

Note

Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine

Mark Wu[†]

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I. INTRODUCTION

Free trade and public morality coexist in a precarious balance. On the one hand, the international trading system was founded on the principle of nondiscrimination. Countries should not disadvantage those that fail to share their geopolitical or religious views. On the other hand, the system was also founded on the notion that countries should not be forced to liberalize trade when doing so would threaten their public morality. But how is this balance defined? How does the system grant states sufficient autonomy to regulate on

[†] Yale Law School, J.D. 2007. Oxford University, M.Sc. 1998. Harvard College, A.B. 1996. Many thanks to Steve Chamovitz, Kimi Gahan, Rob Howse, and Mike Trebilcock for their helpful and insightful comments on earlier drafts of this Note. Thanks also to Kate Heinzelman, Jeff Sandberg, and the staff of the *Yale Journal of International Law* for their editorial suggestions.

moral grounds while preventing states from abusing that power to enact protectionist measures in disguise?

At the heart of this issue is Article XX(a) of the General Agreement on Tariffs and Trade (GATT), more commonly known as the “public morals exception.” This clause allows countries to adopt or enforce trade measures “necessary to protect public morals.”¹ But what exactly is encompassed within the scope of this clause? For over fifty years, this question went unanswered, as no adjudicatory body expounded on its meaning.² However, in 2005, the World Trade Organization (WTO) breathed new life into the exception. In a case generally referred to as *U.S.-Gambling*, the WTO recognized the right of the United States to ban internet gambling services on the grounds that such services violated American public morals.³

While *U.S.-Gambling* clarified a few doctrinal issues, the decision left a number of questions unanswered. For example, who defines what constitutes a “public moral”? Can the exception only be used for inward-directed measures designed to protect the morals of one’s own citizens? Or can the exception be outward-directed and serve as a legal cover for trade restrictions against countries with poor records on human rights, labor norms, or women’s rights? Can the clause be used to curtail trade with those whose actions threaten a country’s territorial integrity? Does it permit trade restrictions based on religious norms? In the wake of the *U.S.-Gambling* decision, little has been written about how the public morals doctrine should evolve.⁴

This Note discusses these open issues and analyzes potential options for doctrinal evolution. It is organized in three parts. Part II provides a background history of the public morals exception clause. I illustrate why, even though the meaning of the clause was not expounded upon for over fifty years, the exception remained important, appearing in subsequent trade agreements and numerous academic works discussing how to incorporate human rights and labor rights into the WTO. Part III provides an overview of

1. General Agreement on Tariffs and Trade art. XX(a), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

2. As a result, relatively few scholarly articles devoted specifically to the public morals exception clause have been published. Two important contributions are Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT’L L. 689 (1998) and Christoph T. Feddersen, *Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT’s Article XX(a) and “Conventional” Rules of Interpretation*, 7 MINN. J. GLOBAL TRADE 75 (1998). However, the clause has been raised in a number of other trade-related articles devoted to other areas, particularly human rights and labor. See, e.g., Sarah H. Cleveland, *Human Rights Sanctions and International Trade: A Theory of Compatibility*, 5 J. INT’L ECON. L. 133 (2002); Michael J. Trebilcock & Robert Howse, *Trade Policy & Labor Standards*, 14 MINN. J. GLOBAL TRADE 261 (2005).

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

4. See, e.g., Jeremy C. Marwell, Note, *Trade and Morality: The WTO Public Morals Exception After Gambling*, 81 N.Y.U. L. REV. 802 (2006). Marwell does touch on the open doctrinal question of standards for considering the question, “which morals are ‘public morals?’” but does not examine many of the other questions considered in Section III.B, *infra*. Other articles have simply analyzed errors in the Appellate Body’s jurisprudence in the case itself, but these authors have not examined the questions that *U.S.-Gambling* leaves unaddressed. See, e.g., Irem Dogan, Note, *Taking a Gamble on Public Morals: Invoking the Article XIV Exception to GATS*, 32 BROOK. J. INT’L L. 1131 (2007); Kelly Ann Tran, *The WTO Appellate Body Gambles on the Future of the GATS: Analyzing the Internet Gambling Dispute Between Antigua and the United States Before the World Trade Organization*, 6 APPALACHIAN J.L. 165 (2006).

the recent *U.S.-Gambling* decision that finally breathed life into the doctrine. I suggest that the decision, while historic, rendered an incomplete interpretation of the clause. I discuss three important unanswered doctrinal questions. For each, I highlight why the nascent doctrine remains ambiguous and discuss the range of options available for resolving these uncertainties.

Part IV discusses these unanswered questions in the context of the debate over how the public morals doctrine should evolve. I examine three alternatives—one that would retreat to a more originalist interpretation and two that advocate a broader interpretation, incorporating moral issues such as human rights and labor standards. I then sound a cautionary note about each of these alternatives, as each could potentially lead to an outcome that threatens the overall stability of the global trading regime. In turn, I present a more modest proposal—one that would impose additional qualifications on the permitted class of inward-directed measures and, should the WTO choose to broaden the doctrinal scope to encompass outward-directed measures, would impose additional evidentiary requirements and allow enforcement only against those violating affirmative commitments. In doing so, I hope to present a vision of how the public morals doctrine can be rescued from its current ambiguity without threatening the fundamental underpinnings of the global trade regime.

II. A HISTORY OF THE PUBLIC MORALS EXCEPTION CLAUSE

When the founders of the modern global trade regime devised the system following World War II, they carved out a series of ten general exceptions to the principle of free trade. The first of these exceptions was for the protection of public morals. Part II provides a basic introduction to this exception for readers unfamiliar with its history. After explaining the language of the text itself, I briefly discuss its purpose and drafting history. I then illustrate how the public morals exception clause lay dormant from 1948 through 2004. During that period, the meaning of the clause was clarified neither through subsequent negotiations nor through adjudicatory decisions. Despite this doctrinal dormancy, the public morals clause continued to play an active role in international trade law. I provide a few illustrations of how countries continued to use the exception. Finally, I explain how, during this period, many academics pressed for a broader interpretation of the exception in order to encompass human rights, labor rights, and other transnational norms.

A. *Considerations on the Clause's Text, History, and Purpose*

The exact language of Article XX(a) of the General Agreement of Tariffs and Trade (GATT), more commonly known as the public morals exception clause, when read in conjunction with Article XX's chapeau, states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in

this Agreement [i.e., the GATT] shall be construed to prevent the adoption or enforcement by any contracting party of measures necessary to protect public morals.⁵

The idea of allowing countries to restrict trade on moral grounds was first proposed in November 1945 by the United States.⁶ This proposal was made during the early stages of the legal drafting of the GATT founding agreements. Every subsequent draft contained similar language allowing for exceptions for "measures necessary to protect public morals."⁷ This suggests that while the drafters continually recognized the importance of enacting such an exception, they either did not see the need to further elaborate upon the concept of "public morals" or they could not agree on its meaning.⁸ Thus, the final agreement simply retained the earlier drafts' language that nations can "adopt[] or enforce[] . . . measures necessary to protect public morals," without any further explanatory text.⁹

What types of trade-restrictive measures, then, could a nation enact to protect public morals? Like statutes, international treaties are often interpreted not solely on the basis of text, but also in conjunction with their purpose and legislative history. Article 32 of the Vienna Convention on the Law of Treaties authorizes consultation of a treaty's drafting history as a supplementary means for determining the meaning of an ambiguous term within that treaty.¹⁰ However, in this case, the purpose and drafting history shed little light on the exact meaning of the text.

In his defining work on the history of Article XX(a), Steve Charnovitz suggested that the American proposal to include a public morals exception clause was partially designed to protect a series of trade restrictions that the United States and other countries already had in place at the time the GATT was negotiated. The restricted items included "intoxicating liquors, smoking opium and narcotic drugs, lottery tickets, obscene and immoral articles, counterfeits, pictorial representations of prize fights, and the plumage of certain birds."¹¹ The U.S. negotiating party feared that if the new treaty forced Congress to amend too many laws, Congress might vote against it. The public morals exception therefore provided legal cover for maintaining existing domestic laws under the new international trade regime. Beyond this near-

5. GATT, *supra* note 1, art. XX(a).

6. U.S. DEP'T OF STATE, PUBL'N NO. 2411, PROPOSALS FOR THE EXPANSION OF WORLD TRADE AND EMPLOYMENT (1945).

7. See United Nations Conference on Trade and Employment, Apr. 10, 1947, *Report of the Second Session of the Preparatory Committee*, U.N. Doc. E/PC/T/186 (Sept. 10, 1947); United Nations Conference on Trade and Employment, Jan. 20-Feb. 25, 1947, *Report of the Drafting Committee of the Preparatory Committee*, art. 37(a), U.N. Doc. E/PC/T/34/Rev.1 (Mar. 5, 1947) [hereinafter *Report of the Drafting Committee*]; United Nations Conference on Trade and Employment, Oct. 15-Nov. 26, 1946, *Report of the First Session of the Preparatory Committee*, art. 32(a), U.N. Doc. E/PC/T/33.

8. Charnovitz, *supra* note 2, at 704-05 & n.94 (suggesting that the negotiators knew what the term meant, namely "that it was an amorphous term covering a wide range of activities").

9. United Nations Conference on Trade and Employment, Nov. 21, 1947-Mar. 24, 1948, *Final Act and Related Documents*, U.N. Doc. E/Conf./2/78 (Apr. 1948).

10. Vienna Convention on the Law of Treaties art. 32, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

11. Charnovitz, *supra* note 2, at 706 (quoting Letter from Frank B. Kellogg, Sec'y of State, to Wilson, Minister in Switzerland (Oct. 6, 1927) in 1 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 1927, at 254, 257 (1942)).

term strategic objective shaped by domestic political concerns, any additional purpose remains unclear.

Charnovitz also found that the drafting history shed little light on the meaning of the clause.¹² The records showed that the public morals exceptions clause was little discussed during the drafting of the actual text. Minutes from a preparatory meeting held in London in early 1946 simply state that the negotiators recognized the need for general exceptions “to protect public health, morals, etc.”¹³ There was no discussion as to what the term “public morals” would encompass. Nor were the minutes from the 1947 drafting session in New York much better. The clause was only discussed during a Norwegian delegate’s comments about Norway’s restrictions on the importation, production, and sale of foreign alcohol. The delegate noted that the public morals exception clause encompassed such restrictions because the restrictions’ purpose was morality-oriented in nature (i.e., the promotion of temperance).¹⁴ Aside from alcohol, however, the drafting history provides no further guidance as to what types of trade restrictions fall within or outside of the clause’s parameters. Throughout the three-year drafting process, the initial American proposal remained unchanged, with no proposals for further amendments or clarifications made by any drafter. The clause, therefore, remained as ambiguous at the end of the drafting process as it had been at its start.

B. *The Clause Lies Dormant: 1948-2004*

Vague treaty provisions, like vague statutory provisions, can be subsequently clarified through one of two mechanisms. Either the drafting institution can revisit the text, and subsequently add amendments or issue clarifying regulations, or judicial bodies can interpret and expound upon the meaning of the text in their rulings. Neither explicatory mechanism was employed with respect to the public morals clause for over sixty years. Nevertheless, during this period of “dormancy,” the public morals exception did not fade into oblivion. Despite the fact that its scope and meaning remained unarticulated, both policymakers and activists continued to look to the exception to justify the legality of certain acts.

1. *Lack of Textual Clarification*

Treaty negotiators can themselves elaborate on the meaning of vague treaty texts through subsequent amendments or through new treaties that expand or build on the original treaty. The parallel analogue in a domestic context is when legislators clarify ambiguous statutes through amendments, subsequent implementing statutes, or other related legislation. When the public morals exception clause was originally enacted in 1947, most negotiators expected that the treaty in which it was contained would be shortly

12. *Id.* at 704-05.

13. United Nations Conference on Trade and Employment, *Draft Report of the Technical Subcommittee*, 32, U.N. Doc. E/PC/T/C.II/54 (Nov. 16, 1946).

14. *See Report of the Drafting Committee*, *supra* note 7, at 31.

clarified by a charter establishing an International Trade Organization that would be part of the United Nations.¹⁵ That process, however, took much longer than expected. Indeed, it took trade negotiators forty-seven years and seven additional rounds of negotiations before the WTO was finally established in 1994.¹⁶

During the first six rounds of the global trade negotiations—which lasted from 1949 to 1979—negotiators did not elaborate on the public morals exceptions clause.¹⁷ It was not until the Uruguay Round began in 1986 that trade negotiators revisited the public morals clause. In drafting a new trade agreement covering services, known as the General Agreement on Trade in Services (GATS), the negotiators decided to include a public morals exception clause. However, rather than elaborating upon or refining the text of GATT Article XX(a), the public morals exception clause in the GATS—Article XIV(a)—is eerily similar:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures . . . necessary to protect public morals or to maintain public order.¹⁸

The public morals exception, as agreed upon in the GATS negotiations, offered only two relatively minor clarifications to the original 1947 language. First, the negotiators decided to explicitly invoke the concept of “public order” within the text. This act definitively resolved any ambiguity around whether measures to protect public security could fall under the public morals exception. Second, the negotiators added an explanatory footnote to clarify that the “exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.”¹⁹ This language constrains the scope of the clause to only those situations involving “serious threats.”

