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Can Human Rights Violations Constitute Public Morals under the Article XX(a) of the GATT and Article XIV(a) of the GATS?[1]

The article considers the problem of interrelation between human rights and internationa trade law. The article studies whether human rights are banished from international trade law to such an extent that even fundamental human rights cannot be invoked by the Panel and the AB to challenge the public morals argument invoked by WTO members under the Article XX(a) of the General Agreement on Tariffs and Trade (hereinafter, GATT) and Article XIV(a) of the General Agreement of Trade in Services (hereinafter, GATS). The article maintains that international trade law doesn't enable effective protection of human rights, since human rights law is not applicable in the World Trade Organization; moreover, the legal construction of the Article XX(a) of the GATT and the Article XIV(a) of the GATS do not ban trade restrictive measure, which contradicts human rights.

Key words: *World Trade Organization, Human Rights, Public Morals, Necessity Test, Chapeaux of the Article XX of the GATT and Article XIV of the GATS.*

1. Introduction

Scarsity of judgements on public morals exception under Article XX(a) of the GATT and Article XIV(a) of the GATS, triggers increasing interest towards the issue of public morals. The public morals is much accommodating notion and it may cause significant jolting in operation of the WTO agreements.

There is an anticipation that the judicial practice of the WTO dispute settlement system will be developed regarding the public morals exception so that, it will be possible to strengthen role of human rights significantly within the framework of international trade law. Though, with regard to the issue of public morals exception, careful attitude is noticeable. It can be explained by existence of threat that moral values can be used for disguising protectionist purposes of member states. This risk plays somehow hindering role for preventing operation of conception of public morals with full normative potential, which may have negative impact on full-fledged integration of human rights in the WTO system under the auspices of public morals exception.

Considering the afore-said, attempt of human rights intervention in international law through the concept of public morals cannot be considered as an optimal way; moreover, in certain cases public morals may even contradict to human rights. In such case, public morals does not support protection of human rights in international trade system, but, on the contrary, directly contradicts to interests of protection of its even most basic principles.

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[1] The article is open for discussion.

The article is dedicated to the problem of interrelation of human rights and internstional trade law. Specifically, the article studies whether human rights are banished from international trade law to such an extent that even fundamental human rights cannot be invoked by the dispute settlement bodies of the WTO – the Panel and the AB to challenge the public morals argument invoked by WTO members under the Article XX(a) of the GATT and Article XIV(a) of the GATS.

For the above-mentioned purpose, two main issues are covered in the paper. The first issue concerns status of international human rights' law in the World Trade Organization. Specifically, it analyses whether human rights are applicable law within the WTO. Within the framework of the second issue it is analyzed whether public morals exception can accommodate human rights violations. The second issue involves three sub-issues, which are separately discussed in the paper: whether the concept of public morals is reconcilable with violations of human rights; whether public morals which contradicts to human rights meets the necessity test; and finally, whether public morals, conflicting with human rights complies with requirements of the chapeau of the Article XX(a) of the GATT and the Article XIV(a) of the GATS.

2. World Trade Organization and Human Rights – What Extent of Integration Is Allowed?

Complexity of the issue, whether international law of human rights has presence within the WTO, is that representatives of both pro and anti - human rights integration views have convincing arguments about the issue for supporting their positions. From the viewpoint of those, who adhere to an idea of inflow of international law of human rights into the WTO system, human rights form integral part of international trade law. On the contrary, from the perspective of those, who are not convinced that human rights are entrenched in international trade law, the two legal systems have high degree of autonomy and their influence on each other is insignificant.

The support of the view that human rights form part of international trade law can be found in the UN Charter (the Charter). In the international treaty, having the supreme legal force - the UN Charter human rights have central place.[2]

Considering the meaning, which was given to human rights by the Charter, it can be claimed without exaggeration that human rights gained the status of constitutional norms in modern international law,[3] creating necessity of "recognizing, promoting, protecting, and implementing human rights at all levels of national and *international relations*…"[4] (highlighted by me). On this backbone, any international system would be suicidal, if it doesn't take take due consideration of human rights[5] and,

2 Article 103 of the UN Charter, 1945.

3 *Petersmann E.U.*, Human Rights and International Economic Law in the 21st Century. The Need to Clarify their Interrelationships, Journal of International Economic Law, 4(1), 2001.

4 UN General Assembly "Declaration of the Right to Development, Resolution, Resolution 41/128, 4th of December, 1986 (Petersmann E.U., Human Rights and International Economic Law in the 21st Century. The Need to Clarify their Interrelationships, see. fn. 3)

5 *Yarwood L.*, Trade Law as a Form of Human Rights Protection?, NUJS Law Reviw, 3, 2010.

hence, it is less conceivable that human rights are neglected in any field of international law, including international trade law.

