

THE ROLE OF INTERNATIONAL HUMAN RIGHTS LAW IN WTO DISPUTE SETTLEMENT

*Agatha Panday**

| | |
|--|-----|
| INTRODUCTION | 245 |
| I. THE WTO INVITES HUMAN RIGHTS LAW INTO THE WTO | |
| FRAMEWORK | 250 |
| II. THE GATT ARTICLE XX EXCEPTIONS | 251 |
| III. THE ROLE OF INTERNATIONAL HUMAN RIGHTS LAW IN TREATY | |
| INTERPRETATION | 253 |
| A. Vienna Convention on the Law of Treaties | 253 |
| B. Evolutionary Interpretation..... | 256 |
| IV. INTERPRETATION OF ARTICLE XX(A) – MEASURES “NECESSARY TO PROTECT PUBLIC MORALS” | 258 |
| V. INTERPRETATION OF ARTICLE XX(B) – MEASURES “NECESSARY TO PROTECT HUMAN LIFE OR HEALTH” | 260 |
| VI. JURISDICTIONAL LIMITATIONS: INWARD VS. OUTWARD TRADE MEASURES | 261 |
| VII. THE NECESSITY REQUIREMENT OF ARTICLE XX(A) AND (B) | 265 |
| CONCLUSION | 270 |

INTRODUCTION

The military government of Burma/Myanmar (“Burma”) is well-known for its human rights violations.¹ When the government lost to the National League for Democracy (NLD) in September 1988, it repudiated the election results and suppressed mass democracy protests.² The government closed NLD offices, jailed NLD members, and sentenced political protesters to fifty-seven years in prison.³ Since then Burma has been trying to establish

* This paper is dedicated to my mom. She has worked very hard and sacrificed so much to make sure that I have a great future. Everything I do is to make her proud. I also want to thank Amy Paden, Senior Articles Editor, and Baber Khan, Research Editor, for all their hard work on this paper. Any errors are all mine. I would also like to thank Professor Andrea Bjorklund. Without her guidance and mentorship, this paper would not have been possible.

¹ SIMON LESTER, ET AL., *WORLD TRADE LAW TEXT: MATERIALS AND COMMENTARY* 846 (Hart Publishing 2008).

² *Id.*

³ HARRISON INSTITUTE FOR PUBLIC LAW, GEORGETOWN UNIVERSITY LAW CENTER,

its commercial infrastructure with forced labor.⁴ In July 1998, the International Labor Organization (ILO) issued a “scathing”⁵ report stating that women, children, elderly persons, and others unfit for labor are subject to forced labor.⁶ The most common form of forced labor is military portering.⁷ Porters are forced to walk ahead of the military to detonate mines and act as human shields in combat.⁸ Teenagers are forced to execute those who are no longer able to work, and women are separated at night to be frequently raped by soldiers.⁹

Burma’s pro-democracy leader and Nobel Peace Prize winner, Aung Suu Kyi, has called for Americans to stop doing business with Burma.¹⁰ Aung Suu Kyi opposes investment and trade with Burma because it strengthens the power of the military. Foreign trade is one of the few sources the military government depends on to sustain its military and to purchase weapons.¹¹ It is argued that doing business with Burma directly supports the military government. In response to Burma’s human rights violations, Massachusetts passed the “Burma Law,” which prohibited the state and its agents from purchasing goods or services from any corporation doing business with Burma.¹² The statute authorized the Operational Services Division, an agency within the Executive Office of Administration and Finance, to establish a “restricted purchase list” of companies “doing business with Burma.”¹³ Massachusetts restricted trade with Burma and corporations doing business with Burma in order to protest Burma’s human rights violations and promote change in Burma’s domestic human rights policies.¹⁴ Japan and the EU filed a claim against Massachusetts at the World Trade Organization (WTO), claiming that the “Burma Law” potentially violated the WTO procurement policy.¹⁵ However, the case was

DEFENDING THE MASSACHUSETTS BURMA LAW 5, *available at* <http://www.law.georgetown.edu/Clinics/hi/background.pdf> [hereafter Defending the Massachusetts Burma Law].

⁴ *Id.* at 5.

⁵ SIMON LESTER, ET AL., *supra* note 1, at 846.

⁶ *Id.*

⁷ DEFENDING THE MASSACHUSETTS BURMA LAW, *supra* note 3, at 3.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² “An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar),” 1996 Mass. Acts 239, ch. 130 (codified at MASS. GEN. LAWS ANN. ch. 7, §§ 7:22H-7:22M, (1997)). The Supreme Court held that the “Burma Law” was preempted by the federal Foreign Operations, Export Financing, and Related Programs Appropriations Act. *See Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000).

¹³ MASS. GEN. LAWS ANN. ch. 7, §§ 7:22H-7:22M.

¹⁴ SIMON LESTER, ET AL., *supra* note 1, at 847.

¹⁵ *Id.* Japan and the EU claimed *inter alia* that the “Burma Law” “imposed qualifications

2009] *The Role of International Human Rights Law in WTO Dispute* 247

never decided on its merits by a WTO panel because the United States Supreme Court struck down the law.¹⁶

Although the WTO has decreed labor rights as solely within the jurisdiction of the ILO, other human rights concerns would still have been implicated in the case.¹⁷ It is clear that civil and political rights of citizens are being violated.¹⁸ There may also be violations of economic and social rights.¹⁹ Although Burma is not a party to human rights instruments such as the International Covenant of Civil and Political Rights (ICCPR) or the International Covenant of Economic, Social, Cultural Rights (ICESCR), they have general obligations under the UN Charter²⁰ and customary international law.²¹ The United States shares similar obligations under the same sources

based on political instead of economic considerations (Art. X) and allowed contracts to be awarded based on political instead of economic considerations (Art. XIII)." *Id.* at 846.

¹⁶ *Id.* See also *supra* note 12.

¹⁷ The civil and political rights potentially implicated in this case include the right to life, freedom from torture and cruel, inhuman or degrading treatment or punishment, freedom from slavery or compulsory labor, rights of political participation, and right to self-determination. These rights can be found in major international instruments, including the UN Charter, the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). There is some consensus that some of these rights have reached customary law status. See *infra* note 21.

¹⁸ See *id.*

¹⁹ The UN Charter, International Covenant of Economic, Social, Cultural Rights (ICESCR), and the UDHR all state that there is a right to adequate food and health. The right to self-determination is also considered as a social, economic and cultural right. There is a clear distinction between economic, social, and cultural rights and civil and political rights, as reflected by these international instruments. See ANTHONY CASSIMATIS, *HUMAN RIGHTS RELATED TRADE MEASURES UNDER INTERNATIONAL LAW* 25 (Martinus NIJHOFF Publishers 2007). It must be noted that there is controversy regarding the status of economic, social, and cultural rights. There are those that argue that economic, social and cultural rights are aspirational goals that have not yet reached the same "gravitas" as civil and political rights. See Chris Downes, *Must the Losers of Free Trade Go Hungry? Reconciling WTO Obligations and the Right to Food*, 47 VA. J. INT'L L. 628 (2007). See also CASSIMATIS, *supra* at 34, n.70.

²⁰ Members of the UN have responsibilities under the Charter to protect the "equal rights and self-determination of peoples" and "human rights and fundamental freedoms." U.N. Charter art. 55, para 1. Article 55 provides that the UN "shall promote . . . universal respect for; and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." Article 56 also provides that all UN Members pledge themselves to take joint and separate action in cooperation with the UN to achieve the purposes of Article 55. U.N. Charter art. 56, para 1.

