‘Human Rights’ Restrictions On Trade

The WTO is generally designed to facilitate free trade between States. In this chapter, the WTO compatibility of restrictions on trade that States may wish to impose for ‘human rights’ reasons is examined.

A differentiating feature of the trade restrictions discussed in this chapter, compared to those proposed in following chapters, is that they largely concern restrictions which developed States (‘the North’) wish to impose on developing States (‘the South’). These human rights restrictions are at the cutting edge of the alleged schism between activists in the North and governments in the South, which was discussed in Chapter 3.¹ Indeed, a UN Report from 2000 reveals the deep distrust of the South over trade and human rights linkages:

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 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.²

However, one cannot blithely dismiss the occasional desirability of the imposition of trade measures for human rights reasons. After all, many of the States in the South that object to such measures are in fact terrible abusers of human rights. It might be appropriate to apply such measures as a response to the appalling human rights record of another State, or to restrict or otherwise regulate the import of a product that has been produced in a way that breaches human rights. Furthermore, States in the North (and indeed all States) have a duty under human rights law to take measures to prevent or regulate the entry of products or services into their jurisdictions which might harm the human rights of their own populations.

This chapter first examines the notion of human rights trade sanctions, both on a general and a product basis. The relevant scope of GATT and GATS obligations is then examined, including the prohibitions on discrimination as well as relevant exceptions in Article XX of GATT and Article XIV of GATS. This law is examined with regard to its effect on human rights trade measures. The same

¹ See Chapter 3, text at notes 90–4.
analysis is then undertaken with regard to the SPS and TBT agreements. The most commonly proposed human rights trade measures relate to labour rights, so the possibility of a new labour rights or ‘social’ clause in the WTO is examined. The role of waivers in bringing WTO rules into compliance with human rights is then discussed. Finally, the potential for WTO rules to open up States to trade which improves human rights will be examined, by inquiring into whether WTO rules might be used to challenge laws mandating extensive internet censorship.

A. Human Rights Trade Measures

General human rights sanctions

General human rights sanctions arise where a State imposes economic sanctions against a State to protest against the latter State’s human rights record, and/or to impose pressure on the latter State to change its ways. Examples are the comprehensive economic sanctions imposed against the military government in Burma by the US and Canada.³ Burma is a WTO member, so bans on its imports prima facie breach WTO obligations regarding quotas (with a zero quota being imposed on such goods) and MFN. Are such sanctions permissible under the WTO?

Article XXI permits ‘national security’ exceptions, none of which have been interpreted in the WTO dispute settlement system. The equivalent exception provision in GATS is Article XIV bis. Article XXI(a) only permits the withholding of certain information and is therefore not applicable. Article XXI(b)(i) and (ii) only apply to prevent trade in fissionable material and armaments. Article XXI(c) permits trade restrictions which are mandated under the UN Charter ‘for the maintenance of international peace and security’. Article XXI(c) essentially permits States to comply with Security Council sanctions imposed under Chapter VII of the UN Charter: the Security Council may impose mandatory economic sanctions on a State under Article 41 of the Charter if it deems (under Article 39) that the relevant State is threatening international peace and security. Under Article 25, States must comply with these sanctions, so Article XXI(c) ensures that the WTO Agreement does not conflict with the UN Charter. For example, the Security Council imposed extensive sanctions on Iraq throughout the 1990s due to its failure to comply with UN weapons inspections. No question of WTO legality arose as Iraq was and is not a WTO member. Nevertheless, such sanctions would have been legal under Article XXI(c) if Iraq had been a member of the WTO. However, it is doubtful that Article XXI(c) applies to sanctions imposed by the General Assembly (GA), the plenary body within the UN. The recommendation of sanctions by the GA is more common than their imposition by the Security Council, but GA resolutions are not legally binding. Therefore, sanctions that are recommended by the GA, such as those against

A. Human Rights Trade Measures

South Africa in the 1970s and 1980s,⁴ are not necessarily ‘saved’ from WTO illegality under Article XXI(c).

Article XXI(b)(iii) permits WTO Members to take actions which ‘it considers necessary for the protection of its essential security interests . . . taken in time of war or other emergency in international relations’ (emphasis added). This provision seems to permit trade restrictions between belligerents in a military conflict, and in conflicts which fall short of war but are nevertheless an international relations ‘emergency’. The perpetration of egregious human rights abuses by a State such as Burma, coupled with the extreme disapproval of those abuses by another State, might count as such an emergency. On the other hand, it might be difficult to maintain that human rights abuses in a far-off State, even of the most severe kind, threaten a State’s security interests.⁵

In any case, States seem to have much discretion under Article XXI(b)(iii). The measures do not actually have to be ‘necessary’: the inquiry instead seems to focus on whether the State imposing the measures ‘considers’ that they were necessary. Given a relevant State will inevitably assert that it did consider the measures to be necessary, it would seem difficult for a WTO dispute settlement body to find otherwise. Indeed, given its language, it is questionable whether Article XXI(b)(iii) is even justiciable.⁶

Article XX of GATT and Article XIV of GATS permit restrictions on trade for ‘non-trade’ reasons beyond national security. These exceptions are discussed in detail below. It is unlikely that any of those provisions would permit such blanket unilateral sanctions.⁷

Is it desirable for general human rights sanctions to be allowed? It is well known that the enforcement system of international human rights law is its Achilles heel. The most common form of sanction against a human rights abusing State is unilateral or multilateral condemnation, that is ‘naming and shaming’. While all States attempt to stave off such shaming, the sanction ‘has been conspicuously unsuccessful in motivating prompt changes in behaviour by delinquent States’,⁸ especially the most incorrigible violators who are often immune from domestic pressure due to their extensive suppression of opposition voices and the media.

⁴ South Africa had been a GATT member since 1948. The Security Council only ever mandated an arms embargo on South Africa, rather than comprehensive sanctions. SC Resolution 418 (4 November 1977) mandated an arms embargo under Chapter VII of the UN Charter. While Resolution 569 (26 July 1985) urged States to adopt further measures against South Africa, that Resolution was not adopted under Chapter VII so those recommendations were not mandatory.


⁷ See also Vázquez, above n 5.

At the other end of the scale, the use of military force to stop a State from violating human rights is illegal in international law unless authorized by the Security Council.⁹ Economic sanctions are therefore the strongest legal measure available in general international law to punish a State for its continuation of human rights abusive behaviour.¹⁰ Therefore, WTO law may be curtailing an important means of enforcing human rights law if it prohibits such sanctions. For example, economic sanctions probably played a large role in the eventual conformity of South Africa and Serbia-Montenegro with international demands regarding human rights.¹¹

However, unilateral economic sanctions may often have little effect beyond the symbolic, as the target State may recoup some or even all resultant trade losses with new trading partners. Furthermore, the sanctioning State will lose influence in the target State.¹² Clearly the strongest unilateral sanctions are those imposed by trading giants such as the US and EU, especially in situations where the sanctioning State/s comprise a large percentage of pre-existing trade with a country. Unilateral sanctions can also set off a domino effect, prompting copycat sanctions by other States or action by international institutions.¹³ Economic sanctions imposed by the Security Council are of course the most effective sanctions, as they deprive the target State of alternative trading partners. However, Security Council sanctions are rare, and are normally limited rather than comprehensive.¹⁴ Furthermore, comprehensive trade sanctions can have the effect of provoking nationalistic backlashes and entrenching regimes, rather than their presumed desired effect of prompting a disgruntled population to force a regime to change its ways.¹⁵

Economic sanctions are often deeply problematic from a human rights point of view. Vázquez eloquently notes that sanctions ‘treat human beings as pawns in a geo-political game’, contrary to the bottom line of human rights which treats human beings as ends rather than means.¹⁶ Unfortunately, sanctions often lead to grave suffering on the part of innocent target populations if a recalcitrant

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⁹ See UN Charter, Articles 2(4) and 2(7). Arguments over the legality or illegality of ‘humanitarian intervention’ have animated lawyers and scholars for many years, especially since the NATO bombings of Serbia to stop ethnic cleansing in Kosovo. This author believes that the majority of international lawyers consider unilateral humanitarian intervention to be illegal under international law.


¹² Perhaps such effects are occurring in Sudan and Zimbabwe, which are both the subject of sanctions from Northern countries, and both now engage in extensive trade with China, which never imposes human rights sanctions. Sudan is not a member of the WTO, though it is engaged in accession negotiations. Zimbabwe has been a member since March 1995.

¹³ Harrison, above n 10, 105, commenting on the history of sanctions against South Africa.

¹⁴Political problems, such as the veto power of the five permanent members of the Security Council (namely, China, France, Russia, UK, and the US), hamper the decision-making powers of the Security Council; the only States that are likely to be the subject of Chapter VII sanctions are those States that lack an ally amongst the Permanent 5.

¹⁵ Ewing-Chow, above n 6, 153.

¹⁶ Vázquez, above n 5, 837.
The government refuses to cave in to the demands of the sanctioning States.\(^\text{17}\) The Iraqi sanctions are illustrative of the devastating effects that sanctions can have. The sanctions severely impacted the economy and many aspects of daily life, affecting the drinking water supply, agriculture, electricity, and the telecommunications and transport systems. This led to significant human rights problems including an increase in infant and maternal mortality rates, malnutrition, illiteracy and even deaths. The most vulnerable groups, such as children, the elderly and nursing mothers, were particularly affected.\(^\text{18}\) Similarly, Ewing-Chow reports that US sanctions have caused few problems for Burma’s military junta, but have hit the civilian population hard.\(^\text{19}\) Concerns regarding effects on innocent parties have led to ‘smart sanctions’, which are more tailored to harm culpable leaders rather than innocent populations in the form of asset freezes, travel bans, and bans on strategic commodities such as arms. Many smart sanctions regimes do not raise WTO issues as they do not affect the movement of goods and services.

In 1997, the Committee on Economic, Social and Cultural Rights issued General Comment 8 on ‘The relationship between economic sanctions and respect for economic, social and cultural rights’. The Committee stated 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.\(^\text{20}\)

Hence, the Committee urged States to consider the likely impacts on the enjoyment of economic, social, and cultural rights in designing and imposing sanctions regimes, and to monitor those impacts while sanctions are imposed.\(^\text{21}\) Sanctioning States must take alleviating measures if those impacts breach ICESCR rights.

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\(^{19}\) Ewing-Chow, above n 6, 174.


especially if the sanctions cause ‘disproportionate suffering [to] vulnerable groups within the targeted country’.²²

The UN General Assembly adopted a resolution in 2009 which unambiguously condemned the use of unilateral economic sanctions, largely on the basis of their detrimental human rights impacts.²³ The voting pattern confirmed that economic sanctions are an area of North/South dispute, with 132 voting in favour and 54 (largely developed) States voting against.

International human rights law never requires the imposition of general sanctions. Rather, human rights law imposes conditions on sanctions regimes if they should be adopted. Therefore, a prohibition on ‘human rights trade sanctions’ under WTO law would not directly conflict with human rights law, as human rights law does not ever demand that a State enforce its norms by imposing general economic sanctions on a delinquent State.²⁴

Product-based trade measures based on human rights

A State may wish to restrict the import of a particular product due to concerns over human rights abuses associated with that product. The concerns may relate to harms the product could cause to the State’s own population (‘inward measures’), such as the damage caused by asbestos or tobacco products which prejudice rights to health and life. Another relevant measure might be the regulation of water providers in ways that breach GATS but which ensure that low-cost water is available to poor people. A State undoubtedly has obligations to protect the rights of its populous so it is obliged under international human rights law to implement some inward measures. If WTO law prohibits such inward measures, a conflict arises with international human rights law.

Alternatively, the human rights concern might relate to human rights abuses associated with a product from an exporting State (‘outward measures’): for example, the targeted products might be those manufactured in conditions of forced labour.²⁵ Another example would be measures aimed at preventing the trade in certain goods, such as ‘conflict diamonds’ in Western Africa, which have fuelled conflicts and associated gross human rights violations.²⁶ The human rights analysis of outward measures is more complex, as the relevant human rights are those of members of the exporting State’s population, rather than people in

²² Ibid, para 14. Note that the Committee is confirming a type of extraterritorial obligation for States: see generally, Chapter 8 below. The Committee also confirmed that sanctions do not remove ICESCR obligations from the target State: para 10.


²⁴ See also Vázquez, above n 5, 802 and 821; Harrison, above n 10, 100–1.

²⁵ See also the typology developed by Harrison, above n 10, at 61–7.

the territory of the State imposing the measures. It is argued in Chapter 8 that States have extraterritorial obligations to the people of other States. However, it is doubtful that such extraterritorial duties would generally require a State to restrict the trade in goods from other States that were manufactured in a way that harmed human rights. Rather, extraterritorial obligations are more likely to entail cooperative rather than coercive measures. Outward measures are unlikely to be mandated save in exceptional circumstances, such as perhaps the ‘conflict diamonds’ situation. Such a duty might arise if an importing State knows or should know that its market for the relevant product is so important that the abuse would stop or significantly decrease if it closed off that market. For example, suppose State A imposes a ban on the import of clothing from State B because that clothing is manufactured by children in exploitative conditions, and suppose that State A’s market constitutes 80 per cent of State B’s clothing exports. The ban might prompt State B to take measures against child labour so as to re-open its market access to State A. Alternatively, State B might find new markets. In that situation, at least State A has absolved itself of any allegation of complicity in the child labour. Unfortunately, the consequence of such measures in some situations might be to worsen the situation for the relevant children. Perhaps the clothing industry in State B will collapse, and the children forced into worse industries, such as mining or prostitution. Therefore, in the scenario given, it seems unlikely that State A is compelled under international human rights law to ban imports of clothing from State B.

The WTO compatibility of product-based human rights measures, whether inward or outward, is discussed below.

B. Do Human Rights Trade Measures Prima Facie Breach GATT/GATS?

A threshold question in determining whether a human rights measure breaches WTO provisions is whether there is a prima facie breach. The lesser the scope of the WTO provisions, the greater a State’s discretion to implement human rights trade measures. In this section, key provisions regarding the scope of GATT and

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28 Eg, Article 2(1) of the ICESCR talks of international cooperation, which does not seem to include hostile measures such as targeted trade embargoes.

29 See also Chapter 6, text at and before notes 158–161 on trade in ‘biofuels’.

30 Note that Harrison, above n 10, at 80 cites The Economist from 13 July 1999 in stating that only 5% of working children are employed in export industries. Ewing-Chow, above n 6, reports that thousands of children were laid off in Bangladesh due to the threat of US trade sanctions, with some moving into ‘more hazardous activities such as prostitution’, at 173.
GATS obligations will be analysed. Issues regarding the SPS and TBT agreements are considered below. TRIPS and the AoA are considered in separate chapters, while the other WTO agreements are examined in less detail in this book.

