The problematic nature of public morals exception under Article XX(a) of the General Agreement on Tariffs and Trade (GATT)

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The foundations of international trade are established by the rules of the World Trade Organisation (WTO).\(^1\) The WTO endeavors to promote and maintain openness, freedom and non-discrimination between its trading members, and to achieve that aim the WTO contains a number of core agreements, including The General Agreement on Tariffs and Trade (GATT) and The General Agreement on Trade in Services (GATS).\(^2\) In order to protect social, cultural or religious preferences, a member of the WTO may adopt measures restricting trade, and, to justify such measures if found to be non-compliant with the WTO’s rules, members have Article XX GATT at their disposal to use as a defence, which seeks to achieve balance between members’ regulatory autonomy and core WTO’s obligations without violating trade liberalization.\(^3\)

Article XX, as a defence, consists of two discrete parts. The first is an introductory paragraph, known as the Chapeau, followed by 10 provisions or exceptions that provide those justificatory reasons for an affirmative defence.\(^4\) Each of the sub-paragraphs of Article XX should be seen as a limited and conditional exception from the substantive obligations and rules set out in the GATT and the burden of proof lies with the member seeking to invoke Article XX.\(^5\) The Chapeau is concerned with the manner in which the measure is applied, and provides that the adopted measure is not “applied in such a way as to constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade”.\(^6\) Therefore, if an admittedly non-compliant measure is to be justified under XX, it must first fall into the categories of (a) to (j) and then be proven to satisfy the requirements of the Chapeau.

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4 Appellate Body Reports, Brazil - Certain Measures Concerning Taxation and Charges, WT/DS472/AB/R, WT/DS497/AB/R, 13 December 2018, para 5.83
5 Panel Report, United States - Tariff Measures on Certain Goods from China, WT/DS543/R, 15 September 2020, para 7.105
7 The General Agreement on Tariffs and Trade (GATT), Art XX
ten justificatory reasons are set out in an exhaustive list, starting with the first measure: (a) necessary to protect public morals. In this way, invoking Art XX(a) as a defence requires three steps; defining the public morals in contention; deciding whether a member state’s measure to restrict trade is necessary to protect such public morals and; deciding whether the particular measure contradicts the Chapeau. In the contemporary case law, the first step is determined by member states, the second and third steps are determined by a WTO Panel and/or Appellate Body (AB).

The purpose of this essay is to discuss one of these justificatory reasons; the public morals exception under Article XX(a) GATT. This essay will shed light on the public morals exception from judicial and jurisprudence points of view, and illustrate how the WTO’s adjudicatory bodies, i.e., the ad-hoc WTO Panels and the standing body of the AB, widely interpreted the exception. It will also show how the members themselves have stretched the provision to cover an array of concerns under the umbrella of ‘public morals’, how this brought to the exception the potential of abuse, and how the absence of clear definition of public morals and the vaguely worded article itself have made this concept more than flexible, and somehow problematic, encouraging many academics to debate its scope.

The public morals exception was contained in GATS Article XIV(a) preceded by its existence in Article XX(a) GATT. But when searching for definition of public morals, GATS did not provide much information. Its negotiators chose not to articulate the meaning of the clause through textual modifications. GATT Art XX(a) inherited the same issue and suffered lack of textual definition and clarity. The lack of definition has made the scope of public morals one of the most controversial topics. Charnovitz demonstrated that public morals are usually related to trade in pornography, gambling, alcohol, and illegal drugs. Wu, stated that two approaches are necessary to understand what is meant by public morals; first, public morals which are universal or widely accepted by humankind, such as prohibitions against genocide or slavery, and secondly each state’s freedom to unilaterally

