TRADE AND MORALITY: BALANCING BETWEEN THE PURSUIT OF NON-TRADE CONCERNS AND THE FEAR OF OPENING THE FLOODGATES

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ABSTRACT

The liberalization of trade is the main objective of the World Trade Organization (WTO) and its numerous agreements. However, trade liberalization often conflicts with some important societal values and interests. This is the reason why a set of exceptions were devised in WTO-covered agreements to reconcile these conflicting interests. These exceptions allow Members to adopt measures for the protection of a number of values, including the protection of “public morals.” But because the term “public morals” is not defined by WTO agreements, the task of ascribing meaning to such a vague concept is left to the WTO judiciary. Highly ambiguous and subjective, “public morals” introduces a dose of uncertainty into the law of the WTO, which may have to deal with as many different conceptions of morality as there are Member States. Since the scope and limits of “public morals” remain uncertain, the adjudicator is left with a difficult task as it is confronted with cases pleading a public morality defense. This Article reviews the cases in which the adjudicator has indulged in the delicate exercise of balancing the preservation of public morals and the imperative of trade liberalization. This Article also critiques the standard of review and sets out to determine the degree of deference accorded to Members to define what constitutes public morals within their respective territories and whether, by so doing, the adjudicator has acted consistently within the delegated power of the Dispute Settlement Understanding (DSU).

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I. Introduction

In May 2014, New Zealand requested consultations with Indonesia at the World Trade Organization (WTO) regarding prohibitions or restrictions on imports of horticultural products, animals, and animal products into Indonesia.\(^1\) New Zealand claimed that these measures violated Indonesia’s obligations under the General Agreement on Tariffs and Trade 1994 (GATT)\(^2\) and the Agreement on Agriculture (Agriculture Agreement).\(^3\) Indonesia, for its part, maintained that its actions were motivated by the desire to protect its public morals, especially its religious precepts regarding halal products.

One objective of the WTO is “the substantial reduction of tariffs and other barriers to trade and . . . the elimination of discriminatory treatment in international trade relations.”\(^4\) The principle of non-discrimination is therefore a cornerstone of the multilateral trading system. However, WTO agreements provide for occasions where otherwise trade-restricting measures, which violations of non-discrimination and certain other obligations can be justified, including for the protection of the environment, national security or public morals. The aim of this Article is to address the WTO judiciary’s approach to the litigation of the public morals exception clause.

Although it is common in the practice of states to resort to public morals to restrict market access,\(^5\) the notion of “public morals” is neither defined in treaties where it appears nor is it evenly understood and interpreted by states that resort to it. Highly ambiguous and subjective, the concept of “public morals” introduces a dose of uncertainty into the law of the WTO, which may have to deal with as many different conceptions of morality as there are Member States. Consequently, given that its scope and its limits remain uncertain, the difficult task is left to the adjudicator as it is confronted with cases pleading a public morality defense.

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5. See, e.g., Case 121/85, Conegate Ltd. v. HM Customs & Excise, 1986 E.C.R. 1007 (holding that a European Economic Community Member State may prohibit the importation of obscene products in its territory on the ground of public morality, provided it does not allow the same goods to be manufactured domestically).
It is a widely held view that drafting history concerning Article XX of the GATT offers little insight into the interpretation of public morals. While this is true to a large extent, a historical account on the public morals exception nonetheless demonstrates that the clause was understood in its framing process as purely domestic and national in nature, without intention to confer upon it any element of extraterritoriality. It is therefore also important to determine whether the dispute settlement mechanism has kept on with this spirit.

This Article is equally a critique of the standard of review of the public morals exception. The issue of standard of review is at the heart of WTO dispute settlement as the large amount of scholarship devoted thereto testifies. Actually a matter of allocation of power between the WTO and its Members, this question arises each time a panel or the Appellate Body (AB) is called upon to review compliance of a Member’s measure with WTO law, and deals with how deferential the adjudicator should be when conducting such a review. The current general standard of review is found in Article 11 of the DSU, which provides that “a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.” The appropriate standard of review is therefore “neither

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9. See Oesch, supra note 8, at 637.

de novo review as such, nor total deference,” but rather an “objective assessment of the fact.”\textsuperscript{11}

While some degree of deference is permissible, especially in the case of trade remedies like anti-dumping,\textsuperscript{12} “total deference,” as it has been put, may fail to “ensure an ‘objective assessment’ as foreseen by Article 11 of the DSU.”\textsuperscript{13} Thus, this Article cautions against the potential of opening the floodgates that may result if too much deference is accorded to countries regarding the selection of the definition and issues they deem to be worth “protecting” under the public morals exception. This fear stems from the risk that several types of public morals arguments could be used for pushing domestic interest at the international level even though admittedly, the very reason why these exceptions exist is to allow for Members’ policy space. With case law leaving unresolved the question on the number of issues that have attained the status of “international morality,” it is apparent that the degree of deference would continue to depend on the particular circumstances of each case. What’s more, this Article intends to reveal whether the lack of textual clarifications of the phrase “public morals” has led, and/or will lead, to its invocation to justify “virtually anything under the sun,”\textsuperscript{14} a catch-all for exception \textit{par excellence}.\textsuperscript{15} The adjudicator, by deferring to uncontemplated issues under Article XX of the GATT, also runs the risk of trespassing the authority conferred to him under Articles 3.2 and 19.2 of the DSU which expressly caution against judicial activism.\textsuperscript{16}

What follows is a discussion of the WTO’s approach to the public morals exception. Section II introduces this exception in the con-

\begin{itemize}
\item \textsuperscript{12} See Crowley & Jackson, \textit{supra} note 8, at 211.
\item \textsuperscript{13} \textit{Id.} at n.82 (referring to Panel Report, \textit{United States – Underwear}, ¶ 7.10, WTO Doc. WT/DS24/R (adopted Feb. 25, 1997)).
\item \textsuperscript{15} See Liane M. Jarvis, \textit{Women’s Rights and the Public Morals Exception of GATT Article 20, 22 \textit{MICH. J. INT’L L.} 219, 232 (2000) (arguing that the public morals exception does not squarely fit under any other GATT Article XX exceptions, and consequently could be invoked to protect women’s rights).
\item \textsuperscript{16} DSU Article 3.2 stipulates in relevant part the following: “[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” DSU Article 19.2, for its part, confirms the provisions of Article 3.2 and states that “[i]n accordance with [Article 3.2], in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.” These provisions mandate WTO adjudicating bodies to limit their task to interpreting WTO law and to abstain from lawmaking.
\end{itemize}
text of the general exceptions and affirmative defenses adduced to escape breach of WTO obligations. Section III reviews the six cases to date in which public morals have been entertained to decipher how panels and the AB tackled the issue. That scrutiny displays the delicate balance struck between the right of WTO Members to pursue non-trade concerns and the imperative of preventing discriminatory or protectionist abuse of their policy spaces. Section IV is a summary of the WTO jurisprudence on public morals and a critique of the standard of review, especially the systemic risks associated therewith. Section V concludes the Article.

II. THE WTO APPROACH TO PUBLIC MORALS

A. Background

In the GATT’s epoch, the interpretation of Article XX was deliberately strict. This was essentially the consequence of what Howse refers to as the “crude economicist ideology and strong deregulatory orientation” of that era, which rendered any public policy almost impossible of justifying under Article XX as there was always a creative way, albeit theoretical with no practical feasibility, to find a less trade restrictive alternative measure than the challenged one. Worse, panels had developed case law that placed the bur-


den of proof on the party invoking the benefit of the exception.\textsuperscript{19} However, the decisions that retained this restrictive interpretation failed to provide analysis demonstrating why Article XX should be interpreted in such a way.\textsuperscript{20}

When the WTO came into being in 1995, it signaled a new approach to trade liberalization and the place of non-trade concerns in the new global trading system.\textsuperscript{21} Not only did the Uruguay texts expand the scope of the multilateral trading system to other sectors like intellectual property and services, it also brought about a comprehensive and strong dispute settlement system including a standing AB. Under the WTO regime, and in a conspicuous desire to break up with past practices, the AB blatantly distinguished itself from the GATT panels’ precedents in its first report. It stated that WTO-covered agreements must not be read “in clinical isolation from public international law”\textsuperscript{22} and should be interpreted in accordance with the Vienna Convention on the Law of Treaties of 1969 (VCLT). Hence, far from being a self-contained regime, the law of the WTO is not hermetically closed to the rest of international law.\textsuperscript{23} By the same token, arguments that interpretation of public morals should not be frozen in a particular time and space have also prevailed over the GATT years’ narrow interpretation.\textsuperscript{24}

Unlike GATT’s panels, the main characteristic of the approach since 1995 has been to strike a balance between trade liberalization


\textsuperscript{20} See Charnovitz, supra note 6, at 720.

\textsuperscript{21} As an indication of this shift, see, for example, Marrakesh Agreement, supra note 4, at pmbl. (recommending “the optimal use of the world’s resources in accordance with the objective of sustainable development.”). See also Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, ¶ 152, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998) (contrasting with the GATT Preamble, whose stated objective was the “full use of the resources of the world,” and which was considered by WTO negotiators as no longer appropriate for the 1990s world trading system).


\textsuperscript{24} See generally Joost Pauwelyn, Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law 267 (Cambridge Univ. Press, 2003) (arguing that the use of “broad, unspecified terms” such as public morals “is an indication that the drafters intended these terms to be interpreted in an ‘evolutionary manner.’”).
and other societal values so much so that Article XX has come to be rightly seen as a “balancing” provision. While the GATT and the General Agreement on Trade in Services (GATS)25 seem to give a certain freedom to countries to decide for themselves what constitutes “public morals” in their territories, the validity of the challenged measures has sometimes undergone stringent scrutiny. Indeed, as described later in this Article, none of the measures found WTO-incompatible has passed the examination of Article XX(a) of the GATT and Article XIV(a) of GATS, albeit for diverse reasons.

The work of WTO panels and that of the AB concerning the interpretation of “public morals” exception form the subject matter of this research. Before engaging with these rulings, however, it is important to understand the role of general exceptions in WTO treaties, and the place of public morals as a defense in dispute settlement.

B. Measures Necessary to Protect Public Morals

1. Understanding Affirmative Defenses under Article XX of the GATT

Article XX of the GATT allows governments to use trade measures to protect public morals, human, animal, or plant life or health if those measures do not discriminate and are not used as protectionism in disguise. The introductory clause (otherwise known as the “chapeau”) of that provision reads:

Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . .26

Article XX is a legal exception to obligations Member States have undertaken. In other words, WTO Members are allowed to justify violations of their GATT obligations by having recourse to one of the grounds provided in Article XX’s exhaustive list. In fact, legislators intended to trump liberalizing obligations present in the rest of the GATT by drafting Articles XX’s list of exceptions,

26. The chapeau of Article XIV of GATS is textually similar. Thus, an analysis under Article XX of the GATT is also relevant for Article XIV GATS. See Appellate Report, US – Gambling, supra note 17, ¶ 291.
thereby showing that other social concerns may in some circumstances take precedence over trade commitments.

Article XX operates as a general exception to all GATT obligations and contains the so-called “affirmative defenses.” Affirmative defenses typically allow Members to pursue legitimate policy objectives, which, while not being among WTO Agreement’s own specific objectives, are deemed compatible with such objectives. Affirmative defenses under Article XX were devised in the GATT years by contracting parties to allow for deviations from the overarching obligation of non-discrimination.27 When a dispute arises, the onus of proving that the measures in question comply with one of the listed grounds rests with the party invoking it,28 who then, if successful, would be lawfully discharged of the obligation from which it sought to deviate from. This requirement of justification by the invoking party serves to balance the values of trade commitment and the endorsement of Members’ regulatory diversity.29 Apart from trade measures, Article XX of the GATT can also be invoked to justify violations of internal measures30 and provide exceptions to obligations assumed under the Accession Protocol.31 While Article XX suggests that room should be left for domestic regulation, the question that arises concerns the amount of trade-restrictiveness that can be tolerated, or as to where and how the balance should be struck between trade facilitation/liberalization and regulatory autonomy.


28. See, e.g., Appellate Report, US – Gambling, supra note 17, ¶ 309 (that “it is well-established that a responding party invoking an affirmative defence [sic] bears the burden of demonstrating that its measure, found to be WTO-inconsistent, satisfies the requirements of the invoked defence [sic].”).

29. See Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, ¶ 121, WTO Doc. WT/DS58/AB/R (adopted Oct. 11, 1998) [hereinafter Appellate Report, US – Shrimp] where, overturning the Panel ruling, the AB expressly made it clear that WTO Members are free to unilaterally regulate their market subject to their compliance with the relevant GATT disciplines.

30. See, e.g., Appellate Body Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, ¶ 115, WTO Doc. WT/DS135/AB/R (adopted March 12, 2001) (where the AB held that a measure found inconsistent with the national treatment provision of Article III of the GATT was capable of justification under Article XX).

The AB has devised a two-pronged test to the GATT that measures the consistency of a party that seeks to defend under Article XX. In its words in the landmark case of *US – Gasoline*,

In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions—paragraphs (a) to (j)—listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX.32

Hence, unless compliance with an Article XX subparagraph is shown, a panel may not proceed with an examination of the compliance of that measure with the chapeau33 because compliance with the chapeau is the ultimate stage of inquiry in determining the availability of the exception to its case.34 In other words, a measure must first be provisionally justified under one of Article XX subparagraphs before any analysis regarding its compliance with the chapeau can be conducted. Note, however, that whereas the same test applies when discussing the consistency of a measure with the chapeau, the use of different language in various subparagraphs implies dissimilar legal tests.35

With regard to the requirement of the chapeau, it is mainly concerned with the manner in which the provisionally justified measures under Article XX subparagraphs are “applied.”36 It is important to keep in mind that the adjudicator is not tasked with passing judgment on the value itself, but rather on the measure chosen to vindicate that right. In the words of Mavroidis, “[e]nds are not justiciable,” only the means employed to achieve those ends are.37 The “purpose and object” of the chapeau being “generally the prevention of ‘abuse of the exceptions’” contained in the subparagraphs,38 this exercise calls for the consideration of “both sub-

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36. *Id.* at 22. As we shall see later, the Appellate Body (AB) in *EC – Seals* does not seem to have stuck to this intellectual wisdom without expressly providing any cogent reason for its departure. See Appellate Report, *EC – Seal Products*, supra note 17 (focusing on the “design, architecture, and revealing structure” of the E.U. Seal Regime opposed to the application).
stantive and procedural requirement[s].” 39 The drafting history of Article XX further informs proceeding in this manner. 40

Article XX’s tests have proven difficult to pass as standing WTO case law suggests. In fact, Members of the WTO were already warned of the difficulty of satisfying the requirement of the chapeau of Article XX. In the words of the AB, it is “of necessity, a heavier task than that involved in showing that an exception . . . encompasses the measure at issue.” 41 As such, not only have Members faced the tough standard of the chapeau, but the overwhelming majority of respondents have also failed to prove that the trade-restricting measures at issue were necessary to achieve the goal for which they were designed. This was particularly the case for measures sought to be justified under subparagraphs (a), (b), and (d) of Article XX, where the requirement of necessity is the controlling variable.

