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PUBLIC MORAL EXCEPTION UNDER GATT: TRADITIONAL AND NEW APPROACHES

Abstract

The World Trade Organization (WTO) regulates the trade between states. The WTO is a treaty-based trade regime with Member States currently representing some ninety-five percent (by value) of all international trade. The WTO contains a number of core agreements including GATT, GATS and side agreements on other matters such as sanitary and phytosanitary measures and technical barriers to trade. The Article discusses interpretation of moral exceptions clause. The "public morals" clause, which appears in both GATT and GATS, formulates one of the general exceptions to the basic obligation of trade liberalization contained in those agreements. Several trends suggest that the public morals exception will play an increasingly important role in international trade relationships within and outside of the WTO.

Annotasiya

Ümumdünya Ticarət Təşkilatı dövlətlərarası ticarəti tənzimləməkdədir. ÜTT bütün beynəlxalq ticarətin doxsan beş faizini təşkil edən ticarət rejimli üzv dövlətlər arasında bağlanmış müqavilə əsasında formalaşmışdır. ÜTT bir neçə əsas müqavilələri ehtiva edir ki, buraya GATT, GATS və digər məsələlər üzrə sanitar və fitosanitar tədbirlər, ticarətə texniki maneələr daxil olmaqla tərəfdaşlıq sazişləri də daxildir. Məqalədə GATT-ın ümumi ictimai dəyərlərlə bağlı istisnaları araşdırılmışdır. Bu istisnaların yaranma səbəbləri, onların tarixi və şərhi verilmiş, eyni zamanda konkret məhkəmə təcrübələri əsasında yazılmışdır. Həm GATT, həm də GATS-də təsbit olunmuş "ictimai dəyər" maddəsi bu sazişlərdə olan ticarətin liberallaşdırılması əsas öhdəliyinə bir sıra ümumi istisnalardan biridir. Bir çox araşdırmalar göstərir ki, ictimai dəyər istisnası ÜTT çərçivəsində və xaricində beynəlxalq ticarət əlaqələrində getdikcə daha vacib rol oynayacaqdır.

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Introduction

The last rise of the number of public moral exception disputes depicts that this brand new trend will play an important role in forthcoming trade agreements. Accordingly, there are several reasons which support this point. Firstly, the increased heterogeneity of the WTO, combined with the growing economic importance of foreign trade to Member States, may increase the frequency of trade-morality disputes.[1] In contrast to the twenty-three members of the original 1947 GATT, the modern WTO consists of 164 member states which represent a diverse variety of religious, cultural, ethnic, and social backgrounds. A second reason to expect increasing use of the public morals exception is a tightening of the WTO regime governing environmental, human health, and other regulations.[2] Besides both stated reasons, technological development requires the advent of new trends that blur the line between health, environment and public moral. For instance, since 1998, the European Union (EU) has maintained a ban on beef treated with growth hormones despite an Appellate Body ruling that this measure violates the SPS Agreement.[3] However, the EU has refused to change its regime and the base for this opposition stems from a desire to preserve traditional European methods of farming and food production[4] against the

[1] Jeremy C. Marwell, *Trade and Morality: The WTO Public Morals Exception after Gambling*, 81 New York University Law Review 802, 808 (2006).
[2] *Id.*, 809.
[3] *Id.* 810.
[4] Mark A. Pollack & Gregory C. Shaffer, *Biotechnology: The Next Transatlantic Trade War?*, 23 The Washington Quarterly 41, 43 (2000).

spread of recent large-scale commercial farming techniques, interests. which could conceivably be cast as matters of public morality. [5] As a result, considering all relevant reasons for importance of public moral exception, it is essential to review the legal meaning, defects of its application and new approaches to this trend. Before applying all these practical issues, it is necessary to dig into the interpretation of public moral exception of GATT with diverse tools of interpretation.

I. Interpretation of moral exception clause

There are five basic sources for interpretation of public moral exception under GATT:

A. History of moral exception clause

The history of any norm is essential for determining the intent of parties that incorporated it into any bilateral or international agreements. Thus we can find out the planned use of this norm and moreover apply to this history in any contradiction about that norm. For public moral exception this is complicated and the reason is that it remains unclear whether there was widely applied public moral exception before 1927. However, incorporation of this exception into agreements goes approximately to the early years of XIX century.

