

NOTES

MUCH NEEDED REFORM IN THE REALM OF PUBLIC MORALS: A PROPOSED ADDITION TO THE GATT ARTICLE XX(A) “PUBLIC MORALS” FRAMEWORK, RESULTING FROM *CHINA—AUDIOVISUAL*

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TABLE OF CONTENTS

I. INTRODUCTION	734
II. HISTORY OF THE GATT “PUBLIC MORALS” CLAUSE AND DEVELOPMENTAL JURISPRUDENCE	740
A. Legislative History	740
B. Room to Maneuver in “Public Morals”	746
C. A Breakthrough? The <i>U.S.—Gambling</i> Decision	749
III. MOVING FORWARD: LESSONS FROM <i>U.S.—GAMBLING</i> AND APPLICATION TO <i>CHINA—AUDIOVISUAL</i>	751
A. Public Morals Principles from <i>U.S.—Gambling</i>	751
i. Provisional Justification	752
a. Public Morals and Dynamic Interpretation	752
b. Necessity of the Measure	752
ii. Nondiscrimination Clause	753
B. <i>China—Audiovisual</i> and Role of the Public Morals Principles	754
IV. MOVING FORWARD—AMBIGUITIES LINGER	757
A. <i>U.S.—Gambling</i> Uncertainties Remain	757
B. Proposals and Alternatives to the <i>U.S.—Gambling</i> and <i>China—Audiovisual</i> Frameworks	758
i. Originalism	758
ii. Universalism	760
iii. Transnationalism	761
iv. Restriction-Sensitive Approaches	763

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V. NON-STATE ACTORS BENEFITTING STATES—A	
PROBLEM AND SOLUTION.....	766
A. The Black Market Problem	766
B. A Solution—Requirement of Inquiry into Internal Legislation and Executive Enforcement	769
VI. CONCLUSION	772

I. INTRODUCTION

The clash between freedom of trade and notions of morality has been a characteristic of the international economic system throughout its duration. The dilemma manifests itself primarily in two competing considerations. On the one hand, international trade achieves optimum efficiencies when it is left unhindered by states' discriminatory trade practices, which often stem from religious or geopolitical ideologies. On the other hand, there is an understanding among trade proponents that states should not be compelled to liberalize their trade policies when doing so would threaten the state's public morals.¹ Finding a proper equilibrium between these concerns is the goal for all trading partners, but achieving it is complicated when states engage in illegal protectionist measures under the pretext of defending the state's moral fabric.

Article XX(a) of the General Agreement on Tariffs and Trade (GATT)² and Article XIV(a) of the General Agreement on Trade in Services (GATS)³ play an important role in fueling this trade-morality dispute. In coordination with Article XX's

¹ Mark Wu, *Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine*, 33 *YALE J. INT'L L.* 215 (2008).

² General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11 [hereinafter GATT]. The GATT is a compilation of multilateral trade agreements aimed at the abolition of quotas and the reduction of tariff duties among signing nations regarding merchandise trade. The GATT's most important principle is trade without discrimination, in which member nations open their markets equally to one another. Once a country and its largest trading partners agree to reduce a tariff, that tariff cut is automatically extended to all GATT members. The GATT also established uniform customs regulations and sought to eliminate import quotas. See *The GATT Years: From Havana to Marrakesh*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited Feb. 26, 2010).

³ General Agreement on Trade in Services, Apr. 14, 1994, 1869 U.N.T.S. 183, 33 I.L.M. 1167 [hereinafter GATS]. The GATS was created to extend the multilateral trading system to the service sector, in the same way the GATT provides such a system for merchandise trade. See *General Agreement on Trade in Services*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm (last visited Feb. 26, 2010).

chapeau,⁴ Article XX(a) of the GATT includes a “public morals” exception to freedom of trade.⁵ Article XIV(a) of the GATS, also in accordance with its own chapeau, provides a defense for trade restrictive measures when such measures are “necessary to protect public morals or to maintain public order.”⁶ A challenge for judicial bodies concerned with international trade is establishing the appropriate scope of these noticeably vague “public morals” clauses in order to simultaneously respect national conceptions of morality and allow for freedom of international trade. For instance, consider a scenario where the United States has historically permitted the importation of manufactured fur coats from China, despite the fact that China has admitted to manufacturing said coats partly with dog fur. However, after a dispute at the United Nations Security Council between the United States and China over the appropriate measures to stop the genocide in Darfur, the United States banned imports of coats that contain dog fur. The U.S. ban has both a geopolitical as well as a public morals rationale when applied to China. The public morals defense, though, while available before the Security Council dispute, was heretofore never invoked. It is the World Trade Organization’s (WTO) prerogative to decide whether such a ban withstands public morals and national treatment⁷ scrutiny. Further complicating the decision is identifying what makes a measure “necessary” under the Article to protect the invoked public moral.⁸

Not until 2004 was there any judicial insight into how public morals defenses would be analyzed. In *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*⁹ (*U.S.—Gambling*), the WTO considered the United

⁴ See Sanford Gaines, *The WTO’s Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT’L ECON. L. 739, 861 n.5 (2001) (“That is, the ‘Subject to...’ clause. In international law, an unnumbered introductory clause or paragraph covering several subsequent provisions is called a chapeau (‘cap’ or ‘hat’).”).

⁵ See GATT, *supra* note 2, art. XX(a).

⁶ See GATS, *supra* note 3, art. XIV(a).

⁷ The national treatment principle explains that a country must grant foreigners the same rights, in certain respects, as those accorded to the country’s own nationals. See *National-Treatment Clause Definition*, BLACK’S LAW DICTIONARY (9th ed. 2009). The national treatment principle is not explicitly enumerated in the GATT or GATS but is typically found in an Article’s chapeau. See *infra* note 24.

⁸ The term “necessary” is included in both Article XX(a) of the GATT and Article XIV(a) of the GATS in reference to the requirements of measures used in protecting a state’s public morals.

⁹ Panel Report, *United States—Measures Affecting the Cross-Border Supply of*

States' right to ban foreign internet gambling services under the GATS on the grounds that the provision of such services contravened the United States' public morals.¹⁰ In so doing, the WTO adopted a two-tiered jurisprudential framework for addressing public morals defenses.¹¹ First, the Panel held that WTO dispute panels must determine whether the trade restrictive measures "fall within the scope of one of the recognized exceptions set out in paragraphs (a) to (e) of Article XIV [of the GATS] in order to enjoy provisional justification."¹² Second, the ruling required that WTO panels determine whether the measures in question "meet the requirements of the introductory provisions of Article XIV, the so-called [GATS] 'chapeau.'"¹³

To determine whether the United States had satisfied its burden of proving that the measures fell within one of Article XIV's recognized exceptions, the Panel adopted a "provisional justification" standard.¹⁴ The provisional justification is a two-pronged legal standard in which the state invoking the Article XIV(a) defense must demonstrate that: "(a) the measure [is] one designed to 'protect public morals' or to 'maintain public order'; and (b) the measure for which justification is claimed [is] 'necessary' to protect public morals or to maintain public order."¹⁵

Gambling and Betting Services, WT/DS285/R (Nov. 10, 2004) [hereinafter *U.S.—Gambling*].

¹⁰ *Id.*

¹¹ *See id.* ¶ 6.449.

¹² *Id.* Article XIV §§ (b)-(e) protect measures:

(b) [N]ecessary to protect human, animal or plant life or health; (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to: (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts; (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; (iii) safety; (d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members; (e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.

GATS, *supra* note 3, art. XIV(b)-(e). For additional information on the GATS, see *Uruguay Round Agreement: General Agreement on Trade in Services*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm#articleXIV (last visited Feb. 27, 2011).

¹³ *U.S.—Gambling*, *supra* note 9, ¶ 6.449.

¹⁴ *Id.* ¶ 6.454.

¹⁵ *Id.* ¶ 6.455.

Importantly, the Panel clarified that public morals viewed under prong (a) of the provisional justification should be construed flexibly and with deference to the state, explaining that “the term ‘public morals’ denotes standards of right and wrong conduct maintained by, or on behalf of a community or nation.”¹⁶ The Panel further 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.”¹⁷

In August 2009, in *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*¹⁸ (*China—Audiovisual*), a WTO Dispute Panel adopted and applied the GATS’ public morals framework to a Chinese GATT Article XX(a) public morals defense of China’s restrictions on imports of U.S. audiovisual goods. This was the first GATT public morals defense ever raised.¹⁹ The Panel found that the Chinese measures failed the “provisional justification” test because “none of the relevant measures [were] demonstrated to be ‘necessary’ within the meaning of Article XX(a) to protect public morals.”²⁰ Notably, the Panel adopted the same subjective approach to the validity of public morals as the Dispute Panel did in *U.S.—Gambling*, stating that there were no interpretative concerns to warrant different analyses for Article XIV(a) and Article XX defenses.²¹ The Panel’s application of the GATS public morals framework was upheld on review.²²

Although *China—Audiovisual* solidified some doctrinal issues related to GATT and GATS public morals defenses, the decision failed to account satisfactorily for the presence of non-state actors, most notably domestic black markets and underground economies,

¹⁶ *Id.* ¶ 6.465.

¹⁷ *Id.* ¶ 6.461.

¹⁸ See Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R (Aug. 12, 2009) [hereinafter *China—Audiovisual*].

¹⁹ See John W. Miller, *China Cites ‘Morals’ in Its WTO Appeal*, WALL ST. J., Sept. 23, 2009, available at <http://online.wsj.com/article/SB125363796886531247.html>.

²⁰ *China—Audiovisual*, *supra* note 18, ¶ 7.913.

²¹ *Id.* ¶ 7.759.

²² Upon review, the Appellate Body upheld the Panel’s findings, stating “that China ha[d] not demonstrated that the relevant provisions are ‘necessary’ to protect public morals, within the meaning of Article XX(a) . . . and that, as a result, China ha[d] not demonstrated that these provisions are justified.” See Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 337, 2009 WL 4919509 (Dec. 21, 2009) [hereinafter *China—Audiovisual* AB Report].

revolving around counterfeit goods, and more importantly, states' restraint in criminalizing and prosecuting the proponents of these markets. For instance, authentic international cellular phone makers, such as Apple Inc. and Nokia, are experiencing stunted sales in Chinese markets due to China's vibrant underground counterfeit cellular phone economy.²³ Such a phenomenon evidences a clear interplay between foreign and domestic goods, implicating states' rights under the GATT. The GATS analytical framework established by *U.S.—Gambling*, and now applied to GATT public morals defense, though, is not sufficiently tailored to account for the presence of these black markets. Indeed, *U.S.—Gambling* and, concomitantly, *China—Audiovisual*, indicate that the GATS and GATT must only be applied to *state*, as opposed to *non-state* discriminatory practices that may violate the national treatment principle contained in GATS Article XIV's and GATT Article XX's chapeaus. As a result, the wholesale adoption of the two-pronged provisional framework developed in *U.S.—Gambling* for determining the first tier of a public morals defense under GATS Article XIV(a) is necessary, but not sufficient in determining the soundness of a public morals defense under Article XX(a) of the GATT. Indeed, the Panel's analysis of prong (a) of the provisional justification—the requirement that the measures be designed to “protect public morals”—should have encompassed a more extensive inquiry into the state's domestically-aimed legislation and *executive/prosecutorial* efforts at combating black markets, which would evidence the state's commitment to protecting the purported morals.