The view that human rights are inevitably mirrored in international trade law, is further reinforced by the fact that member states of the WTO are parties to universal or regional human rights' agreements. In the light of obligations undertaken under these instruments it seems that the state will not bind itself by such international agreements, which may be in conflict with human rights. [6]

Furthermore, even the WTO agreements themselves indicate that human rights are not irrelevant in the context of international trade law. For instance, the preamble of the Marrakesh Agreement maintains that raising standards of living, ensuring full employment, increasing global welfare, promoting sustainable development and protecting environment represents one of the central objects of concern in the world trade system[7] and "draw[s] striking similarity, both in language and essence, with human rights."[8] In addition, the fact that Article XX of the GATT and Article XIV of the GATS permits deviating from objective of global trade liberalization in favor of such humanities, which directly or indirectly boil down to the interests of protecting human rights, shows that international trade law doesn't foreclose human rights.

At the same time, the view that human rights should be *a priori* granted predominance over trade interests and hence, should be granted wide endorsement within the WTO system "would be somewhat simplistic".[9] Some Articles of the DSU[10] highlight that the WTO Panel and the AB have extremely limited jurisdiction, making it in view of some experts fairly "nonrealistic" to integrate human rights in international trade law disputes.[11]

Particularly, according to the Article 1(1) of the DSU, the Panel and the AB can consider only disputes under the covered agreements, which are exclusively international trade agreements.[12] At the same time, as the International Law Commision explained: "A limited jurisdiction does not ... imply a limitation on the scope of the law applicable in the interpretation and application of [WTO] treaties ... While the [DSU] limits the jurisdiction to claims which arise under the WTO covered agreements only, there is no explicit provision identifying the scope of applicable law."[13]

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6 *Zagel G.M.*, Human Rights Accountability of the WTO, *Human Rights and International Legal Discourse*, 1, 2007, 340-355.

7 *Powell S.J.*, The Place of Human Rights Law in World Trade Organization Rules, Florida Journal of Iternational Law, №16, 2004, 220-221.

8 *Yigzaw D.A*., Hierarchy of Norms, The Case for Primacy of Human Rights WTO Law, Suffolk Transnational Law Review, 2015, 40.

9 *Kanade M*., Human Rights and Multilateral Trade:A Pragmaic Approach to Understanding the Linkages, The Journal Jurisprudence, 2012, 396.

10 See Articles 1(1), 7(1) and 7(2), as well as Articles 3(2) and 19(2)of the Understanding on Rules and Procedures Governing the Settlement of Disputes (1994).

11 *Schultz J*., Ball R., Trade as a Weapon? The WTO and Human Rights-based Trade Measures, Deakin Law Review, №12, 2007, 43.

12 See the Appendix I of the DSU.

13 International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN GAOR, 5 81h sess, UN Doc A/CN.4/L.682 (13 April 2006) 28-9 [45] ('ILC Fragmentation Report'). The same view is shared by Joost Pauwelyn,

Besides, according to Articles 7(1) and 7(2) of the DSU member states can present complaints to the WTO dispute settlement bodies only with regard to the covered agreements.

DSU includes other Articles, which impugn competency of the WTO dispute settlement bodies to consider issues of human rights protection. Special mention should be made of Article 3(2). Specifically, according to the Article 3(2) "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements. Consequently, as the AB maintained in *Mexico – Tax Measures on Soft Drinks and Other Beverages* WTO dispute settlement bodies may not "determine rights and obligations outside the covered agreements".[14]

Notwithstanding the above-mentioned Article of the DSU, the idea of integrating human rights in the WTO system does not lose the topicality and attempts are made to show that human rights are organic part of international trade law.

The opinion that, the applicable law of the WTO dispute settlement bodies can be broader concept than the covered agreements, can be somehow grounded in the text of the DSU, particularly in the Article 11. According to the Article 11 of the DSU a panel should make an "objective assessment of the matter before it, including … of applicability of and conformity with the relevant covered agreements, and ***make such other findings*** as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements" (highlighted by me). According to Thomas Schoenbaum, the Article 11 represents "implied power clause which should be interpreted broadly so that panels and Appellate Body can decide all aspects of a dispute",[15] among them, seemingly, the aspects concerning human rights.

