

Generalization of Public Moral Measures in the Context of International Trade and WTO Legal Regulation — Analysis of the Panel Report on *US — Tariff Measures*

Hu Jianguo, Gao Yuxin*

Abstract: Since the establishment of WTO and especially in recent years, some Members have frequently invoked public morals exception to justify their trade-restrictive measures. Public moral measures in the context of international trade have increasingly shown the trend of becoming generalized. Since the case of *US — Gambling*, WTO panels and the Appellate Body have imposed almost no legal check on the “public morals” claimed by responding Member. The Panel on *US — Tariff Measures* followed a similar approach and basically gave up the “design test”. Despite the Panel’s emphasis on “a genuine relationship of ends and means” between the measures at issue and the protection of public morals during the analysis of the contribution elements of the necessity test as well as its implicit rejection of the “economic pressure” argument putting forward by the United States, there is still a major problem: the US Section 301 tariff measures will probably be justified under WTO public morals exception if they are duly designed. By extension, the United States can lawfully adopt unilateral measures to cope with so-called unfair competition issues, such as industrial subsidies and state-owned enterprises, which will significantly affect China. China should firmly object to infinite expansion of the concept of “public morals” based on the context of Article XX(a) of GATT1994 and an objectively narrowing interpretation. China should also actively use the WTO dispute settlement mechanism to affect jurisprudential developments to restrict the increasing abuse of WTO public morals exception.

Keywords: Generalization of public moral measures, WTO public morals exception, *US — Tariff Measures*

Since the establishment of WTO and especially in recent years, some Members have frequently invoked public morals exception to justify their trade-restrictive measures. Public moral measures in the context of international trade have increasingly shown the trend of becoming generalized. Since the case of *US — Gambling*,

* Hu Jianguo, Associate Professor, Nankai University School of Law. Email: hylyhjg@126.com.

Gao Yuxin, Master Degree Candidate, Nankai University School of Law.

This paper is the research result of the Major Projects of National Social Science Fund in 2020 titled “Research on Rule of International Law Related to Free Trade Zone with Chinese Characteristics” (20&ZD205).

WTO panels and the Appellate Body have imposed almost no legal check on the “public morals” claimed by the responding Member. The Panel on *United States — Tariff Measures on Certain Goods from China* (US — Tariff Measures) followed a similar approach and basically gave up the “design test”.

Based on WTO dispute settlement practices relating to public morals exception and particularly the Panel Report on *US — Tariff Measures*,¹ this paper intends to discuss the generalization of public moral measures in the context of international trade and WTO legal regulation. Since the WTO’s provision on public morals exception is very brief, the generalization issues of public moral measures are mainly regulated by the jurisprudence developed by the WTO panels and the Appellate Body in its interpretation and application of the public morals exception under Article XX(a) of the *General Agreement on Tariffs and Trade 1994* (GATT 1994) or Article XIV(a) of the *General Agreement on Trade in Services* (GATS) in individual cases. This paper will mainly analyze the following issues: first, to summarize main manifestations of the generalization of public moral measures in the context of international trade; second, based on major factors of the test of the public morals exception, to analyze and comment on the main rulings of Panel Report on *US — Tariff Measures*, especially the jurisprudential development related to the holistic review approach, the weakening of the “design test” step, and the standard of “a genuine relationship of ends and means” in the contribution analysis that is a part of the necessity test; third, according to the Panel’s jurisprudence, to analyze whether the US Section 301 tariff measures can pass the test of the public morals exception if duly designed; fourth, to point out the significant influence of the Panel’s ruling and propose some suggestions.

I. MAIN MANIFESTATIONS OF THE GENERALIZATION OF PUBLIC MORAL MEASURES IN THE CONTEXT OF INTERNATIONAL TRADE

Public moral measures in the context of international trade refer to trade measures that a WTO Member adopts based on public moral reasons or during the WTO litigation process makes a “public morals” defense for it. Judging from international trade practices, the latter case prevails. Whether or not a trade

¹ Report of the Panel, *United States — Tariff Measures on Certain Goods from China*, WT/DS543/R, Circulated on September 15, 2020.

measure is a public moral measure on its face depends on the reasons that a Member give for it in advance or during the WTO litigation. Whether a trade measure is a real public moral measure depends on an affirmation by the WTO panel and the Appellate Body but does not need meet all the requirements of WTO public morals exception. As long as a trade measure “is designed to” protect public morals, despite its necessity or the conformity of its application with the requirements of the chapeau under Article XX of GATT 1994, it can be considered as a real public moral measure.

The generalization of public moral measures in the context of international trade mainly have two manifestations: first, public morals exception under Article XX of GATT 1994 and Article XIV of GATS are referred to during WTO litigations by infinitely expanding the scope of the concept of “public morals”; second, pure economic measures with nothing related to public morals are disguised as public moral measures, e.g. US Section 301 unilateral sanctions/coercive measures were disguised as public moral measures.

A. Infinite Expansion of the Scope of “Public Morals” Concept

The term “public morals” is not defined in the text of Article XIV(a) of GATS and Article XX(a) of GATT 1994. WTO panels and the Appellate Body interpreted “public morals” as “standards of right and wrong conduct maintained by or on behalf of a community or nation”, holding that the content and scope of the “public morals” concept may vary per different WTO Members subject to the influence of each Member’s value system and measures, and that the content of the “public morals” concept can also vary based on time and space, depending on a range of factors, including prevailing social, cultural, ethical, and religious values. Due to the broad nature of the “public morals” concept and the sensitivity of the involved issues, WTO panels and the Appellate Body have imposed basically no legal restraint on its scope.

Judging from WTO dispute settlement practices, WTO panels and the Appellate Body have accepted without exception the public moral objectives claimed by responding Member. In the case of *US — Gambling*, “preventing minors gambling and protecting pathological gamblers” was accepted as public morals; in the case of *China — Publication and Audio-Visual Products*, content banned in cultural goods such as violence or pornography, together with protecting Chinese cultural and traditional values, were accepted as public morals; in the case of *EC — Seal Products*, “animal welfare” was accepted as public

morals; in the case of *Colombia — Textiles*, cracking down on money laundering activities was accepted as public morals; in the case of *Brazil — Taxation and Charges*, bridging the social digital divide and promoting social inclusion was accepted as public morals. The policy objectives involved in the cases of *US — Gambling* and *China — Publication and Audio-Visual Products* being accepted as public morals was not highly disputed.² Animal welfare (involving EU's concerns of animal welfare in other Member's territory) in the case of *EC — Seal Products* being accepted as public morals triggered controversy for two reasons. Firstly, it may lead to a slippery slope effect when concerns of labor, human rights, and environmental issues within the territories of other Members will all be included in the scope of "public morals". Moreover, it triggers concerns about extraterritorial jurisdiction.³ Since this case, the responding Member has increasingly invoked the public morals exception for

2 Huang Zhixiong, Analysis of WTO Free Trade and the First Public Moral Case — *Antigua vs. US Network Gambling Service Dispute*, *Law Review*, No. 2, 2006; Hu Jianguo, Analysis of the Case of *Antigua vs. US Gambling*, *International Law Review of Wuhan University*, No. 2, 2007; Peng Yue, Trade and Moral — Legal Analysis of China-US Disputes over Cultural Products, *Social Sciences in China*, No. 2, 2009; Liu Yong, On Rules Regarding the Public Morals Exception within the WTO System — And Analysis of Disputes Regarding the Case of China-US Cultural Products Market Access, *Journal of International Trade*, No. 5, 2010; Peng Yue, On the Legality of the Objectives of Relevant Measures during the Application of Provisions on the Public Morals Exception — Based on Analysis of WTO Ruling Bodies' Evading Strategies, *Studies in Law and Business*, No. 3, 2012.

