International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT

By Salman Bal*

TABLE OF CONTENTS

I. THE LINK BETWEEN INTERNATIONAL TRADE AND HUMAN RIGHTS 64
II. GATT ARTICLE XX 69
A. ARTICLE XX: SCOPE AND PROCEDURE 69
B. INTRODUCTORY PHRASE OF ARTICLE XX 71
1. Arbitrary or unjustifiable discrimination 72
2. "Disguised Restriction" 73
C. POLICIES PROTECTED WITHIN THE GENERAL EXCEPTIONS 76
1. Article XX(a): Protection of Public Morals 76
2. Article XX(b): Protection of Life or Health 79
(a) Improvement of Workplace Conditions 80
(b) Methods of Production and Practice 80
3. Article XX(d): Necessary To Secure Compliance With Laws Or Regulations 87
(a) The Scope of "Laws or Regulations" 87
(b) Necessary "to secure compliance with" 92
(c) Invocation For Human Rights Purposes 92
(d) The Exception: Norms of *Jus Cogens* 93

* Salman Bal is an Associate Human Rights Officer at the United Nations Office of the High Commissioner for Human Rights (in Geneva). Prior to his work at the United Nations, the author worked in Kosovo as a Human Rights Officer for the Organization for Security and Cooperation in Europe (OSCE). The views expressed are those of the author and do not reflect those of any organizations (such as the United Nations Office of the High Commissioner for Human Rights and OSCE). The article was written as part of the author's graduate degree (LLM) at the University of Essex, Great Britain. Prior to this Graduate Degree, the author studied international relations (B.A.) at the Graduate Institute of International Studies and the University of Geneva, Switzerland. The author would like to thank Professor Sheldon Leader, Professor David Weissbrodt, Mr. Jan Doerfel, Mr. Evan Ruth, and the editors of this Journal for their help.

(e) The Example of Forced Labor 95
D. NECESSARY TO ACHIEVE POLICY GOALS 97
1. Current Interpretations of the Necessary Prong 97
2. Problems with the Current Interpretation 99
(a) Reasonably Available Alternative Measure 99
(b) Least Trade Restrictive Measure 100
E. THE QUESTION OF EXTRATERRITORIALITY 102
V. CONCLUSION 107

In the present era of globalization, the relationship between international trade and human rights is an issue of increasing significance.[1] In the background of the discussion, the economy has grown increasingly global, while the respect for human rights has advanced slowly in many States. Scholars have argued that human rights are integrally related to international trade, and vice versa, so the linkage of human rights with international trade remains highly controversial.[2] This article argues that there is direct and appropriate involvement by international trade in the protection of human rights.

This article begins by showing that a connection between international trade and human rights exists. This relationship is particularly realized upon examination of the provisions of international agreements and their histories. Then, the discussion turns to an examination of the scope of the General Agreement on Tariffs and Trade ("GATT"), as incorporated in the World Trade Organization Agreement ("WTO") more particularly Article XX. Next, this article discusses the procedure of Article XX, using the Article's introductory phrase. This section details paragraphs (a), (b), and (d) of Article XX, which constitute the most controversial sections concerning the linkage of human rights and GATT provisions. The section further discusses the requirements or application of the paragraphs, related controversial issues, and the possible inclusion of human rights within the Article's scope. Finally,

1. This article uses the term "human rights" where past scholarship has used "labor standards." For a discussion on the terminology debate, *see* Adelle Blackett, *Whither Social Clause? Human Rights, Trade Theory and Treaty*, 31 COLUM. HUM. RTS. L. REV. 1, 26 (1999) (stating that the discussion is shifting from "labor standards" to "human rights").

2. *See* HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE (Lance A. Compa & Stephen F. Diamond eds., 1996).

this article argues that through careful application of these paragraphs, the GATT can be used to protect human rights and expand labor protection.

I. THE LINK BETWEEN INTERNATIONAL TRADE AND HUMAN RIGHTS

Developing countries, free trade economists, and many private enterprises in developed countries are the primary opponents to the linkage between international trade and human rights.[3] These opponents argue that conditioning free trade on human rights is detrimental to the promotion of welfare-enhancing free trade. Moreover, this linkage harms the economy of developing countries because it limits their ability to increase export trade, one of the best methods of economic improvement. They reason that connecting trade with human rights would deprive the South of its key comparative advantage, namely the ability to use cheap labor.[4] It is instead simply a guise for protectionism.[5]

Advocates of a link between human rights and free trade, on the other hand, state that the export of products produced under low standards results in unfair competition that negatively affects working conditions in countries with higher labor standards.[6] This disparity results in a "race to the bottom" and weakens the working conditions in previously "high standard" countries.[7] Other supporters argue that all countries engaged in international trade should respect human rights.[8] These authors deny that such a link would increase protectionism. In contrast they believe that a linkage would

3. *See* Robert Howse & Makau Mutua, *Protecting Human Rights in a Global Economy*, Rights & Democracy, *at* http://www.ichrdd.ca/111/english/commdoc/publications/globalization/wtoRightsGlob.html (last visited Oct. 23, 2000).

4. *See id.*

5. *See generally* Steven Charnovitz, *The Influence of International Labour Standards on the World Trading Regime: A Historical Overview*, 126 INT'L LAB. REV. 565 (1987).

6. *See* J.M. Servais, *The Social Clause in Trade Agreements: Wishful Thinking or an Instrument of Social Progress?*, 128 INT'L LAB. REV. 423 (1989) (noting that, if a country allows its workers to be employed under conditions of work that are miserable, it can export its products at lower prices and thus acquire an unfair advantage over its competitors). According to this theory, because other countries are not willing to lose their exports, they will react by lowering their standards as well. Thus, the "race to the bottom" would be unavoidable.

7. *See id.*

8. *See generally* Charnovitz, *supra* note 5.

eliminate one of the main justifications for trade restrictions.[9] One supporter commented, "[w]hat a strange idea. . .to find a contradiction between the 'labor protectionism' of the [International Labour Organization] and the theory of free or freer trade. . .surely the attempt at nationalistic labor protectionism is in contradiction with the attempt to secure common labor standards which we are pursuing."[10] A common standard, supporters note, would prevent States from restricting trade on the basis of domestic standards.[11]

---

9. *See id.*

10. *Id.* at 581 (quoting Albert Thomas, the first Director of the International Labor Organization).

11. *See generally* Blackett, *supra* note 1, at 48-55 (considering linkage between ILO labor regulations and trade, and discussing role of GATT in protecting rights); Paul de Waart, *Minimum Labor Standards in International Trade from a Legal Perspective, in* CHALLENGES TO THE NEW WTO 245, 256-61 (Pitou van Dijck & Gerit Faber eds., 1996) (arguing for greater trade regulation to protect worker rights); Michael R. Gadbaw & Michael T. Medwig, *Multinational Enterprises and International Labour Standards: Which Way for Development and Jobs?, in* HUMAN RIGHTS, LABOR RIGHTS AND INTERNATIONAL TRADE 141, 143-46 (Lance A. Compa & Stephen F. Diamond eds., 1996) (highlighting legal and economic issues in the linkage debate); Brian A. Langille, *Labour Standards in the Globalized Economy and the Free Trade/Fair Trade Debate, in* INTERNATIONAL LABOUR STANDARDS AND ECONOMIC INTERDEPENDENCE 329 (Werner Sengenberger & Duncan Campbell eds., 1994) (emphasizing how the free/fair trade debate is central to the debate on labor standards in the new economy); Virginia A. Leary, *Workers' Rights and International Trade, in* 2 FAIR TRADE AND HARMONIZATION: LEGAL ANALYSIS 177 (Jagdish Bhagwati & Robert E. Hudec eds. 1996) (discussing opposition to and support of linkage between trade and rights); Alejandro Portes, *By-passing the Rules: The Dialectic of Labour Standards and Economic Interdependence, in* INTERNATIONAL LABOR STANDARDS AND ECONOMIC INTERDEPENDENCE 159, 160 (Werner Sengenberger & Duncan Campbell eds., 1994) (explaining the relationship between labor standards and economic strategies of less developed countries, and presenting proposals for an alternative labor regime); Frank J. Garcia, *The Global Market and Human Rights: Trading Away the Human Rights Principle*, 25 BROOK. J. INT'L L. 51, 85-97 (1999) (analyzing effect of globalization on human rights law); Robert Howse, *The World Trade Organization and the Protection of Workers' Rights,* 3 J. SMALL & EMERGING BUS. L. 131 (1999) (advocating for the adoption of labor rights-based trade related measures); Ray Marshall, *Trade Linked Labor Standards*, 37 ACAD. POL. SCI. 67-78 (1990) (encouraging the United States to use international trade to grow world economies and to protect rights); Gijsbert Van Liemt, *Minimum Labor Standards and International Trade: Would a Social Clause Work?*, 128 INT'L LAB. REV. 433-34 (1989) (supporting adoption of a social clause for international trade in order to institutionalize labor protection). *See also* Jagdish Bhagwati & T. N. Srinivasan, *Trade and the Environment: Does Environmental Diversity Detract from the Case for Free Trade?, in* 1 FAIR TRADE AND HARMONIZATION: ECONOMIC ANALYSIS 160 (Jagdish Bhagwati & Robert E. Hudec eds., 1996)(providing an economic analysis of linkages generally); Herbert Feis, *International Labor Legislation in the Lights of Economic Theory*, in INTERNATIONAL LABOR STANDARDS AND ECONOMIC INTERDEPENDENCE 29, 47 (Werner Sengenberger & Duncan Campbell eds., 1994) (discussing whether international action should be aimed at

The idea of connecting human rights and free trade through international agreements is not a new one. In Article 7 of the Havana Charter, nations first attempted to establish a legal rights framework for trade issues by writing a provision devoted to fair labor standards.[12] The Havana Charter, however, did not enter into force.[13] Instead, GATT 1947 became effective.[14] The establishment of the WTO replaced the GATT in 1995.[15]

From the beginning, the regulation of free trade issues has been the GATT's main purpose, while human rights issues play only a minor role. Unlike the Havana Charter, the GATT does not explicitly incorporate any fair labor concerns.[16] To date, the majority of Contracting Parties have rejected attempts to incorporate fair labor standards into the GATT.[17] An international commitment to recognized core labor standards,

---

uniform standards).

12. *See* Havana Charter, U.N. ESCOR, Conf. On Trade & Emp., U.N. DOC. E/Conf.2/78, art. 7 (1950) [hereinafter Havana Charter] stating:

> [t]he Members recognize that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, conventions and agreements. They recognize that all countries have a common interest in the achievement and maintenance of fair labor standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The Members recognize that unfair labor conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.

13. The United States administration decided not to submit the Havana Charter to the Congress. Without the support of the United States, the Havana Charter and the planned establishment of the International Trade Organization effectively died. *See* MICHAEL J. TREBILCOCK AND ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 21, 35-36 (2d ed. 1999)

14. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

15. Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1144 (1995) ["WTO Agreement"]. The WTO Agreement entered into force on January 1, 1995. The WTO and the various Uruguay Round agreements have replaced the GATT, but maintained its legal norms by incorporating the current version of GATT, designated as GATT 1994. *See generally* JOHN H. JACKSON, THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE 12-29 (1998). For the purposes of this article, unless context indicates otherwise, references to GATT and the WTO incorporate this relationship.

16. *See* GATT *supra* note 14.

17. In general, the countries from the "North" favor an inclusion of "fair labor standards" on the WTO agenda, and the countries from the "South" reject such an inclusion. As a result, they are far from agreeing on a common position. *See generally* Blackett, *supra* note 1, at 5–43; Howse, *supra* note 11, at 135–71 (discussing the general question of human rights and the GATT).

however, is unquestionable.[18] According to a majority of GATT contracting parties, the International Labor Organization ("ILO") "is the competent body to set and deal with these standards."[19] While no one disputes ILO competence over labor standards issues, this competence does not exclude the attribution of any competence concerning fair labor standards to the GATT. Because GATT procedures permit trade sanctions for violations of its rules, it holds the potential for a bigger impact on human rights than the ILO.

Because the GATT primarily has jurisdiction over free trade matters, its competence with regard to labor standards must be restricted to trade related labor standards or questions emerging within the framework of trade. Furthermore, because the GATT is not the appropriate arena to discuss contested rights protections, the WTO should only consider fundamental labor standards or human rights, which few contracting parties oppose.[20] Although the majority of the contracting parties presently reject any consideration of labor standards, trade related human rights could be taken into account within the existing framework of the GATT. This article argues that Article XX, paragraphs (a), (b), (d), and (e), could be applied to enforce trade related human rights.[21]

Within the scope of this article, trade related human rights are considered basic and universally recognized standards. These standards encompass inter-alia freedom of association, collective bargaining, the prohibition of forced labor, the elimination of discrimination in employment and remuneration, the outlawing of exploitation of children and the necessity of

18. For the discussion on the "internationally recognised core labor standards" see *infra* notes 22-25 and accompanying text.

