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What sorts of things are Public Morals? A Liberal Cosmopolitan

Approach to Art XX GATT

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Modern Law Review (forthcoming)

Existing theories of WTO law cannot adequately explain the form or content of the GATT exceptions, including in particular Article XX(a) Public Morals. Nor, in consequence, have they been able satisfactorily to answer the interpretive questions they raise. I argue we can understand Article XX in terms of self-determination. This, however, requires an account of self-determination as a political and moral value, and the choices it mandates peoples make for themselves. Drawing on debates in contemporary political philosophy, I distinguish three categories of argument for self-determination: intrinsic, expressive and instrumental. I draw out the implications of each for the scope of the choices a self-determining community must make for itself, deriving therefrom an account of the political and moral value of self-determination in trade regulation. I use that account to reconstruct Article XX, both explaining the individual provisions thereof, and suggesting how these might be developed and interpreted. I conclude by examining Article XX(a) in detail, highlighting the interpretive questions public morals pose, and the ways understanding Article XX in terms of self-determination suggests these should be answered.

Keywords: WTO; Self-determination; Political Theory; Cosmopolitanism; General Exceptions; Public Morals;

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1. Introduction

WTO law expresses a recurring tension between multilateral discipline and unilateral choice. In some cases, that tension falls to be resolved within individual provisions. In others, such as the General Agreement on Tariffs and Trade, it is expressed through a balance of rules and exceptions. On one hand, the GATT comprises a set of restrictions on, *inter alia*, tariffs (Art II), quantitative restrictions (Art XI), and discrimination, whether against (Art III) or amongst (Art I) trading partners (together, the 'Core Disciplines'). On the other, it provides various exceptions, addressing economic (Art XII Balance of Payments, Art XVIII Economic Development, Art XIX Safeguards) and non-economic (Art XX General Exceptions, Art XXI National Security) concerns. WTO members' freedom to enact particular measures depends, first, on whether a measure is caught by one of the Core Disciplines, and second, whether it falls within one of the exceptions. Indeed, it is primarily under the exceptions, rather than the rules, that the GATT seeks to accommodate such sensitive concerns as environmental protection, public health and public morals. The exceptions thus play a crucial role in delimiting members' regulatory sovereignty.

A plausible account of the GATT must therefore explain both the rules and the exceptions. My concern in this paper is the exceptions, and in particular Article XX, which I argue is inadequately explained in existing theories of WTO law. In

consequence, those theories have struggled to provide interpretive guidance or critical standards for the various exceptions in Article XX, or to legitimize the – often controversial – decisions of WTO panels and the Appellate Body thereunder. Given the centrality of Article XX in the GATT case-law, this is a serious failing.

To remedy this I advance a novel account of Article XX, as expressing the distinctive moral and political value of self-determination. Drawing on various existing arguments for self-determination, I show how these can identify its limits in supporting states' claims to regulate particular matters, notwithstanding the effects such regulation may have on outsiders. I show how these limits can in turn explain the form of the various exceptions in Article XX. Finally, I apply this account to explain and critique one exception in particular, Art XX(a), which exempts measures “necessary to protect public morals”. I highlight the interpretive questions this provision raises, the Appellate Body's difficulties answering these, and the ways thinking about Article XX(a) in terms of self-determination can contribute to their satisfactory resolution.¹

I focus on public morals for three reasons.

¹ While my focus is the exceptions, these cannot be fully divorced from our understandings of the Core Disciplines themselves. For my account of these: O. Suttle, “Equality in Global Commerce: Towards a Political Theory of International Economic Law” 25:4 *European Journal of International Law* (2014) 1043-1070. There is some dependence between the scope of the disciplines and the exceptions, as a broader interpretation of the former inspires calls for broadening the latter, and vice versa.

First, their ambiguity. The scope of Article XX(a) is open, and the subject of significant controversy.² What exactly are public morals? What does it mean to protect them? Are they concerned with qualities of persons, communities, or actions? Whose morals are at stake, and where? Debates about Article XX(a) have pitted advocates of a maximalist understanding, motivated by concerns for national autonomy, pluralism and global subsidiarity; against more minimal interpretations from those worried about disguised protectionism, international stability, and more generally that an expansive interpretation of Article XX(a) risks entirely subsuming the Core Disciplines themselves.³ Howse, Langille and Sykes, for example, deny that Panels or the Appellate Body should examine the authenticity of asserted public morals, whether in terms of public support, legislative history, or connection to particular interests of the regulating people: rather, they suggest enquiring only whether the relevant concerns are ones that could count as moral reasons at all.⁴ Wu, by contrast, suggests limiting public

² It is unsurprising that those advocating a broad interpretation of Article XX(a) also advocate permissive interpretations of the Core Disciplines themselves. See e.g. R. Howse and D. Regan, 'The Product/Process Distinction - an Illusory Basis for Disciplining 'Unilateralism' in Trade Policy' 11 *European Journal of International Law* (2000) 249

³ For an overview of the debates: Charnovitz, 'The Moral Exception in Trade Policy' 38 *Va J Int'l L* (1997) 689; Marwell, 'Trade and Morality: The WTO Public Morals Exception after *Gambling*' 81 *New York University Law Review* (2006) 802 at 817; Wu, 'Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine' 33 *Yale J Int'l L* (2008) 215; R. L. Howse, J. Langille and K. Sykes, 'Pluralism in Practice: Moral Legislation and the Law of the WTO after *Seal Products*' (2015).

⁴ Howse et al., *supra* note 3, at 95-106

morals to issues anticipated by the original drafters, falling under *jus cogens* norms, or widely recognized by members as being moral issues; that only measures passed through standard legislative procedures be eligible; and that additional domestic support and international codification be required where a measure concerns issues outside the territory.⁵ The debate between minimalists and maximalists thus translates into subordinate debates: about whether invoking public morals requires evidence of actual moral beliefs in the relevant state,⁶ or to be endorsed through a particular representative – including democratic – procedure⁷; about whether the morals at stake are exclusively those of the regulating state, or must be shared by other states;⁸ about whether the morals concerns must relate to activities within the territory, or can extend to events in other states.⁹ Article XX(a) offers no guidance, and while the AB has touched on many of these questions, it has done little to clarify. Yet each of these competing interpretations expresses a judgment about why public morals matter, and about the choices particular communities should be free to make; so

⁵ Wu, *supra* note 3, at 243-246

⁶ e.g. Marwell, *supra* note 3, at 824-826

⁷ Wu, *supra* note 3, at 243-244

⁸ For the former view: Marwell, *supra* note 3 at 824. For elements of the latter: Charnovitz, *supra* note 3 at 742-3; Sykes 'Sealing animal welfare into the GATT exceptions: the international dimension of animal welfare in WTO disputes' 12:3 *World Trade Review* (2014) 471.

⁹ For concerns about such extraterritorial measures: Wu, *supra* note 3, at 245-6. For an approach adopting general international law rules on jurisdiction: Bartels, 'Article XX of the GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights' 36:2 *Journal of World Trade* 353-403 (2002)

adjudicating them surely requires an account of why and how we should make such judgments.

Second, Article XX(a) is potentially important for a number of 'linkage' issues, including the relations between the trade regime and human rights, labor rights, animal rights and environmental protection.¹⁰ Each can be understood in moral terms, and so might fall under Art XX(a); so how we understand public morals will significantly affect the balance the trade regime strikes between trade and competing values. However, this is not a one-way street. Rather, our sense of the correct balance should inform our interpretation of Article XX(a); so we need to locate our analysis of the latter in a wider account of Article XX, and of the WTO's rule/exception balance more generally.

Third, the liberal perspectives that dominate much international legal and political scholarship are skeptical of any role for law in protecting morals. Accounting for a public morals exception therefore seems particularly challenging for liberals.¹¹ Of course, in the international context, the fact of

¹⁰ E.g. Howse, 'The World Trade Organization and the Protection of Workers' Rights' 3 *J Small & Emerging Bus L* (1999) 131; L. Nielsen *The WTO, Animals and PPMs* (2007) at 230; Jarvis, 'Women's Rights and the Public Morals Exception of GATT Article 20' 22 *Michigan Journal of International Law* (2000) 219; S. H. Cleveland, 'Human Rights Sanctions and International Trade: A Theory of Compatibility' 5 *Journal of International Economic Law* (2002) 133

¹¹ That public morals raise this distinctive challenge is highlighted in: R. Howse and J. Langille, 'Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values' 37 *Yale Journal of International Law* (2012) 367

pluralism – including moral pluralism – is undeniable, and a public morals exception is an obvious place to accommodate that fact. However, this simply reinforces the need to understand the proper scope of that exception, and the consequent balance it requires between competing moral commitments.

The argument proceeds in a number of steps.

Part 2 provides a brief overview of Art XX.

Part 3 explains why we need an appropriate account of Article XX. It introduces the concept of justificatory explanation, outlining its role in legal interpretation and the difficulties existing economic and sociological approaches have in grounding a suitable justificatory explanation of Article XX. This, I suggest, greatly limits their value in informing the interpretation of Article XX, reinforcing the need for a new approach.

Starting in Part 4, I therefore tell a different story, about self-determination understood as a distinctive political and moral value. That Article XX has something to do with self-determination, understood as sovereign choice, is uncontroversial.¹² However this tells us nothing about which matters are reserved to sovereign choice. One agent's claim to make choices about a

¹² J. H. Jackson *The World Trading System: Law and Policy of International Economic Relations* (1997) at 233

particular matter necessarily excludes the like potential claims of others.¹³ Disputes arise where two communities prefer different choices on an issue. To adjudicate between these, we require an account of why it is valuable for a particular choice to be made by a particular community. This demands not simply an invocation of self-determination, but rather an account of its value.

In order to construct such an account, Parts 5 through 7 examine three sets of arguments for self-determination. The first, intrinsic accounts, understand collective self-determination as grounded in individual autonomy. The second, expressive accounts, understand it as an implication of the equal status of peoples, and the equal respect due to them. The third, instrumental accounts, understand it as valuable in facilitating the realization of other important goods, which prominently include individual autonomy, stability, and basic rights protection. Each approach plays important roles in accounting for international legal and political practices of self-determination. Intrinsic accounts are most intuitively obvious. Expressive accounts seem important in explaining post-colonial self-determination. However, it is instrumental accounts that do most work in explaining the GATT exceptions generally, and Art XX in particular.

By integrating insights from intrinsic, expressive and instrumental approaches, I construct a novel account of self-determination in international trade regulation. In Part 8, I show how that account can help us to understand Art XX, highlighting its implications for interpreting both the individual exceptions and the chapeau.

¹³ For this point in an economic model, Trachtman, 'Regulatory Jurisdiction and the WTO' 10 *Journal of International Economic Law* (2007) 631

Part 9 turns specifically to Article XX(a), highlighting the questions that provision raises, and how understanding public morals in terms of self-determination can answer these and thereby guide the law's progressive development.

