

COMBATTING SLAVERY AT SEA: ARTICLE XX &  
THE WTO

CAROLINE MARKS\*

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## I. INTRODUCTION

The environmental threats posed by unchecked commercial fishing have loomed large for decades among those concerned with sustainability and global climate change.<sup>1</sup> In that time, these threats have motivated significant inter-governmental responses.<sup>2</sup> Those efforts lead to the Fisheries Subsidies Agreement, adopted at the World Trade Organization's (WTO) 12th Ministerial Conference in 2022. But while the depletion of fish stocks and destruction of finite natural resources has been no secret, the global public has only recently begun to take note of another, perhaps equally deleterious feature of the commercial fishing industry: extreme human exploitation. The extreme exploitation of laborers at sea first received widespread attention in 2014, thanks to compelling international exposés published on the topic, and more recently *Seaspiracy*, a documentary film released in March of

1. Ada Hasanagic, *Top 10 Ocean Conservation Organizations You Should Know*, OPEN ED. ONLINE, <https://openeducationonline.com/magazine/ocean-conservation-organizations-you-should-know/> [https://perma.cc/AK7N-UBC2] (last visited Nov. 26, 2022) (explaining how movements aimed at raising awareness on the importance of ocean conservation and issues relating to ocean pollution started in the 1950s and 1960s).

2. See e.g., Liana Wong, Cong. Rsch. Serv., IF11929 Version 4, World Trade Organization Fisheries Subsidies Negotiations, (June 24, 2022) (In 2001, WTO members agreed to “clarify and improve existing WTO disciplines on fisheries subsidies” in addition to negotiating clarifications to the WTO Agreement on Subsidies and Countervailing Measures. The 2005 Hong Kong Declaration clarified goals of the negotiations, specifically calling for the prohibition of certain subsidies and establishment of SDT for developing country members”).

2021.<sup>3</sup> While *Seaspiracy* explored the more well-known environmental impacts of commercial fishing and related concepts like harmful fisheries subsidies and illegal, unreported, and unregulated (IUU) fishing, it notably devoted significant attention to the “alarming global corruption”<sup>4</sup> of the commercial fishing industry, critically documenting the rampant use of slave labor by the global commercial fishing fleet.<sup>5</sup> Mounting public concern for the use of slave labor in commercial fishing (slavery at sea) coincided with the final stages of the WTO Fisheries Subsidies Agreement’s negotiations, and some nations saw the Agreement as the ideal instrument for addressing this issue.<sup>6</sup> However, while the WTO Agreement is undoubtedly a powerful tool for combatting IUU and environmentally harmful fishing, notably absent from the Agreement are any provisions that would meaningfully address the particular issue of slavery at sea. In the absence of any such provisions that meaningfully address this issue, nations concerned with the pervasive evil of slavery in the fishing industry can and should pursue unilateral, trade-restrictive measures that target fish products produced by slave labor, in order to combat the practice. As this Note argues, they can do so secure in the understanding that Article XX of the WTO’s General Agreement on Tariffs and Trade, which provides general exceptions to the Agreement, permits such measures.<sup>7</sup>

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3. See *Seaspiracy Documentary Raises Crucial Points About Human Rights Abuse at Sea*, HUM. RTS AT SEA (Apr. 12, 2021), <https://www.humanrightsatsea.org/news/seaspiracy-documentary-raises-crucial-points-about-human-rights-abuse-sea> [<https://perma.cc/F63H-4D8T>] (“Ever since 2014 and international exposés about slavery, trafficking and human exploitation of workers at sea in the likes of Thai, Taiwanese and New Zealand fleets, there has been increasing public focus on exposing abuse at sea, employer malpractice and exploitation of workers being tricked into work which amounts to slavery at sea.”), SEASPIRACY (Aum Films & Disruptive Studios March 24, 2021).

4. *Id.*

5. *Id.*

6. See *infra* Section II(D).

7. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Legal Instruments – Results of the Uruguay Round vol., 33 I.L.M. 1125 (1994), Annex 1A, General Agreement on Tariffs and Trade, 1994 [hereinafter GATT] (superseding, but incorporating GATT 1947).

## II. THE FISHERIES AGREEMENT

### A. Background

#### i. *The Crisis of Overfishing and Depleted Stocks*

The most notorious threat posed by commercial fishing—and certainly one of the most serious—is overfishing: the depletion of fish stocks at a faster rate than they can be replenished.<sup>8</sup> The current scale of overfishing is staggering: “[a]lmost 90 percent of global marine fish stocks are now fully exploited or overfished.”<sup>9</sup> This grim reality represents both the results and the continuation of a decades-long trend.<sup>10</sup> The decline in fish stocks is not, however, due to increases in take-rate, but rather the ever growing scale of global fishing, at least since 1950 when data collection began.<sup>11</sup> Since then, the scale of fishing has “grown 10-fold for all countries on average.”<sup>12</sup> A large contributor to this increase is Asia, “which increased its effective fishing effort by 25-fold since 1950.”<sup>13</sup> In fact, the take-rate of fishing operations—the quantity of fish caught in relation to the effort put in—is continually declining.<sup>14</sup> This is most likely a manifestation of the damage already done to fish stocks, as ever-increasing efforts are required to catch what little is left in the ocean.<sup>15</sup>

However, despite the consistently decreasing take-rate and resulting drops in the potential profitability of fishing ef-

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8. *See Overfishing*, WORLD WILDLIFE FUND, <https://www.worldwildlife.org/threats/overfishing> [<https://perma.cc/XM7Z-CMUM>] (last visited Nov. 26, 2022).

9. *Life Below Water*, THE WORLD BANK, <https://datatopics.worldbank.org/sdgdatalatlas/archive/2017/SDG-14-life-below-water.html> [<https://perma.cc/E2MG-U6WS>] (2017).

10. FOOD AND AGRIC. ORG. [FAO], THE STATE OF WORLD FISHERIES AND AQUACULTURE 2020: SUSTAINABILITY IN ACTION 47 (2020) (“the percentage of stocks fished at biologically unsustainable levels increased, especially in the late 1970s and 1980s, from 10 percent in 1974 to 34.2 percent in 2017.”).

11. *See* Reg A. Watson et al., *Global marine yield halved as fishing intensity redoubles* 14 FISH AND FISHERIES 493, 496–97 (2013) (discussing how fishing intensity has been growing since 1950).

12. *Id.* at 496

13. *Id.*

14. *See id.* at 497–501 (“catch per unit of fishing effort (CPUE), an important proxy of resource abundance, decreased [from 1950 to present]”).

15. *See id.* at 497 (“The reduction in CPUE . . . indicates that it is very likely that biomass supporting global fisheries has been substantially reduced in the last few decades.”).

forts, the scale of global fishing efforts continues to climb.<sup>16</sup> The market for fish is now significantly oversaturated, “with the worldwide fishing fleet capable of catching 250% of the global need.”<sup>17</sup> This saturation of the industry in spite of its falling profitability can be explained in large part by the availability of fisheries subsidies across the globe.

ii. *The Effect of Fisheries Subsidies*

A subsidy, as defined by the WTO’s *Agreement on Subsidies and Countervailing Measures*, is any “financial contribution by a government or any public body within the territory of a Member . . . where: (i) a government practice involves a direct transfer of funds . . . ; (ii) government revenue that is otherwise due is foregone or not collected . . . ; (iii) a government provides goods or services other than general infrastructure, or purchases goods . . . ; (iv) a government makes payments to a funding mechanism . . .” and “a benefit is thereby conferred.”<sup>18</sup> While subsidies take a myriad of forms, they necessarily involve some government action that specifically benefits an industry or enterprise or group of industries or enterprises within the granting authority’s jurisdiction.<sup>19</sup>

Fisheries subsidies include a wide variety of supporting government actions, and are “estimated to be as high as \$35 billion worldwide.”<sup>20</sup> 65% of global fisheries subsidies are granted by developed countries.<sup>21</sup> Some governmental subsidies included in this umbrella category (like fisheries management programs and services subsidies) can positively impact fish stocks by benefiting “conservation, and the monitoring of

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16. *Id.* at 496 (“We find that global fishing intensity has been growing continuously since 1950”).

17. WORLD WILDLIFE FUND, *supra* note 8.

18. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Legal Instruments – Results of the Uruguay Round vol., 33 I.L.M. 1125 (1994), Annex 1A, Agreement on Subsidies and Countervailing Measures, art. 1, Apr. 15, 1994, [hereinafter SCM Agreement].

19. *See generally* SCM Agreement, *supra* note 18, art. 2 (setting the requirements for deeming a subsidy as specific).

20. *Regulating Fisheries Subsidies*, U.N. CONF. ON TRADE & DEV. [hereinafter Fisheries Subsidies], <https://unctad.org/project/regulating-fisheries-subsidies> [<https://perma.cc/JUE7-VUNK>] (last visited Nov. 26, 2022).