Anti-slavery treaties were the first global regime to prohibit trade for moral reasons. [6] The treaty of 1881 between Madagascar and the United States declares that commerce between the people of the two countries "shall be perfectly free,"[7] although it permits the Malagasy government to ban imports "tending to the injury of the health or morals of Her Majesty's subjects ...."[8] The term "public morals" was used as early as 1919 in the Protection of Minorities Treaty. [9] Then in 1925, a multilateral Convention for the Suppression of Contraband Traffic in Liquor was signed.[10] Noting that this traffic "constitutes a danger for public morals," the parties agreed to prohibit vessels weighing less than 100 tons to export alcoholic liquors.[11]

Genoa Conference was the first step for defining a moral exception as an international trade rule in 1922. The agreement stated that certain exceptions must be anticipated, such as measures for "the safeguarding of public health,

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[5] Marwell, *supra* note 1, 810.
[6] Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 International Organization 479, 491 (1990).
[7] Treaty of Peace, Friendship, and Commerce, U.S.-Madag., art. IV (1), May 13, 1881, 22 Stat. 952, 955.
[8] *Id.* Article IV (9), 956. The treaty does not accord the same exception to the U.S. government.
[9] Treaty between the Allied and Associated Powers and Poland (Protection of Minorities), June 28, 1919, reprinted in 1 International Legislation, A Collection of the Texts of Multipartite International Instruments of General Interest 283, 287, art. 2.
[10] Convention for the Suppression of the Contraband Traffic in Alcoholic Liquors, Aug. 19, 1925, 42 LNTS.75.
[11] *Id.* Preamble, art. 2.

morals or security." The conference did not adopt the agreement however. One year later, another international conference was more successful in attaining agreement for the first international trade treaty. This was the International Convention Relating to the Simplification of Customs Formalities.[12] The protocol of the convention declared that the obligations of the convention "do not in any way affect those which they [i.e., parties] have contracted or may in future contract under international treaties or agreements relating to the preservation of the health of human beings, animals or plants (particularly the International Opium Convention), the protection of public morals or international security"[13] and that was the first general multilateral trade agreement on public moral exception.

However, in comparison with the other previous treaties only the liquor treaties explicitly mentioned "moral consequences" or "public morals," on the other hand it seems undisputed that the international lawmaking considers slavery, firearms, opium, pornography, and animal cruelty as the traditional scope of public moral exception.[14]

Consequently, coming to the history of article XX of GATT there is very little legislative history. The U.S. government wrote the first outline of the ITO Charter in December 1945. That outline included a list of exceptions; the first exception was for measures "necessary to protect public morals". [15] In September 1946, the U.S. government issued a "Suggested Charter" which contained an identical exception. At the preparatory meeting in London in November 1946, the minutes show that "it was generally recognized that there must be General Exceptions such as those usually included in commercial treaties, to protect public health, morals, etc." In early 1947, a drafting committee meeting in New York considered the General Exceptions and agreed to the language on public morals contained in the Suggested Charter.[16] During the preparatory meeting of the Drafting Committee held in New York in 1947, a Norwegian Delegate elucidated that their country's restriction on importation, production and sale of alcoholic beverages were sheltered under the exception on public morals and health.[17] The innovation is the inclusion of a chapeau which corresponds, more or less, to the current chapeau of Art. XX GATT. In the Geneva session later that year, the

[12] International Convention Relating to the Simplification of Customs Formalities, Nov. 3, 1923, 30 U. N. T. S. 371.

[13] *Id.* 409.

[14] S. Charnovitz, *The Moral Exception in Trade Policy*, 38 Virginia Journal of International Law 689, 700 (1998).

[15] *Id.* 697.

[16] Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, U.N. ESCOR, U.N. Doc. E/PC/T/34, 31 (Mar. 5, 1947).

[17] Tyler M. Smith, *Much Needed Reform in the Realm of Public Morals: A Proposed Addition to The GATT Article XX (A) "Public Morals" Framework, Resulting from China Audio Visual*, 19 CARDOZO J. OF INT"L & COMP. LAW 733, 741-745 (2011).

negotiators accepted the New York language on "public morals." [18] This language was put into the GATT and into the final ITO Charter (or Havana Charter). Therefore, while GATT negotiators based their drafting on provisions of prior treaties with public moral exception, it would seem reasonable to consider such treaties as "preparatory work" usable as a supplementary means of GATT interpretation.

B. Ordinary meaning of public moral expression

In order to determine the exact meaning of public moral expression we should separately analyze the meanings of public, moral and public moral as a whole.

The word "public" is needed for the legal interpretation of the GATT Article XX(a) general exception. According to the Shorter Oxford English Dictionary, this word may be interpreted as adjective and noun. As an adjective, its first meaning is "of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation." In its sixth section, the dictionary makes the following reference: "of or pertaining to the international community" and adds "of or common to the whole human race". Thus "public" means "something belongs to whole community, publicity or group of people".

