Legitimization of Trade Restrictions on Moral Grounds (Art.XX GATT):

Could the public morals clause be misused to enforce unilateral policies against the principles of free trade?

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Legitimization of Trade Restrictions on Moral Grounds (Art.XX GATT): Could the public morals clause be misused to enforce unilateral policies against the principles of free trade?

1. Introduction

1.1. The starting point of the investigation

The object and purpose of the GATT is to liberalize the world trade by abolishing trade restrictions.\(^1\) Article XX provides general exceptions from the GATT in order to pursue national objectives. The wording of the so-called General-Exceptions-clause is telling, for it circumscribes, in a rather indistinct fashion, the legitimization of “measures” taken by a member to safeguard particular interests: “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures”.

What follows, is a list of 10 areas of policy, with which the measures are either simply related or for whose protection the measures are deemed to be necessary. Among these 10 areas of policies the exception clause of Article XX (a) GATT is of particular interest. It considers any measures in accordance with the so-called Chapeau’s requirements\(^2\) as legitimate, which are “necessary to protect public morals”. The questions which immediately arise from this formulation are

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2 See Voland, 107f.
the following: Can a member theoretically invoke any policy objectives that he considers himself as relating to public morals? Is a WTO member able to legitimate any breach of a clause under his “right to regulate trade”, provided that an exception of Article XX GATT is met?

As the founding members of the GATT wished for regulatory flexibility of nation states and Article XX was specifically written to fulfill this purpose, imposing a unilateral definition of values on member countries that might embrace their own values violates the purpose of the general exceptions clause. There is a large variety of different values are covered by the concept of public morality, but how does it work in practice?

It is a difficult task of balancing policy objectives of one member against the interests of free trade and economic development of another. A broad definition of the general exceptions clauses carries the risk of undermining the fundamental principles of the WTO while a rigorous approach might violate the legitimate interests and sovereign rights of a member with regards to protecting important values of its society. In my opinion, the public morals exception clause will become increasingly important in the following years, because of the continuing growth of the WTO. One has to bear in mind, that at its foundation the WTO had only 23 members, whereas today 153 member states are associated within this organization, member states with very different cultural backgrounds triggering a variety of disputes.

In this paper, I would like to examine critically the concept of public morality, by looking over the drafting history, legal practice and current scholarly research.
1.2. Main thesis

The main thesis of this paper, to be examined from various angles, is the following: The general exceptions-clause as it is formulated in Art. XX (a) GATT enables members to have recourse to measures on behalf of public morals which are harmful to the free market. Whenever a sufficient policy justification exists members have the legal power to establish measures that may consist of either an import ban imposed of foreign goods or an export ban on domestic goods. This entirely legal procedure is due, to a large extent, to the structure of the general exceptions clause, in particular of Art. XX (a) GATT. Two distinctive features of Art. XX (a) GATT are to be mentioned in this context: On the one hand the legal term of “public morals” lacks itself conceptual determinateness and needs to be interpreted. Whereas in a single legal culture, as for instance German law, a legal term’s lack of determinateness does not necessarily lead to lack of justiciability because every legal term can be given a more determinate, thicker meaning by way of authoritative interpretation, in the international context of the WTO the authority of an interpretation must be called into question. This is due to the fact that there is no single interpretive community, but a plurality of interpretive communities and of legal cultures. The understanding of a term like “public morals” varies among the legal authorities and common sense prevalent in different members. Art. XX (a) GATT does not provide a definition of what is to be understood by public morals in the international context of the WTO. Therefore, not surprisingly, the decision of the WTO’s jurisdictional institutions – the Panel and the Appellate Body – of whether or not a certain measure taken by a member to pursue a certain

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4 Cf. term as it is described by the American legal theorist Stanley Fish, cf. id, “Doing what comes naturally”, 13ff.
policy objective runs the risk of not being founded by firm normative grounds.

On the other hand, one has to bear in mind the chapeau’s normative structure: Article XX GATT contains, as the Appellate Body has put it once, “limited exceptions from obligations under certain other provisions of the GATT, not positive rules establishing obligations in themselves”\(^5\). Art. XX GATT contains exceptions from the constraint to respect the requirements of the GATT; it is applied only once it has determined that a violation of other provisions of the GATT by a member has occurred. Thus, the objective of “public morals” as it is formulated in Art. XX (a) GATT, allows members to impose trade restrictive measures which are inconsistent with the GATT in order to pursue public policy goals, given that such inconsistencies cannot be avoided.

Due to the plurality and heterogeneity of the cultural values, as represented by members on the one hand, and due to the fact that Art. XX (a) GATT does not provide any definition on the other hand, the Panel and Appellate Body must rely on formalistic circumscriptions instead of substantive definitions and precise concepts, when it comes to determine “public morals”. In a decision dating from 2005 the Appellate Body circumscribed public morals as “standards of right and wrong conduct maintained by or on behalf of a community or nation”\(^6\). Obviously, the Appellate Body displays a certain judicial self-restraint in its circumscriptions of “public morals”; far from being entirely inadequate this judicial self-restraint raises at least one objection, namely the question of whether or not it seems normatively sufficient to refer to public morals as a simple matter of fact. The Appellate Body have recourse

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to a kind of empiric concept of public morals because the members of the WTO lack a general, universally acknowledged concept. However, the necessity to judge upon the question whether a certain measure corresponds to the requirements of Art. XX (a) might necessitate a normative interpretation of “public morals”.

1.3. Approach and methodology

This paper will examine the aforementioned thesis in five steps. In the following chapter a closer look will be taken to the exceptions clause of Art. XX GATT and its counterpart in Art. XIV GATS. Chapter 3 will provide an analysis of a decision which can be considered as the (only) landmark decision in terms of the public morals clauses of Art. XX GATT and Art. XIV GATS, namely US – Gambling. Chapter 4 focuses on a dispute which has not been settled yet, namely the EU prohibition of seals products (WT/DS 400 and WT/DS 401). Here, the investigation will try to predict the Appellate Body’s decision as it can be expected with respect to the Appellate Body’s findings in US – Gambling. In addition, I will propose in this chapter my own view of the case. Chapter 5 contains steps towards a more generalizing answer to the question of whether the plurality of contingent cultural values as held by the different members does lead with a certain necessity to diverse and possibly incompatible normative concepts of public morality. In this chapter, the concepts of culture and cultural values will be examined, which makes it necessary to open up this investigation towards a broader sociological approach. In this chapter which precedes the conclusive remarks, I will return to the question which is already alluded to in the title of this investigation: In how far is it really possible to misuse the exception clause of Art. XX (a) GATT for national policy purposes?
2. The exception clauses of Art. XX GATT and Art. XIV GATS

Both the GATT and the GATS contain exceptions clauses. The agreements have different and distinct scopes, the GATT referring to the trade of goods, the GATS to services. The official English version of Art. I sec. 1 GATS reads as follows: “This Agreement applies to measures by Members affecting trade in services”. The landmark decision of US – Gambling applies the general exceptions clause of Art. XIV GATS, which corresponds to a large extent with the structure and wording of the chapeau of Art. XX GATT.\(^7\) However, it is an open question whether the principles which guided the Appellate Body in its decision US – Gambling can be equally applied in the forthcoming dispute settlement concerning the import of seal products, under the premise that the EU’s prohibition can only be justified according Art. XX (a) GATT.

2.1. The exception clauses within the framework of the GATT and the GATS

It was only in 2005 when public morals issue of exceptions clauses came to the fore within the Panel’s and Appellate Body’s jurisdiction. US-Gambling, decided in 2005, was the first case, where the Appellate Body intensely discussed the public morals exception clause.\(^8\) As mentioned before Art. XX’s chapeau which refers to every exception as listed in Art. XX (a) – (j) GATT prohibits a measure from being applied in an manner that would constitute a means of “arbitrary or unjustifiable discrimination between countries where the same conditions prevail” or a “disguised restriction on international

\(^7\) Zdouc, Werner: Legal Problems – Arising under the General Agreement on Trade in Services: Comparative Analysis of GATS and GATT, St. Gallen 2002, 206.

trade”. These three standards in the chapeau – arbitrary discrimination, unjustifiable discrimination and disguised restrictions are separate and additional to the requirements contained under the public moral exception clause of Art. XX (a) GATT.

