WTO AND THE PROTECTION OF PUBLIC MORALS

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ABSTRACT

The World Trade Organization (hereinafter "WTO") members' right to adopt measures to achieve certain nontrade objectives, notwithstanding any other provisions of WTO agreements, is well entrenched in the WTO legal system. These objectives, listed as general exceptions, have been a matter of contestation in several WTO disputes. One such exception that has found increased use in recent times is the adoption of measures to protect "public morals". This paper attempts to analyse the scope and meaning of the public moral exception in the WTO context with specific reference to the evolving jurisprudence of the WTO, and its implication on the practices of WTO member States. The paper shall look at the evolving jurisprudence and the regulatory discretion as interpreted by the WTO panels and the Appellate Body (hereinafter "AB"). The paper finds that the WTO adjudicating bodies have taken a more lenient approach while interpreting the public moral exception and have shown deference to Members' own determinations rather than imposing their own version of what constitute "public moral" in a given context. The Panel/AB's show of deference towards national determination and the broadening of the scope of the public morals exception, however, have been balanced by a tightened necessity test. Although, this may have adverse implications on the use/abuse of the general exceptions.

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I. INTRODUCTION

The right of a World Trade Organization (hereinafter "WTO") Member to adopt measures necessary for nontrade purposes is well entrenched in the WTO jurisprudence. The general exceptions provisions under Article XX of the General Agreement on Tariffs and Trade (hereinafter "GATT") and Article XIV of the General Agreement on Trade in Service (hereinafter "GATS") ensure this right of the WTO members', notwithstanding any other provisions of WTO agreements. These objectives listed as general exceptions include ten justifiable measures, most importantly, measures to protect public morals; protect human, animal, or plant life or health; conserve exhaustible natural resources.[1] Indeed, the burden of proof lies with the State invoking the measures, the legitimacy of which shall be based on the first showing that the measure falls under one of the exceptions, and second, satisfying the requirements of the *Chapeau* of Article XX[2] that obligates the members not to apply the exceptions in "an arbitrarily or unjustifiably" manner and in a way which does not amount to "disguised restrictions on the international trade".

One such general exception which has found increased use in recent times is the adoption of measures to protect "public morals". This exception or defence allows WTO Members to justify trade restrictions that are "necessary to protect public morals" under Article XX(a) of the GATT 1994 and "necessary to protect public morals or to maintain public order" under Article XIV(a) of the GATS respectively. Notwithstanding the similarities between the language of these two provisions, and Article XX of GATT's influence on the drafting of GATS Article XIV during the Uruguay Round, subsection (a) of Article XIV of GATS has more words with a wider scope and enables Members to adopt measures "necessary to protect public morals" as well as "to maintain public order". While guidance on the scope and meaning of the phrase "necessary to protect public morals" was raised in a few recent WTO cases, the term "public morals" remains largely undefined and what may be considered "right and wrong" in any society may be country or culture specific. The observation of the panel, later confirmed by the Appellate Body (hereinafter "AB"), emphasizes the discretion of the WTO Members "in defining the scope of 'public morals' with respect to various values prevailing in their societies at a given time".[3] This has

[1] General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization art. XX, annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).
[2] Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, at 22, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996).
[3] Appellate Body Report, *US – Measures Affecting the Cross-Border Supply of Gambling And Betting Services*, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005) [hereinafter *US — Gambling* Appellate Body Report].

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enhanced the country specific subjectivity that could be brought in the interpretation of this provision.

This paper attempts to analyse the nature and scope of the public morality exception in the WTO context with specific reference to the evolving jurisprudence of the WTO, and its implications on the practices of WTO member States. The paper shall first look into the existing jurisprudence on the meaning and scope of the provision and the regulatory discretion as interpreted by the WTO panels and the AB. The paper finds that the WTO panels and the AB have taken a more lenient approach to interpreting the public morality exception and have shown respect for Members' own determinations rather than imposing their own version of what constitutes "public moral" in a given context. At the same time, the Panel/AB's show of deference towards national determination seems to be balanced by tightened necessity and the chapeau test.

II. PUBLIC MORALS IN WTO LAW

The concept of "necessary to protect public morals" as a general exception was introduced by the United States (hereinafter "US") to protect already existing domestic restrictions on certain goods,[4] and was discussed in the London preparatory meeting in 1946. The concept later found its place in the ITO Charter and was finally incorporated in GATT 1947, the predecessor to the WTO.[5] It seems that no major discussion ensued that could clarify the scope and nature of the newly introduced "public moral" exception. Norway, however, indicated as an illustration that their measures on restrictions on the importation, sale and production of alcohol could be justified under the public moral exception. For strategic reasons, or for the lack of a common understanding of the concept between states, "public moral" remained undefined during the GATT 1947 era and for almost the first decade of the WTO. The provision was neither discussed in any of the GATT's eight trade negotiating rounds nor invoked in any of the GATT disputes that could have shed some light onto the content of the concept.

Though the public moral exception was familiar in other international treaties regimes, the introduction of the concept in the GATT 1947 seems to have influenced a number of multilateral and bilateral trade agreements as a permanent exception, albeit without offering much clarity on the content of the concept. For instance, the exception is reflected in regional trade agreements such as the North America Free Trade Area (NAFTA), the Association of Southeast Asian Nations (ASEAN) and over 100 other free trade agreements.

