

GATT ARTICLE XX AND HUMAN RIGHTS: WHAT DO WE KNOW FROM THE FIRST 20 YEARS?

RACHEL HARRIS* AND GILLIAN MOON†

It has been 20 years since the World Trade Organization and its law came into operation, accompanied by much speculation about its effects on member states' powers to meet their international human rights law obligations. This article sets out what has been learnt over that period about the relationship between WTO law, principally the General Agreement on Tariffs and Trade ('GATT') and human rights law. While there have been no formal disputes during this period expressly invoking the core human rights treaties, much can be deduced from WTO jurisprudence. It is evident that there is normative tension between the trade and human rights domains, both in terms of the ends they pursue and the means they adopt. We argue that mooted solutions to this tension, such as interpreting WTO law in light of human rights law or applying human rights law directly in WTO disputes, face considerable obstacles and appear to have limited prospects. More radical solutions, such as amending WTO law, would yield better results, but would be very difficult to achieve. However, WTO jurisprudence suggests that it is possible to design some human rights measures to avoid non-compliance with WTO law disciplines, so long as the measures are very carefully structured and the policy process well-executed. This article focuses on GATT obligations and on the GATT art XX exception as a window through which human rights measures may potentially pass. To illustrate, we present two hypothetical, trade-affecting human rights measures to show both the prospects of such measures securing compliance with WTO law and how far the boundaries of compliance can be pushed within the existing paradigm.

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* BA, LLB (Hons) (UNSW). This article is written in a personal capacity and presents the views of the authors only. The author can be contacted at: therachelharris@gmail.com.

† Visiting Fellow, Australian Human Rights Centre, and Director of the Trade, Human Rights and Development Project, Faculty of Law, University of New South Wales, Australia (g.moon@unsw.edu.au). Staff page: <<http://perma.cc/TGZ4-K43G>>. Grateful thanks to the UNSW Faculty of Law for its ongoing and generous support for this research.

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I INTRODUCTION

Twenty years ago, on 1 January 1995, the World Trade Organization came into being, with many new WTO law treaties entering into force to supplement the 1947 *General Agreement on Tariffs and Trade* (*GATT*).¹ From the outset, WTO law came under attack, not least by groups concerned about consequences for human rights. The disruption generated by the coalition of trade unions, environmental bodies, human rights organisations and other civil society groups caused the mid-meeting abandonment of the 1999 WTO Ministerial Meeting in Seattle.² One reason for the apprehension expressed by these groups was that, after nearly 50 years of rather lax enforcement of the *GATT* by a weak system of dispute panels,³ the incoming WTO dispute settlement system (*DSS*) would enable much more efficient enforcement of international trade law.⁴ While civil society groups warned about adverse environmental or developmental impacts of the new trade law regime, the particular focus of human rights groups at the time was the erosion of labour rights protection.

This article looks at the first 20 years of the relationship between the *GATT*, especially its general exceptions in art XX, and human rights law; at what has transpired over that period, where the relationship now stands and what the future may hold. Part II explores what we now know about how human rights law relates to WTO law, at both the normative and doctrinal levels. We draw

¹ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (*General Agreement on Tariffs and Trade 1994*) (*GATT*).

² For a description, see Janet Thomas, *The Battle in Seattle: The Story behind and beyond the WTO Demonstrations* (Fulcrum, 2000).

³ Simon Lester, Bryan Mercurio and Arwel Davies, *World Trade Law: Text, Materials and Commentary* (Hart, 2nd ed, 2012) 152–3.

⁴ While the World Trade Organization Dispute Settlement System (*DSS*) does not strictly have the power to ‘enforce’ its decisions in the way that a domestic court would, it may authorise retaliatory action by a successful complainant against a member which fails to bring a challenged measure into conformity with WTO law: *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 (*DSU*) art 22.

from the literature, from the core disciplines of WTO and human rights law and from the reports of WTO panels and the Appellate Body ('AB') to describe what has been learned over that period about the relationship and the likely legal outcomes of future litigation, particularly the extent to which *GATT* art XX might afford protection to human rights measures. To assist with this, two case studies are then presented: in Part III, an outwardly-directed, hypothetical human rights measure addresses labour standards, while in Part IV, an inwardly-directed, hypothetical human rights measure addresses internal racial equality. The article concludes by making some observations, in light of the foregoing, about future directions based on trends and ongoing pressures.

II THE RELATIONSHIP BETWEEN THE WTO AND HUMAN RIGHTS NORMS

Much of what has been learned during the first 20 years about WTO law and human rights comes from the literature, as there has been little related litigation in the DSS which could be described as raising human rights law directly. David Kinley has noted that 'the addressing of human rights issues expressly is limited to a few highly disputed cases'.⁵ Even in these few cases, human rights-related concerns arose only indirectly and legal argumentation has not been based expressly on the core human rights treaties. The most direct contact occurred in the recent *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products* ('*EC — Seal Products*') dispute, where a WTO Panel adverted to two instruments within the broad scope of international human rights law as 'factual evidence'.⁶ Despite this dearth of litigation, over the same period a large literature has grown in which debates have been conducted on the many dimensions of the relationship between WTO law and human rights. These debates have been informed by WTO jurisprudence relating to measures which, although addressing such policy areas as environmental or health protection, raise similar WTO law compliance issues to those which a challenged human rights measure would likely raise.

The literature documents a variety of human rights concerns. Some involve broad or general principles of human rights law, such as the charge that there is a 'democratic deficit' in the operation of the WTO, contrary to the human rights

⁵ David Kinley, *Civilising Globalisation: Human Rights and the Global Economy* (Cambridge University Press, 2009) 53–4.

⁶ Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Docs WT/DS400/R and WT/DS401/R (25 November 2013) ('*EC — Seal Products*'). In this dispute, the European Union presented an argument which drew on the United Nations *Declaration on the Rights of Indigenous Peoples* (a declaration of the UN General Assembly rather than a treaty) and on International Labour Organization *Convention No 169 concerning Indigenous and Tribal Peoples*. See *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007); *Convention (No 160) concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991). These instruments recognise and exhort respect for the inherent rights of indigenous peoples, rather than dealing with universal human rights.

principle of participation,⁷ or the argument that the world should pursue the human rights-based approach to development.⁸ The literature also contains much discussion of possible outcomes should a domestic human rights measure be challenged by another WTO member as non-compliant with the *GATT*. Part II(A) below explores the compliance problems which trade-affecting human rights measures would be likely to encounter, particularly under *GATT* disciplines. The literature also addresses broader legal questions relating to real and anticipated disputes. An important component focuses on legal questions at the level of public international law, particularly the need for greater coherence between the two bodies of international law. One strand explores the possibility of direct conflict between WTO law and human rights law and the availability of interpretive techniques to resolve differences.⁹ Another strand sets out a critique of applicable law available in disputes before the DSS.¹⁰ These coherence-related questions are investigated in Part II(B) below. Finally, much of the literature considers the appropriateness and adequacy of the general exceptions provision in the *GATT*. Article XX is generally considered to offer the best possibility of protection for a trade-affecting human rights measure. Part II(C) below sets out what has been learned in the first 20 years about the scope and purpose of *GATT* art XX.

Over time, it has become clear that there are two broad types of domestic human rights measures likely to be challenged in the DSS in the future. The first is measures which implement the human rights obligations of members towards their own nationals, referred to in this article as ‘inwardly-directed’ human rights measures.¹¹ The second is measures which purport to protect the (extraterritorial) human rights of nationals of other countries. The hypothetical case studies in Parts III and IV below are based on these two types of human rights measures.

A *The Nature of GATT Disciplines and Human Rights Measures in Brief*

WTO members have tended not to refer to human rights obligations in defending WTO challenges to human rights measures. In *EC — Seal Products*, the Panel took cognisance of human rights instruments in only a very limited way as part of the factual evidence before it. It sought to confirm that indigenous peoples, including Inuit peoples, want to preserve their practices and cultures and

⁷ Caroline Dommen, ‘The WTO, International Trade, and Human Rights’ (Paper, 3D: Trade — Human Rights — Equitable Economy, January 2004) <<http://perma.cc/DX7M-SZN9>>. Caroline Dommen also argues that the structure of the WTO decision-making process, being ‘untransparent and undemocratic’, is not in sympathy with art 21 of the *Universal Declaration of Human Rights*, which sets out a right of everyone to take part in the government of their country. See *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

⁸ See HRBA Portal, *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding among UN Agencies* <<http://perma.cc/PJM8-LWY9>>.

⁹ See Gudrun Monika Zagel, ‘WTO and Human Rights: Examining Linkages and Suggesting Convergence’ (2005) 2(2) *IDLO Voices of Development Jurists* 3, 31–2.

¹⁰ See Gabrielle Marceau, ‘WTO Dispute Settlement and Human Rights’ (2002) 13 *European Journal of International Law* 753; Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, 2003).

¹¹ Regarding this distinction, see Steve Charnovitz, ‘The Moral Exception in Trade Policy’ (1998) 38 *Virginia Journal of International Law* 689.

that their interests are both recognised and sought to be protected at the international level. The two instruments are hortatory in nature and deal with the inherent rights of indigenous peoples, rather than with universal human rights enjoyed by all. Other disputes, too, have contained human rights elements and the potential has been there, although not taken up, for parties to have presented arguments in terms of human rights law. For example, on the facts of the dispute, the United States could have argued that its 2009 ban on the sale of clove cigarettes was a measure protecting the human right to the best available standard of health;¹² similarly, Brazil might have argued that its 2005 ban on the importation of retreaded tyres was directed at meeting its human rights law obligation to protect human health.¹³

WTO members have challenged human rights-related measures where their implementation has resulted in discrimination between products that are alike. Under the *GATT*, no WTO member may discriminate between the ‘like’ products of member countries (the Most-Favoured-Nation (‘MFN’) prohibition).¹⁴ The products of every WTO member will be immediately and unconditionally entitled to any special advantage or privilege which a member country gives to a like product of any other country. Thus, it is unlawful for a member to, say, set a lower tariff for goods from one country than it sets for like products from a member country. Nor may a country favour its own goods over ‘like’ imported equivalents (the National Treatment (‘NT’) prohibition). Imported products are entitled to internal ‘treatment no less favourable’ than that accorded to like, locally-produced products.¹⁵ For example, a member may not apply a higher rate of internal sales tax to imported goods than it applies to like, locally-made goods. Moreover, internal regulations should not be applied to imported or domestic products so as to afford protection to domestic production.¹⁶

Note that a measure may be unlawfully discriminatory even where the discrimination it effects is of a de facto or indirect kind. A measure which is origin-neutral on its face may, nonetheless, alter competitive conditions between like imports or between imported and domestic like products. The AB in *United States — Certain Country of Origin Labelling (COOL) Requirements* stated that, where a measure, however expressed, ‘gives rise to adverse effects in the market, which disparately impact imported products, such effects will be attributable to the [measure] for the purposes of examining less favourable treatment’ under the NT rule in the *GATT*.¹⁷ In *EC — Seal Products*, the AB made it clear that this understanding of de facto discrimination also applies to an MFN analysis, where an apparently neutral measure results in advantageous treatment of products from certain countries, compared to the resulting treatment of like products from other

¹² Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc WT/DS406/AB/R, AB-2012-1 (4 April 2012) (‘*US — Clove Cigarettes*’).

¹³ Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/AB/R, AB-2007-4 (3 December 2007) (‘*Brazil — Retreaded Tyres*’).

¹⁴ For the Most-Favoured Nation provision, see *GATT* art I.

¹⁵ For the National Treatment provision, see *GATT* art III.

¹⁶ *Ibid.*

¹⁷ Appellate Body Report, *United States — Certain Country of Origin Labelling (COOL) Requirements*, WTO Docs WT/DS384/AB/R and WT/DS386/AB/R, AB-2012-3 (29 June 2012) [289] (‘*US — COOL*’).

WTO members.¹⁸ This broader understanding of discrimination renders many more measures *prima facie* *GATT* non-compliant than would a prohibition limited only to direct or intentional discrimination.¹⁹

It is perfectly conceivable that domestic human rights measures which affect trade might be discriminatory in their effects: they might overtly favour some products over others which are ‘like’ or the discrimination may be of a *de facto* or indirect kind. In pursuing its objective, a trade-affecting human rights measure might be structured as an ‘outwardly-directed’ one. A measure might, for example, restrict the importation of products made using injurious forms of child labour.²⁰ A similarly structured environmental measure, challenged in the DSS in 1998, restricted importation into the US of foreign shrimp products where the shrimp had been caught using methods which might harm endangered sea turtles.²¹ The issues raised by such measures are important in the trade and human rights debates because WTO law ordinarily views products which are physically the same as ‘like’, however they are caught or made.²² It is now settled *GATT* law that less favourable treatment of a member’s products, under a measure which differentiates between like products on the basis of these sorts of extrinsic factors (referred to as process or production methods (‘PPMs’)), will be unlawful under the *GATT* unless the measure can be justified under the general exceptions provision.²³

It is not yet clear in human rights law whether some states’ obligations under human rights treaties extend beyond their own territorial boundaries. The argument that they do has its basis in the *Charter of the United Nations* (‘*UN Charter*’), which imposes obligations on all parties in the international legal system to respect and observe human rights.²⁴ A body of literature is now

¹⁸ Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R, AB-2014-1 and AB-2014-2 (22 May 2014) (‘*EC — Seal Products*’).

¹⁹ For an analysis of the doctrines of *de facto* discrimination in trade and human rights law, see Gillian Moon, ‘Fair in Form, but Discriminatory in Operation — WTO Law’s Discriminatory Effects on Human Rights in Developing Countries’ (2011) 14 *Journal of International Economic Law* 553. For an analysis of the different ways discrimination can be conceptualised, see Lothar Ehring, ‘De Facto Discrimination in World Trade Law: National and Most-Favoured-Nation Treatment — Or Equal Treatment?’ (2003) 36 *Journal of World Trade* 921.

²⁰ See, for example, the *United States Tariff Act of 1930*, a law that prohibits the importation of products made with ‘forced labor or/and indentured labor’ into the United States. See *Tariff Act of 1930*, 19 USC § 1307. In 1997, the ‘Sanders Amendment’ clarified that this applies to products made with ‘forced or indentured child labor’: *Treasury and General Government Appropriations Act of 1998*, Pub L No 105-61, § 634, 111 Stat 1272, 1316.

²¹ Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998) (‘*US — Shrimp*’).

²² WTO panels and the Appellate Body (‘AB’) have said repeatedly that the factors which will be considered in assessing the likeness of products are their physical characteristics, end uses, consumer preferences and tastes with regard to them and their tariff classifications. See Panel Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/R (12 June 2007) [7.414]–[7.416] (‘*Brazil — Retreaded Tyres*’). For products possibly being found ‘unlike’ despite appearances, see below Part III(A).

²³ The general exceptions provision in the *GATT* is art XX. See Steve Charnovitz, ‘The Law of Environmental “PPMs” in the WTO: Debunking the Myth of Illegality’ (2002) 27 *Yale Journal of International Law* 59.

²⁴ Margot E Salomon, ‘International Economic Governance and Human Rights Accountability’ (Working Paper No 9/2007, London School of Economics and Political Science, September 2007) 21.

emerging in which legal arguments are presented for the existence of an autonomous, broader set of 'extraterritorial obligations' owed by states with regard to the human rights of people outside their own state's territorial area.²⁵ However, the arguments have been focused on what a state must not do to parties in other states, rather than on the existence of positive obligations to realise the human rights of parties outside their borders.²⁶

While there is clearly scope for tension between WTO rules and member states' human rights protection efforts, it is generally conceded that 'it is difficult to identify direct conflicts between WTO rules and international rules mandating the protection of human rights'.²⁷ In part, this is a reflection on the somewhat yielding nature of states' obligations under some international human rights law. The principal source of states' obligations with regard to economic and socio-economic rights is the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR'),²⁸ which guarantees the rights to education,²⁹ to the highest possible standard of physical and mental health,³⁰ to an adequate standard of living (including adequate food, water and shelter),³¹ to work³² and to social security.³³ States party are obliged under the ICESCR to take steps towards the progressive realisation of those rights, to the maximum of available resources.³⁴ This obligation has sometimes been critiqued as inchoate and overly yielding,³⁵ lacking the immediacy and absoluteness of states' obligations in the *International Covenant on Civil and Political Rights* ('ICCPR').³⁶ Concerned that these qualities should not be overstated, the UN Committee on Economic, Social and Cultural Rights has emphasised that states party to the ICESCR may

²⁵ See, eg, Sigrun I Skogly, 'Global Responsibility for Human Rights' (2009) 29 *Oxford Journal of Legal Studies* 827; Rolf Künemann, Mariana Rocha and Ana-Maria Suarez Franco, 'Report of the 3rd Conference of the ETO-Consortium' (Report, FIAN International, December 2009). Margot Salomon also argues that the collective actions of the international community of states (acting, say, as the WTO) must not adversely affect a developing country's ability to meet its domestic human rights obligations: *ibid* 25–6. The extent to which the WTO itself (or, indeed, any international organisation) is capable of holding human rights obligations is the subject of separate debate. See Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006) ch 5.

²⁶ Takele Soboka Bulto, *The Extraterritorial Application of the Human Right to Water in Africa* (Cambridge University Press, 2014) 15.

²⁷ Sarah Joseph, 'Human Rights and the World Trade Organization: Not Just a Case of Regime Envy' (Research Paper, University of Leicester, 31 October 2007) 3, citing Andrew Lang, 'Beyond Formal Obligation: The Trade Regime and the Making of Political Priorities' (2005) 18 *Leiden Journal of International Law* 403.

²⁸ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR').

²⁹ *Ibid* art 13.

³⁰ *Ibid* art 12.

³¹ *Ibid* art 11.

³² *Ibid* arts 6–8.

³³ *Ibid* arts 9, 15.

³⁴ *Ibid* art 2(1).

³⁵ See, eg, Gillian Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, 2006) 925. Cf Malcolm Langford, 'The Justiciability of Social Rights: From Practice to Theory' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008) 3.

³⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

not sit passively but must, at all times, be actively taking expeditious, deliberate, concrete and targeted steps to advance the realisation of the *ICESCR* rights.³⁷ Nevertheless, the deference to ‘available resources’ in the state’s obligation under the *ICESCR* militates against finding hard and sharp conflicts between WTO law-mandated trade policy and states’ obligations of progressive realisation of the *ICESCR* rights. Note, however, that the *ICESCR* imposes an immediate and absolute obligation on states party to eliminate unlawful discrimination in the enjoyment of the *ICESCR* rights,³⁸ an obligation which has been expanded upon in the *International Covenant on the Elimination of All Forms of Racial Discrimination* (*ICERD*).³⁹

Another reason that hard conflicts between the *GATT* and human rights law are difficult to find is the yielding nature of *GATT* obligations themselves. *GATT* art XX is an exceptions clause, as opposed to a true ‘defence’. The chapeau states that nothing in the *GATT* ‘shall be construed to prevent the application or enforcement ... of measures’ within the listed policy areas in art XX.⁴⁰ *GATT* obligations, therefore, only extend to the point where they do not encroach upon the policy areas reserved in art XX’s sub-articles,⁴¹ although the chapeau also requires that ‘such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the

³⁷ Committee on Economic, Social and Cultural Rights, *CESCR General Comment No 3: The Nature of States Parties’ Obligations*, 5th sess, UN Doc E/1991/23 (14 December 1990) [2].

³⁸ *ICESCR* art 2.2.

³⁹ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) (*ICERD*). The prohibition on racial discrimination is particularly powerful in international law, being a *jus cogens* norm, at least with regards to intentional or state-sanctioned racial discrimination: Ian Brownlie, *Principles of Public International Law* (Clarendon Press, 3rd ed, 1979) 596–8. See also *South West Africa (Ethiopia v South Africa; Liberia v South Africa) (Judgment)* [1966] ICJ Rep 6, 250 (Judge Tanaka). No derogation from the prohibition will be permitted and it will ordinarily take priority over treaty obligations: *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 53 (*VCLT*).

⁴⁰ These areas relevantly include:

[M]easures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (c) relating to the importations or exportations of gold or silver;
- (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 ...

GATT arts XX(a)–(g).

⁴¹ Note that *GATT* obligations are subject to further exceptions listed in *GATT* art XXI, together with other qualifications to stated obligations, for example those listed in arts XI(a)–(c).

same conditions prevail, or a disguised restriction on international trade'.⁴² Whether or not a measure will fall within the policy space reserved by art XX requires the application of open-textured tests, discussed below, which subject *prima facie* GATT non-compliant measures to certain conditions, rather than prohibiting them outright. This lack of binary sanction or prohibition militates against the finding of 'hard' legal conflicts between the GATT and human rights norms.

The nature of human rights and WTO law obligations, discussed above, is relevant to whether 'conflicts' exist between these domains and how such conflicts may be resolved under public international law rules. It is important to situate jurisprudential and critical trends concerning the GATT (discussed next) within broader debates about how international norms bearing on the same conduct relate to each other, because these areas of law and debate are not neatly segregated and often become muddled. Part II of this article seeks to provide a framework for understanding how debates concerning the scope of GATT art XX relate to broader debates about the fragmentation of international law. The article then concretises this discussion through the case studies presented in Parts III and IV, before offering in Part V concluding observations and thoughts on future directions.

B *Public International Law and the Relationship between WTO Law and Human Rights Law*

One of the most vexed controversies over the first 20 years of the WTO has been the question of how bodies of public international law relate to one another. In the present context, three principal questions have arisen. First, can human rights law form part of the applicable law in disputes before the DSS? Secondly, can human rights law be called on as a defence to a breach of WTO law where there is a conflict? Thirdly, to what extent can WTO law obligations be read harmoniously with human rights law obligations in order to avoid conflicts arising? Each of these questions is addressed in this Part.

1 *Applicable Law in the WTO DSS*

There has been much debate in the first 20 years about the boundaries of applicable law in the DSS and about whether international law generally may form part of that law. The debate is important in the present study because it helps clarify the status of human rights law in the DSS. Under art 23 of the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* ('DSU'), panels and the AB have exclusive jurisdiction over claims arising under the WTO agreements. Their jurisdiction is also specific: WTO adjudicators may not 'determine rights and obligations outside the covered agreements'.⁴³ Nonetheless, while it is settled that the *jurisdiction* of WTO panels and the AB is limited to adjudicating claims under the WTO agreements, there is some debate about the scope of the *applicable law* in resolving disputes, in terms of 'gap-filling' and, most controversially, in order to resolve 'conflicts' between

⁴² Chapeau to GATT art XX.

⁴³ Appellate Body Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WTO Doc WT/DS308/AB/R, AB-2005-10 (6 March 2006) [56].

WTO law and other subsystems of international law. For its part, the *DSU* does not define the precise scope of the law that panels and the AB may apply.⁴⁴ On a narrow reading, apart from the WTO agreements, the only laws that a panel or the AB may apply are the customary principles of treaty interpretation, as is stipulated in *DSU* art 3(2), which states that the DSS ‘serves to ... clarify the ... provisions of [WTO agreements] in accordance with customary rules of interpretation of public international law’. On this narrow reading, a panel or the AB may not *apply* customary international law, general principles or law from other treaties; these may only come into play within the rubric of arts 31 and 32 of the *Vienna Convention on the Law of Treaties* (*VCLT*), insofar as they may be relevant to *interpreting* the WTO agreements. In an oft-cited passage, the AB in *United States — Standards of Reformulated and Conventional Gasoline* (*‘US — Gasoline’*) stated that the WTO agreements should not be read ‘in clinical isolation from public international law’.⁴⁵ However, this statement should be understood in the context of its preceding paragraph, which acknowledged the broader corpus of international law only insofar as it related to the ‘customary rules of interpretation of public international law’ reflected in *DSU* art 3(2).⁴⁶

This approach is consistent with the view that WTO members gave specific and limited consent to WTO jurisdiction. If the DSS were to step outside these bounds when settling disputes, it would arguably exceed the jurisdiction granted by WTO members. On this view, there is no material difference between the law within WTO jurisdiction and that which it may apply: the WTO agreements themselves define the applicable law. While this narrow reading is logical, it has the consequence that it would make WTO law effectively immune from, and supreme to, the great body of international law in which it is notionally embedded. Given that the jurisdiction of panels and the AB is both exclusive and specific, under the narrow reading there would never be an instance where an adjudicator might determine whether or not WTO law conflicted with, or was subordinate to, any other international rule, including rules of *jus cogens* status.

However, the narrow reading has not been applied in practice. As Isabelle Van Damme explains:

[T]he position that only the WTO covered agreements apply in WTO dispute settlement has always been untenable. It is not a question of whether general

⁴⁴ Cf *Statute of the International Court of Justice* art 38(1).

⁴⁵ Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (29 April 1996) 17 (*‘US — Gasoline’*).

⁴⁶ *Ibid.*

international law applies, but when and how much general international law applies, and whether secondary and/or primary rules apply.⁴⁷

In practice, WTO panels have often supplemented the agreements (particularly the *DSU*) with secondary norms of customary international law.⁴⁸ It is uncontroversial that panels and the AB have powers inherent to their judicial function, over and above subject matter jurisdiction,⁴⁹ and in practice they have applied general principles of law. It appears, therefore, that at least some *secondary* norms of customary international law and some general principles of law may be applied by WTO panels and the AB, in addition to the WTO agreements and customary rules of treaty interpretation.

The question of whether the DSS may apply *primary* rules of customary international law in settling WTO disputes is not yet clear. The Panel in *Korea — Measures Affecting Government Procurement* stated that ‘customary international law applies generally to the economic relations between WTO Members. Such international law applies to the extent that the WTO treaty agreements do not “contract out” from it’.⁵⁰ However, the AB has not shown any indication that it would adopt this approach generally; in fact, it has expressed scepticism, stating that it has ‘difficulty in envisaging circumstances in which a panel could add to the rights and obligations of a Member of the WTO if its

⁴⁷ Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford University Press, 2009) 21. ‘General international law’ may be viewed as synonymous with ‘customary international law’, as distinct from law created by treaties. General international law is understood as being constituted by ‘primary norms’ that regulate the behaviour of states and ‘secondary norms’ concerning ‘how international law should be created, applied, interpreted and enforced’: at 18. Examples of secondary norms are principles such as good faith or due process, customary principles on treaty formation, interpretation, and application, and principles on state responsibility. Isabelle Van Damme has noted that ‘to argue that general international law does not apply in WTO dispute settlement is to doubt the treaty basis of the WTO. At a minimum, the law of treaties applies to the extent that no special rules are provided’: at 18–19.

⁴⁸ *Ibid* 16.

⁴⁹ Subject matter jurisdiction includes, of course, the power to resolve disputes between WTO members and to determine whether measures conform to the covered agreements and rights have been nullified or impaired. *Ibid* 169.

⁵⁰ Panel Report, *Korea — Measures Affecting Government Procurement*, WTO Doc WT/DS163/R (1 May 2000) [7.96]. Joost Pauwelyn is a proponent of the view that customary international law and law from other treaties should form part of the applicable law before a panel or the AB, to the extent that WTO treaties have not ‘contracted out’ of them. Pauwelyn would, however, limit the ‘applicable law’ before panels and the AB to certain types of claims and defences: the admissible claims that can be brought to a WTO panel (which are confined to claims under the WTO covered agreements); the defences invoked by the defending party (sources of law relevant to the defence of a WTO law violation are limited to those brought forward by the defendant, and such laws must apply to all parties to the dispute); the scope of the relevant rules *ratione materiae*, *ratione personae* and *ratione temporis* — the rules invoked must directly apply to the parties and circumstances of the case; and conflict rules in the WTO treaty, general international law and other non-WTO treaties (which would determine, in the event of conflict, which law should prevail): Pauwelyn, *Conflict of Norms in Public International Law*, above n 10, 472–3.

conclusions reflected a correct interpretation and application of provisions of the covered agreements'.⁵¹

Even less clear is whether the DSS may apply other treaty-based subsystems of international law, such as the body of international human rights law; but it is likely that this will fall to be decided at some future date. The International Law Commission ('ILC') has supported the notion that WTO law may be supplemented by the greater corpus of international law, explaining that:

A limited jurisdiction does not ... imply a limitation on the scope of the law applicable in the interpretation and application of [WTO] treaties ... While the [DSU] limits the jurisdiction to claims which arise under the WTO covered agreements only, there is no explicit provision identifying the scope of applicable law.⁵²

The ILC stated that:

There seems ... little reason of principle to depart from the view that general international law supplements WTO law unless it has been specifically excluded and that so do other treaties which should, preferably, be read in harmony with the WTO ... treaties.⁵³

It is possible that law from a non-WTO treaty, such as a human rights treaty, might be introduced by a party as a defence against a claim of unlawful non-compliance with WTO law. Joost Pauwelyn argues that a panel or the AB could properly resolve conflicting obligations by directly applying law from another treaty 'in defense of a claim of a WTO violation',⁵⁴ but it is suggested that it would be difficult for a member to succeed in this in the case of human rights. The member would need to demonstrate that a direct legal conflict existed between the two bodies of law (discussed in the next Part) and that the human rights law obligations on which it sought to rely effectively displaced WTO law obligations to the extent of the conflict.⁵⁵ This would be difficult, given the different substantive subject matters of WTO and human rights treaties and the flexible nature of many of the human rights law obligations of states party. It is possible that an argument might succeed where the extrinsic law called on in defence was of *jus cogens* status, which would include the human rights-related

⁵¹ Appellate Body Report, *Chile — Taxes on Alcoholic Beverages*, WTO Docs WT/DS87/AB/R and WT/DS110/AB/R, AB-1999-6 (13 December 1999) [79]. Note, however, that the AB in *European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft* did not explicitly draw a distinction between the relevance of other 'rules of international law' to its *interpretation* of the WTO covered agreements and their relevance as part of the 'applicable law' that it could directly apply: Appellate Body Report, *European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft*, WTO Doc WT/DS316/AB/R, AB-2010-1 (18 May 2011) ('*EC — Aircraft*').

⁵² International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN GAOR, 58th sess, UN Doc A/CN.4/L.682 (13 April 2006) 28–9 [45] ('*ILC Fragmentation Report*').

⁵³ *Ibid* 90 [169].

⁵⁴ Joost Pauwelyn, 'The Jurisdiction of the World Trade Organization' (2004) 98 *American Society of International Law Proceedings* 135, 136.

⁵⁵ *ILC Fragmentation Report*, UN Doc A/CN.4/L.682, 23–4 [34]–[36].

prohibitions on slavery and (state-sponsored) racial discrimination.⁵⁶ However, how likely or possible is it that a direct legal conflict will arise?

2 *Legal Conflicts and Their Consequences*

What constitutes a ‘conflict’ of law, and what should be done in the event of such conflict, are unsettled questions.⁵⁷ If a WTO member were to argue that a direct legal conflict existed between a WTO law obligation and a human rights law obligation, the international law presumption against conflict would place the burden upon that member to demonstrate that a conflict did indeed exist.⁵⁸ The WTO Panels in *Indonesia — Certain Measures Affecting the Automobile Industry* and *Turkey — Restrictions on Imports of Textile and Clothing Products* summarised the three circumstances they thought should be present for a direct legal conflict between two treaties to exist.⁵⁹ First, the treaties concerned must have the same parties.⁶⁰ However, taking the view that multilateral obligations may be modified inter se, arguably it would suffice that the disputants were parties to both treaties.⁶¹ Secondly, the treaties must cover the same substantive subject matter. Thirdly, the provisions must impose mutually exclusive obligations. The majority view is that there must be some actual inconsistency between the two overlapping provisions, or a discernible intention that one provision is to exclude the other.⁶² As Wilfred Jenks explains:

[A] conflict of law making treaties arises only where simultaneous compliance with the obligations of different instruments is impossible ... There is no conflict if the obligations of one instrument are stricter than, but not incompatible with, those of another, or if it is possible to comply with the obligations of one

⁵⁶ Where a *jus cogens* violation were occurring in the territory of another state, it is arguable that WTO members may not contract out of the ability or obligation to impose countermeasures in response. However, the international law of countermeasures only applies in circumstances where the state itself can be held responsible for breaching the peremptory norm. See generally Jeroen Denkers, *The World Trade Organization and Import Bans in Response to Violations of Fundamental Labour Rights* (Intersentia, 2008).

⁵⁷ For a discussion of this debate and its practical effects, see Andrew Mitchell and James Munro ‘State–State Dispute Settlement under the *Trans-Pacific Partnership Agreement*’ in Tania Voon (ed), *Trade Liberalisation and International Co-Operation: A Legal Analysis of the Trans-Pacific Partnership Agreement* (Edward Elgar, 2013) 156, 161–5.

⁵⁸ See Pauwelyn, *Conflict of Norms in Public International Law*, above n 10, 240.

⁵⁹ Panel Report, *Indonesia — Certain Measures Affecting the Automobile Industry*, WTO Docs WT/DS54/R, WT/DS55/R, WT/DS59/R and WT/DS64/R (2 July 1998) [14.28] n 649 (*‘Indonesia — Automobiles’*). See also Panel Report, *Turkey — Restrictions on Imports of Textile and Clothing Products*, WTO Doc WT/DS34/R (31 May 1999) [9.94] n 324 (*‘Turkey — Textiles’*).

⁶⁰ The Panel in *Turkey — Textiles* noted that the presumption against conflict is especially strong in cases where separate agreements are concluded between the same parties because states are presumed to be consistent with themselves, failing evidence to the contrary: Panel Report, *Turkey — Textiles*, WTO Doc WT/DS34/R, [9.94] n 324. This is evidence against any assertion that human rights law could represent a valid ‘replacement’ of WTO obligations (except where there is a breach of a *jus cogens* norm).

⁶¹ See *VCLT* art 41.

⁶² Appellate Body Report, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO Doc WT/DS379/AB/R, AB-2010-3 (11 March 2011) [236], [307] (*‘US — Anti-Dumping and Countervailing Duties (China)’*).

instrument by refraining from exercising a privilege or discretion accorded by another.⁶³

However, others argue, convincingly in our view, that it is sufficient that there be a conflict between a WTO obligation and an express permission stipulated in another treaty. Arguably, ‘conflict[s]’ arise not only where ‘obligations are mutually exclusive in the sense that a member cannot comply with both obligations at the same time’, but also to ‘the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits’.⁶⁴ In any case, it will often be difficult to identify a direct legal conflict between a human rights obligation or permission and a WTO obligation because of the open-textured nature of WTO obligations, which do not necessarily prohibit trade-restrictive measures, instead obliging members to enact such measures in good faith and in the least trade-restrictive way possible,⁶⁵ where the measure falls within the closed list of policy areas in art XX and does not infringe any other WTO treaty.

How conflicts should be resolved is a matter of further debate. If a member identifies a ‘conflict’ (however this is understood) between obligations imposed under WTO law and human rights law, the conflict might be resolvable through applying either of two key international law principles. The first, *lex specialis derogat legi generali*, states that the provision with the more precisely delineated scope of application will have priority.⁶⁶ As yet, the principle of *lex specialis* has only been applied in the interpretation of apparent conflicts between WTO agreements.⁶⁷ The second principle, *lex posterior derogate legi priori*, states that

⁶³ Wilfred Jenks, ‘The Conflict of Law-Making Treaties’ (1953) 30 *The British Yearbook of International Law* 426–7, cited in Panel Report, *Turkey — Textiles*, WTO Doc WT/DS34/R, [9.92]. However, others argue that it is sufficient that there be a conflict between a WTO obligation and an express permission stipulated in WTO treaties. For a discussion of this position, see Denkers, above n 56, 144–7.

⁶⁴ Panel Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas: Complaint by Mexico*, WTO Doc WT/DS27/R/MEX (22 May 1997) [7.159].

⁶⁵ For example, a ‘conflict’ analysis would logically follow a panel’s conclusion that a measure is inconsistent with *GATT* art XX. At this point, it may be difficult to argue that the parties to any relevant human rights treaty *intended* that the respondent be permitted to enact a human rights measure in bad faith, or in an unnecessarily trade-restrictive way, where the same objective could be achieved by applying the measure in a less trade-restrictive way. Note, however, that there is some debate about the stage at which extrinsic law should be raised in defence and a ‘conflict’ analysis conducted. Some argue that this should occur prior to invoking the exceptions in *GATT* art XX. Jeroen Denkers, for example, implicitly takes this view: Denkers, above n 56.

⁶⁶ *Lex specialis* is a rule of customary international law that was not captured in the text of the *VCLT*. For a general discussion of this principle and its relation to other interpretive rules, see Christopher J Borgen, ‘Treaty Conflicts and Normative Fragmentation’ in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press, 2012) 448, 466–8. The Panel in *Indonesia — Automobiles* noted that ‘[a]mong agreements that are equal ... that should be given preference which is more specific and approaches more nearly to the subject in hand: for special provisions are ordinarily more effective than those that are general’: Panel Report, *Indonesia — Automobiles*, WTO Docs WT/DS54/R, WT/DS55/R, WT/DS59/R and WT/DS64/R, [5.129]. See also Panel Report, *Turkey — Textiles*, WTO Doc WT/DS34/R, [9.92]–[9.96].

