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# Economic Analysis of Law Review

## The Legality of Trade Sanctions based on Human Rights Violations: An analysis through Law and Economics

*A Legalidade de Sanções Comerciais baseadas em Violações de Direitos Humanos: uma análise pelo Direito e Economia*

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### RESUMO

Podem os Estados adotar medidas retaliatórias unilaterais ou coletivas em caso de violações extraterritoriais de direitos humanos? O debate é muitas vezes obscurecido por um conjunto de argumentos jurídicos, políticos, econômicos e morais que produzem mal-entendidos. Enquanto se explora essa questão, este trabalho se desenvolve em três partes. Primeiro, usando-se a análise jurídica tradicional, demonstra-se que os Estados não adotaram qualquer doutrina robusta que os permitam aplicar medidas restritivas ao comércio em resposta a violações de direitos humanos ocorridas fora de seu território. Segundo, usa-se a metodologia de alocação de jurisdição regulatória - e seus respectivos custos (de soberania e de cognição) - para explicar porque estas doutrinas chegam ao mesmo ponto. Terceiro, defende-se que, em função dos custos apontados, a defesa dos direitos humanos em conexão com o comércio internacional ganha força em outras vias, como códigos voluntários de conduta, certificação social e rotulagem.

**Palavras-chave:** Comércio Internacional; OMC; Direitos Humanos; Direito e Economia; Sanções.  
**JEL:** K33.

### ABSTRACT

Are states entitled to take unilateral or collective trade measures in cases of extraterritorial human rights violations? The debate is often blurred by a multitude of legal, political, economic, and moral arguments that have produced misunderstandings. While exploring the above issue, this paper unfolds in three parts. First, using traditional legal analysis, I demonstrate that states have not embraced any robust doctrine permitting states to apply restrictive trade measures as countermeasures against human rights violations abroad. Second, I use the framework of allocation of regulatory jurisdiction (ARJ) and its respective costs (sovereignty and cognitive) to explain why the rules across those doctrinal branches reach the same end point. Third, I argue that, because of those costs, human rights advocacy in connection with international trade gains traction in other ways, such as voluntary codes of conduct, social certification, and labeling.

**Keywords:** International Trade; WTO; Human Rights; Law and Economics; Sanctions.  
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## 1. Introduction

Since the late 1990s, a debate involving international trade and its impact on human rights has taken place in many institutions, such as the United Nations (UN), the World Trade Organization (WTO), non-governmental organizations (NGOs), and academia.<sup>2</sup> The debate is thorny and some argue that there should not even be a debate. An open trading system like the one advanced by the WTO produces higher rates of economic growth. This growth generates money to “fund” human rights that need resources to be implemented. This logical inference can be reasonably accepted if one assumes that human rights implementation depends, of course, on money and also that the trade regime, itself, is free of and does not contribute to human rights violations.

Literature also points to collisions. Examples of this tension are found everywhere, as exploitation of labor conditions overseas by multinational corporations and trade of conflict diamonds are often cited. It seems that this tension occurs most of the time with an extraterritorial factor; that is to say, the importing states and the state where the violation of human rights is taking place are not identical.

While exploring the above issue, this paper unfolds in three parts. First, using traditional legal analysis, I demonstrate that states have not embraced any robust doctrine permitting states to apply restrictive trade measures as countermeasures against human rights violations abroad.

Second, I use the framework of allocation of regulatory jurisdiction (ARJ) and its respective costs to explain *why* the rules across those doctrinal branches reach the same end point. This framework is based on law and economics literature on property rights, which is transposed to problems of international law. Two suggested categories of costs involved in ARJ are sovereignty (the currency of the transaction) and cognitive costs (transaction cost).

Third, I argue that human rights advocacy in connection with international trade is actually gaining traction in other ways. It involves initiatives such as voluntary codes of conduct, social certification, and labeling. These initiatives target the behavior of companies and, at the same time, use international conventions as their normative basis, avoiding the above highlighted costs.

## 2. The Traditional Legal Analysis

In this section, I scrutinize some of the often cited sources to justify the concerned measures.<sup>3</sup> They are found in general (customary international law – CIL-, *jus cogens*, UN-SC

<sup>2</sup> Lang summarizes key moments of that debate as it has unfolded to date. Although he recognizes that the “social history of the trade and human rights debate is yet to be written.” See A. T. F. Lang, ‘Re-thinking Trade and Human Rights’ (15.2 Tulane J Int’l and Comparative L, 2007), p. 336. Lang recalls that the United Nations (UN) initiated a work programme and a series of reports were produced by UN human rights institutions that addressed the impact of the international trade system on the enjoyment of human rights. NGOs also entered the debate. Academia followed suit; numerous conferences and seminars were organized by, among others, the European Journal of International Law and the American Society of International Law. *ibid* 337-40. WTO officers participated as panelists or contributed with papers to some of those events. It should be noted that both institutions and some of their respective officers have produced reports or analysis about the linkages, though not in an institutionalized framework. See, particularly, the many articles from E. Ulrich-Petersmann and Gabrielle Marceau between 1999 and 2002.

<sup>3</sup> Just to avoid the long phrase “restrictive trade measures based on extraterritorial human rights violations” I use “concerned measures” or “examined measures” along the paper.

powers), trade (GATT-WTO exceptions), and human rights law. Each of them is examined separately.

## 2.1. General International Law

Bartels acknowledges that the lawfulness of the examined type of trade measures is grounded in CIL.<sup>4</sup> Specifically, since all states have a legitimate interest in promoting human rights, Bartels posits that extraterritorial entitlements are justified.<sup>5</sup> Along his arguments, allusions to the exercise of this regulatory jurisdiction are made to confirm state practice.

But does CIL really provide a clear entitlement on this matter? The discussion begins with the paradigmatic case of *Lotus*.<sup>6</sup> The issue that came out was whether Turkey's exercise of criminal jurisdiction was in violation of any norm or principle of international law.<sup>7</sup> The Court eventually decided for Turkey, reasoning that the *Lotus* produced "effect" on the Turkish vessel, which is deemed to be Turkish territory because of its flag. Thus, Turkey could exercise its criminal jurisdiction.<sup>8</sup>

<sup>4</sup> L. Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction', (36 Journal of World Trade, 2002), p. 365-86.

<sup>5</sup> *Id.* at 353, 371 n.82, 374 (recognizing, however, that such understanding is not a prevailing one).

<sup>6</sup> *France v Turkey* [1927] PCIJ (ser. A) No. 10 [hereinafter *Lotus*]. In short, the facts of the *Lotus* concern the collision occurred in 1926 between the S.S. *Lotus*, a French vessel, and the S.S. *Boz-Kourt*, a Turkish vessel. The *Boz-Kourt* was cut in two and, as a result, eight Turkish nationals who were on board perished. Some days after landing in (the former) Constantinople, the captains of the French (Lieutenant Demons) and the Turkish (Mr. Hassan Bey) vessels were arrested. Joint criminal charges were instituted against them and the case is much about the French reaction against the imprisonment of its national, Lieutenant Demons. After diplomatic efforts from France, both parties agreed to submit the case to the Permanent Court of International Justice (PCIJ).

<sup>7</sup> In the words of the PCIJ, "[t]he Court is asked to state whether or not the principles of international law prevent Turkey from instituting criminal proceedings against Lieutenant Demons under Turkish law." *ibid* 15.

<sup>8</sup> The relevant part of this case, for my purposes, concerns the PCIJ assertion that "the first and foremost restriction imposed by international law upon a State is that - *failing the existence of a permissive rule to the contrary* - it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; except by virtue of a permissive rule derived from international custom or from a convention. It does *not*, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law[...] Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, *it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules*; as regards other cases, *every State remains free to adopt the principles which it regards as best and most suitable* (emphasis added). *ibid* 18-19. It seems, in addition, that the case can be interpreted in two manners. First, *Lotus* would have confirmed discretion in the exercise of extraterritorial regulatory jurisdiction by states that can be limited by prohibitive rules. Oppenheim infers that international law establishes permissible limits unless because of prohibitive rules. R. Jennings and A. Watts (eds), *I 'Oppenheim's International Law'*, (1999), para 136. Or, on the contrary, *Lotus* would have confirmed limits on the exercise of regulatory jurisdiction by States that can be expanded by permissive rules. Mann argues that leaving up to states to delimitate their jurisdiction, instead of international law, would be an unfortunate and retrograde theory. F. A. Mann, 'The Doctrine of Jurisdiction in International Law' (1964 I), 82 *Recueil Des Cours*, p. 35. Pauwelyn, similarly, contends that it is difficult to accept the principle of "what is not prohibited is allowed" as the default rule of general international law. J. Pauwelyn, 'Conflict Of Norms In Public International Law: How WTO Law Relates to Other Rules of International Law' (Cambridge, University Press, 2003, p. 154-61).