Two points merit clarification at this stage.

First, the approach to self-determination adopted is deflationary; it denies that self-determination constitutes an all-purpose justification for policies adopted by states. Rather, it enquires whether specific invocations of self-determination can be traced back to an account of the *value* of self-determination, and an explanation of why the right to choose the particular policy is itself necessary to that value.

Second, and relatedly, it does not assume that self-determination will always, or even often, feature in the justification of measures. In many cases, no specific justification is demanded: Article XX only comes into play in respect of a specific subset of measures that is caught by the Core Disciplines. In other cases, a specific justification might be required, but it might invoke some other value, for example distributive justice.¹⁴

My political and moral premises are those of liberal cosmopolitanism: individuality, generality and universality¹⁵. Much has been done in other areas of

¹⁴ On both, Suttle, *supra* note 1.

¹⁵ Pogge, 'Cosmopolitanism and Sovereignty' 103 *Ethics* (1992) 48, at 48

international law to reconstruct historically statist doctrines in liberal cosmopolitan terms.¹⁶ In international economic law that work is only beginning.¹⁷ Others derive from these premises accounts of just economic distribution.¹⁸ I instead understand them as posing a challenge of institutional justification.¹⁹ Cosmopolitanism precludes justifying state action to outsiders in terms of *raison d'état*. Instead, we must offer outsiders justifications that they have reason to accept, as free and equal persons and peoples.²⁰ Self-determination is one such justification, and the one I suggest is most relevant to Art XX. The argument thus has two, related, goals: first, to elaborate such a justification of GATT Art XX; and second, to show how understanding Art XX in these terms can guide its interpretation and progressive development, with a specific focus on Article XX(a).²¹

¹⁶ E.g. McMahan, 'The Ethics of Killing in War' 114 *Ethics* (2004) 693

¹⁷ See e.g. Pogge, 'The Role of International Law in Reproducing Massive Poverty'; Howse and Teitel, 'Global Justice, Poverty and the International Economic Order', both in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (2011)

¹⁸ E.g. C. R. Beitz *Political Theory and International Relations* (1979); D. Moellendorf *Cosmopolitan Justice* (2001); T. W. Pogge *World Poverty and Human Rights : Cosmopolitan Responsibilities and Reforms* (2002); F. J. Garcia *Trade, Inequality, and Justice: Towards a Liberal Theory of Just Trade* (2003)

¹⁹ On this strategy: Blake, 'Distributive Justice, State Coercion, and Autonomy' 30 *Philosophy & Public Affairs* (2001) 257, at 262

²⁰ For more on the methodology, Suttle, *supra* note 1.

²¹ We might go further, arguing that the *correct* interpretation of Article XX is the one suggested herein. This might reflect Dworkin's interpretivist theory of law, which claims that the law simply is its best interpretation, in terms of fit and justification. In providing a moral argument for the account of self-determination advanced and an explanation of the positive law in terms of that

2. The Structure of Art XX

Article XX comprises two elements:

First, the introductory language, or chapeau, which reads:

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ...”

account, I establish the main components of that argument. Alternatively, it might reflect a doctrinal approach, invoking object and purpose in Article 31.1 VCLT. We cannot identify multilateral treaties’ object and purpose with their authors’ intentions. Instead, we must look to the texts, and to motives properly attributable to parties, leading to precisely the same considerations as the first, interpretivist, argument.

I don’t advance this claim here. Moral argument looks different from different perspectives. My approach is unapologetically liberal, invoking premises about the primacy of the individual, and the value of choice. Liberals endorse these premises, but they are controversial for non-liberal persons and peoples, including many WTO members. They might not therefore constitute an appropriate basis for interpreting WTO agreements. Certainly, doing so requires more argument that I provide here.

Second, ten individual paragraphs, referring to particular policies or concerns: public morals (XX(a)); human, animal and plant life and health (XX(b)); securing compliance with laws (XX(d)); national treasures (XX(f)); exhaustible natural resources (XX(g)); prison labor (XX(e)); import or export of gold or silver (XX(c)); and provisions for commodity agreements (XX(h)) and managing supply of raw materials and products in short supply (XX(i) and (j)).

The individual paragraphs each include specific language identifying a required nexus between the policy or goal mentioned, and the measure requiring to be justified. In some paragraphs, this requires that measures be “necessary to” achieve the relevant goal, whereas in others they need only “relate to” it.²²

A number of points merit mention.

First, Art XX comprises a closed list of exempted goals and policies. Not every *bona fide* non-protectionist policy is exempted.²³

Second, the combined effect of the chapeau and the nexus language in individual paragraphs is that states are closely circumscribed in how far, in pursuing exempted goals, they can accommodate other, non-exempt, considerations.²⁴

²² Other examples include “undertaken in pursuance of”, “involving” and “essential to”.

²³ For this point: Regan, ‘How to Think About PPMs and Climate Change’ in T. Cottier, O. Nartova and S. Z. Bigdeli (eds), *International Trade Regulation and the Mitigation of Climate Change* (2009) 119

²⁴ See e.g. *Brazil-Tyres*, (AB), §215, 225-227, 232

Third, Art XX exempts unilateral measures. The AB has emphasized that it is for members to decide for themselves at what level policies in Art XX should be realized.²⁵ This is despite the obvious international public goods qualities of some of these.²⁶ In consequence, the dispute in Article XX cases is only partly about the first order interests protected; it is also importantly about the second order question of who gets to make choices about those interests.

Fourth, and by contrast, in one prominent case the AB expressed concerns about unjustifiable unilateralism under Art XX²⁷; and in at least two it identified duties to negotiate with affected states before adopting unilateral measures.²⁸

These, then, are the key features of Article XX that require explanation and/or justification.

3. On Justificatory Explanation and Existing Approaches

In the previous section, I identified a number of prominent features of Article XX that I suggested required explanation. The sense of explanation that concerns me here is justificatory explanation. This is an explanation of an object or practice in

²⁵ e.g. *Korea-Beef*,(AB),§176; *EC-Asbestos*,(AB),§168; *Brazil-Tyres*,(AB),§140

²⁶ Article XX contrasts in this regard with Art 36 TFEU, whose exceptions are subject to harmonization by the Union's legislative organs.

²⁷ *US-Shrimp*,(AB),§166-168

²⁸ *Ibid*, *US-Gasoline*,(AB),pp.27-28

terms of the value that it realizes, explaining both its existence and its particular features in terms of its contribution to that value. It has much in common with what Dworkin labels constructive interpretation;²⁹ however, given controversies about the applicability of Dworkin's wider theory to international law, I prefer to avoid his terminology.³⁰

Justificatory explanation is distinct from historical explanation, which examines the causal antecedents of an object or practice; or genealogical explanation,

²⁹ See generally: R. Dworkin *Law's Empire* (1986) The most obvious distinction between my approach and Dworkin's is my argument's beginning with political morality rather than legal doctrine.

³⁰ On the relevance of Dworkin's view internationally: J. Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case' 16 *Oxford Journal of Legal Studies* (1996) 85, at 55 et seq B. Çali, 'On Interpretivism and International Law' 20 *European Journal of International Law* (2009) 805 J. A. Beckett, 'Behind Relative Normativity: Rules and Process as Prerequisites of Law' 12 *European Journal of International Law* (2001) 627 For Dworkin's own effort in this direction: R. Dworkin, 'A New Philosophy for International Law' 41 *Philosophy & Public Affairs* (2013) 2.

The strongest objection to extending Dworkin's approach internationally is that the reasons he sees for having regard to past political decisions in adjudication, which primarily concern legality and the judge's relation to the community, may not obtain internationally. By reasoning from morals to law, rather than vice-versa, I substantially avoid that objection. There are other good reasons for international adjudicators to have regard to the past, which explains why the argument must end up with the law; but these are primarily instrumental and epistemic, so the specific objections to interpretivism and integrity don't arise. These methodological issues are discussed in more detail in Suttle, *supra* note 1.

which traces its intellectual roots and implicit understandings.³¹ Rather than explaining where the object comes from, in either of these senses, it explains how we, here and now, might understand the object, as something that we have and that plays a role for us. It is justificatory, and so unavoidably normative: it appeals to some scheme of values against which we can judge the contribution of the object under scrutiny. But it is also explanatory, in that it must account for the key features of the object or practice, explaining why we should have this object or practice, as opposed to something else.

It is this latter quality that allows justificatory explanation to also serve our interpretive needs as lawyers: by accounting for the principal features of an area of law, a justificatory explanation can in turn suggest how these should be interpreted. Historical explanations are of course frequently invoked for this purpose, but given the diversity of states, looking to historical accounts of object and purpose of multilateral treaties poses insurmountable theoretical and practical challenges;³² while interpretation that appeals directly to sociologically shared understandings is incompatible with the legalized quality of the modern trade regime.³³ Justificatory explanation thus offers the best prospect of

³¹ For examples of each in the trade context: A. I. Douglas, P. Mavroidis and A. Sykes, *The Genesis of the Gatt* (Cambridge University Press, Aug 2008); A. Lang *World Trade Law after Neoliberalism Re-Imagining the Global Economic Order* (2011)

³² On the limits of historic object and purpose in respect of Article XX in particular: S. Charnovitz, 'Moral Exception in Trade Policy, The' 38 *Va J Int'l L* (1997) 689, at 701

³³ On this evolution: Lang, *supra* note, 31 at 240-246

identifying the object and purpose that settled doctrine requires must inform treaty interpretation.³⁴

The WTO's received wisdom includes a number of standard explanations, justificatory or otherwise, for Article XX. However, these struggle at the level of specifics, and hence provide little interpretive guidance.

The most common economic explanation of Article XX, for example, suggests that it serves to exempt bona fide non-protectionist (or, perhaps, domestically efficient) measures from the Core Disciplines, and to ensure that states are free to pursue legitimate non-trade policies.³⁵ As a historical explanation, this is no doubt sound. However, as a justificatory explanation, it struggles to account for key features of Article XX, including its exempting of some policies and not others, and its requirement for a close nexus between measure and exempted policy. It suggests that we exempt all non-protectionist policies, but this simply is not what Article XX does.³⁶ In consequence, it offers little guidance on interpreting the requirements actually appearing in Article XX.

