TRADE AND MORALITY: THE WTO PUBLIC MORALS EXCEPTION AFTER *GAMBLING*

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Despite a broad commitment to the liberalization of trade in goods and services, Member States of the World Trade Organization (WTO) retain legal authority to impose trade-restrictive measures "necessary to protect public morals." As a matter of first impression under WTO law, in April 2005 the WTO Appellate Body interpreted the term "public morals" as it is found in the General Agreement on Trade in Services (GATS). The Appellate Body held that certain U.S. laws prohibiting the cross-border provision of Internet gambling services, alleged by the United States to be necessary to protect U.S. public morals, were inconsistent with U.S. obligations under GATS. This Note argues that the test adopted by the Appellate Body to determine whether a given trade-restrictive measure is "necessary to protect public morals" improperly impinges on the autonomy of WTO Member States. The Note proposes an alternative doctrinal framework which would better protect Member State autonomy while guarding against potential protectionist abuses and trade-regulatory inefficiencies. The increasing likelihood that trade-morality conflicts will arise in a heterogeneous WTO, the extensive employment of public morals clauses in trade practice worldwide, and the potential relevance of the public morals clause to the integration of international economic law and human rights suggest the growing importance of this emerging area of international economic law.

INTRODUCTION

One important question any free trade system must resolve is the manner and degree of regulatory autonomy individual jurisdictions retain despite a commitment to the free flow of goods and services.[1]

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[1] For examples of conflicts over such autonomy, see Wyoming v. Oklahoma, 502 U.S. 437, 461 (1992), which struck down Oklahoma legislation requiring in-state power plants to burn at least ten percent Oklahoma coal as unconstitutional under the Commerce Clause, and Case 8/74, Procureur du Roi v. Dassonville, 1974 E.C.R. 837, 851, 854, which invalidated a Belgian law that required certificates of origin for certain alcoholic beverages under Article 30 of the Treaty of Rome. *See also* J. Robert S. Prichard & Jamie Benedickson, *Securing the Canadian Economic Union: Federalism and Internal Barriers to Trade*, *in* FEDERALISM AND THE CANADIAN ECONOMIC UNION 3, 3 (Michael J. Trebilcock et al. eds., 1983) ("[T]he tension between political autonomy and economic integration is inescapable in any non-unitary political system."). A typical mechanism for resolving trade-regulatory conflicts is adjudicatory review of trade-restrictive measures at a supra-

Although these issues often arise in the context of environmental and health regulation,[2] a recent dispute at the World Trade Organization (WTO) instead involved trade-restrictive regulations allegedly designed to protect public morals.[3]

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jurisdictional level. *See, e.g.*, H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 538–39 (1949) (describing role of Supreme Court in enforcing U.S. "federal free trade unit" against "local burdens and repressions" imposed by states).

[2] *See, e.g.*, MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 397–431 (2d ed. 1999) (surveying General Agreement on Tariffs and Trade (GATT) and World Trade Organization (WTO) trade-environment conflicts and jurisprudence); Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 2, 192, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *Asbestos*] (upholding under GATT Article XX(b) European Community prohibition on import and sale of asbestos and asbestos-containing products); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 3–5, 153, WT/DS58/AB/RW (Oct. 22, 2001) (upholding under GATT Article XX(g) U.S. prohibition on import of shrimp caught through methods endangering sea turtles).

[3] *See* Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 5, 296, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter *Gambling AB*]; Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 1.1, 3.278, WT/DS285/R (Nov. 10, 2004) [hereinafter *Gambling Panel*]. When disputes arise between WTO Member States, the WTO Dispute Settlement Body has authority to convene panels, adopt their reports, monitor disputes and compliance with judgments, and authorize retaliatory trade measures by victorious parties. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes art. 2.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter Dispute Settlement Understanding]. The Appellate Body, a permanent panel of seven trade experts appointed to four-year terms by the Dispute Settlement Body, has the authority to review legal and, under more limited circumstances, factual findings of appealed Panel reports. *See id.* art. 16.4.

The pertinent measure at issue in *Gambling* was Article XIV(a) of the General Agreement on Trade in Services (GATS), which authorizes countries, under certain conditions, to maintain trade-restrictive measures "necessary to protect public morals." *See* General Agreement on Trade in Services art. XIV(a), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS]. Other WTO Agreements contain parallel public morals clauses. *See* General Agreement on Tariffs and Trade art. XX(a), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (as amended and incorporated into Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1A, Apr. 15, 1994, 33 I.L.M. 1125 (1994), *reprinted in* Text of the General Agreement, GATT B.I.S.D. (vol. IV) at 1 (1969)) [hereinafter GATT]; Agreement on Government Procurement art. XXIII(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4B, Legal Instruments—Results of the Uruguay Round, 1915 U.N.T.S. 103 (1994); Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) art. 27(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994). None of these agreements defines "public morals." This Note focuses on the limited task of suggesting an appropriate doctrinal mechanism for implementing the term as currently found in WTO agreements. There is a substantial sociolegal and historical literature addressing morals regulation more generally. *See generally* ALAN HUNT, GOVERNING MORALS: A SOCIAL

In October 2004, Antigua and Barbuda (Antigua) brought a complaint against the United States, alleging that certain U.S. federal and state laws constituted a ban on the cross-border provision of Internet gambling services.[4] In response to the Antiguan claims, the United States invoked the "public morals" clause of the General Agreement on Trade in Services (GATS). This clause, found in substantially similar form in the General Agreement on Tariffs and Trade (GATT),[5] is one of several general exceptions to the WTO norm of trade liberalization. Other exceptions apply to measures protecting human, animal, and plant life and health, and exhaustible natural resources.[6] These provisions allow states to enact trade-restrictive regulatory measures to serve legitimate public policy goals, despite general obligations of trade liberalization under the WTO.[7]

Although *Gambling* is the first WTO dispute to feature the public morals clause,[8] the emergence of a coherent doctrine governing trade-morality disputes could have substantial implications for the WTO and international law more generally.[9] Some commentators have

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HISTORY OF MORAL REGULATION (1999) (surveying history of morals regulation movements).

[4] *See Gambling AB*, *supra* note 3, ¶¶ 1, 2, 5. Antigua alleged that such a ban was a facial violation of U.S. concessions for liberalization of trade in services under GATS.

[5] This Note will on occasion refer generically to the "public morals clause," without specifying a particular agreement. There are important differences between agreements in which public morals clauses are found, most notably GATS and GATT. However, given the nearly identical language and context of the public morals clauses in GATT and GATS, this Note will discuss, as relevant, both GATT and GATS jurisprudence. The WTO Appellate Body has explicitly adopted this approach. *See Gambling AB*, *supra* note 3, ¶ 291.

[6] GATS includes exceptions, inter alia, for measures "necessary to protect public morals or to maintain public order," "necessary to protect human, animal or plant life and health," and "necessary to secure compliance with [otherwise GATS-consistent] laws or regulations." *See* GATS, *supra* note 3, art. XIV. GATT Article XX includes ten general exceptions, dealing with, inter alia, measures "necessary to protect public morals," "necessary to protect human, animal or plant life or health," and "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." *See* GATT, *supra* note 3, art. XX.

[7] Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 121, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp/Turtle*] ("Paragraphs (a) to (j) [of GATT Article XX] comprise measures that are recognized as exceptions to substantive obligations . . . because the domestic policies embodied in such measures have been recognized as important and legitimate in character.").

[8] *See Gambling Panel*, *supra* note 3, ¶ 6.460.

[9] The existing literature on the WTO public morals exception is limited, probably because the clause had not been invoked under any of the WTO Agreements in which it occurs, *see supra* note 3, until *Gambling*. Two important discussions are Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689 (1997), which explores the meaning and potential uses of GATT Article XX(a), and Christoph T. Feddersen, *Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and "Conventional" Rules of Interpretation*, 7 MINN. J. GLOBAL TRADE 75

viewed the public morals clause as a vehicle for incorporating human rights, women's rights, and labor standards into the WTO and giving practical effect to these norms through the WTO's economic sanctions.[10] However, a broad public morals exception could potentially serve as a shelter for protectionism, vitiating the relatively robust doctrines that now govern environmental and human health regulations and undermining the WTO's substantial progress toward trade liberalization.

The *Gambling* case raised two novel doctrinal questions that distinguish trade-morality conflicts from previous WTO jurisprudence involving environmental or human health measures: First, how should an international tribunal assess a country's assertion that an issue is legitimately a matter of "public morals," given that such interests are likely to be strongly held, geographically localized, and diverse across political boundaries? Second, assuming a particular regulation is legitimately related to public morality, on what basis can and should an international tribunal such as the WTO Dispute Settlement Body balance interests in regulating public morality against the rights of other Member States in trade liberalization?[11]

(1998), which offers an interpretation of GATT Article XX(a) based on conventional methods of treaty interpretation. *See also* THE WTO AND CONCERNS REGARDING ANIMALS AND NATURE (Anton Vedder ed., 2003) [hereinafter CONCERNS REGARDING ANIMALS]. Other scholarship has dealt with the public morals clause indirectly in the context of human rights, labor standards, and women's rights. *See infra* note 10.

[10] For instance, a state might use a public morals justification to ban the import of textiles produced by child labor on the basis of a general moral consensus within the importing state against that practice. *See generally* Robert Howse, *Social and Labor Issues and the Agendas of the IMF, World Bank, WTO and OECD*, 93 AM. SOC'Y INT'L L. PROC. 143, 148 (2000) (remarks as conference panelist) (discussing inclusion of labor rights through GATT Article XX(a)); Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. SMALL & EMERGING BUS. L. 131 (1999) [hereinafter Howse, *Protection of Workers' Rights*] (arguing for inclusion of international labor standards in WTO through public morals exception); Liane M. Jarvis, Note, *Women's Rights and the Public Morals Exception of GATT Article 20*, 22 MICH. J. INT'L L. 219 (2000) (arguing for use of public morals exception to protect women's rights); Carlos Lopez-Hurtado, Note, *Social Labelling and WTO Law*, 5 J. INT'L ECON. L. 719 (2002) (discussing WTO compatibility of government-sponsored social labeling initiatives).

[11] This balancing is at least partially accomplished by setting boundaries for invoking the relevant exception clause. *See Shrimp/Turtle*, *supra* note 7, ¶¶ 156, 159 (discussing "delicate" task of balancing rights and obligations under GATT Article XX). Review by international tribunals of municipal environmental and health regulations has prompted substantial controversy. *See, e.g.*, Steve Charnovitz, *Environment and Health Under WTO Dispute Settlement*, 32 INT'L LAW. 901, 920–21 (1998) (acknowledging environmentalists' lack of trust of WTO dispute settlement system); Julie B. Master, Note, *International Trade Trumps Domestic Environmental Protection: Dolphins and Sea Turtles Are 'Sacrificed on the Altar of Free Trade,'* 12 TEMP. INT'L & COMP. L.J. 423, 424 (1998) ("[R]ecent trends indicate that trade and economic issues are superseding concerns for the marine environment.").

The holdings in *Gambling* only partially resolved these questions. On the former, gambling was found to constitute a legitimate issue of public morality, based primarily on evidence that many countries in addition to the United States held this view.[12] On the latter, a multi-factor balancing test from existing WTO jurisprudence was invoked to weigh the interest of the United States in controlling online gambling against the interests of other WTO Member States in trade liberalization.[13]

This Note argues that the *Gambling* precedent is overly restrictive of the sovereignty of WTO Member States and suggests an alternative approach that offers a better balance between regulatory autonomy and trade liberalization. My primary assertion is that defining public morals based on evidence external to the state whose regulation is in question—the approach implicitly adopted in *Gambling*—improperly imposes a "moral majority" (or at least moral multiplicity) threshold on the public morals exception. For doctrinal, policy, and normative reasons, WTO members should have leeway to define public morals based solely on domestic circumstances.