19. World Trade Organization: Singapore Ministerial Declaration, *adopted December 13, 1996*, 36 I.L.M. 218, 221 (1997); *see also* Jagdish Bhagwati, *The Agenda of the WTO*, *supra* note 11, at 27; Charnovitz, *supra* note 5, at 565; Daniel S. Ehrenberg, *From Intention to Action: An ILO-GATT/WTO Enforcement Regime for International Labor Rights*, *in* HUMAN RIGHTS, LABOR RIGHTS AND INTERNATIONAL TRADE, *supra* note 11, at 163; Alice Enders, *The Role of the WTO in Minimum Standards*, *in* CHALLENGES TO THE NEW WORLD TRADE ORGANIZATION, *supra* note 11, at 61; Erika de Wet, *Labor Standards in the Globalized Economy: The Inclusion of a Social Clause in the General Agreement on Tariff and Trade/World Trade Organization*, 17 HUM. RTS. Q. 443 (1995) (discussing whether the WTO agenda should incorporate labor standard issues).

20. Both human rights bodies and the ILO are better equipped for these kinds of questions and debates.

21. *Compare* GATT, *supra* note 14, art. XX with Havana Charter, *supra* note 12, art. 45. Article XX is very similar to Article 45 of the Havana Charter, although the latter was broader in scope.

reasonable working conditions. The basic and universal nature of these fundamental rights or standards is underlined by the fact that: (1) labor standards doctrine consistently enumerates these standards;[22] (2) the ILO has classified these rights as "basic human rights;"[23] (3) international and regional instruments mention these standards,[24] (4) some are qualified

22. *See* Ray Marshall, *The Importance of International Labour Standards in a More Competitive Global Economy*, *in* INTERNATIONAL LABOR STANDARDS AND ECONOMIC INTERDEPENDENCE, *supra* note 11, at 65, 71; Charnovitz, *supra* note 5, at 571; Virginia A. Leary, *The Paradox of Workers' Rights as Human Rights*, *in* HUMAN RIGHTS, LABOR RIGHTS AND INTERNATIONAL TRADE, *supra* note 11, at 22, 28; Dirk Van Evercooren & Rudi Delarue, *La Problématique des Clauses Sociales*, *in* MONDIALISATION ET DROITS SOCIAUX: LA CLAUSE SOCIALE EN DÉBAT 45, 48 (Denis Horman ed., 1997).

23. *See* International Labor Organization, *ILO Conventions*, *at* http://ilolex.ilo.ch:1567/public/English/ docs/convdisp.htm (last visited Sept. 27, 2000) (listing all ILO conventions). The ILO drafted conventions on a number of human rights subjects, categorized them as "human rights" conventions, and emphasized the importance of their ratification and their implementation. *See, e.g.*, Convention Concerning Minimum Age for Admission to Employment, June 26, 1973, 1015 U.N.T.S. 297 (aiming at the abolition of child labor, stipulating that the minimum age for admission to employment shall not be less than the age of completion of compulsory schooling or, in any case, fifteen years); Convention Concerning Discrimination in respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31 (calling for national policies to eliminate discrimination in access to employment, training and working conditions, on grounds of race, color, sex, religion, political opinion, or social origin and to promote equal opportunity and treatment); Convention Concerning the Abolition of Forced Labor, June 25, 1957, 320 U.N.T.S. 291 (prohibiting the use of any form of forced or compulsory labor as a means of political coercion or education, punishment for the expression of political or ideological views, workforce mobilization, labor discipline, punishment for participation in strikes, or discrimination); Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, June 29, 1951, 165 U.N.T.S. 303 (calling for equal pay for men and women for work of equal value); Convention Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively, July 1, 1949, 96 U.N.T.S. 257 (providing for protection against anti-union discrimination, for protection of workers' and employers' organizations against acts of interference by each other, and for measures to promote collective bargaining); Convention Concerning Freedom of Association and Protection of the Right to Organize, July 9, 1948, 68 U.N.T.S. 17 (establishing the right of all workers and employers to form and join organizations of their own choosing without prior authorization, and lays down a series of guarantees for the free functioning of organizations without interference by the public authorities); Convention Concerning Forced or Compulsory Labor, June 26, 1930, 39 U.N.T.S. 291 (requiring the suppression of forced or compulsory labor in all its forms. Certain exceptions are permitted, such as military service, convict labor properly supervised, emergencies such as wars, fires, earthquakes, and other catastrophic events).

24. *See e.g.* African Charter on Human and Peoples' Rights, Jun. 24-27, 1981, arts. 5, 10, 15, 21 I.L.M. 58; American Convention on Human Rights, Nov. 22, 1969, arts. 6, 15, 16, 9 I.L.M. 99; International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, arts. 8, 21, 26, 999 U.N.T.S. 171; International Covenant on

as *jus cogens* norms or obligations *erga omnes*; and (5) these fundamental rights have been considered, inter–alia, by the ILO Director as a precondition for the enjoyment of all other rights.[25] The acceptance of trade related human rights is thus nearly universal with only a few States contesting their validity.

II. GATT ARTICLE XX

A. ARTICLE XX: SCOPE AND PROCEDURE

Article XX, entitled General Exceptions, primarily addresses the general exceptions available under the GATT for purposes of public policy.[26] It lists protection of public morals,[27] the protection of human, animal or plant life or health,[28] measures securing compliance with GATT-consistent laws,[29] and the prohibition of prison labor[30] among the public policy related exceptions. This provision authorizes governments to apply otherwise illegal measures when such measures are necessary to deal with the listed social or economic policy problems, relieving the contracting parties from the obligations imposed by the GATT.

Article XX cannot be interpreted as accommodating general social or economic considerations, but rather as an express policy decision to allow measures considered harmful to market access when a sufficient social or economic policy justification exists. The reasons must relate to an exception specifically listed in the provision.[31] Because Article XX deals with only exceptions, the provision does not allow broad justifications to

---

Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, arts. 7, 8, 10, 993 U.N.T.S. 3; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, arts. 4, 11, 213 U.N.T.S. 221; Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, arts. 4, 20, 23 (1948).

25. *See International Trade and Labor Standards: The ILO Director speaks out* [Speech entitled: "Trade and Labor Standards: Can Common Rules be Agreed?"], 135 INT'L LAB. REV. 230 (1996).

26. *See* GATT, *supra* note 14, art. XX.

27. *Id.* art. XX(a).

28. *Id.* art. XX(b).

29. *Id.* art. XX(d).

30. *Id.* art. XX(e).

31. *See* GATT, *supra* note 14, art. XX(a)-(j). *See also* John H. Mathis, *Trade Related Environmental Measures in the GATT*, 2 LEG. ISSUES EUR. INTEGRATION 47 (1991) (arguing that this narrow interpretation "illustrates the GATT preference to permit trade flows").

escape from a contracting party's GATT obligations. A GATT panel confirmed this limited interpretation of the character of Article XX.[32] The Tuna-Dolphin Panel stated, "Article XX is a limited and conditional exception from obligations under other provisions of the General Agreement, and not a positive rule establishing obligations in itself. Therefore, the practice of panels has been to interpret Article XX narrowly."[33]

A contracting party may invoke Article XX to justify violations of the GATT, however, it is necessary that a national measure, or some part thereof, is contrary to a party's GATT obligations. While the violation of any GATT obligation can trigger the application of Article XX, the enumerated exceptions particularly apply to national measures inconsistent with Article III,[34] which ensures that national policies apply equally to domestic and imported products. In other words, a party cannot treat domestic products more favorably than foreign products.[35] Since the application of Article XX legitimizes a nation's disadvantageous treatment of imported products, it necessarily justifies the unequal handling of imports with respect to domestic products. Contracting parties also regularly invoke Article XX with regard to violations of Article VI and Article XI.[36]

---

32. *See* GATT Dispute Panel Report on United States: Restrictions on Imports of Tuna, Aug. 16, 1991, GATT B.I.S.D. (39th Supp.) at 155, 204 (1993) [hereinafter Tuna-Dolphin Panel].

33. *Id.* at 197. The Tuna cases involved United States restrictions banning the importation of fish or fish products caught with technology tending to kill dolphins and other marine mammals. The Tuna-Dolphin Panel issued a report, not adopted by the contracting parties, suggesting that the U.S. ban on importation of Mexican tuna caught using other methods violated the GATT. Additionally, the report asserted that neither Article XX(b) nor Article XX(g) justified the restrictions. *See id.* at 205. *See also* GATT Dispute Panel Report on United States: Section 337 of the Tariff Act of 1930, Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) at 345, 392-96 (1989) [hereinafter Section 337 Panel].

34. *See* GATT, *supra* note 14, art. III (entitled "National Treatment on Internal Taxation and Regulation" and aimed at preventing discriminatory internal taxation and regulation).

35. *See* GATT, *supra* note 14, art. III para. 1, which reads in part, "internal taxes and other internal charges, and laws, regulations, and requirements. . .should not be applied to imported or domestic products so as to afford protection to domestic production." Further, paragraph 4 of the same article says that "[t]he products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale."

36. *See* GATT, *supra* note 14, art. VI, XI (dealing with Anti-Dumping and Countervailing Duties and "General Elimination of Quantitative Restrictions,

A complaint by a contracting party regarding the trade measures of another contracting party sets in motion the dispute settlement procedures of the WTO.[37] A WTO dispute panel will first determine whether a party's trade measure violates a provision of the GATT. Upon finding a trade measure to be inconsistent with the GATT, the panel will then turn to Article XX to determine whether the measure is nonetheless justified under an exception. If an exception is justified pursuant to Article XX, then the panel will compare inconsistent elements of the measure with the conditions enumerated in Article XX.

In order to use Article XX to justify a trade measure designed to enhance labor conditions or protect human rights, a party must meet several conditions.[38] First, a nation must show that the policy meets the standards in the introductory phrase, which requires nondiscriminatory trade policies. Second, a nation must show that the adopted measure falls within one of the policy areas recognized in the General Exceptions. Finally, the nation must show the connection between the policy and trade and that the policy is needed in order to reach the stated end.

B. INTRODUCTORY PHRASE OF ARTICLE XX

The introductory phrase, sometime called the "chapeau," applies once a contracting party invokes Article XX.[39] Compliance with its substantive requirements is the precondition for application of one or more of the exceptions listed in Article XX.[40] The chapeau reads as follows:

---

respectively").

37. *See* WTO Agreement, *supra* note 15, Annex 2 (establishing the WTO dispute settlement system). *See generally* JACKSON, *supra* note 15, at 59; *see also* Debra P. Steger, *WTO Dispute Settlement*, THE WTO AND INTERNATIONAL TRADE REGULATION 53 (Ruttley et al. eds. 1998).

38. *See* GATT Dispute Panel Report on United States: Standards for Reformulated and Conventional Gasoline, Jan. 26, 1996, 35 I.L.M. 274 (1996) [hereinafter Gasoline Panel]. *See also* Section 337 Panel, *supra* note 33, at 392.

39. *See* Spring Assembles Panel, *infra* note 42 (indicating that, in order for a contracting party to undertake a legal measure on the basis of Article XX, the measure must also satisfy the conditions of the introductory phrase).

40. *See* Section 337 Panel, *supra* note 33, at 392. The conditions enunciated in the introductory phrase must be satisfied for any measure enacted on the basis of any of the exceptions listed in Article XX. The fulfillment of the conditions mentioned in paragraphs (a) through (j) of the article is not sufficient; all measures must also be neither arbitrary, discriminatory, nor a disguised restriction on trade.

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures. . .[41]

The introductory phrase contains two requirements for all measures falling within the scope of Article XX: "arbitrary or unjustifiable discrimination" and "disguised restriction on international trade."[42]

1. *Arbitrary or unjustifiable discrimination*

The main purpose of this first condition, arbitrary or unjustifiable discrimination, is to restrict attempts to legitimize discrimination against certain countries.[43] Within the framework of the Article, however, this provision does not outlaw every kind of discrimination. Since a lawful employment of Article XX suspends the observance of GATT obligations, it discriminates by definition against the countries affected by its application as opposed to all other countries. Any application of Article XX amounts, therefore, to discrimination. This explains the addition of the adjectives "arbitrary" and "unjustifiable" to this provision.