But as Mann adverts, the *Lotus* decision has been overruled, the passage itself has been pointed out as having the status of *obiter dictum*,<sup>9</sup> and there is no certainty that it was contemplating the doctrine of jurisdiction in general or only the criminal law aspect of the specific case.<sup>10</sup>

Another frequent source to support the concerned measures is *jus cogens*, obligations *erga omnes*, or peremptory norms.<sup>11</sup> The concept was acknowledged as *obiter dictum* of the ICJ in the *Barcelona Traction* case.<sup>12</sup> The case, which concerned mainly a question of diplomatic protection,<sup>13</sup> dealt with one of the most commented, quoted, and debated passages in public international law.<sup>14</sup>

<sup>9</sup> *Obiter dictum* (or “in dicta”) is a Latin expression used in common law systems and means “a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).” See Black’s Law Dictionary (2004, p. 1102).

<sup>10</sup> The decision has been overruled by the Brussels Convention of May 10, 1952 (International Convention Relating to the Arrest of Sea-Going Ships) and the Convention on the High Seas of April 29, 1958. F.A. Mann, ‘The Doctrine of Jurisdiction in International Law’, (1964 I), 82 *Recueil Des Cours*, p. 34-35. See also ICJ [1996] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1. C.J. Reports 1996, p. 238-239.

<sup>11</sup> I use these three terms interchangeably, though some authors do not. See M. Byers, ‘Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules’ (66 *Nordic J Int’l L*, 1997), p. 211 (explaining that, in contrast to *jus cogens* rules, *erga omnes* rules may arise either as customary rules or through treaties; a *jus cogens* or *erga omnes* rule could apply to only a limited number of States; although *jus cogens* rules are necessarily *erga omnes* rules, *erga omnes* rules could exist which were not of a *jus cogens* character). See also Pauwelyn (n 7) 61 (acknowledging Crawford’s view that *erga omnes* obligations are virtually coextensive with peremptory obligations, which in turn arises under norms of *jus cogens*). In the mid-1960s, as George Abi-Saab advances, certain norms of the then current international law appear to possess *jus cogens* character, with opinions diverging on its content, source, and means of determination, and application of these norms. Abi-Saab appears in Andreas Paulus, ‘Jus Cogens in a Time of Hegemony and Fragmentation - An Attempt at a Re-appraisal’ (74 *Nordic J Int’l L*, 2005), p. 301. Shortly after, *jus cogens* was enshrined in the Vienna Convention on the Law of Treaties (VCLT), as a limitation on the content of treaties. See Article 53 and 64 of Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

<sup>12</sup> *Belgium v Spain* [1970] *Barcelona Traction, Light and Power Company, Limited, Second Phase*, Judgment ICJ. Reports 1970 [hereinafter *Barcelona Traction*], 33-4.

<sup>13</sup> O. De Schutter, ‘Globalization and Jurisdiction: Lessons from the European Convention on Human Rights’ (2005) n.20 (Cellule de Recherche Interdisciplinaire en Droits de l’Homme, Working Paper N. 4)), 31-32 (summarizing the case: the claim arose out of the adjudication in bankruptcy by a Spanish Court of the Barcelona Traction, a company incorporated in Canada, but owned mostly by Belgians. Belgium had initially instituted proceedings before the ICJ in 1958, by which it sought reparation for the damaged suffered by Barcelona Traction as a result of acts allegedly committed by organs of Spain in violation of international law. Three years later, Belgium announced the discontinuance of the proceedings in order for the parties to settle the dispute out of the ICJ. The ICJ removed the case from its list in 1961. After settlement failures, the case was then reinstated by Belgium (the “second phase” judgment) with modifications. Belgium sought reparations for damages suffered by Belgian nationals who were allegedly the owners of a substantial number of shares of the company. Spain filed four preliminary objections. By a judgment delivered in 1970, at the end of the second phase, the ICJ upheld one of the preliminary objections of Spain, namely that Belgium did not have legal standing to bring the action, without pronouncing on any other aspect of the case).

<sup>14</sup> “[I]n particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. *Barcelona Traction* (n 11) note 62, 33 (emphasis added). “Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have

As Ragazzi elaborates, the *dictum* in *Barcelona Traction* identified two characteristics of these obligations: (1) “universality,” in the sense that these obligations are binding on all states without exceptions, and (2) “solidarity,” in the sense that every state is deemed to have a legal interest in their protection.<sup>15</sup>

In the case of a violation of a *jus cogens* norm, does the legal interest of every state in the protection of *jus cogens* norms translates into states’ right (or obligations) specifically adopt the concerned trade measures? And as to those questions, as Simma recognizes, “viewed realistically, the world of obligations *erga omnes* is still in the world of “ought” rather than of “is.”<sup>16</sup> Brownlie’s equally well-known comments in 1988 assessed that the regime of obligations and corollaries of *erga omnes* as “very mysterious indeed”<sup>17</sup> and, fifteen years later, re-assessed it as a concept “being explored.”<sup>18</sup> Generally speaking, it is not clear which types of rights and obligations states have to prescribe, because *jus cogens* norms are being violated abroad.<sup>19</sup>

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entered into the body of general international law [...] others are conferred by international instruments of a universal or quasi-universal character”. *ibid* 34 (emphasis added).

<sup>15</sup> M. Ragazzi, ‘The Concept of International Obligations *Erga Omnes*’, (1997, p. 17). The point of my interest is about the consequences following from the second characteristic (solidarity). Though universality may also raise theoretical problems, since it appears difficult to reconcile this element with the structure of a horizontal international society where law making is consensual.

<sup>16</sup> B. Simma, ‘Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations *Erga Omnes*?’ in Delbrück (ed), ‘The Future of International Law Enforcement’ (1993), p. 125.

<sup>17</sup> I. Brownlie, ‘To What Extent Are the Traditional Categories of *Lex Lata* and *Lex Ferenda* Still Viable?’ in Weiler and Cassese (Eds.), ‘Change and Stability in International Law Making’ (1988), p. 66.

<sup>18</sup> I. Brownlie, ‘Public International Law’ (2003, p. 490). See also, Andreas Paulus concluding that “the sweeping effects of *jus cogens* are still not matched by the clarity of its contents. Its impact on concrete cases has remained limited. Its main function appears to provide superior values to an inter-State system, to demonstrate that States are not entitled to abuse their law-making power to justify the violation of the most basic international norms, and to re-orient international law from purely State towards community interests. But without a procedure for ascertaining its content and applying it to concrete cases, *jus cogens* will continue to be more of a mission statement than a practicable legal instrument.” Paulus, *supra* note 10, p. 330.

<sup>19</sup> Has the ILC Draft Article on State Responsibility for Internationally Wrongful Acts (DASR), provided anything differently when *erga omnes* violations occur? See Draft Articles on States Responsibilities of States for Internationally Wrongful Acts, Adopted by the International Law Commission at its 53<sup>rd</sup> Session (2001) [hereinafter DASR]. As an outcome of the ILC work, the DASR reflects the “codification” or the progressive development of international law. Under the DASR, a state “A” is entitled, as an “injured state,” to invoke the responsibility of another state in two situations (DASR art. 49-54). The first one is when the obligation breached is owed to state “A” individually DASR (art. 42(a)). The second situation is when the obligation breached is owed to a group of states, including state “A,” or the international community as a whole (DASR art. 42, *caput*, (b)). In this last case, the breach of the obligation must either specially affect state “A” or “*is of such a character* as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation (DASR art. 42(b)(i)-(ii)). The DASR deals specifically with serious breaches of obligations under peremptory norms of general international law and has a full chapter on countermeasures. As such, these provisions are a perfect match for the measures of this paper: restrictive trade measures (countermeasures) based on extraterritorial human rights violations (serious breach of an obligation under peremptory norms of international law). The question, similarly to what I asked in the previous sections, would be: does the DASR entitle states to unilaterally adopt extraterritorial measures of any sort? Probably it is not. As Tams thoroughly analyzes, the DASR deliberately leaves open the question of countermeasures, or self-help, in response to *erga omnes* violations. See C. Tams, ‘Enforcing Obligations *Erga Omnes* in International Law’ (2005, p. 241). In my opinion, the DASR is, at best, another example in which extraterritorial legal powers is not clearly established.

