Germany's Supply Chain Due Diligence Act: Is It Compatible with WTO Obligations?

Jelena Bäumler*

Table of Contents

* Prof. Dr. LL.M., Leuphana University Lüneburg (Germany). Email: baeumler@leuphana.de. This article is based on and further develops arguments that were made more generally in an article in Archiv des Völkerrechts (4) 2020, pp. 464-501. In particular, this article deals with the German Supply Chain Due Diligence Act that has been enacted in the meantime as a concrete example for mandatory cross-sector global value chain obligation for companies.

Abstract

Regulations that aim at the observance of certain human rights and environmental standards by companies along the value chain have gained momentum. A recent example is the German Supply Chain Due Diligence Act that obliges German companies to adhere to due diligence obligations vis-à-vis human rights and, to a lesser extent, the environment when making use of global supply chains. Germany, as other WTO members, must at the same time ensure compliance with WTO law when adopting such measures. This article will argue that due diligence laws may have a bearing on WTO obligations, but can be justified according to the general exceptions clause of Art. XX GATT. Ultimately, the article argues that such measures may be necessary if international economic law is to accommodate the common goal of sustainable development.

Keywords: WTO, Corporate Due Diligence Obligations, Supply Chains, Most-Favoured-Nation, National Treatment, Art. XX GATT, Human Rights, Environment, Public Morals, Sustainability

A. Introduction

In June 2021, in one of its last sessions before the elections, the German Parliament passed the Lieferketten-Sorgfaltspflichten G (LkSG) [Supply Chain Due Diligence Act], entering into force on 1 January 2023.[1] It adds to the European value chain regulations, following legal acts, such as those in France[2] and the Netherlands[3], and sector specific European regulations[4]. Most recently, the European Commission has

1 An English translation of the "Act on Corporate Due Diligence Obligations in Supply Chains" can be found here: https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf;jsessionid=BA612E5712180730E931A7E7AA1ED539.delivery2-replication?__blob=publicationFile&v=3 (28/3/2022).

2 LOI n° 2017–399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre; see further *Brabant/Michon/Savourey*, Rev. int. compliance 2017/93, p. 1 ff., available at : https://media.business-humanrights.org/media/documents/ba571b7294311e42b3605af7cc4eeaad149c33b2.pdf (17/3/2022); *Nass,* ZEuP 2019/4, pp. 774–802.

3 Child Labour Due Diligence Law ("Wet Zorgplicht Kinderarbeid") of 14 May 2019; see further *Wiedmann* in: Nietsch, § 26, para. 41.

4 Directive (EU) 2010/995, laying down the obligations of operators who place timber and timber products on the market, OJ L 295/23 of 12/11/2010, see further *Henn*, ZUR 2021, pp. 413–422; Directive (EU) 2017/821, laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-effected and high-risk areas, OJ L 130/1 of 19/5/2017, see further *Teicke/Rust,* CCZ 2018/1, pp. 39–43.

published its own proposal for an EU-wide directive applicable to the common market.[5]

These global value chain regulations of the World Trade Organization (WTO) members, including EU member states and the EU itself, have to ensure their compatibility with WTO law. As the WTO aims at creating a global market with equal competitive opportunities for its members, global value chain laws have the potential to conflict with WTO obligations. However, much depends on their actual legal design. This article will analyse Germany's Supply Chain Due Diligence Act in light of WTO law, and assess its compatibility with the latter, focusing on obligations relating to trade in goods.

In the following, after a brief description of the main features of the German Supply Chain Due Diligence Act (B.), the article will argue that value chain regulations have a bearing on WTO agreements, and in particular on non-discrimination obligations for trade in goods. Yet, there are ways for regulating states to justify such legislative measures, including in the case of Germany's Due Diligence Act (C). The final section of the article will offer some concluding remarks (D).

B. Main features of the German Supply Chain Due Diligence Act

The German Supply Chain Due Diligence Act enters into force on 1 January 2023. In terms of scope, it covers companies headquartered or registered in Germany that have at least 3000 employees (§ 1 para. 1 sentence 1 LkSG). It also covers those companies with a German branch and at least 3000 employees working in Germany (§ 1 para. 1 sentence 2 LkSG). Notably, after one year, i.e. from 1 January 2024 onwards, the respective required number of employees is lowered to only 1000 (§ 1 para. 1 sentence 3 LkSG), thus extending the scope of covered companies from approximately 900 companies in 2023 to 4.800 companies from 2024 onwards.[6]

The new LkSG mainly aims at enhancing the protection of human rights, and to a lesser extent at the avoidance of environmental harm along the supply chain.[7] To that end, the LkSG includes twelve alternatives concerning a broad range of human rights, including *inter alia* a prohibition of child labour (§ 2 para. 2 no. 1 LkSG), forced labour (§ 2 para. 2 no. 3 LkSG) and slavery (§ 2 para. 2 no. 4 LkSG), but also infringements of the freedom of association (§ 2 para. 2 no. 6 LkSG), and unjustified discrimination (§ 2 para. 2 no. 7 LkSG). Regarding environmental harm, the LkSG follows a narrower concept and only lists certain prohibitions concerning specific

5 Proposal by the European Commission for a Directive on corporate sustainability due diligence and annex, available at: https://ec.europa.eu/info/publications/proposal-directive-corporate-sustainable-due-diligence-and-annex_en (17/3/2022).

6 *Garbosc*h, in: Garbosch (ed.), p. 67.

7 See *Deutscher Bundestag*, Government's statement of reasons (Regierungsbegründung, 2021) Entwurf eines Gesetzes über die unternehmerischen Sorgfaltspflichten in Lieferketten, p. 23–24, available at: https://dserver.bundestag.de/btd/19/286/1928649.pdf (16/3/2022).

chemical elements (§ 2 para. 3 nos. 1-4 LkSG) and waste (§ 2 para. 3 nos. 5-8 LkSG).[8]

In order to ensure non-violation of those standards along the supply chain, the LkSG provides for different due diligence obligations to be observed for covered companies. All of these obligations must be fulfilled in an appropriate manner ("in angemessener Weise", § 3 para. 1 sentence 1 LkSG). To determine what constitutes "appropriate manner", the LkSG enumerates several criteria, including the ability of a company to influence the risk of a human rights violation (§ 3 para. 2 no. 2 LkSG) or the severity of an expected violation (§ 3 para. 2 no. 3 LkSG). This concept provides flexibility and allows for the individual situation of each covered company to be taken into account, while also making clear that covered companies are only obliged to exercise due diligence without full liability for compliance with the listed prohibitions along their supply chain.[9]

The duties of the covered companies mainly refer to the covered companies' own businesses and their first-tier or direct suppliers. Amongst others, companies have to establish a risk management system to be enshrined in all relevant business processes through appropriate measures (§ 4 para. 1 LkSG). As part of this risk management, companies must conduct a risk analysis (§ 5 para. 1 LkSG). This risk analysis must be conducted annually and, also, on a risk-induced ad hoc basis (§ 5 para. 4 LkSG). According to the drafting materials, when designing or undertaking the risk analysis in an appropriate manner, the political situation in the country where a supplier is located needs to be considered.[10]

Appropriate preventive measures must be taken without undue delay if a company identifies a risk in the course of the risk analysis (§ 6 para. 1 LkSG). Such preventive measures may consist, amongst others, in the delivery of training in the relevant business areas (§ 6 para. 3 no. 3 LkSG), and in the consideration of human rights-related and environment-related measures when selecting a direct supplier (§ 6 para. 4 no. 1 LkSG).