Aside from these two clarifications, however, negotiators have chosen not to further articulate the meaning of the clause through textual modifications. In the current Doha Round talks, ongoing since 2001, discussion of the public morals clause is not on the negotiating agenda.

15. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 36-41 (1997).

16. Rounds of international trade negotiations are named after either the city or country in which they began or an official who played a critical role in starting them. The seven rounds that occurred between the original founding of the GATT in 1947 and the creation of the WTO in 1994 were the Geneva Round (1947), the Ancey Round (1949), the Torquay Round (1951), the Dillon Round (1960-61), the Kennedy Round (1964-67), the Tokyo Round (1973-79), and the Uruguay Round (1986-94). Following the Uruguay Round, the WTO has held the failed Millennium Round (2000) and the current Doha Round (2001-present).

17. During these rounds, negotiators revisited and elaborated on several other sections of the 1947 GATT treaty. For example, the scope of the GATT was greatly clarified in anti-dumping measures and non-tariff barriers.

18. General Agreement on Trade in Services art. XIV, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1177 [hereinafter GATS].

19. *Id.* art. XIV n.5.

Therefore, the textual ambiguities that existed when the clause was originally drafted in 1947 continue to exist nearly six decades later.

Yet the fact that the clause has not been expounded upon textually does not mean that it has been ignored. In fact, the opposite has been true. Today, incorporating a public morals exception clause into an international trade agreement has become nearly a standard practice. Almost one hundred trade treaties now include such a clause.²⁰ The earliest regional treaty to do so was the Stockholm Convention establishing the European Free Trade Association in 1960, which included a public morals exception clause identical to the one in the GATT.²¹ Other examples of regional trade agreements that have also chosen to adopt a public morals clause include the North America Free Trade Agreement (NAFTA)²² and the treaties establishing free trade zones in the Association of South East Asian Nations,²³ the Southern African Development Community,²⁴ and the Caribbean Community.²⁵

The public morals exception clause has also become a standard part of bilateral free trade agreements (FTAs). The United States regularly includes such a clause in its bilateral FTAs.²⁶ The same is true of the European Community.²⁷ Nor is this phenomenon limited to bilateral trade agreements with Western countries. Public morals clauses can be found in a number of other bilateral treaties, including the Chile-Mexico FTA,²⁸ the India-Sri Lanka FTA,²⁹ the China-ASEAN Framework Agreement,³⁰ and the Japan-Singapore regional trade agreement.³¹ However, no party to any of these treaties has elaborated on the meaning of the clause. In fact, negotiators to these treaties

20. The full text of these treaties can be found at Regional Trade Agreements, http://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited Dec. 12, 2007). See also Marwell, *supra* note 4, at 811 & n.37.

21. Convention Establishing the European Free Trade Association art. 12, Jan. 4, 1960, 370 U.N.T.S. 5 [hereinafter Stockholm Convention].

22. North American Free Trade Agreement, U.S.-Can.-Mex. art. 2101(1), Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 605.

23. Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area art. 9, Jan. 28, 1992, 31 I.L.M. 513.

24. Protocol on Trade in the Southern African Development Community art. 9, Aug. 24, 1996, *reprinted in* World Trade Org. Comm. on Regional Trade Agreements, WT/REG176/1 (Oct. 8, 2004).

25. Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy art. 226, Feb. 19, 1997, *available at* http://www.caricom.org/jsp/community/revised_treaty-text.pdf.

26. See, e.g., Agreement on the Establishment of a Free Trade Area, U.S.-Jordan, art. 12.1, Oct. 24, 2000, 115 Stat. 243, 41 I.L.M. 63 [hereinafter U.S.-Jordan FTA]; United States-Chile Free Trade Agreement, U.S.-Chile, art. 23.1, June 6, 2003, 117 Stat. 909, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html.

27. See, e.g., Euro-Mediterranean Agreement, Egypt-Eur. Community, art. 26, June 25, 2001, *reprinted in* World Trade Org. Comm. on Regional Trade Agreements, WT/REF177/1 (Oct. 20, 2004).

28. Free Trade Agreement, Chile-Mex., art. 19-02, Apr. 17, 1998, *reprinted in* World Trade Org. Comm. on Regional Trade Agreements, WT/REG125/1 (Aug. 27, 2001).

29. Free Trade Agreement, India-Sri Lanka, art. IV, Dec. 28, 1998, *reprinted in* World Trade Org. Comm. on Trade and Dev., WT/COMTD/N/16 (June 27, 2002).

30. Framework Agreement on Comprehensive Economic Co-operation, ASEAN-P.R.C., art. 10, Nov. 4, 2002, *available at* <http://www.aseansec.org/13196.htm>.

31. Agreement for a New-Age Economic Partnership, Japan-Sing., art. 19, Jan. 13, 2002, *reprinted in* World Trade Org. Comm. on Regional Trade Agreements, WT/REG140/1 (Dec. 3, 2002).

have chosen either to draft nearly identical language³² or to incorporate the GATT exceptions directly into the treaty.³³

2. *Lack of Judicial Clarification*

Like vague statutory language, vague treaty language can also be clarified by a judicial body. In this instance, the relevant adjudicatory bodies are the GATT panel (prior to 1994) and the WTO Panel and Appellate Body (since 1994). A vast amount of international trade law has been created through this mechanism.³⁴ From 1948 to 1994, at least 200 disputes were addressed by GATT panels, with some scholars estimating the number to be as high as 500.³⁵ Litigation has increased in the WTO era. In the WTO's first ten years (1995-2004), nations brought over 300 trade disputes to the WTO.³⁶ Yet, the court did not discuss the scope or meaning of the public morals clause in any one of these cases.³⁷

This dormancy, however, did not occur because countries failed to take actions that might implicate the public morals clause. Countries remained acutely aware of the importance of the public morals exception during this time period. In fact, a number of countries enacted trade restrictions that they argued were in the interest of public morals. For example, the United States, Canada, South Korea, Honduras, Israel, Nigeria, The Gambia, and several

32. See, e.g., Stockholm Convention, *supra* note 21, art. 12(a) (“[N]othing . . . shall prevent the adoption or enforcement by any Member State of measures . . . necessary to protect public morals . . .”).

33. See, e.g., U.S.-Jordan FTA, *supra* note 26, art. 12(1) (“Article XX of GATT 1994 and its interpretative notes are incorporated into and made a part of this Agreement.”).

34. For general discussions of the WTO jurisprudence and its evolution since the creation of the GATT in 1947, see JACKSON, *supra* note 15; MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* (3d ed. 2005); and PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS* (2005). A number of scholars have published books focusing on the jurisprudence in particular specialized areas. See, e.g., DANIEL C. ESTY, *GREENING THE GATT* (1994) (environmental law); *THE WTO AND AGRICULTURE* (Kym Andersen & Tim Josling eds., 2005); *THE WTO, INTELLECTUAL PROPERTY RIGHTS, AND THE KNOWLEDGE ECONOMY* (Keith E. Maskus ed., 2004). There is also a rich body of legal scholarship analyzing procedural doctrines within the GATT/WTO system. See, e.g., PETER GALLAGHER, *GUIDE TO DISPUTE SETTLEMENT* (2002); DAVID PALMETER & PETROS C. MAVROIDIS, *DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION* (2d ed. 2004); WTO SECRETARIAT, *A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM* (2004); Robert Howse, *The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of Judicial Power*, in *THE ROLE OF THE JUDGE IN INTERNATIONAL TRADE REGULATION* 11 (Thomas Cottier & Petros C. Mavroidis eds., 2003).

35. Compare ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* (1993) (documenting 207 cases handled to date under the GATT regime) with JACKSON, *supra* note 15, at 120 (“[I]t seems plausible that in some sense the GATT system has handled over 500 disputes since its inception.”). Note that the discrepancy in the figure is due to the fact that decisions were not necessarily issued or published in all disputes, making it difficult for scholars to agree on an exact figure.

36. For a chronological list of these disputes, see Chronological List of Disputes, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Nov. 15, 2007).

37. The clause was raised as an issue in only one case, generally known as the *Tuna-Dolphin* case. In that case, Australia argued that “Article XX(a) . . . could justify measures regarding inhumane treatment of animals.” However, the Panel did not comment on Australia’s argument in its eventual decision, other than to mention that it had been raised. Panel Report, *United States—Restrictions on Imports of Tuna*, ¶ 4.4, WT/DS21/R-395/155 (Aug. 16, 1991).

other countries banned the import of pornography on moral grounds.³⁸ Several countries have also enacted bans on narcotics.³⁹ Annex 1 contains a list of the morality-related import restrictions asserted by nations in their most recent WTO Trade Policy Reviews.

One might argue that restrictions on pornography or narcotics may not have served as grounds for a judicial challenge, since it is relatively clear that both fall within the scope of public morals. However, several other trade restrictions enacted were certainly more controversial. For example, in 1991, the Council of the European Community enacted a ban on the import of all furs caught in nations that did not ban the use of leghold traps.⁴⁰ In 1997, the U.S. Congress banned products made by indentured child labor.⁴¹ Charnovitz has highlighted both restrictions as ones that might not necessarily be legally covered under the public morals exception, since their main purpose was not to safeguard citizens within their own countries.⁴² Israel also chose to ban the importation of all non-Kosher meat products,⁴³ and Indonesia placed special restrictions on the importation of all alcohol⁴⁴—actions that both countries took on public morals grounds related to religion. It is not, however, clear in either instance that these bans are legal, since the original public morals discussion made no mention of religion.⁴⁵ Yet in none of these instances did another nation challenge the act. Therefore, none of the enacting countries needed to explicitly invoke the exception to justify the legality of its act.

Countries have also failed to clarify the meaning of the exception outside of the WTO. None of the nations that have signed bilateral FTAs with a public morals exception have litigated the clause, nor have any engaged in any diplomatic exchanges regarding its meaning. As a result, until 2004, although numerous trade agreements contained the public morals exception, no body of jurisprudence existed on its meaning.

C. *Clamoring for a Broader Interpretation*

In recent years, the public morals exception has increasingly drawn the attention of academics and international organizations. Since the late 1980s, calls for the global trade regime to take a more proactive stance in enforcing

38. 19 U.S.C. § 1305(a) (2000) (prohibiting the importation of “obscene pictures” into the United States); WTO Secretariat, *Trade Policy Review: Canada*, at 46, WT/TPR/S/53 (Nov. 19, 1998); WTO Secretariat, *Trade Policy Review: The Gambia*, at 37, WT/TPR/S/127 (Jan. 5, 2004); WTO Secretariat, *Trade Policy Review: Honduras*, at 47, WT/TPR/S/120 (Aug. 29, 2003); WTO Secretariat, *Trade Policy Review: Israel*, 44 *tbl.III.8*, WT/TPR/S/58 (Aug. 13, 1999); WTO Secretariat, *Trade Policy Review: Korea*, at 54, WT/TPR/S/137 (Aug. 18, 2004); Nigeria, *Report by the Secretariat: Nigeria Trade Policy Review*, at 49, WT/TPR/S/39 (May 27, 1998).

39. See, e.g., WTO Secretariat, *Trade Policy Review: Honduras*, *supra* note 38, at 46

40. Council Decision 97/602, 1997 O.J. (L 242) (EC); Commission Regulation 3254/91, art. 3, 1991 O.J. (L 308) (EC). For more background on the import ban, see Gillian Dale, Comment, *The European Union’s Steel Leghold Trap Ban: Animal Cruelty Legislation in Conflict with International Trade*, 7 *COLO. J. INT’L ENVTL. L. & POL’Y* 441 (1996).

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

42. Charnovitz, *supra* note 2, at 736-42.

43. WTO Secretariat, *Trade Policy Review: Israel*, *supra* note 38, at 43.

44. WTO Secretariat, *Trade Policy Review: Indonesia*, at 46, WT/TPR/S/184 (May 23, 2007).

45. See *supra* Section II.A (highlighting that the original discussion of the morals exception does not explicitly mention religion).

certain transnational norms have grown louder. GATT Article XX lent support for countries to restrict trade in favor of certain norms such as environmental protection,⁴⁶ cultural protection,⁴⁷ and prison labor norms.⁴⁸ However, for other norms, such as human rights, gender equality, or labor standards outside of prisons, no explicit exception exists in the text. Therefore, several academics began calling for a broader reading of “public morals” that would permit trade restrictions fostering such norms.

