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Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values

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Article

Permitting Pluralism: The *Seal Products* Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values

Robert Howse & Joanna Langille†

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I. INTRODUCTION

To what extent does the legal framework of the World Trade Organization (WTO) permit trade restrictions that, at least in part, express the moral beliefs of particular societies and have a root in noninstrumental morality?

This Article will consider this question using the current *Seal Products* dispute as an example. The *Seal Products* dispute between the European Union, Canada, and Norway will be the first occasion on which the WTO dispute settlement organs are required to consider noninstrumental rationales (expressions of intrinsic moral or spiritual beliefs) as a distinct basis for trade-restrictive measures.[1] While the WTO dispute settlement system is no stranger to cases regarding the treatment of animals,[2] the policies at issue in earlier cases related to objectives—such as conservation of exhaustible natural resources—that are anchored in environmental science and international policy, or that are related instrumentally to the protection of human life and health or economic interests.[3] The EU seal products ban is in part aimed instrumentally at improving animal health and welfare, but it is also based on a level of protection for the animals in question that is grounded in the community's ethical beliefs about the nature of cruelty and the unacceptability of consumption behavior that is complicit with that cruelty.

We will argue that the WTO legal framework allows countries to adopt trade restrictive measures based on anti-cruelty concerns, both to protect the animals and to express moral censure of those practices. Under WTO law, there is ample policy space for countries to express beliefs concerning the treatment of animals through nondiscriminatory trade measures. Further, and more generally, we deploy our analysis of animal welfare in the *Seal Products* dispute in order to espouse a conception of pluralism that recognizes the importance of expressive, noninstrumental rationales for state decisionmaking, even if those rationales differ or are understood and articulated differently in

1. Christoph T. Feddersen, *Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and "Conventional" Rules of Interpretation*, 7 MINN. J. GLOBAL TRADE 75 (1998); Laura Nielsen, *Emotional and Legal Stakes Are High in the Seals Dispute*, BRIDGES, Nov.-Dec. 2010, at 9, *available at* http://ictsd.org/downloads/bridges/bridges14-4.pdf ("[T]he emerging dispute on the European Union's import ban on seal products is likely to become a landmark case in WTO jurisdiction."); Edward M. Thomas, *Playing Chicken at the WTO: Defending an Animal Welfare-Based Trade Restriction Under GATT's Moral Exception*, 34 B.C. ENVTL. AFF. L. REV. 605, 607 (2007) (stating that an animal welfare case would be a "landmark" decision for the WTO). For prior academic treatment of this issue, see Catherine Jean Archibald, *Forbidden by the WTO? Discrimination Against a Product When Its Creation Causes Harm to the Environment or Animal Welfare*, 48 NAT. RESOURCES J. 15 (2008).

2. *See, e.g.*, Christine M. Cuccia, Note, *Protecting Animals in the Name of Biodiversity: Effects of the Uruguay Round of Measures Regulating Methods of Harvesting*, 13 B.U. INT'L L.J. 481 (1995); *see also* Nielsen, *supra* note 1, at 9 (contrasting the *Seal Products* cases with prior WTO jurisprudence on environmental issues).

3. One partial exception is the *Tuna/Dolphin* dispute, which will be discussed below. *See, e.g.*, Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *US—Shrimp/Turtle*]; Panel Report, *United States—Restrictions on Imports of Tuna*, DS21/R, 395/155 (Sept. 3, 1991).

different societies and cultures. If noninstrumental considerations were impermissible grounds for trade restrictive action, countries would not be able to restrict trade for many sincerely held philosophical or religious reasons.[4] For example, Israel would not be able to prohibit the importation of nonkosher foods,[5] and a state with a large Hindu majority would not be able to prohibit imports of bovine meat.[6] Adopting this position would constitute considerable overreach on the part of the WTO.[7]

On September 16, 2009, the European Union adopted a law banning the import and export of most products made from seals.[8] The measure was explicitly adopted to protect animal welfare.[9] The EU Parliament and Council

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4. For a list of countries that have notified the WTO that they are restricting trade for moral reasons, see Mark Wu, *Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine*, 33 YALE J. INT'L L. 215 app. at 250-51 (2008). The authors of this Article also received information that the government of India considers its restrictions on bovine animals and animal products to be taken on the basis of public morals. E-mail from Suja Rishikesh, Counsellor, Market Access Division, WTO, to Robert Howse (Feb. 22, 2011, 03:43 EST) (on file with authors).

