



**INTERNATIONAL  
LAWYERS ASSISTING  
WORKERS NETWORK**

# WTO LAW ASPECTS OF IMPORT PROHIBITIONS ON PRODUCTS AND SERVICES MADE USING FORCED LABOUR

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## INTRODUCTION AND SUMMARY

All states are obliged under international law to eradicate forced labour within their own territories.<sup>2</sup> However, these obligations do not require states to eradicate forced labour in *other* states. At most, states are obliged to cooperate with each other to this end.<sup>3</sup> But regardless of their obligations, states are increasingly acting voluntarily, adopting unilateral measures to eradicate forced labour in other states, in particular by imposing prohibitions on the importation of products that have been produced using forced labour. It is possible that, in future, they may also restrict trade in services supplied using forced labour.

This memorandum considers the legality of such measures under WTO law. Section 1 considers prohibitions on imports of forced labour products, first by looking at the obligations under the GATT 1994 which apply to such measures, and then by considering the exceptions to these obligations. Section 2 considers the equivalent two questions under the GATS Agreement in relation to restrictions on forced labour services.

The overall conclusion is that, in principle, WTO law is sufficiently flexible to permit WTO Members to adopt measures prohibiting the importation of forced labour products and services. It is almost inevitable that such measures will violate applicable WTO obligations. This is because, by their very nature, these measures are likely to be prohibited quantitative restrictions on trade in goods or services, or they are likely to discriminate against or between foreign products or services.<sup>4</sup> Nonetheless, if carefully designed, prohibitions on imports of forced labour products or services can be justified under the GATT 1994 and GATS general exceptions. This is on two grounds. First, both of these agreements permit WTO Members to adopt measures that are necessary to protect their public morals. It is not difficult to argue that a WTO Member is protecting its public morals by prohibiting imports of forced labour products and services, given international prohibitions on the use of forced labour. However, the prohibition needs to be no more trade restrictive or discriminatory than necessary to achieve its objective.

The GATT 1994 (but not GATS) also has an exception for import prohibitions of ‘products of prison labour’. This exception covers import prohibitions on forced labour products that are produced in correctional settings, and

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<sup>2</sup> The ILO Forced Labour Convention 1930 (No 29), in force 1 May 1932, has been ratified by 179 states (but not Afghanistan, Brunei Darussalam, China, Marshall Islands, Palau, Tonga, Tuvalu, and the United States): [https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312174](https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312174); and see also its 2014 Protocol, in force 9 Nov 2016, ratified by 57 states: [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_INSTRUMENT\\_ID:3174672:NO](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:3174672:NO). The ILO Abolition of Forced Labour Convention 1957 (No 105) has been ratified by 176 states (but not Brunei Darussalam, China, Japan, Laos, Marshall Islands, Myanmar, Palau, Korea, Timor-Leste, Tonga, Tuvalu). Forced labour is also prohibited in all major human rights conventions. In *Nevsun Resources Ltd v Araya* 2020 SCC 5 (CanLII), the Supreme Court of Canada said that ‘[t]o the extent that debate may exist about whether forced labour is a peremptory norm, there can be no doubt that it is at least a norm of customary international law’ (para 102).

<sup>3</sup> Cf para 14 of the ILO Forced Labour (Supplementary Measures) Recommendation 2014 (No 203), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_INSTRUMENT\\_ID:3174688:NO](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:3174688:NO).

<sup>4</sup> This is a simplification. The detail is set out below.

it may also cover import prohibitions on forced labour products that are produced in non-correctional but ‘prison-like’ settings, such as modern slavery. Unlike the ‘public morals’ exception, the ‘prison labour products’ exception does not require the measure to be no more trade restrictive than necessary to achieve any objective; it is enough that it has a connection with prison labour products. However, it must still be no more discriminatory than necessary to achieve its objective.

It is in relation to these ‘necessity’ conditions that careful design is important. An import prohibition will only be ‘necessary’ to achieve its objective if there is no less trade restrictive (in the case of the public morals exception) and no less discriminatory (in the case of the public morals and prison labour exception) alternative measure, reasonably available to the regulating WTO Member, that is capable of achieving the measure’s objective to the same degree. These are not impossible conditions. But meeting them means that the prohibitions must not be unduly onerous. It cannot, for example, be unduly difficult for a trader to demonstrate that the exported product or service is *not* produced using forced labour.

In summary, while WTO law imposes disciplines on trade restrictions on forced labour products and services, these disciplines are designed to ensure good rulemaking, and they are therefore disciplines with which it should be possible to comply.

## GATT 1994

### INTRODUCTION

The WTO General Agreement on Tariffs and Trade (GATT 1994) governs import prohibitions of products based on the way that they are produced.<sup>5</sup> There are three GATT 1994 obligations relevant to import prohibitions. Article XI:1 is a general prohibition on import prohibitions. However, there is an exception where the import prohibition is enforcing a domestic measure. In that event, the Note to Article III states that the import prohibition is to be treated as part of that domestic measure, and it is therefore permitted so long as it does not discriminate against foreign products, contrary to the national treatment obligation in Article III:4. In addition, Article I:1, the most favoured nation obligation, requires import prohibitions – whether or not they are enforcing domestic measures – to be non-discriminatory as between imports from different origins. Importantly, however, a measure that breaches one or more of these obligations can potentially be justified under the general exceptions to GATT obligations.

