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# THE BALANCE BETWEEN ‘PUBLIC MORALS’ AND TRADE LIBERALISATION: ANALYSING THE IMPORTANCE OF ARTICLE XX (A) OF THE GATT AND ITS APPLICATION

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## ABSTRACT

With the development of international society, public morals attract increasing attention from states. Nevertheless, the “public morals” exception clause in Article XX (a) of the General Agreement on Tariffs and Trade (hereinafter ‘GATT’) is hardly invoked by state parties as a distinct basis for trade restrictive measures. The *EC-Seal Product* dispute is the first case that WTO Dispute Settlement Body (hereinafter ‘DSB’) have to consider this issue. This article will analyse what kind of public morals can be justified when implementing trade restrictive measures. It proposes that human rights standard is a significant moral concern and an integration may be made between human rights law and trade law. The article also addressed the question about what procedures should be followed to apply Article XX (a) to avoid it to be abused. It comes to the conclusion that Article XX (A) has an intrinsic importance to strike a balance between trade liberalisation and state sovereignty, for which it must be reserved in the GATT.

## Introduction

With the progress of free trade, people start to attach increasing importance to the moral and ethical problems related to economic development. Can animal welfare be an exception clause to restrict the free trade? Can a local moral standard such as a religion or social belief prevail over the Most Favoured Nation (hereinafter ‘MFN’) obligation and the National Treatment obligation?

Article XX of the General Agreement on Tariffs and Trade (hereinafter ‘GATT’) stipulates a series of exception clauses that can justify contracting parties’ inconsistent acts with the GATT, among which Article XX (a), namely the ‘public morals’ exception clause has hardly been invoked. Although there have been plenty of cases concerning Article XX (b), Article XX (d) and Article XX (g) of the GATT, there had never been a case in the WTO in which Article XX (a) of the GATT was considered as a distinct basis to justify trade restrictive measures

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before the *EC-Seal Products* dispute.<sup>1</sup>

In 2009 and 2010, the European Union enacted Regulation No. 1007/2009<sup>2</sup> and Regulation No. 737/2010.<sup>3</sup> Considering seals are sentient beings and could also experience painful sufferings,<sup>4</sup> the European Union prohibited the placing of seal products on the market by enacting the EU Seal Regime in order to protect seal welfare, unless the products satisfy certain conditions.<sup>5</sup> The first condition is that the seal products concerned are obtained from seals hunted by Inuit or indigenous people (hereinafter ‘IC Exception’).<sup>6</sup> The second condition is that the products are obtained from seals hunted for marine resource management (hereinafter ‘MRM Exception’).<sup>7</sup> The last one is that the products are exclusively for personal use of travellers or their families (hereinafter ‘Travelers Exception’).<sup>8</sup>

However, this Regime aroused objections from Canada and Norway. Canada claimed that the EU Seal Regime promoted animal welfare by establishing conditional market access.<sup>9</sup> Meanwhile, the Regime did not provide information to consumers about the origins of the legally-sold seal products.<sup>10</sup> In brief, the complainants argued that the EU Seal Regime violated the MFN obligation<sup>11</sup> and National Treatment obligation,<sup>12</sup> and nullified benefits accruing to

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<sup>1</sup> R. Howse & J. Langille, ‘Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values’, *The Yale Journal of International Law* 2012-37, p.368.

The WTO has not been confronted with such a case yet, but there have been discussions among scholars. See S. Charnovitz, ‘The Moral Exception in Trade Policy’, *Virginia Journal of International Law* 1998-38, p.689-746; M. Wu, ‘Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine’, *Yale Journal of International Law* 2008-33, p. 215-252; Howse and Langille 2012, supra note 1.

Furthermore, there has been state practice involving public morals concerns. For example, in EU, Article 13 of Title II in Treaty of Lisbon clearly recognises that animals are sentient beings. In United States, Section 307 of the Tariff Act of 1930 prohibited forced labour. More state practice will be introduced in the Chapter III.2 below.

<sup>2</sup> Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on Trade in Seal Products [2009] OJ L 286/36 [in subsequent footnotes use: Regulation No. 1007/2009].

<sup>3</sup> Commission Regulation (EU) No 737/2010 of 10 August 2010 Laying Down Detailed Rules for the Implementation of Regulation (EC) No 1007/2009 of The European Parliament and of the Council on Trade in Seal Products [2010] OJ L 216/1 [in subsequent footnotes use: Regulation No. 1007/2009]. These two regulations will be referred to together as the ‘EU Seal Regime’.

<sup>4</sup> Regulation No. 1007/2009.

<sup>5</sup> Panel report European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (‘EC-Seal Products’) adopted 25 November 2013, WT/DS400/R and WT/DS401/R, para.7.1.

<sup>6</sup> Regulation No. 1007/2009 Art 3.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> First Written Submission of Canada, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, submitted 9 November 2012, WT/DS 400, para. 236.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Idem*, para.324; First Written Submission of Norway, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, submitted 9 November 2012, WT/DS 401, para.273.

<sup>12</sup> *EC-Seal Product: First Written Submission of Canada*, supra note 9, para.347; *EC-Seal Product: First Written Submission of Norway*, supra note 11, para.273.

them under the GATT.<sup>13</sup> But the European Union insisted that the Regime was rooted in the widespread concern of animal welfare around Europe, and any inconsistencies of the Regime with the GATT can be justified by Article XX (a) and Article XX (b).<sup>14</sup> In addition, due to the inherent ‘inhumane’ nature of the commercial hunts, the European Union held that a general ban on such products is the only effective way to protect such moral concerns.<sup>15</sup>

After failing in consultations, both Canada and Norway requested to set up a Panel to settle the dispute according to Article 6 and 7.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter ‘DSU’).<sup>16</sup> After an analysis of the EU Seal Regime, the Panel concluded that the European Union failed to demonstrate that the EU Seal Regime was necessary to protect public morals under Article XX (a) of the GATT.<sup>17</sup> This conclusion was later upheld by the Appellate Body.<sup>18</sup>

Based on the analysis of the Panel and the Appellate Body on the ‘public morals’ exception clause in this case, I will discuss the question of the balance between trade liberalisation and the protection of public morals. The discussion is divided into six chapters. The following Chapter two is an elaboration of the application of Article XX of the GATT in the *EC-Seal Products* dispute. In Chapter three, I will introduce state practice, both historical and contemporary, of trade limitation measures out of ‘public morals’ concerns. There will be a further discussion to justify the importance of Article XX (a) in Chapter four. In Chapter five, I will address the question of the extra-territorial application of Article XX (a). Chapter six is a proposal of necessary evidence to support the existence of a public moral. Finally, I will illustrate the incorporation of human rights law into trade law regarding the ‘public morals’ exception. In the conclusion chapter, I will conclude that Article XX (a), though rarely been invoked, does have its intrinsic importance as a distinct exception clause. It serves as the balancing point between trade liberalisation and contracting parties’ sovereignty on moral concern. To that end, it is important to not only set up a strict and objective application and interpretation regime in the scope of trade law, but also draw reference from human rights law.

## **I. Application of Article XX of the GATT in *EC-Seal Products***

### **I.1. Overview of Article XX of the GATT**

Article XX of the GATT is designed to respect the sovereign rights of each contracting party to protect their interests such as public morals, human and animal health, and exhaustible natural resources, even though this may be against other trade obligations in the GATT, including the

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<sup>13</sup> *EC-Seal Product: First Written Submission of Canada*, supra note 9, para.751; *EC-Seal Product: First Written Submission of Norway*, supra note 11, para.962.

<sup>14</sup> First Written Submission by the European Union European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, submitted 21 December 2012 WT/DS 400 and WT/DS 401.

<sup>15</sup> *EC-Seal Products: Reports of the Panel*, supra note 5, para.7.4.

<sup>16</sup> Request for the Establishment of a Panel by Canada European Communities – Measures Prohibiting the Importation and Marketing of Seal Products submitted 14 February 2011, WT/DS400/4; Request for the Establishment of a Panel by Norway European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, submitted 15 March 2011, WT/DS401/5.

<sup>17</sup> *EC-Seal Products: Reports of the Panel*, supra note 5, para.7.651.

<sup>18</sup> Appellate report European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (‘EC-Seal Product’), adopted 22 May 2014, AB-2014-1 AB-2014-2, WT/DS400/AB/R and WT/DS401/AB/R, para.5.339.

