# REVISITING THE PUBLIC MORAL/ORDER AND THE SECURITY EXCEPTIONS UNDER THE GATS

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**ABSTRACT**

*The main purpose of the General Agreement on Trade in Services (hereinafter "GATS") framework is to support and improve international trade in services by setting rules favoring a liberal market access. National interests are covered by specific exception rules contained in the GATS. The central point of this paper is to analyze the respective provisions in Articles XIV and XIV*[bis] *in view of the increasing trend to justify trade barriers with GATS exceptions. As a consequence, ideas are presented how the balance between the different policy objectives could best be achieved.*

**KEYWORDS:** *case law, GATS, public moral exception, public order exception, security exception, trade in services*

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# I. INTRODUCTION

## *A. Starting Point: Market Access Liberalization vs. National Restrictions*

In view of alleged undesirable effects of the globalization, tendencies are recently flourishing to give national interest greater importance or even priority in relation to free trade. Within its legal framework, the World Trade Organization (hereinafter "WTO") members have limited options to generally impose trade barriers, however, the exception clauses provide a wide scope of interpretation and, additionally, the feasibility and enforceability of the theoretical market access provisions do not guarantee accessible markets in practice. This article analyses the practically most important exceptions of the General Agreement on Trade in Services (hereinafter "GATS"), namely the public moral/order and the security exceptions contained in Articles XIV and XIV*bis*.

In contrast to the General Agreement on Tariffs and Trade (hereinafter "GATT"), which in principle regulates trade with any kind of goods, the GATS regime covers an ever expanding set of activities being quite disparate. [1] Services can range from transport to banking, from communications to tourism, from education to social media and from healthcare to consulting.

Things especially get complicated when none of the human participants has to cross a border for the provision of a service, because the Internet and/or mobile devices are used.[2] Due to the fact that such a way of service provision (particularly by way of cross-border data flow) was hardly offered when the GATS was concluded[3] it is of no surprise that the present legal regime does not meet the commercial needs since the applicable classifications of IT services are quite outdated.[4] Therefore, classifications based on functional aspects are crucial to allow for an appropriate differentiation between data transmission (technical infrastructure/network) and delivered content; such an approach seems to be more resistant to technological changes in the digital environment.[5]

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[1] BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND 317 (2009).

[2] The so called *Cross-border supply* is defined to cover services flows from the territory of one Member into the territory of another Member (e.g., banking or architectural services transmitted via telecommunications or mail).

[3] Regarding the "Birth Defects" of the GATS, see Panagiotis Delimatsis, *Trade in Services and Regulatory Flexibility: 20 Years of GATS, 20 Years of Critique*, *in* EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 2016 153, 157 (Marc Bungenberg et al. eds., 2016).

[4] Rolf H. Weber & Rainer Baisch, *Tensions Between Developing and Traditional GATS Classifications in IT Markets*, 43(1) H.K. L.J. 77, 77 (2013).

[5] Rolf H. Weber, *Digital Trade and E-Commerce: Challenges and Opportunities of the Asian-Pacific Regionalism*, 10(2) ASIAN J. WTO & INT'L HEALTH L. & POL'Y 321, 325-26 (2015).

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Apart from the general goal of the GATS to remove trade barriers, members are allowed to decide which sectors and to what extent they are willing to liberalize their markets. Furthermore, measures can be adopted for non-trade purposes, which is an important issue in the law of the WTO.[6]

Both important WTO frameworks, the GATT and the GATS, contain similar provisions for non-trade purposes based on general and security exceptions aiming at achieving certain objectives.[7] In particular, Article XIV lit. a) of the GATS allows the adoption of measures considering the protection of public morals and the maintenance of public order; in contrast, the GATT (Art. XX) does not contain a public order exception. The reasoning why the original drafters introduced the public morals exception is based on various aspects; the consideration of morality-related issues also includes human and labor rights.[8] Both, the GATS (Art. XIV$^{bis}$) and the GATT (Art. XXI), also provide for the security exception.

From a purely legal perspective the two types of exceptions are independent from each other and are not necessarily conceptually linked. However, two major reasons justify a parallel assessment of the two exceptions hereinafter: (i) The most important services issues in the globalized world concern cross-border data flows in practice; public moral/order and security are highly relevant in this content. (ii) Politics in real life show that nation states usually invoke public moral/order and/or security reasons if services trade restrictions jeopardize the cross-border data flow.

