

**WTO Law Aspects**  
**of**  
**The Clean Trade Project**

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**Introduction<sup>1</sup>**

The Clean Trade Project is designed to prevent certain regimes from exploiting natural resources in violation of the human right to permanent sovereignty over these natural resources.<sup>2</sup> One means of achieving this objective is to inhibit transactions involving these resources. To this end the Clean Trade project envisages two mechanisms:

- A. A direct embargo on trade in exploited resources, and
- B. Duties imposed on trade with third states that permit trade in exploited resources.<sup>3</sup>

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<sup>1</sup> The research for this study was generously supported by a grant from The Leverhulme Trust.

<sup>2</sup> Article 1 of both the International Covenant of Civil and Political Rights and the International Covenant of Social, Economic and Cultural Rights states that: 'All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.' For discussion, see, e.g., Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge: CUP, 1997).

<sup>3</sup> The Clean Trade project further intends that the proceeds of these duties would be diverted to a Clean Hands Trust, held on behalf of the populations of the exploited countries. This aspect of the project does not engage WTO law.

This note examines the likely WTO legality of these two mechanisms.<sup>4</sup> It concludes that, most likely, these mechanisms are WTO-legal. In the event that they are not, though, this note also considers a third option:

- C. A waiver from WTO obligations, along the lines of the waiver for the Kimberley Process for 'conflict diamonds'.

### **A. Direct embargo: prohibition on trade in exploited resources**

There are two ways to close a market to exploited resources. The first is by means of a prohibition on imports of these resources. The second is by means of an internal measure prohibiting the sale of exploited resources, enforced by a prohibition on imports at the border. Both of these mechanisms are governed by the General Agreement on Tariffs and Trade 1994 (GATT 1994), a WTO Agreement, but their legal implications are considerably different.

#### **1. Import prohibition (Article XI GATT)**

A simple prohibition on imports of products from WTO Members would violate Article XI:1 GATT, which prohibits quantitative restrictions on imports from WTO Members.

#### **2. Sales and import prohibition (Article III GATT)**

The second option, a prohibition on sales of exploited resources enforced by an import prohibition, has the same effect as the first option, but has quite different legal implications. Such a measure would be characterised as an internal measure,

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<sup>4</sup> The note assumes that all states concerned are WTO Members.

and would therefore fall to be assessed in terms of the 'national treatment' obligation set out in Article III:4 GATT.<sup>5</sup>

Article III:4 is a non-discrimination provision that ensures equality of competitive conditions between imported and domestic products. It states, relevantly, that:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

The key question, then, is whether the proposed Clean Trade legislation accords the exploited resources less favourable treatment than it does 'like' domestic resources. This requires in the first instance an assessment of whether the exploited resources are 'like' any competitive domestic resources.

## **2.1 'Like' products**

The measure at issue does not discriminate between exploited and non-exploited resources on the basis of any physical characteristics. The sole difference between the two categories of resources is the fact that resources at issue are exploited in violation of international law, and the others are not. The first question is whether this non-physical difference is sufficient for the two categories of product to be considered 'unlike'. If it is, there will be no discrimination in this case.

In *EC – Asbestos*, the WTO Appellate Body said that the 'likeness' of products under Article III:4 is fundamentally about competition between products in the

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<sup>5</sup> The Note Ad Article III GATT emphasises that an internal measure may be enforced 'at the time or point of importation', for example, by an import ban, without losing its character as a measure subject to Article III.

marketplace.<sup>6</sup> It said, further, that a useful framework for determining ‘likeness’ was to consider four factors, no one of which is determinative: physical characteristics, end use, consumer preference and tariff classification.<sup>7</sup> The empirical question in this case is whether, despite the fact that exploited and non-exploited resources share identical physical characteristics, end uses and tariff classifications, as a matter of empirical fact consumers in the market of the regulating state have (or might have) a marked preference for non-exploited resources such that the products at issue cannot be considered competitive. If so, they might be considered ‘unlike’ products in that market, and a prohibition on the sale and importation of exploited products will not violate Article III:4.