Indeed, the necessity test, which was not discussed during the drafting phases, 42 has attracted a lot of attention in Article XX literature. Applying this test generally requires the adjudicating body to explore reasonable alternatives that are less trade-restrictive than the disputed measure, an inquiry which has proven to be both contentious and controversial. 43 Indeed, it all started with Korea – Beef, 44 where the AB addressed the necessity test for the first time under Article XX(d). It reasoned that the word “necessary” refers to a range of degrees of necessity and that “necessary” should be understood as being closer to the “indispensable” than the other pole of merely “making a contribution to” the protection of the value at stake. 45 The AB went on to say that for a measure to be

41. See id. at 23. For a critique of the AB’s approach to the chapeau, see Lorand Bartels, The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction, 109 Am. J. Int’l L. 95 (2015) (describing Article XX’s chapeau and critiquing the AB’s approach to its interpretation); see also Sanford Gaines, The WTO’s Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures, 22 U. Pa. J. Int’l Econ. L. 759, 746 (2001) (concluding that the AB’s reasoning is flawed and argues that the United States law and practice qualified for protection under the article).
42. With hindsight, this is regrettable given the amount of case law later developed on this notion of “necessity.”
45. Id. ¶ 161.
considered necessary, it requires the weighing and balancing of regulations and factors such as the contribution made by the measure to the enforcement of the law or regulation at issue, the relative importance of the common interests or values protected, and the impact of the law on trade.\footnote{Id. ¶ 164.} This “weighing and balancing” (WAB) exercise has been interpreted as requiring a panel or the AB to conduct a cost and benefit analysis. Nevertheless, while some agree with this reading, others believe that such interpretation was never intended by the AB, and that doing so would permit the adjudicator to second-guess governments’ legitimate policies which is neither warranted by the WTO agreements nor desirable.\footnote{See Donald H. Regan, The Meaning of “Necessary” in Article XX of the GATT and Article XIV of GATS: The Myth of Cost-Benefit Balancing, 6 WORLD TRADE REV. 347, 347 (2007) (arguing that by stating that Members should choose their “own level of interpretation,” the AB intended to be more deferential as later transpired in every other case where it engaged in the interpretation of the term “necessary” in Article XX of the GATT or Article XIV of GATS).}

2. The Public Morals Affirmative Defense

Under Article XX(a) of the GATT (as well as Article XIV(a) of GATS), WTO Members are allowed to adopt measures necessary to protect their public morals. Some meager clarifications were recorded during the GATS negotiations. In fact, GATS drafters introduced the concept of “public order,” with the caveat that it “may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.”\footnote{GATS art. XIV(a) n.5.} The drafters intended this to mean that measures necessary for the protection of public security could fall under the public morals clause. Apart from these limited explanations, the definition of “public morals” is not found in the WTO legal corpus. According to some commentators, this was done purposefully. For Pauwelyn, for example, WTO Members probably “wanted” or should have at least “realized” that the vagueness of the term public morals “would result in [its] meaning being open to discussion and variation depending on the context and times.”\footnote{PAUWELYN, supra note 24, at 267.} Steinberg is of the view that certain terms like “public morals” may have been left intentionally imprecise either because negotiators were unable to

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\item[ootnote{Id. ¶ 164.}]
\item[ootnote{See Donald H. Regan, The Meaning of “Necessary” in Article XX of the GATT and Article XIV of GATS: The Myth of Cost-Benefit Balancing, 6 WORLD TRADE REV. 347, 347 (2007) (arguing that by stating that Members should choose their “own level of interpretation,” the AB intended to be more deferential as later transpired in every other case where it engaged in the interpretation of the term “necessary” in Article XX of the GATT or Article XIV of GATS).}]
\item[ootnote{GATS art. XIV(a) n.5.}]
\item[ootnote{PAUWELYN, supra note 24, at 267.}]
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agree on more specific language or simply because they wanted to permit a range of alternative behaviors or national practices.\(^{50}\)

The task of ascribing such meaning to the vague formulation of the public morals exception therefore rests on a panel and eventually the AB in accordance with customary international rules of treaty interpretation as codified by the VCLT.\(^{51}\) This is what the WTO panel (the Panel) did in *US – Gambling* where, with the help of the *Shorter Oxford English Dictionary* (in order to determine the ordinary/textual meaning of the phrase), it stated that the term public morals “denotes standards of right and wrong conduct maintained by or on behalf of a community or nation.”\(^{52}\)

That panel also observed that the content of public morals “can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values.”\(^{53}\) Consequently, in the Panel’s view, “Members should be given some scope to define and apply for themselves the concepts of ‘public morals’ and ‘public order’ in their respective territories, according to their own systems and scales of values.”\(^{54}\)

How much broader or narrower “public morals” should be interpreted has not been made clear. The next Section addresses how the WTO has gone about the interpretation of measures adopted to protect public morals against the backdrop of the interpretative hurdles encountered under Article XX jurisprudence in general—namely the design, the necessity, and the chapeau.


\(^{51}\) The Vienna Convention of the Law of Treaties (VCLT) states in essence that treaty shall be interpreted (i) in accordance with the ordinary meaning to be given to the terms (ii) in their context and (iii) in the light of their object and purpose. In fact, recourse to VCLT is mandated by Article 3(2) of the Dispute Settlement Understanding, requiring the dispute settlement system to “clarify the existing provisions of [covered] agreements in accordance with customary rules of interpretation of public international law.” VCLT art. 3(2), May 23, 1969, 1155 U.N.T.S. 340.

\(^{52}\) Panel Report, *US – Gambling*, supra note 17, ¶ 6.465; see also Appellate Report, *US – Gambling*, supra note 17, ¶ 298. For PAUWELYN, supra note 24, at 268, the consistent use of the most recent version of the dictionary is a testimony that the evolutionary interpretation (i.e., at the time when the agreement is interpreted) has become the *rule* at the WTO, the exception being “contemporaneous interpretation” (i.e., interpretation with reference to rules of international law applicable between the parties at the time of the conclusion of the treaty, in the case of WTO agreements in 1994).

\(^{53}\) Panel Report, *US – Gambling*, ¶ 6.461. This interpretation has been embraced by subsequent panels and the AB, as we will see, in all public morals cases to date.

\(^{54}\) *Id.*
III. GIVING MEANING TO “PUBLIC MORALS”: THE “JEWEL IN THE CROWN” IS PUT TO CONTRIBUTION

While forming an integral part of the multilateral trading system since its inclusion in the original GATT in 1947, the public morals exception literally went untouched for more than half a century. In fact, from 1948 to 2004, neither the WTO adjudicating bodies nor later trade negotiators really sought to clarify the reach of that provision. This paucity of case law led to interesting debates among scholars around the concept. To some commentators, the “culturally specific and open-ended nature of the term ‘public morals’” whose “frequent invocation could neutralize many GATT provisions” was the reason why the exception was never invoked, with Members exercising a form of “wise self-restraint.” Others, in the search of content, opined that international human rights law could be used to provide meaning to the public morals in the WTO legal order. However, with countries of different cultural or religious backgrounds increasingly joining the organization, one can equally expect a surge in the public morals litigation in the years to come, which highlights the importance of defining the public morals exception.

Inactivity around public morals lasted until the US – Gambling panel ruling in 2004. However, at the time of this writing, the WTO judiciary has had the opportunity to address the clash between trade expansion and public morals protection in six cases. The following sub-sections review how panels and the AB dealt with these cases.

55. See Gabrielle Marceau, WTO Dispute Settlement and Human Rights, 13 EUR. J. INT’L. L. 723, 789 n.115 (2002) (questioning whether the term public morals in Article XX(a) has evolved to also now cover what Article XIV(a) of GATS covers).


57. See Charnovitz, supra note 6, at 742 (arguing that “the WTO should use international human rights law to ascribe meaning to the vague terms of Article XX(a).”); see also Frank J. Garcia, The Global Market and Human Rights: Trading Away the Human Rights Principle, 25 BROOK. J. INT’L. L. 51, 80 (1999).

58. Starting with Ecuador (South America) and Bulgaria (Southeastern Europe) in 1996, a diverse number of countries (thirty-six in total) have completed their process of accession since the WTO came into existence in 1995. Twenty more are in the process. See WTO ACCESSIONS, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/acc_e/acc_e.htm (last visited Jan. 8, 2018) [https://perma.cc/72WU-8YZY].
A. Formative Years: The Gate Opening of Public Morality in both Goods and Services

1. Cross-border Supply of Gambling and Betting Services as a Public Moral Concern

Despite the impressive body of case law produced by the WTO dispute settlement system in its first ten years of existence—i.e., over sixty-five AB rulings from 1996 to 2004—US – Gambling was the first case ever to actually interpret public morality exception.\(^{59}\) In this sense, it is a landmark case in the WTO public morals exception jurisprudence. In that case, Antigua and Barbuda brought a complaint concerning certain U.S. federal and state measures which prevented suppliers located outside the United States from remotely supplying gambling and betting services to consumers within the country. Antigua claimed that these measures resulted in a “total prohibition” on the cross-border supply of gambling and betting services from Antigua in violation of U.S. obligations under the GATS.\(^{60}\) The United States contended that its measures, which effectively banned internet gaming, were justified as they were “necessary to protect public morals and public order” within the meaning of Article XIV(a) of GATS.

In a Dispute Settlement Body Meeting on June 24, 2003, prior to the establishment of a panel, the United States had expressed “grave concerns over the financial and social risks” posed by cross-border gambling and betting services to its citizens, “particularly but not exclusively children.”\(^{61}\) These activities were therefore prohibited because of “the social, psychological dangers and law enforcement problems that they created, particularly with respect to internet gambling and betting.”\(^{62}\) Since minors are generally prohibited from gambling, the United States considered remote gambling as “particularly vulnerable to use” by them, as well as prone for “laundering the proceeds of organized crime.”\(^{63}\)

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59. While Article XX(a) was mentioned in US – Tuna (Mexico) and US – Malt Beverages (where the United States sought to justify taxation on alcohol of a certain percentage to protect “public health and public morals,” without actually distinguishing between Article XX(a) and (b)), the respective GATT panels did not deem it opportune to make findings on that issue. See GATT Panel Report, United States – Restrictions on Imports of Tuna, ¶ 4.4, DS21/R – 39S/155 (adopted Sept. 3 1991) [hereinafter GATT Panel Report, US – Tuna (Mexico)]; GATT Panel Report, US – Malt Beverages, supra note 19, ¶ 3.125.


62. Id.

At the Panel stage, the United States also recalled the discussions that took place in the context of the 1927 Convention where, at the request of Egypt, participants at the Convention agreed that “prohibition on the importation of foreign lottery tickets would be covered by the moral exception.”\(^\text{64}\) Hence, considering lottery tickets as “forerunner of modern restrictions on cross-border gambling,” the United States was comforted in the idea that its measures were justified for the maintenance of public order and the protection of public morals.\(^\text{65}\) That is why the Panel, after considering the evidence submitted by the U.S., did not hesitate to find that these measures were indeed designed to address money laundering, organized crimes, underage gambling, pathological gambling, and fraud.\(^\text{66}\)

The next question in the two-tiered analysis was whether the measures were necessary to achieve the goal pursued. The Panel turned to previous WTO precedent for guidance. It noted that the AB in Korea – Beef considered that “a ‘necessary’ measure is . . . located significantly closer to the pole of ‘indispensable’ than to the opposite pole of simply ‘making a contribution to.’”\(^\text{67}\) The Panel in US – Gambling then followed the WAB test developed in previous cases.\(^\text{68}\)

Specifically, the WAB test suggests the examination of (i) the importance of interests or values that the challenged measure is intended to protect; (ii) the extent to which the challenged measure contributes to the realization of the end pursued; and (iii) the trade impact of the challenged measure.\(^\text{69}\) While the Panel acknowledged that the measures served “very important societal interests that can be characterized as ‘vital and important in the highest degree,’”\(^\text{70}\) the issue turned around whether there existed other less trade restrictive “reasonably available” measures to the United States which are capable of achieving the same goals. The Panel went on to conclude that, although the measures were designed so

\(^{64}\) Id. ¶¶ 3.278 n.47, 6.47–473.

\(^{65}\) Id. ¶¶ 3.278–285.

\(^{66}\) Id. ¶¶ 6.474, 6.479–487.

\(^{67}\) Id. ¶ 6.475 (citing Appellate Report, Korea – Beef, supra note 44, ¶ 161).

\(^{68}\) Id. ¶ 6.476. For a critique of the logical inconsistency between the cost-benefit balancing test supposedly applied by the AB in this case (as well as in previous ones) and the principle that it is up to Members to choose their level of protection, see Regan, supra note 47.


