

A human rights approach to World Trade Organization trade policy: Another medium for the promotion of human rights in Africa

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Summary

In this article, the author examines the human rights approach to trade policy within the framework of the World Trade Organization. In this regard, the author outlines the rationale and the basis for the assertion that the World Trade Organization should embrace the human rights approach. The author argues that such an approach to trade policy can play a vital role in the promotion of a human rights culture in Africa. African countries seem to be increasingly embracing a human rights approach to trade and are also party to bilateral trade arrangements, which emphasises the need for a good relationship between international trade and human rights.

1 Introduction

This article examines a human rights approach to trade policy within the framework of the World Trade Organization (WTO).¹ The crux of this article is that a human rights approach to trade policy, though mainly through residual reference and/or the application of public inter-

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¹ The World Trade Organization was created by the *Marrakesh Agreement Establishing the World Trade Organization* (WTO Agreement) 1994 *International Legal Materials* 114-1152. The WTO Agreement covers not only the WTO as an institution, it also covers all the Uruguay Round agreements (associated agreements) attached to it as annexures.

national law, can play a vital role in the promotion of a human rights culture in Africa.² In particular, part 2 of this article outlines the rationale and the basis for the assertion that the WTO should embrace a human rights approach. This includes an examination of the aims and objectives of the WTO. It also includes the examination of the role played by Dispute Settlement Body (DSB)³ panels and the Appellate Body of the WTO in the trade-human right debate. The settlement of trade disputes under the WTO framework generally is governed by the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The role played by the DSB is important. The DSB can be seized with a dispute that carries both a trade and a non-trade aspect. It may also be that the human rights aspect of the dispute is equally important or indispensable to the just adjudication of the trade dispute.⁴ In part 3 I examine, as examples, some provisions of associated agreements (covered agreements) of the WTO, and how their mainly exceptions-based approach to non-trade issues can pave the way for an expanded accommodation and understanding of human rights in the WTO. Associated agreements are agreements containing principles and procedures which WTO members must follow when developing and imple-

² This study, therefore, does not embark on a general discussion of the WTO trade and human rights link. For a general discussion on trade and human rights, see E Petersmann *Time for integrating human rights into the law of worldwide organisations — Lessons form the European integration law for global integration law* Monnet Working Paper 7/01; E Petersmann 'From "negative" to "positive". Integration in the WTO: Time for mainstreaming human rights into WTO law' (2000) 37 *Common Market Law Review* 1363; AE Appleton 'The World Trade Organization: Implications for human rights and democracy' (2000) 29 *Thesaurus Acroasium* 415; M Cohn 'The World Trade Organization: Elevating property interests above human rights' (2001) 29 *Georgia Journal of International and Comparative Law* 247; P Stirling 'The use of trade sanctions as an enforcement mechanism for basic human rights' (1996) 11 *American University Journal of International Law and Policy* 1; SH Cleveland 'Human rights sanctions and the World Trade Organization' in F Francioni (ed) *Environment, human rights and international trade* (2001); AH Qureshi 'International trade and human rights from the perspective of the WTO' in F Weiss et al (eds) *International economic law with a human face* (1998); R Howse & M Mutua 'Protecting human rights in a global economy: Challenges for the World Trade Organization' International Center for Human Rights and Democratic Development: Policy Paper (2000) <http://www.ichrdd.ca/English/commndoc/publications/globalization/WtoRightsGlob.html> (accessed 31 August 2005).

³ The DSB is established under art 2 of Annex 2 of the Agreement Establishing the World Trade Organization: Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). It has the responsibility of administering DSU rules and procedures. It also issues Panel Reports and Appellate Body Reports, oversees the implementation of rulings and recommendations and authorises appropriate relief measures.

⁴ TJ Schoenbaum 'WTO dispute settlement: Praise and suggestions for reform' (1998) 47 *International and Comparative Law Quarterly* 647 653 is of the view that art 11 of the DSU, by allowing panels to 'make such other findings' as will assist in the dispute resolution, gives 'implied powers' for the WTO dispute settlement bodies to 'decide all aspects of a dispute'.

menting trade standards. In part 4 I briefly discuss the issue of the use of economic sanctions to enforce human rights under WTO law.

This article makes specific reference to the WTO regime because of several reasons: The bulk of African nations are currently members of the WTO;⁵ all WTO members have undertaken obligations under international human rights law, to be observed and discharged; characteristically the WTO has a framework which gives it the capacity or the potential to broadly influence the promotion of human rights in Africa. Whilst on this point, we should perhaps acknowledge that there has been some resistance against the consideration of human rights issues within the WTO.⁶ It has been argued that the WTO should be confined to its traditional objective of regulating trade amongst nations.⁷ It has also been argued, and debatably, that the WTO is not adequately equipped to deal with human rights issues.⁸

⁵ Not less than 44 African countries are members of the WTO. Eight African countries enjoy observer status. See *Understanding the WTO: Members and observers* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (accessed 23 August 2005).

⁶ This has been despite the fact that the correct reading of the actual WTO agreements does not preclude members from introducing measures that are directed at preserving non-trade issues or values such as human rights.

⁷ In fact, this stereotypical view of the WTO has led to it being criticised as the 'nightmare of human rights'. This, in my view, is an absurd and unjustifiable over-criticising of the WTO. See *Report: Expert Group of the Sub-Commission on Human Rights*, 15 June 2000 E/CN4/Sub2/2000/13. Trade liberalisation cannot continue to restrict WTO members from regulating the protection of human rights where possible. The need to protect human rights may be important as a check and balance to trade liberalisation.

