1-1-2013

Using Border Trade Adjustments to Address Labor Rights Concerns Under the WTO

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Recommended Citation
Prior to his passing in October 2011, Apple CEO and founder Steve Jobs delivered a speech at a February 2011 dinner event attended by major executives throughout Silicon Valley, as well as U.S. President Barack Obama.1 President Obama interrupted Mr. Jobs’ speech to ask what it would take to get Apple, a company that once prided itself on making its products in America but came to do nearly all of its manufacturing overseas, to make iPhones in the United States.2 Mr. Jobs was said to have replied that “[t]hose jobs aren’t coming back.”3 A New York Times article wrote of Mr. Jobs’ response that:

It isn’t just that workers are cheaper abroad. Rather, Apple’s executives believe the vast scale of overseas factories as well as the flexibility, diligence and industrial skills of foreign workers have so outpaced their American counterparts that “Made in the U.S.A.” is no longer a viable option for most Apple products.4

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2 Id.
3 Id.
4 Id.
But at the same time, it was becoming apparent to the international public that Apple’s incredible productivity in China came at a price. Apple in 2007 audited working conditions at the Shenzhen facility of Foxconn, a Taiwan-based company that was the world’s biggest manufacturer of electronics and Apple’s main manufacturing partner. The prior June, almost a dozen Foxconn employees committed suicide not long after Apple increased orders in a race to meet demand for the popular iPad tablet device. Apple’s review of the Foxconn facilities revealed underage workers, indentured servitude conditions, and other human rights problems. The controversy over workers’ conditions at Foxconn is only more heated today, with whistleblowers coming forward to tell their stories about horrific working conditions, unreasonable hours, and other grievances.

Apple and Foxconn have been singled out for public criticism not because their practices are unique; on the contrary, Foxconn’s labor conditions might be superior to local market standards. Rather, the fact that many Americans own and daily use Apple’s iconic products like the iPad and iPhone, and that they associate the products with personal status, make some consumers feel personally responsible for contributing to the unfair exploitation of other human beings. Moreover, because Apple is a leader, innovator, and model (particularly with respect to its supply chain), its efforts to quell public pressure by demanding better practices from

6 Id.
7 Id.
Foxconn may to some degree serve to improve working conditions across China.  

But what if the public shaming of Apple and Foxconn does not lead to significant change across the industry? And what if Americans subsequently insist that their elected representatives no longer allow imports of products made by children, by people not paid a living wage, by indentured laborers, by people working sixty hour weeks for eleven days in a row, or by others working under indecent labor conditions? This paper examines how, under the World Trade Organization (“WTO”), a country like the U.S. might attempt to use trade measures to force the hand of another country with respect to workers’ rights.

The paper begins by explaining why most restrictions on trade intended specifically to militate in favor of labor rights would be found discriminatory under the WTO. It first focuses in detail on the sections of the General Agreement on Tariffs and Trade (“GATT”) likely to make a labor-rights related trade measure discriminatory, particularly the requirements for most favored nation treatment and national treatment. The paper then looks at exceptions under the GATT General Exceptions Clause that may justify and excuse a discriminatory measure promoting labor rights, and how such a measure would need to be crafted under the Clause’s chapeau. In doing so, this paper points out the critical unanswered questions in current jurisprudence that are central to determining whether a discriminatory trade measure justified by a labor rights purpose would receive an exception under exceptions (a) or (b) of the General Exceptions Clause.

I. What Might a Labor-Rights-Supporting Trade Measure Look Like?

The International Labor Organization (“ILO”), created in 1919 by the Treaty of Versailles, develops internationally agreed-upon standards for workers’ rights. The ILO Declaration on Fundamental Principles and
Rights at Work, adopted in 1998 and binding upon ILO member countries, identifies four main principles: (1) freedom of association and a right to collective bargaining, (2) elimination of forced labor, (3) abolition of child labor, and (4) elimination of employment discrimination. ILO recommends a pre-overtime work week of eight hours per day and of ideally forty, and no more than forty-eight, hours per week, with no more than twelve hours of weekly overtime. In addition to the ILO Conventions, mainstream human rights treaties, such as the United Nations International Bill of Human Rights, propose labor standards that all countries should follow.

There are many ways in which the U.S. could attempt to draw a line on what constitutes an abuse of workers’ rights, and various trade measures that the U.S. could use to respond to such abuses. For example, the U.S. could use the approach attempted in the Dolphin-Tuna case, by creating a “no child labor” label and mandating that manufacturing processes meet a certain standard in order to attain such certification. Alternatively, the U.S. could use any of a number of import-restrictive border adjustment measures, for example,

- by imposing an outright ban on products of prison labor;
- by imposing sanctions or quantitative restrictions (including a partial or complete ban) on products made at below universally agreed upon international human rights standards (e.g., the ILO Declaration on Fundamental Principles and Rights at Work or the International Bill of Human Rights) or the Technical Barriers

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19 See infra note 107 (discussing Turkey-Textiles case).
to Trade ("TBT") Agreement;\(^{20}\)
- by taxing products produced by workers earning below a certain wage or working more than a certain number of hours per week;
- by increasing tariffs or imposing countervailing duties intended to offset the cost-savings wrongly attained through unfair labor practices;\(^{21}\) or
- by extending U.S. regulations on wages, hours, etc. to imports.

The challenge for the U.S. will be to design a border adjustment that will be found either to not discriminate under the WTO rules or, if discriminatory, to be of such a nature that the U.S. is justified in invoking one of its specified rights to discriminate under the General Exceptions Clause.

II. RESTRICTIONS ON TRADE MEASURES

In developing a trade measure, a Member is bound to the schedules agreed upon at WTO admission, per Article II.\(^ {22}\) The Member must also follow the principle of "most favored nation" ("MFN") treatment, which requires that a Member granting a privilege to another Member must extend the same privilege to all other Members.\(^ {23}\) Another central principle that WTO signatories must obey is that of "national treatment," which prohibits countries from taking steps to favor their domestic products over imports.\(^ {24}\)

A. GATT Article I – Most Favored Nation Treatment

GATT Article I requires countries to engage in MFN treatment, meaning that imports from one Member country must be treated on terms no less favorable than those from another Member. In relevant part, Article I states that:

> any advantage . . . granted by any [WTO Member] to any product originating in . . . any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other [Members].\(^ {25}\)

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\(^{20}\) See infra notes 94-97 (discussing the TBT Agreement).

\(^{21}\) See infra Section II.

\(^{22}\) See infra Subsection 0 (discussing schedules of concessions).

\(^{23}\) See infra Subsection A.

\(^{24}\) See infra Subsection 0.

\(^{25}\) General Agreement on Tariffs and Trade art. I, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS:
The term “like product” is a key operator in the WTO language, raising a central threshold question of what makes one product “like” another product. Empirically different products may still be “like products.” For example, in Japan–Taxes on Alcoholic Beverages (“Japan–Alcohol”), the Appellate Body (“AB”) affirmed a GATT Panel decision that vodka and shochu are “like” products and should be taxed equivalently.\textsuperscript{26} Under Article I, “like” products include products that are “remotely similar” regardless of the context of the application.\textsuperscript{27} This broad standard includes “directly competitive or substitutable” products.\textsuperscript{28} There is substantial debate, however, regarding whether any competing or substitute products will be “like,” or whether facts such as the means of production or the competitive relationship between the products merely play a role in getting at the main concerns addressed by Article I (favoritism) and the like-worded Article III (protectionism).\textsuperscript{29}

MFN prevents a Member from using sanctions or targeting taxes against other specific members; for example, a U.S. prohibition on Chinese iPads would violate MFN treatment. Another option would be to try to argue that a good on the market that is the product of bad labor standards is not “like” a competing product made under good labor conditions. However, the “likeness” standard under Article I is broad and generally treats competing and substitute goods as “like products,” so cases in which a Member that treats competing imports (of equal quality) differently solely on the grounds of how the goods are produced will tend to violate its Article I obligations.

\textbf{B. GATT Article II – Schedules of Concessions}


\footnotesize\textsuperscript{27} WON-MOG CHOI, “LIKE PRODUCTS” IN INTERNATIONAL TRADE LAW: TOWARDS A CONSISTENT, GATT/WTO JURISPRUDENCE 100-01, (2003). This is because the applicable language in Article I parallels that of both Article III:2, the “directly competitive or substitutable” standard, and Article III:4, the (broader) “remotely similar” standard, which are interpreted in EC–Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter “Appellate Body Report, EC–Asbestos”]; and Ad Note to GATT Article III:2, second sentence. Some scholars argue that the standard applies differently depending upon whether it is a border measure or an internal measure, but Choi rejects this view in the case of Article I.

\footnotesize\textsuperscript{28} Id.

\footnotesize\textsuperscript{29} The discussion of “likeness” continues in Subsection 0 (on National Treatment).
GATT Members’ schedules of tariff concessions appear either annexed to the Marrakesh Protocol to the GATT of 1994 or, for later WTO entrants, annexed to their respective Protocols of Accession. Each schedule applies to a particular tariff, providing specific tariff concessions and other commitments agreed upon through trade negotiations, and including such details as a description of the product covered and the rate of duty and other charges. For trade in goods, the schedules include maximum tariff levels called “bound tariffs” or “bindings.”

GATT Article II governs tariffs on imports at the border, requiring that countries abide by their Schedules and do not impose additional duties or other charges. Article II is explicit that it does not pertain to “a charge equivalent to an internal tax.” Such measures are instead governed under GATT Article III:2 and referred to as “border tax adjustments.”