Additionally, appropriate remedial action must be taken without undue delay if the company discovers that a violation of a human rights or environmental obligation has already occurred or is imminent (§ 7 para. 1 LkSG). As a last resort, this can mean that companies are required to consider a temporary termination of their business relationships with direct suppliers that violate the listed prohibitions (§ 7 para. 2 no. 3, para. 3 LkSG).

Concerning suppliers other than direct ones, i.e. indirect suppliers, companies are only required to act in case of actual indications suggesting a violation of a human rights or an environmental obligation (§ 9 para. 3 LkSG). According to the German government, for example, a published report about human rights violations in a certain region can constitute such an actual indication.[11] If there are actual indications

8 For a more comprehensive analysis of the covered prohibitions see *Schönfelder*, in: Garbosch (ed.), pp. 75–117.
9 *Ehmann/Berg,* GWR 2021/15, p. 288.
10 Government's statement (fn. 7), p. 44.
11 Government's statement (fn. 7), p. 50.

concerning any supplier, this supplier has to be treated like a direct supplier (cf. § 9 para. 3 LkSG).[12]

Additionally, companies have to establish a complaints procedure (§ 8 para. 1 LkSG). The complaints procedure must extend to all suppliers along the supply chain (§ 9 para. 1 LkSG).

The fulfilment of all due diligence obligations must be documented (§ 10 para. 1 LkSG), and an additional annual report must be prepared (§ 10 para. 2 LkSG). While the annual report is to be published on the company's website (§ 10 para. 2 sentence 1 LkSG), the individual documentation must only be disclosed to public authorities on request (§ 17 para. 2 no. 2 LkSG).[13]

Finally, the LkSG also encompasses different sanctions. Companies may face fines amounting to up to 2% of their global average annual turnover (§ 24 para. 3 LkSG) and, in addition to that, an exclusion from public procurement for up to three years (§ 22 para. 1 LkSG) in case of non-fulfilment of their obligations. However, the LkSG explicitly creates no additional civil liability (§ 3 para. 3 LkSG).[14]

C. The German Supply Chain Due Diligence Act's compatibility with WTO obligations

From a WTO law's perspective, supply chain due diligence obligations may conflict with WTO obligations, especially with regard to trade in goods, the non-discrimination principle enshrined in the most favoured nation obligation (Art. I GATT) and the national treatment obligation (Art. III GATT). The following analysis will scrutinize whether supply chain due diligence laws may qualify as a trade distorting practice under WTO law and, if so, whether they can be justified under the general exceptions clause (Art. XX GATT) (II). Some general considerations will precede this more detailed analysis (I) and some remarks will also be made regarding trade in services (III.).

I. General considerations

Before proceeding to discuss specific WTO obligations in more detail, three general considerations shall be outlined.

First, cross-sector due diligence laws, such as the German Supply Chain Due Diligence Act, do not apply to a specific product or product group, but rather to all goods and services, and their respective value chains in the production process. Although some steps of this process take place entirely outside of the territory of the regulating state, a German company is still required to adhere to its due diligence obligations. If there is a link to the German market, GATT obligations become rele-

12 *Ehmann/Berg,* GWR 2021/15, p. 290.
13 See *Ehmann/Berg,* GWR 2021/15, p. 290.
14 See on further considerations for its relevance in foreign proceedings, *Ehmann/Berg,* GWR 2021/15, p. 291.

vant as the due diligence obligation might have implications for the importation of a certain product, even if it is only as component part of another final product.

Second, due to its broad scope of application along the value chain, with regard to the most favoured nation treatment and the national treatment obligations, what is a "like" product will need to be determined specifically for each and every product (or service). Yet, since the Act does not define any product characteristics for specific products, but due diligence obligations rather require companies to consider the production circumstances of each product, the focus will have to be on process and production methods (PPMs).[15] In the case of PPMs, a distinction is regularly made based on whether the PPMs have an impact on the physical properties of a product or not.[16] While generally human rights standards have no bearing on physical properties, a differentiated examination is required with regard to environmental standards. While certain environmental standards can have an impact on the properties of a product, such as pesticide residues in agricultural products,[17] this is not the case with regard to other environmental obligations relating to carbon emissions, for example, because low-carbon production methods, similar to fishing methods for fish and seafood,[18] generally do not affect the properties of the end product. Therefore, PPMs will require a case-by-case determination.

Third, as a matter of law, cross-sector due diligence obligations do not directly discriminate against products from other WTO members, as they apply irrespective of the origin of a component, and are thus not country-specific. Rather, a detrimental effect could arise from domestic companies avoiding certain manufacturing and production locations as a result of the requirements laid down in the Due Diligence Act. This may happen because a company considers that it is difficult to meet the due diligence obligations with regard to products from certain origins. These effects are indirect in nature, as they do not arise from the law itself, but from decisions made by companies subject to the Act. Since the WTO agreements stipulate state obligations and only a state measure can be the subject of WTO dispute settlement proceedings,[19] the question arises whether the due diligence obligations imposed by the Act are relevant to Germany's obligations under WTO law. Yet, while the detrimental behaviour of covered companies is not directly attributable to the state,[20] WTO law is concerned with regulatory measures of states affecting the conditions

15 *Porterfield*, U. PA. J. INT'L L2019/1, pp. 1–41; *Strauss*, U. PA. J. INT'L L1998/3, pp. 769–821; *Charnovitz,* Am. Univ. Int. Law Rev , 1994/3, pp. 778 f.; *Howse/Regan*, EJIL 2000/2, pp. 249–289 (fn. 26); *Jackson*, EJIL 2000/2, pp. 303–307.

16 *Van den Bossche/Zdouc*, pp. 317–318.

17 Appellate Body, *EC – Measures Affecting Asbestos and Products Containing Asbestos* (Canada vs. EC), WT/DS135/AB/R, 5 April 2001, para. 168.

18 Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (Malaysia vs. US), WT/DS58/AB/R, 6 November 1998.