[4] Mark Wu, "Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine", 33(1) YALE J. INT'L L. 215, 219. (2008)
[5] Steve Charnovitz, "The Moral Exception in Trade Policy", 38 VA. J. INT'L L. 689, 704 (1998).

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The Uruguay Round of trade negotiations, which established the WTO and its covered agreements, simply carried forward the exception without any deliberation. The Uruguay Round negotiators expanded the remit of the public moral exception from simply applying to goods to including services—GATS—with some modifications. Along with "public moral", the GATS provision also includes exceptions intended to "maintain public order", that is "necessary to protect public morals or to maintain public order" in Article XIV(a) of GATS, thereby broadening its application under GATS. However, the exception and any other exceptions were not extended to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and other covered agreements.

Lying dormant for nearly 60 years after its introduction in GATT 1947, the public moral exception has, in the recent times, started playing an increasingly important role in international trade, with a significant increase in the frequency of the public moral exception being used since the *U.S. — Gambling* case in 2003. Several Members have in the recent past attempted to use moral exception to excuse themselves from obligations otherwise imposed on them by WTO agreements. These cases include: *U.S. — Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (2003) complaint by Antigua and Barbuda; *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (2009) complaint by the U.S.; *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products* (2013) complaint by Norway and Canada; *Colombia — Measures Relating to the Importation of Textiles, Apparel and Footwear* (2015) complaint by Panama and the recent *Brazil — Certain Measures Concerning Taxation and Charges* (2017) complaint by European Union (hereinafter "EU") of which the appeal is pending.

The treatment of "public moral" exception by the Panel/AB in the above mentioned cases will now be examined.

A. The U.S. — Gambling *Case*

The *U.S. — Gambling* case[6] was the first instance in WTO jurisprudence that the "public moral" exception was used to justify an otherwise WTO inconsistent measure. Though the U.S. applied the public moral exception only as a second thought, it nevertheless gave the Panel an opportunity to clarify the provision for the first time since its inception. The U.S. measures that prohibited "cross-border supply of gambling and betting services" was challenged by Antigua and Barbuda at the WTO Dispute Settlement Body (hereinafter "DSB") as violating the U.S.'s commitments under GATS to

[6] *U.S. — Gambling* Appellate Body Report, *supra* note 3.

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free trade in recreational services. Antigua alleged that the cumulative effect of the US's measures was a "total prohibition" on the cross-border supply of gambling and betting services.[7] The U.S. responded to the claim by invoking the general exception defence under GATS Article XIV(a) "necessary to protect public morals or to maintain public order" to justify the ban on gambling and betting services. The U.S. did not resort to the Article XX justification until its second written submission to the Panel. The U.S. defended the measures by highlighting its legitimate specific concerns related the online supply of gambling and betting services such as: "(1) organized crime; (2) money laundering; (3) fraud; (4) risks to youth, including underage gambling; and (5) public health" and its correlation with maintaining public morals and public order.[8]

Though the AB found the U.S. measure "arbitrary and unjustifiable discrimination" under the *chapeau* of GATS Article XIV(a), the case presented the Panel/AB an opportunity to interpret the "public morals and public orders" exception under the WTO Agreement. The Panel firstly acknowledged that "such laws are designed so as to protect public morals or maintain public order."[9] Showing deference to the national determination of what should constitute public moral or public orders, the Panel noted that, "the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values."[10]

The Panel premised this statement on the ABs interpretation of similar societal contexts in other general exceptions under GATT Article XX which reiterated the right of the WTO Members "to determine the level of protection that they consider appropriate". The Panel extended the same rationale to interpret the term "public morals or maintain public order" under Article XVI of the GATS, concluding that "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".[11]

Defining the qualifying term "public" in Article XIV(a), the Panel believed that a measure that is sought to be justified "must be aimed at

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[7] *Id.* ¶ 2.

[8] As identified by the Panel. According to Antigua the panel constructed three of the GATS Article XIV defence on behalf of the U.S., which was dismissed by the Appellate Body. See *id.* ¶¶ 278, 283-84.

[9] The Panel interpreted that the term "public morals" "denotes standards of right and wrong conduct maintained by or on behalf of a community or nation" and the term "order", read in conjunction with footnote 5 of the GATS, "refers to the preservation of the fundamental interests of a society, as reflected in public policy and law." Panel Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 6.465, 6.467, 6.535, WTO Doc. WT/DS285/R (adopted Apr. 20, 2005) [hereinafter U.S. — Gambling Panel Report].

[10] *Id.* ¶ 6.461.

[11] *Id.*

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protecting the interests of the people within a community or a nation as a whole". Accordingly, the Panel considered the term "public morals" to denote: "standards of right and wrong conduct maintained by or on behalf of a community or nation."[12]

The Panel, however, differentiated the two concepts—"public morals" and "public order" under Article XIV(a) of GATS. To illustrate, the panel held that:

> it could be argued that the prevention of underage gambling and the protection of pathological gamblers relates to public morals, while the fight against organized crime is rather a matter of public order. The prevention of money laundering and of fraud schemes could arguably relate to both public morals and public order.

Thus, the Panel concluded that a measure designed to prevent gambling and betting, including Internet gambling, could be justified under Article XIV(a) if the object and purpose of the policy was to "protect public morals" or "to maintain public order".

