

TRADE AS A WEAPON? THE WTO AND HUMAN RIGHTS-BASED TRADE MEASURES

JENNY SCHULTZ* AND RACHEL BALL**

[Can the World Trade Organisation become a body for addressing human rights issues? As an international body the WTO is growing in stature. However moves to encompass human rights concerns are unlikely to go unchallenged by developing nations, and the WTO's internal rules add another layer of complexity. Trade sanctions can be a blunt weapon in human rights campaigns.]

‘Pursuant to the WTO, each Member is free to determine the values to which it gives priority and the level of protection it deems adequate for such values. This would include any societal value elected by a WTO Member... [T]he only control exercised by the WTO is whether the member is in good faith when invoking such non-trade values or whether it is hiding a protectionist device. This control is exercised by the WTO dispute settlement mechanism. This WTO dispute settlement mechanism has not up to now given trade policy rules precedence over other multilateral rules.’¹

Director-General of the WTO Pascal Lamy, 2005.

* Senior Lecturer, Faculty of Law, Monash University.

** Rachel Ball is currently undertaking postgraduate research in the US. She cowrote this article in her capacity as a research assistant at the Castan Centre for Human Rights Law at Monash University.

This article is part of the outcomes of an ARC grant on ‘The WTO and Human Rights’ awarded to the Monash Faculty of Law. We wish to thank Rupert Watters for his research assistance and Professor Sarah Joseph for comments on the drafts.

¹ Pascal Lamy, ‘Towards Global Governance?’ (speech delivered at the Master of Public Affairs inaugural lecture at the Institut d’Etudes Politiques de Paris, 21 October, 2005).

I INTRODUCTION

The World Trade Organization [WTO]² is an institution that supervises rules regarding the liberalisation of trade in goods³ and trade in services,⁴ as well as rules regarding the protection of intellectual property.⁵ It also serves as a forum for the negotiation of new trade agreements amongst its Members. At the time of writing, there are 150 State Members of the WTO.

Whilst the WTO generally pursues a free trade agenda, it does not condemn the use of trade measures to achieve non-trade objectives in all circumstances. The most obvious example of its flexibility in this regard is the TRIPS Agreement which provides a mechanism under which trade restrictions can be used to protect intellectual property rights. If the WTO can accommodate objectives other than the promotion of free trade, what can it do for human rights?

For a number of years academic scholars have been debating this question. Generally, human rights advocates identify two ways in which human rights could play a role in WTO operations. First, there is the view that WTO rules should be reformed, structured and applied in such a way as to maximise promotion of human rights objectives; that is that there should be greater linkage between the international trade and human rights regimes.⁶ Second, there is the question of the extent to which the existing trade regime can be utilised to promote or at least not undermine the enjoyment of human rights. This article will deal with one aspect of the latter issue: whether trade can or should be used as a weapon to protect and promote human rights.

² Established in the *Marrakesh Agreement Establishing the WTO*, opened for signature April 15, 1994, 1867 UNTS 154 (entered into force 1 January 1995). (*Agreement Establishing the WTO*).

³ *General Agreement on Tariffs and Trade 1994, Agreement Establishing the WTO, Annex 1A*, 1867 UNTS 187 ('GATT')

⁴ *General Agreement on Trade in Services, Agreement Establishing the WTO, Annex 1B*, 1869 UNTS 183. ('GATS')

⁵ *Agreement on Trade-Related Aspects of Intellectual Property Rights, Agreement Establishing the WTO, Annex 1C*, 1869 UNTS 299. ('TRIPS').

⁶ See, eg, Gudrun Monika Zagel, 'WTO & Human Rights: Examining Linkages and Suggesting Convergence' (Voices of Development Jurists Paper Series Vol.2 No.2, International Development Law Organization, 2005); Marco C.E.J. Bronkers, 'More Power to the WTO?', (2001) 4(1) *Journal of International Economic Law* 41; Thomas Cottier, 'Trade and Human Rights: A Relationship to Discover?', (2002) 5(1) *Journal of International Economic Law* 111, and "Symposium: The Boundaries of the WTO", papers published in (2002) 96 *American Journal of International Law*.

The introduction of an Agreement which uses the WTO dispute settlement mechanism (DSM) to enforce human rights law is manifestly unrealistic. Decisions within the WTO are made by consensus⁷ and therefore require the support of all member states. Given the patent objections to the inclusion of human rights in the trade regime by developing countries in particular,⁸ it is extremely unlikely that such a massive amendment to the function and mandate of the WTO could ever occur. What remains is the possibility that the WTO could accommodate the unilateral human rights-based trade measures instituted by member states. Trade measures are a powerful tool. After the use of force, they are perhaps the most effective means by which one state can impose its will on another.⁹

The question that is examined here is whether Pascal Lamy was correct in his assertion that “each Member is free to determine the values to which it gives priority and the level of protection it deems adequate for such values.”¹⁰ Section II looks at the various ways in which a state may use trade measures to protect and promote its human rights values. Section III examines the jurisprudence from GATT and WTO panels and Appellate Bodies and concludes that only in certain cases will WTO law allow member states to utilise trade measures to protect human rights. The final section evaluates this arrangement from a human rights perspective. It discusses a number of reasons why an expansion of a state’s legal right to protect human rights through trade measures would be counterproductive.

II CLASSIFYING HUMAN RIGHTS-BASED TRADE MEASURES

Human rights related trade measures can be divided into two broad categories: ‘inwardly directed’ and ‘outwardly directed’ measures.¹¹ Inwardly directed measures are those intended to protect human rights within the implementing country. For example, Country A’s law prohibiting the

⁷ Article IX of the *Agreement Establishing the WTO*, above n 2.

⁸ See below in section IV.A.2.

⁹ Carlos Manuel Vazquez, ‘Trade Sanctions and Human Rights – Past, Present, and Future’ (2003) 6(4) *Journal of International Economic Law* 797. At 797-801 Vazquez discusses the evolution and interplay of international law concerning the use of force, human rights and trade.

¹⁰ Lamy, above n 1.

¹¹ Vazquez uses these terms, above n 9, at 812.

import of diseased poultry (designed to protect the right to health of Country A's population)¹² would be an inwardly directed measure.

Outwardly directed measures, more commonly known as sanctions, are those that aim to change practices in other states. Outwardly directed measures can be further sub-divided into country-based and product-based sanctions. Country-based trade measures discriminate against goods with reference to nationality. For example, the general sanctions on goods from Burma which have been imposed by the US pursuant to the Burma Freedom and Democracy Act (2003) can be classified as country-based trade measures.¹³ That Act will be discussed in more detail below. While country-based measures may be authorised by the Security Council under Articles 39 and 41 of the UN Charter, this article will confine its discussion to unilateral sanctions.¹⁴

Product-based sanctions, the second sub-category of outwardly directed measures, discriminate against goods based on the process by which they were manufactured. For example, restrictions on imports that have been manufactured using forced labour would be categorised as product-based measures.

It is important to make these distinctions. As Dommen has noted, “[t]he political will to consider these two different types of human rights concerns [inwardly directed versus outwardly directed trade measures] is very

¹² The right to health is set out in Article 12 of the *International Convention on Economic, Social and Cultural Rights*, opened for signature December 16, 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR'). The right to health is considered not to be confined to the right to health care, but embraces a wide range of factors that promote conditions in which people can lead a healthy life including access to safe water, access to food and nutrition and a healthy environment. Caroline Dommen, 'Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies' (2002) 24(1) *Human Rights Quarterly* 1, 18-19.

¹³ *Burmese Freedom and Democracy Act of 2003*, Pub.L., 108-61, ss. 1-9, 117 Stat 864, 864 – 871 ('*Burmese Freedom Act*')

¹⁴ *Charter of the United Nations*, opened for signature 26 June, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153 (entered into force 24 October 1945) ('UN Charter'). Multilateral sanctions are discussed briefly below in Section IV. For a discussion of the effect of multilateral agreements on WTO obligations see Joost Pauwelyn 'Human Rights in WTO Dispute Settlement', in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi (eds.), *Human Rights and International Trade* (2005), 205, 218-219.

different”.¹⁵ The next section deals with the legal status of each type of human rights based measure under WTO law. The conclusions reached may not conform to the textual analysis of the WTO Agreements as preferred by some authors.¹⁶ However, it is not the concern of this section to examine and compare alternative interpretations of the WTO texts. Rather, the following section constitutes an assessment of what a WTO Panel or Appellate Body would be likely to find if it were to follow the reasoning in previous disputes.

III WTO JURISPRUDENCE

To date no WTO Panel or Appellate Body¹⁷ has ever been called upon to rule on a trade measure instituted by a Member for explicit human rights objectives.¹⁸ Lim reported in 2001 that no Member Country had ever even used the phrase “human rights” in a Panel Submission.¹⁹

¹⁵ Dommen, above n 12, 5.

¹⁶ See, for example Robert Howse and Donald Regan, ‘The Product/Process Distinction – an Illusory Basis for Disciplining “Unilateralism” in Trade Policy’ (2000) 11 *European Journal of International Law* 249.

¹⁷ WTO disputes are heard first by a Panel and then may be appealed to the Appellate Body. WTO dispute settlement procedures are governed by the *Understanding on Rules and Procedures Governing the Settlement of Disputes, Agreement Establishing the WTO, Annex 2*, 1869 UNTS 401.

¹⁸ There was a case involving a U.S. law in relation to Burma which was resolved in the domestic legal system of the U.S. before it was ever adjudicated by the WTO dispute settlement body. In 1997 the European Community requested consultations with the U.S. under the WTO Dispute Settlement Understanding and Article XXII of the Government Procurement Act regarding an Act enacted by the Commonwealth of Massachusetts on 25 June 1996: *An Act Regulating Contracts with Companies Doing Business With Burma (Myanmar)*, 1996 Mass Acts 239, ch. 130. This Act aimed at severely restricting the commercial ties between Massachusetts’s state agencies and any entities economically tied to Burma. Its aim was to take a stand against the repressive government of Burma via trade measures. Because this law was held to be unconstitutional it did not need to be pursued under the WTO system. For a detailed analysis of the law and the domestic case which resulted see Mark Baker, ‘Crosby v National Foreign Trade Council (“NFTC”): Flying Over the Judicial Hump: A Human Rights Drama Featuring Burma, the Commonwealth of Massachusetts, the WTO and the Federal Courts’ (2000) 32 *Law and Policy in International Business* 51. See also ‘Europe Takes Massachusetts Law to WTO’ *Agence France Presse*, June 20, 1997. There have also been other instances where there could have been a challenge made to trade sanctions. For example in 1996 there was a request for the establishment of a GATT panel to consider the United States’ Cuban Liberty and Democratic Solidarity Act. *United States – The Cuban Liberty and Democratic*

Nevertheless, it is possible to examine the existing decisions - particularly those decisions which relate to environmental and health issues - in order to evaluate the likely legal status of human rights-based trade measures under WTO law. This examination is most easily carried out in the context of trade in goods which is regulated by the General Agreement on Tariffs and Trade (GATT).²⁰ The GATT is the longest standing of the WTO Agreements and therefore has the most comprehensive jurisprudence.²¹ The relevant principles and provisions of the GATT are replicated in the other main WTO Trade Agreements.²²

Solidarity Act, WT/DS38/2 (1996) (Request for the Establishment of a Panel by the European Communities). The panel's authority lapsed as of 22 April 1998 (WT/DS38/6, Lapse of the Authority for the Establishment of a Panel). For a discussion of the case, see John H Jackson and Andreas F Lowenfeld, 'Helms-Burton, the US, and the WTO' *ASIL Insight No. 7* (March 1997).