MFN obligation and National Treatment obligation.<sup>19</sup>

## I.2. Article XX (a)

### I.2.1. Definition of ‘public morals’

Before the ruling of *EC-Seal Products*, the term ‘public morals’ in Article XX (a) of the GATT had never been interpreted by the Panel or the Appellate Body in any cases. In *US-Gambling*, the Panel once interpreted this term in the context of Article XIV (a) of General Agreements on Trade and Services (hereinafter ‘GATS’), with this interpretation then cited by the Panel in *EC-Seal Products*. The Panel stated that “the term ‘public morals’ denotes *standards of right and wrong conduct* maintained by or on behalf of a community or nation”.<sup>20</sup>

Meanwhile, the content of public morals can vary in time and space,<sup>21</sup> with the contracting parties able to decide the appropriate protection level according to their own social, cultural, religion and ethical values.<sup>22</sup> This is applicable under both under Article XX (a) of GATT and Article XIV (a) of GATS.<sup>23</sup>

### I.2.2. ‘Necessity’ test

In the *EC-Seal Products* dispute, the Panel, considering the close relationship between the GATT and the Agreement on Technical Barriers to Trade (hereinafter ‘TBT Agreement’), and the need to give a harmonious interpretation of relevant provisions under both Agreements, referred to the method assessing Article 2.2 of the TBT Agreement.<sup>24</sup> In *US - Tuna II (Mexico)*, the Appellate Body recalled that when assessing the necessity of a measure under Article 2.2 of the TBT Agreement, the contribution to the legitimate objective actually achieved by the measures at issue should be considered.<sup>25</sup> In this regard, the Panel in *EC-Seal Products* emphasised an additional element in the context of the GATT, which is the trade-restrictiveness of a measure.<sup>26</sup> Referring to the Appellate Body’s assessment of Article XX (b) in *Brazil - Retreaded Tyres*, the Panel proposed that a certain threshold for the degree of

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<sup>19</sup> J. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, United States of America: The MIT Press 1997, p.206.

<sup>20</sup> *EC-Seal Products: Reports of the Panel*, supra note 5, para.7.380.

<sup>21</sup> Panel report United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services (‘US-Gambling’), adopted 10 November 2004, WT/DS285/R, para.6.461.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *EC-Seal Products: Report of the Panel*, supra note 5, para.7.634.

Furthermore, Article 2.2 of the TBT Agreement stipulates that:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

<sup>25</sup> *EC-Seal Products: Report of the Panel*, supra note 5, para.7.634.

<sup>26</sup> *Idem*, para.7.635.

contribution should be established when testing the necessity of the measures under Article XX (a), which is different from the requirements under Article 2.2 of the TBT Agreement. The trade-restrictiveness should be closely linked to the extent of the contribution achieved by the measures to the objective.<sup>27</sup> In the present dispute, the Panel held that the contributions of the measures at issue should be at least *material* given the context of the extent of its trade-restrictiveness.<sup>28</sup>

However, the Appellate Body reversed the Panel's findings, as the Panel relied excessively on the level of contributions achieved by the measures. The Appellate Body, citing its previous decision in *Brazil-Retreaded Tyres*, pointed out that an analysis of necessity involves a 'holistic' balancing and weighing of a series of factors, including the importance of the objective, the level of the contribution achieved by the measures and the trade-restrictiveness of the measures.<sup>29</sup> It cannot be based on the level of contribution alone.<sup>30</sup> Moreover, for the sake of flexibility, the Appellate Body rejected Canada and Norway's contention, and stated that there is no need to set up a pre-determined threshold in respect of any particular factor.<sup>31</sup>

I do share the view with the Appellate Body that to decide whether a measure aiming to protect a moral concern is necessary according to Article XX (a) involves a thorough examination of a series of factors as is mentioned above. This is consistent with Article 31 of the Vienna Convention on the Law of Treaties (hereinafter "VCLT"), which stipulates that a treaty shall be interpreted in its context. In the meantime, a comprehensive examination of a series of factors reduces the risk of abuse. However, I do not agree with the Appellate Body's denial of setting up pre-determined thresholds in respect of the factors mentioned above. It may leave the Appellate Body with a certain extent of flexibility when adjudicating cases, but it would result in uncertainties when the contracting parties design their trade measures.<sup>32</sup> This reduces the predictability of Article XX (a) of the GATT.

With respect to the thresholds of the factors influencing the necessity of relevant measures, the importance of the objective should fall under the discretion of the contracting parties, which will be addressed in the following chapter.<sup>33</sup> Nevertheless, the importance of the objective has to be supported by sufficient evidence.<sup>34</sup> As for the contribution achieved by the measures and its trade-restrictiveness, I agree with the Panel that there should be a certain threshold degree of contribution. As it has mentioned in *US - Tuna II (Mexico)*, what Article XX of the GATT emphasises is the necessity of the *measures themselves*.<sup>35</sup> This is different from Article 2.2 of the TBT Agreement, the wording of which is put in a positive way and emphasises the

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<sup>27</sup> *Ibid.*

<sup>28</sup> *Idem*, para.7.636.

<sup>29</sup> *EC-Seal Products: Report of the Appellate Body*, supra note 18, para.5.214.

<sup>30</sup> *Idem*, para.5.215.

<sup>31</sup> *Ibid.*

<sup>32</sup> See also M. M. Du, 'Autonomy in Setting Appropriate Level of Protection under the WTO Law: Rhetoric or Reality?', *Journal of International Economic Law* 2010-13, p.1096; C. P. Bown & J. P. Trachtman, 'Brazil -Measures Affecting Imports of Retreaded Tyres: A Balancing Act', *World Trade Review* 2009-8, p.89; F Fontanelli, 'Necessity Killed the GATT - Art XX GATT and the Misleading Rhetoric about 'Weighing and Balancing'', *European Journal of Legal Studies* 2012-5, p.55.

<sup>33</sup> See Chapter VII.2. below.

<sup>34</sup> See Chapter VI. below.

<sup>35</sup> Panel report United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products ('US - Tuna II (Mexico)'), adopted 15 September 2011, WT/DS381/R, paras. [7.458] - [7.460].

necessity of the *trade-restrictiveness* of the measures.<sup>36</sup> Therefore, the necessity test of the latter does not involve a threshold degree of contribution, whereas the former should set up a minimum standard such as material or significant contribution.<sup>37</sup>

Moreover, as the contracting parties enjoy a broad margin of appreciation regarding the content of public morals, it would lead to the abuse of Article XX (a) of the GATT if the necessity test became too flexible. In conclusion, the necessity test should involve a clear indication of thresholds for all the factors, which is conducive to both the predictability and the prevention of abuse of Article XX (a) of the GATT.<sup>38</sup>

### I.3. Article XX (b)

In *EC-Seal Products*, the European Union submitted that apart from Article XX (a), their Seal Regime fell within the scope of Article XX (b) as well because it also contributed to the protection of seal health.<sup>39</sup> However, considering that the Panel has determined the EU Seal Regime's consistency with Article XX (a), and that the European Union has never submitted arguments with regard to seal health as the objective of the Regime, the Panel decided that the European Union has not established a *prima facie* case under Article XX (b).<sup>40</sup>

### I.4. The chapeau

In *EC-Seal Products*, both the Panel and the Appellate Body found that the EU Seal Regime was 'necessary to protect public morals' under Article XX (a) of the GATT. However, the Regime, especially with respect to the IC exception, failed to pass the test in the chapeau of Article XX. The IC hunts as compared to the normal commercial hunts did not reconcile with the purpose of protecting public morals regarding seal welfare.<sup>41</sup> The European Union did not establish why they would be able to do nothing to improve seal welfare in the context of IC hunts without endangering the subsistence and tradition of Inuit indigenous people.<sup>42</sup>

Furthermore, the ambiguities and the broad discretion in IC exceptions have also constituted as means of 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail'.<sup>43</sup> Finally, the European Union has failed to establish that they have made 'comparable efforts' to facilitate the access of the likely seal products derived from Canadian Inuit hunts.<sup>44</sup> As indigenous people, Canadian Inuit people did not have a chance to take advantage of the IC Exception. Therefore, the Appellate Body held that the EC Seal Regime did not pass the test in the chapeau of Article XX of the GATT, and hence was not justifiable under Article XX (a).

