Christiane Gerstetter | Lena Donat

THE ENFORCEMENT OF CONSUMER RIGHTS IN TRADE AGREEMENTS

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Verbraucherzentrale
Bundesverband e.V.

Team
Recht und Handel

Markgrafenstraße 66
10969 Berlin

recht-und-handel@vzbv.de

Bundesverband der Verbraucherzentralen und Verbraucherverbände

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EXECUTIVE SUMMARY

Consumer organisations on both sides of the Atlantic have been involved in the controversial debate regarding current trade negotiations and discuss how a consumer friendly trade policy could look like. The present study contributes to this discussion by examining how complaint mechanisms for consumer organisations concerning consumer-related provisions in international trade agreements could look like.

The degree of effectiveness of consumer-related provisions in trade agreements depends, among others, on the availability of enforcement mechanisms. Currently, there do not appear to be any adjudicative complaint procedures that consumer organisations could make use of when consumer-related provisions in a trade agreement are violated by one of the parties. More generally, however, international law does contain mechanisms allowing individuals, companies or civil society organizations to complain about a state party to an international agreement that allegedly violates the agreement.

The study reviews five existing mechanisms with a view to producing lessons learnt for the field of consumer protection: the complaint procedure under the North American Agreement on Environmental Cooperation (NAAEC), the possibility for non-state actor to submit amicus curiae briefs in dispute settlement proceeding before the World Trade Organisation, the complaint procedure of the International Labour Organisation in the area of freedom of association of workers, the complaint procedure of the International Convenant on Economic, Social and Cultural Rights as well as the EU's so called Trade Barrier Regulation. The latter allows companies or company associations to request the European Commission to investigate trade barriers with an effect on the EU's internal market or export markets of EU companies; such an investigation may result in counter-measures by the EU (e.g. resorting to WTO dispute settlement).

The study makes various recommendations concerning consumer-related complaint mechanisms in trade agreements: Institutions deciding on such complaints should operate independently from the consent of the state concerned. Likely, the effectiveness of such complaint mechanisms is enhanced if sanctions can be imposed on a party to a trade agreement that violates consumer-related provisions. Moreover, it is important that there are clear procedural rules as well as deadlines for dealing with complaint. Requirements on the admissibility of complaints by consumer organisations should not be too strict and need to reflect the fact that consumer organisations act on behalf of consumers rather than defending their own rights. The wording of the relevant rules should make it clear that the evidentiary burden on complainants for showing a violation of an agreement is not excessively high; the institution deciding about the complaint should have the right (ideally even an obligation) as well as resources at hand to carry out an investigation of its own on the matter concerned.

I. INTRODUCTION[1]

Ever since the World Trade Organization (WTO) was founded more than 20 years ago, the relationship between trade policy and trade agreements on the one hand and policy goals such as the protection of the environment and health, including the rights of workers and consumers, on the other, has been the subject of intense political and academic debate at national and international level. And it is a topic that has been receiving greater attention from the general public since the EU began negotiating a series of comprehensive trade and investment agreements with Canada and the US.

Consumer organisations on both sides of the Atlantic have participated in the discussion on the recent trade agreements,[2] discussing what a consumer-friendly trade policy should look like. In principle, international trade that is strengthened by trade agreements can provide consumers with access to particularly competitive products – i.e. products that are reasonably priced or of a high quality. At the same time, there is the risk that rules in trade and investment agreements could restrict the freedom of participating nations to adopt consumer protection measures at the national level.

This report contributes to the debate regarding a consumer-friendly trade policy by providing an overview of the opportunities for consumer organisations to enforce consumer rights in agreements of this type. As trade agreements are concluded between nation states, the rights and duties they contain apply primarily to states, not to entities subject to private law such as companies or individual consumers. This report is based on an analysis of existing literature and legal texts.[3] Case law has only occasionally been taken into consideration. The report does not contain any overarching political or economic assessment as to whether trade agreements are desirable or not, on the whole, from a consumer's perspective. Instead, the aim is to point out ways in which trade agreements can be structured in a more consumer-friendly fashion.

The report investigates a variety of mechanisms at international level which enable individuals, non-governmental organisations (NGOs) and companies to contest the violation of international law by nation states. From this, conclusions are drawn as to which aspects should be taken into account when designing mechanisms for enforcing consumer rights by consumer associations in trade agreements (section II). Finally, recommendations aimed at consumer organisations are formulated on the enforcement of consumer rights in trade agreements (section III).

The report does not address the issue of which consumer rights are already contained within trade agreements; this topic is discussed in a separate report.[4]

[1] The authors would like to thank Christian Pitschas for his helpful comments.

[2] Cf. for example the Transatlantic Consumer Dialogue's numerous statements on the TTIP at http://test.tacd.org/ttip-policy-statements/ ; vzbv 2014.

[3] In the following, legal texts and official documents are quoted in English if there is no official German translation available.

[4] Pitschas/Gerstetter 2016

II. ENFORCEMENT MECHANISMS

Enforcement mechanisms are essential to ensure that the consumer rights enshrined within international trade agreements are fully effective. However, so far as we have been able to ascertain, current trade agreements do not contain mechanisms that can be specifically used by consumer organisations. This is to do with the fact that very few consumer rights as such have been enshrined in trade agreements to date.

In this section, we will be presenting several mechanisms which serve to enforce the rights of non-governmental actors (individuals, but also companies) or which can be used by these actors as well as by NGOs if they consider that a state has violated obligations arising out of an international trade agreement. This analysis will then be used to come up with ideas and recommendations for designing an appropriate trade agreement mechanism that can be used by consumer organisations to enforce consumer rights.

1. SELECTION OF ENFORCEMENT MECHANISMS

The focus of the report is on mechanisms within existing trade and investment agreements, and specifically on those that can be used to contest the violation of individual (human) rights. These are judicial or quasi-judicial proceedings, rather than primarily political approaches for conflict resolution. It should be noted that enforcement mechanisms under international law always involve actions or omissions of the state, or acts of private individuals that are attributable to the state; they are not grievances, complaints or the like directed against or raised by companies. This is due to the nature of international law, which primarily regulates the conduct of nation states.