This Note argues that a WTO member state invoking an Article XX(a) public morals exception must show robust, broad-based and good-faith domestic legislative and *executive enforcement* efforts at protecting the proposed public moral under prong (a) of the provisional justification. Particularly, such efforts must be aimed at combating black markets in goods that are being produced authentically in or by foreign states and are being exported to the defending state. Only then should the WTO dispute panel consider the necessity of the trade restrictive measure under prong (b) of the provisional justification, and whether the restriction satisfies the national treatment under the Article's chapeau.²⁴ This analytical framework would ensure that

²³ See, e.g., Gady Epstein, *China's Black Market Boom*, FORBES, Jan. 29, 2009, available at <http://www.forbes.com/global/2009/0216/014.html>.

²⁴ Article XIV's chapeau states:

the public morals in question receive international and domestic protection, and are not merely serving as a façade for illegal trade restrictions and protectionist regimes. Additionally, this inquiry would help to ensure that international trade partners, and more generally the international economy, benefit from trading profits that would be available absent the unnecessary and illegal trade restrictive measures.

Part II of this Note provides an overview of the history of GATT “public morals” and its corresponding jurisprudence through 2004. Particular focus will be placed on the use of public morals in international agreements and treaties, elaborating more upon the pivotal GATS *U.S.—Gambling* decision framework that

[S]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures.

GATS, *supra* note 3, art. XIV, http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm#articleXIV (last visited Dec. 29, 2010). In *U.S.—Gambling*, regarding whether the United States’ measures satisfied the requirements of Article XIV’s chapeau, the panel began by explicitly stating that due to textual similarities between GATT Article XX’s chapeau and GATS Article XIV’s, the same interpretive principles and jurisprudence used to give meaning to Article XX’s chapeau should be used in applying Article XIV’s chapeau to the contested measures. See *U.S.—Gambling*, *supra* note 9, ¶ 6.571. The panel then cited the Appellate Body’s decision in *United States—Standards for Reformulated and Conventional Gasoline*, where the Appellate Body stated that Article XX’s chapeau is worded in such a way as to prevent abuse of the exceptions under the Article:

[T]he chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate . . . the legal obligations of the holder of the right under the substantive rules of the *General Agreement*.

See Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 1996 WL 227476, at *15 (April 29, 1996) [hereinafter *U.S.—Gasoline*]; see also *U.S.—Gambling*, *supra* note 9, ¶ 6.574. The panel summarized this explanation to mean that the chapeau imposes an obligation of “good faith” on invoking states when citing the exceptions. The panel also looked closely at the text of the chapeau for guidance as to whether a violation of the chapeau had occurred, notably the requirement that a measure “not [be] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail.” *Id.* ¶ 6.578. The panel again cited *U.S.—Gasoline*, stating that three conditions must exist to constitute such discrimination: “First, the application of the measure must result in *discrimination* . . . Second, the discrimination must be *arbitrary or unjustifiable* in character . . . Third, this discrimination must occur *between countries where the same conditions prevail*.” *Id.* The panel then provided specific guidance on the term “disguised restriction on international trade,” noting that there is a certain degree of overlap between “arbitrary or unjustifiable discrimination” and “disguised restriction,” such that the manner in which a restrictive measure is applied may “simultaneously lead to the conclusion that such an application constitutes arbitrary or unjustifiable discrimination and a disguised restriction on trade within the meaning of the chapeau of Article XIV.” *Id.* ¶ 6.580.

would guide later public morals analyses. Deconstructing the recent GATT *China—Audiovisual* decision, Part III examines the history of the U.S.-Chinese dispute. Notably, Part III explains the application of the *U.S.—Gambling* public morals analysis to the audiovisual conflict, and what factors the Dispute Panel considered in analyzing the provisional justification for China's trade restrictive measures. Part IV analyzes and assesses the approaches to interpreting the public morals exception that were initially proposed and considered both before and after the *U.S.—Gambling* decision. Part V addresses the question of how to manage public morals defenses in the face of the presence of black markets in the state raising the defense. Particularly, Part V calls for future WTO dispute panels to add a criterion to their established provisional justification that requires the restricting state to evidence not simply internal legislation, but also executive enforcement efforts aimed at domestically protecting the public moral in question. Part VI concludes by showing the benefits of the proposed rule and the weight the criterion should be given in the future.

II. HISTORY OF THE GATT “PUBLIC MORALS” CLAUSE AND DEVELOPMENTAL JURISPRUDENCE

A. Legislative History

When read in conjunction with the Article's chapeau, Article XX(a) of the GATT states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures necessary to protect public morals.²⁵

The GATT was drafted between 1945 and 1948²⁶ during the

²⁵ See GATT, *supra* note 2, art. XX(a).

²⁶ See *The GATT Years: from Havana to Marrakesh*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited Nov. 4, 2009) [hereinafter *The GATT Years*]; see also JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 36-38 (2d ed. 1997) (explaining that the U.S. President and his negotiators were acting under a 1945 Act, only extending the authority of the President to exercise trade agreements authority to reduce tariffs and other restrictions on trade). The 1945

U.N. Conference on Trade and Employment,²⁷ and it provided rules for international trade until 1995, when the WTO was established. While the GATT seemed well-established, it was still only a provisional agreement and organization.²⁸ “The original intention was to create a third institution to handle the trade side of international economic cooperation, joining the two ‘Bretton Woods’ institutions, the World Bank and the International Monetary Fund.”²⁹ The institution forming the tripartite international economic regime would be called the International Trade Organization (ITO).³⁰ The ITO Charter was agreed to in 1948, but due to ratification problems in national legislatures, particularly the United States, the ITO was effectively killed.³¹ However, its constituent parts remained. The GATT was then left as the only multilateral instrument to regulate trade. Thus, because of the GATT’s interim agreement status, the preparatory work of the ITO Charter is also considered the preparatory work of the GATT for interpretive purposes.³²

In his seminal work, Professor Steve Charnovitz makes clear that legislative history concerning Article XX(a) is scarce.³³ The United States, in its 1945 outline for the ITO Charter, was the first country to propose that member states be permitted to restrict trade on public morals grounds,³⁴ advocating for the inclusion of exceptions for measures “necessary to protect public morals.”³⁵ Thereafter, every subsequent draft of the ITO Charter contained similar language, permitting “measures necessary to protect public morals.”³⁶ However, the member states never defined the

Act did not authorize the President to enter into an agreement for an organization. *Id.*

²⁷ See ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 11-30 (2nd ed. 1990).

²⁸ *The GATT Years*, *supra* note 26.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² See WORLD TRADE ORGANIZATION, *GUIDE TO GATT LAW AND PRACTICE* 9-11 (1995) [hereinafter *GUIDE TO GATT LAW*]; see also *Japan—Taxes on Alcoholic Beverages*, n.39, 1996 WL 910779 (Oct. 4, 1996) (using ITO Charter legislative history to interpret GATT Article III).

³³ Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT’L L. 689, 704 (1998).

³⁴ See *id.*

³⁵ *Id.*

³⁶ See United Nations Conference on Trade and Employment, Apr. 10, 1947, Report of the Second Session of the Preparatory Committee art. 43(a), U.N. DOC. E/PC/T/186 (Sept. 10, 1947); United Nations Conference on Trade and Employment, Jan. 20-Feb. 25, 1947, Report of the Drafting Committee of the Preparatory Committee, art. 37(a), U.N. DOC. E/PC/T/34 (Mar. 5, 1947) [hereinafter Report of the Drafting Committee]; United

contours of the general concept of a public moral. The Norwegian delegate to the Report of the Drafting Committee of the Preparatory Committee in New York in 1947 pointed out that his country's restriction on importing, producing and selling alcoholic beverages stemmed from Norway's "promotion of temperance," and that therefore, the country's taxes and pricing of such beverages were protected by the exceptions made for public morals and health.³⁷ Another Norwegian delegate later confirmed his country's position on the public morals exception in July 1947 at the Second Session of the Preparatory Committee, stating that "[a]s far as we now can see, our restrictions on importation, production and sale of alcoholic liquors are covered" by the exceptions for public morals and health.³⁸ Despite proceeding with only these isolated comments during U.N. sessions, at the Geneva Session of the Conference of Trade and Employment in 1947, negotiators incorporated the "public morals" language³⁹ into the GATT and final ITO Charter.⁴⁰

Thus, interpreting the purpose behind the inclusion of a public morals exception remains a difficult task. Article 31 of the Vienna Convention on the Law of Treaties provides a general rule of treaty interpretation, stating that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."⁴¹ As the term 'public morals' is inevitably ambiguous this general interpretive rule is of little help. Article 32 of the Vienna Convention on the Law of Treaties, though, provides guidance for supplementary interpretation, stating that "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work and the circumstances of its inclusion . . . ," if the ordinary interpretation leaves the meaning

Nations Conference on Trade and Employment, Oct. 15-Nov. 26, 1946, Report of the First Session of the Preparatory Committee, art. 32(a), U.N. DOC. E/PC/T/33. For the full text of these documents, see *Gatt Documents*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/docs_e/gattdocs_e.htm (under "Browse by Symbol", follow "E" hyperlink) [hereinafter *GATT Documents*].

³⁷ Report of the Drafting Committee, *supra* note 36, at 31.

³⁸ United Nations Conference on Trade and Employment, July 3, 1947, Second Session of the Preparatory Committee-Verbatim Report, at 18-19, U.N. DOC. E/PC/T/A/PV/25 (July 3, 1947).

³⁹ *Id.* at 18-21.

⁴⁰ See Havana Charter for an International Trade Organization art. 45(a)(1), Mar. 24, 1948, 1948 Can. T.S. No. 32, art. 45(a)(1), http://www.wto.org/english/docs_e/legal_e/havana_e.pdf.

⁴¹ Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

ambiguous.⁴² However, with only the brief comment on restrictions on alcohol, the preparatory work provides scant insight into Article XX(a)'s purpose.

