

FRAMING THE 'PUBLIC MORALS' EXCEPTION AFTER EC – SEAL PRODUCTS WITH INSIGHTS FROM THE ECtHR AND THE GATT NATIONAL SECURITY EXCEPTION

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Abstract

In light of the recent *EC – Seal Products* dispute in the WTO involving the public morals exception of GATT XX(a), this thesis aims at finding criteria to delimit the scope of this concept, to prevent that WTO Members could justify largely any trade measure under this exception. To this end, insights from a comparison to the GATT National Security exception, and from the European Court of Human Rights' assessment of its morals exception are sought and applied to the analysis of GATT XX(a). This thesis finds that the most appropriate way to delimit the scope of 'public morals' is within the necessity test of GATT XX(a). In a process of 'weighing and balancing' under the necessity test, it should be considered whether consensus among WTO Members exists, notably through international agreements, which evidences the concrete necessity of a measure to justify on moral grounds a violation of international trade law.

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Contents

List of Abbreviations.....	iv
I. Introduction: The Public Morals Exception after the <i>EC – Seal Products</i> Dispute.....	
– Finding Guidance to Move Forward	1
1. The Full Picture: The <i>EC – Seal Products</i> Dispute within the WTO	2
2. Insights from the ECtHR’s Approach? – The case of <i>A, B and C v Ireland</i>	4
II. The Development of the Public Morals Exception in the WTO Case Law	5
1. Providing a Definition of ‘Public Morals’	6
2. The Necessity Test under GATT XX(a): Which Aspects to ‘Weigh’ and ‘Balance’?	7
3. The Chapeau of GATT XX: Making up for a Vague Necessity Test?	10
III. Lessons from the National Security Exception of GATT XXI(b).....	11
1. Introduction: A Comparison to the National Security Exception of GATT XXI(b) .	12
2. Subjective versus Objective Review	13
3. Enacting a Measure in ‘Good Faith’ to address a Security Threat	13
4. Conclusion: Strengthening the Objective Review is needed for ‘Public Morals’ .	14
IV. The ‘Morals Exception’ in the Case Law of the ECHR	15
1. Introduction: The ECtHR’s Approach to ‘Morals’	15
2. Cases Involving Public Morals within the Framework of the ECHR.....	16
3. The Role of the ‘Margin of Appreciation’ within the ECHR	18
4. Defining ‘Morals’ under the ECHR.....	20
5. The ECtHR’s Focus on the Democratic Necessity Test	21
6. Conclusion: The Scope of Public Morals confined by Consensus on the Democratic Necessity of an Interference	27
V. The Weak ‘Public Morals’ Assessment in the WTO: Suggestions from Existing Scholarship or Following the ECtHR’s Approach?	28
1. Introduction: Paving the Way for a Focus on ‘Necessity’	28
2. Focussing on Definition and Content of ‘Public Morals’ to Delimit its Scope? ...	29
3. Necessity at the Core of the Public Morals Exception: A Case for Consensus.....	41
4. Limiting the Public Morals Exception under the Chapeau?	56
VI. Conclusion	60
VII. Bibliography	63

List of Abbreviations

AB	Appellate Body
ABR	Appellate Body Report
AIHTS	Agreement on International Humane Trapping Standards
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CRC	International Convention on the Rights of the Child
DSU	Dispute Settlement Understanding
EC	European Communities
EEC	European Economic Community
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GATS	General Agreement on Trade in Services 1994
GATT	General Agreement on Tariffs and Trade 1994
IC	Inuit Communities
IWC	International Whaling Commission
MRM	Marine Resource Management
PR	Panel Report
TBT	Agreement on Technical Barriers to Trade
UK	United Kingdom
UNFCCC	United Nations Framework Convention on Climate Change
US	United States
VCLT	Vienna Convention on the Law of Treaties 1969
WTO	World Trade Organization

I. Introduction: The Public Morals Exception after the *EC – Seal Products* Dispute – Finding Guidance to Move Forward

The decision of the Appellate Body (AB) of the World Trade Organization (WTO) in the *EC – Seal Products* dispute from 22 May 2014 was one of the rare instances in which the Appellate Body had to deal with the concept of public morals in Article XX(a)¹ as part of the general exceptions of the General Agreement on Tariffs and Trade 1994 (GATT). The definition, scope and application of public morals as the basis for justifying measures, which would otherwise constitute a violation of substantive WTO law, have always been subject to debate. However, the AB's recent decision in this case seemed to have increased uncertainties rather than clarified its application. Given these uncertainties, the question arises whether the public morals exception could ultimately be (ab)used to undermine the system of the WTO as a whole.

In order to prevent that largely anything could be justified under this exception, this thesis aims at finding ways to delimit the scope of public morals of GATT XX(a). To this end, this work seeks to gain valuable insights from the approach taken by the European Court of Human Rights (ECtHR) towards the moral exception included in paragraph 2 of Articles 8 to 11 of the European Convention on Human Rights (ECHR). While a comparison to the National Security exception of GATT XXI(b) will provide the initial direction, the insights on useful criteria applied by the ECtHR will be transposed to the analysis of public morals under GATT XX(a). Considering also whether the existing scholarship on the public morals exception of GATT XX(a) offers useful suggestions on how to cabin public morals, it will be assessed whether the approach taken by the ECtHR towards the morals exception would ultimately provide an additional or even a preferred concrete solution to keep the public morals exception 'in check'.

After discussing the research question, in this initial section, on the background of two concrete cases involving public morals, one from the WTO and one involving the ECHR, this work will proceed as follows: In section II, this thesis will provide the necessary background on how WTO adjudicators address the public morals exception and will outline important

¹ If not mentioned otherwise, this thesis refers to 'public morals' as included in GATT XX(a) as well as in GATT XIV(a). In the case of *US – Gambling*, the AB has made clear that, first, their reasoning with regard to GATT XX is also relevant under GATS XIV; second, although GATS XIV(a) also includes a 'public order' exception a distinction between the two concepts will not be subject to this thesis given that eventually 'public morals' and 'public order' protect "largely similar values" (PR, *US – Gambling*, para. 6.468) and the fundamental interests within the 'public order' exception "can relate, *inter alia*, to standards of [...] morality" (ibid, para. 6.467; emphasis added).

changes to the analysis of the exceptions throughout WTO case law. In section III, it will be analyzed what implications can be drawn from the scholarship on the National Security exception of GATT XXI(b). While the analysis of the National Security exception provides the initial direction of where more objective criteria are needed, the following analysis of the ECtHR's approach, in section IV, will assess the concrete kind of criteria (or criterion) that may be considered by WTO adjudicators to delimit the scope of public morals.

Section V will consider recent scholarship on the topic of GATT XX(a) and it will be assessed whether the existing scholarship could provide concretely applicable criteria which are capable to shed light on the limits of the public morals exception. On this basis, the approach taken by the ECtHR will be applied to the framework of the WTO and the question whether this approach would provide a suitable solution will be answered. Section VI concludes.

1. The Full Picture: The *EC – Seal Products* Dispute within the WTO

The *EC – Seal Products* dispute involved the so called 'EU Seal Regime', including the "Basic Regulation" No. 1007/2009 of the European Parliament and the Council and the "Implementing Regulation" No. 737/2010 of the European Commission (ABR, *EC – Seal Products*, para. 4.1; Sellheim, 2015). This regime, enacted by the European Union (EU) as the responding Member in this dispute, constituted a prohibition on the "placing on the market of seal products" (EU Regulation, 2009, Article 3), and was therefore commonly referred to as the "EU ban" on seal products (e.g. Levy & Regan, 2014, p. 23). The ban generally targets the seal products from commercial hunt of all seal species and included three exceptions: First, those products which derive from hunts conducted by members of Inuit communities ('IC exception'); second, seal products which travellers carry with them in their personal luggage as, for example, souvenirs ('Travelers' Exception'); and third, products that originate from the killing of seals for the purpose of marine resource management ('MRM exception') (Levy & Regan, 2014, p. 1; Sellheim, 2015; EU Regulation, 2009, Articles 3 – 5).

Canada and Norway, which are among the few countries which commercially hunt seals, challenged the EU Seal Regime on the basis of the WTO Agreement on Technical Barriers to Trade (TBT Agreement), as well as on the basis of the GATT, and claimed in particular that the EU Seal Regime violates international trade rules due to the exceptions of the ban (Shaffer & Pabian, 2014; Ogonna, 2014). While the *EC – Seal Products* Panel found that the EU Seal Regime violated the TBT Agreement as well as the GATT, the AB overturned this decision in part and focused solely on the GATT as it did not consider the EU Seal Regime to qualify as a 'technical regulation' – a prerequisite for the TBT Agreement to apply (ABR, *EC – Seal*

Products, para. 5.59; TBT 2.1; TBT Annex 1.1). While the EU did not appeal the violation of ‘national treatment’ under GATT III:4, the AB also upheld the finding of a violation of the ‘most-favored-nation’ principle included in GATT I:1 (ABR, *EC – Seal Products*, para. 5.130).

On this basis, the AB considered the possible justification of these violations on grounds of public morals, as provided by GATT XX(a). In order to demonstrate the vague requirements of GATT XX(a) as well as the extension of the scope of public morals to which the *EC – Seal Products* decision has arguably contributed, three findings of the AB are of particular importance. First, the AB accepted that the “principal objective of the EU Seal Regime is to address EU public moral concerns regarding seal welfare, while accommodating IC and other interests”(ABR, *EC – Seal Products*, para. 5.167). Hence, the AB clarified that a measure that falls within the public morals exception may not only pursue one clear-cut objective, but may pursue besides a ‘principal’ objective also ‘other interests’. Moreover, the animal welfare concerns as reflected in the EU Seal Regime also qualify as a matter of ‘public morals’ such that GATT XX(a) applies (ibid, para. 5.290). While one may argue that animal welfare is already sufficiently addressed by GATT XX(b) allowing Members to enact measures to protect animal life and health, the AB focused on the moral concerns of the EU public which allegedly motivated the EU Seal Regime. The AB, however, did not require concrete evidence for the fact that concerns regarding animal welfare actually prevail within the EU (Shaffer & Pabian, 2014).

Second, the AB found that the wording of GATT XX(a), “necessary to protect public morals”, does not require the EU to establishing that a ‘risk’ to public morals exists, as it would be required under GATT(b) (ABR, *EC – Seal Products*, para. 5.198). Given that a risk does not need to be shown, the identification of “a pre-determined threshold of contribution” to the protection of animal welfare from a certain risk does not have to be identified, either (ABR, *EC – Seal Products*, para. 5.213). The AB merely requires a “holistic” consideration of the necessity of a measure which renders the entire necessity analysis extremely vague and makes it largely impossible to know if and which concrete criteria are relevant to assess necessity (ABR, *EC – Seal Products*, para. 5.214).

Third, a heavy burden is subsequently placed on the analysis of the chapeau of GATT XX, which concerns the non-abusive application of a measure (ABR, *US – Gasoline*, p. 22; ABR, *EC – Seal Products*, para. 5.297). In fact, the main analysis of the public morals exception in the case of *EC – Seal Products* appears to take place at this stage. Having previously accepted that, in principle, a measure may have more than one objective, the AB questions and

eventually rejects that the EU has sufficiently shown the reconcilability of these objectives. It doubted, in particular, that the protection of seal welfare and the mitigation of negative effects of the ban on Inuit communities could both be accommodated under the ban (ibid, para. 5.338). The AB also found that the criteria itself as well as the monitoring of the criteria to fall within the IC exception are not sufficiently clear and allowed for potential abuse (ibid).

In sum, it appears that the AB sought to rectify the created vacuum under the necessity test by shifting great parts of its analysis under the chapeau. Rather than adding substance and credibility to its analysis in providing clarity on how prevailing morals need to be proved or on the concrete criteria of the necessity test, the AB resorted to a rather opaque analysis of whether the EU Seal Regime was “arbitrary and unjustifiable” or constituted a “disguised restriction on international trade” (GATT XX).

However, focussing to a great extent on the chapeau of GATT XX, it is arguably impossible to identify where to draw the line between measures that may fall within the scope of public morals and which do not. The lack of graspable and objective criteria with regard to the scope of public morals raises the question of how the public morals exception can be framed more tangibly and less subjectively in the future. This would particularly prevent Members from enacting trade restrictive measures *à discretion*, apt to undermine the system of the WTO as a whole.

2. Insights from the ECtHR’s Approach? – The case of *A, B and C v Ireland*

The following example of a case based on the rights and freedoms enshrined in the ECHR, shall give an idea of the approach taken by the ECtHR towards a public morals exception. It will be examined in this thesis whether there are concrete criteria within the ECtHR’s approach which could potentially be applied under WTO law in order to frame and delimit the scope of public morals. Could the insights gained make a concrete contribution to a more transparent, tangible and objective analysis of the public morals exception under WTO law?

The case of *A, B and C v Ireland*, decided by the ECtHR in 2010, is relevant in this regard as it exemplifies, first, the complexity of balancing fundamental rights under the morals exception of paragraph 2 of Article 8 ECHR and, second, it highlights particularly well the approach taken by ECtHR to determine whether an interference with fundamental laws may be justified on grounds of public morals.

The case involved three applicants, A, B and C, which challenged Ireland’s applicable laws *vis-à-vis* the possibility of abortion in this country. The Irish Constitution generally guarantees

the right to life to the unborn child and prohibits abortion in its criminal laws (*A, B and C v Ireland*, paras. 30; 36). Although this prohibition was partly softened by a Constitutional amendment in 1983, the complainants nonetheless found the laws on abortion to be too strict and violated, among others their right to respect for private life (Article 8 ECHR) (*ibid*, para. 167). With regards to the first two applicants, the ECtHR determined that the Irish abortion laws constitute an interference with the fundamental freedoms of Article 8 and had to subsequently decide whether this interference could be justified under the exceptions contained in paragraph 2 of Article 8, notably to protect morals (*ibid*, paras. 216, 217). The ECtHR held that the interference pursued the legitimate aim of “the protection of morals of which the protection in Ireland of the right to life of the unborn was one aspect” (*ibid*, para. 227). In the following, the ECtHR examined whether Ireland acted within its “margin of appreciation” with regard to the interference with Article 8 ECHR (*ibid*, para. 234). It assessed, in particular, whether the prohibition of abortion was “necessary in a democratic society” to protect, among others, morals (*ibid*, paras. 227, 229). Within this democratic necessity test, the ECtHR examined whether there was consensus among Council of Europe states *vis-à-vis* the necessity of the strict Irish abortion laws (*ibid*, para. 235). The existence of such European consensus in favour or against the necessity of prohibiting abortion for the protection of public morals hence appears to be an important criterion to determine whether an interference can be justified on moral grounds. This case is apparently special given that the ECtHR, in fact, found consensus among Council of Europe states against the necessity of the strict abortion laws, but for “the first time [it] has disregarded the existence of a European consensus” which exceptionally led the Court not to find an interference with Article 8 (*A, B and C v Ireland*, dissenting opinion, para. 9).

It can be seen from this case that the ECtHR does actually not leave it to the limitless discretion of the Contracting State of the ECHR when interference with fundamental rights can be based on moral concerns. This check appears to take place in particular under the proportionality analysis of the necessity of a measure, involving a thorough balancing of all interests involved.

Whether this approach may constitute a useful path for the analysis of public morals within WTO law will consequently be considered in this thesis.

II. The Development of the Public Morals Exception in the WTO Case Law

To provide the background for the subsequent assessment, this section will present the legal test of the public moral exception as it was applied and developed by the WTO adjudicators to present. WTO adjudicators did not have many occasions to address the public morals

exception within the system of the WTO. Prior to the *EC – Seal Products* case, only two cases have concretely dealt with the public morals exception, *US – Gambling* and *China – Audiovisuals*. The case of *US – Gambling*, involving cross-border online gambling services, was decided on the basis of the rules on trade in services and therefore the applicable public morals exception was GATS XIV(a). In *China – Audiovisuals* the AB held, by virtue of the introductory clause (§5.1) of China’s accession protocol to the WTO, that it could invoke the moral exception of Article XX(a) (ABR, *China – Audiovisuals*, para. 233). Panels and the AB have under the ‘GATT-cases’ of *China – Audiovisuals* and *EC – Seal Products* frequently referred to the previous decision in the ‘GATS-case’ of *US – Gambling*, most notably with regard to the established definition of public morals. However, strictly speaking, the public morals exception of GATT XX was, before the case of *EC – Seal Products*, concretely interpreted only once by the AB, namely in *China – Audiovisuals* (Fitzgerald, 2011; Van den Bossche & Zdouc, 2012).

With regard to the general structure of the exceptions, a measure must satisfy a two-tier test in order to be justified by public moral consideration of GATT XX(a): first, it must fall within one of the sub-paragraphs of GATT XX(a) and, second, satisfy the chapeau (ABR, *US – Gambling*, para. 292). Assessing whether a measure falls within the sub-paragraph of GATT(a), the measure must address public morals and must be “necessary to protect public morals” (ibid). Whether this is the case depends consequently on how the concept of public morals is defined, i.e. what aspects it may possibly contain, and whether the relationship between the measure and the objectives fulfills the requirements of the necessity test. Finally, the chapeau must be fulfilled, which focusses on the application of a measure and aims at preventing an abusive use of the exceptions of GATT XX (ABR, *US – Gasoline*, p. 22).

1. Providing a Definition of ‘Public Morals’

In view of defining public morals, WTO adjudicators have been consistent in applying the definition introduced in *US – Gambling* (Van den Bossche & Zdouc, 2012).

Public morals are defined to “denote[] standards of right and wrong conduct maintained by or on behalf of a community or nation” (ABR, *US – Gambling*, para. 296; PR, *US – Gambling*, para. 6.465). Also in the *EC – Seal Products* case, the panel and AB relied on the definition of public morals as established in *US – Gambling* (AB, *EC – Seal Products*, paras. 5.199; 5.201). Accordingly, this definition lays the foundation for further analysis with regard to the public morals exception of both GATS XIV and GATT XX. The Panel consulted the *Shorter Oxford English Dictionary* for the purpose of defining public morals and quoted that ‘public’ refers to morals “[o]f or pertaining to the people as a whole; belonging to, affecting, or

concerning the community or nation’” (PR, *US – Gambling*, para. 6.463), whereas ‘moral’ refers to “[...] habits of life with regard to right and wrong conduct” (ibid, para. 6.464). Moreover, “the content of [public morals] for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values” (PR, *US – Gambling*, para. 6.461). Members should also have “some scope to define and apply for themselves the concepts of ‘public morals’ [...] in their respective territories, according to their own systems and scales of values” (ibid).