‘Like’ goods and services

The discrimination provisions of GATT and GATS, namely MFN and national treatment provisions, are enlivened when ‘like’ goods or services are treated differently. How has the word ‘like’ been interpreted? The broader the concept of ‘like’ goods and services, the broader the scope of the non-discrimination provisions.

A key issue from a human rights point of view is whether goods can be differentiated on the basis of its production or process methods (PPMs). For example, are shoes manufactured by child labourers ‘like’ shoes when compared to those manufactured by adults? Is salmon that is harvested in a way that harms sustainable rights to food ‘like’ salmon that is harvested in a sustainable way?

In the GATT Tuna cases,³¹ the impugned US measures prohibited the import of tuna from a State unless that State satisfied US standards on dolphin-safe fishing practices. Both panels decided that tuna caught in a dolphin-safe way could not be distinguished for the purposes of GATT obligations from other tuna. In US—Shrimp, measures which distinguished between shrimp caught with a ‘turtle excluder device’ (TED) and shrimp caught without a TED, so as to protect sea turtles, were also deemed to distinguish between ‘like’ shrimp products.³² WTO and GATT jurisprudence therefore suggests that ‘PPMs that are not physically evident in the final product cannot be used to distinguish between otherwise “like products”’.³³

In European Communities—Measures Affecting Asbestos and Products Containing Asbestos (EC—Asbestos)³⁴ the impugned provisions concerned an EC ban on building products made with chrysotile asbestos fibres. Canada argued that such products were ‘like’ other building products used for the same purposes, such as ‘PCG’ fibres.³⁵ Were they ‘like’ products for the purposes of Article III of GATT, which prescribes that imported goods receive the same treatment as local goods? The Appellate Body reasoned that the determination of ‘likeness’ depended on the degree of competitiveness and substitutability between the two products (asbestos and PCG products).³⁶ In determining such matters, the Appellate Body paid regard to ‘the properties, nature and quality of the products’, ‘the end use of the products’, ‘consumers’ tastes and habits’ (or perceptions and behaviour), and ‘the

³⁵ Polyvinyl alcohol fibres (PVA), cellulose, and glass fibres are collectively referred to as PCG fibres by the Appellate Body. See ibid, para 84.
³⁶ Ibid, para 98.
B. Do Human Rights Trade Measures Prima Facie Breach GATT/GATS?

tariff classification of the products'.³⁷ The Appellate Body found that the carcinogenic and toxic nature of asbestos fibres compared to PCG fibres had to be taken into account in assessing the ‘competitive relationship’ between the products.³⁸ Ultimately, the different products were found not to be ‘like’, due to differing physical characteristics and, interestingly, differing consumer perceptions. This decision, while still focusing on physical attributes, might open the way for more nuanced approaches to the notion of ‘like’ products, potentially for human rights or other social purposes.³⁹ Furthermore, one may note a comment from the Panel in EC—Measures Affecting the Approval and Marketing of Biotech Products,⁴⁰ concerning differences in treatment between biotech products and non-biotech products:

it is not self-evident that the alleged less favourable treatment of imported biotech products is explained by the foreign origin of these products rather than, for instance, perceived differences between biotech products and non-biotech products in terms of their safety…⁴¹

The Biotech case concerned the SPS agreement, discussed below, rather than the non-discrimination provisions of GATT. However, the comment implies that ‘a perceived difference in terms of safety’, even if that difference is unproven (distinguishing the circumstances from those in Asbestos), may justify a finding that the goods are not ‘like’.⁴²

Furthermore, it may be noted that one Appellate Body member in Asbestos, in a concurring opinion, suggested that the determination of ‘like’ products should take into account issues beyond economic considerations.⁴³ This opinion seems to open the door to the possibility that products can be differentiated by reference to non-economic considerations, such as their impact on human rights.

Dr James Harrison has raised the issue of whether goods might be distinguished on the basis of the nature of a producer. For example, could preferential regulations be applied to fruit produced by impoverished small farmers compared to fruit produced by a multinational corporation on the basis that the fruit are not ‘like’? A State may wish to apply such regulations in order to boost the incomes and livelihoods of struggling farmers, an aim which would conform with international human rights law. Harrison doubts that the Asbestos test of ‘likeness’ could be stretched so as to permit differential treatment in such an instance.⁴⁴ Indeed, the relevance of producer characteristics to a determination of likeness has been rejected by WTO panels.⁴⁵

A test of likeness which focused on the aims and effects of an impugned regulation, as was applied by a GATT panel in US—Malt Beverages,⁴⁶ might permit
greater regulatory autonomy for States.⁴⁷ Such a test might permit more regulations, including those which promote human rights and are adopted for non-protectionist purposes, and which do not have a disproportionate effect on foreign trade. Such an approach would more closely resemble the tests of discrimination adopted under human rights law. For example, the HRC has stated, with regard to the guarantees of non-discrimination in the ICCPR, that:

not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.⁴⁸

However, a test of aims and effects has been rejected under WTO law, for example by the Panel and Appellate Body in Japan-Alcoholic Beverages II.⁴⁹ The non-trade purpose of a law is generally relevant to the application of GATT exceptions in Article XX, rather than an assessment of whether like goods have been treated differently under Articles I or III. The use of Article XX, an exceptions clause, is a more difficult avenue for justifying regulations adopted for non-trade purposes (including human rights purposes), as the regulating State bears the burden of proof in establishing the application of an exception, whereas the complainant State bears the burden of proof in establishing that discrimination between like goods has arisen.⁵⁰

Regarding GATS, the issue of ‘like’ services is likely to depend on issues such as the characteristics of the service, the classification and description of the service in the UN Central Product Classification (CPC) system, and ‘consumer habits and preferences’ regarding the relevant service or service provider.⁵¹ A particular concern regarding GATS is that it may prohibit the regulation of essential services, such as the provision of utilities or education, which are designed to ensure that such services are accessible to the poor. In this regard, it seems unlikely that the interpretation of ‘like’ services will take into account differences between private utility providers or private education providers in rich areas compared to providers, including government providers, in poorer areas. As noted by Dr Andrew Lang:

it would be hard to argue that two identical services were not like simply because of the socio-economic status of the consumers of that service. Such a distinction would be unthinkable in the goods context.⁵²

⁴⁷ Harrison, above n 10, 193–4.
⁵⁰ See also Rüdiger Wolfrun, Peter-Tobias Stoll, and Anja Seibert-Fohr, WTO: Technical Barriers and SPS Measures (Martinus Nijhoff, Leiden, 2007) para 34. See also Harrison, above n 10, 215.
Discrimination against ‘like’ goods

Under both national treatment and MFN obligations, States may not discriminate between like goods. The Appellate Body and Panels have consistently found that both formal (de jure) discrimination and factual (de facto) discrimination are prohibited. Furthermore, discrimination must cause disadvantage to the relevant imported products: there is no problem, for example, if imports are treated more favorably than local goods, or if the application of different rules results in substantively equal conditions of competition. The GATT Panel in Thailand—Cigarettes in 1990 gave an interesting example of an apparently neutral law that might nevertheless cause disadvantage to imported goods. A general ban on cigarette advertising would, it was suggested, have favoured local cigarettes because, at that time, Thai brands were better known than imported brands.

The inclusion of de facto discrimination is justified on the basis that the non-discrimination obligations could be circumvented by cleverly drafted laws. The result is that the prohibitions on discrimination have a very broad scope. For example, the adoption by a State of unusually high regulatory standards with regard to a particular product might seem non-discriminatory, as it applies to local goods (so there is no apparent breach of national treatment standards) as well as all overseas goods (so there is no breach of MFN). However, unusually high standards might require foreign producers of the particular product to set up separate production lines to continue exports to the relevant State, so discrimination in effect might almost always arise.

More recently, the Appellate Body appeared to significantly narrow the test of discrimination in Dominican Republic—Measures affecting the importation and internal sale of cigarettes. The existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product. The quote seems to indicate that a measure which has a legitimate regulatory purpose, but which impacts disproportionately on imported goods, is not relevantly discriminatory, as the ‘detrimental effect is explained’ by non-trade factors. If so, the quote would signal a significant rollback of the test of factual discrimination.

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55 Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes, GATT doc. DS10/R (7 November 1990) (Report of the Panel) para 78. Such a measure was not at issue in the case. The Panel also suggested that such a ban would be allowed under Article XX(b).


It arguably reintroduces the ‘aims and effects’ test as being relevant to the issue of whether discrimination has arisen between like goods, rather than being relevant to the question of whether the relevant goods are actually ‘like’. Dr Lorand Bartels has suggested that *Dominican Republic—Cigarettes* indicates that a measure which disproportionately impacts on foreign goods will not be deemed discriminatory under GATT if the importer is ‘reasonably able to meet the conditions for more favourable treatment’.⁵⁸ It is premature however to confirm such a major reversal of prior GATT/WTO law.

If a State’s law is found to discriminate against like goods contrary to its GATT obligations regarding national treatment or MFN, it may attempt to justify the measure under one of the general exceptions recognized in Article XX. Part of the test for compliance with Article XX involves another test for non-discrimination stemming from its introductory clause (or ‘chapeau’), which is discussed below.

In any case, the WTO’s mandate now clearly extends beyond discriminatory measures under the SPS and TBT agreements. Under those agreements, a measure will be in breach if it fails to satisfy certain minimum requirements, even if it is not discriminatory. Furthermore, as discussed directly below, the prevailing interpretation of ‘quantitative restrictions’ in Article XI of GATT and Article XVI of GATS lessens the need for a successful WTO complainant to establish that a measure is actually discriminatory.

**Quantitative restrictions**

Article XI prohibits quantitative restrictions on goods. A narrow interpretation of Article XI would simply prohibit de jure or de facto import quotas.⁵⁹ In the *Tuna* cases, the measures were found to impose a zero quota on tuna from certain countries because their tuna catches failed to comply with dolphin conservation standards, so the measures were in prima facie breach of Article XI. A similar decision arose from the Panel in *Shrimp*,⁶⁰ and was not questioned before the Appellate Body. Regarding GATS, the US ban on internet gambling services from Antigua was found to breach Article XVI of GATS, as it amounted to the imposition of a zero quota on those services.⁶¹

David Driesen has convincingly criticized the prevailing interpretation of Article XI. Commenting on the *Tuna* cases, he states that ‘*Tuna/Dolphin* does not explain why a measure, which allows any country to choose to export unlimited quantities of tuna (by choosing to comply with conservation standards), should be considered a quantitative restriction on trade.’⁶² If a State can export without hindrance by

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⁶⁰ *US Shrimp I* (Panel), above n 32, paras 7.17 and 8.1.


⁶² Driesen, above n 59, 338–9.
complying with a regulation, that circumstance is indicative of a qualitative rather than a quantitative restriction. This interpretation of GATT significantly undermines the ability of States to enforce regulations at its borders. And it might be impossible or impractical to enforce some regulations once the offending goods have passed border control.

Article III of GATT, prescribing national treatment, states in an ad note that ‘any regulation’ which is enforced on an ‘imported product’ at the border is nevertheless an internal regulation subject to Article III. In such cases, Article XI should not apply. However, the GATT Tuna panels held that the measures regulated a process rather than a product so Article III did not apply. The significance of this outcome is that Article XI, in prima facie prohibiting ‘zero quotas’, seems to apply to any neutral regulation of goods (which does not distinguish between local and foreign goods) which prohibits non-complying imports.

Tuna/Dolphin’s narrow construction of the Ad Note to Article III made the [impugned measure] illegal only because of broad construction of Article XI. This broad construction of Article XI goes beyond the anti-mercantilist limit on quotas necessary to sustain the non-discrimination principle and embraces a laissez-faire rule limited only by applicable defenses. Hence, narrow construction of the ad note implies greater movement toward laissez-faire trade.

Laissez-faire principles, which dictate broad-based ‘freedom’ for traders to trade without hindrance, pose a greater threat to a State’s regulatory capacities than a mercantilist approach, which challenges only discriminatory regulations.

The Tuna interpretation of Article XI was essentially followed by the Panel in Shrimp, and was not questioned before the Appellate Body. Driesen’s insightful analysis of Tuna applies equally to Shrimp. While there was a zero quota on shrimp caught without a TED, unlimited amounts of shrimp harvested with a TED could be imported: the impugned requirement was again qualitative not quantitative.

A similar approach to quantitative restrictions was taken in US—Gambling under GATS. The WTO Appellate body found that the US had opened up its market to gambling and recreational services without specifying any quantitative restrictions. US regulations banned online gambling. The Panel found the ban imposed a ‘zero quota’ on online gambling services from Antigua, thus prima facie breaching the market access provisions of Article XVI of GATS. On appeal, the US argued that other requirements, such as that of national treatment in Article XVII, should apply in the context of prohibitions on the entry of certain services, and that the Panel’s expanded interpretation of Article XVI had disturbed ‘the balance between liberalization and the right to regulate’. The Appellate Body upheld the Panel’s decision.

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63 Ibid, 339–40. 64 Van den Bossche, above n 6, 329. 65 Driesen, above n 59, 339. 66 Ibid, 340. 67 Market access and national treatment obligations under GATS only apply to the services that a State nominates in its ‘schedule of commitments’; qualifications may be included in that schedule (including quantitative restrictions). See Chapter 5. 68 United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WTO doc. WT/DS285/AB/R, AB-2005-1 (7 April 2005) (Report of the Appellate Body) para 224, see also para 222.
It is arguable that a ‘quantitative restriction’ in relation to online gambling should relate to measures such as limits on the times that US consumers could access the service, or limits on the amounts of money that might be gambled in this way. A total ban seems less concerned with regulating the ‘quantity’ of a service (or a good), and more designed to protect consumers from the malevolent aspects of a particular service (or a good). The national treatment provisions in GATT and GATS should suffice to prevent the protectionist use of such total bans, so it is submitted that Article XI GATT and Article XVI GATS should not apply in such circumstances. Therefore, this author disagrees with the prevailing interpretations of those provisions.

C. Articles XX GATT and XIV GATS

Article XX GATT and Article XIV GATS are the ‘general exception’ provisions which allow States to depart from their GATT/GATS obligations to pursue non-trade objectives. While none of the exceptions expressly relate to ‘human rights’ per se, some of the exceptions might save human rights trade measures from WTO illegality.

Article XX of GATT reads, in part:⁶⁹

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:

(a) necessary to protect public morals;
(b) necessary to protect human, animal or plant life or health; . . .
(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement . . . ;
(e) relating to the products of prison labour;
(f) imposed for the protection of national treasures of artistic, historic or archaeological value;
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; . . .

The commentary below will focus on paragraphs (a), (b) and (g), with some reference to analogous jurisprudence under paragraph (d).

