



OFFICE OF THE
UNITED NATIONS
HIGH COMMISSIONER
FOR HUMAN RIGHTS

HUMAN RIGHTS AND WORLD TRADE AGREEMENTS

USING GENERAL EXCEPTION CLAUSES
TO PROTECT HUMAN RIGHTS



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NOTE

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Preface

The relationship between trade and human rights has come under increasing scrutiny in recent years. While trade can be an engine for the economic growth needed to combat poverty and promote development, it can also threaten human rights in some situations. Recent discussions on the effects of patents on the prices of essential medicines have underlined the right to health dimensions of trade.

Nonetheless, there are ways to reconcile trade rules and human rights, and channel economic growth and development towards achieving a life in dignity for all. This publication explores one of several, namely the use of general exception clauses in world trade agreements as a vehicle to protect human rights. In particular, it sets out to demonstrate how three specific exceptions—allowing States to take measures to protect public morals, human life or health, and public order—could be relevant to human rights.

Chapter I sets out the four steps to interpret these general exception clauses and describes, from a legal point of view, how they could be applied to protect human rights.

Chapter II relies on common sense as well as the World Trade Organization's seemingly flexible approach to defining the general exception clauses as means to defend human rights norms as legitimate exceptions to trade rules. More specifically, it argues that recognizing international human rights norms in this way would help to dispel some of the perceived drawbacks of trade liberalization. It would also enable States to comply with both their human rights obligations and their WTO commitments, and would show respect for the decisions of their parliaments and courts.

Finally, chapter III examines how trade dispute proceedings differ from adjudicatory systems under the human rights model. It describes the practical and legal pitfalls of raising human rights concerns before a forum meant to settle international trade disputes, and suggests ways of avoiding them.

This publication has been prepared in view of the discussions around the sixth session of the WTO Ministerial Conference in Hong Kong, China. The Office of the United Nations High Commissioner for Human Rights is grateful to Mr. James Harrison for his valuable work in the preparation of this publication and to Mr. Steve Charnovitz, Mr. Robert Howse and Ms. Gabrielle Marceau for their assistance in reviewing it.

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Abbreviations

EC	European Communities
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GPA	Agreement on Government Procurement
GSP	Generalized system of preferences
ICCPR	International Covenant on Civil and Political Rights
ILO	International Labour Organization
OHCHR	Office of the United Nations High Commissioner for Human Rights
TBT	Agreement on Technical Barriers to Trade
TRIMS	Agreement on Trade-Related Investment Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
WHO	World Health Organization
WTO	World Trade Organization

Introduction

The objective of this publication is to provoke discussion on the use of general exception clauses in World Trade Organization (WTO) agreements as a means of ensuring that trade agreements maintain the flexibility needed for WTO members to meet their obligations under international human rights law.

It is part of the ongoing work of the Office of the United Nations High Commissioner for Human Rights (OHCHR) on the question of human rights and trade. Most directly, it responds to a recommendation of the High Commissioner, made in an analytical study, to consider the human rights implications of the general exception clauses of WTO agreements.¹

The High Commissioner made that recommendation in the light of findings that the objectives of the multilateral trading system and those of international human rights law are, in many ways, quite different. International human rights principles are intrinsically linked to achieving substantive equality and to redressing the structural biases that lead to discrimination. International trade law is primarily directed towards reducing trade protectionism and improving conditions of international competition. These two broad objectives are not necessarily inconsistent; however, the analytical study illustrated three situations—in relation to Government procurement, agricultural trade and social labelling—where the two distinct prohibitions on discrimination under human rights law and under trade law could conflict. It concluded that, as international trade rules expand into new areas of Government regulation, it is crucial in the debate on globalization to understand how the human rights imperatives of reducing the structural biases that lead to discrimination and promoting substantive equality can be protected alongside trade rules and principles.² The analytical study noted that general exceptions in WTO agreements could provide one mechanism for reconciling the objectives of the multilateral trading system with those of human rights law.

The analytical study focused exclusively on the question of discrimination. However, understanding how human rights imperatives can be reconciled with trade objectives is relevant not only to the principle of non-discrimination but also to many other trade rules and policies. For example, the High Commissioner has already considered the human rights dimensions of intellectual property protection,³ agricultural trade,⁴ trade in services⁵ and investment.⁶

While these reports noted that trade liberalization had the potential to enhance the enjoyment of human rights,⁷ the aim of a human rights approach to trade is to examine potential areas of conflict between the two legal systems and ways to avoid them.

HOW TRADE RULES AND POLICIES CAN AFFECT THE ENJOYMENT OF HUMAN RIGHTS

Trade liberalization in agriculture can create export opportunities in agricultural exporting countries and promote growth and development. However, small farmers might not have the capacity to grow sufficient export crops and might even experience greater competition for resources, including land, thus marginalizing them from the potential benefits of trade. Similarly, greater export opportunities might lead to the reallocation of land and other resources away from domestic food production, with possible adverse consequences for household food security.⁸ Without the introduction of appropriate safeguards and transitional measures, trade rules and policies could have adverse effects on the right to food, workers' rights and other rights of small farmers and the rural poor.

Intellectual property protection—particularly patent protection—should lead to more investment in innovation, including in pharmaceutical research, which is necessary for the promotion of the right to health. At the same time, it may result in an overly commercial approach to innovation and a concentration of control over the dissemination of drugs and other technology in the hands of relatively few corporations. In so doing, the protection of intellectual property might lose sight of its overall developmental objectives. In particular, highly priced drugs could become unaffordable for poor people and have negative implications for the enjoyment of the right to health and other human rights.⁹

The reform of Government procurement could provide greater transparency and effective international competition in this area. However, it could also threaten the use of Government purchasing power to promote opportunities for individuals who have traditionally suffered discrimination, such as women employees or indigenous peoples.¹⁰ It is thus important to ensure that reform of Government procurement proceeds without losing sight of its social functions.

States have used the generalized system of preferences (GSP) to promote human rights, for example in an effort to eliminate forced and child labour or by making its benefits conditional on the ratification of International Labour Organization standards. On the one hand, linking trade and human rights in this way has underscored the social dimensions of trade and the concerns of consumers for fairer trade. On the other, it has raised fears that human rights might be used to cloak narrow protectionist or political aims while reducing trade opportunities in poorer countries and actually worsening the human rights situation of workers there.¹¹ The use of trade to achieve human rights objectives in other countries consequently remains controversial.

Much will depend on how States can strengthen the positive impact of trade on human rights and guard against negative implications. Some flexibility already exists in trade rules to achieve human rights goals in trade reform—for example, in relation to the compulsory licensing of patents over essential medicines. The general exception clauses also provide a mechanism to raise human rights arguments within WTO if a member State is found to have breached the main rules of a WTO agreement. They are thus a means of ensuring WTO law can be interpreted and implemented with due regard for international human rights norms and standards in situations where a conflict of norms and standards might otherwise occur.