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<sup>36</sup> *Ibid.*

<sup>37</sup> See also *EC-Seal Products: Report of the Panel*, supra note 5, note 977.

<sup>38</sup> See also Nicolas F. Diebold, 'The Morals and Order Exceptions in the WTO Law: Balancing the Toothless Tiger and the Undermining Mole', *Journal of International Economic Law* 2007-11, p.67.

<sup>39</sup> *EC-Seal Products: First Written Submission by the European Union*, supra note 14, para.591.

<sup>40</sup> *EC-Seal Products: Reports of the Panel*, supra note 5, para.7.640.

<sup>41</sup> *EC-Seal Products: Report of the Appellate Body*, supra note 18, para.5.338.

<sup>42</sup> *Idem*, para.5.320.

<sup>43</sup> *Idem* para.5.328.

<sup>44</sup> *Idem* para.5.337.

## II. Historical development and current state practice of ‘public morals’ exception

### II.1. ‘Public morals’ as an exception in pre-GATT era

With regard to the history of ‘public morals’ exception before the appearance of the GATT, Professor Charnovitz has conducted a comprehensive research on this topic.<sup>45</sup> It was not until 1927 that the ‘public morals’ exception became a long-established international practice to balance free trade and states’ sovereign rights.<sup>46</sup> At that time, opium, obscene photos, and lottery tickets clearly fell within the scope of this exception.<sup>47</sup>

The idea to bring in a ‘public morals’ exception was first put forward by the United States in 1945,<sup>48</sup> with the language of the exception clause in the United States’ proposal the same as that incorporated into the GATT.<sup>49</sup> During the drafting period of the GATT, this exception was included every time the draft was edited.<sup>50</sup> However, there was barely any further elaborations on the exact meaning of ‘public morals’ in the preparatory work of the GATT.<sup>51</sup> The contracting parties were also very reluctant to invoke this exception clause,<sup>52</sup> with ‘alcohol’ being the only thing that can be deduced from the drafting history covered by this exception.<sup>53</sup>

### II.2. Current state practice of trade limitation measures out of ‘public morals’ concerns

In this section, I will analyse the ‘public morals’ exception in four countries/areas, namely Europe, Muslim countries, the United States and China. The practice in these four countries/areas are typical examples to illustrate the implementation of ‘public morals’ exception. First, with regard to Europe, there is a widespread concern about animal welfare, especially the concern about the treatment of farm animals in recent years.<sup>54</sup> This explains the background of *EC-Seal Products*. Second, as for Muslim countries, because of the ban on consuming alcohol or pork under *Sharia*, there are up to now four of them, namely Jordan, Oman, Yemen, and Saudi Arabia, invoking Article XX (a) of the GATT to protect their moral concerns based on their religion.<sup>55</sup>

Therefore, it is useful to analyse the moral concern in Muslim countries as well. Third, in the United States, people also attach great importance to moral concerns when regulating trade, especially on labour rights. At the end of the Uruguay Round, the United States, together with France, proposed that the WTO agenda include considerations on the relationship between

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<sup>45</sup> See Charnovitz 1998, supra note 1, p.689.

<sup>46</sup> *Idem* p.708.

<sup>47</sup> *Ibid.*

<sup>48</sup> Wu 2008, supra note 1, p.218.

<sup>49</sup> Charnovitz 1998, supra note 1, p.704.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> S. Zleptnig, *Non-Economic Objectives in WTO Law*, Leiden: Brill - Nijhoff 2010, p.129.

<sup>53</sup> Charnovitz 1998, supra note 1, p.704.

<sup>54</sup> ‘Better welfare for animals: A new EU strategy for a new approach’ at: [https://ec.europa.eu/food/sites/food/files/animals/docs/aw\\_brochure\\_strategy\\_en.pdf](https://ec.europa.eu/food/sites/food/files/animals/docs/aw_brochure_strategy_en.pdf), (accessed 8 February 2017).

<sup>55</sup> R. Bhala & S. B. Keating, ‘Diversity within Unity: Import Laws of Islamic Countries on Haram (Forbidden) Products’, *The International Lawyer* 2013-47, p.351.

trade and labour standards and social justice.<sup>56</sup> In the WTO's failed 1999 Seattle ministerial, it proposed the creation of a WTO working party on labour rights with focus on a range of areas such as social protections and core labour standards.<sup>57</sup> This background reflects the moral concerns of American people with respect to trade issues.

Finally, in China, there are also trade restriction clauses, which relate to 'public morals' in Chinese society. For example, before the *EC-Seal Products* dispute, China once invoked Article XX (a) in *China-Audiovisuals*.<sup>58</sup> The background of this case is a good instance to illustrate the moral concerns and the relevant regulations in China. Although both the Panel and the Appellate Body did not elaborate on this clause, it is still worth discussing the moral concerns in China.

### II.2.1. 'Public morals' in Europe

During the past 40 years, European people have been working on the promotion of animal welfare, especially the lives of farm animals.<sup>59</sup> Article 13 of Title II in Treaty of Lisbon clearly recognises that animals are sentient beings. Another example is the debate over the ban on imports of fur from animals caught by leg-hold traps.<sup>60</sup> Besides this, the European Union has a number of directives concerning animal welfare.<sup>61</sup> Domestic legislation in some European Union member states is even stricter.<sup>62</sup> The Council Directive 98/58/EC on the protection of animals kept for farming purposes, which is based on European Convention for the Protection of Animals Kept for Farming Purposes, reflects five freedoms for animals that the European Union is protecting.<sup>63</sup> All these concerns derive from the deeply-rooted animal welfare philosophy and religious belief present in Europe.<sup>64</sup>

### II.2.2. 'Public morals' in Muslim countries

According to Islamic law (*Sharia*), it is illegal for Muslim people to consume alcohol or pork.<sup>65</sup> However, according to the research work of Professor Raj Bhala, the Rice Distinguished Professor at the University of Kansas School of Law who is prominent in the fields of International Trade Law and *Sharia*,<sup>66</sup> instead imposing a 'prohibitive tariff' on such

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<sup>56</sup> J. Jackson & W. Davey & A. Sykes, Jr., *Legal Problems of International Economic Relations*, West Group 2002, p.1033.

<sup>57</sup> *Idem* p.1034.

<sup>58</sup> Panel report China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products ('China-Audiovisual'), adopted 12 August 2009, WT/DS363/R.

<sup>59</sup> 'Animal Welfare', at: [http://ec.europa.eu/food/animals/welfare\\_en](http://ec.europa.eu/food/animals/welfare_en) (accessed 8 February 2017).

<sup>60</sup> See Chapter IV.3. below.

<sup>61</sup> H. Grethe, 'High animal welfare standards in the EU and international trade – How to prevent potential 'low animal welfare havens'?', *Food Policy* 2007-32, p.317.

<sup>62</sup> *Ibid.*

<sup>63</sup> See *Animal Welfare*, supra note 59. And the so-called 'Five Freedoms' are: Freedom from hunger and thirst; Freedom from discomfort; Freedom from pain, injury and disease; Freedom to express normal behaviour; Freedom from fear and distress.

<sup>64</sup> Howse and Langille 2012, supra note 1, p.378.

<sup>65</sup> R. Bhala, 'Recent Developments in International Trade Law Part 2' at: [https://law.ku.edu/sites/law.ku.edu/files/docs/recent-developments/\(6\)BhalaPart%202.pdf](https://law.ku.edu/sites/law.ku.edu/files/docs/recent-developments/(6)BhalaPart%202.pdf), (accessed 8 February 2017).

<sup>66</sup> See <http://law.ku.edu/faculty/raj-bhala> (accessed 8 February 2017).

products,<sup>67</sup> nearly all Muslim countries allow the importation of products containing alcohol and pork.<sup>68</sup> This shows the intention of Muslim countries to be tolerant<sup>69</sup> and that they do not want to separate themselves from other countries in international trade. There are countries taking a more liberal view towards this problem such as Indonesia and Malaysia.<sup>70</sup>

In the meantime, there are still four countries invoking Article XX (a) of the GATT on the importation of *haram* products, namely Saudi Arabia, Yemen, Jordan and Oman.<sup>71</sup> Brunei and Pakistan directly ban the importation. However, in general, under the background of free trade and within the context of WTO, Muslim countries take a tolerating view towards their moral concerns out of religious belief.