¹⁹ Hoe Lim, 'Trade and Human Rights: What's at Issue?' (2001) 35(2) *Journal of World Trade* 275, 284.

²⁰ The original GATT was negotiated between 1946 and 1947 and its Oct. 30 1947 text has been provisionally applied since Jan. 1, 1948. General Agreement on Tariffs and Trade, opened for signature 30 October, 1947, 55 UNTS 187 (entered into force 1 January, 1948). The term GATT 1947 is used to refer to this version of the GATT, as subsequently rectified, amended or modified, that existed before the completion of the Uruguay Round of multilateral trade negotiations. The Uruguay Round was the basis upon which the ministers of trade signed the current WTO agreement at Marrakesh in 1994. In this article the GATT will refer to the new, legally distinct version of the agreement, incorporated into the WTO, which governs trade in goods. See above n 2.

²¹ In *European Communities – Regime for the Importation, Sale and Distribution of Bananas* WTO doc WT/DS27/AB/R, AB-1997-2 (1997), [231], ('*EC – Bananas III*') the Appellate Body confirmed that GATT jurisprudence could be relevant for interpretation of the GATS.

²² Article XX of the GATT, which contains general exceptions to GATT rules, is largely replicated in the GATS article XIV and the Agreement on Government Procurement article XXIII. Arguably, GATT article XX applies to determinations under certain other Agreements contained in Annex 1A of the *Agreement Establishing the World Trade Organisation* (for instance the *Agreement on Agriculture* (1867 UNTS 410), *Agreement on Sanitary and Phytosanitary Measures* (1867 UNTS 493) and *Agreements on Trade-Related Investment Measures* (1868 UNTS 186)). See 'Human Rights and World Trade Agreements: Using general exemption clauses to protect human rights' (2005) Office of the United Nations High Commissioner for Human Rights, <<http://www.ohchr.org/english/about/publications/docs/WTO.pdf>> at 20 February 2006.

In the past, several GATT Panels have found particular health or environmental measures to be inconsistent with GATT Articles and not otherwise justified under GATT Article XX, the exceptions provision discussed in detail below. The most significant of the decisions made prior to the completion of the Uruguay Round of GATT negotiations in 1994 include the Thai Cigarette Panel,²³ the Tuna Dolphin Panel²⁴ and the US Automobiles Panel.²⁵ These disputes illustrate the approach taken by pre Uruguay GATT Panels when environmental legislation has an unequal impact on foreign producers. In all of these cases the article XX exceptions were construed narrowly and the environmental legislation was found to be GATT illegal. More recently, under the auspices of the WTO, there have been a number of significant rulings by WTO Panels and the Appellate Body. These include the US – Gasoline dispute,²⁶ the Beef Hormone dispute,²⁷ the Salmon dispute,²⁸ the Shrimp Turtle dispute,²⁹ the EC - Asbestos dispute³⁰ and the recent US - Gambling³¹ and EC – Biotech disputes.³²

²³ *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT BISD 37th Supp. 200, GATT Doc. DS10/R (Report by Panel, adopted November 7, 1990) ('*Thai Cigarette dispute*').

²⁴ *United States - Restrictions on Imports of Tuna*, GATT BISD 39th Supp.155, GATT Doc. DS21/R (Panel report produced September 3, 1991, never adopted) ('*Tuna Dolphin I*') and *United States - Restrictions on Imports of Tuna* ('*Tuna Dolphin II*') GATT Doc. DS29/R (Report by Panel, adopted June 16, 1994) (collectively known as the '*Tuna Dolphin dispute*').

²⁵ *United States - Taxes on Automobiles*, GATT Doc. DS31/R (Report by Panel, adopted October 11, 1994) ('*US – Automobiles dispute*').

²⁶ *United States - Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/R (Panel Report), modified by WTO Doc. WT/DS2/AB/R, AB-1996-1(1996) (Appellate Body Report) ('*US – Gasoline*'). See Jennifer Schultz, 'The Demise of "Green" Protectionism: The WTO Decision on the US Gasoline Rule' (1996) 25 *Denver Journal of International Law and Policy* 1.

²⁷ The *Beef Hormone* dispute involved two complaints against the EC, one brought by the U.S. and one by Canada. Although the same Panel heard both disputes, it issued two separate but similar reports. For the purposes of simplification this article will refer to the U.S. Panel Report and Appellate Body Report only. See *EC Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/R/USA (1997) (US Panel Report), modified by WTO Doc. WT/DS26/AB/R, AB-1997-4 (1998) (Appellate Body Report) ('*EC – Beef Hormones*' dispute).

²⁸ *Australia - Measures Affecting Importation of Salmon*, WTO Doc. WT/DS18/R (1998) (Panel Report), modified by WTO Doc. WT/DS18/AB/R, AB-1998-5 (1998) (Appellate Body Report) ('*Australian Salmon dispute*').

²⁹ *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/R (1998) (Panel Report), modified by WTO Doc. WT/DS58/AB/R,

These cases, among others, provide an insight into how a human rights-based trade restriction may be interpreted by a WTO Panel or the Appellate Body. It should be recognised at the outset that additional considerations which may entail a stricter approach being taken to human rights than environmental measures would probably be taken into account. Human rights-based measures, particularly those related to labour rights, are sometimes said to be particularly open to claims of protectionism when compared to environmental measures.³³ In addition, environmental regulations generally relate to a tangible aspect of the global commons and member states therefore have an easier task defending their interest in taking action. On the other hand, the International Court of Justice (ICJ) has found that all states have a common interest in the protection of at least some human rights.³⁴

In its analysis of any trade-based human rights law the WTO DSB would first determine whether the measure was GATT illegal. In particular, the DSB would decide whether the measure complies with the core WTO principle of non-discrimination. If the measure is found to breach that principle, the DSB goes on to examine whether the measure could be justified by one of the GATT exceptions as set out in Article XX.³⁵

AB-1998-4 (1998) (Appellate Body Report) (*Shrimp Turtle* dispute). See Jennifer Schultz, 'Balancing the Relationship between Trade and the Environment within the World Trade Organisation: Is this the end of the Sea Turtle?' (1999) 4 *Asia Pacific Journal of Environmental Law* 37.

³⁰ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/AB/R, AB-2000-11 (2001) (Appellate Body Report) ('*EC - Asbestos* dispute').

³¹ *United States – Measures Affecting the Cross Border Supply of Betting and Gambling Services*, WTO Doc. WT/DS285/R (2004) (Panel Report), modified by WTO Doc. WT/DS285/AB/R, AB-2005-1 (2005) (Appellate Body Report) ('*US - Gambling* dispute').

³² *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WTO Doc. WT/DS291/R (2006) (Panel Report) ('*EC - Biotech* dispute'). The European Community has declined to appeal the decision.

³³ Howse and Regan, above n 16, 253. From an economic perspective, Howse and Regan argue that minimum wage restrictions and similar may disadvantage developing nations. They do note, however, that prohibitions on slave labour and child labour are much less likely to be controversial: (pp 283 – 4).

³⁴ *Barcelona Traction, Light and Power Co. Ltd (Belgium v Spain)*[1970] ICJ Rep 3, 33 ('*Barcelona Traction*').

³⁵ This two-tiered analysis was employed in *US - Gasoline*, above n 26, *Shrimp Turtle*, above n 29 and *Korea – Measures Affecting the Imports of Fresh, Chilled and Frozen Beef*, WTO Doc. WT/DS161/R (US Panel Report), modified by WTO Doc.

A *The Non-Discrimination Principle*

The principle of non-discrimination is enshrined in Articles I and III of the GATT. Article I is known as the ‘Most Favoured Nation’ clause. This clause requires that Member States afford equal treatment to ‘like’ imports from all WTO Members. Article III, which is known as the ‘National Treatment Clause’, states that imports must be treated no less favourably than ‘like’ domestic products.

Each type of human rights-based trade restriction identified above in Section II (inwardly directed measures and country and product based sanctions) will give rise to different discrimination issues. It is therefore necessary to examine the potential discriminatory effect of each class individually.

1 *Country Based Outwardly Directed Measures*

It is difficult to defend country-based measures against accusations of discrimination. These measures - which place trade restrictions on goods from a certain country irrespective of whether the goods themselves are associated with human rights abuses - discriminate explicitly on the basis of nationality and are therefore prima facie violations of Articles I and III of the GATT.³⁶ That is, country-based measures by their very nature treat products from one state differently from like domestic and/or imported products.

An early GATT decision to this effect is the Belgian Family Allowances decision.³⁷ In Belgian Family Allowances the Panel assessed a Belgian government policy which granted certain countries an import tax exemption based on whether they maintained an employer tax on family allowances. The panel found that the non-product related regulation violated the Most Favoured Nation principle.³⁸

WT/DS151/AB/R, AB-2000-8 (2000) (Appellate Body Report) (*Korea – Various Measures on Beef*)

³⁶ Howse and Regan state that such a view is ‘not likely to be controversial’. Howse and Regan, above n 16, 250.

³⁷ *Belgian Family Allowances*, GATT BISD 1st Supp. 59, at 59-62 (1953).

³⁸ For a brief discussion of this case see Steve Charnovitz, ‘The Law of Environmental “PPMS” in the WTO: Debunking the Myth of Illegality’ (2002) 27 *Yale Journal of International Law* 59, 83-84.

