Permitting Moral Imperialism: Public Morals Exception to Free Trade at the Bar of the WTO.pdf

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Permitting Moral Imperialism? The Public Morals Exception to Free Trade at the Bar of the World Trade Organization

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The objective of this article is to critically review the case law on public morals exception in the multilateral trading system and argue against the World Trade Organization (WTO) Appellate Body’s exceedingly deferential approach to the meaning and identification of public morals in international trade disputes. Admittedly, the WTO Appellate Body’s judicial minimalism approach to trade dispute settlement has so far prevented it from making any broad claims about public morals exception. Nevertheless, I argue that the Appellate Body has already waded into treacherous waters. Going forward, the WTO Appellate Body must be cautious so as not to permit moral imperialism and put the delicately balanced multilateral trading system at grave risk. For this purpose, I propose a more nuanced approach to define public morals as well as manage its extraterritorial application in international trade law.

1 INTRODUCTION

Incorporating a public morals exception clause into an international trade agreement, be it multilateral, regional or bilateral, has become a standard practice today.1 This clause allows countries to adopt trade restrictive measures necessary to protect public morals, despite the reciprocal market access commitments already negotiated that underlie the trading system. For example, Article XX (a) of the General Agreement on Tariffs and Trade (GATT) 1994 provides:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade,

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nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

a) necessary to protect public morals

While it is obvious that no countries should be obliged to permit imports when doing so would threaten their public morals, the public morals exception, if left unconstrained, could be abused by states to enact disguised protectionist measures. Moreover, even if no protectionist motive is involved, the public morals exception may be expansively interpreted to legitimize extraterritorial application of a particular set of social, cultural, ethical and religious values that may not be widely shared in the international community, or at least not embraced by the country against which trade restrictive measures are directed. Consequently, there is a moral imperialism risk that the World Trade Organization (WTO) regime may degenerate into a mechanism equivalent to a ‘GATT-sanctions version of gunboat diplomacy’ whereby powerful countries impose their moral standards on other cultures and countries.

These are not overblown theoretical concerns. While the public morals clause in the GATT/WTO regime had been dormant for almost sixty years, it has recently come to the fore of international trade policy debate in light of a series of high profile trade disputes. In US – Gambling, Antigua brought a complaint against the United States (US), alleging that certain US federal and state laws constituted a ban on the provision of Internet gambling services, in contravention of US obligations under the General Agreement on Trade in Services (GATS). In response, the US invoked the public morals clause embodied in GATS XIV (a). The WTO Appellate Body held that the US ban was necessary to protect public morals and public order. In China – Publications and Audiovisual Products, China denied the trading rights to foreign-invested enterprises and individuals to import cultural goods into China, in clear violation of China’s Accession Protocol to the WTO. China argued that these trade restrictions were necessary to

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2 Other examples include GATS XIV (a) and Art. 2.2 of the TBT Agreement. Art. 2.2 of the TBT Agreement requires that a technical regulation not be more trade restrictive than necessary to fulfill a legitimate objective. In EC – Seal Products, the Panel found that protecting public morals is a legitimate objective under the TBT Agreement. See WTO Panel Report, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seal Products), WT/DS600/R (25 Nov. 2013), para. 7.421.


protect Chinese citizens’ public morals. The Appellate Body conceded that the Chinese measures were for the purpose of protecting public morals in China, only that they were not necessary to achieve the regulatory objective. In *EC – Seal Products*, the European Union (EU) banned the importation of seal products because the sale of seal products derived from seals hunted in an inhumane manner violated the moral and ethical beliefs of Europeans, even if seal hunting take place extraterritorially in Canada and Norway, and many countries do not necessarily share the EU’s conception of public morals related to seal hunting. The Appellate Body nevertheless held that the EU ban was necessary to protect the European public morals.

The reactions from international trade lawyers to the WTO Appellate Body’s three rulings could not be further apart. While some criticize the WTO Appellate Body for being overly restrictive of the sovereignty of WTO Member States and suggest that WTO Members should have more leeway to define public morals based solely on domestic circumstances, others are worried that the public morals exception could be hijacked by geopolitical or protectionist interests and argue for either restricting the public morals exception to certain type of measures or imposing additional set of requirements to prevent its abuse. While some commentators either question the coherency and rationality of EU public moral concerns about seal welfare or wonder whether the Appellate Body’s deference to WTO Member states may render the public morals exception ‘go out of check’, others defended the Appellate Body and argued that the Appellate Body could actually go even further to protect non-instrumental values and permit pluralism. While some celebrated the avoidance of the vexing territorial nexus requirement when invoking the public morals exception and expected to see a more coherent integration of human rights and labour rights into the trading system, others questioned whether

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8 See Marxwell, supra n. 3, at 806.
the very existence of international law limits on prescriptive jurisdiction could be made to disappear through a sleight of hand.14

The objective of this article is to critically review the WTO case law on public morals exception in the GATT/WTO system and argue against the Appellate Body’s exceedingly deferential approach to the meaning and identification of public morals. Admittedly, the WTO Appellate Body’s judicial minimalism approach to trade dispute settlement has so far prevented it from making any broad claims about public morals exception.15 Nevertheless, I submit that the Appellate Body has already waded into treacherous waters. Going forward, the Appellate Body must be cautious so as not to permit moral imperialism and put the delicately balanced multilateral trading system at grave risk. For this purpose, I propose a more nuanced approach to define public morals as well as manage its extraterritorial application.

This article proceeds in four sections. Section 2 offers an overview of how the public morals clause has been interpreted in the public morals trilogy: US – Gambling, China – Publications and Audiovisual Products and EC – Seal Products. Section 2 ends with a positive summary of how the WTO adjudicators approach the public morals clause in practice. Section 3 reflects critically on the WTO jurisprudence on the public morals exception, highlighting some unresolved issues as well as potential challenges of the WTO Appellate Body’s current interpretative approach to the stability of the GATT/WTO system as a whole. Based on this critical reflection, I put forward a new approach to the interpretation of the public morals exception in international trade law in section 4. Section 5 concludes the article.


The public morals exception clause was first proposed by the United States in 1945. Every subsequent draft of Article XX contained exactly the same language as the first draft an exception for measures ‘necessary to protect public morals’.16 Although the Drafting Committee realized the inclusion of a provision defining obscure or ambiguous terms in the exceptions clause would be helpful, no definitions were codified in the final draft.17 The only directly relevant evidence on the negotiation of this issue was that, in early 1947, the Norwegian delegate to the

16 Charnotivz, supra n. 4, at 704.
17 Feddersen, supra n. 9, at 118.
Drafting Committee stated that his country’s policies on liquor taxes and price restrictions on the importation, production and sale of alcoholic beverages were chiefly aimed at ‘the promotion of temperance’. In the delegate’s opinion, these policies were covered by the public morals exception. It was unclear whether the other delegates agreed with this interpretation as the Norwegian delegation eventually withdrew its proposal during a later conference without any further comment.18

Charnovitz’s research shows that the rationale for the public morals exception was that it was a response to the fact that many governments were banning imports or exports for moral reasons. These governments wanted to be sure that their new obligations in the GATT would not interfere with border controls employed for moral reasons.19 When the GATT was negotiated, there were unilateral or treaty-based trade controls on opium, pornography, liquor, slaves, firearms, blasphemous articles, products linked to animal cruelty, prize fight films, and abortion-inducing drugs. Thus, even though there was no direct evidence, it might be assumed that these restricted items were covered by the ‘public morals’ clause.20 To conclude, the travaux préparatoires for article XX (a) reveals little about what is morality and whose morality is covered except some very limited scenarios.