The following mechanisms were selected for further analysis:

- the *North American Agreement on Environmental Cooperation* (NAAEC), which is the first trade agreement to provide for a mechanism that can be used by NGOs for complaints in certain environmental matters,[5]
- the WTO's dispute settlement procedure due to its great significance for international trade disputes,
- the complaints procedure of the *International Labour Organisation* (ILO) in the area of freedom of association, as a mechanism enabling trade unions to make complaints as civil society organisations against nation states due to the violation of particular international agreements,
- the complaints procedure under the *International Covenant on Economic, Social and Cultural Rights* as an example of an individual complaints procedure under a human rights convention; some of the rights protected in this Covenant are very closely related to consumer rights recognised in the UN Guidelines for Consumer Protection; their implementation can be promoted or impeded through trade agreements (e.g. the right to a fair standard of living, including adequate food)
- the mechanism in the EU's *Trade Barriers Regulation*, which permits individuals, companies and business federations to apply to the Commission to investigate trade barriers that impact the EU's internal market or third country markets and

[5] A list of additional US agreements with similar mechanisms can be found in Knox/Markell 2012, Fn. 40.

> which may lead to a variety of solutions, including invocation of the WTO dispute settlement procedure.

The following aspects are outlined for each mechanism:

- Brief description of the mechanism
- Right to initiate proceedings
- Possible content and admissibility of complaints/grievances,
- Decision-making procedure
- Outcome of the procedure in the event of success (e.g. report, sanctions etc.)
- Cost to complainant(s), petitioners and the like
- Findings – if any – on the current use and effectiveness of the mechanism.

It is conceivable in principle that an international agreement might contain obligations under which the parties would provide certain enforcement mechanisms in their own domestic law. The 1998 Aarhus Convention follows this model in the environmental domain.[6] Article 9 of the Convention requires the parties to the Convention to guarantee individuals access to the courts and administrative review proceedings in their domestic law in respect of environmental matters. The most general provision in this regard is in Article 9.3 of the Convention, which states:

> "each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment".

However, this article makes no provision for NGOs to have access to administrative or judicial proceedings on all environmental issues. According to the EU Regulation that implements the Aarhus Convention, NGOs would only be able to file actions, for example, in relation to administrative acts concerning the environment and not in relation to laws or other measures of general scope.[7] Furthermore, the provisions of the EU legislation implementing the Aarhus Convention that relate to the admissibility of actions or complaints on the part of associations are controversial. Generally, EU law permits Member States to make sufficient interest or impairment of the complainant's own right to be preconditions for the admissibility of a complaint or action.[8] The European Court of Justice (ECJ) has found, in various judgements, that the corresponding provision in EU law must be interpreted in such a way as to allow environmental associations to

[6] Text can be found at http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf.

[7] Cf. Articles 10 and 11 of Regulation No. 1367/2006 of the European Parliaments and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters to Community institutions and bodies, as well as e.g. ECJ, Judgement of 13 January 2015, C-401/12 P to C-403/12 P.

[8] Cf. Art. 11 of Directive 2011/92/EU of the European Parliaments and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ. L 26, 28 January 2012, pages 1-21

take legal action relating to the violation of environmental regulations even if they cannot assert any proprietary interest or rights; when justifying its decisions, the ECJ referred, inter alia, to the Aarhus Convention.[9]

2. OVERVIEW OF INDIVIDUAL ENFORCEMENT MEASURES

2.1 The complaints mechanism under the North American Agreement on Environmental Cooperation (NAAEC)

The NAAEC[10] was agreed between Canada, Mexico and the US during negotiations on the North American Free Trade Agreement *(*NAFTA), and entered into force in 1994. The Agreement contains a series of environmental obligations for the contracting parties, including obligations to implement environmental regulations effectively (Article 5) and to guarantee access to fair administrative and judicial proceedings in the event of complaints relating to environmental matters (Article 6). A number of requirements are defined in relation to administrative and judicial proceedings, including with regard to fairness and transparency (Article 7). The NAAEC provides for the establishment of a Commission for Environmental Cooperation (CEC), made up of a Council of representatives of the parties to the Agreement, a Secretariat, and a Joint Public Advisory Committee (JPAC) of 15 members (five from each party to the Agreement) (Article 8 et seq.). Articles 14 and 15 of the NAAEC provide NGOs and private individuals with the option of lodging complaints if they consider that one of the NAFTA states has violated its obligation to effectively implement its environmental regulations. Guidelines were drawn up on details of the procedure.[11] In the past, NGOs have filed complaints on a huge variety of environmental problems, for example regarding a failure by the Mexican authorities to enforce the law with regard to a quarry in a conservation area[12] or by the Canadian authorities with regard to motor vehicle emissions in Quebec[13].

In addition, the NAAEC also provides for a procedure for participating states to settle disputes among themselves in the event of a ‘persistent pattern of failure by [a] Party to effectively enforce its environmental law’ (Article 22.1). In an inter-state procedure of this type, sanctions could, in principle, be imposed against any party that does not implement its environmental law effectively (Articles 34 and 35). An example of a sanction of this type would be the suspension of concessions that one country had made towards others within the framework of NAFTA.

Right to initiate proceedings: Under Article 14.1 NAAEC complaints can be made by ‘any non-governmental Organisation or person’ residing or established in the territory of one of the parties to the agreement.[14]

Possible content and admissibility of complaints*:* The complaint must reference the fact that a party is failing to effectively enforce its environmental law (cf. Article 14.1

[9] Cf. ECJ, case C-115/09, Trianel, Judgement of 12 May 2011

[10] Text of the Agreement is available online at http://www.cec.org/about-us/NAAEC

[11] Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (‘SEM Guidelines’), available online at http://www3.cec.org/islandora/fr/item/10838-guidelines-submissions-enforcement-matters-under-articles-14-and-15-north-en.pdf.