Based on the above considerations, the Panel justified the US measures as "designed to protect public morals" and/or "to maintain public order" within the meaning of Article XIV(a) of GATS.[13] On appeal, the AB endorsed the Panel's definition of public morals and its evidentiary approach to determine whether the U.S. measures were "designed to protect public morals or maintain public order." The AB, however, did not dwell much on clarifying the scope of the concept. While the panel or the AB did not specifically identify which of the U.S. measures were justifiable under "public morals" or "public order", a plain reading of the panel and AB Reports, one may consider that the conclusion on whether the U.S. measure is justified more based on the "public order" exception than on the ground of "public moral".[14]

B. China — Publications

China — Publications[15] was the first case in which Article XX(a) of GATT 1994 was used to defend the WTO noncompliant measures. The U.S. challenged Chinese measures against the import and distribution of "reading materials such as books, newspapers, periodicals, electronic publications;

[12] *Id.* ¶ 6.465.
[13] *Id.* ¶ 6.487.
[14] *U.S. — Gambling* Appellate Body Report, *supra* note 3, ¶¶ 297-99.
[15] Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc. WT/DS363/AB/R (adopted Jan. 19, 2010) [hereinafter *China — Publications and Audiovisual Products* Appellate Body Report].

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audiovisual home entertainment products such as videocassettes, video compact discs, digital video discs; sound recordings such as recorded audio tapes; and films for theatrical release."[16] The rights to import and distribute, including the right to review the contents of these products and associated services were designed exclusively to favour certain Chinese state-owned enterprises. These measures, including more specifically the "content review mechanism" were considered discriminatory and affected adversely "(i) the importation into China of relevant goods, (ii) the distribution within China of relevant goods, and (iii) services and service suppliers in relation to certain of the above-mentioned products."

China, however, justified the measures as necessary to protect "public morals" as they form part of its policy to review the content of the above mentioned products. China based its argument on the uniqueness of the goods which are "culturally sensitive" and stated that the measures were necessary to protect its legitimate policy objectives in the cultural sector. It noted: "Cultural goods and services have in common the fact of being vectors of cultural identity and values and, as such, of justifying the implementation of specific, yet WTO compliant, regulatory measures."[17]

It further emphasised that, "cultural goods have a major impact on societal and individual morals as emphasized in particular in the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Protection and Promotion of the Diversity of Cultural Expressions."[18] Since the interest sought to be protected is vital to the interest of China, it demands a high level of protection. Thus, the "content review mechanism" to review and prohibits any imported cultural goods by

[16] *Id.* ¶ 1. art 26 of the Chinese regulation provided that no publication may contain content that:

> (1) Defies the basic principles specified in the Constitution;
> (2) jeopardizes the solidarity, sovereignty and territorial integrity of the nation;
> (3) divulges national secrets, jeopardizes national security or injures the national glory and interests;
> (4) incites hatred or discrimination of the nationalities, undermines the solidarity of the nationalities or infringes upon customs and habits of the nationalities;
> (5) propagates evil cults or superstition;
> (6) disturbs public order or destroys social stability;
> (7) propagates obscenity, gambling or violence, or instigates crimes;
> (8) insults or defames others, or infringes upon legitimate interests of others;
> (9) jeopardizes social morality or fine cultural traditions of the nationalities;
> (10) otherwise prohibited by laws, administrative regulations and provisions of the State.

Article 27 of the Publications Regulation provides: "Publications catering to minors shall not contain any content enticing minors to imitate acts that violate public ethics or acts that are illegal or criminal, nor shall they contain horror and cruelty which harm the physical and mental health of minors."

[17] Panel Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 4.89, WTO Doc. WT/DS363/R (adopted Jan. 9, 2010) [hereinafter China — Publications and Audiovisual Products Panel Report].

[18] *Id.* ¶ 4.108.

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a "state-designated and wholly or partially state-owned enterprises", is necessary to achieve the objective pursued. This would ensure that goods with content that could have negative impact on public morals of the people of China are prohibited.[19]

Neither the U.S. nor any of the third parties to the dispute contested the cultural values correlation with public morals. The U.S., the complainant in this case, argued that the measures at issue were not "necessary" for the protection of public morals as there was a "reasonably available WTO-consistent alternative".[20] Australia, in its third party submission, noted that "not all items hav[e] genuine cultural value" and that the onus was on China "to show that there exists a relationship between the cultural value of the items at issue, that is, between reading materials and audiovisual products, including sound recordings, and the standards of right and wrong conduct maintained in China."[21] Japan also stressed the need to demonstrate that the challenged measures were: "(a) designed to 'protect public morals'; and (b) 'necessary' to do so. Further, both Australia and Japan also contested that the reliance of China on the Cultural Diversity Convention had no merit as it could not modify China's rights or obligations under the WTO covered agreements or its Protocol of Accession.[22]

The Panel noted that "public morals" undoubtedly "rank[s] among the most important values or interests pursued by Members as a matter of public policy." The Panel reiterated the Member specific nature of "public morals" developed in *U.S. — Gambling* that "the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values". Members, in applying societal concepts, "should be given some scope to define and apply for themselves the concepts of 'public morals' . . . in their respective territories, according to their own systems and scales of values." It added: "We do not consider it simply accident that the exception relating to 'public morals' is the first exception identified in the ten sub-paragraphs of Article

[19] *Id.* ¶ 4.276:

> 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 living together, ethics and behaviours. Cultural goods may have a negative impact on public morals, such as the depiction or vindication of violence or pornography, against which minors must be specifically protected.