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9 The General Agreement on Tariffs and Trade (GATT), Art XX
10 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’ (1998) 7 Minnesota Journal of International Law 75
11 The General Agreement on Trade in Services (GATS), Art XIV
13 Ibid
define its own public morals.\textsuperscript{15} However, Marwell argued that even with the probability to identify the core near-universal public morals such as prohibiting slavery and torture, determining the precise content of such norms is debatable.\textsuperscript{16} As a result, many academics called for broader interpretation of public morals to include norms such as human rights and gender equality since the exceptions in Art XX are limited.\textsuperscript{17} Some argued that Art XX(a) should be extended to include what they called ‘universal human rights’ including labour rights.\textsuperscript{18} Furthermore, others stretched its scope to include women’s rights\textsuperscript{19} or to cover trade restrictions in conflict diamonds\textsuperscript{20} or even the welfare of animals used in meat production.\textsuperscript{21} However, despite the general rule that exceptions are to be narrowly construed in both civil and common law systems,\textsuperscript{22} there is enough flexibility to achieve either a narrow or broad interpretation of the exceptions clause, depending on the facts and the rule’s application, at the adjudicator’s discretion.\textsuperscript{23} This discretion was structured in the two-stage process of Columbia-Textiles, namely a) whether a measure is designed to protect public morals and b) whether the measure is necessary to protect public morals.\textsuperscript{24}

The lack of consensus in the substance of ‘public morals’ has put a heavier burden on the adjudicatory bodies to find a workable definition of public morals and a more precise framework in which to recognise them.\textsuperscript{25} The first time the WTO broke its silence\textsuperscript{26} about the public morals clause was in US-Gambling.\textsuperscript{27} Although the case was an Article XIV(a)

\textsuperscript{22} 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’ (1998) 7 Minnesota Journal of International Law 75
\textsuperscript{23} ibid
\textsuperscript{25} Safar Safarli and Sabina Mammadzadeh, ‘Public Moral Exception under GATT: Traditional and New Approaches’ (2019) 5 Baku State University Law Review 157
\textsuperscript{27} Panel Report, United States – Measures Affecting the Cross Border Supply of Gambling and Betting Services, WT/DS285/R, adopted 20 April 2005
GATS’s dispute, its importance stems from the fact that the reasoning in that case has been subsequently applied into Article XX(a) GATT’s disputes, paying attention to the extreme similarity between both articles\(^{28}\) and the interrelation between them.\(^{29}\) The role of both is to deal with defences which a member state can invoke when breaching its commitments to the main agreement (GATS/GATT), and the wording of the articles are replicated in both agreements. 

In US-Gambling, when for the first time in the WTO’s jurisprudence the ‘public moral’ exception was invoked,\(^{30}\) the US adopted measures preventing the provision of cross border services in gambling.\(^{31}\) That prohibition was challenged by Antigua and Barbuda as violating the US’s commitments under GATS to free trade in recreational services.\(^{32}\) The US invoked Art XIV(a) GATS ‘necessary to protect public morals or to maintain public order’\(^{33}\) to justify its ban,\(^{34}\) and defended the measure by its legitimate concerns related to the supply of gambling services such as, money laundering, risks to youth, and public health.\(^{35}\) The panel interpreted that “the term ‘public morals’ denotes ‘standards of right and wrong conduct maintained by or on behalf of a community or nation’”,\(^{36}\) and unequivocally stated that “the content of public morals can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values”\(^{37}\), agreeing that latitude was to be given to members in defining the public morals within their territories.\(^{38}\)

The panel noted that “the word ‘necessary’ is not limited to that which is ‘indispensable’ or ‘of absolute necessity’ or ‘inevitable’” and agreed on extending the nature

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\(^{31}\) Panel Report, United States – Measures Affecting the Cross Border Supply of Gambling and Betting Services, WT/DS285/R, adopted 20 April 2005

\(^{32}\) ibid, see also Appellate Body Report, United States – Measures Affecting the Cross Border Supply of Gambling and Betting Services, WT/DS285/AB/R, adopted 20 April 2005

\(^{33}\) The General Agreement on Trade in Services (GATS), Art XIV(a)