To render Article XX (a) the public morals exception applicable to a particular trade dispute, the measure at issue must be designed and implemented to protect public morals.21 This raises a distinctive set of questions. Firstly, who has the power to define the substance and boundaries of ‘public morals’? The term is neither defined in the WTO Agreement, nor the drafting history shed much light on its meaning.22 One of the distinguishing features of public morality is its amorphous, albeit evolutionary nature covering manifold activities taking place in a polity that can be deemed a community.23 Measures related to some universal human moral values could be easily identified as protecting public morals, such as prohibition of murder and slavery. However, beyond this core, it is highly controversial what public morals demand on issues such as alcohol, soft drugs and trade in dog or cat fur.24 Then, should public morals be defined unilaterally, that is, each state can unilaterally define its own public morals, or

18 Ibid., at 119–120.
19 Charnovitz, supra n. 4, at 710.
20 Ibid., at 717.
22 Charnovitz, supra n. 4, at 704. Gonzalez, supra n. 3, at 945.
23 Joseph Raz, Between Authority and Interpretation (Oxford, Oxford University Press 2009), at 184–185.
some sort of international consensus is required before a particular public moral could be protected? What if the public morals concerns are not universally or widely shared by trading partners?

Secondly, whether the measures at issue are genuinely aimed at protecting public morals, as opposed to other ulterior motives such as trade protectionism, could not be established by a WTO Member’s own articulation. There must be evidence showing that public morality concerns exist in a society and that trade restrictive measures are designed to address such moral concerns. How does a panel conduct such an analysis? What evidence needs to be submitted by the disputing parties for the Panel to verify the claim that a particular public morality indeed exists? Must the public morals at issue be ‘prevailing’ values within a WTO Member in the sense that at least a majority of citizens hold such public morals?

Thirdly, does the public morals exception encompass extraterritorial application?\(^{25}\) If the citizens of an importing country find a certain practice in an exporting country to be morally repulsive, to what extent can the importing country invoke Article XX (a) to justify its trade restrictive measures?

It should be noted that, to withstand the WTO scrutiny, trade restrictive measures based on public morals must fulfil two additional requirements. First, there must be a sufficient nexus between the measure at issue and public morals being protected, that is, the trade restrictive measures must be ‘necessary’. In practice, this usually means weighing and balancing several variables and asking whether there exists a less trade-restrictive alternative means to achieve the responding party’s regulatory objective.\(^ {26}\) Moreover, the disputed measures must meet the requirements outlined in the opening paragraph of Article XX, known as the chapeau test. As these two requirements apply not only to Article XX (a) but also other subparagraphs under Article XX, and they have been extensively analysed by other leading WTO experts elsewhere,\(^ {27}\) this article focuses on addressing the first three questions outlined above, which have raised some special challenges to the WTO dispute settlement system. With this analytical framework in mind, I will proceed to examine how the WTO panels and the Appellate Body have approached the public morals exception in practice.

\(^ {25}\) Lorand Bartels, *Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights*, 36 (2) J. World Trade 353 (2002), at 402. Bartels argues that Article XX could apply to save various trade measures designed to promote and protect human rights outside of the territory of the regulating member. On a different take on extraterritoriality under Article XX, see Carlos Manuel Vazquez, supra n. 14.


2.1 US – Gambling

The first formal WTO dispute in which the public morals exception was raised is US–Gambling. The measures at issue were numerous US federal and state statutes prohibiting the Internet supply of gambling and betting services. Antigua and Barbuda alleged that the US ban was in inconsistent with US obligations under the GATS by virtue of specific commitments the US has undertaken in its GATS Schedule. In response, the US invoked Article XIV (a) of the GATS to justify the ban. Similar to Article XX (a) of the GATT, Article XIV (a) of the GATS allows states to enact trade restrictive regulatory measures ‘necessary to protect public morals or to maintain public order’.

The Panel considered the term ‘public morals’ denotes ‘standards of right and wrong conduct maintained by or on behalf of a community or nation’. To determine whether gambling fell within this definition, the Panel referred to a wide range of evidence from statement of leading jurists to domestic legislations of other jurisdictions to historical evidence at the League of Nations. The Panel then concluded that gambling and betting was an issue of public morality and that measures prohibiting such services could fall within the scope of Article XIV (a) of the GATS.

The Panel did not explicitly address the issue of whether a WTO Member has unilateral authority to determine the normative content of public morals. Nevertheless, in the Panel’s view, 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’. Therefore, the Panel argues, WTO 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’. This shows that ‘public morals’ should be interpreted in a dynamic and flexible approach, in consistent with the Appellate Body’s decision in US–Shrimp regarding the interpretation of ‘exhaustive natural resources’ in Article XX (g) of the GATT. Moreover, the WTO Member is given ‘some scope’ to define its own conception of public morals in its own territory. However, the Panel left unexplored how narrow/open the scope is.

To verify the US’ public morals defence, the Panel referred to a number of congressional reports and statements before Congressional committee hearings as evidence establishing that the US adopted the three federal statutes at issue to

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29 Ibid., paras 6.470–6.474.
30 Ibid., para. 6.461.
address concerns pertaining to money laundering, organized crime, fraud, underage gambling and pathological gambling that are associated with Internet gambling and betting services. On this basis, the Panel found that the measures were designed to protect public morals and/or to maintain public order within the meaning of GATS Article XIV (a). On appeal, the Appellate Body left undisturbed the Panel’s definition of public morals and its evidentiary approach to determine whether the US measures were designed to protect public morals.

2.2 CHINA – PUBLICATIONS AND AUDIOVISUAL PRODUCTS

The second case in which the public morals exception was involved is China – Publications and Audiovisual Products. In this dispute, China committed to grant the right to trade (in particular, import) to all enterprises in China including foreign-invested enterprises and individuals under the China’s Accession Protocol to the WTO. However, in practice only designated state-owned entities were permitted to import cultural goods, including reading materials (for example books, newspapers, periodicals, electronic publications), audiovisual home entertainment and sound recordings. China refused to allow any foreign enterprises or foreign individuals to import cultural goods. China contended that its trade restrictive measures, taken together, were aimed at establishing a content review mechanism and a system for the selection of import entities for cultural goods directed at protecting public morals in China. As vectors of identity, values and meaning, cultural goods play an essential role in the evolution and definition of elements such as societal features, values, ways of life together, ethics and behaviors. Because imported cultural goods are vectors of different cultural values, China maintained that they may collide with standards of right and wrong conduct which are specific to China.

The Panel quoted with approval the earlier Panel’s interpretation of public morals in US – Gambling. As Article XIV GATS is substantially similar to the GATT Article XX, the Panel reasoned, the earlier Panel’s reasoning under Article XIV (a) is also valid with respect to the protection of public morals under GATT Article XX (a). Contrary to the US – Gambling case, where Antigua and Barbuda

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35 Ibid., para. 7.712.
36 Ibid., para. 7.751.
37 Ibid., para. 7.712.
38 Ibid., para. 7.759.
claimed that online gambling did not go against public morals in the US, the US did not contest China’s articulation of its regulatory objective in *China – Publications and Audiovisual Products*. Given the absence of US protests on the matter, the Panel simply assumed that each of the types of prohibited content listed in China’s measures could, if it were brought into China, be harmful to Chinese perceptions about public morality and societal values. The Appellate Body accepted the Panel’s assumption, with no further investigation, that the content of cultural products censored by China may be harmful to ‘public morals’ in China, and that the Chinese measures at issue were for the purpose of protecting public morals.