3 Wang Yan and Zhang Lei, The Non-discrimination and Necessity Analysis of Animal Welfare Measures under the WTO System and Development Dilemma — From the Perspective of the Case of *Canada vs. EU Seal Ban*, *International Economics and Trade Research*, No. 7, 2013; Qi Tong, The Debate between Animal Welfare and Free Trade — The Case of *Canada and Norway vs. EU Measures Prohibiting Seal Product Imports*, *Journal of Xiamen University (Arts & Social Sciences)*, No. 2, 2014; Hu Jianguo, The Debate between Animal Welfare and Survival Interests of Indigenous Groups under the Multilateral Trading System — Enlightenment of the WTO Appellate Body's Ruling in the Case of *EC — Seal Products*, *Chinese Review of International Law*, No. 3, 2015; Rob Howse, Joanna Langille & Katie Sykes, Animal Welfare, Public Morals and Trade: The WTO Panel Report in *EC — Seal Products*, *American Journal of International Law Insights*, Vol. 18, No. 2, January 29, 2014; Rob Howse, Joanna Langille & Katie Sykes, Sealing the Deal: The WTO's Appellate Body Report in *EC — Seal Products*, *American Journal of International Law Insights*, Vol. 18, No. 12, June 4, 2014; Simon Lester, The WTO Seal Products Dispute: A Preview of the Key Legal Issues, *American Journal of International Law Insights*, Vol. 14, No. 2, January 13, 2010; Gambardella, Maurizio, The EU Ban on Seal Products: Some Customs and WTO Open Questions (December 12, 2009), *Global Trade and Customs Journal*, No. 4-5, 2010; Peter L. Fitzgerald, "Morality" May Not Be Enough to Justify the EU Seal Products Ban: Animal Welfare Meets International Trade Law, *Journal of International Wildlife Law and Policy*, Vol. 15, 2011; Sykes, Katie, "Nations Like unto Yourselves": An Inquiry into the Status of a General Principle of International Law on Animal Welfare, *Canadian Yearbook of International Law*, Vol. 49, 2011; Robert Howse & Joanna Langille, Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values, *The Yale Journal of International Law*, Vol. 37, No. 2, 2012; Dorothee Cambou, The Impact of the Ban on Seal Products on the Rights of Indigenous Peoples: A European Issue (October 1, 2013). *The Yearbook of Polar Law*, Volume 5, No. 1, 2013, pp. 389-415.

handling with problems of economic nature. For instance, in the case of *Brazil — Taxation and Charges*,⁴ even though the public morals of “bridging the digital divide and promoting social inclusion” was seemingly involved, it essentially concerned Brazil encouraging the development of domestic high and new technologies by introducing localization policies. In the case of *US — Tariff Measure*, the United States further extended the “public morals” concept to the fair competition issues of economic nature.

B. In the Disguise of Public Morals Measures

In the case of *US — Tariff Measure*, the United States disguised pure economic interest/competition issues as “public morals”. It claimed that China’s unfair acts, policies, and practices had infringed upon US public moral concepts of “fair competition and fair play”, and then disguised tariff measures unilaterally implemented under Section 301 as public moral measures. Meanwhile, by virtue of the economic pressure theory, the United States declared that it would impose additional tariffs on China’s large-scale exports (particularly its second-batch products worth 200 billion USD) to force China to change the unfair acts, policies, and practices it asserted, thus expanding the scope of public moral measures and disguising Section 301 unilateral economic sanctions/coercive measures as public moral measures.

II. THE FIRST THRESHOLD OF WTO LEGAL REGULATION: THE UNDEFENDED CONCEPT OF “PUBLIC MORALS”

A. Definition of “Public Morals”

The term “public morals” is not defined in the text of Article XX(a) of GATT 1994. The Panel in *US — Tariff Measures* held that the ordinary meaning of the term “public morals” refers to a set of habits of life relating to right and wrong conduct (i.e. societal values) that belong to, affect or concern a community or a nation. This understanding accorded with prior panels which had considered that the term “public morals” denotes “standards of right and

⁴ About the case of *Brazil — Taxation and Charges* and the public morals exception, see Du Ming, Generalized Interpretation of Provisions on the Public Morals Exception under the WTO Framework and its Systematic Influence, *Tsinghua University Law Journal*, No. 6, 2017.

wrong conduct maintained by or on behalf of a community or nation”. To the extent that the concept of public morals pertains to a group of individuals (a community or nation), the content and scope of this concept may vary from one WTO Member to another, and could be influenced by each Member’s systems and scales of values. Prior WTO adjudicators had similarly observed that the content of the concept of public morals for WTO Members can vary in time and space, depending on a range of factors, including prevailing social, cultural, ethical, and religious values.⁵

B. Affirmation of “Public Morals”: Objective Review and Great Deference

1. Method of Objective Review

Regarding the methods of affirming “public morals”, the Panel in *US — Tariff Measures* held that although the Panel must take into account how the responding Member articulates the measure’s objective, the Panel is not bound by that characterization but must make an objective and independent assessment of the measure’s objective, taking into account all the available evidence. The Panel in *EC — Seal Products* explained its task of determining whether the challenged measures addressed a public moral concern in the following manner: The question of whether a *measure* aims to address public morals relating to a particular concern in the society of a regulating Member requires, in our view, an assessment of two issues: first, whether the concern in question indeed exists in that society; and, second, whether this concern falls within the scope of “public morals” as “defined and applied” by a regulating Member “in its territory, according to its own systems and scales of values”.⁶

2. Method of Great Deference

Several third parties had expressed views on what can constitute a public morals policy for WTO Members. Australia underlined that the discretion accorded to WTO Members in determining what constitutes public morals “was not without some limitations”. Singapore stated that “Members must be afforded a certain degree of domestic policy space to define their own public moral objectives, having regard to their specific cultural, religious and other social contexts”, a discretion that is limited by the requirements set out in the

⁵ Panel Report, *US — Tariff Measures*, paras. 7.115-7.116.

⁶ *Ibid.*, para. 7.117.

design and necessity tests. The European Union did not take a position on whether the standards of conduct that the United States invoked may, in the abstract, qualify as “public morals” within the meaning of Article XX(a), but recalled “the broad deference accorded to each Member in view of defining its own public moral standards”. Japan asserted that each WTO Member may have its own concept of public morals and Members must be afforded a degree of policy space to define their own public moral objectives. Japan also confirmed that “a Member’s domestic criminal law provides relevant evidence for evaluating what might constitute a ‘public moral’ in that Member”. Chinese Taipei warned the Panel against using “an overly restrictive interpretive approach when reviewing a Member’s invocation of Article XX(a)”.⁷ In general, Singapore, the EU, Japan, and Chinese Taipei all stressed the necessity of adhering to WTO Members’ domestic policy space or discretionary power for defining their respective public moral objectives, and only Australia highlighted that such discretionary power “was not without some limitations”.

The Panel in *US — Tariff Measures* agreed with prior WTO adjudicators that “ascertaining the precise content and scope of morality in a given society may not be an easy task”. WTO Members should have some scope to define and apply for themselves the concept of public morals in their respective territories, according to their own systems and scales of values, and the right to determine the level of protection they consider appropriate. WTO Members are thus afforded a certain degree of deference in defining the scope of public morals with respect to the values prevailing in their societies at a given time. Nevertheless, it remains for each WTO Member invoking an Article XX(a) defence to establish that the invoked policy objective at issue is a public moral objective according to its value system.⁸

3. *Whether an Explicit Reference to Public Morals in the Legal Instruments Implementing the Measures at Issue Is Required*

Regarding the affirmation of “public morals”, a disputed issue in *US — Tariff Measures* was whether an explicit reference to public morals in the legal instruments implementing the measures at issue is required. China held that these measures did not mention public morals and proved that they did not have a public moral objective. The United States considered that a measure need not

⁷ *Ibid.*, para. 7.130.