[20] *Id.* ¶ 4.211.
[21] *Id.* ¶ 5.13.
[22] Convention on the Protection and Promotion of the Diversity of Cultural Expressions, art. 20, *adopted* Oct. 20, 2005, 2440 U.N.T.S. 43977 (entered into force Oct. 20, 2005), http://unesdoc.unesco.org/images/0014/001429/142919e.pdf.

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XX. We therefore concur that the protection of public morals is a highly important value or interest."[23]

The U.S. did not contest China's assertion that the prohibited contents listed above could have a negative impact on "public morals" if disseminated within China. Thus, unlike in the *Gambling* case wherein the U.S. measures prohibiting online gambling was challenged on the ground that is was not designed to protect public morals in the U.S., there was no challenge against China on whether the prohibited content listed above came within the meaning of "public morals". Accordingly, the Panel proceed with the assumption that each of the "prohibited types of content listed in China's measures was such that it could have a negative impact on 'public morals' in China within the meaning of Article XX(a) of GATT 1994."[24] The AB accepted the Panel's assumption, with no further investigation, that the content of cultural products censored by China may be harmful to "public morals", and that the Chinese measures were for protecting public morals. Thus, in the second case also, the AB lost the opportunity to clarify the scope and content of public moral exception.

However, on the "necessity" test, that is, whether China has made a *prima facie* case that the measures were "necessary" under GATT Article XX(a) or whether there were any "reasonably available and WTO-consistent alternatives", the Panel found in same favour of the U.S. The Panel noted in the absence of "reasonably available alternatives" the State-ownership requirement would be considered as "necessary". However, in the current case, State-ownership of the import entities was not considered to achieve the level desired by China to protect public morals, and more reasonable and less trade restrictive alternative which could meet the similar end objective was found to be available.

C. EC — Seal Products

This case relates to the EU's "Seal Regime" that imposed a "general ban" on the import of seal products to the EU market coupled with three specific exceptions. Canada and Norway challenged the EU Seal Regime as discriminatory and being in violation of the WTO obligations.[25] The EU defended the legality of the Seal Regime as aimed at addressing "public

[23] China — Publications and Audiovisual Products Panel Report, *supra* note 17, ¶ 7.817.
[24] *Id.* ¶ 7.763; *China — Publications and Audiovisual Products* Appellate Body Report, *supra* note 15, ¶ 49.
[25] Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/R; WT/DS401/R (adopted June 18, 2014) [hereinafter *EC — Seal Products* Panel Report]. The three exception were: (i) "seal products obtained from seals hunted by Inuit or other indigenous communities (IC exception)"; (ii) "seal products obtained from seals hunted for purposes of marine resource management (MRM exception)"; and (iii) "seal products brought by travellers into the European Union in limited circumstances (Travellers exception)."

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moral concerns on the welfare of seals"[26] with the specific objective of "protection of seal welfare; the protection of the social and economic interests of Inuit or indigenous communities (traditional hunting)[27]; and the promotion of sustainable marine resource management (MRM)." The EU justified these objectives as consistent with its WTO obligations and justifiable under the general exceptions under GATT Arts XX(a) and XX(b) as the measure was "necessary to protect public morals (regarding the welfare of seals) and to protect seals' health, respectively." The EU also defended the classification of the seal based on the "type and purpose of the hunt" (three exceptions) as legitimate within the meaning of Article 2.1 of the Technical Barrier to Trade Agreement (hereinafter "TBT Agreement"). It also contended that there were no alternative measures available at the same level as the current Regime that could protect its public moral concerns on seals. With the exception of Inuit or indigenous communities/traditional hunts, the market of seal products is allowed in EU only on a "non-profit basis" or for "non-commercial reasons".[28]

Addressing the justifiability of public moral concerns regarding seal hunts as a legitimate objective under Article 2.2 of the TBT Agreement, the Panel noted that:

> As discussed above, the concept of public morals is a relative term which needs to be defined based on the standard of right and wrong in a given society. Given that the European Union has established that the concerns of the EU public on animal welfare involve standards of right and wrong within the European Union as a community, we consider that addressing the public moral concerns on seal welfare, identified as the objective of the measure at issue, is 'legitimate' under Article 2.2 of the TBT Agreement.[29]

Canada and Norway did not dispute the fact that "addressing the public moral concerns on seal welfare" *per se* is legitimate under Article 2.2 of the TBT Agreement. The Panel concluded even though the exceptions have the effect of diminishing the degree of the measure's actual contribution, the "EU Seal Regime is capable of making and does make *some contribution* to its stated objective of addressing the public moral concerns" (emphasis

[26] *Id.* ¶ 7.3.
[27] Reference were made to U.N., UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (2007), https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf; Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 1650 U.N.T.S. 383 (entered into force Sept. 5, 1991), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169.
[28] *EC — Seal Products* Panel Report, *supra* note 25, ¶ 7.41.
[29] *Id.* ¶ 7.419.