⁸ The argument is based on the general lack of human rights expertise of the WTO adjudicators. It is indeed true that adjudicators of the WTO DSB may lack expertise in human rights law. Eg, since the inception of the WTO, the Appellate Body adjudicators have mainly been persons with 'demonstrable expertise in law, international trade law and the subject matter of the WTO agreements generally', as required by art 17(3) of the DSU. Their background and academic qualifications and experience suggest a lack of expertise in non-trade areas, such as environmental law and human rights. Be that as it may, their lack of 'human rights expertise' does not prevent the WTO DSB from dealing with human rights issues. In fact, they are well equipped to deal with such issues. Pursuant to art 13 of the DSU, they are allowed to have recourse to 'seek information and technical advice from individuals or body' with necessary skills and expertise to help resolve the matter before the DSB, or may consult with 'any relevant source'. See, generally, C Ehlermann 'Six years on the bench of the World Trade Court — Some personal experiences as a member of the Appellate Body of the WTO' (2002) 36 *Journal of World Trade* 605, where he gives an account of the use of experts in the WTO DSB. Prof Ehlermann is one of the original seven Appellate Body members. Other original members are Mr Baccus of the United States; Justice Feliciano of the Phillipines; Mr Muro of Uruguay; Dr El-Naggar of Egypt; Prof Matsushita of Japan; and the late Mr Beeby of New Zealand.

Interestingly, the initial resistance against the presence of human rights issues in the WTO framework was largely from developing countries, including some African nations. Apparently there were fears that human rights-related measures in the WTO framework will lead to disguised protectionist tendencies.⁹ However, the position seems to have changed. African countries appear increasingly to be embracing a human rights approach to trade. Musungu gives an illuminating account of this change in the African context.¹⁰ According to Musungu, several African regional and sub-regional economic treaties, such as the African Economic Community (AEC), the Economic Community of West African States (ECOWAS) and the Common Market for Eastern and Southern Africa (COMESA) 'make specific reference to human rights'.¹¹ Some of these treaties, such as the Southern African Development Community Treaty (SADC Treaty), commit members to human rights and constitutionalism.¹² African countries are also party to trade arrangements with countries in the developed world, emphasising the need for a good relationship between international trade and human rights. These arrangements include the Cotonou Agreement and the United States African Growth and Opportunity Act (AGOA).¹³ The reference to human rights in trade arrangements by African countries is a remarkable achievement in the endeavour to promote human rights in Africa. This achievement can have a greater effect if the WTO system and processes were utilised to influence the protection and promotion of human rights in its member states. In Africa, issues such as pandemics,¹⁴ poverty, lack of food security,¹⁵ exploitation of

⁹ See the Ministerial Conference of the World Trade Organization (Singapore Ministerial Declaration), adopted 13 December 1996, reprinted in (1997) 36 *International Legal Materials* 218, on the argument by developing countries that labour standards within the WTO framework may be used for 'protectionist purposes'. The validity of the protectionist argument diminishes when considering the fact that the WTO members are enjoined to use WTO exceptions to their trade obligation in good faith. Pursuant to art 26 of the Vienna Convention, the WTO always requires its members to discharge their duties and obligations 'in good faith'. The good faith application of obligations may curtail human rights-related protectionism.

¹⁰ See, generally, SF Musungu 'Economic integration and human rights in Africa: A comment on conceptual linkages' (2003) 3 *African Human Rights Law Journal* 88 92-96.

¹¹ Musungu (n 10 above) 92.

¹² As above.

¹³ See generally Musungu (n 10 above) 93-95.

¹⁴ See S Gumedze 'HIV/AIDS and human rights: The Role of the African Commission on Human and Peoples' Rights' (2004) 4 *African Human Rights Law Journal* 181-183.

¹⁵ See O Sibanda 'The WTO and the troubled agriculture liberalisation programme' (2003) *Codicillus* 19 20-22.

resources¹⁶ and child labour¹⁷ are often directly and/or indirectly human rights issues.¹⁸ Furthermore, these issues are influenced by globalisation initiatives and trade liberalisation.

The human rights approach to trade that is evident in some African trade arrangements seems to be losing favour with some traditional users of trade policy to enforce human rights. These nations, such as the United States, appear to selectively resist the human rights approach within the trade context. This, for example, was evident from the South African case of *Pharmaceutical Manufacturers' Association and Others v The President of the Republic of South Africa*.¹⁹ The case deals with access to life-saving HIV/AIDS drugs by the government of South Africa, through measures consistent with WTO rules.²⁰ A group of pharmaceutical companies, under the flagship of the Pharmaceutical Manufacturers' Association of South Africa, took the government to the Pretoria High Court over the constitutionality of proposed amendments to the Medicines and Related Substances Act 101 of 1965.²¹ This resulted in the April 1999 listing of South Africa by the United States under the 'Watch List', pursuant to of section 301 of the Trade Act of

¹⁶ See O Sibanda 'Integrating Africa into the World Trade Organization: Constrains and challenges facing the African Union and the New Partnership for Africa's Development' (2004) 45 *Codicillus* 47 57-58.

¹⁷ See O Sibanda 'South Africa's children in labour pains: Is it not time to prescribe corporate social responsibility?' in C Okpaluba (ed) *Law and the contemporary South African society* (2004) 97 98.

¹⁸ The case of the Ogoni people, *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001), which came before the African Commission on Human and Peoples' Rights, was evidence of how multinational companies abuse human rights. This included the right to health and the right to a clean and safe environment, as recognised in the African Charter on Human and Peoples' Rights.

¹⁹ The South African case of *Pharmaceutical Manufacturers' Association & Others v The President of the Republic of South Africa & Others* Case No 4183/98. See C Ngwena 'AIDS in Africa: Access to health care as a human right' (2002) 15 *South African Public Law* 1 24-25; M Foreman 'Beyond our means: The cost of treating HIV/AIDS in the developing world' (2000) <http://www.panos.org.uk/PDF/reports/Beyond%20Our%20Means.pdf> (accessed 2 September 2002).

²⁰ In particular Annex 1C of the WTO Agreement: The Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), 1869 UNTS 229 reprinted in (1994) 33 *International Legal Materials* 81.

