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Trade and Morality: Preserving "Public Morals" Without Sacrificing the Global Economy

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ABSTRACT

The World Trade Organization (WTO) exists for the purpose of promoting and facilitating trade amongst its member nations. When those member nations acceded to the WTO's agreements, however, they acknowledged that sometimes trade barriers are useful tools in protecting themselves from certain evils. This Note addresses one of those useful tools—the public morals exception—which allows a member nation to maintain trade barriers with respect to certain goods or services.

Since the WTO agreements have been in effect, the public morals has lacked two critical things: a definition and boundaries. This Note will attempt to define the public morals exception in a way that preserves the spirit of the WTO agreements. Furthermore, this Note will propose a test that will allow future WTO panels to decide whether a country's law or regulation, justified under the public morals exception, can legitimately fall within the ambit of the WTO agreements.

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I. INTRODUCTION

> **Mr. [U.S. Senator] GRAMM**: His amendment also deems exempt those State and local laws and ordinances related to a series of issues–such as health, safety, environment, or public morals, *whatever that is*[1]

The WTO's lofty ambition is to "usher[ ] in a new era of global economic cooperation, reflecting the widespread desire to operate in a fairer and more open multilateral trading system for the benefit and welfare of their peoples."[2] Through the WTO, representatives from 124 countries[3] sought "to resist protectionist pressures of all kinds"[4] and pledged that they would not adopt trade measures that would "undermine or adversely affect"[5] the agreements reached during the Uruguay Round negotiations that lasted from 1986 to 1994. In pledging so, the leaders of the nations involved in the creation of the WTO recognized that free trade was an important means of raising global living standards, "ensuring full employment," promoting the growth of the volume of real income and effective demand, "expanding the production of goods and services," preserving the environment, and using the world's resources at optimal levels.[6]

One of the tools the WTO used in promoting this goal is the most favored nation (MFN) principle. Article I of the General Agreement on Tariffs and Trade of 1947 (GATT) states that any benefit that a country confers upon the goods of another country "shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all contracting parties."[7] Similarly, Article II of the General Agreement on Trade in Services (GATS) requires each member to immediately and unconditionally accord to all contracting parties a treatment that is no less favorable than the treatment it accords to like services and service suppliers from any other country.[8] Finally, Article IV of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) places a similar requirement on contracting members where the article in

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1. 148 Cong. Rec. S4604 (daily ed. May 21, 2002) (emphasis added). Senator Gramm is referring to an amendment proposed by Senator John Kerry to the Andean Trade Preference Expansion Act.

2. WORLD TRADE ORGANIZATION, THE LEGAL TEXTS–THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS iv (Cambridge University Press 2002) [hereinafter WTO Documents].

3. Current Membership is at 149 countries. *See Understanding the WTO: The Organization,* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Mar. 29, 2005).

4. WTO Documents, *supra* note 2, at iv.

5. *Id.*

6. *Id.* at 4.

7. *Id.* at 424.

8. *Id.* at 287.

question is intellectual property.[9] In short, the MFN principle requires the member nations of the WTO to treat each other equally.

Another trade-promoting device is the principle of national treatment. In Article III of the GATT, the members agree to enjoin themselves from using internal taxes and other internal regulations to favor domestic products and production over imported products.[10] Article 17 of the GATS further requires that nations give domestic services and service suppliers the same regulatory costs and benefits that they give to foreign services and service suppliers.[11] Finally, Article 3 of the TRIPS agreement requires nations to give the same protection to intellectual property of foreign and domestic entities.[12] Because of this national treatment principle, a nation must extend the same benefits and burdens to foreign goods, services, and intellectual property that it extends to the domestic equivalents.

Yet the principles of national treatment and MFN alone do not govern free trade: schedules of concessions play a critical role in the WTO. Under the GATT and GATS Agreements, member nations may choose which goods and services are committed to the principles of those agreements. Under GATT Article II(a), in a schedule of concessions, member nations guarantee that they will negotiate tariffs for certain goods and bind themselves to charge all member nations the negotiated rate.[13] This does not mean that tariffs will be eliminated, and it does not guarantee that an agreement will be reached for all goods.[14] The services equivalent appears in Article XVI of the GATS.[15] Essentially, members of the GATS are to create a list of the services that they will subject to liberalization.[16] If a member nation selects a certain service for trade liberalization, then the member nation barred from limiting the amount of suppliers of that service, placing quotas on the total value of service transactions, limiting output, limiting the supply of labor to the supply of that specific service, forcing suppliers to sell to particular entities, and limiting foreign shareholding.[17]

Any given good or service may be denied lower tariffs by a simple failure to negotiate. Even if a category is negotiated, however, a good or service may fail to enjoy the benefits of a lower tariff if a country

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9. *Id.* at 323.
10. *Id.* at 427.
11. *Id.* at 299–300.
12. *Id.* at 323.
13. *Id.* at 425.
14. *See e.g.*, Schedule CXLIII–Republic of Latvia–Part I–Schedule of Concessions and Commitments on Goods, *available at* http://www.takuzinis.lv/xhtml1.1/20040917.html (providing an example of one member nation's schedule of commitments and demonstrating the varying negotiated rates).
15. WTO Documents, *supra* note 2, at 298–99.
16. *Id.*
17. *Id.*

chooses to invoke one of three exceptions with respect to a specific good or service. Specifically, this Note addresses a provision that allows a member nation to discriminate to preserve its "public morals." The GATT provision, which is substantially similar to the equivalent GATS provision,[18] reads, in pertinent part:

> *Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where 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:*
>
> (a) *necessary to protect public morals*; . . .[19]

The GATS provision adds "or to maintain public order" after the word "morals."[20] Along these lines, Article 27(2) of the TRIPS agreement notes that "[m]embers may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* . . ."[21]

The WTO has never ascertained the definition of "public morals."[22] This Note will attempt to give meaning to this term in a manner that preserves the spirit of the agreements that form the WTO. Part II of this Note will consider various means that could be used to determine the meaning of the public morals exception. Part III will first consider which of the definitions extracted from the devices discussed in Part II are consistent with the general principles of the WTO and then the implications of abuse of the public morality exception. Finally, Part IV will suggest a workable approach to scrutinizing laws and regulations justified on the grounds that they are aimed at protecting public morals.

II. DEFINING THE BOUNDARIES OF THE "PUBLIC MORALS" EXCEPTION

A. *The Vienna Convention Approach*

The meaning of the public morality exception remains unsettled as of today.[23] Multilateral treaties require creative and nuanced drafting so that the interests of all negotiating parties may be satisfied.[24]

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18. *Id.* at 296.
19. *Id.* at 455.
20. *Id.* at 296.
21. *Id.* at 333.
22. Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689, 690 (1998).
23. *Id.* at 690.
24. ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 184 (2000).

The Vienna Convention on the Law of Treaties (Vienna Convention) was adopted in 1969 to settle disputes arising from treaties made between states through peaceful means and in "conformity with the principles of justice and international law."[25] Accordingly, the Convention applies to the WTO agreements.[26] Under the Vienna Convention, there are four important considerations in treaty interpretation: [27] (1) interpret the treaty in good faith and in accordance with the ordinary meaning of the terms of the treaty in context and in light of its object and purpose;[28] (2) interpret the treaty in context;[29] (3) interpret the treaty in light of subsequent agreements, practice, and applicable laws;[30] and (4) interpret the treaty consistent with any special meanings intended by the signing parties.[31] An interpreter may also consider the *travaux préparatoires* (preparatory work)—essentially the treaty's legislative history—and the context in which the treaty was drafted, to confirm the meaning that is ascertained using the above methods, or to further interpret the treaty if the meaning that is ascertained using the above methods would lead to absurd results.[32]

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25. Vienna Convention on the Law of Treaties, May 23, 1969, pmbl., 1155 U.N.T.S. 331, 340 [hereinafter Vienna Convention].

26. WTO Appellate Body Report, United States-Standards for Reformulated and Conventional Gasoline, WT/DS2/9, 1617 (May 20, 1996).

27. Article 31 instructs the interpreter to:

> 1. Interpret the treaty "in good faith [and] in accordance with the ordinary meaning to be given to the terms of the treaty" in their context and in light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in connexion [sic] with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connexion [sic] with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

Vienna Convention, *supra* note 25, at art. 31.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at art. 32.

The public morals provision has been considered through the lens of the Vienna Convention. This analysis has conclusively demonstrated that the precise meaning of the public morals exception is at best difficult, but likely impossible to ascertain based on the methodology of the Vienna Convention.[33] Looking at the Vienna Convention sources has only yielded two answers: the drafters knew what the term meant (thus, they said little about what it encompassed) and they intended for the term to include regulations aimed at regulating alcohol.[34]

B. *Decisions in International Trade Law Cases*

There is no principle of stare decisis in the WTO.[35] Nevertheless, the cases below provide guidance on how the WTO has interpreted the provisions. These cases also present the various policy and definitional choices that future panels may make.