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added.)[30] It is quite interesting to note that "public moral" is not one of the "legitimate objectives" in TBT Article 2.2 and also mandates risk assessment based on "available scientific and technical information, related processing technology or intended end-uses of products."[31]

After analysis of Article 2.2 of the TBT and after analysing GATT article XX(a), the Panel concluded that the EU Seal Regime was also justifiable as a policy designed to protect public morals. The Panel noted that the EU Seal Regime addressed the "concerns on seal welfare while [it] accommodated other interests or considerations", such as the "interests of Inuit communities engaged in seal hunting, seals hunted for marine management purposes, and seal products brought into the European Union for personal use".[32] The Panel specifically noted that the Travellers exception "does not contribute to achieving the objective of addressing the EU public moral concerns on seal welfare."[33] Thus, despite the "explicit and implicit" exceptions, the Panel found that with respect to the EU Seal Regime as a whole, it contributed "*to a certain extent* to its objective of addressing the EU public moral concerns on seal welfare" (emphasis added.) The Panel also noted that the alternative measure, though less trade restrictive, is not reasonably available to the EU, and so the Seal Regime was deemed necessary within the meaning of GATT Article XX(a).[34]

The AB upheld the panel's analysis and the findings of the Panel that the EU Seal Regime "contributed to a *certain extent* to its objective of addressing the EU public moral concerns on seal welfare".[35] Clarifying the underlying difference between the requirement under subsections (b) and (a) of Article XX, AB noted that the notion of risk under subsection (b) is difficult to reconcile with the subject matter of protection under subsection (a). It held: "Article XX(b) focuses on the risks to human, animal, or plant life or health 'may lend itself to scientific or other methods of inquiry,' however, *such 'risk-assessment methods' do not appear to be of much assistance or relevance* in identifying and assessing public morals" (emphasis added.)

This argument seems to justify the Panel's implicit reading of "public morals" in TBT Article 2.2 beyond the expressly provided legitimate

[30] The Panel had found that the capability of the "EU Seal Regime to achieve its objective of addressing the EU public moral concerns is further negatively affected because other commercial activities such as the inward processing of seal products are allowed without regard to the welfare of seals from which the products are derived." *Id.* ¶ 7.460.
[31] Robert Howse & Joanna Langille, *Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values*, 37(2) YALE J. INT'L L. 431(2012).
[32] *See id.* ¶ 7.399; Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.147, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (adopted June 18, 2014) [hereinafter *EC — Seal Products* Appellate Body Report].
[33] EC — Seal Products Panel Report, *supra* note 25, ¶ 7.460.
[34] EC — Seal Products Appellate Body Report, *supra* note 32, ¶ 7.639.
[35] *Id.* ¶ 5.227.

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objectives and lack of justifiability under scientific risk assessment. AB thus concluded that the term "to protect", when used in relation to "public morals" under Article XX(a), requires the Panel "to identify the existence of a risk to EU public moral concerns regarding seal welfare." For a measure to fall within the meaning of Article XX(a), the Panel only needs to show that the measure was "designed to protect public morals."[36] It also rejected Canada's argument that the Panel "was required to assess whether the seal welfare risks associated with seal hunts exceed the level of animal welfare risks accepted by the European Union in other situations such as terrestrial wildlife hunts."[37] The concern expressed by Iceland in its third party submission that the three exceptions under the Seal Regime seriously undermine the "same moral principle that the measure allegedly aims to protect" was also disregarded by the AB.

D. Colombia — Tariffs[38]

This dispute concerns the imposition of a "compound tariff"[39] by Colombia, which was challenged by Panama. Colombia justified the measure as designed to combat illegal trade which in turn is "designed to protect public morals." Colombia argued combating money laundering is one of the nation's declared policies and the same is designed to protect public morals.

Following the sequence of analysis the Panel analysed first that the measures were "designed" to protect public morals and then whether the measures were necessary or whether a less trade restrictive alternative was available that could meet the same threshold level. The Panel felt that Colombia had convincingly shown that combating money laundering was a declared policy objective and had demonstrated the seriousness of the concern to Colombia. Colombia convincingly established a direct link between money laundering and drug trafficking and other criminal activities, including internal armed conflict. This led the Panel to conclude that combating money laundering was a "policy designed" to protect public morals thereby accepting that the "compound tariff" which was designed to prevent money laundering, had the objective of protecting public morals.[40]

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[36] *Id.* ¶ 5.198.
[37] *Id.* ¶ 5.201.
[38] Appellate Body Report, *Colombia — Measures Relating to the Importation of Textiles, Apparel and Footwear*, WTO Doc. WT/DS461/AB/R (adopted June 22, 2016) [hereinafter *Colombia — Textiles* Appellate Body Report].
[39] Compound tariff on imports of textiles, apparel and footwear, consisting of (i) a 10 percent ad-valorem component; and (ii) a specific component. L. 074/2013, enero 23, 2013, DIARIO OFICIAL [D.O.] (Colom.).
[40] Panel Report, *Colombia — Measures Relating to the Importation of Textiles, Apparel and Footwear*, ¶¶ 7.338-39, WTO Doc. WT/DS461/R (adopted June 22, 2016) [hereinafter *Colombia — Textiles* Panel Report].

