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Are EU Trade Sanctions on Burma Compatible with WTO Law?

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ARE EU TRADE SANCTIONS ON BURMA COMPATIBLE WITH WTO LAW?

*Robert L. Howse**
*Jared M. Genser***

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Within a system which denies the existence of basic human rights, fear tends to be the order of the day. Fear of imprisonment, fear of torture, fear of death, fear of losing friends, family, property or means of livelihood, fear of poverty, fear of isolation, fear of failure Yet even under the most crushing state machinery courage rises up again and again, for fear is not the natural state of civilized man.

—Aung San Suu Kyi

I. INTRODUCTION

For nearly twenty years, Burma has posed a seemingly insurmountable challenge to the international community. The former democracy is mired in economic and social stagnation, and its people are controlled by a repressive and abusive military regime. Faced with these obstacles, world leaders have struggled to develop an appropriate response. The United States has imposed an import and investment ban; the European Union and Japan have chosen more limited “targeted” sanctions. Still others such as China and the Association of Southeast Asian Nations (ASEAN) have tried active engagement and cooperation. Despite these efforts, former Czech Republic President Václav Havel and Archbishop Desmond Tutu, who pressed for action on Burma in the U.N. Security Council, said that the country’s “troubles are causing serious and possibly permanent problems that go well beyond human rights violations . . . [it] has now become a problem for the region and international community.”¹

This Article will explore the European Union’s approach to Burma. The European Union, until recently, has implemented quite limited trade sanctions against the Burmese junta. According to the most recent figures, E.U. countries still import €306 million (\$454 million) of commodities and products, ninety-five percent of which are textiles, timber, gems, and precious metals.² However, the Common Position of November 19, 2007, strengthens considerably E.U. measures against the Burmese regime and contains a ban on the importation of these

1. Václav Havel & Desmond M. Tutu, *Forward to DLA PIPER RUDNICK GRAY CARY US LLP, THREAT TO THE PEACE: A CALL FOR THE UN SECURITY COUNCIL TO ACT IN BURMA* (2005) [hereinafter HAVEL-TUTU REPORT].

2. Response to Question P5253/07 submitted by Glenys Kinnock, Member of Eur. Parliament, Nov. 19, 2007 (on file with the author) [hereinafter Kinnock Response].

goods from Burma.³ Further, the Common Position requires E.U. countries to prohibit intentional and knowing “participation” in activities that “directly or indirectly” have the “object or effect” of circumventing this ban⁴; this could include the transshipment of banned materials from countries other than Burma, which may have been processed or altered in some way so that they do not qualify as imports of Burmese origin under the rules of origin that apply to imports into the European Community as a general matter.

During the debate in the European Union over strengthening sanctions against Burma, concerns were raised by the European Commission that more restrictive sanctions could violate Member State commitments to relevant treaties enforceable by the World Trade Organization (WTO). This Article will argue that the expanded trade sanctions against Burma in the Common Position are clearly compatible with membership in the WTO in that they can be justified under Article XX (General Exceptions) to the General Agreement on Tariffs and Trade (GATT).

We will begin in Part II with a brief overview of Burmese history and a summary of the junta’s record on human rights. Next, in Part III, we will outline the contrasting positions of the European Union and the United States, and discuss the European Union’s concerns that more stringent restrictions might violate the WTO. In Part IV, we will discuss the provisions of the GATT that could potentially prohibit trade sanctions, and in Part V, we will discuss the Article XX exceptions to the GATT, and explain that trade sanctions can be justified under Article XX(a) as being “necessary to protect public morals.”⁵ Finally, in Part VI, we will discuss the WTO issues raised by the anti-circumvention provisions in the expanded E.U. sanctions regime, that are intended to deal with situations in which an economic actor would attempt to get around the sanctions by, *inter alia*, transshipping goods through a third country (e.g. India).

3. Council Common Position (EC) No. 2007/750/CFSP of 19 November 2007 amending Common Position 2006/318/CFSP renewing restrictive measures against Burma/Myanmar art. 2(b), 2007 O.J. (L308) 1 [hereinafter Common Position No. 2007/750/CFSP].

4. *Id.* art. 2(e).

5. General Agreement on Tariffs and Trade art. XX(a), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947].

II. BACKGROUND ON THE SITUATION IN BURMA

A. History

Burma has been ruled by a military junta since 1962, when General Ne Win led a military coup that seized power from the elected, representative government.⁶ Ne Win abolished the constitution and established a xenophobic military government that advocated the “Burmese Way to Socialism.”⁷ In the late 1980s, rising commodity prices, rising debt, and periodic demonetization of Burmese currency that wiped out the savings of most people led to the economy’s collapse in 1987. Non-violent anti-government demonstrations broke out in Rangoon, and on August 8, 1988, military forces took violent action against the demonstrators, killing thousands.⁸

After the August 8, 1988, massacre, a new ruling military junta took control. The State Law and Order Restoration Council (SLORC) continued to suppress protesters, but pledged to hold multiparty elections.⁹ These elections occurred in 1990, and the main opposition party, the National League for Democracy (NLD), won over eighty percent of parliamentary seats.¹⁰ In response, SLORC called the election invalid and refused to relinquish control over the government.¹¹

After a failed promise to draft a new constitution, SLORC changed its name in 1997 to the more benign-sounding State Peace and Development Council (SPDC).¹² The SPDC has continued SLORC’s repressive authoritarian rule.¹³ Despite promises in 2003 to create a “road map” to democracy, the SPDC retains control of Burma’s executive, administrative, and judicial branches.¹⁴ Corruption is widespread,¹⁵

6. See U.S. Dep’t of State, Background Note: Burma (December 2007), <http://www.state.gov/r/pa/ei/bgn/35910.htm> [hereinafter *Background Note*]; see also Columbia Encyclopedia, Myanmar: History (6th ed. 2007), <http://www.encyclopedia.com/doc/1E1-Myanmar.html> [hereinafter *Myanmar: History*].

7. See *Background Note*, *supra* note 6.

8. See *id.*

9. See *id.*

10. See *id.* (reporting that the NLD won 392 of the 485 parliamentary seats).

11. See *Myanmar: History*, *supra* note 6.

12. See *id.*; see also David Lamb, *Myanmar: New Military Rulers Continue an Old Regime of Repression*, L.A. TIMES, July 10, 1998, at 5.

13. See *Background Note*, *supra* note 6.

14. See Stephen McCarthy, *Prospects for Justice and Stability in Burma*, 46 ASIAN SURV. 417, 425–26 (2006) (noting that “to date there has been little to no indication of any realistic movement toward democratic structural change, via a ‘roadmap’ or otherwise”).

15. See TRANSPARENCY INT’L, TRANSPARENCY INTERNATIONAL CORRUPTION PERCEPTIONS INDEX 2007 27 (2007), available at http://www.transparency.org/policy_research/surveys_indices/cpi/2007 (ranking Burma 179th of 179 countries in perceived corruption).

and Burma is at the bottom of many world indicators on education,¹⁶ health care delivery,¹⁷ and per capita gross domestic product (GDP).¹⁸

Burma attracted worldwide attention after a 100 percent increase in the price of fuel and a 500 percent hike in the price of natural gas on August 15, 2007, triggered the largest mass protests in the country since 1988.¹⁹ In the first two weeks of mass protest alone, the junta conducted a brutal crackdown, killing nine and injuring thirty-one, according to official reports. But many others, including British Prime Minister Gordon Brown, indicated that they believed the numbers killed to be much higher.²⁰

B. Human Rights Abuses

Burma's record of on-going human rights abuses is among the worst in the world. Although a detailed catalog of abuses is beyond the scope of this paper, the following is a brief overview of the regime's treatment of its own people.

1. Political Repression

The SPDC has widely restricted the activities of opposition groups and has jailed or killed activists. NLD leaders Aung San Suu Kyi (winner of the 1991 Nobel Peace Prize) and U Tin Oo have been under house arrest for most of the past eighteen years, despite widespread international condemnation. The junta has forcibly closed all NLD offices except for the main office in Rangoon.²¹ Additionally, the SPDC has yet to permit

16. See Education Statistics: Public Spending Per Student: Primary Level by Country, http://www.nationmaster.com/graph/edu_pub_spe_per_stu_pri_lev-spending-per-student-primary-level (last visited Mar. 14, 2008) (reporting that Burma ranks 122nd of 126 countries in primary education expenditures); Education Statistics: Public Spending Per Student: Secondary Level by Country, http://www.nationmaster.com/graph/edu_pub_spe_per_stu_sec_lev-spending-per-student-secondary-level (last visited Mar. 14, 2008) (reporting that Burma ranks number 120 out of 123 countries in secondary education expenditures).

17. See BURMA CAMPAIGN UK, THE EUROPEAN UNION AND BURMA: THE CASE FOR TARGETED SANCTIONS 7 (2004), available at http://www.burmacampaign.org.uk/reports/EU_Sanctions_Report.pdf (reporting that only two to four percent of the junta's spending is on health care); WORLD HEALTH ORG., WORLD HEALTH REPORT 2000 154 (2000), available at http://www.who.int/whr/2000/en/whr00_en.pdf (reporting that Burma ranked 190th out of 191 countries in terms of overall health system attainment and performance).

18. See U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2006: COUNTRY FACT SHEET MYANMAR (2006), available at http://akgul.bilkent.edu.tr/hdr/hdr2006/statistics/countries/country_fact_sheets/cty_fs_MMR.html (reporting that Burma ranks 158th out of 172 countries in gross domestic product (GDP) per capita).

19. See Aye Aye Win, *Myanmar's Economic Decline Fuels Unrest*, USA TODAY, Sept. 29, 2007, http://www.usatoday.com/news/world/2007-09-29-1077302926_x.htm.