1. The Tuna/Dolphin Cases

The Tuna/Dolphin cases occurred prior to the existence of the WTO. As such, these cases were decided by GATT panels.[36] Mexico filed the first Tuna/Dolphin Case against the United States in 1990.[37] The European Economic Community (EEC) and the Netherlands filed the second Tuna/Dolphin Case against the United States in 1992.[38] Both cases concerned measures adopted by the United States to curtail the incidental taking of dolphins by tuna fishermen.

i. The Controversy Behind the Tuna/Dolphin Regulations

Moral outrage—a notion that "radical action" must be taken to "defend life that cannot defend itself"—frequently inspires many

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33. Charnovitz, *supra* note 22, at 704.

34. *Id.* at 702.

35. Panel Report, *United States–Final Dumping Determination on Softwood Lumber from Canada*, ¶ 4.293, WT/DS264/R (Apr. 13, 2004). *But see* Panel Report, *Canada—Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/R (Jan. 28, 2002), Annex B-7, at B-56 (citing R. Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication*, 9 J. TRANSNAT'L L. & POL'Y 1 (1999); *The Myth About Stare Decisis and International Trade Law*, 14 AM. U. INT'L L. REV. 845 (1999)) (arguing that the absence of stare decisis in the WTO Appellate Body is a "myth" and characterizing their decisions as adhering to a "de facto" stare decisis).

36. *See* Panel Report, *United States–Restrictions on Imports of Tuna*, DS21/R–39S/155 (Sept. 3, 1991) [hereinafter Tuna/Dolphin I]; Panel Report, *United States–Restrictions on Imports of Tuna*, DS29/R (June 16, 1994) [hereinafter Tuna/Dolphin II].

37. Tuna/Dolphin I, *supra* note 36, ¶ 1.1.

38. Tuna/Dolphin II, *supra* note 36, ¶ 1.1.

protectors of the environment.[39] Impassioned appeals are common. For example, one editorialist noted that

> [f]ew mammals are so agreeable when murdered, imprisoned or taught how to leap 20 feet, dunk a basketball and snatch the trainer's dead fish on the way down .... Their brains are bigger than ours, suggesting the far-out possibility of an intelligence as yet outside the limits of human understanding.[40]

The issue in the Tuna/Dolphin cases, therefore, struck a chord with some.[41]

Even though such a compelling issue was involved, some feared that the trade measures were inspired by protectionism and not by legitimate moral outrage about gross wrongdoings. A commentator in the early 1990s noticed a phenomenon of "strange bedfellows" during GATT negotiations: "While creating new wealth and opportunities, free trade destroys jobs in an economy's least competitive sectors and forces the overall economy to become more efficient. As a result, free trade will always generate powerful enemies."[42] This preceded a statement that is central to the issue of the interpretation of public morals in the context of the WTO agreements: "'These enemies have wrapped themselves in a green banner and have stepped forward as protectors of the environment.' Says one U.S. trade official: 'The environment could well become the new hidden trade barrier behind which protectionists will all run to hide.'"[43]

U.S. business concerns became unusually aligned with the sentiments of morally outraged environmentalists determined to stop "the killing of dolphins"[44]:

> The U.S. tuna fishing industry, for example, helped persuade Washington to block imports of Mexican-caught tuna, on the grounds that Mexicans were not as careful as U.S. tuna fishermen to avoid snaring dolphins in their nets. As soon as Mexican tuna was

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39. ANDREW J. WEIGERT, SELF, INTERACTION, AND NATURAL ENVIRONMENT: REFOCUSING OUR EYESIGHT (1997).

40. Editorial, *No More Dolphin Kills: We Need to Reject Death Quotas for These Playful Creatures, Who Have Been Massacred by the Million in the 20th Century*, S.F. EXAMINER, Oct. 9, 1995, at A16.

41. *See, e.g.*, Bill Bryant, *Global Trade Needn't Come at Expense of Environment*, SEATTLE POST-INTELLIGENCER, June 27, 1997 at A15 (describing a subway advertisement that urged that Congress "not let dolphins be sacrificed on the altar of free trade"); Stuart Auerbach, *Raising a Roar Over a Ruling: Trade Pact Imperils Environmental Laws*, WASH. POST, Oct. 1, 1991 at D01 (describing the 30-mile-long "curtains of death" used by fishermen in Japan, South Korea, and Taiwan).

42. Peter Fuhrman, *Strange Bedfellows (New Protectionist Alliance)*, FORBES, Dec. 9, 1991, at 94.

43. *Id.*

44. Juanita Darling, *Tuna Turnabout: Mexico Announces a Dolphin Protection Plan*, L.A. TIMES, Sept. 25, 1991, at 6.

embargoed in February, U.S. tuna fishermen moved to hike their prices by 10%.[45]

ii. Factual Background of the Tuna/Dolphin Cases

The disputes brought by Mexico and the EEC (hereinafter, "the Tuna/Dolphin complainants") against the United States in 1990 and 1992, respectively, dealt with restrictions imposed on the importation of certain tuna products.[46] At the time the Tuna/Dolphin complainants filed the disputes, commercial fishermen employed the practice of catching tuna using large "purse seine" nets.[47] To use this method a fishing vessel deploys a smaller boat that unfurls a net around a school of tuna.[48] When the boat has fully encircled the school of tuna, a mechanism on the larger boat traps the contents of the net in what is akin to a "purse."[49]

The measures adopted by the United States sought to curtail the use of this method of fishing in the Eastern Tropical Pacific Ocean (ETP).[50] The United States targeted that region because experts had long observed a peculiar association between tuna and dolphin in that region.[51] Indeed, studies indicated that the purse seine method killed legions of dolphins in the ETP since the 1960s.[52]

In response to these startling numbers, the United States passed the Marine Mammals Protection Act in 1972 (MMPA).[53] Congress enacted the MMPA when it found that "certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities."[54] In addition to the ecological reasons for protecting the mammals,[55] Congress found that it should protect marine mammals because of their great "esthetic [sic] and recreational" value.[56]

The MMPA regulated tuna fishing by U.S. fishermen and by those operating within the jurisdiction of the United States.[57] Under the MMPA, fishermen were obligated to employ fishing techniques

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45. Fuhrman, *supra* note 42, at 94.
46. Tuna/Dolphin I, *supra* note 36, ¶ 1.1; Tuna/Dolphin II, *supra* note 36, ¶ 1.1.
47. Tuna/Dolphin I, *supra* note 36, ¶ 2.1; Tuna/Dolphin II, *supra* note 36, ¶ 2.1.
48. *Id.*
49. *Id.* For a complete and detailed overview of the "purse seine" method of tuna fishing, please visit http://www.defenders.org/defendersmag/issues/summer02/tunadolphin.html.
50. Tuna/Dolphin I, *supra* note 36, ¶ 2.2; Tuna/Dolphin II, *supra* note 36, ¶ 2.2.
51. Tuna/Dolphin I, *supra* note 36, ¶ 2.2.
52. Tuna/Dolphin II, *supra* note 36, ¶ 2.2.
53. Tuna/Dolphin I, *supra* note 36, ¶ 2.3; Tuna/Dolphin II, *supra* note 36, ¶ 2.5.
54. 16 U.S.C. § 1361(1) (2004).
55. 16 U.S.C. §§ 1361(2)–(3).
56. 16 U.S.C. § 1361(6).
57. Tuna/Dolphin I, *supra* note 36, ¶ 5.1; Tuna/Dolphin II, *supra* note 36, ¶¶ 2.6–2.8.

that would "reduce the taking of dolphin[s] incidental" to the tuna-fishing activities.[58] The federal government licensed U.S. vessels under the condition that the entire fleet could not exceed an incidental taking of 20,500 dolphins per year in the regulated region.[59] The U.S. government also "ban[ned] the importation of commercial fish or products from fish caught" using techniques that resulted in incidental killings.[60]

Foreign governments could only market their tuna in the United States upon showing that their "regulatory regime regarding the taking of marine mammals" was similar to the regime employed by the U.S. government.[61] To make this showing, countries had to demonstrate that the average rate of taking of marine mammals was not greater than "1.25 times the average incidental-taking rate of United States vessels operating in" the regulated region.[62] If the United States banned a foreign government's tuna because that government's regulatory regime did not meet the minimum standards, then all other nations were required to ban tuna originating from that foreign government in non-compliance or face an embargo from the United States.[63] If a primary or intermediary nation remained embargoed for six months, it faced the risk of a U.S. embargo on all of its fish and wildlife.[64] Another act, the Dolphin Protection Consumer Information Act (DPCIA), regulated the use of the "Dolphin Safe" label on tuna cans.[65]

iii. Relevant Arguments Raised by Parties

In response to Mexico's complaints, the United States maintained that the MMPA was consistent with its obligations under the GATT.[66] Most importantly for defining the scope of the public morals exception, however, was the U.S. argument that "even if these measures are not consistent with Article III, they were covered by the exceptions in Article XX(b) and XX(g)."[67] Article XX(b) exempts measures "necessary to protect human, animal or plant life or