Charnovitz suggests that the original U.S. proposal for a public morals exception in the GATT was designed to protect existing trade restrictions the United States had in place in other international agreements at the time of the GATT negotiations.⁴³ For example, in a 1927 letter, Secretary of State Frank B. Kellog explained that retaining a moral exception in the International Convention for the Abolition of Import and Export Prohibitions (ICAIEP)⁴⁴ was imperative.⁴⁵ He explained that “American prohibitions or restrictions imposed for moral or humanitarian reasons or to suppress improper traffic relate inter alia to intoxicating liquors, smoking opium and narcotic drugs, lottery tickets, obscene and immoral articles, counterfeits, pictorial representations of prize fights and the plumage of certain birds.”⁴⁶ The U.S.'s concern, in other words, was not exclusively based on concerns for preserving public morals, but was additionally aimed at maintaining the integrity of its older international agreements and domestic laws. As such, Congress would not be forced into amending many new laws to account for the ICAIEP. “The public morals exception therefore provided [a legal means] for maintaining existing domestic laws under the new international trade regime.”⁴⁷

However, upon closer inspection of Kellog's letter, Charnovitz's suggestion that the public morals clause inclusion was driven by domestically-oriented, strategic political concerns is suspect. First, regarding the prohibition on trafficking of bird plumage, GATT Article XX(b) explicitly provides that measures necessary to protect “human, animal, or plant life or health” will be respected if implemented in accordance with Article XX's chapeau.⁴⁸ Thus, public morality in Article XX(a) as contemplated by Kellog is much less inclusive than Charnovitz

⁴² *Id.* art. 32.

⁴³ Charnovitz, *supra* note 33, at 705-10.

⁴⁴ International Convention for the Abolition of Import and Export Prohibitions and Restrictions, Nov. 8, 1927, 97 L.N.T.S. 393. This treaty did not enter into force.

⁴⁵ Charnovitz, *supra* note 33, at 706.

⁴⁶ *Id.* at 706 (quoting letter from Frank B. Kellog, Sec'y of State, to Wilson, Minister in Switzerland (Oct. 6, 1927), in 1 PAPERS RELATING TO THE FOREIGN REL.'S OF THE U.S. 1927, at 257 (1942)).

⁴⁷ Wu, *supra* note 1, at 218.

⁴⁸ See GATT, *supra* note 2, art. XX(b).

suggests, as the GATT framers contemplated that public morality was not expansive enough to protect animal health or life, as indicated by their inclusion of Article XX(b).

Second, the inclusion of the concept of “ordre public” in other international agreements, and its absence in GATT Article XX, also undermines Charnovitz’s political explanation. According to European law, *ordre public*, while not defined in any WTO agreement,⁴⁹ is interpreted to encompass the protection of public security and the physical integrity of individuals as part of society. In accordance with the doctrine, a foreign law that is otherwise applicable is disregarded if its application would violate some fundamental interest, basic policy, or general principle of justice.⁵⁰ For instance, *ordre public* often is invoked to protect against acts that would invoke riots and public disorder, or would lead to other criminal behavior. The concept is also used to justify exceptions aimed at protecting the environment.⁵¹ *Ordre public* exceptions to trade agreements have been distinguished from morality exceptions based on the cultural relativity on which morality exceptions can be based. Morality exceptions are considered to be substantiated by beliefs that are founded on the totality of the accepted norms, which are deeply rooted in a particular culture.⁵² *Ordre public* ideals are much more broad-based, and generally applicable.

Additionally, *ordre public* exceptions are also treated as somewhat distinct from public order or public policy exceptions to international agreements. It is generally understood that the common law term “public policy” is the English equivalent of the term *ordre public* utilized in French countries with civil law traditions.⁵³ However, *ordre public* is considered to be a much more encompassing principle than public policy. For instance, common law jurisdictions would invalidate a judgment if acquired on grounds violating public policy. Similarly, common law jurisdictions would also invalidate a judgment if acquired on

⁴⁹ U.S.—*Gambling*, *supra* note 9, ¶ 6.460.

⁵⁰ See Yongping Xiao & Zhengxin Huo, *Ordre Public in China’s Private International Law*, 53 AMJ. COMP. L. 653 (2005).

⁵¹ In *Plant Genetic Systems/Glutamine Synthetase Inhibitors v (Opposition by Greenpeace)*, 1995 E.P.O.R. 357, 366, the Board of Appeal of the European Patent Office observed, “[i]t is generally accepted that the concept of ‘ordre public’ covers the protection of public security and the physical integrity of individuals as part of society. This concept encompasses also the protection of the environment.” *Id.*

⁵² *Id.*

⁵³ See NATALYA SHELKOPLYAS, *THE APPLICATION OF EC LAW IN ARBITRATION PROCEEDINGS* 172 (1993).

grounds of fraud. However, civil law jurisdictions using *ordre public* would invalidate the law simply under *ordre public*, regardless of whether it was acquired using either common law understandings of fraud or violation of public policy. In other words, the common law's approach to public order uses a more modest, categorical approach in identifying violations, whereas the civil law approach of *ordre public* is much broader in its application. Despite this distinction in meaning, many international agreements and authors treat "public order" and *ordre public* as equivalent terms when used in interpreting international agreements.⁵⁴

Moreover, *ordre public* exceptions can be found in a number of international agreements, and are consistently treated as distinct from morality. For instance, Article XIV (a) of the GATS exempts any measure "necessary to protect public morals or to maintain public order."⁵⁵ Similarly, Article 27 of the Agreement on Trade-Related Aspects of Intellectual Property Protection Agreement (TRIPS) allows an exception from the patentability of any invention if "necessary to protect *ordre public* or morality . . . provided that such exclusion is not made merely because the exploitation is prohibited by their law."⁵⁶

As such, Charnovitz's political explanation fails to take into account that the framers of Article XX(a) may have been doing more than providing legal cover for their existing domestic laws. Charnovitz's explanation too broadly incorporates the idea of *ordre public* in his morality explanation. Indeed, the framers were likely accounting for a substantive legal exception, wholly separate from *ordre public* or public order.

Charnovitz, though, proposes an alternative rationale for the limited comment on the public morals exception. He explains that due to the identical language concerning "measures necessary to protect public morals" that appears throughout all of the subsequent GATT drafts,⁵⁷ the drafters understood that the "public morals" language was necessarily amorphous and covered a wide range of activities, thus obviating the need for further

⁵⁴ See Mo Zhang, *Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law*, 20 EMORY INT'L L. REV. 511, 524 (2006); but see Edith Friedler, *Party Autonomy Revisited: A Statutory Solution to a Choice-of-Law Problem*, 37 KAN. L. REV. 471, 541 (1989).

⁵⁵ GATS, *supra* note 3, art. XIV(a).

⁵⁶ Agreement on Trade-Related Aspects of Intellectual Property Rights art. 27, ¶ 2, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 81 [hereinafter TRIPS Agreement].

⁵⁷ See *GATT Documents*, *supra* note 36.

elaboration.⁵⁸ Otherwise, disagreements over restrictive measures would focus on the irresolvable minutiae of what constituted a public moral according to particular governments.⁵⁹ Therefore, the resulting agreement simply retained the original language. Nevertheless, given the lack of legislative history and the U.S.' limited reasons for proposing a public morals exception, such rationales remain speculative, leaving the meaning of the clause ambiguous throughout the duration of the drafting process.

B. Room to Maneuver in "Public Morals"

Despite the ambiguity of important provisions of the GATT, such provisions remain effective. For example, economists point to the ability of "constructive ambiguity"⁶⁰ to reduce the high transaction costs associated with negotiating and implementing contracts,⁶¹ possibly evidencing Charnovitz's secondary explanation on the inclusion of a public morals exception. In particular, ambiguity in treaties promotes rational choices by allowing contracting parties to alter their interpretive preferences without the need to concomitantly renegotiate the treaty.⁶² "Indeed there is general agreement that it is not to be dismissed as random error in decision-making; rather, ambiguity is intentional and often desirable, as it has several merits besides defusing conflicts."⁶³ As a result, it is very possible that the framers of Article XX(a) never had a solidified concept of the meaning of public morals, and indeed, intentionally avoided developing one.

Therefore, the GATT Article XX(a) public morals exception seems to be an accommodating device. It allows states to protect their public morals unfettered by other countries' attempts to subdue and force the state to sacrifice its national ideals so as to facilitate exports. Alternatively, the ambiguity gives to those other countries the right to mold an exception to protect their own morals. Therefore, the understanding that the GATT's public morals clause will consistently provide an avenue for protection encourages states that were once wary to freely partake in

⁵⁸ See Charnovitz, *supra* note 33, at 705.

⁵⁹ *Id.* at 705 n.94. See Wu, *supra* note 1, at 218.

⁶⁰ Itay Fischhendler, *When Ambiguity in Treaty Design Becomes Destructive: A Study of Transboundary Water*, 8 GLOBAL ENV'T'L. POL. 111, 111 (2008), http://muse.jhu.edu/journals/global_environmental_politics/v008/8.1fischhendler.pdf.

⁶¹ See generally OLIVER E. WILLIAMSON, *THE ECONOMICS INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* (1985).

⁶² See Fischhendler, *supra* note 60, at 111.

⁶³ *Id.*

international trade. However, it is equally clear that such ambiguities can generate disputes as one state may invoke the exception too cavalierly, causing another state to protest the restriction as a form of illegal protectionism. Surprisingly though, with the rapid increase in international trade stemming from the global development in numerous technologies that impact states in different continents,⁶⁴ this contentious situation did not arise for nearly sixty years. However, this gap does not mean that elaboration of the clause was not possible in the interim.

Despite not being discussed in the first six rounds of negotiations from 1949 to 1979, the public morals clause garnered some attention at the 1986 Uruguay Round.⁶⁵ During this Round, negotiators drafted the GATS to regulate services, providing a complement to the GATT's regulation of goods. The negotiators included a public morals clause, but instead of elaborating upon the definition of a public moral they included a clause that is strikingly similar to the language of the GATT public morals exception.⁶⁶ The clause provides in relevant part:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures . . . necessary to protect public morals or to maintain public order.⁶⁷

The GATS formulation contains only two minor clarifications to the original 1947 GATT language. First, the negotiators explicitly provided for a "public order" defense.⁶⁸ The availability of this exclusion for the GATS but not the GATT is significant because it indicates that trade in services can be restricted in order to preserve public order, while trade in goods may not. This difference is reminiscent of the discussion above where the GATT framers likely omitted a concept of *ordre public* from their idea of public morality. Instead, trade in goods must violate a more value-

⁶⁴ See generally THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* (1999) (discussing the rapid technological surge in the 1990s that forced states to quickly globalize and integrate into the world economy and information market).

⁶⁵ See Wu, *supra* note 1, at 220.

⁶⁶ *Id.*

⁶⁷ GATS, *supra* note 3, art. XIV(a).

⁶⁸ There is no explanation why the framers chose a public order exclusion over an *ordre public* exception.

laden public morals exception. Second, in an explanatory footnote, the framers limited defenses based on public order only to situations where sufficiently serious threats are posed to “fundamental interests of society.”⁶⁹ Aside from these slight elucidations, negotiators have not further articulated the meaning of the public morals clause through textual modifications.