2.3 **EC – Seal Products**

The most recent dispute involving the public morals clause is *EC – Seal Products*. In this case, Canada and Norway complained against the EU seal regime which prohibited the placing on the EU market of both pure seal products and seal-containing products, with the exception of seal products resulting from hunts by Inuit, marine resource management hunts and the import by travellers to the extent that they are not for ‘commercial reasons’. The Panel characterized the EU Seal Regime as a ‘technical regulation’, which was overturned by the Appellate Body on appeal. Article 2.2 of the TBT Agreement requires a technical regulation to be no more trade restrictive than necessary to achieve a legitimate objective. To defend the legality of the EU Seal Regime under Article 2.2 of the TBT Agreement, the EU argued that the objective of the EU Seal regime was to:

> address the moral concerns of the EU public with regard to the welfare of seals.

Specifically, these concerns have two aspects: (a) the incidence of inhumane killing of seals and, (b) EU citizens’ individual and collective participation as consumers in, and exposure to (‘abetting’) the economic activity which sustains the market for seal products derived from inhumane hunts.

The Panel found that protecting public morals is a legitimate regulatory objective under Article 2.2 of the TBT Agreement.

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39 Ibid., para. 7.763.
40 Appellate Body Report, *China – Publications and Audiovisual Products*, supra n. 6, paras 250–299. The Appellate Body only held that the Chinese regulations at issue did not make a material contribution to China’s objective of protecting public morals in the necessity test. The veracity of China’s claimed objective and the nexus between Chinese regulations and the pursued objective were not questioned.
42 Appellate Body Report, *EC – Seal Products*, supra n. 7, para. 5.70.
44 Ibid., para. 7.421.
Although the Appellate Body overruled the Panel’s characterization of the EU Seal Regime as a technical regulation, the Panel’s analysis of the EC’s public morals defence under Article 2.2 of is still relevant to public morals analysis under Article XX of the GATT. Indeed, the Panel merely recalled its analysis conducted under Article 2.2 of the TBT Agreement and, without any further analysis, held that the policy objective pursued by the EU falls within the scope of Article XX (a).45

At the panel stage, Canada and Norway contested the applicability of the public morals defence, arguing that addressing public moral concerns was not the objective of the EU Seal Regime.46 Canada based its assertion mainly on two grounds. First, Canada distinguished ‘public concerns’ from ‘public morals’ and contended that the EU public concerns regarding animal welfare of seals were not public moral concerns because they did not arise from perceptions as to the rightness or wrongness of specific conduct.47 Second, Canada argued that there was not a ‘sufficient nexus’ or ‘rational connection’ between the EU Seal Regime and public moral to be protected because the EU regime granted market access to seal products derived from seals inhumanely killed under the three exceptions.48 Norway did not dispute that seal welfare could be a moral issue; however, it argued that the EU had shown neither the existence of public morals whose protection is necessary through the various elements of the EU Seal Regime nor the specific normative content of any public morals that purportedly necessitate protection.49 Norway further questioned the sufficiency and validity of public surveys and scientific evidence that the EU submitted to show the existence of the public moral concerns over seal welfare in the EU.

The Panel addressed these questions largely by examining the text and the legislative history of the EU Seal Regime. The Panel found that the text and legislative history of the EU Seal Regime, and to some extent, the public survey results, established the existence of the EU public’s concerns over seal welfare.50 The Panel also found that the existence of the three exceptions did not necessarily contradict the EU objective of protecting public morals for two reasons. First, there is no reason in principle why the measure at issue could not have ‘a multiplicity of objectives’.51 Second, the text, legislative history, as well as the design and structure of the EU Seal Regime showed that the concerns other than seal welfare appear to have been included in the course of the legislative process to accommodate Inuit community and other interests so as to mitigate the impact of

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46 Ibid., para. 7.358.
47 Ibid., para. 7.359.
48 Ibid., para. 7.360.
49 Ibid., para. 7.363.
50 Ibid., paras 7.398 and 7.404.
51 Ibid., para. 7.400.
the measure on those interests. The Panel held that the interests that were accommodated in the measure through the exceptions must be distinguished from the main objective of the measure as a whole, and in this case, the interests incorporated in the IC, MRM and Travellers exceptions do not form independent policy objectives of the EU Seal Regime.\footnote{Ibid., paras 7.401–7.402.}

On the issue of whether the public concerns on seal welfare are anchored in the morality of European societies, the Panel again first referred to the legislative history and found that references to ‘ethical considerations’ and ‘public morality debate’ in some legislative proposals provided evidence that the public concerns about seal welfare constitute a moral issue for EU citizens.\footnote{Ibid., para. 7.396.} Then the Panel examined the various actions taken by the European Union as well as EU member States concerning animal protection in general, various pieces of legislation and conventions on animal welfare within the European Union and in other countries and various international instruments. Even though not all evidence made an explicit link between seal or animal welfare and the EU public, the Panel held that animal welfare is an issue of ethical or moral nature in the EU.\footnote{Ibid., para. 7.409.}

The Panel did not specifically address Norway’s argument that the EU has not shown the specific normative content of any public morals that necessitate protection. The Panel stated that ‘ascertaining the precise content and scope of morality in a given society may not be an easy task’ and recalled the Panel’s earlier statement in \textit{US – Gambling} that WTO Members should be given some autonomy to define the concept of public morals in their own territories.\footnote{Ibid.}

On appeal, after analysing the text and the legislative history of the EU Seal Regime, the Appellate Body agreed with the Panel that the principal objective of the EU seal regime was to address EU public moral concerns regarding seal welfare, while accommodating Inuit community and other interests so as to mitigate the impact of the measure on those interests.\footnote{Appellate Body Report, \textit{EC – Seal Products}, supra n. 7, para. 5.167.} Canada challenged the Panel’s conclusion that the objective of the EU Seal Regime fell within the scope of Article XX (a). Central to Canada’s position are two related arguments. First, the phrase ‘to protect’ in Article XX (a) requires the identification of a risk to public morals against which the EU Seal Regime seeks to protect.\footnote{Ibid., para. 5.194.} Identifying such a risk requires the identification of a precise standard of animal welfare in the EU, and an assessment of the incidence of suffering in commercial seal hunts against that standard. However, the Panel failed to determine the content of the
relevant public moral, consisting of the exact standard of right and wrong conduct, in the EU. Second, the animal welfare risks associated with seal hunts are not unique and not any higher than the animal welfare risks associated with slaughter-houses and other terrestrial wildlife hunts, such as deer hunts, in the EU. In the absence of higher risk associated with seal hunts, Canada asserted that the EU could not justify its measures on public moral grounds.\(^{58}\)

To Canada’s first argument, the Appellate Body replied that the notion of risk may be relevant to other subparagraphs such as Article XX (b), but it is difficult to reconcile with Article XX (a) because scientific or other methods of risk assessment are not helpful in identifying and assessing public morals. Article XX (a) does not require the Panel to identify the existence of a risk to EU public moral concerns regarding seal welfare.\(^{59}\) In addition, quoting the Panel’s reasoning in US – Gambling, the Appellate Body held that a panel is not required to identify the exact content of the public morals standard at issue.\(^{60}\) To Canada’s second argument, the Appellate Body clarified that Article XX (a) does not have a consistency requirement. Members have the right to determine the level of protection that they consider appropriate, which suggests that WTO Members may set different levels of protection even when responding to similar interests of moral concern.\(^{61}\)

The EU Seal Regime was designed to address seal hunting activities ‘within and outside the community’ and the seal welfare concerns of citizens and consumers in EU member States. The Appellate Body recognized the systemic importance of the question ‘whether there is an implied jurisdictional limitation in Article XX (a), and if so, the nature or extent of that limitation’.\(^{62}\) However, since Norway and Canada did not raise this issue in their submissions either at the panel stage or on appeal, the Appellate Body did not examine this question in the case.