\(^{70}\) Panel Report, US – Gambling, supra note 17, ¶ 6.492 (emphasis added). Note that the Panel continued that it was vital “in a similar way to the characterization of the protection of human life and health against a life-threatening health risk.” See id.
as to protect public morals or maintain public order, they were not necessary to achieve that goal because the United States had failed to “explore and exhaust” all reasonably available WTO-consistent measures.71

On appeal, the AB considered whether the Panel was wrong in requiring the United States to reflect first on the alternatives to the ban. In the AB’s view, that burden in principle rested on the complainant. It was therefore Antigua’s burden to so proceed and provide the United States with those alternatives.72 Furthermore, the AB conducted its own analysis and found that the U.S. measures at issue were indeed necessary within the meaning of paragraph (a) of GATS’ Article XIV as Antigua had not proposed any reasonably alternative measure.73 On the question of whether this finding that U.S. measures were necessary was in fact “closer to the indispensable” rather than merely making “a contribution to” the protection of public morals as articulated by the AB in Korea – Beef, the AB rested its arguments on the simple fact that no reasonably available alternative was proposed by Antigua, and not that the United States had proven its measures to be indispensable (or closer). This conclusion simply follows the AB’s tendency to defer to countries’ choices of their level of protection.

The next leg of the analysis was to find out whether the chapeau’s requirements were met. The exercise, as enshrined in Article XIV of GATS, commanded the adjudicator to analyze whether the restriction, judged to be necessary, was nevertheless applied in a manner that constitutes “arbitrary or unjustifiable discrimination between countries where like conditions prevail”74 or “a disguised restriction on trade in services.”75

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71. Id. ¶¶ 6.528, 6.534–535. The Panel actually blamed the United States for not engaging in bilateral or multilateral consultations with Antigua to look for such alternatives.


73. Id. ¶¶ 326–27.

74. (Emphasis added). Note the difference in the language used here where the word “like” conditions is chosen contrary to “same” conditions used in the chapeau of Article XX of the GATT. Whether this language has any implication has not yet been the object of adjudication. See, e.g., Bartels, supra note 41, at 96 n.7 (arguing that this difference is apparently not significant). Yet, one may be tempted to believe that, since the GATS was negotiated after the GATT, its drafters could as well have chosen to use the same word if they intended that the same requirement should apply. The choice to use “like” instead of “same” may suggest a narrower interpretation.

75. On the similar language of Article XX of the GATT’s chapeau, whose analysis may apply mutatis mutandis to the chapeau of Article XIV of GATS, see supra note 26 and the accompanying text.
At the outset, indulging in the analysis of the chapeau after finding that the measure was not provisionally justified under subparagraph (a) is puzzling. Exercising judicial economy would have been appropriate because the United States stood no chance of winning Article XIV of GATS defense having failed the test of “necessity” under Article XIV(a) of GATS. This approach would not serve to solve the dispute in any way that the analysis under subparagraph (a) had not. It is worth recalling that Article 11 of the DSU (on the standard of review) asks panels, besides completing an objective assessment of facts, to “make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.”  

And as the AB has itself stated, “the aim of [the dispute settlement system] is to resolve the matter at issue and ‘to secure a positive solution to a dispute’” so that “judicial economy has to be applied keeping in mind [that] aim.”  

It follows that the Panel should address only those “claims on which a finding is necessary” to solve the dispute. The US – Gambling Panel itself painstakingly explained why it felt compelled to proceed this way, simply stating that some “important arguments” had been raised under the chapeau. However, since this was the first case to tackle public morals exception, and guided by the fact that the AB only addresses “issues of law covered in the panel report and legal interpretations developed by the panel” (per Article 17(6) of the DSU), the Panel might have thought that it should not only provide guidance for future public morals cases, but also give the litigants the opportunity, if not satisfied by the ruling, to have their finding reviewed and refined on appeal.

In proceeding with the case at hand, the Panel recalled the principles contained in the chapeau of Article XX of the GATT, which it used to guide its own analysis. These principles included “arbitrary discrimination, unjustifiable discrimination and disguised discrimination.”

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76. See Thomas J. Schoenbaum, WTO Dispute Settlement: Praise and Suggestions for Reform, 47 INT’L. & COMP. L. Q. 647, 653 (1998) (interpreting this part as an “implied powers” clause giving broad authority to panels and the AB to decide all aspects of a dispute, including legal questions not directly relating to a covered agreement).


80. See id. ¶¶ 6.571–582.
restriction to trade.”\textsuperscript{81} In doing so, the Panel argued that “the absence of consistency [in the application of the measure] may lead to a conclusion that the measures in question are applied” in the manner prohibited by the chapeau.\textsuperscript{82} The Panel indeed found inconsistencies in the application of the measure because the United States had neither prohibited nor prosecuted certain domestic suppliers of remote gambling services.

The AB found that the measures violated the chapeau—hence the Article XIV defense—because the United States did not demonstrate that the restrictions applied to both foreign and domestic suppliers of gambling and betting services alike.\textsuperscript{83} This meant that the measure would have been valid had it been applied evenly between domestic and foreign service suppliers (i.e., in accordance with the national treatment principle).

The adjudicator embraced a dynamic interpretation of public morals—a step that did not need to be taken to solve the dispute at hand—thereby setting a precedent for future cases. This was not an indispensable pronouncement for the resolution of the dispute given the fact that lottery was already considered a moral concern during the general exceptions’ negotiating history. With regard to what constitutes public morals, this case added to the list of grounds the prohibition of “internet gambling,” a descendant of “lottery tickets” which was already recognized and intended by GATT’s drafters to fall within the ambit of this exception.\textsuperscript{84} But it left some doctrinal questions unanswered, especially those relating to the extraterritorial application of public morals.\textsuperscript{85} Likewise, the AB failed to clarify whether it suffices for a country to declare, without proof, that a restriction serves public morals for it to be accepted.\textsuperscript{86} This was actually what China was allowed to do in a later case, as will be seen in the Section that follows.

\begin{footnotes}
\footnotetext[81]{Id. ¶ 6.581.}
\footnotetext[82]{Id. ¶ 6.584.}
\footnotetext[83]{Appellate Report, US – Gambling, supra note 17, ¶¶ 371–72.}
\footnotetext[84]{Other countries have also considered gambling as a public morals and public order issue. See, e.g., Her Majesty’s Customs and Excise v. Gerhart Schindler and Jörg Schindler [1994] QB 1078 (Eng.).}
\footnotetext[86]{Id. at 233–34.}
\end{footnotes}
2. China Argues for Respect of Its Cultural Values, But Its Censorship Regime Stands Trial

On December 11, 2001, China officially became the 143rd WTO Member after more than fifteen years of laborious negotiations. This accession came with a lot of prior reforms to fit within the rules and policy of the WTO. Consequently, China made substantial concessions during bilateral negotiations, especially with the United States and European Union, which would subsequently be extended to the entire membership on a Most Favored Nation (MFN) basis upon completion of the accession process. At that point in time, fears that the WTO would be incomplete without China, a nation with a market of more than one billion consumers, somewhat vanished. These commitments included the liberalization of China’s trading rights, which materialized in the revision of its foreign trade law.

However, the honeymoon was short. Far from being a passive learner, China became very active on the reforms of the dispute settlement mechanism itself and also became the constant target of complaints, chiefly by the United States, regarding its unfair trade practices as well as restrictions on imports and exports for economic, political, and societal purposes. So in 2007, just six years into its membership and as one of the youngest WTO Mem-

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87. See, e.g., Yongzheng Yang, China’s WTO Membership: What’s at Stake?, 19 WORLD ECON. 661 (1996) (discussing tariff negotiations between China and WTO partners); see also Sylvia A. Rhodes & John H. Jackson, United States Law and WTO’s Accession Process, 2 J. INT’L. ECON. L. 497 (1999) (providing history and overview of China’s attempts to join WTO prior to successfully joining).

88. See Rhodes & Jackson, supra note 87, at 497 (discussing widespread opinion that WTO was “incomplete” without China).

89. Protocol on the Accession of the People’s Republic of China, WTO Doc. WT/L/432 (Nov. 23, 2001) [hereinafter China Accession Protocol]. It should be noted that “trading rights” (meaning the right to import and export) are found nowhere in the WTO Agreement. It is a new obligation now imposed on new WTO acceding countries since 1995. On this score, see Xiaohui Wu, Case Note: China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (WT/DS363/AB/R), 9 CHINESE J. INT’L. L. 415, 416 n.3 (2010).


91. A recent study displays how China learned its international trade law craft through litigation, in particular with the US—a process of “learning by doing” par excellence. Although starting at a disadvantage (since coming into the system only seven years late after the United States and European Union had already dominated the design as well as the drafting of most of the rules), and even accepting China-specific rules which were not always in its favor, China has gradually moved from its position as a “rule taker” to become a “rule maker.” See Gregory Shaffer & Henry Gao, China’s Rise: How it Took on the U.S. at the WTO, 2018 U. ILL. L. REV. 115, 119 (2018).
bers at the time, China faced challenges over certain measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products. The dispute arose only two years after the adoption of the AB Report in US – Gambling.

*China – Publications and Audiovisual Products*, apart from being the second case in WTO’s history to delve into public morals exception and the first one in the context of trade in goods, was actually a trial of China’s censorship policies. In that case, the United States challenged China’s measures on the (i) restriction of trading rights of foreign companies with respect to imported films for theatrical release, audiovisual home entertainment products, sound recordings, and publications; and (ii) restriction of market access for, or discrimination against, foreign suppliers of distribution services for publications, audiovisual services, and sound recording distribution services. By “not allowing all Chinese enterprises and all foreign enterprises and individuals to have the right to import into the customs territory of China . . . films for theatrical release, publications (e.g., books, magazines, newspapers, and electronic publications), audiovisual home entertainment products (e.g., video cassettes and DVDs), and sound recordings,” China was allegedly violating commitments undertaken in Article 5 of its Accession Protocol.

In its written submission, China contended that the United States could not pretend to ignore the nature of cultural goods and services as vectors of cultural identity and values which China never actually committed to liberalize. Qin agrees that it is certainly absurd to think that Chinese negotiators would consider products like vegetable oil, tobacco or cotton (reserved to state-owned enterprises) more sensible than cultural products (subjected to censorship). For the author, “that the Chinese government never

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93. *Id.* ¶ 7.43.
94. *Id.* ¶ 4.89–90.
95. *Id.* ¶¶ 4.89–90.
96. This list of products reserved for state trading, which does not contain cultural and information products, is found in Annex 2A.1 (for import) and 2A.2 (for export) of China’s Accession Protocol. See *China Accession Protocol*, *supra* note 89, annex 2A.1–2.
intended to liberalize trading rights in the cultural sector” should be evident. Moreover, commitment to liberalize trading rights under Article 5 of its Accession Protocol could not be construed as stripping China of its sovereign right to regulate trade “in a manner consistent with the WTO Agreement,” notably under Article XX of the GATT. China then invoked public morals as justification of the restrictions should there be a finding of violation of its commitment under the Accession Protocol.

The first legal question that arose from this dispute concerned the scope of the application of Article XX of the GATT. At issue was whether Article XX can be invoked to deviate from any obligations including those contained in other WTO treaties other than the GATT, in this case the Accession Protocol. Indeed, Article 1.2 of China’s Accession Protocol provided that the Protocol is an integral part of the WTO Agreement. This was a very important systemic issue which could have opened the door for the use of Article XX of the GATT to justify restrictions under other covered agreements. The European Union, for instance, considered that, while the Accession Protocol was certainly part of the WTO Agreement, it was not part of the GATT and could not be justified under the GATT, which was a “different” part of the WTO Agreement as a whole. Rather than addressing this legal issue head on, the Panel instead continued on an arguendo basis. In other words, the Panel proceeded on the assumption that Article XX was available to China and went on to examine whether the measures found to be inconsistent with China’s Accession Protocol satisfied the requirement of Article XX(a). This “expedient” approach was.

98. *Id.*

99. Article 5.1 of the China Accession Protocol, *supra* note 89, states in the relevant part the following: “Without prejudice to China’s right to regulate trade in a manner consistent with the WTO Agreement, China shall progressively liberalize the availability and scope of the right to trade . . . .”


101. *Id.* ¶ 4.120.

102. *Id.* ¶ 7.743.

103. *Id.* ¶ 5.27. On appeal, the European Union confirmed this standpoint. See Appellate Report, *China – Publications and Audiovisual Products*, *supra* note 17, ¶ 111.

104. A precedent on this approach existed. For instance, in the Appellate Body Report, *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, ¶ 310, WTO Doc. WT/DS345/AB/R (adopted July 18, 2008) [hereinafter Appellate Report, *US – Customs Bond Directive*], the AB assumed arguendo that Article XX(d) could be invoked as a defense for a violation found under the Anti-Dumping Agreement, albeit without actually ruling on the availability of that defense to the respondent. See id. ¶ 319.

heavily criticized by the AB, which argued that, as appealing as the technique may be, “it may not always provide a solid foundation upon which to rest legal conclusions.”106 Worse, it “may detract from a clear enunciation of the relevant WTO law and create difficulties for implementation.”107 Note that the AB did not state how the Panel’s approach would create these difficulties and why its own additional ruling was necessary to correct China’s implementation options.108

The Panel considered it appropriate to follow the US – Gambling interpretation of “public morals,” stating that they saw no reason to depart from that since “Article XX(a) uses the same concept as Article XIV(a).”109 Since the concept of public morals “can vary from Member to Member, as they are influenced by each Members’ [sic] prevailing social, cultural, ethical and religious values,” and absent any protest from the United States, the Panel, based on its prior assumption, found that China’s measures were designed to protect public morals.110 In spite of the earlier rebuke based on the arguendo approach, the AB nevertheless sanctioned the Panel’s finding, albeit timidly.111 As Pauwelyn comments, this was only logical; in effect, he argues that if the United States could restrict cross-border gambling for public morals reasons (e.g., for the protection of minors), one could not reasonably contest China’s right to exercise control over the content industry on the same ground.112

But interpreting the public morals approach in this manner was not without implication for the public morals defense considering the context in which this dispute arose and was decided. In effect, China’s censorship regime was, and still is, reputed to be very strict. While it has been argued that cultural goods, like works of art or movies, are not to be treated like any other type of goods, the fact that trade rules can be instrumental in enforcing censorship