As noted earlier, however, the original scope of the public morals clause made no reference to human rights or labor rights. In order for the exception to encompass such norms, several scholars suggested that the WTO ought to interpret the concept of public morals dynamically. Michael Trebilcock and Robert Howse argued that “with the evolution of human rights as a core element in public morality in many postwar societies and at the international level, the content of [the public morals exception] should extend to universal human rights, including labor rights.”⁴⁹ Sarah Cleveland suggested that the public morals clause “most plausibly allows for human rights sanctions.”⁵⁰ Similarly, Stephen Powell asserted that Article XX(a) “likely . . . would support state action on a number of other human rights concerns, which might prompt a WTO Member to ban trade to protest immoral acts by a foreign government against its citizens.”⁵¹ Salman Bal and others also urged that the WTO “consider certain human rights as ‘moral standards.’”⁵²

The United Nations High Commissioner for Refugees (UNHCR) recently also endorsed interpreting the public morals clause to encompass human rights. UNHCR noted that “the very idea of public morality has become inseparable from the concern for human personhood, dignity, and capacity reflected in fundamental rights.”⁵³ As a result, “[a] conception of public morals or morality that excluded notions of fundamental rights would simply be contrary to the ordinary contemporary meaning.”⁵⁴ Therefore, UNHCR suggested that there were “strong arguments” for the WTO’s dispute settlement body to “accept that internationally recognized human rights norms and standards should come within the scope” of the public morals clause.⁵⁵

46. GATT, *supra* note 1, art. XX(g).

47. *Id.* art. XX(f).

48. *Id.* art. XX(e).

49. Trebilcock & Howse, *supra* note 2, at 290.

50. Cleveland, *supra* note 2, at 157.

51. Stephen J. Powell, *The Place of Human Rights Law in World Trade Organization Rules*, 16 FLA. J. INT’L L. 219, 223 (2004) (citing examples “such as products made by indentured children or from countries which deny freedom of the press, the right to emigrate, or with a consistent pattern of gross violations of human rights”).

52. Salman Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT*, 10 MINN. J. GLOBAL TRADE 62, 78 (2001); *see also* Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. INT’L LAW 753, 789 (2002) (suggesting that a WTO member imposing import restrictions for human rights considerations may want to justify its actions by invoking Article XX(a)).

53. Office of the U.N. High Comm’r for Refugees, *Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights*, at 5, U.N. Doc. HR/PUB/05/5 (Nov. 2005).

54. *Id.*

55. *Id.* at 12.

Since the WTO's resistance to adding a "Social Clause" to address labor issues became apparent in the 1996 Singapore Ministerial Declaration,⁵⁶ academics have also turned to the public morals exception as a vehicle for allowing WTO members to impose sanctions against other members who violate core labor rights. Howse has suggested that a trade sanction for labor rights violations can come within the ambit of the public morals exception if "the sanctions have a basis in the Declaration on Fundamental Labor Rights or other international human rights instruments of a universal character," "the practices being sanctioned represent unambiguous violations of the universal content of the right," and the country whose practice is being sanctioned has been singled out for noncompliance by the International Labour Organization.⁵⁷ Others have similarly suggested that the public morals exception may legitimize sanctions to combat child labor practices.⁵⁸

While human rights and labor rights have received the most attention, some academics have entertained the possibility of the public morals clause encompassing other rights as well. For example, Jarvis has suggested that the public morals clause permits trade restrictions to secure women's rights. She has argued that the exception should be read broadly to cover "trade measures aimed at protecting female workers in foreign countries," as well as trade measures "to object to domestic violence, female genital mutilation, bride-burning, forced abortions or sterilization, forced marriages, female infanticide, prostitution, and trafficking in women."⁵⁹ More recently, some scholars have also argued that Article XX(a) permits measures designed to restrict trade in conflict diamonds⁶⁰ and import bans designed to raise the welfare of animals used in meat production.⁶¹

Through the first five decades of Article XX(a)'s existence, the trade and morality doctrine remained largely an academic discussion. Although the clause had been invoked by governments and academics and replicated in numerous agreements, the doctrine itself remained largely untouched and undefined by the international trade regime that created it. Whether the exception should be interpreted as broadly as suggested by many scholars remained an open question.

⁵⁶ World Trade Organization, Ministerial Declaration of 13 December 1996, WT/MIN(96)/DEC, 36 I.L.M. 218, 221 (1997) (stating that "[t]he International Labour Organization (ILO) is the competent body to set and deal with" core labor standards).

⁵⁷ Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. Small & Emerging Bus. L. 131, 169-71 (1999).

⁵⁸ See, e.g., Anjali Garg, Note, *A Child Labor Social Clause: Analysis and Proposal for Action*, 31 N.Y.U. J. Int'l L. & Pol. 473, 526 (1999).

⁵⁹ Liane M. Jarvis, Note, *Women's Rights and the Public Morals Exception of GATT Article 20*, 22 Mich. J. Int'l L. 219, 236-37 (2000).

⁶⁰ Karen E. Woody, *Diamonds on the Souls of Her Shoes: The Kimberly Process and the Morality Exception to the WTO Restrictions*, 22 Conn. J. Int'l L. 335, 352-55 (2007).

⁶¹ Edward M. Thomas, Note, *Playing Chicken at the WTO: Defending an Animal Welfare-Based Trade Restriction Under GATT's Moral Exception*, 34 B.C. Envtl. Aff. L. Rev. 605 (2007).

III. U.S.-GAMBLING AND THE CREATION OF A PUBLIC MORALS CLAUSE JURISPRUDENCE

The WTO finally broke its silence about the public morals clause in 2005 in the *U.S.-Gambling* case. In this Part, I provide an overview of the facts of this dispute and the decisions issued by the WTO's Panel and Appellate Body. I then discuss the emerging public morals clause jurisprudence, as established by the *U.S.-Gambling* decision. I argue that while the decision invokes the public morals clause and attempts to harmonize it with certain core principles of international trade law, what is more significant about the decision is that it left a number of difficult doctrinal questions unaddressed.

A. *An Overview of the U.S.-Gambling Dispute*

The *U.S.-Gambling* case resulted from the U.S. decision to ban crossborder gambling and betting services. On March 27, 2003, Antigua and Barbuda, a small island state in the Caribbean with slightly more than sixty-five thousand inhabitants, brought a complaint before the WTO Dispute Settlement Body alleging that the U.S. ban was illegal. As a result of an economic diversification program in the mid-1990s, Antigua had emerged as a major player in the internet-based offshore gaming industry. By 1999, Antigua had 119 licensed operators employing more than three thousand people, accounting for approximately ten percent of the nation's GDP.⁶² However, by 2003, this once-promising growth sector had fallen into decline. Antigua asserted that the U.S. laws—namely, the federal Wire Act,⁶³ the Travel Act,⁶⁴ and the Illegal Gambling Business Act⁶⁵—were illegal under the GATS and a “material factor” in triggering this decline.⁶⁶

At the time the case was filed, no one expected that the dispute would lead to any discussion of the public morals exception clause. In fact, in its First Written Submission, the United States never once made mention of the need to protect public morals.⁶⁷ Only after the first oral argument did the

62. First Submission of Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 30, WT/DS285 (Oct. 1, 2003), available at http://www.antigua-barbuda.com/business_politics/pdf/Antigua_First_Submission.pdf.

63. 18 U.S.C. § 1084 (2000 & Supp. V 2005).

64. 18 U.S.C. § 1952 (2000 & Supp. V 2005).

65. 18 U.S.C. § 1955 (2000 & Supp. V 2005).

66. First Submission of Antigua and Barbuda, *supra* note 62, ¶ 37. By 2003, the number of licensed offshore gambling and betting services operators in Antigua had declined to twenty-eight, employing fewer than five hundred people. *Id.*; see also Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 3.5, WT/DS285/R (Nov. 10, 2004) [hereinafter *U.S.-Gambling* Panel Report]. Note that Antigua also claimed that a number of U.S. state laws violated the U.S. GATS commitments. However, the Panel absolved Colorado, Minnesota, New Jersey, and New York because those states' laws did not impose criminal liability on suppliers of cross-border gambling services, and the Appellate Body later ruled that Antigua failed to make a prima facie case that the laws of Louisiana, Massachusetts, South Dakota, and Utah violated GATS Article XVI:2. Raj Bhala & David A. Gantz, *WTO Case Review 2005*, 23 ARIZ. J. INT'L & COMP. L. 107, 312-15 (2005).

67. First Written Submission of the United States, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285 (Nov. 7, 2003), available at http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dis

United States raise this defense.⁶⁸ The United States asserted that the ban on remote gambling was necessary because the service posed an increased threat for: (1) organized crime, (2) money laundering, (3) fraud and other consumer crimes, (4) public health (i.e., pathological gambling), and (5) children and youth (i.e., underage gambling).⁶⁹ Taken together, these posed “a grave threat to the maintenance of the public order and the protection of public morals.”⁷⁰

Antigua countered that these public moral concerns were contrived and ill-founded. It argued that the United States had not submitted “evidence of organized crime involvement in Antigua’s gambling industry nor [had] it submitted any evidence that Antigua would not cooperate with criminal investigations and prosecutions by the United States.”⁷¹ Moreover, Antigua explained that its regulatory scheme sufficiently addressed U.S. concerns⁷² and that the United States had rejected its overtures to engage in consultations over its scheme.⁷³ Furthermore, Antigua noted that age verification and other technologies existed to prevent underage gambling that “would be less restrictive on international trade than a total prohibition.”⁷⁴ As a result, Antigua argued that the United States failed to prove that its measures constituted a “necessary” exception to its GATS commitments. Furthermore, Antigua asserted that the U.S. measures violated the requirements of GATS Article XIV’s chapeau that any measure to protect public morals be nondiscriminatory. Because Antiguan operators were denied access to distribution methods available to American service providers, the U.S. laws resulted in “obvious ‘unjustifiable discrimination.’”⁷⁵

On November 10, 2004, the Panel in *U.S.-Gambling* issued the WTO’s first-ever pronouncements on the public morals clause. It began by first defining public morals as “standards of right and wrong conduct maintained by or on behalf of a community or nation.”⁷⁶ The Panel then concluded that, theoretically, restrictions on gambling could fall within the scope of the public

ute_Settlement_Listings/asset_upload_file732_5581.pdf. In its initial arguments in defense, the United States argued that it had made no commitments on gambling and was therefore under no obligation to liberalize trade in this service sector. *Id.* ¶¶ 59-76. Note that Antigua did prepare for the possibility that the United States would make an Article XIV(a) defense by briefing a number of concerns related to such a potential argument in its First Submission. See First Submission of Antigua and Barbuda, *supra* note 62, ¶¶ 204-12.

68. See Executive Summary of the Second Written Submission of the United States, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 37, WT/DS285 (Jan. 16, 2004), available at http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file665_5581.pdf. Note that the United States also continued to assert that “the Panel need not resort to Article XIV [public morals exception clause] to resolve this dispute” because no actual gambling commitments had been made. See *id.* ¶ 4.

69. *Id.* ¶¶ 22-23.

70. *Id.* ¶ 37.

71. *U.S.-Gambling* Panel Report, *supra* note 66, ¶ 3.288

72. First Submission of Antigua and Barbuda, *supra* note 62, ¶¶ 42-74.

73. Sir Ronald Sanders, Chief Foreign Affairs Representative with Ministerial Rank, Opening Statement at the First Panel Meeting in the Dispute Between Antigua and Barbuda and the United States on Internet Gambling ¶ 4 (Dec. 10, 2003), available at http://www.antigua-barbuda.com/business_politics/docs/First_Panel_Meeting.doc.

74. *U.S.-Gambling* Panel Report, *supra* note 66, ¶ 3.291.

75. *Id.* ¶ 3.292.

76. *Id.* ¶ 6.465.

morals exception.⁷⁷ However, in this particular case, the Panel sided with Antigua in decreeing that the United States had “not been able to provisionally justify” that its statutes “are necessary to protect public morals and/or public order within the meaning” of the public morals exception.⁷⁸ The Panel emphasized that the United States had an obligation to explore possible alternatives with Antigua before imposing its ban. Because the United States rejected Antigua’s invitation to do so, its statutes could not pass the Panel’s “necessity” test.⁷⁹ In addition, the Panel held that the United States did not offer convincing proof that it treated domestic and foreign suppliers of gambling services in a consistent manner.⁸⁰ As a result, it could not verify that the statutes were nondiscriminatory, as required by the GATS Article XIV chapeau.⁸¹

On appeal, the Appellate Body overturned the Panel’s finding that the U.S. trade restriction was not “necessary.”⁸² The Appellate Body ruled that the Panel erred in its application of the necessity test. Procedurally, Antigua was required to identify a less restrictive alternative, and the United States’s refusal to engage in consultations, on which the Panel’s decision turned, did not necessarily suggest the existence of an alternative.⁸³ Thus, the Panel did not have sufficient grounds to declare that the U.S. statutes failed the necessity test. The Appellate Body also overturned the Panel’s ruling that the United States’s enforcement of its statutes was de facto discriminatory and violated the public moral clause’s chapeau. It held that the evidentiary record was insufficient for the Panel to reach this conclusion.⁸⁴ Nevertheless, the Appellate Body upheld the Panel’s ruling that the United States had failed to demonstrate that its restrictions did not discriminate against foreign gambling service providers.⁸⁵ Provided this could be rectified, however, the U.S. restrictions would be allowed to stand.

