

TACKLING DIVERSITY INSIDE WTO:
GATT MORAL CLAUSE AFTER *COLOMBIA – TEXTILES*

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After lying dormant for more than five decades, WTO 'public morals' exceptions have been more frequently invoked in recent times. During the last fifteen years, the number of disputes settled through the application of GATT 1994 Art. XX(a) and the homologue GATS Art. XIV has gone from zero to four – and it is likely to keep growing. This could be partially due to WTO expanding membership which facilitates trade connections between countries with different, sometimes opposite cultural and social backgrounds. The interpretation and application of the moral clause entail difficult challenges for WTO Panels and for the Appellate Body (AB). They are called to find a balance not only between trade and non-trade values, but also and most of all between WTO Members' regulatory autonomy and their standard of review. However, WTO case law shows an ongoing struggle to find the best way to accomplish this task. Moving on from the analysis of the Colombia – Textiles dispute, this article will discuss the judicial application of the 'moral clause'. It will compare Colombia – Textiles with the former case law, paying particular attention to some crucial aspects of the AB's legal reasoning in Colombia – Textiles and their potential implications for future case law.

Keywords: WTO, Art. XX GATT, public morals, standard of review

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I. INTRODUCTION

After both Liberia and Afghanistan successfully negotiated their accession terms in July 2016,¹ the World Trade Organization (WTO) now numbers a total of 164 Members, while several other countries are expected to join in forthcoming years.² During the last few decades, the WTO has thus developed into a complex mosaic of heterogeneous countries, which include a variety of cultures, religions, and customs.

The growing diversity inside the WTO gives rise to a challenge of the highest significance: given that a State may restrict trade in order to protect social, cultural or religious preferences, how should regulatory autonomy be balanced with core WTO substantive obligations, such as the Most-Favoured-Nation clause and the National-Treatment clause? To put it in other terms, where should the line be drawn between policy choices by Member States and the mere violation of trade liberalization commitments *vis-à-vis* the other Members?

WTO Members and adjudicating bodies have at their disposal the general exceptions enshrined in Article XX GATT to draw such a line. This provision allows WTO Members to pursue national policy objectives through trade restrictive measures that would otherwise be inconsistent with GATT, provided that the measures at stake comply with the requirements laid down by the Article.³ The provision sets out an exhaustive list of

¹ See respectively, <https://www.wto.org/english/news_e/news16_e/acc_lbr_14jul16_e.htm> and <https://www.wto.org/english/news_e/news16_e/acc_afg_29jul16_e.htm> accessed 1 October 2016.

² For a glance of the countries currently negotiating their accession, see <https://www.wto.org/english/thewto_e/countries_e/org6_map_e.htm> accessed 1 October 2016.

³ See General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round, 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994). Also GATS provides for the same exceptions in Art. XIV: see General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement

objectives from (a) to (j) that may justify the enforcement of a policy deviating from a Member's obligations. In particular, for the purpose of this Article, paragraph (a) states that a *prima facie* protectionist measure may be justified if 'necessary to protect public morals'. Referred to as the 'moral clause', this provision allows cultural, religious and social considerations of a geographically-localized nature to be balanced against the commitments of free trade.⁴

The last of the four disputes settled applying the moral clause is *Colombia – Textiles*.⁵ It should be noted that these four episodes only occurred during the last fifteen years, whereas WTO Members have been familiar with some of the other exceptions since the GATT era. For instance, they have frequently invoked paragraphs (b), (d) and (g) in disputes concerning environmental protection.⁶ The first paragraph justifies trade-restrictive measures necessary

Establishing the World Trade Organization, Annex 1B, 284 (1999), Legal Instruments – Results of the Uruguay Round, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).

⁴ See *ex multis*, Jeremy C Marwell, 'Trade and Morality: the WTO Public Morals Exception after *Gambling*' (2006) 81 New York University Law Review 816.

⁵ See *US – Gambling* (2003); *China – Audiovisual Products* (2007); *EC – Seal Products* (2009).

⁶ See eg *Canada – Herring and Salmon* (1986); *Thailand – Cigarettes* (1989); *Tuna – Dolphin I and II* (1991 and 1992); *US – Car Taxes* (1994); *US – Gasoline* (1995); *US – Shrimps* (1997); *EC – Asbestos* (1998); *Brazil – Retreated Tyres* (2005); *China – Raw Materials* (2009); *China – Rare Earths* (2012). As above, the dates refer to the year in which consultations were requested. Since this body of decisions is now well established, the relevant literature on the issue is now vast: see eg Manjiao Chi, 'Exhaustible Natural Resource' in *WTO Law: Article XX (g) GATT Disputes and Their Implications* (2014) *Journal of World Trade* 939; Arwel Davies, 'Interpreting the Chapeau of GATT Article XX in Light of the New Approach in *Brazil – Tyres*' (2009) 43 *Journal of World Trade* 507; Lorenzo Schiano di Pepe, 'The World Trade Organisation and the Protection of the Natural Environment: Recent Trends in the Interpretation of GATT Article XX(b) and (g) GATT' (2000) *Transnational Law & Contemporary Problems* 272; Ilaria Espa, 'The Appellate Body Approach to the Applicability of Article XX GATT In the Light of *China - Raw Materials: A Missed Opportunity?*' (2012) *Journal of World Trade* 1399; Robert Howse, 'The Appellate Body Rulings in the *Shrimp/Turtle* Case: A New Legal Baseline for the Trade and Environment Debate' (2002) *Columbia Journal of Environmental Law* 491.

to protect 'human, animal, or plant life or health'; the second addresses measures necessary to secure compliance with laws or regulations that are not inconsistent with the GATT; finally, the third refers to measures related to the conservation of exhaustible natural resources.⁷ The widening WTO membership could have played a role in the growing of trade-morality conflicts among WTO Members, bringing together States with opposite socioeconomic compositions and cultural views.⁸

The traditional interpretation of Art. XX consists of a two-tier test: the measure must first be justified under one of the Art. XX exceptions, before being tested against the *chapeau* of Art. XX so as to verify that the measure is not applied in a manner which would constitute 'a means of arbitrary or unjustifiable discrimination'.⁹ This judicial test was developed and applied for the first time by the AB in the case *US – Gasoline* and it has never been altered by the subsequent decisions.¹⁰ Subsequent case law even bolstered this interpretation. In particular, the AB in *US – Shrimps* claimed that 'the sequence of steps indicated above in the analysis of a claim of justification under Art. XX GATT reflects, not inadvertence or random choice, but rather the *fundamental structure and logic* of Art. XX GATT'.¹¹

⁷ For an overview of Art. XX exceptions and the relative case law, see Petros C Mavroidis, George A Bermann and Mark Wu, *The Law of the World Trade Organization (WTO) – Documents, Cases & Analysis* (WEST: American Casebook Series 2010) 692-709.

⁸ See Marwell (n 4) at 816; Mark Wu, 'Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Moral Clause Doctrine' (2008) 33 *The Yale Journal of International Law* 215.