The Tuna I Panel noted the importance of these qualifications.[44] After taking notice of a discriminatory measure towards Canada, the Panel stated that it "felt that the discrimination of Canada in this case might not necessarily have been arbitrary or unjustifiable."[45] The Panel pointed out the difference between "justifiable discrimination" and "arbitrary or unjustifiable discrimination."[46] This difference is significant because, as mentioned above, any country affected by

41. GATT, *supra* note 14, art. XX.

42. GATT Dispute Panel Report on United States: Imports of Certain Automotive Spring Assemblies, May 26, 1983, GATT B.I.S.D. (30th Supp.) at 107, 125 (1983) [hereinafter Spring Assemblies Panel] (noting that "the Preamble of Article XX made it clear that it was the application of the measure and not the measure itself that needed to be examined").

43. *See id.* at 125.

44. *See* GATT Panel Report on United States: Prohibition of Imports of Tuna and Tuna Products from Canada, February 22, 1982, GATT B.I.S.D. (29th Supp.) at 91 (1982) [hereinafter Tuna I Panel] (involving complaint by Canada alleging a U.S. restraint on Canadian imports violated the GATT).

45. *Id.* at 108.

46. *See id.* (finding that the U.S. measure merited further analysis under Article XX).

an Article XX measure experiences discrimination. Yet, to avoid abuses based on the General Exceptions provision, the "arbitrary or unjustifiable" criterion must also be taken into consideration. "If any type of discrimination were to constitute arbitrary or unjustifiable discrimination within the meaning of Article XX, no party could ever successfully invoke the said Article."[47] For a legitimate employment of Article XX a certain amount of discrimination is, therefore, unavoidable provided it is not arbitrary or unjustifiable.

Can arbitrary or unjustifiable discrimination exist between two countries where the same conditions prevail? So far, no GATT or WTO panel has taken a position on this question.[48] In the Tuna-Dolphin case, involving discrimination based on environmental concerns, the United States denied allegations of discrimination and argued that "its measures were not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, because the [Marine Mammal Protection Act] applied evenly to all countries."[49] The Tuna-Dolphin Panel did not analyze this argument in its findings, perhaps because the category of "conditions" lacked definition. The category might be restricted to the one the United States contemplated, but "conditions" might refer to political, economic, cultural or other categories as well. To conclude, it seems difficult to establish arbitrary or unjustifiable discrimination between two countries where the same conditions prevail.

2. *"Disguised Restriction"*

The goal of this second requirement is to ensure that a contracting party may not attempt to cover up protectionist practices by invoking Article XX.[50] The European Community underlined the important function of this requirement in stating

47. Jan Klabbers, *Jurisprudence in International Trade Law: Article XX of GATT*, 26 J. WORLD TRADE 63, 90 (1992).

48. *See id.* (noting Klabbers' belief that the "same conditions" criterion has become "something of a dead-letter clause").

49. The conditions the United States had in mind concerned the criteria of the purse seine nets used by the fishermen. Tuna-Dolphin Panel, *supra* note 32, at 178. The same question was also discussed in the WTO Appellate Body on the United States: Import Prohibition of Certain Shrimp and Shrimp Products, Oct. 12, 1998, 38 I.L.M. 118 (1998) [hereinafter Shrimp-Turtle Appellate Report].

50. [T]he history of this condition suggests that it was intended as a check against attempts to mask protectionist pursuits. . . ." Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. WORLD TRADE 37, 47 (1991)

that, "[t]his condition was intended to ensure that measures taken avowedly for one of the purposes in the ten sub-paragraphs, (a) to (j) of the Article, were not in reality taken primarily to restrict trade, through being more restrictive than necessary to achieve the avowed result."[51]

The analysis of the disguised restriction condition by various panels, however, has weakened this intended purpose by focusing on publication. In one of the earliest cases concerning this requirement, the Tuna I Panel noted that a publicly announced trade measure could not be considered disguised.[52] The Panel also emphasized the importance of the publication of the trade measure in question in its decision regarding U.S. restrictions on the importation of certain automotive parts.[53] This underscoring of publication stresses the word disguised in the term "disguised restriction."

Several sources have criticized the disguised restriction requirement test as applied by numerous panels. Contracting parties involved in GATT disputes, as well as third parties interested both in these disputes and the general governing doctrine, provide sound critiques showing why the soft interpretation of disguised restriction needs to be changed.[54] Many States have resisted the publication-focused emphasis, preferring a broader interpretation instead. "[T]he publication of the trade effects was [not] the sole criterion for determining whether there is a disguised restriction on international trade. It could also happen that the disguise would consist of cloaking a trade measure under considerations of another order."[55]

---

51. Section 337 Panel, *supra* note 33, at 377.

52. *See* Tuna I Panel, *supra* note 44, at 108 (explaining that "the United States action should not be considered to be a disguised restriction on international trade, noting that the United States prohibition of imports of tuna and tuna products from Canada had been taken as a trade measure and publicly announced as such").

53. *See* Spring Assemblies Panel, *supra* note 42, at 125 (noting that, because the exclusion order was published in the Federal Register and based on a valid patent whose infringement had been clearly established, no disguised trade restriction could be identified).

54. For example, in the Section 337 Panel, Japan did not use this line of reasoning when rejecting the United States argument as to the existence of a "disguised restriction." In paragraph 4.4, the Panel considered Japan's argument

> that Section 337 procedures were not "necessary" and were "a disguised restriction" on international trade in terms of Article XX(d), because the procedures and orders issued at the border under Article XX(d) treated imported products less favourably than domestically produced goods and because they could hinder the distribution of genuine goods.

Section 337 Panel, *supra* note 33, at 379.

55. Tuna-Dolphin Panel, *supra* note 32, at 179.

A comparison of the Panel's publication centered interpretation with the interpretation provisions of the Vienna Convention on the Law of Treaties[56] (hereinafter Vienna Convention) may justify disagreement with the panels' interpretation of "disguised restriction." According to the Vienna Convention, a treaty must be interpreted in the light of its object and purpose.[57] There is no doubt that the reduction of barriers to international trade is the most important objective of the GATT.[58] If interpreted in light of this purpose, the overemphasis on publication is therefore unwarranted.

An overemphasis on publication can be abused and serve to disguise protectionist measures. This emphasis risks possible misuse of Article XX, where blatantly protectionist measures might pass the disguised regulation test precisely because of their blatancy.[59] Steven Charnovitz expressed his concern with such blatantly protectionist measures.[60] Jan Klabbers, considering the interpretation of disguised restriction, harshly critiques the Panel interpretation, calling it manifestly absurd.[61] Referring to the non-protectionist character of the GATT, Klabbers continues, "[h]ence, it would be absurd to allow certain of these barriers on the mere basis of their being publicly announced."[62] They show why the soft interpretation of "disguised restriction" would be in need of change in the future.

---

56. *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 8 I.L.M. 679 [hereinafter "Vienna Convention"].

57. *See id.* art. 31(a), at 691-92. "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." *Id.* Since the Vienna Convention cannot be applied retroactively, its treaty law character applies only to cases where ratification of the GATT occurred after ratification of the Vienna Convention. Where this is not applicable, its substantive provisions are taken into consideration as rules of customary international law. *See* DAVID J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 813-16 (5th ed. 1998).

58. *See* GATT, *supra* note 14, pmbl. The text of the GATT preamble demonstrates that the agreement was concluded in order to reduce international trade barriers to a minimum.

59. *See* Charnovitz, *supra* note 50, at 48.

60. *See id.*

61. *See* Klabbers, *supra* note 47, at 91 (considering the interpretation within the confines of Article 32(b) of the Vienna Convention). Article 32(b) reads:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31(b) leads to a result which is manifestly absurd or unreasonable.

Vienna Convention, *supra* note 56, at 692.

62. *See id.* at 91.

A more stringent requirement for the interpretation of the "disguised restriction" condition would be an important bulwark against abuses of Article XX.

As debates over the interpretation of the requirements of the chapeau indicate, it is difficult to meet the requirements necessary to legitimately invoke Article XX. Questions such as "what does arbitrary or unjustifiable mean?" or " when does a measure constitute protectionism?" are indeed difficult to answer and may well be the reason why the panels have so far avoided such questions. The very *raison d'être* of the panels is, however, to provide answers to unclear issues. As is already the case with other provisions of Article XX, the panels should not be afraid to address these questions. Until the WTO addresses these issues involving the chapeau requirements, parties will continue to struggle in their attempts to use Article XX.

Similar issues of interpretation and application currently limit the use of Article XX to protect rights and advance workers' rights. An examination of the relevant portions of the agreement highlights these problems.

C. POLICIES PROTECTED WITHIN THE GENERAL EXCEPTIONS

1. Article XX(a): Protection of Public Morals

Article XX(a) is the first provision considered with regard to the suspension of GATT obligations based on violations of trade related human rights.[63] Because neither GATT nor WTO bodies have interpreted or evaluated Article XX(a), its interpretation remains difficult and uncertain. In order to successfully use Article XX(a) to defend an adopted policy, a party must prove that the substance of the policy of the measure, for which the provision was invoked, is protection of public morals. Because a definition of Article XX(a) is essential for its use, the purpose of this section is to define "public moral."

Australia's position in the Tuna-Dolphin case resulted in one useful definition of "public moral."[64] Australia argued that "Article XX(a). . .could justify measures regarding inhumane treatment of animals, if such measures applied equally to

63. The second provision (whether the measure for which the exception is being invoked is "necessary" to protected human, animal life, or health) is analyzed below. *See infra*, section C(2).

64. *See* Tuna-Dolphin Panel, *supra* note 32.

domestic and foreign animal products."[65] Australia did not mention human rights violations as within the scope of Article XX(a), but limited itself to the inhumane treatment of animals.[66] If its view on inhumane treatment of animals is accepted, however, there is no reason why the same should not be valid for the treatment of human beings. Under this interpretation, Article XX(a) could justify trade actions concerning the inhumane treatment of human beings.[67]

In order to practically use the inhumane treatment standard, a working definition is needed.[68] The European Commission of Human Rights provided one possible definition within the framework of torture.[69] According to the Greek Case, inhumane treatment involves, "at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation, is unjustifiable."[70]

The use of the term "deliberately" is apparently "aimed at specifying intentional rather than merely negligent ill-treatment and is presumably designed to shield those who might unwittingly cause suffering."[71] The word "unjustifiable" exempts certain treatment; first, suffering that must be for no other reason than the benefit of the recipient; and second, situations where the recipient freely gives consent.[72] Under this standard, inhumane treatment could amount to a violation of public morals. For example, a violation of human rights, such as poor work conditions, might satisfy the definition of inhumane treatment.

---

65. *Id.* at 181.

66. *See id.*

67. In order to remain consistent with its larger purpose, the WTO's concern for human rights shall be limited to trade related rights.

68. An exact definition is not needed at this time and should ultimately be determined by a WTO Panel.

69. *See* Greek Case, 1969 Y.B. EUR. CONV. ON H.R. 12 (Eur. Ct. H.R.). After the co*up d' état* in 1967 the Greek military government proclaimed a state of emergency and announced a series of derogations under Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Denmark, the Netherlands, Norway and Sweden referred this to European Commission in order to clarify whether there was an "emergency threatening the life of the nation" (within the criteria set in Article 15), and if so, whether the actions undertaken by the military government were "strictly required by the exigencies of the situation." The prohibition against torture and other articles of the Convention were allegedly violated. *See id.*

70. Id. at 504.

71. NIGEL S. RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 74 (1987).

72. *See id.* at 75-76.

Australia notably conditioned its concern with the measures regarding inhumane treatment of animals on "measures applied equally to domestic and foreign animal products."[73] As a result, it seemed not to object to the extraterritorial application of Article XX(a).[74] An Article XX(a) measure, "applied equally to domestic and foreign animal products,"[75] could, with regard to the inhumane treatment of animals, apply outside the country that implemented the measure as well. For example, a party might suspend the GATT under this section as it relates to inhumane treatment of animals abroad.

An analogous application of this proposal to human beings would read as follows: A domestic measure regarding the inhumane treatment of employees – such as poor work conditions and circumstances deliberately causing severe and unjustifiable suffering (mental or physical) which applied equally to national and foreign products connected with the inhumane treatment of workers would justify the invocation of Article XX(a). The cessation of the observance of the GATT for products associated with the violation of human rights, thereby causing inhumane treatment of employees would become a legitimate act.[76]

Another way to include human rights in Article XX(a) is to consider certain human rights as "moral standards."[77] In an analysis about an eventual ILO or WTO social clause, one author suggests limiting the reach of such a clause "to very serious violations of fundamental workers' rights."[78] She limits these serious fundamental workers' rights to:

> the minimal international labor standards of freedom of association, the right to collective bargaining, and the prohibition of forced labor (considered to include egregious use of child labor) and discrimination in employment. These labor standards are the basic human rights standards of the ILO, they are incorporated in the two main international covenants on human rights, and they are moral

73. *See* Tuna-Dolphin Panel, *supra* note 32.