### II.2.3. 'Public morals' in the United States

The law in United States has prohibited the importation of products made by child labour, which reflects the moral concern over this issue in US society. Early in 1994, Section 307 of the Tariff Act of 1930 prohibited forced labour, with the legislative history of this Act revealing that 'forced labour' includes forced child labour.<sup>72</sup> The Generalised System of Preferences in the United States grants duty-free benefit to developing countries, contingent on the satisfaction of some requirements, including that the applicant country has taken or is taking steps to realise 'internationally recognised worker rights' for workers in that country.<sup>73</sup> The 'internationally recognised worker rights' also includes a minimum age for the employment of children.<sup>74</sup> Later in 1997, Section 634 of the Treasury and General Government Appropriations Act forbade boarder officials from allowing in products made by indentured child labour.<sup>75</sup>

In the GATT, the only exception clause concerning labour issues is Article XX (e), which allows for restricting measures 'relating to the products of prison labour'. Other than this, there are no exception clauses regulating measures concerned with labour standard. Therefore, if American's moral concern on child labour provokes a WTO litigation, it would be best to use Article XX (a) of the GATT to defend the relevant measures,<sup>76</sup> except when the measures specially relate to prison child labour.

Professor Diller and Mr. Levy have argued that Article XX (b) of the GATT can provide a context for claiming an exception to measures banning the importation of products made by child labour.<sup>77</sup> However, invoking Article XX (b) sounds awkward. This concerns the difference between Article XX (a) and Article XX (b), which will be demonstrated in detail in the chapter below.<sup>78</sup> To briefly illustrate this specific question, if the contracting party intends to

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<sup>67</sup> Bhala & Keating 2013, supra note 55, p.349.

<sup>68</sup> Bhala, supra note 65.

<sup>69</sup> *Idem*, p.345.

<sup>70</sup> *Idem*, p.350.

<sup>71</sup> *Idem*, p.351.

<sup>72</sup> J. M. Diller & D. A. Levy, 'Child Labor, Trade and Investment: Toward the Harmonization of International Law', *The American Journal of International Law* 1997-91, p.687.

<sup>73</sup> 19 U.S.C. §2462(c) (7) (1994).

<sup>74</sup> 19 U.S.C. §2462(a).

<sup>75</sup> Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, § 634, 111 Stat. 1272, 1316 (1997).

<sup>76</sup> Steve 1998, supra note 1, p.740.

<sup>77</sup> Diller & Levy 1997, supra note 72, p.682.

<sup>78</sup> See Chapter IV.3.

apply Article XX (b), it should establish that the policies in question pursue the objective of preserving human life or health through the elimination or reduction of health risks posed by *the products*. But the ban on the import of child-labour-made products is more about eliminating or reducing health risks posed to children by *the producing process*. Thus, Article XX (a) of the GATT would be a better defence, as it reflects a general moral concern over a healthy growing environment for children.

#### II.2.4. 'Public morals' in China

In *China-Audiovisuals*, the United States claimed that China's measures regarding the import and distribution of certain publications and audio-visual entertainment products breached its commitments under the WTO. China invoked Article XX (a) to defend that the measures concerned were aimed at protecting public morals in Chinese society.<sup>79</sup> It was important to implement the content review system to select the products that were consistent with the public morals in China.<sup>80</sup> Unfortunately, both the Panel and the Appellate Body failed to explain the meaning of 'public morals'. This was mainly because the United States did not challenge on whether China's measures could fall under Article XX (a). What they disagreed over was the necessity of China's measures.

This case reflects the moral concerns in China, especially with respect to cultural products. In this case, China argued that the content review system governing the importation of cultural goods, especially the measures at issue, was to prevent the entry of products with contents covering violence, pornography and so on.<sup>81</sup> This was to protect the important values enshrined in Chinese society, including 'Chinese cultural and traditional values'.<sup>82</sup> Such values are stated in various regulations such as Article 3 (7) of the Regulations on the Administration of Audio and Video Products,<sup>83</sup> Article 25 (7) of the Regulation on the Administration of Publication<sup>84</sup> and

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<sup>79</sup> *China-Audiovisual: Report of the Panel*, supra note 58, para.7.753.

<sup>80</sup> *Idem*, para.7.755.

<sup>81</sup> *Idem*, para.7.714.

<sup>82</sup> *Ibid.*

<sup>83</sup> Regulations on the Administration of Audio and Video Products (2016 Revised) (effective 1 February 2002, issued 6 February 2016) CLI.2.270896, art 3 (7):

People engaged in the publication, manufacture, reproduction, import, wholesale, retail, and lease of audio and video products shall abide by the Constitution and the relevant laws and regulations, adhere to the orientation of serving the people and serving socialism and disseminate ideas, morals and scientific, technical and cultural knowledge beneficial to economic development and social progress.

The following contents are prohibited from being recorded in audio and video products:

[...]

(7) that which propagates obscenity, gambling, violence or instigates crimes;

[...]

<sup>84</sup> Regulation on the Administration of Publication (2016 Revised) (effective 1 February 2002, issued 6 February 2016) CLI.2.270929, art 25 (7):

The following contents are prohibited from being included in any publication:

[...]

7.Which propagate obscenity, gambling, violence or instigate crimes;

[...]

Article 6 (7) of the Measures for the Administration of Import of Audio and Video Recordings.<sup>85</sup>

However, compared with the moral concerns in the European Union, Muslim countries and the United States, the content of the moral concerns in China is still ambiguous. At least in *China-Audiovisual*, China failed to argue clearly and straightforwardly as to what the key value is that China wanted to protect. All we can see regarding the content of ‘public morals’ in China are these vague expressions such as ‘Chinese cultural and traditional values’.<sup>86</sup> As Australia submitted, not all products having cultural value to a contracting party would automatically be encompassed by the term ‘public morals’ in Article XX (a) of the GATT.<sup>87</sup> China has to show that there is a relationship between the cultural values in the products and the *standards of right and wrong conduct* maintained in China. However, there was no straight or clear answer in China’s submission with respect to what were the standards of right and wrong conduct in Chinese society, and what the relationship was between the cultural values in the products concerned and the standards of right and wrong conduct. If China could have elaborated more clearly on this question, their submissions regarding the necessity of the measures in the case would then have been more persuasive.

### III. Arguments for ‘public morals’ as an exception clause justifying trade-restrictive measures

As Professor Charnovitz argued, the danger of protectionist abuse of Article XX (a) of the GATT is real, since virtually anything can be characterised as a moral issue.<sup>88</sup> Therefore, scholars worry that the tensions between trade and moral issues could pose a deep and dangerous challenge to the WTO law.<sup>89</sup> The fact that there were barely any indications in the preparatory work of the GATT about the reason to include ‘public morals’ as an exception clause under Article XX to justify trade-restrictive measures does not reduce the importance of this clause. No matter under the context of Article XX of the GATT in general, or in its own nature, the ‘public morals’ exception clause is significant in easing the tensions between trade and moral issues.

#### III.1. National sovereignty

First, Article XX (a) allows the contracting parties to preserve certain aspects of its national sovereignty over its domestic moral issues while participating in the international trade regime

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<sup>85</sup> Measures for the Administration of Import of Audio and Video Recordings (2011 Revised) (effective 6 April 2011, issued 6 April 2011) CLI.4.149796, art 6 (7):

The state shall prohibit the import of audio and video recordings with any of the following contents:

[...]

(7) content that propagates obscenity, gambling or violence or instigates crimes;

[...]

<sup>86</sup> *China-Audiovisual: Report of the Panel*, supra note 58, para.7.714.

<sup>87</sup> *Idem*, para.5.12.

<sup>88</sup> Steve 1998, supra note 1, p.731.