21. U. Rashid Sumaila et al., *Global Fisheries Subsidies: An Updated Estimate*, 69 MARINE POLICY 189, 190 (2016).

catch rates through control and surveillance measures to achieve biological and economic optimal use.”<sup>22</sup> Other more controversial, so-called ‘ambiguous subsidies,’ including “fisher assistance programs, vessel buyback programs and rural fisher community development programs,” can in some cases, have similarly positive effects.<sup>23</sup>

This Note sets these positive subsidies aside and employs the term “fisheries subsidies” exclusively to denote harmful fisheries subsidies. Harmful subsidies are those that directly contribute to overfishing.<sup>24</sup> They are the most prolific form of fisheries subsidy, accounting for roughly \$20 billion of the estimated \$35 billion dollar value of fisheries subsidies worldwide.<sup>25</sup> In effect, harmful subsidies partially offset the costs of engaging in fishing, “lead[ing] to [the] overcapacity of fishing vessels and skewing of production costs so that fishing operations continue when they would otherwise not make economic sense.”<sup>26</sup> Specific subsidies within this category include, *inter alia*, “subsidies for boat construction, renewal and modernization programs,” and “fuel subsidies.”<sup>27</sup>

Harmful fisheries subsidies are a demonstrable cause of the drastic overfishing that has led to an impending ocean food-chain collapse.<sup>28</sup> Awareness of this connection between subsidies and overfishing on the part of the international community led to passage of the Fisheries Subsidies Agreement by Members of the WTO.

### B. *The History of the Fisheries Subsidies Agreement*

The *Fisheries Subsidies Agreement* (Agreement) has its roots in the Sustainable Development Goals (SDGs). Succeeding the

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22. *Id.*

23. *Id.*

24. *Id.* (“Capacity-enhancing subsidies are defined as subsidy programs that lead to disinvestments . . . . Excessive disinvestment can lead in some cases to outright destruction of the natural resources.”).

25. See Fisheries Subsidies, *supra* note 20 (observing that \$20 billion in fishery subsidies directly contribute to overfishing worldwide).

26. WORLD WILDLIFE FUND, *supra* note 8.

27. U.R. Sumaila et al., *supra* note 21, at 190.

28. See *id.* (detailing the way in which researchers determine the impact of subsidies on fishery resources).

Millennium Development Goals (2000-2015),<sup>29</sup> the SDGs were adopted in 2015 by the United Nations as “a universal call to action to end poverty, protect the planet, and ensure that by 2030 all people enjoy peace and prosperity.”<sup>30</sup> There are seventeen SDGs in total, and Goal 14 addresses “Life Below Water.”<sup>31</sup> SDG 14 explicitly addresses fisheries and seeks to secure global commitment to “conserve and sustainably use the oceans, sea, and marine resources.”<sup>32</sup> SDG 14 includes several more specific targets, including Target 14.6, which “aims to address harmful subsidies by 2020.”<sup>33</sup> To this end, Target 14.6 directs the international community to generally prohibit all subsidies that fall under that classification, while recognizing that developing and least developed countries may require special and differential treatment.<sup>34</sup>

While negotiations at the WTO regarding fisheries subsidies predated the SDGs,<sup>35</sup> their adoption presented WTO members with an objective to pursue.<sup>36</sup> Work picked up on the draft of the Fisheries Subsidies Agreement, and on May 11, 2021, Ambassador Santiago Wills of Colombia, chair of the fisheries subsidies negotiations, submitted this draft to “serve as the basis for work toward a clean text.”<sup>37</sup> While the May

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29. *Millennium Development Goals*, WHO (Feb. 19, 2018), [https://www.who.int/news-room/fact-sheets/detail/millennium-development-goals-\(mdgs\)](https://www.who.int/news-room/fact-sheets/detail/millennium-development-goals-(mdgs)) [https://perma.cc/725G-SMRJ].

30. *Sustainable Development Goals*, U.N. DEV. PROGRAMME, <https://www.undp.org/sustainable-development-goals> (last visited Nov. 26, 2022).

31. *Goal 14: Life Below Water*, U.N. DEV. PROGRAMME [hereinafter Goal 14], <https://www.undp.org/sustainable-development-goals> [https://perma.cc/HQ76-STFD] (last visited Nov. 26, 2022).

32. Fisheries Subsidies, *supra* note 20.

33. *Id.*

34. Goal 14, *supra* note 31 (“[b]y 2020, prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, eliminate subsidies that contribute to illegal, unreported and unregulated fishing and refrain from introducing new such subsidies, recognizing that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of the World Trade Organization fisheries subsidies negotiation.”).

35. *See* Wong, *supra* note 2 (detailing the history of WTO negotiations on fisheries).

36. *See id.* (noting that negotiations gained momentum after the adoption of the SDGs).

37. *Chair Presents Draft Consolidated Text on Fisheries Subsidies*, SDG KNOWLEDGE HUB (May 19, 2021) (quoting Ambassador Wills), <https://sdg.iisd.org/>

2021 Draft's 11 Articles addressed many practices that contribute to overfishing, none confronted the issue of slavery at sea.

### C. *Slavery at Sea*

Forced labor in the fishing industry is admittedly treated as only an ancillary problem in the broader puzzle of fisheries subsidies.<sup>38</sup> Even so, it is a phenomenon inextricably linked to both overfishing and the fisheries subsidies that enable that broader issue to persist. Recent years have witnessed an increase in forced labor in the fishing industry, due in part to the convergence of “lax maritime labor laws and an insatiable global demand for seafood even as fishing stocks are depleted.”<sup>39</sup> As returns on fishing efforts diminish, more and more fishing vessels seeking to keep costs down are turning to forced labor—as Phil Robertson, deputy director of Human Rights Watch’s Asia division explains, “life at sea is cheap.”<sup>40</sup> This is exacerbated by a growing reliance on long-haul fishing, a symptom of “rising fuel prices and fewer fish close to shore.”<sup>41</sup> Long-haul fishing vessels can stay out at sea for up to years, often putting them beyond the reach of authorities and increasing the risk of laborer mistreatment.<sup>42</sup>

While the practice of forced labor in the fishing industry occurs around the world, it is particularly prevalent in the South China Sea, especially in the Thai fishing fleet.<sup>43</sup> The Thai fleet “faces an annual shortage of about 50,000 mariners, based on United Nations estimates.”<sup>44</sup> Short-staffed fishing vessels typically fill vacancies with migrants from Cambodia and Myanmar who are illegally trafficked into Thailand.<sup>45</sup> Already

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news/chair-presents-draft-consolidated-text-on-fisheries-subsidies/ [https://perma.cc/8Y7S-TMSA].

38. See, e.g., Fisheries Subsidies, *supra* note 20 (discussing subsidies in the context of a development goal without mentioning the issue of forced labor).

39. Ian Urbina, ‘Sea Slaves’: *The Human Misery That Feeds Pets and Livestock*, N.Y. TIMES, July 27, 2015, <https://www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html> [https://perma.cc/PA9Q-T92B].

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*



incredibly vulnerable, these workers—most of them undocumented—then “disappear beyond the horizon on ‘ghost ships’—unregistered vessels that the Thai government does not know exist.”<sup>46</sup> Many miles from help, these workers are “captives from a bygone era.”<sup>47</sup>

These laborers are forced to perform “intense, hazardous and difficult” work for “long hours, at very low pay.”<sup>48</sup> Often, they also face horrific abuse and draconian discipline: “the sick cast overboard, the defiant beheaded, the insubordinate sealed for days below deck in a dark, fetid fishing hold.”<sup>49</sup> Interviewees have recounted being “beaten for the smallest transgressions, like stitching a torn net too slowly or mistakenly placing a mackerel into a bucket for herring . . . .”<sup>50</sup> Many even reported witnessing the murder of other workers by ship captains or officers.<sup>51</sup> Notably, the Thai fishing fleet obtains substantial profits by selling its catch to the United States, where it is often processed into “canned cat and dog food or feed for poultry, pigs and farm-raised fish that Americans consume.”<sup>52</sup>

Chinese and Taiwanese fishing fleets also present growing sources of concern: a 2020 U.S. Department of Labor Report<sup>53</sup> added the fishery products of both countries to a list of commodities associated with forced labor.<sup>54</sup> The report also stated

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46. *Id.*

47. *Id.*

48. *Forced Labour and Human Trafficking in Fisheries*, INT’L LAB. ORG. [ILO], <https://www.ilo.org/global/topics/forced-labour/policy-areas/fisheries/lang-en/index.htm> [<https://perma.cc/2YXZ-5P66>] (last visited Nov. 27, 2022) (also noting that “[c]apture fisheries have one of the highest occupational fatality rates in the world.”).

49. Urbina, *supra* note 39.

50. *Id.*

51. *See id.* (29 out of 50 Cambodian men sold to Thai boats reported seeing a captain or officer kill workers).

52. *Id.*

53. DEP’T OF LAB., 2022 LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR 25, 28 (2022), [https://www.dol.gov/sites/dolgov/files/IILAB/child\\_labor\\_reports/tda2021/2022-TVPRA-List-of-Goods-v3.pdf](https://www.dol.gov/sites/dolgov/files/IILAB/child_labor_reports/tda2021/2022-TVPRA-List-of-Goods-v3.pdf) [<https://perma.cc/PDV6-E7HQ>].

