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What Sorts of Things are Public Morals? A Liberal Cosmopolitan Approach to Article XX GATT

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Existing theories of WTO law cannot adequately explain the form or content of the GATT exceptions, in particular Article XX(a) Public Morals. Nor, in consequence, can they satisfactorily answer the interpretive questions they raise. This article explains Article XX in terms 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, it distinguishes three categories of argument for self-determination: intrinsic, expressive and instrumental, each having implications for the scope of the choices a self-determining community must make for itself. This account of self-determination in trade regulation is used to reconstruct Article XX, both explaining the individual provisions, and suggesting how these might be developed and interpreted. It concludes by examining Article XX(a) in detail, highlighting the interpretive questions public morals pose, and how understanding Article XX in terms of self-determination suggests these should be answered.

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 (Article II), quantitative restrictions (Article XI), and discrimination, whether against (Article III) or amongst (Article I) trading partners (together, the 'Core Disciplines'). On the other, it provides various exceptions, addressing economic (Article XII Balance of Payments, Article XVIII Economic Development, Article XIX Safeguards)

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and non-economic (Article XX General Exceptions, Article 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 legitimise the - often controversial - decisions of WTO panels and the Appellate Body (AB) 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, Article 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 how 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. 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

1 While my focus is the exceptions, these cannot be fully divorced from our understanding of the Core Disciplines themselves. For my account of these, see, O. Suttle, 'Equality in Global Commerce: Towards a Political Theory of International Economic Law' (2014) 25 *European Journal of International Law* 1043. There is some interdependence 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.

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

3 For an overview of the debates, see S. Charnovitz, 'The Moral Exception in Trade Policy' (1997) 38 Va J Int'l L 689; J. C. Marwell, 'Trade and Morality: The WTO Public Morals Exception

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 morals to issues anticipated by the original drafters, falling under *jus cogens* norms, or widely recognised 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 – procedure[7]; about whether the morals at stake are exclusively those of the regulating state, or must be shared by other states;[8] and about whether the moral 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 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 Article XX(a). How we understand public morals will therefore 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). We thus need to locate our analysis of the latter in a

after Gambling' (2006) 81 *New York University Law Review* 802, 817; M. Wu, 'Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine' (2008) 33 Yale J Int'l L 215; R. L. Howse, J. Langille and K. Sykes, 'Pluralism in Practice: Moral Legislation and the Law of the WTO after Seal Products' (2015) 48 *George Washington International Law Review* 81.

4 Howse, Langille and Sykes, n 3 above, 95-106.

5 Wu, n 3 above, 243-246.

6 For example, Marwell, n 3 above, 824-826.

7 Wu, n 3 above, 243-244.

8 For the former view, see Marwell, n 3 above, 824. For elements of the latter, see Charnovitz, n 3 above, 742-743; O. A. Sykes 'Sealing animal welfare into the GATT exceptions: the international dimension of animal welfare in WTO disputes' (2014) 12 *World Trade Review* 471.

9 For concerns about such extraterritorial measures, see Wu, n 3 above, 245-246. For an approach adopting general international law rules on jurisdiction, see L. Bartels, 'Article XX of the GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights' (2002) 36 *Journal of World Trade* 353.

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

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 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. Following a brief overview of Article XX, I first explain why we need an appropriate account of Article XX. I introduce 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.

I therefore set out, in the middle parts of the article, to 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 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, I 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 realisation 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 Article XX in particular.

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' (2012) 37 *Yale Journal of International Law* 367.

12 J. H. Jackson *The World Trading System: Law and Policy of International Economic Relations* (Cambridge, Mass: MIT Press, 1997) 233.

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

By integrating insights from intrinsic, expressive and instrumental approaches, I construct a novel account of self-determination in international trade regulation. I show how that account can help us to understand Article XX, highlighting its implications for interpreting both the individual exceptions and the chapeau. With this in place, I turn 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: individualism, generality and universality.[15] Much has been done in other areas of 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'etat*. 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 Article XX. The argument thus has two, related, goals: first, to elaborate such a justification of GATT Article XX; and second, to show how understanding Article XX in these terms can guide its interpretation and progressive development, with a specific focus on Article XX(a).[21]