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The Panel however, highlighted that not every undervaluation is for money laundering purposes and it was only one of the many methods used for money laundering and which is not a particularly commonly used method. It noted that even if one assumes that products are imported at prices lower than the thresholds, there is no evidence to suggest that "the undervaluation in question is for money laundering purposes." [41] Accordingly, the Panel concluded that there is no relationship between the "compound tariff" and combating of money laundering. The Panel held that, "although Colombia had demonstrated that combating money laundering is one of the policies designed to protect public morals in Colombia, it had not shown that the compound tariff is a measure designed to protect public morals."[42]

More precisely, the Panel found that Colombia had failed to demonstrate that the "compound tariff" was either "designed" or "necessary" to fight money laundering and so could not rely on the "public moral" justification available under Article XX(a) of GATT.

The AB, however, reversed the Panel's conclusion noting that the Panel's analysis itself indicated that a "compound tariff [was] *not incapable* of combating money laundering . . . "[43] as undervaluation of imports was one of the methods identified by the Panel for money laundering.[44] This leads to the conclusion by the AB that such a relationship exists and that the measures at issues were "designed" to protect public morals under GATT Article XX(a).[45] However, based on the "necessity" test, the AB concluded that Colombia had not "demonstrated that the measure is 'necessary' to protect public morals".[46]

E. Indonesia — Horticultural Products[47]

Indonesia introduced eighteen measures to regulate importation of horticultural products, animals and animal products which were challenged by New Zealand and the U.S. Indonesia contented that the challenged measures were justified in relation to Halal requirements as a necessity to protecting public morals which was a crucial policy issue for Indonesia as a

[41] *Colombia — Textiles* Appellate Body Report, *supra* note 37, ¶ 5.55; *Id.* ¶¶ 7.374-75.
[42] *Colombia — Textiles* Panel Report, *supra* note 40, ¶ 7.401.
[43] *Colombia — Textiles* Appellate Body Report, *supra* note 37, ¶ 5.85.
[44] *Id.* ¶ 5.87.
[45] *Id.* ¶ 5.89.
[46] *Id.* ¶¶ 5.107, 5.116. AB based its finding the Panel report that revealed that there was a lack of sufficient clarity on the degree of contribution of "compound tariff" to the objective that it seeks to achieve, given the trade restrictiveness of the measure.
[47] Appellate Body, *Indonesia — Importation of Horticultural Products, Animals and Animal Products*, WTO Doc. WT/DS477/AB/R, WT/DS478/AB/R (adopted Nov. 22, 2017) [hereinafter *Indonesia — Import Licensing Regimes* Appellate Body Report].

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predominantly Muslim country.[48] Specifically, Indonesia defended five import licencing requirements as justifiable to protect Halal on public moral ground under GATT Article XX(a).[49]

Since the Panel found most measures as being inconsistent with the *Chapeau* of Article XX, it felt no need to continue the analysis and restricted the "public morals" analyse to Measures 5 and 6.[50] On Measure 5 (Storage ownership and capacity requirement of horticulture products), Indonesia contended that, under Islamic Law, Halal products should be properly separated and clearly identified and that a storage ownership requirement is necessary to ensure Halal compliance and to protect the Halal status of food sold in Indonesia and that it therefore falls within the scope of public morals.[51] Indonesia alleged that products may even lose their Halal status due to improper storage and misplacement. New Zealand and U.S., however, contested that there are no Halal regulations applicable to horticultural products because they are considered inherently Halal.

The panel noted that Indonesia itself recognized that many foodstuffs are inherently Halal, and Indonesia's own exhibits also imply that horticultural products are inherently Halal. Indonesia also failed to identify the Halal requirements for horticultural products with Measure 5 and nothing in the wording of the regulations implementing this Measure refer to the protection of Halal as a policy objective of this measure.

> Our understanding of the evidence before us is that relevant imported goods can only come into Indonesia if accompanied by the necessary Halal certifications, and that in the case of fresh horticultural products, there are no halal requirements. We fail to understand what the storage ownership/capacity requirements have to do with the objective of protecting halal requirements given that such protection is already ensured through a different set of regulations. We can find no rational connection between the storage measure and the protection of public morals . . . We recall that these requirements prohibit or restrict imported products'

[48] Panel Report, *Indonesia — Importation of Horticultural Products, Animals and Animal Products*, ¶ 7.637, WTO Doc. WT/DS477/R, WT/DS478/R (adopted Nov. 22, 2017) [hereinafter *Indonesia — Import Licensing Regimes* Panel Report].

[49] Measures defended under Article XX(a) were: "Measure 5 (Storage ownership and capacity requirements), Measure 6 (Use, sale and distribution requirements for horticultural products), Measure 9 (Indonesia's import licensing regime for horticultural products as a whole), Measure 14 (Use, sale and distribution of imported bovine meat and offal requirements) and Measure 17 (Import licensing regime for animals and animal products as a whole)."

[50] With respect to Measures 9 through 17: Bearing in mind that compliance with the chapeau of Article XX is a necessary requirement in order for a measure to find justification under this provision, we refrain from continuing our analysis of Indonesia's defences under Article XX(a), (b) or (d) of the GATT 1994 for Measures 9 through 17.

[51] *Indonesia — Import Licensing Regimes* Panel Report, *supra* note 48, ¶ 7.638.