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58. Tuna/Dolphin I, *supra* note 36, ¶ 5.1; Tuna/Dolphin II, *supra* note 36, ¶ 2.6.
59. *Id.*
60. *Id.* ¶ 5.2. This is referred to as the "primary nation embargo." Tuna/Dolphin II, *supra* note 36, ¶ 2.9.
61. Tuna/Dolphin I, *supra* note 36, ¶ 5.1; Tuna/Dolphin II, *supra* note 36, ¶ 2.10.
62. Tuna/Dolphin I, *supra* note 36, ¶ 5.1; *see also* Tuna/Dolphin II, *supra* note 36, ¶ 2.10.
63. Tuna/Dolphin I, *supra* note 36, ¶ 5.3; Tuna/Dolphin II, *supra* note 36, ¶¶ 2.12–2.15. This is referred to as the "intermediary nation embargo."
64. Tuna/Dolphin I, *supra* note 36, ¶ 5.4; Tuna/Dolphin II, *supra* note 36, ¶ 2.12.
65. Tuna/Dolphin I, *supra* note 36, ¶ 5.6.
66. *Id.* ¶¶ 3.6–3.9.
67. Tuna/Dolphin I, *supra* note 36, ¶ 3.6(b).

health"[68]; similarly, Article XX(g) exempts measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."[69] Although the purpose of this Note is to define the scope of the public morals exception, the arguments in the Tuna/Dolphin cases are relevant because they present a definition of the term "necessary"—an important qualifier to the public morals exception. Additionally, Article XX(b) (as well as Article XX(g)) raises the question of whether one government can create laws affecting objects outside of its territorial jurisdiction.

iv. May a Nation Impose Regulations on Objects Outside of its Territorial Jurisdiction?

The Tuna/Dolphin complainants argued that Article XX confined its enumerated exceptions to measures that "contracting parties could adopt or apply from within their own territory."[70] In Tuna/Dolphin I, Mexico's precise objection was that if the United States could impose trade restrictions on the resources of another country, then it would introduce the concept of extraterritoriality into the GATT in violation of its principles.[71] In both Tuna/Dolphin I and II, the United States disagreed with this argument, stating "a government could prohibit imports of a product in order to protect the life or health of humans, plants or animals outside its jurisdiction"[72] and that the location of the object of conservation was irrelevant.[73] The United States noted that trade measures necessarily have effects outside of a nation's borders, but that the MMPA was not extraterritorial legislation.[74]

A further argument, raised by the United States in Tuna/Dolphin II, is that the GATT contemplated that countries could regulate objects located outside of their borders because another provision implied as much.[75] Specifically, Article XX(e) of GATT excludes regulations "relating to the products of prison labour."[76] The United States contended as follows: because that subsection explicitly allowed regulation of objects outside of the country's territorial jurisdiction, and was adjacent to subsection (b), then it had to follow

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68. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, art. XX(b) [hereinafter GATT].
69. *Id.* art. XX(g).
70. Tuna/Dolphin I, *supra* note 36, ¶ 3.31; Tuna/Dolphin II, *supra* note 36, ¶ 3.15.
71. Tuna/Dolphin I, *supra* note 36, ¶ 3.31.
72. *Id.* ¶ 3.36.
73. Tuna/Dolphin II, *supra* note 36, ¶ 3.16.
74. Tuna/Dolphin I, *supra* note 36, ¶ 3.49.
75. Tuna/Dolphin II, *supra* note 36, ¶ 3.16.
76. GATT, *supra* note 68, art. XX(e).

that the entire section permitted the regulation of objects outside of the country's territorial jurisdiction.[77]

v. The Meaning of "Necessary"

The Tuna/Dolphin cases provide helpful analysis on the meaning of "necessary." This insight is significant because, similar to Article XX(a), Article XX(b) requires that the proposed measure be "necessary."[78] The definition of "necessary" is not a settled issue and has been inconsistently interpreted.[79]

In Tuna/Dolphin I, the United States argued that the MMPA embargo was necessary to protect the life and health of dolphins.[80] According to the United States, the appropriate test of necessity required consideration of whether an alternative measure was available or had been proposed, "that could reasonably be expected to achieve the objective of protecting the lives or health of dolphins."[81] The United States stated that without the implementation of the MMPA, purse seining would continue to encircle schools of tuna and dolphin, resulting in the unnecessary death of dolphins.[82]

Mexico responded, in Tuna/Dolphin I, that the MMPA was not "necessary" because the United States could protect the lives and health of dolphins in a manner that was consistent with the GATT.[83] Mexico's proposal to the U.N. Food and Agriculture Organization to hold an international conference on fisheries and the incidental taking of marine mammals[84] was indicative of its stance: the best way of protecting the dolphins was through international cooperation with all interested parties.[85]

The analysis in Tuna/Dolphin II was much more technical. The United States argued that "necessary" had to be interpreted in accordance with its ordinary meaning.[86] To be necessary, the United States posited, there only had to be a need for the measure.[87]

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77. Tuna/Dolphin II, *supra* note 36, ¶ 3.16.

78. GATT, *supra* note 68, art. XX (a)–(b).

79. *Compare* Tuna/Dolphin I, *supra* note 36, ¶ 5.28 (stating that the necessity requirement is met only if the regulating nation has "exhausted all options reasonably available to it" to pursue its objectives in a manner consistent with the GATT and if the regulating nation negotiates with other member nations), *with* Report of the Panel, *United States–Imports of Certain Automotive Spring Assemblies*, (May 26, 1983) GATT B.I.S.D. (30th Supp.) at 107, ¶¶ 58, 60 (finding that "necessary means that the measure is the only way under existing United States law" that the interest could be protected).

80. Tuna/Dolphin I, *supra* note 36, ¶ 3.33.

81. *Id.*

82. *Id.*

83. *Id.* ¶ 3.34.

84. *Id.*

85. *Id.*

86. Tuna/Dolphin II, *supra* note 36, ¶ 3.64.

87. *Id.*

According to the United States, the proposed "least inconsistent" test was too complex, because it required parties to first prove that no other measures existed and then to determine, from the range of available alternatives, which alternatives were "least inconsistent" with the GATT.[88] The other problem with the "least inconsistent" test was that it would implicate sovereignty concerns—other members of the GATT would evaluate a foreign sovereign's options and determine which one the prospective regulator could enact.[89]

The EEC responded that the ordinary meaning of "necessary" was "indispensable," "requisite," "inevitably determined," or "unavoidable"—to meet this standard there could be no other means of meeting the objective.[90] According to the EEC it was important to interpret "necessary" narrowly, because a broad interpretation would "lead to a bias in the name of public morality," which is "strongly determined by specific religious and cultural traditions."[91] In addition, the EEC argued in favor of a reasonableness requirement, which examines what a reasonable government would or could do, as opposed to asking what is reasonable for a government to do.[92]

vi. Conclusions of the Panels

The panel in Tuna/Dolphin I held that the drafters of Article XX(b) intended for the exception to apply only to the implementation of "sanitary measures to safeguard life or health of humans, animals, or plants within the jurisdiction of the importing country."[93] The panel found that the proposed U.S. reading of "necessity" was overbroad and would degenerate GATT, providing the benefits of free trade only to the few contracting parties that had identical domestic regulations.[94] To meet the necessity requirement, the party claiming it was entitled to the exception was required to show that it had attempted to achieve its policy objective through all options reasonably available and consistent with the General Agreement.[95] Additionally, where the object of the regulation was likely to be found in or pass through many nations, there was a duty to negotiate with the aim of creating an international cooperative agreement.[96]

The panel in Tuna/Dolphin II reached the same result, but its analysis differed in at least one fundamental way. Specifically, the Tuna/Dolphin II panel found that there was no limitation on the

88. *Id.*
89. *Id.* ¶ 3.65.
90. *Id.* ¶ 3.71.
91. *Id.*
92. *Id.* ¶ 3.73.
93. Tuna/Dolphin I, *supra* note 36, ¶ 5.26.
94. *Id.* ¶ 5.27.
95. *Id.* ¶ 5.28.
96. *Id.*

location of the living things that the regulating nation sought to protect.[97] Regarding the meaning of "necessary," the panel concluded that the ordinary meaning of "necessary" requires that no other alternative exist.[98] The panel determined that the MMPA embargoes would only succeed if they prompted embargoed nations to change their policies[99] and that "measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be considered 'necessary.'"[100]

Thus, the panels in Tuna/Dolphin I and II opted for a broad definition of necessary.

