“DANGEROUS” DANCEHALL REGGAE AND CARIBBEAN TREATY OBLIGATIONS

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Abstract

Jamaican Dancehall has increasingly become associated with violent, sexually-demeaning, and sometimes homophobic lyrics. The lyrics to these songs and their suggested link to violence have led a growing number of fellow Caribbean governments to refuse entry to Jamaican dancehall artistes and to ban their performances within their countries. However, the countries are also signatories to a Caribbean trade agreement which guarantees the banned artistes the right to travel to and freely provide their services within these countries. The countries instituting the bans have relied on Article 226 of the Treaty, which mirroring Article XIV(a) of the General Agreement on Trade in Services (GATS), provides that a Member may, under limited circumstances, adopt or enforce measures in order to “protect public morals or to maintain public order and safety.” The article argues that Jamaica and/or its artistes should seek from the Caribbean Court of Justice (CCJ), an interpretation and correct application of the public moral/public order exceptions to the rights granted under the Revised Treaty. Relying on WTO case law examining the GATS public morality and public safety exception and on EU law on the circumstances under which restrictions may be imposed on the right to freedom of movement granted under the Maastricht Treaty, the article highlights four areas in which the ban potentially conflicts with that jurisprudence. It concludes that, notwithstanding that this will be a first attempt by the CCJ, the extra territorial jurisprudence in WTO and ECJ law with regards to free movement within a trade treaty suggest workable approaches for the Court to establish a threshold of the applicability of the exceptions and guidelines to avoid abuse of the exceptions by governments. In the absence of such guidelines established by the Court, Jamaican dancehall artistes are being arbitrarily denied their right to freedom of movement and to provide their services within the region.
INTRODUCTION

Jamaican dancehall is a genre of the reggae music form which has disseminated from the small Caribbean island to become popular around the world. Similar to American hip-hop music, and indeed a precursor to that musical genre, dancehall reggae can be thought of as poetry chanted against a backdrop of rhythmic, catchy beats. Unlike, however, the reggae music made popular by such artistes as Bob Marley, Jimmy Cliff, and Third World, which has provided melodic backdrops and inspiration to African national liberation struggles through chants of peace and love, dancehall reggae has increasingly become associated with violent, sexually-demeaning, and sometimes homophobic lyrics. Particularly distressing to many persons is the gun talk genre which appears to be devoted to “the celebration of guns and the street credibility and power derived from them.” “Oil up all a de gun dem, keep them shine and [crisp],” goes the first line in one such example by Shabba Ranks. “Real badman neva afraid, we got bombs and guns and hand grenade,” says Vybz Kartel in another example. Mavado, in yet another example, chants “Run up inna mi gun and bwoy face pon tar.” The lyrics to these and other songs and their suggested link to violence have led a growing number of Caribbean governments to refuse entry to Jamaican dancehall artistes and to ban their performances within their countries.

On June 8, 2010, upon arrival in Trinidad & Tobago for a performance, the artiste Ding Dong was denied entry on the grounds of being a threat to society. Also in 2010, two days before their March 27 performance, the government of Barbados placed a ban on the highly anticipated performance of Vybz Kartel and Mavado, forcing a cancellation of their concert. The stated reason was the government’s fear of the impact on public morality of the artistes’ performance. One month later, Vybz Kartel was banned from performing in St. Lucia. Mr. Vegas was banned from performing in Grenada in February 2010. In 2008, St.

2. Chude-Sokei, supra note 1, at 81.
3. SHABBA RANKS, SHINE AND CRISP, (Shang Muzik 1992).
4. VYBZ KARTEL, REAL BADMAN (Thirty-Six Degrees Records 2011).
5. MAVADO, Real Killer, on WINE & BUBBLE (Roots High Power 2009).
6. Ding Dong Barred from Trinidad, JAMAICA OBSERVER (June 8, 2010), http://www.jamaicaobserver.com/Ding-Dong-barred-from-Trinidad.
8. See Id.
Vincent & the Grenadines banned a performance by Mavado, who had also been previously banned from performing in Guyana.\(^\text{11}\)

These bans have not been limited to performances within the Caribbean. Buju Banton, perhaps the most well-known and the most controversial among Jamaican dancehall artistes, along with Mavado and other artistes, has also been banned from performing in Europe and the United States. One can certainly question whether these bans are a restriction on the right of the artistes to freedom of expression. What is without question is the existence of a treaty that guarantees these artistes the right to freely provide their services within the Caribbean countries that have instituted these bans.

In 2001, the twelve Caribbean countries of Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St. Kitts & Nevis, St. Lucia, St. Vincent & the Grenadines, Suriname, and Trinidad & Tobago signed the Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market & Economy (hereinafter “The Revised Treaty”). This treaty signaled the region’s intention to establish a Caribbean Single Market and Economy (CSME) as a “fully integrated and liberalised internal market” for goods and services.\(^\text{12}\) The essence of this regional trade agreement is that it forms a customs union among the parties to the Treaty, applying a Common External Tariff (CET) and uniform external trade policy with respect to trade with third-party countries. Internally, the CSME is intended to function as one regional market for goods and services by reducing and eliminating barriers to trade in goods and services, and to the movement of people and capital among the members. This regional market is intended not only to serve as an engine for regional integration, but also to create “favourable conditions for sustained, market-led production of goods and services on an internationally competitive basis.”\(^\text{13}\) Accordingly, the Revised Treaty envisages that a Jamaican musician, who is registered with his government as an artiste and travels under a Jamaican (or CARICOM) passport, is entitled to work, i.e. record, produce, and perform, in Trinidad & Tobago, St. Lucia, Barbados, or any other CSME member state.

1. THE CARIBBEAN REGIONAL MARKET FOR TRADE IN SERVICES

The Revised Treaty lists as one of the objectives of the creation of a Caribbean Community, “the accelerated, coordinated and sustained economic development and convergence” of the region.\(^\text{14}\) Article 54 commits the Member States to promote the development of the services sector in order to accelerate the region’s economic development, requiring them to give priority to, among other activities,
"the facilitation of cross-border provision of services which enhance the competitiveness of the services sector."