[12] Cf. Commission for Environmental Cooperation,Sumidero Canyon II - Factual Record regarding Submission SEM-11-002, http://www.cec.org/sites/default/files/submissions/2011_2015/11-2-ffr_en.pdf.

[13] Cf. Commission for Environmental Cooperation Quebec Automobiles - Factual Record Regarding Submission SEM-04-007, http://www.cec.org/sites/default/files/submissions/2001_2005/04-7-ffr_en.pdf.

[14] Cf. No. 2 SEM Guidelines.

NAAEC). Other conditions specified in Article 14.1 NAAEC include the stipulations that the primary aim of the complaint must be to improve enforcement (rather than harassing companies) and that the matter must already have been communicated in writing to the relevant national authorities.

Decision-making procedure*:* The complaint must be submitted to the CEC's Secretariat. The Secretariat will then check whether the complaint meets the criteria for admissibility. If this is indeed the case, the Secretariat will decide whether the complaint merits requesting a response from the party against which the complaint was submitted (Article 14.2). The NAAEC contains a number of criteria to guide the Secretariat in reaching this decision, including whether the party/parties making the complaint have pursued other options for remedying the situation, and whether the complaint relies exclusively on mass media reports. If the Secretariat is of the opinion that the complaint merits further attention, it will obtain a response from the party concerned, including on domestic proceedings in respect of the subject matter of the complaint (Article 14.3). If, after this and in light of any information provided by the party, the Secretariat considers that the complaint should be dealt with further, it will inform the Council accordingly. The NAAEC contains no criteria to guide the Secretariat in reaching its decision at this stage of the procedure.[15] The Council can decide with a two-thirds majority that Secretariat should prepare a factual record – i.e. a report on the circumstances of the case. A decision of this kind can thus be taken against the wishes of the state that is the subject of the complaint. Finally, the Council will decide whether to make the factual record publicly available, with publication of parts of the record also an option (Article 15).

Outcome of the procedure in the event of success: If the complaint is successful, the CEC will publish a factual record. However, this contains no recommendation or binding requirements for the party that had not implemented its environmental law effectively. There is no provision for sanctions mechanisms. Under NAAEC, there is nevertheless the possibility that, following a factual record, the failure of a party to implement its environmental law will also become the subject matter of a state-state dispute settlement. And as described above, the state-state dispute settlement procedure under NAAEC includes the option of sanctions.

Cost to complainant(s): There is no charge to submit a complaint. However, complainants must bear the cost of preparing the complaint (working time etc.) themselves.

Use and effectiveness of the mechanism*:* More than 90 complaints have been submitted since 1994, although only some 20 factual records have been made publicly available.[16] The majority of the complaints were submitted by environmental organisations.[17] The complaints procedure under NAAEC is sometimes seen primarily as a mechanism for drawing the parties' attention to the misconduct of one of the parties.[18] Despite the methodological difficulties involved, several studies have analysed the effectiveness of the mechanism in terms of improvements to the enforcement of environmental law. Knox and Markell conclude that in a few cases, the evidence suggests that the NAAEC complaints procedure has had a positive impact on solving the relevant environmental problems. However, they identify various shortcomings in implementing the

[15] Cf.Knox/Markell 2012, page 511.

[16] As at the end of October 2016.

[17] Knox/Markell 2012, page 518.

[18] Cf. in this respect Knox/Markell 2012, page 510 et seq.

mechanism, including unnecessarily lengthy procedures, as well as changes to and the non-publication, in some cases, of factual records by the Council.[19] Allen (2012) observes that the factual records published have only had a minor impact on the implementation of environmental law in the participating states.[20] She also states that disagreements between the Secretariat and Council on the implementation of the procedure are problematic,[21] and considers these to have been fuelled in part by relatively vague clauses in the NAEEC. Wold (2008) primarily criticises the changes made by the Council to the scope of the factual records.[22]

In response to criticisms of this nature, which were also voiced by civil society, a review process was initiated in 2012, and this was also recommended by the CAC.[23] The process resulted in the guidelines for the procedure being revised. Time limits for individual stages of the procedure were added, as was an obligation on the part of the Council to provide justification if it deviated from the recommendation of the Secretariat when coming to a decision on the factual record.[24]

2.2 WTO dispute settlement procedure

When the WTO was founded in 1995, a dispute settlement procedure was also created. The relevant rules are set out in the Dispute Settlement Understanding (DSU). In the first instance, decisions are taken by panels made up of three people, who are selected from an existing list on an ad hoc basis for each procedure. In recent years, the WTO's Director-General has decided on the composition of the each panel at the request of one of the parties to the dispute. There is also an Appellate Body which is permanent, unlike the panels, and hears appeals relating exclusively to legal questions and not (as is the case with the panels) points of fact. The Appellate Body has seven permanent members, three of which will rule on a particular case.[25] The WTO dispute settlement procedure is a state-state procedure, i.e. proceedings may only be initiated by one WTO member against another WTO member based on the violation of WTO regulations. However, the WTO's panels and Appellate Body have decided that individuals and organisations can submit amicus curiae[26] briefs within the framework of the dispute settlement procedure. These are statements primarily dealing with how WTO law should be interpreted in the case in question.[27] The submission of amicus curiae briefs is not explicitly mentioned in the rules governing the WTO dispute settlement procedure, however these are permitted under WTO case law. The focus below is therefore on the presentation of the amicus curiae briefs.

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[19] Knox/Markell 2012, principally page 521.

[20] Allen 2012, pages 136 et seq. and 149 et seq.

[21] Allen 2012, page 146 et seq.

[22] Wold 2008, page 228 et seq.

[23] Cf. Knox/Markell 2012, page 508.