The chapeau of Art. XIV GATS corresponds largely with the requirements of Art. XX GATT’s chapeau. Likewise it aims at preventing the misuse of the exceptions as formulated in Art. XIV (a) – (e) GATS. However, Art. XIV GATS seems to be more rigid than Art. XX GATT: Whereas the latter forbids an arbitrary and unjustified discrimination between countries where the same conditions prevail, Art. XIV GATS refers to such discrimination between countries, “where like conditions prevail”. In other words, the exception clause of Art. XIV GATS has a broader scope as to the countries which are to be compared. It remains a question whether this linguistic detail is contingent, having no importance, but expressing a certain negligence of the agreement’s authors, or if it is significant in the sense that a more rigid version was intended by the authors. It is more likely that this linguistic detail was intended, given the fact, that the authors could have used the chapeau of Art. XX GATT with the identical wording if they did not intend to alter the provision.⁹ Consequently, Art. XIV GATS expands the possible cases of discrimination insofar as it considers “like conditions” as sufficient for the comparison of countries, whereas the chapeau of Art. XX GATT requires “same conditions”.

⁹ Cf. Voland, 258f.
2.2. The exception clauses Art. XX (a) GATT and Art. XIV (a) GATS

If one takes a closer look at the doctrinal foundations of the exceptions clauses of Art. XX (a) GATT and Art. XIV (a) GATS one becomes aware that the opinions on the matter are diverse and heterogenous. The different views express differences of the legal cultures. Not surprisingly, legal scholars of the Anglo-American common law tradition have an understanding of the provisions that differs significantly from the opinions as expressed by scholars with the cultural background of a codified law tradition like the German. The legal nature of the GATT and the GATS, as well as the particular traits of the WTO, as an international organization and a legal order, have to be taken into account. Both agreements are part of the legal sources of the WTO, together with other agreements of the WTO, the secondary law and the fundamental principles of international (trade) law. The WTO jurisdictional bodies refer in their decisions both to the legal rules as contained in the agreements as well as to legal principles, which are partly written and partly non-written.

In order to analyze the general logical structure of the general exception clauses of Art. XX (a) GATT and Art. XIV (a) GATS, in seems to be helpful to bear in mind, the legal distinction between rule and principle as it has been established by the legal theorist Robert Alexy. Alexy’s innovation consisted in a new criterion to differentiate between rules a principle. According to Alexy principles are nothing more and nothing less than imperatives to optimize values, that is to say norms, which give the order, that something must be achieved – in relation to the legal and factual possibilities – in the best

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12 Alexy, Robert: Theorie der Grundrechte, 75ff.
possible way. As contrasted with legal rules, principles do not have an absolute validity, but are valid only in an approximative way, that is to say in relation to other principles. Legal rules on the other hand are characterized by their mode of absolute validity: Within their scope of application rules are valid absolutely, unless they themselves state an exception. It goes without saying that the exception clauses of Art. XX (a) GATT and Art. XIV GATS are not exceptions from legal rules, but restrictions of the principles, which are enshrined in the GATT and the GATS.

Art. XX (a) GATT and Art. XIV (a) GATS equally presuppose, that the measure taken by a member to pursue a certain of public morals aim not only relates to the policy, but is necessary to “protect” “public morals”, respectively to “protect” or “maintain” “public order”. It is obvious from the wording of both clauses that the necessity-requirement is more rigid than the requirement of a mere being-related-to the policy. However, the meaning of the necessity-requirement is intensively debated. In its decision Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef the Appellate Body held that “the meaning of ‘necessary’ [is] ‘significantly closer’ to the pole of ‘indispensible’ that to the oppositive pole of simply ‘making a contribution to’”. For sure, this circumscription does not render the precise meaning of the necessity-criterion, moreover is has to be interpreted. An interpretation of this criterion seems to be essential with respect to the fact that the conceptual content of “public morals” largely depends upon the cultural values which a predominant in one member state.

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13 Borowski, Grundrechte als Prinzipien, 67.
14 Alexy, Theorie der Grundrechte, 87ff.
15 See for instance Morijn, 191; Voland, 107ff.
The necessity-check is embedded in the application of Art. XX (a) GATT as a whole, that is to say including an analysis whether the measure complies with the similarly worded chapeaux of Art. XX GATT and Art. XIV GATS. According to Voland the necessity-check figures as the second step after the test, whether the measure is capable to contribute to the policy it aims at and before the analysis whether the measure corresponds to the requirement of the chapeau.\(^\text{17}\) The necessity-test in itself consists in two steps: First, it must be asked whether there is an alternative measure at hand, which does not violate – or violates less intensively – the provisions of the GATT. Second, there must not be alternative measures of equal capability, whose undertaking can be reasonably expected from the member.

The first criterion provokes the question under what circumstances an alternative measure can be considered as more adequate, more compatible with the GATT’s provisions. According to the jurisdiction, an alternative can be seen as more appropriate whenever it reaches the target without violating the GATT’s norms – or at least without violating them in such an intense manner.\(^\text{18}\) It is decisive whether or not the measure entails fewer obstacles to international trade. As to the second criterion - are measures at hand which are reasonably available? - the alternative measure needs to be on the hand likewise capable of reaching the aim, namely the public-morals-policy the member intends; on the other hand the alternative measure must be reasonable from the standpoint of the member.

The capability-criterion illustrates that the jurisdiction does not balance the public-morals-policy against the hindrances to trade which are involved by the measure. Moreover, the jurisdiction let the member decide to what extent and how

\(^{17}\) Voland, 107.  
intense a certain policy shall be pursued.\textsuperscript{19} This practice is entirely consistent with the wording of Art. XX (a) GATT and Art. XIV (a) GATS, which only allows for testing the relationship between the policy aim and the measure to pursue. It does not allow for calling into question the aim itself. An act of balancing between the two values of free trade and the public morals issues would not be compatible with the provisions of Art. XX (a) GATT and Art. XIV (a) GATS.\textsuperscript{20}

2.3. Jurisdiction on the necessity-requirement of the exception clauses Art. XX (a), (b), (d) GATT and Art. XIV (a) GATS

In the following I will take a closer look at the jurisdiction on the necessity-requirement as it is expressed in Art. XX (a), (b) and (d)\textsuperscript{21} GATT on the one hand and in Art. XIV (b) GATS on the other. Before the 2005 case of US – Gambling will be analyzed extensively (chapter 3), it might be helpful to envision the jurisdiction concerning the necessity requirements in earlier cases.

As mentioned before, the Panel and the Appellate Body exhibit a certain judicial self-restraint in judging upon the level of importance attributed to a policy by a member. Nonetheless, they sometimes call into question whether a policy objective really is being pursued by a member the way it is officially pretended. In the case of Dominican Republic – Cigarettes\textsuperscript{22} the Panel has uttered its doubt concerning the proclaimed aim of the Dominican Republic to prohibit the smuggling of cigarettes on a zero tolerance level. Curiously, the Panel doubted the intention of the member to entirely

\textsuperscript{19} Cf. WT/DS285/AB/R - US – Gambling, para 308.
\textsuperscript{20} Voland 109.
\textsuperscript{21} Art. XX (a), (b) and (d) are the exceptions of Art. XX, which imply the necessity-restriction.
\textsuperscript{22} WT/DS161/AB/R, para 7.228.
eliminate the smuggling of cigarettes only because of the fact that the member had not succeeded in reducing the smuggling to the level of zero. In the case of Korea – Beef 23 the Appellate Body analysed whether the measure taken by Korea to protect certain good and to pursue a certain policy corresponded to the pretended level of protection. It came to the conclusion that the measure in fact aimed at a lower level of protection as the pretended one; consequently, the Appellate Body oriented their test of alternative equally efficient measures toward a lower level of protection.

As to the reasonably-available-criterion the jurisdiction tended in the case of Thailand – Cigarettes to a more rigid interpretation, whereas in the cases of Korea – Beef and EC – Asbestos exhibited more judicial self-restraint. Some authors 24 pointed to the fact that the Appellate Body did not take into account the Thailand’s state of development when it judged upon the alternative measures to prevent the smuggling of cigarettes. It claimed that there were equally efficient alternative measures involving fewer restrictions to the free trade possible, without taking into account that the member possibly could not realize these measures with respect to its own state of development at that time. 25

In its decision on Korea – Beef which concerned the exception clause Art. XX (d) GATT (measures “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement”) the Appellate Body balanced several factors in order to judge upon the question whether there are alternative measures reasonably available. 26 According to this jurisdiction the necessity-test entails a kind of balancing between the importance of the

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25 Cf. Voland, 110.
policy objective, pursued with the measure, the positive effect of the measure and the negative impacts on the free trade. This interpretation of the necessity-criterion was also adopted in the decision of the case of *EC – Asbestos* 27. Newer decisions, as for instance *US – Gambling* manifest, as mentioned above, a paradigm shift towards a renouncement of balancing. The Appellate Court judges upon the necessity of a measure in these decisions without a proportionality test.