19 See Art. 3.3 of the Dispute Settlement Understanding.

20 See, with regard to attribution under Articles 5 and 8 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, *Zedalis*, J. Int. Econ. Law 2007/2, pp. 350-XY.

of competition between like products.[21] In the context of Art. III:4 GATT, it has therefore been confirmed that a sufficient *nexus* between the behaviour of a third party and the state measure also exists when the measure obliges a company to behave in a certain way or where a disadvantage accrues to a company if it fails to comply.[22] The panel in *Canada-Autos* stated that

> Article III:4 applies not only to mandatory measures but also to conditions that an enterprise accepts in order to receive an advantage, including in cases where the advantage is in the form of a benefit with respect to the conditions of importation of a product.[23]

In fact, if a state measure provides a (positive or negative) incentive for action, there is sufficient connection to the state measure:[24]

> [W]here private actors are induced or encouraged to take certain decisions because of the incentives created by a measure, those decisions are not 'independent' of that measure.[25]

By imposing due diligence obligations, and negative consequences (including sanctions) in cases of non-fulfilment, the German Supply Chain Due Diligence Act may alter the conditions of competition. In situations where violations of human rights and environmental obligations are imminent, the Act's due diligence obligations require companies to be aware of the respective situation, to take remedial action, and to expect adverse consequences if they contribute to such violations. As a result, the

21 Panel, *Canada – Certain Measures Affecting the Automotive Industry* (Japan vs. Canada), WT/DS139/R, WT/DS142/R, 19 June 2000, para. 10.78: "[…] since a fundamental objective of Article III is the protection of expectations on the competitive relationship between imported and domestic products, a measure can be found to be inconsistent with Article III:4 because of its potential discriminatory impact on imported products." With reference to Panel, *United States – Section 337 of the Tariff Act of 1930 and Amendments thereto (*European Communities v. United States of America), WT/DS186/R, 12 January 2000, paras. 5.11 and 5.13.

22 The Panel formulated: "(i) obligations which an enterprise is 'legally bound to carry out'; (ii) those which an enterprise voluntarily accepts in order to obtain an advantage from the government"; ibid., Rn. 10.73; *Bohanes/Sandford*, The (Untapped) Potential of WTO Rules to Discipline Private Trade-Restrictive Conduct, SIEL Working Paper 2008/56, paras 74-81.

23 Ibid., para. 10.73.

24 *Partiti/van der Velde*, J. World Trade 2017/6, under IV.A.; see also Appellate Body, *United States – Certain Country of Origin Labelling (COOL) Requirements* (Canada vs. US), WT/DS384/AB/WT/DS386/AB/R, 23 July 2012, para. 291; see further GATT-Panel, *Japan – Trade in Semiconductors* (EC vs. Japan), L/6309-35S/116, 4 May 1988, para. 109; see also Appellate Body, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (US vs. Republic of Korea), WT/DS161/AB/R, 10 January 2001, para. 146.

25 Appellate Body, *United States – Certain Country of Origin Labelling (COOL) Requirements* (Canada vs. US), WT/DS384/AB/R, WT/DS386/AB/R, 23 July 2012, para. 291; based on this, the Appellate Body concluded that: "[…] the COOL measure modifies the conditions of competition in the US market to the detriment of imported livestock by creating an incentive in favour of processing exclusively domestic livestock and a disincentive against handling imported livestock.", para. 292.

conditions of competition for foreign goods produced in locations with unsafe human rights and environmental standards are thereby affected, rendering the Act suitable to feature in a WTO dispute.

II. Trade in Goods

1. Potential conflict with GATT obligations

Turning to the GATT,[26] the central provisions are, on the one hand, the prohibition of import restrictions under Art. XI GATT, and, on the other, the obligations of non-discrimination with respect to like foreign goods (Art. I GATT) and between like domestic and foreign goods (Art. III GATT).

a) Import restriction vs. non-discrimination

The prohibition of import restrictions in Art. XI GATT has, in principle, a broad scope of application.[27] However, under the Act, companies' due diligence obligations would have no direct bearing on the import of goods from third countries.[28] Products do not have to fulfil any conditions either, and therefore no indirect restriction could be assumed.[29] Rather, all goods in the supply chain can continue to be imported unrestrictedly. Even though the relationship between Art. III and Art. XI has always been controversial, and, in this context, it has been suggested that production and manufacturing methods not affecting the physical characteristics should in principle be covered by Art. XI GATT,[30] there is no textual evidence or current case law to support this view.[31] Since no de facto import restrictions for

26 The Agreement on the Application of Sanitary and Phytosanitary Measures and the Technical Barriers to Trade Agreement are not applicable. Due diligence obligations are neither sanitary nor phytosanitary measures nor are they technical standards that must be observed upon importation.

27 See for the prerequisites Panel, *European Union and its Member States – Certain Measures Relating to the Energy Sector* (Russia vs. EU), WT/DS476/R, 10 August 2018, para. 7.243. See also Appellate Body, *Argentina – Measures Affecting the Importation of Goods* (EU, US and Japan vs. Argentina), WT/DS438/444/445, 26 January 2015, para. 5.216–5.218.

28 As e.g. in *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* (fn. 18), para. 7.17 and 8.1.; GATT-Panel, *EEC* – Program *of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables* (US vs. EEC), L/4687, 18 October 1978, para. 4.14; GATT-Panel, *Japan – Restrictions on Imports of Certain Agricultural Products* (US vs. Japan), L/6253, 2 March 1988, para. 5.2.2.2; Panel, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (US vs. India), WT/DS90/R, 22 September 1999, para. 5.130.

29 See e.g. in *India – Measures Affecting the Automotive Sector*, paras. 7.269–7.270.

30 See GATT-Panel, *United States – Restrictions on Import of Tuna* (Mexico vs. US), 3 September 1991; See also *Marceau/Trachtmann*, J. World Trade 2014/2, pp. 351–432.

31 See *Van den Bossche/Shrijver/Faber*, Unilateral Measures Addressing Non-Trade Concerns, 2007, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1021946 (16/3/2022), p. 86.

certain products or product groups result from the Due Diligence Act, nor other direct restrictive effects on the import process itself,[32] Art. XI GATT is not applicable.[33]

A mandatory due diligence act, such as the German Act, might rather pose challenges with regard to the prohibition of discrimination according to Art. I:1 and Art. III:4 GATT, as both provisions, in essence,[34] protect "the competitive opportunities" and the "commercial relationship between products of different origins".

b) Like products

Non-discrimination obligations require equal treatment of like products. Despite the importance of the concept of "like product" in all trade in goods, it is not defined anywhere in the WTO Agreements, and its interpretation varies depending on the context.[35] However, with regard to determining likeness, the standard in Art. I:1 GATT and III:4 is rather similar.[36] Factors that are considered decisive are the product's end-uses, the habits and tastes of consumers, the properties, characteristics and quality of a product.[37] Much controversy exists concerning whether PPMs should be considered when assessing likeness. As mentioned above, distinction is generally made between PPMs that affect the physical characteristics of a product and those that do not.[38] Only with respect to the former manufacturing methods is it said that they are to lead to "unlike" products, while in the latter case, according especially to

32 See also Appellate Body, *China – Measures Related to the Exportation of Various Raw Materials* (EC vs. China), WT/DS395/AB/R, 22 February 2012, paras. 319–320.

33 Rejecting also Panel, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather* (EC vs. Argentina), WT/DS155/R, 16 February 2001, para. 11.17; a different assessment does not arise with regard to GATT-Panels, see e.g. *Japan – Trade in Semiconductors* (EC vs. Japan), L/6309-35S/116, 4 May 1988, paras. 106-118, as here the state measures had a direct impact on the export itself and therefore cannot be compared to the present case.