²¹ The American Law Institute in its Third Restatement of the Foreign Relations Law of the United States under the heading "Customary International Law of Human Rights" provides that genocide, slavery/slave trade, the murder or causing the disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment have reached customary law status. Others would also include, inter alia, the right to self-determination of people's as customary law. See CASSIMATIS, *supra* note 19, at 78-79.

of law to protect and promote human rights.²² Certain human rights obligations are not owed only to the citizens of each state. The prohibitions on genocide, slavery, and torture or other cruel, inhuman, degrading treatment or punishment are human rights obligations owed *erga omnes*.²³

Inasmuch as these core international human rights instruments form a state's obligation to promote and protect human rights, measures adopted to fulfill those obligations can deny market access to countries responsible for egregious violations and their trading partners. In the Massachusetts case, market access was denied to both the human rights violator (Burma) and those states doing business with Burma (Japan and EU). Such a denial can be instrumental, if not necessary, in inducing compliance with recognized international standards, and is not protectionist or discriminatory in nature.²⁴ Given that human rights instruments lack the teeth to induce compliance, restrictive trade measures may be more effective in pressuring human rights violators. Despite the significant potential of trade to induce states to comply with international human rights standards, there is great resistance to linking trade to human rights. This resistance is not unreasonable. The relationship between trade and human rights is complex, multifaceted, and, as Thomas Cottier suggests, one of discovery.²⁵

Although trade law and human rights law developed in "splendid isolation" from each other, and have traditionally operated in isolation from each other as well, such a position is no longer feasible.²⁶ Today, every WTO member, even Burma, is party to one or more of the UN human rights instruments.²⁷ As the Massachusetts case shows, these two branches of public international law can and do overlap, and it would not be possible to resolve certain WTO claims in isolation from the concerns and the pursuit of human rights. Given the dual obligations of WTO members, dispute settlement bodies (DSBs) may be required to address human rights as

²² Unlike Burma, the US is a member of the ICCPR, the UN treaty that embodies civil and political rights, including the right to life and freedom from torture and cruel, inhuman or degrading treatment or punishment.

²³ See CASSIMATIS, *supra* note 19, at 77-78. *Erga omnes* obligations are non-derogable obligations or rights owed to all. Examples of *erga omnes* norms include piracy, genocide, slavery, and racial discrimination.

²⁴ For example, Egypt, India, Morocco, Pakistan, and Tunisia relied on Article XXXV of GATT 1947 in respect to trade restrictions and place pressure upon South Africa to dismantle its former policy of apartheid. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereafter GATT]; CASSIMATIS, *supra* note 19, at 368.

²⁵ See generally Thomas Cottier, *Trade and Human Rights: A Relationship to Discover?* 5 J. INT'L ECON. L. 111 (2002).

²⁶ Joost Pauwelyn, *Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands*, 25 MICH. J. INT'L L. 904 (2004).

²⁷ As a UN member, Burma has signed the UDHR.

“relevant legal context for interpreting WTO rules.”²⁸ If the Massachusetts case went to dispute settlement, what role would human rights play in the analysis? Raising human rights arguments is an area wholly unexplored in WTO dispute settlement. It is not clear what the appropriate mechanism would be to introduce human rights arguments, and there is a great deal of controversy over the appropriate mechanism. It is clear, however, that bringing human rights within the WTO framework is possible. If the case reached a WTO panel, the “Burma Law” could have facilitated the convergence between trade and human rights in a manner similar to what has occurred in the environmental context.²⁹

The overall purpose of the WTO, as stated in the preamble to the Marrakesh Agreement, is to improve the welfare of all states through free trade.³⁰ Although the drafters of the General Agreement on Trade and Tariffs (GATT) recognized the importance of free trade, they also recognized that governments must have some freedom to pursue other policy goals as well.³¹ A set of general exceptions under Article XX was included to allow States to take actions inconsistent with their GATT/WTO obligations and pursue other policy goals. This paper will analyze GATT Article XX exceptions, specifically GATT Article XX (a) and (b), the

²⁸ Ernst-Ulrich Petersmann, *The ‘Human Rights Approach’ Advocated by the UN High Commissioner for Human Rights and by the International Labour Organization: Is it Relevant for WTO Law and Policy?* 7 J. INT’L ECON. L. 605, 609 (2004).

²⁹ Francesco Francioni, ed., *Environment, Human Rights, and the Limits of Free Trade, in ENVIRONMENT, HUMAN RIGHTS AND INTERNATIONAL TRADE* 6 (2001). In *US – Shrimp*, the Appellate Body referred to several environmental treaties to determine the meaning of “exhaustible natural resources” under Article XX(g). See Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 130, WT/DS58/AB/R (Oct. 12, 1998) [hereafter *US – Shrimp*]. Another significant aspect of *US – Shrimp* was the Appellate Body’s willingness to accept that trade measures directed at actions occurring outside of the State’s territorial boundaries could be justified under Article XX(g). *Id.* at ¶ 133.

³⁰ The Marrakesh Agreement Establishing the World Trade Organization provides that “[T]he field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development” Agreement Establishing The World Trade Organization adopted Apr. 15, 1994, 33 I.L.M. 1144 [hereafter Marrakesh Agreement].

³¹ See generally GATT, *supra* note 24. The General Agreement on Trade and Tariffs (GATT) is a multilateral treaty that covers international trade in goods. It was ratified in 1947 after the Bretton Woods Conference. Provisions of the GATT was revised in 1994 (referred to as GATT 1994) as part of the Uruguay Round negotiations that created the World Trade Organization (WTO). The GATT Articles are only one component of the WTO.

exceptions for measures necessary to protect public morals and to protect human, animal or plant life or health. A review of the Vienna Convention on the Law of Treaties and prior WTO “case law” provides that these exceptions could allow a Member State to pursue human rights policies in contravention of their WTO trade obligations.

I. THE WTO INVITES HUMAN RIGHTS LAW INTO THE WTO FRAMEWORK

One of the primary objectives of the WTO is to reduce trade barriers. Member states cannot restrict or prohibit access to their domestic markets. These objectives are advanced by GATT obligations such as Most-Favoured-Nation (MFN) and National Treatment. Article I outlines the concept of MFN treatment and provides that “any advantage, favour, privilege or immunity granted by any contracting party to any product” granted to one Member is applied immediately and without conditions to all other Members.³² Article III outlines the National Treatment obligation, which provides that Member States cannot discriminate between domestic and imported products. Member States must accord “treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements.”³³ All GATT obligations are subject to Article XX exceptions.

Although the WTO is intended to advance free trade, free trade alone is not the ultimate goal.³⁴ Trade is the means of increasing the welfare of all states. The preamble to the Marrakesh Agreement confirms that trade is but a means to “fulfill basic human rights such as the improvement of global standards of living, promotion of sustainable development, and preservation of the environment.”³⁵ While the WTO treaty does not explicitly refer to human rights, this fact does not support blanket exclusion of human rights law from the WTO framework.

Further, GATT Article XX enumerates a series of exceptions that allow certain non-trade policy concerns to override a state’s trade obligation under the WTO. Article XX covers trade restrictions that are “necessary to protect public morals,” “to conserve exhaustible natural resources,” and “to protect human, animal or plant life or health.” The broad language of the GATT Article XX exceptions could bring human rights law into the WTO

³² GATT, *supra* note 24, at art. I.

³³ *Id.* at art. III.

³⁴ Martii Koskenniemi and Paivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT’L L. 553, 572 (2002).

³⁵ Stephen J. Powell, *The Place of Human Rights Law in World Trade Organization Rules*, in *Proceedings of the Fourth Annual Legal & Policy Issues in the Americas Conference Panel V: Human Rights Commitments in the Americas: From the Global to the Local*, 16 FLA. J. INT’L L. 220, 221 (2004).

framework.³⁶

This position is even more plausible and likely to be accepted given the Appellate Body's ("AB") interpretation of GATT Article XX (g) in *US – Shrimp*.³⁷ The AB found that a balance must be struck "between the right of a Member to invoke one or another of the exceptions of Article XX . . . and the duty of that same Member to respect the treaty rights of other Members."³⁸ The AB recognized the legitimate nature of the policies and interests embodied in the exceptions, and concluded that "a Member's right to invoke them cannot be rendered illusory."³⁹ The AB's interpretation elevated the GATT XX exceptions to an equal plane with GATT's other pillars, bringing a "sea-change" in the nature of Article XX analysis.⁴⁰ In light of the AB's decision in *US – Shrimp*, Article XX may be the best mechanism to incorporate international and regional human rights.