20. Edward Cody, *Junta Restricts Protestors, Communications in Burma*, WASH. POST, Sept. 29, 2007, at A1.

21. *Background Note, supra* note 6.

the 485-member elected legislative assembly to convene. "Prisoners of conscience" are plentiful: human rights organizations report that over 1,100 political prisoners remain in Burmese prisons today, among them elected members of Parliament.²² These prisoners face inhumane prison conditions and torture, including sexual abuse and electric shocks.²³ So-called "trials" violate international fair trial standards, and are "conducted according to laws which criminaliz[e] the peaceful exercise of human rights."²⁴

2. Destruction of Villages

The SPDC and its predecessors have implemented a policy of destruction of villages and forced relocation of civilians for many decades, primarily targeting ethnic minority groups.²⁵ This destruction serves several purposes: it operates as a counter-insurgency tactic; clears room for government development projects; and furthers the policy of "Burmanization" by destroying the culture of ethnic minorities.²⁶ Between 1996 and 2007, over 3,000 villages in eastern Burma were "destroyed, relocated[,] or abandoned."²⁷ Documenting a sampling of this destruction,

22. AMNESTY INT'L, AMNESTY INTERNATIONAL REPORT 2007 191 (2007) (reporting that "more than 1,185 political prisoners [were] held in deteriorating prison conditions"); HUMAN RIGHTS WATCH, WORLD REPORT 2007 248 (2007) (reporting that "[m]ore than 1,200 people are imprisoned for their political beliefs and activities"). The prison terms of some prisoners have already expired, yet they remain incarcerated. The Penal Code allows the government to extend a prisoner's sentence even after the prisoner has completed the original sentence, and authorities make regular use of this provision. U.S. Dep't of State, Bureau of Democracy, Human Rights and Labor, Country Reports on Human Rights Practices—2004: Burma (Feb. 28, 2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41637.htm> [hereinafter Dep't of State Report]. The government claims that it has released 19,906 prisoners since November 18, 2004, but estimates show that only 0.5 percent of those released were political prisoners. Most prisoners released were petty criminals whose sentences had only two or three more years to run. U.K. FOREIGN & COMMONWEALTH OFFICE, ANNUAL REPORT 2005 37 (2005).

23. See generally ASSISTANCE ASS'N FOR POL. PRISONERS (BURMA), THE DARKNESS WE SEE: TORTURE IN BURMA'S INTERROGATION CENTERS AND PRISONS (2005) (presenting a general overview of torture in Burmese prisons and thirty-five firsthand accounts from former prisoners).

24. AMNESTY INT'L, *supra* note 22, at 192.

25. See generally GUY HORTON, DYING ALIVE: A LEGAL ASSESSMENT OF HUMAN RIGHTS VIOLATIONS IN BURMA 236 (2005); MARTIN SMITH, BURMA: INSURGENCY AND THE POLITICS OF ETHNICITY 258–62 (1991).

26. See, e.g., HUMAN RIGHTS WATCH, "THEY CAME AND DESTROYED OUR VILLAGE AGAIN": THE PLIGHT OF INTERNALLY DISPLACED PERSONS IN KAREN STATE 17 (2005), available at <http://hrw.org/reports/2005/burma0605/burma0605.pdf> [hereinafter PLIGHT OF KAREN] (noting that the government's "strategy has had military and ethnic dimensions, . . . allow[ing] for the spread of state-sponsored 'Burmanization,' in which minority cultures, histories, and political aspirations would be eliminated in favor of a 'national' identity").

27. INTERNAL DISPLACEMENT MONITORING CENTRE, BURMA: A WORSENING CRISIS OF INTERNAL DISPLACEMENT 6 (2007).

the American Association for the Advancement of Science has “released satellite images showing charred villages, an increasing military presence, and swelling colonies of displaced people in rural regions of Burma . . .”²⁸

Forced relocation of civilians continues to the present day, and is often accompanied by massacres, systematic rape, forced labor, and wholesale destruction of buildings, crops, and land in accordance with “scorched earth” tactics.²⁹ The government ensures that villagers do not attempt to rebuild by declaring many areas “free-fire” or “brown” zones, meaning that anyone found within the zone will be executed.³⁰ As a result, since the 1960s, the military regime has created over one million internally displaced persons (IDPs).³¹ After being forced from their homes, IDPs are limited to only a few alternatives, including hiding in the jungles, living on the fringes of rural and urban communities, or living in zones of ongoing armed conflict.³²

3. Forced Labor

Forced labor is a pervasive problem in Burma. The military junta compels more than 800,000 Burmese to work as porters or laborers on government infrastructure projects for little or no pay.³³ Civilians are also forced to support counter-insurgency operations, primarily as porters.³⁴ Many of these “convict porters” are worked to death, or used as “human minesweepers.”³⁵ Laborers who do not properly carry out their tasks are often shot or beaten to death.³⁶ In response to these unprecedented labor

28. Colin Nickerson, *Satellite Images Show Burma's Plight*, BOSTON GLOBE, Sept. 29, 2007, at A3.

29. See HAVEL-TUTU REPORT, *supra* note 1, at 16–34.

30. THAILAND BURMA BORDER CONSORTIUM, INTERNAL DISPLACEMENT AND VULNERABILITY IN EASTERN BURMA 8 (2004).

31. PLIGHT OF KAREN, *supra* note 26, at 18.

32. *Id.* at 8.

33. *Burma Condemned Over Slave Labour*, BBC NEWS, June 15, 2000, <http://news.bbc.co.uk/1/hi/world/asia-pacific/791688.stm> (citing a trade union estimate); Marwaan Macan-Markar, *ILO Cracks the Whip at Yangon*, INTER PRESS SERVICE, Mar. 25, 2005 (citing an ILO estimate).

34. See, e.g., AMNESTY INT’L, *supra* note 22, at 192 (noting that “[p]risoners were reported to have increasingly been required to act as porters for the military . . .”); HUMAN RIGHTS WATCH, *supra* note 22, at 249 (reporting that during a large military offensive in Karen state, “[s]cores of civilians were killed and thousands taken as forced porters to support the operation. Prisoners were used as forced porters, and many of them were summarily executed during operations”).

35. KAREN HUMAN RIGHTS GROUP, LESS THAN HUMAN: CONVICT PORTERS IN THE 2005–2006 NORTHERN KAREN STATE OFFENSIVE I (2006).

36. See AMNESTY INT’L, *supra* note 22, at 192 (noting that “[a] number of prisoner porters attempting to escape were reportedly killed”); AMNESTY INT’L, AMNESTY’S CONCERNS AT THE 89TH INTERNATIONAL LABOR CONFERENCE (2001), available at <http://>

rights violations, in June 2000, the U.N. International Labor Organization (ILO), for the first time in its history, adopted a resolution under Article 33³⁷ of its constitution to compel the Government of Burma to comply with its obligations under the Forced Labor Convention (No. 29) of 1930.³⁸ Rather than institute reforms, the Burmese Government has instead given lengthy prison sentences to citizens who contact the ILO to report forced labor violations.³⁹ In June 2007, the ILO confirmed that the Burmese government had not yet implemented any of its recommendations, and expressed “profound concern” at the continued “widespread” imposition of forced labor in Burma.⁴⁰

4. Sexual Violence

The Burmese army is the primary perpetrator of sexual violence against women, particularly against women who are members of ethnic minorities.⁴¹ The U.N. Special Rapporteur on Human Rights in Myanmar has noted that “the rape and sexual abuse of women and girls by government forces has been ‘a regular feature in the mode of operation of the army in its campaign of incursions into the insurgency zones or elsewhere in the relocation sites.’”⁴² These rapes serve as “entertainment” for government forces, and “demoralize and weaken ethnic

web.amnesty.org/library/print/ENGIOR420042001 (recounting reports by civilians who witnessed the junta’s murder of laborers who were unable to adequately perform their duties).

37. Article 33 of the ILO Constitution authorizes the Governing Body of the ILO to “recommend . . . such action as it may deem wise and expedient to secure compliance” with recommendations of a Commission of Inquiry that has been established to investigate violations of a labor convention. Constitution, Declaration Concerning the Aims and Purposes of the International Labour Organization art. 33, May 10, 1944, 49 Stat. 2712, 15 U.N.T.S. 35.

38. Convention Concerning Forced or Compulsory Labor (No. 29), June 28, 1930, 39 U.N.T.S. 55 (entered into force May 1, 1932) (ratified by Burma on Mar. 4, 1955).

39. *Forced Labor in Burma: Time for Action*, ALTSEAN, Nov. 10, 2006, at 2 (reporting that one defendant who had contacted the ILO received a twenty-five-year prison sentence, while seven others received eight-year sentences).

40. Press Release, Int’l Labor Org., Conference Concludes With Adoption of New Standards on Fishing Sector, Approaches to Sustainable Development and Measures to Promote Decent Work (June 15, 2007), http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang--en/WCMS_083100/index.htm [hereinafter ILO Press Release].

41. See SHAN HUMAN RIGHTS FOUND. & SHAN WOMEN’S ACTION NETWORK, LICENSE TO RAPE: THE BURMESE MILITARY REGIME’S USE OF SEXUAL VIOLENCE IN THE ONGOING WAR IN SHAN STATE 9 (2002). For a comprehensive overview of reports on rape in Burma produced by domestic and international humanitarian organizations, see HORTON, *supra* note 25, at 322–98.