2. United States—Cross-Border Gambling and Betting Services

i. The Panel Decision

a. Motives for the Regulation of Gambling

The regulation of gambling in the United States is not a phenomenon of modern-day evangelism. Francis Emmett Williams, the author of a work on lotteries and morals, imagines an angry U.S. president denouncing a proposed federal law that would considerably relax gambling laws:

> [T]hese same ladies and gentlemen are so absorbed by the skill veneer and the big prizes behind it that they are blind to the fact that they are gambling in a game that is saturated from center to circumference with *insincerity, hypocrisy, subterfuge and fraud, and energized* by *the covetous desire to get something for nothing.*[101]

Time has left this debate largely to the annals of U.S. history,[102] but it remains alive in some sense,[103] occasionally with a fervor akin to Williams' fictitious president.[104]

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97. Tuna/Dolphin II, *supra* note 36, ¶ 5.31.
98. *Id.* ¶ 5.35.
99. *Id.* ¶¶ 5.36–5.37.
100. *Id.* ¶ 5.39.
101. FRANCIS EMMETT WILLIAMS, LOTTERIES, LAWS AND MORALS 274 (Vantage Press 1958).
102. Steve Chapman, Commentary, *A Vote for Moral Revival? No Way*, CHI. TRIB., Nov. 7, 2004 (commenting that the United States has left decisions about moral choice to individuals and supporting this by asserting that gambling is now legal in 48 of the 50 states).
103. Cal Thomas, Editorial, SOUTH FLORIDA SUN-SENTINEL, May 7, 2003, at 25 (noting that gambling is not a victimless crime and that it is a vice).
104. Tamara Lush, *Vote Could Ease Path of Slots into Tribal Casinos*, ST. PETERSBURG TIMES, Feb. 28, 2005, at 1B (Florida Governor Jeb Bush comments that "[t]he true costs [of slot machines at pari-mutuel facilities] are significant and real: long-term decay of our traditional industries and the social fabric of our communities.").

States are the traditional regulators of this morally contentious area in the United States, with occasional assistance from the federal government.[105] In this vein, Massachusetts enacted a law that sought to limit the "Use of Telephone for Certain Gaming Purposes."[106] Under the Massachusetts law, anyone who uses a telephone or facilitates the use of a telephone for the purpose of placing or accepting bets or wagers upon the result of a "trial or contest of skill, speed, or endurance of man, beast, bird or machine" as well as athletic games or lotteries, is subject to a fine of not more than $2,000 or by imprisonment for not more than one year."[107] This law is subject to certain exceptions.[108]

Federal law gives the Massachusetts law broader effect. Under 18 U.S.C. § 1804, a person involved in betting or wagering who uses a wire communication facility for the transmission "in interstate or foreign commerce" of a bet or wager faces a fine and/or imprisonment for no more than two years.[109] Section 1084, however, allows bets that are placed *from* a state or foreign country where betting is legal *to* a state or foreign country where betting is legal.[110] Thus, § 1084 forbids electronic bets placed either to or from Massachusetts.

This Massachusetts law is quite common, as evidenced by similar statutes in several other states, including Colorado,[111] Louisiana,[112] Minnesota,[113] New Jersey,[114] New York,[115] South Dakota,[116] and Utah.[117]

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105. United States v. Edge Broad. Co., 509 U.S. 418, 421 (1993).

106. MASS. GEN. LAWS ANN. ch. 271, § 17A (West 2004).

107. *Id.*

108. *Id.*

109. 18 U.S.C. § 1084 (2004).

110. *Id. United States v. Cohen* provides an example of how a law similar to the Massachusetts law functions. 260 F.3d 68 (2d Cir. 2001). In *Cohen* the defendant, a victim of the Internet-bubble burst, created a company in Antigua that solicited bets from the United States. *Id.* at 70. Customers were to wire at least $300 into an account in Antigua before they were eligible to place bets. Id. Undercover FBI agents in New York contacted the defendant several times to open accounts and place bets. Id. at 71. The defendant was arrested and charged with a violation of § 1084. *Id.* The defendant sought to defend himself under the safe-harbor provision of § 1084, claiming that betting was legal in New York. *Id.* at 73–75. The court of appeals disagreed, citing a New York statute. *Id.* at 75. The defendant also argued that "he did not transmit information assisting in the placing of bets or wagers to or from a jurisdiction in which he "knew" betting was illegal." *Id.* at 76. This argument was also dismissed by the court. *Id.*

111. COLO. REV. STAT. § 18-10-103 (2004).

112. LA. REV. STAT. ANN. § 14:90.3 (West 2004).

113. MINN. STAT. ANN. § 609.75, subdivisions 2–3 & § 609.755(1) (West 2004).

114. N.J. CONST. art. IV, § 7; N.J. STAT. ANN. § 2A:40-1 (West 2004).

115. N.Y. CONST. art. I; N.Y. GEN. OBLIG. LAW § 5-401 (McKinney 2004).

116. S.D. CODIFIED LAWS §§ 22-25A-1–22-25A-15 (Michie 2004).

117. UTAH CODE ANN. § 76-10-1102 (2004).

b. Factual Background

On March 13, 2003, Antigua and Barbuda (hereinafter, "Antigua") went to the WTO requesting consultations with the United States.[118] Antigua sought to advance three types of gambling: (1) betting on the outcome of sports; (2) card games involving monetary stakes; and (3) random number games.[119] A small two-island nation in the Caribbean with a large tourist economy,[120] Antigua attempted to revitalize its economy in the 1990s with an economic development plan that included building a large internet-based gaming industry.[121] Antigua's gambling systems include both internet-based and telephone based services.[122]

c. Relevant Arguments Raised by the Parties

Although this case includes various important international trade law-related arguments (e.g., whether the United States undertook specific market commitments or whether the principle of national treatment was violated), this Note focuses on the portions of the Panel report that are helpful to the development of an understanding of the public morals exception. Consequently, this portion of the Note focuses on the meanings of "necessary" and "public morals," as well as the requirement of WTO consistency.

1. The Meaning of "Necessary"

Antigua advocated the use of the necessity test that the WTO panels in *Korea—Various Measures on Beef* and *United States—Section 337* adopted.[123] Under this test, a measure does not meet the necessity requirement when a "WTO-consistent alternative measure which the Member concerned could 'reasonably be expected to employ' is available, or whether a less WTO-inconsistent measure is 'reasonably available.'"[124] Antigua also favored the use of a balancing approach in which the assessor would: (1) consider the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect (the more vital the interest, the more likely the measure would be necessary); (2)

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118. Panel Report, *United States–Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 1.1, WT/DS285/R/1 (Nov. 10, 2004) [hereinafter Gambling and Betting Services].

119. *Id.* ¶ 3.1.

120. CIA, The World Factbook, "Antigua and Barbuda," *available at* http://www.odci.gov/cia/publications/factbook/geos/ac.html (last updated Jan. 10, 2006).

121. Gambling and Betting Services, *supra* note 118, ¶ 3.2.

122. *Id.*

123. *Id.* ¶ 3.255.

124. *Id.*

consider the extent to which the measure contributes to the realization of the end pursued (the greater the contribution, the higher the likelihood of a finding of necessity); and (3) consider the extent to which the measure restricts international commerce (the lower the impact, the higher likelihood of a finding of necessity).[125]

The United States countered that the panel should examine the word "necessary" in accordance with its ordinary meaning.[126] The United States observed that "necessary" has a continuum of meanings[127]—on one end of the spectrum, necessity may mean "absolute physical necessity or inevitability" and on the other it may mean that which is "convenient, useful, appropriate, suitable proper or conducive to the end sought."[128] When considering the necessity of a regulation, the United States posited that the WTO panel should consider the "right of Members to regulate."[129]

Antigua responded that the statutes were not necessary because the crimes mentioned in the U.S. statutes (e.g., loan sharking, murder, kidnapping, arson, etc.) would not be prevented by restricting cross-border gambling and betting services.[130] According to Antigua, the footnote to Article XIV(a) required a narrow reading of the exception.[131]

2. The Meaning of "Public Morals"

Arguing that the United States has a culture of gambling (with gambling in forty-eight states,[132] the largest national gambling market in the world with over $630 billion in wagers,[133] and self-contained mini-cities of nonstop gambling on the Las Vegas strip[134]), Antigua claimed that the U.S. anti-gambling laws could not possibly be intended to protect public morals and public order.[135] Antigua noted that there is a wide availability of gambling opportunities in the United States and that the state and federal governments are involved in the promotion of gambling.[136] Antigua then attempted to refute the two reasons the United States claimed for passing the laws in question by diminishing the credibility of the notion that the laws were passed to protect against crime and by dismissing the fact that

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125. *Id.*
126. *Id.* ¶ 3.271.
127. *Id.* ¶ 3.272.
128. *Id.* ¶ 3.271.
129. *Id.* ¶ 3.272.
130. *Id.* ¶ 3.288.
131. *Id.* ¶ 3.289.
132. *Id.* ¶ 3.8.
133. *Id.*
134. *Id.* ¶ 3.9.
135. *Id.* ¶ 3.290.
136. *Id.*

the United States required a ban on cross-border gambling and betting, arguing that such a ban would greatly expand gambling opportunities in school and home settings.[137] This would not be a problem for adults, Antigua asserted, because the United States conceded that adults were expected to exercise their own moral judgment.[138] This could only be a problem, therefore, for the morals of children.[139] Children, however, could easily be guarded from the moral dangers of gambling through the use of age verification systems and international cooperation (specifically, in the case of the United States, through the sharing of social security number information).[140]