\(^{35}\) ibid


\(^{37}\) ibid

\(^{38}\) ibid
of the concept of necessity to include the adopted measure.\textsuperscript{39} However, the panel understood that the US was obliged to consult with Antigua before and during the measure’s imposition,\textsuperscript{40} and since the US did not engaged in such consultations it failed the necessity test.\textsuperscript{41} The AB reversed the Panel’s finding, and regarded the missing consultations as an unreasonable alternative measure and concluded that the measure was necessary since there was “no reasonably available alternative measure proposed by Antigua or examined by the Panel that would establish that the three federal statutes are not “necessary” within the meaning of Article XIV(a).\textsuperscript{42} In spite of that, the AB agreed with the panel on its findings that the adopted measure was not applied in a manner that does not constitute arbitrary and unjustifiable discrimination, and therefore failed the Chapeau.\textsuperscript{43}

Similarly, in China -Publications and Audiovisual Products, the first real interrogation of Art XX(a) GATT, the WTO’s members were given the ability to almost unilaterally define public morals.\textsuperscript{44} China stretched the exception’s scope and argued that the ban it put in place on the importation of cultural goods, which were deemed to potentially have offensive or harmful materials contained therein, was necessary to protect Chinese citizens’ public morals,\textsuperscript{45} in clear violation of China’s Accession Protocol to the WTO.\textsuperscript{46} The panel’s assumption that the content of cultural products censored by China may be harmful to Chinese public morals was accepted by the AB without any further investigation.\textsuperscript{47} The near unilateral approach to define public morals which was adopted in US –Gambling appeared in China-Audiovisuals. The panel considered the aforementioned approach as respecting members autonomy in matters of public policy,\textsuperscript{48} stating that “protection of public morals

\textsuperscript{40} ibid paras 6.531, 6.534.
\textsuperscript{41} ibid paras 6.533-6.535.
\textsuperscript{42} ibid para 326.
\textsuperscript{46} Ming Du, ‘Permitting Moral Imperialism? The Public Morals Exception to Free Trade at the Bar of the World Trade Organization’ (2016) 50 Journal of World Trade 675
ranks among the most important values or interests pursued by members as a matter of public policy".49

Despite the possible accusation that the panel ignored Art XX explicitly stating that ‘nothing in this Agreement’ (GATT) justified breaches outside the GATT (i.e., China’s Accession Protocol50) the panel’s assumption widely interpreted public morals and accepted China’s censorship as a measure to protect public morals without proper investigations.51 The Panel and the AB differed on this key point. The AB considered in detail whether China could invoke XX(a) in relation to commitments outside of the GATT (namely the Accession protocol) and found a close ‘interlinkage’ between trade in goods (GATT) and regulation of trading entities (Accession protocol),52 and that if a ‘necessary objective link’53 exists between a particular measure to regulate who can trade with what they trade, non-compliance defences like XX could be applied. The Panel used the following reasoning; if the US has concerns about public morals because of online gambling, then China has the ability to pursue public morals when censoring the content industry.54 This reasoning was used without any discussion of the freedom of speech principle possibly violated by China.55 However, the panel rejected China’s assertion of the Article XX(a) exception, reasoning that the measure failed to pass the ‘necessity test’, that is to say that China failed to prove the measure necessary to protect public morals. These findings were upheld by the AB’s report.56

51 The wording of the chapeau left it unclear whether a GATT XX defence was only available for breaches of GATT obligations and perhaps that China’s non-compliant measure was inconsistent with obligations about traders and that the GATT obligations were focused on goods.
53 ibid para 230
54 Panel Report, China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/R and Corr.1, adopted 19 January 2010, para 7.763; It is worth mentioning that this dispute was between the US and China, and thus the issue of public morals takes on a wider geopolitical flavour.
In EC-Seal Products, Canada and Norway challenged the ‘EU seal regime’, which prohibited the importation of seal products, arguing it violated the EU's obligations under the GATT.\(^{57}\) The EU responded by claiming that its seal regime was pursuing public moral concerns over seal welfare because the sale of seal products derived from seals hunted in an inhumane manner, violating the moral and ethical belief of the Europeans, even if seal hunting took place extraterritorially.\(^{58}\) The panel found that the same broad interpretations\(^{59}\) of public morals adopted in US-Gambling\(^{60}\) and China–Audiovisuals\(^{61}\) were equally applicable to the EU,\(^{62}\) offering the WTO member a certain degree of discretion in defining public morals “with respect to various values prevailing in their societies at a given time”.\(^{63}\) The AB upheld the panel's interpretation and affirmed that recognition of public morals will vary, and the members should be given some scope to define and apply for themselves the concept of public morals.\(^{64}\) Such use of Art XX(a) could be seen as abusive. Arguably it carries an extraterritorial imposition of the European moral standards to the method of producing trade goods and trying to justify that under Art XX(a), that could be regarded discriminatory, thus contrary to the Chapeau. The broad interpretation of public morals in this case seems to equip Art XX(a) with a power which enabled it to swallow another exception, i.e., Art XX(b)\(^{65}\) ‘measures necessary to protect human, animal or plant life or health’.