Whether this is the case depends on the facts, which may be ascertainable by such means as market research or econometric analysis of consumer purchasing habits. In the case of natural resources, the identity of the ‘consumer’ must also be identified: this could be a natural person, for example, filling a car with petrol or buying diamonds, or it could be a commercial person, also purchasing fuel for refining. The answer as to whether one group of these consumers has a preference for exploited or non-exploited resources may differ in any given case.

There is a distinct possibility that, already at this stage, exploited and non-exploited resources may be considered unlike in any given market, such that Clean Trade legislation banning the sale and importation of exploited resources would not violate Article III:4. But, as said, this depends on the facts, and it must therefore be asked whether, assuming that the products are considered ‘like’, a prohibition on sales and importation of exploited resources would amount to ‘less favourable treatment’ vis-à-vis non-exploited resources.

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<sup>6</sup> WTO Appellate Body Report, *EC – Asbestos*, WT/DS135/AB/R, adopted 5 April 2001, para 99.

<sup>7</sup> *ibid*, paras 101-2.

## 2.2 *Less favourable treatment*

For a product to be accorded 'less favourable treatment', it is necessary that it be disproportionately affected compared to 'like' domestic products. But, according to the Appellate Body Report in *Dominican Republic – Cigarettes*, while this is a *necessary* condition for 'less favourable treatment', it is not a *sufficient* condition. The Appellate Body said as follows:

[T]he existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product, such as the market share of the importer in this case.<sup>8</sup>

In that case, the detrimental impact was 'explained by the fact that the importer of Honduran cigarettes has a smaller market share than two domestic producers'.<sup>9</sup> What this means is that, if a disproportionate impact on imported 'like' products can be explained by factors or circumstances unrelated to the origin of the product, there will not be 'less favourable treatment'.

In the present case, a ban on sales and importation of exploited products will have a disproportionate impact on exploited products compared to 'like' domestic products. The question is therefore whether, following *Dominican Republic – Cigarettes*, the reason for the disproportionate effect can be explained by 'factors or circumstances' unrelated to the origin of the exploited resources. Answering this question requires first identifying the relevant 'factors or circumstances' explaining the discriminatory effects of the measure, and then determining whether these factors or circumstances are related to the origin of the products.

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<sup>8</sup> WTO Appellate Body Report, *Dominican Republic – Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, para 67.

<sup>9</sup> *ibid.*

The 'factors or circumstances' explaining discrimination in the present case concerns the circumstances in which the exploited products are produced and disposed of. At one level, it might appear that such a 'factor or circumstance' is very much linked to the origin of the product. After all, the policy targets products from states which act in this manner. At a deeper level, however, this connection is more tenuous. There is no reason that a regime cannot change its policies, in which case products from that origin will be accorded the favourable treatment. Indeed, encouraging regimes to change their policies is the very object of the measure.

What is important, then, is the nexus between the 'factor or circumstance' at issue and the situation in any given WTO Member. One might say that this nexus is rather strong, in fact, in cases in which there is no prospect that a given regime will alter its practices. But at this point there is another factor of importance, which is that the activity being targeted is, *ipso facto*, in violation of international law. It would be invidious to take the view that an illegal activity is necessarily connected with a particular state of origin. Rather, any such illegal activity must be seen as temporary, and notice ought to be taken of the obligation of the state of origin to cease that activity in accordance with its international obligations. In this way, an argument can be made that a measure targeting illegal activities does not accord 'less favourable treatment' to products that happen to originate from those places of origin.

### **2.3 *The most favoured nation obligation (Article I GATT)***

A separate question is whether a ban on sales and importation of exploited resources would be compatible with the most favoured nation obligation set out in Article I:1 GATT. This is another non-discrimination provision which states that a WTO Member must accord 'any advantage, favour, privilege or immunity' to products from other WTO Members that it grants to 'like' products from any other country, and that it must do so 'immediately and unconditionally'.

The first part of Article I:1 is similar to Article III:4 GATT, and so is the analysis. If exploited resources are not 'like' non-exploited resources, there will be no violation.