14 On both, see Suttle, n 1 above.
15 T. Pogge, 'Cosmopolitanism and Sovereignty' (1992) 103 *Ethics* 48.
16 For example, J. McMahan, 'The Ethics of Killing in War' (2004) 114 *Ethics* 693.
17 See, for example, T. Pogge, 'The Role of International Law in Reproducing Massive Poverty' and R. Howse and R. Teitel, 'Global Justice, Poverty and the International Economic Order', both in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (Oxford: OUP, 2011).
18 For example, C. R. Beitz, *Political Theory and International Relations* (Princeton, NJ: Princeton University Press, 1979); D. Moellendorf, *Cosmopolian Justice* (Boulder, Co: Westview Press, 2001); T. W. Pogge, *World Poverty and Human Rights : Cosmopolitan Responsibilities and Reforms* (Cambridge: Polity Press, 2002); F. J. Garcia, *Trade, Inequality, and Justice: Towards a Liberal Theory of Just Trade* (Ardsley, NY: Transnational Publishers,2003).
19 On this strategy, see M. Blake, 'Distributive Justice, State Coercion, and Autonomy' (2001) 30 *Philosophy & Public Affairs* 257, 262.
20 For more on the methodology, see Suttle, n 1 above.
21 We might go further, arguing that the *correct* interpretation of Article XX is the one suggested here. This might reflect Dworkin's interpretivist theory of law, which claims that the law simply

THE STRUCTURE OF ARTICLE 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: . . .

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, Article 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] Third, Article XX exempts unilateral measures. The AB has emphasised that it is for members to decide for themselves at what level policies in Article XX should be realised.[25] This is despite the obvious international public goods qualities of some of these.[26] In consequence, the dispute in

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 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. However, I advance neither 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.

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

23 For this point: D. 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* (Cambridge: CUP, 2009) 119.

24 See, for example, *Brazil-Tyres* (Appellate Body Report) WT/DS332/AB/R §215, 225-227, 232.

25 For example, *Korea-Beef* (Appellate Body Report) WT/DS161/AB/R §176; *EC - Asbestos* (Appellate Body Report) WT/DS135/AB/R §168; *Brazil-Tyres ibid*, §140.

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

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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 Article XX[27]; 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.

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 terms of the value that it realises, 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, 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

27 *US-Shrimp* (Appellate Body Report) WT/DS58/AB/R §166-168.

28 *ibid*; *US-Gasoline* (Appellate Body Report) WT/DS2/AB/R, 27-28.

29 See generally, R. Dworkin, *Law's Empire* (Cambridge, Mass: Harvard University Press, 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, see J. Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case' (1996) 16 *Oxford Journal of Legal Studies* 85; B. Çali, 'On Interpretivism and International Law' (2009) 20 *European Journal of International Law* 805; J. A. Beckett, 'Behind Relative Normativity: Rules and Process as Prerequisites of Law' (2001) 12 *European Journal of International Law* 627. For Dworkin's own effort in this direction, see R. Dworkin, 'A New Philosophy for International Law' (2013) 41 *Philosophy & Public Affairs* 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 methdological issues are discussed in more detail in O. Suttle, *Distributive Justice and World Trade Law: A Political Theory of International Trade Regulation* (Cambridge: CUP, forthcoming 2017).

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

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 legalised quality of the modern trade regime.[33] Justificatory explanation thus offers the best prospect of 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.

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

32 On the limits of historic object and purpose in respect of Article XX in particular: Charnovitz, n 3 above, 701.

33 On this evolution, see Lang, n 31 above, 240-246.

34 Article 31.1 Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

35 See, for example, D. Regan, 'The Meaning of 'Necessary' in GATT Article XX and GATS Article XIV: The Myth of Cost–Benefit Balancing' (2007) 6 *World Trade Review* 347, 366-369. For the wider economic accounts of the WTO into which this explanation fits, see P. R. Krugman, M. Obstfeld and M. J. Melitz, *International Economics* (Boston: Pearson, 2012) 260; G. Maggi and A. Rodriguez-Clare, 'The Value of Trade Agreements in the Presence of Political Pressures' (1998) 106 *Journal of Political Economy* 574; K. Bagwell and R. W. Staiger *The Economics of the World Trading System* (Cambridge, Mass: MIT Press, 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 III:4 of the GATT (with Additional Remarks on Article II:2)' (2002) 63 Journal of World Trade 443; P. C. Mavroidis, *Trade in Goods* (Oxford: OUP, 2007) 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, n 13 above, 635-636, 644-646; and more generally J. P. Trachtman, *The Economic Structure of International Law* (Cambridge, Mass: Harvard University Press, 2008). Despite very different methodological commitments, embedded liberals' appeal to the GATT's balance between liberal trade and

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 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. In consequence, interpretations of the specific provisions of Article XX invoking values at this level of generality appear to beg the question.