This stated goal is reinforced by the discussion of regional trade policy in Part Five of the Revised Treaty. Article 78 identifies the Community's trade policy as encouraging, "the sustained growth of intra Community and international trade and mutually beneficial exchange of goods and services among the Member States and between the Community and third States." In keeping with this goal, the Member States are charged with pursuing the objective of, among other things, "full integration of the national markets of all Member States of the Community into a single unified and open market area." To this end, the Member States further commit to: (1) establish and maintain a regime for the free movement of goods and services within the CSME; and (2) refrain from trade policies and practices that have the goal or the effect of frustrating free movement of goods and services. Read together, these treaty provisions clearly communicate the policy goal of creating a regional market for trade in services, with a particular view of enhancing the region's competitiveness in the services sector. Undoubtedly, the cultural industries in the Caribbean, particularly its music, deserve priority attention to achieve this goal.

Articles 36 and 37 of the Revised Treaty commit the member states to remove existing restrictions on the provision of services by Community nationals and to prohibit the imposition of any new restrictions on the provision of services by Community nationals operating across the four delivery modes for trade in services: (1) cross-border, from the territory of one member state into the territory of another; (2) in the territory of a member state to a consumer from another member; (3) through establishment by a service supplier of a commercial presence in the territory of another member; and (4) through the presence within the territory of a member state of individual service suppliers from another member. Almost without exception, musicians and other artistes are frequent users of the fourth delivery mode, i.e. travel from their home to another territory to perform.

The Revised Treaty has also committed the member states to the goal of free movement of Community nationals within the CSME. As a step toward this more long-term goal articulated in Article 45, the CSME member states have committed to immediately give "the right to seek employment" in their jurisdictions to five specified categories of skilled Community nationals: (1) university graduates, (2) media workers, (3) sports persons, (4) artistes, and (5) musicians. In Article 36, the treaty defines "services" as "services provided against remuneration other than wages," and therefore on its face the Article 45 provision does not appear to recognize the identified categories as service providers. Rather, the Article 45
provision identifies categories of skilled persons who should be accorded free movement to provide their skills within the region. In practical terms, however, and particularly as this relates to artistes and musicians, this may be a distinction without a difference.22 The provision is, nevertheless, useful as providing indicators of the types of barriers that are no longer to be used to prohibit delivery of services by natural persons under Article 36. Article 46 goes on to require the CSME member states to provide for the movement of skilled Community nationals “into and within their jurisdictions without harassment or the imposition of impediments,” including elimination of passport and work permit requirements.23 If these barriers are to be removed for artistes and musicians entering a CSME member state to seek or take up employment, it also stands to reason that they be removed for those entering as service providers.

In sum, the Revised Treaty envisions services becoming the lifeblood of the Caribbean region’s integration and economic growth processes. Furthermore, the delineation of musicians and artistes as skilled nationals who are among the first category to be given the right to free movement within the CSME underscores the importance that the region gives to the cultural industries in enhancing its competitiveness in this sector. For example, the ability to draw upon the cultural pool that is available throughout the region enhances the tourism product that each member state can provide. Therefore, an invitation to a Jamaican or Barbadian artiste to perform in Grenada provides value not just for the local community but can also add value to the totality of the “Caribbean experience” which each CSME member is given the opportunity to showcase.

Undoubtedly, among the more widely-known of the region’s cultural products are Jamaica’s reggae artistes.24 Particularly among the younger generation, dancehall reggae artistes, such as Vybz Kartel, Mavado, and the other banned artistes, are immensely popular inside and outside of the region. The Revised Treaty provisions on liberalization of services and freedom of movement confer on

22. Employment is defined in BLACK’S LAW DICTIONARY as the act of employing or the state of being employed. There are various means of being employed. One can be employed on a permanent or a seasonal basis; employment may be at will without a contract or as an independent contractor with a specific project to complete. In fact, the primary use of these terms is to distinguish between the liability that an employer has, or may not have, for the actions of someone in his or her employ. To illustrate, in the event of an injury, a musician hired to perform a regular gig at a hotel and a musician contracted to perform at a musical event will have different claims on the person who hired them. BLACK’S LAW DICTIONARY 604 (9th ed. 2009).


24. The Bank of Jamaica reported that the island’s net foreign exchange earnings in 2010 from cultural services, which includes music, sport and film was higher than earnings from services in finance, business, insurance and construction combined, and was topped only by earnings from the travel and communication sectors. This higher ratio exists despite a four (4) percent decline over 2009 in net inflows as a result of reduced sales of audio products and a drop in the income earned by artistes and musicians who perform overseas. This drop in artistes’ earnings would have been the result not only of the ban on performances in the Caribbean, but also revocation of the U.S. visas of the island’s top five dancehall artistes. See Steven Jackson, Culture Exports Trump Financial Services, THE JAMAICA GLEANER, Oct. 23, 2011, available at http://jamaica-gleaner.com/gleaner/20111023/business/business1.html. While not the focus of this article, these figures indicate the importance of these earnings to Jamaica’s economic health.
the Jamaican dancehall artistes a right of movement within, and the right to provide their services throughout, the Member States of the CSME.

At the same time few, if any, rights are absolute or devoid of responsibility, and neither are those accorded to Caribbean artistes under the Revised Treaty. Article 226 of the Revised Treaty contains General Exceptions that may be invoked by a Member State to counter its obligations under the treaty. Article 226 states that a Member may adopt or enforce measures in order to “protect public morals or to maintain public order and safety,” but only if such measures do not constitute arbitrary or unjustifiable discrimination between Member States” or “a disguised restriction on trade within the Community.” Any such measures must also be disclosed to the Council for Trade and Development (COTED). These provisions signal that withdrawal of, or limitations on, the rights granted to Community nationals by the Revised Treaty cannot be made lightly and require substantiation before the entire Community. Do the actions taken by the governments of Trinidad and Tobago, Saint Lucia, and other parties to the Revised Treaty to ban Jamaican dancehall artistes on public morals or public order and safety grounds meet this test?