5. Israel currently justifies its ban on nonkosher meat on the basis of religious reasons. All meat imports are assessed by the Council of the Chief Rabbinate in Israel to determine whether they are kosher or not. *Import Policy*, FOREIGN TRADE ADMIN. (2012), http://www.tamas.gov.il/NR/exeres/5EA6B0B6-D877-48D7-A21F-BE9337BFA06A.htm.

6. India currently justifies its restrictions based on religious beliefs. For an extensive discussion of the rationale behind India's various restrictions on cattle importation and production, see Daphne Barak-Erez, *Symbolic Constitutionalism: On Sacred Cows and Abominable Pigs*, 6 LANGUAGE, CULTURE, & HUMAN. 420 (2010).

7. One possible objection to our claim is that there should be a distinction between religiously grounded trade restrictions and philosophically or culturally grounded ones. In a given society, moral beliefs concerning the treatment of animals may be more or less grounded on religious faith or tradition, cultural practices, philosophical ethics, or alternative forms of spirituality. Indeed, a given individual's beliefs about animal welfare may be influenced by more than one of these sources. An example is the Jewish vegetarian movement. From the pluralism perspective of this Article, it would indeed stretch the institutional competence and legitimacy of the WTO dispute settlement organs to evaluate the extent to which public morals in a given society or among a predominant group in that society derive from one or more of these various spiritual sources, either today or historically. The World Organisation for Animal Health (OIE) considers that animal welfare standards should address *both* religious *and* cultural aspects of animal welfare, without giving priority or distinct status to one or the other. *2nd OIE Global Conference on Animal Welfare, Cairo (Egypt), Oct. 20-22, 2008, Recommendations*, WORLD ORG. FOR ANIMAL HEALTH, *available at* http://www.oie.int/fileadmin/Home/eng/Conferences_Events/sites/A_AW2008/ANG_Final%20Recommendations.pdf (last visited May 29, 2012). A 1998 agreement between the WTO and the OIE requires both "to act in collaboration and to consult each other on questions of mutual interest . . . ." *Agreement between the World Trade Organization and the Office International des Epizooties*, ¶ 1, WT/L/272 (July 8, 1998). The agreement envisions cooperation primarily concerning sanitary measures, but is not limited to that. *Id.*

8. Regulation (EC) 1007/2009 of the European Parliament and of the Council of 16 September 2009 on Trade in Seal Products, 2009 O.J. (L 286) 36 [hereinafter EU Seal Products Ban].

9. *Id.* Within the legal framework of the European Union, the justification for action at the EU level is that bans at the member state level could not have guaranteed effectiveness consistent with the proper functioning of the internal market. Thus national bans on seal products, to be made effective, would require measures to ensure that seal is not contained in products (such as fur apparel items) flowing into those EU member states with bans from other member states where seal products are permitted. Otherwise, bans by individual member states could easily be circumvented through importation of seal products into member states without bans, where the seal products would be processed into finished products and then exported to member states with bans on seal products. The kinds of enforcement measures necessary to prevent such circumvention would clearly pose an obstacle to commerce within the EU and interfere with the functioning of the internal market. Article 95 of the EU treaty provides for such harmonization upward, to reconcile the legitimate policy objectives of member states with the proper functioning of the internal market. Article 95 explicitly provides that harmonization upward (i.e., to strictest member state standards) should be the norm in the case of

concluded, based on an extensive investigation by the European Food Safety Authority,[10] that the methods typically used to kill and skin seals cause significant and unnecessary pain and suffering.[11] The European Union determined that a ban on commercial seal products was appropriate because seals are sentient beings with the ability to feel pain and distress—which justifies preventing unnecessary suffering[12]—and because of public outcry within Europe denouncing the treatment of seals as cruel and inhumane.[13]

Canada and Norway have two of the largest sealing industries worldwide.[14] In 2008, the year before the European ban, Canada exported approximately CAD $2.5 million in seal products to the EU.[15] Sealing also has significant cultural importance for communities within Canada and Norway, which may also have motivated their desire to challenge the European ban.