A current example of country based measure designed to promote human rights is the US Burmese Freedom Act.³⁹ This Act effectively introduces unilateral sanctions against Burma in response to the May 30 2003 attack on Burmese democracy advocate Aung San Suu Kyi.⁴⁰ The Act is also a response to the Resolution of the International Labour Conference which recommends action against Burma for grave breaches of the International Labour Organisation's (ILO's) Forced Labour Convention.⁴¹

The Burmese Freedom Act seeks to impose an import ban on articles produced, mined, manufactured, grown or assembled in Burma.⁴² The Act clearly articulates that the bans are intended to sanction the Burmese military junta and strengthen Burma's democratic forces, support and recognize the National League of Democracy as the legitimate representative of the Burmese people and for other human rights purposes. Under the Act the President has the right to modify or lift the ban if it is shown that sufficient progress has been made towards the realisation of core human rights.⁴³

While being a clear example of a violation of the Most Favoured Nation principle, a complete analysis of GATT legality would require an examination of Article XX exceptions and of the international law surrounding inconsistent treaty obligations with reference to the ILO Resolution cited above. Such an examination may never become necessary as there appears to be tacit international support for the Burmese Freedom Act and no complaints have been made to the WTO.⁴⁴ In fact, the legislation was

³⁹ *Burma Freedom Act*, above n 13.

⁴⁰ For information about the arrest of Aung San Suu Kyi, see 'ASEAN tries to avoid rift over Burma' *The Age* (Melbourne) 17 June, 2003, 8. See also the findings set out in section 2 of the Bill, above n 13, 1.

⁴¹ The Resolution recommends that ILO members 'review, in the light of the conclusions of the Commission of Inquiry, the relations that they may have with the Member State concerned and take appropriate measures to ensure that the said Member cannot take advantage of such relations to perpetuate or extend the system of forced or compulsory labour referred to by the Commission of Inquiry', Resolution of the International Labour Conference (88th Session, 2000), <http://www.union-network.org/uniindep.nsf/0/42d08ba52349be7dc1256a26003ff3d2?OpenDocument>, at 15 February 2006; Joost Pauwelyn, 'Cooperation in Dispute Settlement' in *Human Rights and International Trade*, above n 14, 218-219.

⁴² Section 3(a)(1), *Burmese Freedom Act*, above n 13.

⁴³ Section 3(b), *Burmese Freedom Act*, above n 13.

⁴⁴ Of course, it may be expected that Burma itself is not happy with the trade sanctions. To date, it has not initiated a complaint against the US.

not even referred to in the recent Trade Policy Review of the United States in the WTO.⁴⁵ However, were the discriminatory effects of the Burmese Freedom Act, or any like legislation, to come into question before a WTO panel there is little doubt that it would be found to violate the non-discrimination principle.

2 Outwardly Directed Measures – Product Based

The discrimination issues surrounding trade measures which place non-origin contingent restrictions on particular products are more complex. Differentiation between products on the basis of the way they were made raises the issue of whether such products are ‘like products’ under GATT rules. Is a product a ‘like product’ if it is made using a different process or production method? The ‘process and production methods’ (PPM) issue would be relevant if, for example, a government banned all goods manufactured using forced labour. The question of whether the relevant goods would be considered ‘like products’ and thus attract the application of Articles I and III would be relevant.

There is no definition of the term ‘like product’ in the WTO agreements and the issue of whether or not PPMs may be used to differentiate products is a matter of interpretation.⁴⁶ The traditional WTO and GATT jurisprudence suggests that PPMs that are not physically evident in the final product cannot be used to distinguish between otherwise ‘like products’. The Panel in U.S. Automobile Taxes ruled, ‘Article III:4 does not permit treatment of an imported product less favourable than that accorded to a like domestic product, based on factors not directly related to the product as such.’⁴⁷

A controversial example of the view that products are ‘like’ unless the product itself is affected is found in the Tuna Dolphin dispute.⁴⁸ In this

⁴⁵ Michael J. Trebilcock and Robert Howse, ‘Trade Policy and Labour Standards’ (2005) 14(2) *Minnesota Journal of Global Trade* 261, 282-283.

⁴⁶ For a detailed article discussing environmental PPMs see Charnovitz, above n 38..

⁴⁷ *US - Automobiles*, above n 25, [5.54].

⁴⁸ For a discussion of the cases, see, eg, Joel P Trachtman, ‘International Decision: GATT Dispute Settlement Panel’(1992) 86 *American Journal of International Law* 142; Steve Charnovitz, ‘Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices’ (1994) 9(3) *American University Journal of International Law and Policy* 751; Stanley Spracker and David Lundsgaard, ‘Dolphins and Tuna: Renewed Attention on the Future of Free Trade and Protection of the Environment,’ (1993) 18 *Columbia Journal of Environmental*

dispute there were two Panel decisions which are commonly referred to as Tuna Dolphin I and Tuna Dolphin II. Both Panels were asked to determine the GATT legality of US restrictions on tuna imports from countries that did not meet U.S. standards on dolphin safe fishing practices. In both reports the Panels found that the U.S. restrictions were a violation of GATT Article III and not within the relevant exceptions in XX (b) and (g) (discussed below). The Panels found that the United States was discriminating against 'like products' based on their production process and that this violated the GATT's Article III national treatment requirement.

In the EC – Asbestos case, the WTO Appellate Body held that when determining what constitutes a 'like product' four criteria should be examined, namely: the physical properties of the products; their end uses; the tastes and habits of consumers of those products; and the tariff classification of those products.⁴⁹ In that case the Appellate Body found that chrysolite asbestos fibres and certain other fibres collectively referred to as PCG fibres⁵⁰ were not 'like products' because they were physically different. Although chrysolite asbestos fibres and PCG fibres are substitutable in terms of their uses, they were held to be physically different, partly because chrysolite asbestos fibres are known to be carcinogenic and also because they had different tariff classifications.⁵¹ The AB also stated that "the health risks associated with a product may be pertinent in an examination of likeness under Article III:4".⁵² Because the products in EC – Asbestos were held not to be 'like products' it was therefore lawful to apply different treatment to them. This case suggests that characteristics beyond the merely physical may render products 'unlike'. However, the factors considered in EC – Asbestos affected the product 'as such'. It is unlikely that EC – Asbestos decision would help a human rights based trade law achieve 'unlikeness' because human rights considerations will rarely affect the quality and character of the end product.

Law 385; Thomas Skilton, 'GATT and the Environment in Conflict: The Tuna-Dolphin Dispute and the Quest for an International Conservation Strategy' (1993) 23 *Cornell University Law Journal* 455; Jennifer Ramach, 'Dolphin-Safe Tuna Labelling: Are the Dolphins Finally Safe?' (1996) 15(4) *Virginia Environmental Law Journal* 743.

⁴⁹ *EC – Asbestos*, above n 30, [33].

⁵⁰ Polyvinyl alcohol fibres (PVA), cellulose and glass fibres are collectively referred to as PCG fibres by the Appellate Body. See *EC - Asbestos*, above n 30, [84].

⁵¹ See *EC – Asbestos*, above n 30, [135].

⁵² See *EC – Asbestos*, above n 30, [113].

At present the GATT rules and their interpretation by WTO Panels and the Appellate Body would probably result in a finding that any outwardly directed trade related human rights measures would be a breach of the non-discrimination principles and therefore prima facie illegal under WTO rules.

3 *Inwardly Directed Measures*

An inwardly directed measure has a greater chance of being assessed as non-discriminatory. For example, trade restrictions on child pornography (attempting to protect the rights of the child)⁵³ would presumably treat all child pornography equally, regardless of its origin. Equally, it would be expected that in the poultry example given above, the same health requirements would apply to all imported and domestic poultry. Nevertheless, the line between trade measures designed to protect local human rights and those designed to protect local industry is not always clear. Consequently accusations of discrimination may be levelled at inwardly directed measures.

For example, in the US - Gasoline dispute the US instituted regulations specifying the level of cleanliness required of gasoline sold in the US.⁵⁴ Venezuela and Brazil argued that the regulations were discriminatory because they subjected foreign gasoline producers to a standard pollution baseline while domestic refiners were able to establish individual baselines. Presumably, if the US had applied the same standard (for example, a universal standard baseline) to all market participants, its environmental regulations would have been found to be legal under WTO law. By analogy, an inwardly directed human rights trade measure which applies equally to domestically produced goods and imports should not be seen as a violation of the National Treatment principle.

Indirect or de facto discrimination is also prohibited under WTO rules. Indirect discrimination occurs where a regulation is not discriminatory on its face, but has a discriminatory effect.⁵⁵ For example, in Malt Beverages,⁵⁶ a

⁵³ *Convention on the Rights of the Child*, opened for signature 20 Nov 1989, 1577 UNTS 3 (entered into force 2 September, 1990).

⁵⁴ *US – Gasoline*, above n 26.

⁵⁵ For an in-depth study of de facto discrimination see Lothar Ehring, 'De Facto Discrimination in WTO Law: National and Most-Favoured Nation Treatment – or Equal Treatment?' (Working Paper 12/01, the Jean Monnet Program, 2001).

lower excise was applied by a Mississippi law to all wines in which a certain grape variety was used. The excise did not discriminate against any Member States on its face. However, it discriminated in effect as the particular grape variety only grew in Mississippi and the Mediterranean.⁵⁷

Furthermore, states are not at liberty to institute any level of protection they please, even in the absence of discrimination. For example, the WTO provides for certain minimum standards under the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement).⁵⁸ These Agreements confirm that Members can adopt trade measures to, for example, protect public health, but only if the measures conform with the requirements of the Agreements.

4 SPS Agreements and Health Measures

The WTO has asserted that these WTO Agreements are not intended to appropriate states' freedom to determine and set appropriate standards and Member States are allowed a level of autonomy. In *Australian Salmon* the Appellate Body stated, regarding the SPS Agreement:⁵⁹

The determination of the appropriate level of protection, a notion defined in paragraph 5 of Annex A, as "the level of protection deemed appropriate by the Member establishing a sanitary ... measure", is a prerogative of the Member concerned and not of a panel or of the Appellate Body.

Nevertheless, decisions such as the WTO Appellate Body's *EC – Beef Hormone* have caused questions to be asked about whether the WTO has intruded too far into Member State's policy-making space. The *EC – Beef Hormone* decision has been seen as evidence that WTO Agreements adversely affects Member countries' ability to set their own health policies and environmental standards.⁶⁰

⁵⁶ *United States – Measures affecting Alcoholic and Malt Beverages*, 19 June 1992, GATT Doc. DS23/R ('*Malt Beverages*')

⁵⁷ *Ibid*, [5.23] – [5.26]. See also Mitsuo Matsushita, Thomas J. Schoenbaum, and Petros C. Mavroidis, *The World Trade Organization: Law Practice and Policy* (OUP, Oxford, 2003), p. 174.