II. ANALYSIS OF THE PUBLIC MORALS AND SAFETY EXCEPTION IN THE REVISED TREATY

Caribbean jurispmdence provides no guidance to assist in the analysis of the Article 226 public morals/public safety exception in the Revised Treaty and its application to the ban on Jamaican dancehall artistes. The Revised Treaty gives the Caribbean Court of Justice (CCJ) compulsory and exclusive jurisdiction to resolve all disputes arising from interpretation and application of the treaty's provisions. The CCJ is a regional judicial tribunal which was established in February of 2001. Perhaps as a result of the Court's youth, it has not as yet addressed the circumstances under which a Member State may utilize the exception to curtail or limit the rights of a Community national under the Revised Treaty. For guidance we therefore turn to persuasive jurisprudence developed by the World Trade Organization (WTO) in interpreting almost identical provisions contained in the General Agreement on Trade in Services (GATS) Article XIV and the General Agreement on Tariffs and Trade (GATT) Article XX, and to jurisprudence by the European Court of Justice. John Marwell, who has investigated the public morality exception to the obligations under the GATS, has noted that many regional trade agreements have adopted identical or similar terminology to that of GATS and

25. Revised Treaty, supra note 12, art. 226(1).
26. Revised Treaty, supra note 12, art. 226(2).
28. Revised Treaty, supra note 12, art. 211.
GATT, and therefore that the development of jurisprudence on the matter is a useful tool in constructing similar provisions in other agreements.\(^\text{30}\)

With respect to WTO jurisprudence, the GATS would be the applicable Agreement in this discussion. However, the first and only case to date which has analyzed the GATS public morals exception, \textit{U.S.-Gambling}, brought interestingly enough by the Caribbean nation of Antigua and Barbuda, has relied on jurisprudence developed in a case applying the GATT Article XX exception. The GATS Article XIV public morals/public safety exception, and the GATT Article XX public morals exception are almost identical in wording, particularly with respect to the use of the term necessary and the requirements set out in the chapeaux to both provisions.\(^\text{31}\)

At the same time, this is where the Article 226 (a) exception of the Revised Treaty textually departs from the WTO provisions because the Revised Treaty does not employ the threshold of necessity with respect to the application of the public morals/public safety exception.\(^\text{32}\) This omission appears to be intentional as the word necessary does appear within other provisions that would trigger an Article 226 exception, for example with respect to measures to protect intellectual property (Article 226(d)), to prevent or relieve food shortage (Article 226(i)), or to secure compliance with laws or regulations relating to customs enforcement (Article 226(c)).\(^\text{33}\) Marwell notes that the requirement of necessity and the applicable test formulated by WTO case law has resulted in a narrow interpretation of the exception, thereby ensuring that it not be abused on the basis of sovereignty.\(^\text{34}\) It is perhaps conceivable that the parties to the Revised Treaty intended to give CSME members greater autonomy in applying the public morals/public safety exception under the Revised Treaty. This will have to be left to the CCJ to decide. However, in doing so, the CCJ is nevertheless likely to seek guidance from WTO analysis of the GATT and GATS exception.\(^\text{35}\)

\textbf{A. Necessity Requirement in the WTO Public Morals/Public Order Exceptions}

The WTO analysis recognizes the right of a country to define its own morals and mores. The panel in \textit{U.S.-Gambling} found that "the term 'public morals' denotes standards of right and wrong conduct maintained by or on behalf of a community or nation," the content of which can vary for each Member "in time and space, depending upon a range of factors, including prevailing social, cultural,

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\(^{32}\) \textit{Revised Treaty}, supra note 12, art. 226(a).

\(^{33}\) \textit{Revised Treaty}, supra note 12, art. 226.

\(^{34}\) Marwell, \textit{supra} note 30, at 806.

\(^{35}\) Article 217 of the Revised Treaty requires that the Court, in exercising its original jurisdiction to interpret and apply the Treaty, apply the applicable rules of international law. \textit{Revised Treaty}, supra note 12, art. 217. \textit{See also} Beckford, \textit{supra} note 27.
ethical and religious values." As a result, the Panel stated, Members "should be given some scope to define and apply for themselves the concepts of 'public morals' . . . in their respective territories, according to their own systems and scales of values." At the same time, WTO jurisprudence is also quite clear on the requirement that the measures taken in defense of these morals must be necessary. WTO legal analysis is built around the concept of necessity, which is considered an objective standard, i.e. independent of the assessment of the Member State that has introduced the measure. The ensuing discussion of that jurisprudence relies on the WTO analysis beginning with the application in U.S.-Gambling of the two-part analysis articulated by the WTO Appellate Body in Korea-Various Measures on Beef. In China—AV, the Appellate Body notes the progression of its analysis with respect to analyzing the necessity of a measure in the following cases: Korea-Various Measures on Beef (in the context of Article XX(d) of the GATT 1994); U.S.-Gambling (in the context of Article XIV(a) of the GATS); and Brazil-Retreaded Tyres (in the context of Article XX(b) of the GATT 1994). In each of these cases, the Appellate Body explained, an assessment of necessity involves "weighing and balancing" a number of distinct factors relating both to the measure sought to be justified as necessary and to possible alternative measures that may be reasonably available to the responding Member to achieve its desired objective. The discussion below will highlight in particular the two cases that explore the public morals exceptions.

In U.S.—Gambling, Antigua and Barbuda claimed that the United States had prohibited the market access of cross border gambling services offered by Antiguan operators in contravention of the United States' GATS commitments. The WTO Panel and Appellate Body found that U.S. federal laws, which restricted such services, were a violation of United States' commitment as a quantitative limitation on the supply of such services. Relying on the GATS Article XIV(a) exception, the United States justified these restrictions as a means of protecting against a range of evils, including gambling by minors, addictive behaviors, and organized crime including racketeering and money laundering. As a result, the restrictions could be upheld if the WTO Panel and Appellate Body accepted the U.S. justification of these laws as a necessity under the GATS Article XIV(a) exception.

