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Focusing on Substantive Law in International Economic Relations: The *Public Morals* of GATT's Article XX(a) and "Conventional" Rules of Interpretation

Christoph T. Feddersen*

INTRODUCTION

World trade and "public morals" are closely intertwined – sometimes they form a homogeneous congeniality, sometimes they lead to troublesome contradictions. Recent instances where the two have clashed are easily at hand, such as import prohibitions on pornographic products¹ and import restrictions

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The author dedicates this article to Professor Dr. Dr. h. c. Ingo von Münch, Department for International Affairs at the University of Hamburg School of Law, on the occasion of his 65th birthday on December 26, 1997 in appreciation for his guidance and continuing mentorship in the past years.

1. This problem was recently discussed with special regard to child pornography. See Judith Matloff, *As Porn Proliferates, South Africa Debates Free Speech*, THE CHRISTIAN SCIENCE MON., Aug. 8, 1997, at 5.

The "import" of child pornography via the Internet could also appear to be a problem with regard to the GATT, assuming the information which is being downloaded is a product. The GATT (or GATS if the pornography is considered to be a service) does not provide effective measures which could tackle this prob-

on fur harvested by leg-hold traps.² Other instances where global trade and public morals do not necessarily correspond include import restrictions on products made in countries where child labor is permitted³ or where basic workers' rights are denied,⁴ and the debate over import bans on cloned animals.⁵ These examples show that, although world trade and its liberalization⁶ are designed to promote the economic growth and wealth of states, they sometimes may not coincide with the "public morals" of participating states. When this occurs, Article XX(a) of the General Agreement on Tariffs and Trade (GATT) specifically provides that a state may deviate from a GATT obligation when compliance with the obligation offends the state's public morals.⁷ In other words, rather than breaching its obligation

lem and which could easily be enforced, because Internet access does not correspond to national borders and thus it is nearly impossible to close national markets to Internet-distributed goods and services.

2. *EP Adopts Resolution on Leg-hold Traps*, THE REUTER EUROPEAN COMMUNITY REP., Feb. 25, 1997, available in LEXIS, CURNWS File; David Fox, *S. Africa Trade, Animal Traps Top EU Meeting*, THE REUTER EUROPEAN COMMUNITY REP., Feb. 23, 1997, available in LEXIS, CURNWS File; Caroline Southey & Nancy Dunne, *Fur Flies in Trapping Row*, FIN. TIMES, Dec. 9, 1996, at 6.

3. See Steven Greenhouse, *Sweatshop Raids Cast Doubt on an Effort by Garment Makers to Police the Factories*, N.Y. TIMES, July 18, 1997, at A10.

In addition see Paul De Waart, *Minimum Labour Standards in International Trade from a Legal Perspective*, in CHALLENGES TO THE NEW WORLD TRADE ORGANIZATION 245, 260 (Pitou van Dijck & Gerrit Faber eds., 1996); Timothy A. Glut, Note, *Changing the Approach to Ending Child Labor: An International Solution to an International Problem*, 28 VAND. J. TRANSNAT'L L. 1203 (1995).

4. See Raymond Torres, *Labour Standards and Trade*, OECD OBSERVER, Oct./Nov. 1996, at 10.

5. See Michael Specter & Gina Kolata, *After Decades and Many Missteps, How Cloning Succeeded*, N.Y. TIMES, March 3, 1997, at A1, B6-B8; Larry Tye, *Small Firms Flock to Profit off Path Opened by Cloned Sheep*, BOSTON GLOBE, Feb. 26, 1997, at A1, A4. See also *British Nobel Laureate Rotblat Warns Against Cloning Peril*, DEUTSCHE PRESSE-AGENTUR, Feb. 25, 1997, available in LEXIS, CURNWS File; Caryn James, *A Warning As Science Catches Up On Cloning*, N.Y. TIMES, Feb. 26, 1997, at C9, C12.

6. World trade has strongly expanded in the past decades, see WORLD TRADE ORGANIZATION, INTERNATIONAL TRADE, TRENDS AND STATISTICS § 1 (1995).

7. Article XX reads as follows:

General Exceptions

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:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;

under GATT, a contracting party in this situation may invoke an Article XX(a) exception. However, since standards of "public morals" could differ among participating states, an interpretation of these standards must be found which can be consistently shared among all GATT members.

In theory, Article XX(a)'s exception is designed to allow a nation to participate in the international trading regime under the World Trade Organization (WTO), while preserving certain aspects of its national sovereignty over its domestic political and

(c) relating to the importation or exportation of gold or silver;

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks, and copyrights, and the prevention of deceptive practices;

(e) relating to the products of prison labor;

(f) imposed for the protection of national treasures of artistic, historic or archaeological value;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;*

(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

(j) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of this Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS (1994), art. XX [hereinafter GATT 1994].

The scope of Article XX is clarified by its Ad Article:

Sub-paragraph (h)

The exception provided for in this sub-paragraph extends to any commodity agreement which conforms to the principles approved by the Economic and Social Council in its resolution 30 (IV) of 28 March 1947.

Id.

legal order.⁸ GATT contains several provisions to safeguard against those obligations that could greatly impinge upon states' sovereignty.⁹ For instance, Article XXI provides that a contracting party may act in contravention with its obligations under GATT when those actions are necessary for the protection of its essential security interests.¹⁰ Article XX(a) and its promise to effectively protect a state's sovereignty against intrusive GATT obligations does not, therefore, raise any *prima facie* legal problems.

In practice, though, the ambiguous and rather obscure wording of Article XX(a) invites possible misuse. If construed narrowly, Article XX(a) opens up a legal quagmire, in which states' national sovereignty could easily vanish. Conversely, an excessively broad reading of Article XX(a) could lead to numerous invocations of the exceptions clause by individual states, which could call into question both the legitimacy of individual GATT provisions and GATT's rule of law as a whole.

This Article examines Article XX(a)'s status as an attempt to navigate between Scylla and Charybdis. It focuses on the interpretation of the term "public morals" at the intersection of desired national sovereignty and required international uniformity. Part I traces the evolution of GATT to the WTO, with special regard to the dispute settlement procedure and the role of Article XX within trade disputes. Part II outlines the standards of interpretation established in the Vienna Convention on the Law of Treaties. Furthermore, it prepares the ground for a "conventional" interpretation of Article XX(a) by examining the

8. For an examination of the effect of the international economic marketplace on a nation's domestic markets, see JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM 1* (1990) [hereinafter *RESTRUCTURING*]; DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY 1-8* (1995); John H. Jackson, *Reflections on International Economic Law*, 17 U. PA. J. INT'L ECON. L. 17 (1996). For discussion of this concept in GATT Panel reports, see John H. Jackson, *WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 60, 62, 64 (1997) [hereinafter *WTO Dispute Settlement Understanding*].

9. For a list of pertinent provisions, see JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT 537-40* (1969).

For an examination of the dispute resolution mechanism of GATT in this context, see Samuel C. Straight, Note, *GATT and NAFTA: Marrying Effective Dispute Settlement and the Sovereignty of the Fifty States*, 45 DUKE L.J. 216 (1995).

10. GATT art. XXI. See also William J. Davey, *The WTO/GATT World Trading System: An Overview*, in *HANDBOOK OF WTO/GATT DISPUTE SETTLEMENT 63-64* (Pierre Pescatore, William J. Davey, Andreas F. Lowenfeld eds., Release June 1996).

applicable methods of interpretation and by addressing extra-provisional problems of Article XX(a) which were raised by recent GATT panel reports. Part III exclusively and strictly uses the "conventional" rules of interpretation, as set forth in the Vienna Convention, to interpret the term "public morals." Finally, Part IV concludes that only strict compliance with these rules can provide predictability with respect to Article XX(a) in particular, as well as the Dispute Settlement System in general, which is intended to solve trade disputes into the next century.

I. THE EVOLUTION OF GATT AND THE FORMATION OF A SUPRANATIONAL ECONOMIC LEGAL ORDER

The dynamics of international trade after the Second World War required a multilateral approach to coordinate economic growth between prosperous and impoverished nations.¹¹ International trade provided an important means by which to preserve world peace and develop interaction between previously hostile nations.¹² The success of this approach is embodied in the evolution from the General Agreement to the World Trade Organization, which is briefly described in Section A. Section B focuses on the dispute settlement system, which is the most important feature of this supranational economic legal order. Finally, Section C examines the specific role and meaning of Article XX in trade disputes.

A. FROM THE GENERAL AGREEMENT TO THE WTO

On October 30, 1947, twenty-three contracting parties signed the General Agreement on Tariffs and Trade (GATT).¹³ Eight of the signatory states agreed to provisionally apply GATT beginning January 1, 1948.¹⁴ This multilateral agreement

11. See generally JACKSON, *supra* note 9, at 36-41 (describing the initiatives for economic cooperation immediately after the Second World War).

12. ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW 49-72 (1991); Thomas R. Howell & Alan W. Wolff, *The Role of Trade Law in the Making of Trade Policy*, in INTERNATIONAL TRADE POLICY: THE LAWYER'S PERSPECTIVE 3-9 to 3-14 (John H. Jackson et al. eds., 1985). See also OLIVIER LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM 61-64 (1985) (describing the eventual balance between the legal approach and pragmatism).

13. WILLIAM A. BROWN, THE UNITED STATES AND THE RESTORATION OF WORLD TRADE, AN ANALYSIS AND APPRAISAL OF THE ITO CHARTER AND THE GENERAL AGREEMENT ON TARIFFS AND TRADE 7 (1950).

14. Protocol of Provisional Application 55 U.N.T.S. 308 (1947). See generally JOHN H. JACKSON, THE WORLD TRADING SYSTEM 35 (1989) (describing the provisional application of GATT).

aimed to facilitate customs treatment of imported products between signatories by creating schedules with specified customs treatment.¹⁵

The negotiations for the General Agreement occurred at the same time the Charter for an International Trade Organization was being developed. In 1945, the United States and Great Britain simultaneously published the first proposal for an International Trade Organization to expand world trade and employment after the Second World War.¹⁶ Based on this proposal and a charter suggested by the United States,¹⁷ a Preparatory Committee of the United Nations Conference on Trade and Employment and a Drafting Committee of technical experts codified draft conventions in London¹⁸ and New York.¹⁹ In a second session, the Preparatory Committee held conferences in Geneva; its work finally culminated in another draft charter.²⁰ On March 24, 1948, the United Nations Conference on Trade and Employment concluded the Final Act and drafted the Havana Charter for an International Trade Organization.²¹ The Charter was a multilateral treaty with a large number of technical provisions, and stipulated the orderly conduct of international economic relations.²² The Charter also proposed an international organization through which the member states would work co-operatively in pursuit of the Charter's principles and objectives.²³

On April 28, 1949, President Truman submitted the text of the Charter to the two houses of Congress, which failed to ap-

15. BROWN, *supra* note 13, at 7; CLAIR WILCOX, A CHARTER FOR WORLD TRADE 46 (1949).

16. U.S. DEPT OF STATE, Pub. No. 2411, PROPOSALS FOR EXPANSION OF WORLD TRADE AND EMPLOYMENT (Nov. 1945) [hereinafter U.S. Proposals].

17. *Report of the First Session of the Preparatory Committee*, U.N. Conference on Trade and Employment, U.N. Doc. E/PC/T/33 (Oct. 1946) [hereinafter U.S. Draft Charter].

18. *Report of the First Session of the Preparatory Committee*, U.N. Conference on Trade and Employment, U.N. Doc. E/PC/T/33 (Oct. 1946) [hereinafter London Draft Charter].

19. *Report of the Drafting Committee of the Preparatory Committee*, U.N. Conference on Trade and Employment, U.N. Doc. E/PC/T/34/Rev.1 (Jan. 20 to Feb. 25, 1947) [hereinafter New York Draft Charter].

20. *Report of the Second Session of the Preparatory Committee*, U.N. Conference on Trade and Employment, U.N. Doc. E/PC/T/186 (Sept. 10, 1947) [hereinafter Geneva Draft Charter].

21. *Final Act and Related Documents*, U.N. Conference on Trade and Employment, U.N. Doc. E/Conf. 2/78 (March 1948) [hereinafter Havana Charter].

22. BROWN, *supra* note 13, at 8; WILCOX, *supra* note 15, at 53.

23. BROWN, *supra* note 13, at 8; WILCOX, *supra* note 15, at 53.

prove the Charter.²⁴ Without the participation of the United States, the other nations were not willing to accept the Charter.²⁵ Thus, the Charter never came into force and the provisionally applied General Agreement became the "primary mechanism for coordinating global trade policy for the next half-century,"²⁶ even though it lacked a real institutional and structural framework. Since then, the contracting parties have held seven rounds of negotiations, in which they have reduced tariff bindings²⁷ and addressed the more recent problem of non-tariff barriers.²⁸ The last of these rounds resulted in the creation of the WTO Agreement, which became effective on January 1, 1995.²⁹

This Agreement established the World Trade Organization, an institutional and procedural framework which coordinates economic relations between its member states.³⁰ The Agreement itself has four annexes, including the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Understanding

24. BROWN, *supra* note 13, at 10.

25. JACKSON, *supra* note 14, at 34; John H. Jackson et al., *Implementing the Tokyo Round: Legal Aspects of Changing International Economic Rules*, 81 MICH. L. REV. 267, 270 (1982); Philip M. Nichols, *GATT Doctrine*, 36 VA. J. INT'L L. 379, 390 (1996).

26. Nichols, *supra* note 25, at 390.

27. See Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 AM. J. INT'L L. 416, 417 (1996).

28. See, e.g., JOAN E. TWIGGS, *THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS* 59-74 (1987); WILLIAM R. CLINE ET AL., *TRADE NEGOTIATIONS IN THE TOKYO ROUND* 145, 189 (1978); Frieder Roessler, *Diverging Domestic Policies and Multilateral Trade Integration*, in 2 FAIR TRADE AND HARMONIZATION 21 (Jagdish Bhagwati & Robert E. Hudec eds., 1996) (discussing non-tariff barriers).

29. Final Act Embodying the Results of the Uruguay Round of Multilateral Negotiations, *opened for signature* April 15, 1994 in Uruguay Round of Multilateral Trade Negotiations: Legal Instruments Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, done at Marrakesh on April 15, 1994 (1994), 33 I.L.M. 1143 [hereinafter WTO Agreement]. See John H. Jackson, *The Uruguay Round and the Launch of the WTO: Significance & Challenges*, in *THE WORLD TRADE ORGANIZATION* 5, 8 (Terence P. Stewart ed., 1996); John H. Jackson, *From GATT to the World Trade Organization: Implications for the World Trading System*, in *GATT-URUGUAY ROUND* 29, 30-34 (Thomas Cottier ed., 1995).