## 2.2. Security Council Resolutions under Chapter VII

Pursuant to article 39 of the UN Charter, the UN-SC has the power to order enforcement action against a state whose conduct represents a threat to peace, breach of the peace, or act of aggression. Article 39 is read together with articles 41 and 42, which respectively refer to economic measures and military action.

Article 41 is of interest here since it clearly establishes that “the UN-SC may decide what measures not involving the use of armed force are to be employed to give effect to its decisions [...] such measures [...] *may include complete or partial interruption of economic relations* and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”<sup>20</sup> Thus, the UN-SC can resort to mandatory sanctions as an enforcement tool to restore peace.<sup>21</sup> The understanding today is that the UN members will have not only the right, but the duty to exercise regulatory jurisdiction in pursuance of the mandatory economic embargo.<sup>22</sup>

History has plenty of examples, and the regime of sanctions towards the Apartheid system in South Africa is a much commented one. Another important case, bearing close relation with the WTO regime and human rights, is the trade ban imposed on the so-called “conflict diamonds” or “blood diamonds.” In sum, Chapter VII provides perhaps one of the few examples through which international law provides clear rights to state exercise of extraterritorial authority by means of economic restrictive measures directed to situations occurring abroad.

## 2.3. The WTO Regime

This subsection divides the investigation in terms of the “human rights” and the “extraterritorial element” in the WTO regime. I aim at demonstrating that both elements are hardly found in the regime. Indeed, regarding the “human rights” element, this could be a very short subsection: the WTO covered agreements and jurisprudence do not contain any express references to it.

The question then shifts to the level of hypothetical interpretations. Among the WTO covered agreements, literature has focused on the general and the security exceptions as a leeway for interpreting trade law in light of human rights. In the first group, the protection of public morals – XX(a)<sup>23</sup>-, human life and health – XX(b)<sup>24</sup> -, prison labour – XX(e)<sup>25</sup> have been

<sup>20</sup> UN Charter, art. 41. See also art. 42: “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”

<sup>21</sup> Decisions adopted under articles 41 and 42 are legally binding.

<sup>22</sup> Surely, there are a myriad of issues related to the exercise of the Chapter VII power (the permanent members’ veto power being the most notorious). But what interests me here is that these measures can encompass trade measures in response to extraterritorial human rights violations.

<sup>23</sup> For instance, Charnovitz, while scrutinizing article XX(a) of the GATT and its legislative history, concludes that, overall, the negotiating history from 1945-1948 does not provide a clear answer to “what” and “whose” morality is covered by the provision. S. Charnovitz, ‘The Moral Exception in Trade Policy’ (38 Va J Int’ l L, 1997-1998), p. 689, 695. A case addressing “public morals” (and the unique case so far in the WTO), was later adjudicated in 2004 involving cross border supply of gambling services (a matter covered by the GATS) between Antigua and Barbuda and the United States. The Appellate Body (AB) upheld the panel findings that the “the term ‘public morals’ denotes standards of right and wrong conduct maintained by or on behalf of a community or nation.” Appellate Body EALR, V. 3, n° 2, p. 260-280, Jul-Dez, 2012

scrutinized. In the second group, article XXI(b)<sup>26</sup>, which deals with measures in connection with a security interest, and the existence of an emergency in international relations, has been pinpointed.<sup>27</sup> The results are timid though. Even human rights bodies, such as the OHCHR, recognize the feasibility of this type of interpretation with reluctance.<sup>28</sup>

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Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted April 20, 2005, para 298-99. Moreover, public order “may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.” An argument can be made that, as human rights are standards of right and wrong conduct maintained by or on behalf of a community or fundamental interests of society, the human rights concept can be accommodated (by interpretation) in such exception, though, such interpretation has never materialized in an actual case. See R. Howse, ‘The World Trade Organization and the Protection of Workers’ Rights’ (3 J Small & Emerging Bus L, 1999), p. 1 (presenting an earlier version of his writings for the inclusion of international labor standards in WTO through public morals exception).

<sup>24</sup> Howse alleges this possibility, since the idea of human security, embodied by the WTO normative floor, is acknowledged by the AB: WTO law must be interpreted and applied in light of the notion that the “preservation of human life and health” is a value that “is vital and important in the highest degree.” R. Howse and R. G. Teitel, ‘Beyond the Divide: the Covenant on Economic, Social and Cultural Rights and the World Trade Organization’, in 30 *Dialogues on Globalization* (2007), p. 10 (referring to the *EC - Asbestos* case judged by the AB). See also Caroline Dommen, arguing that in the case of the health programme of Brazil challenged under the TRIPS agreement by the United States in the later 1990s, Brazil could have invoked a provision similar to article XX(b) in the TRIPS agreement for the protection of life. C. Dommen, ‘Covenant on Economic, Social and Cultural Rights: A Treasure Chest of Support for Developing Countries’ Concerns in the WTO’, in 5 *Bridges Between Trade and Sustainable Development Monthly* (January-April 2001)(discussing how the International Covenant on Economic, Social and Cultural Rights could serve as a “treasure chest” of support for developing countries concerns).

<sup>25</sup> It permits banning the importation of goods that have been produced by prisoners. Some recall the potential use of this exception to accommodate human rights concerns, especially if the prison labor exception is expanded to encompass forced labor or modern forms of slavery. Again, I will assume that this interpretation is possible, though the preparatory work of the text indicates a different purpose of the clause (potential unfair competition coming from prisoners’ work).

<sup>26</sup> As to article XXI(b)(iii), in theory, the only requisite of the clause is the existence of a connection between the measure, a security interest, and the existence of an emergency in international relations. The discretion of the members in relation to article XXI(b)(iii) is well described in the GATT Secretariat, *GATT Analytical Index: Guide to GATT Law and Practice* 557-60 (6th edn 1995). In this sense, a member can justify a restrictive trade measure based on a security exception (and the human rights element can come “in the package”). In practice, two episodes with the above pattern appeared in the WTO system but - perhaps because of the political factors involved - were never adjudicated: *Helms-Burton* and *Massachusetts-Burma*. Generally, WTO members have a great deal of discretion to justify many extraterritorial measures in terms of security. The literature has acknowledged this possibility in order to accommodate human rights. Cleveland posits that the article would be a “potentially attractive” one, though she recognizes that it is a somewhat “awkward basis” for human rights sanctions, as that article primarily concerns a security exception. S. H. Cleveland, ‘Human Rights Sanctions and International Trade: a Theory of Compatibility’ (5.1 J Int’l Econ L, 2002), p. 186. See also See C. M. Vázquez, ‘Trade Sanctions and Human Rights – Past, Present and Future’ (6.4 J Int’l Eco L, 2003), p. 797. Vázquez seems to agree with Cleveland that the security exception of Article XXI of the GATT 1994 may be the best option for general sanctions and the safety valve for the most egregious human rights violations. *ibid* 830.

<sup>27</sup> Article XXI(c), sometimes also referenced, does not seem to add much, nevertheless. Arguably, it merely reproduces the type of situation in which the UN acts for the maintenance of international peace and security. As pointed out, article 103 of the UN Charter establishes that, in case of conflict of obligations, obligations under the UN Charter shall prevail over obligations in any other agreement.

