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Editor's Note

As Managing Editor, I am pleased to present the inaugural issue of CILAD Monthly. This publication has been established as a dedicated academic platform to encourage structured and rigorous engagement in the field of International Law.

As our first edition, particular care was taken to ensure that the standards adopted at the outset reflect the seriousness with which we approach this initiative. Each submission underwent a structured review process assessing substantive merit, analytical clarity, originality, and compliance with citation and formatting norms.

Bringing this issue to publication required consistent effort from the editorial team. I extend my sincere appreciation to our Junior and Senior Editors for their diligence and thoughtful review of each manuscript. I also acknowledge the support of the Convenor of CILAD in guiding this initiative. I further thank our contributors for their cooperation and patience throughout the process.

With this inaugural edition, CILAD Monthly sets the foundation for the academic discipline, consistency, and integrity we intend to maintain in future issues. We trust that the scholarship presented herein will contribute meaningfully to discussions in International Law.

S. Phanitawya

ENVIRONMENTAL EXCEPTIONS OR HIDDEN PROTECTIONISM? A CRITIQUE OF THE WTO'S PALM OIL PANEL REPORTS

- HARGUN DANG*

This blog will deal with the disparities between WTO DS600 and DS593. Both matters concern the palm oil biofuel restrictions of the EU pursuant to the Renewable Energy Directive (RED II), raised by Malaysia and Indonesia.[1] It deals with the panel reports' shortcomings, published on March 5, 2024, for DS600[2] and January 10, 2025, for DS593,[3] dealing with analytical gaps in environmental jurisprudence, aid for developing nations, and trade exception, while proposing way forward for more detailed future rulings to harmonize climate action with fair trade.

The Heart of the Disputes

The core issue here concerns an effort of the EU to phase palm oil out of use in biofuels over fears of *Indirect Land-Use Change* (ILUC), wherein crop shifts cause unintended deforestation.[4] While RED II purports to be a neutral environmental regulation, the 7% threshold and high-ILUC risk designation for palm oil act as a **proxy for protectionism**. By utilizing European-centric models (like GTAP) that fail to account for the superior land-yield efficiency of tropical crops, the EU creates a technical barrier that disproportionately burdens developing-nation exporters while shielding domestic producers,[5] with palm oil marked as high ILUC risk due to its expansion on peatlands and biodiverse areas.[6] A 2019 Delegated Act mandates phasing out biofuels from high-expansion crops (e.g., palm oil above 1.7%) by 2030 unless certified as low-risk with no recent land conversion.[7]

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[1] Directive 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the Promotion of the Use of Energy from Renewable Sources, 2018 O.J. (L 328) 82 [hereinafter RED II].

[2] Panel Report, European Union and Certain Member States, Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels (Malaysia), WT/DS600/R (Mar. 5, 2024).

[3] Panel Report, European Union , Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels (Indonesia), WT/DS593/R (Jan. 10, 2025).

[4] Int'l Council on Clean Transp., Analysis of High and Low Indirect Land-Use Change Definitions in the EU Renewable Energy Directive 1 (2018), https://theicct.org/wp-content/uploads/2021/06/High_low_ILUC_risk_EU_20181115.pdf

[5] Supra note 1.

[6] Supra note 4, at 3.

[7] Supra note 1, at Annex VIII.

While the EU argued its actions were rooted in climate goals, defending these as science-based under GATT Article XX(b) (protecting human health via GHG cuts)[8] and XX(g) (conserving exhaustible resources like forests),[9] citing models showing palm oil's 65 gCO2/MJ emissions versus rapeseed's lower footprint of around 20-40 gCO2/MJ,[10] the complainants contended that the measures were discriminatory, protectionist, and non-confirming with WTO rules. Specially, palm oil, 40% of global vegetable oil,[11] when compared with soy or rapeseed faced stricter limits, breaching GATT Art. I (MFN, by not treating like products equally),[12] Art. III (national treatment, and they are favouring EU producers),[13] and Art. XI (banning quotas).[14] Under Technical Barriers to Trade Agreement, they claimed violations of Article 2.1 (arbitrary distinctions), Art. 2.2 (unnecessary trade restrictions), and Art. 12 (failing S&DT).[15] Protectionism allegations based on EU subsidies funding domestic crops, with ILUC thresholds build to exclude imports, e.g., palm oil's high expansion factor ignored its superior yields (3-4 tons/hectare vs. soy's 0.7 or rapeseed's 0.8 tons/hectare).[16] The report did not distinguish between environmental protection and hidden protectionism. By failing to probe the proportionality and necessity of the EU's measures, the Panel risked legitimizing unilateral actions that may be disguised as environmental policy.[17]

The Panels provisionally justified goals of EU but struck down aspects as in DS600 which are, ILUC reviews and vague certifications violated TBT 5.1 (conformity assessment) and GATT X:3(a) (fair administration).[18] In DS593, the panel reiterate it while adding French bans as arbitrary under XX chapeau.[19] Still, the rulings leaned toward EU intent, prompting scrutiny of their depth.[20]

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[8] International Maritime Organization, Cutting GHG Emissions, https://www.imo.org/en/mediacentre/hottopics/pages/cutting-ghg-emissions.aspx (last visited Sept. 13, 2025).
[9] Supra note 2, ¶¶ 7.1–7.50.
[10] Supra note 4, at 12.
[11] Grand View Rsch., Vegetable Oil Market Size, Share & Trends Analysis Report 1 (2024), https://www.grandviewresearch.com/industry-analysis/vegetable-oil-market.
[12] Supra note 2, ¶ 7.100.
[13] Id. ¶ 7.150.
[14] Supra note 3, ¶ 7.120.
[15] Mario A. Solórzano, (Bio)Fueled to Combat Climate Change? An Analysis of the WTO Panel Decision in the EU-Palm Oil (Malaysia) Dispute, CELIS Blog (Oct. 21, 2024), https://www.celis.institute/celis-blog/biofueled-to-combat-climate-change-an-analysis-of-the-wto-panel-decision-in-the-eu-palm-oil-malaysia-dispute/.
[16] Our World in Data, Oil Yield per Hectare by Crop (2023), https://ourworldindata.org/grapher/oil-yield-by-crop.
[17] Supra note 11, at 15.
[18] Supra note 15.
[19] Supra note 2, ¶¶ 8.1–8.20.
[20] Supra note 3, ¶ 7.300.