There is clearly no suggestion that the general exception clauses are the only way of reconciling the two sets of norms. Every effort should be made to interpret and implement the main rules of WTO agreements in the light of relevant human rights norms and standards, and to use specific WTO provisions that have the potential to protect and promote human rights.¹² The exception clauses ought to be seen as a last resort.

I. GENERAL EXCEPTION CLAUSES AS A MECHANISM FOR RAISING HUMAN RIGHTS IN WTO DISPUTE SETTLEMENT

The general exception clauses provide a mechanism by which specific important State interests and obligations that are not otherwise compatible with WTO agreements can find expression. They recognize “the importance of a sovereign nation being able to act to promote the purposes on the list [of exceptions], even when such action otherwise conflicts with various obligations relating to international trade.”¹³ The WTO Appellate Body has endorsed this view.¹⁴ But the general exceptions should not be seen as allowing Governments the right to take any decision they wish domestically, even if it is welfare-related. Such an interpretation could render unenforceable the entire WTO system, since the exceptions could then be invoked to nullify any WTO obligation at will.¹⁵ It is necessary, therefore, to assess individual exception clauses within trade agreements to understand how they might be used to pursue legitimate human rights ends.

Three of the WTO agreements contain general exception clauses:¹⁶ the General Agreement on Tariffs and Trade (GATT), article XX; the General Agreement on Trade in Services (GATS), article XIV; and the Agreement on Government Procurement (GPA), article XXIII. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) also contains a general exception-type clause relating to the granting of patents.¹⁷ Other WTO agreements do not contain such clauses.¹⁸ But for issues relating to the agreements listed in annex 1A to the Agreement Establishing the World Trade Organization (for instance, the Agreement on Agriculture), GATT is potentially applicable, although the status of the exception clauses in this context is unclear.¹⁹ The Agreement on Technical Barriers to Trade (TBT) on the other hand takes a different approach. Instead of treating human rights-related concerns, such as the protection of human life and health, as general exceptions, it incorporates them into the determination of whether a measure is consistent with trade rules.²⁰

Some of the general exceptions are quite clearly not relevant to human rights, and others are so closely linked to specific human rights that there is little reason to discuss their content in detail.²¹ However, three of the general exceptions could be applicable to a broader range of human rights concerns. Two of these appear in different forms in all four agreements. The first is the exception allowing States to take measures for the protection of public morals.²² The second is the exception allowing measures for the protection of *human, animal and plant life or health*. The third allows measures for the protection of public order/*ordre public*. It appears in TRIPS, GPA and GATS; its omission from GATT should not be considered significant.²³

The Vienna Convention on the Law of Treaties provides the authoritative interpretative methodology for assessing the human rights applicability of these exception clauses. Such an approach to interpretation is mandated under the WTO Dispute Settlement Understanding, article 3.2, which states that WTO agreements need to be interpreted in the light of “customary rules of interpretation”.

The Vienna Convention stipulates in article 31.1 that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their

context and in the light of its object and purpose.” Since these clauses are exception clauses to a treaty’s general provisions, the “object and purpose” of the treaty itself is likely to be of limited use in their interpretation. Article 31 goes on to say that the “context” for the purpose of interpretation shall include the preamble and annexes. Furthermore, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation shall be taken into account. Thus, WTO case law will be an important interpretative tool.

Under article 31.3 (c), “any relevant rules of international law applicable in relations between the parties” shall be taken into account. Finally, article 32 allows recourse to supplementary means of interpretation, including the preparatory work of the treaty, where the interpretative process under article 31 leaves the meaning of the terms ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.

Consequently, in interpreting the general exception clauses that could be relevant to human rights, the core interpretative tools would be:

- An assessment of the ordinary meaning to be given to the terms
- Their context, including the preamble to the treaties and WTO case law
- Any applicable rules of international law between the parties
- If it is still necessary, supplementary means of interpretation, including the preparatory work of the treaty

An assessment of the ordinary meaning to be given to the terms

As far as the term “public morals” is concerned, the *Universal Dictionary of the English Language* defines “moral” as “relating to, concerned with, the difference between right and wrong in matters of conduct.” *Webster’s New International Dictionary* defines “moral” as “conforming to a standard of what is good and right...”. This leaves us with a very broad definition. But arguing for the exclusion of the norms and standards of international human rights on the basis of the ordinary meaning of the terms would be very difficult to sustain. For, “[i]n the modern world, the very idea of public morality has become inseparable from the concern for human personhood, dignity, and capacity reflected in fundamental rights. A conception of public morals or morality that excluded notions of fundamental rights would simply be contrary to the ordinary contemporary meaning of the concept.”²⁴

The term “human life or health”, according to its ordinary meaning, is also very broad and has considerable potential to include a number of human rights. Certainly, the right to life²⁵ and right to health²⁶ fall within its scope. But there is a wide range of other rights that should also be included. In particular, in relation to economic, social and cultural rights, article 25.1 of the Universal Declaration of Human Rights states: “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.” From a human rights perspective, the concept of “human life and health” is therefore connected to a wide range of economic, social and cultural rights relating to a person’s well-being.

Finally, the ordinary meaning of the term “public order” is so broad that it really does little to improve our understanding of how it should be interpreted here. This should not be surprising, as the legal origins of the term are very specific (see below), and this should be seen as the “context” in which the term should be defined.

Their context, including the preamble to the treaties and WTO case law

The primary problem for this type of analysis is that there is little directly relevant case law. References to human rights at all in any of the dispute settlement proceedings of WTO are extremely rare²⁷ and none relates to the exception clauses themselves. Moreover, there has been only one case that has considered the terms “public morals” or “public order”—in relation to article XIV (a) of GATS²⁸—and no case law in relation to article XX (a) of GATT 1994.²⁹

In *United States – Gambling and betting services*, the Panel stated that “public morals” denoted “standards of right and wrong conduct maintained by or on behalf of a community or nation”, while “public order” referred to “the preservation of the fundamental interests of a society, as reflected in public policy and law. These fundamental interests can relate, inter alia, to standards of law, security and morality”. The Panel further held that “public morals” and “public order” were two distinct concepts but that, to the extent that both sought to protect largely similar values, some overlap might exist. However, the Panel was not called upon to consider their human rights dimensions. It is also relevant to note the Panel’s view that the terms “public morals” and “public order” could vary in time and space, depending on prevailing social, cultural, ethical and religious values, and that WTO members “should be given some scope to define and apply for themselves [these concepts] in their respective territories according to their own systems and scales of values”.³⁰ The recent review of the decision by the Appellate Body appears to uphold the Panel’s interpretations.³¹

There are more cases in relation to the protection of human, animal or plant life or health, focusing on article XX (b) of GATT. None involves interpreting the exception to include human rights norms,³² but the case law does shed some light on possible interpretations of the clause for human rights purposes. There is a case involving restrictions on the import of foreign cigarettes into Thailand. The dispute settlement Panel held that the ban on cigarette imports was not justified under article XX (b), because such a measure could not be shown to have actually reduced the level of smoking in the country and because there were other effective means of achieving such a policy objective. However, “[t]he Panel noted that this provision clearly allowed contracting parties to give priority to human health over trade liberalization” as long as the measure taken to promote such an aim was necessary. The Panel noted that a ban on cigarette advertising was, in general, warranted on public health grounds and could be justified under article XX (b).³³ Member States’ freedom to determine the degree of protection they deem necessary was highlighted in the *EC – Asbestos* case, where it was held that “. . . it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation.”³⁴ These cases give rise to a presumption that States have a broad discretion when taking measures to protect the life or health of their population, as long as they are able to show a genuine health risk and a trade measure that genuinely tackles that risk.