⁹ As Art. XX *chapeau* is common to all the subparagraphs, it has been frequently applied and its interpretation is already consolidated. Among the most relevant doctrine concerning Art. XX *chapeau*, see Lorand Bartels, 'Current Developments: The Chapeau of the General Exceptions in the WTO GATT and GATS Agreement: A Reconstruction' (2015) (109)(1) *The American Journal of International Law* 95; Arwel (n 6) 518-521; Petros C Mavroidis, *Trade in Goods: Second Edition* (Oxford University Press 2012), 359ff; Mavroidis, Bermann and Wu (n 7) 685-692, 709-718.

¹⁰ *US – Gasoline*, Report of the Appellate Body, WT/DS2/AB/R, 29 April 1996, at 22.

¹¹ See *US – Shrimp*, Report of the Appellate Body, WT/DS58/AB/R, 12/10/1998, para 119 (emphasis added). The Panel in *China – Raw Materials* supported this approach, maintaining that the legal consequence of the two-tier test is that, unless

Moreover, when this test is applied to the moral clause, the first tier of the test is divided into two additional steps. First, one needs to assess whether the measure is 'designed to protect public morals'; secondly, whether the measure is 'necessary to protect public morals', i.e. not disproportionately trade restrictive.¹² In addition, both the 'design' and the 'necessity' steps are themselves divided into two tiers. With regard to the design of the measure, WTO judicial bodies need to verify whether the policy objective concerns the protection of public morals as defined and applied by a regulating Member 'in its territory, according to its own system and scale of values'.¹³ Then, they need to assess whether its design and structure allow the measure to effectively protect public morals, i.e. whether there is a *causal relationship* between the objective and the measure.¹⁴ When assessing its necessity, in the first place a Panel needs to go through a 'process of weighing and balancing a series of factors', where the importance of the value at stake is balanced against the measure's trade-restrictiveness.¹⁵ In the second place, it needs to ascertain whether a less trade-restrictive measure could achieve the same level of protection pursued by the responding State, without entailing unreasonably higher enforcement costs.¹⁶

compliance with a subparagraph has been demonstrated, the test for the consistency of the measure with the *chapeau* is even superfluous: see *China – Raw Materials*, Report of the Panel, WT/DS394/R, WT/DS395/R, WT/DS398/R, 5/07/2011, para 7.469.

¹² *EC – Seal Products*, Report of the Appellate Body, WT/DS400/AB/R, WT/DS401/AB/R, 22/05/2014, para 5.169; *Colombia – Textiles*, Report of the Appellate Body, WT/DS461/AB/R, 07/06/2016, para 5.67.

¹³ *EC – Seal Products*, Report of the Panel, WT/DS400/R, WT/DS401/R, 25/11/2013, paras 7.380-7.831.

¹⁴ *Colombia – Textiles*, Report of the Panel, WT/DS461/R, 27/11/2015 paras 7.295, 7.297, 7.340 ff. See the cited Report for further references to previous case law. Among scholars, see eg Mads Andenas and Stefan Zleptnig, 'Proportionality and Balancing in WTO Law: A Comparative Perspective' (2007) 20 *Cambridge Review of International Affairs* 71, 74ff.

¹⁵ *Korea – Various Measures on Beef*, Report of the Appellate Body, WT/DS161/AB/R, 11/12/2000, para 164.

¹⁶ This part of the test was developed by the Panel in *US – Section 337 of the Tariff Act 1930*: see *US – Section 337 of the Tariff Act 1930*, Report of the Panel, L/6439 - 36S/345, 7/11/1989, para 5.26. It was later improved by the Panel in *US – Gasoline*: see *US – Gasoline*, Report of the Panel, WT/DS2/R, 29/01/1996, paras 6.20ff.

Colombia – Textiles represents the ultimate application of the judicial test. After a brief case summary, Part I of this article will try to define the notion of 'public morals' and explain how its burden of proof may be satisfied. Part II will then focus on the 'design and structure' of the measure and the 'necessity' test of Art. XX(a), putting the spotlight on the AB's legal reasoning in *Colombia – Textiles*. The latter will be also compared to the former case law, in order to highlight the points of convergence and divergence. In particular, when applying the traditional judicial test, the AB tried to clarify some of its crucial aspects. However, the AB's approach opens the door to more questions than it answers. In particular, the AB's interpretation of the necessity test seems affected by considerable flaws in logic. This article will thus try to shed light on the potential implications of the AB's conclusions, and also to propose some interpretative adjustments to the traditional paradigm.

II. COLOMBIA – TEXTILES: CASE SUMMARY

After consultations with Colombia ended unsuccessfully, on 19 August 2013 Panama requested the Dispute Settlement Body to establish a Panel with respect to the imposition by Colombia of a compound tariff affecting the importation of textiles, apparel and footwear.¹⁷ According to Panama's allegations, due to the tariff's composition and the values applied, the measure exceeded the levels bound in Colombia's Schedule of Concessions with respect to the relevant products. Consequently, Panama complained that Art. II 1(a) GATT had been violated.¹⁸ According to Art. II GATT, a WTO Member must grant to all other Members a treatment no less favourable than what has been agreed under its own goods schedule. This requires the application of ordinary customs duties not higher than those provided in such schedules. The Panel agreed with Panama, and thus found the measure in violation of Art. II 1 GATT.¹⁹

¹⁷ *Colombia – Textiles*, Request for the establishment of a panel by Panama, WT/461DS/3, 20/08/2013.

¹⁸ *Ibid*; For a deeper understanding of how the compound tariff would be applied by Colombia and how it would result in a violation of Art. II:1(a) and (b) according to Panama, see *Colombia – Textiles*, Report of the Panel (n 14) paras 7.42-7.54.

¹⁹ *Colombia – Textiles*, Report of the Panel, (n 14) para 7.189.

Colombia, for its part, invoked *inter alia* as a defense the public moral exception under Art. XX(a) GATT. It argued that the compound tariff was necessary to prevent money laundering, one of the most profitable sources of financing for drug traffickers and organized criminal groups.²⁰ Money laundering, drug trafficking and terrorism were activities regarded as illegal not only in the Colombian society, but also by the international community. Through the imposition of a heavier tax on imports below a certain price threshold, the compound tariff aimed to discourage imports at artificially low prices and thus it was supposed to prevent laundering.²¹ Setting prices too low would trigger the application of the compound tariff, which would make them soar to the level of ordinary market prices. Therefore, Colombia maintained that its measure was related to 'standards of right and wrong conduct', which corresponds with the definition of 'public morals' the Panel gave in *US – Gambling*.²²

The Panel, however, did not find the moral clause applicable to the measure at stake, as it concluded that Colombia had failed to demonstrate not only that the compound tariff was designed to combat money laundering, but also that it was necessary to achieve the intended aim.²³ Moreover, the Panel found that the compound tariff constituted a means of arbitrary and unjustifiable discrimination under Art. XX *chapeau*, since Colombia was not able to justify the exceptions provided by its tariff regulation.²⁴

The Panel thus applied the traditional two-tier test to assess the compatibility of the challenged measure with the moral clause. The AB then confirmed the Panel's findings adopting the same paradigm, even if its legal

²⁰ *Colombia – Textiles*, Report of the Panel (n 14) paras 7.195 ff.

²¹ *Ibid*, paras 7.351 – 7.352.