### GATT OBLIGATIONS

#### QUANTITATIVE RESTRICTIONS (ARTICLE XI GATT 1994)

Article XI:1 GATT 1994 ‘(General Elimination of Quantitative Restrictions)’ prohibits all measures prohibiting the imports of goods.<sup>6</sup> It states:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any

<sup>5</sup> Appellate Body Report, *EC – Seal Products*, WT/DS400/AB/R, adopted 18 June 2014. The WTO Agreement on Technical Barriers to Trade (TBT Agreement) is applicable to measures imposing labelling requirements on products.

<sup>6</sup> Article XI:2 GATT sets out some limited exceptions which are not relevant here.

contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

For this purpose, the intention of the measure is irrelevant.

There is no question that, if it is not enforcing a domestic measure, a prohibition on imports of forced labour products would violate Article XI:1. In *US – Shrimp*, for example, the United States conceded that its prohibition on imports of shrimp that were harvested in a manner that harmed sea turtles would violate Article XI:1. It is the same here. However, as noted, such a violation, under certain conditions, might nonetheless be justified under the general exceptions to GATT obligations.

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#### DOMESTIC MEASURES ENFORCED AT THE BORDER (ARTICLE III GATT 1994)

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##### IMPORT BANS AS PART OF A DOMESTIC MEASURE (NOTE TO ARTICLE III GATT 1994)

The situation is different if the import prohibition is *enforcing* a domestic measure – a prohibition on importing drugs or dangerous toys, would be an example, so long as this is a means of enforcing a domestic ban on selling those drugs or toys. This is set out in the Note to Article III which states, relevantly, that:

... any law ... of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is ... enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as ... a law ... of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

The laws described in Article III:1 GATT are, relevantly, ‘laws ... affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, ....’.

Reading these two provisions together then, Article III, and not Article XI, will apply to an import prohibition that is part of (because it enforces) a law regulating domestic activities.

In terms of the present issue, the matter would be straightforward if the state banning imports of forced labour products also bans the sale of forced labour products, regardless of where they are produced. This, for example, is what the EU has just proposed to do, no doubt for precisely the reasons discussed here.<sup>7</sup> Other states, such as the US, do not have domestic bans on sales of forced labour products; rather, they tend to have bans on the *use* of forced labour in the first place. The legal question is whether a ban on importing forced labour products can be seen as enforcing a ban on using forced labour domestically.

The answer to this question is not as easy as might appear. On the one hand, one could say that a ban on using forced labour implies a ban on selling forced labour products, and that the import ban is therefore enforcing an implicit sales ban. On the other hand, in most cases, import bans enforce domestic bans because they are targeted at the same harms. Drugs and dangerous toys harm domestic consumers, so an import ban enforces a domestic sales ban by preventing these toys from entering the marketplace. This was also true of the measure

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<sup>7</sup> European Commission Communication on decent work worldwide for a global just transition and a sustainable recovery, COM(2022) 66 final, 23.2.2022, at 14.

in *EC – Seal Products*, where an import ban on seal products enforced a sales ban on seal products because both bans protected EU public morals by preventing seal products from being placed on the EU market (the location of the seals was irrelevant). By contrast, a prohibition on the use of forced labour, at least in the first instance, protects (hypothetical or real) domestic forced labourers. It is not obvious that an import prohibition protects those same domestic labourers, such that it can be seen as an enforcement of the domestic measure.

But this is also not the end of the analysis. It can be argued that at least a *secondary* aim of a prohibition on the use of forced labour is to protect persons in the regulating jurisdiction from being presented with forced labour products. If that is the case, then, as in *EC – Seal Products*, an import prohibition on forced labour products can be seen as enforcing the domestic measure. And if that is the case, then the import prohibition, as part of the domestic measure, should be scrutinised under Article III, and not (under the more restrictive) Article XI of GATT 1994.

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#### NATIONAL TREATMENT (ARTICLE III:4 GATT)

On the assumption that Article III applies, the next question is whether the implicit domestic prohibition on sales of domestic forced labour products, enforced by an import prohibition on foreign forced labour products, is consistent with the national treatment obligation in Article III:4 GATT. That obligation states, relevantly, as follows:

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. ...

For measures that name products from a particular country, like the United States's Uyghur Forced Labor Prevention Act, it will be assumed that there is discrimination.<sup>8</sup> For measures that do not specify a given origin, for example an import ban on 'forced labour products' it will be necessary to determine whether there are imported and domestic 'like products', and, if so, whether there is any 'less favourable treatment' between these 'like products'.

#### 'LIKE PRODUCTS'

In terms of the 'comparator', it is now well established that products will be considered 'like' when they are competitive in the domestic marketplace of the regulating WTO Member.<sup>9</sup> This will generally be the case for products that are physically identical. But, at least in theory, this will not be the case when, regardless of their physical similarity, consumers in the regulating Member draw such a distinction between products that they are not, in fact, competitive. Whether consumers in any given country draw such a distinction between forced labour products and physically identical non-forced labour products is an evidentiary matter.