30. BERNHARD M. HOEKMAN & MICHEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM, FROM GATT TO WTO* 36 (1996); José M. Beneyto, *The EU and the WTO*, 7 EUROPAISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 295, 295 (1996); Jeffrey J. Schott, *The Future Role of the WTO*, in *WORLD TRADE AFTER THE URUGUAY ROUND* 105, 105 (Harold Sander & András Inotai eds., 1996).

on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding or DSU).³¹

The WTO Agreement introduces significant changes to the rules governing world trade. In addition to introducing new standards for sectors that previously had not been addressed by GATT, the WTO Agreement, through the DSU, substantially changed and elaborated the few existing rules on trade dispute settlement.³² The changes made in the DSU reflect the experience gained in nearly fifty years of solving trade disputes under the General Agreement and provide the WTO with a procedural framework to settle disputes between member states.³³

B. THE DISPUTE SETTLEMENT PROCEDURE UNDER GATT AND WTO

GATT provided only a few provisions for solving trade disputes between contracting parties. Lacking definite rules for both dispute settlement procedure and enforcement of GATT obligations, GATT's dispute resolution mechanism was considered to be of a weak legal character.³⁴

Article XXIII was the centerpiece³⁵ of the dispute settlement procedure under GATT.³⁶ To successfully invoke the

31. See GATT 1994; Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS (1994) [hereinafter DSU].

32. See GATT 1994, *supra* note 7; DSU, *supra* note 31.

33. GATT 1994, appended to the General Agreement in its Annex 1, consists of the provisions in GATT 1947 with subsequent amendments, the provisions of the legal instruments that entered into force under GATT 1947 before the Agreement entered into force, the decisions by the contracting parties, and six enumerated understandings which were reached during the Uruguay Round. See GATT 1994, *supra* note 7. Thus, the cumulative political and legal history of the GATT has been incorporated into the WTO. Therefore, and most importantly, the "authoritative" interpretations and reports by previous dispute-settlement panels under the GATT still influence the WTO.

34. William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51, 67 (1987); Beneyto, *supra* note 30, at 296; Claudio Cocuzza & Andrea Forabosco, *Are States Relinquishing their Sovereign Rights? The GATT Dispute Settlement Process in a Globalized Economy*, 4 TUL. J. INT'L & COMP. L. 161, 165 (1996). Cf. John H. Jackson, *Reflections on International Economic Law*, 17 U. PA. J. INT'L ECON. 17, 21 (1996) ("an impressive new set of dispute settlement procedures [has been formed]"); Tracy M. Abels, *The World Trade Organization's First Test: The United States-Japan Auto Dispute*, 44 UCLA L. REV. 467, 472 (1996) ("compliance is rigorously surveyed").

35. JACKSON, *supra* note 14, at 94.

36. *Id.* at 94; Cocuzza & Forabosco, *supra* note 34, at 166; Janet McDonald, *Greening the GATT: Harmonizing Free Trade and Environmental Protection in*

mechanism, a contracting party had to claim that benefits accruing to it under GATT had been "nullified or impaired."³⁷ After referring the matter to the contracting parties, a panel of experts was named to examine the dispute.³⁸ If the disputants found a solution, the panel only reported the agreement and dropped the case. If the parties failed to reach an agreement, the panel reported its findings and recommendations to the contracting parties.³⁹ If the report was then adopted by a unanimous consensus and if the violating party had not implemented the recommendations or rulings within a certain time limit, the contracting party bringing the case was authorized to take retaliatory measures.⁴⁰

With the establishment of the WTO, the dispute settlement procedure was substantially changed. Probably the most radical improvement in dispute settlement procedure made by the DSU was the change from the "positive consensus rule," whereby a unanimous vote in the GATT Council was needed to adopt a panel report, to the "negative consensus rule."⁴¹ A consensus in the newly established Dispute Settlement Body is now needed to *reject* the adoption of a panel report.⁴² Additionally, it is now possible to appeal the decision in a panel report by requesting a review by the standing appellate body.⁴³ The DSU furthermore stipulates that the tribunal must employ customary rules of in-

the New World Order, 23 ENVTL. L. 397, 406 (1993); Nichols, *supra* note 25, at 392.

37. See General Agreement on Tariffs and Trade 1947 in Basic Instruments and Selected Documents (B.I.S.D.) (1953) art. XXIII, [hereinafter GATT 1947]; JACKSON, *supra* note 14, at 95.

38. See Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 212, § 10. For a description of the practice at the beginning of GATT's history see Annex: Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII:2), GATT B.I.S.D. (26th Supp.) at 217, § 6 (ii) (1979); JACKSON, *supra* note 14, at 95.

39. Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, *supra* note 38, at 213-14.

40. GATT 1947, *supra* note 37, art. XXIII:2; Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, *supra* note 38, at 214; Ministerial Declaration on Dispute Settlement Procedures, Nov. 29, 1982, GATT B.I.S.D. (29th Supp.), at 13 (1983).

41. DSU, *supra* note 31, art. 16(4).

42. *Id.*

43. DSU, *supra* note 31, art. 17. The Understanding also introduces innovations such as a definite time-frame for a dispute settlement procedure, the "right to a panel," a detailed regulation on the implementation of recommendations and rulings and on compensation for and suspension of obligations. DSU, *supra* note 31, arts. 4, 6, 19, 20, 22.

terpretation of public international law.⁴⁴ Future developments will show whether this framework meets the demands of the WTO's fast increasing number of disputes.⁴⁵

C. TRADE DISPUTES AND GATT ARTICLE XX

Known as the General Exceptions Clause, Article XX contains provisions that could justify a contracting party's violation of a GATT obligation. However, an Article XX exception is justified only if the requirements of Article XX's introductory clause are met. The pertinent part of Article XX reads:

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:

(a) necessary to protect public morals . . .⁴⁶

The text of Article XX is best characterized as broadly and rather vaguely worded, allowing the possibility that contracting parties could easily escape their obligations by invoking Article XX. Even after more than fifty years of GATT practice, there is no consensus as to the authoritative legal interpretation of some provisions of Article XX. Article XX section (a) is perhaps the most prominent example of this lack of consensus. Furthermore, although nearly every aspect of GATT was reconsidered during the Uruguay Round negotiation, the interpretation of Article XX(a) was not elucidated, since the contracting parties chose not to subject Article XX to significant negotiation at that time.⁴⁷

44. DSU, *supra* note 31, art. 3(2).

45. A periodic examination of an overview of the state-of-play of WTO disputes reveals the rapidity with which the number of disputes before the WTO is increasing. As of February 1997, 68 consultations had been requested on 45 distinct matters, nine disputes were being examined by panels, two cases were completed, and 15 were settled or inactive. *WTO-Secretariat, Overview of the State-of-play of WTO Disputes*, visited Feb. 20, 1997 <<http://www.wto.org/wto/dispute/bulletin.htm>>. A mere eight months later, 104 consultations had been requested on 72 matters, 14 disputes were being examined by panels, 7 cases are completed, and 19 are settled or inactive. *WTO-Secretariat, Overview of the State-of-play of WTO Disputes*, visited Oct. 29, 1997 <<http://www.wto.org/wto/dispute/bulletin.htm>>.

46. GATT 1994, *supra* note 7, art. XX(a); see also HOEKMAN & KOSTECKI, *supra* note 30, at 191; JACKSON, *supra* note 9, at 744; Piritta Sorsa, *GATT and Environment: Basic Issues and Some Developing Country Concerns*, in *INTERNATIONAL TRADE AND THE ENVIRONMENT* 325, 329 (Patrick Low ed., 1992).

47. Cf. *THE GATT URUGUAY ROUND, A NEGOTIATING HISTORY 1825* (Terrence P. Stewart ed., 1993) (describing the proposals to modify or re-negotiate

The lack of an authoritative interpretation of Article XX(a) is especially troubling because Article XX exceptions are very frequently invoked in WTO disputes. Typically, when a contracting party brings a case against another contracting party for allegedly violating GATT obligations, the defendant contracting party will deny that it is violating those obligations. The defendant will argue, in the alternative, that even if it is violating GATT obligations, it is justified in doing so under Article XX. This explains why any contracting party bringing a case is well-advised to initially refute any possible invocation of Article XX. Unless parties are able to settle their dispute, the panel dealing with that dispute will have to consider Article XX in its report. Accordingly, a significant number of cases have examined the invocation of Article XX.⁴⁸

aspects of Arts. II, XII, XVII, XVIII, XXIV, XXV, XXVII, and XXXV; and illustrating the absence of proposals to modify or re-negotiate Art. XX).

48. Panels have already formulated reports which examine some sections of Article XX, primarily Article XX sections (b), (d) and (g). See the following overview [not including Panels' obiter dicta to Article XX]:

1. Appellate Body Report on "United States – Standards for Reformulated and Conventional Gasoline," WT/DS2/9 at 9-29 (May 20, 1996) [hereinafter Reformulated Gasoline].

2. Panel on "Canada – Administration of the Foreign Investment Review Act," GATT B.I.S.D. (30th Supp.) at 140 (Feb. 7, 1984).

3. Panel on "Canada – Certain Measures Concerning Periodicals," WT/DS31/R at 72-4 (Mar. 14, 1997). The issue regarding Article XX(d) was not raised by the appellants in the following appeal. See Appellate Body Report on "Canada – Certain Measures Concerning Periodicals," WT/DS31/AB/R at 18 (June 30, 1997).

4. Panel on "Canada – Measures Affecting Exports of Unprocessed Herring and Salmon," GATT B.I.S.D. (35th Supp.) at 98 (Mar. 22, 1988).

5. Panel on "European Economic Community Regulation on Imports of Parts and Components," GATT B.I.S.D. (37th Supp.) at 132 (May 16, 1990) [hereinafter Imports of Parts and Components].

6. Panel Report on "European Communities – Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada, Interim Report at ¶ 4.2-4.6 [Article XX(b)] (May 7, 1997). This Interim Report was adopted on July 1, 1997. *Europe's Ban on Beef From U.S. Held Illegal*, N.Y. TIMES, July 2, 1997, at D2; *WTO Issues Final Ruling in U.S. Case Against EU Over Ban on Beef Imports*, Int'l Trade Rep. (BNA) Vol. 14, No. 34 at 1430 (Aug. 20, 1997).

7. Panel on "Japan – Restrictions on Imports of Certain Agricultural Products," GATT B.I.S.D. (35th Supp.) at 163 (Mar. 22, 1988).

8. Panel on "Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes," GATT B.I.S.D. (37th Supp.) at 200 (Nov. 7, 1990) [hereinafter Thai Cigarettes].

9. Panel on "United States – Imports of Certain Automotive Spring Assemblies," GATT B.I.S.D. (30th Supp.) at 107 (May 26, 1983) [hereinafter Automotive Spring Assemblies].

The existence of an Exceptions Clause in the General Agreement is not unusual. Article XX contains provisions that were customary in commercial agreements preceding the General Agreement.⁴⁹ Similar provisions can be found in recent economic treaties, such as Article 12 of the Framework Agreement on Enhancing ASEAN Economic Cooperation between Brunei-Darussalam, Indonesia, Malaysia, Philippines, Singapore and Thailand,⁵⁰ Article 36 of the Treaty Establishing the European Community (EC Treaty)⁵¹ and Article XIV of the General Agreement on Trade in Services.⁵²

10. Panel on "United States – Measures Affecting Alcoholic and Malt Beverages," GATT B.I.S.D. (39th Supp.) at 206 (June 19, 1983) [hereinafter Alcoholic and Malt Beverages].

11. Panel on "United States – Prohibition of Imports of Tuna and Tuna Products from Canada," GATT B.I.S.D. (29th Supp.) at 91 (Feb. 22, 1982 [hereinafter Canadian Tuna]).

12. Panel on "United States – Restrictions on Imports of Tuna," GATT B.I.S.D. (39th Supp.) at 155 (unadopted) (Aug. 16, 1991) [hereinafter Tuna I].

13. Panel Report on "United States – Restrictions on Imports of Tuna," reprinted in 33 I.L.M. 839 (1994), at 890-98 (unadopted) (June 1994) [hereinafter Tuna II].

14. Panel on "United States – Section 337 of the Tariff Act of 1930," GATT B.I.S.D. (36th Supp.) at 345 (Nov. 7, 1989) [hereinafter Section 337].

15. Panel on "United States – Taxes on Automobiles (Luxury Tax; Gas Guzzler Tax; Corporate Average Fuel Economy (CAFE) Requirements)," reprinted in 33 I.L.M. 1397 (Oct. 11, 1994).

16. Panel Report on "United States – Standards for Reformulated and Conventional Gasoline," WT/DS2/R at 6.20-6.41 (appealed) (Jan. 17, 1996).

49. UNITED STATES TARIFF COMMISSION, ANNUAL REPORT 5 (1947); *Draft Report of the Technical Sub-Committee*, U.N. Economic and Social Council, U.N. Doc. E/PC/T/C.II/54 at 32 (Nov. 16, 1946); GATT Secretariat, *The Most-Favoured-Nation Clause in GATT, The Rules and the Exceptions*, 4 J. W. TRADE LAW 791, 797 (1970); WOLFGANG BENEDEK, DIE RECHTSORDNUNG DES GATT AUS VÖLKERRECHTLICHER SICHT 166 (1990).

50. See Article 12 [General Exceptions] of the Framework Agreement on Enhancing ASEAN Economic Cooperation, 31 I.L.M. 506 (1992).

51. See Article 36 [General Exceptions] of the Treaty establishing the European Community (EC Treaty), EUROPEAN UNION LAW GUIDE 28 (Philip Raworth ed., 1996).

52. See General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M. 44 (1994) art. XIV [hereinafter GATS].

II. PRELIMINARY QUESTIONS REGARDING THE ROLE AND INTERPRETATION OF ARTICLE XX IN THE DISPUTE SETTLEMENT PROCESS

Understanding Article XX requires some preliminary knowledge of the interpretation of GATT provisions in general and Article XX in particular. Section A of Part II addresses the applicable standards of interpretation and establishes the interpretative framework as codified in the Vienna Convention on the Law of Treaties with regard to the General Agreement. Section B examines extra-provisional problems of Article XX, which must be answered before interpreting that provision itself. In particular, Article XX's structure is discussed in Section B.1 and Article XX's pre-provisional requirements are discussed in Section B.2. Section B.3 analyzes the necessity of a presumption of narrowly construing Article XX.