106. Appellate Report, China – Publications and Audiovisual Products, supra note 17, ¶ 213.
107. Id. (emphasis added).
110. Id. ¶ 7.763.
111. Appellate Report, China – Publications and Audiovisual Products, supra note 17, ¶ 233.
112. Joost Pauwelyn, Squaring Free Trade in Culture with Chinese Censorship: The WTO Appellate Body Report in China – Audiovisuals, 11 MELB. J. INT’L L. 119, 133 (2010). This only reinforces WTO adjudicators’ approach not to judge the means to protect a value, just the end. See MAVROIDIS, supra note 37, at 418 (noting the “[e]nds are not justiciable”).
remains critical. This is because China then could as well be “violating basic principles of freedom of speech” in the name of public morals.\footnote{Pauwelyn, \textit{supra} note 112, at 133.} That is why it is submitted that the Panel ought to have embraced a universalist approach instead of the unilateralist one.\footnote{On the definition of public morals in terms of universalism vs. unilateralism, see M. Wu, \textit{supra} note 85, at 231–33.} “An alternative approach would have been to narrowly interpret the ‘public morals’ excuse and to condition that excuse on compliance with basic and universally accepted principles of free speech.”\footnote{Pauwelyn, \textit{supra} note 112, at 133.} It was apparently neither the concern of the Panel nor that of the AB, least of all that of the United States, which was the complainant. Plus, the Panel in \textit{US – Gambling} had examined the conduct of other states that either banned internet gambling or were contemplating doing so. This somehow suggests that the outcome was not guaranteed had the United States been the sole restrictor of internet gambling.\footnote{Wu, \textit{supra} note 85, at 233.} The fact that the adjudicator is \textit{totally deferential} to Members’ choices to unilaterally define the content of public moral should therefore not be seen as absolute.\footnote{Wu, \textit{supra} note 85, at 232.}

As to whether the measures were necessary to achieve the contemplated goal, the Panel in \textit{China – Publications and Audiovisual Products} also followed the approach developed by standing WTO jurisprudence on the matter, chiefly \textit{US – Gambling} and its predecessors. China had stated that, in a bid to achieve its high level of protection of public morals, it was necessary that it review the content of all imports of the products concerned in order to avoid the importation of products with content that could have a negative impact on public morals in China.\footnote{Panel Report, \textit{China – Publications and Audiovisual Products}, \textit{supra} note 17, ¶ 7.790.} For the United States, which was not challenging China’s right to determine its desired level of protection, “prohibiting all foreign importers and all privately owned Chinese importers from importing the products at issue” was \textit{not} necessary to achieve its content review goals.\footnote{\textit{Id.}, ¶ 7.809.} The Panel then had to weigh and balance the value of protecting public morals against the impact on potential importers, plus the lack of a material contribution of the measures to the goal. It easily found

\begin{footnotesize}
\begin{enumerate}
\item Pauwelyn, \textit{supra} note 112, at 133.
\item On the definition of public morals in terms of universalism vs. unilateralism, see M. Wu, \textit{supra} note 85, at 231–33.
\item Pauwelyn, \textit{supra} note 112, at 133.
\item Wu, \textit{supra} note 85, at 233. However, the Panel may have equally carried on this comparison exercise just to substantiate its decision without it being decisive in that finding. See also Panel Report, \textit{EC – Seal Products}, \textit{supra} note 17, ¶ 7.409 n.674, where the Panel engages in a similar comparison without placing much weight on animal welfare measures adopted in this regard by other WTO Members.
\item Wu, \textit{supra} note 85, at 232.
\item \textit{Id.}, ¶ 7.809.
\end{enumerate}
\end{footnotesize}
at the end of the exercise that the measures were not necessary to protect public morals.\textsuperscript{120}

In addition, the United States had proposed a reasonably available less-trade restrictive alternative which would make an equivalent or better contribution to the realization of the objective of protecting public morals, which would give “the Chinese Government . . . the sole responsibility for the conduct of the content review.”\textsuperscript{121} Having failed to demonstrate that such alternative would impose on China “an undue burden, whether financial or otherwise,”\textsuperscript{122} the Panel concluded that China’s measures could not pass the necessity test.\textsuperscript{123} This finding was upheld by the AB, which suggested that China should simply nationalize its censorship regime in order to comply with the ruling. This led the Chinese government to essentially do all the content review (i.e., censorship) and give trading rights to all domestic and foreign companies. In effect, this conclusion does little to open Chinese market for the products under censorship. On the contrary, while products that manage to pass the censorship screen will be imported and distributed, the censorship regime will remain intact, if not in an even more cumbersome manner given the centralization of the process.\textsuperscript{124} After all, “[o]btaining the right to trade or act as an importer does not mean anything if the goods and services you want to import remain blocked by the government.”\textsuperscript{125}

This finding that the measures are not necessary and consequently not provisionally justified under Article XX(a), eventually led the Panel to get away without ruling whether Article XX(a) of the GATT was actually available as a defense for a violation of Accession Protocol’s commitment.\textsuperscript{126} A similar position was adopted by the AB in \textit{US – Customs Bond Directive}.\textsuperscript{127} On appeal, this systemic issue was addressed and the AB found that China could rely on Article XX(a) for violations of trading rights commit-

\begin{itemize}
\item \textsuperscript{120} Id. ¶¶ 7.837–868.
\item \textsuperscript{121} Id. ¶ 7.900.
\item \textsuperscript{122} Id. ¶ 7.906. This requirement of undue burden flows from the Appellate Report, \textit{US – Gambling}, supra note 17, ¶ 308.
\item \textsuperscript{123} Id. ¶¶ 7.907–909.
\item \textsuperscript{124} Qin, supra note 97, at 286–87. Qin also argues that allowing too many importers would equally make customs procedures lengthier and more expensive than one that prevailed under the regime of state-owned enterprises with fewer players. \textit{See id.} at 287.
\item \textsuperscript{125} Pauwelyn, supra note 112, at 134–35.
\item \textsuperscript{127} \textit{See Appellate Report, US – Customs Bond Directive}, supra note 104, ¶ 319.
\end{itemize}
ments under Article 5.1 of its Accession Protocol.\textsuperscript{128} This conclusion that the general exception under one agreement (in this case, the GATT) can be used as defense for a claim under another agreement (the Accession Protocol) was hailed as a welcomed development in WTO jurisprudence.\textsuperscript{129}

In the same vein, unlike the Panel in \textit{US – Gambling} in similar circumstances, the Panel exercised judicial economy and abstained from ruling on the requirement of the chapeau to Article XX.\textsuperscript{130}

As the first case to deeply review Article XX(a) of the GATT, \textit{China – Publications and Audiovisual Products} is a landmark case in the WTO dispute settlement system. However, because the Panel entirely took up the interpretation proposed in \textit{US – Gambling}, this case does not shed much light on the content of the concept of public morality. The Panel, and later the AB, simply “assumed” that the measures were designed to protect public morals, so one does not know for sure that they truly did.\textsuperscript{131} The Panel, by considering that it was “clear” that the measures at issue were “measures to protect public morals in China,”\textsuperscript{132} did not bother to distinguish from among the grounds put forward by China those that were really relevant to the protection of public morals on the one hand, and those referring to other policy issues such as public order or national security on the other hand.\textsuperscript{133} On the contrary, the Panel appears to have placed great confidence in the Chinese authorities as to what they consider to be detrimental to public morality, especially in situations where a measure is capable of pursuing multiple policy objectives. By doing so, the Panel glossed over the determination as to whether the measure was really designed to protect


\textsuperscript{129} Qin, supra note 97, at 293. \textit{But see} Pauwelyn supra note 112, at 138 (arguing that the extent to which Article XX of the GATT may be used to justify violations under other WTO covered agreements remains unclear since interpreting countries’ “right to regulate” may entail going beyond the exhaustive list of policy objectives enshrined in Article XX).

\textsuperscript{130} Panel Report, \textit{China – Publications and Audiovisual Products Panel Report}, supra note 17, ¶ 7.912; Appellate Report, \textit{China – Publications and Audiovisual Products}, supra note 17, ¶ 396 n.614 (concurring) (“In light of these findings, we need not address China’s request that we complete the analysis and find its measures to be ‘necessary’ to protect public morals within the meaning of Article XX(a) and consistent with the chapeau of Article XX of the GATT 1994.”).

\textsuperscript{131} \textit{See} Pauwelyn, supra note 112, at 134.


\textsuperscript{133} \textit{See} Marceau, supra note 55, at 789 n.115 (arguing that GATS’ Article XVI(a) has probably broadened the scope of GATT’s Article XX(a) so that a panel now feels constrained to uphold under the latter policy issues granted under the former).
public morals. This simply reinforces the idea that the leeway left to countries to define what they regard as public morals seems to be really significant, regardless of its dubious origin stemming from US – Gambling. Not surprisingly, the next case to address public morality would be an issue that had theretofore not been contemplated when the clause was drafted: animal welfare.

B. Consolidating the Acquis? A Gradual (and Sometimes Unwarranted) Expansion of the Public Morals Defense

1. Hunting Methods that Cause Suffering to Animals are Repugnant to E.U. Public Morals

Central in the EC – Seal Products dispute is the tricky question of the extent to which the WTO legal framework allows trade restrictions—rooted in “noninstrumental morality”—as an expression of moral beliefs of a particular society. Howse and Langille submit that the measures at issue here are not just aimed “instrumentally at improving animal health and welfare,” but are also “based on a level of protection for the animals in question that is grounded in the community’s ethical beliefs about the nature of cruelty and the unacceptability of consumption behavior that is complicit with that cruelty.” One should not be surprised that this case so greatly attracted the interest of the environmental community.

Other than being the first WTO dispute concerning the issue of animal welfare, this case was a real test for the WTO that could open the Pandora’s box to accepting arguments that are not only not entirely based on science, but also to accept the invocation of the public morality exception based on the methods of obtaining certain products—the PPM issue. The WTO judiciary’s decision


135. Id.

136. It is worth noting that suggestion that Article XX(a) of the GATT can be used against inhumane treatment of animals is not new. See, e.g., GATT Panel Report, US – Tuna (Mexico), supra note 59, ¶ 4.4 (Australia’s submission); see also Andre Nollkaemper, The Legality of Moral Crusades Disguised in Trade Laws: An Analysis of the EC “Ban” on Furs from Animals Taken by Leghold Traps, J. ENVTL. L. 237 (1996); Catherine Jean Archibald, Forbidden by the WTO - Discrimination against a Product When Its Creation Causes Harm to the Environment or Animal Welfare, 48 NAT. RESOURCES J. 15 (2008).

137. See generally Archibald, supra note 136, at 30–31 (suggesting that Article XX(a) should allow PPM distinction in order to protect animal health).
also stirred a significant amount of intellectual debate regarding the wisdom behind the rulings.\textsuperscript{138}

In this case, Canada, where sealing is vital for the indigenous Inuit communities, and Norway challenged the E.U. ban on the import and sale of seal products in the European Union. The complainants argue that the “E.U. Seal Regime” was inconsistent with international trade rules, in particular provisions of the Technical Barriers to Trade (TBT) Agreement\textsuperscript{139} and the GATT. The E.U. Seal Regime refers to a series of measures relating to the sale of seal products.\textsuperscript{140} Under these measures, the placing of seal products on the E.U. market is prohibited except under certain conditions.\textsuperscript{141} These conditions include: (i) seal products obtained from seals hunted by Inuit and other indigenous communities (IC exception); (ii) seal products derived from seals hunted for marine resource management (MRM exception); and (iii) seal products imported for personal use by travelers re-entering the E.U. market (Travelers exception). The seal products with which the ban is concerned are “products, either processed or unprocessed, deriving or obtained from seals, including meat, oil, blubber, organs, raw fur skins and tanned fur skins, as well as articles made from fur skins and oil.”\textsuperscript{142} Under the IC exception, Greenland was the only country from which seal products were permitted into the E.U. market, and consequently the only country that imported them in large quantities. The claimants alleged that the measures, which clearly exclude commercial seals hunting, violate provisions of the GATT and those of the TBT Agreement.


\textsuperscript{139} See generally \textit{Agreement on Technical Barriers to Trade}, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1868 U.N.T.S. 120 (1995) [hereinafter TBT Agreement].


\textsuperscript{141} See Basic Regulation art. 3. Although the Basic Regulation does not use the words “prohibition” or “ban,” the Panel argued that “having regard to the design and structure of the Basic Regulation and in light of the text of that Regulation, the measure effectively operates as a prohibition on seal products that do not meet the conditions under the measure.” Panel Report, \textit{EC – Seal Products}, supra note 17, ¶ 7.46.

\textsuperscript{142} Panel Report, \textit{EC – Seal Products}, supra note 17, ¶ 2.6; see also Basic Regulation art 2.2.
After determining that the TBT Agreement applied to this case, the Panel agreed with Canada that seal products conforming to the three statutory exceptions and seal products not conforming to the exceptions were like products in the eyes of the consumers. The E.U. Seal Regime was found to violate Article I:1 of the GATT (as it failed to “immediately and unconditionally extend the same market access advantage on the E[]U[] market to the complainants’ imports as they do to seal products originating from Greenland”). The Panel also found that the regime violated Article III:4 of the GATT (since the measures granted Canadian and Norwegian seal products a treatment less favorable than that accorded to E.U. seal products).

The European Union invoked Article XX(a) of the GATT, arguing that it was necessary to protect public morals. At issue as far as this plea is concerned was whether “public morals” could be extended to moral concerns about animal welfare (in casu seal welfare). In its assessment of the existence of a valid moral concern

143. For the TBT Agreement to be relevant, the issue was whether the measures are issue qualified as “technical regulation” in the sense of Annex 1.1 of the TBT Agreement, which defines technical regulation as a “document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.” The Panel concluded that, taken as a whole, the E.U. Seal Regime lays down the characteristics for all products that might contain seal.” See Panel Report, EC – Seal Products, supra note 17, ¶ 7.111. On this basis, the Panel declined to examine whether the measure laid down PPMs. See id. ¶ 7.112. This finding that the Seal Regime laid down product characteristics was subsequently reversed by the AB. See Appellate Report, EC – Seal Products, supra note 17, ¶ 5.59. In effect, the AB disagreed with the Panel’s approach. Siding with the European Union, it considered that the Panel should have examined the measure “as a whole” by conducting a “holistic assessment of the weight and relevance of each of the relevant components of the E[].U[]. Seal Regime before reaching a conclusion as to the legal characterization of the measure ‘as a whole.’” Id. ¶ 5.28. The AB then proceeded to examine the participants’ arguments as they relate to the three specific aspects of the E.U. Seal Regime, see id. ¶¶ 5.31–57, and concluded that the measure as a whole does not lay down product characteristics thereby reversing the Panel’s decision. See id. ¶¶ 5.58–59. Consequently, it declared the bulk of the Panel’s findings “moot and of no legal effect.” See id. ¶ 5.70.