C. GATT Article III – National Treatment

GATT Article III permits internal taxes and regulations on both domestic and imported goods, so long as they do not give favor to domestic products over imports. Article III specifically requires that internal taxes or other charges should be the same for like products and that “products . . . imported . . . shall be accorded treatment no less favorable than that accorded to like products of national origin.” As with Article I, concerning MFN, the “like products” standard does not require that the products be physically identical but instead focuses on whether they are competing products or economic substitutes. For this reason, it is often

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32 Id.
33 GATT, art. II(1)(a)-(b).
34 GATT, art. II(2)(a).
36 GATT, art. III(1).
37 GATT, art. III(2)(4).
believed that a Member will not be able to claim that two otherwise indistinguishable products are not “like products” solely on process grounds, e.g., that one product is made under poor labor standards and the other is made under internationally acceptable labor standards.

1. Japan–Alcohol

In Japan–Alcohol, the U.S., European Community (“EC”), and Canada disputed a Japanese liquor tax law that divided various types of alcoholic beverages into ten categories with sub-categories: sake, sake compound, shochu, mirin, beer, wine, whisky, spirits, liqueurs, and miscellaneous. Different tax rates applied to each category and sub-category defined by the law.

The EC argued that “spirits” (vodka, gin, white rum, and genever) are “like” under the first sentence of Article III:2 and therefore may not be taxed at different rates or, in the alternative, that the spirits are “directly competitive and substitutable products” under the second sentence of Article III:2. Canada seized on the same “directly competitive and substitutable product” language from the second sentence of Article III:2, arguing that tax differences distort the products’ relative prices, thereby distorting consumer choice between the products, and ultimately distorting the products’ competitive relationship. The United States argued that the Japanese tax regime for alcohol was devised to protect shochu production and, paired with the similarity in their characteristics and end uses, the brown and white spirits are “like products” per the first sentence of Art. III:2; alternatively, all distilled spirits are “directly competitive and substitutable” per the second sentence of Article III:2 for the same reasons. Japan, on the other hand, countered that the purpose of the tax law was not protectionism, nor did it afford protectionist benefits;
moreover, the various product categories are not “like” under the first sentence of Article III:2, nor “directly competitive and substitutable products” under the second sentence and, consequently, the tax law is valid within the scope of MFN.44

In its analysis, the AB looked at the first two sentences of Article III:2 in their respective order. In the first sentence, products are “like,” as “construed narrowly so as not to condemn measures that its strict terms are not meant to condemn,” in which case the measure fails if the tax rates are even minimally different.45 Next, under the second sentence, where products are not “like” under the narrow definition of the first sentence but instead “like” under the “substitutable and directly competing” standard, the measure fails under the “not similarly taxed” standard only if the difference in tax rates is more than de minimis.46

The AB in Japan–Alcohol upheld the Panel’s finding that shochu and vodka are “like” under both the first and second sentences of Article III:2, such that even a minimal difference in taxation is impermissible, thereby making Japan’s measure impermissible.47 First, the AB surmised whether the dissimilar taxation was applied “so as to afford protection on domestic production” on a case-by-case basis by looking at “the design, the architecture, and the revealing structure of the measure.”48 Whereas the Panel held that this was established merely by observing that the dissimilar taxation exceeded a de minimis level and that the spirits were “directly competitive or substitutable products,” the AB insisted that the level must go well beyond a de minimis level in order to demonstrate protectionism.49 Rather, the AB found the Panel’s additional findings showing significant adverse effects on foreign competition were essential in demonstrating that the measure afforded protectionism.50 Specifically, the AB focused on the Panel’s findings that Japan’s disputed tax “makes it difficult for foreign-produced shochu to penetrate the Japanese market” and “does not guarantee equality of competitive conditions between shochu and [other spirits],” which led the Panel to conclude that “Japan manages to ‘isolate’ domestically produced shochu from foreign competition[.]”51 To the AB, these additional facts were not extraneous, but instead essential evidence demonstrating that Japan acted in a protectionist manner.52 The AB then

44 Id. ¶ 3.4.
46 Id. ¶ 27.
47 Id. ¶ 32.
48 Id. ¶ 29.
49 Id. ¶¶ 30-31.
50 Id.
51 Id.
52 Id.
confirmed its decision by noting that it reflected the reasonableness and flexibility of the WTO rules and that it comported with the “customary rules of public international law,” a reference to Annex 2 of the WTO Agreement, known as the Dispute Settlement Understanding (“DSU”).

2. “Least Favored Nation” Treatment

The Japan–Alcohol holding was softened slightly by Korea–Various Measures on Beef to include “no less favorable” treatment. In that case, the AB held that a Korean regulation established a “dual retail system” inconsistent with GATT Article III:4. Nonetheless, the AB also agreed with Korea’s argument that Article III:4 only requires that WTO members “provide equal conditions of competition,” meaning that “differential treatment” may be acceptable, so long as it is “no less favorable” to foreign imports than to domestic goods. In this regard, differently taxed products found “like” under the “narrow” reading of the first sentence of Article III:2, or found “like” as competitors or substitutes under the second sentence, can in cases of “less favorable treatment” nonetheless be found acceptable under Article III where the competitive harm is distributed in such a way as to dispel the appearance of protectionism. The AB in EC–Asbestos clarified that:

The term “less favorable treatment” expresses the general principle, in Article III:1, that internal regulations “should not be applied . . . so as to afford protection to domestic production”.

In other words, the case-by-case likeness analysis requires attention not only to whether the products have an economically competitive relationship but to the actual impact that the measure in question has on that relationship, and whether it should be construed as of a protectionist nature.

55 Id. ¶ 186(e).
56 Id. ¶¶ 16, 137.
Indeed, the Panel in *EC – Biotech Products* confirmed this approach when it held that an EC regulation on genetically-modified organisms (GMOs) was not “less favorable” to imports because it treated both imported and domestic GMOs and non-GMOs the same way, and the disparate effect of the regulation was in fact a direct consequence of subjective government and consumer perceptions.\(^{58}\) Where a labor-rights-supporting trade measure is extended by a Member country to apply to domestic and imported products alike, and it would otherwise violate MFN treatment, a defense might be to show that the treatment is no less favorable to foreign products than to domestic products. That the WTO permits the “least favored nation” defense to a dispute over dissimilar treatment of otherwise “like” products strongly suggests that it is not the physical makeup of the products, or their competitive relationship, but instead the rejection of protectionism that is the overriding concern at the heart of the likeness analysis.

### 3. Production and Process Methods (PPMs)

Suppose you encounter two shirts in the marketplace that are physically indistinguishable. You learn that one was made by an Italian tailor working 40 hours a week for a reasonable wage, whereas the other was made in a sweatshop in rural China. Can the WTO distinguish the two products as not “like,” and thereby allow member states to treat these imports differently, when they are not only economic substitutes but physically indistinguishable? In other words, can a “likeness” distinction depend *solely* on the method by which a product is manufactured, or must two products at a minimum present a chemical, structural, or other physical difference (however subtle) before the WTO can consider them not “like”?\(^{59}\)

To analyze this question, some commentators distinguish between product related production and process methods (pr-PPMs) and non-product related production and process methods (npr-PPMs), the difference being that the production methods are in some way incorporated into the physical product (perhaps in only a trace amount) in the former case and not in the latter.\(^{60}\) As demonstrated in *Japan–Alcohol*, the WTO does not always allow discrimination where the differences relate to the final products themselves (i.e., shochu versus vodka and other spirits). Nonetheless, where similar products produced through different methods

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\(^{59}\) Low, Marceau & Reinaud, *supra* note 38, at 7.

\(^{60}\) Appellate Body Report, *Japan–Taxes on Alcoholic Beverages*, *supra* note 26, ¶ 32.
have physical differences as a result, the WTO tends to recognize that the distinction can serve as a foundation for attacking their “likeness.” The jurisprudence is more ambiguous, however, for measures distinguishing products as not “like” based solely on npr-PPMs (e.g., a product of child slave labor versus a physically indistinguishable product made in accordance with recognized international labor standards). The un-adopted US–Tuna report, for example, presumed that products differing only in terms of their npr-PPMs must be “like,” whereas the EC–Asbestos holding suggested that npr-PPMs can be relevant to the likeness determination. Specifically, the AB in EC–Asbestos clarified that:

the “characteristics” of a product include, in our view, any objectively definable “features,” “qualities,” “attributes,” or other “distinguishing mark” of a product. Such “characteristic” might relate, inter alia, to a product’s composition, size, shape, color, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity . . . .

However, the AB then proceeded to add that:

product characteristics include, not only features and qualities intrinsic to the product itself, but also related “characteristics,” such as the means of identification, the presentation and the appearance of a product . . . .

In this regard, the AB appeared to hold that the likeness determination can consider more than physical characteristics, but did not go so far as to definitively state that the difference could be in the form of an npr-PPM.

Another case that came close to answering the question of whether a distinction in “likeness” can be made on the grounds of an npr-PPM was


62 Id. at 7.

63 Id.


65 Id.

the US—Superfund case.67 In US—Superfund, the Panel permitted the U.S. to extend a domestic tax on specific chemicals to imports that used the same chemicals.68 Unfortunately, however, the Panel did not specify whether the chemicals needed to be physically present in the product, or merely used in the production process, leaving the question open.69

Joost Pauwelyn, Professor of International Law at the Graduate Institute of International and Development Studies in Geneva, Switzerland, looks to the language from Article II:2(a) permitting “charges on imports equivalent to internal taxes imposed in respect of an article from which the imported product has been manufactured or produced in whole or in part” to argue that npr-PPMs can potentially be “part of” the imported product.70 Other commentators look to the portion of Article III:2 saying that imports “shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products,” to argue that the imposition of taxes on npr-PPMs at the border is consistent with national treatment.71 Patrick Low and Gabrielle Marceau of the WTO, and Julia Reinaud of the Institute for Industrial Productivity, point out that both of these provisions, however, only refer to taxes and charges and not to non-price regulations.72 Consequently, many of the types of regulations generally applied to businesses to protect labor (e.g., the right to form a union, prohibitions on child and prison labor, maximum work hour limits, etc.) may be difficult to require for imports on such grounds.