²¹ Through the Medicines and Related Substances Control Amendment Act 90 of 1997. In this case, a group of pharmaceutical companies and the Pharmaceutical Manufacturers' Association of South Africa sought to prevent the President of the Republic of South Africa and the Minister of Health from amending the country's patent law, making HIV/AIDS drugs more accessible. For extensive discussions of the case, see generally JM Berger 'Tripping over patents: AIDS, access to treatment and the manufacturing of scarcity' LLM thesis, University of Toronto, 2001; J Collins 'The pharmaceutical companies versus AIDS victims: A classic case of bad vs good? A look at the struggle between intellectual property rights and access to treatment' (2001) 29 *Syracuse Journal of International Law* 7.

1974.²² The Clinton administration thus regarded South Africa as a country that does not adequately and effectively protect American drug patents.²³ The new Act gave the South African Minister of Health 'sweeping authority to abrogate patent rights for pharmaceutical products',²⁴ according to the United States.

2 Rationale and basis for human rights protection in the World Trade Organization

2.1 The changed *raison d'être* of the World Trade Organization

Unlike its predecessor, the 1947 General Agreement on Trade and Tariffs (GATT 1947)²⁵ that had a purely trade *raison d'être*, the WTO's

²² Trade Act of 1974, Pub L93-618, 93 Stat 144, 236. Sec 301 is a tool used by the United States to deal with laws, policies, practices or measures of foreign governments or institutions that are inconsistent with the provisions of trade agreements to which the United States is a party, or that 'deny' benefits to the United States under such agreements. For more information on sec 301, see generally JH Bello & AF Holmer 'Section 301, recent developments and proposed amendments' (1988) 35 *Federal Business News and Journal* 68; R Hudec 'Retaliation against "unreasonable" foreign trade practices: The new section 301 and GATT nullification and impairment' (1975) 59 *Minnesota Law Review* 461; KB Thatcher 'Section 301 of the Trade Act of 1974: Its utility against alleged unfair trade practices by Japanese government' (1987) 81 *Northwestern University Law Review* 492.

²³ South Africa was later in the same year removed from the Watch List's Section 301, mostly after pressure was brought to bear on the United States by groups such as Consumers International, Health Action International and Act Up! See International Intellectual Property Institute (IPI) Report — 2000: 'Patent protection and access to HIV/AIDS pharmaceuticals in sub-Saharan Africa' (IPI Patent Report) 16, a report prepared for the World Intellectual Property Organization. Interestingly, on 10 May 2001, the Clinton Administration issued an executive order entitled 'Access to HIV/AIDS pharmaceuticals and medical technology' <http://ofcn.org/cyber.serv/teledem/pb/2000/may/msg00089.htm> (accessed 11 May 2000), which introduced the policy of non-intervention in patent laws of beneficiary sub-Saharan countries, including South Africa, that regulated and promoted access to HIV/AIDS pharmaceuticals and technologies consistent with TRIPS. Such designated sub-Saharan countries may thus produce or import generic HIV/AIDS drugs without fear of trade sanctions. Note that on 27 May 2003, the Bush Administration announced the signing of the Congressional 'HIV/AIDS Act', which allowed the use of over US\$ 15 billion over a period of five years to combat HIV/AIDS in developing countries, possibly to allay fears that it will revoke the Clinton Administration's HIV/AIDS Act.

²⁴ GG Yerkey 'USTR says South Africa agrees to provide WTO-consistent patent protection for drugs' (1999) 16 *International Trade Report* (BMA) 1541.

²⁵ The General Agreement on Trade and Tariffs (GATT 1947), 55 UNTS 1867, is one of the Bretton Woods institutions established immediately after the Second World War. It operated as both a trade regulation institution and a general agreement on trade after the failure of the intended International Trade Organization (ITO). For more on the ITO and GATT 1947 and its double image, see generally Havana Charter for the Establishment of the International Trade Organization, UN Document E/Con2/78 (1948) reproduction in UN Document ICITO/1/4 (1948); M Meier 'The Bretton

objectives go far beyond trade and commercial growth. The Preamble of the WTO Agreement states its objectives as:

raising standards of living and ensuring full employment by expanding the production of and trade in goods and services . . . in accordance with the principles of sustainable development, seeking both to protect and preserve the environment . . . in a manner consistent with . . . needs and concerns at different levels of economic development.

Although the Preamble does not explicitly refer to 'human rights,' my view is that the Preamble gives credence to the theory that the recognition and consideration of some human rights issues are integral to liberalised trade. In fact, the Preamble states objectives that may relate to human rights, such as socio-economic rights. For instance, 'raising the standard of living' and 'development' are values that fall within the purview of human rights. Good living standards and development are human rights.

2.2 The Dispute Settlement Body and the human rights approach

The WTO Appellate Body held in *United States — Standard for Reformulated and Conventional Gasoline*²⁶ (*Reformulated Gasoline (AB)*) that multilateral trade can no longer be considered in 'clinical isolation' from other disciplines and rules of international law.²⁷ In *United States — Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp-Turtles (AB))*²⁸ the Appellate body further held that maintaining the WTO's trade objective is 'necessarily a fundamental and pervasive premise underlying the WTO Agreement', but not an absolute one. Neither is it an 'interpretive rule' to be employed in the 'appraisal' of disputes.²⁹ What can be discerned from these is that WTO functions can no longer be viewed as purely trade related.

Woods Agreement — 7 Years After' (1971) 39 *Stanford Law Review* 235 237; R Hudec *The GATT legal system and the world trade diplomacy* (1975) 48-45; JH Jackson *Restructuring of the GATT system* (1990).

²⁶ *United States — Standard for reformulated and conventional gasoline (Reformulated Gasoline (AB))*, WT/DS2/9, 20 May 1996.