⁸ *Ibid.*, para. 7.131.

include an explicit reference to public morals to be justifiable under Article XX (a), but that in any event the measures at issue “expressly mention an objective falling within the scope of ‘public morals’ in the United States — namely, the elimination of the unfair trade acts, policies, and practices documented in the Section 301 Report”. As the third party, Brazil considered that “while express mention of public moral objectives may be significant”, the Panel should engage in an “assessment of the content, structure, and expected operation of the measure itself” to determine whether it is designed to protect public morals. Another third party, the European Union, also noted that “whether or not the text of the statute that provides for the measure, or its legislative history, mentions the invoked public morals, while not dispositive, is directly relevant in order to identify the genuine objective of the measure”. The Panel did not consider that for a measure to fall within the scope of the public morals exception under Article XX(a), the legal instruments implementing the measure must expressly mention a public moral objective. The Panel agreed with prior WTO adjudicators that an assessment of the design, content, structure, and expected operation of measures that do not expressly refer to “public morals” found that they are related to public morals.⁹ Therefore, the legal instruments implementing the measures at issue did not need to refer to public morals, and a responding Member could claim during WTO litigation that specific public policy objectives are “public morals”.

4. Can “Public Morals” Include Economic Concerns?

The disputing parties had different opinions regarding whether the public policy objectives claimed by the United States constituted “public morals”. The United States asserted that the measures at issue protected public morals within the meaning of Article XX(a) because they had been adopted to “‘obtain the elimination’ of conduct that violates US standards of right and wrong, namely China’s unfair trade acts, policies, and practices”. The United States contended that these acts, policies, and practices violated US “standards of right and wrong”, particularly the prohibition of theft, extortion, cyber-enabled theft and cyber-hacking, economic espionage, and the misappropriation of trade secrets, anti-competitive behavior, as well as the regulation of governmental takings of property.¹⁰ The United States asserted that China’s actions documented in the

⁹ *Ibid.*, paras. 7.120-7.126.

¹⁰ *Ibid.*, para. 7.113.

Section 301 Report violated prevailing US “standards of right and wrong” as reflected in US domestic legislation. As evidence, the United States referred to many domestic instruments, including: 1) state and federal laws, under which the act of “theft” is universally deemed a criminal offense; 2) US laws that generally prohibit extortion; 3) US laws that criminalize cyber-enabled theft and cyber-hacking; 4) US laws that criminalize economic espionage and the misappropriation of trade secrets (including through acts of “bribery” or “extortion”); 5) US laws against anti-competitive behavior (in particular the prohibition and criminalization of monopolization), which reflect “fundamental concepts of fair competition and fair play”, and the breach of which the United States views as “a threat to the ‘preservation of our democratic political and social institutions’” by the United States; 6) US laws on patents; 7) US laws on contracts and torts; and 8) civil and criminal laws on property and governmental takings of property. The United States explained that the economic concerns underlying some of these legal instruments were related to notions of fair competition and fair play, and that it did not view unfair competitive practices merely as a detriment to business and innovation, but also as a threat to the preservation of its democratic political and social institutions. The United States also explained that it “imposes constraints on behavior based on national concepts of right and wrong to ensure market-oriented outcomes”. According to the United States, China “uses coercion and subterfuge to steal or otherwise improperly acquire intellectual property, trade secrets, technology, and confidential business information from U.S. companies with the aim of advantaging Chinese companies and achieving China’s industrial policy goals”. The United States considers that these acts, policies and practices relating to intellectual property and technology transfer violate these US standards of right and wrong and thus implicate US public morals within the meaning of Article XX(a).¹¹

China rejected the characterization of the United States’ concerns as “public morals” within the meaning of Article XX(a) and argued that the United States had failed to establish the existence of a valid public moral objective. According to China, the United States’ reference to public morals was “nothing but a *post hoc* attempt to justify a purely economic objective”, and that the objective of the measures at issue was not to protect public morals, but to

¹¹ *Ibid.*, paras. 7.127-7.128.

reduce China's exports to the United States and address the US trade deficit.¹² China dismissed the United States' reference to its domestic legal instruments stating that "the fact that a Member has criminalized certain conduct does not, by itself, provide sufficient evidence of a public moral objective". China also considered that the United States had not demonstrated that each of the referenced domestic laws embodied alleged public morals that were implicated by China's practices at issue.¹³

The disputing parties had engaged in discussions on whether the Article XX exceptions, and specifically the concept of public morals in Article XX(a), could encompass economic concerns. China argued that the public moral objectives asserted by the United States, "as a matter of law, do not fall within the scope of Article XX(a)" because its scope is limited to non-economic concerns. Generally, China considered that "interests within the realm of trade liberalization are not covered by Article XX". Specifically, China argued that the term "public morals" in Article XX(a) did not encompass economic policy concerns. According to China, "a concern for so-called 'unfair conduct', including a lack of respect for fair competition and innovation" does not constitute a matter of public morals, and Article XX(a) does not allow WTO Members to "circumvent their WTO obligations by interpreting Article XX(a) to encompass so-called 'unfair' trade, a topic which is addressed by several of the covered agreements". The United States considered that the concept of public morals in Article XX(a) could relate to issues of economic concern, and the phrase "public morals" cannot be read to exclude any economic concerns. According to the United States, a measure can have both moral and economic features and "some types of conduct or behavior would appear to be immoral precisely because of the economic harms that result from such conduct".¹⁴

The Panel understood the parties' disagreement in this respect as twofold: first, the parties disagreed whether the exceptions set out in Article XX can pertain to economic interests and concerns; second, the parties disagreed whether the term "public morals" can encompass economic concerns, and in particular concerns pertaining to unfair competition. On the first point, the Panel observed that several of the subparagraphs in Article XX refer to the protection of interests that involve, directly or indirectly, a clear economic dimension,

¹² *Ibid.*, para. 7.114.

¹³ *Ibid.*, para. 7.129.

¹⁴ *Ibid.*, paras. 7.132-7.134.

including the importation or exportation of gold or silver (Article XX(c)), the protection of intellectual property rights (Article XX(d)), price stabilization efforts (Article XX(i)) and products in short supply (Article XX(j)). On the second point, public moral objectives may frequently have inseparable economic aspects. For example, prior panels had recognized that measures targeting money laundering, bridging the digital divide, or promoting social inclusion and fraud prevention were measures related to public morals. In the Panel's view, a measure may be found to pursue a public moral objective even if it has economic aspects. Moreover, the pursuit of non-economic concerns might often lead to the adoption of measures that have economic effects — for instance, a restriction of imports to protect against health risks has a clear economic effect and directly affects trade.¹⁵

The Panel noted that the United States had pointed to several domestic legal instruments that reflected prevailing US “standards of right and wrong” and outlawed some (although not all) of the Chinese practices documented in the *Section 301 Report*. In this connection, the Panel also recalled that prior WTO adjudicators had highlighted that WTO Members must be afforded a certain degree of deference in defining the scope of public morals with respect to values prevailing in their societies at a given time. Further, the Panel noted that most third parties confirmed that broad deference should be accorded to WTO Members in defining their own public moral standards. In addition, certain third parties expressed views on the specific kinds of acts, policies, and practices at issue in this dispute. According to Japan, “no country should require or pressure technology transfer from foreign companies to domestic companies”. Chinese Taipei “shared the same concerns as the United States, and believed it is important for these issues to be taken into account by the Panel”. The Panel took note of the concerns certain third parties and China expressed that the discretion accorded to WTO Members to define the scope of “public morals” with respect to values in their societies should not be “without its limits”, and that Article XX(a) “does not allow WTO Members to circumvent their WTO obligations by interpreting Article XX(a) to encompass so-called ‘unfair trade’”. The Panel reaffirmed its view that, in the present dispute, only a holistic approach to the elements of Article XX(a) would allow it to strike the necessary balance between the right to invoke the Article XX(a) exception and the rights