4. Pauwelyn View

Although Joost Pauwelyn generally holds the belief that products different only in terms of their production process will be considered “like,” he notes that, in theory, two otherwise identical products could be shown as not “like” based on differences in consumer preference (e.g., consumers demonstrate measurably different market preferences with respect to “fair trade” coffee versus exploitative coffee).73 Pauwelyn does this by showing that the WTO cases use four criteria to judge likeness: (1)

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67 GATT Panel Report, United States—Superfund, supra note 61.
68 Id. ¶¶ 17-19.
69 Id.
71 Low, Marceau & Reinaud, supra note 38, at 8.
72 Id. at i and 8.
73 Pauwelyn, supra note 66, at fn. 76 (Apr. 2007) (citing Appellate Body Report EC—Measures Affecting Asbestos and Asbestos-Containing Products, supra note 27, ¶ 101)).
physical characteristics of the products; (2) end-use; (3) consumer tastes and habits; and (4) tariff classification, picking out “consumer tastes and habits” as the only criterion that could make otherwise physically identical products different. But Pauwelyn then goes on to say that, if consumers already prefer and will pay a premium for a product based on their tastes and habits, then that circumstance alone would obviate the need for any government-sponsored competitiveness provision.

Changing consumer preference may itself be a way around the fact that “product likeness” determinations focus on the product rather than the process behind its manufacture. Certification marks, protected under trademark law, are used to target both pr-PPMs and npr-PPMs. For example, Kosher, ISO, fair trade, organic and other labels are licensed for use subject to review by a private or public sector entity and their uses are protected by international treaty. This scheme is weaker than trade measures because one must trust that consumers will become educated enough to identify the labels and then take moral responsibility by paying what could potentially be more for the certified product. There is also a risk that other parties will create similar labels that result in consumer confusion and undermine the purpose of standards-based trademark labeling. In Dolphin-Tuna, the United States attempted unsuccessfully to require that all tuna imports obtain a certification mark that the product was

74 Id. These factors appear in Appellate Body Report, Japan–Taxes on Alcoholic Beverages, supra note 26, at Subsection H.1(a). The factors originally come from Border Tax Adjustment Report, supra note 36, ¶18.

75 See Pauwelyn, supra note 66, at 76.


78 Howse and Regan suggest that the cost to the extra consumer of purchasing the certified product may serve as a major factor in the effectiveness of this approach, particularly where consumers must act collectively to effect a particular social objective and the individual consumer lacks any guarantee that others will make the same economic sacrifice. See supra note 38, at 273.
“dolphin safe,” per a specific set of processes and standards.\(^\text{79}\) However, this additional intervention by the government (i.e., a government mandate that all imports bear a certain standards-certifying mark) might not be necessary in order for the certifying mark to have a significant effect on the market.

5. *Howse and Regan Approach*

Robert L. Howse, the Lloyd C. Nelson Professor of International Law at the New York University School of Law, and Donald Regan, the William W. Bishop Jr. Collegiate Professor of Law at the University of Michigan Department of Philosophy, take a very different stance on the likeness question by arguing that process of production is only relevant to the likeness analysis insofar as it indicates whether a measure is protectionist in nature, which is the primary issue at the heart of the national treatment analysis.\(^\text{80}\) To justify this argument, Howse and Regan look to the *Vienna Convention on the Law of Treaties* (hereinafter “Vienna Convention”).\(^\text{81}\) By default, the Vienna Convention applies only between states and not necessarily to treaties between states and international organizations; however, in the interests of clarity and predictability in the dispute system, WTO panels consistently refer to the Vienna Convention in interpreting the GATT.\(^\text{82}\) Moreover, the Dispute Settlement Understanding, which includes rules that Members agree to follow in resolving disputes, explicitly states that WTO agreements will be clarified “in accordance with customary rules of interpretation of public international law,” giving the WTO dispute settlement body possible grounds for drawing on the Vienna Convention as a widely accepted international treaty providing rules of treaty interpretation.\(^\text{83}\) Article 31 of the Vienna Convention says that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning

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\(^{79}\) Tuna/Dolphin I, supra note 18.


\(^{81}\) Howse & Regan, supra note 38, at 261.


\(^{83}\) See DSU, supra note 53.
to be given to the terms of the treaty in their context and in the light of its object and purpose.” In an attempt to identify the “ordinary meaning” of “likeness” as referenced in GATT Article III, Howse and Regan then argue that:

If we assign “like” its ordinary meaning in context, “not differing in any respect relevant to an actual non-protectivist regulatory policy,” then physically identical products that differ only in their processing histories may be “unlike” because the processing differences may be relevant to such a policy.\(^\text{84}\)

They then emphasize that Article I and Article III do not suggest that any particular regulatory policies are inadmissible, except favoritism between nations and protectionism, and therefore do not expressly rule out npr-PPM-based trade measures.\(^\text{85}\) Howse and Regan read Article III(2)&(4), which deal with likeness, in light of Article III(1), which lays out the general anti-protectivist policy of national treatment, concluding that the interpretative focus should not primarily be on comparing the physical traits of products, but rather on whether the measure is protectionist vis-à-vis foreign imports.\(^\text{86}\) They also counter commentators who say that the “aims” and “effects” of a measure are central in the likeness analysis by explaining that those factors are only important insofar as they are essential in determining whether a particular measure constitutes protectionism.\(^\text{87}\)

Under the Howse and Regan view, a product can be distinguished as not “like” another physically identical product by virtue of a difference in process, and a trade measure might treat the two products differently even if those products are economic substitutes.\(^\text{88}\) For example, a product made under ILO-acceptable labor standards might be distinguishable from an otherwise identical product made at below those standards. According to Howse and Regan, the WTO assesses the legitimacy of the distinction by

\(^{84}\) Howse & Regan, supra note 38, at 261

\(^{85}\) Id.

\(^{86}\) Id. at 268. It is worth noting that in the portion of the holding in Japan–Alcohol concerning likeness, the AB also explicitly draws on the “ordinary meaning” of Article III(2). See id. at 260. It is also worth noting that Howse and Regan’s approach is very similar to (and consistent with) the “less favorable treatment” approach described above, which overrides other standards by getting directly at the competitive effects of the measure and, in particular, whether those effects suggest a protectionist intent. See supra notes 61-64.

\(^{87}\) Howse & Regan, supra note 38, at 261.

\(^{88}\) See generally id. at 269 (comparing “process-based” and “county-based” restrictions on turtle-friendly shrimp nets and turtle-unfriendly shrimp nets).
asking only whether the measure is protectionist. These commentators further assert that even if a secondary purpose is to eliminate the competitive disadvantage of domestic producers (in this case, by bearing the costs associated with compliance with the ILO Conventions or other internationally recognized labor standards), accounting for this economic externality serves the primary purpose of ensuring a minimum labor standard for all workers, and is therefore not in itself protectionism. Howse and Regan go on to emphasize that consumers in a Member country may care equally about social issues that happen at home and abroad, so the fact that a Member claiming discrimination might (hypothetically) not share the same concerns (here, minimum labor standards) may be immaterial where the member imposing the restriction does care about the issue as it applies universally.

In looking at which measures are and are not likely to pass as non-protectionist, Howse and Regan comment that labor legislation that by its nature applies differently in different geographic areas, such as minimum wage standards, will be harder to uphold, whereas universal norms such as against slave or child labor would be easier to support as grounds for non-protectionist trade measures. Given purchasing power and other differences, minimum wage requirements would be particularly hard to set and justify as part of a trade measure. If Howse and Regan are correct in their analysis, Members may succeed in implementing trade measures that treat products differently depending upon the process by which they were produced, and those policies with the greatest chance of passing WTO scrutiny as nondiscriminatory per Article I and Article III would be those based on universal principles (rather than those that may apply differently in one country context versus another, such as a reasonable standard for minimum wage).

Howse and Regan believe that the product/process distinction is not the central determinant of “likeness.” However, other scholars who believe that the “likeness” standards in Article I and Article III leave no space for distinguishing goods based on differences in process often look to the Agreement on Technical Barriers to Trade (“TBT Agreement”), which

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89 See id. at 272 (interpreting objections to the trade measures that are justified by the value of their consequences to mean trade measure adopted without protectionist motives have no efficiency costs).
90 The examples provided by Howse and Regan derive from the facts of Shrimp-Turtle, but the same arguments would here apply to labor rights. Id. at 280.
91 Id. at 281. Howse and Reagan also argue that, regarding the question of “who gets to decide” a moral belief, it must be the right of the country to make such determinations independently insofar as actions apply within that country’s borders. Id. at 281-82.
92 Id. at 284.
93 Id.
applies to technical regulations that “lay down product characteristics or their related processes and production methods.”

Under the TBT Agreement, technical standards must comply with the Code of Good Practice. The Code emphasizes standardization, requires collective standard-setting with periods of review, forbids the creation of standards constituting protectionism, and discourages the creation of unnecessary obstacles to trade. Because the TBT Agreement is aimed at unifying international standards as much as possible, it might represent an inroad for the application of internationally agreed upon labor standards.

D. GATT Article VI – Subsidies, dumping, and countervailing duties

Michael J. Treblicock, Professor of Law at the University of Toronto, and Robert Howse discuss the possibility of using GATT Article VI Anti-Dumping and Countervailing Duties to make a case that countries not meeting internationally-recognized labor standards engage in “social dumping,” or indirect and implicit subsidization. They are quick to reject this approach because low-cost, low-skilled labor is arguably critical to developing countries’ competitive advantage in many instances; because economic studies on the effects of trade with low-wage economies show that these lower wages do relatively little (versus other factors such as technological change or public investments in education, health care, infrastructure, or law enforcement) to drive down wages for low-skill jobs in competitor economies; and because economic theory suggests that the immediate imposition of common international labor standards modeled on existing developed-country standards would reduce economic welfare in all countries (including both importers and exporters).