2. The Necessity Test under GATT XX(a): Which Aspects to ‘Weigh’ and ‘Balance’?

While the applied definition of public morals has remained unchallenged, the applicable necessity test has undergone considerable changes regarding the concrete requirements of establishing whether a measure, according to GATT XX(a) is “necessary to protect public morals”. In general, a measure is necessary when “a sufficient nexus [can be established] between the measure and the interest protected” (ABR, *US – Gambling*, para. 292), and involves a process of “weighing and balancing” of all interests and values at stake (ABR, *EC – Seal Products*, para. 5.214; cf. ABR, *China – Audiovisuals*, paras. 239-243). Before the *EC – Seal Products* dispute, in which the necessity test has seen certain twists, the “analysis of necessity has been uniform regardless of whether a measure intends to protect public morals or order, public health or to secure compliance with a WTO-consistent regulation” (Delimatsis, 2011, p. 6). Consequently, implications could be drawn from the entire case law involving an exception on the aforementioned grounds, particularly of GATS XIV(a) and (b) as well as GATT XX(a) and (b).

The process of ‘weighing and balancing’ involves in general the consideration of three aspects: First, the relative importance of the objective; second, the contribution of the measure to the objective pursued; and third, the trade-restrictiveness of the measure at issue (ABR, *China – Audiovisuals*, paras. 240-243; ABR, *Brazil – Tyres*, paras. 156, 178; ABR, *Korea – Beef*, para. 166; ABR, *US – Gambling*, paras. 306-308). On this basis, a panel shall subsequently assess whether less trade restrictive alternatives are “reasonably available” (ABR, *China – Audiovisuals*, para. 242). Those less trade-restrictive alternatives are “reasonably available” when they are not only “theoretical in nature”, what would be the case if they would place an “undue burden” on the responding Member (ABR, *US – Gambling*, para. 304; Doyle, 2011). The less trade-restrictive alternative must also achieve the same level of protection as the original measure (ibid). WTO adjudicators have stressed that each Member has the right to establish the level of protection that it deems appropriate (PR, *US –*

Gambling, para. 6.461). The burden of proof to show that such less trade-restrictive alternatives are reasonably available and achieve the same level of protection as desired by the responding Member, lies with the Complainant (ABR, *US – Gambling*, para. 309; Doyle, 2011).

Consequently, the process of ‘weighing and balancing’ can be seen as a dialogue: The more important the objective, the more likely the measure is found necessary; the more important the contribution of a measure to the objective, the more likely that necessity is given; the more trade-restrictive a measure, the more it is difficult that the measure will be found necessary (Pitschas & Schloemann, 2012).

Within this act of ‘weighing and balancing’, two of the aspects are relatively straight-forward. Regarding the importance of the objective, ‘public morals’ is a highly important objective which is addressed by WTO Members through public policies (PR, *China – Audiovisuals*, para. 7.817). Regarding the trade-restrictiveness, an import ban on certain products is clearly more trade restrictive than, for example, a labelling requirement where certain conditions are attached to a product in order to allow its import without *a priori* prohibiting all imports of that kind. Consequently, the necessity of a ban is more difficult to establish.

The third aspect of the ‘weighing and balancing’ analysis, the contribution of a measure to its objectives pursued, has become, however, a controversial issue when public morals are involved. The requirements towards the contribution of a measure have changed considerably throughout the case law. In *Korea – Beef*, the AB noted that a measure that is necessary does not have to be ‘indispensable’ but on a “continuum” between being ‘indispensable’ and ‘making a contribution to’, the measure would be located closer to ‘indispensable’ (ABR, *Korea – Beef*, para. 161). In subsequent case law, the AB focused on a general contribution rather than establishing whether a measure is ‘closer to indispensable’. Doyle (2011) argues that in *Korea – Beef* and *US – Gambling* the AB focused on the ‘extent’ of the contribution of a measure to its objective, whereas in *Brazil – Tyres* the test had transformed into an “all-or nothing-test”, requiring to show “‘whether the import ban on retreated tyres *contributes* to the realization of the policy pursued’” (ibid, pp. 159f). Yet, the AB specified that the measure shall be “apt to make a *material contribution* to the achievement of its objective” (ABR, *Brazil – Tyres*, para. 151, emphasis added). This also includes that the contribution must not necessarily be visible immediately but can also occur in the future (ibid). A ‘material contribution’ implies a means-end analysis, i.e. that there must be “a genuine relationship between ends and means between the objective pursued and the measure at issue” (ABR, *Brazil – Tyres*, para. 145). This “contribution is a function of the nature of the *risk*, the

objective pursued, and the level of protection sought” (ibid, emphasis added). Hence, also the establishment of a risk played a considerable role. The contribution to the protection from that risk can be quantitative or qualitative (Pitschas & Schloemann, 2012).

In the subsequent case of *China – Audiovisuals*, the AB continued to focus on the wording of a measure being “apt to make a material contribution” to the objective (ABR, *China – Audiovisuals*, para. 297). In this case, the AB made it very clear that the responding Member must make “a *prima facie* case that its measure is ‘necessary’” (ibid, para. 288), and that it is first of all the Respondent’s duty to provide evidence and arguments so that the Panel can properly perform its ‘weighing and balancing’ assessment (ibid). Ultimately, it rests, however, with the panel to “independently and objectively” assess the evidence before it (ibid) – an important aspect to be borne in mind considering the alleged subjectivity of public morals with respect to each WTO Member. Doyle (2011) criticizes that “the necessity test has over the years not emerged from a troubling state of flux” (p. 164). Hence, for Members, the necessity test remains an opaque construct in which the different steps have become increasingly amalgamated. As shown in the following, the necessity test conducted in the *EC – Seal Products* dispute has arguably even overtopped an already existing ‘troubling state of flux’.

The controversy within the *EC – Seal Products* dispute is rooted within the means-end analysis. Due to the very nature of ‘public morals’, according to the AB, the establishment of a risk is not “of much assistance or relevance in identifying and assessing public morals” (ABR, *EC – Seal Products*, paras. 5.198). Given that a risk to public morals cannot be measured in scientific ways as, for instance, in the case of a risk to health, it is not necessary for the Respondent to show that a risk to morals exists and hence does not have to specify a “a pre-determined threshold of contribution” in order for the measure to be found necessary (ibid, para. 5.213). Consequently, the AB found that the requirement of a ‘material contribution’ to protecting the objective at issue is not a general standard which must always be applied in the necessity test. Rather, the contribution requirement is but one of the aspects of an “‘holistic’ weighing and balancing exercise ‘that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually’” (ibid, para. 5.214).

Before the AB had issued its decision in the *EC – Seal Products* case, Pitschas & Schloemann (2012) stated that the ‘weighing and balancing’ exercise is, in fact, a highly subjective approach. When the AB in the *EC – Seal Products* dispute now decided to make the means-end analysis, and in particular the ‘material contribution’ requirement, a facultative piece of it

and merely referring to a ‘holistic weighing and balancing’ approach, the necessity test as a whole becomes even more subjective and opaque.

3. The Chapeau of GATT XX: Making up for a Vague Necessity Test?

The chapeau of GATT XX has always been highly important for the analysis of the exceptions and in particular in complex cases, such as those involving morals (Van den Bossche, 2005). Considering the weakened requirements of the necessity test of GATT XX(a), the burden weights even heavier on the chapeau, as exemplified by the recent case of *EC – Seal Products* (Appelton, 2014).

The chapeau of GATT XX requires that “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”. The AB has stressed that the chapeau concerns the application of a measure (ABR, *US – Shrimp*, para. 160) and “not so much the challenged measure or its specific content” (PR, *US – Gambling*, para. 6.581). The chapeau represents the principle of ‘good faith’ and one application of this principle is the doctrine of *abus de droit* which prohibits “the abusive exercise of a state’s right” (ABR, *US – Shrimp*, para. 158). Thus, the chapeau’s overall object and purpose is to ensure that there is an adequate balance between Members’ rights to make use of the exceptions and its obligation to respect international trade law (Delimatsis, 2011). Three conditions must be met to find that a measure does not comply with the chapeau: “First, the application of a measure must result in a *discrimination*. [...] Second, the discrimination must be *arbitrary or unjustifiable* in character. [...] Third, this discrimination must occur *between countries where the same conditions prevail*” (ABR, *US – Shrimp*, para. 150). Moreover, the three elements of ‘arbitrary discrimination’, ‘unjustifiable discrimination’ and ‘disguised restriction on international trade’ can be read “side-by-side” and “impart meaning to one another” (ABR, *US – Gasoline* para. 6.579).

In present case law, several categories can be identified in which a violation of the chapeau is found. First, a violation of the chapeau is given when “one particular aspect of the application of the measure [is] ‘difficult to reconcile with the declared objective’ [of the measure]” (ABR, *Brazil – Tyres*, para. 227). Hence, the chapeau takes into consideration the overall objective of the measure and focuses importantly on its consistent application, especially when it pursues multiple objectives. Second, ‘arbitrary or unjustifiable discrimination’ or a ‘disguised restriction on trade’ has concretely been found in cases where measures were too rigid and did not consider other countries’ particular circumstances and therefore obliged other Members to align their regulatory frameworks to comply with the challenged measure (ABR, *US –*

Shrimp, paras. 164, 165, 177; Marwell, 2006; Van den Bossche, 2005). Third, the chapeau was also violated when a measure includes certain regulatory gaps which remain unexplained or when there are other ambiguities in their design or language (ABR, *US – Gambling*, para. 368). Fourth, also Members’ lacking willingness to negotiate targeted agreements with other Members, instead of unilaterally enacting regulations, constitutes an unjustifiable discrimination violating the chapeau (ABR, *US – Shrimp*, para. 172). Herewith, the AB stresses the importance of prioritizing “consensual means” over unilateral action (ibid).

Considering concrete cases involving public morals, the AB decided in the case of *US – Gambling* that a measure violates the chapeau where it arbitrarily favors domestic suppliers over foreign ones (ABR, *US – Gambling*, para. 369).

Equally relying on previous practice, the AB paid considerable attention to the assessment of the chapeau in the case of *EC – Seal Products*. As previously outlined, the EU Seal Regime contained three exceptions which were not addressed by the adjudicators until the analysis of the chapeau. Given that the existence of these exceptions was arguably the main criterion for the Complainants to challenge the EU Seal Regime, the analysis of the chapeau became lengthy and important. It may be argued that the *EC – Seal Products* case combines a number of issues which have previously been found to violate the chapeau. Regarding the design and architecture, the AB found that particularly the criteria of the IC exception were ambiguous and imprecise (ABR, *EC – Seal Products*, paras. 5.302, 5.324). This could lead to a situation in which “commercially hunted seals could still end up on the EU market” (Häberli, 2014, p. 14), although the goal of the EU Seal Regime was precisely to ban commercially placed seal products on EU markets. Second, the EU Seal Regime was inconsistent and particularly the IC exception was irreconcilable with the overall goal to protect animal welfare, given that IC hunts were not required to hunt in ways which would inflict less suffering on seals, i.e. to adopt ‘more humane’ killing practices (ABR, *EC – Seal Products*, para. 5.319). Third, the AB stressed that the prioritization and willingness to “pursue cooperative agreements” *vis-à-vis* the use of the exception by Canadian Inuit was also lacking (ibid, para. 5.337). Given these findings, the AB concluded that the EU Seal Regime did not comply with the chapeau of GATT XX.

To conclude, the ‘good faith’ assessment under the chapeau has been inflated considerably by the AB in *EC – Seal Products*, while the necessity test has become vague and less significant.

III. Lessons from the National Security Exception of GATT XXI(b)

In order to find guidance on the scope of public morals and where concrete criteria are needed in order to delimit its application, a comparison to the National Security exception of GATT

XXI(b) may provide valuable insights. On the basis of the existing scholarship, it will be argued that the difference between GATT XX(a) and GATT XXI(b) lies particularly in an objective versus subjective review of the necessity of a measure. The way in which the public morals exception has been analyzed in the case of *EC – Seal Products* comes too close to the merely subjective review of GATT XXI(b), whereas WTO adjudicator rather should conduct an objective review under GATT XX(a), being guided by objective criteria

1. Introduction: A Comparison to the National Security Exception of GATT XXI(b)

The National Security exception provides a justification for a measure violating international trade law when the requirements of GATT XXI(b) as well as of one of the sub-paragraphs of (i) to (iii) are fulfilled. The provision is particularly suitable for a comparison to GATT XX(a) for two reasons: First, as an exception its structure is similar, yet sufficiently different from GATT XX(a) which permits to draw conclusions on their relevant scope. The wording of GATT XXI(b) and GATT XX(a) differs in the sense that GATT XXI(b) does not have a ‘chapeau’, like GATT XX(a), and the requirements regarding the necessity of a measure are different. GATT XXI(b) provides that “[n]othing in this Agreement shall be construed to prevent any contracting party from taking any action which *it considers necessary* for the protection of its essential security interests” (emphasis added). However, the two provisions are comparable since especially GATT XXI(b) (iii), second alternative, contains an extremely open and undefined wording, i.e. action “taken in [...] other emergency in international relations”, which is similar to the undefined nature of the concept of public morals.

Second, the same questions as to the abuse of the exceptions may arise under GATT XX(a) and GATT XXI(b). With regard to the National Security exception, it may be questioned “whether the State should have exclusive power to determine certain issues which are deemed by some to be particularly sensitive or go to the core of national sovereignty” and whether interests of national security can be subject to “judicial determination” (Akanke & Williams, 2003, pp. 371-372, 381). By the same token, the protection of public morals may be deemed fundamental to the sovereignty of a Member as well as touching upon very delicate considerations of “standards of right and wrong conduct maintained by or on behalf of a community or nation” (ABR, *US – Gambling*, para. 296). The extent to which WTO adjudicators can determine public morals without undermining the entire regulatory system of the WTO it is precisely the question at issue.

Although there is a no relevant case law on the National Security exception, scholars agree that there is a manifest difference in the ‘necessity’-wording and its requirements of the National Security exception as compared to the general exceptions. Under GATT XXI(b), a

Member is left with considerable space to determine the necessity of a measure – a space which is yet not unlimited (e.g. Cann, 2001; Akande & Williams 2003). While decisions by panels or the AB on GATT XXI(b) would clearly lend substantial weight to the below findings, certain implications can nonetheless be drawn from the scholarship on the National Security exception in view of the scope of the necessity of a public morals measure.

2. Subjective versus Objective Review

Despite this broad wording, i.e. that a Member may take action that “it considers necessary to protect essential security interests” (GATT XXI(b)), the National Security exception was not “intended to allow ‘anything under the sun’” (Reiterer, 1997, p. 210). Assuming that the wording of “it considers necessary” leaves limitless discretion to Members would make compliance with international trade rules a voluntary undertaking (ibid). However, the wording does suggest that the standard of review must be a subjective one (Lindsay, 2003). This implies that all relevant circumstances from the subjective viewpoint of the Member must be considered in order to assess whether the necessity requirement of the justification is fulfilled (Reiterer, 1997). Lindsay (2003) concretely compares the wording of GATT XXI to the wording of GATT XX, stating that the wording of GATT XX “suggest[s] an objective standard – a standard under which WTO judicial bodies may define ‘necessary’ and examine measures against this definition” (p. 1282, fn. 19).

To highlight the subjective element in GATT XXI, Cann (2001) separates the “it considers” and “necessary” elements of the wording. He underlines that the ‘necessary’ element should remain constant within the exceptions of the GATT, while the ‘it considers’ element only determines who can decide upon the necessity of a measure. Hence, the difference between GATT XX(a) and GATT XXI(b) is that under GATT XX(a) a panel objectively assesses the necessity of a measure, while under GATT XXI(b) it is the Member itself who considers what is necessary.

3. Enacting a Measure in ‘Good Faith’ to address a Security Threat

Two additional aspects are brought into play in view of the subjective review of the necessity of a measure under GATT XXI. First, a Member must apply the National Security exception in ‘good faith’ and second, a measure subject to GATT XXI(b) must be enacted in view of a ‘threat’ to national security.

Admittedly, the requirement of acting in good faith is a “nebulous mandate” (Cann, 2001, p. 452), which is, however, enshrined in Article 26 of the *Vienna Convention on the Law of*

Treaties (VCLT)² and has been recognized by the AB in *US – Shrimp*, stating that this principle is “at once a general principle of law and a general principle of international law [which] controls the exercise of rights by states” (ABR, *US – Shrimp*, para. 158; Akande & Williams, 2003). According to Akande & Williams (2003), “good faith implies that the party invoking Article XXI must genuinely believe that the measure taken is necessary to protect its national security interests” (p. 392), and that there are important reasons to enact the measure which make it proportionate to the trade restriction caused by the measure (ibid). This demonstrates that it is generally left to the Member to decide on the nature and extent of the measure, as long as, from the subjective viewpoint of the Member, the measure is necessary to protect national security interests.

Finally, it is stressed that, despite the limited, subjective review under GATT XXI(b), a measure enacted to protect the national security of a Member must be made in response to a threat (Cann, 2001). Although Akande & Williams (2003) argue that there is not much scope for review by a WTO panel, the one thing that a panel should examine is “whether the member considered its essential security interests to be threatened and considered the measure taken to be proportionate in addressing that threat” (p. 399). Hence, despite the subjective lens of GATT XXI the requirement of ‘to protect’ implies that a threat or risk to the interest of National Security must exist.