³⁴ Article 31.1 Vienna Convention on the Law of Treaties 1969, 1155 U.N.T.S. 331

³⁵ See e.g. Regan, 'The Meaning of 'Necessary' in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing' 6 *World Trade Review* (2007) 347, at 366-369 For the wider economic accounts of the WTO into which this explanation fits: P. R. Krugman, M. Obstfeld and M. J. Melitz *International Economics* (2012) at 260; Maggi and Rodriguez-Clare, 'The Value of Trade Agreements in the Presence of Political Pressures' 106 *Journal of Political Economy* (1998) 574; K. Bagwell and R. W. Staiger *The Economics of the World Trading System* (2002)

³⁶ This in turn motivates arguments for more liberal interpretations of the Core Disciplines, and specifically of non-discrimination: D. H. Regan, 'Regulatory Purpose And 'like Products' in Article

Another explanation sees Article XX as exempting policies that are particularly important, notwithstanding their adverse trade impacts. States regard their freedom of choice on issues in Article XX as more important, this view suggests, than the economic benefits of liberal trade.³⁷ Again, as a historical explanation this seems eminently plausible: that members chose to exempt specific policy areas from the Core Disciplines suggests that they particularly valued their regulatory autonomy in these areas. However, this does not explain why these areas are important, instead appealing to the revealed preferences of members as expressed in the agreements.³⁸ In consequence, it offers no justificatory account of the content - as opposed to the existence - of Article XX, and in turn no guidance on its interpretation. Some scholars adopting this perspective invoke values including democracy, self-determination, pluralism and cooperation to

III:4 of the GATT (with Additional Remarks on Article II:2)' (2002); P. C. Mavroidis *Trade in Goods* (2007) at 257. This, however, raises further problems about the relationship between disciplines and exceptions.

³⁷ For this idea in an economic model of regulatory transactions: Trachtman, *supra* note 3 at 635-6, 644-6; and more generally J. P. Trachtman *The Economic Structure of International Law* (2008). Despite very different methodological commitments, embedded liberals' appeal to the GATT's balance between liberal trade and domestic autonomy has the same basic structure. See e.g. Howse, 'From Politics to Technocracy - and Back Again: The Fate of the Multilateral Trading Regime' 96 *American Journal of International Law* (2002) 94; Lang, 'Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime' 9 *Journal of International Economic Law* (2006) 81

³⁸ Economic approaches might seek to answer this by reference to aggregate welfare effects, but this motivates a non-categorical cost-benefit approach, rather than the categorical approach actually expressed in Article XX.

bolster their position.³⁹ However, without more, these cannot explain why some powers, and not others, should be reserved to states, or the conditions that should apply thereto. In consequence, interpretations of the specific provisions of Article XX invoking values at this level of generality appear question-begging.

Given Article XX's link to states' choices, explaining it in terms of self-determination seems most promising. The Core Disciplines restrict states' freedom of action. If we thought those restrictions might otherwise conflict with self-determination, then Article XX could be explained as resolving that conflict. However, to be useful this explanation must go beyond merely invoking self-determination: we need an account of self-determination that explains why some particular powers, and not others, are required to be exempted. This will be an account of self-determination as a moral and political value; an account of the powers that a political community requires to hold, and to exercise for itself, and of the values that are thereby realized. It is to this that I turn in the next section.⁴⁰

³⁹ See e.g. Howse and Nicolaïdis's call for "the spirit of embedded liberalism ... to be recovered and reinterpreted under the new conditions of globalization": Howse and Nicolaïdis, 'Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far', in Porter, Sauv , Subramanian and Zampetti (eds.) *Efficiency, Equity, Legitimacy: The Multilateral Trading System at the Millennium* (2001) 227 at 243. Cf. Howse and Nicolaïdis, 'Towards a Global Ethics of Trade Governance: Subsidiarity Writ Large' 79:2 *Law and Contemporary Problems* (2016) 259

⁴⁰ The argument here complements the account of justice in trade regulation in Suttle, *supra* note 1. However, it does not depend on that account. Rather, each of the existing approaches requires to be complemented with an explanation, of this kind, why the specific goals in Art XX should be exempted.

4. Unilateralism, Self-Determination and Shared Goals

The challenge, then, is to identify the powers that properly fall under a claim of self-determination. What powers must a people have, and exercise for themselves, in order to be regarded as self-determining? Answering this question will take us some way from the specifics of Article XX; but that answer is in turn essential to constructing a useful account of Article XX in terms of self-determination.

Self-determination is most frequently discussed in connection with national self-determination and secession⁴¹. In that context, the discussion is complicated by problems of identification (Which groups are entitled to self-determination?), stability (What does self-determination mean for the integrity of existing states?), and conflicting claims (How do we reconcile the claims of the majority in a state, the majority in a region, and any dissenting minorities in that region?). In consequence, much of the literature focuses on these questions, rather than the scope of the powers claimed⁴². Self-determination is generally understood as

⁴¹ For an overview: Miscevic, 'Nationalism' in E. N. Zalta (ed), *Stanford Encyclopedia of Philosophy* (Summer 2010 Edition)

⁴² Much of the debate focuses on whether nations, in particular, have a privileged claim to self-determination. On the diversity of plausible groups: Margalit and Raz, 'National Self-Determination' 87 *Journal of Philosophy* (1990) 439, at 447 On disaggregating questions about territories and the powers and duties attaching thereto: Goodin, 'What Is So Special About Our Fellow Countrymen?' *Ethics* (1988) 663, at 682

comprising a claim to statehood or, where this is not possible (usually, though not always, in response to the conflicting values noted above), some lesser form of self-government⁴³. The precise powers a state requires to be self-determining are rarely discussed⁴⁴. This literature can still provide a starting point, however, as by examining the arguments advanced for self-determination, we can in turn identify the scope of the powers each supports. Once we know why self-determination is valuable, we can work out what realizing that value demands. This is the strategy followed here.

It might seem contradictory to explore the powers of states in terms of a concept, self-determination, that is commonly attached to peoples, and asserted *against* existing states. The contradiction is dissolved, however, once we recognize that the claim to self-determination is itself a claim to constitute a political unit, and includes within it subsidiary claims about the powers that unit should have. The state is thus both the addressee of self-determination demands, and the vehicle through which these seek realization. To the extent states claim legitimacy, they do so in part as vehicles their peoples' self-determination. We can thus reason from self-determination to the powers ostensibly legitimate states properly claim.⁴⁵

⁴³ D. Miller *On Nationality* (1995) at 81

⁴⁴ An excellent example is *ibid*, 100.

⁴⁵ I do not develop the argument's implications for minorities demanding self-determination. It no doubt has such implications, but these are beyond my focus, which is limited to Article XX. One point where the two might interact is in the limits minorities' claims imply on self-determining choices of majorities, particularly under instrumental arguments. Without exploring

It might also be questioned here whether an explanation in terms of self-determination is compatible with my stated starting point in liberal cosmopolitanism. Certainly self-determination, with its emphasis on the particular, is in tension with the universalizing tendencies of cosmopolitanism. However, the argument developed below is liberal and cosmopolitan in the following important senses. First, it is liberal in that it approaches the state and the restrictions it imposes on us as an object of justification, rather than as something natural or pre-political.⁴⁶ I ask, from the perspective of persons and peoples, how the exercise of authority by the state, and specifically the state in its aspect as self-determining, might be justified; and, more particularly, justified to those over whom that authority is exercised, in terms of reasons that liberals can endorse. It is individualist in that, while I refer to both persons and peoples, the arguments examined can all ultimately be understood as addressed to persons: peoples intervene only in so far as we can understand their claims as ultimately realizing the good of persons. It is universalist and generalist, in that I examine claims from the perspectives of both insiders and outsiders, denying that states can simply look to their own in this regard. There are certainly illiberal and anti-cosmopolitan conceptions of self-determination, that value the

the issue here, it seems likely the interpretive proposals in Part 8 could accommodate such minorities' claims.

⁴⁶ This concern with the justification of restrictions has been labeled the 'Fundamental Liberal Premise': Gaus, Gerald, Courtland, Shane D. and Schmidtz, David, 'Liberalism', *The Stanford Encyclopedia of Philosophy* (Spring 2015 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/spr2015/entries/liberalism/>>

nation as an entity distinct from its members, and that value their own nation and co-nationals to the exclusion of outsiders, but these are not my concern here. For those endorsing liberal premises, such conceptions of the nation will be normatively unattractive, while their denial of equality makes them incapable of grounding international justification.

Given these constraints, I divide arguments for self-determination into three categories: intrinsic, expressive and instrumental. Intrinsic arguments see self-determination as an aspect of autonomy, and as such intrinsically valuable. Expressive arguments see it as necessary to express or respect some other value, such as fairness or equality. Instrumental arguments see it as valuable because it makes more likely the sustainable realization of that some other value. I address each category in turn, before integrating their conclusions to construct a dual account of self-determination for the purposes of Article XX, including elements of both unilateralism and shared goals.⁴⁷

5. Intrinsic Arguments

⁴⁷ I do not address arguments from territory to self-determination. Simmons develops such an argument, but concedes it has little relevance in the world as it is: Simmons, 'On the Territorial Rights of States' 35 *Noûs* (2001) 300, at 315. Like property, historical theories of territory only matter if they are true. We must therefore turn to consequentialist or contractualist accounts; but the scope of rights these support depends directly on arguments for those rights, running only contingently through territoriality.

Intrinsic arguments see self-determination as an aspect of autonomy, and as such intrinsically valuable. Despite being the most intuitively obvious arguments for self-determination, they provide limited guidance on the scope of the powers it requires.

Philpott advances one such an argument⁴⁸. Beginning from a Kantian account of autonomy, he argues this implies not only liberty, democracy and distributive justice, but also self determination, which he understands as promoting “participation and representation, the political activities of an autonomous person”⁴⁹.

Two separate claims about democratic autonomy motivate Philpott’s argument.

The first is that self-determination promotes participation. Persons are more likely to, and can more effectively, participate in the political process of a community in which they feel at home, than one from which they are alienated⁵⁰. It is participation in the political process, rather than agreement with its outcome, that constitutes us as free citizens, and reconciles our individual

⁴⁸ Philpott, ‘In Defense of Self-Determination’ 105 *Ethics* (1995) 352

⁴⁹ *Ibid*, at 358

⁵⁰ *Ibid*, at 359

freedom with the coercion of the state⁵¹. My autonomy is therefore better realized when I am a member of a self-determining political community⁵².

The second is that persons' interests are more effectively represented when they are not aggregated with the interests of disparate others. We are not required to "constantly combat or be drowned in the dissonance of foreign ways", and can thus "more directly shape [our] political context and are thus more autonomous".⁵³ On this latter claim, it is outcomes that matter. We are more autonomous when the law in fact represents our interests, regardless of our own participation in the political process⁵⁴.

Unfortunately neither claim provides much assistance in identifying the scope of the powers falling to a self-determining people.

⁵¹ Philpott invokes both Kant and Rousseau in developing this account of autonomy.