74. For a more detailed discussion about extraterritoriality see *infra* section II(E).

75. The equal application of measures to domestic and foreign products is necessary to satisfy the "non-arbitrary and non-justifiable discrimination" requirement of the introductory phrase of Article XX. *See supra* notes 40-49 and accompanying text.

76. For the debate about a limited application of Article XX measures to final products see *infra* section II(C)(2)(b). With regard to the controversy about the legitimacy of "extraterritorial" action see *infra* section II(E).

77. *See* Leary, *supra* note 11, at 221.

78. *Id.*

> standards that few countries would contest and that most have accepted by virtue of membership in the ILO or ratification of human rights conventions.[79]

This proposal is clearly compatible with considering certain human rights as "public morals." Her argument that these rights constitute "moral standards that few countries would contest" seems correct. Her limitation of "moral standards" to fundamental workers' rights can be attributed to the more controversial social-clause debate.[80]

Even though few countries contest the need to protect human rights, many States consider the need for such protection only reluctantly.[81] Therefore, a link between Article XX(a) and the general observance of this limited category of rights likely will be difficult to obtain. In order to mitigate the resistance of countries to link an international trade provision - such as Article XX(a) with fundamental workers' rights or "moral standards," compliance with these selected workers' rights, in certain specific situations, should be restricted. In other words, only if a link to trade is established should fundamental workers' rights and "moral standards" be examined within the context of Article XX(a). Based on Article XX(a), a violation of these rights would then provoke the suspension of observance of GATT provisions.

2. *Article XX(b): Protection of Life or Health*

Article XX(b) also validates certain trade restrictions that otherwise violate the general principles of the GATT.[82] Like Article XX(a), no contracting party has ever invoked Article XX(b) for human rights issues. This section examines whether Article XX(b) could justify the invocation of otherwise unlawful practices when used to protect human rights. While not presently used to protect human rights broadly, Contracting Parties have resorted to Article XX(b) to protect human or animal life, or health.[83] In these cases, the panels interpreted

---

79. *Id*; *see also* Blackett, *supra* note 1, at 34.

80. *See* Leary, *supra* note 11. *See generally supra*, note 11.

81. *See* Leary, *supra* note 11, at 204.

82. *See* GATT, *supra* note 14, art. XX(b) ("necessary to protect human, animal or plant life or health").

83. *See e.g.* Tuna I Panel, *supra* note 44; Tuna-Dolphin Panel, *supra* note 32 (invoking Article XX(b) to protect animal life); *see also* GATT Dispute Panel Report on Thailand: Restrictions on Importation of and Internal Taxes on Cigarettes, 30 I.L.M. 1122 (Nov. 7, 1990) [hereinafter Thai Cigarettes Panel] (using Article XX(b)

the Article's content and indicated its conditions of application.[84] Because there is no reason why future panels dealing with eventual human rights issues should deviate from these findings, the examination of existing panel findings will be the point of departure. These panels start their analysis by examining the nature of the policy used to invoke the exception.

(a) Improvement of Workplace Conditions

A policy compatible with trade related human rights could be consistent with this first condition if it falls within the range of policies designed "to protect human life or health." Regulations on dangerous work conditions certainly comply with these requirements.[85] In light of the fact that human life and health are linked to workplace conditions, GATT inconsistent measures for improvement thereof could be based on Article XX(b). Any labor conditions causing severe health problems or risking the life of employees could provoke a legal application of paragraph (b) of the General Exceptions clause.

(b) Methods of Production and Practice

One of the important legal issues facing the interpretation of Article XX(b) is the scope of its application. Do the exceptional GATT measures only apply to the final product as such or do they also apply to the methods of production and practice ("MPP") included in making the final product? If extended to apply to the MPP of the final product, Article XX(b) could serve as a basis for the defense of a much broader variety of trade related human rights. Taking MPP into account remains highly disputed and no panel has ever approved their consideration. So far, only GATT inconsistent measures limited to the final product have been confirmed. Thailand's ban on the importation of cigarettes from the United States is the classic example of the application of Article XX(b).[86] The Thai Cigarettes case,

---

for human life protection).

84. *See e.g.* Tuna I Panel, *supra* note 44; Tuna-Dolphin Panel, *supra* note 32; Thai Cigarettes Panel, *supra* note 83; Section 337 Panel, *supra* note 33; WTO Panel Report on Australia: Measures Affecting Importation of Salmon, *June 12, 1998,* WTO DOC. WT/DS18/R (1998), *available at* http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm [hereinafter Salmon Panel].

85. Policies concerning the security and health of workers, such workers exposed to dangerous chemical materials without protections, are the main matters of interest.

86. *See* Thai Cigarettes Panel, *supra* note 83, discussing Thailand's ban on the

however, deals only with the final product.[87] It does not consider the MPP of the product.

Panel decisions interpreting other portions of the GATT, and including MPP in their decisions, involve situations sufficiently analogous to those in Article XX(b) cases to extend their analysis. For example, the Tuna-Dolphin Panel examined the question of the scope of the protection measures.[88] In its decision, the Panel stated that the United States' protection measures concerning the production methods of tuna violated the GATT.[89] It further held that Article XX(b) did not legitimize this violation.[90] In making its decision, the Panel first decided that concerns about the production methods violated GATT Article III.[91] The Panel found the inconsistency with Article III in the fact that,

> the standard of Article III – namely that imported products be accorded no less favorable treatment than domestic products – required a comparison between products of the exporting and importing countries, and not a comparison between production regulations . . . that had no effect on the product as such. Therefore, the United States could not embargo imports of tuna products from Mexico simply because Mexico's regulations affecting the production of tuna did not satisfy United States regulations.[92]

---

importation of cigarettes and other tobacco preparations. The sale of domestic cigarettes, however, was authorized. The United States complained that the import restrictions violated the GATT and argued that neither Article XI:2(c) nor Article XX(b) provided justification therefor. Thailand argued that the import restrictions were justified under Article XX(b).

87. *See id.*

88. *See* Tuna-Dolphin Panel, *supra* note 32. For a more comprehensive discussion of the Tuna-Dolphin Panel decision see Don Mayer and David Hoch, *International Environmental Protection and the GATT: The Tuna/Dolphin Controversy*, 31 AM. BUS. L.J. 187 (1993); Carol J. Miller and Jennifer L. Roston, *WTO Scrutiny v. Environmental Objectives: Assessment of the International Dolphin Conservation Program Act*, 37 AM. BUS. L.J. 73 (1999); Hon. R. Kenton Musgrove, *The GATT-Tuna Dolphin Dispute: An Update*, 33 NAT. RESOURCES J. 957 (1993); Richard W. Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn From the Dolphin-Tuna Conflict*, 12 GEO. INT'L ENVTL. L. REV. 1 (1999); Paul J. Yechout, *In the Wake of Tuna II: New Possibilities for GATT-Compliant Environmental Standards*, note, 5 MINN. J. GLOBAL TRADE 247 (1996); *Dolphins and Tuna: An Analysis of the Second GATT Panel Report*, 24 ELR 10567 (1994).

89. *See* Tuna-Dolphin Panel, *supra* note 32, at 195.

90. *Id.* at 200.

91. *See id.* at 195.

92. Gadbaw & Medwig, *supra* note 11, at 150 (citing the Tuna-Dolphin Panel). Based on the decision in the Tuna-Dolphin case, the imposition of production regulations could not be justified under Article II. Although this Panel was dealing with environmental regulation, trade related human rights could just as easily fit

The United States argued that even if the Panel declared its actions inconsistent with GATT obligations, they would be valid under various provisions of Article XX, including Article XX(b).[93] They argued that the ban was necessary for the protection of the life and health of dolphins.[94]

The Panel rejected the United States' Article XX(b) justification for three major reasons. First, Article XX(b)'s limitation to trade measures; second, the non-extraterritorial application of Article XX(b); and third, the necessity of the trade measure in question.[95] While the Panel confirmed the sovereign right of each contracting party to establish its own human, animal or plant life or health standards, it clarified, however, that the application of Article XX(b) referred only to trade measures violating GATT obligations.[96] Broader life or health regulations established by the Contracting Parties did not fall under Article XX(b).[97] The Panel provided the following reason for that narrow view:

> [I]f the broad interpretation of Article XX(b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.[98]

---

the category of "production regulation" to which the Panel referred. *See id.* There is no reason why a future panel could not find a trade-related human rights or labor standard regulation inconsistent with Article III because of the same reasons. *See* GATT, *supra* note 14, art. III.

The same analysis applies to Article XI entitled "General Elimination of Quantitative Restrictions." *See* Tuna-Dolphin Panel, *supra*, note 32, at 201. Trade related human rights measures are also qualified as "quantitative restrictions" and are inconsistent with Article XI of the GATT. *See id.*

93. *See id.* at 168. The other United States' arguments, with regard to Article XX, were based on paragraphs (d) and (g).

94. *See* Tuna-Dolphin Panel, *supra* note 32, at 170. This statement indicates that the production related risks could be used to justify regulations. If export goods produced under dangerous conditions should be limited to protect animal life, than by similar reasoning, they should be limited to protect trade related human rights. If export goods are produced under dangerous working conditions, a ban on their import could be necessary for the protection of the life and health of the workers involved in their production process.

95. *See id.* at 199.

96. *See id.*

97. *See id.*

98. *Id.*

Thus, the Panel rejected Article XX(b)'s use to protect domestic environmental policies violating the GATT. This conclusion, which attempted to avoid unilateral determination of life or health protection policies, weakened the multilateral framework of the GATT for trade purposes. If upheld in future disputes, the analogous application of the Panel's decision to the MPP, trade related human rights regulations resulting in measures violating the GATT could not be based on Article XX(b). The findings of the Panel, however, can be challenged from two different perspectives.

The first problem with the Panel's decision involves its fear of unilateral determination. Since the trade-related human rights considered in this article refer to fundamental workers' rights that only a few countries contest, unilateral action with respect to their observance should not be confused with the unilateral acts to which the Panel referred. Today, the overwhelming majority of countries, in one way or another, complies with the obligation to respect these rights and no longer questions the international customary law character of these rights.[99] Because of their customary or *jus cogens* nature, efforts to gain an international respect for these rights do not aim to unilaterally determine health or life policies. To the contrary, they seek to enforce respect for fundamental workers' rights as required by international human rights laws or by ILO Conventions.

Similarly, the international community endorsed the goal of achieving these rights by including them in the Preamble of the GATT.[100] The Preamble states that the contracting parties recognize that "their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living."[101] The Preamble's reference to raising standards of

99. It is true that these rights are violated in many countries. This violation, however, does not weaken their customary nature, because the countries concerned either deny the allegations or seek to justify their behavior. This reasoning is analyzed in Rodley, *supra* note 71, at 63-64. For a general study of customary international rules see Peter Haggenmacher, *La Doctrine Des Deux Eléments Du Droit Coutumier Dans La Pratique De La Cour Internationale*, 90 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 5 (1986).

100. *See* GATT, *supra* note 14, pmbl.

101. *Id.*; *see also* WTO Agreement, *supra* note 15, pmbl. The Shrimp-Turtle Appellate Report noted the importance of the Preamble within the context of environmental issues. *See* Shrimp-Turtle Appellate Report, *supra* note 49, at 162. The Vienna Convention confirms that for the interpretation of a treaty its preamble must be taken into account. *See* Vienna Convention, *supra* note 56, art. 31(2), at 692. This part of the Preamble has to be considered for the interpretation of the GATT.

living is therefore significant to the analysis of the Panel's "unilateral determination fear." Trade related human rights, such as work conditions, undoubtedly contribute to living standards.[102] As more countries guarantee these rights, living standards will rise. By implementing policies aimed towards these ends, the countries do not unilaterally determine the health or protection policies, but comply with the text of the Preamble and arguably with obligations agreed upon in a multilateral framework. For this reason, the Tuna-Dolphin Panel's decision concerning unilateral determination cannot be accepted.

The other problem with the Panel's rejection of the United States' position relates to its concern that taking the Article into consideration could weaken the multilateral trade character of the GATT.[103] The Panel gave preference to the free trade nature of the GATT and rejected the pro-environment argument.[104] In other words, it "gave great weight to *trade* policy arguments while giving short shrift to other important international values."[105]

If the WTO applies this standard to fundamental workers' rights in the MPP a similar outcome would result; priority would be given to free trade. There is, however, key precedent allowing a departure from this standard. This decision arguably conflicts with the language of report of the Thai Cigarettes Panel, asserting that Article XX(b) "clearly allowed contracting parties to give priority to human health over trade liberalization."[106]

The conclusion of the Thai Cigarettes Panel demonstrates that there is no clear solution in the case of a conflict between

---

See also MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 2 (1993) (stating that the legal significance of the preamble is generally recognized under international law).