²² *Ibid*, paras 7.205-7.206; *US – Gambling*, Report of the Panel, WT/DS285/R, 10/11/2004, para 6.465.

²³ *Colombia – Textiles*, Report of the Panel (n 14) paras 7.440 and 7.470.

²⁴ *Ibid*, paras 7.591ff. For example, the compound tariff is not applicable to imports originating from countries which have signed a free trade agreement with Colombia. The AB did not scrutinise the compound tariff under Art. XX *chapeau*, as it did not comply with subparagraph(a) requirements, and therefore the second step of the test was deemed unnecessary. See *Colombia – Textiles*, Report of the Appellate Body, (n 12), para 6.11.

reasoning diverged from the Panel's in some respects.²⁵ The interpretation and application of Art. XX GATT judicial test substantially followed the previous case law. However, the AB tried to clarify some aspects of the first step of the test. Due to their possible influence on future case law on 'public morals', they will be analysed in depth in the following sections, after a preliminary clarification of the notion of 'public morals'.

III. 'PUBLIC MORALS': IN SEARCH OF A DEFINITION

1. *The Definition of 'Public Morals'*

'Public morals' was defined for the first time by the Panel in *US – Gambling* as 'standards of right and wrong conduct maintained by or on behalf of a community or nation'.²⁶ The dispute concerned a US ban on the cross-border supply of gambling and betting services. The US invoked Art. XIV(a) GATS, maintaining that online gambling could benefit organised crime and affect the behaviour of children and compulsive gamblers.²⁷ Besides developing a definition, the Panel maintained that 'the content of [public morals] can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values'.²⁸ Therefore, WTO Members 'should be given some scope to define and apply for themselves [the concept of public morals] in their respective territories, according to their own systems and scales of values'.²⁹ First the AB in *US – Gambling*, then the subsequent case law confirmed this definition, making *US – Gambling* a leading case.³⁰ In *Colombia – Textiles* the Panel explicitly recognized 'the

²⁵ See *infra*.

²⁶ *US – Gambling*, Report of the Panel (n 22) para 6.463. The Panel resorted to the definition given by the *Oxford English Dictionary*, in order to interpret the notion of 'public morals' according to Art. 31.1 of the *Vienna Convention of the Law of Treaties* (hereinafter VCLT).

²⁷ *US – Gambling*, Report of the Panel (n 22) para 3.211.

²⁸ *Ibid*, para 6.461.

²⁹ *Ibid*.

³⁰ See *US – Gambling*, Report of the Appellate Body, WT/DS285/AB/R, 07/04/2005, para 296. *China – Audiovisual Products*, Report of the Panel, WT/DS363/R, 12/08/2009, para 7.759; *EC – Seal Products*, Report of the Panel (n 13) para 7.382, expanding the *US – Gambling* definition of 'public morals' also to Art. 2.2 *Agreement*

freedom of WTO members to define their own concept of public morals, in the light of factors such as the social, cultural, ethical and religious values prevailing in a society at a given moment in time'.³¹ It thus confirmed the definition given in *US – Gambling*.

In this case law, WTO adjudicators undoubtedly aimed to grant a high degree of deference to national authorities in such a sensitive and uncertain matter like 'public morals'. What amounts to right or wrong conduct changes from one country to another, and it is often the result of cultural and political trade-offs. An international court thus finds itself ill-equipped to substantively scrutinise what may constitute 'public morals'. Indeed, it lacks democratic legitimacy,³² while national courts have more awareness of national hierarchies of values as well as fact-finding expertise.³³

Panels and the AB have thus considered applicable a non-intrusive standard of review for the specific assessment of what constitutes 'public morals'. In the context of international law, standard of review may be understood as the degree of deference or discretion that an international court accords to national legislators.³⁴ In other terms, it expresses the willingness (or unwillingness) of an international court to substitute their assessments for

on Technical Barriers to Trade (hereinafter *TBT Agreement*), 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, 1868 UNTS 120.

³¹ *Colombia – Textiles*, Report of the Panel (n 14), para 7.338.

³² Robert Howse and Kalypso Nicolaidis, 'Legitimacy through 'Higher Law'? Why Constitutionalising WTO Is a Step Too Far', in Thomas Cottier and Petros C Mavroidis (eds), *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO* (University of Michigan Press 2003) 307, 332ff.; Michael Ioannidis, 'Beyond the Standard of Review: Deference Criteria in WTO Law and the Case for a Procedural Approach', in Lukasz Gruszczynski and Wouter Werner (eds.), *Deference in International Courts and Tribunals* (Oxford University Press 2014), 101; Andreas von Staden, 'The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review' (2012) 10 *International Journal of Constitutional Law* 1023.

³³ Andrew T Guzman, 'Determining the Appropriate Standard of Review in WTO Disputes' (2009) 42 *Cornell International Law Journal* 45, 64-69.

³⁴ Sungjoon Cho, 'Global Constitutional Lawmaking' (2010) 31 *University of Pennsylvania Journal of International Law* 621, 643-644; Claus-Dieter Ehlermann and Nicolas Lockhart, 'Standard of Review in WTO Law', (2004) 7 *Journal of International Economic Law* 491, 493.

that of national authorities.³⁵ It is an interpretative tool that comes into question every time international tribunals are called to examine whether a domestic measure complies with international law. It may thus address both questions of fact and questions of law, depending on the issue the adjudicating body is facing.³⁶ To quote the AB in *EC – Hormones*, the standard of review affects 'the balance established [...] between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competence retained by the Members for themselves',³⁷ thus allocating the power to decide upon factual and legal issues.

While in the context of public morals a high degree of deference may seem inevitable, WTO adjudicating bodies have also taken the direction of deferential review into other fields. An example could be that of the assessment of scientific evidence in the recent case law on risk regulation under both GATT and the *Agreement on Technical Barriers to Trade* (TBT Agreement).³⁸ In these disputes the AB focused on the reasonableness and coherence of the regulatory choice under scrutiny rather than verifying the correctness of the scientific data.³⁹ This approach allowed them to be more respectful of domestic policies, since a measure may validly be based on

³⁵ Ioannidis (n 32) 94.

³⁶ See Matthias Oesch, 'Standards of Review in WTO Dispute Resolution' (2003) 6 *Journal of International Economic Law* 635, 639ff.

³⁷ *EC – Hormones*, Report of the Appellate Body, WT/DS26/AB/R, 16/01/1998, paras 115-117. According to the AB, the intensity of the applicable standard of review may vary between the two opposite poles of '*de novo* review' and 'total deference'. The former allows a Panel to completely substitute its own findings for those of the national authority and to arrive to a different factual or legal conclusion. The latter means that judicial review should not substantially interfere with national authorities findings of facts, legal interpretation or ultimate decisions, but contrariwise should be limited to the formal examination of whether procedural requirements for the adoption of a measure were complied with. See also Oesch (n 36) 638.

³⁸ *Agreement on Technical Barriers to Trade* (TBT Agreement), 1868 U.N.T.S. 120.

