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**Michael Duchstein, Das internationale Benchmarkingverfahren und seine Bedeutung für den gewerblichen Rechtsschutz**

## English Summary

### **The international benchmarking-procedure and its meaning to industrial property law**

Indicators and Benchmarks, which monitor patent and copyright rules that obstruct the enjoyment of human rights

#### **I. Introduction**

The following analysis deals with the monitoring of states obligations in the International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR or the Covenant). In the first part it will be examined in general, which principles guide the substantive as well as the procedural law of the Covenant. In the second, the shorter part, it will be more specifically observed which transnational obligations lie upon the states parties especially concerning their patent law and how they can be monitored. Thus, the second part is an application of the results of the first.

#### **II. The substantive duties in the International Covenant on Economic, Social and Cultural Rights (ICESCR)**

##### *1.) The binding character of the ICESCR*

When drafting the ICESCR the Human Rights Committee and the UN General Assembly were aware that there already existed the Universal Declaration of Human Rights (hereinafter UDHR), which contains nearly the same set of economic, social and cultural rights. Due to this fact, they intended a different understanding of both documents, otherwise the ICESCR would be superfluous. The anchoring of a state's reporting procedure shows that in addition to the already existing non-binding UDHR, they wanted the esc-rights of the ICESCR to be binding. Thus, one can no longer argue that the Covenants rights are without obligation. Rather one has to find an interpretation that allows observing whether a member state has fulfilled its obligations despite the vague wording.

## 2.) *Progressive realization*

The central norm of the ICESCR is Article 2(1). It stipulates:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to progressively achieving the full realization of the rights recognized in the present Covenant by all appropriate means, particularly including the adoption of legislative measures.”

The wording differs fundamentally from the one of the parallel rule in the International Covenant on Civil and Political Rights (hereinafter: ICCPR) as it sets the duties of the states not absolute but relative to their level of development, especially the economic development.

## 3.) *The states' margin of discretion*

According to the *travaux préparatoires* and the purpose of Article 2(1) ICESCR, the wording “resources” has to be interpreted in a broad manner. It can be defined as all means, which can serve to realize the economic, social and cultural rights, such as financial resources, knowledge, natural resources, work, land and environment.

According to the Committee on Economic, Social and Cultural Rights (hereinafter: the Committee), even international resources e.g. development aid are part of the available resources and must be used for the realization of the Covenant rights.

Due to this extensive understanding, it is not possible to evaluate the total amount of all available resources of a country. Besides, every state has a number of additional tasks for which the resources are needed. Thus, every state has a margin of appreciation which and how many resources are at its disposal for the realization of the Covenants rights. Also, as the perfect economic and political system has not yet been found, it can decide how to distribute the total amount in between the respective Covenant rights and their elements. Notwithstanding, each right has a core content that every state is obliged to realize with priority, and where its margin of discretion is reduced.

## 4.) *Duties that have to be realized immediately*

Under the terms of Article 2(1) ICESCR all rights are to be realized progressively which, with view on the intention of the Covenant and

the *travaux préparatoires* means as soon as possible. It is not a contradiction but a consequence of this principle that some dimensions of the rights must be realized immediately. These are the elements for whose realization no resources are needed such as the repeal of de-iure-discriminations.

5.) *Respect, protect, fulfill*

Pursuant to the current understanding, the states' obligations can be divided into three categories: first respect, which means that the government must not interfere with the protection of the rights, second protect, which covers that a state must bar third parties from violating the rights, and third, fulfill, which means that it must actively carry out efforts to realize the rights.

6.) *Obligations of conduct and of result*

Another distinction of the obligations refers to the reflection whether a state has to do a certain act of commission respectively of omission (so called obligations of conduct) or whether it must concretely improve the enjoyment of the right comparable to a strict liability (so called obligations of result). It is important to note that the Covenant covers both types of obligations and neither of them is more important than the other. This derives from the wording of the Articles 11(2) and 14 as well as from the intention of the Covenant.

7.) *Availability, accessibility, acceptability and quality*

Not only the Committee but also other political institutions and some human rights experts set forth four criteria to evaluate whether human rights obligations are being realized; these are called availability, accessibility, acceptability and quality. Availability refers to the extent to which the facilities, goods, and services required for the fulfillment of a specific right are available in sufficient quantity. Accessibility has four dimensions: non-discrimination, physical accessibility, economic accessibility and information accessibility. Acceptability is a measure of whether the facilities, goods and services are culturally appropriate and respectful of ethical standards. Quality entails whether the facilities, goods and services are scientifically appropriate and of good quality.

### III. The report consideration procedure in front of the Committee on Economic, Social and Cultural Rights

#### 1.) *The duty to report to the Committee*

As a formal duty, Article 16(1) ICESCR obliges the member states to report in regular intervals to the ECOSOC. The latter has in accordance with Article 68 of the UN-Charter mandated the Committee with the task of the examination of the reports and pursuant Article 17(1) ICESCR determined that states have to report in two respectively five years periods.