However, the word "moral" is a very complex one. It can be both a noun and an adjective as the previous word. The Shorter Oxford English Dictionary explains its various meanings. According to this dictionary, the noun "moral" refers, among other things, to "moral habits, conduct, or (formerly) qualities; habits of life with regard to right or wrong conduct; especially sexual conduct; without qualification, good or right habits or conduct".[19]

Moreover, the adjective "moral" may be interpreted in three ways according to The Shorter Oxford English Dictionary. Its first meaning is (a) "Of or pertaining to the human character or behavior considered as good or bad; of or pertaining to the distinction between right and wrong, or good and evil, in relation to the actions, volitions, or character of responsible beings; ethical; (of knowledge, judgments, etc.) pertaining to the nature and application to this distinction. (b) Of a feeling: arising from the contemplation of something as good or bad. (c) Of a concept or term: involving ethical praise or blame."[20]

C. Scholars' interpretation on public moral expression

It is evident that well-known GATT and GATS researchers' interpretations are crucial in order to determine the main meaning of any expression as well as public moral.

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[18] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, U.N. ESCOR, U.N. Doc. E/PC/T/A/PV/25, 18-21 (1947).
[19] John Kendall, Shorter Oxford English Dictionary on historical principles, 1834-1835 (6th ed. 2007).
[20] *Ibid.*

First of all Wu, defines two approaches regarding to public morals: On the one hand, "public morals" include those moral principles that are universal or widely shared by all humankind and on the other hand each state can unilaterally define its own public morals.[21] In first case there are a handful of moral principles widely recognized in the international community such as; prohibitions against genocide, slavery or execution of mentally retarded.[22] For the second one as an example some Muslim countries banned the importation of alcohol based on the public moral; however, abstention from alcohol consumption is hardly a moral that is universally recognized, though it is shared among Muslim societies.[23]

According to Maxwell, it is far more difficult to draw substantive boundaries around the term "public morals" based on commonly accepted objective evidence.[24] Measures related to a core of near-universal human moral values can probably be identified, such as prohibitions on murder, genocide, slavery, and torture, though the precise content of such norms and even the extent of consensus on such issues is probably debatable.[25] Charnovitz as well-known researcher of this field interpreted the public moral as mostly related to trade in pornography, gambling, alcohol, and illegal drugs,[26] which is undisputable among approximately all commentators according to the survey of multilateral and unilateral agreements before GATT.

D. Interpretations of Panel and AB

Panel and AB have defined in their decisions the meaning, characteristics and scope of application for public moral exception under GATT and GATS agreements which is essential as juridical interpretation and base for upcoming cases.

In its decision considering EU Seal regime case, the Panel concluded that the measure could be justified as a matter of public moral, because of the seal welfare concern this measure was adopted, which is component of the "standards of right and wrong conducted by or on the behalf of" the EU.[27] On appeal, the AB affirmed that the seals regime was provisionally justified under the public moral exceptions.

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[21] Mark Wu, *Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine*, 33 Yale Journal of International Law 215, 231 (2008).
[22] *Id.* 232.
[23] *Ibid.*
[24] Marwell, *supra* note 1, 816.
[25] *Ibid.*
[26] Charnovitz, *supra* note 14, 709.
[27] *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, Request for the Establishment of a Panel by Norway (WT/DS401/R), Request for the Establishment of a Panel by Canada (WT/DS400/R), Feb. 14, 2011, para. 7.409 (hereinafter *EC-Seal Products).*

Moreover, referring to the Panel statement in China-Audiovisuals case "public morals can vary from Member to Member"[28] could be assumed that Members have the right to determine the appropriate level of protection, depending on their discretionary evaluation in the given situations, meaning that, if they deem it appropriate, they can also select very high or zero levels of protection.[29]

In Gambling case the Panel found that "the term 'public morals' denotes standards of right and wrong conduct maintained by or on behalf of a community or nation."[30] The Panel further found that the definition of the term "order", read in conjunction with footnote 5 of the GATS, "suggests that 'public order' refers to the preservation of the fundamental interests of a society, as reflected in public policy and law."[31] The Panel then referred to Congressional reports and testimony establishing that "the government of the United States consider[s] [that the Wire Act, the Travel Act, and the IGBA] were adopted to address concerns such as those pertaining to money laundering, organized crime, fraud, underage gambling and pathological gambling."[32] On this basis, the Panel found that the three federal statutes are "measures that are designed to 'protect public morals' and/or 'to maintain public order' within the meaning of Article XIV(a)."[33]