### *B. Recent Developments Regarding the Invocation of Exceptions*

The right to adopt exceptions' measures is subject to certain conditions specified in the introductory paragraph to Article XIV of the GATS, usually referred to as the "chapeau". The chapeau stipulates that any measure based on an objective listed in the subparagraphs shall not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the like conditions prevail, or a disguised restriction on international trade." For example, in *U.S. — Gambling*, it was justified to prohibit online gambling services from Antigua and Barbuda on public

[6] Lorand Bartels, *The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction*, 109(95) AM. J. INT'L L. 95, 95 (2015).

[7] General Agreement on Tariffs and Trade 1994 art. XX, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT 1994]; General Agreement on Trade in Services arts. XIV & XIV$^{bis}$, Apr. 15 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 183 [hereinafter GATS], https://www.wto.org/englis h/docs_e/legal_e/legal_ e.htm.

[8] 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, 224 (2008).

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morals grounds;[9] however, the measure violated the chapeau because it tolerated United States (hereinafter "U.S.") domestic Internet operators to provide these services.[10]

A different but contemporary issue is the argument of the Trump administration related to the recently imposed tariffs on steel and aluminum imports; the stated reason was national security, because American aluminum and steel "are vital" for national security and the "bedrock" of the defense industrial base.[11] Although this political initiative is related to GATT, it exemplifies the often devious arguments raised in connection with politically favored trading impediments.

In principle, it is justifiable to protect national industry related to security purposes, for example in order to maintain a sufficient national defence. Already one of the prime fathers of free trade, Adam Smith, stated that "*defence, however, is of much more importance than opulence*".[12] The heart of the matter lies in defining the precise requirements of national security. The national security argument should not be used or even abused to justify protective measures in order to assist inefficient national businesses.

Another issue is raised in respect of the complex Chinese cybersecurity legislation that prohibits Virtual Private Networks (hereinafter "VPN") and leased lines from connecting across the Chinese border. These private communication connections are often used by businesses to ensure the confidentiality of sensitive information; however, such connections anonymize the user-data and allow access to restricted content and, therefore, circumvent the detection of potential violations of Chinese censorship laws.[13]

The U.S. informed the WTO that China's data network restrictions are creating unjustified restrictions for cross-border service supplies.[14] Therefore, the new Chinese data security law could potentially harm

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[9] Sacha Wunsch-Vincent, *The Internet, Cross-Border Trade in Services, and the GATS: Lessons from US — Gambling*, 5(3) WORLD TRADE REV. 319, 320-22 (2006).

[10] For details see SIMON LESTER ET AL., WORLD TRADE LAW: TEXT, MATERIALS AND COMMENTARY (2018).

[11] President Donald J. Trump, *President Donald J. Trump Is Addressing Unfair Trade Practices That Threaten to Harm Our National Security*, WHITE HOUSE (Mar. 8, 2018), https:// www.whitehouse.gov/briefings-statements/president-donald-j-trump-addressing-unfair-trade-practices-threaten-harm-national-security/.

[12] ADAM SMITH, WEALTH OF NATIONS BOOK IV: ON SYSTEMS OF POLITICAL ECONOMY 307 (1776), *available at* https://eet.pixel-online.org/files/etranslation/original/The%20Wealth%20of%20Nations.pdf.

[13] In January 2017, Chinese officials published a circular titled "Cleaning up and Regulating the Internet Access Service Market" in order to "strengthen cyberspace information management". Olivia Solon, *China Cracks Down on VPNs, Making It Harder to Circumvent Great Firewall*, GUARDIAN (Jan. 23, 2017, 9:38 PM), https://www.theguardian.com/technology/2017/jan/23/china-vpn-cleanup-great-fir ewall-censorship.

[14] Trevor Schmit, *United States Flags China's VPN Ban as Possible WTO Violation*, GEO. L. TECH. REV. (Mar. 2018), https://www.georgetownlawtechreview.org/united-states-flags-chinas-vpn-ban-as-possible-wto-violation/GLTR-03-2018/.

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international business trade in violation of WTO rules.[15] China insists on its argumentation that its data security law is compliant with WTO rules invoking the interest of the general Chinese public because the data security law ensures that foreign companies and actors "do not do any harm to Chinese national security and national consumers' interests".[16]

The national security exception of the WTO legal regime is very broad and due to the fact that any nation individually decides what it finds indispensable for its national security, this can lead to protectionism and unjustified politically motivated measures.[17]

The described recent challenges appear to justify a new analysis of the exceptions' clauses under the GATS and to revisit the existing wording of the respective provisions in the light of such challenges hereinafter.