But how many consumers have to feel this way? The bar is high. In *Philippines – Distilled Spirits*, the products at issue were 'like' even though they were competitive (for price reasons) for fewer than 15 per cent of

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<sup>8</sup> Appellate Body Report, *Argentina – Financial Services*, WT/DS453/AB/R, adopted 9 May 2016, para 6.36. This is known as *de jure* discrimination.

<sup>9</sup> Appellate Body Report, *EC – Asbestos*, WT/DS135/AB/R, adopted 5 April 2001, para 99.

consumers.<sup>10</sup> In *US – Tuna II (Mexico)*, the United States accepted that its consumers did not distinguish between tuna caught in a dolphin-safe and a dolphin-unsafe manner.<sup>11</sup> In *EC – Seal Products*, the EU also accepted that its consumers did not distinguish between seal products resulting from Inuit and non-Inuit hunts.<sup>12</sup> It might be possible that consumers are more concerned about products produced by forced labour, but this cannot be assumed. It is more likely that forced labour and non-forced labour products will be considered to be ‘like’.

### ‘LESS FAVOURABLE TREATMENT’

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If this is the case, the next question is whether a prohibition on forced labour products results in overall ‘less favourable treatment’ of imported products compared to domestic products. The test for such *de facto* discrimination is whether there is less favourable treatment of *all* the imported products compared to all the domestic ‘like’ products.<sup>13</sup> This depends on the ratios of prohibited and non-prohibited products in each category: for example, if WTO Member X’s exports to WTO Member A comprise (or would comprise, in the absence of the prohibition) 90 per cent non-forced labour products and 10 per cent forced labour products, it would suffer less favourable treatment if the proportion of WTO Member A’s domestic products that is produced using forced labour is less than 10 per cent. This slightly artificial example can be simplified: any prohibition on forced labour products that applies to imports from WTO Members in which forced labour is more prevalent than in the importing WTO Member will necessarily violate Article III:4. That, of course, will almost invariably be the case, as any importing Member adopting such a measure will itself almost invariably already have a relatively lower prevalence of forced labour than WTO Members not adopting such a measure.

### MOST FAVOURED NATION TREATMENT (ARTICLE I:1 GATT 1994)

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A third relevant obligation is the most favoured nation obligation in Article I:1 GATT. This states, relevantly, as follows:

With respect to ... all rules and formalities in connection with importation ..., and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

In short, what the most favoured nation obligation requires is that any ‘advantage’ granted to imported products from one country are granted immediately to ‘like’ imported products from another country (this being a WTO Member). Practically speaking, the tests are the same as for the national treatment obligation. The difference is that the measure applied by WTO Member A may not discriminate against exports from WTO Member X compared to the exports of ‘like products’ from Country Y (which may or may not be a WTO Member). As before, an import prohibition on forced labour products will violate Article I:1 *de jure* if it mentions WTO Member X by name, and it will violate Article I:1 *de facto* if WTO Member A’s consumers do not sufficiently distinguish between forced labour and non-forced labour products, and the measure affects a higher proportion of imports

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<sup>10</sup> Appellate Body Report, *Philippines – Distilled Spirits*, WT/DS396/AB/R, adopted 20 January 2012, para 156.

<sup>11</sup> Panel Report, *US-Tuna II*, WT/DS381/R, adopted 13 June 2012, para 4.246.

<sup>12</sup> Panel Report, *EC – Seal Products*, WT/DS400/R, adopted 18 June 2014, para 7.594.

<sup>13</sup> Appellate Body Report, *EC – Asbestos*, para 100.

from WTO Member X than from Country Y. This will also invariably be the case – indeed, it is likely to be the very reason for the prohibition.

## GATT EXCEPTIONS (ARTICLE XX)

As noted above, breaches of GATT obligations can be justified under the general exceptions in Article XX GATT. These mostly have to do with public policy (including public morals, health, the environment and consumer protection).

These exceptions come with certain conditions, which are, in essence, directed at ensuring that government regulation for public policy objectives is properly targeted to the objective at issue. In a nutshell, Article XX is designed to prevent poor regulation. And while the cases in which regulating WTO members have been unsuccessful in defending their measures under Article XX are well known, even notorious in some circles, the measures that have failed have invariably been poorly designed. Generally, WTO Members who have lost disputes under Article XX have later succeeded in justifying revised versions of their original measures.

Article XX GATT states, relevantly, as follows:

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

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- ... (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies ..., the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
- (e) relating to the products of prison labour; ...

Typically, an analysis of Article XX begins with the subparagraphs and continues with the opening paragraph, which is known as the ‘chapeau’ (or ‘hat’) to Article XX.

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## THE SUBPARAGRAPHS OF ARTICLE XX

The first question is whether a forced labour import prohibition is effective to a legally relevant degree to one of the objectives set out in the paragraphs listed here. It is also possible for a measure to be justified under more than one of these subparagraphs.

