School of Law

A thesis in partial fulfilment of

International Economic Law

LL.M

'*Public Morality*'

A Pursuit in Legitimising the WTO via GATT Article XX(a)

by

2200536b

University of Glasgow

25.08.2022

Acknowledgement

In dedication to my friends and family. May I know them long and healthy.

Abstract

International economic law has undergone substantial change over the past fifty years, incrementally transitioning from a positivist/ voluntarist to a pluralist international economic law system. International organizations, such as the World Trade Organization, have changed to reflect these developments as well. These changes have raised new legitimacy concerns, as previously untouched domestic regulations are now increasingly subject to international globalising forces. Jurisprudence found within the World Trade Organization Dispute Settlement Body has recently developed, via Article XX(a) of the General Agreement on Tariffs and Trade, a *carte blanche* with which states can protect themselves against some of these globalising trends. Despite Article XX(a) receiving a controversially wide scope and returning a degree of political discretion back to states, it is unlikely that Article XX(a) is capable of addressing the various legitimacy concerns raised throughout this dissertation. It can be argued, however, that details found in recent Article XX(a) case law may have the potential to challenge future disputes in such a way that much-needed amendments to Article XX may become necessary.

List of Abbreviations

AB	Appellate Body
Art	Article
CPE	Critical Political Economy
DDA	Doha Development Agenda
DSB	Dispute Settlement Body
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
IEL	International Economic Law
IGO	Intergovernmental Organisation
IIL	International Investment Law
IL	International Law
LPE	Law and Political Economy
NE	Neoclassical Economics
PIL	Public International Law
TBT	Technical Barriers to Trade
US	United States of America
WTO	World Trade Organization
WWII	World War II

Table of Contents

1. Introduction

1.1. Introduction and Major Research Question

Due to the rise of pluralism, IEL has undergone a fundamental shift over the past 50 years, with the WTO changing right alongside it. These changes have not gone unnoticed, with states, academics and the WTO itself reacting to and finding solutions to an ever-morphing set of unresolved IEL challenges and critiques. This dissertation focuses on one such challenge, namely the issues pertaining to legitimacy concerns raised against the WTO's current trajectory of becoming an '*expansive constitutionalist* […] *global economic regulator*'.[1]

As a means of mitigating the current WTO critique, the WTO DSB has, through recent case law rulings, drastically expanded the scope of GATT Art XX(a): the '*public morality*' exception to barriers to trade,[2] thus granting states *carte blanche* with which to oppose certain GATT provisions. This dissertation analyses the development of Art XX(a) against the backdrop of a pluralist WTO and poses the normative research question: to what extent do the DSB's recent Art XX(a) case law developments address legitimacy concerns found within a pluralist WTO?

1.2. Significance of the Research Question

This question is academically significant due to the current academic reactions to Art XX(a) framing their conclusions mostly against the '*interest and continued effectiveness of the GATT itself*' rather than the WTO at large.[3] This dissertation thus undertakes a less written about

[1] Robert Howse and Joanna Langille, 'Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values' [2012] 37 YJIL 432.
[2] GATT (1994) Art XX(a).
[3] Section 3.3 Conclusion.

perspective and draws conclusions on Art XX(a) against the backdrop of the WTO's positioning within IEL pluralism.

1.3. Procedure

This dissertation starts with a contextualisation of WTO law within current IEL and how *public morality* can be instrumentalised within that context, followed by a case law comparison portraying the current state of *public morality* and how academic literature has reacted to it. The second half of this dissertation focuses on the arguments previously raised by the academic literature and scrutinises them against critical legal and political theory in order to provide a normative evaluation on WTO legitimacy. This dissertation closes with a finalising discussion chapter and conclusion through which all major points are brought together.

2. Contextualising *Public Morality* Within IEL and the WTO

2.1. Introduction: Age of Pluralism

In order to draw normative IEL conclusions concerning the trajectory of WTO law, the WTO must first be contextualised within the current IEL framework. This can be done via a brief portrayal of the current legal pluralist model versus the previous Westphalian model of IEL and its implications.

Twentieth-century IEL was characterised by a set of legal, political and economic goals and presumptions that academics broadly define as the PIL age, i.e. the Westphalian model of IEL.[4]

[4] Joel P Trachtman, 'The International Economic Law Revolution' [1996] 17 UPJIEL 33ff; Daniel Tarullo (n 13) s 105ff.

The two defining elements of this model are (i) the legal theory of state voluntarism and positivism and (ii) the institutional theory of stato-centricity, i.e. the subservient relationship of IGOs to states.[5] Concerning point (i), Simma and Paulus defined legal positivism as pertaining to a '*unified system of rules*' existing objectively, i.e. defining laws as they exist versus laws as they should exist. In determining whether an existing law is '*objective*', the said law would require rigorous testing for legal validity, which, from the perspective of classical positivism, can only be derived from '*formal sources*', rather than '*non-legal factors such as natural reason, moral principles and political ideologies*'.[6] Simma and Paulus said further, that from the added voluntarist perspective, '*formal sources*' of IEL are restricted to '*acts of State will*', i.e. '*traditional sources of international law, custom and treaty*'.[7]

Concerning point (ii), Petersmann set out three elements of Westphalian institutional theory. First: the only real subjects of IL are states and state-created IGOs. Within this construct, IGOs' processes are '*Member (State) driven*', i.e. they enjoy only a very limited and decentralised list of competencies and jurisdictional range.[8] Some exceptions had existed, but as Seidl-Hohenveldern demonstrated, this was only ever done through state consent; thus, they were still an extension of state interest.[9] Second: all international relations between states within the Westphalian model were based on sovereign equality, consent and non-intervention, thus culminating in all relevant

[5] Bruno Simma and Andreas Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' [1999] 93 AJIL 303; Ernst-Ulrich Petersmann, 'International Economic Law, "Public Reason" and Multilevel Governance of Interdependent Public Goods' [2011] 14 JIEL 40–42.
[6] Bruno Simma and Andreas Paulus (n 5) 303.
[7] ibid 303–305.
[8] Ernst-Ulrich Petersmann (n 5) 40–42.
[9] Ignaz Seidl-Hohenveldern, *International Economic Law* (3rd edn, Kluwer 1999) 1–2; Ernst-Ulrich Petersmann (n 5) 40–42.

international agreements at the time, such as the GATT as well as the aforementioned IGOs being negotiated under the pretence of providing

> '*reciprocal rights and obligations among states […] view[ing] international economic treaties as instruments for advancing state interests by using national power*'.[10]

Third: in summary, any developments made within the international arena were justified simply via state agreement, thus coating the entire Westphalian construct in a '*dangerously naïve […] legalism*',[11] which, as portrayed by Röpke, has resulted in a deep unification of politics and economics, since all law-making comes from state politics,[12] with minor differentiations only existing via the *domaine réservé*, i.e. the dualist divide of the national and international domains found within the right of non-intervention mentioned above. This Westphalian model recently morphed into the current legal pluralist model, which scholars refer to as the age of hybridity.[13] Characterised via the ever-growing integration of international and domestic economies and their respective regulatory systems, the legal pluralist model sees the depolarisation of IEL in favour of more independent and self-interested IGOs, best exemplified via the collapse of the so-called '*embedded liberalism compromise*'.[14]

Tarullo defined this *embedded liberalism compromise* as a British and American-led post-WWII arrangement premising clear distinctions between international and national economic arenas, with the international arena exemplifying elements of dynamic liberalisation, i.e. greater protection of

[10] Ernst-Ulrich Petersmann (n 5) 40–42.
[11] ibid.
[12] Wilhelm Röpke, 'Economic Order and International Law (Volume 86)' in *Collected Courses of the Hague Academy of International Law* (Brill 1954) 231–232.
[13] Daniel K Tarullo, 'Law and Governance in a Global Economy' [1999] Proceedings of the ASIL Annual Meeting 105ff; Joel P Trachtman (n 4) 33ff.
[14] Daniel K Tarullo (n 13) 105.

property interests and free trade, and the national arena maintaining full state discretion, i.e. the Westphalian *domaine reserve*, by contrast.[15] The collapse of this hard split between the international and national legal domains, i.e. the collapse of *embedded liberalism* into legal pluralism, Tarullos theorised, was due to three major factors.

First, Tarullo argued that the *embedded liberalism compromise* became a victim of its own success. The speed with which states achieved international liberalisation concerning the removal of traditional barriers to trade, i.e. tariff-based barriers to trade, unveiled the hitherto overlooked importance of *non-tariff*-based barriers to trade. Since non-tariff barriers essentially comprise government policies and/or domestic national laws, the continuing – and to a degree – inevitable force through which international liberalisation was promulgating led to non-tariff barriers to trade, i.e. potentially clashing domestic policies, becoming increasingly viewed through the lens of international liberalisation as well. This was substantial, since it resulted in what used to be considered integral elements of the Westphalian *domaine réservé* now becoming legitimate objects of international legal scrutiny and regulation.[16]

Second, Tarullo argued that the increasing scope of globalising industries resulted in the gradual inclusion of highly regulated service-based industries, which, in contrast to more traditional manufacturing industries, required substantial changes to the given legal framework to accommodate the operation of such industries. This new legal framework, due to the nature of international service-based industries, inevitably became a pluralist one.[17] Tarullo substantiated

[15] ibid.
[16] ibid 106.
[17] ibid.

this argument by contrasting the nature of traditional industries to that of service-based industries and their implications on regulation. Traditional industries, such as the manufacture of a car, simply consist of global value production chains in which certain parts are produced in countries A and B and then assembled in country C. Services, on the other hand, such as banking, telecoms and insurance, see trade in legal constructs, such as contracts, financial instruments, broadcasting rights, insurance policies, etc., which is substantial because these objects are not created in factories but rather through national domestic law. Thus, as domestic legal constructs increasingly became objects of international concern and international legal regulation, thus impacting patterns of domestic policymaking, Tarullo argued that the fiction of legal dualism, i.e. the parallel and non-touching existence of international and national laws, became impossible to maintain.[18]

Third, Tarullo argued that through the sheer number of sectors becoming subject to globalisation, states lost the ability to effectively regulate these sectors individually, i.e. the states' regulatory success became dependent on greater harmonisation and transnational coordination with international institutions, hence the systemic need for greater supranational integration. This led to a power shift in which IGOs, either through regulatory convergence or statutory/adjudicatory means, started exercising more independence and individual discretion rather than being diplomatic extensions of states, as observed during the Westphalian era.[19]

In conclusion, due to the processes mentioned above, the current IEL model is one of legal pluralism. This is important, since the GATT and WTO were born out of the Westphalian model

[18] ibid.
[19] ibid 106–109.

and have since evolved and now operate within a pluralist context.[20] This has occurred with little to no textual reform concerning its founding treaties, with Art XX(a), especially, remaining identical since its inception. The positions of the GATT and WTO within this IEL model shift and the challenges they pose are analysed in the following subsection.