Other attempt of injection of human rights within the scope of international trade law are made through the Article 31(3)(c) of the VCLT. [16] According to the Article 31(1) of the VCLT, when interpreting international agreements, we should consider appropriate context of relevant international agreements. On its term, when defining the context according to the Article 31(3)(c) of the VCLT "any relevant rules of international law applicable in the relations between the parties" should be considered. Those, who are

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who considers that we should distinguish: on one side, the jurisdiction of the WTO dispute settlement bodies and on the other side the applicable law by the Panel and AB. Accordingly, Pauwelyn concludes, that though the jurisdiction of the WTO dispute settlement bodies includes only the covered agreements, applicable law within the WTO dispute settlement system is more than simply covered agreements (See *Pauwelyn J.*, How to Win A WTO Dispute Based on Non-WTO Law? Journal of World Trade, №37, 2003 (see *Guzman A.T., Pauwelyn J.,* International Trade Law (New York: Wolters Kluwer Law & Business), 2012, 417-418).

14 Appellate Body Report, Mexico Tax Measures on Soft Drinks and Other Beverages, WTO Doc WT/DS308/AB/R, AB-2005-10 (6 March 2006) [56].

15 *Schoenbaum T.*, WTO Dispute Settlement: Praise and Suggestions for Reform, International and Comparative Law Quarterly, №47, 2000, 653 (see *Marceau G.*, WTO Dispute Settlement and Human Rights, European Journal of International Law, №13, 2002, 764).

16 Pursuant to the Article 3.2 of the DSU- covered agreements of the WTO are to be interpreted in accordance with customary rules of interpretation of public international law. The VCLT codifies rules of customary international law of treaties, *inter alia*, rules on treaty interpretation. (*Gabčíkovo-Nagymaros Project,* I.C.J., 1997, Paragraph 46).

persuaded that human rights should be read into international trade law, bring the argument that according to the Article 31(3)(c) of the VCLT, international trade law should be interpreted in the light of system of international law as a whole, including, international law of human rights. At the same time, we should keep in mind that the Article 31(3) of the VCLT is not opening the door of international trade law too wide for other fields of international law. As the WTO Panel stated in the case *EC-Biotech,* according to the Article 31(3)(c) of the VCLT covered agreements imply only those agreements parties of which all member states of the WTO are.[17] In other words, for the purposes of international trade law only those norms of international law of human rights can be applied, which are recognized by all members of the WTO. Such norms are not few in number, a whole bunch of universal international instruments exist in the field of international human rights law, which are acknowledged by most of the states and which are *per se* obligatory for states or legally binding by power of customary international law.

Acceptance of the described legal arguments for implementing human rights in international trade law is far from unanimous. Moreover, the mentioned arguments cause more skepticism, than support. However, it is a fact that there do not exist sound arguments which would unchallengedly deny possibility of incorporation of international law of human rights in international trade law.

Considering the above mentioned the conclusion may be drawn that interrelation of international law of human rights and international trade law, is quite vague. On the background of this vagueness, the most uncontroversial inference would be that international law of human rights does not have status of actual law within the system of the WTO. However, considering the practice of settling the disputes within the WTO, it is less likely that the WTO dispute settlement bodies will come into confrontation with international law of human rights. It is the fact that conflict situation between international trade law and international law of human rights has happened rarely up to now.[18] As it seems, the WTO Panel and AB try not to create problems to member states and interpret the covered agreements so that these agreements do not come into conflict with international law of human rights.

Besides the fact that the WTO Panel and the AB try not to create legal problems to states, the principle of good faith interpretation of international agreements require to avoid conflicts between different international agreements.[19] Considering this, presumption against conflict, which exist in international law, should be embedded within the scope of dispute settlement system of the WTO,[20] for providing "coordinated" co-existence between international trade law and international law of human rights.[21]

Coordinated co-existence of international trade law and international law of human rights is the most suitable interpretation of interrelation of these two systems of international law from the systemic point of view. International trade law represents part of international law and accordingly, it is not

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17 *EC — Approval and Marketing of Biotech Products*, Panel Report, WTO, 2006, Paragraph 7.68.

18 *Hilpold P.*, WTO Law and Human Rights: Bringing Together Two Autopoietic Order, Chinese Journal of International Law, №10, 2011, 355.

19 *Sinclair I.M.*, The Vienna Convention on the Law of Treaties, (Manchester University Press, Manchester 1973), at 75**,** referring to II ILCYB 1966**,** at 50 (see *Hilpold P.*, WTO Law and Human Rights: Bringing Together Two Autopoietic Order, 356, see fn. 17).

20 *Marceau G.*, WTO Dispute Settlement and Human Rights, 791-795, see fn. 14.

21 *Hilpold P.*, WTO Law and Human Rights: Bringing Together Two Autopoietic Order, 354-357, see fn. 17.

correct to isolate it from other fields of international law, *inter alia*, from international law of human rights, which would cause unjustified fragmentation of international law.[22]

To sum up, international trade law has high degree of autonomy, though at the same time it is not isolated field and does not exclude possibility of being subjected to normative influence of other fields, including international law of human rights. Though this influence is restrained and is limited so that human rights law simply adjust interpretation and application of international trade law in the sense that it prevents interpretation and application of international trade in a manner, which is inconsistent with the obligations of a state under human rights law.