Too much leeway, however, would allow Member States to define public morality unilaterally, risking protectionist abuses and potentially allowing the exception to swallow the rule.[14] This Note argues, in response, that a broader interpretation of public morals can be adequately cabined by applying close scrutiny under two existing doctrinal mechanisms: that trade-restrictive measures must be the least trade-restrictive means of achieving their stated end, and that they must be designed and applied in a nondiscriminatory fashion. Expanding the boundaries of "public morals" while closely scrutinizing the exception's application under these two doctrines will avoid an undesirable imposition on WTO Member States' autonomy while providing a more transparent and justiciable legal standard by which to judge the application of such regulations in practice.

This Note proceeds in three parts. Part I introduces the *Gambling* dispute and trade-morality conflicts more generally, highlighting their growing importance in international trade law. Part II describes and critiques the *Gambling* doctrine and proposes an alternative test. Part III addresses the principal counterargument to the proposed test—overbreadth—and demonstrates how the doctrines of least-restrictive means and nondiscrimination, if carefully applied, will

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[12] *See Gambling Panel*, *supra* note 3, ¶¶ 6.471–74.

[13] *See Gambling AB*, *supra* note 3, ¶¶ 300–03.

[14] *See, e.g.*, Feddersen, *supra* note 9, at 111 ("GATT's trading system would seriously malfunction if a contracting party could simply circumvent its obligations by invoking a[ ] . . . public policy exception based merely on the country's own national standard.").

limit potential overuse and provide a more transparent and workable legal standard.

I
PUBLIC MORALS AND THE *GAMBLING* DISPUTE

This section introduces the WTO's public morals clause and the rulings in *Gambling*, focusing on the two primary doctrinal questions raised above: first, how the WTO did (and should) determine the substantive content of the term "public morals," and second, how a WTO Member State's interest in protecting morality should be weighed against the desire for increased trade liberalization.

A. Public Morals at the WTO

The WTO is a treaty-based trade regime with 148 Member States currently representing some ninety-five percent (by value) of all international trade.[15] The WTO contains a number of core agreements, including GATT, GATS, and side agreements on other matters, including sanitary and phytosanitary measures[16] and technical barriers to trade.[17]

The "public morals" clause, which appears in both GATT and GATS, is structured as one of several general exceptions to the basic obligation of trade liberalization contained in those agreements. The GATS public morals clause provides, in pertinent part:

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

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[15] *See* WTO, INTERNATIONAL TRADE STATISTICS 2004, 30 tbl.II.2 (2004), *available at* http://www.wto.org/english/res_e/statis_e/its2004_e/its2004_e.pdf.

[16] Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 1867 U.N.T.S. 493 (1994) [hereinafter SPS Agreement].

[17] Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 1868 U.N.T.S. 120 (1994) [hereinafter TBT Agreement].

[18] GATS, *supra* note 3, art. XIV. GATT similarly provides:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

Under the structure of GATT and GATS, the general exceptions clauses are invoked as a defense by a respondent Member State after a prima facie showing by a complaining state that the respondent State violated a trade obligation.[19] As such, the Appellate Body has described the general exceptions clause as striking a balance between the right of a Member State to regulate in the enumerated areas (e.g., public morals, health, environment) and the obligation not to interfere with the free flow of goods and services.[20]

Several trends suggest that the public morals exception will play an increasingly important role in international trade relationships within and outside of the WTO.[21] Most importantly, the increased heterogeneity of the WTO, combined with the growing economic importance of foreign trade to Member States, may increase the frequency of trade-morality disputes. In contrast to the twenty-three members of the original 1947 GATT,[22] the modern WTO consists of 148 member states,[23] more than half of which are developing countries,[24] and which represent a diverse variety of religious, cultural, ethnic, and social backgrounds. Expanded membership will bring more countries into contact (and potential conflict), and trading partners with diverse socioeconomic compositions as well as differing cultural and religious views may have more frequent trade-morality conflicts than a more homogenous grouping.

A growing diversity of WTO membership has coincided with the increasing economic importance of international trade to a larger number of countries. Since 1995, the worldwide ratio of international trade to domestic economic production has grown by nearly thirty

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(a) necessary to protect public morals . . . .

GATT, *supra* note 3, art. XX.

[19] *See, e.g.*, Appellate Body Report, *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, at 15–16, WT/DS33/AB/R (Apr. 25, 1997) (discussing burden of proof imposed on complaining party to establish initial violation of WTO agreements).

[20] *See Shrimp/Turtle*, *supra* note 7, ¶ 156.

[21] *See* Anne-Marie de Brouwer, *GATT Article XX's Environmental Exceptions Explored: Is There Room for National Policies?*, *in* CONCERNS REGARDING ANIMALS, *supra* note 9, at 9, 23 ("[T]he possibility that Article XX(a) will be invoked by WTO members in future environmental disputes does seem likely.").

[22] *See* GATT, *supra* note 3, preamble, para. 1.

[23] *See* WTO, Understanding the WTO: Members and Observers, http://www.wto.int/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Dec. 1, 2005).

[24] *See* Developing Countries in WTO Dispute Settlement, *in* WTO, Dispute Settlement System Training Module ch. 11 (2005), http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s1p1_e.htm#txt1.

percent.[25] This increase has taken place even outside the major market economies.[26] An increasing trade-to-GDP ratio suggests that negative economic effects resulting from restrictions on international trade will be more economically significant, perhaps resulting in an increased willingness of states to bear the costs of bringing a complaint at the World Trade Organization.

This expectation is confirmed by examining the identity and number of complaints brought before the WTO Dispute Settlement Body. The past ten years, for instance, have seen a greater diversity of countries become active in WTO dispute settlement than the fifty years of disputes under GATT.[27]

A second reason to expect increasing use of the public morals exception is a tightening of the WTO regime governing environmental, human health, and other regulations. In the decade since its formation, the Appellate Body has consistently found challenged regulatory measures to be in violation of the WTO Agreements on Technical Barriers to Trade (TBT)[28] and Sanitary and Phytosanitary Measures (SPS).[29] To the extent that environmental or health regulations can be recast in terms of public morality, tightening review

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[25] The ratio of world trade (exports plus imports) to world GDP grew from approximately twenty-three percent in 1994 to nearly thirty percent in 2003. *See* WTO, WORLD TRADE REPORT 2004, at 4 (2004).

[26] For instance, substantial increases in the value of trade in merchandise have occurred in Asia and the transition economies of Eastern Europe. *See* WTO, *supra* note 15, at 67, 83.

[27] Under the pre-1995 GATT, 73% of all complaints were filed by the United States, the European Union, Canada, and Australia. The United States, the European Union, Canada, and Japan accounted for 83% of all defendants, and 92% of all complaints involved either the United States or the European Union as a party. *See* TREBILCOCK & HOWSE, *supra* note 2, at 56. Since 1995, developing countries have been complainants in a third and respondents in nearly two-fifths of all disputes. In 2001, developing countries brought 75% of all complaints. *See* Developing Countries in WTO Dispute Settlement, *supra* note 24. Developing countries have also participated actively as third parties to many disputes. *Id.*

[28] TBT Agreement, *supra* note 17.

[29] *See* SPS Agreement, *supra* note 16; *see also* Appellate Body Report, *Japan—Measures Affecting the Importation of Apples*, ¶¶ 1, 2, 243, WT/DS245/AB/R (Nov. 26, 2003) (finding Japanese fire blight restriction on import of apples to violate SPS Agreement); Appellate Body Report, *Japan—Measures Affecting Agricultural Products*, ¶¶ 1, 143, WT/DS76/AB/R (Feb. 22, 1999) (finding Japanese agricultural quarantine requirement to violate SPS Agreement); Appellate Body Report, *Australia—Measures Affecting Importation of Salmon*, ¶¶ 1, 279, WT/DS18/AB/R (Oct. 20, 1998) (finding Australian prohibition on import of Canadian salmon to violate SPS Agreement); Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products*, ¶¶ 2, 158, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *Beef Hormones*] (finding European prohibition on import of beef treated with growth hormones to violate SPS Agreement); Appellate Body Report, *European Communities—Trade Description of Sardines*, ¶¶ 2, 3, 315, WT/DS231/AB/R (Sept. 26, 2002) (finding European labeling requirement for sardines to violate TBT Agreement). *See generally* WTO Appellate Body Reports, http://www.worldtradelaw.net/

under TBT or SPS might prompt countries to attempt to justify regulatory measures under public morals instead.

Third, and conversely, the maturation of WTO doctrines on health and the environment might lead to a relative increase in the frequency of public morals litigation even if countries are attempting to conform to, rather than avoid, their WTO obligations.[30] Under such an account, because ambiguities in the health and environment doctrines have been resolved in prior WTO disputes,[31] Member States can more easily conform their behavior, and aggrieved parties can more accurately assess the strength of their complaints, ex ante. The public morals clause, by contrast, remains largely unexplored, with Member States' obligations correspondingly unclear and thus more likely to be the subject of disagreements that progress to formal dispute settlement.

A fourth reason to expect increased use of the public morals exception is the emergence of technologies that have begun to blur the line between environment, health, and morality. For instance, since 1998, the European Union (EU) has maintained a ban on beef treated with growth hormones despite an Appellate Body ruling that this measure violates the SPS Agreement.[32] The EU has refused to change its regime—thus inflicting upon itself reciprocal trade sanctions by the United States—due to strong consumer opposition to the use of such hormones. This opposition stems, at least in part, from a desire to preserve traditional European methods of farming and food production[33] against the spread of large-scale commercial farming techniques, interests which could conceivably be cast as matters of public morality. Similarly, an ongoing dispute over regulation of agricultural biotechnology[34] has raised concerns about health and environmental risks as well as religious and ethical considerations.[35]

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reports/wtoab/ (cataloguing all Appellate Body Reports and agreements interpreted therein).

30 I am grateful to Michael Livermore for suggesting this argument.

31 *See supra* note 2.

32 *See Beef Hormones*, *supra* note 29, ¶ 113 (affirming Panel's conclusion that European import prohibition was not based on risk assessment and thus violated SPS Agreement).

33 *See, e.g.*, Mark A. Pollack & Gregory C. Shaffer, *Biotechnology: The Next Transatlantic Trade War?*, WASH. Q., Autumn 2000, at 41, 43 (noting concerns about effects of genetically modified agriculture on small and medium-sized farmers as compared to large "agribusiness and multinational seed companies").

34 *See* Request for Consultations by the United States, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, at 1–2, WT/DS291 (May 20, 2003) (complaint against European Communities over alleged moratorium on regulatory approval of genetically modified crops).

35 First Written Submission by the European Communities, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, at 34 ¶ 83 & n.69,

Public morals doctrines may also have effects outside of the WTO due to use of such clauses in regional and bilateral trade agreements. Of the 250 regional and bilateral free trade agreements that have been registered with the WTO,[36] nearly 100 contain public morals exceptions similar or identical to GATS Article XIV(a).[37] Given that many of these agreements explicitly adopt the structure and language of GATT and other WTO agreements, the emergence of an effective public morals doctrine in the WTO is likely to influence practice under regional and bilateral agreements.

B. The Gambling *Dispute*

In March 2003, Antigua and Barbuda brought a complaint before the WTO Dispute Settlement Body alleging that numerous U.S. state and federal laws prohibited the cross-border provision of Internet gambling services in violation of U.S. obligations under GATS.[38] The laws found by the Panel to be in question included the federal Wire Act,[39] the Travel Act,[40] the Illegal Gambling Business Act,[41] as well as state gambling laws in Colorado, Louisiana, Massachusetts, Minnesota, New Jersey, New York, South Dakota, and Utah.[42]

In response, the United States gave several reasons why the state and federal laws, even if found to violate GATS concessions, could be justified under the public morals clause of Article XIV.[43] First, the

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WT/DS291, WT/DS292, WT/DS293 (May 17, 2004) (noting religious and ethical considerations driving national regulatory approaches to biotechnology in Australia, Switzerland, and New Zealand), *available at* http://trade-info.cec.eu.int/doclib/docs/2004/june/tradoc_117687.pdf.