⁵⁸ The SPS and TBT Agreements are part of Annex 1A of the *Agreement Establishing the WTO*, above n 2.

⁵⁹ *Australian Salmon*, above n 28, Appellate Body Report [199].

⁶⁰ Dommen, above n 12, 17 – 21.

In the EC – Beef Hormone case Canada and the U.S. lodged a complaint against the EU for a ban imposed in the 1980s on the sale of meat produced using several growth hormones, on the grounds that the hormones may be carcinogenic. The WTO Panel and Appellate Body [AB] found in favour of the U.S. and Canada that the ban contravened the SPS Agreement. The AB stated that the right of states to determine their own level of protection ‘is not an absolute or unqualified right’.⁶¹ A measure must only be applied to the extent necessary to protect human, animal or plant life or health and must be ‘specifically supported’ by a risk assessment.⁶² In EC – Beef Hormone the Appellate Body was not satisfied that the EC’s trade ban was based on a sufficient risk assessment. Furthermore, the Appellate Body did not accept that the bans could be justified under the “precautionary principle”, so as to allow the EU to take a cautious approach in implementing health measures.⁶³

The decision has been heavily criticised and the WTO was accused of disallowing health regulations aimed at potentially unsafe practices. The Appellate Body was criticised for making a decision based largely on trade considerations whilst giving little comparative consideration to the interests of public health and environmental policy, with the latter being better served by a precautionary approach. Dommen uses this case as an example of a WTO decision that effectively undermines human rights, in particular the right to health.⁶⁴

Similar criticisms have been levelled at the recently released EC – Biotech Panel decision,⁶⁵ although some analysts suggest such criticism may have been premature.⁶⁶ The Panel found that between 1998 and 2003 the EU had

⁶¹ *EC – Beef Hormones*, above n 27, Appellate Body Report [173].

⁶² For a discussion of the substantial requirements of risk assessment see Christopher Charlier and Michel Rainelli, ‘Hormones, Risk Management, Precaution and Protectionism: An Analysis of the Dispute on Hormone-Treated Beef Between the European Union and the United States’ (2002) 14(2) *European Journal of Law and Economics* 83, 87-88.

⁶³ *EC – Beef Hormones*, above n 27, Appellate Body Report [120] – [125], [245].

⁶⁴ See generally, Dommen, above n 12, at 17-21.

⁶⁵ Adrien Bebb, a campaigner from Friends of the Earth Europe stated shortly after the Panel’s preliminary conclusions were leaked that “[t]he WTO has bluntly ruled that European safeguards should be sacrificed to benefit biotech corporations”. See Paul Geitner and Andrew Pollack, ‘A Line in the Sand Over WTO’s Modified Food Ruling’, *International Herald Tribune*, 9 February 2006, 3 and 11.

⁶⁶ See Natalie Bernasconi-Osterwalder and Maria Julia Oliva, Centre for International Environmental Law (2006) at <http://www.ciel.org/Publications/EC_Biotech_Mar06.pdf>, p. 50, at 4 December

instituted a de facto moratorium on the approval of biotechnology products. The moratorium was deemed to be inconsistent with Article 8 the SPS Agreement which requires that regulatory decisions be made without ‘undue delay’. The Panel also ruled that the six EC countries that banned EC-approved biotech products were violating trade rules, as the restrictions were not based on adequate risk assessments. In making these determinations, the Panel called attention to the fact that it was not assessing the EC’s right to consider the possible risks prior to giving approval to biotech products, nor was it assessing the safety of biotech products or whether they are ‘like’ their general counterparts.⁶⁷ As such, the decision may be seen as largely procedural, rather than having an substantive impact. Indeed, in declining to appeal, the EC stated that ‘the impact of that judgment is entirely of historical interest’, as it related to the approval processes operating prior to 2004.⁶⁸

The most significant aspect of the decision from the perspective of those seeking to use the WTO to enforce human rights obligations is the treatment of multilateral environmental agreements by the Panel. One of the defences mounted by the EC was that its moratorium was justified under the 2000 Cartagena Protocol on Biosafety (‘Biosafety Protocol’),⁶⁹ a protocol to the 1992 Convention on Biological Diversity (‘CBD’)⁷⁰ to which the EC was a party. Of the complainants, Canada and Argentina had ratified the CBD, whilst the US had signed it. In respect of the Biosafety Protocol, Canada and Argentina had both signed the Protocol, whilst the US participated in the Protocol’s Clearing House Mechanism on biosafety.

The Panel began by examining Art. 31(1)(c) of the Vienna Convention on the Law of Treaties.⁷¹ Article 31(1)(c) requires a treaty interpreter to take into

2006 where it is observed that ‘[i]n light of the distorted representations of the Panel’s findings following the issuance of the Interim Report in early February 2006, it is important to point out that the Panel report is far from being the clear-cut victory for the complaining parties reflected in the press.’

⁶⁷ *EC – Biotech*, [8.2].

⁶⁸ See ‘EU Won’t Appeal WTO Ruling on GMO Moratorium’, *Reuters*, 22 November 2006, at <<http://www.planetark.com/dailynewsstory.cfm/newsid/39102/story.htm>> at 4 December 2006.

⁶⁹ *Cartagena Protocol on Biosafety*, opened for signature 29 January, 2000, 39 ILM 1097 (entered into force 11 September, 2003).

⁷⁰ *Convention on Biological Diversity*, opened for signature 5 June, 1992, 1760 UNTS 79 (entered into force 29 December, 1993).

⁷¹ *Vienna Convention on the Law of Treaties*, opened for signature 23 May, 1969, 1155 UNTS 331 (entered into force 27 January, 1980). (‘VCLT’)

account ‘any relevant rules of international law applicable in the relations between the parties.’ The Panel determined that this provision could not mean a treaty which applies only to one party. In fact, the Panel concluded the provision could not mean any treaty to which any party to the dispute was not a party. In other words, the fact that the US had not ratified the CBD meant that the Panel was not required to interpret the WTO agreement in light of the CBD.⁷² Similar logic applied to rule out the use of the Biosafety Protocol in considering the meaning of the WTO agreement.⁷³

The Panel then turned to the EC’s argument that, following *Shrimp Turtle*, the Panel could use the CBD and the Biosafety Protocol to assist in the interpretation of the WTO agreement.⁷⁴ The Panel agreed that it could do so, but that it was not required to do so.⁷⁵ Ultimately, it concluded, without further explanation, that it was not appropriate or useful to do so.⁷⁶

This aspect of the decision is significant in the human rights context. At 21 February 2006, the Biosafety Protocol has been ratified by 132 nations and signed by a further 61,⁷⁷ and so could not be described as an unpopular or marginal treaty. Utilising the approach taken the Panel in *EC – Biotech*, it is possible that measures sought to be justified on the basis of human rights treaties (even those of almost universal, acceptance) might well be defeated by countries which are not party to them. Indeed, there is unlikely to be any human rights treaty to which all WTO members are a party.⁷⁸

5 The TBT and Labelling

The TBT Agreement regulates technical barriers to trade. It is possibly controversial from a human rights viewpoint due to the effect it might have

⁷² *EC – Biotech*, [7.74].

⁷³ *EC – Biotech*, [7.75].

⁷⁴ *EC – Biotech*, [7.91].

⁷⁵ *EC – Biotech*, [7.93].

⁷⁶ *EC – Biotech*, [7.95].

⁷⁷ See the Biodiversity Convention Secretariat website, <<http://www.biodiv.org/biosafety/signinglist.aspx?sts=rtf&ord=dt#td>>, at 4 December 2006.

⁷⁸ For example, the most ratified human rights treaty is the *Convention on the Right of the Child*, 20 Nov. 1989, 1577 UNTS 3. However, the US is not a party to that treaty. Furthermore, some WTO members are unable to ratify human rights treaties as they are not States, such as Chinese Taipei, Hong Kong, and the EC.

on product labelling schemes. The issue is whether a mandatory⁷⁹ or voluntary⁸⁰ government⁸¹ labelling scheme which highlights the use of environmentally favourable practices in producing a product such as a dolphin friendly label, or a label illustrating a good human rights approach such as a 'no sweatshop' label, fall within the definition of a 'technical regulation' or 'standard' under the TBT Agreement.⁸² It is unclear whether the definitions catch only those labels that directly relate to the product (such as labels with an impact on product characteristics such as quality, packaging or recycled content) or whether labels that are based on PPMs that do not relate to the product itself would be covered (such as the 'no sweat shop' label). This issue was being discussed as part of the work of both the WTO

⁷⁹ Mandatory government sponsored schemes are government mandated programs that require products to carry labels which convey environmental or human rights information about the product to the consumer. An example of mandatory government sponsored labelling is legislation which was adopted in 1992 by Austria which aimed at stopping all imports of tropical timber and tropical timber products from areas that were not sustainably managed. The legislation provided for mandatory labelling of tropical timber and timber products with a quality mark and imposed a 70% import tariff on all products without the mark. Austria was forced to amend the law when Indonesia and Malaysia threatened legal action before a GATT panel. See Brian F Chase, 'Tropical Forests and Trade Policy: The Legality of Unilateral Attempts to Promote Sustainable Development under the GATT' (1994) 17(2) *Hastings International and Comparative Law Review* 349.

⁸⁰ Germany's 'Blue Angel' program is one of the most well known voluntary government sponsored schemes. Producers can propose a product for the award of a 'Blue Angel' and there is a process for approval that needs to be completed before such an award is granted. A number of countries have developed programs based on the 'Blue Angel' program. See Organisation for Economic Co-operation and Development, *Environmental Labelling in OECD Countries*, 43 (1991).

⁸¹ Another category is non government schemes which are organised and administered by bodies other than governments. First party eco labelling or self declaration labels are an example. In such cases labels are placed on products by the producer, retailer or by a trade industry. Independent third party certification also falls into the non government category. These are not likely to be challenged under the WTO as they are not government sponsored.

⁸² See Report of the WTO Committee on Trade and Environment, WTO Doc. WT/CTE/1 (1996). TBT Agreement above n 13, annex I paragraph 1 defines the term 'technical regulation' for the purposes of the agreement as: 'Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.'