#### 2.) *The results of the state reports examination*

As a result of each survey of a report, the Committee enacts the so-called Concluding observations. Although they are of noncommittal character, they have a strong domestic and international political influence. Therefore, the monitoring procedure is rather political, at best quasi-judicial than judicial.

#### 3.) *Principles of investigation and the onus*

In the procedure in front of the Committee, the state bears the onus if it has made an effort to move toward the full realization of all rights as fast and as effectively as possible. In addition, it has to prove whether it has used the maximum of the available resources. This drawback is imposed on it by the Covenant indirectly as a flipside of its wide margin of discretion and by the fact that it controls the evidences on its territory. Pursuant to the intent of Article 16(1) ICESCR every state is obliged to reveal all information a judicious state, which was in the situation of the one that is monitored and which took the realization of the Covenant rights seriously, would communicate. Nevertheless, the Committee is allowed to undertake its own investigations and to consult third parties to guarantee the veracity and the completeness of the state reports. In spite of the clash of interests, the Committee tries to work together with the governments in a constructive dialogue rather than in an accusatory course of action.

#### IV. The permissibility of the indicator method in the procedure in front of the Committee

##### 1.) *Definition and general attributes of indicators*

In general terms indicators are a means to conclude from a lower level of abstraction to a higher one, from an empirical fact to a theoretical term. They were developed in the social sciences and are needed if an abstract phenomenon is not directly observable.

There are an infinite number of indicators and as long as causal interrelations are not known, every indicator can correspond to every construct. They differ however, in the intensity in which they correspond to the construct. This is the so-called validity, which will be of enormous importance in the following analysis.

This relative belonging of an indicator to a theoretic construct can never be completely verified. It is always only preliminary, together with other indicators.

The second important characteristic of an indicator is its reliability, which can be defined as consistency. As validity, it can only be proven *ad interim* by checking measurements, and observing in how far they deliver comparable results. The problem is that also the control measurement can be faulty and thus only be verified provisionally. To inhibit an infinite regress one has to agree at a certain point on the validity and the reliability of an indicator.

As a result of the universe of indicators, it is principally impossible to name a specific number of indicators that are necessary to measure a theoretical term. De facto, practical reasons decide how many indicators are used.

##### 2.) *Possible concerns against the use of human rights indicators*

Is it allowed to use indicators to measure the degree of the realization of the Covenant rights?

The first objection might result from the fact that they are only interim verified, judicial conclusions, on the other hand ultimately they seem to be ultimately reasoned. However, all scientific theories and causal models are only verified *ad interim* as long as no more exact explanation is developed. As a result, the inductive approach does not differ from the common deductive one in a manner that would forbid it to use indicators in the jurisprudence in general. This assertion assumes that the

indicators are applied in descending order according to their validity, as otherwise a state could argue that the indicators are arbitrarily utilized and the result of the monitoring process would become unpredictable.

The next objection refers to the principle of indivisibility of human rights. The problem is that an indicator purposefully separates a right and thus excludes all other of its dimensions. The indicator measures an abstract term only approximately instead of totally and exactly, like the syllogistic approach, which is common in the jurisprudence. The solution lies in the number of indicators applied. The more of them are used to operationalize a right, the more dimensions are covered. From a theoretical perspective, a right is only fully realized, if all indicators from the universe are applied cumulatively so that finally no aspect is cut off. In practice, it is the time frame of the examination procedure that limits the investigation and leads to the fact that only a few dimensions of each right can be monitored.

However, this time frame was actually set by the states when they mandated the ECOSOC with the consideration of the reports in a very vague verbalized norm, and without providing it with additional financial resources. Therefore, there is no other possibility than to limit the number of indicators applied which automatically includes that certain aspects of the rights are cut off. Thus, there might be a certain constraint of the principle of indivisibility, but this is based in the Covenant.

A third demur might occur in view of human dignity. At least a quantitative assessment could violate this principle, because humans are no longer regarded as individuals but as simple numbers.

Yet, this argument is unremarkable, as it is just the purpose of the quantification to protect the dignity of the persons measured. Besides, Article 16(1) ICESCR reasonably cannot be understood as putting a duty to report on every single human being. Rather its purpose is that a general overview on the realization of the rights in the particular state shall be given. After all, states would be overstrained with such a quixotic, detailed reporting. The reason lies thus again in the Covenant which allows a quantification in a certain range.

### *3.) Disaggregation*

The Covenant does not allow adjusting the measurement on averages. In fact, Article 2(2) obliges the states to operationalize the rights in a disaggregated way. Spoken in the words of social sciences, this norm

constitutes a part of the theoretical concept that is to be measured with indicators. Hence, indicators for the disadvantaged, marginalized and vulnerable groups are exceedingly valid and thus have to be used with priority.

On the other hand, states must be able to forecast the results of the monitoring process as much as possible. Therefore, the Committee is not allowed to focus only on problems in the states, as this would be an arbitrary approach. Instead, it must regard all indicators at least somewhat, in the named descending order.