The WTO is a multilateral organization governing trade among nations, based upon obligations its member states undertake through a series of multilateral and plurilateral treaty instruments.[16] The purpose of the WTO is "the substantial reduction of tariffs and other barriers to trade and . . . the elimination[] of discriminatory treatment in international trade relations."[17] More controversially, the WTO has become a vehicle for limiting regulatory diversity in some areas of policy that are thought to affect the real value of the market access created by the removal of direct barriers to trade.[18] The WTO has a complex legal regime regulating international trade, and countries that are members of the WTO must abide by these rules. If they do not, they can be brought before the WTO's dispute settlement process by other member states

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"health, safety, environmental protection and consumer protection." *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 114, Mar. 30, 2010, 2010 O.J. (C 83) 52.

10. *See Scientific Opinion of the Panel on Animal Health and Welfare on a Request from the Commission on the Animal Welfare Aspects of the Killing and Skinning of Seals*, EUR. FOOD SAFETY AUTHORITY J., Dec. 6, 2007 [hereinafter *EFSA Report*].

11. EU Seal Products Ban, *supra* note 8.

12. *Id.* pmbl. For further discussion of seals as sentient beings and the morality of killing such creatures, see ANDREW LINZEY, WHY ANIMAL SUFFERING MATTERS (2009); and David M. Lavigne & William S. Lynn, *Canada's Commercial Seal Hunt: It's More than a Question of Humane Killing*, 1 J. ANIMAL ETHICS 1 (2011).

13. EU Seal Products Ban, *supra* note 8, at 36.

14. *EFSA Report*, *supra* note 10, at 24-122, 26-122.

15. *Canada Threatens WTO Complaint over European Seal Product Ban*, CBC NEWS (May 5, 2009), http://www.cbc.ca/news/canada/newfoundland-labrador/story/2009/05/05/eu-seal-ban-505.html. Indeed, the Canadian government has claimed that the European measure is likely to cost Canada CAD $5.4 million per year. Lee Berthiaume, *Norway To Join Canada in Challenging Seal Ban*, EMBASSY MAG. (Mar. 16, 2011), *available at* http://www.embassymag.ca/dailyupdate/view/33.

16. *What is the WTO?*, WORLD TRADE ORG. (2012), http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm. A multilateral agreement is one accepted by all WTO member states, whereas a plurilateral agreement is one adopted by some but not all WTO members. *See Plurilaterals: Of Minority Interest*, WORLD TRADE ORG. (2012), http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm.

17. Marrakesh Agreement Establishing the World Trade Organization pmbl., Apr. 15, 1994, 1867 U.N.T.S. 154, *available at* http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_01_e.htm#p.

18. For a survey of the various arguments claiming that the WTO limits the ability of states to regulate, see, for example, Susan Esserman & Robert Howse, *The WTO on Trial*, 82 FOREIGN AFF. 130 (2003).

for violating WTO law.[19]

Canada and Norway have initiated proceedings against the European Union in the WTO dispute settlement process.[20] They argue that the EU measure violates the basic nondiscrimination obligations of WTO law, as well as the provisions of some of the specialized WTO agreements.[21] Further, Canada and Norway contend that the trade restrictions imposed by the European Union cannot be justified, under WTO law, by concerns about animal welfare.[22] The European Union has contested Canada and Norway's claims. It argues that the ban does not violate WTO law because it is nondiscriminatory and is based on legitimate animal welfare concerns rather than the protection of domestic markets.[23]