A. MEANS OF INTERPRETATION

The ambiguity associated with interpreting GATT provisions has caused much commentary in the international legal community. Because many GATT provisions lend themselves to various interpretations, GATT/WTO panels have sought guidance from the General Agreement's drafting history.⁵³ For example, the Panel on "Restrictions on Imports of Tuna" (Tuna I) examined whether import restrictions the United States imposed on tuna products from Mexico could be justified under Article XX(b).⁵⁴ Finding that the provision's text did not unambiguously resolve the issue, the Panel relied immediately and exclusively on Article XX(b)'s drafting history. Similarly, the Appellate Body Report on "Standards for Reformulated and Conventional Gasoline," in determining the object and purpose of Article XX's introductory clause, considered only its drafting history.⁵⁵

The weak character of the GATT dispute settlement system before January 1, 1995 may explain this reliance on drafting history.⁵⁶ Because of the positive consensus rule for the adoption of panel reports, contracting parties may have relied on drafting history (especially *travaux préparatoires*) as a nearly authorita-

53. BENEDEK, *supra* note 49, at 143.

54. Tuna I, *supra* note 48, at 155, § 5.22, 5.27.

55. Reformulated Gasoline, *supra* note 48.

56. Cf. JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 343 (3d ed. 1995) (attributing GATT dispute settlement weakness to the positive consensus rule).

tive and widely accepted interpretative guide.⁵⁷ The Uruguay Round's change to a negative consensus rule could diminish the future influence of the drafting history in the process of interpretation.

The preceding discussion raises the question of whether GATT panels may rely on any rules, besides the general guidance derived from drafting history, in interpreting GATT obligations. The contracting parties did not find it necessary to codify rules of interpretation in the original GATT. The DSU, however, now specifies that panels should follow "customary rules of interpretation of public international law."⁵⁸ Nevertheless, GATT parties still must ascertain which rules of interpretation are part of those customary rules.

Articles 31 through 33 of the Vienna Convention on the Law of Treaties establish general rules for interpreting international treaties.⁵⁹ According to the Convention's principal rule, the starting point of the interpretation of any treaty is the ordinary meaning of the treaty's text.⁶⁰ In addition, the meaning must be determined by examining the context, object, and purpose of the treaty.⁶¹ Each of these three basic principles must receive equal consideration.⁶² Furthermore, the interpretation itself has to be carried out in good faith.

Any subsequent practice conducted in furtherance of the treaty should be considered as part of the context when interpreting the treaty.⁶³ A recent Appellate Body Report found that adopted panel reports alone do not constitute such subsequent practice, since reports have no precedential weight, only an *inter partes* effect.⁶⁴ The Appellate Body Report did, however, find that adopted panel reports are part of the "GATT acquis;"⁶⁵ thus, the adopted panel reports *do* carry some precedential

57. BENEDEK, *supra* note 49, at 143.

58. DSU, *supra* note 31, art. 3(2).

59. Vienna Convention on the Law of Treaties (May 23, 1969), 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

60. *Id.* art. 31(1).

61. *Id.*

62. *Official Records, First and Second Sessions, U.N. Conference on the Law of the Treaties*, at 40, U.N. Doc. A/Conf. 39/11/Add.2 (1969) [hereinafter *Official Records*].

63. See Vienna Convention, *supra* note 59, art. 31(3)(b).

64. Appellate Body Report on "Japan - Taxes on Alcoholic Beverages," WT/DS 8/AB/R, WT/DS 10/AB/R, WT/DS 11/AB/R, at 13 (Oct. 4, 1996) [hereinafter *Taxes on Alcoholic Beverages*].

65. *Id.* at 14.

weight in subsequent panel proceedings.⁶⁶ This Article does not intend to further open the Pandora's box regarding the legal effects of adopted panel reports.⁶⁷ At any rate, since no adopted panel report has made any definitive findings regarding the interpretation of Article XX(a), the question may remain open for the purpose of this piece.⁶⁸

According to the Vienna Convention, tools of interpretation beyond the ordinary meaning of the text and its context, such as preparatory work,⁶⁹ are regarded as supplementary so long as

66. JACKSON, RESTRUCTURING, *supra* note 8, at 67-69; ABRAM CHAYES & ANTONIA H. CHAYES, THE NEW SOVEREIGNTY, COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 215 (1995).

67. *But see WTO Dispute Settlement Understanding, supra* note 8, at 60, 62, 64.

68. One could argue that because it was customary for GATT panels to rely on drafting history in interpreting GATT provisions, subsequent practice, within the meaning of the Vienna Convention, is thereby established. Thus, interpreting a term with the aid of preparatory work would amount to more than just relying on drafting history; it would rise to the level of an accepted subsequent practice by the contracting parties in the Convention's hierarchy of interpretation standards. However, such a notion seems to circumvent this hierarchy because the Convention views drafting history as a mere supplementary tool of interpretation, despite its frequent use by tribunals. Although frequent reliance on drafting history may rise to the level of "practice" in GATT history, the Convention's Articles 31, 32 and 33, along with the context in which they appear, reveal that such recourse and subsequent practice are fundamentally different. Thus, recourse to drafting history cannot be seen as subsumed by the term "subsequent practice in the application of the treaty." Otherwise, any practice which contradicts and neglects the Convention's hierarchy of interpretation standards could, after being referred to for a sufficient length of time, upgrade what was considered to be a supplementary device into an essential tool of interpretation.

A different problem was (obviously unintentionally) raised by the Panel Report on Measures Concerning Meat and Meat Products. The Panel unequivocally stated – while citing two past findings of panels – that "according to established practice, the fundamental rules of treaty interpretation set out in the Vienna Convention on the Law of Treaties . . . form part of these customary rules of interpretation [in the meaning of Article 3 (2) of the Understanding.]" Measures Concerning Meat and Meat Products, *supra* note 48 at 5-6. However, it is doubtful whether two past findings of panels can constitute the "established practice" required for the creation of a rule of customary international law. For a discussion of the creation of a rule of customary international law, see MALCOLM N. SHAW, INTERNATIONAL LAW 61 (2d ed. 1986); MARK E. VILIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 3-37 (1985). In addition, the panel's ambiguous formulation could be read as though the panel implicitly applied Article 31(3)(b) of the Convention ("subsequent practice") in order to apply the means of interpretation as set forth in Article 31(1).

69. There is no rule regarding the use of *travaux préparatoires* in the case of multilateral treaties which are open to accession by states that did not take part in the initial negotiations and drafting proceedings. The International Law Commission stated that those states could request to investigate the

the meaning of a term according to the rules described above remains obscure, ambiguous or leads to an absurd or unreasonable result.⁷⁰ Thus, preparatory work does not constitute an autonomous means of interpretation, but serves only as an aid for interpretations governed by the general rule described above.⁷¹

Several objections may be raised concerning the use of the Convention's rules of interpretation. GATT contracting parties that are not signatory states to the Vienna Convention could assert that they are not bound by the Convention's rules of interpretation. GATT parties might also argue that because the Convention came into force in 1980⁷² and has no retroactive operation,⁷³ at least the GATT 1947 provisions are not subject to the Convention's rules. However, the Convention clearly governs the interpretation of GATT 1994, as GATT 1994 took effect almost fifteen years after the Convention. Because the Convention also governs treaties constituting international organizations and those adopted within an international organization,⁷⁴ the WTO Agreement and its Annexes must be interpreted according to the rules stated above.

It has been suggested that the Convention's means of interpretation have attained the status of customary international law⁷⁵ through a long-standing practice by states and a corresponding *opinio juris*.⁷⁶ Although there is no doubt that certain provisions of the Convention merely embody customary rules of international law,⁷⁷ there is less certainty about whether the

travaux préparatoires before acceding and therefore no special rule was needed. See *Official Records*, *supra* note 62, at 43.

70. See Vienna Convention, *supra* note 59, art. 32(1) (stating the general rules for interpreting international treaties).

71. *Official Records*, *supra* note 62, at 43; IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 630 (4th ed. 1990); IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 72 (1973).

72. SHAW, *supra* note 68, at 459.

73. Vienna Convention, *supra* note 59, art. 4.

74. See Vienna Convention, *supra* note 59, art. 5.

75. Reformulated Gasoline, *supra* note 48 at 23; Taxes on Alcoholic Beverages, *supra* note 64 at sec. D; Measures Concerning Meat and Meat Products, *supra* note 48, at 5. See also BENEDEK, *supra* note 49, at 143; PAR HALLSTRÖM, *THE GATT PANELS AND THE FORMATION OF INTERNATIONAL TRADE LAW* 170 (1994); JACKSON, *supra* note 14, at 88; Lei Wang, *Some Observations on the Dispute Settlement System in the World Trade Organization*, 29 J. OF WORLD TRADE 173, 177 (1995).

76. Cf. SHAW, *supra* note 68, at 61 (discussing the creation of a rule of international customary law); VILLIGER, *supra* note 68, at 3-37.

77. See, e.g., Fisheries Jurisdiction (U.K. v. Ice.), Jurisdiction of the Court, 1973 I.C.J. Reports 3, 18 (explaining how Article 62 embodies the international law principle of termination of a treaty by reason of change of circumstances).

rules of interpretation in the Convention reflect rules of customary international law. Considering the different practices that states used to interpret treaties before the Convention was drawn,⁷⁸ one could argue that there has been neither a consistent nor a long enough practice, necessary for the development of a customary rule. However, even if this argument was persuasive, the Convention's rules would nonetheless be applicable to GATT 1994.

Finally, one could argue that the Vienna Convention simply comprises aspects of all doctrines of treaty interpretation which existed in international law before the Convention was drawn.⁷⁹ This is strong evidence that these various rules as codified in the Convention really reflect customary international law. Therefore, the Vienna Convention's rules of interpretation should be utilized in interpreting the provisions of the General Agreement.

B. INTERPRETATION OF GATT ARTICLE XX

Article XX (the Exceptions Clause) exemplifies how GATT provisions may be plagued by ambiguity and lack of current interpretative guidance. Because of the lack of interpretative guidance, the invocation of the Exceptions Clause by a contracting party requires a panel to carry out adjudicatory functions that closely resemble statutory interpretation in domestic courts. Sections 1 and 2 discuss how the structure of Article XX provides panels with a particular order and form for examining pre-provisional requirements of legal norms on which they may base their rulings. Section 3 illuminates how elusive interpretative rules that past panels employed could lead to an interpretation beyond and almost contrary to the relevant legal norm in a dispute.

1. Structure of GATT Article XX

Article XX is divided into a general introductory clause (Preamble) and subsequent provisions that constitute the circumstances under which exceptions to GATT obligations are justified.⁸⁰ The language used in Article XX's Preamble clearly states that the Preamble applies as a general rule to all subsequent categories of Article XX. The specific action taken by a contracting party must fall under one of the ten enumerated paragraphs, denoted (a) to (j), to be justified. Thus, an indivi-

78. See *Official Records*, *supra* note 62, at 38.

79. SHAW, *supra* note 68, at 480.

80. See *supra* note 7.

dual contracting party which seeks to justify a measure under Article XX must take an action which both falls within paragraphs (a) – (j) *and* meets the Preamble's standards.

The language of Article XX's Preamble establishes a sequential order which should be followed when applying Article XX to a particular dispute. The Preamble begins by referring to "such measures," which become permissible under the exceptions in paragraphs (a) – (j), before stipulating the specific standards that "such measures" must further meet to be acceptable under GATT. Thus, Article XX's structure creates a two-part test: first, an action taken by a contracting party must be characterized as a measure under one of the paragraphs (a) – (j); second, those measures are subject to the additional requirements of the Preamble itself.

Some panel reports have ignored this sequential order when addressing Article XX. For instance, the Panels on both "United States – Prohibition of Imports of Tuna and Tuna Products from Canada"⁸¹ and "United States – Imports of Certain Automotive Spring Assemblies"⁸² first examined whether the measures taken by the United States met the Preamble's requirements before examining whether those measures could actually be regarded as a measure justifiable within any of the meanings of paragraphs (a) through (j).

Applying Article XX in its reverse order would not have led to different results in those cases. However, this observation nevertheless reveals that the Panels simply ignored the logical order which Article XX's language requires. Recent Panels have adhered to the sequential order which Article XX's structure suggests by first examining the measure within the scope of Article XX's relevant paragraph, and then focusing, if necessary, on the requirements the Preamble itself imposes.⁸³

2. *GATT - Violation As a Requirement*

Article XX's Preamble explicitly states that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures" justified under Article XX's general exceptions.⁸⁴ Article XX thus allows a con-

81. Canadian Tuna, *supra* note 48, § 4.8, at 91.

82. Automotive Spring Assemblies, *supra* note 48, § 54-68.

83. Section 337, *supra* note 48, § 5.22-5.26; Imports of Parts and Components, *supra* note 48, § 5.12-5.18; Thai Cigarettes, *supra* note 48, § 72-81; Alcoholic and Malt Beverages, *supra* note 48, § 5.40-5.69; Reformulated Gasoline, *supra* note 48, 13.

84. GATT, *supra* note 7, art. XX.

tracting party to deviate from any contractual obligations in the Agreement.⁸⁵ Consequently, Article XX would not be invoked unless a direct violation of a GATT obligation has occurred. A contracting party's violation, for example, may consist of an import ban imposed on foreign goods or of an export restriction on domestic goods.⁸⁶ Additionally, a contracting party will not look to Article XX if its action is justified by the same provision that it has violated. For instance, a quantitative restriction temporarily applied by a contracting party to prevent critical shortages of foodstuffs would violate GATT Article XI:1, but could be justified under Article XI:2(a).⁸⁷ As a result, because the contracting party justified its violation under Article XI:2(a), it would not need to invoke Article XX.

Article XX allows GATT parties to act contrary to their obligations as long as such action meets the requirements of Article XX. However, Article XX does not permit a GATT party to maintain an action which was justified at the outset, but which, due to a change in circumstances, no longer meets the requirements of Article XX. Thus, since Article XX does not include any time limits, its requirements have to be met throughout the whole period in which both the action in violation of GATT obligations is in effect and its justification is being sought under Article XX.⁸⁸

85. Reformulated Gasoline, *supra* note 48, at 24; Measures Concerning Meat and Meat Products, *supra* note 48, at 9.

86. *Cf.* the wording of Article XX(c) ("... relating to the importation of gold or silver") and Article XX(f) ("... imposed for the protection of national treasures of artistic, historic or archaeological value"). Article XX(a), however, most likely only applies to import restrictions imposed on foreign goods, because the factual scenario that an exporting country will prevent the export of domestic goods which could violate another importing countries' public morals seems to be very remote from current international trade realities. For an examination of the possible "extra-territorial" ramifications in this context, *supra* note 7, see *infra* Part III.E.4.