[36] *See* WTO, Regional Trade Agreements, http://www.wto.int/english/tratop_e/region_e/region_e.htm (last visited Jan. 23, 2006).

[37] A list of regional free trade agreements registered with the WTO can be found at http://www.wto.int/english/tratop_e/region_e/region_e.htm. Appendix I, *infra*, provides several examples of regional and bilateral trade agreements containing public morals clauses. Further to my review of the approximately 250 regional trade agreements listed on the WTO website as of April 2005, a data file listing the approximately 100 such agreements containing public morals clauses is on file with the *New York University Law Review*.

[38] Request for the Establishment of a Panel by Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, at 1, WT/DS285/2 (June 13, 2003).

[39] 18 U.S.C. § 1084 (2000).

[40] 18 U.S.C. § 1952 (2000 & Supp. II 2004).

[41] 18 U.S.C. § 1955 (2000).

[42] *See Gambling AB*, *supra* note 3, ¶ 4. On appeal, the WTO Appellate Body limited its findings to the three federal laws, holding that Antigua had failed to establish a prima facie case with respect to any of the state laws, which were thus not properly before the tribunal. *Id.* ¶¶ 153–55.

[43] The details of the preliminary points on concessions and the effects of the complex of federal, state, and local laws are immaterial here, except to note that neither the United

remote supply of gambling services is particularly vulnerable to exploitation by organized crime due to low set-up costs, ease of provision, and geographic flexibility.[44] Protecting American society against the "destructive influence" of organized crime on persons and property was a matter of public morality.[45] Second, the Internet could introduce gambling into inappropriate settings, such as homes and schools, where it would not be subject to traditional, in-person controls. Internet gambling would facilitate gambling by children[46] and have detrimental effects on compulsive gamblers by allowing anonymous, twenty-four-hour access.[47]

The Panel's analysis began with a textual definition of "public morals": "standards of right and wrong conduct maintained by or on behalf of a community or nation."[48] To determine whether gambling fell within this definition, the Panel looked to a variety of international practices: the domestic regulations of other states,[49] regional practice such as rulings of the European Court of Justice,[50] and histor-

States nor Antigua initially raised or argued the public morals defense. *See generally* First Written Submission of the United States, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285 (Nov. 7, 2003), *available at* http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file732_5581.pdf.

[44] *See Gambling Panel*, *supra* note 3, ¶¶ 3.189–.192, 3.279–.281, 6.506–.507.

[45] *See* Executive Summary of the Second Written Submission of the United States, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 37, WT/DS285 (Jan. 16, 2004), *available at* http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file665_5581.pdf.

[46] *Id.*

[47] *Gambling Panel*, *supra* note 3, ¶¶ 3.211, 6.511.

[48] *Id.* ¶ 6.465.

[49] The Panel noted that at least two other WTO member states restrict trade in gambling-related goods or services on moral grounds: Israel prohibits the importation of lottery tickets and the Philippines restricts foreign ownership of gambling operations. *See id.* ¶ 6.471. The Panel also noted findings by a gambling industry group that, "in virtually all parts of the world," gambling activities are either prohibited or "subject to strict regulation, involving civil and criminal laws." *Id.* ¶ 6.473 n.914 (citing INTERNET GAMBLING REPORT VI (Mark Balestra & Anthony N. Cabot eds., 6th ed. 2003)). Further, the Panel recognized that eleven countries (Australia, Austria, Belgium, Brazil, Denmark, Finland, Iceland, Italy, the Netherlands, Sweden, and the United Kingdom) had developed or were in the process of developing special regulatory frameworks for Internet gambling, and that five countries (Estonia, Hong Kong, Iceland, Norway, and Uruguay) have either severely restricted Internet gambling or prohibited it entirely. *Id.*

[50] The Panel looked to decisions by the European Court of Justice (ECJ) with respect to Article 36 of the Treaty of Rome, which recognizes the right of countries to take measures "justified on grounds of public morality." Treaty Establishing the European Economic Community (Treaty of Rome) art. 36, Mar. 25, 1957, 298 U.N.T.S. 11. The Panel noted two ECJ decisions upholding the right of Member States to enact national legislation restrictive of gambling-related activities—in particular, cross-border access to lotteries and the operation of gambling equipment. *See Gambling Panel*, *supra* note 3, ¶ 6.473 n.914

ical evidence of broad international agreement about gambling and morality at the League of Nations.[51] Based on this evidence, the Panel concluded that gambling was an issue of public morality that could be encompassed by the GATS public morals clause.[52]

The Panel then addressed whether the particular U.S. measures at stake (as distinguished from gambling generally) were directed at protecting public morals.[53] For this analysis, the Panel looked to the legislative history of the federal Wire Act and the Illegal Gambling Business Act, testimony by the U.S. Attorney General about the implementation of the Travel Act, and decisions of U.S. federal courts, ultimately concluding that the U.S. measures were designed to protect public morals within the meaning of GATS Article XIV(a).[54]

The Panel then addressed whether the U.S. measures were "necessary" to protect public morals per GATS Article XIV(a).[55] The Panel applied a multi-factor balancing test developed in prior GATT jurisprudence[56] that considers the vitality of the interests to be protected, the extent to which the measure contributes to the stated goal, and the measure's overall effect on trade.[57] The exact mechanics of this balancing test are somewhat opaque.[58] The Panel acknowledged that the interests the United States sought to preserve (control of organized crime, protection of children and compulsive gamblers) were extremely important, and that the measures made a substantial contribution to the stated goal, but, noting that they also had a "signif-

(noting Case C-275/92, Her Majesty's Customs and Excise v. Schindler, 1994 E.C.R. I-1039, and Case C-6/01, Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v. Portugal, 2003 E.C.R. I-8621).

51 The Panel referred to a 1927 debate in the Economic Committee of the League of Nations, in which it was suggested that a proposed moral exception (under a GATT-precursor treaty) would permit a state to prohibit the importation of lottery tickets. *Gambling Panel*, *supra* note 3, ¶ 6.472; Econ. Comm., *Commentary and Preliminary Draft International Agreement for the Abolition of Import and Export Prohibitions and Restrictions*, at 10, 15, League of Nations Doc. C.E.I.22 1927 II.13 (1927).

52 *Gambling Panel*, *supra* note 3, ¶ 6.474.

53 *Id.* ¶ 6.487.

54 *See id.* ¶¶ 6.482–.483, 6.485, 6.487.

55 *See id.* ¶¶ 6.488–.535.

56 *See* Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 164, WT/DS169/AB/R (Dec. 11, 2000) [hereinafter *Korea—Beef*].

57 *See Gambling Panel*, *supra* note 3, ¶ 6.488 ("[W]e recall that we must assess . . . (a) the importance of the interests or values that these Acts are intended to protect; (b) the extent to which these Acts contribute to the realization of the ends respectively pursued by these Acts; and (c) the respective trade impact of these Acts.").

58 The Panel simply articulated its conclusions as to the strength of each (conflicting) element and asserted that "we must now 'weigh and balance' those elements." *See id.* ¶ 6.532.

icant restrictive trade impact,"[59] judged the balance of these conflicting factors to lie against the United States.[60]

On appeal, the WTO Appellate Body overturned the Panel's ruling that the U.S. measures were not "necessary,"[61] but it ultimately ruled against the United States on the ground that the U.S. laws had not been shown not to discriminate against foreign gambling service providers.[62] In particular, the Interstate Horseracing Act[63] potentially exempted U.S. (but not foreign) companies supplying remote gambling services (e.g., off-track and pari-mutuel betting) from the laws in question.[64] In reaching this conclusion, the Appellate Body affirmed the Panel's ruling that the U.S. measures fell within the scope of XIV(a),[65] leaving undisturbed both its definition of "public morals" and its evidentiary approach to determining whether gambling could be considered an issue of public morals.[66]

Read together, the decisions of the Panel and Appellate Body establish the following test for applying the public morals exception: First, determine whether the issue, as a general category, falls within the scope of "public morality" as defined textually and by reference to international state practice. Second, if the issue in general is considered a question of public morality, examine the specific measure in question to ensure that it is legitimately directed at that moral interest. Third, if the particular measure does address a matter of public morals, ensure that the measure is not more trade restrictive than necessary, weighing the morality interest of the regulating state against the interest of other WTO Member States in trade liberalization.[67] Finally, ensure that the measure is not applied in a nondiscriminatory fashion.

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59 *Id.* ¶ 6.495.

60 *Id.* ¶ 6.535. The Panel emphasized the United States' alleged failure to engage in negotiations with Antigua about less trade-restrictive alternatives to a statutory ban. *Id.* ¶ 6.531. The Appellate Body later rejected this reasoning. *See Gambling AB*, *supra* note 3, ¶¶ 317–18.

61 *See Gambling AB*, *supra* note 3, ¶ 327.

62 *Id.* ¶ 372.

63 15 U.S.C. §§ 3001–07 (2000).

64 *See Gambling AB*, *supra* note 3, ¶ 371. Because the United States bore the burden of demonstrating that its measures qualified under the exception in GATS Article XIV, its failure to demonstrate that the Interstate Horseracing Act applied nondiscriminatorily blocked its invocation of the public morals clause. *See id.* ¶ 372.

65 *Id.* ¶ 299.

66 The Appellate Body rejected the Panel's holding that the United States should have engaged in multilateral negotiations with Antigua. *See id.* ¶ 326.

67 *See supra* notes 56–57 and accompanying text.

II
WHICH MORALS ARE "PUBLIC MORALS"?

This section addresses the first doctrinal question raised by the *Gambling* dispute: whether gambling is a matter of "public morals" for the purpose of GATS Article XIV(a). Although the legal doctrine is likely to be driven by underlying policy factors (i.e., political beliefs about the appropriate balance between regulatory autonomy and trade), any solution must fit within the bounds of the treaty text as informed by well-settled principles of treaty interpretation.[68]

The difficulty of defining "public morals" is evident from both policy and textual perspectives. Amongst 148 WTO Member States, "public morals" could mean anything from religious views on drinking alcohol or eating certain foods to cultural attitudes toward pornography, free expression, human rights, labor norms, women's rights, or general cultural judgments about education or social welfare. What one society defines as public morals may have little relevance for another, at least outside a certain core of religious or cultural traditions.[69]

A. A Comparative View

The problem of deciding whether a given measure falls within the scope of an enumerated exception is not unique to public morals. The Appellate Body has previously determined, for instance, whether sea turtles are an "exhaustible natural resource[ ]" per GATT Article XX(g)[70] and whether the risk of mesothelioma from asbestos inhalation is a threat to "human health" per GATT Article XX(b).[71]

The most significant contrast between public morals and natural resources or health is the existence or absence of internationally accepted objective evidence as to the nature of the exception itself. In a dispute over U.S. restrictions on the import of shrimp harvested in a way that endangered sea turtles, the Appellate Body interpreted

[68] The starting point for interpreting WTO agreements is "customary rules of interpretation of public international law." *See* Dispute Settlement Understanding, *supra* note 3, art. 3.2. The Appellate Body equates these rules with the Vienna Convention on the Law of Treaties. *See* Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, at 15, WT/DS2/AB/R (Apr. 26, 1996) [hereinafter *Gasoline*].

[69] *See* Allan Rosas, *Non-Commercial Values and the World Trade System: Building on Article XX*, *in* ESSAYS ON THE FUTURE OF THE WTO: FINDING A NEW BALANCE 75, 78 (Kim Van der Borght ed., 2003) (suggesting "certain cultural or religious traditions" as example of GATT drafters' original intent for public morals clause).

[70] *See Shrimp/Turtle*, *supra* note 7, ¶¶ 127–34.

[71] *See Asbestos*, *supra* note 2, ¶¶ 162–63. In *Gambling*, the Appellate Body explicitly endorsed the relevance of GATT Article XX jurisprudence in interpreting GATS Article XIV. *See Gambling AB*, *supra* note 3, ¶ 291.