II. THE GATT ARTICLE XX EXCEPTIONS

Since the GATT Article XX exceptions allow certain non-trade policy concerns to override a Member's trade obligation, this is potentially the most significant provision for addressing human rights concerns in the trade context. There are a number of WTO decisions concerning the interpretation of Article XX. Although these decisions do not directly implicate human rights obligations, they shed light on the possible ways human rights arguments can fit within the WTO framework.

Because of the limited substantive jurisdiction of WTO DSBs, WTO panels can only decide legal claims arising under WTO covered agreements.⁴¹ The WTO's Dispute Settlement Understanding (DSU) applies only to "disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to the DSU."⁴² Article 3.2

³⁶ *Id.* at 223.

³⁷ *US – Shrimp*, *supra* note 29, at ¶ 156.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Powell, *supra* note 35, at 227.

⁴¹ Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?* 95 AM. J. INT'L. L. 535, 554 (2001).

⁴² Understanding on Rules and Procedures Governing the Settlement of Disputes Article 1.1.: The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement. Understanding on Rules and Procedures Governing the Settlement

states that the DSU mechanism “serves to preserve the rights and obligations of Members under the covered agreements.”⁴³ As a result of this limited jurisdiction, claims arising from alleged breaches of international law, including breaches of human rights, cannot be brought to WTO dispute settlement. If Japan and the EU’s case against Massachusetts had been presented to a WTO panel, the panel could not decide if Burma had violated international human rights law. A panel could only decide whether Massachusetts had violated its trade obligations, and whether the violation is justified by one of the Article XX exceptions. In invoking the Article XX exceptions, the offending state has the burden to prove that the measure is justified under the relevant provision. This burden applies to arguments concerning the legal test of the specific exception being invoked and the arguments concerning the chapeau, the introductory paragraph of GATT Article XX.⁴⁴

The drafters of Article XX recognized the need to protect a sovereign nation’s right to pursue specific important state interests and obligations.⁴⁵ They also saw its potential for abuse.⁴⁶ In light of these concerns, DSBs have applied a balancing approach in their decisions.⁴⁷ Under this weighing and balancing approach, the non-trade policy is weighed and balanced against the offending state’s trade obligations. This balancing can prominently be found in the environmental cases. These cases reveal that Article XX can accommodate national policies pursuing non-trade interests, even if the interest to be protected is *not* within the jurisdiction or territory of

of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereafter DSU].

⁴³ Understanding on Rules and Procedures Governing the Settlement of Disputes Article 1.1: The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements. DSU art. 1.1.

⁴⁴ See GATT, *supra* note 24, at art. XX. The chapeau states that “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 [the GATT] shall be construed to prevent the adoption or enforcement by any contracting party of measures”

⁴⁵ CASSIMATIS, *supra* note 19, at 334.

⁴⁶ *Id.*

⁴⁷ These cases include: *Thai – Cigarettes*; *United States – Standards for Reformulated and Conventional Gasoline*; *US – Shrimp*; *EC – Asbestos*. See CASSIMATIS, *supra* note 19, at 335, n.198.

the offending State.⁴⁸

At least two of the Article XX exceptions lend themselves to an interpretation that incorporates a broad range of human rights concerns. The first is Article XX(a), the exception for trade measures “necessary for the protection of public morals.” The second is Article XX(b), the exception for trade measures “necessary to protect human, animal, or plant life or health.”⁴⁹ Given the broad and evolutionary nature of public morals and human life and health, DSBs will have to draw from international human rights instruments for their meaning and scope. Cases concerning the environment and trade provide support for this position. Additionally, the recent Doha Declaration on TRIPS and Public Health provide that when interpreting WTO provisions, DSBs must take into account relevant human rights law.⁵⁰ The analysis below will focus on the role human rights can play in the interpretation and scope of Article XX(a) and (b), and in the balancing process embodied by the necessity requirement of each exception.

III. THE ROLE OF INTERNATIONAL HUMAN RIGHTS LAW IN TREATY INTERPRETATION

A. *Vienna Convention on the Law of Treaties*

DSU 3.2 requires that DSBs turn to the Vienna Convention on the Law of Treaties in determining the scope and definition of GATT Article XX exceptions. Article 31.1 of the Vienna Convention states that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Article 31.2 further provides that the context, in addition to the text, includes the preamble and annexes. Article 32 provides that if Article 31 leaves the meaning of a term ambiguous, obscure, or leads to an

⁴⁸ For example, in *US – Shrimp*, the US law in question was intended to protect migratory sea turtles. The AB did not invalidate the US’s measure even though the species of turtles may have never entered US territory. The AB notes that “it is not claimed that *all* populations of these species migrate to, or traverse, at one time or another, waters subject to US jurisdiction.” *US – Shrimp*, *supra* note 29, at ¶ 133.

⁴⁹ JAMES HARRISON, *THE HUMAN RIGHTS IMPACT OF THE WORLD TRADE ORGANIZATION* 199 (Hart Publishing 2007).

⁵⁰ World Trade Organization, Ministerial Declaration of 20 November 2001, WT/MIN(01)/DEC/2, *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm [hereafter Doha Declaration]. “We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members’ right to protect public health and, in particular, to promote access to medicines for all.” Doha Declaration at ¶ 4.

interpretation that is absurd or unreasonable, DSBs can turn to supplementary materials for interpretation. Of most importance to human rights is Article 31.3(c). The “principle of systematic integration” enshrined in Article 31.3(c) provides that a treaty interpreter may apply “any relevant rules of international law applicable in the relations between the parties.”⁵¹ Article 31.3(c) emphasizes unity in international law and stands for the proposition that treaties should not be read in isolation from other sources of public international law.⁵²

In utilizing the Vienna Convention, WTO decisions have recognized the role of public international law in treaty interpretation. In *US – Gasoline*, the first dispute decided under the WTO Agreements, the AB noted that the GATT “is not to be read in clinical isolation from public international law.”⁵³ This obligation, however, must be balanced with Article 3(2) of the DSU, which provides that “recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” How can DSBs take into account human rights law without violating Article 3(2)? Disputes involving environmental concerns and public health have demonstrated a feasible approach in balancing the requirements of effective treaty interpretation and the limitations of Article 3(2). Cases such as *Thailand – Cigarettes*, *EC – Asbestos*, and *US – Shrimp* all involved non-trade concerns, and the offending Member States in each dispute argued for an interpretation of WTO obligations that took into account the relevant social concern.⁵⁴ Similarly, a dispute involving human rights concerns would require interpreting GATT Article XX provisions in light of international human rights law, including substantive rights established by applicable human rights treaties, general international law and customary international law.⁵⁵

The principle of systematic integration of Article 31.3(c) of the Vienna Convention provides that ambiguous WTO provisions, such as “public morals” or “natural exhaustible resources,” could “fall-back” on non-WTO

⁵¹ See CASSIMATIS, *supra* note 19, at 249. See generally International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* – Finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.882 (Apr. 13, 2006); C. MacLachlan, *The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT’L & COMP. L.Q. 279 (2005).

⁵² JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW* 253 (Cambridge University Press 2003).

⁵³ Appellate Body Report, *United States-Standards for Reformulated and Conventional Gasoline Treatment of Imported Gasoline and Like Products of National Origin*, WT/DS2/9 (adopted May 20, 1996) 35 I.L.M. 603, 621 (1996) [hereafter *US – Gasoline*].