As mentioned, this depends very much on the market of the regulating state. If however they are 'like', the next question is whether, by allowing the sale and importation of 'like' non-exploited resources, while prohibiting the sale and importation of exploited resources, the regulating state is according the former an 'advantage' that it is not according to the latter.

On this point, panels have tended to be concerned that 'advantages' are not based on 'factors' that are related to the origin of the products at issue.<sup>10</sup> In *EC – Tariff Preferences*, the Panel rejected a measure based on the extent to which the country of origin was experiencing difficulties in regulating drugs,<sup>11</sup> and in *EC – Fasteners*, the Panel rejected a measure based on the 'market' nature of the economy of the country of origin.<sup>12</sup> Both of these factors were closely tied to specific origins, and also difficult (if not impossible) to change.

In the present case, the proposed measure would be failing to grant the 'advantage' of market access to exploited resources. The question is whether this can be explained by a factor unrelated to the origin of the products. For much the same reason as that relevant in the analysis under Article III:4, it can be argued that even though there is a certain nexus between the products not being accorded the advantage and a given origin, this nexus is only superficial, and that international law requires that such a nexus be disregarded in favour of the universal character of the 'factors and circumstances' underlying the measure.

There is also another hurdle. As mentioned, Article I:1 GATT requires not only that 'advantages' be 'accorded' to products from all WTO Members, but also that they be

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<sup>10</sup> Many of these cases are confused, wrongly focusing in this non-discrimination analysis on the requirement to accord an advantage 'immediately and unconditionally'.

<sup>11</sup> WTO Panel Report, *EC – Tariff Preferences*, WT/DS246/R, adopted as modified by the Appellate Body Report, 20 April 2004, para 7.60.

<sup>12</sup> WTO Panel Report, *EC – Fasteners*, WT/DS397/R, adopted as modified by the Appellate Body Report, 28 July 2011, paras 7.124-7.127. This latter finding was declared moot by the Appellate Body on other grounds, in WTO Appellate Body Report, *EC – Fasteners*, WTO/DS397/AB/R, adopted 28 July 2011, paras 397-398.

accorded 'immediately and unconditionally'. There has been some debate as to the application of this condition, but at a minimum it appears to prevent a WTO member from according an 'advantage' that is 'conditional' on acts to be performed by another WTO Member (e.g., by concluding a treaty or adopting legislation).<sup>13</sup> On its face, this would seem to be fatal to the proposed mechanism, which accords the 'advantage' of legitimate sale and importation only to resources from WTO Members that conduct themselves in a certain way.

On the other hand, an argument might be mounted that this interpretation of the 'immediately and unconditionally' requirement should be confined to situations in which the targeted WTO Member is not otherwise required to act in a certain way. In the present case, that WTO Member is, to the contrary, being required to conform to its international obligations. Admittedly, such a reading amounts to an authorisation under WTO law to use trade measures to induce other WTO Members to comply with their international obligations. In *Mexico – Soft Drinks*, the Appellate Body rejected the suggestion that Article XX(d), an exception for measures necessary to secure compliance with 'laws and regulations', might extend to *other* WTO Members' *international* obligations.<sup>14</sup> But that ruling can be explained on the basis of its particular wording. The Appellate Body based its reasoning on the meaning of 'laws and regulations'. It gives no reason to exclude, out of hand, the possibility that WTO law does not permit Members to condition market access on compliance with given international obligations.

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<sup>13</sup> GATT Panel Report, *Belgian Family Allowances*, GATT Doc G/32, adopted 7 November 1952, para 3; *Report of the Working Party on the Accession of Hungary*, adopted 30 July 1973, BISD 20S/34, para 12; WTO Panel, *EC – Trademarks and Geographical Indications (US)*, WT/DS174/R, adopted 20 April 2005, para 7.704 (on Article 4 TRIPS). It would appear that this was accepted by the WTO Panel in *Canada – Automobiles*, WT/DS139/R, adopted 19 June 2000, para 10.25, which described the first two cases here, without disapproval, as involving 'conditions that entailed different treatment of imported products depending upon their origin'.