At the same time, the idea of full-fledged integration of human rights in international trade law is groundless. Neither the text of the covered agreements, nor general international law, except for the law of human rights, suggest that international law of human rights is acting law within the WTO system and accordingly neither the Panel, nor the AB may rely on it to legally challenge trade-restrictive measures, which are introduced for the purpose of protecting public morals and which represent obvious abrogation from human rights law.

The issue of admissibility of public morals, which conflicts with human rights law, is not exhausted here. The next question is whether the content and design of the Articles XX(a) of the GATT and Article XIV(a) of the GATS makes the public morals exception conceptually reconcilable with violations of human rights. The next chapter of the paper is dedicated to consideration of this issue.

3. Three-stage Test

3.1 Preface

According to the practice of the WTO Panel and the AB, assessment of trade restrictive measure, which is justified by the member state based on the the Article XX(a) of the GATT and Artcle XIV(a) of the GATS, is made by using three-stage test: first stage is determining whether ground of restricting of trade is really demand of public moral considerations; on the second stage necessity of this measure is tested; third stage is about determining compliance with the requirements of the chapeau of the Article XX(a) of the GATT and Artcle XIV(a) of the GATS.

Considering this the issue to be studied within the scope of this work is discussed in three stages. First, it is examined what the concept "public morals" means according to the WTO agreements and whether violations of human rights can represent public morals according to this concept. Afterwards, the issue, whether trade restrictive measure, adopted on the basis of public morals, which at the same time may represent violation of human rights, can be considered as necessary measure according to the Article XX(a) of the GATT and Article XIV(a) of the GATS, is analyzed. Finally the brief overview of the issue of compliance of such measure with the requirements of the chapeau of the Article XX(a) of the GATT or Article XIV(a) of the GATS is provided.

[22] Ibid, 357.

3.2 Public Morals and Violations of Human Rights

First question to be discussed is – whether violations of human rights can represent public morals. The best possibility of answering the question - whether violation of human rights may represent public morals according to the Article XX(a) of the GATT, was the case *China — Publications and Audiovisual Products.* The case was about restrictions on import and distribution of audiovisual products, sound recordings and publications imposed by government of China. In response to these restrictions, US brought a claim against China at the WTO Panel, alleging that China has violated its trade obligations under the China's Protocol of Accession,[23] the GATT[24] and the GATS[25]. One of the central issues for consideration by the Panel was whether a content review for the importation of cultural goods, operated through a system of selected import entities, was consistent with Article XX(a) of the GATT. China appealed to the interest of protection of public morals in order to justify restrictions, imposed on importers, which practically represented censure of printed and audiovisual products, as well as sound recordings, since as China stated these "cultural goods may have a negative impact on public morals".[26] Unfortunately, U.S did not raise an issue about the fact that the mentioned restriction may contradict to freedom of speech. Hence, the Panel either did not consider the issue whether it is acceptable to qualify violations of human rights as public morals, according to the Article XX(a) of the GATT.[27] The AB neither discussed the mentioned issue and consequently, in this case the chance of discussing the issue under consideration by the dispute settlement bodies of the WTO was lost. As Pauwelyn writes, this lost chance cannot not be assessed in favor of freedom of speech.[28]

Considering the fact that neither the Panel, nor the AB have discussed the issue whether the concept of public morals can imply violations of human rights, it is reasonable to refer to original source – first decision of the WTO Panel on public morals exception. It was first time when the concept of public morals was determined within the scope of international trade law. The mentioned decision was made in the case *US — Gambling* with regard to public morals exception as envisaged in the Article XIV(a) of the GATS. Decision made in the case *US - Gambling* on the concept of public morals still remains as controlling case, since nothing substantially new was added to the issue of what can be considered as public morals even in the recent *EC — Seal Products* case.[29]

The position of the Panel in the *US-Gambling* regarding the concept of public morals gives possibility of double interpretation. On one hand, the wide discretion of defining the concept of public

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23 Paragraphs 1.2, 5.1-5.2 of the Part I of the Protocol of Accession.
24 Article XI(1) of the GATT.
25 Article XVI and XVII of the GATS.
26 China — Publications and Audiovisual Products, WTO Panel Report, 2009, Paragraph 4.276-4.279.
27 Ibid, Paragraph 7.763.
28 *Pauwelyn J.*, Squaring Free Trade in Culture with Chinese Censorship: The WTO Appellate Body Report on China – Audiovisuals, Melbourne Journal of International Law, №11, 2010, 135.
29 *Flores Elizondo C.J.*, Case Comment, Manchester Journal of International Economic Law, Volume 11, Issue 2, 2014, 319-320.

morals of states was recognized. Specifically, according to the Panel, ordinary meaning of public morals "denotes standards of right and wrong conduct maintained by or on behalf of a community or nation".[30] Besides, the Panel also considers the fact that the content of the concept "public morals" "can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values".[31] Highlighting that public morals is based on the believes which exist in certain state and which are conditioned by social, cultural and religious traditions of this state, proves that the state has high level of autonomy when defining the concept of public morals.