In the previous three cases the AB did not question or rule on the definition of public morals adopted by the panel, and the WTO’s members implicitly welcomed that.\(^{66}\) In US-Gambling and EC-Seal Products, the measures were found to satisfy the first tier of the necessity tests ‘necessary for the protection of public morals’,\(^{67}\) however, in neither case were the requirements of the Chapeau met.\(^{68}\)

\(^{58}\) ibid para 7.3.
\(^{63}\) ibid para 7.381
\(^{64}\) Appellate Body Report, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R, WT/DS401/AB/R, adopted 18 June 2014, para 5.199
\(^{65}\) The General Agreement on Tariffs and Trade (GATT), Article XX(b)
\(^{66}\) Paola Conconi and Tania Voon, ‘EC–Seal Products: The Tension Between Public Morals and International Trade Agreements’ (2016) 15 World Trade Review 211
\(^{67}\) Panel Report, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/R, WT/DS401/R and Add.1, adopted 18 June 2014, para 7.644
\(^{68}\) ibid para 7.650
In Colombia-Textiles another stretch occurred; Panama challenged the compound tariff imposed by Colombia on imports of textiles, apparel and footwear. Colombia defended that measure by stating that it was to prevent illegal trade and money laundering which in turn was designed to protect public morals. The panel concluded that preventing money laundering was indeed a ‘policy designed’ to protect public morals, and thereby accepted the ‘compound tariff’ as a measure having the objective of protecting public morals. The panel again stated the freedom to defining public morals given to member states, and therefore confirmed the US-Gambling definition of public morals. This freedom can be conceived as a high degree of deference given to national authorities in defining such a crucial and uncertain matter, one that considers the knowledge of the societal and cultural values of national authorities is deeper and more comprehensive. The panel and AB appear to keep following non-intrusive standards of determining what constitute public morals, and left that to the national authorities which was a very much appreciated leeway.

Finally in Brazil-Taxation, the EU and Japan challenged a measure adopted by Brazil concerning taxation and charges in the automotive sector, technology industry, and exporters' tax advantages. Brazil claimed that the measure was to overcome the digital divide, and to have the right to protect public morals through audio-visual transmission and therefore its differential taxation system could be justified. The panel noted as the conditions and circumstances vary between members, it is for each member to determine

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72 ibid para 7.338
74 Andrew T Guzman, ‘Determining the Appropriate Standard of Review in WTO Disputes’ (2009) 42 Cornell International Law Journal 45
77 ibid para 3.1, 3.2
78 ibid para 7.545
what objective is a matter of public morality in its territory, and this broad scope of public morals, as defined and applied by Brazil, included its concerns about the digital divide and promoting social inclusion. Where the panel tried to pinpoint the substance of ‘public morals’, it did not distinguish between public concerns, public policy and public morals.

The boundary between these different concepts was first blurred in China–Audiovisuals and then in EC–Seal when the panel accepted the EU’s claim that the seal welfare is a public moral issue in Europe, which resulted in the panel being accused of emptying the term ‘public moral’ of any prescriptive normative content. Despite the objectives in Brazil-Taxation being ostensibly legitimate, and goals any government should pursue, these objectives were not necessarily considered as public morals, and there is a need for more clarification within the scope of public morals. A clear distinction must be established between public policy and public morals, since “any public policy may pursue a legitimate objective but not every legitimate objective may be properly called ‘public morals’”. Notwithstanding the above, the adopted measure did not pass the necessity test.