³⁹ See eg, *EC – Asbestos*, Report of the Appellate Body, WT/DS135/AB/R, 5/04/2001, para 168; *Brazil – Retreated Tyres*, Report of the Panel, WT/DS332/R, 17/12/2007, paras 7.61, 7.68; *US – Tuna II (Mexico)*, Report of the Panel, WT/DS381/R, 13/06/2012, para 7.504.

minority scientific opinions rather than mainstream science.⁴⁰ Given that deference is necessary in a field that may rely on scientific objectivity, *a fortiori* it may be appropriate when it comes to morality-related disputes.

Other international courts have proved to be highly deferential as well. For instance, it is worth mentioning the case of the European Court of Human Rights' (ECtHR) well-established doctrine of the margin of appreciation. According to this, national authorities are better placed than international judges to assess local values and their application.⁴¹ Moreover, the Court of Justice of the European Union (CJEU) applied a similar standard of review when confronted with national risk regulation policies. In particular, it recognized that public institutions should enjoy a broad level of discretion in defining the level of protection pursued and the 'appropriate means of action'.⁴²

Considering the shape the WTO has taken hitherto, this unilateralist approach may well be said to be the only sustainable solution, as it allows

⁴⁰ Lukasz Gruszczynski and Valentina Vadi, 'Standard of Review and Scientific Evidence in WTO Law and International Investment Arbitration: Converging Parallels?', in Gruszczynski and Werner (n 32) 165ff.

⁴¹ See *Handyside v UK* 1 EHRR 737 (1976), para 48. A wide number of scholars have dealt with the margin of appreciation doctrine: see eg, Janneke Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 *European Law Journal* 80; Jan Kratochvíl, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2011) 29 *Netherlands Quarterly of Human Rights* 324; Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012); George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 *Oxford Journal of Legal Studies* 705; Yuval Shany, 'Towards a General Margin of Appreciation Doctrine in International Law' (2005) 16 *European Journal of International Law* 926.

⁴² Case C-333/08 *Commission v France* EU:C:2010:44, paras 85-86; Case C-192/01 *Commission v Denmark* EU:C:2003:492, paras 42-43. See Alberto Alemanno, *Trade in Food—Regulatory and Judicial Approaches in the EC and the WTO* (Cameron May 2007), 325ff; Alberto Alemanno, 'EU Risk Regulation and Science: The Role of Experts in Decision-making and Judicial Review' in Ellen Vos (ed), *European Risk Governance—Its Science, its Inclusiveness and its Effectiveness* (Mannheim: Connex Report Series No. 6, 2008) 59-63; Patrycja Dąbrowska-Kłosińska, 'Risk, Precaution and Scientific Complexity before the Court of Justice of the European Union', in Gruszczynski and Werner (n 32) 198ff.

Members with minority views to undertake trade liberalization commitments without questioning their religious, cultural and ethnic specificity. Moreover, this approach appears more suitable with the negative integration paradigm on which WTO is premised. As long as WTO Members do not discriminate between imported and domestically produced goods or services of the same kind, they have a right to freely regulate in accordance with national public policy choices.⁴³ Imposing *de facto* a homogeneous definition of 'public morals' on Member States would thus not only be illegitimate, but also superfluous, given that the WTO's goal is ensuring non-discrimination and equal treatment in trade relations, rather than building a community based on cultural and religious homogeneity.⁴⁴

Moreover, as scholars have suggested, a less intrusive scrutiny of what amounts to 'public morals' may be balanced out by a stringent one in the subsequent steps of the test, namely the necessity analysis and the application of Art. XX *chapeau*.⁴⁵ The case law seems to have already found this equilibrium. In the four disputes which have occurred hitherto, the objective pursued by the measures at stake was always recognized as a matter of 'public morals'. However, a measure was never found justifiable under Art. XX(a) GATT. In *China – Audiovisual Products* and in *Colombia – Textiles* the measure was not found 'necessary to protect public morals', whereas in *US – Gambling* and in *EC – Seal Products* it eventually failed the scrutiny under Art. XX *chapeau*.⁴⁶ A general mistrust of WTO Members seems thus to underlie these judicial decisions, as the adjudicating bodies, while according high deference to member States' moral concerns, eventually prevent them from enforcing measures apt to protect those values.

⁴³ See *China – Audiovisual Products*, Report of the Appellate Body, WT/DS363/AB/R, 21/12/2009, para 222.

⁴⁴ Gisele Kapterian, 'A Critique of the WTO Jurisprudence on 'Necessity'' (2010) 59 *International and Comparative Law Quarterly* 89, 98.

⁴⁵ See Marwell (n 4) 827ff.

⁴⁶ *China – Audiovisual Products*, Report of the Appellate Body (n 43) paras 336f; *Colombia – Textiles*, Report of the Appellate Body (n 12) para 5.116; *US – Gambling*, Report of the Appellate Body (n 30) para 372; *EC – Seal Products*, Report of the Appellate Body (n 12) para 5.339.

2. Proof of 'Public Morals'

However, deference is directly proportional to the risk of national policies deviating from international law commitments. Were WTO adjudicating bodies to omit any kind of scrutiny, WTO Members may easily disguise protectionist measures behind Art. XX(a) GATT. In order to avoid such a drift, scholars have rightly suggested that Members invoking the moral clause should produce appropriate evidence that the measure's aim is an issue of moral significance for their own citizens.⁴⁷ Indeed, even if a Panel may not substitute its assessments for those of domestic decision-makers, nothing prevents it from reviewing whether States have exercised their discretion in *bona fide* and in a reasonable way.⁴⁸ In other words, an international tribunal may certainly not claim to be the authentic interpreter of a Member State's *Volksgeist*, imposing its own scale of values. Nonetheless, this should not obviate the need for sufficient evidence to support a particular claim.

In the light of the *US – Gambling* doctrine, relevant evidence may stem exclusively from WTO Members' domestic *fora*. The international community's consensus with regard to an issue of 'public morals' is thus not necessary to prove that the measure being challenged complies with Art. XX(a) GATT.⁴⁹ This of course does not mean that adjudicating bodies may

⁴⁷ This approach was developed by Marwell (n 4). According to Marwell, evidence could include historical practice, legislative history of the measure, the country's international commitments previously undertaken, contemporary public opinion polls, results of political referenda, statements of accredited religious leaders. See also Tamara Perišin, 'Is the EU Seal Products Regulation a Sealed Deal? EU and WTO Challenges' (2013) 62 *International and Comparative Law Quarterly* 373, 394f: 'WTO generally does not require countries to have the same views on issues [...] but it has to be proven that the protected interest corresponds to the EU's 'public morals''.

⁴⁸ Shany (n 41) 910.

