WTO`s Public Morals Exception

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Abstract

"Trade is not elevated to the supreme common value that all WTO Members must observe at any cost". With this affirmation, Mavroidis introduces one of the most controversial provisions of the WTO: GATT Article XX. This provision is conceived as a 'flexibility' clause that establishes a hierarchy between trade commitments and national social preferences, such as public morals or human health. GATT Article XX allows Members to justify the inconsistency of a measure with the obligations of the WTO Agreements, whenever certain requirements are met. This paper aims to describe the different issues and interpretations concerning GATT Article XX (a) in four sections. Section I summarizes all the cases concerning GATT Article XX (a). Section II explains the issues relating to the concept of "public morals", such as the possibility to impose extraterritorial measures and the legal interpretation of the concept. Section III describes the "necessity test" and its application by Panels and the Appellate Body. Section IV concludes and recapitulates the most relevant issues of GATT Article XX (a).

Key words

GATT, trade, public morals.

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Excepción de la Moral Pública en la OMC

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Resumen

"El comercio no está elevado al valor supremo común que todos los miembros de la OMC deben seguir a cualquier costo". Con esta afirmación, Mavroidis introduce una de las provisiones más controversiales de la OMC: el artículo XX del GATT. Esta provisión está concebida como la clausula de "flexibilidad" que establece una jerarquía entre los compromisos de comercio y las preferencias sociales nacionales, tales como la moral pública o la salud de las personas. El artículo XX de la GATT permite a los miembros justificar la inconsistencia de la medida con la obligación de acuerdos de la OMC, cuando se dan una serie de requisitos. Este texto permite describir los diferentes problemas e interpretaciones relacionados con el Artículo XX (a) del GATT. La Sección I resume todos los casos relacionados con el Artículo XX (a) del GATT. La Sección II explica los problemas relacionados con el concepto de "moral pública", así como la posibilidad de imponer medidas extraterritoriales y la interpretación legal del concepto. La Sección II describe el "test de proporcionalidad" y su aplicación por Paneles y el Órgano de Apelaciones. La Sección IV concluye y recapitula sobre los problemas más importantes del Artículo XX (a) del GATT.

Palabras clave

GATT, comercio, moral pública.

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1. INTRODUCTION

"Trade is not elevated to the supreme common value that all WTO Members must observe at any cost" (Mavroidis 2013, 326). With this affirmation, Mavroidis (2013) introduces one of the most controversial provisions of the WTO: GATT (1994) Article XX. This provision is conceived as a 'flexibility' clause that establishes a hierarchy between trade commitments and national social preferences, such as public morals or human health (PR- EC 2013, para. 7.611). GATT Article XX allows Members to justify the inconsistency of a measure with the obligations of the WTO Agreements, (GATT PR-US 1989, para. 5.9; Van den Bossche 2005) whenever the following requirements are met (ABR-CO 2016, para. 5.67; ABR-US 1996, 22; ABR-US 2005, para. 292; GATT 1994, art. XX; PR-China 2009, para. 7.746):

- The objective of the measure must be under the scope of one of the sub-paragraphs of GATT (1994) Article XX (public morals, human health, prison labour, etc.).
- There must be a 'degree of connection' between the measure and the objective. This degree varies depending on the words used in the subparagraph: "relating to", "necessary to", "essential to", "in pursuance of", etc (ABR-US 1996, 17-18; ABR-US 2005, para. 292).
- The measure cannot be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination in countries where the same conditions prevail, or as a disguised restriction on international trade. This requirement is commonly known as the "chapeau", and its objective is to prevent Members to disguise their trade restrictions on national social preferences, such as the environment, public morals, or health (PR-CO 2015, para.7.540).

One of the "non-economic societal values" protected in GATT (1994) Article XX is the protection of public morals (subparagraph (a)) (Van den Bossche 2005). Members wishing to justify a WTO inconsistent measure under this subparagraph must demonstrate that it is necessary to protect public morals and that it fulfills the requirements of the chapeau (ABR-China 2009, para.288; ABR-EC 2014, para. 5.169; ABR-CO 2016, para. 5.67; Delimatsis 2011, 265; R-BR 2017, para. 7.517; PR-US 2004, para. 6.455).