Flaws in the Panel Reports

Upon dissecting the reports, several interconnected weaknesses starts to surface, starting with RED II's core functioning and going to broader WTO principles. These lapses not only undermine credibility but also tilt outcomes toward wealthier members.[21]

Implementation Gaps and Methodological Bias

RED II forms the disputes' backbone, yet panels critiqued its rollout without examing foundational biases.[22] This ILUC methodology is based on European models like the GTAP (Global Trade Analysis Project) database, which further assume expansion factors derived from Europe (i.e., assuming uniform 10-20% cropland shifts) that do not properly credit tropical efficiencies, virtually classifying all palm oil as high-risk within the logic, although very clear lands are damaged and yields are stable.[23] Panels noted certification inoperability until 2022, granted the need for proof of "financial additionality" (extra investment beyond business as usual) or smallholder status (<2 hectares), but intentionally ignore 16 million small farmers in Indonesia and Malaysia who has the burden of compliance costs hitting $500-1,000 per farm annually.[24]

Additionally reports accepted "probable risk" proxies from IPCC data without mandating site-specific validation, ignoring palm oil's lower direct emissions (12-20 gCO2/MJ with good practices).[25] This proves protectionism, as EU's oil evades similar scrutiny despite ILUC from set-aside conversions.[26] Without a detailed analysis of the necessity behind RED II's delegated act such as could other adjusted thresholds (Indonesia's 0.5% cap proposal) do 80% of the emission savings? The panels justified a model that, according to economic models, could

[21] Supra note 15.
[22] Prakruti S. Mishra & Aditya S. Bhattacharya, Trade and Environment Back in the Spotlight: Measuring-Up the EU's Rules on Biofuels – WTO Panel Report in EU – Palm Oil (DS600), 51 Legal Issues Econ. Integration 7, 12 (2024).
[23] Supra note 1.
[24] Supra note 4, at 5.
[25] Malaysian Palm Oil Bd., Indirect Land Use Change as a Criterion to Determine Sustainable Biofuel Crop Production 4 (2020), https://www.mpoc.org.my/indirect-land-use-change-as-a-criterion-to-determine-sustainable-biofuel-crop-production/.
[26] Supra note 4, at 8.

reduce the revenues of exporters by €2-3 billion on an annual basis without creating proportional gains in global climate benefits.[27]

Overlooked Obligations for Developing Economies

TBT Agreement Article 12 promises *Special and Differential Treatment*, like extended comment periods and tailored assessments for developing countries.[28] Panels found EU consultations (e.g., via trade sustainability dialogues) adequate, citing smallholder exemptions.[29] However, there has been no quantitative impact analysis of GDP hits (palm oil is 4.5% of Malaysia's exports, contributing over 2% to GDP)[30] or job losses (3 million livelihoods).[31] The Panels' failure to quantitatively analyse Malaysia's GDP impact violates Article 12 of the TBT Agreement. By reducing S&DT to mere consultation, they've rendered it meaningless and undermined the WTO's commitment to fair trade for developing economies.[32]

This superficiality perpetuates inequities, developed nations impose extraterritorial rules without tech transfers, like ILUC monitoring tools.[33] Panels could have thought of invoking the precedents like US-Shrimp, but instead, they reinforced a system where S&DT feels performative, which might result in eroding trust among least-developed members.[34]

Cursory Review of Exceptions and Alternatives

Article XX of GATT offers defences for environmental measures, but panels' chapeau analysis, testing for arbitrary discrimination, showcased rushed.[35] Provisional justifications held for XX(b)/(g), yet flaws like delayed data reviews (e.g., 2019 ILUC updates postponed to 2023)

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[27] D. S. Putri et al., Costs and Benefits of Certification of Independent Oil Palm Smallholders in Indonesia, 14 Int'l Food & Agribusiness Mgmt. Rev. 1, 5 (2018), https://www.researchgate.net/publication/325024215_Costs_and_benefits_of_certification_of_independent_oil_palm_smallholders_in_Indonesia.
[28] Supra note 4, at 10.
[29] Supra note 15.
[30] ScienceDirect, Impact Assessment of EU Import Ban on Palm Oil on the Malaysian Economy 2 (2022), https://www.sciencedirect.com/science/article/pii/S0048969722057941.
[31] Id. at 4.
[32] Agreement on Technical Barriers to Trade art. 12, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120.
[33] Supra note 2, ¶ 7.200.
[34] Statista, Malaysia: Palm Oil Share of GDP 2024 (2024), https://www.statista.com/statistics/952996/malaysia-palm-oil-share-of-gdp/.
[35] Id.

triggered failures.[36] Critically, reports omitted deep alternatives scrutiny, overlooked international standards such as the *Roundtable on Sustainable Palm Oil (RSPO)* schemes,[37] which mandate no-deforestation after November 2018,[38] free prior informed consent for *indigenous lands, and biodiversity preservation via 30+ principles audited annually*.[39] Under Article XX(b), the Panels should have assessed whether RSPO or MSPO schemes, requiring no-deforestation with annual audits, are less trade-restrictive alternatives. Dismissing these as 'complementary' endorsed unilateralism over international harmonization.[40]

In DS600, panels looked into RSPO as "*complementary*" but not as equivalent, skipping harmonization under TBT Agreement Article 2.4. DS593 rejected ISO 14067 (*carbon footprinting*) relevance for ILUC, yet failed to explore hybrids, e.g., RSPO+EU audits yielding 95% verification rates.[41] This cursory probe risks greenwashing as panels endorsing in unilateralism without proportionality tests (do measures exceed what's needed for 20-30% emission drops?).[42]

Enhancing WTO Analytical Rigor

To address these, future panels must evolve beyond binary rulings, [43] which can be achieved by first, integrating mandatory impact assessments under S&DT, as in Tuna-Dolphin II, with remedies like capacity-building funds (€500M EU-wide precedent).[44] Second, by deepening alternatives evaluation, testing if blended standards achieve equivalent GHG reductions (studies show 40-60% ILUC mitigation).[45] Panels could commission third-party audits to achieve this evaluation, drawing UNFCCC equity principles.[46] Third, by fortifying Article XX:

[36] Supra note 30, at 3.
[37] Supra note 15.
[38] Supra note 30, at 6.
[39] Supra note 2, ¶ 7.250.
[40] Id. ¶ 7.280.
[41] Roundtable on Sustainable Palm Oil [RSPO], RSPO Principles and Criteria for the Production of Sustainable Palm Oil 10 (2020), https://rspo.org/as-an-organisation/our-standards/.
[42] Id. at 15.
[43] M. A. Saptorno et al., Mitigating the Risks of Indirect Land Use Change (ILUC) Related to EU Biofuel Policy, 104 Land Use Pol'y 104–110 (2021), https://www.sciencedirect.com/science/article/abs/pii/S0264837721002210.
[44] Supra note 15.
[45] Supra note 22, at 18.
[46] United Nations Framework Convention on Climate Change, Equity and Common but Differentiated Responsibilities and Respective Capabilities (2015), https://unfccc.int/process-and-meetings/the-paris-agreement/equity-and-common-but-differentiated-responsibilities.

expand chapeau to intent probes, cross-referencing subsidies data (EU's €6B farm aid) for protectionism flags.[47]

These modifications might seem small but touch the very spirit of the institution, with a blueprint for WTO in a multipolar era, with sustainability as its uplift. If climate pressures grow, reforms shall interfere with disputes that ask for the suspension of progress, preventing green policies from becoming masks to hide barriers.[48]

The main point here is that the DS600 and DS593 do advance trade-environment dialogue even though several elements such as their flaws, superficial treatment of issues, ignored standards, and equity oversights point to the need for reform. The WTO must consistently safeguard forests without banking on farmers, therefore exercising rare mediating depth for the divides.