⁶⁷ These interpretations have taken place both between provisions in single instruments and between provisions in different WTO covered agreements. For a thorough examination of how the principle of *lex specialis* may apply in interpreting separate WTO agreements, see Appellate Body Report, *US — Anti-Dumping and Countervailing Duties (China)*, WTO Doc WT/DS379/AB/R.

later law overrides prior law. This customary law principle is ‘effectively codified’ in *VCLT* art 30,⁶⁸ which outlines the law on the conflict of successive treaties relating to the same subject matter.⁶⁹

Without a clear mandate to examine discordant treaties side by side, these canons of treaty construction have proved of limited use in the DSS.⁷⁰ The utility of these techniques is further frustrated by difficulties in identifying clear conflicts between trade and human rights norms and the requirement that the conflicting treaties cover the same subject matter.⁷¹

A more recent, and perhaps promising, approach has been to apply the law of responsibility to the problem of normative fragmentation.⁷² Here, the question is less one of how to interpret apparently conflicting obligations, and more one of whether a complainant retains the right to challenge a measure, and whether a respondent’s actions should be considered ‘wrongful’ in the particular context of a dispute. In this regard still unresolved, but likely to remain contentious in future disputes, is whether a complainant may, through its conduct:

- a) ‘Waive’ procedural rights to a WTO panel with respect to certain obligations, or certain types of measures, under art 45⁷³ of the ILC’s

⁶⁸ See Christopher J Borgen, ‘Resolving Treaty Conflicts’ (2005) 37 *George Washington International Law Review* 573, 603; Jan B Mus, ‘Conflicts between Treaties in International Law’ (1998) 45 *Netherlands International Law Review* 208, 214–17.

⁶⁹ *VCLT* art 30(4)(a) states that ‘[w]hen the parties to the later treaty do not include all the parties to the earlier one ... [a]s between States parties to both treaties the same rule applies as in paragraph 3’. Article 30(3) states: ‘When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty’. Note that two further customary canons of construction may be called upon, that of *lex prior* and *pacta sunt servanda*. See generally Borgen, ‘Treaty Conflicts and Normative Fragmentation’, above n 66, 464–7.

⁷⁰ Evidence of the AB’s unwillingness to interpret external treaties without a clear mandate is provided in *Peru — Additional Duty on Imports of Certain Agricultural Products*, where the AB was careful to anchor its consideration of a free trade agreement (‘FTA’) between Peru and Guatemala in art XXIV of the *GATT*. See Appellate Body Report, *Peru — Additional Duty on Imports of Certain Agricultural Products*, WTO Doc WT/DS457/AB/R, AB-2015-3 (20 July 2015) [5.86] n 276 (‘*Peru — Agricultural Products*’).

⁷¹ This is a difficult hurdle in relation to conflicts between competing normative domains that affect trade, such as trade and environment. However, note there is some debate about how strict this requirement is. See Borgen, ‘Treaty Conflicts and Normative Fragmentation’, above n 66, 468.

⁷² Kristen Boon explains that ‘[t]he law of responsibility is a law of consequences. It is largely devoid of primary rules, and instead provides default secondary rules on attribution, the effect of breaches, excuses, and reparations’: Kristen E Boon, ‘Regime Conflicts and the UN Security Council: Applying the Law of Responsibility’ (2011) 42 *George Washington International Law Review* 787, 790.

⁷³ Article 45 relevantly provides that ‘[t]he responsibility of a State may not be invoked if ... [t]he injured State has validly waived the claim’: International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (2001) ch IV(E) art 45 (‘*Draft Articles on Responsibility of States for Internationally Wrongful Acts*’) art 45.

draft articles on the ‘Responsibility of States for Internationally Wrongful Acts’ (‘Draft Articles’);⁷⁴ or

- b) ‘Consent’ to a particular measure, precluding its ‘wrongfulness’ under art 20⁷⁵ of the Draft Articles.⁷⁶

These questions will be particularly relevant where a treaty to which both disputants are party expressly permits or encourages a particular kind of trade-affecting human rights measure, or where two or more members decide between them to immunise certain (for example health) measures from WTO challenge. The underlying questions of whether a panel may directly apply the law of responsibility in this way to resolve a dispute,⁷⁷ or whether such waiver or consent may instead serve as factual evidence that a complainant is not acting in ‘good faith’ contrary to *DSU* arts 3(7) and 3(10),⁷⁸ remain contentious.⁷⁹ Another related question likely to be raised in future is whether two or more parties may through, for example, a subsequent human rights or environmental treaty, modify WTO obligations between themselves under art 41 of the *VCLT*, in order to leave each other more policy space to enact trade-affecting human rights

⁷⁴ In *Peru — Additional Duty on Imports of Certain Agricultural Products*, Peru had argued before the Panel that Guatemala was not acting in good faith, contrary to its obligations under *DSU* arts 3(7) and (10) because it had previously concluded an FTA that effectively waived its right to a WTO panel with regards the measure at issue under art 45 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, despite possible WTO inconsistency: Panel Report, *Peru — Additional Duty on Imports of Certain Agricultural Products*, WTO Doc WT/DS457/R (27 November 2014) [7.66]–[7.96]. The Panel did not ultimately rule on the issue, given the relevant treaty was not yet in force: at [7.525]–[7.528]. On appeal, the AB did not exclude the possibility that WTO members may waive their WTO procedural rights in a form other than a ‘mutually agreed solution’ under *DSU* art 3(7), nor that bringing a WTO challenge in such circumstances may constitute bad faith, but it was not convinced that the FTA in question in fact constituted such a waiver: Appellate Body Report, *Peru — Agricultural Products*, WTO Doc WT/DS457/AB/R, [5.25]–[5.28].

⁷⁵ Article 20 provides that ‘[v]alid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent’: *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc A/56/10, art 20.

⁷⁶ The AB rejected Peru’s argument along these lines in *Peru — Agricultural Products*. However, this rejection was specific to the facts of the case. The AB was not convinced that the FTA constituted evidence that Guatemala consented to a WTO-inconsistent price range system, as opposed to one that complied with WTO disciplines: Appellate Body Report, *Peru — Agricultural Products*, WTO Doc WT/DS457/AB/R, [5.103] n 296.

⁷⁷ Pauwelyn has argued that, should a panel need a ‘hook’ within the WTO agreement upon which to hang its consideration of extrinsic international law, this could also be provided in *GATT* arts XXIV, V and the ‘enabling clause’. For a detailed discussion of these issues, see Joost Pauwelyn, ‘Waiving WTO Rights in an FTA? Panel Report on *Peru — Agricultural Products*’ on *International Economic Law and Policy Blog* (3 December 2014) <<http://perma.cc/BM9V-289H>>.

⁷⁸ For a detailed consideration of this argument, see Bregt Natens and Sidonie Descheemaeker, ‘Say It Loud, Say It Clear — Article 3.10 *DSU*’s Clear Statement Test as a Legal Impediment to Validly Established Jurisdiction’ (2015) 49 *Journal of World Trade* 873.

⁷⁹ Any expression of consent or waiver would need to be explicit and it may be difficult to outline the precise scope of the waiver or permission, which may or may not extend to measures enacted in bad faith or in an unnecessarily trade-restrictive way. However, such a consent or waiver may be useful in defence to a WTO challenge that a measure is *prima facie* WTO inconsistent, for example, because its objective does not fall within the closed list in art XX.

measures, free from the threat of WTO litigation.⁸⁰ Despite the noted difficulties such arguments face, it may be expected that in future they will complement a respondent's defence of human rights measures under *GATT* art XX.

3 *Harmonious Interpretation*

There has been much debate about whether *VCLT* art 31(3)(c) may be useful in interpreting WTO law, and *GATT* art XX in particular, 'harmoniously' with human rights law. The key question is whether treaty terms should *mean something different* depending on the particular parties to a dispute. In one sense, to do so may ameliorate the fragmentation of international law between disputing parties by making obligations between them internally consistent. On the other hand, this approach fragments WTO obligations in general (and the jurisprudence flowing therefrom), given treaty terms will mean something different depending on who is party to a dispute,⁸¹ arguably making the system less predictable.⁸²

Under *VCLT* art 31(3)(c), when interpreting a WTO treaty, WTO panels and the AB are required to take into account 'together with the context ... [a]ny relevant rules of international law applicable ... between the parties.'⁸³ According to the ILC, it is 'a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations'.⁸⁴ The WTO Panel in *European Communities — Measures Affecting the Approval and Marketing of Biotech Products* ('*EC — Biotech*') had high hopes for art 31(3)(c), treating it as 'a guarantee against [the] retrenchment of the rights and obligations protected under international law'.⁸⁵ However, such hopes have not been realised during the first 20 years of WTO jurisprudence. Indeed, Pauwelyn has expressed the view that attempting to address the problem of the unclear relationship between WTO law and other bodies of international law — or 'fragmentation' — through interpretative analyses is a largely fruitless pursuit.⁸⁶

The phrase 'harmonious interpretation' is not used in either the *VCLT* or WTO law. Christopher Borgen has described the principle of harmonious interpretation as requiring that '[w]hen there are multiple possible interpretations of a treaty text, one of which would cause a violation of another international norm, lawyers should avoid it in favour of an interpretation that is not violative

⁸⁰ The AB rejected such arguments in *Peru — Agricultural Products* in relation to an FTA between Guatemala and Peru, but this was, again, on the facts of that case, where the FTA did not expressly modify or even address the particular WTO obligations Peru was found in breach of and where, in any case, Peru had not ratified the FTA in question: Appellate Body Report, *Peru — Agricultural Products*, WTO Doc WT/DS457/AB/R, [5.110]–[5.111].

⁸¹ *Ibid* [5.106].

⁸² This is in contrast to the approach described above, whereby external treaty obligations form part of the law that panels may apply in settling disputes. On this approach, the meaning of treaty terms stays the same for all parties, but certain rights or obligations may be waived or modified by another treaty, or another treaty may be said to prevail to the extent of conflict.

⁸³ *VCLT* art 31(3)(c).

⁸⁴ International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Eighth Session*, UN GAOR, 61st sess, Supp No 10, UN Doc A/61/10 (2006) 408 [251(4)]. See also *ILC Fragmentation Report*, above n 52, 90–1 [169]–[170].

⁸⁵ Van Damme, above n 47, 371.

⁸⁶ Pauwelyn, *Conflict of Norms in Public International Law*, above n 10, 440–86.

of other obligations'.⁸⁷ It is thus the *interpretation* of a treaty in light of other international law obligations which is permissible under the *VCLT* in order to ascertain the meaning of the subject treaty. Confusion arises when a decision-maker seeks to *apply* those other international law obligations directly, under the guise of treaty interpretation, or to change the meaning of the treaty terms because other international law obligations exist between the disputing parties.⁸⁸ The AB in *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* ('*US — Anti-Dumping and Countervailing Duties (China)*') clarified that, when conducting an analysis under art 31(3)(c), the relevant question was not whether the latter rules 'applied', but, rather, whether they were to be taken into account in determining the meaning of the WTO agreement.⁸⁹

The AB in *US — Anti-Dumping and Countervailing Duties (China)* explored the operation of art 31(3)(c) in the context of WTO law and explained that the article contains three elements: '[I]t refers to "rules of international law"', those 'rules must be "relevant"' and the 'rules must be "applicable in the relations between the parties"'.⁹⁰ While states' human rights law obligations would qualify as rules of international law, establishing the other two elements will be difficult. Regarding the second element, it is difficult to see how, even assuming human rights norms may be 'taken into account', these norms could shed light on the intentions of the parties to WTO agreements or on precisely what various terms in the WTO agreements mean.⁹¹ Here, a further distinction must be drawn between calling upon other treaty norms to aid in the interpretation of a WTO treaty and, as explained earlier, using other treaty norms as evidence for or against a statement of fact in a dispute. Human rights law is most likely to be raised by a party to a dispute as evidence supporting an assertion of fact. Panels

⁸⁷ Borgen, 'Treaty Conflicts and Normative Fragmentation', above n 66, 460.

⁸⁸ For example, in the *Case concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, when interpreting the word 'necessary' in the context of the use of force, the majority arguably used art 31(3)(c) to expand the scope of applicable law before the Court in this way: *Case concerning Oil Platforms (Islamic Republic of Iran v United States of America) (Judgment)* [2003] ICJ Rep 161, 238 [48] (Judge Higgins).

⁸⁹ Appellate Body Report, *US — Anti-Dumping and Countervailing Duties (China)*, WTO Doc WT/DS379/AB/R, [312], [316]. See also the AB in *Peru — Agricultural Products*, where the AB rejected Peru's arguments under *VCLT* art 31(3)(c) because it considered Peru was improperly asking the AB to *apply* FTA provisions in preference to WTO provisions, instead of asking it to refer to the FTA to aid in the *interpretation* of those provisions: Appellate Body Report, *Peru — Agricultural Products*, WTO Doc WT/DS457/AB/R, [5.91]–[5.97].

⁹⁰ Appellate Body Report, *US — Anti-Dumping and Countervailing Duties (China)*, WTO Doc WT/DS379/AB/R, [307].

⁹¹ For example, regarding the meaning of the words 'justifiable' or 'necessary' in *GATT* art XX, as opposed to establishing facts that would help a respondent to pass these tests. For further details, see Alexander Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' (2003) 14 *European Journal of International Law* 529, 537. In *Peru — Agricultural Products*, the AB rejected Peru's arguments under art 31(3)(c) in part because it found that the extrinsic obligations being referred to were not 'relevant' to the interpretation of WTO provisions. Peru also raised the argument that the FTA could be considered a 'subsequent agreement' on the interpretation of the relevant WTO obligations under *VCLT* art 31(3)(a). The AB similarly rejected this argument on the grounds that the FTA did not provide 'relevant' interpretative guidance on the WTO obligations in question: Appellate Body Report, *Peru — Agricultural Products*, WTO Doc WT/DS457/AB/R, [5.103]–[5.104].

and the AB have in the past taken note of non-WTO treaties where they have been introduced in a dispute as evidence of a claimed fact, such as that a particular species is endangered⁹² or, in *EC — Seal Products*, that there is a recognised interest internationally in preserving the traditions and cultures of Inuit and indigenous communities.⁹³

The third element to be established is that human rights norms form part of the ‘rules of international law *applicable between the parties*’.⁹⁴ It is not yet settled in WTO jurisprudence whether the phrase ‘between the parties’ refers to rules of international law applicable between all (or perhaps a majority of) WTO members, or only between the parties to a specific dispute. Prior to *European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft* (*EC — Aircraft*), contradictory views had been expressed: the Panel in *United States — Import Prohibition of Certain Shrimp and Shrimp Products* (*US — Shrimp*) arguably supported an interpretation that the phrase referred only to the parties to that specific dispute,⁹⁵ while the Panel in *EC — Biotech* held that a non-WTO treaty could be taken into account only if all WTO member states were party to it.⁹⁶ While not ultimately ruling on the issue, the AB clarified in *EC — Aircraft* that, when recourse is had to a non-WTO rule for the purposes of interpreting provisions of the WTO agreements, a delicate balance must be struck between ‘taking due account of an individual WTO Member’s international obligations and ... ensuring a consistent and harmonious approach to the interpretation of WTO law among all WTO Members’.⁹⁷ The AB thus appears cautiously open to a less strict interpretation of ‘the parties’.⁹⁸ It may be arguable that, where the *vast majority* of WTO members are party to the treaty being considered in the context of interpretation (such as the *ICESCR* and the *ICCPR*), that treaty may be regarded as establishing ‘the common intention of the parties’. The position may be different for prohibitions applicable in the relations between all WTO members by virtue of their *jus cogens* status. Two such prohibitions would be the prohibitions on slavery and on (state-sanctioned) racial discrimination, both of which appear in the case studies

⁹² Regarding app I of the *Convention on International Trade in Endangered Species of Wild Flora and Fauna*, see Appellate Body Report, *US — Shrimp*, WTO Doc WT/DS58/AB/R, [25]. See also *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, signed 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975) app I.

⁹³ Regarding the United Nations *Declaration on the Rights of Indigenous Peoples* and the International Labour Organization *Convention No 169 concerning Indigenous and Tribal Peoples*, see Panel Report, *EC — Seal Products*, WTO Docs WT/DS400/R and WT/DS401/R, [7.292]–[7.295].

⁹⁴ Appellate Body Report, *US — Anti-Dumping and Countervailing Duties (China)*, WTO Doc WT/DS379/AB/R, [307] (emphasis added).

⁹⁵ Appellate Body Report, *US — Shrimp*, WTO Doc WT/DS58/AB/R. However, Richard Gardiner disputes that *US — Shrimp* actually stands for this proposition: Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2009) 273.

⁹⁶ Panel Report, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WTO Docs WT/DS291/R, WT/DS292/R and WT/DS293/R (29 September 2006) [7.65]–[7.72].

⁹⁷ Appellate Body Report, *EC — Aircraft*, WTO Doc WT/DS316/AB/R, [845].

⁹⁸ The AB again avoided ruling on this issue in *Peru — Agricultural Products* but expressed ‘reservations’ as to whether an FTA between only two WTO members ‘can be used under art 31(3) of the *Vienna Convention* in establishing the common intention of WTO Members’ underlying the relevant WTO provisions: Appellate Body Report, *Peru — Agricultural Products*, WTO Doc WT/DS457/AB/R, [5.105]–[5.106].

below. A respondent member would, of course, still need to establish the relevance of those prohibitions to the WTO law terms being interpreted.

4 Summary

While the scope of law the DSS may interpret and apply has been the subject of considerable debate over the first 20 years, the answer is still not clear. What is clear is that the ever-expanding web of trade-affecting treaty obligations is putting increasing pressure on the DSS to take a broader view of its mandate. Such a development would be positive from the perspective of those wishing for greater coherence between WTO and human rights obligations, and within public international law more generally.

It seems that the DSS would likely take cognisance of human rights law where it is introduced as evidence to establish a fact and, probably, where the human rights law raised constituted a *jus cogens* norm of customary international law. It is unlikely that human rights law will be successfully raised as a defence to a claim of non-compliance applying conflict-of-law principles, but it remains to be seen whether human rights norms may evince a complainant's waiver of procedural rights or consent to a measure. Possible future directions in these regards are discussed further in Part V.

The need to delve into the complex arguments above is, of course, obviated if the relevant measure falls within the *GATT* art XX exceptions. Through *GATT* art XX, some 'regulation' of the relationship between WTO law and human rights law is affected. The next section describes the nature of the exceptions in art XX and explains the progression of WTO jurisprudence relevant to its application to human rights measures over the past 20 years.