¹⁵ *Ibid.*, paras. 7.135-7.137.

of other WTO Members under the substantive rules of the GATT.¹⁶ The Panel also emphasized that at this stage of its analysis it was considering the issue of the public moral objectives that the United States had invoked, and not the further questions that must be answered under Article XX of the relationship of these public morals to the measures challenged in this dispute. In this context, the Panel concluded that the “standards of right and wrong” invoked by the United States (including norms against theft, misappropriation and unfair competition) could, at least at a conceptual level, be covered by the term “public morals” within the meaning of Article XX(a) of the GATT 1994.¹⁷

In conclusion, even though the Panel held that Article XX of the GATT 1994 and subparagraph (a) could cover policy objectives of an economic nature, it ruled with some reservation (using wording such as “could, at least at a conceptual level”) in this case.

C. “Public Morals” Can Cover Almost All Public Policies under Existing Jurisprudence

Judging from the past WTO dispute settlement practices, WTO panels or the Appellate Body have never questioned the “public morals” that responding parties have claimed. Previous WTO adjudicators have affirmed that the following policies involve public morals: preventing minors from gambling and protecting pathological gamblers (*US — Gambling*); restricting banned content in cultural goods such as violence or pornography, together with protecting Chinese cultural and traditional values (*China — Publication and Audio-Visual Products*); protecting animal welfare (*EC — Seal Products*); cracking down on money laundering activities (*Colombia — Textiles*); bridging the social digital divide and promoting social inclusion (*Brazil — Taxation and Charges*). In this case, the concept of “public morals” was extended to economic concerns, covering norms against theft or stealing as embodied in numerous US laws, and particularly extended to the fair competition field. According to the United States’ opinions that the Panel accepted, fair competition and fair play constituted “public morals” of the United States.

The Panel’s ruling of this case will have far-reaching influences: the public morals exception can be used to address currently hot issues such as industrial policies as well as state-owned enterprises and subsidies. As such, besides

¹⁶ *Ibid.*, paras. 7.138-7.139.

¹⁷ *Ibid.*, para. 7.140.

continuing to cope with China's so-called unfair acts, policies, and practices with anti-dumping and anti-subsidy measures, the United States, the EU, and other WTO Members can also directly adopt trade-restrictive measures against Chinese products in the future provided that these measures are disguised as public moral measures.

WTO panels and the Appellate Body basically imposed no limits on the concept of "public morals", which might subject the multilateral trading system to enormous sliding risks. *EC — Seal Products* was the first case where the WTO Appellate Body regarded animal welfare as a public moral issue. That said, in the future, will provisions on the public morals exception be applied under other circumstances where animal welfare must be protected, e.g. using animals in scientific experiments or feeding animals within fences and cages? Furthermore, if we agree that in our value system, human rights are more important than animal welfare, then "public morals" certainly covers internationally recognized standards and norms on human rights.¹⁸ If any public policy can be referred to as "public morals", then any trade-restrictive measure will be exempted as a public morals exception as long as it is duly designed, which will overthrow the multilateral trading system.

The situation in which the concept of "public morals" is undefended is related to the fact that it reflects people's "moral concerns". In theory, a nation or community can pay attention to any international or domestic matters,¹⁹ and can refer to these concerns as public morals. Generally speaking, a nation or community paying attention to domestic matters and considering them as public morals will not provoke big issues. However, if it pays attention to matters in other nations, it may face conflicts with other nations regarding views on them. For instance, the EU's public attention on the inhumane hunting of seals within Canadian territory (animal welfare concerns turning into public morals) differed from Canadian aboriginal residents' views in this aspect (merely deeming it a tradition). Moreover, China deemed the so-called unfair acts, policies and practices that the United States asserted in *US — Tariff Measures* as reasonable and fair. Regarding these conflicts in views, the chief principle of any solutions is to respect other countries' acts, policies, and practices without responding by implementing unilateral measures. If the involved acts, policies,

¹⁸ Public moral measures can hereby be divided into introvert type and extravert type. See *supra* n. 5, Du Ming (2017).

¹⁹ *Ibid.*

and practices damage its domestic interests, the involved party should appeal to negotiations or the official dispute settlement mechanism to address disagreement.

III. The Second Threshold of WTO Legal Regulation: The Weakening of “Design Test”

A. The Holistic Review Approach Was Proposed and the “Design Test” Was Weakened

As to whether a trade-restrictive measure can be provisionally justified pursuant to the public morals exception in Article XX(a) of the GATT 1994, the WTO panels and Appellate Body usually reviewed the following factors in turn: whether the “public morals” that a responding Member has claimed actually exists; whether the measure at issue is “designed” to protect the claimed public morals (based on the term “to protect” in subparagraph(a), referred to as “design test” in this paper); whether the measure at issue is necessary to protect the claimed public morals.²⁰ The Panel in *US — Tariff Measures* highlighted the holistic nature of its analysis under Article XX(a). It considered that its analysis under subparagraph (a) of Article XX is a holistic exercise, which involved an overall assessment of whether the United States had demonstrated that the challenged measures were necessary to protect its invoked public morals, although this overall assessment would be based on the Panel’s interpretation of each element of Article XX(a) and on its application to the dispute’s specific facts. Using this holistic approach, the Panel analyzed the elements and requirements of subparagraph (a) together, before reaching its final conclusion on whether the United States had demonstrated that the WTO-inconsistent measures were necessary to protect its invoked public morals. The Panel refrained from reaching any intermediate conclusion before completing the entire analysis. This holistic approach was the only way to guarantee that the nature and purpose of Article XX(a) are not violated. The Panel assessed 1) whether the United States raised a public moral objective within the meaning of Article XX(a) of the GATT 1994; 2) whether the measures were designed to protect the public moral objective as the United States had invoked; and 3)

²⁰ *Supra* n. 7, paras. 7.109-7.110.

whether the measures were necessary to protect this objective. Each step of this analysis can allow us to continue our assessment towards an overall conclusion whether the challenged measures are “necessary to protect public morals” within the meaning of Article XX(a) of the GATT 1994.²¹

The disputing parties and third parties were highly divergent regarding the design test. First, regarding the necessity to conduct this test, China seemed to consider that this requirement exists,²² but the United States asserted that Article XX(a) has no textual requirement to show that a measure is “designed to ” protect public morals.²³ Brazil, Japan, and Singapore invited the Panel to follow the approach that prior WTO adjudicators had used in determining the existence of a relationship between the measures and the protection of public morals by investigating the measures’ design (including their content, structure, and expected operation).²⁴

Second, regarding legal standard for the design test, in past cases, the Appellate Body had considered that the phrase “to protect public morals” requires the adjudicator to examine “the design of the challenged measure, including its content, structure and expected operation”, with a view to ensuring that the measure is “not incapable of ” protecting public morals. Following this approach, if a panel finds that a measure is incapable of protecting the values considered by the responding Member as public morals, there is no relationship between the measure and the protection of public morals that would meet the requirements of the “design test”. On the other hand, if a panel finds the measure as “not incapable of protecting public morals”, this will indicate the existence of a relationship between the measure and the protection of public morals that would meet the design test requirement.²⁵ However, China questioned whether the legal standard suggested by the Appellate Body (i.e. “not incapable”) is “properly based” on the text of Article XX(a) of the GATT 1994.²⁶

Last, the disputing parties and third parties were also highly divergent regarding whether the measures at issue in *US — Tariff Measures* were “designed” to protect public morals that the United States invoked. The United States asserted that “there is a clear relationship between the US measures at

²¹ *Ibid.*, paras. 7.111-7.112.