The United States maintained that its law was a necessary measure for the protection of public morals and public order.[141] Noting that the term "public order" emanates from the civil law concept of *ordre public,* the United States based its definition of "public order" on a statement by Judge Lauterpacht, formerly a judge on the International Court of Justice, expressing that "public order" refers to "the fundamental national conceptions of law, decency and morality";[142] whereas "public morals" concerns the "standards of right and wrong that can be described as 'belonging to, affecting, or concerning the community or nation.'"[143] In addition, the United States pointed to the statement in *United States v. Edge Broadcasting* that gambling is an area that is considered a vice and has been subject to much regulation,[144] and the United States further denied Antigua's assertion that gambling is commonplace and that violations of gambling laws are largely unpunished.[145] The United States also advanced the argument that remote gambling is vulnerable to criminal activity[146] and that "maintaining a society in which persons and their property exist free of the destructive influence of organized crime is both a matter of 'public morals' and 'public order.'"[147]

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137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* ¶¶ 3.290–91.
141. *Id.* ¶ 3.278.
142. *See id.* (citing Application of the Convention of 1902 Governing the Guardianship of Infants (Neth. v. Swed.), 1958 I.C.J. 55, 90 (Nov. 28) (separate opinion of Judge Lauterpacht)).
143. *Id.* ¶ 3.278.
144. *Id.* ¶ 3.18.
145. *Id.* ¶ 3.20.
146. *Id.* ¶ 3.279.
147. *Id.*

3. The Requirement of WTO Consistency

Antigua further submitted that the public morals exception requires regulations to be consistent with the rest of the WTO agreements.[148] In effect, Antigua argued that there had to be a balance between the right of a member to invoke one of the exception clauses and the duty of that member to respect the treaty rights of other members.[149] If the exceptions were greatly abused, argued Antigua, then the treaty's "juridical character" would dissolve and it would devalue the treaty rights of other members.[150] Evidence of a regulation's failure to meet WTO standards is present if the measure is "rigid and unbending."[151]

The United States argued that the gambling laws at issue were "tools to secure compliance with other WTO-consistent U.S. laws."[152] The United States responded that WTO consistency was presumed because Antigua failed to make out a prima facie case.[153]

d. Conclusions of the Panel

On November 10, 2004, a WTO Panel ruled that laws like the one in Massachusetts violated U.S. commitments under GATS.[154] To remedy the violation of the GATS, the WTO Panel urged the United States to bring the relevant measures "into conformity with its obligations under the GATS."[155] According to the Panel, the United States would be well advised to address its motives for certain legislative proposals "[t]hrough bilateral and multilateral consultations and negotiations" so that the enacted law is consistent with the free trade principles of the WTO.[156] The spokesman from the U.S. Trade Representative's Office reacted with outrage, stating that U.S. gambling laws were exempt from the GATS and that "there is no obligation for WTO members to conduct international consultations before taking action to protect public morals and public order and enforce the criminal laws."[157]

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148. Gambling and Betting Services, *supra* note 118, ¶ 3.257.
149. *Id.*
150. *Id.*
151. *Id.* ¶ 3.258.
152. *Id.* ¶ 3.273.
153. *Id.* ¶ 3.274.
154. *Id.* ¶¶ 7.1–7.2.
155. *Id.* ¶ 7.5.
156. *Id.* ¶ 6.529.
157. Press Release, Office of the United States Trade Representative, Statement from USTR Spokesman Richard Mills Regarding the WTO Gambling dispute with Antigua and Barbuda (Nov. 10, 2004), *available at* http://www.ustr.gov/Document_Library/Spokesperson_Statements/Section_Index.html.

In its analysis of the U.S. laws at issue, the WTO Panel used the "ordinary meaning" approach to defining "public morals" and "public order."[158] The panel found that those concepts could vary in "time and space, depending on a range of factors, including prevailing social, cultural, ethical and religious values."[159] The panel also stated that, when considering these issues, the regulating country has the right to determine the appropriate level of protection.[160] Using a dictionary to construct a definition, the Panel concluded that "public morals" meant "standards of right and wrong conduct maintained by or on behalf of a community or nation."[161] "Public order" was held to refer to the "preservation of the fundamental interests of a society, as reflected in public policy and law," including "standards of law, security and morality."[162] Ultimately, the panel concluded that the laws in question were designed to protect public morals and maintain public order after analyzing the legislative history of the federal statutes.[163]

In determining whether a measure is necessary, the WTO panel applied the three-pronged balancing test favored by Antigua. The first prong of the test evaluates the importance of the interests or values that the measure intended to protect.[164] In determining the importance of the values protected, the panel examined the legislative history of the Wire and Travel Acts.[165] On those bases, the panel determined that very important societal interests were at stake.[166] In the context of this line of analysis, the panel also considered the fact that the United States does not completely ban gambling and has a tolerant attitude towards it in some parts of the country.[167] The second prong evaluates the extent to which the laws contributed to the realization of the ends pursued.[168] The WTO Panel quickly treated this prong when the panel observed that, since the acts prohibit the cross-border gambling and betting, then they must contribute to addressing those concerns.[169] The third prong considers the trade impact of the laws.[170] The panel noted that these laws have a significant restrictive trade impact.[171] The panel stated that concerns about money laundering, fraud, health, and underage

158. Gambling and Betting Services, *supra* note 118, at ¶ 6.459.
159. *Id.* ¶ 6.461.
160. *Id.*
161. *Id.* ¶ 6.465.
162. *Id.* ¶ 6.467.
163. *Id.* ¶¶ 6.479–6.487.
164. *Id.* ¶ 6.488.
165. *Id.* ¶ 6.490.
166. *Id.* ¶ 6.492.
167. *Id.* ¶ 6.493.
168. *Id.* ¶ 6.488.
169. *Id.* ¶ 6.494.
170. *Id.* ¶ 6.488.
171. *Id.* ¶ 6.495.

gambling motivated the passage of the challenged laws and that regulations that were used to address these concerns in the context of non-remote gambling (e.g., traditional brick-and-mortar casinos) could not be "compared and examined as WTO-consistent alternatives" that could have been used to address these concerns in the context of remote gambling.[172] Despite this, the WTO Panel states that "in rejecting Antigua's invitation to engage in bilateral or multilateral consultations and/or negotiations, the United States failed to pursue in good faith a course of action that could have been used by it to explore the possibility of finding a reasonably available WTO-consistent alternative."[173] In sum, the United States contravened its obligations under the GATS by failing to negotiate.[174]

ii. The Appellate Body Decision

On April 7, 2005, a WTO appellate panel weighed in on the gambling dispute.[175] First, the Appellate Body determined that the U.S. gambling statutes fell within the concept of "public morals."[176] Then, the Appellate Body applied what it called an "objective" standard of necessity.[177] The Appellate Body overturned the Panel's decision that required the United States to engage in consultations with Antigua and then employed a balancing test in which it identified, weighed, and balanced relevant factors.[178] The Appellate Body determined that Antigua's failure to identify a reasonably available alternative measure demonstrated that the U.S. statutes were "necessary."[179]

The Appellate Body, however, did not find that the U.S. laws were "necessary" because they were indispensable to the protection of public morals. Instead, the Appellate Body found that the U.S. laws were necessary because Antigua failed to meet its burden under a three-part burden-shifting scheme. Under the Appellate Body's three-part scheme:

> (1) The defending party must first "make a prima facie case that its measure is 'necessary' by putting forward evidence and arguments that enable a panel to assess the challenged measure in the light of the relevant factors to be 'weighed

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172. *Id.* ¶ 6.521.
173. *Id.* ¶ 6.531.
174. *Id.* ¶ 6.535.
175. Appellate Body Report, *United States-Measures the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter Gambling and Betting Services Appeal].
176. *Id.* ¶ 299.
177. *Id.* ¶ 304.
178. *Id.* ¶¶ 323, 325.
179. *Id.* ¶ 326.

and balanced' in a given case." The defending party, however, is under no obligation to point out why alternative measures are inadequate, but it may do so if it would like.[180]

(2) The complaining party then has the opportunity to offer a WTO-consistent alternative that, in the complaining party's view, the defending party should have taken.[181]

(3) If the complaining party proposes a WTO-consistent alternative, then the defending party must show "why its challenged measure nevertheless remains 'necessary' in the light of that alternative or, in other words, why the proposed alternative is not, in fact, 'reasonably available.'" If the defending party can show that the proposed alternative is not "reasonably available,"[182] then the WTO will deem the challenged measure "necessary."[183]

Applying this scheme, the Appellate Body found that Antigua had failed to raise WTO-consistent alternatives.[184] Thus, the Appellate Body found the challenged measure "necessary."

C. *The Usage of "Public Morals"*

The term "public morals" (and its variations) has an extensive history of usage. Courts and legislative bodies have used this term abundantly in the opinions and statutes. This Section provides a survey (though, of course, not an exhaustive one) of the usage of these terms across the world.

