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Defining the Contours of the Public Morals Exception under Article XX of the GATT 1994

Bader Bakhit M. AlModarra

Dean of the College of Science and Theoretical Studies

Saudi Electronic University, Riyadh, Saudi Arabia

Though the liberalisation of trade in goods is the central objective of the General Agreement on Tariffs and Trade 1994 (GATT 1994), Article XX makes provisions on general exceptions to the legally binding trade liberalisation obligations. Of the ten paragraphs contained under Article XX that provide for various exceptions, the first paragraph – Article XX(a) – allows for derogation from the obligations under the GATT 1994 if the justification for this is based on a necessary protection of public morals. There are very few cases on the public morals exception. The *U.S. – Gambling* case was the first decided case where the public morals exception was the subject matter. However, this case was decided under the services regime in WTO law – i.e., the General Agreement on Trade in Services. The *China – Publications and Audiovisual Products* case offered the opportunity for a WTO dispute settlement panel and the Appellate Body to provide clarity on the public morals exception as it relates to trade in goods. This article explores the contours of the public morals exception under Article XX(a) of the GATT 1994 by engaging in analyses of the two decided cases where the issue of public morals was a key subject matter in the dispute. It also borrows from the jurisprudence on other exceptions under Article XX in a bid to map out the contours of the public morals exception.

Keywords: extra-territorial jurisdiction, public morals, trade liberalisation

I. Introduction: The General Provisions on Trade Liberalisation in the GATT

The overriding objective of the General Agreement on Tariffs and Trade (GATT) 1994 is to liberalise trade in goods. The preamble to the GATT thus recognises the fundamental importance of “reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.”¹ There are a number of substantive provisions in the GATT that aim at liberalising trade in goods. Notable among them are Article I, dealing with the most favoured nation treatment; Article III, dealing with the national treatment principle; and Articles II and XI, dealing with tariff bindings and elimination of quantitative restrictions respectively. The nondiscrimination provisions of Articles I and III of the GATT have been touted as the cornerstone of the international trade system.²

The most favoured nation treatment (MFN) provision of Article I prevents discrimination between WTO members. Consequently, a WTO member must not grant more advantageous or more favourable conditions of trade to a member or nonmember of the WTO without granting the same treatment to other WTO members. Discriminatory or less favourable conditions of trade may hinge on customs duties and charges of any kind payable due to exports or imports, the method of levying such duties and charges, and rules and formalities in connection with imports and exports.³ Thus when products are being exported from a WTO member to other WTO members or products are being imported from WTO members, the general MFN provision requires that all like products must be treated the same, independent of destination or origin, once the destination or origin is a WTO member state.

The complementing nondiscrimination national treatment (NT) provisions in Article III prevent the use of domestic fiscal or regulatory measures to favour domestic products as compared to like imported products. Thus domestic taxes and other charges and rules, regulations or measures imposed on the sale, transportation or distribution of domestic products must not be more favourable than those imposed on like imported products. These two-pronged provisions on MFN and NT constitute the nondiscrimination obligation that permeates not only the GATT 1994, but also the General Agreement on Trade in Services (GATS)⁴ and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement).⁵

While the principle of nondiscrimination undoubtedly forms the bedrock upon which the international trade system is founded,⁶ it is quite evident that the agreements are inadequate with respect to achieving the trade liberalisation objectives espoused in the preamble to the GATT 1994. For example, the MFN obligation does not bind WTO

members to grant market access to goods into their territories. It only requires the nondiscriminatory application of border measures with respect to imports and exports. The national treatment provisions on the other hand only relate to the nondiscriminatory treatment of imported goods once the said goods have satisfied a WTO member's border measures and gained access into the domestic market. Thus, without substantive provisions on market access, it would have meant that, if a WTO member imposed a total ban on imports of a product from state A, the same ban must apply to imports of like products originating from other WTO member states as long as state A is also a WTO member.