2.2. Critique of the WTO Within Modern Globalised Pluralist Society

Having outlined the current model of IEL, a contextualisation of the GATT and WTO within this construct must ensue to set an adequate framing to judge against when considering the effect that *public morality* may have on the trajectory of the WTO.

Due to the timeframe required to set up the institution, the WTO framework, despite being established in the 1990s, was actually a product of the 1970s and 1980s and thus reflective of Westphalian *embedded liberalism* rather than modern Pluralism.[21] With academic literature finding the WTO's institutional role and its '*relationship to the regulatory autonomy of its member states*' as being deeply compatible with the *embedded liberal compromise* characteristic of the times and the GATT on which it was based,[22] unsurprisingly, it has now become contradictory to the WTO's current trajectory as an '*expansive constitutionalist* […] *global economic regulator*' operating within a pluralist context.[23] This issue of contradicting self-identities within the WTO is

[20] To be expanded upon below.
[21] Peter van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (4th edn, CUP 2019) 84–87; Robert Howse and Joanna Langille (n 1) 432.
[22] John G Ruggie, 'Embedded Liberalism and the Postwar Regimes' in *Constructing the World Polity: Essays on International Institutionalization* (1st edn, Routledge 1998) 62; Jeffrey L Dunoff, 'The Death of the Trade Regime' [1999] 10 EJIL 733; Robert Howse, 'From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime' [2002] 96 AJIL 96; Robert Howse and Joanna Langille (n 1) 432.
[23] Robert Howse and Joanna Langille (n 1) 432.

exemplified via its mantric insistence on being '*member-driven*',[24] a classically Westphalian notion, while simultaneously taking up an increasingly pluralist role internationally and establishing pluralist decisions via its dispute settlement system.[25] The result culminated in various contemporary controversies, such as the Seattle, Quebec and Gothenburg WTO protests,[26] US attacks on the AB[27] and the long list of scholarly critiques of WTO legitimacy laced throughout this dissertation, to name a few.[28] Perez described these legitimacy concerns as stemming from deep scepticism towards '*a-national legal structures*' or put differently, the lack of accessibility and democratic accountability concerning the decision-making process associated with these IGOs.[29] Many movements have portrayed the WTO as imposing a form of '*faceless*' tyranny[30] derived primarily from '*uncontrollable and inattentive economic rationality*' and governed by '*unaccountable experts*' adjudicating via opaque methods or as Koh put it, '*un gouvernement mondial dans l'ombre*'.[31] Perez's portrayal of public sentiments can be categorised under two

[24] John H Jackson, 'The WTO "Constitution" and Proposed Reforms: Seven "Mantras" Revisited' [2001] 4 JIEL 72; Cosette D Creamer, 'Can International Trade Law Recover? From the WTO's Jewel to its Crown of Thorns' [2019] 113 ASIL Unbound 51.
[25] Daniel K Tarullo (n 13) 106–109; Andrew Lang, *World Trade Law* (OUP 2011) 308–309; Gregory C Shaffer and others, 'Winning at the WTO: The Development of a Trade Policy Community Within Brazil' in G C Schaffer and R Melèndez (eds), *The Developing Country Experience* (CUP 2010) 94–96; Monique Libardi and Patricia Glym, 'The Reflection of WTO Brazilian Dispute Settlements on Domestic Law: A Place to Legal Pluralism?' [2019] 3 Revija za Pravnu, Političku I Socijalnu Teoriju i Filozofiju 145.
[26] Robert Howse and Joanna Langille (n 1) 432.
[27] Cosette D Creamer (n 24) 51.
[28] Robert Howse and Joanna Langille (n 1) 432; Daniel C Esty, 'The World Trade Organization's Legitimacy Crisis' [2002] 1 WTR 7ff.
[29] Vandana Shiva, 'This Round to the Citizens' (The Guardian, December 1999) <https://www.theguardian.com/society/1999/dec/08/wto.guardiansocietysupplement1> accessed 02 August 2022; Barry Coates, 'Friends Fall Out' (The Guardian, December 1999) <https://www.theguardian.com/society/1999/dec/08/wto.guardiansocietysupplement> accessed 02 August 2022; Guy de Jonquières, 'Prime Target for Protests: WTO Ministerial Conference' (Financial Times, 24 September 1999).
[30] Andrew Marr, 'Friend or Foe: The Seattle Debacle Has Raised Crucial Questions About the Role of the World Trade Organisation' (The Guardian, December 1999) <https://www.theguardian.com/world/1999/dec/05/wto.comment> accessed 02 August 2022.
[31] Oren Perez, 'Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law' [2003] 10:2 IJGLS 27; Martin Koh, 'Un Gouvernement Mondial Dans L'Ombre' (May 1997, Le Monde Diplomatique) 10 <https://www.monde-diplomatique.fr/1997/05/KHOR/4340> accessed 05 August 2020.

subcategories: (i) the internationalisation of originally deeply social/political elements of domestic politics and (ii) legitimacy deficits concerning the means by which the WTO adjudicates.

Concerning point (i), Lang demonstrated that the shift from *embedded liberalism* to pluralism did not actually decrease the amount of politics as a whole but rather outsourced that political power mostly from the national level to the inter- or supranational level.[32] Lang substantiated this by demonstrating how domestic political discretion, i.e. purely political decision making, is now infused with law, resulting in legislatures, for example, when attempting to legislate on domestic health and safety standards, labour standards or environmental standards, not only needing to first consult the international legal regulatory environment but then also legislating within the confines of this realm of obligation.[33] As demonstrated by Tarullo in the section above, under pluralism, law and politics are two sides of the same coin, i.e. law can be understood as the continuation of politics.[34] Thus, when states are perceived to have lost political power to international legal regulation, the cumulative amount of global political power has not actually decreased; rather, the discretion to use the said power has simply moved from the states to IGOs.[35] This empowerment of the WTO (in our case) is substantial, since it cannot be understood as a product of Westphalian state positivism/voluntarism; hence, the second part of Perez's point is, concerning the critiques of the WTO's legitimacy to wield such power, if not state will, what else legitimates the WTO?

Concerning point (ii), Narlikar differentiated between five separate yet equally valid interpretations of legitimacy: (i) legitimacy as '*input legitimacy*', i.e. how accessible/democratic

[32] Andrew Lang (n 25) 235, 238–241, 308–310.
[33] ibid.
[34] Daniel K Tarullo (n 13) 105–107.
[35] Andrew Lang (n 25) 235, 238–241, 308–310.

the decision-making process is; (ii) legitimacy as '*substantive values*', i.e. do institutions genuinely reflect their fundamental value claims; (iii) '*specialized knowledge*', i.e. to what extent '*technical*' issues genuinely reflect technical rather than political matters; (iv) '*output generation*', i.e. are institutions actually generating the effects and products they claim they are; and (v) '*transparency and accountability*', i.e. how easy is it to review and scrutinise the institutions in question.[36]

Concerning the WTO, Perez's portrayal of perceived democratic deficits is immediately contradictory to Narlikar's point (i) of input legitimacy. When viewing the WTO as a purely court-based DSB, missing input legitimacy may be justified via the nature and expectations of that system, but given the political discretion with which a pluralist WTO is now expected to govern, deficits in input legitimacy may pose increasing merit. Concerning point (ii), contradictions between the WTO in practice, which sees domestic socially sensitive elements exposed to global free market liberalisation, and the WTO in treaty, which makes general value claims, such as '*raising standards of living, ensuring full employment [...] growing volume of real income and effective demand […] sustainable development [etc]*',[37] may arise based on various critiques of the socio-economic effects of neoliberalism within this system.[38] Concerning point (iii), specialised knowledge is also without criticism, as demonstrated by Lang and later Borrows, since the pluralist redressing of politics into law under the neoliberal assumption that '*running the market*' is a matter of technocratic expertise rather than political compromise can be viewed as not only incredibly reductionist and dismissive of the various ways in which markets can be organised but also, through Borrows' case study, demonstrative that even against the WTO's own objectives,

[36] Amrita Narlikar, *Law and Legitimacy: The World Trade Organization* (1st edn, Routledge 2008) 294–296.
[37] WTO Agreement (1994) Preamble.
[38] Expanded upon in the discussion section below.

expert knowledge cannot always be assumed to be more effective than local political regulatory initiatives when it comes to generating effective regional economic policies.[39] Finally, points (iv) and (v) are less controversial, despite the WTO failing to conclude "*a single round of negotiations*",[40] it has generated a positive reception regarding its DSB, which renders publicly accessible decisions with extensive explanatory commentaries.[41] In that sense, DSB output as creating a rational body of law capable of solving disputes between members in a consistent and transparent way has been quite successful. Points (i)–(iii), however, are not as much. A more nuanced analysis of the various points raised within this segment is dealt with under the discussion section in Chapter 4.

To conclude, the WTO has morphed from a diplomatic extension of state will to a self-sufficient, technocratic and legalist international economic regulator whose legitimacy question seems to favour institutionalised neoliberalism rather than democratic accessibility. Referencing Rodrick's trilemma,[42] with the idea that one can only have two out of the three – (i) hyperglobalisation, (ii) democratic politics or (iii) the nation state – at any one time, the WTO's change from embedded liberalism to pluralism can be observed as a transition between a system focused on the nation state and democratic politics (Bretton Woods compromise) to that of the nation state and hyperglobalisation (golden straightjacket). How *public morality* fits into this metamorphosis is set out below.