²⁷ n 26 above, 18. See also G Marceau 'WTO agreements cannot be read in clinical isolation from public international law', paper at the World Bank seminar on International Trade Law, 24-25 October 2000. Art 3(2) of the Uruguay Round Understanding on Rules and Procedures Governing Settlement of Disputes (DSU), Annex 2, WTO Agreement, also requires that the WTO agreements and its associated agreements be interpreted, taking into account customary rules of interpretation, such as those embodied in the Vienna Convention.

²⁸ *The United States — Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp-Turtles (AB))*, WT/DS58/AB/R, 15 October 1998.

²⁹ *Shrimp-Turtles (AB)* para 116.

The institutional culture of the WTO and of its predecessor, GATT 1947, created a stereotyped free trade perspective of global trade, and helped establish an incorrect view that WTO dispute settlement bodies are jurisdictionally limited to considering non-trade concerns.³⁰ This incorrect view can no longer be maintained in the light of similar rulings by the DSB, such as *Reformulated Gasoline (AB)* and *Shrimp-Turtles (AB)*. When seized with a dispute that concerns a trade and a human rights aspect, the DSB should be able to at least consider such dispute without discarding the human rights aspect of it. This conclusion is subject to the relevant provisions of the WTO and its associated agreements.

Article 3(3) of the DSU calls for the prompt settlement of disputes in 'situations in which a member considers that any benefits accruing to it directly or indirectly under the covered agreement are being impaired by measures taken by another member'. If the case is brought before the DSB, in terms of article 4(4) of the DSU, a complaining party is required to identify clearly the measures or matters at issue, and indicate the legal basis for the complaint. Pursuant to article 23(1) of the DSU, the DSB is confined to DSU rules and procedures in settling disputes. Article 22(1) provides:

When members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or impairment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

In light of the preemptory nature of article 23(1), read with other articles of the DSU, such as articles 1(1), 7(2), and 11, the DSB may have recourse only to WTO rules as contained in its covered agreements as the applicable law.³¹ This is further confirmed by articles 3(2) and 19(1) of the DSU, which prohibit the DSB from adding to or diminishing the rights and obligations in WTO agreements. In relation to our study, this seems to suggest that the DSB is precluded from ruling purely on human rights issues. Otherwise the dispute should be a trade dispute with human rights elements pursuant to WTO provisions and exceptions.³² The DSB cannot demand or even suggest that members change their laws to bring them into conformity with non-WTO norms, unless they could relate such suggestions to compliance with a provision of a covered agreement.³³ In brief, reference or recourse to

³⁰ See G Marceau 'Conflicts of norms and conflicts of jurisdiction' (2001) 35 *Journal of World Trade* 1081; JP Trachtman 'The domain of WTO dispute resolution' (1999) 40 *Harvard International Law Journal* 333.

³¹ See R Howse 'Human rights in the WTO: Whose rights, what humanity? Comment on Petersmann' (2002) 13 *European Journal of International Law* 651.

³² Howse (n 31 above) 17.

³³ As above.

public international law, such as human rights law, is only of residual nature. The residual approach to human rights law should be subject to the normative hierarchy of public international law.³⁴

The argument on the residual recourse to public international law may also stem from the fact that the WTO is a self-contained regime. As correctly put by Howse, the WTO system is a *lex specialis* system,³⁵ which applies only to WTO disciplines. Simma describes a self-contained regime as a regime³⁶

which is intended to exclude more or less totally the application of the general legal consequences of wrongful acts, in particular the application of the countermeasures normally applied at the disposal of an injured party.

As a self-contained system, the WTO has greater powers than many international bodies, including the United Nations (UN): It has full executive authority³⁷ over its associated agreement; possesses the elements of the legislative authority, which it exercises by compelling members to establish new laws that conform to WTO rules.³⁸

3 Human rights-related provisions in the World Trade Organization

Trade and human rights, though conceptually divergent and having evolved separately and in parallel, are fundamentally coexistent and

³⁴ This would mean that the areas of human rights law recognised as customary international law, *erga omnes*, or as of general application, will normally prevail, or that WTO rules should be interpreted and applied as consistent with them. See generally Howse & Mutua (n 2 above).

³⁵ Howse (n 31 above) 22.

³⁶ B Simma 'Self-contained regimes' (1985) 16 *Netherlands Yearbook of International Law* 111 117.

³⁷ Note that the executive authority of WTO is bestowed on its Ministerial Conference. The Ministerial Conference, which heads WTO's institutional structure, is composed of international trade ministers from all member countries. In terms of art 4(1) of the WTO Agreement, the Ministerial Conference is tasked with carrying out the functions of the WTO. The Ministerial Conference enjoys supreme authority, including the authority to 'take decisions on all matters under any Multilateral Trade Agreement. As the governing body of the WTO, the Ministerial Conference is responsible for the strategic direction of the WTO. When the Ministerial Conference is not in session, its functions are performed by the General Council in terms of art 4(2) of WTO Agreement. In addition to the interim exercise of the functions of the Ministerial Conference, the General Council is also responsible for overseeing the day-to-day business and management of the WTO. The General Council may also convene as the DSB and the Trade Policy Review Body (TPRB). The DSB oversees the implementation and effectiveness of the dispute resolution mechanisms of all the WTO agreements. The primary responsibilities of the General Council, when sitting as the DSB, are to establish dispute settlement panels, adopt panel and the Appellate Body reports, maintain the surveillance of implementation of ruling and recommendations, and authorise appropriate remedies or relief measures.

³⁸ See generally the DSU.

practically complementary. WTO agreements have provisions that deal with, among others, public health and prison labour. Notable, for example, are article 2, read with the Preamble of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement),³⁹ article 27(2), read with article 27(1) of the Agreement of Trade-Related Aspects of Intellectual Property (TRIPS), article XIV(a) of the General Agreement on Trade in Services⁴⁰ (GATS), article XXIII(2) of the Agreement on Government Procurement (AGP),⁴¹ and, most importantly, article XX of GATT. These provisions, although exception-based, take the form of WTO 'soft law' or 'soft rules' on human rights.