87. GATT 1994, *supra* note 7, arts. XI:1 and XI:2. If the requirements of Article XI:2(a) are met, the quantitative restrictions are justified and do not violate GATT Article XI:1.

88. Interesting procedural questions arise for parties considering invoking and defending an Article XX argument. Arguably, a justified action under Article XX may subsequently turn into an unjustifiable measure and vice versa. In the former case there is no procedural problem; however, the party requesting a panel would be well-advised to underscore the circumstances which allegedly changed the once-justified measure into an unjustifiable one. In the case of a formerly unjustifiable measure becoming a justified measure, the solution is not that obvious. Because the goal of the dispute settlement procedure is to achieve full compliance with GATT obligations after a report has been adopted, the question arises whether a contracting party can request a panel if the other contracting party now indisputably complies with its GATT obligations even

3. *Presumption of narrow construction?*

Some recent panel reports stated that Article XX exceptions must be construed narrowly,⁸⁹ whereas other panel reports simply failed to mention this presumption of narrow construction.⁹⁰ Many legal scholars agree that because it is an exception to GATT's general rules, Article XX should be interpreted restrictively.⁹¹

Neither the wording of Article XX nor the Vienna Convention on the Law of Treaties includes a rule suggesting that exceptions should be narrowly construed. Thus, the question arises whether the presumption of narrow construction is truly appropriate when interpreting Article XX. Although the panel reports stated that it was, the rule was not applied in a manner which amounted to any legal consequence. Rather, the panels seemed to mention its existence merely as an introductory consideration of and general reflection on Article XX.⁹²

though it did not in the past. An argument against this "ex-post investigation" is that the establishment of a panel would be moot.

On the other hand, such "ex-post investigation" and a formal declaration of past illegal practices of a contracting party could play a role in domestic political discussions as well as in international affairs. This question has not been addressed yet and its answer could reveal a lack of available legal remedies within the dispute settlement process; consequently, procedural law, rather than substantive law, begins to govern the problem.

89. *Alcoholic and Malt Beverages*, *supra* note 48, § 5.41; *Tuna I*, *supra* note 48, § 5.22.

There is a presumption of narrow construction as a general principle of interpreting GATT exceptions which allow an abrogation of GATT obligations, *see* Panel on "United States – Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada", July 11, 1991, GATT B.I.S.D. (38th Supp.) § 4.4; Panel on "Canada – Import Restrictions on Ice Cream and Yoghurt", Dec. 5, 1989, GATT B.I.S.D. (36th Supp.), § 59; *Alcoholic and Malt Beverages*, *supra* note 48, § 5.41.

90. *Automotive Spring Assemblies*, *supra* note 48, § 50; Panel on "Canada – Administration of the Foreign Investment Review Act," Feb. 7, 1984, GATT B.I.S.D. (30th Supp.), § 5.20 [hereinafter *Foreign Investment Review Act*]; Panel on "Canada – Measures Affecting Exports of Unprocessed Herring and Salmon," Mar. 22, 1988, GATT B.I.S.D. (35th Supp.), § 4.4 [hereinafter *Unprocessed Herring and Salmon*]; *Imports of Parts and Components*, *supra* note 48, § 5.12.

91. BENEDEK, *supra* note 49, at 163; EDMOND MCGOVERN, *INT'L TRADE REGULATION*, § 13.112 (1995); Christopher A. Cherry, *Environmental Regulation within the GATT Regime: A New Definition of Product*, 40 UCLA L. REV. 1061, 1083 (1993); Jan Klabbbers, *Jurisprudence in International Trade Law, Article XX of GATT*, 26 J. WORLD TRADE 63, 70, 88 (1992).

92. *See Unprocessed Herring and Salmon*, *supra* note 90, § 4.4; *Automotive Spring Assemblies*, *supra* note 48, § 50; *Foreign Investment Review Act*, *supra* note 90, § 5.20; *Imports of Parts and Components*, *supra* note 48, § 5.12.

Both common and civil law systems contain the rule that exceptions are to be narrowly construed.⁹³ While appearing to both limit and clarify the scope of a law's application, the rule of strict construction is flexible enough to achieve either a narrow or broad interpretation of the Exceptions Clause, depending on the factual situation and the application of the rule.⁹⁴ An adjudicator may choose to narrowly interpret an exception by *excluding* factual situations typically covered by the exception language or which were intended to be covered by that exception. Conversely, an adjudicator may opt to broadly interpret an exception by *including* factual situations which typically fall outside either the purview of the exception language or its intent. However, the outcome is always dependent upon the manner in which the rule of narrow construction is applied in the individual case and thus *is ultimately dependent on the will of the adjudicator*.

Some scholars have astutely questioned the general applicability of the rule of strict construction, especially its potential impact on the Exceptions Clause. Some commentators have argued that this rule should be abandoned because of its ambiguous scope and problematic definition, and have instead suggested an Exceptions Clause should be interpreted according to the general criteria of construction of international treaties.⁹⁵ Most importantly, some adjudicators may use the rule of strict construction to dispose of the issue of interpretation prematurely, instead of using it as a guide to interpretation,⁹⁶ which would defeat the purpose of the interpretation.

In the context of Article XX, the presumption of narrow construction has dubious practical value because the factual situation will always control the result. If a factual situation does not fall within a certain Article XX paragraph, those grounds for an exception cannot support an outcome based on the rule of strict construction alone. On the other hand, if a set of particular facts falls directly within the scope of a paragraph, those grounds for exception *can* support an outcome without recourse to any rules

93. A.H. Phillips Inc. v. Walling, 324 U.S. 490, 493 (1944); KARL LARENZ, *METHODENLEHRE DER RECHTSWISSENSCHAFT* 337 (5th ed. 1983); FRIEDRICH MÜLLER, *JURISTISCHE METHODIK* 211 (3d ed. 1989); Sutherland Stat. Const. § 47.11 (4th ed. 1992).

94. A.H. Phillips Inc. v. Walling, *supra* note 93; LARENZ, *supra* note 93, at 340.

95. Sutherland Stat. Const., *supra* note 93, § 47.11. Cf. MÜLLER, *supra* note 93, at 212.

96. BROWNLIE, *supra* note 71, at 626.

of interpretation. Thus, the presumption of narrow construction appears rather unnecessary and almost superfluous, and could arguably lead to further misconstructions of Article XX.

Some commentators suggest that three additional requirements must be met before the presumption of narrow construction may be used to interpret Article XX.⁹⁷ First, the measure must be intended to achieve the objective mentioned in the exception; second, a party may not use a measure which deviates from GATT rules more than needed to achieve the measure's objective; third, the measure must be a proportional response to the circumstances that gave rise to the measure.⁹⁸ It seems questionable whether these additional requirements could actually be deduced from a rule of interpretation without examining the actual language of the Article XX paragraph. In other words, this assumption perfectly exemplifies how a rule of interpretation could begin a life of its own if it were not linked to and limited by the actual language of Article XX. Thus, it is desirable to abandon the presumption of narrow construction in interpreting Article XX.

III. INTERPRETATION OF "PUBLIC MORALS"

Article XX(a) allows GATT parties to impose measures contrary to their obligations as long as such measures are necessary to protect public morals. Unlike other sections of Article XX, neither section (a) nor its construction have ever been examined by a GATT panel. Thus, very little information is available to help interpret the phrase "necessary to protect public morals."⁹⁹ This absence of interpretation of section (a) is reflected by a lack of legal scholarship dealing with Article XX as a whole.¹⁰⁰

97. MCGOVERN, *supra* note 91, § 13.112. It is not implausible to infer these additional requirements from the language of Article XX itself, since the exact meaning of the "necessary" or "relating to-" requirement is still unclear.

See also Klabbers, *supra* note 91, at 89 (trying to deduce the allocation of burdens of proof with respect to Article XX from the presumption of narrow construction).

98. See MCGOVERN, *supra* note 91, § 13.112.

99. Past panel reports mainly examined Article XX(b), (d) and (g). See *supra* note 48. This explains why the Analytical Index to GATT Law and Practice does not provide any annotations to Article XX(a). See GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 565 (6th ed. 1995).

100. See KENNETH W. DAM, THE GATT, LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 193 (1970); MCGOVERN, *supra* note 91, § 13.12; HOEKMANN & KOSTECKI, *supra* note 30, at 190; JACKSON, *supra* note 9, at 741, 743; ERNST-ULRICH PETERSMANN, INTERNATIONAL AND EUROPEAN TRADE AND ENVIRONMENTAL LAW AFTER THE URUGUAY ROUND 51 (1995) [hereinafter INT'L AND EURO-

Part III aims to develop a general interpretation of Article XX(a) by applying the rules of interpretation found in the Vienna Convention of the Law of Treaties. The analysis focuses on the applicability of Article XX(a) to import restrictions imposed on the production method rather than on the product. Two recent developments with potentially major impact on international trade will illustrate this problem. First, a recent European Community regulation on pelts and fur highlights the conundrum between process and product and thus warrants investigation by a WTO panel. Second, the expansive interpretation of Article XX(a) could remedy the lack of a "social clause" in the General Agreement.

The issue of whether GATT provisions are applicable to measures which regulate the method of production of an item, rather than the product itself,¹⁰¹ was examined in "United States – Restrictions on Imports of Tuna."¹⁰² The United States imposed import restrictions on products made from tuna caught with harvesting methods that caused the incidental killing or serious injury of dolphin.¹⁰³ Otherwise indistinguishable imported tuna products caught in an "dolphin-safe" manner were not subject to import restrictions.¹⁰⁴ If these process restrictions violated GATT obligations,¹⁰⁵ then the question of justification under Article XX arose. In the Tuna-Dolphin dispute, the Panel examined Article XX(b) and (g); Article XX(a) was not invoked in the dispute.

PEAN TRADE]; RICHARD SENTI, GATT SYSTEM DER WELTHANDELSORDNUNG 275 (1986); Klabbers, *supra* note 91, at 63.

101. See Steve Charnovitz, *Green Roots, Bad Pruning: GATT Rules and their Application to Environmental Trade Measures*, 7 TUL. ENVTL. L.J. 299, 323 (1994); William J. Snape & Naomi B. Lefkowitz, *Searching for GATT's Environmental Miranda: Are "Process Standards" Getting "Due Process?"*, 27 CORNELL INT'L L.J. 777, 796-99 (1994); Alan Isaac Zreczny, *The Process/Product Distinction and the Tuna/Dolphin Controversy: Greening the GATT Through International Agreement*, 1 BUFF. J. INT'L L. 79, 115 (1994).

102. Tuna I, *supra* note 48, at 155; Tuna II, *supra* note 48, at 839.

103. Tuna I, *supra* note 48, § 5.2.

104. Tuna I, *supra* note 48, § 2.7 ("On August 28, 1990, the U.S. government imposed an embargo . . . on imports of commercial yellowfin tuna . . . caught by purse-seine nets . . .").

105. See JACKSON et al., *supra* note 56, at 585; Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. OF WORLD TRADE 37, 53 (1991); Cherry, *supra* note 91, at 1067; John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227, 1242 (1992).

A. THE EEC REGULATION ON PELTS AND FUR

For many years, there has been a broad discussion about "animal welfare" and "animal rights" in the European Community.¹⁰⁶ Various regulatory measures have been implemented to improve conditions of animals used in the production of certain products, such as cosmetics, meat, or fur. Examples of these regulatory efforts include a EU directive which orders member states to end the sale of all cosmetics tested on animals by June 30, 2000,¹⁰⁷ and a proposed directive modifying the standards for trucks used by the meat industry to transport animals.¹⁰⁸

The latest effort to improve "animal welfare" in the European Community is the proposed ban on imports of fur from animals caught by leg-hold traps.¹⁰⁹ The debate over leg-hold traps is dominated by discussion of the inhumane and cruel character of this trapping method. The trap consists of spring-powered steel jaws designed to capture an animal by the limb with tremendous force.¹¹⁰ The traps usually break the animals' legs but

106. See, e.g., *Man's Mirror (Animal Rights)*, THE ECONOMIST, Nov. 16, 1991, at 21; Barry James, *Pro-Animal Campaign Sets Sights on France and Its Foie Gras Trade*, INT'L HERALD-TRIBUNE, Dec. 8, 1993, at 6; *The Morality of Animal Rights*, FIN. TIMES, Jan. 30, 1995, at 17.

107. Commission Directive 97/18/EC Postponing the Date After Which Animal Tests Are Prohibited for Ingredients or Combinations of Ingredients of Cosmetic Products (17. April 1997), art. 1, 1997 O.J. (L 114), 43. See generally Council Directive 76/768/EEC on the Approximation of the Laws of the Member States Relating to Cosmetics Products (27. July 1976), art. 4 section 1 lit. i, 1976 O.J. (L 262), 169.

108. Proposal for a European Parliament and Council Directive relating to motor vehicles and their trailers transporting certain animals and amending Directive 70/156/EEC in respect of the type-approval of motor vehicles and their trailers, 1997 O.J. (C290) 1.

Japan and the United States may bring a claim in the WTO against a blanket import ban on cosmetics and other goods tested on or produced from animals which are not transported according to certain standards. This claim would raise issues similar to those raised in the Tuna-Dolphin dispute, including measures imposed on behalf of production methods, the possible "extra-territorial" effect of domestic environmental provisions, and others.