[39] Andrew Lang (n 25) 235, 238–241, 308–310; John Borrows, *Indigenous Peoples and International Trade: Building Equitable and Inclusive International Trade and Investment Agreements* (CUP 2020) 11ff.
[40] Siddhartha K Rastogi1 and Anirban Sengupta, 'Political Economy of the WTO Negotiations: A Game-Theoretic Explanation' in Bertram Spector (ed), *International Negotiation: A Journal of Theory and Practice* (Brill Nijhoff 2022) 1; WTO Agreement (1994) Art I.
[41] Jan Wouters and Jed Odermatt, 'Comparing the 'Four Pillars' of Global Economic Governance: A Critical Analysis of the Institutional Design of the FSB, IMF, World Bank, and WTO' [2014] 17 JIEL 53, 68-69.
[42] Dani Rodrick, *The Globalization Paradox* (OUP 2011) 200–201.

2.3. Conclusion: The Potential of *Public Morality* Within IEL

Realising that some protective measures may be legitimate, GATT Art XX provides exceptions through which some barriers to trade can be justified.[43] Not all Art XX exceptions, however, are treated equally, with Art XX(a) *public morality*, the main focus of this dissertation, receiving a considerably different treatment than comparable Art XX exceptions.[44] Normally, an Art XX exception would be subject to a two-tier test in which (i) the exception must correspond to one of the prescribed Art XX(a)–(j) specifications and (ii) also must comply with the requirements found in the chapeau.[45] Furthermore, the formulation of the Art XX subparagraphs, Art XX(a) included, usually requires an element of '*necessity*', which van den Bossche and Zdouc portrayed as consisting of five parts.

First, that necessity must always be judged against its disruptiveness towards international trade, i.e. '*the more restrictive the impact of a measure is* […] *the more difficult it is to consider that measure necessary*'.[46] Second, any measure argued as *necessary* would require further testing on whether less restrictive alternatives are feasible.[47] Third, the members have the discretion to determine their own level of protection, and other members are not able to challenge the said protection outside the realm of *necessity* per se.[48] Fourth, the states must prove that the restrictive measure proposed genuinely contributes to the achievement of the objective in question, i.e. whether '*a genuine relationship of ends and means*' exists[49] based on evidence that (i) the measure

[43] Peter van den Bossche and Werner Zdouc (n 21) 544ff.
[44] Art XX(a) is discussed extensively below.
[45] Peter van den Bossche and Werner Zdouc (n 21) 554–555; AB Report, *US – Shrimp* (1998) paras 119–120.
[46] AB Report, *Brazil – Retreaded Tyres* (2007) para 150.
[47] AB Report, *EC – Asbestos* para 174; Peter van den Bossche and Werner Zdouc (n 21) 561.
[48] AB Report, *EC – Asbestos* (2001) para 168; AB Report, *Brazil – Retreaded Tyres* (2007) para 7.108.
[49] AB Report, *Brazil – Retreaded Tyres* (2007) para 145.

has '*already* (demonstrably) *resulted in material contributions*' or (ii) can be proven to have the potential '*to produce a material contribution*' in the future.[50] Finally, even after the '*weighing and balancing*' tests, the whole measure must then undergo a final reconfirmation that the measure at issue genuinely provides the least trade-restrictive method possible.[51]

The Art XX requirements listed above demonstrate a very sophisticated and challenging justification procedure in which most attempted Art XX disputes have failed to fully justify their GATT-inconsistent measures, resulting in modifications of the measures in question to provide less disruptive alternatives instead of full acquittals.[52] Thus, states are provided with a substantial legal barrier to exercise political discretion via Art XX or when interpreting from an IEL lens, and despite access to Art XX, the DSB's balance of priorities between domestic societal values and global trade liberalisation is still skewed to that of the latter instead of the former. This makes the recent jurisprudence concerning *public morality* so surprising, and for many scholars, it is a substantial shift in the DSB's trajectory.

As demonstrated in the following chapter, *public morality* jurisprudence has empowered states with *carte blanche*, which, in practice, not only dismantles all *necessity*-related requirements but also relaxes the two-tier test as set in *US – Shrimp*. The implications of added moral flexibility as a remedy to WTO controversies within the pluralist IEL constitute the second half of this dissertation.

3. Current State of Public Morality: *Carte Blanche*

3.1. Case Law Comparison

[50] ibid para 151.
[51] Peter van den Bossche and Werner Zdouc (n 21) 564.
[52] ibid 556.

US – Gambling

The first formal case dealing with *public morality* was the *US – Gambling* case, which saw Antigua and Barbuda challenge US prohibitions on internet-based gambling and betting services[53] on the grounds of restricted market access via Article XVI of the GATS. It caused the US to invoke a *public morality* defence via GATS Art XIV(a),[54] the GATS equivalent to GATT Art XX(a), to justify the ban.[55] Defining '*public morals*' as '*standards of right and wrong conduct maintained by or on behalf of a community or nation*',[56] the panel concluded, after a thorough investigation, that gambling fell within the scope of *public morality*. It argued that *public morality* can '*vary in time and space*' and is dependent on a diverse range of 's*ocial, cultural, ethical and religious*' factors.[57] The panel concluded that

> '*Members, in applying similar societal concepts, have the right to determine the level of protection that they consider appropriate*'.[58]

In so doing, the *US – Gambling* panel set the scope of *public morality* to include the members' own specific norms and values.[59]

China – Publications and Audiovisual Products

The *China – Publications and Audiovisual Products* case built upon *US – Gambling*. Interpreting Art XX(a) *public morality* as granting rights to censor imported audiovisual products, China gave

[53] GATS (1994) Art XVI(1)+(2): Market Access Commitment.
[54] ibid Art XIV(a).
[55] GATS and GATT have the same wording concerning '*public morality*'.
[56] Panel Report, *US – Gambling* (2004) para 6.465.
[57] ibid para 6.461, footnote 109.
[58] ibid para 6.461; similar findings in AB Report, *Korea – Various Measures on Beef* (2000) para 176 and AB Report, *EC – Asbestos* (2001) para 168.
[59] Panel Report, *US – Gambling* (2004) para 6.461.

its state-owned companies a monopoly over importing and distributing foreign audiovisual products via its new Accession Protocol. This, the Chinese government argued, was necessary to preserve Chinese-specific values, such as concepts of right and wrong, against contradicting foreign influences.[60] The *China – Publications and Audiovisual Products* panel found that the concepts of *public morality* as defined in Art XIV GATS and Art XX GATT were sufficiently similar to apply *US – Gambling* to the present case. In so doing, the panel maintained China's right to set its own interpretation of *public morality*, which, unlike *US – Gambling*, did not require evidence towards the merits of China's self-appraisal concerning the claimed *public morals* in question, however. Opting instead to simply assume their existence, the AB through its decision not only implied that the members enjoy an exemption from having to demonstrate the existence of any given *public moral* within their own societies but also abolished any comparative analyses with mirrored practices abroad, a concept still maintained in *US – Gambling*.[61] Thus, it granted the members substantially increased discretion and undid the fourth *necessity* requirement: evidence.

EC – Seal Products

The most notorious case, however, was *EC – Seal Products* in which Norway and Canada challenged the EU's prohibition on importing and distributing pure seal and seal-containing products within the EU, with a few exceptions granted only to indigenous Inuit-sourced seal products and non-commercial imports.[62] Despite discussing it under the pretext of the TBT agreement on the first instance and then later overturning and reinterpreting it under the GATT

[60] Ming Du, 'Permitting Moral Imperialism? The Public Morals Exception to Free Trade at the Bar of the World Trade Organization' (2016) 50:4 JWT 682; Panel Report, *China – Publications and Audiovisual Products* (2009) paras 7.861, 7.712, 7.751.
[61] Katarina Jakobsson, 'The Dilemma of the Moral Exception in the WTO' [2013] SUFL 28.
[62] Panel Report, *EC – Seal Products* (2013) para 7.42.

Art XX(a) on appeal, the AB came to the same conclusions as the original panel under the TBT and upheld all the conclusions concerning *public morality* drawn on the first instance.[63] For the purpose of this dissertation, all points are discussed in unison, foregoing technicalities concerning the scope of the TBT versus GATT and instead concentrating on the arguments scrutinising *public morality* through a GATT-focused lens.

In summary, the AB found the EU's seal ban and its complementary exceptions within the scope of Art XX(a) despite fierce Canadian and Norwegian opposition.[64] The discourse can be understood via the following subpoints. First, Canada argued two points: (i) that in order to justify *public morality*-based protective measures, as implemented by the EU, the implementing party should demonstrate some risk to *public morals*, which the given seal regime would be obligated to protect, i.e. there should be a direct connection between a need for *public morality* protections and the protection itself, which Canada argued should manifest itself in some form of animal welfare standard in this case, against which the EU's seal prohibitions could be measured against.[65] Furthermore (ii), Canada argued that the EU failed to demonstrate a sufficient differentiation in risk to animal welfare concerns between seal hunting and other conventional forms of '*terrestrial wildlife hunts*', such as deer, thus painting the EU's insistence towards seals as arbitrary.[66]

In response to Canada, the AB set out the difficulty in assessing *risk* in the sense that, unlike other Art XX subparagraphs, such as Art XX(b),[67] *public morality* is difficult to quantify, i.e. it would

[63] AB Report, *EC – Seal Products* (2014) paras 5.167, 5.70.
[64] ibid para 5.167.
[65] ibid para 5.194.
[66] ibid para 5.196.
[67] GATTS (1994) Art XX(b): necessary to protect human, animal or plant life or health.

be outside the scope of Art XX(a) to identify or pass judgment over any specific *public moral* put forth,[68] going so far as to conclude that the panel would not even have the discretion to identify the '*exact content of the public morals standard at issue*', thus reiterating the previous panel's findings in *US – Gambling*.[69] Concerning Canada's complaint of inconsistency concerning the differing levels of protection for different animals, the AB made clear that Art XX(a) fails to mention any consistency requirements, thus suggesting that the members enjoy free discretion concerning how they establish morality within their own territories.[70]