⁵² Arguments for the intrinsic value of participation in shared political projects, and for collective self-authorship, have a similar structure: Miller, *National Responsibility and Global Justice* (2007), at 88; D. Miller *Citizenship and National Identity* (2000) at 162 Cf. McMahan, 'The Limits of National Partiality' in R. McKim and J. McMahan (eds) *The Morality of Nationalism* (1997) 107, at 111 For an argument combining aspects of both claims, together with instrumental arguments: Y. Tamir *Liberal Nationalism* (1993) at 69

⁵³ Philpott, *supra* note 48, at 359

⁵⁴ As a claim about autonomy, this seems suspect. Whatever autonomy consists in, given diversity it cannot require outcomes actually reflect one's preferences. We might also query whether, given political economy concerns, domestic decision-making is more likely to achieve this. Cf. E. B. Kapstein and J. H. Rosenthal *Economic Justice in an Unfair World: Toward a Level Playing Field* (2006) at 70.

The participation claim asserts the value of a political sphere in which we can effectively participate. However, it does not identify the scope of the choices that fall to be made within that political sphere. They must presumably be sufficient to give us a meaningful sense of ownership over our shared lives. If our choices relate only to ephemera, or are wholly frustrated by external factors, then autonomy is not realized⁵⁵. However, this cannot require that we control all factors affecting how our lives go. Just as individual autonomy must be reconcilable with living together with other autonomous agents, so collective autonomy must respect the shared context in which polities act. Where issues affect more than one community, one's maximizing claim of autonomy necessarily conflicts with the similar claims of others. Some other argument is required to explain where the balance between such maximizing claims is drawn⁵⁶.

Similarly, while the outcome claim suggests that persons are more autonomous when their preferences are more frequently reflected in political decisions, it cannot tell us whose preferences should be reflected where decisions affect both members and non-members of a particular political community. Yet these are precisely the decisions that concern us. Again, we need more to get from the outcome claim to an account of who should decide in such cases.

⁵⁵ On what this might mean internationally: Miller, *Citizenship*, *supra* note 52, at 163; G. Brock *Global Justice: A Cosmopolitan Account* (2009) at 224

⁵⁶ On the limits of democracy in justifying borders: Abizadeh, 'Democratic Theory and Border Coercion' 36 *Political Theory* (2008) 37; Margalit and Raz, *supra* note 42

Philpott recognizes these problems in his discussion of secessionists' obligations to former compatriots, observing that self-determination applies only to "affairs that are truly [our] own", but not matters affecting the wider state⁵⁷. However, what we understand to be exclusively the affairs of a particular community will depend on our theory of justice, including importantly of economic justice⁵⁸. Just as domestically liberal commitments motivate both liberty rights and socio-economic rights, so internationally they imply both a core of self-determination, and a complex of restrictions to respect the equal rights of others.⁵⁹

The intrinsic argument, then, offers little guidance on the scope of the choices over which communities can expect to be self-determining. It demands a sufficient range of choices to provide meaningful self-authorship⁶⁰; but tells us

⁵⁷ Philpott, *supra* note 48, at 363. Cf. Margalit and Raz, *supra* note 42, at 456. In the trade context this is recognized in J. H. Jackson *Sovereignty, the WTO, and Changing Fundamentals of International Law* (2006) at 59; Howse, 'Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence' in J.H.H. Weiler (ed.) *The EU, the WTO, and the NAFTA* (2001) 67

⁵⁸ See generally Philpott, *supra* note 48, at 362. Cf. Fine, 'Freedom of Association Is Not the Answer' 120 *Ethics* (2010) 338, at 345

⁵⁹ For my views on the scope of those rights, Suttle, *supra* note 1. Readers need not share those views to accept the point here. The problem will arise for any view acknowledging the moral standing of outsiders.

⁶⁰ Moore includes some choices about land use and property regimes in this category: Moore, 'Natural Resources, Territorial Right, and Global Distributive Justice' 40 *Political Theory* (2012) 84, at 87

little about the relationship between self-determination and decisions affecting outsiders.

In consequence, it offers a very limited account of *external* self-determination⁶¹. Because external decisions necessarily relate to outsiders, the argument from autonomy seems to run out. We can motivate treaty powers from autonomy by analogy to Fried's account of contracts as promising⁶²; but this tells us nothing about our pre-contractual rights and obligations⁶³. This seems unsatisfactory given the history and contemporary practice of self-determination. External self-determination is commonly regarded as fundamental; and the establishment of an independent foreign policy has been a key step for post-colonial states in asserting their independence⁶⁴. The intrinsic argument cannot, then, be the whole of self-determination. But if such claims cannot be grounded in autonomy, how should we understand them?

6. Expressive Arguments

⁶¹ Put otherwise, it explains Westphalian Sovereignty, but not International Legal Sovereignty: S. D. Krasner *Sovereignty: Organized Hypocrisy* (1999) at 14

⁶² C. Fried *Contract as Promise: A Theory of Contractual Obligation* (1981) Simmons labels this the 'federative' power: Simmons, *supra* note 47, at 306

⁶³ On the distinction: Hart, 'Are There Any Natural Rights?' 64 *The Philosophical Review* (1955) 175

⁶⁴ I. Brownlie *Principles of Public International Law* (2008) at 73

The second category noted above is expressive arguments, including in particular arguments from fairness and equality. These neither ascribe intrinsic value to self-determination nor claim it serves instrumentally to advance some other value. Rather, they claim that according self-determination to particular populations expresses or respects some other value that, while not comprised in self-determination, is connected to it⁶⁵. Unfortunately, while providing more guidance than intrinsic arguments on the powers falling under self-determination, they remain inadequate for our purposes.

What does an expressive argument look like?

Consider, first, colonial peoples. Their colonial status might substantially undermine their autonomy, grounding an intrinsic argument for self-determination. However, in many cases colonial peoples were accorded substantial self-government, particularly in respect of matters that were “truly [their] own”. We might imagine a particularly restrained imperialist affording self-government in all matters where the intrinsic argument uncontroversially applies, controlling only foreign and defence policies. While the intrinsic argument would not apply, we presumably still regard the situation as unjust. The explanation, on the expressive account, is that external control over foreign and defence policy is unfair, denying the equality of peoples.⁶⁶.

⁶⁵ E.g. Waldron, ‘Two Conceptions of Self-Determination’ in S. Besson and J. Tasioulas (eds), *supra* note 17, 399. Cf. C. Gans *The Limits of Nationalism* (2003) at Ch. 3

⁶⁶ Elements of this idea appear in Copp, ‘Democracy and Communal Self-Determination’ in R. McKim and J. McMahan (eds), *supra* note 52, at 292; Philpott, ‘Self-Determination in Practice’ in

This argument does not identify any intrinsic value in self-determination. It is compatible with a world where no people is self-determining, or where peoples exercise limited self-determination, provided the limits are fair having regard to those imposed on others. However, it challenges any arrangement whereby some peoples' self-determination is limited, while others' is not. It need not condemn this; countervailing concerns might trump self-determination claims of some peoples but not others. But such unequal self-determination is at least *prima facie* objectionable.

This might suggest the expressive argument was silent on the content of self-determination. Provided it is equal, it may be more or less restricted without objection. However, the requirement of equality itself generates limits in at least two circumstances.

First, the expressive argument can directly condemn measures whereby one people exercises power over another. This, recall, is the objection to colonialism. Where one people makes choices for another, it necessarily expresses the disrespect that this argument addresses.⁶⁷

M. Moore (ed), *National Self-Determination and Secession* (1998) 83. Cf. Berlin, 'Two Concepts of Liberty' in H. Hardy and R. Hausheer (eds.) *The Proper Study of Mankind: An Anthology of Essays* (1997) at 226

⁶⁷ Of course, identifying when this is the case requires a further argument, which I do not attempt to provide here. Elements of an answer appear in Suttle, *supra* note 1.

Second, consider the claim that small and developing states are more exposed than others to developments in international markets and the international system. This might reflect their reliance on export earnings, international capital markets or foreign investors⁶⁸; or perverse incentives international law poses for domestic institutions⁶⁹. In either case, the objection is in terms of *equal* self-determination. It is not simply that the relevant states are subject to external influences. All states in an interdependent world are subject to such influences. Rather, the objection is that they are *more* exposed to such influences than larger and more developed states. Formal equality obscures substantively unequal freedom⁷⁰.

Of course, given the inevitable – and not necessarily objectionable – facts of states’ varying sizes and economic endowments, some inequalities of this kind are inevitable. Any view condemning all such inequalities would thus struggle for practical relevance. That does not however dispense with this argument, however. Rather than focusing on all such inequalities, we might look for some

⁶⁸ Garcia, ‘Trade and Inequality: Economic Justice and the Developing World’ 21 *Michigan Journal of International Law* (2000) 975 at 987; Ronzoni, ‘Two Conceptions of State Sovereignty and Their Implications for Global Institutional Design’ 15 *Critical Review of International Social and Political Philosophy* (2012) 573; Margalit and Raz, *supra* note 42, at 441; O. O’Neill *Bounds of Justice* (2000) at 140

⁶⁹ Pogge, ‘Are We Violating the Human Rights of the World’s Poor’ 14 *Yale Hum Rts & Dev LJ* (2011) 1, at 29

⁷⁰ Ronzoni, *supra* note 68, at 581; Loriaux, ‘Fairness in International Economic Cooperation: Moving Beyond Rawls’s Duty of Assistance’ 15 *Critical Review of International Social and Political Philosophy* (2012) 19, at 28

minimum threshold for regarding a state as self-determining in this sense. If we can then say, not that one people is more self-determining than another, but rather that one enjoys self-determination while the other does not, then the expressive argument can be invoked. However, we must look elsewhere to identify this threshold.

The expressive argument, then, has some relevance for our inquiry, but like the intrinsic argument, it cannot explain which powers a people must exercise for themselves in order to be self-determining. We therefore turn to a third cluster of arguments, which identify an instrumental value in self-determination.

7. Instrumental Arguments

Instrumental arguments defend self-determination as making more likely the sustainable realization of some other good to which it is causally linked. It is here that we find the clearest guidance on the content of the powers required to be exercised by a self-determining state. A number of distinct instrumental arguments might be advanced: I here consider the four most prominent.

A number of broadly nationalist thinkers advance instrumental arguments for self-determination as protecting national cultures⁷¹. These depend on a prior claim about the value of such cultures for persons. Margalit and Raz, for example,

⁷¹ Gans, *supra* note 65, at Ch. 2; Nielsen, 'Liberal Nationalism and Secession' in M. Moore (ed), *supra* note 66, at 121; Tamir, *supra* note 52, at 69; Miller, *supra* note 43, at 85

argue that culture is a pre-requisite to our forming and pursuing worthwhile goals and relationships, which are in turn understood as essential components of wellbeing.⁷² To the extent this is the case, persons have a fundamental interest in the continued flourishing of the cultures into which they are born, and in their adherence thereto. Protecting that continued flourishing may in turn require that the relevant group enjoy “political sovereignty” over its own affairs⁷³.