### **Article XX(a) GATT**

Article XX(a) GATT permits trade restrictions which are necessary to protect the public morals of the regulating WTO Member. For this purpose, ‘public morals’ are taken to be ‘standards of right and wrong’ in a particular community. In 2020, the Panel in *US – Tariff Measures* usefully summarised the previous caselaw on the public morals exception, stating that:

Prior WTO adjudicators have found the following policies as pertaining to public morals: prevention of underage gambling and the protection of pathological gamblers; restricting prohibited content in cultural goods, such as violence or pornographic content, as well as protection of Chinese culture and traditional values; protecting animal welfare; combatting money laundering; or bridging the digital divide within society and promoting social inclusion.<sup>14</sup>

In *US – Tariff Measures*, the Panel concluded that ‘the “standards of right and wrong” invoked by the United States (including norms against theft, misappropriation and unfair competition) could, at least at a conceptual level, be covered by the term “public morals” within the meaning of Article XX(a) of the GATT 1994.’<sup>15</sup> This finding is notable for several reasons. One is that, as in some of the earlier reports, the Panel extended the meaning of ‘public morals’ beyond what might be considered ‘morality’ in a narrow sense. Second, the Panel saw no distinction between US ‘public morals’ concerning practices taking place in the United States and practices taking place in China. This was despite the fact that the evidence laid before the Panel consisted of domestic US legislation prohibiting theft, extortion, espionage and expropriation – but only when committed within the United States or by US nationals.<sup>16</sup> The Panel’s broad approach can perhaps be explained on the grounds that morality does not usually come with geographical limitations.

In terms of the issue at hand, there can be no doubt that the ‘public morals’ of any given WTO Member defending a prohibition on imports of forced labour products will include the eradication of forced labour at least in their territories. The evidence to this effect will be abundant, in the form of international obligations<sup>17</sup> and domestic legislation and practices. It is also relevant that the UN’s Sustainable Development Goal 8 – ‘[to] promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all’ – is elaborated by SDG Target 8.7, according to which states are, inter alia, to ‘[t]ake immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour’. This does not necessarily mean that the eradication of forced labour in *other* countries is part of the public morals of any given WTO Member. But, given the Panel’s approach to this question in *US – Tariff Measures*, this may not be an obstacle. In any event, it would not be difficult, one would assume, to obtain more targeted evidence, for example based on survey data, that forced labour contradicts the public morals of any WTO Member regardless of where it takes place.

There are however other questions. The next concerns the effectiveness of the measure adopted to achieve that objective. In *US – Tariff Measures*, the Panel considered the standard to be whether the measures adopted were ‘apt to contribute’ to the protection of public morals. In that case, the Panel was not persuaded that there was any relationship between the measure at issue, additional customs duties on Chinese imports, and the protection of US public morals. It can by contrast be taken for granted that a prohibition on the importation of forced labour products would be ‘apt to contribute’ to the objective of eradicating forced labour in the exporting country.

This most difficult question is whether an import prohibition on forced labour products can be considered ‘necessary’ to protect public morals. This depends, essentially, on whether there is an alternative measure

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<sup>14</sup> Panel Report, *US – Tariff Measures*, WT/DS543/R, circulated 15 September 2020, para 7.118 (references omitted).

<sup>15</sup> *ibid*, para 7.140.

<sup>16</sup> See <https://www.finnegan.com/en/insights/articles/the-extraterritorial-reach-of-u-s-trade-secret-law.html>.

<sup>17</sup> See above at n 2.



reasonably available to the regulating WTO member that is as effective as the measure at issue but less trade restrictive. In *China – Publications and Audiovisual Products*, for example, China argued that, in order to protect public morals (by prohibiting undesirable content in the publications at issue), only Chinese state-owned enterprises could be permitted to import those publications. The United States successfully proposed an alternative, which was to allow other entities to import these products subject to a content review to be carried out by China.<sup>18</sup> Importantly, this was seen as a reasonably available alternative for China even though it came at an administrative and financial cost.

For any prohibition on imports of forced labour products, the question will therefore be whether there is an alternative measure, reasonably available to the regulating WTO Member, that would be equally effective but less trade restrictive. For example, it should in principle be permissible to presume that products from a particular region are produced using forced labour, as is the case with the United States's Uyghur Forced Labor Prevention Act.<sup>19</sup> However, that presumption would need to be founded upon clear evidence that products from that region are indeed produced using forced labour. It must also be possible to rebut that presumption. And it would be important for the WTO member imposing the import prohibition to be able to adjust its prohibition at reasonable notice. A blunt prohibition without these qualifications and flexibilities would most likely be unnecessarily trade restrictive.

### **Article XX(b) GATT**

Article XX(b) GATT permits a regulating country to adopt measures that are necessary to protect 'human life or health'. It is very unlikely that this exception could apply to justify forced labour import prohibitions. This is because it is generally understood that the humans that can be protected are only those under the ordinary jurisdiction of the regulating state, with one possible exception where that state has a right, under international law, to regulate in favour persons in other countries. Arguments have been made that in case of certain human rights norms this rule can still permit a regulating country to take legislative measures protecting persons in other countries, but this argument has been untested in practice, and is likely to meet with resistance.<sup>20</sup>

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<sup>18</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, WT/DS363/AB/R, adopted 19 January 2010, paras 336-337.

