporting/docs/consultation_summary_en.pdf> accessed 12 September 2018 p 10; Michel Barnier, 'The EU Transparency and Accounting Directives' (2014) 7(1) Journal of World Energy Law and Business p 17.
[123] SEC(2011)1289 final (n 71) pp 25.
[124] Art 45.1 Directive 2013/34/EU.
[125] Repsol, 'Response to the Commission's Consultation on Country–by–Country Reporting by Multinational Companies' (2011) <http://ec.europa.eu/yourvoice/ipm/forms/dispatch?userstate=View&id=605444800501> accessed 1 May 2018 nr 2; Statoil, 'Response to the Commission's Consultation on Country–by–Country Reporting by Multinational Companies' (2011) <http://ec.europa.eu/yourvoice/ipm/forms/dispatch?userstate=printcase&id=866987818> accessed 1 May 2018 nr 5.

emerging states do not have.[126] For example, while state-owned oil corporations in these states far outnumber EU and US privately owned corporations when measured in ownership of reserves, the latter group is far ahead in terms of capital expenditure.[127]

Several extractive industry corporations displayed a constructive attitude during the drafting process of the CBCR rules.[128] The reason seems to be that this industry is characterised by long project cycles, which are coupled with great uncertainty regarding resource prices and project output. Increased transparency acts as a safeguard against reopening negotiations or expulsion after investments have been made in the resource-rich state where they operate.[129] In turn, it also makes the conversations clearer regarding the contributions – including local infrastructure improvements – that corporate payments make to such states.

In comparison, the logging industry was far more vocal against the CBCR rules.[130] Two reasons can explain the difference in attitude. First, section 1504 US Dodd-Frank Act does not cover corporate activities related to the logging of primary forests. Competitors that are listed in the US (but not in the EU) do not have to disclose payments on a CBCR basis. Second, and more importantly, most logging corporations that fall under the CBCR rules are not listed and are smaller than extractive industry corporations. Competitors of unlisted EU logging corporations are more likely to escape the CBCR rules, as they are less likely to have subsidiaries with legal personality in the EEA.[131] The effect is further amplified

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[126] SEC(2011)1289 final pp 26 and 39; Michel Barnier, 'The EU Transparency and Accounting Directives' (2014) 7(1) Journal of World Energy Law and Business p 17.
[127] SEC(2011)1289 final pp 39–40 referring to Donald Losman, 'The Rentier State and National Oil Companies: An Economic and Political Perspective' (2010) 46(3) Middle East Journal p 427 and table 5. See also Amy Myers Jaffe, 'The Changing Role of National Oil Companies: Introduction and Summary Conclusions' (2007) James Baker III Institute for Public Policy of Rice University <http://large.stanford.edu/publications/coal/references/baker/studies/noc/docs/BI_Study_35–1.pdf> accessed 11 February 2018.
[128] European Commission, 'Summary report of the Commission's Consultation on Country–by–Country Reporting by Multinational Companies' (2011) <http://ec.europa.eu/finance/consultations/2010/financial–reporting/index_en.htm> accessed 11 February 2018.
[129] Cf European Parliament, Resolution of 7 October 2010 on Failures in Protection of Human Rights and Justice in the Democratic Republic of Congo (2010) P7_TA(2010)0350.
[130] According to the 2018 review of the CBCR rules commissioned by the European Commission, logging companies were also the least likely to comply with the CBCR rules (Porsch (n 105) p 21).
[131] SEC(2011)1289 final (n 71) p 8.

because logging corporations are generally less specialised than extractive industry corporations.

However, it comes as no surprise that the EU has included the logging of primary forests in the CBCR rules. The CBCR rules regarding logging complement other initiatives that have been taken in the framework of the FLEGT Action Plan, including the Timber Regulation (EU Regulation 995/2010), which requires traders of timber products to exercise due diligence in order to prevent illegal wood from entering the EU market.[132] The EU has taken a leadership role in international environmental politics since the early 1990s, to protect the general interests of the whole of Europe and, by extension, the global common good. It is beyond the scope of this chapter to discuss in-depth the reasons why the EU has taken up a leadership role in environmental matters.[133] It suffices to note here that the EU's interest in global compliance in environmental matters is much more direct than in human rights matters, due to the interdependency of environmental regimes.[134]

3.2.3 Managing globalisation

The CBCR rules provide textbook examples of two complementary techniques that the EU employs to regulate the extent and terms of globalisation, as identified by Wade Jacoby and Sophie Meunier in their 2010 article, 'Europe and the Management of Globalization'.[135] Relying upon an inductive analysis, Jacoby and Meunier theorised that the EU has tried to 'empower international institutions' and 'exercise regulatory influence' by regulating outside its borders on various occasions since the 1980s. The former technique is conceptualised as a strategy for the EU to 'develop the institutional architecture to monitor global rules, and build the capacity of international organizations to enforce them'.[136] The latter

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[132] European Parliament and Council, Regulation Nr 995/2010 Laying Down Obligations of Operators who place Timber and Timber Products on the Market [2010] OJ L 295.
[133] Eg Daniel Kelemen, 'Globalizing European Union Environmental Policy' (2010) 17(3) Journal of European Public Policy pp 335–336.
[134] Jennifer Shkabatur, 'A Global Panopticon? The Changing Role of International Organisations in the Information Age' (2011) 33 Michigan Journal of International Law p 175.
[135] Wade Jacoby and Sophie Meunier, 'Europe and the Management of Globalization' (2010) 17(3) Journal of European Public Policy pp 299–317.
[136] Ibid p 307.

technique is conceptualised as a strategy for the EU 'to develop its own regulatory power in a way that decisively shapes global governance'. [137]

First, the EU tries to empower two multilateral institutions to achieve these goals. On the one hand, the EU plans to contribute to the 'continued work' of the development of an international framework by the International Accounting Standards Board (IASB), a private sector organisation that has become the most widely recognised international financial reporting standard-setter since its establishment in 1973.[138] 166 states either permit or require the use of its standards. The development of an accounting standard for extractive industries by the IASB has been slow. The EU aims to get CBCR on the agenda of the IASB, even though the IASB stated that CBCR is not within the scope of accounting regulation, in its 2006 project on company segmental reporting.[139] On the other hand, it has been mentioned above that the CBCR rules try to strengthen the EITI by increasing pressure on governments that have decided to remain outside the EITI.[140] The ultimate objective is to contribute to the strengthening of the EITI and to extend its scope to all resource-rich states.[141] The European Commission has been a member of the EITI board and the EU has funded the EITI directly and via the World Bank-administered EITI Multi-Donors Trust Fund. However, the European Commission identified the need to 'accelerate' the process by which payments to governments in developing resource-rich states would be characterised as being required to fall into the public domain.[142] It underlined that in 2011, eight years after the EITI initiative had started, only nine out of fifty states designated as resource-rich had joined the EITI. Some top exporters of hydrocarbons, such as Algeria, Angola and Venezuela, were not EITI compliant or candidate states. Only one state, Liberia, had opted to extend the EITI to the logging sector at the time.[143]

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[137] Ibid p 306.
[138] Recital 53 Directive 2013/34/EU.
[139] IASB, International Financial Reporting Standards 8 Operating Segments <www.iasb.org> accessed 11 February 2018.
[140] SEC(2011)1289 final (n 71) pp 24–25.
[141] European Commission, 'Proposal for Directive on Transparency Requirements for Listed Companies and Proposals on Country by Country Reporting – Frequently Asked Questions' (2011) MEMO/11/734 para 16.
[142] SEC(2011)1289 final (n 71) p 19.
[143] Ibid p 40.

Second, the EU tries to shape global governance in a definite way. While the CBCR rules empower the EITI, they also go further than the EITI in two respects. According to the impact assessment, the CBCR rules were more adequate than the EITI, as governments cannot easily strip them of their impact. First, governments do not decide on the materiality level for reporting payments or company participation under the CBCR rules. Under the EITI, governments can autonomously decide on the size of payment or the threshold size of company operations, below which they are excluded from the process for reasons of cost-benefit. Second, the obligation to publish all information does not ultimately lie with governments, but with corporations under the CBCR rules. While corporations have to provide fully disaggregated statements that apply international auditing standards under the EITI, the government can opt to publish the data in an aggregated form in the public EITI report. The conclusion that the European Commission wanted to have a definite say in how country-by-country reporting should happen is further supported by the fact that establishing a multilateral framework was not seen as an option, as it 'would be the result of negotiation and compromise between the EU and its international partners, and the outcome of such negotiations would be difficult to foresee'.[144]

3.2.4 Court of Justice of the EU

The conceptualisation of the EU as a 'manager of globalisation' was originally launched into the broader public debate by Frenchman Pascal Lamy in 1999, when he was European Commissioner for Trade.[145] Joanne Scott examines that the EU increasingly started acting as a 'manager of globalisation' in response to the 2007 global financial crisis, which severly affected the Eurozone.[146] In order to increase the integrity and transparency of financial markets, the EU regulates conduct taking place outside its borders but which is connected with its territory via domestic measures with extraterritorial implications. Prior to establishing the CBCR rules in 2014, the EU took measures in other areas, such as animal welfare, data protection and the environment. It is interesting to take a closer look

[144] Ibid pp 21–22.
[145] Rawi Abdelal and Sophie Meunier, 'Managed Globalization: Doctrine, Practice and Promise' (2010) 17(3) Journal of European Public Policy p 353 referring to Pascal Lamy, 'Hearings of Commissioners–Designate' (1999).
[146] Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2013) 62 The American Journal of Comparative Law p 134.

at two of these regulatory frameworks that the Court of Justice of the EU has interpreted, EC Regulation 1223/2009 and EU Regulation 421/2014.

Article 18(1) EC Regulation 1223/2009, prohibits the placing on the EU internal market of products with ingredients that have been subject to animal testing.[147] The Regulation applies to all cosmetic products marketed on the EU internal market, wherever the testing may have occurred. While the compatibility of domestic measures with extraterritorial implications with international law has not been definitively proclaimed, the Court of Justice of the EU reasoned that this is lawful, as 'any other application would make it easy for cosmetics companies to do their animal testing outside the EU'.[148]

EU Regulation 421/2014 imposed a temporary scheme – which ran from 2013 to 2016 – for greenhouse gas emissions from commercial aviation activities.[149] While this Regulation was not generally applicable to aircraft registered in non-EEA states and flying over third states or the high seas, emission allowances for the full trajectory of flights that arrived at or departed from an aerodrome situated in the territory of an EEA Member State needed to be monitored, reported and surrendered, including for the parts of the flight above the high seas and in the airspace of non-EEA states. This Regulation had the explicit ambition to combat climate change by securing a future international agreement to control emissions from aviation by 2020.[150] In particular, it aimed to empower the International Civil Aviation Organization (ICAO) to adopt specific measures to control international aviation emissions.

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[147] European Parliament and Council, Regulation Nr 1223/2009 on Cosmetic Products [2009] OJ L 342/59.
[148] Case C–592/14 *European Federation for Cosmetics Ingredients v Secretary of State for Business, Innovation and Skills* (2016) EU:C:2016:703. See Jessica Lawrence, 'The Extraterritorial Reach of EU Animal Welfare Rules (Again): Case C–592/13 European Federation for Cosmetic Ingredients' (*European Law Blog,* 16 November 2016) <https://europeanlawblog.eu/2016/11/16/the–extraterritorial–reach–of–eu–animal–welfare–rules–again–case–c–59214–european–federation–for–cosmetic–ingredients/> accessed 11 February 2018.
[149] European Parliament and Council Regulation Nr 421/2014 Amending Directive 2003/87/EC Establishing a Scheme for Greenhouse Gas Emission Allowance Trading within the Community, in View of the Implementation by 2020 of an International Agreement Applying a Single Global Market–based Measure to International Aviation Emissions Text with EEA Relevance (2014) OJ L 129/1.
[150] Recital 2 ibid.

In *Air Transport Association of America and others v Secretary of State for Energy and Climate Change* (the *ATAA* case), the Court of Justice considered EU Regulation 421/2014.[151] It held that situations in which there is some territorial link with EU Member States fall squarely within the EU's jurisdiction. It is worth quoting in full the relevant paragraph of this judgment

> The European Union legislature may in principle choose to permit a commercial activity, in this instance air transport, to be carried out in the territory of the European Union only on condition that operators comply with the criteria that have been established by the European Union and are designed to fulfil the environmental protection objectives which it has set for itself, in particular where those objectives follow on from an international agreement to which the European Union is a signatory.[152]

EU Regulation 421/2014 was not well received by other states. The US issued a blocking legislation preventing US-based airlines from participating in the EU Scheme, and China threatened to stop its agreements with the European Aeronautic Defence and Space Company.[153] In response, the EU adopted a 'stop the clock' Regulation to temporarily suspend EU Regulation 421/2014, under the condition that a multilateral solution to address emissions from aviation would be found within ICAO by the end of 2016.[154] The ICAO subsequently adopted the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA) in 2016.[155] It thus appears that the EU has succeeded in securing a multilateral agreement. However, this agreement turned out not to be as stringent as the EU might have hoped.[156] The CORSIA will only apply to emissions growth and not to existing emission levels. In addition, the CORSIA has yet to establish a system of sanctions for non-compliance and enforcement criteria. There has been some debate between the EU institutions about what an appropriate reaction to the

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[151] Case C–366/10 *Air Transport Association of America and others v Secretary of State for Energy and Climate Change* (2011) ECR I–13755 paras 122–123.
[152] Ibid para 128 referring to art 191(2) TFEU.
[153] European Union Emissions Trading Scheme Prohibition Act 2011 (US).
[154] European Parliament and Council, Regulation Nr 2017/2392 amending Directive 2003/87/EC to Continue Current Limitations of Scope for Aviation Activities and to Prepare to Implement a Global Market–Based Measure from 2021 [2017] OJ L 350/7; Cedric Ryngaert and Marieke Koekkoek, 'Extraterritorial Regulation of Natural Resources: Functional Approach' in Jan Wouters and others (eds), *Global Governance through Trade EU Policies and Approaches* (Edward Elgar 2015) p 247.
[155] ICAO, 'Consolidated Statement of Continuing ICAO Policies and Practices Related to Environmental Protection – Global Market–based Measure Scheme' (2016) Res A39–3.
[156] X, 'Clash Looms Between EU Institutions on How Long to Stop the Clock on Scope of the Aviation EU ETS' (*Green Air Online,* 13 September 2017) <www.greenaironline.com/news.php?viewStory=2406> accessed 11 February 2018.

CORSIA would be. Ultimately, a new Regulation was adopted in 2017 that gives the ICAO more time (until the end of 2021) to issue stricter measures.[157]

The *ATAA* case illustrates that the EU can try to accommodate changes in the global rule-making landscape, but must respect substantive limits. Unilateral rule-making denies the reality of different experiences and needs in other states. Criticisms of neo-colonialism, interference in other states' sovereignty and protectionism are apposite. In addition, the EU's global efforts continually interact with the strategies of other states.[158]

The exercise of extraterritorial extensions as proclaimed in the CBCR rules could have been controversial if other states had regarded it as interference against their sovereign right to regulate corporations within their own borders and to pursue their own economic, social and cultural interests.[159] The CBCR rules' review clause indicates, therefore, that the European Commission shall take into account international developments and asses the impact of other regimes.[160] However, the CBCR rules did not raise major concerns. The main reason seams to be that the US had already adopted a regulation that required corporations listed in the US to begin country-by-country reporting in 2019, under section 1504 US Dodd-Frank Act.

3.2.5 Outlook

The current situation is very different. Although the US Dodd-Frank Act became law in 2010 under the Obama Administration, the US Securities and Exchange Commission (US SEC) could implement section 1504's disclosure provisions only in 2016.[161] Rule 240.13q-1 would have required most corporations to begin disclosing payments in 2019. However, the Republican-controlled US Congress

[157] European Parliament and Council Regulation 2017/2392 amending Directive 2003/87/EC to Contiue Current Limitations of Scope for Aviation Activities and to Prepare to Implement a Global Market-Based Measure from 2021 [2017] OJ L 350/7
[158] Alberta Sbragia, 'The EU, the US and Trade Policy: Competitive Interdependence in the Management of Globalization' (2010) 17(3) Journal of European Public Policy p 368.
[159] Daniel Augenstein, 'Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union' (2010) <https://ec.europa.eu/enterprise/policies/sustainable–business/files/business–human–rights/101025_ec_study_final_report_en.pdf> accessed 5 March 2016 pp 12–13.
[160] Art 48 Regulation 2013/34/EU.
[161] US SEC, Resource Extraction Payment Disclosure (81 FR 49426, 27 July 2016) Rule 240.13q–1.

removed this Rule in a joint resolution that was signed by President Donald Trump under the Congressional Review Act in 2017.[162] Removing the CBCR obligation is part of the Trump Administration's efforts to reduce the regulatory burden facing corporations. In a statement, it was explained that Rule 240.13q-1 would impose compliance costs on American energy companies that are not 'justified by quantifiable benefits'.[163] They could 'face a competitive disadvantage in cases where their foreign competitors are not subject to similar rules'.[164]

The US rules will be redrafted by the US SEC, under section 1504 US Dodd-Frank Act, but it is likely that their replacement will not meet the same standard, as the Trump Administration has vowed to protect commercially sensitive information as well as governments that prohibit disclosure of their projects.[165] Note that Rule 240.13q-1(d) already allowed US-listed corporations to apply for 'exemptive relief' when governments prohibit the publication of country-by-country reports. The US SEC had adopted this rule in response to a lawsuit that had been brought by the American Petroleum Institute in a US District Court.[166]

Regardless of what will happen next in the US, country-by-country reporting seems to be here to stay. It appears that the EU has been successful in creating CBCR rules that do not have an overly negative impact on EU-based corporations. Three observations support this hypothesis. First, Norway and Canada have adopted CBCR obligations that resemble the EU's initiative.[167] Second, the number of states that have joined the EITI has increased significantly. At the time of the impact assessment in 2011, only nine out of the fifty states considered to be hydrocarbon or mineral-rich by the International Monetary Fund (IMF) were EITI compliant. Today, more than thirty of these are compliant with the 2011 version of the EITI. Third, European extractive companies have not reported that they suffer material damage or loss of opportunities due to the introduction of the

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[162] Public Law 115–4 2017 (US).
[163] Donald Trump, 'Statement of Administration Policy: HJ Res 38, HJ Res 36 HJ Res 41, HJ Res 40 and HJ Res 37' (1 February 2017) <www.presidency.ucsb.edu/ws/?pid=123145> accessed 6 July 2018.
[164] Ibid.
[165] Ibid.
[166] *American Petroleum Institute v US SEC*, 953 F. Supp 2d 5 (DDC, 2013); US SEC, 'Disclosure of Payments by Resource Extraction Issuers' (2016) <www.sec.gov/rules/final/2016/34–78167.pdf> accessed 28 June 2019 p 202.
[167] Forskrift om Land–For–Land Rapportering 2013 (NO); Extractive Sector Transparency Measures Act 2014 (CA).

CBCR requirements, according to the 2018 review of the CBCR rules, which was conducted at the request of the European Commission.[168]

It is, however, also likely that the EU will not further strengthen its CBCR rules in the oil, gas, mining and logging sectors in the immediate future by, for example, imposing a mandatory audit.[169] Fortunately, some EU Member States – such as Belgium – required such an audit when they transposed the CBCR rules into national law.[170] It can be predicted that these EU Member States will be supporters of similarly strict obligations in the EEA. The creation of a level playing field in the EEA would enable states to make sure that their respective corporate nationals would not suffer (perceived and real) short-term corporate disadvantages vis-à-vis other EEA Member States.[171]

3.3 Conflict Minerals Regulation

The further analysis of the Conflict Minerals Regulation is organised as follows. Section 3.3.1 describes the obligations created by this Regulation. Section 3.3.2 discusses the duty-bearers and how 3TG smelters and refiners in non-EU countries will be *de facto* bound by the Regulation, if they want to continue their business relationships with powerful EU-based importers. Section 3.3.3 shows that the EU aims to 'manage globalisation' by empowering multilateral initiatives. It further highlights that, in achieving this goal, the EU attempts to bypass foreign governments. Section 3.3.4 discusses the compatibility of the Regulation with the GATT. Finally, section 3.3.5 discusses recent developments.

3.3.1 Obligations

The Conflict Minerals Regulation introduces supply chain *due diligence* requirements for certain large EU-based *importers* of mineral ores, concentrates and processed metals containing or consisting of 3TG from *conflict-affected or high-risk areas*. Three concepts require further clarification. 'Importers' are understood to be legal persons declaring goods for release for free circulation

[168] Porsch (n 105) p 13.
[169] Ibid pp 64–73.
[170] Arts 3(7), 3(8), 3(33) and 3(34) Wetboek van Vennootschappen en Verenigingen 2019 (BE).
[171] Cf Callaghan (n 53) p 923.

according to the Union's Customs Code.[172] 'Conflict-affected or high-risk areas' are 'areas in a state of armed conflict or fragile post-conflict as well as areas witnessing weak or non-existent governance and security, such as failed states, and widespread and systematic violations of international law, including human rights abuses'.[173] Finally, the concept 'due diligence' corresponds to the definition set out in the OECD Guidelines for Multinational Enterprises. [174] It is the process through which importers can identify, prevent, mitigate and account for how they address actual and potential adverse impacts associated with their sourcing activities.

EU citizens have frequently expressed concerns about being exposed, within the boundaries of the EU, to companies that are not held accountable for their involvement in the illicit extraction and trade of conflict minerals.[175] They have sent petitions to the European Commission to request that legislation be proposed to the European Parliament to hold companies accountable to international standards because they were not able to buy consumer products with confidence. [176] 3TG have a range of applications in technical sectors, including IT, electronics, automobiles, healthcare and aerospace. Tantalum is, for example, used to make the glass of camera lenses and hard disk drives.[177] The European Parliament echoed these concerns, explaining that consumption products indirectly link EU citizens to conflicts outside the EU that have severe impacts on human rights.[178] Since 2010, the European Parliament had been calling for binding legislation on conflict minerals along the lines of section 1502

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[172] Art 2.l Regulation 2017/821.
[173] Art 2(f) ibid.
[174] Art 2(d) ibid.
[175] Recital 10 ibid; European Commission, 'Staff Working Document Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and the Council Setting up a Union System for Supply Chain Due Diligence Self–Certification of Responsible Importers of Tin, Tantalum and Tungsten, their Ores and Gold Originating in Conflict–Affected and High Risk Areas' (2014) SWD(2014)53 final p 14.
[176] European Parliament (European Conservatives and Reformists Group), 'New Measures Will Tackle Trade in Conflict Minerals' (2017) <http://pr.euractiv.com/pr/new-measures-will-tackle-trade-conflict-minerals-152189> accessed 11 September 2019.
[177] Sebastiaan Deetman and others, 'Deriving European Tantalum Flows Using Trade and Production Statistics' (2017) 22(1) Journal of Industrial Ecology p 171.
[178] Recital 8 European Parliament, 'Amendments adopted by the European Parliament on 20 May 2015 on the Proposal for a Regulation of the European Parliament and of the Council Setting up a Union System for Supply Chain Due Diligence Self–Certification of Responsible Importers of Tin, Tantalum and Tungsten, their Ores, and Gold Originating in Conflict–affected and High Risk Areas (2015)' COM(2014)0111 — C7–0092/2014 — 2014/0059(COD)' [2015] OJ C 353, amendment.

US Dodd-Frank Act.[179] The European Commission initially proposed setting up a system in 2014 for voluntary self-certification for all companies operating in the EU that use and trade 3TG sourced from conflict-affected and high-risk areas.[180] In so doing, the European Commission sided with the business sector, as the majority of the consulted trade organisations and consulted corporations were against a mandatory initiative.[181] However, the European Parliament successfully pushed for mandatory measures.[182]

Article 4 EU Regulation 2017/821 lists a first group of requirements, which concern the management systems of importers. Importers of minerals and metals have to put in place internal systems and processes that enable them to know the names and types of imported minerals and metals, as well as the names and addresses of suppliers.[183] In addition, importers of mineral ores and concentrates should also have information regarding the timing of mining activities, the quantities imported and the country of origin. Where minerals originate from conflict-affected and high-risk areas, or where other supply chain risks, as listed in the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (OECD Minerals Due Diligence Guidance), have been ascertained by EU importers, they should also provide information in accordance with the specific recommendations for upstream economic operators, as set out in the OECD Minerals Due Diligence Guidance.[184] This information concerns, amongst others, the mine of origin; locations where

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[179] European Parliament, Resolution of 7 October 2010 on Failures in Protection of Human Rights and Justice in the Democratic Republic of Congo (2010) P7_TA(2010)0350 para 14; European Parliament, Resolution of 5 July 2011 on Increasing the Impact of EU Development Policy (2011) 2011/2047(INI) para 60; 2013/2126(INI) (n 69) para 46.
[180] Art 1(2) European Commission, 'Proposal for a Regulation of the European Parliament and of the Council Setting Up a Union System for Supply Chain Due Diligence Self–certification of Responsible Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating in Conflict–affected and High risk Areas' (2014) COM(2014)111 final.
[181] SWD(2014)53 final (n 175) p 54; Elena Vyboldina, 'Guest column – Eurometaux's head of international trade' (2016) <https://chemicalwatch.com/48775/guest–column–eurometauxs–head–of–international–trade> accessed 2 April 2018.
[182] 2013/2126(INI) (n 69) para 46.a; European Parliament, 'Amendments adopted by the European Parliament on 20 May 2015 on the Proposal for a Regulation of the European Parliament and of the Council Setting Up a Union System for Supply Chain Due Diligence Self–certification of Responsible Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating in Conflict–affected and High Risk Areas' (2015) COM(2014)0111– C7–0092/2014 – 2014/0059(COD).
[183] Art 4(f)(5) and art 5.4 Regulation 2017/821.
[184] OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict–Affected and High Risk Areas* (2nd edn, OECD Publishing 2013).

minerals are consolidated, traded and processed; and taxes, fees and royalties paid.[185]

Article 5 EU Regulation 2017/821 lists a second group of requirements, which concern risk management procedures. Importers of minerals and metals need to check that what they buy is sourced responsibly and does not fund conflicts or other illegal activities. They need to examine the likelihood that they could be financing conflicts, forced labour or other related illegal activities. In addition, mineral importers should identify and assess risks and adverse impacts in supply chains against the standards of supply chain policies, which need to be in line with the international responsible sourcing standards, as set out in the OECD Minerals Due Diligence Guidance. They must mandatorily act upon the results of this assessment. They need to make sure that the supplier addresses any identified risk or adverse impact within a given deadline, considering their ability to influence and, where necessary, exert pressure on suppliers. They should consult with suppliers and other stakeholders concerned, including local and central government authorities, international or civil society organisations and affected third parties, and agree on a strategy for measurable risk mitigation in a risk management plan.[186] If it is not possible to mitigate identified risks with smelters or refiners, then the importer should suspend or discontinue trade with the concerned supplier.[187]

The importer's management systems and procedures for due diligence are supported by obligations to disclose documentation demonstrating their respective compliance and the duty to carry out audits via an independent third party.[188] Mineral and metal importers shall report as widely as possible, including on the Internet, on their supply chain due diligence policies and practices for responsible sourcing.[189]

[185] Art 4(f)(5) Regulation 2017/821.
[186] Art 5.2 ibid.
[187] Art 5.b ibid.
[188] Art 3.1 ibid.
[189] Art 7.3 ibid.

3.3.2 Duty-bearers and competition concerns

Obligations are directly imposed on EU importers of mineral ores and concentrates containing 3TG and exceeding the quota in Appendix Table A1 EU Regulation 2017/821.[190] The idea to differentiate between 3TG ores and concentrates on the one hand and processed metals containing or consisting of 3TG on the other hand arose during the trilogue negotiations between the European Commission, the European Parliament and the Council of the EU, which took place behind closed doors. As a result, the material scope of the Conflict Minerals Regulation is much more limited than the US Dodd-Frank Act. European electronics producers (that are not listed in the US) would, for example, have to comply with EU Regulation 2017/821 if they import raw minerals themselves, but not if they import semiconductors, half-finished or finished products.

The EU Member State authorities are tasked with examining importers' third-party audits (or evidence of conformity with a supply chain due diligence scheme that has been recognised by the European Commission).[191] They are also burdened with carrying out mandatory on-the-spot inspections of an importer's premises, if needed. If an EU importer has not complied with the Conflict Minerals Regulation, then the Member State should order the firm to address the problem and follow up to make sure it does so. Member States can determine which sanctions they deem fit.

While the EU seems to find that the Regulation falls squarely within its territorial jurisdiction, some commentators have said that the EU has overstepped its legal jurisdiction.[192] It has been suggested that EU importers are, indirectly, turned into private regulators, resulting in EU law being applied and transferred across borders.[193] Indeed, 3TG smelters and refiners in non-EU countries are not *de jure* bound but they will be *de facto* bound, if they want to continue their business relationship with EU-based importers. Trade partners in conflict-affected and high-risk areas are expected to accept conditions imposed by EU importers in

[190] Art I.3 and Annex I ibid.
[191] Art 3.2 and 11 ibid.
[192] Letter from Aloys Tegera and others to Governments, Companies, Non–Governmental Organisations and other Stakeholders Implicated in Efforts of Various Kinds related to the Issue of 'Conflict Minerals' (9 September 2014).
[193] Chang–hsien Tsai and Yen–nung Wu, Conflict Mineral Rules and Corporate Social Responsibility (2018) 38(2) Northwestern Journal of International Law and Business p 249.

order to obtain or keep business opportunities.[194] Due to its market power, the EU has proven it can force corporations in other jurisdictions to follow EU rules.[195] The EU is fundamentally a large, regulated single market with substantial influence in the global economy. In particular, it is a relatively large importer of minerals, accounting for one third of global trade volumes.[196] The EU could be thorough in creating a level playing field in minerals. The Conflict Minerals Regulation is expected to even have an impact on non-EU importers because the mining process is largely indivisible.[197] Smelters and refiners that would like to continue their business relationship with EU importers, will have to make changes throughout the whole mining process.

EU importers have also protested against the role of 'private regulator'. They have reported countless difficulties and practical challenges in the exercise of supply chain due diligence. Most importantly, they argued that 3TG supply chains can be lengthy and complex, involving many corporations, which are often unaware of the risks involved. Educating suppliers would be difficult and costly. Sensitive information, including smelters and refiners' names, intellectual property protection and other corporate secrets, might be disclosed and that contractual agreements might be terminated. Traders, in particular, reported instances in which they have had to disclose the origin of their minerals and found themselves bypassed by their clients, who seized the opportunity to source directly from the disclosed sources.[198]

These concerns have acted as an important disincentive to inject more transparency into supply chains.[199] Late in the negotiations, some EU Member States successfully pushed for the inclusion of a series of import thresholds (as set out in Appendix Table A1 to the Regulation). A threshold has, for example, been installed for dentists and other small organisations importing gold

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[194] Li–Wen Lin, 'Legal Transplants through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example' (2009) 57 American Journal of Comparative Law p 722.
[195] Cf Jacoby and Meunier (n 135) pp 682–699.
[196] Cf SWD(2014) 53 final (n 175) p 36.
[197] Mureille van der Meulen, 'The EU Responsible Trading Strategy for Minerals from Conflict Zones – A Path towards, Peace, Stability and Development' (2017) <www.researchgate.net/publication/318310381_the_eu_responsible_trading_strategy_for_minerals_from_conflict_zones_–_A_path_towards_peace_stability_and_development> accessed 3 April 2018 pp 7–9.
[198] 2013/2126(INI) (n 69) para 46.b.
[199] SWD(2014)53 final (n 175) p 25.

'unwrought or in semi-manufactured forms, or in powder form with a gold concentration of 99.5 per cent or higher that has passed the refining stage'.[200] One serious disadvantage is that these thresholds are rather high. Dentists may, for example, import up to 100 kg of gold, even though they usually use zirconium, a by-product of titanium and tin mining, to make dental crowns.

3.3.3 Managing globalisation

Just like the CBCR rules, the Conflict Minerals Regulation seems to constitute an attempt to 'manage' how globalisation should happen. The systematic structure provided by Jacoby and Meunier's template, which was introduced in section 3.2.3, is useful to organise this argument. It can be observed that the EU uses the same complementary techniques to influence globalisation as it did in the CBCR rules, that is, empowering international institutions and exercising regulatory influence. The Conflict Minerals Regulation advocates for greater support for and the use of the standards issued by the OECD, even beyond the OECD Member States. At the same time, it has been indicated that the OECD Minerals Due Diligence Guidance would not sufficiently guarantee that revenues made on the proceeds of extraction and trade of minerals would be used to support sustainable development, including growth and poverty reduction strategies, which benefits everyone in the affected areas.[201] The European Commission explains that the OECD Minerals Due Diligence Guidance does not appropriately support due diligence efforts. Only importers opting for self-certification are obliged to integrate all elements of this Guidance into their management systems. It is reasoned that EU action is justified because the least developed states are 'negatively affected by the absence or inadequacy of multilateral rules'.[202] It is further spelled out that 'setting up a binding international agreement would 'require a lengthy process with an uncertain outcome'.[203] Further evidence that the EU tries to shape global governance according to its own norms, can be found in the European Commission's assessment that the DR Congo and Rwanda were too slow in implementing legislation, as the deadline for issuing export certificates as part of the conformity procedures has been repeatedly extended.[204]

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[200] EU Regulation 2017/821 Appendix table A1.
[201] COM(2011)25 final (n 93) p 11.
[202] Ibid p 6.
[203] SWD(2014)53 final (n 175) p 51.
[204] SWD(2014)53 final (n 175) p 29.

3.3.4 Violation of Articles I:1 and III:4 GATT

States Parties to the GATT – including all EU Member States – have to deal with the WTO regime when they aim to improve corporate accountability through imposing import restrictive measures. The EU claimed that the Conflict Minerals Regulation is fully WTO compliant, 'as it applies to importers regardless of the origin of the goods they source', during its 2017 review before the WTO panel.[205] There were no further discussions regarding this statement during the review. The WTO DSM has, to date, also refrained from commenting on extraterritoriality.

It needs to be pointed out here, however, that the Conflict Minerals Regulation might potentially raise issues under the Most Favoured Nation Principle (Article I:1 GATT) and the National Treatment Principle (Article III:4 GATT). According to the former principle, States Parties to the GATT, including all EU Member States, cannot discriminate as between other States Parties.[206] In particular, the distinction between conflict-affected or high-risk areas and other areas in the Conflict Minerals Regulation may generate detrimental treatment for the group of products originating from certain WTO Member States that overlap partly or fully with conflict-affected or high-risk areas.[207] The latter principle prohibits discrimination by a State Party between similar domestic and imported products in a way that treats imported products less favourably. Imported mineral ores, concentrates and processed metals containing or consisting of 3TG are treated less favourably than, for example, recycled materials, which have been excluded by the Regulation due to the practical impossibility of tracing their origin.[208]

Could the Conflict Minerals Regulation be justified under the exceptions of the GATT? It can be attempted to frame the Conflict Minerals Regulation as a regulatory measure that protects the 'moral interests' of the importing society (Article XX(a) GATT). Chapter 2 section 2 of this thesis discussed that 'necessary' trade-restricting measures are likely to be permitted to protect public morals. This requires sufficient evidence that public concerns regarding the way in which

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[205] WTO, *Trade Policy Review Minutes of the Meeting* (5 and 7 July 2017) WT/TPR/M/357/Add.1 pp 52–53.
[206] Art I:1 GATT.
[207] Enrico Partiti and Steffen van der Velde, 'Curbing Supply–Chain Human Rights Violations through Trade and Due Diligence. Possible WTO Concerns Raised by the EU Conflict Minerals Regulation' (2017) 51(6) Journal of World Trade p 1051.
[208] Arts 1.6 and 2.s Regulation 2017/821.

3TG products are traded truly exist in the EU, and that a connection exists between such concerns and the scope of 'public morals' as 'defined and applied' by the EU in its territory according to its own systems and values. If sufficient evidence is deemed to exist, then it is, however, likely that the chapeau test of Article XX GATT – which determines that arbitrary or unjustifiable discrimination between States Parties to the GATT where the same conditions prevail, and disguised restrictions on international trade are forbidden – would fail. EU public concerns regarding human rights violations and other issues in the extraction process of 3TG are not only related to these materials in the form of concentrates or ores, but also in the form of metals. EU citizens' concerns do not diminish simply because processing has taken place outside the EU.

The exception of Article XXI(c) GATT might also be considered. This Article permits extraterritorial measures which address the illicit trade of natural resources.[209] This paragraph states that 'Nothing in this Agreement shall be construed ... to prevent any contracting party from taking any action in pursuance of its obligations under the UN Charter for the maintenance of international peace and security'. There has been no substantive case law focusing on Article XXI(c) GATT, but Lena Partzsch and Martijn Vlaskamp hypothesised that section 1502 US Dodd-Frank Act would largely fall within this exception, as it fits within the UN Security Council's 2008 sanctions against individuals or entities supporting the illegal armed groups in the eastern part of the DR Congo through illicit trade of natural resources.[210] Enrico Partiti and Steffen van der Velde stated, however, that this exception would only justify the Conflict Minerals Regulation – which covers a much broader scope than section 1502 Dodd-Frank Act – if the WTO DSM took an extensive interpretation.[211] While section 1502 Dodd-Frank Act is geographically limited to the DR Congo and nine adjoining states, Angola, Burundi, the Central African Republic, the Republic of Congo, Rwanda, Sudan, Tanzania, Uganda and Zambia, the Conflict Minerals Regulation refers to 'conflict-affected or high-risk areas'. The European Commission will regularly update the list that determines which areas are to be considered affected by conflict or high

[209] Lena Partzsch and Martijn Vlaskamp, 'Mandatory Due Diligence for 'Conflict Minerals and Illegally Logged Timber: Emergence and Cascade of a New Norm on Foreign Accountability' (2016) 3 The Extractive Industries and Society pp 981–982.
[210] Ibid pp 981–982 referring to UNSC Res 1857 (2008) UN Doc S/RES/1857 para 4.g.
[211] Partiti and van der Velde (n 207) pp 1061–1062.

risk, because risks change, conflicts are settled and new conflicts arise. While the European Commission still has to craft the first list that determines which areas are affected by conflict or high risk, this list will, in all likelihood, be geographically expansive. This is to be expected, because the European Commission has indicated that it intends to avoid creating an incentive for corporations to avoid compliance costs by pulling out of the DR Congo and adjoining states altogether, depriving this region of investment and fuelling illegal trade.[212] The Commission indicated that trade of 3TG fuels conflict in other parts of Africa, including Côte d'Ivoire and in South American states such as Panama and Peru.

Partiti and van der Velde also consider the exception of Article XXI(b)(ii) GATT, as it contains an exception 'to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment'. They suggested, however, that the value of this exception is limited because the Conflict Minerals Regulation covers not only areas in which conflict is taking place, but also high-risk areas, including those 'witnessing weak governance'.

3.3.5 Outlook

While at this early stage it is impossible to assess whether the Conflict Minerals Regulation will help to reach the set global goals of the OECD, the Regulation may be useful in contributing to efforts that are being taken all over the world to break the nexus between the trade in conflict minerals and human rights violations. During the drafting process of the Conflict Minerals Regulation, a number of other states took steps toward non-binding measures. The International Conference on the Great Lakes Region, which includes twelve African Member States, operating on behalf of affected exporting states, set up, in 2015, a Mineral Tracking and Certification Scheme to find a solution to the problem of illicit trade in 3TG.[213] Some other importing states have also taken steps towards non-binding rules, similar to the underlying reference standards that are articulated in the OECD

[212] SWD(2014)53 final (n 175) pp 26–30.
[213] International Conference on the Great Lakes Region, 'Regional Certification Mechanism – Certification Manual' (2015) <www.oecd.org/investment/mne/49111368.pdf> accessed 4 September 2018.

Minerals Due Diligence Guidance. The Ministry of Trade, Industry and Energy of the Republic of Korea has, for example, been organising events to raise awareness of minerals originating in conflict-affected areas. The Korea Mineral Resources Corporation identifies and introduces alternative import channels for minerals and the Korea Trade-Investment Promotion Agency monitors the responses from other states through its overseas offices.[214] Similarly, a subordinate unit of the Ministry of Commerce in China – which is not a member of the OECD – has adopted non-binding Guidelines for Social Responsibility in Outbound Mining Operations.[215] These guidelines were drafted in association with a number of partners, including the OECD and the German development agency GIZ. Turkey and the United Arab Emirates have also been discussing official guidelines along the same lines.[216]

In the US, the Republican US SEC Chairman Michael Piwowar has announced, however, that he is scaling back the implementation of section 1502 Dodd-Frank Act.[217] He pledged that more effective means of targeting specific companies known to be engaging in the trade of conflict minerals will be considered to replace the suspended rule. This announcement comes after an Appeals Court agreed with the US Chamber of Commerce that part of section 13(p)(1) Exchange Act and Rule 240.13p-1 – which were established to implement section 1502 Dodd-Frank Act – violated the free speech rights of companies.[218] While there has been some discussion whether Piwowar has the authority to issue such rules,[219] the staff of the US SEC's Division of Corporation Finance have already announced

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[214] NHRCK, 'Recommendations for National Action Plans on Business and Human Rights' (2016) Nr 2016.7 p 20.
[215] WT/TPR/G/357 (n 205) para 4.51; China Chamber of Commerce in Metals, Minerals and Chemicals Importers and Exporters, 'Due Diligence Guidelines for Responsible Mineral Supply Chains' (2015) <https://mneguidelines.oecd.org/chinese-due-diligence-guidelines-for-responsible-mineral-supply-chains.htm> accessed 1 September 2016.
[216] Partzsch and Vlaskamp (n 209) p 980.
[217] Michael Piwowar, 'Statement on the Court of Appeals Decision on the Conflict Minerals Rule' (7 April 2017) <www.sec.gov/news/public-statement/piwowar-statement-court-decision-conflict-minerals-rule> accessed 8 July 2018.
[218] Section 13(p) Securities Exchange Act 1934 (US); US SEC, Requirement of Report regarding Disclosure of Registrant's Supply Chain Information regarding Conflict Minerals (77 FR 56362, 12 September 2012) Rule 240.13p-1; *National Association of Manufacturer et al v US SEC*, Nr 13-CF-000635 (DDC 2017); *National Association of Manufacturers et al v US SEC*, 800 F.3d 518, 530 (DC Cir 2015) para 23 noted that 'the Conflict Minerals rule 'violate(s) the First Amendment to the extent the statute and rule require regulated entities to report to the Commission and to state on their website that any of their products have 'not been found to be "DRC conflict free"'.
[219] Sarah Lynch, 'SEC Halts Some Enforcement of Conflict Minerals Rule Amid Review' *Reuters* (Washington, 7 April 2017) <www.reuters.com/article/us-usa-sec-conflictminerals/sec-halts-some-enforcement-of-conflict-minerals-rule-amid-review-idUSKBN1792WX> accessed 6 July 2018.

that it would not recommend enforcement action if a company only includes disclosure concerning 'their reasonable country of origin inquiry and briefly describe the inquiry they undertook' and does not include 'disclosure relating to due diligence on the source and chain of custody of conflict minerals or a Conflict Minerals Report and associated Independent Private Sector Audit'.[220] The current US SEC position does not express any legal conclusion on the Rule and does not control the courts. Corporations subject to the US Dodd-Frank Act remain subject to private causes of action, under section 18 Securities Exchange Act for misleading statements.[221]

4 Civil judicial remedies

Negative business and human rights measures requiring regulatory compliance can not only be imposed as a direct obligation formulated in a rule, but also indirectly by offering corporations the opportunity to defend against civil violations. In its contribution to the 2017 UN Forum on Business and Human Rights, which had as a central theme 'realising access to effective remedies', the EU highlighted that participating in discussions on this theme should not serve as an excuse to avoid providing access to remedies for victims waiting for justice now.[222]

The European Commission has expressed in its amicus curiae brief in the *Kiobel* case – which has already been mentioned in Chapter 2 section 3.2 of this thesis – that it favours local capacity development over extraterritorial litigation.[223] It reasons that 'as opposed to "remote justice", ... "in-country justice" may be more likely to inspire accountability in the afflicted nation, and, where needed, to generate remedial policy reforms'.[224]

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[220] SEC (Division of Corporation Finance), 'Updated Statement on the Effect of the Court of Appeals Decision on the Conflict Minerals Rule' (7 April 2017) <www.sec.gov/news/public–statement/corpfin–updated–statement–court–decision–conflict–minerals–rule> accessed 8 August 2018.
[221] Securities Exchange Act 1934 (US) section 18; Colin Diamond and Irina Yavmenenko, 'Conflict Minerals Update – SEC Releases Guidance Following District Court decision' (17 April 2017) <www.whitecase.com/publications/alert/conflict–minerals–update–sec–releases–guidance–following–district–court–decision> accessed 7 July 2018.
[222] EEAS (n 8).
[223] European Commission (on behalf of the EU), 'Brief as Amicus Curiae in Support of Neither Party in Kiobel v Royal Dutch Petroleum Co' Nr 10–1491 (13 June 2012).
[224] Ibid p 33.

While the EU claimed at the 2017 UN Forum that it stands ready to continue working to confront the global challenge, together with states and other actors from across regions to improve access to remedy, very few EU development cooperation initiatives that specifically focus on access to civil judicial remedies have been reported. Its efforts have been largely limited to supporting the development of NAPs in, amongst others, Latin American and Caribbean states and African Union Member States.[225] There is an opportunity to step up EU efforts in the framework of international cooperation. The European Council is committed to increasing collective official development assistance from 0.5 per cent to 0.7 per cent of EU GNI by 2030.[226] The third part of this thesis studies, through case study research, which of the EU's bilateral relations could play a role in the development of local access to justice.

The remainder of this section will focus on extraterritorial remediation in the EU. The rules on 'the Law Applicable to Non-Contractual Obligations' have been harmonised in the Rome II Regulation.[227] For those who seek to bring a case in an EU Member State court, it might be desirable to not apply the law of the developing or emerging state where the violation has occurred, as EU Member States generally have more liberal procedural rules on presumptions of law, shifting the burden of proof and time limits. Article 4(1) Rome II Regulation determines, nevertheless, that the applicable law to non-contractual obligations is in most cases that of the state where the damage occurred. In the case of corporate human rights violations, this rule could lead to application of the substantive laws of the non-EU state, which would then govern the establishment of liability, damages and time limitations in the proceedings taking place in the EU Member State court. The general rule of Article 4(1) Rome II Regulation is subject to some exceptions. When the claimant and defendant both have their habitual residence in the same state at the time the damage occurs, the law of that state shall apply (Article 4(2) Rome II Regulation). If it is clear from all the

[225] UN Working Group on Business and Human Rights, 'Fostering Implementation of the UN Guiding Principles on Business and Human Rights through Regional Cooperation: AU–EU Seminar on Business and Human Rights' (2014) <www.ohchr.org/documents/issues/business/africanforum/agenda.pdf> accessed 20 November 2017; EEAS (n 8) referring to Council of the EU, Santiago Declaration (2013) 5747/13.
[226] European Commission, 'European Development Assistance Reaches Highest Ever' (2017) IP/17/916.
[227] European Parliament and Council Regulation (EC) 864/2007 of 11 July 2007 on the Law Applicable for Non–Contractual Obligations (2007) OJ (L 199) (Rome II Regulation).

circumstances of the case that the tort or delict is more closely connected with another state, the law of that state will be applicable (Article 4(3) Rome II Regulation). It is unlikely, however, that foreign victims of human rights violations can use these clauses to ensure that the law of the forum state is applicable.[228] It is more likely that courts of the forum state do not allow the application of a provision of the law of a third state if such application is manifestly incompatible with the *ordre public* ('public order') of the forum under Article 26 Rome II Regulation. This may be the case, for example, if the foreign law legitimises manifest breaches of human rights. In such cases, judges in EU Member States could apply obligations that follow from international human rights treaties.

The Brussels I Regulation on Jurisdiction of Judgments in Civil and Commercial Matters (EU Regulation 1215/2012) contains the most important rules for establishing jurisdiction in tort cases for corporate human rights violations in the EU.[229] It allocates jurisdiction in civil or commercial disputes of a cross-border nature, including civil liability disputes concerning the violation of human rights regardless of the court or tribunal, but excluding matters of revenue, customs or administrative disputes, or the liability of Member States for acts and omissions in exercise of their authority.[230] In so doing, the Regulation aims to promote free circulation of civil and commercial judgments within the EU and, in pursuance of that goal, to create the highest possible degree of legal certainty.[231]

Only the rules on jurisdiction for EU-defendants are currently harmonised under the Brussels I Regulation. A person domiciled in an EU Member State can generally be sued in the courts of that Member State according Article 4 Brussels I Regulation. Whether a defendant is domiciled in a Member State is determined by that Member State's law on residence, whereas, pursuant to Article 63(1)

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[228] Cf Alex Geert Castermans and Jeroen van der Weide, 'De Juridische verantwoordelijkheid van Nederlandse Moederbedrijven voor de Betrokkenheid van Dochters bij Schendingen van Fundamentele, Internationaal Erkende Rechten' (2009) <www.parlementairemonitor.nl/9353000/1/j4nvgs5kjg27kof_j9vvij5epmj1ey0/vibl8vaz64zp/f=/blg22488.pdf> accessed 20 November 2018 p 40.
[229] Council and European Parliament, Regulation Nr 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2012] OJ L 351.
[230] Art 1(1) ibid. Art 1(2) of this Regulation exempts several other procedures, including family law, social security and bankruptcy.
[231] Recitals 1 and 6 ibid. The Regulation has art 81 (2) (a), (c) and (e) TFEU as a legal basis. It amends Council, Regulation Nr 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L 12/1.

Brussels I Regulation, companies are considered to be domiciled in the place where they have their statutory seat, central administration or principal place of business. Absent case law interpretation of the concepts 'central administration' or 'principal place of business' by the Court of Justice of the EU, the meaning of these concepts remains scarcely defined. TNC-DEMs will generally not be considered as EU defendants. They may come within the Brussels I Regulation only in highly exceptional circumstances, if they meet the tests for domicile under this article. For example, an English court determined, in a 2017 case, that a defendant incorporated in the Marshall Islands was held to be domiciled in Greece, as that is where its central administration took place (all of its directors were resident in Greece and all company meetings were held there).[232]

Article 4 Brussels I Regulation preserves the traditional rules for defendants who are not domiciled in a Member State, such as TNC-DEMs. Daniel Augenstein and Nicola Jägers have indicated that grounds for exclusive jurisdiction listed in the Brussels I Regulation – such as concurrent jurisdiction to the courts of the Member State where the violation was committed in cases of tort, delict or quasi-delict – are largely irrelevant for all human rights violations by non-EU corporations occurring outside the territories of EU Member States.[233] Only the ground for exclusive jurisdiction in Article 17 Brussels I Regulation can, in principle, be used in some instances to bring non-EU corporations before a court in an EU Member State. According to this article, persons domiciled in an EU Member State can – for a purpose which can be regarded as being outside their trade or profession – bring claims against a non-EU corporation regarding a contract that falls within that corporations' commercial or professional activities in a limited number of circumstances, including when the non-EU corporation directs its activities to that Member State.[234] Such consumption claims can be brought in the Member State where the consumer is domiciled or in the Member

[232] *Delos Megacore Ltd v Omega Investments Ltd and another* (2017) EWHC 2724 (UK QB).
[233] Art 7(2) Regulation 1215/2012; Daniel Augenstein and Nicola Jägers, 'Judicial Remedies: the Issue of Jurisdiction' in Juan José Álvarez Rubio and Katerina Yiannibas (eds), *Human rights in Business. Removal of Barriers to Access to Justice in the European Union* (Kindle edn, Routledge 2017) p 18.
[234] Art 17(1) and 18 Regulation 1215/2012; art 17(3) of this Regulation further exempts contracts of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.

State where the third-state defendant has a branch, agency or establishment.[235] This rule might be useful for cases in which people in the EU claim that the protection of their own consumer rights coincides with the protection of rights of victims on the ground in developing and emerging states.

Even if consumer claims were filed against non-EU corporations directing activities to EU-regulated markets under Article 17, there will be difficulties in bringing their non-EU subsidiaries under the Brussels I regime. It is not necessary to discuss this point here in great detail, as the issue of structural complexities within business entities has already been extensively discussed in relation to third-state incorporated subsidiaries of EU-based corporations in the literature.[236] It is sufficient to report here that some have argued in EU Member State courts that third-state subsidiaries of EU-based corporations can fall under the Brussels I regime when the claimant can prove that a subsidiary's central administration lies with its parent corporation, as set out in Article 63(1) Brussels I Regulation.[237] However, this requires extensive knowledge of the corporate group's decision-making process and internal organisation.

An extension of the scope of the Brussels I Regulation was discussed during the preparation of its recast in 2012. In its Green Paper (2009), the European Commission suggested deleting the current Article 4 in order to fully harmonise the Brussels I regime.[238] It was reasoned that EU citizens can experience unequal access to justice depending on whether their claim is against an EU-based defendant, which is harmonised under EU law, or a defendant domiciled in a non-EU state, over which the forum state's courts may or may not have jurisdiction under national law. The European Commission has aimed to end this 'artificial

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[235] Art 17(2) and 18 ibid. See also International Federation for Human Rights, 'Corporate Accountability for Human Rights Abuses' (2016) <www.fidh.org/IMG/pdf/corporate_accountability_guide_version_web.pdf> accessed 9 November 2018 p 251 referring to Case 14/76 *De Bloos SPRL v Societe en Commandite par Actions Bouyer* (1976) ECR–1497 para 21; Case 139/80 *Blanckaert et Willems PVBA v Luise Trost* (1981) ECR–819 and Case 33/78 *Somafer SA v Saar–Ferngas AG* (1981) ECR–2138 para 12.

[236] Eg Gwynne Skinner, 'Beyond Kiobel: Providing Access to Judicial Remedies for Violations Of International Human Rights Norms by Transnational Business In a New (Post–Kiobel) World' (2014) 46 Columbia Human Rights Law Review pp 214–219; Siel Demeyere, 'Liability of a Mother Company for its Subsidiary in French, Belgian, and English Law' (2015) 3 European Review of Private Law.

[237] Eg *Vava v Anglo American South Africa Ltd (No 2)* (2013) EWHC 2131 (UK QB).

[238] European Commission, 'Green Paper on the Review of the Council Regulation (EC) Nr 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters' (2009) COM(2009)175 final pp 3–4.

distinction' on the basis of precise rules on international jurisdiction, so that EU citizens would be guaranteed access to the courts for civil and commercial disputes even if the defendant were domiciled in a non-EU State.[239]

In theory, such full harmonisation would potentially have created two opportunities to bring claims against TNC-DEMs when EU citizens claim that the protection of their own rights coincides with the protection of rights of victims on the ground in developing and emerging states. To compensate for the full harmonisation of the Brussels I Regulation, the European Commission's Green Paper introduced subsidiary jurisdiction rules, which introduce two 'mildly exorbitant' additional fora for disputes involving defendants domiciled outside the EU.[240] According to the European Commission, these two exorbitant rules of jurisdiction would have struck a balance between ensuring access to justice on the one hand and international courtesy on the other hand.[241] The two additional grounds of jurisdiction would have been based on the location of assets (draft Article 25 Brussels I Regulation (recast)) and on EU Member State human rights obligations to ensure access to justice under Article 6(1) ECHR (draft Article 26 Brussels I Regulation (recast)).[242]

Draft Article 25 Brussels I Regulation (recast) proposed jurisdiction in the Member State where property belonging to the defendant is located if no other Member State court is competent. This rule is a variation on existing law in a number of Member States, including Austria and Germany.[243] This draft article established two conditions. First, the value of that property could not be disproportionate to the value of the claim. Second, the dispute needed to have 'sufficient connection' with the Member State of the court seized.

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[239] European Commission, 'Staff Working Paper Impact Assessment Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters' (2010) SEC(2010)1547 final p 26.
[240] European Commission, 'Proposal for a Regulation on the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters' (2010) COM(2010)748 final p 8.
[241] COM(2009)175 final (n 238) pp 3–4. See also SEC(2010)1547 (n 239) final p 27.
[242] Arts 25–26 COM(2010)748 final (n 240).
[243] Johannes Weber, 'Universal Jurisdiction and Third States in the Reform of the Brussels I Regulation' (2011) 75 Rabel Journal of Comparative and International Private Law p 640 referring to Oikeudenkäymiskaari 1734 (FI); Zivilprozessordnung 1877 (DE) para 2; Jurisdiktionsnormen 1895 (AT) para 99; Rättegångsbalk (SE) 1942 Ch 10 s 3; arts 86(2) and 88(I) Občanský soudní řád 1963 (CZ); art 1103(2) Kodeks poste̜powania cwilnego 1964 (PL); Retsplejelov 1992 (DK) para 248(2).

Draft Article 26 Brussels I Regulation (recast) is an application of the forum by necessity doctrine. In particular, this article proposed jurisdiction if the claim had a sufficient connection with the Member State of the court seized and if the right to a fair trial or the right to access to justice so requires. This draft article established two conditions. The first condition was that a case should have a 'sufficient connection', which is a proximity condition. The second condition is that 'the right to a fair trial or the right to access to justice' is impeded. This condition flows from EU Member State human rights obligations under Article 6(1) ECHR. [244] Local courts and other courts with a closer nexus thus have the right to grant access to jurisdiction first, if they are able to guarantee a 'fair' trial.