⁵⁴ HARRISON, *supra* note 49, at 191.

⁵⁵ Sarah H. Cleveland, *Human Rights Sanctions and International Trade: A Theory of Compatibility*, 5 J. INT’L ECON. L. 150 (2002).

2009] *The Role of International Human Rights Law in WTO Dispute* 255

treaties for its scope and definition.⁵⁶ Under Article 31.3(c), panels could use human rights instruments as relevant legal context for interpreting provisions of Article XX. If a treaty rule is ambiguous, “general international law definitions as well as certain other rules should be injected in the treaty [rule] to be defined.”⁵⁷ For example, in *US – Shrimp*, the AB interpreted the broad term “exhaustible natural resources” in Article XX(g) with reference to relevant environmental treaties.⁵⁸ The “fall-back” approach, however, has inherent limitations. First, the terms to be defined must be broad and ambiguous enough to require input from other rules.⁵⁹ Second, the rule to be relied on must be relevant to the WTO provision in question.⁶⁰ Lastly, the rule to be relied on must reflect the common intentions of all parties.⁶¹ This last limitation emphasizes the fact that Article 31.3(c) refers to rules “applicable in the relations between the parties.”⁶² Article 2(1)(g) defines “party” as “a State which has consented to be bound by the treaty.”⁶³ Accordingly, the term “parties” in Article 31.3(c) refers to all members of the WTO agreement. As a result, non-WTO treaties that have not been *accepted* by all WTO members cannot be used to interpret ambiguous provisions.⁶⁴ WTO cases concerning the environment and trade provide that despite this limitation, DSBs are not necessarily prohibited from considering a treaty that has not been signed or ratified by every WTO member. A law that may not have been ratified by all WTO members may still be applicable in a dispute because it reflects the common intentions of all WTO members.⁶⁵

In paragraphs Article 31.3(a) and (b) of the Vienna Convention, the reference to “agreement . . . of parties” does not require express agreement to a treaty.⁶⁶ Hence, Article 31.3(c) similarly does not require express agreement by all member states.⁶⁷ Not all WTO Members must have formally and explicitly agreed to the non-WTO rule in order for it to be

⁵⁶ JOOST PAUWELYN, CONFLICT OF NORMS, *supra* note 52, at 201.

⁵⁷ *Id.*

⁵⁸ *See, e.g., US – Shrimp, supra* note 29.

⁵⁹ *Id.* at 245.

⁶⁰ *Id.*

⁶¹ *Id.* at 257.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 485.

⁶⁶ *Id.* at 258 (stating that “Arts. 31(3)(a) and (b) provide . . . that account must be taken of ‘any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions’ and ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’”).

⁶⁷ *Id.* at 261.

considered “accepted.”⁶⁸ Implicit acceptance or acquiescence is sufficient for the purposes of Article 31.3(c).⁶⁹ The AB in *US – Shrimp* accepted this interpretation of Article 31.3(c), and referred to multilateral environmental treaties that were not binding on all WTO members. More notably, some of the treaties used were not binding on all of the parties in the dispute. Although not all WTO Members ratified the relevant treaties, the AB still concluded that the non-WTO treaties were relevant and applicable in defining “exhaustible natural resources.” The AB implicitly concluded that the treaties reflected the common intentions of all WTO members. The AB supported its conclusion by citing the increasing “acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources.”⁷⁰ The AB also noted that “modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources.”⁷¹

The decision in *US – Shrimp* supports referring to human rights instruments, such as the ICCPR, in determining “public morals”⁷² or “measures necessary for the protection of human . . . life or health”⁷³ even though not all WTO members have ratified them. Human rights laws that have reached customary law status or garnered a degree of international support similar to the environmental treaties in *US – Shrimp* arguably reflect the common intentions of all WTO Members. Article 31.3(c) would effectively allow for the interpretation of WTO provisions in light of the evolving rules of public international law, even if some WTO members have not ratified them.⁷⁴

B. Evolutionary Interpretation

Article 31.3 (c) also incorporates the principle of evolutionary

⁶⁸ *Id.* (stating that “the requirement is not that all the parties to the WTO agreement have, one after the other, formally and explicitly agreed with the non-WTO rule, nor even that this rule is otherwise legally binding on all WTO members. It could be submitted that the criterion is rather that the rule can be said to be at least implicitly accepted or tolerated by all WTO members, in the sense that the rule can reasonably be said to express the common intentions or understanding of all members as to what the particular WTO term means”).

⁶⁹ *Id.*

⁷⁰ See *US – Shrimp*, *supra* note 29, at ¶ 131.

⁷¹ *Id.* at ¶ 130.

⁷² GATT, *supra* note 24, at art. XX(a).

⁷³ *Id.* at XX(b).

⁷⁴ CASSIMATIS, *supra* note 19, at 342 (stating that the “International Law Commission, in its commentary to the draft Article that became Article 31.3(c) of the Vienna Convention, appeared to recognize that the rule contained in the article allowed for the interpretation of a treaty in the light of subsequent evolution of rules of general international law”).

interpretation. In *US – Shrimp*, the AB, adopting the interpretive principle of Article 31(3)(c),⁷⁵ referred to non-WTO treaties to determine the “common intentions” of all WTO parties and the ordinary meaning of the term “exhaustible natural resource” in the context of Article XX (g).⁷⁶ The AB referred to the United Nations Convention on the Law of the Sea, the Convention on Biological Diversity, the Convention on the Conservation of Migratory Species of Wild Animals, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora.⁷⁷ The AB further noted that the “generic term ‘natural resources’ in Article XX(g) is not ‘static’ in its content or reference but is rather ‘by definition, evolutionary.’”⁷⁸ Given the evolutionary nature of the term, the AB found it relevant that “modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources.”⁷⁹ The AB continued to state that “[g]iven the recent acknowledgement by the international community of the importance of concerted” efforts “to protect living natural resources,” and in light of the “explicit recognition by WTO members of the objective of sustainable development in the preamble of the WTO Agreement, we believe it is too late . . . to suppose that Article XX(g) . . . may be read as referring only to the conservation of exhaustible or other non-living natural resources.”⁸⁰

Article XX provisions for measures necessary to protect public morals and human life and health can and should be deemed as evolutionary terms similar to “natural exhaustible resources.” Both terms, especially “public morals,” are broad and ambiguous, and panels would be required to turn to international human rights instruments for its scope and meaning.⁸¹

Although an evolutionary approach would allow reference to the changes in public international law, there are certain limitations. As stated earlier, the approach undertaken by the AB in *US – Shrimp* suggests that reference to non-WTO law may be limited to those that have received a degree of consensus. In the human rights context, this may mean that reference may be limited to those rights that are clear, fundamental, and

⁷⁵ The AB made express reference to Article 31.3(c) in a footnote. *See US – Shrimp*, *supra* note 29 at 158 n.157.

⁷⁶ The AB stated that “[g]iven the recent acknowledgement by the international community of the importance of concerted or multilateral action to protect living natural resources, and recalling the explicit recognition of WTO members of the objective of sustainable development in the preamble of the WTO agreement, we believe it too late in the day to suppose otherwise . . .” *See US – Shrimp*, *supra* note 29, at ¶ 131.

⁷⁷ *US – Shrimp*, *supra* note 29, at ¶ 118-20.

⁷⁸ *Id.* at ¶ 117.

⁷⁹ *Id.* at 116.

⁸⁰ *Id.* at 118.

⁸¹ *See infra* Part IV for a discussion on the scope and meaning of “public morals.”

have reached customary law status, as well as to those international human rights treaties that reflect a high degree of support. In *US – Shrimp*, the AB emphasized the general consensus surrounding the environmental treaties it used.