<sup>14</sup> WTO Appellate Body Report, *Mexico – Soft Drinks*, WT/DS308/AB/R, adopted 24 March 2006, para 69.



## **2.4 Conclusion**

The legality of a sales ban (enforced by an import ban) on exploited resources under Article III:4 and Article I:1 GATT depends on three questions. The first is whether consumers (whether private or industrial) have (or might have) a demonstrated preference in favour of non-exploited resources over exploited resources. If they do, then there is a chance that the two categories of product could be considered 'unlike', and there cannot be any discrimination under these provisions. This depends on an analysis of the market at issue.

If the products are however considered 'like', it is necessary to consider a second question, which is whether WTO law permits 'less favourable treatment' based on the fact that a given regime in a given state of origin is conducting itself in violation of its international obligations. An argument can be made that such treatment is not linked to any given origin; indeed, that by the force of international law it *cannot* be so linked. A similar argument can also be made in connection with the common understanding that the requirement in Article I:1 GATT that advantages must be accorded 'immediately and unconditionally' to products from all WTO Members. Even though this is usually understood to mean that WTO Members cannot be required to act in any particular way for their products to obtain the advantage, it might be argued that this understanding does not extend to WTO Members being required to act in accordance with their international obligations. At the same time, it must also be acknowledged that these arguments are novel, and there is no guarantee that they will be successful.

Therefore, as both the law in this area and the facts of the case are uncertain, it is necessary to consider the possibility that the proposed measure does violate one or other of the above mentioned GATT obligations. If so, it is necessary to consider whether the mechanism can be justified under the general exceptions set out in Article XX GATT.

### 3. Justification under Article XX GATT

Under Article XX GATT, WTO Members are entitled, subject to certain conditions, to adopt measures for various non-economic reasons. Relevantly, WTO Member may adopt measures necessary to protect public morals, and measures necessary to enforce domestic laws not themselves inconsistent with the GATT.

#### 3.1 Article XX(a) – measures necessary to protect public morals

##### ***‘Public morals’***

Article XX(a) GATT permits WTO Members to adopt measures necessary for the protection of public morals. In *US – Gambling* the WTO Panel said, in a statement implicitly endorsed by the Appellate Body, that:

the term 'public morals' denotes standards of right and wrong conduct maintained by or on behalf of a community or nation ... 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.<sup>15</sup>

WTO tribunals have taken a relaxed view as to what constitutes the public morals of any given WTO Member. In *China – Audiovisual Products*, for example, both the Panel and the Appellate Body accepted, without question, the proposition that the importation of uncensored materials could have a detrimental impact on public morals in China.<sup>16</sup> But even if there is no particular restriction on the *nature* of public morals in any given country, it is important is that the claim is consistent. A

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<sup>15</sup> WTO Panel Report, *US – Gambling*, adopted 20 April 2005, para 6.465; Appellate Body Report, *US – Gambling*, WT/DS285/AB/R, adopted 20 April 2005, para 299.

<sup>16</sup> WTO Appellate Body Report, *China – Audiovisual Products*, WT/DS363/AB/R, adopted 19 January 2010, para 148. It is relevant, though not conclusive, that the point was not challenged by the complainant.

WTO Member could not, for example, prohibit imports of pornographic materials that it otherwise permits to be sold domestically.<sup>17</sup>

In the present case, one can identify two potential sets of 'public morals'. The first is the desire of the regulating WTO Member to enforce other states' obligations not to violate the rights of peoples to sovereignty over their natural resources. But a second, more limited, objective is also conceivable: namely, the desire of the regulating WTO Member not to *contribute* to conduct infringing this right. While both could be legitimate examples of public morals, the latter has the advantage of being supported by international law. Article 16 of the Articles on State Responsibility provides that:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.

It cannot be denied that a state should be able to avoid risking its responsibility under Article 16, and that such an interest should be considered the public morals of a state.