Other case law of the WTO system is more generally relevant to the method of interpreting the general exception clauses. It deals with other sub-clauses of article XX of GATT³⁶ and shows how a dispute panel or the Appellate Body would interpret cases under the clauses highlighted here as potentially relevant for human rights.

The first important principle that the case law establishes is that just because these clauses are exceptions to the general rules of the WTO agreements does not mean they should be given a narrower or stricter interpretation. The *EC – Hormones* case states that: “merely characterizing a treaty provision as an ‘exception’ does not by itself justify a ‘stricter’ or ‘narrower’ interpretation of that provision than would be warranted by an examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty’s object and purpose, or, in other words, by applying the normal rules of treaty interpretation.”³⁶ In the same case the Appellate Body stated that, if the meaning of a treaty is ambiguous, the meaning that is to be preferred is the one “which is less onerous to the party assuming the obligation” or “involves less general restrictions upon the parties.”³⁷ Such an interpretative technique grants greater scope to the general exception clauses since they are exempting States from their treaty obligations.³⁸

Second, evidence for a broad interpretation of the exception clauses is found in a further WTO case, *Japan – Taxes on alcoholic beverages*, which states: “WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind.”³⁹ Such an approach is particularly relevant to the exception clauses, since they were “intentionally drafted in general terms to allow for the flexibility that is necessary for a single norm to be used in numerous and distinct factual circumstances.”⁴⁰

Third, such a flexible interpretative approach is supported by a principle gleaned from the case law that could be termed an “evolutionary approach”. Much of the most relevant case law concerns cases where general exceptions have been invoked for environmental purposes. Such cases are comparable in that they involve important social issues based on non-economic values that, within the WTO system, need to be set against trade concerns. One very important principle was set out by the Appellate Body in a case that has become known as the *Shrimp/Turtle* case,⁴¹ where it was asked to examine the meaning of the expression “exhaustible natural resources” under GATT article XX (g). It held that the term included endangered species such as the turtle. It did so by adopting an “evolutionary approach” to the interpretation of treaty terms—treaty terms are not static but need to be interpreted in the light of their modern-day meaning.⁴² Thus, WTO members could take measures, otherwise in breach of their GATT obligations, to protect endangered species under the exception provided by article XX (g) of GATT. To define the scope of article XX (g), the Appellate Body referred to international environmental law, as it had developed since the negotiation of the original GATT, and held that the provisions of international environmental law were those by which to judge the meaning of “exhaustible natural resources”.

The Appellate Body found that such an “evolutionary approach” was, in general, the appropriate method for interpreting the meaning of terms in treaties, quoting a number of cases from the International Court of Justice. The terms “public morals”, “human life or

health” and “public order” should also be interpreted using an “evolutionary approach”, which would recognize modern respect for international human rights norms and standards.⁴³

Finally, it is worth noting that there is some limited evidence in the case law to support the use of the general exceptions as a mechanism for imposing conditions and sanctions on *other* countries for their failure to adhere to human rights standards. In the *Shrimp/Turtle* case, sanctions were considered justified, even though there was some doubt as to whether the turtles (which were the intended beneficiaries of the environmental protection) would ever enter United States territory.⁴⁴ Thus, this decision has been seen as evidence that restrictions can be legally imposed on other countries even when the supposed beneficiaries have no connection to the country imposing it (so, for instance, a ban on products that were made in another State under working conditions that did not comply with basic labour rights).⁴⁵ However, it does seem clear from the Appellate Body’s reasoning (here and elsewhere) that, if the exception is being used for reasons occurring outside the jurisdiction of that country, for instance to enforce labour standards in another State, it will be far harder to justify than a situation where a State is invoking a general exception in order, for example, to protect the human rights of its own population.⁴⁶

Any applicable rules of international law between the parties

The obligation to take into account “applicable rules of international law between the parties” has been adopted by the Appellate Body, which, in the *United States – Gasoline* case, held that WTO law cannot be read in “clinical isolation from public international law”.⁴⁷ Importantly, for the broad reading of this obligation, the phrase “between the parties” should not be interpreted so that rules of international law are relevant only when they apply to all WTO members. No international treaty has identical membership, and since WTO admits non-sovereign members it cannot possibly have exactly the same membership as any other international treaty.⁴⁸ Furthermore, on a number of occasions the Appellate Body has examined international treaties with different memberships to WTO in order to interpret the meaning of a particular provision in a WTO agreement.⁴⁹ For instance, in the *Shrimp/Turtle* case cited above, the Appellate Body used the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and other multilateral environmental agreements which did not have the same membership as WTO as a means of interpreting the term “exhaustible natural resources”.⁵⁰

It is therefore possible to conclude that international human rights treaties with broad membership would be valid tools to interpret the terms “public morals”, “human life or health” and “public order”.

If it is still necessary, supplementary means of interpretation, including the preparatory work of the treaty

This section considers the *travaux préparatoires* for each of the terms “public morals”, “public order” and “protection of human life or health”, as well as relevant case law and interpretations from other jurisdictions.

Public morals

There was practically no debate about the meaning of article XX (a) during the negotiations that took place in order to conclude GATT.⁵¹ The most plausible explanation is that the trade negotiators already had a common understanding of what the term “public morals” meant. This was because it was based on similar clauses commonly inserted into prior commercial treaties. These treaties could be considered “preparatory work” for the interpretation of the term “public morals” and, therefore, a valid interpretative tool. On the basis of analysis of these previous treaties and the way the relevant terms were applied, it has been stated, in relation to GATT, that: “The range of policies covered by XX (a) [the public morals exception] would seemingly, at least, include slavery, weapons, narcotics, liquor, pornography, religion, compulsory labour and animal welfare.”⁵²

What this suggests is that the “moral exception” in commercial treaties historically contained a series of diverse measures based on eclectic value premises concerning issues considered important to individual societies at the time. Some of these issues, such as freedom from slavery or forced labour, we now consider to be human rights. For others, such as the treatment of alcohol, individual societies have much discretion to set their own moral thresholds. Against this background, the term “public morals” could arguably include human rights (recognized in international human rights treaties with broad membership and reflecting fundamental values) within its scope.