<sup>19</sup> Section 4(a) of the Uyghur Forced Labor Prevention Act states that '[e]xcept as provided in subsection (b), all goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region of China, or by persons working with the Xinjiang Uyghur Autonomous Region government for purposes of the "poverty alleviation" program or the "pairing-assistance" program which subsidizes the establishment of manufacturing facilities in the Xinjiang Uyghur Autonomous Region, shall be deemed to be goods, wares, articles, and merchandise described in section 307 of the Tariff Act of 1930 (19 U.S.C. 1307) and shall not be entitled to entry at any of the ports of the United States.' Section 4(b) states that 'The prohibition described in subsection (a) shall not apply if the Commissioner of U.S. Customs and Border Protection (1) determines, by clear and convincing evidence, that any specific goods, wares, articles, or merchandise described in subsection (a) were not produced wholly or in part by convict labor, forced labor, or indentured labor under penal sanctions; and (2) submits to the appropriate congressional committees and makes available to the public a report that contains such determination.' Uyghur Forced Labor Prevention Act (H.R. 6256), 2021.

<sup>20</sup> See Lorand Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights' (2002) 36 *Journal of World Trade* 353.

**Article XX(d) GATT**

Another potentially relevant provision is Article XX(d) GATT, which permits trade restrictions that are necessary to ensure compliance with a domestic law that is itself not in violation of WTO law, for example, as specified in Article XX(d), intellectual property or antitrust laws.<sup>21</sup> In this particular case it is not likely that there is such a WTO-consistent law.

**Article XX(e) GATT**

A more relevant exception is Article XX(e), which permits trade restrictions ‘relating to the products of prison labour’. For these purposes, it does not matter whether that prison labour is forced or not forced. It is sufficient that it is prison labour.<sup>22</sup> What is more difficult to determine is what constitutes a ‘prison’, and in particular whether this term includes non-correctional settings.

To answer this question, it is necessary to turn to the rules of interpretation set out in the Vienna Convention on the Law of Treaties (VCLT). The first and most fundamental rule of treaty interpretation is set out in Article 31(1) VCLT, which states that:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

In practice, WTO tribunals have tended to rely on ‘ordinary meaning’ first, frequently by reference to dictionaries, and then to consider questions of context and object and purpose, when useful. Following this tradition, it is relevant to cite the Oxford English Dictionary, which distinguishes two meanings of the word ‘prison’, depending on whether the word is preceded by an article (eg ‘a’ or ‘the’). With an article, it defines ‘prison’ narrowly as ‘[a] building or other facility to which people are legally committed as punishment for a crime or while awaiting trial.’<sup>23</sup> However, without an article, ‘prison’ is defined as follows:

Originally: the condition of being kept in captivity or confinement; forcible deprivation of personal liberty; imprisonment. Hence (now the usual sense): a place of incarceration.

This might broaden the term to cover non-correctional settings, in particular those coming under the heading of ‘modern slavery’. Further in favour of adopting a broad reading of the terms ‘prison labour’ is the context of Article XX(e), set out in the preamble to the WTO Agreement. This preamble states the WTO’s objectives, relevantly, as follows:

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services,

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<sup>21</sup> Article XX(d) GATT has a built-in circularity, often referred to in litigation though not yet acknowledged in any WTO dispute settlement report.

<sup>22</sup> It is irrelevant that Art 2(2)(c) the 1930 Forced Labour Convention ‘forced labour’ excludes prison labour (albeit this was later qualified).

<sup>23</sup> ‘Prison’ in Oxford English Dictionary, 3<sup>rd</sup> edition (Oxford, 2007, updated 2021).

while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment ...

In *US – Shrimp*, the Appellate Body used this reference to ‘sustainable development’ to interpret the phrase ‘natural resources’ in Article XX(g).<sup>24</sup> First, it said that use of the term ‘sustainable development’ in the WTO preamble meant that the phrase ‘natural resources’ in Article XX(g) was intended to have an ‘evolutionary’ meaning.<sup>25</sup> To determine whether this term could include living natural resources, the Appellate Body then looked to several international instruments<sup>26</sup> which treated both living as well as non-living resources,<sup>27</sup> and concluded that it did.

A similar approach can be adopted in the present instance. From the perspective of the preamble to the WTO Agreement, which refers not only to ‘sustainable development’ but also to full employment and the raising of living standards, it can be proposed that the reference to ‘prison labour’ was intended to have an evolutionary meaning beyond its original intention (protecting domestic producers from inexpensive prison labour products).<sup>28</sup> As to what ‘prison labour’ might encompass, one can consider the range of international instruments on prison labour and other related forms of labour illegal under international law. These are well summarised in SDG Target 8.7, which, as noted, requires states to ‘[t]ake immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour’. On this basis, it is at least plausible that ‘prison labour’ covers forced labour in non-correctional settings.

In light of these considerations, it may be concluded that a measure prohibiting the products of forced labour is ‘related to’ products of prison labour when that forced labour takes place in a correctional setting but also, with a slightly lower degree of certainty, when that forced labour takes place outside of a correctional setting. Importantly, Article XX(e) has no ‘necessity’ requirement, so the considerations noted above in the context of Article XX(a) concerning calibrated administrative requirements do not need to be taken into account.