The “social dumping” approach closely mirrors Joseph Stiglitz’s proposal that excessive carbon emissions in inadequately regulated

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95 Id. at Article 4.
96 Id. at Annex 3; Treblicock & Howse, supra note 17, at 292.
97 See SARAH JOSEPH, BLAME IT ON THE WTO?: A HUMAN RIGHTS CRITIQUE 128 (2011) (considering the ILO standards as a possible candidate for inclusion through the TBT Agreement because “they might be deemed to be based on an international standard and therefore ‘rebuttable presumed not to create an unnecessary obstacle to trade’ under Article 2(5).”)
98 See Treblicock & Howse, supra note 17, at 266.
99 Id. at 267-69.
countries should be treated as unfair subsidies because, in such cases, the firms are not paying for the full cost of production.\textsuperscript{100} In the labor context, the argument would be that, by putting an unjustifiable burden on the worker (e.g., through unreasonably long hours, child labor, inadequate pay, etc.), the firm is not paying the full production cost. Joost Pauwelyn rejects this argument because the WTO rules say that a subsidy is a financial contribution by a government, whereas this type of “subsidy” involves only a failure by the government to act.\textsuperscript{101} Pauwelyn also points to the WTO Agreement on Subsidies and Countervailing Measures, which clarifies that countervailing duties to offset foreign government subsidies can be levied only where the subsidy is “specific to an enterprise or industry or group of enterprises or industries . . . within the jurisdiction of the granting authority.”\textsuperscript{102} Therefore, where the counterpart government has not targeted any particular business units within its jurisdiction or provided a formal subsidy (rather than simply failing to act), it seems the WTO subsidies rules will not apply.

Where the subsidy argument might succeed, however, is where the government’s failure to act when “government revenue that is otherwise due is foregone or not collected.”\textsuperscript{103} In United States–Tax Treatment for “Foreign Sales Corporations,” the WTO AB determined that what is “otherwise due” refers to “the prevailing domestic standard of the Member in question.”\textsuperscript{104} China, for example, is an ILO member country and has various laws protecting labor rights.\textsuperscript{105} To the extent that another Member can demonstrate that China knowingly neglects enforcement and/or enables companies to violate these existing laws, it is conceivable that a case can be made for calling this a ‘subsidy’ equivalent to a financial contribution by the government.\textsuperscript{106} This may be a hard case to make, however, if the violations are not in an easily quantifiable form (e.g., foregone pension, etc.).


\textsuperscript{101} Pauwelyn, supra note 66, at 14-15.

\textsuperscript{102} Id. at 15 (citing WTO Agreement on Subsidies and Countervailing Measures, Articles 1.2, 22, available at http://www.wto.org/english/docs_e/legal_e/24-scm.pdf).

\textsuperscript{103} Id. at Article 1.1(a)(ii).

\textsuperscript{104} WT/DS108/AB/R, adopted on 20 March 2000, ¶ 90.


\textsuperscript{106} C.f., Stanley James, Foxconn Auditor Finds ‘Serious’ Violations of Chinese Law, BLOOMBERG (Mar. 30, 2012), available at http://www.bloomberg.com/news/2012-03-29/foxconn-auditor-finds-serious-violations-of-chinese-law.html (discussing how the violations uncovered at Foxconn were in violation of China’s domestic labor laws). Presumably, these violations would need to be systematically and deliberately ignored such that they reflected a conscious and deliberate effort on the part of the Chinese government to provide a benefit to companies. This may be extremely difficult to show.
medical, or other payments) and absent strong evidence of an intent to give advantage to domestic companies (i.e., rather than mere ineptness in enforcement).

E. GATT Article XI – General Elimination of Quantitative Restrictions

GATT Article XI reflects a preference toward tariffs over quotas that is a “cornerstone” of the GATT and dates back to the Uruguay Round, in which the original Members sought to phase out quantitative restrictions for textiles and agriculture.\textsuperscript{[107]} Article XI:1 begins by stating that:

\begin{quote}
No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained . . . on the importation of any product . . .\textsuperscript{[108]}
\end{quote}

As this text indicates, Article XI applies generally to the importation of products, regardless of the form of the restriction.\textsuperscript{[109]} Moreover, in addition to a quota or other partial limit on imports, an outright ban on a certain product would also constitute a “quantitative restriction” (i.e., of zero) and therefore would be inconsistent with GATT Article XI:1.\textsuperscript{[110]}

Even where a measure imposes a quantitative restriction, or violates MFN, national treatment, or some other combination of GATT rules, it may nonetheless be justified and therefore allowed, provided that it falls within one or more of the exceptions provided under the General Exceptions Clause.

III. GATT ARTICLE XX – THE GENERAL EXCEPTIONS CLAUSE

Article XX of the GATT, the General Exceptions Clause, offers a right to Member countries to discriminate in violation of other GATT obligations where such discrimination is justified as specified in one or

\textsuperscript{[108]} GATT, art. XI(1).
\textsuperscript{[109]} Panel Report, \textit{India–Measures Affecting the Automotive Sector}, ¶¶ 7.318-7.322 WT/DS146/R, WT/DS175/R (Dec. 21, 2001) (holding that, because the standard concerns whether some restriction applies to imports, even non-border measures may in some instances violate Article XI); Panel Report on \textit{US–Shrimp}, ¶ 7.16 WT/DS58/R (May 15, 1998) (holding that certifications can amount to “prohibitions or restrictions” per Article XI(1)).
more of the listed exceptions.\textsuperscript{111} Exception (e) provides an exception “relating to the products of prison labour.”\textsuperscript{112} The “relating to” clause is normally interpreted relatively broadly by the WTO Appellate Body.\textsuperscript{113}

\textit{A. GATT Article XX(e) – Products of Prison Labor}

The ILO addresses the use of prison labor in the Forced Labour Convention (No. 29).\textsuperscript{114} Under the ILO definition,

forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.\textsuperscript{115}

For government-sponsored punitive labor, the ILO makes an exception; however, the requirement that an individual must offer him/herself “voluntarily” still applies when companies utilize prison labor.\textsuperscript{116} To the extent that the relationship between the company and the prisoner does not resemble that of free labor, the ILO recognizes the relationship as involving labor rights abuse.\textsuperscript{117} Therefore, products of prison labor are not necessarily labor rights abuses, but in many cases might reflect abuses, particularly where the products originate from private companies (i.e., rather than government-owned and -managed institutions).

If a Member seeks to apply a quantitative restriction in the form of a ban to products of prison labor, that action would invoke Article XI of the

\begin{footnotesize}
\begin{enumerate}
\item See GATT, art. XX.
\item Id. at XX(e).
\item Id. As compared to exceptions that use the language “necessary to . . .” Pauwelyn, supra note 66, at fn. 93.
\item Convention Concerning Forced or Compulsory Labour, ILO No. 29, (June 28, 1930) [hereinafter “Forced Labor Convention”].
\item Id. at art. 2(1).
\item The definition makes an exception for “any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations” Id. at art. 2(2)(c). But the Convention does not give the same exception to non-government entities: “No concession granted to private individuals, companies or associations shall involve any form of forced or compulsory labour for the production or the collection of products which such private individuals, companies or associations utilise or in which they trade.” Id. at art. 5(1).
\item See ILO, Q&As on Business and Forced Labour >> Use of prison labour (last updated Sept. 01, 2010), http://www.ilo.org/empent/areas/business-helpdesk/faqs/WCMS_DOC_ENT_HLP_FL_FAQ_EN/lang--en/index.htm (offering a set of indicators used by the ILO to determine whether the conditions of employment are similar to those of a free labor relationship).
\end{enumerate}
\end{footnotesize}
An outright ban would represent a prohibition or restriction in violation of the Article; however, the Member could justify that violation by showing (1) that the ban does indeed serve to restrict products of prison labor under exception (e) of the Article XX and that (2) the measure is tailored narrowly so as not to violate the chapeau of Article XX, which says that the measure must not involve:

(a) “arbitrary discrimination” (between countries where the same conditions prevail);
(b) “unjustifiable discrimination” (with the same qualifier); or
(c) a “disguised restriction” on international trade. 119

The chapeau is said to embody the international law principle of “good faith.” 120 Although Article XX(e) specifically allows for restrictions on products of prison labor, a ban on such products that is needlessly overprotective will violate the chapeau and be deemed as not justified under Article XX. In U.S.–Shrimp, the AB characterized the chapeau as striking a balance between the WTO Member’s right to invoke an Article XX exception and the same Member’s duty to respect the rights of other members, as evaluated on a case-by-case basis. 121

The AB in U.S.–Shrimp found that arbitrary discrimination exists when a measure fails to account for the fact that different countries face different circumstances. 122 A country imposing a ban on prison labor thus would need to evaluate the costs that its restriction would impose on other WTO members.