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 realised. It is to this that I turn in the next section.[40]

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

domestic autonomy has the same basic structure. See, for example, R. Howse, 'From Politics to Technocracy - and Back Again: The Fate of the Multilateral Trading Regime' (2002) 96 *American Journal of International Law* 94; A. Lang, 'Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime' (2006) 9 *Journal of International Economic Law* 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.

39 See, for example, Howse and Nicolaïdis's call for 'the spirit of embedded liberalism ... to be recovered and reinterpreted under the new conditions of globalization': R. Howse and K. Nicolaïdis, 'Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far' in R. B. Porter, P. Sauvé, A. Subramanian and A. B. Zampetti (eds), *Efficiency, Equity, Legitimacy: The Multilateral Trading System at the Millennium* (Washington D.C.: Brookings Institution Press, 2001) 227, 243. cf R. Howse and K. Nicolaïdis, 'Towards a Global Ethics of Trade Governance: Subsidiarity Writ Large' (2016) 79 *Law and Contemporary Problems* 259.

40 The argument here complements the account of justice in trade regulation in Suttle, n 1 above. 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 Article XX should be exempted.

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 secession.[41] 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 claimed.[42] Self-determination is generally understood as 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-government.[43] The precise powers a state requires to be self-determining are rarely discussed.[44] 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 realising 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 recognise 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 realisation. 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]

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 universalising tendencies of cosmopolitanism. However, the argument developed below is liberal and cosmopolitan in the

41 For an overview: N. Miscevic, 'Nationalism' in E. N. Zalta (ed), *Stanford Encyclopedia of Philosophy* (Stanford, Ca: Stanford University, 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: A. Margalit and J. Raz, 'National Self-Determination' (1990) 87 *Journal of Philosophy* 439, 447. On disaggregating questions about territories and the powers and duties attaching to them: R. E. Goodin, 'What Is So Special About Our Fellow Countrymen?' (1988) 98 *Ethics* 663, 682.

43 D. Miller, *On Nationality* (Oxford: OUP, 1995) 81.

44 For an excellent example, see *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 scope, 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 the issue here, it seems likely the interpretive proposals set out below could accommodate such minorities' claims.

following important senses. First, it is liberal in that it approaches the state and the restrictions is 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 realising 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 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 realisation 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]

INTRINSIC ARGUMENTS

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 argument.[48] 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

46 This concern with the justification of restrictions has been labeled the 'Fundamental Liberal Premise': G. Gaus, S. Courtland, and D. Schmidtz, 'Liberalism' in E. N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Stanford, Ca: Stanford University, Spring 2015 Edition).

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: A. J. Simmons, 'On the Territorial Rights of States' (2001) 35 *Noûs* 300, 315. Like property, historical theories of territory only matter if they are true, which they clearly are not. 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.

48 D. Philpott, 'In Defense of Self-Determination' (1995) 105 *Ethics* 352.

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 alienated.[50] It is participation in the political process, rather than agreement with its outcome, that constitutes us as free citizens, and reconciles our individual freedom with the coercion of the state.[51] My autonomy is therefore better realised when I am a member of a self-determining political community.[52] 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 process.[54] Unfortunately neither claim provides much assistance in identifying the scope of the powers falling to a self-determining people.

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 realised.[55] 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 maximising claim of autonomy necessarily conflicts with the similar claims of others. Some other

49 *ibid*, at 358
50 *ibid*, at 359
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, see for example D. Miller, *National Responsibility and Global Justice* (Oxford: OUP, 2007) 88; D. Miller, *Citizenship and National Identity* (Cambridge, Mass: Polity, 2000) 162. cf J. McMahan, 'The Limits of National Partiality' in R. McKim and J. McMahan (eds) *The Morality of Nationalism* (Oxford: OUP, 1997) 107, 111. For an argument combining aspects of both claims, together with instrumental arguments, see Y. Tamir, *Liberal Nationalism* (Princeton, NJ: Princeton University Press, 1993) 69.
53 Philpott, n 48 above, 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* (Princeton, NJ: Princeton University Press, 2006) 70.
55 On what this might mean internationally, see Miller, *Citizenship and National Identity* n 52 above, 163 and G. Brock, *Global Justice: A Cosmopolitan Account* (Oxford: OUP, 2009) 224.

argument is required to explain where the balance between such maximising claims is drawn.[56]

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.