Norway, on the other hand, forewent a critique concerning scope and attempted instead to discredit the existence of the supposed seal-related *public moral* itself, arguing that the EU failed to provide evidence that its citizens truly harboured a sufficient amount of protective sentiments towards seals to warrant the given prohibitions.[71] Norway furthered this notion by scrutinising the quality of the public surveys and scientific evidence provided and claiming that the evidence was insufficient to establish an indicative existence of seal-related *public morals* in the EU.[72] Even if it did, Norway further argued that less trade-restrictive alternatives, such as animal welfare certifications and labelling requirements, were '*completely ignored*' by the panel and were thus completely contrary to established jurisprudence.[73] The AB refuted this in much the same way it did Canada's argument by restating that '*ascertaining the precise content and scope of morality in a given society may not be an easy task*', thus avoiding Norway's question concerning the prerequisite '*normative content*'

[68] AB Report, *EC – Seal Products* (2014) para 5.198.
[69] ibid para 5.199.
[70] ibid para 5.200.
[71] Panel Report, *EC – Seal Products* (2013) para 7.363.
[72] ibid 7.364.
[73] AB Report, *EC – Seal Products* (2014) para 5.285.

requirements for *public morality* assertions in much the same way the panel did in *US – Gambling* and favouring instead to restate the members' autonomy in defining such concepts themselves.[74]

Unlike *US – Gambling*, however, the panel in *EC – Seals Products*, through their insistence on their inability to assess questions of *public morality*, rejected considerations concerning alternative, less trade-restrictive measures, such as labelling,[75] thus further dismantling the first, second and fifth elements of *necessity* listed above. It also rendered the first part of *US – Shrimp*'s two-tier test as arbitrary, since the members could now choose for themselves what Art XX(a) means, thus leaving any *public morality* claims subject solely to the chapeau.[76]

Brazil – Taxation and Charges

Finally, *Brazil – Taxation and Charges*,[77] the most recent case, further widened the scope of *public morality* to such an extent that concepts such as '*public concerns, public policy and public morals*' are no longer distinguishable.[78] This case dealt with Brazil granting tax exemptions to specific national companies involved in supplying local television infrastructure and in so doing, granting *de facto* subsidies to national products over foreign imports. It caused the EU and Japan, exporters of such products to Brazil, to claim breaches of GATT Art III, discrimination towards imported like products as well as supplementary like products. Despite an overall failure of the Art XX(a) defence, primarily due to Brazil's severe shortcomings in substantiating its refusal to adopt less

[74] Panel Report, *EC – Seal Products* (2013) para 7.409; AB Report, *EC – Seal Products* (2014) para 5.289.
[75] AB Report, *EC – Seal Products* (2014) paras 5.286–5.288; Pelin Serpin, 'The Public Morals Exception After the WTO Seal Products Dispute: Has the Exception Swallowed the Rules?' [2016] CBLR 242–244.
[76] Pelin Serpin (n 75) 244.
[77] Panel Report, *Brazil – Taxation and Charges* (2017).
[78] Ming Du, 'How to Define 'Public Morals' in WTO Law? A Critique of the Brazil – Taxation and Charges Panel Report' [2018] 13:2 GTCJ 72.

restrictive trade measures, Brazil's success in widening the overall scope of *public morality* remains jurisprudentially significant.[79]

Brazil's justification was based on a need to surpass a self-diagnosed *digital divide* within its society, i.e. supplying modern television infrastructure and services to its most neglected regions. This, Brazil argued, constituted a *public morality* concern, since the government has a moral obligation to provide its citizens with access to information as well as facilitate the enjoyment of cultural products, which, Brazil furthered, is primarily achieved via television and the accompanying infrastructure surrounding it. The corresponding tax exemptions for domestic companies involved in this project, Brazil argued, were the only way to ensure acceptable standards of television services pursuant to its moral obligation previously set out; thus, they were congruent with Art XX(a).[80]

Upon investigating, the panel verified that '*television continues to reign as the prevailing means of communication*' within Brazil and that most citizens watched '*TV mainly to get informed*'.[81] The panel verified the alleged *digital divide* submitted by Brazil and highlighted the implications this divide could have on the citizens' living standards.[82] Referencing the WTO's preamble, which states that members ought to raise the standards of living within their countries,[83] the panel interpreted Brazil's measures, which the panel viewed as harbouring educational elements as well,

[79] Panel Report, *Brazil – Taxation and Charges* (2017) paras 7.562–7.568, 7.584–7.585.
[80] ibid 7.562–7.568.
[81] ibid para 7.562.
[82] ibid paras 7.563–7.565.
[83] ibid para 7.565.

as objectively bridging the *digital divide* and promoting social inclusion. Thus, the ruling stated that such concerns are '*within the scope of public morality*'.[84]

With this ruling, *US – Shrimp*'s first test, which *EC – Seal Products* already made mostly redundant, is pushed even further to now include '*legitimate social and economic development*' as an aspect of *public morality*, thus leading some scholars to speculate on the ease with which Art XX(a) could be hijacked in future as a means of pursuing simple public policy objectives should they clash with the GATT provisions.[85]

Conclusion

In conclusion, *public morality* case law has demonstrated an unequivocal trend towards the degradation of what would normally constitute a rigid and demanding legal barrier to the justifications of measures contrary to the GATT. Not only is the scope of what *public morality* means, for the purpose of the *US – Shrimp* test I, so wide that even non-moral issues, such as simple *social and economic development*, are capable of being included, but also, increasingly more aspects, usually integral to the *necessity test*, have been eroded and/or ignored on various occasions. In order to better understand how these developments have been received and what their general perceived implications are, a comparison of academic reactions to these developments will now ensue.

3.2. Academic Reactions

[84] ibid paras 7.565–7.568.
[85] Ming Du (n 78) 73–74.

Reactionary scholarly critiques of the above-mentioned jurisprudential development seem to focus on GATT-centric consistency and legitimacy concerns. In so doing, they interpret *public morality* predominantly against the GATT rather than IEL at large.

As seen in the initial reactions to *US – Gambling*, scholars such as Diebold criticised the ruling based on its vagueness and legal inconsistencies and lamented not only that Art XX(a) was interpreted and applied '*without giving clear limits to the scope of the definition*'[86] but also that the panel misinterpreted *EC – Asbestos*,[87] the crux of *US – Gambling*'s argument, and went beyond anything that *EC – Asbestos* had originally intended.[88] Marwell, on the other hand, argued that even when taking the ruling at face value, the provided analysis of the case was contradictory to itself by stating that the panel clearly ruled that the members enjoyed discretion in defining *public morality* yet required evidence of comparable restrictions in other states when considering the justification.[89] Wu further questioned the authenticity with which governments are capable of claiming that certain *public morals* exist within their societies and whether governments are simply able to '*declare without proof that a restriction serves to protect a public moral*' or '*some evidence that the public seeks to have such a moral protected*' is needed, either through opinion polls or an act of parliamentary will.[90] The reaction to *US – Gambling* is one of contempt in that it poses more questions than it answers,[91] thus leaving the dispute-oriented legal scholar understandably frustrated.

[86] Nicolas F Diebold, 'The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole' [2008] 11:1 JIEL 51.
[87] AB Report, *EC – Asbestos* (2001).
[88] Nicolas F Diebold (n 86) 52–53.
[89] Jeremy C Marwell, 'Trade and Morality: The WTO Public Morals Exception After Gambling' 81 New York Law Review 817.
[90] Mark Wu, 'Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine' [2008] 33 YJIL 233.
[91] Katarina Jakobsson (n 61) 24–25.

This trend is furthered via *China – Publications and Audiovisual Products* in which Bhala and Gantz as well as Jakobsson expressed doubts on whether practices amounting to *censorship* for the purpose of exerting control over one's own population can be considered *public morality* due to their potential violations of basic human rights principles.[92] Obvious within this line of critique is the degree to which *public morality* is being exempted from international scrutiny, or as Jakobsson put it, that despite the conformity requirements of the *necessity test* and the chapeau, the DSB would have to accept *public morality* as '*claims of importance without questioning*' in practice, thus frustrating established DSB principles.[93]

More nuanced, however, are the reactions to *EC – Seal Products* and *Brazil – Taxation and Charges*. Scholars have criticised the panels and the AB on various points. First, and most obviously, the *Seal* panel's rejection of less trade-restrictive labelling alternatives, Serpin argued, can potentially be used to justify further animal welfare-based legal justifications in the future. Or as Shaffer and Pabian put it, if other animal welfare issues, such as '*cosmetics tested on animals and meat from animals raised in some pens and cages*', can find coverage within *public morality*,[94] what would stop potentially higher-value objectives, such as human rights objectives and social development projects at large, as seen in *Brazil Taxation*, from being included within this scope?[95]

[92] Raj Bhala and David A Gantz, 'WTO Case Review 2010' [2011] 28 AJICL 320; Katarina Jakobsson (n 61) 24–25.
[93] Katarina Jakobsson (n 61) 28–29.
[94] Gregory Shaffer and David Pabian, 'European Communities – Measures Prohibiting the Importation and Marketing of Seal Products' [2015] 109 AJIL 158.
[95] Ming Du (n 78) 73; Jagdish Bhagwati, 'Afterword, The Question of Linkage' [2002] 96 American Journal of International Law 133; Claire R Kelly, 'Enmeshment as a Theory of Compliance' [2005] 37 NYUJILP 328.