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118 See GATT, art. XI.
119 This language, quoted from the Appellate Body, isolates each of the three main conditions given in the chapeau. Appellate Body Report, United States—Standards for Reformulated and Conventional Gasoline, ¶ 23 WT/DS2/AB/R (Apr. 29, 1996) [hereinafter US–Gasoline]. The Appellate Body then writes that “‘Arbitrary discrimination’, ‘unjustifiable discrimination’ and ‘disguised restriction’ on international trade may . . . be read side-by-side; they impart meaning to one another. It is clear to us that ‘disguised restriction’ includes disguised discrimination in international trade.” Id. at p. 25. See also Joshua Meltzer, Climate Change and Trade—The EU Aviation Directive and the WTO, 15 J. INT’L ECON. L. 111, 140, 144 (Mar. 2012) (stating that the Article XX chapeau “focuses on ensuring that the measure has not been applied in ways that constitute arbitrary and unjustifiable discrimination or that is a disguised restriction on international trade.”).
121 Id. ¶¶ 156, 159. Accordingly, the AB in U.S.–Shrimp was explicit that that the first step is to evaluate whether the measure in question corresponds to a right listed in Article XX, then the second step is to evaluate whether the measure is applied fairly or abuses the right(s) invoked. Id. ¶¶ 119–20 (citing U.S.–Gasoline, supra note 119, ¶ 22).
122 U.S.–Shrimp, supra note 120, ¶ 177.
Members, including the administrative and producer costs of meeting new standards or baselines.\textsuperscript{123} Depending upon how the Member requires approval or certification to meet the conditions of the ban before it may import products, a country or its producers might need to effect significant procedural changes, and these changes may be costly. Particularly where systems and procedures for identifying products of prison labor are already in place in other Member countries, the Member imposing the ban should focus on whether another measure is comparable in effectiveness, enables exporting countries to take advantage of their own capacities and unique circumstances, and yet still achieves the outcome desired.\textsuperscript{124}

Where costs are foreseeable and not “merely inadvertent or unavoidable,” the measure will be deemed to represent “unjustifiable discrimination” and a “disguised restriction on international trade” where such costs are not mitigated.\textsuperscript{125} This puts an obligation on the Member putting forward the measure to provide other Members with an opportunity to be heard, to hear arguments against the measure, and to give a written decision.\textsuperscript{126} Where a Member fails to offer such a review as a matter of procedural fairness and due process, the measure will be found to represent arbitrary and unjustifiable discrimination.\textsuperscript{127} Moreover, the manner of application of the measure itself should be transparent and predictable (i.e., rather than “informal” or “casual”) in order to adequately notify exporting Members of what steps they must take to reasonably ensure compliance.\textsuperscript{128}

\textsuperscript{123} \textit{Cf.,} U.S.–Gasoline, supra note 119, \textsuperscript{¶} 28–29 (faulting the United States dually for failing to “explore adequately means . . . of mitigating the administrative problems relied on for rejecting individual baselines for foreign refiners; and to count the costs for foreign refiners that would result from the imposition of statutory baselines”).

\textsuperscript{124} See Meltzer supra note 119, at 146. Meltzer emphasizes that a measure that does not acknowledge other approaches that effectively achieve the same policy goal by different means will tend to be interpreted by the dispute resolution body as an inappropriate attempt to force other countries to conform their polices accordingly, and rejected as arbitrary and unjustifiable discrimination inconsistent with WTO commitments. \textit{Id.} citing \textit{US–Shrimp}, supra note 120, \textsuperscript{¶} 165. The AB was specifically concerned with the uniform nature of the measure applied by the U.S., noting, for example, that some shrimp exports would be excluded from the U.S. market using methods identical to those used in the U.S., solely because they were caught in the waters of countries not certified by the U.S. \textit{Id.} \textsuperscript{¶}¶ 164-5.

\textsuperscript{125} This was the finding in \textit{US–Gasoline}, where the measure complied with Article XX(g), but the discrimination was foreseen and the U.S. was found responsible for an “omission” by failing to mitigate in advance. \textit{US–Gasoline}, supra note 119.

\textsuperscript{126} \textit{Appellate Body Report on US–Shrimp, supra note 120, ¶¶ 180-83.} In \textit{US–Shrimp}, the AB faulted the U.S. for failing to negotiate with Asian countries to accommodate their existing measures for reducing turtle deaths from shrimp trawling and instead applying U.S. standards. \textit{Id.} \textsuperscript{¶} 161.

\textsuperscript{127} \textit{Id.} ¶ 184.

\textsuperscript{128} The AB in \textit{US–Shrimp} deemed the “rigidity and inflexibility” of the U.S. certification process to constitute “arbitrary discrimination” under the chapeau. \textit{Id.} ¶ 177. The AB also found “arbitrary and unjustifiable discrimination where the same conditions prevail” on the basis of “due process” where the approval process was “informal” and “casual” and where prospective importers did not have an opportunity
If a ban on goods produced with prison labor falls squarely under the Article XX(e) exception and thus is carefully tailored to eliminate unnecessary costs, respects existing approaches that effect the same policy objective, and extends opportunities for due process and procedural fairness to dissenting Members, then the measure would likely succeed under the Article XX(e) exception, even if found discriminatory under one or more other articles of the GATT.

Looking back to the ILO definition of forced and compulsory labor, it is worth noting that the ILO does not perceive all forms of prison labor as labor rights abuses. One may therefore wonder whether the WTO would be willing to apply Article XX(e) where the party creating the product is a government using punitive prison labor, or a company meeting all of the ILO indicators that evidence a prison labor relationship approximating that of a free labor relationship. Would the WTO look at Article XX(e) on its face, which seems to unequivocally and universally justify a ban on any product of prison labor, or would it look to the intent of the rule and hold that what the international community agrees are “acceptable” forms of prison labor do not in fact qualify for the Article XX exception? It is possible that the WTO will find the policy to represent arbitrary and unjustifiable discrimination if it is overbroad in that it bans more forms of prison labor than captured within the stated policy objectives of the Member implementing the measure, i.e., if the Member itself allows certain forms of prison labor or bases the measure on a standard (like the ILO standard) that condones certain forms of prison labor.

It is worth noting that an alternative means for circumventing the GATT’s various restrictions on “discriminatory” treatment is for a Member to obtain an explicit exception as part of its negotiated schedule of concessions. The U.S., for example, bans the importation of products made by convict labor, forced labor, and indentured labor as part of the Harmonized Tariff Schedule of the United States, under the Tariff Act of 1930. GATT Article II governs import tariffs at the border, providing in relevant part that products identified in Part I of a Member’s Schedule are subject to the terms set forth in the Schedule. Although the U.S. would have a good chance of succeeding in effecting a similar outcome using the

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129 See supra notes 115-18.
130 Id.
131 See Subpart 0 (discussing schedules of concessions).
133 See supra Subsection 0.
Article XX(e) exception for products of prisoner labor, according to GATT Article II, countries like the U.S. that pre-negotiated such bans (or other restrictions) into their WTO Schedules do not need to rely upon other parts of the GATT to support their otherwise discriminatory or trade-restrictive practices.

But suppose that the U.S. seeks to use trade measures to combat perceived human rights violations beyond those related to prison labor, and suppose that another article of the GATT deems these measures to be discriminatory. Although GATT and WTO trade rounds have included debates on labor standards since 1948, the WTO never addressed the issue in its negotiating rounds, nor explicitly incorporated labor standards into its trade framework, in part due to opposition from developing countries.134 Louis Henkin Professor in Human and Constitutional Rights and Faculty Co-Director of the Human Rights Institute at Columbia Law School, Sarah H. Cleveland, points to the Article XX(a) exception for measures “necessary to protect public morals” and the Article XX(b) exception for measures “necessary to protect human . . . life” as those that “most plausibly allow for human rights sanctions.”135

B. GATT Article XX(a) – Public Morals

Steve Charnovitz, Associate Professor of Law at The George Washington University, suggested that the American proposal to include a public morals exception clause when the GATT was negotiated was in defense of a series of trade restrictions already negotiated, including “intoxicating liquors, smoking opium and narcotic drugs, lottery tickets, obscene and immoral articles, counterfeits, pictorial representations of prize fights, and the plumage of certain birds.”136 Charnovitz concluded


that the drafting history shed little light on the meaning of the clause.\footnote{137} The exception subsequently went uninterpreted by the WTO for over fifty years, in part because Members were reluctant to challenge the exception out of concern that the inherent ambiguity of “public morals” meant that that too narrow or broad of an interpretation by the WTO could either threaten national sovereignty or lead to exploitative overuse of the exception.\footnote{138} Consequently, the first jurisprudence regarding the circumstances enabling the invocation of part (a) of the General Exceptions Clause, allowing an exception where “necessary to protect public morals,” did not emerge until 2005 in \textit{U.S.–Gambling}.\footnote{139}

\textbf{1. \textit{U.S.–Gambling}}

\textit{U.S.–Gambling} concerned a trade dispute brought by Antigua and Barbuda alleging the illegality of a U.S. ban on cross-border gambling and betting services, resulting in the decline of the Internet-based offshore gaming industry that accounted for ten percent of the island nation’s GDP.\footnote{140} The U.S. justified its ban on online gambling as necessary because the service encouraged organized crime, money laundering, and fraud and consumer crimes, as well as endangering public health (related to gambling addictions) and children and youth (by increasing access to underage gambling), together posing “a grave threat to the maintenance of the public order and the protection of public morals.”\footnote{141} \textit{U.S.–Gambling} related to

\footnote{137}Charnovitz, supra note 136, at 704-05, 730-31.