E. Interpretation of Vienna Convention

We should start with the directive in article 31 of the Vienna Convention to interpret a treaty in accordance with its ordinary meaning and in light of its object and purpose.[34] However considering the object and purpose of the GATT leads to an ambiguous result since the exception is meant to allow deviation from the rules.[35] Then moving to the supplementary means of interpretation within the meaning of article 31.3 of the Vienna Convention for the following reasons reveals that there were no relevant rule of international law applicable in the relations between the parties regarding article XX, there was no subsequent agreement between the parties regarding Article XX(a) and no subsequent explicit practice between the parties regarding Article XX(a).[36]

[28] *China, Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products,* Report of the Panel (WT/DS363/R), 12 Aug. 2009, para. 7.763.
[29] *Id.* para. 7.819
[30] *United States, Measures Affecting the Cross-border Supply of Gambling and Betting Services*, Report of the Panel (WT/DS285/R), 10 Nov. 2014, para. 6.46 (hereinafter *US-Gambling and Betting*).
[31] *Id.* para. 6.467
[32] *Id.* para. 6.486.
[33] *Id.* para. 6.487.
[34] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, art. 31.1 (hereinafter *VCLT*).
[35] Charnovitz, *supra* note 14, 702.
[36] *VCLT*, *supra* note 34, art. 31.3.

Article 32 of Vienna Convention on law of treaties defines that "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 a) leaves the meaning ambiguous or obscure b) leads to absurd or unreasonable result."[37]

According to that article the *travaux preparatoires* for article XX(a) reveals that at international conferences, the need to exempt import bans relating to narcotics, pornography, and lottery tickets was specifically discussed.

Consequently, the Vienna Convention is useless from the aspect of defining the final word on how to interpret treaties.[38]

II. Whose moral and which moral

In fact, the basic dilemma is about which and whose moral questions in the realization process of public moral exception. It has been suggested that the two ends of this question lie, on the one hand, in the moral principles represented by the national sovereign states and, at the other extreme, the moral values of a universal type shared by all humankind.

First of all, in determining the meaning of whose moral question two types of targets had been developed:

1. Outwardly – directed - trade measures used to protect the morals of foreigners residing outside one's own country. For example, in 1997, the U.S. Congress forbade border officials from allowing importation of products made by forced or indentured child labor.[39]
2. Inwardly – directed - trade measures used to protect morals of persons in one's own country. For example, Islamic states ban import of pork for religious reasons and this trade measure would be absolutely inwardly – directed.[40]

However, in some cases it is difficult to define the direction of measure as inwardly or outwardly. For example, suppose a government bans imports made by indentured children and in this case the ban can be characterized such as outwardly-directed because the purpose would be to react against such kind of production, on the other hand, this ban might also be characterized as inwardly-directed to prevent domestic consumers from suffering a moral taint from serving as a market for such products.[41]

[37] *Id.* art. 32.
[38] Charnovitz, *supra* note 14, 703.
[39] Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, 634, 111 Stat. 1272, 1316 (1997).
[40] Charnovitz, *supra* note 14, 702.
[41] *Ibid.*

In this stage it is also important to define the scope of the moral within the meaning of article XX an of GATT.

The dilemma between universalism- defines public moral as relating to the general moral sense of humankind and unilateralism- defines public moral as the standards relating to each society itself was left unresolved by the Appellate Body, at least in specific terms.[42]

However, in the Gambling case, our attention is drawn to one point: the practice of the judiciary indicates that while trying to define a moral standard, it examines the practices and legislations of other countries.[43] The decision, at least implicitly, suggests that States invoking a public morals defense will be expected to present evidence of similar practice by other states or in other word the Gambling doctrine might be read as implying that states cannot unilaterally define public morals.[44]

According to Marwell, for doctrinal, policy, and normative reasons, WTO members should have leeway to define public morals based solely on domestic circumstances.[45]

Consequently, a review of recent WTO Trade Policy Reviews reveals that products currently subject to morality-based import restrictions include alcohol, pornographic or obscene materials, child pornography, gambling equipment or games of chance, hate propaganda illegal drugs, lottery tickets, non-kosher meat products, posters depicting crime or violence, stolen goods, treasonous or seditious materials, automobile radar detectors and video tapes and laser discs.[46]

III. Conceptions for eliminating the abuse of public moral exception

In modern literature there are 4 main conceptions that have own ways to eliminate the abuse of public moral exception:

A. Universalism

As was in Gambling case this approach requires parties to refer to universal or near-universal practice of other WTO member states in order to show that a given issue is morality issue in the meaning of GATT art XX a: e.g., modern prohibitions on slavery, genocide, or torture.[47] In the public morals context, evidence of widespread international consensus might be found, for instance, in the aspirational preamble language of broadly subscribed international

[42] Emil Sirgado Díaz, Human Rights and the "Public Morals" Exception in the WTO, (unpublished Ph.D. dissertation), 397 (2014).
[43] *Ibid.*
[44] Marwell, *supra* note 1, 817.
[45] *Id.* 806.
[46] *Id.* 817-818.
[47] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN G.A. Res. 39/46, U.N. Doc. A/39/51 (Dec. 10, 1984).

agreements or conventions.[48] However, the drawback of this approach is that states will need trade-restrictive measures to protect its population against products or services produced by foreigners with different moral standards, but not in the areas where international consensus has been reached, for instance, a ban on lingerie imposed by a conservative Muslim state, or restrictions on Christian evangelical materials by a non-Christian state.[49]

B. Moral Majority or Multiplicity

A less constricting alternative would be to require widespread, though not universal, state practice, especially amongst states most likely to be affected.[50] Such an approach would encompass issues agreed to be moral by certain groups of states, such as free speech, labor standards, women's rights,[51] nondiscrimination on the basis of gender or sexual orientation or alcohol restriction of Muslim community. The weak point of this conception is that it neglects article XIV of GATS which applies to the measures of any Member State but not States or communities.

C. Unilateralism

According to this approach states might be permitted to define public morals unilaterally. The most obvious concern here is the need to impose some boundary on what could be included[52] in the public morals exception in order to eliminate the potential abuse of public moral exception.

D. Mix of moral majority and unilateralism

Another conception is a recent and complex one while proposed approach requires state actions that unilaterally defined and supported with evidences such historical practice, contemporary public opinion polls, results of political referenda, or statements of accredited religious leaders.[53] The advantage of this approach is that instead of deciding whether a particular issue, as a general category, is related to public morals, the tribunal's task would be to judge whether the interest, as articulated by the regulating state, was credible based on factual circumstances within that country.[54]

[48] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, art. 55 (calling upon U.N. member countries to promote "universal respect for, and observance of, human rights and fundamental freedoms for all").

[49] Marwell, *supra* note 1, 821.

[50] *North Sea Continental Shelf Case* (F.R.G. v. Den.), 1969 I.C.J. 3, 42 (Feb. 20) (noting that conventional rule may "be considered to have become a general rule of international law... [if a] widespread and representative" group adopts that rule).

[51] Liane M. Jarvis, Note, *Women's Rights and the Public Morals Exception of GATT Article 20*, 22 MICH. J. INT'L L. 219, 219 (2000).

[52] Marwell, *supra* note 1, 823.

[53] *Id.* 824-825.

[54] *Id.* 826.

IV. Three-tier Test

Article XX of the GATT defines a "two-tier analysis" in order to justify Member's trade restrictive measure under that provision. Firstly, it should be determined A) whether the challenged measure falls within the scope of one of the paragraphs of Article XX and this requires that the challenged measure address the particular interest specified in that paragraph and that there be a sufficient nexus between the measure and the interest protected.[55] Where the challenged measure has been found to fall within one of the paragraphs of Article XX, we should then consider B) whether that measure is necessary to restrict unmoral trade transactions. Thirdly, we must check out C) whether the measure satisfies the requirements of the chapeau of Article XX.[56]

A. The challenged measure at issue must fall under one of the exceptions – sub-paragraphs (a) to (j) - listed under Article XX while each sub-paragraph is related to different objectives.

It is far more difficult to draw substantive boundaries around the term "public morals" based on commonly accepted objective evidence. However there is at best a tenuous consensus on issues such as trade in pornography, gambling, alcohol, and illegal drugs, which many commentators would perhaps readily agree fall within the public morals exception.[57]

B. Necessary to protect Public Morals.

Subparagraph of the public moral exception requires, as a distinct condition, that a measure must be "necessary" to achieve a legitimate objective.[58] The Appellate Body discussed the meaning of this term in Korea-Various Measures on Beef and said that a measure's "necessity" for achieving one of the objectives in the subparagraphs depends on the "weighing and balancing" of several factors including followings:[59]

1. The contribution made by the measure to the achievement of its objective.

The Appellate Body has explained that a contribution exists "when there is a genuine relationship of ends and means between the objective pursued and the measure at issue". [60] The contribution must not be "marginal or