This paper aims to describe the different issues and interpretations concerning GATT (1994) Article XX (a) in four sections. Section I summarizes all the cases concerning GATT (1994) Article XX (a). Section II explains the issues relating to the concept of "public morals", such as the possibility to impose extraterritorial measures and the legal interpretation of the concept. Section III describes the "necessity test" and its application by Panels and the Appellate Body. Section IV concludes and recapitulates the most relevant issues of GATT (1994) Article XX (a).

2. SUMMARY OF THE CASES

2.1. US – *GAMBLING*

This case concerned three federal laws of the United States that banned the cross-border supply of gambling and betting services. The United States argued that this prohibition was related to public morals since it addressed problems like money laundering, organized crime, under-age gambling, and pathological gambling (PR-US 2004, para. 6.457).

The US failed to prove that its measures were justified under GATS Article XIV (a).[01] The Panel held that these measures were not "necessary" to protect public morals since there was an alternative measure: "(...) to engage in bilateral and/or multilateral consultations and/or negotiations to determine whether there is a way of addressing its concerns in a WTO-consistent manner" (PR-US 2004, paras. 6.553- 6.554).

The Appellate Body overruled the decision of the Panel and considered that the measures were necessary to protect public morals. Engaging in consultations is only a *process* and not an alternative measure per se (ABR-US 2005, para. 317). However, these measures did not fulfill the requirements of the chapeau since the United States could not demonstrate that these measures were applied in the same way to foreign and domestic service suppliers (ABR-US 2005, para. 371).

2.2. CHINA – *AUDIOVISUAL PRODUCTS*

This case concerned different measures related to trading and distribution of publications and audio-visual products. The objective of these measures was the content review to prevent the importation of products that "(...) contained prohibited content" (PR-China 2009, para. 7.766).
China failed to prove that its measures were justified under GATT Article XX (a). The **first measure**

01 This Article establishes the exception of public morals in GATS Agreement.

established that only the entities which were "designated" or "authorized" by the Government could import these products. The *designation* procedure applied to newspapers, while the *authorization* one applied to books and electronic publications (PR-China 2009, para. 7.841). The issue, in this case, concerned the "designation" procedure because it limited completely the right to import those products. The Panel and the Appellate Body considered that the designation procedure was not justified under GATT Article XX (a) since it was highly trade-restrictive and had the same contribution to the public moral's objective (the content review) as the "authorization" procedure (ABR-China 2009, para. 275; PR-China 2009, paras. 7.844, 7.847 and 7.849).

The **second measure** established that the Chinese importation entities required a special corporate structure. The **third measure** was a procedure to select the importation entities, which used geographical and quantitative criteria. The Panel held that these measures were not necessary since there was an alternative measure: making the Chinese Government conduct the content review (PR-China 2009, para. 7.887). The Appellate Body found that these measures were not necessary because it was not demonstrated that a limitation of Chinese importation entities would materially contribute to the content review objective (ABR-China 2009, para. 292).

The **fourth measure** provided that these entities should be wholly state-owned enterprises. The Panel and the Appellate Body considered that this measure was not necessary to protect public morals because it was highly trade-restrictive and it did not contribute to the objective of content review (ABR-China 2009, para.268; PR-China 2009, para. 7.863). According to the Panel and the Appellate Body, the fact that the companies are private-owned does not imply that they would be more or less careful in the content review process.

2.3. EC – *SEAL PRODUCTS*

This dispute concerned a ban on seal products to protect the welfare of seals. The ban had some exceptions, which included the seal products hunted with the traditional methods of the indigenous communities such as the Inuit.

The European Communities failed to prove that its measure was justified under GATT Article XX (a). The Panel found that the ban did not fulfill the requirements of the chapeau since it was not applied in an even-handed manner between national and foreign producers (PR- EC 2013, para. 7.650).

The Appellate Body upheld the decision of the Panel since the European Communities could not demonstrate how the exceptions of the ban to indigenous communities could be "(...) reconciled with

the objective of addressing EU public moral concerns regarding seal welfare" (ABR-EC 2014, para. 5.338). That is to say, it was contradictory to affirm that the objective of the measure was the seal welfare while authorizing traditional methods of the indigenous communities.

2.4. COLOMBIA – *TEXTILES, AND APPARELS*

The measure was an ordinary customs duty on textiles, apparel, and footwear. Colombia argued that this measure was necessary to protect public morals since it aimed to reduce money-laundering in Panama's textile companies.