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## THE CHAPEAU OF ARTICLE XX

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### INTRODUCTION

The ‘chapeau’ to Article XX GATT sets out two horizontal conditions that apply to any measure sought to be justified under Article XX, and traditionally an analysis of the chapeau follows an analysis of whether a measure

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<sup>24</sup> Appellate Body Report, *US – Shrimp*, WT/DS58/AB/R, adopted on 6 November 1998, para 129.

<sup>25</sup> *ibid*, para 130.

<sup>26</sup> The Appellate Body noted that these instruments were not in fact binding on the parties to the dispute, still less all WTO Members, but this did not interrupt its analytical approach.

<sup>27</sup> Appellate Body Report, *US – Shrimp*, para 130.

<sup>28</sup> See Elissa Alben, ‘GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link’ (2001) 101 *Columbia Law Review* 1410. The same is true of domestic US law prohibiting imports of forced or prison labour products: see Congressional Research Service, *Section 307 and US Imports of Products of Forced Labor: Overview and Issues for Congress*, R46631, 1 February 2021, at 3-4.

falls under the subparagraphs of Article XX.<sup>29</sup> The following is therefore predicated upon the conclusion of the above analysis, which is that:

- the Article XX(a) exception for measures necessary to protect public morals applies to import prohibitions of forced labour products, provided that these prohibitions have well calibrated administrative and evidentiary rules, and
- the Article XX(e) exception for measures relating to the products of prison labour applies to import prohibitions of forced labour products produced in correctional settings and, with a slight degree of hesitation, also in non-correctional settings, this time regardless of the accompanying administrative and evidentiary rules.

The two conditions in the chapeau are as follows. First, a measure may not be applied in a manner constituting arbitrary or unjustifiable discrimination between countries where the same conditions prevail – or, to reverse these terms and add subsequent interpretative guidance, a measure that discriminates in this way may still be justified if it is necessary to achieve a legitimate objective. Second, a measure may not be a ‘disguised restriction on international trade,’ which is best understood as meaning that a measure with an improper purpose cannot be disguised as having a proper purpose.<sup>30</sup>

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#### ARBITRARY AND UNJUSTIFIABLE DISCRIMINATION BETWEEN COUNTRIES WHERE THE SAME CONDITIONS PREVAIL

The chapeau does not prohibit all discrimination, but only discrimination between countries where the same conditions prevail, and these ‘conditions’ correspond to the policy objective of the measure at issue.<sup>31</sup> In *EC – Seal Products*, for instance, the Appellate Body determined that ‘the same animal welfare conditions prevail in all countries where seals are hunted’, and that the European Union had not otherwise succeeded in demonstrating that the conditions prevailing in Canada and Norway, on the one hand, and Greenland, on the other hand, were relevantly different.<sup>32</sup> In *US – Tuna II (Art 21.5 – Mexico)* the Appellate Body said that ‘the prevailing conditions between countries are the risks of adverse effects on dolphins arising from tuna fishing practices.’<sup>33</sup>

What is unclear is whether the ‘same conditions’ will prevail if the same risk is present in the countries at issue, but to a different degree. For two reasons this seems unlikely. First, in neither of these cases did the Appellate Body engage in any quantification exercise. Having ascertained that there was *some* risk of harm to animal welfare and dolphins, it proceeded on the basis that the relevant conditions were the ‘same’ in the countries at issue. Second, it *did* quantify the extent of the risk to animal welfare and to dolphins at the next stage of the analysis, which concerns the justifiability of the discriminatory aspects of the measure. Nor does it appear that this analytical choice is accidental. If differing risk profiles were relevant at the first stage, the result would be

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<sup>29</sup> Lorand Bartels, ‘The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements’ (2015) 109 *American Journal of International Law* 95.

<sup>30</sup> *Ibid.*

<sup>31</sup> Appellate Body Report, *EC – Seal Products*, para 5.300.

<sup>32</sup> *Ibid.*, para 5.317.

<sup>33</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, WT/DS381/AB/RW, adopted 3 December 2015, para 7.308.

that that there is no discrimination, and *any* measure, no matter how poorly designed, would then be permitted (provided it meets the conditions in the subparagraphs and is not a disguised restriction on trade). By contrast, if different risk profiles are only relevant at the second step, it then becomes relevant whether the measure at issue is properly calibrated to those different risks. The Appellate Body's approach can therefore be understood as allowing for a basic filter to be applied (conditions will be the same unless there is *no* risk in a relevant country) while permitting a later consideration of the extent to which the measure is calibrated to different risk profiles.

It follows that conditions will be the same as between any countries in which there is a risk of forced labour. As that covers all countries,<sup>34</sup> the next questions are whether a prohibition on imports of forced labour products discriminates between any of these countries, and, if so, whether such discrimination can be justified.