This protective argument suggests possible boundaries on the rights it will justify. If self-determination is understood as protecting a group’s culture then it must accord to peoples at least such powers as are necessary to do that⁷⁴. This might seem to substitute one ill-defined term (‘culture’) for another (‘self-determination’).⁷⁵ However, by explaining why culture is valued, namely as a context for individuals to form and pursue goals and relationships, it suggests some possible boundaries on that concept. In particular, it suggests that the culture requiring protection is that which exists within the territory of the

⁷² Margalit and Raz, *supra* note 42, at 448

⁷³ This argument is not limited to a distinctively national culture. It depends only on being attached to some culture: McMahan, *supra* note 52, at 121 Gans, *supra* note 65, at 42. However, a further set of identity-based arguments pre-empt the objection that any culture, and not only persons’ original culture, will suffice for this purpose: Miller, *supra* note 43, at 86; W. Kymlicka *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1996) at 84

⁷⁴ Miller tentatively distinguishes the implications of this argument for social, economic and defence powers: Miller, *supra* note 43, at 100

⁷⁵ Thus Miller assumes the powers required will vary with the relevant culture. Gans argues this justifies protecting cultures, but not individual practices therein: Gans, *supra* note 65, at 55 et seq.

relevant state, in so far as it is there that goals and relationships are formed and pursued. This will not always be the case. We can imagine peoples whose encompassing culture was expressed externally, and for whom that external expression was valuable in the sense invoked by Margalit and Raz⁷⁶. However, we might doubt whether, even in these cases, the fact of external expression, as opposed to the aspiration, was valuable in the relevant sense. There are also obvious fairness problems with such externally expressed cultures: if the only way one people can maintain its valued culture is through seeking to change others', then such a culture may simply be incompatible with the equality of peoples⁷⁷. An analogy can be drawn to individual conceptions of the good that deny the equal claim of others to pursue their own conceptions⁷⁸. We need not deny that peoples can have reasons to pursue changes in the cultures and practices of others; but this cannot be justified solely through the instrumental value for them of preserving their own encompassing culture. Something more than self-determination is required.

There is a second, less culturally focused, protective argument. Margalit and Raz locate the value of culture in its stabilizing role. However, for persons to form and pursue goals and relationships, more than a stable culture is required. They

⁷⁶ E.g. MacIntyre, 'Is Patriotism a Virtue?' *Debates in Contemporary Political Philosophy* (1984) 286, at 7

⁷⁷ It may also conflict with the expressive argument for self-determination.

⁷⁸ For a similar point, Hurka, 'The Justification of National Partiality' in R. McKim and J. McMahan (eds), *supra* note 52

also require a stable institutional, political and economic environment⁷⁹. Consider, for example, the choice of career, which will often have pervasive effects on a person's life. While stability may not be a prerequisite to choice, relative stability is a plausible prerequisite to meaningful choice. If I choose to pursue an academic career, for example, that choice may be frustrated if, some years later, all the universities in my country close. This is likely significantly to impair both my material wellbeing and my sense of autonomy. We need not suppose that I have any right to pursue any particular career, or indeed to continue in my chosen career, to recognize the value that a stable context of choice offers for individuals⁸⁰. What is at issue here is not the range or quality of choices available, but rather their stability. How much stability is required is an open question. Some risk is presumably inevitable, and need not prevent individuals taking control over and responsibility for their own lives. Further, some individuals may flourish in uncertain environments, while others prefer stability. More generally, at a societal level stability may be valuable, to the extent that it protects expectations; but it may also be costly, stifling innovation and restricting opportunities, particularly for new participants. While there is no logical necessity that stability be protected locally, the value judgments required,

⁷⁹ Theorists of embedded liberalism emphasize this aspect: Polanyi *The Great Transformation : The Political and Economic Origins of Our Time* (2001), passim, esp. Ch. 12, 18 and 21; Ruggie 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order' 36 *International Organization* (1982) 379, at 386; Lang, *supra* note 31, at 190. Cottier argues such stabilizing mechanisms are pre-requisites to successful liberalization: Cottier, 'Poverty, Redistribution, and International Trade Regulation' in K. N. Schefer (ed), *Poverty and the International Economic Legal System: Duties to the World's Poor* (2013)

⁸⁰ On the perils of ignoring these concerns with commodity labor: Polanyi, *supra* note 79, at 76

as well as informational considerations, suggest this is better done here than internationally. Instrumental and intrinsic arguments thus converge to suggest that peoples should have the powers necessary to maintain this stability⁸¹. However, this argument is similarly subject to fairness constraints. A people cannot expect both perfect stability domestically, and reliable access to the international economy, with implications for the stability of others.

A third instrumental argument emphasizes the role of the state in providing public goods, including in particular security of persons and property. We label as 'failed' states that cannot provide physical security for their populations. However, the concern here is broader. States provide diverse public goods, including security, stability, cultural protection and political and socio-economic justice, including the protection of basic rights⁸². For various reasons, it makes sense to provide such goods at the level of individual political communities⁸³.

⁸¹ The assumption that stability is best provided domestically may also reflect the extent to which we have come to identify the trade regime with unregulated markets, eliding earlier assumptions about the role of social order in international trade regulation.

⁸² This includes what Buchanan labels 'distributional autonomy': Buchanan, 'Rawls's Law of Peoples: Rules for a Vanished Westphalian World' 110 *Ethics* (2000) 697, at 705

⁸³ Kratochwil identifies the failure to provide these as stimulating the transition from feudal to territorial sovereignty. Ronzoni and Dietsch make similar points in advocating moves towards cooperative sovereignty. Kolers examines a number of arguments for defining state borders by reference to the efficient scope of public goods. Kratochwil, 'Of Systems, Boundaries, and Territoriality: An Inquiry into the Formation of the State System' 39 *World Politics* (1986) 27; Ronzoni, *supra* note 68; Dietsch, 'Rethinking Sovereignty in International Fiscal Policy' 37 *Review*

Their value lies in their provision to individuals; but they also constitute plausible prerequisites to individuals enjoying the benefits of being self-determining, as that concept is understood by the other arguments. To the extent this is the case, the capacity to make and implement choices about such goods is itself a necessary element of self-determination.

A fourth instrumental argument highlights the role of peoples as custodians of territories, and of the resources found therein. Two separate arguments might be made. The first parallels Hume's consequentialist argument for property. It claims that resources will be better managed, to the benefit of all, if they are controlled by particular peoples⁸⁴. The second highlights the importance of natural resources for other aspects of self-determination, including autonomy and cultural stability⁸⁵. Peoples who control territories and resources are more secure in their enjoyment of these latter goods⁸⁶. Control of territory and resources is therefore a necessary element of self-determination.

What these instrumental arguments share is the claim that particular goods are better realized at local rather than global levels. There are presumably others

of International Studies (2011) 2107; Kolers, 'Justice, Territory and Natural Resources' 60 *Political Studies* (2012) 269, at 34.

⁸⁴ Rawls adopts a version of this view: J. Rawls *The Law of Peoples* (1999) at 38

⁸⁵ See, on the link between self-determination and sovereignty over resources: Kratochwil, *supra* note 83, at 42

⁸⁶ Moore labels this the 'standard view' of territorial rights: Moore, *supra* note 60, at 85 Cf.: Kolers, *supra* note 83; Armstrong, 'Resources, Rights and Global Justice: A Response to Kolers' *Political Studies* (2013)

that might be proposed, but these suffice for our purposes. What do they imply about the scope of the rights required for a people to be self-determining?

A people must be able to provide the goods highlighted by each argument: to protect and develop its distinctive culture, to the extent this is valuable for its members; to stabilize institutions, politics and markets to the extent necessary for persons to make meaningful choices; to make and implement choices about the provision of public goods; and to manage the natural resources that provide the material basis for all of the above.

One potential instrumental argument must be rejected, however. This is the claim that peoples must necessarily judge *for themselves* what measures are required under any of these arguments. The claim to self-judgment is generally advanced in instrumental terms. In its simplest form, it simply restates Hobbes' argument against trust in a state of nature⁸⁷: if the values protected by self-determination have overriding importance then peoples must exercise these powers securely, which requires having the final say on whether they require to be exercised⁸⁸. The argument is vulnerable to the same challenge commonly offered to Hobbesian realists: in most cases there is little reason to think, and much reason to doubt, that peoples will be more secure in their rights if each

⁸⁷ Hobbes himself regards adjudication as an essential element of sovereignty, and the impossibility of alienating it as an argument against limited government. Hobbes *Leviathan* (R. Tuck ed.) (1996) at 124

⁸⁸ Cf. MacIntyre, *supra* note 76

claims a privilege to determine for itself what this requires⁸⁹. There is, however, a moderate form of this argument that we can accept. This is the claim that, in many cases, peoples are best placed to determine what is required to protect the goods underpinning self-determination. The specific content of those goods will vary across peoples; in a number of cases, that variation is the reason self-determination is valued. In consequence, members of a community have epistemic advantages in determining their relative importance, and the measures required to protect them⁹⁰. This, however, is compatible with international review of the self-determination justifications that states offer.

8. Reconstructing Self-Determination in Trade Regulation

The intrinsic, expressive and instrumental arguments each provide different accounts of the minimum powers a people requires in order to be self-determining. We need not adjudicate between them; we might consistently hold that peoples have an intrinsic claim to exercise some powers, expressive claims to others, and instrumental claims to others again⁹¹. By integrating the three approaches, we can derive a general account of self-determination for the

⁸⁹ This does not mean that we must reason from global justice to domestic limits, but only that the limits of self-determination must be defined for the international context. Cf.: Miller, *Citizenship*, *supra* note 52, at 167

⁹⁰ Margalit and Raz, *supra* note 42, at 457; Dietsch, *supra* note 83, at 2114. We see elements of this idea in the public morals caselaw discussed in Part 9 below.

⁹¹ Philpott, *supra* note 66, at 82

purposes of the GATT. This suggests two main ways self-determination might be relevant.

The first concerns powers essential to the self-determination of the regulating people, and relies predominantly on instrumental arguments. The scope of the measures it justifies depends on the scope of those instrumental arguments, but runs at least to measures necessary to protect the various goods noted above. To the extent that a measure is required for these purposes, it is justified under self-determination. To the extent it goes further, whether because it is pursued another goal, or is unnecessary to the particular goal pursued, it requires justification in other terms. There are reasons to defer to peoples in drawing this line, but the line is defined by objective justification, not subjective choice. Instrumental arguments do most work in fleshing out this aspect of self-determination. Expressive and intrinsic arguments play a supporting role.

The second concerns shared goals and standards. I noted above that the intrinsic argument tells us little about peoples' claims to determine matters affecting others. Its one implication for external politics was in justifying a treaty power or, more generally, a power of peoples to commit themselves to particular goals. This need not take the form of legal commitments: just as promising is wider than contracting, there are many ways peoples can commit themselves to shared standards, goals and projects. Such commitments provide a plausible basis, grounded in the intrinsic argument, for justifying measures in pursuit of such

standards, goals and projects.⁹² That justification reflects the self-determination of both the regulating people and the affected outsiders.