The EU seal products ban is in part aimed instrumentally at improving animal welfare outcomes, but it is based on a level of protection for the animals that is also grounded in the ethical beliefs of the community in question with regards to the nature of cruelty. The ban functions as an expression of moral outrage at the treatment of the animals, enshrining the moral beliefs of Europeans in legislation and prohibiting their complicity with cruelty through the consumption of seal products within the European Union. The choice of the ban as a policy instrument must be considered, we argue, in light of the fact that both goals are sincere and important. While the physical and psychological suffering of animals can be observed and understood scientifically, the animal welfare movement is equally a response of moral revulsion to certain practices in the treatment of animals, which are believed to be "cruel,"[24] with many cultural and religious dimensions affecting the perception of cruelty. Although scientists can give a sense of the duration and intensity of animal suffering that likely result from a given killing method, it is ultimately the predominant moral beliefs of a particular society that will determine how much and what kinds of suffering are acceptable or unacceptable to that society, and therefore the level of protection it demands against animal suffering.

The perceived quantum of physical and psychological suffering of animals is a crucial ingredient in the determination of cruelty, but it is not the only one. The moral attitude with which the suffering is inflicted is enormously important. The worst attitude is one of actual pleasure at the infliction of pain on another sentient being, while an intention to inflict even intense suffering—where unavoidable for purposes of human survival or meeting fundamental human needs—may not be considered cruel. The European Union largely bans

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19. For a discussion of the WTO's dispute settlement process, see *Understanding the WTO*, WORLD TRADE ORG. (2012), http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm.

20. Request for the Establishment of a Panel by Norway, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/5 (Mar. 15, 2011) [hereinafter Norway's Panel Request]; Request for the Establishment of a Panel by Canada, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/4 (Feb. 14, 2011) [hereinafter Canada's Panel Request].

21. Canada's Panel Request, *supra* note 20; Norway's Panel Request, *supra* note 20.

22. Dispute Settlement Body, *Minutes of Meeting*, ¶ 68, WT/DSB/M/293 (Feb. 24, 2011).

23. *Id.* ¶ 69.

24. *See infra* Part II.

the use of animals in cosmetics testing but does not do so in the case of medical or pharmaceutical research; there may be a social consensus that a certain level of suffering is unacceptably cruel where it is inflicted for the sake of producing vanity goods like cosmetics, but not in order to develop lifesaving medications. Spiritual beliefs about certain animals, the meaning invested in their particular qualities, and the nature of their relation to humankind may also influence ethical beliefs about what is cruel.[25]

In sum, since the regulation of cruelty against animals is concerned both with the effective protection of animals against physical and psychological suffering, and also with the censure of a certain moral attitude, the instrumental rationality typically deployed in WTO dispute settlement[26] to assess whether trade restrictions motivated by values external to the trading system are justified or permissible will be incapable of doing full justice to animal welfare. In the case of animal welfare, it is necessary to address the legitimacy of both instrumental and noninstrumental and expressive functions of law[27] in relation to the trading system. This is largely a new challenge for the WTO, although one that was already implicit in two disputes concerning the public morals exception in WTO treaties.[28] Nevertheless, as we shall show, in those disputes the WTO sidestepped the real difficulty by regarding the moral considerations at issue through an instrumental lens. Such reductionism is not possible in the *Seal Products* dispute without fundamentally distorting the articulated basis for the policies under scrutiny.

To sustain our claim that the WTO should permit trade-restrictive measures rooted at least in part in noninstrumental rationality, this Article will proceed in four Parts. In Part II, we consider the history of measures designed to protect animal welfare in the European Union in order to show that these moral concerns are deep-rooted and a common basis for legislation. We demonstrate that animal welfare concerns have long been a genuine motivation

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25. In many societies, practices involving the killing of, or infliction of suffering on, animals that have a close relationship to human society, such as dogs and cats, are particularly unacceptable. Thus, the European Union has banned the importation, exportation, and marketing of cat and dog fur and products. What one might call moral aesthetics—revulsion at the spectacle of killing certain animals in certain ways—may contribute to our perception of what is "cruel." While the prevention of actual physical or psychological suffering of animals is clearly a vital goal of animal welfare, the concern with human moral attitudes has been central throughout the history of the regulation of cruelty to animals. *See infra* Part II. The British essayist Thomas Macaulay famously observed that the Puritans hated bear-baiting not because of the pain it gave to the bear, but because of the pleasure it gave to the spectators. 1 THOMAS BABINGTON MACAULAY, THE HISTORY OF ENGLAND: FROM THE ACCESSION OF JAMES THE SECOND 142 (Charles Harding Fifth ed., Macmillan & Co. 1913) (1848). Today animal welfare would encompass both the harm to the animal and the moral harm to the spectators.