109. MEP Bloch von Blottnitz in EUR. PARL. (4-472) 1 (Dec. 1, 1995).

110. See Council Regulation 3254/91 on Prohibiting the Use of Leg Hold Traps in the Community and the Introduction Into the Community of Pelts and Manufactured Goods of Certain Wild Animal Species Originating in Countries Which Catch Them by Means of Leg Hold Traps or Trapping Methods Which Do Not Meet International Humane Trapping Standards, art. 1, 1991 O.J. (L 308) 1 [hereinafter Council Regulation (EEC) No. 3254/91]; Daniel P. Blank, *Target-Based Environmental Trade Measures: A Proposal For the New WTO Committee on Trade and Environment*, 15 STAN. ENVTL. L.J. 61, 120 (1996); see also EUR. PARL. (4-472) 10-16 (Dec. 13, 1995).

do not kill them.¹¹¹ The trapped animal remains alive for a lengthy period of time and sometimes even chews off its own limb in a desperate effort to escape.¹¹² Aquatic animals caught underwater usually drown because they cannot reach the surface to breathe.¹¹³

In 1988, the European Union took the first legal action against leg-hold traps by adopting a resolution relating to labeling requirements for such fur.¹¹⁴ In 1991, the Council of the European Community enacted a regulation prohibiting the use of leg-hold traps in all countries of the European Community effective January 1, 1995.¹¹⁵ In addition, imports of fur from thirteen different species commonly caught by leg-hold traps were banned, except when in the country of origin the use of leg-hold traps is prohibited or trapping methods meet internationally agreed humane trapping standards.¹¹⁶

Because the European Community hoped to enter into an agreement with the United States, Canada and Russia on this matter, the implementation of the import ban was repeatedly postponed. The European Community's agreement to delay the implementation of the ban was based on a clause in the regulation which allowed suspension until December 31, 1995 if "sufficient progress is being made in developing humane methods of trapping" by the fur exporting countries.¹¹⁷ The suspension was further prolonged until December 31, 1996 to avoid jeopardizing the achievements gained by both the International Organization for Standardization¹¹⁸ and a working group on the development

111. Peter V. Michaud, *Caught in a Trap: The European Union Leghold Trap Debate*, 6 MINN. J. GLOBAL TRADE 355, 358 (1997); Paul Brown, *EU Move to Lift Fur Ban Challenged*, THE GUARDIAN, Dec. 24, 1996, at 5.

112. Patricia Doyle, *The European Community and Wildlife Supervision: The Sovereign Right to Protect National Resources*, 9 N.Y. INT'L L. REV. 49, 63 (1996).

113. Brown, *supra* note 111.

114. Doyle, *supra* note 112, at 63.

115. See Council Regulation (EEC) No. 3254/91, art. 2, *supra* note 110.

116. See *id.* at art. 3(1).

117. See *id.* at art. 3(2); Commission Regulation 1771/94 of July 19 1994 on Laying Down Provisions on the Introduction Into the Community of Pelts and Manufactured Goods of Certain Wild Animal Species, 1994 O.J. (L 184) 3 [hereinafter Commission Regulation (EEC) No. 1771/94].

118. Since 1987, the International Organization for Standardization (ISO) has tried to develop international humane standards for the trapping of mammals. Recently, one technical committee, "TC 191 Animal (mammal) traps," consisting of 15 participating and eight observing countries, was established. International Standards Organization, *TC 191 Animal (mammal) traps* (visited Dec. 12, 1997) <<http://www.iso.ch/meme/TC191.html>>. This technical committee works on the standardization of terminology, classification, characteristics

of international humane trapping standards, consisting of Canada, the United States, Russia and the Community.¹¹⁹ An informal decision by the Council of the European Community in December 1996 again postponed the import ban.¹²⁰ Although no definite decision was made, there was an apparent understanding that the ban would come into effect no later than March 31, 1997.¹²¹ Finally, after five months of negotiation, the Community, Canada and Russia reached a compromise on trapping standards.¹²²

In July 1997, the European Union's Foreign Affairs Council¹²³ finally approved this compromise, which was highly controversial in the European Union.¹²⁴ The objective of the "International Agreement on Humane Trapping Standards" is

and test methods for effective mammal traps and their use. *Id.* In the process of the development of an international standard, the committee finalized its work in a draft International Standard (ISO/DIS 10990-4 Animal (mammal) traps) which was circulated to all ISO members' bodies for voting and comment within a specific time period.

119. Commission Proposal for a Council Regulation Amending Council Regulation 3254/91 EEC Prohibiting the Use of Leg Hold Traps in the Community and the Introduction Into the Community of Pelts and Manufactured Goods of Certain Wild Animal Species Originating in Countries Which Catch Them By Means of Leg Hold Traps or Trapping Methods Which Do Not Meet International Humane Trapping Standards, COM (95) 737 final [hereinafter Commission Proposal for a Council Regulation Amending Council Regulation No. 3254/91].

120. *EU Insists on End to Steel Traps - Import Ban Due End March*, DEUTSCHE PRESSE AGENTUR, Dec. 9, 1996, available in LEXIS, INTRAD File; *EU May Ban Fur Imports in Dispute Over Leg Hold Traps*, 13 INT'L TRADE REP. (BNA) 1916 (Dec. 11, 1996). The decision was clouded by a serious dispute over the competence of the Commission to delay the ban without being affirmed by the Parliament or the Council, in which the Parliament even considered the initiation of a procedure in the ECJ under Article 175 EC (failure to act by an institution). See MEP Pimenta in EUR. PARL. (4-472) 12 (Dec. 13, 1995). See also *Animal Welfare: Euro-MPS Corner Commission on Leg-Hold Traps*, EUR. REP., April 27, 1996; *EU/Canada/US/Russia: Netherlands holds out alone on leg-hold traps*, EUR. ENV'T, Jan. 23, 1996; both available in WESTLAW, ALLNEWS File.

121. There is no apparent legal basis for this date, as the definite date on which the ban was to take effect is Dec. 31, 1995. Art. 3(1), Council Regulation (EEC) No. 3254/91, *supra* note 110.

122. *Fur Ban Threat Looms as EU Approves Standard Banning Animal Leg-Hold Traps*, Int'l Trade Rep. (BNA) Vol. 14, No. 30 at 1265 (hereinafter *Fur Ban Threat Looms*). See also *Defend Our Trappers*, TORONTO STAR, Dec. 30, 1996; Ric Dolphin, *Metis President Hopeful on Fur Agreement*, EDMONTON J., Dec. 26, 1996; *Europe Rejects Fur Boycott But Formal Vote Still Needed*, EDMONTON J., Jan. 15, 1997; *European Union Rejects Fur Ban*, EDMONTON J., Dec. 19, 1996.

123. *Fur Ban Threat Looms*, *supra* note 122; at 1265.

124. *Leghold Traps Deal Approved*, FIN TIMES, July 24, 1997.

to “. . . establish standards on humane trapping methods.”¹²⁵ It applies to “trapping methods and the certification of traps for the trapping of wild terrestrial or semi-aquatic mammals for wildlife management including pest control; obtaining fur, skin or meat; and the capture of mammals for conservation.”¹²⁶ The Agreement additionally requires its parties to prohibit traps which do not meet the standards for restraining or killing trapping methods as set forth in Part 1 of the Agreement’s Annex 1.¹²⁷ Competent authorities from the parties to the Agreement must certify the trapping methods’ compliance with the codified standards within three to five years after the Agreement becomes effective for restraining trapping methods, and within five years after the Agreement becomes effective for killing trapping methods.¹²⁸ According to Article 7 of the Agreement, the competent authorities then prohibit those trapping methods which do not meet the certification requirements after an additional three years.¹²⁹

Canada declared that restraining trapping methods for a number of species will be prohibited as soon as the Agreement becomes effective.¹³⁰ For a number of other species, the methods will be prohibited within approximately three years.¹³¹ The Russian Federation declared that it would prohibit leg-hold traps beginning January 1, 2000, provided it received sufficient financial compensation for finding and applying alternative trapping methods.¹³² If sufficient financial aid is not received, it would prohibit all leg-hold traps within four years after the Agreement becomes effective.¹³³ At first, the United States did

125. Proposal for a Council Decision Concerning the Signing and Conclusion of an International Agreement Between the European Community, Canada and the Russian Federation on Humane Trapping Standards, art. 2, 1997 O.J. (C 95), 46 and Amended proposal for a Council Decision concerning the signing and conclusion of an Agreement on international humane trapping standards between the European Community, Canada and the Russian Federation, art. 2, 1997 O.J. (C 207), 14, 16 [hereinafter Amended Proposal for an International Agreement].

126. Amended Proposal for an International Agreement, art. 3, *supra* note 125.

127. *Id.* at art. 7 (3).

128. See the schedule in Amended Proposal for an International Agreement, Annex 1, Part 2, No. 4.2.1, *supra* note 125.

129. *Id.* at Annex 1, Part 2, No. 4.2.2.

130. *See id.* at Annex 4, Declaration of the Parties.

131. *Id.*

132. *Id.*

133. *Id.*

not join the compromise.¹³⁴ Instead, the United States threatened to request a WTO panel on this issue.¹³⁵ After long negotiations the United States and the EC reached a compromise in which the United States will prohibit the use of leg-hold traps within a period of 6 years.¹³⁶

According to the original regulation, the main reason for imposing import restrictions on fur and pelt products manufactured from fur of animals caught with leg-hold traps is the production method's inability to meet humane trapping standards.¹³⁷ If this regulation were considered under Article XX(b), it might face a question similar to the one raised in the Tuna-Dolphin dispute — whether Article XX(b) can justify import restrictions based on process rather than product.

To fall within the scope of Article XX(b), the restrictions must have been imposed to protect animal life or health. The restrictions are supposed to ban all imports of furs and pelts that were obtained by a cruel and inhumane trapping method. However, the fur or pelt-products inherently require the death of the animal. Thus, the restrictions on cruel and inhumane trapping standards deal more with the *method* of killing than with the *protection* of animal life or health. Therefore, the regulation does not *prima facie* fall within the scope of Article

134. See Neil Buckley, *Leghold Traps Deal Approved*, FIN. TIMES, July 24, 1997, at 5. Because several U.S. states have passed their own laws relating to leghold traps, federalism restricts the U.S. government from passing nationwide restrictions. See, e.g., Gary Gerhardt, *Coyote Problem Raises Its Head Again, Metro-area Incidents Renew Debate About Using Leg-Hold Traps*, ROCKY MOUNTAIN NEWS (Denver), July 13, 1997, at 39A.

135. Leyla Boulton & Caroline Southey, *London Urges Hard Line by EU on Leg-hold Traps*, FIN. TIMES, Dec. 23, 1996, at 2; Brown, *supra* note 111; *EU Insists on End to Steel Traps - Import Ban Due End March*, *supra* note 120; Caroline Southey & Nancy Dunne, *Fur Flies in Trapping Row*, FIN. TIMES, Dec. 9, 1996, at 6.

136. *Der Kompromiss über die Fangeisen ist mit Mehrheit angenommen worden und die Amerikanischen Pelze können in die EU eingeführt werden*, Agence Europe No. 7111, Dec. 1, 1997. See also *EU/USA: Möglicherweise Kompromiss in der Frage der Fangeisen und des Einfuhrverbotes für Felle*, Agence Europe No. 7110, Nov. 29, 1997; Neil Buckley, *EU Relents over US Fur Ban*, FIN. TIMES, Dec. 2, 1997, at 7.

137. Council Regulation (EEC) 3254/91, Preamble, *supra* note 110, sec. 8; Commission Regulation (EEC) 1771/94, *supra* note 117, Preamble, sec. 3 & 4; Commission Proposal for a Council Regulation Amending Council Regulation 3254/91, *supra* note 119, Sec. 2 of the Explanatory Memorandum of the Proposal. Similar reasoning may be found in Australia's third-party submission in Tuna I — it argued that Art. XX(a) could justify measures regarding inhumane treatment of animals. See Tuna I, *supra* note 48, at § 4.4.

XX(b).¹³⁸ Likewise, an argument premised on Article XX(g) would fail, because even if animals could be seen as exhaustible natural resources within the meaning of this exception, the restrictions do not deal with the conservation of animals.¹³⁹ It remains unclear whether Article XX(a) could be used to justify measures taken to restrict imports of products based on their cruel and inhumane production method, which result from the "immoral" nature of the trapping method.¹⁴⁰

B. INCLUSION OF A "SOCIAL CLAUSE"

Concerns similar to those raised in the leg-hold trap scenario are found in an examination of the social conditions of the production process of a good. The inclusion of a "social clause" in international trade has recently received strong support.¹⁴¹ Examples of such social clauses can be found in the Protocol on Social Policy in the Maastricht Treaty¹⁴² and in the agreement on labor cooperation appended to NAFTA.¹⁴³ At the WTO min-

138. See also Blank, *supra* note 110, at 120; Michaud, *supra* note 111, at 373. Article XX(b) could theoretically apply only if "non-target species," such as endangered species or even playing children, became victims of the leg-hold traps. Because the European Community does not use this or any similar reasoning to justify its regulation, the regulation is obviously not aimed at the protection of "human, animal . . . life or health."

139. GATT art. XX(g).

140. Cf. Ernst-Ulrich Petersmann, *Trade and Environmental Protection: The Practice of GATT and the European Community Compared* in TRADE & THE ENVIRONMENT: THE SEARCH FOR BALANCE 147, 162 (James Cameron et al. eds., 1994).

141. Harald Grossmann & Georg Koopmann, *Social Standards in International Trade, A New Protectionist Wave?*, in WORLD TRADE AFTER THE URUGUAY ROUND 115 (Harald Sander & András Inotai eds., 1996); Virginia A. Leary, *Workers' Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, US Laws)*, in FAIR TRADE AND HARMONIZATION, VOL. 2 LEGAL ANALYSIS, at 172 (Jagdish Bhagwati & Robert E. Hudec eds., 1996); Patricia Sterling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U. J. INT'L L. POL'Y 1, 45 (1996); Laura Ho, Catherine Powell & Leti Volpp, *(Dis)Assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry*, 31 HARV. C.R.-C.L. L. REV. 383, 392 (1996).

142. TREATY ON EUROPEAN UNION Protocol No. 14 on Social Policy, *annexed to the EC TREATY*, reprinted in EUROPEAN UNION LAW GUIDE 253 (Philip Raworth ed., 1996).

143. North American Agreement on Labor Cooperation, Dec. 17, 1992, U.S.-Mex.-Can., Pub. L. No. 103-182, 107 Stat. 2057, reprinted in 32 I.L.M. 1499 (1993). See also Juli Stensland, *Internationalizing the North American Agreement on Labor Cooperation*, 4 MINN. J. GLOBAL TRADE 141 (1995); Laura O. Pomeroy, *The Labor Side Agreement under the NAFTA: Analysis of its Failure to Include Strong Enforcement Provisions and Recommendations for Future La-*

isterial conference in Singapore, the United States and the European Union proposed a "social clause" amendment as a "social chapter"¹⁴⁴ to provide minimum standards within this area of GATT.¹⁴⁵ The debate surrounding social standards or conditions, particularly the denial of basic worker rights or the use of child labor, provided the impetus for this amendment.¹⁴⁶ Several developing countries opposed this proposal, arguing that any link between social standards and trade would result in protectionist measures that would overburden the developing countries.¹⁴⁷ The Singapore Ministerial Declaration establishes the International Labor Organization as "the competent body to set and deal with [labor] standards."¹⁴⁸

bor Agreements Negotiated with Developing Countries, 29 G.W. J. INT'L L. & ECON. 769 (1996); Lance Compa, *Going Multilateral: The Evolution of US Hemispheric Labor Rights Policy under GSP and NAFTA*, 10 CONN. J. INT'L L. 337, 365, 379, 403, 427, 533 (1995).