Both exorbitant grounds for jurisdiction might, in principle, have facilitated tort litigation in EU Member State courts for corporate human rights abuses in relation to cases in which an EU or non-EU claimant brings a claim against a TNC-DEM in respect of activities in developing or emerging states. [245] Asset-based jurisdiction facilitates litigation in EU Member States where a TNC-DEM does significant business without having its domicile there. The forum by necessity rule would have opened some possibilities to bring claims against TNC-DEMs in EU Member State courts. While there has been no thorough discussion regarding the interpretation of the proximity condition, the European Parliament has indicated that it might be interpreted as 'doing business' in a Member State. The European Parliament indicated that remediation might be offered when corporations have the EU 'as an essential outlet' or when they have 'substantive business' there or 'their main place of business' is in the EU.[246] This is in line with the International Law Association's interpretation of the forum by necessity doctrine. This Association proposed that 'some activity of the defendant' in the forum state can, amongst others, give rise to a 'close connection' in its interpretation of the forum by necessity doctrine in the Sofia Guidelines on Best Practices for International Civil Litigation.[247] The second condition should be conditional upon the actual

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[244] Jodie Kirshner, 'A Call for the EU to Assume Jurisdiction over Extraterritorial Corporate Human Rights Abuses' (2015) 13 Northwestern Journal of International Human Rights paras 58–59.
[245] Fons Coomans and Rolf Künneman, *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* (Intersentia 2012) p 230.
[246] European Parliament, Resolution of 25 October 2016 on Corporate liability for Serious Human Rights Abuses in Third Countries (2016) 232315(INI) paras G and 33.
[247] International Law Association, Sofia Guidelines on Best Practices for International Civil Litigation' (2012) Res 2/2012 para 2.3(3).

exercise of jurisdiction within a reasonable time and in accordance with fundamental standards of justice.[248] This conclusion emerged from the discussions of a forum by necessity clause in the Council of Europe's Committee of Ministers Recommendation on Business and Human Rights (2016).[249] If a remedy is too speculative and does not engender trust amongst the claimants who are supposed to use it, it will impinge on its effectiveness. Yet, due to the exceptional nature of claims on these exorbitant grounds, only a small number of foreign-cubed cases could have been brought before courts of EU Member States.

As indicated, both exorbitant grounds for jurisdiction were, however, ultimately not included in the 2012 update of the Brussels I Regulation. In fact, universal jurisdiction was omitted altogether following the intervention of the European Parliament. This body found the proposed reforms to be too premature and required 'wide-ranging consultation and political debate'.[250] The European Parliament was joined in this view by a number of Member States. Two concerns were raised.

First, it was explained that the issues at hand should be left to a multilateral framework, which would ensure reciprocity at the international level, such as The Hague Conference on Private International Law, even though the negotiations in this forum have failed to garner an international consensus over more than twenty years.[251] A number of Member State Parliaments argued that the harmonised EU rules would not necessarily improve the EU's position in future negotiations in this forum.[252] In so doing, they refuted the European Commission's assertion that

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[248] Cf Council of Europe (Committee of Members and Observers' Steering Committee for Human Rights' Drafting Group on Human Rights and Business) 'Comments from Members and Observers' (2014) CDDH–CORP(2014)12rev p 46.
[249] Council of Europe (Committee of Ministers), 'Recommendation to Member States on Human Rights and Business' (2016) CM/Rec(2016) paras 7 and 34–36.
[250] European Parliament, 'Report on the Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast) Explanatory Statement' (2012) COM(2010)0748 – C7–0433/2010 – 2010/0383(COD) section 2.
[251] SEC(2010)1547 final (n 239) pp 24–25 and 49.
[252] Eg Greece (Parliament), 'Reasoned Opinion on Brussels I (document COM(2010)748)' (2011) <www.ipex.eu/IPEXL–WEB/scrutiny/COD20100383/grvou.do> accessed 5 April 2016 p 4; The Netherlands (Parliament), 'Reasoned Opinion on Brussels I (document COM(2010)748)' (2011) <www.ipex.eu/IPEXL–WEB/dossier/files/download/082dbcc5420d8f48014270e004837310.do> accessed 5 April 2016 p 1; UK (Parliament; European Scrutiny Committee), 'Recognition and Enforcement of Judgments in Civil and Commercial Matters' (2012) <www.ipex.eu/IPEXL–WEB/scrutiny/COD20100383/ukcom.do> accessed 5 April 2016.

the alignment of national rules, as such, would be neutral in this respect and that the introduction of exorbitant fora in the Regulation could improve the EU's bargaining position in the international negotiations.[253]

Second, concerns were raised that the European Commission had overstepped its mandate. The harmonisation of rules of jurisdiction would not respect the principle of subsidiarity.[254] As the Brussels I Regulation is a closed system that harmonises Member State rules on jurisdiction within its scope of application, Member State courts would have been barred from considering grounds of jurisdiction in accordance with their national law. In particular, harmonising exorbitant grounds would prevent Member States from maintaining or allowing more liberal conditions for access to justice in their national law.[255] By rejecting the changes, the right that is reserved by the EU Member States to assert jurisdiction, in accordance with their national law, over third-country defendants who are not domiciled within their respective territories, is upheld.

The European Commission reopened the debates on a recast of the Brussels I regime in its 2015 Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights. [256] The European Commission indicated that 'some practical problems' exist due to the 'dichotomy' between actions against companies with a seat domiciled in the EU and actions against companies with domicile outside the EU.[257] The European Commission did not further discuss this dichotomy as it limited itself to 'a first analysis'. It indicated that willingness from the European Parliament and the Council to take this issue forward is required.[258]

In recent years, the European Parliament, supported by civil society organisations, has issued various calls to EU Member State governments and the European Commission to consider proposals for mandatory frameworks that will

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[253] SEC(2010)1547 final (n 239) p 27.
[254] Art 5(3) TEU; Letter from Maroš Šefčovič, Vice–President European Commission to Voorzitter Tweede Kamer der State–Generaal (NL)' (2011) <www.ipex.eu/IPEXL–WEB/scrutiny/COD20100383/nleer.do> accessed 6 April 2016 p 2.
[255] Burkhard Hess, 'The Brussels I Regulation: Recent Case Law of the Court of Justice and the Commission's Proposed Recast' (2012) 40 Common Market Law Review p 1105.
[256] SWD(2015)144 final (n 7).
[257] Ibid para p 34.
[258] Ibid para pp 25 and 34.

ensure access to remedy and compensation for human rights violations linked to business operations outside the EU.[259] In a 2015 Resolution, for example, the European Parliament stated that remediation should not exclusively depend on naming and shaming by campaign groups or voluntary corporate efforts.[260] These calls generally refer to the need to make EU-based corporations accountable for human rights abuses occurring in their supply chains in developing and emerging states, and request the alleviation of barriers to justice, including corporate structures that obfuscate the effective ownership of certain corporations.[261] However, the European Parliament now also encourages reflection on the extension of jurisdictional rules under the Brussels I Regulation to third-country defendants in actions against non-EU companies that have a clear link with an EU Member State, including when the EU is an essential market. In a 2016 motion, it called for the establishment of cases of jurisdiction based on the presence of the defendant's assets in the EU and the establishment of a forum by necessity.[262]

Similarly, the Council of the EU requested to put 'access to civil judicial remedies' on the EU agenda in its Conclusions on Business and Human Rights (2016).[263] The Council asked EU Member States to include access to remedy in their NAPs.[264] The Council further emphasised the need to carve out a role for the EU in this complex matter, aligning efforts with those of the UN Working Group on Business and Human Rights, the OHCHR's Accountability and Remedy Project, and the Council of Europe's Committee of Ministers.[265] To this end, it asked the European Commission to address remedies in its forthcoming EU Action Plan on Responsible Business Conduct, and to consider providing guidance to Member States.[266] The Council also requested the EU Fundamental Rights Agency (FRA) to issue an expert opinion on possible avenues to lower barriers for access to remedy in the area of business and human rights, to feed into this Action Plan,

[259] Eg 2014/2216(INI) (n 24) para 106; 2015/3035(RSP) (n 1) para 27; 2015/2315(INI) (n 1) para 25.
[260] Eg European Parliament, Resolution of 29 April 2015 on the second anniversary of the Rana Plaza building collapse and progress of the Bangladesh Sustainability Compact (2015) 2015/2589(RSP) para 6.
[261] Eg 2015/2315(INI) (n 1) para 26.
[262] Ibid paras G and 33.
[263] Council of the EU (n 23) para 27.
[264] Ibid para 15; Council of the EU, 'Council Conclusions on EU Priorities at UN HR fora in 2017' (2017) 5689/17 para 12.
[265] Council of the EU (n 23) para 15; Council of the EU (n 264) paras 15–16.
[266] Council of the EU (n 23) para 15; Council of the EU (n 264) para 13.

taking into account existing EU legal instruments and competences at EU and Member State levels.[267]

In its 2017 expert opinion, the FRA compared the key norms in the area of business and human rights related to remedy, with the EU standards on access to remedy.[268] A considerable part of the opinion discusses judicial remedies regarding violations, which occur 'outside of but with links to the EU'.[269] Of relevance for this chapter is that the expert body reasons in this regard that 'in addition to EU companies, any business acting within the EU would certainly have to comply with EU standards'.[270] The suggestion that non-EU corporations that are acting within the EU would need to comply with the same standards as EU corporations is remarkable, as it seems to reject that such corporations would not have a sufficiently close connection for EU Member State courts to accept jurisdiction. It also raises serious questions in terms of capacity of courts of EU Member States. The FRA further emphasised that the EU's actions might be limited to incentivising Member States, as competence to take action is shared or exclusively at the national level.[271] The FRA is currently collecting more information on barriers to justice for victims of business-related violations in EU Member States, following a request from the European Commission.

5 Conclusions

This chapter has indicated that direct and indirect unilateral regulatory accountability initiatives that have been taken within the EU's business and human rights policy, have all been concerned with competition from transnational corporations based in developing and emerging states. First, it was indicated that competition from TNC-DEMs was a particular concern in the crafting process of the Non-Financial Reporting Directive, the only sector-wide initiative that contributes to the EU's business and human rights policy (and a limited number of related matters). This Directive was pushed by a number of EU Member States that had already passed similar legislation at the national level. Although Commissioner Michel Barnier reported that the European Commission tried to

[267] Council of the EU (n 23) para 14; FRA, Improving Access to Remedy in the Area of Business and Human Rights at the EU Level (2017) Opinion 1/2017.
[268] FRA (n 267).
[269] Ibid para 24.
[270] Ibid para 21.
[271] Ibid para 21.

include 'large companies listed in EU-regulated markets, but registered in Third World countries' in the scope of this Directive, this option was ultimately not retained. Instead, the European Commission made substantial efforts to ensure that the administrative burden on EU companies was kept to a minimum. The Directive does not determine key performance indicators as well as auditing obligations. Corporations can simply state that they do not disclose non-financial information relating to respect for human rights. In response, some EU Member States have already started discussing more extensive reporting legislation to proactively address risks. It concerns the Dutch Child Labour Duty of Care Law (2019) and the French Law on Parent Corporations' Duty of Care (2017). Parliamentary Chambers and Committees of eight EU Member States requested the European Commission to use the French law as a blueprint for an EU legislative proposal to enhance CSR to apply to all enterprises having their headquarters in the EU. These Parliamentary Chambers and Committees relied upon the 'green card' mechanism, which allows them to propose intervention at EU level when this can provide more 'critical mass' and leverage at a global level compared to possible action by individual Member States.[272] Commissioner Elzbieta Bienkowska and Vice President Frans Timmermans answered, however, that the European Commission had no plans to introduce further measures to contribute to the implementation of the UN Guiding Principles in a letter to the eight Parliamentary Chambers and Committees at the end of 2016.[273] Second, tension between long-term and short-term economic concerns has been identified in the crafting process of the Country-by-Country Reporting rules and the Conflict Minerals Regulation. In the long run, EU-based corporations might benefit from regulation to secure access to energy resources and critical raw materials, which are needed to innovate value propositions. In the short run, regulation might, however, harm EU-based corporations. They might, amongst other things, lose

[272] European Commission, 'Report from the Commission. Annual Report 2016 on Relations between the European Commission and National Parliaments' (2017) COM(2017)601 final p 10.

[273] Letter from Frans Timmermans and Elzbieta Bienkowska, European Commission to Danielle Auroi, Chair European Affairs Committee Parliament (FR), Eduardo Ferro Rodrigues, President Assembly (PT), Inara Murniece, President Latvian Parliament (LV), Pietro Grasso, President Senate (IT), Boswell of Aynho, Chairman of EU Select Committee House of Lords (UK), Claude Bartolone, President Parliament (FR), Andrej Danko, President Parliament (SK), Loreta Grauziniene, President Parliament (LT) and Khadija Arib, President Parliament (NL) (15 December 2016). The Greek *Vouli ton Ellinon* later joined these eight Parliamentary chambers.

business opportunities when they have to disclose confidential information. Emerging economies are seen as a particular threat, as they emerge as major buyers of energy resources and critical raw materials; a trend which has accelerated in the aftermath of the global financial crisis. Mirroring legal developments in the US, the EU ultimately decided to take a long-term view, while attempting to minimise the impact on the competitiveness of EU-based corporations by extending its regulations to some non-EU corporations that have a linkage with the EU and giving these rules a 'global' character. On the one hand, the CBCR rules require all large oil, mining, mineral and logging corporations listed in the EEA – even if they are not incorporated under the law of an EEA Member State – to report on payments made to governments regardless of their place of incorporation. In so doing, the EU has tried to strengthen the Extractive Industries Transparency Initiative, while at the same time having a definite say as to how CBCR should happen on a global scale. Such EU rules with extraterritorial effects might be considered as interfering with third states internal affairs, but it was the explicit ambition of the EU to bypass these governments. The ECJ confirmed, however, that such rules fall squarely within the territoriality principle in the *ATAA* case. On the other hand, the Conflict Minerals Regulation requires EU-based importers of the largest volumes of ores and concentrates containing tin, tantalum, titanium and gold – scarce materials on which EU Member States are highly dependent to innovate product value chains – to exercise due diligence over their suppliers in conflict-affected and high-risk areas outside the EU. Smelters and refiners in non-EU countries are not *de jure* bound but they will be *de facto* bound if they want to continue their business relationships with EU-based importers. In this case, the EU relies on its market power as a relatively large importer of minerals – accounting for one-third of global trade volumes – to strengthen the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from conflict-affected and high-risk areas, while at the same time having a definite say on how these industries should function. Like section 1502 Dodd Frank Act (which has now been turned back), it has been set out that it might potentially create problems under the WTO's Most Favoured Nation Principle. In addition, the exclusion of recycled materials might also create problems under the National Treatment Principle. A justification of these problems under Article XX(a) GATT will likely fail. There is no reason – under the chapeau test – why minerals are subject to the Regulation, while metals are excluded. In this regard,

the US regime seemed to be better thought-through. Finally, there have not (yet) been any regulatory changes to strengthen access to civil judicial remedies in light of the EU's business and human rights policy. While the rules on the applicable law to non-contractual obligations have been harmonised in the Rome II Regulation, the EU Member States did not agree with a full harmonisation of jurisdiction rules in the Brussels I Regulation. The proposed recast – which has never been adopted – contained two exorbitant ground for jurisdiction which might in principle have facilitated tort litigation in EU Member State courts for corporate human rights abuses in relation to cases in which an EU or non-EU claimant brings a claim against a TNC-DEM in respect of activities in developing or emerging states. These two additional grounds of jurisdiction would have been based on the location of assets (draft Article 25 Brussels I Regulation (recast)) and on EU Member State human rights obligations to ensure access to justice (draft Article 26 Brussels I Regulation (recast)). The following chapters, therefore, examine the variation on such exorbitant grounds which exist in France and the Netherlands. In recent years, there have been new calls to update and harmonise the Brussels I Regulation to ensure access to remedy and compensation for human rights violations linked to business operations outside the EU. These calls – of course – mainly concern the activities of EU-based corporations. However, the European Parliament and the FRA– following up on a request of the Council of the EU – have recognised that other corporations acting
in the EU would also fall under this Regulation.

CHAPTER 4 EU MEMBER STATE: THE NETHERLANDS

This chapter aims to investigate the extent to which the Netherlands has attempted to rein in TNC-DEMs by imposing requirements as a matter of regulatory compliance, either as a direct obligation formulated in a rule, or indirectly by offering corporations the opportunity to defend against civil violations in court. The Netherlands, in 2019, became the second EU Member State, after France, to adopt supply chain responsibility legislation. Section 1 of this chapter examines this *Wet Zorgplicht Kinderarbeid* ('Child Labour Duty of Care Law'; 'the Law'). An evaluation of the parliamentary debates increases our understanding as to whether and to what extent competition from non-Dutch corporations – and in particular, TNC-DEMs – in the global marketplace has had an impact on the stringency and reach of this legislative initiative. Section 2 of this chapter sets out that the Dutch government prioritises supporting local access to judicial remedies in developing and emerging states for victims of corporate abuse. There have, however, been no concrete initiatives to date. The analysis, therefore, focuses mainly on the (largely hypothetical) avenues available to bring claims against TNC-DEMs in Dutch courts. This analysis is considerably shorter than the analysis on the avenues available to bring extraterritorial claims against TNC-DEMs in France in the next chapter. The reason is that civil liability claims can more easily be brought in criminal proceedings in France.

1 Dutch Child Labour Duty of Care Law

Section 1.1 discusses the Child Labour Duty of Care Law's obligations, duty-bearers and sanctions.[1] It explains that non-Dutch corporations – including TNC-DEMs - that sell or deliver goods or services to Dutch end-users more than once a year can be sanctioned under the Law. By mandating the same child labour standards across both national and foreign corporations, the Netherlands has created an artificial level playing field in its market. Despite this broad scope, the immediate competitiveness of Dutch corporations in the wider world is likely to be negatively impacted by the Law. The Dutch Parliament was, nevertheless, convinced that the immediate impact on the competitiveness of Dutch

[1] Wet Zorgplicht Kinderarbeid 2019 (NL).

corporations needed to be compromised to achieve the abolition of child labour, even though the other EU Member States and the European Commission were not prepared to put this issue on the agenda (section 1.3). Section 1.2 discusses the WTO-compatible aim of the Law: ensuring that people in the Netherlands have information regarding which corporations operating on the Dutch market are doing as much as is reasonably possible to prevent their goods and services being provided with the help of child labour.

1.1 Obligations, duty-bearers and sanctions

Corporations subject to the Law are required to do as much as is reasonably possible to prevent goods being sold or services being delivered to end-users in the Netherlands that have been produced using child labour. The Law is only applicable to business-to-consumer and not to business-to-business transactions.[2] It contains two specific obligations. First, corporations subject to the Law have to carry out an investigation to assess whether there is reasonable suspicion that their products or services involve child labour, anywhere in the world.[3] If there is reasonable suspicion, corporations also have to develop and implement a plan of action.[4] Many details still need to be determined by the government in a Royal Decree, but the Law clarifies already that such investigation only needs to take into account reasonably known and consultable sources. Second, corporations subject to the Law have to submit a 'duty of care' statement to the competent supervising authority, which has yet to be determined.[5] The supervising authority would publish the declarations in a public, freely accessible and digitally searchable register on its website.[6]

The Law is applicable to corporations registered in the Dutch trade register and corporations that are not listed in this register but that sell or deliver goods or

[2] The Netherlands (Parliament), Memorie van Toelichting zoals Gewijzigd naar Aanleiding van het Advies van de Afdeling Advisering van de Raad van State 7 October 2016 Dossier 34506 Nr 6.
[3] Art 5(2–3) Wet Zorgplicht Kinderarbeid 2019 (NL).
[4] Art 5 ibid.
[5] Art 4(1–2) ibid.
[6] Art 4(5) ibid; The Netherlands (Parliament), Amendement van Joël Voordewind en Stientje van Veldhoven ter Vervanging van dat Gedrukt onder Nr 10, Dossier 3456 26 January 2017 Nr 16; The Netherlands (Parliament), Stemmingen Zorgplicht Kinderarbeid, Dossier 34506 Handelingen TK 2016–2017 49–9.

services to Dutch end-users more than once a year.[7] Corporations are defined broadly and include any economically active entity, irrespective of its nature or the way it is financed (apart from corporations concerned solely with the transportation of goods).[8] It is likely that size barriers will be adopted by Royal Decree at a later point in time.

The scope of the Law was expanded after the initial parliamentary proceedings via amendment in order to protect the business opportunities of Dutch corporations as much as possible.[9] By mandating the same child labour standards across both national and foreign corporations that operate in its market, the Netherlands has created an artificial level playing field. A socio-liberal Member of Parliament added that including the latter category of corporations would prevent Dutch corporations from moving their headquarters outside the Netherlands in a bid to avoid compliance with the Law.[10]

In subsequent debates, the government's office *Autoriteit Consument & Markt* ('Authority for Consumers & Markets') – which had been suggested as a potential supervising authority to be tasked with enforcing the Law – indicated that it was not convinced that the proposed scope would sufficiently protect the competitiveness of Dutch corporations. A representative of this office expressed that, even with the amendment, the Law would create 'an uneven level playing field' because 'corporations incorporated abroad are more likely to escape enforcement'. [11] Some conservative political parties supported this point by indicating that corporations subject to the Law are 'trapped in a position which is determined by the dogma of competitiveness'.[12] Some Dutch consumer goods industry bodies indicated that they would prefer to continue relying upon voluntary multi-stakeholder covenants in order to accommodate their concerns

[7] Art 4(1) Wet Zorgplicht Kinderarbeid 2019 (NL).
[8] Art 1.c ibid.
[9] Compare Roelof van Laar in The Netherlands (Parliament), Vierde Nota van Wijziging 26 Januari 2017 Dossier 34506 Nr 221 and Roelof van Laar in Nederland (Kamer), Voorstel van Wet 24 Juni 2016 Dossier 34506 Nr 2. See also Attje Kuiken in The Netherlands (Senate), Wet Zorgplicht Kinderarbeid 19 December 2017 Dossier 34506 Nr 13.
[10] Stientje van Veldhoven (D66) in The Netherlands (Parliament), Wet Zorgplicht Kinderarbeid 14 December 2016 Dossier 34506 Nr 13.
[11] Bernadette van Buchem representing Autoriteit Consument & Markt, Verslag van een Deskundigenbijeenkomst 24 October 2017 Dossier 34506 Nr K.
[12] Peter Ester in The Netherlands (Senate), Wet Zorgplicht Kinderarbeid 19 December 2017 Dossier 34506 Nr 13. See also Marjolein Faber–van de Klashorst in The Netherlands (Senate), Wet Zorgplicht Kinderarbeid 19 December 2017 Dossier 34506 Nr 13.

regarding costs of compliance with the Law and the liability risks that it entails.[13] Similarly, Minister for Trade and Development Cooperation Sigrid Kaag explained that she favoured non-binding measures that limit the costs for the Netherlands.[14] If the burden for corporations subject to the Law turned out to be too onerous, it would be relatively easy for this Minister to repeal the Law by Royal Decree.

Any stakeholder that finds that its interests are violated by non-compliance with the provisions under or pursuant to the Law can file a complaint with the corporation.[15] In that case, there must be concrete evidence that the corporation has not been careful or that it has not submitted a statement in line with the Law.[16] This means that there should be demonstrable and sufficiently concrete facts – if possible in terms of 'who', 'what', 'where', 'when' and 'how' – to justify further investigation. A simple suspicion is not sufficient, nor is hearsay or generally formulated inferences, such as, 'In view of the low price it cannot be other than ...'.[17]

If stakeholders find that their grievances have not (or not satisfactorily) been resolved by the corporation after six months, then they can file a complaint with the supervising authority.[18] While no key performance indicators have been set out in the Law, the supervising authority can inspect the corporation's plan of action whenever necessary. The authority can request additional information or act on its own initiative to determine whether the corporation has respected the Law.[19] Th supervising authority will always first mediate and/or give a binding instruction. If that is not sufficient, it can impose a fine of maximum 8,700 euro for corporations that do not submit the statement within the time limits determined by Article 4(2) of the Law. When it becomes apparent the corporation is not willing to carry out the investigation or develop a plan of action in line with the requirements to be determined in a Royal Decree, in accordance with the ILO-

[13] Jeroen van Dijken representing Vereniging van Grootwinkelbedrijven in Textiel, MODINT and IN retail in The Netherlands (Senate), Verslag van een Deskundigenbijeenkomst 24 October 2017 Dossier 34506 Nr K.
[14] Sigrid Kaag in The Netherlands (Senate), Wet Zorgplicht Kinderarbeid 19 December 2017 Dossier 34506 Nrs 13 and 19.
[15] Art 3(2–3) Wet Zorgplicht Kinderarbeid 2019 (NL).
[16] Art 3(3) ibid.
[17] Letter from Lilianne Ploumen, Minister Voor Buitenlandse Handel En Ontwikkelingssamenwerking to Voorzitter Eerste Kamer der Staten–Generaal (17 July 2017) Dossier 34506 Nr G.
[18] Arts 3(4) and 5(2–3) Wet Zorgplicht Kinderarbeid 2019 (NL).
[19] Letter from Attje Kuiken, Tweede Kamerlid to Voorzitter Eerste Kamer der Staten–Generaal (15 October 2018) Dossier 34506 Nr M; Letter from Attje Kuiken, Tweede Kamerlid to Voorzitter Eerste Kamer der Staten–Generaal (9 April 2019) Dossier 34506 Nr Q.

IOE Child Labour Guidance Tool for Business, the supervising authority can also impose an administrative fine up to a maximum of 820,000 euro (716,196 GBP at GBP 1:EUR 1.14) or alternatively 10 per cent of the corporation's annual turnover.[20] Criminal proceedings can follow if new offences occur within five years of the previous offences, if they are carried out at the request of or under the management of the same director.[21] The public prosecutor can also conduct investigations outside Dutch borders.

1.2 Aim

Reducing child labour is not framed as the aim but as a possible effect of the Law.[22] The Law aims to ensure that people in the Netherlands have information regarding which corporations operating in the Dutch market are doing as much as is reasonably possible to prevent their goods and services having come about with the help of child labour. Attje Kuiken, the sponsor of the Law – who replaced Roelof van Laar shortly after the Bill had been adopted in Parliament – explained in this regard that being exposed to such products or services, 'whether or not unintentionally, could have a negative impact on citizens'.[23] Her predecessor alleged that Dutch citizens do not want to consume products manufactured using child labour and that they find it unacceptable that child labour enables corporations to offer products at lower prices.[24] According to the Law's recital, it helps Dutch citizens to 'buy with peace of mind', thanks to the available supply chain insights. These insights can be used to inform their consumption habits.[25] They can take better care that they do not 'unwantedly and undesirably buy products of child labour' and, in so doing, 'contribute to the violation of human rights'.[26]

The sponsors of the Law indicated only that they 'hope that the duty of care obligations will – indirectly – increase the demand for child-labour-free products

[20] Art 7 Wet Zorgplicht Kinderarbeid 2019 (NL).
[21] Art 9 ibid.
[22] Roelof van Laar in The Netherlands (Parliament), Advies van de Afdeling Advisering van de Raad Van State 19 September 2016 en Reactie van de Initiatiefnemer 7 October 2016 Dossier 34506 Nr 4 p 8.
[23] Attje Kuiken In The Netherlands (Senate), Memorie Van Antwoord 19 June 2017 Dossier 34506 Nr D.
[24] Roelof van Laar in The Netherlands (Parliament), Memorie van Toelichting zoals Gewijzigd naar Aanleiding van het Advies van de Afdeling Advisering van de Raad Van State 7 October 2016 Dossier 34506 Nr 6.
[25] Henk Overbeek in The Netherlands (Senate), Wet Zorgplicht Kinderarbeid 27 September 2017 Dossier 34506 Nr H; Frits Lintmeijer in The Netherlands (Parliament), Wet Zorgplicht Kinderarbeid 19 December 2017 Dossier 34506 Nr 3.
[26] Roelof van Laar In The Netherlands (Parliament), Advies van de Afdeling Advisering van de Raad Van State 19 September 2016 en Reactie van de Initiatiefnemer 7 October 2016 Dossier 34506 Nr 4 p 2.

and services'.[27] This citizen-centric approach is not new in the Netherlands. Some provisions in the non-binding Dutch multi-stakeholder sector covenants also rely on citizen preferences for multi-stakeholder management of CSR.[28] An obvious disadvantage of this indirect approach is that it might be forgotten that import restrictions on products from child labour alone are insufficient to protect children's rights beyond territorial borders. Indeed, measures to accompany the Law in order to eradicate child labour in the world have been left largely undiscussed in the parliamentary debates. Perhaps remarkably, representatives of business organisations were the main actors that have referred to such accompanying measures relating to, amongst other things, education and infrastructure building.[29] They referred to such measures, however, not to constructively contribute to the design of such measures, but as a reason to reject a binding Dutch approach altogether.

While it would be desirable that such accompanying measures are further analysed and developed in the near future, it is nevertheless understandable that the sponsors of the Law have chosen the protection of Dutch citizens as the Law's aim. Doing so enhanced the Law's chances of success, both internally and externally. On the internal plane, the Dutch Parliament and the Senate needed to consider the Law's effectiveness in light of the realisation of its aim.[30] While the Law might be a step on the long road to handling the complex problem of child labour, it will in itself not be effective to significantly reduce child labour in developing and emerging states. The main reason is that child labour takes place mainly in economic sectors that do not produce for export, such as subsistence agriculture. In its 2014 NAP, the Dutch government had stated in this regard that it was not convinced that domestic legislation with extraterritorial implications would be sufficient nor that it 'would contribute to preventing human rights

[27] Roelof van Laar in The Netherlands (Parliament), Wet Zorgplicht Kinderarbeid 14 December 2016 Dossier 34506 Nr 10; Attje Kuiken in The Netherlands (Senate), Memorie Van Antwoord 19 June 2017 Dossier 34506 Nr D.
[28] Eg Nederland (Government) and others, 'IMVO Convenant Duurzame Textiel' (2017) <www.imvoconvenanten.NI/Convenantenoverzicht/Eiwit> accessed 13 April 2018 p 68.
[29] Marian Geluk representing Federatie Nederlandse Levensmiddelen Industrie in The Netherlands (Senate), Verslag van een Deskundigenbijeenkomst 24 October 2017 Dossier 34506 Nr K; Faber–van de Klashorst (PVV) in The Netherlands (Senate), Wet Zorgplicht Kinderarbeid 19 December 2017 Dossier 34506 Nr 13; Letter from VNO NCW to Leden Tweed Kamer Staten–Generaal (15 December 2017).
[30] Eg Attje Kuiken in The Netherlands (Senate), Nadere Memorie van Antwoord 27 September 2017 Dossier 34506 Nr H.

abuses by foreign corporations in the countries in which they are active'.[31] On the external plane, this formulation could ensure that difficult issues that arise in the debate on a social clause in the global market could be sidestepped. The Ministry for Trade and Development Cooperation and the parliamentary debates indicated that the Law would be considered inconsistent with the WTO regime, but that it would also be justifiable under the exception of Article XX(a) GATT.[32] Indeed, while the overall WTO system remains largely unpredictable, it was reasoned in Chapter 2 section 2.2.2 of this thesis that WTO States Parties can rely upon the perceptions of their citizens to protect the morals of those citizens under Article XX(a) GATT.

While the formulation of the Law's aim is not that straightforward, it seems to accurately reflect the perceptions of Dutch citizens. Child labour is a sensitive issue in the Netherlands. The sponsors of the Law even stated that Dutch citizens display 'zero tolerance' regarding child labour.[33] The accuracy of this observation is supported by the fact that forty-two corporations supported the Law.[34] Apart from smaller social enterprises, it concerned Dutch branches of some of the biggest corporations that produce some of the most influential consumer brands, such as Unilever and Nestlé. These corporations are in the 'public' eye and arouse much interest from NGOs and the media.[35] They have to make efforts to curb child labour in their global supply to prevent reputational damage.[36] Such efforts, however small, come with immediate 'costs and investments' that their

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[31] The Netherlands (Ministry of Foreign Affairs), 'National Action Plan on Business and Human Rights' (2014) pp 38–39.
[32] Letter from Lilianne Ploumen, Minister Voor Buitenlandse Handel en Ontwikkelingssamenwerking to Voorzitter Eerste Kamer der Staten–Generaal (20 January 2015) p 6. See also Roelof van Laar in The Netherlands (Parliament), Initiatiefnota van het lid van Laar over het Verbieden van Producten gerelateerd aan Kinderarbeid 17 June 2014 Dossier 34506 Nr 2; The Netherlands (Parliament), Memorie van Toelichting zoals Gewijzigd naar Aanleiding van het Advies van de Afdeling Advisering van de Raad van State 7 October 2016 Dossier 34506 Nr 6 para 5.7.
[33] Attje Kuiken in Netherlands (Parliament) Wet Zorgplicht Kinderarbeid 19 October 2017 Dossier 34506 Nr J.
[34] Letter from Tony's Chocoloney and others to Vaste Kamercommissie voor Buitenlandse Zaken, Defensie en Ontwikkelingssamenwerking' (2018) <https://tonyschocolonely.com/storage/configurations/tonyschocolonelycom.app/files/wetzorgplichtkinderarbeid/standpunt_bedrijfsleven_-_initiatiefwet_zorgplicht_kinderarbeid.pdf> accessed 19 December 2018.
[35] Eg Peter Whoriskey and Rachel Siegel, 'Cocoa's Child Labourers' *Washington Post* (Guiglo, 5 June 2019) <www.washingtonpost.com/graphics/2019/business/hershey–nestle–mars–chocolate–child–labor–west–africa/?utm_term=.92aff27f7c74> accessed 5 August 2019.
[36] Cf Frank Hendrickx and others, 'The Architecture of Global Labor Governance' (2016) 155(3) International Labour Review pp 10–11.

competitors do not have to bear.[37] They wrote a letter to the Senate asking whether they would be rewarded or punished for the efforts made.[38] Mandatory regulation creates a level-playing field for corporations of goodwill that operate in the Netherlands.[39]

1.3 Relation to the international and EU perspectives

The Law fits in with the Netherlands' engagement to respect, protect and fulfil those human rights included in the Universal Declaration of Human Rights (1948) and in subsequent human rights instruments that it has ratified, most notably the UNCRC.[40] Recall that the CRC recommended States Parties to take measures to curb child labour.[41] For example, in its Concluding Observations for Italy it wrote that the State Party 'should use its leverage as an EU Member State to ensure that cotton originating from child labour does not enter the European market'.[42] Moreover, this Law legally anchors the development and promotion of international standards to which the Netherlands has committed itself. Article 2 of the Law mirrors the definition of child labour in ILO Convention 138 and Convention 182.[43] Article 5(3) of the Law explains that the supply chain investigations and plan of action need to be in accordance with the ILO International Organisation of Employers Child Labour Guidance Tool for Business.[44] Reference has also been made to the UN Sustainable Development Goals, which require immediate action to prohibit and eliminate the worst forms

[37] Letter from Tony's Chocoloney (n 34).
[38] Ibid. See also Attje Kuiken in The Netherlands (Senate), Memorie van Antwoord 19 June 2017 Dossier 34506 Nr D; Paul Schoenmakers representing Toney's Chocoloney, The Netherlands (Senate), Verslag van een Deskundigenbijeenkomst 24 October 2017 Dossier 34506 Nr K.
[39] Eg Elbert Dijkgraaf in Netherlands (Parliament) Wet Zorgplicht Kinderarbeid 14 December 2016 Dossier 34506 Nr 10 p 10.
[40] The Netherlands has not ratified the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure 1930 (adopted 19 December 2011, entered into force 14 April 2014) and the ICPRM.
[41] See Chapter 2 section 2.1.
[42] CRC, 'Consideration of Reports submitted by States Parties under Art 44 of the Convention Concluding Observations: Italy' (2011) UN Doc CRC/C/ITA/CO/3–4 paras 20–21
[43] The Netherlands (Parliament), Amendement van de Leden Joël Voordewind en Stientje van Veldhoven ter Vervanging van dat Gedrukt onder Nr 11, Dossier 3456 26 January 2017 Nr 15; The Netherlands (Parliament), Stemmingen Zorgplicht Kinderarbeid, Dossier 34506 Handelingen TK 2016–2017, 49–9; Roelof van Laar in The Netherlands (Parliament), Memorie van Toelichting 24 June 2016 Dossier 34506 Nr 3.
[44] See Attje Kuiken in The Netherlands (Senate), Memorie van Antwoord 19 June 2017 Dossier 34506 Nr D; Attje Kuiken in The Netherlands (Senate), Wet Zorgplicht Kinderarbeid 19 December 2017 Dossier 34506 Nr 13 and 19 referring to ILO, 'Eliminating Hazardous Child Labour Step by Step' (2003) <www.ilo.org/ipecinfo/product/viewProduct.do?productId=1660> accessed 19 October 2018.

of child labour and end child labour in all its forms by 2025.[45] The Law further gives substance to the 'state duty to protect' as formulated in the UN Guiding Principles and the updated OECD Guidelines.[46] The corporations subject to the Law can rely upon the six steps of due diligence and their characteristics as laid down in the OECD Guidance on Due Diligence for Responsible Business Conduct to investigate whether there is a reasonable suspicion that a product or service involves child labour anywhere in the world.[47]

The Law also goes further than the UN Guiding Principles, as it introduces binding preventive obligations regarding child labour that reach beyond its borders. Recall that the UN Guiding Principles did not set out that states have extraterritorial obligations.[48] They only 'encourage' states to hold 'their' private transnational corporations accountable if these business entities are engaged in human rights violations abroad. The main merit of the UN Guiding Principles in the Dutch debate appears to be that they 'normalised' the idea that corporations are expected to comply with the 'social norm' that states that corporations have to respect human rights in countries with low regulatory standards. The former UN Special Representative for Business and Human Rights John Ruggie wrote in his 2017 Article 'The Social Construction of the UN Guiding Principles' that 'social norms are shared expectations of how particular actors are to conduct themselves in given circumstances ... within spheres of social interaction'.[49] As observed in other chapters in this thesis, the reaffirmation of the social norm that corporations have to respect human rights in all their operations and business relations in the UN Guiding Principles has been quite successful. Apart from the three EU regulatory frameworks, the French Law on Parent Corporation's Duty of Care had made considerable progress at the time that the first Dutch debates

[45] Attje Kuiken in The Netherlands (Senate), Wet Zorgplicht Kinderarbeid 19 December 2017 Dossier 34506 Nr 13 and 19 referring to UN General Assembly, Res 70(1) (21 October 2015) UN Doc A/RES/70/1 Goal 8.7.
[46] Roelof van Laar in The Netherlands (Parliament), Memorie van Toelichting 24 June 2016 Dossier 34506 Nr 3 referring to CRC, 'Concluding Observations: the Netherlands' (2015) UN Doc CRC/C/NDL/CO/4 para 23(a), UN Guiding Principles and OECD, *OECD Guidelines for Multinational Enterprises* (2nd edn, OECD Publishing 2011).
[47] Letter from Attje Kuiken, Tweede Kamerlid to Voorzitter van de Eerste Kamer der Staten–Generaal 9 April 2019 Dossier 34506 Nr Q referring to OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (OECD Publishing 2018).
[48] See Chapter 1 section 1.1.
[49] John Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights' (2017) Harvard University Corporate Responsibility Initiative Working Paper Nr 67 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2984901> accessed 30 September 2019 p 13.

were being held. In fact, the UN Guiding Principles seem to have been so successful in triggering an iterative process among global governance systems, that there was almost no discussion regarding the extraterritorial dimensions of the Law in the parliamentary debates. Opponents of the Law focused mainly on practical issues during the parliamentary debates. One notable exception came from a right-wing Member of Parliament, who said, 'We cannot take on the problems of the whole world. ... I think that India needs to regulate this issue. ... [I]t is the problem of those countries and not that of Dutch corporations'. [50]

There was a large degree of agreement in the Netherlands that regulation to tackle child labour should best be designed at the EU level.[51] At the time that the parliamentary debates on the Law were initiated, the Dutch government tried to consult with other EU Member States and the European Commission. The Dutch government had previously, between 2007 and 2010, also tried to mobilise the European Commission and other EU Member States to eliminate the 'worst forms of child labour' in developing and emerging states by means of unilateral trade-related restrictions (alongside appropriate accompanying measures).[52] A binding EU initiative would protect competitiveness of corporations that operate in the Netherlands to a wider extent, and at the same time create structural solutions regarding human rights due diligence that would enable benchmarking across the internal market.[53] The Conflict Minerals Regulation and the Timber Regulation were mentioned as inspirational precedents.[54]

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[50] Marjolein Faber–van de Klashorst in The Netherlands (Senate), Wet Zorgplicht Kinderarbeid 19 December 2017 Dossier 34506 Nr 13. See also Marjolein Faber–van de Klashorst in The Netherlands (Senate), Wet Zorgplicht Kinderarbeid 23 April 2019 Dossier 34506 Nr 27.
[51] Algemene Commissie voor Buitenlandse Handel en Ontwikkelingssamenwerking, Verslag Wet Zorgplicht Kinderarbeid 11 November 2016 Dossier 34506 Nr 7; Vaste Commissie voor Buitenlandse Zaken, Defensie en Ontwikkelingssamenwerking, Verslag Wet Zorgplicht Kinderarbeid 14 Maart 2017 Dossier 34506 Nr B; Suzan van der Meij in the Nederlands (Senate) Wet Zorgplicht Kinderarbeid 26 October 2017; Nr K Frits Lintmeijer in The Netherlands (Parliament), Wet Zorgplicht Kinderarbeid 19 December 2017 Dossier 34506 Nr 3; Petra Stienen in The Netherlands (Senate), Wet Zorgplicht Kinderarbeid 19 December 2017 Dossier 34506 Nr 3.
[52] The Netherlands, 'Dutch Non–Paper on Child Labour' (2010) <www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/201/201005/20100510_2_2non–paperfinal_en.pdf> accessed 22 January 2018 p 1; Letter from Lilianne Ploumen, Minister Voor Buitenlandse Handel En Ontwikkelingssamenwerking to Voorzitter van de Tweede Kamer der Staten–Generaal (20 January 2015) p 1.
[53] Roelof van Laar in The Netherlands (Parliament), Memorie van Toelichting 24 June 2016 Dossier 34506 Nr 3.
[54] Joël Voordewind in The Netherlands (Parliament), Wet Zorgplicht Kinderarbeid 14 December 2016 Dossier 34506 Nr 10.

A major difference with these two regulations, is that the EU does not have direct economic interests to impose binding measures with extraterritorial effects to regulate child labour. With this in mind, it is rather unsurprising that the European Commission showed limited willingness to engage in a constructive dialogue regarding child labour with the Netherlands. It was noted in the Dutch parliamentary debates that the European Commission's priorities had changed under Jean-Claude Juncker's presidency (2014-2019) and that 'nor the officials nor the commitment' existed anymore.[55] The Commission was reportedly concerned about the effectiveness and implementation of such initiatives, stating that only '5 per cent' of the products of child labour would be exported.[56] This outdated percentage is frequently and inaccurately used in European Commission documents under José Manuel Barroso II (2009-2014). For example, a 2010 report describes that '5% of the *total* documented world child labour population in 2004 work in the export sector',[57] while a 2013 Staff Working Document inaccurately refers to this report, noting that only '5 per cent' of *the worst forms of* child labour would be associated with traded goods.[58] This estimation was introduced in 1994 by the US Government's Department of Labor in the second edition of its study, 'By the Sweat and Toil of Children: The Use of Child Labor in American Imports'.[59] This study has been done every year since 1994 to study child labour practices in manufacturing and mining industries that export to the United States. While there are no recent estimates of child labour in the export sector, the 2017 edition of this report finds that the total 'proportion of children in child labor is actually rising – with one-in-five children engaged in child labor'.[60] The European Parliament has also confirmed this trend.[61]

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[55] Suzan van der Meij representing MVO Platform in the Nederlans (Senate), Verslag van een Deskundigenbijeenkomst 24 October 2017 Dossier 34506 Nr K.
[56] The Netherlands (Parliament), Advies van de Afdeling Advisering van de Raad van State 19 September 2016 en Reactie van de Initiatiefnemer 7 October 2016 Dossier 34506 Nr 4 p 2.
[57] European Commission, 'Combating Child Labour' (2010) SEC(2010)37 p 8 (emphasis added).
[58] European Commission, 'Trade and the Worst Forms of Child Labour' (2013) SWD(2013)173 pp 4–11 (emphasis added) referring to ibid.
[59] Sarah Bachman, 'A New Economics of Child Labor: Searching for Answers Behind the Headlines' 53(2) (2000) Journal of International Affairs p 547 referring to US (Government's Department of Labor), 'By the Sweat and Toil of Children: The Use of Child Labor in American Import' (1994) p 2.
[60] US (Government's Department of Labor), 'By the Sweat and Toil of Children: The Use of Child Labor in American Import' (2017) p 11.
[61] European Parliament, 'Resolution of 12 March 2015 on the Annual Report on Human Rights and Democracy in the World 2013 and the European Union's policy on the matter' (2014) 2014/2216(INI) para 111.

More astonishing is the rest of the presented analysis in the 2013 Staff Working Document. On the one hand, this document lacks nuance as it draws exclusively from arguments presented by opponents in the debate on a social clause (which have been discussed in Chapter 2 section 2.1 of this thesis). It claims, for example, that 'through increases in income, trade provides countries with a powerful tool to fight poverty – and thus child labour'. [62] On the other hand, this document uses arguments relevant to questions regarding the design of import-restrictive measures, but not per se for their desirability. It professes, for example, that 'needy families in countries lacking proper education, credit markets, and enforcement of labour standards may well be forced to send their children to perform work in non-traded areas of the economy'.[63] The document fails to mention any of the studies that conclude that import sanctions can be effective if they are accompanied by appropriate accompanying measures, such as educational subsidies and incentives for parents to have small families. The Council of the EU picked up on this, in its Conclusions on Child Labour (2016), by asking the European Commission to ensure coherence and complementarity between its education and child labour-oriented development programmes as well as facilitating school-to-work transition and decent work for youth.[64] It explained that delivering on social protection floors and quality education are key factors in contributing to a decline in child labour. Action is most effective and sustainable when it is embedded within comprehensive action plans and programmes to eliminate all forms of child labour, including through integrated area-based and sector-based programmes and value chain approaches.

While some business people indicated that it would be best to wait for an initiative at the EU level (or at the UN level), the majority in the Dutch Parliament found the limited progress and support at the EU level to not be a valid reason to delay a Dutch regulatory initiative.[65] The Advisory Division of the Dutch Council of State agreed with this functionalist approach, stating that limited progress at EU level

[62] SWD(2013)173 (n 58) p 9.
[63] Ibid p 10.
[64] Council of the EU, Conclusions on Child Labour (2016) 10244/16 para 4.
[65] Eg Suzan van der Meij representing MVO Platform in The Netherlands (Senate) and Marhijn Visser representing Employers' Organisation VNO–NCW in the Netherlands (Senate) Verslag van een Deskundigenbijeenkomst 24 October 2017 Dossier 34506 Nr K. See also Michiel Servaes in The Netherlands (Senate), Wet Zorgplicht Kinderarbeid 19 December 2017 Dossier 34506 Nr 13.

> does not affect the fact that also in the national context, as much as possible needs to be done to help put a stop to child labour – as defined in the international agreements – and to prevent goods and services made from child labour being available on the Dutch market.[66]

A major role in this proactive Dutch attitude was played by, what political psychologists would call, a human, irrational desire to change the status quo and to enhance the international status of the Netherlands as a nation.[67] The sponsors of the Law and Lilianne Ploumen, the previous Minister for Trade and Development Cooperation, emphasised that the Law would display the Netherlands' positive willingness to be a 'leader' or 'pioneer' in the EU.[68] The Law could serve as a bottom-up approach to create a level playing field across the EU. While it was acknowledged that the market power of one EU Member State would be limited,[69] there was considerable faith that the Law could create a snowball effect in the other EU Member States and the EU.[70] Van Laar derived hope from a precedent of the *Seal* regime.[71] After the Netherlands had prohibited the sale of seals by law, other EU Member States had swiftly followed suit.

2 Civil judicial remedies

The Dutch NAP acknowledged that the government has 'a major role to play in creating scope for remediation to implement the 3rd pillar of the Ruggie Framework, and providing information on the matter'.[72] Supporting local access to judicial remedies in developing and emerging states for victims of corporate abuse has been prioritised in the NAP. It was noted that local solutions are 'the most effective and sustainable', and that corporations and other interested parties will only use dialogue and mediation if they have 'confidence in both the

[66] The Netherlands (Parliament), Advies van de Afdeling Advisering van de Raad van State 19 September 2016 en Reactie van de Initiatiefnemer 7 October 2016 Dossier 34506 Nr 4.
[67] See Tomer Broude, 'Behavioral International Law' (2015) 163 University of Pennsylvania Law Review p 1103.
[68] Roelof van Laar in The Netherlands (Parliament), Memorie van Toelichting 24 June 2016 Dossier 34506. Nr 3; Attje Kuiken in The Netherlands (Senate), Memorie van Antwoord 19 June 2017 Dossier 34506 Nr D; Letter from Lilianne Ploumen, Minister Voor Buitenlandse Handel en Ontwikkelingssamenwerking to Voorzitter Eerste Kamer der Staten–Generaal (17 July 2017) Dossier 34506 Nr G.
[69] Attje Kuiken in The Netherlands (Senate), Memorie van Antwoord 19 June 2017 Dossier 34506 Nr D.
[70] Roelof van Laar in Netherlands (Parliament) Wet Zorgplicht Kinderarbeid 14 December 2016 Dossier 34506 Nr 10.
[71] Ibid.
[72] The Netherlands (Government), 'NAP' (2014) p 32.

design and function of the relevant mechanisms'.[73] Similarly, it was said that 'a court judgment must also be enforceable, and it is not up to the Netherlands to decide for other countries whether this is possible'.[74]

Back in 2017, the Ministry for Trade and Development Cooperation indicated that there was a budget for supporting projects that increase local capacity building for victims of corporate human rights violations in developing and emerging states.[75] To date, however, Dutch official development assistance projects have been largely limited to non-judicial remedies. Most notably, in 2013, the government gave funding to the NGO Access Facility. Multilateral aid has been carried out through organisations such as the OECD National Contact Point network and the International Development Law Organization.[76] The Ministry of Foreign Affairs noted that the most important challenge to local capacity development in business and human rights matters are 'political limitations imposed by foreign governments or multilateral institutions'.[77]

There would certainly be leverage for the Netherlands to be involved in local capacity-building projects in bilateral and multilateral partnerships. In 2016, the Netherlands spent 0.75 per cent of its GNI on official development assistance.[78] In 2017, however, this budget dropped below 0.7 per cent, the budget that the Netherlands committed to spending on official development assistance in 1970 before the UN General Assembly. Such retrogressive measures are not in line with the 'obligation' to move as expeditiously and effectively as possible to progressively realise rights.[79] The new government, in office since October 2017, has committed to compensating for the budget cuts made by the last government

[73] Ibid pp 38–39.
[74] Ibid pp 38–39.
[75] Minister voor Buitenlandse Handel en Ontwikkelingssamenwerking, 'Besluit Vaststelling Beleidsregels en Subsidieplafond Subsidieregeling Ministerie van Buitenlandse Zaken 2006 (Mensenrechtenfonds 2017–2020)' (2017) Minbuza–2017 4000000581.
[76] Bert Koenders, 'Mensenrechtenrapportage' (2014) <www.tweedekamer.nl/downloads/document?id=3d2d952a–0968–4a6f–ae40–0084d2902c19&title=Mensenrechtenrapportage%202014.pdf> accessed 5 August 2018 p 31.
[77] Business & Human Rights Resource Centre, 'Interview with the Netherlands (Ministry of Foreign Affairs)' <www.business–humanrights.org/en/netherlands> accessed 5 May 2018.
[78] Donor Tracker, 'the Netherlands' <https://donortracker.org/country/netherlands> accessed 5 August 2018.
[79] Cf CESCR, 'General Comment 3 on the Nature of States Parties Obligations' (1991) UN Doc E/1991/23 para 9.

by increasing official development assistance levels.[80] Yet, business and human rights issues do not seem to be one of the priorities on the agenda.[81]

The national human rights institution – the Netherlands Institute for Human Rights – criticised the NAP for glossing over the existing extraterritorial Dutch case law regarding corporate violations occurring in developing and emerging states.[82] Previously, the Dutch government also discredited extraterritorial jurisdiction in its joint amicus curiae brief with the UK government in the US *Kiobel* case.[83] The government stated that allowing extraterritorial claims with little nexus might give domestic states 'reason to downplay or even ignore their own responsibilities for implementing human rights law obligations'.[84] It was further claimed that they would 'come under less pressure to provide and remedy ... and indeed prevent, abuses'.[85] While such effect might exist, it needs to be added that the mere possibility of effective extraterritorial litigation could accelerate the development of local remedies, as developing and emerging states might feel encouraged to contribute to local capacity building in order to avoid airing their dirty laundry on the world stage.[86]

Recall that Article 4 Brussels I Regulation preserves the traditional rules for defendants who are not domiciled in an EU Member State.[87] That is, if a defendant is domiciled elsewhere, the national court hearing the case is left to

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[80] Donor Tracker (n 78).
[81] See Stef Blok, 'Speech by Ministry of Foreign Affairs Stef Blok on the Occasion of a Meeting with the African Ambassadors to the Netherlands' (The Hague, 14 January 2019) <www.government.nl/government/members-of-cabinet/stef-blok/documents/speeches/2019/01/14/speech-by-minister-of-foreign-affairs-stef-blok-on-the-occasion-of-a-meeting-with-the-african-ambassadors-to-the-netherlands> accessed 17 January 2019.
[82] Netherlands Institute for Human Rights, 'Advice Response to the National Action Plan on Business and Human Rights "Knowing and Showing"' (2014) <www.business-humanrights.org/sites/default/files/documents/netherlands-nhri-re-national-action-plan.pdf> accessed 30 September 2019 p 10.
[83] The UK (Government) and The Netherlands (Government), 'Joint Submission of United Kingdom and Netherlands in Kiobel v Royal Dutch Petroleum' Nr 10-1491 (June 2012).
[84] Ibid pp 25-26.
[85] Ibid p 35.
[86] Lucas Roorda and Cedric Ryngaert, 'Business and Human Rights Litigation in Europe: the Promises Held By Forum of Necessity-Based Jurisdiction' (2014) Unijuris <https://unijuris.sites.uu.nl/wp-content/uploads/sites/9/2014/12/Business-and-Human-Rights-Litigation-in-Europe.-The-Promises-Held-by-Forum-of-Necessity-based-Jurisdiction.pdf> accessed 30 September 2019 p 28.
[87] Art 4 Council and European Parliament, Regulation Nr 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2012] OJ L 351. See Chapter 3 Section 4.

determine jurisdiction based on the traditional rules otherwise governing such questions in their legal system. The remainder of this section studies the four (largely hypothetical) avenues to bring claims against TNC-DEMs in the Netherlands. Article 2, Article 9, Article 7(1) Code of Civil Procedure and Civil liability claims in criminal proceedings are discussed in turn.

In fact, Article 4 Brussels I Regulation provides a *first* ground. This article establishes that entities domiciled in an EU Member State shall be sued in the courts of that Member State, regardless of the victim's nationality and state of residence, and regardless of where the harm occurred. This principle has been transposed into Article 2 Dutch Code of Civil Procedure.[88] The existing cases brought on this basis mostly concern Dutch corporations, but recall that, according to Article 63(1) Brussels I Regulation, also TNC-DEMs that have their statutory seat, central administration or principal place of business in an EU Member State are considered to be domiciled there. It follows that, in principle, TNC-DEMs can be brought before courts in the Netherlands, based on EU Regulation 1215/2012, for violations committed abroad if they have their primary commercial activities, for example via a branch, in the Netherlands.[89]

Second, it can be attempted to file proceedings with Dutch courts against TNC-DEMs for their involvement in human rights violations in third states, based on the doctrine of forum by necessity. This doctrine is based on the right to a fair trial under Article 6(1) ECHR. The forum by necessity doctrine has been explicitly articulated in Article 9 Code of Civil Procedure since 2002.[90] The introduction of the forum by necessity doctrine in this Code compensated for the abolition of exorbitant jurisdiction based on the domicile of the claimant in the forum under the Brussels I regime.[91] While Article 9 Code of Civil Procedure is very rarely

[88] Art 2 Wetboek van Burgerlijke Rechtsvordering 2002 (NL).
[89] See Nicola Jägers and Marie–José van der Heijden, 'Corporate Human Rights Violations: the Feasibility of Civil Recourse in the Netherlands' (2008) 33(3) Brooklyn Journal of International Law pp 847–849.
[90] Art 9 Wetboek van Burgerlijke Rechtsvordering 2002 (NL).
[91] Arnaud Nuyts and Katarzyna Szychowska, 'Study on Residual Jurisdiction. Review of the Member States' Rules Concerning the "Residual Jurisdiction" of Their Courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations' (2007) <http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf> accessed 11 March 2016 p 142.

applied, it provides a potential basis to bring cases against TNC-DEMs before the Dutch courts.[92]

Article 9 Code of Civil Procedure contains two versions of the forum by necessity doctrine. First, jurisdiction can arise if legal proceedings outside the Netherlands are 'impossible'.[93] The assessment of this condition would depend on the facts and the judge handling the case.[94] Such situations can arise in the absence of a competent judge and where there are factual impediments, for example, caused by natural disasters or situations involving war.[95] Note that this version of the forum by necessity doctrine is exceptional because it does not require the claimant to prove that there is a connection between the claim and the Netherlands.[96] Every other EU Member State that recognises the forum by necessity doctrine requires some connection with the forum state. Second, jurisdiction can arise if it would be 'unacceptable' to expect the claimant to bring the lawsuit elsewhere.[97] Contrary to the situation in which it is 'impossible' to bring a claim abroad, the claimant who alleges that it would be 'unacceptable' to bring a claim abroad has to prove that there is a sufficient connection with the Dutch legal system. The assessment of this situation would depend on the facts and the judge handling the case. In a 2012 case, a District Court determined that it would be unacceptable for a Palestinian doctor to bring his claims against unidentified Libyan government officials working in Libyan prisons due to upheaval at the time.[98] This court found that there was a sufficiently proximate connection with the Netherlands because of the physical presence of the claimant in the Netherlands, irrespective of the fact that he did not reside in the Netherlands.