Colombia failed to prove that its measure was justified under GATT Article XX (a). The Panel considered that there was no connection between the objective of combating money laundering and the customs duty imposed by Colombia. Therefore, the objective of the measure was not the protection of public morals.

The Appellate Body overruled that finding and considered that the measure was capable of protecting public morals since it discouraged the importation of goods "(...) at artificially low prices for money laundering purposes" (ABR-CO 2016, para. 5.89). However, Colombia did not demonstrate the "necessity" of this measure since it did not prove the "(...) amount or proportion of imported goods below the thresholds that are actually used for money laundering purposes" (ABR-CO 2016, para. 5.110).

2.5. BRAZIL – *CERTAIN MEASURES CONCERNING TAXATION AND CHARGES*

The measure, in this case, was the PATVD, which provided a discriminatory tax exemption to TV equipment "developed in Brazil". Brazil argued that this discrimination was justified under GATT Article XX (a) since its objective was to reduce the digital divide and to promote social inclusion.

The Panel found that this measure was not necessary to protect public morals because of two reasons. The first one was the contradiction of the measure. If the objective was to guarantee the supply of TV equipment, there was no reason to discriminate imported products (PR-BR 2017, para. 7.598). The second one is the existence of alternative measures, such as creating tax exemptions that applied both to imported and domestic products. That measure would be less trade-restrictive than the PAVDS and would make a greater contribution to the objective of increasing the supply of TV equipment (PR-BR 2017, para. 7.612).

3. PUBLIC MORALS

This section will address the legal issues concerning the first step to justify a measure under GATT Article XX (a): proving that its objective is the protection of public morals (PR-CO 2015, paras.7.295-7.297).

3.1. The objective of the measure

The Panels and the Appellate Body have defined certain criteria to assess the objective of a measure, such as its statutes, its legislative history, and other evidence regarding its design, structure, and operation (ABR-CO 2016, para. 5.69; ABR-EC 2014, para. 7.378). The Appellate Body has established that this is an objective approach; therefore, the Member's characterization of the objective is not relevant (ABR-CO 2016, para. 5.69; ABR-EC 2014, para. 7.378; ABR-US 2005, para. 304).

Identifying the objective of the measure was one of the main issues in the case of EC – *Seal Products*. The measure, in that case, pursued two independent objectives: (i) addressing the moral concerns of the EU population regarding the welfare of seals and (ii) protecting Inuit and indigenous communities' cultural identity by exempting their products from the seals-ban (Marín 2016). These objectives contradict each other since the European Communities could not verify if the methods used by the indigenous communities did not affect the welfare of seals (Marín 2016).

This contradiction is problematic since the Appellate Body in Brazil – *Tyres* interpreted that to justify an inconsistent measure under the chapeau, the respondent shall prove that its discriminations are related to its objective and that such discriminations do not go against it (ABR-BR 2007, para. 227). Hence, under the interpretation of the Appellate Body in Brazil – *Tyres*, measures cannot have opposing objectives (Marín 2016). This position was implicitly modified in the following paragraph of the case EC – *Seal Products*:

> "(...) the European Union has failed to demonstrate (...) how the discrimination resulting from the manner in which the EU Seal Regime treats IC hunts as compared to "commercial" hunts can be reconciled with, or is related to, the policy objective of addressing EU public moral concerns regarding seal welfare. In this connection, we note that the European Union has not established, for example, why the need to protect the economic and social interests of the Inuit and other indigenous peoples necessarily implies that the European Union cannot do anything further to ensure that the welfare of seals is addressed in the context of IC hunts, given that IC hunts can cause the very pain and suffering for seals that the EU public is

concerned about (ABR-EC 2014, para. 5.320)".

According to Marín (2006), even if the European Union could not reconcile both objectives, the

Appellate Body opened the door to establish measures with opposing objectives whenever the respondent demonstrates that no alternative measure could be designed to overcome that contradiction[02]. Hence, if the EC could demonstrate that no alternative measure could protect simultaneously the interest of protecting the indigenous communities and the welfare of seas, it would probably meet the requirements of GATT (1994) Article XX (a). According to Marín (2016), the Appellate Body:

> "(...) seems here to be (implicitly) accepting the protection of Inuit interests as a legitimate justification for discrimination under the chapeau, but requiring the EU to demonstrate that there is no reasonable alternative (i.e. it 'cannot do anything further') that would achieve this Inuit protection purpose while being less inconsistent with the seal welfare objective of the measure. In practical terms, this would mean that the IC exception can be retained to the extent that it is shown that the two regulatory purposes cannot be reconciled—i.e. the need to protect Inuit interests 'necessarily implies' the EU can do nothing to ensure that the welfare of seals is addressed in the context of IC hunts (478)."