²² *Ibid.*, para. 7.149.

²³ *Ibid.*, paras. 7.142 & 7.149.

²⁴ *Ibid.*, para. 7.144.

²⁵ *Ibid.*, para. 7.145.

²⁶ *Ibid.*, paras. 7.148-7.149.

issue and the objective of protecting public morals” and that the measures at issue satisfy the “design” requirement of Article XX(a). The United States argued that the measures at issue were not “incapable” of addressing the acts, policies, and practices documented in the *Section 301 Report* because: 1) the United States had adopted the measures at issue “with the explicit goal of eliminating the unfair trade acts, policies, and practices documented in the *Section 301 Report*”; 2) the measures at issue were “structured so as to target particular types of goods that benefit from the unfair and immoral Chinese technology transfer policies”; 3) the measures at issue “alert US consumers and purchasers to the unfair and immoral practices that underlie many traded Chinese products and signal to US consumers and purchasers that such practices are not acceptable”; and 4) the same measures “raise the economic cost that China will incur so long as it maintains the unfair trade acts, policies, and practices documented in the *Section 301 Report*”. The United States concluded that its measures created a disincentive for China to continue its conduct found morally objectionable, and thus met the minimal threshold of being “designed to” protect public morals for the purposes of Article XX(a).²⁷ China considered that the measures at issue were not designed to protect public morals, mainly because they were not designed to apply to “goods that embody content or conduct offensive to public morals in the United States”. According to China, the measures at issue are “underpinned by economic concerns and are not designed to shield US public morals from imported goods that contain offensive content or embody offensive conduct”. China asserted that for a measure to have a sufficient nexus to the public moral objectives and be provisionally justified under Article XX(a), it must be designed to apply to products that embody the morally offensive conduct or content. It concluded that the measures at issue are incapable of protecting public morals because “there is no evidence that the additional import duties imposed by the United States are designed to apply to goods that embody content or conduct offensive to public morals in the United States”. Moreover, it argued that “Even if the phrase ‘to protect public morals’ requires the measure at issue to be ‘not incapable of’ protecting public morals, the US measures are incapable of protecting public morals”.²⁸ The European Union — similarly to China — considered that the measures at issue do not seem designed to protect public morals because they

²⁷ *Ibid.*, paras. 7.142 & 7.147.

²⁸ *Ibid.*, paras. 7.143, 7.148 & 7.149.

“seem not to seek to restrict specifically imports into the US territory of Chinese goods that offend the US public morals”. According to the European Union, Article XX(a) requires that the risk to public morals, against which the measures are meant to protect, manifests itself either in the content of the goods or the methods in which they were obtained or produced.²⁹

The Panel in *US — Tariff Measures* considered that every case must be assessed on its own merits. The design test is a preliminary step aimed at assisting and informing the further analysis of whether a measure is provisionally justified under subparagraph (a) of Article XX. That said, it is sometimes the case that the application of this test at the general level will not necessarily provide useful information that informs this analysis. In the present case, the Panel did not consider that the “design test” (if there was one) was an undemanding task to perform. Having said this, the Panel was not convinced that, in the absolute, the imposition of additional duties would always be incapable of protecting public morals or would never be incapable of protecting public morals. In the circumstances of this case, the Panel found it difficult to assess at any general level whether the measures at issue were “designed” to protect public morals and was therefore not convinced that the intermediate step of this test was helpful for its analysis. The more detailed design aspects and consequential understanding of measures may only become apparent once an analysis of the necessity of the measures was advanced further. In this regard, the Panel agreed with the Appellate Body that it must not structure its analysis of the “design” step to lead it to end its investigation prematurely and thereby foreclose consideration of crucial aspects of the “necessity” analysis.³⁰ The Panel stressed its preference for a holistic approach to determining whether the measures at issue were “necessary to protect public morals” within the meaning of Article XX(a). During this holistic analysis, the Panel considered that whether an appropriate nexus existed between the products subject to the additional duties and the public moral objective as the United States invoked pertained rather to the assessment of the line or balance between the trade-restrictive measures that were acceptable as necessary to protect public morals, and those that were not acceptable as not necessary to protect public morals. For this reason, the Panel addressed the parties’ (and third parties’) arguments related to the nexus between the products subject to additional duties and the public moral

²⁹ *Ibid.*, para. 7.144.

³⁰ *Ibid.*, paras. 7.150-7.151.

objective as the United States invoked, in the context of the necessity analysis. Therefore, the Panel continued its holistic examination of the challenged measures to determine whether they were necessary to protect the invoked public moral objective, consistent with Article XX(a).³¹

B. Analyzing the Reasons Why the Panel Weakened the “Design Test”

Judging from the rulings on the “design test”, the Panel intended to weaken (and even doubted³²) the design test step. The Panel asserted that the “design test” aims at assisting and informing the further analysis of whether a measure is provisionally justified under subparagraph (a) of Article XX. On this basis, the Panel considered that the application of the “design test” at a general level will not always provide useful information that informs the necessity analysis. In *US — Tariff Measures*, the Panel found it difficult to assess at any general level whether the measures at issue were “designed” to protect public morals. The intermediate step of this test was not helpful for its analysis.

The reasons why the Panel weakened the “design test” may include the following: First, the disputing parties both doubted the textual basis of the “design test” requirement under Article XX(a) of the GATT 1994 and of the legal standard of “not incapable of” put forward by the Appellate Body. The Panel evaded these two legal issues by weakening the “design test”. Second, the “design test” may trigger extensive controversies. The “design test” or the “to protect” review essentially means exploring the purpose or motive of the measures at issue. Judging from dispute settlement practices, although a measure’s purpose (e.g. to review whether or not the measures at issue can be considered as intended “to protect domestic production” in the context of the second sentence of Article 3.2 of the GATT 1994, and “to protect” public morals under Article XX(a)) can be identified by objectively reviewing its design (including content, structure, and expected operation), it is not always easy to conduct this review or avoid controversy. Third, a deeper and more intensive analysis of the connection between the measures at issue and the objective of protecting public morals, including whether or not the measures at issue are “designed” to protect public morals, can be conducted at the necessity test step. In this case, one of the key disagreements between the disputing parties was the “economic pressure theory” that the United States claimed (particularly the imposition of

³¹ *Ibid.*, paras. 7.152-7.153.

³² The Panel used the wording of “if there is one”.

additional duties on products that did not directly provoke US public moral concerns). China argued that the measures at issue were not related to the protection of public morals, while the United States asserted that public morals could be protected by imposing economic pressure. The Panel successfully avoided answering this tricky question in the “design test” section,³³ which could have triggered major controversy. Instead, the Panel introduced the standard of “a genuine relationship of ends and means” as part of the contribution analysis during the necessity test, holding that the measures at issue must target products involved in Chinese acts, policies and practices that have provoked US public moral concerns, thus indirectly disproving the US “economic pressure theory”.

We believe that the Panel’s approach of weakening the “design test” has certain merits. Judging from WTO dispute settlement practices, the “design test” has a very limited legal check on trade-restrictive measures and nearly all measures at issue have passed this test. Compared with the necessity test, the “design test” preliminarily reviews the relationship between the measures at issue and the protection of public morals, and focuses on the purpose of the measures at issue. Considering that reviewing the purpose of the measures at issue may trigger controversies, the “design test” has very limited role in regulating trade-restrictive measures, and the relationship between the measures at issue and the protection of public morals will be reviewed more deeply and intensively during the necessity analysis, weakening the “design test” has certain merits. However, if it is easy to explicitly confirm that the measures at issue are not designed to protect public morals, further review is unnecessary in order to save judicial resources.