144. Leary, *supra* note 141, at 178; Mary Van Lieshout, *The Most Contentious Issue Facing the World Trade Organisation This Week Will Be Demands to Enforce Labour Rights Through Trade Agreements*, THE OBSERVER, Dec. 8, 1996.

145. See Alice Enders, *The Role of the WTO in Minimum Standards in CHALLENGES TO THE NEW WORLD TRADE ORGANIZATION* 61 (Pitou van Dijk & Gerrit Faber eds., 1996).

146. Michael Richardson, *WTO Is Set to Grapple With Rights of Workers 'Social Clause' Looms As Contentious Issue at Singapore Meeting*, INT'L HERALD TRIB., Dec. 9, 1996.

147. Grossmann & Koopmann, *supra* note 141, at 130; Jeff Atkinson, *The Rights of the World's Workers are a Major Trade Issue*, INT'L HERALD TRIB., Dec. 5, 1996; *Malaysian Minister Attacks on Several WTO Fronts*, AGENCE FRANCE PRESSE, Dec. 11, 1996, available in WESTLAW, ALLNEWS File; Richardson, *supra* note 146; *Trade Policy: EU Council Agrees Guidelines for WTO Ministerial Conference*, EUROPEAN REPORT, Oct. 31, 1996; available in WESTLAW, ALLNEWS File. The Federation of Indian Exporters' Association stated that the increasing trend towards establishing a "social clause" was discharging imports from India. *Indian Export Chamber Flays Non-Tariff Barriers*, ASIA PULSE, Feb. 14, 1997.

Britain and Germany were the only members of the EU which opposed this proposal. See *Developed States Differ over Social Clause*, JAKARTA POST, Dec. 10, 1996, available in WESTLAW, ALLNEWS File; Van Lieshout, *supra* note 144. See also Abraham Katz, *WTO and the Social Clause*, J. COM., Jan. 8, 1997.

148. Singapore Ministerial Declaration, Dec. 13, 1996, Ministerial Conference of the World Trade Organization, at § 4.

The International Labour Organization regards the following as fundamental human rights in the working world, as elaborated in several conventions: freedom of association and protection of the right to organize (Convention No. 87 [July 9, 1948], ratified by 119 states), right to organize and collective bargaining (Convention No. 98 [July 1, 1949], ratified by 133 states), suppression of forced or compulsory labor in all its forms (Convention No. 29 [June 28, 1930], ratified by 143 states) and as a means of political or other coercion (Convention No. 105 [June 25, 1957], ratified by 120 states), elimination of any discrimination in access to or during employment (Convention No. 111 [June 25,

Provisions dealing explicitly with certain social standards or conditions can be found neither in any draft of the GATT nor in the GATT itself.¹⁴⁹ In the past, contracting parties tried to compensate for the absence of social standards by threatening to suspend benefits, derived from the Generalized System of Preferences, to less-developed countries which ignored a minimum level of social standards¹⁵⁰ or by invoking other GATT provisions which could enforce a *de minimis* standard.¹⁵¹ There may be a risk in applying Article XX(a) to countries with low or non-existent social standards, assuming that “public morals” could be extended to areas of social policy.¹⁵² However, the most convincing argument for setting certain social and labor standards appears not be an economic, but a moral argument.¹⁵³

C. ORDINARY MEANING

The interpretation of Article XX(a) greatly depends on the interpretation of the term “public morals.” According to Article

1958], ratified by 123 states), equal pay for men and women for work of equal value (Convention No. 100 [July 29, 1951], ratified by 127 states), certain minimum age for admission to employment (Convention No. 138 [June 26, 1973], ratified by 51 states).

149. Frederick M. Abbott, *International Trade and Social Welfare: The New Agenda*, 17 COMP. LAB. L.J. 338 (1996); Daniel S. Ehrenberg, *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor*, 20 YALE J. INT'L L. 361, 394 (1995); Ho, Powell & Volpp, *supra* note 141, at 398; Robert Howse & Michael Trebilcock, *The Fair Trade - Free Trade Debate: Trade, Labor, and the Environment*, 16 INT'L REV. L. & ECON. 61 (1996); Leary, *supra* note 141, at 177; Juli Stensland, *supra* note 143, at 148; Sterling, *supra* note 141, at 37.

150. See Thomas Schoenbaum, *International Trade and Social Welfare: The New Agenda*, 17 COMP. LAB. L.J. 338, 350 (1996) (giving an overview of actions by the United States); *ICFTU Welcomes EU's Decision on Burmese Trade Privileges*, REUTER EUR. COM. REP., Mar. 25, 1997, available in LEXIS/NEXIS, CURNWS File.

151. Cf. Panel on “United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear,” Nov. 8, 1996, § 5.9, available in WESTLAW, GATT File (outlining the U.S.'s attempt to justify an Escape Clause proceeding under GATT Article XIX by arguing that Costa Rica's “lower-priced foreign fabric” was causing serious injury to the domestic industry). See also Ehrenberg, *supra* note 150, at 392 (supporting the applicability of provisions dealing with the two major unfair trade practices in GATT/WTO in this context, dumping and subsidies); Johanna Son, *Trade-Labor: Study Debunks Social Clause Theory*, INTER PRESS SERVICE, Sept. 5, 1996, available in WESTLAW, ALLNEWS File.

152. PETERSMANN, *supra* note 100, at 51. The ILO proposed a link between international trade and workers' rights by an amendment to GATT Art. XX. See Sterling, *supra* note 141, at 37.

153. David Crane, *Labor-Rights Issue Divides Trade Summit*, THE TORONTO STAR, Dec. 10, 1996.

31(1) of the Vienna Convention, interpretation must start with the ordinary meaning of "public morals."¹⁵⁴ Neither Article XX nor any other GATT provision contain a legal definition of the term "public morals." The term "public morals" can be seen as including those rules and principles in a given society which both characterize conduct as right or wrong and stipulate the behavioral norms in that society.¹⁵⁵ While all contracting parties would agree on the same formal definition of "public morals," nothing has been said about the material content of public morals. Material content means which rules or principles are or should be included by the term. Material content also addresses whether public morals refers to the well-known legal concept of public order or public policy used in civil and common law systems. It is most likely that different rules or principles will be considered, depending upon the particular contracting parties' social, cultural and political systems and experiences. Unfortunately, the text of the GATT remains silent on this question. Thus, the ordinary meaning of "public morals" remains open and ambiguous. An interpretation based on the ordinary meaning of the term "public morals" could lead to a blanket clause with an overly broad scope and countless meanings.¹⁵⁶

Article XX(a)'s language itself indicates, however, some limits in the determination of the material content and scope of "public morals." If this were not the case, GATT perhaps may have adopted different language allowing contracting parties to use their individual national standards as a basis for determining public morals under Article XX(a).¹⁵⁷

With respect to the EEC regulation on pelts and fur, the ambiguous ordinary meaning of Article XX(a) does not reveal anything about the Article's applicability to methods of production or processing standards of a product. Instead, this ambiguity allows the broad meaning of "public morals" to possibly encompass certain standards of behavior and conduct which might lead to guidelines for production methods. The ordinary meaning could support an interpretation which includes production methods considered immoral by a contracting party. There-

154. Vienna Convention on the Law of Treaties, opened for signature, May 23, 1969. Article 31(1) 1155 U.N.T.S 331 [hereinafter Vienna Convention].

155. BLACK'S LAW DICTIONARY 1008 (6th ed. 1990); see also 7 THE ENCYCLOPEDIA OF PHILOSOPHY 155, 5 THE ENCYCLOPEDIA OF PHILOSOPHY 385 (Paul Edwards ed., 1967).

156. MCGOVERN, *supra* note 91, § 13.12; PETERSMANN, *supra* note 100, at 51.

157. *But see* SENTI, *supra* note 100, at 275 ("the definition of . . . morals is left to the contracting parties").

fore, the ordinary meaning of Article XX(a) could justify restrictions imposed on the use of "cruel" or "inhumane" production methods like the EEC regulation on pelts and fur.¹⁵⁸

Interpreting Article XX(a) based on its ordinary meaning may shed light on the possible inclusion of a "social clause" in Article XX(a). Because the ordinary meaning of the term "public morals" remains ambiguous, one could argue that certain social standards or conditions are to be regarded as immoral and thus, corresponding restrictions on behalf of such unsocial and immoral conditions are justifiable under Article XX(a).¹⁵⁹

In conclusion, Article XX(a)'s ordinary meaning does not reveal very much about the possible interpretation of the phrase "public morals." The language, however, confirms that the definition of the term is at least not limitlessly open to any national standard of individual contracting parties.

D. CONTEXT

Article 31(1) of the Vienna Convention stipulates that the context of Article XX(a) must also be taken into account when interpreting the provision. Article XX allows GATT members to circumvent their obligations through exceptions related to their individual public policies. In addition to paragraph (a), Article XX provides exceptions for the protection of human, animal or plant life or health, exportation or importation of gold or silver, products of prison labor, protection of national treasures, and conservation of exhaustible natural resources.

Article XX outlines each exception separately. One could argue, *argumentum e contrario*, that this is strong evidence that every section of Article XX is supposed to have its own and independent meaning. Accordingly, if the scope of one section is not limited by the scope of another section it would have been unnecessary and useless to include sections with partially or totally overlapping scopes. Thus, it could be argued that the term "public morals" excludes those measures enumerated in the other paragraphs of Article XX. Otherwise, either section (a) or one of the other sections becomes superfluous, at least to the extent the scopes of each section overlap.

While this contextual interpretation is probably correct in the national and statutory context of civil law countries, GATT does not constitute a legal framework of comparable consistency

158. See also PETERSMANN, *supra* note 100, at 51.

159. *Id.*

and relative accuracy. GATT unites similarities of *national* civil law countries in an *international* organization; it has a general statutory basis and independent (quasi-) judicial bodies interpreting this basis in a *supranational* context.¹⁶⁰ This international context necessitates more flexibility and dynamic interpretation than one could ever imagine in a relatively consistent and static civil law system. Accordingly, methods of contextual interpretation of national law that provide satisfactory answers when they are used in civil law countries do not necessarily provide correct answers in the supranational context of GATT, even when they are applied without any modification. Thus, one could also argue that in some situations the scope of two Article XX paragraphs *can* overlap even though all exceptions have an independent and simultaneous existence in Article XX. If the penumbras of two sections can at least partially cover the same factual situation, one section may be rendered ineffective to the extent the scopes of the sections overlap.

For instance, environmental measures dealing with human, animal and plant life or health definitely fall under section (b). Because section (a) and (b) are both provisions of Article XX and, assuming that every section of Article XX is supposed to have its own independent meaning, one could argue that the scope of section (a) does not include measures which fall under section (b). Any justification for the measure under section (a) would be foreclosed in that case.

A strong argument may be made for the opposite position. A measure aimed at the protection of human, animal or plant life or health, falling under section (b), could also be considered to be justifiable under section (a) as protecting public morals. In other words, protection of human, animal or plant life or health simply coincides with protection of public morals. The measure could be aimed at one public policy goal covered by the penumbras of sections (a) and (b) simultaneously.

In addition, a contracting party is not precluded from the procedural strategy of invoking one section of Article XX to justify a measure while invoking another section in the alternative. Efficient operation of the dispute settlement process demands

160. Thus, the relationship between rulings and law-making by quasi-judicial bodies in the framework of the WTO dispute settlement system and legal rules of written GATT-law appears to resemble the common problem of judge-made law in civil law countries, at least to a certain extent. Accordingly, the discussion regarding legal effects of adopted panel reports should focus more on this similarity than on exclusively drawing parallels to legal effects of case law in common law countries. *See also supra* notes 63-68 and accompanying text.

that a contracting party bring as many facts and legal arguments as it deems necessary for the panel to consider. Were this not the case, a contracting party could neither make its strongest case nor bring all its legal arguments to the consideration of the Appellate Body.¹⁶¹ Thus, the goal of efficient GATT dispute settlement procedures demands the possibility of an alternative pleading before the panel.¹⁶²

1. *The EEC regulation on pelts and fur – Revisited*

The context of Article XX does not provide definite evidence that any of its sections apply to products alone or whether they apply to production methods as well. For example, the language of Article XX(b) mentions nothing about its application to methods of production. Based on the wording of this section, however, one could assume that measures taken with regard to certain production methods could be justifiable. Article XX(e) is the only provision that explicitly deals with the production method of a product. Allowing measures “relating to prison labor,” this section explicitly focuses on products which were processed in prisons of another contracting party. It allows measures to prevent the importation of those products based on their production methods and presumed “social dumping.”¹⁶³ One could argue that, because Article XX(e) is the only provision with a “social agenda” and was found to be of such importance, it had to be explicitly included in the final text of GATT.¹⁶⁴ Conversely, the fact that Article XX(e) is the only provision explicitly addressing production methods strongly indicates that the other Article XX sections were not intended to include measures based on production methods. Viewed in this way, the context of Arti-

161. In the appellate phase of GATT dispute settlement, a party may only bring arguments that are limited to the issues of law and legal interpretations discussed by the panel in its report. DSU, *supra* note 31, art. 17(6).

162. Tuna I, *supra* note 48, § 5.22.

163. Cf. the opinion of the French Delegation in UNITED NATIONS, PREPARATORY COMMITTEE OF THE INTERNATIONAL CONFERENCE ON TRADE AND DEVELOPMENT, COMMITTEE II, TECHNICAL SUB-COMMITTEE, at 8, U.N. Doc. E/PC/T/C.II/12, (Oct. 26, 1946) (explaining that the French legislature does not prohibit prison-made goods because it does not have any penalties for social dumping). For a discussion of social dumping, see generally Ehrenberg, *supra* note 149, at 379.