3.2. Whether the objective falls under the scope of GATT Article XX (a)

Once the objective is identified, the following step is to demonstrate that it protects public morals. To interpret the concept of public morals, the Panel of US – *Gambling* relied on the ordinary meaning of these words. The concept 'public' is defined as "Of or pertaining to the people as a whole, belonging to, affecting, or concerning the community or nation" (PR-US 2004, para. 6.463). The word 'morals' is defined as "Habits of life with regard to right and wrong conduct" (Ibíd., para. 6.464). Taking these definitions into account, the Panel interpreted public morals as "standards of right and wrong conduct maintained by or on behalf of a community or nation" (Ibíd., para. 6.464; PR-CO 2015, paras.7.299 and 7.334).

Relying on that, the words public morals have been interpreted 'openly' since they are defined in the context of a specific time and nation (PR-CO 2015, paras.7.299 and 7.334; PR-China 2009, para. 7.759; PR- EC 2013, para. 7.381; PR-US 2004, para. 6.461). This implies that Members can give the scope to the concept of public morals in their territories, according to their systems and scales of values (PR-

02 The Appellate Body addressed this issue in the step of the "chapeau"; however, it is relevant to consider it when members define the objective of the measure.

CO 2015, paras.7.299 and 7.334; PR-China 2009, para. 7.759; PR- EC 2013, paras. 7.381 and 7.383; PR-US 2004, para. 6.461).

The Panels and Appellate Body have clarified certain specific rules to consider if a measure falls under GATT (1994) Article XX (a):

- Colombia – *Textiles and Apparels* (2015): The Panel considered that the measure did not protect public morals since it was not designed to combat money laundering (which was the public moral's objective protected by Colombia). According to the Panel, the compound tariff imposed a higher levy on imports entering at low prices, without distinguishing whether those low prices were related to money laundering (PR-CO 2015, para. 7.351).
- This decision was appealed, and the Appellate Body reversed those findings. It established that, in this step of the legal threshold, it suffices to prove that the measure is not 'incapable' of protecting public morals (ABR-CO 2016, para. 5.89; PR-BR 2017, para. 7.519). Consequently, it held that the compound tariff was not incapable of combatting money laundering since - at least- some goods subject to the compound tariff were imported at artificially low prices for money laundering purposes (ABR-CO 2016, para. 5.89).
- US Gambling (2004): The Panel clarified that even if money laundering and criminal finance exist in other sectors of the economy, the US was free to decide their policy to combat these concerns in those sectors (PR-US 2004, para. 6.505).[03]
- EC – Seal Products (2014): Canada claimed that the European Union was required to identify a risk which the measure seeks to protect, using the interpretation of the Appellate Body in EC – Asbestos (ABR-EC 2014, para. 5.197). The Appellate Body clarified that the respondent did not have to prove such risk (Ibíd., para. 5.198).

3.3. Interpretation of "Public Morals"

One of the main issues in this step of the analysis is how to interpret the concept of "public morals". There are two main positions regarding this issue:

- Restrictive interpretation: Authors defending this position use three main reasons to argue that the word "public morals" should be interpreted restrictively:
  - A broad interpretation of this concept could lead to the application of protectionist measures and would undermine and render ineffective the WTO's objective of expanding trade liberalization (Marwell 2006, 805, and 817). Thus, it would violate the principle of effective

03 This rule was confirmed in the ABR-EC (2014) para. 5.200.

interpretation since it would make clauses of the treaty useless (ABR-US 1996, 23).
    - Previous GATT Panels applied the principle that exceptions shall be narrowly interpreted (Qureshi 2006, 104).
    - The position to interpret 'public morals' narrowly would be confirmed by the supplementary means of interpretation of VCLT Article 32 (Wu 2008, 218). Steve Charnovitz (1994) suggested that GATT Article XX(a) was designed to protect restrictions as intoxicating liquors, opium, drugs, or pornography.
- Broad interpretation: Some authors and institutions have proposed a broad interpretation of the term "public morals", arguing that it encompasses universal human rights, labour rights, women's rights, and environmental protection (Ibíd., 224-225). This position is sustained on the *evolutionary interpretation* of the words "public morals" (Ibíd., 224-225): the interpretation of the law cannot remain unaffected by the subsequent development of the law through time (ABR-US 1998, supra note.109 para.130). Thus, these authors suggest that the words 'public morals' must be interpreted in light of the *actual* concerns of our societies.