<sup>28</sup> The OHCHR said that, in relation to some of article XX exceptions, “[b]ecause the definition of ‘public morals’, ‘public order’ and ‘human life or health’ is so broad, because they have yet to be defined precisely in WTO case law, and because human rights arguments have never been raised so that their scope can be clarified in this regard, there is *no direct and conclusive evidence for human rights usage of these terms*. There are, however, a number of *strong arguments to be made in favour of the conclusion that member States’ international human rights obligations towards their own populations* could fall within the compass of the ‘public morals’, ‘public order’ and ‘human life or health’

What about extraterritoriality in the GATT/WTO regime? To begin with, there is no literal expression of such concept in the WTO covered agreements.<sup>29</sup> And among the previous possibilities, article XX(e)<sup>30</sup> and XXI<sup>31</sup> are the only ones with some margin for extraterritorial usage, which leaves again few ground for the concerned measures<sup>32</sup>.

## 2.4. Human Rights Regimes

I now analyze the extraterritoriality and trade elements across human rights regimes.<sup>33</sup> The main proposition here is whether obligations to respect, to protect, and to fulfill defines anything in terms of extraterritorial jurisdiction concerning restrictive trade measures.<sup>34</sup>

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exceptions. Office Of The U.N. High Comm'r For Human Rights, Human Rights And World Trade Agreements: Using General Exception Clauses To Protect Human Rights 8 (2005)[hereinafter OHCHR Report on Human Rights and Trade] 8 (emphasis added).

<sup>29</sup> In fact, the debate of extraterritoriality has appeared in the GATT system along the well-known *Tuna-Dolphin* and the *Shrimp-Turtle* cases. R. Howse and D. Regan, 'The Product/Process Distinction – an Ius Cogens Basis for Disciplining "Unilateralism" in Trade Policy (11.2 Eur J Int'l L, 2000), p. 249-250. In a nutshell, these cases were respectively adjudicated in the GATT and the WTO dispute settlement system and concerned United States measures (environmental legislation) that restricted the imports of tuna and shrimp coming from a variety of states. Aside from the distinguishable pairs of harvested/endangered sea creatures on those cases (Tuna/Dolphin and Shrimp/Turtle), the cases bear close similarities. The United States adopted legislation banning imports because, in the first case, the harvesting of tuna harmed dolphins and, in the second case, because the harvesting of shrimps harmed turtles. The cases discussed extraterritoriality in environmental cases, not "human rights" cases, in terms of articles XX(b) and XX(g). The *Tuna* cases – which encompasses two cases with contradictory outcomes – were never adopted (Panel Report, United States – Restriction on the Import of Tuna, DS21/R-39S/155 (Sep 3, 1991), unadopted. United States – Restriction on the Import of Tuna, DS21/R-39S/155 (Jun. 16, 1994), unadopted. The *Shrimp* case can be actually interpreted to have eschewed the extraterritoriality issue (Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted Nov. 6, 2008).

<sup>30</sup> On the other hand, extraterritoriality can be logically inferred from the prison labor exception. As Charnovitz puts it, article XX(e) of GATT would seem to be "outwardly-directed" in that it would allow governments to condition the entry of imports on the production method used in another country." In *dicta*, the panel in *US-Tuna II* seems to have recognized the nature of that clause, by saying that "[article XX(e) is an example of an exception] with respect to things located, or actions occurring, *outside the territorial jurisdiction of the party taking the measure*." Charnovitz, *supra* note 22. See also *US-Tuna II* para 5.16 (emphasis added).

<sup>31</sup> Arguably, extraterritoriality can be also inferred from article XXI. This is because measures taken for the protection of essential security interests can be taken due to "other emergency of international relations" or "in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security." By definition, these are situations occurring outside the jurisdiction of the member taking the measure.

<sup>32</sup> As to whether article XX(a) could encompass extrajurisdictional (outwardly-directed) measures, Charnovitz notes that a more likely scenario is that "a panel would [...] find that article XX(a) will not validate an import ban to force higher morality onto the exporting country." Charnovitz, *supra* note 22, p. 723. The OHCHR also deems this exception as very unlikely to cover extraterritorial measures. OHCHR Report on Human Rights and Trade, *supra* note 27, p. 8 (mentioning "towards its own population"). Finally, as an overall assessment by the OHCHR concerning article XX design for extraterritorial argumentation, its report concludes that "it does seem clear from the Appellate Body's reasoning (here and elsewhere) that, if the exception is being used for reasons occurring outside the jurisdiction of that country, for instance to enforce labour standards in another State, *it will be far harder* to justify than a situation where a State is invoking a general exception in order, for example, to protect the human rights of its own population". *ibid* 8 (emphasis added). See also Vázquez, *supra* note 25, p. 818.

<sup>33</sup> Obviously, there is no need to develop any analysis of the human rights element in this regime; it is its *raison d'être*.

<sup>34</sup> Traditionally, in human rights doctrine, a first generation of rights prescribes conduct that governments should not do (negative rights). A second generation prescribes conduct that governments should take (positive rights). A third generation of rights, as Ruppel summarizes, has been distinguished from the other two categories of human rights in EALR, V. 3, n° 2, p. 260-280, Jul-Dez, 2012

A starting point is to notice the usage of a common terminology among many of the human rights instruments. This widespread language suggests that the contracting parties' obligations are oriented "within their territory and subject to their jurisdiction." The ICCPR, for instance, establishes that "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant [...]"<sup>35</sup> The Torture Convention posits that "[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."<sup>36</sup>

Interestingly, the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO C182) does not replicate the jurisdictional language.<sup>37</sup> It provides that "[e]ach Member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labor as a matter of urgency."<sup>38</sup> The ILO recommendation specifying its action programme, arguably, concerns a clause with extraterritorial nature but as to criminal law.<sup>39</sup> Apart

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that its realization is predicated not only upon both the affirmative and negative duties of the state, but also upon the behavior of each individual. O. C. Ruppel, 'Third-Generation Human Rights and the protection of environment', in Bösl & Horn (Eds.), 'Human Rights and the Rule of Law in Namibia' (2008), p. 101-103. This taxonomy, however, may create confusion since for each human right there may be not a single, but a set of state obligations of a positive or negative nature. As a consequence, rather than the positive-negative dichotomy, it may be useful to remember that states obligations under international human rights law are categorized under three headings: obligation to respect, to protect, and to fulfill. An earlier elaboration of the three levels of obligations has been attributed to Asbjorn Eide. See Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report on the Right to Food as a Human Right*, U.N.Doc. E/CN.4/Sub.2/1987/23 (July 7, 1987) para 66-70, 112-14. A more refined division in five categories is found in H. Steiner et al., 'International Human Rights In Context: Law, Politics, Morals' (2008, p. 186-190). Obligation to respect requires states, and thereby all its organs and agents, to abstain from doing anything that violates the integrity of the individual or infringes on her or his freedom. *ibid* 66. The obligation to protect requires from the State and its agents the measures necessary to prevent other individuals or groups from violating the integrity, freedom of action, or other human rights of the individual. *ibid* 67. The obligation to fulfill requires the State to take the measures necessary to ensure for each person within its jurisdiction opportunities to obtain satisfaction of those needs, which are recognized in the human rights instruments and cannot be secured by personal efforts. *ibid* 68.

<sup>35</sup> International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, S Exec Doc E, 95-2 (1978), 999 UNTS 171 (entered into force Mar. 23, 1976). art. 2.1.

<sup>36</sup> Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85, art. 2.1 (emphasis added). See also references to "under its jurisdiction" in arts. 5.1.1, 5.2, 11, 12, 13, and 16. But see, article 2.1: "This article is *without prejudice to any international instrument or national legislation which does or may contain provisions of wider application*" and article 5.3, "[t]his Convention *does not exclude any criminal jurisdiction* exercised in accordance with internal law." (emphasis added).

<sup>37</sup> Similarly, the ICESCR does not employ "jurisdictional" language, prescribing that "[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant *by all appropriate means, including particularly the adoption of legislative measures*". International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16 1966, 993 UNTS 3 (entered into force Jan. 3, 1976) art. 2.1. Moreover, a comment about the discharge of parties' obligations under the ICESCR clarifies that "whether a State has discharged its minimum core obligation must also take account of resource constraints applying *within the country concerned*." General Comment 3, the nature of States parties' obligations (Art. 2, par.1), CESCR, UN Doc. E/1991/23 (Dec 14, 1990), para 10, 13.