To effectuate the trade liberalisation ethos of the GATT and complement the nondiscrimination provisions in Articles I and III, Article II of the GATT requires that when a tariff reduction concession has been made by a WTO member and this concession has been duly stipulated in the member's schedule of concessions, the said member is prohibited from imposing a tariff higher than that provided for in its schedule of concessions. Tariffs stipulated in a member's schedule of concessions constitute the bound tariffs or tariff ceilings.⁷ A WTO member may impose a tariff below the bound tariff rate but cannot charge above the bound rate.⁸ The main rationale for binding WTO members to the tariffs in their schedule of concessions is to ensure certainty in both the outcomes of international trade negotiations and the conduct of international trade. Also, tariffs bound under the Article II provisions ensure market access, as they reflect the tariff reductions secured during multilateral trade negotiations.

While Article II deals with the tariffs aspect of market access with respect to trade in goods, Article XI provides for a general prohibition of quantitative restrictions on imports or exports. Article XI:1 provides that

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

The general embargo on the imposition of quantitative restrictions on imports or exports of goods is fundamental to ensuring liberalisation of trade in goods, because an exporter may be willing to pay high tariffs to gain access into the market of the importing WTO member state. However, where there is a total ban on imports or a quota on the quantity of imports, the trade restrictive effects are more drastic. Consequently, the main aim of Article XI is to eliminate this potentially drastic barrier to international trade.

The nondiscrimination and market access provisions of the GATT therefore operate in a complementary manner to make effective the fundamental objective of trade liberalisation espoused under the preambles to both the GATT 1994 and the Agreement Establishing the World Trade Organisation.⁹

II. The General Exceptions to the GATT Obligations

The above introductory summary on the principles of nondiscrimination and market access has placed trade liberalisation at the heart of the GATT 1994. In fact, as stated earlier, the three substantive areas of the WTO's trade regulations – goods, services and intellectual property – all have provisions that ensure nondiscrimination and market access. Thus the trade liberalisation ethos transcends the GATT 1994. It is the core agenda of the WTO. It would, however, be erroneous to argue that the WTO system in general, and the GATT 1994 in particular, represent an unbridled system of trade liberalisation that overrides all other objectives. As well noted in the 2004 Sutherland Report,

Neither the WTO nor the GATT was ever an unrestrained free trade charter. In fact, both were and are intended to provide a structured and functionally effective way to harness the value of open trade to principle and fairness. In so doing they offer the security and predictability of market access advantages that are sought by traders and investors. But the rules provide checks and balances including mechanisms that reflect political realism as well as free trade doctrine. It is not that the WTO disallows market protection, only that it sets some strict disciplines under which governments may choose to respond to special interests.¹⁰

More importantly, the preamble to the WTO Agreement, apart from making pronouncements on trade liberalisation¹¹ also states unequivocally that sustainable development and protection and preservation of the environment are fundamental objectives of the organisation. This preambular provision was used by the Appellate Body in its interpretation of the exception relating to the conservation of exhaustible natural resources under Article XX(g) of the GATT 1994. It held that

The words of Article XX(g), 'exhaustible natural resources', were actually crafted more than 50 years ago. They 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. While Article XX was not modified in the Uruguay Round, the preamble attached to the WTO Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the WTO Agreement – which informs not only the GATT 1994, but also the other

covered agreements – explicitly acknowledges ‘the objective of sustainable development’.¹²

Though there are a number of exceptions to the GATT obligations,¹³ the provisions under Article XX constitute general derogations that aim at balancing the trade liberalisation agenda with legitimate protection of certain societal values that may not be economic in nature. They are thus in sync with the observations expressed by the Sutherland Report regarding the WTO not having an unrestrained free trade regime. The preamble to Article XX provides that

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:

The paragraphs that follow the stated preamble allow for an exhaustive list of exceptions. The list of exceptions includes the protection of the following values and rights – public morals,¹⁴ human, animal or plant life or health,¹⁵ patents, trade marks and copyrights, and the prevention of deceptive practices,¹⁶ and the protection of national treasures of artistic, historic or archaeological value.¹⁷ Restrictions on trade under Article XX can also be justified if products have been manufactured with prison labour,¹⁸ or the justification may be based on the conservation of exhaustible natural resources.¹⁹