In determining the scope and meaning of the public morals exception it is also useful to consider how it has been applied in case law in other jurisdictions. The term appears in a number of regional trade agreements⁵³ and in European Union (EU) case law. The Treaty of Rome, under article 28, forbids quantitative restrictions on trade within EU. But, similar to the general exception clauses in the WTO treaties, article 30 provides that restrictions may be placed on trade for certain specified and limited reasons, including public morality, public order, and the protection of the health and life of humans.

There have been two important cases, both involving the import of pornography, that help explain the application of the provision concerning public morality. In *Henn and Darby*,⁵⁴ the defendants were convicted of fraudulently evading the prohibition on the importation of pornography into the United Kingdom. The European Court of Justice held that “in principle, it is for each Member State to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its territory.” But in *Conagate*,⁵⁵ where foreign rubber dolls were banned, also on the grounds of prohibiting pornography, and there was only a partial restriction on sales domestically, there was a finding against the Government. The ban was seen as an unfair restriction on foreign imports, since there was no justification for the lack of a total ban on equivalent domestic pornography. This case law has been interpreted as allowing member States to determine “the sense of public morality within their own territory” but not use this moral exception simply to impose restrictions on foreign importers above and beyond those imposed on domestic producers.⁵⁶

The term “public morals” also occurs in the International Covenant on Civil and Political Rights⁵⁷ and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Both include it in a number of the human rights that they list as legitimate

reasons for Governments to restrict the full enjoyment of the right in question. So, in the case of *Handyside v United Kingdom*, a book publisher convicted of an obscenity violation in the United Kingdom brought a case under article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (freedom of expression) to the European Court of Human Rights. The Government of the United Kingdom defended the case on the basis of the need to protect public morality. The Court held that there was no uniform conception of morals within contracting States and that there was a “margin of appreciation” given to States because they were in a better position to judge than an international adjudicator.⁶⁸

If WTO panels were to take an approach similar to that of the European Courts of Human Rights and of Justice, then a wide interpretation of public morals would be appropriate where there was a genuine basis for invoking it, and WTO panels should be encouraged not “to second-guess the moral preferences of the Government taking the measure.”⁶⁹ However, the case of *Dassonville*⁶⁰ suggests a limit on the use of public morals in the European context to the morals within one’s own State, which indicates that there could be complications if attempting to use moral or human rights arguments extraterritorially.⁶¹

Public order

Unlike the other two terms under consideration, the term “public order” has a very particular history, which is helpful in defining its meaning and application.⁶²

The concept of “public order” stems from that of *ordre public*. In French law it was used as a rationale for invalidating private contracts or transactions deemed to be in conflict with fundamental provisions of domestic law or, to put it another way, “held to offend public order”.⁶³ *Ordre public* is now a well-established concept in many civil law jurisdictions and in EU law, and is present in many international treaties.⁶⁴ In these contexts, “public order” has been interpreted as referring to the basic and fundamental values of a domestic legal system, encompassing values that are moral, economic or political.

Although the term *ordre public* appears in many international treaties, its precise content or ambit of application does not appear to be defined in any of them.⁶⁵ The Treaty of Rome contains a provision on *ordre public*, which is translated as “public policy”, suggesting a very broad concept, and the term also appears in an EU directive that allows States to derogate from their obligations with regard to the free movement of workers, the freedom of establishment and the free movement of services.⁶⁶ However, the European Court of Justice has placed limits on the interpretation of this term, when raised by Governments. It has interpreted the Treaty’s “public policy” exception (specifically when talking about the free movement of persons) to cover only “a genuine and sufficiently serious threat to one of the fundamental interests of society.”⁶⁷ This mirrors precisely the language of GATS, article XIV (a), footnote 5, which states: “The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society”. In using the European Court of Justice’s case law as a guide to how this footnote should be interpreted, it should be remembered that the case in question involved a country’s right to deport an individual. The State was invoking its right to use the “public order” provision where an individual’s human rights were at stake, and the Court’s limitation of the State’s right to use the provision in this case was clearly justified.

Does such a restriction on the use of public order, as interpreted by the European Court of Justice and mirrored in the GATS footnote, limit its applicability to human rights norms and standards? A restrictive approach to interpretation does appear reasonable given that a broadly interpreted public order/public policy exception has the potential to justify such a wide range of actions that it threatens the whole rule-based system of international trade.⁶⁸ On the other hand, it would be hard for a WTO panel to rule that a human rights norm from an international human rights treaty with broad international membership, when used to protect the population of the State invoking the provision, was not a fundamental interest of that society, and that any threat to such standards was not serious. As has been argued, “public order is not a value in and of itself, but is a legal doctrine whereby existing, fundamental values of a legal system will prevail over specific laws that come into contact with them”.⁶⁹ Given that human rights do indeed represent exactly such fundamental values, the limitations to the public order exception should not impinge on its use for raising human rights arguments.

Protection of human life or health

With regard to the *travaux préparatoires* for “the protection of human life or health”, no agreed interpretation for the full scope of this term was discovered, although evidence was found that the negotiators were concerned that, when invoked under GATT article XX (b), it might be used as a means of discriminating against foreign products on the basis of “sanitary regulations”.⁷⁰ But there is no evidence to suggest that the scope of this exception is limited to sanitary measures, and earlier use of directly related terms in negotiations for international treaties suggests widespread recognition of a broad meaning which would include the protection of human life or health in many other situations.⁷¹

With regard to other relevant case law, as noted above, article 30 of the Treaty of Rome also contains a provision relating to the “protection of the health and life of humans”. The case law shows that the European Court of Justice will subject claims on this ground to close scrutiny to ensure that the real aim is not the protection of domestic producers.⁷² However, where the Court considers that a public-health claim is sustainable in principle, but there is uncertainty as to the precise medical implications, it will be for each individual member State to decide how much protection it deems necessary for its citizens.⁷³ As under the public morals exception above, it therefore seems that the Court gives a good degree of leeway to a State invoking this measure, where there is a sound and principled basis for the claim.

II. CONCLUSIONS ON THE APPLICABILITY OF THE GENERAL EXCEPTIONS TO HUMAN RIGHTS ARGUMENTS AT WTO

Because the definition of “public morals”, “public order” and “human life or health” is so broad, because they have yet to be defined precisely in WTO case law, and because human rights arguments have never been raised so that their scope can be clarified in this regard, there is no direct and conclusive evidence for human rights usage of these terms.

There are, however, a number of strong arguments to be made in favour of the conclusion that member States’ international human rights obligations towards their own populations could fall within the compass of the “public morals”, “public order” and “human life or health” exceptions. First, under the ordinary meaning of the terms, the full range of human rights norms and principles that are codified in international legal instruments could come within the ambit of the term “public morals”, while the term “human life or health” could also denote specific human rights, particularly economic, social and cultural rights, such as the right to health and the right to an adequate standard of living.