54. Mark Godfrey, *US Ramping Up Pressure on China’s Use of Forced Labor in Distant-Water Fishing*, SEAFOODSOURCE (Nov. 19, 2020), <https://www.seafoodsource.com/news/environment-sustainability/us-ramping-up-pressure-on-china-s-use-of-forced-labor-in-distant-water-fishing> [<https://perma.cc/LG45-DJF5>].

that, as with the Thai fleet, “the majority of workers on Chinese distant-water fishing vessels are migrants,” in this case, from Indonesia and the Philippines.<sup>55</sup> These products are also processed for sale to American and European buyers.<sup>56</sup>

D. *The U.S. Proposal to Address Forced Labor in the Fishing Industry*

In light of the egregious problem of forced labor in the fishing industry, its association with IUU fishing and harmful fisheries subsidies, and its arguably significant link to American consumers, the Biden-Harris Administration sought to address the issue within the framework of the WTO Fisheries Subsidies Agreement.<sup>57</sup> In response to the May 2021 Draft Text—which, as described above, lacked any provisions regarding forced labor—the United States submitted a document titled *The Use of Forced Labor on Fishing Vessels* (U.S. Submission).<sup>58</sup> Alongside this submission, the Biden-Harris Administration urged “WTO Members to help address this global problem in the ongoing negotiations to curb harmful subsidies . . . .”<sup>59</sup>

The U.S. Submission divided its approach to addressing forced labor within the May 2021 Draft Text into three components:

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55. *Id.*

56. *Id.*

57. See Press Release, *United States Urges WTO Members to Address Forced Labor on Fishing Vessels in Ongoing Fisheries Subsidies Negotiation*, OFF. OF U.S. TRADE REP. (May 26, 2021) [hereinafter U.S. Press Release], <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/united-states-urges-wto-members-address-forced-labor-fishing-vessels-ongoing-fisheries-subsidies> [<https://perma.cc/CC7X-KHLG>] (“In addition to the human cost, forced labor gives fishing vessels who engage in the practice an unfair cost advantage. It also exacerbates overfishing and the depletion of the world’s oceans. Recognizing the link between forced labor and the harmful subsidies that may also go to these vessels is an important step in tackling this pervasive problem.”); see also Submission of the United States, *The Use of Forced Labor on Fishing Vessels*, at 1 (May 26, 2021) [hereinafter U.S. Submission], <https://ustr.gov/sites/default/files/IssueAreas/Trade%20Organizations/WTO/US.Proposal.Forced.Labor.26May2021.final%5B2%5D.pdf> [<https://perma.cc/PA8K-6RPJ>].

58. U.S. Submission, *supra* note 57.

59. U.S. Press Release, *supra* note 57.

(1) the inclusion of *effective disciplines* on harmful subsidies to fishing activities that may be associated with the use of forced labor; (2) the *explicit recognition* of the problem and the need to eliminate it; and (3) *transparency* with respect to vessels or operators engaged in the use of forced labor.<sup>60</sup>

i. *Effective Disciplines*

To incorporate the inclusion of effective disciplines, the Submission proposed adding language to Article 3 of the Fisheries Subsidies Agreement.<sup>61</sup> Article 3 is titled “Prohibition on Subsidies to Illegal, Unreported and Unregulated Fishing.”<sup>62</sup> The language of Article 3.1 is as follows, with the U.S. contributions italicized:

3.1 No Member shall grant or maintain any subsidy to a vessel [or operator] engaged in illegal, unreported and unregulated (IUU) fishing *or fishing related activities in support of such fishing.*<sup>63</sup>

The intent of this amendment was to capture activities such as transshipping<sup>64</sup> and any other activity that “enables a vessel to offload fish and receive fuel and supplies at sea . . . .”<sup>65</sup> The U.S. Submission explains that these activities both support IUU fishing and “allow vessels using forced labor to evade detection.”<sup>66</sup>

The U.S. Submission also supports existing language in the May 2021 Draft Text that it sees as contributing to *effective disciplines*.<sup>67</sup> Article 5, titled, “Prohibition on Subsidies Con-

60. U.S. Submission, *supra* note 57, at 1 (emphasis added).

61. *Id.* at 1.

62. WTO Negotiating Group on Rules, *Fisheries Subsidies: Draft Consolidated Chair Text*, art. 3 WTO Doc. TN/RL/W/276 (May 11, 2021) [hereinafter May 2021 Draft Text].

63. U.S. Submission, *supra* note 57, at 1.

64. Transship: “to transfer for further transportation from one ship or conveyance to another.” *Transship*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/tranship> [https://perma.cc/A7GL-ZP4Q] (last visited Nov. 27, 2022).

65. U.S. Submission, *supra* note 57, at 1.

66. *Id.*

67. *Id.* (“Members are currently negotiating disciplines on harmful fisheries subsidies, including with respect to illegal, unreported, and unregulated (IUU) fishing, certain distant water fishing, and fishing by vessels not

cerning Overcapacity and Overfishing,” specifically provides in part:

No Member shall grant or maintain subsidies contingent upon, or tied to, actual or anticipated fishing or fishing related activities in *areas beyond the subsidizing Member’s jurisdiction* (whether solely or as one of several other conditions), including subsidies provided to support at-sea fish-processing operations or facilities, such as for refrigerator fish cargo vessels, and subsidies to support tankers that refuel fishing vessels at sea.<sup>68</sup>

This language, the U.S. Submission notes, was included in Article 5 because of the recognition that “some flag States may have difficulty monitoring vessels’ activities far from home, and some coastal States may lack capacity to monitor and enforce rules on foreign vessels fishing in their waters, especially when such vessels are numerous or not well-regulated by their flag State.”<sup>69</sup> The U.S. Submission contends that this lack of monitoring of distant fishing vessels not only poses a unique overfishing problem, but also facilitates the use of forced labor.<sup>70</sup> Therefore, it recommends retaining this language.<sup>71</sup>

In a similar vein, the U.S. Submission recommends retaining Article 5.4’s proposed prohibition on subsidies to “vessels not flying the flag of the subsidizing Member” based on the concern that such subsidies “may also enable fishing vessels engaged in the use of forced labor to avoid detection . . . .”<sup>72</sup>

## ii. *Explicit Recognition*

Beyond detailed technical requirements, the U.S. Submission also asserts the value of “raising awareness of this issue and in signaling [a] collective resolve to address it.”<sup>73</sup> To fur-

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flying the subsidizing Member’s flag. The use of forced labor has often been associated with these types of fishing. Disciplines to prohibit these harmful subsidies can therefore contribute to Members’ efforts to address the use of forced labor on fishing vessels . . . . These disciplines should therefore be included in any outcome.”).

68. May 2021 Draft Text, *supra* note 62, art. 5.

69. U.S. Submission, *supra* note 57, at 2.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

ther that objective, the Submission recommends the following text for inclusion in any preamble:

Recognizing that effective disciplines on and greater transparency of fisheries subsidies can contribute to Members' efforts to prevent and halt the use of forced labor on fishing vessels;<sup>74</sup>

Additionally, it recommends the following as a chapeau to Article 3:

Members recognize that the use of forced labor on fishing vessels is often associated with IUU fishing, and therefore that effective disciplines on subsidies to vessels and operators engaged in IUU fishing or fishing related activities in support of such fishing can contribute to Members' efforts to eradicate forced labor on fishing vessels.<sup>75</sup>

Both suggested paragraphs add a gloss to provisions that mainly target IUU fishing, effectively indicating that they also serve the essential function of addressing slavery at sea.

iii. *Transparency*

Finally, to allow for greater data provision and transparency on the use of forced labor in fishing, the U.S. Submission recommends several additions to Article 8.2. This subclause of the May 2021 Draft contains an annual notification requirement for Members, whereby Members must collect in writing certain kinds of information dictated by the Agreement, and provide it to the Subsidies and Countervailing Measures Committee.<sup>76</sup> This recommendation requires, for example, the annual provision of a "list of vessels and operators that it has determined as having been engaged in IUU fishing . . . ."<sup>77</sup> Noting that additional information would allow Members to "ensure that [they do] not provide fisheries subsidies to any such vessels or operators," and that it would "help other Members evaluate the effects of the disciplines on harmful fisheries subsidies and how they can make a meaningful contri-

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74. *Id.*

75. *Id.*

76. May 2021 Draft Text, *supra* note 62, art. 8.2.

77. *Id.*

bution to addressing this problem,”<sup>78</sup> the U.S. Submission recommends a new item, Article 8.2 (b):

any vessels and operators for which the Member has information that reasonably indicates the use of forced labor, along with relevant information to the extent possible. . .<sup>79</sup>

The language, while far from comprehensive, is nonetheless critical to addressing forced labor in any meaningful way within the confines of the Agreement. Without these additions any effect on forced labor flows solely from provisions that primarily address other issues, such as IUU, and that are not specifically tailored to the contours of the problem of forced labor. Furthermore, unless the Agreement identifies forced labor as an objective of the Agreement, it is far less likely enforcement mechanisms will be construed to pursue that objective.

Although many within the Biden-Harris administration hoped that with the November 2021 Consolidated Draft,<sup>80</sup> at least some of the U.S. Submission’s suggestions would appear in the final agreement,<sup>81</sup> the WTO’s 12th Ministerial conference in June, 2022 ultimately dashed those hopes.

#### E. *The WTO’s Twelfth Ministerial Conference and the Fisheries Subsidies Agreement*

The WTO’s Twelfth Ministerial Conference took place between June 12 and 17, 2022 at the WTO headquarters in Ge-

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78. U.S. Submission, *supra* note 57, at 3.

79. *Id.* (changing art. 8.2(b) of the May 2021 Draft Text to 8.2(c)).

80. Ministerial Conference, *Agreement on Fisheries Subsidies: Draft Text*, WTO Doc. WT/MIN(21)/W/5 (Nov. 24, 2021) [hereinafter November 2021 Draft Text].