[47] Intergovernmental Panel on Climate Change [IPCC], Climate Change 2022: Mitigation of Climate Change ch. 7 (2022).
[48] Id.

THE INTERPLAY OF RISK ASSESSMENT, NON-DISCRIMINATION, AND PROVISIONAL SAFEGUARDS IN WTO SPS MEASURES: EXPLORING THE SYNERGIES BETWEEN ARTICLES 5.1, 5.5, AND 5.7

- ARPIT JAIN*

The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) forms a cornerstone of the World Trade Organization (WTO) framework, balancing the sovereign right of Members to protect human, animal, and plant life or health against the imperative to facilitate international trade. Adopted during the Uruguay Round, the SPS Agreement seeks to prevent SPS measures from being used as disguised restrictions on trade while ensuring they are scientifically justified. Central to this balance are Articles 5.1, 5.5, and 5.7, which address risk assessment, non-discrimination through consistency in protection levels, and provisional measures in the face of scientific uncertainty, respectively.

Article 5.1 mandates that SPS measures be based on a risk assessment appropriate to the circumstances, incorporating available scientific evidence.[1] This provision operationalizes the general obligation in Article 2.2 that measures must not be maintained without sufficient scientific evidence. As interpreted in WTO jurisprudence, "based on" implies that the measure must be reasonably supported by or sufficiently warranted by the risk assessment, not merely conforming to it in a superficial manner.[2] Prominent WTO scholars like Petros Mavroidis have emphasized that Articles 5.1 to 5.3 translate the broad duties of Article 2.2 into specific requirements, underscoring the role of science in justifying trade-restrictive measures.[3]

Article 5.5 promotes consistency in the application of appropriate levels of protection (ALOP), aiming to avoid arbitrary or unjustifiable distinctions that could discriminate between Members or situations.[4] This non-discrimination principle echoes Article 2.3 but adds a layer of internal consistency, requiring Members to justify varying ALOPs across comparable risks. Joost

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[1] Agreement on the Application of Sanitary and Phytosanitary Measures art. 5.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493 [SPS Agreement].

[2] Appellate Body Report, *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, ¶ 189, WTO Docs. WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *EC – Hormones* AB Report].

[3] Petros C. Mavroidis, *The Regulation of International Trade: Volume 2: The WTO Agreements on Trade in Goods* (MIT Press 2016).

[4] SPS Agreement, supra note 1, art. 5.5.

Pauwelyn, in his analysis of early SPS disputes such as EC-Hormones, highlights how Article 5.5 ensures that risk management is not origin-based but tied to objective criteria.[5]

Article 5.7 allows provisional SPS measures where relevant scientific evidence is insufficient, provided they are based on available pertinent information and reviewed within a reasonable period.[6] This provision incorporates a precautionary approach, as noted by Gabrielle Marceau in discussions on the interplay between trade and environmental concerns.[7] Alan Sykes has critiqued its application, arguing it serves as a qualified exception to the scientific rigor of Article 5.1.[8]

The synergies among these articles create a cohesive framework for risk-based regulation, where risk assessment under 5.1 informs non-discriminatory application under 5.5, and provisional safeguards under 5.7 act as a bridge during evidence gaps. This article explores these interplays, drawing on WTO Analytical Index interpretations and insights from leading scholars.

Risk Assessment Under Article 5.1: The Scientific Foundation

Article 5.1 requires Members to base SPS measures on a risk assessment that evaluates potential adverse effects on health, considering factors like available scientific evidence and processes of risk characterization.[9] The WTO Analytical Index clarifies that risk assessment must link the measure to identified risks, as seen in Australia-Salmon, where the Appellate Body stressed that "based on" means the assessment must sufficiently warrant the measure.[10]

Mavroudis argues that this provision elevates science as an international review standard, questioning the viability of purely precautionary approaches without empirical support.[11] In EC-Hormones, the Panel found the EU's ban lacked a proper risk assessment, illustrating how Article 5.1 disciplines measures that deviate from scientific consensus.[12] Pauwelyn notes that

[5] Joost Pauwelyn, *The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three SPS Disputes: EC – Hormones, Australia – Salmon & Japan – Varietals*, 2 J. Int'l Econ. L. 641 (1999).
[6] SPS Agreement, supra note 1, art. 5.7.
[7] Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 Eur. J. Int'l L. 753 (2002).
[8] Alan O. Sykes, *Reflections on the Varietals Dispute, the SPS Agreement, and WTO Dispute Settlement* (2006).
[9] SPS Agreement, supra note 1, art. 5.1.
[10] Appellate Body Report, *Australia — Measures Affecting Importation of Salmon*, ¶ 124, WTO Doc. WT/DS18/AB/R (Oct. 20, 1998) [hereinafter *Australia – Salmon* AB Report]; WTO, *Analytical Index: SPS Agreement — Article 5 (Jurisprudence)*, at 10.
[11] Mavroidis, supra note 3.
[12] Panel Report, *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, ¶ 8.41, WTO Doc. WT/DS26/R (Aug. 18, 1997).

while minority scientific views can be considered, they must rationally connect to the measure.[13]

The context of Article 5.1 includes economic factors under Article 5.3, allowing consideration of damage from pests or diseases, which ties into broader risk management.[14] Sykes emphasizes that this integration prevents overreach, ensuring measures are proportionate.[15]

Non-Discrimination and Consistency Under Article 5.5

Article 5.5 obliges Members to avoid arbitrary distinctions in ALOPs across different situations if such distinctions result in discrimination or disguised trade restrictions.[16] The Analytical Index outlines a three-step test: identifying comparable situations, differing ALOPs, and arbitrary or unjustifiable nature leading to discrimination.[17]

In EC-Hormones, the Appellate Body found the EU's higher ALOP for hormone-treated beef arbitrary compared to natural hormones in other foods.[18] Pauwelyn interprets this as reinforcing non-discrimination beyond GATT, focusing on internal consistency.[19] Mavroidis highlights how Article 5.5 cooperates with international standards under Article 3, promoting harmonization while allowing deviations if justified.[20]

Sykes notes that findings under Article 5.5 can evidence violations elsewhere, such as under Article 2.3, creating evidentiary synergies.[21] Marceau adds that in complex regulations, transparency aids in assessing consistency.[22]