The preamble to the Article XX provisions grants very important general derogations from all the obligations in the GATT. The Appellate Body reiterated the importance of this preambular provision in the *U.S. – Gasoline*²⁰ case by emphasising that the preamble to Article XX clearly states that “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures”. Thus, no obligation under the GATT is exempted under the Article XX exceptions. While this, on face value, gives a very broad scope for members to adopt exceptions to obligations under the GATT, both the preamble to Article XX and the substantive derogations in paragraphs (a) to (j) have embedded checks aimed at preventing abuse. The very fact that the list of exceptions is exhaustive means that a WTO member cannot justify a trade restrictive measure under Article XX if the justification is not provided for in any of the paragraphs in the said article. As has been clarified by the Appellate Body in the *U.S. – Gasoline*²¹ and *U.S. – Shrimp*²² cases, the first step in the analysis of consistency of a measure with Article XX is to ascertain whether the measure can be justified under any of the ten paragraphs. If the measure at issue passes this test, it then has to meet the requirements of the preamble to Article XX

– i.e., whether the measure constitutes an arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. This two-tier test forms the basis of demonstrating either consistency with or breach of Article XX.

III. The Article XX(a) Provision on Measures Necessary to Protect Public Morals

Subject to the conditions set out in the preamble to Article XX, paragraph XX(a) allows WTO members to derogate from any obligations in the GATT by adopting measures “necessary to protect public morals”. The stated provision does not define what constitutes public morals. The contours of what constitutes public morals have therefore been defined through the jurisprudence of WTO panels and the Appellate Body. The panel in the *U.S. – Gambling* case defined the term ‘public morals’ as denoting “standards of right and wrong conduct maintained by or on behalf of a community or nation.”²³ It further stated that “the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values.”²⁴ Though the *U.S. – Gambling* case dealt with the subject of crossborder online gambling services, the language regarding the exceptions related to protection of public morals in the GATS²⁵ and GATT is the same. Thus, though this definition came through analysis of exceptions in the GATS, the jurisprudence has relevance for interpreting the Article XX(a) exception on public morals in the GATT. For example, in their definition of ‘public morals’ in Article XX(a) of the GATT, the panel in the *China – Publications and Audiovisual Products* case adopted the definition used by the panel in the *U.S. – Gambling* case,²⁶ quoted above.

From the definition of public morals used in the *U.S. – Gambling* and *China – Publications and Audiovisual Products* cases, it is evident that what constitutes a public moral is subjective to individual states. The panel in the *U.S. – Gambling* case actually conceded that the content of a public moral can vary in time and space. Thus what is permissible in one WTO member state may be prohibited as a breach of public morals in another member state. For example, while most WTO member states do not impose any bans on the import of alcohol or pork products, the Kingdom of Saudi Arabia imposes bans on the said products under the Article XX(a) public morals exception.²⁷ In fact, including the said products, Saudi Arabia maintains import bans on some 73 products considered as *haram* (prohibited) under *Shar’ia* Law.²⁸

While the definition of public morals is based on the subjective religious, cultural, social or ethical considerations of a WTO member, there is a necessity test embedded in the construction of the Article XX(a) provision. This thrusts any analysis of

consistency of a measure with the said article into the realm of an objective test. In the brief discussion above on the general exceptions under Article XX, it was stated that a measure must meet both the provisions in any of the paragraphs under Article XX and the preamble to the article. However, in provisions like Article XX(a) where the exception is prefixed with the word ‘necessary’,²⁹ the analysis of consistency is not that straightforward. In the *U.S – Gasoline* case, the panel adopted a three-tier test of consistency with respect to justification of a measure under Article XX(b) – a provision also prefixed with the word ‘necessary’. The panel held that for a measure to be justified under Article XX(b), it must satisfy the following requirements:

- (1) that the policy in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health;
- (2) that the inconsistent measures for which the exception was being invoked were necessary to fulfil the policy objective; and
- (3) that the measures were applied in conformity with the requirements of the introductory clause of Article XX.³⁰

The above stated three-tier test was affirmed and used by both the panel and the Appellate Body in the *China – Publications and Audiovisual Products* case. In the said case, China had adopted various trade restrictive measures with respect to the trading and distribution of publications and audiovisual products in its territory. There was an instituted content review process resulting in the need for approval before an entity could import the said products. Only entities that had gained approval through the content review process could import publications and audiovisual materials into China. China justified this trade restrictive measure as being necessary to protect public morals.

With respect to the first test developed in the *U.S. – Gasoline* case, the panel considered the public morals that China sought to protect under Article XX(a) and held that WTO members “should be given some scope to define and apply for themselves the concepts of public morals.”³¹ Due to this broad right members have to determine their own public morals, the panel or the Appellate Body does not rule on the necessity of the public moral, as this is an idiosyncratic value. It would thus not be the place of a panel or the Appellate Body to rule on the validity or necessity of cultural, social, ethical or religious values that a community holds dear. The panel proceeded on the assumption that if the restricted audiovisual products and publications were imported into China, they would have a negative effect on the public morals that China seeks to protect. Per this analysis, the social, cultural, ethical or religious values China sought to protect fell within the scope of public morals envisaged under Article XX(a).

The second stage in the three-tier test analyses the necessity of the measure adopted by a WTO member to protect an important public moral. In effect, the question is this: Even though the importance of an identified public moral is not in doubt, is the measure taken to protect that public moral necessary? In assessing whether China's measures were necessary to protect public morals, the panel considered the following: (i) how the measures contributed to the realisation of the objective of protecting public morals; (ii) how restrictive the Chinese measures were on international trade; and (iii) a weighing and balancing of the extent to which the Chinese measures contributed to protecting public morals and their restrictive effect on international trade.³² In the third analysis, the panel also considered the high level of importance of the public morals to China and the fact that China had adopted a high level of protection for the public morals.³³ After engaging in the stated weighing and balancing, the panel concluded that China's measures did not meet the necessity requirement in Article XX(a) considering the fact that there were less-restrictive alternatives available. On appeal, the validity of the panel's process of analysis and its decision on nonconformity with the necessity test were confirmed by the Appellate Body. The Appellate Body held that

The less restrictive the effects of the measure, the more likely it is to be characterized as 'necessary'. Consequently, if a Member chooses to adopt a very restrictive measure, it will have to ensure that the measure is carefully designed so that the other elements to be taken into account in weighing and balancing the factors relevant to an assessment of the 'necessity' of the measure will 'outweigh' such restrictive effect.³⁴

Per the jurisprudence of the WTO panel and the Appellate Body, there is a discernible proportionality requirement embedded in the necessity test that seeks to create a balance between the right of a member to impose trade restrictions to protect a public moral and the member's obligations assumed under the GATT 1994. Whenever the right to use the Article XX(a) exception is exercised by a WTO member, there is an invariable loss to another WTO member, as there is an inevitable restriction on international trade. As Steve Charnovitz argues, "the moral gain achieved by prohibiting certain transactions (e.g., the purchase of pornography) needs to be balanced against the moral loss caused by denying Freedom."³⁵ The Appellate Body's position on how necessary a trade restrictive measure has to be in order to protect a public moral is summarised in the following opinion in the *Korea – Various Measures on Beef* case. The Appellate Body opined that

the term "necessary" refers, in our view, to a range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is "necessary" taken to mean as "making a contribution to". We consider that a "necessary" measure is, in this

continuum, located significantly closer to the pole of “indispensable” than to the opposite pole of simply “making a contribution to”.³⁶