3. Case Study 1: US - Gambling

3.1. The decision of the Appellate Body

The case of *US – Gambling* involved a complaint by Antigua and Barbuda challenging various US measures including federal and state laws, government actions and agreements between US enforcement agencies and credit card companies which according to Antigua constituted a total prohibition of the cross border supply of gambling and betting services to the US. The Appellate Body partly reversed, partly upheld the findings and conclusions of the Panel. Characteristic for its style of argumentation is the breadth of the remarks, full of redundancies and explanations, which seem to – at least from the standpoint of a codified law tradition – awkward, blurred and overly lengthy.

The Appellate Body starts with an exceedingly detailed account of the Appellant’s 28 (US’) and the Appellee’s 29 (Antigua’s) arguments and reports also the standpoints of the European Communities and Japan as “Third Participants” 30. Then it identifies the “Issues Raised in the Appeal” 31 before it

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27 WT/DS135/AB/R – EC – Asbestos, Rn 170-172.
29 Ibid, para 41ff.
30 Ibid, para 98ff.
31 Ibid, para 114.
enters into the legal discussion and decision of the “Measures at Issue”.

Both the Panel and the Appellate Body found that three US federal laws violated the US market access commitment under Art. XVI (a) and (c) of the GATS, namely the Wire Act, the Travel Act and the Illegal Gambling Business Act. Both Dispute Settlement Bodies found that these acts effectively impose a “zero quota” on the provision of remote supply gambling and betting services by banning this remote supply, that is to say by prohibiting gambling and betting services whose suppliers are located outside the US while providing the services within the US market. In its defence, the US stated that its measures were justified on the basis of the GATS’ general exceptions for measures necessary to protect public morals and/or to maintain public order, namely Art. XIV (a) GATS and for measures necessary to secure compliance with other WTO-consistent US laws Art. XIV (c).

On the one hand, the Appellate Body rebutted the Panel's finding that the measures taken by the US were not necessary in the sense of Art. XIV (a) GATS to protect public morals and/or maintain public order. On the other hand, the Appellate Body also found the US had not demonstrated that its measures were fully consistent with the requirements of the chapeau of Art. XIV GATS. As mentioned before, US – Gambling represented the first case in which a member invoked the general exception for public morals; both the Panel and the Appellate Body found similarity in the language between the general exceptions provisions of the GATT and the GATS, and accordingly applied the two-tier test as developed in Art. XX GATT jurisprudence. The argumentation of the Appellate Body centers on the meaning

32 Ibid, para 115.
33 Ibid, para 318-321, 370.
34 See Voland, 104ff.
of the term “necessary”, beginning its analysis with the question whether or not the measure was necessary to achieve the specific legitimate policy objective. It is interesting how the Appellate Body rejects the Panel’s finding in this regard and reaches the conclusion that the measure fulfills the requirements of the first step.

In its analysis of Art. XIV GATS the Panel included the weighing and balancing of different factors as laid out by the Appellate Body in its decision on Korea – Beef. The Panel took the factors into account: first, the importance of the interest/values protected, stating that the measure served societal interests that are vital and important in the highest degree; second, the contribution of the measure to the ends aimed at, stating that the US measures must contribute to the ends pursued, at least to some extent; third, the trade impact of the measure, holding that there is a significant restrictive impact on trade. Then, the Panel turned to a prior Appellate Body statement, which set forth that a member must first explore and exhaust all GATT/WTO-compatible alternatives, before taking recourse to alternatives which are consistent with WTO requirements. In that context, the Panel found that by rejecting Antigua’s invitation to engage in negotiations, the US had failed to explore the possibilities of finding a reasonably available WTO-compatible alternative. Therefore, the Panel concluded that the US measure could not be justified under Art. XIV (a) GATS.

On appeal, the Appellate Body reversed the Panel’s finding and further clarified the necessity test with a number of statements. The Appellate Body noted that the factors involved in the weighing and balancing process were not exhaustive. In addition, in stated that the importance of the

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36 US – Gambling, AG, para 301.
37 Cf. ibid., 306.
interest at issue plays a key role in determining the ultimate necessity of the measure, when comparing the challenged measure to possible alternatives. The Appellate Body’s determine necessity under Art. XIV (a) GATS as follows:

“We note, at the outset, that the standard of "necessity" provided for in the general exceptions provision is an objective standard. To be sure, a Member's characterization of a measure's objectives and of the effectiveness of its regulatory approach -as evidenced, for example, by texts of statutes, legislative history, and pronouncements of government agencies or officials- will be relevant in determining whether the measure is, objectively, "necessary". A panel is not bound by these characterizations, however, and may also find guidance in the structure and operation of the measure and in contrary evidence proffered by the complaining party. In any event, a panel must, on the basis of the evidence in the record, independently and objectively assess the "necessity" of the measure before it". 38

Regarding the reasonable availability of an alternative measure, the Appellate Body found that an alternative that is merely theoretical may not be considered a reasonably available alternative. 39 It referred to examples such as situations in which the responding Member is not capable of taking an alternative measure and situations in which the alternative measure would impose an undue burden on that member. In that context, the Appellate Body also noted that a reasonably available alternative measure must preserve the Member's right to achieve its desired level of protection with to the objective pursued, the Appellate Body restrains from weighing and balancing the appropriateness of the level of protection. The Appellate Body reversed the Panel’s finding that an alternative measure at hand would have been

38 Cf. Ibid., para 304.
39 Ibid., para 308.
consisted in negotiations between the US and Antigua: “Turning to the Panel’s analysis of alternative measures, we observe that the Panel dismissed, as irrelevant to its analysis, measures that did not take account of the specific concerns associated with remote gambling [...] We found above that the Panel erred in finding consultations with Antigua constitutes a measure reasonably available to the United States [...] Antigua raised no other measure that, in the view of the Panel, could be considered an alternative to the prohibitions on remote gambling contained in the Wire Act, the Travel Act, and the IGBA. In our opinion, therefore, the record before us reveals no reasonably available alternative measure proposed by Antigua or examined by the Panel that would establish that the three federal statutes are not “necessary” within the meaning of Article XIV(a). Because the United States made its prima facie case of "necessity", and Antigua failed to identify a reasonably available alternative measure, we conclude that the United States demonstrated that its statutes are "necessary", and therefore justified, under paragraph (a) of Article XIV.”

Parts of the Appellate Body’s extensive critique of the Panel’s finding as to the measure’s necessity is dedicated to the procedural question of the burden of proof. The Appellate Body clarified that the responding party did not, in the first instance, need to explore the universe of reasonably available measures.\textsuperscript{40} Rather, the responding party merely had to make a so-called prima-facie case that its measure was necessary.\textsuperscript{41} The Appellate Body made the clarifying remark that once the complaining party raised a WTO consistent-alternative, the responding party then needed to demonstrate that the suggested alternative was not reasonably available.\textsuperscript{42}

\textsuperscript{40} Ibid. Para 309.
\textsuperscript{41} Ibid, para 310.
\textsuperscript{42} Ibid, para 311.
Finally, the Appellate Body turns to the question whether or not the US measure complied with the requirements of the chapeau of Art. XIV GATS. Interestingly, as the Appellate Body also pointed out, the Panel examined whether the challenged measures satisfy the requirements of the chapeau of Art. XIV GATS, although the measures, according to the view of the Panel, did not pass the first step of the test. The Appellate upheld the Panel’s finding only in part. The Panel’s findings as to the general requirements of the chapeau consisted in the statement that the US had failed to demonstrate that the application of its laws did not result in an unjustifiable or arbitrary discrimination or in a disguised restriction on international trade. The suspicion that the enforcement of the Wire Act, the Travel Act, and the Illegal Gambling Business Act involves an unjustified discrimination was raised by the fact that the US States agencies had not prosecuted certain domestic remote suppliers of gambling service and that a US statute, namely the Interstate Horseracing Act “could be understood, on its face, to permit certain types of remote betting on horseracing within the United States”. In this regard, the Appellate Court concludes: “Therefore, we modify the Panel’s conclusion in paragraph 7.2(d) of the Panel Report. We find, instead, that the United States has demonstrated that the Wire Act, the Travel Act, and the Illegal Gambling Business Act fall within the scope of paragraph (a) of Article XIV, but that it has not shown, in the light of the Interstate Horseracing Act, that the prohibitions embodied in these measures are applied to both foreign and domestic service suppliers of remote betting services for horse racing. For this reason alone, we find that the United States has not established that these measures satisfy the requirements of the chapeau. Here, too, we uphold the Panel, but only in part.”