Both sides rushed to declare victory. Antigua claimed a “David versus Goliath” victory, which was technically true, as the Appellate Body had sided with Antigua. The United States also claimed victory. The Appellate Body had recognized its right to enact a ban on gambling services on moral grounds,

77. *Id.* ¶ 6.474. To reach this decision, the Panel considered a number of factors including historical facts (e.g., a 1927 debate in the Economic Committee of the League of Nations), other countries’ regulations, and decisions in the European Court of Justice. *See id.* ¶¶ 6.472-73.

78. *Id.* ¶ 6.535.

79. *Id.* ¶¶ 6.531-35. To reach this decision, the Panel needed to first reject the argument that the U.S. had not made any commitments on gambling in its schedule. *See id.* ¶ 6.134 for further details on why the Panel chose to do so. *See also id.* ¶¶ 6.137-38.

80. *Id.* ¶¶ 6.607-08.

81. *Id.* ¶ 6.608.

82. *U.S.-Gambling* AB Report, *supra* note 3, ¶¶ 324-26.

83. *Id.* ¶¶ 311, 317-18. “Engaging in consultations with Antigua . . . 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.” *Id.* ¶ 317.

84. *Id.* ¶¶ 353-57. The Appellate Body noted that instead the Panel should have focused on de jure discrimination and that the “measures, on their face, do *not* discriminate between United States and foreign suppliers of remote gambling services.” *Id.* ¶ 357.

85. *Id.* ¶¶ 367-72. In particular, the Appellate Body held that the Interstate Horse Racing Act, 15 U.S.C. §§ 3001-07 (2000 & Supp. V 2000), could potentially be discriminatory if it exempted American but not foreign suppliers of remote gambling services, such as off-track betting.

and provided it could enact this ban in a nondiscriminatory manner, its ban could stand.⁸⁶

B. Doctrinal Clarifications from the U.S.-Gambling Decision

For many outside observers, the most important development of the case was not its outcome, but the fact that a WTO adjudicatory body had finally expounded on the meaning of the public morals clause. The Appellate Body itself was conscious of the historic nature of its decision, observing that the case was the first “where the Appellate Body was requested to address exceptions relating to ‘public morals.’”⁸⁷

I suggest that the *U.S.-Gambling* decision, while historic, was extremely cautious in its jurisprudence. It clarified little beyond what was required, and instead deferred most of the difficult doctrinal questions for future consideration. In each instance of clarification, the adjudicators simply confirmed that the interpretative principles that had been applied to other general exceptions should also be extended to the public morals clause. I discuss three such clarifications in this Section.

1. Necessity

Like two other Article XX exceptions, the public morals exception can only be applied if a measure is deemed “necessary.”⁸⁸ In the *Korea-Beef*⁸⁹ and *E.C.-Asbestos*⁹⁰ cases, the Appellate Body laid out a three-factor balancing test for considering necessity. *U.S.-Gambling* clarified that the same necessity test should be used when evaluating a public morals claim. In deciding whether a measure is necessary to protect public morals, adjudicators are to weigh and balance: (1) the importance of the societal interests and values that the measure is intended to protect,⁹¹ (2) the “extent to which the [challenged measure] contribute[s] to the realization of the ends pursued” by the

86. Subsequent to the decision, the United States did not make any changes to the text of any of the challenged statutes or the Interstate Horse Racing Act (IHA). The United States argued that it was not required to do so by the ruling, since it could comply with the Appellate Body’s ruling by demonstrating that the measures met the requirements of GATS Article XIV, which it did through an April 2006 statement by the Department of Justice. See First Written Submission of the United States, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services—Recourse to Article 21.5 of the DSU by Antigua and Barbuda*, ¶¶ 43-44, WT/DS285 (Oct. 16, 2006), available at http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file356_5581.pdf. However, the Article 21.5 Panel has found the United States to be in noncompliance with the ruling. Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services—Recourse to Article 21.5 of the DSU by Antigua and Barbuda*, WT/DS285/RW (Mar. 30, 2007).

87. *U.S.-Gambling* AB Report, *supra* note 3, ¶ 291 n.351 (noting also that this was the first case in which the Appellate Body was requested to address the GATS general exceptions).

88. See GATT, *supra* note 1, art. XX1(b), (d).

89. Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 178, WT/DS169/AB/R (Dec. 11, 2000).

90. Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 172, WT/DS135/AB/R (Mar. 12, 2001).

91. *U.S.-Gambling* Panel Report, *supra* note 66, ¶ 6.492.

measures,⁹² and (3) the trade impact of the challenged measure, including “whether a reasonably available WTO-consistent alternative measure” exists.⁹³

The Appellate Body made important procedural clarifications about the third prong of this test. As noted earlier, the Appellate Body clarified that a state need not engage in any consultations with other WTO members before enacting a restriction to protect public morals.⁹⁴ In other words, it rejected the Panel’s suggestion to add a “consultations pre-condition” to the necessity doctrine. Furthermore, the Appellate Body clarified that the burden falls on the challenging party “to identify a reasonably available alternative measure”⁹⁵ if it argues that the restriction is not necessary.⁹⁶ A defendant is only expected to respond once the challenging party has first proven the existence of a reasonable alternative.

2. *Nondiscrimination*

In addition, any GATT Article XX (or GATS Article XIV) exception must also meet the requirement of the article’s chapeau that a measure not be applied in a manner that constitutes “arbitrary or unjustifiable discrimination.”⁹⁷ There exists a long line of previous WTO cases discussing how nondiscrimination is to be evaluated.⁹⁸ These previous cases have clarified that the chapeau restricts not only overtly discriminatory measures but also facially nondiscriminatory measures whose application creates a discriminatory effect.⁹⁹

The Appellate Body in *U.S.-Gambling* clarified that the public morals exception should be interpreted in conformity with the established principle for evaluating nondiscrimination. In holding that the challenged measures failed to meet the chapeau’s requirement, the Appellate Body based its finding not on actual discrimination but rather on the United States’s failure to demonstrate that the measures were applied in a nondiscriminatory manner.¹⁰⁰ Again, the Appellate Body did not require outright discrimination but deemed the possibility of a discriminatory application to be sufficient.

3. *Dynamic Interpretation*

Because both necessity and nondiscrimination are requirements explicitly stated in the text, it is unsurprising that the first public morals clause

92. *Id.* ¶ 6.494.

93. *Id.* ¶¶ 6.495-96.

94. *See supra* note 83 and accompanying text.

95. *U.S.-Gambling* AB Report, *supra* note 3, ¶ 326.

96. *See id.* ¶¶ 310-11.

97. GATT, *supra* note 1, art. XX; GATS, *supra* note 18, art. XIV.

98. *See, e.g.*, Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (Apr. 5, 2001); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 12, 1998) [hereinafter *Shrimp/Turtle* AB Report]; Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS58/AB/R (Oct. 4, 1996).

99. *See Shrimp/Turtle* AB Report, *supra* note 98, ¶¶ 165, 168, 172, 175.

100. *U.S.-Gambling* AB Report, *supra* note 3, ¶¶ 369, 371.

case would be forced to elucidate these doctrinal principles. The third doctrinal clarification, however, differs because it concerned an issue which the adjudicators could have avoided but did not. Prior to *U.S.-Gambling*, it was unclear whether the public morals clause should be interpreted statically or dynamically. Static interpreters would limit the exception to the scope of public morals as understood by the drafters in 1947. Dynamic interpreters, in contrast, would argue that the scope can expand over time as new issues of public morality emerge.

In *Shrimp/Turtle*, the Appellate Body hinted at its preference for dynamic interpretation, at least with respect to the GATT Article XX(g) exception for conservation of natural resources. It proclaimed that the clause “must be read by a treaty interpreter in light of the contemporary concerns of the community of nations.”¹⁰¹ *U.S.-Gambling* appeared to endorse a similarly dynamic interpretation of public morals. The Panel stated unequivocally that “the content of [public morals] can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values.”¹⁰² This language stood unmodified by the Appellate Body.

Adoption of such language was not necessary since, as the Panel itself recognized, gambling clearly fell within the original scope of the public morals clause.¹⁰³ The case therefore could have been resolved without recourse to dynamic interpretation. Nevertheless, the Panel chose explicitly to establish the dynamic nature of the exception. This move represented yet another doctrinal clarification in line with previous Appellate Body jurisprudence.

C. Unanswered Questions

Outside of confirming that three previously established principles applied to the public morals clause, *U.S.-Gambling* did little to clarify other difficult doctrinal questions concerning the exception. In this Section, I highlight three such questions. Failure to provide answers has meant that what constitutes a legal invocation of the public morals exception still remains largely uncertain in the wake of *U.S.-Gambling*.

1. Defining Public Morals: Universalism vs. Unilateralism

The first doctrinal question that *U.S.-Gambling* did not address is a basic definitional question: which morals are “public morals” as opposed to those that are simply shared by a group of individuals? One possibility is that “public morals” include only those moral principles that are universal or widely shared by all humankind. At the other extreme is the possibility that each state is a proxy for the “public,” and therefore, each state can unilaterally define its own public morals. Other variants would lie in between, such as a requirement that a certain number of states, but not necessarily all, have

101. *Shrimp/Turtle* AB Report, *supra* note 98, ¶ 129.

102. *U.S.-Gambling* Panel Report, *supra* note 66, ¶ 6.461 (emphasis added).

103. *Id.* ¶ 6.472 (concluding that the drafters likely considered the term “public morals” to encompass gambling because of a 1927 League of Nations debate linking gambling and morality).

adopted a particular moral principle before it could become a “public moral.”¹⁰⁴

Both universalism and unilateralism would pose potential problems. If one were to require that morals be near-universal before being considered a “public moral,” then the set of morals that would actually qualify might be so limited as to render the exceptions clause effectively useless. Only a handful of moral principles are widely shared in the international community—such as prohibitions against genocide,¹⁰⁵ slavery,¹⁰⁶ and execution of the mentally retarded.¹⁰⁷ Moreover, from a practical standpoint, when a norm is already widely shared, states will rarely have a need to protect against it—likewise rendering the exception clause useless. In addition, imposing a narrow universalist standard would invalidate many of the morality-based trade restrictions that nations currently exercise. For example, some Muslim nations have imposed an import ban on alcohol by referencing public morality.¹⁰⁸ Yet abstention from alcohol consumption is hardly a moral that is universally shared, even if it is widespread among Islamic societies.

On the other hand, allowing states to unilaterally define their “public morals” would also entail certain problems. The main threat is that, left unconstrained, states will abuse the exception to pass a large number of trade restrictions under the guise of protecting public morals.¹⁰⁹ Even if a state were required to present evidentiary proof that an issue is of genuine concern to public morality, there is the risk that such evidence could not be easily verified and the test “would collapse in practice into an empty procedural requirement.”¹¹⁰

Given this difficult choice, it is unsurprising that *U.S.-Gambling* did not provide clear guidance on this issue. The Panel appeared to reject a pure universalist approach. It clarified that WTO members “should be given *some* scope to define and apply for themselves the concept of ‘public morals.’”¹¹¹ On the other hand, the decision also implied that public morals cannot be unilaterally defined. In determining whether restrictions on gambling

104. See Marwell, *supra* note 4, at 819-26 (presenting a similar spectrum of options and articulating the possibility of a “moral majority or multiplicity” alternative). Note that one option would be to use a parallel form of the legal standard for determining whether a particular practice has become part of customary international law.

105. See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

106. See Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253, amended by Protocol Amending the Slavery Convention, Dec. 7, 1953, 7 U.S.T. 479, 182 U.N.T.S. 51.

107. “[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.” *Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002).

108. WTO Secretariat, *Trade Policy Review: Indonesia*, at 46, WT/TPR/184 (May 23, 2007); WTO Secretariat, *Trade Policy Review: Qatar*, at 26-27, WT/TPR/S/144 (Jan. 24, 2005).

109. See Marwell, *supra* note 4, at 826 (“Allowing a country to invoke the public morals exception unilaterally could shield from WTO scrutiny regulations that inefficiently restrict trade or are motivated by protectionism. Without reference to international practice, it might be feared that any municipal law or regulation could be cast as a matter of public morals, undoing the WTO’s significant progress in liberalizing regulatory barriers to trade.”) (citation omitted).

110. *Id.* at 824 (highlighting some of the risks with such a requirement, but arguing nonetheless in favor of it).

111. *U.S.-Gambling* Panel Report, *supra* note 66, ¶ 6.461 (emphasis added).

constituted a protection of public morals, the Panel carefully examined the practices of other WTO members. The Panel found that two other WTO members restricted trade in gambling-related services and products on moral grounds,¹¹² while sixteen others had already restricted or prohibited internet gambling or were in the process of doing so.¹¹³ Based on this evidence, the Panel concluded that the U.S. ban could fall under the public morals clause.¹¹⁴ The Panel's inquiry thus suggests that, had the United States been alone in defining gambling as an issue of public morality, the outcome might have been different.