1. The United States

A survey of all United States laws reveals that U.S. Code and the laws of thirty-six states and territories mention the term "public morals." Several U.S. Supreme Court cases interpreting the U.S. Constitution also refer to "public morals." The U.S. Code address this term with respect to smuggling of aliens,[185] gambling,[186] obscenity,[187] drug use by prisoners,[188] general drug use,[189] alcohol transportation,[190] and observance of state health laws.[191]

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180. *Id.* ¶ 310.
181. *Id.* ¶ 311.
182. *Id.*
183. *Id.*
184. *Id.* ¶ 326
185. 18 U.S.C. § 1328 (2004).
186. 18 U.S.C. § 1084.
187. 18 U.S.C. § 1461.
188. 18 U.S.C. § 4253.
189. 21 U.S.C. § 802.
190. 26 U.S.C. § 2055.

State laws tend to mention them in the context of conspiracy,[192] obscene movies and magazines,[193] drugs,[194] brothels,[195] alcohol,[196] indecent advertisements,[197] public nuisances,[198] breaches of peace,[199] disorderly conduct,[200] gambling,[201] religion,[202] immoral shows,[203] cruelty to animals,[204] sex crimes,[205] prostitution,[206] abortion,[207] sodomy and bestiality,[208] weapons sales,[209] cruelty,[210] battery and exploitation of the sick,[211] cohabitation,[212] habitual sexual intercourse,[213] voyeurism[214] and bribery.[215] There are a few "oddballs" such as prohibitions on unruly dance halls,[216] tattooing minors,[217] placing gold fillings in minors,[218] disinterring dead bodies,[219] purchasing dead bodies[220] and keeping stallions or jacks in public.[221]

The Commerce Clause of the U.S. Constitution gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[222] Thus, in one case the Supreme Court held that while Congress has the power to regulate commerce among the states, the states "never surrendered, the power to protect the public health, the public morals, and the

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191. 42 U.S.C. § 97 (2005).
192. ALA. CODE § 13A-4-3 (1975).
193. ARIZ. REV. STAT. ANN. § 12-817 (2006).
194. ARK. CODE ANN. § 16-105-402 (2006).
195. *Id.* § 20-27-401.
196. *Id.* § 20-64-702.
197. MISS. CODE ANN. § 97-29-105 (2005).
198. FLA. STAT. ANN. § 823.01 (West 2005).
199. *Id.* § 877.03.
200. *Id.*
201. KAN. STAT. ANN. § 21-4303 (2003).
202. FLA. CONST. art. 1, § 3.
203. CONN. GEN. STAT. § 22-121 (2003).
204. KAN. STAT. ANN. § 21-4310 (2005).
205. LA. REV. STAT. ANN. § 14:80 (2005).
206. *Id.* § 14:82.
207. *Id.* § 14:32.9.
208. *Id.* § 14:89.
209. *Id.* § 14:91.
210. NEB. REV. STAT. § 14-102 (2003).
211. IND. CODE ANN. § 12-10-3-10 (West 2004).
212. TENN. CODE ANN. § 36-3-306 (2005).
213. LA. REV. STAT. ANN. § 14:82 (2005).
214. MISS. CODE ANN. § 97-29-61 (2005).
215. *Id.* § 97-29-17.
216. ARK. CODE ANN. § 16-105-303 (2006).
217. ARIZ. REV. STAT. ANN. § 13-3721 (2006).
218. LA. REV. STAT. ANN. § 14:93.2.2 (2005).
219. MISS. CODE ANN. § 97-29-19 (2005).
220. *Id.* § 97-29-21.
221. *Id.* § 97-29-57.
222. U.S. CONST. art. I, § 8, cl. 3.

public safety, by any legislation appropriate to that end."[223] While this case dealt with a challenge to a law relating to the protection of the health of domestic animals,[224] another case confronted the morals question more directly. In *Champion v. Ames*, the Supreme Court considered the constitutionality of a law that regulated the interstate transportation of lottery tickets.[225] Justice Harlan, writing for the Court and referring to lottery tickets, stated: "But surely it will not be said to be a part of anyone's liberty, as recognized by the [Constitution], that he shall be allowed to introduce into commerce among the States an element that will be confessedly injurious to the public morals."[226] Furthermore, Justice Harlan defended the law, stating, "Congress only supplemented the action of those states—perhaps all of them—which, for the protection of public morals, prohibit the drawing of lotteries."[227] This reflects the judgment that the government may regulate gambling to preserve public morals.

The Supreme Court has also considered public morals when analyzing the Contracts Clause of the U.S. Constitution, which forbids states from "impairing the Obligation of Contracts."[228] In one case the Supreme Court indicated that one of the core functions of legislatures is to protect public health and public morals and that a legislature could not abdicate this role through contract.[229]

Several First Amendment cases from the Supreme Court indicate areas where government may legislate to preserve "public morals."[230] The Supreme Court has been unwilling to recognize a "public morals" exception for the First Amendment.[231] In *44 Liquormart*, the Court listed alcoholic beverages, lottery tickets, and playing cards as a few of the items that would be proscribed by an unworkable "public morals" exception to the First Amendment.[232] In another case, the City of Hialeah attempted to proscribe animal sacrifices to protect "public morals."[233] Ultimately, the Supreme

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223. Mo., Kan. & Tex. Ry. v. Haber, 169 U.S. 613, 625–26 (1898).
224. *Id.* at 616.
225. Champion v. Ames, 188 U.S. 321, 322 (1903).
226. *Id.* at 357.
227. *Id.*
228. U.S. CONST. art I, § 10, cl. 1.
229. New Orleans Gas-Light Co. v. La. Light & Heat Producing & Mfg. Co., 115 U.S. 650, 668 (1885).
230. The First Amendment to the U.S. Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. CONST. amend I.

231. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 589 (2001).
232. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 514 (1996).
233. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535 (1993).

Court struck down the city ordinance because it was drafted to frustrate the practice of a particular religion.[234] The experience of First Amendment-related legislation and case law indicates that the regulation of alcohol, lottery tickets, and animal sacrifice is frequently justified as an attempt to protect "public morals."

As observable from the above, "public morals," or "public morality," generally—though not always—arises in cases or laws dealing with the same themes. As Professor William Prosser noted, the scope of "public morals" includes "houses of prostitution, illegal liquor establishments, gambling houses, indecent exhibitions, bullfights, unlicensed prize fights, or public profanity."[235]

2. Pakistan

The issue of "public morals" was raised and treated, though not conclusively, by Acting Chief Judge Muhammad Haleem in the Pakistani decision *Qureshi v. Union of Soviet Socialist Republics*.[236] This case arose when the plaintiff claimed that the USSR breached a contract with him for the supply of jeeps and trucks to the Pakistani Government.[237] The court dealt with the issue of whether the Pakistani court system had jurisdiction to try a case against a foreign sovereign.[238] Judge Haleem supports the British approach to guarding "public morals" through the judicial system.[239] The principal, and essential difference, is that Judge Haleem modifies the expression "public morals" to "Islamic moral values."[240]

3. Latin America

The concept of "public morals" exists in Latin America as well. The Annual Report of the Inter-American Commission on Human Rights notes, "[i]n cases of crimes against sexual freedom and privacy or public morals, the proceedings are public actions but require a private complaint."[241] The Commission does not attempt to define the phrase, but the mention presents trace evidence that the concept

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234. *Id.* at 547. This was not an incidental interference with the practice of Santeria; instead, the ordinance was drawn to interfere specifically with that religion.

235. Tull v. United States, 481 U.S. 412, 421 n.5 (1987) (citing WILLIAM PROSSER, LAW OF TORTS 583–85 (4th ed. 1971)).

236. Qureshi v. Union of Soviet Socialist Republics, 20 I.L.M. 1060, 1085 (Pak. Sup. Ct. 1981) (Acting C.J. Muhammad Haleem).

237. *Id.* at 1060.

238. *Id.*

239. *Id.* at 1085.

240. *Id.* Basing the definition of "public morality" on religion is not an addition by Judge Haleem. Indeed, one of the statements from which he creates an Islamic version of public morality notes that the common law has its roots in Christianity.

241. Lopéz v. Guatemala, Case 11.303, Inter-Am. C.H.R., Report No. 29/96, OEA/Ser.L/V/II.95, doc 7 rev. ¶ 48 (1996).

exists in Latin America. This case involved a Guatemalan labor activist who was the victim of an assassination attempt by Guatemalan military forces.[242] Subsequently, the Guatemalan government denied the victim legal protection.[243] The complaint alleged a violation of several articles of the American Convention on Human Rights.[244]

4. Australia

The Australian view of "public morals" may be coextensive with the U.S. view of "public morals" as expressed through Commerce Clause jurisprudence. In *King v. Connare*, an Australian court heard the appeal of Connare, who was charged with a violation of the Lottery and Art Unions Act after he attempted to sell a Tasmanian lottery ticket in Sydney.[245] The appeal dealt with the issue of whether the Act violated Section 92 of the Constitution because it constituted a restriction upon the freedom of trade, commerce, and intercourse among the States.[246] Ultimately, the court dismissed the appeal.[247] One judge supported a U.S. Supreme Court opinion which asked, anticipating an answer in the affirmative, "can the legislature of a State contract away its power to establish such regulations as are reasonably necessary from time to time to protect the public morals against the evils of lotteries?"[248] Thus, gambling in Australia could be constitutionally regulated on the grounds of preserving "public morals."