\footnote{138}Id.; Christoph T. Feddersen, \textit{Focusing on Substantive Law in International Economic Relations: The Public Morals of Gatt's Article XX(a) and 'Conventional' Rules of Interpretation}, 7 \textit{MINN. J. GLOBAL TRADE} 75, 77 (1998) (observing that the “ambiguous and rather obscure wording of Article XX(a) invites possible misuse.”). This concern has not been fully resolved by newer case law. \textit{See infra} notes 155-57 (discussing the continuum between universalist and unilateralist interpretations of “public morals”).


services rather than goods; however, the “public morals” clause of General Agreement on Trade in Services (“GATS”) Article XIV is substantially similar to the “public morals” clause of GATT Art. XX(a), such that the GATT “public morals” analysis from U.S.–Gasoline is relevant in interpreting the analogous “public morals” exception of the GATS and vice-versa.\textsuperscript{142}

Antigua countered the U.S. justification, arguing that the U.S. had shown “insufficient evidence of organized crime involvement,” that its regulatory scheme sufficiently addressed U.S. concerns, that the U.S. rejected offers to consult on Antigua’s gambling scheme in advance of instituting the measure, and that age verification and other technologies existed and “would be less restrictive on international trade than a total prohibition.”\textsuperscript{143} Consequently, Antigua argued that the measure failed to meet the “necessary to . . .” requirement of the “public morals” exception, and that the discriminatory nature of the ban (vis-à-vis domestic service providers competing locally rather than remotely) violated the chapeau of GATS Article XIV(a), which requires measures protecting public morals to be nondiscriminatory.\textsuperscript{144}

In its decision, the WTO Panel defined public morals as “standards of right and wrong conduct maintained by or on behalf of a community or nation” and concluded that gambling could potentially fall under the exception.\textsuperscript{145} Nonetheless, the Panel held that in this case the U.S. failed to “provisionally justify” that its statutes were “necessary to protect public morals and/or public order within the meaning” of the “public morals” exception because it neglected to adequately explore possible alternatives, rejected Antigua’s offer to negotiate a compromise, and failed to prove convincingly that it treated foreign providers in a manner consistent with the manner it treated domestic providers of gambling services.\textsuperscript{146} The AB subsequently affirmed the Panel’s ruling that the U.S. had failed to demonstrate that its restrictions were nondiscriminatory vis-à-vis competing foreign providers of gambling services, but overturned the


\textsuperscript{144} \textit{U.S.–Gambling}, supra note 143, ¶ 3.292. Again, this exception is interpreted analogously with the “public morals” exception of GATT Article XX(a). See Marwel, supra note 142.

\textsuperscript{145} Id.

\textsuperscript{146} Id. ¶¶ 6.474, 6.531-35, 6.607-08.
Panel’s decision that it lacked the grounds to assert that the U.S. de facto failed to meet the “necessary to . . .” requirement because Antigua had not met its obligation to first identify a less restrictive alternative to a ban. 147 The AB decision in U.S.–Gambling unfortunately leaves several questions unanswered, including whether the exception can be applied only to “inwardly-directed” measures intended to protect a Member’s own citizens, as well as who defines what constitutes a “public moral.” 148

2. Implications of U.S.–Gambling in a Potential Labor Rights Application of Article XX(a)

Experts distinguish “inwardly-directed” trade measures, put in place by a country to protect the morals of individuals within its jurisdiction, from “outwardly-directed” trade measures, implemented to protect the morals of individuals living beyond the country’s jurisdiction. 149 A Member’s measure protecting foreign workers would have an “outwardly-directed” moral purpose. 150 Prior to U.S.–Gambling, Members cited the “public morals” exception to justify inwardly-directed bans on pornography, narcotics, Kosher meat products (in Israel), and the importation of all alcohol (in Indonesia). 151 Some countries even used the exception to justify overtly outwardly-facing trade measures. For example, the European Community banned furs caught in nations that did not ban the use of leghold traps in 1991, and the U.S. banned goods produced by indentured child labor in 1997. 152 But because all of these trade restrictions went unchallenged, including ones based on religious grounds not explicitly mentioned in the exception itself or in the original public morals discussion surrounding Article XX(a)’s creation, it is unknown whether these various exceptions would have stood up if disputed. 153 Moreover, because U.S.–Gambling concerned an inwardly-directed measure by the U.S.


148 Wu, supra note 139, at 216, 226, 231-36.

149 See Charnovitz supra note 136, at 695. Charnovitz provides as examples of “inwardly-directed” measures the government of Israel’s ban on non-kosher meat products and the U.S. government’s ban on the importation of “obscene” pictures as, but also notes that this distinction is inherently “somewhat arbitrary” because transactions always have two sides. Id. at 695-6.

150 Id. at 696.

151 See Wu supra note 139, at 222-23, Annex 1 (providing a complete list of trade restrictions that relied on Article XX(a) for justification).

152 Id. at 223.

153 Id.
Government to protect Americans from dangers that the government associated with offshore gambling, the decision left open the question of whether the U.S. could rely on the “public morals” exception to implement an externally-directed measure targeting foreign labor practices affecting non-U.S. parties.

Although, as originally drafted, the public morals exception made no reference to human or labor rights, a number of commentators, and the United Nations High Commissioner for Refugees (UNHCR), proposed that the WTO should dynamically interpret GATT Article XX(a) to include such rights. Mark Wu, Assistant Professor of Law at Harvard Law School, distinguishes universalism and unilateralism as two potential starting points for identifying those public morals that should fit within the scope of the moral exception, but notes that the universe of norms on which there is unanimous consensus may be both too small and too irrelevant, given that universally held norms are, by definition, unlikely to be challenged in the first place. Unilaterally-decided norms, on the other hand, would be subjective and also difficult to challenge if used merely to disguise protectionist trade measures. The Panel looked to existing international practices, whereby sixteen countries already restricted or prohibited Internet gambling, in determining that gambling could fall under the “public morals” exception, and in doing so, appeared to reject both the pure unilateralist and pure universalist approaches; however, U.S.–Gambling did not ultimately define where, between those two extremes, a particular restriction must fall in order to meet the Article XX(a) moral exception. Additionally, Wu points out that the Panel and AB in U.S.–Gambling did not take a firm position regarding the extent to which a Member must prove the legitimacy of the moral asserted to excuse its trade measure, asserting only (ambiguously) that the public moral must be “prevailing,” while sending “mixed signals” by acknowledging some international rulings regarding the impacts of cross-border gambling but overtly disregarding others.


156 Wu supra note 139, at 231-32.

157 Id. at 232-33.

158 Id. at 233-35.
At the same time, the decision in *U.S.–Gambling* did clarify that the “necessary to . . .” language would be applied using the same three-factor test applied for other exceptions using identical language, and that the language in the chapeau regarding “arbitrary or unjustifiable discrimination” would be interpreted in conformity with the principles already established in prior cases.\(^{159}\) The Panel also stated “the content of [public morals] can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values.”\(^{160}\) Multiple scholars equate the *U.S.–Gambling* Panel’s language here, which subsequently went unmodified by the AB, to the “dynamic” or “evolving” standard for interpreting exception XX(g) offered in *Shrimp-Turtle*.\(^{161}\) Specifically, the AB in *Shrimp-Turtle* acknowledged that the Article XX(g) exception for protecting natural resources did not at the time of its drafting include living species, but nonetheless held that the exception should now be interpreted as including them.\(^{162}\) The same explicit flexibility in the scope of what qualifies as a “public moral” is important because it means, doctrinally, that the “public morals” exception need not be interpreted as static and therefore might now be read as including labor rights not explicitly envisioned by the original signatories of the GATT as “public morals.”

Looking back at the issues not fully answered by *U.S.–Gambling*, a labor rights justification based on an internationally agreed-upon convention such as the ILO Declaration on Fundamental Principles and Rights at Work or the International Bill of Human Rights will have a good chance of succeeding, assuming that it is found “necessary” and is not “arbitrary or unjustifiable discrimination” under the common interpretations of the “necessary to . . .” clauses and the chapeau. Even if future WTO decisions fall on the more restrictive side of the universalism vs. unilateralism spectrum, we know from *U.S.–Gambling* that total consensus is not required among member nations, so a generally accepted international convention would probably be adequate to justify a consistent action in moral defense of labor rights.\(^{163}\) Likewise, even if the legitimacy requirement is very high,

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\(^{159}\) Panel Report, *United States–Gambling*, supra note 143, ¶ 6.492; Appellate Body Report, *U.S.–Gambling*, supra note 147, ¶¶ 369, 371. Consequently, the chapeau analysis in an Article XX(a) case arguing for a labor rights exception would apply the chapeau in the same way seen above in the Article XX(e) analysis.

\(^{160}\) Panel Report, *United States–Gambling*, supra note 143, ¶ 6.461. This language was not amended in the subsequent AB report.

\(^{161}\) See, e.g., Kagan supra note 134, at 209-10; Wu supra note 139, at 230-31.

\(^{162}\) *U.S.–Shrimp*, supra note 120, ¶ 129.

\(^{163}\) Joshua Kagan suggests that “morals” should be defined based on standards put forward by the international human rights movement and that whether the morals are “public” should depend upon the degree of state adoption and ratification of
e.g., public opinion polls and legislative debates are found not to serve as adequate evidence to justify the sincerity of an asserted moral stance, an international convention that a country has signed (and consistently obeys) should represent strong enough evidence that the asserted moral standard is legitimate. Of all the public morals exception questions in US–Gambling left to future panels to decide, the one that creates the most uncertainty for the application of labor or human rights is the inwardly-facing/outwardly-facing distinction. That is to say that, even if in the future a Member applies a measure that it demonstrates to be (1) necessary under the “necessary to . . .” condition, (2) nondiscriminatory under the chapeau, (3) consistent with modern interpretations of public morals under the dynamic interpretation language of US–Gambling, and (4) meeting a standard of public morality demonstrated by signed international convention to be both (A) nearly universal and (B) common, formal, and long-standing practice in the Member country, a future Panel may nonetheless rule that (5) a Member cannot justify an outwardly-directed trade restrictive measure, i.e., the measure can only be used to safeguard the morals of inhabitants within one’s own country.  

It is additionally worth nothing that the 1994 WTO Agreement on Government Procurement, which narrowly applies to government procurements only, has a somewhat more broadly worded version of the public morals exception. The text prohibits Members from preventing each other from taking measures “necessary to protect public morals, order or safety, human, animal or plant life or health or intellectual property; or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour.” In addition to some language similar to Article XX(e) and wording identical to Article XX(a), as well as some exceptions that do not appear in the General Exceptions Clause, this compound exception mimics the wording of Article XX(b),

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international human rights instruments, concluding that “the widespread state ratification of the labor rights provisions of the ICCPR, ICESCR, the ILO Declaration, and the ILO Fundamental Conventions creates a strong justification for viewing these rights as universal and public.” Kagan, supra note 134, at 210.