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[55] *United States, Measures Affecting the Cross-border Supply of Gambling and Betting Services*, Report of the Appellate Body (WT/DS285/AB/R), 7 Apr. 2005, para. 292 (hereinafter *US-Gambling*).
[56] *Ibid.*
[57] Mark Wu, *supra* note 21, 232.
[58] GATT 1994: *General Agreement on Tariffs and Trade 1994*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994), art. XX(a) (hereinafter *GATT 1994*).
[59] *Korea, Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body (WT/DS161/AB/R), 11 Dec 2000, para. 164 (hereinafter *Korea-Beef*).
[60] *Brazil, Measures Affecting Imports of Retreaded Tyres*, Report of the Appellate Body (WT/DS332/AB/R), 3 Dec. 2007, para. 210 (hereinafter *Brazil- Retreaded Tyres*).

insignificant"; rather, the measure must be "apt to make a material contribution to the achievement of its objective".[61]

2. The importance of the interests or values at stake.

The Appellate Body also has observed that the more vital or important the common interests or values pursued, the easier it would be to accept as "necessary" a measure designed to achieve those ends.[62]

3. The trade-restrictiveness of the measure.

This factor defines that the measure has to be compared with possible available alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued.[63] It is significant that the Appellate Body refers here to a reasonably available, "less WTO inconsistent" alternative measure.[64] According to J.Maxwell (less restrictive measure) adopted in Gambling case is more useful than weighing and balancing in the context of public morality, involves an inquiry as to whether a less trade-restrictive measure (LRM) is "reasonably available, based on the degree to which an alternative measure achieves the stated goal, the difficulty of implementing the alternative measure, and the identity of parties bearing any additional costs.[65]

C. Chapeau of Article XX

The other prong of the two-tier analysis is the chapeau of article XX, which is as essential as necessity test. The chapeau provides that a measure that is adopted for one of the legitimate objectives listed in the subparagraphs of these provisions not be "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."[66]

In U.S.-Gasoline, the Appellate Body's initial distinction between a measure's "specific contents" and its "application" set the stage for its view that the chapeau is concerned with preventing the abuse of rights granted under the general exceptions.[67] Moreover, in U.S.-Shrimp it was defined that:

The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the

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[61] *Id.* para. 150.
[62] *Korea-Beef*, *supra* note 59, para. 162.
[63] *Brazil-Retreaded Tyres*, *supra* note 60, para 156.
[64] Lorand Bartels, *The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction*, 109 Am. J. Int'l L. 95, 106 (2015).
[65] Marwell, *supra* note 1, 828.
[66] *GATT 1994*, *supra* note 58, art. XX. The chapeau of GATS, Art. XIV, uses the term "like conditions" instead of "same conditions," but this difference does not appear to be significant.
[67] *United States, Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body (WT/DS2/AB/R), 29 Apr. 1996, 22 (hereinafter *US-Gasoline*).

doctrine of *abus de droit,* prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably."[68]

1. Application of Chapeau

Bin Cheng explains spirit and legal root of purpose of chapue in his General principles of law as applied by international courts and tribunals book as following:

"Whatever the limits of the right might have been before the assumption of the obligation, from then onwards, the right is subject to a restriction. Henceforth, whenever its exercise impinges on the field covered by the treaty obligation, it must be exercised bona fide, that is to say reasonably. A reasonable and bona fide exercise of a right in such a case is one which is appropriate and necessary for the purpose of the right. But the exercise of the right in such a manner as to prejudice the interests of the other contracting party arising out of the treaty is unreasonable and is considered as inconsistent with the bona fide execution of the treaty obligation, and a breach of the treaty."

The AB, in its report on US—Shrimp, held that for a measure to be chapeau consistent, it should:

1. Not amount to an arbitrary and unjustifiable discrimination between countries where the same conditions prevail; and
2. Not be a disguised restriction to trade either.[69]

GATT/WTO case-law has often examined the arbitrary or unjustifiable discrimination requirement in tandem, but without distinguishing between its two elements.[70] It was only in US–Shrimps case that Panel differentiated between unjustifiable and arbitrary and defined that unjustifiable discrimination refers to the substantive aspect or the material effects of the application of the measure.[71] Furthermore, the AB has already observed that if the resulting discrimination could have been foreseen, the measure can in turn be unjustifiable.[72] While arbitrary discrimination refers to the formal aspect of the application of the measure, such that the measure is arbitrary according to the method in which it has been applied; arbitrary in this sense refers to procedural requirements. In addition, arbitrary also means, according to the AB, to be inflexible or rigid, as in the use of national certification schemes, for example.[73] Moreover Lorand Bartels differentiate