<sup>89</sup> R. Howse & J. Langille & K. Sykes, ‘Pluralism in Practice: Moral Legislation and the Law of the WTO after *Seal Products*’ (2015) New York University Public Law & Legal Theory Research Paper Series Working Papers, Paper 506, 93 at: [http://lsr.nellco.org/nyu\\_plltwp/506/](http://lsr.nellco.org/nyu_plltwp/506/) (accessed 3 May 2017).

under the WTO.<sup>90</sup> This is consistent with the function of Article XX in general. Although it did not point out the object and purpose of Article XX (a) of the GATT in its case law, the WTO dispute settlement body has generally elucidated the one of other exception clauses in Article XX. Examples can be found in *Thailand - Cigarettes*<sup>91</sup> and *US-Tuna-Dolphin (I)*<sup>92</sup> (with respect to Article XX (b)), and *Canada - Herring* (with respect to Article XX (g))<sup>93</sup>. Therefore, we can draw the same conclusion that Article XX (a) is important in the sense that it allows the contracting parties to preserve their sovereignty over moral issues as other exception clauses under Article XX do and strikes a balance between international trade and national moral concerns.

### III.2. Intrinsic importance of ‘public morals’

The ‘public morals’ exception also has its own intrinsic importance. First, ‘public morals’, as a non-economic subject matter, is *per se* a vital aspect of our societies.<sup>94</sup> The Appellate Body recognised this in *US - Gasoline*, stating that the exception clauses under Article XX of the GATT are designed to protect important state interests.<sup>95</sup> Free trade is the *means* to realise the objective of ‘raising standards of living’, as the preamble of both the GATT and Agreement Establishing the World Trade Organization (hereinafter ‘WTO Agreement’) states. It is not *ends* of everything but has to work together with other non-economic subject matters, including ‘public morals’, to raise the standards of living of human beings.

Moreover, as its definition states, ‘public morals’ denotes a standard of right and wrong conduct. It signifies the basic social value of a society. In Ancient Roman times, *boni mores* was recognised as ‘the basis of the Roman legal system and life’.<sup>96</sup> In contemporary societies, it also appears in many constitutional charters and international covenants.<sup>97</sup> Therefore, the ‘public morals’ exception *per se* is of great importance to current societies.

### III.3. The unique function of ‘public morals’ exception

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<sup>90</sup> C. T. Feddersen, ‘Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT’s Article XX(a) and “Conventional” Rules of Interpretation’, *Minnesota Journal of Global Trade* 1998-7, p.77.

<sup>91</sup> See Panel report Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes (‘Thailand-Cigarettes’), adopted 7 November 1990, BISD DS10/R - 37S/200/75, para.73.

<sup>92</sup> See United States - Restrictions on Imports of Tuna (‘US-Tuna-Dolphin (I)’), published 3 September 1991, DS21/R - 39S/155, para.5.27. The Panel Report was circulated in 1991 but not adopted due to Mexico’s refusal to pursue the case further. Therefore, the report does not have a status of a legal interpretation of the GATT law. But still, it can be a reference when discussing the extraterritorial effect of Article XX of the GATT. The introduction of this case see [https://www.wto.org/english/tratop\\_e/envir\\_e/edis04\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/edis04_e.htm) (accessed 5 May 2017).

<sup>93</sup> See Panel report Canada - Measures Affecting Exports of Unprocessed Herring and Salmon (‘Canada-Herring’), adopted 22 March 1988, GATT BISD L/6268 - 35S/98/12, para.4.6.

<sup>94</sup> See Zleptnig 2010, *supra* note 52, pp.93 - 95.

<sup>95</sup> Appellate report United States - Standards for Reformulated and Conventional Gasoline (‘US-Gasoline’), adopted 29 April 1996, AB-1996-1, WT/DS2/AB/R, p.29.

<sup>96</sup> R. Perrone, ‘Public Morals and the European Convention on Human Rights’, *Israel Law Review* 2014-47, p.361.

<sup>97</sup> *Idem*, para. 362. Dr. Perrone named plenty of constitutions within the European Union, such as Constitution of the Netherlands (1815), art 7(3), Constitution of Italy (1948), arts 19 and 21(6) and Basic Law of the Federal Republic of Germany (1949), art 2(1). International covenants are International Covenant on Civil and Political Rights, Convention on the Rights of the Child and so on.

The ‘public morals’ exception also has its unique function comparing to other exception clauses under Article XX of the GATT. First, this exception clause can cover measures regulating the *method* to produce a product. Compared with Article XX (b) of the GATT, sometimes a policy aiming to protect public morals can also fall under the category of protecting human, animal or plant life or health, such as the EU Seal Regime in *EC-Seal Products*.

Nevertheless, there are more cases where it would be problematic if mixing the scopes of these two articles. Article XX (a) can contain areas where Article XX (b) cannot reach. For example, the European Community once enacted an EC Regulation on Pelts and Fur.<sup>98</sup> This regulation was designed to ban on import of fur from animals caught by leg-hold traps.<sup>99</sup> When an animal happens to fall in the trap, its limb will be caught but the animal will not immediately die.<sup>100</sup> However, these trapped animals will eventually die out of fear, thirst and loss of blood.<sup>101</sup> Concerning the welfare of these potential trapped animals, the European Union decided to ban the import of fur from such animals in order to prevent such inhumane killing.

Unsurprisingly, this regulation provoked objections from other contracting parties such as the United States. The United States threatened to submit this dispute to WTO.<sup>102</sup> Finally they made a compromise that the United States would prohibit the use of trap within the next six years.<sup>103</sup>

Imagining this dispute were to be submitted to WTO and the European Union based their claims on Article XX (b) rather than Article XX (a), the arguments might be hard to structure. As the European Union did not intend to ban the *killing* of such animals, what they refused was the inhumane *method* to kill these animals,<sup>104</sup> with the rationale behind this ban being based on the overall concern in European society about harm caused to the feelings of animals. Under such circumstances, Article XX (a) of the GATT is apparently more suitable to base their arguments on.

Furthermore, except for above-mentioned cases, where the policy in question has domestic legislation to support the public morals it protects, there are other cases where the public morals are purely out of psychological reasons such as religion or belief. The ban on the import of *haram* products in several Islamic countries is a good example.<sup>105</sup> A similar instance could be the banning of exportation of Buddha images imposed by the government of Thailand, which is purely out of the moral and religious sensibilities of Thai citizens.<sup>106</sup> In such situations, Article XX (a) is more directly-concerned with the topic at issue.

#### IV. Types of ‘public morals’ and questions of its extraterritorial application

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<sup>98</sup> Feddersen 1998, *supra* note 90, p.98.

<sup>99</sup> *Ibid.*

<sup>100</sup> P. V. Michaud, ‘Caught in a Trap: The European Union Leg-hold Trap Debate’ *Minnesota Journal of Global Trade* 1997-6, p.358.

<sup>101</sup> *Ibid.*

<sup>102</sup> Feddersen 1998, *supra* note 90, p.102.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> See Chapter III.2.2. above.

<sup>106</sup> Charnovitz 1998, *supra* note 1, p.696.

Professor Charnovitz has divided measures protecting public morals into two categories. The first one is ‘outwardly-directed’ measure, namely the one safeguarding the morals of foreigners residing outside one’s own country.<sup>107</sup> The second one is ‘inwardly-directed’ measure, which aims to protect the morals of nationals in one’s own country.<sup>108</sup> Professor Wu, however, explores three categories, splitting Professor Charnovitz’s ‘outwardly-directed’ measure into two types. ‘Type I’ is the same as the ‘inwardly-directed’ measures proposed by Professor Charnovitz.<sup>109</sup> ‘Type II’ refers to measures protecting morals directly involved in the production of the products or services in the exporting country.<sup>110</sup> ‘Type III’ does not directly relate to the production of the products, but involves measures limiting importation from a country whose practices are considered as morally offensive by the importing state.<sup>111</sup> It is more about using trade limitations to raise objections to the immoral practices of the exporting country, rather than their products. For example, the EU adopted sanctions against Zimbabwe in 2002 as an objection towards the latter’s grave violation of its human rights obligations, especially regarding freedom of opinion, of association, and of peaceful assembly.<sup>112</sup>

Whatever the categories of the limitations are, one key question here is whether Article XX (a) can encompass extraterritorial application. Mr. Bal concluded that given the measures based on Article XX (e) regarding products made by prison labour would have an extraterritorial effect, analogous reasoning could be applied to other clauses such as Article XX (a).<sup>113</sup> Many other scholars including Professor Wu,<sup>114</sup> and Professor Howse, Ms. Langille and Professor Sykes indeed support this position.<sup>115</sup>

There has never been a WTO case law addressing this question regarding Article XX (a) of the GATT, but the Panel has delivered its opinion in *US-Tuna-Dolphin (I)* on the similar question on the application of Article XX (b). The Panel in *US-Tuna-Dolphin (I)* rejected the extraterritorial effect of Article XX (b),<sup>116</sup> because this would influence the multilateral framework established by the GATT, and the GATT would provide legal security only in respect of trade between a limited number of Contracting Parties with identical internal regulations.<sup>117</sup>

Based on the reasoning in *US-Tuna-Dolphin (I)*, Professor Schoenbaum argues that chaos and anarchy would appear if every contracting party were allowed to impose its own domestic standards on other Parties.<sup>118</sup> Indeed, it is unfair to force other countries to obey one country’s own moral standard. However, there are still some moral standards that can apply extraterritorially. First, *jus cogens* norms falls in this category. According to Article 53 of the VCLT, a treaty shall be void when conflicting with *jus cogens* norms. Therefore, trade regulations prohibiting slavery, genocide, racial discrimination et. al. necessarily implies an

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<sup>107</sup> Charnovitz 1998, supra note 1, p.695.