2.4 The Appellate Body’s interpretative approach: a summary

To determine the regulatory objective(s) of a disputed measure under GATT Article XX is usually a straightforward exercise. The Panels normally demonstrate a degree of deference to WTO members’ self-claimed objectives.\(^{63}\) Nevertheless, the determination of the regulatory objective of a measure could

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\(^{58}\) Ibid., para. 5.196.

\(^{59}\) Ibid., para. 5.198.

\(^{60}\) Ibid., para. 5.199.

\(^{61}\) Ibid., para. 5.200.

\(^{62}\) Ibid., para. 5.173.

sometimes be very controversial because a Panel may be faced with conflicting arguments as to the nature of the objectives pursued, and the measure at issue may be pursuing inconsistent multiple objectives. In EC – Seal Products, the Appellate Body outlined the analytical approach for the determination of regulatory objectives under Article XX:

A Panel should take into account the Member’s articulation of the objective or objectives it pursues … but it is not bound by that Member’s characterizations of such objective. Indeed, a Panel must take account of all evidence put before it in this regard, including the texts of the statutes, legislative history, and other evidence regarding the structure and operation of the measure at issue. (emphasis added).

The WTO Panels have generally followed this analytical framework when handling the three cases discussed above. Recall the three questions I raised at the beginning of this section, I submit that the WTO Panels and the Appellate Body has adopted an exceedingly deferential approach when applying the public morals exception under the GATT/WTO Regime.

In the first place, a WTO Member has almost unilateral power to define public morals in accordance with its own systems and scales of values. In EC – Seal Products, Canada argued that public concerns regarding seal welfare are qualitatively different from moral concerns on seal welfare. The Panel held that:

The reference to ethical considerations in the Commission Proposal, combined with the reference to a ‘public morality debate’ in the Council of Europe Recommendation, provide evidence that the public concerns about seal welfare constitute a moral issue for EU citizens.

In other words, simply because the EU claimed that seal welfare is an issue of public morality in Europe, the Panel acknowledged that it should be treated as so. However, by doing so, the Panel emptied the terms ‘public morals’ of any prescriptive normative content.

Similarly, in China – Publications and Audiovisual Products, the Appellate Body accepted the Panel’s assumption, with no further investigation, that the content of cultural products censored by China may be harmful to Chinese public morals. Ironically, in the same case, the Appellate Body criticized the Panel for relying on ‘an assumption arguendo’ when the Panel had simply ‘assumed’, without making a legal finding, that GATT XX (a) was available for China to justify its violation of the Accession Protocol.

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64 Appellate Body Report, EC – Seal Products, supra n. 7, para. 5.144.
66 Alexia Herwig, Too Much Zeal on Seals? Animal Welfare, Public Morals, and Consumer Ethics at the Bar of the WTO, 15 (1) World Trade Review, at 122. To clarify, I am not arguing that protecting seal welfare is not an issue of public morality. There is sufficient evidence showing that there is an emerging consensus on animal welfare as moral concerns. What I am saying is only that reference to public morals in the legislation, by itself, is not sufficient to prove the existence of public morals.
For the Appellate Body, such an assumption ‘may not always provide a solid foundation upon which to rest legal conclusions’ and would ‘detract from a clear enunciation of the relevant WTO law and create difficulties for implementation’. As a consequence of such an assumption, the fact that China’s content review mechanism may be violating basic principles of freedom of speech was not even mentioned.

Secondly, universal recognition or even a widespread international consensus on the existence and worthiness of such public morals is not required. Extraneous evidence such as practices in foreign countries and various international instruments are not necessarily relevant to identify the public morals within a given WTO Member. In both US – Gambling and EC – Seal Products, after the Panel found that prohibiting Internet gambling and protecting seal welfare were issues of public morality within the territories of the defending Member, the Panels undergirded their conclusions with extraneous evidence. However, such extraneous evidence was only used to corroborate or strengthen an already decided matter, rather than limiting the public morals clause to the regulation of issues broadly agreed to be matters of moral judgment. In EC – Seal Products, the Panel held that:

International 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 being in general. (emphasis added).

Thirdly, a Panel’s inquiry under Article XX (a) is limited to the existence of public morals in a given WTO Member. There is neither a requirement to ascertain the existence of a risk to such public morals, nor a requirement to identify the normative content of the public morals standard at issue. Moreover, the public morals clause does not have a consistency requirement in the sense that Members may set different levels of protection even when responding to similar interests of moral concern.

Fourthly, the text, structure, design and application of the measure as well as the legislative history usually provide strong evidence showing that public morals indeed exist in a society and trade restrictive measures are designed to address such concerns. Public survey results may also be relevant, though the weight given to them is not clear.

In EC – Seal Products, certain EU member states expressed doubts over various features of the proposed measure and that the ‘difficulties of balancing different views’ had to be overcome in the legislative process. The Panel nevertheless held that, as a

67 Appellate Body Report, China – Publications and Audiovisual Products, supra n. 6, para. 213.
70 Appellate Body Report, EC – Seal Products, supra n. 7, para. 5.200. The Appellate Body’s position raises consistency and coherency concerns, see Perisin, supra n. 10, at 397.
whole, a majority of comments and statements documented in these exhibits show an overall support for the measure in light of the wishes of EU citizens.\footnote{Ibid., para. 7.397.}

Finally, on the extraterritorial application of the public morals clause, the Appellate Body has not yet had the opportunity to address it explicitly. In both \textit{US – Gambling} and \textit{China – Publications and Audiovisual Products}, the measures were designed to protect interests located inside the complaining Member. The EU Seal Regime, by contrast, is different. It is designed to address seal hunting activities ‘within and outside the community’ as well as the seal welfare concerns of EU citizens and consumers. It is probably out of litigation strategy considerations that the EU did not pursue strongly that its measures were for the purpose of protecting animal life or health under Article XX (b), because that would put squarely on the table the issue of whether the EU has proper jurisdiction over seals beyond its territory. Instead, the EU sought to justify its measures under Article XX (a), whereas the moral outrage and abetting inhumane seal killing by consumption concerns are located safely inside the EU.\footnote{Robert House and Joanna Langille, \textit{Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values}, 37 Yale J. Int'l L. 367 (2012); Marxwell, \textit{supra} n. 3, at 824; Tamara S. Nachmani, \textit{To Eat His Own: The Case for Unilateral Determination of Public Morality under Article XX (a) of the GATT}, 71 U. Toronto Faculty L. Rev. 31 (2013), at 34.} It is debatable whether the invocation to Article XX (a) could entirely evade the extraterritoriality issue, as it is simply a shift from protecting foreign seals to EU citizens’ feelings about the seals. Still, given that both the Panel and the Appellate Body upheld the EU Seal Regime under Article XX (a), extraterritorial application of the public morals clause does not seem to be an insurmountable hurdle.