4. Conclusion: Strengthening the Objective Review is needed for ‘Public Morals’

The analysis of the scholarship on the National Security exception of GATT XXI(b) leads to two insights: First, there must be a noticeable distinction between a subjective review of the necessity of a measure under GATT XXI(b) and an objective review of necessity under GATT XX(a). Thus, in order to delimit the scope of public morals under GATT XX(a), guidance from objective criteria is required and it is precisely the task of WTO adjudicators to define and interpret ‘necessity’ in the relevant case. Given that the AB in *EC – Seal Products* neither further specified the content, nor required a risk assessment or standard *vis-à-vis* the protection of public morals, such objective criteria are however precisely what is currently missing. By the same token, given the broad wording of GATT XXI(b), a subjective ‘good faith’ review which requires a Member to ‘genuinely believe that the measure taken is necessary’ cannot be enough under the objective wording of ‘necessary to protect public

² The AB in *US – Gasoline* (p. 17) has recognized that Article 31 VCLT has attained the status of customary international law, which is to be taken into account by WTO adjudicators according to Article 3(2) of the Dispute Settlement Understanding (DSU).

morals'. It was stressed in *EC – Seal Products* that a Member has the “right to determine the level of protection [that it considers] appropriate” for protecting morals (ABR, *EC – Seal Products*, para. 5.200). Yet, combined with a lack of concrete criteria to check whether the measure actually achieves this level of protection, the analysis of public morals under *EC – Seal Products* comes extremely close to a mere subjective review, i.e. leaving almost limitless discretion to the Member provided that it is itself convinced of the necessity of a measure. Moreover, the assessment whether a measure is enacted in ‘good faith’ already takes place under the chapeau of GATT XX. GATT XXI does not contain a chapeau, hence conducting an abusiveness check within the ‘it-considers-necessary’ assessment may be appropriate. Given that the chapeau of GATT XX already covers the ‘abusiveness-check’, the necessity test under GATT XX must be more than that.

Second, even under the National Security exception, the ‘to protect’-wording implies that a threat to national security must exist. However, even if one was to accept that identifying a threat or risk to public morals is difficult in some cases, completely ignoring whether the existence of a risk to morals is present and not requiring at least other objective criteria that can be taken into account to support the necessity of a measure in view of protecting morals is arguably inappropriate under GATT XX(a).

IV. The ‘Morals Exception’ in the Case Law of the ECHR

Given that the ECHR equally contains a morals exception, the approach taken by the ECtHR to define and apply this exception will be assessed. On the background of the finding that concrete objective criteria are needed in order to distinguish the ‘it-considers-necessary’ analysis of GATT XXI(b) from the necessity analysis of GATT XX(a) and that it is the task of WTO adjudicators to concretely decide on the necessity of a measure, particular attention will be paid to the ECtHR’s criteria applied under the ‘democratic necessity test’.

1. Introduction: The ECtHR’s Approach to ‘Morals’

According to the Preamble of the ECHR, the Members of the Council of Europe have committed themselves to respect the fundamental rights and freedoms enshrined therein. The ECtHR applies the provisions of the ECHR and produces judgements which according to Article 46 ECHR are binding for those Contracting States that are parties to the dispute. Article 8, the right to respect for private and family life, Article 9, freedom of thought, conscience and religion, Article 10, freedom of expression and Article 11, freedom of assembly and association, are four of the fundamental freedoms protected through the ECHR. Paragraph 2 of Articles 8 to 11 ECHR contains an exception to the prohibition of interference

with these fundamental rights on grounds of legitimate aims. One of these legitimate aims is morals, also referred to as public morals (Delimatsis, 2011). Paragraph 2 of Article 8 ECHR, provides that “[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society [...] for the protection of [...] morals, [...]” (emphasis added). Although the exact wording of paragraph 2 varies slightly in Articles 8 to 11 ECHR, a so-called “four-stage test” (Letsas, 2006, p. 711) can be identified for the exceptions, which needs to be fulfilled for an interference to be justified. First, an interference with the rights and freedoms of the ECHR must exist; second, the interference must be prescribed by or be in accordance with the law; third, a legitimate aim or aims must be pursued by the interference; and finally, the interference must be “‘necessary in a democratic society’ for the aforementioned aim or aims” (*Olsson v Sweden*, p. 59, Letsas, 2006). In order to assess ways of delineating the concept of public morals, the third criterion of pursuing the legitimate aim of public morals, as well as the fourth criterion, i.e. the test of necessity in a democratic society including the leeway given to a contracting state in choosing the means to protect them, will be considered.

2. Cases Involving Public Morals within the Framework of the ECHR

Certain cases can be found in which the public moral exception was explicitly invoked before the ECtHR. These cases involve notably issues of sexual morality (*Handyside v UK*; *Dudgeon v UK*) and homosexual rights (*Alekseyev v Russia*), as well as the morality of abortion (*A, B and C v Ireland*). The most influential case regarding the analysis of morals is the case of *UK v Handyside*, decided in 1976. The case involved a book, “The Little Red Schoolbook”, which was targeted at schoolchildren between the age of 12 and 18 containing certain information on sexuality and adolescent behaviour. The Irish Government considered the content of that book to be immoral at that time (Greer, 1997). The publisher of the book in England was subsequently persecuted, based on the ‘Obscene Publications Act’ of 1959 and 1964 (*ibid*). Finding that by way of the persecution and conviction of the publisher, his right to freedom of expression (Article 10) was violated, the ECtHR had to determine whether this interference was justified on the grounds of public morals. The ECtHR found in this case that a broad discretion is attributed to the contracting state to decide on both the definition of morals as well as the necessity of the means taken to protect them. The ECtHR determined that “it is not possible to find in the domestic laws of the various Contracting States a uniform European conception of morals” (*Handyside v UK*, para. 48). This was particularly due to public morals being likely to change “from time to time and from place to place” (*ibid*). It further stated that regarding the “‘necessity’ of a ‘restriction’ or penalty’ intended to meet [public morals]”

(*ibid*), national bodies are allegedly closer to the realities of their countries and thus better situated to judge on the existence or non-existence of public morals (*ibid*). As a result of this case, the ECtHR found the interference with fundamental rights to be justified on the grounds of public morals. This statement has influenced all subsequent ECtHR judgments involving public morals and the ECtHR has generally “tended to give states a wide margin of appreciation” when they relied on the moral exception (Radacic, 1991, p. 608).

The case of *Dudgeon v UK* concerned complaints against laws of Northern Ireland which criminalize male homosexual acts between consenting adults. The Northern Irish Government defended the laws to be “necessary in a democratic society for the protection of morals [...]” (*Dudgeon v UK*, para. 36). The ECtHR acknowledged that, in general, different communities with diverse cultural backgrounds may exist within the same state, which, as a result, leads to different moral perceptions (*ibid*, para. 56). However, the ECtHR states that “[it] is not concerned with making any value-judgements as to the morality of homosexual relations between male adults” (*ibid*, para. 54). In this way, the ECtHR again left the concept of public morals very broad and accepted Ireland’s moral justification. Indeed, ‘morals’ appears to be an empty box and each state could freely decide upon its content. The ECtHR does not seem to put into question whether the moral concern on which a Contracting State bases its justification is actually given or prevails in the society.

The outcome of the case of *Alekseyev v Russia* seemed to take, however, a different turn. In invoking, among others, the public moral exception included in paragraph 2 of Article 11 ECHR *vis-à-vis* a prohibition of public demonstrations for the rights of homosexuals (*Alekseyev v Russia*, para. 64), Russia also relied on an alleged “wide margin of appreciation” (*ibid*, para. 83). Yet, in contrast to what was argued by Russia, the ECtHR found that a ban on demonstrations by homosexuals was not a necessary means of protecting morals in Europe and that public debates on homosexuality and demonstrations for homosexuals’ rights do not have adverse effects on public morality in the form of negatively influencing children or other vulnerable groups (Johnson, 2011). Such an interference with Article 11 ECHR could hence not be justified by protecting morals. This case shows that the public morals exception of the ECHR is not limitless and that the ECtHR indeed found ways to cabin its scope.

Finally, also the aforementioned case of *A, B and C v Ireland* involved the justification of an interference with Article 8 ECHR on grounds of public morals. The strict prohibitive laws regarding abortion in Ireland were eventually found to be justified, however, the case shows exemplarily that the ECtHR considers aspects limiting the reach of public morals, notably in

the form of ‘European’ or ‘international consensus’ on the necessity of an interference based on public morals (section I. 2).

In these cases involving the moral exception, the ECtHR generally considers two aspects: first, the content and definition of public morals and, second, the democratic necessity with respect to the means taken in order to protect public morals. However, despite an alleged ‘wide margin of appreciation’ initially granted in *Handyside v UK*, the ECtHR has found ways to limit the morals exception. The role of the ‘margin of appreciation’ will be addressed in the following, as well as the ECtHR’s approach towards the definition of morals and its assessment within the democratic necessity test. It will be shown that the ‘consensus’ criterion considered in the democratic necessity test is the main criterion which delimits the scope of the exceptions in general and also the scope of the morals exception.

3. The Role of the ‘Margin of Appreciation’ within the ECHR

Considering the aforementioned cases, the ECtHR refers to a ‘margin of appreciation’ with regard to the morals exception. In general, the margin appears to play a particular role when the ECtHR has to decide on the weight it attributes to competing interests (Bakircioglu, 2007). Such competing interests, i.e. interference with private rights due to public concerns, can mainly be found in the analysis of the exceptions under paragraph 2 of Articles 8 to 11 ECHR, including morals.

The ECtHR stated that “a wider margin is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of *morals* [...]” (*Wingrove v UK*, para. 58; emphasis added). The Court has also contrasted the morals exception with other exceptions, such as ‘maintaining the authority and impartiality of the judiciary’ and concluded that the “power of appreciation” is not identical for each of the exceptions included in paragraph 2 of Article 10 (*Sunday Times v UK*, para. 59). For the morals exception, however, the margin of appreciation appears to be particularly wide (ibid). This has led to the conclusion that, generally, the Court gives a ‘wide’ or ‘wider’ margin of appreciation to Contracting States where the protection of public morals is invoked (Radacic, 1991).

Despite the frequent invocation of ‘margin of appreciation’ and an alleged ‘wide’ margin available to states for advancing a public morals justification, its nature remains opaque. It will be shown that, for two reasons, a mere reliance on the ‘margin of appreciation’ may be misleading and that it is necessary to uncover the underlying criteria which determine the ECtHR’s assessment instead of focusing on the ‘margin of appreciation’ alone. First, the ECtHR has never provided a definition of ‘margin of appreciation’ and those provided by

scholars do not help to shed light on its nature. Second, cases involving public morals have been decided with different outcomes despite apparently granting a ‘wide margin of appreciation’ to Contracting States. Hence, the margin itself cannot be the criterion that determines whether an interference is justified on grounds of public morals.

In the absence of a clear definition by the ECtHR, scholars have attempted to delineate the concept of the margin. According to Benvenisti (1999), the ‘margin of appreciation’ doctrine implies that “each society is entitled to a certain latitude in resolving the inherent conflicts between individual rights and national interests or among different moral convictions” (p. 843). Hence, it is first and foremost the role of the Council of Europe states to ensure that the rights and freedoms of the Convention are respected as well as to choose the necessary means to protect them (Letsas, 2006). However, the definition provided by Benvenisti (1999) does not shed any light on what the ‘certain latitude’ implies for the scope of morals. According to Kratochvíl (2011), from a multitude of possible ways to define the margin of appreciation, “the common feature [...] is the notion of space in which States can legally move”. Yet, also this description is as vague as the concept itself. Additionally, the ECtHR has decided cases involving public morals with very different outcomes despite granting an apparently ‘wide margin of appreciation’ to contracting states in each of these cases (Perrone, 2014). As can be seen in *Handyside v UK* and *Dudgeon v UK*, the ECtHR granted a ‘wide’ margin to states in defining and deciding upon the necessary measure to protect morals and hence found the respective interferences with fundamental rights to be justified. In *Alekseyev v Russia*, Russia equally claimed a ‘wide’ margin in granting or denying certain rights to people, relying, among others on a public morals defence. However, the ECtHR found the ban on demonstrations not to be justified.

The misleading effect of, on the one hand, allowing a generally ‘broad margin of appreciation’ available to a Contracting State and, on the other hand, conducting a full review of the circumstances relevant, in particular, for the democratic necessity test and consequently finding a violation of Convention rights, has also been criticized by Judge C. L. Rozakis (*in Odièvre v France*, Letsas, 2006). According to him, “[w]hen [...] the Court has in its hands an abundance of elements leading to the conclusion that the test of necessity is satisfied by itself and embarks on a painstaking analysis of them, reference to the margin of appreciation should be duly confined to a subsidiary role.” (*in Letsas*, 2006, p. 713). Hence, the invocation of the ‘margin of appreciation’ is particularly superfluous when a profound proportionality analysis

will anyways be conducted by the ECtHR, regardless of whether a justification is based on morals or other exceptions.

To conclude, focussing primarily on the margin of appreciation, which conveys the idea that, under public morals, a state can legitimately interfere with fundamental rights without facing substantive judicial review, is inappropriate. As will be addressed below, especially when the democratic necessity test leads to a limitation of the reach of public morals, reference to a ‘wide margin of appreciation’ conveys a wrong impression of a state’s actual leeway in invoking this defence. After assessing how the ECtHR defines morals, it will then be considered how the democratic necessity test leads to delimit this concept.

4. Defining ‘Morals’ under the ECHR

In the case of *Handyside v UK*, the ECtHR refrained from identifying a universally valid ‘moral’ for the Council of Europe States. Even twelve years after the *Handyside* case, the Court repeated that a common European moral cannot be found and bases this finding on the fact that, “especially in our era” (*Müller v Switzerland*, para. 35), the opinions on morals evolve constantly. The Court reinforced this attitude once again in stating that “even within a single country [the] perception [on morals] may vary” (*Otto-Preminger-Institut v Austria*, para. 50). The ECtHR also sees the State and its national authorities “in principle in a better position” than the ECtHR, to assess content and necessity of public morals within their territory (*Handyside v UK*, para. 48). As will be demonstrated below (section IV. 5.), while necessity is addressed in depth, the ECtHR does not seem to place particular weight on whether the invocation of a moral exception is somewhat genuine or reflects the morals of the public. In fact, content and definition of morals seem to always play a secondary role, while the primary focus lies on the democratic necessity of a measure.

Contracting States seem to also focus on the necessity of their laws to protect public morals rather than on the abstract content of morals. In *Dudgeon v UK*, the Northern Irish Government submitted that “the laws are necessary in a democratic society for the protection of morals and for the protection of rights of others for the purpose of paragraph 2 of Article 8” (*Dudgeon v UK*, para. 36). In this case, the ECtHR does not even deem it necessary to clearly distinguish between the legitimate aim of “protection of the rights and freedoms of other” and “protection of morals” (*ibid*, para. 47). Similarly, in the case of *Alekseyev v Russia* the Court only implicitly analyzed the existence of legitimate aims to the extent that this is relevant for the subsequent assessment of proportionality. The ECtHR states that “[it] may dispense with ruling on these points, because, irrespective of the aim and the domestic lawfulness of the ban, it fell short of being necessary in a democratic society” (*Alekseyev v Russia*, para. 69).

Hence, the question of what a Contracting State may invoke as being a ‘moral’ issue is in none of the above-mentioned cases decisive for finding whether a violation of fundamental rights is justified by public morality considerations.

Consequently, the ECtHR refrains from prescribing any form of universally valid moral within Europe and leaves it entirely to the Contracting States to define and rely on public morals when invoking an exception. It appears that the ECtHR never did and never would state that the “concept of public morals envisioned by the State was wrong” (Perrone, 2014, p. 5). Considering that a limitation of the morals exception does consequently not take place within the definition of morals, it will be considered how the ECtHR restricts the scope of morals under the subsequent democratic necessity test.

5. The ECtHR’s Focus on the Democratic Necessity Test

Despite the considerable freedom in defining morals for the Council of Europe states, the Court has yet found violations of the ECHR in some cases – but not in all cases – in which the Contracting State relied on public morals. Therefore it will be considered how the ECtHR’s limits the scope of the morals exception in its analysis of whether an interference is ‘necessary in a democratic society’. In this democratic necessity test, the ECtHR establishes the proportionality of the interference to the legitimate aim pursued by this interference (*Olsson v Sweden*; *Dugeon v UK*; Parker, 2006). Under the necessity test, the ECtHR requires that a “fair balance [...] has to be struck between the relevant competing interests in respect of which the state enjoys a margin of appreciation” (*A, B and C v Ireland*, para. 229). This aspect is also considered to be the “most demanding criterion for whether the limitation of a right was permissible under the Convention” (Letsas, 2006, p. 711). The function of the democratic necessity test is to identify whether an interference with the Convention rights is pursuing genuine needs compared to “alleged needs” of a democratic society (Greer, 1997, p. 9). It will be shown that the necessity analysis is conducted by the ECtHR with much more depth and rigor than the analysis of what may fall under the definition of morals. Particularly, the existence of ‘consensus’ with regard to the democratic necessity of a measure is the main criterion taken into account by the ECtHR, which limits the scope, among others, of the public morals exception.

a. The Role of Consensus

Within the democratic necessity test, consensus or even emerging consensus on different spheres, such as the European as well as the international sphere, may importantly limit the extent to which contracting states can rely on the invocation of a morals exception. In general,

existing consensus is often referred to narrowing the ‘margin of appreciation’, while a lack of consensus is referred to widening the ‘margin of appreciation’ (e.g. *Fretté v France*, para. 36; *A, B and C v Ireland*, para. 234). Yet, as shown above, reference to the ‘margin of appreciation’ is often misleading. Therefore, it will be focused on the existence of consensus within the democratic necessity test and that such finding of consensus is in fact crucial in determining the scope of the exceptions in general, and hence also of the application of morals.

b. Consensus in Cases Involving Public Morals

Several examples can be identified which demonstrate that the existence or absence of consensus is concretely taken into consideration in cases where public morals are concerned. On this basis, it can subsequently be considered how the ECtHR finds and applies consensus in general.