These arguments also imply clear limits. Self-determination cannot be invoked to justify every policy that a people wishes to adopt. It is only where that policy falls under one of the specific arguments outlined above that justification under self-determination is available. This distinguishes this approach from economic approaches in Part 3. It also substantially ameliorates problems of conflicting invocations of self-determination, providing a route whereby particular issues can be located within the domains of particular peoples.

Understanding self-determination in these terms can illuminate a number of areas of WTO law where conventional economic approaches struggle. For example, it suggests an account of trade remedies disciplines, which have resisted economic explanation. It has implications for the SPS and TBT agreements, and the scope of regulatory autonomy thereunder. However, for present purposes, the most significant implication of this account of self-determination is in explaining the various exceptions in the GATT, and in particular Art XX.⁹³

⁹² Internationally the pervasive possibility of coercion means care is required in identifying whether and to what extent goals are in fact shared by relevant peoples.

⁹³ On the implications elsewhere in the trade regime: Suttle, *Distributive Justice and World Trade Law: A Political Theory of International Trade Regulation*, (Forthcoming, Cambridge University Press)

Articles XX (a), (b), (c), (d), (f), (i) and (j) can each be understood as expressing, to varying degrees, the first aspect of self-determination above. Consider: if public morals are understood as relating to a community's shared life and public culture, rather than its judgment of outsiders, their protection becomes central to the instrumental approach.⁹⁴ The capacity to protect human, animal and plant life is similarly necessary for regarding a people as self-determining on that view. This is clearest for human life; but protecting animal and plant life, as important parts of the physical and social fabric of a community, may also be essential to sustaining self-determination. Controls on the import and export of precious metals and the exploitation of natural resources, price stabilization measures, and controls on trade in essential products in short supply can all be understood as necessary, particularly for smaller and less resilient economies, to maintain effective control over economic development and ensure equitable distribution amongst domestic constituencies⁹⁵. Finally, the capacity to ensure compliance with domestic laws is a *sine qua non* of political self-determination. If a people cannot effectively implement their collective choices, as expressed through their political process, then self-determination becomes illusory⁹⁶. If domestic choice is pre-empted by international factors, then both intrinsic and expressive

⁹⁴ As in e.g.: Miller, *supra* note 43, at 24. The protection of national treasures is similarly relevant here, as well as to the idea of nations as trans-historical communities: *ibid*, 23; Gans, *supra* note 65, at 49-58.

⁹⁵ In each case the paragraphs' provisos emphasize that self-determination cannot be purchased at the expense of other peoples. Consider, e.g., the AB's suggestion that the proviso to Art. XX(g) expresses a concern for even-handedness: *US-Gasoline*,(AB),p.21. Cf. *China-Rare Earths*,§5.123-1.136. A similar analysis applies to safeguards under Art XIX.

⁹⁶ Recall Miller's image of nations as communities 'active in character'. Miller, *supra* note 43, at 24

arguments imply a claim to insulate the domestic from the international to the extent necessary to make that choice possible⁹⁷.

The second aspect is expressed in Article XX(a), (b), (e), (g) and (h). This list overlaps with that in the previous paragraph. For example public morals, while reflecting the shared life of a community domestically, can also be understood in global terms, as expressing judgments of right conduct shared by peoples generally⁹⁸. The protection of human, animal, and plant life might also be understood in terms of shared goals, particularly where states act to protect these values outside their borders. Controls on the products of prison industry might be understood as reflecting a collective recognition of their moral complexity. Finally, the conservation of exhaustible natural resources is the archetypal global common concern⁹⁹. Again, this problem looks different internally and externally. The conservation of a state's own resources is essential to effective self-determination, under both instrumental and intrinsic approaches¹⁰⁰. Concern for resources elsewhere, whether in others' territories

⁹⁷ Note, however, that it is domestic choice, not international relations, that is protected: *Mexico-Soft Drinks*,(AB),§75

⁹⁸ I discuss this point further in the next section.

⁹⁹ On the link between cooperation and international conservation: Charnovitz, 'Exploring the Environmental Exceptions in GATT Article XX' 25 *Journal of World Trade* (1991) 37, 52-53 Interestingly, in tracing the move from cooperative to unilateral conservation measures, Charnovitz highlights cases where the relevant harms (over-fishing, ozone depletion) redound to the regulating state.

¹⁰⁰ On both the relation between natural resources and self-determination, and the inherent limits of this argument: *China-Rare Earths*,(Panel),§7.261-277

or the global commons, requires justification in other terms. Global environmental degradation may undermine states' capacity for self-determination but this has not been the sole focus of such concerns¹⁰¹. Global environmental arguments typically bifurcate into anthropocentric and transcendental claims. The former evoke the value of environmental resources for human persons and peoples; while the latter evoke the inherent value of nature, biodiversity, or particular animal and plant species¹⁰². To the extent environmental measures addressing global commons are anthropocentric, they are also frequently distributive; they protect the value for some of conserving resources, at the expense of the value for others of exploiting them¹⁰³. Measures pursuing such distributive concerns cannot be justified directly under self-determination¹⁰⁴. Conversely, arguments in transcendental terms rely on contestable value claims, which we cannot assume are shared; the fact that a regulating people values these constitutes no justification to others. However, to the extent conservation reflects a *collective* political choice amongst relevant peoples, we may justify measures to protect resources in the territories of those

¹⁰¹ To the extent global commons problems are understood in these terms, response may be justified under the first limb. Anthropogenic climate change seems a plausible candidate. Whether responses are best justified under the first or second aspects depends on the implications for effective self-determination of both regulating and third states.

¹⁰² O'Neill, 'Environmental Values, Anthropocentrism and Speciesism' 6 *Environmental Values* (1997) 127, at 127

¹⁰³ *Ibid*, 130

¹⁰⁴ There might, of course, be other globalist justifications available (although I have elsewhere argued there are not).

peoples, or in the global commons, under this second aspect of self-determination¹⁰⁵.

The Art XX chapeau plays two roles on this account.

The first, policing the intrusion of extrinsic considerations, has been most prominent in the case-law. In *Gasoline, Tyres and Seals*, the chapeau analysis focused on whether discrimination tracked the exempted interest or other, extrinsic, considerations¹⁰⁶. The account above suggests self-determination justifies measures in pursuit of relatively narrow goals. It is therefore important that measures in fact pursue those goals, and are not tailored to advance others.

The second, suggested by the AB in *Shrimp*, is a substantive review of the justifiability of measures, and a balancing of the rights of members.¹⁰⁷ This will be most relevant under the second aspect of self-determination. In *Shrimp*, particularly in discussing coercion and negotiations, the AB goes beyond whether extrinsic considerations intrude, to inquire how far the goals pursued are in fact shared, and whether they are pursued in a reasonable manner, having regard to the claims of outsiders. The fact that a category of goal (public morals, conservation of resources) is mentioned in Art XX does not answer whether the particular standard invoked is to which affected outsiders have committed themselves. This is precisely the analysis implied by the second aspect above.

¹⁰⁵ The chapeau can be read as tracking these concerns: *US-Shrimp*,(AB),§156,159

¹⁰⁶ The analysis of arbitrariness in *Tyres* is particularly expressive of this concern.

¹⁰⁷ *US-Shrimp*,(AB),§159

9. Public Morals, Public Culture and Shared Goals

We can thus move from an account of the value of self-determination to an account of Article XX. This in turn has implications for how we interpret both Article XX's individual paragraphs, and the chapeau. Those implications will vary from paragraph to paragraph, a conclusion reflected the AB's own approach.¹⁰⁸ In this penultimate section, I therefore examine the implications for one specific exemption, public morals under Article XX(a).

As noted, public morals are potentially relevant under both aspects of self-determination. I therefore start by introducing a number of unanswered questions in the Article XX(a) case-law, before showing how my dual account of self-determination suggests these be answered.¹⁰⁹ These include the exact nature of public morals, and what it means to protect them. These are questions that the AB itself seems reluctant to address, preferring to focus on more familiar issues of necessity and arbitrariness. In the second half of this section I therefore examine how far the AB's approach to these latter issues in fact depends on answers to the former questions, and how addressing these more directly might affect that approach.

¹⁰⁸ *US-Shrimp*,(AB),§120

¹⁰⁹ As well as the WTO case-law, I note below some answers to these questions in other contexts. However differences across contexts and the variety of answers offered precludes drawing any direct lessons from these, and I make no claim to provide a systematic doctrinal account of these issues as they arise elsewhere.

The first question is how we define, and identify, public morals.

In the three cases – *Gambling*, *Audiovisual* and *Seals* – that have considered public morals, the same formulation is adopted, describing them as “standards of right and wrong conduct maintained by or on behalf of a community or nation”.¹¹⁰ Further, the Panel in *Gambling*, in reasoning endorsed by the AB in *Seals*, observed that “content of [public morals] for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values”, and that accordingly members should be given “some scope to define and apply for themselves the concepts of “public morals” ... in their respective territories, according to their own systems and scales of values”.¹¹¹

The most obvious interpretation of these remarks is that public morals are cultural or sociological facts, characteristics of particular populations or communities.¹¹² So conceived, they exist independent of the political acts of that community.¹¹³ Members’ political organs are not free, on this view, to determine

¹¹⁰ *EC-Seals*,(AB), §5.199

¹¹¹ *US-Gambling*,(Panel),§6.461, approved in *EC-Seals*,(AB),§5.199

¹¹² For this approach: Marwell, *supra* note 3, at 824-826; T. Perišin, ‘Is the EU Seal Products Regulation a Sealed Deal? EU and WTO Challenges’ 62 *International and Comparative Law Quarterly* (2013) 373, at 394. On the ambiguities in the AB’s approach to this point: Wu, *supra* note 3, at 233

¹¹³ This conception of public morals appears in certain ECHR case-law: e.g. *Otto-Preminger-Institut v Austria* 13470/87 [1994] ECHR 26 (20 September 1994), §50.

the content of their own public morals. Rather, public morals are prior to political choice. However members have epistemic advantages identifying their own public morals, so some deference to their judgment is appropriate.