81. *Compare* U.S. Submission, *supra* note 57 with November 2021 Draft Text (The prong of *effective discipline* as proposed by the United States was essentially included in the consolidated draft of the fisheries agreement. By contrast, the suggestions made by the U.S. to *explicitly recognize* forced labor on fishing vessels and the need to eliminate it, found no success (neither the proposed language for the preamble, nor the proposed chapeau to Article 3 were included). And finally, the proposed *transparency* language was successfully incorporated into the November 2021 Draft Agreement. Notably, this clause, 8.2(b), is the only clause in the entire agreement that directly addresses forced labor. Nonetheless, the consolidated draft appeared to be a step in the right direction.).

neva.<sup>82</sup> By the conference's conclusion, WTO members had agreed upon a final draft of the Agreement on Fisheries Subsidies, along with a host of other key trade initiatives.<sup>83</sup> The final text followed hardly any of the U.S. Submission's prior suggestions, and significantly weakened the few that were preserved. For example, the U.S.-endorsed language that prohibited subsidies for *any* fishing or related activities that occurred or was anticipated to occur beyond a subsidizing member's own territorial jurisdiction<sup>84</sup> was instead replaced by language that merely prohibits subsidies for fishing or related activities that occur beyond both the territorial jurisdiction of a coastal Member and a coastal non-Member, as well as occur outside the competence of a relevant RFMO/A.<sup>85</sup> In effect, the final Agreement prohibits only those subsidies aimed at fishing that takes place in both a) international waters and b) outside the competence of a RFMO/A (or Regional Fisheries Management Organizations). This renders the prohibition virtually meaningless, as RFMO/As "cover the majority of the world's seas."<sup>86</sup> The provision prohibiting subsidies for vessels not flying their national Members' flags was also significantly weakened. In the final agreement that provision no longer contains any prohibition at all, instead counseling Member States to take "special care" and exercising "due restraint" when granting subsidies.<sup>87</sup> And in an additional symbolic and substantive blow to the U.S. Submission, the final Agreement omitted Article 8.2 (b), the only clause from the draft that even mentioned forced labor.<sup>88</sup>

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82. *Twelfth WTO Ministerial Conference*, WTO, [https://www.wto.org/english/thewto\\_e/minist\\_e/mc12\\_e/mc12\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_e.htm) [<https://perma.cc/Y73L-2H4A>] (last visited Nov. 27, 2022).

83. Agreement on Fisheries Subsidies, WTO Doc. WT/MIN(22)/33 (June 22, 2022) [hereinafter *Fisheries Subsidies Agreement*].

84. U.S. Submission, *supra* note 57, at 2.

85. Fisheries Subsidies Agreement, *supra* note 83, art. 5.1.

86. *Regional Fisheries Management Organisations (RFMOs)*, EUR. COMM'N, [https://oceans-and-fisheries.ec.europa.eu/fisheries/international-agreements/regional-fisheries-management-organisations-rfmos\\_en](https://oceans-and-fisheries.ec.europa.eu/fisheries/international-agreements/regional-fisheries-management-organisations-rfmos_en) [<https://perma.cc/2YFS-Q77N>] (last visited Nov. 27, 2022).

87. *Compare* May 2021 Draft Text, *supra* note 62, art. 5.4 *with* Fisheries Subsidies Agreement, *supra* note 83, art. 5.2 (replacing the prohibition with language requiring "due restraint").

88. *Id.* art. 8.2.

The deletion of the forced labor reporting requirement in the final Agreement suggests, at the very least, that the Fisheries Subsidies Agreement is not the appropriate forum for addressing forced labor. This was the argument made by China during the negotiations in November 2021, when the Chinese delegation refused “to endorse [the] U.S. demand for annual inspections of fleets for use of forced labor to be included” in the Fisheries Subsidies Agreement.<sup>89</sup> Specifically, China claimed that “the WTO has no mandate for tackling the labor issue in the agreement.”<sup>90</sup> But while China’s objections in this context emphasized subject matter propriety, it is likely that it would oppose mechanisms to combat forced labor in any context, given the rampant use of forced labor in its distant-water sector,<sup>91</sup> which continues to grow at least in part due to government support.<sup>92</sup> Ultimately, despite the best efforts of the United States and others, forced labor remains unaddressed in the WTO Fisheries Subsidies Agreement.

### III. UNILATERAL MEASURES & ARTICLE XX OF THE GATT AS AN ALTERNATIVE

When the United States submitted its recommendations regarding forced labor on fishing vessels to the WTO, the U.S. Trade Representative urged WTO Members “to consider the full range of trade tools at [their] disposal to combat forced labor and other exploitative labor conditions.”<sup>93</sup> Given that almost all U.S. recommendations for combatting forced labor through the Fisheries Subsidies Agreement were jettisoned,

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89. Mark Godfrey, *China Blocks US Forced Labor Proposal at WTO Fishery Subsidies Talk*, SEAFOODSOURCE (Nov. 19, 2021), <https://www.seafoodsource.com/news/environment-sustainability/china-blocks-us-forced-labor-proposal-at-wto-fishery-subsidies-talks> [https://perma.cc/M9W5-JKDW].

90. *Id.*

91. *See supra* Section II. C (discussing the extent of forced labor in China’s fishing industry).

92. Godfrey, *supra* note 54; *see also* Mark Godfrey, *Report: WTO Fuel Subsidies Deal Would Make Half of China’s Distant-Water Fleet Unprofitable*, SEAFOODSOURCE (Sept. 26, 2019), <https://www.seafoodsource.com/news/premium/supply-trade/report-wto-fuel-subsidies-deal-would-make-half-of-china-s-distant-water-fleet-unprofitable> [https://perma.cc/E4V6-ERYR] (discussing an instance of a Chinese distant-water fishing firm receiving a subsidy payment from the local government).

93. U.S. Press Release, *supra* note 57.



the remainder of this Note explores an alternative tool available to Member States seeking to combat forced labor at sea through the World Trade Organization: unilateral trade measures and Article XX of the 1994 General Agreement on Tariffs and Trade (GATT).

A. *The Liberal Trade Regime vs. Unilateral Trade-Restrictive Measures*

Generally, the WTO promotes a liberal trade regime, discouraging measures that would fetter the flow of trade or discriminate unfairly between nations.<sup>94</sup> Two requirements of the GATT<sup>95</sup> that encapsulate these principles are the Article I Most Favored Nation (MFN) standard<sup>96</sup> and the Article XI General Prohibition on Quantitative Restrictions,<sup>97</sup> both of which are explored below. These requirements are particularly relevant because a trade measure in this policy space would most likely take the form of either a tariff imposed on, or outright ban of, fishery product imports on the basis of non-compliance with a chosen regulatory regime that would ensure those products are not the result of forced labor. The implications of both types of measures for both the MFN standard and Article XI are explained in more detail in the following sections. To aid in this analysis, this Note also draws heavily upon two WTO disputes: *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (US – Shrimp Imports)<sup>98</sup> and *Euro-*

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94. See GATT, *supra* note 6, pmbl. (“Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.”).

95. Christina Majaski, *What is the General Agreement on Tariffs and Trade (GATT)?*, INVESTOPEdia (Oct. 29, 2022), <https://www.investopedia.com/terms/g/gatt.asp> (“The General Agreement on Tariffs and Trade (GATT), signed in 1947 by 23 countries, is a treaty minimizing barriers to international trade by eliminating or reducing quotas, tariffs, and subsidies. It was intended to boost economic recovery after World War II. . .GATT was expanded and refined over the years, leading to the creation in 1995 of the World Trade Organization (WTO)”).

96. GATT, *supra* note 7, art. I.

97. *Id.* art. XI.

98. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998) [hereinafter *Shrimp Products AB*].

*pean Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (EC – Seal Products).<sup>99</sup> Both featured these types of measures, adopted under similar circumstances.

i. *Most Favored Nation*

The MFN standard is “prominently enshrined in Article I,” of the GATT.<sup>100</sup> In effect, “MFN bars a WTO Member from discriminating among the other members on the basis of national origin in the treatment of the imports of like products.”<sup>101</sup> Under strict application of the MFN standard, a proposed U.S. trade measure that applied significant tariffs only to the imported catch of fishing vessels from certain Member States, even if it was due to their supposed inadequate monitoring of labor practices among their commercial fishing fleets or insufficient enforcement of anti-human trafficking and forced labor policies, would be invalid. By excepting nations deemed as ‘safe’ with regards to the condition of forced labor in their fishing industry from tariffs, the United States would effectively be conferring a privilege upon those nations and discriminating against those nations it deemed ‘unsafe.’

An analogous measure was at issue in the WTO dispute, *EC – Seal Products*.<sup>102</sup> There Canada, and later Norway, challenged E.U. regulations that placed a general prohibition on the import and market placement of seal products writ large as along with various exceptions to the general ban, including one for seal products derived from indigenous and Inuit con-

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99. Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Docs. WT/DS400/AB/R, WT/DS401/AB/R (adopted June 18, 2014) [hereinafter *Seal Products AB*].

100. Thomas Cottier & Lena Schneller, *The Philosophy of Non-Discrimination in International Trade Regulation*, in *THE PRINCIPLE OF NATIONAL TREATMENT IN INTERNATIONAL ECONOMIC LAW: TRADE, INVESTMENT AND INTELLECTUAL PROPERTY* 3, 14 (Anselm Kamperman Sanders ed., 2014); GATT, *supra* note 6, art. I (“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.”).