34 The provisions have a slightly different perspective: while Art. I:1 GATT requires that advantages are immediately and unconditionally extended to like products; Art. III:4 requires that no less favourable treatment is accorded. Yet, at the heart of both provisions lays the principle of non-discrimination for like products.

35 Appellate Body, *Japan – Taxes on Alcoholic Beverages* (EC vs. Japan), WT/DS8/AB/R, 1 November 1996, para. 114.

36 See for the particular criteria for Art. III:4 GATT, Appellate Body, *EC – Measures Affecting Asbestos and Products Containing Asbestos* (Canada vs. EC), WT/DS135/AB/R, 5 April 2001, para. 103.

37 Report by the Working Party on Border Tax Adjustments, L/3463, 30 November 1970, para. 18.

38 So-called product related PPMs (PR PPMs) and non-product related PPMs (nPR PPMs), *Van den Bossche/Shrijver/Faber,* Unilateral Measures Addressing Non-Trade Concerns (2007), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1021946 (16/3/2022), p. 86.

WTO case law, the products are generally assumed to be like, in which case the non-discrimination obligation applies.[39]

c) Opportunities in competition

But does the regulation provide an advantage to certain products and a disadvantage for others? For both provisions, the relevant test is whether a governmental regulation affects the equality of competitive opportunities between like products.[40] In this context, an advantage may arise in all stages that affect the "sale, distribution and use of the products" between foreign products (Art. I:1) or between foreign and domestic products (Art. III:4).[41] Even formally equal treatment can entail a disadvantage if it means significant additional burden for the like product.[42] To establish the disadvantage or less favourable treatment, a complaining WTO member is not required to actually prove the adverse effect. Rather, it is sufficient and decisive that the state measure, by its architecture, structure and design, is likely to result in a disadvantageous position.[43]

While, as it has already been observed, the governmental measure under consideration is the imposition of due diligence obligations on companies, the point of assessment here is the detrimental effect on competitive opportunities for like products. Although the German Supply Chain Due Diligence Act is drafted in an origin-neutral manner, it is possible that some regions will be more heavily and adversely affected by this type of regulation than others. For example, it will be much easier for companies to prove that they have carried out their due diligence obligations in

39 See on the various constellations and the ensuing jurisprudence also the Analytical Index of Art. I and III GATT, available at: https://www.wto.org/english/res_e/publications_e/ai17_e/ai17_e.htm (16/3/2022); also, *Van den Bossche/Zdouc*, pp. 317–318.

40 Appellate Body, *EC – Measures Prohibiting the Importation and Marketing of Seal Products* (EC vs. Norway), WT/DS401/AB/R, 18 June 2013, para. 5.95: The Appellate Body confirmed the Panels' conclusions that "[…] 'in terms of its design, structure, and expected operation', the measure at issue detrimentally affects the conditions of competition for Canadian and Norwegian seal products as compared to seal products originating in Greenland." See also Panel, *Measures Prohibiting the Importation and Marketing of Seal Products* (EC vs. Canada), WT/DS400/R, 18 June 2014, para. 7.597.

41 See *Van den Bossche/Shrijver/Faber,* p. 21.

42 Panel, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes* (Honduras vs. Dominican Republic), WT/DS302/R, 19 May 2005, para. 7.197: "The Panel notes that, in this case, the differences in the conditions between imported and domestic products mean that the Dominican Republic should not apply the tax stamp requirement in a formally identical manner that does not take those differences into account, since this would, in practice, accord less favourable treatment to imported products. On the contrary, the Dominican Republic could have chosen to apply the requirement in a different manner to imported products, to ensure that the treatment accorded to them is *de facto* not less favourable." [Emphasis in the original].

43 Appellate Body, *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (Indonesia vs. US), WT/DS406/AB/R, 24 April 2012; Panel, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (Mexico vs. US), WT/DS381/R, 13 June 2012, para. 371; see for this also *Bäumler*, J. Int. Econ. Law 2018/4, p. 813.

relation to some countries, or to refer to domestic alternatives, than in relation to others, where the legal situation is more opaque and the verification of standards may pose greater challenges. It might also be true simply for more distant countries, for which regular surveillance might be more difficult. In addition, companies will often rely on reports from third parties, such as NGOs or companies specializing in a particular area, and, thus, whether verification of observance of human rights and environmental standards by such certification bodies exists, is also likely to be important. This could lead to considerable disadvantages for those states in which it is difficult to verify compliance with environmental and human rights standards, or where such third parties are not active, for example because conditions do not play a significant role for a sufficient number of companies.[44] As a result, companies may avoid these states as sourcing locations for their components, and manufacturing locations for their production processes. This would give an advantage to countries where human rights and environmental standards are comparable to those existing in Europe, and where this can be easily verified, or sufficient certification is available. It must therefore be assumed that there will be an indirect de facto discrimination against products from countries that companies avoid due to the Due Diligence Act, because of the different legal situations in terms of human rights and environmental law, and possible implementation deficits.

d) Nexus with the domestic market

It could be questioned whether a sufficient nexus with the domestic market exists regarding parts or components that are bought somewhere and then assembled elsewhere. With regard to Art. I:1 GATT, established jurisprudence interprets "rules and formalities in connection with importation" "to encompass a wide range of measures".[45] These are not only measures directly related to importation, but also measures that have an "impact on actual importation."[46] Thus, certain goods that constitute components in a value chain and that might be imported at a later stage after being assembled into another product are also covered by the obligations relating to importation. In light of the understanding that Art. I:1 GATT protects competitive opportunities, a disadvantage might also arise in regard to goods that are only imported once they are assembled and form part of a new product.

The same considerations apply to Art. III:4 GATT, which similarly protects the competitive opportunities between domestic and foreign like products, and captures

44 Mexico made a similar argument in *US – Tuna II*, in which it accused the United States of putting pressure on all states to conform to U.S. legal standards, see Panel, *US – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (Mexico vs. US), WT/DS381/R, 13 June 2012, paras. 53–55.

45 Panel, *US – Certain Measures Affecting Imports of Poultry from China* (China vs. US), WT/DS392/R, 29 September 2010, para. 7.407, referring to *US – MFN Footwear* para. 6.8; Panel Report, *US – Certain EC Products*, para. 6.54 and Appellate Body Report, *EC – Bananas III*, para. 206 respectively.

46 Panel, *US – Certain Measures affecting imports of Poultry from China*, WT/DS392/R, 29 September 2010, para. 7.410.

regulations that affect the internal sale, distribution or use of the product. When certain regulations lead to less favourable treatment for foreign like products, even if concerning only component parts that can be sourced either domestically or from third states to be used in production processes in a third country, this is still covered by Art. III: 4 GATT.