C *GATT Article XX: What We Have Learned about Its Purpose and Scope*

GATT art XX authorises domestic measures that are otherwise inconsistent with the *GATT*, provided that they fall into any of art XX's excepted policy areas. To obtain this protection, the measures must pass probing tests in the sub-articles and in the chapeau to art XX. Twenty years on, it is timely to assess the 'policy space' to enact trade-affecting human rights measures left to WTO members by art XX, as interpreted by the DSS. Only three of the 10 policy areas listed in art XX are likely to be directly relevant to human rights measures in general: the public morals exception in art XX(a); the human life or health exception in art XX(b); and the art XX(d) exception authorising measures which secure 'compliance with other laws or regulations which are not ... inconsistent' with the provisions of *GATT*.⁹⁹

There have been competing trends in WTO jurisprudence on art XX over the past 20 years. Four key legal questions have emerged from the reports of panels and the AB and from public debate around them. How broadly can the terms of art XX be read? Does art XX permit outwardly-focused, trade-affecting human rights measures? How is the 'necessity' of a measure to be determined? And finally, how can WTO adjudicators determine whether a measure is exploiting

⁹⁹ See Gillian Moon, 'Double Agents, Discrimination, Duress and Doha: A Review of Trade and Human Rights since the *China — Publications and Audiovisuals Decision*' (2011) 19 *African Journal of International and Comparative Law* 283, 284.

the opportunity provided by art XX to affect disguised protectionism? Each of these questions is addressed below, in the specific context of human rights measures.

1 *How Broadly Can the Terms of Article XX be Read?*

The DSS is not a precedential system; its rulings cannot ‘add to or diminish the rights and obligations’ of the members under the WTO agreements.¹⁰⁰ Nevertheless, prior opinions of the AB carry considerable weight and ‘a quick read of any panel or Appellate Body report shows extensive citation to prior reports’.¹⁰¹ Twenty years of WTO jurisprudence has given ground for some expectation that the terms of art XX may be read expansively, applying ‘customary rules of interpretation’, as stipulated by *DSU* art 3(2). Article 31(1) of the *VCLT* requires that treaties must 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(1) thus provides a lens through which WTO provisions may be read in light of contemporary norms (including those captured in international treaties), without needing to clear the hurdles posed by art 31(3)(c), discussed above.

Over the past 20 years, the AB has shown it is capable of reading art XX broadly. In particular, it is clear that the meaning of some terms in art XX may be capable of evolution. This ‘evolutionary approach’ is premised on the view that certain generic treaty terms were intended to keep pace with evolving societal values and the law in force at any given time.¹⁰² Two such are the terms ‘public morals’ in art XX(a) and ‘natural resource’ in art XX(g). The AB in *US — Shrimp* held that the Panel had wrongly failed to apply this approach to its interpretation of the phrase ‘exhaustible natural resource’ in art XX(g).¹⁰³ According to the AB, the generic term ‘natural resources’ in art XX(g) is not ‘static’ but ‘by definition, evolutionary’.¹⁰⁴ In order to obtain a contemporary meaning, the AB referred to a range of international conventions and reached the interpretive conclusion that all natural resources, living and non-living, were included in the term.¹⁰⁵ This interpretive approach indicates that, for generic terms, other international norms may be admitted to aid the interpretive process.

On this basis, it could be argued that adjudicators must assess the contemporary context of a country’s imposing, for example, a measure to protect public morals. The Panel in *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (‘*US — Gambling*’) stated that ‘the term “public morals” denotes standards of right and wrong

¹⁰⁰ *DSU* art 3(2).

¹⁰¹ Lester, Mercurio and Davies, *World Trade Law*, above n 3, 201.

¹⁰² Appellate Body Report, *US — Shrimp*, WTO Doc WT/DS58/AB/R, [129]–[130]. See also James Harrison, *The Human Rights Impact of the World Trade Organization* (Hart, 2007) 207–9; *Aegean Sea Continental Shelf (Greece v Turkey) (Judgment)* [1978] ICJ Rep 3, 31–2 [76]; *Kasikili/Sedudu Island (Botswana/Namibia) (Judgment)* [1999] ICJ Rep 1045, 1113 [2] (Judge Higgins); *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua) (Judgment)* [2009] ICJ Rep 213, 232–5 [32]–[41].

¹⁰³ Appellate Body Report, *US — Shrimp*, WTO Doc WT/DS58/AB/R, [127]–[131].

¹⁰⁴ *Ibid* [130].

¹⁰⁵ *Ibid* [131].

conduct maintained by or on behalf of a community or nation'.¹⁰⁶ In *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, the Panel treated the term public morals as an evolutionary one, observing that 'the content and scope of the concept of "public morals" can vary from Member to Member, as they are influenced by each Member's prevailing social, cultural, ethical and religious values'.¹⁰⁷

With regard to human rights specifically, James Harrison points out that 'public morals' is a particularly broad term within which 'the full range of human rights norms and principles that are codified in international legal instruments' could properly fall.¹⁰⁸ His view is that WTO jurisprudence suggests that WTO panels and the AB would be likely to take a flexible approach to the definition of the phrase. Robert Howse has also argued that it would be very difficult to sustain an argument that the norms and standards of international human rights law should be excluded from our understanding of what is meant in the contemporary context by public morals.¹⁰⁹ The question remains unresolved, even after the *EC — Seal Products* dispute. The Panel in that case found that the welfare of seals was an issue of a moral nature in the European Union and, hence, that the measure was one to protect public morals, but the Panel 'did not determine the moral content' of the indigenous exception in the measure.¹¹⁰ Thus, the opportunity to find that international instruments recognising indigenous rights and exhorting the international community to respect and protect them — instruments falling within the broad scope of international human rights law — was not taken up by the Panel or the AB.

The phrase 'human ... life or health' in *GATT* art XX(b) is also open to broad interpretation. This may include measures that protect all aspects of physical and psychological health and wellbeing. Thus, there is scope for prima facie WTO-inconsistent human rights measures to be excepted through a broad and evolving reading of at least these sub-articles of art XX. However, it is clear from the jurisprudence that panels and the AB will reserve for themselves the final determination of the precise character and phrasing of a measure's objective.¹¹¹ This exercise will be rigorously conducted, taking account of all available evidence, including the enacting member's view, together with 'the

¹⁰⁶ Panel Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/R (10 November 2004) [6.465] ('*US — Gambling*').

¹⁰⁷ Panel Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/R (12 August 2009) [7.759].

¹⁰⁸ Harrison, above n 102, 211.

¹⁰⁹ *Ibid* 205 nn 55–6, citing Robert Howse, 'Back to Court after Shrimp/Turtle? Almost but Not Quite Yet: India's Short Lived Challenge to Labour and Environmental Exceptions in the European Union's Generalized System of Preferences' (2003) 18 *American University International Law Review* 1333, 1368.

¹¹⁰ Appellate Body Report, *EC — Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R, [5.148].

¹¹¹ Panel Report, *Brazil — Retreaded Tyres*, WTO Doc WT/DS332/R, [7.42]–[7.43].

texts of the statutes, the legislative history, and other evidence regarding the structure and operation of the measure at issue'.¹¹²

2 Does Article XX Permit 'Outwardly-Directed' Measures Affecting Trade?

Within WTO jurisprudence, the AB has assiduously avoided the question of whether prima facie non-compliant, trade-affecting human rights measures may be excepted under *GATT* art XX on the basis that they pursue one of the listed policy purposes in a space beyond the territory of the regulating member.¹¹³ In *US — Shrimp*, the AB avoided the question, there being in that case a 'sufficient nexus' between the measure and the objective of protecting sea turtles generally, as the turtles passed through US territorial waters.¹¹⁴ In *EC — Seal Products*, the AB again avoided the question, reasoning that neither the European Commission ('EC') nor the complainants, Canada and Norway, had raised it in their appeals.¹¹⁵ Given that the EC and Canada are two of the most frequent and influential WTO litigants, this is perhaps an encouraging sign for those who believe that such outwardly-directed, trade-affecting measures should be permitted under WTO law.¹¹⁶

3 Determining the Necessity of a Trade-Affecting Human Rights Measure

Articles XX(a) and (b) require that a measure be 'necessary to protect', respectively, public morals or human life or health. The AB has explained that, except where a measure is patently indispensable, it will be subjected to 'weighing and balancing' to assess its necessity by reference to its trade-restrictiveness, the importance of the aims it pursues and the extent to which the measure contributes to the achievement of the aim.¹¹⁷ The AB has explained that this will be followed by a second analytical step in which a panel will evaluate whether a less trade-restrictive measure that makes at least an equivalent contribution is reasonably available.¹¹⁸ These two steps, or stages,

¹¹² Appellate Body Report, *EC — Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R, [5.134].

¹¹³ Measures with extraterritorial purposes and effects have been justified under WTO law (for example, *EC — Seal Products* and *US — Shrimp*). However, such measures have been justified on the basis of domestic regulatory concerns such as protecting public morals within the regulating member's own territory. The AB has not yet ruled on whether a measure may be justified under art XX solely for purposes beyond its territory, for example, for protecting exhaustible natural resources in foreign territory.

¹¹⁴ Appellate Body Report, *US — Shrimp*, WTO Doc WT/DS58/AB/R, [133].

¹¹⁵ Appellate Body Report, *EC — Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R, [5.173]. However, this may also have been because these parties preferred the law on this matter to remain ambiguous, rather than to risk establishing a precedent that a measure seeking to affect conduct beyond its jurisdiction may fall within the scope of art XX(a).

¹¹⁶ See Sarah Joseph, *Blame It on the WTO? A Human Rights Critique* (Oxford University Press, 2013) 106–7.

¹¹⁷ Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Docs WT/DS161/AB/R and WT/DS169/AB/R, AB-2000-8 (11 December 2000) [164] ('*Korea — Beef*'). See also Appellate Body Report, *US — Gasoline*, WTO Doc WT/DS2/AB/R, pt III; Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, AB-2000-11 (12 March 2001) [155]–[181] ('*EC — Asbestos*').

¹¹⁸ See Appellate Body Report, *EC — Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R, [5.169].

have been usefully conceptualised by Federico Ortino as requiring two types of proportionality. The first stage requires an assessment of whether the measure's level of trade-restrictiveness is 'strategically proportionate' to the importance of the measure's objective and the degree to which the measure contributes to that objective. The second stage is comparative and requires a more objective assessment of whether the measure is 'tactically proportionate', that is, whether a less trade-restrictive measure is reasonably available which would make no less a contribution to the *same* goal.¹¹⁹ In other words, 'tactical proportionality (or a cost-effectiveness test) involves a review of the instruments chosen to achieve the given objective, while strategic proportionality (or cost-benefit balancing) implies a review of the given objective itself'.¹²⁰

When assessing 'strategic proportionality', a panel will make separate findings regarding the measure's level of trade-restrictiveness, the degree to which it contributes to its objective and the importance of that objective. These findings may be produced within various disciplinary paradigms and may be qualitative or quantitative. WTO adjudicators may also be more or less deferential in assessing the strategic proportionality of a challenged measure. Sarah Joseph observes that the AB has shown willingness 'to concede the necessity of impugned measures when public health issues are at stake'¹²¹ because of the high importance of public health. She argues that this willingness would probably extend to protection of human rights because they, too, are of the 'highest importance'.¹²² However, the more a measure affects trade, it appears, the greater the importance which the AB will require of the measure's objectives and the greater its required contribution to the achievement of that objective. In *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, the AB held that, for a measure to be deemed necessary, the discriminatory element in it must make a 'material' contribution — indeed, a contribution closer to 'indispensable' — to the achievement of the measure's objective.¹²³ Subsequent AB reports have not followed this reasoning, with the AB in *EC — Seal Products* declining to set any threshold requirement, such as that of materiality, and explaining that:

[T]he very utility of examining the interaction between the various factors of the necessity analysis ... is that it provides a means of testing these factors as part of a holistic weighing and balancing exercise, whether quantitative or qualitative in

¹¹⁹ Federico Ortino, 'GATT' in Daniel Bethlehem et al (eds), *The Oxford Handbook of International Law* (Oxford University Press, 2009) 130, 143.

¹²⁰ Ibid. Note that while art XX does not expressly impose a test of proportionality, the set of tests which the AB has developed for determining necessity are very similar in practice: Harrison, above n 102, 212.

¹²¹ Joseph, *Blame It on the WTO?*, above n 116.

¹²² Ibid 113.

¹²³ Appellate Body Report, *Korea — Beef*, WTO Docs WT/DS161/AB/R and WT/DS169/AB/R, [161]. See Berta Esperanza Hernandez-Truyol and Stephen J Powell, *Just Trade: A New Covenant Linking Trade and Human Rights* (New York University Press, 2009) 97. Much narrower tests had been applied in pre-WTO disputes, including a standard of 'unavoidability' in: GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS21/R (3 September 1991, unadopted) GATT BISD 39S/155.

nature ... The flexibility of such an exercise does not allow for the setting of pre-determined thresholds in respect of any particular factor.¹²⁴

These open-textured tests leave much scope for subjective judgment, which diminishes their predictability. In contrast, the second stage of the analysis — that of tactical proportionality — lends itself to more objective and transparent reasoning. It simply requires that the degree of contribution which the measure makes to its objective be compared with any reasonably available alternative measures that equally contribute to the objective but are less trade-restrictive. Nonetheless, this second stage of the analysis still involves making value judgments. For example, the AB has noted that, the more trade-restrictive a measure, the more concerted will be the search for an alternative.¹²⁵ The AB has explained that:

[A]n alternative measure may be found not to be ‘reasonably available’ ... where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties.¹²⁶

However, a panel may have considerable latitude in determining whether a burden is ‘undue’ or whether costs are ‘prohibitive’. To complicate matters further, where a member is attacking a problem from multiple angles, as was the case in *Brazil — Measures Affecting Imports of Retreaded Tyres* (*‘Brazil — Retreaded Tyres’*), measures might be viewed as complementary rather than as ‘alternatives’.¹²⁷ Note, too, that the existence of available alternatives and the contribution they will make to the member’s objective will depend in part on how that objective is defined by the panel or the AB hearing the dispute. The wider the objective, the easier it would be for a complainant to demonstrate that alternatives were reasonably available.

The burden of proof in demonstrating ‘necessity’ under art XX shifts back and forth between respondent and complainant. The burden is on the respondent to demonstrate that the measure is of a type falling within one of art XX’s sub-paragraphs and that the measure is (strategically) necessary to fulfill that objective.¹²⁸ The burden then shifts to the complainant to postulate a ‘WTO-consistent alternative measure’ which the member concerned could ‘reasonably be expected to employ’ or a less WTO-inconsistent measure that is

¹²⁴ Appellate Body Report, *EC — Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R, [5.215].

¹²⁵ See, eg, Appellate Body Report, *Brazil — Retreaded Tyres*, WTO Doc WT/DS332/AB/R, [133]–[212]; Appellate Body Report, *EC — Asbestos*, WTO Doc WT/DS135/AB/R, [155]–[175].

¹²⁶ Appellate Body Report, *Brazil — Retreaded Tyres*, WTO Doc WT/DS332/AB/R, [156], quoting Appellate Body Report, *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) [308] (*‘US — Gambling’*).

¹²⁷ See Benn McGrady, ‘Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures’ (2009) 12 *Journal of International Economic Law* 153.

¹²⁸ Appellate Body Report, *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, AB-2004-1 (7 April 2004) [95].

‘reasonably available’.¹²⁹ At this point, ‘the responding party will be required to demonstrate why its challenged measure nevertheless remains “necessary” in the light of that alternative’.¹³⁰

The AB has, over time, moved its emphasis in the overall testing of necessity towards the tactical proportionality analysis. This may be in recognition of the extreme sensitivity of WTO members to review by the AB of the strategic proportionality of their chosen measures. Joseph spoke in 2011 of an increasingly deferential trend to assessing tactical proportionality, comparing the *GATT* Panel’s harsh approach to the respondent’s arguments in the pre-WTO dispute *Thailand — Restriction on Importation of and Internal Taxes on Cigarettes* with the AB’s more sceptical approach to the complainant’s proposed alternative measures in *Brazil — Retreaded Tyres*.¹³¹ Whether the increasing emphasis on tactical proportionality is a positive development has been debated.¹³² From a human rights perspective, a judicial approach that is deferential to domestic policymakers will be more positive than one that seeks to engage in a forensic, merits-style review of a measure’s design and operation.

4 How to Discern Disguised Protectionism

A measure which falls within one of the policy areas listed in art XX and which is held to be necessary will be considered to be ‘provisionally justified’.¹³³ However, for a measure to secure the validity provided by art XX, it must also comply with the demands of the chapeau.¹³⁴ The chapeau requires that a measure must not arbitrarily or unjustifiably discriminate between countries where the same conditions prevail, nor constitute a disguised restriction on international trade. The AB has described the purpose of the chapeau as being to guard against the abuse or misuse of the sub-article exceptions.¹³⁵ It also emphasised in *Brazil — Retreaded Tyres* that the chapeau is intended to prevent art XX being used as a way by which a member can circumvent its obligations towards other members.¹³⁶ When analysing whether a measure’s application constitutes ‘arbitrary or unjustifiable discrimination’, the AB will focus on the cause of or

¹²⁹ Appellate Body Report, *Korea — Beef*, WTO Docs WT/DS161/AB/R and WT/DS169/AB/R, [166], cited in Appellate Body Report, *EC — Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R, [5.261].

¹³⁰ Appellate Body Report, *US — Gambling*, WTO Doc WT/DS285/AB/R, [309]–[311]. See also Appellate Body Report, *Brazil — Retreaded Tyres*, WTO Doc WT/DS332/AB/R, [156]. Note that the issue of whether an alternative measure must be WTO-consistent, or merely less WTO-inconsistent, is not clear.

¹³¹ Joseph, *Blame It on the WTO?*, above n 116, 111–13. The two most recent cases examining this question have continued the trend towards treating proposed alternative measures with scepticism. See Appellate Body Report, *EC — Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R; Panel Report, *United States — Certain Country of Origin Labelling (COOL) Requirements*, WTO Docs WT/DS384/RW and WT/DS386/RW (20 October 2014) (*US — COOL*).

¹³² Sarah Cleveland argues that a strong insistence on this constitutes a narrow reading of art XX: Sarah H Cleveland, ‘Human Rights Sanctions and International Trade: A Theory of Compatibility’ (2002) 5 *Journal of International Economic Law* 133, 164.

¹³³ Appellate Body Report, *US — Gasoline*, WTO Doc WT/DS2/AB/R, pt IV.