Under international law, there is a distinction between civil and political rights, and economic, social and cultural rights. It is argued that social, economic and cultural rights are not “real rights” but simply vague, aspirational, long-term goals.⁸² They do not have customary law standing, and lack the necessary gravitas to be seriously contemplated in the context of the WTO.⁸³ Due to the lack of consensus surrounding economic, cultural, social rights, international human rights instruments that embody these rights may not be applicable in interpreting the broad terms of GATT Article XX(a) and (b). Although Burma may be in violation of both civil and political rights, and economic and social rights, Massachusetts may only be able to justify its measure under Article XX(a) or Article XX(b) on the grounds that Burma is in violation of civil and political rights. As such, Article XX provisions would be applicable when “clear” and “fundamental” rights are implicated. They would not be applicable in cases implicating rights that lack weight in international law. Given the evolutionary approach adopted by the AB in *US – Shrimp*, economic, social, and cultural rights can become relevant context for WTO provisions once they have reached a similar degree of international consensus as those of civil and political rights. As will be discussed *infra*, such distinctions may not be necessary when a measure is inwardly directed, in that it is intended to protect and promote the human rights of persons within the offending state’s territorial boundaries.⁸⁴

In sum, an analysis of the relevant provisions of the Vienna Convention and the interpretive mechanisms utilized by WTO DSBs reveal that human rights concerns can be raised in WTO proceedings as relevant sources for the interpretation and application of broad, ambiguous WTO provisions. Although there are certain limitations in how and what types of human rights law can be considered, there are interpretive mechanisms that allow introducing human rights into WTO dispute settlement.

IV. INTERPRETATION OF ARTICLE XX(A) – MEASURES “NECESSARY TO PROTECT PUBLIC MORALS”

Article XX(a) is an exception for trade-restrictive measures “necessary to protect public morals.” As previously noted, whether Article XX(a)

⁸² Downes, *supra* note 19, at 628-29.

⁸³ *Id.*

⁸⁴ *See infra* note 86.

proves to have an important role in the balance between human rights and trade depends on its interpretation. So far, no GATT or WTO body has interpreted Article XX (a).⁸⁵ To determine its ordinary meaning, Steve Charnovitz suggested referring to an English language dictionary of the period, as the exception was proposed by the United States.⁸⁶ He found that the Universal Dictionary of the English Language defines “moral” as “relating to, concerned with, the difference between right and wrong in matters of conduct.”⁸⁷ As Charnovitz concluded, the dictionary definition clearly does not help in clarifying the term. A dictionary definition of the period would be a good starting point, but the principle of evolutionary interpretation would allow reference to modern-day dictionaries. Unfortunately modern day definitions also do not elucidate the term. The American Heritage Dictionary defines “moral” as “of or concerned with the judgment of the goodness or badness of human action and character” and “conforming to standards of what is right or just in behavior.”⁸⁸ Similar to the dictionary definition in 1946, the modern-day definition of “moral” does not illuminate what morals are covered and whose morals are protected.

The Vienna Convention states that interpreting a treaty term can be informed by the “object and purpose of the treaty.”⁸⁹ Reference to the object and purpose of the WTO Agreement supports an interpretation that includes human rights. The preambular references to “raising standards of living” and “ensuring full employment” reflects the Member States’ commitment to respect human dignity.⁹⁰ An interpretation that incorporates human rights within Article XX is in accord with the preambular language of the Marrakesh Agreement. Robert Howse has argued that “in the modern world, the very idea of public morality has become inseparable from the concern for human personhood, dignity, and capacity reflected in fundamental rights.”⁹¹ Given the preambular references and the generality of the term “public morals,” an interpretation that excludes the concern for human rights

⁸⁵ Cf. Panel Report, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (adopted April 7, 2005) [hereafter *US – Gambling*]. *US – Gambling* was decided under the General Agreement in Trade and Services.

⁸⁶ Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT’L L. 689, 700 (1998).

⁸⁷ *Id.*

⁸⁸ AMERICAN HERITAGE DICTIONARY 1142 (Joseph Pickett ed., Houghton Mifflin 2000) (1987). The term “morals” is defined as “rules of habit or conduct . . . with reference to standards of right and wrong.” *Id.*

⁸⁹ Vienna Convention on the Law of Treaties, Article 31(1), Jan. 27 1980, 1155 U.N.T.S. 331.

⁹⁰ Marrakesh Agreement, *supra* note 30.

⁹¹ Robert Howse, *Back to Court After Shrimp/Turtle? Almost But Not Quite Yet: India’s Short Lived Challenge to Labor and Environmental Exceptions in the European Union’s Generalized System of Preferences*, 18 AM. U. INT’L L. REV. 1333, 1368 (2003).

would be contrary to the ordinary meaning of the term.

The only relevant case interpreting the term “public morals” is the GATS panel report in *US – Gambling*.⁹² The panel considered the public morals exception of GATS Article XIV(a). The panel found that the public morals exception could apply to the United States’ prohibition on internet gambling because of the impact internet gambling could have on “money laundering, fraud, health and underage gambling.”⁹³ The panel interpreted “public morals” as denoting “standards of right and wrong conduct maintained by or on behalf of a community or nation.”⁹⁴ The panel further noted that the term’s meaning can vary in time and space depending on prevailing social, cultural, ethical and religious values.⁹⁵ As the panel report reveals, there is considerable potential within the broad language of this term. The generality of “public morals,” the preambular references, and the modern conception of public morals that embodies human rights standards means that a reasonable interpretation would incorporate notions of human rights.

V. INTERPRETATION OF ARTICLE XX(B) - MEASURES “NECESSARY TO PROTECT HUMAN LIFE OR HEALTH”

Restrictive trade measures could also be potentially justified under XX(b). Article XX(b) is an exception for trade-restrictive measures “necessary to protect human, animal, or plant life or health.” Like Article XX(a), this exception has not been invoked for human rights issues, so there are no GATT or WTO cases that can assist in its interpretation. Although the language is not as broad as “public morals,” the language is broad enough to incorporate certain human rights trade restrictions. Examples are measures to protect the right to life or measures to improve dangerous work-conditions.⁹⁶ Since human life and health are linked to workplace conditions, “GATT inconsistent measures for improvement thereof could be based on Article XX(b).”⁹⁷ Although the drafting history of Article XX(b) indicates that the provision was intended to justify sanitary and quarantine restrictions for the protection of human, animal or plant life or health,⁹⁸ the evolutionary approach adopted in *US – Shrimp* could justify an

⁹² GATS Article XIV(a) provides that Member States can adopt and enforce measures “necessary to protect public morals or to maintain public order.”

⁹³ *US – Gambling*, *supra* note 86, at ¶ 6.494.

⁹⁴ *Id.* at 3.278.

⁹⁵ *Id.*

⁹⁶ Salman Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT*, 10 MINN. J. GLOBAL TRADE 62, 80 (2001).

⁹⁷ *Id.*

⁹⁸ CASSIMATIS, *supra* note 19, at 391.

interpretation taking into account international human rights law.

VI. JURISDICTIONAL LIMITATIONS: INWARD VS. OUTWARD TRADE MEASURES

Trade measures intended to promote human rights can take several forms. Generally, such measures can either be outwardly or inwardly directed. Outward trade measures are those measures taken by WTO Member States in order to promote and protect human rights policies in another WTO Member State by making some aspect of its trade with that State conditional on that State's human rights performance. Examples include the US's ban on importation of any product of Ugandan origin until the President certified that the "government of Uganda is no longer committing a consistent pattern of gross violations of human rights."⁹⁹ Inward trade measures, on the other hand, are trade measures designed to protect and promote the human rights of persons within the Member State's jurisdiction. Examples of inwardly directed measures include the government of Israel's ban the importation of non-kosher meat products, the U.S.'s ban on the importation of obscene pictures, and Thailand's import prohibition and internal taxes of tobacco.¹⁰⁰

It is not clear if GATT Article XX(a) and XX(b) could justify outward trade measures intended to pressure other nations to undertake certain actions, including modifying their own domestic standards.¹⁰¹ In adopting restrictive trade measures, whether inwardly or outwardly directed, each Member State must be given flexibility to interpret and comply with its national and international human rights obligations. Giving states too much freedom, however, may conflict with human rights standards and obligations of other Members States. It may also lead to further confusion regarding the content of international human rights. The legitimate diversity among national and international human rights obligations raises difficult questions for WTO DSB's.¹⁰²

Cases such as *EC – Asbestos* and *US-Gambling* reveal that greater deference may be given to trade-restrictive measures intended to protect human rights of individuals within a Member State's territory. This

⁹⁹ Charnovitz, *supra* note 86, at 697.