For reasons of equal treatment, this includes whoever claims that his order is the correct one and has, on objection of the counterpart, to prove it with other indicators.

In addition, for reasons of foreseeability and universality of human rights a state might argue that the Covenant should express *ex ante* for which groups the data has to be disaggregated. As this is not the case, the state should have the power to decide how far to disaggregate.

At first, this thesis is problematic for reasons of universality, because the groups would differ from state to state and some could be excluded on purpose. Moreover, it contradicts the intention of the reporting procedure, that every state could decide for itself what to report on. On the other hand, the Committee does not have the competence to decide on its own, which groups to choose, as it is only mandated to observe. The solution lies in the amount of resources that must be spent for a maximal disaggregation. This and other problems will be examined in the next unit.

## **V. Structure and imperative of the indicator model in the procedure in front of the Committee on Economic, Social and Cultural Rights**

### *1.) The relation of the violations approach to the indicator model*

As a counterpart to the indicator model the violations approach has been developed. The latter means that the monitoring process focuses on violations deriving from governmental actions, laws and policies. The violations can be based on acts or policies reflecting discrimination as well as such resulting from the failure to implement a core minimum.

In the result, both approaches can supplement each other. At first, indicators are needed to measure the progressive dimensions of the right. Additionally, the violations approach can be used to evaluate the obliga-

tions that have to be implemented immediately such as the elimination of de iure discriminations. Besides, the violations approach should be applied in cases where gross and massive violations of human rights are in question, since the procedure in front of the Committee must not be weaker than the Charter based 1503-procedure. Otherwise, states would be allowed to escape into a constructive dialogue where this course of action was misplaced.

### *2.) Qualitative and quantitative indicators*

Indicators are a means by which the progressive realization is measured. They do not release the Committee of evaluating whether a state behaves in conformity with the Covenant or not. This final question must be pointed out by a qualitative value judgment. This, in turn, is one reason why it is not convincing to speak of quantitative indicators as an objective tool of measurement, as the Committee is no computer and the final decision is always subjectively motivated. Rather it is not forbidden to use qualitative indicators, which mean those that cannot be presented numerically.

In the social sciences, it is disputed whether the quantitative or the qualitative approach deliver better results. Correct is that quantitative measurements must always conform with strict methods, whereas qualitative approaches allow the investigator a much bigger latitude. As the states are interested in obtaining results that are as foreseeable as possible, the examination of the reports must follow strict rules as much as possible. Yet, even with qualitative indicators, this requirement can be guaranteed if they are applied in descending order according to their validity and their reliability.

Furthermore, the monitoring process cannot abstain from using qualitative data, especially to measure discriminations and political plans where no quantitative data yet exist.

Insofar the prevailing opinion follows that qualitative indicators can support the quantitative, and both categories are needed in the states' reporting procedure.

### *3.) The three categories of human rights indicators*

By now, the newer discussions distinguish three categories of human rights indicators: structural, process, and outcome indicators. Structural indicators measure whether or not appropriate legal regulating and

institutional structures are in place that are considered necessary or useful for the realization of a human right. This refers *inter alia* to national law, policy frameworks and institutional organization. Most structural indicators are qualitative in nature.

Process indicators are designed to assess how and to what degree activities necessary to attain objectives specific to certain rights are put into practice. They also serve to incorporate the human rights principles of non-discrimination, accountability and participation in the monitoring process.

The third group, the outcome indicators, measure the status of the population's enjoyment of a right. In how far a result is achieved by a state's policy can be measured only approximately, and only by including other correlating indicators in the monitoring process. Otherwise, all residual circumstances that potentially influence the outcome value would have to be constant, which is never the case in practice. However, since the Covenant allows due time constraints to reduce the number of indicators applied to a small quantity, it permits to measure only approximately.

Lastly, it may be important for the development of indicators, but not for the monitoring procedure, to allot the indicators to a certain class. Anyway, the three categories overlap and the indicators have to be applied in descending order according to their correspondence.

Admittedly, it is important to use all categories if a state wants to exculpate the negative value of an indicator – especially of an outcome indicator – with differing priorities. Then it can prove that it has utilized its means for another human rights aim by showing which policies and laws it has adopted to reach it.

Also, it should be mentioned that all three dimensions of the rights, “respect, protect and fulfill” can and should be supervised with all three categories of indicators.

#### *4.) Human rights indicators for special applications*

For the duties the states have to realize immediately that the Committee may use indicators as checklists. The real indicator approach however is not demanded, because these duties are not subject to the progressive dimensions for whose measurement they serve.

Indicators can be employed to measure the core contents, as their realization is partly resource-dependent and these means might lack. In this case, the Committee can at least observe if a State is moving more

closely to the core content threshold and is undertaking all possible efforts to reach this goal.

Furthermore, indicators for the core contents have – according to the intention of the right – an extraordinary high validity. Thus, they have to be applied with priority. Yet, additional work is needed to clear the exact substance of the core content of each right.