[24] Cf. Commission for Environmental Cooperation (CEC), Summary Record of the Nineteenth Regular Session Of The Council, 10-11 July 2012 , New Orleans, Louisiana, United States, Item 9, http://www.cec.org/sites/default/files/documents/council_sessions/summary-record-12-00-en.pdf

[25] The members are appointed by the WTO's members for a period of four years with the option of extending their term of office for another four years, cf. Article 17 DSU.

[26] Translated literally, the Latin term 'amicus curiae' means 'friend of the court'.

[27] Cf. for example the amicus curiae submission in connection with the Brazil Re-treaded Tyres case of the WTO at http://www.ciel.org/wp-content/uploads/2015/05/Brazil_Tires_Amicus_11Oct07.pdf

Right to initiate proceedings*:* Dispute settlement proceedings before the WTO can only be initiated by WTO members. There are no specific provisions regarding a party's entitlement to submit amicus curiae briefs; in the WTO's case law, it is assumed that the right of the panels and Appellate Body 'to seek information' as set out in Article 13 DSU, also includes the right to accept the briefs.[28] However, some WTO members have domestic mechanisms within their jurisdictions which permit companies or individuals to notify the competent authorities of the existence of measures that are restricting trade in a manner that is (allegedly) incompatible with WTO law. Procedures of this sort can ultimately result in an action being filed with the WTO (cf. below under IV 2.5).

Possible content and admissibility: Proceedings initiated by WTO members against another member must relate to the violation of WTO regulations by the other party.[29] No particular requirements regarding admissibility apply in respect of amicus curiae briefs; however, in individual proceedings, the Appellate Body has formulated requirements for the submission of amicus curiae briefs for the proceedings in question.

Decision-making procedure: Upon the completion of written and oral proceedings, the panels and/or the Appellate Body prepare a report in which they determine whether a party has violated WTO law. Where appropriate, they also recommend that the party in question bring its offending activities in line with WTO law. The report also states – as is the practice of the panels – which amicus curiae briefs were submitted. If an amicus curiae brief forms part of the documents submitted by a party and is supported by that party, it is treated as a statement by that particular party; where briefs are independently submitted by other organisations, there is no obligation for the briefs to be taken into consideration.[30] The reports of the panels must then be adopted by the Dispute Settlement Body (DSB) – a committee comprising representatives of all WTO members. This happens virtually automatically as the DSB takes decisions using the reverse consensus method, i.e. the report will be adopted unless all WTO members refuse to adopt it – something that has not yet happened in practice.

Outcome of the procedure in the event of success*:* If a WTO member is successful in pursuing its complaint before the WTO, a time frame is agreed – or, if this is impossible, fixed by a court of arbitration – for the member against whom the complaint was made to implement the recommendations of the report. If at the end of this period the successful complainant considers that the other member is still in violation of WTO law, it can request that the panels review the matter again. If the report's recommendations are not implemented, the DSB can authorise the successful complainant to impose sanctions by suspending trade concessions that were otherwise agreed under the WTO framework (e.g. imposing higher duties on imports) until the violation of WTO law is definitively remedied. If they are taken into consideration by the panels or Appellate Body, the amicus curiae briefs can, in principle, contribute to the outcome of the proceedings. To date, however, these bodies have routinely either rejected the amicus curiae briefs

[28] Cf. Appellate Body Shrimp-Turtle (WT/DS58/AB/R), paragraph 79 et seq.

[29] WTO members also have the opportunity, in principle, to file a *non-violation complaint* if a WTO member considers that another WTO member has conducted itself in such a way as to nullify or reduce the benefits conceded to another member without having violated WTO law (cf. Article XXIII GATT, 26 DSU). However, *non-violation complaints* of this type are very rare in practice.

[30] Cf. WTO, Participation in dispute settlement proceedings – Amicus Curiae submissions, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c9s3p1_e.htm#fnt4 with evidence relating to case law.

as inadmissible, or have accepted them as admissible without taking them into consideration when reaching their decision.[31]

Cost of amicus curiae briefs*:* No fees are charged for submitting amicus curiae briefs. However, the persons or organisations involved must bear the cost of preparing the brief.

Use and effectiveness of the procedure*:* In general, the WTO's dispute settlement procedure is a comparatively effective procedure for settling disputes, given the extremely large number of proceedings for an international court (more than 500 to date) and the possibility of sanctions. Nevertheless this does not hold to the same extent with regard to the opportunities for participation through amicus curiae briefs, which thus far have been submitted by NGOs (e.g. environmental organisations) as well as by business federations and individuals. As mentioned above, although the panels and the Appellate Body have regularly allowed briefs of this type to be submitted, they have always gone on to state that they have not been taken into consideration when deciding upon the matter. The WTO's amicus curiae option still offers NGOs added value, as it enables publicity to be generated for certain WTO dispute settlement cases and the impact of WTO law on environmental measures to be made clear, as well as enabling additional information to be contributed.[32] The decision of the panels and Appellate Body fundamentally to admit amicus curiae briefs has been widely welcomed in academic literature as a positive step towards opening up the WTO dispute settlement procedure to civil society.[33] However, this issue remains contentious among WTO members.[34]

2.3 Complaints procedure of the International Labour Organisation regarding freedom of association

Freedom of association is one of the four fundamental principles on which the International Labour Organisation (ILO) is based, and was fleshed out further in Conventions no. 87 'Freedom of Association and Protection of the Right to Organise' (1948) and no. 98 'Right to Organise and Collective Bargaining' (1949).

In 1951, the ILO Governing Body set up a special Committee on Freedom of Association (CFA) to oversee the implementation of this principle – even in countries that hadn't ratified Conventions 87 and 98. Employers' and workers' organisations may file complaints with the CFA directly against member states. The Committee was actually set up merely as a lower instance for the Fact Finding and Conciliation Commission, which was supposed to investigate complaints relating to freedom of association where a country had not ratified the relevant ILO Convention. However, as proceedings before the Commission require the consent of the country in question, this has hardly ever been used, and the CFA has evolved into a much more important institution over the years.[35]

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[31] Cf. WTO, Participation in dispute settlement proceedings – Amicus Curiae submissions, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c9s3p1_e.htm#fnt4 at the end.