Committee on Trade and Environment and the TBT Committee.⁸³ The Committee on Trade and Environment appears to have concluded that the matter is one for the TBT Committee.⁸⁴ In its Third Triennial Review in 2003, the TBT Committee noted that the issue had been brought to its attention and that it would continue to deal with it,⁸⁵ but it does not appear to have been considered at the Fourth Triennial Review in 2006.⁸⁶ If labels are regulated under the TBT, that circumstance has ramifications for consumers' rights to freedom of information,⁸⁷ and, perhaps other rights.⁸⁸

In conclusion, existing WTO jurisprudence indicates that any outwardly directed human rights-based trade measure will be deemed to violate the WTO's non-discrimination principle. In contrast, a legitimate inwardly directed measure (that is, one that is not a cover for some protectionist purpose) may be legal under WTO law if its application does not suggest direct or de facto discrimination, and so long as it complies with the requirements of WTO agreements such as the SPS and TBT.

B Article XX Exceptions

Even if a measure is found to be discriminatory it may be protected under Article XX of the GATT. Insofar as it is relevant to human rights based trade measures, Article XX states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

⁸³ See www.wto.org/english/trtop_e/dohaexplained_e.htm at 4 December 2006.

⁸⁴ See http://www.wto.org/English/tratop_e/envir_e/cte03_e.htm#ecolabelling at 4 December 2006.

⁸⁵ See Third Triennial Review Report, WTO Doc. G/TBT/13 (2003), [58] – [62].

⁸⁶ See Fourth Triennial Review Report, WTO Doc. G/TBT/19 (2006).

⁸⁷ See Article 19 of the *International Covenant on Civil and Political Rights*, opened for signature 16 December, 1966, 999 UNTS 171 (entered into force 23 March, 1976) ('ICCPR').

⁸⁸ For example, given the concerns regarding the right to health arising from GM foods (which are explicitly now decided upon in *EC-Biotech*), a prohibition on labelling could arguably jeopardise the right to health.

- (a) necessary to protect public morals;⁸⁹
- (b) necessary to protect human, animal or plant life or health;
- ...
- (e) relating to the products of prison labour;
- ...
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption ...⁹⁰

Of the listed exceptions, it may be noted that paragraph (e) is extremely narrow, and arguably does not concern human rights abuse.⁹¹

Two conditions need to be satisfied in order for any human rights-based trade measure to attract the protection of Article XX. First, the measure would need to fall within the scope of at least one of the specific exceptions listed in Article XX. Second, the measure would need to conform to the requirements of the introductory paragraph of Article XX, which is known as the chapeau.⁹²

1 *The Listed Exceptions*

To show that a regulation falls under one of the listed exceptions a Member state needs to demonstrate that the measure is designed to protect the relevant

⁸⁹ GATS Article XIV corresponds with GATT Article XX. However, there are a number of differences, one being that GATS makes an exception for measures designed to protect public morals or to maintain public order. GATT Article XX(a) only refers to public morals.

⁹⁰ Environmental protection impacts on a number of human rights. For example, environmental pollution can harm enjoyment of the right to health and the right to food and water. The latter rights are protected under article 11 of the ICESCR, above n 12, which generally guarantees a right to an adequate standard of living.

⁹¹ For example, article 8(3) of the ICCPR, above n 87, which prohibits forced labour, permits prison labour in some circumstances. Paragraph (e) was inserted into Article XX to protect against unfair competition, rather than for humanitarian reasons: Lorand Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction', (2002) 36 *Journal of World Trade* 353, 356. Of course, some forms of prison labour do breach human rights.

⁹² Salman Bal, 'International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT' (2001) *Minnesota Journal of Global Trade* 62.

public policy interest and that the measure is ‘necessary’ to pursue that interest.⁹³

The UN Report, *Globalization and its Impact on the Full Enjoyment of Human Rights* states that:⁹⁴

The exceptions referred to [in Article XX] call to mind the protection of the right to life, the right to a clean environment, the right to food and to health, the right to self determination over the use of natural resources, the right to development and freedom from slavery to mention a few.

Under the Report’s interpretation a trade measure that is designed to protect human rights would have no great difficulty fitting into one of the listed exception categories.⁹⁵ However, the trade experts on WTO Panels will not necessarily agree with this reading. For example, in examinations of Article XX (b) WTO DSBs have focused on whether the product itself is supposed to cause the risk to human health.⁹⁶ In the case of inwardly directed measures where an import ban is directed at a dangerous product this requirement may well be satisfied.⁹⁷ Bartels states that “it is relatively uncontroversial to say that the exception for measures “necessary to protect human ...life or health” should permit a WTO Member to impose trade restrictions necessary to safeguard the human rights within its territory.”⁹⁸ However, in the case of outwardly directed human rights measures (for example, a ban on the import of products manufactured in dangerous working conditions) “the connection between the product and the risk is far more attenuated” and an argument made under Article XX(b) is unlikely to be successful.⁹⁹

It is the ‘public morals’ exception in Article XX(a) that has the greatest potential to shield a human rights-based trade measure from GATT illegality.¹⁰⁰ It has been argued that this Article might be invoked to justify,

⁹³ *US – Gambling*, above n 31, Panel Report [6.455].

⁹⁴ *Globalization and its Impact on the Full Enjoyment of Human Rights: Preliminary Report of the Secretary General*, [17], UN Doc. A/55/342 (2000).

⁹⁵ Articles XX(a), (b) and (g) are the most obvious candidates in the GATT.

⁹⁶ Tatjana Eres, ‘The Limits of GATT Article XX: A Back Door for Human Rights?’ (2004) 35 *Georgetown Journal of International Law* 597, 617-618.

⁹⁷ To gain the protection of Article XX the measure would also have to meet the ‘necessity’ requirement which is discussed below.

⁹⁸ Bartels, above n 91, 354.

⁹⁹ Eres, above n 96, 618.

¹⁰⁰ Stephen J. Powell, ‘The Place of Human Rights Law in the World Trade Organisation Rules’ (2004) 16 *Florida Journal of International Law* 219, 223.

for example, trade sanctions against products that involve the use of child labour or the denial of workers' basic core rights.¹⁰¹

The WTO Dispute Settlement Bodies considered the public morals exception for the first time in its recent decision in *United States – Measures Affecting the Cross-Border Supply of Betting and Gambling Services*.¹⁰² In the *US - Gambling* dispute, both the Panel and the Appellate Body found that the US had instituted market access restrictions on the remote supply of gambling services (internet gambling) which were prima facie contrary to GATS. The US argued, inter alia, that:

“Maintaining a society in which persons and their property exist free of the destructive influence of organised crime is both a matter of ‘public morals’ and one of ‘public order’. Protecting children from uncontrolled gambling settings is certainly a matter of ‘public morals’.”¹⁰³

The Appellate Body agreed that these measures were generally necessary to protect public morals and public order. However, beyond defining public morals as “standards of right and wrong conduct maintained by or on behalf of a community or nation”, neither the Panel nor the Appellate Body gave much guidance as to what is meant by the public morals exception.¹⁰⁴

Nevertheless, many human rights could fall under that definition. Howse has stated:

“In the modern world, the very idea of public morality has become inseparable from the concept of human personhood, dignity and capacity reflected in fundamental rights. A conception of public morals or morality that excluded notions of fundamental rights would simply be contrary to the ordinary contemporary meaning of the concept.”¹⁰⁵

¹⁰¹ Robert Howse, ‘The World Trade Organization and the Protection of Workers’ Rights’ (1999) 3 *Journal of Small and Emerging Business Law* 131. This article has been examined and criticized in Yasmin Moorman, ‘Integration of ILO Core Rights Labour Standards into the WTO’ (2001) 39 *Columbia Journal of Transnational Law* 555.

¹⁰² *US – Gambling*, above n 31.

¹⁰³ *US – Gambling*, above n 31, Panel Report [6.457].

¹⁰⁴ *US – Gambling*, above n 31, Appellate Body Report [296] – [299].

¹⁰⁵ Robert Howse, ‘Back to Court After Shrimp/Turtle? Almost but not quite yet: India’s short-lived challenge to labour and environmental exceptions in the

Further, it would be surprising if WTO law allowed for children to be protected from the dangers of gambling but not, for example, from the dangers of hazardous working conditions.

2 *The Necessity Requirement*

Arguments about whether a measure is designed to protect public morals or any of the other Article XX categories need to be assessed on a case by case basis. However, previous WTO cases indicate that it is not this requirement that is most difficult to meet. Rather, it tends to be more difficult to convince a panel or the Appellate Body that the relevant measure is 'necessary' to pursue the relevant human rights objective. While the WTO's interpretation of the term 'necessary' is not as restrictive as it once was,¹⁰⁶ it remains a strict standard. In the *Korea – Various Measures on Beef* dispute the Appellate Body stated that:¹⁰⁷

[T]he term "necessary" refers, in our view, to a range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is "necessary" taken to mean as "making a contribution to." We consider that a "necessary" measure is, in this continuum, located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to".

In that same case the Appellate Body articulated the 'weighing and balancing test' which is used to determine whether a trade measure is sufficiently 'necessary' in the pursuit of the relevant Article XX public policy exception.¹⁰⁸ The Appellate Body stated that the decision:¹⁰⁹

European's Union's generalized system of preferences' (2003)18 *American University International Law Review* 1333, 1368.

¹⁰⁶ The necessity test used in *United States – Section 337 of the Tariff Act of 1930*, GATT BISD 36th Supp, 345, [5.27] ('*US – Section 337*') (Report by Panel Adopted 7 November 1989) was the 'least GATT-inconsistent test' which required Members to exhaust all other possible measures that were less GATT-inconsistent than the measure complained of.

¹⁰⁷ *Korea – Various Measures on Beef*, above n 35, Appellate Body Report [161].

¹⁰⁸ In this case the Appellate Body was making a determination under Article XX(d) of the GATT. However, it's reasoning is transferable to any case in which the 'necessity' of a trade measure is in question.

[I]nvolves in every case a process of weighing and balancing a series of factors which predominantly include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interest or values protected by that law or regulation, and the accompanying impact of that law or regulation on imports or exports.