3 \hspace{1em} HAS THE WTO APPELLATE BODY GONE TOO FAR?

The review of the WTO case law on the public morals clause in section 2 of the article has shown that the WTO Panels and the Appellate Body have been exceedingly deferential to a WTO Member’s own formulation of public morals defence. In all three cases reviewed, the Appellate Body sided with the responding Member that the measures at issue were for the purpose of protecting public morals. In two out of three disputes, the Appellate Body held that the measures at issue were ‘necessary’ to protect public morals. Under the Appellate Body’ deferential approach to Article XX (a), the only constraint to the potential abuse of the public morals exception is evidence, in particular, the text of the statute and legislative history. The Appellate Body’s interpretative framework is generally consistent with the theory of ‘evidentiary unilateralism’ or ‘pluralism’ as some commentators advocated.\footnote{Philip I. Levy & Donald H. Regan, \textit{EC – Seal Products: Seals and Sensibilities (TBT Aspects of the Panel and Appellate Body Reports)}, 14 (2) World Trade Rev. 337 (2015), at 372.}
Admittedly, there is much to commend about the evidentiary unilateralism approach to the protection of public morals in the GATT/WTO system. It starts with an observable and undisputable fact, that is, public morals are likely to be geographically localized and heterogeneous across political boundaries due to the diversity of social, cultural, ethical and religious values being held, as revealed by recent WTO Trade Policy Reviews.\textsuperscript{75} Therefore, it does not make much sense for the WTO tribunal to demand that either all or at least some WTO Members must share such public moral concerns. It is precisely for this powerful reason that some competing models, such as transnationalism or universalism, which require a regulating WTO Member to show that the public moral is shared widely by a group of similarly situated countries, should be rejected.\textsuperscript{76} Another rival interpretative model, originalism, which advocates for restricting the concept of public morals to what was understood by GATT negotiators in 1947 when the GATT was negotiated, should also be rejected because, as a fact, public morals do vary with time and context as the Panel acknowledged in \textit{US – Gambling}.\textsuperscript{76}

Moreover, the protection of public morals is different from the protection of other nontrade values such as human health and environment. As Howse forcefully argued, the EU seal products ban is not only aimed instrumentally at improving animal health and welfare, it is also grounded in the community’s ethical beliefs, that is, non-instrumental moral values, about the nature of cruelty and the unacceptability of consumption behaviour that is complicit with that cruelty.\textsuperscript{77} As such, it does not make much sense for the Appellate Body to inquire into the rationale behind the measures because it is simply deeply embedded in a community’s value systems. Lastly, the evidentiary unilateralism model allows the WTO tribunal to sidestep some of the most problematic and value-laden issues such as whether a particular interest is vital enough to fall under the public morals exception or the precise content and scope of morality in a given society.

In short, in view of the amorphous nature of ‘public morals’ and all the sensitivities associated with its interpretation, it is a politically savvy choice for the Appellate Body to protect the legitimacy of its ruling by refraining from second-guessing the responding party’s characterization of public morals.

Still, one may wonder whether the WTO Appellate Body has not been too deferential when scrutinizing a regulation based on public morality claims. The multilateral trading system is premised on a carefully negotiated balance of rights and obligations and the role of the WTO dispute settlement processes is to strike a delicate balance between a Member state’s right to regulate for legitimate purposes

\textsuperscript{75} Marxwell, supra n. 3, at 817–818; Wu, supra n. 1, at 223.

\textsuperscript{76} As to the discussion of other competing models, see Wu, supra n. 1, at 237–242.

\textsuperscript{77} Howse and Langille, supra n. 74, at 371–372.
and the obligation not to interfere with the free flow of goods and services.\textsuperscript{78} The excessive tilting of this balance threatens to put the multilateral trading system in jeopardy. In this connection, I submit that the Appellate Body’s excessive deference has thrown up some serious challenges to the stability of the GATT/WTO system in the long run.

3.1 The doctrinal challenge

In \textit{EC – Seal Products}, the Appellate Body held that a WTO Member is not required to identify the exact content of the public moral standard, nor the existence of a risk to the public moral. It is all very well if what is required to justify a measure based on public morals under Article XX (a) is only the existence of a public moral concern. But it is not. Even if the measure at issue is genuinely designed to protect public morals, it must also meet the necessity test and the chapeau test. But how can a WTO Panel make an objective and convincing assessment of the measures under the necessity test if it knows neither the normative content of public morals nor the desired level of protection?\textsuperscript{79} In \textit{EC – Seal Products}, the parties debated on the extent of contribution of the EC Seal Regime to the protection of public morals concerning seal welfare. Since both the content of public morals regarding seal welfare and the level of protection that the EU aimed to achieve was not clear, the evidence available was very controversial as to whether the EC Seal Regime has indeed led to better seal welfare.\textsuperscript{80} The Panel acknowledged that its analysis of the necessity test was seriously hampered by the unclearly defined public moral standard and the Appellate Body quoted the panel approvingly:

[\textit{I}n addressing whether the alternative measure was reasonably available, the panel was exploring the hypothetical implications for the EU’s ability to achieve its objective of addressing seal welfare concerns … We note the panel’s explanation that it was undertaking an analytical exercise in which the contours of the animal welfare standards required as part of the alternative measure were not clearly defined, and that this had a bearing on the range of hypothetical versions of the alternative measure that the panel was being asked to examine.\textsuperscript{81}]

It would clearly be a better choice if the Appellate Body requires a regulating country to be a bit clearer about the standard of public morals and the level of protection it pursues. This could be done without much intrusion into a regulating

\textsuperscript{78} Appellate Body Report, \textit{US – Shrimp}, supra n. 31, para. 156.

\textsuperscript{79} Pauwelyn, \textit{supra} n. 10.


\textsuperscript{81} \textit{Ibid.}, para. 5.269.
member’s national regulatory autonomy, if only for the purpose of facilitating the necessity and chapeau analyses under Article XX.

3.2 **Weak evidentiary constraints**

The doctrinal challenge, important as it is, is dwarfed by another more salient and profound concern: the abuse of public morals exception by some WTO Member states to advance their political or protectionist agenda. Given (1) the open-ended nature of ‘public morals’, (2) a WTO Member’s power to define public morals *unilaterally* with no need to demonstrate even a rough international consensus on whether or not it is an issue of public morality, (3) no need to identify a risk to harm such public morals, (4) no need to identify the normative content of public morals being protected, (5) no need to submit evidence such as public surveys confirming that citizens of the regulating WTO Member really hold such moral concerns and that such moral concerns are prevailing among citizens, (6) no need to regulate other products which pose exactly the same, or even higher, public moral concerns and (7) a WTO Member’s power to apply it extraterritorially, affecting market access of the exports from other states who do not share such moral concerns, isn’t there a real risk that the public morals exception may be abused to justify disguised trade-restrictive measures or achieve certain controversial political ends? What could prevent a WTO Member from claiming that its people have moral concerns on any imported product? How could the WTO tribunal be confident that the public morals defence is genuine, sensible and will not destabilize the reciprocal bargains that underlie the GATT/WTO system?