Accepting broad determination of the concept of public morals comes in unison with that general attitude, established by the practice of the dispute settlement bodies of the WTO. For instance, the AB stated in the case *US — Shrimp* that "right to invoke one of [Article XX of the GATT] exceptions is not to be rendered illusory",[32] danger of which would exist in case of narrow and restricted interpretation of the Article XX of the GATT and Article XIV of the GATS.

At first glance, such broad interpretation discretion gives authority to member states to justify trade restrictive measures by requirements of public morals, even if public morals contradict to international law of human rights, as recognized by the majority of international community. But it is wrong to claim that wide interpretation authority implies unlimited freedom of state to define the content of public morals. It is noteworthy, that wide interpretation authority of the "public morals" concept is supported by other international structures as well. For instance, the European Court of Human Rights stated that "By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of … requirements [of public morals]".[33] As the case of *Handyside v United Kingdom* shows, the ECtHR is supporter of wide interpretation of public morals, though it does not mean that such approach is neglecting human rights – it is inconceivable that the ECtHR supported such wide interprettaion of public morals which might pose threat to the interests of protection of human rights.

Moreover, the nuances given in the decision on the case *US-Gambling* suggest that the Panel is not supporting to give unlimited freedom of determining the concept of "public morals" to the state. First, it should be mentioned that the Panel states that members should be given "some" scope to determine and apply for themselves the concepts of "public morals"[34]. Highlighting "some scope" by the Panel means that the Panel considers that the authority of the state to determine the concept of public morals is not unrestrained.[35]

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30 *US-Gambling,* Panel Report, WTO, 2004, Paragraph 6.465.

31 Ibid, Paragraph 6.461.

32 US-Shrimp, AB Report, WTO, 1998, Paragraph 156.

33 Handyside v United Kingdom, Application №5493/72, ECtHR, 1976, Para 48.

34 US-Gambling, Panel Report, WTO, 2004, Paragrph 6.461.

35 It is noteworthy that Nicolas F. Diebold evaluates indication of the WTO Panel that states have freedom to determine "some scope" of public morals not as restriction of the states' authority of defining public morals, but, on the contrary, as states' high level of freedom to outline the concept of public morals. According to the author, "some scope" denotes universally recognized right of the WTO member to determine own level of protection, in which it has unrestrained freedom. As Diebold considers these two

Besides, it is noteworthy that for corroborating the fact that prohibition on gambling is prompted by requirements of public morals, the court refers to practice of other states that gambling is against public morals.[36] Reliance on the practice of other states suggests that viewpoint of individual states on public morals is not absolute and the position of other states should be given due consideration.

Great importance of that part of the Panel's decision, where the Panel indirectly talks about necessity of considering perspectives on public morals of other countries, is demonstrated by the huge attention of scholarly works to this excerpt of the judgement.

Marwell, for instance, writes, that when the Panel relied on practice and views of foreign countries regarding the gambling, it implicitly determined the concept of public morals as morals of majority.[37] The author says that "The decision, at least implicitly, suggests that States invoking public morals defense will be expected to present evidence of similar practice by other states. Taken to an extreme, the *Gambling* doctrine might be read as implying that states cannot unilaterally determine public morals."[38] Author himself has the view that if the WTO member states are able to provide relevant evidences they should be unrestraindly free to define the concept of public morals[39] and this view has recently gained some support in scholarly works.[40] Though at the same time Marwell himself admits that today jurisprudence of the WTO Panel and the AB and positions of member states adhere to more universal rather than unilateral approach in defining public morals.[41]