An alternative interpretation understands public morals as political facts, expressing a community's collective choices through its political organs.¹¹⁴ It is through joint political action that the distinct moral commitments of individuals become the shared public morals of a community.¹¹⁵ The standard from which members enjoy some scope for departure then becomes, not the sociological consensus of the first interpretation, but rather an internationally shared standard of public morals.¹¹⁶ This latter interpretation is supported by references, in both *Gambling* and *Seals*, to evidence of international concerns about the relevant moral issues.¹¹⁷

¹¹⁴ A unilateral form of this interpretation is defended in Howse, Langille and Sykes, *supra* note 3. For criticisms of such purely political domestic conceptions: Du, *supra* note 3, at 692-694

¹¹⁵ The ECJ adopts this interpretation in Case 34/79 *R v Henn and Darby*, §17

¹¹⁶ Such an international sense of public morals appears in: Charnovitz, *supra* note 3, at 742; Wu, *supra* note 3. It is reflected in the ECtHR's more recent margin of appreciation jurisprudence, which compares a member's public morals with those obtaining in the membership as a whole: Dollé & Ovey, 'Handyside, 35 Years down the road' in Casadevall, Myjer, O'Boyle and Austin eds., *Freedom of Expression Essays in honour of Nicolas Bratza* (2012)

¹¹⁷ *US-Gambling*, Panel Report, §6.471-6.473; *EC-Seals*, Panel Report, §7.292. Admittedly, it is not clear how much weight these international factors carry, beyond confirming conclusions already reached based on domestic considerations. For a reading of the *Seals* dispute emphasizing this international aspect: Sykes, *supra* note 8. On the challenges of either a purely global or purely local definition: Wu, *supra* note 3, at 231

It is worth emphasizing here what public morals in WTO discourse are not about, namely the truth or otherwise of the underlying moral claims. When we argue about public morality, we argue about the claim of particular communities to have, or to choose, their own standards, rather than about the validity of those standards in any deeper metaphysical sense.¹¹⁸ In consequence, when we invoke public morals, our claim is not that particular conduct is immoral as a matter of objective fact; we claim only that it is immoral by the standards that obtain *around here*. Our claim is thus about which standards should apply, in circumstances where standards vary across disputing members.¹¹⁹

The second question is what it means to “protect” public morals. Again, there are a number of ways we might understand this.¹²⁰

The first understands public morals as the moral qualities of individual members of the public. On this interpretation, we protect public morals by protecting the public from immoral behavior.¹²¹ If we understand particular conduct, or

¹¹⁸ Some commentators seem to overlook this point. E.g. A. Herwig, ‘Too Much Zeal on Seals? Animal Welfare, Public Morals, and Consumer Ethics at the Bar of the Wto’ 15 *World Trade Review* (2016) 109, at 120

¹¹⁹ This characteristic role of disagreement distinguishes public morals in Article XX(a) from similar concepts in human rights treaties, where morals are invoked to balance rights, rather than to settle inter-community disagreement. For an interesting effort to capture the idea of morals at their most general: Howse, Langille and Sykes, *supra* note 3, at 95

¹²⁰ For a somewhat different classification: Charnovitz, *supra* note 3, at 692

¹²¹ See e.g. Charnovitz, *supra* note 3, at 692.

particular products (alcohol, narcotics, pornography) as tending to debase or pollute those engaged with them, then restricting that conduct, or those products, will in turn protect public morality.¹²²

A second interpretation understands public morals as qualities of a particular community. Recalling the language favored by the AB, these are the standards of right and wrong conduct maintained by that community. So understood, public morals are social conventions, part of the public culture of the relevant community; and we protect public morals by protecting their status as such, and the community's relation to them.¹²³

A third interpretation equates protecting public morals with protecting the values or interests that those morals identify. It reads "protecting" as "enforcing", or perhaps "vindicating", implying that any measure enforcing compliance with a moral standard, or preventing a moral harm, thereby protects public morals. It is under this third interpretation that issues of extraterritoriality most readily arise.¹²⁴

¹²² This sense of protection is evident in the ECtHR's decision in Case 5493/72 *R v Handyside* §52

¹²³ Howse and Langille's emphasis on the 'expressive' function of law reflects something like this understanding: Howse and Langille, *supra* note 11 at 372. The ECHR's understanding of blasphemy arguably reflects this idea: see e.g. Case 13470/87 *Otto-Preminger-Institut v Austria* 13470/87 (20 September 1994), §56; Case 17419/90 *R v Wingrove* (25 November 1996) §57-58. The protection of morals as public standards might indeed be particularly relevant in the context of restrictions on expression generally.

¹²⁴ This is the understanding implicitly adopted by Advocate General Léger in Case 1/96 *R v Ministry of Agriculture, Fisheries and Food ex. p. Compassion in World Farming*, AG's Opinion, §90-

The WTO cases invoke elements of each interpretation. *Gambling* expresses elements of the first, referring to links between gambling, addiction and social dysfunction.¹²⁵ *Audiovisual* is concerned with the second, focusing on the protection of the prevailing cultural standards in the regulating member.¹²⁶ And the AB in *Seals* seems clearly to have accepted the third, eliding any distinctions between protecting public morals and pursuing moral goals.¹²⁷

How can thinking about public morals in terms of self-determination help resolve these interpretive questions?

As noted, public morals seem relevant under both aspects of self-determination. However, they have quite different implications under each.

The first aspect is concerned with the minimum powers peoples require to be effectively self-determining, which include the power to protect and develop their own distinctive public cultures. It is within those cultures that persons develop and exercise their capacities for autonomous choice. In many cases,

91. Much of the academic literature assumes this interpretation, a feature challenged by Howse and Langille. For various attempts to distinguish the inward and outward aspects of public morals on this interpretation: Wu, *supra* note 3, at 235; Charnovitz, *supra* note 3, at 695; Du, 'Permitting Moral Imperialism? The Public Morals Exception to Free Trade at the Bar of the World Trade Organization' 50(4) *Journal of World Trade* 675-704 (2016), at 699-702.

¹²⁵ *US-Gambling*,(Panel),§6.457,6.463-6.465,6.469-6.473;(AB),§296

¹²⁶ *China-Audiovisual Materials*,(Panel)§7.751-7.763

¹²⁷ *EC-Seals*,(AB),§5.196-5.199

shared moral standards will be part of that shared culture. Part of what it means for a particular community to be one in which members can feel at home is their being able to endorse, or at least recognize, the values it expresses. There may therefore be measures that a state can legitimately take to protect and promote those shared values.

If this is the function of Art XX(a), it has a number of implications.

First, the public morals to which it refers are those in fact shared within the relevant public culture. The test is local and sociological. It is concerned with a community's capacity to protect a particular aspect of its shared cultural life, not its capacity of make and implement collective moral choices, or the justifiability of those choices by any outside standard.¹²⁸

Second, it is concerned with protecting the relevant moral standards, as cultural objects and aspects of a social environment, rather than with vindicating the particular moral claims those standards express. It is not clear what might be required to do this, but it is unlikely to require strict compliance or enforcement.

¹²⁸ An alternative intrinsic argument might be made for understanding such morals politically, suggesting that making choices about what things are like 'around here', including about prevailing public morality, falls within the minimum required for peoples to regard themselves as authors of their shared lives. I am doubtful how attractive this argument is once distinguished from the instrumental claim, particularly from a liberal perspective. In any event, the limitations of the intrinsic argument seem clearly to apply if it is extended to choices about the conduct of outsiders.

Some moralities may have this structure; but for others unpunished violations might provide opportunities for discursive reinforcement of the community's relation to the relevant standard.¹²⁹ This will be a matter of cultural interpretation in particular cases. Regardless, it seems clear that the mere fact of immorality elsewhere, or of 'moral harms' *per se*, are not relevant here.

Third, and related, this argument raises particular challenges for liberal states, for whom protecting moral standards as such runs contrary to a fundamental political commitment to individual liberty. This reflects the point, in the previous paragraph, about the structure of particular moralities. A key feature of the public moralities of liberal states is their acceptance of pluralism, with a consequent commitment to refrain from legally enforcing moral standards as such.¹³⁰

Turning to the second aspect, which is concerned with shared goals, and the ways these are manifested in particular cases. There is no reason these shared goals cannot include distinctively moral ones. Many international institutions and initiatives – the suppression of the slave trade, the practice of human rights – are clearly morally motivated. A number of states, acting together, might jointly commit themselves to advancing a particular moral cause; and that commitment

¹²⁹ The possibility of such discursive reinforcement features prominently in the Hart/Devlin debate, and in Mill's defence of free speech on which Hart there draws.

¹³⁰ See e.g. I. Kant *Political Writings* (1991) at 73; J. S. Mill *On Liberty* (1989) at 15; H. L. A. Hart *Law, Liberty and Morality* (1963)

might in turn justify measures advancing that cause, under the self-determination of both regulating and affected states.

What implications does this have?

First, unlike the first aspect, it suggests public morals be understood politically rather than sociologically. This limb, recall, derives from a concern with collective autonomy, and the ways that autonomy is extended through adhesion to shared goals and projects. Autonomy is the capacity to make and act on choices, which would be pre-empted if public morals were limited to existing social understandings. Indeed many of the practices that might fall under this limb, including international human rights, are themselves progressive, part of a process whereby states make choices about the kinds of values they should have.

Second, we are concerned not with the choices of individual communities, but rather with their shared goals and projects. I noted earlier the limits of intrinsic arguments from autonomy in justifying measures affecting outsiders; but where those outsiders have committed themselves to the relevant goals and projects, this objection falls away. The upshot is that we should look to international standards, whether formal or informal, in identifying public morals under this aspect.¹³¹

¹³¹ I assume here that we are looking to standards that are shared in the sense that these have been endorsed by the peoples concerned. There may be standards, goals and projects that are shared in the sense that peoples have reason to endorse them, even where they have not in fact done so, perhaps for pragmatic or self-serving reasons. It may therefore be possible to look to

Third, we are not limited to protecting public morals as cultural artifacts. Rather, the projects to which we are jointly committed may include the promotion, or prevention, of particular practices, or particular moral harms or values. To the extent we are jointly committed to realizing a particular moral goal, we cannot object to measures pursuing that goal. Under this limb, then, protection is closer to enforcement or vindication.

We thus derive, from an account of self-determination, two quite different approaches to public morals. One is local and cultural, the other international and political. Interpreting public morals in terms of self-determination suggests being sensitive to the particular structure of the moral justifications that states offer in particular cases, to determine which aspect they fall under, and the kinds of limits this implies. Where a member invokes local values, it suggests examining the extent to which those values in fact form part of the public culture of that member, and limiting justification to measures required to protect those values within the relevant community. Where, by contrast, measures are concerned with preventing moral harms per se, and especially with moral harms

values that are widely endorsed globally, whether by peoples, or in political, ethical or religious cultures, even where these have not been endorsed by the particular people concerned. This, however, risks ignoring the extent to which reasons may in fact not be shared. I do not attempt to resolve this problem here.

and behaviors outside the relevant community, it suggests looking to shared standards, howsoever evidenced, as a prerequisite to such justification.¹³²

This, then, is how I suggest we understand public morals and their protection. As noted, the AB's public morals jurisprudence has not focused on these issues, preferring to emphasize questions of necessity and, under the chapeau, arbitrariness. However, even a relatively cursory reading of the AB's approaches to these latter questions shows how far they are in turn shaped by our understanding of the nature of both public morals and their protection.