<sup>38</sup> Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (entered into force Nov 19, 2000) [hereinafter ILO C182], art. 1.

<sup>39</sup> Under "other measures aimed at the prohibition and elimination of the worst forms of child labour," that document recommends the contracting parties to "provid[e] for the prosecution in their own country of the

from that, as one commentator suggests, the convention “may simply require countries to make it illegal for their citizens, or persons operating within their territory, to use child labour.”<sup>40</sup>

In sum, it appears plausible that the obligations found in human rights instruments (to protect, to respect and to fulfill) steer action within the territorial jurisdiction of the contracting parties.<sup>41</sup>

As to the “trade” element on human rights regimes, they are hardly addressed with noted exceptions in situations where the protected person is being tradable itself.<sup>42</sup>

In sum, this section investigated the state of international law regarding the legality of the examined trade measures. Interestingly, from the dogmatic analysis of general international law, WTO trade law, and human rights law a common pattern arises: international law has not embraced any robust doctrine permitting states to apply the concerned measures. The question demanding attention is *why* such a consistency is found across different regimes.

### 3. The Legal Analysis Explained in Terms of Allocation of Regulatory Jurisdiction and Transaction Costs

As noted, my aim is now to re-describe the examined issue using L&E theory, while explaining the necessary distinctions and limitations. I begin by pointing out that the elected L&E methodology is developed in terms of a positive approach, as opposed to a normative one. It tries to explain something, rather than propose a specific outcome.<sup>43</sup> Introduction to some L&E concepts is necessary at this point.

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Member's nationals who commit offences under its national provisions for the prohibition and immediate elimination of the worst forms of child labour *even when these offences are committed in another country*. Recommendation Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (June 17, 1999)[hereinafter ILO Recommendation 190] para 15(d).

<sup>40</sup> Vázquez, supra note 25, p. 821.

<sup>41</sup> Few exceptions authorize the prescription of legislation with extraterritorial coverage. Cleveland notes, for instance, that the 1957 Slavery Convention obligates the contracting parties to exercise extraterritorial jurisdiction: “Each of the States Parties to this Convention shall take all practicable and necessary legislative and other measures to bring about [...] the complete abolition or abandonment of the following institutions [forced labour and other slave-like practices], *where they still exist* [”](emphasis added). Cleveland, supra note 25, p. 153. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 7 September 1956, 266 UNTS (entered into force 30 April 1957)[hereinafter Supplementary Convention on Slavery].

<sup>42</sup> A comprehensive study indicating where to find trade measures in human rights treaties is yet to be done and would be an interesting avenue of research. For now, I underline that the Supplementary Convention on Slavery dedicates an entire session to the slave trade. It provides that the “States Parties shall take all effective measures to prevent ships and aircraft authorized to fly their flags from conveying slaves” (art. 2(a)); it also mentions that the “States Parties shall take all effective measures to ensure that their ports, airfields and coasts are not used for the conveyance of slaves” (art. 2(b)). One can also infer from the ILO C182 trade related measures. For instance, the definition of the worst forms of child labor comprises the sale and trafficking of children, and the use, procuring or offering of a child for, *inter alia*, prostitution or illicit activities. ILO C182 art. 3(a)-(c). However, in contrast to the Slavery Convention, the ILO C182 does not enumerate the types of trade measures that the contracting parties should take.

<sup>43</sup> Positive and normative economics is a common distinction in the economics field. Polinsky puts it simply, saying that economic analysis is used to both try to explain the legal system as it is and to recommend changes that might improve it; the first function is positive (or descriptive) economics and the second normative (or prescriptive). A. M. Polinsky, ‘An Introduction to Law and Economics’ (Aspen, 2003, p. xvii). See also, R. A. Posner, ‘Economic Analysis of Law’ (Aspen, 2002, p. 24-26).

### 3.1.L&E Methodology: Property Rights and Allocation of Regulatory Jurisdiction

Property rights, or entitlements, are evoked in the L&E literature to mean the full range of legal entitlements of individuals.<sup>44</sup> The transposition process of L&E from the domestic to the international settings requires parsing. Trachtman suggests the following analogy:<sup>45</sup>

Table 1 - Pairing of Concepts (adapted)

| Domestic L&E           | International L&E                      |
|------------------------|----------------------------------------|
| Individuals            | States                                 |
| Tragedy of the Commons | Anarchical System / <i>Res nullius</i> |
| Property rights        | Regulatory Jurisdiction                |

The first correspondence in this transposition is to pair individuals with states. To the same extent that individuals have their own preferences, states also have preferences in the form of policy decisions. Individuals and states act to maximize their preferences, as rational actors. Second, like the tragedy of the commons among individuals, states found themselves in a primitive order. Maybe it is even better to say that instead of order, anarchy reigned.<sup>46</sup> That is akin to the idea of “commons,” or a *res nullius* regime manifested in the international society.<sup>47</sup>

Third, just as individuals have property rights, states also have their property rights. Largely, this idea of control over something can make a duo with the concept of regulatory jurisdiction.<sup>48</sup> L&E acknowledges the transition from the commons to the property rights society.<sup>49</sup> Similarly, international society evolved from the commons to a regime of property rights set by international law. The types of transactions in the domestic and international settings are different though. Dunoff and Trachtman point out that the “assets traded in this

<sup>44</sup> J. L. Dunoff and J. Trachtman, ‘Economic Analysis of International Law: An Invitation and a Caveat’ (April 1998), p. 17. The idea of entitlement is not only the common perception of owning something, but also the entitlement to make noise, to pollute, to breathe clean air, and to have children, among others. G. Calabresi and A. D. Melamed, ‘Property Rules, Liability Rules, and Inalienability: One View of the Cathedral’ (85 Harv L Rev, 1972), p. 1089-1090.

<sup>45</sup> See J. P. Trachtman, ‘Economic Analysis of Prescriptive Jurisdiction’ (42 Va J Int’l L, 2001-2002), p. 11-15. It should be noted that Trachtman’s overall framework seems to draw from a blend of research in both economics and political science, drawing from the acknowledged work of Oliver Williamson and Douglass North elsewhere in his writings. *ibid* footnote.17-18 9, footnote 204 79.

<sup>46</sup> Here, I do not use the term anarchy in the technical sense of international relations theory, but in the common sense of disorder.

<sup>47</sup> *Res nullius* is the Latin expression meaning “the property of no one.” In the world commons, states could exercise regulatory jurisdiction with very little limitations. Surely, I mean limitations set by treaties and CIL because they were very primitive at this point of history (the type of limitations in domestic statutes or constitutions is another question).

<sup>48</sup> As Trachtman puts it, property and jurisdiction “involve legally-constructed packagees of control of things of value.” Trachtman, *supra* note 44, p. 11.

<sup>49</sup> As Trachtman puts it: “as property of this type [increasing value to the legislating state of the application of its jurisdiction] becomes more valuable, given that it is otherwise subject to appropriation, we would expect the rise of property rights: in this context, ‘property rights’ or ‘entitlements’ would be expected to be comprised of international or federal laws or legal principles allocating prescriptive jurisdiction.” Trachtman, *supra* note 44, p. 14.

international ‘market’ are not goods or services *per se*, but assets peculiar to states: components of power.”<sup>50</sup> As Trachtman posits:

[I]t can be argued that all WTO cases are concerned with allocation of regulatory authority, just as all applications of international law are concerned with the questions of whether the respondent state retained or transferred authority to effect the measures at issue.<sup>51</sup>

Restraints and constraints (of international law) are fundamentally ways to articulate that allocation of regulatory authority or ARJ is occurring. States are obliged to enact or apply law (through the enactment of domestic legislation, executive action, or judicial implementation) in accordance with the ARJ created by international law regimes.<sup>52</sup>

### 3.2. The Currency of the Deal: Sovereignty Costs

Sovereignty costs are prominent in the type of ARJ involved in the extraterritorial jurisdiction. But how the fluid concept of sovereignty<sup>53</sup> can be thought of as costs? As Kenneth Abbott explains, the term *sovereignty costs* is actually not new:

*sovereignty costs* may arise for psychological or symbolic reasons, or they may have a material basis where supranational decisions could be detrimental to national interests [...] but thinking of limitations on sovereignty as a cost leads us to focus on situations in which the costs may vary,