Judicial clarification of the clause has also proven fruitless for nearly the entire sixty years since the clause’s inception. Although the relevant adjudicatory bodies⁷⁰ have created a vast amount of international trade law by deciding at least 200 disputes from 1948 to 1994,⁷¹ the court had not discussed the scope or meaning of the public morals clause during those years.⁷² Even in the WTO’s first ten years, a period of increased international trade litigation,⁷³ no court had discussed the scope or meaning of either the GATT or GATS public morals exceptions.⁷⁴

As Professor Mark Wu points out, though, the public morals clause’s continued ambiguity was not the result of states failing to take actions that could implicate the clause. In fact, “a number of countries enacted trade restrictions that they argued were in the interest of public morals . . . [f]or example, the United States, Canada, South Korea, Honduras, Israel, Nigeria, The Gambia, and several other countries banned the importation of pornography on moral grounds[,]” explains Wu.⁷⁵ Pornography restrictions, though, would likely not be subject to judicial challenge because there is generally worldwide consensus that pornography falls within the scope of public morals (assuming the restrictions are applied in accordance with the national treatment requirement of the chapeau). Indeed, more controversial trade restrictive measures have been enacted. For instance, Wu points out that the United States has banned products made by indentured child

⁶⁹ GATS, *supra* note 3, art. XIV(a) n.5.

⁷⁰ These bodies are the GATT panel prior to 1994 and the WTO Panel and Appellate Body since 1994.

⁷¹ Compare ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM (1993) (documenting 207 cases handled to date under the GATT regime) with JACKSON, *supra* note 26, at 120 (saying “it seems plausible that in some sense the GATT system has handled over 500 disputes since its inception”).

⁷² See HUDEC, *supra* note 71.

⁷³ For a chronological list and summary of each of these disputes, see *Chronological List of Disputes Cases*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tra_top_e/dispu_status_e.htm (last visited Dec. 30, 2009). The litigious period was marked by 324 disputes brought to the WTO by various nations.

⁷⁴ See Wu, *supra* note 1, at 222.

⁷⁵ *Id.* at 222-23.

labor;⁷⁶ Israel has banned importation of all non-Kosher meat products;⁷⁷ and Indonesia has placed restrictions on the importation of all alcohol.⁷⁸ In the indentured child labor situation, the United States was not seeking to safeguard the citizens of the United States from a physical perspective,⁷⁹ but rather protecting other countries' youth. In the Israeli and Indonesian cases, both countries' actions were based on religious concerns, despite the fact that public morals clause does not mention a religion-based exception to freedom of trade. Despite the possible controversy in invoking the exceptions, in none of these instances did another state challenge the religious restriction, leaving the public morals clause untested as a religious-based defense.⁸⁰

C. *A Breakthrough? The U.S.—Gambling Decision*

In the 2005 *U.S.—Gambling* case, a WTO Appellate Body finally provided some insight into the public morals clause. In March 2003, Antigua and Barbuda alleged that the United States violated the GATS' freedom of trade requirements in light of the U.S. ban on cross-border gambling and betting services—namely, with the United States' implementation of the U.S. federal Wire Act,⁸¹ the Travel Act,⁸² and the Illegal Gambling Business Act.⁸³ In its first oral argument, the United States argued that the ban on remote gambling was necessary.⁸⁴ It contended that the online

⁷⁶ Treasury and General Government Appropriations Act of 1998, Pub. L. No. 105-61, § 634, 111. Stat. 1272, 1316 (1997).

⁷⁷ WTO Secretariat, *Report of the WTO Secretariat on the Trade Policy Review of Israel*, ¶ 24, WT/TPR/S/58 (Aug. 13, 1999), available at http://docsonline.wto.org/GEN_highLightParent.asp?qu=%28+%40meta%5FTitle+Israel%29+and+%28+%28+%40meta%5FSymbol+WT%FCTPR%FCS%FC%2A+%29%29&doc=D%3A%2FDDFDDOCUMENTS%2FT%2FWT%2FTPR%2FS58%2D0%2EDOC%2EHTM&curdoc=3&popTitle=WT%2FTPR%2FS%2F58.

⁷⁸ WTO Secretariat, *Report on the Trade Policy Review of Indonesia*, ¶ 30, WT/TPR/S/184 (May 23, 2007), available at http://docsonline.wto.org/GEN_highLightParent.asp?qu=%28+%40meta%5FTitle+Indonesia%29+and+%28+%28+%40meta%5FSymbol+WT%FCTPR%FCS%FC%2A+%29%29&doc=D%3A%2FDDFDDOCUMENTS%2FT%2FWT%2FTPR%2FS184%2D00%2EDOC%2EHTM&curdoc=21&popTitle=WT%2FTPR%2FS%2F184.

⁷⁹ One could make the argument that the United States was seemingly protecting its citizenry from itself, in that many citizens would consider purchasing goods made by indentured children sinful, etc.

⁸⁰ See Wu, *supra* note 1, at 223.

⁸¹ See 18 U.S.C. § 1084 (2000).

⁸² See *id.* § 1952.

⁸³ See *id.* § 1955.

⁸⁴ See Executive Summary of the Second Written Submission of the United States,

gambling services posed increased threats for organized crime, money laundering, fraud and consumer crimes, public health by way of pathological gambling, and children and youth via underage gambling.⁸⁵ Antigua countered that the United States failed to submit evidence of organized crime in Antigua's gambling industry or evidence that Antigua had failed to cooperate with United States' criminal investigations and prosecutions.⁸⁶ Additionally, Antigua pointed to the existence of age verification technology that could prevent underage online gambling.⁸⁷ Antigua explained that such technology was less restrictive to international trade than a total prohibition that the United States had in place.⁸⁸ Therefore, Antigua contended that the U.S. ban did not constitute a "necessary" exception to its GATS commitments.

In November 2004, the WTO Dispute Panel handling the case defined a public moral as a "standard of right and wrong conduct maintained by or on behalf of a community or nation."⁸⁹ The Panel held, *inter alia*, that a restriction on gambling and betting services "could fall within the scope of Article XIV(a) if [it is] enforced in pursuance of policies, the object and purpose of which is to 'protect public morals' or 'to maintain public order.'"⁹⁰ However, the Panel ruled in favor of Antigua. It stated that "the United States has not been able to provisionally justify, under Article XIV(a) of the GATS, that the [restrictions] are necessary to protect public morals... within the meaning of Article XIV(a),"⁹¹ because it failed to exhaust "WTO-consistent alternatives" prior to adopting its total ban.⁹²

On appeal, the WTO Appellate Body reversed the Panel's holding that the three U.S. statutes were not "necessary" within the meaning of Article XIV(a) of the GATS.⁹³ The Appellate Body noted that the Panel only found that the U.S. restrictions

United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285 (Jan. 16, 2004), available at http://www.ustr.gov/webfm_send/794.

⁸⁵ *Id.* ¶¶ 22-23.

⁸⁶ *U.S.—Gambling*, *supra* note 9, ¶ 3.288.

⁸⁷ *Id.* ¶ 3.291.

⁸⁸ *Id.*

⁸⁹ *Id.* ¶ 6.465.

⁹⁰ *Id.* ¶ 6.474.

⁹¹ *U.S.—Gambling*, *supra* note 9, ¶ 6.535.

⁹² *Id.* ¶ 6.534.

⁹³ See Appellate Body Report, *United States—Measures Affecting The Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter *U.S.—Gambling AB Report*].

violated the GATS because the United States did not first consult with Antigua prior to instituting the challenged regulations.⁹⁴ Therefore, but for the United States' failure to consult, the United States would have satisfied the necessity prong, *prima facie*. The Appellate Body explained that a consultation with Antigua would not constitute a reasonably available measure to the United States.⁹⁵ Further, because Antigua failed to identify any such reasonably available alternative measure in the first place, the U.S. statutes were "necessary" and justified under Article XIV(a) of the GATS.⁹⁶

However, because the United States did not demonstrate that the statutes applied to both foreign *and* domestic suppliers of gambling and betting services, they were inconsistent with Article XIV's chapeau, which prohibits discrimination among foreign and domestic providers.⁹⁷ In other words, the United States' restriction violated the national treatment principle. As a result, the United States was able to establish that its restrictions were necessary for GATS purposes, but applied them in a discriminatory manner, such that they were found to violate the GATS. On appeal, the Panel's ruling that public morals are "standards of right and wrong conduct maintained by or on behalf of a community or nation," was not reviewed.

III. MOVING FORWARD: LESSONS FROM *U.S. — GAMBLING* AND APPLICATION TO *CHINA — AUDIOVISUAL*

A. *Public Morals Principles from U.S.—Gambling*

The dispute between the United States and Antigua is most important for its precedent in interpreting future public morals defenses. Three criterion set forth in *U.S.—Gambling*—namely the interpretive framework of a public morals defense, the necessity of a restriction, and application of the nondiscrimination clause—are of particular significance, and each are discussed in turn.

⁹⁴ *Id.*

⁹⁵ *Id.* ¶ 326.

⁹⁶ *Id.*

⁹⁷ *Id.* ¶¶ 370-72.

i. Provisional Justification

a. Public Morals and Dynamic Interpretation

In order for a country to successfully invoke a public morals exception defense under the GATS, the state must provide a “provisional justification.” To do so, the country must demonstrate that the measure: (i) is “designed to ‘protect public morals’ or to ‘maintain public order’”; and (ii) “[is] ‘necessary’ to protect public morals or to maintain public order.”⁹⁸ Regarding the first prong, WTO panels must assess whether the pertinent restrictions fall within the scope of Article XIV public morals or order by considering, for example, legislative reports and executive statements to determine whether such restrictions are designed to protect morals or order.⁹⁹ However, what is most important about the Panel’s holding in *U.S.—Gambling* is that the Panel interpreted “public morals” based on a dynamic, flexible approach. Presented with a choice of whether to interpret morals statically (adhering to the understanding of the GATT framers in 1947) or to interpret morals dynamically (allowing for the scope of morals to evolve and enlarge as new notions of public morality emerge with time), the Panel opted for the latter alternative.¹⁰⁰ It stated that public morals “can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values,”¹⁰¹ leaving open the possibility of a very relativistic approach to deciding morality disputes among WTO members.

b. Necessity of the Measure

The second prong of the provisional justification demands a more exacting analysis. The WTO Panel in *U.S.—Gambling* spent considerable time assessing this prong, and adopted the tripartite weighing and balancing framework laid out in the GATT cases of *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*¹⁰² (*Korea—Beef*) and *European Communities—Measures*

⁹⁸ *U.S.—Gambling*, *supra* note 9, ¶ 6.455.

⁹⁹ *Id.* ¶¶ 6.479-6.487.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* ¶ 6.461.