On the question of discrimination, the answer is simple. If a measure comes to be appraised under Article XX, it may be assumed that it has violated the prohibition on quantitative restrictions in Article XI:1, in which case by definition it will discriminate against imported products, or it has been determined already to violate one of more of the non-discrimination obligations in Articles III:4 and I:1. The more complicated question is whether that discrimination is 'arbitrary or unjustifiable', and on this question the jurisprudence of the Appellate Body indicates that discrimination will be 'arbitrary or unjustifiable' when it is not necessary to achieve a legitimate objective. This is almost the same test as that the 'necessity' test that is found in various of the subparagraphs of Article XX. There is, however, a difference, which is that what has to be necessary in that context is the *trade restrictiveness* of the measure at issue, whereas what has to be necessary in the context of the chapeau are the *discriminatory effects* of the measure at issue. The difference is subtle, but analytically important.

The question is then whether the discriminatory effects of a prohibition on imports of forced labour products is necessary to achieve a legitimate objective, and this depends on whether there is any alternative but *less discriminatory* measure that will achieve the same objective. At this point, it is essential to identify the objective of the measure at issue. If the measure is maximalist, for example, it is designed to eradicate forced labour everywhere, but it only targets one country where forced labour is prevalent, there will be a less discriminatory measure that achieves the relevant objective, namely an extension of the import prohibition to products from all countries. The fact that this measure is more trade restrictive is not relevant at this stage of the analysis. If, on the other hand, the objective is to *reduce* without eradicating incidences of forced labour practices, then it would almost certainly be possible to achieve this same objective by treating different countries according to their respective forced labour profiles. What cannot be said, of course, is that the objective is to eradicate forced labour in only one country: an objective cannot itself be discriminatory.

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#### DISGUISED RESTRICTION ON INTERNATIONAL TRADE

The second condition under the chapeau of Article XX is that a measure may not be a 'disguised restriction on international trade'. This has never been material in any WTO case to date, and it is not even certain precisely what it means. However, based on historical analysis, it would appear that the best interpretation that can be given to this condition is that it prohibits measures adopted in bad faith: namely, when they are ostensibly adopted for one reason but they are in fact adopted for another, improper, reason. In the case at hand, one might imagine a discriminatory prohibition on imports of forced labour products that is actually intended to coerce another country in relation to an entirely different policy. It would however need to be established that this is the real motive underlying the prohibition.

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<sup>34</sup> <https://www.globallslaveryindex.org/2018/data/maps/#prevalence>.

## THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

### INTRODUCTION

The GATS applies to trade in services, which Article I:2 defines as occurring in four ‘modes’:

Mode 1 (cross-border trade in services) is where service suppliers located in WTO Member X supply services to consumers in WTO Member Y (for example, online services).

Mode 2 (consumption abroad) is where service suppliers in WTO Member X supply services in the same country to the consumers of WTO Member Y, who have travelled there (for example, tourism).

Mode 3 (commercial presence) is where WTO Member X service suppliers established in WTO Member Y supply services from WTO Member Y (for example, foreign investors).

Mode 4 (natural persons) is where WTO Member X service suppliers supply services through natural persons located in WTO Member Y (for example, a WTO Member X foreign investor supplying services through WTO Member X employees in WTO Member Y). The service supplier can be a natural person, in which case the service supplier is considered to be supplying services ‘through’ themselves (for example, a WTO Member X consultant supplying consultancy services in WTO Member Y ‘through’ him or herself).

Conceivably, a WTO Member may wish to adopt a measure prohibiting the supply of services from another WTO Member (in the case of Modes 1 and 2) or supplied by a service supplier from another WTO Member (in the case of Modes 3 and 4) on the basis that the services at issue are supplied using forced labour. In that event, there are several GATS obligations and exceptions to consider, largely mapping onto the equivalent GATT provisions.

However, there is one important difference, which is that, except for the most favoured nation obligation, the relevant obligations only exist for any given WTO Member if it has made a specific ‘commitment’ to liberalise a given service sector. Those commitments are located in so-called ‘schedules of commitments’.

### GATS OBLIGATIONS

#### MARKET ACCESS (ARTICLE XVI GATS)

Article XVI GATS prohibits WTO Members from restricting trade in services in certain specified ways. The types of measures that are prohibited under Article XVI are limitations on (a) the number of service suppliers, (b) the value of service transactions or assets, (c) the number of service operations or service output, and (d) the number of natural persons who can be employed. In addition, WTO Members are prohibited from (e) requiring services to be supplied using a particular legal form, and (f) limiting foreign investment.

This obligation only applies however to sectors in which WTO Members have negotiated liberalization commitments, and even then they are free to adopt such measures if they negotiated a reservation to this effect. It is therefore always critical to examine the schedules of services commitments of any WTO Member in considering whether it might have breached its GATS obligations.

#### NATIONAL TREATMENT (ARTICLE XVII GATS)

Article XVII GATS is similar to Article III:4 GATT. It prohibits WTO Members from discriminating against foreign services and service suppliers. Again, the application of this obligation to any forced labour measure will depend upon whether the regulating WTO Member has scheduled a service sector, and whether it has listed any reservations permitting such discriminatory conduct. The test for a national treatment violation, as with Article III:4 GATT, is whether foreign services and service suppliers are treated less favourably than ‘like’ domestic

services and service suppliers. This will necessarily be the case if they are expressly singled out by origin in the measure itself.<sup>35</sup>

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#### MOST FAVOURED NATION TREATMENT (ARTICLE II:1 GATS)

Article II:1 GATS is a most favoured nation obligation that is drafted in identical terms to Article XVII, except that the prohibited 'less favourable treatment' is now between services and services suppliers from different origins (the protected service and service supplier being from a WTO Member). There is however one important difference, which is that the obligation applies to all services and service suppliers except for measures listed in a GATS annex. These exemptions are very specific and are unlikely to be implicated by a forced labour prohibition.