### ***Measures 'necessary' to protect public morals***

Once the public morals at issue have been identified, the next question is whether the given measure is 'necessary' for their protection. According to WTO jurisprudence, a measure will be 'necessary' if it makes a 'material contribution' to the stated

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<sup>17</sup> Cf. Case 121/85, *Conegate* [1986] ECR 1007.

objective, and if there is no reasonably available alternative measure that is less trade restrictive) that achieves this stated objective. The ‘necessity’ test is essentially a question of the means chosen to achieve a specified end.

On the basis that the regulating state’s specified objective is the need not to be complicit in violations of international law, the first question is whether a prohibition on sales and importation of the exploited resources makes a ‘material contribution’ to that end.<sup>18</sup> Clearly, it does. More difficult, perhaps, is the second question, whether there is an alternative measure that would be less trade restrictive but equally effective to achieve the given objective. It could be argued that such other measures exist, for example negotiations, or financial and technical aid. It is difficult in the abstract to assess such claims, but it is unlikely they would be fully effective on their own. At most, they might form part of a regulatory package, including trade measures of the type at issue, which together would constitute an appropriate means of achieving the specified objective.<sup>19</sup> This would require the regulating country to adopt a comprehensive strategy involving less trade restrictive measures alongside its trade measures. But, importantly, the mere existence of such additional measures does not mean that the import ban is *not* necessary. In sum, there is reason to believe that, based on the ‘public morals’ of a state to the effect that it should not be involved in violations of international law, a ban on sales and imports of exploited resources could be provisionally justified under Article XX(a).

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<sup>18</sup> WTO Appellate Body Report, *Brazil – Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, para 150.

<sup>19</sup> *ibid*, para 154.

### **3.2 Article XX(d) – measures necessary to enforce measures themselves not inconsistent with the GATT**

A second potential justification for the measures at issue is Article XX(d), which permits WTO Members to adopt measures:

necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices.

As mentioned, the Appellate Body has clarified that these ‘laws or regulations’ are domestic laws, including domestic laws incorporating international obligations in legal systems in which international law has direct effect.<sup>20</sup> But it stated clearly that they do not include the international obligations of *other* WTO Members.<sup>21</sup> Consequently, Article XX(d) cannot justify counter-measures designed to enforce such obligations.

The key question, then, is whether there is a domestic ‘law or regulation’ which can serve as the normative basis for a prohibition on the sales and importation of exploited resources.<sup>22</sup> Article 16 of the Articles on State Responsibility, mentioned above, is of direct application in this context. For WTO Members with legal systems in which international obligations have direct effect, this would be sufficient to sustain a defence based on Article XX(d). In some cases, moreover, there are positive

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<sup>20</sup> WTO Appellate Body Report, *Mexico – Soft Drinks*, WT/DS308/AB/R, adopted 24 March 2006, para 69.

<sup>21</sup> *ibid.*

<sup>22</sup> In principle, any domestic law or regulation could be nominated as ‘not inconsistent’ with the GATT. A series of cases has taken the view that, unless challenged, it will be presumed that a domestic law is ‘not inconsistent’ with the GATT. But this does not mean that it is. And just as any law could be ‘not inconsistent’ with the GATT, it is equally true that any law *could* be inconsistent with the GATT, including criminal laws.

legal norms to the same effect. Article 21 of the Treaty on European Union states relevantly that:

The Union shall respect the [following] principles ... in the development and implementation of the different areas of the Union's external action:

democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law ...

For the EU, it is therefore particularly straightforward to argue that a prohibition on sales and importation of exploited resources is necessary to 'secure compliance' with its domestic 'law'. Other countries may be in the same position. However, those countries that are under no domestic obligation to comply with international rules on complicity in violations of international obligations would not, seemingly, be able to rely on Article XX(d) GATT to support Clean Trade measures.