The first two tests discussed above have looked at whether a measure protected public morals and whether the measure was necessary to protect public morals. The third test stipulated by the panel in the *U.S. – Gasoline* case, and affirmed by the Appellate Body, deals with the consistency of a measure with the preamble to Article XX. With respect to the consistency of a measure with the preamble to Article XX, the Appellate Body held in the *U.S. – Gasoline* case that the construction of the preamble aims at addressing the manner in which a measure that is justified under any of the exceptions is applied and not so much the specific contents of the measure as such.³⁷ The underlying ethos of the preamble is the prevention of abuse of the exceptions provided for under Article XX and a balance of rights and obligations. Thus, while a WTO member can invoke its right to use an Article XX exception, this right must be exercised reasonably so as not to frustrate or defeat the legal obligations assumed under the GATT 1994.³⁸ There needs to be a balance of rights – i.e., the rights of the member invoking the exception and the rights of other members whose interests would be adversely affected as a result of the invoked exception.³⁹ The Appellate Body thus opined in the *U.S. – Shrimp* case that

The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of the general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state’s rights and enjoins that, whenever the assertion of a right ‘impinges on the field covered by [a] treaty obligation, it must be exercised *bona fide*, that is to say, reasonably’. An abusive exercise by a Member of its own treaty rights thus results in a breach of the treaty rights of the other Members, and, as well, a violation of the treaty obligation of the Member so acting.⁴⁰

In ensuring the nonabusive use of the Article XX exceptions, the preamble makes specific requirements that must be met. It requires that for a measure to be justified under Article XX it must not “constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.” There are two prohibitions here that WTO members must adhere to – (i) ‘arbitrary or unjustifiable discrimination’ and (ii) disguised restriction on international trade.

Regarding the prohibition against arbitrary or unjustifiable discrimination, it is worthy of note that this nondiscrimination requirement is not the same as in articles I and III of the GATT, where all like products are to be treated the same independent of origin. The qualifiers – ‘arbitrary’ and ‘unjustified’ – connote the possibility of

discriminating between members as long as the discrimination is not arbitrary or unjustified. Thus, if a WTO member imposes a ban on imports of pork due to its citizens' adherence to religious requirements, this would be in conformity with both the provisions in Article XX(a) and the chapeau, as the example of Saudi Arabia's ban on *haram* products shows. However, supposing Saudi Arabia allowed only a few WTO members to export pork into its territory, this would be an unjustified or arbitrary discrimination within the context of the chapeau. It would be an unreasonable unfairness in the treatment of the WTO members who would have been prevented from exporting pork to Saudi Arabia. The *U.S. – Shrimp* case offers a number of very good examples of how the prohibition against arbitrary and unjustifiable discrimination has been interpreted. Two of these will be briefly considered here.

In the stated case, exporters of shrimp to the United States were required to adopt 'turtle friendly' harvesting measures that were essentially the same as those prescribed in U.S. domestic law. While the U.S. objective of saving the lives of sea turtles was justified under Article XX(g), the design of the U.S. measure did not allow other WTO members to adopt their own 'turtle friendly' harvesting methods that were equally effective at preventing the incidental deaths of sea turtles. The overly rigid and inflexible nature of the U.S. measure was thus deemed to be an arbitrary and unjustified discrimination.⁴¹

The Appellate Body was also of the view that the process of obtaining certification to export shrimp into the United States was casual and informal.⁴² Hence there was a lack of certainty with respect to the fairness and justness of the certification process. This certainty deficit in the process of certification meant that those denied certification were arbitrarily and unjustifiably discriminated against, as there was no clear objective basis for ascertaining why some certifications were granted while others were rejected.⁴³

Regarding the second prohibition in the preamble to Article XX – i.e., 'disguised restriction on international trade' – the Appellate Body ruled in the *U.S. – Gasoline* case that this requirement "may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX."⁴⁴ From this jurisprudence, it would appear that the standards set for measures deemed to be arbitrary or unjustified restrictions on trade are applicable to the requirement not to adopt measures that amount to a disguised restriction on international trade.

The examples drawn from cases like *U.S. – Gasoline* and *U.S. – Shrimp* show that the standards set in the chapeau of Article XX and how they have been interpreted would also apply to Article XX(a).