Philpott recognises 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 state.[57] However, what we understand to be exclusively the affairs of a particular community will depend on our theory of justice, including importantly of economic justice.[58] 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 range of choices sufficient to provide meaningful self-authorship;[60] but tells us little about the relationship between self-determination and decisions affecting outsiders.

In consequence, it offers a very limited account of *external* self-determination.[61] 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 promising;[62] but this tells us nothing about our pre-contractual rights and obligations.[63] This seems unsatisfactory given the history and contemporary practice of self-determination. External self-determination is commonly regarded as

56 On the limits of democracy in justifying borders, see A. Abizadeh, 'Democratic Theory and Border Coercion' (2008) 36 *Political Theory* 37; Margalit and Raz, n 42 above, 455–456.

57 Philpott, n 48 above, 363. cf Margalit and Raz, *ibid*, 456. In the trade context this is recognized, see J. H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge: CUP, 2006) 59; R. 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 : Towards a Common Law of International Trade* (Oxford: OUP, 2001) 67.

58 See, generally, Philpott, n 48 above, 362. cf S. Fine, 'Freedom of Association Is Not the Answer' (2010) 120 *Ethics* 338, 345.

59 For my views on the scope of those rights, see Suttle, n 1 above. 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: M. Moore, 'Natural Resources, Territorial Right, and Global Distributive Justice' (2012) 40 *Political Theory* 84, 87.

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

62 C. Fried, *Contract as Promise: A Theory of Contractual Obligation* (Oxford: OUP, 1981). Simmons labels this the 'federative' power, see Simmons, n 47 above, 306.

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

fundamental; and the establishment of an independent foreign policy has been a key step for post-colonial states in asserting their independence.[64] 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?

EXPRESSIVE ARGUMENTS

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 it.[65] 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 would 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]

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

64 I. Brownlie, *Principles of Public International Law* (Oxford: OUP, 2008) 73.

65 For example, J. Waldron, 'Two Conceptions of Self-Determination' in Besson and Tasioulas (eds), n 17 above, 399. cf C. Gans, *The Limits of Nationalism* (Cambridge: CUP, 2003) ch 3.

66 Elements of this idea appear in D. Copp, 'Democracy and Communal Self-Determination' in McKim and McMahan (eds), n 52 above, 292; D. Philpott, 'Self-Determination in Practice' in M. Moore (ed), *National Self-Determination and Secession* (Oxford: OUP, 1998) 83. cf I. Berlin, 'Two Concepts of Liberty' in H. Hardy and R. Hausheer (eds), *The Proper Study of Mankind: An Anthology of Essays* (London: Chatto & Windus, 1997) 226.

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]

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 investors;[68] or perverse incentives international law poses for domestic institutions.[69] 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 freedom.[70]

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 dispense with this argument, however. Rather than focusing on all such inequalities, we might look for some 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.

INSTRUMENTAL ARGUMENTS

Instrumental arguments defend self-determination as making more likely the sustainable realisation of some other good to which it is causally linked. It is

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, n 1 above.

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

69 T. Pogge, 'Are We Violating the Human Rights of the World's Poor' (2011) 14 Yale Hum Rts & Dev LJ 1, 29.

70 Ronzoni, n 68 above, 581; S. Loriaux, 'Fairness in International Economic Cooperation: Moving Beyond Rawls's Duty of Assistance' (2012) 15 *Critical Review of International Social and Political Philosophy* 19, 28.

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 cultures.[71] These depend on a prior claim about the value of such cultures for persons. Margalit and Raz, for example, 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 affairs.[73]

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 that.[74] 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 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 Raz.[76] 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 peoples.[77] An analogy can be drawn to individual conceptions of the good that deny the equal claim of others to pursue their own conceptions.[78] We need

71 Gans, n 65 above, ch 2; K. Nielsen, 'Liberal Nationalism and Secession' in Moore (ed), n 66 above, 121; Tamir, n 52 above, 69; Miller, n 43 above, 85.