IV. THE THIRD THRESHOLD OF WTO LEGAL REGULATION: THE NECESSITY TEST

A. Importance of the Pursued Policy Objective

In the case of *US — Tariff Measures*, the United States asserted that the measures

³³ The Panel took a position to not offend either side: For one thing, the Panel was not convinced that in the absolute, the imposition of additional duties would always be incapable of protecting public morals or would never be incapable of protecting public morals. For another, it found it difficult to assess at any general level whether the measures at issue were “designed” to protect public morals. The intermediate step of this design test was not helpful for its analysis.

at issue pursue the vitally important objective of upholding US norms against theft and coercion, and that these values are “of tremendous importance to US society and the functioning of the US economy”, which China did not question. The Panel held that deference should be accorded to WTO Members to define the scope of public morals they want to protect in their societies, corresponding to their own system and scales of values. Regarding how to assess “public morals”, prior WTO adjudicators had focused on examining the protected societal interest, “rather than assuming that by virtue of its status as a ‘public moral’ objective the interest is *per se* vital or important to the highest degree”. For instance, in the case of *US — Gambling*, the panel examined the interests and values protected by the challenged measure and concluded that these interests and values “serve very important societal interests that can be characterized as ‘vital and important in the highest degree’”. Similarly, in the case of *EC — Seal Products*, the panel noted the European Union’s claim that the specific moral concern regarding the protection of animals was a highly important value in the European Union, and found that “the protection of such public moral concerns is indeed an important value or interest”. In the circumstances of the present case, the Panel “noted” that the public moral objectives as the United States invoked reflects societal interests that the United States described as highly important to it.³⁴

From the perspective of respecting WTO Members’ sovereignty, the WTO panels can only conduct a highly limited objective review of the public morals that the responding Member claimed. If public morals involved did exist, the panels should highly respect these public morals and the importance given it by the responding Member. This way of affirming public morals by highly respecting WTO Members’ sovereignty can easily lead to responding Member abusing it, particularly considering that WTO Members are not required to mention in advance in the legal instruments implementing the measures at issue the public morals that these measures are designed to protect, and only need to point out these public morals during WTO litigation. The Panel’s wording of the conclusion (“noted”, “reflected”, “the United States described as”) seems to indicate its ambivalence: almost completely accepting the United States’ characterization but with certain reservation. The Panel did not accept the United States’ characterization of the importance of its public

³⁴ *Supra* n. 7, paras. 7.167-7.169.

morals (“vitally important”, “of tremendous importance”), but instead used the phrase “highly important”. In any case, the first factor of the preliminary necessity test can barely impose any effective legal control over responding Member’s abuse of the public morals exception.

B. Restrictive Influence of the Challenged Measures on Trade

Regarding the restrictive influence of Section 301 tariff measures on trade, the United States asserted that the measures at issue are not overly trade restrictive, because they “do not impose a ban on the import of any Chinese products, [but] tariffs at moderate levels, and [...] calibrated to obtain the elimination of the conduct documented in the *Section 301 Report*”. China argued that measures at issue are severely trade-restrictive, because they “extend to essentially all imports from China and have resulted in increases of 25 percent above the bound tariff rates”, which “have reduced the ability of Chinese imports to compete in the US market by increasing their price relative to domestically-produced products and imports from third countries not subject to the additional import duties”. The Panel observed that the measures at issue are not an import ban, but rather additional tariff duties on a wide range of products imported from China. Even though a “tariff is less restrictive on international trade than an import ban or measure having the effects of a ban”, it still has “definite effects on international trade, by reducing the capacity of the products concerned to compete on the market”. The Panel noted that particularly given the wide range of products imported from China subject to the additional duties, the measures have significant effects on international trade.³⁵

Generally speaking, the trade restrictive influence of tariffs is lower than that of quota and other quantitative restrictions. However, since the Section 301 tariff in this case covers a value of 234 billion USD with a tax rate as high as 25%, it has a significant influence on China-US trade. Qualitative and quantitative analyses are equally important when considering a measure’s trade -restrictive influence.

C. Contribution of the Measures to the Pursued Public Moral Objectives

1. Contribution Analysis: The Standard of “a Genuine Relationship of Ends and Means”

Prior WTO Panels and the Appellate Body have consistently held that contribution

³⁵ *Ibid.*, paras. 7.170-7.171.

exists “when there is a genuine relationship of ends and means between the objective pursued and the measure at issue”. They have thus determined the level of contribution that the challenged measures can make by assessing the extent to which these measures were “apt to” contribute to the objectives pursued. This assessment can be either in quantitative or qualitative terms and panels generally enjoy a certain latitude in designing appropriate methodology to use and deciding how to structure or organize their analysis. Therefore, the Panel in *US — Tariff Measures* focused on determining the existence of a genuine relationship of ends and means between the public moral objective as the United States has invoked and the measures at issue.³⁶

2. Whether the Public Moral Measures Must Target Morally Offensive Products

The disputing parties and third parties have had largely divergent views on whether public moral measures must target morally offensive products. The United States asserted as follows: First, the measures at issue “make a substantial contribution” to the objective of protecting US public morals because they raise the cost of China’s practices and reduce China’s incentive to continue engaging in them, and reduce the incentive for US actors to engage in similar practices. Second, after the adoption of the measures at issue, China entered negotiations with the United States to address the concerns documented in the *Section 301 Report*. Third, the text of Article XX(a) does not require a direct correlation or “embodiment” between the products subject to the measure at issue and the public moral objective that the defending WTO Member has invoked, because “Article XX(a) refers to measures ‘necessary to protect public morals’, not measures necessary to protect public morals from morally offensive products”, while “a measure may be necessary to protect public morals without being limited to a product that itself offends public morals”.³⁷ China argued that Article XX(a) cannot be interpreted as permitting measures that target non-morally offensive products. According to China, this interpretation “is incorrect as a matter of treaty interpretation, unsupported by the relevant jurisprudence, and would set a dangerous precedent”. In China’s view, “a measure that targets products on grounds other than their embodiment of morally offensive content or conduct is not genuinely related to enforcing policies for the protection of public morals”. The European Union seemed to agree with China

³⁶ *Ibid.*, para. 7.175.

³⁷ *Ibid.*, paras. 7.176-7.177.

and asserted that a “tariff increase on a very large category of products, regardless, apparently, of whether the imports of the products concerned pose, by themselves, any threat to the public morals” makes the relationship between the measures at issue and the public policy objective that the United States has pursued “too indirect”.³⁸

The Panel in *US — Tariff Measures* did not consider it necessary to resolve the debate between the parties on the above issue at an abstract level. Its investigation will focus on trying to identify the connection between the United States’ selected measure (imposing additional duties on large-scale products) and its public moral concerns. It opined that the scope of Article XX(a) was essentially limited. Even if it is assumed for argumentation purposes that a measure requiring justification under Article XX(a) is not necessarily only applicable to a product considered morally offensive, the responding Member should still demonstrate that its chosen measures (imposing additional duties on large-scale Chinese products) is apt to protect public morals and that these measures do not exceed the necessity within the meaning of Article XX(a).³⁹ Basically, the Panel differentiated measures targeting morally offensive products and other products, and seemingly tended to strictly control public moral measures targeting non-morally offensive products.