<sup>108</sup> *Ibid.*

<sup>109</sup> See Wu 2008, supra note 1, p.235.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

<sup>112</sup> Common Position 2002/145/CFSP, (February, 21, 2002), 2002 OJ (L50) 1.

<sup>113</sup> S. Bal, ‘International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT’, *Minnesota Journal of Global Trade* 2001-10, p.107.

<sup>114</sup> See Wu 2008, supra note 1, p.236.

<sup>115</sup> Howse & Langille & Sykes 2015, supra note 89, p.126.

<sup>116</sup> *US-Tuna-Dolphin (I)*, supra note 92, paras.5.27 - 5.28.

<sup>117</sup> *Idem*, para.5.27.

<sup>118</sup> T. J. Schoenbaum, ‘Free International Trade and Protection of the Environment: Irreconcilable Conflict?’, *The American Journal of International Law* 1992-86, p.703.

extraterritorial application. Second, human rights as enshrined in widely accepted international treaties should also be extended to public morals exception and be applied extraterritorially. There have been cases where human rights, especially labour rights, is the major concern of trade limitation regulations. For instance, in 1988 when Myanmar's military government's seized the power of the country, the United State revoked Myanmar's benefit under Generalised System of Preferences (hereinafter "GSP"), in response to Myanmar's violation of worker's rights.<sup>119</sup>

## V. Necessary evidence to support invoking Article XX(a)

The 'public morals' exception in Article XX (a) of the GATT is relatively subjective in nature. As the Panel stated in *EC-Seal Products*, the contents of 'public morals' vary from time to time and from space to space.<sup>120</sup> Hence, the contracting parties have a broad discretion when invoking this clause. Consequently, there is a risk of abuse of this clause. To prevent Article XX (a) from being abused, it is essential to set up a strict standard to assess the evidence supporting the existence of a certain type of moral concern. If the threshold is too low, then any contracting party can invent a moral concern and invoke Article XX (a) to impose trade-restrictive measures and protect domestic industry. Therefore, it is necessary to discuss the problem of evidence. The more objective and strict the standard of evidence is; the less possible such a subjective exception clause would be abused.

Regarding the admissibility of evidence at WTO, the Panel has concluded in *US – Countervailing Duty Investigation on DRAMS* that, "the evidence of ... must in all cases be probative and compelling", but it does not have to be in a great detail.<sup>121</sup> In using the terms of "probative and compelling", the Panel's view on admitting evidence is that the evidence relied upon must demonstrate the alleged effect of the claimant's argument.<sup>122</sup> In other words, whatever the nature or form of the alleged acts, whatever the type of evidence relied upon, there must always be a determination to the effect of the acts alleged by the claimant.

Accordingly, I will analyse five types of evidence that have been used or might be used in the application of Article XX (a) of the GATT in this chapter, namely the text of the regulations concerned and the legislative history, the form of the measures, opinion polls/public surveys, scientific evidence and religious or moral origins.

### V.1. The text of the regulations concerned and the relevant legislative history

In the *EC-Seal Products* dispute, the evidence relied on most was the text of the EU Seal Regime and the relevant legislative history. The Panel concluded that the text of the EU Seal Regime, together with the previous initiatives such as the 2006 'Declaration of the European Parliament on banning seal products in the European Union' (hereinafter 'Parliament Declaration') and the proposal submitted by the European Commission in 2008 (hereinafter

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<sup>119</sup> M. Ewing-Chow, 'First Do No Harm: Myanmar Trade Sanctions and Human Rights', *Northwestern Journal of International Human Rights* 2007-5, 156.

<sup>120</sup> *EC-Seal Products: Report of the Panel*, supra note 5, para.7.380.

<sup>121</sup> Panel report United States - Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) From Korea ('US – Countervailing Duty Investigation on DRAMS'), adopted 21 February 2005, WT/DS296/R, para.7.35.

<sup>122</sup> *Ibid.*

‘Commission Proposal’), supported the argument that public concern for seal welfare constitutes a moral issue for EU citizens.<sup>123</sup>

However, the assessment of the evidence by the Panel in this case was too simple. A reference to the preamble of the legislation and tracing back to the history of this moral concern was insufficient to establish the existence of a moral concern in a given society. The contracting parties only need to hire some skilful legislators to meet this low threshold.<sup>124</sup> Therefore, in this case, regulations and legislative history as evidence cannot necessarily lead to the determination that the alleged moral concern is shared by the whole society as a standard of right or wrong. This type of evidence does not satisfy the requirement of being probative and compelling. Additionally, due to the threshold being rather low, there would be a high risk of abusing this exception clause as a disguise for trade protectionism.<sup>125</sup>

But this is not to say that regulations and legislative history cannot serve as evidence to support the existence of public morals absolutely. According to Article X (3) (a) of the GATT, “laws, regulations, judicial decisions and administrative rulings of general application” affecting the sale of products shall be administered by the contracting parties in a “uniform, impartial and reasonable manner”. The administrative process governing such a legal instrument may constitute relevant evidence to establish the uniformity or non-uniformity of that instrument, as is stated by the Appellate Body in *EC-Selected Customs Matters*.<sup>126</sup> Therefore, the more uniform, impartial and reasonable the administrative process of the legal instrument is, the higher evidential value it has to prove the existence of the public moral. In the *EC-Seal Products* dispute, instead of a mere reference to the preamble of the legislation and the legislative history, the panel should also check the administrative process of the EC Seal Regime, in order to confirm its evidentiary value.

## V.2. Form of the measures

In his article on a systematic analysis of the ‘public morals’ exception clause and the *EC-Seal Products*, Professor Howse suggested looking at the form of the measures—whether they apply to both domestic products and imported products, or are only aimed at imported products.<sup>127</sup> This type of evidence is helpful, in the sense that if the measures concerned only aim at imported products, it is hard to believe that they are genuinely necessary to protect the public morals in question.

## V.3. Opinion poll/public surveys

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<sup>123</sup> *EC-Seal Products: Reports of the Panel*, supra note 5, paras.7.385- 7.389, 7.390- 7.397.

<sup>124</sup> See R. Alford, ‘Morality Play at the WTO’ (*Opinio Juris*, 5 December 2013) at: <http://opiniojuris.org/2013/12/05/morality-play-wto/> (accessed 8 May 2017).

<sup>125</sup> See also J. Pauwelyn, ‘The Public Morals Exception After Seals: How to Keep It in Check?’ (*International Economic Law and Policy Blog*, 27 May 2014) at:

<http://worldtradelaw.typepad.com/ielpblog/2014/05/the-public-morals-exception-after-seals-how-to-keep-it-in-check.html> (accessed 8 May 2017).

<sup>126</sup> Appellate Body report European Communities – Selected Customs Matters (‘EC-Selected Customs Matters’), adopted 13 November 2006, AB-2006-4, WT/DS315/AB/R, para.225.

<sup>127</sup> R. Howse, ‘Comments’ (*International Economic Law and Policy Blog*, 27 May 2014) at:

<http://worldtradelaw.typepad.com/ielpblog/2014/05/the-public-morals-exception-after-seals-how-to-keep-it-in-check.html> (accessed 16 May 2017).