43 Ibid, para 338.
44 Ibid, para 348.
In its “Findings and Conclusions” the Appellate Body summerized its arguments concerning the general exception clause of Art. XIV (a) GATS on the one hand, of the chapeau of Art. XIV GATS on the other as follows:

“For the reasons set out in this Report, the Appellate Body:

[...]

(a) upholds the Panel's finding, in paragraph 6.487 of the Panel Report, that "the concerns which the Wire Act, the Travel Act and the Illegal Gambling Business Act seek to address fall within the scope of 'public morals' and/or 'public order'";

(b) reverses the Panel's finding that, because the United States did not enter into consultations with Antigua, the United States was not able to justify the Wire Act, the Travel Act and the Illegal Gambling Business Act as "necessary" to protect public morals or to maintain public order;

(c) finds that the Wire Act, the Travel Act, and the Illegal Gambling Business Act are "measures ... necessary to protect public morals or to maintain public order"; and

(d) finds that the Panel did not fail to "make an objective assessment of the facts of the case", as required by Article 11 of the DSU;

[...]

(a) reverses the Panel's finding, in paragraph 6.589 of the Panel Report, that "the United States has failed to demonstrate that the manner in which it enforced its prohibition on the remote supply of gambling and betting services against TVG, Capital OTB and Xpressbet.com is consistent with the requirements of the chapeau";

(b) finds that the Panel did not fail to "make an objective assessment of the facts of the case", as required by Article 11 of the DSU; and
(c) modifies the Panel’s conclusion in paragraph 6.607 of the Panel Report and finds, rather, that the United States has not demonstrated that—in the light of the existence of the Interstate Horseracing Act—the Wire Act, the Travel Act, and the Illegal Gambling Business Act are applied”.

3.2. Criticism in the existing literature

In this section an account will be given as to how the decision(s) on the US — Gambling case resonated in the literature. It has become clear that the content and scope of the public morals/public order exception clauses is treated by the WTO’s adjudicative bodies only as a side-issue. It is telling that the Appellate Body, in its summary of its findings and conclusion underscores that the “concerns which the Wire Act, the Travel Act and the Illegal Gambling Business Act seek to address” fall within the scope of Art. XIV (a) GATS. Fore the Appellate Body as well as for Panel it almost goes without saying that the three federal acts, which ban the remote/online access supply of gambling and betting services, are morality-based trade restrictions. Both adjudicative bodies of the WTO it is beyond any reasonable doubt that the trade restrictions the Wire Act, the Travel Act and the Illegal Gambling Business Act entail, express a public moral and/or public order concern. According to the Appellate Body the question is whether or not the morality concerns as expressed in the three acts are justified under the provision of Art. XIV GATS. In the following I will focus on contributions of the literature which problematize the content and scope of the public morality clauses. Given the fact that US — Gambling is the only case in which the public morals exceptions has so far been applied in discussed, is does not come as a surprise that in each contributions the
US – Gambling case serves as a starting point. The decisive question raised by the WTO decision on US – Gambling is the question of whether or not the WTO members should define public morals and public order individually or whether the content of public morals and order should be fixed universally and alike for all members.\footnote{Diebold, 45.} In other words, the question remains: Who defines the scope and content of public morals and public order?

3.2.1. Diebold

Nicolas F. Diebold made an important contribution to the discussion of the content and scope of public morals and public order in article the author published, under the title of “The Morals and Order Exceptions in WTO Law: Balancing the toothless Tiger and the Undermining Mole”, in the Journal of International Economic Law.\footnote{Diebold, 45.} Diebold provides an interesting critique of the Panel’s and Appellate Body’s conception. He points to the increasing relevance of Art. XIV (a) GATS and Art. XX (a) GATT, in particular with the case of China – Measures Affecting Trading Rights and Distribution Services for certain Publications and Audiovisual Entertainment Products.\footnote{See Diebold, 47.} The author calls into question the underlying premise of the Panel’s as well as the Appellate Body’s findings in US – Gambling. As mentioned before, the premise of the WTO’s adjudicative bodies consists in the assumption that a member is capable of defining the content and scope of the public morals provisions. According to Diebold, both institutions did not analyze meticulously enough as to why the measures of the US to ban imports of online gambling and betting services could count as measures that aim legitimately at the “policy objectives of preventing underage and
pathological gambling". Diebold makes the point that the Panel as well as the Appellate Body “erred in applying the “level of protection” concept in the context of defining the scope of Article XIV (a) GATS”. According to him one has to distinguish sharply between the question as to which values can be protected and the question as to how strongly an acknowledged value should be protected.

In its decision on US – Gambling the Panel, as Diebold puts it, used the necessity test to determine the scope definition, that is to say to determine which values can be protected. In some cases the distinction seems to be less important than others, as Diebold suggests: Whenever a policy objective appeals to be of general or even universal validity – as for instance in the prohibition of torture, in the reinforcement of public health or in the combating of criminal deeds – the problem of scope definition is of minor relevance. The question if a policy objective falls within the scope of the public morality clause of Art. XX (a) GATT or Art. XIV (a) GATS becomes more relevant whenever the policy objective exhibits a highly particular interest. If this is the case or not can often be judged empirically. Diebold illustrates this point with the fictitious example of the WTO-member Israel prohibiting the importation of non-kosher meat products. It is, according to Diebold, rather unlikely that the kosher requirement will be considered “part of the internationally uniform public morals”.

If the public moral clauses meant internationally uniform public morals, the general exceptions clauses of Art. XX (a) GATT and ART. XIV (a) GATS would turn out to be a “toothless tiger”, since a lot, possibly most of the public policy objectives cannot be considered to be universally accepted.

\[48\] Ibid, 47.
\[49\] Ibid, 54.
\[50\] Ibid, 53.
\[51\] Ibid, 55.
Diebold conceives of the problem of public morality’s scope and content as a kind of dilemma, which could be solved in the case of US – Gambling. He points to the fact that the WTO’s adjudicative bodies’ solution to assign to a WTO-member the leeway of defining scope and content of public morals and public order is in accordance with other sources and practices of international law. 52 On the one hand the Panel’s and the Appellate Body’s finding in this respect correspond to the methodological requirements as laid down in Art. 31 of the Vienna Convention on the Law of Treaties; 53 on the other hand agreements like the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention from 1958 follows the same principle of leaving it to each party to determine its own scope and content of public policy instead of establishing a “common standard”. 54

The problem of balancing the toothless tiger and the undermining mole does not, according to Diebold, lead into an aporia. Moreover, at least in the case of US – Gambling, it could be solved by the WTO’s adjudicative bodies by assigning the member’s capability to define the scope on the one hand and limiting its defining power on a procedural level on the other. “The allocation of the burden of proof” 55 as well as the determination of the available “means of evidence”, 56 as Diebold states, provide instrument for “preventing abuse of the Members’ scope”. 57

52 Ibid, 56.
53 Ibid, 49.
54 Ibid, 57.
55 Ibid, 60.
56 Ibid, 64.
57 Ibid, 60.
3.2.2. Marwell

In an article, entitled “Trade and Morality: The WTO Public Morals Exceptions after Gambling” and published in an 2006-issue of the New York Law Review, Jeremy C. Marwell has pointed out that the case of US – Gambling raised “two novel doctrinal questions”, the one consisting in the WTO’s assessment of a member’s assertion “that an issue is legitimately a matter of “public morals”, the other consisting in the Dispute Settlement Body’s task to “balance interests in regulating public morality against the rights of other Member States in trade liberalization”.

Marwell points to the increasing importance of the public-morality-clause, giving the fact that the public morality exception clause as contrasted with the other exceptions of Art. XX GATT and Art. XIV GATS can be raised also in issues of environmental or health regulation. These could be easily “recast in terms of public morality”. Interestingly, Marwell criticizes the “Gambling doctrine” for an overly restrictive access to public morality’s scope. “Despite the need to constrain the scope of the public morals exception”, Marwell argues, “Gambling went too far. The decision, at least implicitly, suggests that States invoking a public morals defense will be expected to present evidence of similar practice by other states. Taken to an extreme, the Gambling doctrine might be read as implying that states cannot unilaterally define public morals”. According to him, US - Gambling “was an easy case” with respect to the fact that in a lot of countries the unrestricted providing of gambling and betting service would be considered as an issue of public morality.