⁴⁹ In contrast, some scholars have argued that Art. XX(a) may be invoked to protect moral concerns that are shared universally, rather than crafted unilaterally within national borders. Countries would thus be required to show that the public moral is shared widely by a group of similarly situated countries. Among the major advocates of this approach, known as 'universalism' or 'transnationalism', see Miguel A Gonzalez, 'Trade and Morality: Preserving 'Public Morals' Without Sacrificing the Global Economy' (2006) 39 *Vanderbilt Journal of International Law* 939; Christian Häberli, 'Seals and the Need for More Deference to Vienna by

not take into consideration moral concerns expressed by the international community, but rather that they may use these trends only as arguments *ad abundantiam* when assessing the legitimacy of a trade restriction on moral grounds. In other words, on the one hand, a common understanding of a moral issue may reduce the risk of a hidden protectionist measure. On the other hand, its absence may not lead by itself to the failure of the justification under Art. XX(a) GATT.⁵⁰

Since *US – Gambling*, in WTO case law the country invoking the general exceptions was always asked to prove that the moral concern at issue was felt by its citizens, and that it was the policy objective of the measure being challenged.⁵¹ In *Colombia – Textiles*, the Panel relied on a wide range of evidence to conclude that combating money laundering was a policy objective designed to protect 'public morals' in Colombia. In particular, the Panel took into consideration both national pieces of legislation and international instruments ratified by Colombia, showing Colombia's commitment to fighting against money laundering.⁵²

The Panel's reliance on evidence stemming from the international forum should not be deemed at odds with the unilateralist paradigm mentioned before. Indeed, the ratification of international instruments may represent the projection into foreign affairs of an internal moral concern. Therefore, a Member State's international commitments may constitute relevant evidence of what amounts to 'public morals' in its society. They may also

WTO Adjudicators' (2014) Fourth Biennial Global Conference of the Society of International Economic Law (SIEL) Working Paper No 22 <<http://ssrn.com/abstract=2463680>> accessed 12 October 2016; Wu (n 7) 238-242.

⁵⁰ See Moonhawk Kim, 'Disguised Protectionism and Linkages to the GATT/WTO' (2012) 64 *World Politics* 426, 435; Tyler M Smith, 'Much Needed Reform in the Real of Public Morals: a Proposed Addition to the GATT Article XX(a) 'Public Morals' Framework Resulting from *China – Audiovisual*' (2011) 19 *Cardozo Journal of International and Comparative Law* 733, 762; Nicolas F Diebold, 'The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole' (2007) 11 *Journal of International Economic Law* 43, 63-64.

⁵¹ See *US – Gambling*, Report of the Panel (n 22), paras 6.474ff; *China – Audiovisual Products*, Report of the Panel (n 30) para 7.751; *EC – Seal Products*, Report of the Panel (n 13) paras 7.386 ff.

⁵² *Colombia – Textiles*, Report of the Panel (n 14) paras 7.335-7.337.

prove that the international community shares the same values. However, a coherent interpretation of the *US – Gambling* doctrine requires that international consensus should be *stricto sensu* unnecessary, as I have tried to explain above. Nonetheless, in its submissions Colombia frequently stressed that the international community supported its moral concerns regarding illicit trade, drug trafficking and money laundering in particular.⁵³ It expressly mentioned treaties and conventions it had ratified as evidence that 'money laundering [was] conduct deemed illegal by the international community'.⁵⁴

Yet Colombia was not the first State to adopt this line of defense. In *China – Audiovisual Products*, the US accused China of restricting market access for foreign audiovisual entertainment products and for foreign suppliers seeking to engage in the distribution of those products.⁵⁵ Invoking Art. XX(a) GATT, China mentioned UNESCO Universal Declaration on Cultural Diversity to show that the international community deemed cultural products capable of having a major impact on public morals.⁵⁶ However, this trend appears even clearer in *EC – Seal Products*. The dispute was about an import ban imposed by the EU on seal products. The EU justified it on the ground that some hunting and killing methods adopted in certain States (mainly Canada and Norway) had raised moral concerns among the EU population due to their cruelty.⁵⁷ In addition to pieces of EU legislation, the EU referred to recommendations of the Office International des Epizooties (Guiding Principles for Animal Welfare), other WTO Members' measures on seal products based on moral grounds, as well as the 'philosophy of animal welfare' and its connection to 'a long-established tradition of moral thought' worldwide.⁵⁸

This trend may thus reflect a general mistrust among WTO Members towards the application of the *US – Gambling* doctrine. Indeed, the arguments mentioned should be only *ad abundantiam*, but instead they played

⁵³ *Colombia – Textiles*, Report of the Panel (n 14) paras 7.63, 7.89, 7.94, 7.205, 7.332, 7.509.

⁵⁴ *Ibid*, para 7.98.

⁵⁵ *China – Audiovisual Products*, Report of the Panel (n 30), paras 2.iff.

⁵⁶ *Ibid*, para 7.751.

⁵⁷ *EC – Seal Products*, Report of the Panel (n 13) paras 2.iff.

⁵⁸ *Ibid*, para 7.408.

a prominent role in WTO Members' lines of defence. Even though the AB interpretation of 'public morals' is meant to enhance regulatory autonomy, it seems that Member States would rather rely on evidence stemming from the international forum, due to its highly persuasive value. This could be Member States' response to the reciprocal lack of confidence the judicial bodies have implicitly expressed hitherto, as I have explained above.

In *Colombia – Textiles* the conclusion that fighting money laundering was an issue of 'public morals' was rather straightforward, even if the international community had not shared the same view. There was a well-established line of legislation tackling the issue, and most of all money laundering was punished as a crime in Colombia.⁵⁹ Therefore, it referred by definition to 'standards of right and wrong conduct', as the WTO interpretation of 'public morals' requires. Moreover, in *US – Gambling* WTO adjudicating bodies had already recognised that anti-money laundering policies may legitimately justify trade restrictions.⁶⁰

However, it is worth noting that all the evidence submitted by Colombia was of a legislative kind, either of national or international origins. The Panel thus decided on this exclusive basis.⁶¹ From a general point of view, national legislation may assure a high degree of certainty, as its evidentiary value is less volatile and questionable compared to that of opinion polls or statements by religious leaders, for example.⁶² However, WTO adjudicating bodies should handle this kind of evidence with care.

⁵⁹ *Colombia – Textiles*, Report of the Panel (n 14) para 7.205.

⁶⁰ *US – Gambling*, Report of the Panel (n 22) para 6.492. See also *US – Gambling*, Report of the Appellate Body (n 30) para 301. The Panel in *Colombia – Textiles* explicitly mentions this judicial precedent, see para 7.338.

⁶¹ *Colombia – Textiles*, Report of the Panel (n 14) paras 7.335-7.338. This is not a new feature in the Panels and the AB legal reasoning. In *EC – Seal Products*, EU pieces of legislation amounted to a major portion of the evidence submitted. Leaving aside the evidence showing that the international community shared EU moral concerns, they were the only ground on which the Panel decided that animal welfare was felt as a moral concern by European citizens. See *EC – Seal Products*, Report of the Panel (n 13) paras 7.415ff.

⁶² For instance, in *EC – Seal Products* the EU adduced several opinion polls to prove that the objective of its import ban, namely seal welfare, was felt as a moral concern

In particular, legislation should be in line with a society's contemporary beliefs in order to be deemed relevant proof under Art. XX(a).⁶³ Otherwise, labelling an issue as one of ethical concern would require 'little more than the sponsor of a legislation'.⁶⁴ Therefore, the Panels and the ABs should also take into account several context-dependent elements in order to determine whether national legislation could be of some relevance. For instance, they could verify whether there is a well-established legislative history behind the challenged measure, showing that the latter belongs to a coherent context that has persisted through the years. They could also consider whether or not the measure in question followed an ordinary *iter legis*. Furthermore, they could also take into consideration whether there have been political referenda or relevant court decisions surrounding the issue, as well as protests carried out by social or cultural movements. Also, as the Panel did in *Colombia – Textiles*, the fact that the Member State has undertaken several international commitments related to the moral ground invoked should be assessed.