"exhaustible natural resources" in GATT Article XX(g) in light of strong scientific evidence that living natural resources could be exhaustible[72] and a broad international consensus that this threat was significant for sea turtles.[73] Similarly, in a dispute over a French public health prohibition on the import of asbestos and asbestos-containing products, the Appellate Body referred to internationally accredited scientific findings—such as reports by the World Health Organization—on the carcinogenic nature of asbestos fibers in concluding that asbestos was a threat to "human life or health."[74]

By contrast, it is far more difficult to draw substantive boundaries around the term "public morals" based on commonly accepted objective evidence. Measures related to a core of near-universal human moral values can probably be identified, such as prohibitions on murder, genocide, slavery, and torture, though the precise content of such norms and even the extent of consensus on such issues is probably debatable. Beyond this core, there is at best a tenuous consensus on issues such as trade in pornography, gambling, alcohol, and illegal drugs, which many commentators would perhaps readily agree fall within the public morals exception.[75]

In sum, what constitutes a threat to human health or an exhaustible natural resource is common amongst even a diverse array of countries to an extent that what constitutes a question of public morals is not.[76] Accordingly, this Note argues that a decision to assess one state's public morals regulation with respect to evidence of other states' practice is unworkable.

B. Assessing the Gambling *Doctrine*

The *Gambling* decision can be understood as using historic and contemporary state practice to limit, for policy reasons, a treaty text of potentially broad scope. Conceivably, any law passed by a representative government prohibiting any behavior could be considered a social

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[72] *See Shrimp/Turtle*, *supra* note 7, ¶¶ 128–34 (citing evidence from "modern biological sciences" that living species are susceptible to "exhaustion and extinction").

[73] *Id.* ¶ 132 (noting recognition of "exhaustibility" of sea turtles indicated by signatories to Convention on International Trade in Endangered Species of Wild Flora and Fauna).

[74] *See Asbestos*, *supra* note 2, ¶ 162 (noting findings by International Agency for Research on Cancer and World Health Organization about carcinogenic nature of asbestos fibers).

[75] *See infra* note 101 and accompanying text.

[76] This is not to imply that countries will not have diverse opinions about how or whether to address a particular threat. This section argues only that identification of the risk (e.g., does cancer count as a threat to human health) is different than deciding how vigorously to regulate that risk, and that the former is far more difficult in the context of public morals than for environment or human health.

judgment about right and wrong, thus falling within a broad textual definition of public morals.[77]

But an approach under which the exception would effectively swallow the rule of trade liberalization would conflict with the explicit object and purpose of GATS and GATT. The GATS preamble memorializes the parties' intent to expand trade in services through "progressively higher levels of liberalization."[78] Although the preamble also "[r]ecogniz[es] the right of Members to regulate . . . in order to meet national policy objectives,"[79] any interpretation which reads trade liberalization out of the treaty is untenable under basic principles of treaty interpretation.

However, despite the need to constrain the scope of the public morals exception, *Gambling* went too far. The decision, at least implicitly, suggests that States invoking a public morals defense will be expected to present evidence of similar practice by other states. Taken to an extreme, the *Gambling* doctrine might be read as implying that states cannot unilaterally define public morals.[80]

There is empirical evidence that Members' views of what constitute "public morals" regulations are currently broader than such a definition would allow. A review of recent WTO Trade Policy Reviews[81]—regular declarations by WTO Member States about their

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[77] *See* Feddersen, *supra* note 9, at 106 (arguing that relying on ordinary meaning of public morals "could lead to a blanket clause with an overly broad scope and countless meanings"); Charnovitz, *supra* note 9, at 700 ("dictionary definitions do not help much" in determining what morals are covered).

[78] GATS, *supra* note 3, preamble, para. 3.

[79] *Id.* ¶ 4.

[80] It might seem unlikely that a WTO Panel would explicitly reject a country's attempted invocation of Article XIV(a) on the ground that no other state treated the issue similarly. Nevertheless, the *Gambling* doctrine may be cognitively attractive to WTO decisionmakers. Commentators have criticized international tribunals, including the WTO, as ill-suited to second-guess national legislatures about the legitimacy or appropriateness of municipal laws. Citing the presence or absence of other state practice provides decisionmakers an "objective" touchstone on which to base decisions, perhaps avoiding the perception of decisions based on individual subjective judgments. *See, e.g.*, Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 27 (2005) (criticizing international judicial decisionmakers as "likely to allow moral ideals, ideological imperatives, or the interests of [third-party] states to influence their judgments"); Anupam Chander, *Globalization and Distrust*, 114 YALE L.J. 1193, 1195 (2005) (discussing criticism of "authoritarianism" in International Criminal Court, International Court of Justice, North American Free Trade Agreement (NAFTA) tribunals, International Tribunal for the Law of the Sea, and WTO Appellate Body).

[81] Between 1995 and 2004, at least thirty-two WTO Member States reported public morals laws or measures or reserved the right to make use of such measures. *See infra* Appendix II. To locate Trade Policy Reviews disclosing or discussing morals-related measures, I searched the WTO Documents Online database, available at http://docsonline.wto.org/, using document symbol "WT/TPR/*," keyword "moral*," and a date range of January 1, 1995 through November 1, 2004. This search yielded Trade Policy Reviews, Reports by

domestic trade policies—reveals that products currently subject to morality-based import restrictions include alcohol,[82] pornographic or obscene materials,[83] child pornography,[84] gambling equipment or games of chance,[85] hate propaganda,[86] illegal drugs,[87] lottery tickets,[88] non-kosher meat products,[89] posters depicting crime or violence,[90] stolen goods,[91] treasonous or seditious materials,[92] counterfeit money,[93] automobile radar detectors,[94] and video tapes and laser discs.[95]

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the WTO Secretariat subsequent to the submission of Trade Policy Reviews, and minutes of WTO meetings at which Trade Policy Reviews were discussed. From these results, I identified and catalogued instances where a country imposed or asserted the right to impose trade-restrictive measures based on public morality. Many countries declared multiple morals-related measures in a single Trade Policy Review or maintained different measures over time; for brevity, Appendix II lists only one illustrative citation per country. As the frequency with which a WTO Member State performs Trade Policy Reviews increases with that country's share of international trade, this data should provide a reasonably good measure of worldwide "morals" practices as they are relevant to trade. Note that page references in citations to Trade Policy Reviews *infra* and in Appendix II correspond with opening the electronic files in their native file format (i.e., WordPerfect or Word); pagination may differ if files are converted between file formats.

82 Indonesia, Addendum to Minutes of Meeting, *Indonesia Trade Policy Review*, at 3, WT/TPR/M/117/Add.1 (Sept. 11, 2003).

83 Republic of Korea, Report by the Secretariat, *Republic of Korea Trade Policy Review*, at 54, WT/TPR/S/137 (Aug. 18, 2004); Honduras, Report by the Secretariat, *Honduras Trade Policy Review*, at 46, WT/TPR/S/120 (Aug. 29, 2003); Israel, Report by the Secretariat, *Israel Trade Policy Review*, tbl.III.8, WT/TPR/S/58 (Aug. 13, 1999); Nigeria, Report by the Secretariat, *Nigeria Trade Policy Review*, at 78, WT/TPR/S/39 (May 27, 1998). The United States prohibits the importation of "obscene" pictures. *See* Charnovitz, *supra* note 9, at 695 (discussing 19 U.S.C. § 1305(a) (2000)).

84 Canada, Report by the Secretariat, *Canada Trade Policy Review*, tbl.III.4, WT/TPR/S/53 (Nov. 19, 1998).

85 Turkey, Report by the Secretariat, *Turkey Trade Policy Review*, tbl.III.7, WT/TPR/S/125 (Nov. 19, 2003); Thailand, Report by the Secretariat, *Thailand Trade Policy Review*, tbl.III.3, WT/TPR/S/123 (Oct. 15, 2003); Indonesia, Report by the Secretariat, *Indonesia Trade Policy Review*, at 28 & tbl.II.3, WT/TPR/S/117 (May 28, 2003); *Israel Trade Policy Review*, *supra* note 83, tbl.III.8; *Nigeria Trade Policy Review*, *supra* note 83, tbl.III.9.

86 *Canada Trade Policy Review*, *supra* note 84, tbl.III.4.

87 *Thailand Trade Policy Review*, *supra* note 85, tbl.III.3 (noting restriction on imports of potassium permanganate, known precursor for illegal drugs); India, Report by the Secretariat, *India Trade Policy Review*, at 38–39, WT/TPR/S/100 (May 22, 2002); *Honduras Trade Policy Review*, *supra* note 83, at 46.

88 *Israel Trade Policy Review*, *supra* note 83, tbl.III.8.

89 *Id.* at 31.

90 *Canada Trade Policy Review*, *supra* note 84, tbl.III.4.

91 Suriname, Report by the Secretariat, *Suriname Trade Policy Review*, tbl.III.2, WT/TPR/S/135 (June 14, 2004).

92 *Canada Trade Policy Review*, *supra* note 84, tbl.III.4.

93 *Israel Trade Policy Review*, *supra* note 83, tbl.III.8; *Canada Trade Policy Review*, *supra* note 84, tbl.III.4.

94 *Israel Trade Policy Review*, *supra* note 83, tbl.III.8.

95 Singapore, Report by the Secretariat, *Singapore Trade Policy Review*, at 43, WT/TPR/S/14 (May 7, 1996).

Although this list is relatively broad, and although the data set is likely underinclusive,[96] several features stand out. First, a relatively small range of products and services (e.g., pornography, gambling equipment, illegal drugs) are subject to moral trade restrictions in multiple countries.[97] Second, and more importantly, morality-driven trade restrictions in certain countries (e.g., on non-kosher meat products, video tapes, automobile radar detectors) may not reflect shared international practice.[98] Applied literally, the *Gambling* standard may exclude from the scope of the public morals exception some of the measures included above. As argued below,[99] such a doctrine would impermissibly restrict the autonomy of WTO Member States to pass measures protecting legitimate moral interests.[100]

C. *Possible Alternative Standards*

This section will explore alternatives to the *Gambling* doctrine, considering a range of plausible textual interpretations of "public morals" and the policy balance struck by each. Such an analysis was not rendered moot by *Gambling*, which did not explicitly address whether evidence of other states' practices was *necessary* to qualify an issue under GATS XIV(a) or GATT XX(a). Because there was ample evidence about practices worldwide, *Gambling* was an easy case. Future disputes, however, could yield harder cases in which the necessity question would be determinative.

1. *Originalism*

One natural starting point is to inquire what public morals meant when GATS was signed in 1995 or, more meaningfully, when the term was first incorporated into international economic law in 1947. Steve Charnovitz's study of the history and preparatory work of GATT Article XX(a) suggests that public morals would have been understood in 1947 as applying to, at a minimum, alcohol, narcotics, pornog-

96 Many countries, for instance, reported maintaining morality-based trade restrictions without naming the particular products affected by such measures. *See, e.g.*, Uganda, Report by the Government, *Uganda Trade Policy Review*, at 4, WT/TPR/G/4 (June 30, 1995).

97 *See supra* notes 83, 85, 87 and accompanying text.

98 *See supra* notes 89, 94–95.

99 *See infra* Part II.C.2.

100 I do not argue categorically that all of the particular measures discussed above—such as prohibitions on the import or sale of laser discs or automobile radar detectors—should fall within the public morals exception. Rather, this Note suggests below a multi-stage doctrinal framework that should govern how a WTO tribunal would make such a determination. At this point I argue only that the *Gambling* decision, read literally, would improperly exclude such measures at the threshold, rather than allowing the more nuanced, fact-specific inquiry I propose below. *See infra* Parts II.D, III.C.

raphy, lottery tickets, firearms, blasphemous articles, products linked to animal cruelty, prize fight films, and abortion-inducing drugs.[101]

Although this list provides a plausible starting point, several policy factors weigh against an originalist approach. Most notably, the Appellate Body has previously taken an explicitly evolutionary approach to interpreting other enumerated exceptions in GATT Article XX.[102] This reasoning would apply with equal or greater force to "public morals," a standard whose plain meaning necessitates an evolution to match contemporary beliefs and norms.[103] Originalism therefore would be both inconsistent with existing jurisprudence and unsuited to today's more diverse World Trade Organization.