First, in the case of *A, B and C v Ireland*, the ECtHR had to determine with respect to two of the three applicants whether the Irish laws on abortion were too rigid and thereby violated their rights under Article 8 ECHR (Wicks, 2011). The ECtHR accepted that the restriction on abortion pursued the protection of morals as one of the legitimate aims under Article 8, paragraph 2 (*A, B and C v Ireland*, para. 227). Although there was disagreement on the morality of abortion *per se*, the ECtHR examined in depth the laws of other states of the Council of Europe and held, however, that “there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law” (*A, B and C v Ireland*, para. 235). The Court was also willing to consider “international trends” for the purpose of deciding on the necessity of the interference, however, it was satisfied by the fact that European consensus was sufficiently established (*ibid*). Thus, the ECtHR found that the laws which interfered with the applicants’ rights were not in line with European consensus, and were in fact stricter than in the rest of Europe. Within the balancing exercise of the proportionality analysis, the Court took into account the European consensus on the fact that many other European countries legally allowed abortion, the right to life of the unborn child, the right of the applicants to respect for private life and also the alleged prevailing morals in Ireland (*ibid*, paras. 237-241). Eventually, the finding of consensus did however, not weigh heavily enough to find that Ireland could not invoke the public morals exception to justify its strict abortion laws. The Court did not find a violation of Article 8 with respect to the first two applicants (*ibid*, paras. 237, 242).

A second example is the case of *Alekseyev v Russia* involving the rights of homosexual people. Also in this case, the ECtHR has taken European consensus into account when conducting the democratic necessity test in a case which involves morals. In this case, the applicant attempted to organize demonstrations for gay and lesbian rights in Moscow. Russian authorities had several times refused to grant permission for these events and also the appeals to the Moscow City Court against these decisions remained fruitless (Johnson, 2011). Accepting that the ban on these demonstrations pursued among others, the protection of public morals, the ECtHR did not consider it relevant whether there was consensus on the morality of homosexuality or the treatment of homosexuals in general. However, it stated that “[t]here is no ambiguity [and hence consensus], about the other States’ recognition of the right of individuals to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their rights and freedoms, particularly in exercising their freedom of peaceful assembly” (*Alekseyev v Russia*, para. 84). Therefore, Russia acted in contrast to European consensus when it found that it was necessary to restrict the right to peaceful assembly to protect public morals.

Three implications for limiting the public morals exceptions can be drawn from these cases: First, while acknowledging that a general consensus on what is ‘moral’ may not exist, there can still be European consensus on how to address sensitive issues that touch upon moral consideration. In other words, there is no European consensus on whether, for example, abortion or homosexuality are moral, yet, there appears to be consensus on which measures are necessary to address these issues. Second, the ECtHR is not only open to consider national laws of Council of Europe states in providing a tangible basis for its reasoning, but it also generally considers international consensus within its democratic necessity analysis (*A, B and C v Ireland*). Third, consensus found among Council of Europe states is an important criterion of the balancing of interests under the democratic necessity test, but it is not binding on the ECtHR. The Court has been criticized for allegedly not taking European consensus sufficiently into consideration in *A, B and C v Ireland* (Gallagher, 2011). However, this decision shows that consensus can be outweighed by the importance of other interests. Therefore, the existence of consensus provides an objective criterion for the ECtHR which is considered in the necessity test, yet it leaves the necessary space for the Court to independently balance conflicting fundamental rights in its proportionality analysis.

c. The Nature of Consensus

The ECtHR has never provided a definition of what it concretely understands as ‘consensus’ (Regan, 2011). Also the Preamble of the ECHR provides only limited guidance on the nature

of consensus (Wildhaber et al., 2013). In the Preamble, the Council of Europe states subscribe to the fundamental freedoms as the basis for justice and peace, which are “best maintained [...] by a common understanding and observance of the Human Rights upon which they depend” (ECHR, p. 5). Throughout the case law, however, the ECtHR has further developed its consensus approach and it can be found that, in general, it considers European consensus, as well as international consensus, partly in the form of international agreements. Moreover, the identified consensus must concretely target the issue at hand and must not be too general.

i. European Consensus

In its early decisions, the Court limited itself to refer more globally to an established “common ground” among the Council of Europe states (e.g. *Sunday Times*, para. 59; *Rasmussen v Denmark*, para. 40; Wildhaber et al. 2013). While such a global reference to consensus is generally a characteristic of older ECHR cases, the case of *Alekseyev v Russia* is a recent exception. The Court apparently considered the peaceful right to assembly for all groups of people so evident that it simply found that “demonstrations similar to the ones banned in the present case are commonplace in most European countries” (*Alekseyev v Russia*, para. 84). However, the ECtHR’s general approach in recent decisions is more demanding regarding the evidence of an existing European consensus and mainly focuses on the prevalent domestic laws of Council of Europe states. In *A, B and C v Ireland*, the Court assesses the numbers and lists the names of those European countries in which the first two applicants could have legally undergone an abortion, those in which it was strictly forbidden, and those in which laws regarding abortion have recently changed (paras. 112, 235). In order to find consensus, the ECtHR in the case of *Lautsi v Italy* analyzed within all Council of Europe states whether the presence of religious symbols in schools is forbidden, prescribed, tolerated or unregulated and goes into detail on cases before Supreme or Constitutional Courts in European countries (*Lautsi v Italy*, paras. 26-28; 70). Similarly, in *Schalk and Kopf v Austria*, the Court assessed the pertaining legislation of Council of Europe states regarding the legal possibility of same-sex marriage and found varying forms thereof as well as diverse legal, material and parental consequences which consequently did not lead the ECtHR to find consensus (paras. 27-34). An established European consensus is extremely important *vis-à-vis* the weight attributed to the interest of the individual applicant (Donoho, 2001). It therefore limits the extent to which an interference can be based on an invoked exception, which also extends to moral reasons.

ii. The Evolutionary Nature of Consensus – Towards International Consensus

The ECtHR has also demonstrated its attentiveness to evolution within the legislations of the Council of Europe states (Gallagher, 2011). The Court has since *Tyrer v UK* repeatedly stressed that “the Convention is a living instrument which [...] must be interpreted in the light of present day conditions” (para. 31; also *Goodwin v UK*, para. 75). The attention to evolution in legislation is required, as the rights enshrined in the ECHR must be “practical and effective, and not theoretical and illusionary” (*Goodwin v UK*, para. 74). To do justice to this evolution, the ECtHR began to look beyond European borders for the purpose of establishing consensus. The Court has demonstrated its evolutionary approach in a sequence of cases involving rights of transsexual people. Although this topic involves complicated debates on morality and social values, the Court found a visible development in the legal orders of the Council of Europe states. They were increasingly inclined to granting and extending identity rights to transsexuals, such as a right regarding recognition of the new gender after a gender transformation (*Sheffield and Horsham v UK*). However, initially, it did not consider these ‘trends’ as consolidated enough to find that a European consensus had emerged (ibid; Letsas, 2006). In the following case, *Goodwin v UK*, which equally involved gender identity and transsexual rights, the Court took into consideration again new trends and developments regarding the recognition of a ‘new’ gender. According to the ECtHR, also an “emerging consensus within Contracting States in the Council of Europe on providing legal recognition following gender re-assignment” had started to show (*Goodwin v UK*, para. 84). The ECtHR consequently recognized that the law was “in a state of transition” (*Goodwin v UK*, para. 85). Most importantly, however, the ECtHR considered an international survey on the laws regulating ‘new’ gender recognition. Based on this survey, the Court found “clear and uncontested evidence of a continuing international trend in favour [...] of a legal recognition of the new sexual identity of post-operative transsexuals” (ibid). Most importantly, this clear international trend overrides the fact that the Court could still not identify European consensus in the legal systems of the Council of Europe states (ibid).

This demonstrates that the ECtHR can be convinced of the democratic necessity of a measure by the fact that a clear international trend towards consensus exists in the legal systems of other than Council of Europe states.

iii. International Agreements as Source of Consensus

The ECtHR also considers other sources of international law in the form of international treaties and agreements within its democratic necessity test. Most frequently in cases

involving adoption rights for homosexual couples as well as, in a very early case, involving the rights of ‘legitimate’ and ‘illegitimate’ children, the Court referred to sources of international law, such as the *International Convention on the Rights of the Child* (CRC), *The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* (Hague Adoption Convention), or the revised *European Convention on the Adoption of Children* as well as the *Draft European Convention on the Adoption of Children* (e.g. *E. B. v France*; *Ageyevy v Russia*; *Marckx v Belgium*).

Consensus drawn from international treaties and the laws therein is again not binding on the ECtHR, but may serve as guidance for the Court (Judges Jungwiert and Traja in *Fretté v France*). In a very early case of 1979, *Marckx v Belgium*, the Court has, according to Wildhaber et al. (2013), chosen an “adventurous approach” (p. 253). Here, the Court has considerably extended the rights for so called ‘illegitimate’ children, based on the mere existence of two international treaties³ which had only been ratified by four states (ibid; *Marckx v Belgium*). The fact that the two Conventions were in force was sufficient for the Court to conclude that “there is a clear measure of common ground in this area amongst modern societies” (*Marckx v Belgium*, para. 41). In later cases involving adoption rights, the Court frequently considered the CRC which, however, is by now ratified by all Council of Europe member states (e.g. *Ageyevy v Russia*).

Moreover, the ECtHR has more and more abandoned its general reference to the mere existence of international treaties and analyzes whether a source of international law contains evidence on the concrete question at issue. In the case of *E. B. v France* the Court was explicitly seeking evidence in international law which would convey homosexuals a ‘right to adoption’. To this end, the ECtHR considered the CRC as well as the *Draft European Convention on the Adoption of Children*. Yet, it found that these international instruments did not grant such a right (*E. B. v France*, para. 42).

In this case, the Court also assessed whether the laws which were claimed to interfere with fundamental rights of the applicants, were in accordance with the CRC and the *Hague Adoption Convention*. The ECtHR found that the precise measures and safeguards taken by the French authorities in verifying the requirements *vis-à-vis* potential parents to adopt a child were perfectly in line with those established in the Conventions (ibid, para. 77). Thus, if measures taken by a state are aligned with those previously negotiated on an international level, it is very unlikely that a violation of the ECHR will be found.

³ The 1962 Brussels Convention in the Establishment of Maternal Affiliation of Natural Children; the 1975 European Convention on the Legal Status of Children born out of Wedlock (Wildhaber et al., 2013, fn. 61).

d. Critique Regarding the ECtHR's Consensus Approach

The way in which the ECtHR considers the existence of consensus is not without criticism. Scholars criticize that the ECtHR is inconsistent when considering whether consensus exists (e.g. Johnson, 2011). Others state that the ECtHR does not attach proper weight to the existence of consensus (e.g. Gallagher, 2011).

Johnson (2011) criticizes that the ECtHR is inconsistent in taking European consensus into account. In comparison to the case of *Alekseyev v Russia*, Johnson (2011) argues that the Court was wrong not to find that fundamental rights of homosexual couples are violated when they are denied the possibility of civil marriage in *Schalk and Kopf v Austria*. It appears, however, to be an important element of the use of consensus by the ECtHR that such consensus needs to be sufficiently precise *vis-à-vis* the measure at issue. It appears insufficient that there is some kind of general consensus on homosexuals having certain rights in the democratic societies of Europe. Instead, the ECtHR sought European consensus on the necessity of having concrete laws allowing or prohibiting same-sex marriages among European states, which it could not identify in *Schalk and Kopf v Austria*.

Other authors criticize that the Court partly attaches wrong weight to the existence of consensus within the necessity test or did not inquire the existence of consensus deeply enough (e.g. Radacic, 1991, Gallagher, 2011). Yet, the exact weight attached to the human right at issue and the element of consensus found by the Court is in every case debateable and is an inherent feature of the balancing process. Consensus is an important aspect considered by the Court, yet, it is not substituting for a reasoned proportionality assessment. Despite possible disaccord regarding the outcome, the consensus criterion is nevertheless a tangible and objective criterion when assessing the proportionality of the means to the aims pursued.

6. Conclusion: The Scope of Public Morals confined by Consensus on the Democratic Necessity of an Interference

It appears that the ECtHR leaves the decision on the content of public morals entirely to the individual Council of Europe state. In order to delimit the public morals exception, it considers instead, in a balancing process, whether an interference is 'necessary in a democratic society'. The main aspect in determining if an interference is necessary appears to be whether there is consensus on the necessity of the interference in question, i.e. on the interfering laws and measures of a state. As a European Court, the ECtHR first of all considers whether European consensus among the Council of Europe states can be established. Throughout the case law, a clear tendency can be identified to consider the

existence of precise and targeted consensus on the type and extent of the interference in the domestic legal orders of the Council of Europe States. An abstract recognition of certain rights among the Council of Europe states is insufficient. Hence, the ECtHR considers whether consensus regarding the concrete laws on, for example, abortion or on homosexual marriage, exists. The ECtHR also looks beyond European borders to find whether consensus can be identified. Interestingly, when according to the ECtHR an international consensus can be shown, it can even override a lack of European consensus. It also takes into account international agreements in order to establish whether consensus on the democratic necessity of a measure exists. Similarly, it consults international treaties to determine whether the laws and regulations that result in an interference are actually in harmony with the concrete content of these agreements. Apparently, the mere existence of an international treaty which touches upon a certain issue in very broad terms is insufficient. To concluded, the approach of considering consensus as an aspect of the proportionality analysis does due justice to the need of carefully balancing the fundamental rights and freedoms of Articles 8 to 11 ECHR with restrictions based, among others, on moral grounds.

V. The Weak ‘Public Morals’ Assessment in the WTO: Suggestions from Existing Scholarship or Following the ECtHR’s Approach?

Considering that the comparison to the National Security exception has revealed that more objective guidance under GATT XX(a) is needed in view of delimiting the scope of public morals, it will be analyzed, whether existing scholarship has put forward useful suggestions in this regard or whether the ECtHR’s consensus approach would be an objective criterion that contributes to delimiting the public morals exception.

1. Introduction: Paving the Way for a Focus on ‘Necessity’

On the basis of what existing scholarship offers to delimit the scope of public morals within the WTO, it will be shown that three aspects from the ECtHR’s approach are particularly worthwhile considering within the WTO’s legal test of public morals. First, focussing on the necessity analysis instead of the definition of public morals; second, considering consensus among Members regarding the necessity of a measure, for example, in taking international consensus in the form of international agreements into account in the process of ‘weighing and balancing’ under the necessity test; and third, to consider such consensus only when it is specifically targeting the necessity of the measure at issue. In the case of the WTO, the main problem with the existing suggestions from the scholarship lies in focussing either on the

definition and content of public morals, or on the chapeau of GATT XX. None of the existing scholarship seems, however, to advocate for a strengthened necessity test. The strengths and weaknesses of the existing opinions will hence be examined. Subsequently it will be shown how the insights from the ECtHR's approach to the public morals exception can be used to address potential weaknesses. Placing the necessity test at the heart of the analysis of public morals and considering the international consensus approach within the necessity test, may be a concrete way of providing an objective criterion for limiting the scope of the public morals exception under GATT XX(a).

2. Focussing on Definition and Content of 'Public Morals' to Delimit its Scope?

On the one hand, the definition of public morals provided in the case of *US – Gambling*, namely “standards of right and wrong conduct maintained by or on behalf of a community or nation” (ABR, *US – Gambling*, para. 296), may imply that “total deference” (Häberli, 2014, p. 16) is given to a Member in deciding on its public morals. On the other hand, this may only be an indication for WTO adjudicators’ “propensity towards more flexibility and deference” (Delimatsis, 2011, p. 16). Considering, however, that the Panel in *US – Gambling* held that only ‘some’ scope should be available to Members with regards to “define and apply for themselves” the concept of public morals, there may also be a certain limit to this deference (PR, *US – Gambling*, para. 6.461).

On the basis of these options, scholars have put forward several ways to delimit the public morals exception under the definition of public morals and to limit what the concept may legitimately include. It will be argued, however, that addressing the content and definition of public morals is, in fact, not an appropriate way to overall delimit the scope of public morals. Targeting the definition of public morals, leads to an ‘all or nothing’ decision which does not do justice to the complexity of the issue. As will be shown, one may argue that restricting the content of public morals is required due to the ‘closed list’ of exceptions included in the GATT as compared to the TBT Agreement including an ‘open list’. Yet, prescribing what the definition of public morals may or may not contain would be made on too abstract and too theoretical grounds at this early stage of analysis. Eventually, also the approach taken by the ECtHR supports the view that the scope of public morals can and should not be limited within its definition and possible content.

a. Universalism vs. ‘Qualified’ Unilateralism?

Wu (2008) argues that the crucial question in deciding on the content and definition of public morals is whether they can be defined unilaterally by the Member or whether morals must be

universally shared. While those are two extreme forms, it may also be claimed that an ‘in-between’ is needed, for example, a ‘qualified’ unilateral decision where the Member must fulfill certain objective criteria to show that the unilateral invocation of a public moral corresponds to internal moral convictions. Wu (2008) raises the problem of universalism versus unilateralism already in the aftermath of the *US – Gambling* decision. The following *EC – Seal Products* decision has arguably done little to provide greater clarity on the content of public morals. Also in this case, the AB referred to the definition of public morals endorsed by the Panel in *US – Gambling* (ABR, *EC – Seal Products*, para. 5.199). The AB refrained from establishing which evidence or factors it would consider decisive in assessing “whether a [public moral] defense is genuine” (Shaffer & Pabian, 2014, p. 8). Hence, it will be assessed whether the solutions proposed within the categories of universalism and ‘qualified’ unilateralism are valid ways to delimit the scope of public morals.

i. Universalism

The “some scope”-wording chosen by the Panel in *US – Gambling* (para. 6.461) may be seen as a valid entry point for considering universal or internationally shared moral values to limit its scope. In anticipation of the *EC – Seal Products* decision, it seemed important for scholars to establish upfront that the advanced objective, in this case animal welfare, is widely recognized among WTO Members. Based on this widely shared concern, animal welfare would hence fall within the possible content of public morals (Sykes, 2014; Howse et al. *Amici curiae brief*, 2013; Howse & Langille, 2012). It is, however, not clear from the scholarship, what exactly is the quality of a public moral that is universally shared. Two extremes in view of ‘sharing’ a moral value may be identified. First, according to Wu (2008), it can be held that “‘public morals’ include only those moral principles that are universally held or widely shared by *all humankind*” (p. 232, emphasis added). It is however questionable whether a moral that is universally shared by all humankind could ever be found. The second extreme would be to accept that it is sufficient for falling under the definition of ‘public morals’, that other Members have somehow regulated the issue in question. This was arguably the approach taken by the AB in *US – Gambling* where it considered whether other Members had regulated the issue of online gambling ‘at all’ (PR, *US – Gambling*, para. 6.473). Similarly, Galantucci (2008) has mentioned in support of recognizing that animal welfare is a shared public moral concern, that “the state practice of Belgium as well as a large number of other countries (and perhaps more to come), indicate that the public moral sentiment supporting the humane treatment of animals is strong” (p. 10).