2. Justification?

While arguably a mandatory due diligence act, such as the German LkSG, may conflict with Art. I:1 and/or Art. III:4 GATT, its justification with regard to human rights and environmental considerations is equally possible. First, the extraterritorial effect of a mandatory due diligence act does not prevent the invocation of the Art. XX GATT general exceptions (a). Second, justification grounds exist, i.e. human rights and environmental due diligence obligations fall within the protective ambit of Art. XX, and can be taken separately, but, as a more recent approach indicates, also cumulatively (b). Third, the conditions of the chapeau are met if the Due Diligence Act is applied in a non-discriminatory and non-protectionist manner (c).

a) Extraterritoriality

Regarding the first aspect, extraterritorial rules can be defined as those that regulate persons, property or facts outside a state's own territory.[47] They are characterized by the fact that they aim to influence the behaviour of actors outside the territory.[48] While jurisdiction must in principle be limited to a state's territory, extraterritorial effects may be permissible, broadly speaking, where there is sufficient connection with an issue occurring outside the territory for it to be regulated.[49] This can also be the case where a process taking place outside the territory has significant effects within a state's own territory.[50] In relation to due diligence acts, the relevant regulations are concerned with domestic companies, which constitute the scope of application and the connecting point to the jurisdiction of the regulating state. Where imports into the home market are concerned, the measures similarly provide for a clear nexus with regard to the power to regulate the domestic market.[51] Nevertheless, it cannot be denied that such measures may have an impact on other states, es-

47 In the context of economic measures, see *Ankersmit/Lawrence/Davies*, Minnesota Journal of International Law Online 2012, p. 23.
48 In the context of economic measures, ibid., p. 24.
49 See on this issue fundamentally *Shaw*, pp. 499–505 and for the WTO context *Cooreman*, ILCQ 2016/65, pp. 229–248; *Bartels*, J. World Trade 2002/2, pp. 353–403.
50 The Appellate Body found that effects on the domestic market were sufficient as a connecting factor, Panel, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (Mexico vs. US), WT/DS381/R, 13 June 2012, para. 7.426 and Appellate Body, para. 337.
51 *Sifonios/Ziegler*, JIEL 2020, p. 125.

pecially if the regulating state has considerable market power, such as Germany or the collective power of the member states of the EU.[52]

While in GATT times, panels were rather opposed to the possibility of justifying regulations with extraterritorial effects under Art. XX GATT, this view changed fundamentally with the Dolphin-Tuna II case law.[53] Although the Appellate Body has so far avoided formulating the basic parameters for regulations that have extraterritorial effects to be compliant with WTO law, it has in any case concluded that if there is sufficient connection with the regulating state – as in the specific case of protected migratory species, such as turtles, a regulation is not prohibited per se.[54]

This case law has now been consolidated. The possibility to adopt measures with extraterritorial effects is grounded on the open wording of the different alternatives under Art. XX, especially since it is expressly recognized in some of the grounds of justifications that some extraterritorial effects may be admissible.[55] As a rule, measures for protected goods that are accompanied by trade restrictions might generally create extraterritorial effects and can in principle be justified under Art. XX GATT. In this context, it must also be considered whether a state enacts a regulation primarily in its own national interest, namely whether the measure is directed inward, or whether it regulates issues that are fundamentally linked to aspects outside its own territory, e.g. when it is a matter of protecting the human rights of persons and environmental conditions abroad.[56] As the German Supply Chain Due Diligence Act addresses German companies there is generally a sufficient nexus to the regulatory competence of Germany.

b) Separate and cumulative justification grounds

(1) Protection of human rights

The Supply Chain Due Diligence Act aims at improving the human rights situation along the value chain. Given the "clear connection" between internationally pro-

52 See *Ankersmit/Lawrence/Davies*, Minnesota Journal of International Law Online 2012, p. 24.

53 Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, (fn. 18), para. 129; see also *Howse,* Columbia J. Environ. Law 2002/2, pp. 489–519.

54 "We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)"; *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, (fn. 18), para. 133; explicitly left open also in *EC – Seal Products:* "while recognizing the systemic importance of the question of whether there is an implied jurisdictional limitation in Article XX(a), and, if so, the nature or extent of that limitation, we have decided in this case not to examine this question further."; *EC – Measures Prohibiting the Importation and Marketing of Seal Products*, (fn. 40); Panel, para. 5.173.

55 In particular, Art. XX lit. e, which refers to goods from penal institutions and allows WTO Members to prohibit the importation of such goods.

56 *Charnovitz* labels this as inward-looking und outward-looking, YJIL 2002/1, p. 695.

tected human rights and Art. XX GATT,[57] there seem to be two alternatives for measures aimed at the protection of human rights to be justified under this provision. The first is to view them as aiming at the protection of life and health of persons whose rights are violated or threatened to be violated in the supply chain (Art. XX lit. b GATT). The second option is to consider them as aiming at the protection of the public morals of the population in the country where the companies are based and the products are imported (Art. XX lit. a GATT).

Regarding Art. XX lit. b GATT, its wording does not refer to human rights in general, but to the protection of "human […] life or health" rendering the justification of the protection of human rights other than those protecting the life and health of people difficult. This might especially relate to civil and political rights that may not have a direct bearing on the life and health conditions of individuals.[58] Furthermore, although the text of Art. XX lit. b GATT is not limited to the protection of a country's own population, it could still be questioned whether this provides a sufficient nexus for protecting human rights abroad.[59] Traditionally, Art. XX lit b GATT has rather been invoked to justify measures to protect the health of a WTO members' own population.[60] The rationale of the Shrimp – Turtle decision, which accepted a connection between the protection of exhaustible resources and US regulatory jurisdiction, particularly with regard to migratory turtles, on the ground that effective protection of such species moving freely in the world's oceans (and through American waters) would not be possible, if no state were allowed to take measures, would not seem to be applicable when it comes to the protection of human rights abroad, given that the affected persons fall under the sovereignty of their respective home state. Whether the unwillingness or inability of a government to efficiently protect the life and health of its own people merits protection by third states has not yet been established in WTO case law. Yet, state parties to human rights conventions are also under an obligation to protect persons from violations committed by third parties, and this applies particularly with regard to domestic companies operating globally through their supply chains.[61] Whether panels or the

57 *Bartels*, J. World Trade 2002/2, p. 353; see also the discussion in *Harris/Moon*, Melbourne Journal of International Law 2015/2, pp. 432–483.

58 This may exclude justification of obligations relating e.g. the Convention No. 87 of the International Labour Organization of 9 July 1948 concerning to Freedom of Association and Protection of the Right to Organise; Convention No. 98 of the International Labour Organization of 1 July 1949 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively; Convention No. 100 of the International Labour Organization of 29 June 1951 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value or parts of the International Covenant of 19 December 1966 on Civil and Political Rights, (as those human rights referred to in the Annex to § 2 para. 1, § 7 para. 3 sentence 2 LkSG Nos. 3, 4, 5 and 10).

59 *Bartels*, J. World Trade 2002/2, p. 357; *Harris/Moon*, Melbourne Journal of International Law 2015/2, p. 465.

60 See e.g. Panel, *Brazil – Measures Affecting Imports of Retreaded Tyres* (EC vs. Brazil), WT/DS332/R, 12 June 2007, paras. 4.6–4.7.