This paper considers that the concept of "public morals" should be interpreted **broadly** for four reasons:

- The Appellate Body has given a broad interpretation of "public morals" as a concept varying in time and space. Even if the Appellate Body reports are not binding, they ensure security and predictability in the interpretation of the WTO Agreement (DSU 1994 Article III.2).
- There are no legal arguments to affirm that exceptions should be interpreted restrictively. On the contrary, all the agreement, including its obligations, definitions, and exceptions, should be interpreted according to the general laws of interpretation of international law: VCLT Articles 31, 32, and 33 (ABR-US 1996, 18; ABR-EC 1998, para.104).
- The WTO does not only have the objective of trade liberalization, but it also pursues other objectives such as sustainable development, environmental protection, and raising the standards of living (ABR-EC 2004, para.94; Qureshi 2006, 109; WTO 1994). Thus, the interpreter must give the same weight to GATT Article XX as to the general obligations of the WTO.
- Interpreting the words "public morals" broadly does not necessarily imply that Members would misuse this exception. Panels allow Members to define their public morals unilaterally but require them **evidence** (historical practice, public opinion polls, etc.) supporting that a particular issue is, in fact, a public moral's concern (Marwell 2006, 824-825). To do so, Panels may excise its right under DSU Article 13 to seek information and technical advice from any individual or body, in order "(...) to act independently of influence from the parties" (Ibíd., 824-825). Thus, by excising a rigorous appreciation of the evidence, Panels may prevent Members to misuse this exception.

3.4. Jurisdiction

Another concern in WTO literature regarding GATT Article XX(a) is *jurisdiction*. Wu (2008) provides a theoretical framework to consider this issue by classifying three different restrictions (Wu 2008, 235):

- Type I restrictions: Measures that protect the morals of inhabitants within the territory of the member.
- Type II restrictions: Measures that protect the morals relating to the production of products or services in the *exporting* state. For example, prohibiting the importation of products related to child labour or sex tourism.
- Type III restrictions: Measures that protect morals that are *not* directly related to the production of products or services, but to the practices of the *exporting* State. For example, establishing a ban on imports because of human rights violations in a certain country.

The discussions of jurisdiction occur in the context of measures falling under Type II or Type III restrictions, and there are two main positions:

- Position 1: These measures do not fall under GATT Article XX (a): The main argument to defend this position is the interpretation of the Appellate Body in the case of US – *Shrimp*:

  > "We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g) (ABR-US 1998, para.133)."

  The reasoning of the Appellate Body suggests that GATT (1994) Article XX may be applied if a sufficient nexus exists between the protection of the societal values and the territory of the Member. Thus, Type II and Type III restrictions would not be covered under GATT Article XX (a) since these restrictions are related to a situation occurring outside the territory of the member (Van den Bossche, Schrijver, and Faber 2007, 95-96).

- Position 2: These measures fall under the scope of GATT Article XX (a): According to this posi-

tion, the "context" of the agreement suggests that these measures are covered by GATT Article XX. GATT Article XX (e) establishes that members can justify WTO inconsistent measures "relating to the products of prison labour" (Charnovitz 1998, 15-16; Cleveland 2002,158; PR US – *Tuna* I 1991). Hence, according to this position, GATT Article XX may be used to justify measures related to the production methods or the practices of the exporting State. This would allow, for example, to justify a higher duty in products that were produced in a country that does not meet certain human rights standards.

This paper considers that **Position 2** is correct for the following reasons:

- One of the objectives of GATT Article XX is conditioning trade to the adoption of certain policies by the exporting member. This is a member's right. If one interprets that measures concerning production methods or practices of the exporting State are prohibited, this right would be useless. As interpreted by the Appellate Body:

  > "It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure a priori incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply (ABR-US 1998, para. 121)."

- In many cases, limiting public morals to a certain territory may be problematic and it may render the justification into inutility. For example, if society goes against child labour, it would go against it regardless of the territory in which it occurs.