Eventually, both approaches would, however, depend on the acceptable stretch between the actual measure and its allegedly underlying objective or ‘core’ moral, as well as the extent to which a measure may be allowed to pursue multiple objectives.

1) Universal Treaties to ‘Delimit’ the Scope of Public Morals?

A moral that is universally or ‘close to’ being universally shared ‘by all humankind’ may be characterized as a matter of ‘public morals’ under GATT XX(a) when it is supported by the existence of international treaties. Given that Members’ moral concerns are actually not limited geographically, Members’ may use trade restrictions to generally express moral disapproval of certain practices. Many examples of import bans can be found, which do not only address moral concerns of citizens within the enacting Member state, but also have implications of shaping a broader moral. Charnovitz (1998) calls such measures to be “inwardly” as well as “outwardly-directed” (p. 4). He refers, for example, to a ban on the importation of Negro slaves. Such a measure has arguably the purpose of “preventing moral turpitude at home”, and is therefore inwardly directed, as well as to “secur[e] the moral welfare of potential victims of slavery overseas”, which is at the same time an outwardly directed purpose (ibid, p. 12). Such measures are hence enacted to a certain degree out of ‘moral principle’. Howse & Langille (2012), as well as Howse et al. (2015) find that a measure may at the same time have an ‘instrumental’ as well as a ‘non-instrumental’ objective (see further section V. 3. a.). According to them, the measure at issue in *EC – Seal Products* has an ‘instrumental’ objective of reducing the unnecessary suffering of animals, i.e. seals, as well as the ‘non-instrumental’ objective of expressing a moral opposition towards inhumane and cruel seal killing and to object “consumer behaviour that is complicit with this cruelty” (Howse & Langille, 2012, p. 412). While the AB seems to generally accept in the *EC – Seal Products* case that a measure may be enacted out of moral conviction *per se*, outwardly directed or with a ‘non-instrumental’ focus, and that such as measure may pursue multiple interests, it may be questioned how general such a moral disapproval on which a measure is based may be framed and how far the acceptable stretch between the measure and the moral disapproval may reach. The more a measure is a mere expression of a ‘moral principle’ and the greater the breadth of the allowed stretch, the easier a universal treaty may be found that includes the public moral at issue.

In the example of the *EC – Seal Products* case, where the measure in question is a ban on commercial seal products, it may be questioned whether it is already sufficient that an overall agreement on the general worthiness of protection of animals can be shown to be universally acknowledged. According to Sykes (2014), “there does seem to be convergence on the core

idea that inflicting unnecessary or gratuitous suffering on animals should be proscribed” (p. 10). Would, however, only a treaty that concretely addresses animal welfare be considered sufficient evidence for a universally shared public moral? For the case of *EC – Seal Products*, there is, for example, currently no global treaty in place, which concretely addresses animal welfare (Lester, 2010; Galantucci, 2008). Given the absence of such a targeted treaty, Sykes (2014), refers to very broad international agreements that address animal welfare as secondary concern and primarily target general environmental protection. Consequently, the broader the referenced treaty, the less would the requirement of the existence of an international treaty be useful to delimit the content of public morals.

One could therefore focus on a certain ‘core’ of morals that are truly shared (Marwell, 2006). While a ‘core’ of “near-universal” human moral values may most likely be established (p. 816), including, for example, the shared conviction that murder, torture or slavery must be prohibited from a moral point of view, a shared moral consensus beyond this ‘core’ will increasingly be difficult to show (ibid). Considering only this ‘core’, the measure that may consequently fall within this intersection will arguably be very small, which may restrict the public morals exception much too severely and may largely deprive Members of their “right to regulate” under GATT XX (ABR, *EC – Seal Products*, paras. 5.125; 5.127).

Yet, again, the more it is possible to abstract the underlying ‘core’ moral from the measure, the easier will a treaty be found that addresses this core. The narrower the scope of an international treaty or the agreement required, the less it is likely that such a treaty will be universally recognised. Under the universalist approach there would hence always be a considerable trade-off between a targeted and a widely shared agreement.

As seen in the case of *EC – Seal Products* the moral implication of a measure may then be supported by *The Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES) (Sykes, 2014). Before illustrating what the consideration of such broad treaties may imply, it will be addressed whether such international treaties are relevant at all for the interpretation of public morals.

2) *The Relevance of International Treaties for the Interpretation of Public Morals*

Whether international treaties are, in fact, relevant to be taken into account by a WTO panel to interpret terms like public morals, was addressed by the Panel in *EC – Biotech*. It has also addressed the requirements necessary for the universality of a treaty. On the background of the general rules of treaty interpretation of the VCLT, the Panel in *EC - Biotech* had to decide whether the *UN Convention on Biodiversity* and the *Cartagena Protocol on Biosafety to the Convention on Biodiversity* are “relevant rules of international law applicable in the relation

between the Parties” in the sense of Article 31(3)(c) VCLT (Franken & Burchardi, 2007). If this were the case, then a panel would have to take these treaties as context for its interpretation into account. For this purpose, the Panel had to determine to whom ‘the Parties’ in paragraph (c) refers to. ‘The Parties’ can either mean the WTO Members as parties of the WTO Agreement, the parties to the dispute at issue, or WTO Members, but not necessarily those that are party to the dispute (ibid). Given that ‘the Parties’ in Article 31 (3)(c) are not further specified, the Panel decided that it must follow the definition of ‘the Parties’ in Article 2.1(g) VCLT, i.e. ‘the Parties’ refer to those that are parties to the treaty which is being interpreted (ibid). For the *EC – Biotech* case, this means that ‘the Parties’ refers to the parties of the WTO Agreement. Consequently, an international treaty would only have to be mandatorily taken into account by a panel as context if all WTO Members had signed and ratified it. However, the Panel also decided that it was not necessary for it to rule whether it was enough that the Parties to the dispute have signed and ratified an international treaty. Thereby, it left open if a treaty is to be considered as context for the interpretation when all parties to the dispute have ratified the treaty in question and where they agree that this treaty shall be taken into account for treaty interpretation (ibid).

In any event, the Panel underscored that, in accordance with Article 31(1) VCLT, it is in general possible for a panel to take international treaties in its interpretation into account, “like a dictionary to elucidate the ‘ordinary meaning’ of a WTO provision” (ibid, p. 48). The panel may consider other sources of international law when it “deems such rules to be informative” (PR, *EC – Biotech*, para. 7.93). While the panel or the AB are thus not obliged to resort to international treaties unless ratified by all WTO Members to clarify ambiguous terms, such as public morals, the possibility to refer to international treaties when they inform the meaning of an unclear term is possible. For this optional consideration of international treaties, there is, however, no requirement regarding its universality.

3) *Illustrating the Breadth of ‘Public Morals’ under the Universalist Approach*

Nonetheless, in light of the suggested approach *vis-à-vis* a universally shared moral, the following example of a rare case in which a treaty is nearly universally ratified shall highlight that reference to such an international treaty may not help to delimit or clarify the scope of the public moral exception. We may consider, for instance, a measure enacted by a Member prohibiting the import and production of cars that are powered by a gasoline engine. Mitigating climate change is an objective covered by the *United Nations Framework Convention on Climate Change* (UNFCCC), ratified by 195 parties (“First steps to a safer future”, 2014). A Member could arguably submit that it was morally unbearable to see the

increasingly rapid degradation of nature due to massive amounts of pollution and that cars, at least those that are powered by gasoline, are contributing massively to this pollution. Recognizing the responsibility for future generations, it would be a matter of public morals for that Member to ban the import and production of cars. In accepting that the underlying public moral for the ban on cars and car production is climate protection, this ban could arguably fall within the scope of GATT XX(a) as this moral objective is even supported by a broadly ratified international treaty. In this example, however, the existence of a universally shared public moral enshrined in an international treaty would hence allow a very random measure like a ban on cars and car production to become an issue of public morality. Given that a more targeted treaty or shared opinion on the morality of producing and importing cars does not exist, the requirement of universality is not helpful in delimiting the overall scope of the public morals exception.

To conclude, this is not to say that the threshold for allowing a measure to fall within the possible content of public morals under GATT XX(a) shall be high. It shall, however, show that these considerations of universality or (widely) shared morals do not contribute to delimit the scope of public morals after all, irrespectively of whether they are covered by universal treaties or whether they are arguably just universally shared.

Nevertheless, as will be shown in the following, the existence of an international consensus may indeed be relevant, not to restrict the definition or possible content of public morals, but rather when considering the necessity of a measure to protect morals. The main difference lies in the possibility of performing an adequate ‘weighing and balancing’ of the conflicting interests. It will be assessed in the following whether suggestions *vis-à-vis* ‘qualified’ unilateralism may provide a solution or whether the aforementioned consensus approach taken by the ECtHR may overcome the weaknesses of requiring universalism.

ii. ‘Qualified’ Unilateralism

Considering the definition of public morals provided by the Panel in *US – Gambling*, especially in view of Members’ possibility to determine their morals “according to their own systems and scales of values” (PR, *US – Gambling*, para. 6.461), it is argued that the content of public morals may only be determined unilaterally. ‘Pure’ unilateral determination of morals, however, entails the great risk that morals are used as pre-text for enacting unlawful barriers to trade (Wu, 2008). Hence, it may be considered whether there must be certain criteria that ‘prove’ the existence of a unilaterally relevant public moral for the Member in

question, which is referred to here as ‘qualified’ unilateralism. These criteria may take the form of ‘rationalization in quantitative terms’ or of other objective criteria which would concretely need to be defined on a case-by-case basis.

1) Rationalization in Quantitative Terms

Perisin (2013) argues that a Member must rationalize its unilateral approach and that therefore each Member has the duty to show that the interests protected by a measure actually match prevailing morals. With respect to the *EC – Seal Products* dispute, the EU is thus in charge of furnishing proof that the measure corresponds with European morals. She argues that, in fact, this has been the paths chosen by the EU in the *EC – Seal Products* dispute. The EU has tried to quantify or at least to measure moral concerns and thereby attempted to rationalize the ban on seal products. The European Commission mentions in particular the “massive number of letters and petitions on the issue [of seal hunting], expressing citizens’ deep indignation and repulsion regarding the trade in seal products in such conditions” (Commission Proposal, 2008, p. 2).

Considering also that the Panel in *US – Gambling* pointed out that the dictionary definition of ‘public’ pertains to the people as a whole, polls conducted within the community or nation in question could be another way of furnishing proof regarding the sincerity of a public morals claim. However, Regan & Levy (2014) question the usefulness of such polls in a system where the decision of enacting trade barriers is made by governments. This is all the more so given that the definition provided and constantly applied in public morals cases foresees that public morals are standards that concern right and wrong conduct held “by or *on behalf* of a community or nation” (ABR, *US – Gambling*, para. 296; emphasis added). In cases where it is impossible to establish that a certain moral is concretely held by the public, governments may hence always argue that they act ‘on behalf’ of the public. Moreover, unless a poll would result in a “resounding ‘we don’t care’” (Regan & Levy, 2014, p. 9), showing the clear absence of a public moral concern, a trade measure can always be considered as a political compromise enacted to satisfy overall public moral concerns, regardless of their nature of favoring or opposing a certain measure (ibid). One has therefore hardly any choice but to assume that governments’ motives are pure in finding a compromise to address the concerns of their citizens (ibid). It may also be seen from the ECtHR’s approach that it considers the Council of Europe states ‘generally in a better position’ to determine the morals of their societies. In the case of *A, B and C v Ireland*, the first two applicants, in fact, attempted to rely on opinion polls representing the changed views on the lawfulness of abortion in Ireland (para. 226). According to the ECtHR, however, these polls could not “displace the State’s

opinion to the Court on the exact content of the requirements of morals in Ireland” (ibid). This deference and the fact that the ECtHR focuses on the democratic necessity of a measure can arguably be seen as ways for the ECtHR to avoid putting into question the domestic legislators’ ability of properly representing the moral convictions of their citizens in their laws and measures.

2) *Case-by-Case Consideration of Other ‘Objective’ Criteria?*

There may, however, be other objective criteria, besides quantitative rationalization, on which the moral genuineness of a measure may be grounded. It could, for example, be considered whether in the case of *EC – Seal Products*, seals are domesticated animals, which would render them especially worthy of protection (Perisin, 2013). Alternatively, it could be taken into account whether seals are sentient beings, as actually submitted by the EU (European Food Safety Authority report in Sykes, 2014). However, according to Article 13 of the Treaty of the Functioning of the European Union, the EU recognizes that all animals are sentient beings (Fitzgerald, 2011), which would arguably not justify that a ban on seal products is chosen in particular. Moreover, it appears that, in many cases, these criteria would not be as ‘objective’ as they are claimed to be, but that they would still provoke controversial discourse: In the case of animal welfare, would it even be morally appropriate to objectify these concerns? How could one believe that it is ‘more cruel’ to kill domesticated animals rather than non-domesticated animals? In order to rely on an objective distinction between sentient and non-sentient beings, how certain can one be about the sensibility of animals? Given that all animals are apparently considered to be sentient, are some of them ‘more sentient’ than others and based on which scientific evidence could this be proven?

Since such rationalization and the requirement of allegedly objective criteria leave many questions unanswered, others have tried to decide on the basis of the history and consistency of domestic regulation whether a universally determined public moral is genuine (Howse & Langille, 2012; Sykes, 2014). In their work prior to the AB’s decision in the *EC – Seal Products* dispute, Howse & Langille (2012) describe at length the “history of measure designed to protect animal welfare in the European Union in order to show that these moral concerns are deep-rooted and common basis for legislation” (Howse & Langille, 2012, p. 372). They conclude that the enacted EU ban on seal products shall be understood as a “continuation” of “a long history in protecting seals from cruelty” (ibid, p. 378). Similarly, Sykes (2014) appears to attribute much importance to the fact that the tradition of regulating seal hunts dates back to the time of the European Economic Community (EEC). As emphasized by Pitschas & Schloemann (2012), already in 1983, the EEC temporarily banned

products derived from harp and hooded seal species, which was subsequently transformed into a permanent ban. Would this, however, mean that Members who do not have such a proven history would be barred from enacting certain moral measures? How long does a legislative history need to date back in order to be accepted as sufficient proof for a genuine moral concern?

Moreover, the path taken by Howse & Langille (2012) is not without contradictions. On the one hand, they claim that a ‘rationality test’ for public moral concerns should not be required by Members in order to leave the greatest possible scope for moral pluralism. On the other hand, as Feichtner (2012) argues, Howse & Langille (2012) do, in fact, “rationalize in moral terms the ban on seals” (p. 3), particularly in view of the long-standing ‘moral’ legislative history of the EU regarding animal welfare.

In their later work, after the AB had ruled on the *EC – Seal Products* dispute, Howse et al. (2015) no longer insist as much as before upon the AB’s ruling on the importance of demonstrating the profound legislative history of the EU. In support of their view that the WTO should allow as much pluralism with regards to moral considerations as possible, they argue that the only requirement for the WTO adjudicators under the scope of public morals can be “whether the proffered reason could count as a moral reason at all” (Howse et al., 2015, p. 25). This view comes very close to ‘pure’ unilateralism in deciding on public morals, i.e. leaving it entirely to the Member to determine their morals. In their opinion, a moral reason is given when it is somewhat “rooted in ethical, moral or religious beliefs” (ibid). Regarding legislative consistency, it is held that reference to past practice can simply serve as evidence for a measure to be motivated by public moral concerns, which is, according to them, all that needs to be shown (ibid). The WTO adjudicators should in particular not be in charge of determining whether moral beliefs are good, bad, consistent or rational (ibid). Arguably, requiring a profound and long-standing history of legislation targeting the particular public moral, as Howse & Langille (2012) have established in their earlier work, would limit pluralism much too severely.

As a result, requiring objective criteria on the existence of non-existence of public morals would not only provoke further controversial and philosophical discussions on which objective criteria are actually appropriate in each single case, also the suggested criteria of consistency and historical tradition remain rather vague and unsubstantiated.

b. Advocating in Favor of ‘Pure’ Unilateralism

Without saying that the public morals justification shall remain limitless in general, with regard to the aforementioned it appears, however, convincing to keep a low threshold for a

measure to qualify as a public morals measure. Neither the arguments under the universalist approach to morals seems to reasonably limit the scope of application of the public moral exception, nor does the rationalization approach which requires ‘objective’ criteria for unilaterally determining morals. Moreover, there are two particularly supportive aspects when advocating for a ‘pure’ universalist approach to the content of public morals. First, leaving the content of public morals entirely to the Members will contribute to a harmonization between TBT and GATT rules. Second, the practice of the ECtHR shows that defining the content of public morals is not critical and may be achieved at a later stage, while at the same time it is a convenient way to avoid questioning the genuine invocation of a moral justification.

i. Universalism and ‘Qualified’ Unilateralism are Not Convincing

Despite some insistence on a consistent legislative history, much speaks in favor of accepting the opinion of Howse et al. (2015) that “the WTO should not adopt a ‘closed set’ approach to interpreting public morals justifications [and i]t should not adopt a position on what type of moral reasons count” (p. 20). As will be further detailed below, the approach that Howse et al. (2015) take regarding the overall test of the public moral exception may not be followed in its entirety. Yet, arguing that it is not the role of WTO adjudicators to side with one or the other way of determining the possible content of public morals, appears to be the most appropriate solution under the definition of morals. In fact, each of the above-mentioned propositions would require WTO adjudicators to make a subjective value judgement on acceptable public morals. Under the universalist approach, WTO adjudicators would have to decide on the acceptable stretch between the measure and the shared objective, or to limit the possibility of multiple objectives that a measure might pursue. Under ‘qualified’ unilateralism, WTO adjudicators would arguably need to answer philosophical rather than objective questions as to whether it is, for example, a matter of morality to protect only domesticated or also other, non-domesticated animals or on how to ‘measure’ cruelty done to animals. Or they would be asked to doubt that domestic legislators are actually able to properly reflect the morals of their society when invoking the public morals exception *vis-à-vis* a certain measure.