42. U.N. Econ. & Soc. Council [ECOSOC], *Integration of the Human Rights of Women and the Gender Perspective: Violence against Women*, U.N. Doc. E/CN.4/2001/73 (Jan. 23, 2001) (quoting ECOSOC, *Situation of Human Rights in Myanmar: Report of the Special Rapporteur, Mr. Rajsoomer Lallah, Submitted in Accordance with Commission on Human Rights Resolution 1999/17*, ¶ 50, U.N. Doc. E/CN.4/2000/38 (Jan. 24, 2000)).

nationality populations.”⁴³ Rapes of ethnic minority women are used strategically to “intimidate the local population, to extract information from female detainees, and to extract bribes.”⁴⁴ They also further “Burmanization,” a policy of ethnic cleansing according to human rights groups and democracy activists.⁴⁵ As a result of these atrocities, the U.N. General Assembly adopted a resolution in 2003 “express[ing] grave concern at . . . rapes and other forms of sexual violence carried out by members of the armed forces” in Burma and the “disproportionate suffering of ethnic minorities, women, and children from such violations.”⁴⁶

5. Child Soldiers

Burma has more child soldiers than any other country in the world.⁴⁷ In 2002, an estimated 70,000 of Burma’s 350,000 active-duty soldiers were children,⁴⁸ and this number has remained virtually unchanged.⁴⁹ The army often captures boys in public places, such as train and bus stations and markets.⁵⁰ Although eleven years appears to be the youngest age at which children are pressed into the army, children below this age are recruited and detained until they are of age.⁵¹ Following a torturous training period in the Su Saun Yay recruit holding camps, where boys frequently die from illness and beatings,⁵² the child soldiers are forced to

43. REFUGEES INT’L, NO SAFE PLACE: BURMA’S ARMY AND THE RAPE OF ETHNIC WOMEN 45 (2003).

44. See ECOSOC, *supra* note 42.

45. See, e.g., Dennis Bernstein & Leslie Kean, *Burmese Military’s Dirty Mission? Rape Allegedly a New Weapon in Government’s Anti-Ethnic Arsenal*, BOSTON GLOBE, July 12, 1998, at D2.

46. G.A. Res. 57/231, U.N. Doc. A/Res/57/231 (Feb. 28, 2003).

47. Press Release, Human Rights Watch, Demobilize Child Soldiers (June 4, 2004), available at http://hrw.org/english/docs/2004/06/04/burma8734_txt.htm [hereinafter Demobilize Child Soldiers].

48. HUMAN RIGHTS WATCH, MY GUN WAS AS TALL AS ME 3 (2002) [hereinafter MY GUN WAS AS TALL AS ME].

49. Press Release, Human Rights Watch, Burma: Use of Child Soldiers Continues Unabated (Sept. 12, 2004), available at <http://hrw.org/english/docs/2006/09/12/burma14179.htm> (noting that a new report “found that child recruitment rates remain essentially unchanged compared to four years ago”).

50. MY GUN WAS AS TALL AS ME, *supra* note 48, at 3–4 (reporting that recruiters “stalk the railway, bus and ferry stations, the streets, marketplaces and festivals,” and are rewarded with money and bags of rice for each soldier they enlist). Police seeking to recruit child soldiers often stop children to check their identification cards, even though identification cards are not given to children. When the children are unable to produce identification cards, they are taken to the police station and given the choice of enlisting in the army or spending several years in prison. *Id.* at 3.

51. See *id.* at 4 (relaying the story of a boy who was kidnapped at ten and forced to work as a servant for three years before becoming a soldier).

52. See *id.* at 2, 5 (noting that during training, the children are “subject to beatings and systematic humiliation,” and that those attempting to escape are beaten and placed in crowded holding cells).

carry out human rights abuses and engage in battles against armed ethnic opposition groups.⁵³ The children are isolated from their families and “brutalized by their commanders,” who “beat them for little or no reason” and “steal their pay and their rations.”⁵⁴ As a result, some child soldiers see suicide as their only option.⁵⁵ Burma’s continued use of child soldiers not only contravenes U.N. Security Council Resolutions 1460 and 1612, but also violates Burma’s obligations as a signatory to the Convention on the Rights of the Child.⁵⁶

III. INTERNATIONAL RESPONSES TO BURMA’S HUMAN RIGHTS ABUSES

The international response to the junta’s political repression and human rights abuses has varied widely, from active trade (China) to limited sanctions (European Union) to an import and investment ban (United States). In this Part, we will briefly discuss the sanction regimes of the European Union and the United States, and then outline the European Union’s concern that tightening sanctions might violate WTO commitments.

At the outset, it is particularly important to note that Burma’s National League for Democracy which, along with its allies, won more than eighty percent of the seats in Burma’s Parliament in its 1990 elections, has long been a supporter of sanctions.⁵⁷

A. *The European Union Common Position*

The European Union has formally maintained limited sanctions against Burma since 1996, citing as justification the junta’s “absence of progress towards democratization” and “the continuing violation of hu-

53. See HUMAN RIGHTS EDUC. INST. OF BURMA, *DESPITE PROMISES: CHILD SOLDIERS IN BURMA’S SPDC ARMED FORCES 7* (2006) (noting that the children are “forced to perpetrate violence and commit human rights violations,” including “destroying villages suspected of supporting ethnic insurgent movements” and “extrajudicial killings”); *Demobilize Child Soldiers*, *supra* note 47 (reporting that child soldiers often are required to “roun[d] up villagers for forced labor, bur[n] villages, and carr[y] out executions”).

54. MY GUN WAS AS TALL AS ME, *supra* note 48, at 6.

55. See HUMAN RIGHTS EDUC. INST. OF BURMA, *supra* note 53, at 7; MY GUN WAS AS TALL AS ME, *supra* note 48, at 6.

56. See Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (noting that Burma acceded to the Convention on the Rights of the Child on July 15, 1991).

57. The NLD has long supported trade sanctions on Burma. The reason for this policy is best understood by the statement made by Aung San Suu Kyi: “Until we have a system that guarantees rule of law and basic democratic institutions, no amount of aid or investment will benefit our people. Profits from business enterprises will merely go toward enriching a small, already privileged elite.” *Take Your Investments Elsewhere, Please*, BUS. WEEK, Mar. 30, 1998, at 52.

man rights.”⁵⁸ The current sanctions regime includes six major components: (1) an arms embargo; (2) the expulsion of military attachés; (3) a visa ban on senior SPDC officials and associates; (4) a ban on non-humanitarian aid; (5) an assets freeze on the funds of senior SPDC officials and associates; and (6) a limited investment ban.⁵⁹ The European Union also suspended Burma’s Generalized System of Preferences (GSP) benefits in 1997 over the regime’s use of forced labor.

Despite several seemingly-restrictive components, the effect of the E.U. sanctions regime prior to the November 2007 Common Position was minimal. First, some elements proved largely symbolic: despite the expulsion of attachés, the European Union continues to host a full Ambassador to Burma.⁶⁰ Similarly, the E.U. arms embargo served little purpose, as the regime was well-supplied with weapons and military equipment from trading partners China, Russia, and India.⁶¹ Further, many of the sanctions measures were riddled with exceptions. The visa ban, for instance, contains exceptions for intergovernmental meetings and international conferences, thus merely serving to prevent junta officials from vacationing in the European Union, which they were not doing in any case.⁶² Similarly, the ban on non-humanitarian aid exempts projects that are “in support of human rights” programs involving health, education, or environmental protection, and projects that “buil[d] the capacity of civil society.”⁶³ While this made sense, there was minimal aid from the European Union that previously was outside of these categories. In addition, the investment ban applied only to certain state-run

58. The European Union first formally adopted sanctions against Burma in Council Position 96/365/CFSP, which implemented a visa ban and suspended diplomatic visits to Burma. Council Common Position (EC) No. 96/365/CFSP of 28 October 1996, 1996 O.J. (L 287) 1. The 1996 CFSP also “reaffirmed” an arms embargo, suspension of non-humanitarian aid, and the withdrawal of military attachés; it is likely that these measures had been previously implemented through an informal agreement among Member States. Stockholm Int’l Peace Res. Inst., *The EU Arms Embargo and Trade Restrictions on Burma (Myanmar)* (2005), available at http://www.sipri.org/contents/expcon/eu_burma.html. The CFSP is renewed and revised every six months. Major updates were made in 2000 (assets freeze) and 2004 (limited investment ban). For a complete timeline of developments, see Peter G. Peterson Inst. for Int’l Economics, *Case Studies in Sanctions and Terrorism: Burma (Myanmar)* (2007), available at <http://www.iie.com/research/topics/sanctions/myanmar.cfm>. The current E.U. sanctions legislation is Council Position 2006/318/CFSP. Common Position No. 2007/750/CFSP, *supra* note 3.

59. Commission Regulation 481/2007, 2007 O.J. (L 111) 50, 50.

60. ALTSEAN, SPECIAL REPORT: READY, AIM, SANCTION! 40 (2003), available at <http://www.altsean.org/Docs/PDF%20Format/Special%20Reports/Ready%20Aim%20Sanction.pdf>.

61. See *Myanmar: Dirty Dealings*, ECONOMIST, May 26, 2007, at 7 (discussing Chinese and Russian arms sales to the junta and investments in Burmese state-run oil and gas ventures).

62. See Commission Regulation 481/2007, *supra* note 59.

63. *Id.*

enterprises listed in an attached annex. These enterprises included a brewery, a pineapple juice company, several steel companies, and a number of mines and mills,⁶⁴ but noticeably omitted several of the largest state-run companies, including Myanmar Oil and Gas Enterprise (MOGE), Myanmar Timber Enterprise (MTE), and Myanmar Post and Telecommunications (MPT).⁶⁵ E.U. companies thus remained free to fund these key enterprises: France's Total Oil alone provided the junta with an estimated \$450 million per year through investments in MOGE.⁶⁶ Finally, some aspects of the sanctions regime were hampered by the junta's lack of European connections. The assets freeze, for instance, only affected the European holdings of junta officials,⁶⁷ which are minimal.⁶⁸

The November 2007 Common Position largely corrects these shortcomings. With respect to trade measures, the focus of this Article, the ban in the new Common Position on imports of textiles, timber, gems, and precious metals would have a real impact on the Burmese junta by costing it at least €288 million (\$410 million) per year on the imports alone.⁶⁹

B. *Position of the United States*

The United States maintains the most comprehensive trade sanctions against Burma.⁷⁰ Sanctions were first implemented after the July 8, 1988, massacre, which led the United States to impose an arms embargo and

64. *Id.* annex II.