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[92] Nicola Jägers, Katinka Jesse and Jonathan Verschuuren, 'The Future of Corporate Liability for Extraterritorial Human Rights Abuses: The Dutch Case against Shell' (2014) 107 American Journal of International Law p 39.
[93] Art 9(b) Wetboek van Burgerlijke Rechtsvordering 2002 (NL).
[94] Stephanie Redfield, 'Searching for Justice: The Use of Forum Necessitatis' (2014) 45 Georgia Journal of International and Comparative Law pp 893–928.
[95] Nuyts and Szychowska (n 91) p 84.
[96] Ibid p 65.
[97] Art 9(c) Wetboek van Burgerlijke Recthsvordering 2002 (NL).
[98] *El–Hojouj v Unnamed Libyan Officials* (2012) Nr 400882/HA ZA 11–2252 (ECLI:NL:RBSGR:2012:BV9748) (Rechtbank Den Haag, 21 March 2012); Daniel Augenstein and Nicola Jägers, 'Access to Justice in the European Union for Corporate–Related Human Rights Violations: Jurisdictional Issues' (2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2942674> accessed 30 September 2019 pp 28–20.

Article 9 Code of Civil Procedure does not explicitly require absence of a *fair* trial, but such requirement has been developed in the case law of Dutch courts.[99] In 2000, the Netherlands considered a case against Kuwait Airways by Iraqi pilots residing in the Netherlands that concerned a labour dispute with the Kuwait Airlines Corporation. Even though the labour contract established the competence of the Kuwaiti courts, the Dutch court accepted jurisdiction as a forum by necessity because the pilots, as former Iraqi nationals, could not expect a fair trial in Kuwait.

Third, Article 7(1) Code for Civil Procedure codifies the so-called connected claims doctrine. This provision provides that a Dutch court can find itself competent in relation to a foreign defendant (anywhere in the world) if it is competent to hear a case against another defendant, and sufficient connection exists between the legal actions of both defendants such that joint treatment can be justified for reasons of process efficiency. According to this article, in principle, Dutch courts may establish jurisdiction over TNC-DEMs where the claim against the TNC-DEM is so closely connected with the claim against a corporation over which the Dutch courts do have jurisdiction that joint adjudication of these claims is considered justified for efficiency reasons.[100]

The case *Friday Alfred Akpan and Milieudefensie v Royal Dutch Shell and SPDC*, in the District Court, involved the joining of a foreign corporation in litigation against a Dutch corporation on the basis of Article 7(1) Code for Civil Procedure.[101] This case can provide some insights regarding the 'process efficiency' condition. The

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[99] Chilenye Nwapi, 'Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor' (2014) 30 Utrecht Journal of International and European Law p 34.
[100] Nuyts and Szychowska (n 91) pp 52–53.
[101] *Friday Alfred Akpan and Milieudefensie v Royal Dutch Shell and SPDC* (2013) Nr C/09/337050 / HA ZA 09–1580 (ECLI:NL:RBDHA:2013:BY9854) (Rechtbank Den Haag, 30 January 2013). See also *Milieudefensie v Royal Dutch Shell and SPDC; SPDC v Friday Alfred Akpan* (2015) Nr 200.126.849 (zaak e) + 200.127.813 (zaak f) (ECLI:NL:GHDHA:2015:3587) (Gerechtshof Den Haag, 18 December 2015). Two other claims have been brought against Shell with support of the NGO Milieudefensie. The first claim concerned the Oruma community *[eiser 1], [eiser 2] and Milieudefensie v Royal Dutch Shell and SPDC* (2009) Nr ECLI:NL:RBSGR:2009:BK8616 (Rechtbank Den Haag, 30 December 2009); *Fidelis Ayoro Oguru, Alali Efanga* and *Milieudefensie v Royal Dutch Shell and SPDC* (2015) Nr C/09/365498 / HA ZA 10–1677 (zaak a) + C/09/330891 / HA ZA 09–0579 (zaak b) (ECLI:NL:GHDHA:2015:3588) (Gerechtshof Den Haag, 18 December 2015)). The second claim concerned the Goi community *[eiser 1] and Milieudefensie v Royal Dutch Shell and SPDC* (2009) Nr ECLI:NL:RBSGR:2010:BM1470) (Rechtbank Den Haag, 30 December 2009); *Eric Barizaa Doh and Milieudefensie v Royal Dutch Shell and SPDC* (2015) Nr C/09/337058 / HA ZA 09–1581 (zaak c) + C/09/365482 / HA ZA 10–1665 (zaak d) ECLI:NL:GHDHA:2015:3586 (Gerechtshof Den Haag, 18 December 2015)).

District Court reasoned that the claims against Royal Dutch Shell and Shell Petroleum Development Company of Nigeria were sufficiently intertwined because both claims concerned the same damage based on the same factual circumstances.[102] The Court of Appeal confirmed this and noted two other factual circumstances in its assessment of process efficiency.[103] First, it indicated that further investigations are possibly required and that such investigations should preferably be carried out together to avoid divergent findings and assessments. Second, it considered that there exists a group link between Royal Dutch Shell and SPDC.

The Court of Appeal stated that – although only SPDC was held liable by the District Court, according to Nigerian law – the claim against Royal Dutch Shell had not been *kansloos* ('without chance') from the outset. Note that the Court of Appeal held that it is not per se required that there is a parent-child relationship between the joined defendants. While the Court of Appeal stated that 'active involvement in and management of SPDC's business operations' had been taken into account to determine that the claim against it was not a priori 'without chance', it was also held that 'this is not to say that without this ... involvement a violation of the duty of care is unthinkable'.[104]

The Court of Appeal also confirmed the District Court's reasoning that it does not matter that 'the reasons of process efficiency' cease to exist after jurisdiction over connected claims has been granted.[105] The Court of Appeal held that another interpretation would be in conflict with the 'perpetuatio fori' principle.[106] This principle sets out that changed circumstances that cannot be foreseen at the time that jurisdiction is granted by a judge cannot affect its adjudicative jurisdiction.[107]

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[102] *Friday Alfred Akpan and Milieudefensie v Royal Dutch Shell and SPDC* (n 101) para 4.1 referring to *[eiser 1] and Milieudefensie v Royal Dutch Shell and SPDC* (2010) Nr 337050 / HA ZA 09–1580 (ECLI:NL:RBSGR:2010:BM1469) (Rechtbank 's Gravenhage, 24 February 2010).
[103] *Milieudefensie v Royal Dutch Shell and SPDC; SPDC v Friday Alfred Akpan* (n 101) para 2.4.
[104] *Eric Barizaa Doh and Milieudefensie v Royal Dutch Shell and SPDC* (2015) (n 101) para 3.2.
[105] *Friday Alfred Akpan and Milieudefensie v Royal Dutch Shell and SPDC* (n 101) para 4.6.
[106] *Milieudefensie v Royal Dutch Shell and SPDC and SPDC v Friday Alfred Akpan* (n 101) para 2.8 referring to *Solvochem Holland v Rasheed Bank* (2010) Nr 179770 / HA ZA 02–1524 (ECLI:NL:GHSGR:2010:BP3078.) (Gerechtshof 's–Gravenhage, 30 November 2010).
[107] 'Perpetuatio fori–beginsel', *Lycaeus Juridisch Woordenboek* <www.juridischwoordenboek.nl/zoek/perpetuatio%20fori–beginsel> accessed 1 December 2018.

It is of interest to highlight here that the claimants tried to argue that a Dutch Court was not competent to assert jurisdiction over SPDC, as it would not have been 'foreseeable' for SPDC to be called before court in the Netherlands.[108] This argument was based on an analogous reasoning of the Court of Justice of the EU's interpretation of Article 8(1) EU Regulation 1215/2012.[109] This article provides that claims against EU-based defendants may be brought together if such claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.[110] The Court of Justice of the EU determined, in the *Eva-Maria Painer v Standard Verlags GmbH* case, that claims against several EU-based defendants do not need to have the same legal basis under this article, as long as it was foreseeable that they could be brought before a court in an EU Member State where at least one of the defendants is based.[111] The District Court and the Court of Appeal agreed with the defendants that it is desirable that the Dutch interpretation of Article 7(1) Code for Civil Procedure is consistent with the Court of Justice of the EU's interpretation of Article 8(1) EU Regulation 1215/2012 in the *Painer* case. It was determined that it had been foreseeable that SPDC could be brought before court in the Netherlands.[112] The Court of Appeal held, amongst other things, that Shell's involvement in oil spills in Africa has been under public scrutiny all over the world for more than sixty years.[113] It will depend on the specific circumstances of the case whether it was foreseeable for TNC-DEMs to be adjudicated in the Netherlands under Article 7(1) Code for Civil Procedure.

Finally, Dutch criminal judges can also declare themselves competent over a civil liability claim arising from a criminal offence for which prosecution has been instituted in the Netherlands.[114] Liesbeth Enneking and her co-authors indicate, however, that this avenue to justice is largely irrelevant for business and human rights claims.[115] They explain that the criminal judge in the Netherlands will

[108] *Friday Alfred Akpan and Milieudefensie v Royal Dutch Shell and SPDC* (n 101) paras 4.4–4.5.
[109] Art 8(1) Regulation 1215/2012; C–145/10 *Eva–Maria Painer v Standard VerlagsGmbH and others* (2011) ECR I–12533.
[110] See *Milieudefensie v Royal Dutch Shell and SPDC; SPDC v Friday Alfred* (n 101) para 2.3.
[111] *Eva–Maria Painer v Standard VerlagsGmbH and others* (n 109) para 81.
[112] *Friday Alfred Akpan and Milieudefensie v Royal Dutch Shell and SPDC* (2013) para 4.5; *Milieudefensie v Royal Dutch Shell and SPDC; SPDC v Friday Alfred Akpan* (n 101) para 2.2.
[113] *Milieudefensie v Royal Dutch Shell and SPDC; SPDC v Friday Alfred Akpan* (n 101) para 2.6.
[114] Art 7(3) Regulation 1215/2012; Art 361 Wetboek van Strafvordering 1921 (NL).
[115] Liesbeth Enneking and others, 'Zorgplichten van Nederlandse Ondernemingen' (2015) <www.rijksoverheid.nl/documenten/rapporten/2016/04/21/zorgplichten–van–nederlandse–

almost always have to determine that a civil claim constitutes a disproportionate burden on the criminal case in view of the complexity of civil liability procedures regarding transnational corporations. The criminal judge will need to refer the injured party in the criminal proceedings to a civil judge.[116]

At the end of this analysis of four grounds to bring TNC-DEMs before court in the Netherlands, it needs to be underlined that this analysis is tentative and must be applied with caution. Three reasons need to be given. First, while opening courts to TNC-DEMs might make the liability risks for Dutch corporations and other corporations more equal, it would also create a considerable burden on the Dutch court system. The Netherlands has limited resources to adjudicate foreign-cubed cases.[117] Moreover, adjudicating such claims might create a pull factor for which the Netherlands alone has not sufficient capacity.[118]

Second, as has been explained in Chapter 2 section 3.2, above, foreign-cubed civil cases – as they used to exist in the US under the Alien Tort Statute – are extremely controversial. While the analysis above indicates that Dutch judges can, in theory, act as real 'agents' of the international community addressing human rights violations against victims of TNC-DEMs in emerging and developing market corporations when it is 'impossible' to get a fair trial elsewhere, Dutch courts acting as 'world courts' would inevitably be badly perceived on a diplomatic level. This point of view was articulated by the Dutch government in its amicus curiae brief, which was written jointly with the UK government in the US *Kiobel* case.[119] Recall that this case involved a foreign claimant (Nigerian citizens), foreign defendants (Royal Dutch Shell based in the Netherlands and its subsidiary SPDC) and foreign activities (alleged aiding and abetting the Nigerian government to violate customary international law). The Dutch and UK governments set out that universal jurisdiction creates substantial risks of jurisdictional conflict. Such jurisdiction would frustrate principles of legal certainty and predictability because defendants would not be able to know in advance where they would be sued, and states with a greater nexus to the dispute would be prevented from effectively

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ondernemingen–inzake–internationaal–maatschappelijk–verantwoord–ondernemen> accessed 16 September 2016 p 75.
[116] Art 361(3) Wetboek van Strafvordering 1921 (NL).
[117] Business & Human Rights Resource Centre (n 77).
[118] Enneking (n 115) p 376.
[119] The UK (Government) and The Netherlands (Government) (n 83) pp 25–26.

resolving the dispute. On a more fundamental level, the Dutch and UK governments argued that jurisdictional restraints – essential to maintaining peace and comity – were imposed by international law. They asserted that abuses of peremptory norms of international law alone cannot justify civil jurisdiction in US courts. Such 'truly "universal" jurisdiction' is only well established in the criminal context. [120] This argument stands in stark contrast with the European Commission's amicus curiae brief (filed on behalf of the EU Member States) in the *Kiobel* case, which was in favour of universal jurisdiction in cases concerning peremptory norms of international law. [121] The two amici curiae briefs agree, however, that there is an 'exhaustion of remedies' requirement for extraterritorial claims. Claimants would have to be able to demonstrate that there were no effective remedies available in states having a closer factual nexus with the claim (such as the territorial state) before the US could assert subject-matter jurisdiction pursuant to the Alien Tort Statute. In the Dutch/UK amicus curiae brief, it is, in particular, suggested that 'superior access to evidence and/or the presence of nationals or residents as defendants within its jurisdiction' would amount to a closer factual nexus. [122]

Third, even when cases against TNC-DEMs can be brought before a Dutch court on the basis of the grounds listed above, it remains almost impossible for corporations to be held legally liable in the Netherlands for any involvement in human rights violations committed abroad. Claimants in such cases have faced significant procedural obstacles, and most cases have been dismissed at their preliminary stages. Cost of litigation, restrictions on the right to institute class actions and evidentiary problems are the most notable procedural barriers to justice. [123] These barriers are well documented in the literature on corporate violations by Dutch corporations in developing and emerging states and do not to be discussed here. [124] In addition, there are barriers created by notions of separate 'juridical personality' and 'limited liability', which are problematic for

[120] Ibid p 16.
[121] European Commission (on behalf of the EU), 'Brief as Amicus Curiae in Support of Neither Party in Kiobel v Royal Dutch Petroleum Co' Nr 10–1491 (13 June 2012).
[122] The UK (Government) and The Netherlands (Government) (n 83) p 34.
[123] See Jägers (n 92) p 36; Letter from Bert Koenders, the Minister of Foreign Affairs, Lilianne Ploumen, Minister for Foreign Trade and Development Cooperation, in conjunction with the Minister of Security and Justice to the House of Representatives (2016) <https://www.business-humanrights.org/sites/default/files/documents/BZ119755.pdf> accessed 30 September 2019 p 5.
[124] Eg Enneking (n 115).

those seeking to hold transnational corporations accountable. Transnational corporations regularly shield their accountability by making use of a group structure. Each entity of a corporate group is treated as an autonomous legal person in Dutch law.

3 Conclusions

This chapter first discussed the Dutch Child Labour Duty of Care Law. This innovative Law requires all corporations that operate in the Netherlands to do as much as is reasonably possible to prevent goods being sold or services being delivered to end-users in the Netherlands that have been produced using child labour. All corporations have to carry out an investigation to assess whether there is reasonable suspicion that their product or service involves child labour, anywhere in the world and to make a public 'duty of care' statement. Those corporations that find indications that there might be child labour in their supply chains also need to create a plan of action. Any stakeholder that has concrete evidence and finds that its interests are violated by non-compliance with the provisions under or pursuant to the Law can file a complaint which can lead to civil and criminal sanctions. The parliamentary debates took into account competition from transnational corporations based in developing and emerging states. As a result, foreign corporations – including TNC-DEMs – that sell or deliver goods or services to Dutch end-users more than once a year are subject to the Law. By mandating the same child labour standards across national and non-Dutch corporations that operate in its market, the Netherlands has created an artificial level playing field. The future will show whether the Netherlands has sufficient capacity to implement this broadly scoped regulation. It is not unthinkable that there might be a different 'enforcement' level between Dutch corporations and other corporations in practice due to capacity constraints. Third states might – in principle – object to regulation by the extraterritorial home state based on the principle of non-interference. Such objections by ILO Member States are, however, questionable because child labour is one of the four core labour rights. To date, the main opposition has come from corporations, and not from third states. Business organisations (that bear fewer reputational risks) have, amongst others, highlighted the importance of 'accompanying measures' to handle the complex issue of child labour. It can, indeed, be considered unfortunate that this has not been an integral part of the debates on the Law. It

has been hypothesised that this has not been discussed in-depth in the parliamentary debates because the Law needed to be framed as an effort to protect Dutch citizens as consumers in, and exposure to, the economic activity that sustains the market for child labour in order to make it effective and WTO-compliant. Nevertheless, it would certainly be desirable that accompanying measures to alleviate undesirable effects of child labour would be designed in the near future. All in all, it can be applauded that Dutch Parliament took the functionalist stance to compromise the short-term business interests of corporations that bear fewer reputational risks in order to take a new step on the long road in handling the complex problem of child labour. 'As much as possible' has been done in the Netherlands, even when other EU Member States and the EU are – at this point in time – not willing to do this. By doing so, it made the expectation that states would protect against corporate human rights violations when they operate abroad – describes in the UN Guiding Principles – legally binding. This is a prime example of interaction between soft law at the UN level and hard law at the national level, starting a process in which its non-binding character might be gradually lost. Future intervention in other EU Member States or at the EU level would provide more 'critical mass' – which minimises the burden on corporations that operate in the Netherlands – and leverage at a global level compared to possible action by the Netherlands alone. While both Dutch and foreign corporations can be fined by a supervising authority – and risk criminal proceedings – when they have not respected the Law, it remains much more difficult to bring foreign corporations in Court in the Netherlands. The second section of this chapter analysed the idea that, theoretically, in exceptional circumstances, some claims against TNC-DEMs can be brought in the Netherlands on the basis of Articles 2, 9 and 7(1) Code of Civil Procedure. It has, however, been explained that such controversial foreign-cubed claims will probably remain limited, due to procedural barriers to justice and the barriers created by notions of separate 'juridical personality' and 'limited liability'. Moreover, opening Dutch courts to TNC-DEMs would create a considerable burden on the Dutch court system. Such claims might create a pull factor for which the Netherlands alone does not have sufficient capacity or resources. The Dutch government indicated that it would prefer supporting local access to judicial remedies in developing and emerging states. Chapter 6 of this thesis presents a case study on the Kenyan floriculture industry, in which Dutch, Kenyan

and Indian entrepreneurs are well represented. This case study points out that, despite political limitations imposed by the Kenyan government, the Netherlands and other EU Member States can do much more to support local capacity building.

CHAPTER 5 EU MEMBER STATE: FRANCE

This chapter aims to investigate the extent to which France has attempted to rein in TNC-DEMs by imposing requirements as a matter of regulatory compliance, either as a direct obligation formulated in a rule, or indirectly by offering corporations the opportunity to defend against civil violations. In 2017, France became the first state in the world to adopt a supply chain responsibility law for all corporate risks, including human rights-related risks. This law goes much further than the Dutch Child Labour Duty of Care Law, which concerns the most sensitive of those human rights at work that entails considerable reputational damage and has been declared morally salient by the ILO. Section 1 of this chapter analyses the parliamentary debates preceding the *Loi sur le Devoir de Vigilance des Sociétés Mères* ('Law on Parent Corporations' Duty of Care'; 'the Law') in order to increase our understanding of the impact that competition in the global marketplace had on the genesis and the stringency of the Law. Section 2 of this chapter sets out that the French government prioritises working towards supporting local access to judicial remedies in developing and emerging states. However, there have, to the best of this author's knowledge, been no concrete initiatives to date. The analysis, therefore, focuses mainly on the avenues available to bring claims against TNC-DEMs in France. Interestingly, a number of civil liability claims have been brought against the Korean transnational corporation, Samsung, and its French subsidiary in criminal proceedings in France.

1 French Law on Parent Corporations' Duty of Care

Section 1.1 discusses the obligations, duty-bearers and sanctions in the Law on Parent Corporations' Duty of Care.[1] In the first instance, the Constitutional Council ultimately determined – after the adoption of the Law – that the Law has no direct impact on non-French corporations. The very existence of its sanction regime – consisting of civil liability actions – constitutes a significant legal and financial risk for the French corporations subject to the Law. However, the Law had the explicit ambition to anchor itself in the tradition that finds that there is a

[1] Loi Relative au Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses d'Ordre 2017 (FR) inserting art L 225–102–4 and 225–102–5 in Code du Commerce 1807 (FR).

linkage between trade and human rights (section 1.2). The competitive threat by TNC-DEMs and other non-French corporations was successfully reframed as subordinate to other 'perceived interests'.

1.1 Obligations, duty-bearers and sanctions

Promulgated by the French Parliament in February 2017, the Law on Parent Corporations' Duty of Care was inserted into the French Code of Commerce. The Law imposes obligations on certain large corporations regarding their own or their suppliers' activities. Specifically, these corporations are required to design a *plan de vigilance* ('duty of care plan') in collaboration with stakeholders of the corporation, and regularly report on its implementation. The plan should contain the following five elements. First, the plan should contain procedures to identify, analyse and rank risks relating to human rights and fundamental freedoms, health and safety of persons and the environment. Second, the plan should contain procedures to regularly assess, in accordance with the risk mapping, the situation of corporations it *controls* directly or indirectly, and subcontractors and suppliers with which it maintains an *established business relationship*. A corporation 'controls' another corporation where it exercises a dominant influence by virtue of a contract or statutory clauses; or if it is directly or indirectly holding a majority of voting rights; or if it appoints the majority of the members of the administration, management or supervisory bodies for a period of two consecutive financial years.[2] The concept of 'established business relationships' covers all types of stable, regular relations with a certain volume of business (with or without contracts) between professionals that creates a reasonable expectation that such relations will last. Third, the plan should contain appropriate actions to mitigate risks or prevent serious violations. Fourth, the plan should contain an alert mechanism that collects information on potential or actual risks, developed in partnership with trade union representatives. Finally, the plan should include a monitoring scheme to follow up and assess the efficiency of the implemented measures. The government is authorised to set out additional elements that need to be included in the plan. The plan, alongside the report of its effective implementation, is to be published in the management report of the board of directors (and available to the annual general meeting of shareholders). It cannot

[2] Art L 233–16 II Code du Commerce 1807 (FR).

be published in a separate report. This requirement brings into effect Article 34 Accounting Directive 2013/34/EU, which provides that a statutory auditor or audit firm shall assess whether the plan and the report are consistent with the financial statements, and whether they contain any material misstatements.[3]

According to Article 1, the Law is applicable to

> any corporation that employs, for a period of two consecutive financial years, at least five thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within French territory, or at least ten thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within French territory or abroad, shall establish and implement a duty of care plan in an effective manner.

There are two conditions. Regarding the first condition of corporate form, the government indicated that only *sociétés anonymes*, *sociétés en commandite par action* and *sociétés par actions simplifies* registered in the French *Registre du commerce et des societies* ('Register of Commerce') as described in the French Commercial Code fall under the Law.[4] Corporations that are 'controlled' by other corporations that are included in the vigilance plan of their parent corporation do not need to create their own vigilance plan. Regarding the second condition of employee threshold, the government indicated that those corporations that meet the size criteria would certainly be capable of 'establishing tracking and control tools', because they are equally capable of maintaining established supply chains and varied activities in various countries.[5] It was estimated that 150 corporations would meet the above conditions at the time of the adoption of the Law.

It is unclear whether the phrases 'whose registered office is located within French territory' and 'whose registered office is located within French territory or abroad' in Article 1 of the Law apply to 'any corporation' or, alternatively, to its 'direct or indirect subsidiaries'. This ambiguous formulation has led to discussion amongst

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[3] Art 34 Directive Nr 2013/34/EU on the Annual Financial Statements, Consolidated Financial Statements and Related Reports of Certain Types of Undertakings, Amending Directive 2006/43/EC of the European Parliament and of the Council and Repealing Council Directives 78/660/EEC and 83/349/EEC Text with EEA Relevance [2013] OJ L 182/19.
[4] France (Government), 'Observations du Gouvernement sur la Loi' 28 March 2017 Nr 5 Journal Officiel de La République française 0074j para 1.
[5] Jean–Marie Le Guen in France (Senate), Discussion d'une Proposition de Loi 21 October 2015 Nr 40.

commentators. Some have opted for the first interpretation, which is more extensive and includes TNC-DEMs located abroad that employ at least ten thousand employees directly or indirectly. For example, a right-wing Member of Parliament, expressed at the time of the adoption of the Law that 'our courts have to interpret this law as if it gives an extraterritorial dimension to the French law, which is possible under Article 1. Such interpretation would allow that they do not *only* penalise French corporations'. [6] Others have opted for the second interpretation, explaining that it not possible to make the Law directly applicable to foreign corporations that have no 'sufficient' territorial link with France. [7] Accordingly, the 'extraterritorial dimension' is only 'relative' or 'implicit'. [8] The Consultative National Commission on Human Rights had supported this interpretation in its 2013 report regarding business and human rights issues in France. [9]

It was only in March 2017 – after the Law was adopted – that it became clear that the second interpretation is the correct one. The French Constitutional Council stressed this by way of a reformulation

> corporations whose registered office is located in France and which, at the closure two consecutive financial years, employ at least five thousand employees themselves and in their French subsidiaries, or employ at

[6] Pierre Lellouche in France (Parliament), Lecture Definitive 21 February 2017 Nr 3 (emphasis added). See also Laurent Gamet, 'La Loi sur le Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses d'Ordre a été votée le 21 February 2017 et Fait l'Objet d'un Recours devant le Conseil Constitutionnel' (*Semaine Sociale Lamy,* 6 March 2017); Maxime Goualin, 'Droits Humains: Schneider Electric Prépare son Plan de Vigilance' (updated after reader comment) (*E–RSE* 19 June 2017) <https://e–rse.net/respect–droits–humains–schneider–electric–prepare–plan–de–vigilance–25973/> accessed 27 March 2018.

[7] Eg Christian Dargham and Rita Nader–Guéroult, 'Vers une Obligation Légale de Mise en Place d'un Dispositif de Prévention de la Corruption en France' (2015) <www.nortonrosefulbright.com/knowledge/publications/127110/vers–une–obligation–legale–de–mise–en–place–dun–dispositif–de–prevention–de–la–corruption–en–france> accessed 27 March 2018; Paul Mougeolle, 'Sur la Conformité Constitutionnelle de la Proposition de Loi Relative au Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses d'Ordre' (2017) La Revue des Droits de l'Homme para 65.

[8] Christophe-André Frassa representing Commission des Lois Constitutionnelles, de Législation, du Suffrage Universel, du Règlement et d'Administration General (Senat), 'Rapport sur la Proposition de Loi adoptée par l'Assemblée Nationale, relative au Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses d'Ordre' 14 October 2015 Nr 74 p 34; Christophe–André Frassa in France (Senate), Discussion d'une Proposition de Loi 21 October 2015.

[9] France (Commission Nationale Consultative des Droits de l'Homme), 'Business and Human Rights: Opinion on the Issues associated with the Application by France of the United Nations Guiding Principles' (24 October 2013) <www.business–humanrights.org/sites/default/files/media/documents/cncdh–opinion–france–ungp–oct–2013.pdf> accessed 7 December 2018 p 19.

> least ten thousand employees themselves and in their French and foreign subsidiaries, are bound by the obligation to establish a duty of care plan.[10]

Therefore, the Law does not directly create obligations for corporations that are registered outside France, including in developing and emerging states. The Law only creates indirect obligations for foreign corporations that are subsidiaries of or controlled by corporations registered in France that satisfy the conditions of the corporate form and the employee threshold.[11]

Two sanction regimes guarantee that the Law does not remain 'dead letter'.[12] First, any concerned party has legal standing can request those corporations that fall under the Law to establish, publish or implement a duty of care plan within three months.[13] Afterwards, this party can also ask a court to determine whether a corporation has failed to respect the Law. The court may direct the corporation to do so. The court may also impose *astreintes* (i.e. periodic injunctive fines payable on a daily or per-event basis until the defendant satisfies a given obligation). Second, victims of corporations failing to comply with their duty of care plan, or with an inadequate plan, can bring a civil liability action in court to seek damages for negligence.[14]

In accordance with general tort law principles, as articulated in Articles 1240 and 1241 Civil Code, liability will depend on the demonstration of fault, damage on the part of the corporation and a causal relationship between fault and damage suffered.[15] The fault has to result from violations of the obligations stipulated by Article 1 of the Law. The sponsors of the Law initially sought to reverse the burden of proof in civil liability actions in order to correct the imbalance of power between corporations subject to the Law and victims. However, this element was

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[10] Conseil Constitutionnel (23 March 2017) Nr 2017–750 <www.conseil–constitutionnel.fr/decision/2017/2017750DC.htm> accessed 11 September 2018 para 3.
[11] France (Government), Observations du Gouvernement sur la loi Relative au Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses d'Ordre 28 March 2017 Journal Officiel de La République française Nr 5 para 1.A. See Stéphane Brabant and Elsa Savourey, 'Scope of the Law on the Corporate Duty of Vigilance' (2017) 50 International Review of Compliance and Business Ethics pp 2 and 7.
[12] Jacques Krabal in France (Parliament), Lecture Définitive 21 February 2017 Nr 3.
[13] Art 1 Loi Relative au Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses d'Ordre 2017 (FR); Dominique Potier representing la Commission des Lois Constitutionnelles, de la Législation et de l'Administration Générale de la République (Parliament), 'Rapport sur la Proposition de Loi nr 3239 Rejetée par le Sénat en Première Lecture' 16 March 2016 Nr 3582 pp 14–15.
[14] Conseil Constitutionnel (n 10) para 28.
[15] Arts 1240 and 1241 Code Civil 1804 (FR).

ultimately removed from the Bill.[16] The general rule of Article 9 Code of Civil Procedure is, therefore, applicable, which provides that the burden of proving the fault, damage and causal link falls on the party requesting remedy.[17] This requirement comes on top of other procedural and material barriers that make it difficult to gain access to courts in France, including high costs and the limited circumstances in which class actions can be brought. In reality, it will thus be extremely difficult to bring any case before court. According to Nicolas Maziau, it is not desirable that the Law alleviates such barriers because such a result would create additional litigation risks that non-French corporations do not have to bear.[18]

French business organisations also stated that the Law would handicap them.[19] The President of *Association française des entreprises privées* ('French association of private enterprises'; AFEP) wrote that the Law threatens the governments' ambitions to 'restore the competitiveness and attractiveness of our country and to support the development of corporations', in a letter to Emmanuel Macron, who was the Minister of Economy, Industry and Digital Affairs at the time.[20] Higher compliance costs, liability risks and the risk of disclosing confidential information, put large French corporations at risk as long as there is no global level playing field.[21] Such risks would be felt at home and in the wider world. On the one hand, French corporations would suffer in the domestic market as 'foreign corporations that distribute products on the French market' are generally not included within the scope of the Law.[22] Similarly, investors would have an incentive to invest

[16] Evelyne Didier in France (Senate), Discussion d'une Proposition de Loi 21 October 2015 Nr 40.
[17] Art 9 Code de Procédure Civil 1973 (FR).
[18] Nicolas Maziau, 'La Responsabilité des Entreprises Multinationales en Matière des Droits de l'Homme: Rapports "Mère–Fille" et Application Extraterritoriale du Droit. Brève Analyse de Jurisprudence Comparée' (2016) 4 Revue Internationale du Droit des Affaires pp 9–11.
[19] AFEP, 'Communiqué de Presse' (2015) <www.contexte.com/positions/proposition–de–loi–sur–la–responsabilite–des–societes–meres–et–entreprises–donneuses–dordre–28012.html> accessed 30 September 2019 pp 3–4; Chambre de Commerce et d'Industrie de Région Paris Ile–de–France, 'Proposition de Loi Instaurant une Obligation de Vigilance à l'Encontre de Certaines Sociétés Réaction Synthèse' (2015) <www.cci–paris–idf.fr/sites/default/files/etudes/pdf/documents/obligation–de–vigilance–1506.pdf> accessed 4 November 2018 p 1; MEDEF, 'Devoir de Vigilance: une Loi Inefficace Qui Menace Notre Economie' (2016) <www.medef.com/fr/communique–de–presse/article/devoir–de–vigilance–une–loi–inefficace–qui–menace–notre–economie> accessed 5 July 2018.
[20] Letter from Pierre Pringuet, Président AFEP to Emmanuel Macron, Ministre de l'Economie, de l'Industrie et du Numérique (4 February 2015).
[21] AFEP (n 19). See also Frassa (n 8) pp 43–44.
[22] Michel Vaspart in France (Senate), Lecture Définitive 18 November 2015.

outside France. This would create a negative impact on jobs in France.[23] On the other hand, French corporations would suffer in the wider world, particularly when they compete with TNC-DEMs. To illustrate this point, a right-wing Member of Parliament cited a 2015 study that indicates that corporations based in OECD Member States are three times as likely to have a CSR management system than corporations based in the BRICS countries.[24] The concerns of business organisations resulted in considerable changes relating to the size barriers and the sanction regime relatively early in the legislative process in Parliament, in 2015, at the request of the government.[25] After this changed Bill had been approved in Parliament with a majority of 94 to 4 (out of 103 Members that were present to vote), the Senate rejected the Bill by a prejudicial motion.[26] The Senate found that the Bill would create a disproportional attack on the competitiveness of French corporations in the absence of similar foreign legislation. This can be considered a particularly strong signal from the Senate, as such a motion had only been used once before (since its introduction in 1959). In March 2016, the Parliament voted again on the Bill, but the Senate obstructed it again by adopting a new text without binding sanctions. When the Bill was ultimately adopted by Parliament in 2017 – less than three months before the Presidential elections and just before the dissolution of Parliament – 120 Members of the Senate and Parliament brought their case before the Constitutional Council, a case to which this section has referred already. The Council found, in its decision of March 2017, that the freedom to trade and do business can be subject to limitations for the benefit of other constitutional principles relating to public interest.[27] It held that the liberty of enterprise is not unlimited, by referring to Article 4 of the 1789 *Déclaration des Droits de l'Homme et du Citoyen* ('Declaration

[23] Frassa (n 8) p 37. See also Philippe Dalier in France (Senate), Lecture Définitive 18 November 2015.
[24] Patrick Hetzel in Potier (n 13) referring to Médiation Inter–Entreprises and Ecovadis, 'Comparatif de la Performance RSE des Entreprises françaises avec celle des pays de l'OCDE et des BRICS' (2015) <www.economie.gouv.fr/files/files/directions_services/mediateur–des–entreprises/PDF/Etude_Conjointe_EcoVadis_Mediation_InterEntreprises.pdf> accessed 30 September 2019 p 5. See also Didier Marie in France (Senate), Discussion d'une Proposition de Loi 21 october 2015 Nr 40.
[25] Patrice Carvalho in France (Parliament), Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses d'Ordre Lecture Définitive 21 February 2017 Nr 3; Mougeolle (n 7) paras 56 and 81.
[26] Art 44(4) Règlement du Senat et Instruction Générale du Bureau (1958) <www.senat.fr/reglement/reglement_moNohtml> accessed 9 July 2018; Frassa (n 8) pp 43–44. See also Christophe–André Frassa and Anne–Catherine Loisier in France (Senate), Discussion d'une Proposition de Loi 21 October 2015 Nr 40; Philippe Dalier and Joël Labbé in France (Senate), Lecture Définitive 18 November 2015; Patrick Hetzel in Potier (n 13) p 22.
[27] Conseil Constitutionnel (n 10) para 28.

of the Rights of Man and of the Citizen'), which holds that 'Liberty consists in being able to do anything that does not harm others'. The Council set out that the duty of care established by the Law does not reveal the industrial or commercial strategies of corporations subject to the Law.[28] The Council's decision is perhaps surprising, as it had a tendency to prioritise the perceived interests of business organisations in other recent decisions.[29] For example, in 2016, the Council declared the proposed Article 137 Sapin II law – which introduced country-by-country reporting obligations to prevent the relocation of tax bases – unconstitutional because it would have created a disproportionate interference with the freedom of enterprise.[30] At that time, the Council argued that all operators in the markets where those activities are carried out – and, in particular, competitors of French corporations – would be able to identify the essential elements of their industrial and commercial strategy.

1.2 Aim and relation to the international and EU perspectives

The Law explicitly aims to encourage responsible business conduct in order to prevent tragic events in France or abroad and to obtain remediation for victims in the event of violations relating to human rights and the environment.[31] Contrary to the sponsors of the Dutch Child Labour Duty of Care Law, the sponsors of the Law tried not to avoid the debate on a linkage between trade and human rights. The left-wing Member of Parliament, Dominique Poitier, and the other sponsors of the Law expressed a viewpoint that is similar to France's stance during the WTO's Singapore Round, in which France stressed the indivisibility of French interests from those of the world at large.[32] They explained that while global trade liberalisation contributes to the economic influence and development of the countries participating in it, it is also accompanied by certain practices that have

[28] Ibid para 18.
[29] See Olivier Petitjean, 'Quand le Conseil Constitutionnel se Fait Gardien des Intérêts des Grandes Entreprises' *Basta !* (Paris, 1 March 2017) <www.bastamag.net/Quand-le-Conseil-constitutionnel-se-fait-le-gardien-des-interets-des-grandes#nb53-3> accessed 30 September 2019.
[30] Art 137 Loi relative à la Transparence, à la Lutte Contre la Corruption et à la Modernisation de la Vie Economique 2016 (FR); Conseil Constitutionnel (8 December 2016) Nr 2016-741 <www.conseil-constitutionnel.fr/decision/2016/2016741DC.htm> accessed 11 September 2018.
[31] France (Parliament), Proposition de Loi Nr 1897 2014 p 2.
[32] See Martii Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge University Press 2002) pp 266-317.

a negative impact on human rights (and the environment).[33] Poitier expressed further his conviction that 'the fight for the dignity of workers and people at the end of the world and at the end of the street is the same'.[34] The majority of the Members of Parliament invoked similar sentiments. One Member of Parliament said, 'certainly, free trade is beneficial because it brought prosperity to our countries, but at the cost of much suffering in other countries of the world'.[35] Another asserted that 'we have to curb ultraliberalism'.[36] Rawi Abdelal and Sophie Meunier have traced the French proactive attitude regarding CSR back to the French socialist tradition of the 1980s, which tries to provide an answer to unbridled globalisation and trade liberalisation by exercising power in the WTO, the EU and other global institutions.[37]

Many Members in the Senate and a small minority in the Parliament questioned, however, whether 'a French law could change anything on the ground in economically developing countries'.[38] The *rapporteur* of the Senate Christophe-André Frassa wrote in this regard that the Law would be costly and disproportional, and would ultimately change nothing regarding the situation of workers (and the protection of the environment) in the Global South.[39] In so doing, the Senate aligned its stance with that of French business organisations. AFEP's President explained, for example, that it is not up to France to 'globalise human rights', noting that 'a large French corporation cannot impose the freedom of association in certain countries in Asia nor the equality between men and women in the Middle East'.[40]

The Law 'transcribes diplomatic engagements into French law and clarifies the legal climate ... enabling work towards respect for human rights and

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[33] France (Parliament), Proposition de Loi 29 April 2014 Nr 1897 p 2.
[34] Dominique Potier in France (Parliament), Lecture Définitive 21 February 2017 Nr 3. See also Dominique Potier in France (Parliament), Première Lecture 30 March 2015 Nr 2.
[35] Anne–Yvonne Le Dain in France (Parliament), Lecture Définitive 21 February 2017 Nr 3.
[36] Jacques Krabal in France (Parliament), Lecture Définitive 21 February 2017 Nr 3.
[37] Rawi Abdelal and Sophie Meunier, 'Managed Globalization: Doctrine, Practice and Promise' (2010) 17(3) Journal of European Policy pp 353–356.
[38] Patrick Hetzel in France (Parliament), Lecture Définitive 21 February 2017 Nr 3. See also Philippe Houillon in Potier (n 13) pp 23–24.
[39] Dominique Potier and Christophe André Frassa representing la Commission Mixte Paritaire Chargée de Proposer un Texte sur les Dispositions (Parliament and Senat), 'Rapport' 2 November 2016 Nr 4184 (Parliament) and Nr 99 (Senat) p 5.
[40] Gaëlle Macke, 'Bataille de Lobbying sure le 'Devoir de Vigilance' des Multinationales' *Challenges* (Paris, 30 November 2016) <www.challenges.fr/economie/bataille–de–lobbying–sur–le–devoir–de–vigilance–des–multinationales_440825> accessed 30 September 2019.

environmental norms in global commercial transactions'.[41] In particular, the Law fits in with France's engagement to respect, protect and fulfil those human rights included in the 1948 Universal Declaration of Human Rights and in subsequent human rights instruments that it has ratified. It concerns the ECHR and all eighteen UN covenants and protocols but one.[42] As a Member State of the ILO, France also has to adhere to the Declaration on Fundamental Principles and Rights at Work, which targets the four core labour rights.

The Law has also been shaped by the UN Guiding Principles. The concept of *vigilance* ('duty of care') is inspired by the concept of 'due diligence', in the sense of the UN Guiding Principles (and the updated OECD guidelines).[43] The former UN Special Representative for Business and Human Rights John Ruggie referred to the Law as an example where the UN Guiding Principles managed to 'trigger an iterative process of interaction among ... global governance systems, producing cumulative change over time', in his paper 'The Social Construction of the UN Guiding Principles'.[44] These principles helped domestic 'norm entrepreneurs' advocating a minority position to strengthen their position in domestic debates.[45] While the UN Guiding Principles do not establish extraterritorial obligations, they 'encourage' states to hold their private transnational corporate nationals accountable, if these business entities engage in human rights violations abroad.[46] In so doing, they confirmed to those in favour of the Law in Parliament that it is 'reasonable to have a unilateral attitude franco-française ... outside any international established framework'.[47] Civil society organisations used the UN Guiding Principles as a springboard to mobilise expert lawyers and to overcome

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[41] France (Parliament), Proposition de Loi 29 april 2014 Nr 1897.
[42] France has not signed the ICPRM.
[43] France (Parliament), Proposition de Loi 29 April 2014 Nr 1897 pp 3–4.
[44] John Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights' (2017) Harvard University Corporate Responsibility Initiative Working Paper Nr 67 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2984901> accessed 30 September 2019 p 13.
[45] Cf Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52(4) International Organization p 895.
[46] Commentary to UN Guiding Principle 2.
[47] Michel Vaspart in France (Senate), Lecture Définitive 18 November 2015. See also Anne–Catherine Loisier in France (Senate), Discussion d'une Proposition de Loi 21 October 2015 Nr 40; Pierre–Louis Périn, 'Devoir de Vigilance et Responsabilité Illimitée des Entreprises: qui Trop Embrasse Mal Etreint' (2015) 2 Revue Trimestrielle de Droit Commercial et de Droit Economique p 217; Régis Bismuth, 'La Responsabilité (limitée) de l'Entreprise Multinationale et son Organisation Juridique Interne – Quelques Réflexions Autour d'un Accident de l'Histoire' (2017) <www.regisbismuth.com/publications/articles–book–chapters> accessed 16 November 2018 p 437.

ideological differences with trade unions.[48] Together, they mediatised the collapse of the 2013 Rana Plaza factory building in Bangladesh, where labels of the French retailer Auchan's house brand were found. This helped them to convince more than 120,000 French citizens to sign a petition in favour of the Law.

This seems to be, however, not a sufficient explanation as to why France has established itself as a 'first mover' in adopting binding legislation that goes further than any other law in the world. Traditions that perceive international relations in an instrumental manner – in particular, the functionalist approach – provides a useful analytical lens to understand how Members of Parliament approached concerns raised by business organisations and senators. These approaches explicate that states engage in international regimes when the 'perceived interests' of doing so outweigh the costs.[49] Prior to assessing the discourse that was successfully employed by the sponsors of the Law, it is important to consider that 'perceived interests' are not always rational but 'bounded' and 'influenced by emotions', as well as 'procedural and distributive justice'.[50] Political psychologists have theorised that the perception of interests is contextual and dynamic as they depend on 'history, development and learning'.[51] It is, for example, useful to mention that the French Senate does not ultimately have the power to overturn a law ratified by the French Parliament. France has also often been 'ahead of the curve', because state intervention is the 'preferred mode of problem solving'. Alice Evans noted in this regard that the French CSR movement has previously fuelled regulation without an increase in voluntary initiatives, including the Grenelle II legislation.[52]

It was reasoned that it would be in the perceived interested of both French corporations and France to adopt a law with binding preventive obligations that

[48] Anne–Catherine Loisier in France (Senate), Discussion d'une Proposition de Loi 21 October 2015 Nr 40; Patrice Carvalho, Dominique Potier and Michel Sapin in France (Parliament), Lecture Définitive 21 February 2017 Nr 3.
[49] Jennifer Shkabatur, 'A Global Panopticon? The Changing Role of International Organisations in the Information Age' (2011) 33 Michigan Journal of International Law p 175; Alice Evans, 'Hope for Reform Strengthening Corporate Accountability in Global Supply Chains' (2018) <www.researchgate.net/publication/326293484_hope_for_reform_strengthening_corporate_accountability_in_global_supply_chains> accessed 20 August 2019 p 4.
[50] Anne van Aaken, 'Behavioural International Law and Economics' (2014) 55(2) Harvard International Law Journal p 436.
[51] Rose McDermott, *Political Psychology in International Relations* (University of Michigan Press 2004) p 7.
[52] Evans (n 49) p 16 referring to Loi Nr 2010–788 Portant Engagement National pour l'Environnement (Grenelle II) 2010 (FR);.

reach beyond its borders; something that no other state had done before. Two arguments have been made for adopting such obligations. First, it was said that French corporations would benefit from the Law in the long run. Three points were made. To begin with, it was stated that 'prevention is cheaper than cure'.[53] The Law would diminish the total costs for corporations by 'preventing possible accidents, pollution and social conflicts'.[54] In addition, it was said that investors would appreciate both the continued good reputation of French corporations and the legal certainty offered by the Law.[55] It was predicted that they would not stop investing in France, as French people have a certain 'purchasing power' and are increasingly sensitive to the ethical and environmental dimensions of corporate behaviour.[56] Finally, it was said that 'those who act as an example will have the competitive advantage'. [57] By promoting good practices, the Law helps corporations to anticipate future international reglementary constraints.[58] The sponsors of the Law stated that corporations that 'blossom tomorrow are those who adapt to the increasing complexity of commercial transactions in the world today'.[59] This point is an application of the 21st-century movement that identifies future regulation as 'a source of sustainable competitive advantage'. [60] Accordingly, not only the CSR actions taken concerning respect for human rights, but yet-to-be established international regulation on human rights can be a source of sustainable competitive advantage. Current delays in the issuing of preventive binding due diligence regulation in other countries can potentially shape opportunities for corporations subject to the Law to experiment and gradually implement due diligence practices. It gives them the chance to create practices that are valuable, rare and difficult to substitute by competitors.[61] When other

[53] Didier Marie in France (Senate), Discussion d'une Proposition de Loi 21 October 2015.
[54] Ibid.
[55] Antoine Lyon–Caen, 'Intervention devant la Commission des Lois de l'Assemblée Nationale le 5 Mars 2015 avec une Présentation de la Proposition de Loi' (2015) 7–8 Revue de Droit du Travail pp 447–450; Évelyne Didier in France (Senate), Discussion d'une Proposition de Loi 21 October 2015; Anne–Yvonne Le Dain in Potier (n 13) p 23; Michel Sapin in France (Parliament), Lecture Définitive 21 February 2017 Nr 3.
[56] Didier Marie in France (Senate), Discussion d'une Proposition de Loi 21 October 2015; Michel Sapin in France (Parliament), Lecture Définitive 21 February 2017 Nr 3.
[57] Jérôme Durain in France (Senate), Lecture Définitive 18 November 2015. See also Jean-Marie Le Guen in France (Senate), Discussion d'une Proposition de Loi 21 October 2015 Nr 40.
[58] France (Parliament), Proposition de Loi 29 April 2014 Nr 1897.
[59] Ibid.
[60] George Siedel and Helena Haapio 'Using Proactive Law for Competitive Advantage' (2010) 47 American Business Law Journal pp 641–686; Robert Bird and David Orozco, 'Finding the Right Corporate Legal Strategy' (2014) 56(1) MIT Sloan Management Review.
[61] Robert Bird, 'Law, Strategy, and Competitive Advantage' (2011) 44 Connecticut Law Review p 63.

states adopt enforceable legislation, these corporations can rely upon the capabilities that they have developed and use these practices as sources of sustainable competitive advantage.[62] As laggard corporations emulate French corporations, their best practice will be competitive parity and not competitive advantage.[63]

Second, it was said that it was in the perceived interest of France to adopt due diligence regulation early, as it gives France considerable leverage in the diplomatic process as well as in how those rules should look. Poitier has anticipated that other EU Member States would use the Law as a blueprint before any EU initiative would be established.[64] He stated that France was capable of exercising such influence as it had significant market power in Europe.[65] France is home to eleven out of the fifty biggest European corporations (including Switzerland).[66]

This argument was strengthened by an emotive discourse regarding France's role in the EU. At one point, AFEP noted that an EU initiative would be 'acceptable' as it would extend the protection of the competitiveness of corporations that operate in France, while at the same time creating structural solutions regarding due diligence that would enable benchmarking across the internal market.[67] This can be considered as a major concession, given that, in fact, only an initiative with a global reach can overcome all the immediate competitive threats that non-EU corporations, including TNC-DEMs, pose.

Poitier objected, however, that pursuing such a 'top down' approach was similar to 'giving up any prospect of success'.[68] He said that 'history teaches us that it is

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[62] Ram Nidumolu, CK Prahalad and MR Rangaswami, 'Why Sustainability is Now the Key Driver of Innovation' (2009) 9 Harvard Business Review.
[63] Cf Michael Porter, 'Changing Patterns of International Competition' (1986) 28(2) California Management Review pp 9–40.
[64] Potier (n 13) pp 6, 8 9 and 21.
[65] Ibid.
[66] France (Parliament), Proposition de Loi 29 april 2014 Nr 1897.
[67] Letter from Pringuet (n 20). See also AFEP (n 19) pp 1–2; Chambre de Commerce et d'Industrie de Région Paris Ile–de–France (n 19) p 1; Anne–Catherine Loisier and Didier Marie in France (Senate), Discussion d'une Proposition de Loi 21 October 2015 Nr 40; Patrick Hetzel in Potier (n 13).
[68] Potier (n 13) pp 6, 8 and 12; Fanny Roux, 'Dominique Potier: "Il Faut Dédramatiser la Proposition de Loi sur le Devoir de Vigilance"' *Contexte* (Paris 17 March 2016) <www.contexte.com/article/pouvoirs/dominique–Potier–il–faut–dedramatiser–la–proposition–

almost always national initiatives that put Europe on the path of progress'.[69] Accordingly, EU Member States need to 'dare to anticipate and be a pioneer to make sure that the EU, which is often slow [to act], starts asking questions'.[70] Not doing so would be a 'lack of courage'.[71] France was framed as being particularly well suited to take on the role of 'motor of change' that 'shows the way' and 'educates other countries'.[72] Expressive language was used to depict France as 'an example' and 'a brand' that has always been *à l'avant garde*.[73] Protesting against the Law was framed as 'against the history of our country', which was labelled as 'the homeland of human rights'.[74] Poitier has also indicated that the Law was 'in the tradition of the French revolution and the Enlightenment'.[75] Reference was made to the French tradition of Gaullism and to Henri Grégoire and Victor Schœlcher, two ardent abolitionists of slavery, who 'considered that the economy is in service of people and not the other way around, and that she [France] has to contribute to social progress and a better world'.[76] It was voiced that also, back then, there were opponents who argued that France would weaken itself by abolishing slavery before other countries. Reference was made to successful precedents where France did not wait for the 'permission of Brussels to advance', which fueled the conviction that other countries would follow suit.[77] It was correctly affirmed that the Grenelle II legislation had served as 'a driving force' for the Non-Financial Reporting Directive.[78] It was further explained that EU Regulation 421/2014, which installed a temporary scheme for greenhouse gas

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de–loi–sur–le–devoir–de–vigilance_48452.html> accessed 8 July 2018. See also Dominique Raimbourg in France (Parliament), Lecture Définitive 21 February 2017 Nr 3.

[69] Potier (n 13) pp 9 and 21.

[70] Ibid pp 9 and 21; Potier and Frassa (n 39) p 4.

[71] Didier Marie in France (Senate), Discussion d'une Proposition de Loi 21 October 2015 Nr 40; André Chassaigne in France (Parliament), Lecture Définitive 21 February 2017 Nr 3.

[72] Michel Le Scouarnec and Didier Marie in France (Senate), Lecture Définitive 18 November 2015; Dominique Potier and Michel Sapin in France (Parliament), Lecture Définitive 21 February 2017 Nr 3.

[73] France (Parliament), Proposition de Loi 29 April 2014 Nr 1897; Didier Marie in France (Senate), Discussion d'une Proposition de Loi 21 October 2015 Nr 40; Potier (n 13) p 8.

[74] Didier Marie in France (Senate), Discussion d'une Proposition de Loi 21 October 2015 Nr 40.

[75] Dominique Potier in France (Parliament), Lecture Définitive 21 February 2017 Nr 3. See also Potier (n 13) p 17.

[76] Didier Marie in France (Senate), Discussion d'une Proposition de Loi 21 October 2015 Nr 40.

[77] Jérôme Durain in France (Senate), Lecture Définitive 18 November 2015. See also Jean–Marie Le Guen in France (Senate), Discussion d'une Proposition de Loi 21 October 2015 Nr 40.

[78] Jérôme Durain in France (Senate), Lecture Définitive 18 November 2015; Potier (n 13) pp 6, 8 and 12; Mireille Delmas–Marty and Kathia Martin–Chenut, 'Droits de l'Homme: Enfin "Un Devoir de Vigilance pour les Entreprises Transnationales"' *Le Monde* (Paris, 1 March 2017) <www.lemonde.fr/idees/article/2017/03/01/droits–de–l–homme–enfin–un–devoir–de–vigilance–pour–les–entreprises–transnationales_5087320_3232.html> accessed 2 November 2018.

emission, followed from French President Jacques Chirac – together with Brazilian President Lula Da Silva – threatening to impose a 'solidarity tax' on flight tickets.[79]

The portrayal of the 'perceived interests' that the Law would fulfil appealed to Michel Sapin, the minister who replaced Macron when the latter left his post to work on his Presidential campaign. He stressed that 'the law will pay tribute to our country' and the socialism for which President François Hollande had campaigned before his election.[80] This is not entirely true. Hollande had suffered major losses to right-wing political parties in French municipal elections in 2014 because he had not been capable of living up to his promises to create jobs and to lower taxes. He subsequently appointed Macron to the post of minister.[81] Contrary to Sapin, Macron reportedly refused to meet NGO representatives, and referred to the Secretary of State for Relations with Parliament as the person responsible.[82] The reluctant attitude of Macron and Hollande was confirmed by the fact that they, together with Emmanuel Valls – the Prime Minister, who had also been appointed after the 2014 municipal elections – retracted the new Article L 117-1 Commercial Code, which had not come into effect at the time.[83] This was a clear signal that places corporations over people. As a result, consumers who had reasons to assume that products placed on the market in France had been produced in violation of international human rights norms, lost their right to obtain information on the origin of products from manufacturers, producers and distributors. If his record of accomplishment as President of France is any indication of his past priorities, it even appears that Macron does not see a special role for France as a motor of change within the EU. Since he assumed office in 2017, he has frequently used the concept *surtransposition* ('over-

[79] European Parliament and Council Regulation Nr 421/2014 Amending Directive 2003/87/EC Establishing a Scheme for Greenhouse Gas Emission Allowance Trading within the Community, in View of the Implementation by 2020 of an International Agreement Applying a Single Global Market–based Measure to International Aviation Emissions Text with EEA Relevance (2014) OJ L 129/1.
[80] Michel Sapin in France (Parliament), Lecture Définitive 21 February 2017 Nr 3.
[81] Olivier Petitjean, 'Le Devoir de Vigilance des Multinationales Revient devant l'Assemblée Nationale' (*Observatoire des Multinationales*, 23 March 2016) <http://multinationales.org/Le–devoir–de–vigilance–des–multinationales–revient–devant–l–Assemblee–nationale> accessed 5 December 2018.
[82] Guillaume Delalieux, 'La Proposition de Loi "Devoir de Vigilance": vers la Fin de l'Impunité des Firmes Multinationales' in Michel Hastings and Bruno Villalba (eds), *De l'Impunité: Tensions, Controverses et Usages* (Presses Universitaires du Septentrion 2017) pp 235–237.
[83] Art 34 Ordonnance Nr 2016–301 retracting art L. 117–1 in Code du Commerce 1807 (FR) (created by art 93 Loi Nr 2014–856 relative à l'Economie Sociale et Solidaire 2014 (FR)).

transposition'), a concept that was also employed by opponents of the Law, to turn back any legal efforts that go further than EU law.[84]

2 Civil judicial remedies

This section first explains that the French government prioritises supporting local access to judicial remedies in developing and emerging states for victims of corporate abuse. There have, however, to the best of this author's knowledge, been no concrete initiatives to date. This section, therefore, focuses mainly on the (largely hypothetical) avenues to bring claims against TNC-DEMs in France.