Another Australian case indicates that there is (or that at least there may be) an offense of "conspiracy to corrupt public morals."[249] While the case dealt with whether a defendant could raise a particular defense,[250] the case nonetheless indicates that an individual may commit an offense against public morals if he possesses materials relating to pedophilia.[251]

5. Canada

The Canadian Supreme Court has demonstrated that the government may regulate sexual conduct under the guise of "public morals." In *Regina v. Sharpe*, the Court upheld the validity of a law

242. *Id.* ¶ 1-19.
243. *Id.*
244. *Id.*
245. King v. Connare (1939) 61 C.L.R. 596, 597 (Austl.).
246. *Id.* at 598.
247. *Id.* at 633.
248. *Id.* at 622 (citing Douglas v. Kentucky, 168 U.S. 488 (1897)).
249. Gollan v. Nugent (1988) 166 C.L.R. 18, 43 (Austl.).
250. *Id.*
251. *Id.* at 21.

that proscribed possession of child pornography.[252] The Court found that "Parliament made a legitimate policy decision in determining that the possession of adolescent self-depictions of sexual activity should be prohibited" because such depictions raise the danger of creating conditions which are "exploitative and can be used to exploit other children."[253] In *Regina v. Smith*, the Ontario Supreme Court upheld the application of a statute forbidding prostitution.[254] There the Ontario Supreme Court found that certain freedoms are not absolute and may be regulated "for purposes of decency, public order and state security."[255]

Contrary to the view of the court in *Qureshi*, the Canadian Supreme Court held in *Regina v. Big M Drug Mart* that religion was not a valid basis for regulating on the basis of protecting the "public morality."[256] In so holding, the Canadian Supreme Court struck down the Lord's Day Act that prohibited "work and commercial activity" on Sundays.[257]

Other Canadian cases indicate that "public morals" motivated legislation in the areas of vagrancy[258] and creation of a common nuisance.[259]

6. Hong Kong

Case law indicates that Hong Kong courts allowed the regulation of alcohol, violence, sexual content, gambling to protect "public morals." In one case, the Hong Kong Court of Appeal held that the Commissioner for Television and Entertainment Licensing could regulate video games on the basis of their content of violence, sexual content and gambling elements.[260] The limitation placed by the Court was that Commissioners responsible for the granting of licenses had to find their reasons for banning a certain video game in the statute, not in their personal moral values.[261] In *Tsang Ching Chiu*, the Court noted that the regulation of alcohol was an issue of

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252. Regina v. Sharpe, [2001] S.C.R. 45, ¶ 231.

253. *Id.* It should be noted that in this opinion the Court uses the phrase "public good" instead of "public morals."

254. Regina v. Smith, 44 CCC (3d) 385 (Ontario Sup. Ct. 1988).

255. *Id.* at 386.

256. Regina v. Big M Drug Mart Ltd., [1985] S.C.R. 295, 321.

257. *Id.* at 301.

258. *See* Regina v. Cyr, [1917] 2 W.W.R. 1185 (Alta.) (holding a woman liable to summary conviction for vagrancy under Criminal Code § 238(a) when her only visible means of maintaining herself was prostitution).

259. *See* Regina v. Taylor, [1852] 8 U.C.Q.B. 257 (upholding a mayor's conviction under 72nd clause of statute 12 Vic. Ch. 82 for obstructing a town street by putting a fence across it).

260. Wong Kam Kuen v. Comm'r for Television and Entm't Licensing, [2003] 3 H.K.L.R.D. 596, 617 (C.A.).

261. *Id.*

social concern and that, consequently, the conduct of patrons in establishments benefiting from alcohol licenses could be regulated.[262] This case also supports the notion that prostitution may be regulated to safeguard public morals, since the parties do not allege that the government may not regulate the sale of sexual services to preserve public morality.[263] In another case, a court punished a man for possessing pornographic materials.[264] The judge noted that the purpose of the statute under which the defendant was convicted was "to prevent the corruption of public morals."[265]

Though many cases indicate that certain sexual conduct may corrupt public morals, at least one case indicates that trivial conduct may trigger prosecution for corruption of public morals. In *HKSAR v. Tsui Ping Wing*, a taxicab driver was prosecuted for swearing at a passenger.[266] The court stated:

> No one could sensibly argue that public morality is not adversely affected by the use of obscene or blasphemous language directed at or even in the presence of young children. Generally speaking, responsible adults use their best endeavors to shield young children from such language. A public service vehicle driver who does not respect this and expresses himself in a way which is not civil and orderly is damaging the standards of morality set by parents and teachers.[267]

Thus, "public morals" may exceed the realm of sex, slavery drugs, gambling, and alcohol.

7. United Kingdom

A widely discussed British case involving "public morals" is *Shaw v. Director of Public Prosecutions*.[268] In *Shaw*, the defendant published a magazine advertising London prostitutes.[269] At the time of conviction, neither prostitution, fornication, nor adultery was prohibited in England.[270] Nevertheless, the defendant was convicted

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262. HKSAR v. Tsang Ching Chiu, [2002] 3 H.K.L.R.D. 172, 176 (C.F.I.).

263. *Id.* at 175. Instead, the defendant argues that this was a *private* club and, therefore, did not concern *public* morality. The Court rejects this because there was no official membership and no attempt to exclude the general public from the premises. *Id.* at 176. *See also* Leung Kuan-Fu v. the Queen, [1977] H.K.L.R. 175 (C.F.I.) (stating that a sham club where prostitution occurred was *contra bongs* [sic] *mores*).

264. HKSAR v. Wong Man Tat, [2000] H.K.E.C. 915 (C.F.I.).

265. *Id.*

266. HKSAR v. Tsui Ping Wing, [2000] H.K.E.C. 437 (C.F.I.).

267. *Id.*

268. Shaw v. Dir. of Pub. Prosecutions, [1961] 2 W.L.R. 897, 937 (H.L.).

269. Case Note, *Criminal Law–In General–Courts Have Power as Custodes Morum to Punish Conspiracy to do Acts Newly Defined as Corruptive of Public Morals*, 75 HARV. L. REV. 1652, 1652 (1962).

270. *Id.*

of "conspiracy to corrupt public morals."[271] In doing this, the House of Lords was asserting the residual power of the courts to "declare criminal . . . any act injurious to public morals."[272] In discussing the issues surrounding this decision, Lord Devlin stated, "Christian morals remained embedded in the law."[273] English case law indicates that certain sexual acts can offend the public morality.[274]

III. THE "PUBLIC MORALS" CATCH-ALL DILEMMA

It is apparent, from the above discussion, that "public morals" has a range of meaning that most frequently encompasses alcohol, sex, gambling, animal torture and drugs. One version of the public morals exception has frequently been used to prohibit slavery.[275] Though these are the most consistently implicated themes in public morals-inspired regulations, they are not the only possible targets of legislation aimed at preserving public morals. The lack of a formal definition for the term has fed the imaginations of many scholars and trade experts who view the public morals exception as a means of achieving social justice through trade. Thus, a judge on the European Union Court of First Instance writes: "There is no real jurisprudence on this interpretation of these public morals, but it is possible to consider that this provision could incorporate some human rights considerations."[276] Judge Rosas further suggests that the "provision could be interpreted more extensively to give a certain basis for trade sanctions if there have been clear and systematic violations of fundamental human rights."[277] A failure to delimit "public morals" will inevitably lead to an application of the exception that may frustrate the entirety of the Uruguay Round Agreements.

Confusion already exists on the environmental front. As one author notes, "Commentators are divided on whether [GATT Article XX was] intended to apply to the environment in the broadest sense

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271. *Id.*

272. *Id.*

273. Lord Devlin, *Law, Democracy and Morality*, 110 U. PA. L. REV. 635, 636 (1962). In his speech, Lord Devlin frequently referred to homosexuality as one of the acts which offended "public morals."

274. *See e.g.*, Webster v. Dominick, 2005 J.C. 65, 66 (H.C.J. 2003) (discussing "public morals" in the context of "shameless indecency" before four young girls); Wright v. Comm'rs of Customs and Excise, [1999] 1 Crim. App. 69 (Q.B.) (concerning obscene videotapes and magazines).

275. Charnovitz, *supra* note 22, at 717.

276. Allan Rosas, *Non-Commercial Values and the World Trade System: Building on Article XX*, *in* ESSAYS ON THE FUTURE OF THE WTO: FINDING A NEW BALANCE 78 (Kim Van der Borght ed., 2003).

277. *Id.*

(including moral and aesthetic concerns)."[278] Historically, the application of Article XX vis-à-vis the environment has been extremely questionable, with nations attempting to disguise protectionist measures as environmental measures.[279] There has not been a lack of activity on the regulation of environmental activities—controversies have arisen regarding fuel-economy and automobile taxes, wildlife conservation, leg-hold traps, eco-labeling, and chemical testing.[280] Removing all doubt that the issue has moral implications, upset parties have accused the European Union of "cultural genocide" and the GATT of "sacrificing animals on the altar of free trade."[281] While there is a history of justifying environmental measures using public morals, the environmental measures that have previously been justified have displayed characteristics of cruelty.[282] Such a practice bears little similarity to air pollution or even killing dolphins through fishing.