Furthermore, Serpin as well as Shafer and Pabian made an argument concerning the implications of the *Seal* panel's justification of the continued allowance of '*illegal*' discrimination via the sale exemptions of Inuit-sourced seal products.[96] In their view, the panel's requirement of demonstrative *competitive opportunities* as a means of determining whether a measure in question is discriminatory or not is indicative of a confusion between the GATT and the TBT, since the TBT allows for '*disparate impact on competitive opportunities*' if demonstrable of a '*legitimate regulatory purpose*' for the impact, while the GATT does not.[97] This confusion is substantial, as it not only demonstrates an attempt by the AB to accommodate all '*legitimate regulatory purposes under the chapeau*'[98] but now also implies that

> '*every regulation that results in different market opportunities for different countries, regardless of the reason for the regulation and no matter how incidental that effect, is a prima facie violation of GATT and has to be justified under Article XX*'.[99]

An interpretation that Howse argued may render a myriad of current regulations protective of national public policies, such as 'e*nvironmental, safety, and health rules*', illegal due to their likelihood of affecting foreign-made goods.[100] However, this may not be much of an issue for the members, as the very wide scope of *public morality* has, according to some scholars, reduced Art XX(a) to a simple '*catch-all justification*' for protectionist-minded members.[101] Pauwelyn argued that the AB's wording implied that '*precise **standards***' and '***concerns/risks***' are no longer needed

[96] Gregory Shaffer and David Pabian, 'The WTO EC – Seal Products Decision: Animal Welfare, Indigenous Communities and Trade' [2014] UCISL 7; Pelin Serpin (n 75) 242–244.
[97] ibid.
[98] ibid.
[99] Rob Howse and others, 'Sealing the Deal: The WTO's Appellate Body Report in EC – Seal Products' [2014] 18:12 ASIL <https://perma.cc/2RYP-8YQF> accessed 11 August 2022.
[100] ibid.
[101] Rob Howse and others (n 99); Adam Behsudi, 'WTO Rules on Seal Furs Imports' [2014] Politico <http://perma.cc/FA89-VYP2> accessed 11 August 2022.

when declaring *public morality*-based trade restrictions, without which '*necessity, proportionality or even-handedness assessments*' are made impossible,[102] thus furthering the notion that '*if the government says so, that is enough*'.[103] Or as Charnovitz put it, 'v*irtually anything can be characterized as a moral issue*', and so *'[t]he danger of protectionist abuse is real*'.[104]

Finally, scholars have argued that the *necessity test* and *non-discrimination requirements* as found in the Art XX chapeau can provide some safeguards from potential abuse or *overstretching*.[105] This proposition has received a mixed reception, as Du, for example, responded with the observation that the issue remains within the interpretation of *public morality* rather than its application. As Du described, the chapeau analyses '*the manner in which the measure is applied*' rather than the '*design, content and structure of the measure*'.[106] When applying this principle, the case law hitherto portrays inconsistencies between measures, and the chapeau fails to render any *substantial change* to the content of the measure in question.[107]

3.3. Conclusion: A Matter of Perspective

In conclusion, scholarly critiques seem to revolve around a few key points: (i) issues concerning the legitimacy of Art XX(a) when compared to itself, the other Art XX exceptions and the values of the GATT itself, (ii) the scope of domestic regulation capable of being subject to Art XX and (iii) the fear of protectionism. As stated in the introduction, the arguments concerning

[102] Joost Pauwelyn, 'The Public Morals Exception After Seals: How to Keep It in Check?' [2014] IELPB <http://perma.cc/B6CPQRN8> accessed 11 August 2022.
[103] ibid.
[104] Steve Charnovitz, 'The Moral Exception in Trade Policy' [1998] 38 VJIL 731; Brendan McGivern, 'Commentary, The WTO Seal Products Panel—The "Public Morals" Defense' [2014] 9 GTCJ 70; Pelin Serpin (n 75) 244.
[105] Jeremy C Marwell (n 89) 827.
[106] AB Report, *US Gasoline* (1996) 22; Ming Du (n 78) 73.
[107] Ming Du (n 78) 73.

points (i) and (ii) seem to make value judgments based on the interests and continued effectiveness of the GATT itself, within which the potential of Art XX(a) disrupting this effectiveness, i.e. allowing greater state discretion in justifying anti-GATT regulations, are viewed as inherently negative. This same negativity, however, cannot be unanimously shared when taking a greater IEL view of Art XX(a), since from this perspective, value judgments would be based on systemic questions concerning the GATT/WTO, i.e. how the balance between states and institutions should be within the greater context of the IEL system. Similarly, concerning point (iii), threats of protectionism would also need to be viewed relatively. Accepting that the balance between nation states and globalisation is more nuanced than a simple *protectionist* and *globalist* binary, the analysis enquires whether shifts within that gradient can be viewed as legitimate.

Thus, leading to the penultimate chapter of this dissertation, a detailed analysis of the points just raised within this conclusion, but from an IEL perspective, hearkens back to the issues raised in Chapter 2.

4. Discussion: *Public Morality* Within IEL

4.1. Introduction: General Merit in Obstructing the GATT/WTO

Arguments concerning the obstruction of the GATT seem to focus on the states' ability to '*cheat*' the system. Important for this discussion are first, what that system implies, i.e. what principles states are capable of circumventing via Art XX(a), and second, whether circumventions can be justified when taking GATT/WTO legitimacy concerns into account, i.e. whether these circumventions address any of the legitimacy concerns posed above.

To start, as demonstrated in Sections 3.2 and 3.3, despite its widened scope, Art XX(a) seems to focus on intrinsically social issues, with animal welfare, social development and moral well-being being the most cited examples.[108] Even when taking Charnovitz's most reductionist interpretation of Art XX(a) as simply concerning '*the difference between right and wrong in matters of conduct*',[109] it cannot be doubted that Art XX(a) deals with issues of genuine political concern within presumably democratic societies.[110] It is also well known from either the language used by the treatise, the DSB or the scholarly reactions to the individual cases that the WTO represents a global liberalising force with neoliberal principles as its foundational ideology; hence, issues such as *necessity*, *non-discrimination* and *competitive opportunities* make up the central points of contention when considering Art XX(a).[111]

When taking a neoliberal perspective,[112] Art XX(a) can be viewed as an externality through which traditional ideas of *perfect competition* are obstructed, especially given how unchallenged the process through which these *externalities* have been implemented, as seen in Section 3.2. Recalling the pluralist trend of incrementally subjecting states' *domaine réservé* to global liberalisation, developments within Art XX(a) can be viewed as the DSB's attempt to allow some exceptions to this trend, especially since Art XX as a whole has been routinely criticised for being too narrow in its ability to adequately cover the potential range of legitimate regulatory objectives modern-day governments may wish to pursue.[113] Whether the DSB's reactionary choice of granting some

[108] Dissertation Section 3.1
[109] Steve Charnovitz (n 104) 731.
[110] The legitimacy concerns of states' domestic political systems are beyond the purpose of this dissertation.
[111] Dissertation Sections 2.2, 3.2–3.3
[112] Expanded upon below.
[113] Ming Du and Qingjiang Kong, 'EC – Seal Products: A New Baseline for Global Economic Governance and National Regulatory Autonomy Debate in the Multilateral Trading System' [2016] 13:1 MJIE 16–17.

leeway with Art XX(a) actually addresses any of the issues still surrounding the WTO is analysed below.

Referencing Narlikar, this discussion chapter unpacks the various points just described in the following manner. First, the WTO's claim to *specialised knowledge* within the context of the technocratisation of neoliberal economics is scrutinised against critical traditions, such as CPE, LPE and legal realism, to evaluate its legitimacy in claiming *objective knowledge* within this field – the results of which are scrutinised against the WTO's stated values. In so doing, Art XX(a) is compared regarding its legitimacy in opposing these principles. Afterwards, the position of the WTO within the current IEL context is re-evaluated to make value judgments upon its current position within Rodrick's triangle of global governance and what the Art XX(a) developments may imply concerning the continued shift towards pluralism.

4.2. Part I: Merit in the Technocratisation of Neoliberal Economics Within the WTO

Referencing Lang, the GATT, an originally political instrument exercised through diplomatic methods, has since morphed into a highly legalist and technocratic instrument institutionalising neoliberal principles[114] on presumptions concerning the *epistemic objectification* of economics, i.e. the establishment of perfect markets as an issue of *economic knowledge* and social engineering.[115] The critique ensues in two subsections: first, concerning neoliberal objectivism based on its fundamental ideas, and second, concerning neoliberal objectivism based on its real-world effects.

[114] Dissertation Chapter 2.2; Andrew Lang (n 25) 235, 238–241, 308–310.
[115] Andrew Lang, 'Governing 'As If': Global Subsidies Regulation and the Benchmark Problem' [2014] 67:1 CLP 138–139; Dorothy Ross, 'Changing Contours of the Social Science Disciplines' in Roy Porter and others (eds), *The Cambridge History of Science: Volume 7, The Modern Social Sciences* (CUP 2003) 234–235.

Critique of Fundamental Neoliberal Ideas

First, the fundament of neoliberal objectivism is itself shaky. As demonstrated by Lang, the common critiques can be compartmentalised into three broad categories: (i) that the *objectified image* of the neoliberal market itself is *false*, (ii) that the separation of economic and social lives necessary for *market equilibrium* is *socially constructed* and unnatural and (iii) that the concept of *ideal markets* is *indeterminate* and thus biased.[116]

Starting with point (i), the foundational principles of neoliberalism can be found within NE, which, briefly summarised, maintain three axiomatic beliefs: (i) *methodological individualism*, referring to *socioeconomic* explanations starting from the *individual agent*, i.e. *homo economicus*, (ii) *methodological instrumentalism*, which describes *homo economicus* as pursuing preferences dispassionately and through instrumental means, and (iii) *methodological equilibration*, understood as establishing predictability via rational and predictable *homo economicus* actions and operating within an environment removed from uncertainty/externalities.[117] Neoliberalism is understood as the use of law in creating and maintaining a market within a society to close the gap between the NE models of perfect market competition and actual market reality.[118]

The critiques of foundational neoliberal assumptions thus pertain to these three points. With the scope of this dissertation in mind, the critiques are limited to CPE, LPE and legal realism. Through

[116] Andrew Lang (n 115) 139–140.
[117] Christian Arnsperger and Yanis Varoufakis, 'What Is Neoclassical Economics? The Three Axioms Responsible for its Theoretical Oeuvre, Practical Irrelevance and, Thus, Discursive Power' [2006] 53:1 Panoeconomicus 7, 8, 10–12; David Dequech, 'Neoclassical, Mainstream, Orthodox, and Heterodox Economics' [2007] 30:2 JPKE 280.
[118] Rudolf Richter, 'The Role of Law in New Institutional Economics' [2008] 26 WUJLP 13.