The French NAP sets out that care should be taken that extraterritorial civil judicial remedies which are exclusively available to victims of French corporations do not create 'an uneven playing field for French corporations'.[85] This observation is similar to Maziau's claim that it would not be desirable that the Law alleviates barriers to justice, because this would create additional litigation risks that non-French corporations do not have to bear.[86] The *Rapporteur* of the Senate, Frassa proposed that extraterritorial civil judicial remedies should be subordinate to local capacity development in developing and emerging states. It is useful to cite him directly

> development is the challenge: we have to help these countries – which serve as the workplaces of this world – to improve the fate of their workers and to provide an effective judicial system to sanction and compensate on their own territories.[87]

As written in Chapter 2 section 3.3, above, local capacity building has a variety of advantages, including not distinguishing between TNC-DEMs and French corporations (nor between transnational supply chains and corporations with local supply chains). There has, however, to date, not been any dedicated initiative to support the capacity to remedy corporate violations locally in developing and emerging states. There would certainly be leverage for France to be involved in

[84] Eg Philippe Dalier, in France (Senate), Lecture Définitive 18 November 2015. See France (Government), 'France's Method of Working on European Issues' <www.gouvernement.fr/en/france–s–method–of–working–on–european–issues> accessed 5 December 2018.
[85] France (Government), 'NAP' (2017) implementation UN Guiding Principle 26.
[86] Maziau (n 18) pp 9–11.
[87] Christophe–André Frassa in France (Senate), Discussion d'une Proposition de Loi 21 October 2015.

local capacity-building projects in bilateral and multilateral partnerships. The French official development assistance budget will be increased in coming years. In 2017, France spent 0.43 per cent of its GNI on official development assistance. President Macron has committed to increasing this level to 0.55 per cent by 2022.[88] This target would still be lower than France committed to spending in 1970 before the UN General Assembly. In addition, there is room to make the management of official development assistance more efficient, including by evaluating the impact of aid and by collaboration at the EU level.[89] Civil society organisations and private corporations could also be better supported. Currently, development assistance is provided exclusively through public agencies.[90]

Recall that Article 4 Brussels I Regulation preserves the traditional rules for defendants who are not domiciled in a Member State. [91] France employs thus different policies as regards the assertion of jurisdiction over non-EU defendants than the Netherlands and other EU Member States. Five avenues will be discussed in turn: Article 42(1) Civil Procedural Code, Article 14 Civil Code, the 'forum by necessity' doctrine, Article 42(2) Civil Procedural Code and civil liability claims in criminal proceedings.

First, Article 4 Brussels I Regulation establishes that entities domiciled in an EU Member State shall be sued in the courts of that Member State, regardless of the victim's nationality and state of residence, and regardless of where the harm occurred. This principle is mirrored in Article 42(1) French Civil Procedural Code.[92] The existing cases mostly concern French corporations, but recall also that, according to Article 63(1) Brussels I Regulation, TNC-DEMs that have their

[88] Emmanuel Macron, 'Transcription du Discours du Président de la République à la Conférence des ambassadeurs' (2018) <www.elysee.fr/emmanuel-macron/2018/08/27/discours-du-President-de-la-republique-a-la-conference-des-ambassadeurs> accessed 30 September 2019.
[89] See Hervé Berville, 'Un Monde Commun, Un Avenir Pour Chacun' (2018) <www.ladocumentationfrancaise.fr/var/storage/rapports-publics/184000579.pdf> accessed 12 September 2019.
[90] Vince Chadwick, 'Macron's Development Vision Takes Shape' *Devex* (Brussels, 11 September 2018) <www.devex.com/news/macron-s-development-vision-takes-shape-93375> accessed 30 September 2019.
[91] Art 4 Council and European Parliament, Regulation Nr 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2012] OJ L 351. See Chapter 3 Section 4.
[92] Art 42(1) Code de Procédure Civil 1973 (FR).

statutory seat, central administration or principal place of business in an EU Member State are considered to be domiciled there.

It follows that, in principle, two types of TNC-DEMs can be brought before courts in France, under EU Regulation 1215/2012, for violations committed abroad. First, French courts have jurisdiction, under certain circumstances, over TNC-DEMs that have a branch with a statutory seat in France.[93] French courts have installed two conditions that such claims need to satisfy in order to be heard.[94] On the one hand, the said branch needs to be sufficiently autonomous. This means that it cannot act as a mere go-between. On the other hand, the claim must only concern the specific activities of that branch. Second, French courts have jurisdiction over TNC-DEMs that, despite not having their statutory seat in France, conduct their primary management or commercial activities in France.

Second, according to Article 14 Civil Code, if a harmful event occurs outside the EU and the EEA, French nationals can file proceedings in the French courts on a subsidiary basis, regardless of the nationality of the perpetrator.[95] This ground is relevant for victims of TNC-DEMs in third states in two (exceptional) cases. First, this ground is relevant to claimants who are not French nationals, but who are residents or refugees in France.[96] According to Article 6(2) EU Regulation 1215/2012, they have to be treated the same as French citizens. Second, this article authorises foreign claimants to act jointly with a 'French' claimant against a defendant domiciled abroad before French courts, provided the 'French' claimant has a personal interest in the underlying operation and a legitimate interest in the proceedings.[97]

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[93] Arts 5(5) and 6 Council, Regulation Nr 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L 12/1; Pierre Raoul–Duval and Marie Stoyanov, 'Comparative Study of 'Residual Jurisdiction' in Civil and Commerical Disputes in the EU National Report for: France' (2010) <http://ec.europa.eu/civiljustice/news/docs/study_resid_jurisd_frnce_en.pdf> accessed 22 November 2018 p 7.
[94] Peter Herzog and Martha Weser, *Civil Procedure in France* (Springer 1967) p 189.
[95] Art 14 Code Civil 1804 (FR).
[96] Liesbeth Enneking and others, 'Zorgplichten van Nederlandse Ondernemingen' (2015) <www.rijksoverheid.nl/documenten/rapporten/2016/04/21/zorgplichten–van–nederlandse–ondernemingen–inzake–internationaal–maatschappelijk–verantwoord–ondernemen> accessed 16 September 2016 p 245.
[97] Raoul–Duval and Stoyanov (n 93) note 50 referring to Cour de Cassation (28 June 1989) *Rev crit DIP* 1990 p 111.

Third, it can be attempted to file proceedings with French courts against TNC-DEMs for their involvement in human rights violations in third states based on the forum by necessity doctrine. Like in other EU Member States that acknowledge this doctrine, it is based on the right to a fair trial under Article 6(1) ECHR. Particular to the French case is that the general principle of public law 'denial of justice' is another ground for a French court to act as a forum by necessity.[98] Article 4 Civil Code establishes, in this regard, that judges may not 'deny justice' under the pretext of the silence, obscurity or insufficiency of the law.[99]

Two requirements have been developed by French judges to apply the forum by necessity doctrine. The first requirement sets out that the claimant relying on French courts' jurisdiction has to prove that it is impossible to bring the claims before a foreign court. There has been a lot of speculation about this condition by scholars as to how this condition should be applied in practice.[100] Ultimately, this condition has been interpreted by the Court of Cassation in a case against the Gabonese corporation Comilog in 2017.[101] This case concerned the claim of six Congolese workers who had been dismissed, together with 947 others, without notice or compensation following Comilog's decision to cease its ore transport activities on the Congolese railways in 1992. The Court of Cassation interpreted 'impossibility' strictly. The fact that the two claimants had been waiting for a judgment by the Supreme Court of the Republic of Congo – after the tribunal and Court of Appeal in Congo had considered themselves territorially incompetent – for more than two decades was sufficient for the French court to hold that it had not been impossible for the claimants to bring a claim regarding their alleged unfair dismissal before a court in Congo. Arguably, the overruled judgment that had been delivered by the French Court of Appeal in 2008 was more compatible

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[98] Cour d'Appel Paris (10 September 2015) Nrs 11/05955 and 11/05959; Arnaud Nuyts and Katarzyna Szychowska, 'Study on Residual Jurisdiction. Review of the Member States' Rules Concerning the 'Residual Jurisdiction' of Their Courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations' (2007) <http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf> accessed 11 March 2016 p 64.

[99] Art 4 Code Civil 1804 (FR).

[100] Eg Nuyts and Szychowska (n 98) p 66; Maria Chiara Marullo, 'Access to Justice and Forum Necessitatis in Transnational Human Rights Litigation' [2016] HURI–AGE Consolider–Ingenio <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2713744> accessed 31 March 2016 pp 20–21.

[101] Cour de Cassation (14 September 2017) Nrs 15–26, 737 and 15–26.738.

with the very *raison d'être* of the forum by necessity doctrine in France.[102] The latter court granted jurisdiction to the two workers, holding that the failure to render a judgment within a reasonable period by Congolese Courts is evidence of denial of justice, justifying jurisdiction on the basis of the forum by necessity doctrine.[103] This interpretation was also in accordance with Article 6(1) ECHR, which stresses that everyone is entitled to a fair and public hearing *within a reasonable time* by an independent and impartial tribunal established by law.

The second requirement of the forum by necessity doctrine sets out that there must be some link with France. Some authors have argued that this link can be quite remote. Having assets within France's jurisdiction or offering products to customers in France might constitute such linkage.[104] Whether cases brought against TNC-DEMs would have a link with France will, in practice, depend on the facts and the judge handling the case. In the *Comilog* case, the French Court of Appeal found that the fact that the French corporation Eramet had acquired a majority of shares in Comilog after the alleged wrongful dismissal was insufficient proof of a link with France. The French government has also insisted on a more limited interpretation, which excludes TNC-DEMs from the forum by necessity doctrine. This can be derived from the government's suggestion to interpret this doctrine as giving claimants the opportunity to bring claims against subsidiaries of corporations based in France (and other EU Member States) during the renegotiations of the forum by necessity doctrine in the recast Brussels I Regulation. This interpretation was also followed by the Consultative National Commission on Human Rights, the National CSR Forum and in the French NAP.[105]

Fourth, French courts have determined that Article 42(2) Civil Procedural Code – which allows a claimant to sue defendants domiciled in various states before the courts of the domicile of one of them – should not only apply to defendants

[102] Cour d'Appel Paris Nrs 11/05955 and 11/05959 (n 98). This Court dismissed the claim of four other workers who had not filed a complaint in Congo.
[103] Ibid p 14.
[104] Nuyts and Szychowska (n 98) p 66; Raoul–Duval and Stoyanov (n 93) p 20.
[105] France (Government), 'NAP' (2017) p 52 referring to France (Commission Nationale Consultative des Droits de l'Homme) (n 9) pp 18–19; Platforme Responsabilité Sociétale des Entreprises, 'Implications de la Responsabilité des Entreprises sur leur Chaîne de Valeur (Filiales et Fournisseurs) by Sabine Gagnier, Jean–Christophe Sciberras and Hélène Valade' (2014) <www.strategie.gouv.fr/sites/strategie.gouv.fr/files/atoms/files/rapport_detape_gt–3_–_le_13–11–2014.pdf> accessed 16 November 2018 p 16.

domiciled in EU Member States.[106] They want to avoid creating a gap between standards in EU Regulation 1215/2012, which apply to defendants domiciled in EU Member States, and non-Regulation standards. Accordingly, a TNC-DEM can be sued before French courts as a co-defendant in a proceeding brought against another defendant domiciled in France.[107] Contrary to the Netherlands, in France there is no substantial case law regarding corporate human rights violations based on the connected claims doctrine. Other case law based on Article 42(2) Civil Procedural Code provides two insights. First, the object of the disputes involving the French corporation and the TNC-DEM needs to be identical, even though causes of action need not.[108] Second, the Court of Cassation stressed that the defendant upon which jurisdiction is based has to be an actual serious defendant.[109] The Court of Cassation has determined that jurisdiction that has been granted can be removed if there are changed circumstances such that the claim against the French defendant no longer exists. In a plane crash case against Air Algeria in 2012, the Court of Cassation determined that foreign claimants could no longer bring claims against Air Algeria, a foreign defendant of foreign nationality that resides in a foreign state, after out-of-court settlements had been reached between French victims and Air Algeria's French co-defendants, including the French maintenance corporation. According to the Court of Cassation, the *raison d'être* of this condition is the desire to avoid any fraudulent choice of jurisdiction by initiating a fictitious claim against a defendant domiciled in France. This interpretation is diametrically opposed to the interpretation of the Dutch Court of Appeal in *Friday Alfred Akpan and Milieudefensie v Royal Dutch Shell and SPDC*, a case discussed in Chapter 4 section 2.

Fifth, victims of TNC-DEMs can try to obtain civil remedies for damages that are directly related to the commission of a criminal offence, be it a *crime* ('serious crime or felony'), *délit* ('misdemeanour or less serious offence') or *contravention* ('minor offence').[110] From a procedural point of view, criminal and tort law are

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[106] French courts lack jurisdiction over connected claims if the only basis thereof lies in a choice–of–court clause or in one of the defendant's is a French national who is not domiciled in France. Art 42(2) Civil Procedural Code is thus inapplicable where jurisdiction is based on art 14 Civil Code (Raoul–Duval and Stoyanov (n 93) p 14 referring to Cour de Cassation (Civil Chamber), 6 February 2001 Peavy Company, *JCP G* 2001, II, 10567).
[107] Enneking (n 96) p 244.
[108] Nuyts and Szychowska (n 98) pp 108–109.
[109] Cour de Cassation (5 December 2012) Nr 11–18.169. D. 2012. 2974.
[110] Art 2 Code de Procédure Pénale 1957 (FR).

linked in France. Conduct that is both a criminal offence and a tort can lead to engaging the civil liability of the perpetrator, if the victim claims damages in the course of the criminal trial. All legal entities, except the state, incur criminal liability on the dual conditions that the criminal offence was committed by one or more individuals in their capacity as bodies or representatives of the legal entity, and that is was committed on the legal entity's behalf (Article 121-2 Criminal Code). Importantly, a victim of a criminal offence is the person who 'personally suffered from damage directly caused by the offence'.[111] In case law, this has been extended to, among others, surviving relatives, trade unions and associations in connection with the goals and object of their mission.[112]

Using criminal cases to pursue civil remedies can be an advantage in cases of extraterritorial corporate human rights violations that would not otherwise fall within the competence of national courts under that state's private international law. *Plaintes avec constitution de partie civile* ('complaints with civil action') are an effective way to bring alleged *crimes* or *délits* to the attention of the French public prosecutor and to oblige him to start an investigation. The prosecutor is not obliged to start an investigation, if alleged offences are brought to their attention through *complaint simple* ('simple complaint') without civil action or, specifically for *délits* and *contraventions*, through *citation directe*.

French criminal law applies where criminal offences are committed on the territory of the French Republic (Article 113-2 Criminal Code). In determining whether an offence has been committed on French territory, case law is guided by the theory of ubiquity: an offence is deemed to have been committed in France where one of its constituent elements, whether action or outcome, is located in France. Where personal jurisdiction is concerned, French criminal law applies to a large number of offences committed by or against a French individual or legal entity outside France. As regards the protective principle or universal principle, no distinction is made between French and foreign nationals. This principle applies to specific offences mentioned either in Article 113-10 Criminal Code, including attacks on the fundamental interest of the nation, or elsewhere. Before explaining

[111] Ibid.
[112] Valerie Malabat and Véronique Wester–Ouisse, 'The Quest for Balance between Tort and Crime in French Law' in Matthew Dyson (ed), *Comparing Tort and Crime: Learning from Across and Within Legal Systems* (Cambridge University Press 2015) p 84.

how the passive personality principle is relevant to human rights violations committed by French and non-French corporations, including TNC-DEMs outside France (Article 113-7 Criminal Code), it is necessary to explain briefly in the following two paragraphs how the active personality principle, enshrined in Article 113-6 Criminal Code, is relevant to French corporations that are involved in human rights violations outside France. These paragraphs indicate that existing case law regarding French corporations is very open to normative extraterritoriality, but its implementation may be complicated by procedural or substantive conditions.[113]

If the perpetrator has French nationality, extraterritorial jurisdiction applies to all offences classified as *crimes* and – if the offence is a criminal act in the state where it has been committed as well as in France ('principle of double criminality') – also to those classified as *délits* (Article 113-6 Criminal Code). The most notorious business and human rights case was a *plainte avec constitution de partie civile* before a tribunal in 2002 on the ground of personal jurisdiction against the French oil corporation Total and 'X' by William Bourdon, founder of the NGO Sherpa, in the name of two Burmese workers, in connection with allegations of forced labour on a gas pipeline in Myanmar between 1995 and 1998.[114] The facts were identical to those of *Doe v Unocal* (1997) in the US to which Chapter 2 section 3 of this thesis has referred. [115] The human rights claims were framed as sequestration, because forced labour as such is not a criminal offence in French law.[116] The authorities affirmed competence based on Articles 113-6 and 113-2 Criminal Code.[117] In a judgment of 2005, the investigating chamber of the Court of Appeal refused to close the investigation as requested by the prosecutor (who is generally reluctant to investigate and prosecute

[113] Hervé Ascencio, 'Extraterritoriality as an Instrument – Contribution to the Work of the UN Secretary–General's Special Representative on Human Rights and Transnational Corporations and Other Businesses' (2010) <www.business–humanrights.org/sites/default/files/media/documents/ruggie/extraterritoriality–as–instrument–ascensio–for–ruggie–dec–2010.pdf> accessed 10 May 2016 para 16.
[114] Ludovic Hennebel, 'L'Affaire Unocal en Birmanie Jugée en Europe et aux Etats–Unis' (2006) CRIDHO Working Paper Nr 9 <https://sites.uclouvain.be/cridho/documents/Working.Papers/CRIDHO.WP.2006.09.pdf> accessed 5 June 2018 p 12 referring to Cour d'Appel Versailles (11 January 2005) Nr 2004/01/600.
[115] *Doe v Unocal Corp* 963 F Supp 880 (CD Cal 1997).
[116] Art 224–1 Code Pénal 1791 (FR).
[117] Olivier De Schutter, 'Les Affaires *Total* et *Unocal*: Complicité et Extraterritorialité dans l'Imposition aux Entreprises d'Obligations en Matière des Droits de l'Homme' (2006) 52 Annuaire français de Droit International p 69.

extraterritorial claims against corporations).[118] The prosecutor considered that additional factual elements were needed – which could only possibly be provided by the civil parties – in order to qualify the facts as sequestration. The matter ultimately did not come to trial, as it resulted in an *ordonnance de non-lieu* ('non-suit') in 2006, after Total and the complainants came to an out-of-court settlement, in which they agreed to withdraw their complaint.

French corporations can also be found complicit in a subsidiary's offence abroad if the principle of double criminality applies and if a definitive judgment has been obtained in the state where the offence was committed.[119] The Council of Europe's Group of States against Corruption has recommended that France strike out the latter condition.[120] It found that France can establish the constituent elements of the principal offence without interfering in the judicial process of the state where the offence was committed, since the French court would only be giving final judgment on the charge of complicity.[121] However, France holds that convicting someone of complicity without waiting for the final judgment on the principal offence would constitute interference in the judicial process of the state where the offence was committed. French courts would have no competence to make such a finding concerning an offence perpetrated abroad by a non-French national.[122] For example, the complaint against the French corporation Rougier by seven Cameroon farmers, brought by Sherpa and another NGO, for its involvement in a number of *délits*, including bribery by its Cameroon-based subsidiary, was rejected because there was no final judgment in Cameroon, thus preventing complaint by prosecution in France, even though the principle of double criminality applied.[123] The claimants also came up against another obstacle formulated in Article 113-8 Criminal Code. According to this article, prosecution of *délits* committed abroad on the basis of active or passive personal jurisdiction may only be brought at the request of the prosecutor (and must be preceded by a complaint from the victim (or their beneficiaries), or by an official

[118] Ibid p 69; Cour d'Appel Versailles (11 January 2005) Nr 2004/01/600.
[119] Art 113–5 Code Pénal 1791 (FR); art 689 Code de Procédure Civil 1973 (FR).
[120] Council of Europe (Group of States against Corruption), 'Compliance Report on France Incriminations (ETS 173 and 191, GPC 2) Transparency of Party Funding' (2011) Greco RC–III (2011) 1E para 36.
[121] Ibid para 32.
[122] Council of Europe (Group of States against Corruption), 'Third Evaluation Round. Second Compliance Report of France' (2013) Greco RC–III (2013) 3E para 32.
[123] Cour d'Appel Paris (13 February 2004) reported by Ascencio (n 113).

accusation by the authorities of the state on whose territory the offence was committed). The prosecutor used their discretion to refuse to launch an investigation, explaining that the alleged crimes were not sufficiently grave to warrant French prosecutorial action.[124] No appeal is possible against such a decision.

If the victim has French nationality, extraterritorial jurisdiction extends to any *crime* and to any *delit* punishable by imprisonment, without a double criminality requirement (Article 113-7 Criminal Code).[125] The NGO Sherpa, and a number of other civil society organisations, have framed French citizens as victims of 'misleading commercial practices', and by bringing an action on this ground, Sherpa was able 'to circumvent existing legal obstacles in terms of the liability of multinationals' (Article L121-1 Consumption Code).[126] Bourdon has indicated that transnational corporations could offend this article, as they often allege to act with social responsibility and respect for human rights, while there is proof that the opposite is true.[127] Article 113-8 Criminal Code also needs to be fulfilled, as the offence of misleading commercial practices has been categorised as a *délit*. Both French and non-French corporations that have French end-consumers can be prosecuted on this ground on the condition that these corporations rely upon misleading commercial practices in relation to their consumers. Sherpa has filed a series of complaints against the Korean transnational corporation Samsung, its French subsidiary and the French retailer Auchan based on this ground in recent years. The discussion that follows is organised according to the way in which their complaints have been filed, i.e. *complaint simple*, *citation directe*, and *plaintes avec constitution de partie civile*.

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[124] Ibid.

[125] This article transposes Directive 2005/29/CE of 11 May 2005 concerning Unfair Business–to–Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) Nr 2006/2004 of the European Parliament and of the Council [2005] OJ L 149.

[126] Art L121-1 Code de la Consommation 2020 (FR); Sherpa, 'Auchan et le Rana Plaza: Plainte pour Pratiques Commerciales Trompeuses' (*Asso–Sherpa*, 22 August 2014) <www.asso–sherpa.org/auchan–and–the–rana–plaza–deceptive–business–practices> accessed 23 November 2018.

[127] William Bourdon cited in Véronique Smée, 'Plainte Contre Samsung, Accusé de Bafouer ses Engagements Ethiques en Chine' (*Novethic,* 27 February 2013) <www.novethic.fr/actualite/social/conditions–de–travail/isr–rse/plainte–contre–samsung–accuse–de–bafouer–ses–engagements–ethiques–en–chine–144046.html> accessed 20 November 2018.

First of all, in February 2013, Sherpa (together with a number of other NGOs and a consumer organisation) brought a *complaint simple* against Samsung France, a subsidiary of Samsung.[128] The claimants submitted that Samsung claimed to engage in ethical practices in its advertising to French consumers. Bourdon has remarked, in particular, that the Samsung Group has signed the Electronic Industry Citizenship Coalition Code of Conduct, which tries to ensure employees who work for both signatories and their suppliers are treated with dignity and respect.[129] They explain that Samsung has committed itself, by signing the Code, to respect human rights, in particular, the prohibition of forced labour and child labour, and in relation to working hours, security at work and protection from machinery.[130] The claimants explained that Samsung's 'commitments' are misleading commercial practices, as Samsung was allegedly relying on forced labour and child labour at Chinese manufacturing sites. Teenage girls would allegedly work excessively long hours without an employment contract for a wage one third of an adult in a carcinogenic environment.[131] Proof has been based on field investigations by the NGO China Labor Watch in factories of Shinyang Electronics in China, which manufactures Samsung products.[132]

To obtain financial compensation, a simple complaint will not suffice. However, that was also not the claimants' aim. They primarily aimed at getting Samsung to express itself on the subject and respond to the accusations. In addition, the simple complaint does not automatically result in prosecution, as this is left in the sole discretion of the prosecutor, under the principle of the advisability of prosecution.[133] Prosecutions may be dropped, or not even started.[134] The prosecutor decided, however, to start a preliminary investigation – a first of its

[128] Tribunal de Grande Instance Bobigny (26 February 2013) Complaint brought by Sherpa, ActionAid France – Peuples Solidaires and INDECOSA–CGT) reported by Ethique sur l'Etiquette, 'Classement sans Suite des Plaintes contre Samsung and Auchan' (2015) <https://ethique–sur–etiquette.org/Classement–sans–suite–des–plaintes> accessed 20 November 2018.
[129] William Bourdon cited in Smée (n 127).
[130] Smée (n 127).
[131] Sherpa, 'Des Jeunes Filles de 14 ans dans ses Usines: Samsung Poursuive' (*Asso–Sherpa*, 22 December 2015) <www.asso–sherpa.org/des–jeunes–filles–de–14–ans–dans–ses–usines–samsung–poursuivi> accessed 2 January 2018.
[132] Sherpa, 'Samsung in China: an Attack on the Fundamental Rights of Workers' (*Asso–Sherpa*, 6 December 2013) <www.asso–sherpa.org/samsung–in–china–an–attack–on–the–fundamental–rights–of–workers> accessed 20 November 2018 referring to China Labor Watch 'Samsung Factory Explointing Child Labor – Investigative Report on HEG Electronics (Huizhou) Co. Ltd. Samsung Supplier' (2012) <www.chinalaborwatch.org/upfile/2012_8_8/samsung8–27.pdf> accessed 20 November 2018.
[133] Art 40 Code Pénal 1791 (FR).
[134] Malabat and Wester–Ouisee (n 112) p 79.

kind in Europe – in July 2013.[135] Sherpa suggested that the French authorities should request judicial cooperation with Korea.[136] However, the investigation was limited to French territory. It consisted of a hearing with Samsung France's legal director and searches on the website of Samsung France.[137] Samsung France allegedly denied all liability with respect to its head office in Korea.[138] After eighteen months, the complaint was closed for lack of an evidentiary causation link.[139]

The next *complaint simple* regarding misleading advertising was filed against both Samsung and its subsidiary Samsung France in January 2018.[140] The claimants, Sherpa and ActionAid France, asserted that 'Samsung publishes many ethical commitments which guarantee the strict respect for workers' rights throughout the production chain'. They referred, in particular, to Samsung's website, which states that the corporation aims 'to become one of the most ethical corporations in the world'.[141] It was suggested that these messages to consumers were at odds with the reality in Chinese and Korean factories. The report of the NGO China Labor Watch was amongst the presented evidence. The prosecutor in Paris decided, however, to transfer the case to Bobigny, where, in March 2018, the case was closed with no further action.

In between these two complaints against Samsung, Sherpa and a number of other NGOs also brought a *complaint simple* against French retailer Auchan for

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[135] China Labour Watch, 'Preliminary Inquiry Opened on a Complaint Lodged against Samsung France (2013) <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=4189&context=globaldocs> accessed 20 December 2018.
[136] Smée (n 127).
[137] Sherpa (n 132); Business & Human Rights Resource Centre, 'Samsung Lawsuit (re Misleading Advertising & Labour Rights Abuses)' <www.business-humanrights.org/en/samsung-lawsuit-re-misleading-advertising-labour-rights-abuses> accessed 20 November 2018.
[138] Sherpa (n 132).
[139] Cyril Shroff and Delphine Constantin, 'Corporate Social Responsibility: An Asian Perspective' (*Conventus Law*, 13 August 2015) <www.conventuslaw.com/report/corporate-social-responsibility-an-asian/> accessed 20 November 2018.
[140] Tribunal de Grande Instance Paris (11 January 2018) Complaint brought by Sherpa and Action Aid France – Peuples Solidaires reported by Sherpa, 'Samsung Target of a Lawsuit that Would Expose Human Rights Violations' (*Asso-Sherpa*, 11 January 2018) <www.asso-sherpa.org/samsung-target-of-a-lawsuit-that-would-expose-human-rights-violations> accessed 20 November 2018.
[141] Sherpa (n 140) referring to Samsung, 'Notre Promesse' <www.samsung.com/fr/aboutsamsung/vision/philosophy/samsung-spirit/> accessed 20 November 2018.

misleading commercial practices with the prosecutor in April 2014.[142] The complaint concerned public statements of Auchan to consumers regarding its efforts for good labour and environmental conditions in its supply chains. In April 2013, however, labels of Auchan's house brand were found in the ruined Rana Plaza building. Auchan alleged that it was not aware that its suppliers outsourced the production to sweatshops in this building. The prosecutor started an investigation but stopped it after eight months for lack of an evidentiary causation link.

Sherpa and a consumer organisation summoned both Samsung and its subsidiary Samsung France to appear before the Tribunal for misleading commercial practices in December 2015.[143] They relied upon the *citation directe*, a private prosecution procedure – available for *contraventions* and *délits* – in which an *exploit d'huissier* ('officer of the court') notifies the defendant that a claimant alleges to hold sufficient evidence against him (which does not require further investigation by the prosecutor).[144] The NGOs asserted that the evidence that they had gathered, including the report by China Labor Watch, was sufficient.[145] In January 2017, the judge set the costs of the procedure and the date for the substantive hearing in December 2017. However, the NGOs did not follow through and withdrew from the proceedings. The reason for the withdrawal was twofold. On the one hand, the cost of translating Korean documents was too high.[146] On the other hand, the NGO had access to new evidence.[147] Sherpa states on its website that 57 new interviews with workers in Samsung's supply chains in Vietnam had

[142] Tribunal de Grande Instance Lille (24 April 2014) Complaint brought by Ethique sur l'Etiquette and Peuples Solidaires reported by Sherpa, 'Auchan et le Rana Plaza: Plainte pour Pratiques Commerciales Trompeuses (Asso–Sherpa, 20 October 2015) <www.asso–sherpa.org/auchan–le–rana–plaza–des–pratiques–commerciales–trompeuses> accessed 30 September 2019.
[143] Tribunal de Grande Instance Bobigny (17 December 2015) Complaint brought by Sherpa and INDECOSA–CGT reported by Business & Human Rights Resource Centre (n 137).
[144] Art 380 etc Code de Procédure Pénale 1957 (FR); Sherpa, 'Rapport d'activités 2015' (2015) <www.asso–sherpa.org/wp–content/uploads/2013/09/RA_2015–FR–web.pdf> accessed 30 September 2019 p 27.
[145] Business & Human Rights Resource Centre (n 137).
[146] Phone call between the author and Clara Gonzales (Sherpa's Litigation and Communication Officer) (4 February 2019).
[147] Ibid; Business & Human Rights Resource Centre (n 137). Samsung, however, explains that no new elements were brought in the claim of January 2018 which has been discussed above (Pauline Gilles, 'L'Envers du Décor: Deux ONG Accusent Samsung d'Utisiler des Enfant sen Asie pour Fabriquer ses Smartphones' (*Newsmonkey*, 12 January 2018) <http://m.fr.newsmonkey.be/article/22171> accessed 8 February 2018).

been conducted by two other NGOs.[148] It is understandable that Sherpa decided to take its time to strengthen its case. In the case where a claim initiated by a *citation directe* fails, the claimants can be ordered to pay compensation and the costs of the process. They can also be pursued for false accusations.[149]

Most recently, in June 2018, Sherpa and ActionAid France filed a *plainte avec constitution de partie civile* against Samsung and its subsidiary Samsung France for misleading advertising, seeking the instruction of an investigating judge.[150] In October 2018, the Tribunal in Paris confirmed its jurisdiction and has questioned the civil parties. Contrary to simple complaints without civil action or complaints brought through *citation directe*, the prosecutor is required to start an investigation when such a complaint is brought.[151] The prosecutor must also investigate the alleged elements of the crime, and the evidence that can be used by victims to substantiate their tort claims. In principle, this can be relatively easy, as courts in Korea, as discussed in Chapter 7 of this thesis, have recently confirmed that Samsung recognised that it exposes its workers in Korean factories to toxic chemicals.

In practice, the prosecutor's investigations can, however, take a long time. In June 2015, when Sherpa, together with two other NGOs, had brought a *plainte avec constitution de partie civile* against Auchan to appear before the Tribunal in Lille, the prosecutor had sent an international *lettre rogatoire* ('letter rogatory') questioning an investigation in Bangladesh, which had to be transmitted via diplomatic channels.[152] The French Ministry of Foreign Affairs has stated that it

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[148] Sherpa, 'Samsung en Chine, au Vietnam et en Corée du Sud – Pratiques Commerciales Trompeuses' (*Asso–Sherpa,* 2015) <www.asso–sherpa.org/samsung–en–chine–atteinte–aux–droits–fondamentaux–des–travailleurs> accessed 20 December 2018; Sherpa, 'Sherpa and Action Aid Continue Actions Against Samsung for Misleading Information over Working Conditions' (*European Coalition for Corporate Justice,* 25 June 2018) <http://corporatejustice.org/news/6599–sherpa–and–action–aid–continue–actions–against–samsung–for–misleading–information–over–working–conditions> accessed 20 December 2018 referring to IPEN, CGFED, 'Stories of Women Workers in Vietnam's Electronics Industry' (2017) <https://goodelectronics.org/stories–women–workers–vietnams–electronics–industry/> accessed 30 September 2019.
[149] Art 226–10 Code Pénal 1791 (FR).
[150] Tribunal de Grande Instance Paris (25 June 2018) Complaint brought by Sherpa and ActionAid France reported by Sherpa 2015 (n 148).
[151] Art 1 etc Code de Procédure Pénale 1957 (FR).
[152] Tribunal de Grande Instance Lille (10 June 2015) Complaint brought by Sherpa, Ethique sur l'Etiquette and Peuples Solidaires reported by AFP, 'Rana Plaza: des Associations Interpellent le Quai d'Orsay après leur Plainte contre Auchan' l'Express (Paris, 24 April 2018)

cooperates actively with the judicial authorities and that it proceeds with the transmissions requested by the prosecutor.[153] The three NGOs allege, however, that there has been limited progress in the *Auchan* case – despite the willingness of the prosecutor – due to the limited efforts of this Ministry.[154]

At the end of this analysis of five grounds to bring civil claims against TNC-DEMs in France, it needs to be underlined that this analysis should not be taken as an indication that they are easy to obtain and that they are not seen as controversial. There are at least three reasons for this. First, while opening courts to TNC-DEMs might make the liability risks for French corporations and other corporations more equal, it would create a considerable burden on the French court system. Moreover, adjudicating foreign-cubed claims might create a pull factor for which France alone has not sufficient capacity.

Second, as explained in Chapter 2 of this thesis, the extraterritorial judicial remedies remain controversial. It is worth referring here to the amicus curiae brief of the French government in *Doe v Unocal*, in which a US District Court granted jurisdiction against US corporation Unocal (Chevron) and the French corporation Total for allegedly knowingly using forced labour to construct a pipeline in Myanmar in 1997. [155] Although this case did not concern universal jurisdiction but personal jurisdiction – Total was one of the partners of the joint venture between Unocal and the Burmese government – the French brief shows that the government was averse to extraterritorial cases. The government noted that maintenance of this action against Total in the US usurped its sovereignty and was in conflict with its foreign policy interests. [156]

Third, even when cases against TNC-DEMs can be brought before courts on the basis of the grounds listed above, it remains almost impossible for corporations

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<www.lexpress.fr/actualites/1/societe/rana–plaza–des–associations–interpellent–le–quai–d–orsay–apres–leur–plainte–contre–auchan_2002456.html> accessed 22 November 2018.
[153] AFP (n 152).
[154] Ibid.
[155] *Doe v Unocal Corp* (n 115).
[156] Letter from Marie Hélène Aubert to Hubert Védrine, Ministre des Affaires Etrangères (6 April 1998) referring to France (Government's Ministry of Foreign Affairs), 'Brief as Amicus Curiae in Doe v Unocal' CV 96-6959-RAP (1997). This Ministry initially denied writing this brief. In 1998, the Minister of Foreign Affairs Hubert Védrine said that it concerned 'a document that was created by Unocal and approved by his Ministry' (Réponse from Hubert Védrine, Ministre des Affaires Etrangères à une Lettre Ecrite (8 June 1998)). See Francis Christophe, *TotalFina: Entre Marée Noire et Blanchiment de la Drogue* (Editions Golias 2000) Annex II.

to be held legally liable in France for any involvement in human rights violations committed abroad. [157] All the existing case law concerns very specific circumstances. Claimants in such cases face significant procedural obstacles and most cases have been dismissed at their preliminary stages. Cost of litigation, restrictions on the right to institute class actions and evidentiary problems are the most notable procedural barriers to justice. These barriers are well documented in the literature on corporate violations by French corporations in developing and emerging states and do not to be discussed here. [158] There are also barriers created by notions of separate 'juridical personality' and 'limited liability', which are problematic for those seeking to hold transnational corporations accountable. Transnational corporations can shield their accountability by making use of a group structure because each entity of a corporate group is treated as an autonomous legal person in French law. Attempts to enact legislation to pierce the 'corporate veil' have failed, to date. For example, in 2015, when a French citizen contracted lung cancer while working for six years at Cominak's uranium-processing factory in Niger in the 1980s, France's highest court, the Court of Cassation, confirmed that Cominak was not a subsidiary of the French nuclear corporation Areva, which held one third of Cominak's shares and was the concession holder of the mine exploited by Cominak.[159] The fact that Cominak had a postal address in France at the headquarters of Areva and that both corporations conducted identical activities and exploited the same mining site did not change this. (It has been discussed that NGOs have found a way to sidestep some of these barriers when they try to obtain civil remedies for damages that are directly related to the commission of a criminal offence.)

3 Conclusions

This chapter analysed the French Duty of Care Law, the world's first supply chain responsibility law for all corporate risks, including human rights-related risks. The Rana Plaza disaster in Bangladesh created momentum for civil society organisations, trade unions and the sponsors to get the Law through Parliament.

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[157] France (Government), 'NAP' (2017) p 49.
[158] Eg Enneking (n 96); Gwynne Skinner and others, 'The Third Pillar Access to Judicial Remedies for Human Rights Violations by Transnational Business' (2013) Accountability Roundtable <http://accountabilityroundtable.org/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf> accessed 5 March 2016.
[159] Cour de Cassation (Deuxième Chambre) (22 January 2015) Nr 13-28.414; Nicolas Bueno, 'Corporate Liability for Violations of the Human Right to Just Conditions of Work in Extraterritorial Operations' (2017) 21 The International Journal of Human Rights pp 13–14.

They used the UN Guiding Principles – which normalised the adoption of a domestic law with extraterritorial effects to rein in home state corporations – as a springboard. A number of such tactics used by norm entrepreneurs in France were identified and described. They re-framed the corporate interests at stake in order to make a convincing argument that French should compromise the immediate impact on French corporations in order to achieve longer-term common goals shared by French state and non-state actors. The Law would, furthermore, attract investors and put French corporations in a position that gives them time to experiment with human rights capabilities before non-French competitors. The large French corporations subject to the Law need to design a detailed 'duty of care' plan that is subject to an external audit. To construct an incentive structure that promotes corporate respects for the standards set down in the Law, any concerned party can bring civil liability actions. It is most likely that the sponsors of the Law had formulated it an ambiguous way to leave open an interpretation that would minimise the impact on the competitiveness of French corporations. But, the Constitutional Council ultimately determined that the Law would not be applicable to TNC-DEMs (and other non-French corporations) after its adoption by way of a reformulation. While the Council, rightly, set out that the duty of care established by the Law does not render the industrial or commercial strategies of corporations subject to public law, the very existence of its sanction regime – consisting of civil liability actions – constitutes a significant legal and financial risk for the large French corporations subject to the Law, which makes indemnity no longer dependent upon their goodwill. Considering this, it is unsurprising that the government noted in the NAP – which was adopted one month after the Law – that care should be taken that extraterritorial civil judicial remedies that are exclusively available to victims of French corporations do not create 'an uneven playing field for French corporations'.[160] A number of avenues were identified to bring TNC-DEMs in Court in France: the forum by necessity doctrine, Article 14 Civil Code and Article 42(1) and 42(2) Civil Procedural Code. The most promising way to obtain for damages in France is, however, civil remedies directly related to the commission of a criminal offence. While this procedure also entails significant procedural obstacles, NGOs have used this avenue to claim that corporations that operate in third countries, engage in misleading advertising in France. This creates the

[160] France (Government), 'NAP' (2017) implementation GP 26.

opportunity for NGOs to bring claims against corporations that operate in France and that tell their consumers that they engage in ethical practices, when they in fact engages in human rights violations at its manufacturing sites. The NGO Sherpa has brought claims against both the Korean transnational corporation, Samsung and its French subsidiary and the French retailer Auchan on this ground. While opening French proceedings to TNC-DEMs might make the liability risks for French corporations and other corporations more equal, it would create a considerable burden on the French court system. Increased awareness amongst French citizens may, in some instances, result in changes in buying and investment attitudes, and in better policy-making. It might also permit French citizens to influence foreign policy decisions that the executive branch would prefer to decide based on political and diplomatic concerns. Chapter 7 – a case study on the Korean electronics industry – will demonstrate that this has been perceived as important by Korean civil society organisations. This chapter will also determine whether and to what extent EU Member States can support local capacity development.

CHAPTER 6 CASE STUDY: KENYAN FLORICULTURE INDUSTRY

Drawing from desk research and fifteen expert interviews, this case study aims to investigate whether – and if so, in what ways – the EU and its Member States can support Kenya to strengthen opportunities to remedy human rights violations in the floriculture industry.[1] The framework set out in Chapter 2 section 3.3 of this thesis will be used to study whether bilateral trade relations between the EU and Korea can play a role in developing local remediation mechanisms. Before discussing relations between the EU and Kenya in detail, it is necessary to discuss the specific context in which the floriculture industry became so economically successful in Kenya (section 1). Relevant social forces that can impede the enjoyment of rights in context are described. This section, furthermore, introduces the different types of floriculture corporations as well as the legal framework that came into existence in 2007 under pressure from the Central Organization of Trade Unions Kenya (COTU-K), the parent organisation of the only trade union that floriculture workers can currently join, the Kenya Plantation and Agricultural Workers Union (KPAWU). Section 2 concerns the legal commitments in relation to human rights and the clauses that are relevant to remediation, specifically in the Economic Partnership Agreement between the EAC and the EU (EAC-EU EPA) (section 2.1). This analysis is considerably shorter than the analysis of the bilateral relations between the EU and Korea reported in the next chapter. The main reason is that the EAC-EU EPA is not yet operational and less comprehensive than the agreements between the EU and Korea. Subsequently, empirical evidence collected in case studies will be introduced to identify the main stakeholders in transnational social network relations that can contribute to local capacity development (section 2.2). Recommendations are made as to how the EU could support Kenya to make justice institutions more responsive to people's needs. Problems with existing development initiatives – which have often focused exclusively on floriculture corporations with European owners – are also identified. Finally, section 3 analyses whether people in Kenya are able to use justice institutions when they allege that their rights have been violated by

[1] The introduction to this thesis discussed the reasons why the case study methodology and this case study have been selected. The Annex to this thesis discusses the data collection and analysis processes. It also describes how the researcher tried to make sure that the research was carried out in a respectful and responsible way.

corporations, what factors affect whether they can do. This part fits in the broader conceptual framework of this thesis and pays particular attention to civil judicial remedies. Yet, it is important to not define needs formally and measure access to justice through limited preconceptions. Alternative mechanisms that were repeatedly mentioned during interviews as being (or having the potential to be) effective ways to provide remedies in a direct or indirect way are also evaluated. In-company proceedings and proceedings before state-based mechanisms that cannot provide binding outcomes (the national human rights institution – the Kenya National Commission on Human Rights (KNCHR) – and the Ministry of Labour and Social Protection's labour offices) are therefore assessed.

1 Kenyan floriculture industry

There are approximately 190 medium and large flower farms of a size larger than five hectares of land owned by approximately 145 corporations in Kenya.[2] The majority of this category of corporations is in Kenyan hands, while the minority is owned by business people from the Netherlands and other EU Member States and India. Irrespective of the nationality of the owners, all these medium and large corporations are registered as Kenyan private limited companies under the Companies Act (2015) and, generally, have no parent or subsidiary corporations in the home state of the owner or other states.[3] Only a minority of farms that are owned by foreigners are part of a multinational group.[4] Additionally, it is estimated that approximately 2,500 local Kenyan smallholder farmers produce flowers on less than five hectares of land.

[2] Interview data – participants KE–F, KE–I and KE–J; Agnieszka Kazimierczuk and others, 'Never a Rose without a Prick: (Dutch) Multinational Companies and Productive Employment in the Kenyan Flower Sector' (2018) ASC Working Paper Nr 142 <https://openaccess.leidenuniv.nl/bitstream/handle/1887/64705/Working_paper_142.pdf?sequence=1> accessed 20 December 2018 p 18.

[3] Examples of corporations with Kenyan owners mentioned in this chapter are Karen Roses, Migotiyo Plantations, Elbur Flora and Sirgoek Flowers. Elgon Orchards and Timaflor are two examples of floriculture corporations owned by EU citizens in Kenya. Both companies rely on agents in the Netherlands to prepare their exports for the Dutch auction. (Notice that mergers and acquisition are frequent in the floriculture industry.)

[4] Bigot flowers and Bilahaka Flowers – companies to which this chapter also refers – are members of European corporations. Bigot Flowers is a member of the French group Bigot Fleurs. Bilashaka Flowers is a part of the Dutch group Zuurbier & Co.

A few European settlers had already started flower cultivation before Kenya gained independence from the UK.[5] The first President of Kenya, Jomo Kenyatta (1964-1978), considered the horticulture industry as a viable solution for covering Kenya's trade deficit when prices for the traditional export commodities, tea and coffee, were falling.[6] The Horticultural Crops Development Authority was established in 1967 as a statutory board to develop and coordinate the production and marketing of horticultural crops for exportation.[7] A Danish investor, Jan Bonde Nielsen, subsequently opened the first large-scale flower corporation, a subsidiary of the Danish corporation Dansk Chrysanthemum Kultur (DCK).[8] The Kenyan government gave Nielsen a long-term low-cost lease with exclusive growing and trading rights for eight years on several types of flowers and a 25-year guarantee not to change laws on foreign investor taxation and profit repatriation.[9] These highly beneficial measures were the result of Nielsen's high-profile connection with Bruce MacKenzie, Minister for Agriculture under the Jomo Kenyatta administration.[10] Mackenzie and other political figures, such as Attorney General Charles Njonjo, also became shareholders of DCK.[11] DCK signed an agreement with COTU-K (which was, by law, determined to be the only trade union at the time). DCK collapsed when the fraudulent tax cartel that it had set up was exposed as a result of an inquiry into Njonjo's involvement in a failed coup attempt on Daniel arap Moi, Kenya's second President (1978-2002).[12] As a result, the farms that DCK owned were split in two. On the one hand, the DCK farms in Naivasha were taken over by UK-owned tea corporation Brooke Bond (Flamingo Flowers). On the other hand, the DCK farms in Uptown Nairobi were passed into

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[5] Marta Nowakowska and Agnieszka Tubis, 'Reliability of the Cut Flowers' Supply Chain' (2015) in Luca Podofillini and others (eds), *Safety and Reliability of Complex Engineered Systems* (CRC Press 2015) p 1757.
[6] Horticultural Crops Directorate, 'Welcome to Horticultural Crops Directorate' <https://horticulture.agricultureauthority.go.ke> accessed 6 March 2018.
[7] Ibid.
[8] Steven Jaffee, 'How Private Enterprise Organized Agricultural Markets in Kenya' (1992) World Bank Policy Research Working Paper Nr WPS 823 <http://documents.worldbank.org/curated/en/175561468774886883/pdf/multi-page.pdf> accessed 30 September 2019 para 34.
[9] PM Nyangweso and MO Odhiambo, 'Exporting Kenya's Horticultural Products: Challenges and Opportunities in the 21st Century' (2004) *Proceedings of the Inaugural Symposium Shaping the Future of African Agriculture for Development: The Role of Social Scientists* <https://ageconsearch.umn.edu/record/9533/files/cp04ny01.pdf> accessed 7 December 2017.
[10] John Kamau, 'Secrets of Unwanted Danish Billionaire Jan Bonde Nielsen' *Daily Nation* (Nairobi, 8 October 2017) <www.nation.co.ke/news/Secrets-of-unwanted-Danish-billionaire-Jan-Bonde-Nielsen/1056-4129620-8iqbp0z/index.html> accessed 9 December 2017.
[11] Trade Unions Act 1965 (KE); Kazimierczuk (n 2) p 7.
[12] Kamau (n 10).

Kenyan hands.[13] Leading government officials became major shareholders and decided to restructure these farms into a smallholder outgrower scheme in order to expand Kenyan participation in the floriculture industry.[14] This scheme collapsed, but those who had had a taste of flower farming continued to be active in the industry. Former DCK workers took advantage of the knowledge and skills that they had acquired. Some of them continued growing flowers for commercial purposes on small farms and others set up their own small companies to provide flower-marketing services.[15] In addition, prominent politically linked families continued to engage in flower growing as a profitable side business.[16] Up until today, many medium and large corporations are connected to the Kenyan elite. For example, Sian Roses and Enkasit flowers are owned by important figures from the Moi Administration.[17]

Three factors have been important to the increased economic success of flower corporations under the Moi Administration. First, economic growth in the floriculture industry was spurred by the 'Structural Adjustment Policies' insisted upon by the World Bank, the IMF and the US.[18] Flower exports were highly compatible with their agenda to diversify exports of non-traditional goods and high-value commodities. Second, the Moi Administration was averse to any form of dissent organisation. Just as the colonial rulers had done before it, the Moi Administration weakened COTU-K through a number of tactics. The government refused to ratify the ILO Conventions on freedom of association, and encouraged the formation of NGOs to oppose COTU-K.[19] Third, the Kenyan floriculture

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[13] Jaffee (n 8) para 34.
[14] Kazimierczuk (n 2) p 7.
[15] Jaffee (n 8) para 34; Kazimierczuk (n 2) p 7.
[16] Winnie Mitullah, Paul Kamau and Joshua Kivuva, 'Employment Creation in Agriculture & Agro–Processing Sector in Kenya in the Context of Inclusive Growth: Political Economy & Settlement Analysis' (2017) Partnership for African Social & Governance Research Working Paper Nr 20 <www.pasgr.org/wp–content/uploads/2017/08/Employment–creation–in–agriculture–and–agro–processing–sector–in–Kenya–in–the–context–of–inclusive–growth.pdf> accessed 30 September 2019 pp 34–35.
[17] Karen Roses, Zena Roses Limited, Migotiyo Plantations, Simbi Roses and Suera Flower Farm are also politically well–connected.
[18] Structural Adjustment Policies have been widely criticized for their harmful socio–economic impacts that are difficult to reverse. See eg Alex Hughes, 'Global Commodity Networks, Ethical Trade and Governmentality: Organising Business Responsibility in the Kenyan Cut Flower Industry' (2001) *Transactions of the Institute of British Geographers* p 394.
[19] Eric Otenyo, 'Politics and the Lack of Labor Militancy in Kenya: Trade Unionism after Independence' in Michael Mwenda Kithinji, Mickie Mwanzia Moster and Jerono Rotich (eds), *Kenya After 50* (Palgrave Macmillan 2016) pp 115 and 122.

industry benefited from a preferential tariff system in its trade with the EU under the successive non-reciprocal preferential Lomé Conventions.

In the mid-1990s, newspapers in Europe started reporting on working conditions in the Kenyan floriculture industry, highlighting low wage levels for workers, and risks to the health and safety of workers and the environment due to pesticide use on farms.[20] In response, the Kenya Flower Council was established. It created multiple codes and certifications, which have considerably improved the situation at medium and large-scale farms in Kenya.[21] There was a consensus amongst the interview participants that European farm owners are the most prone to implement such guidelines, as they are the best placed to understand consumer demands in Europe.

It emerged from the interviews, however, that the adoption of voluntary standards in the floriculture industry has had three adverse effects.[22] First, due to increased demand for certified flowers, it became increasingly difficult for Kenyan smallholders (that are often uncertified) to export their products to consumers in Europe. Medium and large corporations were no longer willing to supplement their flowers with flowers from smallholders in peak periods. They would rather expand their capacity – and rely on temporary workers – in such periods. Second, corporations with European owners reportedly use their relatively better treatment of workers – which is far from 'exemplary' – to sweep any accusations of wrongdoing under the carpet and point the finger at farms owned by Kenyan owners. Third, voluntary standards are reportedly used as an excuse to not create broader comprehensive mandatory regulation. This is frustrating for civil society organisations in the field.

It was also in the 1990s that some Kenyans of Asian descent saw an opportunity to invest in opening new farms. For example, P J Dave was established and Shalimar was acquired by the East African Growers group. Subsequently, Indian investors also started investing in Kenya. Notoriously, the Indian businessman

[20] Alex Hughes, 'Global Commodity Networks, Ethical Trade and Governmentality: Organising Business Responsibility in the Kenyan Cut Flower Industry' (2001) 26(4) Transactions of the Institute of British Geographers p 395.
[21] Ibid p 395.
[22] Interview data – participants KE–A and KE–D.

Ram Karuturi bought 188 hectares of farmland in Naivasha.[23] The working conditions on farms owned by Kenyans of Asian descent and Indian investors are reported to be considerably worse than on other farms.[24] For example, one interview participant said in this regard, 'It is a stereotype, but a lot of matters happen under the table. *They* use all the tricks in the book'.[25] That being said, this category of corporations is less able to benefit from political connections.[26] In fact, the perceived hard-wired 'business mentality' of Kenyans of Indian descent is, in many ways, a consequence of the racist ways in which they have been treated throughout history, both by the colonial regime and black Kenyans.[27]

Under President Mwai Kibaki (2002-2013), Kenya saw a reduction in dependence on Western donor aid, with the country being increasingly funded by foreign direct investments. The Kibaki Administration was largely pro-business, incentivising the floriculture industry by issuing preferential measures.[28] Until a few days before Kibaki's first Presidential term ended, the Federation of Kenyan Employers had successfully opposed the introduction of new labour laws.[29] The laws were ultimately enacted just before the general election in 2007. COTU-K had issued an ultimatum to the government that it would mobilise its large membership base to vote against the ruling party unless the laws were passed before the election date.[30]

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[23] Karaturi Flowers exported mostly to Dubai. After its fraudulent tax cartel was exposed in 2013, the corporation moved its operations to Ethiopia (Interview data – participant KE–A). See Attiya Waris, 'How Kenya Has Implemented and Adjusted to the Changes in International Transfer Pricing Regulations: 1920–2016' (2017) International Center for Tax and Development Working Paper Nr 69 <https://opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/13401/ICTD_WP69.pdf> accessed 8 March 2018.

[24] KNCHR, 'The National Action Plan on Business and Human Rights in Kenya. Report on Stakeholder Consultations held in Kisumu County' (2017) <http://nap.knchr.org/Portals/0/Reports/Kisumu%20regional%20consultation%20report.pdf?ver=2017–09–04–174649–703> accessed 5 January 2018 p 7; Interview data – participants (anonymised) (including data collected from Kenyan interview participants of Indian descent).

[25] Interview data – participant KE–O.

[26] Interview data – participant KE–M.

[27] Interview data – participants KE–E and KE–J.

[28] Samuel Njoroge and Timothy Okech, 'An Assessment of the Factors Influencing Foreign Direct Investment Inflows in Kenya's Horticultural Industry' (2011) 2(5) International Journal of Business and Social Science p 2.

[29] William Maema, 'Current Trends in Employment Disputes in Kenya – a Disturbing Trajectory' (2016) <www.ikm.co.ke/export/sites/ikm/news/articles/2016/downloads/IKM–Employment–update.pdf> accessed 30 September 2019 p 4; Otenyo (n 19) p 127.

[30] Mitullah (n 16) p 29.

The 2007 legal reforms have considerably strengthened the rights of workers. It is useful to give two examples here. First, section 29 Employment Act (2007) amended the provisions on maternity leave from two months with loss of annual leave to three months without loss of benefits.[31] This section represented significant progress, as Article 10(2) ICESCR – regarding the special protection to mothers before and after childbirth, whereby they should be accorded paid leave or leave with adequate social security benefits – is the only reservation that Kenya has made to the seven core international human rights instruments it has signed.[32] Second, section 101(1) Occupational Health and Safety Act (2007) provides that where workers are employed in any process involving exposure to 'wet, injurious or offensive' substances, protective clothing and appliances should be provided by the employer. The significance of this provision will be discussed in section 3.5, below.

However, the 2007 legal reforms also served as a vehicle for COTU-K to strengthen its own position. Due to the time pressure, the laws were passed without much debate or scrutiny, almost in the same form in which they had been proposed by COTU-K. COTU-K strengthened its position vis-à-vis other unions as well as civil society organisations. First, the 2007 legal reforms created rigid registration provisions that affected the freedom of association of workers, as they are not allowed to join trade unions of their choice.[33] Section 14(1)(d)(i) Labour Relations Act (2007) determines, for example, that a trade union may only apply for registration if no other trade union is already registered. On this basis, COTU-K's subsidiary organisation KPAWU has continually been bringing lawsuits in court against the recognition of the Kenya Export Floriculture, Horticulture and Allied Workers Union (KEFHAU), which tried to register for the first time in 2009.[34] By doing this, COTU-K not only obstructs freedom of association, but it also deprives floriculture workers of the opportunity to join a union that is tailored to their needs. KPAWU, which covers all agricultural workers, is not equipped to deal with the specific challenges that floriculture workers encounter. They are

[31] Interview data – participant KE–F.
[32] Kenya has also signed and ratified the ICCPR, CAT, UNCRC, CRPD, ICERD, UNCEDAW. Kenya has signed but not ratified the CED. Kenya has not signed the ICPRM.
[33] Otenyo (n 19) p 127; Interview data – participant KE–O.
[34] Interview data – participant KE–K/KE–L. See also *KPAWU v David Benedict Omulama and others and the Registrar of Trade Unions* (2017) 141/2014 Court of Appeal (Nairobi); *KPAWU v KEFHAU represented by David Benedict Omulama and others and the Registrar of Trade Unions* (2018) 5/2017 Court of Appeal (Nairobi).

exposed to extreme temperatures in the greenhouses and cold rooms, and to a plethora of toxic chemicals, including those that are illegally imported.[35] Exposure to those chemicals produces cancer, neurologic diseases, birth defects and other reproductive illnesses, sometimes long after workers have left their jobs.[36] Second, the 2007 legal reforms enabled COTU-K to strengthen its own position at the expense of civil society.[37] Two specific examples concerning the proceedings before labour officers – covered by sections 40 and 48 Employment Act (2007) – are discussed in section 3.4 below. It suffices to state here that the relations between COTU-K and civil society are extremely hostile.[38] COTU-K sustains the myth that labour rights are entirely distinct from human rights, and therefore, so the reasoning goes, the reserved domain of trade unions. They portray NGOs as 'self-seeking groups' for workers.[39] While NGOs, of course, pursue their own agenda, COTU-K's narrative mainly seems to serve its own interests, which suffer from undemocratic top-down governance structures and a general lack of accountability and transparency in the utilisation of union funds.[40]

Some flaws in the 2007 laws have been remedied by the Constitution, which was promulgated in 2010. To begin, Article 2(1) of the Constitution determines that it takes precedence or supersedes any other law. In the absence of a specialised court to address constitutional matters, all Kenyan superior courts have the authority to make interpretations and determinations on the Constitution. Some judges have used this opportunity to determine that the 2007 laws are not in the

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[35] Abu Kargbo, Jing Mao and Cai–yun Wang, 'The Progress and Issues in the Dutch, Chinese and Kenyan Floriculture Industries' (2010) 9(44) African Journal of Biotechnology p 7406; Pamela Tsimbiri and others, 'Health Impact of Pesticides on Residents and Horticultural Workers in the Lake Naivasha Region' (2015) 3 Occupational Diseases and Environmental Medicine pp 24–34; Interview data – participant KE–O.