Thus, the *U.S.-Gambling* decision appeared to reject both the pure unilateralist and the pure universalist approach. However, it also sidestepped the matter of determining what a middle-ground approach would entail. It left open for future WTO adjudicators to decide the question: to what extent must other nations agree that a particular topic is an issue of public morality before a nation can enact a trade restriction to protect it?

2. Legitimacy Requirements

Second, *U.S.-Gambling* left unanswered the question of whether a public moral needs to be endorsed by certain institutions or through certain processes in order to be considered legitimate. In other words, can a government simply declare without proof that a restriction serves to protect a public moral? Or must it offer some evidence that the public seeks to have such a moral protected? If so, what confers legitimacy? Would it be an opinion poll, endorsement by an international organization, and/or passage through certain parliamentary procedures?

In *U.S.-Gambling*, the Panel defined "public morals" as "prevailing" values. It gave wide latitude to the types of values encompassed within the term, by allowing states to base it upon "a range of factors, including prevailing social, cultural, ethical, and religious values."¹¹⁵ However, neither the Panel nor the Appellate Body specified what a member must do to establish that a belief is "prevailing." Moreover, looking at the United States's argument in *U.S.-Gambling* offers little assistance. In its brief and oral arguments, the United States made reference only to legislative reports, statements before Congressional committee hearings, and the Congressional Record.¹¹⁶ It did not cite any opinion polls or general publications to

112. The Panel noted that Israel prohibits the importation of lottery tickets while the Philippines restricts foreign ownership of gambling operations. *Id.* ¶ 6.471

113. At the time of the Panel's decision, Estonia, Hong Kong, Iceland, Norway, and Uruguay had either prohibited or severely restricted internet gambling. Australia, Austria, Belgium, Brazil, Denmark, Finland, Iceland, Italy, the Netherlands, Sweden, and the United Kingdom had developed or were in the process of developing a regulatory framework for internet gambling. *Id.* ¶ 6.473 n.914.

114. *Id.* ¶ 6.474.

115. *Id.* ¶ 6.461.

116. *Id.* ¶¶ 6.481-87 (noting that the U.S. evidence presented included a 1961 report by the House of Representatives on the Wire Act, the testimony of Attorney General Robert Kennedy before the Senate Judiciary Committee in 1961, the 2003 hearings before the Subcommittee on Crime, Terrorism and Homeland Security regarding the yet-to-be-enacted Unlawful Internet Gambling Funding Prohibition Act, and the Congressional statement of findings made in advance of enactment of the Illegal Gambling Business Act).

demonstrate that the morals in question were widely held in the United States.¹¹⁷

We are therefore left with a series of unanswered questions about what is required to confer legitimacy upon a set of trade restrictions. Is the WTO implicitly endorsing a theory of democratic legitimacy, that is, assuming that any legislative action reflects the will and mores of the majority of citizens? Or could an executive branch simply enact a trade restriction on its own accord in the name of protecting public morals? Had the measures resulted from executive orders or administrative decrees, would they also have legitimately represented prevailing public mores? Would it matter if the executive was democratically accountable, or if the executive branch held public consultations before enacting the restrictive measure? *U.S.-Gambling* simply demanded that a public moral be “prevailing,” but failed to establish any requirements as to what is necessary to prove this fact.

U.S.-Gambling also left open the question of whether pronouncements from other international organizations should influence Article XX(a) disputes and, if so, to what extent. Certain scholars, worried about potential abuse of discretion if countries were allowed to define public morals unilaterally, have advocated tying application of the public morals exception to multilateral determinations.¹¹⁸ Countries would need to draw on such determinations in order to buttress their claim that a genuine issue of public morality is at stake.

Again, *U.S.-Gambling* offered mixed signals on this question. On the one hand, the Panel appeared to endorse a meaningful role for international organizations in defining public morality issues. It turned to rulings within the European Court of Justice upholding the right of countries to enact crossborder restrictions on gambling services as proof that such bans were legitimate.¹¹⁹ As noted earlier, it also turned to proclamations dating back to the League of Nations.¹²⁰ On the other hand, the Panel blatantly disregarded assessments from a multilateral organization about the seriousness of the threat to public morality in this particular case. One of the reasons that the United States argued that the ban was necessary was to guard against money laundering. Antigua retorted that a multilateral regime known as the Financial Action Task Force (FATF) had been established to coordinate international responses to money laundering and that both the United States and Antigua were members of this multilateral regime.¹²¹ Each year, the FATF identifies

117. This absence led Antigua to challenge whether the morals being protected were actually held by the American public. It noted that Americans spent more on gambling than on groceries, 68% of Americans had gambled in the past year and 86% in the course of their lifetime, many global remote-gaming operations were American in origin, and remote-access gambling had spread. See First Submission of Antigua and Barbuda, *supra* note 62, ¶¶ 77, 82-86, 117-18.

118. See, e.g., Cleveland, *supra* note 2, at 162-63 (suggesting “an evolutionary approach tying GATT interpretations to human rights law”); Trebilcock & Howse, *supra* note 2, at 281 (expecting that the “dispute settlement organs of the WTO would rely heavily on the judgment of the ILO and/or UN human rights organs in determining the seriousness of the situation to which the unilateral sanctions are a response”).

119. *U.S.-Gambling* Panel Report, *supra* note 66, ¶ 6.473 n.914 (citing Case C-6/01, Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v. Portugal, 2003 E.C.R. I-8621; and Case C-275/92, Her Majesty’s Custom and Excise v. Schindler, 1994 E.C.R. I-1039).

120. See *id.* ¶ 6.472.

121. The FATF includes thirty-four member states and was established by the G7 Summit in 1989 to adopt and implement measures designed to counter the use of the financial system by criminals.

noncooperative countries, and at the time of the dispute, nine countries were so designated—a list that did not include Antigua. In fact, Antigua was a model member; it had implemented all of the FATF's recommendations to combat money laundering and chaired the Caribbean regional body (CFATF) to which the United States also belonged.¹²² Antigua argued that it was unreasonable for the United States to issue an outright ban directed at all countries to address its money laundering concerns when a multilateral regime already existed that allowed the United States to target likely offenders. Moreover, the multilateral regime provided an objective determination that the situation in Antigua was unproblematic, a finding that the United States subsequently ignored. The Panel, in this instance, discounted Antigua's argument and downplayed the importance of the multilateral organization's country assessments.

U.S.-Gambling therefore failed to provide clear signals regarding the requisite burden of proof for establishing that a trade restriction genuinely protects public morals. The decision does not answer the question of whether public morals can be established by the legislature, the executive branch, multilateral institutions, opinion polls, and/or any other mechanism.

3. *Inward- vs. Outward-Directed Measures*

Perhaps the most important doctrinal question left unaddressed by *U.S.-Gambling* is the third issue: does the public morals exceptions clause cover only restrictions enacted by a government to protect its own citizens? Or can it encompass extraterritorial applications? In other words, if a practice of the exporting state with respect to its citizens offends the public morality of the importing state, can the importing state restrict trade with the exporting state?

To date, most discussions on this question have largely used the terminology of “inwardly-directed” vs. “outwardly-directed” (or “extraterritorial”) restrictions.¹²³ I suggest instead a three-part division that further subdivides the latter category. Type I restrictions are those used to directly safeguard the morals of inhabitants within one's own country. The U.S. ban on internet gambling would fall into this category, as would bans on pornography, narcotics, or alcohol. Type II restrictions are those linked to the protection of those directly involved in the production of the product or service in the exporting state. For example, a ban on products made by child labor would fall within this category, as would a ban on services for sex tourism. Type III restrictions are those aimed at products or services produced in an exporting state whose practices are considered morally offensive by the importing state, but where the practices are not directly involved in the production of the products or service being banned. An example would be an outright ban on imports from Sudan because of its government's human rights violations in Darfur.

For more information, see Financial Action Task Force, <http://www.fatf-gafi.org> (last visited Nov. 7, 2007).

122. Caroline Bissett, *All Bets are Off(line): Antigua's Trouble in Virtual Paradise*, 35 U. MIAMI INTER-AM. L. REV. 367, 384-88 (2004).

123. See Charnovitz, *supra* note 2, at 695.

Type II and Type III restrictions cannot arise simply because one state seeks to meddle in the internal affairs of another. Like Type I restrictions, they also require a showing that its own citizens find a certain practice to be offensive to public morality. In other words, all three types of restrictions arise out of the importing state's moral concern. What differs is that Type II and Type III restrictions may also be seeking to protect certain individuals beyond the restricting state's own borders, whereas this is not the case for Type I restrictions.

By recognizing the right of a country to use trade-restrictive measures to protect its own citizens, *U.S.-Gambling* explicitly endorsed Type I restrictions under the public morals clause. However, the legality of Type II and Type III restrictions—the outward-directed restrictions—was left uncertain. Some have argued that the public morals exception should extend to Type II restrictions, since another WTO general exception (i.e., Article XX(e) for products of prison labor¹²⁴) is such a restriction.¹²⁵ Others have suggested that if the public morals clause were to extend extraterritorially, it should encompass Type III restrictions, rather than simply Type II restrictions.¹²⁶ However, in *U.S.-Gambling*, neither the Panel nor the Appellate Body willingly addressed either Type II or Type III restrictions. Without an explicit endorsement by the WTO that either type of restriction is legal, governments will continue to be reluctant to employ trade restrictions to spur social change in other countries.

Whether the public morals doctrine allows countries to enact sanctions aimed at protecting individuals outside of their own borders is a question of critical importance. A doctrine that encompasses Type II and/or Type III restrictions is much more powerful than one limited to only Type I restrictions. Yet again, *U.S.-Gambling* fails to provide a clear answer.

* * *

Part III has demonstrated that the *U.S.-Gambling* decision is less of a significant breakthrough for the public morals clause doctrine than supposed. The decision left almost all of the critical doctrinal questions—ranging from “how is the clause to be interpreted” to “who can the clause be used to protect”—unanswered. In Part IV, I discuss some alternative proposals for how the three unanswered questions could potentially be resolved.

IV. BEYOND *U.S.-GAMBLING*: PROCEEDING WITH CAUTION

In considering how the public morals doctrine should evolve, the WTO should have two objectives in mind. First, the clause ought to remain aligned with the evolution of the rest of international trade law. How the exception clause is construed should not deviate significantly from the interpretative

124. GATT, *supra* note 1, art. XX(e).

125. *See, e.g.*, Bal, *supra* note 52, at 107; Charnovitz, *supra* note 2, at 701.

126. *See, e.g.*, Francisco Francioni, *Environment, Human Rights, and the Limits of Free Trade*, in ENVIRONMENT, HUMAN RIGHTS, AND INTERNATIONAL TRADE 1, 19-20 (Francesco Francioni ed., 2001) (attacking a product-oriented approach as incongruent logically and asserting instead that an extraterritorial application of the exception should be linked to international standards of morality and human dignity).

methods used for other legal texts on international trade. This goal is important in ensuring that the jurisprudence of the WTO remains a consistent and coherent body of law. Second, the clause should not undermine the global trading system. The GATT/WTO regime has functioned effectively for six decades partially because it has avoided becoming entangled in the ideological battles that have ensnared other multinational institutions. Legal realists would say that in order for the clause to be effective, it must continue to be viewed by the major trading powers (on whose support the regime depends) as a tool to facilitate rather than undermine their trade objectives.

With these objectives in mind, I explore three possible alternatives for how the public morals doctrine could evolve in the future. I highlight weaknesses with each approach. Finally, I offer my own proposed solution for a limited expansion of the doctrinal scope.

A. *Potential Alternatives*

1. *A Retreat to Originalism*

One possibility is that judges could decide to constrain, rather than expand, the scope of the public morals exception. This would be done by explicitly stating that the exception applies only to inward-directed measures (i.e., Type I restrictions) of the type witnessed in *U.S.-Gambling*. It would also make explicit that the list of exceptions is static—that is, restricted to the concept of public morals as understood at the time of the treaty’s negotiation.¹²⁷ As one advocate has argued, this approach would do the most to ameliorate concerns that the public morals exception will be invoked for disguised protectionist purposes.¹²⁸ Future WTO panels would rely heavily on the GATT negotiating history to determine whether the challenged measure falls within the intended scope of the public morals exception.¹²⁹ The outcome in *U.S.-Gambling* would be consistent with this approach, since gambling falls under the scope of morality considered by the original GATT negotiators.

This approach should be rejected for three reasons. First, morals do vary with time and context, a fact that *U.S.-Gambling* itself recognized.¹³⁰ Second, the approach contradicts how WTO members have already come to understand and exercise the clause. For example, religious mores were not enumerated as one of the original exceptions, yet the public morals exception has been frequently invoked to enact import bans on goods for religious reasons (e.g., Israel’s ban on non-Kosher meats and Islamic countries’ ban on alcohol). A retreat to originalism would throw the legitimacy of such exceptions in doubt. Third, originalism would also contravene the approach

127. See *supra* Section II.A for a discussion of what that interpretation entailed. See also Charnovitz, *supra* note 2, at 705-17, for a detailed historical review.