¹⁰⁰ *Id.*

¹⁰¹ I will not go into an in-depth discussion on the varying types of measures that can be undertaken. See HARRISON, *supra* note 49, at 62 for an in-depth discussion on the different types of measures undertaken by nations.

¹⁰² Petersmann, *supra* note 28, at 610 (stating that there is a "need to respect 'the margin of appreciation' of each country regarding the interpretation of its national and international human rights obligations, and the legitimate diversity among national and international human rights rules, raises difficult questions . . .").

deference is appropriate given that state sovereignty provides states a “margin of appreciation”¹⁰³ in determining its domestic policies. As *Korea – Beef* and *EC – Asbestos* reveal, once a state presents a genuine policy objective, it has the right to determine the level of protection it considers appropriate for its citizens.¹⁰⁴ A clear implication would be that inwardly directed trade measures may refer to a broader set of human rights. For example, Jamaica could turn to both international and regional human rights instruments to support a policy promoting and protecting the right to food under Article XX(b), the exception for measures necessary to protect human life and health. If the measure was to protect its citizens’ right to food and health, then greater deference should be given. Once the offending state has proven a genuine policy objective, they should receive greater deference to determine the level of protection necessary for their citizens. They would not be prevented from using international human rights instruments supporting the right to food and health.

The human right to food may be deemed too imprecise to justify an outward trade measure. Outward trade measures designed to promote human rights in other states, such as Massachusetts’s Burma Law, may involve a more complex range of issues than inward-trade measures. Outwardly directed trade measures may lead to an unlawful intervention in another state’s domestic affairs. It can also impinge another state’s ability to determine its own domestic and international human rights obligations. However, the distinction between outward and inward trade measures is somewhat arbitrary.¹⁰⁵ There are two sides to a transaction, and both inwards and outwards measures can affect the domestic policies of other states.¹⁰⁶ Both can violate another state’s sovereignty.

If Article XX(a) and (b) are limited to protect human life or public morals within a state’s own territory, then human rights trade measures designed to target a foreign state’s domestic policies such as the Burma Law could never be justified under Article XX. The potential of these exceptions to promote and protect international human rights would be very limited. The GATT does not expressly address extraterritoriality, and the ordinary meaning of either exception sheds no light on this issue. Previous WTO decisions, however, are informative.

With regards to the jurisdictional limits of “public morals,” *US – Gambling* is instructive.¹⁰⁷ In *US – Gambling*, the panel allowed the U.S.’s

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Steve Charnovitz, *supra* note 86, at 689.

¹⁰⁶ *Id.*

¹⁰⁷ The AB in *US – Gambling* considered the meaning of “necessary” under the public morals exception of GATS Article XIV(a). In its analysis, the AB noted that the GATS

prohibition on internet gambling based on the argument that such activity would potentially corrupt the behavior of U.S. citizens. The panel states that internet gambling could lead to “money laundering, fraud, health and underage gambling.”¹⁰⁸ The law was intended to prevent U.S. citizens from participating in what the panel concluded was immoral conduct, and the measure would protect citizens of the violating state, the U.S., from such conduct. The panel’s reasoning cannot be easily extended to human rights violations, however. The purchase or use of a product made through forced labor or by those subject to rape and torture cannot be argued to lead to corrupt or immoral behavior. Thus, under the approach adopted by *US – Gambling*, Massachusetts’s Burma Law, which was intended to change the domestic policies of Burma, could not fall within the scope of “public morals.”

Unlike the decision in *US – Gambling*, the AB’s decision in *US – Shrimp* supports the use of outward trade measures under Article XX. The AB in *US – Shrimp* rejected the panel’s conclusion in the *Tuna-Dolphin* cases that Article XX should not protect trade measures intended to effect non-trade policies or practices in other states. The AB rejected the panel’s conclusion that the “United States measure at stake fell within that class of excluded measures because Section 609 conditions access to the domestic shrimp market of the United States on the adoption by exporting countries of certain conservation policies prescribed by the U.S.”¹⁰⁹ The AB noted that “conditioning access to a Member’s domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing member may . . . be a common aspect of measures” within the scope of Article XX exceptions.¹¹⁰ As a result of that case, WTO Members who condition access to their domestic markets by requiring exporting countries to adopt certain policies or practices may still turn to Article XX. Such trade restrictive measures do not automatically render the measure beyond the scope of Article XX. Such an interpretation would be abhorrent to the principle of effective treaty interpretation DSBs are required to apply, and renders Article XX “inutile.”¹¹¹

The AB qualified its conclusion in *US – Shrimp* by noting that that there was a “sufficient nexus” between the US and the turtle population the US measure intended to protect. The AB did not require that the US

Article XIV exceptions are similar to the GATT Article XX exceptions. Thus, it found previous GATT Article XX exceptions relevant for the analysis of GATS Article XIV exceptions. See SIMON LESTER, ET AL., *supra* note 1, at 386.

¹⁰⁸ *US – Gambling*, *supra* note 85, at ¶ 324.

¹⁰⁹ *US – Shrimp*, *supra* note 29, at ¶ 121.

¹¹⁰ *Id.*

¹¹¹ *Id.*

regulate only those turtles that were likely to enter US territory, and expressly stated that it was not addressing “the question of whether there is an implied jurisdictional limitation in Article XX(g).”¹¹² The basis of this nexus requirement is unclear. Cassimatis argues that the nexus requirement may be the result of the need to balance commitments to liberalize trade with a nation’s right to restrict trade to further a non-trade policy.¹¹³ This balancing “required the interpolation of a nexus requirement.”¹¹⁴ On this basis, a Member State proposing to restrict trade due to human rights violations in another state can legitimately claim a nexus between itself and the violations. He argues that *erga omnes* obligations could provide such a nexus.¹¹⁵ Alternatively, the nexus requirement may mean that the AB was “adopting an ‘effects test,’ upholding jurisdiction over foreign activity that has effects within the sanctioning state’s territory.”¹¹⁶ The nexus requirement, whatever its basis, provides a feasible mechanism to justify outward trade measures under Article XX(a) and (b).¹¹⁷

Assuming outward trade measures are justifiable under Article XX(a) and XX(b), human rights trade measures intended to change the human rights policies of a foreign state must be based on clear and fundamental human rights laws that have customary law standing. States cannot impose human rights standards idiosyncratic to the nation imposing the trade restriction. Regarding outwardly directed trade measures, there will be a greater need to refer to international human rights instruments to prove the universality of the human rights value being protected, and that the measure taken will advance those goals. As mentioned above, it is generally accepted that civil and political rights are real rights recognized under international law, but economic, social, and cultural rights are not. As such, any outwardly directed measures may only be justified if it is intended to protect civil and political rights.

The concern that states will try to unilaterally impose human rights standards on the international community can be prevented, or at least limited by reference to international human rights laws that establish universal standards. For example, a nation imposing trade measures to prevent slavery could be justified as universally accepted by referring to human rights instruments. A trade measure intended to impose an eight-to-

¹¹² *Id.* at 133.

¹¹³ CASSIMATIS, *supra* note 19, at 366.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Sarah H. Cleveland, *Human Rights Sanctions and the WTO*, in ENVIRONMENT, HUMAN RIGHTS AND INTERNATIONAL TRADE 236 (Francesco Francioni ed., 2001).