[36] CEDAW, 'Concluding Observations on the Eighth Periodic Report of Kenya' (2017) UN Doc CEDAW/C/KEN/CO/8 para 36(b).

[37] KNCHR, 'Report of the Stakeholders Forum on the Development of a National Action Plan on Business and Human Rights' (2016) <http://nap.knchr.org/Portals/0/Report%20of%20the%20Stakeholders%20Forum%20on%20the%20Development%20of%20a%20NAP%20on%20BHR.pdf> accessed 30 September 2019 p 10; Interview data – participant KE–O.

[38] KNCHR (n 37) p 10; Interview data – participants KE–G and KE–O.

[39] Wilfred Nyaundi Konosi, 'The Thorns Behind Blooming Roses: The Impact of the Law on the Working Conditions of Women on Flower Farms in Naivasha, Kenya' (DPhil thesis, University of Zimbabwe 2008) <https://searcwl.ac.zw/index.php?option=com_docman&task=doc_details&gid=99&tmpl=component&Itemid=96> accessed 3 March 2018 p 41.

[40] Lone Riisgaard, 'Global Value Chains, Labor Organization and Private Social Standards: Lessons from East African Cut flower Industries' (2009) 37(2) World Development p 333; Kabiru (n 40) p 218.

letter and spirit of the Constitution.[41] For example, the Industrial Courts relied upon the Bill of Rights – which was introduced by Articles 18-59 Constitution – to require the Registrar of Trade Unions to grant KEFHAU registration, noting that floriculture workers need specific protection.[42] (At the time of writing, KEFHAU is not yet operational, as an appeal against its registration has been brought by KPAWU before the Supreme Court.[43]) In addition, the Constitution clarifies the responsibilities of corporations, trade unions and other bodies with respect to human rights. Article 20 provides that the Bill of Rights binds 'all state organs and all persons', including companies, associations, or other bodies of persons, whether incorporated or unincorporated.[44]

During the 2015 Universal Periodical Review, the Uhuru Kenyatta Administration – in office since 2013 – accepted recommendations to develop a NAP.[45] A National Steering Committee was set up through a multi-stakeholder forum held in Nairobi in 2016, but it has been recommended to reach out to a broader range of civil society organisations by the UN Working Group on Business and Human Rights after its visit in 2018.[46] More generally, the space for civil society work has been shrinking since Uhuru Kenyatta took office. Various instances of crackdowns on civil society organisations have been reported and the government has tried to introduce repressive amendments to the Public Benefits Organizations Act (even though the Act is yet to take effect).[47] These amendments are, amongst other things, aimed at restricting the functioning and foreign funding of civil society

[41] See Kenya (National Council for Law Reporting), 'Legislation / Provisions of the Law Declared Unconstitutional' <www.kenyalaw.org/kl/index.php?id=8662> accessed 5 March 2018.
[42] *David Benedict Omulama and others v the Registrar of Trade Unions* (2014) 7/2011 Industrial Court (Nairobi). See also *KPAWU v David Benedict Omulama and others* (2017) 141/2014 Court of Appeal (Nairobi).
[43] *KPAWU v The Hon Cabinet Secretary, Labour & Social Protection and Kenya Export Floriculture, Horticulture & Allied Workers Union* (2018) 22/2018 Employment and Labour Relations Court of Kenya (Nakuru).
[44] See definition of 'person' in art 260 Constitution 2010 (KE); Kenya (Office of the Attorney General and Department of Justice), 'Concept Paper on the Development of a National Action Plan on Business and Human Rights' (2015) <http://nap.knchr.org/LinkClick.aspx?fileticket=DLVTia9S2_w%3D&tabid=110&portalid=0> accessed 13 July 2017 p 2.
[45] Kenya (Government), 'NAP' (2019).
[46] UN Working Group on Business and Human Rights, 'Statement at the End of Visit to Kenya' (2018) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23356&LangID=E> accessed 1 December 2018.
[47] Public Benefits Organizations' Act 2013 (KE); OHCHR, 'UN Experts Urge Kenya to End Crackdown on Rights Groups to Ensure Fair Elections' (2017) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21172&LangID=E> accessed 30 September 2019.

organisations.[48] Instances of intimidation and discrimination against floriculture workers that join KPAWU have also continued, effectively depriving them of collective bargaining opportunities.[49] Despite promises of the Uhuru Kenyatta Administration to uphold ILO Conventions and encourage freedom of association, Kenya has not ratified the fundamental Convention 87 on Freedom of Association and Protection of Union Rights.[50] This is the only one of the eight core conventions that it has not yet ratified.

2 Transnational regulatory governance

Section 2.1 first determines the legal commitments in relation to human rights and the clauses that are relevant to remediation in the EAC-EU EPA. Section 2.2 then relies upon empirical evidence to identify the key stakeholders in transnational social network relations that can fuel local capacity development: civil society organisations and the judiciary. The considerations in section 2.2 serve as mere recommendations.

2.1 EAC-EU EPA

The Uhuru Kenyatta Administration heavily invested in the establishment of the WTO-compatible Economic Partnership Agreement (2014) between the EU and the East African Community Partner States, Kenya, Burundi, Rwanda, Tanzania and Uganda, under pressure from the Kenyan floriculture industry.[51] This was confirmed in an article authored by Benjamin William Mkapa, a former President of Tanzania, and in a briefing commissioned by the European Parliament.[52]

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[48] HRC, 'Report of the Working Group on the Universal Periodic Review' (2015) UN Doc A/HRC/29/10 para 142; CEDAW/C/KEN/CO/8 (n 36) paras 12–13.

[49] Eg Interview data collected from 738 floriculture workers reported in Kenya Human Rights Commission, '"Wilting in Bloom" The Irony of Women Labour Rights in the Cut Flower Sector in Kenya' (2012) <www.khrc.or.ke/publications/63–wilting–in–bloom–the–irony–of–women–s–labour–rights–in–the–cut–flower–sector–in–kenya/file.html> accessed 3 March 2018 p 9; International Trade Union Confederation, 'Global Rights Index – Kenya' (2015) <www.refworld.org/docid/557a9a1111.html> accessed 4 March 2018 p 31; Interview data collected from 24 floriculture workers reported in Kabiru (n 40) p 222.

[50] Otenyo (n 19) p 128.

[51] In 2016, South Sudan became the sixth member of the Economic Partnership Agreement between the East African Community Partner States, of the one Part, and the European Union and its Member States of the Other Part (2014) <http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153845.pdf> accessed 1 December 2018 (EAC–EU EPA).

[52] Benjamin William Mkapa, 'Why the EPA is not Beneficial to Tanzania' (*The South Bulletin*, 1 November 2016) <www.southcentre.int/question/why–the–epa–is–not–beneficial–to–tanzania/> accessed 1 November 2017; Eric Pichon, 'Briefing. International Agreements in Progress.

Removal of preferential market access – which the floriculture industry had under the previous IVth Lomé Convention – would decrease its competitiveness in the EU, where its main competitors benefit from a duty-free regime, either because they qualify as Least Developed Countries under the Everything But Arms special arrangement (Ethiopia) or because they are part of a free trade agreement with the EU (Colombia and Ecuador).[53]

Kenya is, however, the only EAC Partner State that has signed and ratified the EAC-EU EPA.[54] In 2018, the EAC heads of state postponed the endorsement of the agreement again until 'satisfactory clarification of concerns', which might entail a renegotiation of the agreement with the EU.[55] There are two reasons why the other EAC Partner States are less eager than Kenya to ratify the EAC-EU EPA. First, the other EAC Partner States all qualify as Least Developed Countries, which have duty-free and quota-free access to the EU market under the Everything But Arms scheme, without the EAC-EU EPA in place.[56] Second, the other EPA Partner States have relatively more reasons to be concerned about the impact of the EAC-EU EPA on their long-term objectives to promote industrialisation and to add value to their resources.[57] The agreement provides for immediate duty-free and quota-free access to the EU market for all EAC exports, and gradual liberalisation of the EAC market to imports from the EU, providing access to 82.6 per cent of the market's value over 25 years. There are fears that East African companies will not be able to withstand heightened competition from EU corporations in Africa. Moreover, the agreement does not break trade patterns, whereby the EAC Partner States are expected to export raw materials and agricultural products instead of manufactured goods. President Mkapa accused the EU of using the agreement to

Economic Partnership Agreement with the East African Community' (2018) <www.europarl.europa.eu/RegData/etudes/BRIE/2018/620218/EPRS_BRI(2018)620218_EN.pdf> accessed 3 December 2018 p 9.

[53] European Parliament and Council, Regulation 978/2012 of 25 October 2012 applying a Scheme of Generalised Tariff Preferences and Repealing Council Regulation (EC) Nr 732/2008 [2012] OJ L 303/1.

[54] Rwanda has also signed the EAC–EU EPA.

[55] EAC, 'Joint Communiqué: 19th Ordinary Summit of Heads of State of the East African Community' (2018) <www.eac.int/communique/1001–joint–communiqué–19th–ordinary–summit–of–heads–of–state–of–the–east–african–community> accessed 7 December 2018; Pichon (n 52).

[56] Kenya's ratification of the EAC–EU EPA has been regarded as a sufficiently strong commitment by the EU. For the time being, Kenyan floriculture corporations continue to export under the Generalised System of Preferences regime until the reinstatement process is over.

[57] SEATINI–Uganda and others, 'Civil Society Statement on the EAC–EU EPA and the Rendezvous Clause Negotiations' (2016) <http://eacsof.net/EACSOF/wp–content/uploads/2016/08/CSO–EU–EPA–1.pdf> accessed 7 March 2018.

secure access to East African raw materials, including tungsten and tantalum, under the Raw Materials Initiative.[58] Such concerns are less pressing in Kenya for two reasons. On the one hand, Kenya is relatively resource-poor. There have only recently been discoveries of oil in the conflict-affected region of Turkana County.[59] On the other hand, Kenya is already relatively industrialised. Kenya's exports to the EU were 2.5 times as much as the exports of Tanzania – the most developed of the least developed EAC Partner States in 2018.[60]

The failure to have the EAC-EU EPA in place would result in a decrease in production and significant loss of employment in the Kenyan floriculture industry. Approximately 100,000 people are currently directly employed in the floriculture industry, supporting over half a million beneficiaries. While the number of jobs in other industries in Kenya has stagnated, the number of floriculture jobs has doubled over the last decade.[61] The challenge of creating *productive* jobs – an essential precondition for achieving the UN Sustainable Development Goals on decent work for all, poverty alleviation and gender equality – has, however, been largely ignored during the EAC-EU EPA negotiations. For example, no gender impact assessment has been carried out, while the EAC-EU EPA is likely to further contribute to the feminisation of precarious labour in the floriculture industry. In particular, women workers in the floriculture industry are disproportionally impacted, as their work is segmented by gender.[62] The higher-paying jobs, such as supervision and construction, are disproportionally given to men.[63] Women are concentrated in the more numerous lower-paying jobs, such as planting and picking.[64] The gender factor cannot be isolated from a series of other factors.[65]

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[58] Mkapa (n 52).
[59] Kenya (Office of the Attorney General, Department of Justice) and KNCHR, 'The National Action Plan on Business and Human Rights in Kenya. Report on the stakeholder Consultations held in Turkana County' (2017) <http://nap.knchr.org/Portals/0/Reports/Turkana%20regional%20consultation%20report.pdf?ver=2017–09–04–174649–783> accessed 5 December 2017 p 3.
[60] See European Commission, 'European Union, Trade in Goods with Kenya' (2019) <https://webgate.ec.europa.eu/isdb_results/factsheets/country/details_kenya_en.pdf> accessed 25 March 2019; European Commission, 'European Union, Trade in Goods with Tanzania' (2019) <https://webgate.ec.europa.eu/isdb_results/factsheets/country/details_tanzania_en.pdf> accessed 25 March 2019.
[61] Mitullah (n 16) p 29.
[62] Kenya Human Rights Commission (n 49) p 17; Mitullah (n 16) p 31.
[63] Eg *Esther Wavinya Mulwa v Redland Roses* (2017) 548/2009 High Court (Milimani).
[64] Kate MacDonald, 'The Reality of Rights. Barriers to Accessing Remedies When Business Operates Beyond Borders'. Corporate Responsibility Coalition' (2009) <https://business–

Many workers are single mothers who have migrated from non-flower growing regions to flower growing areas in Kenya.[66] These migrant workers rely upon their employers for housing, transport, meals, and medical assistance. This state of dependence is an effective disincentive to raise concerns about any violation of their rights taking place during or outside their working hours.

Does the EAC-EU EPA create a legal basis for cooperation on issues relating to human rights, including labour rights? While a Committee of Senior Officials and a Consultative Committee, consisting of civil society organisations, have been tasked with monitoring and assessing the impact of the EAC-EU EPA on sustainability, negotiations in areas of trade and sustainable development were left for future discussions.[67] The open-ended nature of this 'rendez-vous' clause in the EAC-EU EPA mirrors the discussions on a social clause. It would be unfair to put a social clause in 'an asymmetrical agreement', as EAC Partner States have been reluctant to have such a clause in the WTO. Civil society organisations have already called upon the EAC Partner States to not undertake these negotiations until the EAC has put in place its own policy frameworks.[68]

Human rights conditionality is controversial but the EAC-EU EPA provides, nevertheless, some clauses containing modes of cooperation and legitimation relating to human rights, as well as a framework to engage in discussions.[69] The EAC-EU EPA has been established under the overarching framework for EU relations with the African, Caribbean and Pacific (ACP) group of states, the Cotonou Agreement.[70] Under the latter agreement, the EU and the ACP states acknowledge that human rights, democratic principles, and the rule of law are 'essential elements' that underpin the domestic and international policies of their partnership.[71] Lorand Bartels argues that such elements will still underpin the

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humanrights.org/en/pdf–the–reality–of–rights–barriers–to–accessing–remedies–when–business–operates–beyond–borders> accessed 30 September 2019 p 13.

[65] Patricia Kameri–Mbote, 'The Quest for Equal Gender Representation in Kenya's Parliament: Past and present challenges' in Japhet Biegot (ed), *Gender Equality and Political Processes in Kenya* (Strathmore University Press 2016) p 65.

[66] Mitullah (n 16) pp 29 and 33.

[67] Art 3 EAC–EU EPA.

[68] SEATINI–Uganda (n 57).

[69] Cf David Armstrong, Theo Farrell and Hélène Lambert, *International Law and International Relations* (2nd edn, Cambridge University Press 2012) p 308.

[70] Recital, arts 2, 4, 75, 136 and 142(3) EAC–EU EPA.

[71] Art 9Cotonou Agreement.

EAC-EU EPA after the Cotonou Agreement expires in 2020.[72] He bases his argument on the wording of Article 4(a) EAC-EU EPA, which provides that this agreement is 'based on the principle of building on the *acquis* of the Cotonou Agreement'. A recital of the EAC-EU EPA also states that this agreement 'shall be consistent with the objectives and principles of the Cotonou Agreement'.[73] Under Article 50 Cotonou Agreement, the ACP states have also reaffirmed their commitment to the ILO core labour standards. While core labour standards should not be used for protectionist purposes, EAC Partner States and EU Member States have agreed to cooperate on labour matters.

2.2 Transnational regulatory networks (Recommendations)

While it cannot be said that there would be a shared interest in collaborating in all kinds of capacity-building activities relating to human rights in the EAC Partner States, there seems to be some common ground to collaborate regarding certain business and human rights issues in Kenya. During a round table discussion for businesses operating in East Africa organised by Kenya in 2012, it was agreed that the EAC can learn from what has been done in other regions, so as not to reinvent the wheel when it comes to how businesses should approach human rights.[74] A number of projects have been started. Denmark's national human rights institution has been invited to support the development process of NAP.[75] Those involved in the process of the creation of this plan took great pride in being the first African state to establish such a plan.[76] Kenya's national prestige is not only boosted within Africa and the EAC region, but also in the EU, where its efforts have been received as 'exemplary'.[77] In 2013, the KNCHR also launched the Nairobi Process: A Pact for Responsible Business, in collaboration with the

[72] Lorand Bartels, 'Human Rights Provisions in Economic Partnership Agreements in Light of the Expiry of the Cotonou Agreement in 2020, Policy Department for External Relations' (2017) <https://publications.europa.eu/en/publication–detail/–/publication/625a2a32–19c4–11e7–808e–01aa75ed71a1> accessed 30 September 2019 pp 15 and 39.
[73] Ibid pp 15 and 39.
[74] Office of the Attorney General and Department of Justice (n 44) p 8.
[75] KNCHR, 'National Baseline Assessment on Business and Human Rights' (2017) <http://nap.knchr.org/Portals/0/Reports/Kenya%20NBA%20Final.pdf> accessed 5 February 2018 p 47.
[76] Interview data – participant KE–G.
[77] Eg Beata Faracik, 'Implementation of the UN Guiding Principles on Business and Human Rights' (2017) <www.europarl.europa.eu/RegData/etudes/STUD/2017/578031/EXPO_STU(2017)578031_EN.pdf> accessed 30 September 2019 pp 9 and 15. See also Reinhard Wolf, 'Respect and Disrespect in International Relations: The Significance of Status Recognition' (2012) 3(1) International Theory p 123.

international NGO, the Institute for Human Rights and Business. This project aimed to embed human rights standards and due diligence in the emerging oil and gas sector in Kenya, through the application of the UN Guiding Principles.

In relation to 'access to remedies', a relatively uncontroversial contribution can be deployed to carry out relevant activities – such as assistance for legal and administrative infrastructure and technical assistance – because these activities exist relatively independently from 'political will'.[78] Such capacity-building activities shift the emphasis away from a focus on monitoring of the EAC Partner States towards the EU Member States international obligation to cooperate.[79] Other funders, such as US Aid, UN Women and the World Bank, have already supported the Kenyan judiciary to improve its performance and to increase access to courts in recent years.[80] In its 2017 review to the Committee on the Elimination of Discrimination against Women, the Kenyan government claimed that it had failed to strengthen access to justice because insufficient financing from the EU and other development partners had allegedly been provided.[81] Interview participants agreed that local capacity building – which facilitates legal certainty and the participation of everyone involved – should be prioritised over facilitating access to extraterritorial remedies in EU Member States.

The field research points out that two groups of stakeholders would benefit from more support from the EU and its Member States to lower barriers to 'access to justice': the judiciary and civil society organisations. First, it emerged from the interviews that technical and financial assistance to courts – further discussed in section 3.5 – by the EU and its Member States could make the biggest impact for floriculture workers that seek a remedy when their rights are violated.[82] A number of concrete actions were suggested. First, EU Member States can support

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[78] See MacDonald (n 64) p 42; Franz Christian Ebert, 'Labour Provision in EU Trade Agreements: What Potential for Channelling Standards–Related Capacity Building' (2016) 155(3) International Labour Review p 408.
[79] Cf Ebert (n 78) p 426.
[80] CEDAW, 'List of Issues and Questions in Relation to the Eighth Periodic Report of Kenya. Addendum Replies of Kenya' (2017) UN Doc CEDAW/C/KEN/Q/8/Add.1 para 6; World Bank, 'Judicial Performance Improvement Project Kenya' <http://documents.worldbank.org/curated/en/118271548714228981/Disclosable–Version–of–the–ISR–Judicial–Performance–Improvement–P105269–Sequence–No–10> accessed 30 September 2019; Interview data – participants KE–N and KEO.
[81] CEDAW/C/KEN/Q/8/Add.1 (n 80) para 6.
[82] Interview data – participants KE–B and KE–C.

educational and awareness-raising programmes concerning existing barriers to justice and relevant international standards, including the UN Guiding Principles, for the judiciary.[83] Second, it was considered valuable for them to co-facilitate an online peer-to-peer learning platform in which judges can exchange ideas. Such a tool would empower judges and further increase transparency.[84] Third, they can co-develop and disseminate concrete case studies as to how barriers to justice can be alleviated in Kenya and the rest of the East African Community.[85]

A variety of initiatives in which the EU and its Member States support labour officers – further discussed in section 3.4 – could also be developed. National human rights institutions in EU Member States and the KNCHR – discussed in section 3.3 – could also exchange best practices as to how they can fulfil their role as remedying bodies with a 'watchdog' role within governments that prioritise economic growth.[86] Yet, it emerged from the interviews that – as long as the legal issues are not resolved – it would be better to prioritise allocating scarce funds to capacity development activities in courts.

Second, the EU-ECA EPA – or an alternative agreement that would be concluded – could serve as an organisational platform through which NGOs can help to shape ideas and expertise.[87] While some individuals in Kenyan civil society sometimes engage in questionable activities, the interview participants – at least those that were not affiliated with trade unions – indicated that the 'best shot' would be to vet and support local Kenyan NGOs that are supporting floriculture workers to enjoy their rights.[88] This finding resonates with the approach set out by Martha Finnemore and Kathryn Sikkink in their seminal article, 'International Norm Dynamics and Political Change', in which they describe NGOs as 'norm promoters' in transnational networks.[89]

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[83] Interview data – participants KE–E and KE–G.
[84] Interview data – participants KE–F and KE–G.
[85] Interview data – participants KE–H and KE–O.
[86] Interview data – participant KE–G.
[87] Peter Spiro, 'NGOs and Human Rights: Channels of Power' in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar 2010) pp 122–123.
[88] Kenya Human Rights Commission (n 49) p 40; Interview data – participants KE–D, KE–F and KE–H.
[89] Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52(4) International Organization.

The EU and its Member States could enhance the environment for NGOs that support floriculture workers in Kenya in two ways. First, opportunities for Kenyan NGO representatives to educate themselves could be created. Awareness raising about the status of core labour rights as human rights under international law was reported to be a priority.[90] Training on advocacy and litigation, as well as dissemination of research initiatives that report on human rights violations and impunity, were reported to be other valuable initiatives.[91] Second, as a major export destination of Kenyan flowers, there is a major opportunity to facilitate public debate in the EU. Partnerships between NGOs in the EU and Kenya could mobilise EU citizens.[92]

Most importantly, it emerged from the interviews that any such development cooperation process should target all types of floriculture corporations, including corporations with Kenyan and Indian owners.[93] Development cooperation approaches funded by EU Member States currently often exclusively target flower corporations with European owners. This practice widens the protection gap between large and medium-sized corporations with European owners and the other corporations with Kenyan and Indian owners. This problem is exacerbated by the fact that there are major concerns regarding the priorities of EU Member States when they provide funding.[94] It is perceived that EU state funds – especially those provided through economic or foreign affairs ministries – reportedly serve as a financial leeway to support business interests of floriculture corporations with European owners and to keep regulatory standards low. One interview participant said, 'If we want to put the minimum wage on the agenda', then an European state funder will question 'why low standards should be raised' as 'other countries and in particular Ethiopia will benefit'.[95] Another interview participant indicated that European state funders tell her that 'Kenya has its own laws' or 'accept and move on'.[96]

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[90] Interview data – participants KE–G and KE–O.
[91] Interview data – participant KE–O.
[92] Kristian Bruun Andersen and Selina Omwaka Wambutsi, 'The Challenges and Opportunities for Organising Labour in the Kenyan Flower Industry' (2013) <https://core.ac.uk/download/pdf/43027000.pdf> accessed 5 March 2018 p 36; Interview data – participants KE–A, KE–F, KE–K/KE–L, KE–O and KE–J.
[93] Frank Hendrickx and others, 'The Architecture of Global Labor Governance' (2016) 155(3) International Labour Review p 11.
[94] Interview data – participant KE–H.
[95] Interview data – participant (anonymised).
[96] Interview data – participant (anonymised).

At the EU level, concrete initiatives to support local capacity development can be embedded in the existing EU development cooperation initiatives. In 2019, the European Commission provided approximately 1.8 million euro (1,57 million GBP at GBP 1:EUR 1.14) of development support to civil society organisations and public sector non-profit agencies, institutions and organisations (such as the KNCHR), under the European Instrument for Democracy and Human Rights.[97] This funding opportunity promotes partnerships between NGOs in the EU and Kenya as at least one of the beneficiaries needs to be based in Kenya. One of the aims of this initiative was to 'increase accountability and combat cultures of impunity' in Kenya.

While it is difficult to examine the allocation of development assistance by individual EU Member States, it was observed in the second part of this thesis that France and the Netherlands are currently not even spending the budget that they committed to spending in 1970 before the UN General Assembly. There is room for more efforts on the side of the EU and its Member States to support local capacity building. Recall also that the Dutch and French governments have set out that they prefer supporting national governments to develop local capacity building in developing and emerging states over opening the doors of their respective national courts to victims of corporate human rights.

3 Remedies

Proposing specific ways in which the EU and its Member States can support Kenya in its state obligations regarding access to remedies requires an analysis of the legal, practical and other barriers that lead to a denial of access to remedy. Section 3.1 sets out that workers are effectively discouraged from seeking a remedy, as this might lead to their dismissal. This section also describes that workers struggle to find trustworthy representation. The remedies that are discussed in sections 3.2-3.4 were reported in the interviews as potential avenues

[97] European Commission, 'European Instrument for Democracy and Human Rights (EIDHR) Country–based Support Scheme Kenya 2018' (2019) <https://webgate.ec.europa.eu/europeaid/online–services/index.cfm?adsschck=1548647551219&do=publi.detpub&searchtype=qs&orderby=upd&orderbyad=Desc&nbPubliList=15&page=1&aoref=162330> accessed 1 February 2019. See also European Parliament and Council, Regulation 235/2014 of 11 March 2014 establishing a Financing Instrument for Democracy and Human Rights Worldwide [2014] OJ L 57 L77.

to get non-binding redress for workers. Court proceedings are discussed in section 3.5. Court proceedings are also valuable for other people that are affected by, but not in an employment relationship with, floriculture corporations. Such claims have not been investigated in-depth due to space and time limitations.

3.1 Awareness and representation issues

According to the interview participants, workers are not always aware that their human rights are being violated.[98] Amongst those workers that are aware of human rights violations, there is a general disbelief that complaining would change anything. Human rights violations have been perceived as 'God's will' and compared with 'the compromises one has to make in marriage'.[99]

Floriculture workers reportedly frequently face intimidation or dismissal when they raise concerns regarding their rights within or outside the company.[100] This is an effective incentive to not complain, as 'getting food on the table' is the main priority for workers in a state with so much unemployment.[101] Floriculture workers are to some extent protected against dismissal and other disciplinary penalties, under section 46(h) Employment Act (2007). According to this section, no disciplinary penalties can be imposed on an employee who has brought a complaint or legal proceeding against their employer. However, this section also provides that disciplinary proceedings might be taken 'where the complaint is shown to be irresponsible and without foundation'. The effects of being dismissed are worse for migrant workers, as they risk being sent out of the company-provided facilities and having to uproot their families. Women face other specific barriers in gaining access to justice because of a number of factors, including gendered roles, social stigma and power balances.[102] Some married women are,

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[98] MacDonald (n 64) pp 12–14; Interview data – participants KE–B and KE–C.
[99] Interview data – participants KE–D and KE–N.
[100] KNCHR (n 75) p 47; Interview data – participants KE–C, KE–I and KE–N.
[101] Martin Ole, 'Protecting, Observing and Enforcing Human Rights for Labourers in the Cut Flower Industry in Kenya: a Critique' (2012) <www.researchkenya.or.ke/thesis/21716/protecting,–observing–and–enforcing–human–rights–for–labourers–in–the–cut–flower–industry–in–kenya–:–a–critique> accessed 3 October 2018 p 73; Interview data – participant KE–E.
[102] UN General Assembly, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (2017) UN Doc A/72/162 para 30; Hivos, 'Women@Work' <www.hivos.org/program/decent–work–for–women–womenwork/> accessed 30 August 2018.

for example, reportedly afraid to complain about incidents of sexual harassment because doing so may lead to marital problems with their husbands.

Floriculture workers who are prepared to voice their complaints can, in principle, seek support from NGO representatives, pro bono lawyers, KPAWU branch officials and shop stewards. There are, however, representation issues that might complicate floriculture workers' right to a remedy. The reported issues for the three categories of representatives are discussed in turn.

First, floriculture workers can try to be supported by NGO representatives. While it will be discussed below that NGO representatives face substantial difficulties in representing claimants in a labour office or court, they try to find ways to help workers.[103] One interview participant reported, for example, that she helps workers by setting up a mobile office out of sight of the management, where workers can get advice.[104] Sometimes, NGO representatives ask a fee for providing their services. While it was alleged by an interview participant that such a fee helps workers 'to see the value of the service provided', the fee can be as high as three months' wage for a floriculture worker.[105] To alleviate such problems, the KNCHR has encouraged the government to work with NGOs and the Law Society of Kenya to allocate more funding to legal aid.[106] While a National Legal Aid Service was established in 2016, the stringent conditions currently make access to aid practically unavailable.[107]

Second, floriculture workers can seek support from lawyers who work on a pro bono basis. In some law firms, the interests of lawyers and workers are aligned. Bigger law firms often consider pro bono work as a 'social duty', which provides public relations opportunities.[108] One issue that has been reported is that they assign less-experienced staff to prepare such claims.[109] The interviews further revealed that 'ambulance chasing' lawyers are another problem. These lawyers are driven by money and often do a disservice to the workers they claim to

[103] Interview data – participant KE–J.
[104] Ibid.
[105] Interview data – participant (anonymised).
[106] Section 29(2) (d) Legal Aid Act 2016 (KE); KNCHR (n 75) p 49.
[107] See KNCHR (n 75) p 49; Interview data – participants KE–A, KE–C and KE–J.
[108] Interview data – participant KE–J.
[109] Interview data – participant KE–O.

represent.[110] For example, such lawyers would accept a bribe from the floriculture corporation – in the form of an out-of-court settlement – and leave the workers they are supposed to represent empty-handed.[111]

Third, those floriculture workers who are unionised – approximately 50 per cent – can try to seek support from KPAWU, which has a monopoly in the floriculture industry (and other agricultural industries).[112] However, in two independent studies, workers have reported that KPAWU branch officials do generally not inform them of their rights or represent them in cases of human rights grievances.[113] KPAWU allegedly does not pursue human rights violations as long as money is coming in.[114] While there is limited transparency in the organisation of KPAWU, this observation seems to be evidenced by the following two points. First, most court cases initiated by KPAWU against floriculture corporations that are included in the National Council for Law Reporting's database concern the failure by companies to deduct union fees, at 2 per cent of their gross wages, to KPAWU.[115] Second, while the contribution to COTU-K from flower workers alone is estimated to be over KES 200 million (GBP 1.5 million at GBP 1:KES 131) per year, KPAWU branch officials reportedly have to work with minimal resources.[116] Shop stewards on flower farms reportedly have to do much of their work alone, while not being sufficiently trained in handling complaints.

It emerged from the interviews with KPAWU officials that they are unaware that there are any specific barriers to remedies for women.[117] This finding is further evidenced by the landmark case *KPAWU v Unilever Tea (K) Ltd* (2014) concerning the dismissal of five male workers on a Kenyan Unilever tea plantation in Kenya that KPAWU had initiated. The workers had been dismissed in 2017 on the basis

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[110] Interview data – participants KE–C and KE–J.
[111] Interview data – participant KE–C.
[112] Kabiru (n 40) p 221.
[113] Interview data collected from 24 floriculture workers reported in Kabiru (n 40) p 222; Interview data collected from 738 floriculture workers reported in Kenya Human Rights Commission (n 49) p 31.
[114] Interview data – participant KE–F, KE–M and KE–O. See also NTV, 'Zena Roses Workers Demand Salaries Amounting to Ksh. 3M' (15 October 2018) <https://ntv.nation.co.ke/news/2720124–4807564–yxiobu/index.html> accessed 15 December 2018; Elvanis Gishu, 'Flower Workers Take to the Streets in Eldoret over Three Months' Pay' (2018) <https://hivisasa.com/posts/1052–zena–roses–workers–demonstrate–over–unpaid–three–months–salaries–due> accessed 15 December 2018.
[115] Eg *KPAWU v Expressions Flora Limited* (2012) 11/2012 Industrial Court.
[116] Kenya Human Rights Commission (n 49) p XI.
[117] Interview data – participants (anonymised).

of disciplinary proceedings for sexual harassment. Unilever's observation that KPAWU has 'abdicated its duty of defending ... women, who are also their members' seems to be accurate.[118] In court, KPAWU claimed that the dismissed workers (most of them in supervising jobs) – including one worker who admitted that he had attacked a female co-worker in her house – should have been allowed to cross-examine the alleged victims during the disciplinary proceedings, a request that is prohibited in relation to sexual harassment, under section 6(3) Employment Act (2007).

3.2 In-company proceedings

The interviews indicated that whether in-company proceedings provide an efficient opportunity to complain and continue the working relationship in a constructive manner depends, in practice, solely on the goodwill of the farm management.[119] Section 12 Employment Act (2007) set outs that employers should have a statement on the in-company grievance procedures. This section has, however, two considerable limitations. First, this section is limited in scope. It does not apply to grievances relating to health and safety at work and it only covers corporations with more than 50 employees. Second, its structure is confusing. This section refers not only to grievance procedures (which aim to improve employee relations) but also to disciplinary rules (which aim to impose punishment of workers, including dismissal).[120] This ambiguous formulation is used by some employers to erroneously confuse grievance proceedings with disciplinary proceedings. For example, in *KPAWU v Bilashaka Flowers Ltd* (2013), a court case that will be discussed below, the management dismissed shop stewards because they had acted on deficiencies reported by workers in a grievance procedure on the basis of section 12 Employment Act.[121]

3.3 KNCHR

The Kenya National Commission on Human Rights can provide workers whose rights have been violated with non-binding means of redress. Section 8(d) KNCHR

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[118] *KPAWU v Unilever Tea Kenya* (2014) 13/2014 Employment and Labour Relations Court (Kericho) para 17; MacDonald (n 64) pp 12–14.
[119] See MacDonald (n 64) p 15.
[120] See *KPAWU v Bilashaka Flowers* (2013) 25/2012 Industrial Court (Nairobi).
[121] Ibid referring to *Grace Gacheri Muriithi v Kenya Literature Bureau* (2011) 44/2011 Industrial Court (Nairobi).

Act (2011) provides that this Commission can receive and investigate human rights complaints about alleged abuses of human rights, and endeavour to resolve them by conciliation, negotiation or mediation. While the UN Working Group on Business and Human Rights stated that it heard only positive comments about the KNCHR's investigation of complaints,[122] it was perceived by some interview participants as a 'talking shop' that sees its adjudicating role as 'optional'.[123] These claims seem to be confirmed by the KNCHR's website, which explains that complaints that do not touch on discrimination issues are redirected to the Ministry of Labour and Social Protection's labour offices.[124] This practice can be considered unfortunate in light of the conclusions that are drawn in section 3.4, below. An additional problem is that the KNCHR Act provides that discrimination complaints that fall under the mandate of the Gender and Equality Commission are also outside the KNCHR's jurisdiction.[125] This further limitation to the scope of complaints that can be brought before the KNCHR is unfortunate as the Gender and Equality Commission does not host a complaint mechanism.[126]

3.4 Labour offices

The Ministry of Labour and Social Protection's labour officers have jurisdiction over any dispute as to the rights of workers, including the right to health.[127] Major advantages compared to court proceedings are that decisions made by labour officers are made promptly and informally.[128] There is little cost involved and workers can be helped in Swahili.[129] Labour officers can consider laws, policies, codes of conduct, collective bargaining agreements and findings of ex officio investigations in their non-binding decisions.[130]

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[122] UN Working Group on Business and Human Rights (n 46).
[123] Interview data – participants KE–D and KE–E.
[124] MacDonald (n 64) p 15; KNCHR, 'About us' <www.knchr.org/Aboutus/FAQs.aspx> accessed 10 January 2018; Interview data – participant KE–I.
[125] Section 8 (d) Kenya National Commission on Human Rights Act Nr 14 2011 (KE).
[126] CEDAW/C/KEN/CO/8 (n 36) para 14.
[127] Section 87(1)(b) Employment Act 2007 (KE). The Ministry of Labour and Social Protection's Directorate of Occupational Health and Safety has been recognised by the court as also having the power to adjudicate work injury claims. However, this has been disputed in court (see Irene Kashindi, George Kashindi and Paul Munyao, 'Employment and Labour Law in Kenya' (Lexology, 13 December 2018) <www.lexology.com/library/detail.aspx?g=3b9feea6–9be3–488f–8984–298724a9c797> accessed 20 December 2018).
[128] Interview data – participant (anonymised).
[129] Interview data – participant (anonymised).
[130] Interview data – participants KE–D, KE–H and KE–N.

As explained in section 3.1, complaints involving rights are often only brought after the worker has been dismissed (or when wages or union dues have not been paid out). The worker has three months to bring claims after being dismissed.[131] Labour officers can play an important role in reviewing whether employers have accounted for the seniority, skills, abilities and reliability of employees, under section 40 Employment Act (2007), which covers dismissal on account of redundancy. This section serves, in principle, to facilitate dismissals when workers' services have become 'superfluous' through no fault of their own, for example, when employers face inefficiency gains or falling demand in low seasons.[132] But it is, in practice, often abused to dismiss, without payment of severance pay and compensation for the leave to which they are entitled, those workers that try to obtain an in-company or state-based remedy.[133]

There are legal issues that impede the proceedings before labour officers. These issues are connected to the observation that COTU-K prioritised its own interests over those of workers during the 2007 legal reforms. Most notably, section 48 Employment Act (2007) sets out that NGO representatives or pro bono lawyers cannot represent workers in a labour office. This is a privilege of trade union representatives.[134] Normally, shop stewards will represent workers in the labour office, and they report the results of the negotiations back to the KPAWU headquarters. Even if NGO representatives tried to advise workers without formally representing them, this would, reportedly, have little impact. NGO representatives alleged that labour officers do not mediate with workers who are not represented by KPAWU but 'just ask workers to sign'.[135] One interviewed labour officer seemed to confirm such practices when he explained that NGO representatives are 'annoying' and 'not representative'.[136]

Similarly, under section 40 Employment Act (2007), trade union representatives have a right to be informed about 'the reasons for, and the extent of, the intended

[131] Section 47 2007 Employment Act.
[132] Walter Amoko and Georgina Ogalo–Omondi, 'Redundancy Process: Getting it Right' (2018) <www.oraro.co.ke/2018/09/12/redundancy–process–getting–it–right/> accessed 3 December 2018; Eugene Mweresa Sudi, 'Termination of Employment on Account of Redundancy' (2018) <http://salclaw.co.ke/2018/04/18/termination–of–employment–on–account–of–redundancy/> accessed 3 December 2018.
[133] Interview data – participant KE; Section 40 (1)(e) and (g) Employment Act 2007 (KE).
[134] Interview data – participant (anonymised).
[135] Interview data – participant (anonymised).
[136] Interview data – participant (anonymised).

redundancy' by the employer, alongside the labour officer. They are better protected than both non-unionised and unionised workers. Non-unionised workers also have a right to be informed about their redundancy as well as the labour officer, but they do not have a right to be informed about the reasons or the extent of the redundancy.[137] Unionised workers do not even have a right to be informed directly by the employer about their redundancy.[138] This creates opportunities for bribery, as trade union representatives can wield undue influence on the labour officer without the knowledge of the employee.

Apart from these legal issues, there are plenty of practical issues, such as limited staffing, limited training and bureaucratic procurement procedures.[139] Interviewed labour officers themselves confirmed that they were open to corruption.[140] The effective implementation of the Access to Information Act (2016) would be one important step to ensure greater transparency and accountability.[141] Enhanced participation in the e-government might also serve this goal.[142]

3.5 Courts

The Kenyan judicial system is a three-instance system, which is composed of the High Courts and Employment and Labour Relations Courts as the courts of first instance, six Courts of Appeal, and the Supreme Court as the ultimate court of appeal.[143] The High Courts in the counties have powers to determine judicial proceedings and constitutional petitions. The Employment and Labour Relations Courts (or 'Industrial Courts'), which have been installed by the Constitution, are of equal status to the High Courts and deal specifically with all matters relating to labour and employment. Decisions by the courts of first instance can be appealed

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[137] Section 40 (1)(b) and (f) Employment Act 2007 (KE).
[138] Section 40 ibid; *Kenya National Private Security Workers Union v G4S Kenya Limited* (2017) 2326/2017 Employment and Labour Relations Court (Nairobi).
[139] KNCHR (n 75) p 51; Kamwaro (n 101) p 76; Kenya Human Rights Commission (n 49) pp X–XI; Interview data – participants KE–A, KE–F, KE–H and KE–O.
[140] MacDonald (n 64) p 15; Interview data – participant (anonymised).
[141] UN Working Group on Business and Human Rights (n 46) referring to section 35 Constitution and Access to Information Act 2016 (KE).
[142] Kenya Human Rights Commission (n 49) p 28; Esther Nderitu Imbamba and Nancy Kimile, 'A Review of the Status of E–Government Implementation in Kenya' (2017) 2(2) Regional Journal of Information and Knowledge Management pp 1–15.
[143] Art 48 Constitution 2010 (KE).

to a Court of Appeal. Further appeals come before the Supreme Court, but only in limited circumstances.

Article 22 Constitution provides that every person has the right to institute court proceedings claiming that rights or fundamental freedoms in the Bill of Rights have been denied, violated, infringed or threatened.[144] Workers need to file their claims within a time frame of three years from the alleged breach.[145] Bringing claims in court often requires expert knowledge of the law and legal proceedings. Flower corporations are normally represented in court by their human resource manager and an external lawyer. KPAWU officials have represented floriculture workers in court. It used to be problematic for civil society organisations to represent workers in court, as they have no legal standing.[146] However, they have found a way around this issue.[147] They can file 'constitutional petitions' to secure and preserve rights guaranteed by the Constitution, including the Bill of Rights, under Articles 22(2) and 258(2)(c) Constitution.[148]

The formalities relating to initiating court proceedings should be kept to a minimum. [149] Courts entertain proceedings on the basis of informal documentation (Article 22(3)(b) Constitution). Interview participants claimed that it is relatively easy to get video or written proof.[150] Blood tests, soil reports and medical notes can also be used as evidence.[151] Witnesses can be brought to court, but witness protection is poor. [152] Class actions are allowed. [153] For example, in one of the few published human rights court claims brought by non-workers against a floriculture company, the Simotweet Community was granted an injunction against Karen Roses to stop excavating, constructing or channelling

[144] Art 22(1) ibid.
[145] Section 90 Labour Employment Act 2007 (KE).
[146] Interview data – participants KE–E and KE–K/KE–L.
[147] Interview data – participants KE–A and KE–F.
[148] Interview data – participant KE–G; Katiba Institute, 'What we Do' <www.katibainstitute.org/what–we–do/litigation/> accessed 30 August 2018.
[149] Art 22(3)(b) Constitution 2010 (KE).
[150] Interview data – participant KE–B.
[151] *Bigot Flower v Julius Mwaniki Wachiri* (2016) 12/2015 Employment and Labour Relations Court (Nakuru) para 13; Interview data – participant KE–A.
[152] Interview data – participants KE–B, KE–F and KE–K/KE–L.
[153] Art 22(2)(b) Constitution 2010 (KE); Interview data – participants KE–D and KE–E.

water into a reservoir located on their community land and a reservoir at the neighbouring primary school.[154]

Costs, the long delays in proceedings and limited access to court documents pose considerable challenges to access to justice for floriculture workers.[155] Each concern is discussed in turn. First, Article 48 Constitution stipulates that a fee to file a claim may be required. Claimants reportedly have to pay to get copies of proceedings and judgments. There are various other costs, including the costs of transport to court and the price of medical evidence. For example, in *William Wagura Maigu v Elbur Flora* (2012), the claimant paid a doctor KES 10,000 (GBP 76), which equals approximately a month's wage, to produce a medical report that stated that he became quadriplegic after falling off a greenhouse, even though health facilities are under an obligation to keep and maintain records.[156] Costs of court proceedings follow the events unless for good reason the judge rules otherwise, either awarding no costs, or directing both parties to bear their own costs.[157] Second, the long delays in proceedings are another barrier that impedes access to courts. Proceedings can take more than a decade to come to court, but some courts, such as the Industrial Courts in Nyeri and Nakuru, work relatively fast.[158] The main reason for the existing lengthy delays is that Kenyan courts have limited human and material resources to fully carry out their functions.[159] Third, claimants sometimes face barriers in accessing court documents. For example, the High Court found, in *Moses Lubakwa v Bigot Flowers* (2012), that the claimant was 'not serious and not acting diligently' as he had not tried hard enough to get copies of proceedings – despite being able to prove that such copies had been requested – during the three years that his case was pending.[160]

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[154] *Sylvia C Endere v Karen Roses LTD* (2010) 298/2005 High Court (Nakuru) (The court relied upon its civil procedure rules as the 2010 Constitution was not yet adopted at the time).
[155] Robert Kibugi, 'Development and the Balancing of Interests in Kenya' in Michael Faure and Willemien Du Plessis (eds), *The Balancing of Interests in Environmental Law in Africa* (Pulp 2011) *p 186.*
[156] *William Wagura Maigua v Elbur Flora* (2012) 248/2011 High Court (Nakuru).
[157] Section 27 Civil Procedure Act 2007 (KE).
[158] Interview data – participants KE–A and KE–F. See eg *Elgon Orchards v Doris Gerizo Agote* (2014) 25/2008 High Court (Kitale); *Esther Wavinya Mulwa v Redland Roses* (n 63).
[159] A/HRC/29/10 (n 48) para 142.
[160] *Moses Lubakwa v Bigot Flowers* (2012) 100/2008 High Court (Nakuru). See also *Daniel Karari v Bigot Flowers* (2012) 101/2008 High Court (Nakuru).

The UN's 2015 Universal Periodic Review indicated that the Kenyan judiciary was considered to lack independence. Interviewed participants agreed that corruption occurs in court cases.[161] Typically, files go 'missing' in such cases.[162] Nevertheless, corruption by the judiciary has decreased a lot in recent years.[163] The main reason for this improvement is the increased control over judges due to the increased computerisation of the court system.[164] Another reason is the active and activist role that the Industrial Courts have taken upon themselves.[165] Proactive judges in this court understand that they can provoke change, as much gravitas is attached to binding court proceedings in Kenyan society.[166] It has been described above that these judges can directly rely upon the Constitution, which has supremacy over all laws (Article 2(1) Constitution). These judges can also interpret international treaties or conventions that Kenya has ratified. Article 2(5)-(6) Constitution removed the need for 'domestication' of international law. Nevertheless, the status of ratified treaties and conventions in Kenya remains unclear.[167] On the one hand, the relation between provisions in the Constitution and international law is uncertain. On the other hand, Article 93(5) Constitution 'preserves the people's sovereignty and power to enact laws binding unto themselves through Parliament'. This preservation of the role of Parliament extends through the Treaty Making and Ratification Act (2012), which sets out that Parliament should play a decisive role in incorporating international law into Kenya.

It was described in section 3.1 that complaints regarding labour rights are often only brought to court after the worker has been dismissed (or when no wages or union dues have been paid). On several occasions, the courts have set out that the employer must comply with procedural and substantive fairness when dismissing workers. This means that the reasons for dismissal must be valid and that a fair procedure must be followed. Fair procedure includes the right of the worker to be heard before being summarily dismissed. For example, in *KPAWU v Sirgoek*

[161] A/HRC/29/10 (n 48) para 142.
[162] Interview data – participant KE–B.
[163] Interview data – participants KE–C and KE–E.
[164] Interview data – participants KE–B and KE–G.
[165] Maema (n 29) p 4; Interview data – participants KE–A, KE–C, KE–D, KE–E, KE–F and KE–G.
[166] Interview data – participants KE–A, KE–D, KE–F, KE–G and KE–O.
[167] Joseph Ndirangu Maina, 'Do Articles 2 (5) and 2(6) of the Constitution of Kenya 2010 transform Kenya into a Monist State?' (2014) <www.ssrn.com/abstract=2516706> accessed 9 December 2017. See also CEDAW, 'List of Issues and Questions in Relation to the Eighth Periodic Report of Kenya' (2017) UN Doc CEDAW/C/KEN/Q/8 para 1; CEDAW/C/KEN/Q/8/Add.1 (n 80) paras 1–2.

Flowers Ltd, the Industrial Court held that it was unfair to fire a worker for gross misconduct without sending a show cause letter or hearing the worker.[168] The Court, in determining a wrongful dismissal, may recommend to the employer to pay the wages that the employee would be entitled to or up to the equivalent of a maximum of one year's wages or salary (sections 49 and 50 Employment Act (2007)).[169] The Court can also order the employer to reinstate the employee in the same or similar work in which they were employed prior to dismissal, at the same wage. Courts will, however, normally not grant the latter 'remedy' as the working relationship between employer and worker will have been damaged.

Almost all human rights complaints in the National Council for Law Reporting's database touch upon the right to health and safety at work, including the lack of safety gear and exposure to chemicals. For example, in *KPAWU v Bilashaka Flowers Ltd* (2013), upon which this chapter relied in section 3.2, the Industrial Court considered dismissals by managers who had heard the grievances of workers who refused to work in a greenhouse as long as the flowers were still wet from the spraying of an unidentified chemical.[170] While the flower farm's manager alleged that this was in line with minutes of a meeting held with the Ministry of Labour and Social Protection and the standards of the World Health Organization, the court – after considering previous health and safety issues at the farm – held that it is 'unfair labour practice' for the employer to fail to act on reported deficiencies in line with Article 41(1) Constitution.[171]

In such 'health and safety' cases, the court normally determines whether the alleged violation was caused by the corporation's negligence and/or breach of contractual duty and, if so, whether the respondent is entitled to any damages and to what extent.[172] It is useful to give three more examples. First of all, in *Bigot Flower (K) Ltd v Julius Mwaniki Wachira* (2016), the Employment and Labour Relations Court determined, on appeal, that the defendant was 20 per cent liable

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[168] *KPAWU v Sirgoek Flowers Limited* (2013) 34/2013 Industrial Court (Nakuru) interpreting section 44(4)(d) Employment Act 2007 (KE). See also *KPAWU v Roseto Flowers* (2013) 44/2013 Industrial Court (Nakuru); *James Okeyo v Maskant Flower Limited* (2014) 244/2014 Employment and Labour Relations Court (Nakuru) para 37.
[169] Eg *David Gaitho Ndungu v Timaflor Limited* (2017) 132/2016 Employment and Labour Relations Court (Nyeri).
[170] *KPAWU v Bilashaka Flowers* (2013) 25/2012 Industrial Court (Nairobi).
[171] This article states 'Every person has the right to fair labour practices'.
[172] *Elgon Orchards v Doris Gerizo Agote* (n 158).

for injuries he sustained at work.[173] The claimant was found to be negligent by assigning work to the defendant that was not normally carried out by him. Second, in *Mt. Elgon Orchards v Doris Gerizo Agote* (2014), the High Court held that the defendant had been 30 per cent responsible for chemical trauma to both eyes 'by failing to observe safety precautions'.[174] The claimant was 70 per cent responsible as the defendant should not have been asked to harvest flowers before the chemicals had dried up. Third, in *David Gaitho Ndungu v Timaflor Ltd* (2016), the Employment and Labour Relations Court considered that the defendant had unfairly dismissed the claimant after he had been hospitalised for organophosphate poisoning and refused to sign a declaration that he was 'fit to work'.[175] In all three cases, the court considered that the employer failed to provide protective work gear (as required under section 101(1) Occupational Health and Safety Act (2007)).

Corporations often allege that the worker was not employed or not 'on duty' at the time of an accident or unlawful dismissal.[176] Payslips with the name of the claimant and respondent are accepted as evidence to prove that the worker was in an employment relationship.[177] Some employers are, however, reluctant to provide payslips or allege that they provide them via email, even though most workers do not have access to the Internet.[178] In response, Employment and Labour Relations courts have repeatedly held that the burden of proof for holding that workers were not 'on duty' is on the corporation.[179] According to section 74 Employment Act (2007), employers have to keep written records of all employed workers, their rest days and sick leave.[180] In practice, most employers fail to provide these records in court.

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[173] *Bigot Flower v Julius Mwaniki Wachiri* (n 151) para 22.
[174] *Elgon Orchards v Doris Gerizo Agote* (n 158). *See also Esther Wavinya Mulwa v Redland Roses* (n 63).
[175] *David Gaitho Ndungu v Timaflor Limited* (n 169).
[176] Eg *Elgon Orchards v Doris Gerizo Agote* (n 158); Kashindi (n 127).
[177] *Esther Wavinya Mulwa v Redland Roses* (n 63); Interview data – participant KE–F.
[178] *KPAWU v Kongoni River Farm (Star Division)* (2017) 124/2017 Employment and Labour Relations Court (Nakuru); Antony Gitonga, 'Another Flower Farm Sacks 500 Workers in Naivasha' *Standard Digital* (Nairobi, 10 April 2017) <www.standardmedia.co.ke/business/article/2001235717/another–flower–farm–sacks–500–workers–in–naivasha> accessed 1 August 2017.
[179] *Bigot Flower v Julius Mwaniki Wachiri* (n 151) para 20; *Elgon Orchards v Doris Gerizo Agote* (n 158).
[180] Interview data – participants KE–F and KE–J.

Finally, it is worth noting here that there are major concerns about the lack of effective complaint procedures for women to seek remedies in cases of sexual harassment. [181] Hierarchical relations between female workers and male supervisors can create problems, as female workers are dependent on male supervisors or line managers for the allocation of overtime or perks.[182] Victims usually seek practical solutions, such as getting another position in the firm where they have a different supervisor. Section 23 Sexual Offences Act (2006) defines sexual harassment and the burden of proof. The definition of sexual harassment is, however, restrictive and unclear. According to the law, sexual advances are only considered to be offensive if they were persistent and had an impact on the career of the alleged victim. The section has, in practice, not been used in court decisions. In the above reported *Unilever* case, the judge noted that the subject of sexual harassment is 'only gaining ground' in Kenya.[183] The case law is currently being developed by claims brought by domestic and office workers. It is useful to highlight two issues. First, it is not clear whether the employer and/or the perpetrator can be held accountable.[184] In the *Unilever* case, the court relied upon *P O v Board of Trustees, A F* (2010), a case that concerned sexual harassment of an employee of a fair trade organisation.[185] The court also referred to a number of standards, including ILO Convention 111, to determine that it is the duty of 'the employer or other responsible persons in the workplace' to prevent and remedy acts of sexual harassment. Another case, in which the employer was held liable without giving the alleged perpetrator an opportunity to be heard, is currently pending on appeal.[186] Second, it is not clear whether the burden of proof is on the worker or on the employer.[187] In one case, the court found that the burden of proof changes when an employer with more than twenty employees fails to provide and act upon sexual harassment policies, which are required under section 6(2) Employment Act (2007).[188]

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[181] UN Working Group on Business and Human Rights (n 46); Interview data – participant KE–G.
[182] Kenya Human Rights Commission (n 49) p 22; Interview data – participant KE–F.
[183] *KPAWU v Unilever Tea Kenya* (n 118).
[184] Interview data – participants KE–A, KE–J and KE–O.
[185] Ibid referring to *P O v Board of Trustees AF, BLH and RJKC* (2014) 927/2010 Industrial Court (Nairobi).
[186] *JMK v MWM and MFS* (2015) 15/2015 Court of Appeal (Mombasa).
[187] Eg *NML v Peter Petrausch* (2015) 441/2013 Employment and Labour Relations Court (Mombasa) para 23; *BWK v EK and Conservation Corporation of Kenya Limited* (2017) 443/2003 High Court (Nairobi) paras 3 and 32.
[188] *Kenya Union of Commercial, Food and Allied Workers v Meru Central Dairy Co–Operative Union Ltd* (2014) 147/2014 Employment and Labour Relations Court (Nyeri).