65. *EU Sanctions on Burma: No Sanctions at All: An Analysis of the New EU Common Position*, BURMA CAMPAIGN UK, Dec. 13, 2004, available at <http://www.burmacampaign.org.uk/cpanalysis.html>.

66. BURMA CAMPAIGN UK, *TOTALITARIAN OIL 7* (2005), available at <http://www.burmacampaign.org.uk/PDFs/total%20report.pdf>.

67. Notably, the assets freeze does *not* apply to the European assets of Burma's state-run enterprises, which may be more substantial. See BURMA CAMPAIGN UK, *supra* note 17, at 15.

68. In 2006, for example, the U.K. Secretary of State for Foreign and Commonwealth Affairs acknowledged that "those on the assets freeze list are unlikely to hold bank accounts in the [United Kingdom] or the [European Union]," and reported that the United Kingdom had frozen only £3,576.65 in junta assets. 451 PARL. DEB., H.C. (6th ser.) (2006) 465W, available at <http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm061101/text/61101w0012.htm>.

69. See Kinnock Response, *supra* note 2.

70. Behind the United States and the European Union, Canada maintains the most comprehensive sanctions regime. Canada has suspended diplomatic relations with Burma, bans most bilateral and multilateral aid, limits exports to humanitarian goods, and has eliminated applicable trade preferences. See For. Aff. & Int'l Trade Canada, *Country Overview-Burma (Myanmar)* (June 2003), <http://www.infoexport.gc.ca/ie-en/DisplayDocument.jsp?did=1272>.

ban all non-humanitarian aid.⁷¹ The United States also began to use its influence in international organizations to block multilateral funding and loans to Burma, and in 1994, “threatened to reduce . . . funding to any United Nations agencies found to be conducting programs in Burma.”⁷² In 1997, the U.S. sanctions were supplemented by Executive Order 13,047, which prohibited all new investment in Burma by U.S. persons or entities.⁷³ The final components of the U.S. sanctions regime were put into place in 2003, after an attack by junta forces on a convoy transporting Aung San Suu Kyi. In response to this attack, Congress passed the Burmese Freedom and Democracy Act (BFDA). This legislation implemented a number of new sanctions measures, including a ban on all Burmese imports, an assets freeze of SPDC officials, a visa ban on SPDC officials, and a ban on exporting financial services to Burma.⁷⁴ Later in 2003, the Treasury Department blacklisted two major Burmese banks because of ties to drug traffickers, a move that barred the banks from doing any business with U.S. financial institutions.⁷⁵ Since then, the State Department has found “no measurable progress toward political liberalization” in Burma, and the sanctions have been consistently renewed and tightened further, most recently in July 2008.⁷⁶ As of 2003, U.S. banks had frozen over \$320,000 in Burmese assets, and as of 2004, the Treasury Department had blocked \$13.3 million worth of financial transactions with Burmese entities.⁷⁷

The U.S. sanctions have unquestionably had “the most severe and damaging impact” on the junta.⁷⁸ In the year before the BFDA was passed, Burma exported \$356 million in goods to the United States—approximately 15 percent of total exports.⁷⁹ The BFDA not only halted this trade, but directly deprived the junta of revenue from its ten percent export tax.⁸⁰ Further, the U.S. ban on aid halted United States Agency for

71. Ardeth Maung Thawngmung & Paul Sarno, *Myanmar Impasses: Alternatives to Isolation and Engagement?*, 14 *ASIAN J. POL. SCI.* 40, 43–44 (2006).

72. *Id.* at 44.

73. U.S. Dep’t of State, 2005 Investment Climate Statement—Burma (2005), <http://www.state.gov/e/eeb/ifd/2005/41990.htm>.

74. U.S. TREASURY DEP’T, WHAT YOU NEED TO KNOW ABOUT US SANCTIONS AGAINST BURMA (MYANMAR) I (2005), available at <http://www.treas.gov/offices/enforcement/ofac/programs/burma/burma.pdf>.

75. See William Barnes, *Burma Put on Dirty Money Blacklist by US*, *FIN. TIMES*, Nov. 21, 2003, at 4.

76. See *Bush Tightens Sanctions on Myanmar Junta, Targets Gem Trade*, *BLOOMBERG*, July 30, 2008, <http://www.bloomberg.com/apps/news?pid=20601080&sid=azNisu9OXDvo&refer=asia>.

77. U.S. Dep’t of State, 2005 Report on US Trade Sanctions Against Burma (Apr. 28, 2004), <http://www.state.gov/p/eap/rls/rpt/32106.htm>.

78. Thawngmung & Sarno, *supra* note 71, at 47.

79. ALTSEAN, *supra* note 60, at 25–26.

80. *Id.* at 25.

International Development (USAID) funding that had averaged \$10.3 million per year.⁸¹ Even more significantly, U.S. influence in the International Monetary Fund (IMF), World Bank, and other international organizations has reduced multilateral aid to Burma by an estimated \$111 million per year.⁸²

In the wake of the September 2007 crackdown on mass demonstrations, fourteen senior regime officials were added to the Department of the Treasury's Specially-Designated Nationals (SDN) list, including Senior General Than Shwe.⁸³

C. Sanctions Compatibility with the WTO

Although the U.S. ban on Burmese imports has been in place since 2003 (and more limited sanctions for years prior), the military junta has never brought a challenge before the WTO.⁸⁴ This is not surprising: the junta has been under significant international pressure to restore democracy and end its human rights abuses and a challenge before the WTO Dispute Settlement Body would invite a detailed examination of the junta's actions in dispute settlement proceedings.

Perhaps more significantly, a comprehensive review of U.S. trade policies pursuant to the World Trade Organization Trade Policy Review Mechanism (TPRM), undertaken after the U.S. Burma import ban had come into force, does not cite the ban as an issue for U.S. compliance with WTO rules; indeed the U.S. TPR only mentions the ban in passing.⁸⁵

Nevertheless, some E.U. officials had privately cited the WTO as justification for opposing the amendment of the earlier E.U. Common Position, arguing that additional trade restrictions would violate WTO obligations. Back in 1998, the European Union brought a WTO challenge against the United States regarding Massachusetts' selective-purchasing law that would have prevented public monies in the state

81. *Id.* at 35–36.

82. Thawngmung & Sarno, *supra* note 71, at 47.

83. See Office of Foreign Assets Control, U.S. Dep't of the Treasury, Recent OFAC Actions, Sept. 27, 2007, available at <http://www.ustreas.gov/offices/enforcement/ofac/actions/20070927.shtml>.

84. The junta has, however, publicly criticized the U.S. position. See, e.g., *Myanmar Slams US Sanctions*, CNN.COM, July 29, 2003, <http://www.cnn.com/2003/WORLD/asiapcf/southeast/07/29/myanmar.suukyi/index.html> (reporting that Burma's Foreign Minister Win Aung "lashed out" against the newly-passed BFDA, telling reporters that "[s]anctions are one-sided, unilateral actions taken by some without any regard for the people").

85. See Trade Policy Review Body, World Trade Org. Secretariat, *Trade Policy Review of the United States of America*, ¶ 114, WT/TPR/S/160/Rev. 1 (June 20, 2006) ("The United States bans imports from certain countries for foreign policy purposes. Most imports from . . . Myanmar [and other countries listed] . . . are subject to bans or approval requirements.").

from indirectly benefiting the military junta in Burma.⁸⁶ Although the law was struck down in U.S. courts solely on domestic constitutional grounds before the WTO case was heard, that challenge is evidence of an aggressive approach that the European Union had taken previously on Burma sanctions.

In the next Parts, we argue that the enhanced E.U. trade sanctions against Burma are fully compatible with WTO law.

IV. OVERVIEW OF WTO LAW

The WTO was established on January 1, 1995, at the conclusion of the Uruguay Round negotiations on the GATT. Due to disputes regarding the European Union's competency to ratify such a comprehensive agreement, the European Union⁸⁷ and each constituent Member State are Contracting Parties to the WTO.⁸⁸ The WTO was established to serve as a forum for continuing trade liberalization and to oversee the various agreements governing free trade among the Contracting Parties.⁸⁹ The WTO further serves as the common institutional framework for administering trade relations among its members in matters annexed⁹⁰ to the WTO charter.⁹¹ Furthermore, the WTO creates a unified dispute settlement system⁹² that has exclusive and (in effect) compulsory

86. The Massachusetts law prevented state agencies from contracting with companies doing business in Burma. MASS. GEN. LAWS ANN. ch. 7, §§ 22G–M (West 2008). The European Union argued that this provision violated the WTO Government Procurement Agreement, but agreed to suspend the WTO case while the law was challenged in U.S. courts. The Supreme Court overturned the law based on federal supremacy over foreign affairs, moot-ing the WTO dispute. See generally Robert Strumberg & Matthew C. Porterfield, *Who Preempted the Massachusetts Burma Law? Federalism and Political Accountability Under Global Trade Rules*, 31 PUBLIUS: J. FEDERALISM, Summer 2001, at 173.

87. While technically it is the European Community, rather than the European Union, that is a party to the WTO and negotiates on behalf of the E.U. Member States, we will refer to the European Union for simplicity.