2. *Universalism*

A more evolutionary interpretative approach might require parties to demonstrate universal or near-universal practice amongst other WTO member states showing that a given issue related to morality: e.g., modern prohibitions on slavery, genocide, or torture.[104]

This test is suggested by reasoning in prior WTO jurisprudence; one case, for instance, referred to the "acknowledgment by the international community" of the need to preserve living natural resources.[105] In the public morals context, evidence of widespread international consensus might be found, for instance, in the aspirational preambulary language of broadly subscribed international agreements or conventions.[106]

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[101] *See* Charnovitz, *supra* note 9, at 705–17 (surveying historical evidence of contemporary understanding of morals clauses in bilateral and multilateral international trade agreements prior to GATT).

[102] For instance, it reasoned that the term "natural resources" in GATT Article XX(g) "must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment." *Shrimp/Turtle*, *supra* note 7, ¶¶ 129–30.

[103] *See* Howse, *Protection of Workers' Rights*, *supra* note 10, at 142 ("[T]he interpretation of public morals should not be frozen in time . . . ."); Robert Howse, *Back to Court After* Shrimp/Turtle*? Almost But Not Quite Yet: India's Short Lived Challenge to Labor and Environmental Exceptions in the European Union's Generalized System of Preferences*, 18 AM. U. INT'L L. REV. 1333, 1368 n.145 (2003) ("[R]esponsible and representative governments clearly have to be accountable to the values and interests of the citizens of today—and tomorrow—not those of yesteryear."); HUNT, *supra* note 3, at 6 (discussing historical changes in moral regulation "across economic, social and cultural fields").

[104] *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51 (Dec. 10, 1984).

[105] *Shrimp/Turtle*, *supra* note 7, ¶ 131.

[106] *See, e.g.*, U.N. Charter art. 55 (calling upon U.N. member countries to promote "universal respect for, and observance of, human rights and fundamental freedoms for all"); The United Nations Conference on Environment and Development, June 3–14, 1992, *Rio Declaration on Environment and Development*, Annex 1, princ. 7, U.N. Doc. A/CONF.151/

A universalist approach is, however, problematic. First, it might so constrain the public morals exception as to render it effectively useless, again contrary to general principles of treaty interpretation.[107] Second, states will rarely need to restrict trade to protect public morality in areas where there is broad international consensus; most countries would already be protecting the given moral interest independently, and interactions with other states would exert substantial informal pressure on outlier nations to reform their practices. Rather, a public morals exception is needed most when opinions are diverse. Then, a country will need trade-restrictive measures to protect its population against products or services produced by foreigners with different moral standards. One might imagine, for instance, a ban on lingerie imposed by a conservative Muslim state, or restrictions on Christian evangelical materials by a non-Christian state.

From the evidence of state practice discussed above,[108] many states currently impose moral trade restrictions without broad support from other states or the international community, highlighting the problematic nature of a universalist approach. It is reasonable to assume that the basic purpose motivating the inclusion of the public morals clauses in GATT and GATS was to protect national autonomy on sensitive moral questions despite broad commitments to free trade.

A less objectionable version of a universalist approach would restrict the public morals clause to the regulation of issues broadly agreed to be matters of moral judgment, but on which a diversity of substantive opinions exist as to the content of that judgment, such as the death penalty or abortion. In other words, the requirement would be for universal recognition of the regulatory category (e.g., pornography, abortion, etc.) rather than the opinion itself.

A "categorical universalist" approach would mitigate, to some extent, the moral minority objection discussed above, as trade-restrictive regulations protecting a State's controversial substantive views on universally recognized moral issues would be protected by the public morals clause. However, a categorical universalist approach would provide no protection to countries or groups of countries unable to demonstrate consensus about an issue they believed to constitute a

26/Rev.1 (June 14, 1992) ("States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem.").

107 *See Gasoline*, *supra* note 68, at 16 (holding that one treaty provision should not be interpreted so as to render another provision ineffective or inutile).

108 *See supra* notes 81–95 and accompanying text.

matter of public morality.[109] Insofar as the public morals clause is most naturally read to protect regulations reflecting substantive views in the moral minority, it is appropriate also to protect regulations reflecting unique views of what issues, in general, constitute morality.

3. *Moral Majority or Multiplicity*

A less constricting alternative would be to require widespread, though not universal, state practice, especially amongst states most likely to be affected.[110] Such an approach would encompass issues agreed to be moral by certain groups of states, such as free speech, labor standards,[111] women's rights,[112] or nondiscrimination on the basis of gender or sexual orientation. It would also include moral judgments held by similarly situated nations, such as Muslim nations' restrictions on alcohol, solving in part the moral minority problem.

This standard is likely still too restrictive, though its scope will depend on what is taken to constitute adequate evidence of state practice. Ultimately, a moral multiplicity approach fails (perhaps by definition) because it excludes from the public morals exception the unilateral actions of any state. For one, Article XIV on its face applies to the measures of "any Member," in the singular, not the plural. In addition, the argument made above about the purpose of Article XIV—to guard the autonomy of WTO Member States in sensitive areas affecting national sovereignty—applies with greater force in the case of an individual State whose interests diverge from all other WTO Members. Because the WTO's representative policy bodies, in which each state has a single vote, will provide greater recourse to States whose interests align with others than for individual outliers, the structural safeguard of a textual protection for lone outliers is particularly important.

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[109] For instance, although countries imposing controls over speech and news media might view such regulation as driven by morality, it seems unlikely that all states view controls of speech or the press as distinctly moral issues.

[110] *Cf.* North Sea Continental Shelf Case (F.R.G. v. Den.), 1969 I.C.J. 3, 42 (Feb. 20) (noting that conventional rule may "be considered to have become a general rule of international law . . . [if a] widespread and representative" group adopts that rule).

[111] *See, e.g.*, International Labour Organization [ILO], *ILO Declaration on Fundamental Principles and Rights at Work*, ¶ 2, June 18, 1998, 37 I.L.M. 1233, *available at* http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm (requiring all ILO members to comply with fundamental labor rights).

[112] *See, e.g.*, Jarvis, *supra* note 10, at 219 (arguing that GATT public morals exception should be read to include women's rights).

4. *Unilateralism*

At the other extreme, states might be permitted to define public morals unilaterally. The most obvious concern here is the need to impose some boundary on what could be included in the public morals exception.[113] Insofar as a unilateral approach removes any limitation on the scope of acceptable public morals issues, it is incompatible with the treaty's text and subsequent state practice.[114] Moreover, public morals should not be read in a way as to deny its neighboring general exception clauses independent meaning.[115] "Public morals," for instance, should not encompass other categories found in GATT Article XX, such as the products of prison labor,[116] products related to national cultural heritage,[117] exhaustible natural resources,[118] human, animal, or plant life or health,[119] or national security.[120]

At least some WTO Members appear to understand the GATT and GATS public morals exceptions as relatively constrained. Several WTO Member States have employed language in bilateral and regional free trade agreements that explicitly reserves a greater degree of regulatory autonomy than in GATS or GATT. One bilateral free trade agreement, for instance, provides that "[n]othing is [sic] this Agreement shall prevent any Contracting Party from taking action and adopting measures, *which it considers necessary* for the protection . . . of public morals . . . ."[121] At least facially, this language renders the inquiry subjective; a state can take any measures "it considers necessary," rather than only those, in the GATT and GATS formulation, that are objectively "necessary." As such, this formulation allows the regulating state greater unilateral discretion over what

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113 *See supra* notes 78–79 and accompanying text.

114 *Id.*

115 *See* Feddersen, *supra* note 9, at 107 ("[I]t could be argued that the term 'public morals' excludes those measures enumerated in the other paragraphs of Article XX. Otherwise, either section (a) or one of the other sections becomes superfluous, at least to the extent the scopes of each section overlap.").

116 *See* GATT, *supra* note 3, art. XX(e).

117 *See id.* art. XX(f).

118 *See id.* art. XX(g).

119 *See id.* art. XX(b).

120 *See id.* art. XXI.

121 *See* Free Trade Agreement Between India and Sri Lanka art. IV, Dec. 28, 1998, *reprinted in* World Trade Organization Committee on Trade and Development, WT/COMTD/N/16 (June 27, 2002) (emphasis added). Other regional and bilateral agreements registered with the WTO employ similar language. *See, e.g.*, Agreement Between the Government of Republic of Armenia and the Government of Russian Federation on Free Trade art. 11, Sept. 30, 1992, *reprinted in* Communication to World Trade Organization Committee on Regional Trade Agreements, *Free Trade Agreement Between Armenia and the Russian Federation*, WT/REG174/1 (July 27, 2004).

constitutes public morals than is available under the objective GATS and GATT test of measures "necessary to protect public morals."

D. A Proposed Solution

A superior alternative would be to permit a country to define public morals unilaterally but to require evidence from that country supporting its claim that a particular issue has moral significance. First, such a solution charts a middle course between the moral minority and unrestrained unilateralism problems outlined above. Second, judging a regulation based solely on domestic evidence is more respectful of state sovereignty than conditioning such review on the views of an international tribunal or practices of other countries.[122] The *Gambling* Panel explicitly recognized that "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."[123]

In addition, this interpretation of the public morals exception is textually plausible. "Public" could as easily be read to mean "nation" or "community" as "international community." The neighboring general exceptions in GATT address conditions commonly understood as concerning matters within a country, such as human health or exhaustible natural resources. By association, public morals would take on similar meaning. Historical evidence also suggests that the general exceptions clauses would have been understood in 1947 as referring primarily to domestic policy conditions.[124]

One concern with the proposed solution might be that such evidence would be easily falsified, such that the test would collapse in practice into an empty procedural requirement that the state merely articulate an interest. However, as long as a Member State was required to submit substantial evidence of its internal conditions—e.g., historical practice,[125] contemporary public opinion polls, results

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122 *See, e.g.*, Wibren van der Burg, *The WTO and Public Morals: Inspiration from the ECHR*, *in* CONCERNS REGARDING ANIMALS, *supra* note 9, at 101, 110 (noting that European Court of Human Rights has avoided developing "substantive view" of public morals, instead reasoning that "[s]tate authorities are in principle in a better position than the international judge to give an opinion on the exact content of these [moral] requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them" (quoting Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) ¶ 48 (1976))).

123 *Gambling Panel*, *supra* note 3, ¶ 6.461.

124 *See* Rosas, *supra* note 69, at 78 (asserting that GATT Article XX(a) "surely meant national public morals" to drafters and contemporary observers).

125 There is a substantial scholarly literature about historical practices related to morals regulation. *See, e.g.*, PAUL BOYER, URBAN MASSES AND MORAL ORDER IN AMERICA, 1820–1920 (1978) (surveying history of efforts to shape and regulate morals in U.S. cities);

of political referenda, or statements of accredited religious leaders—the test would be non-trivial. Moreover, requiring the regulating country to articulate an interest would facilitate, as an evidentiary matter, later stages of the doctrinal analysis—such as whether a measure is "necessary"[126]—under which a Panel would consider the degree of fit between the regulation and its stated aim.

The WTO Dispute Settlement Body is competent and experienced in making such judgments. Assessing the credibility of proffered evidence is a traditional judicial fact-finding role in which WTO Panels can draw on the established techniques and practices of municipal courts. WTO Panels have demonstrated their willingness and ability to perform complex fact-finding on subjects such as the trade effect of a government program combining regulation and voluntary initiatives[127] or the resolution of conflicting scientific claims about risks to the environment or human health.[128]

In the context of public morals, a Panel's task would be to assess the evidence presented by a regulating party about the existence of a morality-related interest. This determination would turn on the content and credibility of documentary and other evidence as to whether a particular group held the moral belief asserted as the basis for regulation.[129] In addition to evidence presented before it, a Panel has authority to seek information "from any relevant source," including experts and "any individual or body which it deems appropriate"[130]—such as, for instance, religious or civil society organizations, public opinion firms, local government officials, and individual citizens.