Under the Appellate Body’ deferential approach, the only constraint to the potential abuse of the public morals exception is empirical evidence, in particular, the text, legal history and evidence regarding the structure and operation of the measure. But these evidentiary constraints seem to be rather weak. There is a real risk that they would collapse in practice into an empty procedural requirement that the state merely articulate an interest.\(^\text{82}\) In *EC – Seal Products*, for example, the Panel relied principally on the text and legislative history of the EU Seal Regime to establish the existence of the EU public’s concerns on seal welfare.\(^\text{83}\) On the issue of whether the public concerns on seal welfare are embedded in the morality of European societies, the Panel essentially relied on references to ‘ethical considerations’ and ‘public morality debate’ in some legislative proposals. Importantly, the Panel simply noted such references without any further verification or analysis. Clearly, given the amorphous nature of public morals, it will be not a challenging

\(^{82}\) Maxwell, *supra* n. 3, at 824.

\(^{83}\) Panel Report, *EC – Seal Products*, *supra* n. 2, para. 7.398 and para. 7.404.
task for a regulating WTO Member to present such evidence on any imported products, even if there are no strong public moral concerns held by its citizens.

On other occasions, public morality may be genuine and it could easily pass any empirical evidentiary requirements. Nevertheless, the risk of trade protectionism and/or the mixed motive problem is so acute that the WTO Appellate Body may want to rethink whether it should endorse the regulating member’s assertion of protecting public morals. Consider a hypothetical example. In September 2012, the Japanese government announced that it intended to nationalize the disputed Diaoyu Islands – known as Senkaku islands in Japan – in the East China Sea. The unilateral and provocative announcement sparked the protests across China and angry crowds even smashed Japanese cars to vent their anger and indignation. At that time, Chinese Internet users have engaged in heated discussions on the possibility of boycotting Japanese products. Now suppose that the Chinese government capitalized on Chinese people’s sentiments and enacted restrictions on Japanese made cars, alleging that they hurt Chinese citizens’ ‘public morals’. Given the antagonistic relationship between China and Japan and the recurrent calls for boycotting Japanese products, public opinion surveys in China would likely show some support for the trade restrictive measures. But will a WTO Panel agree to such a definition of public morals for the sake of Article XX (a)? My point is that as long as a WTO Member has the power to define public morals unilaterally, the evidentiary constraints may not be effective in preventing free trade principles from being undermined by geopolitical interests or trade protectionism cloaked as public morals.

Some commentators argued that closely scrutinizing the measures at issue under the least trade restrictive means requirement in the necessity test and non-discrimination requirement in the chapeau test would be sufficient to prevent potential abuse of the public morals exception. The other conditions embodied in Article XX certainly alleviate the concerns of potential abuse of the public morals exception. However, to recognize the legitimacy of protecting Chinese public morals by boycotting Japanese cars itself may be a hard sell. Moreover, it is doubtful whether the necessity test and the chapeau test are sufficient to prevent the potential abuse of the public morals exception. Previously, the WTO Panels and the Appellate Body interpreted both the necessity test and the chapeau test in Article XX stringently. The recent case law, however, has loosened significantly

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85 Maxwell, supra n. 3, at 827; Nachmani, supra n. 74, at 57.
the previous stringent interpretation of ‘necessary’. Moreover, in contrast to the sub-paragraphs of Article XX, which address the design, content and structure of the measure, the focus of the analysis under the chapeau is on the manner in which the measure is applied. As the case law has shown, the inconsistency with the chapeau usually does not involve a substantial change of the content or the withdrawal of the measure at issue.

Wu showed the limitation of the necessity test and the chapeau test in preventing potential abuse in his hypothetical of Arab countries enacting a labelling requirement that any company with a connection to the multinational forces in Iraq must attach a prominent sticker stating that ‘this product is made by a company that supports the Iraqi occupation’. As Wu argued, such a labelling requirement would likely pass both the least trade restrictive test and the non-discrimination test. But it would certainly lead to a backlash against the WTO within the United States and other countries targeted by similar sanctions.

3.3 A slippery slope? Human rights, labour standards and beyond

On the question of what ‘public morals’ mean, the Appellate Body has only provided an ambiguous definition that it denotes ‘standards of right and wrong conduct maintained by or on behalf of a community or nation’. But this definition is singularly unhelpful. It does not provide any practical guidance on what distinguishes public morals from morals simply held by a small group of people. Conceivably, any law passed by a representative government prohibiting any behaviour could be considered a social judgement of what is right or wrong conduct and therefore framed as a public moral issue. For example, in EC–GMO, the EU argued that its regulatory approach to biotechnology was partly driven by ethical concerns, in addition to the health implications, arising from ‘the presence in the novel food or food ingredient of any material which is not present in an existing equivalent foodstuff’.

88 WTO Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (20 May 1996), at 22. It should be noted that in EC – Seal Products, the Appellate Body diluted the significance of this distinction by noting that whether a measure is applied in a particular manner can most often be discerned from the design, architecture, and the revealing structure of a measure. See Appellate Body Report, EC – Seal Products, supra n. 7, para. 5.302.
90 Wu, supra n. 1, at 239.
92 Charnovitz, supra n. 4, at 731.
The lack of clear definition of public morals threatens to bring a significant slippery slope risk to the world trading system. The EC – Seal Products case is the first to apply the public morals exception to animal welfare. Going forward, will other animal welfare concerns, such as cosmetics tested on animals and meat from animals raised in some pens and cages, be also covered by the public morals exception? If we agree that human rights are more important than animal welfare in our value scale, internationally recognized human rights norms and standards should definitely come within the scope of the ‘public morals’, as many leading figures have long argued. If EU citizens could have legitimate moral concerns about how Norwegians and Canadians hunt seals in Norway and Canada, then why couldn’t the US government claim that the US citizens have legitimate moral concerns on gender equality in Saudi Arabia, human rights in Myanmar and labour standards in China? In other words, what to prevent the public morals clause from being used as a vehicle for incorporating human rights, women’s rights, labour standards and many other issues marginally related to international trade into the GATT/WTO system and giving practical effect to these norms through the WTO’s effective dispute settlement system?

But if the WTO Appellate Body went down that road, such judicial activism would be opening a real Pandora’s box, risking putting the very legitimacy and credibility of the international trading system at grave risk. As one of the most challenging policy puzzles for international economic relations and institutions today, trade linkage issues have already derailed a number of WTO Ministerial Conferences and threatened to derail the successful functions of the WTO itself.

Whilst some scholars suggested that the WTO tribunal take a proactive stance in enforcing certain transnational norms such as human rights or labour rights on moral grounds, a more cautious and widely shared view among WTO commentators argued strongly against WTO tribunal’s proactive role in addressing such divisive political issues. The emerging consensus after the debate is clearly that such divisive political issues should be addressed in the political arena, through political

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96 Bhagwati, supra n. 4, at 133; see also Claire R. Kelly, Immateriality as a Theory of Compliance, 37 N.Y.U. J. Intl. L. & Pol. 303 (2005), at 328.
processes, by the political actors in the system, and not by the WTO adjudicative bodies. Before the WTO approves trade sanctions to enforce labour standards or human rights norms, WTO Members must first build a political consensus through negotiations at both international and national levels. In this connection, it is suggested that the addition of new exceptions to Article XX itself is the best way for the WTO to address social issues. Other proposals include the creation of new trade groups or committees at the WTO addressing these issues. However, the Appellate Body’s approach to public morals in *EC – Seal Products* seems to have undermined this consensus and put the public morals exception on a slippery slope, with potentially far-reaching implications for the stability and legitimacy of the GATT/WTO system.