88. See Meinhard Hilf, *The ECJ's Opinion 1/94 on the WTO-No Surprise, but Wise?*, 6 EUR. J. INT'L L. 1, 3 (1995).

89. See JOHN H. JACKSON, *The World Trade Organization: Watershed Innovation or Cautious Small Step Forward?*, in THE JURISPRUDENCE OF GATT & THE WTO 399 (2000).

90. This includes, among other agreements, the original and amended GATT. GATT 1947, *supra* note 5; General Agreement on Tariffs and Trade of 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 1867 U.N.T.S. 190, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].

91. See Marrakesh Agreement Establishing the World Trade Organization art. II(1), Apr. 15, 1994, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter Marrakesh Agreement].

92. See Understanding on Rules and Procedures Governing the Settlement of Disputes art. II(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization,

jurisdiction to hear disputes arising under each of the WTO Agreements. As a general proposition, economic sanctions could potentially be inconsistent with several provisions of the GATT, including Article I (Most Favored Nation Status), Article XI (General Elimination of Quantitative Restrictions), and Article III(4) (National Treatment).

A. Most Favored Nation Status (Article I)

Within the WTO, Most Favored Nation (MFN) treatment applies to all duties, charges, advantages, favors, privileges, and immunities imposed on, or granted to, any other WTO Member.⁹³ MFN treatment means that a WTO Member cannot improve the benefits that it accords any other Member unless it equally improves benefits to *all* Members.⁹⁴ Accordingly, Members must treat goods “originating” in one Member State no less favorably than goods “originating” in other Member States. Under the Agreement on the Rules of Origin, goods are deemed to “originate” either in the Member State territory in which they were wholly produced *or* in the territory in which they underwent their most recent “substantial transformation.”⁹⁵ Thus, MFN status attaches even to Member goods that incorporate “substantially transformed” materials from a sanctioned, non-Member country.

Article I, then, prevents Member States from imposing trade sanctions on other WTO Members to the extent that this entails less favorable treatment of “like products” from the sanctioned State. Without a valid exception,⁹⁶ MFN principles prevent Members from reducing benefits to one Member (in this case, restricting imports and/or exports) without similarly reducing benefits to all other Members. Additionally, Article I would prevent Members from imposing economic sanctions on WTO Members who incorporate “substantially transformed” materials from a sanctioned, non-WTO Member country into their exported goods (for example, using Cuban cotton in clothing). Under the WTO Rules of Origin, these goods would be deemed to have originated in the territory of the WTO Member State, and *not* the territory of the non-Member country. Accordingly, the principle of MFN would prevent the Member from

Annex 2, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994); Marrakesh Agreement, *supra* note 91, art. II(1).

93. See GATT 1947, *supra* note 5, art. I(1).

94. See *id.*

95. See Agreement on Rules of Origin art. III(b), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IA, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 22347 (1999), 1868 U.N.T.S. 397 (1994) [hereinafter WTO Rules of Origin].

96. See *infra* Part VI.

restricting trade without similarly disadvantaging all other WTO Members.

B. *General Elimination of Quantitative Restrictions (Article XI)*

In addition to the MFN principle, the GATT includes specific provisions to eliminate non-tariff barriers to trade and to promote greater market access. Article XI of the GATT prohibits WTO members from imposing import or export restrictions on goods originating from, or destined to a Member State's territory.⁹⁷ Restrictions such as quotas, import or export licenses, and other measures that have the effect of creating a non-tariff restriction are specifically prohibited.⁹⁸ Article XI's only exceptions are for preventing crucial shortages of essential goods, grading or classifying commodities, or enforcing certain governmental measures relating to agriculture or fishing.⁹⁹

Article XI of the GATT prevents a WTO Member from imposing trade sanctions that would limit exports to another Member State, or sanctions that would restrict the importation of goods originating from another Member State.¹⁰⁰ For example, Article XI would prohibit the United States from imposing licensing requirements on the importation of Canadian food products that incorporate Cuban sugar or, alternatively, from imposing import restrictions on the goods of any Member State that trades with Cuba.¹⁰¹

C. *Principle of National Treatment (Article III)*

Finally, Article III(4)'s "national treatment" standard might prohibit trade sanctions depending on how such sanctions were devised and implemented. Under the national treatment principle, a Member is permitted to impose regulatory requirements on imported goods, provided that these goods are treated no less favorably than like domestic goods.¹⁰² For example, if the European Union were to introduce rules requiring that all manufactured goods comply with certain labor standards, these measures would have to comply with Article III(4) and be implemented in a non-discriminatory fashion. It is an open question whether goods would be considered "unlike" by virtue of the labor standards that

97. See GATT 1947, *supra* note 5, art. XI(1).

98. See *id.*

99. See *id.* art. XI(2).

100. See *id.* art. XI.

101. Note that these measures might still be justified by one of the GATT's exceptions. See *supra* Part VI. For a history of the E.U. challenge to the Helms-Burton Act, see generally Harry L. Clark, *Dealing with Extraterritorial Sanctions and Foreign Countermeasures*, 20 U. PA. J. INT'L ECON. L. 61, 91-96 (1999).

102. See GATT 1947, *supra* note 5, art. III(4).

are applied in the context of their production (the so-called product/process controversy), but there is no textual basis in Article III(4) to exclude differences that relate to production methods, especially where those differences matter from the perspective of the values of consumers in the importing country.¹⁰³ However, Article III(4) only applies when the measure in question is a “single measure” aimed at domestic and imported products, even if applied to imports differently, *i.e.*, at the border.¹⁰⁴

V. ANALYSIS OF ARTICLE XX EXCEPTIONS TO THE GATT

On a *prima facie* basis then, Articles I, III, and XI of the GATT potentially restrict WTO Member States from imposing trade sanctions against other WTO Members. These articles, however, cannot be read alone. In fact, the GATT contains broad exceptions and definitional limitations that effectively permit policy-makers to avoid WTO obligations without facing recourse from the WTO Dispute Settlement Body.¹⁰⁵ Specifically, a Member can justify restrictive measures under the Article XX General Exceptions.

The Article XX exceptions provide that a Member may impose otherwise GATT-illegal measures under two distinct conditions. First, the measure must fall into one of ten categories, including:

- (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 operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade

103. For an argument that Article III(4) of the GATT permits a wide range of human rights related measures, including conditioning the sale of any product, domestic or imported, on production methods consistent with respect for labor rights, see Robert Howse, Brian Langille & Julien Burda, *The World Trade Organization and Labour Rights: Man Bites Dog*, in *SOCIAL ISSUES, GLOBALISATION AND INTERNATIONAL INSTITUTIONS: LABOUR RIGHTS AND THE EU, ILO, OECD, AND WTO*, 157, 157–231 (VIRGINIA A. LEARY & DANIEL WARNER eds., 2006).

104. See Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R (Sept. 18, 2000).

105. See GATT 1947, *supra* note 5, art. XX.

marks and copyrights, and the prevention of deceptive practices.¹⁰⁶

Second, a trade-restrictive measure must comply with Article XX's *chapeau*: it cannot be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail," and it cannot be "a disguised restriction on international trade."¹⁰⁷

During the GATT era, the *United States—Tuna/Dolphin* rulings, never adopted by the GATT Membership as binding on the parties to the dispute, established the notion that Article XX of the GATT could not be used to justify trade measures targeted at the *policies* of exporting countries.¹⁰⁸ In *United States—Import Prohibition of Certain Shrimp and Shrimp Products (United States—Shrimp/Turtle)*, however, the Appellate Body of the WTO held exactly the reverse, stating:

It appears to us, however, that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as *exceptions to substantive obligations* established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutility, a result abhorrent to the principles of interpretation we are bound to apply.¹⁰⁹

In this Part, we argue that the enhanced sanctions in the November 2007 Common Position can be justified through the Article XX(a) exception, "necessary to protect public morals." As previously discussed,

106. *Id.*

107. *Id.* (preamble paragraph).

108. Report of the Panel, *United States—Restrictions on Imports of Tuna*, DS21/R-39S/155 (Sept. 3, 1991), GATT B.I.S.D. (39th Supp.) at 155 (1993) (*Tuna/Dolphin I*); Report of the Panel, *United States—Restrictions on Imports of Tuna*, DS29/R (June 16, 1994), 33 I.L.M. 839 (1994) (not adopted) (*Tuna/Dolphin II*).

109. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DSF8/AB/R (Oct. 12, 1998) [hereinafter *United States—Shrimp/Turtle*].

Article XX exceptions require a two-tiered analysis: first, the measure must fit within one of the prescribed categories, and, second, the measure must adhere to the requirements of the *chapeau*.¹¹⁰ According to the procedure established in *United States—Standards for Reformulated and Conventional Gasoline*,¹¹¹ we will first address the category, and then discuss the *chapeau*.

A. “Necessary to Protect Public Morals”—Article XX(a)

In *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services (United States—Gambling)*, the WTO dispute settlement organs addressed the concept of public morals for the first and only time, in the course of interpreting an exception in the General Agreement on Trade in Services (GATS) that has broadly similar, though not identical, wording to that in GATT XX(a).¹¹² The Dispute Settlement Panel and the Appellate Body identified two separate components for analysis: the definition of “public morals” and the definition of “necessary.” We will consider each in turn.

1. “Public Morals”

In *United States—Gambling*, the dispute settlement organs had to decide whether the U.S. prohibition on Internet gambling was a measure “necessary to protect public morals.” In its approach to the interpretation of this language, the WTO Panel displayed considerable deference to the value choices of the WTO Member defending its measures, in this case the United States. “The content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values.”¹¹³ Analogizing to past Appellate Body decisions concerning similar provisions, the Panel concluded that “Members should be given some scope to define and apply

110. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 22, WT/DS2/AB/R (Apr. 29, 1996).