Paragraph (e) is the only explicit WTO provision which deals with labour. It is not however a human rights provision as prison labour is not per se prohibited under human rights law.⁷⁰ Rather, paragraph (e) is an economic provision which is designed to prevent States from gaining unfair advantages by exporting goods which are artificially cheap due to the availability of inexpensive prison labour.⁷¹

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⁶⁹ I have omitted clauses that are irrelevant to the purposes of this book.
⁷⁰ Eg, Article 8(3)(b) of the ICCPR states that the prohibition on forced labour does not apply to prevent ‘hard labour’ as a punishment for a crime.
⁷¹ McBeth, above n 27, 119.
Paragraph (f) relates to the human right to enjoy one’s culture under Article 15(1)(a) of the ICESCR. Examples of a relevant measure might be a restriction on the export of national treasures. It has not yet been interpreted by the GATT and WTO dispute settlement bodies. However, the exception seems to relate only to trade restrictions on tangible cultural property, rather than trade measures which protect culture generally. It seems unlikely that Article XX(f) is broad enough to safeguard all of the rights in Article 15(1)(a).

Regarding culture, Article IV GATT permits States to impose quotas on the screenings of foreign films. Cultural protection has been an area of dispute within GATT and WTO negotiations, with the EC and particularly France arguing for extensive protection and the US arguing that products of cultural value beyond films are caught within GATT disciplines. An early WTO decision in *Canada—Certain measures concerning periodicals* gives rise to legitimate concern that the dispute settlement bodies may not be sufficiently sensitive to cultural issues. The dispute was triggered by the marketing in Canada of a ‘split-run’ version of the US magazine, *Sports Illustrated*, whereby a separate ‘Canadian’ version of the magazine was sold in Canada with some special Canadian sports content. Canada enacted measures to protect Canadian periodicals, with their uniquely Canadian perspective and content, from being squeezed out by US split run periodicals. *Sports Illustrated Canada* shut down within a month of the introduction of the impugned measures, which included a large discriminatory excise. Despite the clear relevance of media products to a State’s cultural milieu, as well as the particular risk to Canada of being swamped by US cultural material given its proximity, the Panel stated that ‘cultural identity was not an issue’ in the case. My concern here is not necessarily with the outcome of the case, in which the Canadian measures were found to breach Canada’s WTO obligations. My concern is with the apparent inability by the WTO Panel to recognize the obvious cultural issues at play in this case. On the other hand, as discussed below, WTO dispute settlement bodies were prepared to identify the cultural element in Chinese restrictions on the imports of publications and audio-visual entertainment products in *China—Measures affecting trading rights and distribution services for certain publication and audiovisual entertainment products*.
Article XIV is the equivalent exceptions provision in GATS. It reads, in part:

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 like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(a) necessary to protect public morals or to maintain public order;
(b) necessary to protect human, animal or plant life or health;
(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to . . .
(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
(iii) safety . . .

Paragraph (a) is the only provision that has been subject to interpretation by the DSBs, and is discussed below. It differs from its GATT counterpart in that it refers to the maintenance of public order as well as the protection of public morals. Paragraph (b) seems identical to the equivalent paragraph (b) in Article XX GATT. Finally, paragraph (c) has no counterpart in GATT, and provides extra protection for the human right to privacy, and perhaps human rights associated with security of the person and ‘safety’, such as the right to life.

Before embarking on a detailed examination of the jurisprudence under these exception provisions, some general matters must be addressed, namely extraterritorial application and the process of interpretation.

Extraterritorial application of Article XX exceptions

In the GATT Tuna disputes, US measures regarding tuna imports were found to breach GATT in both cases. In Tuna I, the Panel suggested that the US was prohibited from adopting measures designed to enforce its environmental standards extraterritorially.⁸⁰ Tuna II softened that line, indicating that the US could impose extraterritorial measures so long as they were not intended to coerce changes in policies in other States.⁸¹ Of course, outward measures are coercive and would not therefore be allowed according to the Tuna panels.

However, in Shrimp-Turtle, the WTO Appellate Body explicitly did not decide ‘whether there [was] an implied jurisdictional limitation in Article XX(g) [and presumably the rest of Article XX], and if so, the nature or extent of that limitation’.⁸² A jurisdictional nexus between the US and the sea turtles protected by its impugned measures was found, as some of the migratory turtles passed through US waters, so the question of extraterritoriality did not have to be

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⁸⁰ Tuna I, above n 31, paras 5.27 and 5.33. ⁸¹ Tuna II, above n 31, para 5.15.
answered. Therefore, it remains possible for outward measures to be valid under WTO law.⁸³

In any case, the Tuna jurisprudence on extraterritoriality is arguably incoherent. Any trade measure, whether inward or outward, can have detrimental extraterritorial impacts and therefore be deemed to be coercive. For example, a ban on hormone-injected beef by the EC, a measure challenged in European Communities—Measures concerning meat and meat products (hormones) (discussed below), was an inward measure allegedly designed to protect the health of Europeans. However, the ban could have ‘coerced’ overseas farmers to refrain from using those hormones in order to avoid jeopardizing their European markets.⁸⁴

**Process of interpreting Article XX and Article XIV exceptions**

Exceptions to treaty provisions are normally interpreted narrowly. For example, human rights bodies openly claim to interpret qualifications to rights strictly.⁸⁵ However, the Appellate Body has not explicitly taken this approach to the general exceptions provisions. Rather, it claims to take a ‘balancing’ approach, whereby it balances in each individual case the interests of trade liberalization against the relevant non-trade value.⁸⁶ However, as argued below, that approach has not been borne out in practice. Rather, it is submitted that the dispute settlement bodies have tended to prioritize the trade side of the equation.

In order to rely on Article XX GATT or Article XIV GATS, a State must pass a three-step test before a measure will be saved from WTO illegality.⁸⁷ The following rules are gleaned from Article XX jurisprudence and are likely to be the same for Article XIV. First, the impugned measure must ‘fall within the range of policies’ designed to pursue the relevant end.⁸⁸ Second, the impugned measure must be ‘necessary’ to achieve the desired goal, or, for Article XX(g), it must ‘relate to’ that goal.⁸⁹ The third step is that the impugned measure must satisfy the requirements of the ‘chapeau’, that is the opening clause, of Article XX.

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⁸³ See also Cassimatis, above n 6, 348.
⁸⁷ Lang, above n 52, 832.
⁸⁸ *US—Reformulated Gasoline* (Panel), above n 45, para 6.20.
⁸⁹ The exact framing of this second step depends on the actual words of the clause of Article XX which is at issue.
Protection of public morals and public order

Article XIV(a) GATS has an ad note, stating that the exception can only be invoked ‘where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society’. Article XX(a), drafted in 1947 along with the original GATT, contains no such ad note.

The exceptions regarding public morals are potentially very broad, and there is little indication from the preparatory documents to the treaties to shed light on their meaning. Harrison quotes Charnovitz in saying that morality measures include, ‘at least’, measures concerning ‘slavery, weapons, narcotics, liquor, pornography, religion, compulsory labour and animal welfare’.⁹⁰

US—Measures affecting the Cross-Border Supply of Gambling and Betting Services⁹¹ concerned a challenge by Antigua and Barbuda to a number of US laws which prohibited internet gambling in the US. The US defended the measures under Article XIV GATS on the basis that they were necessary to protect public morals and public order. In particular, the prohibition was said to be necessary to combat ‘money laundering, organized crime, fraud, underage gambling and pathological gambling’.⁹²

The Panel interpreted the term ‘public morals’ as denoting ‘standards of right and wrong conduct maintained by or on behalf of a community or nation’,⁹³ and ‘public order’ as pertaining to ‘the preservation of the fundamental interests of a society, as reflected in public policy and law’.⁹⁴ The Appellate Body agreed that the US measures passed the first step of the Article XIV test, as they were measures that were conceivably necessary to protect morals.⁹⁵ The Panel had added that public morals vary according to ‘prevailing social, cultural, ethical and religious values’, and that Members had some discretion in defining the concepts for themselves ‘according to their own systems and scales of values’.⁹⁶ This aspect of the Panel’s decision was not mentioned on appeal.

Those definitions certainly indicate that a measure imposed for the purposes of protecting human rights, whether inward or outward, could fall within the public morals/order exceptions. Professor Robert 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.⁹⁷

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⁹⁶ US—Gambling (Panel), above n 91, para 6.461.

Howse adds a further justification for the use of international human rights law as a touchstone for the interpretation of the public morals clauses, in stating that the exceptions could be ‘almost limitless if the content of public morals does not have a universal element’.\(^98\) McBeth supports this idea of ‘ensuring a degree of universality’, given the common fear that Article XX exceptions might be abused to disguise protectionist measures.\(^99\)

The Appellate Body has not confirmed the Howse thesis. If it adopted the evolutionary approach to interpretation that it took in *Shrimp* with regard to Article XX(g) (discussed below), it could use modern human rights treaties to interpret the public morals exceptions.\(^100\) If it was to do so, the full range of human rights based trade measures might plausibly be allowed under the public morals exceptions. An inward measure could be justified on the basis that it fulfilled a State’s human rights obligations. A ban on goods manufactured by children, a product-based outward measure, could be said to promote the global moral purpose of combating child labour and thus protecting human rights. General sanctions could be justified as promoting the global moral purpose of combating an egregious regime that violates human rights. Alternatively, the use of public morals may transform outward measures into inward measures. That is, the morals being protected are those of the State’s own population, who may not wish to be exposed to goods tainted by human rights abuses. Just as inward measures have an outward effect, outward measures arguably have an inward effect in terms of protecting the ‘public morals’ of consumers.\(^101\) Therefore, the exceptions regarding public morals and public order (the latter only in GATS) may provide an opportunity for States to justify trade restrictive human rights measures, such as those based on labour rights, which do not otherwise come under another clause in Articles XX or XIV.

In *China—Measures affecting trading rights and distribution services for certain publication and audiovisual entertainment products*,\(^102\) the US challenged Chinese measures which required that foreign books, movies, and music be imported through government-approved agents. China justified the measures as necessary to protect public morals, as the laws ensured that the content of the imports complied with Chinese censorship laws. Both the Panel and the Appellate Body found that the mandated use of government-approved agents to import cultural goods was not necessary to protect public morals. Therefore, both bodies were able to sidestep the issue of whether China’s censorship laws were per se justifiable as measures to protect public morals.\(^103\) Indeed, the point was essentially conceded by the US:

> China notes that the United States does not appear to dispute that China has a sovereign right to put in place a system designed to review and control the content of cultural goods


\[^99\] McBeth, above n 27, 117; see also Harrison, above n 10, 209.

\[^100\] Harrison, above n 10, 212; Cassimatis, above n 6, 360.

\[^101\] See also Harrison, above n 10, 66. See also text above at n 84.

\[^102\] *China Entertainment Products (Panel and Appellate Body)*, above, n 79.

\[^103\] See Bridges *Weekly Trade News Digest*, ‘WTO rules against Chinese restrictions on foreign books, movies, music, 9 September 2009. See also below, Part G.*
that enter its territory. The United States also does not appear to dispute that China is entitled to decide the level of protection that it requires.¹⁰⁴

However, the Panel then added:

China has decided that the control of cultural content is a matter of fundamental importance, and that it requires a complete exclusion from its territory of materials which could have a negative impact on public morals. The right to set such standard of enforcement and to put in place a system that will maintain such standard is unquestionable and recognized also by the Appellate Body jurisprudence.¹⁰⁵

Therefore, the public morals exception may be so broad as to permit a State to adopt extensive censorship measures. While some censorship is certainly justified for the purposes of protecting public morals and public order, such as censorship of child pornography or genuine national security information, China’s censorship laws are excessive from a human rights point of view. This issue is discussed further below.¹⁰⁶

**Protection of health**

Article XX(b) GATT and Article XIV(b) GATS allow for measures that protect public health. Such measures are clearly of relevance to the human right to an adequate standard of health (Article 12 ICESCR) and the right to life (Article 6 ICCPR). The HRC has confirmed that the right to life has a broad interpretation, such that States must take ‘positive measures’ to protect the right, including ‘positive measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics’.¹⁰⁷ Trade measures regarding protection of the rights to food and water, both essential for health and life, should also come within Article XX(b). A broad interpretation of Article XX(b) might permit measures which promote all human rights that protect physical and mental security, such as the right to be free from torture and certain prohibitions on labour rights abuses.

The following are examples of cases where the impugned measures have been found to constitute policies aimed at protecting health within the meaning of Article XX(b) GATT: US measures which specified standards of cleanliness for gasoline sold in the US in *US—Standards for reformulated and conventional gasoline*,¹⁰⁸ the ban in *Asbestos* on chrysolite asbestos products,¹⁰⁹ and a ban in

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¹⁰⁴ China Entertainment Products (Panel), above n 79, para 4.573.
¹⁰⁵ Ibid, para 4.574. ¹⁰⁶ See also below, Part G.
¹⁰⁷ HRC, ‘General Comment No 6: The right to life (art. 6)’, Sixteenth Session, 1982, 30 April 1982, para 5.
¹⁰⁹ The Appellate Body considered the Article XX issue in *EC Asbestos* (Appellate Body), above n 34, even though Article XX was not strictly engaged, as the measures had not breached the national treatment provisions of GATT.
Brazil—Measures affecting imports of retreaded tyres, as discarded tyres were breeding grounds for mosquitoes which increased the incidence of mosquito-borne diseases.

The test of ‘necessity’

The public morals and health exceptions are only permissible if they are deemed to be ‘necessary’ to achieve their respective goals. In Thailand—Cigarettes, a GATT panel found that the test of necessity required that there be no available alternative measures that were GATT consistent or less GATT inconsistent which could reasonably be used to achieve the desired ends. The ban on the import of foreign cigarettes in Thailand—Cigarettes, which prima facie breached Article XI, was imposed due to harmful additives in imported cigarettes and a desire to reduce tobacco consumption for health reasons. The GATT Panel suggested that the following measures, which did not distort trade as much as the impugned measure, might have sufficed: labelling requirements, ingredient disclosure regulations, and a ban on tobacco advertisements. It is doubtful that such measures were as effective as the impugned measures in achieving Thailand’s health aims. The early test of ‘necessity’ was criticized for being too strict, and arguably ‘impossible to satisfy’. Despite criticism of the test, the Gasoline Panel adopted the Thailand—Cigarettes test and found that the impugned US ‘clean air’ measures were not necessary in order to promote health as less trade restrictive measures were available.