4 THE PROPOSAL FOR A NEW APPROACH

As could be seen from my analysis in section 3, most of the difficulties with the public morals clause are likely to arise when WTO Members base their trade restrictive measures on public morality claims which are not widely shared in the international community and/or they applied these measures not only on their own territories, but also extraterritorially. It is precisely in such scenarios that there is a greater clash in values and a graver risk of trade protectionism or moral imperialism.

Bearing in mind the merits and the weaknesses of the evidentiary unilateralism approach adopted by the WTO Appellate Body, I will proceed to propose a modified version of evidentiary unilateralism. I argue that this modified version not only retains the benefits of evidentiary unilateralism, but also substantially reduces the risk of the public morals exception being abused to achieve ulterior motives. The key elements of my proposal are to give a bigger role to international consensus in confirming public morals, a prevailing requirement in ascertaining public morals, and carving out certain outward-oriented trade measures as inconsistent with the GATT/WTO law.

4.1 THE ROLE OF INTERNATIONAL CONSENSUS

To prevent the public morals clause from becoming a blanket clause with an overly broad scope and countless meanings, the Panel should be more intrusive...
in framing what issues concern ‘public morals’ and thus fall within Article XX (a). In particular, the Panel could take into account the extent of international consensus in such a determination. I would like to emphasize I am not arguing that only public morals endorsed by international consensus could be protected under Article XX (a), nor do I argue that it is necessary for all WTO Members to accept that the legitimate concerns at issue constitute issues of ‘public morals’. The WTO is composed of a heterogeneous group of members and a complete consensus on an amorphous term ‘public morals’ is close to impossibility. There should be no doubt that public concerns within a state not generally recognized as public morals in the international community could be regarded as such under Article XX (a).

What I do argue is that the more broadly are the issues agreed to be matter of moral judgement in the international community, the easier for such concerns to be recognized by the WTO Panel as public morals. By contrast, if public moral concerns claimed by the responding party are not shared by other WTO Members, such claims should be subject to a more rigorous scrutiny. The regulating WTO Member bears the burden of proof to explain moral implications of such concerns and underpin such claims with solid evidence, such as historical evidence, contemporary public opinion polls, results of political referendum or statements of accredited religious leaders, to be further elaborated below. It is not sufficient for the Panel to point to some sporadic and vague references to ‘ethical concerns’ in legislative proposals, and without more, accept that the measure at issue was morally motivated.

Take EC – Seal Products as an example. Evidence shows that a commitment to seal welfare seems to receive increasingly international recognition, not only in Europe, but also in non-Western states. At least thirty-four countries in the world now ban the importation and sale of seal products, including the US, Russia, Mexico and Taiwan. In other words, there is strong evidence that seal welfare has been widely recognized as an issue of public morality in the international community. This evidence of international consensus lends support to the Appellate Body’s ruling that the EC Seal Regime was designed for the purpose of protecting European citizens’ public morals.

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4.2 The ‘prevailing’ requirement for public morals

The word ‘public’ in the term ‘public morals’ should be read to mean ‘nation as a whole’. Accordingly, public morals must be ‘prevailing’ or at least widely held within a WTO Member.105 Conceivably, this evidentiary burden is easy to meet for public morals broadly recognized as so in international community.

In EC – Seal Products, the Panel examined documents demonstrating various EU member States’ views on the Commission proposal. Though certain EU member States expressed doubts on various features of the measure, the Panel found that a majority of comments and statements show an overall support for the measure.106 However, it was not clear whether the EU member States supported the EU measure on public moral grounds or simply the protection of animal life and health. My point is that the public morals exception is applicable only when there is clear evidence showing that it is a public morality issue deeply rooted in a particular society, and that it is a prevailing or at least widely held value, within a WTO Member state. If the link between public morals and the measures at issue is not clearly supported by evidence, then the Panel should hold that the applicable rule is not Article XX (a), but other subparagraphs under Article XX such as Article XX (b) or (g).107 This approach will help differentiate an ambiguous Article XX (a) from other subparagraphs under Article XX. Otherwise, all legitimate interests may be categorized as ‘public morals’ and other subparagraphs would be either redundant or less used in practice.

Some commentators argued that even if certain public morals are not widely shared within a WTO Member, a WTO Panel should simply assume that any legislative action reflects the will and mores of the majority of citizens. This is because one of the roles of the government is to construct and articulate public commitments more concretely and distinctively than the population at large has the means to do.108 The corroborating evidence for this claim is US – Cool, where the legislature could pursue a legitimate purpose of providing country-of-origin information to consumers even though such an objective was not clearly supported the mainstream consumer demand.109 But the Appellate Body has not yet clearly opinionated on this point.110 In addition, given the

105 Wu, supra n. 1, at 233.
107 Article XX (b) allows measures ‘necessary to protects human, animal or plant health life or health’. Article XX (g) allows measures ‘relating to the conservation of exhaustible natural resources’ if certain conditions are met.
108 Howse and Langille, supra n. 74, at 429–430; Levy and Regan, supra n. 73, at 371.
amorphous nature of public morals and the potential of its abuse, why should a legislative act be automatically immune from scrutiny when it claims to protect public morals? Isn’t the role of the WTO panel precisely to ascertain, as a factual matter, whether the measures at issue reflect the public morals?

4.3 The normative content of public morals

In EC – Seal Products, the Appellate Body held that a panel is not required to identify the exact content of the public morals standard at issue.111 Granted, the precise contours of public morals, as an ethical-expressive preference, could not be specified in nature. Still, one may wonder if the Appellate Body has not gone too far. It is not clear why the complaining party cannot be asked to clarify, as far as possible, the normative content of public morals being held if it indeed exists in a given society. For example, when the EU has adopted measures to protect seal welfare purportedly for public morality reasons. Why could not the Panel invite the EU to clarify some questions such as: does any killing of seals or only commercial killing, or only cruel and inhuman killing of seals hurt public morals? Requiring the regulating WTO Member to articulate its public moral concerns help the Panel understand the nature of the moral concern and the level of protection pursued by the regulating Member. Such understanding will facilitate the doctrinal analysis at the later stage on whether the measures at issue are ‘necessary’ as well as whether they constitute arbitrary or unjustifiable discrimination under the chapeau test, as the Appellate Body acknowledged in EC – Seal Products.

4.4 Carving out certain outwardly directed trade measures

WTO scholars have frequently used the terminology of ‘inwardly directed’ and ‘outwardly directed’ trade restrictions when discussing to what extent should the extraterritorial application of a WTO Member’s domestic law be permitted under Article XX.112 ‘Inwardly directed’ trade measures refer to measures by the importing state designed to protect the morals or health of the people within its territory. The US ban on Internet gambling and the China’s denial of trading rights of cultural goods to foreign-invested enterprises would fall into this category. ‘Outwardly directed’ trade measures, by contrast, cover measures to protect the morals or health of persons in the exporting state or elsewhere

111 Appellate Body, EC – Seal Products, supra n. 7, para. 5.199.
112 Laura Nielsen, The WTO, Animals and PPMs, 262 (Martinus Nijhoff Publishers 2007); Charnovitz, supra n. 4, at 695; Carlos Manuel Vazque, supra n. 14, at 812.
outside the importing state, for example, to prohibit child labour or promote democracy in other countries.