[32] Cf. in this respect the somewhat older study by Butler (2006), which identifies various objectives that are pursued by NGOs using amicus curiae briefs, particularly page 12.

[33] Cf. Eckersley 2007, for example.

[34] Cf. De Brabandere 2011, page 109 et seq.

[35] Gravel et al. 2001, page 10

Right to initiate proceedings: Complaints can be filed by workers' organisations, employers' organisations, and governments. National organisations must have a direct interest. International organisations must either have consultative status with the ILO, or one of their member organisations must be directly affected. The Committee is free to decide whether an organisation is classified as a workers' or employers' organisation as defined by the ILO. Information regarding its members, statutes, and affiliation to international associations is taken into account when reaching this decision, and it is irrelevant to the Committee whether the organisation has been disbanded by the government, is in exile, or has never been recognised by the government. Nevertheless, the organisations must have a long-term presence, so that the Committee can correspond with them.[36]

Possible content and admissibility of complaints*:* The Committee is responsible for complaints regarding the violation of the principle of freedom of association. Complaints can be filed against all ILO member states, regardless of whether they have ratified Conventions 87 and 98, and without first having to obtain the member states' consent. Complaints can even be submitted against non-ILO members via the United Nations Economic and Social Council (UN ECOSOC). The Council decides whether to forward the complaint to the Committee, although the country in question must consent to this.

Decision-making procedure*:* The complaint must be submitted in writing to the Director-General of the ILO and must specify the manner in which the country is allegedly violating its obligations to protect freedom of association, providing supporting evidence where possible. The Committee may ask the complainant to provide additional evidence, if appropriate. If the Committee feels that the complaint is well-founded, it will convey this to the government concerned via the ILO Director-General and request a response. Should the government fail to provide a timely and substantiated response, the Director-General or the Committee can attempt to approach the government via the ILO's country offices or via the government's representatives at the International Labour Conference. In serious cases, the Director-General can send an envoy to the country in question to explain to the government the principles of freedom of association and induce it to cooperate. The Committee can hear the parties to the conflict during one of its sessions if it considers this necessary in order to reach its decision, although decisions are usually taken solely on the basis of the documents presented.[37]

The composition of the Committee corresponds to the ILO's tripartite approach: in addition to an independent chairperson, there are three representatives each of governments, employers, and workers (and nine deputies). The members are recruited from the ILO[38] Governing Body. Members whose organisation or government is involved in the dispute are not permitted to attend the session in question. The Committee tries to

[36] ILO (2016); Special procedures for the examination in the International Labour Organisation of complaints alleging violations of freedom of association. Online at http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2565060:NO" \l "E1 (most recently retrieved on 29 November 2016); see also Tajgman/ Curtis 2000, page 58 et seq.

[37] Gravel et al. 2001, page 17.

[38] The Governing Body is the executive body of the ILO. It has 56 members, made up of governments, workers' organisations and employers' organisations in a ratio of 2:1:1. Ten of the 28 government seats are held by countries of chief industrial importance – the remaining seats are elected. For an overview of the Governing Body's current composition, see http://www.ilo.org/gb/about-governing-body/WCMS_531121/lang--en/index.htm

reach its decisions unanimously and has always decided by consensus to date.[39] The rules of procedure have been continuously developed over the years.[40]

Outcome of the procedure in the event of success: If, in the light of the information provided by both sides, the Committee takes the view that the complaint is justified, it will forward a final report together with recommendations on how the matter can be remedied to the Governing Body for adoption. The recommendations are not legally binding. However, the relevant government will be asked to report to the Committee on its implementation of the recommendations. If the country has ratified the ILO Convention concerned, the matter is usually referred to the Committee of Experts on the Application of Conventions and Recommendations, which is responsible for monitoring the implementation of the ILO Conventions. If the country has not ratified the Conventions, its government will be routinely reminded to take appropriate remedial measures. The Committee can also recommend to the Governing Body that the country in question be induced to consent to having the matter handed over to the Fact Finding and Conciliation Commission. With the consent of the government, direct contact missions can then be initiated, which will try to find solutions on the ground by entering into direct dialogue with the various parties.

Cost to complainant(s)*:* The cost to complainant(s) is not mentioned in the Committee's rules of procedure.

Use and effectiveness of the mechanism*:* The Committee has dealt with more than 3,000 cases against 60 countries[41] in the 65 years since it was founded, with the number of new cases steadily rising over the decades. After the procedure for reviewing the implementation of the Committee's recommendations was tightened up in 1971, the number of cases of progress (countries that have amended their laws or practices in accordance with the Committee's recommendations) has risen almost exponentially.[42] The Committee itself claims to have a great deal of influence on global respect for freedom of association, ascribing this success primarily to its consensus-oriented procedures and the fact that its members act in a personal capacity.[43] Even independent sources judge the mechanism to be comparatively effective.[44]

2.4 Individual complaints under the International Covenant on Economic, Social and Cultural Rights (ICESCR)

In 1966, the United Nations General Assembly adopted the International Covenant on Economic, Social and Cultural Rights (ICESCR), which contains provisions on working

[39] ILO (2016). The Standards Initiative: Joint Report of the Chairpersons of the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association. ILO Doc GB.326/LILS/3/1, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_456451.pdf.

[40] A compilation is available at http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2565060:NO#E1

[41] Freedom of Association cases: Africa: 397 - Americas: 1785 - Arab States: 46 - Asia and the Pacific: 353 - Europe: 652, see http://www.ilo.org/dyn/normlex/en/f?p=1000:20060:0::NO:20060::

[42] 360th Report of the Committee on Freedom of Association, ILO GB.311/4/1, 2011, page 14

[43] 360th Report of the Committee on Freedom of Association, ILO GB.311/4/1, 2011, page 14

[44] For example the Encyclopaedia of Human Rights describes the ILO Committee on Freedom of Association as "*one of the most active and effective human rights complaints bodies in the international system*", cf. Lawson/Bertucci 1996, page 857.

life, social security, protection of the family, an adequate standard of living, health, education, and culture. State parties to the Covenant must regularly report on the measures they have taken to implement the Covenant.