4 Conclusions

The case study presented in this chapter addressed the accountability of corporations in the Kenyan floriculture industry – which export almost exclusively to the EU – and the role that EU Member States can play to support Kenya in fulfilling its obligations to remedy human rights violations. This industry was interesting to study because it is almost exclusively occupied by corporations with Kenyan and European owners. An assessment of contextual factors allowed identifying social forces that create issues in relation to getting protection and providing remedies in Kenya. Two important categories of problems have been found. One obvious category of problems is limited resources in government agencies and courts. Such capacity constraints are, in many respects, a product of Kenya's position within the broader international political economy, where it is dependent on a labour-intensive export sector. Analysis has shown that such constraints are likely to persist, as the bilateral Economic Partnership Agreement between the EU and the East African Community – of which the Kenyan floriculture industry has been an ardent supporter – does not significantly alter the existing system. Another category of problems is that the sound working of legal and institutional systems for the protection of Kenyan floriculture workers is subordinated to the perceived interests of political and economic elites. The integrity of administrative or judicial processes is sometimes undermined by the corruption of individual officials.[189] Most importantly, this chapter has illustrated that existing labour laws are functional for serving the needs of the trade union COTU-K at the expense of workers. For example, only trade union officials can represent workers in the labour office. These two contextual factors – in combination with the fear of intimidation or dismissal – effectively prevent workers from seeking a remedy. Human rights cases – mostly touching on the right to health and safety at work – are often only brought after the worker has been dismissed (or when wages or union dues have not been paid out). Various deficits in the proceedings of the KNCHR and the labour offices have been identified. Some judges, especially in the Employment and Labour Relations Court are, however, oriented towards strengthening human rights compliance. They have already found some ways to work around laws that favour those in power. Transnational relationships between Kenya and the EU that are facilitated by the Cotonou Agreement and the EAC-EU EPA (or an alternative agreement) can

[189] UN Working Group on Business and Human Rights (n 46).

provide a legal basis for some capacity development in remediation. Technical and financial assistance to the judiciary, including the facilitation of peer-to-peer learning opportunities, could make a real difference for floriculture workers. Transnational regulatory governance also implies the opening up of the policy processes and support for non-state actors. It has been identified that Kenyan civil society would benefit from strengthened ties with civil society in the EU. Importantly, this chapter demonstrated that any international cooperation and assistance initiatives would need to target workers in all types of floriculture corporations in the field, including corporations with Indian owners and smaller corporations with Kenyan owners (which respect rights less than medium and large corporations with Kenyan or European owners). Development support that excludes such workers serves, in practice, as a gateway to maintain the status quo and keep mandatory regulatory standards, applicable to all corporations regardless of the nationality of their owners, low. This is an important finding that has been overlooked in the existing research and practice that focuses on corporations with European owners.

CHAPTER 7 CASE STUDY: KOREAN ELECTRONICS INDUSTRY

Drawing from desk research and ten expert interviews, this case study aims to investigate whether – and if so, in what ways – the EU and its Member States can support Korea to strengthen opportunities to remedy human rights violations in the electronics industry.[1] The framework set out in Chapter 2 section 3.3 of this thesis will be used to study whether bilateral trade relations between the EU and Korea can play a role in deploying local remediation. The previous chapter of this thesis demonstrated that the enjoyment of rights often depends upon contextual factors. Section 1 of this chapter assesses relevant social forces. This section provides an essential key to a contextualised understanding of how chaebols are structured. Section 2 concerns the legal commitments in relation to human rights and the clauses that are relevant to remediation, specifically in the Framework Agreement and Free Trade Agreement between the EU and the Republic of Korea (EU-Korea Framework Agreement; EU-Korea FTA), which aim to lay a solid foundation for a deeper relationship with long-term engagement (section 2.1). Subsequently, empirical evidence collected in case studies will be introduced to identify the main stakeholders in transnational social network relations that can contribute to local capacity development (section 2.2). Finally, section 3 analyses whether workers in Korea are able to use justice institutions when they allege that their rights have been infringed and what factors affect whether they can do so. This part fits into the broader conceptual framework of this thesis and pays particular attention to civil judicial remedies. However, it is important to not define needs formally and measure access to justice through preconceived views. Alternative mechanisms that were repeatedly mentioned as being (or having the potential to be) effective ways to obtain remedies in a direct or indirect way during interviews are therefore also discussed. In-company proceedings, proceedings before the national human rights institution (the National Human Rights Commission of Korea (NHRCK)), the Korean National Contact Point (KNCP), and the Ministry of Employment and Labour's Worker's Compensation and Welfare Service Commission (COMWEL) are assessed. An ad-hoc mediation

[1] The introduction to this thesis discussed the reasons why the case study methodology and this case study have been selected. The Annex to this thesis discusses the data collection and analysis processes. It also describes how the researcher tried to make sure that the research was carried out in a respectful and responsible way.

and arbitration case between the Korean civil society organisation Sharps and Samsung Electronics is also reported.

1 Korean electronics industry

Electronics chaebols' global success has frequently been attributed to centralised planning and government sponsoring under the military dictatorship of President Park Chung-hee.[2] Through centralised planning, Park achieved impressive economic growth. When he became President of Korea in 1963, Korea's GNI per capita was comparable to that of Kenya and Thailand.[3] At the time of his assassination in 1979, Korea's GNI almost tripled the GNI of these two states. Park used the myth that Korea is ethnically and culturally homogeneous to overcome the traumatic experiences of Japanese, American and Russian interference on the Korean Peninsula in the past. This emphasis on national unity was congruent with Confucianism, which served as the official state philosophy on the Korean peninsula during the Choson Dynasty from 1392 until 1910.[4] Confucian values of loyalties and diligence were also successfully transposed to the education system and corporate environments.[5] Individuals were expected to provide cheap and diligent labour as well as to feel a supreme loyalty to corporate interests. Collective labour disputes were, for example, framed as threats to the national economy and security, because they would ruin the national aspiration of victory over the Democratic People's Republic of Korea, internationally known as North Korea.[6] Park further ensured that those business owners that were well connected benefited from various preferential measures, including loans, subsidised interest rates, tax exemptions and tariff-free access to B2B imports, in return for expansion and job creation. These preferential measures were funded from aid, loans and other funds from Japan and the US, and foreign currency

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[2] Seung–Mi Han, 'The New Community Movement: Park Chung Hee and the Making of State Populism in Korea' (2004) 77(1) Pacific Affairs p 73.
[3] World Bank, 'GNI Per Capita' <https://data.worldbank.org/indicator/NY.GNP.PCAP.CD?contextual=default&end=1979&locations=KR–KE–TH&start=1963&year_high_desc=false> accessed 1 December 2018.
[4] Young Chun Kim and Jeasik Cho, 'Now and Forever: Portraits of Qualitative Research in Korea' (2005) 18(3) International Journal of Qualitative Studies in Education p 356; Jae Park, 'Metamorphosis of Confucian Heritage Culture and the Possibility of an Asian Education Research Methodology' (2011) 47(3) Comparative Education p 2.
[5] Andrew Eungi Kim and Gil–sung Park, 'Nationalism, Confucianism, Work Ethic and Industrialization in South Korea' (2003) 33(1) Journal of Contemporary Asia p 44.
[6] Eun Bae Choi, 'A Brief Introduction on South Korean Labour Dispute Resolution System' (2012) <http://ww2.fwa.gov.au/manilafiles/files/international/Koreacountrypaperword16.pdf> accessed 10 February 2018 p 3.

earned by temporary Korean workers in West Germany.[7] Over time, Park narrowed support to those industries that could keep up with his high growth ambitions, that is, export-oriented heavy and chemical industries, including the electronics industry.

The first civilian President of Korea Kim Young-sam (1993-1998) initially attempted to increase the accountability of corporations and aimed to bring Korea's labour practices up to the standards proclaimed by the ILO, which Korea had joined in 1991.[8] Interest rates were liberalised and the government stopped influencing the nomination of bank presidents.[9] The Kim Young-sam Administration remained, however, opposed to collective labour rights. The government decided that the state-controlled Korean Federation of Trade Unions was to be the only officially approved union.[10] For a short time, the repression of unions threatened Korea's accession to the OECD, but it was ultimately admitted in 1996.[11] Later in his tenure, Kim created various additional anti-worker measures in reaction to the 1997 Asian financial crisis.[12] They reflected Kim's ambition to follow up on the rapid economic growth policy of his predecessors.

It is in this era that the business model of vertically integrated production networks with multitier subcontracting emerged.[13] This business model is still used today by chaebols. This supply chain configuration forms a prime example of large corporations that 'knowingly outsource human rights risks' to small and

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[7] Alicia Hoffenberg Amsden, *Asia's Next Giant: Korea and Late Industrialisation* (Oxford University Press 1989) p 295.
[8] Young Whan Khil, *Transforming Korean Politics: Democracy, Reform, and Culture: Democracy and Culture* (Routledge 2015) p 152.
[9] Chung–Sok Suh and Seung–Ho Kwon, 'Whiter the Developmental State in South Korea? Balancing Welfare and Neoliberalism' (2014) 38(2) Asian Studies Review p 682.
[10] Catherine Keumhyun Lee and Sheri Prasso, 'Crunch Time for the Chaebol' *Businessweek* (Seoul and New York, 13 January 1997) <http://sheridanprasso.com/Chaebol.htm> accessed 10 February 2018.
[11] See Peter Carroll and William Hynes, 'Korea's Accession to the OECD: a History' (2016) <http://oecdobserver.org/news/fullstory.php/aid/5658/Korea_92s_accession_to_the_OECD:_A_history.html> accessed 30 September 2019.
[12] Eg Act on Special Measures for the Deregulation of Corporate Activities 1995 (KR); Labour Standards Act 1997 (KR). The Korean Ministry of Government provides (non–official) English translations on its website <www.moleg.go.kr/english/korLawEng> accessed 30 September 2019.
[13] Aelim Yun, 'Empowering "the Bottom" of Supply Chains to Establish Corporate Responsibility' (2015) <www.global–labour–university.org/fileadmin/GLU_conference_2015/papers/YUN.pdf> accessed 30 September 2019 p 3.

medium-sized corporations.[14] Samsung Electronics' supply chain in Korea consists, for example, of approximately 195 fully-fledged incorporated subsidiaries (of which it owns a majority share), 63 component suppliers (of which it does not own majority shares) and many more third-tier small and medium-sized suppliers.[15] Component and third-tier suppliers often illegally rely upon temporary workers and subcontractors disguised as in-house temporary workers through labour dispatch agencies.[16] The working conditions are the worst amongst third-tier suppliers.[17] One interview participant commented in this regard that third-tier suppliers' managers violate human rights because they 'strive to survive' and, contrary to the chaebols, have 'no reputation to protect'.[18] The trade contracts between electronics chaebols and third-tier subcontractors change all the time.[19] This is due to the asymmetrical relationship between these small and medium-sized corporations and powerful chaebols. Samsung Electronics can effectively put pressure on third-tier subcontractors, as most of them are its exclusive subcontractors in Korea. The other small and medium-sized electronics suppliers are subcontractors of LG Electronics, LG Display and SK Hynix.

To stop the drain of foreign exchange and stabilise the exchange rate, the Kim Dae-jung Administration (1998-2003) agreed to accept a rescue package that was provided by the IMF and supported by the US and Japan.[20] This package came

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[14] See Michael Addo, 'Business and Human Rights and the Challenges for Small and Medium–Sized Enterprises' in Thilo Rensmann (ed) *Small and Medium–Sized Enterprises in International Economic Law* (Oxford University Press 2016) p 330.
[15] Jiwon Han, Wol–san Liem and Yoomi Lee, 'In the Belly of the Beast: Samsung Electronics Domestic Supply Chain and Workforce in Korea' (2013) 82 Asia Monitor Resource Centre <www.amrc.org.hk/content/belly–beast–samsung–electronics–domestic–supply–chain–and–workforce—korea> accessed 10 February 2018.
[16] Interview data – participant KO–E.
[17] HRC, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises on its Visit to the Republic of Korea' (2017) UN Doc A/HRC/35/32/Add.1 para 27 referring to Solidarity for Worker's Health, 'Pyramid Contract "Mul–Yang Team", Causes Death' (2017) <http://labourhealth.or.kr/index.php?mid=journal&category=41072&document_srl=41187> accessed 1 December 2018.
[18] Interview data – participant KO–F.
[19] Samsung Electronics, 'Reply to Report 'The Blind An Untold Story Behind Samsung and LG Cell Phones' by Solidarity for Worker's Health, Korean House for International Solidarity, Korean Lawyers for Public Interest and Human Rights' (2017) <www.forum–asia.org/uploads/wp/2017/06/The–Blind_methanol–poisoning–in–supply–chains–for–Samsung–LG–_web.pdf> accessed 8 November 2017 p 76.
[20] Jongwon Choi and Taehyon Choi, 'Changes in the Political, Social and Economic Environment of Public Policy in South Korea after the 1980s' in Jongwon Choi, Huck–ju Kwon and Min Gyo

with a stringent set of neoliberal conditions. Chaebols were broken up into clusters of companies, imports were liberalised, foreign investment was legitimised and the foreign ownership ceiling was lifted from 50 per cent to 100 per cent overnight.[21] The Korean National Contact Point and the National Human Rights Commission were established and initiatives were started to promote Korean culture (later named 한류 (*Hallyu*; 'the Korean wave') as a new economic growth engine. At the time, President Kim foretelled that, 'In 2003, the size of creative cultural industry will grow ... bigger than the size of the semiconductor market'.[22]

While President Kim Dae-jung received praise from Western states, his neoliberal policy was heavily criticised in Korea. Korean chaebols and banks took it 'personally', as it appeared to them that the West was interfering in Korea's policies.[23] For example, Eun Bae-choi, a judge in the Seoul District Court, emphasised the disadvantages of unbridled globalisation and trade liberalisation by noting that the IMF had 'reversed the trend of expansion of labour rights' in Korea.[24]

Ultimately, President Roh Moo-hyun (2003-2008) formally accepted trade liberalisation by starting bilateral negotiations after the failure to make significant progress during the WTO's Doha Round in 2001. After gaining experience in negotiating Free Trade Agreements (FTA) with smaller economies, Chile and Singapore, Korea agreed to conclude an FTA with the US in 2007.[25] Korea and the EU announced the official launch of negotiations for their FTA in the same year. On that occasion, the EU also proposed an upgrade of political ties between them to a strategic partnership and the revision of the Framework Agreement (1996).

Koo, *The Korean Government and Public Policies in a Development Nexus* (Springer 2017) pp 13–15.

[21] Jang-Sup Shin and Ha-Joon Chang, *Restructuring Korea Inc.* (Routledge 2003) p 84.

[22] Kim Dae-jung quoted in Tae Young Kim and Dal Yong Jin, 'Cultural Policy in the Korean Wave: an Analysis of Cultural Diplomacy Embedded in Presidential Speeches' (2016) 10 International Journal of Communication p 5522.

[23] Katharina Moon cited in Linda Pool, 'Why South Korean Business Can Legally Refuse to Serve Foreigners' (Citylab, 11 March 2016) <www.citylab.com/equity/2016/03/why—korean-businesses-can-legally-refuse-to-serve-foreigners/473220/> accessed 10 February 2018.

[24] Eg Choi (n 6) pp 3 and 10.

[25] Younsik Kim, 'The Policy and Institutional Framework for FTA Negotiations in the Republic of Korea' in James Harrison (ed) *The European Union and South Korea The Legal Framework for Strengthening Trade, Economic and Political R*elations (Edinburgh University Press 2013) pp 42–43.

Due to the past interference of the US on the Korean peninsula, civil society organisations and other actors were reportedly less opposed to the EU-Korea FTA than to the FTA between the US and Korea.[26]

Chaebols largely escaped the impact of the 2007 global financial crisis, due to their experience with the 1997 Asian financial crisis and the pro-chaebol attitude of President Lee Myung-bak (2008-2012). President Lee minimised the impact of the environmental legislation that had been adopted under President Roh and relaxed licensing requirements to allow all types of factories to be located close to houses and rice fields, exposing residents to manganese and nickel.[27] The government further created a win-win cooperation index, whereby large enterprises can win awards for good practice after being evaluated by the Ministry of Strategy and Finance.[28] Under this index, Samsung Electronics has been rated 'excellent' for consecutive years, despite the then chairman, Lee Kun-hee, being pardoned in 2008 for tax evasion and breach of trust.[29] A former Samsung Group Vice Chairman alleged later in court that President Lee would have solicited bribes from the corporation.[30]

The Lee Administration further increased the visibility of Korea in the global scene. Three realisations need to be reported. First, Korea organised the 2010 G-20 summit and joined the Development Co-operation Directorate, a group of 27 OECD Member States that promotes economic and social development worldwide through grants and loans.[31] Second, as part of the agreement to upgrade their bilateral relations to a strategic partnership, the EU and Korea signed a new

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[26] Sung–Hoon Park and Sung–Woon Yoon, 'EU Perceptions Through the FTA Lens: Main Results of Interviews among the Korean "Elites"' (2010) 8 Asia–Europe Journal p 185.
[27] HRC, 'Report of the Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes on its Mission to the Republic of Korea (2016) UN Doc A/HRC/33/41/Add.1 para 96.
[28] This Ministry has been re–named the Ministry of Economy and Finance in 2018.
[29] UN Working Group on Business and Human Rights, 'Statement at the End of Visit to the Republic of Korea' (2016) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20038&LangID=E> accessed 30 September 2019 p 3.
[30] Yee–ji Jang, 'Lee Myung–bak Curses at Witness During Trial' *Hankyoreh* (28 March 2019) <http://english.hani.co.kr/arti/english_edition/e_national/887815.htm> accessed 30 March 2019.
[31] OECD, 'OECD Development Assistance Committee (DAC) Welcomes Korean Membership' (2009) <www.oecd.org/dac/oecddevelopmentassistancecommitteedacwelcomeskoreanmembership.htm> accessed 10 February 2018.

Framework Agreement in 2010 and the FTA in 2011.[32] Third, the Lee Administration issued a standing invitation to all thematic UN Special Procedure Mandate Holders , which facilitated a number of visits by Special Rapporteurs during the last decade. Their reports provide abundant details of sustained human rights violations in the Korean electronics industry.[33]

President Park Geun-hye (2013-2017) was repressive, actively pursuing the weakening of labour law.[34] Her Administration promoted irregular work by extending the term limit of temporary workers and splitting existing full-time jobs rather than creating new job opportunities of decent quality, on the pretence of promoting economic activity amongst women. Unable to get such reforms through parliament after the Federation of Korean Trade Unions went on strike, Park pushed her policies by Presidential directives.[35] She was ultimately impeached in 2017, as a direct consequence of accusations of soliciting bribes from Lee Jae-yong, the *de facto* heir to the Samsung empire. Park is currently serving a prison sentence of 24 years and Lee was released after the Seoul High Court reduced and suspended his sentence. However, in 2019, the Supreme Court found that the High Court had misinterpreted 'the principles of law

[32] Framework Agreement for Trade and Cooperation between the European Community and its Member States, on the one hand, and the Republic of Korea, on the other hand (signed 10 May 2010, entered into force 1 June 2014) L20 p 2 (EU–Korea Framework Agreement); Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (signed 6 October 2010, entered into force 13 December 2014) L127 p 6 (EU–Korea FTA).

[33] Eg HRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue' (2011) UN Doc A/HRC/17/27/Add.2; A/HRC/33/41/Add.1 (n 27); A/HRC/32/36/Add.2 (n 33); A/HRC/35/32/Add.1 (n 17); HRC, 'Report of the Special Rapporteur on the Situation of Human Rights Defenders Margaret Sekaggya' (2013) UN Doc A/HRC/25/55/Ad.1. See also X, 'Janus–Faced Korea: ICT Power but Freedom of Opinion and Expression Oppressed' (*OhMyNews*, 21 October 2009) <http://english.ohmynews.com/articleview/article_sangview.asp?menu=c10400&no=385735&rel_no=1> accessed 17 November 2017.

[34] Korean Human Rights Organizations Network, 'NGO Submission to the Committee on Economic, Social and Cultural Rights for the Adoption of the List of Issues' (2017) <https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/KOR/INT_CESCR_ICO_KOR_26668_E.docx> accessed 1 November 2018 referring to NHRCK, 'Report on Cases of Human Rights Counseling' (2016). See also James Harrison and others, 'Governing Labour Standards through Free Trade Agreement: Limits of the European Union's Trade and Sustainable Development Chapters' (2018) 57(2) Journal of Common Market Studies pp 7–8.

[35] Korean Human Rights Organizations Network (n 34); Interview data – participant KO–G. See also Letter from Georgi Stoev, Thomas Jenkins and Gaelle Dusepulchre, EU DAG to Cecilia Malmström, European Commissioner for Trade (16 December 2016) Annex 4 p 1.

regarding bribes' and sent the case back to the Seoul High Court to review its decision.[36]

After this scandal, some changes have occurred in Samsung Electronics' worker policies. For example, there was a sudden breakthrough in an arbitration case between former workers and Samsung Electronics after more than ten years of negotiations. In addition, after this corporation was accused of labour violations in Malaysia, the vice President of 'European corporate affairs' issued a public communication that Samsung Electronics is 'committed to ensuring good and safe work conditions for employees at our facilities and at suppliers'.[37] This statement can be considered as a major event, as this corporation has, at various times, indicated that it does not consider itself responsible for human rights violations in its Korean and foreign suppliers' factories. For example, in a statement that was issued in 2017, Samsung Electronics' vice President of 'corporate sustainable management' wrote that 'Samsung is not a participating party to any contract between its third-tier suppliers (who also supplied to other customers) and to the affected employees'.[38] He alleged that Samsung Electronics is not responsible under the applicable Korean laws in its third-tier suppliers.[39] Such a claim relies upon Article 18 Fair Transactions in Subcontracting Act (2011), which states that 'the prime contractor shall not intervene in the management of the subcontractor by means of regulating the volume of subcontract transactions'. After its visit to Korea in 2017, the UN Working Group on Business and Human rights suggested an alternative interpretation of this article that is in line with the UN Guiding Principles. It held that this article should be interpreted as concerning the volume of goods

[36] Ju–min Park and Joyce Lee, 'South Korea Court Ruling Raises Chance of Samsung Heir's Return to Jail' *Reuters* (Seoul, 29 August 2019) <www.reuters.com/article/us–southkorea–corruption/south–korea–top–court–returns–samsung–heir–lees–bribery–case–for–review–idUSKCN1VI2PX?il=0> accessed 13 September 2019.
[37] Letter from Caleb Lee, Samsung Electronics' Vice President European Corporate Affairs to Business & Human Rights Resource Centre (8 November 2018).
[38] Letter from Dohyon Kim, Samsung Electronics' Vice President European Corporate Affairs to Bobbie Sta Maria and Phil Bloomer (2017) <https://business–humanrights.org/sites/default/files/documents/Samsung–response–Aug–2017.pdf> accessed 1 December 2017> accessed 30 September 2019 p 1; Interview data – participants KO–F and KO–I..
[39] Letter from Dohyon Kim (n 38) p 1. See also A/HRC/35/32/Add.1 (n 17) paras 24 and 29.

produced, and not human rights violations taking place at the subcontractor's facilities.[40]

However, the impact of this single statement by the vice President of 'European corporate affairs' should not be exaggerated. The 2018 arbitration case – which will be discussed in section 3.5 – does not include any third-tier suppliers. Moreover, the limited responsibility of electronics chaebols is the generally accepted view in Korea. In a 2017 statement, LG Electronics wrote that it would start supplier risk management in third-tier suppliers, but that it 'typically only manages first- and second-tier suppliers'.[41] One interview participant – of the 40+ age group – also said that it would be 'illegal' or 'dangerous' for electronics chaebols to interfere and engage in the 'individual and personal issues' of third-tier suppliers.[42]

The current President, Moon Jae-In (2017), faces the challenge to increase the accountability of chaebols, while tackling other issues, such as youth unemployment and fierce competition from Chinese semiconductor companies.[43] Eyebrows were raised when Lee Jae-yong and other business leaders accompanied President Moon during his visit to Pyongyang to talk about economic cooperation with its Northern neighbour with which it is (technically) still at war. President Moon also joined Lee on his trip to India for the opening of a new Samsung factory.[44] To President Moon's credit, he has appointed a number of experts to limit the power of chaebols. A proposed law to pressure chaebols to spin off financial units is on the table.[45] Such legislation would reduce the risk

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[40] A/HRC/35/32/Add.1 (n 17) paras 29 and 31.
[41] Letter from LG Electronics to Business & Human Rights Resource Centre (2017) <www.business–humanrights.org/sites/default/files/documents/LG–response–Aug–2017.pdf> accessed 3 March 2018.
[42] Interview data – participant (anonymised).
[43] European Commission, 'Report from the Commission to the European Parliament and the Council Annual Report on the Implementation of the EU–Korea Free Trade Agreement' (2017) COM(2017)614 final p 10; Interview data – participant KO–B; Lee Chang–dong, 'Burning' (16 May 2018).
[44] Sotaro Suzuki, '"Chaebol Fighter" Moon Warms to Businesses as Employment Falters' *Nikkei Asian Review* (Seoul, 18 July 2018) <https://asia.nikkei.com/Politics/Chaebol–fighter–Moon–warms–to–businesses–as–employment–falters> accessed 10 December 2018.
[45] Yoon Young–sil, 'Samsung Group Catches Breath from Governance Reform Pressures' *Business Korea* (Seoul, 4 December 2018) <www.businesskorea.co.kr/news/articleView.html?idxno=27124> accessed 11 December 2018.

that Korea would plunge into crisis if one of the Samsung subsidiaries collapses.[46] However, Moon's Democratic Party of Korea does not have the required three-fifths majority in Parliament required to push through legislation unilaterally.[47] One important policy that has been introduced is that Article 51 Labour Standards Act (2008) has been amended to shorten the length of the working week. Thanks to this amendment, electronics workers in small and medium-sized enterprises – who used to work 66 hours per week – are now prohibited from working more than 52 hours per week. This amendment drew the ire of fragile small and medium-sized corporations, who had to lower their production targets. Under this controversy, Lee Jae-gab, who previously headed COMWEL, has replaced Kim Young-joo as Minister of Employment and Labour.[48]

2 Transnational regulatory governance

This section first covers the legal commitments in relation to human rights and the clauses that are relevant to remediation in the EU-Korea FTA and Framework Agreement (section 2.1). Section 2.2 then relies upon empirical evidence to identify the key stakeholders in transnational social network relations that can fuel local capacity development: civil society representatives and journalists, especially those raised after the authoritarian era. The considerations in section 2.2 serve as mere recommendations.

2.1 Bilateral agreements

It is first explained that clear legal obligations only arise in relation to the core labour rights under Chapter 13 on 'Trade and Sustainable Development' of the EU-Korea FTA (section 2.1.1). It is then explained that the Domestic Advisory Group (DAG) of the EU commented on the state of core labour rights in Korea, focusing on-discrimination at work and violations of the freedom of association and the right to collective bargaining in law and in practice, indicating these were

[46] Sangin Park, 'How South Korea Can Survive a Samsung Electronics Collapse' (*Korea Exposé*, 28 October 2016) <www.koreaexpose.com/can—korea–survive–without–samsung–electronics/> accessed 11 December 2018.
[47] Anthony Fensom, 'South Korea's Chaebol Needn't Fear Moon' *The Diplomat* (Washington, 19 June 2017) <https://thediplomat.com/2017/06/–koreas–chaebol–neednt–fear–moon/> accessed 30 September 2019.
[48] Elizabeth Shim, 'Top South Korea Officials Replaced in Moon Jae–In Government' *United Press Internaitonal* (New York, 31 Aguust 2018) <www.upi.com/Top_News/World–News/2018/08/31/Top—Korea–officials–replaced–in–Moon–Jae–in–government/3651535698933/> accessed 14 December 2018.

perceived as the most pressing issues. Reference is also made to the impact of these violations on workers in the electronics industry (section 2.1.2). Section 2.1.3 discusses that the European Commission, in 2019, has used the dispute settlement mechanisms of Chapter 13 to formally address these issues. Section 2.1.4 evaluates whether the EU-Korea relations can have any meaningful impact on core labour rights in Korea.

2.1.1 Bilateral agreements

Korea is an important partner for the EU from an economic point of view. In 2017, Korea was the EU's eighth largest supplier and its ninth largest export market, while the EU was Korea's second largest supplier and its third largest export market.[49] Korea had been identified as a priority FTA negotiation partner in the EU's Global Europe Strategy (2006).[50] The EU-Korea FTA is the EU's first bilateral trade deal with a Far Eastern state and the first of a 'new generation' of FTAs concluded by the EU, by reason of its comprehensive nature. In addition to removing tariffs, it contains rules on eliminating non-tariff barriers that go beyond the obligations contained in the WTO agreements on technical barriers to trade and intellectual property rights.[51] The Annex 2-B provisions on the electronics industry have been partially successful in reducing some of the non-tariff barriers faced by EU exporters in the Korean market. However, some non-tariff barriers, such as cultural and language differences and discretionary enforcement of regulation, remain problematic.[52] The Korean Occupational Safety and Health Agency (KOSHA), which exists within the Ministry of Employment and Labour, would, for example, have adopted new rules requiring costly Korean third-party certification for electronics imports to Korea.[53]

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[49] EEAS, 'Content' <https://eeas.europa.eu/delegations/–korea_en/8789/e_CSDP_Annual%20Report.pdf_en> accessed 1 December 2017.
[50] European Commission, 'Global Europe: Competing in the World. A Contribution to the EU's Growth and Jobs Strategy' (2006) COM(2006)0567.
[51] TBT Agreement; Agreement on Trade–Related Aspects of Intellectual Property Rights (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154.
[52] Ifo Institute and Civic Consulting, 'Evaluation of the Implementation of the Free Trade Agreement between the EU and its Member States and the Republic of Korea Interim Technical Report Part 1: Synthesis Report' (2017) <http://trade.ec.europa.eu/doclib/docs/2017/june/tradoc_155673.pdf> accessed 9 January 2018 p 295.
[53] Ibid p 292.

EU-Korea relations are clearly concentrated on liberalising trade and economic growth. For example, the Sustainable Impact Assessment commissioned by the European Commission's Directorate General for Trade asserted that 'no significant adverse effects on gender can be foreseen', even though it was acknowledged that the share of women in irregular employment has been increasing.[54] Nevertheless, the EU-Korea FTA and the EU-Korea Framework Agreement also aim to serve the interest of workers and the wider public. Articles 1.1 and 3 EU-Korea Framework Agreement and Article 15.14.1 and Chapter 13 EU-Korea FTA are discussed in turn.

Article 1.1 of the EU-Korea Framework Agreement determines that the EU and Korea 'confirm their attachment to democratic principles, human rights and fundamental freedoms, and the rule of law'. Disputes arising over the implementation of these 'essential elements' are to be considered by a Joint Committee consisting of representatives of Korea, the members of the European Commission and the Council of the EU.[55] Whenever a solution acceptable to both the EU and Korea cannot be found, the complaining party may seek to induce compliance with the Agreement by adopting unilateral 'appropriate measures', including trade sanctions.[56] Such measures must be proportionate to the failure to implement obligations under the agreement.[57] They may be challenged before a tribunal consisting of three arbitrators. The tribunal has jurisdiction to consider any aspect of, or the basis for, the measures taken.[58]

Article 3 Framework Agreement further requires the EU and Korea to establish 'a regular political dialogue, based on shared values and aspirations'.[59] This political dialogue should explicitly address major international issues of common interest,

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[54] IBM Belgium and others, 'Trade Sustainability of the EU–Korea FTA: final Report – (Phase 3)' (2008) <www.eu–korea–sia.org/uploads/filedir/Docs/Reports%20T/Final%20Report%20T/EU%20Korea%20FTA%20SIA%20Phase%203%20Final%20Report.pdf> accessed 9 September 2019 pp 15 and 65

[55] Arts 44 and 45.2 EU–Korea Framework Agreement.

[56] Art 45.3 ibid.

[57] Arts 45 and 46 ibid and Annexed Joint Interpretative Declaration concerning Articles 45 and 46 EU–Korea Framework Agreement; Gracia Marin Duran, 'Innovations and Implications of the Trade and Sustainable Development Chapter in the EU–Korea Free Trade Agreement' in James Harrison (ed), *The European Union and South Korea The Legal Framework for Strengthening Trade, Economic and Political Relations* (Edinburgh University Press 2013) p 140.

[58] Art 45.4 EU–Korea Framework Agreement and Annexed Joint Interpretative Declaration concerning articles 45 and 46 EU–Korea Framework Agreement.

[59] Art 3(1) EU–Korea Framework Agreement.

including human rights.[60] Such dialogue could focus specifically on the electronics industry.[61] It can take place through a variety of channels, including summit meetings at state leaders' level, consultations at ministerial level, briefings at senior officials' level and exchanges of delegations between the European Parliament and the Korean National Assembly.

Contrary to the EU-Korea Framework Agreement, a human rights clause has only been inserted indirectly in the EU-Korea FTA. Article 15.14.1 EU-Korea FTA states that, 'unless specified otherwise, previous agreements between the [parties] are not superseded or terminated by this Agreement'. This agreement further contains a more specific Chapter 13 on 'Trade and Sustainable Development', which was included under pressure from the European Parliament.[62] In a 2007 Resolution, the European Parliament asked that the EU-Korea FTA would 'complement the WTO rule book by covering issues such as social and environmental standards where it is currently difficult to find a multilateral agreement'.[63] Mirroring the WTO Singapore Declaration, Article 13.2.2 EU-Korea FTA also states that labour rights 'should not be used for protectionist trade purposes' and that the parties' 'comparative advantage should in no way be called into question' by this clause. The rights and obligations of EU Member States and Korea under Article XX GATT are also affirmed.[64]

According to Article 13.1.2 EU-Korea FTA, the EU and Korea recognise the benefit of cooperating on trade-related social and environmental issues.[65] The EU and Korea committed to promote full and productive employment and decent work for all, and to cooperate on trade-related labour and employment issues of mutual interest, taking into account scientific, technical and other relevant information.[66] An indicative list of activities is included in Annex 13 to the FTA. The EU and Korea committed, amongst other things, to exchange information and cooperate on corporate social responsibility and accountability, including on the effective implementation and follow-up of internationally agreed guidelines. They also

[60] Art 3(2) ibid.
[61] Cf art 3(3)(d) ibid.
[62] European Parliament, Resolution on Trade and Economic Relations with Korea (2007) 2007/2186(INI) para C.
[63] Ibid para C.
[64] Art 2.15 EU–Korea FTA
[65] Art 13.1.2 ibid.
[66] Arts 13.4.1, 13.8 and 14.4.2 ibid.

agreed to cooperate on trade-related aspects of the ILO Decent Work Agenda, including on the interlinkages between trade and full and productive employment, gender equality and social protection.

Chapter 13 excludes harmonisation of labour rights and opts instead for a progressive approach, where the EU and Korea commit to cooperate towards increasing levels of protection.[67] The EU and Korea keep their right to establish their own levels of labour (and environmental) protection and to regulate domestic law and policies, but agree to provide for and encourage high levels of protection consistent with international labour instruments.[68] There are three implications. First, ILO Conventions already ratified by the EU Member States and Korea need to be effectively implemented.[69] Second, the EU Member States and Korea must not fail to enforce their labour (and environmental) laws and must refrain from weakening or reducing the achieved protection in its laws *as a means to* encourage trade and investment.[70] Finally, they must strive to respect, promote and realise the ILO Conventions.[71] Clear legal obligations to undertake continued and sustained efforts to ratify ILO Conventions only emerge with regard to the eight ILO fundamental Conventions that cover core labour rights.[72]

While the EU Member States have ratified all eight core labour conventions, Korea has only ratified the four conventions against discrimination and child labour. Korea has thus committed under the EU-Korea FTA to ratify Conventions 29 and 105 on the Abolition of Forced Labour, Convention 87 on the Freedom of Association and Protection of the Right to Organise, and Convention 98 on the Right to Organise and Collective Bargaining. Recall that Korea is, in principle, held to respect and enforce the rights protected in all eight core labour conventions in accordance with the obligations deriving from membership of the ILO, the Declaration on Fundamental Principles and Rights at Work and its follow-up the Declaration on Social Justice for a Fair Globalization.

[67] Art 13.1.3 and 13.7 ibid.
[68] Art 13.3 ibid.
[69] Art 13.4.3 ibid.
[70] Art 13.7 ibid.
[71] Art 13.4 ibid.
[72] Art 13.4.3 ibid.

Domestic Advisory Groups have been established – on the request of the EU Parliament – to advise on the implementation of Chapter 13 EU-Korea FTA.[73] A DAG can undertake action at the request of the Trade and Sustainable Development Committee, the Panel of Experts, the European Commission, or on its own initiative. DAG members of each party comprise representative organisations of civil society in a balanced representation of environment, labour and business organisations, as well as other relevant stakeholders.[74] The EU DAG is quite institutionalised. It has subsequently been chaired by a member of the European Trade Union Confederation and a member of the Employers' Group. Initially, there were concerns regarding the independence of civil society representatives in the Korean DAG. The vast majority of the members of the Korean DAG were senior academics, and the Korean Confederation of Trade Unions was only included after significant pressure from the European side and beyond.[75] This is perhaps not surprising, as Korean civil society organisations had also been described as 'subordinate or even tokenistic partners' during the negotiations of the EU-Korea FTA.[76] The Economic and Social Policy Officer of the International Trade Union Confederation suggested that the differences in understanding regarding the rules of composition and role of the DAGs might stem from different cultural mindsets.[77]

Members of the EU DAG and the Korean DAG meet each other in a Civil Society Forum, which is in principle organised once a year, alternating between Brussels and Seoul.[78] The academic members of the Korean DAG, reportedly, did not want the ILO present as an observer during these meetings.[79] No Civil Society Forum was held in 2016 due to complications arising from the Park Geun-hye

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[73] Art 13.12.4 and 13.12.5 EU–Korea FTA; 2007/2186(INI) (n 62) para 15.
[74] Art 13.12.5 EU–Korea FTA.
[75] Judith Kirton–Darling, 'Speech at EP INTA Hearing on Sustainable Development Chapters in Trade Agreements' (27 November 2013) <www.europarl.europa.eu/document/activities/cont/201312/20131206ATT75636/20131206ATT75636EN.pdf> accessed 1 December 2018; Lore Van den Putte, 'Involving Civil Society in Social Clauses and the Decent Work Agenda' (2015) 6(2) Global Labour Journal pp 229–230; Harrison (n 34) p 9.
[76] Kim (n 25) pp 47–48.
[77] Yorgos Altintzis, 'Civil Society Engagement and Linkages in EU Trade Policy' (2013) TMC Asser CLEER Working Papers Nr 4.2 <https://www.asser.nl/media/1639/cleer_13-4_web.pdf> accessed 30 June 2019 p 33.
[78] Art 13.13 EU–Korea FTA.
[79] Van den Putte (n 75) pp 229–230.

Administration.[80] In 2018, the Civil Society Forum could not agree on common conclusions due to the differences in opinion on the freedom of association between employer and employee representatives in the Korean DAG.[81] The Chairs of both DAGs then adopted a joint statement in which they noted that the ILO is best placed to assist in ratifying and implementing the ILO Conventions in line with Annex 13 of the EU-Korea FTA and Article 8 EU-Korea Framework Agreement.[82]

2.1.2 Concerns raised by the EU DAG

In a 2013 opinion, the EU DAG commented on the state of core labour rights in Korea.[83] The opinion discussed the four core labour rights as well as precarious working conditions, but discrimination at work and violations of the freedom of association and the right to collective bargaining in law and in practice were perceived as the most pressing issues. Both concerns are discussed in turn. Reference is also made to the impact of these violations on workers in the electronics industry. While the EU DAG did not focus specifically on the electronics industry in its reports, the ILO has noted that these problems also exist in this industry in 2017.

First, the EU DAG pointed to the discrimination of irregular workers, women and migrant workers in Korea.[84] The EU DAG relied upon studies of international bodies, such as the OECD and the IMF. It was noted that roughly one third of the national workforce in Korea works on an irregular basis, including as disguised in-house temporary workers.[85] Irregular workers are regularly victimised by verbal and physical abuse, while they face low employment protection and limited health insurance and other social benefits. While most of Korea's irregular workers are

[80] Letter from Georgi Stoev, Thomas Jenkins and Gaelle Dusepulchre (n 35).
[81] EESC, The Civil Society Forum under the EU–Korea Free Trade Agreement 6th meeting in Seoul – 11 April 2018 Joint Statement by the Chairs of the Korea DAG and the EU DAG Lee Ho–Geun and Georgi Stoev (2018) EESC–2018–02011–00–00–EDI p 4; Georgios Altintzis cited in Ji–hye Lee, 'Korean Business Leaders Criticized for 'Acting Like Spoiled Children'' *Hankyoreh* (Seoul, 13 April 2018) <http://english.hani.co.kr/arti/english_edition/e_business/840512.html> accessed 4 December 2018).
[82] EESC (n 81) paras 20 and 24.
[83] EU DAG, 'Opinion on the Fundamental Rights at Work in the Republic of Korea, Identification of Areas for Action' (2013) CES746–2013_00_01_TRA_TCD para 3.1.6.1.
[84] Ibid para 3.3.
[85] Ibid para 4 recommendation 6.3.2 referring to OECD, 'Economic Surveys Korea' (2012) <www.oecd.org/eco/50191444.pdf> accessed 1 February 2018 p 22.

employed in non-tradable economic activities, it was reported that an estimated 9 per cent work in export-oriented industries, including the electronics industry.[86] The high rate of women in irregular employment – estimated to be 70 per cent – is due to ongoing discrimination against women, including patriarchal attitudes and gender-based stereotypes.[87] Korea has the biggest gender pay gap in the OECD, which stood at 34.6 per cent in 2017.[88] This challenge is compounded by gender norms. Female workers are often hired over men, as they are believed to be 'better suited' to perform repetitive tasks, such as manufacturing and testing chips, batteries and displays.[89] It is further perceived that women are easier to control and less likely to insist on their rights and to join trade unions.[90]

Much more extensive were the EU DAG's comments on the freedom of association and the right to collective bargaining. The EU DAG relied heavily on the findings of the ILO Committee on Freedom of Association, which detailed the multitude of ways in which Korean laws and practice are at substantial odds with the principle of freedom of association.[91] The problems in Korea have also been documented by various other actors.[92]

First, the EU DAG criticised Korean laws for failing to protect freedom of association and the right to collective bargaining. Korea has ratified Article 8 ICESCR on the right to form a trade union and join a trade union of choice. Korea has, however, made a reservation to Article 22 ICCPR on the freedom of association, declaring that this article shall be applied in such a way that it is to

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[86] CES746–2013_00_01_TRA_TCD (n 83) para 4 recommendation 6.3.2 referring to IMF, 'Republic of Korea: 2011 Article IV Consultation—Staff Report and Public Information, Notice on the Executive Board Discussion' (2011) <www.imf.org/external/pubs/ft/scr/2011/cr11246.pdf> recommendation 6.2.3.
[87] HRC, 'Concluding Observations on the Fourth Periodic Report of the Republic of Korea' (2015) UN Doc CCPR/C/KOR/CO/4 para 16; CEDAW, 'Concluding Observations on the Eighth Periodic Report of the Republic of Korea' (2018) UN Doc CEDAW/C/KOR/CO/8 para 38.
[88] CES746–2013_00_01_TRA_TCD (n 83) para 3.3.1; OECD, 'Gender Wage Gap' (2017) <https://data.oecd.org/earnwage/gender–wage–gap.htm> accessed 1 February 2019.
[89] Yun (n 13) p 5.
[90] Interview data. See also Louise Patterson and Bae Seon, 'Gender (In)equality in Korean Firms: Results from Stakeholders Interviews' (2013) 17(1) Journal of Organizational Culture, Communications and Conflict.
[91] CES746–2013_00_01_TRA_TCD (n 83) referring to ILO Committee on Freedom of Association, 'Report Nr 363 Case Nr 1865' (2012) and ILO Committee on Freedom of Association, 'Report Nr 365 Case Nr 2829' (2012).
[92] Eg A/HRC/25/55/Ad.1 (n 33) paras 39, 45 and 69; US (Secretary of State's Trade Representative and Secretary of Labour), 'Republic of Korea Labour Rights Report' (2011) <www.dol.gov/ilab/reports/pdf/southkorea_lrr.pdf> accessed 8 July 2017 p 17.

conform to the provisions of the local laws, including the Constitution of Korea.[93] While Article 33(1) Constitution guarantees the right to independent association, collective action and collective bargaining, Article 33(3) Constitution determines that the right to collective action of workers employed by important defence industries may either be restricted or denied under the conditions as prescribed by law. This conforms to the interpretation of international law that allows restrictions to the discussed rights.[94] The UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai, stressed, however, that Korea seems to have reversed 'the relation between the right and restriction, between norm and exception'.[95] While Korea faces unique challenges due to its unsettled relationship with North Korea, he pointed out that limitations to those rights for reasons of national security do not conform to the principles of proportionality and necessity in a democratic society, and are not tailored to achieve the protective function for the objective sought.

Two examples mentioned by the EU DAG are particularly worrisome for the electronics industry. First, regarding the right to strike, for example, the ILO Committee on Freedom of Association has criticised that Article 314 Criminal Code – which deals with 'obstruction of business' – is being applied to detain and arrest union officials and members who join non-violent associational activities.[96] Second, when the prohibition to set up new labour unions in a workplace with an existing labour union was abolished in 2010, a forced 'bargaining channel unification system' was introduced in Article 29-2 Trade Union and Labour Relations Adjustment Act.[97] This means that collective bargaining must be conducted through a single bargaining channel unless the employer agrees to hold multiple negotiations. Accordingly, the biggest union, which can be a coalition of unions, has the sole right to bargain if multiple unions fail to decide

[93] Korea is a state party to ICCPR*, ICESCR, CAT, UNCRC, CRPD* (with a reservation on the provision regarding life insurance in art 25(e)), ICERD, UNCEDAW. Korea has not signed the CED and the ICPRM.
[94] Eg art 22(2) ICCPR; HRC, 'Joint Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the Proper Management of Assemblies' UN Doc A/HRC/31/66 para 29.
[95] A/HRC/32/36/Add.2 (n 33) para 18 referring to HRC, 'General Comment 27 on Freedom of Movement' (1999) UN Doc CCPR/C/21/Rev.1/Add.9 para 14. See also HRC, 'Lee v the Republic of Korea' (2014) UN Doc CCPR/C/84/D/1119/2002 para 7.3.
[96] EU DAG, Opinion on the Fundamental Rights at Work in the Republic of Korea, Identification of Areas for Action (2013) CES746–2013_00_01_TRA_TCD para 3.1.6.1.
[97] Ibid para 3.1.3.1 referring to Trade Union and Relations Adjustment Act 1997 (KR).

upon a common bargaining agent. Electronics corporations allegedly abuse this system and support the establishment of 'yellow unions' to incapacitate independent and democratic unions.[98]

Second, the EU DAG reported that the freedom of association and the right to collective bargaining are often violated in practice. This is a highly sensitive issue in Korea. The Korean government has often denied such allegations. In 2017 – four years after the EU DAG presented its Opinion – the ILO Committee on Freedom of Association noted, however, that the Korean Ministry of Employment and Labour confirmed that the kidnapping and harassment of several unionists had taken place at the Samsung Ulsan service centre.[99] While electronics chaebols claim to allow lawful union activities, trade union membership is estimated to be approximately 3 per cent.[100] Excluding LG Display and LG Electronics, membership is allegedly less than 1 per cent.[101] The alleged limited unionisation has two particularly worrisome effects. First, it enables electronics corporations to control the wages that their suppliers pay. Second, it is interlinked with violations of the 'right to health'. While workers in industries with higher levels of unionisation can rely to a larger extent on unions' approval before new chemicals are introduced into manufacturing processes, workers in the electronics industry are only protected to a limited extent.

What are these effects on the right to health of workers in the electronics industry? In 2015, the UN Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes, Baskut Tuncak, heard testimony from former Samsung workers about the tasks that they performed, including manually dipping semiconductors into chemical solutions.[102] After a prolonged struggle by the Korean civil society organisation Sharps, Korean courts have confirmed that a range of diseases – leukemia, multiple sclerosis, brain cancer and ovarian cancer – have been caused by on-the-job chemical exposure to chemicals in electronics

[98] A/HRC/32/36/Add.2 (n 33) para 87; Lee (n 81).
[99] ILO Committee on Freedom of Association, 'Report Nr 381 Case Nr 3047' (2017) para 325.
[100] Han (n 15).
[101] Ibid.
[102] A/HRC/33/41/Add.1 (n 27) para 55.

factories. [103] The COMWEL has also acknowledged that aplastic anaemia, infertility, malignant lymphoma, lung cancer and breast cancer have been caused by on-the-job chemical exposure in electronics factories.[104] Samsung Electronics has long denied that such risks exist – and continues to do so – but has indicated that it has failed to respect the rights of workers in its own factories on two separate occasions. After the mediation proceedings initiated by Sharps ended in 2014, Samsung Electronics' CEO stated that

> several workers at our production facilities suffered from leukemia and other incurable diseases, which also led to some deaths. ... We should have settled the issue earlier, and we are deeply heartbroken that we failed to do so and express our deep apology. [105]

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[103] *Sanggi Hwang, Seonwon Lee, Aejeong Jeong, Eungyeong Kim and Changho Song v COMWEL* (2011) Administrative Court (Seoul) <http://humanrights.or.kr/?module=file&act=procFileDownload&file_srl=5214&sid=a41184ccbaa035eab9130689c2657756&module_srl=93> accessed 1 August 2017; Gil Ross, 'In Cancer–Causation Case, Science Loses in South Korean Court' (*American Council on Science and Health*, 1 February 2016) <www.acsh.org/news/2016/02/01/korean–court–overrules–scientific–evidence–on–cancer–causation–whats–next> accessed 1 December 2018; Alejandro Gonzalez, 'Two Legal Wins, SHARPS Achieves New Momentum' (*Good Electronics*, 12 July 2017) <https://goodelectronics.org/two–legal–wins–sharps–achieves–new–momentum/> accessed 1 December 2018, Hyeon–ho Yeo, 'Supreme Court Issues Landmark Decision in Samsung LCD workers' Industrial Accident Case' *Hankyoreh* (Seoul, 30 August 2017) <http://english.hani.co.kr/arti/english_edition/e_national/808974.html> accessed 1 December 2018; Youkyung Lee, 'Samsung worker killed by brain tumor wins compensation case' *Associated Press* (Seoul, 14 November 2017) <https://phys.org/news/2017–11–samsung–worker–scores–victory–south.html> accessed 1 December 2018; Il–Jun Cho, '10 Year Struggle of Banollim for Semiconductor Workers' Health and Human Rights' *Hankyoreh* (Seoul, 26 November 2017) <http://english.hani.co.kr/arti/english_edition/e_national/820700.html> accessed 1 December 2018.

[104] Yun (n 13) p 7; Sharps, 'A Milestone Victory: S. Korean Gov't Declares Malignant Lymphoma Occupational Disease' (*Stop Samsung*, 7 June 2016) <https://stopsamsung.wordpress.com/2016/06/07/a–milestone–victory–korean–govt–declares–malignant–lymphoma–occupational–disease/> accessed 1 November 2017; Tae–woo Park, 'Two Lung Cancer Deaths at Samsung Electronics Deemed Occupational in Nature' *Hankyoreh* (Seoul, 2 September 2016) <http://english.hani.co.kr/arti/english_edition/e_national/759699.html> accessed 1 November 2017; Tae–woo Park, 'Samsung Semiconductor Worker is First Case of Female Infertility Recognized as Industrial Accident' *Hankyoreh* (Seoul, 20 March 2017) <http://english.hani.co.kr/arti/english_edition/e_business/787230.html> accessed 1 November 2017.

[105] Aatif Sulleyman, 'Samsung Offers Compensation and "Deep" Apologies after Covering Up Over 50 Cancer Deaths' (*ITProPortal*, 14 May 2014) <www.itproportal.com/2014/05/14/samsung–apologieses–deeply–after–covering–up–leukemia–deaths/> accessed 1 December 2018.

After the follow-up arbitration proceedings ended in 2018, a Samsung Electronics director added that it 'did not sufficiently and completely manage the risk associated with health hazards at chip and LCD plants'.[106]

These violations of the right to health are in the first place attributable to the state. After his visit to Korea in 2015, Special Rapporteur Tuncak noted 'a surprisingly low level of action taken by the Government ... the primary duty bearer' when it comes to respecting, protecting and fulfilling the right to an effective remedy.[107] Similarly, the ILO Committee on Freedom of Association expressed that it was concerned about the government's 'inaction to address ... allegations against the biggest IT corporation in the world'.[108] The Committee regretted, amongst other things, that the government had not provided details regarding its findings of other allegations of anti-union practices, after it had confirmed the kidnapping and harassment of unionists at the Samsung Ulsan service centre. Korean laws protecting workers' right to health are rather passive. Amongst others, KOSHA has failed to give enough support for the prevention aspect of occupational safety.[109] Korea recognises only a limited list of carcinogenic substances, despite recent action to amend the Occupational Safety and Health Act. Provisions relating to inspection and safety control, identification of chemical substances and outsourcing of harmful work in this Act are also pre-empted by the Act on Special Measures for the Deregulation of Corporate Activities.[110]

2.1.3 Disputes raised under Chapter 13 EU-Korea FTA

The EU and Korea agreed that the dispute mechanisms that exist for violations of trade norms and intellectual property rights under the EU-Korea FTA, cannot be

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[106] See Sharps, 'Finally, Samsung Apologizes to Victims of its Illness Cluster' (*Stop Samsung*, 24 November 2018) <https://stopsamsung.wordpress.com/2018/11/24/finally–samsung–apologizes–to–victims–of–its–illness–cluster/> accessed 1 December 2018.
[107] A/HRC/33/41/Add.1 (n 27) para 63.
[108] ILO Committee on Freedom of Association (n 99) para 337.
[109] Letter of Allegation from MINBYUN–Lawyers for a Democratic Society to the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health' (25 September 2013) <http://minbyuneng.prizma.co.kr/?p=601> accessed 5 January 2018.
[110] Arts 3, 29, 40, 52, 55.5 and 55.6 Act on Special Measures for the Deregulation of Corporate Activities 1995 (KR); Oh Ju Shin, 'Working to Live, Risking Their Lives' (The Granite Tower, 5 November 2018) <www.thegranitetower.com/news/articleView.html?idxno=2243> accessed 1 December 2018).
[110] Letter from MINBYUN–Lawyers for a Democratic Society (n 109) pp 7–8.

used for violations of Chapter 13 EU-Korea FTA.[111]The EU and Korea can only rely upon government consultations (Article 13.14) and a panel of experts (Article 13.15) in the case of disputes under this chapter. Both procedures allow for consultations with the ILO and the DAGs.[112] Under the government consultation mechanism, each party can request consultations in the permanent Committee on Trade and Sustainable Development relating to any matter of mutual interest on specific labour issues arising under the sustainable development chapter.[113] The EU and Korea can also agree to seek the advice of the ILO or other international organisations.[114] Whenever the consultations fail to address the issue at stake, each party can request the creation of an independent panel consisting of 15 experts, of whom at least five shall be non-nationals of either party. The panel can also seek the advice of the ILO.[115] The Panel should provide recommendations, which are monitored by the Committee on Trade and Sustainable Development.[116]

In 2014 and 2016, the EU DAG wrote letters to the subsequent Commissioners for Trade to start a formal consultation procedure with the Korean government, under Article 13.14 EU-Korea FTA, over concerns regarding violations of the freedom of association in Korea.[117] The EU DAG noted that immediate attention was required in the deteriorating human rights situation under the Park Geun-Hye Administration, which was said to have been involved in 'a concerted attack on trade unions'.[118] The EU DAG went as far as stating that failure to act in light of the 'overwhelming evidence' would undermine the effectiveness of Sustainable Development chapters in any EU trade agreements and the EU trade policy in general.[119] In April 2017, the European Parliament also requested for a consultation to be launched under Article 13.14 EU-Korea FTA, over concerns regarding violations of the freedom of association, expressing its expectation that

[111] Art 13.16 EU–Korea FTA.
[112] Arts 13.14.1, 13.14.2 and 13.15.1 EU–Korea FTA.
[113] Art 13.14 EU–Korea FTA.
[114] Art 13.14.2 EU–Korea FTA.
[115] Art 13.15.1 EU–Korea FTA.
[116] Art 13.15 EU–Korea FTA.
[117] Letter from Thomas Jenkins, EU DAG to Karel De Gucht, European Commissioner for Trade (13 January 2014); Letter from Georgi Stoev, Thomas Jenkins and Gaelle Dusepulchre (n 35).
[118] Letter from Thomas Jenkins (n 117).
[119] Ibid.

the issues would be resolved before starting the negotiation of an investment agreement between the EU and Korea.[120]

The European Commission initially raised the existing concerns informally, including through the EU Delegation in Korea.[121] A joint project on gender discrimination under the ILO fundamental Convention 111 was also started to provide a greater understanding of the relationship between Korea and the EU, which was reported to be 'far from obvious' considering 'Korea's initial reactions to such events'.[122] This project was said to provide a basis for cooperating on the rights to association and collective bargaining in the future. Ahead of the 2018 meeting of Committee on Trade and Sustainable Development under the EU-Korea FTA, it was again observed by the EU DAG that Korean officials had 'not understood the gravity of the situation'.[123] They were reportedly not prepared to answer questions from the European Commission.[124] In December 2018, the EU ultimately requested that consultations should be undertaken under Article 13.14 EU-Korea FTA, concerning certain measures, including provisions of the Trade Union and Labour Relations Adjustment Act.[125] European Commissioner for Trade Cecilia Malmström expressed that the Conventions would need to be ratified before summer 2019.[126] The Korean government subsequently promised to submit the outstanding fundamental ILO Conventions (except ILO Convention 105 on the Abolition of Forced Labour) for ratification in the National Assembly and to seek the adoption of the necessary labour reforms. This will be difficult, as

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[120] European Parliament, Resolution on the Implementation of the Free Trade Agreement between the European Union and the Republic of Korea' (2017) 2015/2059(INI) paras 5 and 10.

[121] Letter from Cecilia Malmström, European Commissioner for Trade to Georgi Stoev, Thomas Jenkins and Gaelle Dusepulchre, EU DAG EU–Korea FTA (7 February 2017); COM(2017)614 final (n 43) p 10–11. See also Johan Vandromme,'The Assessment of the EU–Korea Free Trade Agreement' (2018) 75 Korea Unternehmen Märkte p 10.

[122] Letter from Cecilia Malmström (n 121); COM(2017)614 final (n 43) p 10.

[123] Interview data collected from EU DAG Members reported in Verena Füller, 'Trade and Sustainable Development Mechanisms – Beyond Window–Dressing and Talking Shops? The Effectiveness of the Institutional Mechanisms in EU Trade and Sustainable Development Chapters' (2018) <http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=8940379&fileOId=8940380> accessed 20 February 2019 pp 35–36.