¹³⁴ A measure which falls legitimately within any of the sub-articles will only be ‘provisionally justified’: Appellate Body Report, *US — Shrimp*, WTO Doc WT/DS58/AB/R, [118]–[120].

¹³⁵ Appellate Body Report, *US — Gasoline*, WTO Doc WT/DS2/AB/R, pt IV.

¹³⁶ Appellate Body Report, *Brazil — Retreaded Tyres*, WTO Doc WT/DS332/AB/R, [215].

rationale for the discrimination.¹³⁷ The AB will ask whether the rationale for discrimination is ‘legitimate’ in light of the objectives pursued and whether it bears a sufficiently ‘rational connection to the objective falling within the purview of a sub-article of Article XX’.¹³⁸ Many measures which have passed the tests in the sub-articles themselves have failed the tests in the chapeau. In *US — Gasoline*, for example, while the US *Clean Air Act*¹³⁹ was a provisionally justified measure, the AB held that the manner in which it was imposed represented unjustifiable discrimination and a disguised restriction on international trade.¹⁴⁰

More recently, the DSS has applied the tests in the chapeau in a way which arguably constrains the ability of sovereign states ‘to strike delicate compromises in real world circumstances’.¹⁴¹ In *EC — Seal Products*, an EC regulation banning the selling of seal products was struck down by the AB because it contained certain exceptions, particularly for products of seals hunted by Inuit peoples. The WTO Panel had earlier criticised the measure for attempting to balance the interests of animal welfare against the interests of preserving indigenous cultures, stating:

[W]hile the measure prohibits certain seal products on the EU market based on their link to the potential incidence of inhumane killing of seals, the measure allows commercial activities within the European Union, which is directly connected to the processing of the same products. This incoherency in the measure, in our view, further reduces the contribution of the measure to the reduction of the global demand for seal products derived from inhumane killing ... [T]he EU Seal Regime undermines its intended objective of addressing the EU public concerns on seal welfare ...¹⁴²

This is concerning, given that domestic social policy measures typically represent a patchwork of interests once they have passed through all the usual parliamentary processes and may constitute a compromise between competing but non-protectionist objectives. However, there are indications in *EC — Seal Products* that the AB might adopt a more flexible reading of the chapeau’s requirements in particular circumstances. In particular, a member may yet be able to justify discriminatory aspects of a measure even where those aspects are not rationally related to the objective under which the measure is provisionally justified. Arguably, this might occur where the discriminatory aspect of a measure may be justified as pursuing a separate, but justifiable, objective which

¹³⁷ Ibid [229].

¹³⁸ Ibid [227].

¹³⁹ *An Act to Improve, Strengthen, and Accelerate Programs for the Prevention and Abatement of Air Pollution*, Pub L No 88-206, 77 Stat 392 (1963).

¹⁴⁰ Appellate Body Report, *US — Gasoline*, WTO Doc WT/DS2/AB/R, pt IV. Once this unjustifiably discriminatory element had been removed by the United States legislature from the scheme, the measure became compliant.

¹⁴¹ Rob Howse, Joanna Langille and Katie Sykes, ‘Animal Welfare, Public Morals and Trade: The WTO Panel Report in *EC — Seal Products*’ (2014) 18(2) *ASIL Insights* <<http://perma.cc/J5ZN-B8D8>>.

¹⁴² Panel Report, *EC — Seal Products*, WTO Docs WT/DS400/R and WT/DS401/R, [7.448].

is non-protectionist and where the measure is being applied in a way that causes neither undue discrimination nor disguised restriction on international trade.¹⁴³

Building on what has been set out above, two case studies are presented which serve to illustrate how normative conflicts between WTO and human rights law may arise and the extent to which the general exceptions provision in *GATT* art XX might afford protection to human rights measures. They also indicate that the boundaries of the policy space reserved for WTO members to enact human rights measures might, if the measures are developed very carefully, be wider than is commonly believed.

III OUTWARDLY-DIRECTED MEASURES: LABOUR RIGHTS CASE STUDY

A *The Measure and Its 'GATT Compliance'*

Using what can be gleaned from the first 20 years of WTO jurisprudence, this Part analyses the *GATT*-compliance of a hypothetical domestic measure to combat core labour rights abuses ('CLRAs') in supply chains. The main objective of the hypothetical measure is to ensure that products for sale in the territory of the regulating member are not contaminated by CLRAs and that consumers may have confidence that this is the case. The measure is 'outwardly directed' in the sense that it targets human rights abuses in exporting states. Labour rights have been chosen because they are particularly relevant to trade in goods and because protecting labour rights in supply chains raises two probing compliance issues: PPMs and extraterritoriality.¹⁴⁴ This kind of measure is particularly antigenic, providing a useful 'canary in the coal mine' to test more deeply the tolerance of both the *GATT* and the DSS for trade-affecting human rights measures. If such a controversial measure as this were found to be *GATT*-consistent, there are strong grounds for anticipating that a wide range of human rights measures could be accommodated within WTO law, without need to confront the 'conflict of norms' difficulties already discussed.

The CLRAs which the system would seek to identify would be the four fundamental principles set out in the 1998 International Labour Organization's ('ILO') *Declaration on Fundamental Principles and Rights at Work*, which correspond with human rights obligations set out in the major international human rights instruments.¹⁴⁵ The fundamental principles/human rights are:

¹⁴³ Appellate Body Report, *EC — Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R, [5.321].

¹⁴⁴ See, eg, Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Trading Lives: Modern Day Human Trafficking* (2013) ch 6. This chapter examined the issue of exploitation in supply chains and noted the prevalence of products known to be contaminated with exploitation (including core labour rights abuse: slavery and human-trafficking). Indeed, 'the *ILO Work Declaration* exists because WTO Members in the 1996 *Singapore Declaration* embraced worker rights and asked the ILO to set down those most tied to trade': Hernandez-Truyol and Powell, above n 123, 363–4 n 27.

¹⁴⁵ International Labour Organization, *ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up* (Declaration adopted by the International Labour Conference, 86th sess, Geneva, 18 June 1998) [2]. Note that labour rights also derive from sources other than human rights instruments and that their status as human rights is contested in some circumstances. See Philip Alston, 'Labour Rights as Human Rights: The Not So Happy State of the Art' in Philip Alston (ed), *Labour Rights as Human Rights* (Oxford University Press, 2005) 1.

freedom of association and effective recognition of the right to collective bargaining;¹⁴⁶ the elimination of all forms of forced or compulsory labour;¹⁴⁷ the effective abolition of child labour;¹⁴⁸ and the elimination of discrimination in respect of employment and occupation.¹⁴⁹ Of these, only those instances of child and forced labour that coincide with slavery¹⁵⁰ and instances of official or state-sanctioned racial discrimination¹⁵¹ constitute *jus cogens* norms. Arguably, in targeting CLRAs occurring offshore, the measure implements the legal and moral obligations that the state may hold not to abet (labour-related) human rights abuses occurring anywhere, an obligation which may be owed *erga omnes*.¹⁵²

The hypothetical measure would require that all products for sale in the enacting country meet CLRA-free standards. It would establish a domestic authority to investigate the supply chains of suspect goods and to impose targeted trade barriers in specified circumstances. The system which the measure would create is modelled on the anti-dumping system, with which WTO members are already very familiar. Unlike systems which merely aim to encourage transparency¹⁵³ or to provide consumers with information via product labelling,¹⁵⁴ this system would have considerable enforcement capability. Being highly targeted, it would not simply impose blanket bans on all goods from countries with poor labour standards¹⁵⁵ or on all goods of particular types.¹⁵⁶

¹⁴⁶ Corresponding to human rights in: *ICCPR* art 22; *ICESCR* art 8.

¹⁴⁷ Corresponding to human rights in: *ICCPR* arts 4, 8(3); *ICESCR* art 6(1). See also *Slavery Convention*, signed 25 September 1926, 60 LNTS 253 (entered into force March 9, 1927) ('*Slavery Convention of 1926*'); *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, signed 7 September 1956, 266 UNTS 3 (entered into force 30 April 1957). The supplementary convention retained the definition of slavery from the *Slavery Convention of 1926*.

¹⁴⁸ Corresponding to human rights in: *ICESCR* art 10(3); *Convention on the Rights of the Child*, signed 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 32.

¹⁴⁹ Corresponding to human rights in: *ICESCR* arts 2(2), 3; *ICCPR* art 4; *ICERD* art 5(e); *Convention on the Elimination of All Forms of Discrimination against Women*, signed 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

¹⁵⁰ See Denkers, above n 56, 141.

¹⁵¹ Brownlie, above n 39.

¹⁵² See Christian J Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press, 2005). As noted in Part II of this article, such claims are contested.

¹⁵³ See, eg, *California Transparency in Supply Chains Act of 2010*, Cal Civil Code § 1714.43 (2012). This Act requires retail sellers and manufacturers doing business in that state to disclose their efforts to eradicate slavery and human trafficking from their direct supply chains for tangible goods offered for sale.

¹⁵⁴ See Carlos Lopez-Hurtado, 'Social Labelling and WTO Law' (2002) 5 *Journal of International Economic Law* 719.

¹⁵⁵ See the historical example of trade sanctions imposed on Myanmar in retaliation against state-sanctioned forced labour: Francis Maupain, 'Is the ILO Effective in Upholding Workers' Rights? Reflections on the Myanmar Experience' in Philip Alston (ed), *Labour Rights as Human Rights* (Oxford University Press, 2005) 85. Also see Denkers, above n 56.

¹⁵⁶ In relation to conflict diamonds, see, eg, Krista Nadakavukaren Schefer, 'Stopping Trade in Conflict Diamonds: Exploring the Trade and Human Rights Interface with the WTO Waiver for the Kimberly Process' in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi (eds), *Human Rights and International Trade* (Oxford University Press, 2005) 391. Further, unlike more quixotic models, there would be no policing of minimum standards and, as such, no reliance on major changes to international architecture. See, eg, Renee Chartres and Bryan Mercurio, 'A Call for an Agreement on Trade-Related Aspects of Labor: Why and How the WTO Should Play a Role in Upholding Core Labor Standards' (2012) 37 *North Carolina Journal of International Law and Commercial Regulation* 665.

Instead, officials would investigate the supply chains of particular goods from particular countries. Countries and exporters subject to investigation would have the same incentive to cooperate as they do with the anti-dumping system: if they were non-cooperative, investigators might make determinations on the basis of ‘facts available’, which would primarily be supplied by the complainant.¹⁵⁷ Investigators would then make legal determinations under statutory criteria consistent with international human rights law.¹⁵⁸ Depending on the circumstances, import restrictions would then be imposed on a country-, product- or company-specific basis.¹⁵⁹

The hypothetical measure would be discriminatory on its face because it would differentiate between physically identical products on the basis of human rights violations occurring in the production processes of some. It would confer an advantage upon CLRA-free products from certain countries over like, but CLRA-contaminated, products from other member countries. Depending on the nature and enforcement of domestic labour laws, it is also likely that the measure would result in treatment less favourable for imported than for like, locally-produced products. Under the *GATT*, products will ordinarily be considered ‘like’ regardless of differences in their PPMs. Panels and the AB have repeatedly confirmed that products will be considered like where they have ‘the same physical characteristics ... the same end uses and the same tariff headings ... and ... no evidence of any difference in consumers’ perceptions and behaviour’.¹⁶⁰ In limited circumstances, it is possible that products which are apparently physically identical may be found to be unlike, despite appearances. For example, the AB in *European Communities — Measures Affecting Asbestos and Asbestos Containing Products* found that products which contained a highly carcinogenic form of asbestos were unlike products which did not. The different

¹⁵⁷ See *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1868 UNTS 3 (entered into force 1 January 1995) annex 1A (*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*) art 6(8):

In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

This provision is mirrored in: *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (*Agreement on Subsidies and Countervailing Measures*) art 12(7).

¹⁵⁸ For a discussion of how findings of de facto slavery may be determined in domestic legal systems, see Rachel Harris and Katharine Gelber, ‘Defining “De Facto” Slavery in Australia: Ownership, Consent and the Defence of Freedom’ (2011) 11 *International Criminal Law Review* 561.

¹⁵⁹ Measures of this kind are not beyond the realm of possibility. See, eg, *California Transparency in Supply Chains Act*, Cal Civil Code § 1714.43 (2012). Similarly, in 2013, the (then) Australian Government announced ‘a new whole-of-government strategy to reinforce ethical behaviour in procurement so that no firm providing goods or services to the Commonwealth is tainted by slavery or people-trafficking anywhere in the supply chain’: Julia Gillard, ‘International Women’s Day Breakfast’ (Speech delivered at the International Women’s Day Breakfast, Sydney, 8 March 2013) <<http://perma.cc/S7QH-QZCH>>. The proposed strategy involved training government officials and, as such, relied on their due diligence: Julia Gillard, ‘Further Government Action to Eliminate Modern Slavery’ (Media Release, 19141, 8 March 2013) <<http://perma.cc/5DJE-X5PX>>.

¹⁶⁰ Panel Report, *Brazil — Retreaded Tyres*, WTO Doc WT/DS332/R, [7.145].

level of danger the two products posed to human health was sufficient to render them unlike.¹⁶¹

It is also possible that consumers might indicate through their purchasing preferences that they did not view two physically like products as substitutes for each other. The AB has emphasised that the determination of likeness under *GATT* art III(4) (the NT provision) ‘is a determination about the nature and extent of a competitive relationship between and among the products at issue’.¹⁶² In the present example, if there were evidence that CLRA-contaminated products were not being bought as substitutes for uncontaminated products, the two products might be considered unlike. However, it is probable that community awareness of the issues would not be sufficiently strong for this to occur in a definitive way. In addition, the threshold test for finding that products are sufficiently substitutable by consumers one for another is not particularly high.¹⁶³

A line of reasoning in which the AB seemed to interpret the like products test more narrowly has not been followed. On this narrow view,¹⁶⁴ products should not be considered ‘like’ if the respondent has a non-protectionist policy basis for treating the products differently (the so-called ‘aim and effects’ test). Applying that reasoning to the present case, measures imposing trade restrictions on goods contaminated with CLRAs would not breach arts I or III because the member would have a non-protectionist reason for distinguishing between the products. However, it is very unlikely that the AB would re-adopt this approach in the future¹⁶⁵ as recent attempts to revive it have indicated.¹⁶⁶ The key reason for the

¹⁶¹ Appellate Body Report, *EC — Asbestos*, WTO Doc WT/DS135/AB/R, [87]–[154].

¹⁶² Appellate Body Report, *US — Clove Cigarettes*, WTO Doc WT/DS406/AB/R, [120].

¹⁶³ For example, see Appellate Body Report, *Philippines — Taxes on Distilled Spirits*, WTO Docs WT/DS396/AB/R and WT/DS403/AB/R, AB-2011-6 (21 December 2011) [142]–[157].

¹⁶⁴ For example, the *GATT* Panel interpreted the ‘like product’ concept by considering the policy objective stated in art III(1) of the *GATT*: *GATT* Panel Report, *United States — Measures Affecting Alcohol and Malt Beverages*, *GATT* Doc DS23/R (16 March 1992, adopted 19 June 1992) *GATT* BISD 39S/206. The Panel interpreted these words to mean that the legitimacy of internal taxes and regulations should be determined on the basis of their market effects *and* their aim, that is, whether they have a legitimate regulatory purpose. When the US was unable to provide any legitimate regulatory purpose for making a regulatory distinction between grape varieties, the Panel concluded that the only evident *purpose* of the product distinction was to protect local producers. The Panel also found that the *effect* of the tax differential was protective and thus concluded that the product distinction had both the ‘aim and effect’ of protecting domestic production. On this basis, the Panel concluded that the types of grape were like products. See also Robert E Hudec, ‘*GATT*/WTO Constraints on National Regulation: Requiem for an “Aim and Effects” Test’ (1998) 32 *International Lawyer* 619.

¹⁶⁵ See Appellate Body Report, *Korea — Taxes on Alcoholic Beverages II*, WTO Docs WT/DS75/AB/R and WT/DS84/AB/R, AB-1998-7 (18 January 1999) [99]–[101]; Hudec, above n 164.

demise of an aims and effects test is that it would call the purpose of art XX into question and would seemingly render the chapeau inutile.

The EC, nonetheless, recently presented a comparable argument in *EC — Seal Products* (albeit in the context of assessing whether less favourable treatment had been afforded, as opposed to whether the products involved were ‘like’). The EC reasoned that a measure will not violate NT or MFN obligations if the discrimination involved flows from the making of a ‘legitimate regulatory distinction’ (‘LRD’), a doctrine similar to the ‘aim and effect’ test.¹⁶⁷ The concept of LRD was developed in the context of interpreting the WTO *Agreement on Technical Barriers to Trade* (‘*TBTA*’), but the EC argued that the LRD test should also apply when interpreting NT and MFN obligations in the *GATT*.¹⁶⁸ The AB rejected the EC’s argument, stating that the LRD test is

¹⁶⁶ See the revival attempt in: Panel Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc WT/DS406/R (2 September 2011) [7.114]–[7.116]. This formulation was rejected on appeal: Appellate Body Report, *US — Clove Cigarettes*, WTO Doc WT/DS406/AB/R, [117]–[118]. See also Appellate Body Report, *Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes*, WTO Doc WT/DS302/AB/R, AB-2005-3 (25 April 2005) [96]. The AB report’s suggestion that a measure will only violate *GATT* art III where the discrimination relates to the foreign origin of the product has not been followed. See especially Appellate Body Report, *US — Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R, [5.104].

¹⁶⁷ This was an attempt to moderate the expansive reading of de facto discrimination adopted in previous AB decisions. See Appellate Body Report, *US — COOL*, WTO Docs WT/DS384/AB/R and WT/DS386/AV/R, [289]:

[I]f a specific technical regulation adopted by a Member gives rise to adverse effects in the market, which disparately impact imported products, such effects will be attributable to the technical regulation for purposes of examining less favourable treatment under Article 2.1.

¹⁶⁸ The European Commission argued that the ‘regulatory space’ left to members would be wider under the *Agreement on Technical Barriers to Trade* (‘*TBTA*’) than under the *GATT*, as the objective pursued under a *TBTA* measure need only be ‘legitimate’, whereas it would need to fit within the specific exceptions listed in *GATT* art XX. The EU argued that:

[T]he national treatment obligations of Article 2.1 and Article III.4 are ‘built around the same core terms’. The contours of the basic non-discrimination obligations in Article 2.1 of the *TBT Agreement* and Article III:4 of the *GATT 1994* are similarly crafted as there would be no point in recognising the regulatory space in the *TBT Agreement* if then the same regulatory autonomy were to be undermined under Article III:4 of the *GATT 1994*.