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> access to retailers and consumers and that these limitations do not apply to domestic products. Bearing in mind that both imported and domestic products are subject to Halal regulations, we do not understand how the resulting discrimination can be reconciled with, or is rationally related to, protecting halal regulations.[52]

Accordingly, the Panel concluded that Indonesia had been unable to demonstrate any relationship between Measure 5 and the protection of the public moral of Halal.[53] Following a similar line of argument in Measure 6, the Panel further held that Indonesia concluded that it failed to see any connection between the Measure 6 with the Halal requirements and in turn with the public moral of Halal.[54]

On appeal, Indonesia raised the issue of "mandatory sequence" in respect of Measures 9 through 17, and did not contest the finding of the panel on Measures 5 and 6. The AB noted that while there was no legal error in deviating from the normal sequence of analysis, the Panel "should have also made findings on those elements under the applicable paragraphs that were relevant for its analysis of the requirements of the chapeau." Since the Panel did not complete the analysis, the Panel's finding on the justifiability of the Measures 9 through 17 under GATT Articles XX(a), (b) or (d) are moot and of no legal effect.[55]

F. Brazil — Taxation[56]

Brazil's invoked GATT Article XX(a) to justify certain inconsistencies with respect of its Programme of Support to the Technological Development of the Industry of Digital TV Equipment (hereinafter "PATVD programme")[57] that attempted to bridge the "digital divide" that existed within Brazil. Brazil stressed that the "digital divide" was a problem which was faced by developing countries in particular, which if not addressed appropriately would have consequences on the ability to "improve literacy, democracy, social mobility, economic quality, and growth." Brazil argued that: "since television remains the population's predominant source of information, ensuring appropriate conditions to the implementation of the digital television system, falls squarely within the range of policies necessary to protect public morals."

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[52] *Id.* ¶ 7.819.
[53] *Id.* ¶ 7.660.
[54] *Id.* ¶ 7.719.
[55] *Indonesia — Import Licensing Regimes* Appellate Body Report, *supra* note 47, ¶ 5.103.
[56] Panel Report, *Brazil — Certain Measures Concerning Taxation and Charges*, WTO Doc. WT/DS472/R, WT/DS497/R (Aug. 30, 2017) [hereinafter *Brazil — Certain Measures Concerning Taxation and Charges* Panel Report].
[57] *Id.* ¶ 7.543.

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To this end, the programme focused on the capacity to develop and manufacture digital TV transmission equipment in Brazil to implement digital system across Brazil to ensures access to the technology for the people. Therefore, Brazil contended that the programme was justified under paragraph (a) of Article XX of GATT.[58]The EU, however, argued that "the social and economic development objectives claimed by Brazil characterise any governmental action, and that if objectives such as 'access to information and education' were protected under Article XX, then any governmental action taken in the public interest could be justifiable under Article XX."[59]

The Panel identified two objectives of the PATVD programme "(a) establish and promote a domestic Brazilian industry capable of supplying digital TV equipment to the domestic market and (b) bridging the so-called 'digital divide' and promoting social inclusion." [60] The first objective incentivised local production through tax incentives and local content requirements. According to Brazil, in order to achieve the second objective, attainment of the first objective was a precondition. Disagreeing with the EU argument that justifying Brazilian measures "would be tantamount to justifying any governmental action taken in the public interest" under Article XX, the Panel noted that the conditions and circumstances vary from WTO Member to Member and whether the particular objective is a "public moral objective is *for that* Member" to determine in its particular context (emphasis added).[61] The Panel therefore found that Brazil had "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."[62]

As to whether the measure was "designed to protect" the Panel notes at the outset that the programme was designed more to promote domestic industry, [63] and this discriminatory aspects of the programme had "no connection with the objective of bridging the digital divide, or social inclusion." Moreover, there was nothing on record to argue that the foreign suppliers would not or could not sufficiently supply the market. The Panel noted that:

> 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 programme is incapable of contributing to bridging the digital divide and

[58] *Id.* ¶ 7.546.
[59] *Id.* ¶ 7.548.
[60] *Id.* ¶ 7.559.
[61] *Id.* ¶ 7.567.
[62] *Id.* ¶ 7.568.
[63] *Id.* ¶ 7.57.

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> promoting social inclusion. Indeed, it is not inconceivable to the Panel that under certain circumstances, discriminatory measures could indeed contribute to the claimed objectives in a manner similar to that explained by Brazil.

Accordingly, the Panel found that the measures were "not incapable of contributing to the objective". Brazil and the EU have decided to appeal the finding.[64]

III. LIBERAL INTERPRETATION OF PUBLIC MORAL AND IMPLICATIONS THEREOF

From the above cases and the interpretation, it can be concluded that both the panels and AB have interpreted "public moral" as "standards of right and wrong conduct maintained by or on behalf of a community or nation" and among the "most important values or interests pursued by Members as a matter of public policy." They have also reiterated the discretion of the WTO Members to define the scope of "public morals" with respect to various values prevailing in their societies at a given time and the right "to determine the level of protection that they consider appropriate". Such values and the determination of what is right or wrong in a given society may be community specific or specific to a nation as a whole. In other words, the public morals need not be universally recognised or by a group of WTO members to be recognised and protected.