Article XX⁴² of GATT states in part that:

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

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
-
- (e) relating to the product of prison labour.

In almost similar terms as GATT, GATS article XIV states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries . . . or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

- (a) necessary to protect public morals or to maintain public order;
- (b) necessary to protect human, animal or plant life or health.

GATS article XIVbis further states:

- 1 Nothing in this Agreement shall be construed:
 - (c) to prevent any member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

The Agreement on Government Procurement states:

- 23.2 Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries . . . or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent

³⁹ Annex 1A of the WTO Agreement.

⁴⁰ Annex 1B of the WTO Agreement.

⁴¹ Annex 4(b) of the WTO Agreement.

⁴² See L Bartels 'Article XX of GATT and the problem of extraterritorial jurisdiction' (2002) 36 *Journal of World Trade* 353 for a discussion on GATT art XX and human rights. Note that in terms of art 3 of the Agreement on Trade-Related Investment Measures (TRIMS), '[a]ll exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this agreement'.

any Party from imposing or enforcing measures necessary to protect public morals, order or safety, human, animal or plant life or health or intellectual property; or relating to products or services of handicapped persons, of philanthropic institutions or of prison labour.

The SPS Agreement states:

Members,

Reaffirming that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between members where the same conditions prevail or a disguised restriction on international trade;

Hereby agrees as follows:

- 2.1 Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with provisions of this Agreement.
- 2.2 Members shall ensure that any sanitary and phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, based on scientific principles and is not maintained without sufficient scientific evidence, except as provided by paragraph 7 of article 5.
- 2.3 Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

TRIPS states that:

- 27.2 Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided such exclusion is not made merely because the exploitation is prohibited by their law.

3.1 Justification⁴³ for the use of human rights exceptions in the World Trade Organization

3.1.1 Public morality

Based on moral principles, the WTO should be able to deal with relevant human rights issues where necessary.⁴⁴ There are many trade-related activities which have moral dimensions that should not be

⁴³ The words 'defences', 'justification' and 'exceptions' are used interchangeably throughout this article.

⁴⁴ Positivists such as John Rawls and Jagdish Bhagwati would disagree. In support of the argument that trade should not deal with human rights issues, they argue that legal obligations, which largely characterise the multilateral trading system, should be divorced from moral obligations.

separated from human rights. For instance, the use of unlawful child labour, and the export and import of the products of such child labour create a moral ground to resist the use of such activities. The global moral obligation enjoins the world community to take dissuasive measures against such processes and methods of production. Child labour involves the violation of fundamental labour rights, which are human rights worthy of protection.⁴⁵ Like child labour, prison labour may also be subsumed under the broader 'public morals' exception.⁴⁶

As Charnovitz states correctly, the public morality defence is one of the 'uncharted' arguments within the WTO. This is despite the fact that this general exception has been in existence since its drafting by the United States in 1947.⁴⁷ There is a case still to come before the WTO that deals specifically with this exception. Therefore, the interpretation and application of the 'public morals' exception may open a Pandora's box and generate many questions and debates.⁴⁸ The questions considered by Charnovitz are: Whose morals and what morals are covered?⁴⁹ Should the term 'public morality' be understood as meaning

⁴⁵ See S Bal 'International free trade agreement and human rights: Reinterpreting article XX of GATT' (2001) 10 *Minnesota Journal of Global Trade* 62 78-79; C Feddersen 'Focus on substantive law in international economic relations: The public morals of GATT's article XX(a) and "conventional rules" of interpretation' (1998) 7 *Minnesota Journal of Global Trade* 75 77.

⁴⁶ GATT art XX(e). It has been argued that the public morality exception subsumes 'public order' exception, which is found in GATS art XIV(a); Agreement on Procurement art 2; and TRIPS art 27(2), or that the latter should be read as broadening the former in terms of meaning and context. See generally S Charnovitz 'The moral exception in trade policy' (1998) 38 *Virginia Journal of International Law* 689. The fine reading of these agreements, particularly GATS art XIV(a), concludes otherwise. The footnote to 'public order' in GATS art XIV(a) states that 'public order' exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society'. This implies that a 'public order' defence may only be invoked in extreme circumstances. The emphasis on extreme circumstances suggests that the understanding of 'public morality' and 'public order' cannot be the same, nor can 'public morality' subsume 'public order'. However, nothing prevents a member from using the 'public morals' exception in order to justify a measure that falls within the 'public order' exception but for the requirements.

⁴⁷ Charnovitz (n 46 above) 690. Charnovitz provides a thought-provoking and an intellectually stimulating writing of the public moral exception in the WTO agreements. He also provides a historical account of the public moral exception in commercial field starting with the stillborn 1922 Genoa Conference Draft Agreement on the Reduction of Import and Export Prohibitions.

⁴⁸ For more on the application and interpretation of the 'public morals' exception, see Feddersen (n 45 above) 27.

⁴⁹ Charnovitz (n 46 above) 700.

universal morality or as having a uniform international standard?⁵⁰ Is it domestic morality (inwardly directed), or international morality (outwardly directed), which would involve imposing morality on the exporting country?⁵¹

3.1.2 Public health and the protection of human life

Closely related to the public morals defence is the safety and protection of human life and health defence. Many measures may fall under the rubric of the protection of the life and/or health of humans. These may include measures such as domestic food safety, labelling⁵² and compulsory licensing of pharmaceutical patents as recognised under article 31 of TRIPS.