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terms "some scope" and "own level of protection" are identical in meaning and he thinks that when determining the content of the term "some scope", member state has same level of freedom as in defining "own level of protection" (*Diebold N.F.*, The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole, Journal of International Economic Law 11(1), 2007, 51-52). It is hard to agree with Diebold in this opinion, as according to jurisprudence of the WTO, the term - "own level of protection" – should employed on the second stage of the so-called three-stage test, when the necessity of using trade restrictive measure for the purpose of protecting legitimate interests listed in the Article XX(a) of the GATT or the Article XIV(a) of the GATS is evaluated. In the case *US-Gambling,* the Panel uses the term "some scope" not on the second stage of the three-stage test, but on the first stage, when the Panel studies whether banning of gambling falls within the scope of the concept of "public morals". As Diebold himself admits, it is a mistake to use the term "own level of protection" on the first stage of the test (Diebold N.F., The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole, 53). Considering this it is legitimate to ask, why should we think that the court made a mistake and used the term in the wrong place. There is no ground for thinking that the Panel used the terms "some scope" and "own level of protection" as interchangeable concepts. Moreover, according to the ordinary meaning of the mentioned two terms it is doubtful that the term "some scope" means such high level of autonomy in determining its content by the state, as determination of "own level of protection" implies.

36 *US-Gambling,* Panel Report, WTO, 2004, Paragraph 6.471-6.473.

37 *Marwell J.C.*, Trade and Morality: The WTO Public Morals Exception After Gambling, New York University Law Review, Vol. 81, 806.

38 Ibid, 817.

39 Ibid, 824-826.

40 *Nachmani T.S.*, To Each His Own: The Case for Unilateral Determination of Public Morality under Article XX(a) of the GATT, University of Toronto Faculty of Law Review, № 71, 2013.

41 *Marwell J.C.*, Trade and Morality: The WTO Public Morals Exception After Gambling, 820-823, see fn.32.

In fact, Marwell's view that in the case *US-Gambling* the Panel and the AB adopted pro-universal approach in interpreting public morals concept, is disputable. The Panel's decision on the case *US-Gambling* was not crucial in solving the long-standing unsettled issue - giving privilege to universal or unilateral approach to defining the concept of public morals.[42] Due to difficulty of the issue it was expectable. It is worth mentioning that due to the complexity of the problem, even before the WTO Panel and the AB discussed the issue what "public morals" mean for pruposes of the WTO agreements, Feddersen stated, that the concept should stay "indefinite"[43] and it should be determined considering all factual circumstances and factors of each particular case.[44] Though, at the same time Feddersen specified that "Such method lies at intersection of a contracting party's national sovereignty with the minimum of a uniform interpretation of an internationally binding agreement".[45]

The approach, that the concept of public morals in every certain case should be determined in the context of individual state, but not averting universal values, is mostly acceptable. It gives opportunity to prevent those shortcomings, which accompanies universalist and unilateralist approaches. As Wu writes, with universalist approach there is a risk that the Article XX(a) of the GATT and the Article XIV(a) of the GATS will become completely "useless", as number of values shared by all states, is insignificant.[46] Accordingly, grounds, which may be qualified as moral grounds for trade restriction, would be extremely narrow.[47] Besides, Wu states that giving freedom to the states to determine unilaterally the concept of public morals will cause danger of manipulation: the states may overexploit the right to introduce the trade-restrictive measures with mask of public morals.[48] Charnovitz goes even further and states that the concept of public morals established by the state unilaterally will not be "legitimate" and necessarily will require "internationalization".[49]

Identifying shortcomings of universalist and unilateralist approaches, Wu offers framework for integrating mutually excluding universal and unilateral conceptions of public morals. Specifically, Wu maintains that "countries need not agree on the specifics of the norm itself, just that the category as a whole constitutes a moral issue. For example, states may differ about the specific religious restrictions to be imposed on imports of food and beverages, but most would recognize that the "category writ large

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42 *Diebold N.F.*, The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole, 51, see fn.30.

43 It is worth mentioning that even drafters opted to leave the concept undefined. For the detailed drafting history of the Article XX(a) of the GATT see *Charnovitz S.*, The Moral Exception in Trade Policy, Vanderbildt Journal of International Law, №38, 1998.

44 *Feddersen C.T.,* Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and "Conventional" Rules of Interpretation, Minnesota Journal of Global Trade ,№7, 1998, 112-114.

45 *Feddersen C.T.*, Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and "Conventional" Rules of Interpretation, 114, see fn. 43.

46 *Wu M.*, Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine, Yale Journal of International Law, №33, 2008, 232.

47 Ibid, 232.

48 Ibid.

49 *Charnovitz S.,* The Moral Exception in Trade Policy, Vanderbilt Journal of International Law, №38, 742.

qualifies as an issue of public morality."[50] In other words the author thinks that public morals should be determined by each state individually, but the state's view on public morals should be understandable for other states, so the states should be convinced that this or that trade restrictive measure is indeed prompted by concerns of public morals, despite the fact whether similar view about public morals is shared by them unilaterally or not.