In Korea—Various Measures on Beef, the Appellate Body, in a case on Article XX(d), stated that a measure did not have to be ‘indispensable’ in order to be ‘necessary’. A determination of ‘necessity’ involved a ‘weighing and balancing’ process. Korea—Beef therefore modified the strict ‘least trade restrictive’ test. The Appellate Body has followed this modified test in Asbestos, Gambling, and Dominican Republic—Measures affecting the importation and internal sale of cigarettes. The Appellate Body in the latter case summed up the law on ‘necessity’ as follows:

The Appellate Body Reports in Korea—Various Measures on Beef, EC—Asbestos and US—Gambling indicate that, in the assessment of whether a proposed alternative to the impugned measure is reasonably available, factors such as the trade impact of the measure, the importance of the interests protected by the measure, or the contribution of the measure to the realization of the end pursued, should be taken into account in the analysis. The weighing and balancing process of these three factors also informs the determination whether a WTO-consistent alternative measure which the Member concerned could

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112 Ibid, paras 77–8.
113 Lang, above n 52, 833.
114 The measures were discriminatory, as discussed below in text before n 138, so less discriminatory options were available. US—Reformulated Gasoline (Panel), above n 45, para 6.22.
115 Korea—Measures affecting imports of fresh, chilled and frozen beef, above n 54.
reasonably be expected to employ is available, or whether a less WTO-inconsistent measure is reasonably available.¹¹⁶

The Appellate Body in *Dominican Republic—Cigarettes* went on to approve a quote from *US—Gambling*, stating that an alternative measure was not available if it was ‘merely theoretical in nature’ or where it imposed ‘an undue burden on that Member’.¹¹⁷ These clarifications indicate that the Appellate Body will be sensitive to a State’s technical and financial capacities to implement alternative measures.¹¹⁸ Finally, the alternative measure has to ‘preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued’.¹¹⁹

In *Asbestos*, the Appellate Body confirmed that ‘necessity’ does not relate to the goal of a measure, but rather the necessity of the means to that end.¹²⁰ This decision implies that a State may seek to attain any level of health protection that it desires, or, by analogy, any level of protection of public morals (or public order under GATS). However, one outcome of the new balancing test of ‘necessity’ is that, while the Appellate Body will not question the validity of an end once it is deemed to fall within a paragraph of Article XX, the perceived importance of that end ultimately makes a difference in deciding whether the measure utilized is necessary. The Appellate Body in *Asbestos*, in finding that the measures were in fact necessary, was influenced by the fact that the goal pursued, the protection of human health from well-known and life-threatening health risks, was ‘both vital and important in the highest degree’.¹²¹

In *Brazil—Retreaded Tyres*, the Panel stated that ‘few interests are more “vital” and “important” than protecting human beings from health risks’.¹²² Brazil explained that it had banned imports of retreaded tyres in order to reduce the health risks posed by waste tyres, which became mosquito breeding grounds and also generated toxic tyre fires. The ban on imports meant that those imports were replaced by domestic retreads, which meant fewer local tyres became waste tyres. The Appellate Body noted that the ban could be justified even though it was as trade restrictive as was possible.¹²³ However, it disagreed with Brazil’s contention


¹¹⁷ *US—Gambling* (Appellate Body), above n 91, para 308, quoted at *Dominican Republic Cigarettes* (Appellate Body), above n 116, para 70.

¹¹⁸ Lang, above n 52, 834.

¹¹⁹ *US—Gambling* (Appellate Body), above n 93, para 308, quoted at *Dominican Republic Cigarettes* (Appellate Body), above n 116, para 70.

¹²⁰ The Appellate Body examined Article XX on appeal even though the measures did not need to be justified under Article XX as there was no discrimination between like goods. See also *US—Reformulated Gasoline* (Panel), above n 45, para 6.22.

¹²¹ *EC—Asbestos* (Appellate Body), above n 34, para 172.


¹²³ *Brazil—Retreaded Tyres* (Appellate Body), above n 122, para 150.
that such a ban would be necessary if it had only a ‘marginal or insignificant’ effect because it aimed ‘to reduce risk exposure to the maximum extent possible’.¹²⁴ Thus, the impugned measure must be reasonably effective in order to be deemed ‘necessary’.

In its decision in Brazil—Tyres, the Appellate Body found that the ban was necessary. Its trade impacts were outweighed by the importance of the ban in reducing health risks caused by waste tyres. It supported the Panel’s finding that alternative measures proposed by the appellant, the EC, including the use of tyres in landfill, recycling, incineration, and stockpiling, were not reasonably available to Brazil or were not appropriate alternative policies (for example, they carried their own risks).

Extrapolating from Asbestos and Brazil—Retreaded Tyres, the Appellate Body has signalled a great willingness to concede the necessity of impugned measures when public health issues are at stake.¹²⁵ The promotion of human rights is also of the highest importance.¹²⁶ These cases also indicate that a less strict test of necessity, compared to the test from Thailand—Cigarettes, has been adopted, which increases the capacities of States to enact human rights measures that restrict trade.

In US—Gambling, the Appellate Body overturned the Panel’s decision and found that the US’s measures were necessary to protect public morals and public order. The Panel had stated that the US should have negotiated with Antigua before banning internet gambling. In the view of the Appellate Body, consultations were ‘not an appropriate alternative . . . because consultations are by definition a process, the results of which are uncertain and therefore not capable of comparison with the measures at issue in this case’.¹²⁷ As no other alternative measure had been raised, the Appellate Body found that the measure was necessary to protect the US’s chosen level of protection for public morality and public order.

In China—Audiovisual entertainment products, the Appellate Body found that the impugned measures were not necessary in order to protect public morals because less trade restrictive measures were reasonably available to achieve the same level of protection of morality, so the measure was not particularly important in achieving China’s ends. For example, China could simply apply its national censorship laws to the imported products in the same way as it applied those laws to the like domestic products.¹²⁸ There was no need to restrict the entities that could physically import the relevant goods in order to ensure compliance with its censorship regime.

Inward measures, especially those designed to protect health, seem likely to pass the necessity test so long as they are reasonably effective in achieving a goal within Article XX. Outward measures seem to be less likely to satisfy the necessity criterion. Indeed, outward measures would rarely satisfy the test given that unilateral economic sanctions are often ineffective (or even counterproductive).¹²⁹

in promoting human rights compliance in the target State. Furthermore, less trade restrictive means of registering a protest against a State’s human rights abuses would often be reasonably available.\textsuperscript{130} Of course, the effectiveness of sanctions increases according to the power of a State. It would seem unsatisfactory if human rights sanctions were only available to powerful States under WTO law.\textsuperscript{131} However, an outward measure designed to protest against a State’s human rights abuses, whether general or product-based sanctions, might pass muster under the necessity test if the relevant desired impact was not the effect on the target State’s behaviour, but the assuaging of the conscience and satisfaction of the moral code of consumers in the sanctioning State.

\textbf{Protection of environment}

Article XX(g) is not directly relevant to human rights measures. Rather, it concerns measures that protect environmental ends. Nevertheless, Article XX(g) cases are relevant because environmental measures can be necessary to protect human health as well as rights to food and water.\textsuperscript{132} Article XX(g) cases also act as signposts to the potential outcomes in future cases concerning human rights.

As noted in Chapter 2, the Appellate Body in \textit{US—Shrimp} utilized a number of modern environmental treaties to interpret the scope of Article XX(g).\textsuperscript{133} For example, it rejected an argument that the reference therein to ‘exhaustible natural resources’ referred only to mineral or ‘non-living’ resources: the Appellate Body found that living resources were ‘susceptible of depletion, exhaustion and extinction’.\textsuperscript{134} The Appellate Body went on to note that while Article XX(g) had been drafted over 50 years earlier (under the original GATT treaty), modern and ‘evolutionary’ notions of environmental protection could inform its interpretation of the provision in 1998.\textsuperscript{135} Therefore, a measure designed to protect the endangered sea turtle was a measure ‘related to’ Article XX(g) purposes.

Unlike Articles XX(a) and XX(b), a measure under Article XX(g) does not have to be ‘necessary’: it must simply ‘relate to’ environmental ends. In \textit{US—Gasoline}, the Appellate Body confirmed that this test was not as strict as that of ‘necessity’ under Articles XX(a) and (b). Indeed, the impugned measures in \textit{US—Gasoline} were not found to be ‘necessary’ for the purposes of Article XX(b), but they were found to ‘relate to’ ends that came within Article XX(g). Therefore, the impugned measures ‘passed’ the second stage of the test for Article XX(g) but not Article XX(b).\textsuperscript{136} A measure passes the ‘related to’ test so long as it was ‘primarily aimed at’

\textsuperscript{130} See also Vázquez, above n 5, 819.
\textsuperscript{131} Ibid, 834–5; Schultz and Ball, above n 129, 75–6.
\textsuperscript{133} See Chapter 2, text at n 123.
\textsuperscript{134} \textit{US—Shrimp} I (Appellate Body), above n 82, para 128.
\textsuperscript{135} Ibid, paras 129–30.
ends within Article XX(g), or is ‘reasonably related to’ those ends. The less onerous test for Article XX(g) may supply an alternative justification for health measures related to the environment if a justification under Article XX(b) should be found not to be ‘necessary’.

The chapeau

The chapeaus in both Articles XX and XIV state that measures passed under one of the relevant sub-paragraphs are not allowed if they amount to ‘arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade’. The chapeau has been interpreted as a safeguard against abuse of Article XX rights by States. The ‘chapeau’ test has been the downfall of most measures that a WTO Member has sought to justify under Article XX. Almost all such measures have ultimately been found to be discriminatory in a way that breaches the chapeau.

In US—Gasoline, the impugned ‘clean gas’ measures were not justified under Article XX(g) (having failed to reach even the third stage of the Article XX test under Article XX(b)) as different administrative regulations for measuring pollutants applied, respectively, to US producers of gasoline and to those in the complainant States, Venezuela and Brazil. The measures failed the chapeau test as they were clearly discriminatory. In US—Gambling, the US ultimately lost because the federal Interstate Horseracing Act permitted remote gambling on horse races by some US providers. This discrimination in favour of certain US companies suggested that the measures were in fact ‘disguised restrictions on trade’ rather than measures designed to protect public morals. The discrimination in these two cases was fairly blatant.

In US—Shrimp, the measures failed the chapeau test, partly because the US had dealt with different countries in different ways without justification. For example, while it had negotiated a treaty on the issue of saving the sea turtle with Latin American States, it had unilaterally embargoed shrimp from other States without consultation and without sufficient consideration of whether those countries might have adopted equivalent measures which avoided the incidental killing of sea turtles while harvesting shrimp. The US amended its laws in the wake of Shrimp; those modifications were challenged by Malaysia in US—Shrimp (Article 21.5—Malaysia) (‘Shrimp 2’). The Appellate Body found that the new measures, which allowed shrimp imports from States where there were programmes in place that were comparably effective in saving the turtle, were WTO legal. The Shrimp litigation indicated a preference by the WTO for cooperative rather than coercive solutions: States should at least attempt to resolve grievances before imposing trade

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¹³⁷ See Harrison, above n 10, 217.
¹³⁸ Note however that the US disputes the interpretation of the relevant horse racing statute by the Panel and Appellate Body in US—Gambling.
restrictions. The *Shrimp* precedent indicated that outward product-based measures might need to be preceded by negotiations with the relevant States before their unilateral imposition is permitted under WTO law. However, the imposition of a requirement of negotiations by a Panel was overturned by the Appellate Body in the later decision in *US—Gambling*.¹⁴⁰

Driesen has queried one of the discrimination findings in *Shrimp*. To recap, both US and foreign shrimp fleets were required to use TEDs. The measure was found to be discriminatory and contrary to the chapeau of Article XX GATT, as the regulation did not take into account the ‘different conditions’ that might arise in foreign States.¹⁴¹ However, the decision did not identify why or even whether those ‘different conditions’ rendered it difficult for other States to install TEDs. The US arguably failed to discriminate *in favour of* the foreign fleets by exempting them from the TED requirement.¹⁴² *Shrimp* arguably indicates that any neutral measure that somehow obstructs international trade, even if applied equally to domestic trade, might nevertheless be construed as discriminatory.¹⁴³

In *Brazil—Retreaded Tyres*, the measures failed the test in the chapeau for two reasons. First, the Appellate Body noted that Brazil’s goals were blatantly undermined by the fact that non-retreaded used tyres could still be imported. Secondly, Brazil was a member of the MERCOSUR regional trade grouping, and had exempted its MERCOSUR partners from the retreaded tyres ban. Brazil had lost a challenge to its import ban before a MERCOSUR tribunal, despite the existence of a regional exemption akin to Article XX(b). The Appellate Body found that the MERCOSUR exemption cut against the health promotion goals of the measure, and therefore manifested a breach of the chapeau. As Brazil had not cited health reasons for the ban before the MERCOSUR tribunal, the Appellate Body suggested that its decision did not necessarily ‘result from a conflict between provisions under MERCOSUR and the GATT 1994’.¹⁴⁴ However, this circumstance does not seem to have been decisive in the Appellate Body’s reasoning: it seems that it was quite prepared to find ‘arbitrary and unjustifiable’ discrimination, and that the measure was a ‘disguised restriction on trade’, even if such discrimination arose from a clash between MERCOSUR and GATT obligations. The result in *Brazil—Tyres* is that Brazil can maintain its ban if it extends it appropriately.¹⁴⁵ However, it might not be so easy for Brazil to extend the ban to MERCOSUR countries, due to its apparent obligations (according to a MERCOSUR tribunal) to allow the import of tyres under MERCOSUR.¹⁴⁶

General human rights sanctions against a State could well fail the chapeau test unless a State imposed like sanctions on all States with a similarly bad human rights record. Such even-handedness is not typical of general human rights sanctions.

¹⁴⁰ See above, text at note 127.
¹⁴¹ *US—Shrimp I* (Appellate Body), above n 82, para 164. ¹⁴² Driesen, above n 59, 333.
¹⁴³ Joseph, above n 84, 337.
¹⁴⁴ *Brazil—Retreaded Tyres* (Appellate Body), above n 122, para 234.
¹⁴⁶ See also *Brazil—Measures affecting imports of retreaded tyres—ARB-2008-2/23—Arbitration under Article 21.3(c)—Award of the Arbitrator, WT/DS332/16 (29 August 2008) (‘Brazil—Retreaded Tyres—Arbitration’).
For example, as noted above, Canada and the US have imposed extensive trade sanctions on Burma. While Burma undoubtedly commits horrendous human rights abuses, other WTO members arguably have similarly bad records, such as the Central African Republic or the Democratic Republic of the Congo.\footnote{\textsuperscript{147}} While such measures are unlikely to be imposed for protectionist purposes, they could amount to ‘arbitrary or unjustifiable discrimination between countries where the same conditions prevail’.\footnote{\textsuperscript{148}}

**Conclusion on GATT/GATS jurisprudence**

The above survey of WTO cases signals three trends. First, the Appellate Body and the Panels engage in a high level of scrutiny in examining a State’s impugned measures under WTO law. There is little sign of a margin of discretion being accorded to States. Notwithstanding the landmark \textit{Asbestos} decision, the goal of a law is normally irrelevant in determining if products are ‘like’ for the purposes of GATT, and it seems likely the same approach will be adopted under GATS.

Secondly, a wide interpretation has been given to ‘discrimination’ for the purposes of MFN and national treatment obligations. While the definition may have been rolled back in \textit{Dominican Republic—Cigarettes}, a very broad interpretation has been given to the prohibition of quantitative restrictions. Altogether, these interpretations give GATT and GATS obligations a broad scope. The broader their scope, the greater their impact on a State’s regulatory capacities.