3.5. Legitimacy

The final main issue posed by the legal literature is the "legitimacy": who can define whether an objective is aimed to protect public morals? Concerning this question, Marwell (2006) considered three different approaches:

- The 'paternalist' one, in which the government imposes its concept of 'public morals' on other groups within society.
- The 'pre-commitments' of the society, implying "(...) efforts by a society to pre-commit itself to a particular rule in anticipation of individuals later preferring a different outcome" (Marwell 2006,

831).
- The "strong, widely held social views condemning a particular practice, such as child pornography" (Marwell 2006, 832).

In most cases, the Panels legitimized 'paternalist' and 'pre-commitments' situations as they considered laws, legislative history, and international treaties to be relevant to define a public morals concern. In respect of this issue, Wu (2008) posed that, implicitly, the Panels may be endorsing a theory of democratic legitimacy since they are assuming that legislative actions reflect the will of the majority of citizens (Wu 2008, 234).

From a legal point of view, it would be interesting to use these arguments to question the evidence used to demonstrate the objective of the measure. For example, does a law or a treaty approved in 1993 protect the public morals of 2020? Is the respondent required to demonstrate that laws still represent public morals?

4. NECESSITY TEST

Once a Member demonstrates that its measure concerns a public morals objective, it must prove it is **necessary** to protect it.

The word 'necessary' does not mean 'indispensable' (PR-China 2009, para.7.782). Instead, it refers to a process of weighing and balancing a series of factors, such as (i) the relative importance of the interests furthered by the measure, (ii) its contribution to the realization of the ends pursued and (iii) its degree of trade restrictiveness (ABR-CO 2016, para. 102; ABR-China 2009, para.240; ABR-US 2005, para. 306; PR-US 2004, para. 6.476; Wu 2008, 229-230).

Once the panel makes such an assessment, it must compare the challenged measure with any alternative measures proposed by the complainant (ABR-China 2009, para.240; ABR-US 2005, para. 307).

4.1. Relative Importance

The first factor to be considered in the necessity test is the relative and vital importance of the interests furthered by the measure (ABR-CO 2016, para. 5.71). These examples show how members have demonstrated this relative importance:

- US – *Gambling*: The Panel accepted US Congressional statements, which showed the economic,

political, and security threat posed by organized crime and gambling (PR-US 2004, para. 6.491).

- Colombia – *Textiles and Apparels*: The Panel considered the relationship between money laundering, drug trafficking, and the armed conflict (PR-CO 2015, para.7.406). It also took into account the fact that money laundering is a criminal conduct in Colombia and that this country has ratified different international instruments against this conduct and the financing of terrorism (PR-CO 2015, para.7.407).

4.2. Contribution

The second factor to be considered in the necessity test is the contribution of the measure to the end pursued. Such contribution exists whenever there is a genuine relationship of ends and means between the objective and the measure (PR-BR 2017, para. 7.526; PR- EC 2013, para. 7.633). In assessing this relationship, the panel must "(...) address, qualitatively and quantitatively, the *extent* of the measure's contribution to the end pursued, rather than merely ascertaining whether or not the measure makes any contribution" (ABR-CO 2016, para. 5.72). Thus, this is a consideration concerning the *degree* of the actual contribution of the measure (ABR-CO 2016, para. 5.103; ABR-China 2009, para.253). It is important to take into account that measures do not have to fulfil the objective pursued by themselves, but they can have some level of contribution to its achievement (PR-China 2009, para. 7.792).

Depending on the nature, quantity, and quality of the evidence existing at the time the analysis is made, the Appellate Body has recognized that the panel might conclude that a measure has a degree of contribution whenever it is *apt* to produce a material contribution to the achievement of its objective (ABR-China 2009, para.254; ABR-EC 2014, paras. 5.213 and 5.221; PR-BR 2017, para. 7.315; PR-CO 2015, para.7.315). Hence, in such exceptional cases, Members may submit quantitative or qualitative **projections** of the contribution of the measure in the future (ABR-China 2009, para.254; ABR-EC 2014, para. 5.213; PR-CO 2015, para.7.315).