## II. ORIGINS AND CONTENTS OF ARTICLE XIV AND ARTICLE XIV*bis* GATS

### *A. History and Origins*

A good and comprehensive appreciation of the GATS's context and history in world trade helps to understand the current concerns about it and to interpret it correctly.[18] Long before the GATS negotiations were finished, there was the GATT in place aiming at removing or reducing barriers from international trade in goods, like customs duties, subsidies and import bans. As a result of the Uruguay Round, which started in 1986, the WTO was formed in 1995. A very significant new element was the agreement of the signatories to grant to the WTO the power to enforce trade treaties. The other major result was the implementation of the GATS focusing on reducing barriers to international trade of services.[19]

Already in 1947 when the tariff negotiation sessions in Geneva took place for the final version of the GATT draft the exception clauses were divided into a general and a specific provision.[20] Consequently, the GATT draft encompasses Article XX General Exceptions and Article XXI Security

[15] GATS, *supra* note 7, Annex on Telecommunications; GATS requires that "service supplies of any other Member may use public telecommunications transport networks and services for the movement of information within and across borders, including for intra-corporate communications".
[16] Trevor Schmit, *China's Great Firewall Remains Shut to Noncompliant U.S. Tech Firms*, GEO. J. INT'L L. ONLINE (Jan. 15, 2018), http://www.gjil.org/2018/01/chinas-great-firewall-remains-shut-to.html.
[17] For further details see NELLIE MUNIN, LEGAL GUIDE TO GATS 11 (2010), 379-386.
[18] *Id*. at 379.
[19] For further details see Juan A. Marchetti & Petros C. Mavroidis, *The Genesis of the GATS (General Agreement on Trade in Services)*, 22(3) EUR. J. INT'L L. 689, 689 (2011).
[20] For further details, see MITSUO MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 613 (2017).

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Exceptions.[21] A similar regime has been taken up in the GATS (Art. XIV and Art. XIV*bis*).

As mentioned, Article XIV of GATS is introduced by a chapeau which includes some general principles. The chapeau is followed by a list of specific public policy objectives that must be read in close conjunction with the content in the chapeau.[22]

When interpreting the GATS exceptions, the generally accepted "*ordre public*" principle under international law can provide useful assistance. The *ordre public* concept and *public policy*, the common law counterpart, are deeply rooted in Western democracies and commonly accepted in private international law. Due to the legal perceptions of the GATT originators it can be assumed that the exceptions clauses in WTO law are in line with the *ordre public* principle. When it comes to conflicts of laws, especially the enforcement of foreign judgments, conceptually the *ordre public* exception allows to apply domestic law and/or to refuse enforcement.[23]

The security exception, already contained in the GATT (Art. XXI), found its way into the GATS only at a relatively late stage. Since the public order (not contained in the GATT) might not cover all security needs of nation states and particularly not allow the assessment of subjective elements, the implementation of Article XIV*bis* into the GATS framework appeared to be appropriate.

### *B. Basic Contents*

*1. Problem of Contradictory Policy Objectives* — The purpose and objective of the general and specific obligations applicable according to the GATS in relation to non-discrimination and market access and a level playing field in services restrict the pursuit of legitimate policy goals.[24] Public interests and values such as public health, public order, safety, public morals, environment etc. often lead to trade-restrictive measures, which in principle are in conflict with the GATS obligations.

The challenge is to find a suitable balance between contradictory policy objectives. A mechanism, partially also used as a loophole, has been introduced with the right of nation states to provide for general exceptions applicable to the GATS commitments. Article XIV of the GATS equates Article XX of the GATT and provides for the scope to pursue legitimate non-economic policy ideas. Since the wording of the exception clauses is quite

[21] Ji Yeong Yoo & Dukgeun Ahn, *Security Exceptions in the WTO System: Bridge or Bottle-Neck for Trade and Security?*, 19(2) J. INT'L ECON. L. 417, 420 (2015).
[22] MUNIN, *supra* note 17, at 340.
[23] Nicolas F. Diebold, *The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole*, 11(1) J. INT'L ECON. L. 43, 56 (2008).
[24] Thomas Cottier et al., *Article XIV GATS: General Exceptions, in* MAX PLANCK COMMENTARIES ON WORLD TRADE LAW, WTO: TRADE IN SERVICE 287, 290 (Rüdiger Wolfrum et al. eds., 2008).