Thirdly, the interpretation of the Article XX (and Article XIV) exceptions has arguably been quite narrow. Certainly, the interpretation of the values which are promoted within the various sub-paragraphs has been quite broad. The Appellate Body and Panels will refrain from questioning the validity of the social ends that a State wishes to pursue if those ends feasibly fall within Article XX GATT or XIV GATS. However, their perception of the importance of the ends pursued is clearly important in deciding whether a measure is ‘necessary’ under Article XX or Article XIV. The Appellate Body in \textit{Shrimp I} confirmed that Article XX(g) and presumably the other sub-paragraphs will be interpreted dynamically in the light of contemporary values. The public morals exceptions appear to be the only provisions which might permit human rights trade measures in general. However, a broad interpretation of Article XX(b) (or Article XIV(b) GATS) could allow a State to defend measures which protect a number of human rights related to human security.

For a time, the utility of these exceptions was undermined by a very strict test of ‘necessity’ that was manifested in \textit{Thailand—Cigarettes} and \textit{US—Reformulated Gasoline}. This second step in the Article XX test has however become less strict, with the ‘least trade restrictive’ test being replaced by a ‘weighing and balancing’ test which gives greater weight to non-trade values. And indeed, the impugned measures in a number of cases have ‘passed’ this test of necessity, as seen in \textit{Asbestos}, \textit{Gambling}, and \textit{Retreaded Tyres}. The test was not passed in \textit{China—Audiovisual}

\footnote{\textsuperscript{147} See also Vázquez, above n 5, 823.} \footnote{\textsuperscript{148} Ewing Chow, above n 6, 166–7.}
Entertainment Products. The less strict ‘relating to’ test under Article XX(g) was ‘passed’ in Gasoline and Shrimp. However, the remaining hurdle of the chapeau has only been surmounted fully in Shrimp II (with no chapeau analysis taking place in Asbestos).

It is submitted that outward measures are far less likely to be legal under WTO law than inward measures. For example, it will be difficult to establish that an outward measure is necessary. It would seem easier to justify an inward measure by reference to public morals, public order (in GATS), or the need to protect human health. All human rights trade measures will have to be carefully crafted in order to avoid falling foul of the non-discrimination requirement in the chapeau.

The outcomes from the WTO’s dispute resolution process regarding social measures have been criticized by social justice campaigners. For example, environmentalists have argued that the WTO unduly ‘undermines necessary environmental legislation’.¹⁴⁹ Certainly, most challenges to social measures under WTO law have resulted in the legislation being found to breach WTO provisions in some respect. However, the criticism may not be fair. After all, the cases may simply signal that a State can adopt social regulations but must ensure that they are not relevantly discriminatory. However, given the width of the test of discrimination under the chapeau, as pointed out by Driesen in regard to Shrimp, that requirement may be more onerous than it sounds. Furthermore, the removal of discrimination can be potentially difficult, as indicated by Brazil in requesting extra time to negotiate with its MERCOSUR partners over a resolution to the Tyres dispute.¹⁵⁰

The human rights obligations of the State adopting human rights trade measures will rarely be at issue with regard to outward measures because States are rarely if ever obliged to impose such sanctions under international human rights law. However, human rights obligations are clearly at issue for many inward measures. From a human rights point of view, it is troubling that an explicit human rights exception is not included within Articles XX and XIV. Furthermore, it is troubling that a human rights measure, such as the health measure in Brazil Tyres, should be subjected to scrutiny according to its impact on trade.¹⁵¹ Perhaps it is unfortunate that human rights considerations are ‘weighed’ or ‘balanced’ against non-human rights concerns at all. After all, ‘adherence to free trade obligations’ is not a recognized limitation to any human right, and international human rights bodies have never indicated that they accept WTO compliance as an excuse for limiting a human rights obligation.¹⁵²

However, there is perhaps nothing wrong, from a human rights point of view, with the Panels and Appellate Body insisting that a less trade restrictive option be taken if it is reasonably available, given that the determination of such reasonable availability pays due deference to a State’s desired level of protection of an Article XX (or Article XIV) value, as well as a State’s capacities to implement an alternative measure. In this regard, it is interesting to speculate on the outcome of a human

¹⁴⁹ Van den Bossche, above n 6, 623 (noting such arguments).
¹⁵⁰ See Brazil—Retreaded Tyres— Arbitration, above n 146.
¹⁵¹ See also McBeth, above n 27, 124.
¹⁵² See also Harrison, above n 10, 218–19.
rights assessment of the Brazil Tyres measure. The measure would have been found to conform to the right to health, but the exceptions regarding used tyres and MERCOSUR countries would have been found to undermine that conformity. That is, human rights bodies would possibly have condemned the same flaws in the scheme as the Appellate Body. However, under human rights law, the abolition of the import ban would not be an acceptable solution, whereas trade law dictates the lifting of the import ban if those flaws cannot be fixed.¹⁵³

A social measure which restricts free trade can also impact badly on the enjoyment of human rights. If one accepts that free trade increases wealth, trade restrictions diminish that wealth, and consequently can impact on the enjoyment of economic, social, and cultural rights. However, the ‘diminution of aggregate wealth’ could not constitute a legitimate limit to human rights, particularly in respect of a measure that simultaneously and directly promotes human rights. On the other hand, severely detrimental impacts on the livelihoods of people, such as those in an offshore export industry who are put out of work by a major trading partner’s import ban, could potentially be classified as harms to the right to work (Article 6 ICESCR) and the right to an adequate standard of living (Article 11 ICESCR). Such violations might arise if those offshore workers are vulnerable people in a poor State that lacks the capacity to compensate for their losses or cope with sudden economic adjustments.¹⁵⁴ This issue is discussed in greater detail in Chapters 5, 6, and 8, and below in regard to SPS measures.

Free trade restrictions do not, of course, always have such serious human rights impacts: resultant market losses may only rarely harm the livelihoods of affected offshore traders to such an extent as to harm their human rights. Yet the potential generation of human rights abuses by protectionist measures indicates that, in principle, some limitation on the regulatory power of the State to restrict free trade is welcome from a human rights point of view. However, the WTO dispute resolution bodies do not take into account the ‘effect on human rights caused by trade restrictions’ in deciding whether protectionist measures are or are not permissible; they explicitly focus on the trade impact per se (which may or may not impact on human rights).

So far, States have not specifically relied on human rights obligations to defend social legislation in WTO litigation. For example, Brazil did not refer to the right to health in Brazil—Tyres. It is a matter of speculation as to why States are not using explicit human rights claims to bolster their arguments before the WTO.¹⁵³

¹⁵³ Indeed, Article 3.7 of the Understanding on Rules and Procedures Governing the Settlement of Disputes states, in part:

In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.

Thus, Article 3.7 dictates a preference for withdrawal of the impugned measures if a mutual agreement to a solution does not arise.

¹⁵⁴ See Ha-Joon Chang, Bad Samaritans: the Myth of Free Trade and the Secret History of Capitalism (Bloomsbury Press, New York, 2008) 73, commenting that loss of livelihood in the developing world can be a matter of ‘life and death’. See also below, note 156, for an example of such arguments being made in the context of indigenous peoples in a developed State.
One reason may be that the bureaucrats that prepare arguments for WTO litigation are not human rights experts.¹⁵⁵

As noted, very few social measures have survived challenge before WTO panels or the Appellate Body. This circumstance may have a chilling impact on social legislation where that regulation has an impact on foreign trade. However, the case statistics reflect the outcomes of very few cases. A new case on the horizon, concerning complaints by Canada and Norway against EC bans on seal products, might reveal more about the approach of the Panels, and perhaps the Appellate Body, in this respect.¹⁵⁶

D. The SPS and TBT Agreements

The SPS Agreement regulates sanitary and phytosanitary standards while the TBT Agreement regulates the technical standards which a State may apply to products. Both of these Agreements regulate the extent to which a State can use such standards when those standards restrict foreign trade. They are discussed in turn below.

The SPS

Sanitary and phytosanitary (SPS) standards are measures aimed at protecting human animal or plant life from food-borne risks, pests or diseases.¹⁵⁷ Hence, they are standards that are essentially imposed on agricultural goods, which restrict the entry of non-compliant goods.¹⁵⁸ The SPS Agreement imposes restrictions on a State’s ability to implement certain inward measures. Given the importance of agriculture to the livelihoods of most of the world’s poorest people, as discussed in Chapter 6, and the importance of quarantine measures in protecting consumers and others from health risks or risks to food supplies, SPS measures can set up a clash of respective human rights interests.

The SPS Agreement imposes the following disciplines on SPS measures. States should only adopt SPS measures which are necessary to protect the health of humans, animals, and plants (Article 2.2). Such measures should be based on scientific evidence and principles (Article 2.2), and must comply with MFN and


¹⁵⁶ European Communities—Measures prohibiting the importation and marketing of seal products, WTO docs. WT/DS400/1 (2 November 2009) (Requests for Consultations by Canada) and WT/DS401/1 (5 November 2009) (Request for Consultations by Norway). It is notable, from a human rights point of view, that the Canadian Inuit argue that the ban threatens their livelihoods and their communities: see, eg, ‘Canadian Seal Hunters lose bid to lift EU import ban’, ABC News, 29 October 2010, at <http://www.abc.net.au/news/stories/2010/10/29/3051380.htm?section=world>.

¹⁵⁷ Van den Bossche, above n 6, 463.

¹⁵⁸ In the Asbestos case, Canada had initially claimed that the ban on asbestos products was in breach of the SPS Agreement as well as the GATT (see WT/DS/135/3, 9 October 1998). Presumably this claim was based on the reference in the SPS Agreement to ‘diseases’ (such as, perhaps, asbestos-related cancer). However, Canada did not pursue the claim before the Panel (see Appellate Body report, above n 34, fn 4).
national treatment principles (Article 2.3). Finally, Article 2.4 confirms that SPS measures are permissible under WTO law so long as they comply with the SPS agreement: they are not subject to a separate challenge under GATT.

Article 3 of the Agreement expresses a preference for harmonized SPS standards. To that end, States may base their standards on international standards or conform to those standards. If a State does so, its SPS measures are presumed to comply with the SPS Agreement. A State may still choose to impose a higher level of protection of health under its SPS standards than is achieved under a relevant international standard. However, if a State does so, it must justify its SPS standards by reference to a scientific risk assessment.

The concept of risk is crucial under the SPS Agreement. ‘Risk assessment’ is a scientific process for establishing the risks entailed (for example, in the ingestion of a certain microbe), taking into account likelihood and magnitude of risk. ‘Risk management’ is a process for determining the level of protection required from a certain risk and choosing SPS measures accordingly. Risk management decisions take into account risk assessment, but also societal values, consumer preferences, industry interests and costs.

Article 5.1 requires that SPS measures be based on a risk assessment, taking into account recognized risk assessment techniques. In *EC—Measures concerning meat and meat products (hormones)*, the Appellate Body clarified that there must be a rational relationship between risk assessment and the measure adopted, and that the assessment must ‘reasonably support’ the measure.

Article 5.2 specifies some scientific and technical factors that Members should take into account in assessing risks such as the existence of ‘pest- or disease-free areas’; that list is not exhaustive. Article 5.3 specifies certain economic criteria that should be taken into account in devising SPS standards, such as production losses in the event of the entry of a particular pest or disease into the country.

Article 5.5 requires that Members avoid ‘arbitrary or unjustifiable distinctions’ in their SPS measures if these distinctions ‘result in discrimination or a disguised restriction on international trade’. Article 5.6 requires Members to ensure that their SPS measures are ‘not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility’. That is, a State should adopt a less trade restrictive measure if it is reasonably available and will achieve the same level of desired protection.

Finally, Article 5.7 deals with the situation where there is a dearth of scientific evidence on relevant risks. WTO Members in that situation may adopt provisional

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159 Van den Bossche, above n 6, 463.
161 Ibid.
163 Ibid, para 193.
164 Eg, Australia can justify stronger measures to keep out rabies, given that rabies does not exist in Australia, compared to a country that already has rabies.
165 See also Van den Bossche, above n 6, 465.
SPS measures. Members should review provisional SPS measures as more evidence becomes available, with a view to modifying them as appropriate.

It is clear that the SPS Agreement is not only concerned with eliminating trade discrimination: it imposes minimum standards on permissible SPS standards to the extent that they affect trade. Those minimum standards relate to the requirements for risk assessments and the need for proportionality to be maintained between those risk assessments and the measures adopted. In *Beef Hormone*, the Appellate Body found that the impugned measures breached the SPS Agreement even though they did not discriminate between EC and foreign products. Driesen argues that the decoupling of the regulation of SPS measures from non-discrimination provisions was a big step by the WTO towards ‘trade free of national regulation under a broad laissez-faire conception’.¹⁶⁶

The cases decided so far under WTO law have essentially concerned the provisions regarding risk assessment.¹⁶⁷ Restrictions on genetically modified organisms (GMOs) were subject to a challenge before a WTO Panel in *EC—Measures affecting the approval and marketing of biotech products*.¹⁶⁸ The case concerned a challenge to a de facto moratorium on the approval of GMOs by the EC as well as bans on GMOs by certain individual EC States. The relevant moratorium and bans were found to breach the SPS on the basis that risk assessments on GMOs had not been carried out and had been unduly delayed. The breaches of the risk assessment requirements were blatant. Thus, the substantive issue of whether imports of GMO foods could be restricted or banned was not addressed.

*EC—Beef Hormone* concerned an EC ban on all hormone-treated meat, including local products and imports, due to concerns about the health impacts of hormones including possible carcinogenic effects. The EC measures applied a higher sanitary protection measure than that recommended by the Codex Alimentarius, the relevant international standards body. The ban was found to breach the SPS Agreement, as it was found not to be properly based on a risk assessment.

The Appellate Body in *Beef Hormone* confirmed strict requirements for risk assessments.¹⁶⁹ There must be proof of risk, rather than mere theoretical uncertainty.¹⁷⁰ However, an assessment may go beyond ‘controlled laboratory conditions’ and take into account consequences ‘in the real world where people live and work and die’.¹⁷¹ The assessment must be focused on the particular type of risk at issue rather than on a generalized risk of harm.¹⁷² Risk assessments can focus on qualitative and quantitative assessments of risk. That is, assessments do not have to establish a ‘minimum magnitude of risk’; they must simply establish that

¹⁶⁶ Driesen, above n 59, 285.
¹⁶⁹ The following summary is taken from Van den Bossche, above n 6, 465.
¹⁷⁰ EC—Hormones (Appellate Body), above n 162, para 186.
¹⁷¹ Ibid, para 187.
¹⁷² Ibid, para 200.
D. The SPS and TBT Agreements

a risk assessment justifies the measure taken.¹⁷³ Finally, a Member may rely on risk assessments conducted by other States or by international organizations.¹⁷⁴

The dispute resolution bodies have used scientific risk assessment as the touchstone for deciding whether an SPS measure is rational, implying that scientific assessments are objective and relatively unimpeachable. The Beef Hormone decision was heavily influenced by the relevant Codex standard, which was lower than that of the EC. However, the relevant standard had been adopted by the organization by a margin of 33-29 with seven abstentions,¹⁷⁵ a vote which is hardly indicative of an uncontroversial standard. The marginal nature of this vote was not taken into account by the Panel (or the Appellate Body). While that approach showed more fidelity to the words of the SPS Agreement,¹⁷⁶ it probably unduly undermined the ability of States to depart from Codex standards in the interests of promoting the right to health. In fact, this level of reliance on science raises greater problems ‘in terms of cultural autonomy and democratic legitimacy’.¹⁷⁷

Scientific assessments are not value-free or culturally uniform.¹⁷⁸ Science is also often ‘incomplete and uncertain’.¹⁷⁹ Nor is it stable, as scientific opinion on a matter constantly evolves.