37. See id. at ¶ 6.461. This statement was adopted by the panel in a later case applying the public moral exception under GATT XX(a). See also Panel Report, China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audio-Visual Entertainment Products, ¶ 7.759, WT/DS363/R (Aug. 12, 2009).
40. Id.
In China—AV, the United States, joined by Australia, the European Union, Korea, and Japan as third parties, alleged that China was in violation of its WTO obligations to provide non-discriminatory treatment to foreign and domestic companies.\(^4\) China, they alleged, unjustifiably restricted to Chinese state-owned enterprises the right to import into and distribute within China reading materials, audio-visual products, sound recordings, and films for theatrical release; and restricted the importation into and distribution within China of imported reading materials, sounds recordings intended for electronic distribution, and films for theatrical release.\(^4\) The Panel and the Appellate Body found that China was in violation of its WTO obligations.

China, in support of its GATT Article XX(a) defense, submitted that the regulations governing the importation of cultural goods established a content review mechanism and a system for the selection of import entities directed at protecting public morals in China.\(^4\) Noting that cultural goods are unique in that they may have a potentially serious impact on societal and individual morals, China further argued that imported cultural goods, because they are vectors of different cultural values, may collide with standards of right and wrong conduct specific to China.\(^4\) China submitted that, although this may result in limitations of the right to trade, the system was consistent with China's "right to regulate trade" as defined in paragraph 5.1 of its Accession Protocol and justified under Article XX(a).\(^4\)

In turn, the United States acknowledged China’s right to take action to protect its morals. However, the United States challenged China’s approach to the issue because it: (1) denied trading rights to all foreign and privately-owned importers, constituting "arbitrary or unjustifiable discrimination" and a "disguised restriction on international trade;" and (2) WTO-consistent alternatives were reasonably available, as a result of which the measures could not be justified as necessary under GATT Article XX(a).\(^4\)

Noting the similarity between the language in the GATT and the GATS exceptions, and relying on the test developed in applying the GATT Article XX exception in Korea-Various Measures on Beef, both cases outlined the following two-part test to determine whether a violating measure could nevertheless be justified as necessary under the public moral exceptions in GATS Article XIV and GATT Article XX.\(^4\) First, is the measure necessary to preserve public order or protect public morals?\(^5\) Only if the measure is found to be necessary to preserve

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44. Id.
45. Id. at ¶ 7.712.
46. Id.
47. Id. at ¶ 7.713. Although this case raised issues under both GATT and GATS, China did not raise the GATS Article XIV(a) defense.
48. Id. at ¶¶ 7.717–7.719.
50. Id.
public morals/public order does the analysis move on to the second part of the test which is laid out in the chapeau, i.e. can the measure still be considered necessary as being the least restrictive means of obtaining the desired end? Together, this two-part test of the “necessity” of the measure constitutes a balancing and weighing of the following factors:

a) first, the relative importance of the interests or values being furthered by the measure;

b) next, the other factors to be weighed and balanced against these interests or values, which will in most cases include:

i) extent to which the measure contributes toward meeting these goals,

ii) extent to which the measure has a restrictive impact on international commerce, and

iii) non-discriminatory application of the measure in that there are no other WTO-consistent alternative measures that could reasonably and practically be applied toward the same goals.

Assessment of the importance of the interests or values being protected can be supported by legislative history with respect to the measure, as the Panel did in U.S.–Gambling. In assessing the counter-balancing factors, the measure’s contribution to the ends being pursued must “enforce obligations” under the relevant laws or regulations, at least in part if not exclusively, rather than just ensure attainment of these objectives.

The key to assessing the trade impact of a measure at issue is the extent to which the Member has explored and exhausted reasonably available WTO-consistent alternatives. The panel in U.S.–Gambling stated: “We recall that Members are obliged to consider all reasonably available WTO-consistent alternatives before imposing a WTO-inconsistent measure” (which may be justified by the relevant WTO exceptions provisions). This requirement reflects the shared understanding of Members that substantive GATS obligations should not be deviated from lightly. The alternative must be available in practice, not just in theory, and must also be a measure that would preserve for the responding Member

51. Id.
53. See U.S. Gambling Panel Report, supra note 36, ¶¶ 6.489–6.492. There was no need for a similar exercise in China AV given that the United States did not contest the importance of the interests being asserted by China. China AV Report, supra note 43, ¶ 7.762.
55. Id. ¶ 6.526.
56. Id.
its right to achieve its desired level of protection with respect to the public moral objective pursued under GATS Article XIV(a).\footnote{Id.} While there is no obligation to present the universe of reasonably available alternatives, the Member invoking the public morals/public safety defense will be required to demonstrate why the proposed alternative is, in fact, not reasonably available.\footnote{Id. \textsuperscript{\S} 311.} In that case, concluded the Appellate Body in \textit{U.S.--Gambling}, the challenged measure must be considered necessary.\footnote{Id.}

Application of the GATT/GATS public order exception requires a similar weighing and balancing of such factors as: (1) the contribution of the measure to enforcing the law or regulation at issue; (2) importance of the common interests or values protected by that law or regulation; and (3) accompanying impact of the law or regulation on imports or exports.\footnote{See Appellate Body Report, \textit{Korea—Measures Affecting Imports of Fresh, Chilled, and Frozen Beef}, ¶¶ 164–66, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000) [hereinafter \textit{Korea Beef AB Report}].} An additional factor at play with the public order exception is the required existence of clear laws and/or regulations aimed at enforcing public order.