72 Margalit and Raz, n 42 above, 448.

73 This argument is not limited to a distinctively national culture. It depends only on being attached to some culture: McMahan, n 52 above, 121, Gans, n 65 above, 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, n 43 above, 86; W. Kymlicka *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: OUP, 1996) 84.

74 Miller tentatively distinguishes the implications of this argument for social, economic and defence powers: Miller, *ibid*, 100.

75 Thus Miller assumes the powers required will vary with the relevant culture. Gans argues this justifies protecting cultures, but not individual practices within cultures, see Gans, n 65 above, 55 et seq.

76 For example, A. MacIntyre, 'Is Patriotism a Virtue?' *The Lindley Lecture* (Lawrence, KS: University of Kansas, 1984) 7.

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

78 For a similar point, T. Hurka, 'The Justification of National Partiality' in McKim and McMahan (eds), n 52 above.

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 stabilising role. However, for persons to form and pursue goals and relationships, more than a stable culture is required. They also require a stable institutional, political and economic environment.[79] 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 recognise the value that a stable context of choice offers for individuals.[80] 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, 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 stability.[81] 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 emphasises 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

79 Theorists of embedded liberalism emphasise this aspect: K. Polanyi, *The Great Transformation : The Political and Economic Origins of Our Time* (Boston, Mass: Beacon Press, 2nd ed, 2001) passim, esp ch 12, 18 and 21; J. G. Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36 *International Organization* 379, 386; Lang, n 31 above, 190. Cottier argues such stabilising mechanisms are pre-requisites to successful liberalisation: T. Cottier, 'Poverty, Redistribution, and International Trade Regulation' in K. N. Schefer (ed), *Poverty and the International Economic Legal Sytem: Duties to the World's Poor* (Cambridge: CUP, 2013).

80 On the perils of ignoring these concerns with commodity labor, see Polanyi, n 79 above, 76.

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.

justice, including the protection of basic rights.[82] For various reasons, it makes sense to provide such goods at the level of individual political communities.[83] 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 their resources. 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 peoples.[84] The second highlights the importance of natural resources for other aspects of self-determination, including autonomy and cultural stability.[85] Peoples who control territories and resources are more secure in their enjoyment of these goods.[86] 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 realised at local rather than global levels. There are presumably others 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 stabilise 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'

82 This includes what Buchanan labels 'distributional autonomy': A. Buchanan, 'Rawls's Law of Peoples: Rules for a Vanished Westphalian World' (2000) 110 *Ethics* 697, 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. F. Kratochwil, 'Of Systems, Boundaries, and Territoriality: An Inquiry into the Formation of the State System' (1986) 39 *World Politics* 27; Ronzoni, n 68 above; P. Dietsch, 'Rethinking Sovereignty in International Fiscal Policy' (2011) 37 *Review of International Studies* 2107; A. Kolers, 'Justice, Territory and Natural Resources' (2012) 60 *Political Studies* 269, 34.

84 Rawls adopts a version of this view: J. Rawls *The Law of Peoples* (Cambridge, Mass: Harvard University Press, 1999) 38.

85 See, on the link between self-determination and sovereignty over resources, Kratochwil, n 83 above, 42.

86 Moore labels this the 'standard view' of territorial rights: Moore, n 60 above, 85. cf Kolers, n 83 above; C. Armstrong, 'Resources, Rights and Global Justice: A Response to Kolers' (2013) 62 *Political Studies* 216.

argument against trust in a state of nature:[87] 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 exercised.[88] 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 claims a privilege to determine for itself what this requires.[89] 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 them.[90] This, however, is compatible with international review of the self-determination justifications that states offer.

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 again.[91] By integrating the three approaches, we can derive a general account of self-determination for the 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 pursues 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

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

88 cf MacIntyre, n 76 above.

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 and National Identity* n 52 above, 167.

90 Margalit and Raz, n 42 above, 457; Dietsch, n 83 above, 2114. We see elements of this idea in the public morals case-law discussed in the penultimate section below.

91 Philpott, n 66 above, 82.

arguments do most of the 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 polices 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 discussed earlier. 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 Article XX.[93]

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 stabilisation 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 constituencies.[95] Finally, the capacity to ensure

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, n 30 above.