¹⁰² See Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R (Dec 11, 2000) [hereinafter *Korea—Beef*] (analyzing Korea’s defense of trade restrictions on foreign beef under a

*Affecting Asbestos and Asbestos-Containing Products*¹⁰³ (*EC—Asbestos*) for determining whether a measure is “necessary” under the GATS Article XIV. Consequently, WTO panels must weigh and balance:

(a) the importance of interests or values that the challenged measure is intended to protect[,] (b) the extent to which the challenged measure contributes to the realization of the end pursued by that measure[,] [and] (c) the trade impact of the challenged measure [including consideration of whether a reasonably available WTO-consistent alternative measure exists].¹⁰⁴

Part (c)—the showing of alternative trade measures—is perhaps the most important of the necessity prongs because of its burden-placement scheme. As stated above, the Appellate Body in *U.S.—Gambling* held that states need not first consult with other WTO members before adopting a trade restrictive measure.¹⁰⁵ Effectively, the Appellate Body eliminated a “consultations pre-condition,”¹⁰⁶ and clarified that the burden of proof falls on the complaining party to identify a reasonably available WTO-consistent alternative if said party disputes the necessity of the initial measure. The burden only shifts back to the defending party to justify its measure if an alternative measure is identified.

ii. Nondiscrimination Clause

The third aspect of *U.S.—Gambling* deserving clarification concerns the role that Article XIV’s chapeau played in a public morals analysis. In addition to the provisional justification discussed above, the state must satisfy the article’s chapeau by not applying the measure in a way “which would constitute a means of arbitrary or unjustifiable discrimination between countries.”¹⁰⁷ In guiding this determination, the chapeau restricts not only overtly discriminatory measures, but also facially nondiscriminatory

GATT Article XX(d) defense).

¹⁰³ See Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *EC—Asbestos*] (analyzing the European Communities’ defense of measures taken by European members banning asbestos and asbestos-containing products under a GATT Article XX(b) defense).

¹⁰⁴ *U.S.—Gambling*, *supra* note 9, ¶ 6.477.

¹⁰⁵ See *U.S.—Gambling* AB Report, *supra* note 93, ¶ 326.

¹⁰⁶ Wu, *supra* note 1, at 231.

¹⁰⁷ See GATS, *supra* note 3, art. XIV.

measures whose application creates a discriminatory effect, regardless of the restricting state's intent.¹⁰⁸ Furthermore, in contrast to the necessity analysis' burden-placement scheme, the defending state has the duty to demonstrate to the panel the nondiscriminatory nature of its restriction such that it meets the chapeau's requirements.¹⁰⁹

B. China—Audiovisual and Role of the Public Morals Principles

The *China—Audiovisual* case resulted from a Chinese decision that required importers to channel foreign publications and audiovisual products through state-run companies that censored goods deemed to be offensive to Chinese public morals.¹¹⁰ State companies were required to screen “publications such as books and newspapers, audio and video products including CDs, DVDs and games, and music downloading services.”¹¹¹ Specifically, the United States challenged the areas of China's import restrictions, China's distribution restrictions and China's failure to afford national treatment to imported materials.¹¹²

The role of GATT Article XX(a) in the dispute was most relevant to China's import restrictions. The United States claimed that China violated its WTO responsibilities under its Accession Protocol and Working Party Report,¹¹³ which detail China's trading rights commitments.¹¹⁴ The United States alleged that by “refus[ing] to permit any foreign enterprises or foreign individuals to import the Products, and likewise only allow[ing] a subset of enterprises in China—i.e. wholly state-owned Chinese enterprises approved or designated by the Chinese Government—to import

¹⁰⁸ See Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 165 & 172, WT/DS58/AB/R (Oct. 12, 1998).

¹⁰⁹ See *U.S.—Gambling* AB Report, *supra* note 93, ¶ 369.

¹¹⁰ See *China Appeals WTO Ruling on Books, Audio-visual Products*, BEIJINGREVIEW.COM.CN, http://www.bjreview.com.cn/World_Financial_Crisis/2009-09/22/content_219284.htm.

¹¹¹ *Id.*

¹¹² See *China—Audiovisual*, *supra* note 18, ¶ 2.3.

¹¹³ For the full text of China's and other countries' Accession Protocols and Working Party Reports, see *Protocols of Accession for New Members Since 1995, Including Commitments in Goods and Services*, WORLD TRADE ORGANIZATION (July 23, 2008), http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm. In the WTO, Accession Protocols and Working Party Reports are essentially documents detailing the commitments of the parties, very similar to a treaty.

¹¹⁴ See *China-Audiovisual*, *supra* note 18, ¶ 3.1. China's Accession Protocol and Working Party Report basically spells out China's rights and obligations of WTO membership.

the Products,” China violated such commitments.¹¹⁵ China countered that its system for selecting importation entities that are able to provide effective content review mechanisms for screening violence and pornography was necessary to protect the country’s morals.¹¹⁶ Thus, China claimed that limiting the import screening task to only state-run import companies was justified under Article XX(a)’s public morals exception and similarly justified under its Accession Protocol and Working Party Report.¹¹⁷

In its Second Written Submission to the WTO the United States discounted China’s public morals defense, arguing that China’s wholly state-owned importation entities were not necessary to protect China’s public morals within the meaning of Article XX(a).¹¹⁸ The United States posited that “reasonably available WTO-consistent alternative[s]” were available to China,¹¹⁹ stating that “foreign-invested enterprises could conduct the content review of reading materials, AVHE [audiovisual home entertainment] products, sound recordings and films for theatrical release, after developing the expertise to do so by training existing personnel or hiring experts as employees to conduct such review.”¹²⁰ China responded that given the high level of protection the state desired for its public morals, such strict regulation of imports was necessary within the meaning of Article XX(a).¹²¹ Furthermore, China rejected the U.S. argument that foreign enterprises conducting content review was a reasonably available WTO-consistent alternative because China feared that foreign entities would not fully comprehend the concept of Chinese morals.¹²² Moreover, China argued that because the entities would not be subject to China’s laws, the foreign enterprises could not properly be held liable for their failures to restrict offensive material.¹²³

On August 12, 2009, the Panel in *China—Audiovisual* issued the WTO’s first ever pronouncement on a GATT Article XX(a) public morals defense. After laying out the U.S. and Chinese arguments, the Panel announced that it would apply the before-

¹¹⁵ *See id.* ¶ 4.32.

¹¹⁶ *Id.* ¶¶ 4.113-4.120.

¹¹⁷ *Id.*

¹¹⁸ *Id.* ¶ 4.320.

¹¹⁹ *China-Audiovisual*, *supra* note 18, ¶ 4.320.

¹²⁰ *Id.*

¹²¹ *Id.* ¶¶ 4.439-4.450.

¹²² *See id.* ¶ 4.453.

¹²³ *See id.*

used two-tiered Article XX analysis to China's defense of its regulations—first, determining whether the restrictions are (i) designed to protect public morals and (ii) whether they are necessary to protect such public morals, and second, determining whether China's restrictions are in accordance with Article XX's chapeau.¹²⁴ In approaching the first two prongs of the provisional justification,¹²⁵ the Panel used the same public morals definition laid down in *U.S.—Gambling* and applied the same dynamically interpretive framework to it. The Panel explained that “[s]ince Article XX(a) uses the same concept as Article XIV(a), and since we see no reason to depart from the interpretation of ‘public morals’ developed by the Panel in *U.S.—Gambling*, we adopt the same interpretation for purposes of our Article XX(a) analysis.”¹²⁶ Subsequently, the Panel analyzed seven¹²⁷ of China's applicable measures for their nexus and fit to the protection of Chinese public morals, assuming that each of the measures prohibited audiovisual content that, if brought into China, could have a negative impact on Chinese public morals within the meaning of Article XX(a).¹²⁸

With regard to the third prong of the provisional justification—the necessity prong—the Panel again used the framework laid down collectively in *U.S.—Gambling* and *Korea—Beef*.¹²⁹ The Panel, though, summarized the process using the language from *Brazil—Measures Affecting Imports of Retreaded Tyres*¹³⁰ (*Brazil—Tyres*), a 2007 case involving an Article XX(b) health claim, but which nevertheless used the same necessity analysis, stating:

In order to determine whether a measure is “necessary” . . . a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and

¹²⁴ See *China-Audiovisual*, *supra* note 18, ¶ 7.746.

¹²⁵ These were (i) considering the importance of interests or values that the challenged measure is intended to protect; and (ii) the extent to which the challenged measure contributes to the realization of the end pursued by that measure.

¹²⁶ *China-Audiovisual*, *supra* note 18, ¶ 7.759.

¹²⁷ The seven measures were the Publications Regulation, Products Regulation, Products Importation Rule, Catalogue, Foreign Investments Regulation, Several Opinions, and the (Sub-) Distribution Rule. While the measures are not explicitly described in the Panel Report, they each act in conjunction either to limit the importation, distribution, or foreign investment in the disputed audiovisual goods.

¹²⁸ *China-Audiovisual*, *supra* note 18, ¶¶ 7.760-7.781.

¹²⁹ See *Korea—Beef*, *supra* note 102.

¹³⁰ See Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (Dec 3, 2007) [hereinafter *Brazil—Tyres*], available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm.

its trade restrictiveness. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective.¹³¹

After careful analysis,¹³² the Panel found that the U.S. proposal for foreign entities to conduct the content review process was both a genuine and reasonably available alternative to China, such that China's more trade restrictive measures were not "necessary" under Article XX(a).¹³³

On appeal, the Appellate Body found that the Panel's necessity analysis in determining China's public morals defense was correct, on the grounds that U.S. proposals for less restrictive trade measures were reasonably available.¹³⁴ Notably, the Appellate Body did not review the Panel's use of the *U.S.—Gambling* public morals analysis, implicitly giving its approval of such use.

IV. MOVING FORWARD—AMBIGUITIES LINGER

A. U.S.—Gambling *Uncertainties Remain*

The *U.S.—Gambling* decision introduced a number of questions about the GATS public morals doctrine. Because the *China—Audiovisual* Panel and Appellate Body applied the same inquisitive framework as *U.S.—Gambling* without differentiating the nature of the disputes, adjudicatory bodies using the GATT public morals analysis are left facing similar questions. Perhaps the most intriguing question in the wake of *U.S.—Gambling* and *China—Audiovisual* is: what authority decides what public morality is? On the one extreme, there is a unilateral approach, which allows a state to independently, domestically define its morals and adopt restrictions surrounding it. On the other extreme, there is an absolute universalism approach, which requires a state wishing to adopt a restrictive measure to show that the measure is based on a universally accepted idea of a public moral.¹³⁵ Even further complicating the determination is what

¹³¹ See *China—Audiovisual*, *supra* note 18, ¶ 7.786.

¹³² *Id.* ¶¶ 7.869–7.911.

¹³³ *Id.* ¶ 7.911.

¹³⁴ *China—Audiovisual* AB Report, *supra* note 22, ¶ 337.

¹³⁵ See, e.g., Jeremy C. Marwell, *Trade and Morality: The WTO Public Morals Exception After Gambling*, 81 N.Y.U. L. REV. 802, 820 (2006).

standard of review will be used to review those determinations, and who conducts such a review?