Thus, in accordance with the object and purpose of the GATT, as stated in the third recital of the GATT Preamble, the “reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations” are at its core (GATT, 1994). Deciding on the content of morals and thereby *a priori* exclude certain morals from being able to justifying a breach of trade law would place a too heavy burden on a panel that, at its core, is concerned with facilitating international trade.

However, if following the opinion of Howse et al. (2015) that the decision on public morals is left entirely to the Member, one must also be consequent in leaving such scope to all Members. It is thus not the task of WTO adjudicators either, to decide that one moral concern is ‘more genuine’ than another. With regards to *China – Audiovisuals*, Howse & Langille (2012) argue that “the actual measure under scrutiny [in the *China – Audiovisuals* case] was not in itself an expression of public morals. Rather the impugned measure was a modality claimed to be supportive of the underlying moral regulation. This makes the measure different from the one at issue in *US – Gambling*.” (pp. 416-417). Howse & Langille (2012) make this point in referring to their introduced distinction between ‘instrumental’ and ‘non-instrumental’ measures, which will be addressed in detail below (section V. 3. b. i). However, it is inconsequent, on the one hand, to leave a Member broad freedom to determine own morals and enact measures on this basis and to argue, on the other hand, that certain measures are merely extensions or supportive of an underlying moral regulation which makes them less genuine. If WTO adjudicators shall neither judge on the content, nor on the reach of a Member’s moral conviction, they cannot judge either whether a measure was ‘in itself’ an expression of moral belief or a ‘mere extension’. Otherwise, the assessment on where to draw the line between morally genuine measures and morally less genuine measures will go round in circles.

ii. Harmonizing the “Closed List” and ‘Open List’ Approach

A major concern with leaving such broad scope to WTO Members in defining the content of public morals may be the ‘watering-down’ of the ‘closed list’ approach chosen by the drafters of the General Agreements *vis-à-vis* the limited number of sub-paragraphs of GATT XX as compared to the TBT. While the TBT does not contain a general exceptions clause, TBT 2.2 states that measures do not violate the agreement when they are “not more trade-restrictive than necessary and fulfill a legitimate objective”. In view of these ‘legitimate objectives’, TBT 2.2 includes an indicative list, i.e. an open list of possible objectives (Levy & Regan, 2014), as compared to the exhaustive list included GATT XX (Diebold, 2007; Delimatsis, 2011). A broad concept of public morals, which is unilaterally determined by the Members, may thus transform the exhaustive list of exceptions under the GATT and GATS into an equally open list as under the TBT. However, the imbalance between the open list approach of the TBT and the exhaustive list of exceptions of GATT XX has already been criticized (Shaffer & Pabian, 2014), and may arguably make it easier to find a violation of substantive trade rules under the GATT than under the TBT. This would eventually render the TBT

superfluous as complaining Members would generally seek to design a measure that falls within the scope of the GATT rather than the TBT.

Consequently, leaving a wide scope of public morals to the discretion of Members may contribute to the harmonization between GATT and TBT, which is a need that the AB has underlined in the case of *US – Clove Cigarettes*. According to the AB, the GATT and the TBT “overlap in scope and have similar objectives” and that “the two Agreements shall be interpreted in a coherent and consistent manner” (ABR, *US – Clove Cigarettes*, para. 91; Shaffer & Pabian, 2014). In general, there should be no difference between a Members’ “right to regulate” under the TBT and the GATT (ABR, *EC – Seal Products*, para. 5.122, Marceau, 2014). Giving Members the possibility to freely determine the content of their public morals under GATT XX would hence contribute to closing the gap between the TBT Agreement and the GATT.

Shaffer & Pabian (2014) argue that “if possible, Members should amend GATT XX to create an open list of exceptions” (p. 8). For the time being, a broad concept of public morals will achieve the same result. Delimiting the scope of public morals is ultimately important in order to prevent that anything may fall within its realm. Yet, delimiting the scope of public morals in prescribing its definition and content is arguably an inappropriate approach.

iii. Support for ‘Pure’ Unilateralism from the ECtHR

The approach taken by the ECtHR demonstrates that the Court avoids prescribing and questioning what the content of public morals may be but still makes sure that this exception does not go out of hand. The ECtHR has made clear that it is its mandate to protect democracy and to promote the harmonization of democratic values among Council of Europe states (Gallagher, 2011). Despite this common denominator of democracy on which the ECtHR could build to define public morals, it refuses to judge on what morals Contracting States may legitimately invoke. Moreover, although the ECHR is applicable to a much smaller number of states than the WTO laws, the ECtHR deems the different values, practices and morals among Council of Europe states to be too diverse in order to identify a definition that would streamline the content of public morals for all Council of Europe states. Yet, the ECtHR’s approach exemplifies that accepting a broad leeway for States to invoke morals does not mean that this was the last word on the limits of public morals. On the contrary, the concrete nuanced assessment of the measure is only possible after a measure has been accepted to fall within the scope of public morals.

c. Conclusion: 'Pure' Unilateralism is Acceptable for Defining Morals

Given that the arguments for a universalist approach to public morals as well as the criteria suggested *vis-à-vis* 'qualified' unilateralism are not convincing, and taking into account that there are indeed advantages to a broad content of public morals regarding a harmonization of the GATT and the TBT, the goal of limiting the overall scope of public morals must be achieved elsewhere in the analysis of this exception. Moreover, as the example of the ECtHR has shown, it is, in fact, feasible to leave a broad discretion to Members in invoking morals while a limitation on this exception is nonetheless possible, notably within the democratic necessity test.

3. Necessity at the Core of the Public Morals Exception: A Case for Consensus

In light of the aforementioned, it will be argued in the following that the necessity test shall be at the core of the assessment of the public moral exception and that it is the most adequate step within the exceptions test, where the scope of public morals can be limited. It will be shown that the risk of an overly broad public morals exception which undermines the provisions of the GATT can be attributed largely to a weak necessity test. In view of the necessity test, particularly the approach to public morals provided by Howse & Langille (2012) as well as Howse et al. (2015) will be considered. However, in introducing a differentiation between 'instrumental' and 'non-instrumental' measures to protect public morals, they arguably deteriorate the uncertainties *vis-à-vis* the necessity test instead of resolving them. The consensus approach of the ECtHR, may, however, provide a solution to strengthen the necessity test under WTO law and to remedy the introduced imbalance between the different sub-paragraphs of GATT XX. It will be argued that the consensus approach is particularly useful to fill the gap of not requiring a 'material contribution' to protecting public morals.

a. 'Necessary to Protect' – Same Measure – Different Necessity Tests?

In accordance with the AB's decision in the *EC – Seal Products* case, Howse et al. (2015) argue that in order to allow the widest possible 'moral pluralism' among the WTO Members, it is even insufficient to only leave the content and invocation of public morals to the decision of the Members. According to them, it is also necessary to accept that certain public morals measures "[do] not lend [themselves] to a strict means-end analysis" (Howse et al., 2015, p. 20), and therefore a 'softened' necessity test appears appropriate.

Equally Howse & Langille (2012) suggest that a differentiation must be made between 'instrumental' and 'non-instrumental' measures. While a measures may pursue a dual or even

a multiplicity of purposes, Howse et al. (2015) suggest that, given these different purposes, a measure may be both ‘instrumental’ and ‘non-instrumental’ at the same time. Yet, the proposed differentiation between ‘instrumental’ and ‘non-instrumental’ public morals measure, and especially the different requirements regarding the necessity as a consequence of this differentiation, lead to two major difficulties: First, it creates an extreme imbalance, not only between the different sub-paragraphs of GATT XX but also among measures falling within the same sub-paragraph, i.e. GATT XX(a) to protect public morals. Second, following this argumentation, the requirements of the necessity test will ultimately depend on the constitution of the Member.

i. The Differentiation between ‘Instrumental’ and ‘Non-Instrumental’ Measures

In distinguishing between ‘instrumental’ and ‘non-instrumental’ measures addressing public morals, it is proposed that ‘non-instrumental’ measures are those that are not enacted by a Member with the goal of achieving a certain outcome or of producing perceptible effects, but which are enacted as an intrinsic expression of moral beliefs of a society (Howse & Langille, 2012; Howse et al., 2015). In the case of *EC – Seal Products*, the AB would be confronted with a dual purpose measure which is, on the one hand, “aimed instrumentally, at reducing unnecessary animal suffering, a goal that engages public morals as well as the protection of animal life and health as such”, while on the other hand, the measure is “a noninstrumental expression of moral opprobrium at animal cruelty and consumer behaviour that is complicit with that cruelty” (Howse & Langille, 2012, p. 412). Based on the AB’s frequently used sentence that Members have the right “to determine the level of protection that they consider appropriate” (e.g. ABR, *EC – Seal Products*, para. 5.200), they argue that Members have the freedom to decide upon the restrictiveness of a measure to achieve the desired protection. If a ban on a certain product was the only way in which a Member could do justice to its held moral values, then no alternative measures could be accepted to achieve the desired level of protection. A rigid scrutiny of allegedly available alternative measures would therefore contradict the possibility granted under sub-paragraph (a), to enact moral regulations (Howse et al., *Amici curiae brief*, 2013).

Consequently, such a distinction between ‘instrumental’ and ‘non-instrumental’ measures has a significant impact on the necessity test. When a ‘non-instrumental’ public morals measure is at issue, according to Howse et al. (2015), the AB decided correctly that a “‘material contribution’ standard is inappropriate for non-instrumental moral reasoning” (p. 64). It would therefore not be possible to subject a ‘non-instrumental’ measure to a means-end analysis.

The ‘weighing and balancing’ process under the necessity test would hence only involve the consideration of the importance of the objectives pursued and the trade restrictiveness of the measure, but a ‘material contribution’ would not be part of the proportionality analysis. With regard to the EU Seal Regime, Howse & Langille (2012) simply conclude that “the measure is certainly ‘necessary’ in its noninstrumental aspect” (p. 416).

ii. The Plastic Bag Example: One Measure, Two Contradicting Outcomes?

To illustrate the discrepancy among the sub-paragraphs of GATT XX with regards to the requirements of the necessity test, a ban on the import and production of plastic bags and plastic wrapping material shall serve as a fictitious example. It could be argued that a ban on the production and importation of plastic bags and plastic wrapping material is, on the one hand, an ‘instrumental’ measure seeking to protect human, animal or plant life or health of GATT XX(b). The amount of plastic, especially from plastic packaging materials, has led to considerable pollution of the oceanic ecosystem which is negatively affecting marine animals, in particular sea turtles and seabirds (Derraik, 2002). On the other hand, the measure could also be classified as a ‘non-instrumental’ measure which expresses the moral conviction of a society that the oceanic nature and its ecosystem is highly protect-worthy and that it is morally unacceptable to destroy it or to contribute to its destruction. Following the ‘weighing and balancing’ steps of the necessity test both objectives, public morals under GATT XX(a) as well as human, animal or plant life or health under GATT XX(b), are highly important objectives (ABR, *EC – Asbestos*, para. 172; PR, *US – Gambling*, para. 6.492). By contrast, a ban on plastic packaging material is, in fact, maximally trade-restrictive. With regards to the means-end analysis, i.e. the contribution of the measure to the objective pursued, the measure would now be subject to two different tests. Considering the measure as an ‘instrumental’ measure under GATT XX(b), the responding Member, i.e. the Member defending the measure, would have to make a *prima facie* case that the ban is necessary (ABR, *US – Gasoline*, p. 22-23; ABR, *US – Gambling*, paras. 309-310), and hence makes a ‘material contribution’ to the objective pursued, namely to the protection of human animal or plant life or health (ABR, *Brazil – Tyres*, para. 150). Given that a ‘material contribution’ involves the assessment of the nature of the risk, the objective pursued and the level of protection sought (ABR, *Brazil – Tyres*, para. 145), the responding Member would need to make a *prima facie* case that these requirements are fulfilled. The degree of marine pollution would lend itself to demonstrate a certain risk as well as a certain level of protection sought. It might even be referred to existing long-term studies on this topic and other scientific assessments. However,

even if the responding Member was to argue that its desired level of protection is zero marine pollution and hence completely plastic-free seas, the ban could arguably be found to make a ‘material contribution’ to this goal. In a next step, the measure would also need to withstand a comparison to less trade-restrictive alternatives (e.g. ABR, *China – Audiovisuals*, paras. 240-243). It could be argued that banning all plastic bags and packaging material is not necessary as stricter recycling requirements and a more sophisticated waste management of the Member could achieve the same level of protection, namely that the plastic materials do not end in the oceans. As the AB has underlined in *China – Audiovisuals*, the fact that this would require restructuring measures and certain financial expenses does not transform it into an unreasonably burdensome alternative for the responding Member. The concrete question would be whether this would mean an ‘undue’ burden on the Member, which needs to be supported by sufficient evidence (ibid, para. 327).

Taking the measure as a ‘non-instrumental’ measure, the entire assessment regarding the contribution to the objective pursued, would not be required. The conviction that it is a matter of morality to protect the marine environment and especially that it is immoral to destroy the ecosystems of the oceans would not lend itself to a risk assessment. A Member could simply argue that the Member’s public morals as reflected in the ban on plastic bags and plastic wrapping material is an objective that is protect-worthy to the highest degree and that therefore a ban is necessary.

The AB has stressed on many occasions that the necessity test is fundamentally a process of ‘weighing and balancing’ (e.g. ABR, *US – Gambling*, paras. 304–305). It has also reiterated in *US – Gambling*, as well as in *EC – Seal Products* that the contribution of the measure to the ends pursued is ‘one’ part of the ‘weighing and balancing’ process, while the other one is “the restrictive impact of the measure on international commerce” (ABR, *Korea – Beef*, para. 164). However, without assessing the ‘material contribution’ and within it the interplay of risk, objective pursued and level of protection, a true ‘weighing and balancing’ is no longer identifiable. After all, it is much more subjective and left to the consideration of the WTO adjudicators compared to cases in which an ‘instrumental’ measure is at issue.

iii. One Measure, Two Countries, Two Contradicting Outcomes?

Moreover, Howse & Langille (2012) argue that a public morals measure is not necessarily always a ‘non-instrumental’ measure, but that such a measure can also be ‘instrumental’ to protect public morals.

According to them, the ban on internet gambling in the *US – Gambling* case was an ‘instrumental’ measure to protect public morals. It is submitted that the United States “used

instrumental material reasons to justify its gambling ban” (ibid, p. 412). Thus, the ban on internet gambling was not enacted “to express moral opprobrium at gambling” (ibid), but to make, among others, a contribution to alleviate the established risk of underage gambling. Such a risk is “a specific concern with respect to the remote supply of gambling and betting services” (PR, *US – Gambling*, para. 6.516). In such a case, a material contribution within the means-end analysis would be required given that the public morals measure is arguably ‘instrumental’. In justifying that the public morals measure chosen by the US is ‘instrumental’, Howse & Langille (2012) argue that basing a ban on online gambling on a moral judgement may stand in contrast to the United States’ Constitution which is “founded on separation of church and state” (p. 412). Given this separation, the United States would not have the possibility to submit reasons of intrinsic public morals to place a ban on online gambling (ibid). Yet, according to them, “[o]ne can imagine that other WTO Members with a different kind of domestic political regime might be more inclined to justify prohibitions on gambling as expressions of what is regarded as intrinsic right or wrong” (ibid).

Following Howse & Langille (2012), it would hence depend on the constitution of each Member state whether it could produce ‘non-instrumental’ measure for which a means-end analysis under the necessity test is not required. For the EU, for example, this would be particularly difficult, given that there is no univocal view on the separation of the state and the church which Howse & Langille (2012) take as evidence. In Northern European countries, the separation of church and state is generally much clearer than in Southern European countries including, however, several exceptions and recent changes on the legislative level of different European Member states (de Beaufort et al., 2009). On the basis of this uncertainty, a WTO Member like the EU would arguably not be able to enact ‘non-instrumental’ measures at all.

Moreover, Howse & Langille (2012) argue strongly against the WTO adjudicators being in charge of entering a profound assessment of the cultural, traditional and legislative history of WTO Members, and hence trying to engage in a “second-guessing” of Members’ public morals (Howse & Langille, 2012, p. 428). Accordingly, they state that it is in general not the WTO’s mandate to judge on the substance of the laws of its Members. Consequently, one may also doubt whether it would be the WTO’s mandate to judge whether a WTO Member could, by its constitutional prerequisites and particularly by its separation of state and church, be able to enact a ‘non-instrumental’ public morals measure.