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vague and refers to overarching terms such as "public morals" and "public order" (only in the GATS), the room of manoeuvre for the nation states remains wide. The same assessment applies to the security exceptions in Article XIV*bis* of the GATS and Article XXI of the GATT. As a consequence, the development of interpretation guidelines is imperative in order to avoid that nation states use the general exceptions with the objective of enforcing that protectionist policies in conflict with the basic obligations and commitments under GATS.[25]

*2. Interpretation Guidelines* — For the first time, the case *U.S. — Gambling* has addressed and interpreted the terms "public moral" and "public order". The findings acknowledge that the interpretation of both notions depend on nationally widely diverging values.

(1) "Public moral" must be defined relying on the national perception of right and wrong conduct, while "public order" refers to measures relating to alcohol, sex, gambling, slavery, torture of animals and drugs with the idea to preserve fundamental interests of a society including morality.[26]
(2) The broad concept of "public order" could be used to cover all kinds of legitimate objectives; however, some constraints are expressed in *footnote 5 to Article XIV of the GATS*: "The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society." Therefore, a certain level of seriousness has to be asserted. If a measure rests on "public morals" footnote 5 does not apply.[27]

As the concretization of the terms "public moral" and "public order" has shown, the interpretation guidelines tend towards a relatively narrow scope of the exceptions. In particular, the necessity and proportionality of national measures are to be assessed with an objective standard. State interventions into the cross-border data flow can consequently not be easily justified.

When drafting the security exception, the application of subjective standards was not intended to be excluded, even if the hope prevailed that the atmosphere inside the trade agreements would be an efficient guarantee against abuses.[28] But the history proves that the wide discretion has not been seriously questioned in the past.[29] The self-judging and subjectively oriented spirit of the security exception requires that this "safety valve" will be exercised with wisdom and in good faith.[30] Invocations of the security exception have not often been challenged, and those challenges have never

[25] *Id*.
[26] *Id.* at 298.
[27] *Id*. at 299-300.
[28] Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011(3) UTAH L. REV. 697, 699 (2011).
[29] *Id*. at 758.
[30] MUNIN, *supra* note 17, at 402.

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resulted in a binding GATT/WTO decision.[31]

In principle, Article XIV*bis* GATS stipulates three general security exceptions:[32] Article XIV*bis* lit. a: information supply contrary to essential security interests; Article XIV*bis* lit. b: trade restrictions which are aimed at the protection of its essential national security interests: (i) relating to the services supplying a military establishment, (ii) relating to nuclear fission and fusion, (iii) adopted in wartime or other emergency in international relations; Article XIV*bis* lit. c: subordinates GATS obligations to the primacy of measures adopted under the aegis of the United Nations Charter.

As mentioned, any derogation from the GATS provisions for security reasons essentially relies on subjective criteria because it is all up to what a nation state considers necessary to protect essential security interests. In comparison to Article XIV of the GATS no objective necessity test is applied but instead the overall context is assessed. The right of invocation is abused, if security interests are manifestly absent (*e.g.*, only prevent/reduce foreign competition).[33] However, this misuse if often difficult to prove, especially when commercial and national security interests are overlapping and interrelated.[34]

The basic question is: What qualifies as an "essential security interest"? It is important to define this notion as an objective criterion.[35] Two parts appear to be relevant: (i) the interest must relate to the security of a nation and (ii) it has to be qualified as "essential". Based on this assumption non-economic military or political motives are to be assessed; thereby, nations are granted a wide discretion, only limited by the abuse threshold. In consequence, WTO members are allowed to define what they consider necessary for the protection of their national security interests; this includes not only measurers against actual threats but also covers preventive action.[36]

Legal doctrine has also confirmed that the language of the security exception is written in a manner that characterizes the provision as self-judging. [37] Nevertheless, arbitrary decisions of nation states in the interpretation of the term "security" are not acceptable. The security exception should be considered as last resort to ensure the national policy sphere in case of international emergency.

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[31] *Id.* at 699.
[32] Thomas Cottier & Panagiotis Delimatsis, *Article XIV*bis *GATS: Security Exceptions*, *in* MAX PLANCK COMMENTARIES ON WORLD TRADE LAW, WTO: TRADE IN SERVICES, *supra* note 24, at 328, 337.
[33] *Id*. at 338.
[34] *Id*.
[35] *Id.* at 339.
[36] *Id*. at 340.
[37] *See* Yoo & Ahn, *supra* note 21, at 427-28.

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## III. INTERPRETATION OF EXCEPTIONS IN PRACTICE

### *A. Overview over Case Law*

As already mentioned, the structure which combines a list of public policy objectives with a *chapeau* aiming at preventing abuse, originates from Article XX of the GATT. The scope and the respective normative content of the public morals exception as well as the public order exception provide ample scope for controversial debates. However, prior to the *U.S. — Gambling* case, there was no relevant jurisprudence or any other guidance from political bodies of the WTO regarding the potential interpretation of these provisions.