More importantly, the AB has laid down the "not incapable" test, meaning if the Members measures contributed to a certain extent, directly or indirectly, addresses the public moral concerns, the Panel/AB has justified the measure as designed to protect public moral, thereby endorsing it. The *EC — Seal*, *Colombia — Tariffs* and *Brazil — Taxation* are clear cases to this point. For instance, in *Brazil — Taxation* case, the bridging the digital divide and promoting social inclusion was interpreted as within the scope of "public morals", has the potential of justifying any governmental action taken in the public interest under GATT Article XX as argued by EU. Similar is the interpretation of compounded border tariffs as "not incapable" of combating money laundering which in turn has correlation with the protection of public moral. In *EC — Seal* the Panel and AB went one step further in expanding the scope and subjectivity involved in defining "public moral" noting that unlike Article XX (b), which focus on the risks to human, animal, or plant life or health, " . . . may lend itself to scientific or other methods of inquiry,"

[64] Communication from the Appellate Body, *Brazil — Certain Measures Concerning Taxation and Charges*, WTO Doc. WT/DS472/10, WT/DS497/8 (Mar. 14, 2018).

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however, such "risk-assessment methods" do not "appear to be of much assistance or relevance in identifying and assessing public morals".[65]

The absence of specific sets of parameters by which to judge the public moral defence and the over reliance on Member's own determination may have larger consequences. It is appreciable that the WTO Panel/AB have shown considerable leeway to the Member's determination of what constitutes a public moral in their given setting. However, there is a danger that such lenient interpretation and broadening scope of the public moral defence would pave the way for invoking the exception as a defence for almost every government measure challenged at the WTO DSB. This could pose considerable challenges to the WTO adjudicating bodies. Further, the analyses of some of these cases also raise questions as to the sufficiency of the burden of proof that is placed on the States, and the panels own analysis of the justifiability of public moral. Interestingly, few complaining Members themselves were unwilling to question whether the measures was designed to protect public measure.

Howse, et al argues that moral, ethical, and philosophical reasons should be considered adequate to justify trade-restrictive measures without which there is a risk of "imposing a secular, materialist vision of politics on all its member states."[66] Recognizing pluralism would only enhance the ability of the WTO to fulfill its "own institutional mandate more effectively and does not unnecessarily encroach on the regulatory autonomy of member states."[67] While there are others who are worried that the public morals exception could be used as protectionist tool and argue for restrictive interpretation of public morals and stricter conditions for its use.[68] It has been noted that the adjudicating bodies deferential approach has the effect of imposing only limited constraint on the potential abuse of the public morals exception.[69] There is also the risk that the weak evidentiary requirement "would collapse in practice into an empty procedural requirement that the state merely articulate an interest."[70]

It is predicted that the tension between trade-morality will only increase with time given the "increased heterogeneity of the WTO" and the growing importance of foreign trade to Member States in the WTO that represent a

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[65] *EC — Seal Products* Appellate Body Report, *supra* note 32, ¶ 5.198.
[66] Howse & Langille, supra note 31. *See also* Robert Howse et. al, *Pluralism in Practice: Moral Legislation and the Law of the WTO after Seal Products*, 48(1) GEO. WASH. INT'L L. REV. 81, 145-49 (2015).
[67] *Id.* at 430.
[68] *See* Ming Du, *Permitting Moral Imperialism? The Public Morals Exception to Free Trade at the Bar of the World Trade Organization*, 50 (4) J. WORLD TRADE 675 (2016); Nicolas F. Diebold, *The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole*, 11 (1) J. INT'L ECO. L. 43, 59-66 (2011).
[69] Ming Du, *supra* note 68, at 700.
[70] *Id*.

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diverse variety of religious, cultural, ethnic, and social backgrounds.[71] This will lead to increases in the use of public moral as a defence for prohibiting or restricting trade. Further, issues such as environmental protection, health regulations, human rights, etc., which could otherwise fall under other GATT Article XX exceptions, can be recast within the concept of public morality to afford protection.[72] For instance, the EU's ban on beef injected with hormones, which has been found scientifically unjustifiable on health grounds (or even under precautionary principle) may find a new set of arguments on moral grounds which could not be assessed on a scientific basis. Similar arguments could be advanced in the context of trade in genetically modified organisms (GMOs), etc on cultural, religious and ethical considerations.

IV. CONCLUSION

Thus, from the above analysis a pattern seems to be emerging that while the Panel/AB is showing considerable deference to the member's determination of what constitutes a public moral in their given setting. Indeed, the Panel/AB seems to limit the damage of uncontested acceptance of public moral objective of a measures by a stricter interpretation of the "necessity" test, and identifying viable less trade restrictive alternatives. The cautious approach of Panel/AB not wanting to be the arbitrator of what should be "public moral" in a given context, could perhaps be explained by the reason that the notion of public morals are country or community specific and more sentimental in nature in terms of their belief of what is right or wrong rather than based on scientific justification. By tightening the necessity test, however, the Panel/AB seems to temporarily overcome the moral dilemma in favour of trade and economic interests. At the same time, the interest of predictability and legitimate use of the public moral defence, and balancing the rights of other members demands more clarity on the scope and meaning the public moral, of which the evolving WTO jurisprudence may have more to offer.

[71] Jeremy C. Marwell, *Trade and Morality: The WTO Public Morals Exception After Gambling*, 81(2) N.Y.U. L. REV. 802, 808 (2006).
[72] *Id.* at 809.

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