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<sup>50</sup> *ibid* 10. And it is important to observe that these transactions take place in many forms: (i) states can voluntarily “trade” their jurisdictional power (e.g. by a treaty); (ii) CIL, functionally speaking, produces the same effect on the regulatory jurisdiction; and (iii) international courts’ decisions can also affect regulatory jurisdiction of states when it clarifies the meaning of international law. Ultimately, international law (treaty, CIL, judicial decisions, etc.) is law that allocates regulatory jurisdiction. For instance, recall that in trade regimes, the national treatment clause prescribes that an importing state should treat imported goods no less favorably than it treats domestic like-products. The importing state, which is subject to the international trade regime, relinquishes part of its autonomy to treat imported goods. Other regimes produce similar effects. State parties to the core ILO conventions (or the ILO core labor regime) are restrained by the obligations imposed by this regime. They relinquished their regulatory authority to permit forced or compulsory labor in their territory; in fact, they are actually compelled to take positive actions to eliminate it. Overall, the authority of states to regulate and prescribe law is the property being restrained by those regimes. This is akin to asserting that regulatory jurisdiction is being restrained. The idea is actually broad: international law can prevent a state to regulate in a certain way or require a state to regulate in a certain way.

<sup>51</sup> J. Trachtman, ‘Regulatory Jurisdiction and the WTO’ (10.3 J Int’l Econ L, 2007), p. 631-633.

<sup>52</sup> Though not developed here, Trachtman presents a typology, or strategies, of ARJ. In 2002, Trachtman elaborated on three strategies of ARJ that would achieve the goal of efficient allocation. J. Trachtman, ‘Institutional Linkage: Transcending “Trade and [...]”’ (96 Am J Int’l L, 2002), p. 83-84. See also, Trachtman, *supra* note 44, p. 33. Trachtman, *supra* note 50, p. 645-46. His point is to focus on the kind of TCs and circumstances involved in the adoption of a certain ARJ. Then, one could assess the extent to which certain allocations or transactions may result in greater efficiency. An efficient allocation would be an allocation in which authority is allocated to those who would derive the most value from the allocation at the lowest TC. *ibid* 645. By the way, the assertion follows directly from Coase’s theorem (not explored here).

<sup>53</sup> Sovereignty has a plurality of meanings and it is an evolving concept. A common articulation of the concept refers the exercise of power over a defined territory. Krasner’s typology of four types of sovereignty translates accurate observations in terms of the existence of different types of sovereignty. See S. D. Krasner, ‘Sovereignty: Organized Hypocrisy’ (1999).

suggesting at least a partial explanation for the varieties of legalization [wide range of normative and institutional arrangements]<sup>54</sup>.

Most of the substantive norms of international law impose sovereignty costs on states. It is the currency of the international law deal. States transact regulatory jurisdiction by accepting constraints and restraints on it, aiming at some type of coordinated benefit.<sup>55</sup>

But, arguably, transactions on extraterritorial jurisdiction carry, in a *scale of sovereignty costs*, higher costs. This is because the affected state (e.g., the exporter) would abdicate part of its regulatory authority to another state.

Therefore, extraterritorial transactions are said not to have a very “liquid market” *per se* and it is quite an extraordinary situation when states agree on matters of extraterritorial jurisdiction.<sup>56</sup> Heightened costs, in form of sovereignty costs, inform these transactions.

In other words, the extraterritorial nature of these allocations escalates concerns over sovereignty and non-intervention in internal affairs, making this type of allocation costly, and therefore, exceptional. This is also potentialized by the significant number of WTO members, each of whom may perceive the sovereignty cost differently.

### 3.3.Transaction Costs (TCs)

Another relevant concept in this methodology relates to the role of transactions costs (TC) influencing each ARJ. Generally, TCs are defined as “costs other than the money price that

<sup>54</sup> K. W. Abbott, ‘The Many Faces of International Legalization’ (92 Am Soc’y Int’l L Proc, 1998), p. 62 (emphasis added). Abbott suggests two initial variables affecting sovereignty costs: (1) the subject issue and (2) – what I would call – the leverage of the concerned state involved. As to the subject issue, costs of sovereignty “are especially *high* in areas affecting national security [...], *moderate* in areas such as economics and environmental protection, and *low* in technical areas where national interests of participating states are closely aligned.” As to the leverage of the concerned state, “[s]mall states would seem to have *low* sovereignty costs on average, since they already have less autonomy than large states [...] Large states would seem to have less need for legalization, though in fact they might seek it as an efficient way to structure governance where they can dictate the rules and exert political control over their implementation.” Laurence Helfer also makes use of *sovereignty costs* in the context of human rights. Helfer indicates that “[t]he substantive provisions of these treaties create *sovereignty costs* for their member states by restricting how they treat individuals and groups located in territories subject to their jurisdiction. See L. Helfer, ‘Nonconsensual International Lawmaking’ (1 U Ill L Rev, 2008), p. 71, 86.

<sup>55</sup> This is observable in the trade and the human rights regimes, though the motivations to ratify these categories of conventions are probably different. Joining the WTO means a trade-off between sovereignty (costs) and the formal enjoyment of guarantees of non-discriminatory trade imposed on all members (benefit).

<sup>56</sup> And as components of power, Trachtman points out that, unsurprisingly, this market is not very “liquid.” See Trachtman, *supra* note 44, p. 11-12. I understand that Trachtman is referring here to international law that specifically addresses jurisdiction to prescribe as the core element of the transaction. The concept of liquidity generally means how easy it is to buy and sell something. And the lack of liquidity on treaties with extraterritorial application is also noted by Bianchi. See commentaries from Andrea Bianchi in H. G. Maier, ‘Jurisdictional Rules in Customary International Law’, in Meessen (Ed.) ‘Extraterritorial Jurisdiction in Theory and Practice’ (1996), p. 64 (criticizing the contention advanced by several authors that resolution of conflicts of jurisdiction should be pursued by means of international agreements. Maier recalls that “practice shows that is quite extraordinary that states reach agreement on the matter of extraterritorial jurisdiction.” But he also recognizes that international agreement may usefully serve to attract disputes into institutionalized mechanisms of dispute settlement agreed on by that treaty).

are incurred in trading goods or services.”<sup>57</sup> While the sovereignty cost is the money (currency) price, TCs would be everything else informing the ARJ.

Generally, in L&E, TCs are captured in terms of information costs, bargaining costs, decision costs, and enforcement costs.<sup>58</sup> These costs also manifest in the international setting involving ARJ.

There is one category of TCs that I propose as significant to inform my analysis: *cognitive costs*. It comes from the very idea that regimes express distinguishable domains of knowledge, or of discrete communities with particular beliefs and lexicons.<sup>59</sup> Regimes organized and developed themselves in terms of issue-areas, cluster-areas, operating without close links to other regimes in other issue-areas.<sup>60</sup> They are sparsely connected.

Drawing from organizational theory, Lang explains that the current integration of these different domains of knowledge is potentially barred, among other things, by the cognitive and epistemological frameworks that can be deeply embedded and highly resistant to change.<sup>61</sup>

<sup>57</sup> Paul M. Johnson, ‘A Glossary of Political Economy Terms’ (2005), online edition, [http://www.auburn.edu/~johnspm/gloss/transaction\\_costs](http://www.auburn.edu/~johnspm/gloss/transaction_costs).

<sup>58</sup> Ibid (exemplifying costs in typical trading contexts. For a transaction to occur, there are a number of activities involving opportunity costs in terms of time, energy and money. If the transaction is technically complicated, negotiations for such a detailed contract may itself be prolonged and very costly in terms of time, travel expenses, lawyers’ fees, and so on. After a trade has been agreed upon, there may also be significant costs involved in monitoring or policing the other party to make sure he is honoring the terms of the agreement). See also Polinsky, *supra* note 42, p. 14 (illustrating TCs: costs of identifying the parties related to the transaction, costs of getting together, the costs of bargaining process, and the costs of enforcing the bargain itself). TCs are also generally categorized in “search and information costs,” “bargaining and contracting costs,” and “policing and enforcement costs.”