101. Cottier & Schneller, *supra* note 100.

102. See *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WTO, [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds400\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds400_e.htm) [<https://perma.cc/GG4E-94KN>] (last visited Nov. 28, 2022) (providing a summary of the dispute and its timeline).

ducted hunts (IC exception).<sup>103</sup> Because the IC exception privileged seal products from Inuit communities in Greenland, but did not extend immediately and unconditionally to comparable products from Canada, the Panel found that the exception violated Article I(1) of the GATT 1994.<sup>104</sup> However, whether a measure violates a provision of the GATT is not the only inquiry, as is discussed below.

ii. *Article XI*

GATT Article XI – titled “General Elimination of Quantitative Restrictions” – codifies a limitation on the use of import prohibitions or restrictions. This article reads in part:

No prohibitions or restrictions other than duties, taxes or other charges. . . shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party. . .<sup>105</sup>

All direct quantitative import restrictions are formally prohibited under the GATT.<sup>106</sup> Accordingly, if a proposed U.S. measure were to fully or otherwise quantitatively ban imported catches from fishing vessels of Member States deemed ‘unsafe’ under the considerations described above, Art. XI would also be implicated.

This scenario played out in the highly topical case of *US–Shrimp Imports*.<sup>107</sup> India, Malaysia, Pakistan, and Thailand challenged the U.S. ban on the importation of certain shrimp and shrimp products from their fishing fleets.<sup>108</sup> In 1989, the

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103. See Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, ¶¶ 1–6, WTO Docs. WT/DS400/R, WT/DS401/R (Nov. 25, 2013) [hereinafter Seal Products Panel] (providing the factual basis and each party’s arguments in the dispute).

104. *Id.* at ¶ 7.597.

105. GATT, *supra* note 7, art. XI (1).

106. Some Art. XI-specific exceptions for quantitative restrictions can apply on a limited or temporary basis. For an explanation see Trade Pol’y Comm. of the Indus. Structure Council, *Subcomm. on Unfair Trade Pol’ys and Measures’ 2011 Rep. on Compliance by Major Trading Partners with Trade Agreements - WTO, FTA/EPA, BIT*, at 236 (Feb. 2011) (Jap.).

107. Shrimp Products AB, *supra* note 98.

108. *India etc. Versus US: ‘Shrimp-Turtle’*, WTO, [https://www.wto.org/english/tratop\\_e/envir\\_e/edis08\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/edis08_e.htm) [<https://perma.cc/6SLU-P5VD>] (last visited Nov. 29, 2022).

United States, concerned with the endangerment of sea turtles, enacted *a law* that, in effect, created an express ban on shrimp imports from noncertified countries.<sup>109</sup> This meant that U.S. efforts to protect sea turtles conflicted with GATT Art. XI, according to the Panel that presided over the case.<sup>110</sup> However, just as in *EC – Seal Products*,<sup>111</sup> this aspect of the Panel’s decision did not ultimately doom the trade provision in question.<sup>112</sup> That is because lurking in the background of both cases were Article XX’s General Exceptions.

### B. Article XX Overview

GATT Article XX, titled “General Exceptions,” reads 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. . .<sup>113</sup>

As both the title and text of the provision illustrate, Article XX provides a *general* exception: it may except the invoker from *any* applicable provisions of the GATT, including both the paramount MFN standard and Article XI. Specifically, it

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109. *Id* (the law asserting that “shrimp harvested with technology that may adversely affect certain sea turtles may not be imported into the US — unless the harvesting nation was certified to have a regulatory programme and an incidental take-rate comparable to that of the US, or that the particular fishing environment of the harvesting nation did not pose a threat to sea turtles.”).

110. Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 7.17, WTO Doc. WT/DS58/R (adopted Nov. 6, 1998), [hereinafter *Shrimp Products Panel*] (finding that Section 609 violates Article XI:1 of GATT).

111. *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, *supra* note 104.

112. *See generally* *Shrimp Products AB*, *supra* note 98.

113. GATT, *supra* note 7, art. XX.

“authorises domestic measures that are *otherwise inconsistent* with the GATT,”<sup>114</sup> under specific circumstances. But to qualify for Article XX’s expansive protections, a disputed domestic measure must first be shown to fall within Article XX’s scope.

### C. *Satisfying Article XX*

To fall within the exacting scope of Article XX’s General Exceptions, the disputed domestic measure must both fall within the Article’s enumerated subparagraph categories and be consistent with the Article’s Chapeau.<sup>115</sup> This requirement has been described by WTO dispute resolution bodies as a “two-tiered” analysis, whereby a measure is “provisionally justified under one of the subparagraphs of Article XX, before it is subsequently appraised under the Chapeau of Article XX”<sup>116</sup> The Chapeau provides initial definitions, as well as the general contour and purpose of the Article XX General Exceptions.<sup>117</sup>

#### i. *The Subparagraph Categories*

Although Article XX lists ten qualifying subparagraph categories (a–j) of trade measure justifications, examination is limited here to the two that are most likely to be relevant to human rights based measures: subparagraphs (a) and (b).<sup>118</sup> They encompass the public morals exception (subparagraph (a)) and the life or health exception (subparagraph (b)).<sup>119</sup> The WTO’s Appellate Body has held that any defense of a domestic measure under any of the subparagraph categories must “address the particular interest specified in that paragraph,” and that “there [must] be a sufficient nexus between the measure and the interest protected.”<sup>120</sup>

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114. Rachel Harris & Gillian Moon, *GATT Article XX and Human Rights: What do We Know from the First 20 Years*, 16 MELB. J. INT’L L. 432, 451 (2015) (emphasis added).

115. GATT, *supra* note 7, art. XX chapeau. For a demonstration of how appellate bodies look at the disputed measure as a whole, *see, e.g.*, Seal Products AB, *supra* note 99, ¶ 5.185.

116. Seal Products AB, *supra* note 99, at ¶ 5.169.

117. GATT, *supra* note 7, art. XX chapeau.

118. GATT, *supra* note 7, art. XX (a–j); Harris, *supra* note 114, at 451.

119. GATT, *supra* note 7, art. XX (a–b).

120. Seal Products AB, *supra* note 99, ¶ 5.169 (citation omitted).

a. *Addressing the Particular Subparagraph Category Interest*

1. *XX(a): The Public Morals Exception*

For a measure provisionally justified under subparagraph (a), the invoking member must therefore demonstrate that “it has adopted or enforced a measure ‘to protect public morals’, and that the measure is ‘necessary’ to protect such public morals.”<sup>121</sup>

The category of concerns properly constituting ‘public morals’ in the context of Article XX is an incredibly amorphous one. The meaning and content of public morals vary significantly across states and communities.<sup>122</sup> Reflecting this variance and associated concern about universal application of Article XX, the WTO panel in *US – Gambling* sought to articulate a common definition, stating that public morals are “standards of right and wrong conduct maintained by or on behalf of a community or a nation.”<sup>123</sup> The panel also explained that the content of public morals can be characterized by a degree of variation, and that, for this reason, “Members should be given some scope to define and apply for themselves the concept[ ] of ‘public morals’ . . . according to their own systems and scales of values.”<sup>124</sup> This deferential and context-specific definition was further endorsed by the WTO panel in *EC – Seal Products* and affirmed by the Appellate Body in that dispute.<sup>125</sup> There, the Appellate Body further clarified that members invoking public moral concerns under Article XX need not identify a discrete risk to their specific concern—an Art. XX(b) requirement discussed below<sup>126</sup>—nor treat all moral

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121. *Id.* (citation omitted).

122. See Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.465, WTO Doc. WT/DS285/R (adopted Apr. 20, 2005) [hereinafter *Gambling Panel*] (finding that the term “public morals” depends on the specific community or nation in question).

123. *Id.*

124. *Id.* ¶ 6.461.

125. See *Seal Products Panel*, *supra* note 103, ¶¶ 7.380, 7.382 (quoting the *US – Gambling* panel report and finding that standard applicable to the *Seal Products* dispute); *Seal Products AB*, *supra* note 99, ¶¶ 5.199, 5.200 (noting the Panel’s application of *US – Gambling* and using it to address further public morals concerns).

126. *Seal Products AB*, *supra* note 99, ¶ 5.198.

concerns uniformly.<sup>127</sup> Therefore, though reviewing panels are expected to conduct their own inquiries on a potential public moral concern rather than relying entirely on the assertion of the invoking Member,<sup>128</sup> this requirement is fairly easily met.

With this light standard, the United States should be able to justify a potential measure directed at combatting slavery and forced labor in commercial fishing by establishing the relevant issues as presenting a public moral concern. Concern regarding slavery and forced labor is central to key human rights treaties like the Universal Declaration of Human Rights<sup>129</sup> and the International Covenant on Civil and Political Rights.<sup>130</sup> It is so widely held that it is considered a *jus cogens*, or a peremptory norm, under international law.<sup>131</sup> By contrast, Member States opposing a relevant trade protection would face significant challenges in arguing that slavery and forced labor do not rise to the level of public moral concerns and would face significant public perception issues in the process.

Once a public moral concern has been identified, an Article XX inquiry next examines whether the disputed domestic measure was genuinely adopted to address that concern. This step is not concerned with the measure's actual impact on the public moral issue, but rather instead whether it was adopted with the required intent. A Member State's own "articulation of the objective or the objectives it pursues through its measure" is certainly relevant to this inquiry.<sup>132</sup> However, review-

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127. *Id.*, ¶ 5.200 (rejecting Canada's argument that the EU must recognize the same animal welfare risk for other animals as it does for seals).

128. *See id.*, at ¶ 5.203 (the Appellate Body was not concerned about the Panel's assessment that the moral concern regarding the protection of animals was a value of high importance in the European Union given that Panel appeared "to have reached this conclusion on the basis of its own assessment, and therefore did not rely solely on the position it attributed to the parties.").

129. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (slavery prohibited in Article 4).

130. *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (Slavery prohibited in Article 8(3)).

131. Thibaut Fleury Graff, *The Prohibitions of Slavery, a Jus Cogens Norm in International Law and an Unconditional Right in European Law*, 2 *Les Cahiers De La Justice* 197, 205 (2020) (Fr.).

132. Seal Products AB, *supra* note 99, ¶ 5.144; Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting*

ing panels must be more searching and should “take account of all evidence put before it in this regard, including ‘the texts of statutes, *legislative history*, and other evidence regarding the structure and operation’ of the measure at issue.”<sup>133</sup> When assessing these sources of evidence, reviewing panels seek to identify the ‘main’ or ‘principal’ objective of a disputed measure.<sup>134</sup> Therefore the presence of multiple motivations is not inherently detrimental to a measure, provided that its principal motivation is proven to be the intent to address a public moral concern.<sup>135</sup>

## 2. XX(b): *The Life or Health Exception*

Though it addresses a different area of concern, Article XX(b) employs a structural approach comparable to that of Article XX(a). To justify a measure under subparagraph (b), an invoking member must demonstrate that the measure was designed and adopted for the purpose of protecting human, animal or plant life or health, and that the measure is necessary to accomplish that purpose.<sup>136</sup>

Determining whether a measure has been adopted to protect human, animal, or plant life or health is a considerably more involved process than determining that a measure has been adopted to protect against a public moral concern. While the amorphous nature of public morality does not lend itself well to quantitative or data-oriented analyses, risks to human, animal, or plant life and health, by contrast, often can and do face scientific scrutiny.<sup>137</sup> Thus, Article XX(b) first necessitates the identification of an *actual risk* to any of the above catego-

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*Services*, ¶ 304, WTO Doc. WT/DS285/AB/R (Apr. 7, 2005) [hereinafter US – Gambling AB]).

133. Seal Products AB, *supra* note 99, ¶ 5.144 (quoting Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 314, WTO Doc. WT/DS381/AB/R (adopted June 13, 2012)) (emphasis added).

134. *See* Seal Products AB, *supra* note 99, ¶¶ 5.146–48 (reviewing the Panel’s assessment of the measure’s objectives).

135. *See, e.g., id.* ¶ 5.158 (the Panel found that the measure could take Inuit economic interests into account while having the main objective of protecting the moral concern for seals).

136. GATT, *supra* note 7, art. XX (b).

137. *See* Seal Products AB, *supra* note 99, ¶ 5.198 (discussing how risk-assessment lends itself to scientific or other methods of inquiry unlike public morals).



ries.<sup>138</sup> The Panel in *US – Shrimp Turtle*, for example, solicited and relied upon the answers of scientific experts responding to the following questions: are sea turtles threatened or endangered worldwide? Does shrimp trawling without Turtle Excluder Devices (TEDs) result in the death of large numbers of sea turtles? Do TEDs, when properly installed and used, significantly reduce the mortality of sea turtles caused by shrimp trawl nets?<sup>139</sup>

Similar scientific and technical analysis would be likely required to defend a restrictive trade measure under Article XX(b). Fortunately, substantial qualitative and quantitative data regarding forced labor in the fishing industry have been published, particularly in the past five years, demonstrating the problem to be both rampant and rapidly growing. Victims are escaping and sharing stories of horrific abuse at the hands of their captors,<sup>140</sup> non-profit organizations and NGOs are publishing reports,<sup>141</sup> and satellite technology has honed in on the illegal practice.<sup>142</sup> A paper published by the National Academy of Sciences on December 21, 2020, claims that “satellites can reveal [the] global extent of forced labor in the world’s fishing fleet” by analyzing and mapping the systematically different behavior of vessels reported to use forced labor.<sup>143</sup> Already existing data and relevant experts, therefore, have the potential to identify the risk to human life and health posed by forced labor practices in the fishing industry, to a degree sufficient to satisfy a WTO Panel regarding this requirement of XX(b).

Though caselaw adjudicating Article XX(b) remains sparse, all indications suggest that, as for analysis under sub-

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138. Panel Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, ¶ 8.170, WTO Doc. WT/DS135/R (Adopted Apr. 5, 2001) (determining that the phrase “to protect” in Article XX(b) required identification of a health risk).

139. Shrimp Products Panel, *supra* note 110, ¶¶ 5, 5.397.

140. *See, e.g.*, Urbina, *supra* note 39 (recounting the stories of individuals who were trafficked and forced to work in fishing).

141. *See, e.g.*, ILO, *supra* note 48 (a U.N. nonprofit organization that publishes information on forced labor in fisheries).

142. *See, e.g.*, Gavin G. McDonald et al., *Satellites Can Reveal Global Extent of Forced Labor in the World’s Fishing Fleet*, 118 PROC. NAT’L ACAD. SCI., no. 3, 2021, at 1 (stating that satellite technology has been used to identify forced labor practices in fisheries).

143. *Id.*

paragraph XX(a), it is not enough to simply demonstrate that a risk exists; a presiding panel must also conclude that the trade measure at issue was adopted for the purpose of addressing this risk.<sup>144</sup> While the panel in *US – Shrimp Products* ultimately invalidated the domestic provisions at issue on other grounds and so did not complete its analysis under the Article XX(b) exception,<sup>145</sup> its overview of the arguments made by parties opposing the U.S. policy in this regard, demonstrates that the analysis is substantially similar to that described for subparagraph (a).<sup>146</sup> Parties opposing the U.S. policy in that case looked to invalidate the measure by claiming it was adopted for a purpose other than protecting human, animal, or plant life or health by similarly looking to the legislative history of the measure, noting, *inter alia*, various legislative drafts and statements made by relevant Senators.<sup>147</sup>

Ultimately, this requirement does not present a substantial obstacle to a measure adopted at the instigation of an explicit desire to combat forced labor, for the same reasons described during analysis of subparagraph (a).

b. *Necessity*

Beyond the individualized requirements of the Article XX(a) and (b) exceptions, any potential measure that provisionally falls within the bounds of either exception must also be determined ‘necessary’ to protect the moral or public health risks identified.<sup>148</sup> This inquiry was articulated in *Brazil—Retreaded Tyres*, a dispute that contemplated an exception under Article XX(b),<sup>149</sup> and was reiterated in relation to Article XX(a) by the Appellate Body in *EC—Seals*.<sup>150</sup> Given the commonality of this requirement, the meaning and relevance

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144. See *Shrimp Products Panel*, *supra* note 110, ¶¶ 237-241.

145. *Id.* at ¶ 7.63.

146. See *id.* ¶¶ 3.211–15 (looking at arguments as to whether the measure had the purpose of protecting sea turtles).

147. *Id.*

148. See Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶¶ 140–43, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007) [hereinafter *Brazil – Tyres AB*] (articulating the necessity requirement and looking at various tests).

149. *Id.*

150. *Seal Products AB*, *supra* note 99, ¶ 5.169.

of ‘necessity’ in both possible subparagraph categories of Article XX is explored in concert.

This crucial step in the analysis is arguably more exacting than those that precede it because it considers the *practical effect* of the measure at issue, rather than its objectives and intent.

As a threshold matter, it is important to note that dispute resolution bodies at the WTO do not consider ‘necessary’ to mean ‘indispensable’—a more stringent requirement.<sup>151</sup> While a measure indispensable to achieving a valid moral or health-related objective would undoubtedly satisfy the necessity requirement, resolution bodies have instead held that ‘necessary’ under Article XX lies somewhere between ‘indispensable,’ and merely making ‘some contribution’ to the desired outcome.<sup>152</sup> As a result, determinations of necessity do not involve pre-determined thresholds of adequate contribution.<sup>153</sup> Instead, the necessity inquiry “involves a process of ‘weighing and balancing’ a series of factors, including the *importance of the objective*, the *contribution of the measure to that objective*, and the *trade-restrictiveness of the measure*.”<sup>154</sup> Any reasonable, less-trade restrictive measures that might also achieve desired objectives are also taken into account.<sup>155</sup> Appellate Bodies in multiple disputes frame this inquiry as “holistic.”<sup>156</sup> In essence, this is a risk/utility analysis in the context of a liberal trade regime, balancing the proffered benefits of a measure against those negative externalities inherent in trade restrictions.

Typically, when a Panel conducts this balancing test to assess a measure’s necessity, the importance of the objective and the trade restrictiveness of the measure are factors of signifi-

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151. See Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 161, WTO Docs. WT/DS161/AB/R, (adopted Jan. 10, 2001) [hereinafter Beef AB] (assessing a measure in the context of Article XX(d)).

152. See *id.* (stating that the necessity requirement lies somewhere on that spectrum, but closer to “indispensable” than to “making a contribution to”).

153. See Seal Products AB, *supra* note 99, ¶ 5.215 (explaining that determining whether a measure is necessary requires a holistic review that does not allow for pre-determined thresholds).

154. *Id.* ¶ 5.214 (citation omitted).

155. *Id.*

156. *Id.* ¶¶ 5.214, 5.125 (citing Tyres AB, *supra* note 148, ¶ 184).

cantly less contention than that which considers the contribution of the measure to that objective. This is due in part to the information required to sufficiently assess each factor.