European Communities — Measures Prohibiting the Importation and Marketing of Seal Products: Second Written Submission by the European Union, DS400 and DS401 (27 March 2013) (Written Submissions) [345].

reserved for the *TBTA* only and was applied to solve the textual problem that *TBTA* art 2.1 lacks any express exception.¹⁶⁹

The enacting state in the present case might nonetheless argue that the measure was not discriminatory since it subjected all imported and locally produced products to identical labour standards. However, as explained in Part II, the *GATT* prohibits discrimination even where it is of a de facto or indirect kind: despite being origin-neutral on its face, the measure might nonetheless alter competitive conditions between like imports or between imported and domestic like products.¹⁷⁰ In the present case, where CLRAs are less common in the country legislating the measure than in many of the countries which export goods to it, and more common in some of those exporting countries than in others, a claim of de facto discrimination would likely succeed under both the MFN and NT rules.

Taking all of the above into account, it is likely that at least some aspects of the hypothetical CLRA measure would fail to comply with *GATT* arts I and III.¹⁷¹ The measure might, however, find protection in art XX. The discussion below deals first with provisional justification, exploring whether the CLRA measure might fall within the range of measures within one of the policy areas listed in art XX. It then considers the implications of the requirement in arts XX(a), (b) and (d) that, to be valid, measures must be ‘necessary’ for achieving their objectives and, finally, it applies the chapeau tests to the measure.

B *Would the Measure be Valid under Article XX?*

1 *Is the Measure Aimed at One of the Objectives Listed in Article XX?*

The objective of the hypothetical measure is to protect the public from the moral hazard and moral contamination caused by consuming, say, slave-made imports. However, the measure arguably aims to protect public morals both in the member’s territory and in *external* territories. It might be argued that the extraterritorial element of the present measure is an essential one in protecting the public of the enacting state from moral hazard and moral contamination. In

¹⁶⁹ Appellate Body Report, *EC — Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R, [5.90]. The AB washed its hands of any inconsistency between the relative scopes of application of the *GATT* and the *TBTA*, retorting that it is obliged to give meaning to the texts as it finds them and that ‘[i]f there is a perceived imbalance in the existing rights and obligations under the *TBT Agreement* and the *GATT 1994*, the authority rests with the members of the WTO to address that imbalance’: at [5.129]. For a more recent example, see Panel Report, *US — COOL*, WTO Docs WT/DS384/RW and WT/DS386/RW, [5.370]–[5.380]. The AB was again able to avoid confronting the problem of a measure being found consistent with *TBTA* art 2.1 but potentially inconsistent with *GATT* arts III(4) and XX, given the apparently differing scope of those provisions because the measure was found inconsistent with *TBTA* art 2.1. However, it seems likely that such a scenario will arise in the future, which may put further pressure on the DSS to interpret the scope of *GATT* art XX broadly, so as to avoid such apparent inconsistency.

¹⁷⁰ Appellate Body Report, *US — COOL*, WTO Docs WT/DS384/AB/R and WT/DS386/AB/R, [289]; Appellate Body Report, *EC — Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R.

¹⁷¹ The proposed system would not fall under *GATT* art XI given that it is a generally applicable measure with a border arm, as opposed to an import restriction. See *Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade*, opened for signature 14 September 1948, 62 UNTS 80 (entered into force 30 May 1995) pt G(i).

light of dicta in the *EC — Seal Products* dispute, such an argument may have reasonable prospects. The public morals exception may lend itself fairly generously to justifications based on providing inwardly-directed protection, even where the measure in question also has outwardly-directed effects on public morals.

Whether combatting CLRAs in supply chains would fall within an evolved or contemporary meaning of ‘public morals’ would be a question of fact. The reasoning of the Panel in *EC — Seal Products* is consistent with this approach. In order to glean whether the measure was aimed at protecting public morals, the Panel assessed

first, whether the concern in question *indeed exists* in that society; and second, whether such concern falls within the scope of ‘public morals’ as ‘defined and applied’ by a regulating Member ‘in its territory, according to its own systems and scales of values’.¹⁷²

The Panel concluded that the objective of the EU seal regime was ‘to address the moral concerns of the EU public with regard to the welfare of seals’.¹⁷³ In the present hypothetical case, evidence of international consensus that labour rights abuses are a moral issue would support such an argument but would not be definitive. The AB’s reasoning in *US — Gambling* indicates that support from the relevant ILO and human rights treaties would assist,¹⁷⁴ as would evidence of domestic parliamentary and policy processes describing a matter as a moral issue.¹⁷⁵

It could also be argued that the measure is aimed at protecting the health of workers in supply chains, citing clear links between CLRAs and poor physical and mental health outcomes. However, in relying on art XX(b), the objective of the measure would have to be understood as entirely outwardly-directed, since the measure could not in any sensible way be said to protect the health of that state’s nationals. In *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries*, the Panel held that art XX(b) cannot apply to outwardly-focused measures: the challenged measure was not one for the purpose of protecting human life or health because ‘the policy reflected in the [measure under dispute was] not one designed for the purpose of protecting human life or health in the [EC]’.¹⁷⁶ It remains to be seen how broadly the AB may read art XX(b).

¹⁷² Appellate Body Report, *EC — Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R, [7.383] (emphasis added).

¹⁷³ Panel Report, *EC — Seal Products*, WTO Docs WT/DS400/R and WT/DS401/R, [7.410]. Specifically, the Panel referred to EU citizens’ wish to avoid

individual and collective participation as consumers in, and exposure to (‘abetting’), the economic activity which sustains the market for seal products derived from inhumane hunts ... [T]he ban under the EU Seal Regime is capable of making a contribution to preventing the EU public from being exposed on the EU market to products that may have been derived from seals killed inhumanely in Canadian or Norwegian hunts.

At [7.410], [7.448].

¹⁷⁴ Appellate Body Report, *US — Gambling*, Doc WT/DS285/AB/R, [6.471].

¹⁷⁵ *Ibid* [6.481].

¹⁷⁶ Panel Report, *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/R (1 December 2003) [7.210].

A final consideration is whether art XX(d) might provide protection for the CLRA measure. This sub-article requires that a measure be necessary ‘to secure compliance with [another measure] which is not inconsistent with’ the *GATT*. There seems no reason to expect that domestic laws guaranteeing core labour rights, such as non-discrimination in employment, freedom from servitude and from forced or compulsory labour, and freedom to form and join trade unions,¹⁷⁷ would per se be inconsistent with the *GATT*. However, it would be difficult to disentangle ‘the measure’ from the laws requiring it, given that measures are normally broadly defined by complainants as comprising all laws and regulations related to them. A further difficulty for the enacting state would lie in convincing a panel or the AB that the CLRA measure is in some way needed to ‘secure compliance’ with the domestic laws. This would depend, of course, on the content of those laws. At this point, the argument threatens to become circular: if the domestic laws require the state to protect labour rights in jurisdictions other than its own, such that the CLRA measure was indeed required to secure compliance with those domestic laws, doubt would probably exist about the *GATT*-consistency of the domestic laws in the first place. How could a law requiring a provisionally *GATT*-inconsistent measure be *GATT*-consistent? Alternatively, however, the domestic laws might simply guarantee core labour rights, without mandating any particular measures in order to support this guarantee. This flexibility would allow the domestic laws the possibility of being *GATT*-consistent, but would likely lead to a discussion of the nature and content of the rights in their instruments of origin, the human rights treaties and ILO instruments. This would return the analysis to the contested matters explored in the above paragraphs, including whether the provisionally *GATT*-inconsistent measure really was needed to secure compliance with those laws, or whether a less trade-restrictive route could have been taken. Such reasoning ventures into the realm of absurdity, which the treaty drafters would clearly not have intended.

To avoid such an absurd result, art XX(d) might instead be understood as a general requirement that a measure be needed to achieve an objective that is non-protectionist or otherwise not contrary to *GATT* principles and is sanctioned by relevant domestic lawmakers. This interpretation would also have the benefit of resolving the apparent inconsistency between the scope of exceptions in the *TBTA* and the *GATT*, discussed further below. However, as yet, there is scant judicial support for this interpretation and such an argument should be made in the alternative, rather than as the primary means of justifying these measures.

To protect against the risk that the measure is found not to fall within any of the listed objectives in art XX,¹⁷⁸ the respondent may argue that the measure is also defensible under the ‘conflict-of-norms’ principles discussed in Part II(B) above. However, it is unlikely that it could rely on human rights law as a defence in these circumstances. Not least, this is because there is presently no obligation

¹⁷⁷ *ICCPR* arts 2(1), 8(2), (3)(a), 22(1).

¹⁷⁸ In this situation, measures that de facto discriminate against or between imports may be prohibited per se. This is distinct from a situation where a measure fails the more open-textured tests of art XX because, for example, it is more trade-restrictive than necessary or fails the chapeau tests. As discussed above, it will be difficult to argue that a state is obliged or expressly permitted to enact measures in bad faith or in an arbitrary, unjustifiable or unnecessarily trade-restrictive way.

under treaty or customary international law for parties to enact CLRA measures so as to set up a potential conflict with WTO law.¹⁷⁹

2 *Is the Measure 'Necessary'?*

In order to be deemed 'necessary', the hypothetical measure would need to be both strategically and tactically proportionate. To be strategically proportionate, the measure's level of trade-restrictiveness must be in balance with the importance of the objective. One way to assess a measure's importance is to examine its 'risks of non-fulfillment'. The risks from not fulfilling this measure's objective would be that the public morals of citizens would be compromised and that the health of workers in exporting states would be impaired. Weighing these risks is highly value-laden, particularly when protecting something as amorphous as 'public morals' from risk. Indeed, the importance a society assigns to preserving morality (as described by it) may vary greatly between WTO members.

Assessing strategic proportionality also involves assessing the contribution of the measure to its objective, which will partly depend on how the objective is characterised. The present measure arguably makes a high contribution to the objective of protecting public morals but may make a relatively low contribution to protecting the lives and health of foreign workers (depending on how many states adopt such measures, the pressure that can be brought to bear on the governments of exporting states and the commercial interests of those in the supply chain). A complainant could be expected to argue that the measure will not benefit human rights overall and that newly unemployed children will turn instead to prostitution or sink further into poverty — an 'immoral' result and a net decrease in human health. These are complex questions of fact and law and it is difficult to predict confidently how a panel or the AB would determine these facts and 'weigh and balance' these various elements (which, as argued above, may partly explain the shift in emphasis towards the relatively more objective tactical stage of the necessity test). While measures no longer need to meet a threshold of 'material' contribution, members will always do well to amass evidence that a measure makes a maximal contribution to its objective(s). This will stand the measure in good stead in weighing and balancing the measure's level of contribution against its trade-restrictiveness, as well as in diminishing the likelihood that the complainant will be able to demonstrate that a reasonably available, but less trade-restrictive, measure makes an equivalent contribution.

¹⁷⁹ The situation may be different where the extrinsic law called on in defence is of *jus cogens* status. It could be argued that the hypothetical respondent state would be obliged or at least entitled to impose countermeasures against another state responsible for slavery in supply chains and that it cannot contract out of this obligation or entitlement. However, the international law of countermeasures only applies where the state itself can be held responsible for breaching the peremptory norm, as opposed to individuals or corporations operating in its territory. See generally Denkers, above n 56. This requirement could be met in some instances, but will constitute a small subset of the imports targeted by this measure. As discussed above, the situation may also be different where there is evidence that a complainant has waived its right to a panel with regards to the measure or has consented to the measure, or where the disputing parties have relevantly modified WTO obligations inter se. For a panel to accept such arguments would constitute a step away from the more isolationist approaches the DSS has taken to date.

Assessing strategic proportionality also requires balancing the importance of the measure's objective and the measure's contribution to that objective against its 'trade-restrictiveness', although the exact meaning of that term is unclear. It has been described by the AB as something 'having a limiting effect on trade'.¹⁸⁰ Given that this measure is a targeted one, as opposed to a blanket ban, it may cause only a minimal amount of restriction on trade flows overall. In the context of the *GATT*, 'trade-restrictiveness' has also been described as the degree of provisional WTO-inconsistency.¹⁸¹ On this view, the degree of 'trade-restrictiveness' will be the degree to which a measure alters competitive conditions against or between like products. On either view, this will be a question of fact.

Turning to the requirement for tactical proportionality, the onus is on the complainant to postulate a less trade-restrictive alternative that will make an equal or greater contribution to the measure's objective. It is then up to the respondent to establish that such an alternative is not less trade-restrictive, does not make an (at least) equivalent contribution to the objective, or is not 'reasonably available' — all questions of fact. How the objective is phrased is again crucial. If the measure's objective is stated too broadly (for example, to protect the human health of workers), this vastly opens up the range of less trade restrictive alternative measures that may make an equal or greater contribution to this objective. If it is stated more narrowly (for example, to prevent the public morals of consumers being compromised through consumption of goods contaminated with CLRAs), fewer alternatives will do this precise job. Notably, the AB has acknowledged that it is up to the regulating member to set its 'level of protection' against a particular risk. The AB in *EC — Seal Products* affirmed the deferential approach to this issue taken in *US — Gambling*, which it said

underscored that Members have the right to determine the level of protection that they consider appropriate, which suggests that Members may set different levels of protection even when responding to similar interests of moral concern.¹⁸²

¹⁸⁰ Appellate Body Reports, *United States — Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R, AB-2012-2 (16 May 2012) [319]. See also Appellate Body Report, *US — COOL*, WTO Docs WT/DS384/AB/R and WT/DS386/AB/R, [375].

¹⁸¹ When applying the *GATT* art XX 'necessity test', the AB has held that a measure will be trade-restrictive to the extent that it has been found provisionally inconsistent with *GATT*. The AB has used the concepts of 'less trade-restrictive' and 'less *GATT*-inconsistent' interchangeably. For example, it observed in *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, in the context of comparing alternative measures, that:

In *Korea — Various Measures on Beef* and *EC — Asbestos*, the Appellate Body clarified that, as part of an overall evaluation of 'necessity' using the 'weighing and balancing' process, a panel must examine whether the responding party could reasonably be expected to employ an alternative measure, consistent (or less inconsistent) with the covered agreements, that would achieve the objectives pursued by the measure at issue.

Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/AB/R, AB-2009-3 (21 December 2009) [318] ('*China — Publications and Audiovisual Products*').

¹⁸² Appellate Body Report, *EC — Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R, [5.200].

This is particularly important in the context of assessing less trade-restrictive alternatives: any such alternatives must provide no less a level of protection, meaning that the DSS will not ‘second-guess’ the lengths to which a member goes to address a particular risk.

Assuming the jurisprudential trends discussed above continue, there is a good chance the present hypothetical human rights measure would be found strategically proportionate and that WTO adjudicators will maintain a relatively high bar in evaluating a complainant’s submissions that the measure was not tactically proportionate. Particularly if morality is understood in deontological rather than utilitarian terms,¹⁸³ it would be difficult to argue that less trade-restrictive alternative measures could provide an equal safeguard against the risk of consumers participating in immoral practices.¹⁸⁴ In other words, it is hard to envisage an alternative which could achieve this policy outcome to this degree.¹⁸⁵

3 *Does the Measure Meet the Requirements of the Chapeau?*

Whether the proposed CLRA measure would meet the requirements of the chapeau would largely depend on the measure’s structure. A panel or the AB will want to be certain that the manner in which the measure is applied is not arbitrarily or unjustifiably discriminatory and that the measure is not a disguised restriction on international trade. If the legislators avoided any temptation to favour special interests, if the measure were tightly targeted and if each aspect bore a rational relationship to a listed (or at least non-protectionist) objective under art XX, it would have a good chance of success. The fact that this measure would target individual supply chains contaminated by CLRAs, rather than imposing blanket bans on imports from certain countries, should make it more readily justifiable as a non-arbitrary measure. The AB has shown repeatedly that its scrutiny of a measure under chapeau discipline will be rigorous, in order to unearth disguised protection of domestic industry. However, the targeted nature of the measure shields it from both claims of arbitrariness and protectionism. In short, provided the measure is meticulously designed, it appears to have good prospects of meeting chapeau strictures.

¹⁸³ For an explanation of the differences between these approaches, see Shaun Nichols and Ron Mallon, ‘Moral Dilemmas and Moral Rules’ (2006) 100 *Cognition* 530.

¹⁸⁴ See Joseph, *Blame It on the WTO?*, above n 116, 108–10; Jeremy C Marwell, ‘Trade and Morality: The WTO Public Morals Exception after *Gambling*’ (2006) 81 *New York University Law Review* 802; Christoph T Feddersen, ‘Focusing on Substantive Law in International Economic Relations: The Public Morals of *GATT*’s Article XX(a) and “Conventional” Rules of Interpretation’ (1998) 7 *Minnesota Journal of Global Trade* 75–6. See also Harrison, above n 102; Charnovitz, ‘The Moral Exception in Trade Policy’, above n 11.

¹⁸⁵ Note that core labour rights abuses were accepted as international ‘standards’ by the WTO. See *Singapore Ministerial Declaration*, WTO Doc WT/MIN(96)/DEC (18 December 1996, adopted 13 December 1996) para 4. Had this measure been a technical regulation covered by the *TBTA* and based on an international standard, it could have been defended as being based on a ‘legitimate regulatory distinction’ and presumptively not more trade-restrictive than necessary.

IV INWARDLY-FOCUSED MEASURES: RACIAL EQUALITY CASE STUDY

A *The Measure and Its 'GATT Compliance'*

The hypothetical human rights measure analysed in this Part is solely 'inwardly-directed' in that it seeks only to advance the human rights of a group within its own territory. The measure exempts the products produced by the enacting state's racial or ethnic minority enterprises from consumption taxes. From a human rights law perspective, the measure is part of the state's efforts to counter discrimination on the basis of race or ethnicity, discrimination which is unlawful under the international human rights conventions. Both the *ICESCR* and the *ICCPR* prohibit discrimination, in the realisation and enjoyment of the human rights in those covenants, 'as to race, colour, language ... national or social origin ... or other status'.¹⁸⁶ Importantly, longstanding racial discrimination may cause racially-delineated inequality to develop. Where this has occurred, the *ICERD* obliges states party to take the positive step of introducing temporary 'special measures', where 'warranted', to help raise those who have experienced injurious discrimination to a position of equality with those who have not.¹⁸⁷ The consumption tax exemption is a 'temporary special measure' which, for present purposes, will be taken to be both 'warranted' by the inequality existing in the hypothetical state and directed at the benefit of a disadvantaged racial/ethnic minority.