### **3.3 *Chapeau***

The final stage of analysis concerns the so-called 'Chapeau' of Article XX GATT, which requires that measures provisionally justified under the subparagraphs of Article XX:

[may] 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

This raises the question whether the ban on sales and importation of exploited resources could constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.<sup>23</sup>

This requires, in the first instance, a determination of the 'countries' at issue and the 'conditions prevailing' in those countries. The 'countries' at issue are all countries exporting (in reality or hypothetically) resources to the regulating state. The 'conditions prevailing' must be assessed in terms of the policy underlying the measure, which in the present case concerns the exploitation of resources in given WTO Members.<sup>24</sup> Once these terms have been identified, a WTO Member implementing Clean Trade legislation is required not to discriminate between countries where these same conditions prevail. This requires the regulating country correctly to identify the relevant 'countries where the same conditions prevail' and to treat them without discrimination, unless this discrimination can be justified in terms of the objective of the legislation. In the present case, these conditions should not be especially difficult to meet.

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<sup>23</sup> The last requirement is generally understood as meaning that the measure is adopted for protectionist purposes: it is not an issue in the present case.

<sup>24</sup> See Lorand Bartels, 'The WTO Legality of the EU's Emissions Trading System (ETS) as Applied to Aviation' (2012) 23 *European Journal of International Law*, forthcoming.

### **3.4 Conclusion**

The conclusion of this analysis is that even if a prohibition on sales and importation of exploited resources violates a GATT obligation, it is very likely able to be justified under Articles XX(a) or XX(d) GATT.

### **B. Imports from intermediate country**

#### **4. Article II GATT**

The second element of the proposed Clean Trade legislation is a duty levied on imports from intermediate countries that themselves allow trade in exploited resources from the country primarily targeted. There are two possible reasons for such a measure. The first is to prevent circumvention of the primary embargo on resources from the target country. This circumvention can occur directly, insofar as the resources are transhipped through the intermediate country, or indirectly, insofar as the intermediate country represents an alternative market for the exploited resources. The second is to encourage the intermediate country to change its own policies, so as to prevent imports of exploited resources from the country the subject of the primary embargo.

If a duty of this type rises above the rate bound by the regulating WTO Member in its schedule of concessions, such an action would undoubtedly violate Article II:1(a) and (b) GATT. This depends on the product at issue. However, many WTO Members, and in particular developed countries, have a very high rate of tariff bindings. For example, the United States has bound 100 per cent of its tariffs, at an average rate of 3.5 per cent. The EU has likewise bound 100 per cent of its tariffs, at an average rate



of 5 per cent.<sup>25</sup> It is extremely likely that any raising of tariffs on products from an intermediate country WTO Member would violate Article II:1 GATT.

But even if not, there is a question whether such a measure would violate Article I:1 GATT. As mentioned, Article I:1 GATT prohibits WTO Members from according 'advantages' on condition that another WTO Member acts in a certain way. Above, it was argued that this requirement might not apply when that condition reflects an obligation binding under international law. As mentioned, Article 16 of the Articles on State Responsibility prohibits a state from knowingly aiding or assisting another State in the commission of an internationally wrongful act.<sup>26</sup> Otherwise, there is no applicable international obligation. If this reading of Article I:1 GATT is correct, and it can be demonstrated that an intermediate state is in responsible according to this standard, it would follow that a regulating WTO Member is able to impose duties on intermediate WTO Members without violating Article I:1 GATT. It is by no means certain, but there is a possibility that these conditions are met.

#### **4.2 Article XX GATT**

If the imposition of duties on an intermediate WTO Member violates Article II:1 and/or Article I:1, it is necessary to consider whether such a measure could be justified on the basis of Article XX.

##### ***Article XX(a) (public morals)***

For the reasons mentioned, it is arguable that it is the 'public morals' of a state not to be complicit in violations of international law under Article XX(a). This raises two further questions: first, whether a state is complicit in such a violation if it fails to prevent exploited resources from being imported via an intermediary state; and second, whether it is complicit if it fails to encourage that intermediate state from

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<sup>25</sup> WTO/ITC/UNCTAD, World Tariff Profiles (Geneva: WTO/ITC/UNCTAD, 2011).