Furthermore, allowing a state to select its public morals interest unilaterally (i.e., restricting the WTO inquiry to the factual question of whether the stated interest actually exists) removes from the Panel's analysis the most problematic and value-laden issue: whether a particular interest is vital enough to fall under the GATT and GATS public morals exception. In other words, a WTO tribunal would no longer need to decide whether a particular issue, as a general cate-

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DAVID J. PIVAR, PURITY CRUSADE: SEXUAL MORALITY AND SOCIAL CONTROL, 1868–1900 (1973) (discussing historical moral regulation of prostitution).

126 *See infra* Part III.A.

127 *See* Report of the Panel, *Japan—Trade in Semi-conductors*, ¶¶ 99–117, L/6309–35S/116 (Mar. 24, 1988), GATT B.I.S.D. (35th Supp.) at 116, 152–58 (1989), *available at* http://www.worldtradelaw.net/reports/gattpanels/japansemiconductor.pdf (considering market effect of complex network of informal regulations and guidance from Japanese government to semiconductor industry).

128 *See generally Asbestos*, *supra* note 2.

129 *Cf.* Claus-Dieter Ehlermann & Nicolas Lockhart, *Standard of Review in WTO Law*, 7 J. INT'L ECON. L. 491, 501–03 (2004) (challenging appropriateness and feasibility of Panels making "de novo" determinations about national regulatory measures).

130 Dispute Settlement Understanding, *supra* note 3, art. 13.

gory, is related to public morals. Instead, the tribunal's task would be to judge whether the interest, as articulated by the regulating state, was credible based on factual circumstances within that country.

Finally, such a test would have the additional virtues of transparency and predictability. Although the Appellate Body does not review a Panel's findings of fact,[131] the parties do have an opportunity to review and challenge a Panel's draft report.[132] The party whose regulations were challenged would be well-positioned to judge—and to advocate for reconsideration of—factual findings about its own domestic conditions, rather than (as under the *Gambling* test) evidence of practice in other states. Moreover, a state could have greater confidence ex ante whether a particular measure would likely be found to violate its WTO obligations, as the legal inquiry would be based on information to which the regulating state had ready access.

III
AVOIDING OVERBREADTH

The most powerful counterargument to the interpretation advanced above is its potential overbreadth. Allowing a country to invoke the public morals exception unilaterally could shield from WTO scrutiny regulations that inefficiently restrict trade or are motivated by protectionism. Without reference to international practice, it might be feared that any municipal law or regulation could be cast as a matter of public morals, undoing the WTO's significant progress in liberalizing regulatory barriers to trade.[133] Such backsliding could destabilize the reciprocal bargains that underlie the international economic system and reduce net welfare by suppressing otherwise beneficial economic exchange.[134]

In response to this formidable critique, this section focuses on the role of two doctrinal constraints in limiting the potential overuse of the public morals exception: that a measure be the least restrictive means of protecting the interest at stake and that it be applied in a nondiscriminatory fashion.[135] These doctrines, used elsewhere in

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131 *See id.*, art. 17.6.

132 *See id.*, art. 15 (providing for "interim review" of draft Panel report, opportunity for written comment, and request for reconsideration of particular elements).

133 *See supra* note 14 and accompanying text.

134 *See* de Brouwer, *supra* note 21, at 23 ("An excessively broad reading of Article XX(a) could lead to numerous invocations of the exceptions clause by individual states . . . call[ing] into question . . . the GATT's rule of law as a whole.").

135 *See, e.g.*, Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, at 30, WT/DS11/AB/R (Oct. 4, 1996) [hereinafter *Alcoholic Beverages AB*] (finding Japanese taxes on alcoholic beverages in violation of WTO obligations because taxes were discrimina-

WTO jurisprudence,[136] were adopted explicitly in *Gambling*.[137] Sections A and B below introduce the doctrines and discuss their general application to public morals measures. Section C introduces an analytical framework through which to consider the effectiveness of the least restrictive means and nondiscrimination doctrines as applied to morals regulation, and suggests that, in most cases, the doctrines will play complementary roles in checking potential abuses. In the minority of circumstances where neither doctrine is likely to be effective, the threat of protectionism is not substantial.

A. Least Restrictive Means

The requirement that measures be "necessary to protect public morals" is explicit in GATS and GATT.[138] Drawing on prior WTO jurisprudence interpreting "necessary" in the context of other general exceptions, *Gambling* adopted a two-part necessity test. The first part involves a "weighing and balancing" of several factors, including the vitality of the interest at stake, the effectiveness of the measure in achieving its stated end, and the measure's overall effect on trade.[139]

Although the *Gambling* Panel and Appellate Body both employed the "weighing and balancing" analysis, this doctrine is unlikely to be fully satisfactory in the context of public morals. For one, it will often be analytically indeterminate because two of its prongs—vitality and effect on trade—pull strongly in opposite directions.[140] In addition, the test lacks transparency and predictability.[141] Although the Appellate Body is unlikely to disclaim completely a for-

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tory); *Shrimp/Turtle*, *supra* note 7, ¶ 186 (finding U.S. restriction on imported shrimp to be "arbitrary and unjustifiable discrimination").

136 *See, e.g.*, *Korea—Beef*, *supra* note 56, ¶ 164 (applying necessity doctrine in context of GATT Article XX(d)); *Shrimp/Turtle*, *supra* note 7, ¶¶ 177–86 (finding arbitrary discrimination under GATT Article XX).

137 *See Gambling AB*, *supra* note 3, ¶¶ 291, 348.

138 *See* GATT, *supra* note 3, art. XX(a); GATS, *supra* note 3, art. XIV(a).

139 *See Gambling AB*, *supra* note 3, ¶¶ 304–27; *Korea—Beef*, *supra* note 56, ¶ 164.

140 Many issues at the core of public morality, such as religion, pornography, illicit drugs, or alcohol, will be correlated with strongly held and deeply personal opinions, justifiably classified as vital. Given the highly contextual and country-specific nature of public morals issues, a WTO Panel, none of whose members can be a national of a party to a dispute, *see* Dispute Settlement Understanding, *supra* note 3, art. 8.3, may be hesitant to substitute its judgment for that of a Member State about the vitality of a particular moral interest. Conversely, the measures enacted to protect such interests are likely to be outright prohibitions on a particular good or service, the most trade restrictive of possible alternatives.

141 To the extent that Panelists wish to avoid making explicit assertions about the vitality of a particular morality interest, they may "balance it away" against one of the other factors. Such factors may explain the *Gambling* Panel's assertion that the U.S. measures served societal interests that could be characterized as "vital and important in the highest degree"—language that, in the context of prior WTO decisions, would put the interests on

mulation only recently adopted, the weighing and balancing approach should play a lesser role in the context of public morals.

The second part of the necessity inquiry adopted in *Gambling*, more useful than weighing and balancing in the context of public morality, involves an inquiry as to whether a less trade-restrictive measure (LRM) is "reasonably available,"[142] based on the degree to which an alternative measure achieves the stated goal,[143] the difficulty of implementing the alternative measure,[144] and the identity of parties bearing any additional costs.[145] A measure is only judged to be "necessary" if there is no reasonably available measure less restrictive of trade;[146] i.e., the measure chosen must be the least trade restrictive of reasonably available alternatives.

The LRM analysis is essentially a requirement of good fit between the means employed and the stated end.[147] Because the complaining party has the burden to propose an alternative measure against which the challenged provision is compared,[148] LRM harnesses the complainant's self-interest in further trade liberalization as an engine to identify and eliminate inefficiently trade-restrictive measures. The means-ends analysis will filter out measures less narrowly

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par with human life and health—while ultimately finding that the measure was not necessary. *See Gambling Panel*, *supra* note 3, ¶ 6.492; *Asbestos*, *supra* note 2, ¶ 172.

In practice, past decisions on vitality provide little ex ante guidance to parties as to what other kinds of interests are vital. The Appellate Body has held that a cigarette tax stamp regulation designed to avoid tax evasion was "a most important interest for any country . . . ." *See* Panel Report, *Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶ 7.215, WT/DS302/R (Nov. 26, 2004); *see also* Appellate Body Report, *Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶ 71, WT/DS302/AB/R (Apr. 25, 2005) (affirming Panel's analysis). Conversely, measures protecting the integrity of a grain grading and quality assurance system have been judged "essentially commercial in nature" and "important," but "not as important as" human life or health. *See* Panel Report, *Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain*, ¶¶ 6.224–.225, WT/DS276/R (Apr. 6, 2004).

142 *See Gambling AB*, *supra* note 3, ¶¶ 307–08 ("A comparison between the challenged measure and possible alternatives should then be undertaken . . . ."); *Korea—Beef*, *supra* note 56, ¶¶ 165–66 (describing "weighing and balancing process" as "comprehended" in less WTO-inconsistent analysis).

143 *Asbestos*, *supra* note 2, ¶¶ 170–74.

144 *Korea—Beef*, *supra* note 56, ¶¶ 179–80.

145 *Id.* ¶ 181.

146 *See, e.g.*, *Gambling AB*, *supra* note 3, ¶ 308; *Korea—Beef*, *supra* note 56, ¶ 166.

147 Some economic commentators note that the least trade-restrictive requirement is related to choosing the policy that most efficiently achieves a given end. *See, e.g.*, DANIEL C. ESTY, GREENING THE GATT 48 n.15 (1994) ("A 'least GATT-inconsistent' or 'least trade-restrictive' test could work as an efficiency precept, forcing attention to the means chosen to pursue environmental goals, without threatening the goals chosen.").

148 *See Gambling AB*, *supra* note 3, ¶ 311.

tailored to the stated goal, making it difficult or impossible for Member States to disguise alternative purposes.

In the context of the public morals clause, the LRM doctrine provides benefits of transparency and predictability. It involves a concrete, particularized comparison between the measure in question and a specific proposed alternative.[149] This analysis, used in conjunction with the proposal advanced in Part II.D above, avoids the indeterminacies and ambiguities that would plague a Panel's attempt (as in *Gambling*) to set substantive boundaries around the term "public morals" or to assess the vitality of a given interest. Further, Panels are well-positioned to determine questions of fact such as the extent to which the challenged and alternate measures will achieve the stated end, the relative cost of each measure, and the distribution of those costs.[150] Finally, because the regulating state can (and in well-functioning systems, probably does anyway) undertake a similar analysis ex ante by comparing the effects and costs of various potential measures, the doctrine should provide a high degree of predictability.

B. Nondiscrimination

A complementary check on overuse of the public morals exception is the requirement of nondiscrimination. The chapeaux[151] to GATS Article XIV and GATT Article XX require that measures not be applied in a manner that constitutes "arbitrary or unjustifiable discrimination."[152] The nondiscrimination requirement was the basis for the ruling against the United States in *Gambling*, in which the Appellate Body found the Interstate Horseracing Act potentially to permit the domestic provision of remote gambling services while the Wire Act, Travel Act, and Illegal Gambling Business Act denied similar opportunities to foreign entities.[153]

The basis of the nondiscrimination requirement is a comparison between the treatment of foreign products and like domestic products. The doctrine applies both to measures that make explicit provision for

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[149] The Appellate Body has emphasized that a "merely theoretical" alternative measure is not "reasonably available." *See Gambling AB*, *supra* note 3, ¶ 308.

[150] *Cf. supra* notes 127–28 and accompanying text.