V. APPLYING THE MORAL CLAUSE

1. *The 'Design and Structure' of the Measure*

Showing that 'public morals' in Colombia could encompass money laundering was not enough for the Panel to conclude that the compound tariff was designed to protect public morals. According to the Panel, Colombia failed to demonstrate (1) first that, if a product's price was low enough to trigger the application of the compound tariff, it was *necessarily* because it had been undervalued; 2) second that its undervaluation was

by the European population. See *EC – Seal Products*, First Written Submission by the European Union, WT/DS400, 21/12/2012, paras 194ff.

⁶³ Panagiotis Delimatsis, 'Protecting Public Morals in a Digital Age: Revisiting the WTO Rulings on *US – Gambling* and *China – Publications and Audiovisual Products*' (2011) *Journal of International Economic Law* 257, 259.

⁶⁴ Joost Pauwelyn, 'The Public Morals Exception After Seals: How to Keep It in Check?' (*International Economic Law and Policy Blog*, 27 May 2014) <<http://worldtradelaw.typepad.com/ielpblog/2014/05/the-public-morals-exception-after-seals-how-to-keep-it-in-check.html>> accessed 29 December 2016.

necessarily serving money laundering purposes.⁶⁵ In other words, the Panel acknowledged that among the imported products affected by the compound tariff there could have also been those undervalued for money laundering purposes. However, Colombia's measure had too wide a scope of application, because it was also able to affect products that did not constitute a threat to public morals. The Panel thus concluded that Colombia had failed to demonstrate that the measure was designed to protect money laundering, as a *necessary* connection between the compound tariff and the alleged objective had not been shown.⁶⁶

However, the Panel's implicit admission that a connection between the measure and the objective could at least be plausible was enough for the AB to reverse the Panel findings on this specific issue. Even if it eventually confirmed that the challenged measure was not justifiable under Article XX GATT, the AB considered the measure at least 'designed' to protect public morals. According to the AB, 'if the measure is not incapable of protecting public morals, there must be a relationship between the measure and the protection of public morals'.⁶⁷ This potential connection may result from the 'content, structure and expected operation' of the measure, i.e. evidence such as text of statutes and regulations, the measure's legislative history, and its objective.⁶⁸ If it exists, then one needs to conclude that the measure was designed to protect public morals. The AB thus set a very low threshold for the 'design' step of the analysis, consistently expanding the zone of legality within which WTO Members are free to operate by virtue of Art. XX(a). The equation between 'designed to protect public morals' and 'not incapable of protecting public morals' ultimately affects the responding State's burden of proof, making it considerably lighter.⁶⁹

⁶⁵ *Colombia – Textiles*, Report of the Panel (n 14) paras 7.362ff.

⁶⁶ *Colombia – Textiles*, Report of the Panel (n 14) paras 7.399-7.400.

⁶⁷ *Colombia – Textiles*, Report of the Appellate Body (n 12) para 5.68.

⁶⁸ *Ibid*, para 5.80.

⁶⁹ With regard to the issue of the burden of proof in WTO law, see Joost Pauwelyn, 'Defenses and the Burden of Proof in International Law' in Lorand Bartels and Federica Paddeu (eds), *Exceptions under International Law* (Oxford University Press forthcoming), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2863962> accessed 23 February 2017.

The AB conclusion is imbued with an inherent logic: if there is at least a chance that a measure accomplishes its task, then its design and structure clearly are 'not incapable of protecting public morals'. The mere fact that the measure is capable of restricting both morally dangerous trades and morally neutral ones does not lead automatically to the conclusion that the measure is not designed to protect public morals. The measure will probably result as disproportionately trade-restrictive, but this will be ascertained in the second step of the test, i.e. the necessity test, where the measure's qualitative and quantitative contribution to the objective pursued will be assessed. In other terms, the AB clarified that the 'design' step is a matter of *whether* the measure could make any contribution to the accomplishment of its purpose, whereas the 'necessity' step is about the *quantum* of the contribution.⁷⁰

2. *The Necessity Analysis*

Once a measure's design and structure are found appropriate to protect 'public morals', the judicial review needs to focus on the necessity of the measure at stake. The necessity analysis is not a unique feature of Art. XX(a) GATT, as subparagraphs (b) and (d) demand the same benchmark. Moreover, Art. XIV GATS includes symmetrical provisions. WTO case law has fostered an interpretative unification of the necessity analysis. First, the Panel in *Thailand – Cigarettes* maintained that the term 'necessary' had the same meaning under both subparagraph (b) and (d).⁷¹ Then the Panel in *US – Gambling* interpreted the necessity requirement of Art. XIV(a) GATS

⁷⁰ *Colombia – Textiles*, Report of the Appellate Body (n 12) para 5.103: 'in an analysis of necessity, a Panel's duty is to assess, in a qualitative and quantitative manner, the extent of the measure's contribution to the end pursued, rather than merely ascertaining whether or not the measure makes any contribution. [...] whereas an assessment of whether the measure is 'designed' to protect public morals focuses on determining whether the measure is or is not incapable of protecting public morals, an examination of the measure's contribution to the protection of public morals focuses on determining the degree of such contribution, in a qualitative or quantitative manner'.

⁷¹ *Thailand – Cigarettes*, Report of the Panel, BISD 37S/200, 7/11/1990, para 74.

following the same case law.⁷² Finally, the Panel in *China – Audiovisual* applied the same test when interpreting Art. XX(a) GATT.⁷³

The test developed through the case law may be split into two main tiers: the 'Weighing and Balancing' (WAB) formula and the 'Least Trade-Restrictive Means' (LTRM) paradigm. This two-tier test is the offspring of a long interpretative effort started in the GATT era. Even though they now constitute two features of a unitary concept, the two steps of the test emerged in different moments in time.

The initial interpretation of necessity consisted only in the LTRM test. According to the Panel in *US – Section 337*, a measure could have been deemed 'necessary' as long as a less trade-restrictive measure was not available.⁷⁴ If such a measure existed, then a State would have been bound to use it.⁷⁵ This test was further improved by the Panel in *US – Gasoline*, where it stated that WTO Members enjoy absolute freedom to choose the value to pursue and to set the level of protection they deem appropriate.⁷⁶ Moreover, the following case law specified that the alternative measure should be 'reasonably available' to the responding State. This means that first, the alternative measure should permit the responding State to preserve the same degree of protection initially sought. Second, it should not impose an undue burden on the responding State, in terms of e.g. administrative costs or technical difficulties.⁷⁷ It rests upon the complaining party to identify possible alternatives that the responding party could take.⁷⁸

However, the Appellate Body in *Korea – Various Measures on Beef* introduced a preliminary step in the necessity analysis, i.e. the WAB formula. According to the Appellate Body, an assessment of the necessity of a measure requires a 'process of weighing and balancing' of at least three factors: (1) the importance of the interests and values protected; (2) the contribution of the

⁷² *US – Gambling*, Report of the Panel (n 22) para 6.448.