164. Further evidence supporting this assumption could be found in the discussion of an amendment to Article 43 dealing with social dumping, which was finally rejected. See *Report of Sub-Committee D on Articles 40, 41, 43*, U.N. Conference on Trade and Employment, Third Committee: Commercial Policy, at 4, U.N. Doc. E/CONF.2/C.3/37, (Jan. 20, 1948).

cle XX does not provide justification for the EEC regulation on pelts and fur under section (a).

2. *Inclusion of a "social clause." – Revisited*

As stated earlier, Article XX contains no provision dealing with certain social standards that would extend "public morals" to areas of social policy. The only provision somewhat related to this idea which persistently appeared in the drafts¹⁶⁵ and which was ultimately included in GATT is Article XX(e). As mentioned above, it explicitly provides an exception for measures "relating to prison labor." If Article XX(e) is viewed as allowing measures related to certain social standards or conditions, it is the only provision found to be so important that it had to be explicitly included in the final text of GATT. It may be argued that if Article XX(e) is the only explicit provision in this area, there is strong evidence that, *argumentum e contrario*, no further rules dealing with social policy can be implicitly read into the blanket clause of Article XX(a).

E. OBJECT AND PURPOSE

According to Article 31(1) of the Vienna Convention, the object and purpose of Article XX(a) must also be examined. This subsection first outlines the dichotomy of Article XX's object and purpose in order to show its consequences at the intersection of interpretation and quasi-judicial review. Further, the subsection examines the examples of fur regulation and a social clause in light of Article XX's object and purpose.

1. *Dichotomy of the object and purpose of Article XX*

Article XX enables individual contracting parties to deviate from their GATT obligations if necessary to effectuate their national public policies. The effect of Article XX is to give precedence to a contracting party's national sovereignty over GATT's commitments to trade liberalization.¹⁶⁶ Panel reports have gen-

165. See *infra* APPENDIX, GENESIS OF ARTICLE XX(a) GATT; U.S. Proposals, *supra* note 16, at III G 6 (p.18); US Draft Charter, *supra* note 17, Article 32(h); London Draft Charter, *supra* note 18, Article 37(h); New York Draft Charter, *supra* note 19, Article 37(h); Geneva Draft Charter, *supra* note 20, Article 43(e); Havana Charter, *supra* note 21, Article 45:1(a)(vi).

166. PETERSMANN, *supra* note 100, at 30; Robert E. Hudec, *GATT – Legal Status in U.S. Domestic Law*, in *THE EUROPEAN COMMUNITY AND GATT* 239 (Meinhard Hilf et al. eds., 1986); Ernst-Ulrich Petersmann, *The European Economic Community as a GATT Member*, in *THE EUROPEAN COMMUNITY AND GATT* 26 (Meinhard Hilf et al. eds., 1986); Sorsa, *supra* note 46, at 329.

erally elucidated Article XX's object and purpose. For example, the panel on "Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes" affirmed the object and purpose of Article XX by stating that section (b) allows parties to "give priority to human health over trade liberalization," if the other requirements of the provision are met.¹⁶⁷ The Panel on "Canada – Measures Affecting Exports of Unprocessed Herring and Salmon" concluded that Article XX(g)'s purpose is to ensure that GATT commitments do not hinder or burden national policies pursued by a contracting party.¹⁶⁸ The Panel on "United States – Restrictions on Imports of Tuna (Tuna I)" found that Article XX permits an individual contracting party to use import restrictions in the pursuit of overriding public policy goals.¹⁶⁹

In contrast, the General Agreement, as its title literally indicates, requires a certain level of general consensus and uniform interpretation among the contracting parties.¹⁷⁰ GATT's trading system would seriously malfunction if a contracting party could simply circumvent its obligations by invoking an Article XX public policy exception based merely on the country's own national standard. The term "contracting parties" would inevitably turn into "contrasting parties"¹⁷¹ and GATT as a whole would become *ad absurdum*. Methodologically, it would be erroneous to interpret an international multilingual treaty based solely on the interpretation of an individual nation's legal order, if the treaty itself lacked such an interpretation.¹⁷²

This dichotomy between a mere national interpretation to protect the sovereignty of an individual contracting party and the minimum standard of agreement on internationally and supranationally binding obligations crystallizes the difficulty in interpreting the object and purpose of Article XX. This analysis shows that neither end of the spectrum can coincide with the object and purpose of Article XX to provide a satisfying result.

167. Thai Cigarettes, *supra* note 48, § 73.

168. Unprocessed Herring and Salmon, *supra* note 90, § 4.6.

169. Tuna I, *supra* note 48, § 5.27.

170. See Ernst-Ulrich Petersmann, *International Economic Theory and International Economic Law: On the Tasks of a Legal Theory of International Economic Order*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* 243 (R. St. J. MacDonald & Douglas M. Johnston eds., 1983).

171. The (almost?) Freudian slip "CONTRASTING PARTIES" can be found in Christopher Thomas, *Litigation Process under the GATT Dispute Settlement System*, 30 *J. OF WORLD TRADE* 64 (1996).

172. MEINHARD HILF, *DIE AUSLEGUNG MEHRSPRACHIGER VERTRÄGE* 86 (1973).

2. "Public morals" as an indefinite term

The phrase "public morals" can be interpreted according to neither national nor international standards, which leaves the meaning of the phrase open to a broad range of interpretations. Numerous other provisions throughout GATT contain similar ambiguous phrases.¹⁷³ For instance, neither the context nor the object of Article VI:1 reveals much about the possible meaning or scope of the phrase "material injury." The Agreement on Subsidies and Countervailing Measures, however, prevents an expansive range of interpretations by defining the phrase in Article 15.¹⁷⁴ An interpretative note to that Article makes it clear that the term "material injury" must be interpreted according to the standards and criteria defined there.¹⁷⁵ Article XIX contains a similar legal caveat; its terms must be interpreted in accordance with the provisions found in the Agreement on Safeguards.¹⁷⁶

Unfortunately, there are no specific guidelines for the interpretation and application of the phrase "public morals." A panel examining the application of Article XX(a) in an individual case cannot rely on authoritative guidelines provided by the contracting parties.¹⁷⁷ Instead, a panel must interpret this phrase on its own. The panel must take into account the object and purpose of Article XX - protection of national sovereignty -¹⁷⁸ while maintaining the interpretative uniformity that is indispensable for the health of internationally binding agreements.¹⁷⁹ The panel must consider the national interpretation of a contracting

173. Cf. BENEDEK, *supra* note 49, at 396; FRANK SCHOCH, UNBESTIMMTE RECHTSBEGRIFFE IM RAHMEN DES GATT (1994).

174. See Agreement on Subsidies and Countervailing Measures, opened for signature Apr. 15, 1994, GATT Secretariat, The Results of the Uruguay Round of Multilateral Trade Negotiations 264, GATT Sales No. 1994-4 (1994) (Art. 15.7 lists factors used to be determining the existence of material injury).

175. *Id.*

176. See Agreement on Safeguards, *reprinted in* United States Trade Representatives, Final Texts of the GATT Uruguay Round Agreements Including the Agreement Establishing the World Trade Organization 264 [hereinafter Final Texts].

177. See MCGOVERN, *supra* note 91, § 13.12.

178. PETERSMANN, *supra* note 100, at 29-30; Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 205 (1996). See also Bello, *supra* note 27, at 417 (stating that the flexibility of WTO/GATT allows for national sovereignty while still promoting international trade).

179. Croley & Jackson, *supra* note 178, at 205; Ernst-Ulrich Petersmann, *supra* note 166, at 243.

party within the limits which GATT itself sets.¹⁸⁰ These limits must be reduced to a common denominator accepted by all contracting parties and shared by a majority. These limits set the outside boundaries of the phrase "public morals" and leave only a small margin within which the individual contracting party can define the term.¹⁸¹

Two kinds of possible interpretations exist within these parameters of construction. Under the first interpretation, one phrase is uniformly and identically interpreted by all contracting parties. This unanimous interpretation would likely lie at the heart of the phrase. Measures aimed at this "core interpretation" would not likely encounter problems with the dispute settlement procedure.¹⁸² A second interpretation could be that the phrase "public morals" includes different interpretations depending upon the individual contracting party invoking and interpreting Article XX. These potentially different interpretations would fall simultaneously under section (a) and its penumbras, provided they fall within the absolute outer limits set by GATT. In a dispute settlement proceeding, this interpretation could only be subject to limited judicial review by a panel because it enjoys a limited degree of deference. The panel could only find a violation of this margin of interpretation (and thus of the provisional standard of section (a)) if the contracting party itself acted beyond the scope of its own interpretation in obvious cases. Otherwise, the panel would deny the individual contracting party any latitude in applying Article XX. This could occur when the contracting party applying Article XX based its interpretation on false or inaccurate facts or simply misinterpreted the provision.¹⁸³

This limited standard of review is not new in the GATT/WTO context. It is described in Article 17.6 of the Agreement on

180. Cf. Croley & Jackson, *supra* note 178, at 205 (suggesting that by focusing on national interpretation, individual parties will have more authority in the determination of a dispute).

181. See Edmund McGovern, *Dispute Settlement in the GATT - Adjudication or Negotiation?* in THE EUROPEAN COMMUNITY AND GATT 73, 80 (Meinhard Hilf et al. eds., 1986).

182. SCHOCH, *supra* note 173, at 57.

183. This legal construction of the term "public morals" is consistent with the necessary flexibility of the General Agreement, which is structured on a system of obligations that exists between a "policy-based" and "rule-based" system. Cf. Singapore Ministerial Declaration, *supra* note 148, at § 1 ("We, the Ministers have met . . . to further . . . the continuing liberalization of trade within a rule-based system. . .").

Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, which provides:

. . . In examining the [establishment of a panel by the DSB at the request of a complaining party]

- (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the fact was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
- (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.¹⁸⁴

Thus, in reviewing the conclusions of prior panels, a panel cannot strike down an interpretation which is premised on rational and sensible factual and legal bases, even though the panel might have reached a different, equally plausible conclusion.

It could be argued that this process applies exclusively to Article VI since there is no special agreement on the implementation of Article XX.¹⁸⁵ On the other hand, this contextual argument is not as convincing in the GATT/WTO context as it would be in a domestic context of a civil law country.¹⁸⁶ Rather, Article 17.6 of the Agreement on Implementation of Article VI of GATT 1994 demonstrates there is a particular method to interpreting indefinite terms within the framework of GATT. Such a method lies at the intersection of a contracting party's national sovereignty with the minimum of a uniform interpretation of an internationally binding agreement.

184. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, opened for signature Apr. 15, 1994, art. 17(6) reprinted in Final Texts, *supra* note 176.

185. Cf. Panel Report on "United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India", January 6, 1997, WTO-Doc. WT/DS33/R, § 5.7 (stating India's similar opinion). The Appellate Body Report, however, fails to address this topic. See Appellate Body Report on "United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India", April 25, 1997, WTO-Doc. WT/DS33/AB/R.

186. See *supra* Part III.D.

3. "Core" interpretation of "public morals"

The legal character of the phrase "public morals" indicates a "core" interpretation of that phrase which is shared and agreed upon by all or a vast majority of the contracting parties. Such a core interpretation of the object and purpose of the phrase "public morals" could include the restriction of imports considered indecent, because every contracting party has a moral interest in restricting imports of indecent material.¹⁸⁷ As such, indecent products, such as pornographic literature or movies, could be viewed as central to the meaning of Article XX(a).¹⁸⁸ However, the standards of indecency can vary between individual contracting parties. It has been suggested that Article XX(a) allows the individual contracting party to limit or ban the importation of print media, literature, movies, and videotapes found to be indecent under its *domestic standard*.¹⁸⁹ For example, Section 305 of the Tariff Act of 1930 prohibits the importation of any obscene materials into the U.S.¹⁹⁰ The obscenity of imported materials is determined by applying a national standard.¹⁹¹ Basing the indecent character of a product solely on a national standard, however, would cause "public morals" to be an indefinite term. Article XX(a) does leave the definition of indecent material open to the determination of the individual contracting party, but only to the extent allowed by GATT. Applying the national standard to the determination of indecent material is acceptable and complies with Article XX when that standard falls within the prescribed limits.

187. The problem of sexually explicit goods of artistic value has not been examined by legal scholarship on international art trade in context with Article XX(a). Rather, it has been addressed with regard to Article XX(f) which allows export restrictions "... imposed for the protection of national treasures or artistic, historic or archaeological value." See Pierre Lalive, *Le Projet de Convention de l'UNIDROIT Sur les Biens Culturels Volés ou Illicitement Exportés*, in 4 INTERNATIONAL ART TRADE AND LAW 35, Martine Briat & Judith A. Freedberg eds., 1993); Robert Lecat & Van Kirk Reeves, *The Regulatory Framework for the Free International Circulation of Objects of Art*, in 4 INTERNATIONAL ART TRADE AND LAW 58 (Martine Briat & Judith A. Freedberg eds., 1993).

188. Cf. SENTI, *supra* note 100, at 275.

189. *Id.*

190. Tariff Act of 1930, 19 U.S.C. § 305 (1930). According to a decision of the Supreme Court, Section 305 is not unconstitutionally overbroad on First Amendment grounds; see *United States v. 12,200-Ft. Reels of Super 8mm Film*, 413 U.S. 125, 129 (1973).

191. In *Miller v. California*, the U.S. Supreme Court held that judicial review adequately protects First Amendment rights and therefore a state standard may be constitutional. 413 U.S. 15 (1993).

4. *The EEC regulation on pelts and fur and the inclusion of a social clause revisited*

The regulation of pelts and fur aims to prevent “inhumane” trapping standards. Because the European Community already prohibits leg-hold traps within its own borders, the prohibition of non-complying imports effectively acts as an “export” of the standard to other contracting parties. Thus, the leg-hold trap regulation faces a similar situation to that found in the Tuna-Dolphin dispute — whether Article XX can justify prescriptive measures which take effect outside the territory of the acting contracting party.¹⁹² Both Panels reporting on the Tuna-Dolphin dispute rejected the assertion that Article XX permits the application of measures with extrajurisdictional effects or which could force another contracting party to change its policies.¹⁹³ The Tuna I Panel stated that

. . . [if] each contracting party could unilaterally determine [the standards at issue] . . . the General Agreement would . . . no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.¹⁹⁴

The panel essentially found that the “export” of internal regulations of one contracting party to other contracting parties would jeopardize trade liberalization with respect to the stan-

192. See Tuna I, *supra* note 48, § 5.32, 5.27, with regard to Article XX(b) and (g) (holding that Article XX allows a contracting party to set its own standards). See also Tuna II, *supra* note 48, § 5.26. Article XX(b) and (g) could apply to measures taking effect outside of a contracting party’s jurisdiction; however, these sections do not cover boycotts taken to force other countries to change their policies and which were effective only if such changes occurred. See JACKSON, *supra* note 56, at 343 (stating that block adoption should prevent unilateral U.S. actions).