26. For a description of the typical WTO approach to justification of trade restrictive measures, see *infra* Section IV.B.

27. For a discussion of the expressive function of law, see, for example, Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (2000); Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609 (1998); and Dan M. Kahan, *What's* Really *Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075 (2006).

28. Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (Dec. 21, 2009) [hereinafter *China—Publications and Audiovisual*]; Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter *US—Gambling*].

for legislation in a wide range of contexts and of European countries over an extended period of time; concern for animal welfare (and, by implication, other noninstrumental moral beliefs) is not disguised protectionism or an immediate response to some domestic producer lobby, but a genuine, longstanding rationale for legislation. In particular, the European Union has often acted to protect the welfare of seals.

Demonstrating the sincerity of the European Union's belief in the need to protect animal welfare is important because it counters aspersions that the measure is a pretext for protectionism or an arbitrary response to a passing outburst of public sentiment. In Part III, we provide an overview of the current *Seal Products* dispute at the WTO. We summarize the dispute, discuss the nature and history of the EU measures that provoked the Canadian and Norwegian complaints, and outline the broader factual record underlying the dispute (including the history of sealing and the animal welfare concerns that have dogged the industry). In doing so, we show the basis for the EU decision to ban seal products. We demonstrate that the decision was rooted in widely-held moral beliefs regarding the treatment of animals and justified by evidence that seals are not hunted in a fashion considered by Europeans to be humane.

Having set out the rationale for the European action, we move on to defend it (and, by implication, other morally motivated trade-restrictive measures) in Part IV. We discuss the legal claims at issue in the *Seal Products* dispute, respond to each of the claims made by Canada and Norway, and argue that it is extremely difficult to make out a violation of WTO law. Further, we argue that even if a violation of WTO law can be established, the EU action is justified under the General Exceptions clause, which permits countries to justify measures that would be otherwise in violation of WTO law but which are taken for acceptable policy reasons. The European Union's action does not violate WTO law, in light of its strong, ongoing commitment to animal welfare and the even-handedness of the ban, which does not favor EU commercial interests. We contend that sincere animal welfare concerns specifically (and noninstrumental moral reasons more generally) are a legitimate rationale for trade restrictive measures.

In Part V, we draw on the analysis in Parts III and IV to make some more general conclusions about the types of justifications that are permissible in the WTO, and about the WTO's institutional role more broadly. We argue that the WTO should permit a pluralism of values when analyzing which justifications for trade restrictive measures are permissible.

II. A HISTORY OF ANIMAL WELFARE LAWS

As background to the details of the legal issues at stake in the *Seal Products* dispute discussed in Parts III and IV, this Part discusses animal welfare concerns more generally to show that they are a well-established and universally accepted ground for legislation in Europe, and that they have long been a preoccupation of philosophical and religious thinking. We will then show that animal welfare (and by implication other noninstrumental moral beliefs) is not merely a protectionist or pretextual justification, but a serious

and sincere rationale for legislation. First, we discuss the broader European history of animal welfare protection and specific measures taken by European countries to prevent cruelty to seals. Second, we sketch out the beliefs and values underlying the animal welfare movement. The animal welfare movement reflects a longstanding moral position that has resulted in significant legislation designed to protect the wellbeing of animals. Third, we discuss the history of the animal welfare movement, demonstrating that animal welfare concerns have a lengthy lineage that has resulted in significant legislation. This history explains how the current seal products ban is the result of Europe's deeply rooted and evolving commitment to preventing cruelty to animals and protecting public morals by prohibiting complicity in that cruelty. It is the latest iteration of a decades-long quest effectively to prevent cruelty to seals and express its moral unacceptability.