In order to support their argument of moral concerns on seal welfare, the European Union also submitted the results of an opinion poll. A multi-country survey conducted after the adoption of the measure at issue in 11 member states confirmed such concerns in the European Union.<sup>128</sup> The Panel ruled that the results of the surveys are informative in demonstrating the European Union's public concern but only to a limited extent.<sup>129</sup> First, some of the surveys were conducted in countries outside the European Union. Thus they cannot provide sufficient guidance when assessing the moral concerns in the scope of European Union countries.<sup>130</sup> Second, the results of the surveys did not demonstrate whether it is acceptable to exempt seal products obtained from Inuit hunts and resource management-related culls from a prohibition on the sale of seal products.<sup>131</sup> Finally, the responses of the survey companies did not really rebut the specific claim proposed by the complainants.<sup>132</sup> Therefore, the Panel did not put much weight on the results of the public surveys.

Apart from the problems pointed out by the Panel, the results of the surveys conducted by the European Union did not reveal the key issue to support the existence of a moral concern on animal/seal welfare, namely a standard of right and wrong conduct. Although the surveys did prove that a majority of the interviewees supported the EU Seal Regime,<sup>133</sup> it did not demonstrate whether the concern on seal welfare reflects a standard of right and wrong conduct in their mind.<sup>134</sup> To put it differently, would they really refuse to buy a certain type of seal product only because it is wrong, as these interviewees maintain, to adopt inhumane methods of killing to produce the product? Would they voluntarily pay for seal products obtained from seals killed humanely with higher prices as they considered it right to do so? As a rational adult, few people would really say 'yes' to inhumane killing of animals.

Nevertheless, it is one thing to show your attitude to an opinion, but another thing to really transfer this attitude into practice. In this regard, Canada challenged this Regime, as it did not provide information to consumers about the provenance of seal products that could legally be sold in the European Union, not even about the presence of such products.<sup>135</sup> The European Union could not argue that inhumane killing is against their moral concern if their consumers were not even aware of the existence of such killing methods. Thus, the surveys carried out by the European Union cannot be deemed as probative and compelling evidence.

#### V.4. Scientific evidence

Some moral concerns can be explained by scientific reasons. For instance, the European Union submitted scientific evidence including scientific reports and killing methods recommended by various veterinary experts.<sup>136</sup> Scientific evidence can illustrate the background and the rationale behind the moral concerns, but it is not an evidence of the existence of the

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<sup>128</sup> *EC-Seal Products: First Written Submission by the European Union*, supra note 14, para.194.

<sup>129</sup> *EC-Seal Products: Reports of the Panel*, supra note 5, para.7.398.

<sup>130</sup> *EC-Seal Products: Reports of the Panel*, supra note 5, note 653.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*

<sup>133</sup> *EC-Seal Products: First Written Submission by the European Union*, supra note 14, para.194.

<sup>134</sup> See also Panel Report European Communities – Measures Prohibiting the Importation and Marketing of Seal Products Reports of the Panel, Addendum, Annex B-1, adopted 25 November 2013, WT/DS400/R/Add.1 and WT/DS401/R/Add.1, para.59.

<sup>135</sup> See Chapter I above; *EC-Seal Products: First Written Submission by Canada*, supra note 9, para. 236.

<sup>136</sup> *EC-Seal Products: First Written Submission by the European Union*, supra note 14, paras.77 – 169.

moral concerns. After all, this is not under the context of Article XX (b) or Article XX (g) of the GATT, where scientific assessment is necessary to establish the necessity of certain measures ‘to protect human, animal or plant life or health’ or ‘relating to the conservation of exhaustible natural resources’. What matters when invoking Article XX (a) of the GATT is the presence of a moral belief that a certain conduct constitutes a *standard of right and wrong conduct* in this society. Even when scientific evidence is significant to explain the existence of a moral concern, such as the case of *EC-Seal Products* dispute, the Panel must respect the due process right of the parties.<sup>137</sup> The Panel should also pay attention to its limited mandate of review.<sup>138</sup>

## V.5. Religious or moral origins of the measures

As mentioned above, there are countries where a pure religious or moral belief is widely held by an overwhelming majority of people.<sup>139</sup> Under this situation, it is necessary to examine the religious or moral origins of the relevant measures.<sup>140</sup> In a word, no matter what form of evidence that the contracting parties choose, they have to be probative and compelling to demonstrate that the moral concern at issue is *widely-* and *deeply-*rooted among the citizens in that country/area. The more subjective the exception clause is, the more objective the evidence standard should be.

In the *EC-Seal Products* dispute, although both the Panel and the Appellate Body did not shed doubt on this point, Canada challenged the importance of the European Union’s moral concern on animal welfare, as the evidence submitted by the European Union disclosed that the views of their citizens are not rooted in any knowledge of the seal hunts or the seal industry.<sup>141</sup> As far as I am concerned, Canada’s challenge holds water. The European Union’s evidence is superficial, which does not reach the root of the question. Texts and history of legislations and opinion polls of the attitude towards inhumane killing of animals are more of a description of *what the right moral standard should be*, rather than a proof of *how it has already existed*. The European Union should provide evidence in a more substantial sense.

## VI. Integrating human rights law with trade law

### VI.1. The reason to incorporate human rights law

As mentioned above, the DSB has defined ‘public morals’ as ‘standards of right and wrong conduct’ in *US-Gambling*, with the Panel in *EC-Seal Products* citing this definition, regarding it as ‘equally applicable’ in the case at hand.<sup>142</sup> Referring to the Panel report of *US-Gambling*, we

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<sup>137</sup> Appellate Body report Canada – Continued Suspension of Obligations in the EC – Hormones Dispute (‘Canada – Continued Suspension’), adopted 16 October 2008, AB-2008-6, WT/DS321/AB/R, para.592. This was discussed under the context of Agreement on the Application of Sanitary and Phytosanitary Measures (‘SPS Agreement’), where scientific evidence is a must for the DSB to review the parties’ SPS measures. Under such circumstances, scientific evidence’s role is limited according to the Panel’s task, not to mention the context of Article XX (a) of the GATT.

<sup>138</sup> *Ibid.*

<sup>139</sup> See Chapter III.2.2. above.

<sup>140</sup> See S. Lester, ‘Evidence of Public Morals’ (*International Economic Law and Policy Blog*, 27 May 2014) at: <http://worldtradelaw.typepad.com/ielpblog/2013/08/evidence-of-public-morals.html>, (accessed 10 May 2017).

<sup>141</sup> Addendum, Annex B-1, *supra* note 134, para.59.

<sup>142</sup> *EC-Seal Products: Reports of the Panel*, *supra* note 5, paras.7.380 – 7.382.

can see that its determination was based on the definition of ‘public’ and ‘moral’ in *Shorter Oxford English Dictionary* and the clarifications in footnote 5 of the GATS.<sup>143</sup> Afterwards, the Panel in *EC-Seal Products* did not add further explanations. This method of interpretation seems too simple and mechanical, especially the reference to the dictionary. Although the Appellate Body has acknowledged that dictionaries are not dispositive statements of the definition of a word but only a ‘useful starting point’ for the analysis of the ‘ordinary meaning’ of a treaty term based on Article 31 of the VCLT,<sup>144</sup> it still relies on dictionaries in a great detail.<sup>145</sup> In *US-Gambling* where the term ‘public morals’ was defined, the dictionary was almost the main source that the Panel relied on.<sup>146</sup>

Rather than putting a heavy weight on dictionaries, the WTO dispute settlement body should develop the treaty terms more in line with other sources of public international law.<sup>147</sup> Although there has been no WTO case (nor GATT case, as WTO’s predecessor) discussing a normative conflict between trade and human rights,<sup>148</sup> it can be deduced from cases addressing other exception clauses under Article XX of the GATT, that Article XX exceptions are evolving concepts which could, and also should be interpreted in accordance with the development of international law.<sup>149</sup> The Appellate Body’s analysis on the definition of ‘natural resources’ in *Shrimp/Turtle I* is a constructive precedent, where it held that the generic term of ‘natural resources’ is not static but evolutionary.<sup>150</sup> Accordingly, the growing concern about human rights in international law academy is of course an essential part of international law’s current development. This is also the requirement underlined in Article 3.2 of the DSU and Article 31(3)(c) of the VCLT. The Appellate body has also acknowledged in *US-Gasoline* that the GATT cannot be read in clinical isolation from public international law.<sup>151</sup> Thus, it is necessary to incorporate human rights law when interpreting ‘public morals’ in Article XX (a).