### 1. *Importance of the Objective*

For a public moral objective, although some concerns may seem more or less important to a given Panel, deference is generally given to the countries in identifying and defining their public moral concerns, as discussed above. Given the variability in the content of and weight given to public moral concerns among WTO members, this prong appears unlikely to detract from a finding of ‘necessity.’ In fact, this aspect was not even discussed by the Appellate Body in *EC—Seal Products* within the context of necessity and was only explored under step one of the inquiry: “to protect public morals.” In the context of forced labor at sea, ‘importance of the objective’ is even less likely to detract from a finding of necessity. Instead it would likely support a necessity finding, given that slavery has already been established as an extremely important moral concern of the global community.<sup>157</sup> If anything, the importance of the objective in this case will weigh in favor of a finding of ‘necessary.’

If the objective is framed instead as confronting risks to human, animal, or plant life and health, the scientifically ascertained magnitude and quality of the identified risk would likely figure into ‘necessity’ balancing. Here, where the harm to human life and health posed by slavery as a peremptory evil is massive, the importance of the motivating objective is undeniably apparent. Under subparagraph XX(b), this factor once again weighs in favor of a finding of ‘necessary.’

### 2. *Trade-Restrictiveness*

On the other side of necessity balancing, the restrictiveness of a measure on trade can be assessed through examination of the design and content of that measure. However, WTO analysis of this prong of the necessity test is often fairly cursory. For example, although the Appellate Body in *EC—Seal Products* did mention restrictiveness during its necessity

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157. Graff, *supra* note 131, at 207 (analyzing the important effects of caselaw from the French National Court of Asylum on the Prohibition of slavery).

analysis, it noted only that the E.U. Seal Regime “is trade restrictive because it does ‘hav[e] a limiting effect on trade’ by prohibiting certain seal products. . . from accessing the EU market.”<sup>158</sup>

Although the restrictiveness of any measure that forecloses and drastically burdens imports from certain states can hardly be denied, the precise and relative impacts of different restrictive measures on necessity balancing can be tough to quantify. Even extremely trade restrictive measures can be found ‘necessary,’ provided that in such cases a proportionately stronger showing of the measure’s contribution to its objective is made.<sup>159</sup> In addition, a measure’s degree of trade-restrictiveness informs consideration of other reasonable ‘less-trade restrictive’ measure alternatives.<sup>160</sup>

The significance of an anti-forced labor at sea measure’s trade restrictiveness would depend entirely upon the specific measure ultimately adopted. A total ban on imports of targeted catches, for example, would be deemed far more trade restrictive than a tariff imposed upon the same group of vessels that did not outright foreclose the possibility of imports.

### 3. *Contribution of the Measure to the Objective*

The most critical factor in the ‘necessity’ balancing test regards the contribution of the measure to the objective.<sup>161</sup> This factor is often inherently opaque and contentious, in part because the measures contested before the WTO are often in “a relevantly nascent stage of implementation,” at the time of litigation.<sup>162</sup> In those cases, the actual impact of a measure on

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158. Seal Products Panel, *supra* note 99, ¶ 7.426 (assertion made under the Article 2.2 of the TBT Agreement analysis, but summarily extended to the Article XX(a) necessity analysis in, *see* Panel, EC—Seal Products, ¶ 7.636).

159. *See* Seal Products AB, *supra* note 99, ¶ 5.215 (“It is also consistent with our understanding that the EU Seal Regime, even if it were highly trade-restrictive in nature, could still be found to be ‘necessary’ . . .”).

160. *Id.* ¶ 5.215.

161. *See* Beef AB, *supra* note 151, ¶ 164 (stating that the “contribution made by the compliance measure to the enforcement of the law . . .” features prominently in analyzing whether it is “necessary”).

162. *See* Seal Products AB, *supra* note 99, ¶ 5.221 (noting that the permissive aspects of the challenged measure were still in the early stages of implementation when the panel was reviewing them).

an objective cannot be quantified.<sup>163</sup> Panels are therefore limited to a more qualitative analysis that focuses “mainly on the design and expected operation of the measure.”<sup>164</sup>

Although Members contesting a necessity designation have been quick to criticize the lack of clarity and precision in this portion of Article XX analysis,<sup>165</sup> Appellate Bodies of the WTO have formally recognized the implicit limitations of reviewing WTO Panels in this context.<sup>166</sup> As one Appellate Body noted, “a panel enjoys certain latitude in setting out its approach to determine contribution; that such an approach may be performed in qualitative or quantitative terms; and that it ultimately depends on the nature, quantity, and quality of evidence existing at the time the analysis is made.”<sup>167</sup>

As described above, determining the effectiveness of specific unilateral trade measures requires either a design-specific *ex-ante* assessment or a data-rich *ex-post* evaluation and falls beyond the scope of this Note, which advocates for the development of a set of measures to address forced labor at sea more generally. But regarding the conditioning of some trade restrictive measure on compliance with a satisfactory regulatory regime to monitor and police the use of forced labor and human trafficking in the fishing industry, it is necessary to stress the importance of creating a thoughtful and well-designed regulatory regime. Just as the Panel in *US – Shrimp Products* explored an empirical question regarding whether the proposed technology would mitigate turtle deaths,<sup>168</sup> it would similarly assess any regime comprised of these suggested trade restrictions based on their prospective effect on the rates of forced labor and human trafficking within the fishing industry. This is especially likely given that – based on the speed at which many Member State initiate disputes before the WTO – adjudication would likely occur prior to the full implementa-

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163. *Id.* (suggesting it would be difficult for the panel to perform a quantitative analysis).

164. *Id.*

165. *See e.g., Id.* ¶ 5.226 (“Again, the complainants consider that this finding is not sufficiently clear and precise.”).

166. *Id.* ¶ 5.221 (citing *Tyres AB*, *supra* note 148, ¶¶ 145,146).

167. *Id.* (citing *Tyres AB*, *supra* note 148, ¶¶ 145,146).

168. *See Shrimp Products Panel*, *supra* note 110, ¶ 5.397 (the panel had to ask experts whether the turtle excluder devices actually prevented harm to turtles).

tion of any protections, precluding reliance on empirical data to evaluate effectiveness.

Available evidence, however, strongly suggests that any action taken by the US to cut its consumption of fish products of questionable origin would have a significant impact on the issue globally, in part because the United States remains one of the top destinations for Thai fish products.<sup>169</sup>

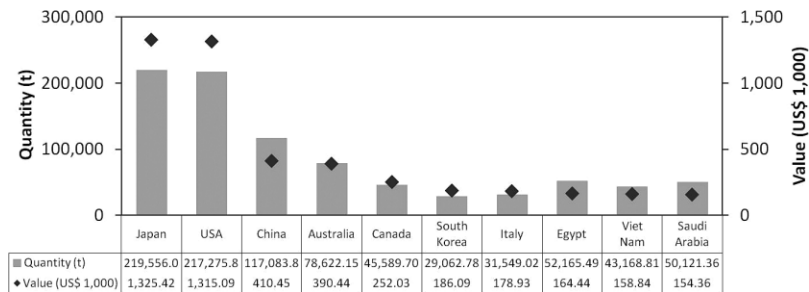


FIGURE 1. TOP 10 DESTINATION COUNTRIES IN TERMS OF VALUE OF FISH AND FISHERY PRODUCTS EXPORTED BY THAILAND IN 2018 BY QUANTITY (T) AND VALUE (US\$ 1,000) SOURCE: DOF, 2019A<sup>170</sup>

As described earlier, the Thai fishing fleet is notorious for its rampant forced labor: Thailand has received both a “yellow card” warning from the European Union for its IUU fishing and a Tier 2 spot on the United States’ Watch List in its Trafficking in Persons Report.<sup>171</sup> Therefore, if the Thai fleet were to face losing out on the significant profits generated by importing into the United States on account of their use of forced labor, incentives may shift, encouraging the fleet to do away with the practice or risk precipitous declines in earning.

Although it is important to be diligent in crafting a regulatory regime enforced by a unilateral trade restrictive mea-

169. Sumolmal Suwannapoom, *County Fisheries Trade: Thailand*, S.E. ASIAN FISHERIES DEV. CTR. (2019), <http://www.seafdec.org/county-fisheries-trade-thailand/> [<https://perma.cc/9WUDU-GAZB>].

170. *Id.*

171. HUMAN RIGHTS WATCH, *HIDDEN CHAINS: RIGHTS ABUSES AND FORCED LABOR IN THAILAND’S FISHING INDUSTRY 2* (2018), [https://www.hrw.org/sites/default/files/report\\_pdf/thailand0118\\_report\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/thailand0118_report_web.pdf) [<https://perma.cc/D4VC-AHN5>].

sure, in this instance the element of ‘contribution’ to the objective is nowhere near an insurmountable hurdle.

#### 4. *Reasonable Less Trade Restrictive Measures*

A final key factor in a Panel’s understanding of ‘necessity’ is the presence of any alternative, reasonable, and less trade restrictive measures. The burden to present alternative measures falls on the contesting Member during Panel review.<sup>172</sup> For the alternative to meaningfully factor into the inquiry, it must be a) reasonably available, b) less trade restrictive,<sup>173</sup> and c) “preserve for the responding Member its right to achieve its *desired level of protection*.”<sup>174</sup>

The reasonable availability condition requires that the alternative cannot be “merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties.”<sup>175</sup> The less trade restrictive component is fairly self-explanatory. Finally, and critically, the reasonable less trade restrictive measure component incorporates an acknowledgment that the quality of protection desired to be achieved by a given measure, shall be respected. If a proposed less trade restrictive alternative measure would significantly mitigate the desired effect of the trade measure at issue, it is not a viable alternative for the purposes of this analysis.