The DSB, for example, dealt with food safety exceptions to trade obligations by member states in the *Beef Hormone* case,⁵³ the first WTO food safety case. The case arose out of a complaint by the United States (and Canada) against the 1987 measures by the European Community (EC), affecting livestock fed with growth hormones and their meat. Relying on the SPS Agreement, the EC imposed a ban on the importation of hormone-treated beef. The SPS agreement allows the implementation of measures in order to protect human life or health

⁵⁰ Charnovitz (n 46 above) 694 & 716-718. There can be no crystallisation of the 'public morals' concept into a universal sense. Morality will always differ from one jurisdiction to the other. For instance, the traditional African (South African) concept of *ubuntu*, which translates into humanness, has now evolved into a morality yardstick with constitutional implications, including the promotion of human good, mutual respect and fairness. Thus, in *S v Makwanyana* 1995 3 SA 391, the concept of *ubuntu* played a critical role in the Constitutional Court's invalidating the death penalty as a sentence for the new constitutional South Africa. The Constitutional Court said the following about *ubuntu*: '*Ubuntu* translates as "humanness". In its fundamental sense, it translates as "personhood" and "morality". Metaphorically it expresses itself in *umuntu ngumuntu ngabantu*, describing the importance of group solidarity' (*per* Mokgoro J). 'An outstanding feature of *ubuntu* in a community sense is the value it puts on life and human dignity. The dominant theme of the culture is that the life of another person is at least as valuable as one's own respect, for the dignity of every person is integral to this concept. Treatment that is cruel, inhuman or degrading is bereft of *ubuntu*' (*per* Langa J). The move towards a universal morality is complicated by morality used either descriptively or normatively.

⁵¹ It would be inwardly directed morality if one was to follow the *United States — Restriction of Tuna, (Tuna-Dolphin I)* 16 August 1992, GATT BISD (39th Supplement), and outwardly directed morality if one was to follow cases such as the *United States — Restrictions on Imports of Tuna (Tuna-Dolphin II)*, (1994) 33 *International Legal Materials* 839 and the *Shrimp-Turtles (AB)*.

⁵² See AE Appleton 'The labelling of GMO products pursuant to international trade rules' (2000) 8 *New York University Environmental Law Journal* 566, discussing product labelling pursuant to the SPS Agreement and the TBT Agreement.

⁵³ EC Measures Concerning Meat and Meat Products (*Beef Hormones (AB)*), WT/DS26/AB/R (16 January 1998) modifying and reversing in part the Panel report in EC Measures Concerning Meat and Meat Products (*Beef Hormones (P)*) WT/DS26/USA (18 August 1997).

within the territory of member states from risk due to the intake of certain foods, beverages or foodstuffs; or the protection from risk arising from arising from disease carried by animals, plants or products thereof. The ruling represented the Appellate body's acknowledgment that such measures may be taken to further the legitimate objective of human health and safety.⁵⁴

3.2 The application and interpretations of human rights exceptions

The criterion for the application of the grounds stated above emanates from a number of WTO Dispute Settlement Body⁵⁵ (DSB) cases on exceptions. Though the DSB reports do not create precedents or 'subsequent practice' within the meaning of article 31(3)(b) of the Vienna Convention on the Law of Treaties,⁵⁶ they may be taken into account because of their persuasive value and because they create a 'legitimate expectation' to be seriously considered.⁵⁷ Given the virtual similarity of the stated provisions of GATT, GATS, TRIPS, SPS Agreement and the Agreement on Government Procurement, GATT interpretation would be directive in the application and interpretation of human rights-related measures.⁵⁸

If previous WTO DSB reports are anything to go by, a member relying on the WTO Agreement's public morals, public order and protection of human life exceptions to achieve the broader aim of the protection of

⁵⁴ Note that the European Community failed because, in accordance with the precautionary principle, it did not meet a certain minimum scientific risk assessment justification for its ban, and there was no scientific evidence presented that the EC measure was just a protectionist ploy. See *Beef Hormone (AB)* 98 para 245. See also SPS Agreement art 2(2) read with art 5. For more on the SPS Agreement, its application and the EC Beef Hormone dispute, see generally K Mueller 'Hormonal imbalance: An analysis of the hormone treated beef trade dispute between the United States and the European Union' (1997) 1 *Drake Journal of Agricultural Law* 9; IP Steward & RW Johnson 'The SPS Agreement of the World Trade Organization and the international trade of dairy products' (1999) 54 *Food and Drug Law Journal* 55; DE MacNiel 'The first case under the WTO's Sanitary and Phytosanitary Agreement: The European Union's hormone beef' (1998) 39 *Virginia Journal of International Law* 89.

⁵⁵ The Dispute Settlement Body (DSB) is established under art 2 of the DSU.

⁵⁶ The Appellate body in *India — Patent Protection for Pharmaceutical and Agricultural Chemical Products (India Pharmaceuticals (AB))*, WT/DSS0/AB/R 19 December 1997 (adopted 16 January 1998) para 7.30 held that: 'Panels are not [legally] bound by previous decisions of panels or the Appellate Body even if the subject matter is the same.'

⁵⁷ See *Japan — Taxes on Alcoholic Beverages (Japan Taxes (AB))*, WT/DS8/AB/R 4 October 1996 (adopted 1 Nov 1996) para 13; *European Economic Community — Restrictions on Imports of Dessert Apples (Dessert Apples)*, BISD 36S/93 (adopted 22 June 1989) para 121.