144. See Panel Report, EC – Seal Products, supra note 17, ¶ 7.149. That finding on “likeness” was, beside TBT, also relevant in finding violations of Article I:1 and Article III of the GATT. See id. ¶¶ 7.592–600, 7.604–609.

145. Id. ¶ 7.600.

146. See id. ¶ 7.609.

147. Note that the Panel considered it more “logical and economical” to begin its analysis with the TBT Agreement since, as an established WTO adjudicating bodies practice, “panels are free to structure the order of their analysis as they see fit” unless “there exists a mandatory sequence of analysis which, if not followed, would amount to an error of law and/or affect the substance of the analysis itself.” Id. ¶¶ 7.63, 7.69. The present Article’s deliberate choice to go straight to the GATT is without prejudice to that sequence.
about seal welfare, the Panel cited both international instruments and other states’ practices without necessarily relying on them. This is a ritual which dates back to *US – Gambling*. It is therefore unsurprising that the United States, as a third party in this case, echoed the same reasoning in its submission. In the case at hand, the Panel argued that, “[i]nternational doctrines and measures of a similar nature in other WTO Members, *while not necessarily relevant* to identifying the European Union’s chosen objective, illustrate that animal welfare is a matter of ethical responsibility for human beings in general.” The Panel gave total leeway, as opposed to “some scope,” to the European Union to define what constituted public morals. In effect, it averred that its analysis would be based on the existence of a public morals concern “as defined and applied” by the European Union in its territory. Consequently, the Panel found that the policy objective pursued by the European Union (“addressing the E[.]U[.] public moral concerns on seal welfare”) falls within the scope of Article XX(a). Thus, in terms of design, the measure was up to the task.

While not directly challenging the existence of a public morals concern regarding animal welfare within the European Union, Canada claimed before the AB that the Seal Regime was *not* designed to protect public morals. According to the appellant, the Panel had failed to “determine the content of the relevant public moral, which delineate the exact standard of right and wrong conduct,” in the European Union. For Canada, relying on the *EC – Asbestos* Panel, the phrase “to protect” within the meaning of Article XX(a) of the GATT commanded that the European Union identify the risk to its public morals, against which the measures seek to protect. The AB discarded Canada’s statement, arguing that it was made in the context of Article XX(b) which “particular focus [is] on the protection from or against certain dangers or

149. *See id.* ¶ 7.409 n.674 (“We also take note of the United States’ comment that while the focus must be on the responding Member’s system and scale of values, what Members other than the responding Member consider to be public morals can offer confirmation of a panel’s determination as to what constitutes a public moral within the system of the responding Member.”).
150. *Id.* ¶ 7.409 (emphasis added).
151. *Id.* ¶¶ 6.383, 7.403.
152. *Id.* ¶ 7.631.
risks,” capable of scientific inquiry. Consequently, the AB did not consider that the term “to protect” “when used in relation to ‘public morals’” requires the identification of a risk to the European Union’s moral concern over seal welfare. While the AB thereby confirmed that different language under Article XX dictates different standards of review, it was at the very same time stating that the same language, “to protect,” means different things when confronted with life and health issues under subparagraph (b) and public morals under subparagraph (a). This is particularly troubling as no such pronouncement was ever made with regard to the necessity test common to Article XX subparagraphs (a), (b), and (d). What’s more, one does not actually see how this distinction factors in the “public order” value under Article XIV(a) of GATS, which may also be invoked in case of a “serious threat” to the interests of the society. This prompts the question: is the AB similarly implying that Article XX(a) of the GATT and Article XIV(a) of GATS have different standards of review as well? Furthermore, this pronouncement is at odds with the finding in US – Gambling that problems of money laundering are inherent to cross-border gambling and recognized them as a public morals issues, which were as vital as human life and health in EC – Asbestos.

Canada further contended that the Panel should have assessed whether the seal welfare risks associated with seal hunts exceeded the level of animal welfare risks accepted by the European Union in other situations. Since Members should be given some latitude to define and apply for themselves the concept of public morals according to their own systems and scales of values since US – Gambling, the AB in EC – Seal Products also rejected Canada’s argument that “a panel is required to identify the exact content of the public morals standard at issue.” Accordingly, a Member has the right

156. Id. ¶ 5.198.
157. See, for example, Appellate Report, China – Publications and Audiovisual Products, supra note 17, ¶ 242, stating that the approach to the “necessity” analysis in Brazil – Retreated Tyres (Article XX(b) of the GATT) does not differ from that in US – Gambling (Article XIV(a) of GATS), all inspired by Korea – Beef (Article XX(d) of the GATT) (“In each case, a sequential process of weighing and balancing a series of factors was involved.”).
158. Of course it is true, as the Panel in US – Gambling has stated, that even though they are “two distinct concepts,” some overlap may exist between “public morals” and “public order” under Article XIV(a) of GATS “to the extent that both concepts seek to protect largely similar values.” See Panel Report, US – Gambling, supra note 17, ¶ 6.468.
159. See id. ¶ 6.492.
to determine the level of protection afforded to its public morals as it sees fit, which includes setting different levels of protection “even when responding to similar interests of moral concern.” Hence, the fact that the E.U. does not recognize the same level of animal welfare risks in slaughterhouses or terrestrial wildlife hunts as it does in seal hunts has no bearing on the E.U. Seal Regime as a measure designed to protect public morals under Article XX(a) of the GATT.\textsuperscript{161}

Since the parties agreed that the protection of “moral concern with regard to the protection of animals” in the European Union is an important value or interest worth pursuing, the next task was to rule on whether the measure was “necessary” to the goal pursued.\textsuperscript{162} The Panel noted that the necessity of a measure, like in \textit{US – Gambling} (itself inspired by \textit{Korea – Beef} and others), is determined through “‘a process of weighing and balancing’ of ‘all the relevant factors, particularly the extent of the contribution to the achievement of a measure’s objective and its trade restrictiveness, in the light of the importance of the interests or values at stake.’”\textsuperscript{163} Concerning the standard of review of a measure deemed necessary, the Panel noted that “the more vital or important the values or interests furthered by a measure are, the easier it will be to accept that measure as necessary.”\textsuperscript{164} In other words, the more important the objective, the more deferential the standard of review will be.

Recalling pre-established AB case law, especially \textit{Brazil – Retreaded Tyres}, the Panel noted that in assessing a measure’s contribution to the objective pursued, there must exist “a genuine relationship of ends and means between the objective pursued and the measure at issue.”\textsuperscript{165} For the Panel, it would have been difficult to reconcile total bans on sales with the necessity requirement, absent a finding that the impugned measure had material contribution to the attainment of the stated objective.\textsuperscript{166} Relying on its earlier findings under the TBT Agreement, the Panel argued in substance that the E.U. measure made a material contribution to the objective pursued because: (i) by reducing the overall demand of seal products, the European Union was also reducing its contribution to the inhumane killing of seals; and (ii) although the degree of the con-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{161} Id. ¶ 5.200.
\item \textsuperscript{162} Panel Report, \textit{EC – Seal Products}, supra note 17, ¶ 7.632.
\item \textsuperscript{163} Id. ¶ 7.630.
\item \textsuperscript{164} Id.
\item \textsuperscript{165} Id. ¶ 7.633; see Appellate Report, \textit{Brazil – Tyres}, supra note 33.
\item \textsuperscript{166} Panel Report, \textit{EC – Seal Products}, supra note 17, ¶ 7.635.
\end{enumerate}
\end{footnotesize}
tribution made by the ban is diminished by both the explicit and implicit exceptions, the measure still contributed to a certain extent to its objective.\textsuperscript{167} The Panel found the Seal Regime to be necessary to protect public morals under Article XX(a) because there existed no “reasonably” available less-trade restrictive alternative measure to the European Union.\textsuperscript{168} The AB upheld this finding,\textsuperscript{169} recognizing that the E.U. Seal Regime was “capable of making and does make some contribution” to its objective.\textsuperscript{170}

Having found the measure provisionally justified under subparagraph (a) of Article XX, the Panel continued its analysis with the measure’s compliance with the chapeau. The Panel repeated its earlier finding under Article 2:1 of the TBT Agreement,\textsuperscript{171} and concluded that “due to the lack of even-handedness in the design and application of the IC exception, the IC exception does not meet the requirements under the chapeau of Article XX.”\textsuperscript{172} It also held with respect to the MRM exception that it “is not designed and applied in an even-handed manner and hence is inconsistent with the requirements of the chapeau of Article XX.”\textsuperscript{173}

While Canada and Norway agreed with the Panel’s conclusion that the E.U. Seal Regime does not meet the requirements of the Article XX chapeau, they appealed the Panel’s reasoning in reaching that conclusion. In fact, they challenged the Panel’s application of the “same test to determine the existence of arbitrary or unjustifiable discrimination under the chapeau of Article XX as . . . applied in determining whether the measure was inconsistent with Article 2:1 of the TBT Agreement.”\textsuperscript{174} The AB sided with the appellants, recognizing that although “important parallels” exist between the two provisions, there are certainly “significant differences” between them, so much so that “the Panel should have provided more explanation as to why and how its analysis under Article 2:1 of the TBT Agreement was ‘relevant and applicable’ to

\begin{itemize}
\item \textsuperscript{167} Id. ¶ 7.637–638.
\item \textsuperscript{168} Id. ¶ 7.639.
\item \textsuperscript{169} Appellate Report, EC – Seal Products, supra note 17, ¶ 5.207–290.
\item \textsuperscript{170} Id. ¶ 5.289.
\item \textsuperscript{171} The violation of TBT art. 2.1 had been established because the products were like, and, by granting access to IC hunts and not to seals products of Canadian origin, the E.U. was affording to the latter less favorable treatment than to the former. See Panel Report, EC – Seal Products, supra note 17, ¶ 7.317–319.
\item \textsuperscript{172} Id. ¶ 7.650.
\item \textsuperscript{173} Id.
\item \textsuperscript{174} Appellate Report, EC – Seal Products, supra note 17, ¶ 5.294.
\end{itemize}
the analysis under the chapeau.”\textsuperscript{175} It consequently concluded that the Panel should have conducted an independent legal analysis of the consistency of the E.U. measures with the specific terms and requirements of the chapeau.

In completing the legal analysis under the chapeau, the AB found that the E.U. Seal Regime, in particular with respect to the IC exception, is not designed and applied in a manner that meets the requirements of the chapeau of Article XX of the GATT.\textsuperscript{176} Before arriving at this conclusion, the AB made a number of pronouncements worth reviewing. It recalled the function of the chapeau, which is to prevent “abuse or misuse” of a Member’s right and imposes on the respondent a “heavier task than that involved in showing that an exception . . . encompasses the measure at issue.”\textsuperscript{177} The AB reviewed past precedents on the application of the test of the chapeau and noted that the examination under the chapeau is concerned with the “manner” in which a disputed measure is “applied.” Yet, it decided, without explaining its move in this particular case, to deviate from past precedents and also consider the “design, architecture, and revealing structure” of the E.U. Seal Regime in order to establish whether, “in its actual or expected application,” the regime constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.\textsuperscript{178} Doubts exist as to the legal basis of such an approach to solve the case before the adjudicator. In effect, it has been criticized as being overly analytical, unnecessarily opening the door to a more “expansive” review under the chapeau.\textsuperscript{179}

The question before the AB was whether the European Union was acting consistently with the chapeau by allowing seal products from the Greenland Inuit community (who, according to the European Union, harvest seals for subsistence reasons), while at the same time prohibiting those products from the Canadian Inuit community (who harvest seals for commercial purposes). There is no doubt that the European Union was applying different standards to the parties involved. The question that arose from this distinction was whether the E.U. Seal Regime qualified as one or two measures. In other words, did the European Union aim to protect its public morals regarding animal welfare or rather the

\textsuperscript{175} Id. ¶ 5.310–311.
\textsuperscript{176} Id. ¶ 5.339.
\textsuperscript{177} Id. ¶ 5.297 (referring to Appellate Report, \textit{US – Gasoline}, supra note 22, at 23).
\textsuperscript{178} Id. ¶ 5.302.
subsistence of Greenland Inuit Community? Mavroidis argues that the Panel and the AB were both wrong in defining these objectives as a single measure.\textsuperscript{180} The characterization as two distinct measures would have led to a totally different outcome; such a characterization likely would have led the adjudicator to uphold the ban (provided that it met the requirement of the general exceptions) and certainly to outlaw the IC exception upfront.\textsuperscript{181} For Qin, however, the AB missed the opportunity to explicitly recognize that “the IC exception has a justifiable purpose independent of the policy objective of seal welfare,” which would have entailed extending the policy exceptions beyond Article XX of the GATT’s exhaustive list.\textsuperscript{182} Whether such an expansion is warranted is another issue altogether.