The lack of relevant jurisprudence is caused by the interesting aspect that WTO members did not invoke these exception in WTO dispute settlements for quite some time.[38] In other words, a reluctance of WTO members in this regard could be observed, that might be explained by their apprehensions; they used to be dissuaded from doing so because a Pandora's box could be opened up by arguing for a broad interpretation of these exceptions. As a result from a potential abuse of an exception, others could follow and invoke the exceptions as a defense in dispute settlement would become a regular scenario. This would undermine the effectiveness of the WTO system since members could tend to invoke related concerns.[39]

*1. U.S. — Gambling* — In 2004, *U.S. — Gambling* was the first case to raise the public morals exception in the WTO. As already mentioned, the contested measures were intended to restrict the remote supply of gambling services via the Internet.[40] The U.S. invoked Article XIV(a) of the GATS to justify its course of action. The Panel acknowledged the challenges related to a definition of the scope covered with the clause "public morals". Generally, WTO members have some discretion to determine what is covered by the public morality:[41]

> We are well aware that there may be sensitivities associated with the interpretation of the terms "public morals" and "public order" in the context of Article XIV. In the Panel's view, the content of these concepts for Members can vary in time and space,

[38] STEFAN ZLEPTNIG, NON-ECONOMIC OBJECTIVES IN WTO LAW: JUSTIFICATION PROVISIONS OF GATT, GATS, SPS, AND TBT AGREEMENTS 129 (2010).
[39] *Id.*
[40] See also Rolf H. Weber, *Digital Trade in WTO-Law: Taking Stock and Looking Ahead*, 5(1) ASIAN J. WTO & INT'L HEALTH L. & POL'Y 1, 15-16 (2010); Shin-yi Peng, *Trade in Telecommunications Services: Doha and Beyond*, 41(3) J. WORLD TRADE 293, 311-13 (2007).
[41] *See also* for case law Glyn Ayres & Andrew D. Mitchell, *General and Security Exceptions Under the GATT 1994 and the GATS*, *in* INTERNATIONAL TRADE LAW AND THE WTO 226 (Indira Carr et al. eds., 2012).

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> depending upon a range of factors, including prevailing social, cultural, ethical and religious values. Further, the Appellate Body has stated on several occasions that Members, in applying similar societal concepts, have the right to determine the level of protection that they consider appropriate. Although these Appellate Body statements were made in the context of Article XX of the GATT 1994, it is our view that such statements are also valid with respect to the protection of public morals and public order under Article XVI of the GATS. More particularly, 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. [42]

The Panel considered that the term "public morals" "denotes standards of right and wrong conduct maintained by or on behalf of a community or nation". [43] The Appellate Body equally confirmed in *U.S. — Gambling* decision[44] that the two-tier analysis developed by dispute settlement practice with respect to Article XX of the GATT 1994 may be used *mutatis mutandis* for the application of the general exceptions clause under the GATS. [45] Therefore, it has to be assessed whether a measure is justifiable under a specific provision of lit. a to e in Article XIV of the GATS.

Firstly, a sufficient connection between the measure and the potentially protected interest is required and secondly an examination must be done whether the measure is in line with the content of the *chapeau*.[46] However, instead of a sufficient connection as developed and required for in Article XX of the GATT, under Article XIV of the GATS the literature prefers to invoke a necessity test applicable to the general exemptions. The two-tier analysis firstly examines whether the measure is compliant with one of the interests of Article XIV and then it assesses whether it is necessary to achieve the objective pursued. Finally, the compliance with the good faith principle of the chapeau has to be analyzed.[47]

The legal authority to impose trade-restrictive measures "*necessary to protect public morals*" as promoted in *U.S. — Gambling* was also criticized because the test to determine the necessity might infringe the autonomy of

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[42] Panel Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.461, WTO Doc. WT/DS285/R (adopted Apr. 20, 2005).
[43] *Id*. ¶ 6.465.
[44] *See generally* Joel P. Trachtman, *United States: Measures Affecting the Cross-Border Supply of Betting and Gambling Services. WT/DS285/AB/R*, 99(4) AM. J. INT'L L. 861(2005).
[45] Cottier et al., *supra* note 24, at 294.
[46] *Id*. at 295.
[47] *Id*. at 295-96.