102. *See* Thai Cigarettes Panel, *supra* note 83, at 1129 (noting Thailand's reference to the Preamble as it sought to prove that smoking among other things lowered the standard of living; unfortunately, the Panel did not deliberate this interesting point).

103. *See* Tuna-Dolphin Panel, *supra* note 32, at 199.

104. *See id.*

105. See Eric Christensen & Samantha Geffin, *GATT Sets Its Net on Environmental Regulation: The GATT Panel Ruling on Mexican Yellowfin Tuna Imports and the Need for Reform of the International Trading System*, 23 U. MIAMI INTER-AM. L. REV. 569, 586 (1991-92); *see also* Shrimp-Turtle Appellate Report, *supra* note 49 (taking a similar position).

106. Thai Cigarettes Panel, *supra* note 83, at 1137. With regard to the legal value of panel decisions, see *infra* note 159 and accompanying text.

trade under the GATT and the protection of life and health. It is important to note that Article XX(b) overrides the GATT's concern for trade liberalization with its General Exceptions.[107] Regrettably, the Tuna-Dolphin Panel ignored this point. Therefore, the conclusion reached by the Thai Cigarettes Panel must be given priority over the Tuna-Dolphin Panel's decision.

Finally, an exclusion of MPP non-trade concerns from the analysis of Article XX would have contradictory effects on other Article XX norms. Robert Howse, an internationally recognized expert on trade regulation and labor rights, explains this conflict:

> Even if one thinks that Article XX(a) is somehow limited to matters such as the regulation of pornography, imposing a limitation on its scope to measures on "products" would prevent a country from banning imports of pornographic films made with children or involving (but not necessarily depicting) involuntary acts of sex and other illegal violence. One has only to think of this example to see how unduly and irrationally restrictive of the ability of members to protect public morals Article XX(a) would be if it excluded PPM [MPP]-based measures. Indeed, unless independently harmful, any product manufactured in the context of racketeering or organized crime would have to be given the full protection of GATT![108]

Furthermore, Article XX(b) allows a contracting party's health interests to prevail over the trade interests of other contracting parties.[109] Overall, a blind subordination of non-trade matters to trade concerns would undermine many of the economic advantages that the GATT creates.

The drafters of the GATT did not specifically designate the Article XX measures that relate to MPP, but an examination of Article XX(e)[110] shows that it should be applied to measures

---

107. *See generally*, WTO Panel Report on United States: Import Prohibition of Certain Shrimp and Shrimp Products, 37 I.L.M. 832, 846 (Nov. 3, 1998) [hereinafter Shrimp-Turtle Panel], deciding that Article XX is to be interpreted with reference to and consideration of the object and purpose of the GATT as a whole). *See also Id.* at 849 (stating that Article XX allows Members to take measures contrary to its GATT obligations if and only if it does not abuse the object and purpose of the GATT by preventing market access and non-discriminatory treatment).

108. Howse, *supra* note 11, at 143-44.

109. *See* Frieder Roessler, *Diverging Domestic Policies and Multilateral Trade Integration*, in 2 FAIR TRADE AND HARMONIZATION: LEGAL ANALYSIS, *supra* note 11, at 34-35. *See also* Shrimp-Turtle Panel, *supra* note 107, at 843 (stating that "Article XX can accommodate a broad range of measures aiming at the conservation and preservation of the environment").

110. *See* GATT, *supra* note 14. Article XX(e) permits GATT inconsistent measures "relating to the products of prison labor." Although no panel has analyzed this exception in depth, one panel summarily noted that "GATT 1994 indicated that

concerning the MPP of imported goods. Although the paragraph does not contain any specific provision to this effect, one can deduce this from its structure because a ban on products made by prison labor refers to the conditions under which the product was produced. Thus, Article XX(e) takes into account the MPP under which the final product is produced. It is unlikely that the drafters of the GATT had another interpretation in mind. The same is applicable to the other paragraphs of Article XX, namely paragraphs (a), (b), and (d).[111] If the drafters had not wanted the latter paragraphs to be interpreted in the same way as paragraph (e) with regard to the MPP, they would have made such an intention explicit.[112] Since the wording of the paragraphs (a), (b), and (d) does not contain any statement excluding Article XX measures based on MPP, it follows that these concerns can also be taken into account.

To date, GATT and WTO panels have interpreted the measures referred to in Article XX narrowly. The EEC Regulation Panel made this very clear in its report, where it is stated that, "the panel considered that the 'measures' referred to in Article XX is the measure requiring justification under Article XX."[113] Even though no panel expressly has considered MPP, decisions concerning the environment have demonstrated that panels' decisions would not incorporate MPP.[114] Within the meaning of Article III of the GATT, as presently understood, any embargo on imports is limited to the products as such, and cannot be extended to the MPP.[115] Article XX(b) is therefore currently restricted to final products as such and the MPP of products are not taken into account. In light of the expanded protections that a consideration of MPP would allow, the WTO

---

trade measures could take effect through their influence on countries." *See* Shrimp-Turtle Panel, *supra* note 107 (stating that "since the management of prisons was almost universally within the sphere of governments, Article XX(e) unquestionably was intended to allow trade measures to [sic] that could serve to influence the policies and practices of governments").

111. This line of reasoning is supported by statutory canons of interpretation: (1) the "presumption of consistent usage," and (2) a breed of *in pari materia*, which normally dictates that provisions should be construed together when their scope and aim are similar, or, as is true in regards to Article XX, the legal framework embraces similar purposes or policies.

112. A related canon supports this interpretation: *ex expressio unius est exclussio alterius*.

113. GATT Dispute Panel Report on EEC: Regulation on Imports of Parts and Components, 30 I.L.M. 1075, 1113 (May 16, 1990) [hereinafter EEC Regulation Panel].

114. *See* Shrimp-Turtle Panel, *supra* note 107, at 851.

115. *See* Gasoline Panel, *supra* note 38, at 294.

should also depart from current practice and allow the application of Article XX(b) to protect work conditions by taking the MPP of traded products into consideration.

3. *Article XX(d): Necessary To Secure Compliance With Laws Or Regulations*

Measures that are inconsistent with the GATT can also be based on paragraph (d) of Article XX.[116] Although several panels analyzed the legal validity of various Article XX(d) measures, surprisingly, no contracting party has referred to human rights. Article XX(d) creates the following exception:

> [N]ecessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;[117]

With regard to measures inconsistent with the GATT, "Article XX(d) covers only measures designed to prevent actions that would be illegal under the laws or regulations."[118] It is important to note that the measures violating the GATT must consist of the actions needed to enforce the laws or regulations and not of the laws or regulations themselves.

(a) The Scope of "Laws or Regulations"

Since the first condition with regard to the application of Article XX(d) is the consistency of the laws or regulations with GATT, an examination of the understanding and the scope of these laws or regulations is indispensable. This section looks at a number of controversies related to the scope of Article XX(d), including whether the article refers to domestic or international law, whether reviewing boards should consider the text or the purpose of potentially conflicting laws, and whether the list of exceptions is exhaustive.

The numerous panels that have dealt with the meaning of the phrase "laws or regulations" have agreed that the "'laws or regulations' to be examined under sub-paragraph (d) are the laws or regulations the contracting party invoking Article XX(d)

116. GATT, *supra* note 14, art. XX(d).
117. *Id.*
118. EEC Regulation Panel, *supra* note 113, at 1114.

claims to secure compliance with."[119] Thus, the panels were loyal to the wording of paragraph (d) and interpreted it literally. They did not make a deep examination of the paragraph. *Ab initio*, this interpretation is unclear as to whether there is a domestic or international character to the laws or regulations in question. Subsequent panels have maintained the domestic nature of the laws or regulations, noting that, "Article XX(d) [authorizes] a contracting party to secure compliance with its national laws or regulations. . .the protection of patents was one of the few areas of national laws and regulations expressly mentioned in Article XX(d)."[120]

Without any clearly persuasive reasoning, later panels have adopted this restrictive interpretation concerning the nature or the laws or regulations. Had the drafters of GATT contemplated such a restrictive understanding, they would have chosen wording that indicates such intent.[121] The addition of the terms "internal" or "domestic" to the laws or regulations would have been enough to justify such an interpretation. However, the drafters did not add these terms and, therefore, it is very unlikely that the panels' limited interpretation of the laws or regulations corresponds with the drafters' intent. Accordingly, the panels' restrictive view with regard to the domestic or international character of the laws or regulations is incorrect.

In any case, because internal law cannot violate international law,[122] it is legitimate to ask whether it is important to differentiate between domestic and international law with regard to Article XX(d). It is very important to distinguish domestic laws or regulations from international ones because of the impact on state sovereignty. Complaining parties

119. *See, e.g.*, *id.* at 1113.

120. *E.g.* Spring Assemblies Panel, *supra* note 42, at 124.

121. This is particularly important because the provisions of the GATT are to be read in light of their ordinary meaning. Augmenting or deleting the language of provisions clearly violates such a rule. *See* Vienna Convention, *infra* note 196 and accompanying text (discussing ordinary meaning). *See generally* WTO Appellate Body Report on Canada: Certain Measures Affecting the Automotive Industry, May 31, 2000, WTO DOC. DS142, 139, *available at* http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm [hereinafter Automotive Industry Appellate Report] (examining the "ordinary meaning" of Article 3.1(b) to commence the analysis of its scope).

122. *See* The Vienna Convention, *supra* note 56, art. 27, at 690. "A party may not invoke the provisions of its internal law for its failure to perform a treaty." *Id.* *See also* Advisory Opinion No. 44, Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, 1932 P.C.I.J. (ser. A/B) No. 44, at 24 (affirming that this principle is not restricted to treaties and can be considered as customary international law).

often regard measures adopted to secure compliance with the implementing party's domestic laws or regulations as interference in the internal affairs of the complaining party.[123] These measures are rejected as being in violation of the sovereignty principle.[124] Whereas these arguments can be considered plausible in the case of domestic laws or regulations, they are of doubtful validity with regard to disputes concerning international laws or regulations. As a result, there is no persuasive argument for limiting the application of Article XX(d) to domestic laws or regulations.

The second debate involves whether Article XX(d) limits only laws, which are textually inconsistent with the GATT, or if it also looks at the objectives underlying the law or regulation in question. "[I]n order for a measure to be covered by Article XX(d), it must *secure compliance with* laws or regulations that are not inconsistent with the General Agreement."[125] The laws or regulations in question, therefore, must be textually consistent with the GATT provisions. The clear wording of the paragraph does not permit an alternative interpretation. It does, however, leave open whether Article XX(d) also applies to laws or regulations with purposes inconsistent with the GATT.

However, consideration of statutes' objectives is inconsistent with Article XX(d). This view is shared by the EEC Regulation Panel, which stated, "this provision does not refer to objectives of laws or regulations but only to laws or regulations. This suggests that Article XX(d) merely covers measures to secure compliance with laws and regulations as such and not with their objectives."[126] Because panels are not considered competent to judge the policy objectives of the contracting

123. Sovereignty refers to a State's complete independence to conduct its own affairs. It is an integral part of the principles of equality of States and of territorial integrity and political independence. The community of States is based on the principle of sovereign equality of all of its members. *See* UN CHARTER art. 2, para. 1. International law, however, restricts State sovereignty. The adoption of international treaties and the establishment of international customary law are, indeed, a limitation of sovereignty. In accepting international obligations, State sovereignty is either removed or diminished over the obligations in question. Since States have the sovereign right to manifest their adherence to international law, a violation of international law cannot be defended on the grounds of sovereignty. *See* Debra Steger, *The Impact of GATT/WTO Rule Making and Rule-Interpretation on the Sovereignty of States*, *in* PROCEEDINGS OF THE CANADIAN COUNCIL ON INTERNATIONAL LAW 138 (Oct. 1992) (discussing sovereignty).

124. *See id.*

125. EEC Regulation Panel, *supra* note 113, at 1113 (quotations omitted).

126. *Id.* at 1114.

parties,[127] this limited interpretation is not surprising. A panel's examination is restricted to the validity of the instruments chosen by the contracting parties for the attainment of such policy objectives.[128] Therefore, Article XX(d) refers to the laws or regulations as such.

Another question that causes disagreement concerns the debate over whether the list of laws or regulations in Article XX(d) is exhaustive, or whether it can be expanded to other laws or regulations. The answer to this question centers on the incorporation of the term "including" in the wording of paragraph (d). This term refers to the laws or regulations and its use implies that the list is not exhaustive and only enumerates some examples. The EEC Regulation Panel confirmed this by referring to the list as "examples of the laws and regulations indicated in Article XX(d)."[129] The Spring Assemblies Panel took a similar position in referring to the United States' argument concerning unfair methods of competition or unfair acts.[130] It stated that, "Article XX(d) did not mention unfair methods of competition or unfair acts as such. The drafters of that Article seemed to have had in mind national laws which were not inconsistent with the GATT."[131]

Because the drafters had national laws in mind, the list enumerates only some laws or regulations and is not exhaustive.[132] Laws or regulations referring to other areas are not necessarily excluded. However, they must not be inconsistent with the provisions of the GATT.