Second, the case law of WTO promotes a broad and flexible approach to the definition of the general exception clauses, which, in turn, helps to justify the inclusion of human rights norms as appropriate exceptions to trade rules. Importantly, the “evolutionary approach”, adopted for the interpretation of environmental norms in the *Shrimp/Turtle* case, should support arguments seeking the recognition of the modern-day status of human rights norms and standards as:

- Issues that should be at the heart of “public morality”
- Values that member States are entitled to include within their concept of “public order” and
- Norms and standards that give substance to the definition of the elements necessary for human life or health

Such a human rights interpretation of the general exception clauses might also be supported by the European case law on the subject, which grants discretion to Governments to determine the appropriate measures to take, where there are genuine motives for invoking the provision in question. This is also the approach taken in WTO dispute settlement in relation to arguments concerning the protection of human life or health under article XX (b)⁷⁴ and a similar approach could be taken with regard to human rights arguments under the exception clauses. Such a human rights approach would in fact give more specific definition to terms that are currently relatively vague.⁷⁵ It would also validate action taken on the basis of internationally agreed norms, while preventing the kind of disguised protectionism that can occur without an agreed definition of the terms being used and what they stand for.⁷⁶

To look at the broader picture, if WTO dispute settlement were to accept that internationally recognized human rights norms and standards should come within the scope of the general exception clauses, this would:

- Enable States to comply with their other international legal responsibilities without creating a conflict between obligations originating from WTO and human rights treaties.

- Demonstrate due respect for national bodies (democratic institutions, courts, etc.) that are taking legitimate decisions on balancing their various international and national obligations.⁷⁷
- From a trade law perspective, serve to dispel some of the perceived negatives of trade liberalization. It would demonstrate the extent to which WTO agreements contain a mechanism for ensuring that they do not have an adverse impact on vulnerable, poor and disadvantaged people, and would ensure that critics cannot easily blame WTO rules for causing human rights infringements.

III. METHODOLOGICAL QUESTIONS IN THE INTERPRETATION OF THE GENERAL EXCEPTION CLAUSES FROM A HUMAN RIGHTS PERSPECTIVE AND APPROACHES TO TACKLING THEM

Although in principle it might be possible to include human rights within the interpretation of the terms “public morals”, “public order” and “human life or health”, in practice there remain questions as to whether, in raising them in this way, human rights can be given their due weight. The rest of this section will briefly analyse some methodological questions in the interpretation of general exception clauses from a human rights perspective and propose ways to minimize or overcome them.

One issue concerns the extent to which a WTO panel or the Appellate Body might consider a human rights measure as “necessary” to protect “public morals”, “public order” or “human life or health”. The analysis in the previous section concluded these three terms could be interpreted as including human rights. However, this analysis has to be placed in the context of the overall methodology for interpreting and applying GATT article XX. The case law of WTO on this article provides a methodology for how the exception clauses are interpreted and applied in all of the relevant WTO agreements.

The interpretation and application of GATT article XX involves a two-tier test.⁷⁸ First, the challenged measure must meet the criteria for one of the article XX exceptions (a)-(g). In the context of this publication, this requires that the challenged measure should address a particular interest specified in the paragraph (e.g., “public morals”, “order public” or “human life or health”) *as well as* examining whether there is sufficient nexus between the measure and that interest by determining that the measure is “necessary” to protect it. Second, the measure must pass the requirements of the introductory clause of article XX, which basically provides a means of ensuring that the general exceptions are not used for protectionist purposes.

The requirement, under the first stage of the test, that a human rights measure must be “necessary” to protect “public morals”, “public order” or “human life or health” raises the question of the interpretation of what is “necessary”. The Appellate Body has noted that the standard of necessity is an objective standard. A panel may examine a WTO member’s characterization of the measure’s objectives and the effectiveness of its regulatory approach, but is not necessarily bound by this, and may therefore also find guidance in the structure and operation of the standard.⁷⁹

To determine the necessity of a measure, the panel should assess it through “a process of weighing and balancing a series of factors”.⁸⁰ This process begins with an assessment of the relative importance of the particular interests at stake and should then turn to other factors to be “weighed and balanced”. In most cases, two factors will be relevant: the contribution of the measure to the realization of the ends pursued by it and the restrictive impact of the measure on international commerce. A panel should then compare the challenged measures and possible alternatives, and consider the results of this comparison in the light of the importance of the interests at stake.

Importantly, it is for the responding party to a dispute—namely, the party invoking the general exceptions—to make a prima facie case that its measure is “necessary” to protect, in the present context, “public morals”, “public order” or “human life or health”.⁸¹ The responding party must demonstrate that the measure falls somewhere between “indispensable to” and “making a contribution to” the policy interest being pursued by it. In making this determination, the measure should be significantly closer to the former—indispensable—than the latter—making a contribution to the interest pursued by it.⁸²

One of the key factors in the decision-making process is that the more vital or important the values pursued are, the easier it would be for the Appellate Body to accept that the measures taken were “necessary” to achieve the specified policy objective.⁸³ States making arguments based on human rights provisions of international treaties under the general exceptions would be justified in arguing that fundamental values of society were at stake, and that a dispute panel should adopt a less onerous version of the necessity test (namely, closer to “making a contribution to” the policy objective than to demonstrating that the measure is “indispensable”).⁸⁴

However, the above decision-making process is still a fundamentally different mechanism for balancing human rights arguments than would be used in a legal forum accustomed to dealing with human rights issues, where there might be an assessment, for instance, of whether the measure taken was *proportionate* to the problem faced. The underlying issue is that, by using a provision of WTO agreements to raise human rights arguments, countries are subjecting those arguments to the WTO legal system, and there are bound to be ways in which that system will differ from adjudicatory systems under the human rights model.

Another issue is the status of the exception clauses in the overall structure of the WTO agreements and how this could affect the discussion of human rights within WTO and the wider framework of WTO law. General exceptions will be considered in any dispute settlement only once there has been a determination of a violation of other WTO provisions. The exceptions listed are understood as allowing States to impose trade restrictions inconsistent with the WTO agreement in question. So the State invoking human rights will always need to defend its position. Thus, human rights norms might be associated too closely with trade restrictions. This could work against the wider objective of human rights approaches to trade and development, which place the realization of human rights among the objectives of trade rules. It will also mean that the burden of proof will be on the State invoking the general exception to show that the elements of the exception clause have been complied with (i.e., Is the measure genuinely aimed at a policy included in the exceptions? Is it necessary? and so on).⁸⁵

When raising human rights arguments within a *trade* forum, concerns such as those raised above can never be entirely removed, but they can, to some extent, be assuaged by making sure that human rights arguments are treated appropriately within the adjudicatory process. An important mechanism that will help to ensure that human rights norms and standards are interpreted consistently would be for appropriate human rights expertise to be used by any dispute settlement panel or the Appellate Body when taking a decision where human rights issues were raised under the general exception clauses.⁸⁶

Evidence could be provided by acknowledged human rights experts on whether the State in question faced a genuine human rights issue and whether the measures taken addressed it. This would certainly solve some of the evidential problems of explaining the nature of the human rights issues faced. Such an approach would not be without precedent. For instance in the *Thailand – Cigarettes* case, the Panel consulted the World Health Organization (WHO) in order to obtain expert opinion on the effects of smoking, and whether Thailand's ban on the import of foreign cigarettes was appropriate to tackle the health problem faced.⁸⁷ Similarly, where a human rights issue is raised, dispute panels could, as a matter of course, seek expert evidence from human rights treaty bodies, given that the panels themselves will not have the immediate expertise to recognize whether there is a genuine basis for the human rights argument raised.