IV. Extra-territorial Application of the Public Morals Exception?

The availability of restrictions on trade that are justified on the basis of protection of public morals evokes possible scenarios under which such restrictions may be imposed. A very pertinent consideration in this direction is the extra-territorial effect of a public morals protection measure adopted under Article XX(a). Supposing a WTO member imposes a ban on products manufactured under conditions where internationally recognised labour standards have been breached, could this ban be justified under Article XX(a)? Could the member invoking the Article XX(a) exception argue that its citizens consider the use of child labour unethical, and as such this justifies a ban on products manufactured with child labour? Jeremy Marwell observes that the tightening in the application of the exception provisions on human health and the environment, and other regulations like the agreements on Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS), will make reliance on the public morals exception more appealing to WTO members.⁴⁵ There are some arguments in favour of a teleological interpretation of Article XX(a) to include human rights.⁴⁶ As quoted earlier, the Appellate Body, in the *U.S – Shrimp* case, was willing to reinterpret exhaustible natural resources as provided in Article XX(g) to include living organisms. This reinterpretation hinged on the provisions on environmental protection and sustainable development in the preamble to the WTO Agreement. Consequently, the Appellate Body's jurisprudence has shown that it is not averse to teleological interpretations of the Article XX provisions. Considering the broad international consensus on the protection of human rights, especially those of children, where the other exceptions under Article XX become unavailable as a defense it is not impossible for members to rely on the Article XX(a) provision on the protection of public morals.⁴⁷ The thorny issue here though is whether reliance on Article XX(a) can be used as a justification when the measure in question has an extra-territorial effect.

There are two sides to the issue of extra-territorial effect of Article XX(a) measures. Supposing state A imposed a ban on products from state B due to the use of child labour in the manufacturing of the said product. State B could argue the labour issue in the manufacturing process did not occur in the territory of state A. Thus, imposing such a ban has an extra-territorial effect, as it seeks to change a practice that is not occurring in the territory of state A. Conversely, state A could also argue that per the ethical standards of its citizens, child labour is abhorrent and, as such, it has a right to impose a ban on importation of products manufactured in a manner that infringes the moral values of its citizens. It must be conceded though that WTO panels and the Appellate Body have not given a definitive ruling on the issue of extra-territorial effects of Article XX exceptions.

In the *EC – Tariff Preferences* case, the panel, commenting on the European Union’s Drug Arrangements, which offered more favourable treatment to some developing countries under the Generalised System of Preferences, stated that

the policy reflected in the Drug Arrangements is not one designed for the purpose of protecting human life or health in the European Communities and, therefore, the Drug Arrangements are not a measure for the purpose of protecting human life or health under Article XX(b) of the GATT 1994.⁴⁸

Thus, while the issue of extra-territorial application of the Article XX exceptions has not been definitively clarified by the Appellate Body, the ruling of the panel in the *EC – Tariff Preferences* case may indicate a position against such jurisprudence. There is however a nuanced contrast between the panel’s decision on extra-territorial application of the Article XX exceptions in the *EC – Tariff Preferences* case and the *U.S. – Shrimp* case. As discussed earlier, in the *U.S. – Shrimp* case, the United States had placed a ban on the importation of shrimp harvested in a manner that resulted in the incidental killing of sea turtles. This ban was evidently inconsistent with the provisions on market access in Article XI of the GATT 1994, but the United States justified the measure under Article XX(g) – i.e., a GATT-inconsistent measure which is however justified because it relates “to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.” Due to the fact that the banned shrimps were harvested in the territories of other WTO members, there was a legitimate issue of the extra-territorial effect of the U.S. measure. While the Appellate Body did not rule on the general availability of extra-territorial application of Article XX exceptions, it noted in the specific case under consideration that

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).⁴⁹

The fact that the protected animals under the ban were migratory species meant that the sea turtles could not be confined to one particular territory, as, during some seasons, they could be found in the territorial waters of the United States. Thus the availability of a seemingly extra-territorial application of the U.S. ban lay in the nexus between the migratory nature of the movements of the sea turtles and their classification as endangered species. Supposing the sea turtles were nonmigratory and indigenous to, say, India, the decision on availability of the Article XX(g) defense for the U.S. ban may have been different.