CPE, scholars primarily adopt Marx's theory of economics to criticise the primary NE assertion of *methodological individualism*. According to Marx, *homo economicus* is viewed as existing in a sociohistorical context within which economic relations are not viewed from pure and voluntary NE '*egos*' entering free exchange but rather from '*individuals at a definite stage of development of their productive forces and requirements*'.[119] Thus, relations are the result of satisfying individual means, with the nature of any relationship being substantially influenced by the sociohistorical context and thus laced with pre-existing power disparities.[120] The change of perspective from equal to unequal power relations endorses the idea of exploitation rather than exchange, thus painting *methodological equilibrium* as a legally enforced framework maintaining these unequal power relations from external and possibly socially corrective measures.[121] Further arguments criticising the '*purity*' with which NE agents allegedly act can be found in Granovetter's thesis, which found the '*rational actor*' hypothesis insufficient due its neglect in appreciating the structural '*embeddedness*' of social relations, either by people's susceptibility to *systematic and predictable cognitive biases* concerning decision making or due to the influences of *social norms* altering social behaviour within the market.[122]

Following that, point (ii) emphasises the issues concerning the social construction needed for such NE markets to exist. Analysing the *embeddedness* problem just raised, Polanyi argued that forcing disembeddedness via splitting the markets from the social aspects, such as '*politics, religion, and*

[119] Karl Marx, *Das Kapital* 437–438 as found in Ernesto Screpanti and Stefano Zamagni, 'Marx's Economic Theory' in Ernesto Screpanti and Stefano Zamagni (eds), *An Outline of the History of Economic Thought* (OUP 2005) 4.3.1.
[120] ibid.
[121] ibid 4.3.1–4.3.2.
[122] Andrew Lang (119) 139; Mark Granovetter, 'Economic Action and Social Structure: The Problem of Embeddedness' (1985) 91 AJS 481–510.

social relations', poses an unnatural and socially destructive construct.[123] Given how states are required to play an *ongoing role* in maintaining *self-regulating* markets, i.e. government involvement as a '*precondition for market competition*',[124] Polanyi argued that it is not only '*utterly impossible to sustain market liberalism's view that the state is "outside" of the economy*',[125] but it is also indicative of an unnatural construct prone to failure.[126]

Intermediary Discussion

The CPE view of the law as a coercive tool in either maintaining an exploitative *market equilibrium* status quo or an unnatural market disembeddedness is itself not without criticism. A classic contrary example to CPE's interpretation of the law as a simple extension of class interest is the welfare state within which laws favour '*the interests of the working class*', which, according to Collins, would not fit into a strict CPE dichotomy.[127] When viewing the debates from the point of view of *class instrumentalism*, i.e. the law as an instrument of class struggle, welfare state social programmes would unequivocally contradict a '*hard*' reading of the term but less so a '*soft*' reading. With '*soft class instrumentalism*', welfare states can be interpreted as providing bare minimum social programmes to maintain '*the interests of the wealthy and powerful*'.[128] Many Marxists, however, argue that this distinction does not detract from the view of the law as an expression of struggle, which, despite capable of being implemented by the subordinate classes, remains largely at the discretion and benefit of the ruling classes.[129] Collins added further nuance

[123] Karl Polanyi and Fred Block, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press 1944 reprint 1955) xxiii–xxiv.
[124] ibid xxvi, note 14+15.
[125] ibid xxvi.
[126] ibid.
[127] Hugh Collins, *Marxism and Law* (OUP 1982) 46.
[128] ibid 46.
[129] ibid 46–47.

in his critique of CPE by arguing how *class instrumentalism* is commonly misunderstood as an analytical tool to connect specific laws with their effects, i.e. to analyse whether certain provisions benefit or maintain the interests of any specific class of people. Instead, Collins argued that dissecting the sets of '*interpretation[s] and evaluation[s]*' underpinning any specific legal system, i.e. whether these ideas are in tune with the given '*dominant ideology*',[130] is much more indicative of where power is pooled. In so doing, power is not articulated via individual decisions but rather in possessing the means of interpretation, i.e. the ability to create and maintain ideological hegemony in the interests of the power-holding classes.[131]

Applying a CPE perspective onto a pluralist WTO, power relations can be observed simultaneously between the WTO and the states but also between the WTO and individual people who are now increasingly subject to WTO governance decisions. The promulgation of '*objectified*' neoliberal market requirements, which CPE views as instruments for furthering the reach of the power-holding classes, in the states' *domaine réservé* would not only play into the hands of capitalist multinational interests but also, primarily, into the interests of the WTO as a form of institutional self-actualisation or, expressed in the negative, at the expense of local democratic social interests. Even when considering the WTO's preamble value promises, such as employment goals, economic development and raising standards of living, as a counter-example, CPE can still argue that such measures are tantamount to welfare state-like *soft class instrumentalism* practices through which some concessions are granted while still maintaining an exploitative system. Furthermore, referencing Collins, the language used by the DSB can be indicative of *objectified* neoliberal assumptions woven into legal *interpretation and evaluation*, going beyond a simple

[130] ibid 50–51.
[131] ibid.

reading of the treaty. Britton-Purdy's paper on LPE synthesis provided an example of how such NE principles have merged with the law on the constitutional and institutional levels and why these developments can pose legitimacy concerns.[132]

Example: LPE Synthesis

Britton-Purdy and others distinguished between two key developments over the past century: first, concerning NE concepts '*bridging […] traditional institutional focus[es] of law*' and second, regarding public law incorporation of NE concepts.[133]

Concerning the first development, Britton-Purdy portrayed the institutionalised synthesis of economics and law as inserting '*economic legal scholarship and doctrine*' into law to '*overcome inefficiencies and press toward wealth-maximizing outcomes*', thus sidelining '*questions of distribution, power, and democracy*' in favour of '*market supremacy*'.[134] This, Britton-Purdy argued, was achieved through economic '*technicians*' who, by packaging NE theory as *expert knowledge*, were capable of setting up *linking theories* between law and economics to gradually integrate the said principles within legal institutions, resulting in legal disputes being increasingly interpreted against the backdrop of *perfect markets*.[135] Concerning the second development, Britton-Purdy demonstrated a set of parallel moves to the first development in which economic scholarship became synthesised into political concepts that '*render economic power hard to find and correct*', i.e. economics was moved from the *foreground* to the *background*, obscuring NE

[132] Jedediah Britton-Purdy and others, 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis' [2020] 129 YLJ 1784ff.
[133] ibid 1798.
[134] ibid 1784, 1799–1800.
[135] ibid.

operations from *democratic reordering*.[136] Britton-Purdy argued that this was achieved through US constitutional law's alteration of key liberal values, such as '*freedom, equality, and state neutrality*', to include certain NE assumptions. This was achieved via the jurisprudence of *increasingly conservative judges* expanding *free speech* to include '*advertising, campaign spending, and even the sale of data*', *liberty* to include *market access*, etc.[137] Furthering an '*aggressive application of public-choice theory's market-modelled scepticism*' on legislative and administrative regulations, the US constitutional court formed an '*encasement of economic power in the constitutional realm*', which not only removed issues of *the market* from democratic scrutiny but now also holds democracy beholden to the market instead of the other way around.[138]

Discussion Continued

LPE synthesis demonstrates the processes through which *objective* NE is promulgated through institutions and constitutionally entrenched in the complete absence of political will. It cannot be overlooked how the practice of LPE synthesis emphasises an obscuring of economic principles via its redressing of legal or political structures. Recollecting Lang and his observations on the trend of redressing politics into law,[139] mirrored practices indicate a more general trend towards the furthered instrumentalisation of the law, which, when referencing Collins, can be interpreted as a form of economic capturing for the purpose of establishing ideological hegemony pursuant to some overarching interest. Referencing Narlikar, such observations would draw major legitimacy concerns towards point (iii), *specialised knowledge*, if NE is to be understood as neither fully correct, as viewed with the CPE critiques and *embeddedness* issues raised above, nor even less so

[136] ibid 1794.
[137] ibid 1807.
[138] ibid 1806–1807.
[139] Dissertation Section 2.2.

when viewed as a tool with which ulterior special interests are being pursued, as that would render NE an extension of political will/struggle rather than a matter of simple fact, i.e. it cannot be compared to the *neutrality* traditionally associated with the concept of *specialised knowledge*.

Concerning whose interest is being pursued, the pluralist trends discussed in Chapter 2 indicated a pooling of political power into IGOs within which the interest being pursued can be understood as that of the WTO itself, since it increases their discretion and relevance as an institution delegated with the task of *interpretation and evaluation*. Mirrored practices in IIL have found the US and its constitutional court exercising a disproportionate influence in shaping international economic principles.[140] Taking Britton-Purdy's portrayal into account, however, it would be difficult to argue how any of these developments would suit the interests of the US constitutional court, given how the empowerment of IGOs takes away from domestic courts, or the US in general, given its recent resistance to the WTO DSB.[141] More likely, following the developments in Britton-Purdy, it would be an interpretation of an ideological interest, i.e. the promulgation of an economic doctrine for the continued development and perceived legitimacy of the said economic doctrine and all parties who directly benefit from the acceptance of such a doctrine, that of being an economic policy producing '*knowledge*' institutions, *specialists* and wealth-accumulating parties and businesses.

Legal Realism

For point (iii), concerning the indeterminacy of markets, legal realists have argued that economic factors, including the concept of *perfect markets*, are nothing more than *legal entitlements* through

[140] David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise: Cambridge Studies in Law and Society* (CUP 2008) 46–47, 69–74.
[141] Cosette D Creamer (n 24) 51.

which *no set of criteria internal to economics* can exist. This would render *perfect markets* an indeterminate construct, since no '*true*' combination of ideal legal entitlements to create such a *perfect market* would exist outside of what is simply laid out in the law.[142] This is relevant concerning the WTO, since it institutionalises *perfect markets* as *specialised knowledge* without determining what that means, opting instead to act *as if* that were the case, dependent primarily on the context and its '*particular instituted form*' on a case-by-case basis.[143] Lang, in his analysis of benchmarking, argued that this practice allows lawyers to set which government measures are prioritised and which are '*taken-for-granted*'.[144] This '*post positivist epistemological*' interpretation of *perfect markets* grants the WTO power through its ability to frame the way in which *perfect markets* are applied at any given moment, thus ultimately developing jurisprudence legitimising its own interests,[145] which, like points (i) and (ii), distorts legitimacy claims of objective *specialised knowledge* under the pretence of subjective interest.