Another residual question is how much evidence is required by a WTO adjudicatory body to determine that the restricting state legitimately holds the purported public moral. Both *U.S.—Gambling* and *China—Audiovisual* held that the morals must be based on the “prevailing social, cultural, ethical, and religious values” of the state, implying that a long history of moral practice need not be shown to support the restriction based on public morality grounds.¹³⁶ However, an argument that morals can change on a daily basis is highly improbable, meaning that some concept of a reasonable period of time must be established when measuring a moral.

B. Proposals and Alternatives to the U.S.—Gambling and China—Audiovisual Frameworks

The following subsections will outline alternative approaches to the *U.S.—Gambling* and *China—Audiovisual* doctrines, detailing the advantages of each proposal as well as the shortcomings. In particular, this section will argue for an additional public morals criterion that will help battle non-state actors that create black-market goods which negatively impact the global economy. Most notably, there should be a demand that a WTO member state invoking an Article XX(a) public morals exception must show under prong (a) of the provisional justification a robust, broad-based, good-faith domestic legislative and *executive enforcement* effort at protecting the proposed public moral by targeting black markets.

i. Originalism

One form of statutory interpretation is reverting to an originalist perspective, which would constrain the definition of public morals to what was understood as a public moral at the signing of the GATT in 1947. Advocates of this approach argue that predictability of trade is at its highest only when the most restricted forms of public morality can be used as a defense of a trade restrictive measure.¹³⁷ They argue that when there is limited

¹³⁶ See *U.S.—Gambling*, *supra* note 9, ¶ 6.461 (emphasis added); see also *China—Audiovisual*, *supra* note 19, ¶ 7.763.

¹³⁷ See Miguel A. Gonzalez, *Trade and Morality: Preserving “Public Morals” Without Sacrificing the Global Economy*, 39 VAND. J. TRANSNAT’L L. 939, 970-971 (2006).

predictability due to open-ended meanings of statutory terms, free trade can never reach its optimum levels.¹³⁸ Such an approach would, at its most restrictive level, limit public morals defenses to restrictions on sex, drugs, alcohol, gambling, slavery, and animal torture, and at a more permissive level, bans on alcohol, narcotics, pornography, lottery tickets, firearms, blasphemous articles, products linked to animal cruelty, prize-fight films, and abortion-inducing drugs.¹³⁹

The complications with this approach are numerous. First, an originalist perspective is simply unsuited for the existing WTO framework because the restrictions of 1947 are neither sensitive, nor applicable to today's cultural norms.¹⁴⁰ Moreover, originalists would be hard-pressed to even identify a generally accepted understanding among the GATT framers regarding a moral because of the confusion among how defenses based on public morals related to Article XX's other exceptions. Even further, because of the possible intentional ambiguity of the framers in interpreting a "public moral," the originalist's endeavor to find a meaning would be fruitless because there was no original meaning at all. Second, reverting to originalism would fly in the face of existing GATT jurisprudence advocating a temporal and spatial relativity when approaching proposed restrictions. The language in *U.S.—Gambling* and *China—Audiovisual* is direct evidence of this deficiency¹⁴¹ and is perhaps most applicable to public morals, which necessarily evolve to match contemporary beliefs.¹⁴² Third, an originalist approach is highly insensitive to new WTO countries that are willing and able to participate in free trade, but whose public morals support restrictions on activities or products falling outside the originalist's aforementioned categories. Fourth, the emergence of new technologies that do not neatly fall into the originalist's categories, subsequently prompting new legal issues, makes originalism unworkable. For instance, consider a Chinese ban on U.S. imports of Apple's iPad. The iPad, *qua* technological gadget, hardly lends itself to restrictions based on public morality, but the iPad gives its user the ability to access pornographic

¹³⁸ *Id.*

¹³⁹ Compare Gonzalez, *supra* note 137, at 971 (taking an originalist stance on public morals clause interpretation), with Charnovitz, *supra* note 33, at 705-17 (describing the areas to which a public morals exception would apply).

¹⁴⁰ Wu, *supra* note 1, at 237.

¹⁴¹ See *U.S.—Gambling*, *supra* note 9, ¶ 6.461; *China—Audiovisual*, *supra* note 18, ¶ 7.759.

¹⁴² See Marwell, *supra* note 135.

material, gamble, etc., which would likely fall into an originalist's restrictive category. Thus, a new determination would need to be made under the originalist's framework as to whether items can be banned that may, but not necessarily, be used to circumvent a state's public morals restrictions.

ii. Universalism

A second alternative would be to adopt a universalist approach, which would require states to demonstrate universal or near-universal practice amongst other WTO Member States, showing that a given issue is related to morality. This approach, however, is problematic because of the nullifying effect it will likely have on the public morals clause. For instance, among today's international understanding of what may be regulated under a public morals analysis, only a very limited number of issues may be raised to support a trade restriction under a universalist framework. Among these issues are slavery, genocide, and torture. However, it is readily acknowledged that states' use of the public morals exception extends well beyond these concerns, such that if the WTO would employ a universalist approach, the exception would become useless.

Jeremy Marwell proposes a second strand of universalism. Marwell advocates what has been called "expansive unilateralism with evidentiary constraints."¹⁴³ Marwell argues for unilateral determination of public morals, but on the condition that the trade restrictive measures "be the least restrictive means of protecting the interest at stake and that it be applied in a nondiscriminatory fashion."¹⁴⁴ Additionally, Marwell demands that the state supply evidence to verify that the moral in question is indeed held by the public, such as public opinion polls or statements of religious leaders, but does not require that any multilateral institutions endorse the moral.¹⁴⁵

Wu points out that this approach is appealing for a number of reasons. First, it avoids the dilemma posed to strict universalism by allowing for the protection of a broader field of morals, such as labor and women's rights, and it is responsive to existing public morals jurisprudence. Second, it employs an academically-favored, least-restrictive means analysis, which attempts to provide

¹⁴³ Wu, *supra* note 1, at 238.

¹⁴⁴ Marwell, *supra* note 135, at 826.

¹⁴⁵ *Id.* at 824-25.

for optimum economic growth by not allowing overbroad protections to quell exports.¹⁴⁶ Third, it provides a non-discrimination clause so that states cannot sculpt restrictive measures to the detriment of specific exporting states.

However, upon closer inspection, the framework is deficient because it allows for too many situations that could permissibly undermine the global trade regime. For instance, Wu hypothesizes a situation in which Arab states propose a labeling requirement for all companies associated with states that are involved in the occupation of Iraq.¹⁴⁷ The requirement would mandate that companies include a sticker stating that “this product is made by a company that supports the Iraqi occupation.” With this hypothetical, it becomes clear that there are problems with Marwell’s proposal. First, the least restrictive means test is satisfied as the Arab countries are only imposing a labeling requirement, as opposed to an absolute ban. Second, it complies with the non-discrimination clause as the labeling requirement applies to all states. Third, the evidentiary requirement of public approval is fulfilled because of Arab opposition to the invasion of Iraq.¹⁴⁸ The restriction would also likely pass national treatment scrutiny as well because nothing exempts an Arab state’s own companies from the reporting requirement. However, the WTO would suffer a backlash from the likes of the United States and United Kingdom as those states’ exports would receive the disdain of the Arab population, essentially legalizing geopolitical agendas aimed at protectionism.¹⁴⁹

iii. Transnationalism

Another alternative would be to opt for a transnationalist approach. Under this approach, states retain the ability to unilaterally determine their public morals, similar to Marwell’s expansive universalist approach. However, transnationalism has two distinguishing features. First, it is grounded in the idea that certain moral norms are shared universally, as opposed to being state-specific.¹⁵⁰ Second, transnationalism’s evidentiary requirements are slightly more demanding because the state would

¹⁴⁶ Wu, *supra* note 1, at 238.

¹⁴⁷ *Id.* at 239.

¹⁴⁸ See *Where the World Stands on an Invasion of Iraq*, GLOBAL POLICY FORUM, (Jan. 12, 2003), <http://www.globalpolicy.org/component/content/article/167/35122.html>.

¹⁴⁹ Wu, *supra* note 1, at 239.

¹⁵⁰ *Id.* at 240.

need to demonstrate that the public moral is shared by a group of similarly situated countries—designated perhaps by dominant religion, similar geographic region, or similar governmental structure:¹⁵¹ “As justification, countries could point to international agreements that endorse the moral principle, or to national restrictions in other similar countries, or even to rulings by transnational bodies such as the International Court of Justice (ICJ) or the International Criminal Court (ICC).”¹⁵²

This approach is attractive because it would allow states with a strong commitment to the eradication of human rights violations or other international issues to enact legitimate trade restrictions against other states. Such states would also be forced to look beyond their own unilaterally created ideals and point to customary practices endorsed in treaties by the global community: “This approach would thereby link bodies of international law closer together and foster transnational norm-building.”¹⁵³

However, transnationalism falls prey to the same concerns of undermining the global trade regime that expansive unilateralism suffered from. Consider, for instance, a labeling requirement implemented by anti-death penalty states on grounds that the intentional killing of human beings, whether or not state-sponsored, offends the state’s public morals. The state disfavoring the death penalty may require pro-death penalty states to attach a label to its exports which states: “This product is manufactured by a company that resides in a state that endorses the death penalty.”¹⁵⁴ Like expansive unilateralism, the requirement would pass the least restrictive means and non-discrimination tests, because it is merely a labeling requirement and it is applied equally for all states. Further, it would satisfy transnationalism’s demands because the states with the requirement can point to numerous treaties, such as the International Covenant on Civil and Political Rights¹⁵⁵ that condemn the death penalty. However, this

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ While there may be a nexus problem here between whether the labeling requirement actually protects the restricting state’s morals, the nexus problem only arises for “inwardly-directed” measures, as theorized by Charnovitz. *See generally* Charnovitz, *supra* note 33. Requiring another state to attach a label hardly protects a state’s own inhabitants’ morals. However, regarding “outwardly-directed” measures, there is a direct nexus between the labeling requirement and the protection of the restricting state’s inhabitants’ morals.