The Panel and the AB nevertheless considered that, although pursuing two regulatory objectives, the “main” aim of the European Union measures was the protection of animal welfare.\textsuperscript{183} They also did so to avoid ruling that the “subsistence” of Inuit communities is anything but a public morals question as currently defined. At best, it is a public policy concern, and probably an industrial policy consideration in this case (as it somehow promotes the Inuit Communities’ export of seal products to the European Union), which should not be a matter for Article XX(a) of the GATT to preserve. Yet, as we shall see later in Brazil – Taxation, the Panel has opened the door to the justification of public policy issues in the guise of public morals, which, as Mavroidis rightly points out, risks putting the GATT edifice in peril.\textsuperscript{184}

Even more intriguing as this conflation of purposes is concerned is the likelihood of invoking human rights in an exporting state to justify restrictions of trade for the protection of the public morals of the importing state. Indeed, as far as extraterritoriality is concerned, the AB simply declined to rule on the issue, although it recognized the “systemic importance of the question of whether there is an implied jurisdictional limitation in Article XX(a), and, if so, the nature or extent of that limitation.”\textsuperscript{185} The European Union had supported the permissive aspect of its measure by two

\textsuperscript{180} Id. at 391.
\textsuperscript{181} Id.
\textsuperscript{182} Julia Y. Qin, Accommodating Divergent Policy Objectives under WTO Law: Reflections on EC – Seal Products, 108 AJIL UNBOUND 308, 312 (2015). However, her conclusion only holds true if the AB had separated the two measures into two distinct measures.
\textsuperscript{183} Appellate Report, EC – Seal Products, supra note 17, ¶ 2.107.
\textsuperscript{184} See Mavroidis, supra note 179.
\textsuperscript{185} Appellate Report, EC – Seal Products, supra note 17, ¶ 5.173.
international human rights instruments on the protection of indigenous communities’ human and cultural rights: the United Nations Declaration on the Rights of Indigenous Peoples and the International Labour Organization (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries. According to the Panel, these sources “demonstrate the recognized interest of Inuit and indigenous people in preserving their traditions and cultures.”186 While Canada’s challenge of the Panel’s reliance on these ‘extraneous’ sources was not addressed by the AB,187 the European Union maintained that in some circumstances (i.e., hunting for Inuit subsistence) and regardless of the inhumane manner of killing seals, these interests were “morally superior to the welfare of seals”188 even if their pursuit entailed inflicting the very pain and suffering to seals which were the main concern of E.U. citizens. By this conduct, the European Union was regulating conduct in a foreign jurisdiction, implying that a country can invoke its domestic public morals to prevent the import of goods manufactured in a country whose human rights situation does not suit the morals of the importing state’s population.

The novelty of EC – Seal Products as far as the public morals jurisprudence is concerned rests not on the conflict between the traditional trade and nontrade interests, but rather between multiple nontrade values. One important finding in this case is the fact that WTO Members can now justify trade restriction on grounds of animal welfare as a testimony of the evolution of the concept of “public morals” through time. Animal cruelty, which was not contemplated during the framing phases of this clause, is henceforth recognized as a public moral concern, in line with what Sykes refers to as “the development of international legal norms concerning animal welfare.”189 After animal rights, the calls for human rights concerns to be brought under public morals may therefore sound legitimate, yet problematic in the backdrop of developing countries’ resistance to social clauses at the WTO. Accordingly, the temptation to extend EC – Seal Products’ findings to the recognition


187. Appellate Report, EC – Seal Products, supra note 17, ¶ 2.1.1. According to Canada, the international agreements to which the European Union cites “do not require the [EU] to protect the interests of Inuit or other indigenous communities by discriminating against the products of non-indigenous peoples.”

188. Id. ¶ 2.108.

that trade can be legally restricted on labor rights grounds should be closely monitored.

As in the previous cases, the AB did not inquire into the genuineness of the public morals defense, simply leaving the responding party the latitude to define what constitutes public morals, even if it meant interpreting it as public policy or even industrial policy. Even more challenging for future cases is the test relied on by the Panel—the understanding of public morals “as defined . . . by the regulating Member”—which differs from previous public morals jurisprudence. This absolute deferential approach is exactly the reason why Members would be tempted to bring anything unjustifiable under any other Article XX subparagraphs of the GATT to the public morals table. The adjudicator seems to be complicit in this future development. Indeed, the AB did not reverse this finding and also chose not to rule on the “exact content” of a public moral concern.

2. Combatting Money Laundering is “Vital and Important,” Thus a Public Morals Concern

The Colombia – Textiles case resulted from the imposition by Colombia of a compound tariff which was affecting the import of textiles, apparel, and footwear from Panama. This “compound tariff” consisted of an *ad valorem* levy, expressed as a percentage of the customs value of the merchandise, as well as a fixed component, expressed in units of currency per unit of measurement.190 Panama argued that, in some instances, the application of this measure would result in an imposition of duties that exceeded the bound rates in Colombia’s Schedule of Concessions, thereby violating Article II:1(a) and first sentence of Article II:1(b) of the GATT.191

Colombia argued that the impugned measures were meant to combat “illegal trade operations,” which fall outside Article II of the GATT.192 For Colombia, the claimant had also failed to establish that the application of the compound tariff resulted in a breach of the bound rates in its Schedule.193 However, Colombia additionally requested that the Panel, in the event that it found a

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191. *See id.* ¶ 3.1. While Article II:1(a) provides that each WTO Member “shall accord to the commerce of the other [Members] treatment no less favourable than that provided for” in its tariff Schedule, Article II:1(b) requires that imported products shall be “exempt from ordinary customs duties in excess of those set forth” in that Schedule.
192. *Id.* ¶ 3.4.
193. *Id.*
violation of Article II, consider that its actions were justified under both Article XX(a) and Article XX(d) of the GATT.\footnote{Id. Article XX(d) of the GATT provides exception for measures “necessary to secure compliance with laws and regulations which are not inconsistent with the provision of [the GATT].”} With respect to Article XX(a), Colombia argued that the compound tariff was an important instrument to fight against money laundering linked with drug trafficking and other criminal activities. In effect, according to the argument, the import of apparel and footwear at “artificially low prices” was interpreted to be a channel to launder money and the disputed measure sets out to prevent such conduct.\footnote{Panel Report,\textit{ Columbia – Textiles, supra} note 17, ¶ 7.200.}

Finding that the compound tariff violated the terms of Colombia’s Schedule of Concessions, hence Article II of the GATT,\footnote{Id. ¶ 7.193–194.} the Panel proceeded to examine the argument that the measure was justified under public morals exception in Article XX(a).

That “problems relating to money laundering fall within the scope of the notion of public morals”\footnote{Id. ¶ 7.236.} is undisputed following \textit{US – Gambling}, in which it was acknowledged to be “vital and important,” like the protection of human health.\footnote{See Panel Report, \textit{US – Gambling, supra} note 17, ¶ 6.492.} Panama did not challenge that conception. Colombia, however, manifestly did not receive a blank check. It had to show that its compound tariff was itself \textit{designed} and \textit{necessary} to protect public morals. In making sure that the measure met those conditions, the Panel considered the text of the legislation at issue, as well as other available evidence concerning both the structure and the application of the compound tariff. The Panel then found that, while Colombia had shown that combating money laundering is aimed at protecting public morals in Colombia, it failed to prove that the compound tariff was designed to combat money laundering.\footnote{See Panel Report, \textit{Columbia – Textiles, supra} note 17, ¶ 7.401.}

For the Panel, there was no relationship between the compound tariff, the legislation, and the fight against money laundering. Several reasons accounted for this verdict. In fact, the temporary nature of the measure—which was meant to only last for two years—was not in line with the seriousness of the objective to thwart criminal activity.\footnote{See id. ¶ 7.389, 7.506 (the Colombian Criminal Code enumerates money laundering as a crime). Moreover, the fact that the only penalty}
for importing at low prices was a compound tariff did not match the spirit behind the fight against money laundering, which would have also necessitated criminal investigations directed at the suspects of these activities.201 The Panel found this attitude “incongruous.”202 Having concluded that the measure was not designed to protect public morals for the foregoing reasons, the Panel then only examined the necessity requirement “for the sake of argument.”203

The AB disagreed with that conclusion. In reversing the Panel’s finding, the AB noted at the outset that in order to conclude that a measure is designed to protect public morals, the threshold involves being capable (or “not incapable”) of doing so.204 In other words, if the assessment of the link between the measure and the protection of public morals “reveals that the measure is incapable of protecting public morals,” then the adjudicator will be forced to conclude that the measure is not designed to protect public morals.205 This is, in the AB’s own opinion, not a particularly demanding task.206 The AB was thereby confirming explicitly the low threshold assigned to the design of the measure. On the basis of the Panel’s own findings, such as one that “not every” undervaluation operation is for money laundering purposes, which the AB construed as “an acceptance [by the Panel] that at least some of the undervaluation operations can be carried out in order to launder money,”207 the AB concluded that there was a relationship between the impugned measure and the protection of public morals.208 Consequently, the measure was interpreted to have been designed to protect public morals.209

In completing the legal analysis, since the Panel’s own conclusion with regard to “necessity” was guided by its prior erroneous finding that the compound tariff was not designed to protect public morals, the AB agreed with the parties that “the fight against money laundering is a societal interest that could be described as

201. See id. ¶¶ 7.375 (detailing Colombian Ministry of Justice investigations into money laundering), 7.390–391.
202. Id. ¶ 7.391.
203. Id. ¶ 7.402; see also ¶¶ 7.403–445 (Panel discusses various factors and concludes that “Colombia has failed to show that the compound tariff is a measure necessary to combat money laundering.”).
204. Appellate Report, Colombia – Textiles, supra note 17, ¶ 5.68.
205. See id.
206. See id. ¶ 5.70.
207. Id. ¶ 5.87 (emphasis added).
208. Id. ¶ 5.89.
209. Id. ¶ 5.100.
vital and important in the highest degree” for Colombia. However, the AB reasoned, the Panel’s finding that there may be \textit{at least some} contribution of the compound tariff to the protection of public morals fails to determine the \textit{degree} of such contribution. This lack of “sufficient clarity” of the degree of the contribution made by the compound tariff to the objective of combating money laundering as well as the degree of the trade-restrictiveness of the measure were enough to prevent the AB from conducting a proper “weighing and balancing.” It proceeded to conclude that Colombia’s measure was not “necessary to protect public morals” in the sense of Article XX(a) of the GATT.

\textit{Colombia – Textiles} confirmed the deferential attitude towards countries’ conceptions of public morals. Combatting money laundering was never questioned, neither by Panama nor the Panel, much less the AB, probably because of the \textit{US – Gambling} precedent. The dispute revolved around the compound tariff as a \textit{means} to protect public morals, which the AB found to be inadequate in this respect.

\textbf{C. Reclaiming Control over Relaxed Article XX(a) Test or Letting Go of the Filter?}

1. Halal Food May Be a Public Morals Issue for a Muslim Country Like Indonesia, But It is \textit{No Longer} Enough to Claim Without Proving that the Measures Relate to Its “Protection”

\textit{Indonesia – Import Licensing Regimes} represents a joint dispute, brought by New Zealand and the United States against eighteen separate measures that Indonesia had imposed on the import of horticultural products, animals, and animal products. The co-complainants argued that these measures were inconsistent with Article XI:1 of the GATT (prohibiting quantitative restrictions of goods in general) and Article 4.2 of the Agriculture Agreement (prohibiting the use of non-tariff measures, especially quantitative restrictions, on agricultural products). They also contended that the import licensing regimes accord treatment less favorable to

\begin{itemize}
  \item 211. \textit{Id.} ¶ 5.107.
  \item 212. \textit{Id.} ¶¶ 5.113–115.
  \item 213. \textit{Id.} ¶¶ 5.93, 5.117.
\end{itemize}
imported horticultural products than to domestic-like products contrary to Article III:4 of the GATT.

In particular, the eighteen measures challenged by the co-complainants comprise: (i) discrete elements of Indonesia’s import licensing regime for horticultural products (Measures 1 through 8);215 (ii) Indonesia’s import licensing regime for horticultural products as a whole (Measure 9);216 (iii) discrete elements of Indonesia’s import licensing regime for animals and animal products (Measures 10 through 16);217 (iv) Indonesia’s import licensing regime for animals and animal products as a whole (Measure 17);218 and (v) the requirement whereby importation of horticultural products, animals, and animal products depends upon Indonesia’s determination of the sufficiency of domestic supply to satisfy domestic demand (Measure 18).219 Indonesia rejected claims of violations of its obligations under the covered agreements and requested that the Panel decide accordingly.220

The Panel found that the measures at issues violate Article XI:1 of the GATT because they constitute prohibitions on importation or restrictions having a limiting effect on importation “by virtue of their design, architecture and revealing structure.”221 Indonesia invoked Articles XX(a), XX(b), and XX(d) of the GATT as a defense against the inconsistencies of its measures.

The first issue the Panel dealt with was the violation of the principles of good faith and due process rights in the admissibility of Indonesia’s defenses under Article XX. As the AB in US – Gambling had formulated, “the principles of good faith and due process oblige a responding party to articulate its defense promptly and clearly” so as to allow the complaining party to understand the nature of the defense, “be aware of its dimensions, and have an adequate opportunity to address and respond to it.”222 In effect, the co-complainants protested against a set of “new” defenses submitted by Indonesia after the second substantive meeting, to which they did not have the opportunity to respond.223 They also pointed to the murkiness of Indonesia’s defenses. Indeed, while New Zea-

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216. Id. ¶ 2.49.
217. Id. ¶¶ 2.50–63.
218. Id. ¶ 2.64.
219. Id. ¶¶ 2.65–66.
221. Id. ¶ 8.1.b.
223. Id. ¶ 7.506.
land mentioned the “lack of elaboration” as a factor precluding timely response, the United States spoke of “bare reference to the relevant Article XX subparagraph,” including “an ambiguous word or two” in the newly-submitted defenses.\footnote{224 Id. ¶ 7.508.} The Panel agreed with New Zealand and the United States and consequently refused to entertain these newly-introduced defenses in its analysis.

In addition, the Panel found that a number of defenses raised by Indonesia did not meet the standard of Article XX either because they were “patently underdeveloped” or merely “unsubstantiated.”\footnote{225 Id. ¶¶ 7.513–517.} It is established case law that a Member invoking a defense under one subparagraph of Article XX bears the burden of showing that the conditions prescribed therein are met.\footnote{226 Appellate Report, 
\textit{Korea – Beef}, supra note 44, ¶ 157.} Here, the Panel found that Indonesia had not discharged that burden of proof since it failed to corroborate its “bare” reference to Article XX(a) with “any evidence” to support its claim.\footnote{227 Panel Report, \textit{Indonesia – Import Licensing Regimes}, supra note 17, ¶ 7.516.} Consequently, the Panel held that Indonesia had not made a \textit{prima facie} defense under Article XX(a) for Measure 15.\footnote{228 Measure 15 was a requirement imposed upon importers of large ruminant meats to purchase local beef from certified slaughter houses; importers who failed to do so would either not obtain or lose their Ministry of Agriculture (MOA) Recommendation. \textit{See id.} ¶¶ 2.60–61. Obtaining a MOA Recommendation is a mandatory step prior to applying for a Ministry of Trade (MOT) Import Approval. For the import licensing procedures for animal and animal products in Indonesia, see \textit{id.}, ¶¶ 2.20–27.} In effect, Indonesia had contended that domestic beef purchase requirement was necessary to the protection of human, plant, and animal life or health under Article XX(b) as “an integral part of [its] food safety and security plan,” and also justified under Article XX(a) without further demonstration as to how and why.\footnote{229 Id. ¶ 7.413.} This signaled a paradigm shift in the attitude of the Panel when it comes to assessing whether a public moral issue which the disputed measure sets out to protect actually exists in the regulating Member. It indicated that the measures sought to be justified have to undergo close scrutiny, departing from past precedents in which Members were simply trusted in their claims.