In 1985, the Committee on Economic, Social and Cultural Rights (CESCR) was established to monitor implementation of ICESCR.[45] While from the very start there was an Optional Protocol (OP) to the Covenant on Civil and Political Rights that enabled individuals to file complaints against states, a similar OP to the ICESCR was only adopted in 2008.[46] The Optional Protocol entered into force in 2013, although it has not yet been ratified by Germany.[47]

Right to initiate proceedings: Complaints can be submitted by (1) individuals or groups of individuals who believe themselves to be victims and are subject to the authority of a state party to the Covenant; (2) third parties acting on behalf of and with the consent of these individuals or groups; and (3) other persons acting on behalf of, but without the consent of, alleged victims, if this is sufficiently justified. Both natural persons and legal entities can act on behalf of the alleged victims.[48]

Possible content and admissibility of complaints*:* The Committee is responsible for complaints about violations of the provisions of ICESCR. These violations must have occurred after the OP entered into force for the country in question. Complaints are admissible only if all domestic legal remedies have been exhausted, unless proceedings at a national level have been unreasonably prolonged. Complaints must be submitted within one year of the domestic legal remedies being exhausted. Complaints in relation to violations that have already been dealt with by the Committee itself or in other international proceedings are not admissible.

Decision-making procedure*:* After checking the admissibility of the complaint, the Committee brings the case confidentially to the attention of the state party concerned, and allows it six months to state its position on the matter. The Committee reviews the complaint in a closed session on the basis of the documents to hand and considers the adequacy of the state measures to implement the provisions of ICESCR. It can consult additional documents from other international institutions. If the Committee gives its consent, interested parties can also contribute information in the form of amicus curiae briefs.[49] The Committee then expresses its view as to whether a violation has occurred.

Outcome of the procedure in the event of success*:* If the Committee determines that a violation has occurred, it sends its recommendations for action to the country concerned. The decisions of the Committee are not legally binding. However, the state party to the Covenant must respond to the decision in writing within six months and provide details of any measures it has taken in response to the recommendations for action. The Committee can subsequently request additional information, which the state party can provide as part of its reports. A rapporteur is appointed to check whether the

[45] Cf. ECOSOC Resolution 1985/17 of 28 May 1985; previously, ECOSOC itself was responsible.

[46] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, New York, 10 December 2008

[47] To date, 22 states have ratified the Optional Protocol (as at 21 November 2016), see http://indicators.ohchr.org/

[48] Langford/ Porter/ Brown/ Ross (2016), page 60.

[49] Langford et al. 2016, page 15. See also the Committee's guidance on third-party interventions: www.ohchr.org/Documents/HRBodies/CESCR/Guidance3rdPartyInterventions.doc

state party is implementing the recommendations and regularly report back to the Committee on this. To this end, the rapporteur can take up contact with representatives of the state party itself, and with the complainants.

The Committee also has the option of asking the state party to take interim measures in order prevent the alleged victim from potentially suffering irreparable damage. Should a party to the dispute request this, the Committee will also offer to help the parties come to an amicable settlement.

Cost to complainant(s): No information on the cost of submitting a complaint is provided in the rules of procedure. In the single successful case to date, Spain was asked to reimburse the costs of proceedings incurred by the complainant.[50]

Use and effectiveness of the mechanism*:* Since the Optional Protocol entered into force, the Committee has ruled on four cases, all against Spain: two were rejected as inadmissible, in one case, a violation of ICESCR was determined, and in the other case the complaint was rejected as unfounded.[51] Six cases are currently pending against Spain and Ecuador.[52] The small number of complaints submitted is explained by the fact that only 22 states have ratified the OP to date. In view of the small number of cases, no conclusions can as yet be drawn regarding the mechanism's effectiveness. The establishment of the new mechanism has generally been praised by NGOs.[53] However, there has also been some criticism of the fact that complaints can only be submitted within one year of all domestic legal remedies becoming exhausted. It is also difficult, in the main, for complainants to prove that the state measures are not adequate.[54]

2.5 EU Regulation on trade barriers

Several legal instruments of the EU offer opportunities for companies to request an examination by the Commission of certain trade-related practices on the part of foreign states or companies[55]; with such examinations potentially resulting in trade-related countermeasures by the EU. The procedures under Regulation 654/2014, which deals generally with a variety of trade barriers, are set out below.

EU Regulation 654/2014[56] – referred to as the Trade Barriers Regulation (TBR) – contains a mechanism under which individuals, companies, or business federations can ask the EU Commission to initiate an examination procedure if they believe trade barriers or unfair trade practices in another country are harming their economic interests. A distinction is made here between examinations of negative effects upon EU companies in the EU Single Market, and of negative effects upon EU exports in markets of non-EU

[50] Committee on Economic, Social and Cultural Rights (2015).Communication No. 2/2014. Views adopted by the Committee at its fifty-fifth session (1-19 June 2015). UN Doc. E/C.12/55/D/2/2014, para. 16

[51] http://juris.ohchr.org/en/search/results?Bodies=9&sortOrder=Date

[52] http://www.ohchr.org/EN/HRBodies/CESCR/Pages/PendingCases.aspx

[53] See for example the statements of the NGO Coalition ESCR Net: https://www.escr-net.org/news/2014/reclaiming-and-sustaining-op-icescrs-vision-revisiting-journey-so-far-keep-moving-forward

[54] Langford et al. 2016, page 19 et seq.

[55] The mechanisms regarding dumping and subsidies that harm EU companies are particularly important.

[56] Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015 laying down Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, Official Journal L 272 of 16 October 2015, pages 1–13.

countries. Provided that certain conditions are met, the EU Commission examines the situation and, if the complaint is successful, decides upon possible countermeasures. One possible course of action is to invoke the dispute settlement mechanism of the WTO. The mechanism was already contained in Regulation 3286/94[57], the predecessor to Regulation 654/2014, meaning that it has already been available for a good 20 years.[58] The current Regulation does not replace its predecessor, but merely contains amendments to the detail.