¹⁵⁵ *See* International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171.

approach, again, would effectively exclude major trading states from the global trade regime because the United States, Japan, and China allow for death penalty sentences.¹⁵⁶ In this extreme case, the United Kingdom, for instance, would be able to effectively hinder these states' companies from fully benefitting from its markets. This is hardly a scenario the WTO would authorize because, again, it allows for geopolitical agendas to influence global trade and provides lawful avenues for protectionist regimes.

iv. Restriction-Sensitive Approaches

Another alternative public morals interpretation is proposed by Mark Wu, whereby different types of trade restrictive measures must satisfy different requirements in order to be deemed WTO-consistent.¹⁵⁷ Wu begins with what he calls Type I restrictions—restrictions that are directed at protecting the morals of domestic citizens.¹⁵⁸ The restrictions in *U.S.—Gambling* are Type I restrictions.¹⁵⁹ For these restrictions, he requires the WTO panel to first consider whether the measure concerns a moral that was originally understood by the GATT's drafters, such as gambling or pornography. However, because WTO panels have favored a dynamic interpretation of morals, Wu also suggests that if the measure does not fall within one of these initial categories, the panel should then consider whether the measure falls within a *jus cogens* norm or a category that is widely recognized as a moral issue.¹⁶⁰

Wu explains that if the measure passes public moral scrutiny, the “adjudicatory body should then proceed with the second and third parts of the test[, which] are the standard necessity and nondiscrimination tests, as applied to Article XX's general exceptions and incorporated into the public morals clause analysis by *U.S.—Gambling*” and *China—Audiovisual*.¹⁶¹

Wu then instructs that states would need to fulfill a fourth prong. He suggests that “only measures which are, in effect,

¹⁵⁶ See *Retentionist Countries*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries> (last visited March 29, 2011).

¹⁵⁷ Wu, *supra* note 1, at 243.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* A *jus cogens* norm is essentially a fundamental principle recognized by international law, such as the illegality of piracy on the high seas.

¹⁶¹ *Id.*

statutes passed through a legislative process, be allowed to qualify under the public morals exception.”¹⁶² He explains that this requirement would avoid a “strongman” problem in that it would not allow a single act such as an executive order or decree to impose moral regulations, and that it would promote transparency around the motive for the restriction.¹⁶³

Wu then explains what he calls Type II and Type III restrictions. Type II restrictions are ones that are “linked to the protection of those directly involved in the production of the product or service in the exporting state” such as restrictions against products produced by child labor.¹⁶⁴ Type III restrictions “are those aimed at products or services produced in an exporting state whose practices are considered morally offensive by the importing state, but where the practices are not directly involved in the production of the products or service being banned.”¹⁶⁵ Restrictions that are aimed at goods produced in Sudan during the genocidal conditions are examples of Type III products.¹⁶⁶ For Type II and III restrictions, Wu proposes three additional steps to satisfy the WTO panel. First, he requires that the state provide direct proof that its citizenry strongly values the public moral, whether through direct public referenda or opinion polls.¹⁶⁷ Second, the moral norm in question must be codified by an international organization or treaty, explicitly endorsed by WTO members.¹⁶⁸ Presumably, a country opposing the death penalty could cite its membership in the International Covenant on Civil and Political Rights¹⁶⁹ to support a restriction against pro-death penalty states, as stated above. And third, the state “must demonstrate that any outward-oriented restriction is directed against countries that have already explicitly embraced this norm.”¹⁷⁰ In other words, State A may not enact public morals restrictions that prevent State B from exporting goods to State A, if State B has not agreed to accept the norm under which the public morals are asserted. This requirement appears to avoid unilateralist measures.

¹⁶² Wu, *supra* note 1, at 243.

¹⁶³ *Id.* at 244.

¹⁶⁴ *Id.* at 235.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Wu, *supra* note 1, at 245.

¹⁶⁸ *Id.*

¹⁶⁹ See International Covenant on Civil and Political Rights, *supra* note 155.

¹⁷⁰ Wu, *supra* note 1, at 246.

Wu's restriction-sensitive approaches are a commendable attempt to distinguish between "inward-directed" measures—Type I restrictions—and "outward-directed" measures—Type II and Type III restrictions—and thereafter formulate requirements according to each type's necessities. His approaches are also well constructed for his requirement scheme, in that his Type I requirements consider originalists' demands for predictability, but also account for the dynamic interpretation that recent WTO panels have embraced. Further, his Type I requirement that there be a legislative statute to evidence a public moral, as opposed to an executive decree, is also forward-thinking in that it prevents geopolitical differences, in the forms of individual religious edicts and demagoguery, from undermining the global trade regime.

Wu's Type II and III restrictions strive to ensure freedom of trade by preventing states from implementing restrictions on other states for not joining a specific organization or treaty—a common political concern—and also stop unilateralist measures from being enacted under the guise of a commitment to an international agreement. Further, adherence to treaty requirements is normatively fair because states can then form reasonable expectations for trading partners that another state will abide by its agreements.¹⁷¹ These improvements upon the transnationalist approach seem well-suited for international trade because they address the death penalty problem mentioned above. Trading partners of the United States, Japan and China would no longer be able to enact restrictions against these trading giants because none of them has agreed to stop using the death penalty as a punitive component of its criminal justice system.

However, Wu's requirements still suffer from a major flaw. Notably, his Type I restrictions suffer at a conceptual level and lend themselves to Type II and Type III restriction analysis. Type I restrictions apparently purport to look first at the imported good to make a moral judgment, while Type II and III restrictions look first not at the good, but rather the exporting country's means of production, or general actions, to make a moral judgment. What this distinction fails to address is that calling a restriction inwardly-oriented is simply an issue-framing exercise. While the intent may actually be to stop the restricting state's citizenry from being exposed to pornography, the state still cannot escape the

¹⁷¹ *Id.*

reciprocating effect it has on the exporting state, namely that the protecting state is projecting its morals on the exporting state by refusing to accept its exports. In other words, Wu's distinction fails in that it simply looks at the *intent* of the restriction, but does not fully address the restriction's *effects*, from both an economic perspective and a morals perspective. While the intent to protect domestic morals of the restricting state is accounted for intentionally, the restriction's effects are accounted for *necessarily*. Alternatively, Type II and Type III restrictions, at the outset, intend both to communicate the restricting state's stance on the exporting state's morals (albeit by reference to its own domestic morals), as well as to affect that exporting state's morals. Thus, Type I restrictions look much more akin to Type II and III restrictions. As a result of the failed distinction, constructing different requirements for a showing of genuine moral condemnation based on these easily kaleidoscopic Type I, II, and III restrictions is inappropriate, or at least misguided.

V. NON-STATE ACTORS BENEFITTING STATES—A PROBLEM AND SOLUTION

A. *The Black Market Problem*

As a result of restrictions lending themselves to similar analysis despite the nomenclature, it appears that one framework for adjudicating a public morals defense is appropriate. Wu's calls for more substantiation of a state's claimed morals prior to giving effect to the defense, though, is still an appropriate line of thought. However, his demand for legislative evidence, i.e. a legislatively passed statute, of a claimed moral still faces a large problem: how should the WTO address states that benefit from non-state actors and black markets that illegally circumvent trade agreements such as the GATT?

The amount in dollars of black market goods supplied around the world is more than substantial. For instance, in 2008, an estimated \$18.2 billion was made on the motion picture piracy market.¹⁷² In Singapore alone, approximately 350,000 illegal movie downloads are performed monthly.¹⁷³ The music download

¹⁷² *Havoscope Black Markets Products Index Total*, HAVOSCOPE, <http://www.havoscope.com/indexes/products/> (last visited Mar. 30, 2011).

¹⁷³ Konrad Foo, *S'pore Mulls 'Three-Strikes' Law Against Piracy*, ZDNET ASIA (AUG. 19, 2009), <http://www.zdnetasia.com/news/business/0,39044229,62057025,00.htm>.

industry also suffers significantly with an estimated \$12.5 billion lost to global music piracy each year.¹⁷⁴ In China, one of the largest copyright infringers, nearly ninety percent of downloaded songs are illegal.¹⁷⁵ Perhaps even more indicative of the negative impact of prevalence of black market goods is the number of jobs and amount of forgone tax revenue lost to the piracy market. According to the U.S. Customs and Border Protection, 750,000 U.S. jobs have been lost due to international theft of intellectual property.¹⁷⁶ In the music industry alone, global piracy causes “71,060 U.S. jobs lost, a loss of \$2.7 billion in workers’ earnings, and a loss of \$422 million in tax revenues, \$291 million in personal income tax and \$131 million in lost corporate income and production taxes.”¹⁷⁷

These statistics clearly present a problem for proponents of intellectual property rights. However, with respect to GATT Article XX(a)’s protection of public morals, they are similarly a problem for international trade theorists. The problem is that the determination of whether the restricting state truly embraces the public moral is overwhelmingly relativistic, such that hollow legislation can serve to provide evidence of an alleged moral that, in reality, fails to exist. Mark Wu’s proposed solution is evidence of these deficiencies. Regarding Type I restrictions, a Chinese ban on importation of pornographic materials could easily satisfy his requirements. First, a pornography ban would satisfy Wu’s demand for a showing of a legitimate moral concern because it was likely contemplated by the GATT framers.¹⁷⁸ Second, by allowing foreign-enterprises to enforce the content-review mechanism¹⁷⁹ against imports from all states prior to the goods being dispersed throughout the country, the ban would also meet Wu’s second and third requirements—necessity and nondiscrimination. Third,

¹⁷⁴ *Piracy: Online and on the Street*, RECORDING INDUS. ASS’N OF AMERICA, <http://www.riaa.com/physicalpiracy.php> (last visited Mar. 30, 2011).

¹⁷⁵ Daniel Castro, Richard Bennett & Scott Andes, *Steal These Policies: Strategies for Reducing Digital Piracy*, THE INFO. TECH. & INNOVATION FOUND. (Dec. 2009), <http://www.itif.org/files/2009-digital-piracy.pdf>.

¹⁷⁶ James Bacchus, *China In the Dock*, FORBES (AUG. 13, 2009), <http://www.forbes.com/2009/08/13/china-united-states-wto-copyright-dvd-counterfeit-opinions-contributors-james-bacchus.html>.

¹⁷⁷ RECORDING INDUS. ASS’N OF AMERICA, *supra* note 174.

¹⁷⁸ See Gonzalez, *supra* note 137, at 971.

¹⁷⁹ Allowing foreign enterprises to review the content of imported material would meet the necessity requirement as laid out by the WTO Panel in *China—Audiovisual*, because it is a reasonably available WTO-consistent alternative to only permitting Chinese companies to perform the reviews. See *China—Audiovisual*, *supra* note 18, ¶ 7.911.

China already has a ban in place against pornographic material that has been enacted by the legislature, and not by a “strongman.”¹⁸⁰ Thus, absent consideration of black markets, the Chinese ban would stand under Wu’s restrictions. However, considering that the pornography industry generated \$27 billion in revenue in China in 2006,¹⁸¹ it is difficult to reconcile the validity of the ban against importation of pornographic goods with the instant revenue statistic.

To provide a United States-centered example of how Wu’s requirements are insufficient, consider the United States’ prohibition on alcohol from 1920 to 1933.¹⁸² Because the subject of the ban is alcohol, it meets Wu’s showing that it be a legitimate public moral concern. It would also meet the necessity and non-discrimination tests because the ban is applied to all foreign states and need not only be enforced by U.S. Customs, but rather a foreign enterprise. Third, the ban would easily avoid the “strongman” problem because three-fourths of state legislatures must have ratified the ban, as it became embodied in a U.S. Amendment.¹⁸³ However, as the black markets evolved to law enforcement strategies during the prohibition era, and because demand for alcohol as well as prices and consumption increased dramatically during the prohibition years,¹⁸⁴ Wu’s proposed ban would effectively be shielding out foreign alcohol while allowing internal domestic black markets to flourish.