Irrespective of the state's level of development, the Committee has to secure with indicators that the State does not move backwards with the realization of the Covenant rights. If this is the case, the State will have shortened capacities to exculpate.

##### *5.) The number of human rights indicators*

Unsolved until today is the question of how many indicators have to be used for each State report. From the intention of the Covenant follows that as many dimensions of the rights as possible have to be measured. On the other hand, the Committee has on average only three half days for every state report. As it is not feasible to predict how long the discussions on the respective elements will take, and as this time differs from report to report, it is not possible to set a fixed or even a minimum number of indicators that have to be applied. Therefore,

practice must decide how many indicators to use in each observation. However, this rule applies only to the Committee, not to the States. Rather the States have to deliver, pursuant to the purpose of the reporting procedure, an image of their human rights situation, which has to be as detailed as possible.

Of course, it is not possible to itemize all indicators of the universe, as their number is infinite. Hence, a state would have pick only those indicators that any reasonable average state would, which seriously cares for the realization of economic, social and cultural rights.

If a State does not have the means to detect a certain indicator value, it can justify this lack under the terms of Article 2(1) ICESCR. In any case, if the State fails to name an indicator, the Committee is nevertheless allowed to use it. Otherwise, a State could bypass the aggravating effects of the monitoring process and deliver an incomplete picture of its human rights situation.

### 6.) *The data*

The data for the States reports can be derived from different sources, such as official statistical registers, censuses, social services, surveys, and samples.

### 7.) *Indices*

In an index, multiple indicators are coalesced into one single value. Sometimes each indicator of the index is additionally multiplied with a different factor to assess it.

In contrast to pure political analyses, as the specialized agencies do sometimes, it is not allowed to use indices in the State reporting procedure. Firstly, by using indices, factors run the risk of being hidden. Above all, every combination of indicators to one single value means that they are weighted and it is not possible to weight indicators without arbitrariness.

## VI. The IBSA-procedure

### 1.) *Outline on benchmarks, scoping and assessment*

As a consequence of the fact that it cannot determine completely the available resources and that it is difficult to assess whether a State chooses the best opportunity to realize the rights, the Committee has demanded the states to set benchmarks. The latter can be defined as targets set by a state that serve to assess the progressive realization with a view to the available resources.

Benchmarks can either be qualitative or quantitative in nature. They can be set on every indicator, although the outcome indicators are especially suitable for them.

The complete IBSA-procedure contains four steps: First indicators are developed, on which the states set benchmarks. Next, the Committee reviews the benchmarks to make sure they are neither too low nor too high, the so-called scoping. In the following reporting period, it observes whether the state has reached its goals, this is what is called assessment. At that time, new benchmarks are set and the procedure starts anew.

### *2.) Possible arguments against the IBSA-procedure*

The IBSA-approach, particularly the scoping, is not forbidden for reasons of inalienability and of indisposability of human rights. Rather, the task of the Committee is to secure that the states follow their obligations even if this means that both negotiate on what is the best way to realize the rights.

A likely objection against the IBSA-procedure might also occur on the question of which state will set benchmarks if it thereby simplifies the Committee to determine if it has violated its obligations. But then one must also ask which state should ratify a human rights Covenant and by that put itself under public assessment instead of realizing the rights on its own and more secretly. Furthermore, states get legal certainty by knowing what the Committee will expect of them.

### *3.) The voluntary character of the benchmark setting*

One could raise the question, whether or not states are obliged to set benchmarks by now. Even if the wording of the Articles 16 et seq. ICESCR only sets a duty to report, an obligation to set benchmarks could be derived from the principle of good faith. This is because it would counter this principle if states do not follow the wish of the Committee to set benchmarks without adequate arguments.

However, this view is not convincing, as with their ratification the states intended no further formal obligations than to report, and the wording "report" points to the past and not to the future. The intention of the states even limits the ECOSOC in its powers to rule the reporting procedure according to Article 17 ICESCR. In the end, it is up to the Committee, national human rights movements, and the international community to convince or politically force the states to set benchmarks.

### *4.) The frame of the benchmarksetting*

In general, benchmarks must be set with a view to the next reporting period, usually five years. By way of exception shorter periods are not only allowed but commanded if the duties substantively have to be realized faster, as for example the ones that have to be realized immediately.

For reasons of substantive law, the states must set their benchmarks as high as possible. But as states are not obliged to set benchmarks at all, every negotiation with the Committee is voluntary. In the scoping process then again they have to prove that the target is adequate, whereas it cannot demand more than to explain it plausibly.

Again, every state possesses a margin of appreciation on which target can reasonably be reached. This is a consequence of the fact that a number of economical and technical questions must be taken into account, when computing the targets and the Committee does not have a higher expertise on those questions than the state itself. But then, the Committee supervises, if the target lies in a maintainable frame. How exact the benchmarks must be measured should be in accordance with the available resources. The richer a state is the more resources it must spend for an exact calculation. Further, it is relevant how valid the underlying indicator is. The more it corresponds to the right, the more accurate must the analyses be.