It is noteworthy, that the attitude, according to which the state is given discretion to determine the concept of public morals or other categories so that at the same time this determination should be understandable for international community of the states, is well established in international structures. For instance, the EU Court of Justice, which was discussing in case *Omega Spielhale* how acceptable it is on the basis of public policy of Germany to restrict the freedom of providing services, stated: "it is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected… [Thus] the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State."[51]

Wu's approach enables to bring consistency in the concept of public morals, as defined by the Panel and lately shared by the AB in the case *US-Gambling*. Specifically, the approach proposed by Wu, gives possibility of co-existence of universalist and unilateralist elements of public morals within the scope of single concept. Consequently, decision in the case *US-Gambling* can be seen not as judgement full of contradictory elements, but as rationalized decision, which gives possibility that individual views of the state about public morals be viable within the scope of even such multinational system like the WTO.

In the light of the afore-said we can conclude that, when in the *US-Gambling* the Panel and the AB stated that public morals should be based on the views existing in separate society about public morals, actually, the Panel and the AB recognize that individual state itself has decisive role in determining the concept of public morals. Though when the Panel refers to practice of other countries, it can be explained as attempt of not endorsing such concept of public morals, which will be incomprehesible for other countries. It should be highlighted, that incomprehesible does not mean different. In other words, for recognzing some rule as moral rule, it is not necessary that other countries share or accept analogue or somehow similar rule, but it should be understandable and convincing for other countries that appropriate rule can indeed be the moral rule in the given society.

Having determined public morals as understandable and convincing for all WTO members moral standards, is it possible that the WTO Panel and the AB accept violations of human rights as claims of public morals? The given determination of public morals is somehow a filter, which will not give opportunity to very serious and grave violations of human rights, which are completely unacceptable for

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50 *Wu M.*, Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine, 243, see fn. 45.

51 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn, Case C-36/02, European Court of Justice (First Chamber), 2004, Paragraphs 37-38, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-36/02>.

international community as a whole, to be qualified as public morals. Other less serious types of violations, will probably pass this filter, as, for instance, it is still understandable and convinsing for modern world that despite their unacceptability, restrictions of women's rights are deeply embedded in religion and culture of particular countries and represents component of public moral. This conclusion leads us to the next chapter, which covers the issue whether less serious violations of human rights satisfy requirements of necessity test.

3.3 The Necessity Test

The necessity test for the public morals exception is established by the Panel in the case *US-Gambling*. In applying the necessity test the Panel and the AB engage in "weighing and balancing" of the importance of interests or values that the challenged measure is intended to protect and asses the extent to which the challenged measure contributes to the realization of the ends pursued by that measure, as well as the trade impact of the challenged measure.[52]

Will trade restrictive measures, imposed on the ground of public morals and violating human rights, pass the test?

It is noteworthy that in the case *US-Gambling*, when discussing importance of interests and values for which challenged trade restrictive measure was introduced, the Panel focused not on importance of protection of public morals as such, but on importance of social purposes and interests, which the ban on gambling fostered. The Panel emphasized that the challenged measure confronted perverse social practice, such as money laundering and corruption.[53] Considering such approach and analysis of the issue by the Panel, it seems that only protection of moral values is not enough cause and that trade restrictive measure should also have so called "instrumental" social or other rational.[54]

Though, as subsequent practice shows, protection of public morals as such is considered to be of central concern. As the Panel in the case *China — Publications and Audiovisual Products* stated: "undoubtedly … the protection of public morals ranks among the most important values or interests pursued by Members".[55] In the case *EC — Seal Products* the Panel stated that "protection of … public moral concerns is indeed an important value or interest".[56] Considering this, the element of necessity test, which implies assessment of importance of interests or values that the challenged measure pursues becomes superfluous and therefore, it can be considered that any measure established on the ground of public morals automatically satisfies the first element of the given test.

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52 US-Gambling, Panel Report, WTO, 2004, Paragraph 6.4777.

53 Ibid, 6.491.

54 *Howse R.*, *Langille J.,* Permitting Pluralism:The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Non-instrumental Moral Values, The Yale Journal of International Law, Vol. 37, 2012.

55 *China — Publications and Audiovisual Products*, WTO Panel Report, 2009, Paragraph 7.817.