[68] *United States, Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body (WT/DS58/AB/R), 12 Oct. 1998, para. 158 (hereinafter *US-Shrimp*)
[69] *Id.* para 150.
[70] *US- Schrimp*, *supra* note 68, para 150.
[71] *Id.* paras. 161-176.
[72] *US-Gasoline*, *supra* note 67, 25.
[73] *US- Schrimp*, *supra* note 68, para 177.

both words as following: "arbitrary" discrimination could refer to discrimination for which no rationale is offered, whereas "unjustifiable" discrimination could refer to discrimination for which the proposed rationale either is illegitimate or does not justify the measure that has been adopted.[74]

Appellate Body, in its report on US—Gasoline, discusses the issue whether the term 'between countries where the same conditions prevail' should be understood as referring only to exporting countries or, conversely, whether it should encompass the importing country as well. Although the AB did not formally rule on this issue on this occasion, it saw no reason to deviate from the prevailing practice of WTO members which privileged the latter interpretation.[75] Actually, 'between countries where the same conditions prevail' means, it is not acceptable, in international trade relations, for one WTO Member to use an trade restrictive measure toward other Members without taking into consideration different conditions which may occur in the territories of those other Members.[76] In EC--Seal Products, the Appellate Body said that "conditions" relating to the particular policy objective under the applicable subparagraph are relevant for the analysis under the chapeau.[77] It might also be suggested that these "conditions" should be defined in terms of not only the measure's objective but also the degree to which that measure achieves its objective, for example, for a measure prohibiting imports of products produced by prison labor, "conditions" would be the same in countries where products are, to the same degree, produced by prison labor, but they would be different in countries where products are not produced by prison labor to the same degree.[78]

The second of the conditions in the chapeau requires that a measure not be applied in a manner that constitutes a "disguised restriction on international trade. In the US–Gasoline case, the AB defined "disguised restrictions" as following:

Whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX.[79]

Moreover it was in the EC–Asbestos case the Panel defined the term "disguise" as the intention to conceal something, and that it covers measures the compliance with which is "only a disguise to conceal the pursuit of trade restrictive objectives".[80]

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[74] Bartels, *supra* note 64, 123.
[75] *US-Gasoline*, *supra* note 67, 24.
[76] Marwell, *supra* note 1, 112.
[77] *EC-Seal Products, supra* note 27, para. 5.300.
[78] Bartels, *supra* note 64, 112.
[79] *US-Gasoline*, *supra* note 67, 25.
[80] *European Communities, Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Panel (WT/DS135/R), 18 Sept. 2000, para 8.236.

i. Importance of negotiation for interpretation of unjustifiable discrimination

In some cases, Panel and AB can interpret measures without previous consultation as discriminatory and unjustifiable. In US–Shrimps, the AB stated that bilateral and multilateral negotiations could be an alternative to unilateral and non–consensual procedures. [81] In this case, the importing country had conducted negotiations with some countries, but denied access to its markets without previously attempting to reach an agreement with some other countries which led to the following decision of AB:

"Clearly, the United States negotiated seriously with some, but not with other Members (including the appellees), that export shrimp to the United States. The effect is plainly discriminatory and, in our view, unjustifiable. The unjustifiable nature of this discrimination emerges clearly when we consider the cumulative effects of the failure of the United States to pursue negotiations for establishing consensual means of protection and conservation of the living marine resources here involved, notwithstanding the explicit statutory direction in Section 609 itself to initiate negotiations as soon as possible for the development of bilateral and multilateral agreements."[82]

However sometimes AB may consider previous negotiation as useless. In US– Gambling, the Panel first established that the measure was not necessary because the United States did not engage in previous consultations with Antigua before applying the restrictive measure.[83] However, the organ of appeal considered that previous consultation was not an appropriate alternative measure as following:

"In our view, the Panel's "necessity" analysis was flawed because it did not focus on an alternative measure that was reasonably available to the United States to achieve the stated objectives regarding the protection of public morals or the maintenance of public order. Engaging in consultations with Antigua, with a view to arriving at a negotiated settlement that achieves the same objectives as the challenged United States' measures, was not an appropriate alternative for the Panel to consider because consultations are by definition a process, the results of which are uncertain and therefore not capable of comparison with the measures at issue in this case."[84]

ii. When can justifiable discrimination happen?