⁷³ *China – Audiovisual Products*, Report of the Panel (n 30) paras 7.782ff.

⁷⁴ *US – Section 337*, Report of the Panel (n 16) para 5.26.

⁷⁵ *Ibid.*

⁷⁶ *US – Gasoline*, Report of the Panel (n 16) paras 6.22 and 7.1.

⁷⁷ See *Korea – Various Measures on Beef*, Report of the Appellate Body (n 15) para 180; *EC – Asbestos*, Report of the Appellate Body (n 39) paras 172-174.

⁷⁸ *US – Gambling*, Report of the Appellate Body (n 30) paras 309-311.

challenged measure to the objective pursued; (3) the trade-restrictiveness of the measure.⁷⁹ These factors would then interact according to some general rules of thumb. First, '[t]he more vital or important those common interests or values are' and the greater the measure's contribution to the objective pursued, 'the more easily the measure might be considered 'necessary''.⁸⁰ Second, a measure with a 'relatively slight impact upon imported products might more easily be considered 'necessary' than a measure with intense or broader restrictive effects'.⁸¹

In subsequent disputes, from *EC – Asbestos* to *Colombia – Textiles*, the WAB test was always deemed as an unavoidable step of the test by the Panels and the AB. However, in *Colombia – Textiles* it appears to have even gained a logical prominence within the structure of the necessity test. Both the Panel and the AB treated the measure's compliance with the WAB formula not only as an autonomous aspect of their analysis, but as a logical condition in order to move forward to the LTRM part of the test. The Panel in *Colombia – Textiles* was explicit when it maintained that only '[i]f the *preliminary conclusion* is that the measure is necessary, the result should be confirmed by comparing the challenged measure with possible, reasonably available, WTO-consistent or less inconsistent alternatives that could have less trade-restrictive effects while making an equivalent contribution to the achievement of the objective pursued'.⁸² The AB then confirmed the Panel's approach, describing the LTRM test as merely a potential step of the test that '*in most cases*' may follow the application of the WAB formula.⁸³ Coherently, both the Panel and the AB considered irrelevant a comparison

⁷⁹ *Korea – Various Measures on Beef*, Report of the Appellate Body (n 15) para 164.

⁸⁰ *Korea – Various Measures on Beef*, Report of the Appellate Body (n 15), para 163.

⁸¹ *Ibid*, para 163. The Appellate Body here clearly echoes Alexy's famous interpretation of balancing as optimization: see Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) 102: 'the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other'.

⁸² *Colombia – Textiles*, Report of the Panel (n 14) para 7.310 (emphasis added).

⁸³ *Colombia – Textiles*, Report of the Appellate Body (n 12) para 5.102 (emphasis added).

with possible alternative measures, once they had found that Colombia had failed to demonstrate that the measure was necessary at the WAB tier.⁸⁴

Nevertheless, this seems to constitute a significant logical flaw in the Panel's and the AB's legal reasoning. In particular, the WAB paradigm itself raises more questions than it answers, since it factors in the importance of the protected interest. WTO case law expressly acknowledged that Members pursuing a legitimate domestic goal should be able to choose their 'own level of protection'.⁸⁵ This imposes a judicial self-restraint that may hardly coexist with the WAB exercise, as the 'level of protection' sought is a direct consequence of the importance of the protected interest. Moreover, if WTO judicial bodies had to decide which value should prevail in a conflict of rights, the judicial review would be at odds with the WTO negative integration paradigm.⁸⁶ Finally, giving leeway to WTO Members to set the importance of the value pursued is coherent with a holistic interpretation of the moral clause.

If it is up to WTO Members to decide what constitutes 'public morals', then for the same reasons they should be the ones entitled to express the importance of a certain moral concerns, according to their own society's hierarchy of values. Leaving to the WTO adjudicating bodies the power to decide on the importance of the interests and values protected would then be at odds with the high deference accorded in the first step of the test. Therefore, the first factor of the WAB formula should be untouchable by definition. For its part, the Panel in *Colombia – Textiles* did not question Colombia's claim that fighting money laundering constitutes a 'social interest

⁸⁴ *Colombia – Textiles*, Report of the Appellate Body (n 12) para 5.115; *Colombia – Textiles*, Report of the Panel (n 14) para 7.447.

⁸⁵ *Korea – Various Measures on Beef*, Report of the Appellate Body (n 15) para 176.

⁸⁶ Filippo Fontanelli and Giuseppe Martinico, 'Browsing the XX Files: Necessity in the GATT, and Why It Is Not Like Proportionality in the EU' [2013] Xi Nan Zheng Fa Da Xue Xue Bao 32, 38; Donald H Regan, 'The Meaning of Necessary in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing' (2007) 6 World Trade Review 347, 349; Jan Neumann and Elizabeth Turk, 'Necessity Revisited: Proportionality in World Trade Organization Law after *Korea-Beef*, *EC-Asbestos*, and *EC-Sardines* (2003) 37 Journal of World Trade 199, 232, claiming that balancing sensitive issues requires a strong sense of democratic legitimacy.

[...] vital and important in the highest degree'.⁸⁷ Moreover, in order to reach this conclusion, it considered the same evidence assessed in the 'design' step of the test and applied a similar legal reasoning.⁸⁸ It thus followed the Panels' approach both in *US – Gambling* and in *China – Audiovisual Products*. In these disputes the Panels were highly deferential when assessing the importance of the interest pursued, and mostly relied on the same evidence they had considered in the 'design' step of the test.⁸⁹ As in *Colombia – Textiles*, the interest in question were found to be of the highest importance in the Member State's society.⁹⁰

The WAB test might then focus on the measure's contribution to the objective and its trade-restrictiveness. However, the assessment of these two factors leaves the door open to a wide range of questions, which are clearly exemplified in *Colombia – Textiles*. In this dispute, the AB clarified that the 'examination of the measure's contribution to the protection of public morals focuses on determining the *degree* of such contribution, in a qualitative or quantitative manner'.⁹¹ This constitutes the main distinction between the analysis of the contribution and that of the design of the measure. While the latter addresses *whether* the challenged act is capable of protecting public morals, the former pays attention to *how much* protection the measure may assure. However, the AB has not set any benchmark in order to carry out such an assessment. How then should a Panel determine the degree of contribution of the measure at stake? Which aspects should it factor in? And which would be the specific features of high contribution? And of low contribution? The Panels' assessment would then risk being arbitrary and scarcely transparent.

Nonetheless, a way out from this maze of questions may be found inside the necessity test itself, specifically in the LTRM paradigm. The Panels' legal reasoning would certainly gain in clarity if a measure's contribution was

⁸⁷ *Colombia – Textiles*, Report of the Panel (n 14) para 7.408.

⁸⁸ *Ibid*, paras 7.404ff.

⁸⁹ *US – Gambling*, Report of the Panel (n 22), para 6.492; *China – Audiovisual Products*, Report of the Panel (n 30) para 7.817.

⁹⁰ *Ibid*.