Dr Caroline Foster has argued that the assessment of risk must involve objective and subjective elements. While risk involves consideration of the likelihood and magnitude of an eventuality, the Panels and Appellate Body have tended to focus on likelihood, which is much easier to measure in objective technical terms (so long as there is sufficient available scientific evidence).¹⁸⁰ Yet an assessment of magnitude clearly entails subjective elements, as questions of magnitude ‘will always hinge partly on value judgments by the society that is to be subjected to the risk’.¹⁸¹ Therefore, in her view, the Panels should take public opinion into account in making decisions under the SPS. Such consideration would result in more transparent decision-making. Presently, Panels and Appellate Body are likely influenced by their own views of the risk at issue but they do not tend to acknowledge those views.¹⁸² A problem with Foster’s proposal is that consumer choice might be manipulated for protectionist ends. For example, regarding the GMO issue, it has been argued that European consumers are being brainwashed by a barrage of GMO-propaganda produced by protectionist farmers in an unholy alliance with

¹⁷⁴ EC—Hormones (Appellate Body), above n 162, para 190.
¹⁷⁸ Winickoff  and others, ibid, trace the differing social science and regulatory experiences of the EC and the US in the context of ‘testing’ GMOs at 93–6.
¹⁸² At 299, ibid, Foster notes that the Panel in Biotech seemed to believe that the risk entailed in biotech products was not great, ‘a view seemingly not shared by Austria, France, Germany, Italy, Greece and Luxembourg’.
influential NGOs. However, Foster argues that evidence of the provision to the public of appropriate information could be sought, including evidence of a process of public consultation and deliberation (including processes which take account of the views of affected offshore exporters). Furthermore, she does not argue that public opinion should be the decisive consideration. Scientific risk assessment would retain an important role in SPS decisions, but the opinions of the people to be affected by the decisions would be another relevant consideration. Consideration of public opinion would accord with democratic principles, including rights of political participation in Article 25 of the ICCPR. Finally, it may lend some much-needed legitimacy to the WTO’s dispute resolution processes, given that States have been very reluctant to implement WTO decisions which run counter to domestic public opinion.

The EC in Beef Hormone attempted to justify its ban on the basis of the precautionary principle, to the effect that it was entitled to ban hormone-injected beef to ensure protection for European consumers from potentially deadly harm until the safety of such hormones was established. The Appellate Body found that the precautionary principle was partially enshrined in Article 5.7, but that Article 5.7 did not override the risk assessment requirements of Articles 5.1 and 5.2.

It is possible that the interpretation of the SPS decision in Beef Hormone overly constrains a Member’s ability to adopt inward health measures, particularly in situations where there is insufficient scientific evidence accompanied by a suspicion of serious health risks. Certainly, the EC policy probably would have been applauded by international human rights bodies, though it is perhaps a stretch to claim that the forced entry of hormones into the EC beef market would breach the right to health. On the other hand, Special Rapporteurs on the Right to Health and the Right to Food have endorsed the precautionary principle, with the latter claiming that it was an especially appropriate principle to apply in the context of genetically modified foods.

Despite their positive impact on the right to health, SPS measures are highly problematic for developing States. Most of the poorest people in the world depend on agriculture for their livelihoods and SPS measures can pose onerous trade barriers which threaten those livelihoods, and hamper the abilities of agricultural workers to climb out of poverty. For example, an EU regulation, which requires dairy products made from cow’s milk to be produced from cattle milked mechanically, effectively prevents trade with the many small producers who cannot afford

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184 Foster, above n 167, 303–4.
185 Ibid, 290 and 306.
186 Ibid, 306–8. See also Chapter 3, Part B.
187 Ibid, 287 and 309.
188 EC—Hormones (Appellate Body), above n 162, paras 124–5.
mechanization.¹⁹¹ As another example, a World Bank report in 2001 found that the SPS standards imposed by the EU in respect of aflatoxins, which were set above international standards, would cut African exports of nuts and grains by 64 per cent at a cost of US$640 million.¹⁹² Those trade losses caused significant human rights harms in terms of the right to work and the right to an adequate standard of living, especially given the limited adjustment capacities of African economies. At the same time, it was estimated that the aflatoxin measures reduced health risks by 1.4 deaths per billion per annum.¹⁹³

The aflatoxin case study gives rise to a difficult conundrum from a human rights point of view. Those 1.4 per billion people undoubtedly have a right to life. Should Europe be required to lower its SPS standard and jeopardize the lives of 1.4 people per billion in order to safeguard the livelihoods and the rights of those dependent on the nut and grain export industry?¹⁹⁴ The right to life is not absolute: one may not be ‘arbitrarily’ deprived of one’s life.¹⁹⁵ Is the subjection of a person to such a low risk a breach of the right to life? Certainly, no State has an obligation to reduce all lethal risks to zero. Otherwise, for example, States would be commonly condemned by human rights bodies for permitting people to drive cars at potentially lethal speeds.

The Appellate Body in Beef Hormone added in a footnote which noted that if the arguments regarding the dangers of the hormones were true, 371 women in the EU out of a population in 1995 of 371 million were likely to develop breast cancer, perhaps implying that those potentially lethal illnesses were justified by the liberalizing effects of allowing hormone-injected beef into the EU.¹⁹⁶ In contrast, the EC had argued that any risk, even ‘a risk of one in a million’, was sufficient justification for an SPS measure.¹⁹⁷ From a human rights point of view, it is questionable whether a State is obliged to protect against such slight threats to life and health. On the other hand, trade liberalization per se does not justify a retrogressive measure (such as the removal of the hormone ban if one accepts that the hormones might cause breast cancer for a few women) with regard to the right to health, even one which only raises the risk by a ‘one in a million’ chance.¹⁹⁸ However, the countervailing human rights of traders, if their rights to work and to a livelihood

¹⁹¹ Kurtz, above n 175, 512.
¹⁹³ Ibid.
¹⁹⁴ See also Joel P Trachtman, ‘Developing Countries, the Doha round, Preferences, and the Right to Regulate’ in Chantal Thomas and Joel P Trachtman (eds), Developing Countries in the WTO Legal System (Oxford University Press, New York, 2009) 122. See also Chapter 8 below on the notion of extraterritorial obligations.
¹⁹⁵ See Article 6 ICCPR. I will not undertake a comparable analysis regarding a possible limit to rights of political participation in Article 25, which could also be qualified by being balanced against the human rights of offshore traders. See also Chapter 3, text at notes 155–6.
¹⁹⁷ EC—Hormones (Appellate Body), above n 162, para 29.
¹⁹⁸ See also Chapter 1, text at notes 71–2 on retrogressive measures under the ICESCR.
were seriously threatened, might justify such a measure. It is unlikely that such human rights were threatened by the EU’s hormone ban, given that the aggrieved traders were located in developed States, so it is unlikely their rights to an adequate standard of living were seriously threatened.¹⁹⁹

At the least, developed States (which generally impose the strictest SPS standards) must negotiate with and supply technical assistance to developing States (which are the least able to comply with strict SPS standards) to ameliorate the harshest impacts of their SPS measures. Furthermore, efforts must be made to increase developing country participation in relevant standard setting bodies such as Codex.²⁰⁰ Article 9 of the SPS agreement recommends the provision of technical assistance. Article 9(2) specifies:

Where substantial investments are required in order for an exporting developing country Member to fulfil the sanitary or phytosanitary requirements of an importing Member, the latter shall consider providing such technical assistance as will permit the developing country Member to maintain and expand its market access opportunities for the product involved (emphasis added).

Like most provisions concerning the provision of international assistance, Article 9(2) is not mandatory.²⁰¹

Further illumination of the impact of the SPS Agreement on the right to health may be forthcoming if a current trade dispute between South Korea and Canada leads to a Panel decision. The dispute concerns Korean restrictions on bovine meat and meat products from Canada due to the risk of bovine spongiform encephalopathy (‘mad cow disease’).²⁰²

The TBT

The TBT agreement regulates ‘technical regulations and standards’ which might impose barriers to trade. Like the SPS, it imposes requirements of national treatment and MFN, and certain minimum standards.²⁰³ Technical regulations and standards are mandatory measures which prescribe product characteristics for an identifiable product or group of products.²⁰⁴ Examples of such regulations include labelling and packaging requirements. Onerous requirements can unduly hinder foreign trade.

Under Article 2.2, technical requirements must not be more trade restrictive than necessary. They must be adopted for a legitimate purpose, which imposes a minimum standard requirement rather than a requirement of non-discrimination: a non-discriminatory technical requirement which fails to

¹⁹⁹ They also probably had access to alternative markets, including local markets. Furthermore, alternative hormone-free methods of production may have been available to affected producers.
²⁰⁰ See generally, Kurtz, above n 175. See also Chapter 3, text at notes 52–4.
²⁰¹ See also SPS, Article 10. See also Chapter 5, text at notes 31–4.
²⁰² Korea—Measures affecting the importation of bovine meat and meat products from Canada, WTO doc. WT/DS391/1 (15 April 2009) (Request for Consultations by Canada).
²⁰³ TBT, Articles 2.1, 2.2.
²⁰⁴ Van den Bossche, above n 6, 458.
appropriately serve a legitimate purpose will breach the TBT. Article 2.2 contains a non-exhaustive list of such purposes, such as the protection of human health and the environment. Presumably, the protection of human rights would suffice as a legitimate purpose. Where an international standard for a technical requirement exists, a Member’s technical requirement should be based on that standard (Article 2.4).[^205] However, a Member may depart from that standard if the standard is not effective in fulfilling the objective pursued, or if there are geographical or climatic factors, or technological problems, that render the international standard inappropriate.

The definition of a technical standard is very broad. In *Asbestos*, the Appellate Body gave some clues as to the measures affected by the TBT agreement. It found that the ban on asbestos fibres (with some limited exceptions) prescribed technical requirements for an identifiable group of products, that is ‘all products that might contain asbestos’.[^206] Therefore, it overruled the Panel and found that the measures fell within the TBT. However, the Appellate Body did not go on to examine whether the asbestos prohibition breached the TBT. The Panel, having decided that the TBT did not apply, accordingly failed to rule on Canada’s claims under the TBT. As the Panel had not dealt with the TBT claims in detail, the Appellate Body found itself unable to do so.[^207] The Appellate Body did note that the TBT obligations were ‘different from, and additional to’ GATT obligations.[^208] Therefore, it is possible that the win for the right to health in the *Asbestos* case could possibly be undone by a new claim regarding the TBT compliance of the prohibition.[^209]

The Appellate Body perhaps recognized the breadth of the consequences of its finding regarding the TBT Agreement in *Asbestos* in stating:

> We note, however—and we emphasize—that this does not mean that all internal measures covered by Article III:4 of the GATT 1994 ‘affecting’ the ‘sale, offering for sale, purchase, transportation, distribution or use’ of a product are, necessarily, ‘technical regulations’ under the TBT Agreement. Rather, we rule only that this particular measure... falls within the definition of a ‘technical regulation’ given in Annex 1.1 of that Agreement.[^210]

Nevertheless, the Appellate Body did not hint at any particular limit to the definition of a ‘technical standard’ beyond an indication that a total prohibition on a particular product might not be a technical standard in regard to that product.[^211] It is therefore very possible that the TBT, especially given its explicit prescription of minimum standards beyond non-discrimination obligations, significantly

[^206]: EC—*Asbestos* (Appellate Body), above n 34, para 75.
[^207]: Ibid, para 83.
[^208]: Ibid, para 80, emphasis not added.
[^209]: No such challenge has arisen.
[^210]: EC—*Asbestos* (Appellate Body), above n 34, para 77.
[^211]: Ibid, para 71. The Appellate Body suggested that the ban on asbestos fibres prescribed no characteristics for the fibres themselves. Note also that the TBT Agreement does not apply to SPS standards, which are dealt with exclusively under the SPS Agreement (Article 1.5).
constrains the regulatory capacities of States, and may therefore limit their abilities to implement human rights trade measures.

For example, it is fairly certain that the TBT regulates the mandatory imposition of labeling requirements. While spurious and onerous labeling requirements should probably be restricted, human rights considerations demand that the interpretation of the TBT ensures that consumer rights to informed choices regarding the food they consume are not prejudiced by overzealous labeling prohibitions. For instance, labels which identify GMOs should be permitted under the TBT, so as to enable a consumer to avoid such products if he or she wishes. Such a labeling requirement would not be onerous. While such labels might place genetically modified products at a disadvantage in markets where consumers are largely hostile to GMOs, the rights of consumers to such information should prevail over rights of free trade.

We await further interpretation of the TBT by the Panels and the Appellate Body to clarify the extent of its constraints on State regulatory capacities. However, human rights advocates might be skeptical that the right balance will be struck, given the lack of human rights expertise and the predominance of trade expertise on the Panels and the Appellate Body.

However, the breadth of the TBT might open a door for the application of human rights measures. McBeth has suggested that any measure which sought to impose labour rights standards as a condition for the importation of goods might be a technical requirement subject to the TBT. If such measures were imposed by reference to the standards of the International Labour Organization (ILO), they might be deemed to be based on an international standard and therefore ‘rebuttably presumed not to create an unnecessary obstacle to trade’ under Article 2(5). Such a measure would not be totally immune from WTO challenge under the TBT or the GATT, but would at least benefit from a presumption of WTO compatibility. Indeed, that approach could perhaps be applied to any trade restrictive measure that applied a human rights standard. This argument is stronger in regard to inward measures, where human rights obligations apply, rather than outward measures, where they would rarely if ever apply.