⁵⁸ On the interpretation of GATS's exceptions, see PB Yu *Human rights and the WTO Agreement in trade in services* (2001) <http://www.antenna.nl-foei/trade/humanrights.-doc> (accessed 11 July 2003).

human rights, will generally have to pass a three-pronged test.⁵⁹ The test comprises the elements of necessity and of non-discrimination and non-trade restriction, resonating in almost all of the WTO agreements referred to above. Firstly, it will have to be satisfied that the trade-related human rights measure employed falls within the range of policies in the particular WTO agreement. Secondly, that the measure is 'necessary' to fulfil the human rights objective. Thirdly, that the measure is in conformity with the *chapeau* or preamble of the relevant agreement, if the agreement has such.⁶⁰

3.2.1 Elements of the three-pronged test

Policy nature and scope of the measure

The policy underlying the trade measure should fall within the range of policies of the covered agreement. This calls for several questions to be answered. For example, if using a 'public morals' exception, it may be necessary to answer a question as to which human rights fall under 'public morals' and whether such morals are inwardly directed or outwardly directed. According to Charnovitz, if, for example, one was pleading public morality, religion and compulsory or child labour would be among the range of considerations underlying such a trade-impacting measure.⁶¹

Necessity

Exceptions mentioned in the WTO agreements above require that measures taken must be 'necessary'. The word 'necessary' entails that the measure must be essential, but not 'indispensable' or 'inevitable'.⁶² This is a balancing initiative requiring proportionality between trade and non-trade measures taken. Past WTO/GATT decisions favoured the least restrictive approach in determining if the measure is necessary. The use of the exception had to 'entail the least degree of inconsistency'

⁵⁹ Based on cases such as *Reformulated Gasoline (AB)*.

⁶⁰ The three-pronged test can generally be divided into two parts. The first part is the provisional phase consisting of the clauses in the exceptions. The second part is the final phase consisting of the *chapeau* or introductory paragraph (or preamble) of the entire provisions.

⁶¹ Charnovitz (n 46 above) 729-730.

⁶² In *Korea — Various Import Measure on Fresh, Chilled and Frozen Beef, (Korea-Beef)* WT/DS161/AB/R, WT/DS169/AB/R (adopted 10 January 2001), paras 161-164 held that a not 'indispensable' measure may be 'necessary'.

with core obligations of WTO agreements.⁶³ Following the *Korea-Beef* case, there is now a move to a less restrictive⁶⁴ and evolutionary approach. The approach is supplemented with reasonableness and a proportionality test.⁶⁵ It requires the weighing and balancing of some serious factors that give content to 'necessary'. The factors to be weighed and balanced include, but are not limited to:⁶⁶

the contribution made by the measure to the enforcement of the law or regulation at issue, the importance of the common interests⁶⁷ or values protected and the accompanying impact of the law or regulation on imports or exports.

The DSB will have to determine if a less restrictive or restrictive measure was available in the circumstances. It should be determined if a WTO member could 'reasonably be expected' to have employed an alternative WTO/GATT consistent or less inconsistent measure.⁶⁸ A less restrictive approach means that a measure with 'intense or broader restrictive effects' on trade is likely to be considered necessary.⁶⁹ Simply, a WTO member wanting to advance a human rights defence must show how necessary its actions are to human rights. This it will do by demonstrating the necessity of the law or measure taken to protect human rights; demonstrating the need to use trade-related measures to do so; and satisfying the WTO that such trade-related or trade-impacting measure is the least of the restrictive measures to be taken.⁷⁰

It is worth noting the absence of the 'necessary' qualification in GATT article XX(e) on prison labour, which is present in a similar provision in the Agreement of Government Procurement. GATT Article XX(e) only requires that the measure be 'relating to' products of prison labour. WTO/GATT bodies have given differing interpretations to the words

⁶³ *Tuna-Dolphin II* para 5.35. The *Tuna-Dolphin II* was never adopted by the GATT due to the 'positive adoption' system applicable under the 1947 GATT dispute settlement system, as opposed to the 'reverse consensus' or 'automatic'/'deemed' adoption system now applicable under the WTO. The WTO has discarded the GATT 1947 diplomatic approach to dispute settlement for a more legalistic approach. On reports adoption of GATT/WTO, see generally C Reitz 'Enforcement of the General Agreement on Tariffs and Trade' (1996) 17 *University of Pennsylvania Journal of International Economic Law* 555; WJ Davey 'Dispute settlement in GATT' (1987) 11 *Fordham International Law Journal* 51.

⁶⁴ However, the 'public order' exception seems to require a least-restrictive approach.

⁶⁵ According to J Neumann J & E Turk 'Necessity revisited: Proportionality in World Trade Organization law after *Korea Beef*, *EC- Asbestos* and *EC-Sardines*' (2003) 37 *Journal of World Trade* 199 210, the reasonableness test was first introduced in the WTO jurisprudence by the Appellate body in *Korea-Beef*.

⁶⁶ n 62 above, para 164.

⁶⁷ According to the Appellate body, *Korea-Beef (AB)* para 162: 'The more vital or important the common interest is, the easier it would be to accept as "necessary" a measure designed as an enforcement instrument.'

⁶⁸ n 62 above, para 166.

⁶⁹ n 62 above, para 63.

⁷⁰ See UNEP/ISSD *Environment and trade — Handbook* (2000) 29.

'relating to'. Applying GATT article XX(g), which only requires that the measure be 'relating to' conservation, the GATT Panel has held that the term 'relating to' in GATT XX(g) means 'primarily aimed at'.⁷¹ The WTO Panel in *Reformulated Gasoline (P)* explained 'primarily aimed at' as analogous to 'necessary' or 'essential'.⁷²

The Panel ruling in *Reformulated Gasoline(P)* was revised by the Appellate Body. Reluctant to read 'necessary' into 'relating to', the Appellate Body held that the term 'relating to' means 'primarily aimed at'.⁷³ It further held that 'primarily aimed at' does not mean 'necessary' or 'essential'.⁷⁴ 'Relating to' should be interpreted as requiring the existence of a 'substantial relationship' between the measure and the goal.⁷⁵

Meeting the chapeau requirements

Once the human rights-related measure or human rights-related law passes the provisional determination test, it must pass requirements in the *chapeau* (or the preamble) of the agreement, if there is one.⁷⁶ The *chapeau* addresses how the law should be applied.