This factor can be understood more clearly with its application:

- Colombia – *Textiles and Apparels*: The Appellate Body found that Colombia's measure had some level of contribution as it created a disincentive of using artificially low prices for money laundering purposes (ABR-CO 2016, para. 5.106). However, Colombia did not meet its burden of proof regarding the *degree* of contribution of this measure. Colombia did not demonstrate "(...) the *amount* or *proportion* of imported goods below the thresholds of the decree that are actually used for money laundering" nor "(...) the extent to which the compound tariff acts as disincentive to money laundering" (ABR-CO 2016, paras. 5.110 and 5.114). Thus, as we recalled, it is not enough to

demonstrate that a measure has *some level of contribution*: it is indispensable to prove the *degree* of such contribution.

- China – *Audiovisual Products*: The Appellate Body found that China's measure establishing that the entities performing content review could not have foreign investment did not contribute to the protection of public morals in China. Indeed, the mere fact that an entity has foreign investment does not imply that the content review would be carried out by professionals who are not familiar with Chinese values or incapable of understanding them (ABR-China 2009, para.277). Hence, there was not a genuine relationship between ends and means between the measure and its objective (content review).
- EC – *Seal Products*: The Panel found that the EU Seal Regime was capable of contributing to the objective pursued since it "(...) prevents the EU public from being exposed (...) as consumers in commercial activities related to products derived from seal that may have been killed inhumanely" (PR- EC 2013, para. 7.478). This case is relevant since the Panel found that the degree of contribution was 'diminished' by the exceptions of the measure, concerning the indigenous communities. This is since these exceptions "(...) reduce the effectiveness of the ban by allowing *some* seal products access to the EU markets" (PR- EC 2013, para. 7.638). Thus, some exceptions may reduce the degree of contribution of the measure.

4.3. Trade restrictiveness

The third factor to be considered in the necessity test is the *degree* of trade restrictiveness of the measure. In analysing this issue, the panel should not consider whether the measure is trade-restrictive or not, but to *what extent* it restricts trade (ABR-China 2009, para. 308; ABR-CO 2016, para. 5.104). Otherwise, the panel would be making the same analysis concerning the inconsistency of the measure with the WTO Agreement.

At this point, the panel must consider the nature of the measure itself. For instance, in the case of *Colombia – Textiles and Apparels*, the Panel considered the fact that the Colombian measure was a tariff. The Panel interpreted that tariffs can reduce the capacity of imports to compete in a domestic market by increasing the price of the products, and when they are too high, they can have a prohibitive effect in the market. However, the Panel also considered the fact that tariffs are a form of protectionism accepted by the rules of the WTO, provided that they meet the requirements of GATT Article II. Thus, these measures do not have a high trade-restrictive impact (PR-CO 2015, para. 7.441). On the other hand, measures such as import bans or total prohibitions of certain products are the most trade-restrictive measures (PR-US 2004, para. 6.495).

4.4. Weighing and balance

To judge whether the measure is necessary or not, the panel must examine individually each of the criteria mentioned above, and then weigh and balance them holistically (ABR-EC 2014, paras. 5.214 and 5.215; PR-BR 2017, para. 7.534).

As all these factors must be evaluated, even a highly restrictive measure can be found 'necessary' if the interest pursued is important and the measure has a high degree of contribution to the end pursued (ABR-EC 2014, para. 5.215).

At this point, the legal doctrine has highlighted some important issues to be considered. Delimatsis (2011) noted that there is a paradox in the application of the 'weighing and balance' test. Indeed, measures adopting bans for certain products (such as Brazil – *Retreated Tyres* or EC – *Seal Products*) have been considered as measures pursuing a high level of protection, even if they have a high degree of trade restrictiveness. Thus, when the panel considers that the interests or values furthered by the challenged measure are of vital importance, it is more likely that a highly trade-restrictive measure is found as necessary. According to Delimatsis (2011): "(...) the reader gets the impression that adopting highly trade – restrictive measures such as an import ban is the safest choice for a regulator (263-264)." Therefore, there is a paradox in the application of this test as it is more plausible to consider a measure as 'necessary' whenever it is highly trade-restrictive.