56 EC — Seal Products, WTO Panel Report, 2013, Paragraph 7.632.

Actually, in the context of public morals exception the necessity test is perceived as "minimum derogation principle."[57] In other words, this test centers on the second and third elements, namely on extent to which the challenged measure contributes to the realization of the ends pursued by that measure and on impact the measure has on trade, to find out whether it is the least trade restrictive measure.[58]

The state which imposes trade restrictive measure, should demonstrate *prima facie* case of necessity and show that this measure is proportional to the purpose of public morals protection. Afterwards, burden of proof shifts to complainant, who has to produce the evidence that there exists least trade restrictive alternative,[59] which is not "merely theoretical in nature", but is "reasonably available".[60]

Moreover, the alternative measure should ensure the same level of protection as the challenged measure. As the AB has mentioned several times, determination of "level of protection" is prerogative of relevant state.[61] Speifically, with regard to the public morals exception the Panel in the case *US-Gambling* has stated the states should have discretion in ascertaining "different levels of protection even when responding to similar interests of moral concern".[62] Accordingly, if the state protects its own public morals with strict standard, which inevitably implies restriction of human rights, it should be considered as its discretion and other states should not apply less standard of protection when proposing alternative measures. Hence, the alternative will most likely involve human rights' violations of the same gravity. In other words, if protection of public morals inseparably is related with restriction of human rights, then any alternative measure will almost certainly cause restriction of human rights of similar magnitude.

To sum up, the measure introduced for protecting public morals, automatically satisfies the first element of the necessity test. As for the second and third elements of the test, they simply inquire whether there exists least *trade* restrictive measure and they are not concerned with existence of less human rights' restrictive measure. In other words, these elements of the test do not give possibility to reject trade restrictive measure on the ground that it conflicts with human rights. Moreover, even with alternative trade restrictive measure level of human rights restriction will apparently stay unchanged, because the level of protection of public morals should be maintained on the level as determined by the defendant.

Conclusion that the necessity test will not contribute anything to protection of human rights, triggers discussion of the issue whether restriction of human rights may be ground for challenging trade restrictive measure under the chapeau of the Article XX of the GATT and Article XIV of the GATS.

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57 *Kevin C.,* Kennedy, International Trade Regulation, 270 (Vicki Been et al. eds., Aspen 2009) (citing Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Nov. 6, 1998)) (see *Doyle C*., Gimme Shelter: The "Necessary Element" of GATT Article XX in the Context of the China –Audiovisual Products Case, Boston University International Law Journal, №29, 2011, 152).

58 US-Gambling*,* AB Report, WTO, 2005, Paragraph 308.

59 Ibid, Paragraph 310.

60 Ibi., Paragraph 308.

61 *Korea – Various Measures on Beef*, AB, WTO, Para. 2000, 176; *EC-Asbestos,* AB, WTO, 2000, Paragraph168.

62 US-Gambling, the WTO Panel Report, 2004, Paragraph 6.461.

3.4 Chapeau of the Article XX of the GATT and Article XIV of the GATS.

According to the chapeau of the Article XX of the GATT and the Article XIV of the GATS exceptions under these articles should not be "applied in a manner which would constitute means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade".

As the AB stated in the case *US-Shrimp*, chapeau embodies good faith principle and its purpose is not to allow abusing of exceptions under the Article XX of the GATT and Article XIV of the GATS.[63] Though as it seems from the text, for the chapeau good faith means prevention of discrimination between the states only. It does not focus on other aspects of discrimination and says nothing about the unjustifiabilty of, for instance, discrimination on the basis of gender between individuals. In other words, the chapeau enforces not the ban of discrimination generally, but specifically ban of discrimination between states specifically.

The AB also stated in the case *US-Shrimp* that the chapeau prohibits "*abus de droit"*, in other words, "the abusive exercise of a state's rights".[64] But according to the AB abusive exercise of rights implies only "breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting".[65] On the background of this pronouncement an attempt can be made to claim that a state, which invokes public morals exception in breach of its human rights' obligations, is abusing its rights. But this claim does not seem to have success, since put in context with the other parts of the judgment the pronouncement in question clearly implies abuse of rights and obligations of member states under the GATT and not under other treaties, operating outside the WTO system.

Considering the above-mentioned, chapeau will not be effective tool for preventing relying of states on such public morals which essentially amount to violatons of basic human rights principles.

4. Conclusion

At the current stage of development, there are no real mechanisms for integrating human rights in international trade law. International law of human rights is not operative within the scope of international trade law. Accordingly, neither the Panel, nor the AB can rely on international law of human rights for rejecting such public morals, which are in conflict with human rights. Besides, neither content, nor design of public morals exception secures from appealing to public morals at the dispute settlement structures of the WTO, when public morals clearly contravene to interests of protection of human rights. Consequently, public morals, which obviously contradicts to human rights, might be fully endorsed at the WTO. This inevitably leads to conclusion that even when human rights can release barriers of international trade, WTO has very limited legal capacity to advert to international law of human rights and on the pretext of protecting human rights safeguard trade interests.

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63 US-Shrimp, AB Report, WTO, 1998, Paragraph 158.
64 Ibid.
65 US-Shrimp, AB Report, WTO, 1998, Paragraph 158.

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