Turning first to necessity. Before examining the cases, it is worth highlighting the relational quality of necessity as a concept. In both legal and everyday speech, necessity is not a feature that attaches to an object in itself. Rather, it links two or more objects. Thus, an action is not necessary *simpliciter*. Rather, it is necessary *for* some purpose. What is necessary depends on the nature of that purpose. The obvious upshot is that any answer to what is necessary to protect public morals necessarily relies on some understanding, explicit or implicit, of what public morals are, and what it means to protect them.

¹³² While the way the distinctions are drawn here do not map onto previous approaches, the idea that different standards might be applicable depending on the sense of public morals in play is not new: Charnovitz, *supra* note 4, at 730; Wu, *supra* note 4, at 242. The idea that local sociological and global political standards might constitute alternate grounds is advocated, albeit for other reasons, in: Du, *supra* note 124, at 696-7

The AB's established case-law approaches necessity in two ways. First, necessity is approached by 'weighing and balancing' three sets of factors: the contribution made by the measure; the importance of the common interests or values protected; and the measure's restrictiveness. Second, necessity is understood by reference to the reasonably available alternative measures for the achievement of the relevant goal. These elements are combined in various ways at various times, but the basic elements remain relatively stable.¹³³

However, the AB has struggled to apply this approach to public morals, in part because of a lack of confidence on the two questions noted above. Thus, in both *Gambling* and *Seals*, much of the AB's necessity analysis examined the relation between the challenged measures and specific, measurable, non-moral harms (problem gambling, organized crime, animal suffering). An important consideration was thus whether the relevant measures were a more effective remedy to those harms than reasonably available, and less trade restrictive, alternatives. This may frequently be a satisfactory approach, particularly where – as in *Gambling* – these harms are the measure's principal object. However, it involves adopting a proxy, rather than directly addressing the protection of public morals. And in other cases, such as *Seals*, that proxy will cause serious problems. This is because, in many cases, protecting public morals is more about

¹³³ For the classic statement of this approach, *Korea-Beef*, AB Report, §160-166. However, very similar analyses appear outside the GATT context, including under TBT Art 2.2 and SPS Art 5.6. On the former: *US-Tuna II*, AB Report, §318-322.

the relation between the community and its values, than it is about the underlying harm itself.¹³⁴

The problems with the AB's approach are clearest, in *Seals*, in its treatment of risk. Canada argued in that case, based on previous case-law, that the concept of protection in Article XX was tied up with the idea of a risk, against which it was sought to protect.¹³⁵ Applying Article XX(b) thus required identifying a standard of right and wrong, a risk to the interests identified by that standard, and the relation between a challenged measure and that risk. The upshot of doing this in *Seals*, Canada suggested, would be to recognize that seal-hunting was only one, and a relatively minor, threat to the animal welfare interests identified by EU public morals. In consequence, it would be difficult to conclude that the seal regime was necessary to protect public morals, having regard to the less trade restrictive alternative measures that are reasonably available.

The AB, recognizing that this approach would pose insuperable obstacles for states invoking public morals in many cases, responded by effectively reading out the concepts of protection and risk from Article XX(a), going so far as to deny the need even to identify the content of the public morals invoked. The

¹³⁴ This point is well made, albeit to a different purpose, in Howse and Langille, *supra* note 11, at 371. And on the use of concrete harms as a proxy in *Gambling*, *ibid*, at 412-413

¹³⁵ *EC-Seals*, AB Report, §5.194

consequence was that the AB effectively read ‘necessary to protect’ as ‘relating to’, contradicting its own of settled case-law.¹³⁶

There is an evident sensitivity in the AB’s discussion here to the risks of overruling states’ judgments on public morals. It recognizes, and rightly, the risk of requiring members to express, and live by, a single, consistent moral standard on any issue. However, once having rejected this approach, it finds no alternative means of assessing when action in pursuit of non-instrumental moral goals is necessary to protect public morals. Without a clear answer to what public morals are, and what is meant by protecting them, no such means is available. Instead, the analysis moves quickly from the existence of a moral standard around animal suffering, to the contribution of this measure to alleviating the occurrence of suffering to the relevant animals, and the above noted examination of necessity by proxy.¹³⁷

How does the present argument suggest this issue be approached? First, as outlined above, it suggests the need for greater clarity on both the content of the relevant public morals, and the manner in which a measure seeks to protect these. This may mean asking quite different questions, depending on the kind of moral standards at stake. In *Seals*, it would include asking what was necessary to

¹³⁶ AB Report, §5.194-5.200. This runs contrary to an established line of AB jurisprudence emphasising the difference between these two standards. *US-Gasoline*, AB Report, pp 17-18

¹³⁷ This is true notwithstanding continuing references to a second public morals purpose, around Europeans’ commercial participation in that suffering. See e.g. the way the AB elides these two goals, prioritizing the instrumental goal, at §5.279.

protect the EU's commitment to a standard of right and wrong that included minimizing animal suffering. This might lead into the kinds of consistency analyses suggested by Canada; but it might equally include a recognition of the variability of both the relevant standard, and the kinds of steps required to protect it in various contexts. Even where a moral standard is uniform, the fact of public attention to a particular violation may mean it constitutes a greater threat than others; failing to act would then constitute a public abandonment of that standard. Given that the standard invoked in *Seals* was at least in part an internationally shared one, it might also involve examining the instrumental question, of to what extent the relevant measure in fact served to protect seals from suffering. However, importantly, this would not be the whole of the necessity analysis. Because public morals have these two quite different aspects, we may find elements of a measure that are unnecessary under one, but necessary under the other. In consequence, while engaging more directly with questions of the nature of public morals, and the reasons for their protection, might seem to require tackling sensitive issues that the AB would rather avoid, it may also in many cases allow it more effectively to preserve the freedom of members to protect important public values. By focusing so heavily on the instrumental question, the AB risks failing to do this.

A more explicit engagement with these questions would also facilitate a more satisfactory analysis under the Article XX chapeau.

In *Seals*, a major focus of the chapeau analysis was whether the challenged discrimination was rationally related to or reconcilable with the underlying

objective, an apparent relaxation of the rational relationship standard in *Brazil-Tyres*.¹³⁸ This in turn led the AB to two questions: first, whether and to what extent the IC and MRM exceptions themselves pursued public moral goals, as opposed to reflecting non-moral constraints on the pursuit of moral goals; and second, to what extent the existence of these exceptions undermined the realization of the measure's moral objectives.

On the former question, the AB's analysis is complicated somewhat by a distinction between whether the IC and MRM exceptions constitute objectives of the measure, and whether they reflect public moral concerns.¹³⁹ However, in so far as the AB addresses their moral status, it does so by reference to the first, domestic, sense of public morals discussed above, understood in a sociological rather than political sense.¹⁴⁰ Given the prominence of domestic public morals in motivating the measure, this makes some sense. However, the account above suggests that we also consider whether the exemptions might reflect public moral concerns in the second, international and political, sense.¹⁴¹ It is here the evidence of international consensus on the importance of protecting indigenous communities is relevant. Recognizing the dual aspects of public morals thus

¹³⁸ While this shift is not explicitly acknowledged, it is evident from a comparison of e.g. *EC-Seals*, AB Report §5.306,320 and *Brazil-Tyres*, AB Report, §227, 228

¹³⁹ See e.g. AB Report, §5.139, 5.146

¹⁴⁰ *EC-Seals*, AB Report, §5.147, 5.164; Panel Report §7.402. While references to the legislative process might suggest the AB was open to a political understanding, they seem more pertinent to identifying the measure's objective.

¹⁴¹ For the AB's skepticism of arguments that concern for Inuit communities fell under European public morals: AB Report, §5.148

facilitates acknowledging the complexity of morally motivated measures, while still maintaining appropriate scrutiny of these.

On the second question, the AB focused on the ways these exceptions undermined the instrumental goals of the measure in alleviating animal suffering. This reflects the same tendency, noted above, to approach protecting public morals through the proxy of protecting the non-moral interests those morals pick out. If we read “protecting public morals” as “preventing seal suffering”, then the IC and MRM exceptions, which contain no animal welfare provisions, are clearly not reconcilable with that goal. If, however, we recognize that our first concern is the moral standard, rather than the goal, then we might reach different conclusions. Most obviously, taking a domestic perspective, we might think that a ban on products of commercial seal hunts, the central case of the morally objectionable practice, was sufficient to express the community’s shared view, and thereby reinforce the relevant standard. This might be true notwithstanding that European citizens did not distinguish amongst seal products based on the type of hunt involved. Indeed, permitting seal products under the exceptions might actually strengthen the relevant public morals, through providing opportunities for discursive contestation and reinforcement.¹⁴² Linking domestic and international perspectives, we might recognize that elements of international public morals, including both concerns to protect indigenous communities from economic harm, and concerns to respect their particular cultures, could explain why no animal welfare conditions

¹⁴² Cf. the discussion at fn. 129 supra.

were attached to the IC exception.¹⁴³ In each case, focusing on the protection of public morals as such, rather than on an instrumental proxy, suggests quite different answers to the questions raised by the chapeau. However, again, we can only sensibly tackle those questions once we know what public morals are, and why their protection matters.

10. Conclusion

This is a paper about Article XX of the GATT. As such, it has hopefully offered a useful perspective on that provision. While by no means exhaustive, I have tried to flesh out in some detail the implications of my argument for Article XX, including on some specific interpretive points; reader should be well position to complete that analysis for other points if desired.

However, at a more general level, this is also a paper about self-determination in economic regulation, and, more general still, about the methods and theoretical approaches that are appropriate to international economic law scholarship. I can do no more than gesture at its implications at these levels here. Any serious

¹⁴³ Thus Howse and Langille highlight the reference, in the United Nations Declaration on the Rights of Indigenous Peoples, to protecting communities right to live *by traditional means*: Howse and Langille, *supra* note 123, at 385, 403.

elaboration of would require something much more substantial than the present paper.¹⁴⁴

As an account of self-determination, the present argument can be adapted to make sense of much that appears elsewhere in the WTO: the SPS and TBT agreements; trade remedies rules; the special place of agriculture; and indeed key aspects of the services rules, including exceptions and rules on market access and domestic regulation. And beyond the WTO entirely, it can help us think about economic self-determination in such contexts as debt crises, investment arbitration, and regional integration.

As an essay in methods, it has hopefully shown that liberal political philosophy can offer useful perspectives on practical, doctrinal problems of WTO law. In many cases, those perspectives will be more illuminating than more common economic or sociological approaches. Yet this need not imply they should displace these latter approaches. Most obviously, international economic law is about economics, so it would be perverse to suggest interpreting it wholly without regard to economic ideas. However, if readers, faced with practical and doctrinal problems, are led to inquire what political philosophy, *together* with history, economics and sociology, might have to say, then this paper will have served its methodological purpose.

¹⁴⁴ While by no means complete, some of these implications are worked out in more detail in: Suttle, *Distributive Justice and World Trade Law: A Political Theory of International Trade Regulation*, (Forthcoming, Cambridge University Press).