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

129. See, e.g., Tatjana Eres, Note, *The Limits of GATT Article XX: A Back Door for Human Rights?*, 35 GEO. J. INT’L L. 597 (2004) (using such an approach to determine that Article XX cannot be used to justify trade restrictions based on human rights).

130. See *supra* note 102 and accompanying text.

taken by the WTO in interpreting other enumerated exceptions in Article XX.¹³¹ As a result, an originalist approach would certainly frustrate one of the goals identified above: finding a solution in step with the rest of international trade law.

2. *Expansive Unilateralism with Evidentiary Constraints*

Jeremy Marwell has offered another proposal for the post-*U.S.-Gambling* evolution of the public morals doctrine. Marwell argues that countries should be allowed to define morals unilaterally, but with the condition that the trade-restrictive measure “be the least restrictive means of protecting the interest at stake and that it be applied in a nondiscriminatory fashion.”¹³² In addition, countries must provide evidence to verify that the measures are based on morals shared by the public. Marwell suggests this latter requirement could be met unilaterally (e.g., opinion polls, statements of religious leaders) and need not be endorsed by any multilateral institution.¹³³ Finally, Marwell proposes that the exception should be expanded beyond Type I restrictions to cover Type II restrictions.¹³⁴ I label Marwell’s vision as a type of “expansive unilateralism with evidentiary constraints.”

Marwell’s proposal is attractive to several constituencies. First, Marwell’s proposal appeals to those who are concerned that the approach for interpreting the public morals clause should not deviate from that used for other GATT/WTO enumerated clauses. Marwell incorporates two well-established concepts—the least-restrictive means test and the nondiscrimination test—that are used in other parts of WTO law. Second, Marwell’s proposal, in allowing for Type II restrictions, also accommodates those who seek a broader reading of the public morals clause to cover areas such as human rights, labor rights, women’s rights, and the like. Market access can therefore serve as a tool to be leveraged to induce norms-altering behavior in trading partners.

However, Marwell’s proposal falls short when one considers whether its adoption would enhance or undermine the global trade regime. Marwell himself recognizes that a potential danger is his proposal’s “overbreadth.”¹³⁵ In other words, by allowing countries to define morals unilaterally, his proposal increases the possibility that some countries may advance their own political or protectionist agenda in the name of safeguarding morals. This in turn would “destabilize the reciprocal bargains that underlie the international economic system and reduce net welfare by suppressing otherwise beneficial economic exchange.”¹³⁶ Marwell attempts to guard against this possibility by

131. See *supra* note 91 and accompanying text.

132. Marwell, *supra* note 4, at 826.

133. *Id.* at 824-25.

134. Marwell suggests that the concept of public morals “could as easily be read to mean ‘nation’ or ‘community’ as ‘international community.’” See *id.* at 824. He only endorses examples of Type II restrictions and does not explicitly discuss Type III restrictions. See, e.g., *id.* at 832 (child labor example). However, one could postulate that most Type III restrictions would not meet his least-restrictive means test.

135. *Id.* at 826.

136. *Id.*

introducing the evidentiary constraints outlined above, but unfortunately, these safeguards would ultimately not prove effective.

Consider, for example, this hypothetical: Select Arab countries enact a labeling requirement that any company with a connection to the multinational forces in Iraq must attach a prominent sticker stating that “this product is made by a company that supports the Iraqi occupation.” This requirement would affect not only companies that supply military equipment but also providers of software, vehicles, food, and services. In other words, it would affect a vast number of prominent multinational corporations. Because it is a labeling requirement and not a ban, it would pass Marwell’s least-restrictive means test. And because it is applied to goods from all countries, rather than just those from the United States, it would also pass the nondiscrimination test. Moreover, the evidentiary requirements could be easily met. Opinion polls would likely show strong public support for such measures. Religious leaders could testify that the continued marketing of goods produced by those who support the “illegal occupation of fellow Muslims” runs counter to established mores. But authorizing such forms of sanction would certainly lead to a backlash against the WTO within the United States and other countries targeted by similar sanctions.

The same analogy could be carried over to a number of different contexts. For example, China could enact restrictions on companies that sell military weapons to Taiwan, which it regards as a renegade province, because they undermine the “moral of public order” by fostering a secessionist movement. Or countries could place restrictions on companies that assist the Israeli presence in the West Bank and Gaza Strip. The problem is that even with Marwell’s safeguard constraints, there is a distinct possibility that free trade principles will be undermined by geopolitical interests disguised as “public morals.” A unilateral system, even one with constraints, would still allow countries to enact restrictions under the rubric of public morality, even as their underlying motive remains political. Over time, those countries hurt by this process—the United States, European Union, and other industrialized nations—would withdraw their support for this increasingly politicized global regime.¹³⁷ The strength of the WTO system might slowly come undone as it is inundated with tit-for-tat, geopolitically motivated sanctions.

One might counter that the answer to this problem would simply be to tighten the constraints further. But it is hard to envision what additional constraints would solve the problem. One possibility is requiring procedural constraints. Instead of simply demonstrating proof of support from opinion polls or statements from religious leaders, a country must also pass the restriction through its legislature after holding open hearings. Because of the procedural costs involved, this would limit the frequency of such restrictions. This solution might help, but it still would not solve the problem. All of the hypothetical examples discussed above could easily pass through a required

137. This has been the case with several other multinational regimes where the organization’s effectiveness has been crippled after it became increasingly politicized, for example UNICEF after the withdrawal of U.S. support and the U.N. Human Rights Council.

legislative enactment process, if necessary.¹³⁸ Marwell's vision of "unilateralism with constraints," if enacted, could gradually destabilize and politicize the international trade regime.

3. *Transnationalism*

An alternative fix would be to shift away from the unilateralist approach endorsed by Marwell toward a more transnationalist approach. Again, like Marwell's proposal, this approach would interpret the public morals exception dynamically and authorize its use beyond Type I restrictions. However, it would differ in two respects. First, it would be grounded in a vision that certain moral norms are shared universally, rather than crafted unilaterally within national borders. Second, it would impose different evidentiary requirements. A country could not prove that a public moral existed simply by turning to internal domestic evidence. Instead, countries would be required to show that the public moral is shared widely by a group of similarly situated countries. As justification, countries could point to international agreements that endorse the moral principle, or to national restrictions in other similar countries, or even to rulings by transnational bodies such as the International Court of Justice (ICJ) or the International Criminal Court (ICC).

Adopting a transnationalist approach would again meet the objectives of individuals who seek a means of allowing outward-directed restrictions on moral grounds. Furthermore, this approach would ground the moral principle in other sources of international law. This practice is already embraced by WTO adjudicators when interpreting other enumerated clauses in the GATT/WTO text.¹³⁹ Therefore, this approach also avoids conflict with other WTO interpretative approaches.

At first glance, this approach seems quite attractive. It permits countries whose citizens feel strongly about human rights abuses or other violations of international law to enact trade restrictions against regimes responsible for such abuses. The legitimacy for such action is grounded not only in the WTO's public morals clause but in other treaties or customary practices widely endorsed by the international community. This approach would thereby link bodies of international law closer together and foster transnational norm-building. Unlike Marwell's approach, it would also constrain the ability of WTO members to exercise the morality exception unilaterally. A state would need to justify its trade restriction based on shared, transnational principles. For example, this approach would authorize trade sanctions against Burma, but not China's censorship of internet services.

138. For example, China's legislature, the National People's Congress, has made its position quite clear that it will not tolerate anyone who supports Taiwanese independence. See *Top Legislature Adopts Anti-Secession Law*, CHINA.ORG (Mar. 14, 2005), available at <http://www.china.org.cn/english/2005/Mar/122756.htm>. Similarly, it would not prove difficult to obtain legislative authorization condemning the American presence in Iraq or the Israeli presence in the Palestinian Territories.

139. See, e.g., Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, ¶ 7.72, WT/DS291/R, WT/DS292/R, WT/DS293/R (Sept. 29, 2006). The panel report turns to the Vienna Convention, Rio Declaration, and Cartagena Protocol in interpreting legal issues concerning the WTO's Sanitary and Phytosanitary Agreement.

Unfortunately, a transnationalist approach also cannot successfully avoid the problems faced by Marwell's expansive unilateralist approach. While the optimistic vision of a vitalized transnational norm-building project could certainly occur, a darker outcome is also possible. Under the transnationalist approach, geopolitical issues could still be introduced under the guise of "public morals" to the detriment of the WTO regime. For example, both the hypothetical restriction against suppliers to Taiwan and Israel would pass an evidentiary test requiring transnational legitimacy. There is clear universal recognition of Taiwan as formally a part of China; no government or international organization recognizes Taiwan as an independent state.¹⁴⁰ Similarly, there is near-universal recognition that the West Bank and Gaza Strip do not belong to Israel, including a U.N. Security Resolution to that effect.¹⁴¹ Simply requiring international recognition to legitimate an action therefore does not solve the problem.

Moreover, there is the added risk that such an approach would allow countries to use the guise of public morals to advance not only geopolitical agendas, but also protectionist ones. The public morals clause could become a cover for disguised trade barriers. Consider, for example, if the European Commission wanted to enact a Type III restriction against all countries that condone the death penalty. Again, it could legitimate its action on the basis of domestic and international support; the European public is strongly anti-death penalty,¹⁴² and capital punishment is widely banned worldwide.¹⁴³ But then consider which countries' products would be adversely affected by this restriction. The list includes the United States, Japan, and China—all key competitors of European producers. And then one might wonder: is this truly a public moral being enforced or might this be a disguised protectionist tactic benefiting European producers at the expense of their competitors? The answer may remain unclear. But from a legal realist standpoint, it is the possibility of this negative outcome that matters. Any doctrinal approach that

140. A small number of governments do recognize Taiwan's government as the legitimate government of China, but even these still recognize Taiwan as part of the territory of China. See Ministry of Foreign Affairs, Republic of China, Embassies and Missions Abroad, <http://www.mofa.gov.tw/> (follow "About MOFA" hyperlink; then follow "Embassies and Missions Abroad" hyperlink) (last visited Nov. 7, 2007). Also, in a number of international organizations, including the WTO, Taiwan is given a special status (e.g., as a Customs Union), but is still considered to be part of China, rather than an independent state. See, e.g., Pasha L. Hsieh, *Facing China: Taiwan's Status as a Separate Customs Territory in the World Trade Organization*, 39 J. WORLD TRADE 1195 (2005).

141. See S.C. Res. 446, U.N. Doc. S/RES/446 (Mar. 22, 1979).

142. See Council of Europe, Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in All Circumstances, *opened for signature* Mar. 5, 2002, Europ. T.S. No. 187. The Protocol has been ratified by almost all the members of the European Community and entered into force on Jan. 7, 2003. For a list of signatories, see Council of Europe, [Signatories to the] Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in All Circumstances, <http://conventions.coe.int/Treaty/EN/v3MenuTratates.asp> (follow "you know the CETS number of the abridged title of the treaty" hyperlink; then select "abolition of death penalty in all circumstances" hyperlink) (last visited Nov. 7, 2007).

143. At least 118 nations have already banned capital punishment, either in law or in practice. See Bree Polk-Bauman, *Capital Punishment: Where the World Stands*, U.N. CHRON. ONLINE, 2004, <http://www.un.org/Pubs/chronicle/2004/issue4/0404p29.html>.

might adversely affect three of the world's four largest exporters is not likely to win acceptance.¹⁴⁴

B. *A Proposed Solution*

How then are we to solve this conundrum? One possibility is to accept the implication of *U.S.-Gambling*, that only Type I restrictions are permitted under the public morals exception. If countries seek to expand the scope of public morals to incorporate human rights, women's rights, or labor rights, they should do so through textual additions to GATT Article XX. Debra Steger has called for a wholesale revision of the general exceptions, including clarification of the public morals clause to reflect widely accepted international conventions on human rights and labor rights.¹⁴⁵ Others echo Steger's idea that the addition of new exceptions to the text itself is the best way for the WTO to address social issues.¹⁴⁶ Jose Alvarez has argued that, before the WTO tries to tackle issues such as human rights, its members must first build a political consensus through negotiations at both international and national levels.¹⁴⁷ Similarly, Andrew Guzman has suggested that labor rights are "a political issue that should be addressed through a political process."¹⁴⁸

This approach is attractive because it is clean and straightforward. However, as noted above, even if one were to restrict the public morals exception to simply Type I (i.e., inward-oriented) restrictions, some doctrinal clarifications may be necessary. In addition, given the time and difficulties required to pass such textual amendments, the practical impact of any major change might not be felt for decades, if ever. Developing countries will most likely resist efforts to introduce new textual amendments, as evidenced by their fierce opposition in the Singapore Ministerial Conference to discussion of the social clause.