Because the examples listed in Article XX(d) are not exclusive, it is important to examine whether the invocation of non-listed examples must correspond with the specified list. In other words, need the non-enumerated examples be the same kind of laws or regulations as the ones mentioned in Article XX(d)? The paragraph is again silent on this question. For example, it is not clear from the text whether the laws or

127. *See* Roessler, *supra* note 109, at 34-35 (discussing panel's incompetence with regard to the interpretation of policy objectives).

128. *See* WTO Panel Report on Canada: Certain Measures Concerning Periodicals, Mar. 14, 1997, WTO DOC. WT/DS31/R, para. 5.9, *available at* http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm [hereinafter Periodicals Panel].

129. EEC Regulation Panel, *supra* note 113, at 1114.

130. *See* Spring Assemblies Panel, *supra* note 42, at 114.

131. *Id.* at 120.

132. For the debate about the controversial limitation to national laws or regulations see *supra* Section II(C)(3).

regulations with regard to the prevention of deceptive practices, mentioned in the last example of Article XX(d), are restricted to deceptive practices with regard to the other listed examples or whether general deceptive practices are included.

Some excerpts from the Section 337 Panel's report shed some light on this issue through the analysis of *in rem* exclusion orders.[133] The Panel stated the following:

> [T]aking action against infringing products at the source, that is at the point of their production, would generally be more difficult in respect of imported products than in respect of products of national origin: imported products are produced outside the jurisdiction of national enforcement bodies and it is seldom feasible to secure enforcement of the rulings of a court of the country of importation by local courts in the country of production. *In personam* action against importers would not in all cases be an adequate substitute for action against the manufacturer, not only because importers might be very numerous and not easily brought in to a single judicial proceeding, but also, and more importantly, because as soon as activities of known importers were stopped it would often be possible for a foreign manufacturer to find another importer. For these reasons the Panel believed that there could be an objective need in terms of Article XX(d) to apply limited *in rem* exclusion orders to imported products.[134]

In rem exclusion orders apply within the framework of Article XX(d) because it is more difficult to take action at the point of production of imported products. Therefore, GATT consistent laws or regulations concerning the place of production of imported goods can be enforced legally through GATT inconsistent measures. Since the laws or regulations with regard to the point of production are not limited to the categories of laws or regulations listed in Article XX(d), laws and regulations enforced under paragraph (d) can differ from the enumerated categories. Therefore, by deduction, the list recorded in Article XX(d) is neither exhaustive nor specific.

---

133. *See* Section 337 Panel, *supra* note 33, at 394. The Panel stated in the same paragraph that the "*in rem* exclusion orders to imported products applies, although no equivalent remedy is applied against domestically-produced products." The *in rem* actions must, however, meet the other requirements with regard to the term of "necessary" and to the introductory phrase.

134. *Id.*

(b) Necessary "to secure compliance with"[135]

Existing interpretations of the phrase "to secure compliance with" have also taken a narrow view. The EEC Regulation Panel, in its examination, confirmed that, "Article XX(d) covers only measures related to the enforcement of obligations under laws or regulations consistent with the [GATT]."[136] The Panel excluded interpretations meaning "to enforce obligations under laws and regulations."[137] Actions enforcing the obligations must therefore be distinguished from actions only related to the enforcement of these obligations. GATT inconsistent measures are authorized if they are linked to the enforcement of obligations under laws or regulations consistent with GATT provisions. It is obvious that requiring this link narrows a party's choice of measures. Since the main purpose of the GATT is the establishment and furtherance of free trade between contracting parties, a narrow definition of measures eradicating free trade is not surprising. This interpretation preempts the use of Article XX(d) for human rights measures.

(c) Invocation For Human Rights Purposes

As a general rule, any application of Article XX(d) measures must be necessary to secure compliance with laws or regulations that are not inconsistent with GATT provisions. Because the GATT is devoted exclusively to free trade issues, it does not embody any human rights. In short, the GATT simply does not address these standards.[138] Therefore, any invocation of human rights is inconsistent with the provisions of the GATT. Thus, Article XX(d) cannot be the basis to authorize GATT inconsistent measures necessary to secure compliance with laws or regulations concerning human rights. Any GATT inconsistent measures necessary to secure compliance with laws or

135. *See* Section 337 Panel, *supra* note 33, at 392-93 (detailing the usage of the term "necessary"). The term "necessary" has already been defined. Since this definition can be applied to GATT inconsistent measures based on Article XX(d), there does not seem to be any need for further examination of "necessary."

136. EEC Regulation Panel, *supra* note 113, at 1114.

137. *Id.*

138. If human rights were considered within the framework of the GATT, the balance of the GATT specific rights and obligations and, therefore, the purpose of the entire GATT could be jeopardized. The purpose of "provisions of this Agreement" seems to confirm the dominance of free trade concerns over any other worries. *See also* EEC Regulation Panel, *supra* note 113, at 1101 (stating Japan's position with regard to unfair trading practices).

regulations not referred to in the GATT or having a link with its provisions, therefore, constitute illegal acts under the GATT. However, this is not correct for a particular category of international law provisions, namely *jus cogens* norms.

(d) The Exception: Norms of *Jus Cogens*

The above analysis of human rights does not include *jus cogens* norms because of the peremptory nature of *jus cogens* norms. The Vienna Convention underlines the peremptory character of this rule:

> A treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[139]

In the case of new *jus cogens* norms, which did not exist at the time of the conclusion of the treaty, the Vienna Convention states that, "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."[140] Therefore, no internationally binding treaty can violate *jus cogens* norms.[141] If a treaty infringes *jus cogens* norms, it becomes void and terminates. It does not matter whether the treaty is in conflict with a *jus cogens* norm at the time of its conclusion or whether it violates a new *jus cogens* norm that did not exist at the time of

139. Vienna Convention, *supra* note 56, art. 53, at 698. It is true that the concept of *jus cogens* was a subject of controversy among States and international jurists. However, its incorporation in the Vienna Convention is evidence that the community of States has accepted it. For a more detailed analysis of the *jus cogens* concept see Gomez A. Robledo, *Le jus cogens international: sa genèse, sa nature, ses functions*, 172 RECUEIL DES COURS DE L' ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 9-217 (1981). For a critical point of view concerning the creation of *jus cogens* norms, see Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 423 (1983).

140. Vienna Convention, *supra* note 56, art. 64, at 703.

141. *See* Reports of the International Law Commission on the Second Part of its Seventeenth Session and on its Eighteenth Session, U.N. DOC. A/6309/Rev.1 (1966), *reprinted in* [1966] 2 Y.B. Int'l Comm'n 247-48 (listing examples proposed by the International Law Commission including treaties contemplating an unlawful use of force contrary to the principles of the Charter, treaties contemplating the performance of any other act criminal under international law or treaties contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide).

the treaty's establishment. Since domestic law must accord with international law, domestic law cannot violate *jus cogens* norms.[142]

The GATT is not exempt from this line of analysis. In short, the GATT cannot contradict *jus cogens* norms. Laws or regulations with regard to *jus cogens* norms cannot be inconsistent with either the GATT or its provisions; otherwise, the GATT would be void. Thus, GATT inconsistent measures based on laws or regulations based on *jus cogens* rules automatically become legal by right.[143] This applies in all cases with regard to *jus cogens* norms. It applies even if the GATT does not link or refer to *jus cogens* norms. This rule becomes clearer when considered in conjunction with *erga omnes* obligations.

The concept of *erga omnes* obligations is similar to norms of *jus cogens*. The International Court of Justice defined *erga omnes* obligations as "obligations of a State towards the international community as a whole."[144] Because *erga omnes* obligations are by their nature concerns of all nations, "all States can be held to have a legal interest in their protection."[145] Thus, a treaty that authorizes slavery would be void as contrary to *jus cogens*, and acts constituting slavery would be in breach of the *erga omnes* obligation with regard to the prohibition of slavery. Because "all States. . .have a legal interest" in the outlawing of slavery, any nation could take legal action to end such activity.[146]

While Article XX(d) generally bars laws or regulations concerning human rights that are inconsistent with the GATT, the foregoing discussion demonstrates that the GATT conflict with *jus cogens* norms and that domestic law must accord with

142. *See supra* note 56; *see also supra* note 122 and accompanying text (discussing Article 27 of the Vienna Convention).

143. In order to authorize Article XX(d) measures, the other two requirements of the application condition must also be met. *See* EEC Regulation Panel, *supra* note 113, at 1113.

144. Barcelona Traction, Light and Power Company (Belg. v. Spain), 1970 I.C.J. 4, 32 [hereinafter Barcelona Traction]; *see also* MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES (1997) (discussing the obligations *erga omnes*).

145. The International Court of Justice listed as examples of *erga omnes*: the outlawing of acts of aggression, of aggression and the protection of principles and rules concerning basic rights of the human person including the protection from slavery and racial discrimination. Barcelona Traction, *supra* note 144, at 32.

146. *See id.*

international law.[147] It follows, then, that laws or regulations regarding *jus cogens* norms are "not inconsistent" with GATT provisions. Therefore, if it can be demonstrated that human rights are regarded as *jus cogens* norms, laws or regulations concerning these standards would be consistent with the provisions of the GATT.

Whether human rights should be considered as *jus cogens* norms is a controversial issue. Customary human rights laws "are based on principles of concern to all States and protect interests which are not limited to a particular State or group of States."[148] Therefore, they are very similar to *jus cogens* norms. However, despite their similarity, no authoritative body has used them synonymously. The human rights examples concerning *erga omnes* obligations provided by the International Court of Justice can surely be regarded as *jus cogens* rules.[149] The human rights referred to in this article are also undoubtedly regarded as customary international rules. Their nature as *jus cogens* norms is nevertheless questionable.

(e) The Example of Forced Labor

The illegality of forced labor is one human right that has received the status as a *jus cogens* norm. An Inquiry Commission of the International Labor Organization (hereinafter ILO Commission)[150] confirmed this, stating that, "there exists now in international law a peremptory norm

147. *See id.*

148. OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE, 343 (1991).

149. *See* Barcelona Traction, *supra* note 144, at 32.

150. This Commission is certainly not empowered to legislate binding international law. As a body of an international Organization, it can, however, contribute to the creation of international law:

> La formation de la coutume s'appuie sur l'ensemble des agissements des sujets du droit international. . .Il suffit que les agissements émanent de sujets de droit international - États, mais aussi organisations internationales,. . .et que ces agissements soient opposables à leur auteur, donc ne soient pas viciés. . . Les organisations internationales participent également à la formation du droit international général par les résolutions qu'elles adoptent, par les conventions internationales quxquelles elles participent, et par l'ensemble de leurs relations avec d'autres sujets de droit international.

NGUYEN QUOC DINH, PATRICK DAILLIER & ALAIN PELLET, DROIT INTERNATIONAL PUBLIC 317-18 (5th ed. 1994). Reports of this Commission can, undoubtedly, also be regarded as interpretation tools of the various ILO Conventions. Thus, the legal value of these reports should not be underestimated.

prohibiting any recourse to forced labor and that the rights not to be compelled to perform forced or compulsory labor is one of the basic human rights."[151]

The Commission based its conclusion on a number of sources and factors: (1) the Forced Labor Convention, 1930 (No. 29); (2) the fact that many States have prohibited forced labor at the constitutional level; (3) the fact that numerous international human rights instruments explicitly banned forced labor; (4) the fact that forced labor was closely related to the protection of other basic human rights; and (5) the provisions of international law of armed conflict prohibiting forced labor.[152] Furthermore, because forced labor is regarded as a slavery-like practice, international law's prohibition on slavery also applies to forced labor.[153] The uniform opposition to slavery is recognized as both a *jus cogens* norm[154] and an obligation *erga omnes*.[155] Moreover, a serious violation on a widespread scale of the slavery-prohibiting obligation can be qualified as an international crime.[156] Thus, forced labor can be considered as an obligation *erga omnes* and its violation can be regarded as an international crime.

Because of its status as *jus cogens*, an authorized application of GATT inconsistent measures could be based on laws or regulations with regard to forced labor. This conclusion is supported by the fact that WTO panels have considered international law in their deliberations. For example, the Gasoline Appellate Report confirmed that, "the *General Agreement* is not to be read in clinical isolation from public international law."[157] Using the *jus cogens* analysis, it is possible

151. Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labor Organization to examine the observance by Myanmar of the Forced Labor Convention, 1930 (No. 29), July 2, 1998, para. 203, *at* http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm.

152. *See id.* at para. 202.