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58 Marwell 805.
59 Ibid, 805.
60 Ibid, 808.
61 Ibid, 816.
62 Ibid, 818.
morality. “Future disputes” “could yield harder cases”, in which the question whether a measure can be qualified as aiming at an objective of public morality would be discussed much more controversial.

Marvell outlines four possible alternative standards as to defining the range of public morality, namely “originalism”, “universalism”, “moral majority or multiplicity”, and “unilaterism”. The first standard refers to what one might call the original content of the GATT agreement of 1947. Historically, the authors of the agreement conceived of public morals issues as for instance narcotics, pornography and blasphemous articles. “Universalism” would be an another interpretative approach, which obviously would lead to a even more restrictive scope of public morals comprising generally acknowledged values as for instance the prohibitions of slavery, genocide, or torture. The third option would be what Marwell call “Moral Majority of Multiplicity”, an approach according to which only issues can count as legitimate public morals objectives which are consented to be moral by “certain groups of states, such as free speck, labor standards, and women’s rights”. “Unilateralism” would be the other extreme, a model which permits states to define unilaterally, with the limitation that no intersections with other categories found in GATT Art. XX as for instance the protection of human, animal, or plant life or health should be allowed.

The solution Marwell proposes, consists in a “middle course” between the moral minority and the “unrestrained unilateralism”. According to Marwell, the unilateralism has to be put under the three constraints. First, the constraint of

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63 Ibid, 818.
65 Marwell, 819.
66 Marwell, 821.
67 Marwell, 822
empiric evidence: a proof is being required for the member’s claim “that a particular issue has moral significance”.68 Second, the “potential overuse of the public morals exception” should be limited by the “doctrinal constraint” “that a measure be the least restrictive means of protecting the interest at stake. The third “doctrinal constraint” lies in the necessity that the measure must be applied in a “non-discriminatory fashion”.69

3.2.3. Voland

The focal point of the critique, Voland brought forward, centers not so much on the content and scope of public morals and public order. Moreover, Voland points to the inconsistencies between the Panel’s and the Appellate Body’s account of the reasonably-available-criterion.70 Both adjudicative bodies of the WTO judged upon the necessity of the measure taken by the US to protect the citizens from unlawful and immoral gambling in different ways. Whereas the Panel referred in its decision on US – Gambling to the procedure of “weighing and balancing” as applied by the Appellate Body in earlier decisions,71 the Appellate Body made clear in its decision that the total ban of the online/remote-access-services in gambling and betting as provided by suppliers from Antigua must not be subjected to a proportionality test. According to Voland, such a test would exceed the legitimacy of the Appellate Body since it would endow it with a leeway to judge upon the importance of the policy objective, which is pursued by the measure, and the importance of free trade and the other values of the WTO a legal order. Since the WTO lacks the normative foundations on which such a far reaching decision might be grounded, the

68 Marwell, 823.
69 Marwell, 825.
70 Voland, 113f.
71 See for instance Korea – Beef, AB, para 163-166.
adjudicative bodies of this organization are obliged, according to Voland, to display a certain judicial self-restraint in this respect.

Interestingly, Voland does not problematize a member’s ability to define the content and scope of public morals and public order in the sense of Art. XX (a) GATT respectively Art. XIV (a) GATS. However, there is a simple explanation as to why Voland’s investigation does not address this issue: The public morality exception clauses of the GATT and the GATS are not that relevant for his study, which focuses on the policy aim of customer protection, a policy aim which must be subsumed under the heading of Art. XX (b) GATT. Voland discusses the US – Gambling case with respect to the necessity-relation as presupposed in Art. XX (b) and Art. XX (a) GATT likewise.

3.3. Own critical remarks

Neither Diebold nor Marwell offer critiques of the WTO-decision on US – Gambling that are really severe. On the contrary, both authors do affirm the approach the Panel as well as the Appellate Body chose to determine the meaning and scope of public morals in Art. XIV (a) GATS. It has been acknowledged that this exception clause is problematic, given the fact that the WTO legal order itself does not provide concepts and means to fulfil this semantic placeholder. Therefore, the approach that was chosen in the decision on US – Gambling appears to be quite reasonable, and not likable to disagree about. Marwell convincingly pointed to the fact that with unilateralistic approach the danger that becomes obvious, namely the temptation to misuse the public morality clause for particular policy objectives can be controlled through certain doctrinal constraints.
Among the three doctrinal constraints Marwell mentions only the requirement of empiric evidence can be considered as not being enshrined in the text of the public morality exception clauses. What Marwell calls the LRM-criterion (“last restrictive measure”) and the requirement of non-discrimination can be found in the provisions wording itself. Voland’s contribution is quite clear in this respect, pointing to the fact that US – Gambling – at least the decision of the Appellate Body – has done away with the proportionality test, the act of weighing and balancing the member’s policy objective against the values of free-trade, non-discrimination between the members and others.

Marwell also rightly underscores that US – Gambling appears to be – in terms of the public morality provision – a rather easy case, since the measure taken by the US exclusively falls within the scope of Art. XIV (a) GATT, other provisions are obviously not pertinent. A harder case can be easily imagined. A harder case would be a case, in which the measure can be considered as blurring the line between several public exception clauses, for instance between environment, health, and morality. Such a case will be discussed in the next section.

4. Case Study 2: The EU’s prohibition of the import of seal products (DS 400/401)

The second case analysis of this investigation concerns a case on which the Dispute Settlement Body of the WTO have not decided yet, namely the EU Ban on seal products. Canada and Norway brought the measures taken by the EU to prohibit the importation and marketing of seal products before the WTO’s Dispute Settlement Body. Theses measures consist
essentially in two regulations,\textsuperscript{72} the one consisting of eight articles, establishing harmonized rules concerning the placement on the market of seal products, the other laying down detailed rules for the regulation No. 1007/2009.

4.1. The EU Ban of Seal Products

The procedural status of this dispute is documented in a text, published by the WTO in its database resources in spring 2011: in November 2009, Norway requested consultations with the EU concerning certain measures affecting trade in seal products; in December 2009 Norway and the EU held consultations on the EU seal regime. After the enactment of the second regulation, Norway presented a further request. The consultations that have been held until today have failed to settle the dispute. Consequently, has requested the Dispute Settlement Body to establish a panel to examine this matter.

According to Norway, the EU regulations impose a general prohibition on the importation and sale of processed and unprocessed seal products in the EU, thereby depriving Norway of access to a significant market for its exports of these products. Whereas the regulations involve certain exceptions that set forth conditions under which seal products may be placed on the EU market, these exceptions seem to discriminate in favour of seal products originating in the EU and in certain third countries. The “EU seal regime”\textsuperscript{73} also includes elements of a system for certifying that seal products are in conformity with the relevant conditions for being placed on the EU market under the exceptions. Norway maintains that the EU does not appear to have established adequate procedures for the assessment of conformity of imported seal products with the relevant conditions for being placed on the

\textsuperscript{72} EU Regulation No. 1007/2009 and EU Regulation No. 737/2010.

\textsuperscript{73} Document WT/DS 401/5.
EU market. Consequently, the EU seal regime appears from the standpoint of Norway to be inconsistent with the EU's obligations under the Agreement on Agriculture, the TBT Agreement and the GATT 1994. In particular it violates, according to Norway, among other provisions Article I:1 of the GATT 1994 and Article 2.1 of the Agreement on Technical Barriers (TBT); Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement. As to the GATT, Norway maintains that by restricting the importation of seal products, the EU seal regime appears to violate also Article XI:1 of the GATT 1994.  

From the standpoint of Norway’s representatives, these violations nullify or impair benefits accruing to Norway directly or indirectly under the covered agreements within the meaning of Article XXIII:1(a) of the GATT 1994. Besides, the EU seal regime appears to nullify or impair benefits accruing to Norway under the covered agreements, within the meaning of Article XXIII:1(b) of the GATT 1994, in particular, benefits accruing to Norway pursuant to tariff concessions granted with respect to the various seal products that can no longer be imported into the EU.  