Provisional Safeguards Under Article 5.7: Bridging Scientific Gaps

Article 5.7 permits provisional measures when scientific evidence is insufficient, subject to four cumulative requirements: insufficiency of evidence, basis in available information,

[13] Pauwelyn, supra note 5, at 658.
[14] SPS Agreement, supra note 1, art. 5.3; WTO, *Analytical Index: SPS Agreement — Article 5 (Jurisprudence)*, supra note 10, at 44.
[15] Sykes, supra note 8.
[16] SPS Agreement, supra note 1, art. 5.5.
[17] WTO, *Analytical Index: SPS Agreement — Article 5 (Jurisprudence)*, supra note 10, at 53.
[18] EC – Hormones AB Report, supra note 2, ¶ 250.
[19] Pauwelyn, supra note 5, at 660.
[20] Mavroidis, supra note 3.
[21] Sykes, supra note 8.
[22] Gabrielle Marceau & Joel P. Trachtman, *A Map of the World Trade Organization Law of Domestic Regulation of Goods: The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade*, 48 J. World Trade 351 (2014).

seeking additional information, and timely review.[23] The Analytical Index positions it as a qualified right, not an exception but a temporary deviation from Article 5.1.[24]

In Japan-Varietals, the Appellate Body clarified that insufficiency triggers when evidence does not allow a sufficiently objective risk assessment.[25] Mavroudis views Article 5.7 as reflecting precaution without overriding scientific disciplines.[26] Pauwelyn, analysing Australia-Salmon, stresses the obligation to review, ensuring provisionality.[27]

Sykes critiques that Article 5.7 limits sovereignty by requiring ongoing evidence gathering.[28] Marceau links it to broader synergies with environmental agreements.[29]

Exploring Synergies: Interplay Between Articles 5.1, 5.5, and 5.7

The synergies lie in their collective promotion of science-based, non-discriminatory, and flexible regulation. Article 5.1 provides the evidentiary core, requiring risk assessments that inform ALOPs under 5.5.[30] Inconsistent ALOPs may signal inadequate risk assessment, as in EC-Hormones where 5.5 violations supported 5.1 findings.[31]

Article 5.7 complements 5.1 by allowing action in uncertainty, but only provisionally, aligning with 5.5's non-discrimination by preventing indefinite arbitrary measures.[32] The Analytical Index notes that 5.7 measures must still respect consistency, avoiding unjustifiable distinctions.[33]

Mavroudis sees this triad as a risk management continuum: assessment (5.1), consistency (5.5), and precaution (5.7).[34] Pauwelyn argues that in disputes like Continued Suspension, synergies ensure measures evolve with science, preventing stasis.[35] Sykes highlights how 5.5's test can

[23] SPS Agreement, supra note 1, art. 5.7.
[24] WTO, *Analytical Index: SPS Agreement — Article 5 (Jurisprudence)*, supra note 10, at 63.
[25] Appellate Body Report, *Japan — Measures Affecting Agricultural Products*, ¶ 93, WTO Doc. WT/DS76/AB/R (Feb. 22, 1999) [hereinafter *Japan – Varietals* AB Report].
[26] Mavroidis, supra note 3.
[27] Pauwelyn, supra note 5, at 662.
[28] Sykes, supra note 8.
[29] Marceau, supra note 7, at 780.
[30] WTO, *Analytical Index: SPS Agreement — Article 5 (Jurisprudence)*, supra note 10, at 53.
[31] EC – Hormones AB Report, supra note 2, ¶ 252.
[32] SPS Agreement, supra note 1, art. 5.7.
[33] WTO, *Analytical Index: SPS Agreement — Article 5 (Jurisprudence)*, supra note 10, at 63.
[34] Mavroidis, supra note 3.
[35] Pauwelyn, supra note 5.

probe whether provisional measures under 5.7 are discriminatory.[36] Marceau emphasizes precautionary synergies, noting 5.7's role in bridging gaps without undermining 5.1's rigor.[37]

These interplays enhance predictability, as provisional measures (5.7) must transition to full assessments (5.1), all under consistency scrutiny (5.5).

Conclusion

The synergies between Articles 5.1, 5.5, and 5.7 embody the SPS Agreement's ethos: science-driven trade liberalization with room for caution. By requiring robust risk assessments, consistent protection levels, and temporary safeguards, they prevent abuse while respecting sovereignty. As Mavroudis and Pauwelyn illustrate through dispute analyses, these provisions interlock to foster fair trade. Sykes and Marceau further underscore their role in regulatory coherence. Future jurisprudence, as catalogued in the WTO Analytical Index, will continue refining these dynamics, ensuring the SPS framework adapts to emerging risks like biotechnology and climate impacts.

[36] Sykes, supra note 8.
[37] Marceau & Trachtman, supra note 22, at 380.

GLOBAL MODELS OF UNIFORM CIVIL CODES AND THE INDIAN DEBATE: LESSONS FROM COMPARATIVE EXPERIENCES

- SHOURYA PARIHAR*

Introduction: The Indian Predicament

The Uniform Civil Code (UCC) has consistently held a contradictory status within the realm of Indian constitutional discussions. Looking back at the Indian Constitution, few provisions have been the subject of as much debate and inaction, and one of them is Article 44[1], the Uniform Civil Code. For over seventy years, the Uniform Civil Code has been invoked by the courts as a way to push the parliament towards legal reform and, unfortunately, shelved when politics gets in the way. The crux of the problem is that the dilemma faced by India today is very clear-cut: should the nation prioritise equality and consistency, or its commitment to preserve diversity? Well-known as the issue of an outdated way of framing, because India is soon to mark its hundredth year of freedom, treating the UCC as a mere theoretical concept is no longer viable.

Coming to the heart of the issue, rather than asking whether India should have a Uniform Civil Code, we need to ask what sort of UCC the nation could practically put in place. The answer to that would involve looking at how similar codes have worked out in other countries. Such as the colonial "model" of Goa, the secularism that was bulldozed in Turkey, the incremental reforms in Tunisia, and the mythical French neutrality. It would help clarify the answer.

As Werner Menski[2] has pointed out, law never exists in a vacuum and has to go head-to-head with religion, culture, and people's way of life. Flavia Agnes said that a UCC-imposed top-down system will rapidly become the same thing as a crushing and unyielding majority rule pretending to be a reform, and Upendra Baxi[3] argued that the legitimacy of any legal change is not about how "uniform" it is, but whether it rings true with the moral values of the Constitution.

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[1] INDIA CONST. art. 44.

[2] Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, 200-210 (2d ed. 2006).

[3] Upendra Baxi, *The Crisis of the Indian Legal System*, (1982).