This last Section takes a two-part approach. First, it proposes additional clarifications that should be made by the WTO in its interpretation of the public morals clause, even if the exception's scope is restricted simply to Type I, inward-oriented measures. Second, it proposes the imposition of an

144. Even without these hypothetical public morals cases in place, there is already pressure within the United States to withdraw from the WTO because of negative rulings against it on steel and agricultural tariffs. See, e.g., Press Release, Congressman Pete Visclosky, Visclosky to Call for U.S. Withdrawal from the WTO (June 8, 2005), available at http://www.house.gov/visclosky/archive/WTO_Withdrawal.html.

145. Debra P. Steger, Afterword, *The "Trade and . . ." Conundrum—A Commentary*, 96 AM. J. INT'L L. 135, 144 (2002) (noting that while Steger thinks that the scope of the WTO Agreement should be left as is, she does "believe that the linkage between the norms already set out in the GATT, which have been listed in Article XX since 1948, could be clarified and modified to better reflect present-day shared values and norms").

146. See, e.g., Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U. J. INT'L L. & POL'Y 1 (1996); Gonzalez, *supra* note 128, at 971-72.

147. Jose E. Alvarez, *How Not to Link: Institutional Conundrums of an Expanded Trade Regime*, 7 WIDENER L. SYMP. J. 1, 19 (2001).

148. Andrew T. Guzman, *Trade, Labor, Legitimacy*, 91 CAL. L. REV. 885, 891 (2003) (suggesting, as well, the creation of a separate labor department within the WTO); accord Chantal Thomas, *Should the World Trade Organization Incorporate Labor and Environmental Standards?*, 61 WASH. & LEE L. REV. 347, 373-74 (2004) ("Labor and environmental standards might be better incorporated through legislation rather than adjudication.").

additional set of requirements should the WTO decide in the future to extend the scope of the exception to Type II and possibly also Type III measures that are outward-oriented. To be clear, this Note does not explicitly call for such an extension. Indeed, as will be discussed, several individuals have outlined valid reasons why such a move should be avoided.¹⁴⁹ But if such a move were made, this Note advocates a bifurcated approach in which adjudicators examine inward- and outward-directed measures differently, with the latter subject to more stringent analysis.

1. *Requirements for Type I (i.e., Inward-Directed) Measures*

As discussed earlier, the WTO has only explicitly recognized that the public morals exception may exempt certain Type I restrictions directed at protecting the morals of domestic citizens. Even in such instances, unanswered questions remain, such as who defines public morals and whether the measure must meet certain legitimacy requirements in order to qualify as a legitimate public moral. For such restrictions, I propose that WTO adjudicatory bodies apply a four-part test.

First, the adjudicators must determine whether the measure falls under the public morals exception. The *U.S.-Gambling* language of “standards of right and wrong” offers little concrete guidance as to what measures fall within the scope of the exception. I propose instead that adjudicators undertake a two-step analysis in determining this first question. First, they should consider whether the measure at stake concerns a classification of morals as originally understood by the GATT’s drafters. In *U.S.-Gambling*, the challenged measure would have qualified under this step of the analysis. However, since *U.S.-Gambling* recognized a dynamic interpretation of the exception, a second step to the analysis should be added. If a measure fails to qualify pursuant to one of the original categories, the adjudicators then should consider whether it falls within a jus cogens norm, or alternatively, a category that is widely recognized as a moral issue. For the latter, countries need not agree on the specifics of the norm itself, just that the category as a whole constitutes a moral issue. For example, states may differ about the specific religious restrictions to be imposed on imports of food and beverages, but most would recognize that the category writ large qualifies as an issue of public morality.

Provided the challenged measure could fall under the public moral exception, the adjudicatory body would then proceed with the second and third parts of the test. These are the standard necessity and nondiscrimination tests, as applied to Article XX’s general exceptions and incorporated into the public morals clause analysis by *U.S.-Gambling*.

Finally, I propose adding a fourth step as a means of testing whether a public moral is prevailing, as a guard, albeit an imperfect one, against disguised protectionism. I suggest that only measures which are, in effect, statutes passed through a legislative process, be allowed to qualify under the public morals exception. This requirement prevents a strongman from single-

149. See *infra* notes 153-156 and accompanying text.

handedly imposing restrictions under the guise of morality through an executive order, decree, or administrative regulation. Instead, it ensures a certain degree of debate about the need for a morality-based restriction. Moreover, it promotes transparency in the form of a legislative record that adjudicators can scrutinize when examining the motive for the restriction. Of course, I acknowledge that such ideals may be compromised in states with controlled quasi-legislatures, but even in such states, this proposed limitation creates additional cost for enacting morality-based restrictions that will hopefully deter some (though, unfortunately, not all) disguised protectionist measures.

My proposed approach differs from originalism in that it allows the categories of public morals to evolve dynamically. Thus, this approach is more in keeping with the Panel's statement in *U.S.-Gambling* that the content of public morals can vary with time and space.¹⁵⁰ At the same time, it differs from Marwell's proposal in that it imposes a quasi-universalist requirement, rather than allowing countries to define morals unilaterally. It also differs from a transnationalist approach insofar as there need not be widespread agreement on the particular moral issue, but only near-consensus that the category to which the issue belongs falls under the auspices of public morality.

As a result, this proposal significantly lessens the potential risk that the public morals exception could be hijacked by geopolitical or protectionist interests, at least insofar as Type I restrictions are concerned. The hypothetical restrictions placed on supporters of Israel, Taiwan, or the U.S. presence in Iraq considered earlier above¹⁵¹ would all fail the first part of my proposed test because there is no agreement that the category under which they fall (e.g., anti-occupation or anti-secession sentiments) is one that implicates public morality.

Such an approach offers the possibility that the scope of public morals can evolve dynamically to accommodate the changing global context. It also eliminates the risk of becoming overly broad, since the scope can only expand once there is near-universal agreement that a category falls under the morals exception. Finally, by imposing a requirement for a legislative record, the test ensures that some modicum of debate occurs before a restriction is enacted and creates an evidentiary record for adjudicators to review in any potential litigation.

2. *Requirements for Type II and Type III (i.e., Outward-Directed) Measures*

Whether the public morals exception extends to extraterritorial applications is an unresolved matter that has triggered tremendous debate. While a number of academics have advocated for such an interpretation,¹⁵² others have argued vociferously against it. Jagdish Bhagwati has suggested that the WTO is unqualified to "manage the complex issues" that would arise

150. See *supra* note 102 and accompanying text.

151. See *supra* Subsection IV.A.2.

152. See *supra* Section II.C.

if trading privileges were linked to labor rights and the like.¹⁵³ Such sanctions are often counterproductive and function as the “GATT-sanctions version of gunboat diplomacy,” placing weaker countries at a disadvantage.¹⁵⁴ Others have suggested that it is practically impossible for Article XX(a) to permit WTO members to apply its concept of public morals extraterritorially, since “[t]he notion of public morals is very variable in different States and the application of such a subjective concept with extraterritorial effects could put the whole system of reciprocal commercial advantages guaranteed by the GATT at grave risk.”¹⁵⁵

This Note has argued that the WTO should proceed with caution; it does not directly advocate interpreting the public morals exception to apply to outward-directed measures. This is a decision that a future Appellate Body will need to make, weighing the clear risks and benefits of such an interpretation.¹⁵⁶ What this Note does suggest is that, were the Appellate Body to do so, it has two options: it can limit the exception’s application to Type II restrictions only or recognize its application to Type III restrictions as well. Regardless of which move the Appellate Body chooses to make, this Note proposes that it impose three additional requirements on the party enacting the challenged measure, on top of the four-part test discussed above.

First, the member enacting the trade-restrictive measure in the interest of public morality must provide direct proof that its public cares strongly about the moral issues at hand. Simple enactment through a legislative process is insufficient; the enacting government must also show, through opinion polls or a direct referendum, that a significant percentage of its citizens hold such moral views. This requirement ensures that governments and legislatures cannot enact Type II and III restrictions that serve only the interests of their party constituents or special interests but must instead show that these moral interests are widely shared.¹⁵⁷

Second, the moral norm at stake must itself have been codified by an international organization through a treaty, guideline, code, or other document that has been explicitly endorsed by a majority of WTO members. Examples that would qualify include the International Labour Organization’s guidelines

153. Jagdish Bhagwati, Afterword, *The Question of Linkage*, 96 AM. J. INT’L L. 126, 132 (2002).

154. *Id.* at 133.

155. Diego J. Liñán Noguera & Luis M. Hinojosa Martínez, *Human Rights Conditionality in the External Trade of the European Union: Legal and Legitimacy Problems*, 7 COLUM. J. EUR. L. 307, 328 (2001); cf. Claire R. Kelly, *Enmeshment as a Theory of Compliance*, 37 N.Y.U. J. INT’L L. & POL. 303, 328 (2005) (arguing that Type III restrictions do not “fall under the WTO’s Article XX exceptions”); Dexter Samida, *Protecting the Innocent or Protecting Special Interests? Child Labor, Globalization, and the WTO*, 33 DENV. J. INT’L L. & POL’Y 411, 426 n.108 (2005) (suggesting the improbability of success for an extraterritorial application of Article XX(a) in the form of a child labor ban).

156. Such a decision could also be resolved through political negotiations. See *supra* notes 147-148.

157. One could argue that this requirement should also apply to Type I restrictions. I am open to this possibility, but did not suggest it because there is an added cost involved for governments, and also because citizens are more likely to participate in a legislative process where those impacted are themselves, rather than foreigners in another state.

on child labor¹⁵⁸ and the U.N. Convention on Genocide.¹⁵⁹ Imposing such a requirement ensures that outward-directed measures are taken only on the basis of norms embraced by the international community. Trade sanctions could not be taken for norms that are still evolving or for which widespread disagreement persists.

Finally, a country must demonstrate that any outward-oriented restriction is directed against countries that have already explicitly embraced this norm.¹⁶⁰ Put differently, restrictions cannot be imposed against a country for violating a norm that it has never endorsed. While controversial, this requirement is absolutely critical if the problems faced by the other alternative proposals are to be avoided. It ensures that a broader interpretation of the public morals exception does not cause the WTO regime to degenerate into a mechanism whereby countries seek to impose their moral norms on one another. Countries would only be held accountable for those norms to which they have already acceded.

Such a requirement implicitly recognizes the primacy of states in recognizing and realizing international human rights, labor rights, and other accepted transnational norms. It suggests, however, that if a state recognizes, but fails to realize, a norm—because of either incapacity or unwillingness—that other states have the legal right to apply pressure to ensure the norm's realization.

Bagwell, Mavroidis, and Staiger have advanced an argument for why this is normatively fair.¹⁶¹ Ratification of treaty commitments creates reasonable expectations for trading partners that a country will abide by such commitments. These expectations can factor into the trading partners' negotiations of market access and other concessions with that country. To the extent that a country fails to comply with the obligations of a ratified treaty, this may have market access implications, and therefore, in principle, its trading partners should have a right of redress.

The burden of proof for demonstrating a state's noncompliance with a ratified treaty norm should fall on the enacting party. If the treaty in which the moral obligation arises has an enforcement body, then the enacting party should offer a determination from that body as proof of the noncompliance that justified its morality-based trade restriction. If the treaty lacks an associated enforcement body, then the WTO should not delve into the task of interpreting treaties arising under other international law regimes, as it lacks the capacity to do so properly. Instead, the WTO might apply a clear statement rule, requiring the enacting party to demonstrate a violation of a

158. See Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, 2133 U.N.T.S. 161; see also ILO Declaration on Fundamental Principles and Rights at Work, art. 2, June 18, 1998, 37 I.L.M. 1233, 1237-38.

159. Genocide Convention, *supra* note 105.

160. This is a slight narrowing of Sarah Cleveland's previous suggestion that, because the concept of public morals is quite broad, the "Article XX provisions necessarily must be limited to values which are either mutually binding on the sanctioning and target states by treaty, or which are core jus cogens and *erga omnes* obligations of the international community." Sarah H. Cleveland, *Human Rights Sanctions and the World Trade Organization*, in ENVIRONMENT, HUMAN RIGHTS, AND INTERNATIONAL TRADE, *supra* note 126, at 199, 239.

161. Kyle Bagwell, Petros C. Mavroidis & Robert W. Staiger, *It's a Question of Market Access*, 96 AM. J. INT'L L. 56, 73-74 (2002).

clear treaty obligation. Any ambiguity would be resolved in favor of the challenging party rather than examined in-depth by the WTO.

Returning to our earlier hypothetical,¹⁶² Article XX(a) could therefore not be used to place restrictions against the United States, China, and Japan for their use of the death penalty because none of these countries have explicitly pledged to ban capital punishment. Certainly, such a constraint would reduce the effectiveness of Type II and III restrictions in advancing human rights or labor rights causes, but it would not altogether eliminate it. Moreover, from a realist standpoint, such a constraint may be necessary if a more expansive reading of the public morals clause is to be endorsed by the major trading powers.