The ‘weighing and balancing’ test was also utilised in *EC - Asbestos*¹¹⁰ and *US - Gambling*.¹¹¹ When applying the ‘weighing and balancing’ test the relevant DSB should also consider whether “an alternative measure which [a member] could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it”.¹¹²

The importance of the values protected by human rights law is generally recognised by States, as evidenced by the widespread ratification of human rights treaties.¹¹³ There is a good case to be made that a high level of deference should be granted to a government regulating to protect human rights.¹¹⁴ Despite this, it is unlikely that an outwardly directed human rights sanction would be deemed ‘necessary’ when subjected to the weighing and balancing test. The ‘reasonable availability’ of other measures and the effect of such a measure on imports are likely to weigh heavily against a finding of necessity. Import bans are unlikely to be the least trade restrictive measures available to a member state pursuing human rights objectives.¹¹⁵ For example, an import ban on goods manufactured using child labour has the potential to worsen the situation for the children affected,¹¹⁶ and also may prove totally ineffective in combating child labour.¹¹⁷

¹⁰⁹ *Korea – Various Measures on Beef*, above n 35, Appellate Body Report [164] – [166].

¹¹⁰ *EC – Asbestos*, above n 30, [172].

¹¹¹ *US – Gambling*, above n 31, Panel Report [6.475] – [6.487].

¹¹² *US – Section 337*, above n 106, [5.26].

¹¹³ For information on the ratification of international human rights treaties see <<http://www.ohchr.org/english/bodies/docs/RatificationStatus.pdf>> at 14 February 2006. It must however be conceded that there is divergence over the interpretation of the broad standards in the core UN human rights treaties.

¹¹⁴ United Nations, ‘Human Rights and World Trade Agreements’, above n 22, 15. Also see *EC – Asbestos*, above n 30, [172].

¹¹⁵ See Zagel, above, n 6, 13.

¹¹⁶ On the positive side the child would not be forced to work and may potentially go to school. On the negative side is the fact that income from the child’s labour would not be available to the child and his/her family. There is also the problem that

An inwardly directed human rights measure will come up against the same challenges. It might be difficult to measure the effectiveness of human rights measures.¹¹⁸ Indeed, it is the opinion of many that “[m]ost unilateral, trade-restrictive measures designed to promote human rights are grossly ineffective”.¹¹⁹ However, the Appellate Body’s decision in *EC – Asbestos* indicates that an inwardly directed human rights based trade measure could, in certain circumstances, be deemed ‘necessary’. Despite having found that the products in question were not ‘like’,¹²⁰ so the non-discrimination principles were not activated, the Appellate Body went on to confirm the Panel’s decision that French Decree complained of was “necessary to protect human ... life or health” within the meaning of Article XX(b) of the GATT.¹²¹ The issue that arose was whether “controlled use” of chrysolite asbestos fibres was a reasonably available, less GATT inconsistent alternative to the French government’s outright ban. The Appellate Body decided that controlled use would not allow France to achieve its chosen level of protection which was identified to be a halt in the spread of asbestos-related health risks.¹²² If a Member state decided to institute an import ban to protect public morals or human life and health the reasoning in *EC – Asbestos* may provide protection if it can be shown that the ban is the only way to achieve the level of protection desired.

In conclusion, because of the unlikelihood of an outwardly directed measure ever being the least GATT-inconsistent option, the benefits of Article XX protection will probably only extend to inwardly protected measures. Even then the government instituting the regulations would have to show that the trade restrictions were both effective and instituted as a last resort.

children who are no longer employed may turn to other more dangerous and exploitative types of work such as prostitution. See ‘Human Rights: Ethical Shopping’ *The Economist*, 3 June 1995, reporting on the observations of Caroline Lequesne of Oxfam after visiting Bangladesh.

¹¹⁷ See below, note 146.

¹¹⁸ Sarah Cleveland, ‘Human Rights Sanctions and International Trade: A Theory of Compatibility’ (2002) 5 *Journal of International Economic Law* 133, 145.

¹¹⁹ Eres, above n 96, 631; see also Zagel, above n 6, 25. The questionable effectiveness of sanctions in achieving human rights objectives is discussed below in Section IV.

¹²⁰ See discussion above in Section 3.A.II.

¹²¹ *EC – Asbestos*, above n 30, [175].

¹²² *EC – Asbestos*, above n 30, [173] – [174].

3 *The Chapeau Requirements*

Even if Article XX (a), (b), or (g) catches a human rights-based trade measure, there is still the problem that historically the WTO DSBs have interpreted the chapeau of Article XX narrowly. The chapeau requires that a measure not be applied in a manner which would constitute a means of ‘arbitrary or unjustifiable discrimination between countries where the same conditions prevail’ or ‘a disguised restriction on international trade’. The focus of the chapeau is therefore on the application of the trade measure. In *US – Gasoline* the Appellate Body wrote:¹²³

The Chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement.

In *US - Gambling*, one US statute was found to breach GATS even though the restrictions on internet gambling at issue were generally found to be necessary to protect public morals. The federal Interstate Horseracing Act was found to possibly permit domestic service suppliers to offer internet gambling but not offshore suppliers. Of course, the threat posed to public morality by US supplied internet gambling facilities was no less than that posed by those supplied from abroad.¹²⁴

The difficulty that arises is that a trade measure designed to protect human rights can look the same as one designed for protectionist purposes. In assessing whether the measure complies with the chapeau requirements a Panel or Appellate Body is likely to look for proof of prior negotiation with the affected States. In addition, the Chapeau has been interpreted as a barrier to the unilateral imposition of policy standards from one Member state to another. Both of these issues were examined in the *Shrimp Turtle* dispute.

In the *Shrimp Turtle* dispute the environmental regulation in question was ultimately found to be GATT illegal because the law was applied in a manner that constituted both ‘arbitrary discrimination’ and ‘unjustifiable discrimination’. The dispute involved U.S. legislation designed to protect sea turtles, which had the effect of banning imports of shrimp caught using certain fishing practices, from entering the U.S. market. When finding that the U.S. had applied the law in a manner that constituted ‘arbitrary

¹²³ *US – Gasoline*, above n 26, Appellate Body Report p. 22.

¹²⁴ *US – Gambling*, above n 31, Appellate Body Report [371] – [372].

discrimination', the Appellate Body noted that the U.S. had taken insufficient account of whether shrimp exporting countries targeted by the law had special conditions that would work against implementation of a U.S. style conservation program, or whether these countries had in place other programs to protect sea turtles.¹²⁵

On the issue of unjustifiable discrimination, the Appellate Body stated that the U.S. had not made sufficient efforts to negotiate an arrangement to protect sea turtles with the complaining countries. They noted that the U.S. had negotiated and concluded a regional international agreement for the protection of sea turtles - The Inter-American Convention.¹²⁶ The effect of these negotiations was discriminatory in that the U.S. failed to negotiate with other Members, notwithstanding the fact that law in question itself contained a statutory direction to initiate negotiations for the development of bilateral or multilateral agreements. In addition they found that the U.S. allowed the complaining countries a shorter phase in period for compliance with the law than countries in the Western Hemisphere.

The Appellate Body also criticised the intended and actual coercive effect of the disputed measure on the specific policy decisions made by foreign governments. The effect of the trade embargo in that case was that it required other WTO Members to adopt essentially the same policies and enforcement practices as the U.S. in relation to the protection of sea turtles. The Appellate Body noted that:¹²⁷

'it is not acceptable in international trade relations for one WTO Member to use an economic embargo to require other Members to

¹²⁵ The regulation in dispute outlined a certification process whereby the U.S. officially certified that foreign countries have adopted fishing policies that adequately protect sea turtles. Without this certification, and the evidence to support it, the United States was required to block the importation of shrimp and shrimp products from the foreign country in question. The Appellate Body criticised the rigidity and lack of flexibility involved in making a determination for certification and the fact that there was no process for review, or appeal from a denial of an application, which meant the determinations lacked fairness and due process. See Jennifer Schultz, above n 29, 48-49 for a detailed examination of the legislation in dispute.

¹²⁶ Opened for signature on 1 December 1966 and signed by 5 countries - Brazil, Costa Rica, Mexico, Nicaragua and Venezuela.

¹²⁷ *Shrimp Turtle*, above n 29, Appellate Body Report [164].

adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, without taking into consideration different conditions which may occur in the territories of those other Members.’

In *Shrimp Turtle* when interpreting Article XX(g) the Appellate Body did suggest that a State could extend national conservation measures to activities beyond their national jurisdiction if it showed a legitimate interest and also demonstrated that the policy was recognized as desirable. According to this reasoning the U.S. had jurisdiction to protect the migratory turtles, as the challenged fishing practices had effects in U.S. territorial waters.¹²⁸ The problem was the way in which the U.S. had exercised its jurisdiction.

In response to the Appellate Body’s decision the US revised its legislation to allow for imports of shrimp that were caught using methods ‘comparable in effectiveness’ to those used by the US. When Malaysia complained about the new U.S. regulations both the newly formed Panel and the Appellate Body found in favour of the United States. They justified this decision saying that the revised policy “gives sufficient latitude to the exporting member with respect of the programme it may adopt to achieve the level of effectiveness required”.¹²⁹ The U.S. retained an obligation to maintain “ongoing serious, good-faith efforts to reach a multilateral agreement”.¹³⁰

The WTO’s preference for multilateral environmental policies was also prevalent in the two Tuna Dolphin disputes. In the GATT Panel decision in *Tuna Dolphin I* it was held that the U.S. was not permitted to apply an environmental law extra jurisdictionally under Article XX(b) or (g).¹³¹

¹²⁸ See *Shrimp Turtle*, above n 29, Appellate Body Report [133]: ‘We observe that sea turtles are highly migratory animals, passing in and out of waters subject to the rights of jurisdiction of various coastal states and high seas. ... The sea turtles here at stake, i.e. covered by Section 609, are all known to occur in waters over which the United States exercises jurisdiction.’

¹²⁹ *US – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, WTO Doc. WT/DS58/AB/RW, AB-2001-4 (2001) [144] (Appellate Body Report).

¹³⁰ *Ibid.*, [152].

¹³¹ *Tuna Dolphin I*, above n 24, [5.27]. The Panel further held, at [5.28], that the measures were not ‘necessary’ to the objective of protecting animal health under Article XX(b) because they were unrelated to a negotiated agreement and also

However the Panel in *Tuna Dolphin II* stated in dicta, that Article XX does allow governments to impose extraterritorial measures, provided the measures are not designed to coerce other countries into changing their policies within their own jurisdiction.¹³²

Nevertheless, the *Shrimp Turtle* disputes indicate that a DSB is going to take a dim view of any measure which it views as an attempt to unilaterally direct the domestic policy of another country. In the case of outwardly directed measures the human rights violation being sanctioned has its cause and effect in a country outside the jurisdiction of the regulating state. It is difficult to envisage a situation where a trade regulation applied extraterritorially for human rights purposes would not be viewed as coercive.