The Portuguese Experience in Goa: Continuity and Complexity

Goa is a frequent presence in the Indian UCC discussion, often portrayed as the "model state" for a common code, dating back to colonial times. First implemented via the Portuguese Civil Code of 1867[4], the common code survived Goa's accession to India in 1961. On the records, Goa offers a common code of regulations for marriage, divorce, and succession for every community. But a more intense examination yields a very different picture.

For India, too, the lesson is clear. A UCC is not possible as a colonial transplant or as a symbolic concession. It must be framed with democratic authority, broad consultation, and a real commitment to gender justice, not party politicking. Goa's example proves that "uniformity" without substantial equality only perpetuates old hierarchies in a different guise.

Turkey: Constraints of Radical Secularism

Quite a different template is found in Turkey, where, in the 1920s, Mustafa Kemal Atatürk's reforms eliminated the religious family law and introduced the Swiss Civil Code[5] in its place. The Turkish system was staunchly secular: they eliminated the religious courts, and marriage became a civic duty. The Turkish state reserved for itself exclusive control of family law, analogous to its overall programme of state building and Westernisation.

While first feted as a product of secular modernity, in turn, the model of Turkey reveals the disadvantages inherent in top-down reform. The Turkish example, therefore, cautions India not to delude itself into thinking that law codes are sufficient to change deeply ingrained social customs. However Turkey's secular top-down structure created a cultural void that many of its citizens found hard to fill. The question this brings up is: can a country update its family law without giving up its religious character? The answer lies, in part, in the gradualism practiced by Tunisia.

Tunisia: Road to Incremental Reforms

Tunisia's reforms since independence are a helpful case to analyse. Tunisia, since 1956 under Habib Bourguiba's leadership, implemented the Code of Personal Status[6], ending polygamy, implementing judicial divorce, and progressing in the promotion of the rights of women in an Islamically compatible manner. Where Turkey adopted outright a Western code, Tunisia

[4] Portuguese Civil Code, 1867 (Goa).
[5] Schweizerisches Zivilgesetzbuch [ZGB], Code Civil [CC], Codice Civile [CC] [Swiss Civil Code] Dec. 10, 1907, SR 210, Art. 1(Switz.).
[6] Code Du Statut Personnel [C.S.P.] [Code of Personal Status] Decree of Aug. 13, 1956 (Tunis.).

implemented gradual reform, respecting the maintenance of its Islamic essence while harmonising family law with principles of equality and secularity.

Scholars, such as Mounira Charrad[7], have noted that Tunisia was a relevant example where law reform became legitimate through an accommodation in domestic cultural and religio-political contexts. Through framing such reform in compliance with contemporary Islam, Tunisia avoided the charge of cultural disconnection seen in Turkey. Through a gradual approach related to local movements for female rights and local legitimacy, sustainability and acceptability were fostered.

For India, Tunisia's precedent is especially relevant. Reform does not have to mean a polar choice of religious personal law versus a fully secular code. Rather, reform can become a development of progressive convergence, grounded in constitutional ideals yet respectful of communal sentiment. A "phased UCC," proceeding from consensus points, e.g., equality of rights in matters of inheritance, rights to maintenance, or prohibition against polygamy, can become a more fruitful alternative than a polar option. While Tunisia provides one example of the effective operation of local legitimacy, the Global North offers a different perspective. The French experience often considered the gold standard for secular uniformity, shows even ostensibly neutral codes bear their own historical baggage.

France: Civil Code and Myth of Neutrality

The French Civil Code[8], frequently regarded as a universal paradigm, simultaneously exposes complexities pertinent to India. Originating from the French Revolution, it established family law as a secular and standardised framework. Throughout a significant portion of its history, the Code subordinated women in the context of marriage and familial relationships, bestowing upon husband’s legal supremacy over their wives until reforms in the late 20th century rectified these disparities.

As the French experience reveals, Flavia Agnes cautions against: "uniformity" does not mean equality. A code can pose as secular and neutral, but unless closely examined, it might only canonically reproduce prevailing patriarchal norms. India must then refrain from the temptation to use the UCC as a magic solution for gender justice. Equality must not only be attained through uniformity but through substantive and gender-sensitive drafting.

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[7] Mounira M. Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia. Algeria, And Morocco* (Univ. of Cal. Press 2001).
[8] Code Civil Des Français [C. CIV.] [Civil Code of the French] (1804) (Fr.).

Interacting with Indian Scholarship: The Essence of the Discourse

Indian scholarship on the UCC has been rich, diverse, and often contentious. Granville Austin[9] saw the Directive Principles as the Conscience of the Constitution. He viewed UCC as integral to transformative changes, which could bring social revolution.

These scholars together remind us again that the Indian UCC debate is not taking place in a vacuum. It must be placed in a very long tradition of constitutional thought and jurisprudential challenge. Excluding these voices is not a mere intellectual undertaking it is a necessary measure for ensuring any eventual reform possesses intellectual credibility and democratic legitimacy.

Conclusion: Learning from International Experience

The experience of Goa, Turkey, Tunisia, and France shows that a Uniform Civil Code may not be a single, universal panacea. These international experiences bring us back to the primary question that arises within the Indian context-namely, how is uniformity to be reconciled with a unique constitutional identity? In this connection, it shall be pertinent to refer to the writings of the scholars who have spoken on the Indian constitutional ethos.

Indeed, no single "model UCC" exists that can be replicated universally. The case of Goa reveals the hollowness of uniformity in the absence of equality, while the lessons from Turkey and Tunisia diverge over matters concerning the pace of reform and its cultural integration. France, in turn, warns against the presumption of neutrality within standardized codes. As Granville Austin and Upendra Baxi aptly emphasize, the Indian Uniform Civil Code is to be treated not as a simplistic legislative slogan but as emerging from deliberative democracy, an evolutionary process that foregrounds substantive justice over mere procedural uniformity.

[9] Granville Austin, *The Indian Constitution: Cornerstone of a Nation* 75-84 (Oxford Univ. Press, 1996).

THE RISE OF ALGORITHMIC TRADE BARRIERS: RETHINKING DIGITAL TRADE GOVERNANCE IN THE AI ERA.

- ANANYA CHAUHAN*

Introduction

"The world of the future will be an ever more demanding struggle against the limitations of our intelligence." ~ *Norbert Wiener, The Human Use of Human Beings (1950).*

Digital trade has become a fundamental component of the multinational economy. In practice, it now shapes how goods and services are exchanged across borders, particularly through data flows, online platforms, and digitally delivered services. According to estimates from the Organisation for Economic Co-operation and its partner institutions, by 2020 trade that was digitally ordered or digitally delivered accounted for around one quarter of total global trade. With a value close to five trillion United States dollars, this highlights just how deeply digital trade is embedded in today's global economy.[1] As governments and private platforms increasingly use artificial intelligence for regulatory and operational functions, a new form of trade restriction has emerged. These are known as algorithmic trade barriers. They arise when automated systems unintentionally or deliberately impede the free flow of digital goods and services across borders. Traditional trade law was not designed for these automated systems which operate within complex models that lack transparency and evolve over time. The result is an urgent need to rethink digital trade governance for the artificial intelligence era.