The NT rule in *GATT* art III(2) requires that internal taxes applied to imported products not be in excess of those applied to like, locally-produced products, where the two are 'directly competitive or substitutable'.¹⁸⁸ Products will be 'like', despite differences in their PPMs, where they have the same physical characteristics, end uses and tariff classifications, and where there is no evidence of a significant difference in consumers' perceptions and behaviour. In the present case, the only relevant difference between the products is the ethnic identity of their producers, a distinguishing characteristic which will not, in the absence of strong consumer differentiation, render the products unlike. The consumption tax exemption measure creates a situation in which internal sales of all imported products are taxed but those of minority-produced, like domestic products, are not. Although the like products of *non-minority* local enterprises would also be taxed, to the extent that the measure favours locally-produced goods over their imported equivalents, it would tax imported products in excess of directly competitive and substitutable like domestic products.¹⁸⁹ The tax

¹⁸⁶ *ICESCR* art 2(2); *ICCPR* art 2(1). The prohibition relates to enjoyment and realisation of the rights set out in the covenants, but the right to and guarantee of equality before the law in art 26 of the *ICCPR* are autonomous and are not expressed as confined to the rights in that *Covenant*.

¹⁸⁷ *ICERD* art 2(2). While the prohibition on official or state-sponsored racial discrimination is a *jus cogens* norm, it is unlikely that the state obligation to introduce special measures shares that status.

¹⁸⁸ *GATT* art III(2).

¹⁸⁹ In *US — Clove Cigarettes*, the AB emphasised the importance of comparing imports as a group with domestic products as a group when assessing whether imports are being treated less favourably. It explained that the assessment

measure might also have ‘a detrimental impact on competitive opportunities for imported products, compared to like domestic products’.¹⁹⁰ Additionally, where large sales volumes or numerous minority enterprises were involved, the tax measure might afford a substantial level of protection overall to domestic production. In all, the tax measure would fail to comply with the NT disciplines in *GATT* art III.

B *Would the Measure be Valid under Article XX?*

1 *Is the Measure Aimed at One of the Objectives Listed in Article XX?*

The objective of the present, hypothetical measure may be compiled from two sources. First, art 2(2) of the *ICERD* requires the use of temporary special measures ‘in the ... economic ... field’, to ‘ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms’. Secondly, a Commission established in South Africa to report on ways of raising black participation in the economy recommended that the government look at a more extensive system of tax incentives for black small and medium enterprises, with the objective of ‘ensur[ing] broader and meaningful participation in the economy by black people to achieve sustainable development and prosperity’.¹⁹¹ The two sources may be synthesised to form the objective for the hypothetical measure, of promoting the equal development of disadvantaged, local racial/ethnic groups, in this case by advancing their meaningful participation in the economy. Of course, a panel or the AB would form its own view as to the objective or objectives of the measure, on the basis of all available evidence.

A measure with this objective might fall within the range of measures to protect ‘public morals’ in art XX(a) insofar as advancing racial equality is a matter of public morals, involving an assertion of ‘standards of right and wrong conduct’ within a community or nation.¹⁹² The reasoning of both the Panel and the AB in *EC — Seal Products* suggests that, supported by evidence from the enacting country, the consumption tax exemption could be accepted as a public morals measure. As discussed above, the AB has indicated that the meaning of terms in art XX may evolve, thus keeping pace with changing societal values and the law in force at any given time. What is unknown, however, is whether the DSS would accept as a ‘public morals’ measure one which discriminated in

requires panels to assess objectively, on the basis of the nature and extent of the competitive relationship between the products in the market of the regulating Member, the universe of domestic products that are like the products imported from the complaining Member.

Appellate Body Report, *US — Clove Cigarettes*, WTO Doc WT/DS406/AB/R, [192]. Note that, although this dispute related to *TBTA* art 2.1, it involved analysis of the same phrase as occurs in *GATT* art III: products imported from another member ‘shall be accorded no less favourable treatment than that accorded to like products of national origin’.

¹⁹⁰ Appellate Body Report, *EC — Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R, [5.110].

¹⁹¹ Black Economic Empowerment Commission, ‘Report’ (2001) 2, 37 <<http://perma.cc/TN6T-W6HK>>.

¹⁹² Panel Report, *US — Gambling*, WTO Doc WT/DS285/R, [6.465].

favour of domestic racial/ethnic minorities but against racial/ethnic minorities outside its territorial boundaries, including those experiencing the same kind of inequality. The fact that the enacting member is obliged by the *ICERD* only to adopt special measures to advance its own minorities to a position of equality will not be decisive, and may not even be relevant, in convincing a panel or the AB that the measure is one for the protection of public morals. The issue would come down to facts: if the measure were aimed specifically at promoting the equality of domestic racial/ethnic minorities, it could be buttressed by the enacting member amassing evidence demonstrating the specific nature of the moral obligation the domestic population feels towards redressing the domestic racial/ethnic inequality for which it holds directly responsible.

Alternatively, the measure might be one protecting ‘human ... life or health’, if a causal connection could be demonstrated between, on the one hand, continuing economic racial inequality and, on the other hand, deprivation, ill-health and high mortality. Note that, as an inwardly-directed measure, there is no attempt to protect human life or health in other countries with disadvantaged ethnic/racial minorities, which could raise similar authenticity concerns to the public morals argument. Alternatively, the measure might ‘secure compliance with laws or regulations which are not inconsistent with the provisions of the [*GATT*]’, as giving effect to that state’s (*GATT*-compliant) laws prohibiting all forms of racial discrimination and guaranteeing racial equality.¹⁹³

To avert the risk of the panel finding the measure did not fall within any of the listed objectives in art XX,¹⁹⁴ the respondent member might also develop a parallel argument in justification. Specifically, the member might argue that its obligations under *ICERD* art 2(2) unequivocally require, or at least permit, it to take temporary special measures of this kind to raise its racial minorities to a position of economic equality with others within its territory. As previously noted, such an argument is most unlikely to succeed, for the reasons set out in Part II(B) above.¹⁹⁵

2 *Is the Measure ‘Necessary’?*

Articles XX(a), (b) and (d) all require that the challenged measure be ‘necessary’. As explained in Part II, the necessity of a measure has been determined by the AB, first, by assessing its strategic proportionality: calculating the importance of a measure’s objective and the contribution which the measure makes towards the achievement of it and balancing these against its trade-restrictiveness.¹⁹⁶ Assuming the panel and AB accepted the enacting state’s characterisation of this hypothetical measure’s objective, it is likely that the aim

¹⁹³ *GATT* art XX(d).

¹⁹⁴ Again, this is to be distinguished from questions of necessity and good faith. See above n 168 and accompanying text.

¹⁹⁵ It would be extremely difficult to argue that a direct conflict exists between the *ICERD* obligation and those in the *GATT*, given the different substantive subject matters of the treaties and the open nature of the particular *ICERD* obligation. See above Part II(B). Nor would the argument be strengthened by the *jus cogens* status of the customary international law prohibition on racial discrimination, as the *ICERD* obligation to introduce special measures seems too distant from that prohibition to ‘borrow’ from its legal strength.

¹⁹⁶ Appellate Body Report, *Korea — Beef*, WTO Docs WT/DS161/AB/R and WT/DS169/AB/R, [162].

of advancing domestic racial equality in the realisation of human rights would be agreed to be an important one. However, a complainant might raise doubt about the extent of the contribution which the special measure is likely to make to the objective, which might not be easy to negative. In fact, the effectiveness of special measures in advancing the human rights status of racial minorities is presently under some challenge in the US, although there has been little independent evaluation.¹⁹⁷ A study by Daron Acemoglu found that the black economic empowerment which has occurred so far in South Africa has been narrowly-based, with the gainers being primarily those who are well-connected politically.¹⁹⁸ The AB might probe into this vexed matter in some depth, particularly if the measure were highly trade-restrictive. On the other hand, the AB has indicated that a relatively low or uncertain level of contribution may not be fatal.¹⁹⁹

In conducting a strategic proportionality assessment, the AB has placed considerable weight on the degree of trade-restrictiveness of a challenged measure, which on one view relates to the degree of provisional *GATT*-inconsistency of the measure.²⁰⁰ The degree of trade-restrictiveness caused by the consumption tax exemption in practice will depend on market factors. Where racial/ethnic minorities are involved, the trade-restricting effect is likely to be on the smaller side, although where there are numerous minority enterprises or large sales volumes, it could have a strongly trade-restricting effect. If the measure's trade-restrictiveness is judged by the degree of its provisional *GATT*-inconsistency as a measure with the express purpose of discriminating in favour of a sub-group of local producers in order, in effect, to subsidise their enterprises, the measure is markedly *GATT*-inconsistent.

In conducting a tactical proportionality assessment, it is to be expected that a complainant would propose other options which it considered to be less trade-restrictive and reasonably available, and which would make at least an equal contribution to the identified objective. In this case, the objective is a relatively broad one which might, presumably, be achieved using any of a range of tactics in, say, the income tax, social security or regional development systems. However, there is some uncertainty as to how the reasonable availability of alternatives will be assessed. Where the enacting state is a low-income developing country with a substantial informal economy, the income

¹⁹⁷ The use of affirmative action has never been free of controversy but pressure to remove some types has been building in the US, with a succession of US Supreme Court decisions dealing with constitutional challenges to affirmative action in university admissions. See *Grutter v Bollinger*, 539 US 306 (2003); *Coalition to Defend Affirmative Action v Regents of the University of Michigan*, 592 F Supp 2d 948 (Mich, 2008); *Ricci v DeStefano*, 557 US 557 (2009). See also 'Time to Scrap Affirmative Action', *The Economist* (online), 27 April 2013 <<http://perma.cc/K9EP-V4VN>>.

¹⁹⁸ Daron Acemoglu, Stephen Gelb and James A Robinson, 'Black Economic Empowerment and Economic Performance in South Africa' (Policy Brief, August 2007) <<http://perma.cc/WZ9Y-6SDN>>. The authors argue that the Black Economic Empowerment special measures have 'had no noticeable impact on inequality in general', although, by benefiting that 'somewhat narrow [black] elite', they have 'increased the share of national income which accrues to black people': at 17.

¹⁹⁹ Appellate Body Report, *EC — Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R, [5.215].

²⁰⁰ See Appellate Body Report, *China — Publications and Audiovisual Products*, WTO Doc WT/DS363/AB/R, [319].

tax system may not be an effective means for achieving racial equality objectives. A developing country's alternatives may also be narrowed by shortage of funds. The greater the level of deference a panel or the AB show towards a regulating state, the better that state's chances of demonstrating that such alternatives are not, in its particular circumstances, reasonably available.

3 *Does the Measure Meet the Requirements of the Chapeau?*

The special measure must also meet the requirements of the chapeau to art XX. The AB has become highly alert to inconsistency between the objective of a measure and the rationale for its discriminatory aspects, indicating that where the rationale 'goes against [the measure's] objective, to however small a degree', the measure is likely to be found arbitrarily or unjustifiably discriminatory.²⁰¹ The objective of the present special measure is promoting the equal development of domestic racial/ethnic minorities through advancing their participation in the economy. On its face, the discriminatory aspect of the measure is its overt favouring of local minority products over other like products. The rationale for the discriminatory aspect is that giving a tax advantage only to minority products in the marketplace will promote their sale over the sale of non-minority like goods. The rationale seems a sound one, even allowing for the lack of conclusive evidence of the effectiveness of special measures in general, and seems to enjoy a close and supportive relationship with the measure's objective.

However, the tax measure would, if effective in its purpose, divert market share away from imports towards domestic producers (despite only a subset of domestic producers benefiting from this diversion). It is likely to discriminate de facto in favour of local products, taken as a whole, over like imports. This fact would inevitably bring the measure under intense scrutiny by the DSS. The AB in *EC — Seal Products* made clear that members must take great care to ensure that the manner in which the discriminatory aspect of a measure is structured and applied does not allow for any abuse, including the favouring of special interests.²⁰² In the present case, the AB might question as arbitrary or unjustifiable the state's failure to extend the tax exemption to products of foreign racial minority enterprises suffering comparable disadvantage. While the AB might take cognisance of the fact that the treaty obligations of WTO members which are states party to the *ICERD* are limited to adopting special measures to advance equality for their own racial/ethnic minorities, this would not be conclusive of the matter because it would still be necessary for those members to structure their measures in a manner which avoided arbitrary or unjustifiable trade discrimination.

Against this, the measure's domestically-focused objective will already have been settled at an earlier stage of the art XX analysis and it is this expression of the objective which the panel will refer to in measuring the arbitrariness or unjustifiability of the discrimination. It is unlikely that a panel would take the novel approach of reviewing the objective again at this point, in order to ascertain whether the measure's focus on domestic disadvantage is 'a means of

²⁰¹ Appellate Body Report, *Brazil — Retreaded Tyres*, WTO Doc WT/DS332/AB/R, [228].

²⁰² Panel Report, *EC — Seal Products*, WTO Docs WT/DS400/R and WT/DS401/R, [5.324]–[5.327].

arbitrary or unjustifiable discrimination between countries where the same conditions [of racial inequality] prevail'.²⁰³ However, to offset any risk of this, a member might consider structuring its measure ab initio so as to exempt all products produced by racial/ethnic minorities globally. However, designing a system which was perfectly even-handed in its treatment of minority products, whatever their origin, and with a perfectly neutral certification scheme, would be extraordinarily difficult. Nor might such practical obstacles have any bearing on a panel's assessment of whether the measure was adequately even-handed.²⁰⁴ Similarly, the fact that the countries in which the most impoverished racial/ethnic minorities live are mostly low- and lower-middle income countries might have no bearing on the outcome; for them, a tax exemption extending globally would probably be both unaffordable and politically impossible. These factors might, however, incline a panel to take a more deferential approach to the right of members to focus their objectives on domestic concerns.

On balance, there would appear to be reasonable prospects of a measure of this kind being found WTO-consistent under art XX, provided that there was sound evidence of the sincerity of the objective, the likely contribution of the measure to the objective and the unsuitability of alternative measures in achieving that objective. Much would depend on the measure being very carefully structured so as not unduly to benefit domestic products and on the degree of deference which the panel or the AB chose to show towards the measure.

V THE FUTURE OF HUMAN RIGHTS MEASURES IN THE WTO

Both the formal WTO disputes and the related literature over the first 20 years suggest that it is not possible to be fully confident that any trade-affecting human rights measure will be 'WTO-proof', given the open-textured nature of the tests and continuing uncertainties revealed in the above exposition. There are definitely grounds for anticipating that genuine human rights measures will fall within one or more of the policy areas listed in art XX through a broad and evolving reading of the terms. This seems especially likely for the area of public morals. However, the outcome of the necessity test in art XX is still highly unpredictable. In assessing the strategic proportionality of measures, panels and the AB have been led into testing which has been highly value-laden and in which deference towards members' trade-affecting human rights measures has been variable in degree and shifting in focus. The survival of a human rights measure may depend to a great extent on how the measure's objective is phrased, which is ultimately determined by the DSS and not by the enacting member. There are indications that the AB might prefer to place more emphasis on assessing the tactical, rather than the strategic, proportionality of measures. Assessing tactical proportionality is a more objective, less value-laden exercise and one which, so far, the AB has approached with some deference towards members' choices. This is probably a positive development for human rights measures, although there is still much uncertainty in testing tactical

²⁰³ *GATT* art XX.

²⁰⁴ Interestingly, unlike the assessment of alternatives under the 'necessity test', there does not appear to be any requirement under the chapeau analysis that an absolutely even-handed approach be 'reasonably available', taking practical considerations into account.

proportionality, particularly due to the inherent subjectivity in assessing whether or not an alternative measure is 'reasonably available'. Further, determinations under art XX are usually extremely fact-heavy, often involving complex questions of causation. Uncertainties about how such facts will be determined, and within what disciplinary paradigm, also contribute to the unpredictable nature of WTO dispute settlement. The AB will continue to apply rigorous testing under the chapeau and it seems that any hint of favouring particular interests in a way unjustified with reference to the overarching objective will doom the measure to WTO non-compliance.

Much, however, can be done to buttress human rights measures against WTO challenge. Some of this is in the hands of the regulating state, some in the hands of the lawmaking membership of the WTO and some in the hands of panels and the AB as they apply and interpret WTO law in context. Much also depends on the playing out of external, often political, trends.

A *Buttressing Human Rights Measures*

The degree to which a trade-affecting human rights measure is effective in achieving its objective is clearly of significance to the DSS. A highly effective measure will be attributed greater legitimacy and the discrimination it affects is less likely to be considered arbitrary or unjustifiable. Thus, a prudent member could improve its chances under art XX by conducting a human rights impact assessment, early on, of its proposed measure, enabling the measure to be shaped so that its objective is clear and the rationale for its discriminatory element is justifiable. The member could also conduct an assessment of the adverse trade impacts of the various options reasonably available to it. To use the hypothetical example from Part IV, a developing country with a disadvantaged racial minority could more easily justify its tax special measure where it could offer reliable evidence that the measure will indeed advance the economic development of the racial minority in question. In short, it is imperative that states gather as much evidence as possible *ex ante* to demonstrate the authenticity of their trade-restricting human rights measures. Indeed, the jurisprudence indicates that human rights policymakers will have to be extremely well prepared to justify their measures, as the WTO law exercise of testing, weighing and balancing will expose any lack of rigour in human rights methodology. States should remain alert to the presence of policy overlap between human rights and the areas listed in *GATT* art XX. Where the overlap is substantial, it might be strategically wise for them to characterise those measures from the beginning as within the range of, say, public morals or human health, but the characterisation would need to be authentic. In sum, the message from the jurisprudence seems to be that sound, convincing evidence of legitimacy and authenticity will be essential.

While this precautionary approach will greatly strengthen human rights measures against WTO challenge, it is interesting to consider that domestic human rights measures which restrict trade have been in force for the duration of the WTO's existence but have not been formally challenged. Examples include aspects of Malaysian legislation favouring enterprises owned or controlled by

indigenous Malays,²⁰⁵ South African Black Economic Empowerment laws imposing race-related conditions for license approvals²⁰⁶ and US trade sanctions against imports made from child labour. As affected developing economies grow and become more significant markets for global goods, it may become more likely that a measure of this kind will be challenged. Regulators should, therefore, undertake a risk assessment of how a human rights measure will affect private interests and whether those interests are strong enough to persuade other WTO members to challenge the measure. This risk assessment might also inform the lengths to which a regulating state is prepared to go in gathering its evidence base. It would be an unfortunate result if the prohibitive cost of preparing, say, econometric evidence of a human rights measure's likely effect on the market were to throw a chill over regulators wishing to enact trade-affecting human rights measures. Unfortunately, over the past 20 years the DSS has shifted from a quasi-legal diplomatic process towards an increasingly litigious one,²⁰⁷ aided by the increasing involvement of commercial law firms. Assuming this trend continues, it appears likely that this will diminish the capacity of (particularly poorer) states to enact human rights measures that affect trade, due to the sheer expense of warding off a WTO dispute and of defending such measures should they be challenged.