¹¹⁷ *Id.* The use of the nexus requirement may be limited to the specific facts of *US – Shrimp*. The AB focused on the migratory nature of sea-turtles in its decision, which could limit the usefulness of the ruling when it comes to human rights measures.

2009] *The Role of International Human Rights Law in WTO Dispute* 265

five workday in other nations could not be justified, as it is not a universally accepted human rights concern. Human rights instruments would provide guidance to a WTO panel or appellate body in determining whether the stated purpose or policy of the trade measure could be justified under international human rights law.

VII. THE NECESSITY REQUIREMENT OF ARTICLE XX(A) AND (B)

Once a Member State has demonstrated that the trade-restrictive measure falls within Article XX(a) or (b), it must then prove that the measure adopted is necessary to fulfill the policy objective. Justifying trade restrictive measures requires satisfying the legal tests embodied in the “necessary” requirement of Article XX (a) and (b). The term “necessary” within Article XX(a) has not been defined.¹¹⁸ There are, however, a number of cases that have considered the term “necessary” in Article XX(b) and other provisions of Article XX.¹¹⁹ These cases shed light on the methodology that would potentially be applied. They also reveal that the “necessary” requirement of XX(a) and (b) may be a significant balancing tool between trade and human rights.

The term “necessary” in GATT Article XX was first interpreted in *US – Tariff Act*. The Panel addressed the GATT exception contained in Article XX(d).¹²⁰ In defining “necessary,” the panel determined that a Member State “cannot justify a measure inconsistent with another GATT provision as ‘necessary’ in terms of Article XX(d) if an alternative measure which it could be reasonably expected to employ, and which is not inconsistent with other GATT provisions, is available to it.”¹²¹ Even if a GATT consistent measure is not reasonably available, Member States must still use the measure that is least inconsistent with GATT provisions.¹²² Subsequent WTO panels have adopted this interpretation of “necessary.” The panel in *Thai – Cigarettes* saw no reason why the understanding of the term “necessary” in the context of Article XX(d) should not be the same in Article XX(b).¹²³ It noted that the “fact that paragraph (d) applies to inconsistencies resulting from the enforcement of GATT-consistent law and regulations while paragraph (b) applies to those resulting from health-related

¹¹⁸ See GATT, *supra* note 24, at art. XX.

¹¹⁹ See *US – Tariff Act; Korea – Beef; US – Shrimp; Thai – Cigarettes*.

¹²⁰ See GATT, *supra* note 24, at art. XX(d).

¹²¹ Panel Report, *United States – Section 337 of the Tariff Act of 1930*, ¶ 5.26, BISD L/6439 - 36S/345 (Nov. 7, 1989) [hereafter *US – Tariff Act*].

¹²² *Id.*

¹²³ Panel Report, *Thailand-Restriction on Importation of and Internal Taxes on Cigarettes*, ¶ 74, DS10/R-37S/200, (adopted Nov. 7, 1990) [hereafter *Thai – Cigarettes*].

policies . . . did not justify a different interpretation of necessary.”¹²⁴

Under *US – Tariff Act* and *Thai – Cigarettes*, “necessary” meant that there must be no alternative measure which the Member State “could reasonably be expected to employ” to achieve its policy objective.¹²⁵ As a result, panels had to determine whether reasonable alternatives were available to the defending state that would also achieve their stated policy goal. WTO cases revealed that WTO DSBs were reluctant to conclude that there were no reasonable alternatives available to the offending state. This was the case in *US – Tariff Act* and *Thai – Cigarettes*.¹²⁶ Again, in *US – Gasoline*, the AB concluded that individual emission standards for foreign refiners were available to the United States.¹²⁷ The collective emission standard adopted by the US was rejected even though administering such standards may have been easier.¹²⁸ Given the reluctance of GATT panels to “regard alternatives as not being available,” many considered that the necessary test “impinged too heavily upon Members’ regulatory autonomy to pursue legitimate non-economic values.”¹²⁹

The AB in *Korea – Beef*, in addressing Article XX(d), also adopted the definition of “necessary” applied in the *US – Tariff Act* case.¹³⁰ The AB, however, introduced “certain relaxing elements into the necessity test.”¹³¹ The AB noted that the term necessary “encapsulate[s]” the need for a “weighing and balancing process.”¹³² This weighing and balancing involves consideration of three factors: the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.¹³³

In assessing the “necessary” requirement, the AB emphasized that the term “‘necessary’ is not limited to that which is ‘indispensable’ or ‘of

¹²⁴ *Id.*

¹²⁵ *Id.* at ¶23 (citing *US – Tariff Act* at ¶ 5.26).

¹²⁶ Jan Neumann & Elizabeth Turk, *Necessity Revisited – Proportionality in WTO Law after Korea – Beef, EC – Asbestos and EC – Sardines*, 37.1 J. WORLD TRADE 199, 208 (2003).

¹²⁷ Appellate Body Report, *United States-Standards for Reformulated and Conventional Gasoline*, ¶ 25-27, WT/DS2/AB/R (Apr. 29, 1996) [hereafter *US – Gasoline*].

¹²⁸ See Neumann & Turk, *supra* note 126, at 208.

¹²⁹ *Id.*

¹³⁰ Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, ¶ 166, WT/ DS161/AB/R (adopted Jan. 10, 2001) [hereafter *Korea – Beef*]. The AB stated that the “necessary” standard described in *US – Tariff Act* “encapsulates the general considerations we have adverted to above.” See *US – Tariff Act*, *supra* note 121.

¹³¹ See Neumann & Turk, *supra* note 126, at 210.

¹³² *Korea – Beef*, *supra* note 130, at ¶ 166.

¹³³ *Id.* at ¶ 164.

absolute necessity' or 'inevitable.'"¹³⁴ There is a continuum, and a measure that is necessary can fall between "indispensable" and "making a contribution to" the stated policy objective.¹³⁵ The AB emphasized the significance of the "relative importance" of the non-trade policy objective in assessing where a measure falls within the "continuum."¹³⁶ The AB noted that a treaty interpreter must "take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect."¹³⁷ The more vital or important those common interests or values, the easier they would be to accept as "necessary" trade-restrictive measures.¹³⁸ The AB recognized that Member States must be given some flexibility to pursue certain non-trade policy objectives. To accommodate Member States, the AB relaxed the necessary requirement for those policy objectives deemed to be "vital" or "important."¹³⁹

This balancing process is a "promising basis" for considering human rights within the structure of the WTO.¹⁴⁰ However, striking the appropriate balance would be a difficult task for a panel. Given the "absence of legal texts, or even informal institutional discussions, on how trade and human rights norms interact, there are evident difficulties" in a balancing exercise between human rights and trade.¹⁴¹ This process is still one of discovery, and there are practical considerations from both the human rights side and the trade side of the argument. There are valid concerns that require further inquiry and prudence. The point is WTO "case law" has created a process in which human rights concerns can enter WTO dispute settlement. There is a clear distinction between raising human rights concerns and determining whether the measures adopted to meet those concerns are justified.

In regards to human rights concerns, the balancing process would require a panel to take into account relevant human rights instruments. The factors used in the balancing process involve both questions of law and fact. What is a vital concern? Massachusetts can present several human rights instruments to show that civil and political rights are a vital concern for the international community, as evidenced by the sheer number of treaties on the subject and the number of states that have ratified such treaties. Similarly, to

¹³⁴ *Id.*

¹³⁵ *Id.* at ¶ 161. The AB in *EC – Asbestos* also referred to weighing and balancing approach the in the context of Article XX(b). See Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 172, WT/DS135/AB/R (adopted Apr. 5, 2001).

¹³⁶ *Id.* at ¶ 162.

¹³⁷ *Id.* The AB noted that these factors are not exhaustive.