61 See *Zimmermann/Weiß*, AVR 2020/4, pp. 427–428, as well as *Klinger/Krajewski/Krebs/Hartmann*, pp. 16 17.

Appellate Body, if ever functioning again, would accept an argument that the protection is in fulfilment of a state party's own human rights obligation regarding human life and health abroad and its necessity is an open question.[62]

Contrary to that, justification under Art. XX lit a GATT would not face the same obstacles as it protects interests of a state's own population.[63] In this respect, the decisions of the panel and the Appellate Body in the EC-Seals case are seminal. Whilst Art. XX lit. a GATT played hardly any role for a long time, the EU[64] invoked this justification in those proceedings on the grounds that the moral conception of the European population was opposed to the sale of seal products.[65] The EU had argued that the EU public should be protected from participating (as consumers) in maintaining the market for seal products derived from "inhumane hunts".[66] The panel limited itself to examining "whether the public concerns on seal welfare are anchored in the morality of European societies."[67] Based on the reasoning put forward by the EU, the Panel found that animal welfare is a moral or ethical concern of the EU public.[68] The protection of the moral values of the population, once proven to be one of the main purposes of a measure,[69] is a legitimate justification, as explicitly stated in Art. XX lit. a GATT.[70] The Appellate Body also reiterated that members should have some discretion in formulating and assessing their own moral standards.[71]

Against this background, if a dispute were to be brought before the WTO Dispute Settlement Body over a Due Diligence Act, it would be crucial for e.g. Germany to first demonstrate that the Act actually addresses moral concerns of its population with regard to the observance of human rights in the supply chain, and, second, that it was also enacted for this purpose.[72] Additionally, regarding the necessity of the respective measure, Germany would have to prove that the Act – in

62 See on this point also *Smith*, IJLC 2105/2, pp. 148–149.
63 *Bartels*, J. World Trade 2002/2, pp. 355–57; *Harris/Moon*, Melbourne Journal of International Law 2015/2, pp. 464–465.
64 Still EC at the time of the pendency of the litigation.
65 Appellate Body, *EC – Measures Prohibiting the Importation and Marketing of Seal Products,* (fn. 40), para. 5.3.2.
66 Panel, *EC – Measures Prohibiting the Importation and Marketing of Seal Products,* (fn. 40), para. 7.410.
67 Ibid., para. 7.404.
68 The evidence "as a whole sufficiently demonstrates that animal welfare is an issue of ethical or moral nature in the European Union", Panel, *EC – Measures Prohibiting the Importation and Marketing of Seal Products* (EC vs. Canada), WT/DS400/AB/R, 16 June 2014, para. 7.409.
69 Ibid., paras. 7.401–7.402.
70 Ibid., para. 7.41.
71 Ibid., paras. 5.199–5.200, referring to Appellate Body, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (Antigua and Barbuda vs. US), WT/DS285/AB/R, 20 April 2005, para. 6.461 (referring to Appellate Body, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef,* (fn. 24), para. 176; and Appellate Body, *EC – Measures Affecting Asbestos and Products Containing Asbestos* (Canada vs. EC), WT/DS135/AB/R, 5 April 2001, para. 168, as well as ibid., para. 8.170.
72 *L. Smit et al.*, European Commission Study on due diligence requirements through the supply chain – Final Report, 2020, p. 89, available at: https://op.europa.eu/o/opportal-ser

quantitative or qualitative terms[73] – makes a substantial contribution to the achievement of the objective.[74] This process must also include a consideration of the legal interest to be protected and the material constraints placed on international trade:

> [i]t is on the basis of this 'weighing and balancing' and comparison of measures, taking into account the interests or values at stake, that a panel determines whether a measure is 'necessary' or, alternatively, whether another WTO-consistent measure is 'reasonably available'.[75]

In this "weighing and balancing process", considerable importance is likely to be attached to the protection of the moral concerns of the population to which the product is imported. These pertain to production under ethically acceptable conditions. This should apply all the more to universally recognized human rights that must have been complied with regarding goods that are allowed to be sold on the market.

(2) Environmental protection

The considerations in the context of environmental protection would follow the same process in examining whether the measure is justified under Art. XX lit b GATT relating to the protection of the life or health of humans, animals or plants, or Art. XX lit g GATT, concerning measures relating to the conservation of exhaustible natural resources. In case the environmental protection measure serves to protect the country's own human, animal or plant life or health under Art. XX lit b, i.e. if it is directed inward, questions about the permissibility of extraterritorial effects arise in a less sharp form.[76] Environmental protection measures can also be directed outward, provided there is still a sufficient connection with the state's regulatory sovereignty. This is likely to be the case in particular for the protection of global environmental goods, such as the climate or atmosphere, especially if the protection maps onto obligations stemming from international agreements.[77]

The situation with regard to Art. XX lit g, concerning the protection of exhaustible natural resources, is likely to be similar since the inherently global dimension of loss of natural resources, species and biodiversity provides a basis for all states to take measures to protect these exhaustible natural resources, even if the re-

vice/download-handler?identifier=8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1&format=pdf&language=en&productionSystem=cellar&part=. (16/3/2022).

73 Appellate Body, *Brazil – Measures Affecting Imports of Retreated Tyres* (EC vs. Brazil), WT/DS332/AB/R, 17 December 2007, para. 146.

74 "Material or significant contribution", Appellate Body, *EC – Measures Prohibiting the Importation and Marketing of Seal Products,* (fn. 40), para. 5.208.

75 Appellate Body, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (Antigua and Barbuda vs. US), WT/DS285/AB/R, 20. April 2005, para 307 (refers to Appellate Body, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (US vs. Republic of Korea), WT/DS161/AB/R, 10 January 2001, para. 166.

76 *Howse*, Columbia J. Environ. Law 2002/2, pp. 489–519.

77 See, with regard to the climate, *Boysen*, AVR 2012/4, p. 385; *Biermann*, AVR 1996, pp. 426–481.

spective animal or plant species is not located in the territory of the regulating state.[78] In any case, conversely, a state cannot be required to permit the sale of products that run counter to the protection of exhaustible natural resources, given that the state would contribute to biodiversity reduction if it is not allowed to prohibit certain production methods.

In applying these general considerations to the German Supply Chain Due Diligence Act, the Act's approach in the protection against environmental harm is limited. While § 2 para. 2 No. 10 LkSG protects the environment only when it serves as livelihood for humans, falling within the ambit of Art. XX lit. b GATT, other environmental obligations relate to mercury, chemicals and waste only. However, similarly, those environmental obligations also serve to protect human, animal or plant life or health in terms of Art. XX lit. b GATT in producing as well as in importing countries. The Persistent Organic Pollutants (POPs) Convention, for example, aims at reducing the harm impact of persistent organic pollutants that are resistant to biodegradation and cause harm to human, animals or plants (Art. 1 POPs Convention).[79] Similarly, the Basel Convention is concerned with hazardous wastes and aims at protecting human health and the environment.[80] Due diligence obligations that aim at enforcing those obligation therefore serve the protection of human, animal and plant life and health.