⁹¹ *Colombia – Textiles*, Report of the Appellate Body (n 12) para 5.103 (emphasis added). See also *Colombia – Textiles*, Report of the Panel (n 14) para 7.423.

appraised in relative rather than absolute terms. In other words, it would be easier for a Panel to assess whether a measure's contribution is *higher* or *lower* than that of an alternative measure reasonably available, instead of *high* or *low* in general terms. In this way, a definition of what constitutes a high or low contribution would not be needed. Moreover, were the Panel to rule out a measure without being sure that an alternative one is available, Members' freedom to regulate would be seriously jeopardised.

Colombia's compound tariff may constitute a relevant example. First the Panel, then the AB could not carry out thoroughly the WAB test because of a lack of evidence in Colombia's allegations.⁹² Consequently, the measure had to be ruled out, since it failed the WAB test. In particular, the measure's degree of contribution to the objective pursued could not be determined in light of the available information.⁹³ On the one hand, the Panel acknowledged that the interest protected was 'vital and important in the highest degree'. On the other hand, it found that the measure was highly trade-restrictive. Now, consider for a moment a hypothetical scenario in which the burden of proof was satisfied, but still the measure failed the WAB test because its contribution to the objective pursued was deemed insufficient to balance out its trade-restrictiveness. The Panel and then the AB would thus reject Colombia's defence. Yet, if there is no alternative measure that may pursue Colombia's objective to fight money laundering, should that moral concern be deprived of any form of protection? In other words, before stating that a measure is disproportionately trade-restrictive, should not the AB verify that it is not the only possible way to protect a 'vital' interest?

In the light of all this, the LTRM test seems the most appropriate tool to reach the best compromise between trade-restrictiveness and the right to regulate. In addition, it excludes the need for Panels and the AB to engage in a likely intrusive balancing between legitimate non-trade values and free trade interests.⁹⁴ Moreover, even admitting for a moment that the WAB's rationale is sustainable, it results of no practical added use. As a matter of fact,

⁹² *Colombia – Textiles*, Report of the Panel (n 14), paras 7.423, 7.430, 7.437, 7.445; *Colombia – Textiles*, Report of the Appellate Body (n 12) paras 5.110, 5.115, 5.116.

⁹³ *Colombia – Textiles*, Report of the Panel (n 14) paras 7.414 ff.

⁹⁴ Regan (n 86) 350-353.

the LTRM test already factors in the WAB's features of the measure's contribution and trade-restrictiveness.⁹⁵ The remarkable advantage of the LTRM test is that the assessment of the reasonable availability of an alternative measure does not imply second-guessing a Member State's hierarchy of values. Indeed, a measure is reasonably available if it is able to assure the same level of protection while not entailing additional enforcement costs. The problem then is not how a Member State should allocate its funds, which is also a policy choice modelled after a particular hierarchy of values, but the focus is on how the same budget may be invested in a more WTO consistent trade measure. What thus comes into question in the LTRM analysis are mostly technical issues, characterised by a higher degree of certainty and objectivity. This may allow WTO adjudicating bodies to push their review to a deeper tier, judging the technicalities and the appropriateness of the *means* adopted by a Member State, rather than the *end* itself.⁹⁶

WTO's version of the balancing test should then be absorbed by the LTRM analysis in only one holistic reasoning. The necessity test would then be premised on one question: whether the same level of protection may be sought by a less trade-restrictive measure. The answer should be positive if there is a 'reasonably available' alternative, i.e. if its enforcement does not entail unreasonably high costs for the regulatory State.

V. FINAL REMARKS

To put it in geometrical terms, Art. XX(a) GATT represents the intersection of two planes: the first, horizontal, one is the ideological struggle between non-trade and trade values; the second, vertical one is the institutional tension between WTO adjudicating bodies and WTO Members, and

⁹⁵ Fontanelli and Martinico (n 86) 38: 'the WAB does not have much to share with a real proportionality test, nor does it allow for express cost-benefit analysis' and that 'the LTRM test is apt to ascertain the necessity of a measure, the WAB serving merely as a warm up test'.

⁹⁶ In more general terms, see Mavroidis, *Trade in Goods* (n 9) 254, maintaining that WTO is about the justiciability of *means* rather than *ends*. See also *Korea – Various Measures on Beef*, Report of the Appellate Body (n 15) para 176.

directly concerns the allocation of power.⁹⁷ As WTO's number of Members is continuing to grow, the moral clause is likely to play an increasingly important role in legal and political dynamics inside the organization. However, since the moral clause lay dormant for more than five decades, several hermeneutical hurdles still need to be overcome.

In *Colombia – Textiles* WTO adjudicating bodies were called to apply the GATT moral clause for the fourth time in its history. For the most part, they followed the previous case law, thus reinforcing what is now becoming to look like a more consolidated interpretation of the Art. XX(a) two-tier test. The AB confirmed that Member States' culturally-oriented regulations deserve a high degree of deference. In particular, the AB helped clarify the applicable threshold in the 'design' step of the analysis. A measure will now be deemed designed to protect 'public morals' if it is not incapable of reaching this goal. The threshold for compliance has thus been considerably lowered.

At first glance, it may appear that a scarcely intrusive standard of review in the first part of Art. XX(a) test may jeopardise the WTO edifice, giving leeway to the enforcement of highly trade-restrictive measures. Member States could merely label a protectionist measure as a protection for 'public morals' (and provide appropriate evidence) to have it justified under Art. XX(a) GATT. However, a highly deferential scrutiny on what constitutes 'public morals' may be balanced out by a more stringent one in the subsequent steps of the test, namely the necessity analysis and Art. XX GATT *chapeau*. Adopting this perspective, the judicial review would focus less on the values at stake and more on the technical aspects of a measure's enforcement.

In particular, Art. XX GATT *chapeau* guarantees that the application of a measure does not amount to an arbitrary and unjustifiable discrimination. Once it has been verified that the measure complies with one or more of Art. XX GATT substantive provisions, the focus thus shifts to whether its application constitutes a discrimination among 'countries where the same conditions prevails'.⁹⁸ The issue under the spotlight is how the measure is enforced *vis-à-vis* WTO Members. This is a relative assessment relying on the measure's objective implementation, but there is no room for a judgment

⁹⁷ Kapterian (n 44) 90.

⁹⁸ Mavroidis, Bermann and Wu (n 7) 709ff.

concerning the importance of the interests and values protected.⁹⁹ The necessity test may also provide for such a guarantee if it is correctly carried out. Nevertheless, the logical structure the Panel and the AB gave to their necessity analysis in *Colombia – Textiles* raises concerns. The application of the two-step test conferred logical prominence to the former, while describing the latter only as a potential and conditional phase of the test. However, the WAB formula may turn into a highly intrusive and scarcely transparent judicial review, being at odds with the negative integration principle on which the WTO is premised. On the contrary, the LTRM paradigm provides WTO judicial bodies with a clearer and simpler benchmark in order to conduct a comparative analysis. Most of all, the LTRM test does not imply a judicial scrutiny involving a Member State's morally-based policy choices. In contrast, it concerns the technical aspects of the measure's enforcement.¹⁰⁰

Clarifying the role of the WBA formula – if there should be one – should be a priority for the Panels in future disputes, since it now appears as the most critical aspect of Art. XX(a) GATT test for compliance.

⁹⁹ Marwell (n 4) 829ff.

¹⁰⁰ Marwell (n 4), 827ff.