153. *See id.* at para. 198.

154. *See* International Law Commission, *supra* note 141, at 247-48.

155. *See* Barcelona Traction, *supra* note 144, at 32; *see also supra* notes 145-46 and accompanying text.

156. *See I. L. C. Draft Articles on State Responsibility Article 19(3)(c), I. L. C.'s 1996 Report, G. A. O. R.*, 51st Sess., Supp. 10, p. 125

157. WTO Appellate Body Report on United States: Standards for Reformulated and Conventional Gasoline, 35 I.L.M. 603, 621 (Apr. 29, 1996) [hereinafter Gasoline Appellate Report]. Nevertheless, some areas of international law are very vague. To name just a few, the interpretation of existing rules and the customary nature of international law raise serious and controversial questions. Given that the panels specialize in trade questions, they might lack the knowledge to examine these serious yet important issues. In the past, panels used various methods to find

that Article XX(d) could be used for human rights measures.

D. NECESSARY TO ACHIEVE POLICY GOALS

1. *Current Interpretations of the Necessary Prong*

Once a nation has demonstrated that a measure falls within one of the enumerated General Exceptions, it must prove that the measure is necessary to fulfill the policy objective.[158] The Section 337 Panel was the first to define "necessary" in the context of an assessment of a GATT inconsistent measure.[159] The Panel found that a party could not invoke Article XX as necessary when a reasonable alternative measure existed and when that measure was not inconsistent with "other GATT provisions available to it."[160] In cases where a reasonable alternative does not exist, a party must adopt the measure "which entails the least degree of inconsistency with other GATT provisions."[161] Under this standard, it is the individual measure in question that must meet the "necessary" criterion and not the various social policies listed under Article XX.[162] The Section 337 Panel confirmed this, concluding:

> If the term 'necessary' were interpreted to refer not to the

---

answers to these questions. *See* Salmon Panel, *supra*, note 84, at Annex 2 (seeking of advice from experts); Thai Cigarettes Panel, *supra*, note 83, at 1138-39 (referencing decisions, resolutions and recommendations of specialized international Organizations); Gasoline Appellate Report, *supra*, at 618-23 (mentioning cases adjudicated by the International Court of Justice or by regional courts).

158. *See* Gasoline Panel, *supra* note 38, at 296.

159. *See* Section 337 Panel, *supra* note 33, at 392. Once adopted, this interpretation created binding precedent for other WTO Panels. References to previous adjudications are a common habit in international public law. Only through taking into considerations previous judgments, can a coherent interpretation of various principles be possible. Although panel reports do not and should not be regarded as binding precedents, correct and logical panel decisions are to be coherent and previous cases will always provide material for analysis and analogy. Various panels have confirmed this, stating that: "[Adopted panel reports] create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute." *See also* Periodicals Panel, *supra* note 128, at para. 5.7 (adopting the approach of a previous panel for an analysis of Article XX(d)) For more on the jurisprudential role of GATT or WTO dispute panels, see Jeffrey Waincmyer, *Reformulated Gasoline Under Reformulated WTO Dispute Settlement Procedures: Pulling Pandora out of a Chapeau?,* 18 MICH. J. INT'L L. 141, 178 (1996) and Klabbers, *supra* note 49, at 65.

160. Section 337 Panel, *supra* note 33, at 392-93.

161. *Id.*

162. *See id.*

> inconsistency requiring justification but to the health policy itself, then GATT panels would have to pass judgment on the justification of the contracting party's health policy itself rather than the trade measure implementing it, and this in spite of the absence of any guidance on this issue in Article XX(b). One can safely assume that the drafters of the General Agreement, had they considered that only 'necessary' health policies could be implemented through trade restrictions, would have given some guidance on the criteria to be used in assessing the necessity of the contracting parties' health policies.[163]

With regard to the substantive definition of the term necessary, a measure would not be regarded as necessary under Article XX if an alternative measure is available that is not inconsistent with other GATT provisions and which a contracting party can reasonably be expected to employ. A contracting party, therefore, cannot resort to exceptional measures before exhausting other reasonably available alternative measures. However, if a GATT consistent alternative measure is not available, a contracting party is obligated to employ the least restrictive trade measure reasonably available to it.

Panels analyzing the term "necessary" with regard to Article XX(b) have referred to the first definition, used in the Section 337 Panel.[164] The Thai Cigarettes Panel, for example, saw no reason why the understanding of the term "necessary" under paragraph (d) should not be the same as in paragraph (b). Following this line of reasoning, the panel stated that:

> In both paragraphs the same term was used and the same objective intended: to allow contracting parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistency were unavoidable. The fact that paragraph (d) applies to inconsistencies resulting from the enforcement of GATT-consistent laws and regulations while paragraph (b) applies to those resulting from health-related policies therefore did not justify a different interpretation of the term "necessary."[165]

---

163. Roessler, *supra* note 109, at 34-35.

164. *See* Section 337 Panel, *supra* note 33; *see also supra* note 159 and accompanying text.

165. Thai Cigarettes Panel, *supra* note 83, at 1138. Charnovitz criticizes this analogy. *See* Charnovitz, *supra* note 50, at 50. He argues that there is a distinction between the measures "necessary to secure compliance with laws or regulations" within the framework of paragraph(d) and the measures "necessary to protect life and health." *Id.* Since the Panel examined the sole term of "necessary" and not the "necessity" of the different social policies, Charnovitz's criticism may be rejected. As the following debate about the definition of "necessary" will show, the "necessary" measure has to be distinguished from the social policy in question.

The consistent application of the Section 337 Panel definition has allowed GATT and WTO panels' great consistency while nonetheless creating a number of problems.

2. *Problems with the Current Interpretation*

The construction of the necessary prong currently employed by GATT and WTO panels is too narrow. It is unclear in parts and therefore does not contribute to a satisfactory understanding of Article XX. In other parts, the panels' interpretation does not correspond to the meaning of the General Exceptions clause. As a result, the interpretation of necessary is misleading.

(a) Reasonably Available Alternative Measure

The central problem with the panels' definition is its insistence on exhaustion of reasonably available GATT consistent measures. This rule potentially serves to limit the options available to developing nations. For example, although the Section 337 Panel clearly stated that this requirement does not compel contracting parties to change the substantive policy for which an Article XX measure was invoked,[166] the outcome of the policy may depend on the measures employed for its realization. By requiring the use of different measures to achieve the policy, the interpretation injures a nation limited by political, economic, technical and cultural conditions. These conditions might obligate it to apply the GATT inconsistent measure. As a result, the contracting country would not fulfill the necessary requirement and its non-conforming measure could not be accepted under the General Exceptions clause.

The current definition is also limited by its failure to consider the efficiency concerns of social policy.

> It would be consistent with the language of the necessity test as currently interpreted for a GATT panel to find that a measure significantly less effective in achieving the non-trade purpose would nonetheless be identified by the panel as "reasonably available," and

166. *See* Section 337 Panel, *supra* note 33, at 392-93. The Panel stated that a contracting party could not be asked to change its substantive patent law and such level of enforcement of that law, provided that imported and domestically produced products are treated equally if a contracting party could reasonably secure that level of enforcement in a manner that is not inconsistent with other GATT provisions. *See id.*

therefore serve as the basis for invalidating the chosen measure.[167]

The Tuna-Dolphin Panel, for example, referred to the possibility of international co-operative arrangements as a possible alternative and then held that the measure in question was not necessary.[168] This holding ignored United States' concerns that dispute settlement efforts under such an international arrangement were not productive or practically efficient.[169] When attempts were made to use these arrangements, the claimant, Mexico, was unwilling to cooperate.[170] In cases like this, country-specific import prohibitions on certain products might be the only means for the achievement of the purposes enumerated in Article XX. Moreover, some social policies might be so urgent so as to necessitate the implementation of GATT inconsistent measures. Under such a scenario, the GATT consistent measures could prove unsatisfactory. Given the rulings of the panels, GATT consistent measures must be given priority even though they may be less efficient in achieving the purpose of the social policy than GATT inconsistent ones. In the panels' views, the criterion of consistency prevails over all other concerns. [171]

(b) Least Trade Restrictive Measure

The portions of the current rule requiring nations to use the least trade restrictive measure are also flawed. For example, the link between necessary and least trade restrictive measures does not correspond to the wording of Article XX(b).[172] The definition of "necessary" is wrong because:

> [i]t [the definition of necessary] does not accord with the grammar and syntax of Article XX(b) [paragraphs (a) and (d) included]. The word "necessary" in this provision is part of a purpose clause that has as its object the protection of living things. The "least trade restrictive" interpretation turns the clause on its head: "necessary" no longer related to the protection of living things, but to whether or not the

167. Garcia, *supra* note 11, at 84.

168. *See* Tuna-Dolphin Panel, *supra* note 32, at 199 (stating that "[t]he United States had not demonstrated to the Panel. . .that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement, in particular through the negotiation of international co-operative arrangements").

169. *See* Christensen & Geffin, *supra* note 105, at 588.

170. *See id.*

171. *See id.* at 586.

172. *See* Thomas J. Schoenbaum, *Reconciling Trade and Protection of the Environment,* 91 AM. J. INT'L. L. 268-76 (1997).

measure is a "necessary" departure from the trade agreement. . . .[173]

This analysis is correct because the term necessary refers to the object of the protection. Thus, the protective character of the measure should prevail over the trade implications. The definition used by the panels does not suggest that, in cases where a GATT consistent measure is not available, the measure most "necessary" for the achievement of the purposes listed in Article XX must be applied.[174] The realization of these purposes therefore is less important than the nature of the measure invoked. In giving priority to the least trade restrictive measures, the definition "turns the clause on its head."[175] The purposes of Article XX are sacrificed for the free trade objective and the predominant position of the free trade concern is once again confirmed.

A second criticism, raised by author Steven Charnovitz, criticizes the definition of necessary by asking how the "least degree of inconsistency" with other GATT provisions can be determined.[176] He sees the difficulty in the fact that "[a]ll GATT provisions presumably would count in such a calculation. But how should one weigh an action inconsistent with Article XI, for example, against an alternative inconsistent with Article XIII?"[177] Neither the WTO panels nor Charnovitz has been able to provide an answer to this question. A rearrangement of the definition of the term "necessary" could prove helpful to resolve this unanswered question. The concerns listed in paragraphs (a), (b) and (d) of Article XX could then replace the "least restrictive trade" measure.

The narrow definition of necessary is, from a certain point of view, very close to the interpretation of the introductory phrase of Article XX. If GATT consistent alternative measures were reasonably available, a resort to Article XX measures would constitute an arbitrary or unjustifiable restriction. The use of the least trade restrictive criterion is also very close to the use of unjustifiable discrimination in the introductory phrase. The panels have, indeed, incorporated the introductory phrase within the definition of "necessary."[178] In doing so, they have

173. *Id.*
174. *See* Section 337 Panel, *supra* note 33, at 392-93.
175. Schoenbaum, *supra* note 172 and accompanying text.
176. *See* Charnovitz, *supra* note 50, at 49.
177. *Id.*
178. *See* Schoenbaum, *supra* note 172, at 277. "It is no wonder that panels have found it unnecessary to examine whether a measure meets the tests set out in the

created a very high threshold for the term necessary. A clear separation of the assessment of necessary from the introductory phrase would lower this threshold and simultaneously allow clarification in the interpretation of necessary.

E. THE QUESTION OF EXTRATERRITORIALITY

In addition to the traditional three-step examination, questions have arisen with regard to the interpretation of the extraterritoriality[179] of Article XX in general, and paragraph (b) in particular.[180] The Tuna-Dolphin Panel examined the question of the extraterritorial application of Article XX measures.[181] In that case, Mexico contested the United States ban on imports because:

> [n]othing in Article XX entitled any contracting party to impose measures in the implementation of which the jurisdiction of one contracting party would be subordinated to the legislation of another contracting party. It could be deduced from the letter and spirit of Article XX that it was confined to measures contracting parties could adopt or apply within or from their own territory. To accept that one contracting party might impose trade restrictions to conserve the resources of another contracting party would have the consequence of introducing the concept of extraterritoriality into the GATT, which would be extremely dangerous for all contracting parties.[182]

Mexico based its argument on the absence of either language explicitly permitting extraterritorial actions or other indications implicitly authorizing extraterritorial measures. The United States objected to characterization of its measures as extraterritorial, arguing that, "[t]hese measures simply specified the products that could be marketed in the territory of the United States."[183] The United States also argued that its measures were "necessary to protect the life and health of

---

chapeau: arbitrary or unjustifiable discrimination between countries or a disguised restriction on international trade. Their interpretation of 'necessary' makes these tests unnecessary." *Id.*

179. "Extraterritorial" trade measure refers to measures that seek to regulate behavior outside of the country.