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#### CONCLUSIONS

It is very difficult in the abstract to assess the legality, under these obligations, of a measure that would restrict trade in services in one of the four modes detailed above. With the exception of the most favoured nation obligation, this depends entirely on the services schedules of the WTO Member at issue. Further details would be required for an analysis of these issues.

#### GATS EXCEPTIONS

Article XIV of GATS is a general exceptions provision that is modelled on Article XX GATT. However, its list of permitted objectives is slightly different. Article XVI(a) is an exception for measures necessary to protect public morals, and can be interpreted in precisely the same way as Article XX(a) GATT.<sup>36</sup> There are also exceptions for measures necessary to protect human life and health (Article XIV(b)) and measures necessary to secure compliance with laws or regulations which are not inconsistent with GATS (Article XIV(c)). What is missing, however, is any equivalent to Article XX(e); hence there is no exception for restrictions in trade in services using prison labour. The result is that any measures that violates GATS obligations in respect of services produced by forced labour can only be justified on public morals grounds, as discussed in the context of Article XX(a) GATT. Article XIV also has a 'chapeau' that is functionally identical to the chapeau of Article XX, so the analysis of that chapeau applies here as well.

#### CONCLUSIONS

The conclusion of this analysis is that, in principle, WTO law permits WTO Members to adopt measures prohibiting the importation of forced labour products and services. The key issue is whether such prohibitions can be justified under the GATT 1994 and GATS general exceptions. The answer is that they can, depending on how they are designed.

First, both GATT 1994 and GATS permit WTO Members to adopt measures that are necessary to protect their public morals. It is not difficult to argue that a WTO Member is protecting its public morals by prohibiting imports of forced labour products and services, especially given international prohibitions on the use of forced labour. However, the prohibition needs to be no more trade restrictive than necessary to achieve its objective (Article XX(a)) and also no more discriminatory than necessary to achieve its objective (the chapeau of Article XX).

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<sup>35</sup> See above at n 8.

<sup>36</sup> Article XIV(a) GATS also permits measures necessary to 'maintain public order', but that is not relevant.

Second, the GATT 1994 (but not GATS) also has an exception for import prohibitions of ‘products of prison labour’ (Article XX(e)). This exception covers import prohibitions on forced labour products that are produced in correctional settings, and it may also cover import prohibitions on forced labour products that are produced in non-correctional but ‘prison-like’ settings, such as modern slavery. The ‘prison labour products’ exception does not require the measure to be no more trade restrictive than necessary to achieve any objective; it is enough that it has a connection with prison labour products. However, because of the chapeau of Article XX, the measure must still be no more discriminatory than necessary to achieve its objective.

What do these ‘necessity’ tests mean for a selective measure that prohibits imports of forced labour products from only one country when it is known that there is forced labour in other countries? The first ‘necessity test’, which only applies to the ‘public morals’ exception, requires that the measure be no more *trade restrictive* than necessary to protect public morals. This will be the case if there is no alternative measure that is (a) reasonably available and (b) less trade restrictive than the actual measure and (c) the alternative measure achieves at least the same level of protection of public morals as the actual measure. It is also important to note, however, that a measure may be ‘necessary’ even if it does not completely achieve its objectives. For example, a measure may have the objective of eradicating forced labour regardless of where it occurs, but only do so by targeting forced labour products originating in one country. Such a measure can still be necessary so long as there is no reasonably available alternative measure that achieves the objective of eradicating forced labour to the same degree as the actual measure. A less trade restrictive measure, such as a ban on fewer imports than the actual measure, would not achieve the objective of the actual measure to the same degree. A more general ban on imports from other countries as well would, by definition, be more trade restrictive than the actual measure. The end result is that there is no alternative measure that meets the required conditions, and hence the actual measure is ‘necessary’, even though it is selective and does not achieve its objectives in full (complete eradication of forced labour).

To be permissible, however, the measure would need to pass a second ‘necessity test’ under the chapeau of Article XX, both in the case that it is justified as protecting public morals under Article XX(a) and in the case that it is justified as relating to the products of prison labour. There is an identical condition in the chapeau of Article XIV of GATS, which would apply in the same way to a measure prohibiting imports of forced labour services. This second ‘necessity test’ consists of the measure not being more *discriminatory* than necessary to meet a legitimate objective as between countries where the same conditions prevail. In the scenario presented above, the selective measure is by definition discriminatory, as it singles out one country from a range of other countries where the same conditions (forced labour) prevail. But if the discrimination corresponds to a particularly high prevalence or type of forced labour in the targeted country, this discrimination can be justified on the grounds that the measure is calibrated to that special situation.



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