If one was to accept the differentiation between ‘instrumental’ and ‘non-instrumental’ measures, it can be assumed that Members will in general seek to frame their policies as ‘non-instrumental’ public morals measures considering that they would not be concerned by

establishing a ‘material contribution’. Arguably, one could find an underlying public morals concern in any measure, even if it concerns the production and import of plastic packaging material. If the hurdle to pass the necessity test is hence lower in the case of ‘non-instrumental’ public morals measures, all other legitimate objectives enumerated in the subparagraphs of GATT XX would become meaningless.

iv. Rejecting the Differentiation between ‘Instrumental’ and ‘Non-Instrumental’ Measures

Through their distinction, Howse & Langille (2012) further enlarge the gap between the requirements by introducing a distinction regarding the instrumentality of a public morals measure. Although it must be acknowledged that the AB arguably opened the door for making a differentiation between ‘instrumental’ and ‘non-instrumental’ measures, such differentiation leads nonetheless to a gap, not only among the requirements *vis-à-vis* the different subparagraphs of GATT XX, but even among different public morals measures, arguably based on the enacting Member’s constitutions. If one was yet to accept this distinction, an element that restores a balance in the necessity test of ‘non-instrumental’ measures is needed. As addressed in the following, the consensus requirement regarding the necessity of a measure as applied by the ECtHR may provide a solution to close this gap.

b. Applying the ECtHR’s Consensus Approach

In the following, the main criterion that determined whether a measure passes the democratic necessity test applied by the ECtHR will be introduced into the public morals analysis under WTO law. The main criterion within the ECtHR’s analysis of the justifications in general and also on moral grounds is the existence of consensus *vis-à-vis* the democratic necessity of a concrete interference. As shown above, interference with fundamental rights were found where the existence of certain laws leads to a violation of individual rights, such as the prohibition of homosexual activity among consenting adults (e.g. *Dudgeon v UK*), where a certain fundamental right was denied through the absence of legal opportunities, such as the absence of the legal possibility of same-sex marriage (e.g. *Schalk and Kopf v Austria*), or where through certain authority acts the possibilities of making use of fundamental freedoms is denied, such as the prohibition of peaceful assembly by public authorities (e.g. *Alekseyev v Russia*).

In its subsequent assessment of paragraph 2 of Articles 8 to 11 ECHR, the ECtHR therefore considered whether there was consensus on the necessity of such interference with fundamental laws to justify such an interference, among others, on moral grounds. Where a

violation of international trade law is found within the system of the WTO, the WTO adjudicators consider within their analysis whether the measure violating substantive trade law is necessary to protect public morals under GATT XX(a). Therefore, also under GATT XX(a), WTO adjudicators may ask whether there is consensus on the necessity of a measure violating substantive trade rules, in order to protect public morals, and consider their finding within the ‘weighing and balancing’ process of the necessity test.

It will be shown that for the purpose of finding such consensus, WTO adjudicators may consider the domestic laws of WTO Members to find whether there is consensus on restricting trade for moral purposes. While this may be considered impractical, WTO adjudicators could also take the ‘shortcut’ of considering whether there are concrete international agreements in place with target the necessity of restricting trade in order to protect public morals.

i. Consensus on the Necessity of a Measure among WTO Members

In the case of *US – Gambling*, the Panel already demonstrated its general readiness to consider the laws and regulations of other WTO Members in order to find evidence that online gambling is a matter of public morals. The panel took into account the domestic regulations of other Members and found that, besides the United States, two other Members “restricted trade in gambling-related services and products on moral grounds, while sixteen others had already restricted or prohibited Internet gambling or were in the process of doing so” (PR, *US – Gambling*, para. 6.473; Marwell, 2006, p. 813). Following the example of the ECtHR, these considerations would have been better placed within the ‘weighing and balancing’ of the necessity of a measure.

To illustrate the way in which WTO adjudicators may take consensus among WTO Members regarding the necessity of a certain measure into account, a prohibition on the possession and trade with child pornographic material as well as with pornographic material in general can serve as examples. In the cases of child pornography and of pornography in general, Members may attempt to justify their bans on moral grounds, i.e. as an expression of moral disapproval. In the words of Howse et al. (2015), Members may attempt to enact ‘non-instrumental’ measures to protect public morals. A Member may argue that a ban on trade with pornographic films or online material is rooted in deeply held moral convictions. Consequently, it may not be willing or able to enter an assessment on whether child pornography or pornography in general poses risks to moral values of a society or whether such a prohibition makes a material contribution to the objective pursued.

Here, a panel could, in fact, consider consensus among WTO Members with regards to the necessity of a ban in order to inject an objective criterion into the ‘weighing and balancing’ analysis under the necessity test.

Regarding the first aspect of child pornography, it can be found in domestic legislations that “[p]ossession of child pornography is a criminal offence in all industrialized nations and that the criminalisation of child pornography in relation to online distribution has recently been reiterated in Art. 9 of the Convention on Cybercrime” (Murray, 2007, p. 159). Akdeniz (2008) assesses in detail the regulations on material and virtual child pornography in the United States, Canada, England and Wales. Not only do all of these countries ban the possession of such material, he also finds joint efforts of international harmonization of banning child pornographic material. There is an “international trend that seeks to ban child pornography, as evidenced by the recent adoption of the Optional Protocol to the UN Convention on the rights of the child, on the sale of children, child prostitution and child pornography (Optional Protocol to the CRC) [...]” (European Committee On Crime Problems *in* Akdeniz, 2008, p. 196). In particular, Article 3.1(c) of the Optional Protocol to the CRC requires State Parties to criminalize, among others, “importing, exporting, offering, selling, or possessing [...] child pornography”. By contrast, such joint harmonization efforts on a trade ban *vis-à-vis* pornography in general cannot be identified and a general agreement on the necessity of banning pornographic material does not exist.

Consequently, when a Member is able to show that its laws are in line with international consensus, this may be an important evidence of the fact that its own ban is necessary to protect morals. In cases where such harmonized laws do not exist, as on the topic of pornographic material in general, this may be considered as evidence against the necessity of a trade ban.

Although the *US – Gambling* Panel has proven that it would consider domestic legal regulations of Member, it may nonetheless be argued that it is an impossible task to assess the domestic regulations on a specific matter with respect to all 161⁴ Members of the WTO. Yet, as the abovementioned argument of a trade ban on child pornographic material shows, international agreements, as ‘shortcuts’, targeting the issue at hand may therefore be more adequate to take into account in the consensus analysis.

⁴ Effective April 26th, 2015 (https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm).

ii. Consensus on the Necessity of a Measure Evidenced by International Agreements

Instead of conducting a time-intensive analysis of the domestic legal systems of Members, WTO adjudicators may consider international agreements as evidence of consensus among WTO Members on the necessity of a public morals measure. The effort of negotiating and finding agreements on concrete measures that are necessary to address a certain problem in cooperation with other countries that are involved, affected or concerned may serve as an important criterion in ‘weighing and balancing’ the importance of the objective and the trade-restrictiveness of a measure. For measures that not only aim internally to protect a Member’s own morals, but also outwardly affect the moral actions of others, Wu (2008) has suggested that “the moral norm must itself have been codified by an international organization through a treaty, guideline, code or other document that has been explicitly endorsed by a majority of WTO Members” (p. 245). The approach presented here, by contrast, suggests that not the ‘moral norm’ shall be subject of such an agreement, but the measures necessary to address a sensitive issue itself. It will also be shown below (section V. 3. c. ii.) that targeted agreements only among a few Members may as well contain important evidencing value.

Such agreements on concrete measures could be found, for instance, in addressing the arguably morally relevant issue of whaling or using leghold traps.

The *International Convention for the Regulation of Whaling*, for example, includes a schedule which contains the detailed agreements of the parties regarding, among others, the protected species and hunting techniques. This is one very sophisticated example of consensus evidenced by an international agreement which details the necessity of measures (ICRW, 1946). Since 1986, there is a zero quota on commercial whale hunts, which is actually a temporary agreement, called a ‘pause’, binding on the Members of the International Whaling Commission (IWC) (Gambell, 1993; Gales et al., 2005). The Convention, however, also sets out agreed exceptions, such as under Article VIII, the permission to hunt whales for scientific purposes, or the exceptions for aboriginal hunts (Oberthür, 1998/99). The ban on whale hunting is being discussed for decades. Certain countries have even left the IWC, such as Canada, a country that was even a founding member of the IWC who withdrew in 1982 (Gambell, 1993). Others are faced with accusations of continuous abuse of the exceptions, such as Japan (Gales et al., 2005). Nonetheless, the terms of the commercial ban as well as the complicated negotiations that have led to reaching this agreement are arguably a considerable achievement of joint international effort.

Another example where international consensus has been reached on a sensitive, arguably morally relevant issue is the *Agreement on International Humane Trapping Standards* (AIHTS). The EU together with Canada and Russia was able to agree on trapping standards, after the EU had actually intended to unilaterally ban the import of fur from certain types of animals caught through leghold traps (Prince, 2004). While Article 7 AIHTS details the commitments of the parties, Article 10 AIHTS also foresees possible derogations to the commitments “on a case-by-case basis, provided that they are not applied in a manner that would undermine the objectives of the Agreement”. This Article, among others, provides an exception for the use of “traditional wooden traps essential for preserving cultural heritage of indigenous communities” (Article 10 d. AIHTS). Particularly in the context of the EU’s ban on seal products, this agreement is often mentioned as a comparable regulation. As compared to the EU Seal Regime, Perisin (2013) finds, however, that the AIHTS is even “responsive to different hunting techniques” (p. 398).

Agreements of this type can therefore serve as evidence that there is not only consensus on the necessary measures to take in order to address a certain moral concern, such as for example the cruelty done to animals arising from leghold traps, but also on the necessity of the type of exceptions included in a regulation. The advantage of considering at the same time the necessity of the exceptions will be addressed in the following (section V. 4.).

Consequently, targeted agreements which reflect consensus on common actions to address certain morally relevant issues, like whaling or leghold trapping, exist and that they may serve as means to lend substance to the necessity of a measure.

c. Strengths, Weaknesses and Limits of Transposing the International Consensus Approach to GATT XX(a)

While noticeable benefits can be seen in considering consensus as an objective criterion under the necessity test of GATT XX(a), it may be questioned whether such an approach would be within the limits of what WTO adjudicators can consider for the purpose of interpreting necessity, particularly when taking international agreements into account. It could also be argued that the approach taken by the ECtHR is not suitable for the WTO due to their different mandates. It will be shown, however, that this approach is not to suggest that WTO Members will be forced to adhere to agreements they have not consented to, rather that the consideration of consensus within the ‘weighing and balancing’ process constitutes evidence which can be taken into account by panels. Panels cannot be obliged to consider international consensus, yet it could provide a basis for WTO adjudicators to produce reasoned judgements and prevents the isolation of WTO law. Moreover, their different mandates may not exclude

WTO adjudicators to consider international consensus, given that the WTO is not a hermetically closed regime, but situated precisely within an international system of global interaction.

i. Advantages of Considering Consensus within the Process of ‘Weighing and Balancing’

It must be stressed at the outset that focusing on the consensus approach aims at limiting the scope of the public morals exception in reintroducing an objective criterion in the necessity test of public morals. If one was to follow the approach taken by Howse et al. (2015) and Howse & Langille (2012), the consensus approach may even reintroduce a balance among the criteria for ‘instrumental’ and ‘non-instrumental’ public morals measures. This is, however, not to suggest that Members shall be deprived of their “right to regulate” under the exception of GATT XX(a) (ABR, *EC – Seal Products*, paras. 5.125; 5.127), unless they act in harmony with international consensus.

Following the suggested approach, Members would be left with a choice of either providing evidence regarding a material contribution of their measure, or with providing evidence that they act in conformity with international consensus. The AB in *EC – Seal Products* did not exclude the possibility that Members may establish a material contribution to the aim pursued. In cases where Members can and do provide such objective evidence regarding a material contribution of a public morals measure to protect important values, this can and should be taken into account by panels. However, in cases where a Member is not willing or cannot provide objective evidence with regard to the necessity of a public morals measure, international consensus should be considered as crucial factual evidence in answering the question whether such a measure is necessary to ‘express’ such moral conviction. In fact, in these cases it is more appropriate to speak of ‘expression’ of moral conviction, given that a risk and a contribution to protecting certain values from that risk do not need to be shown.

As previously stressed, it rests ultimately with the panel to “independently and objectively” assess the evidence before it (ABR, *China – Audiovisuals*, para. 287). Regarding this evidence, it is entirely the panel’s decision “which evidence it chooses to utilize in making its findings, and to determine how much weight to attach to the various items of evidence placed before it by the parties to the case” (ABR, *EC – Seal Products*, para. 5.166). Obviously, panels cannot be obliged to consider international consensus *vis-à-vis* the necessity of a measure in their assessment. However, this possibility is by no means excluded. Herwig (2015) argues that, although international consensus is generally relevant in the interpretation of ‘public morals’, it is only one factor to be considered. Yet, in the interpretation of what is

actually relevant for the interpretation of what is ‘necessary to protect public morals’, it is argued here that, particularly in the absence of other objective criteria to determine the necessity of a measure, international consensus may indeed be a very important factor.

Diebold (2007) criticizes the consideration of international consensus with regard to the Panel’s approach in *US – Gambling*. In this case, the Panel confirmed that online gambling may be a matter of public morals through an assessment of whether other Members have also regulated gambling. Such an approach would be inappropriate because, “when interpreted *a contrario*, it could arguably mean that a respondent will always have to present evidence of similar practice by other states which would basically prevent Members from defining their own morals and order” (ibid, p. 63).

The advantage of the approach suggested here is, however, that consensus is not needed *vis-à-vis* the qualification of a measure to address public morals. Rather, it is suggested that in cases in which a Member seeks to base its measure exclusively on public moral consideration and refrains from providing objective evidence as to a material contribution, the consensus requirement is a useful criterion. As long as a Member can and does provide evidence that the measure makes a material contribution to the objective pursued and identifies a certain standard which can be taken into account in the ‘weighing and balancing’ exercise under the necessity test, there is no need to demonstrate action in line with international consensus. In the absence of such objective evidence, however, such consensus would constitute an important aspect in the ‘weighing and balancing’.

ii. The Possibility of Focussing on International Agreements as Source of International Consensus

It is certainly problematic that the ECtHR does not specify what ‘consensus’ actually means, i.e. how widespread the consensus must be, neither regarding European nor international consensus. As previously shown, even the emergence of international consensus was sufficient evidence for the ECtHR to override a lack of European consensus, provided that such consensus was specific enough, for example in view of the recognition of a ‘new’ gender identity. Yet, with regard to international consensus found in domestic legislations, there may be a certain logistical aversion given that this would arguably involve scrutiny of the domestic laws of all WTO Members. The above application therefore stressed the ‘shortcut’ of considering international agreements as evidence of international consensus. Regarding the relevance of international agreements other than WTO agreements, a few points deserve mention.

First, it must be stressed that a Member cannot be bound by international agreements to which it is not party (Pauwelyn, 2001). Yet, as previously outlined, the *EC – Biotech* Panel has highlighted that, according to Article 31(1) VCLT, international treaties may be taken into account in order to elucidate the ordinary meaning of WTO provisions and where a panel considers such treaties to be informative (see section II. 2. a. i.). According to the Panel in *EC – Biotech*, “other relevant rules of international law may in some cases aid a treaty interpreter in establishing, or confirming, the ordinary meaning of treaty terms in the specific context in which they are used” (para. 7.92). Following the ECtHR’s example in considering consensus, it would also not be appropriate to argue that the content of international agreements was mandatory for the decision of the WTO. In particular, when a Member can provide very weighty evidence in favour of its public morals and against the fact that consensus shall be taken into account (see *A, B and C v Ireland*).

In support of the importance of using agreements for the purpose of informing the necessity test despite non-universal adherence, Pauwelyn (2001) argues that “[e]ven if [a] convention is not binding on all WTO members, or on the disputing parties in the particular case (in particular the complainant), the fact that say sixty countries including half of the WTO membership have ratified the convention may constitute significant proof under GATT Article XX(b) that the defendant’s measure is, indeed, ‘necessary for the protection of human health’” (p. 572). This would arguably not only be true for the necessity of a measure under GATT XX(b), but also for GATT XX(a). According to Marceau (2002), in order to decide whether a measure is necessary for the protection of public morals, it should also be possible for a panel “to examine the participation of concerned members in relevant human rights treaties as [among others] evidence of the efficacy of the chosen measure” (p. 790).

Considering the difficulties to limit the possible content and definition of morals, not only human rights issues may fall under the definition of morals. Expecting a range of sensitive issues to be placed under this concept, such as animal welfare (exemplified by the ban on seal products) and environmental concerns (exemplified by the fictitious example of a ban on plastic bags), the consideration of treaties and agreements should not be limited to human rights treaties.

Moreover, given that targeted agreement on the necessity of measures is sought by the ECtHR and preferred over some generic treaty, agreement may only exist between a limited number of WTO Members. Considering the example of the AIHTS, where a binding agreement was reached only between the EU, Canada and Russia, those targeted agreements may, however, be of particular informative value due to their precise content in terms of necessity of a

measure. Despite the limited number of adhering Members, those Members are arguably directly concerned, not only by the public morals issue in question, but also by resulting trade effects. Their effort to negotiate an agreement arguably reflects genuine attempts to find a compromise on what is the least trade-restrictive means considering the competing interests involved, such as subsistence needs of Inuit communities (*see also* section V.4.).

Within the sphere of environmental measures, the decision of the AB in *US – Shrimp* also supports the view that the WTO system welcomes other international agreements and that WTO adjudicators recognize the importance for Members to enter into agreements, smaller as well as broader ones, on necessary measures to protect important objectives also in other international settings. With respect to the US' aim of protecting shrimp and turtles, the AB underscored that “[w]e have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have *not* decided that sovereign states should not act together to bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly they should and do.” (ABR, *US – Shrimp*, para. 185; Fitzgerald, 2011, p. 111). Consequently, in considering international agreements as evidence of international consensus within the ‘weighing and balancing’ of the necessity of a measure, WTO adjudicators would only act consistently with their acknowledgment of the importance of international negotiation and cooperation.

Against the proposition for panels to consider international agreements (particularly targeted but limited ones in terms of adherence) may speak that the AB in the *US – Gambling* case ruled against an alleged “‘consultation pre-condition’ added to the necessity doctrine” (Wu, 2008, p. 228). Here, the AB rejected the Panel’s view that the US was obliged to enter into consultations with Antigua before enacting the ban on online gambling (ABR, *US – Gambling*, para. 317). However, this requirement was rejected under the analysis of an existing less trade-restrictive alternative measure. The AB did not find that procedurally a Member would need to have “‘*explored and exhausted*’ all reasonably available WTO-compatible alternatives before adopting its WTO-inconsistent measure” (ibid, para. 315). This is, however, different from what is suggested here. The existence of consensus exemplified by existing international agreements shall primarily help to understand whether there is a certain prevailing common understanding on the necessity of a measure that appropriately addresses a moral concern. While it is not to suggest that a Member must explore all possible ways of settling the dispute through agreement, such agreements that have been found between

Members should receive appropriate weight in the ‘weighing and balancing’ process under the necessity test.

iii. Effects of a Different Mandate of the ECtHR and the WTO?