The absence of textual definition of public morals, combined with the expansive room to operate given to the members by the panel and AB to determine what constitute public morals has raised many questions and concerns. Wu wondered if the definition of public morals is universal, where what constitute public morals are only the universally accepted moral principles, or unilateral, by granting each state the ability to define its public morals, and stated that if a principle became universal it will rarely need to be protected which will

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83 ibid
leave the exception clause useless.\textsuperscript{90} More importantly Wu and Cleveland warned of pure unilateralism and demonstrated that pure unilateralism will result in a real threat to the international trade by leaving the exception open to abuse\textsuperscript{91} by states pursuing more trade restrictions when freely stretching the exception’s scope and hiding behind the public morals defence.\textsuperscript{92} But based on all cases discussed above, none of the member states managed to justify its measures under Art XX GATT, though several met the requirements in XX(a) while failing the “chapeau”, therefore, it could be argued that there seems to be no actual abuse incurred. However, this is a rather superficial appraisal of the appearance of facts.

The pure unilateralism approach will lead to more uncertainty as to what constitutes public morals and will make it more difficult to define the notion of such an important concept. Moreover, it is not proven, yet, given the number of disputes concerning public morals, that the necessity test and the chapeau, when used as a shield against the abusive use of the defence, are impermeable. Considering the number of members that could use this defence to justify a breaching measure with the freedom to define their public morals, and the number of cases concerning the public moral defence, it is too early to judge such impermeability. On top of that, the disruption that international trade will suffer, the inconvenience members will encounter when dealing with each other, and the disputes’ costs and length can all be considered as potential abuse. In light of Charnovitz’s analysis of the inward and outward measures,\textsuperscript{93} the panel and AB clearly supported the adoption of inward measures but were not clear enough about the outward ones. That can be seen when the EU, intelligently, invoked Art XX(a) in EC–Seal, since the panel will easily accept inward measures, and claimed that the seal welfare is one of the Europeans’ public concerns which resulted in satisfying the first tier of the necessity tests.\textsuperscript{94}

The lack of clarity about what constitutes public morals has drawn the attention of some scholars towards important international values that are not covered explicitly in Art XX GATT and suggested that Art XX(a) should be broadly interpreted to cover these values.

\textsuperscript{94} Panel Report, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/R, WT/DS401/R and Add.1, adopted 18 June 2014, para 7.644
Jarvis argued that women’s rights are one of these values. Guanglin suggested that concerns related to labour rights, such as child labour, should also be protected by Art XX(a) which best suits pursuing such a protection. However, Wu asserted that when a moral principle becomes widely shared or universal, states would rarely need to protect against such a moral principle, stating that this will empty the exception clause from its meaning. Wu pointed out that since the US-Gambling, a newly emerging doctrine may lead the WTO’s jurisprudence to consider morality-related issues, such as human rights and labour standards, and emphasized that this must be done carefully through judicial interpretation.

These scholars’ main focus seems to be on the article’s judicial interpretation and avoiding any suggestions for textual clarification to include such values. This could be the only possible way to achieve such aim, but it could also be attributed to the fear of rejection that textual amendment may receive from some developing countries, given their previous denial of the social clause amendment proposal submitted by the US and the EU at the WTO ministerial conference in Singapore.

With only 5 cases concerning public moral defence, it is insufficient to establish a solid ground and clear guidance to the panel and the AB in interpreting Art XX(a). The public moral defence is a sensitive concept that needs to be judicially mastered, which requires a larger body of case law concerning specifically this concept. The analysis applied on similar measures to restrict trade adopted by two members with different societal backgrounds could give some hints, but it cannot sufficiently help here, since if that analysis is to be applied in the public morals scenario, it will clearly ignore the sensitivity of this defence.