(3) A cumulative "sustainability" argument

As a final note, a novel approach in justifying measures under Art. XX GATT can be identified in the recent arguments by the EU in the *EU – Biofuels* case. In *Biofuels*, the EU discussed "how closely knitted is the fabric of the Article XX exceptions" and argued that a measure can be "jointly held" by the three pillars of Art. XX lit a, b, and g, adopting a cumulative approach serving the common cause of sustainability.[81] The EU did not distinguish clearly between the three different alternatives of Art. XX GATT, but argued instead in light of the intent of the regulator:

> The European Union relies concurrently on Article XX(a), (b) and (g) in the present proceedings. This means that the three values-based and science-based objectives are intertwined and for our composite defence to fail it would mean

78 Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* (fn. 18), para. 133; cf. *Gómez-Altamirano*, in: Baetens/Caiado, pp. 81–83; *Bartels*, EJIL 2012/2, pp. 449–450.

79 *United Nations Environment Programme (UNEP)*, Stockholm Convention on persistent organic pollutants (POPS), 22 May 2001, 2256 UNTC 119, 17 May 2004.

80 *United Nations Environment Programme (UNEP)*, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 22 March 1989, 1673 UNTC 57, 5 May 1992. Recital 2, Basel Convention.

81 WTO, *EU and Certain Member States – Certain Measures concerning Palm Oil and Oil Palm Crop-Based Biofuels* (Malaysia vs. EU/France/ Lithuania), WT/DS600, First Written Submission by the EU, 30 November 2021, paras. 1259–1262, 1328.

that the three justifications should fail altogether. For the reasons described in detail in this submission, this should not happen.[82]

The same line of argument could eventually be pursued in a potential case about the Supply Chain Due Diligence Act, in which the respondent might argue that the objectives of Art. XX lit a, b and g GATT taken together justify the regulation aiming at sustainable products on the domestic market. The EU in *Biofuels* argued that this would not mean a departure from existing case law, but rather a consequential development of existing jurisprudence in light of climate change and the interlinked effects with the threat to human, animal and plant life addressed and moral concerns that require protection from those threats.[83] In fact, studies increasingly reveal the close connection between human rights, a healthy environment and sustainable development.[84] This is in line with the preamble of the Marrakech Agreement referring to sustainable development, and its importance has been emphasized in WTO cases.[85] That argument might, however, be more convincing with regard to those due diligence acts that follow a more comprehensive human rights and environmental approach, as is the case with regard to the European Commission's proposal for a Directive on Corporate Sustainability Due Diligence.

(4) Chapeau

In addition, the chapeau of Art. XX GATT generally requires all measures not to be applied in such a way as to result in arbitrary and unjustifiable discrimination between countries where like conditions prevail, or in a manner to constitute a disguised restriction on international trade. The chapeau protects WTO members from discrimination even in the case of measures that in principle fall under one of the exceptions and is an expression of the prohibition of abuse of rights.[86] Due diligence acts must, therefore, ensure that they apply equally to goods from all WTO members and stipulate due diligence obligations in relation to domestic markets. That is the case with regard to the German Due Diligence Act that does not distinguish due diligence obligations with regard to specific sectors or different origins. Therefore, it appears unlikely that an argument that the Due Diligence Act has been implemented in a "protectionist manner" will prevail.

82 Ibid., paras. 1320–1330.
83 Ibid., paras. 1334–1341.
84 *ESC*, Human rights and the environment: final report: corrigendum/prepared by Fatma Zohra Ksentini, Special Rapporteur, UN DocE/CN.4/Sub.2/1994/9, 13 September 1994,, para. 49; *Boyd/Knox/Limon*, The time is now – The case for universal recognition of the right to a safe, clean, healthy and sustainable environment, available at: https://www.universal-rights.org/urg-policy-reports/the-time-is-now-the-case-for-universal-recognition-of-the-right-to-a-safe-clean-healthy-and-sustainable-environment/ (21/3/2022).
85 For a more detailed analysis and reference to cases see *Lydgate,* WTR 2012/11, pp. 623–626.
86 Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, paras. 138–139.

III. Trade in Services

1. GATS obligations

The GATS follows a fundamentally different structure of obligations from the GATT. Only MFN treatment is a general obligation that applies to all members – with the exception of such listed applications – vis-à-vis services and service suppliers from all other members.[87] For market access issues, as well as national treatment, the content and scope of the obligations are derived from the specific schedule of concessions of the member.[88] Since a due diligence act can affect different service sectors and modes, a review of the individual services affected would be necessary. Should the WTO member have entered into obligations, however, it is conceivable that, similar to the area of trade in goods, a due diligence act would result in a violation of the non-discrimination (and market access obligations) due to the disadvantage created by its provisions for services from some countries in comparison to others.

2. Justification

Similar considerations are also pertinent with regard to the grounds for justification in case of a GATS violation, since the general exceptions clauses essentially run parallel under the GATT and the GATS. It should only be noted that Art. XIV lit. a GATS mentions "public order" in addition to public morals, although this might not offer any additional ground for justification beyond the protection of "public morals". The protection of life and health of humans and animals is similarly possible under the GATS.

D. Conclusion

This rather short and cursory analysis has shown that due diligence acts might be relevant to the WTO obligations of WTO members. However, even if found to be discriminatory with regard to altering the competitive relationship of like products due to incentives for companies to prefer products from origins with safe human rights and environmental standards, such acts might also be justifiable according to Art. XX GATT. Human rights and environmental protection, aiming at protecting human, animal or plant life or health, generally fall under the general exceptions clause. Moral arguments to protect domestic markets from products with unsustainable production processes might have also increasingly been brought forward by respondents, and accepted by panels and the Appellate Body in light of devastating environmental degradation and climate change. Additionally, a sustainability argument similar to the line of argumentation as pursued by the EU in the *Biofuels* case

87 See on the GATS, *Herdegen*, p. 265 ff.
88 See https://www.wto.org/english/tratop_e/serv_e/guide1_e.htm (16/3/2022).

might further diminish the strict contours between the different alternatives to serve all those justification grounds cumulatively and in pursuance of the common goal of sustainable development.

Bibliography

ANKERSMIT, LAURENS; LAWRENCE, JESSICA C.; DAVIES, GARETH, *Diverging EU and WTO perspectives on extraterritorial process regulation*, Minnesota Journal of International Economic Law Online, 2012, pp. 17–92

BAETENS, FREYA; CAIADO, JOSÉ, *Frontiers of international economic law: legal tools to confront interdisciplinary challenges*, 1st edition, Leiden, 2014

BARTELS, LORAND, *Article XX of the GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights*, Journal of World Trade, 2002, Vol. 36(2), pp. 353–403

BARTELS, LORAND, *The WTO Legality of the Application of the EU's Emission Trading System to Aviation,* The European Journal of International Law, 2012, Vol. 23(2), pp. 429–467

BÄUMLER, JELENA, *Implementing the No Harm Principle in International Economic Law: A Comparison Between Measure-Based Rules and Effect-Based Rules*, Journal of International Economic Law, 2018, Vol. 20(4), pp. 807–828

BIERMANN, FRANK, *'Common Concern of Humankind': The Emergence of a New Concept of International Environmental Law*, Archiv des Völkerrechts, 1996, Vol. 34, pp. 426–481