193. See also JACKSON, *supra* note 14, at 209 (stating that Article XX prohibits disguised restrictions); John Bogardus, *The GATT and the Environment: Irreconcilable Differences?*, 5 DALHOUSIE J. OF LEGAL STUDIES 237, 240 (1996) (stating Article XX allows the use of trade restrictions for environmental purposes); Steve Charnovitz, *Dolphins and Tuna: An Analysis of the Second GATT Panel Report*, 24 ENVTL. L. REP. 10567, 10568 (1994) (explaining that the type of measure should be central to determining whether it is inconsistent); Ted L. McDorman, *The GATT Inconsistency of US Fish Import Embargoes to Stop Driftnet Fishing and Save Whales, Dolphins and Turtles*, 24 GEO. WASH. J. INT’L L. & ECON. 477, 517 (1991) (suggesting that the goal of U.S. law is to influence other countries’ environmental policies). For an economic point of view see Bernhard Hoekman & Michael Leidy, *Environmental Policy Formation in a Trading Economy: A Public Choice Perspective*, in THE GREENING OF WORLD TRADE ISSUES 227 (Kym Anderson & Richard Blackhurst eds. 1992) (discussing trade measures used to promote environmental policies).

194. Tuna I, *supra* note 48, § 5.27.

dard at issue, because unencumbered trade as provided by GATT could only take place between contracting parties having identical standards in a given area.

The second Panel examining the Tuna-Dolphin dispute basically affirmed this interpretation. The second Panel, however, made different findings on the issue of "extra-territoriality." It stated that no contracting party could coerce another contracting party to change the latter's policies within its own jurisdiction.¹⁹⁵ This Panel, however, arrived at its conclusion without repeating the first Panel's observations regarding an "extrajurisdictional application" of Article XX.

Although neither report was adopted, it is highly doubtful that Article XX could allow a different result. Article XX provides a public policy which acts as a safeguard for each contracting party's national sovereignty.¹⁹⁶ Allowing a party to use Article XX to impose measures which take effect in another contracting party's territory would infringe upon that party's national sovereignty and provide an absurd result.

Article XX permits a contracting party to pursue its own public policy goals; by the same token, Article XX cannot allow a contracting party to dictate another contracting party's public policy goals. Considering the object and purpose of Article XX, one could argue that neither the European Community's regulation on pelts and fur nor an extended interpretation of "public morals" to areas of social policy can be justified under Article XX(a).¹⁹⁷

F. A SUPPLEMENTARY MEANS: *TRAVAUX PREPARATOIRES*¹⁹⁸

According to Article 32 of the Vienna Convention, the drafting history of Article XX can be used as a supplementary means of interpreting the phrase "public morals." During the Article XX negotiations, the participating states made numerous unsuccessful attempts to support their own national political agendas

195. Tuna II, *supra* note 48, § 5.26.

196. Petersmann, *supra* note 166, at 26. See *supra* Part III.E.1.

197. To allow for both the EC's regulation on pelts and furs and an extended interpretation of the phrase "public morals," Article XX would have to be explicitly amended. Alternatively, an interpretative understanding, permitting exemption from GATT obligation, would have to be negotiated. See MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 412 (1995).

198. To gain a better understanding of this subsection, see *infra* APPENDIX, GENESIS OF ARTICLE XX(a) GATT.

by modifying the exceptions clauses.¹⁹⁹ At the same time, the term “public morals” appeared in the drafts. The negotiating states could not reach a compromise on the inclusion of any such provisions. The fact that debates over these rejected amendments occurred contemporaneously with the inclusion of Article XX(a) may indicate that politically motivated measures are not intended to fall under Article XX(a).

Every draft of Article XX, beginning with the original U.S.-Proposal, contained an exception for measures “necessary to protect public morals.”²⁰⁰ This indicates that the drafters agreed on the importance of such an exception, but could not agree on an unambiguous statement of what “public morals” was supposed to mean. The preparatory work may reveal that there was no unanimous interpretation of the phrase when it was included in Article XX. Although the Drafting Committee realized the inclusion of a provision defining obscure or ambiguous terms in the Exceptions Clause would be helpful,²⁰¹ no definitions were codified in the final draft.

The preparatory work is clear, however, with respect to whether the phrase “public morals” is considered identical to the legal concept of *ordre public* (public order). Public order is a conflict-of-laws rule relevant when jurisdictional problems occur between states.²⁰² Based on the international law principle that no state has jurisdiction over acts of another state, courts of one state are usually not competent to examine the lawfulness of another state’s action, at least as long as the latter state acted within its jurisdiction and acts other than acts *jure gestionis* are concerned (acts *jure imperii*).²⁰³ Even so, courts of one state might refuse to follow laws of another state if such laws violate the former state’s public order.²⁰⁴

199. See *infra* notes 209-216 and accompanying text.

200. U.S.-Proposals, *supra* note 16, at Ch. III G 1. (p.18); US Draft Charter, *supra* note 17, Article 32(a); London Draft Charter, *supra* note 18, Article 37(a); New York Draft Charter, *supra* note 19, Article 37(a); Geneva Draft Charter, *supra* note 20, Article 43 (a); Havana Charter, *supra* note 21, Article 45:1(a)(i).

201. *Report of the Technical Sub-Committee*, United Nations Preparatory Committee of the International Conference on Trade and Development, Committee II, at 7, U.N. Doc. E/PC/T/C.II/64 (Nov. 22, 1946) and at 38, U.N. Doc. E/PC/T/C.II/54/Rev.1 (Nov. 28, 1946).

202. “The civilian doctrine of *ordre public* concerns itself only with exceptional or highly significant manifestations of foreign sovereign will.” COVEY T. OLIVER ET AL., *THE INTERNATIONAL LEGAL SYSTEM* 624 (1995).

203. See BROWNLIE, *supra* note 71, at 332; SHAW, *supra* note 68, at 374.

204. GERHARD KEGEL, *INTERNATIONALES PRIVATRECHT* 324 (1987); HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 240 (1952).

If the term "public morals" were identical to the legal concept of *ordre public*, Article XX(a) would provide a justification for restrictions on an imported product that would otherwise be in contradiction with the national legal order of the importing country. In other words, the individual contracting party would control the interpretation of "public morals," which would be indirectly executed by its national legal order.

Strong evidence, based on the *travaux préparatoires*, indicates that a country's national legal order was to remain conceptually separate from "public morals." Article 45, section 1(a)(ii) of the Havana Charter provided an exception for measures "necessary to the enforcement of laws and regulations relating to public safety."²⁰⁵ Even though the phrase included the legal concept of *ordre public*,²⁰⁶ it was considered to be separate from the concept of "public morals." The drafts included in Article 45, section 1(a)(i) an exception for measures "necessary to protect public morals."²⁰⁷ Significantly, the Working Party on Modifications to the General Agreement decided not to include Article 45 section 1(a)(ii) or a similar provision into the General Agreement.²⁰⁸ Therefore, the drafting history indicates that the phrase "public morals" cannot be interpreted as being identical to the legal concept of *ordre public*. In this sense, the *travaux préparatoires* could be considered a rejection of leaving limitless power to the individual contracting parties to define "public morals."

The drafting history of Article XX reveals at least one interpretation which the phrase "public morals" does not encompass. The Norwegian delegate to the Drafting Committee stated his country's tax and price restrictions on the importation and sale of alcoholic beverages were chiefly aimed at "the promotion of temperance."²⁰⁹ In the delegate's opinion, the taxation and

205. See *infra* Article 45(1)(a) in APPENDIX, GENESIS OF ARTICLE XX(a) GATT. See also Havana Charter, *supra* note 21, art. 45(1)(a)(i).

206. Report of Sub-Committee D on Articles 40, 41, 43, U.N. Conference on Trade and Employment, Third Committee: Commercial Policy, at 3, U.N. Doc. E/CONF.2/C.3/37 (Jan. 28, 1948) and Reports of Committees and Principal Sub-Committees, United Nations Interim Commission for the International Trade Organization, at 84 § 18 (1948).

207. See *infra* Article 45(1)(a)(i) in APPENDIX, GENESIS OF ARTICLE XX(a) GATT.

208. Report of Working Party No. 3 on Modifications to the General Agreement, at 2, U.N. Doc. GATT/CP.2/22/Rev.1 (1948). See also *infra* Article 45(1)(a)(i) in APPENDIX, GENESIS OF ARTICLE XX(a) GATT.

209. Report of the Drafting Committee of the Preparatory Committee, U.N. Conference on Trade and Employment, at 31, U.N. Doc. E/PC/T/34/Rev. 1 (May 29, 1947) See also New York Draft Charter, *supra* note 19, art. 37.

price policy was covered by Article XX(a), as it was necessary to protect public morals.²¹⁰ During the negotiations, the Norwegian Delegation restated this view.²¹¹ Unfortunately, it is unclear whether the other delegates agreed with that interpretation of "public morals" or whether they would have defined this term more restrictively. The Norwegian Delegation eventually withdrew its proposal during a later conference without any further comment.²¹² Thus, one could argue that "public morals" were not intended to cover "the promotion of temperance."²¹³

In another example of a possible interpretation of "public morals" in the drafting history, the Chinese delegate to the Drafting Committee wanted to include an exception to justify measures taken "to prevent, arrest, or relieve conditions of social disturbance, natural calamity or other national emergencies."²¹⁴ Although this proposal was discussed in the Technical Sub-Committee,²¹⁵ it was neither included in later drafts of the Exceptions Clause nor proposed for inclusion in the General Agreement.²¹⁶

One could argue that this drafting history reveals that these interpretations are not covered by the term "public morals."

210. The delegate additionally opined that Norway's measures should be seen as justified under section (b). *Report of the Drafting Committee of the Preparatory Committee*, *supra* note 209.

211. *Report of the Second Session of the Preparatory Committee*, U.N. Conference on Trade and Employment, at 37, U.N. Doc. E/PC/T/189 (1947). *See also* Geneva Draft Charter, *supra* note 20, art. 43.

212. *Reports of the Third Committee: General Commercial Policy*, U.N. Conference on Trade and Development, at 24, U.N. Doc. E/CONF.2/C.3/1 (Dec. 2, 1947). *See also* Geneva Draft Charter, *supra* note 20, art. 43.

213. During a recent Panel proceeding the United States ignored this part of Article XX's drafting history. Without any statement to refute this obvious assumption, the U.S. claimed that the restrictions linked to a certain percentage of beverages' alcohol content were necessary to "protect public morals." *See* Alcoholic and Malt Beverages, *supra* note 48, § 3.125. Unfortunately, the Panel failed to state its opinion towards the U.S. claim. *See id.* at § 5.70.

214. *Report of the Preparatory Committee of the International Conference on Trade and Development*, Committee II, Technical Sub-Committee, at 11, U.N. Doc. E/PC/T/C.II/50 (Nov. 13, 1946); *Draft Report of the Technical Sub-Committee*, at 35, U.N. Doc. E/PC/T/C.II/54 (Nov. 16, 1946).

215. *Report of the Preparatory Committee of the International Conference on Trade and Development*, Committee II, at 2, U.N. Doc. E/PC/T/C.II/35 (Oct. 30, 1946).

216. *See Reports of the Second Session of the Preparatory Committee*, U.N. Conference on Trade and Employment, Draft General Agreement on Tariffs and Trade, at 48, U.N. Doc. E/PC/T/189 (Aug. 30, 1947); *Report of the Second Session of the Preparatory Committee*, U.N. Conference on Trade and Employment, at 50, U.N. Doc. E/PC/T/186 (Sept. 10, 1947).

Otherwise they would have either been included simultaneously with the "public morals" exception in Article XX or withdrawn in an early stage of the negotiations.²¹⁷ However, the evidence for this assumption is based on the drafting history, which is, according to Article 32 of the Vienna Convention, only a supplementary tool of interpretation.

IV. CONCLUSION

Dispute proceedings within the World Trade Organization have risen to a quasi-judicial level resembling the operations of adjudicatory proceedings in national legal systems. Although nations have developed extensive conventions to ensure consistency in interpreting laws, the WTO judicial system has just begun to develop similar judicial mechanisms to ensure uniform and predictable treaty interpretations. The interpretation of Article XX(a) exemplifies the nascent stage of this legal order and its limitations. To further develop this interpretative scheme, the WTO panels must focus on substantive law by applying "conventional" rules of treaty interpretation, rather than utilizing "extra-provisional" rules not linked to the provision's wording, context, object or purpose.

The stability of the Dispute Settlement System is crucial to the success of trade liberalization and the World Trade Organization. The WTO provides a suitable forum for the peaceful resolution of disputes through institutionalized and formalized proceedings. The vastly increased number of dispute proceedings calls, however, for uniform and reliable rules of interpretation based on and applied to the substantive law of GATT provisions. If panels realize that such rules can guarantee consistency and predictability within the Dispute Settlement System, the System can provide and enforce common solutions of trade disputes in the transition to the next century.

217. See *supra* notes 209-213 and accompanying text.

**Focusing on Substantive Law in International Economic Relations:
The Public Morals of GATT's Article XX(a) and "Conventional" Rules of Interpretation**

APPENDIX

GENESIS OF ARTICLE XX(a) GATT

US-Proposals	US-Draft Charter	London/New York Drafts	Geneva Draft	Havana Charter	GATT
Section G. General Exceptions	Art. 32. General Exceptions to Chapter IV	Art. 37. General exceptions to Chapter V	Art. 43. General Exceptions to Chapter IV	Art. 45. General Exceptions to Chapter IV	Art. XX. General Exceptions
The undertakings in this Chapter should not be construed to prevent members from adopting or enforcing measures:	Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any Member of measures	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 Chapter V shall be construed to prevent the adoption or enforcement by any Member of measures:	Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Member countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Chapter shall be construed to prevent the adoption of enforcement by any Member of measures	1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Member countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Chapter shall be construed to prevent the adoption of enforcement by any Member of measures	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:
1. necessary to protect public morals;	(a) necessary to protect public morals;	(a) necessary to protect public morals;	I. (a) necessary to protect public morals;	(a) (i) necessary to protect public morals;	(a) necessary to protect public morals;
				(ii) necessary to the enforcement of laws and regulations relating to public safety;	