74 Besides Norway maintains the violation of a lot of further TBT-provisions, see the document WT/DS401/5.  
75 WT/DS 401/5.
4.2. The Regulations No. 1007/2009 and No. 737/2010 and the general provison clauses of Art. XX (a) GATT

As to the GATT, in the forthcoming dispute settlement the EU will be confronted with the allegation to have violated the following provisions: Art. I (1), III (4) and XI (1) GATT. These provisions read as follows:

Art. I (1): With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

Art. III (4): The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.
Art. XI (1): No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

It is beyond the scope of this analysis to go through the violations, Norway (and Canada) claim to have occurred through the pertinent EU legislation. In the following, the investigation merely focuses on what can count as the key issue of this WTO litigation, namely the general exceptions clause of Art. XX GATT. It is an open question whether the EU’s defense will be organized along the lines of the public morality clause of Art. XX (a) GATT or with reference to other exceptions of the general provisions clause. Two other exceptions appear to be pertinent in this context, namely Art. XX (b) GATT („measures necessary to protect human, animal or plant life or health”) and Art. XX (g) (measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”).

According to Gambardella\textsuperscript{76} it is more likely that the EU will raise the issue of protecting animal life and its legality under Art. XX (b) GATT and/or the general provision of Art. XX (g) GATT, which concerns measures relating to the Conservation of Exhaustible Natural Resources. For Gambardella, the possibility that the EU may choose Art. XX (a) GATT for its defense against Norway’s and Canada’s allegation is only the “third theoretical exemption”.\textsuperscript{77} Gambardella points to previous WTO environmental cases as for instance US – Gasoline,

\textsuperscript{76} Gambardella, GTCJ Volume 5, 2010, 145/150.

\textsuperscript{77} Gambardella, GTCJ Volume 5, 2010, 145/150.
US– Shrimp, and EC – Asbestos, in which the general exceptions of Art. XX (b) and/or Art. XX (g) GATT were raised.

4.2.1. Art. XX (b) and (g) GATT
Art. XX (b) or Art. XX (g) GATT contain the most important provisions of the WTO legal order, which are designed to protect the environment. According to Art. XX (b) GATT WTO members have the right to take measures, which are “necessary to protect human, animal or plant life or health”; Art XX (g) GATT refers measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”. “Exhaustible natural resources” are to be understood in a broad fashion. The term comprises animals and animal products as well as plants, plants products and minerals. According to Gambardella both provisions are pertinent in the EU case. It is beyond the scope of this article, if the EU ban of all cruel hunting methods which do not guarantee the instantaneous death, without suffering of the animals and the prohibition of “the stunning of animals with instruments such as hakapiks, bludgeons and guns” really fall within the rage of policies in the sense of Art. XX (b) and/or Art. XX (g) GATT. As contrasted with other WTO environment cases a difference should be noted, namely the fact that the EU ban on seals products does not target the hunting and killing of seals, moreover it aims at prohibiting methods of hunting that are considered to be cruel.

78 Ibid, 150.
79 Senti, 37.
80 Senti, 37.
4.2.2. Art. XX (a) GATT

Bracketing the question, whether Art. XX (b) and Art. XX (g) GATT are really pertinent to solve the case, it seems to be beyond all question that the public morals exceptions clause of Art. XX (a) GATT is an option for the EU to protect itself against the allegation that the ban on the seals products imposes unjustifiable trade restrictions. Therefore, in the following, I will try to predict the Panel’s and Appellate Body’s decision as it seems likeable with respect to their findings and conclusions in the US – Gambling case.

4.3. The possible decision as predictable in the light of US – Gambling and other pertinent cases

The test for applying the public morals exception of Art. XX (a) GATT in the EU ban of seals products case will involve, roughly speaking, three steps: First, it must be determined whether the measures taken by the EU fall within the range of public morality. Second, if the adjudicative bodies affirm the question and hold that the measure address a matter of public morals, it must be tested whether or not the measure is not more trade restrictive than “necessary”. If the measure successfully passes the necessity test, it must be analysed, thirdly, if it meets the requirements of the chapeau of Art. XX GATT.

Art. XX (a) GATT presupposes, that the measure taken by a member to pursue a certain of public order not only relates to the policy, but is necessary to “protect” “public morals”. This clause must be divided into step No.1 and step No.2. As to the question whether the particular policy adopted by the EU through the banning of seals products falls within the scope of
public morals, my guess is that the EU will be successful in this regard. As in US – Gambling this question seems to be less problematic than step No.2. In US – Gambling the WTO’s adjudicative bodies solved the problem of defining the scope of “public morals” by assigning the member the capability to define the scope on the one hand and by limiting its defining power on a procedural level on the other. The EU will be able to demonstrate that the ban of seals products is largely motivated by the EU legislative bodies’ point of view that common practices of seal hunting do not correspond with the ethical values as held by a majority of the people living in the EU.

The focal point of the Panel’s and Appellate Body’s finding will probably be laid on the necessity test. As mentioned, the necessity-check figures as the second step after the test, whether the measure is capable to contribute to the policy it aims at, preceding the analysis whether the measure corresponds to the requirement of the chapeau.\(^1\) It will be asked whether there is an alternative measure at hand, which does not violate – or violates less intensively – the provisions of the GATT (in particular: Art. 1 (1) and Art. XI (1)). Furthermore it will be tested whether there are alternative measures of equal capability, whose undertaking can be reasonably expected from the member.

According to the jurisdiction, an alternative can be seen as more appropriate whenever it reaches the target without violating the GATT’s norms – or at least without violating them in such an intense manner.\(^2\) The question is, whether measures are at hand, which entail fewer obstacles to international trade. In Art. 3 sec. I of the Regulation No. 1007/2009 it is stated that “the placing of the market of seal products shall be allowed only where the seal products result

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1 Voland, 107.
from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence”. Art. I of the corresponding Regulation No 737/2010 states, that the Regulation No. 1007/2009 allows also “for the placing on the market of seal products where the hunt was conducted with the sole purpose of the sustainable management of marine resources and where the import of seal products are occasional in nature and consist exclusively of goods for the personal use of travellers and their families”.

It is an open question, whether the intention of banning cruel hunting and killing of seals could have been reached with the admission of further exceptions. The exceptions from the EU ban of seals products as stated in both regulations seem to be conceived of as too narrow. Therefore, the Panel and the Appellate Body will probably point to alternative measures, which entail a violation of the GATT’s aims, which appears to be less significant.

As to the reasonably-available-criterion the alternative measure needs to be on the hand likewise capable of reaching the aim, namely the public-morals-policy the member intends; on the other hand the alternative measure must be reasonable from the standpoint of the member. Regarding the reasonable availability of an alternative measure, the Appellate Body found in US – Gambling that an alternative that is merely theoretical may not be considered a reasonably available alternative. In this previous case the Appellate Body referred to examples such as situations in which the responding Member is not capable of taking an alternative measure and situations in which the alternative measure would impose an undue burden on that member. As mentioned above, the Appellate Body underscored in its decision of US – Gambling that a reasonably available alternative measure must preserve

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83 US – Gambling, AB, para 308.
the Member’s right to achieve its desired level of protection with to the objective pursued, the Appellate Body restrains from weighing and balancing the appropriateness of the level of protection. It abstains from a proportionality test.

Giving these findings in the earlier case of US – Gambling, one might expect that the WTO’s adjudicative bodies will point to alternative measures, which will successfully undergo the availability-test. To exempt softer hunting methods from the EU ban, methods, which appear less cruel and more ethical than the hunting and killing as it is actually practiced by the seal product industry, seems to be a reasonably available measure in the sense of Art. XX (a) GATT’s necessity test. It can hardly be imagined that the provisions of the pertinent EU regulations, as they are formulated by now, will pass the necessity test. There is obviously no need to limit the conditions of the seal products’ legal placing on the market to seal products which result from the traditional hunting style as practiced by the Eskimos on the one hand, and to the cases, in which the “hunt was conducted with the sole purpose of the sustainable management of marine resources and where the import of seal products are occasional in nature and consist exclusively of goods for the personal use of travellers and their families”. A ban of seals products, which would limit the scope of the ban from the outset to seal products which result from hunting and killing methods that appear to be cruel, is obviously a measure in the sense of Art. XX (a) GATT, which entails by far less obstacles to the free trade while being equally efficient as the actual EU-provisions and reasonably available at the same time. The best they can expect, in Fitzgerald opinion, is a decisionsimilar to the Shrimp-Turtle II case\textsuperscript{84}, “ that the ‘public morals’ exception might well be useful in an animal welfare context, but that such measures must

also respect the rights of exporting States under the WTO Agreements in a manner which this particular regulatory scheme fails to do."\(^{85}\)

### 4.4. Some critical remarks

The question is whether the WTO’s adjudicative bodies’ decision on the EU ban on the seal products as it can be expected deserves acceptance or not. With respect to the *ratio decidendi* as outlined in the US – Gambling case it would be convincing to reject the EU ban as a measure of a member, which is not justified according to Art. XX (a) GATT. The EU ban of seals products as it is formulated in the two pertinent regulations will clearly fail the necessity test of Art. XX (a) GATT. A more interesting aspect of this dispute consists in defining the scope of the public-morals-exception. In accordance with the findings and conclusions of US – Gambling the Panel and the Appellate Body will have to assign to the EU the right to consider this specific measure as a matter of public morals and therefore to defend the measure along the lines of Art. XX (a) GATT. This is so, because the prohibition must be regarded as a legislative measure of democratically elected institutions, expressing a normative standpoint of a – at least parliamentary – majority.