BOHANES, JAN; SANDFORD, IAN, *The (Untapped) Potential of WTO Rules to Discipline Private Trade-Restrictive Conduct*, 25.7.2008, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1166623 (15/3/2022)

BOYD, DAVID; KNOX, JOHN; LIMON, MARC, *The time is now – The case for universal recognition of the right to a safe, clean, healthy and sustainable environment, Universal Rights Group*, 2/2/2021, available at: https://www.universal-rights.org/urg-policy-reports/the-time-is-now-the-case-for-universal-recognition-of-the-right-to-a-safe-clean-healthy-and-sustainable-environment/ (21/3/2022)

BOYSEN, SIGRID, *Grundfragen des transnationalen Klimaschutzrechts, Archiv des Völkerrechts*, 2012, Vol. 40(4), pp. 377–419

BRABANT, STÈPHANE; MICHON, CHARLOTTE; SAVOUREY, ELSA, *The Vigilance Plan – Cornerstone of the Law on the Corporate Duty of Vigilance,* Revue Internationale de la Compliance et de l'éthique des affaires, 2017, Vol. 93, pp. 1–15

CHARNOVITZ, STEVE, *Environmental Trade Sanction and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices*, American University International Law Review, 1994, Vol. 9(3), pp. 751–807

CHARNOVITZ, STEVE, *The law of environmental PPMs in the WTO: debunking the myth of illegality*, Yale Journal of International Law, 2002, Vol. 27(1), pp. 59-110.

COOREMAN, BARBARA, *Addressing Environmental Concerns Through Trade: A Case for Extraterritoriality,* International and Comparative Law Quarterly, 2016, Vol. 65(1), pp. 229–248

EHMANN, ERIK; BERG, DANIEL F., *Das Lieferkettensorgfaltspflichtengesetz (LkSG): ein erster Überblick*, Gesellschafts- und Wirtschaftsrecht, 2021, Vol. 13, pp. 288–291

GARBOSCH, ROBERT, *Das neue Lieferkettensorgfaltspflichtengesetz*, Baden-Baden, 2021

GOMES-ALTAMIRANO, DANIELA, *The EU Emission Trading Scheme as Applied to Aviation: Extraterritorial Measure Justified under GATT Article XX*, in: Beatens, Freya; Caiado, Jose, Frontiers of International Economic Law: Legal Tools to Confront Interdisciplinary Challenges, Leiden, 2014, pp. 81–83

HARRIS, RACHEL; MOON, GILLIAN, *GATT Article XX and Human Rights: What Do We Know from the First 20 Years*?, Melbourne Journal of International Law, 2015, Vol. 16(2), pp. 432–483

HENN, ELISABETH V., *Rechtliche Pfade zum Schutz der Wälder jenseits der EU-Grenzen: Status Quo und Herausforderungen,* Zeitschrift für Umweltrecht, 2021, Vol. 7–8, pp. 413–422

HERDEGEN, MATTHIAS, *Principles of International Economic Law*, 2nd edition, Oxford, 2013

HOWSE, ROBERT; REGAN, DONALD H., *The Process and Product Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy*, European Journal of International Law, 2000, Vol. 11(2), pp. 249–289

HOWSE, ROBERT, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, Columbia Journal of Environment Law, 2002, Vol. 27(2), pp. 489–519

JACKSON, JOHN H., *Comment on Shrimp/Turtle and the Product/Process Distinction*, European Journal of International Law, 2000, Vol. 11(2), pp. 303–307

KLINGER, REMO; KRAJEWSKI, MARKUS; KREBS, DAVID; HARTMANN, CONSTANTIN, *Verankerung menschenrechtlicher Sorgfaltspflichten von Unternehmen im deutschen Recht*, Berlin, 2016

LYDGATE, EMILY BARRETT, *Sustainable development in the WTO: from mutual supportiveness to balancing*, World Trade Review, 2012, Vol. 11(4), pp. 621–639

MARCEAU, GABRIELLE; TRACHTMAN, JOEL P., *A Map of the World Trade Organization Law of Domestic Regulation of Goods: The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade,* Journal of World Trade, Vol. 48(2), 351–432

NASS, LAURA, *Devoir de vigilance, Die neue Sorgfaltspflicht zur Menschenrechtsverantwortung für Großunternehmen in Frankreich, ZEuP 2019, 774–802*

PARTITI, ENRICO; VAN DER FELDE, STEFFEN, *Curbing Supply-Chain Human Rights Violations Through Trade and Due Diligence. Possible WTO Concerns Raised by the EU Conflict Minerals Regulation*, Journal of World Trade, 2017, Vol. 51(6), pp. 1043–1068

PORTERFIELD. MATTEW, *Broder Adjustments for Carbon Taxes, PPMs, and the WTO*, University of Pennsylvania Journal of International Law, 2019, pp. 1–41

SIFONIOS, DAVID; ZIEGLER, ANDREAS R., *"Tuna-Dolphin Forever"? The Development of the PPM Debate Related to Trade and Environment in the WTO*, Indian Journal of International Economic Law, 2020, Vol. 12, pp. 107–133

SCHÖNFELDER, DANIEL, *Persönlicher und zeitlicher Anwendungsbereich,* in: Garbosch, Robert, Das neue Lieferkettensorgfaltspflichtengesetz, Baden-Baden, 2021, pp. 75–117

SHAW, MELCOLM N., *International Law Seventh Edition*, 9th edition, Cambridge, 2021

SMITH, FIONA, *Natural resources and global value chains: What role for the WTO?*, International Journal of Law in Context, 2015, Vol. 11(2), pp. 135–152

STRAUSS, ANDREW L., *From GATTZilla to the Green Giant: Winning the Environmental Battle for the Soul of the World Trade Organization*, University of Pennsylvania Journal of International Law, 1998, Vol. 19(3), pp. 769–821

TEICKE, TOBIAS; RUST, MAXIMILIAN, *Gesetzliche Vorgaben für Supply Chain Compliance – Die neue Konfliktmineralien-Verordnung*, Corporate Compliance Zeitschrift, 2018, Vol. 1, pp. 39–43

VAN DEN BOSSCHE, PETER; SCHRIJVER, NINO; FABER, GERRIT, *Unilateral Measures Addressing Non-Trade Concerns*, 12/10/2007, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1021946 (15/3/2022)

VAN DEN BOSSCHE, PETER; ZDOUC, WERNER, *The Law and Policy of the World Trade Organization*, 5th edition, Cambridge, 2021

ZEDALIS, REX J., *When Do the Activities of Private Parties Trigger WTO Rules?*, Journal of International Economic Law, 2007, Vol. 10(2), pp. 335–362

WIEDMANN, MICHAEL, *Das niederländische "Wet zorgplicht kinderarbeid"*, in: Nietsch, Michael, Corporate Social Responsibility Compliance, München, 2021, pp. 602 ff.

ZIMMERMANN, ANDREAS; WEIß, NORMAN, *Völker- und verfassungsrechtliche Parameter eines deutschen Lieferkettengesetztes*, Archiv des Völkerrechts, 2020, Vol. 58(4), pp. 424 ff.