For developing countries, the possibility of reinterpreting Article XX(a) to cover issues like core labour standards and human rights produces some apprehensions.⁵⁰ This may seem to be ‘egging on’ WTO panels and the Appellate Body to legislate on matters that should lie within the competence of the political bodies. The apprehensions of developing countries regarding broadening the remit of the WTO into areas like core labour standards were eloquently stated by the Zimbabwean Minister for Industry and Commerce during the 1996 Singapore Ministerial Conference. An extract from the speech is reproduced below:

My colleague, the Honourable Minister of Trade and Commerce of Tanzania, Ndugu Abdullah O. Kigoda, has briefly outlined the position of the collective membership of the countries of the Southern African Development Community (SADC) on the issues before this Conference. Zimbabwe endorses that position, and wishes to underline two aspects. Firstly, the huge workload that the WTO is setting up for itself and for its Members, especially young members like Zimbabwe. In our view, this Conference should be focusing on the substantive review of the implementation of the Uruguay Round Agreements since the establishment of the WTO in January 1995. The credibility of the WTO system lies in the full implementation of the Uruguay Round results. This implementation process is with respect to the notification obligations, as well as the actual implementation of the substantive commitments. This includes a wide range of subjects, which has put a heavy administrative burden on less-developed countries. We think the WTO has adopted too many agendas. Secondly, the question of the mandate of the WTO. The general view expressed by many speakers, and also in the opening statement by the Honourable Prime Minister of Singapore, Mr. Goh Chok Tong, is that the WTO should concentrate on its core business of promoting worldwide trade. The issues of labour should be dealt with by the ILO, and those of investment and development by the UNCTAD.⁵¹

There may thus be the legitimate argument that international organisations established to deal with issues like human rights and labour standards should be empowered with enforcement mechanisms instead of using the WTO system as an omnibus enforcement regime to cure the ills of the world.

V. Conclusion

The importance of trade as an international public good is not in doubt. The GATT 1994 thus makes substantive provisions that effectuate the objective of liberalising trade in goods. However, the economic and noneconomic benefits of international trade must be balanced with other equally important values. This balancing act may necessitate the imposition of restrictions on trade so as to give effect to important issues like public morals, public health and environmental protection. Though the public morals

exception has been challenged under the WTO dispute settlement system on very few occasions, the possibility of it becoming more prominent in disputes may be inevitable. Using the judicial arm of the WTO to expand the remit of the public morals exception will evidently result in accusations of judicial activism. The onus therefore lies on the legislative decision making bodies in the WTO to develop international trade law in a manner that keeps it in step with possible trade related issues like human rights and core labour standards.

Endnotes

* Dean of the College of Science and Theoretical Studies, Saudi Electronic University, +966555555689, P.O. Box 59146, Code 11525, Riyadh, Saudi Arabia.

¹ 3rd paragraph of the preamble to the GATT 1994.

² See Thomas Cottier and Petros C. Mavroidis, *Regulatory Barriers and the Principle of Non-discrimination in World Trade Law: Past, Present, and Future*. University of Michigan Press, 2000.

³ Article I of the GATT 1994.

⁴ Articles II and XVII of the GATS make provisions on the MFN and NT obligation respectively.

⁵ Articles 3 and 4 of the TRIPS Agreement provide for the NT and MFN obligations respectively.

⁶ For example, even before the end of World War II, the planning of the post-war world order envisaged equal access to trade for all states. Thus principle 4 of the 1941 Atlantic Charter provided as follows: "Fourth, they will endeavour, with due respect for their existing obligations, to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity."

⁷ See Petros Mavroidis, *Trade in Goods: The GATT and the Other Agreements Regulating Trade in Goods*. Oxford University Press, 2007.