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²¹² The TBT would not constrain voluntary labeling schemes adopted by industry groups: Cassimatis, above n 6, 401.
²¹³ See CESC, ‘General Comment 12: The Right to Adequate Food’, UN doc. E/C.12/1999/5 (12 May 1999) para 11, on the right of consumers to information about the nature of the food they are eating. Similarly, people have a right to make informed choices regarding their own health, including perhaps the right to choose to avoid GMOs which can only be protected if labelling is allowed: see General Comment 14, above n 132, para 37. Article 19(2) ICCPR guarantees the right to freedom of expression, including the right to seek and receive information, though this right may not apply outside the context of government information. See also Schultz and Ball, above n 129, 57–9.
²¹⁴ I would include here labels which identify the possibility of some GMOs in the product, given that some manufacturers might be unable to guarantee the total absence of GMOs.
²¹⁵ McBeth, above n 27, 131–2.
²¹⁶ The GATT also applies to technical measures, though the TBT would prevail in the unlikely event of a clash between the two treaties: Van den Bossche, above n 6, 459.
E. Waivers

Under Article IX of the Marrakesh Agreement, a WTO obligation may be waived in exceptional circumstances if approved by three quarters of WTO members. Waivers may be used to allow the departure from WTO rules for human rights reasons. For example, the General Council adopted a waiver to permit Members to restrict the diamond trade to diamonds certified under the Kimberley Process Certification Scheme.²¹⁷ The Kimberley Process Certification Scheme is designed to guard against the trade in diamonds that indirectly fund civil wars in Africa. In the waiver, initially adopted in May 2003, the General Council explicitly recognizes:

the extraordinary humanitarian nature of this issue and the devastating impact of conflicts fuelled by the trade in conflict diamonds on the peace, safety and security of people in affected countries and the systematic and gross human rights violations that have been perpetrated in such conflicts…²¹⁸

Susan Aaronsen describes the waiver as an important precedent, which was ‘the first time that the WTO…approved a waiver to protect human rights’.²¹⁹ It may be noted that the US and Canada refused to join the Kimberley Scheme unless the WTO adopted an explicit waiver to permit that Scheme. That reluctance demonstrates how States can prioritize WTO considerations over human rights considerations, given the clear link between the diamond trade and gross human rights violations in West Africa.²²⁰

Another waiver with positive ramifications for human rights was adopted in August 2003, concerning the ‘Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health’.²²¹ This waiver has important implications for the right to health and is discussed in Chapter 7 of this book.

As a ‘solution’ to any possibility that WTO rules might hinder the adoption of human rights trade measures, the possibility of waiver is important but limited. Most obviously, waivers can only be adopted if there is a significant degree of political will in the form of the consent of three quarters of the WTO membership. Waivers are therefore unlikely to arise in contentious areas. Nor are they likely to arise if the waiver authorizes trade measures against politically powerful Members,

²¹⁸ WTO, above n 217, preamble.
²¹⁹ Susan Aaronsen, ‘Seeping in slowly: how human rights concerns are penetrating the WTO’ (2007) 6 World Trade Review 413, 428.
²²⁰ See Harrison, above n 10, 94, and 236. Even though the Kimberley Scheme regulated outward measures, it is possible that the continued engagement in trade in conflict diamonds by the US and Canada would breach their human rights obligations, given the close causal relationship between that trade and the financial base of groups perpetrating egregious human rights abuses.
as those Members will likely mobilize enough political support to prevent the adoption of a waiver. Furthermore, waivers are only meant to be temporary measures, and human rights problems often cannot be ‘temporarily’ resolved.²²² Having said that, waivers can be extended. For example, the Kimberley waiver initially only lasted until the end of 2006. It has since been extended to the end of 2012.²²³

F. A ‘Labour Rights’ Clause for the WTO?

Labour rights are recognized in many treaties under the auspices of the ILO. ‘Core labour standards’ are recognized in the ILO Declaration on Fundamental Rights at Work 1998 as: freedom of association and the right to collective bargaining, freedom from forced labour, freedom from child labour, and the right to non-discrimination in employment. Aspects of labour rights are also recognized in the ICESCR in articles 6 (the right to work), 7 (right to just and equitable conditions of work) and 8 (trade union rights), as well as in articles 8 (freedom from slavery and forced labour) and 22 (freedom of association) of the ICCPR.

The most commonly mooted outward measures in academic and activist literature are those targeted at labour rights violations in other States. Examples are measures which restrict imports of goods that are manufactured by children, under conditions of forced labour, or in States where trade unions are suppressed or banned. Relevant trade measures might be aimed at coercing a State into raising its labour standards.

Labour rights measures may however be conceptualized as inward measures, designed to rectify the distorting effects of unfair trade practices.²²⁴ An exporting State may be attaining an unfair competitive advantage in permitting excessively low wages and exploitative practices, lowering the ‘normal’ cost of the labour component of goods or services. The effect can be to drive workers out of jobs in the importing State, or to depress their working conditions. This phenomenon (if it exists) is sometimes termed ‘social dumping’.²²⁵ Ordinary dumping arises when goods are exported at less than their normal value. Dumping is not prohibited under WTO law, but States are permitted to respond to dumping by taking anti-dumping measures pursuant to Article VI GATT and the Agreement on Implementation of Article VI. Anti-dumping measures are supposed to counteract the unfair nature of dumping. By analogy, social dumping also constitutes unfair trade, which should therefore justify analogous countermeasures.²²⁶ Indeed,

²²² Aaronsen, above n 219, 429.
notions of social dumping probably underpin the exception in Article XX(e) concerning prison labour.

A related concern is that the global trade competition catalysed by WTO rules generates a ‘race to the bottom’ in that States will compete with each other to offer conditions designed to attract investment, such as low wages and poor labour conditions, or will depress labour conditions to maintain trade competitiveness. If the ‘race to the bottom’ thesis is true, the progressive realization of labour rights is being undermined, and free trade is acting as a catalyst for human rights abuses. In such a case, it would be appropriate for WTO rules to alleviate that impact by safeguarding labour rights in some way.

Labour is an inherent aspect of trade. The trade/labour link is explicitly recognized in the preamble to the Marrakesh Agreement, with its references to ‘economic endeavour’ and ‘full employment and a large and steadily growing volume of real income’.²²⁷ Proposals for inclusion of a ‘social clause’ to protect against labour rights violations were part of the proposals for an International Trade Organization in the immediate post-war period.²²⁸ Indeed, social clauses have been included in a number of commodities agreements.²²⁹ It is arguably odd that a topic such as intellectual property is within the WTO tent, which came late to the trade debate, while labour remains outside.²³⁰ Indeed, the inclusion of intellectual property rights in the WTO agreements was ostensibly motivated by similar arguments that arise today with regard to labour: the intellectual property regime needed to be strengthened in order to prevent it from being weakened by the growth of global trade.²³¹ That is, the enforcement regime that pre-existed TRIPS was weak, as is the case today with the ILO and labour rights.

Labour rights reform became a necessary part of the industrial revolution in developed States to curb abuses.²³² Likewise, stronger global labour rights protection is probably needed to ward off labour abuses in the current globalized economic revolution.²³³ Such protection could take the form of a minimum standards clause, performing a similar function to TRIPS regarding intellectual property protection. Alternatively, the protection of labour rights could form an exception to WTO free trade obligations along the lines of the existing Article XX/XIV

²²⁹ Eg, social clauses were included in the International Coffee Agreement of 2001 and in the tin and sugar agreements of 1954: Goode, above n 225, 392.
²³¹ Chantal Thomas, ‘The WTO and labor rights: strategies of linkage’ in Joseph, Kinley, and Waincymer (eds), above n 84, 276–7.
²³³ See also World Commission on the Social Dimension of Globalisation, above n 227, at xiii and paras 426, 501.
exceptions, permitting the unilateral imposition of trade sanctions in response to poor labour rights standards in the sanctioned State. As noted below, there are other potential models for a social clause which may be worth exploring.

The idea of a social clause within the WTO agreements was defeated at the WTO Ministerial Conference in Singapore in 1996. In the Singapore Ministerial Declaration, WTO Members reaffirmed a ‘commitment to the observance’ of core labour standards, but they rejected ‘the use of labour standards for protectionist purposes, and [agreed] that the comparative advantage of countries, particularly low-wage developing countries’ must not be ‘put into question’. Thus, developing States are generally opposed to a social clause because they fear that it would be abused for protectionist purposes to undercut their comparative advantages in labour costs. Hence, the WTO confirmed that the ILO was ‘the competent body to set and deal with [labour] standards’, rather than the WTO. Whilst it is laudable that the WTO Members affirmed their support for the ILO’s work, the fact remains that the ILO’s record in enforcing labour rights is, in the words of Professor Chantal Thomas, ‘woeful’. It is therefore submitted that there is merit in reviving the debate over the explicit linkage of trade and labour within the WTO framework.

The existence of a race to the bottom regarding labour standards is disputed. While workers across the industrialized world perceive greater job insecurity due to globalization, those fears are not necessarily well founded. Certainly, any increase in jobs caused by export markets might create demand for labour by providing jobs where there were none, and even drive up wages. For example, reports from China in mid-2010 suggest that this phenomenon may be starting to take place in that country.

There is no evidence that foreign investment is generally being redirected to states with poor labour rights regimes. Many factors drive foreign investment, of which the price of labour is but one, including the adequacy of infrastructure,

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234 Thomas, above n 231, 281.
237 See also Harrison, above n 10, 77–80.
238 Thomas, above n 231, 258.
property rights regimes, availability of and attractiveness to skilled staff, levels of crime and corruption, and security issues. Notwithstanding higher labour rights protection, developed States clearly have huge advantages over developing States in attracting foreign investment. They also have huge advantages in terms of worker productivity.

Indeed, a pattern has emerged in many developing States with some of the worst labour records of de-industrialization (indicating jobs lost in the manufacturing sector)\textsuperscript{244} and transformation from food exporting to food importing status (indicating a loss of jobs in the agricultural sector).\textsuperscript{245} Low labour costs do not seem to coincide with success in the modern global economy.\textsuperscript{246} Furthermore, numerous studies have indicated that conditions in factories in developing States run by foreign investors, even if poor, are better than those run by local entrepreneurs.\textsuperscript{247} The same is reportedly true of the much-maligned export processing zones (EPZs),\textsuperscript{248} though there is evidence of widespread gender discrimination, poor occupational health and safety (which impacts on rights under Article 7 ICESCR) and occasional mistreatment of workers.\textsuperscript{249}

However, the above circumstances do not mean that there is no race to the bottom. In response to claims regarding the ‘good’ labour rights record of foreign investors in developing States compared to local businesses, it may be noted that foreign investors often do not run factories themselves, but instead source supplies from local contractors. Those contractors may compete with each other to offer attractively cheap labour to those investors.\textsuperscript{250} Therefore, unconscionable labour standards may be hidden in a supply chain. Furthermore, there are some instances where labour standards in EPZs are ‘explicitly lower’ than in the rest of a country.\textsuperscript{251}

A relevant indicator in identifying a race to the bottom is whether the advent of global competition has prompted governments to reduce labour entitlements. Indeed, many governments certainly act as if deregulation of the labour force and a diminution of labour rights is needed in order to compete in the global economy.\textsuperscript{252} For example, a recent report by the NGO War on Want, based on ILO reports and other authoritative materials, asserts that free trade has caused or at

\textsuperscript{244} See also Chapter 5, Part E. See also War on Want, ‘Trading away our jobs: How free trade threatens employment around the world’ (2009) at <http://www.waronwant.org/attachments/Trading%20Away%20Our%20Jobs.pdf>.
\textsuperscript{245} See also Chapter 6, text at notes 75–8.
\textsuperscript{247} Ibid, 238–9.
\textsuperscript{248} An EPZ is an area where a State permits the duty-free import of primary goods or components for the purposes of further processing and assembly and subsequent export: Goode, above n 225, 182.
\textsuperscript{251} Lang, above n 249, 20.
least coincided with widespread job losses and deteriorating job conditions across the world.²⁵³ While some deregulation in some markets might be warranted, a labour rights clause in the WTO might curb measures which ill-advisedly drive standards so low as to breach human rights.

In a 2007 report on trade and employment compiled under the joint auspices of the WTO and the ILO, the authors concluded:

trade policies and labour and social policies do interact and that greater policy coherence between the two domains can help ensure that trade reforms have significantly positive effects on both growth and employment.²⁵⁴

The report does not explicitly discuss a labour rights clause. However, it does recognize that trade and labour policies should not develop in isolation from each other, and that benign or beneficial impact on the latter by the former cannot be presumed.

If global economic integration and competition is generating a race to the bottom, there is a human rights imperative to address that circumstance to ensure the maintenance of some form of minimum social floor. If the race to the bottom does not exist, that circumstance would indicate that there is no real comparative advantage in the maintenance of low labour conditions. In that case, a social clause should not disrupt the balance of trade, but it might facilitate a decrease in labour rights violations. While this author believes that respect for labour rights is important in and of itself, I add that an increase in labour rights and conditions can have beneficial economic effects, such as the creation of a more productive and healthier workforce with higher morale.²⁵⁵ Furthermore, a social clause might incentivize diversification away from low-skilled labour as a basis for a State’s comparative advantage. An export economy based on such labour is highly vulnerable, so such diversification is beneficial where possible.²⁵⁶

The labour rights debate in the WTO has been an area of North/South dispute. However, international labour rights are designed to protect all workers all over the world. There are demands in developing States for decent jobs just as there are in industrialized nations.²⁵⁷ Indeed, a labour rights clause is perhaps more likely to protect jobs in developing States from unconscionable competition from other developing States.²⁵⁸ The demand for labour in a State can easily be undermined by the cheaper availability of labour in another State. For example, War on Want has reported how one in seven ‘maquilas’ in Mexico (where raw products are processed via assembly lines in sectors such as textiles and electronics) closed within a year of China joining the WTO; the number of closures had nearly doubled a

²⁵³ See generally, War on Want, above n 244.
²⁵⁴ WTO and ILO, above n 240, 10.
²⁵⁵ At ibid, 66, the WTO and ILO note studies that show that freedom of association and collective bargaining rights ‘do not harm the export potential of developing countries and may even stimulate it’. See also Hepple, above n 243, 15–16. ²⁵⁶ See Chapter 5, text at notes 196–200.
²⁵⁷ World Commission on the Social Dimension of Globalisation, above n 227, paras 66–9, 92–4.
²⁵⁸ See, generally, Anita Chan and Robert J S Ross, above n 237. See also World Commission on the Social Dimension of Globalisation, above n 227, para 389.
year later.²⁵⁹ The same report states that Chinese jobs are now threatened by even cheaper labour in Vietnam.²⁶⁰ While the governments of developing States are against a social clause, the same is not necessarily true of their trade unions, many of which are supportive of a social clause.²⁶¹ An empirical survey in 2002 of the attitudes of members of two major global union federations (representing members from across the world) in the education and metalwork sectors uncovered ‘overwhelming support among union official and delegates’ for a social clause.²⁶²

Labour standards are currently imposed under regional²⁶³ and bilateral trade and investment treaties.²⁶⁴ Furthermore, the WTO permits States to unilaterally offer preferential trade terms to underdeveloped States under the General System of Preferences (GSP).²⁶⁵ Both the US and the EU base certain GSP schemes on adherence to labour and human rights standards.²⁶⁶ In European Communities—Conditions for the granting of tariff preferences to developing countries, the Appellate Body indicated that such conditions can be attached to GSP schemes so long as they are offered and applied in a non-discriminatory manner.²⁶⁷ GSP measures might be characterized as carrots rather than sticks, enticing but not forcing States to adopt appropriate labour standards. However, a trade carrot can rapidly metamorphose into a stick, as the sudden withdrawal of preferential market access can

²⁵⁹ War on Want, above n 244, 13; see also B Lynn, 'Trading with a Low-Wage Tiger' (2003) 14 The American Prospect 10 (available via <http://www.prospect.org/print/V14/2/lynn-ba.html> accessed 24 January 2006; Oxfam, above n 242, 79 and 139. See also Stiglitz and Charlton, above n 226, 23.