Of course, the introduction of human rights expertise and evidence might not, of itself, be sufficient to satisfy the differences in legal approach outlined above (human rights as "exceptions", different legal principles, etc.).⁸⁸ However, such expertise might assist a panel or the Appellate Body to determine whether a measure could in fact be considered a genuine human rights measure as well as one that was "necessary" to achieve the stated end.

A related point concerns the capacity of WTO panels or the Appellate Body to provide interpretations for human rights norms and standards.⁸⁹ While WTO members have mandated the panels and the Appellate Body to interpret the various WTO agreements, there may at times be a fine line between recognizing a human rights measure as coming within the terms of a general exception and actually interpreting the content or breadth of a human rights norm. The methodology outlined above should ensure that dispute panels and the Appellate Body are not put in such a position. Adjudication would require expert human rights evidence to assess whether there is a genuine basis for the trade measure adopted, and then panels would simply be required to judge whether that particular measure is "necessary" (using the broadest interpretation of the term). In making their decisions, adjudicators should allow a broad margin of appreciation to national decision-making bodies. Thus dispute settlement bodies should not at any stage themselves need to consider or define the nature of the substantive human rights obligations that arise from international human rights standards and norms.

Problems might also arise in relation to the ways States use human rights measures in the context of trade and to whether a WTO panel or the Appellate Body would apply general exception clauses in all cases. Two general examples illustrate some of the complexities relevant to the discussion. On the one hand, a State might use a measure considered trade-restrictive under WTO rules as a means of meeting its human rights obligations towards its own population—for example, to promote positive discrimination in favour of goods and services produced by disadvantaged individuals or groups of individuals. On the other, a State might use human rights measures to encourage other States to promote and protect human rights—for example, as a condition for preferential treatment under the generalized system of preferences. As noted in the introduction, this latter use of human rights in the context of trade raises complex issues.⁹⁰ In particular, it may be difficult to distinguish between conditions imposed for authentic human rights purposes and others used as a

means of disguised protectionism—the latter meeting neither trade nor human rights objectives.⁹¹ It may be that greater scope will be allowed to States to benefit from general exception clauses to protect trade-related human rights at home than abroad.⁹²

Finally, as mentioned earlier, protecting human rights through the exception provisions of trade agreements is not necessarily the only way of reconciling the norms and standards of human rights with trade rules. In particular, a human rights approach to trade reform, promoting human rights in the process of negotiating and implementing trade rules through, for example, assessing the real and potential effects that trade reform can have on the enjoyment of human rights, should be viewed as a preferable means to ensure human rights-compatible outcomes. The use of general exception clauses could, however, provide a further means of protecting human rights.

NOTES

- ¹ Analytical study of the High Commissioner for Human Rights on the fundamental principle of non-discrimination in the context of globalization (E/CN.4/2004/40, para. 52).
- ² *Ibid.*, para. 51.
- ³ The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights (E/CN.4/Sub.2/2001/13).
- ⁴ Globalization and its impact on the full enjoyment of human rights (E/CN.4/2002/54).
- ⁵ Liberalization of trade in services and human rights (E/CN.4/Sub.2/2002/9).
- ⁶ Human rights, trade and investment (E/CN.4/Sub.2/2003/9).
- ⁷ See, for example, E/CN.4/2002/54, paras. 20 and 33, E/CN.4/Sub.2/2002/9, para. 15, and E/CN.4/Sub.2/2001/13, paras. 37, 42 and 50.
- ⁸ See FAO, *Agriculture, Trade and Food Security: Issues and Options in the WTO Negotiations from the Perspective of Developing Countries*, vol. II, Country case studies, Rome, 2000, for descriptions of specific food security issues that farm workers in developing countries face in the context of liberalization; see also FAO, "Developing country experience with the implementation of the Uruguay Round Agreement on Agriculture: Synthesis of the findings of 23 Country Case Studies", Paper No. 3, p. 31. The study noted the case of fresh and processed asparagus in Peru. While asparagus emerged as the most dynamic export crop in Peru during the 1990s, the producers were mainly large farms, not poor farmers. The study concluded that the winners and losers of open trade policies were likely to be different and it was often the poor that got hurt most.
- ⁹ WHO has noted that "patents are by no means the only barriers to access to life-saving medicines, but they can play a significant, or even dominant, role in that they grant the patent holder a monopoly on a medicine for the number of years the patent is in force". See WHO/UNAIDS/MSF, "Determining the patent status of essential medicines in developing countries", *Health Economics and Drugs*, EDM Series, No. 17, 2004 (WHO/EDM/PAR/2004.6), p. 7.
- ¹⁰ E/CN.4/2004/40, paras. 28–34.
- ¹¹ WTO has recently considered the use of conditionalities concerning drug arrangements in the generalized system of preferences in: *European Communities – Conditions for the granting of tariff preferences to developing countries*, Report of the Panel (WT/DS246/R), 1 December 2003 and *EC – Tariff preferences*, Report of the Appellate Body (WT/DS246/AB/R), 7 April 2004.
- ¹² See, for example, E/CN.4/Sub.2/2001/13, paras. 51–58, for a discussion of how mechanisms such as compulsory licensing in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) allow countries in certain circumstances to reduce the costs of treatment of HIV/AIDS in a way that is considered to be in compliance with both the TRIPS Agreement and human rights obligations.
- ¹³ John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (Cambridge, MIT Press, 1989), p. 206.
- ¹⁴ *United States – Standards for reformulated and conventional gasoline*, Report of the Appellate Body (WT/DS2/AB/R), 29 April 1996.
- ¹⁵ Christopher McCrudden, "International economic law and the pursuit of human rights: A framework for discussion of the legality of 'selective purchasing' laws under the WTO Government Procurement Agreement", *Journal of International Economic Law*, vol. 2, No.1 (1999), pp. 3–48, p. 41; Salman Bal, "International free trade agreements and human rights: reinterpreting article XX of the GATT", *Minnesota Journal of Global Trade*, vol. 10, No. 1 (Winter 2001), pp. 62–108, p. 70.
- ¹⁶ Under GPA and TRIPS they are not, strictly speaking, called "general exceptions".
- ¹⁷ Article 27.2 allows members to exclude inventions from their patent systems where it is "necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law."
- ¹⁸ The Agreement on Trade-Related Investment Measures (TRIMS), article 3, states: "All exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement", and so article XX of GATT should apply in the same way.
- ¹⁹ The relationship between the GATT exception clauses and the other Multilateral Agreements on Trade in Goods is unclear. Article XX states that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures necessary to protect public morals" etc. However, the Multilateral Agreements on Trade in Goods state: "In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization

(referred to in the agreements in Annex 1A as the "WTO Agreement"), the provision of the other agreement shall prevail to the extent of the conflict". So the applicability of the general exception clauses to the Agreement on Agriculture is unclear.