Understanding Algorithmic Trade Barriers

Algorithmic trade barriers refer to restrictions that arise from the use of automated systems in cross border digital interactions. These include artificial intelligence content filters, automated data localization tools, algorithmic customs screening, and platform governance systems. Unlike tariffs or quotas, these barriers are embedded within technological systems. Their effects often go unnoticed until they significantly alter market access. The emergence of algorithmic trade barriers can be attributed to several technical and regulatory factors such as:

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[1] OECD et al., Measuring Digital Trade: Definitions and Statistics 2 (2025) (noting that digital trade accounted for roughly 25% of global trade in 2020 amounting to nearly USD 5 trillion), available at oecd.org.

Firstly, many artificial intelligence models operate as opaque systems. Their logic is difficult to interpret, and this reduces the ability of regulators or firms to challenge discriminatory outcomes.

Second, bias in training data leads to different treatment of foreign goods and services because the model may be trained primarily on domestic information. For instance, when the training data lacks this broader perspective, the model tends to fall back on familiar patterns. However, when used elsewhere, it may lead to inaccurate decisions or uneven treatment. Over time, these mismatches can disadvantage foreign enterprises and give rise to indirect, and often unnoticed, discrimination.[2]

Further, automated over compliance occurs when systems block foreign content or services more aggressively than required by law. Lastly, artificial intelligence systems evolve over time and their impact on trade may change without notice. These features make algorithmic barriers dynamic and unpredictable. They differ in form and effect from traditional regulatory barriers.

The emergence of algorithmic trade barriers exposes structural limitations in international trade law:

A. WTO[3] Law and the State Action Problem

The WTO framework is built around the assumption that trade barriers are created by states. Yet, most algorithmic trade barriers are produced by:

- Private digital platforms
- AI vendors
- Automated supply-chain intermediaries
- Cloud service providers

[2] OECD, Enablers, Guardrails and Engagement for Unlocking Trustworthy AI: Governing with Artificial Intelligence 1-2 (2025) (noting that artificial intelligence systems trained on data that are not representative can lead to bias and unfair outcomes because models may not generalize well outside their original training domain and emphasizing the importance of representative and diverse data for fair and accurate AI decision-making), available at https://www.oecd.org/en/publications/2025/06/governing-with-artificial-intelligence_398fa287/full-report

[3] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

While state responsibility can arise under GATT[4] or GATS commitments when private conduct is entrusted or directed by governments, algorithmic systems often fall into a regulatory grey zone. For instance:

- A platform's AI-based ranking that deprioritizes foreign sellers may not constitute a "measure" under WTO law.
- AI-driven customs risk assessment can lead to discriminatory delays without explicit state intention.

B. Data Governance as Trade Governance

Modern trade agreements such as CPTPP[5], USMCA[6] and DEPA[7] comprise chapters on digital trade and data transmission. However, they predominantly pertain to:

- Prohibiting forced data localization
- Ensuring cross-border data flows
- Preventing discriminatory digital regulations

None explicitly addresses algorithmic opacity, automated discrimination, or AI-driven market exclusion. Thus, a platform may comply fully with digital trade obligations while still creating algorithmic trade barriers through opaque ranking systems or biased AI policies.

C. Competition Law and Trade Law Misalignment

Competition authorities increasingly scrutinize algorithmic abuse of dominance especially in the EU and US. But competition law is not designed to address cross-border trade equity. A platform's algorithm may distort trade flows without meeting the thresholds for antitrust intervention. Thus, the global trade regime lacks a dedicated mechanism to regulate algorithmic distortion as a trade issue.

[4] General Agreement on Tariffs and Trade (1947), art. III, 61 Stat. pt. 5 T.I.A.S. 1700, 55 U.N.T.S. 194.
[5] Comprehensive and Progressive Agreement for Trans-Pacific Partnership signed Mar. 8, 2018.
[6] United States–Mexico–Canada Agreement, Can.-Mex.-U.S. signed Nov. 30, 2018, 32 I.L.M. 289 (2018).
[7] Digital Economy Partnership Agreement signed June 11, 2020.

Algorithmic Governance and Public Policy

A. National Security and Data Sovereignty

Governments often arrange automated systems to attain legitimate policy target such as data security, cyber resilience, public order and consumer protection. Data localization laws for instance are justified as necessary to protect sensitive information and national security. Automated monitoring tools enforce these rules by detecting cross border transfers. While these objectives are recognized under the General Agreement on Trade in Services Article XIV[8], automated systems enforcing them may create excessive restrictions. If an artificial intelligence filter blocks digital services from another country in a manner that is not necessary or proportionate, it may violate trade commitments even when the policy goal itself is legitimate.

B. Platform Power and Private Governance

Large digital platforms exercise significant influence over global trade flows. They rank products, moderate content, recommend listings, and enforce compliance rules through automated systems. These algorithmic decisions determine market access for millions of foreign sellers. Because platforms are private actors, they do not fall directly under the World Trade Organization framework. This creates a gap where major gatekeepers of global digital commerce operate without formal accountability mechanisms. Their automated systems can become barriers to trade even when states have not imposed any restriction.

Gaps in Current International Trade Law

A. WTO Framework Limitations

The WTO's rules were drafted long before artificial intelligence became part of global trade, so it's understandable that they don't directly deal with how automated systems can influence market access. Agreements like GATS[9] and the TBT[10] Agreement simply weren't written with algorithmic discrimination in mind, which leaves some noticeable gaps today.

B. Burden of Proof and Attribution

Proving discrimination becomes much harder when AI is involved. Traditional WTO disputes look at what a state did and what impact those actions had. But AI systems are often created or

[8] General Agreement on Trade in Services, art. XIV, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).
[9] General Agreement on Trade in Services, Apr. 15, 1994, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).
[10] Agreement on Technical Barriers to Trade, World Trade Organization, WTO Agreements Series (2021).

operated by private companies, and many of them evolve on their own through machine learning. That makes it unclear who should be held responsible when something goes wrong.

C. Fragmented Regional Approaches

Some modern trade agreements try to fill in these gaps. The CPTPP, the USMCA, and several EU agreements include rules on data flows, source-code protections, and digital trade cooperation. As a result, instead of one clear global framework, we're left with a patchwork of regional approaches. It helps move things forward, but it still doesn't create the consistent international system needed for handling AI-related trade issues.