180. The "extraterritorial" debate is not solely limited to paragraph (b), but rather concerns the entire Article XX. Nevertheless, the following discussion will concentrate on paragraphs (a), (b), and (d). Particular reference will be made to paragraph (b). By means of analogy, the conclusions pertaining to paragraph (b) can be applied analogously to paragraphs (a) and (d).

181. *See* Tuna-Dolphin Panel, *supra* note 32, at 170.

182. *Id.*

183. *Id.*

dolphins"[184] and were therefore consistent with Article XX(b). However, the Panel rejected that argument as a defense of the "extraterritorial" principle.[185] On the other hand, Mexico successfully argued that Article XX(b) "referred to protection of the life and health of humans and animals within the territory of the contracting party protecting them."[186]

Overall, the Tuna-Dolphin Panel confirmed that the wording of Article XX(b) did not provide a clear solution to the dispute:

> [t]he basic question. . .whether Article XX(b) covers measures necessary to protect human, animal or plant life or health outside the jurisdiction of the contracting party taking the measure, is not clearly answered by the text of that provision. It refers to life and health protection generally without expressly limiting that protection to the jurisdiction of the contracting party concerned. The Panel therefore decided to analyze this issue in the lights of the drafting history of Article XX(b), the purpose of this provision, and the consequences that the interpretations proposed by the parties would have for the operation of the General Agreement as a whole.[187]

The Panel's decision to refer to the drafting history, the purpose, and the consequences of the provision are consistent with well-accepted rules of interpretation.[188] The Panel began its analysis with an examination of the drafting history and concluded that, "the record indicates that the concerns of the drafter of Article XX(b) focused on the use of sanitary measures to safeguard life or health, animals or plants within the jurisdiction of the importing country."[189]

While the Panel used conventional tools of interpretation,

---

184. *Id.*
185. *See id.* at 199.
186. *Id.* at 171.
187. *Id.* at 198.
188. *See* Vienna Convention, *supra* note 56, arts. 31, 32, at 691-92.
189. Tuna-Dolphin Panel, *supra* note 32, at 199. The Panel reasoned on the issue extensively, noting that

> the proposal for Article XX(b) dated from the Draft Charter of the International Trade Organization (ITO) proposed by the United States, which stated in Article 32, Nothing in Chapter IV [on commercial policy] of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures. . .(b) necessary to protect human, animal or plant life or health. In the New York Draft of the ITO Charter, the preamble had been revised to read as it does at present, and exception (b) read: 'For the purpose of protecting human, animal or plant life or health, if corresponding domestic safeguards under similar conditions exist in the importing country.

Id. at 198.

its approach in this case was flawed in two principal ways. First, the Panel's interpretation of the drafting history and its unique reference to that drafting history are controversial. The legislative history on the International Convention for the Abolition of Import and Export Prohibitions (hereinafter 1927 Convention) may not actually support the panel's interpretation.[190] Discussions about the extent of the "General Exceptions" occurred during the negotiations of the 1927 Convention. Given that the "General Exceptions" in the ITO Charter were equivalent to the 1927 Convention, there was no need for "rehashing the obvious."[191] Therefore, the Panel should have looked at the drafting history of the equivalent Article of the 1927 Convention to resolve the debate about the extraterritorial applicability of Article XX.[192]

The Panel also may have erred in its understanding of the deleted section of the New York Draft of the current Article XX(b)[193] The proposal was deleted because of its confusing language, not as the Panel suggests, because Article XX(b) was meant to be restricted to domestic jurisdiction or domestic sanitary measures.[194] Moreover, if the drafters intended to restrict the application of Article XX(b) to sanitary measures, "they could have referred specifically to 'sanitary' measures. . .[a term] with a well understood meaning within international trade parlance at the time of the initial GATT negotiations."[195] Even if the New York Draft proposal could be understood to restrict the application of Article XX(b) to domestic measures, its removal would contradict the Tuna-Dolphin Panel's

190. *See* International Convention for the Abolition of Import and Export Prohibitions and Restrictions; Nov. 8, 1927. Although ratified by a number of countries, this Convention ultimately failed.

191. *See* Charnovitz, *supra* note 50, at 44.

192. *See* Christensen and Geffin, *supra* note 105, at 583. "These earlier negotiations clearly established that laws to 'protect human, animal or plant life or health' included measures to prevent the 'degeneration or extinction' of animals, as well as to protect animals and plants from imported pests and diseases." *Id.*

193. The original suggestion for Article XX(b) was the same as the current language. Upon a proposal made by Belgium and Luxembourg, the following was added to the original suggestion during the New York Draft phase of the ITO Charter: "if corresponding domestic safeguards under similar conditions exist in the importing country." *See* UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, DRAFTING COMMITTEE OF THE PREPARATORY COMMITTEE OF THE UNITED NATIONS CONFERENCE ON TRADE AND EMPLOYMENT, TECHNICAL SUB-COMMITTEE, U.N. DOC. E/PC/T/C.6/41. The final text of the ITO Charter this proposal was, however, rejected.

194. *See* Charnovitz, *supra* note 50, at 44.

195. Christensen & Geffin, *supra* note 105, at 585.

interpretation.

In referring exclusively to the drafting history of Article XX(b), the Panel overlooked the other criterion necessary for its proper interpretation. Article 31(1) of the Vienna Convention indicates clearly that the terms of a treaty shall be interpreted according to their context.[196] With regard to human rights, labor standards and environmental concerns, the international context has changed radically since the end of the World War II. Consideration of these questions has shifted from domestic jurisdictions to international spheres. They have become a concern of the community of states, some of which have gained the status of customary international law, *erga omnes* obligations and *jus cogens*. In a proper examination of the extraterritorial principle, this has to be taken into account.[197] Because of their new status, these concerns override the concept of "extraterritoriality." With regard to the environment, "[i]t is well established as a matter of international law that states have an obligation to prevent damage to both the environment of other states and areas beyond the limits of national jurisdiction."[198] Much the same can be said with regard to human rights, such as slavery, forced labor and racial discrimination. As such, the state's sovereignty and independence to direct the outcome of its own domestic concerns has eroded.[199]

Some authors, nevertheless, have defended the Tuna-Dolphin Panel's conclusion of the non-extraterritorial application of Article XX(b) measures. Worries about the unilateral imposition of domestic yardsticks led one critic to argue that:

> [t]he tuna ban violates the GATT not because of any inherent policy against conservation but because the GATT rightly protects member

196. "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context. . . ." Vienna Convention, *supra* note 56, art. 31(1), at 691.

197. The United States referred to the flexibility afforded by Article XX to take account of new methods of manufacture and commerce that had taken place. *See* EEC Regulation Panel, *supra* note 113, at 1109.

198. Schoenbaum, *supra* note 172, at 280.

199. States still have the right to decide, however, through their constitutional process, whether or not to ratify conventions. It is up to them to determine whether they accept formal obligations. Once they have freely accepted these obligations, they do have a legal responsibility to comply. The big number of international human rights instruments and the customary character of these rights are the reasons for the narrowing of the concept of sovereignty. *See* Steger, *supra*, note 123 at 138 (discussing the specific question of sovereignty and the GATT).

> states from the unilateral imposition of domestic standards by importing countries through market access restrictions. . .If every country were allowed to impose its own domestic environmental standards on other countries, the result would not be greater environmental protection but chaos and anarchy.[200]

With regard to human rights and environmental standards, this argument must be rejected. These standards are no longer domestic standards; they have become the concern of the community of states.[201] Furthermore, the critique seems to forget that every member country must fulfill the application conditions of any Article XX measure. Since these conditions are very narrowly defined, the employment of the measures in question would rarely lead to chaos and anarchy.[202]

Other critics reject extraterritoriality because it is likely to require panels to make decisions about policy goals. Since the successful extraterritorial application of any import restriction is necessary if it is the only measure reasonably available to persuade other countries to change their policy, the question of reasonably available measures will lead panels to make decisions based on the wrong set of criteria.[203] Panels would be obligated to answer difficult technical questions like:

> Would an interruption of diplomatic relations have been sufficient? Would a refusal of landing rights for the national airline have induced a policy change? Or the removal from the list of beneficiaries of GSP tariff preferences? These examples show that an extra-jurisdictional interpretation of Article XX would force panels to assess the foreign policy options of Contracting Parties and the effectiveness of applying alternative means of exerting pressure available to them. . .However, it seems unlikely that in practice the United States and other contracting parties to the GATT would [not] be ready to accept an interpretation of Article XX according to which the scope of their trading rights and obligations would vary with foreign policy means available to them to coerce other countries into a change of their

200. Thomas J. Schoenbaum, *Free International Trade and Protection of the Environment: Irreconcilable Conflict?*, 86 AM. J. INT'L L. 700, 703 (1992). This argument is very similar to the one used in Tuna-Dolphin Panel, *supra* note 32, at 393.

201. It is true that differences exist between the various social policies of different countries, that conflicts of values exist among the countries and that it is, therefore, difficult to agree upon common criteria for the various social policies. But this is no reason to prevent "extraterritorial" measures for any kind of concerns. Since the rights in question are the most universally recognized rights, the above-mentioned arguments become irrelevant.

202. *See* Shrimp-Turtle Panel, *supra* note 107.

203. *See* Roessler, *supra* note 109, at 35.

domestic policies.[204]

This skepticism about unilateral state action is unwarranted. Given that any application of foreign policy means will either be approved or rejected by panels (which define the conditions for such applications very narrowly), any state abuse of extraterritorial measures based on Article XX can be ruled out. WTO panels can control the extraterritorial misuse of foreign policy within the framework of Article XX. Additionally, the proposal in question, human rights, is limited to universal standards. Thus, at least in this context, states have no reason to be afraid of extraterritorial applicability of Article XX measures.

The drafters did not specify any thoughts about the extraterritorial criterion with regard to the four paragraphs dealing with social policies. In addition to paragraphs (a), (b), and (d), paragraph (e) does not refer to any extraterritorial application.[205] However, given that measures based on Article XX(e) relate to products made by prison labor, any restrictions on their import would have an extraterritorial effect. The drafters must have been aware of that fact. The logical deduction of the drafters' silence is that they approved "extraterritorial" actions with regard to prison labor. If the drafters had a different logic in mind for the other paragraphs, and particularly for paragraphs (a), (b), and (d), they certainly would have expressed this intention in the text of the said paragraphs. Because the wording of these paragraphs does not contain anything with regard to the extraterritoriality of the measures in question, as is the case in paragraph (e), the conclusion established for the latter paragraph can also be applied to these paragraphs. Thus, measures based on paragraphs (a), (b), and (d) of Article XX, just as measures justified on Article XX(e), can possess an extraterritorial component.

IV. CONCLUSION

Paragraphs (a), (b), and (d) of Article XX historically have been defined very narrowly. Within the WTO, the free trade

204. *Id.*

205. *See infra* Section IIC(2)(b) (delineating the text of paragraph (e) and providing an analogue argumentation with regard to Article XX measures based on MPP).

purpose of the GATT has been given priority over issues such as human or animal life and the environment. No panel has so far dealt with human rights as such. From the existing decisions it appears that a WTO panel would reject a reference to human rights for GATT inconsistent measures. Arguments concerning unjustified discrimination, disguised trade restriction, protectionism, extraterritoriality, sovereignty and the availability of GATT consistent measures have led the panels to the rejection of claims with regard to human or animal life and the environment. Many of the same arguments would be used for rejecting human rights concerns.

This article, however, has shown that the panels' arguments justifying the rejection of GATT inconsistent measures, with regard to Article XX(a), (b), and (d), are unwise and that they can be challenged. Thus, rejecting the consideration of "human rights " in Article XX(a), (b), and (d) would be wrong.

The main reason for objecting to the panels' decisions concerns the predominance given to free trade. It is true that the GATT is meant to deal primarily with free trade concerns. The General Exceptions clause in Article XX is meant to override these concerns and to prevail over any provision of the GATT. Even the most important provisions establishing free trade can be overridden. Under the provisions of Article XX the balance must be in favor of non-trade issues, such as human rights. By continually deferring to free trade the WTO panels continue to ignore the purpose of Article XX.

The trade-focused bias of the panels is also in contradiction with the concept of norms of *jus cogens*. Since these norms cannot be violated, the predominance of free trade issues over human rights is in violation of international law. Furthermore, their *erga omnes* character makes them a concern of the international community. Thus, every State has a legal interest for the protection of these human rights. Sovereignty or extraterritorial arguments rejecting Article XX measures accordingly become void.

While the world agrees in its condemnation of abuses of human rights, it had not yet agreed on a formal measure to address these concerns. While the GATT is not the mechanism for a systematic human rights regulatory system, it provides a means to address trade related concerns via Article XX. Therefore, Article XX should be reinterpreted and used for its intended purpose.