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WTO member states.[48] One proposal argues that WTO Member States should be allowed to define public morals based on certain evidentiary requirements. On the other hand, "countries should face close scrutiny of the fit between their chosen regulatory means and stated goal, as well as intolerance of any potential discrimination against foreign interests".[49]

*2. China — AVHE* — The other important case raising the public morals exception is *China — Publications and Audiovisual Entertainment Products*.[50] The measure at issue was a series of Chinese regulations related to the importation and distribution of certain publications and audiovisual entertainment products. In consequence, the capacity of foreign enterprises to import and distribute foreign publications and audiovisual products was restricted and in respect of the content review imposed foreign products were not treated like domestic products.[51]

China argued with the protection of public morals because they were a necessary part of its censorship regime. The Panel and the Appellate Body concluded that the prohibited content against which the measures were targeted could affect public morals in China and then assessed whether they were necessary for that purpose. Because content and scope of the concept of "public morals" can vary widely from member to member, depending on national notions regarding social cultural, ethical and religious values, this exception is very broad.

Nevertheless, some basic principles are to be observed if the public moral/order exception is invoked; in particular, even if the wording of the Panel Report is not very clear on that, any measure must meet the principle of technological neutrality.[52]

### *B. Analogy to Other Regulatory Fields?*

As shown, the dispute settlement practice related to the application of the exception clauses is very limited. In particular, the security justification being more frequently applied under the GATT, has so far not played a major role under the GATS. Therefore, it might be worthwhile to shed light on other regulatory fields embracing the term of "essential security interest". The main example can be found in the International Telecommunications Regulations.

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[48] Jeremy C. Marwell, *Trade and Morality: The WTO Public Morals Exception After Gambling*, 81(2) N.Y.U. L. REV. 802, 802 (2006).
[49] *Id.* at 836.
[50] *DS363: China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO, https://www.wto.org/english/tratop_e/ dispu_e/cases_e/ds363_e.htm (last visited Sept. 12, 2018).
[51] *See* Weber, *supra* note 40, at 16; Shin-yi Peng, *Liberalization of Trade in Television Services: The Negotiation Dilemma and Challenges for the Future*, 43(4) J. WORLD TRADE 657, 679 (2009).
[52] *See also* Weber, *supra* note 5, at 328-29.

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Already for decades, the International Telecommunication Union (hereinafter "ITU") has defined the term "security" in numerous ITU-T Recommendations; the definitions are not identical, but in essence consistent. The shortest definition can be found in Recommendation ITU-T Y.140.1, defining security as the "protection of information availability, integrity and confidentiality"; in this context, integrity also includes authenticity.[53]

The International Telecommunication Regulations (hereinafter "ITR") of 1988 were intensively discussed during the World Conference on International Telecommunications (hereinafter "WCIT") in Dubai in December 2012. The term "security" was also heavily debated since the ITU members did not agree on a common understanding. Partly, particularly by the Western countries, it was argued that "secure" would mean "robust" and "safe", i.e., the technical functioning has been considered to be the main purpose of security. Other countries being organized more hierarchically (less democratically) expressed the opinion that security should also include the notion of "public order"; this approach wanted to allow the nation states to intervene based on policy considerations being in the interest of the concerned country.[54]

Finally, the majority of the participants of the WCIT agreed on the following wording (being aware of the fact that the ITU usually takes unanimous decisions having the consequence that the ITR 2012 do not have a global reach of applicability): "Member States shall individually and collectively endeavor to ensure the security and robustness of international telecommunication networks in order to achieve effective use thereof and avoidance of technical harm thereto, as well as the harmonious development of international telecommunication services offered to the public" (Art. 6.1).

As can be seen from the wording, the notion of "public order" or "public policy" has not been literally taken up by the ITR, but emphasis was put on the technical harm. Nevertheless, subsequent to the WCIT, a number of civil society organizations published a list of principles advocating for the necessity and the proportionality principle that purported to capture best practices regarding human rights.[55] Therefore, nation states do have a relatively broad leeway in connection with the implementation of Article 6.1. of the ITR. These developments show that in this particular regulatory field the scope of the term "security" is—equally to the GATS—subject to unclear interpretation approaches; therefore, a convincing analogy cannot be drawn and the WTO Dispute Settlement Body might not be in a position to concretize Article XIV*bis* GATS on the basis of the ITR discussions.

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[53] RICHARD HILL, THE INTERNATIONAL TELECOMMUNICATIONS REGULATIONS AND THE INTERNET: A COMMENTARY AND LEGISLATIVE HISTORY 103 (2014).
[54] For further details see *id.* at 21 & 42.
[55] For further details see *id.* at 104.