Any country-based measure would encounter additional problems due to the fact that to fulfil the chapeau requirements a measure must apply equally to all countries where the same conditions prevail.¹³³ Human rights violations are notoriously difficult to assess and quantify. Further, most states are human rights violators on one level or another. Consequently, an accusation of arbitrariness might easily stick to most country-based measures.

C Conclusions

A number of barriers to WTO legality face any restrictive trade measure designed to protect or promote human rights. The table below represents the conclusions reached from the discussion so far:

because the quota by which the measure was made effective was based on the indeterminate factor (how many dolphins had been caught by U.S. fishermen in a given period) and that both the extrajurisdictional nature of the measure and this last factor meant that the measures did not 'relate to' (that is, were not primarily aimed at) the conservation of exhaustible natural resources within the meaning of Article XX (g). See [5.33].

¹³² *Tuna Dolphin II*, above n 24, [5.15].

¹³³ Vazquez, above n 9, 823.

Table 1

Requirements for GATT legality	Country based	Product based	Inwardly Directed
Does the measure fulfil the non-discrimination requirement?	No.	No. Existing jurisprudence supports the argument that a PPM is GATT illegal.	Possibly. This will depend on the design and effect of the specific trade measure.
Does the measure comply with the SPS and TBT?	Irrelevant	Irrelevant	Possibly.
Even if the measure is discriminatory it may be protected under the Article XX Exceptions			
Does the measure relate to one of the listed exceptions?	Possible under Article XX.		Possibly under Article XX.
Is the measure necessary to achieve that listed goal?	No, as are not 'necessary'. Less GATT-inconsistent measures are available.		Possibly, if the trade measure is the only way to achieve the level of protection desired.
Does the measure fulfil the chapeau requirements ?	Irrelevant as the measure is not 'necessary'.		Possibly, if it does not have a protectionist effect or design and does not unilaterally impose policy standards on other States.
Result	GATT illegal	GATT illegal	Potential for GATT legality.

In sum, only inwardly directed human rights measures are likely to be assessed as legal under WTO law. There are a number of conceptual and practical differences between inwardly and outwardly directed measures that justify such a distinction. Despite vast changes in the role of sovereignty in

the international order, it still provides a relevant framework. It makes sense that a sovereign state should be able to define the policies which it deems appropriate to protect people within its borders, but should be restricted from unilaterally imposing those policies on other states. Also, States have international legal responsibilities aside from those under the WTO Agreements. Allowing States to protect human rights within their borders avoids situations of conflict between obligations under international human rights treaties and WTO law.¹³⁴ Finally, the concerns about outwardly directed measures that are discussed in the next Section do not apply to inwardly directed measures.

Some human rights advocates may be dissatisfied with this result because it restricts the ability of WTO Member States to promote and protect international human rights through trade measures. The next section considers whether such a concern is justified.

IV ARE SANCTIONS THE WAY FORWARD?

Absent the WTO, trade sanctions seem to be a legitimate way for States to unilaterally promote human rights abroad. They have been employed on a multilateral level with some success in the fight against South African apartheid,¹³⁵ and more recently in response to the human rights violations associated with the trade in “conflict diamonds”.¹³⁶ Both of these are examples of multilaterally endorsed trade measures. It also may be noted that multilaterally endorsed trade measures endorsed by the Security Council are allowed under Article XXI(c) of the GATT.¹³⁷

¹³⁴ United Nations, ‘Human Rights and World Trade Agreements’, above n 22, 12-13.

¹³⁵ Geoff Simons, *Imposing Economic Sanctions: Legal Remedy or Genocidal Tool?* (Pluto Press, 1999) 75-81; Adrienne S. Khoransanee, ‘Sacrificing Burma to Save Free Trade: The Burma Freedom Act and the World Trade Organization’ 35 *Loyola of Los Angeles Law Review* 1295, 1311.

¹³⁶ In 2003 the General Council of the WTO passed the *Waiver Concerning Kimberly Process Certification of Rough Diamonds* (WTO Doc. WT/L/518, 2003) which allows the Kimberly Process participants to disregard the non-discrimination principle when dealing with trade in rough diamonds associated with gross human rights violations.

¹³⁷ Article XXI has never been interpreted by the WTO dispute settlement bodies. The status of sanctions endorsed by an international body other than the Security Council is uncertain.

If multilateral trade sanctions have had some success in the past, then why should they not also be employed unilaterally? This section examines a few of the main reasons why unilateral, outwardly directed human rights sanctions may not be the best way to promote human rights including: the harmful outcomes that the sanctions themselves can have on the population of the target country, the disproportionate effect of such sanctions on the trading opportunities of developing countries; and the political and institutional limitations of the WTO.¹³⁸

A Sanctions and Human Rights

It is widely acknowledged that economic sanctions are not human rights neutral and can themselves be the cause of human rights violations. For example, the right to life, the right to freedom from inhuman or degrading treatment, the right to an adequate standard of living, food, clothing, housing and medical care are some of the rights that may be vulnerable to violation under trade sanctions.¹³⁹ Kofi Annan, UN Secretary General, has stated that:¹⁴⁰

...humanitarian and human rights policy goals cannot easily be reconciled with those of a sanctions regime. It cannot be too strongly emphasised that sanctions are a tool of enforcement and, like other models of enforcement, they will do harm.

That economic sanctions may not be the best way to deal with human rights violations is attested to by the fact that there are no articles in any of the main international human rights treaties which provide for the use of trade sanctions as an enforcement measure.¹⁴¹ Indeed, the Committee on Economic Social and Cultural Rights confirmed in its General Comment 8 on 'The Relationship between Trade Sanctions and Respect for Economic, Social and

¹³⁸ See also *The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights*, UN Doc E/CN.4/Sub.2/2000/33 (2000); Gary Clyde Hufbauer, Jeffrey J. Schott and Kimberly Ann Elliott, *Economic Sanctions Reconsidered* (Peterson Institute, 2nd ed, 1990, Washington DC). See also Lim, above n 19, 285.

¹³⁹ Lim, above n 19, 285.

¹⁴⁰ *Report of the Secretary-General on the Work of the Organization*, UN GAOR 53rd Sess., Supp. No. 1, [64], UN Doc. A/53/1 (1998).

¹⁴¹ Lim, above n 19, 285.

Cultural Rights' that it 'has no role to play in relation to decisions to impose or not to impose sanctions'.¹⁴²

It is usually the poorest and most defenceless in the targeted states who suffer the worst effects of the 'blunt weapon' of economic sanctions.¹⁴³ Indeed, one of the roles of sanctions is to burden these people in order to incite opposition to the ruling regime.¹⁴⁴ Meanwhile, it is the political elite (who are generally those responsible for the human rights violations in the first place) who are likely to be shielded from most of the negative effects of the sanctions.¹⁴⁵

In General Comment 8, the Committee on Economic Social and Cultural rights outlined some of the detrimental human rights effects of sanctions at paragraph 3:

While the impact of sanctions varies from one case to another, the Committee is aware that they almost always have a dramatic impact on the rights recognized in the Covenant. Thus, for example, they often cause significant disruption in the distribution of food, pharmaceuticals and sanitation supplies, jeopardize the quality of food and the availability of clean drinking water, severely interfere with the functioning of basic health and education systems, and undermine the right to work. In addition, their unintended consequences can include reinforcement of the power of oppressive élites, the emergence, almost invariably, of a black market and the generation of huge windfall profits for the privileged élites which manage it, enhancement of the control of the governing élites over the population at large, and restriction of opportunities to seek asylum or to manifest political opposition. While the phenomena mentioned in the preceding sentence are essentially political in nature, they also have a major additional impact on the enjoyment of economic, social and cultural rights.

These issues are not exclusively relevant to comprehensive country-based trade measures. Product based sanctions, which are a type of 'selective sanction', can also have profound negative effects.¹⁴⁶ The example of bans

¹⁴² UN Doc. E/C.12/1997/8, paragraph 9. The Committee on Economic Social and Cultural Rights monitors the implementation by States parties of the ICESCR (see above n 12).

¹⁴³ Ibid., [4]; Gary C. Hufbauer and Barbara Oegg, 'Targeted Sanctions: A Policy Alternative?' (2000) 32 *Law and Policy in International Business* 11, 11.

¹⁴⁴ Vazquez, above n 9, 837.

¹⁴⁵ Zagel, above n 6, 24.

¹⁴⁶ It should be noted that even these 'selective' sanctions are not as well targeted as they may appear. For instance, only 5% of the output of child labour is exported, so

on goods manufactured using child labour could force children into more dangerous areas of economic activity, or leave them without enough money to survive.¹⁴⁷ For example, in Bangladesh, some children were apparently forced into prostitution by destitute parents when the threat of a US bill banning products manufactured using child labour led to the discharge of children working in the textiles industry.¹⁴⁸ The availability of other measures, for example those instituted under the International Programme for the Eradication of Child Labour of the International Labour Organisation, should also be considered in an evaluation of their desirability of sanctions.¹⁴⁹

Sanctions also have the effect of depriving populations of the benefits that come with access to international markets.¹⁵⁰ International trade is not intended to be an end in itself. The preamble to the Marrakesh Agreement establishing the World Trade Organisation states that the trade system should be ‘conducted with a view to raising standards of living... ensuring full employment... and allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development.’¹⁵¹ If these objectives were realised then international trade should help to promote human rights – particularly economic and social rights. Indeed, “there are “few reputable developing country analysts or governments who question the positive potential role of international trade or capital inflow in economic growth and overall development””.¹⁵² Even when the application of the trade system is criticised, the benefits of having a trade system at all are generally

the vast majority of offending products would remain unaffected by sanctions: Jagdish Bhagwati, ‘The Boundaries of the WTO: Afterword: The Question of Linkage’ (2002) 96 *American Journal of International Law* 126, 132.

¹⁴⁷ See *Economist*, above n 116. This will not necessarily be the case if appropriate support structures and safety nets (e.g. new schools and financial support) are put in place to assist children who lose their jobs.

¹⁴⁸ Bhagwati, above n 146, 132.

¹⁴⁹ See International Programme for the Eradication of Child Labour website, <<http://www.ilo.org/public/english/standards/ipecc/>> at 4 December 2006.

¹⁵⁰ United Nations Development Programme, *Making Global Trade Work for People* (2003).

¹⁵¹ *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, opened for signature 15 April, 1994, 1867 UNTS 14, Preamble.