164 Notably, Wu adds a further level of abstraction to Charnovitz’s inwardly/outwardly facing distinction by suggesting a three-part division: Type I restrictions safeguard the morals of inhabitants within one’s own country, Type II restrictions relate to the protection of those directly involved in the production of the product, and Type III restrictions target an exporting state which is engaging in practices that the importing state finds offensive not related to the production of the product. Wu, supra note 124, at 235. Here, the labor rights exceptions would fall under Type II. If future Panels choose to adopt this tripartite distinction approach, it is possible that certain outwardly-facing restrictions may be allowed (possibly including labor rights-related restrictions) while others are disallowed).

165 GATT, at art. XXIII(2).

166 Id.
which protects animal and plant life or health.\textsuperscript{167}

3. Later Jurisprudence on the “Necessary to” Standard

Multiple WTO cases have examined the “necessary to” standard that appears in some of the Article XX exceptions, including Article XX(a). In 2000 Korea–Beef, a dispute brought by the U.S. and Australia alleging an Article III:4 violation caused by Korea’s “dual retail system” for domestic and imported beef, the AB noted that “necessity” under Article XX does not require a showing that such measures are “indispensable.”\textsuperscript{168} The AB also clarified that “[t]he more vital or important [the interests or values put forward], the easier it would be to accept as “necessary” a measure designed as an enforcement instrument.”\textsuperscript{169} Finally, the AB noted that the “necessary” analysis should include a “determination of whether a WTO-consistent alternative measure which the member concerned could ‘reasonably employ’ is available, or whether a less WTO-inconsistent measure is ‘reasonably available.’”\textsuperscript{170} These additional elements in the “necessary to” analysis left a large degree of predictive uncertainty.\textsuperscript{171}

The following year, EC–Asbestos revisited the issue, holding that the WTO dispute settlement body will be deferential to a Member’s claim regarding the degree of protection deemed adequate to secure the asserted public morals.\textsuperscript{172} For the measure under dispute to be deemed “necessary,” however, it must be at least potentially capable of affording the same degree of protection that the Member claims it needs.\textsuperscript{173}

The aforementioned U.S.–Gambling case was the next to interpret the public morals exception in 2005, with the AB overruling the Panel decision that the U.S. did not satisfy the “reasonably available alternatives” element because it “failed to pursue in good faith a course of action that could have been used to explore the possibility of finding a reasonably available WTO-consistent alternative” on the grounds that the defending party only has the burden of making a \textit{prima facie} case that the measure is “necessary.”\textsuperscript{174}

\textsuperscript{167} Id. at XX(b).
\textsuperscript{168} See Korea–Beef, supra note 54, ¶ 614.
\textsuperscript{169} Id. ¶ 162.
\textsuperscript{170} Id. ¶ 166 (quoting Panel Report, United States – Section 337 of the Tariff Act of 1930, ¶ 5.26, L/6439 (Nov. 7, 1989), GATT B.I.S.D. (36th Supp.) at 345 (1989)).
\textsuperscript{172} Appellate Body Report, EC–Asbestos, supra note 27, ¶ 172.
\textsuperscript{173} Id.
After the defending party makes the *prima facie* case, the complainant may propose WTO-consistent alternatives, at which point the defending party must explain why those alternatives are not “reasonably available,” for example, because the alternative measure would be “merely theoretical in nature” (e.g., it would be unduly expensive or otherwise burdensome) or because it would not actually achieve the stated objective (as held in *EC–Asbestos*).\(^\text{175}\)

*Brazil–Tyres* in 2007 restated the “necessary to” analysis as composed of two steps.\(^\text{176}\) After the proponent makes a *prima facie* case, a three-part test analyzes (1) the “relative importance” of the interests that the measures are intended to protect, (2) the extent to which those means contribute to the stated ends, and (3) the measure’s restrictive impact on international commerce.\(^\text{177}\)

*China–Audiovisuals* is a more recent WTO case from 2009 in which the Chinese unsuccessfully attempted to apply the “public morals” exception, and it is of particular relevance here because it analyzed the “necessary to” question in light of the language of the “public morals” exception from GATT Article XX(a).\(^\text{178}\) In that case, the U.S. alleged that China restricted the rights of both Chinese and foreign enterprises with respect to the importation and distribution of a wide variety of publications and audiovisual products, in violation of the GATT, GATS, and two paragraphs of China’s WTO Accession Protocol.\(^\text{179}\) China did not appeal a finding by the Panel that some of these measures violated GATT Article III:4 and instead attempted to justify the measure under the GATT Article XX(a) “public morals” exception.\(^\text{180}\) In the end, however, the AB upheld the Panel’s finding that China failed to demonstrate that the national treatment violation was “necessary” to protect public morals and therefore the

\(^\text{175}\) Id.


\(^\text{180}\) Id. at II.A.; *China–Audiovisuals*, supra note 178, ¶ 469. China also violated its national treatment commitments under GATS Articles XVI and XVII. Id. at pp. 467-69.
measure did not justify an exception under GATT Article XX(a).\footnote{China–Audiovisuals, supra note 178, ¶ 415(d), (e).}

Two major focuses in China–Audiovisuals include whether the “public morals” exception can apply to a claim arising from a source such as an Accession Protocol, which is neither a part of the GATT nor the GATS (which include analogous versions of the exception), and the appropriate standard to apply to the “necessary to” language that appears in multiple of the Article XX exceptions, including Article XX(a).\footnote{Doyle, supra note 171, at 145-46 (explaining that while the public moral exception is embodied in the GATT and GATS and not the Accession Protocol, such an exception should still be permitted as a defense of Accession Protocol claims. The body’s reasoning, however, is somewhat unclear. The Appellate body further interprets the “necessary to” portion of Article XX(a) based on its legislative history.).} The Panel and AB in China–Audiovisuals were in agreement that the “public morals” exception is available in Accession Protocol cases, but the reasoning behind that decision was unclear, leaving room for future debate.\footnote{Id. at 157-68; Panel Report, China–Audiovisuals, supra note 179, 7.751; see supra note 177 (providing the three part test from Brazil–Tyres).}

The “necessary to” question was evaluated using the Brazil–Tyres three-step analysis described above, beginning with the question of whether there is a “link between import entities, content, review, and the protection of public morals”; i.e., an assessment of the relative importance of the moral values at stake.\footnote{Panel Report, China–Audiovisuals, supra note 179, ¶ 7.756.} The United States, however, conceded that the purpose of China’s measures was to protect public morals and instead argued that the measures were not “necessary” to protect those public morals per Article XX(a).\footnote{Panel Report, China–Audiovisuals, supra note 179, ¶ 7.808-7.811.}

On the next question of the analysis, i.e., the question of whether the means used by China materially contributed to protecting the moral values asserted by China, the U.S. argued that China failed to show that the prohibition related to its goal of preventing inappropriate material, that allowing only a selective group of importers was not necessary for adequate content review, and that the measures went a step too far by calling for state ownership of import activities.\footnote{China–Audiovisuals, supra note 178, ¶¶ 290, 294.} The AB held that the Panel did not err in agreeing with the United States on this point; however, the AB clarified a perceived ambiguity in the Panel’s approach by specifying that the party applying the exception must demonstrate an actual (i.e., rather than merely apparent) contribution to protecting the moral value in question.\footnote{Id. at 157-68; Panel Report, China–Audiovisuals, supra note 179, 7.751; see supra note 177 (providing the three part test from Brazil–Tyres).}
The third factor from the Brazil–Tyres analysis is a balancing of the measure’s trade-restrictive impact on international commerce.\textsuperscript{188} Here, the U.S. offered a less restrictive alternative that would still permit China to review content before it passed through customs.\textsuperscript{189} The Panel agreed that the U.S. proposal would be “significantly less restrictive” than China’s intended approach without affording China inferior protection of public morals, concluding therefore that China failed both the second and the third parts of the Brazil–Tyres analysis and consequently lacked the justification required to receive an exception for its trade measure under Article XX(a), and the AB agreed with the Panel’s conclusion.\textsuperscript{190}

\textbf{C. GATT Article XX(b) – Protection of Human Life}

The other exception under the General Exceptions Clause that might justify a Member’s otherwise discriminatory trade measure is Article XX(b), which provides an exception for measures “necessary to protect human, animal or plant life or health.”\textsuperscript{191} Robert Howse commented in 2003 that various labor rights could plausibly be connected to human health, if human health is interpreted broadly to include physical and psychological well-being.\textsuperscript{192} Howse gave such examples as freedom of association, recognition of collective bargaining rights, and elimination of employment and occupational discrimination, noting that “[t]he other issues concerning whether the EU measures fit under Article XX(b) are quite similar to those that exist for Article XX(a).”\textsuperscript{193} Under this reading, and given that it uses the same “necessary to . . .” condition, Article XX(b) can be read as applying to the same variety of labor rights issues that would apply under Article XX(a), and can be applied using the same formal analysis as provided in the prior section for Article XX(a).