It seems that the ambiguous wording of Art XX(a) and the lack of case law have influenced the panel and the AB in interpreting Art XX(a) to broadly grant discretion to the members in terms of the content of public morals, and highly respect members’ sovereignty. However, that has generated a risk of abusing the public moral exception, since...

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96 Qiaozi Guanglin, ‘The Balance between Public Morals and Trade Liberalization: Analysis of the Application of Article XX(A) of the GATT’ (2019) 14 Frontiers of Law in China 86
98 ibid
100 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’ (1998) 7 Minnesota Journal of International Law 75
a distinction between overlapping concepts (e.g., policy with a social objective and public morals) has not been achieved. Furthermore, the WTO’s inability to distinguish more delicate concepts such as public morals and public policies, which could result in any behavior prohibited by a state member, can be regarded as social judgment of what is right or wrong conduct and regarded as a public moral issue.

What made the situation problematic is not the broad interpretation alone. The low threshold of “moral issues” has played its role. Despite this low threshold enhancing members' sovereignty, by claiming that the adopted measure is concerning public morals, the lower the threshold of “moral issues”, the harder it is for the measure to fulfill the necessity test, since there can be many reasonable alternatives. A careful interpretation of the obscure wording of Article XX(a) should be considered since the narrow construction could threaten the sovereignty of the members, and an extremely broad interpretation may lead to members invoking Art XX(a) to justify any adopted measure, which will affect GATT's provisions and the rule of law. Du emphasised that the low threshold threatens to bring ‘a significant slippery slope risk to the WTO’ and stressed that the panels’ extremely deferential approach to the public morals clause and the AB overstretching Article XX (a) “threatens to render the public moral exception go out of check”.

While the panel and AB broadly interpreted Art XX(a) highly respecting members’ sovereignty, and set an exceedingly low threshold of public morals, they compensated for that (the uncontested acceptance of public moral objective of a measure) by adopting stricter understanding of the necessity test and application of the Chapeau, which can be clearly seen when examining the five disputes. Only two cases passed the necessity test but failed the Chapeau, and the rest did not even pass the necessity test. That was attributed to both the ‘general mistrust’ of WTO’s members and the ‘cautious approach’ by the panel and AB.

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103 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’ (1998) 7 Minnesota Journal of International Law 75
and their reluctant to behave as ‘the arbitrator’ of what should constitute public morals.\textsuperscript{107} These two different approaches (the members’ discretion in deciding public morals’ scope, and the strict application of the necessity test and the Chapeau) were described as the balance of trade liberalisation and public moral.\textsuperscript{108}

Despite being called “a balance”, it does not seem to be ideal. Applying the principle of compensation is not always desirable in international disputes and could be avoided by finding limitations on the unconditional acceptance of the public moral objective of a measure. Applying two different approaches in one dispute could leave both the disputing parties and the judicial body in confusion and unpredictability. Some limitations on the members’ sovereignty and increasing the threshold could add more value to this approach.

In conclusion, the ambiguous wording of the broad interpretation of Article XX(a), the lack of case law, and the overreliance on the US-Gambling definition of public morals by the WTO’s judicial bodies, have allowed the WTO’s members to freely stretch the exception’s scope and to claim, nearly, any adopted measure has public moral objectives and could be justified under Art XX(a). The WTO’s panel and AB strict application of the necessity test and the Chapeau has limited that potential abuse, but not completely eliminated it, especially because only five cases were seen under this exception and each case stretched the exception in different way, leaving open the possibility for a future stretch of the exception and potential to pass the test of necessity. Therefore, a definition of public morals is needed. This could be an enumerated list, or a set of standards to decide what can be counted as public morals, to enable it to include highly demanded human rights such as, women rights and labour rights and child rights, and eliminate the chance of abuse. Such issues should be discussed in further studies.


\textsuperscript{108} Qiaozi Guanglin, ‘The Balance between Public Morals and Trade Liberalization: Analysis of the Application of Article XX(A) of the GATT’ (2019) 14 Frontiers of Law in China 86
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The General Agreement on Trade in Services (GATS), Art XIV


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