#### *5.) Conditioned benchmarks*

Benchmarks may not be subjected to a condition, neither a resolvent, nor a suspensive one. The base for this postulate lies in the purpose of the benchmarks. They shall facilitate the observation of the reports and create legal certainty. Contrariwise a condition would be derogating legal security, and further aggravate the procedure if the Committee had to investigate whether the event has occurred or not.

#### *6.) The legal force of benchmarks*

The next problem that arises concerns the question, in how far benchmarks are binding. If they were completely nonbinding, a state could abdicate them and the advantages of the IBSA-procedure would vanish. Probably some governments will claim that they feel not bound by the targets a prior government set for the state. If they were not flexible, they would not have the opportunity to make a better human rights policy. As the Committee was not authorized to compose an international treaty, benchmarks could not bind with the same stringency as an international treaty does. Thus not the state as such would be bound, but only the current government.

Even though benchmarks are no treaty, it is not impossible to apply the provisions analogously, especially Article 27 of the Vienna Convention

on the Law of Treaties. This is justifiable as the latter provision rules the conflict between international and domestic law in favor of international law for reasons of legal certainty. The clash appearing in the benchmark approach is comparable, and should thus be solved in an identical manner. The objection concerning the comparison to a treaty can be rebutted, as the international law knows other binding forms of action that bind for reasons of good faith. *Videlicet* it would encounter this latter principle if a government agent sets targets for its state and this state would later claim not to be bound by them. Cumulatively it appears that a state in international law is in principle seen as a single unit and the procedure in front of the Committee is part of international law. Furthermore, the benchmarks concern the state report, which means that a whole state is observed and evaluated and not just its current government.

Thus, as the abovementioned possible objections of the governments are not convincing, the conclusion is that benchmarks can bind a state.

The next question is: under which circumstances they do bind. If benchmarks would always bind irrespective of the scoping, states would set them systematically low. On the other hand, the only task of the Committee is to observe the reports, thus it is not competent to set benchmarks on its own for a state. Therefore, no state is obliged to change its benchmarks if the Committee criticizes them as too low. However, not only the state but also the public needs legal certainty if a state insists on its benchmark, or if it is willing to reveal it. This goal can best be reached by certain formalities. Consequently, benchmarks bind only if the Committee has accepted them in its Concluding observations.

### 7.) *The substance of the scoping-procedure*

How should the Committee know if a benchmark is neither too high nor too low as long as the total amount of the resources is not measurable? The solution lies in the onus. Benchmarks are an *ex ante* specification of the margin of discretion, and according to the previous results the states are obliged to demonstrate what their resources are, and how they spend them for the realization of economic, social and cultural rights. On this basis the Committee can consult UN specialized agencies, if the way the state plans to spend its resources is reasonable concerning the realization of the rights, or if it is unacceptable.

8.) *The domestic competence to set benchmarks*

Who is competent to set benchmarks for the state?

According to the intentions of the Articles 7, 27 and 46 of the Vienna Convention on the Law of Treaties, a state decides on itself, who sets the benchmarks. It is a domestic matter. During the oral session it is in practice the head of the delegation, who decides who talks to the Committee on a specific topic.

9.) *The order of the benchmarks in the scoping procedure*

The Committee is free to use proposed benchmarks independent of the validity of the respective indicator. The reason for this is that it is not obliged to use the benchmarking-procedure at all. Then it must a fortiori have the capacity to decide in which cases benchmarks will facilitate the observance of the reports and in which they are unnecessary.

10.) *Benchmarks and core contents*

Although the core contents are universal, it is allowed to apply the IBSA-approach in these dimensions, because they also contain progressive elements.

11.) *The number of benchmarks*

The Covenant does not determine either a minimum or a maximum number of benchmarks to be applied. Regarding the terse time of the monitoring process, it seems feasible to have a number of five to six per state report.

12.) *Benchmark Indices*

As benchmarks are no more than values on indicators, they follow in principle the rules that count for the latter. Therefore, it is not allowed to form benchmark-indices.

### 13.) *The assessment*

During the last step, the assessment, the Committee checks if a state has reached the benchmark. If it failed, the Committee will observe the reasons for this failure. Only sudden, unpredictable occurrences such as natural disasters can excuse a state, because by setting its benchmark, it has in principle guaranteed to reach it. As it controls the evidences on its territory, the onus is on the state to prove that it has reached its goal.

Over and above, the Committee is not bound to the indicators that have been provided with benchmarks. Rather, according to the purpose of the treaty, it may still use all other indicators. Otherwise, the IBSA-procedure would run the risk of being misused by states that would set one or two benchmarks and thereby avoid all their other substantive obligations.

## VII. Transnational obligations in the ICESCR and their monitoring

In how far the Covenant obliges the states to realize the economic, social and cultural rights beyond their borders is a disputed question.