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5. The concept of public morality: moral grounds and cultural backgrounds

5.1. The concept of public morals in Art. XX GATT and Art. XIV GATS

As it should have become clear in the previous chapters of this investigation, the WTO’s adjudicative bodies display a certain kind of judicial self-restraint regarding the content of Art. XX GATT’s respectively Art. XIV GATS’ public morals/public order-clauses. A policy objective can count as a matter of public morality, as falling into its range, insofar as the member can prove that the issue is considered by the majority of the citizens that belong to the member as a matter of public morals. Whenever the measure consists in legislative acts and the legislators refers to public morals, it can be, at least in democracies, reasonably assumed that the policy objective falls within the scope of public morality.

The Panel and the Appellate Body do not have any rational means to exclude policy objectives from a member’s public morals agenda other than the denial of a member’s claim that its majority has a certain moral interest in pursuing this policy objective. This solution of the public-morals-problem does not necessarily involve uncontrolled leeways of defining public morals for a member, while the possibility of misusing this leeway for other purposes than the enforcement of particular public-morality standards cannot be denied. Nevertheless, one question remains: How can it be that it is almost impossible to define widely accepted standards of public morals, while it seems to be relatively easy to come to a world-wide consensus on the question whether sea turtles are an “exhaustible natural resource” in the sense of Art. XX (g) GATT or “whether the risk of mesothelioma from asbestos inhalation is a threat to “human health” per GATT Article XX
One possible answer could be provided by the consideration that public moral is a matter of culture, that public morality hinges upon the member’s culture.

5.2. Excursus: Public morality and contingent cultural values

Culture is a buzz word, as a concept is has to be clarified. Clarification means: to sort out the distinctive features which are relevant for this investigation. In defining public morals as the “standards or right and wrong conduct maintained by or on behalf of a community or nation” the Appellate Body refer to an empiric, non-normative concept of public morals and public morality. This understanding brackets the possible reasons as to why communities or nations maintain different standards of right and wrong; the preliminary answer would be: because of the nations’ and communities diverse cultures. But what is culture?

5.2.1. The Concept of Culture

Culture is something that can be taken to distinguish people while in the same instance it can be taken to encompass people. Culture seems to be something that results in similar behaviour as well as in different behaviour. Culture is something expressed in artefacts and craftwork and culture is something dynamic. With the words of the prominent cultural theorist Geert Hofstede, culture “is always a collective phenomenon, because it is at least partly shared with people who live or lived within the same social environment, which is where it was learned. It is the collective programming of the

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86 Marwell, 815.
87 Hofstede 2001, 296-299.
mind which distinguishes the members of one group or category of people from another”\textsuperscript{88}

According to \textit{Hofstede}, culture consists of values and norms. Whereas the latter resembles some form of directive, saying what ought to be done, the former can be thought of as being broad tendencies to prefer certain states of affairs to others. The core values are surrounded by rituals, heroes and symbols that are the visible signs of the culture’s core of values. Rituals are actions regarded within a society as socially essential; heroes are persons who have been highlighted within the societies because they incorporate characteristics that are highly prized. Symbols are — frankly speaking - the rest. Symbols are gestures, words, objects everything that carries some meaning for a particular society. “In conclusion, it is possible to describe culture as a shared set of basic assumptions and values, with resultant behavioural norms, attitudes and beliefs which manifest themselves in systems and institutions as well as behavioural patterns and non-behavioural items”\textsuperscript{89}

Culture, as \textit{Hofstede} sees it, is responsible for a bulk of differences that is expected to emerge, when people of different cultural origins meet. And in the end, everything can be reduced to the “value” core: Any difference that occurs if two people of different cultural context meet each other can be interpreted as a difference in values. So, if the assumptions laid bare until now hold true the way to intercultural success leads through an almost perfect knowledge of the other culture’s values.

\textbf{5.2.2. Various Dimensions of Culture}

Culture reveals itself in verbal and non-verbal behaviour: The behaviour an individual shows is an overt expression of his

\textsuperscript{88} Hofstede 1991, 5.
\textsuperscript{89} Dahl 2004, 6.
values grounded in the culture he stems from. The content of the culture is learned through childhood by socialisation: “Culture is learned, not inherited. It derives from one’s social environment, not from one’s genes. Culture should be distinguished from human nature on the one side, and from the individuals personality on the other ...”  

Hofstede discovered on the level of countries or nations five dimensions that can be used to distinguish one culture from another. The concepts are labelled “power distance”, “uncertainty avoidance”, “individualism-collectivism”, “masculinity” and “long-term orientation”.  

Power distance is defined as “the extent to which the less powerful members of institutions and organisations within a country expect and accept that power is distributed unequally”. Power distance can be high or low. Taken to describe companies or organizations it can be said that in countries with low power distance companies tend to have decentralized decision structures, a flat organization and so on, while in countries with a high power distance companies tend to be centralized and hierarchically organized and so forth: “In small power distance countries there is limited dependence of subordinates on bosses, and a preference for consultation, that is, interdependence between boss and subordinate”.  

Uncertainty avoidance may reveal itself in scepticism toward technological innovations, in less tolerance for ambiguity in structures and procedures and may be counteracted by e.g. a strong appeal for technological solutions. The high need of predictability as given for individuals in countries of high uncertainty avoidance reveals itself in self-assuring

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90 Hofstede 1991, 5.  
91 Hofstede 2001, 296ff.  
92 Hofstede 1994, 51.  
93 Hofstede 1994, 51.
communication styles and an almost complete lack of the expressive function.

Furthermore, countries are ranked on the dimension of individualism and collectivism: “individualism pertains to societies in which the ties between individuals are loose. Everyone is expected to look after himself or herself and his or her immediate family. Collectivism as its opposite pertains to societies in which people from birth onwards are integrated into strong, cohesive in-groups, which throughout people’s lifetime continue to protect them in exchange for unquestioning loyalty”.\textsuperscript{94}

Individualism may result in a belief in individual decisions, in many invention patents and a greater mobility across occupations. Collectivism may produce a belief in collective decisions, fewer inventions patents and less social mobility across occupation as compared to individualistic countries. Accordingly, collectivism should see the use of the appellative and the descriptive function of language prevail the expressive function.

Individualism scales aimed at country rankings are relatively common in the social sciences. Especially Schwartz\textsuperscript{95} made uncounted attempts to rank countries on the respective scale. In contrast to Hofstede, Schwartz subdivided his dimension of individualism in different sub-dimensions, e.g. power achievement, hedonism, stimulation, self-direction, universalism, tradition, conformity and security. So one has to ask which measure or dimension of individualism is more appropriate to display the “real” world within a country – the one dimension of Hofstede or the eight sub-dimensions of Schwartz.

\textsuperscript{94} Hofstede 1994, 51.
\textsuperscript{95} Schwartz 1994 and Schwartz 1992
Another dimension that is, according to Hofstede, useful for distinguishing countries is the dimension of masculinity: “masculinity pertains to societies in which social gender roles are clearly distinct (i.e., men are supposed to be assertive, tough, and focused on material success, whereas women are supposed to be more modest, tender, and concerned with the quality of life); femininity pertains to societies in which gender roles overlap (i.e., both men and women are supposed be modest, tender, and concerned with the quality of life).”\textsuperscript{96}

The last dimension identified by Hofstede is the long-term orientation. Long term-orientation describes the focus on building relationships rather than on short-term results. It is characterized by “persistence, ordering relationships by status and observing this order, thrift, and having a sense of shame, whereas short term orientation is characterized by personal steadiness and stability, protecting your ‘face’, respect for tradition and reciprocation of greetings, favours, and gifts.”\textsuperscript{97}

5.2.3. National boundaries of Culture

Usually, it is taken as a given, that culture is restricted to national boundaries. People inhabiting a particular country are distinguished by people inhabiting another country by their culture.