Under either exception, once a panel has identified the factors to be weighed and balanced, a comparison of the challenged measure and possible alternatives should be undertaken, and the results considered in light of the importance of the objective pursued.\footnote{See \textit{U.S. Gambling AB Report}, supra note 31, ¶¶ 306–308; \textit{China AV—AB Report}, supra note 39, ¶ 240.} It is on the basis of this "weighing and balancing" and comparison of measures, taking into account the interests or values at stake, that a panel determines whether a measure is necessary or, alternatively, whether another, WTO-consistent measure is reasonably available.\footnote{\textit{U.S. Gambling AB Report}, supra note 31, ¶ 307; adopted by \textit{China AV Report}, supra note 43, ¶ 7.784.}

As noted earlier, both cases indicate a \textit{de facto} recognition by the WTO panels and Appellate Body of the importance of the interests at stake with respect to protecting a Member's moral values. In \textit{China--AV}, for example, the United States, the Panel, and the Appellate Body throughout acknowledged China's right to take appropriate measures to protect its culture and its morals.\footnote{See, e.g., \textit{China AV Report}, supra note 43, ¶ 7.763.} In \textit{U.S.--Gambling}, because of Antigua's challenge, this step required an examination of the U.S. legislative record behind the respective measures, which the Panel then found supported the U.S. contention of the importance of the public moral and public order interests at stake.\footnote{See \textit{U.S. Gambling Panel Report}, supra note 36, ¶¶ 6.489–6.492.} Analysis of the necessity of a measure under the public moral exception focuses on balancing against this interest the other relevant factors identified in the WTO test. It is in this regard that China's actions fell short. While the measures at issue were found to support the important interest of protecting China's morals, and even to be necessary, the means chosen to do so were deemed
to be too trade-restrictive as more reasonable alternatives to achieve the same ends were found to be available to, and in fact were already being used by China. As a result, without proceeding to the final phase of the analysis under the chapeau, the Panel and Appellate Body concluded that China had not proved that the measures at issue were necessary to protect public morals.

B. Analysis of Non-Discriminatory Application Under the Chapeau

A measure found to be necessary as a result of the previous analysis because of the importance given to the interests being protected must nevertheless survive the chapeau requirement. It requires that the measures in question are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services. Its primary purpose is to prevent abuse of the exception. Therefore, the focus is on the manner in which the measure is applied. Reiterating the analysis in a prior case, U.S.—Shrimp, the panel in U.S.—Gambling stated that a balance must be struck between the right of a Member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members (emphasis by Panel). The U.S.—Gambling Panel went on to adopt the following test, which had been articulated by the Appellate Body in U.S.—Shrimp:

To determine when a measure is being applied in a manner which would constitute "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", three elements must exist. First, the application of the measure must result in discrimination. Second, the discrimination must be arbitrary or unjustifiable in character. Third, this discrimination must occur between countries where the same conditions prevail.

The panel in U.S.—Gambling found that the absence of consistency in implementing the measure at issue is sufficient to lead to a conclusion that the measure in question is applied in a manner that constitutes "arbitrary and unjustifiable discrimination between countries where like conditions prevail" and/or a "disguised restriction on trade." In sum, although the U.S. laws aimed at prohibiting remote gambling served a legitimate public interest, the laws were being inconsistently applied, as a result of which domestic suppliers were permitted to provide remote gambling services in situations where foreign suppliers were

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69. Id. ¶ 6.574.
70. Id. ¶ 6.575 (emphasis added).
71. Id. ¶ 6.578 (emphasis added).
72. Id. ¶ 6.584.
Accordingly, the laws prohibiting remote gambling were being enforced in a manner that discriminated between domestic and foreign suppliers. Under WTO law, discriminatory application of a measure, even one which serves a legitimate public moral/public order interest, leads to the conclusion that the measure is not necessary to accomplish the interests being asserted.

C. Analysis of Commitments to Free Movement Under EU Law

Another distinction between GATS and the Revised Treaty is noteworthy and suggests the need for application of an additional body of law. The GATS provides rules to govern trade in services but contains no provisions guaranteeing freedom of movement. The Maastricht Treaty creating the European Union (EU), on the other hand, does provide for freedom of movement, and is reinforced by the Rome Treaty on the Functioning of the EU (TFEU). Freedom of movement and of residence within the Union by nationals of EU member states forms the cornerstone of the concept of citizenship in the EU.

Accordingly, it is advisable and proper to also look to the jurisprudence of the Court of Justice of the European Communities (ECJ), charged with ensuring the proper interpretation and application of the Treaties, for persuasive guidance when interpreting freedom of movement provisions under the Revised Treaty. Freedom of movement of persons is governed chiefly by Directive 2004/38/EC of the European Parliament and by the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, which governs the exercise of the right of free movement within the European Union. The Directive establishes guidelines for restricting the right of entry and of residence according to the TEU, which permits such restrictions solely on grounds of public policy, security, or health. Such restrictions, the Directive provides, must: (1) be based exclusively on the personal conduct of the individual; (2) address conduct that represents a "genuine, present and sufficiently serious threat affecting one of the fundamental interests" of the host Member State; (3) comply with the principle of proportionality, i.e. be sufficient to achieve the aim where there is no less-restrictive measure that would do so; and (4) be consistent with repressive or other effective measures to combat such conduct with regards to the host country's own nationals.

74. *Id.* at ¶ 372. The Panel had found that the evidence provided by the United States was not sufficiently persuasive to conclude that, as regarded wagering on horseracing, the remote supply of such services by domestic firms continued to be prohibited. *Id.* ¶ 364.
77. *TEU* supra note 76, art. 19.
79. *Id.* at art. 1(c).
80. *Id.* at art. 27(2).
This test was applied by the ECJ in *Joined Cases Andoui and Cornuaille*.  Two French citizens were refused permits to reside in Belgium on the grounds that their conduct was considered to be contrary to public policy because they were waitresses in a bar considered to be involved in prostitution. Belgian law placed restrictions on conduct associated with but did not ban prostitution. The ECJ stated that, on grounds of public policy, the Maastricht Treaty permits Member States to adopt, with respect to nationals of other EU member states, actions which they cannot apply to their own nationals, i.e. the act of expulsion. Nevertheless, the Court continued, the basis for that action should not have the effect of applying an arbitrary distinction to the nationals of other member states. Accordingly, a state may not rely on the reservation relating to public policy to expel the national of another state or refuse him/her access when the same conduct by a national of the state would not give rise to repressive measures intended to combat such conduct.