- ²⁰ Thus, under article 2.2 of the TBT Agreement, WTO members undertake to ensure "that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective". The Agreement provides a non-exhaustive list of "legitimate objectives" such as the protection of human health or safety. The open-ended nature of the legitimate objectives of a regulatory measure could provide the flexibility to support human rights measures, not as exceptions to trade rules, but rather within the mainstream of such rules as "legitimate objectives".
- ²¹ For instance, article XXIII of GPA refers to measures relating to: the products or services of handicapped persons (relevant to the prohibition on discrimination under human rights law as well as the negotiations in the General Assembly's Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities); of philanthropic institutions; and of prison labour (relevant to the prohibition on forced and compulsory labour, article 8 of the International Covenant on Civil and Political Rights (ICCPR)). GATT also refers to measures relating to the products of prison labour. GATS article XIV (c)(ii) refers to the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts (relevant to the prohibition on arbitrary and unlawful interference with privacy in article 17 of ICCPR).
- ²² Article 27 of the TRIPS Agreement used the term "morality" rather than "public morals".
- ²³ GATT was negotiated in 1947, while the other agreements were all negotiated during the Uruguay Round of trade negotiations concluded in 1994. And although practically every aspect of GATT was reconsidered during the Uruguay Round, article XX was not subject to serious negotiation at that time. See, e.g., Gabrielle Marceau, "WTO dispute settlement and human rights", *European Journal of International Law*, vol. 13, No. 4 (2002), pp. 753–814, at footnote 115, where she notes that: "[t]he evolution of the GATT exceptions brings about interesting questions of interpretation. For instance, faced with the absence of a reference to 'prison labour' in the list of GATS exceptions of Article XIV, it may be possible for a panel to conclude that the term 'public morals' of GATS XIV (a) has evolved (from the GATT days) to include 'prison labour'. At the same time, it would be difficult to conclude that the reach of GATT Article XX (a) 'public morals' is effectively narrower than that of GATS Article XIV (a) referring to a similar 'public morals and public order' concept. How can a single measure be exempted under GATS for a policy reason condemned under GATT? Has the term 'public morals' in GATT Article XX evolved to cover what the term 'public morals and public order' of GATS Article XIV (a) now covers?"
- ²⁴ Robert Howse, "Back to court after Shrimp/Turtle? Almost but not quite yet: India's short lived challenge to labor and environmental exceptions in the European Union's generalized system of preferences", *American University International Law Review*, vol. 18, No. 6 (2003), pp. 1333–1381, at p. 1368.
- ²⁵ Universal Declaration of Human Rights, art. 3.
- ²⁶ International Covenant on Economic, Social and Cultural Rights, art. 12.
- ²⁷ Ernst-Ulrich Petersmann, "Constitutional primacy and 'indivisibility' of human rights in international law? The unfinished human rights revolution and the emerging global integration law", in *International Economic Governance and Non-Economic Concerns: New Challenges for the International Legal Order*, Stefan Griller, ed. (New York, Springer Wien, 2003), p. 254.
- ²⁸ *United States – Measures affecting the cross-border supply of gambling and betting services*, Report of the Panel (WT/DS285/R), 10 November 2004.
- ²⁹ Steve Charnovitz, "The moral exception in trade policy", in *Trade Law and Global Governance* (Cameron May, 2002), pp. 325–376, at p. 374; McCrudden, loc. cit., p. 38; Christoph T. Feddersen, "Focusing on substantive law in international economic relations: the *public morals* of GATT's article XX (a) and 'conventional' rules of interpretation", *Minnesota Journal of Global Trade*, vol. 7, No. 1 (1998), pp. 75–122, p. 96; Bal, loc. cit., p. 76; Howse, "Back to court...?", p. 1367.
- ³⁰ *United States – Gambling and betting services*, Report of the Panel, paras. 6.465–6.468 and 6.461.
- ³¹ *United States – Gambling and betting services*, Report of the Appellate Body (WT/DS285/AB/R), 7 April 2005, paras. 293 f.
- ³² Bal, loc. cit., p. 79.
- ³³ *Thailand – Restrictions on importation of and internal taxes on cigarettes*, Report of the Panel (DS10/R – 37S/200), 7 November 1990, in particular paras. 72–73 and 78.
- ³⁴ *EC – Measures affecting asbestos and asbestos-containing products*, Report of the Appellate Body (WT/DS135/AB/R), 12 March 2001, para. 168.