4.5. Comparison test

The complainant party may propose alternative measures to demonstrate that the measure at issue is not necessary (PR-China 2009, para. 7.869). In this 'comparison test', the panel must take into account: (i) whether the alternative measure makes an equivalent contribution as the challenged measure to the objective pursued; (ii) whether the alternative measure is less trade-restrictive than the measure at issue; and (iii) whether the alternative measure is reasonably available (ABR-CO 2016, para. 5.74; ABR-EC 2014, para. 5.261; Delimatsis 2011, 262; PR-BR 2017, para. 7.532; PR-China 2009, para. 7.869). These are the most relevant applications of this test under GATT (1994) Article XX (a):

- China – *Audiovisual Products*: The US proposed that the Chinese Government could conduct the review of relevant products imported into China, instead of establishing that only some private importation entities are authorized by the government to import audiovisual products (PR- EC

2013, para. 7.887). The Panel found that this alternative measure makes an equivalent contribution as the challenged measure as it "(…) ensures that no products with prohibited content are imported into China" (Ibíd., 7.888). This alternative measure was reasonably available since the Chinese government was already financing the import entities that made the preliminary content review decisions (Ibíd., 7.904). Thus, the alternative measure did not represent any higher cost for the Chinese Government (Ibíd., 7.904). Therefore, the Panel established that this measure was not 'necessary' under GATT Article XX (a) since there was an alternative less restrictive measure.

- US – *Gambling*: The Panel considered that the United States did not take into account all the reasonably available alternative measures before imposing a WTO inconsistent one (PR-US 2004, para. 6.526). This is because the United States did not engage in good faith negotiations or consultations with Antigua before prohibiting gambling and betting services. Thus, they failed to explore the *possibility* of finding a reasonably available measure through negotiations or consultations with Antigua (PR-US 2004, para. 6.531).

  The Appellate Body overruled this finding since negotiations and consultations are "(…) by definition a process, the results of which are uncertain and therefore not capable of comparison with the measure at issue" (ABR-US 2005, para. 317). Thus, from this case, we can conclude that it is not sufficient for the complainant to identify a better process to design a measure, but it has to identify a specific measure to be compared to (ABR-US 2005, para. 320).
- EC – *Seal Products*: Canada and Norway proposed an alternative measure consisting of conditioning market access for seal products on compliance with animal welfare standards combined with a certification of conformity and labelling requirements (PR- EC 2013, para. 7.468). Even if this alternative measure is less trade-restrictive, the Panel found that it did not contribute equally to the protection of the environment (Ibíd., paras. 7.472 and 7.480). Among other reasons, the Appellate Body considered that the alternative measure has a lesser impact than the challenged one in reducing the production of seals as it would re-open a market (even if it does it in a limited way) that was prohibited under the EC Seal regime (Ibíd., para. 7.482). As it was mentioned above, this case raises a paradox under the theory of Delimatsis (2011): it seems that adopting bans or highly restrictive measures is the safest WTO choice for Members.

5. Conclusion

GATT (1994) Article XX (a) is one of the most relevant and important provisions of the WTO. It authorizes members to create WTO inconsistent measures to protect certain values and to guarantee that the products commercialized in their countries meet certain standards according to their public morals.

However, as it is demonstrated in this paper, countries cannot establish disguised measures using GATT (1994) Article XX (a). The fact that countries have to demonstrate that their measures are "necessary" to protect that objective and have to be applied in a way that is not arbitrary or discriminatory demonstrates that this is a limited exception and it cannot be used with a protectionist objective. Furthermore, in every case concerning this justification the following issues should be taken into account:

- Whether the objective of the measure is to protect public morals: Some authors affirm that the concept of public morals should be interpreted restrictively. Nonetheless, this paper sustains that, by definition, this is concept should be interpreted broadly.
- Extraterritoriality of the measure: If the measure aims to protect the public morals concerning the production processes or practices of the exporting State, it is probably an extraterritorial measure. Even if this is problematic, we consider that there are sufficient arguments to argue that these measures are covered under GATT (1994) Article XX (a).
- Whether the measure has opposing objectives: In public policy, this is relatively common whenever a measure has an exception, such as the case of EC – *Seal Products*. According to the interpretation of the Appellate Body, WTO inconsistent measures may have opposing objectives only if there is not a less restrictive alternative measure.
- Demonstrating the contribution of the measure: As a general rule, Members have to demonstrate the actual *degree* of the contribution. This degree cannot be proved through presumptions, such as it occurred in the case of Colombia – *Textiles and Apparels*.
- Dilemma of the necessity test: The case of EC – *Seal Products* may suggest that whenever a measure has a higher degree of trade restrictiveness (such as a ban), it is more possible to demonstrate its necessity since it pursues a high level of protection.

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