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### *C. Relation to the United Nations and Influence of Free Trade Agreements*

*1. United Nations* — With the establishment of the WTO an independent organization fully responsible for trade matters was created. Combined with the effective Dispute Settlement Body (DSB) having jurisdiction over the "covered agreements", the WTO operates as a separate organization outside the UN umbrella. Since 1995 an arrangement for effective cooperation between the WTO and the United Nations (hereinafter "UN") is in place.[56]

Looking back to the history, the original project for an International Trade Organization (hereinafter "ITO") Charter did not contain a separate provision covering security exceptions. However, during the negotiations, based on a London draft and a New York draft, the parties agreed that the general exceptions and the security exception should be regulated in parallel; the slimmer agreement in form of the GATT 1948 (instead of the ITO) has been adopted in a similar form as now stated in the GATT.[57] This fact equally means that an interlinkage between the GATT provisions and the principles stated in the UN Charter does not exist. The GATS has later followed the GATT.

In particular, the specific rule contained in Article 86 of the draft ITO Charter addressing the relations between the Trade Organization and the UN would have been an interpretation guideline for the concretization of the security exceptions. Not only the necessary communication channels between the WTO and the UN should be established but political matters appear to be more an issue to be decided by the UN than by a trade body, i.e. the question could be asked to what extent political matters should not be transferred to the jurisdiction of the UN.[58] In the Marrakesh Protocol no reference is made to the institutional arrangement between the WTO and the UN and to the scope of their corresponding jurisdictions over the WTO security exceptions.

*2. Free Trade Agreements* — In the sphere of Free Trade Agreements (hereinafter "FTA") the identity of the general and the security exceptions has been diverging to a various degree. Some FTA have security exceptions provision embedded in them, some do not contain any security exceptions. Thereby, FTA partially reproduce the language of the WTO security exceptions or even broadened the scope of security exceptions.[59]

Generally looking, however, the impression prevails that in most FTA not much attention is paid to a clear and concrete wording of the general

[56] *See* General Council, *Arrangements for Effective Cooperation with Other Intergovernmental Organizations*, WTO Doc. WT/GC/W/10 (Nov. 3, 1995).
[57] Yoo & Ahn, *supra* note 21, at 419-20.
[58] *Id.* at 425-26.
[59] *Id.* at 436.

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exceptions and the security exception. The respective languages are rather diverse and could therefore harm the prospects of governing politically motivated trade sanctions.[60] At any rate, FTA provisions cannot really be a model for a revised wording of Articles XIV and XIV*bis* of the GATS.

## IV. ARTICLE XIV AND ARTICLE XIV*bis* GATS REVISITED

### *A. Adjustment of the Legislative Wording*

The services sector is not only growing in well developed countries but services will also and even more dominate economic development and trade of all continents in the future; however, the deficiencies of the GATS legal framework undermine its relevance for the global economy. Therefore, the GATS with its partly outdated wording and in many areas with obsolete classifications must be revitalized; changes are necessary notwithstanding the not promising recent political developments. It remains to be seen which role the GATS can play amidst regional service-related initiatives and bilateral trade agreements that might impact its existence (*e.g.*, Trade in Services Agreement, TiSA).[61]

Looking at potential risks, it should be clear that WTO members cannot claim an absolute discretion in reading too much into the provided, in this article discussed exceptions; in general, the intrinsic idea of any exception calls for a narrow interpretation.[62] An extensive application would create a loophole in the system of the GATS, being in strict contrast to the objectives and purpose of a free trade agreement.[63]

The approach to solve the conflict in line with the objective of the GATS must identify certain elements limiting the WTO members' scope regarding the interpretation of the "public morals" and "public order" exceptions; the aim must be to prevent an overbroad or abusive application of the exceptions.[64] Therefore, a clear interpretative policy needs to be developed; the present ambiguous language provides an uncertain environment and thus WTO members hardly are able to anticipate the outcome when invoking these exemptions.[65]

Article XIV of the GATS refers to "public morals" and "public order". These terms are open and vague; theoretically, it could be considered to add a specific definition, however, such an approach does not appear to be very promising. Rather the idea should be pursued to limit the application of the

[60] For further details see *id*. at 437-39.
[61] Delimatsis, *supra* note 3, at 153.
[62] MUNIN, *supra* note 17, at 402.
[63] "[T]he exception would effectively swallow the rule of trade liberalization . . . ." Marwell, *supra* note 48, at 817.
[64] Diebold, *supra* note 23, at 59.
[65] MUNIN, *supra* note 17, at 402.

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general exceptions to "fundamental interests" to be interpreted in an objective manner. Such an adjustment to the existing wording appears to be justifiable.