Prior to Shrimp-Turtle, scholars were uncertain as to whether Article XX(b) could be applied in an outwardly-directed manner.\textsuperscript{194} Although the Shrimp-Turtle holding concerned an application of Article XX(g), later scholars viewed the “dynamic” standard articulated in the case as formally

\begin{align*}
\textsuperscript{188} & \text{See supra note 177 (providing the three part test from Brazil – Tyres).} \\
\textsuperscript{189} & \text{Panel Report, China–Audiovisuals, supra note 179, ¶¶ 7.886-7.887.} \\
\textsuperscript{190} & \text{Id. ¶¶ 7.897, 7.907, 7.911; Appellate Body Report, China–Audiovisuals, supra note 178, ¶¶ 312, 322, 332, 415.} \\
\textsuperscript{191} & \text{See GATT, art. XX(b).} \\
\textsuperscript{193} & \text{Id.} \\
\textsuperscript{194} & \text{See Charnovitz supra note 136, at 714.}
\end{align*}
permitting outwardly-directed measures under Article XX(b). That may be too generous a reading of *Shrimp-Turtle*, which utilized an environmental application of Article XX(b), particularly because environmental offenses (e.g., killing endangered sea turtles) have tangible physical impacts traceable outside the borders of the offending country (e.g., reduced presence of sea life in international waters), whereas it is conceivably much more difficult to evidence harms caused outside a Member’s borders (other than with respect to economic competitiveness) arising from its domestic labor rights offenses. That is to say that, even if *Shrimp-Turtle* allows for new interpretations of the General Exceptions Clause not originally contemplated at the time of drafting, it is not necessarily the case that this extends to outwardly-directed measures; and even if it can apply to some outwardly-directed measures, *Shrimp-Turtle* itself describes a circumstance that is at least in some modicum inwardly-facing, whereas a measure to require better labor standards abroad seems (at least in many cases) to be *entirely* outwardly-facing and therefore might be distinguished by the WTO as different from the circumstances of *Shrimp-Turtle*.

A more recent case addressing the application of Article XX(b), albeit for a clearly inward-facing measure, is *EC–Asbestos*. In that case, the French Government imposed a ban on chrysotile asbestos, which was known to be harmful to human health despite its use in some industrial applications. The Panel found that the measure violated GATT Article III:4. Nonetheless, the Panel followed the approach of *US–Gasoline* to

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195 See supra notes 160-161 (referencing the “dynamic” or “evolving” standard that allows for reinterpretation of the parts of the General Exceptions Clause discussed in *Shrimp-Turtle* to be reinterpreted based on changing international norms); Fabio Pantano & Ricardo Salomone, *Trade, ILO Child Labour Standards and the Social Clause: Definitions, Doubts and (Some) Answers* in *Child Labour in a Globalized World: A Legal Analysis of ILO Action* 334-35 (2008).


197 Id. Stating that “The 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, offering for sale, purchase, transportation, distribution or use.” This determination was made in light of Note *Ad Article III* in the Notes and Supplementary Provisions in Annex I to the GATT 1994, which states that: “Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.” Interpreting the two clauses together, the Panel stated that “When a domestic measure applies to
find that the measure was (1) necessary insofar as the EC made “a prima facie case for the non-existence of a reasonably available alternative to the banning of [asbestos] products,” that the measure was (2) not on its face arbitrary or unjustifiable, (3) nor a “disguised restriction” on international trade per the conditions provided in U.S.–Gasoline.\footnote{198} Consequently, the panel concluded that Article XX(b) provided an exception for the violation of Article III:4.\footnote{199} On appeal, the AB affirmed the Panel’s ruling despite reversing some of its findings on legal grounds.\footnote{200}

IV. CONCLUSION

Whether a trade measure can, under the WTO Most Favored Nation and National Treatment rules, treat otherwise identical goods differently because one good is made under poor labor conditions and the other is made under labor conditions deemed acceptable by the international community depends largely upon whether the two goods will be considered “like” products under GATT Articles I or III.\footnote{201} If the standard is that products merely need to be competing or substitute goods to be “like” products, it seems that they would not be distinguishable as other than “like” if the sole difference between the products is their respective processes of manufacture and if the production and process methods used do not relate to the final product (i.e., on the sole grounds of npr-PPMs). Although this view was affirmed in the un-adopted US–Tuna report, EC–Asbestos and US–Superfund appeared to leave the door open to the possibility that npr-PPMs can be relevant to a likeness determination; however, it is unclear whether, at a minimum, some trace amount of process-related input must be physically present in the final product.\footnote{202}

Looking at Japan–Alcohol, the AB corrected the Panel regarding the relevance of evidence that Japan’s disputed measure isolated Japan’s domestic product from foreign competition, emphasizing that this evidenced protectionism in violation of the WTO rules.\footnote{203} Korea–Beef and EC–Biotech Products subsequently reaffirmed this focus on protectionism both domestic and imported products, Article III must apply.” Panel Report, EC–Asbestos, supra note 196, ¶ 8.90. The Panel emphasized that, at the time of France’s decree banning asbestos, France was itself a producer of asbestos and, therefore, the measure “applies to an imported product and to the like domestic product” per Note at Article III. Id. at ¶ 8.91. After finding the similar asbestos products in question were like, the Panel concluded that the ban violated GATT Article III:4. Id. ¶ 8.158.\footnote{198} Id. ¶¶ 8.222, 8.229 & 8.235-8.240.\footnote{199} Id. ¶ 8.241.\footnote{200} Appellate Body, E.C.–Asbestos, supra note 27, ¶ 192.\footnote{201} Supra Part I.\footnote{202} Supra notes 57-63.\footnote{203} Supra notes 37-51.
as the overriding concern at the core of the likeness analysis when it put forward the principle of “no less favorable treatment,” which excuses differential treatment even where there is an economically competitive relationship between the products in question, so long as the treatment is no less favorable to the foreign imports than to the competing domestic product.204

Looking broadly at the jurisprudence, Howse and Regan assert that the competitive relationship between two products is only instrumentally relevant in determining the main issue, which is whether the measure in question amounts to protectionism.205 This approach gets away from the product/process distinction, leaving open the possibility that a permissible trade measure may be founded primarily on process grounds (e.g., differences in applicable labor standards). Under this approach, it may be easiest for a Member to justify its actions as non-protectionist if the approach used is universal (i.e., what constitutes a reasonable standard for minimum wage may vary considerably from one country context to another, whereas the same ban on child labor or slavery could be equally appropriate in any country context). Other approaches to creating a WTO-compliant labor-rights-focused trade measure include trying to introduce commonly agreed-upon labor standards, such as the ILO standards, through the TBT Agreement, and using the subsidies, dumping, and countervailing duties rules of the WTO to justify countervailing duties where a Member’s failure to enforce its own labor-related standards amount to a subsidy equivalent to a financial contribution by the government.

But assuming that a labor-supporting trade measure is deemed discriminatory under one of the other Articles of the GATT, the Article XX General Exceptions Clause may in specific instances excuse and allow what would otherwise be a violation. GATT Article XX(e) provides a straightforward exception for trade measures targeting products of prison labor. The other two exceptions that may be applicable in the labor rights context are Articles XX(a) and XX(b); however, their scope is prima facie vague and must be understood in light of the various cases that interpret them.

U.S.–Gambling was the first case that interpreted the “public morals” standard, not through Article XX(a) but instead through an analogous provision in the GATS.206 That case showed that the facial test for the “necessary to” standard does not require either that the party defending the

204 Supra notes 52-56.
205 Supra notes 79-85.
206 Supra notes 137-45.
measure tried to negotiate with the other party to devise a more mutually acceptable alternative or that the complaining party came to the dispute proposing a less restrictive alternative to the measure in question.\textsuperscript{207} The other cases interpreting the “necessary to” standard applied the same approach, regardless of whether the measure fell under XX(a), (b), (d), all of which use the same “necessary to . . .” language as the GATS section referenced in \textit{US–Gambling}.\textsuperscript{208} After \textit{US–Gambling}, \textit{Brazil–Tyres} provided an important three part test later applied in \textit{China–Audiovisuals}, the first case to directly analyze the application of GATT Article XX(a) (i.e., rather than its GATS analog).\textsuperscript{209} There, the U.S. conceded the first step and the AB held that China failed to meet the other two parts of the test, and therefore failed to justify its measure under Article XX(a).\textsuperscript{210} Whereas the earlier \textit{EC–Asbestos} case held that the measure must at a minimum be potentially able to accomplish the moral objective in question in order to make the \textit{prima facie} case, \textit{China–Audiovisuals} went a step farther by holding that the party defending the measure must ultimately show an actual (rather than merely a perceived) contribution to that goal.\textsuperscript{211} \textit{China–Audiovisuals} also confirmed that demonstration of a reasonable alternative measure that meets the moral objective of the measure in question through substantially less trade-restrictive means is evidence that the measure is not in fact “necessary.”\textsuperscript{212}

For a labor rights measure in particular, an important question remains whether the measure can be “outwardly facing,” i.e., apply to the public morals of countries other than the one advancing the trade measure under dispute. In this regard, the ability to demonstrate the universality of those morals may be a deciding issue. To that end, international treaties, e.g., the ILO Declaration on Fundamental Principles and Rights at Work or the International Bill of Human Rights, may be instrumental in evidencing universal acceptance of some set of public morals concerning labor rights.

In addressing the human and labor rights problems that persist in international trade, some commentators argue that the best way to improve international labor rights standards is to look for possibilities within the rules of the World Trade Organization, including the addition of explicit exceptions allowing trade measures intended to promote labor rights.\textsuperscript{213} These commentators argue that, unlike other international institutions like

\begin{footnotesize}
\begin{enumerate}
\setcounter{enumi}{0}
\item Id.
\item Doyle supra note 171, at 160.
\item Supra notes 176-90.
\item Id.
\item Id.
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
the ILO or UN, the WTO has strong enforcement mechanisms.214 It is worth noting, however, that dissenting critics argue that linking labor standards and trade “is like spreading peanut butter on your steak” and can even produce destructive results.215 These critics believe that labor rights issues should be left to the ILO and other organizations designed for the purpose of promoting those issues.216 In the meantime, as future WTO decisions clarify the scope of application of Article XX(a) and Article XX(b) in the context of discriminatory trade measures justified on labor rights grounds, it will become more apparent whether the WTO is a forum that is appropriate for, and capable of, enforcing labor rights standards.

216 See Kolben *supra* note 214, at 461-62.