[124] Ibid pp 35–36.

[125] EU, Republic of Korea – Compliance with Obligations under Chapter 13 of the EU – Korea Free Trade Agreement Request for the Establishment of a Panel of Experts by the European Union (2019) Ares(2019)4194229 – 02/07/2019.

[126] Hye–jeong Cho and Mi–na Kim, 'EU to increase pressure on South Korea for ratifying core ILO conventions before summer' *Hankyoreh* (Seoul, 10 April 2019) <http://english.hani.co.kr/arti/english_edition/e_international/889518.html> accessed 1 August 2019.

members of the conservative opposition parties – including the head of the Parliamentary Committee on Labour Affairs Kim Hack-yong – strongly oppose their ratification.[127] He reportedly noted that 'European standards cannot be applied [directly] to South Korea'.[128] Commissioner Malmström then requested that a panel of experts be created under Article 13.15 EU-Korea FTA.[129] The EU asked the Panel to focus on some specific articles of the Trade Union and Labour Relations Adjustment Act and on the observation that Korea has not made continued and sustained efforts towards ratifying all fundamental ILO Conventions over the last eight years.

2.1.4 Evaluation

These difficulties in the EU-Korea partnership might be interpreted as evidence of the neo-realist view that Korea and the EU do not share 'so much constructivist "we-ness" or shared sense of self that they are making joint altruistic decisions'.[130] From this perspective, it can be asserted that these states do not 'easily become friends due to their social interaction'.[131] While this might be 'desirable in principle' it is 'not realisable in practice', because states are forced to 'behave as egoists' in international relations.[132]

Generally, Koreans are highly sensitive to 'foreign interference'.[133] Any form of collaboration – international, regional or bilateral – on core labour rights and remediation can be perceived as a violation of Korea's sovereignty. One interview participant said that 'even Korean trade unions' were reluctant to engage with the process of including labour rights in the EU-Korea FTA.[134] The main reason for

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[127] Soo–yeon Kim, 'Gov't Seeks Labor Law Revisions for Parliamentary Ratification of Key ILO Conventions' *Yonhap News Agency* (Seoul, 30 July 2019) <https://en.yna.co.kr/view/AEN20190730004651315?section=news> accessed 1 August 2019.
[128] Kim and Cho (n 4).
[129] Ares(2019)4194229 – 02/07/2019 (n 125).
[130] Robert Kelly, 'Korea–European Union Relations: Beyond the FTA' (2012) 12 International Relations of the Asia Pacific pp 101–132.
[131] Richard Jackson, Georg Sørensen and Jørgen Møller, *Introduction to International Relations: Theories and Approaches* (7th edn, Oxford University Press 2019) p 254.
[132] Ibid p 254 referring to John Mearsheimer, 'The False Promise of International Institutions' in Michael Brown, Sean Lynn–Jones and Steven Miller (eds), *The Perils of Anarchy: Contemporary Realism and International Security* (Massachusetts Institute of Technology Press 1995) p 367.
[133] Interview data – participant KO–J.
[134] Interview data – participant KO–F. See also Gi–Wook Shin and Hilary Jan Izatt, 'Anti–American and Anti–Alliance Sentiments in South Korea' (2011) 51(6) Asian Survey pp 1113–1133.

this attitude is the shameful memories of Japanese occupation and American war-making, which are very much resented in modern day-Korea.[135]

However, from a constructivist perspective, it might be conceived that the EU-Korea relations constitute 'a primary case of transnational regulatory networks', of which the economic agreements form the backbone.[136] Axel Marx, Jan Wouters, Woo-Sik Moon, Yeongseop Rhee and Sunhee Park articulated this position in their 2014 project, 'EU-Korea Relations in a Changing World'.[137] Accordingly, the EU-Korea Framework Agreement and FTA provide an information exchange system that facilitates the management and gathering of information, as well as the institutional and informal channels through which such information has to flow.[138] Repeated interactions between officials in the EU and Korea can facilitate mutual policy learning and the internalisation of new norms.[139]

Two examples of collaborations that have taken place can be reported here. First, the EU's 2006 Regulation on the Registration, Evaluation, Authorisation and Restriction of Chemicals has had effects on policy and legal developments in Korea. [140] The 2013 Korean Act on the Registration and Evaluation of Chemicals was amended in 2018 to mirror the EU's Regulation even more closely.[141] These developments allow authorities in the EU and Korea to share and compare chemical data and the results of risks assessments. Future cooperative activities could include more comprehensive discussions on occupational safety and health that take into account up-to-date scientific and technical information (cf Article 13.8 EU-Korea FTA).[142] Second, the KNCHR has invited Denmark's

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[135] Interview data – participant KO–K.
[136] Axel Marx and others, 'EU–Korea Relations in a Changing World Project: Main Results and Recommendations' (2014) 12 Asian Europe Journal p 248.
[137] Ibid p 248. See also Joost Pauwelyn, Ramses Wessel and Jan Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Law Making' (2014) 25(3) The European Journal of International Law.
[138] Ibid p 248.
[139] Cf ibid pp 244 and 248.
[140] European Parliament and Council, Regulation 1907/2006 of 18 December 2016 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing an European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) Nr 793/93 and Commission Regulation (EC) Nr 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC [2006] OJ L 396.
[141] Act on the Registration and Evaluation of Chemical Substances 2013 (KR).
[142] Katia Biedenkopf, 'Assessing Possibilities for Enhanced EU–South Korea Cooperation on Chemical Regulation' in Axel Marx and others (eds), *EU–Korea relations in a Changing World* (Leuven Centre for Global Governance Studies 2013) pp 187–188.

national human rights institution to support the development process of the Korean NAP.[143] The KNCHR has also made reference to business and human rights regulation in the EU – including the Non-Financial Reporting Directive – in its 2016 Recommendations for this NAP.[144]

In a 2014 opinion, the EU DAG envisioned other collaborative activities to support Korea in the fulfilment of its 'state duty to protect'. It proposed, amongst other things, to create an inventory of companies that mention respect for human rights in their strategy and encourage supply chain responsibility.[145] Such action could fuel discussions regarding the responsibility of electronics chaebols over third-tier suppliers. It would be particularly interesting to ensure that these suppliers and the Korea Federation of Small and Medium-sized Enterprises are included in such dialogues (cf Article 11 EU-Korea Framework Agreement).[146] The EU DAG also suggested that an inventory of national laws and mechanisms facilitating victims' right to effective legal remedies could be made (cf Article 13 and Annex 13 EU-Korea FTA).[147] It further encouraged transnational judicial cooperation.[148]

2.2 Transnational regulatory networks (Recommendations)

It needs to be added here that COMWEL and KOSHA officers would benefit from translations in Korean of academic studies and exchanges with technical, health and regulatory experts in occupational safety and health.[149] Officers of both agencies reported that they continually study the European system, but that they have limited access to its workings.[150] Exchanges of staff with their European counterparts could lead to further 'cross-fertilisation' and even closer

[143] Interview data – participant KO–G.
[144] NHRCK, 'Recommendations for National Action Plans on Business and Human Rights' (2016) pp 12 and 14.
[145] EU DAG, 'Opinion on the European Union's Vision and Practice of Corporate Social Responsibility (CSR)' (2014) EESC–2014–03302–00–01–TCD–TRA para 6.7.
[146] See art 2(1)(e) EU–Korea Framework Agreement.
[147] EESC–2014–03302–00–01–TCD–TRA (n 145) para 6.7.
[148] Ibid para 1.11.
[149] Interview data – participant KO–B; Tae–Won Jang and others, 'Work–Related Musculoskeletal Diseases and the Workers' Compensation' (2014) 29 Journal of Korean Medical Sciences pp 18–23; Kwon (n 219) p S6. Cf Garrett Brown, 'Effective Protection of Workers' Health and Safety in Global Supply Chains' (2015) 7(1–2) International Journal of Labour Research p 41.
[150] Interview data – participant (anonymised).

cooperation, as Korean officials will better understand the rationale behind the EU's regulatory framework and its implementation.[151]

Transnational network relations also connect a variety of actors outside official capacities to contribute to the creation of a 'thick' stakeholder consensus.[152] The EU-Korea FTA and Framework Agreement contain provisions to promote effective interactions with organised civil society and its effective participation beyond the institutionalised dialogue.[153] This political dialogue should aim at 'promoting people-to-people contacts and understanding' (cf Article 2(1)(h) Framework Agreement).

Two context-specific factors might facilitate such interactions between Korea and the EU. First, Korea's chequered past has, paradoxically, created certain elements of shared understanding with the EU. Korea has adopted 'European' enlightenment values via the 19th-century Christian missionaries and a German-style continental system of codification of laws during the Japanese occupation.[154] Second, Korea is relatively sensitive to its global status.[155] Koreans, especially those aged fifty and older, are, for example, extremely proud of the global recognition that electronics chaebols have brought to Korea.[156] Korea's status in the world has recently expanded beyond economic areas, as the Korean cultural wave – which has been first set out under the Kim Dae-jung Administration – has gained momentum.[157] Korean media feared that these achievements will be overshadowed by the report that has to be drafted by 'the

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[151] Interview data – participant KO–B.
[152] Marx (n 136) p 248.
[153] Art 40 EU–Korea Framework Agreement; art 13.9 EU–Korea FTA.
[154] Wolfgang Pape, 'EU–Korea Relations to Promote Regulatory Cooperation in Economic Policies, in Particular Industrial Development Policies' in Axel Marx and others (eds), *EU–Korea Relations in a Changing World* (Leuven Centre for Global Governance Studies 2013) p 271; Hyaeweol Choi, 'Between the Sacred and the Secular: Christianity as Lived Experience in Modern Korea Special issue' (2020) 25(2) The Journal of Korean Studies.
[155] Interview data – participant KO–K. See also Jörg Friedrichs, 'An Intercultural Theory of International Relations: How Self–Worth Underlies Politics Among Nations' (2016) 8(1) International Theory p 84.
[156] Kwangsik Kim, 'Historical Awareness of the Post–War Generation in Korea and National and Social Responsibility' (2010) 22(4) Korean Journal of Defence Analysis p 446.
[157] Eg Ophélie Surcouf, 'Comment le Monde Entier Succombe à la Culture Coréenne' *Le Figaro* (Paris, 7 April 2018) <www.lefigaro.fr/culture/2018/03/18/03004–20180318ARTFIG00002–comment–le–monde–entier–succombe–a–la–culture–coreenne.php> accessed 9 December 2018.

panel of experts' under Article 13.15 EU-Korea FTA. It has been anticipated that this report will 'dishonour' Korea as 'a backward country'.[158]

It emerged from the field data that civil society organisations and journalists would benefit from opportunities to engage with their counterparts in the EU. To begin with, Korea has a vibrant and well-organised civil society tradition. Korean NGOs have worked together to write detailed reports to the visiting UN Special Representatives and the Working Group on Business and Human Rights. In recent years, Korean civil society organisations have also been reaching out to NGOs in European countries, such as France and the Netherlands, to gain access to remedies in Europe. This has frequently been perceived as their 'only' option due to the difficulties reported in section 3, below. Recall, for example, the collaboration between Sharps and the French NGO Sherpa, which was discussed in Chapter 5 of this thesis.[159] In addition, it needs to be specified that the freedom of expression and the press are limited in Korea. There are two reasons for this. First, Chapter 33 Criminal Act on 'Crimes against Reputation' enables chaebols to suppress critics, even when they speak the truth.[160] This chapter will briefly be discussed in section 3.1, below. It suffices to state here that the punishments are more severe for publication by means of newspapers or other news outlets. This has a considerable impact on the accuracy of the information that is made available. For example, Special Rapporteur Tuncak wrote, in a 2016 op-ed, that Korean media had grossly misrepresented his report as not finding evidence that working conditions at Samsung Electronics led to disease or

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[158] Dae-yeon Jung, 'The EU Seeking to Sanction South Korea for Not Ratifying ILO Conventions' *Kyunghyang Shinmun* (Seoul, 5 July 2019) <https://english.khan.co.kr/khan_art_view.html?code=710100&artid=201907051843107&med id=enkh> accessed 1 August 2019.

[159] See also the following three interconnected cases: Dutch National Contact Point, 'Final Statement ABP/APG – Lok Shakti Abhiyan, KTNC Watch, Fair Green and Global Alliance, Forum for Environment and Development' (2013) <www.oecdguidelines.nl%2Fbinaries%2Foecd-guidelines%2Fdocuments%2Fpublication%2F2015%2F1%2F6%2Ffinal-statement-abp-apg—somo-bothends%2Ffinal-statement-somo-bothends-apg-abp2.pdf&usg=AOvVaw2IRGUfLKUuRu4KOIjqgsvH> accessed 9 November 2017; KNCP, 'Initial Assessment of Complaint on Violation of OECD Guidelines for Multinational Enterprises' (2013) <https://complaints.oecdwatch.org/cases/Case_260/1287> accessed 9 November 2017; Norwegian National Contact Point, 'Final Statement Lok Shakti Abhiyan, Korean Transnational Corporations Watch, Fair Green and Global Alliance and Forum for Environment and Development v POSCO (South Korea), ABP/APG (Netherlands) and NBIM (Norway)' (2013) <http://oecdwatch.org/cases/Case_262> accessed 9 November 2017.

[160] Article 19, 'South Korea: Criminal Defamation Provisions Threaten Freedom of Expression' (2018) <www.article19.org/resources/south-korea-repressive-criminal-defamation-provisions-threaten-freedom-of-expression/> accessed 9 December 2018.

disability among former workers.[161] Second, most Korean newspapers are dependent on chaebols for advertising revenue.[162] Cases have been reported in which journalists could not be paid after chaebols stopped investing in advertising after negative reporting.

Collaborating with their European counterparts might create opportunities for Korean journalists and civil society organisations to share reports on human rights violations in the electronics industry that they cannot themselves tackle. Various interview participants opined that such increased contact might fuel substantive change, as Korean electronics corporations are sensitive to protecting their reputation in Europe. It emerged from the interviews that it would also be particularly important to create awareness about Sharps' successes in COMWEL cases (section 3.3), court proceedings (section 3.4) and, most recently, ad-hoc arbitration proceedings (section 3.5). Increased awareness in Europe might not only result in changes in buying attitudes and business practices, it could, potentially, also create an opportunity to indirectly influence policy decisions that the European Commission might prefer to decide based on economic and diplomatic concerns.[163]

In both institutionalised and broader network relations between the EU and Korea, the most optimistic scenario to change laws and practices would be to find a way to connect with Koreans who have been raised since the authoritarian era.[164] During the interviews, it was confirmed that this group – less burdened by historical legacies – is generally less adverse towards cooperation regarding labour rights issues.[165] Those Koreans who are currently in their forties, have benefited from democracy and political stability with fewer economic difficulties, but it is the so-called '2030 generation' that displays an increased general understanding of the problems caused by the preferential treatment of

[161] Baskut Tuncak, '바스쿠트 툰작 유해물질과 폐기물 처리 관련 유엔 인권특별보고관 원문보기: Unfinished Business *Hankyoreh* (19 September 2016) <www.hani.co.kr/arti/opinion/column/761730.html#csidx789d5f08b15f53ba9a633f410c26fae> accessed 3 November 2017.
[162] Chunyo Kim, *Samsung, Media Empire and Family: a Power Web* (Routledge 2015) pp 133–136; Interview data – participants KO–A and KO–J.
[163] Cf Beth Stephens, 'Individuals Enforcing International Law: The Comparative and Historical Context' (2002) 52 DePaul Law Review p 457.
[164] Cf Geoffrey Fattig, 'Only Words on Paper? Freedom of Speech & Expression in South Korea' (2014) 6(1) Yonsei Journal of International Studies p 148.
[165] Interview data – participants KO–F and KO–G.

chaebols.[166] Kim Kwangsik reported that Koreans who are currently in their thirties would consider global norms more important than inherent Korean values, while Koreans who are currently in their twenties would also display a strong belief that everyone is free to gather in an open forum, and share opinions and information.[167] Within the limits of social relations ranked according to age, the '2030 generation' has already been able to bring about some change. It was this generation that initiated peaceful candlelight protests via social media that ultimately led to President Park Geun-hye's impeachment in 2017. They had previously, in their teenage years also organised such protests against the importation of US beef out of concern about mad cow disease.[168]

3 Remedies

Section 3.1 sets out that workers are effectively discouraged from seeking a remedy by corporations and Chapter 33 Criminal Act. Section 3.2 assesses the non-binding proceedings before the NHRCK and the KNCP. Section 3.3 discusses the binding proceedings before the COMWEL. Under the Petition Act, it is possible to file a petition with any governmental agency, local authority, entity or individual that exercises administrative functions.[169] There are various other proceedings than the COMWEL proceedings. For example, victims of environmental pollution can file complaints with the Ministry of Environment under the Environmental Dispute Adjustment Act and victims of sexual harassment can file complaints with the Ministry of Employment and Labour.[170] These state-based adjudicative mechanisms were acknowledged by the interview participants, but they did not consider them to be valuable ways to get access to remedies, for reasons that are similar to those raised in relation to the COMWEL proceedings. Court proceedings (discussed in section 3.4) are also valuable for other people who are affected by, but not in an employment relationship with, electronics corporations. Such claims have not been investigated in-depth due to space and time limitations. Finally, section 3.5 sets out the mediation and arbitration proceedings.

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[166] Kim (n 156) p 446; Hansoo Choi, 'Samsung, Lee Jae–Yong's Conviction and How Business in South Korea is Changing' (2017) 9 Harvard Business Review.
[167] Kim (n 156) p 446.
[168] Jiyeon Kang, 'Internet Activism Transforming Street Politics: Korea's 'Mad Cow' Protests and New Democratic Sensibilities' (2017) 39(5) Media, Culture and Society p 751; Interview data – participant KO–D.
[169] Petition Act 2005 (KR); art 26 Constitution 1948 (KR).
[170] CEDAW/C/KOR/CO/8 (n 87) para 22(e).

3.1 Awareness and in-company proceedings

While Korean, as opposed to migrant, electronics workers generally have good awareness of complaint mechanisms, they are not always aware that their rights are being violated.[171] The Korean mindset is one of not complaining.[172] One participant explained that, 'Korean workers often believe that they have pain because they have worked hard'.[173] Rigid hierarchal age and job seniority company structures support this culture.

Complaints are reportedly dealt with via agreement deals between workers and corporations. In-company proceedings can be valuable because they can offer particular benefits, such as speed of access and reduced costs.[174] Concerns have, however, been raised because workers allegedly have to sign a non-disclosure agreement in which they agree that they cannot bring the same claim before a state-based mechanism.[175] Such practice is contrary to the commentary to UN Guiding Principle 26, which sets out that in-company mechanisms should not be used to 'preclude access to judicial or other non-judicial grievance mechanisms'.[176] The implementation of the agreement between the worker and the company allegedly often depends solely on the company's good faith.[177] Those workers who can rely upon trade unions are advised to do so, as companies would otherwise not hold to their end of the deal.[178]

Civil society organisations receive almost all requests for support due to the limited number of electronics workers who are members of trade unions.[179] The increased use of social media has created opportunities for workers to contact NGO representatives directly.[180] There are two barriers that, nevertheless, prevent workers from seeking such support. First, workers are often afraid to seek support, as NGO representatives are frequently portrayed as 'communists' or

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[171] Interview data – participants KO–A, KO–E, KO–G and KO–I.
[172] Kim and Park (n 5) p 43; Interview data – participants KO–G, KO–H and KO–J.
[173] Interview data – participant KO–G.
[174] UN Guiding Principle 29.
[175] Letter from MINBYUN–Lawyers for a Democratic Society (n 109) pp 6–7; Interview data – participant KO–A
[176] Commentary to UN Guiding Principle 29.
[177] Letter from MINBYUN–Lawyers for a Democratic Society (n 109) p 5; Interview data – participant KO–I.
[178] Interview data – participant KO–A.
[179] Interview data – participants KO–A and KO–F.
[180] Interview data – participants KO–A, KO–E and KO–J.

'radicals' in society.[181] Second, fear of retaliation has been reported.[182] Workers who file a complaint allegedly face considerable challenges, including disciplinary actions, fines, discrimination, verbal abuse and ostracism at work.[183] Employers also search for reasons to dismiss the worker. Companies allegedly sometimes follow up on a complaint by starting workplace surveillance through technological devices, such as a CCTV camera, to monitor the worker 'for security reasons'.[184] To end such practices, the NHRCK has recommended enacting special legislation and details on human rights to regulate all kinds of electronic surveillance in the workplace.[185] The UN Working Group on Business and Human Rights has recommended whistle-blower protection programmes.[186]

Another barrier that needs to be reported here is of a legal nature. On the basis of Chapter 33 Criminal Act, electronics corporations sometimes file countersuits for insults or defamation against claimants.[187] For example, a LED corporation allegedly brought a defamation suit against its worker, after this worker had received compensation from COMWEL.[188] While Chapter 33 Criminal Act is congruent with Article 21 Constitution, which states that 'neither speech nor the press shall violate the honour or rights of other persons', it cannot be justified under Article 19(3) ICCPR.[189] The maximum prison sentence under Chapter 33 is five years or, alternatively, a fine of KRW 10 million (GBP 6,834 at GBP 1:KRW 1463). Imprisoning individuals for seeking a remedy is inherently harsh and has a disproportionate chilling effect. In addition, it is particularly worrisome that the claimant does not need to prove that a reported fact was false under Chapter

[181] ILO Committee on Freedom of Association (n 99) para 338; Interview data – participants KO–A and KO–F. See also Haeryun Kang, 'Impeach the Impeachment: Older Conservatives "Defend Democracy"' (*Korea Exposé*, 13 February 2017) <www.koreaexpose.com/taegukgi–rally–conservatives–defend–democracy/> accessed 30 September 2019.
[182] Interview data – participant KO–I.
[183] Interview data – participant KO–K. Cf Jeyup Kwaak, 'Hyundai Whistle–Blower, in Rarity for South Korea, Prompts Recall' *New York Times* (Seoul, 16 May 2017) <www.nytimes.com/2017/05/16/business/hyundai–south–korea–whistle–blower–recall.html> accessed 30 September 2019.
[184] Interview data – participant KO–K.
[185] Korean Human Rights Organizations Network (n 34) p 37 referring to NHRCK, 'Decision of 12 December 2007 Recommendation for Improvement of Laws, Regulations and Systems for the Protection of Human rights of Workers against Electronic Workplace Surveillance' (2007).
[186] UN Working Group on Business and Human Rights (n 29) p 6.
[187] Criminal Act 1953 (KR); Interview data – participant KO–D, KO–I and KO–J.
[188] Sharps, 'Young Woman Dies Amid Employer's Attempt to Invalidate Her Workers Compensation' (Stop Samsung, 5 May 2019) <https://stopsamsung.wordpress.com/2019/04/10/young–woman–worker–dies–amid–employers–attempt–to–invalidate–her–workers–compensation/> accessed 5 May 2019.
[189] See A/HRC/17/27/Add.2 (n 33) paras 21–28.

33. It suffices to prove that the reported fact had a demonstrably negative effect on their reputation. When 'publicly alleging' truthful facts, the defendant can spend up to two years in prison or pay a fine of up to KRW 5 million.[190] The defence of truth is only available to workers (or their representatives) who can demonstrate that their communications were made 'solely for the public interest'.[191]

3.2 NHRCK and KNCP

The NHRCK and the KNCP provide complaint proceedings for individuals. In principle, these mechanisms could facilitate a mediated dialogue with non-binding outcomes. While both mechanisms are currently not functioning effectively, they are perceived as having major potential for the future.[192] It emerged from the interviews that there are two reasons for this. First, a major reported advantage is that these mechanisms do not bear 'the social cost of litigation'. Second, there is a strong sense that the judicial system does not have the capacity to deal with all labour rights violations. Both mechanisms are discussed in turn.

The NHRCK can only deal with complaints that concern discrimination against private corporations.[193] In principle, the proceedings take three months, but they may last a few more months in practice.[194] The NHRCK commissioners may conduct ex officio investigations, such as field visits, if there is sufficient evidence of grave discriminatory acts.[195] After investigating the complaint, the defendant may be recommended to pay compensatory damages and to take measures to

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[190] Art 307(1) Criminal Act 1953 (KR).
[191] Cf art 310 ibid.
[192] Interview data – participants KO–D, KO–H and KO–J.
[193] Art 30 National Human Rights Commission Act 2016 (KR); NHRCK, 'How to File a complaint' <http://humanrights.go.kr/site/homepage/menu/viewMenu?menuid=002004001> accessed 4 March 2018.
[194] NHRCK, 'FAQs' <http://humanrights.go.kr/site/program/board/basicboard/list?boardtypeid=7025&menuid=002004005001&pagesize=10&currentpage=2> accessed 4 March 2018.
[195] Arts 30 and 36(1–2) National Human Rights Commission Act 2016 (KR); NHRCK, 'Complaint Handling Process' <http://humanrights.go.kr/site/homepage/menu/viewMenu?menuid=002004002001> accessed 4 March 2018.

prevent similar violations in the future.[196] The recommendations that are made in favour of victims have, however, a low acceptance rate by corporations.[197]

The NCHRK has reported various cases in its Guidelines for Human Rights Management, and Check List (2015).[198] It describes, for example, that it recommended an electronic device manufacturer to pay female workers the same basic wage as male workers for similar work. The statistics on its website indicate, however, that 90 per cent of cases brought between November 2001 and May 2017 have been found inadmissible, dismissed or null.[199] Commissioners allegedly often sided with those in power instead of serving as a watchdog during this period. They would also not have been immune from legal liability for actions undertaken in good faith when acting in their official capacity.[200]

In recent years, a certain level of transparency has been injected into the selection process of NHRCK commissioners.[201] The commissioners have also engaged more with civil society.[202] Interview participants saw this as a positive step, but reflected that NHRCK commissioners are overburdened and do not have sufficient resources to deal with complaints.[203]

The KNCP – which was established under the Ministry of Trade, Industry and Energy – can assess specific complaints under the OECD Guidelines for Multinational Enterprises. For example, the KCNP tried to mediate a complaint on alleged union surveillance of a Korean subsidiary of a Taiwanese corporation in 2016.[204] It emerged from the interviews that the KNCP complaint mechanism is considered to have a lot of potential because it can handle all kinds of human rights complaints against private corporations. The KNCP can, in principle, also

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[196] NHRCK (n 194).
[197] Interview data – participants KO–D, KO–H and KO–I.
[198] NCHRK, 'Guidelines for Human Rights Management, and Check List' (2015) p 50.
[199] NCHRK, 'Statistics' <http://humanrights.go.kr/site/program/link/statisticsEng?menuid=002003005> accessed 1 November 2018.
[200] CESCR, 'Concluding Observation Republic of Korea' (2009) UN Doc E/C.12/KOR/CO/3 para 8; A/HRC/25/55/Ad.1 (n 33) paras 53–62; A/HRC/32/36/Add.2 (n 33) paras 85–87.
[201] A/HRC/25/55/Ad.1 (n 200) paras 53–62.
[202] Interview data – participant KO–J.
[203] NCHRK (n 199); Interview data – participants KO–D, KO–H and KO–I.
[204] KNCP, 'Final Statement Complaint from Korean Metal Workers' Union and others v Hydis Technologies Co Ltd E Ink Holdings Inc and Yuen Foon Yu Inc' (2016) <http://mneguidelines.oecd.org/database/instances/kr0014.htm> accessed 3 February 2018.

make recommendations regarding the impact of Korean corporations in third states.[205]

However, the KNCP complaint mechanism is currently not functioning efficiently.[206] Questions have been raised regarding the independence, expertise and professionalism of the appointed commissioners.[207] The NHRCK, under its new leadership, has recommended that the KNCP should invite stakeholders to participate and cooperate, to improve access to its website, and to revise its rules of procedure to guarantee transparency and responsibility in its work.[208] The Korean government has also announced that additional experts in the field of labour relations and arbitration will be appointed in an effort to better accommodate the views of multi-stakeholders.[209] Other positive improvements are that the KNCP has recently opened an English-language website, and is now affiliated with the Ministry of Employment and Labour, and the Ministry of Environment.[210]

Finally, it should be reported here that the KNCP is scheduled to undergo a voluntary peer review of its procedures at the time of writing. The peer review team will consist of the OECD Secretariat and representatives of two to four other National Contact Points, either as reviewers or as observers. They will make recommendations to help the KNCP acquire more capacity to function in a visible, accessible, transparent and accountable manner. It is likely that the EU DAG will participate and promote participation in the stakeholder consultations that the peer reviewers will carry out. The EU DAG has previously opined that it would be useful to engage in such activities and the Civil Society Forum has already created

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[205] Korea (State Council), 'The 3rd National Action Plan (NAP) for the Promotion and Protection of Human Rights Republic of Korea (2018–2022) (provisional translation by Korea House for International Solidarity' (2018) <https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2017/11/3rd-hr-nap-of-republic-of-korea-2018-2022-chapter-8-bhr-only-by-khis-2018-11-24.pdf> accessed 1 December 2018 p 7; Interview data KO–J.
[206] Interview data – participants KO–D and KO–J.
[207] Korea (State Council) (n 205) p 7; Interview data KO–J.
[208] NHRCK (n 144) p 27.
[209] HRC, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises on its Visit to the Republic of Korea: Comments by the State' (2017) UN Doc A/HRC/35/32/Add.3 para 14; Korea (State Council) (n 205) p 7.
[210] EESC-2014-03302-00-01-TCD-TRA (n 145) para 6.1; A/HRC/35/32/Add.3 (n 209) para 13; Korea (State Council) (n 205) p 7.

opportunities for the French, Dutch, Swedish (and Norwegian) National Contact Points to share experiences with the KNCP.[211]

3.3 COMWEL

The Ministry of Employment and Labour's COMWEL is the principal governmental body that provides access to remedies and benefits for work-related injuries, diseases, disabilities or deaths.[212] COMWEL has one head office, six regional headquarters and fifty branch offices. It only collects insurance premiums from employers with *more than one full-time* worker.[213] Employers that have less than one full-time worker can voluntarily pay such premiums to ensure that their workers have access to COMWEL proceedings. Small and medium-sized electronics enterprises that rely exclusively on disguised subcontracted workers or temporary workers will, however, normally not voluntarily contribute such premiums. Their workers are therefore, in practice, excluded from getting remedies from COMWEL, despite the fact that Article 6 Industrial Accident Compensation Insurance Act (2015) stipulates that *all* workers, regardless of their nationality, shall be protected.

Approval of compensation for accidents at work is based on the recommendation of COMWEL consultants, whereas approval of compensation for occupational diseases is decided based on the consensual judgment of the Committee on Occupational Disease Judgment. These Committees – established within every regional headquarter – have one chairperson and six members, including doctors, lawyers, certified labour consultants and industrial accident professionals. These members rely upon legal standards and standards determined by KOSHA to decide on the approval or disapproval of compensation. COMWEL can grant a number of benefits, such as partial, temporary or permanent disability benefits;

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[211] EESC–2014–03302–00–01–TCD–TRA (n 145) para 6.1; EESC, 'National Contact Points #OECD guidelines on multinational enterprises France, Sweden, Netherlands and Norway share experience with #Korea' (*Twitter,* 20 February 2017) <https://twitter.com/EESC_TRADE/status/833644115745185797> accessed 9 March 2018; EESC, 'Practical example on how National Contact Points cooperate at the #EU–#Korea CSF' (*Twitter,* 20 February 2017) <https://twitter.com/EESC_TRADE/status/833647396353605632> accessed 9 March 2018.

[212] Art 10 Industrial Accident Compensation Insurance Act 2015 (KR).

[213] In Ok Kim and Seon Ju Sim, 'Development of WCI Scheme in Korea', title 5 (no date; handed over by a COMWEL officer to the author on 5 February 2018); COMWEL, 'Working for Workers' (2018) p 11.

nursing care benefits; disease compensation; and funeral costs.[214] Sports, loans and studentships can also be funded.[215] It emerged from the interviews that compensation provided does normally not recover all the damages, but this has previously been disputed by Samsung Electronics.[216] COMWEL decisions are binding and can be appealed in administrative courts.[217]

Workers can bring their claim electronically, by phone or face to face, in any COMWEL office.[218] The claim should include the worker's personal information, cause of the accident or disease, description and explanation of the event, doctor's opinion after the first examination sealed by the medical service provider, whether compensation is to be received other than benefits from workers' compensation insurance, the victim's seal or signature and the employer's seal or signature.[219] Considering the practices that have been explained in section 3.1, above, the latter requirement is a disproportionate burden on the employee.[220]

Three more barriers for workers need to be mentioned here. First, medical representatives have no duty to report, and will, in practice, not often represent a worker before COMWEL.[221] The reason is that the medical representative does not want to be responsible for the claimant's family losing their livelihood, in return for the limited remedies that COMWEL can offer.[222] Workers are, therefore, generally advised to only file a claim after they have made their mind up that they are willing to resign.[223] Second, COMWEL reportedly suffers from insufficient funds, workforce and expertise.[224] Periodic education of COMWEL and KOSHA

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[214] COMWEL, 'COMWEL Service Guide' (2017) p 9–12; Cho (n 103).
[215] COMWEL (n 214) p 7.
[216] Samsung, 'Additional Information Regarding the Associated Press Article of August 10, 2016' (2016) <https://news.samsung.com/global/additional-information-regarding-the-associated-press-article-of-august-10-2016> accessed 20 March 2017; Interview data.
[217] COMWEL has often appealed against court decisions that overturn its decisions.
[218] Interview data – participant KO–B.
[219] COMWEL, 'COMWEL Service Guide' (2017) p 6; Letter from MINBYUN–Lawyers for a Democratic Society (n 109) pp 7–8; Soon–Chan Kwon, Hyoung–Ryoul Kim and Young–Jun Kwon, 'The Administrative Process for Recognition and Compensation for Occupational Diseases in Korea' (2014) 29 Journal of Korean Medical Science p S6.
[220] Interview data – participant KO–B.
[221] Interview data – participant KO–G.
[222] Interview data – participant KO–B and KO–G.
[223] Interview data – participant KO–G.
[224] Interview data – participants KO–B, KO–C, KO–I and KO–K.

officers and a system to accredit them could alleviate this barrier.[225] Undue influence is also exercised on COMWEL officers by corporations.[226] Finally, workers bear the burden of proof and need to prove that there is a 'proximate causal relationship' between the health impact suffered and the work environment. Both points are discussed in turn.

First, the burden of proof is on the claimant.[227] Injuries are easier to prove than occupational diseases. In practice, civil society organisations often have to rely upon informants within corporations and the government.[228] Electronics corporations are generally reluctant to cooperate and submit data, and no legislation obliges them to do so.[229] Electronics chaebols frequently allege that the requested information is categorised as a 'trade secret' or that it has not been collected. For example, Samsung Electronics did not share information on the chemicals that were used in production line 3 of its Giheung plant, where Hwang Yu-mi had been working since graduating from high school when she died at the age of 23 from myeloid leukemia in 2006. A journalist of Associated Press quoted a Samsung Electronics vice President who allegedly said, 'We have a right to protect our information from going to a third party'.[230] She also quoted a letter from Samsung Electronics' CEO to regulators. He allegedly asserted that details regarding chemicals including 'types and volumes of substances' are trade secrets that cannot be shared as 'it is feared that the technology gap with rivals at home and overseas would be reduced and our company's competitiveness would be lowered'.[231] Samsung Electronics later accused the journalist of making irrelevant and misleading claims. For clarity purposes, it is useful to reprint the relevant part of Samsung Electronics' rectification statement

> Chemical information which Samsung has been unable to disclose is what our suppliers deemed as trade secret and refrained from disclosure. Suppliers are not required to reveal information deemed a trade secret,

[225] Kwon (n 219) p S8.
[226] Interview data – participants KO–C and KO–K.
[227] A/HRC/35/32/Add.1 (n 17) para 42.
[228] Interview data – participant KO–C.
[229] A/HRC/35/32/Add.1 (n 17) para 19.
[230] Youkyung Lee, '2 Words Keep Sick Samsung Workers From Data: Trade Secrets' *Associated Press* (Seoul, 10–11 August 2016) <https://apnews.com/ea1b8280b50b4ad3a9bdcd9def798914> accessed 1 February 2018.
[231] See ibid; Samsung, 'Employee Health and Safety at Semiconductor Facilities' (2016) <https://news.samsung.com/global/employee–health–and–safety–at–semiconductor–facilities> accessed 20 March 2018.

> however they are required to disclose whether their products contain any toxic substance. This means that even if a supplier cites trade secrets to withhold information, the chemical product provided to Samsung has been certified as not containing any toxic substance.[232]

This statement concurs with Special Rapporteur Tuncak's observation that Samsung Electronics is satisfied when its chemical suppliers provide a letter of warranty that chemical formulas purchased do not contain hazardous substances.[233] The corporation seems to have decided that in order to avoid disclosure of potentially negative information it is better to not acquire information regarding chemicals in the first place.[234]

In the past, COMWEL officers have accepted Samsung Electronics' 'trade secrecy' policy as a basis to reject workers' petitions for lack of evidence.[235] COMWEL held, for example, that the Hwang family was denied access to data 'because under law they were deemed trade secrets'.[236] COMWEL appears to be slowly changing this policy. In 2016, COMWEL granted workers compensation to the family of a 28-year-old worker who died of malignant lymphoma after she had worked at the Samsung Electronics' Giheung plant between 2002 and 2006.[237] After on-site investigations, COMWEL concluded that she had been exposed to carcinogenic materials, pointing to the fact that chemical data submitted by Samsung were redacted as trade secrets and that there was no chemical detector in place when the victim worked at the company.

Second, claimants have to prove that there is a 'proximate causal relationship' between the health impacts suffered and the work environment.[238] Article 34 Enforcement Decree of the Industrial Accident Compensation Insurance Act stipulates the specific conditions that need to be met before a disease is deemed

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[232] Samsung (n 216). See also Samsung, 'Statement on the Associated Press Article of August 10, 2016' (2016) <https://news.samsung.com/global/statement-on-the-associated-press-article-of-august-10-2016> accessed 20 March 2017.
[233] A/HRC/33/41/Add.1 (n 27) paras 56–57.
[234] Cf Jennifer Shkabatur, 'A Global Panopticon? The Changing Role of International Organisations in the Information Age' (2011) 33 Michigan Journal of International Law p 207.
[235] Corporate for All and others, 'Civil Society Report to Parliament' (2010) IR-20100928 p 13; Lee (n 230).
[236] Chapter 9 Unfair Competition Prevention and Trade Secret Protection Act 1987 (KR); Mu-Hyun Cho, 'Korea Labour Ministry Denies Re-Opening Samsung Toxin Case' (ZDNet, 15 August 2016) <www.zdnet.com/article/korea-labour-ministry-denies-re-opening-samsung-toxin-case/> accessed 1 February 2018.
[237] Sharps (n 104).
[238] Art 37 Industrial Accident Compensation Insurance Act 2015 (KR).

an 'occupational disease', one of which is that the 'causal relationship between the work-related injury and the disease should be medically recognised'.[239] There are considerable gaps in the Occupational Safety and Health Act and Toxic Chemicals Control Act – on which COMWEL officers have to rely when they have to determine the causal relationship between illnesses and working conditions. For example, the Hwang family claim was rejected because 'the causal relationship between work and disease was not established'.[240] It will be discussed below that the Seoul Administrative Court later overturned this decision, finding the agency to be wrong in rejecting the link between leukemia and the workplace, in relation to two workers.

3.4 Courts

The Constitution and the Court Organization Act consolidate the three-instance court system in Korea, which is composed of District Courts as the court of first instance, High Courts as the court of second instance, and the Supreme Court as the ultimate court of appeal.[241] The judicial dispute resolution procedure has two tracks. One is civil and the other is administrative.[242] Both tracks can be used simultaneously. The civil judicial procedure is initiated before the District Courts. The administrative judicial procedure is initiated before administrative courts. They can review decisions of government agencies such as COMWEL. Administrative courts other than Seoul Administrative Court are annexed to the District courts. Appeals are normally brought before the High Courts, located in the major cities of Korea.[243] Decisions of the High Courts can be appealed to the Supreme Court. While District Courts and High Courts can deal with the facts and the law of the cases brought before them, the Supreme Court can only deal with questions of law.

Judges are well respected in Korean society and there are various checks and balances in place to prevent corruption.[244] Article 27 Constitution determines that

[239] Interview data – participants KO–B and KO–G.
[240] Cho (n 103).
[241] Art 101 Constitution 1948 (KR); Art 3 Court Organization Act 1987 (KR).
[242] Interview data – participant KO–K.
[243] See Jongcheol Kim, 'Courts in the Republic of Korea: Featuring a Built–In Authoritarian Legacy of Centralization and Bureaucratization' in Jiunn–rong Yeh and Wen–Chen Chang (eds), *Asian Courts in Context* (Cambridge University Press 2014) p 113.
[244] Interview data – participants KO–D, KO–H and KO–K.

all citizens have the right to trial in a speedy manner. The average period for a first instance case is seven months.[245] Bringing a case all the way up to the Supreme Court can take as long as five years.[246] Tort claims must either be brought within ten years from the date the violation was committed or within three years from the date the claimant became aware of the damage and the identity of the tortfeasor (whichever is earlier).[247] Class actions are not allowed.[248] Other barriers to access to justice include the high costs associated with legal procedures, such as court stamp fees.[249] All lawyers admitted to bar associations can represent claimants in court. They also offer some paralegal services.[250] The Korea Legal Aid Corporation further provides free legal advice in its 113 offices. Lawyers often give discounts to civil society organisations and they sometimes get office space from trade unions in return for their help.[251] In principle, litigation costs are borne by the unsuccessful party.[252] The full recovery of lawyers' fees is not normally possible.

Civil society organisations bring strategic cases because their effect can bring about changes.[253] That is the main reason why most landmark cases have been brought against Samsung Electronics. Judges are sometimes reluctant to make progressive decisions due to the obscurity or absence of applicable laws.[254] It was stated in interviews that judges 'can only do so much', as the laws are strict vis-à-vis workers.[255] The CESCR has encouraged judges to align their decisions to international human rights standards and bodies.[256] International law is directly

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[245] Kim (n 243) p 120.
[246] Eg Yeo (n 103); Youkyung Lee, '#MeToo takes off in South Korea, but how far will it go?' *Associated Press* (Seoul, 22 March 2018) <www.csmonitor.com/World/Asia–Pacific/2018/0322/MeToo–takes–off–in–South–Korea–but–how–far–will–it–go> accessed 10 December 2018.
[247] Jin Yeong Chung and Sungjean Seo, 'Litigation and Enforcement in South Korea: Overview' (2018) <https://uk.practicallaw.thomsonreuters.com/8–381–3681?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1> accessed 1 December 2018.
[248] NHRCK (n 144) p 28.
[249] UNCESR, 'Concluding Observations on the Fourth Periodic Report of the Republic of Korea' UN Doc E/C.12/KOR/CO/4 paras 7–10; Interview data – participants KO–I and KO–J.
[250] Interview data – participant KO–I.
[251] Interview data – participants KO–I and KO–J.
[252] Art 98 Civil Procedure Act 1960 (KR).
[253] Interview data – participant KO–K.
[254] Nohyoung Park, 'Application of International Law in Korean Courts' (2004) 1 Asia Law Review p 23; Kim (n 243) p 134; Interview data – participants KO–F, KO–K and KO–J.
[255] Interview data – participants KO–D and KO–K.
[256] CESCR, 'Concluding Observations on the Fourth Periodic Report of the Republic of Korea' UN Doc E/C.12/KOR/CO/4 para 6.

applicable in Korea.[257] Nevertheless, court cases in which covenants are used as the legal or interpretive standard remain extremely rare. There are two reasons for this. First, there is limited expertise on international treaties and frameworks, such as the UN Guiding Principles.[258] Second, the Constitution has equal effect as international law, according to the Constitutional Court and the Ministry of Justice.[259] In one case, the Constitutional Court acknowledged the supremacy of international law over a domestic law that was in compliance with the Constitution.[260] Judges might, however, be reluctant to challenge laws that respect the Constitution, but violate international law.

Some courts – in particular those based in Seoul – have also shown that they are willing to take a stance in interpreting flaws in written laws.[261] For example, in 2012, the Seoul Administrative Court cancelled a police prohibition for a rally by a newly established union in front of the Samsung Electronics' headquarters to honour Hwang.[262] The police authority had rejected the union's plan to hold this rally because another union had already registered to hold a rally.[263] The Seoul Administrative Court found that a yellow union had applied to hold rallies more than 130 times that year but had never actually held any. (While this judgment was a victory for trade unions, an amendment was introduced in the Assembly and Demonstration Act in 2016 to legitimise the practice of police authorities supporting yellow unions.[264])

The claimant – who bears the burden of proof – faces substantial legal and practical barriers to get access to evidence.[265] The claimant can request the court to order anybody to be present and testify in court as a witness.[266] A witness may refuse to testify when they are examined on 'matters falling under his or her

[257] Art 6(1) Constitution 1948 (KR).
[258] Interview data – participants KO–D and KO–K.
[259] See Park (n 254).
[260] Ibid p 59 referring to Constitutional Court Case 99Hun–Ma139.142.156.160 3.Ka (2001).
[261] Kim (n 243) p 113.
[262] Art 6 Assembly and Demonstration Act 2007 (KR); X, 'Court Allows Union Rally in Front of Headquarters' *Korea Times* (Seoul, 23 July 2012) <www.koreatimes.co.kr/www/news/nation/2012/07/117_115713.html> accessed 10 December 2018.
[263] It emerged from the interviews that this union does no longer exist.
[264] Assembly and Demonstration Act 2007 (KR) amended by Act Nr 13834 2016 (KR).
[265] Art 136(1) Civil Procedure Act 1960 (KR).
[266] Art 303 ibid.

technical or professional secrets'.[267] In practice, it is impossible to get co-workers to witness in court because they fear that they will lose their jobs.[268] The claimant will, most of the time, request the court to issue an order to produce specific documents that are in the possession of the defendant or a third party.[269] Such a request must clearly indicate the document requested, the contents of the requested document, the document holder, the fact to be proved by the document and the grounds on which the document should be produced.[270] There is an obligation to comply with such requests under the Civil Procedure Act, but most documents containing 'technological or professional secrets' are exempted from submission.[271] It has also been reported in section 3.3 that chaebols often allege that they do not collect such requested information from their suppliers.

Courts are increasingly no longer accepting refusals to provide information when workers suffer diseases. For example, in a 2017 decision – the third case involving multiple sclerosis of a Samsung Electronics worker – the Supreme Court overturned first and second trial rulings against the claimant and returned the case to the Seoul High Court.[272] The lower courts had denied the worker's claim, explaining that the correlation between the worker's duties and the illness was inadequately proven. No records of her workplace conditions were publicly available and COMWEL had refused to disclose them, citing 'trade secrets'. The Supreme Court overruled this decision. It held that the lack of evidence, resulting from Samsung Electronics' refusal to provide the information and an inadequate investigation by the government, should not be held against the worker. Instead, it said that such special circumstances should be considered in favour of the worker. This decision is in line with the Civil Procedure Act, which determines that a court can accept the facts alleged by the applicant without any evidence, if the defendant fails to comply with the court order to produce documents without a justifiable reason.[273]

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[267] Art 315(1)(2) ibid.
[268] Interview data – participant KO–K.
[269] Art 344 Civil Procedure Act 1960 (KR).
[270] Art 345 ibid.
[271] Art 344(3)(c) referring to art 315 Civil Procedure Act 1960 (KR).
[272] Cho Il–Jun, 'Semi–Conductor Workers' Seek Acknowledgement of Industrial Accident Status' *Hankyoreh* (Seoul, 1 November 2017) <http://english.hani.co.kr/arti/print/817039.html> accessed 30 september 2019.
[273] Art 349 Civil Procedure Act 1960 (KR).

The claimant also bears the burden of proving the causal relationship between a worker's duties and their disease or death. Courts have taken a more lenient approach to the issue of causation than COMWEL. For example, the Seoul Administrative Court overturned COMWEL's decision on Hwang's death in 2011. It found that COMWEL was wrong in rejecting the link between her myeloid leukemia and the conditions in which she had to work at the Giheung plant.[274] The Court held that the possibility of developing leukemia when exposed to toxic chemicals cannot be completely excluded despite the absence of medical or scientific proof, since it may be due to factors that have not been investigated.[275] In the same ruling, the court also held Samsung responsible for causing Lee Sook-Young's death. Like Hwang, Lee worked at the Giheung plant and died of myeloid leukemia at the age of 29, a disease only three in 100,000 Koreans get, according to the Journal of Korean Medical Science.[276] The Court did, however, not recognise Samsung Electronics' responsibility for three other workers who worked at other Samsung Electronics' plants, including two who were also fighting myeloid leukemia. After COMWEL appealed the decision, the High Court noted that Hwang and Lee had probably been exposed to cancer-causing substances like benzene or radiation, although this was not medically or scientifically verified.[277] The Supreme Court upheld this decision in 2016.

In this case, the claimants faced considerable difficulties to prove their case, as COMWEL relied on an epidemiological survey conducted by KOSHA, years after Hwang and Lee's deaths, that determined no significant levels of the carcinogenic benzene.[278] Another post-mortem survey, conducted by a US-based consultancy office, was commissioned by Samsung. The latter survey, which was published in

[274] *Sanggi Hwang, Seonwon Lee, Aejeong Jeong, Eungyeong Kim and Changho Song v COMWEL* (n 103).
[275] Ibid p 22.
[276] Louise Voller, 'The Human Cost of Tablets' (*Danwatch*, 29 December 2014) <https://old.danwatch.dk/en/nyhed/sydkoreas–it–produktion–kraever–menneskeliv/> accessed 1 December 2018.
[277] Pbr, 'Appellate Court Upholds Decision Blaming Samsung for Employees' Leukemia Deaths' *Yonhap News Agency* (Seoul, 21 August 2014) <https://en.yna.co.kr/view/AEN20140821007200315> accessed 10 December 2018; International Trade Union Confederation, 'Appeal Court Blames Samsung for Leukemia Deaths' (2014) <www.ituc–csi.org/appeal–court–blames–samsung–for> accessed 10 December 2018; X., 'Top Court Rules Samsung Not Liable For Workers' Leukemia Death' *Yonhap News Agency* (Seoul, 30 August 2016) <https://en.yna.co.kr/view/aen20160830007100315> accessed 1 December 2018.
[278] Corporate for All (n 235); Rachael Jones and others, 'Author Response to Drs Paek and Gassert' (2015) 57(11) Journal of Occupational and Environmental Medicine e144–145; Interview data – participant KO–G.

part four years after it was conducted, has been disputed.[279] For example, Samsung wrote on its website that an external scientific advisory panel of experts from reputable institutions have reviewed the study.[280] One of the Panel experts has, however, communicated that the panel had only been asked to comment on the research design and not on its findings.[281] Moreover, Paek Domyung aptly commented that these surveys had limited value, as carcinogens might have been present in the past, before the surveys were conducted.[282] In a more recent 2017 decision, the Supreme Court seems to end such discussions over scientific surveys. It overruled the High Court's decision regarding an ex-Samsung Electronics worker who died at the age of 32 in 2015, after she had been diagnosed with a brain tumour. The Court said that limitations in government investigations only measuring a broad spectrum of chemicals and not evaluating health risks of exposure should not be held against a worker with a brain tumour whose cause is unknown.[283]

In Hwang's case, however, the Seoul Administrative Court had issued a more complex reasoning, which did not directly criticise the government. The Court held that Hwang – who allegedly only wore a common mask absent an anti-gas function – may have been exposed to toxic chemicals as each bay in the production line where she worked had open forms without doors that did not prevent air from travelling around through the ventilation system.[284] It also noted

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[279] Rachael Jones and others, 'Exposure Reconstruction and Risk Analysis for Six Semiconductor Workers with Lymphohematopoietic Cancers' (2015) 57(6) Journal of Occupational and Environmental Medicine pp 649–658. See also Miyoung Kim, 'Samsung Study Rejects Claims Semiconductor Plants Caused Cancer' *Reuters* (Giheung, 14 July 2011) <www.reuters.com/article/us–samsung–cancer–idustre76d0xd20110714>) accessed 1 December 2018.

[280] Samsung (n 231).

[281] E–mail from a panel expert to the author (12 May 2019). See also Samsung, 'Environ Discusses Findings of Study on Health and Safety Measures inside Samsung Semiconductor Facilities' (2011) <www.samsung.com/semiconductor/minisite/EHS/resource/press–release/03–environ/> accessed 1 December 2018.

[282] Domyung Paek cited in Matthew X., 'Court Recognizes Brain Tumor as Industrial Accident from Samsung Electronics' *Business Korea* (Seoul, 10 November 2014) <www.businesskorea.co.kr/news/articleView.html?idxno=7224> accessed 1 December 2018. See also Domyung Paek and Thomas Gassert, 'Fatally Flawed: Samsung's Environ Consultants' (2015) 57(11) Journal of Occupational and Environmental Medicine e141–e143.

[283] Lee (n 103); Swapna Krishna, 'Samsung Factory Worker Awarded State Compensation for Brain Tumor' (*Engadget,* 14 November 2017) <www.engadget.com/2017/11/14/samsung–factory–worker–brain–tumor–occupational–hazard/?guccounter=1&guce_referrer_us=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_cs=sAoq5C–HuB1GgyWHLl6TFQ> accessed 1 December 2018.

[284] *Sanggi Hwang, Seonwon Lee, Aejeong Jeong, Eungyeong Kim and Changho Song v COMWEL* (n 103) p 22; Letter from MINBYUN–Lawyers for a Democratic Society (n 109) p 4.

that Lee had been exposed to various kinds of toxic chemicals for 10 years. The Court found that demonstrating a causal relationship does not necessarily require clear medical or scientific reasoning. A proximate causal relationship can be inferred from an employee's health condition at the time of employment, the cause of disease, the existence of substances known to cause illness in the work place and the duration of work inside the contaminated workplace.[285]

3.5 Ad hoc mediation and arbitration

In 2008, Sharps and Samsung Electronics started bilateral negotiations to disclose the list of chemical products being used at Samsung's manufacturing plants and to compensate those workers who suffered health issues.[286] Negotiation efforts were met with difficulties and they led to the formation of a group that splited from Sharps, the Samsung Occupational Disease Family Committee (Family Committee).[287] Eventually, in 2014, it was agreed to create a Mediation Committee of three members, with former Supreme Court judge Kim Ji-hyung as the chair. After eight months of negotiations, the Mediation Committee proposed a recommendation to prevent recurrence for a number of disease groups. The Mediation Committee also proposed that Samsung Electronics apologise and provide compensation of KRW 100 billion (GBP 68.3 million), which would be distributed by an independent organisation.[288] Both Samsung Electronics and the Family Committee rejected the establishment of an independent organisation. The Family Committee expressed the view that speedy compensation should be a priority, while Samsung Electronics proceeded to create an internal company-run fund to provide compensation.[289] Over 150 applications were made to Samsung Electronics for compensation. As of May 2016, Samsung Electronics claimed it had compensated 110 former workers

[285] Pbr (n 277).
[286] A/HRC/33/41/Add.1 (n 27) para 64.
[287] Ibid para 64; Yoo–chul Kim, 'Ex–Justice to Mediate Samsung Cancer Talks' *The Korea Times* (Seoul, 8 October 2014) <www.koreatimes.co.kr/www/news/tech/2014/10/133_165997.html> accessed 9 November 2017.
[288] A/HRC/33/41/Add.1 (n 27) para 65; Noh Hyun–woong, 'After Nine Years, Samsung Reaches Deal With Victims' Families over Leukemia Cases' *Hankyoreh* (Seoul, 13 January 2016) <http://english.hani.co.kr/arti/english_edition/e_national/725996.html> accessed 8 November 2017.
[289] Samsung (n 231).

affected with the specified diseases and had physically presented apology letters from the CEO to those subject to compensation.[290]

Sharps was not satisfied with the way in which Samsung Electronics handled the complaints.[291] It claimed, amongst other things, that it obliged the claimants to sign a confidentiality agreement shielding the company from any further legal and financial liability.[292] The NGO started a sit-in at Samsung's flagship store in Seoul in October 2015.[293] The Mediation Committee then commented that it felt remorse for its failure to accomplish its mission. It agreed with Sharps that the issue is of significant meaning for Korean society but considered mediation 'practically impossible', and proposed binding arbitration as an alternative. Sharps then agreed to fully comply with the arbitration committee's decision, whatever the outcome would be.[294] Samsung ultimately decided to take part in July 2018.[295]

Four months later, the arbitration committee announced its decision. Everyone in Korea who has worked for at least one year on Samsung Electronics' semiconductor and LCD production lines since the first line became operative in 1984 is eligible for assistance and compensation.[296] The programme has expanded to include pulmonary conditions and birth defects. Eligibility will also be granted when the causal relationship between work and the medical condition

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[290] A/HRC/33/41/Add.1 (n 27) para 67.
[291] Min–kyung Kim and Jeong–hoon Lee, 'Samsung Accused of Spurning Dialogue–Based Solution for Leukemia Victims *Hankyoreh* (Seoul, 24 September 2015) <http://english.hani.co.kr/arti/english_edition/e_national/710260.html> accessed 20 March 2018; Park 2016 (n 104); Tae–woo Park, 'Former Samsung Worker's Multiple Sclerosis Ruled a Work–Related Disease' *Hankyoreh* (Seoul, 12 February 2017) <http://english.hani.co.kr/arti/english_edition/e_business/782259.html> accessed 20 March 2018.
[292] Sharps, 'Samsung Hands Out Hush Money to Occupational Disease Victims' (Stop Samsung, 23 October 2013) <https://stopsamsung.wordpress.com/2015/10/23/samsung–hands–out–hush–money–to–occupational–disease–victims/> accessed 27 November 2017.
[293] Sharps (n 106).
[294] Ha–yan Choi, 'Samsung's Acceptance of Offer by Arbitration Committee Likely Influenced by Vice Chairman's Upcoming Trial' *Hankyoreh* (Seoul, 23 July 2018) <http://english.hani.co.kr/arti/english_edition/e_national/854484.html> accessed 9 December 2018.
[295] Ibid.
[296] Ki–yong Park, 'Arbitration Committee for Samsung's Leukemia Outbreak Proposes Final Mediation Plan' *Hankyoreh* (Seoul, 4 November 2018) <http://english.hani.co.kr/arti/english_edition/e_national/868717.html>accessed 9 December 2018; Sharps (n 106).

is suspected, but not definite.[297] The amount of individual compensation is set below the standard compensation for industrial accidents in order to include the greatest number of Samsung Electronics workers who might have been harmed by their work environment. The ceiling for individual compensation is set at KRW 150 million (GBP 102,515). A Seoul-based law firm will manage the programme. [298] Separately, the arbitration committee entrusted KOSHA to manage KRW 50 billion in funds to improve workers safety in the electronics industry. The scheme runs for ten years, and may be subject to renewal. The arbitration committee also urged Samsung Electronics to regard this agreement as a paradigm for the question of compensating workers at other workplaces where similar issues are raised.[299] This might be useful for the categories of workers that remained outside the arbitration agreements: workers that are employed at Samsung SDI, subcontracted workers and workers who were employed at third-tier suppliers.[300]

In the meantime, SK Hynix has also established an independent mediation committee composed of seven experts.[301] This body reportedly recommended that the scope of compensation includes all diseases and conditions that could, in any way, be related to the semiconductor industry. SK Hynix announced that it would accept all of the recommendations made by the mediation committee and that it would establish an internal compensation committee composed of external experts. As of January 2016, SK Hynix claimed it had compensated 39 former workers.