### 1.) *The wording*

The wording of several articles of the Covenant indicates that transnational, sometimes also called extraterritorial or even international obligations are not unknown to the ICESCR. Particularly Article 2(1) speaks of “international co-operation”, although it should be mentioned that this sentence is interpreted in different manners.

### 2.) *The intention of the Covenant*

It would be strange if a state was obliged to realize the Covenant right on its own territory as fast as possible, but at the same time could hamper the enjoyment of these rights in other states. This could be a problem in particular, if the foreign territory belongs to a member of the ICESCR, because then the first state would disturb its treaty partner with the realization of its obligations. This again does not conform to the principle of good faith.

Besides, one could argue that a state discriminates for reasons of nationality if it does not care about the human rights of foreigners in foreign countries.

One might object that foreigners could turn to their own government and were thus protected sufficiently. So a state would be allowed to treat foreigners in other countries different from its own inhabitants.

Yet, if this objection were absolutely correct, one would approach sub-standards for sub-humans, because a government would even be allowed to harm inhabitants of foreign territories intentionally. Rather, a state discriminates if it does not care how its policies on human rights affect foreign countries, especially if the minimum standard of the right is enshrined in the foreign country by its policy.

However, not to be forgotten is the fact that there is a second state, which is primarily competent to realize the rights of the concerned people, so the competence of all other states for them is only secondary. This allows these latter states to assign the human rights interests of foreign states a lower rank than the ones in their own country. But when practicing their discretion they also have to take into account how far the human rights in other states are already realized compared to their own. This can even imply to transfer resources from rich to poorer states if this is the most effective way to help them with the realization of the rights.

On the other hand, the ICESCR is no development-aid-treaty. Its transnational elements are sparse and weakly phrased compared to the remaining human rights obligations. Building on that, it cannot be supposed that the states intended a massive transfer of resources when ratifying the Covenant. Particularly, when ratifying the Covenant, richer states did not show that they were up to reduce the national realization of human rights in the peripheral dimensions as long as the minimum standards were not reached globally. Thus, the transnational obligations are secondary compared to the domestic ones, especially if resources are needed for their realization, but nevertheless they do exist.

### *3.) The scope of the transnational obligations*

So the question remaining is only to which extent these obligations exist and how they can be concretized. According to a very restrictive interpretation one could assume that states are only obliged to consult with UN specialized agencies. Thereby one could refer to Articles 55(b) and (c) in connection with Article 56 of the UN-Charter. Though, even

if read in conjunction with the friendly–relations–declaration, these provisions are less concrete than the ones in the ICESCR. So the latter can be regarded as *leges speciales*, and thus embodies stricter obligations than the UN–Charter.

In favor of a restrictive approach, it could be alleged that the Articles 22 and 28 of the UDHR were in fact not included in one of the Covenants, although most other human rights of the UDHR were. Then again, the wording of the parallel provision to Article 2(1) ICESCR, Article 2(1) ICCPR is narrower than the one of the ICESCR by speaking of “all individuals within its territory and subject to its jurisdictions”. As the ICESCR does not contain such a qualification, it can be assumed that all three dimensions of economic, social and cultural rights shall be realized domestically as well as transnationally.

No further obligations follow from the right to development, because there is currently no consensus that such a right with binding obligations exists.

But in recent General Comments, the Committee has specified the contents of the transnational obligations to some degree. It does not hesitate to acknowledge extraterritorial obligations for all three dimensions for certain rights.

Noteworthy is also Article 13 of the Charter of Economic Rights and Duties of States. Although it is only a declaration of the UN General Assembly, it shows how the UN–Charter is interpreted nowadays by the majority of states.

To find criteria under which circumstances a member party of the ICESCR is responsible for the status of enjoyment of human rights in another country, an analogy to international environmental law can be drawn. According to general principles in this subject, a state is responsible for actions taking place on its territory or under its jurisdiction. The limits up to which a state is allowed to use its resources and to pollute the environment are based on a balance between its sovereignty and the interests of the other states. While this counts only for positive actions, the analogy can only be justified for the dimensions of the obligations to respect and to protect. In these areas, a state is thus responsible for violations of economic, social and cultural rights outside its territory if it controls the source of interference.

The conclusion that can be drawn from the analysis of the Covenant and the named documents is that primarily every state is responsible on its own to realize the Covenants rights within its territory. Additionally, other states are tasked to assist, which can mean not to hamper the re-

alization, and to regulate third parties not to interfere. Third parties can be enterprises as well as international organizations.

Even in the area of the obligations to fulfill exist transnational obligations as the Covenant sets the duty to co-operate in general terms without distinguishing between the three categories of obligations.

The problem is that the Covenant lacks criteria, which state shall help whom, under which circumstances and to which extent. Thus, every state has a very broad margin of discretion on how to realize its transnational obligations to fulfill. As the term of progressive realization is also valid for the extraterritorial obligations, the available resources are one indicator how far the transnational duties reach.