Critique of *Objective* Neoliberal Outcomes

Second, even when taking *objective* knowledge-based neoliberalism at face value, the effects of this system have produced scepticism as well. As Borrows' study on indigenous peoples' experiences with trade liberalisation demonstrated, the *objective* expert-based NE *free market* system has posed two fundamental concerns.

[142] Andrew Lang (n 115) 139; Warren J Samuels, 'The Economy as a System of Power and its Legal Bases: The Legal Economics of Robert Lee Hale' [1973] 3:27 UMLR 265; Duncan Kennedy, 'The Role of Law in Economic Thought: Essays on the Fetishism of Commodities' [1985] 34 AULR 961–962, 695–966.
[143] Andrew Lang (n 115) 140–141.
[144] ibid 147.
[145] ibid 135, 144–147, 154–157, 165.

First, concerning exploitation, Borrows argued that *free market* principles have enabled the *de facto* exploitation of indigenous resources, such as property rights of land, woods and raw materials, through (i) enacting laws and regulations denying the '*indigenous ownership of land and resources in the first place*' and (ii) strengthening the *free market* status quo by restricting *indigenous political jurisdiction* and denying challenging rights over the said neoliberal economic principles,[146] thus entrenching indigenous peoples in unequal trading relationships with foreign states and multinational corporations. Second, they have created an expert-based system in which states or other indigenous groups are burdened with providing experts of their own to even be considered capable of participating in/resisting the said expert-based exploitation.[147]

These two issues are problematic, as the first point, in much the same way as seen in LPE's demonstration of economic entrenching in the US, removes political accessibility to concerns perceived by indigenous peoples as deeply political. This, Borrows argued, clads '*experts*' in a biased/partisan light, as they are perceived as having *specialised knowledge* yet produce unequal outcomes favourable to their respective states or private interests.[148] Concerning the second point, *free market* liberalisation presupposes expert knowledge to influence legislation and resolve disputes, yet it neglects states' and peoples' very unequal access to the said experts, legal traditions and financial resources to participate and potentially operationalise their own interests within the said system.[149] The result is less-endowed states and communities being less able to defend themselves against foreign interests, thus reaffirming the CPE and legal realist concerns raised

[146] John Borrows (n 39) 21–23.
[147] ibid 23–24.
[148] ibid 23–24, 35.
[149] ibid.

above. Given the example just listed, *specialised knowledge* cannot be considered *objective* on an outcome-based argument either.

Furthermore, many critiques of neoliberalism in both theory and practice can be viewed as having adverse/exploitative effects on less-endowed states internationally, which question Narlikars' second point, *value legitimacy*,[150] concerning the social development promises found within the preamble and DSB claims. Finally, the way through which these economic principles have been institutionally '*uploaded*' and removed from democratic accessibility – through the obscurity of LPE synthesis, the incremental and self-empowering legalism of the DSB or the DDA's failures in addressing any of these issues[151] – is demonstrative of further legitimacy concerns in both (i) input, as all of these developments have occurred without state consent and remain practically inaccessible to state-willed change and (ii), output, as the neoliberal critique portrays the failures in addressing the concerns of less-developed countries internationally and generally less-endowed classes domestically.

Part II: Art XX(a) as a Legitimising Force

Hearkening back to the introduction of this chapter, the conclusions just drawn allow an interpretation that views the states' ability to '*cheat*' the GATT/WTO system as plausibly legitimate due to the aspects of the system being circumvented, as they are themselves potentially illegitimate. The following discussion analyses the degree to which Art XX(a) addresses these legitimacy concerns.

[150] Narlikar (n 36) 294–296.
[151] Antoine Bouët and David Laborde, 'The Potential Cost of a Failed Doha Round' [2008] 56 IFPRI 2ff.

First, concerning *specialised knowledge*, Art XX(a) jurisprudence demonstrates a consistent refusal to scrutinise *public morality* claims posed by states, requiring neither *evidence* of the said moral standard existing within the claiming state's society nor rigorous testing concerning *necessity*, as found in other Art XX exceptions. Thus, it substantially lowers the legal and expert-based barriers to justifying domestic regulations conventionally required under the WTO. Legal teams are obviously still required, but the burden on states to defend their justifications, however, has been significantly reduced.[152] This potentially addresses some expert-based inequalities, as raised by Borrows, and gives states, through a *de facto no-questions-asked* free card, a substantial degree of discretion back. This, however, is only the case currently, and it is unknown whether the DSB will continue to entertain such a reading of *public morality* in the future. Furthermore, despite the *public morality* free card undoubtedly catering to states' current interests, given how *public morality* is typically understood, i.e. there is a presumption of morality-based arguments constituting the exception instead of the norm, it is doubtful whether Art XX(a) can be effective in normalising economic nuance concerning the states' economic relationships with the WTO in the future. It is also doubtful whether a hands-off, no-questions-asked approach is conducive to creating and maintaining a nuanced, socially conscious international economic trade doctrine and is not rather an example of the pendulum swinging too far the other way.[153]

Second, concerning v*alues*, Art XX(a) does little to influence the WTO's piety towards global liberalisation and the continued trend of liberalising states' *domaine réservé*. Much like the point raised at the end of the previous paragraph, Art XX(a), despite its increased scope and ease of application, seems little more than a temporary concession on the part of the DSB to allow states

[152] cf Dissertation Sections 3.2–3.3.
[153] cf Steve Charnovitz (n 104) 731.

some discretion concerning especially egregious issues as a means of maintaining the states' continued acceptance of the WTO and the DSB in general without, however, addressing the legitimacy concerns previously raised. This conclusion can be ascribed to the third and fourth legitimacy issues concerning *input* and *output* as well, and as no structural change has occurred, the states have simply received a general pass for when the WTO framework becomes too rigid, thus preserving the system as a whole.

Some aspects of Art XX(a) jurisprudence, however, may prove useful. Specifically, Howse's fear of *EC – Seals* potentially triggering virtually every domestic regulation against the backdrop of '*affecting foreign-made goods*' and thus initiating a myriad of Art XX disputes[154] may have a paradoxically positive effect on the DSB going forward. This proposition is based on Trachtman's view on how issues of trade law should ideally relate to the IEL revolution. According to Trachtman, IEL is a '*law of competition which permits and forbids certain competitive acts*' in IL, within which *the market* can be understood as a market '*among States for public goods*' and through which *trade* and *other values* are balanced.[155] Trachtman also recognised the difficulty of dealing with non-tariff barriers to trade and the bifurcation between '*socially rooted, often democratically legitimate*' structures and IEL trade it usually implies. Trachtman thus proposed that to overcome this dilemma, conflicts between '*trade and other societal values*' need to be addressed via an institutional design capable of making efficient trade-offs between these conflicting stances in such a way that produces a product that maximises '*our basket of goods*'.[156] Trachtman argued that the WTO, unlike domestic governments, cannot solve these IEL trade-off

[154] cf Howse (n 99); Dissertation Section 3.2.
[155] Joel P Trachtman (n 4) 50–51.
[156] ibid 51–55.

questions through conventional legislative procedures. Harking back to a competitive understanding of IEL, Trachtman endorsed a dispute settlement system through which the GATT/WTO defends *trade* interests and the states defend *other societal values* in an effective DSB. Thus, states can bring forth concerns and perspectives on issues that the GATT/WTO may be ignorant of, and the GATT/WTO provides adequate market-based scrutiny.[157] Notice the nuance of this perspective, as it reflects the states concerns without catering to protectionism. Referencing Rodrick's trilemma of global governance, it seeks to facilitate a more tailored *golden straightjacket*, without compromising IGO's endowed position within pluralism, i.e. it demonstrates a method through which IGO's can become a better source of good, rather than simply regressing to state protectionism.

Art XX(a) can be conducive to bringing about such a system, since both the sudden influx of Art XX cases and the now potentially vast range of diverse Art XX infringements would not only (i) produce an extensive list of case law from which to develop Art XX jurisprudence but more importantly, (ii) reflect within the DSB what academics have already described for the past 20 years, namely the pluralist nuance that non-tariff barriers to trade disputes require. In so doing, the DSB would be inclined to gradually reform Art XX to better reflect states' needs as a matter of institutional necessity. Art XX(a) can be viewed as a catalyst through which states are given the opportunity to routinely challenge the GATT/WTO on matters of *domaine réservé* to synthesise domestic values with IEL through international competition, thus following Trachtman's ideal that IEL should '*not reject domestic values, [but] absorb them*'.[158]

[157] ibid.
[158] ibid 51.

What such a DSB system would ideally look like goes beyond the scope of this dissertation. It can be argued, however, given the various conclusions laced throughout this dissertation, that first, the role of '*experts*' and their utilisation of *specialised knowledge* can be re-evaluated against the backdrop of a more interdisciplinary and continuously developing understanding of economics. By considering a wider range of *specialised knowledge* sources in a transparent and comprehensible way, a re-objectification of *specialised knowledge* may be achieved. Second, concerning input and output legitimacy, an opening up of the DSB procedure to a wider range of expert sources to increase comparisons to standard domestic court procedures may facilitate an increase in nuanced and state-tailored DSB judgments, thus achieving DSB jurisprudence reflecting a more equitable trade-off between the needs of developing states and IEL at large.

All in all, the Art XX(a) jurisprudence hitherto discussed has laid out vital threads from which such a turn in DSB practice and rhetoric can be deemed internally consistent and legitimate should it choose to build upon any of these issues in the future.

5. Conclusion

In conclusion, Art XX(a) provides states with a free pass on non-negotiable issues but does little in addressing WTO legitimacy concerns as a whole. It is uncertain whether even the most liberal reading of Art XX(a) jurisprudence renders the defence reliable in generating the required nuance so demanded within the WTO's pluralist role as an '*expansive constitutionalist* […] *global economic regulator*'. Art XX(a) can, however, be viewed as a potential catalyst and legitimising force through which future developments of the DSB can be facilitated.