[151] In the context of the WTO, "chapeau" (chapeaux in the plural) is understood to refer to a preambulary paragraph applying generally to all provisions in a particular clause, such as the preambles to GATT Article XX and GATS Article XIV. *See supra* note 6. The WTO Appellate Body has interpreted the Article XX and XIV chapeaux as imposing an overarching requirement that the enumerated exceptions not be applied so as to constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail. *See Shrimp/Turtle*, *supra* note 7, ¶¶ 147, 150.

[152] *See* GATS, *supra* note 3, art. XIV; GATT, *supra* note 3, art. XX.

[153] *See Gambling AB*, *supra* note 3, ¶¶ 369, 371.

arbitrary or unjustifiable discrimination and those that, while facially nondiscriminatory, are applied in an arbitrary or unjustifiable manner.[154] The Appellate Body has found the unilateral application of a measure, coercive effects on other countries, and rigidity and inflexibility in a measure's application to constitute arbitrary or unjustifiable discrimination.[155] Nondiscrimination thus ensures that any costs imposed on foreign producers or service providers by a particular regulation will also be felt by domestic interests.[156]

As seen in *Gambling*, nondiscrimination is most effective as a check on protectionism when a regulated market contains both imported and like domestic products and services. Whether morals regulations are likely to satisfy this condition is explored further in Section C below.

One frequent point of contention in nondiscrimination analysis is which products or services should be compared as "like." Although this determination is often difficult and subjective, it may be easier for public morals analysis than in other regulatory areas. Whether two alcohol products, for instance, are "like" for the purposes of a tax or other regulation could depend on similarities or differences in alcohol content, method of production, consumer uses, or raw materials.[157] In general, the characteristic chosen as the basis for comparison may be determinative as to likeness.[158] Morals regulations, however, will often identify a particular objectionable characteristic or class of goods (e.g., alcohol or pornography), eliminating the need for a WTO

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154 *See Shrimp/Turtle*, *supra* note 7, ¶ 160. The Appellate Body has acknowledged that the chapeau's nondiscrimination requirement cannot be equivalent to the obligation under GATT Article III, the general requirement of nondiscrimination between domestic and imported goods. *See id.* ¶ 150 ("[T]he nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994, such as Articles I, III or XI."). Beyond noting that they cannot be identical, the Appellate Body has not specified the precise differences between the two requirements.

155 *See Shrimp/Turtle*, *supra* note 7, ¶¶ 164–65, 168, 172, 175.

156 In addition to serving as a check against protectionism, domestic producers or service providers are likely to be more effective than their foreign counterparts in shaping the outcome of domestic political and regulatory processes. As such, they will reduce the likelihood that measures are inefficiently trade restrictive, as any requirements that restrict the ability of foreign producers to sell a service or product in a particular market will, under a strict nondiscrimination doctrine, also restrict the ability of domestic producers to sell in their own market.

157 *See* Panel Report, *Japan—Taxes on Alcoholic Beverages*, ¶ 6.23, WT/DS8/R, WT/DS10/R, WT/DS11/R (July 11, 1996) (applying likeness factors); *Alcoholic Beverages AB*, *supra* note 135, § H.1(a).

158 *See* Henrik Horn & Joseph H.H. Weiler, *EC—Asbestos: European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, *in* THE WTO CASE LAW OF 2001 14, 25 (Henrik Horn & Petros C. Mavroidis eds., 2003) (discussing "alternative comparators" approach to determining likeness).

tribunal to do so. By defining the appropriate basis upon which to compare products, morality-based regulations will involve less ambiguity than likeness determinations under other GATT and GATS provisions.

C. *Application to Public Morals*

To illustrate the complementary roles of the least restrictive means and nondiscrimination doctrines in cabining abuses of the public morals clause, it is useful to categorize morals regulations along two dimensions. First, morals regulations may be categorical bans or lesser restrictions on the use or provision of goods or services. Second, regulations can be distinguished as affecting only foreign products or services or affecting imported and domestic sources equally. The effectiveness of the least restrictive means and nondiscrimination doctrines will depend on the "placement" of a particular regulation along these two dimensions.

In practice, morals regulations often involve categorical measures such as product bans, import restrictions, and licensing schemes.[159] Prohibitions might result from a number of domestic conditions. Most common are probably paternalistic efforts by a governing group to impose views on other groups within society.[160] Practical examples of this phenomenon include bans on gambling equipment,[161] pornography,[162] alcohol (e.g., Prohibition in the United States), or illegal drugs.[163] Second, efforts by a society to pre-commit itself to a particular rule in anticipation of individuals later preferring a different outcome might also involve prohibitions on goods or services.[164] Finally, categorical measures might be appropriate in the presence of strong,

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159 *See, e.g.*, *Indonesia Trade Policy Review*, *supra* note 82, at 16 (import restrictions and special licensing requirements); *Israel Trade Policy Review*, *supra* note 83, at 43 (import prohibition); Mauritius, Addendum to Minutes of Meeting, *Mauritius Trade Policy Review*, at 10, WT/TPR/M/90/Add.1 (Jan. 17, 2002) (import prohibition); *Suriname Trade Policy Review*, *supra* note 91, at xiii (discussing removal of import licensing scheme).

160 *Cf.* HUNT, *supra* note 3, at 5 (describing historical examples of moral regulation "from above, from 'the middle' and from below").

161 *See supra* note 85.

162 *See supra* notes 83–84.

163 *See supra* note 87.

164 *See infra* notes 174–75 and accompanying text. Pre-commitment refers to the idea that a society might deliberately pass laws that are difficult or impossible to modify later, based on the judgment that society will be better off with such laws even if future preferences change. *See, e.g.*, Stephen Holmes, *Precommitment and the Paradox of Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY 195, 239 (Jon Elster & Rune Slagstad eds., 1988) (arguing that constitutional pre-commitment "is a useful device for forestalling . . . collective self-destruction").

widely held social views condemning a particular practice, such as child pornography.[165]

Other morality-related measures do not involve categorical bans. One such group of regulations is motivated by consumer convenience. A ban on non-Kosher meat products,[166] for instance, might be understood less as a safeguard against consumer temptation than as a reflection of strong preferences exclusively to consume Kosher meat. While a categorical ban would reduce transaction costs by eliminating the need for verification, less restrictive measures such as product labeling might suffice.

It is also useful to distinguish morality regulations in which the regulating country has (or, prior to implementation of the measure in question, had) domestic production or services in the regulated sectors from countries without such domestic production. The U.S. laws at issue in *Gambling*, for instance, applied to service providers both in the United States and abroad. Other morals regulations might affect only imports, whether due to a natural lack of domestic supply or the regulatory elimination of domestic production.

Taken together, with examples provided for illustration, this analysis yields four categories of morality measures:

TABLE 1: TYPES OF MORALS REGULATIONS

	Domestic Production	**No Domestic Production**
Categorical	*Gambling*	Alcohol ban in non-producing state
Non-Categorical	Labeling of meat products	Labeling of products of child labor

The dashed line separating the left and right columns reflects the lack of a sharp distinction between situations with and without domestic production, as discussed further below. The remainder of this section considers the effectiveness of the least restrictive means and nondiscrimination doctrines in each of these four categories.

1. Non-Categorical Measures

Examples of non-categorical measures include a labeling or segregation requirement for meat products by a country in which many consumers practice vegetarianism, or a "dolphin friendly" certification

165 *See supra* note 84.
166 *See supra* note 89.

and labeling process for canned tuna.[167] Whether or not domestic production exists, the least restrictive means and nondiscrimination doctrines will provide robust checks against countries employing non-categorical measures for protectionist purposes or at inefficiently trade-restrictive levels.

Both the nondiscrimination and least restrictive means requirements would be effective when non-categorical measures affect both foreign and domestic production; such measures thus present the least risk of abuse. A country's willingness to maintain a regulatory scheme despite high initial costs to domestic interests should be evidence that the measure was neither motivated by protectionism nor needlessly overbroad in its restraint on trade. The reliability of this metric scales, of course, with the size and scope of domestic industry affected by the measure; in the absence of domestic production, a nondiscrimination requirement will not discipline the overuse of public morals regulations.[168] Furthermore, non-categorical measures are unlikely (or at least less likely than categorical bans) to drive domestic producers out of business. As a result, nondiscrimination will remain a viable check on potential abuses over time.

The LRM doctrine will also constrain countries employing non-categorical measures such as labeling or product segregation requirements. A close comparison between the measure in question and possible alternative measures will highlight areas in which the restriction on trade is overbroad or inefficient.

Where a country regulates in the absence of domestic production—such as, for example, mandatory labeling in U.S. markets of products produced using child labor[169]—the nondiscrimination requirement is unlikely to be very effective.[170] However, in such cir-

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[167] That WTO Member States did not include non-categorical measures in trade policy review disclosures, *see supra* notes 81–95 and accompanying text, does not necessarily indicate that such measures will never be observed in practice. For instance, countries might not even consider labeling requirements to be restrictions on trade, and thus fail to report them.

[168] It might be argued that, even in the absence of domestic production, a tribunal could examine whether a regulation applied in theory to both imports and (hypothetical) domestic production, i.e., whether the regulation was facially discriminatory. Although requiring regulations to be facially nondiscriminatory is salutary, in practice, a restraint on domestic production in the absence of any domestic firms likely to be affected is relatively costless for the regulating government and not likely to be a robust check on protectionism.

[169] *See* 142 CONG. REC. 24,099 (1996) (statement of Representative George Miller on introduction of Child Labor Free Consumer Information Act of 1996, a voluntary "child labor free" product labeling policy).

[170] Nonetheless, the nondiscrimination analysis might play some useful role. *See infra* note 180 and accompanying text.

cumstances the LRM analysis will continue to guard against inefficiently trade-restrictive measures.

2. *Categorical Bans*

Some moral regulations involve a country banning a product or service both domestically and from foreign sources.[171] Examples include a 1991 European Council prohibition on fur pelts harvested by leg traps,[172] as well as bans on pornography or treasonous and seditious materials.[173]

The least restrictive means analysis is unlikely to be an effective check on categorical measures because a total ban may be the only acceptable means of achieving goals of such high vitality. Where a total ban is, in effect, the least restrictive available measure, the LRM analysis will do no work. In each of the three circumstances discussed above—paternalism, pre-commitment, and shared moral consensus—a categorical ban is plausibly the least restrictive measure.[174] Paternalistic bans on a product or service are likely to be motivated by the existence of divergent views within a society.[175] Non-absolute measures such as product labeling are unlikely to be as effective in coercively changing such views or behaviors as removing the product from the market. Similarly, for a pre-commitment theory, a ban would be necessary to prevent expected future non-conforming individuals from later violating the terms of the morals agreement. Finally, on issues of broad social consensus, non-absolute measures are unlikely to be satisfactory in expressive message or practical effect.[176]

The nondiscrimination doctrine will, however, filter out protectionist and non-protectionist but inefficiently trade-restrictive measures, because many categorical regulations apply to both domestic and foreign products.[177]

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171 Despite the distinction presented in Table 1, categorical bans in the presence and absence of domestic production are closely related and in practice may reduce to a single category.

172 *See* Council Regulation 3254/91, 1991 O.J. (L. 308) 1, 1; *see also* de Brouwer, *supra* note 21, at 35–40.

173 *See supra* notes 84, 92.

174 *See supra* text accompanying notes 160–65.

175 The motivation to pass paternalistic regulations may be reduced when a particular viewpoint is widely held within a country. In such circumstances, absent concerns about consumer fraud or confusion, there may be little need to regulate given that individuals would avoid such products and services anyway based on their personal views.

176 Consider, for instance, whether a requirement to label all foreign news media products as such would be equally acceptable as a total ban where a regime was attempting to control the flow of information, or whether parental advisory labels are fully satisfactory to those who view pornography or violent movies as a threat to their children.

177 *See supra* text accompanying notes 154–56.