The term “especially economic and technical” in Article 2(1) ICESCR specifies the extraterritorial obligations. If this passage is read in conjunction with Article 15(1) (b) and (2) of the Covenant one can derive an obligation not to hamper another state with the access to technology, as well as to negotiate on the transfer of technology. Yet, both obligations exist only to a small degree, because the states were not disposed to constrict their sovereignty in a huge extent for the benefit of other states when ratifying the covenant.

Furthermore, from the wording “particularly the adoption of legislative measures”, it can be derived that technical and economic co-operation shall be secured by laws and treaties, if this is an adequate means. Laws and treaties in this area are especially those ruling patent law and utility models, because economic questions in the fields of technology are their subject.

If one agrees with the thesis of the prevailing opinion that a state has obligations of result although it cannot influence all factors relevant for the realization of human rights, there is no cogent reason why this should not apply to the transnational obligations. Admittedly, the influence capability is reduced on foreign territories, so the obligations of result cannot reach as far as in the domestic area. Yet, one cannot deny them completely. In favor of the obliged state however the onus switches onto the international community.

#### *4.) Transnational indicators and benchmarks*

The need for transnational indicators has been postulated several times. Besides the amount of development assistance, indicators could be the amount of essential pharmaceuticals delivered to developing countries or the average vitamin dose of exported food.

If it is possible to attribute a certain result in analogy to the international environmental law, it is also allowed to use outcome indicators of the concerned foreign country.

Yet in every case it is important to take into account the vast discretion every state has with the realization of its transnational obligations. Thus, the IBSA–approach is extraordinarily valuable in these dimensions. States can set transnational benchmarks to get the Concluding observations more foreseeable.

### **VIII. The overcoming of obstacles by intellectual property law with the IBSA–procedure**

#### *1.) Obstacles by intellectual property law that hamper the access to variables relevant to human rights*

##### a) National and international patent law and similar rights

A patent is a document, issued upon application, by a government office, which describes an invention and creates a legal situation in which the patented invention can normally only be exploited (manufactured, used, sold, imported) with the authorization of the owner of the patent. “Invention” means a solution to a specific problem in the field of technology. An invention may relate to a product or a process. The protection conferred by the patent is limited in time, generally 20 years.

In a number of countries, inventions are also protected through registration under the heading of “utility model” or “short–term patent.” The requirements are somewhat less strict than

those for patents, in particular in respect to inventive step, and in comparison with patents the fees are lower, and the duration of protection is shorter, but otherwise the rights under the utility model or short–term patent are similar.

The aim of the patent law and the named similar rights is to stimulate the technical progression and thereby the benefit for mankind by granting a monopoly. This on the other hand does not mean that the patent gives the right to use or sell anything. The effects of the grant of a patent are that the patented invention may not be exploited by persons other than the owner of the patent, unless the owner agrees to such exploitation. Thus, while the owner is not given a statutory right to practice his invention, he is given a statutory right to prevent others from commercially exploiting his invention, which is frequently re-

ferred to as a right to exclude others from making, using or selling the invention. The right to take action against any person exploiting the patented invention without his agreement constitutes the patent owner's most important right, since it permits him to derive the material benefits to which he is entitled as a reward for his intellectual effort and work, and compensation for the expenses which his research and experimentation leading to the invention have entailed.

#### b) Connection to human rights

By granting a monopole, a patent can hamper the access of humans to essential innovations such as pharmaceuticals or novel food. For this reason it is highly disputed how strong the protection of patent law shall be. Some argue that the protection must not be too weak, because then it would not stimulate potential inventors enough to invest in improvements for the realization of human rights. As it has not been possible yet to find a generally accepted consensus, this remains a political question analogous to the one for the best way to realize economic, social and cultural rights.

The dilemma gets even more complex if the international effects of patent law are taken into account. *De iure*, though some international treaties deal with intellectual property law, an industrial property right counts only in the domestic area. *De facto* however, it can affect the human rights realization in foreign countries in many ways. Firstly, it can influence the price for the invention, which might increase to such a level that people in poor countries are no longer able to pay for it. In all cases this concerns the right to enjoy the benefits of scientific progress and its applications, in many cases also the right to health, and in some the right to food, to water and to housing.

#### 2.) *National duties concerning intellectual property law*

As the state adapts the structure of the patent law and it grants the patent, one can argue that it governs the monopole and hereby the source of interference, which impedes the access to variables relevant for human rights in other countries. Respectively, if the obstacle "patent" concerns the duty to respect or the duty to protect, the analogy to international environmental law can be applied, because the state has the possibility to change the situation on its territory.

Certainly, the need remains to find the optimum balance between an adequate stimulation of the technical progression and access to human rights. Furthermore, according to the prior results the state is allowed to impede access to essential innovations in foreign countries by intellectual property law, if this improves access to these innovations for its own inhabitants. On the other hand, it has – as explained – within its discretion to take into account the possible consequences of its policies on the human rights of aliens. Thus, a state may not only for its own economic progress, disregard these impacts as this would in fact ignore the transnational elements of the Covenant.