There is no document similar to the EC Directive which interprets and applies the freedom of movement provisions in the Revised Treaty. At the same time, the guidelines contained within the EC Directive and embodied into EC law are derived from the following language in the Maastricht Treaty: "[t]he Union shall offer its citizens an areas of freedom, security and justice without internal borders, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime." The attention given to efforts to restrict these rights is derived from the importance given to the concept of free movement within the EU. Within the Revised Treaty, the commitment to free movement within the Community by the nationals of member states is stated even more categorically: "Member States commit themselves to the goal of free movement of their nationals within the Community." Read together with Article 7 of the Revised Treaty, which prohibits any discrimination on grounds of nationality only, freedom of movement within the CSME can be viewed as a fundamental perquisite for the effectiveness of the single market. As such, the types of restrictions placed on the ability to limit the right of free movement within the EU would be entirely appropriate within the CSME.

Application of ECJ case law on this issue would indicate two additional factors that must be considered with respect to restrictions placed on the right to freedom of movement granted within a regional arrangement, such as the EU or the CSME.

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82. *Id.* at ¶ 2.
83. *Id.* at ¶ 3, 6.
84. *Id.* at ¶ 7.
85. *Id.*
86. *Id.* at ¶ 9.
87. TEU, supra note 76, art. 3.
Restrictions on that right must address personal conduct that: (1) represents a real, present and sufficiently serious threat that affects one of the fundamental interests of the host Member State; and (2) would also be subject to repressive measures if done by a national of the host Member State.

III. APPLICATION OF THE JURISPRUDENCE TO THE REVISED TREATY

We have previously noted the absence of the term “necessity” from the Article 226 exception in the Revised Treaty, which requires only that adopted measures not constitute arbitrary or unjustifiable discrimination or a disguised restriction on trade.90 Meanwhile, as discussed above, under WTO law, the determination of whether a measure has a restrictive effect on trade is part of the weighing and balancing approach employed by WTO panels and the Appellate Body for assessing necessity.91 Whether a CCJ decision adopts the same balancing analysis, an appropriate test will be important to achieve the balance between a country’s right to enforce its moral values and its duty to its trading partners under the Revised Treaty. At a minimum, the WTO test outlined in U.S.—Shrimp and adopted by U.S.—Gambling to determine whether a measure is being applied in an arbitrarily or unjustifiably discriminatory manner, discussed earlier, is certainly applicable. Otherwise, a CSME member will be able to circumvent its obligations under the Treaty by merely asserting a cultural or moral value being protected by a violating measure.

Whatever the approach taken by the CCJ, and when tested against the persuasive jurisprudence outlined above, the following discussion highlights some red flags for the bans instituted against Jamaican dancehall artistes with respect to: (1) the challenge of establishing that the restrictions on the right to movement are a response to a real, present, and sufficiently serious threat to a fundamental societal interest; (2) the challenge of determining that the speech being banned presents a threat to public morality or public order; (3) availability of less trade-restrictive measures to achieve the desired outcome; and (4) non-discriminatory application of the ban.

A. Are the restrictions on the right to free movement responding to a threat to a fundamental societal interest?

Under ECJ jurisprudence, restrictions on the right to freedom of movement granted by the Maastricht Treaty are justifiable only in response to a real, present, and sufficiently serious threat that affects one of the fundamental interests of the host Member State. Undoubtedly, preservation of public order constitutes a fundamental societal interest.92 The true test, however, is whether the performances of Jamaican dancehall artistes present a serious threat to the preservation of public

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90. Revised Treaty, supra note 12, art. 226(2).
order. Considering this issue in *Joined Cases Andoui and Cornuaille*, the ECJ allowed that EU law does not attempt to impose on its member states a uniform scale of values with respect to what may be considered a threat to public policy. However, it could not consider conduct to be a serious enough threat to justify restrictions on nationals of another member state if the state imposing the restrictions does not place restrictions on similar conduct by its own nationals.\(^9\) As we discuss later, this requirement that the restrictions be imposed in a non-discriminatory manner poses an additional challenge for the countries restricting access by Jamaican dancehall artistes.

**B. Is the banned speech a threat to public morality/order?**

As discussed above, WTO decisions in *U.S.-Gambling* and *China-AVmax* indicate a *de facto* recognition by the WTO panels and Appellate Body of the importance of the interests at stake with respect to protecting a Member's moral values, and a Member's right to both determine its own moral values and to take the appropriate measures to protect them. Nevertheless, the commitments made to trade partners must be taken seriously. Accordingly, under WTO analysis the interests underlying the ban on the performances must be balanced and weighed against the factors identified in the WTO tests, including the extent to which the ban addresses the perceived threat(s) to public moral/public order.

In his article discussing the state of the GATS public morals exception after *U.S.-Gambling*, Marwell discusses the challenges of having an international tribunal assess whether a country is asserting a legitimate issue that concerns public morals.\(^94\) His critique suggests that there is a need to incorporate analytical approaches and tools that can address the existence of strong mores and practices even in the absence of law, regulations, and the supporting legislative record. First, he notes, with the exception of a core of near-universal human moral values, such as prohibitions on murder, genocide, slavery, and torture, and some tenuous consensus on such issues as trade in pornography, gambling, alcohol, and illegal drugs, there is no internationally accepted objective evidence as to what constitutes an allowable exception to trade commitments based on public morals.\(^95\) As a result, he states, such interests are likely to be strongly held, geographically localized, and diverse across political boundaries.\(^96\) Secondly, in his belief, defining public morals based on evidence external to the state whose regulation is in question improperly imposes a moral majority threshold on the use of the exception.\(^97\) WTO members,

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\(^94\) *Marwell*, *supra* note 30, at 805.