111. *Id.*; see also *United States—Shrimp/Turtle*, *supra* note 109, ¶¶ 118–19 (confirming that the *chapeau* should be considered second).

112. Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 296–99, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter *United States—Gambling* Appellate Body Report]. Although this case concerned the Article XIV exceptions to the General Agreement on Trade in Services (GATS), the Appellate Body noted that the exceptions were set out “in the same manner” as in Article XX of the GATT, and thus analogized the two sections. *Id.* ¶ 291.

113. Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.461, WT/DS285/R (Nov. 10, 2004) [hereinafter *United States—Gambling* Panel Report].

for themselves the concepts of ‘public morals’ . . . in their respective territories, according to their own systems and scales of values.”¹¹⁴

This flexibility notwithstanding, the Panel determined that “we must nonetheless give meaning to these terms in order to apply them to the facts of in [sic] this case.”¹¹⁵ Considering the definitions of “public” and “morals” from the *Shorter Oxford English Dictionary*, the Panel at length concluded that “‘public morals’ denotes standards of right and wrong conduct maintained by or on behalf of a community or nation.”¹¹⁶ Although this portion of the Panel’s decision was not appealed, the Appellate Body quoted this definition in its final decision, indicating some support for this reasoning.¹¹⁷

Finally, to add context to this definition, the Panel looked at past precedent by other WTO Members, as well as similar language in other international agreements. The Panel first noted that several other WTO Members had used the public morals exception to justify gambling-related restrictions.¹¹⁸ Next, the Panel examined the use of “moral” in a League of Nations draft convention, noting that this exception was thought to include lottery tickets.¹¹⁹ The Panel also discussed past decisions of the European Court of Justice, which had allowed E.U. Member States to restrict gambling-related activities despite E.U. free trade rules.¹²⁰ Applying all the above considerations to the *United States—Gambling* case, the Panel determined that gambling-related restrictions fell under the “moral” exception so long as they were enforced “in pursuance of policies, the object and purpose of which is to ‘protect public morals.’”¹²¹

Applying the *United States—Gambling* Panel’s reasoning, there is ample support for the inclusion of human rights standards in the definition of “public morals.” First, the Panel’s overall approach demonstrates that the WTO does not intend to “second-guess” a Member’s assessment of its own public moral standards. The Panel noted that these standards will “vary in time and space,” and that “Members should be given some scope to define and apply [them] for themselves.”¹²² This is not to say that the Appellate Body would countenance *any* definition—the WTO would undoubtedly reject a trade embargo with a purely specious justification unrelated to shared public values as reflected in law, regulation,

114. *Id.*

115. *Id.* ¶ 6.462.

116. *Id.* ¶ 6.465.

117. *United States—Gambling* Appellate Body Report, *supra* note 112, ¶ 296.

118. *United States—Gambling* Panel Report, *supra* note 113, ¶ 6.471.

119. *Id.* ¶ 6.472.

120. *Id.* at 369 n.914.

121. *Id.* ¶ 6.474.

122. *Id.* ¶ 6.461.

and policy. Human rights abuses (such as Burma's political repression, destruction of villages, forced labor, sexual violence, and the use of child soldiers) are repugnant to public values widely embodied in laws, regulations, and policies, and indeed judicial decisions at the highest level. In fact, trading with a country that engages in these practices invokes two different kinds of moral concerns. As a general matter, any formal association with an abusive foreign government can violate a Member's public morals: this is the underlying rationale behind many government decisions to sever diplomatic relations with abusive regimes. Additionally, the act of trading with an abusive regime raises the more specific concern of complicity: exchanging money for goods that are produced even indirectly with the support of forced labor perpetuates this practice. For these reasons, it is likely that the Dispute Settlement Body would give deference to a Member's declaration that a trade embargo is necessary to protect public morals.

Considering the *United States—Gambling* Panel's dictionary definition lends further support to this argument. Human rights standards are clearly "standards of right and wrong conduct maintained by or on behalf of" Member States, as most Members maintain statutory and customary bans on human rights abuses. For example, all E.U. Members are signatories to the European Convention on Human Rights.¹²³ This legally binding instrument specifically rejects political repression,¹²⁴ the destruction of land and property,¹²⁵ and forced labor,¹²⁶ three of the largest categories of abuses perpetrated by the Burmese junta.¹²⁷ Similarly, all E.U. Member States are signatories to the Convention of the Rights of the Child, which forbids the use of child soldiers.¹²⁸ Thus, human rights abuses are clearly "public morals" under the Panel's definition.

Finally, reference to other international treaties and practices (as made by the *United States—Gambling* Panel) buttresses the conclusion that "public morals" include human rights standards. As previously noted, Article XX has little legislative history, largely because the exceptions were seen as mirroring the terms of past international trade agreements. Many of these trade agreements included moral excep-

123. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222 [hereinafter ECHR].

124. *Id.* art. 9 ("[f]reedom of thought, conscience and religion"); *id.* art. 10 ("[f]reedom of expression"); *id.* art. 11 ("[f]reedom of assembly and association").

125. Protocol No. 11 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, May 11, 1994, E.T.S. No. 155 (entered into force Nov. 1, 1998).

126. ECHR, *supra* note 123, art. 4.

127. *See supra* Part II.

128. Convention on the Rights of the Child, *supra* note 56, at 7.

tions,¹²⁹ and included in this category were such varied items as “opium, pornography, liquor, slaves, firearms, blasphemous articles, products linked to animal cruelty, prize fight films, and abortion-inducing drugs.”¹³⁰ However, to the extent that the legislative history (*travaux préparatoires*, to use the precise term in international law) are relevant to confirming the interpretation argued above,¹³¹ there is evidence that these exceptions encompassed far more than obscene and controversial items. For example, in 1927, twenty-nine countries (including Great Britain, Belgium, France, Italy, Germany, the Netherlands, Poland, and the United States) signed the Multilateral Abolition of Import and Export Prohibitions and Restrictions.¹³² Similar to the GATT, this treaty allowed trade-restrictive measures only under certain circumstances. First, the measures could “[not be] applied in such a manner as to constitute a means of arbitrary discrimination between two foreign countries where the same conditions prevail, or a disguised restriction on international trade” (language nearly identical to the Article XX *chapeau*).¹³³ Second, the measures had to fall into one of several categories, including:

...

2. Prohibitions or restrictions imposed on *moral or humanitarian* grounds.

...

3. Prohibitions or restrictions imposed for the protection of public health or for the protection of animals or plants against disease, insects, and harmful parasites.¹³⁴

When this treaty reached the U.S. Senate for ratification, two Senators engaged in a floor debate as to whether or not “moral or humanitarian grounds” included goods produced in violation of labor standards.¹³⁵ As a result, the final resolution ratifying the treaty included language

129. For a more thorough discussion of moral exceptions in pre-GATT trade agreements, see Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689, 698–701 (1998).

130. *Id.* at 717.

131. Article 32 of the Vienna Convention on the Law of Treaties permits recourse to the *travaux préparatoires* in order to confirm an interpretation based on, *inter alia*, the language of the text and the purpose, object, and context of that wording, or to address textual ambiguity. Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

132. International Convention on the Abolition of Import and Export Prohibitions and Restrictions, Nov. 8, 1927, 46 Stat. 2461, 97 L.N.T.S. 393 (not in force).

133. *Id.* art. 4.

134. *Id.* (emphasis added).

135. Charnovitz, *supra* note 129, at 707–08.

expressing the Senate's understanding that the "moral exception" would "permit parties to ban imports made by 'forced or slave labor however employed.'"¹³⁶ Accordingly, there is historical support for the inclusion of "forced labor," at the very least, in the definition of "public morals."

2. "Necessary"

A trade-restrictive measure must not only protect public morals, but it must be "necessary" to do so. In *United States—Gambling*, the Appellate Body found that "necessary" was an objective standard necessitating a three-pronged test.¹³⁷ First, a panel must assess the "relative importance of the interests or values furthered by the challenged measure."¹³⁸ Next, a panel must "weig[h] and balance[e]" other factors, particularly the "contribution of the measure to the realization of the ends pursued by it" and "the restrictive impact of the measure on international commerce."¹³⁹ Finally, a panel must compare the measure with possible alternatives, "and the results of such comparison should be considered in the light of the importance of the interests at issue."¹⁴⁰

Under the *United States—Gambling* analysis, trade sanctions due to human rights abuses would likely be deemed "necessary." First, human rights are undoubtedly an "important" interest. In *United States—Gambling*, the Appellate Body appears to have accepted largely without question that the United States' concerns regarding "money laundering, fraud, compulsive gambling, and underage gambling" constituted "important" interests that could justify the gambling prohibition.¹⁴¹ We would therefore expect that human rights concerns such as the use of forced labor and child soldiers would be accorded even greater weight—especially in light of the large number of domestic and international measures attempting to eradicate these abuses. Thus, the first prong of the *United States—Gambling* test should be satisfied easily.

Second, the trade sanctions would need to be weighed based on the "contribution of the measure to the realization of the ends pursued by it" and the "restrictive impact . . . on international commerce."¹⁴² In *United States—Gambling*, the Appellate Body determined that the U.S. prohibition on gambling was "linked" to a number of identified interests, including the abovementioned money laundering, fraud, and underage

136. *Id.* at 708 (quoting 71 CONG. REC. 3744, 3785 (1929)).

137. *United States—Gambling* Appellate Body Report, *supra* note 112, ¶¶ 304–07.

138. *Id.* ¶ 306.

139. *Id.*

140. *Id.* ¶ 307.

141. *Id.* ¶ 108.