<sup>59</sup> Ruggie’s comparison of regimes and languages are indicative of this idea. For Ruggie, like any social institution, international regimes limit the discretion of their constituents units to decide and act on issue that fall within the regime’s domain. Regimes are akin to language and have their own generative grammar. J. G. Ruggie, ‘International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order’, in Stephen Krasner (Ed.), ‘International Regimes’ (1983), p. 195-196. Keohane and Nye employ the term “club model” to describe the institutional origin of these distinct domains of regime. See R. O. Keohane and J. S. Nye, ‘The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy’ (John Kennedy School of Government, Working Paper n. 4, 2001), [http://www.hks.harvard.edu/visions/publication/keohane\\_nye.pdf](http://www.hks.harvard.edu/visions/publication/keohane_nye.pdf).

<sup>60</sup> Surely, this is a generalization.

<sup>61</sup> Lang draws from organizational theory (Bo Hedberg’s work). Lang, *supra* note 1, p. 402, 405. Haas, a “cognitive theorist,” draws from many disciplines to show that the combination of prior belief systems, operational codes, and cognitive maps shapes decision makers responses not only by influencing the ways in which they interpret the world but also *by erecting barriers to the types of information that they consider valuable*. See P. M. Haas, ‘Introduction: Epistemic Communities and International Policy Coordination’ (46.1 Int’l Org, 1992), p. 29. The term “cognitive theorist” is employed by Kenneth Abbott to indicate Ernst Haas as a leading “cognitive” theorist. See K. W. Abbott, ‘Modern International Relations Theory: A Prospectus for International Lawyers’ (14 Yale J Int’l L, 1989), p. 335, footnote 19, p. 339. It should be noted that Haas is credited elsewhere in the literature for the introduction of the role of “epistemic communities” in international politics. Epistemic communities is “a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area defined as are one possible provider of this sort of information and advice.” To the extent to which an epistemic community consolidates bureaucratic power within national administrations and international secretariats, it stands to institutionalize its influence and insinuate its views into broader international politics.” *ibid* 3.

Therefore, what I want to capture by *cognitive costs* refers to the obstacles identified above created by the very specialization of regimes and the formation of cognitive communities.<sup>62</sup>

In sum, the two categories of costs to inform the examined measures are sovereignty (the currency, or the price of the transaction) and cognitive costs (a type of transaction costs). Extraterritorial allocations boost the first. Distinct policy domain involved increases the second. Those heightened costs would explain the lack of a vigorous doctrine to justify restrictive trade measures addressing human rights violations abroad.

#### 4. Transnational New Governance: Overcoming Sovereignty and Cognitive Costs

In this section, the main proposition is to depict trade and human rights initiatives that involve lower or no significant amount of sovereignty and cognitive costs.

As categories of Transnational New Governance (TNG), these initiatives are diverse and encompass the adoption of voluntary codes of conduct, certification strategies, or merely reporting requirements;<sup>63</sup> combined or not.

Abbott and Snidal suggest that TNG “allows states to participate in international regulation and delegate limited authority without incurring significant *sovereignty costs*.”<sup>64</sup> Moreover, TNG allows “IGOs to pursue their regulatory goals with *less resistance from states and greater collaboration with private actors*.”<sup>65</sup> Below, I analyze three of these initiatives.

##### 4.1. Voluntary Codes of Conduct: the United Nations Global Compact

The UN-GC corresponds to a TNG initiative first envisaged by former UN Secretary General Kofi Annan in 1999. The UN-GC describes itself as “the world’s largest, global

<sup>62</sup> Though I have not found this particular source of cost expressed as “cognitive costs” under the legal or international relations. Cognitive means “relating to, being, or involving cognition” and cognition is broadly defined as “the act or process of knowing.” Merriam-Webster Dictionary (1981), p. 446.

<sup>63</sup> Kenneth Abbott and Duncan Snidal identify the emergence of a new kind of international regulatory system that they name TNG as follows: TNG is emerging spontaneously, largely out of dissatisfaction with the failure of international “Old Governance” (OG) – acting through treaties and intergovernmental organizations (IGOs) – to adequately regulate international business. NGOs, business firms and other actors, singly and in novel combinations, are creating a plethora of innovative institutions to apply transnational norms to business, especially on worker rights, environmental protection and human rights. K. W. Abbott and D. Snidal, ‘Strengthening International Regulation Through “Transnational New Governance”’ (2008), [http://works.bepress.com/kenneth\\_abbott/1](http://works.bepress.com/kenneth_abbott/1). Abbott and Snidal name these initiatives regulatory standard setting (RSS) and explain that TNG demands a broader view of “regulation” and a more nuanced view of the state as regulator. *ibid* 3-4. TNG and RSS are just two of the many acronyms found in the literature to describe these initiatives. Bernstein and Hannah, for instance, point out that the proliferation of transnational non-state mechanisms – usually in the form of producer certification and product labeling systems – are a sub-set of the broader “corporate social responsibility” (CSR) category. S. Bernstein & E. Hannah, ‘Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space’ (11 J Int’l Econ L, 2008), p. 1. Moreover, they indicate that scholars in law, political science, and business have also employed the labels “transnational regulatory systems,” “non-state market driven (NSMD) governance systems,” and “civil regulation. *Ibid* 2. They also acknowledge that NSMD, although slightly awkward, has been widely cited and has generated the most detailed and distinct categorization of these mechanisms. Putting aside the acronyms competition, I adopt TNG initiatives or initiatives in this paper.

<sup>64</sup> Abbott and Snidal, *supra* note 62, p. 61.

<sup>65</sup> *ibid* 61.

corporate citizenship initiative.” The UN-GC provides a framework for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labor, the environment, and anti-corruption.

The UN-GC tackles the trade and human rights linkage by asking companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights (principles 1-2) and labor standards (principles 3-6).<sup>66</sup>

UN-GC is not a treaty (it does not involve ARJ) but a set of principles that companies embrace. Sovereignty costs do not attach directly to states, as they do not have any legal obligation under the UN-GC (the principles are phrased as “*businesses should do something*”). As Hurd explains, one of the features of the initiative is the code of conduct approach, borrowing the principle of voluntarism and generating the subsidiary effect of skipping all state-based authority.<sup>67</sup>

Interestingly, another feature mentioned by Hurd is useful to highlight: low cognitive costs. Hurd comments that

from the WTO, [the UN-GC] *borrow*s the notion that monitoring can or should be performed by those with an interest in finding violations. And from the ILO, it *inherits* the set of pre-established and (arguably) universal conventions which give it content. This amalgam is an interesting piece of constitutional design, particularly for the way that it takes advantage of the coincidence between the self-interests of the participants and the legitimacy of the UN.<sup>68</sup>

Translated into the lexicon of this paper, by borrowing and inheriting principles from other IGOs, the UN-GC arguably circumvents the cognitive costs that would otherwise attach if the WTO straightforwardly adopted ILO conventions or human rights standards.

## 4.2.Social Certification: Social Accountability International (SAI) and SA 8000

Social Accountability International (SAI) – a NGO based in New York - developed the SA 8000 standard in 1998. The SA 8000 is in its third edition and specifically focuses on the working conditions of employees in supply chains. SAI is under the umbrella of the International Social and Environmental Accreditation and Labeling Alliance (ISEAL).<sup>69</sup> The initiatives encompassed by the ISEAL have been described as the most relevant example of NSMD system.<sup>70</sup> Currently, the initiative has more than one thousand certified companies.

<sup>66</sup> Though it is true that the UN-GC was not meant to specifically address the trade and human rights linkage, if a company that trades in the international market adopts the code, the initiative ends up dealing with the linkage. Furthermore, because it is the largest initiative of voluntary codes, it is worth mentioning and analyzing.

<sup>67</sup> I. Hurd, ‘Labor Standards through International Organizations: The Global Compact in Comparative Perspective’ (2001, p. 17).

<sup>68</sup> *ibid* 17-18 (emphasis added).