Addressing algorithmic trade barriers requires a reorientation of digital trade governance toward accountability and transparency as follows:

One practical way to reduce algorithmic trade barriers is to push for more transparency in how AI systems operate in trade-related situations. This doesn't mean companies should reveal their source code and nobody expects them to hand over their core technology. But there should at least be a clear explanation of how the system makes decisions, some basic documentation of its impact, and enough information for regulators to understand what's happening behind the scenes. The US–Mexico–Canada Agreement already offers a decent model for this, since it protects source code while still allowing meaningful review.

Secondly, governments could also use Algorithmic Impact Assessments, which work a bit like privacy impact reviews. These assessments help identify whether an automated tool could unintentionally limit access to foreign markets. They also make sure important trade principles such as necessity, proportionality and non-discrimination aren't being overlooked.

Thirdly, there should also be a way for businesses, especially smaller exporters to challenge algorithmic decisions that feel biased. A digital-trade ombudsperson or a similar setup could handle these concerns. The role wouldn't be overly formal, it would just involve investigating complaints, helping firms communicate with regulators, and recommending fair solutions when needed.

Further, cross-border regulatory sandboxes are another useful tool. They let countries test AI-driven regulatory approaches in a controlled environment before rolling them out more widely. By sharing data and learning from each other's experiments, states can support innovation without accidentally disrupting trade. It's basically a safe way to try new ideas and learn from mistakes.

Finally, trade law could benefit from integrating well-established ethical AI principles. The OECD guidelines focusing on transparency, accountability and fairness provide a solid starting point. Embedding these values into trade agreements would help create a more human-centred and fair digital trade system, one that encourages innovation without losing sight of equity.

Conclusion

AI has reshaped digital trade a lot faster than most people expected. Algorithms now influence almost everything how customs systems screen goods, how platforms decide what gets promoted and even how small businesses reach buyers in other countries. They tend to operate quietly in the background, but their impact is huge. The problem is that traditional trade laws weren't built for a world where automated decisions have this much power. To keep digital trade open and fair not only for big companies but also for smaller players we need to update the legal framework. This includes clearer transparency around how algorithms function, meaningful impact assessments and more cooperation between countries so their rules don't clash. It also helps to weave ethical AI standards into trade policies making sure automation supports trade instead of creating new problems.

REFRAMING EXTRADITION: THE NELSON MANDELA RULES AND THE JUDICIAL CONSTRUCTION OF HUMAN RIGHTS GUARANTEES

- VALLIMIREDDY ABHINAV DEEP DORA* AND (PROF.) DR. V. VIJAY**

Introduction

The interplay between extradition law and human rights is both delicate and deeply significant. While extradition helps nations work together to ensure that offenders do not escape justice, it is firmly restrained by the absolute global prohibition on torture and inhuman or degrading treatment. This safeguard, reflected in Article 3 of the European Convention on Human Rights (ECHR) and the Convention Against Torture (CAT), places a clear duty on states: no person can be sent to a country where they face a real and credible risk of such abuse. In this way, the pursuit of justice must never come at the cost of human dignity.[1]

In recent years, courts have turned more frequently to the United Nations Standard Minimum Rules for the Treatment of Prisoners — the Nelson Mandela Rules — when deciding whether extraditing someone would violate basic human rights principles. Even though these rules are considered "soft law," they carry significant moral and normative weight, helping transform broad human-rights protections into concrete, measurable standards. This study explores how the Mandela Rules are shaping modern extradition practice by guiding courts in assessing risk, informing the negotiation of diplomatic assurances, and strengthening accountability across international justice systems.[2]

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[1] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

[2] United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), G.A. Res. 70/175, U.N. Doc. A/RES/70/175 (Dec. 17, 2015).

The Foundational Framework of the Mandela Rules

A. History and Legal Character

The Nelson Mandela Rules (NMR) is a combination of 122 rules, adopted by the UN in 1955 and amended in 2015, are an international norm for humane treatment of prisoners.[3] Although non-binding, their worldwide legitimacy comes from state consensus and court recognition as best practices.[4]

The NMR are categorized as soft law, indicating they do not possess legal enforcement under treaty frameworks.[5] However, their legal relevance is apparent in their interpretative authority—courts and human rights organizations consistently utilise them to evaluate whether detention circumstances comply with international norms.[6] The European Court of Human Rights (ECTHR) and the UN Committee Against Torture (CAT Committee) reference the NMR to elucidate Article 3 of the ECHR and CAT, respectively.[7]

B. Rule 1 and the Inherent Dignity Principle

Rule 1 of the Mandela Rules makes a simple but powerful demand: every person in detention must be treated with respect for their inherent dignity and humanity.[8] This core principle leaves no room for torture or any form of cruel, inhuman, or degrading treatment, no matter who the person is or what they are accused of.[9] It also creates a clear connection to the principle of non-refoulement, which prohibits sending anyone to a place where they may be exposed to such abuse. In essence, dignity is non-negotiable — and protection from mistreatment must follow wherever a person is sent.[10]

[3] Id.
[4] United Nations Office on Drugs & Crime, *Nelson Mandela Rules History* (2015), https://www.unodc.org (Last visited on 31st October 2025)
[5] Essex Paper No. 3, The Essex Group on the Mandela Rules (2017).
[6] Penal Reform Int'l, Guidance Document on the European Prison Rules (2023).
[7] Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989).
[8] Mandela Rules, *supra* note 2, Rule 1.
[9] Id.
[10] Id.

Non-Refoulement and the Role of the NMR in Extradition Law

A. Absolute Nature of the Prohibition

No state may "expel, return ('refouler') or extradite" a person to another state if there are sufficient reasons to believe they would be tortured under CAT Article 3.[11] ECHR Article 3 guarantees the right to be free from torture and cruel or degrading treatment.[12] No exceptions, such as terrorism or national security, may justify departing from these restrictions.[13]The NMR provide the evidentiary framework necessary to substantiate or rebut such claims, effectively transforming soft law norms into hard law evidence.[14]

B. The NMR as an Evidentiary Bridge

In extradition proceedings, courts must decide whether the detainee's potential imprisonment would breach Article 3 protections. The abstract threshold of "substantial grounds for believing" is operationalized through the specific, quantifiable benchmarks set by the NMR.[15] for example:

Rules 10–11 mandate adequate floor space, lighting, ventilation, and sanitation, which courts use to evaluate claims of overcrowding.[16]

Rule 24 guarantees "equivalence of care" between prison and community healthcare, a critical measure for assessing the adequacy of medical facilities.[17]

Rule 45 limits solitary confinement to 15 days, establishing a globally recognized threshold for when such treatment becomes potentially torturous.[18]

These objective metrics enable judges to make empirically grounded determinations of human rights risk, reinforcing the legal weight of non-refoulement obligations.

[11] CAT, *supra* note 1, art. 3.
[12] European Convention on Human Rights art. 3, Nov. 4, 1950, 213 U.N.T.S. 221.
[13] *See* European J. Int'l L., *Does Article 3 Enshrine Absolute Rights?* (1998).
[14] Mandela Rules, *supra* note 2.
[15] Id. Rules 10–11.
[16] Id.
[17] Id. Rule 24.
[18] Id. Rule 45.