Concerning the other measures, Indonesia first pleaded that its storage ownership and capacity requirements for horticultural products were justified under Article XX(a). Measure 5 required importers to own storage facilities with sufficient capacity to contain the full quantity of products for which import authorization is
sought, and to show proof of their existence in their application.\textsuperscript{230}

Relying on previous cases where it was stated that Members should be given some margin to define and apply public morals according to their system of values,\textsuperscript{231} as well as the right to determine their appropriate level of protection,\textsuperscript{232} Indonesia contended that as a “predominantly Muslim country,” the measure aimed at guaranteeing Indonesians have access to halal products as provided by Islamic law.\textsuperscript{233} It further argued that, in order to be considered halal, some foodstuffs must have their ingredients “carefully selected and sourced” by adopting, \textit{inter alia}, “appropriate . . . handling and storage procedures.”\textsuperscript{234} That is why, in Indonesia’s opinion, the storage ownership requirement was “necessary to ensure Halal compliance and to protect the Halal status of food sold in Indonesia.”\textsuperscript{235}

That halal is a public moral issue in Indonesia, one of the world’s largest Muslim countries,\textsuperscript{236} was not disputed by the co-complainants. In fact, it is known that many countries adopt and/or maintain trade-restricting measures on religious grounds.\textsuperscript{237} What was at issue, however, was whether the import licensing measures were \textit{designed} “to protect” public morals. According to the co-complainants, horticultural products to which the storage ownership requirement applied are “inherently” halal so much so that there are doubts as to the measure’s objectives.\textsuperscript{238} Plus, whereas most halal laws pertain to animals and animal products, no such requirement existed for horticultural products.\textsuperscript{239} Barely asserting a defense, in the words of the Panel, does not necessarily make the case availing. The respondent bears the burden of demonstrating the nexus between the design of the measure and the objective it seeks to achieve. The Panel had no difficulty in concluding that, in the absence of any mention of the protection of public morals as one of the objectives of Measure 5, coupled with the fact that the

\textsuperscript{230} Id. ¶¶ 2.41–42.
\textsuperscript{233} Panel Report, \textit{Indonesia – Import Licensing Regimes}, supra note 17, ¶ 7.637.
\textsuperscript{234} Id. ¶ 7.638.
\textsuperscript{235} Id. ¶ 7.640.
\textsuperscript{239} Id. ¶¶ 7.654–655.
respondent had not shown that the latter was capable of protecting public morals, Indonesia had failed to demonstrate a link between Measure 5 and the “protection” of public morals.\(^{240}\) Hence, the measure was not provisionally justified under Article XX(a).\(^{241}\)

Measure 6, which related to the use, sale, and distribution requirements for horticultural products,\(^{242}\) suffered the same fate. The Panel concluded in that respect, after examining its design, including its content, structure, and expected operation, that the measure was not provisionally justified under Article XX(a).\(^{243}\) These findings precluded any further analysis pertaining to “necessity,” let alone the chapeau.

The originality of this case does not result from the finding that a Member who wants to benefit from the public morals exception must adduce evidence in that respect. This principle is in the nature of affirmative defenses, even though previous cases had not followed this trend scrupulously. Rather, the Panel’s order of analysis with regard to the other measures which Indonesia claimed were also justified under Article XX(a) is what demands attention. In fact, it has been well-established since \textit{US – Gasoline} that Article XX sets out a two-tier test to determine whether a measure can be justified under Article XX. The adjudicator must first examine whether a measure is provisionally justified under one Article XX subparagraph before proceeding to examine compliance with the chapeau.\(^{244}\) The Panel in the case at hand deviated from this mandatory sequence, which has mechanically been followed by all panels and the AB.

Indeed, in order to examine compliance with Article XX chapeau, the Panel, after finding that the conditions specified therein

\(^{240}\) Id. ¶¶ 7.656–660.

\(^{241}\) Id. ¶¶ 7.660–661.

\(^{242}\) See id. ¶ 2.44, which provides that under this measure, an importer that obtains recognition as a Producer Importer of Horticultural Products (PI) can only import horticultural products as raw materials or auxiliary materials for its industrial production processes and is thus prohibited from trading and/or transferring them. Likewise, an importer that obtains recognition as a Registered Importer of Horticultural Products (RI) can only import horticultural products for consumption provided they are traded or transferred to a distributor and not directly to consumers or retailers. Designation as an RI or PI can be revoked where the relevant importer is proven to have traded and/or transferred imported horticultural products.

\(^{243}\) Id. ¶¶ 7.709–721.

\(^{244}\) Appellate Report, \textit{US – Gasoline}, supra note 22, at 22; see also Appellate Report, \textit{US – Shrimp}, supra note 29, ¶ 119 (explaining that this sequence is mandatory and does not reflect “inadvertence or random choice, but rather the fundamental structure and logic of Article XX”).
were not met,245 had nevertheless assumed *arguendo* that Measure 8 (relating to the requirement that all imported fresh horticultural products have been harvested less than six months prior to importation) was provisionally justified under subparagraph (b) as a measure necessary for the protection of human, animal or plant life and health. Beginning with this assumption, the Panel proceeded to check whether it was applied in a manner that does not violate the chapeau. It did so to provide the AB in due course with “sufficient facts on the record to address *any* argument under the chapeau,” as the finding was susceptible, in the Panel’s view, of being appealed.246 However, instead of focusing exclusively on Measure 8, the Panel applied the test to Indonesia’s import licensing regimes (for both horticultural and animal and animal products) “as a whole.” It was guided in its own angle of attack by Indonesia’s conflation of its defenses under subparagraphs (a), (b), and (d) of Article XX. It then concluded that the measures as a whole, including Measure 8, were not applied in a manner that is compliant with the chapeau.247 This finding that Measure 8 (and the import licensing regime as a whole) violated the chapeau led the Panel to also conclude that Measures 9 through 17 were not provisionally justified under subparagraphs (a), (b), and (d) of Article XX, respectively (without seeing the need to examine the individual subparagraphs separately).248

Indonesia argued that the Panel’s approach was an error of law that needed to be corrected by the AB. The AB agreed with Indonesia that “following the normal sequence of analysis under Article XX provides panels with the necessary tools to assess the requirements of the chapeau.”249 However, the AB tempered its critique by arguing that, depending on the circumstances of a case, a panel may deviate from this logical sequence without “necessarily,” for

245. Panel Report, *Indonesia – Import Licensing Regimes*, supra note 17, ¶¶ 7.789–804. The Panel had concluded that, although it was designed, at least in part, to protect human health, it was not necessary in that regard. See, e.g., *id.*, ¶¶ 7.797, 7.804.

246. *Id.*, ¶ 7.804 (emphasis added). A similar approach was taken by the Panel in *US – Gambling*, citing “important arguments” raised without naming them and without explicitly stating that it was helping out the AB in case of appeal. See Panel Report, *US – Gambling*, supra note 17, ¶ 6.566.


248. *Id.*, ¶¶ 7.829–830. Among these measures, apart from Measures 5 and 6 analyzed above, the ones that Indonesia had specifically sought to justify under Article XX(a) were Measure 9 (Import licensing regime for horticultural products as a whole); Measure 14 (Use, sale and distribution of imported bovine meat and offal requirement); Measure 15 (*supra* note 228); and Measure 17 (Import licensing regime for animals and animal products as a whole). See *id.*, ¶ 7.819.

that reason “alone,” committing a reversible legal error.\textsuperscript{250} The AB added a proviso in such a circumstance to avoid setting a precedent. Normally, a panel may only depart from this line of analysis if it “has made findings on those elements under the applicable paragraphs that are relevant for its analysis of the requirements of the \textit{chapeau}.\textsuperscript{251} In other words, a panel would normally commit a legal error if it failed to follow the mandated sequential approach to Article XX unless there is a genuine reason to digress, which should be considered on a case-by-case basis. In this particular case, departure from the established Article XX wisdom was simply dictated by judicial economy since findings under individual paragraphs were not necessary for the resolution of the dispute. These are the same reasons which motivated the AB to “decline to rule” on Indonesia’s appeal on this score and to declare the related Panel’s findings “moot and of no legal effect.”\textsuperscript{252}

Before Indonesia – Import Licensing Regimes, especially following China – Publications and Audiovisual Products, WTO Members seemed to have been given a total liberty (not just a \textit{certain} latitude as US – Gambling envisaged)\textsuperscript{253} to define what they can claim as public morals protection, without the requirement of proving that the challenged measure is actually aimed at achieving that goal. Indonesia also sought to benefit from this “broad discretion.”\textsuperscript{254} This case is further a living example of how the public morals defense is being trivialized. The fact of conflating arguments under paragraphs (a), (b), and (d) without specifically delineating how the measures relate to each of these policy grounds is a case in point. Regarding the public morals defense, this case reaffirmed that countries are not given total leeway in the choice of \textit{measures} they may impose for the protection of public morals. Instead, they are required to provide evidence linking the disputed measure and the objective pursued. Notwithstanding that, what constitutes public morals in a particular country is still left to the country to decide. In this case, the disputants did not challenge the religious (and moral) values behind halal protection; neither did the Panel nor the AB.

\textsuperscript{250} Id.
\textsuperscript{251} Id.
\textsuperscript{252} Id. \textsuperscript{¶} 5.103, 6.8.
\textsuperscript{254} Panel Report, Indonesia – Import Licensing Regimes, supra note 17, annex C-5 (First Part of the Executive Summary of the Arguments of Indonesia), \textsuperscript{¶} 23; annex C-6 (Second Part of the Executive Summary of the Arguments of Indonesia), at C-61, \textsuperscript{¶} 21.
Indonesia – Import Licensing Regimes can only be celebrated for the correct application of the Article XX test, at least as far as Measures 5 and 6 are concerned, even though the Panel’s approach to the other measures may be criticized for having been conducted in an incorrect manner. Yet, even if the Panel had followed the right sequence, or if the AB had reversed the Panel’s findings in this regard, Indonesia’s defense would still not have passed the test of the chapeau. The Panel’s arguendo argument makes this point extremely clear. One is therefore left to question whether the WTO adjudicatory bodies have begun to reclaim control over the public morals defense (which it appeared to have yielded to litigants). The next case will likely prove instructive as to the direction in which the adjudicator is heading.

2. Is Recognizing the Promotion of “Social Inclusion” as a “Public Morals” Concern (Not) Stretching the Accordion Too Far From Its Original Intent/Design?

This Article analyzes Brazil – Taxation last because its appeal is still pending as of this writing. The case is also significant in the way the public morals exception has been handled by the Panel and the direction in which it is taking a measure pursuant to Article XX(a) of the GATT. The case originates from a complaint brought by the European Union, later joined by Japan, against a set of Brazilian federal taxes and contributions applied in the automotive sector, the electronics and technology industries, and goods produced in free trade zones. This represents another program related to tax advantages for exporters. For the purpose of this Article, the program of Support for the Technological Development of the Industry of Digital TV Equipment (PATVD program) exempts accredited firms from paying certain taxes (at zero rates) with respect to equipment that transmits frequency signals for digital television. The tax exemption also applies to machinery, apparatuses, instruments, equipment, inputs, and software for the production of digital television transmission equipment. In effect, the tax exemptions are granted to companies engaged in the manufacturing of digital TV transmitters in Brazil. Moreover, in order to benefit from the programs, companies must be “accredited” by the relevant government ministries. To be accredited,

256. Id. ¶ 2.82–83.
257. Id.
companies must further invest a minimum of 2.5 percent of their gross revenue from sales of the final products in research and development (R&D) in Brazil.\textsuperscript{258}

Complainants argue that, individually and taken as a whole, these measures increase the effective level of border protection in Brazil, while providing preferences and support to domestic producers and exporters. The measures allegedly do so not only by imposing a higher tax burden on imported goods than on domestic goods, but also by conditioning tax advantages to the use of domestic goods, and by providing export-contingent subsidies.\textsuperscript{259} In particular, as far as the PATVD program is concerned, the European Union argued that the measures violate Article III of the GATT because the set of tax advantages are contingent upon domestic production and technological development of these products in Brazil. More precisely, imported ICT goods and semiconductors are taxed in excess of like domestic products contrary to the first sentence of GATT’s Article III.2. Not only that, imported inputs (by the requirement to use local inputs in order to benefit from tax exemptions) are also accorded less favorable treatment, contrary to Article III.4 of the GATT. Likewise, the complainants contended that the conditions to obtain accreditation grant a less favorable treatment to producers of imported goods.