²⁶⁰ War on Want, above n 244, 32. See, however, text at note 242 above.


²⁶⁴ See, eg, the Free Trade Agreements between the US and Jordan, and the US and Morocco. See generally, Hepple, above n 243.


²⁶⁶ Eg, under the ‘GSP +’ arrangements of the EU, GSP preferences may be granted to certain states if they ratify and implement certain labour rights treaties (and other human rights treaties), and GSP preferences may be withdrawn due to systemic violations of certain labour rights conventions. GSP preferences have been withdrawn from Burma and Belarus on the basis of labour rights violations. See Council Regulation (EC) No 552/97 of 24 March 1997 temporarily withdrawing access to generalized tariff preferences from the Union of Myanmar (1997) Official Journal L 085, 8; Council Regulation (EC) No 1933/2006 of 21 December 2006 temporarily withdrawing access to the generalized tariff preferences from the Republic of Belarus (2006) Official Journal L 405, 35. On the US GSP scheme, see Lang, above n 249, 31–2, and Harrison, above n 10, 112–13.

have severe consequences for industries that have depended on that access and have structured their business accordingly.²⁶⁸

The existence of regional, bilateral and unilateral imposition of labour standards strengthens the argument for a general WTO labour rights clause. A multilateral approach to labour standards ensures greater consistency, and is less prone to abuse and political arbitrariness than bilateral and unilateral approaches.²⁶⁹ Of course, a multilateral approach is also preferable from a labour rights perspective.

As noted above, labour rights measures might feasibly be permitted under the ‘public morals’ exceptions in Articles XX(a) GATT and XIV(a) GATS. From the perspective of developing States, an explicit clause, with its parameters negotiated openly by the plenary WTO membership, is preferable to a clause imposed via interpretation by the judicial branch of the WTO.

If the threshold for minimum labour standards was set at an appropriate level, those standards should not undercut any legitimate comparative advantages of a State. There is, for example, nothing wrong per se from a human rights point of view for State A to have lower wages than State B if State A has a lower cost of living compared to State B. This will normally be the case if State A is a developing State and State B is a developed State. Nor is there anything wrong with an industry moving to take advantage of lower wages in State A, so long as some appropriate provision for the loss of jobs in State B is made.²⁷⁰ In such a scenario, State B has a greater capacity to provide compensation for the loss of jobs if it is a developed State through, for example, alternative employment, social security benefits, or retraining programmes.

Labour rights protection in the WTO could take many forms. A starting point would be to provide for protection of the core labour rights recognized by the ILO complemented by the extra labour rights in the ICESCR. A labour rights clause could constitute a sword, that is the mandating of minimum standards by the WTO, or a shield, by permitting the unilateral enforcement of labour rights by way of trade sanctions. Just as important as the substantive content of such a clause would be its institutional platform. Labour rights protection could arise within the WTO framework, or be a joint initiative between the WTO and the ILO, or could entail the strengthening of existing ILO mechanisms, coupled with assurances that WTO rules would ‘stay out of the way’ and not obstruct those mechanisms.²⁷¹ For example, persistent and egregious labour rights abuses in Burma have resulted in the exceptional authorization of trade (and other) sanctions by the ILO under article 33 of the ILO Constitution in 2000.²⁷² The US has accordingly imposed sanctions on Burma in 2003.²⁷³ So far, the US has not been criticized by

²⁶⁹ See Chapter 3, Part E.
²⁷⁰ WTO and ILO, above n 240, 60.
²⁷³ It may be noted that the ban affects all goods, rather than only goods likely to have been manufactured under poor labour conditions: see Ewing-Chow, above n 6, 157.
or within the WTO for these measures, perhaps an appropriate example of de facto forbearance regarding an issue that is a serious human rights issue and perhaps only incidentally a trade issue.²⁷⁴

An explicit labour rights clause could introduce measures outside the blunt instrument of sanctions, with trade sanctions only being authorized as an explicit last resort.²⁷⁵ There could for example be a peace clause dictating a moratorium on sanctions for a number of years. Developing States could benefit from longer timelines for full compliance, as occurred under TRIPS. Such timelines could accord with the ICESCR in light of the principle of progressive realization. Technical assistance could be provided on a mandatory basis to facilitate transition and implementation by the poorest States. Instead of being subjected to sanctions, a delinquent State could first be compulsorily referred to investigation by and/or compulsory consultation with the ILO.²⁷⁶ An attractive component of this last proposal is that labour matters would be entrusted to a specialist labour rights body, rather than the WTO’s dispute settlement bodies, who lack labour rights expertise. Such a proposal would also add flesh to the bones of the decision adopted in the Singapore Declaration of 1996 that labour rights be addressed by the ILO, and that the WTO support it in that endeavour.

This latter model of cooperation, whereby labour rights are strengthened by their inclusion within WTO agreements, but remain ‘enforced’ by the ILO, could be exported to other areas, such as other human rights or the environment. Indeed, the effective incorporation of certain ILO standards within the WTO framework would not be so revolutionary: it would follow the precedent set under TRIPS whereby the intellectual property standards established by the World Intellectual Property Organization (WIPO) are incorporated within the WTO framework.²⁷⁷ These themes of inter-institutional cooperation and the strengthening of bodies outside international economic law are further elaborated in Chapter 10, Part D.

G. The Potential Emancipatory Effect of ‘Good’ Trade

The above commentary focuses on the impact of WTO rules on the ability of States to prohibit trade that is potentially ‘bad’ for human rights. In this section, I examine the potential for WTO rules to promote trade that is ‘good’ for human rights. In other words, WTO rules might compel the import of goods or services which in some way promote human rights. A timely example is to ask whether WTO

²⁷⁴ See also Jeffrey L Dunoff, ‘The Death of the Trade Regime’ (1999) 10 European Journal of International Law 733, 757ff.
rules might prohibit China’s current rules on internet and media censorship, which arguably breach the human right to freedom of expression.

The ‘Great Firewall of China’ is ‘a system of filters and bottlenecks that effectively shuts the country within its own intranet.’²⁷⁸ The firewall restricts access by Chinese internet users to much information, such as information about the Tiananmen Square protests and crackdown of 1989, and dissidents such as the Dalai Lama, Uigher leader Rebiya Kadeer and the Falun Gong. Censorship is permitted under international human rights law to the extent that it might be necessary to promote legitimate countervailing interests such as public morals or public order.²⁷⁹ However, the level of censorship practised by China does not conform with the right to freedom of expression. China however is not a party to any treaty which protects that right.²⁸⁰ It is of course arguable that freedom of expression is protected under customary international law and that China is therefore bound to respect the right in international law. Furthermore, other WTO members which heavily censor the internet, such as Vietnam and Turkey, clearly have international obligations to protect freedom of expression.

In early 2010, the First Amendment Coalition, a California-based NGO, urged the US government to challenge the WTO legality of Chinese internet restrictions. Internet giant Google similarly lobbied the US government in 2007.²⁸¹ The First Amendment Coalition claims that the firewall is an illegal barrier to trade. For example, it ‘degrades the performance of websites based outside the country’,²⁸² so the argument may be made that it impairs foreign competition via the internet in China’s huge market. Indeed, it was reported that Google rapidly lost market share in China after moving its operations outside the firewall to Hong Kong early in 2010.²⁸³

Professor Tim Wu has surveyed some of the issues that would arise in any relevant WTO challenge to Chinese internet censorship. He notes that physical goods ordered over the internet are goods subject to GATT regulations. Online services which do not involve downloads, such as the use of search engines, are probably services subject to GATS. There is uncertainty over the classification of a third category: downloads that are kept in digital form, such as electronic books.²⁸⁴ It is possible that the latter category could fall under both GATT and GATS.²⁸⁵ China’s commitments are broader under GATT, as its GATS obligations are largely dependent upon its voluntary commitments in its GATS ‘schedule of commitments’. However, China’s services commitments are quite extensive, reflective of the extra commitments that are often extracted from acceding States.

²⁷⁹ See Article 19(3) ICCPR.
²⁸⁰ China has signed but not ratified the ICCPR.
²⁸² Scheer, above n 278.
²⁸⁴ Wu, above n 61, 7.
²⁸⁵ In China—Audiovisual Entertainment Products, the Appellate Body confirmed that a measure could fall under both sets of provisions: see above n 79, paras 193–4.
has committed to some liberalization of ‘online information and database retrieval services’ and to ‘open’ access for the crossborder supply of ‘data processing services’. It is possible that such commitments could be interpreted dynamically to entail market access commitments to the provision of search engines.²⁸⁶ Furthermore, *US—Gambling* indicates that censorship, even of limited websites, amounts to a zero quota in respect of those websites, in potential breach of the market access provisions in Article XVI of GATS.²⁸⁷

Other Chinese regulations might also simultaneously breach human rights law and WTO law, such as regulations which limit the wi-fi capabilities and mobile applications of mobile phones and computers in order to preserve the Chinese government’s ability to eavesdrop on its population. Such practices breach the human right to privacy, and of course have detrimental effects on political rights as it allows the Chinese government to identify and track political dissidents. These regulations also impact on trade. The Apple I-Phone was released in the Chinese market two years after its global launch without its wi-fi capabilities. New software must be installed in computers before they can be shipped to China.²⁸⁸ Again, it is plausible that such measures breach WTO rules in the GATT and/or the TBT.²⁸⁹

Of course, China would seek to justify its laws under the public morals exceptions of GATT and GATS, and the public order exception in GATS. It would be very interesting to see how a Panel or the Appellate Body would deal with China’s extensive political censorship. If the exceptions were interpreted in light of international human rights law, just as Article XX(g) was interpreted in light of international environmental law in *Shrimp I*, it might be concluded that measures which breach human rights cannot be classified as measures which protect public morals or public order. While China might be able to plea that it is not bound by those human rights obligations, it is notable that one of the parties in *Shrimp I*, the US, was not a party to the relevant environmental treaties.²⁹⁰ Furthermore, under the ad note to Article XIV, China may find it difficult to maintain that its level of censorship counters a ‘genuine and sufficiently serious threat . . . to one of the fundamental interests of society’.²⁹¹ On the other hand, the Panel seemed to concede a very broad scope for China’s sovereign right to censor cultural products in *China-audiovisual entertainment products*, as noted above.²⁹² Neither the Panel nor the Appellate Body had reason, however, in that case to extensively discuss the substance of the Chinese censorship regime, as their decisions focused on the means by which China was enforcing that regime.

Even if China could establish that its censorship laws fell within the realm of public morals/public order laws, it would still have to overcome the hurdles of the necessity test and, perhaps most problematically, the chapeau test. Regarding the

²⁸⁶ Wu, above n 61, 24–6.
²⁸⁹ Hindley and Lee-Makiyama, above n 287, 8.
²⁹⁰ See also Chapter 2, text at notes 123–6.
²⁹¹ Hindley and Lee-Makiyama, above n 287, 14.
²⁹² See above, text at note 105.
necessity test, China might find it difficult to justify the total block placed on certain overseas internet sites by the Great Firewall, compared to more selective filtering mechanisms.²⁹³ For example, Thailand censors certain pages of Amazon, rather than the whole site.²⁹⁴ China has the technological capacity to adopt selective filtering, given the investment made to set up the Great Firewall, unlike poorer countries.²⁹⁵ Regarding the chapeau, China’s laws impose different standards of censorship, depending on whether a site is located within or outside China. While China-based companies are not in an ‘enviable position’, given that breach of Chinese censorship law leads to ‘crackdowns, expropriations and jail sentences’, offshore sites are ‘simply censored without official notice or any possibility of taking the matter to domestic courts’.²⁹⁶ The difference in treatment might amount to arbitrary discrimination and disguised protectionism under the chapeau to Article XX or XIV.

H. Conclusion

The obligations of WTO Members under GATT, GATS, the SPS, and the TBT are very broad. The broader a Member’s WTO obligations, the more a State’s regulatory capacities are restricted. The extent of the restriction on State capacities to discharge human rights obligations is uncertain, largely due to the dearth of relevant WTO cases. A survey of that case law indicates that States are more likely to be permitted to adopt inward measures rather than outward measures.

Certain exceptions to WTO obligations are permitted. Waivers provide one avenue for preserving the ability of States to implement their human rights duties, though significant political will is needed in order for such waivers to be adopted. The impact of Article XXI GATT and Article XIV bis GATS is uncertain given that there are no cases on those provisions. In contrast, there have been a number of relevant cases on Article XX GATT and Article XIV GATS.

The effect of WTO laws on State human rights regulatory capacities is probably not as profound as had been indicated by earlier GATT cases, such as the Tuna cases and Thailand—Cigarettes. The most problematic WTO case to date, from a human rights point of view, is probably Beef—Hormone, where greater deference to the precautionary principle would have been preferable from a human rights perspective. Other cases, such as Asbestos, US—Gambling and Brazil—Tyres, have indicated that States retain significant regulatory capacities to protect public health, and perhaps a raft of human rights considerations under the public morals exceptions, so long as the relevant measures are necessary and non-discriminatory. The latter requirement has been the downfall of many challenged social measures, and from a human rights point of view, has probably been interpreted more extensively than is desirable.

²⁹³ Hindley and Lee-Makiyama, above n 287, report at 5 that 18,000 foreign websites are totally blocked.
The global competition prompted by WTO rules may have prejudiced the global enjoyment of labour rights. It is argued above that the idea of some form of labour rights clause within the WTO should be revisited.

The detrimental human rights impact of certain measures which obstruct free trade, such as consequences for offshore rights to livelihood amongst affected traders, particularly in poor States, must not be forgotten. In that respect, the benefit to human rights of some restrictions on protectionist measures must be acknowledged. This issue arises again in Chapter 6, in regard to the failure of the Agreement on Agriculture to adequately restrain certain protectionist measures. However, it may be noted that no WTO decision has been explicitly influenced by consideration of offshore human rights impacts. It is doubtful that WTO law dictates that the permissibility of a measure with a protectionist effect varies according to its impact on the human rights of persons in the relevant export industry.

Certain trade restrictions may harm the enjoyment of human rights inside the regulating State, such as overly broad restrictions on internet content. The potential emancipatory effect of WTO laws in such situations is examined above. If such a case is ever to be brought to the WTO dispute resolution bodies, the extent of the use of human rights law on the interpretation of relevant WTO rights, duties and exceptions will be particularly instructive.