Bibliography

Treatise

GATS (General Agreement on Trade in Services), Marrakesh Agreement Establishing the World Trade Organization Annex 1B 1869 UNTS 183 33 ILM 1167 (1994)

GATTS (General Agreement on Tariffs and Trade), Marrakesh Agreement Establishing the World Trade Organization, Annex 1A 1867 UNTS 187 33 ILM 1153 (1994)

TBT (Agreement on Technical Barriers to Trade) 1868 UNTS 120

WTO Agreement (Marrakesh Agreement Establishing the World Trade Organization) 1867 UNTS 154 33 ILM (1994)

Cases

Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* (*Brazil – Retreaded Tyres*) WT/DS332/AB/R (2007)

Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (*EC – Asbestos*) WT/DS135/AB/R (2000)

Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (*EC – Seal Products*) WT/DS400/AB/R (2014)

Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (*Korea – Various Measures on Beef*) WT/DS169/AB/R (2000)

Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* (*US – Gasoline*) WT/DS2/AB/R (1996)

Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (*US – Shrimp*) WT/DS58/AB/R (1998)

General Agreement on Tariffs and Trade: *Dispute Settlement Report on United States Restrictions on Imports of Tuna*, 30 ILM 1594 (1991)

General Agreement on Tariffs and Trade: *Dispute Settlement Report on United States Restrictions on Imports of Tuna*, 33 ILM 839 (1994)

Panel Report, *Brazil – Certain Measures Concerning Taxation and Charges* (*Brazil – Taxation and Charges*) WT/DS472/R (2017)

Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (*China – Publications and Audiovisual Products*), WT/DS363/R (2009)

Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (*EC – Seal Products*), WT/DS400//R (2013)

Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (*US – Gambling*), WT/DS285/R (2004)

Books and Journals

Arnsperger C and Varoufakis Y, ‘What Is Neoclassical Economics? The Three Axioms Responsible for its Theoretical Oeuvre, Practical Irrelevance and, thus, Discursive Power’ [2006] 53:1 Panoeconomicus

Bhagwati J, ‘Afterword, The Question of Linkage’ [2002] 96 American Journal of International Law

Bhala R and Gantz DA, ‘WTO Case Review 2010’ [2011] 28 Arizona Journal of International and Comparative Law

Borrows J, *Indigenous Peoples and International Trade: Building Equitable and Inclusive International Trade and Investment Agreements* (Cambridge University Press 2020)

Bouët A and Laborde D, ‘The Potential Cost of a Failed Doha Round’ [2008] 56 International Food Policy Research Institute

Britton-Purdy J, Singh-Grewal D, Kapcynski A and Rahman KS, ‘Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis’ [2020] 129 The Yale Law Journal

Charnovitz S, ‘The Moral Exception in Trade Policy’ [1998] 38 Virginia Journal of International Law

Collins H, *Marxism and Law* (Oxford University Press 1982)

Creamer CD, ‘Can international Trade Law Recover? From the WTO’s Jewel to its Crown of Thorns’ [2019] 113 the American Society of International Law Unbound

de Jonquières G, ‘Prime Target for Protests: WTO Ministerial Conference’ (Financial Times, 24 September 1999)

Dequech D, ‘Neoclassical, Mainstream, Orthodox, and Heterodox economics’ [2007] 30:2 Journal of Post Keynesian Economics

Diebold NF, ‘The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole’ [2008] 11:1 Journal of International Economic Law

Du M, ‘How to Define ‘Public Morals’ in WTO Law? A Critique of the Brazil - Taxation and Charges Panel Report’ [2018] 13:2 Global Trade and Customs Journal

Du M, ‘Permitting Moral Imperialism? The Public Morals Exception to Free Trade at the Bar of the World Trade Organization’ (2016) 50:4 Journal of World Trade

Du M & Kong Q, ‘EC – Seal Products: A New Baseline for Global Economic Governance and National Regulatory Autonomy Debate in the Multilateral Trading System’ [2016] 13:1 Manchester Journal of International Economic Law

Dunoff JL, ‘The Death of the Trade Regime’ [1999] 10 European Journal for International Law

Esty DC, ‘The World Trade Organization's Legitimacy Crisis’ [2002] 1 World Trade Review

Granovetter M, ‘Economic Action and Social Structure: The Problem of Embeddedness’ (1985) 91 American Journal of Sociology

Howse R, ‘From Politics to Technocracy-and Back Again: The Fate of the Multilateral Trading Regime’ [2002] 96 American Journal of International Law

Howse R & Langille J, ‘Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values’ [2012] 37 The Yale Journal of International Law

Jackson JH, ‘The WTO 'Constitution' and Proposed Reforms: Seven 'Mantras' Revisited’ [2001] 4 Journal of International Economic Law

Jakobsson K, ‘The Dilemma of the Moral Exception in the WTO’ [2013] Stockholm University Faculty of Law

Kelly CR, ‘Enmeshment as a Theory of Compliance’ [2005] 37 New York University Journal of International Law and Policy

Kennedy D, ‘The Role of Law in Economic Thought: Essays on the Fetishism of Commodities’ [1985] 34 American University Law Review

Lang A, ‘Governing ‘As If’: Global Subsidies Regulation and the Benchmark Problem’ [2014] 67:1 Current Legal Problems

Lang A, *World Trade Law* (Oxford University Press 2011)

Libardi M and Glym P, ‘The Reflection of WTO Brazilian Dispute Settlements on domestic Law: A Place to Legal Pluralism?’ [2019] 3 Revija za Pravnu, Političku I Socijalnu Teoriju i Filozofiju

Marwell JC, ‘Trade and Morality: The WTO Public Morals Exception After Gambling’ 81 New York Law Review

Marx K, *Das Kapital* as found in Ernesto Screpanti and Stefano Zamagni, ‘Marx’s Economic Theory’ in Ernesto Screpanti and Stefano Zamagni (eds), *An Outline of the History of Economic Thought* (Oxford University Press 2005)

McGivern B, ‘Commentary, The WTO Seal Products Panel— The “Public Morals” Defense’ [2014] 9 Global Trade and Customs Journal

Narlikar A, *Law and Legitimacy: The World Trade Organization* (1st edn, Routledge 2008)

Perez O, ‘Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law’ [2003] 10:2 Indiana Journal of Global Legal Studies

Petersmann E, ‘International Economic Law, ‘Public Reason’ and Multilevel Governance of Interdependent Public Goods’ [2011] 14 Journal of International Economic Law

Rastogi1 SK and Sengupta A, ‘Political Economy of the WTO Negotiations: A Game-Theoretic Explanation’ in Bertram Spector (ed), *International Negotiation: A Journal of Theory and Practice* (Brill Nijhoff 2022)

Richter R, ‘The Role of Law in New Institutional Economics’ [2008] 26 Washington University Journal of Law & Policy

Rodrick D, *The Globalization Paradox* (Oxford University Press 2011)

Ruggie JG, ‘Embedded Liberalism and the Postwar Regimes’ in *Constructing The World Polity: Essays on International Institutionalization* (1st edn, Routledge 1998)

Ross D, ‘Changing Contours of the Social Science Disciplines’ in Roy Porter and others (eds), *The Cambridge History of Science: Volume 7, The Modern Social Sciences* (Cambridge University Press 2003)

Röpke W, 'Economic Order and International Law (Volume 86)' in Collected Courses of the Hague Academy of International Law (Brill 1954)

Samuels WJ, 'The Economy as a System of Power and Its Legal Bases: The Legal Economics of Robert Lee Hale' [1973] 3:27 University of Miami Law Review

Shaffer GC et al, 'Winning at the WTO: the Development of a Trade Policy Community within Brazil' in Schaffer GC & Melèndez R (eds), The Developing Country Experience (Cambridge University Press 2010)

Schneiderman D, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise: Cambridge Studies in Law and Society* (Cambridge University Press 2008)

Serpin P, 'The Public Morals Exception After the WTO Seal Products Dispute: Has the Exception Swallowed the Rules?' [2016] Columbia Business Law Review

Simma B & Paulus A, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' [1999] 93 American Journal of International Law

Shaffer GC & Pabian D, 'European Communities – Measures Prohibiting the Importation and Marketing of Seal Products' [2015] 109 American Journal for International Law

Shaffer GC & Pabian D, 'The WTO EC—Seal Products Decision: Animal Welfare, Indigenous Communities and Trade' [2014] University of California Irvine School of Law

Seidl-Hohenveldern I, *International Economic Law* (3rd edn, Kluwer 1999)

Tarullo D, 'Law and Governance in a Global Economy' [1999] 93 American Society of International Law Proceedings

Trachtman JP, 'The International Economic Law Revolution' [1996] 17 University of Pennsylvania Journal of International Economic Law

Polanyi K and Block F, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press 1944 reprint 1955)

van den Bossche P & Zdouc W, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (4th edn, Cambridge University Press 2019)

Wouters J and Odermatt J, 'Comparing the 'Four Pillars' of Global Economic Governance: A Critical Analysis of the Institutional Design of the FSB, IMF, World Bank, and WTO' [2014] 17 Journal of International Economic Law

Wu M, 'Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine' [2008] 33 The Yale Journal of International Law

Media

Behsudi A, 'WTO rules on seal furs imports' [2014] Politico <http://perma.cc/FA89-VYP2> accessed 11 August 2022

Coates B, 'Friends Fall Out' (The Guardian, December 1999) <https://www.theguardian.com/society/1999/dec/08/wto.guardiansocietysupplement> accessed 02 August 2022

Howse R et al., ‘Sealing the Deal: The WTO’s Appellate Body Report in EC—Seal Products’ [2014] 18:12 American Society of International Law <https://perma.cc/2RYP-8YQF> accessed 11 August 2022

Koh M, ‘Un Gouvernement Mondial Dans L’Ombre’ (May 1997, Le Monde Diplomatique) <https://www.monde-diplomatique.fr/1997/05/KHOR/4340> accessed 05 August 2020

Marr A, ‘Friend or Foe: The Seattle Debacle Has Raised Crucial Questions About the Role of the World Trade Organisation’ (The Guardian, December 1999) <https://www.theguardian.com/world/1999/dec/05/wto.comment> accessed 02 August 2022

Shiva V, ‘This Round to the Citizens’ (The Guardian, December 1999) <https://www.theguardian.com/society/1999/dec/08/wto.guardiansocietysupplement1> accessed 02 August 2022

Pauwelyn J, ‘The Public Morals Exception After Seals: How to Keep It in Check?’ [2014] International Economic Law and Policy Blog <http://perma.cc/B6CPQRN8> accessed 11 August 2022