\(^95\) *Id.* at 815–16.

\(^96\) *Id.* at 805.

he believes, should have leeway to define public morals based solely on domestic circumstances. At the same time, this approach raises a third challenge, which is the risk that it carries of protectionist abuse, potentially allowing the exception to swallow the rule. Marwell submits that a possible solution would be to allow the country to present evidence that the particular service has some moral significance in the form of historical practice, contemporary public polls, results of a political referendum, or statements from accredited religious leaders.

There is an additional hurdle when the trade restriction in question involves a ban on speech, as is the case with the ban on Jamaican dancehall artistes. This is a constitutional hurdle to be overcome which is based on the right to freedom of expression contained within the Constitutions of most CSME member states. Can an activity which is protected by the constitution be deemed a fundamental threat to society? In none of these constitutions is there an absolute right to freedom of expression; the exercise of such freedom is restricted by the need to respect the rights of others, is subject to public interest, or even restricted to the extent of the authority of the law.

Many of the countries are also parties to various international conventions in which the right to freedom of expression is enshrined. As United Nations members they are all parties to the Universal Declaration of Human Rights, in which Article 19 articulates the unqualified right to freedom of expression. All but two of the CSME member states are signatories to the International Covenant on Civil and Political Rights, Article 19 which provides: “[e]veryone shall have the right to freedom of expression, including the freedom to seek, receive, and impart information and ideas of all kinds orally, in writing, in print, in the form of art, or through any other media of his choice.” In this document, Article 19 also goes on to recognize the ability of a government to place restrictions on these rights, but only restrictions that are provided by law and are necessary to respect the rights or

98. Marwell, supra note 30, at 806.
99. Id.
100. Id. at 824–25. For example, Jamaica and many Caribbean islands would be able to present a strong body of such evidence with respect to the issue of homosexuality, a subject about which, rightly or wrongly, many nationals have very strongly-held positions and opinions.
103. See the various preambles of the Section/Chapter containing fundamental rights and freedoms within the above Constitutions. See sources cited supra note 101.
reputations of others, for the protection of national security, public order, public health, or public morals.107

Similarly, under WTO law, support for the ban as a means of ensuring public order will seem to require examination of underlying laws and regulations that the ban is intended to enforce.108 With respect to the public morals exception, U.S.-Gambling indicates that a challenge to the legitimacy of the moral interest being asserted could require an examination of the relevant laws and their legislative history.109 This approach would require the existence of underlying laws or regulations espousing the interests that the bans are intended to enforce. That such laws exist is questionable. As Dr. Delroy Beckford has noted, these bans constitute an attempt at censorship of dancehall music in the absence of a definitive threshold for this censorship and restraint.110 Hence, perhaps, the need to consider Marwell’s alternative approaches, outlined above.

Finally, the laws that do exist with respect to the right to freedom of speech do not necessarily require censorship as the appropriate response to the concerns being espoused. Rather, the common test is the harm principle established in 1859 by J.S. Mill, who suggested that the use of freedom of expression could reasonably be limited if it caused harm to others.111 The typical example of harmful use of this freedom is to shout “Fire!” in a crowded theatre.112 In such a situation, there is a likelihood that harm will result if everyone rushes to the exit doors. The concept of immediacy is also essential. Thus, speech deemed harmful loses its constitutional protection and can be restricted.

There are some facts which suggest that this test for harm could be met with respect to the ban on Jamaica’s dancehall artistes. On February 28, 2008, the Trinidad Express placed blame for the stabbing of a youngster on Mavado’s gangsta lyrics. Mavado concerts have repeatedly been associated with violence, either among the audience or involving the artiste himself.113 At the same time, attempts to restrict freedom of expression will require more than just such anecdotal evidence, but will be subjected to the rigorous tests developed by courts to protect the important right to speech, and tests of international tribunals aimed at ensuring that any restrictions are an appropriate, if not necessary response to a threat to public morals or public order.

C. Are there less trade-restrictive measures available?

Assuming that a country is able to persuade a tribunal of the validity of its public moral/public order claim, the ban will need to meet at least two additional

107. Antigua & Barbuda and St. Kitts & Nevis are the two non-signatories; St. Lucia signed in September, 2011 and at the time of writing had not yet ratified. Id. at art. 53.
108. See, e.g., Korea Beef AB Report, supra note 61, ¶¶ 164–66.
110. Beckford, supra note 27.
112. Id.
113. Dancehall Star Banned for his ‘Gangsta Lyrics,’ supra note 11.
tests. Both the WTO and ECJ require that the measure be the least trade-restrictive that is reasonably available to achieve the desired means. Outright prohibitions are often proof of the importance of the interest at issue. At the same time, WTO jurisprudence requires that: (1) such prohibitions contribute to addressing the underlying concerns; and (2) the Members have explored and exhausted reasonably-available WTO-consistent alternatives.

At least one alternative approach that stops short of an outright ban on the artiste’s right to perform readily suggests itself through the issuance of criteria or guidelines for performances. Regulations that, for example, prohibit the use of obscenity or references to violence in a public performance could more easily be upheld as a reasonable restriction on trade than can an outright ban on an artiste’s performance. The government of Grenada has allowed a concert by dancehall artist, Mavado, to proceed, but on condition that he not perform four of his songs. Furthermore, as we discuss below, the songs continue to remain accessible to listeners over the radio, the Internet, and other media, conceivably undermining the intended goals of the bans. These facts suggest that more reasonable and more effective alternatives exist which still permit the Member to meet the underlying interest of protecting public order and morals and that therefore an outright ban on performances would be deemed too trade-restrictive.

D. Is the ban being applied in a non-discriminatory manner?

Application of the WTO test under the chapeau requires that the bans being imposed by CSME members on Jamaican dancehall artistes not be applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination where like conditions prevail between Revised Treaty members. As noted above, the inconsistent application of a ban purporting to uphold public moral/public safety interests could be sufficient evidence that the ban is being applied in a manner that constitutes "arbitrary and unjustifiable discrimination between countries where like conditions prevail" and/or a "disguised restriction on trade."