- ³⁵ Feddersen, loc. cit., footnote 48, lists WTO cases that have considered GATT article XX.
- ³⁶ *EC – Measures concerning meat and meat products (hormones)*, Report of the Appellate Body (WT/DS26/AB/R; WT/DS48/AB/R), 16 January 1998, para. 104.
- ³⁷ *Ibid.*, para. 165.
- ³⁸ Charnovitz, "The moral exception...", p. 337.
- ³⁹ *Japan – Taxes on alcoholic beverages*, Report of the Appellate Body (WT/DS11/AB/R), 4 October 1996.
- ⁴⁰ Marceau, loc. cit., p. 790.
- ⁴¹ *United States – Import prohibition of certain shrimp and shrimp products*, Report of the Appellate Body (WT/DS58/AB/R), 12 October 1998.
- ⁴² *Ibid.*, paras. 129–130.
- ⁴³ One caveat to this approach is that a part of the reasoning of the Appellate Body on this issue concerned the fact that article XX of GATT had to be read in the light of the preamble of the Marrakech Agreement, which states that "sustainable development" is an objective of WTO, thus showing that "the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy." The preamble does not specifically mention human rights in the same way, so the argument from a human rights perspective would be slightly weakened (although it does state that "relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living..." which could be construed as having human rights applicability).
- ⁴⁴ Although the Appellate Body explicitly stated (*Shrimp/Turtle*, Report of the Appellate Body, para. 133) that it was not ruling on the question of extraterritorial application of article XX (g).
- ⁴⁵ Howse, "Back to court...?", p. 1367. Sarah H. Cleveland, "Human rights sanctions and the World Trade Organization", in *Environment, Human Rights and International Trade*, F. Francioni, ed. (Hart Publishing, 2001), p. 236.
- ⁴⁶ For the problems of this approach in a human rights context, see Charnovitz, "The moral exception...", p. 329; Feddersen, loc. cit., p. 116; Petersmann, op. cit., p. 258. See also *United States – Gambling and betting services*, Report of the Panel, para. 6.461.
- ⁴⁷ *United States – Gasoline*.
- ⁴⁸ Marceau, loc. cit., section 3 (A)(1), pp. 780 f.
- ⁴⁹ *Ibid.*
- ⁵⁰ *Ibid.*, referring to *Shrimp/Turtle*, para. 111, and to the use of the Lomé waiver in *European Communities – Regime for the importation, sale and distribution of bananas*, Report of the Appellate Body (WT/DS27/AB/R), 9 September 1997, and to the applicability of the bilateral agreement between Brazil and EU in *European Communities – Measures affecting the importation of certain poultry products*, Report of the Appellate Body (WT/DS69/AB/R), 13 July 1998.
- ⁵¹ Charnovitz, "The moral exception...", at p. 338 – the only concern raised regarding the content of the public moral exception concerned its use to impose restrictions on alcoholic beverages to promote temperance.
- ⁵² *Ibid.*, p. 361.
- ⁵³ *Ibid.*, p. 366: notes that the Australia – New Zealand Closer Economic Relations Trade Agreement of 1983 contains an exception to protect public morals, art. 18 (b) 22 ILM 945, 970. The Agreement for ASEAN Free Trade Area of 1992 declares that nothing in the Agreement shall prevent a member from taking action that "it considers necessary" for the protection of public morals, art. 9. Also NAFTA incorporates GATT XX (a) by reference, art. 2101 (1) 32 ILM.
- ⁵⁴ Case 34/79, *R v Henn and Darby* [1979] ECR 3795, [1980] 1 CMLR.
- ⁵⁵ Case 121/85, *Conegate Ltd. v Commissioners of Customs and Excise* [1986] ECR 1007, [1986] 1 CMLR 739.
- ⁵⁶ Paul Craig and Grainne De Burca, eds., *EU Law: Text, Cases and Materials*, 2nd ed. (OUP, 1998), p. 597.
- ⁵⁷ See arts. 12, 14, 18, 19, 21 and 22.
- ⁵⁸ Charnovitz, "The moral exception...", p. 357.
- ⁵⁹ *Ibid.*, p. 361.
- ⁶⁰ Case 8/74, *Procureur du Roi v Dassonville* [1974] ECR 837, [1974] 2 CMLR 436.
- ⁶¹ Charnovitz, "The moral exception...", p. 358.
- ⁶² There appears to be little evidence in the literature of *travaux préparatoires* for this term. For example, there is no mention of its meaning in the *WTO Analytical Index: Guide to WTO Law and Practice* (WTO and Bernan Press, 2003).
- ⁶³ McCrudden, loc. cit., p. 40; Timothy G. Ackermann, "Dis'ordre'ly loopholes: TRIPS patent protection, GATT and the ECJ", *Texas International Law Journal*, vol. 32 (1997), pp. 489-510, p. 495.
- ⁶⁴ McCrudden, loc. cit., p. 40.

- ⁶⁵ Ibid.
- ⁶⁶ For a description of the full extent of the derogations (public policy, security and health) possible under directive 64/221, see Craig and De Burca, op. cit., pp. 786 f.
- ⁶⁷ Case 30/77, *R v Bouchereau* [1977] ECR 1999, [1977] CMLR 800.
- ⁶⁸ McCrudden, loc. cit., p. 41.
- ⁶⁹ Ibid., p. 40.
- ⁷⁰ *Guide to GATT Law and Practice: Analytical Index, Volume 1*, Updated 6th ed. (Geneva, WTO and Bernan Press, 1995), p. 565, quoting the record of both the Geneva Session of the Preparatory Committee and the Havana Conference of the Third Committee as raising this concern.
- ⁷¹ Steve Charnovitz, "Exploring the environmental exceptions in GATT article XX", *Journal of World Trade*, vol. 25, No. 5 (1991), p. 37, pp. 41 f.
- ⁷² Craig and De Burca, op. cit., p. 603.
- ⁷³ Ibid., p. 602.
- ⁷⁴ See *EC – Asbestos*, para. 178, quoting *EC – Hormones*, para. 194.
- ⁷⁵ Charnovitz, "The Moral Exception...", p. 373.
- ⁷⁶ Indeed, the widest possible interpretation of public morals, public order and human life or health would lead to the unacceptable situation where WTO member States could derogate from international trade rules whenever they felt the inclination to do so, using the outward justification of human rights norms and standards. Charnovitz, "The moral exception...", p. 373; Cleveland, op. cit., p. 239; McCrudden, loc. cit., p. 41; Ackerman, loc. cit., p. 491.
- ⁷⁷ Petersmann, op. cit., p. 258.
- ⁷⁸ Feddersen, loc. cit., pp. 91 f.
- ⁷⁹ *United States – Gambling and betting services*, Report of the Appellate Body, para. 304.
- ⁸⁰ *Korea – Measures affecting the import of fresh, chilled and frozen beef*, Report of the Appellate Body (WT/DS161/AB/R; WT/DS169/AB/R), 11 December 2000, para. 164 cited in *United States – Gambling and betting services*, Report of the Appellate Body, para. 305.
- ⁸¹ Ibid., paras. 306, 307 and 309.
- ⁸² See *Korea – Beef*, para. 161.
- ⁸³ Ibid., para. 162.
- ⁸⁴ Howse, "Back to court...?", p. 1371.
- ⁸⁵ See McCrudden, loc. cit., p. 44.
- ⁸⁶ For example, FIDH, *Position Paper – The WTO and Human Rights*, November 1999 at www.fidh.org/rapports/wto-fidh.htm; McCrudden, loc. cit., p. 43; Cleveland, op. cit., p. 258.
- ⁸⁷ See *Thailand – Cigarettes*, paras. 72–81, where at a number of places it appears that it is the evidence of WHO that leads the Panel to conclude that Thailand's measure falls outside the scope of article XX (b).
- ⁸⁸ The institutional tension between the two sets of legal norms cannot be made to disappear entirely by the provision of evidence by human rights experts. This is not simply a question of calling an expert, as one would call a renowned doctor to give evidence in a medical matter. The problem is complicated by the fact that the human rights at issue have their own legal system and norms that differ from those of the trade law judges, for instance, on the issue of non-discrimination.
- ⁸⁹ Marceau, loc. cit., section 2 (B)(1), p. 777.
- ⁹⁰ For a wide variety of views on this issue, see the following: R. Howse and M. Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* (2000), at <http://www.ichrdd.ca>; Cleveland, op. cit., pp. 245 f.; Vazquez, Carlos Manuel, "Trade sanctions and human rights—past, present, and future", *Journal of International Economic Law*, vol. 6, No. 4, pp. 797–839, pp. 803 f., 817; Marceau, loc. cit., pp. 805 ff.; Petersmann, op. cit., p. 258.
- ⁹¹ Feddersen, loc. cit., p. 104 and see Third World Intellectuals and NGOs' Statement Against Linkages presented at the Seattle Ministerial Conference – <http://www.cuts-international.org/Twin-sal.htm> (accessed 2 August 2005).
- ⁹² See footnote 30 above. Such a distinction would be in keeping with the various reports of the High Commissioner considering questions of trade and human rights, which have focused on ensuring that States maintain the ability to promote and protect human rights in their own territories.