Right to initiate proceedings: Article 3 of Regulation 3286/94 concerns trade barriers[59] that impact the EU market. According to Article 3 of the Regulation, any 'natural or legal person, or any association not having legal personality, acting on behalf of a Community industry which considers that it has suffered injury as a result of obstacles to trade that have an effect on the market of the Community' can request that proceedings be initiated. Article 4 of the Regulation concerns trade barriers that impact markets in non-EU countries. In this regard, any EU company and 'any association, having or not legal personality, acting on behalf of one or more Community enterprises, which considers that such Community enterprises have suffered adverse trade effects as a result of obstacles to trade that have an effect on the market of a third country' can request that proceedings be initiated. The group of possible complainants is more narrowly drawn in this case. In addition, the EU Member States can also request that proceedings be initiated in accordance with Article 6.

Possible content and admissibility of complaints*:* Complaints must be lodged in writing with the Commission. In accordance with Articles 3, 4 and 6 of the Regulation, they must contain 'sufficient evidence' of the existence of trade barriers and of the injury or adverse trade effects caused thereby. Article 11 of the Regulation contains a list of relevant criteria for different situations. These vary depending on whether it is alleged that an injury has already occurred or is in danger of occurring and whether the injury is in the EU Single Market or an export market. Criteria specified include trade volume, prices of competitors' products, and indicators that enable the impact on EU companies to be estimated e.g. utilisation of capacity, sales, market share, and prices. The EU Commission has made a model TBR complaint available online.[60]

Decision-making procedure*:* The Commission checks whether the complaint contains sufficient evidence to justify initiating an examination procedure. If this is not the case, it informs the complainant(s) accordingly (Article 5.3). In addition, the Commission also considers whether initiating an examination procedure is in the interest of the EU (Article 9). If the Commission is of the opinion that the complaint contains sufficient evidence, it informs the Member States accordingly. It then obtains additional information (including from the Member States), possibly consults with the companies affected,

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[57] Council Regulation (EC) 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, Official Journal L 349 of 31 December 1994, pages 71- 78.

[58] Before this, there was another, rarely used instrument, the New Commercial Policy Instrument, cf. Aruoja 2012, page 15.

[59] A trade barrier is defined in Article 2.1 (a) as trade practice 'in respect of which international trade rules establish a right of action. Such a right of action exists when international trade rules either prohibit a practice outright, or give another party affected by the practice a right to seek elimination of the effect of the practice in question'. Simply put, a trade barrier only exists if a country violates an international trade agreement.

[60] Cf. http://trade.ec.europa.eu/doclib/docs/2006/february/tradoc_127354.pdf. This model refers to the predecessor Regulation. It appears that a more up-to-date document is not available online.

etc., and finally prepares a report on this basis. The report is presented to the committee responsible with representatives of the Member States (Article 9). If, during the examination, the Commission determines that the interests of the EU do not require any further action to be taken, it will suspend the procedure (Article 12.1). The procedure must be completed within five months (within seven months for particularly complex procedures) (Article 9.8).

Outcome of the procedure in the event of success*:* If the Commission determines that further action is necessary in the interests of the EU, various trade-related measures can be taken (Article 13). These include the initiation of a WTO dispute settlement procedure, but also the suspension or withdrawal of concessions agreed in trade agreements, the raising of customs duties or the introduction of trade-restrictive measures, although the latter measures are only permissible under WTO law upon the successful completion of a dispute settlement procedure. However an amicable settlement may be reached with the non-EU country and the contested measures changed. All actions taken by the EU must be legally permissible – i.e. consistent with international trade agreements. The decision-making procedure regarding measures to be taken is determined by which measures should be taken. The Commission is solely responsible for decisions relating to dispute resolution procedures, whereas the committee of Member State representatives and/or possibly the European Parliament should be involved in decisions relating to other types of measures (Article 14).

Cost to complainant(s)*:* No fees are imposed; no provision is made for the costs of complainants (individuals or companies) to be reimbursed.

Use and effectiveness of the mechanism*:* There is no information yet on the application of the current Regulation, as this only entered into force at the end of 2015. There is, however, some information regarding the use and effectiveness of the previous Regulation. The mechanism was used 25 times in total between 1996 and 2008[61], i.e. a little over twice a year on average, which appears to be rather a low figure given the diversity of the EU's external trade relations. The majority of these cases were in relation to trade barriers affecting export markets.[62] Seven cases resulted in the initiation of a WTO dispute settlement procedure.[63] A 2005 evaluation of the predecessor Regulation[64] found the mechanism to be basically useful. However, it did identify shortcomings preventing companies from making fuller use of the mechanism. The companies surveyed stated that a TBR complaint would be the last resort if all other efforts (e.g. lobbying) proved to be fruitless.[65] According to these companies, obstacles to using the Regulation included the requirements regarding the evidence to be submitted and the availability of resources to formulate the complaint.[66]

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[61] Cf. European Commission 2008, page 15; the Commission appears not to have published a figure for later periods.

[62] Cf. European Commission 2008, page 5 et seq. The Commission attributes this to the fact that such trade barriers can also be examined under other EU Regulations (e.g. regarding anti-dumping).

[63] Cf. European Commission 2008, page 15 et seq.

[64] Crowell and Moring 2005.

[65] Crowell and Moring 2005, page 39.

[66] Crowell and Moring 2005, page 43 et seq.

3. CONCLUSIONS WITH REFERENCE TO CONSUMER ORGANISATIONS

None of the mechanisms discussed above is aimed at the enforcement of consumer rights, although several of the mechanisms could also be used by consumer rights organisations in principle (e.g. amicus curiae briefs in relevant WTO dispute proceedings). Basically, there are relatively few mechanisms for enforcing non-trade issues in trade agreements, while those for enforcing trade-related interests are more developed. This hardly surprising, however, as these agreements are aimed primarily at promoting international trade.