<sup>69</sup> The third version of the SA 8000 has been released in 2008. The normative elements of this standard are based on national law, international human rights norms and the ILO conventions. See the standard at [http://www.sai-intl.org/\\_data/n\\_0001/resources/live/2008StdEnglishFinal.pdf](http://www.sai-intl.org/_data/n_0001/resources/live/2008StdEnglishFinal.pdf). ISEAL convenes eight members aiming to set social and environmental standards in sectors ranging from forestry and agriculture to fisheries, manufacturing, and textiles. For general information, see <http://www.isealliance.org/>

<sup>70</sup> Bernstein and Hannah, *supra* note 62, p. 7.

It should be noted that: (i) SAI is a standard-setting body that draws its standards from the ILO conventions and human rights treaties; (ii) SAI's accreditation services are managed by another organization called Social Accountability Accreditation Services (SAAS); and (iii) the SA 8000 label is not used on products; that is to say, the certification is given directly on companies, informing the supply chain of that fact.

Most of the SA 8000 certified companies pertain to supply chains involved in international trade. SAI website refers to case studies regarding the implementation of the SA 8000 in companies in Vietnam (glass industry), Thailand (apparel industry), Central America (garment manufacturing), and China (in general), among others.<sup>71</sup>

NGOs and companies are the main actors involved in the initiative. SA 8000 requires that, besides the obligations of companies to comply with national and all other applicable laws where it operates, *companies shall respect* the enumerated principles of sixteen ILO conventions and six human rights conventions.<sup>72</sup>

That language shows the way the initiative directly targets companies and refrains from using the regulatory framework of governments and international organizations, at least, directly. Clearly, sovereignty and cognitive costs are immediately circumvented by the initiative approach. SA 8000 is neither about member "A" telling member "B" that the latter cannot export to member "A," because member "B" does not comply with ILO conventions and human rights treaties that member "B" has ratified; nor is it about the WTO adopting, as a covered agreement or in a decision, ILO and human rights conventions. SA 8000 is a standard developed by a NGO. To be certified by SAI, companies in member "B" need to comply with prescriptions contained in ILO and human rights conventions.

#### 4.3.A Hybrid Initiative: the KPCS

As to its origins, a first meeting to discuss the KPCS certification was held at Kimberley, South Africa, in May 2000. In December 2000, the UN-GA adopted Resolution 55/56 which expressed the concern over the problem of conflict diamonds fuelling conflicts in a number of countries and the devastating impact of these conflicts on peace, safety and security for people in affected countries, as rebel movements finance their military activities through the trade of diamonds. The resolution also supported the creation and implementation of a purportedly simple and workable international certification scheme for rough diamonds. In November 2002, these efforts led to the creation of the KPCS.<sup>73</sup>

As to the classification of the KPCS as a voluntary code, certification or labeling, the initiative seems to be *sui generis*. It does not label or certify individual diamonds or companies as

<sup>71</sup> See in general, <http://www.sa-intl.org>. Companies as Dole (the largest producer and distributor of fresh fruit in the world) and Chiquita Banana are SA 8000 certified.

<sup>72</sup> Social Accountability International, Social Accountability 8000 (2008) 2, [http://www.sa-intl.org/\\_data/n\\_0001/resources/live/2008StdEnglishFinal.pdf](http://www.sa-intl.org/_data/n_0001/resources/live/2008StdEnglishFinal.pdf).

<sup>73</sup> In 2006, The KPCS counted at some forty-six participants, or seventy countries. See The Kimberley Process Certification Scheme Third Year Review, Submitted by the Ad Hoc Working Group on the Review of the Kimberley Process Certification Scheme (Nov. 2006), 64 [hereinafter KPCS Third Year Review], [http://www.kimberleyprocess.com/documents/third\\_year\\_view\\_en.html](http://www.kimberleyprocess.com/documents/third_year_view_en.html). The diamond trade is represented by the World Diamond Council and the civil society by NGOs (Global Witness and Partnership Africa Canada).

free from conflicts. Rather, it certifies an entire shipment of rough diamonds.<sup>74</sup> Moreover, in parallel, KPCS relies on a self-regulation mechanism of the diamond industry.<sup>75</sup>

The initiative is a sort of hybrid type of regulation, with states, NGOs and companies sharing governance. But like others TNG initiatives, KPCS is not a treaty, but soft law. Surely, among the TNG initiatives, KPCS is the only in which, to be a participant, a government must develop a certification process for diamonds. This certification process must follow minimum requirements contained in the KPCS and governments' customs officials have to inspect these certifications.

However, as Schefer reckons, the requirements surrounding the certificate are a balance between "maintaining effective control over diamond trading activities and not overburdening the participants (private and public) with either *sovereignty-threatening international oversight* or costly administrative paperwork requirements."<sup>76</sup> Cognitive costs, it is submitted here, are also low because, as other TNG initiatives, the KPSC does not involve the elaboration of human rights normative linkages at the WTO.

## 5. Conclusions

Is there a right in international law by which states are allowed (or obligated) to impose restrictive trade measures because of violations of human rights occurring outside their territory? While exploring this question, my argument has been divided into three distinct parts.

First, reviewing traditional legal analysis, the overall conclusion is the lack of a vigorous doctrine supporting the lawful recourse to the examined measures. Is it an obvious assessment? Probably it is not. The assessment actually demystifies common sense perceptions about rights and duties that international law prescribes based on CIL, *jus cogens*, WTO and human rights law.

Since rules are pretty hostile to the exercise of extraterritorial legal powers in any context, the natural question demanding response is *why* that is the case. Among the tools that one could employ for explanatory purposes, I found this possibility in terms of L&E.

In the adopted approach, preference was given to a positive approach; *i.e.*, to explain the legal system as it is, rather than to recommend changes. I began with a pre-question: what is the function of international law? In one strong sense, international law is law that allocates, shifts, and transfers authority. This means that international law performs ARJ; that international law is a device of ARJ; that international law is a mechanism of ARJ. In addition, in the L&E model, ARJ is a function of the costs involved. If those costs are high, allocations may not even occur and, when occurring, allocations are muddy or organizational solutions to decide something *ex-post* are provided. The main suggested types of costs involved were (i) sovereignty and (ii) cognitive costs.

<sup>74</sup> KPCS §II(a).

<sup>75</sup> In October 2002, when the Kimberley Process was in its infancy, the International Diamond Manufacturers Association (IDMA) and the World Federation of Diamond Bourses (WFDB) created a voluntary system of self-regulation which required its members to sign on to a System of Warranties and a Code of Conduct. See KPCS Third Year Review (n 73) 72.

<sup>76</sup> K. N. Schefer, 'Chilling the Protection of Human Rights: What the Kimberley Process Waiver Can Tell Us About the WTO's Effect on International Law' (NCCR Trade Regulation Working Paper No. 2007/03, Jan. 01, 2007), p. 22-23, <http://ssrn.com/abstract=1094619>.

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Sovereignty costs are a type of cost acknowledged in the literature. It is actually the currency of international law itself. Every ARJ is a bargain of sovereignty as the price exchanged. Purportedly, escalated sovereignty costs emerge in connection with extraterritorial jurisdiction concerns. Cognitive costs, in turn, relate partially from my remarks about the isolation, compartmentalization, and resistance to change of communities with different policy domains and expectations (in this case, trade and human rights).

The following section focused on the exploration of the *modus* human rights advocates are attempting to advance the trade and human rights linkages through TNG initiatives. The main proposition requiring proof in that section was the lower level (or absence) of sovereignty and cognitive costs.

I chose three relevant examples of TNG initiatives to demonstrate the lower level of sovereignty price and cognitive costs. As a common denominator, it was possible to envisage how states are basically accessory to them (providing general support or moral suasion), rather than being required to adhere to any formal obligation. Furthermore, by referring to international standards found in human rights and labor rights conventions that *companies* must adopt, these initiatives move away from the WTO as a *locus* to formally enshrine human and labor standards, thereby avoiding cognitive costs.

In sum, the recognition that states are lawfully entitled to or have a duty to act by imposing restrictive trade measures based on extraterritorial human rights consideration is an unlikely type of ARJ because of the costs involved. This is not to say that powerful states will, in practice, refrain from resorting to them (an issue of compliance, not developed in this paper).

But in general, following a L&E framework and in the absence of significant events that change the calculation of costs to states, it is expected that future developments of trade and human rights linkages will be based on variations of TNG initiatives.

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