Given the pervasive nature of violent and sexually-explicit forms of entertainment in today’s world, this is probably the most difficult challenge that the bans on Jamaican dancehall artistes face. Are local artistes who perform the work of the banned artistes—a foregone conclusion given their popularity—being asked to refrain from performing their work? Furthermore, despite the bans, the artistes’ music continues to be heard “on every cellular phone of almost every youngster, every street corner, [and every van].” The style of the artistes is on display among artistes in the host countries.

114. See, e.g., U.S. Gambling AB Report, supra note 31, ¶ 313 (stating that the existence of the outright prohibition on remote gambling in U.S. legislation was an indication that they contributed to addressing the U.S. concerns).
116. Dancehall Star Banned for His 'Gangsta Lyrics,' supra note 11.
118. Dancehall Star Banned for His 'Gangsta Lyrics,' supra note 11.
Finally, one cannot help but agree with the question posed by Mavado's manager upon hearing of one of the bans: "I wonder if they plan to ban 'R'-rated movies, rap, soca music ... from their island also?" Soca music was born in another CSME member state, Trinidad & Tobago, and is renowned within the region for the clever way in which the performers use sexual innuendo:

*Hol it down when u get di cat u must hol it down*
*Hol it down when u get di cat u must hol it down*
*Attack it from di front! Attack it from di back!*

So goes the refrain of one very popular soca song. Any doubts as to the activity being suggested disappears when one views an accompanying live performance.

If the countries are imposing restrictions only on Jamaican dancehall artistes, ignoring nationals of the states in which the bans are being imposed, or under WTO law any other nationals, this inconsistent application supports the finding of arbitrary discrimination. Using the alternative approach suggested by Marwell, perhaps the more appropriate conclusion would be that in these societies sexual innuendo and sexually-explicit performances are acceptable societal norms, while violent lyrics are not. A country would nevertheless have to be able to produce the public opinion polls and other evidence of societal norms to support its bias in favor of soca over dancehall music. Perhaps it is the absence of allegations of sexual aggression following or in conjunction with soca concerts that makes the difference. However, could such allegations be substantiated? Furthermore, it could prove difficult to establish why performances by Jamaican dancehall musicians are a threat while similar performances by local artistes are not. Are there statistics, or even anecdotal evidence, available on whether performances by non-Jamaican dancehall artistes have ever been accompanied by violence? Even if such evidence does exist, and music is found to hold the potential to generate such negative effects in the Caribbean, perhaps what is required are not bans by individual countries of selected artistes, but rather a concerted regional effort to curtail these negative and unwanted effects.

IV. IMPACT OF THE BANS ON REGIONAL UNITY & INTEGRATION

In addition to the legal issues raised, there is the larger question of the impact of the governments' actions on the goal of Caribbean economic integration. If the region intends to pay more than lip service to the concept of a single market, the countries must also accept the concept of a Caribbean culture and combine forces to curtail any negative influences that the culture contains. Surely the countries share similar concerns about the possible impact of violent and degrading lyrics on the moral fabric of their societies? Nevertheless, the challenge is to find a threshold.

119. *Id.*
120. *SQUARE ONE, Kitty Cat, on J'OUVERT VIBES* (Square One Music 1998).
that is acceptable by all member states whose cultures are different. The other challenge is the reality that as a single market, the CSME, will be a success only if its relevant laws remain consistent and coherent throughout their application and enforcement. Unilateral action on this issue is therefore an undermining factor towards the goal of regional integration. Without sufficient attention to crafting a regional solution the concept of a single market could face erosion before it realizes its potential.

Jamaican Opposition Spokesperson on Foreign Affairs and Trade, Mr. Anthony Hylton, has noted that the bans being imposed against Jamaican dancehall artistes are a restraint on the rights granted by the CSME and that the issue is justiciable before the CCJ. In April 2011 the Minister of Foreign Affairs and Trade, Dr. Kenneth Baugh, stated that the matter would be placed on the agenda for discussion with the CARICOM heads of state. These statements suggest preliminary consultations that could eventually lead to an action being brought before the CCJ.

A matter regarding the interpretation or application of the Treaty governing the CSME may be brought before the CCJ by: (1) a Contracting Party to the Treaty, i.e. a CSME member state; or (2) the national of a Contracting Party. A complainant who is a national must meet the following four criteria: (1) be seen by the Court as having been conferred the right claimed and the benefit thereof; (2) show that they were thwarted of the right that was intended to confer a benefit on them; (3) show that the Contracting Party of which the individual is a national has either not pursued the claim or has granted express permission for the individual to take the claim to the CCJ; and (4) satisfy the CCJ that there is a genuine claim to be pursued in the interest of justice. Our earlier discussion has established the rights granted under the Revised Treaty to the region's artistes and the effect of the bans imposed. While the negative economic consequences of the bans on Jamaican artistes have not been the focus of this discussion, the revenue losses resulting from these bans have been felt both by the individuals and by the nation.

Not only for their own sakes, but also in the interest of regional unity and the search for a regional solution, Jamaica and/or its artistes should approach the CCJ for an interpretation and correct application of the public moral/public order exceptions to the rights granted under the Revised Treaty. Notwithstanding that this will be a first attempt by the CCJ, the extra territorial jurisprudence in WTO case law and ECJ law with regards to free movement within a trade treaty suggests workable approaches for the Court to establish a threshold of the applicability of the exceptions and guidelines to avoid abuse of the exceptions by governments. In

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123. See Revised Treaty, supra note 12, arts. 187, 212, 222, which permits Member States only to request an advisory opinion concerning the interpretation and application of the Treaty.
124. Revised Treaty, supra note 12, art. 222.
125. See Culture Exports Trump Financial Services, supra note 24.
the absence of such guidelines within the CSME, Jamaican dancehall artistes are being arbitrarily denied their right to freedom of movement and to provide their services within the region.