As far as the security exceptions are concerned, a more far reaching change of the wording should at least be assessed. Thereby, reference could be made to the UN Charter and the Vienna Convention on the Law of Treaties; furthermore, it would be worth to insert a chapeau provision in Article XIV*bis* of the GATS similar to the provision in Article XIV of the GATS. In addition, it must be made clear that only objective criteria can justify the application of a security exception.[66]

Finally, more emphasis should be put on the assessment of the different modes of services trade and of sectoral issues. This aspect which has already been dealt with under the GATT[67] merits even more attention under the GATS. As mentioned, the services classifications are outdated, particularly in the world of digital services; in addition, several sectors are subject to special regulations (for example the financial markets). In the light of this situation, future research should also tackle the question to what extent the public order and the security exceptions should be designed in a way that takes account of the specifics of markets.

### *B. Institutional Rebalancing*

As mentioned, the WTO framework and the UN system are not closely interlinked. The respective original attempts undertaken after the Second World War have not been successful. This fact is less detrimental in the context of the public morals and the public order exceptions than in the context of the security exceptions. The current institutional arrangement for the coexistence of the WTO and the UN blurs the scope of their authority regarding security exception matters.[68] Since economic sanctions are usually politically motivated an inherent link exists between trade and politics. Therefore, the WTO and the UN should more thoroughly share their expertise and authority in order to advise and consult over the matter at issue.[69]

The application of the security exceptions by the WTO Dispute Settlement Body is only one side of the medal. Resolutions of the UN Security Counsel also influence the economic environment, particularly in case of sanctions with extraterritorial application. Furthermore, the enforcement of UN sanctions is often quite complicated in the trade realm. All these facts plead for a clarification of the formal cooperative relationship

[66] *See also* Yoo & Ahn, *supra* note 21, at 442.
[67] *Id.* at 443.
[68] *Id.* at 440.
[69] *Id.*

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between the WTO and the UN as well as of the scope of UN comity over WTO security exceptions.[70]

## V. OUTLOOK

Public morals and public order as general exceptions as well as security exceptions have been a contested core element of international trade law for more than fifty years, originally mainly under GATT. Since ten years, these issues are also debated under the GATS. Experience has shown that adaptions would be desirable in order to clarify the scope of the exceptions in a better way. Some questions still remain unanswered; one is whether the exception may only be invoked for inward-directed measures designed to protect the morals within a nation or could the exception applied also outward-directed for trade restrictions against countries with poor records on e.g., human rights.

Furthermore, some questions remain unanswered; one is whether the exceptions could only be invoked for inward-directed measures designed to protect the public order within a nation or not. Another is whether the exception may also be applied outward-directed for trade restrictions against countries with poor records on e.g., human rights.[71]

In addition, the steadily increasing data flows and questions around data storage give rise to legitimate concerns regarding data protection and privacy. Many governments put restrictions on cross-border data transfers in place. The importance to facilitate data transfers is in contrast to the limited presence of specific rules on data protection which exist at the international level.[72] Measures relating to cross-border data transfer could be examined under the GATS as digital data are crossing borders without a transfer of physical commodities.[73]

The discussed exceptions are also common rationales to restrict certain services. National security is invoked in a number of countries to limit data transfers. China and several other countries impose restrictions on online data transfers in certain sectors for reasons of "public order" or "public morals" (*e.g.*, Iran imposes restrictions on political information that is circulated online for the purposes of maintaining public order).[74]

Such measures to prevent dissemination of information are often triggered by the fear of a destabilized government; therefore, also alternative routes which allow access to information from blocked websites (*e.g.*, VPN

[70] *Id.* at 441.
[71] Wu, *supra* note 8, at 235.
[72] Andrew D. Mitchell & Jarrod Hepburn, *Don't Fence Me in: Reforming Trade and Investment Law to Better Facilitate Cross-Border Data Transfer*, 19(1) YALE J. L. & TECH. 182, 186 (2017).
[73] *Id*. at 196.
[74] *Id*. at 190-91.

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or proxy servers) are restricted.[75] However, the availability of technical loopholes subverts effective prohibition and challenges their rationale.[76]

Restrictions on cross-border data transfers need to solve the fundamental question of classifying the relevant services to apply core GATS obligations. Then the assessment of the particular measures depends on the interpretation and application of the exceptions in GATS. Therefore, there is a need for more specific rules, based on a consensus on how to deal with these modern technologies and practices.[77]

[75] *Id*. at 191.
[76] *Id*. at 192.
[77] *Id*. at 206.

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