¹⁵² Gerald K. Helleiner, ‘Markets, Politics and the Global Economy: Can the Global Economy be Civilized?’ (Paper presented at the Tenth Raul Prebisch Lecture, United Nations Conference on Trade and Development, Geneva, 11 December 2000), 3.

acknowledged.¹⁵³ If human rights based trade sanctions are going to do more harm than good for the very people they are supposed to be helping then their illegality under WTO rules should not be seen as a cause for concern by human rights advocates.

B *Objections from the South*

Developing countries have particular concerns relating to human rights involvement in trade issues. Trade advocates from ‘the South’, that is developing States, often view unilaterally determined human rights policies backed by trade measures as objectionable intrusions on their sovereignty. The argument from the South is that such measures constitute protectionist devices and are aimed at denying market access to their products and limiting their competitive advantage. Regardless of whether this is true in any particular instance, it is likely to be the case that a WTO slackening of the non-discrimination principle in the name of human rights will be ‘a bone down the gullets of the poor countries.’¹⁵⁴

In the United Nations Report entitled ‘The Realization of Economic, Social and Cultural Rights’, it was noted that there is a deep and well-founded distrust of those advocating for trade-human rights linkages.¹⁵⁵ The UN Report states:¹⁵⁶

The tying of trade to human rights in the fashion in which it has so far been done is problematic for a number of reasons. In the first instance, it too easily succumbs to the charge by developing countries of neo-colonialism. Secondly, the commitment of Northern countries to a genuinely democratic and human rights-sensitive international regime is rendered suspect both by an extremely superficial rendering

¹⁵³ Oxfam reports that “World trade has the potential to act as a powerful motor for the reduction of poverty, as well as for economic growth, but that potential is being lost. The problem is not that international trade is inherently opposed to the needs and interests of the poor, but that the rules that govern it are rigged in favour of the rich.” Kevin Watkins and Penny Fowler, *Rigged Rules and Double Standards* (2002), 3.

¹⁵⁴ Bhagwati, above n 146, 128.

¹⁵⁵ J. Oloka-Onyango and Deepika Udagama, ‘The Realization of Economic, Social and Cultural Rights: Globalization and its impact on the full enjoyment of Human Rights’, UN Commission on Human Rights, 52nd Sess, Provisional Agenda Item 4, UN Doc. E/Cn.4/Sub.2/2000/13 (2000).

¹⁵⁶ *Ibid*, 17. Footnotes omitted.

of the meaning of human rights, and by the numerous double standards that are daily observed in the relations between countries of the North and those of the South.

These concerns are particularly relevant because human rights sanctions are more likely to be instituted by rich countries and operate to the detriment of poor countries. Unilateral sanctions can only make an impact if they are instituted by a state with economic clout. If Burma decided to institute sanctions on the US the economic effects would no doubt be negligible compared to those caused by the US sanctions on Burma. Sanctions will necessarily have a greater effect on poor countries as they are more likely to 'be dependent on a small range of export goods and have no slack in the economy'.¹⁵⁷ The fact that unilateral sanctions are a tool which is effectively only available to rich countries is in itself a cause for concern. Their use affords rich countries even more control over the functioning of the trade system as well as the economic development and evolution of comparative advantage in poor countries.

C *The WTO's Institutional Capacity*

Proponents of WTO regulated human rights sanctions have set a hard task for the WTO. The reality is that economic measures "should not and cannot be applied with respect to the entire universe of international human rights guarantees. The task is to find out about the core standards that are of paramount importance for the protection of human dignity..."¹⁵⁸ This is problematic because "the universal, indivisible, interdependent and interrelated nature of human rights gives scope to virtually any civil, political, economic, social or cultural issue to be described in terms of human rights."¹⁵⁹

Even if the "core standards" are ascertained the need to interpret and evaluate them in cases of conflict would remain. Such a responsibility has proven to be conceptually and practically difficult even for specialised human rights bodies. The international community has not necessarily achieved universal consensus about the parameters of human rights obligations and specifically

¹⁵⁷ Janet Dine, *Companies, International Trade and Human Rights* (CUP, Cambridge, 2005), p. 198.

¹⁵⁸ Cottier, *Trade and Human Rights*, above n 6, 125.

¹⁵⁹ Lim, above n 19, 287.

in this context, the human rights that should be included in the WTO.¹⁶⁰ The WTO would have to be able to negotiate questions of cultural relativism which pertain to the idea that human rights values vary across cultures. While cultural relativism arguments can often be challenged, it is nevertheless difficult to maintain that there is true unanimity amongst states regarding the proper interpretation of human rights.¹⁶¹

The assessment and evaluation of unilateral human rights trade restrictions may be beyond the WTO's institutional capability. The WTO is a relatively small body with a limited budget – in 2006 the WTO Secretariat had a budget of \$134 million US Dollars and a staff of 635.¹⁶² Further the Panellists and members of the Appellate Body are not human rights experts. This is related to the additional concern that if the WTO was to be in charge of determining human rights issues, human rights would be subjugated to trade concerns.¹⁶³ A United Nations report on trade and human rights suggested that “by using a provision of WTO Agreements to raise human rights arguments, countries are subjecting those arguments to the WTO legal system, and there are bound to be ways in which that system will differ from adjudicatory systems under the human rights model.”¹⁶⁴ Lim argues that “the WTO dispute settlement system is simply neither mandated nor competent to handle such a matter. Whether sanctions are permitted or not to bring about the enforcement of human rights in third States is ultimately a general issue of public international law and not of WTO law.”¹⁶⁵

¹⁶⁰ Jose Alvarez, ‘Trade and the Environment: Implications for Global Governance: How *Not* to Link: Institutional Conundrums of an Expanded Trade Regime’ (2001) 7 *Widener Law Symposium Journal* 1, 2-3.

¹⁶¹ See DL Donoho ‘Relativism versus Universalism in Human Rights: The Search for Meaningful Standards’ (1991) 27 *Stanford Journal of International Law* 345.

¹⁶² See ‘The WTO Fact File’ at

<http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm> at 20 February 2006. The IMF's annual budget for 2006 is \$937 million and had a staff cap of 2802. See International Monetary Fund, ‘The FY 2006 Budget and Medium-Term Budgetary Framework’, 1 April 2005, at

<<http://www.imf.org/external/np/pp/eng/2005/040105.pdf>> at 20 February 2006.

¹⁶³ This problem could be partially ameliorated if the panels were to seek expert advice from UN human rights bodies under Article 13 of the DSU or accept *amicus curiae* briefs from competent NGOs. For more details see Cleveland, above n 118, 186-187.

¹⁶⁴ United Nations, ‘Human Rights and World Trade Agreements’, above n 22, 15. Like Cleveland (see above n 118) the Report suggests that there may be ways around this problem if panels and the Appellate Body was willing to call on the expertise of human rights specialists.

¹⁶⁵ Lim, above n 19, 286.

Compulsory multilateral sanctions, as noted, are within the purview of the Security Council. Of course, the Security Council is not a perfect body and has its own limitations. Articles 39 and 41 of the UN Charter only allow for sanctions when human rights abuses threaten international peace and security.¹⁶⁶ The Security Council also has its own institutional difficulties to contend with, a fact attested to by its failure to respond adequately to the severe human rights violations which took place in Bosnia and Rwanda.¹⁶⁷ Nevertheless the UN Security Council has in the past mandated trade sanctions against Iraq, Yugoslavia and Burundi.¹⁶⁸ Notwithstanding the significant problems associated with the institution of economic sanctions, a multilateral determination under the auspices of the Security Council seems more appropriate, and certainly more effective, than unilateral actions against parties whose only recourse would be through the WTO dispute settlement mechanism.

In addition to the Security Council, there are a number of authoritative human rights bodies already in existence. Despite not having the capacity to institute economic sanctions, bodies such as the UN human rights treaty bodies, the new UN Human Rights Council, and the ILO may be better placed than the WTO to deal with the human rights concerns of the international community. The UN Secretary-General made this case in a 1998 address to the Economic and Social Council (ECOSOC).¹⁶⁹

Some have suggested using trade rules to achieve goals with respect to labour, the environment and human rights. I believe instead that full use should be made of the United Nations system to pursue such goals. To attempt to use the multilateral trading system to solve problems in these and other areas would put it under great strain, and would be much less effective than adopting policy solutions in the sectors themselves.

The institutional limitations of the WTO should be considered in an evaluation of the utility of unilateral trade sanctions as they, along with the other factors mentioned in this section, have the capacity to cause trade sanctions to do more harm than good for human rights.

¹⁶⁶ UN Charter, above n 14; Cleveland, above n 118, 177.

¹⁶⁷ Cleveland, above n 118, 177.

¹⁶⁸ Lim, above n 19, 287.

¹⁶⁹ 'Secretary-General Calls for Full Use of United Nations System to Aid Trade Liberalization', UN Doc. SG/SM/6629 – ECOSOC/5762 (1998). Also cited in Lim, above n 19, 288.

V CONCLUSION

States may reasonably and legitimately wish to act to protect and promote human rights. There are a number of ways in which they may go about this, trade measures being only one option. This article has discussed whether this option is one that is legally available under WTO law. The conclusion that has been reached here is that while trade measures aimed at protecting the human rights of a state's own population may on occasion comply with obligations under the WTO Agreements, unilateral trade measures aimed at protecting people in other states are likely to be found to be illegal under WTO law.

This conclusion is based on existing jurisprudence, rather than a textual analysis of the agreements themselves. The possibility remains that WTO panels or the Appellate Body could alter their interpretative approach. In *Japan Alcoholic Beverages* the Appellate Body stated that "WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts and real cases in the real world."¹⁷⁰

However, as was argued in the previous section, to change or reinterpret WTO rules to allow for outwardly directed trade measures would be counterproductive in terms of achieving human rights goals. There are better ways to go about promoting human rights through trade. In the introduction to this article two approaches to addressing human rights concerns through trade were mentioned. The first option, not discussed here, was the possibility that human rights objectives be somehow mainstreamed into WTO trade agreements and their application. In his speech on global governance Pascal Lamy suggested that this may be the direction in which the WTO is headed. He stated that the WTO Preamble "calls for the consideration of fundamental values other than those of market opening to include, for instance, the protection of the environment, human rights and other social values."

In the context of achieving human rights goals, trade is and should remain a weapon for defensive purposes only. The enjoyment of human rights overseas should be pursued through other means.

¹⁷⁰ *Japan – Taxes on alcoholic beverages*, WTO Doc. WT/DS11/AB/R, AB-1996-2 (1996), p. 31 (Report of the Appellate Body).