¹³⁸ *Id.*

¹³⁹ See Neumann & Turk, *supra* note 126, at 211.

¹⁴⁰ Downes, *supra* note 19, at 653.

¹⁴¹ *Id.* at 654.

show the importance of the common interests or values protected by that law or regulation, a state could refer to international human rights instruments to show that the human rights concern addressed is a vital common interest.

For example, if Jamaica has given primacy over the right to food or health to its citizens, they may turn to Article 20 of the Preamble of the Agreement on Agriculture, which provides that non-trade concerns should be taken into account in the continuation of reform process, and this includes developing countries' right to food. They may also turn to a number of international legal instruments relating to nutritional concerns to prove that the right to food has been developed.¹⁴² Article 11 of the Economic Covenant, Article 24(2)(c) of the Convention of the Rights of the Child, Article 12(2) of the Convention on the Elimination of All Forms of Discrimination Against Women, Article 25 of the UDHR, the First Commitment of the 1996 Rome World Food Summit Political Declaration and Plan of Action, Article 10(b) of the Declaration on Social Progress and development, Articles 1 and 2(3) of the Declaration on the Right to Development, and Articles 1 and 2 of the Universal Declaration of the Eradication of Hunger and Malnutrition provide guidance as to the scope and content of the right. Each can also be presented to show that the right to food is a vital, common interest for the offending state. Similar to what occurred in *Thai – Cigarettes*, a panel may turn to reports of the World Health Organization in regards to information about food and health in developing nations.¹⁴³ Reference to these sources of laws would quantify the state's interest in pursuing the stated human rights objective, as well as reveal a compelling state interest to a panel.

Member States may also rely on international human rights instruments to prove that the inconsistent trade measure is not protectionist in nature, but a good faith effort to address important public concerns. A panel should examine the state's participation in international, regional and bilateral treaties as an indication that the right to food or health is a vital interest to the offending nation. In *US – Shrimp*, the US's participation in regional and bilateral environmental treaties was a factual matter the AB considered relevant in the assessment of its good faith efforts.¹⁴⁴ A similar approach

¹⁴² Gabrielle Marceau, *The WTO Dispute Settlement, in International Trade and Human Rights*, in INTERNATIONAL TRADE AND HUMAN RIGHTS 203 (Frederick M. Abbott et al. eds., The University of Michigan Press 2006).

¹⁴³ *Thai – Cigarettes* at ¶ 50. With permission from the parties, the panel asked WHO to submit a report on "the health effects of cigarette use and consumption, and on related issues for which the WHO was competent.

¹⁴⁴ *US – Shrimp*, *supra* note 29, at ¶ 135. Because the United States is a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the panel in *US – Shrimp* accepted that there was a need and obligation by the United States to protect sea turtles. *US – Shrimp*, *supra* note 29, at ¶ 7.58.

can be undertaken with relevant human rights treaties.¹⁴⁵ DSBs could also take into account other factual elements such as “declarations in national and international forums, decisions of human rights jurisdictions, other relevant general declarations by states on the importance and primacy of human rights, relevant resolutions of the ILO or the General Assembly, all of which would constitute public knowledge or factual information which the panel can obtain.”¹⁴⁶

It is less clear what role international human rights law will play in determining the extent to which the measure pursued contributes to the public policy the offending nation is pursuing. States may refer to international human rights instruments to prove that the measure is intended to protect and promote fundamental values. Once the offending State proves that the human rights concern being addressed is vital or fundamental, panels should adopt the less onerous definition of necessary. Measures “making a contribution to” the policy objectives should be sufficient to satisfy the “necessary” requirement exceptions as opposed to “indispensable.” This approach, however, may only be applicable to inwardly directed measures. As discussed previously, inwardly directed measures do not require that the human rights concern be “clear” or “fundamental,” and should be given more deference. Given the more complex issues that can arise with outwardly directed measures, a much more stringent approach may be necessary. Hence, a panel may conclude that an outwardly directed trade measure would have to be indispensable to meet the stated policy goal. Additionally, such measures are extremely contentious and developing countries could rightly object to such measures as unlawful unilateral acts. For those reasons, greater caution should be used with outwardly directed measures.

In regards to Burma’s violation of human rights, the trade-restrictive measure adopted by Massachusetts was designed to end Burma’s human rights violations. Whether it would have been indispensable to meet that end is unlikely. In some instances, such trade measures may be the only option that involves real pressure on the target state to end the human rights violation. There may only be two ways to influence the behavior of other states: negotiation or coercion.¹⁴⁷ If negotiations have failed, trade measures to coerce will be crucial.¹⁴⁸ This may be relevant in determining whether a

¹⁴⁵ Marceau, *supra* note 142, at 206.

¹⁴⁶ *Id.* at 206-07.

¹⁴⁷ CASSIMATIS, *supra* note 19, at 372-73 (quoting Professor Robert E. Hudec, *GATT Legal Restraints on the Use of Trade Measures against Foreign Environmental Practices*, in *FAIR TRADE AND HARMONIZATION – PREREQUISITES FOR FREE TRADE?* (Jagdish Bhagwati & Robert E. Hudec eds., 1996)).

¹⁴⁸ *Id.*

measure is indispensable to achieve the stated human rights goal of the offending nation.

The balancing process has great potential for raising human rights concerns in WTO dispute settlement proceedings. However, the weighing and balancing approach has been criticized from both the human rights perspective and the trade perspective. It is argued that “the necessity test . . . is biased in favor of trade values” since it “evaluates measures by reference to their trade effects.”¹⁴⁹ As a result, trade values are privileged over all other competing values and human rights are not given the sufficient weight it deserves. There is a danger that trade restrictive measures similar to the “Burma Law” will be revoked without due consideration of whether they are justified from a human rights perspective.¹⁵⁰ States may also be deterred from enacting similar laws in fear of WTO challenges.¹⁵¹ Essentially, despite the development of the balancing process, human rights may still play second fiddle to the market principles of trade and the WTO’s non-discrimination policies.¹⁵² There may be truth in these assertions, but the WTO is “making respectable progress in fitting the square norms of human rights into the round pegs of utilitarian trade rules.”¹⁵³ As mentioned in earlier sections, the relationship between human rights and trade is multifaceted and complex. To prevent any instability in public international law, we must proceed with caution.

CONCLUSION

If the Massachusetts case went to WTO dispute settlement, a panel would have been confronted with international human rights concerns, as well as a government’s obligation to promote and protect human rights. Rejecting human rights arguments altogether would mean ignoring the preambular references to the ultimate goals of the WTO of protecting basic human rights and raising the global standard of living. Additionally, doing so would not comport with current WTO “case law,” which recognizes the legitimate objectives contained in Article XX and a Member State’s right to

¹⁴⁹ *Id.* at 372.

¹⁵⁰ HARRISON, *supra* note 49, at 103.

¹⁵¹ While the Massachusetts case was pending dispute settlement, Maryland was about to pass similar legislation that would have prohibited the state from doing business with the military government of Nigeria or with firms operating there. After learning about the legislation, the Clinton Administration lobbied heavily against it claiming that such measures are perceived to be in violation of WTO rules, and counterproductive measures could result. Although the bill was favored to pass, it lost by one vote. See HARRISON, *supra* note 49, at 103.

¹⁵² Powell, *supra* note 35.

¹⁵³ *Id.*

2009] *The Role of International Human Rights Law in WTO Dispute* 271

invoke Article XX exceptions. Within the WTO framework, non-trade concerns may over-ride the trade obligations of Member states under GATT Article XX. As such, Article XX may be the best mechanism to raise human rights arguments. Prior WTO cases provide that human rights law can be used as interpretive tools to determine the scope and definition of broad and ambiguous terms found within Article XX exceptions. They may also be introduced in the balancing process embodied by the “necessary” requirement within Article XX(a) and (b).