Brazil, in response, argued that its PATVD program is justified under Article XX(a) of the GATT as a measure necessary to protect public morals in Brazil. To support its arguments, Brazil stated that there is a “digital divide” between “demographics and regions that have access to modern information and telecommunications technology” and those that either have restricted access or do not have access at all.\textsuperscript{260} In order to close this gap and promote “social inclusion,” it has chosen to provide accessible and affordable digital television which would, in turn, improve “literacy, democracy, social mobility, economic quality and growth.”\textsuperscript{261} These concerns, according to Brazil, fall “squarely within the range of policies necessary to protect public morals.”\textsuperscript{262}

The Panel agreed with Brazil that there is a problematic “digital divide” in its territory, which has implications on the standard of

\textsuperscript{258} See id. ¶ 2.87.
\textsuperscript{259} See Request for Consultations by the European Union, Brazil – Certain Measures Concerning Taxation and Charges, at 1, WTO Docs. G/L/1061. G/SCM/D100/, G/TRIMS/D/3/, WT/DS472/1 (Jan. 8, 2014).
\textsuperscript{260} Panel Report, Brazil – Taxation, supra note 17, ¶ 7.544.
\textsuperscript{261} Id. ¶¶ 7.544–545.
\textsuperscript{262} Id. ¶ 7.545.
living recognized in the Preamble of the WTO Agreement, which states that trade between WTO Members “should be conducted with a view to raising standards of living.” 263 Since Members are accorded “certain” discretion to define the scope of public morals within their societies and to choose measures to protect the same, 264 the Panel found that it should defer in this case to Brazil’s choice in these particular circumstances. Accordingly, the Panel concluded that:

Brazil has demonstrated that a concern exists in Brazilian society with respect to the need to bridge the digital divide and promote social inclusion, and that such concern is within the scope of “public morals” as defined and applied by Brazil. 265

This finding is obviously without consequence for the degree of deference the Panel is willing to accord to countries to define for themselves what constitutes public morals within their societies. Here, the danger of justifying virtually anything under the sun as a public morals issue—an exacerbation of protectionism—looms large. Even though the Panel ruled in favor of Brazil, this perspective was not unchallenged. In fact, the European Union argued in this case—and rightly so, in this author’s view—that Brazil’s incentives are merely of a general social and economic nature, like any other governments’ policies taken in the public interest which have nothing to do with public morals objectives. 266 Raising the standard of living, access to information and education, and promoting social inclusion are obviously legitimate policy goals for any government to pursue. But whether these are purely “public morals” issues or other things altogether remains an open question. In its judgment, the Panel utterly blurs the line between public policies issues and those that fall within the exception meant to protect public morals. It further aggravates the public morals “catch-all dilemma,” whereby issues not explicitly listed under any other Article XX subparagraph would be brought under subparagraph (a). 267 Perhaps the Panel leaned purposefully in this direction.

The Panel then analyzed whether the measure was designed to protect public morals (i.e., whether there is a nexus between the

263. See Marrakesh Agreement, supra note 4, at pmbl.
264. See Panel Report, US – Gambling, supra note 17, ¶ 6.461; see also Panel Report, EC – Seal Products, supra note 17, ¶ 7.381 (holding that “WTO Members are afforded a certain degree of discretion in defining the scope of ‘public morals’ with respect to various values prevailing in their societies at a given time.”).
266. See id. ¶ 7.548.
267. See Gonzalez, supra note 14, at 967–70.
PATVD program and the protection of public morals). The finding on this count is a novelty in itself, proceeding along the following lines. The complainants had argued that the PATVD program was aimed at pursuing an “industrial policy” of Brazil so that there would be no “genuine relationship of ends and means” between the latter and the public morals allegedly protected.268 The Panel decided to follow the standard of review developed in *Columbia – Textiles*, where the AB stated that for a measure to be designed to protect public morals, it simply has to be *not incapable* of contributing to that objective.269 As already noted above, this is, generally speaking, a low threshold and not “a particularly demanding” one. It merely requires exploring the content, structure and *expected* operation of the measure.

That notwithstanding, the Panel recalled previous case law which places the burden on the party invoking the protection of public morals to adduce evidence in that respect, despite the latitude to define and apply for themselves the concept of public morals. After considering these pieces of evidence, the Panel noted at the outset that no *prima facie* relation existed between the discriminatory aspects of the PATVD program and the objective to bridge the digital divide, or social inclusion.270 Moreover, the Panel was not “fully convinced” by the argument that the PATVD program by its design will achieve its goal of closing the digital divide “by establishing and promoting a domestic industry.”271 Yet, disregarding the “inherent tension to Brazil’s argument,”272 the Panel found that the design and structure of the discriminatory aspects of the PATVD program were “indeed intended to foster Brazilian technology and industry and to promote Brazilian production of instruments and services.”273 However, the latter is contrary to Brazil’s arguments that it is a *means* to achieve the goal of bridging the digital divide, and is an *end* in and of itself. Instead of drawing the logical conclusion out of these findings, the Panel, by relying on the lenient standard of review, flimsily justified why it should nevertheless rule that the measure was designed to protect public morals. Indeed, the Panel admitted that the “functioning” of the program apparently contradicts its underlying logic, but concluded that:

269. Appellate Report, *Colombia – Textiles*, *supra* note 17, ¶ 5.68.
271. *Id.*
272. *Id.* ¶ 7.575–578.
273. *Id.* ¶ 7.579.
Notwithstanding its deep reservations regarding the design of the measure, the Panel does not consider that it is in a position to make a finding in the negative, to the effect that the PATVD program is incapable of contributing to bridging the digital divide and promoting social inclusion.274

This is certainly a step backward from the Panel’s ruling in Indonesia – Import Licensing Regimes where the logical conclusion from lack of nexus between the means and the goal led the Panel to conclude that the measure was not designed to protect public morals.275 The Brazil – Taxation Panel justified its conclusion on the ground that, given the structure and the expected operation of the discriminatory aspects of Brazil’s measure, it could potentially contribute to the protection of public morals.276 Whether the measure did actually contribute to the protection of public morals, or that there was no certainty that it would do so in the future, was irrelevant to the Panel. The foregoing should have been enough to rule that the measure was not designed, let alone necessary, to protect public morals in Brazil. If, in the Panel’s view, “it is likely that the PATVD program will not make much, if any, contribution to the objective of social inclusion and access to information,”277 one wonders why it continued the analysis simply to end up concluding that the measure is not necessary to protect public morals.278 It appears that the sole virtue in proceeding was to point at WTO-consistent and less trade-restrictive alternative measures that were reasonably available to Brazil so it could correct the discriminatory aspects of its program. Otherwise, this conclusion in itself hardly adds anything to the inference which ought to have been drawn from the findings above. It remains to be seen whether the AB will correct it.

Brazil – Taxation has demonstrated that the line between “public morals” (which ought to cover issues of serious threats) and other public policy issues is no longer as distinct as one would have thought. Admittedly, the adjudicatory bodies will always have at their disposal the necessity test and the chapeau to control protectionist application of a WTO-inconsistent measure. But the scope to define the existence of the public morals issue and how the measure for its protection is designed need to be kept in check to avoid opening the floodgates which risk emptying the exception of its

274. Id. ¶ 7.581.
276. See Panel Report, Brazil – Taxation, supra note 17, ¶ 7.582.
277. Id. ¶ 7.602.
278. See id. ¶¶ 7.603–622.
substance and making Article XX(a) of the GATT and Article XIV(a) of GATS appear as ragbags.

IV. Delineating the Standard of Review to Guard Against the Floodgates

Panels and the AB in the public morals cases reviewed in this Article have, to varying degrees, adhered to the well-established practice of judicial review under Article XX of the GATT (and Article XIV of GATS). In general, countries are free to choose the level of protection they wish to assert. It is not the WTO adjudicator’s task to judge the value that the respondent is seeking to protect. Rather, what is under review is the measure chosen to protect that value. By this “hands-off” technique, the WTO adjudicator seeks not to be too intrusive in reviewing individual countries’ choices to protect values important to them.

While this may have been the proper call in some cases, opening the gates by relaxing the first leg of the analysis with the hope of tightening it in the second and third steps can work in the short run. It definitely gives disputants on whom the decision is binding, and eventually the whole membership, some material to chew on in a context where the public morals exception is still underdeveloped. This is particularly so because the crystallization of the jurisprudence of other subparagraphs would likely direct attention in the future to public morals. It was therefore appealing for the WTO adjudicator to explore in an experimental way all aspects of this defense through a kind of test conducted on each step of the general exception even when the circumstances of the cases, and even its own analysis, called for another conclusion, as we observed in US – Gambling or the recent Brazil – Taxation.

However, this can backfire and cause systemic problems. The similar language under subparagraphs (b), (g), and (a) of GATT’s Article XX, which has given rise to different standards of review, is a case in point. While this interpretation of language is objectively difficult to comprehend, the tendency seems to suggest that any policy not explicitly codified under the general exception is amenable to the terrain of public morals.279 Thus, according to some commentators, under the “respect for collective preferences” approach in the EC – Seal Products case, the AB would be right to

279. See, e.g., Robert Howse, The World Trade Organization and the Protection of Workers’ Rights, 3 J. SMALL & EMERGING BUS. L. 131, 142 (1999) (arguing that Article XX(a) should be invoked to justify trade sanctions against products that involve the use of child labor or the denial of workers’ rights); see also Jarvis, supra note 15, at 232.
provide room to justify measures not covered by any other exception. Yet, this would be tantamount to equating some deference with total deference, which, as we saw, would not guarantee the “objective assessment” under Article 11 of the DSU.

That kind of “judicial activism,” meaning the incorporation of non-WTO norms and the interpretation of the provisions of the various WTO treaties in an expansive way, is subject to criticism. Recall that Articles 3.2 and 19.2 of the DSU provide, in relevant part, that the rulings of the WTO judiciary “cannot add to or diminish the rights and obligations provided in the covered agreements.” The propensity of opening the gates of public morals exceptions to issues not falling under Article XX’s enumerated measures may then introduce questions of the legitimacy of this international trade court’s judgements. This is certainly one of the “emerging” constitutional problems which Jackson warned against some time ago, especially the “tendency for the WTO diplomacy to rely too heavily on the dispute system to correct the many ambiguities and gaps” in the covered agreements. Echoing the same concern as Jackson, Bronckers nevertheless concedes that WTO tribunals are called upon to find answers to unclear treaty provisions like “public morals,” which may sometimes leave them with no other choice but to “drift away from agreements that have been democratically approved.”

Other commentators, a contrario, see in the AB and panels’ attitudes exactly the avoidance of the type of legal creativity and judicial activism referred to above. For Howse, for instance, the adjudicator, with the risk of not always being coherent, has preferred a low profile so as to maintain that balance between the right to regulate and trade liberalization. This argument sug-

280. See Howse, supra note 18, at 63.
281. See Crowley & Jackson, supra note 8, at 211.
283. For the proposition that the WTO dispute settlement system functions as a “court of international trade,” see Schoenbaum, supra note 76, at 655.
286. See Howse, supra note 18, at 13.
gests that, for fear of being accused of judicial activism, panels and the AB have opted to let any type of measure be presented as a public morals concern even if it means sacrificing consistency and, eventually, predictability on the way.287

One risk associated with judicial activism is the loss of the political support of powerful Members with the peril of undermining, not just the dispute settlement per se, but the entire system altogether.288 The United States’ recent persistent assault on the AB, whether justified or not, which some see as a barometer of the latter’s power in global economic governance,289 can be seen in light of this context. The report of the AB in Brazil – Taxation has been delayed owing, inter alia, to the current unfilled vacancies which, in times of heavy workload, delay appeal procedures beyond the sixty days stipulated by Article 17.5 of the DSU.290

V. Conclusion

WTO agreements guarantee to the countries the right to regulate trade by pursuing legitimate policy objectives such as public morals. This serves the purpose of preventing domestic measures from being threatened on the ground that they are trade restrictive. “Public morals” is, however, inherently subjective and devoid of a clear definition. This may explain why WTO Members have been reluctant to raise it for such a long time, let alone litigate on the matter. So far, the clause has been the resort of some major users of WTO dispute settlement (the United States, China, the European Union, and Brazil, respectively) and less frequent users like Indonesia. The identity of the public morals litigants also displays the cultural diversity at play at the WTO and the need to canalize its operation. The WTO may in the future have to deal with as many understandings of public morals as there are Members, the number of which is in constant flux.

At the end of the tour d’horizon in the galaxy of public morals disputes, we have highlighted shortcomings in the panels’ and AB’s identification and justification of measures meant to protect public morals. We have seen, for instance, that the Panel sometimes “trusts” the respondent, like in China – Audiovisuals, when the mea-

287. For a criticism of AB’s inconsistency under Article XX adjudication, see Roessler, supra note 108, at 134–36. This is also the result of the absence of binding precedents in the WTO judicial system.
288. See Steinberg, supra note 50, at 257.
289. Howse, supra note 18, at 76.
sure could be addressing something other than public morals \textit{per se}. Maybe \textit{US – Gambling} is the Trojan horse through which issues of public policy have become public morals concerns.

The grueling exercise of determining the scope and limits of public morals in the absence of any internationally-recognized scientific and objective criteria remains a complex challenge for WTO dispute settlement bodies. Since \textit{US – Gambling}, WTO case law on the public morals exception has provided a great deal of deference to Members’ choices regarding what constitutes public morals within their territory. This deferential approach to the definition of public morals has nevertheless been balanced by the “necessity” test and the strict adherence to the requirement of the chapeau of Article XX. While this suggests that the Article XX balancing exercise will continue to be the gatekeeper against abuses of the provision, the kind of conflating arguments in \textit{Indonesia – Import Licensing Regimes} and public policy issues in \textit{Brazil – Taxation} risk emptying Article XX(a) of its substance, as it was meant, from the drafting history, to address serious threats to a Member’s national morals.

It is true that it is not the mandate of WTO adjudicators to judge the policy objectives of a Member, but rather the means to achieve these ends. However, the degree of deference, if left unguarded as has been the case more often, could open the door to a floodgate of interpretations so that virtually everything would be alleged to fall under the public morals exception. But this fear should be nuanced. Indeed, we have witnessed a pinch of inconsistency in the attitude of adjudicators when this defense is raised. While panels and the AB seemed to skim through the first leg of the analysis in the formative years of the public morals jurisprudence, especially in \textit{US – Gambling} and \textit{China – Audiovisuals}, they have also recently engaged, in some instances, in strict scrutiny of the design of the measure aimed at public morals protection, as it did in \textit{Indonesia – Import Licensing Regimes}, so much so that the certain (as opposed to total) latitude left to Members to define for themselves the degree of protection of public morality begins to make sense. While this may be an indication that the trade court is taking control of the standard of the review, it may also be a display of its lack of coherence which \textit{in fine} undermines security and predictability.\footnote{291}

\footnote{291. DSU Article 3.2 provides in relevant part that the WTO dispute settlement system is “a central element in providing security and predictability to the multilateral trading system.”}