The sociologist Stephen Dahl for instance proposes a rather rude method to restrict culture to national boundaries because the nationality of a person “can easily be established, whereas membership of a sub-culture is more difficult to establish, particularly in cases where individuals may declare themselves members of various sub-cultures at the same time. The use of nationality is therefore avoiding unnecessary

\textsuperscript{96} Hofstede 1994, 82-83.
\textsuperscript{97} Dahl 2004, 13f.
duplication and removes ambiguity in the research process, as the nationality of a person can usually be established easily. Secondly, there is considerable support for the notion that people coming from one country will be shaped by largely the same values and norms as their co-patriots. In this view culture exhibits itself as a two-sided concept. While on the one side, culture is the one thing that members of a specific nation have in common so that they can be easily distinguished from other nationals, culture is divided within a specific nation, several sub-cultures co-exist and people do not have much in common. Thus, the picture one grasps of the culture an individual belongs to, depends of the side one is looking at the specific person. From this perspective, it becomes obvious that depending on one nation’s culture, on the collectively given non-natural facts which characterize one nation’s people, the morality-based trade restrictions are as diverse and heterogenous as the nations themselves.

5.3. The chapeau of Art. XX as a remedy against the misuse the exception clause of Art. XX (a) GATT for national policy purposes

In this investigation relatively little attention has been attributed so far to the general introduction of Art. XX GATT which contain the so-called chapeau. As mentioned above. Art. XX’s chapeau refers to every exception as listed in Art. XX (a) – (j) GATT. It prohibits a measure from being applied in a manner that would constitute a means of “arbitrary or unjustifiable discrimination between countries where the same conditions prevail” or a “disguised restriction on international trade”.

With regard to the range of the chapeau the Appellate body has stated in its decision on US – Shrimps that “the task of interpreting and applying the chapeau is [...] essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions of the GATT [...] The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging [but] moves as the kind and the shape of measures at stake vary and as the facts making up specific cases differ.”

Concerning the function of the chapeau, the aim and the object is the prevention of “abuse of the exceptions of Art. XX”, “the fundamental theme [being the avoidance of] abuse or illegitimate use of the exceptions to substantive rules available in article XX”.

With respect to arbitrary and unjustifiable discrimination, it has been made clear, what needs to be examined is the application of the measure leading to a discriminatory situation, not the measure itself. The determination of whether the discrimination of whether the discrimination was arbitrary or necessary must address not only “the detailed operating provisions of the measure”, but also the way, in which the measure “is actually applied”. If the application of the measure is considered to be discriminatory, it still remains to be decided whether it is arbitrary and/or unjustifiable between countries where the same conditions prevail. That is the next step in the analysis. There has not been much clarification as to what constitutes an arbitrary discrimination. It is nevertheless obvious that this will be the case if a measure “imposes a single, rigid and unbending requirement without

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inquiring into the appropriateness of the measure for the conditions prevailing in exporting States”.

As to the unjustifiable discrimination this has been regarded as one a discrimination that could have been “foreseen” without being “merely inadvertent or unavoidable”. Two criteria can be identified: The first to be understood as a “serious effort to negotiate with the objective of concluding bilateral and multilateral agreements for the achievement of a certain policy goal”. The criterion entails the engagement “in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements, before enforcing the import prohibition against the shrimp exports of those other Members.”. This finding has been taken to mean firstly that the state invoking Art. XX GATT must have taken the initiative to negotiate; secondly that the negotiations had to be taken place with all interested parties; thirdly that the negotiation-effort must be serious efforts in good faith; and last but not least that the negotiations should take place before the enforcement of measure.

The second criterion for the not-foreseeable discriminatory effects of the measure relates to the measure’s flexibility. A lack of flexibility in taking into account different situations in different States hat been interpreted as to amount to an unjustifiable discrimination. This has been detailed to require an approach which is based on “whether a measure requires essentially the same regulatory programme of an exporting Member as that adopted by the importing Member applying the measure”.

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character of a factual discrimination lies in the focus on the flexibility in the implementation process of the measure. The flexibility will have been provided if the implementing measure provides for “comparable effectiveness”. 109

The last element of the requirements of Art. XX GATT’s chapeau consists in the application of what is circumscribed as “disguised restriction on international trade”. The adjudicative bodies of the WTO have introduced three criteria to determine whether a measure is a disguised restriction on international trade. The first criterion consists in a publicity test. In this respect it has been states that concealed or unannounced restrictions or discriminations in international trade does not exhaust the meaning of this term. 110 In EC – Asbestos the Panel interpreted this finding in the following way. According to the Panel, it means that a measure that has not been published could not satisfy the publicity test. 111 Secondly, the Appellate Body has considered that “disguised restriction […] may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX”. 112 The third criterion according to which “protectionist objectives” can be uncovered as a disguised restriction on international trade is by focusing in the “design, architecture and revealing structure” 113 of the measure.

With this content the chapeau of Art. XX GATT is designed to identify unjustified measures that have passed, in a first step, the necessity test of the public-morals exception clause of Art. XX (a) GATT. The requirements of the chapeau pertain to all of the ten exceptions as listed in Art. XX GATT. Therefore, it is

111 EC – Asbestos, Panel Report, par. 8.234.
113 ES – Asbestos, Panel Report, para 8.236.
not a specific means to sort out measures that are officially taken by a member to pursue a certain public moral issue, while essentially pursuing other non-protected particular aims. Nonetheless, it goes without saying that the requirements of the general exceptions’ chapeau clause are capable to identify likewise measures in the name of public morals, whose effects consists in either an arbitrary/unjustified discrimination between countries with same conditions or/and in a disguised restriction on international trade.

6. Summary

1. The problem, this investigation tried to tackle, consists in the question whether a member of the WTO can theoretically invoke any policy objectives that he considers himself as relating to public morals in order to defend a measure in the sense of Art. XX GATT.

2. The legal term of “public morals” lacks itself conceptual determinateness and needs to be interpreted. The WTO’s adjudicative bodies have referred, in their decision on US – Gambling to a kind of empiric conception of public morals which attributes to the WTO members a leeway to define the scope of public morals. Public morals is a general fashion circumscribed as “standards of right and wrong conduct maintained by or on behalf of a community or nation”.

3. The decision whether a measure fits the requirements of Art. XX (a) GATT or Art. XIV (a) GATS is to be made in three steps. First, it has to be tested, whether the measure is capable to contribute to the policy it aims. Second, it has to undergo a necessity test, and third - in case the previous steps have led to positive answers - it must be questioned whether the measure corresponds to the requirements of the so-called chapeau of Art. XX GATT (Art. XIV GATS).
4. Since the decision on US – Gambling, the necessity test is carried out without a proportionality test, consisting only in the test whether or not alternative measures which involve less trade restricting effects would have been reasonably available for the member.

5. In the case of US – Gambling both the Panel and the Appellate Body found that three US federal laws violated the US market access commitment under Art. XVI (a) and (c) of the GATS, namely the Wire Act, the Travel Act and the Illegal Gambling Business Act. Both dispute settlement bodies held that the concerns which the Wire Act, the Travel Act and the Illegal Gambling Business Act seek to address fall within the scope of 'public morals' and/or 'public order'. Only according to the Appellate Body the measure at stake successfully passed the necessity test.

6. After US – Gambling, the literature articulated criticism which centered on the question as to why the measures of the US to ban imports of online gambling and betting services could count as measures that aim legitimately at the policy objectives of preventing underage and pathological gambling. Possible alternative standards as to defining the range of public morality, namely “originalism”, “universalism”, “moral majority or multiplicity”, and “unilaterism” are discussed in the critical literature.

7. As to the EU ban of seal produces, the EU will be confronted. In the forthcoming dispute settlement, with the allegation to have violated the following provisions: Art. I (1), III (4) and XI (1) GATT. The decision seems to be quite easy to predict. The Panel will find that the measures taken by the EU have not been necessary in the sense of Art. XX (a) GATT to protect the legitimate policy objective to do away with cruel hunting and killing practices.
8. To exempt softer hunting methods from the EU ban, methods, which appear less cruel and more ethical than the hunting and killing as it is actually practiced by the seal product industry, seems to be a reasonably available measure in the sense of Art. XX (a) GATT’s necessity test.
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