142. *Id.* ¶ 306.

gambling.¹⁴³ These links were sufficient to constitute a “contribution of the measure to the realization of the ends pursued by it.”¹⁴⁴ This standard, then, is a relatively loose one, and the connection between a trade embargo and the protection of public morals should be sufficiently evident to satisfy this requirement. Similarly, the *United States—Gambling* Appellate Body found that although the U.S. prohibition on Internet gambling had a significant restrictive impact on international commerce (since it prevented foreign gambling websites from acquiring U.S. customers), “strict controls” were necessary in order to protect the United States’ important interests.¹⁴⁵ As noted above, human rights would likely be considered an even more important interest than preventing gambling. Accordingly, the Appellate Body would likely find that although a trade embargo would have a significant restrictive impact on international commerce, “strict controls” would nonetheless be necessary to satisfy a Member State’s important interest in protecting public morals. Here, the targeting of the sanctions in the November 2007 Common Position to imports of goods that are significant sources of revenue for the Burmese regime indicates a clear link between the conduct that raises concerns of public morals and the measures that are being justified under Article XX.

Third, and finally, trade sanctions would have to be compared with possible alternatives, to see if “another, WTO-consistent measure is ‘reasonably available.’”¹⁴⁶ In *United States—Gambling*, the Appellate Body made clear that this prong does not require a Member State to “identify the universe of less trade-restrictive alternative measures”; rather, a Member must simply show that the measure is “significantly closer to the pole of ‘indispensable’ than to the opposite pole of simply ‘making a contribution to.’”¹⁴⁷ In the case of human rights abuses, a Member State should be able to make the argument that a trade embargo is “indispensable.” Just as the United States’ gambling ban was deemed “necessary” to protect U.S. interests largely based on the importance of the issues at stake, here too we would expect a similar result. If a Member’s public morals are offended by trading with an abusive country, nothing less than a full embargo will sufficiently protect this interest. Thus, trade sanctions due to human rights abuses would satisfy the *United States—Gambling* three-pronged test and qualify under Article XX(a).

In this case, it is particularly relevant that the United States and the international community, through the United Nations, have made

143. *Id.* ¶ 313.

144. *Id.* ¶ 306.

145. *Id.* ¶ 323.

146. *Id.* ¶ 307.

147. *Id.* ¶¶ 309–10 (quoting Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, ¶ 161, WT/DS169/AB/R (Dec. 11, 2000)).

persistent efforts to engage constructively with the Burmese regime to address these most serious of human rights abuses. In particular, there have been thirty resolutions adopted by the U.N. General Assembly, U.N. Human Rights Council, and former U.N. Commission on Human Rights urging the Burmese junta to reform itself and curb its human rights abuses.¹⁴⁸ And the International Labor Organization, in particular, has made intensive efforts at documenting forced labor and attempting to change the regime's behavior.¹⁴⁹ In this case, therefore, it is indeed appropriate to conclude that sanctions here are a last resort, reflecting the abject failure of such efforts due to the non-cooperation of the regime, as well as the evident failure of the earlier less stringent E.U. sanctions regime.

As a final matter, this usage of trade sanctions should be distinguished from *Mexico—Tax Measures on Soft Drinks and Other Beverages (Mexico—Soft Drinks)*, a recent dispute under a different provision of Article XX.¹⁵⁰ In this case, the United States challenged a Mexican tax on all imported soft drinks containing sweeteners other than cane sugar. In response, Mexico argued that its measure was needed in order to force the United States to adhere to certain NAFTA commitments. Therefore, Mexico claimed that the provisions were justified under Article XX exception (d): “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement.”¹⁵¹ In ruling that Mexico's sanctions did *not* qualify for this exception, the Appellate Body held that the terms “laws or regulations” in exception (d) “do not include obligations of *another* WTO Member under an international agreement.”¹⁵² This ruling is based entirely upon the Appellate Body's interpretation of the particular language in Article XX(d) “laws and regulations” and is not relevant to whether sanctions linked to a violation of international obligations can be justified under Article XX(a). Moreover, in *Mexico—Soft Drinks*, the Appellate Body noted that even the language in Article XX(d) that it had interpreted restrictively as not including international legal rules, would include domestic laws and regulations implementing those international rules,

148. See, e.g., G.A. Res. 61/232, U.N. Doc. A/RES/61/232 (Dec. 22, 2006); U.N. Human Rights Council, Portugal (on behalf of the European Union): Draft Resolution 6/ . . . Situation of human rights in Myanmar, U.N. Doc. A/HRC/S-5/L.1/Rev.1 (Oct. 2, 2007); Comm'n on Human Rights, U.N. Econ. & Soc. Council [ECOSOC], *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World: Myanmar*, U.N. Doc. E/CN.4/2005/L.29 (Apr. 11, 2005).

149. See *supra* Part II(B)(3).

150. Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (Mar. 6, 2006) [hereinafter *Mexico—Soft Drinks*].

151. GATT 1947, *supra* note 5, art. XX(d).

152. *Mexico—Soft Drinks*, *supra* note 150, ¶ 69.

bringing into the question in fact the significance of the restrictive reading of Article XX(d).¹⁵³

B. The “Chapeau” of Article XX

Once it is determined that a measure falls within a valid Article XX category, the provision must next be analyzed for consistency with the Article’s *chapeau*. As previously noted, the *chapeau* requires that a measure must “not [be] 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.”¹⁵⁴ The Member State seeking the exception has the burden of showing that its measure satisfies these requirements.¹⁵⁵

The Dispute Settlement Body first comprehensively considered the *chapeau* in *United States—Shrimp/Turtle*. In this case, India, Malaysia, Pakistan, and Thailand challenged a U.S. import ban on shrimp caught without the use of turtle protective technology. In response, the United States argued that its ban was justified under Article XX(g) as “in relation to the conservation of exhaustible natural resources.”¹⁵⁶ The Appellate Body agreed with the United States, holding that the measure was indeed valid under Article XX(g)¹⁵⁷; next, they moved on to the *chapeau*. Ultimately, the Appellate Body concluded that several aspects of the United States’ ban constituted unjustified and arbitrary discrimination in violation of the *chapeau*: the failure of the ban to take into account different conditions in different Member States¹⁵⁸; U.S. negotiation of multilateral environmental treaties with some, but not all, banned countries¹⁵⁹; and a “phase-in” period for some countries but not others.¹⁶⁰

153. Compare *id.* ¶¶ 69–70, with *id.* ¶ 79 (“[W]e conclude that the terms ‘laws or regulations’ cover rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member’s legal system.” (footnote omitted)).

154. GATT 1947, *supra* note 5, art. XX.

155. See *United States—Gambling* Appellate Body Report, *supra* note 112, ¶¶ 307–09.

156. GATT 1947, *supra* note 5, art. XX(d).

157. *United States—Shrimp/Turtle*, *supra* note 109, ¶¶ 125–45.

158. *Id.* ¶¶ 162–64.

159. *Id.* ¶¶ 169–72. But see *United States—Gambling* Appellate Body Report, *supra* note 112, ¶¶ 315–17 (clarifying that prior negotiation is not a necessary component of an Article XX exception).

160. *United States—Shrimp/Turtle*, *supra* note 109, ¶¶ 173–76. The United States altered its implementation of the statute in light of the Appellate Body ruling, and in a later decision, reviewing these changes, the Appellate Body decided that they were adequate to bring the United States in compliance with the *chapeau*. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, ¶ 154, WT/DS58/AB/RW (Oct. 22, 2001).

Despite these findings, the Appellate Body made sure to leave the door open for future measures, stipulating that “[w]e have *not* decided that sovereign States should not act together bilaterally, plurilaterally or multilaterally . . . to protect endangered species or to otherwise protect the environment. Clearly, they should and do.”¹⁶¹ Rather, the Appellate Body simply held that although the United States ban was legitimate under Article XX(g), it was applied in an arbitrary and discriminatory manner.¹⁶²

Like *United States—Shrimp/Turtle*, trade sanctions due to human rights abuses would violate the *chapeau* if they did not “treat like countries alike.” However, in the case of Burma, the *chapeau* should not pose an obstacle. Applying the *United States—Shrimp/Turtle* test for “unjustified and arbitrary discrimination,” it is clear that although trade sanctions would undoubtedly constitute “discrimination,” in the case of Burma, sanctions would be neither “unjustified or arbitrary,” nor “discrimination between countries in which the same conditions prevail.” This is because Member States have good reason to single out Burma.

Although other WTO Members have at times faced criticism for human rights abuses, the situation in Burma has garnered unprecedented international action and condemnation. First, Burma is distinguished by its persistent defiance of the ILO. As previously noted, the junta’s practice of forced labor is sufficiently widespread and severe that in 2000, the ILO made an unprecedented move—for the first and only time, the ILO adopted a resolution under Article 33 to compel the junta to adhere to its obligations under the Forced Labor Convention. As of 2007, the junta had yet to comply with any of the ILO’s recommended changes.¹⁶³ Burma’s miserable human rights record has also attracted unparalleled condemnation by the United Nations. As of 2007, Burma has been the subject of an astounding thirty resolutions by the U.N. General Assembly’s U.N. Human Rights Council, and former U.N. Human Rights Commission. These resolutions have condemned the junta’s use of forced labor, the regime’s political repression, and the government’s overall abysmal human rights record.¹⁶⁴ On September 15, 2006, the U.N. Security Council voted 10-4-1 to add Burma to its formal agenda,¹⁶⁵ meaning that Security Council Members are now entitled to raise Burma as an item for question, and request regular reports from the U.N. Secretariat.¹⁶⁶

161. *Id.* ¶ 185.

162. *See id.* ¶ 186.