The requirements that should be satisfied are whether, in its application, the measure or law is 'arbitrarily discriminatory'; 'unjustifiably discriminatory'; or 'constitutes a disguised restriction on trade'. The DSB is yet to define these terms. The WTO Appellate body, in *Reformulated Gasoline (AB)*, called for a complementary 'side-by-side' reading of the words 'arbitrarily discriminatory'; 'unjustifiably discriminatory'; or 'disguised restriction' in international trade, since they 'impart meaning to one another' and considerations for determining discrimination are relevant for determining a disguised restriction.⁷⁷ According to the Appellate body, 'disguised restriction' also includes 'disguised discrimination'. In addition, 'disguised restriction' is a comprehensive term that may include restrictions which 'amount to arbitrary or unjustifiable discrimination'.⁷⁸

⁷¹ *Tuna-Dolphin II* paras 521-522.

⁷² *United States — Standards for Reformulated and Conventional Gasoline (Reformulated Gasoline (P))*, WT/DS2/R, 29 January 1996, para 6.40.

⁷³ As above.

⁷⁴ As above.

⁷⁵ As above.

⁷⁶ Some of the requirements that appear on the *chapeau* (or in the preamble) as in GATT, the SPS Agreement and GATS, may be found ingrained in the actual provisions of the agreement, as is the Agreement on Government Procurement, TRIPS.

⁷⁷ *Reformulated Gasoline (AB)*, para 629. However, see AE Appleton 'GATT Article XX's Chapeau: A disguised 'necessity' test?: The WTO Appellate Body's ruling in *United States — Standards for Reformulated and Conventional Gasoline*' (1997) 6 *Review of European Community and International Environmental Law* 131 135-136, criticising this conflation of terms approach.

⁷⁸ *Reformulated Gasoline (AB)*, para 629.

The *chapeau* requirements are good faith requirements for invoking the exceptions, ensuring that a member's 'assertion' of a right that 'impinges' on the field covered by [a] treaty obligation' is exercised reasonably.⁷⁹ These are requirements of 'even-handedness in the imposition of restrictions'.⁸⁰ The trade-related human rights measure must satisfy the requirement of the *chapeau*.

4 Enforcement of human rights obligations through World Trade Organization sanctions

In 2.2 above, we mentioned that the WTO is a self-contained entity. One of the characteristics of the WTO as a self-contained entity is its ability to demand compliance from its members, to force compliance with the WTO law where necessary by means of economic sanctions.⁸¹ The question to consider is whether economic sanctions can be used to enforce human rights under the WTO framework. The answer is simply no. As it currently stands, the WTO sanctions regime cannot be used to enforce human rights violations, except in as far as compliance with such human rights primarily discharges the obligation to conform to WTO law. Here we may talk about the exceptional use of sanctions to enforce human rights under WTO law.⁸² What complicates the general use of trade sanctions under WTO law is that human rights covenants do not mandate the trade sanctions against countries that violate their human rights standards. I agree with Leebron that it would not be advisable for the WTO to recognise and extra-legally use trade sanctions to enforce human rights instruments.⁸³

5 Conclusion

This study examined the human rights approach to trade policy in the WTO. It transpired that the primary objective of the WTO is to pursue economic efficiency and the development and harmonisation of trade relations. Its agreements primarily carry trade obligations. However,

⁷⁹ See *Shrimp-Turtles* (AB) para 158 read with para 184, interpreting art XX of GATT.

⁸⁰ *Reformulated Gasoline* (AB) 20-21. See J Waincymer 'Reformulated Gasoline under reformulated WTO dispute settlement procedure: Putting Pandora out of the *chapeau*' (1996) 18 *Michigan Journal of International Law* 141 146.

⁸¹ See DSU arts 22 & 23.

⁸² See Howse (n 31 above) 34 39.

⁸³ DW Leebron 'Linkages' (2002) 96 *The American Journal of International Law* 5 22.

these objectives have been re-stated⁸⁴ in the broadest terms so that they may be stretched, in an evolutionary manner, to other necessary non-trade issues, such as human rights.⁸⁵ We also indicated that regard to human rights in the WTO is mainly exception-based. This is due to several reasons, including that the WTO is a self-contained system, which was designed for covered agreements. However, the exception-based approach to human rights, though dismissed by Mehra as 'inadequate, unreliable and designed to promote *ad hocism* in policy making', is now more important than ever in the human rights evolution in WTO jurisprudence.⁸⁶ The institutionalisation of the human rights approach in the WTO trade policy can greatly contribute to the promotion and respect of human rights by members, particularly members from the African continent.

⁸⁴ The principal objectives of GATT 1947, like that of the WTO, are the raising of the standard of living, ensuring full employment, expanding production and trade, and allowing the optimal use of the world's resources. However, the WTO objectives have been broadened to include sustainable development in both trade in goods and services.

⁸⁵ The exceptions have effectively been used in the protection of the environment and also in facilitating the debate on the trade-environment link. See Waincymer (n 59 above); RF Housman & DJ Zaelke 'The collision of the environment and trade: The GATT Tuna/Dolphin Decision' (1992) 22 *Environmental Law Reporter* 1026; S Yoshida 'Yellow Tuna Fishery and Dolphin conversation: International free trade meets environmentalism' (1998) 21 *Environ's Environmental Law and Policy* 163; PI Hansen 'Transparency, standards of review, and the use of trade measures to protect the global environment' (1999) 39 *Virginia Journal of International Law* 1016; JH Jackson 'World trade rules and environmental policies: Congruence or conflict?' (1992) 49 *Washington & Lee Law Review* 1227; TJ Schoenbaum 'International trade and protection of the environment: The continuing search for reconciliation' (1997) 91 *American Journal of International Law* 268; *Shrimp-Turtles (AB)*; *Reformulated Gasoline (AB)*.

⁸⁶ M Mehra 'Human rights and the WTO: Time to take on the challenge' http://www.wtowatch.o/HUMAN_RIGHTS_AND_THE_WTO_TME_TO_TAKE_ON_THE_C.h (accessed 18 July 2003).