3. Conclusion of the Contribution Analysis of List 1 and List 2 Products Additional Duties

In the case of *US — Tariff Measures*, the additional duties that the United States imposed on Chinese exports amounting to 34 billion USD are referred to as List 1 products additional duties, and those imposed on Chinese exports amounting to 200 billion USD are referred to as List 2 additional duties. The Panel also examined the product exclusion procedures for the Section 301 tariff measures. Upon review, the Panel affirmed as follows:

Regarding additional duties imposed on List 1 products, the United States has failed to adequately explain why there is a genuine relationship of ends and means between the products facing additional duties and the public moral objectives it has invoked. This conclusion also applies to the initial narrowing of the range of products that List 1 covers and the exclusion of particular products from the scope of the additional duties on List 1 products.

³⁸ *Ibid.*, See Panel Report, *US — Tariff Measures*, para. 7.177.

³⁹ *Ibid.*

The United States clearly stated that it adopted the additional duties on List 2 products because China had “made clear” that it would not change its policies, and also to respond to China’s countermeasures against the United States after it imposed additional duties on List 1 products. The Panel did not believe that the contribution of imposing additional duties on List 2 products to the public moral objective as the United States invoked can “derive from” (potential) contributions made by imposing additional duties on List 1 products. Moreover, the United States did not provide any other evidence or explanation to prove the existence of a genuine relationship of ends and means between its measure of imposing additional duties on List 2 products and the public moral objective it invoked.⁴⁰

D. Preliminary Conclusion on Necessity after “Weighing and Balancing” the Three Factors

The Panel in *US — Tariff Measures* concluded that the public moral objectives that the United States invoked reflects societal interests and values that seem highly important in the United States, and that the measures at issue significantly affect international trade. However, the United States has not provided an explanation that how the measures contribute to the public moral objective it invoked. More specifically, the United States did not demonstrate that there was a genuine relationship of ends and means between the measures at issue and the public moral objective it pursued. Hence, after “weighing and balancing” all the three factors, on the ground that there was no genuine relationship of ends and means between the measures at issue and the public moral objective, the Panel concluded that US Section 301 tariff measures did not pass the necessity test.⁴¹

The question deserving further discussion is whether these 301 tariff measures will pass the necessity test if they are more duly designed, e.g. specifying that they exclusively target products involved in Chinese acts, policies, and practices that have provoked US public moral concerns. The answer to this question may be yes. First, if these measures are duly designed, a genuine relationship of ends and means will be established between them and the objective of protecting public morals. Second, if these measures’ purpose is to ensure fair competition (i.e. to offset Chinese products’ competitive edge gained due

⁴⁰ *Ibid.*, paras. 7.182-7.227.

⁴¹ *Ibid.*, paras. 7.228-7.231.

to these unfair Chinese acts, policies, or practices as the United States has claimed by imposing additional Section 301 duties) rather than forcing the Chinese government to give up or change these acts, policies, or practices (the Panel has essentially denied the economic pressure theory), these measures will make a substantial (even a hundred percent) contribution. In particular, there is a perfect correspondence between the trade restrictiveness of the measures at issue and the problems that they are designed to address. Finally, based on balancing the necessity test's three factors, US Section 301 tariff measures will probably pass the necessity test under Article XX(a).

E. Comparison with Reasonably Available Alternative Measures

In assessing whether a challenged measure is “necessary” within the meaning of Articles XX(a), XX(b), or XX(d), prior WTO adjudicators had consistently considered whether there exists reasonably available alternatives. China in *US — Tariff Measures* did not suggest any alternative measure, because in its opinion, the challenged measures were not about public morals, not designed to deal with public morals, and certainly not necessary. China also did not require the Panel to examine alternative measures.⁴² The United States pointed to its prior efforts to address its concerns with China's acts, policies and practices “through dialogue, admonishment, engagement in multilateral forums, and bilateral mechanisms”. According to the United States, “that none of these prior efforts have proven durably effective further demonstrates the necessity of the measures at issue”.⁴³ In other words, the United States deemed “dialogue, admonishment, engagement in multilateral forums, and bilateral mechanisms” as alternative measures. China refused to propose reasonably available alternative measures, and the Panel's preliminary conclusion was that the United States had not explained how the chosen measures were apt to contribute to the public moral objective it invoked. As a result, the Panel held that it was not required to compare these measures with reasonably available alternative measures.⁴⁴

F. Overall Conclusion about the Necessity Test

After holistically assessing all of the evidence in *US — Tariff Measures*, the

⁴² *Ibid.*, para. 7.233.

⁴³ *Ibid.*, para. 7.234.

⁴⁴ *Ibid.*, para. 7.235.

Panel concluded that the United States did not provide an explanation to demonstrate how imposing additional duties on the selected imported products contributed to achieving the public moral objective it invoked. It follows that the United States did not adequately explain how the measures it chose were necessary to protect these public morals.⁴⁵

The Panel observed that the nature and purpose of Article XX of the GATT 1994 (to allow WTO Members to adopt measures that would be otherwise WTO-inconsistent to protect their public morals) cannot be reconciled with a situation where WTO Members would be allowed to restrict any trade from any WTO Member with the mere invocation of what might be abstractly considered a valid policy objective within the meaning of this Article. The scope of the restrictive measures justifiable under Article XX(a) is determined based on the public moral objectives invoked and on the requirement that these measures must be necessary to achieve the objectives. In other words, it is required that there is a nexus between the challenged measure and the interest protected based on the policy objective at issue. In the case of Article XX(a), this requirement is specified with the term “necessary to protect public morals”. This is especially important in the context of Article XX(a) because the concept of “public morals” is broad and may be based on considerations specific to individual WTO Members. The invocation of each Article XX defence must be considered carefully based on the facts related to the particular subparagraph of this Article relied on and the challenged measures. The Panel noted that the text of Article XX(a) itself limits the range of measures that WTO Members are allowed to rely on. These measures must concern public morals if they are to fall within the limited scope of Article XX(a). Moreover, these measures must be “necessary” to achieve the public moral objective invoked. In other words, if the adopting WTO Member does not explain how the challenged measures contribute to achieving the public moral objectives pursued by showing that there is “a genuine relationship of ends and means” between these measures and this objective, it strongly indicates that the challenged measures have exceeded the limits acceptable under Article XX(a).⁴⁶

By requiring that there is “a genuine relationship of ends and means” between the measures at issue and the public moral objectives, and by stressing that invoking these objectives abstractly does not allow WTO Members

⁴⁵ *Ibid.*, para. 7.238.

⁴⁶ *Ibid.*, paras. 7.236-7.237.

to restrict any trade from any other WTO Member, the Panel has actually explicitly disproved the “economic pressure theory” that the United States has proposed. This Panel ruling is important and can limit the measures that WTO Members adopt to address specific public moral concerns within the scope of necessity, i.e. trade measures must at least target products triggering public moral concerns, thus effectively rejecting unilateralism and bullying forcing other Members to change their acts, policies, and practices by imposing economic pressure, controlling power in international trade relationship, and thereby promoting the legalization of international economy and trade.

The Panel’s foregoing ruling has also governed the relation between Section 301 and the public morals exception: the United States can use Section 301 investigations to identify other countries’ acts, policies, or practices triggering US public moral concerns as well as products involved thereby, and can adopt trade measures conforming to the public morals exception to settle disagreements, but it cannot use unilateral trade sanctions to accomplish this goal.

V. THE FOURTH THRESHOLD OF WTO LEGAL REGULATION: REQUIREMENTS ON APPLICATION OF MEASURES

A. Requirements on Application of Public Moral Measures

The chapeau of Article XX of the GATT 1994 stipulates as follows: “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 ...”. As such, it imposes three different requirements on the application of public moral measures, that is not to constitute: 1) a means of arbitrary discrimination between countries where the same conditions prevail, 2) a means of unjustifiable discrimination between countries where the same conditions prevail, and 3) a disguised restriction on international trade. Judging from WTO dispute settlement practice, some cases invoking the public morals exception (*US — Gambling*, *EC — Seal Products*) can pass the necessity test under Article XX(a) of the GATT 1994 but not that of the chapeau of Article XX.