Skeptics of my proposal are likely to ask whether adding a qualifier that a country has already ratified a treaty obligation causes the morality-based restriction to be devoid of consequence. After all, what good is a threat directed at those who have already pledged not to violate a norm? I recognize that if outward-directed restrictions cannot be directed at pariah states, they do lose much of their bite. Nevertheless, they are not entirely without effect. For example, my proposal would allow countries to place restrictions on trade with violators of the U.N. Genocide Convention, such as Serbia, a signatory found to be in violation of the Convention by the International Court of Justice.¹⁶³

In addition, the proposal directly affects any country that signed onto an international convention without intending to comply fully.¹⁶⁴ Such countries would now either have to comply fully or take the embarrassing measure of withdrawing from the convention and exposing their empty promise to their domestic constituents. Plenty of countries would be affected. For example, Saudi Arabia and others would face a hard choice about whether they should comply or withdraw from the Convention on the Elimination of All Forms of Discrimination Against Women.¹⁶⁵ Vietnam and many African dictatorships would be forced to confront whether they should comply with granting freedom of expression and assembly as they have promised under the U.N. Convention on Civil and Political Rights, or withdraw.¹⁶⁶ Hopefully, these increased costs of noncompliance would spur countries to grant rights long promised but never delivered. In the very least, this proposal would cull the

162. See *supra* Subsection IV.A.2.

163. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.))*, 2007 I.C.J. (Feb. 26) (finding Serbia to have violated the obligation to prevent genocide under the Convention, with respect to the Srebrenica genocide in July 1995).

164. This is a fairly common phenomenon, given that many countries view such conventions as lacking in enforcement mechanisms and consequences for non-compliance. See, e.g., Ryan Goodman & Derek Jinks, *International Law and State Socialization: Conceptual, Empirical, and Normative Challenges*, 54 DUKE L.J. 983 (2005); Oona Hathaway, *Do Human Rights Treaties Make a Difference?* 111 YALE L.J. 1935 (2002).

165. *Convention on the Elimination of All Forms of Discrimination Against Women*, adopted Dec. 18, 1979, 1249 U.N.T.S. 13.

166. *International Covenant on Civil and Political Rights*, G.A. Res. 2200A, art. 2(1), U.N. GAOR, 21st Sess., U.N. Doc. A/RES/2200 (Dec. 16, 1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

list of signatories of international conventions to those who actually comply while exposing those signatories that had no intention of ever doing so.¹⁶⁷

I recognize that my proposal is a second-best solution and may prove disappointing to many transnational activists who advocate a more forceful interpretation of the public morals exception. Nevertheless, I argue that it is the best that we can hope for given present circumstances. Textual amendments may be preferable, but are unlikely to occur any time soon. Meanwhile, a more expansive unilateralist or transnationalist interpretation has its own problems. Doctrinal shifts to accommodate human rights and labor rights interests may also result in accommodating other, less desirable protectionist or geopolitical interests as well. If such doctrinal shifts are not managed carefully, the ultimate result from an otherwise noble goal may be the weakening of the legitimacy of the entire WTO system.

We should therefore be careful when advocating any doctrinal shift that permits WTO members to become overly aggressive in enacting public morals restrictions, especially when these restrictions affect not only their own citizens but those in other member states as well. This Note has argued that any proposal to expand the public morals doctrine needs to be moderate and contain stronger limiting constraints than others have proposed to date. Only then can we balance an interest in expanding the scope of the public morals exception beyond *U.S.-Gambling* with maintaining a robust free trade regime.

V. CONCLUSION

The public morals exception to free trade was arguably important enough that the original drafters of the world trade “constitution” listed it as the first of several exceptions to the principles of providing unfettered access to trade privileges.¹⁶⁸ But for fifty-seven years, the exception remained dormant—utilized but never formally explicated. Only recently did the doctrine reemerge, in the *U.S.-Gambling* decision, finalized in April 2005. The birth of a newly emerging public morals exception clause doctrine has generated excitement that the WTO may finally give greater consideration within its jurisprudence to morality-related issues, such as human rights.

While the emergence of a public morals clause doctrine is welcome, this Note has suggested, first, that we should not become overly optimistic about what it can deliver in terms of human rights and labor rights, and second, that we should be cautious in how we go about shaping its evolution. This is because the doctrine, as laid out in *U.S.-Gambling*, is nascent. *U.S.-Gambling* clarified only the basics of the public morals clause doctrine in a manner consistent with the core principles of international trade law. As a result, a number of important questions remain unanswered, as outlined in Part III.

167. This proposal might also have a chilling effect on the drafting of additional multilateral treaties and create additional incentives for countries not to sign agreements in the first place. Whether one views these effects as positive or negative depends on one’s normative views about the impact of countries ratifying treaties to which they have no intention to comply.

168. See John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511 (2000) (suggesting that the GATT and WTO founding documents serve as a world trade constitution).

Several possibilities exist as to how the public morals doctrine can evolve as these questions are answered. To many, by far the most attractive possibilities to activists are expansive approaches that emphasize the unilateral right of countries to delineate their own morals and/or the importance of transnational norms. This Note suggests that while these are noble approaches, they entail inherent dangers. Such doctrinal evolutions, if not implemented carefully, may ultimately lead to unintended consequences that threaten the stability and legitimacy of the WTO regime. Yet at the same time, to wait for textual amendments to the GATT/WTO legal documents that would affirmatively enumerate members' rights to exercise restrictions based on concerns of human rights or labor standards is to wait largely in vain. Calls for such additions to date have been ignored or met with skepticism.

If we are to move beyond *U.S.-Gambling* to affirmatively recognize a right to exercise a public morals exception for human rights, labor standards, and other rights, we must do so through judicial interpretation in a careful, limited manner. This Note has suggested a bifurcated approach, in which countries are given greater leeway to enact restrictions that protect their own citizens, but must concurrently meet more stringent requirements if they seek to impose restrictions that affect citizens in other WTO member states. This proposed approach recognizes the right of countries to shape their own norms rather than have them imposed through trade leverage, but at the same time demands that those that make normative commitments actually follow them.

Some might contend that such a proposal for future doctrinal evolution does not go far enough. But it is certainly an improvement over the dormancy of the doctrine that persisted for nearly six decades and the largely ambiguous state of affairs that still persists after *U.S.-Gambling*. And, after all, better that we progress too slowly and not tap the full potential of this newly emerging doctrine than to move too fast in the wrong direction and unintentionally weaken the entire system.

ANNEX 1

WTO MEMBERS ASSERTING MORALITY-BASED TRADE RESTRICTIONS
AS NOTED BY THE WTO SECRETARIAT IN TRADE POLICY REVIEWS*

WTO Member	Products Prohibited or Restricted Due to Public Morality Reasons*	Document Symbol
Bahrain	Live swine; drugs	WT/TPR/S/185/Rev.1 (Oct. 23, 2007) at 28-29
Bangladesh	Swine products, drugs; obscene or subversive materials or those containing matters likely to offend religious feelings and beliefs of citizens of Bangladesh	WT/TPR/S/168/Rev.1 (Nov. 15, 2006) at 55, 142
Benin	Narcotics	WT/TPR/S/131 (May 24, 2004) at 42 n.68
Brunei	Alcohol; gambling-related products, opium; certain meat products	WT/TPR/S/84 (Apr. 27, 2001) at 43-45
Canada	Materials found to be obscene, treasonous, seditious, hate propaganda, or child pornography; posters depicting crime & violence; coin counterfeits	WT/TPR/S/53 (Nov. 19, 1998) at 46
Colombia	Pornographic material involving minors; warlike toys	WT/TPR/S/172/Rev.1 (Apr. 3, 2007) at 41
Fiji	Games of chance; the book "Satanic Verses"	WT/TPR/S/24 (Mar. 13, 1997) at 24
Gambia	Pornography; narcotic drugs; matter deemed seditious, scandalizing, or demoralizing	WT/TPR/S/127 (Jan. 5, 2004) at 31, 37
Guyana	Indecent printed articles; certain cinematographic films	WT/TPR/S/122 (Oct. 1, 2003) at 44
Haiti	Pornography; narcotics; counterfeiting equipment	WT/TPR/S/99/Rev.1 (Oct. 7, 2003) at 41
Honduras	Drugs, narcotics, psychotropics, & pornography	WT/TPR/S/120 (Aug. 29, 2003) at 46
Indonesia	Alcohol	WT/TPR/S/184/Rev.1 (Nov. 6, 2007) at 46
Israel	Licentious or indecent films; counterfeit currency; gambling or lottery tickets & games; blank sales invoices; goods with false product descriptions	WT/TPR/S/157/Rev.1 (Mar. 24, 2006) at 30
Jamaica	Counterfeit goods; obscene or indecent printed matter, films & articles	WT/TPR/S/139/Rev.1 (Mar. 9, 2005) at 48
Korea	Pornography and other unacceptable materials	WT/TPR/S/137 (Aug. 18, 2004) at 54
Malaysia	Articles bearing imprint or reproduction of any currency note; indecent or obscene articles; cloth bearing the imprint or reproduction of any verses of the Koran	WT/TPR/S/92 (Nov. 5, 2001) at 37-38 & n 27
Morocco	Narcotics and psychotropic drugs, pornographic materials and pornographic art, bovine animals	WT/TPR/S/116 (May 19, 2003) at 41
Mozambique	Pornography; narcotic drugs	WT/TPR/S/79 (Dec. 21, 2000) at 33
Nigeria	Certain spirits; obscene articles	WT/TPR/S/147 (Apr. 13, 2005) at 36
Panama	Indecent or morally offensive printed publications; foreign lottery or raffle tickets; smoking opium & resin	WT/TPR/S/186 (Aug. 13, 2007) at 39
Qatar	Swine; pork & pork products; alcoholic beverages	WT/TPR/S/144 (Jan. 24, 2005) at 26-27
Romania	Drugs & narcotics	WT/TPR/S/155/Rev.1 (Jan. 31, 2006) at 38
Sri Lanka	Book or pamphlet containing disparaging & insulting religious references; indecent or obscene articles; lottery tickets, narcotic drugs; coins/notes or imitation of coins/notes of any other government	WT/TPR/S/128 (Feb. 4, 2004) at 38, 121-22
Suriname	Goods obtained illegally in their country of origin	WT/TPR/S/135 (June 14, 2004) at 38-39
Taiwan	Dog meat	WT/TPR/S/165/Rev.1 (Oct. 10, 2006) at 39
Tanzania	Narcotic drugs	WT/TPR/S/66 (Jan. 28, 2000) at 37

Thailand	Potassium permanganate; coin- or disc-operated game machines	WT/TPR/S/123 (Oct. 15, 2003) at 45-46
Trinidad & Tobago	Indecent or obscene articles or matter	WT/TPR/S/151/Rev.1 (Oct. 12, 2005) at 42
Tunisia	Meats of swine; oleaginous plants (cannabis, poppy); gums, resin and saps (opium, cannabis)	WT/TPR/S/152/Rev.1 (Oct. 31, 2005) at 39-40
Turkey	Gambling instruments, products making illegal use of a trademark	WT/TPR/S/125 (Nov. 19, 2003) at 43-44
United Arab Emirates	Narcotics, swine & its products; counterfeit money; printed matter or works of art that contradict Islamic teachings, decency, or deliberately imply immorality or turmoil	WT/TPR/S/162/Rev.1 (June 28, 2006) at 26-28
Zambia	Indecent, obscene, or objectionable goods; pirated or counterfeit goods	WT/TPR/S/106 (Sept. 25, 2002) at 39

*Three different points should be noted about the countries listed and the products identified in this Annex.

First, in several instances, a WTO member referenced public morality as one among several reasons for restricting trade in its Trade Policy Review. It also listed specific trade restrictions, but did not map products to specific exceptions. In such instances, the Annex makes general inferences about common categories of products excluded on moral grounds (e.g., pornography, narcotics, etc.). However, one should note that for some products, multiple exceptions may apply. For example, narcotics may be prohibited on the basis of public morals as well as on grounds of protecting human health.

Second, several WTO members made reference to restricting trade based on public morality in their Trade Policy Reviews but did not mention specific restrictions. These include: Antigua, Australia, Barbados, Chile, India, Kenya, Liechtenstein, Madagascar, Mexico, Niger, Paraguay, Switzerland, Uganda, the United States, and Venezuela. These countries are not listed in the Annex above because of the missing information about specific product restrictions, but should be considered as countries that have exercised the public morals exception.

Finally, some countries referenced import prohibitions that appear to be based on the public morals exception, but made no specific mention of morality. For example, Namibia bans indecent or obscene goods, and Papua New Guinea bans pornography. I do not include them in the Annex above, as I did not infer these countries to have exercised the public morals exception. However, it is quite possible that they have done so, but that their exercise of the public morals exception was omitted in their Trade Policy Review.

Source: WTO Secretariat, *Trade Policy Reviews of various countries, available at* http://www.wto.org/english/tratop_e/tpr_e/tpr_e.htm.