Admittedly, the distinction between inwardly and outwardly directed measures is not free from ambiguities.\(^{113}\) For example, an inwardly directed ban on importing child pornography could be interpreted as an outwardly directed ban because it protects not only the citizens of the importing state, but also the children exploited in films located outside of the importing state.\(^{114}\) Similarly, any outwardly directed measure will have been stimulated by the volitions of individuals inside the regulating country.\(^{115}\) For example, in *EC – Seal Products*, the EU regulation banning seal products was outwardly directed. However, as the EU argued, it also satisfied a demand inside the EU to prevent EU moral complicity. In addition, the distinction of ‘inwardly directed’ and ‘outwardly directed’ trade restrictions has never been endorsed by the WTO jurisprudence.

Nevertheless, I submit that the conceptual distinction between inwardly and outwardly directed measures is an important one in that it helps us to think more analytically what measures with extraterritorial effects should properly fall within Article XX (a). To begin with, the issue that has to be dealt with under the public morals exception is a practical one: how do WTO Panels do about slippery slope toward endless political agendas cloaked as ‘public morals’? There must be some firm handholds on this slippery slope to ensure that the multilateral trading system functions smoothly.\(^{116}\) Furthermore, the distinction between inwardly and outwardly directed measures hinges on what is the primary concern of the regulation at issue and which state is primarily responsible for protecting the relevant interests at stake. No one will seriously argue that the primary concern of a ban prohibiting child pornography is to protect the children exploited in films located outside of regulating country. In the same vein, the primary concern of the EU ban on seal products is the welfare of seals outside the EU’s territory. The whole point of the EU seal import ban is to induce a change in how seals are hunted in Norway and Canada by utilizing the denial of access to the EU market as the enforcement mechanism.\(^{117}\) Precisely because public

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morals may vary across cultures and countries, outwardly directed measures are more problematic for the reciprocity-based GATT/WTO system.

Finally, if all outwardly directed measures could be re-characterized as an inwardly directed regulation aiming at protecting public morals within the regulating WTO Member’s own territory, then an appeal to public morals would avoid any territorial limitation and no regulations allegedly motivated by public moral concerns would violate limits on prescriptive jurisdiction in public international law. However, the very existence of international law limits on prescriptive jurisdiction separate and apart from international law limits on adjudicatory and enforcement jurisdiction shows that concerns about extraterritoriality cannot be made to disappear through such a sleight of hand. Arguably, the Appellate Body’s cautious approach to the territorial nexus element in US – Shrimp, US – Tuna II and EC – Seal Products testifies the sensitivity of outwardly directed trade measures in the multilateral trading system. Therefore, I disagree with those who seem to suggest that territorial nexus is no longer relevant to legal analysis under Article XX in general, and Article XX (a) in particular.

Since US – Shrimp, it has been clear that not all outwardly directed measures are inconsistent with the WTO law. However, the difficulty is to decide what outwardly directed measures should be outlawed. Mark Wu called inwardly directed measures Type I measure and further divided outwardly directed measures into two categories. Type II restrictions are those linked to the protection of those directly involved in the production of the product in the exporting state. For example, a ban on products made by child labour would fall within this category. Type III restrictions are those aimed at products or services produced in an exporting state whose practices are considered morally offensive by the importing state, but where the practices are not directly involved in the production of the products being banned. An example would be an outright ban on imports from Sudan because of its government’s human rights violations in Darfur.

I argue that Type III measures should not be legitimatized under the public morals clause precisely because the morally offensive practices are not directly involved in the production of the products. Since the imported goods could

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118 Carlos Manuel Vazque, supra n. 14, at 814.
120 Levy and Regan, supra n. 73, at 372–375.
121 Wu, supra n. 1, at 235.
122 When discussing the legality of PPM-based environment protection measures after US – Shrimp, Pauwelyn also argued that GATT Article XX requires a sufficient nexus between the actual product that is banned and the environmental risk at hand. Joost Pauwelyn, Recent Books on Trade and Environment: GATT Phantoms still Haunt the WTO, 15 (3) Eur. J. Intl. L. 575 (2004), at 587. Also see Appleton, supra n. 13, at 15.
not be vectors of some morally offensive practices under the circumstances, it is unconvincing to argue that to allow access of products from a country whose practices are considered morally repulsive would harm the public morals of the importing country.\textsuperscript{123} To put it another way, trade restrictive measures are not reasonably related to the regulatory objectives pursued. To permit such measures is equal to issue an open invitation to abuse the public morals exception with impunity.

I further argue that, depending on how measures at issue are designed and implemented, not all Type II measures could be legitimatized under Article XX (a). For example, in Wu’s typology, the EC ban on seal products in \textit{EC – Seal Products} should properly fall within Type II restrictions. Similarly, the US ban on turtle-unfriendly shrimp in \textit{US – Shrimp} will also fall within Type II restrictions. In the same vein, it is also possible for a ban on shoes produced by child labour in Myanmar to pass muster the public morals exception. However, consider another hypothetical ban. Country A claims that its citizens are morally offended by the poor working conditions, long working hours and low pay in country B. In order to protect its moral concerns with regard to foreign workers, country A would impose a ban or a punitive tariff on exports from country B unless workers in country B are paid an appropriate minimum wage and provided more decent working conditions. Again, this would be a Type II restriction in Wu’s typology because the ban is directly linked to the protection of workers who are directly involved in the production of the product. But in view of the overbroad design and almost assured disruptive effects on the multilateral trading system, the hypothetical measure would be universally condemned as illegal, including those who support unbridled extraterritorial application of trade measures motived by public morals.\textsuperscript{124} Thus, only tailored Type II measures with narrow application may be properly upheld under the public morals exception.

5 CONCLUSION

The public morals exception had laid dormant for almost sixty years and not a single panel had ever expounded on its meaning until the \textit{US – Gambling} case in 2005. Up to date, the Appellate Body has clarified some important doctrinal questions concerning the scope and application of the exception. I argue that the WTO Appellate Body’s exceedingly deferential approach to the public morals clause, demonstrated by the public morals trilogy and particularly \textit{EC – Seal


\textsuperscript{124} Levy and Regan, supra n. 73, at 374–375.
Products, threatens to render the public morale exception go out of check and lead to a ‘war between public morals’. I argue that that, while recognizing the open-ended nature of the term ‘public morals’, we also need to keep alert to the risk of overstretching Article XX (a) so that all types of all types of outwardly directed trade restrictions could be legitimized under GATT Article XX (a). So far, thanks to the Appellate Body’s judicial minimalism approach, we are still in the search for the outer boundary of the public morals defence under Article XX. Nevertheless, it must be warned that an overly liberal interpretation of public morals clause runs the risk of permitting moral imperialism and put in jeopardy the stability of the multilateral trading system. I demonstrated this risk in section 4.4.

I further argue that the WTO Appellate Body should adopt a modified evidentiary unilateralism approach when the public morals exception is invoked to justify trade restrictive measures. This is particularly the case when public morality claims are not widely shared in the international community and/or the measures are applied extraterritorially because there is a greater risk of trade protectionism and/or moral imperialism in such scenarios. The key elements of my proposal are to give a larger role to international consensus in confirming public morals, a ‘prevailing’ requirement in ascertaining public morals, to explain as far as practical the normative content of public morals, and carving out certain outward-oriented trade measures as inconsistent with the GATT/WTO law. I submit that this modified version not only retains the benefits of evidentiary unilateralism, but also substantially reduces the risk of the public morals exception being abused for ulterior motives.