The viability of any proposed alternatives to the measure implemented to address forced labor in commercial fishing would depend both on the ultimate content of the contested measure and the specific adjudicative strategy and proposal of any complaining Member. However, it is worth emphasizing here that any restriction settled on by the United States or a similarly situated WTO Member must be capable of being robustly defended against alternatives by asserting that it promotes a uniquely high level of deterrence to slavery at sea, one that any proposed alternative simply cannot achieve. A

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172. Seal Products AB, *supra* note 99, ¶ 5.261 (citing Tyres AB, *supra* note 148, ¶ 156; Gambling AB, *supra* note 132, ¶ 311).

173. Seal Products AB, *supra* note 99, ¶ 5.261.

174. Tyres AB, *supra* note 148, ¶ 156 (quoting Gambling AB, *supra* note 132, ¶ 308).

175. *Id.* ¶ 156 (quoting Gambling AB, *supra* note 132, ¶ 308).



straightforward example of a high-impact measure is a complete ban on the imported catch of foreign fishing vessels that fly the flag of Member States deemed to inadequately monitor and police labor practices in their fleets. An outright ban, an enforcing Member could argue, assures that its citizens don't buy products produced by slave labor or support that practice where it is detectable and preventable under the proffered regulatory regime. In such a case, should a complaining Member argue for an alternative in the form of a tariff regime, the enforcing Member could demonstrate that slave labor massively undercuts prices,<sup>176</sup> enabling relevant products to economically survive tariff regimes. Products of detectable and preventable slave labor would then continue to enter the market and the preventable practice would linger. The robust aims of an outright ban therefore would not be fully reflected in an alternative, less-restrictive tariff, rendering that alternative inviable under a necessity inquiry.

c. *Summary: Satisfying the Subparagraph*

Satisfying the demands of subparagraphs (a) or (b) of Article XX of the GATT is no easy feat. A proposed unilateral trade protection must survive a lengthy and detailed analytical process driven by WTO scrutiny and resistance from affected Member States. Even so, the above analysis suggests that a trade-restrictive measure aimed at reducing slavery in the global fishing industry by conditioning imports on robust monitoring and policing could be justified under either subparagraph exception.

ii. *The Chapeau*

However, the work does not end there. The second part of the two-tier analysis under Article XX requires a finding that the disputed measure complies with the Article's Chapeau ["The Chapeau"]. The Chapeau provides that measures invoked under the Article's exceptions 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*."<sup>177</sup>

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176. *See id.* (suggesting that the enforcing member could show prohibitive costs to show that the alternative is not reasonable).

177. GATT, *supra* note 7, art. XX.

The Chapeau thus “demands adherence to certain bedrock trade norms as a prerequisite to the general exceptions.”<sup>178</sup>

The WTO Appellate Body in *US-Shrimp Products* understood that its duty was to “interpret the existing language of the chapeau of Article XX by examining its ordinary meaning, in light of its context and object and purpose,” and then apply the Chapeau to the measure at issue and assess “whether [it] qualifies for justification under Article XX.”<sup>179</sup> Ultimately, the Appellate Body determined that the substantive and procedural standards contained in the Chapeau were necessarily different from the requirements of the applicable sub-paragraph, and also different from the standard used to determine that the measure is violative of the relevant substantive rules of the GATT.<sup>180</sup> The Body asserted that the Chapeau embodies an essential equilibrium between the purpose of Article XX’s General Exceptions and the rest of the GATT provisions, ensuring that “neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement.”<sup>181</sup> The Chapeau is therefore primarily concerned with the abuse and misuse of the General Exceptions by Member States.<sup>182</sup> The Chapeau of Article XX, the Appellate Body summarized, is “but one expression of the principle of good faith.”<sup>183</sup>

a. *Arbitrary or Unjustifiable Discrimination*

The requirement that a trade restriction not constitute “*arbitrary or unjustifiable discrimination between countries where the same conditions prevail*,”<sup>184</sup> proved particularly problematic for

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178. Sanford Gaines, *The WTO’s Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT’L ECON. L. 739, 741 (2001).

179. *Shrimp Products AB*, *supra* note 98, ¶ 155.

180. *Id.* ¶¶ 150, 160.

181. Gaines, *supra* note 178, at 742 (citing *US – Shrimp Products AB*, *supra* note 98, at ¶ 159).

182. *See, e.g.*, *Shrimp Products AB*, *supra* note 98, ¶ 160 (considering whether the measures application was a use or misuse of Article XX(g)).

183. *Id.* ¶ 158.

184. *See* GATT, *supra* note 7, art. XX.

the disputed measure in *US-Shrimp Products*.<sup>185</sup> The Appellate Body was particularly concerned with the substantial requirements imposed on shrimp exporting states and with the coercive pressure exerted on differently situated Members to adopt essentially the same comprehensive regulatory regime that the United States applied to its own domestic trawlers.<sup>186</sup> The Appellate Body noted that “discrimination results not only when countries in which the same conditions prevail are differently treated, but also when *the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.*”<sup>187</sup> The provided process for certifying compliance with a satisfactory regulatory regime also proved problematic for the Appellate Body—it was too “informal and casual, and . . . conducted in a manner such that . . . [it] could result in the negation of rights of Members.”<sup>188</sup> The process afforded “no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it, in the course of the certification process before a decision to grant or to deny certification is made. Moreover, no formal written, reasoned decision, whether of acceptance or rejection, is rendered on applications . . . .”<sup>189</sup> The Appellate Body also criticized the United States’ multilateral negotiations and the financial and technical assistance provided to *some* Member States before enforcement of the U.S. measure,<sup>190</sup> before the Body finally concluded that the measure violated the Chapeau of Article XX.<sup>191</sup>

It is essential that any restriction on fishery imports associated with forced labor avoid the sorts of obstacles that ultimately brought down the measures at issue in *US—Shrimp Products*. First, from these findings, it is apparent that any theo-

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185. See *Shrimp Products AB*, *supra* note 98, ¶¶ 160–86 (finding application of the U.S. measure to be arbitrary and unjustifiable discrimination).

186. *Shrimp Products AB*, *supra* note 98, ¶ 165.

187. *Id.* ¶ 165 (emphasis added).

188. *Id.* ¶ 181.

189. *Id.*

190. *Id.* ¶¶ 166–76.

191. *Id.* ¶ 184 (“We find, accordingly, that the United States measure is applied in a manner which amounts to a means not just of “unjustifiable discrimination”, but also of “arbitrary discrimination” between countries where the same conditions prevail, contrary to the requirements of the chapeau of Article XX.”).

retical measure that conditions import tariff avoidance on a satisfactory forced labor monitoring and policing regime must clearly articulate what qualifies as “satisfactory,” with standards that are both ‘necessary’ to advancing the objective<sup>192</sup> and sensitive to different conditions prevailing among member States and a uniform certification process with the essential elements of due process.

Regarding the first requirement, standards must be tailored closely and clearly to the ultimate objective, and any specific requirements can be justified by reference to the robust reasoning and empirical support previously used to satisfy the subparagraph requirement of ‘necessary.’ But they must also be flexible and able to accommodate significant discrepancies in Member States’ capacities. To alleviate the scale of monitoring and policing burdens, an importing State could extend support to *all* nations that attempt to comply with the importing State’s standards.

As for the second requirement, it is difficult to prescribe specific procedures or to determine a requisite level of ‘due process.’ However, as a first step, the certification process should include an opportunity for hearings whereby parties can raise and respond to key concerns, and a prompt written decision explaining why a Member State has been certified or denied. It would also be prudent to include standardized avenues for reconsideration of certification on a fairly frequent basis.

It is also worth noting the importance of proceeding with the development and implementation of a trade-restrictive measure with the cognizable international legal standard of ‘good faith,’ in mind. Ultimately, in spite of the many discrete hurdles in this analysis, it should be possible to implement a measure of the kind raised here without running afoul of Article XX’s Chapeau, just as the United States in *US-Shrimp Products* was able to do after it remedied the Appellate Body’s specific concerns.<sup>193</sup>

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192. See *supra*, Part III(B)(i)(b).

193. See Appellate Body Report, *US – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 153–54, WTO Doc. WT/DS58/AB/RW (adopted Nov. 21, 2001).

#### IV. CONCLUSION

The crisis of forced labor in the fishing industry is significant for its scale, extreme human cost, and long-lasting negative environmental impacts. As major importers of implicated fish products, like the United States, consider avenues for combatting the problem and remedying their own complicity, they should consider *all* trade tools at their disposal. Article XX, which provides general exceptions to the provisions of the GATT, clearly presents such a tool, and within Article XX, subparagraphs (a) and (b) are the most well-tailored to the human rights-based efforts advocated here. However, due to both the overarching purpose of the GATT and the language of Article XX's Chapeau and subparagraphs (a) through (j), it is also clear that any possible exception for trade-restrictive measures must be "limited and conditional."<sup>194</sup> Furthermore, to fall within this limited exception, the 'certification procedure' upon which the trade-restrictive measure is to be conditioned must be carefully developed to reflect both the requirement of 'necessity' and the fairness and due process requirements of the Chapeau. Despite these challenges, it would be feasible to satisfy Article XX's limited exceptions with a measure like those contemplated here. Given this possibility, and in light of both the significant human costs of slavery at sea and the failure of the adopted Fisheries Subsidies Agreement to adequately address the problem, this Note encourages motivated nations to pursue the course laid out above.

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194. Shrimp Products AB, *supra* note 98, ¶ 157.