¹⁸⁰ Christopher Beam, *They Know It When They See It*, SLATE (June 24, 2009), <http://www.slate.com/id/2221026/>; *China Bans 16,000 More Websites for Containing Pornography Content*, THE ECON. TIMES (Feb. 12, 2010), <http://economictimes.indiatimes.com/infotech/internet/China-bans-16000-more-websites-for-containing-pornography-content/articleshow/5564898.cms>; Tim Richardson, *China Terminates 700 Sites in Porn Crackdown*, THE REGISTER (AUG. 2, 2004), http://www.theregister.co.uk/2004/08/02/china_porn_crackdown/.

¹⁸¹ Jerry Ropelato, *Top 10 Internet Pornography Statistics*, TOPTENREVIEWS, <http://internet-filter-review.toptenreviews.com/internet-pornography-statistics-pg2.html>.

¹⁸² Compare U.S. CONST. amend. XVIII (making illegal the manufacture, sale and distribution of alcoholic beverages) with U.S. CONST. amend. XXI (repealing the Eighteenth Amendment).

¹⁸³ See U.S. CONST. art. V.

¹⁸⁴ See James Roumasset & Min Min Thaw, *The Economics of Prohibition: Price, Consumption and Enforcement Expenditures During Alcohol Prohibition*, <http://www.hawaiireporter.com/file.aspx?Guid=cf0541b8-adda-4c54-ab20-f72fe6f9a3aa> (last visited Feb. 27, 2010).

B. A Solution—Requirement of Inquiry into Internal Legislation and Executive Enforcement

Mark Wu's frameworks for moral restriction criteria are the best solutions offered thus far for the reasons stated in Part IV(B)(iv), despite their unintended fluidity. However, his requirements still breed inconsistencies with GATT regulation when accounting for black markets, as mentioned above. Therefore, this Note argues, first, for an amendment to Wu's fourth requirement for his Type I restrictions.¹⁸⁵ Going forward, future GATT adjudicatory bodies should first inquire into the substance of the internal legislation of the enacting government, and not simply demand evidence of legislation. In particular, the bodies should require that the proposed legislation consist of a broad-based, robust, good-faith legislative effort aimed at combating and preventing black markets or otherwise counterfeit goods manufacture within the country before allowing the state's ban to stand.¹⁸⁶ A positive endorsement of a moral supported by toothless legislation, in other words, should not be enough. A stout effort at attacking elements that undercut the moral should also be demanded.

Second, this Note argues that to complement the legislative demands set forth above, an executive enforcement component should also be demanded from restricting states. The executive enforcement requirement would guarantee that the legislation is actually being implemented, responding to the U.S.'s alcohol prohibition problem mentioned above.¹⁸⁷ To satisfy the requirement, states would simply need to supply, for example,

¹⁸⁵ This is the requirement that "only measures which are, in effect, statutes passed through a legislative process, be allowed to qualify under the public morals exception." Wu, *supra* note 1, at 243.

¹⁸⁶ One potential legislative effort would be Italy's end-consumer laws that impose an administrative fine of up to 10,000 euros for purchasing or accepting a product without ascertaining its legitimate origin, due to its quality, terms of sale, or the price offered. See ORGANISATION FOR ECON. CO-OPERATION AND DEV., THE ECONOMIC IMPACT OF COUNTERFEITING AND PIRACY 238 (2008); D. Law 14 Marzo 2005, n.80, in G.U. Marzo 2005, n/111 (It.). In addition, the legislation supporting the claimed public moral will ideally be present in the restricting country for an amount of time long enough to satisfy the dynamic interpretation method used in *U.S.—Gambling* and *China—Audiovisual's* panels.

¹⁸⁷ This is not to say that either China in the instant case, or the United States during the prohibition years, would fail to meet either of these requirements, such that they could not use an Article XX(a) defense for a morality restriction. Rather, the legislative and executive requirements are steps forward ensuring that loopholes in public morality jurisprudence are closed, as demonstrated by the Chinese and United States examples.

police reports, agency reports, reports showing conviction rates per arrest, etc., or other executive materials demonstrating a good-faith prosecutorial attempt at reducing the illegal activity in question, using a very liberal approach to the requirement.

These requirements would satisfy a number of international parties and commentators. First, originalists will be satisfied because the proposed requirements do not affect the *types or categories* of restrictions that states can enforce. The restrictions only affect *when* states can employ the categorical restrictions. Also, the requirements allow for dynamic interpretation¹⁸⁸ that past WTO panels have embraced and states have grown accustomed to when enacting restrictions, allowing for predictability.

Second, the requirements should appeal to universalists as they can only work to break down a state's idiosyncratic trade barriers that are not fully supported by the restricting state. This would likely have the effect of WTO panels recognizing fewer and fewer public morals that are not universally shared by lessening the amount of deference to state morals in the current public morals framework.

¹⁸⁸ It is necessary to explain the compatibility of dynamic interpretation with originalism. Originalism applies to the categories of restrictions upon which a country chooses to rest its public morals restriction. For instance, Country X may choose to outlaw pornography (a category) under originalism because the restricting country claims that pornography runs contrary to its public moral of chastity until marriage, and a pornography ban was contemplated by the GATT framers. The dynamic interpretation that the Panels used in *U.S.—Gambling* and *China—Audiovisual*, though, is only applied to whether the country indeed holds the moral to justify the categorical restriction. For instance, applying dynamic interpretation to the above example, a WTO Panel would not have to determine whether Country X has outlawed pornography in the past, but rather whether Country X actually holds the public moral of chastity until marriage to support the outlawing of pornography. To illustrate with a hypothetical, imagine that the United States had never outlawed cocaine and had high levels of domestic production and consumption of the drug. Further, because of the United States' favorable climate, it was the only country that could economically produce cocaine. However, in the past year, Mexican companies developed a technology that can be used to produce cocaine at very efficient rates, and Mexico began exporting cocaine in large quantities to the United States. In response, the United States passes a law outlawing the production, sale, distribution and consumption of cocaine, on grounds that the drug detracted from the moral foundation of the family unit. From an originalist perspective, this restriction is acceptable as drug restrictions were contemplated by the GATT framers. At the same time, a dynamic interpretation of U.S. morals could also support the restriction, if the Panel finds that the United States actually holds the moral. (Here, it may be questionable whether the United States held the moral because until this year, the United States had not expressed concern over cocaine.) The originalist's categories are not affected by the morals analysis. Dynamic interpretation just affects whether a country can cite a moral concern that could trigger a categorical restriction.

Third, transnationalists' concerns are addressed because the requirements still permit similarly situated countries, when defending their own legislative efforts, to make reference to the others' legislation and executive efforts aimed at combating black markets as evidence of good faith. In other words, State A can point to State B's laws and enforcement of such laws as evidence of robust, effective legislation aimed at targeting black market goods, such that State A's acts constitute a good-faith legislative and executive effort. The requirements also have the tendency to strike down highly relativistic claims, which concern both transnationalists and universalists.

Fourth, the requirements may help spur a new influx of goods into countries that previously had a public morals façade in place. Thus, the international trading community will be able to reap the benefits of forgone revenue that was lost to black markets. Not only will tax revenues and profits from trade increase, but many jobs will be restored as well.¹⁸⁹

Fifth, although indirectly, in the country whose restriction was struck down with the new requirements, working conditions should improve, wages and benefits should increase, and crime should decrease with the legislative and executive requirements because the illicit manufacturers will have to compete legitimately with recognized state and foreign actors.¹⁹⁰

Lastly, states that are legitimately attempting to stop black markets that are flourishing within their borders would not be forced to open their ports to more goods that contain material offensive to public morals. An acute concern with the black market legislative and executive enforcement requirements is that a state that truly holds a public moral, but which is losing a battle with black market suppliers within the state, would be compelled to receive exports that contain more of the morally offensive material that it was attempting to battle in the first place. This would essentially lead to annihilation of the moral in the name of freedom of trade, which would cause an undue balance of trade concerns. Because the proposed requirements only demand a "good faith" effort, albeit a robust effort, future WTO panels have some latitude in deciding whether a restriction should pass GATT Article XX(a) muster despite the presence of black markets, and

¹⁸⁹ In the United States, an estimated 750,000 jobs are lost due to counterfeiting. See *The Truth About Counterfeiting: Get Real*, THE INT'L ANTICOUNTERFEITING COALITION, <http://iacc.org/about-counterfeiting/> (last visited Mar. 30, 2011).

¹⁹⁰ See *id.*

thus, the panels can accommodate struggling states.

VI. CONCLUSION

After nearly sixty years of ambiguity hovering around the role of public morals in international trade, the WTO spoke and delivered a definitive answer that states would be granted deference in defending their moral stance. While the advantage to this approach is the preservation of diverse cultures, customs, languages, religions, etc., the potential damage that it could have on international trade is sufficient to call for a reexamination of the public morals doctrine. In particular, the substantive aims that the GATT and GATS agreements center around should have demanded more attention from the WTO Panel and Appellate Body in *China—Audiovisual*.

Going forward, WTO panels should amend their analysis to demand more exacting scrutiny into the state's internal legislation and executive efforts. The panels should be advised that in assessing a restrictive measure that is based on an alleged public moral, the substantive inquiry into both the type of domestic legislation that the enacting state has adopted to protect the moral, as well as its prosecutorial enforcement efforts of such legislation, should focus particularly on the state's enforcement mechanisms aimed at combating black markets and counterfeit goods. Such an approach would allay the fears of cultural relativists who argue that demanding universal acceptance of a moral before it can support a trade restriction would lead to moral absolutism¹⁹¹ and destruction of world cultures. At the same time, the requirements would also defend against protectionist regimes that conveniently overlook that black markets in consumer goods are thriving within the state, so much so that allowing foreign exports into its ports is unnecessary. In other words, they would give the public morals analysis more teeth. Furthermore, the amount of trade profits and tax revenues that could be reclaimed and the number of unemployed put back to work are only further evidence of the attractiveness of the requirement. Considering that trading giants China and the United States have tense years of trading ahead of them,¹⁹² it is appropriate that WTO panels correct the deficiency in

¹⁹¹ Moral absolutism is the belief or theory that there are absolute standards against which moral questions can be judged and suggests that morals are not determined by societal or situational influences. See *Moral Absolutism*, ECONOMICEXPERT.COM, <http://www.economicexpert.com/a/Moral:absolutism.html> (last visited Mar. 30, 2011).

¹⁹² See Kenneth Lieberthal, *Around the Halls: The State of the Union and Foreign*

its early stages.