Various fundamental issues need clarifying before the different mechanisms can be translated into a consumer context (such as which types of harm to consumer interests could action be taken against, what evidence would need to be submitted, etc.) Detailed discussion of these issues is beyond the scope of this paper. Moreover, consumer rights enforcement mechanisms are only of use in trade agreements if these trade agreements contain clear consumer rights obligations for states. As shown in section III, this is not generally the case at present.

A few basic conclusions can nevertheless be drawn from the above overview regarding the form that should be taken by mechanisms for civil society organisations to contest the violation of international law by nation states.

- Previous experience has shown that it is important that complaints can be examined regardless of the intentions of the country concerned. The competent decision-making body must therefore be independent, and the initiation of the next procedural step in each case should be at the discretion of the organisations making the complaint.
- Clear time limits for the individual procedural steps should to ensure that the complainant can expect a decision within a reasonable time frame.
- Excessively strict requirements should not be set with regard to the admissibility of complaints filed by consumer organisations. As the example of the implementation of the Aarhus Convention within EU law shows, consumer organisations should not be required to be affected themselves or wish to assert their own legally protected interests in order to be able to make a complaint. Due consideration should be given to the fact that consumer organisations are acting as representatives for consumers.
- Several of the examples that we have discussed show that it is important to adopt clear regulations within the agreements regarding the procedure itself as well as the way in which the outcome of the complaints procedure is taken into account by the relevant executive bodies that are party to the agreements. This would prevent the rights of consumer organisations being given a narrow scope in domestic implementation measures, for example. It would also help to avoid situations such as that seen in the WTO dispute settlement arrangements for, where the opinions of NGOs are allowed to be submitted but are routinely ignored it comes to deciding the matter.
- Experience of the existing mechanisms shows that it can sometimes be difficult and/or involve considerable expense and effort for complainants to demonstrate specific, de facto effects of countries' actions and thereby prove that rights have been violated. However, none of the mechanisms presented above offers a solution

to this problem. One option would be to expressly set the requirements for the provision of evidence at a relatively low level, i.e. to require that a prima facie case is made for the violation of a right without it having to be proved beyond doubt, for example. The institution responsible for ruling on the complaint should also always have the right and the resources – ideally even the obligation – to carry out its own investigation into the matter.

- One thing that several of the above mechanisms have in common is that they make no provision for possible sanctions over and above the preparation of a public report on the matter, in which conduct in breach of international law by one of the parties to the agreement is established and/or this party is asked to conduct itself in conformity with international law. Despite the lack of more far-reaching possible sanctions, countries appear to have changed their behaviour in certain cases in response to public reports regarding their unlawful conduct. This means – probably also in the context of consumers – that the effectiveness of a complaints mechanism doesn't automatically depend on whether it allows the imposition of stronger sanctions. However, a mechanism that permitted trade-related sanctions to be imposed if consumer protection rules were violated, for example, would probably be more effective. That said, WTO law should be complied with when designing a sanction mechanism.
- It should additionally be noted that none of the mechanisms described above contains an unambiguous rule to the effect that organisations using the mechanism will have the costs they incurred reimbursed in the event that they are successful. There is therefore a question mark over whether countries would sign up to an agreement that contained a rule of this type, even if this would be desirable from the perspective of consumer organisations.

Aside from embedding complaints mechanisms within trade agreements, i.e. at the international level, the creation of opportunities to file complaints at a national level is also conceivable in principle. Opportunities of this type already exist in the trade sector in the EU, for example. The existing rules in the EU allow the competent political institutions a relatively broad scope for making decisions regarding the examination of complaints and the approach to take with regard to non-EU countries should the complaints be well-founded. If this model is applied to consumer rights, complaints by consumer organisations might come to nothing relatively quickly if the competent political institutions baulk at legal action or other trade-related measures.

III. RECOMMENDATIONS

We have set out various recommendations below for the design of enforcement mechanisms. There are various models for the implementation of mechanisms permitting civil society organisations to contest the violation of rules in an international agreement by a party to that agreement.

Set out below are key points for improving the effectiveness of complaint mechanisms, without going into further detail:

- **Clear rules on the procedure** are required, as well as **due consideration of the outcome** of complaint procedures by the relevant executive bodies that are party to the agreements. Complaints should be able to be filed independently of the will of the country concerned and the decision-making body tasked with ruling on the claim should be able come to a decision **independently** of the intentions of the country concerned.
- **Complaints procedures should contain clear time limits** for individual procedural steps in order to prevent the procedure from taking too long.
- Excessively strict requirements should not be set regarding the **admissibility of complaints filed by consumer associations**. An example of such a requirement would be that consumer organisations could file complaints only if their own rights had been violated. Due consideration should be given to the fact that consumer organisations are acting as representatives for consumers.
- When designing mechanisms, the requirements regarding the **factual evidence** to be provided by consumer organisations in support of the allegation that a party to the agreement is acting in violation of that agreement should not be made too stringent. The institution responsible for ruling on the complaint should always have the right and the resources – ideally even the obligation – to carry out its own investigation into the matter.
- As a result of a complaint, it should be possible as a last resort to impose trade-related **sanctions** (e.g. the suspension of previously enacted concessions) against a country which is in violation of contractual clauses protecting consumer interests and is thereby harming consumer interests.
- It would also be desirable to have a clear rule stating that the state party to the agreement should reimburse the **out-of-pocket expenses and costs** of the consumer association that filed the complaint, if the complaint is successful.

It should be noted that it might not be possible to implement some of the above points for political reasons. In such cases, consumer organisations should carefully consider whether a weaker enforcement mechanism is better for consumer rights than no mechanism at all. Previous experience of other mechanisms has shown that even procedures which only result in a public report on the unlawful conduct by one of the parties to the agreement, for example, can also lead to a change in the practices of that country.

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