4 Conclusions

The case study presented in this chapter addressed the accountability of corporations in the powerful Korean electronics industry and the role that EU

[297] Sharps (n 106).
[298] Ibid.
[299] Park (n 296).
[300] Sharps, 'Young Samsung SDI Researcher Dies of Leukemia After 3 Years of On-the-Job Chemical Exposure' (Stop Samsung, 1 February 2019) <https://stopsamsung.wordpress.com/2019/02/01/young-samsung-sdi-researcher-dies-of-leukemia-after-3-years-of-on-the-job-chemical-exposure/> accessed 1 February 2019; Sharps, 'More than 100 Occupational Disease Victims of Samsung Likely Remain Uncompensated' (Stop Samsung, 5 March 2019) <https://stopsamsung.wordpress.com/2019/03/05/more-than-100-occupational-disease-victims-of-samsung-likely-remain-uncompensated/> accessed 1 April 2019.
[301] A/HRC/33/41/Add.1 (n 27) paras 69–70.

Member States can play to support Korea in fulfilling its obligations to remedy human rights violations. The presented case study was atypical, in that Korea has had stratospheric economic growth over recent decades. Promoting goals of economic growth has been prioritised over developing legal and institutional systems for the protection of workers. This chapter illustrated, for example, that the legal framework for protecting the right to health is deficient, while rules that legitimise trade union busting are frequently created. Former Supreme Court judge Kim Ji-hyung noted in this regard that Korea would need to 'contemplate with a critical frame of mind how dedicated we have been to interpreting the laws so as to actively guarantee workers' right to health even under the current legal system'. [302] It has been indicated that the EU-Korea FTA and Framework Agreement provide a legal basis for capacity development regarding core labour rights. Some collaborative initiatives in law- and policy-making have been taken, and more initiatives might follow. Recently, the European Commission has requested that a panel of experts would be created under Article 13.15 EU-Korea FTA to address concerns of the EU Domestic Advisory Group regarding violations of the freedom of association and the right to collective bargaining in law and practice in Korea in 2013. This will be an important precedent as it is the first case of dispute settlement in trade and sustainable development. There have been some indicators that Korea has showed some goodwill by introducing some new laws to protect the freedom of association following the formal complaint. Nevertheless, it is too early to draw any conclusions from these indicators. The exchanges between the EU and Korea on core labour rights under the trade and sustainable development chapter of the EU-Korea FTA have been fraught with difficulties. Any form of collaboration – international, regional or bilateral – is often perceived as foreign interference in Korea due to the trauma that has been inflicted by foreign interference on the Korean peninsula in the past.[303] In both institutionalised and broader network relations between the EU and Korea, the most optimistic scenario to change laws and practices would be to find a way to connect with Koreans who have been raised after the authoritarian era. Incremental changes that create opportunities to exchange information, disseminate knowledge and facilitate learning would be particularly valuable. Korean NGOs and journalists would particularly benefit from opportunities to

[302] Choi (n 294).
[303] Interview data – participant KO–J.

strengthen ties with their European counterparts to raise awareness about the issues at hand in Europe, because the freedom of expression and the press are limited in Korea. Their European counterparts could for example, report about the recent successes in COMWEL cases, court proceedings and ad-hoc arbitration proceedings to recognise and compensate work-related diseases in electronics factories. It can be considered undeserved that these cases – for which NGOs had to overcome the 'trade secrets' rule and various other hurdles – have received so little media attention in various EU Member States apart from France. It has also been highlighted by interview participants that these successes do not diminish the perceived need to further pursue the ongoing case in France against Samsung, which has been described in Chapter 5 of this thesis. Most interview participants agreed that this case could give a strong signal to Korean electronics corporations that 'the world is watching'.[304] A successful extraterritorial case might also contribute to the acknowledgement of obligations of one state in relation to corporate human rights abuses endured by individuals in another state. This would be of importance for a much wider suite of instances than those that have been reported in this chapter: Korean electronics corporations are increasingly outsourcing their supply chains to low-cost countries in the Far East.[305] They also buy large amounts of natural resources from high-risk and conflict-affected areas in Africa.[306]

[304] Interview data – participant KO–A.
[305] Yun (n 13) p 4.
[306] Tuncak (n 161).

CHAPTER 8 CONCLUSIONS

This thesis investigated the conditions under which the EU and its Member States influence the accountability of transnational corporations that are based in developing and emerging states for their involvement in human rights violations. The main contribution lies in narrowing the existing research gap on the accountability of TNC-DEMs. In addition, this thesis provided a new perspective on the widely documented poor track record of EU member states in terms of holding 'their' corporate nationals accountable. Seven main conclusions can be drawn. First, the UN Guiding Principles on Business and Human Rights have normalised 'business and human rights' regulation with extraterritorial implications in some EU Member States. Second, corporate concerns about the competitive threat of TNC-DEMs constitute a barrier to strengthen the accountability of corporations that are based in the EU. Such concerns are not abstract but identifiable and varied. Third, regulation to ensure 'corporate respect for human rights' has been adopted when the 'perceived interests' in the EU and its Member States outweigh these concerns. Such interests are vastly different at EU level and Member State level. Fourth, whenever such perceived interests lead to regulatory measures, regulators have had the explicit ambition of minimising the impact on the competitiveness of corporations based in the EU or a Member State. The EU, France and the Netherlands have considered 'extending' their regulatory frameworks to competitors that have a certain connection with their territory. While EU Member States' laws fit within the WTO framework, the EU Conflict Minerals Regulation tries to challenge this framework. Moreover, the EU tries to influence, in a definite way, how globalisation should happen. There has been remarkable little objection from affected states regarding such interference in their internal affairs. Fifth, extraterritorial remedies for TNC-DEMs in EU Member States are desirable and might be realistic. Sixth, while support for local capacity building in developing and emerging states by EU Member States is promising, current efforts are insufficient. Seventh, legal barriers that are functional for serving the needs of those in power are an important challenge to local capacity building that has been largely overlooked in the literature. This chapter discusses each of these conclusions.

First, the 2011 UN Guiding Principles on Business and Human Rights normalised 'business and human rights' regulation with extraterritorial implications in some EU Member States.

The UN Guiding Principles serve as the central reference point across the entire spectrum of rights that might be impacted by corporations and remedies that might be available for rights-holders. Various norm entrepreneurs – including civil society organisations and scholars – have scrutinised the UN Guiding Principles because they do not acknowledge that states have 'extraterritorial *protect* obligations' over their corporate nationals when they are involved in violations of human rights in third states. This thesis, demonstrated that these Principles were, however, very succesful in putting issues on the legislative table and giving 'norm entrepreneurs' a tool to strengthen their (minority) position in debates in France and the Netherlands. Other multilateral soft-law instruments – such as the EITI and the OECD Minerals Due Diligence Guidance – have fulfilled a similar role in the EU debates. They served as 'stepping stones' in building consensus on the need for and the best way of structuring unilateral measures.

Second, this thesis elucidated what immediate threats EU-based corporations fear if competitors from other states do not have to live up to the same business and human rights standards.

All too often, commentators refer to the overly generic concept of 'competitive disadvantage'. Such a broad concept does not allow norm entrepreneurs to start a dialogue on innovative accountability mechanisms for corporate human rights violations. This conclusion can help them to reframe business concerns when they are looking to change the status quo. Five categories of (perceived and real) business risks have played a role in the negotiations of supply chain legislation in EU Member States and more general business and human rights regulations at EU level: compliance costs, liability risks, practical difficulties in educating suppliers, disclosure of sensitive company information (including information on levels of turnover, pricing, costs and profit structure) and loss of business opportunities (not qualifying as contract partners and being bypassed by clients who seize the opportunity to source directly from the disclosed sources). At their

most extreme, such risks might be an incentive for corporations to move their investments and headquarters to escape the regulations.

In the debates regarding the Dutch Child Labour Duty of Care Law and the French Law on Parent Corporations' Duty of Care, corporate concerns related mostly to the competition from transnational corporations based in the other EU Member States. In both Member States, it was suggested that regulation at the EU level would be desirable. At the EU level, however, concerns related mainly to the competition from TNC-DEMs (as opposed to competitors from other economically developed states outside the EU). Developing and emerging states have a comparative advantage and significantly fewer capabilities and less willingness to install business and human rights requirements compared to economically developed states.

While it has often been asserted that more regulation can enable corporations to reap various immediate and long-term benefits (including employee morale, citizen trust and cost savings), this thesis has demonstrated that business organisational behaviour is resistant to change. Only two instances could be identified in which *some* corporations agreed that the benefits of regulation should prevail over immediate business risks. First, some EU-based extractive industry corporations displayed a relatively constructive attitude in the adoption process of the Country-by-Country Reporting rules. In an industry that is characterised by long project cycles, these transparency rules were perceived to create some certainty regarding resource prices, investments and project outputs in unstable and insecure regions. This finding should not be exaggerated, as the CBCR rules are limited to reporting obligations. The EU-based extractive industry was generally reluctant to support the Conflict Minerals Regulation, which addresses human rights supply chain risks proactively. Second, some Dutch branches of big transnational corporations supported the Dutch law on child labour. It concerns highly visible corporations that heavily invest in consumer branding. Allegations of child labour in their supply chains constitute an extreme reputational risk. To prevent reputational damage, these corporations often have no other choice than to make efforts to proactively monitor and curb child labour in their global supply chains. Legislation enforces the same obligations (and associated costs) on some of their less visible competitors. It would probably be

much more difficult to find business support for supply chain regulation concerning most other human rights, which are less sensitive to public opinion (including the core labour standards on freedom of association and the effective recognition of the right to collective bargaining).

Third, concerns about a competitive threat from TNC-DEMs can be overcome when the 'perceived interests' in the EU and its Member States outweigh concerns regarding competitiveness. Such interests are vastly different at EU level and Member State level.

At the more remote EU level, perceived 'long-term' economic interests overshadowed short-term concerns in the adoption process of both the CBCR rules and the Conflict Minerals Regulation. In the long run, EU-based corporations could benefit from both regulatory frameworks, as they help to secure access to energy resources and critical raw materials that are needed to innovate value propositions. The emerging economies of China and India are seen as a particular threat, as they have emerged as major buyers of energy resources and critical raw materials, which is a trend that has accelerated in the aftermath of the global financial crisis. It has thus been concluded that the EU's 'civilian' or 'normative' interests in the field of business and human rights are subjugated to and influenced by its economic interests. More than a normative agent, the EU acts as an economic player. It has also been illustrated that such economic interests continue to be prioritised in the EU's bilateral relations. The study of the trade relations between the EU and the East African Community in Chapter 6 established, in particular, that the EU does not seem to be prepared to significantly alter developing states' subordinate position in the world order.

First-mover EU Member States have very limited ability to push through their 'perceived interests' in the determination of the EU's regulatory business and human rights agenda. Three findings illustrate this conclusion. First, when a number of proactive EU Member States pressured the EU to adopt the Non-Financial Reporting Directive, substantial efforts were undertaken to ensure that the administrative burden on EU corporations was kept as minimal as possible. It went so far in this that the Directive dilutes rather than enhances the information available to stakeholders. Second, the European Commission replied with a prima facie rejection to the 'green card' request of the parliamentary chambers and

committees of eight Member States to use the 2017 French Law on Parent Corporations' Duty of Care as a model for the EU legislative proposal. Third, the European Commission refused to engage in a constructive dialogue regarding child labour, despite repeated calls by the Netherlands.

By adopting their respective laws, France and the Netherlands have proven that they are willing to compromise their short-term economic self-interests to achieve larger long-term goals. In both cases, this 'functional' approach was facilitated by (what political psychologists would define as) a human, irrational desire to change the status quo and to enhance the international status of the Netherlands and France as a nation. While the Dutch sponsors of the law leveraged corporate concerns about the impact of child labour in their supply chain on their reputation, the French sponsors used a variety of tactics to overcome opposition. A number of other tactics used by norm entrepreneurs were identified and described. The Law would, amongst others, attract investors and put French corporations in a position that gives them time to experiment with human rights capabilities before non-French competitors.

Fourth, irrespective of the divergent reasons for adopting business and human rights regulations in the EU and its Member States, there has been the same ambition to minimise the impact on the competitiveness of their 'own' corporations.

The compatibility of domestic measures with the extraterritorial implications of international law has not been definitively asserted. It has been established that both the CBCR rules and the Conflict Minerals Regulation have ultimately left little flexibility to take proper account of regulatory requirements abroad. The EU has justified issuing such domestic measures with extraterritorial implications on the basis that there exists a connection between the territory of the EU Member States and the regulated conduct. This connection is of a direct nature in the CBCR rules. Listed oil, mining, minerals and logging corporations in the EEA – even if they are not incorporated under the law of an EEA Member State – must report on payments made to governments, regardless of their place of incorporation. This connection is of an indirect nature in the Conflict Minerals Regulation. EU-based importers of large amounts of ores and concentrates containing 3TG are required to exercise due diligence over their suppliers outside

the EU in conflict-affected or high-risk areas. These suppliers may lose access to the large EU market if they do not comply with the Conflict Minerals Regulation. Smelters and refiners in non-EU countries are not *de jure* bound but they will be *de facto* bound if they want to continue their business relationships with EU-based importers. There was remarkably little opposition by third states regarding interference in their internal affairs, despite the fact that the EU tried to have a definite say into how the extractive industries should function and tackle human rights issues.

The EU tries to challenge the interpretations of the WTO rules. In particular, it has been explained that the Conflict Minerals Regulation could potentially raise issues under the Most Favoured Nation Principle (Article I:1 GATT) and the National Treatment Principle (Article III:4 GATT). The WTO DSM system remains largely unpredictable, but the EU could try to defend such rules under Articles XXI(b)(ii) and (c) and XX(a) GATT. The EU has previously challenged the WTO on the latter ground by framing the EU regulations on seal hunting as measures that protect EU citizens (and not seals directly). They had determined to be a 'necessary' trade-restricting measures to protect EU citizens' morals.

It is on the basis of this case that the Netherlands could confidently adopt the Child Labour Duty of Care Law, which has an impact on *all* corporations that sell or deliver goods or services to Dutch end-users more than once a year. There seems to be sufficient evidence that public concerns regarding products from child labour exist in the Netherlands, and that a connection exists between such concerns and the scope of 'public morals' as 'defined and applied' by the Netherlands in its territory according to its own systems and values.

The French parliamentary debates did not engage substantially with the WTO regime. It would probaby have been too difficult to justify that moral concerns inspired by genuine citizen concerns generally exist over 'human rights and fundamental freedoms' and other issues that are covered by the law. It is likely that French citizens are not sufficiently aware or informed of, nor concerned about, all human rights issues. This explains why the French Constitutional Council ultimately decided that the Law on Parent Corporations' Duty of Care is only applicable to French corporations.

These findings indicate that there is a need to develop initiatives that can determine whether concerns exist within EU Member States regarding human rights violations in third countries. Such mechanisms would allow the EU and its Member States to further challenge the WTO system, for example, to make its interpretation of the National Treatment Principle less extensive by not only taking public concerns relating to morals into account, but also international norms, when interpreting Article XX(a) GATT. Developing such mechanisms would be a reasonable measure to ensure that the EU and its Member States act consistently with their human rights obligations.

Most importantly, nuanced, accessible and reliable information on *all* core labour rights needs to be made available (without impoverishing democratic principles, such as freedom of speech). This includes those standards for which public attention and reputational costs are low (compared to child labour), such as the freedom of association and the effective recognition of the right to collective bargaining. There is also a need to develop initiatives to empower citizens in their consumption of corporate human rights information in the contemporary age of 'information disorder'. The development of such initiatives is rather urgent. The new regulatory frameworks in France and the Netherlands make large amounts of information available that is not presented in comparable and user-friendly ways. Such unstructured information can create a 'poverty of attention' and new accessibility issues.[1]

Fifth, extraterritorial remedies for human rights violations by TNC-DEMs in EU Member States are desirable and might be realistic.

Human rights cases may be filed with the direct aim of contributing to the development of international human rights law, including the recognition of extraterritorial obligations. Independent judges in remote EU courts that are able and willing to litigate a lawsuit against a TNC-DEM can also have an impact on the ground. They can provide remedies to claimants that currently have no access to remedies. This might also serve as an essential incentive for third states to strengthen their efforts to protect human rights, change laws that constrain

[1] Herbert Simon, 'Designing Organizations for an Information–Rich World' in Martin Greenberger (ed), *Computers, Communication, and the Public Interest* (The Johns Hopkins Press 1971) pp 40–41.

respect for human rights, and provide access to justice locally. This argument is, of course, limited. It is only valid for those governments that do not object to such jurisdiction – on the principle of non-justiciable political question and the broader principle of non-interference in internal affairs – and are sensitive to their reputation. However, even the mere possibility of extraterritorial claims might serve as an incentive for those corporations that have a reputation to defend. After all, increased awareness of the global economic activity that sustains human rights abuses in the export market may, in some instances, result in changes in buying and investment attitudes. It may, eventually, also lead to innovative foreign policy decisions, which the executive branch would prefer to decide based on political and diplomatic concerns.

Article 4 Brussels I Regulation preserves the traditional rules for defendants who are not domiciled in a Member State, such as TNC-DEMs. In exceptional circumstances, TNC-DEMs can, nevertheless be considered to be 'domiciled' in the EU (when they have their statutory seat, central administration or principal place of business in an EU Member State). Two other grounds to bring TNC-DEMs in court in France and the Netherlands have been identified and analysed: the forum by necessity doctrine and the connected claims doctrine. Article 14 of the French Civil Code furthermore provides a potential ground for claimants who are residents or refugees in France or act jointly with a 'French' claimant. It has also been considered that there exists a ground to bring claims against TNC-DEMs that have assets in various EU Member States, including Germany. This ground served as an inspiration for Draft Article 25 Brussels I Regulation (recast) which has never been adopted. But, the most notable opportunity that has been studied is Article L121-1 French Consumption Code. French NGOs have framed French citizens as victims of misleading commercial practices by both the French corporation Auchan and the Korean corporation Samsung, citing contradictions between corporate ethical commitments and evidence of labour rights violations. In so doing, they aim to secure civil remedies for damages that are directly related to the commission of a criminal offence. The claims against Samsung propel the debate on jurisdiction over 'foreign-cubed cases' forward after the US Supreme Court substantially limited such jurisdiction with the *Kiobel* case.

Simultaneously, it has been acknowledged that foreign-cubed claims will probably remain controversial due to the risk of infringing third countries' sovereignty. They will also remain limited due to procedural barriers to justice and the barriers created by notions of separate 'juridical personality' and 'limited liability'. Furthermore, it has been amply considered that while extraterritorial jurisdiction might make the liability risks of all transnational corporations more equal, opening courts to victims of TNC-DEMs would create a considerable burden on national court systems, which might create a pull factor for which one EU Member State alone does not have sufficient capacity or resources.

Sixth, while support for local capacity building in developing and emerging states by EU Member States is promising, current efforts are insufficient.

It has been concluded that cases on extraterritorial remedies need to be complemented by efforts to support judicial remedies locally. Practical local remedies facilitate legal certainty, predictability and the participation of everyone involved. By design, such remedies would be beneficial for victims of all corporations, regardless of the nationality of the owner. They can, furthermore, increase awareness about the behaviour of corporations in the places where abuse occurs and might have a regulatory effect on all operating there.

While the European Commission, the Dutch and the French governments all said that they support (and favour) local capacity building their current track record is insufficient. It has been predicted that incremental changes – in and outside institutionalised relations – can lead to information sharing and the internalisation of new norms of proper behaviour. Such initiatives need to target all corporations in third countries, and not just corporations that are 'home' in EU Member States or other economically developed countries. It was demonstrated in the case study in Chapter 6 that any other approach would, in practice, only serve as a way to maintain the status quo and keep mandatory regulatory standards, applicable to *all* corporations, low.

The case studies in Chapters 6 and 7 started from the idea that needs do not need to be defined formally. A 'bouquet' of preventive, redressive and deterrent remedies might be available to rights holders. In both case studies, evidence has

been as to why judicial remedies should form the backbone of a wider package of remedies for business and human rights issues that includes non-judicial remedies at the state, industry and company levels.[2] In Kenya, the judiciary, in particular the forward-looking judges in Industrial Courts would be key contacts (alongside NGO representatives). In Korea, on the other, hand, NGO representatives and journalists – who are prevented from criticising chaebols – under 40 would benefit from better connections to raise awareness about landmark cases. This is an important reminder for those policy makers who over and over again return to presenting (support for) non-binding remediation as an equivalent alternative for binding measures.

Seventh, legal barriers that are functional for serving the needs of those in power and their allies are an important challenge that has been largely overlooked in the literature.

There is a tendency to underestimate social forces in the literature on business and human rights because barriers to access to justice are often interpreted as being exclusively of a 'technical nature'. This might create the impression that if only bad procedures were be replaced and good ones adhered to, then the issues connected with human rights violations would go away. This thesis has proposed a broader contextual approach towards 'barriers to justice' which takes into account historical factors and evidence from the field. In so doing, it has demonstrated that it is viable and useful to account for '*conditions* under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained'.[3]

[2] Cf Commentary to UN Guiding Principle 26.
[3] Preamble UN Charter (emphasis added).

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ANNEX FIELD RESEARCH METHODOLOGY

This Annex discusses the case study research methodology used in the third part of this thesis. It is structured around the 'Rigour, Respect and Responsibility' framework, which had been proposed as a Universal Ethical Code for Scientists by the UK Government Office for Sciences (2007).[1] These three pillars are indeed common themes in ethical guidelines which encourage active reflection amongst researchers across institutional and other boundaries. Section 1 discusses the first pillar 'Rigour'. The introduction to this thesis discussed why the case study methodology was chosen to study the local perspective in a number of emerging and developing states. It was also explained there why the Kenyan floriculture industry and the Korean electronics industry were selected as case studies. This section discusses the data collection and analysis processes. A template of the interview questions and an overview of the demographics of the research participants are also provided. Sections 2 and 3 reflect upon the 'respect' and 'responsibility' pillars. This Annex is written from a first person perspective. This reflective approach increases the reliability, transparency and the quality of the conducted case study research.

1 Rigour

Rigorous research requires strict adherence to scientific methods and understanding as to how the researcher and the work which has been conducted by other researchers inform research results.[2] It requires that the researcher keeps her skills up to date.[3] I had been trained in methods and ethics during my doctoral course and during a previous job as a marketing researcher in a business school which adheres to the American tradition in my home country of Belgium. This experience has allowed me to learn about various types of data collection activity. The remainder of this section discusses the data collection processes (section 1.1) and the criteria for assessing the external validity, internal validity and reliability of the field research (section 1.3). It is highlighted that transposing Anglo-American methods overseas came with particular challenges (section 1.2). I explain that this experience sharpened my sensitivity to my own social identity in Kenya and Korea. I reflect that this identity was defined by a privileged outsider component and a less significant insider component.

1.1 Data collection

Semi-structured interviews with those concerned with law and policy-making form one of the most important sources for case study researchers.[4] Participants with the required expertise and experience of the ways in which state-based justice mechanisms deal with business and human rights claims in the Kenyan floriculture industry and the Korean electronics industry were needed. The categories of participants were defined with the help of the 'access to justice' tool

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[1] UK (Government's Science & Society Team Department for Innovation, Universities & Skills). 'Rigour, Respect and Responsibility, a Universal Ethical Code for Scientists' (2007) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/283157/universal–ethical–code–scientists.pdf> accessed 5 March 2018 p 2.
[2] Ibid p 2.
[3] Ibid p 2.
[4] Lisa Webley, 'Stumbling Blocks in Empirical Legal Research. Case Study Research' (2016) 3 Law and Method p 9; Aikaterini Argyrou, 'Making the Case for Case Studies in Empirical Legal Research' (2017) 13(3) Utrecht Law Review p 102.

of the American Bar Association.[5] It concerned lawyers, trade union and NGO representatives, labour officers, adjudicators and independent experts. A major drawback is that affected right-holders were not interviewed.[6] My School's Institutional Review Board, Cardiff School of Law and Politics Research Ethics Committee, indicated that interviewing them would be an ambitious endeavour because of the additional layers of protection that are necessary to protect their vulnerabilities. There were not sufficient resources to do this. Right-holders' views were therefore only indirectly included in this research project, in as much as they are reflected in secondary sources.

Participants were sampled for range and identified through non-probability methods to recruit a diverse and specialised overall sample. The desk research highlighted that data collection (and analysis) needed to be sufficiently differentiated along age and gender lines. Other 'subcategories' of participants that needed to be included were identified during the course of the fieldwork after the first data were analysed. They were constructed using both reputational and purpose sampling techniques.[7] For example, it was necessary to collect sufficient data from Kenyan people of Indian descent with specialised knowledge, as early participants often made distinctions between Kenyan flower producers from this community and other communities. The subcategories of participants were redefined and revised until they did not need further modification. Using snowball sampling made it possible to get in touch with people that were hard to access.

The participants were recruited via a combination of emails, phone calls and direct approach. The specific procedure depended largely on the context. Participants in Korea preferred being contacted by email, while participants in Kenya preferred being contacted by phone. Further, while I left any public gathering in Kenya immediately, such gatherings were an integral part of the research environment in Korea. Attending a candlelight protest against the probationary release of Lee Jae-yong, the *de facto* heir to the Samsung empire, provided me with a unique chance to get access to participants. At the time of the research in Kenya, the re-election of President Uhuru Kenyatta had not been fully recognised by his opponent Raila Odinga. The country was divided in confrontational 'for' and 'against' groups. Previous post-election protests, in 2007 and 2011, had been violent.

An interview setting can capture the subjective views and non-verbal behaviour of participants and, through them, a true picture of the social fabric and local contexts in which legal practices are embedded. The semi-structured nature of the conducted interviews allowed participants to clarify responses or pursue ideas whenever they felt the need to. As a result, I was less likely to be blindsided by unchecked assumptions and beliefs. For example, this thesis focuses on civil judicial remedies, but participants often referred to other state-based justice

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[5] American Bar Association, 'Access to Justice Assessment Tool' (2012) <www.americanbar.org/content/dam/aba/directories/roli/misc/aba_roli_access_to_justice_assessment_manual_2012.authcheckdam.pdf> accessed 30 September 2019 pp 34 and 51.
[6] Cf UN General Assembly, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (2017) UN Doc A/72/162 para 22.
[7] Cf Cheryl Hyde, 'Multicultural Organization Development in Nonprofit Human Service Agencies: Views from the Field' (2003) 11(1) Journal of Community Practice p 45 referring to Michael Miles and Matthew Huberman, *Qualitative Data Analysis* (Sage 1994).

mechanisms. Their elaborations provided valuable insights into the reasons why and when claimants and their representatives opt to go to court.

A template of the interview questions and an overview of the demographics of the participants are given below:

> Are there any similarities or differences between corporations in how they treat their workers and other people depending on the community to which the owner belongs (Kenya) / the nationality of the owner (Korea)?
>
> > *follow up* Which factors could explain differences in perception?
>
> Do you think that there are sufficient laws to protect human rights in Kenya / Korea? Why (not)?
>
> What are the state-based grievance mechanisms available to those seeking remedy for business-related human rights abuses?
>
> Are informal grievance mechanisms being used?
>
> > *follow up* Are they effective? Why (not)?
>
> Which representatives bring cases before court, the ministry (or any other state-based mechanism)? Why (not)?
>
> Do NGOs bring cases before court, the ministry (or any other state-based mechanism)? Why (not)?
>
> Do trade unions bring cases before court, the ministry (or any other state-based mechanism)? Why (not)?
>
> Can you describe the relationship between NGOs and trade unions?
>
> Are there any disadvantages or advantages to bringing complaints before court (compared to other grievance mechanisms)?
>
> Are dispute settlers aware of the UN Guiding Principles on Business and Human Rights or other multilateral frameworks relevant to business and human rights issues?
>
> Are remedies for claims against floriculture / electronics corporations with Kenyan / Korean owners and against other floriculture / electronics corporations active in Kenya / Korea available to the same extent? Why (not)?
>
> Can you describe the awareness of the existence of grievance mechanisms amongst citizens?

Which factors affect chances of bringing cases in a state-based grievance mechanism? (*open-ended question barriers to remediation*)

Can you describe cases brought in court? (*closed-ended question barriers to remediation; repeat this question for other grievance mechanisms mentioned by the research participant*)

- What must be demonstrated in order to convince the dispute settler that the actions of the servants of the corporation may be attributed to the corporation to establish the guilt of the business?

- What are the monetary costs? Who pays? What is the availability of lawyers' services that are free of charge?

- Which evidence can be accessed? Which evidence can be used?

- Are there any time limitations to bringing a claim?

- How long do proceedings take?

- Are the interests of claimants and representatives aligned?

- Are there any barriers that women experience?

- Are there any barriers that (other) marginalised groups experience?

Are there any risks for claimants when they brought business-related human rights claims?

Are there any checks and balances on discretion or decision-making?

What mechanisms established by law, if any, exist to provide for decisions to be enforced? Are there any obstacles that prevent decisions from being enforced?

Are there any activities that state actors undertake to enhance awareness about access to justice among citizens when business-related human rights violations occur?

Are state actors taking any steps to ensure that when business-related human rights abuses occur within their territory and/or jurisdiction, those affected have access to effective remedies?

Are state actors giving the country's national human rights institution sufficient powers and sufficient funding to contribute to the area of business and human rights?

Are state actors taking steps to ensure and promote business respect for human rights when acting as members of multilateral institutions that deal with business-related issues? If so, what steps are being taken?

When parent and subsidiary entities of corporations are involved in a multinational setting, does the grievance mechanism assert jurisdiction over parents or subsidiaries located out of country (eg Ethiopia/Vietnam)? If so, how?

Is it useful to bring human rights violations in the Korean electronics / Kenyan floriculture industry before court in:

- the home country of an European corporation that operates in Korea / Kenya and is involved in human rights violations?

- China / India, if a Chinese / an Indian corporation that operates in Korea / Kenya and is involved in human rights violations?

- the country to which a corporation that operates in Korea / Kenya exports?

- the country to which a Korean / Kenyan corporation exports?

> *alternative formulation* What do you think about bringing claims regarding human rights violations in the floriculture sector in Kenya / electronics sector in Korea in any other country (country that serves as an export market, home country of a foreign corporation)?

Was equal attention given to Korean and non-Korean corporations / corporations that are owned by Kenyans and non-Kenyans in the drafting process of the NAP? Are the challenges that women experience addressed in the drafting process?

Is Kenya / Korea involved in a regional dialogue on business and human rights?

Do the lower compliance costs in neighbouring countries have an impact on:

- development of business and human rights initiatives in Kenya / Korea?

- access to remedy in Kenya / Korea?

Can EU Member States support capacity building? If so, how?

Are EU Member States taking any steps to offer any cooperation in the development of legal mechanisms?

Do EU Member States do anything to strengthen access to remedies for claimants in the framework of international cooperation? If so, what?

Could EU Member States do anything else to contribute to strengthening access to remedies for claimants in the framework of international cooperation?

Are you aware of the trade relations between the EU and Kenya / Korea?

> *follow up* Did the relations between Kenya / Korea with the EU change after the EAC-EU FTA was signed by Kenya / the EU-Korea FTA?

Are you aware of the EU's Aviation Directive's impact in Kenya? / Are you aware of the EU's Data Regulation Framework's impact in Korea?

> *follow up* Do you think that a similar initiative to advance the protection and remediation of corporate human rights violations in the electronics industry / floriculture industry can work?

1.2 Challenges

Using a research method that works well in the Anglo-American context in other contexts raises serious questions.[8] I had some reservations about applying the interview method as part of a British doctoral degree in Kenya, a state where British colonial administrators had conducted social science research to identify and manage institutions and customary laws.[9] Some Kenyan participants referred to this by expressing their enthusiasm when they noticed that I do not speak English with a British accent.

While all Kenyan participants were familiar with the interview method, various participants in Korea indicated that they were not. Qualitative methods have for a long time not been fully recognised by the Korean research community.[10] Some older participants questioned, for example, why multiple interviews would provide richer insights than one single interview. Some younger participants referred me to older colleagues who did not have specialist knowledge but were placed higher in organisational hierarchies. It is, of course, possible that such reactions were just indirect ways to decline an interview request. However, this would not explain participants' willingness to continue our conversation and their astonishment when I elaborated further upon the methodology and goals of the field research. Rather, these initial reactions seem to be attributable to Confucian values that are difficult to reconcile with the individualistic interview method. At the risk of essentialising Confucianism, it can be noted that these values emphasise collectivism, loyalties and hierarchical social relations.[11] The question should therefore be raised as to whether it was at all appropriate to ask potential participants to consent to participating in a research project of which they could not fully assess the risks because they were not familiar with the method and research concepts used.[12] I will further reflect upon this issue in section 2, which addresses respect for participants.

The experiences described sharpened my critical awareness of my own social identity. I am a white woman who had until recently been trained exclusively in the European tradition. My status as a privileged person inevitably influenced my access to participants, their willingness to share their experiences and my safety. I cannot elaborately reflect upon this position because I cannot place myself in the shoes of those who are less privileged.[13] It would also be impossible to tease out all the specific effects of my gender, ethnicity, age and social standing in my experiences in the field. I can, however, give the following anecdotal evidence. When I noted that almost all potential participants who were contacted in Kenya agreed to be interviewed, a Kenyan contact of my age replied with the rhetorical question: 'Would it have been equally easy for me?'

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[8] Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books 2013) text above note 21.
[9] Ryan Sheely, 'Regimes and Randomization: Authoritarianism and Field Research in Contemporary Kenya' (2016) 97(4) Social Science Quarterly p 940.
[10] Young Chun Kim and Jeasik Cho, 'Now and forever: Portraits of qualitative research in Korea' (2005) 18(3) International Journal of Qualitative Studies in Education p 367.
[11] Jae Park, 'Metamorphosis of Confucian Heritage Culture and the Possibility of an Asian Education Research Methodology' (2011) 47(3) Comparative Education p 2.
[12] Kim and Cho (n 10) pp 370–371.
[13] Wanda Pillow, 'Confession, Catharsis, or Cure? Rethinking the Uses of Reflexivity as Methodological Power in Qualitative Research' (2003) 16(2) International Journal of Qualitative Studies in Education p 185.

It is appropriate to reflect here upon my outsider status. The geographical and cultural distance and the feeling of being lost in translation in both research contexts were constant reminders of my outsider status. Research conducted by an outsider is neither superior nor inferior to research conducted by an insider.[14] Participants might have been more open because they might value my lack of direct involvement.[15] I have, however, also experienced that some participants were guarded about disclosing their views at the beginning of the interview in both research contexts.

Soon after starting my field research, I realised that my identity was not exclusively defined by this outsider component. It also had a small but important insider component in both contexts. Various people whom I met in Kenya and in Korea – including various research participants – belong to my generation, which is the global millennial generation (born between 1979 and 1994) as typically depicted in popular literature and empirical research studies. This insider component of my identity was largely influenced by the following two factors in the research design. First, the case studies were carried out in states that heavily invest in technology and international trade with Europe. Second, the categories of participants who were ultimately chosen often live and work in urbanised areas that are vibrant hubs of activity where well-educated millennials play a central role in the workforce.

Well-educated individuals belonging to the millennial generation have shared momentous events, such as economic changes and technological innovations, on a global scale during their formative years.[16] They have been able to build networks with contemporaries on a global scale under the influence of increased mobility and digitalization. As a result, they share various aspirations and attitudes.[17] Various Kenyan millennial contacts had, like me, had the chance to pursue a degree in the UK, and some Korean millennial contacts had lived in Germany, a country where I had also been a visiting researcher. My millennial contacts had fused their social lives into digital technology and were using this technology for their personal and professional development and growth. We used the same Internet slang and digital tools were easy conversation starters. For example, a Kenyan millennial contact advised me to replace my taxi service app with a new one, which had a feature to call for help in emergency situations; a Korean millennial contact advised me to replace the navigation app upon which I usually rely with an alternative app that works better in Korea.

There were, of course, elements specific to the local context that differentiated us. They highlighted my outsider status. For example, my Kenyan millennial contacts who were similar in age, generally had much more influence in their professional

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[14] Alexander Weinreb, 'The Limitations of Stranger–Interviews in Rural Kenya' (2006) 71 American Sociological Review p 1015.
[15] Cf Georg Simmel, 'The Stranger' in Kurt Wolff (ed), *The Sociology of Georg Simmel* (Free Press 1950) p 404.
[16] Ruth Tubey, Alice Kurgat and Kipkemboi Jacob Rotich, 'Employment Expectations among Generation Y Employees in Kenya' (2015) III(1) International Journal of Economics, Commerce and Management p 2; Sunyoung Park and Sohee Park, 'Exploring the Generation Gap in the Workplace in South Korea' (2017) 21(3) Human Resource Development International p 4.
[17] Cf Park and Park (n 16) p 4; John Kamau, Mary Njau and Jacinta Wanyagi, 'Factors Influencing Work Attitude Amongst 'Y' Generation University Evening Students in Kenya' (2014) 16(5) IOSR Journal of Business and Management p 34.

roles than I do, while my Korean contacts were used to functioning in organisations that are much stricter than those in which I have worked. They were also used to managing age hierarchy, which is engrained in Korean culture. Yet, these differences did not create insurmountable barriers to interaction. My millennial contacts were open and eager to communicate about differences. Open-mindedness is a character strength that allows millennials to embrace diversity and differing viewpoints.[18] In doing so, they are more comfortable expressing their opinions than older generations.[19]

1.3 Data analysis

It is required to discuss the internal validity or credibility (assessment of the causal relationship between theory and evidence), external validity (assessment as to whether the case study's findings can be subject to generalisation), and reliability or dependability (assessment as to whether the applied procedures provide stable and consistent results) of the research design.[20]

To begin with, three data analysis tactics helped to increase the internal validity of the research findings. First, it has been noted in section 1.1 that the unstructured nature of the interviews allowed new themes and directions to unfold inductively. It is useful to note here that Lisa Webley has stated that immersion in the field might more easily result in confirmation bias by case study researchers.[21] However, Bent Flyvbjerg has argued that case study research would not be any more prone to confirmation bias than any other qualitative research method.[22] He explains that the field itself is a powerful and unavoidable disciplinary force in case study research. Listening to participants in a context that is not part of the researcher's normal context can sharpen critical awareness. Second, the explanation-building process benefited from a series of iterations.[23] Data collection and data analysis were placed in a dialectical relationship. Data were colour-coded to identify emerging themes and the ways in which people talk about them.[24] More data were added through recruiting new participants to define, revise and extend theme categories.[25] Theme categories were considered to be saturated when data could adequately account for the possible explanations of the identified theme.[26] The saturation point was reached after interviewing fifteen participants in Kenya, and after interviewing ten participants in Korea. The

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[18] Florina Pînzaru and others, 'Millennials at Work: Investigating the Specificity of Generation Y versus Other Generations' (2016) 4(2) Management Dynamics in the Knowledge Economy p 189.
[19] Park and Park (n 16) p 4.
[20] Frans Leeuw and Hans Schmeets, *Empirical Legal Research* (Edward Elgar 2016) pp 120–122 and 153.
[21] Webley (n 4) p 6.
[22] Bent Flyvbjerg, 'Five Misunderstandings about Case–Study Research' (2006) 12(2) Qualitative Inquiry p 19.
[23] Cf Robert Yin, *Case Study Research and Applications. Design and Methods* (Sage 2018) p 180.
[24] Cf Hyde (n 7) p 48.
[25] It needs to be indicated here that I had conducted a literature review concerning the electronics and automobile industries in Korea to prepare the field research. Ultimately, I decided to focus the theoretical framework and the data collection process exclusively on the electronics industry in order to increase the depth of the study. But, participants sometimes decided to use examples of the Korean automobile industry to clarify their answers in theme categories.
[26] Glenn Bowen, 'Naturalistic Inquiry and the Saturation concept: A Research Note' (2008) 8 Qualitative Research p 140.

interviews lasted on average 60 minutes. Third, the interview data were triangulated by comparing them with data drawn from other sources. Established data analysis techniques, such as explanation building, pattern matching and cross-case analysis, were used. The employed techniques allowed getting a thoroughly nuanced picture of the extent to which the hypothesis for each unit of analysis could be sustained, refined or rejected.[27]

Regardless of whether generalisations are derived from the desk research or uncovered at the conclusion of the case study research, they need to be supported by sufficient data and fair argumentative claims to guarantee external validity.[28] Two measures were taken to increase the external validity. First, multiple case studies were carried out. Second, extensive efforts were made to make a connection with research participants that were difficult to reach, in order to collect additional data. Third, the study design was augmented with 'how' and 'why' questions.

Finally, accounting for the reliability of the conducted research requires demonstrating that the research approach was consistent and well documented. 'Reliability' is to some extent a consequence of the validity of a case study.[29] Two specific efforts have been made to increase the reliability. First, the research protocol is discussed in detail in this Annex; a bibliography is included in this thesis; and the files with interview data and observations (which contain sensitive information) are stored privately.[30] Second, rather than glossing over my role in the field, it is necessary to draw attention to the ways in which my background, agenda and emotions have influenced my work.[31] Sections 2 and 3 of this Annex explain how I tried to make the field research as respectful and responsible as possible.

2 Respect

Respectful research requires adherence to the law and making sure that participants are treated as humanely as possible.[32] Researchers should also comply with the legal and ethical requirements existing in the countries where the research is conducted.[33] The International Compilation of Human Research Standards of the US government's Office for Human Research Protections provides an up-to-date overview of relevant laws and clearance proceedings.[34] Permission was sought and received from the Kenyan National Commission for Science, Technology and Innovation. In addition, interactions in the field can,

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[27] Webley (n 4) pp 16–17.
[28] Yin (n 23) pp 38–40.
[29] Michael Patton, *Qualitative Evaluation and Research Methods* (Sage 2002) p 14.
[30] Yin (n 23) pp 126–136.
[31] Ping-Chun Hsiung, 'Teaching Reflexivity in Qualitative Interviewing' 36(July) Teaching Sociology (2008) p 212.
[32] UK (Government's Science & Society Team Department for Innovation, Universities & Skills) (n 1) p 2.
[33] UK (Research Integrity Office), 'Research involving Human Participants, Human Material or Personal Data' (2009) <ukrio.org/publications/code-of-practice-for-research/3-0-standards-for-organisations-and-researchers/3-7-research-involving-human-participants-human-material-or-personal-data/> accessed 12 November 2017 para 3.7.2.
[34] US (Government's Office for Human Research Protections), 'The International Compilation of Human Research Standards' (2018) <www.hhs.gov/ohrp/sites/default/files/2018-International-Compilation-of-Human-Research-Standards.pdf> accessed 7 March 2018.

inevitably, provoke harm. Anticipated adverse impacts of my interviews included risk to participants' social standing, risk to their position within occupational settings, intrusion, distress, inconvenience, time lost and boredom.

Ethical guidelines assist researchers in anticipating and minimising potential harm. They originate from the Nuremberg Code, which provided a written response to the Nazi experiments, which severely harmed human research subjects.[35] These guidelines helped me to consider multiple ways to handle issues such as informed consent, data protection and confidentiality prior to entering the field. During the preparations and course of my field research, I was continuously reminded that the distinction between ethical and unethical behaviour is not dichotomous and that researchers need to use their discretion in how to interpret and assimilate such guidelines.[36] The complexity of an issue can give rise to multiple questions about proper behaviour that need to be assessed in context. It is useful to give two examples. First, while one code of practice recommends that researchers leave their phones switched on in order to protect their own safety, another field guide recommends that researchers switch off their mobile phones to generate trust.[37] I, ultimately, decided to put my phone in airplane mode in Kenya; the research participants were frequently pausing the interview to make and receive phone calls in my presence. I decided, however, to switch my phone off while investigating the powerful Korean electronics industry. Second, various participants and other contacts in both research contexts wanted to help me by introducing me to their networks. I was regularly asked which people I had seen or contacted already. It is important to not pass along any information, however incidental, from one participant to another.[38] One field guide states that 'your refusal to disclose any information about others will reassure [participants] about your commitment to protecting confidentiality'.[39] I assessed, however, that such an overly formal refusal would have alienated or offended the participants. I therefore opted to sidestep such questions in a courteous way.

Dealing with difficulties involved much trial and error. I did not always manage to get this right. In Kenya, I did, for example, not always succeed in making sure that a question regarding corruption in the broader professional category to which the participant belonged was not taken personally during some interviews. I noticed that it was helpful, but not sufficient, to ask neutral questions about sensitive issues at the end of the conversation. I learned that it was helpful to emphasise the sensitive and non-personal character of a question before posing the actual question.

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[35] US (Government), 'Nuremberg Code' (1947) <history.nih.gov/research/downloads/nuremberg.pdf> accessed 7 March 2018.
[36] Cf Alan Kimmel, *Ethics and Values in Applied Social Research* (Sage 1988) p 36; Patricia Bricklin, Being Ethical: More than Obeying the Law and Avoiding Harm (2001) 77(2) Journal of Personality Assessment p 196.
[37] Social Research Association, 'A Code of Practice for the Safety of Social Researchers' (2000) <the–sra.org.uk/wp–content/uploads/safety_code_of_practice.pdf> accessed 7 March 2018 p 5; Natasha Mack and others, 'Qualitative Research Methods: a Data Collector's Field Guide' (2005) Family Health International <www.fhi360.org/sites/default/files/media/documents/Qualitative%20Research%20Methods%20–%20A%20Data%20Collector's%20Field%20Guide.pdf> accessed 30 September 2019 p 34.
[38] Mack (n 37) p 11.
[39] Ibid p 32.

I made efforts to sharpen my cultural awareness by building meaningful relationships with participants and the society to which they belong. This is a well-known strategy. Various researchers have reflected upon their experiences such that they would be able to to engage in 'sustainable relationship building'.[40] Building trusted relations started already prior to going into the field. I had discussed my research project with Kenyans and Koreans living in Europe. They helped me with finding hosts at local universities. In Korea, I had the opportunity to participate in a two-week introductory course on 'Human Rights and Asia'.

As indicated in section 1.1, the preventive measures that I had taken were formalised in applications to my School's Institutional Review Board. Such ethical clearance proceedings are crucial to support researchers in protecting participants from harm.[41] However, the ethical clearance proceedings also created new challenges. In particular, protocolled formalities which were required by this Board exacerbated the challenge that came with using the interview method in Korea (described in section 1.2 above). To begin with, the individualistic nature of many of these formalities is at odds with the collective values that exist in Korea. If not addressed appropriately, this could have created an awkward and undesirable distance between the participants and me. In addition, I struggled with one of the promises made in order to get ethical clearance because this promise limited my individual agency to make context-specific accommodations.[42] During my preparations, I had considered giving participants the chance to comment on my research findings in order to increase the internal validity of the research findings. During my time in Korea, I realised that doing so would also be particularly useful for those participants who were not familiar with the interview method. It would give them the opportunity to comment on and perhaps to withdraw consent if they realised that they could do so.[43] I had, however, agreed to not invite Korean participants to comment on research findings after my School's Institutional Review Board advised removing this option in the Korean case study. The reason was that continued contact with participants would affect confidentiality.

Sunghee Park and Neil Lunt, who were based in the UK, documented similar experiences when reflecting upon their research experience in Korea.[44] Moreover, researchers have often launched calls for more flexible approaches by

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[40] Eg Elizabeth McKay, Susan Ryan and Thelma Sumsion, 'Three Journeys towards Reflexivity' in Linda Finlay and Brendan Gough (eds), *Reflexivity. A Practical Guide for Researchers in Health and Social Sciences* (Blackwell Publishing 2003) p 55; Brendan Browne and Luke Moffett, 'Finding Your Feet in the Field: Critical Reflections of Early Career Researchers on Field Research in Transitional Societies' (2014) 6(2) Journal of Human Rights Practice pp 223–237; Njoki Wamai, 'First Contact with the Field: Experiences of an Early Career Researcher in the Context of National and International Politics in Kenya' (2014) 2(1) Journal of Human Rights Practice pp 216 and 221.

[41] Marilys Guillemin and others, 'Human Research Ethics Committees: Examining their Roles and Practices' (2012) 7(3) Journal of Empirical Research on Human Rights Ethics p 46.

[42] Cf Douglas May and Matthew Luth, 'The Effectiveness of Ethics Education: a Quasi–Experimental Field Study' (2013) 19 Science and Engineering Ethics p 551.

[43] Cf Devika Choudhuri, 'Conducting Culturally Sensitive Qualitative Research' in Madonna Constantine and Derald Sue (eds), *Strategies for Building Multicultural Competence in Mental Health and Educational Settings* (John Wiley & Sons 2005) p 275.

[44] Sunghee Park and Neil Lunt, 'Confucianism and Qualitative Interviewing: Working Seoul to Soul' (2015) 16(2) Forum: Qualitative Social Research p 2.

Institutional Review Boards that allow contextual accommodations abroad.[45] Limited room for context-dependent accommodations can even be counterproductive, because this can lead to poor relations and mistrust between Institutional Review Boards and researchers. A British senior researcher told me that he had experienced that the measures imposed by his School's Board in the UK for conducting field research in Kenya were often unnecessarily paternalistic, limiting the autonomy of the participants. He reflected that this was an incentive for him to provide his School's Board only with the minimum amount of required information.

To consider different courses of action for dealing with the challenges in Korea, I relied upon the insider component of my identity. Repeated interactions with well-educated millennials in the field resulted in trusted relations in which I could openly question cultural and political considerations when issues arose. This was extremely useful because the '2030 generation' has an increased general understanding of the problems caused by the preferential treatment of large corporations (contrary to older Koreans) as described in chapter 7.[46] I learned, for example, from my local contacts that the character strength of humility is valued in Korea. I also learned that it was desirable to mention curricular achievements, situate myself in my School's hierarchy and identify my networks prior to starting any research-related conversations. Being affiliated with a reputable university was valuable information in this context, as higher-level education and school networks are perceived as being of great importance. My local Korean contacts were also willing to openly discuss strict age hierarchy, power distance and loyalties. They reassured me that the cultivation of courteousness in everyday behaviour is concerned with consideration for another's feelings. In addition, they helped me to 'step into my power' and develop the fortitude to convert intentions into actions despite institutional pressures.[47] I became confident in my ability to actively and positively deal with ethical issues that arose.[48] In order to use the interview method and make the formal aspect of conducting field research less awkward, they recommended that I spend extra time in Korea to engage in exploratory talks with a wide range of potential participants. The extra time was used to create an in-between space in which it was possible to communicate openly about Korean values and the requirements of my research methodology and degree. I observed the wording, voice intonations and body language of potential participants to detect whether there were any indications that they did not feel willing or able to familiarise themselves with these requirements. This approach required that many more potential participants needed to be identified and approached than initially foreseen. Those participants who were ultimately not interviewed often provided

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[45] Eg Herbert Kritzer, '"Research is a Messy Business" An Archeology of the Craft of Socio–Legal Research' in Simon Halliday and Patrick Schmidt (eds), *Conducting Law and Society Research: Reflections on Methods and Practices* (Cambridge University Press 2009) pp 280–281; Guillemin (n 41) p38.

[46] Hansoo Choi, 'Samsung, Lee Jae–Yong's Conviction and How Business in South Korea is Changing' (2017) Harvard Business Review; Park Sang–In cited in Bryan Harris, 'Commentary: Moon Jae–in's Tricky Mission to Tame Korea Inc' *Channel News Asia* (Seoul, 17 September 2017) <www.channelnewsasia.com/news/asia/commentary–moon–jae–in–s–tricky–mission–to–tame–korea–inc–9219244> accessed 1 December 2018.

[47] Cf Douglas May, Matthew Luth and CE Schwoerer, 'The Effects of Business Ethics Education on Moral Efficacy, Moral Meaningfulness and Moral Courage: a Quasi Experimental Study' (2009) 1 Academy of Management Best Paper Proceedings p 551.

[48] Cf Ibid p 551.

alternative exchanges of information with which they felt comfortable. I have, amongst other things, received internal working documents and typed-out answers to my questions, which represent the official standpoints of the organisations in which the potential research participant worked. These data were not considered as interview data, but they were useful for triangulation purposes.

3 Responsibility

Responsible research requires that the benefits and burdens of research participation be distributed fairly.[49] Participants should benefit from the research in exchange for the time and information that they provide. Prior to entering the field, I had anticipated that participants would benefit in two ways. The first benefit was privileged access to research results. The second benefit was a photo essay that will be published in a popular newspaper in Europe, which will increase awareness about the issues at hand. The content presented in this essay could also be used by civil society organisations that wish to disseminate research results.

I asked the research participants to assess whether the research participants perceived the anticipated benefits as beneficial. Regarding the first anticipated benefit, I learned that not all participants wanted to directly benefit from the research results through privileged access to the results of my case study. The Kenyan government officials were willing to explain the sources of pressure exerted upon them, as well as the factors that influence whether they are able to resist such pressures. Some of them requested, however, to not give their real name or receive the results of the study, because they feared repercussions. They told me that they saw contributing to this research, which might inform system changes, as advantageous. Furthermore, I know now that the case study results will provide more insights to Kenyan participants than to Korean participants. In Korea, participants across all groups of representatives and experts worked extremely well together to share information and effect change. Participants indicated that the Korean case study would, nevertheless, be valuable to them as a part of this thesis. In Kenya, however, information was more scattered, while problems were less understood. One important reason for this is that two groups of Kenyan representatives – those working in civil society and in trade unions – were not on speaking terms.[50] My outsider status allowed me to gather and integrate data from both groups.

I learned that Korean participants valued the second anticipated benefit more than Kenyan participants. Awareness-raising in Europe was considered as a major benefit in Korea. One Korean NGO representative told me, 'We have no chances here. The government defends corporate interests. We have to get directly in touch with NGOs and consumers in Europe'.[51] This belief might have been

[49] UK (Government's Science & Society Team Department for Innovation, Universities & Skills) (n 1) p 2.
[50] Kenya Human Rights Commission, '"Wilting in Bloom" The Irony of Women Labour Rights in the Cut Flower Sector in Kenya' (2012) <www.khrc.or.ke/publications/63–wilting–in–bloom–the–irony–of–women–s–labour–rights–in–the–cut–flower–sector–in–kenya/file.html> accessed 3 March 2018 p 9; Collins Omondi, 'Report of the Stakeholders Forum on the Development of a National Action Plan on Business and Human Rights' (2015) <nap.knchr.org/Portals/0/Report%20of%20the%20Stakeholders%20Forum%20on%20the%20Development%20of%20a%20NAP%20on%20BHR.pdf> accessed 5 December 2017 p 10.
[51] Interview data – participant (anonymised).

strengthened by the fact that some major global consumer brands were included in the Korean case study. Most participants understood that European consumers are not aware of human rights concerns that occur in the supply chains of these brands. To the contrary, I learned that this anticipated benefit was not considered significant in Kenya. The researched industry had already been covered in some popular newspaper articles in the past. Kenyans told me that this had not resulted in significant changes on the ground. One interview participants indicated that 'Only Kenyans can solve Kenyan problems'.[52]

Finally, I tried to be as open as possible by asking participants if I could be of help to them in any way. Various participants had a clear idea about this. While some had specific questions about business and human rights regulation in Europe, others were looking for benefits that were not directly connected with my presence in the field. For example, some Kenyan participants asked for practical advice to advance their professional careers. One Korean participant asked me to do some small research tasks using British legal databases that he could not access.

4 Conclusions

This Annex described the data collection and data analysis processes that were applied, and reflections on conducting respectful and responsible case study research in the Kenyan floriculture industry and Korean electronics industry. Finding good rapport with well-connected and open-minded contemporaries of the millennial generation was used as the starting point to foster a meaningful relationship with research participants and with the society to which they belong. This has been particularly beneficial to deal with two Anglo-American elements of my research methodology – the interview method and requirements imposed by my School's Institutional Review Board – which were not easily understood in the Confucian-infused Korean context. This Annex might help other junior socio-legal researchers to better prepare case study research. It provides real insights that cannot be found in field guides, codes of conducts and other guidelines.[53] I am looking forward to reflective accounts from other researchers. Like my account, such accounts can encourage educational institutions to support field researchers in a way that is sensitive to the various contexts in which research is carried out.

[52] Interview data – participant KE–F.

[53] Cf Paul Gready, 'Early Career Researchers and Fieldwork' (2014) 6(2) Journal of Human Rights Practice p 198.

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