Scholars have also advocated the use of the "public morals" exception to improve labor conditions. For instance, Trebilcock and Howse have contemplated how the "public morals" exception would work in the area of labor rights, noting that labor sanctions would have to be consistent with the chapeau of the Agreements.[283] In a separate article, Howse argued, "good reasons do not exist for excluding fundamental labor rights from the ambit of the concept of 'public morals.'"[284]

Other scholars have suggested that the "public morals" exception could be used to secure women's rights. For instance, one author indicates that the public morals exception should be "interpreted in

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278. MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 397 (2d ed. 1999).

279. *Id.* at 398.

280. DAVID VOGEL, BARRIERS OR BENEFITS? REGULATION IN TRANSATLANTIC TRADE 38–56 (Brookings Inst. Press 1997).

281. *Id.* at 45.

282. *See* John M. Raymond & Barbara J. Frischholz, *Lawyers Who Established International Law in the United States, 1776–1914*, 76 AM. J. INT'L L. 802, 813 (1982) (observing that Secretary of State James G. Blaine in 1892 protested that pelagic sealing was against public morals).

283. See TREBILCOCK & HOWSE, *supra* note 277, at 453. *See also* Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. SMALL & EMERGING BUS. L. 131, 142 (1999).

> Even if the trade sanctions violated Article XI, possibly Article XX(a), which permits otherwise GATT-inconsistent measures "necessary to protect public morals," might be invoked to justify trade sanctions against products that involve the use of child labor or the denial of workers' basic rights. There is no GATT or WTO jurisprudence on the interpretation of Article XX(a).

284. Robert Howse, *Back to Court After Shrimp/Turtle? Almost but not Quite Yet: India's Short Lived Challenge to Labor and Environmental Exceptions in the European Union's Generalized System of Preferences*, 18 AM. U. INT'L L. REV. 1333, 1371 (2003).

light of evolving international law on women's rights and rights related to gender."[285] This author notes that "[t]he public morals exception operates as a catch-all for measures that do not squarely fit under any of the other exceptions in Article XX."[286] Therefore, the author suggests that the public morals exception could be used for virtually anything under the sun, except for things listed under the other Article XX exceptions. The implication of this reasoning is that Article XX(a) has no meaning—it means whatever the country invoking it interprets it to mean.

The problem with this resounding lack of clarity in the meaning of public morals is that it may contribute to one of the evils that the WTO seeks to eliminate—protectionism. Though the size of the economic costs of protectionism has recently come into question,[287] economists emphasize that protectionism has substantial social costs.[288] When the risks from protectionism are so high, one cannot responsibly ignore the potential for abuse because of a definitional problem. Indeed, an entire field has arisen in philosophy which is premised on the idea that there are no moral absolutes.[289] In trade, the risk is that while one country may consider the forty-hour workweek oppressive and immoral, another may consider the thirty-five hour workweek uncompetitive and inefficient. If, in fact, the shorter workweek is inefficient, then the country using that workweek may raise trade barriers with the countries using the longer workweek, using a broad definition of public morals to justify the practice.

Even if one assumes away the possibility that a government enacted a law or regulation with protectionist intent, an unbridled interpretation of the public morals exception can lead to a "war between public orders."[290] There is evidence that this is already occurring.[291] Indeed, the U.S. Supreme Court has already dealt with one battle in the "war between public orders" when it considered the constitutionality of the Massachusetts Burma law.[292] The Massachusetts Burma law generally barred state entities from

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285. Liane M. Jarvis, Note, *Women's Rights and the Public Morals Exception of GATT Article 20*, 22 MICH. J. INT'L L. 219, 230 (2000).

286. *Id.* at 232.

287. *See, e.g.*, Robert C. Feenstra, *How Costly is Protectionism?*, 6 J. ECON. PERSP. 159, 159 (1992) (arguing that U.S. quotas impose a loss on trading partners that is comparable to the magnitude of rents).

288. *See, e.g.*, William Thorbecke, *Rent-Seeking and the Costs of Protectionism*, 7 J. ECON. PERSP. 213, 213 (1993) (stating that rent-seeking, a product of protectionism, redistributes wealth and income, benefiting special interests and harming consumers).

289. *See, e.g.*, Felix E. Oppenheim, *In Defense of Relativism*, 8 W. POL. Q. 441, 441 (1955) (explaining the difference between relativism and absolutism).

290. Kyle Bagwell, Petros C. Mavroidis & Robert W. Staiger, *It's a Question of Market Access*, 96 AM. J. INT'L L. 56, 75 (2002).

291. *Id.*

292. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 366 (2000).

purchasing goods and services from persons doing business with Burma.[293] The amicus briefs reveal the rift between the public orders. For instance, one brief, calling states "laborator[ies] for action on international human rights" argued that "[i]nternational human rights law creates an affirmative obligation on nation states to promote respect for universal human rights, including an end to forced labor and slave-like practices."[294] Another brief noted that the Massachusetts Burma law interfered with its power and ability to deal with the labor practices in Burma through other means.[295]

In sum, the problem with the current state of the "public morals" exception is that it lacks a fixed meaning. In the absence of an ascertained definition, the exception is subject to abuse and may result in the frustration of the objectives of the WTO.

IV. A TRADE-PROMOTING AND SOVEREIGNTY-PRESERVING DEFINITION FOR "PUBLIC MORALS"

When considering the range of definitional possibilities, four paths are possible. Because the exception applies to measures "necessary to protect public morals," definitions must attach to "necessary" and "public morals." As shown above, the Vienna Convention has been very unhelpful in achieving this end. For each of these terms one can adopt either a restrictive or a permissive interpretation. The four possibilities are as follows: (1) a permissive standard of necessity and restrictive standard of public morality; (2) a restrictive standard of necessity and a restrictive standard of public morality; (3) a permissive standard of necessity and a permissive standard of public morality; and (4) a restrictive standard of necessity and a permissive standard of public morality.

The ideal solution to the definitional crisis is to adopt a permissive standard of necessity and a restrictive standard of public morality. To determine whether this standard is met, a WTO panel should first consider whether the regulation regulates a traditional issue of public morality. Admittedly, this Note has shown that "oddballs" have made it onto the list of topics that have been targeted by public morals-inspired legislation. But free trade is at its optimum when there is predictability, and there can be no predictability if a term—particularly one in an exception—is afforded an open-ended meaning. If the regulation does target a traditional issue of public

293. *Id.* at 367.

294. Brief for Non-Profit Organizations as Amici Curiae Supporting Petitioners, at 3, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

295. Brief for the European Communities and their Member States as Amici Curiae Supporting Respondents, at 4, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

morality, the panel should determine whether the regulation is reasonably related to the preservation of that public morality.

To ameliorate the concern of protectionism, for the purposes of this test, the only issues that concern public morality are issues that concerned public morals when the member nations approved the GATT in 1947. Thus, a limited public morals exception would only cover sex, drugs, alcohol, gambling, slavery, and animal torture.

If the regulation is a traditional question of "public morals" then the reviewing bodies should accord a deferential standard of scrutiny. The cases litigated before the GATT and WTO panels have demonstrated that it is exceedingly difficult to determine whether a measure meets one of the various necessity tests. Currently this inquiry might be important because of the absence of a limited definition, but once "public morals" is defined to include only certain topics, the danger of abusive measures getting by a permissive necessity test will be substantially reduced.

The least attractive interpretative possibility is to use permissive standards of necessity and public morals. Such an interpretation would justify virtually any policy advanced as being related to preserving public morals.

A permissive standard of public morality combined with a restrictive standard of necessity would allow for the regulation of virtually anything as a question of public morals, but would then apply a very high standard of scrutiny (i.e., the least restrictive means test employed in the Tuna/Dolphin cases). While this approach would reflect a trade-promoting approach, legitimate public morals regulations may be blocked by the high standard of scrutiny alongwith the illegitimate ones.

Another possibility would be to use a restrictive definition of public morals and a restrictive definition of necessity. This option would promote trade the most—demonstrating a high degree of risk aversion to protectionism—but would impinge on a state's traditional power to regulate certain reprehensible acts.

V. CONCLUSION

The danger of an unclear public morals exception is the danger of abuse. Without clear direction on the definition of the phrase, there is a significant possibility that contracting parties could use the provision to justify protectionist measures. This Note does not pass judgment on the propriety of measures that restrict trade to coerce other nations to change their treatment of women, the environment, and the laborers. The argument is that the public morals exception should not be used to achieve these worthy goals because its vague nature can be abused to the point of undermining the WTO Agreements. Instead, the contracting parties should consider

addressing social justice issues through the addition of new exceptions.

The public morals exception should be limited to the traditional range of public morals issues, and countries regulating to protect their public morals should be accorded substantial deference in this legislative capacity.

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