One may also question whether the mandate of the WTO would actually permit WTO adjudicators to perform the sort of extensive balancing of rights and interest as conducted by the ECtHR when assessing the justification of an interference (Delimatsis, 2011). The mission and mandate of WTO adjudicators and the ECtHR are certainly different. While the WTO is primarily mandated to promote trade liberalization and non-discrimination (Pauwelyn, 2001), the ECtHR is mandated, in particular, to protect human rights as well as democracy (Delimatsis, 2011; Gallagher, 2011). Hence, one may allege also differences between a ‘democratic necessity test’ and the ‘necessity test’ performed by WTO adjudicators. Although a detailed assessment of the development of the WTO’s mandate in recent years is beyond the scope of this thesis, it shall nonetheless be underlined that the AB has clarified on several occasions that the GATT is neither to be read in “clinical isolation from public international law” (ABR, *US – Gasoline*, p. 16), nor that “WTO rules are [...] so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever changing ebb and flow of real facts in real cases in the real world” (ABR, *Japan – Alcoholic Beverages II*, p. 29 – 31). One of the most appropriate occasions to break out of a ‘clinical isolation’ as well as to make ‘reasoned judgements’ considering facts of the ‘real world’ is arguably the ‘weighing and balancing’ under the necessity test within the public morals exception. WTO adjudicators should consider all relevant evidence, notably consensus among Members and agreements reached by Members in other spheres within the international community, in order to do justice to the WTO system being situated amidst rather than pretending to be ‘sealed off’ from public international law.

d. Conclusion: International Consensus as a Useful and Feasible Criterion

Placing the necessity test at the center of the analysis of the public morals exception and considering the approach taken by the ECtHR, is an appropriate way to duly ‘weigh and balance’ all competing interests and relevant evidence instead of *a priori* excluding a certain measure from the scope of public morals. Moreover, it could be shown that the ECtHR’s consensus approach, as evidenced, in particular, in the form of international agreements *vis-à-vis* the necessity of a measure, may serve as an objective criterion. This consensus criterion is able to guide the necessity test regarding a public morals measure in cases where a material contribution is not or cannot be established. It could also be shown that considering this type

of consensus is reconcilable with the possibilities of WTO adjudicators and does not mandatorily impose obligations on Members in case they are not party to an agreement. Ultimately, evidence on consensus can importantly inform what is considered necessary to protect a certain morally relevant objective and thereby delimit the scope of public morals.

4. Limiting the Public Morals Exception under the Chapeau?

Several scholars, notably Delimatsis (2011) and Howse et. al (2015), argue that WTO adjudicators should focus on the chapeau of GATT XX when assessing the public morals exceptions and thereby agree with the AB's approach in *EC – Seal Products*. They argue that the chapeau is enough to keep the public morals exception 'in check' and that this part of the exceptions analysis is the most appropriate point when considering Members' need of flexibility to enact measures that express domestic moral convictions.

It will be argued that the opposite is the case. First, the chapeau is not enough to keep the public morals exception 'in check'. While Delimatsis (2011) argues in favor of a 'strong' chapeau and a sort of 'necessity test light', it is, however, precisely the necessity test where the fine-tuning and calibration of a measure must take place.

Second, it will be shown that the AB's analysis of the exceptions of the EU Seal Regime under the chapeau of GATT XX came too late and that in particular the question of reconcilability of a measure and its integrated exceptions must be addressed earlier, namely under the necessity test. Again, considering international consensus under the necessity test may provide a feasible solution.

a. Why the Chapeau is Not Enough

According to Delimatsis (2011), the case of *China – Audiovisuals* has demonstrated that a focus on the necessity test leads to absurd results. In accepting that state-controlled content review of audiovisual material is a less trade-restrictive alternative under the necessity test, the AB endorsed a less democratic alternative which, according to him, is counter-productive to international trade. Delimatsis (2011) argues that economic studies show that democratic countries promote and expand international trade, which is one of the most important goals of the WTO. However, it may be argued that particularly in the case of China it is not true that the non-democratic Chinese regime hampers its involvement in international trade. Moreover, also the requirement under the necessity test that a measure must be least trade-restrictive should at least be of equally high priority for the WTO to foster international trade. The least trade-restrictive design of a measure can no longer be achieved under the chapeau which shall merely address the non-abusive use of the exceptions.

Although Howse et al. (2015) criticize the application of the chapeau in the *EC – Seal Products* case, they submit that, in general, the chapeau is “an effective juridical technique for ensuring that measures are adopted in good faith [and in a] non-protectionist fashion” (p. 66). This alone would be enough in order to reject the argument that the decision in the *EC – Seal Products* case opened the doors for a wide range of protectionist measures (ibid). Howse et al. (2015) criticize, in particular, the way in which the AB questioned the reconcilability of the exceptions of the EU Seal Regime with the main objective of the measure, namely animal welfare. According to them, this restricts too extremely the possibility of achieving moral pluralism among WTO Members.

It may be argued that precisely the opposite is appropriate under WTO law. In the *EC – Seal Products* case, one may indeed criticize that the AB inflated the chapeau analysis in the way it assessed the reconcilability of main objective and objectives of the exceptions. Yet, it is not the very fact that the AB assessed the relationship between the main objectives and those of the exceptions at all, rather it is the fact that this assessment comes too late, namely under the chapeau and not under the necessity test.

The exceptions, in particular the IC exception, can be seen as an integral part of the measure. Considering Article 3.1 of the Regulation No. 1007/2009 on trade in seal products, stating that “[t]he placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities [...]”, the IC exception is arguably part and parcel of the EU Seal Regime. Given the IC exception, it is questionable in the first place whether the EU Seal Regime actually pursued a “100 per cent protection of seals or the prevention of inhumane hunting” (Perisin, 2013, p. 400). Initially the IC exception did not require Inuit hunts to be conducted in a humane way, and hence a ‘100 per cent’ protection of animal welfare could anyways not have been the objective of the EU Seal Regime (ibid). Instead of addressing this within the necessity of the measure, the AB states within the analysis of the chapeau that it is not convinced of the IC exception “given that ‘IC hunts can cause the very pain and suffering for seals that the EU public is concerned about’” (ABR, *EC – Seal Products*, para. 5.320). Admittedly, the AB has ruled that the identification of a standard for the necessity of a measure, like a ‘100 per cent’ protection, is often not possible in the case of public morals. Hence also the assessment of the necessity of exceptions on the background of a certain standard is difficult.

However, the relationship between the measure and the exception that the AB addresses within the chapeau could also be called the necessity relationship, namely of the measure as a whole, including its exceptions, and the objective of the protection of public morals, here

animal welfare. The EU has now proposed adjustments to its regulation in order to comply with the AB's decision that its measure is incompatible with the requirements of the chapeau (Amending Regulation No 1007/2009, 2015). Apparently in view of reconciling the main objective of animal welfare with the objectives of the IC exception to mitigate the adverse effects on the measure on Inuit communities, the EU has introduced the requirement that also IC hunts must be "conducted in a manner which reduces pain, distress, fear, or other forms of suffering of the animals hunted to the extent possible" (Amending Regulation No 1007/2009, 2015, p. 6). Although the amendment further stresses that all hunts must 'primarily' be for non-commercial purposes, the question arises whether the ban was necessary in the first place, or whether, for example, 'humane killing standards' combined with certain hunting limits would not achieve the same level of animal welfare protection that the EU desires. These questions are, however, part of the necessity analysis and should have been discussed at this point of the exceptions analysis.

It must also be considered that accepting the ban under the necessity test in the first place, and challenging the compliance of the measure with the chapeau, leads to strange outcomes.

Given that under the chapeau a Member can 'rubber-stamp' anything as long as a measure is non-discriminatorily applied, a Member may rectify the non-compliance with the chapeau in making a ban even stricter, i.e. in renouncing on the discriminatory exceptions altogether. This sends a wrong signal to Members enacting measures to protect public morals. It signals that the stricter a ban is designed, the more likely it will be WTO-consistent. The signal that the AB should rather send out is that it is necessary to carefully calibrate and design a measure considering whether a full ban is necessary in the first place or what type of exceptions are truly necessary in view of the aim pursued. In order to comply with the AB's decision in the *EC – Seal Products* case, the EU has now decided to renounce on the MRM exception altogether (Commission proposes adjustments to trade in seal products, 2015). Also in the case of *Australia – Salmon*, for example, compliance was reached by making the ban stronger rather than less trade restrictive (Fitzgerald, 2011).

b. Using Consensus to Remedy the Shortcomings of the Chapeau

In light of the above-mentioned, the approach taken by the ECtHR may also here provide a solution for the problem of taking due account of the exceptions, already within the necessity test. Considering international consensus, particularly in the form of international agreements between countries, also exceptions are commonly part of these agreements.

Taking into account the consistency of a measure with international agreements as one criterion under the 'weighing and balancing' procedure, it may at the same time be assessed

whether the exceptions of a measure are in line with the exceptions designed in the agreement. Two examples may illustrate the advantage of considering international consensus on potential exceptions of a measure.

First, the exceptions for indigenous hunts included in the AIHTS, for instance, are rather narrow. Article 10 AIHTS refers to derogations, which are granted on a case-by-case basis. Under Article 10.1(d) AIHTS, also indigenous communities' interests are addressed, stating that the use of "traditional wooden traps essential for preserving cultural heritage of indigenous people" shall be one exception. Moreover, Article 10.2 AIHTS provides that "[d]erogations granted under paragraph 1 must be accompanied by written reason and conditions." If a Member was to enact a measure including exceptions that differ from these derogations, for example, in making these exceptions even narrower or omitting exceptions for indigenous people altogether, it may be considered in the 'weighing and balancing' of the necessity of a measure that the exceptions are not in line with those of an international agreement. This may count against the necessity of the measure as a whole. As mentioned above for the case of *EC – Seal Products*, broader exceptions than those internationally agreed upon, by contrast, could be considered as evidence of the actual protection sought and thereby influence the decision regarding the necessity of a measure.

Second, one may also ask whether a moral conviction tolerates any exceptions at all. According to Francione (*in Fitzgerald*, 2011), "if something is morally wrong, such as pedophilia [...], then there can't be an exception for 'humane' or 'compassionate' pedophilia (p. 128). This is arguably reflected in the Optional Protocol to the CRC targeting the sale of children, child prostitution and child pornography. Although one may argue that the Optional Protocol to the CRC does not capture all kinds of sexual abuse and cruelty which may be done to children, there are, however, no exceptions or derogations included in this effort to harmonize actions against child pornography. The necessity of a total ban on this kind of pornographic material, without any exceptions, would hence be supported by this agreement evidencing international consensus.

c. Conclusion: Consensus also Extends to the Exceptions of a Measure

To conclude, merely focusing on the 'abusiveness-check' under the chapeau of GATT XX conveys a message to Members which is counter-productive to the achievements of international trade. If Members may comply with trade rules in extending their trade-restrictive measures rather than designing them in the least-restrictive way, the use of painstaking negotiation rounds to reduce trade barriers is put into question. While the chapeau ensures that the exceptions are enacted in 'good faith', also under public morals a measure

must still be fine-tuned in view of achieving least trade-restrictive results. When a Member acts according to what has been negotiated with other countries and where consensus could be found, such consensus also extends to the exceptions of a measure to protect a certain moral issue. In the absence of requiring a risk to that moral issue, or a certain moral standard that a measure shall achieve, reliance on international consensus may provide an objective criterion to be considered in the ‘weighing and balancing’ of the necessity of a trade-restrictive measure, including its exceptions.

VI. Conclusion

The goal of this thesis was to find ways in which the scope and application of the public morals exception of GATT XX(a) could be delimited using insights from the ECtHR’s approach to public morals, the National Security exception of GATT XXI(b), as well as existing scholarship on the topic of public morals.

To this end, this thesis makes four important findings: First, the scope of public morals should not be limited in prescribing what this concept may possibly contain or which ‘kind of’ morals may be invoked. Second, it should be focused on the necessity of a measure to protect the identified public moral objective. It is precisely within the ‘weighing and balancing’ of the necessity test in which WTO adjudicators can make a reasoned judgement considering all interests involved. Focusing on the necessity test and on the least trade-restrictive means to achieve a certain objective will signal to Members that they need to carefully calibrate their measures, including possible exceptions, to comply with WTO rules. Third, considering the ECtHR’s practice, the additional criterion that WTO adjudicators should take into account to delimit the scope of public morals, is whether consensus can be identified on the necessity of a certain measure to protect public morals, notably in the form of targeted international agreements. Fourth, the ‘abusiveness check’ under the chapeau is not enough to keep the public morals exception ‘in check’. Potential exceptions of a measure should better be addressed within the necessity test and in view of existing consensus *vis-à-vis* the exceptions of a measure.

Hence, the ECtHR’s consensus approach on the necessity of a measure, particularly evidenced by international agreements, is found to be a feasible and useful approach to provide an objective criterion under the necessity test of GATT XX(a) which is ultimately able to delimit the scope of the public morals exception.

Along the different steps of this work, it could initially be shown that the AB’s decision in the *EC – Seal Products* dispute, notably the vague criteria used regarding the necessity of a public

morals measure, has left WTO Members with an overly broad leeway to enact public morals measures under GATT XX(a). It could be demonstrated that not requiring the establishment of a risk nor a material contribution to the objective of protecting public morals left a considerable gap in the necessity analysis and made a proper ‘weighing and balancing’ process impossible. Due to this gap, Members’ available discretion under the public morals exception has become almost identical to the discretion of Members under the National Security exception of GATT XXI(b). It is therefore not sufficient under the public morals exception that a Member is itself genuinely convinced of the necessity of a measure to protect public morals, but that it must present certain objective evidence and that the WTO adjudicators are required to objectively review such evidence.

In order to find possible evidence for the necessity of a public morals measure, the approach taken by the ECtHR revealed an important criterion to delimit the scope of morals, namely whether there is consensus *vis-à-vis* the ‘democratic necessity’ of a measure.

Such consensus could emerge in three ways: First, from the legal orders of the Contracting States of the ECHR, i.e. on a European level, second, from domestic laws of other states on an international level, and third, from international agreements as evidence of an international consensus. It could also be shown that the ECtHR does not seek a vague, blanket consensus on a certain moral topic but rather seeks targeted consensus on the concrete democratic necessity of the measure in question. Such consensus is considered by the ECtHR in a thorough process of balancing the necessity of the applied means to the aims sought. Notably, the ECtHR does not attempt to limit the application of the public morals exception by prescribing a definition of what is ‘moral’ or by deciding on the content of a moral justification that a state invokes. Thereby, the consensus approach offers a solution to delimit the scope of public morals, without limiting a Contracting State in what it may consider ‘moral’.

Before applying these insights to the public morals analysis of GATT XX(a), suggestions from WTO scholarship on how to delimit the scope public morals were considered. These suggestions focused either on the definition and content of morals, or on the chapeau of GATT XX. The offered suggestions *vis-à-vis* the definition of public morals appeared to raise more questions than they could possibly answer and could therefore not be considered as convincing methods to delimit the scope of public morals. In accordance with the ECtHR’s approach, WTO adjudicators should hence not attempt to delimit the scope of public morals in

prescribing what this concept may possibly contain, as they will never be able to answer all philosophical questions on what is ‘moral’ and what is not. Merely focussing on the chapeau of GATT XX eventually leads to counter-productive outcomes and fails to signal Members that their measures must not only be enacted in ‘good faith’ but also be least trade-restrictive in order to strengthen and not weaken the WTO system.

Following the findings under the National Security exception as well as under the ECtHR’s analysis, this thesis therefore focused on identifying tangible criteria for the analysis of the necessity test of GATT XX(a). Regarding the requirements for a public morals measure to be necessary, it was assessed whether a classification of measures into ‘instrumental’ and ‘non-instrumental’ was a useful differentiation. It could, however, be demonstrated that this differentiation increases uncertainties regarding *how* to use and *who* may use the public morals exception. This approach also causes an unacceptable imbalance in the analysis of the general exceptions of GATT XX.

By contrast, in applying the ECtHR’s consensus approach to the public morals exception of GATT XX(a), it could be shown that important guidance can be found in considering targeted international agreements as evidence of international consensus for the necessity of measures under GATT XX(a). While the analysis of the legal orders of all WTO Members to find international consensus may be impractical, the consideration of international agreements as a ‘shortcut’ of international consensus, proved however, feasible.

Two aspects deserve mention regarding potential doubts on whether findings under a ‘democratic necessity test’ of the ECtHR may have implications on the ‘necessity test’ of the WTO, which does not have the mandate to harmonize democratic systems.

First, this approach does, in fact, not seek to harmonize democratic values, but to find evidence on what Members consider necessary to address issues for which they cannot provide other objective evidence *vis-à-vis* their necessity. In this way, Members are even offered a choice to either support the necessity of a public morals measure through evidence regarding a material contribution or to provide evidence that the public morals measure, in fact, complies with those measures agreed upon with other states. This approach does not limit Members’ ‘right to regulate’, but it arguably gives proper weight and attention to agreements that have been negotiated to align efforts for protecting matters of morality. Second, in considering other sources of international law, such as international agreements on necessary measures, the WTO would act consistently with its affirmation that it is not isolated

from public international law and that it considers all necessary evidence in making a reasoned judgement.

The consensus approach shall particularly not suggest that Members will be bound by international agreements to which they have not consented. Yet, international agreements as a form of consensus may be considered as evidence to shed light on what is necessary to protect public morals. It must also be acknowledged that a panel cannot be obliged to consider international consensus, as it is free to choose the evidence that it deems informative. A panel may, however, find in this approach a tangible criterion that lends substance to its ‘weighing and balancing’ analysis to ultimately decide which measures would fall under the scope of public morals and which measures would not.

28,535 words

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