A logically separate question is how to identify the set of rationales that can justify discrimination under the chapeau and the chapeau's text leaves this issue entirely open. However according to Lorand Bartels there are some options for justifying discriminatory measure: *"Firstly, discrimination could be justified on grounds recognized elsewhere in the agreement at issue or other WTO*

[81] *US-Schrimp, supra* note 68, para. 171.
[82] *Id.* para. 172.
[83] *US-Gambling and Betting, supra* note 30, paras. 6.533-6.535.
[84] *US-Gambling, supra* note 55, para 317.

agreements. Discrimination might accordingly be justified in terms of the right to form a regional trade agreement or the right to discriminate, in certain respects, in favor of developing countries. Secondly, discrimination could be justified for reasons recognized in international standards."[85]

In few cases discriminatory measure may be considered as justifiable by Panel and AB. The Appellate Body supported the same position in EC-Tariff Preferences and defined that a developing country's "needs" in relation to the WTO Enabling Clause 3(c) are to be assessed according to broad-based recognition of a particular need, set out in the WTO Agreement or in multilateral instruments adopted by international organizations".[86]

In EU Seal Regime AB finds that the European Union has not demonstrated that the EU Seal Regime, in particular with respect to the IC exception-an exception under the EU Seal Regime for seal products obtained from seals hunted by Inuit or other indigenous communities, is designed and applied in a manner that meets the requirements of the chapeau of Article XX of the GATT 1994.[87]

In some cases, Panel and Appellate Body can be in contradiction regarding to the justifiable and unjustifiable discrimination. In Brazil-Retreaded Tyres, government of Brazil imposed an import ban on retreaded tyres but "MERCOSUR" (Mercado Común del Sur (Southern Common Market)) states were out of the imposition of this ban measure.[88] According to Appellate Body Report

"Appellate Body reverses the Panel's findings, that the MERCOSUR exemption has not resulted in arbitrary discrimination; also reverses the Panel's findings, that the MERCOSUR exemption has not resulted in unjustifiable discrimination; and finds, instead, that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX."[89]

iii. Burden of proof

Coming to the procedural matters, the main issue is about burden of proof, especially which party is obliged to proof the necessity of measure. In US-Gambling Case, Appellate Body decided as following:

"It is well-established that a responding party invoking an affirmative defense bears the burden of demonstrating that its measure, found to be WTO-inconsistent, satisfies the requirements of the invoked defense. In the context of Article XIV(a), this means that the responding party must show that its measure is "necessary" to achieve objectives relating to public morals or public order. In our view, however, it is not the

[85] Bartels, *supra* note 64, 118.
[86] *European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries*, Report of the Appellate Body (WT/DS246/AB/R), 7 Apr. 2004, para. 163.
[87] *EC-Seal Products, supra* note 27, para. 6.3.
[88] *Brazil-Retreaded Tyres, supra* note 60, para. 122.
[89] *Id*, para. 258.

responding party's burden to show, in the first instance, that there are no reasonably available alternatives to achieve its objectives. In particular, a responding party need not identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective".[90]

V. New approach on two-tier test

Recently, there is a new approach toward necessity test especially, its structure. In exact words, up to now it has been defined by Appellate Body in most cases that following the structure of two-tier test is mandatory. For instance, in US-Shrimp case Appellate Body decided that where the specific exception threatened with abuse has not been firstly identified and examined it makes task of interpretation very difficult.[91] However according to Lorand Bartels *"it is necessary to identify a measure's purpose in order to determine whether the "same conditions" prevail in different countries and also whether the measure constitutes a "disguised restriction on international trade."*[92] This approach does not ignore the significance of Two-tier test and the advantage of new approach would show its effect on sphere of judicial economy.

Conclusion

The public moral exceptions play an important role in world trade process. Among WTO Member States, public moral clause could mean anything from religious views on drinking alcohol or eating some harmful food, society's attitudes towards pornography to human rights, norms' of labor and etc. In most cases different countries define public moral exceptions properly from social and religious aspects. However, a more extensive interpretation of public moral clause should not be given; as such interpretation may leave room for illicit protectionism. In addition, Panel and Appellate Body while surveying trade restrictive measures on public moral should not look into only domestic laws to check whether the State has naturalized even mechanism to preserve such morals. In this period of appearing trade, it is substantial to abolish the lack in the clause and put forward a more relating interpretation of the term public moral.

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[90] *US-Gambling, supra* note 55, para. 309.
[91] *US-Schrimp, supra* note 68, para. 120.
[92] Bartels, *supra* note 64, 105.