Nonetheless, the case studies reveal how the techniques of trade restriction and trade discrimination may be adopted deliberately by human rights policymakers as good faith mechanisms for advancing social purposes. The classic illustration is the relatively common use of preferential government procurement to achieve wider social goals;²⁰⁸ indeed, this particular practice is the subject of an express exception in *GATT* art III(8). From the human rights perspective, in the effort to counter gross violations such as slavery and racially-delineated extreme poverty,²⁰⁹ trade-affecting measures are no different to any other economic measure which could be effective. It is these types of human rights measures — ones which consciously adopt trade restriction as their technique for advancing an explicit human rights goal — which are most likely

²⁰⁵ Christopher McCrudden, *Buying Social Justice — Equality, Government Procurement, and Legal Change* (Oxford University Press, 2007) 238–40.

²⁰⁶ *Broad-Based Black Economic Empowerment Act 2003* (South Africa) art 10.

²⁰⁷ Contrasting the 'soft law' approach of the pre-WTO *GATT* system, Jennifer Hillman notes that, more recently, '[t]hose appearing before WTO panels of the Appellate Body are less frequently diplomats and more often than not private lawyers hired to appear on behalf of the government or governments involved in the case': Jennifer Hillman, 'An Emerging International Rule of Law? The WTO Dispute Settlement's Role in its Evolution' (2010) 42 *Ottawa Law Review* 271, 277. The increased participation of commercial law firms has coincided with a vast expansion in the length and complexity of WTO disputes, as evinced in the burgeoning size of AB reports. For example, *US — Gasoline*, a seminal case and one of the first reports issued by the AB, was circulated in 1997 less than 18 months after the first request for consultations and is 46 pages long. The AB report in *EC — Aircraft*, by contrast, was circulated in 2011, six years after the first request for consultations and is 599 pages long.

²⁰⁸ See McCrudden, above n 205.

²⁰⁹ Household survey data indicates that more than two-thirds of the world's extremely poor live in ethnic minority households in developing countries: Andy Summer, 'The New Face of Poverty: How Has the Composition of Poverty in Low Income and Lower Middle-Income Countries (Excluding China) Changed since the 1990s?' (Working Paper No 408, Institute of Development Studies, November 2012) 22 <<http://perma.cc/C8UG-B5TR>>.

to provoke a challenge before the DSS. When this happens, the AB will probably be required to make rulings as to the precise boundaries of applicable law before it.

B *Future Directions*

The proposition that the DSS may directly apply primary rules of customary international law and other sub-systems of international law appears reasonable when set against the broader backdrop of international law — particularly with reference to the practice of the International Court of Justice. However, the proposal appears outlandish in the WTO context, where, despite protestations to the contrary, the DSS has largely continued to operate in isolation from the broader corpus of international law. Unless and until the members formally consent to panels and the AB taking a broader role of this kind, these bodies will do their best to avoid defining the bounds of applicable law before them. In the interim, and in the absence of formal consent, the DSS practice of applying general principles and customary international law, particularly as a source of procedural law, will no doubt continue. WTO members will also ‘continue to rely on other rules of international law in their submissions and pleadings before panels and the Appellate Body’, either in ‘implied acknowledgement of the relationship between WTO law and other rules and principles of international law, or as a litigation strategy’.²¹⁰ This suggests that international law may have influenced, and may continue to influence, WTO adjudicators to interpret and apply WTO law in a way that leaves space for members to take human rights and other such measures in a rhetorical, if not a strictly legal, sense.²¹¹

Where disputing parties have concluded a human rights treaty expressly allowing for a WTO-inconsistent measure, it may be possible in some circumstances for a respondent to argue that the parties have thereby ‘consented’ to it, precluding that action’s wrongfulness under art 20 of the ILC Draft Articles. Alternatively, it is possible that parties may be able to waive their right to a WTO panel in relation to certain human rights-related matters. On this basis it may be further argued that a WTO member that challenges a measure after such a contrary waiver or expression of consent is acting in bad faith. It is further possible that, in certain circumstances, a panel may accept that disputing parties have modified WTO obligations between them, which would provide a valid defence for what may otherwise be WTO-inconsistent human rights measures.²¹²

²¹⁰ Van Damme, above n 47, 15.

²¹¹ While a panel may not feel able to directly interpret and apply human rights norms in settling disputes, it seems probable that the existence of this separate body of norms permitting or requiring a measure strongly indicates that the respondent is acting in good faith, that the measure is justifiable, and may also encourage the panel to take a more deferential approach than it would otherwise. It may also persuade a WTO member not to initiate a WTO challenge in the first place. See, for example, the US 1997 ‘Sanders Amendment’ noted in above n 20 that banned products made with ‘forced or indentured child labor’. To date, this measure has not been challenged under the DSS, despite this measure prima facie breaching *GATT* national treatment rules and not obviously falling within a listed exception.

²¹² This may be, for example, where parties agree that they may enact trade-affecting human rights measures even where the purposes of those measures do not fall within art XX’s closed list, provided they comply with the art XX chapeau and are not more trade-restrictive than necessary.

The debates of the first 20 years reveal clearly that the relationship between human rights law and WTO law is a political as well as a legal one. Some political pressures have been building over that period and will continue to shape the nature of the debates, and possibly the development of trade law, into the future. The first type of political pressure is directed at creating a closer and more harmonised relationship between WTO law and human rights law.²¹³ In part, this has been sparked by political concern about the widening net of de facto trade discrimination.²¹⁴ Under WTO law as presently interpreted, even human rights measures which have no protective intent may be non-compliant purely because they do not fall within the closed list of policy areas in art XX, a provision drafted more than 65 years ago and before any of the international human rights law instruments (other than the *UN Charter*) had come into existence. There is diverse pressure to better harmonise trade and human rights norms through interpretative techniques or through structural and relational reforms. Proposals include the establishment of a single court to interpret, apply and balance trade and human rights norms²¹⁵ or that WTO adjudicators allow other international bodies to participate in dispute settlement proceedings.²¹⁶ Other proposals focus on the need for the WTO to become more engaged at an institutional level with UN bodies²¹⁷ and for domestic bureaucracies responsible for trade and human rights to restructure in ways which foster the more coherent creation and implementation of international law obligations.²¹⁸

The political pressure to harmonise trade and human rights norms includes pressure to modify WTO obligations themselves to accommodate human rights measures expressly and unequivocally. The need for modification is particularly acute if, as seems likely, art XX is not available for the protection of measures which violate disciplines in WTO agreements other than the *GATT*.²¹⁹ One proposal has been that WTO members adopt a waiver with respect to certain types of human rights measure;²²⁰ another that they amend the Special and

²¹³ For a general survey of possible reforms to ensure greater harmony between trade and human rights, see Joseph, *Blame It on the WTO?*, above n 116, 265–84.

²¹⁴ See, for example, the statement of the US to the Dispute Settlement Body following the AB report in *US — COOL*, which noted with concern the ‘novel approach’ taken by the AB to de facto discrimination: *Minutes of Meeting*, WTO Doc WT/DSB/M/320 (28 September 2012) [95].

²¹⁵ The key advocate for this approach is Ernst-Ulrich Petersmann. See Ernst-Ulrich Petersmann, ‘Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism’ in Christian Joerges and Ernst-Ulrich Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart, 2006) 5.

²¹⁶ For example, through the use of amicus curiae briefs. See Ignacio Garcia Bercero and Paolo Garzotti, ‘DSU Reforms: What Are the Underlying Issues?’ in Dencho Georgiev and Kim van der Borght (eds), *Reform and Development of the WTO Dispute Settlement System* (Cameron May, 2006) 132.

²¹⁷ See Victor Mosoti, ‘Institutional Cooperation and Norm Creation’ in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi (eds), *Human Rights and International Trade* (Oxford University Press, 2005) 165.

²¹⁸ See Caroline Dommen, ‘Human Rights and Trade: Two Practical Suggestions for Promoting Coordination and Coherence’ in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi (eds), *Human Rights and International Trade* (Oxford University Press, 2005) 199, 203.

²¹⁹ See Appellate Body Report, *China — Publications and Audiovisual Products*, WTO Doc WT/DS363/AB/R, [230]–[233]. Cf Panel Report, *China — Measures related to the Exportation of Various Raw Materials*, WTO Docs WT/DS394/R, WT/DS395/R and WT/DS398/R (5 July 2011) [7.129]–[7.160].

²²⁰ See Schefer, above n 156, 391.

Differential Treatment provisions in WTO law to enable low income developing countries to utilise all means, including trade-affecting means, to enhance the economic and socio-economic human rights of their peoples.²²¹ More recently, there have been growing calls for art XX to be amended to include a new sub-article expressly excepting legitimate domestic human rights measures. Lorand Bartels has proposed and drafted such a human rights clause, targeting the international trade agreements of the EU.²²² In contrast, Franziska Sucker has proposed amending art XX to add an exception for measures ‘necessary to protect the public interest’, which would be defined expressly to include inwardly-directed human rights measures.²²³

However, the second type of political pressure is, to an extent, directed *against* the first and involves concern about creating too close a relationship between the two bodies of law. Opposition has come from human rights advocates who are opposed to what they see as a ‘merger and acquisition’ of human rights law by the WTO.²²⁴ The concern is that ‘reforms’ of the above kind could weaken human rights law by enabling trade lawyers to apply that law within the paradigm of neoliberal economic values, an application which would be coloured by disciplinary and institutional bias and by the ‘pattern of relations and subject positions’ to which international trade laws ‘attempt to give shape’.²²⁵ Many WTO adjudicators might be inherently biased against human rights measures that frustrate trade policy, such as those that rely on targeted subsidies or trade restrictions. For very different reasons, developing country members have also expressed opposition to creating greater legitimacy for human rights measures under art XX. Their concern has been to limit the use by industrialised countries of outwardly-directed human rights-related measures to

²²¹ Moon, ‘A Review of Trade and Human Rights’, above n 99, 305. In WTO law, Special and Differential Treatment is the name given to the collection of roughly 155 provisions which offer special treatment to developing countries in recognition of their weaker economies and special development challenges.

²²² Lorand Bartels, ‘A Model Human Rights Clause for the EU’s International Trade Agreements’ (Study, German Institute for Human Rights and Misereor, February 2014) 37 <<http://perma.cc/4KTC-PAUR>>. Eschewing a necessity test, Lorand Bartels proposes a provision (preceded by a chapeau in the terms of *GATT* art XX) authorising measures ‘undertaken for the purpose of respecting, protecting or fulfilling human rights and respecting democratic principles and the rule of law in [a party’s] internal and international policies’: at 37.

²²³ Franziska Sucker, ‘Including a General Public Interest Clause in WTO Agreements: A Way Forward in Trade Linkage Debates’ (Working Paper No 2014/19, Society of International Economic Law, June, 2014) 18. Recognising the need for WTO law to accommodate ‘trade-and’ concerns, and acknowledging the failure to date of attempts to reach consensus separately on the individual ‘trade-and’ issues, Franziska Sucker recommends amending *GATT* art XX to include a general public interest clause. To be structured as an exception in the same form as those listed in art XX, it would be phrased as a broad, general clause into which any genuine measure necessary to protect the public interest could fall. The clause would be sufficiently broad to catch measures relating to human rights, environmental protection, public health, labour standards, cultural diversity, food security or any other authentic public interest, although it would define the ‘public interest’ expressly to include human rights.

²²⁴ See Philip Alston, ‘Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann’ (2002) 13 *European Journal of International Law* 815.

²²⁵ See Anne Orford, ‘Beyond Harmonization: Trade, Human Rights and the Economy of Sacrifice’ (2005) 18 *Leiden Journal of International Law* 179; David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2007) 3.

frustrate the competitive advantage they enjoy from lower labour and environmental protection standards.²²⁶

The third type of political pressure is the trade law creation which is currently taking place in the context of regional and bilateral treaty negotiations. These decisions are being made outside the Doha Round of multilateral trade negotiations, within individualised trade and investment agreements struck between two or a few trading nations. As it seems highly unlikely that WTO members in the problem-wracked Doha Round will turn their attention to, for example, adopting a new sub-clause to art XX, the source for any change of approach is likely, realistically, to be future bilateral and regional trade treaties. Such trade agreements increasingly include chapters concerning labour and environmental standards, with the intention of introducing norms that promote environmental protection and labour rights.²²⁷ There have also been moves to place ‘choice of forum’ clauses in new human rights and environmental treaties, such that where the new treaty calls for steps that may fall foul of WTO law, the matter may be determined through dispute settlement provisions of the new agreement.²²⁸ It is unclear whether the DSS would decline jurisdiction where a dispute had already been the subject of a ruling under the separate treaty, and such a circumstance would present a serious challenge to the DSS.²²⁹

C Concluding Thoughts

It is sometimes said that there is no real conflict between trade and human rights norms, as the increased prosperity brought by trade liberalisation will facilitate greater human rights protection. While direct ‘conflicts’ in the legal sense may be rare, as has been illustrated by the case studies above, there is normative tension between trade and human rights domains, both in terms of the ends they pursue and the means they adopt.²³⁰ The goals of the human rights and WTO regimes are distinct. WTO law is ‘generally aimed at freeing trade from the constraints of government’ while human rights law is aimed at protecting

²²⁶ See Qingjiang Kong, ‘A Human Rights Approach to Trade? Some Reflections’ in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi (eds), *Human Rights and International Trade* (Oxford University Press, 2005) 232; Bob Hepple, *Labour Laws and Global Trade* (Hart, 2005) 145–7.

²²⁷ See, for example, the side agreement to the *North American Free Trade Agreement: North American Agreement on Labor Cooperation*, Canada–Mexico–United States, 32 ILM 1499 (signed and entered into force 14 September 1993). See also *United States–Korea Free Trade Agreement*, 46 ILM 642 (signed and entered into force 30 June 2007) ch 20. This includes a commitment by both parties to fulfil their obligations under specified multilateral environmental agreements.

²²⁸ See James Watson, *The WTO and the Environment: Development of Competence beyond Trade* (Routledge, 2013) 132–6.

²²⁹ For a discussion of how the DSS may handle such a situation, see, eg, Felicity Hammond, ‘A Balancing Act: Using WTO Dispute Settlement to Resolve Regional Trade Agreement Disputes’ (2012) 4 *Trade Law and Development* 421; Sherzod Shadikhodjaev, ‘Keeping Regionalism under “Control” of the Multilateral Trading System: State of Play and Prospects’ (2013) 19 *Law and Business Review of America* 327, 349–50.

²³⁰ Note that the literature includes evidence that economic openness promotes and supports democratic rights and freedoms. See, eg, Thomas Cottier, ‘Trade and Human Rights: A Relationship to Discover’ (2002) 5 *Journal of International Economic Law* 111, 121; Harrison, above n 102, 38. Cf Marjorie Cohn, ‘The World Trade Organization: Elevating Property Interests above Human Rights’ (2001) 29 *Georgia Journal of International and Comparative Law* 427.

individual freedoms while also imposing ‘positive duties to protect and fulfill which require action, regulation and intervention by States’.²³¹ To put this in context, if a government were to remove subsidies and tariff protection from an industry, from a WTO perspective this would be positive and any short-term ill effects would be justified by assumed long-term productivity gains. From a human rights perspective, the impact on people’s livelihoods might be dire and represent a failure of governments to protect their citizens’ human rights. Meanwhile, the long-term collective gains from trade liberalisation may not be accepted as justifying the individual harms and, in any case, it may not be as accepted that such gains will materialise or be distributed fairly.

In the authors’ view, the tensions between trade and human rights norms arise most fundamentally from the differing conceptions of ‘development’ underlying WTO law and human rights law and, consequently, from their differing strategies for achieving development. WTO law invokes efficiency in production and openness to the global economy as the core strategies on which the economic development of all member countries should be built.²³² The human rights-based approach to development

is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. ... [T]he plans, policies and processes of development are anchored in a system of rights and corresponding obligations established by international law.²³³

Thus, the international trade regime seeks to achieve equality in competitive conditions, not racial equality. It seeks to eradicate trade barriers, not labour rights abuses. To the extent that it acknowledges the right of states to pursue these other objectives, it militates against doing so through trade-affecting means. This effectively renders trade-affecting measures an instrument of last resort in the non-trade policy toolkit, even where other options are more expensive or politically unachievable. It also forces any regulators wishing to enact trade-affecting human rights measures to do so under the cloud of costly WTO litigation, a process which would deeply probe the evidence base and policy process for such measures from a different (likely economic) disciplinary perspective. This has the effect of placing trade interests nearer the top of societal values at the expense of other imperatives, including the pursuit of human rights.

We have shown that, on the current state of play, solutions to this normative tension that focus on interpretative techniques and an expansive understanding of WTO applicable law appear to have limited prospects. More radical solutions, such as amending art XX or concluding entirely new treaties, would be more likely to yield results but would be more difficult to achieve. However, an

²³¹ Joseph, *Blame It on the WTO?*, above n 116, 37.

²³² Jeffrey Dunoff coined the phrase ‘the efficiency model’ to describe this, based on David Ricardo’s work demonstrating that fostering maximum efficiency and outwardly-focused industries will stimulate employment and raise standards of living: Jeffrey L Dunoff, ‘The Death of the Trade Regime’ (1999) 10 *European Journal of International Law* 733, 737.

²³³ Office of the United Nations High Commissioner for Human Rights, ‘Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation’ (United Nations, 2006) 15.

examination of WTO jurisprudence reveals that the future of trade-affecting human rights measures is not necessarily bleak, and is brighter than it seemed 20 years ago. Indeed, this article has posited two cutting edge human rights measures that would stand a fair chance of being found WTO-consistent on an expansive reading of art XX and a deferential application of its tests, so long as the measures were well-supported by evidence. The jurisprudence of the DSS suggests that it is possible for some *prima facie* non-compliant human rights measures, if they have been very carefully structured to contain no unnecessary or unjustifiable discriminatory elements, to find protection in *GATT* art XX. However, as the analysis in this article reveals, 20 years on, the uncertainty and difficulties for such measures remain. Thus, the future of trade-affecting human rights measures rests partly with WTO adjudicators but also, crucially, with human rights advocates and their willingness to navigate the vagaries of the DSS rather than succumbing to regulatory chill and with trade advisors who are prepared to guide their path.