163. ILO Press Release, *supra* note 40.

164. *See, e.g.*, G.A. Res. 49/197, U.N. Doc. A/RES/49/197 (Mar. 9, 1995).

165. *See* Judy Aita, *U.N. Security Council Sets Formal Review of Situation in Burma*, AMERICA.GOV, Sept. 15, 2006, <http://www.america.gov/st/washfile-english/2006/September/20060915181057AJatiA0.7863886.html>

166. *UN Votes to Put Burma on Agenda*, BBC NEWS, Sept. 16, 2006, <http://news.bbc.co.uk/2/hi/asia-pacific/5351246.stm>. Despite having the affirmative nine votes to

This unprecedented international condemnation distinguishes Burma from certain other WTO Members with questionable human rights records. This is *not* a case, as in *United States—Shrimp/Turtle*, in which, under the application of the scheme addressed in the first Appellate Body report, similarly-situated countries were treated differently. Burma's human rights situation is exceptional, as is its failure even to engage with the international community and responsible regional powers concerning this issue. Thus, trade sanctions would not be "discrimination between countries in which the same conditions prevail," nor would they be unjustified or arbitrary. *United States—Shrimp/Turtle* made clear that Article XX does *not* prohibit Member States from enacting sanctions targeted at particular policies in order to protect important interests, so long as these provisions are applied in a non-discriminatory manner. Accordingly, trade sanctions against Burma are WTO-compliant restrictions that would be fairly targeted at a distinctively bad actor. It may well be the case that there could be other human rights situations in other WTO Members that in some aspects are as serious as those in Burma. In these other cases, there may be other political, economic, diplomatic, or military options available to address the situation and a different policy calculus concerning the costs and benefits of sanctions. We note that the *chapeau* does not prohibit selectivity as such with respect to countries targeted by sanctions, but only selectivity that is inherently unreasonable, i.e., arbitrary or unjustifiable.

Given the severity of the situation in Burma, the European Union would be able to justify a full ban on trade with Burma. Certainly, then, the ban in the November 2007 Common Position on imports of textiles, timber, gems, and precious metals would also be WTO-compliant. Ultimately, any such sanctions would be removed in accordance with the procedure described in the E.U. Common Position itself.¹⁶⁷ In the *United States—Shrimp/Turtle* case, it is to be noted, the Appellate Body initially held that the United States had violated the conditions of the *chapeau* by rigidly applying benchmarks from a domestic U.S. regulatory scheme to determine the conditions under which imports could enter the United States, regardless of the conditions in the exporting countries, and without

adopt a resolution on the situation in Burma, a non-punitive resolution was subsequently vetoed by China and Russia, both permanent members of the Security Council. Press Release, Security Council, Security Council Fails to Adopt Draft Resolution on Myanmar, Owing to Negative Votes by China, Russian Federation, U.N. Doc SC/8939 (Jan. 12, 2007).

167. See Council Position 2006/318/CFSP, *supra* note 58. Clause 8 of the preamble states in pertinent part: "In the event of a substantial improvement in the overall political situation in Burma/Myanmar, the suspension of these restrictive measures and a gradual resumption of cooperation with Burma/Myanmar will be considered, after the Council has assessed developments." *Id.* pmb1. This provision of the 2006 Common Position has not been amended in the Common Position of November 2007 and thus remains in force. See Common Position No. 2007/750/CFSP, *supra* note 3.

flexibility as to the means by which those countries could achieve the legitimate environmental objectives in question. In the case of Burma, however, the norms in question are widely, and in many cases universally recognized, human rights, some of which have the status of *jus cogens* (peremptory) norms. The judgment that Burma is not in conformity with these norms, and is not making good faith efforts to address its violations, is one that has been echoed throughout various international institutions, in numerous acts of formal censure. As we suggest, there is no reason why the enhanced E.U. sanctions in the November 2007 Common Position could not be accompanied by a transparent, objective process to determine whether Burma is making serious good faith efforts to improve its human rights performance—a process that could rely heavily on the views of multilateral organizations and respected independent non-governmental organizations.

VI. ANTI-CIRCUMVENTION

As noted, Article 2(e) of the November 2007 Common Position provides that knowing and intentional participation in activity that has the object or effect of circumventing the trade ban is to be prohibited. One obvious means of circumventing the ban would be to transship the interdicted goods from a third country, concealing their Burmese origin. However, parties involved in such activity might attempt to set up a defense for themselves under E.U. law by having the goods processed or transformed in some way in the third country. This might be thought to allow them to claim that what has been done to the goods in the third country would make them, as a legal matter, goods from the third country and not from Burma. As a matter of internal E.U. law, there would be a question of interpretation as to whether the intent of the anti-circumvention provision is to suspend the otherwise applicable rules of origin in the European Union, where these rules are manipulated to circumvent the ban in Article 2(b). Under Article 4(3) of the new E.U. Regulation, the origin of goods shall be determined by reference to Regulation (EEC) No. 2913/92.¹⁶⁸ And, Article 24 of that Regulation states that “[g]oods whose production involved more than one country shall be deemed to originate in the country where they underwent their last, substantial, economically justified processing or working in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of manufacture.”¹⁶⁹

168. *Id.* art. 4(3); see Commission Regulation (EEC) No. 2913/92, Establishing the Community Customs Code, 1992 O.J. (L 302) 1.

169. *Id.* art. 24.

Arguably, it is precisely because of such rules of origin, that an anti-circumvention clause is required, to prevent the trade sanctions being rendered ineffective through processing in third countries. If such an interpretation were adopted by the relevant E.U. authorities, the third countries from which the goods in question were shipped might attempt to bring an action in the WTO against the European Union, arguing that considerations of public morals cannot justify a ban on imports from a third country that itself is not engaging in the underlying conduct that raises public morals concerns. Yet there is nothing in Article XX(a) of the GATT that suggests that a measure, to be justified under that provision, must be exclusively addressed to the State engaged in the conduct in question. The issue under Article XX(a) is whether the measure is "necessary" to protect public morals, and therefore whether without anti-circumvention action with respect to goods altered in a third country and then shipped into the European Union, the ban would be ineffective or significantly less effective in addressing the underlying conduct of the Burmese junta. The experience thus far of the United States, where the legislation banning Burmese imports does not include such an anti-circumvention provision, suggests that the lack of such action against goods altered in and shipped from third countries considerably weakens the ability of the sanctions to achieve their legitimate purpose under Article XX(a). The U.S. government, therefore, recently closed this loophole. Congress adopted and President George W. Bush signed legislation that redefines Burmese rubies and jadeite as being gemstones that are "mined or extracted in Burma," thereby limiting the prospect of circumventing sanctions through substantial transformation.¹⁷⁰

It should be noted that even if a WTO adjudicator were to find that such action against shipments against third countries were not justifiable as necessary for the protection of public morals under Article XX(a), the measure would still be justifiable under Article XX(d) as necessary to "secure compliance with laws and regulations which are not inconsistent with the provisions of [the GATT], including customs enforcement . . ." ¹⁷¹ The ban in Article 2(b) of the Common Position is clearly such a law or regulation; and, since the *primary* ban is justified under Article XX(a) for public morals reasons, the additional anti-circumvention measure to ensure its effective enforcement would qualify under Article XX(d) as a measure

170. Tom Lantos Block Burmese JADE (Junta's Anti-Democratic Efforts) Act of 2008, Pub. L. No. 110-286, § 6, 122 Stat. 2632, 2638 (2008); Jennifer Loven, *Bush Signs Myanmar Sanctions Bill*, ASSOCIATED PRESS, July 29, 2008, available at <http://www.wtop.com/?nid=116&sid=1177265>.

171. GATT 1947, *supra* note 5, art. XX(d).

necessary to secure compliance with laws and regulations which are not inconsistent with the provisions¹⁷² of the GATT.

Finally, it might be asked why the European Union, instead of requiring that the *activity* of circumvention be prohibited, has not simply amended the rules of origin so as to ensure that *goods* sourced from Burma but altered in a third country are considered goods of Burmese origin within the meaning of Article 2(b) itself, and thereby prohibited entry into the European Union. The answer may be in part that such an approach would risk a challenge under the WTO Agreement on Rules of Origin, which requires, *inter alia*, that rules of origin “shall not discriminate between other Members” of the WTO,¹⁷³ *i.e.*, that they must apply on an MFN basis. Article I of the Agreement on Rules of Origin defines the scope of the disciplines in that Agreement by limiting the meaning of rules of origin to “those laws, regulations and administrative determinations of *general application* applied by any Member to determine the *country of origin* of goods.”¹⁷⁴ By contrast, the anti-circumvention provision in the November 2007 Common Position does not amend any law, regulation, or administrative determination of general application concerning the origin of goods, but rather entails an inquiry into whether the particular conduct of a particular party knowingly and intentionally circumvented the trade ban in object or effect. Liability arises under this provision not because the goods are deemed to be of Burmese origin, but because the conduct is deemed to be of a circumventing nature.

VII. CONCLUSION

The situation in Burma is dire and this instability has only been highlighted by the recent mass protests and brutal crackdown. The former democracy is mired in economic and social stagnation, and its people are controlled by a repressive and abusive military regime. In that context, countries have taken different approaches with regards to trade sanctions. Officials in Europe have sometimes suggested that strengthening the, until recently, mild sanctions could constitute a violation of WTO legal obligations. However, an examination of the strengthened sanctions contained in the November 2007 Common Position suggests that, while likely in various respects, a violation of Articles I, III, and XI, of the GATT, these enhanced measures could be justified as consistent with the Article XX(a) exception as “necessary to protect public morals.”

172 *Id.*

173. WTO Rules of Origin, *supra* note 95, art. 2(d) (emphasis added).

174. *Id.* art. I.