94 As in, for example, Miller, n 43 above, 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, n 65 above, 49-58.

95 In each case the paragraphs' provisos emphasise that self-determination cannot be purchased at the expense of other peoples. Consider, for example, the AB's suggestion that the proviso

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 illusory.[96] If domestic choice is pre-empted by international factors, then both intrinsic and expressive arguments imply a claim to insulate the domestic from the international to the extent necessary to make that choice possible.[97]

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 generally.[98] 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 concern.[99] 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 approaches.[100] Concern for resources elsewhere, whether in others' territories 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 concerns.[101] Rather, 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 species.[102] 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 them.[103] Measures pursuing such distributive concerns

to Art XX(g) expresses a concern for even-handedness: *US-Gasoline* (Appellate Body Report), 21. cf *China-Rare Earths* (Appellate Body Report) WT/DS431/AB/R, §5.123-5.136. A similar analysis applies to safeguards under Article XIX.

96 Recall Miller's image of nations as communities 'active in character', Miller, n 43 above, 24.

97 Note, however, that it is domestic choice, not international relations, that is protected: *Mexico-Soft Drinks* (Appellate Body Report) WT/DS308/AB/R, §75.

98 I discuss this point further in the next section.

99 On the link between cooperation and international conservation, see S. Charnovitz, 'Exploring the Environmental Exceptions in GATT Article XX' (1991) 25 *Journal of World Trade* 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, see *China-Rare Earths* (Appellate Body Report), §7.261-277.

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

103 *ibid*, 130.

cannot be justified directly under self-determination.[104] 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 peoples, or in the global commons, under this second aspect of self-determination.[105]

The Article 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, considerations.[106] 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 Article XX does not answer whether the particular standard invoked is one to which affected outsiders have committed themselves. This is precisely the analysis implied by the second aspect above.

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

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

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

106 The analysis of arbitrariness in *Tyres* is particularly expressive of this concern: concern: *Brazil-Tyres* (Appellate Body Report), §224-252.

107 *US-Shrimp* (Appellate Body Report), §159.

108 *ibid* §120.

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.

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 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

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.

110 *EC-Seals* (Appellate Body Report) WT/DS400/AB/R, §5.199.

111 *US-Gambling* (Panel Report) WT/285/R, §6.461, approved in *EC-Seals* (Appellate Body Report) §5.199.

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

113 This conception of public morals appears in certain ECHR case-law: For example, Case 13470/87 *Otto-Preminger-Institut* v *Austria* (1994) 19 EHRR 34, ECLI:CE:ECHR:1994:0920JUD001347087, §50.

114 A unilateral form of this interpretation is defended in Howse, Langille and Sykes, n 3 above. For criticisms of such purely political domestic conceptions, see Du, n 3 above, 692-694.

115 The ECJ adopts this interpretation in Case 34/79 *R* v *Henn and Darby* [1979] ECR 3795, ECLI:EU:C:1979:295, §17.

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]

It is worth emphasising 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 is 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 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]

116 Such an international sense of public morals appears in: Charnovitz, n 3 above, 742; Wu, n 3 above. 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: S. Dollé and C. Ovey, 'Handyside, 35 Years down the road' in J. Casadevall, E. Myjer, M. O'Boyle and A. Austin (eds), *Freedom of Expression Essays in honour of Nicolas Bratza* (Oisterwijk: Wolf Legal Publishers, 2012).

117 *US-Gambling* (Panel Report), §6.471-6.473; *EC-Seals* (Panel Report) WT/DS400/R, §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 emphasising this international aspect: Sykes, n 8 above. On the challenges of either a purely global or purely local definition: Wu, n 3 above, 231.

118 Some commentators seem to overlook this point. For example, A. Herwig, 'Too Much Zeal on Seals? Animal Welfare, Public Morals, and Consumer Ethics at the Bar of the WTO' (2016) 15 *World Trade Review* 109, 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, see Howse, Langille and Sykes, n 3 above, 95.

120 For a somewhat different classification, see Charnovitz, n 3 above, 692.

121 See, for example, *ibid*, 692.

122 This sense of protection is evident in the ECtHR's decision in Case 5493/72 *R* v *Handyside* (1976) 1 EHRR 737, ECLI:CE:ECHR:1976:1207JUD000549372, §52.