Applying NMR Standards in Extradition Risk Assessment

A. Accommodation and Overcrowding

Overcrowding remains the most recurrent issue in extradition litigation involving developing states. The NMR's provisions on accommodation (Rules 10–11) require detention facilities to meet all health and safety needs, considering climate, ventilation, lighting, and minimum floor space.[19] Chronic overcrowding inherently undermines these standards, creating conditions that courts have deemed incompatible with human dignity.[20]

The ECTHR has consistently relied on these metrics in finding violations under Article 3, recognizing that persistent overcrowding and inadequate sanitation constitute inhuman treatment per se.[21] Consequently, when a Requesting State cannot prove compliance with NMR benchmarks, extradition is typically denied.

B. Solitary Confinement and Psychological Harm

The NMR's Rule 45 prohibits "prolonged solitary confinement," defined as more than 15 consecutive days without meaningful human contact.[22] This rule provides an objective temporal limit, enabling courts to quantify when isolation crosses the threshold into cruel or inhuman treatment.[23]

Judicial practice has increasingly recognized that extended solitary confinement can cause irreversible psychological harm.[24] When a Requesting State's prison system permits segregation beyond this period—or lacks adequate mental health safeguards—courts view extradition as incompatible with Article 3 obligations.[25]

C. Health Care and Equivalence of Treatment

Under Rule 24, the provision of healthcare is a state responsibility, and prisoners must receive the same standard of care available to the general population.[26] The NMR also emphasize

[19] Id. Rules 10–11.
[20] Penal Reform Int'l, *Health Care in Prisons* (2017).
[21] *See Ananyev v. Russia*, App. Nos. 42525/07 & 60800/08, Eur. Ct. H.R. (2012).
[22] Mandela Rules, *supra* note 2, Rule 45.
[23] Id.
[24] *See* Univ. of N.C. Sch. of L., *Cruel, Inhuman, & Degrading: A Comparative Analysis of Solitary Confinement* (2023).
[25] Id.
[26] Mandela Rules, *supra* note 2, Rule 24.

clinical independence—medical decisions must remain free from political or security pressures.[27]

In extradition proceedings involving vulnerable individuals or those with chronic illness, courts have used this rule to scrutinize the Requesting State's capacity for equivalence of care.[28] If healthcare systems fail to meet community standards or if clinical independence cannot be guaranteed, extradition is barred on human rights grounds.

D. Procedural Dignity and Access to Justice

Beyond material conditions, the NMR emphasize procedural safeguards such as privacy in searches (Rule 50) and the right to consult legal counsel without delay (Rule 61).[29] Courts increasingly interpret violations of these procedural rights as evidence of systemic disregard for human dignity, further strengthening non-refoulement claims.[30]

Diplomatic Assurances and the NMR Framework

A. Nature and Judicial Scrutiny

When courts identify substantial risks of inhuman treatment, extradition may proceed only if the Requesting State provides diplomatic assurances that mitigate those risks.[31] However, such assurances are subject to strict judicial scrutiny. They must be specific, verifiable, and binding, and they must originate from an authority capable of enforcing compliance.[32]

Assurances that merely reiterate general respect for human rights are insufficient.[33]Courts demand NMR-based specificity—for example, assurances must include details about cell size, sanitation, healthcare access, and protections from solitary confinement or violence.[34]

B. Systemic Reliability and the "Pattern Test"

Courts also evaluate the systemic reliability of assurances by examining the Requesting State's history of compliance with prior commitments.[35] Where evidence shows a consistent pattern of human rights violations or prison overcrowding, assurances—even if specific—may lack

[27] Id.
[28] Id. Rule 25.
[29] Id.
[30] Id.
[31] Council of Europe, *Extradition and Human Rights: Diplomatic Assurances in Context* (2015).
[32] Human Rights Watch, *"Diplomatic Assurances" Against Torture* (2006).
[33] Id.
[34] *Vijay Mallya v. Government of India*, [2018] EWHC 199 (Admin).
[35] Id.

credibility.[36] The NMR Rule 2, requiring continuous protection and security of prisoners, reinforces this standard by demanding that safety be ensured "at all times."[37]

C. Monitoring and Enforcement Gaps

A critical weakness of diplomatic assurances lies in the monitoring gap post-extradition. Once transferred, the Requested State loses jurisdiction, making verification difficult.[38] Without independent access for monitoring bodies, assurances risk becoming hollow promises.[39] Therefore, best practice demands inclusion of binding clauses guaranteeing access for independent observers, with remedial mechanisms in case of non-compliance.[40]

Policy Recommendations

A. Institutionalizing NMR-Based Assurance Protocols

To enhance transparency and accountability, Requested States should require all diplomatic assurances to explicitly reference specific NMR rules—for example, Rule 45 on solitary confinement and Rule 24 on healthcare.[41] These references should be accompanied by documentary proof such as facility blueprints, staffing ratios, and medical infrastructure details.[42]

B. Post-Transfer Monitoring

Assurances must mandate access for independent monitors—such as UN Special Rapporteurs or recognized NGOs—to ensure continuous NMR compliance.[43] Such access must include unannounced visits, interviews with detainees, and mechanisms for confidential complaints, consistent with Rule 57 of the NMR.[44]

C. Capacity-Building and Systemic Reform

Ultimately, sustainable compliance depends on institutional reform within the Requesting State. Rule 74 of the NMR emphasizes the professional training and integrity of prison

[36] OHCHR, *Diplomatic Assurances and the Prevention of Prohibited Treatment* (2015).
[37] Mandela Rules, supra note 2, Rule 2.
[38] UN News, *From Extradition Risks to Broader Implications: The Assange Case* (Feb. 2024).
[39] Id.
[40] Id.
[41] Id.
[42] Id.
[43] Mandela Rules, supra note 2, Rule 57.
[44] Id.

personnel, while Rule 105 promotes educational programs for prisoners to facilitate reintegration.[45] Strengthening these systemic elements not only supports domestic human rights reform but also bolsters international confidence in extradition proceedings.

Conclusion

The Nelson Mandela Rules have emerged as the definitive interpretive tool for evaluating the absolute prohibition of non-refoulement in extradition law. Though non-binding, they operationalize fundamental human rights by providing objective, quantifiable standards for detention conditions, healthcare, and procedural safeguards.

By aligning extradition assessments with NMR benchmarks, courts ensure that human dignity remains the central measure of justice. To sustain the integrity of this system, states must embed NMR compliance into both their diplomatic assurances and domestic correctional policies. Only through verifiable adherence to these universal standards can the international community uphold the promise that those behind bars remain beyond cruelty but never beyond rights.

[45] Id. Rules 74, 105.

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