B. Whether the United States' Section 301 Tariff Measures Satisfy the Requirements of the Chapeau

As to whether the application of US 301 tariff measures satisfied the requirements of the chapeau of Article XX of the GATT 1994, the United States in *US — Tariff Measures* argued as follows: First, it had not applied the measures at issue in a manner that constitutes “a disguised restriction on international trade” because it has taken “no steps to conceal the reasons for adopting the measures at issue”; Second, it has not applied the measures at issue in a manner that constitutes “arbitrary or unjustifiable discrimination” because of the “deliberate nature” in which it proceeded before adopting the measures and because it “has explained the rationale and justification for adopting the measures at issue”; Third, it has not applied the measures in a manner inconsistent with the chapeau of Article XX because “no other government is engaging in forced technology transfer policies and practices of the type or to the extent that China is”.⁴⁷ China proposed three rebuttals: First, the measures at issue are not provisionally justified under Article XX(a) and so “there is no need to proceed to evaluate whether the measures are consistent with the conditions set forth in the chapeau of that provision”; Second, on an *arguendo* basis, the measures at issue fail to satisfy the requirements of the chapeau because the “lack of a rational connection between the US measures and the covered products reflects the true, coercive intent of the US measures”, and “a prohibition on unduly coercive action is tied directly to the limiting function of the chapeau”; Third, the measures at issue “restrict international trade under the guise of a public moral measure” and “are nothing more than barely disguised restrictions on international trade”.⁴⁸ The Panel held that prior WTO adjudicators had traditionally refrained from assessing the conformity with the chapeau of measures that they had found not provisionally justified under subparagraphs of Article XX. Considering its conclusion that the United States had not demonstrated how the measures at issue can be provisionally justified under the public morals exception under Article XX(a), the Panel did not consider it necessary to proceed to evaluate whether the measures at issue satisfied the requirements of the chapeau of Article XX.⁴⁹

⁴⁷ *Ibid.*, para. 7.239.

⁴⁸ *Ibid.*, See Panel Report, *US — Tariff Measures*, para. 7.240.

⁴⁹ *Ibid.*, paras. 7.241-7.242.

It is worth discussing whether the United States' Section 301 tariff measures can pass the test of the chapeau of Article XX if they are duly designed and have passed the necessity test. In particular, considering that the United States has launched Section 301 investigations exclusively against China, do "countries where the same conditions prevail" mentioned in the chapeau of Article XX exist?

VI. SIGNIFICANT INFLUENCE OF GENERALIZATION OF PUBLIC MORAL MEASURES AND SOME PROPOSALS

A. The Significant Influence of Generalization of Public Moral Measures

The method of affirming "public morals" in *US — Tariff Measures* creates a major problem. As analyzed above, if US Section 301 tariff measures are more duly designed, i.e. exclusively targeting products covered by the so-called unfair Chinese acts, policies, and practices that have triggered US public moral concerns, they will probably be justified under the public morals exception under Article XX(a) of the GATT 1994. This will allow the United States to conduct Section 301 investigations against China (targeting Chinese acts, policies and practices that have violated the US concept of fair competition, e.g. industrial policies, state-owned enterprises and subsidies), and lawfully adopt unilateral Section 301 tariff measures in response (it suffices to claim that the purpose is to protect US public morals either in advance in legal documents implementing the measures or during WTO litigations). When coping with China's so-called non-market economic policies and practices, the United States can rely on public moral measures as well as anti-dumping and anti-subsidy tools, which will have a tremendously negative influence on China's interests.

WTO Members should address fair competition and other issues through trade negotiations. Addressing these issues through public moral measures seems to infringe upon other Members' national sovereignty. As a matter of fact, any measures against WTO rules (e.g. raising tariffs, most-favored-nation treatment and national treatment discrimination, quantitative restriction, breaching GATS and TRIPS rules, etc.) can be deemed as infringing upon the United States' so-called moral concept of fair competition. As such, the United

States can completely bypass the WTO multilateral trading system by directly conducting Section 301 investigations and unilaterally adopt Section 301 measures while asserting that these measures are designed to protect US public morals. If every Member follows this example, the WTO multilateral trading system will collapse.

B. Some Proposals for China and Other WTO Members

1. To Explicitly Object to the Infinite Expansion of the Concept of “Public Morals” in International Trade Laws

This paper shows that the Panel rulings in *US — Tariff Measures* will lead to the following consequences: 1) the United States handles the so-called unfair competition, forced technology transfer, industrial policies, as well as other economic and trade issues by virtue of public moral measures; 2) the United States can use “public morals” as an excuse during Section 301 investigations and tariff sanctions against China; 3) the WTO multilateral trading system may collapse. This paper argues that and as demonstrated in the above analysis, the key reason leading to the above situations are the infinite expansion of the concept of “public morals” and the undefended attitude of the WTO adjudication bodies. If duly designed, the measures claimed to protect public morals can pass all the other thresholds of public morals exception. China and other WTO Members should explicitly object to the infinite expansion of the concept of “public morals”. First, context can narrow down the results of text interpretation. Textual interpretation results in a broad concept of “public morals”. However, according to the context of the concept of “public morals”, its scope should be appropriately narrowed, and at least the public policy objectives involved in other subparagraphs of Article XX of the GATT 1994 should be excluded. Second, object and purpose can narrow down the results of text interpretation and inform its application. The interpretation and application of the concept of “public morals” should be duly balanced between the objects of trade liberalization and protection of public morals, and should not lead to abuse of public morals exception. However, incorporating economic concerns into public morals concept may result in abuse of the exception. It is noteworthy that the Panel did not accept China’s assertion that Article XX of the GATT 1994 and particularly subparagraph (a) thereof does not include economic concerns. Third, a prudent attitude should be maintained towards one WTO Member’s

concern about another Member's domestic matter and its characterization thereof as public morals, and other WTO Members' opinions of their own domestic matters should be respected. If a Member's domestic matters have overflow effects, affected Members should settle these matters through consultation, appealing to the WTO dispute settlement mechanism, or enacting new trade rules under the WTO legal framework.

When it comes to assessing the importance of protected social interests under the public morals exception, the characterization of "public morals" should not automatically highly value the social interests that responding Member claim. The actual protected interests (economic interests in *US — Tariff Measures*) should be found, as evidenced by the characterization of "fair competition and fair play" as "public morals" by the United States. There is no hierarchy between economic interests involved under the public morals exception (on the precondition that consideration of economic interests is allowed) and trade liberalization interests.

2. Appeal in Due Time to Promote Jurisprudential Development

In the context of the Appellate Body's stalemate, in order to prevent the WTO Dispute Settlement Body (DSB) from adopting the Panel Report and thereby turning it into a ruling with legal binding force, the United States appealed the Panel Report on October 26, 2020 without pointing out the appealed legal issues.⁵⁰ China has not yet appealed the Report. Once the Appellate Body resumes operation, China should appeal against part of the Panel ruling, particularly the scope of the concept of "public morals" and the judgment of the importance of interests involved in this case. Despite the difficulty in affirming public morals and their importance, it is not impossible to examine these issues. In fact, the Panel's rulings related to these two issues indicate its reservation or even suspicion.⁵¹

⁵⁰ WT/DS543/10, October 27, 2020.

⁵¹ *Supra* n. 7, paras. 7.140 & 7.169.