Categorical bans in the absence of domestic production pose the greatest challenge to the doctrinal framework advanced in this Note, as neither the LRM analysis (for the reasons advanced above)[178] nor the nondiscrimination requirement is likely to be effective. It may also be difficult to distinguish between legitimate measures maintained despite their extinguishing effect on domestic production, and regulations carefully targeted ex ante at foreign interests. Moreover, a separate criticism of these measures has been advanced: When invoked by a large consuming market, they effectively impose the moral standards of the regulating state on its trade partners.[179]

These risks can be mitigated in part by a searching application of the nondiscrimination doctrine. WTO tribunals should carefully examine the structure of the market in question across a range of potentially competing products and services to ensure that domestic interests do not stand to benefit from the regulation in question.[180]

It is also important to note that where no domestic products or services stand to benefit (now or in the future) from the exclusion of imports under a moral regulation, the risk of protectionism will be much lower, reducing the need for vigilant policing at the WTO. Nonetheless, even absent protectionist concerns, categorical measures may be inefficiently trade restrictive, reducing net welfare by eliminating mutually beneficial economic exchange, and reaffirming the need for scrutiny where possible.

In sum, morality-related measures (except categorical bans without prior domestic production) are likely to be adequately cabined by the doctrines of LRM and nondiscrimination. Where neither doctrine is effective, abuses will be less likely to occur due to the absence of protectionist motivation; merely inefficient regulations can be filtered out, in part, by a searching application of the nondiscrimination doctrine. Table 2 summarizes this analysis.

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178 *See supra* text accompanying notes 174–76.

179 *See supra* note 10; de Brouwer, *supra* note 21, at 24–25 (questioning whether state can use trade measure to protect public morals outside of its jurisdiction). This Note does not attempt to resolve such questions, which are part of an ongoing larger debate over the extraterritorial application of the GATT general exceptions. *See generally* TREBILCOCK & HOWSE, *supra* note 2, at 406–12 (discussing GATT case law on extraterritorial application of domestic environmental measures).

180 Such an inquiry is within the competence of a WTO Panel, which can draw on well-recognized econometric techniques for determining, e.g., the cross-price elasticity of products or services.

TABLE 2: SUMMARY OF DOCTRINES LIMITING OVERBREADTH

	Domestic Production	**No Domestic Production**
Categorical	Nondiscrimination	[Neither]
Non-Categorical	Nondiscrimination & LRM	LRM

CONCLUSION

One of this decade's most significant changes in international economic law has been the shift from a focus on tariff barriers to a broader attention to domestic environmental, human health, and safety regulations. Review of municipal regulations by an international tribunal in reaction to this development, however, has prompted substantial controversy. The emergence of trade-morality disputes at the WTO marks a highly significant transition point, bringing into sharp relief the conflicting interests of national sovereignty and economic interdependence.

This Note has argued that the decisions of the WTO Panel and Appellate Body in *Gambling* lay an inadequate framework for a normatively attractive and pragmatically workable public morals doctrine and impermissibly limit a state's ability to enforce its moral values. Given that public morals interests are likely to be highly subjective, geographically localized, and diverse across political boundaries, this Note has argued that WTO Member States should be able, pursuant to certain evidentiary requirements, to define public morals based solely on their internal circumstances. In turn, however, countries should face close scrutiny of the fit between their chosen regulatory means and stated goal, as well as intolerance of any potential discrimination against foreign interests. This approach provides several advantages over the *Gambling* result: It gives meaning to the public morals clause while preserving the essential core of national sovereignty implicated by issues of moral regulation, offers a predictable and transparent legal standard, and provides a more stable, enduring decision rule for future "hard cases" likely looming on the trade-morality horizon.

APPENDIX I
REGIONAL AND BILATERAL TRADE AGREEMENTS

TABLE 1: EXAMPLES OF REGIONAL TRADE AGREEMENTS INCORPORATING PUBLIC MORALS CLAUSES

Region	**Citation**
Association of South East Asian Nations (ASEAN)	Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA) art. 9, Jan. 28, 1992, 31 I.L.M. 513 (public morals clause)
Caribbean Community	Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM [Caribbean Community] Single Market and Economy art. 226, 2001, http://www.caricom.org/jsp/secretariat/legal_instruments/revisedtreaty.pdf (public morals clause)
European Free Trade Association	Convention Establishing the European Free Trade Association art. 12, Jan. 4, 1960, 370 U.N.T.S. 5 (public morals clause)
North America	North American Free Trade Agreement (NAFTA), U.S.-Can.-Mex., art. 2101(1), Dec. 17, 1992, 32 I.L.M. 605 (incorporating GATT Article XX into NAFTA)
Southern African Development Community	Protocol on Trade in the Southern African Development Community art. 9, Aug. 24, 1996, *reprinted in* World Trade Org. Comm. on Regional Trade Agreements, WT/REG176/1 (Oct. 8, 2004) (public morals clause)

TABLE 2: EXAMPLES OF BILATERAL FREE TRADE AGREEMENTS INCLUDING PUBLIC MORALS CLAUSES

Countries	**Citation**
Australia–New Zealand	Australia–New Zealand Closer Economic Relations Trade Agreement art. 18, Mar. 28, 1983, 1329 U.N.T.S. 176, 22 I.L.M. 945 (public morals clause)
Chile-Mexico	Free Trade Agreement Between Chile and Mexico art. 19-02, Apr. 17, 1998, *reprinted in* World Trade Org. Comm. on Regional Trade Agreements, WT/REG125/1 (Aug. 27, 2001) (incorporating by reference Article XX of GATT and Article XIV(a) of GATS)
China-ASEAN	Framework Agreement on Comprehensive Economic Co-Operation Between the Association of South East Asian Nations and the People's Republic Of China art. 10, Nov. 4, 2002, http://www.aseansec.org/13196.htm (public morals clause)
Egypt–European Community[181]	Euro-Mediterranean Agreement Establishing an Association Between the European Communities and Their Member States and the Arab Republic of Egypt art. 26, June 25, 2001, *reprinted in* World Trade Org. Comm. on Regional Trade Agreements, WT/REG177/1 (Oct. 20, 2004), *available at* http://trade-info.cec.eu.int/doclib/docs/2004/june/tradoc_117680.pdf (public morals clause)
Japan-Singapore	Agreement Between Japan and Singapore for a New-Age Economic Partnership art. 19, Jan. 13, 2002, *reprinted in* World Trade Org. Comm. on Regional Trade Agreements, WT/REG140/1 (Dec. 3, 2002) (public morals clause)
India–Sri Lanka	Free Trade Agreement Between India and Sri Lanka art. IV, Dec. 28, 1998, *reprinted in* World Trade Org. Comm. on Trade and Dev., WT/COMTD/N/16 (June 27, 2002) (public morals clause)

[181] Many of the European Union's other bilateral trade agreements contain public morals clauses, including those with Egypt, Chile, Jordan, Israel, Croatia, Lebanon, Mexico, Estonia, Latvia, and Lithuania.

Countries	Citation
United States–Chile[182]	Free Trade Agreement between the United States and Chile art. 9.16, June 6, 2003, Temp. State Dep't No. 04-35, 2003 WL 23855093, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html (incorporating GATT public morals clause by reference)

[182] U.S. free trade agreements with Jordan and Singapore also incorporate the GATT public morals clause by reference.

APPENDIX II
COUNTRIES MAINTAINING OR CLAIMING THE RIGHT TO MAINTAIN MORALS-RELATED TRADE-RESTRICTIVE MEASURES

Country	**Illustrative Citation**
Australia	Report by the Secretariat, *Australia Trade Policy Review*, at 55, WT/TPR/S/41 (June 10, 1998)
Barbados	Minutes of Meeting, *Barbados Trade Policy Review*, ¶ 16, WT/TPR/M/101 (Aug. 13, 2002)
Belize and Suriname	Minutes of Meeting, *Belize and Suriname Trade Policy Review*, ¶ 17, WT/TPR/M/135 (Sept. 22, 2004)
Bulgaria	Minutes of Meeting, *Bulgaria Trade Policy Review*, ¶ 10, WT/TPR/M/121 (Nov. 20, 2003)
Canada	Report by the Secretariat, *Canada Trade Policy Review*, tbl.III.4, WT/TPR/S/53 (Nov. 19, 1998)
Chile	Report by the Secretariat, *Chile Trade Policy Review*, at 49, WT/TPR/S/28 (Aug. 7, 1997)
Czech Republic	Minutes of Meeting, *Czech Republic Trade Policy Review*, ¶ 10, WT/TPR/M/89 (Nov. 29, 2001)
European Communities	Report by the Secretariat, *European Communities Trade Policy Review*, at 70, WT/TPR/S/136 (June 23, 2004)
Fiji	Report by the Secretariat, *Fiji Trade Policy Review,* at 23, WT/TPR/S/24 (Mar. 13, 1997)
Gambia	Report by the Secretariat, *The Gambia Trade Policy Review*, at 17, WT/TPR/S/127 (Jan. 5, 2004)
Guyana	Report by the Secretariat, *Guyana Trade Policy Review*, tbl.III.6, WT/TPR/S/122 (Oct. 1, 2003)
Honduras	Report by the Secretariat, *Honduras Trade Policy Review*, at 46, WT/TPR/S/120 (Aug. 29, 2003)
India	Report by the Secretariat, *India Trade Policy Review*, at 38–39, WT/TPR/S/100 (May 22, 2002)

Country	Illustrative Citation
Indonesia	Report by the Secretariat, *Indonesia Trade Policy Review*, at 24, WT/TPR/S/117 (May 28, 2003)
Israel	Minutes of Meeting, *Israel Trade Policy Review*, ¶ 31, WT/TPR/M/58 (Oct. 19, 1999)
Jamaica	Report by the Secretariat, *Jamaica Trade Policy Review*, at 49, WT/TPR/S/139 (Oct. 11, 2004)
South Korea	Report by the Secretariat, *Korea Trade Policy Review*, at 16, WT/TPR/S/137 (Aug. 18, 2004)
Malaysia	Report by the Secretariat, *Malaysia Trade Policy Review*, at 37, WT/TPR/S/92 (Nov. 5, 2001)
Mali	Report by the Government, *Mali Trade Policy Review*, ¶ 94, WT/TPR/G/133 (May 24, 2004)
Morocco	Report by the Government, *Morocco Trade Policy Review*, at 8, WT/TPR/G/8 (Nov. 16, 1995)
Niger	Report by the Secretariat, *Niger Trade Policy Review*, at 39, WT/TPR/S/118 (June 30, 2003)
Nigeria	Report by the Secretariat, *Nigeria Trade Policy Review*, at 49, WT/TPR/S/39 (May 27, 1998)
Paraguay	Report by the Secretariat, *Paraguay Trade Policy Review*, at 40, WT/TPR/S/26 (June 12, 1997)
Romania	Report by the Secretariat, *Romania Trade Policy Review*, at 49, WT/TPR/S/60 (Sept. 3, 1999)
Singapore	Minutes of Meeting, *Singapore Trade Policy Review*, ¶ 77, WT/TPR/M/14 (Aug. 6, 1996)
Sri Lanka	Report by the Government, *Sri Lanka Trade Policy Review*, at 69, WT/TPR/G/128 (Feb. 4, 2002)
Suriname	Report by the Secretariat, *Suriname Trade Policy Review*, at 38, 39 tbl.III.2, WT/TPR/S/135 (June 14, 2004)
Thailand	Report by the Government, *Thailand Trade Policy Review*, ¶ 53, WT/TPR/G/123 (Oct. 15, 2003)

Country	Illustrative Citation
Turkey	Minutes of Meeting, *Turkey Trade Policy Review*, ¶ 74, WT/TPR/M/125 (Feb. 9, 2004)
Uganda	Report by the Government, *Uganda Trade Policy Review*, at 4, WT/TPR/G/4 (June 30, 1995)
United States	Report by the Secretariat, *United States Trade Policy Review*, at 59, WT/TPR/S/126 (Dec. 17, 2003)
Venezuela	Report by the Secretariat, *Venezuela Trade Policy Review*, at 45, WT/TPR/S/108 (Oct. 30, 2002)