<sup>26</sup> Article 16 of the Articles on State Responsibility.

adopting a primary embargo of its own. The first is easily arguable; the second is most likely too remote. This means that it is not permissible to impose duties on products from intermediate countries other than the exploited resources themselves.

If it can be established that an intermediate embargo has the purpose of preventing complicity in an international violation, it must be established that it makes a 'material contribution' to this objective, and also that the intermediate embargo is necessary to this end. As to 'material contribution', it will be necessary to establish that the duty has the effect of inhibiting the imports. A small duty may not have this objective. It is therefore important that the duty be sufficient to have this effect. An import embargo might be even more effective.

The next question is that of the necessity of the measure. As noted above, this depends on whether there is another reasonably available measure that is less trade restrictive that achieves the given objectives. It seems relatively safe to say that there is no such measure, and there is precedent to this effect. The United States requires annual reporting on countries exporting rough diamonds to the United States that are not controlled through the Kimberley Process Certification Scheme, if the failure to do so has significantly increased the likelihood that those diamonds not so controlled are being imported into the United States.<sup>27</sup> There is, in consequence, a good argument that Article XX(a) is available for an embargo targeted at intermediate countries through which exploited resources are transported.

***Article XX(d) GATT (securing compliance with laws and regulations)***

Article XX(d) leads to a similar result, albeit that, as mentioned above, this exception is only available for importing WTO Members for which it is a domestic obligation to comply with international law, including the requirement not to be complicit in

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<sup>27</sup> 19 USC § 3911 (Kimberley Process Implementation Coordinating Committee).

violations of international law. For such Members, the question is whether the intermediate embargo is necessary to secure compliance with such laws or regulations. The same argument applies as for Article XX(a): namely, that the intermediate embargo is necessary to prevent circumvention of the primary embargo. And, for the same reasons, for the countries covered, there is a good argument that Article XX(d) protects duties (or embargoes) on exploited products imported via intermediate countries.

### **C. A political solution: a waiver**

It is always possible for WTO obligations to be waived, under Article IX:3 of the WTO Agreement. A precedent, in a similar context, is the waiver obtained for the Kimberley conflicts diamonds system.<sup>28</sup>

Whether a waiver request would be successful in the WTO is essentially a question of policy and diplomacy. However, it bears noting that the Kimberley diamond waiver was essentially an implementation of a decision already agreed in the UN system, and other politically sensitive waivers have been similarly based on a broad based agreement.<sup>29</sup> Furthermore, even though, in principle, waivers require a three-quarters majority of the WTO Membership, in practice, as with all other decisions taken in the WTO, decisions on waivers are taken by consensus. Given these constraints, one would be hesitant to predict a positive outcome for a waiver request for the mechanisms under discussion, at least in the absence of a broad-based political agreement. That such agreement is presently lacking is amply demonstrated by the very need for the Clean Trade project.

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<sup>28</sup> Joost Pauwelyn, 'WTO Compassion or Superiority Complex? What to Make of the WTO Waiver for 'Conflict Diamonds'' (2003) 24 Michigan Journal of International Law 1177.

<sup>29</sup> Isabel Feichtner, *The Law and Politics of WTO Waivers: Stability and Flexibility in Public International Law* (Cambridge: CUP, 2011).

## **D. Conclusions**

The conclusions of this analysis are, on the whole, favourable to the WTO legality of the principal trade mechanisms designed to achieve the goals of the Clean Trade project. While a simple import prohibition on exploited resources would without question violate Article XI:1 GATT, a domestic sales ban, enforced by an import ban, on the same products has a good chance of surviving GATT scrutiny. There are also arguments in favour of the imposition of duties (or an embargo) on exploited products imported via an intermediate WTO Member. On the other hand, it does not appear permissible to impose duties on other products from such an intermediate WTO Member as a means of inducing that Member to change its policies. To this extent, there may be an enforcement gap in the mechanisms envisaged by the Clean Trade project. However, the primary goal of targeting regimes that improperly expropriate their peoples' natural resources remains largely intact, as does the goal of preventing the circumvention of such restrictions.