⁸ See Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*. 2005.

⁹ For example, paragraph 3 of the preamble to the Agreement Establishing the World Trade Organisation states the objective of "entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations."

¹⁰ Peter D. Sutherland et al., *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, 15. Report by the Consultative Board to the Director-General Supachai Panitchpakdi. Geneva: World Trade Organisation, 2004.

¹¹ First reading of the preamble to the WTO Agreement states that WTO members recognise "that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development."

¹² Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products* (1998), para. 129.

¹³ For example, economic emergency exceptions to the Article XI prohibition against quantitative restrictions are provided for in Article XII and the Agreement on Safeguard Measures. Article

XXI makes provisions on security exceptions while Article XXIV provides for exceptions to MFN obligations for the purpose of the establishment of free trade areas and customs unions.

¹⁴ Article XX(a) of the GATT 1994.

¹⁵ Article XX(b) of the GATT 1994.

¹⁶ Article XX(d) of the GATT 1994.

¹⁷ Article XX(f) of the GATT 1994.

¹⁸ Article XX(e) of the GATT 1994.

¹⁹ Article XX(g) of the GATT 1994.

²⁰ Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline* (1996).

²¹ Ibid.

²² Op. cit., note 12.

²³ Panel Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (2004), para. 6.465.

²⁴ Ibid, para. 6.461.

²⁵ Article XIV(a) of the GATS.

²⁶ Panel Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (2004), para. 6.461.

²⁷ Raj Bhala and Shannon B. Keating, 'Diversity within Unity: Import Laws of Islamic Countries on *Haram* (Forbidden) Products', *The International Lawyer* (2013) 47:3 pp.343-406, at 348. See also Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organisation, WT/ACC/SAU/61, dated 1 November 2005, Annex F, List of Banned Products.

²⁸ Ibid.

²⁹ The provisions in Article XX(a), (b) and (d) are prefixed with the word 'necessary'.

³⁰ Panel Report, *United States — Standards for Reformulated and Conventional Gasoline* (1996), para. 6.20.

³¹ Panel Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (2009), para. 7.759.

³² Ibid., para. 7.819.

³³ Ibid.

³⁴ Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (2009), para. 310.

³⁵ Steve Charnovitz, 'The Moral Exception in Trade Policy', *Virginia Journal of International Law*, 38, (1998), 689.

³⁶ Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (2000), para. 161.

³⁷ Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, (1996), p.22.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products* (1998), para. 158.

⁴¹ Ibid., para. 177.

⁴² Ibid., para. 180-181.

⁴³ Ibid.

⁴⁴ Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline* (1996), p. 25.

⁴⁵ Jeremy Marwell, 'Trade and Morality: The WTO Public Morals Exception After Gambling', *New York University Law Review*, 81 pp.802-842, at 810.

⁴⁶ See Robert Howse, 'The World Trade Organization and the Protection of Workers' Rights', *The Journal of Small and Emerging Business Law*, (1999), 3, 131.

⁴⁷ Jeremy Marwell, op. cit., note 45.

⁴⁸ Panel Report, *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries* (2004), para. 7.210.

⁴⁹ Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, (1998), para. 133.

⁵⁰ See Alex Ansong, 'Creating WTO Law by Stealth: GSP Conditionalities and the EC – Tariff Preferences Case', *Estey Journal of International Law and Trade Policy*, 14:2 (2013) pp.133-144. In his analysis of the *EC – Tariff Preferences* case, the author argues that when the Appellate Body allowed developed countries to institute conditionalities for developing country access to trade preferences, it resulted in a situation where extra-WTO rules could be 'smuggled' into the trade regime and applied only to developing countries.

⁵¹ Statement by the Honourable N.M. Shamuyarira, Zimbabwean Minister of Industry and Commerce, delivered on 10 December 1996, at the Singapore Ministerial Conference, 9-13 December 1996. Full statement available online at http://www.wto.org/english/thewto_e/minist_e/min96_e/st45.htm (viewed 06/07/11).