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<sup>143</sup> *US-Gambling: Report of the Panel*, supra note 21, paras.6.463 – 6.467. The footnote 5 in the GATS reads as follows: ‘The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.’

<sup>144</sup> Appellate report United States - Continued Dumping and Subsidy Offset Act of 2000 (‘US - Offset Act’), adopted 16 January 2003, WT/DS217/AB/R and WT/DS234/AB/R, para. 248; Appellate report United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services (‘US-Gambling’), adopted 7 April 2005, WT/DS285/AB/R, para. 164 and note 191; Appellate report European Communities - Customs Classification of Frozen Boneless Chicken Cuts (‘EC - Chicken Cuts’), adopted 12 September 2005, WT/DS269/AB/R and WT/DS286/AB/R, paras.175 – 176.

<sup>145</sup> I. V. Damme, ‘Article 31 of the VCLT and ‘textualism’’ (*Opinio Juris*, 2 March 2009) at: <http://opiniojuris.org/2009/03/02/6904/> (accessed 15 May 2017).

<sup>146</sup> In *US-Gambling*, the Panel determined the definitions of both ‘public’ and ‘morals’ on dictionary. Recalling to footnote 5 of the GATS was simply an additional explanation. The Panel only gave a direct citation of this footnote with no further assessment and then drew a conclusion on this question. See *US-Gambling: Report of the Panel*, supra note 21, paras.6.463 – 6.467

<sup>147</sup> See also C. Häberli, ‘Seals and the Need for More Deference to Vienna by WTO Adjudicators’ (2014) World Trade Institute, University of Bern, Working Papers, 6 at: <http://ssrn.com/link/SIEL-2014-Bern-Conference.html> (accessed 13 May 2017); S. H. Cleveland, ‘Human Rights Sanctions and International Trade: A Theory of Compatibility’ *Journal of International Economic Law* 2002-5 133, 149.

<sup>148</sup> A. R. Ziegler and B. Boie, ‘The Relationship between International Trade Law and International Human Rights Law’ in E. D. Wet and J. Vidmar (eds) *Hierarchy in International Law: The Place of Human Rights*, Oxford: Oxford University Press 2012 p.28

<sup>149</sup> Cleveland 2002, supra note 147, p.162.

<sup>150</sup> Appellate report United States - Import Prohibition of Certain Shrimp and Shrimp Products (‘US-Shrimp’), adopted 12 October 1998, AB-1998-4, WT/DS58/AB/R, para.130.

<sup>151</sup> *US - Gasoline: Report of the Appellate Body*, supra note 21, p.17.

## VI.2. The doctrine of the margin of appreciation

In determining the content of ‘public morals’, the WTO Panel held that the contracting parties have a certain degree of discretion.<sup>152</sup> Similarly, the state parties to human rights treaties also enjoy such discretion when defining the content of public morals. Of note is the doctrine of the margin of appreciation as developed by the European Court of Human Rights (hereinafter ‘ECtHR’). In the *Handyside* case, the ECtHR ruled that since the view towards certain morals varies from time to time and from place to place, it is better for national authorities to decide the content and the requirements of the morals at issue.<sup>153</sup> Accordingly, states enjoy a margin of appreciation in assessing the necessity of the measures taken to protect their moral concerns.<sup>154</sup> This leading decision gave a systematic elaboration of the Strasbourg organs’ well-known doctrine, especially regarding exception clause ‘public morals’.

The ECtHR has never provided a definition for this doctrine. In general, it is defined by scholars as “the discretion that a judicial body (in this case the European Court of Human Rights) acknowledges the member states have in assessing the prerequisites to apply certain measures”.<sup>155</sup> It is a “grant of ‘breathing space’ or ‘elbow room’ by international authorities to national authorities”.<sup>156</sup>

When reviewing the necessity of the measures to protect public morals based on the doctrine of margin of appreciation, one must keep in mind of the difference between the *establishment of facts* and the *determination of questions of laws*. When analysing this doctrine in the context of the European Convention on Human Rights, Professor van Dijk and Professor van Hoof pointed out that the assessment whether the facts, namely the measures at issue constitute a violation of the Convention can only be decided by the Strasbourg organs.<sup>157</sup> Whereas the establishment of the facts, especially the relevant national law and its interpretation should be accomplished by national authorities.<sup>158</sup> This can contribute to judicial expediency and efficiency of the fact-finding and evaluation of evidence at an international organ.<sup>159</sup>

Therefore, when assessing the contents of a certain moral concern in the context of Article XX (a) of the GATT, the contracting parties may also enjoy a margin of appreciation to decide ‘whether, in their societies, concrete situations and forms of conduct clash with public morals’.<sup>160</sup> However, it has to be emphasised that the parties’ discretion can only be extended to examining whether specific facts i.e. the import/export of certain goods is in conflict with a moral concern in their society.<sup>161</sup> As for the definition of the term ‘public morals’ in the GATT and whether the measures in question violate the GATT, the WTO dispute settlement body

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<sup>152</sup> *EC-Seal Products: Reports of the Panel*, supra note 5, para.7.381.

<sup>153</sup> *Case of Handyside v. the United Kingdom*, Decision of 7 December 1976 1 EHRR 737, para.48.

<sup>154</sup> *Ibid.*

<sup>155</sup> Perrone 2014, supra note 96, p.363.

<sup>156</sup> H. C. Yourow, ‘The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence’, *Connecticut Journal of International Law* 1987-1988- 3, p.118.

<sup>157</sup> P. v. Dijk & G. J. H. v. Hoof, *Theory and Practice of the European Convention on Human Rights*, Kluwer Law and Taxation 1990, pp.446-448.

<sup>158</sup> *Ibid.*

<sup>159</sup> Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia 2001, p.239.

<sup>160</sup> See Perrone 2014, supra note 96, p.366.

<sup>161</sup> See *ibid.*

shall have the competence to decide.<sup>162</sup>

## VII. Conclusion

In the contemporary society, there is a growing number of non-trade factors influencing trade issues. The ‘public morals’ clause in Article XX (a) of the GATT, though rarely being discussed during the preparation of the GATT, is playing an increasingly important role in balancing trade liberalisation and the protection of the Contracting Parties’ sovereignty over domestic moral issues.

The *EC-Seal Products* dispute was the first case where the WTO dispute settlement body discussed ‘public morals’ as a distinct basis for trade measures inconsistent with the requirements in GATT. In this case, the Panel cited the definition of ‘public morals’ in the GATS given by the Panel in *US-Gambling*, which was ‘standards of right and wrong conduct maintained by or on behalf of a community or nation’. Moreover, since the content of public morals varies from time to time and from space to space, it should be the national authorities that decide the content of their moral concerns rather than the DSB. When assessing the necessity of European Union’s measures, the Appellate Body held that a holistic weighing of different factors should be considered rather than focusing on the contributions of the measures alone as the Panel did. Meanwhile, there should be a pre-determined threshold when balancing each factor rather than setting up different standards of these factors in different cases. Pre-determined thresholds contribute to the predictability of Article XX (a) of the GATT and can prevent the abuse of this clause. Moreover, a thorough examination of evidence, focusing on whether the moral problem at issue constitutes a deeply- and widely-rooted concern in the given society, is also conducive to the prevention of abuse of Article XX (a) of the GATT.

Moreover, it would be useful to integrate human rights law with trade law on ‘public morals’ exception, especially regarding the definition of this term. Of note is the doctrine of ‘margin of appreciation’ established by the ECtHR, which would be helpful to decide the autonomy and discretion of the contracting parties when they apply ‘public morals’ clause. In establishing the facts, states can enjoy a margin of appreciation when assessing the content of their moral concern, i.e. whether a certain conduct is consistent with their domestic morals. But when determining whether the measures protecting the moral concerns violate Article XX (a), it should be the WTO dispute settlement body that makes the final decision.

In conclusion, granting contracting parties discretion in deciding the content of their moral concerns, but in the meantime conducting a comprehensive and thorough examination for the necessity test as well as making use of the chapeau of Article XX of the GATT, then a balance can be struck between trade liberalisation and public moral issues.

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<sup>162</sup> See *ibid.*