As a result, the state has a wide margin of discretion on which its patent law is formed, best to realize the economic, social and cultural rights on its territory, as well as in foreign ones. Not to be forgotten is that international treaties like the TRIPs-agreement might narrow this discretion, but at least it does not disappear completely. For example, a state is still flexible to grant compulsory licenses, create patent pools, adapt its anti trust law, maximum price provisions, or exporting duties.

As it is incompatible with Article 31(3)(c) of the Vienna Convention on the Law of Treaties, the view that human rights treaties always reign over intellectual property treaties must be rejected. Rather, both treaties have to be applied conjointly, and an approach that allows both treaties to coexist must be found.

There have been several attempts to deal with this problem in the area of the right to health, namely the Doha-Declaration, the TRIPs-waiver and the additional protocol on the TRIPs-agreement. Finally yet importantly, the TRIPs-agreement contains in its rarely discussed Articles 66 and 67(2) provisions that remind of the duty of international cooperation in the ICESCR. All these provisions of and around the TRIPs-agreement must be taken into account when interpreting it.

Thus, in front of the Committee a state can only have a very limited claim of being hampered by the TRIPs-agreement on the realization of its transnational obligations in the field of intellectual property law. Rather, it has to demonstrate, according to general principles, that it has found the best way to cope with its human rights obligations.

3.) *The monitoring procedure for the transnational obligations in the field of intellectual property law*

a) Practical necessities

The Committee is the only human rights body that deals with economic, social and cultural rights and that can constitute a counterpart to the WTO–Council, which is competent to handle questions on intellectual property, even if they affect human rights. In the area where both treaties overlap, both bodies are competent. De facto, a state will follow the recommendations of the one with the stronger enforcement procedures. As the ones of the WTO are very strong, the political procedure in front of the Committee must be highly developed if the duties of the ICESCR shall not exist only on paper.

b) The violations approach in the area of intellectual property law

As discussed above, a combination of the violations approach and the IBSA–model delivers the best results. For the area of the duties to respect, indicators are only needed as a checklist, but not to measure the progressive realization. Yet, duties only exist as far as the analogy to the international environmental law reaches.

Examples of violations of transnational obligations in the field of intellectual property law could be:

- Reprimand of another country that uses the flexibilities of the TRIPs–agreement in favor of human rights.
- Pressuring country negotiators not to support positions embodying Doha Declaration objectives.
- Use of trade pressure to impose TRIPs–plus–protection if this potentially harms the realization of human rights, which means intellectual property law that is stronger than the TRIPs requires.
- Tightening its own patent law to the disadvantage of human rights, e.g. the abolishment of the possibility to grant exporting compulsory licenses. Here, there actually occurs a retrogressive step.

c) Transnational indicators in the area of intellectual property law

For the progressive dimensions, one has to find transnational indicators that cover the area of patent and similar law.

Indicator on the area of the obligations to protect could be:

- Controls against the misuse of patents such as the number of persons employed in anti trust law offices.
- Voting and arguing in favor of human rights in international organizations for the protection of intellectual property.
- Existence of a law against reverse payments.
- Existence of a maximum exporting price for a certain invention relevant for the realization of human rights.
- Percentage of exports compared on the total merchandising if the patentee holds patents for the same invention in several countries.
- The number of alien licensees for an invention relevant for the realization of human rights.

Not a good indicator however would be the number of compulsory licenses, as it depends highly on the strength of the domestic patent protection. The weaker the latter is, the less compulsory licenses are needed. A little bit better would be the number of the compulsory licenses compared to the number of granted patents, but this is still imprecise as the number of patent applications filed is influenced by a number of legislative and economic questions.

Besides the amount of financial development assistance, indicators for the obligations to fulfill could be,

- The total amount of essential drugs exported to developing countries.
- The amount of domestically produced drugs that serve as treatment of diseases, which are primarily spread in foreign countries.
- The amount of essential drugs that were produced by domestic factories and delivered free of charge to poorer countries.
- The increase in the number of people in a foreign country that have access to safe potable water due to a invention on water preparation that was made on the territory of the monitored state.
- Adoption of international partnerships for the transfer of essential technologies.
- The amount of license fees the monitored state spent to export essential drugs.
- The height of the promise of a reward for an invention that is primarily needed in foreign countries.
- The average price for a certain invention relevant for the realization of human rights in a foreign country.

## d) Transnational benchmarks in the area of intellectual property law

Due to its extremely wide margin of discretion on its transnational obligations concerning patent law, the IBSA-procedure is extraordinarily valuable in this field. States could set transnational outcome-benchmarks such as the number of deaths of HIV-infected people in a certain country, if it possesses the capacity to produce and to export pharmaceuticals against AIDS.

Also, it could set structural benchmarks concerning their patent law such as the adoption of greater possibilities to grant compulsory licenses.

Not least, process-benchmarks can be valuable such as the number of exported drugs into certain countries against AIDS.