123 Howse and Langille's emphasis on the 'expressive' function of law reflects something like this understanding: Howse and Langille, n 11 above, 372. The ECtHR's understanding of blasphemy arguably reflects this idea: see, for example, *Otto-Preminger-Institut* v *Austria*

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]

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, 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 recognise, 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 Article 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]

n 113 above, §56; Case 17419/90 *Wingrove* v *United Kingdom* (1997) 24 EHRR 1, ECLI:CE:ECHR:1996:1125JUD001741990, §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* [1998] ECR I-1251, ECLI:EU:C:1997:365, Advocate General's Opinion, §90-91. 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, see Wu, n 3 above, 235; Charnovitz, n 3 above, 695; M. Du, 'Permitting Moral Imperialism? The Public Morals Exception to Free Trade at the Bar of the World Trade Organization' (2016) 50 *Journal of World Trade* 675, 699-702.

125 *US-Gambling* (Panel Report), §6.457, §6.463-6.465, §6.469-6.473; (Appellate Body Report) WT/DS285/AB/R, §296.

126 *China-Audiovisual Materials* (Panel Report) WT/DS363/AB/R, §7.751-7.763.

127 *EC-Seals* (Appellate Body Report), §5.196-5.199.

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

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. 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 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

the intrinsic argument seem clearly to apply if it is extended to choices about the conduct of outsiders.

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 draws.

130 See, for example, I. Kant *Political Writings* H. B. Nisbet (trans), H. S. Reiss (ed) (Cambridge: CUP, 1991) 73; J. S. Mill *On Liberty* (1989) 15; H. L. A. Hart, *Law, Liberty and Morality* (Stanford, Ca: Stanford University Press, 1963).

to international standards, whether formal or informal, in identifying public morals under this aspect.[131]

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 realising 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 state invokes local values, it suggests examining the extent to which those values in fact form part of the public culture of that state, 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 and behaviors outside the relevant community, it suggests looking to shared standards, however 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 emphasise 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 implication 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.

The AB's established case-law approaches necessity in two ways. First, necessity is approached by 'weighing and balancing' three sets of factors: the

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 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.

132 While the way the distinctions are drawn here does 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, see Charnovitz, n 4 above, 730; Wu, n 4 above, 242. The idea that local sociological and global political standards might constitute alternate grounds is advocated, albeit for other reasons, in Du, n 124 above, 696-697.

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, organised 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 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 recognise 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, recognising 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 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 recognises, and rightly, the

133 For the classic statement of this approach, *Korea-Beef* (Appellate Body Report), §160-166. However, very similar analyses appear outside the GATT context, including under TBT, Article 2.2 and SPS, Article 5.6. On the former: *US-Tuna II* (Appellate Body Report) WT/DS381/AB/R, §318-322.

134 This point is well made, albeit to a different purpose, in Howse and Langille, n 11 above, 371. On the use of concrete harms as a proxy in *US-Gambling*, *ibid* 412-413.

135 *EC-Seals* (Appellate Body Report), §5.194.

136 *ibid*, §5.194-5.200. This runs contrary to an established line of AB jurisprudence emphasising the difference between these two standards, for example, *US-Gasoline* (Appellate Body Report), 17-18.

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 protect the EU's commitment to a standard of right and wrong that included minimising 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

137 This is true notwithstanding continuing references to a second public morals purpose, around Europeans' commercial participation in that suffering. See, for example, the way the AB elides these two goals, prioritising the instrumental goal in *EC-Seals* (Appellate Body Report), §5.279.

138 While this shift is not explicitly acknowledged, it is evident from a comparison of, for example, *EC-Seals* (Appellate Body Report), §5.306,320 §5.306,320 and *Brazil-Tyres* (Appellate Body Report), §227, 228.

the existence of these exceptions undermined the realisation 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, insofar 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 that the evidence of international consensus on the importance of protecting indigenous communities is relevant. Recognising the dual aspects of public morals thus 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 recognise 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 recognise 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 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

139 See, for example, *EC-Seals* (Appellate Body Report), §5.139, 5.146.

140 *ibid*, §5.147, 5.164; (Panel Report) WT/DS400/R, §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, see *EC-Seals* (Appellate Body Report), §5.148.

142 cf the discussion at n 129 above.

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, n 123 above, 385, 403.

tackle those questions once we know what public morals are, and why their protection matters.

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; readers should be well positioned 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 generally 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 elaboration 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, n 30 above.