A. *Europe's Previous Efforts To Protect Animal Welfare*

The EU ban on seal products is part of a much broader European effort to protect animal welfare. The European Union has "an extensive body of animal welfare legislation," and many individual member states have passed even more stringent rules.[29] Most of these measures impose regulatory burdens on Europe's own agriculture and fisheries activities and related economic interests: it is far from the case that animal welfare has emerged in the EU as a pretext for protectionism. The European Union has sought to protect "five freedoms" for animals: freedom from discomfort; freedom from hunger and thirst; freedom from fear and distress; freedom from pain, injury and disease; and freedom to express natural behavior.[30] Since 1974, the European Union has developed legislation to protect those freedoms for farm and wild animals alike.[31] The principle of animal welfare is thus a deep-rooted and basic precept of European legislation. Indeed, the Treaty of Lisbon, which established the European Union in its current form, enshrines the principle of animal welfare as one of the goals of the Union:

> In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the member States relating in particular to religious rites, cultural traditions and regional heritage.[32]

The European Union has also developed general legislation on the

29. Harald Grethe, *High Animal Welfare Standards in the EU and International Trade–How To Prevent Potential "Low Animal Welfare Havens"?*, 32 FOOD POL'Y 315, 317 (2006).

30. *Animal Welfare—EU Action Plan, Evaluation and the Second Strategy on Animal Welfare* (Aug. 15, 2011) [hereinafter *Animal Welfare*], *available at* http://ec.europa.eu/food/animal/welfare/actionplan/actionplan_en.htm.

31. European Commission, Directorates-General for Health and Consumers, *EU Action Plan, Evaluation and the Second Strategy on Animal Welfare* (Mar. 7, 2012), http://ec.europa.eu/food/animal/welfare/actionplan_en.htm.

32. Consolidated Version of the Treaty on the Functioning of the European Union art. 13, Mar. 30, 2010, 2010 O.J. (C 83) 54, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri= OJ:C:2010:083:0047:0200:en:PDF.

welfare of farm animals.[33] Passed in 1998, EC Directive 98/58/EC provides significant legislative protection, requiring farmers to minimize the pain and suffering that farm animals experience.[34] Animals must be kept and bred in verifiably humane conditions.[35] Member states have reporting and enforcement obligations to ensure that these requirements are met.[36] Other European legislation regulates the transport of farm animals,[37] protects animals at the time of slaughter and killing,[38] and regulates how animals used for scientific experimentation should be treated.[39]

The European Union has also passed legislation regarding the treatment of specific farm and domesticated animals. For example, extensive legislation has been passed concerning the treatment of pigs,[40] which mandates the precise conditions in which they can be kept, including the size of pens.[41] Conditions for chickens kept for meat are strictly regulated.[42] EU regulations dictate the conditions in which layer hens can live, including the precise cage space per layer hen.[43] Calves are given significant protection; the European Union

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33. Commission Decision of 14 November 2006, 2006/778/EC, Amending Decision 2000/50/EC, 2006 O.J. (L 314) 39, Concerning Minimum Requirements for the Collection of Information During the Inspections of Production Sites on Which Certain Animals Are Kept for Farming Purposes; *see also* Council Directive 98/58/EC, of 20 July 1998 Concerning the Protection of Animals Kept for Farming Purposes, 1998 O.J. (L 221) 23-27; European Convention for the Protection of Animals Kept for Farming Purposes, 1978 O.J. (L 323) 14-21; Council Decision 78/923/EEC, of 19 June 1978, Concerning the Conclusion of the European Convention for the Protection of Animals Kept for Farming Purposes, 1978 O.J. (L 323) 12, 13.

34. Council Directive 98/58/EC, of 20 July 1998, art. 3, 1998 O.J. (L 221) 24.

35. *Id.* art. 4.

36. *Id.* arts. 6-10.

37. There are four important pieces of legislation regulating the transport of farm animals: Council Regulation 1/2005, of 22 December 2004, on the Protection of Animals During Transport and Related Operations and Amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No. 1255/97, 2005 O.J. (L 3) 1; Council Decision 2004/544/EC, of 21 June 2004 on the Signing of the European Convention for the Protection of Animals During International Transport (European Convention for the Protection of Animals during International Transport); Commission Regulation (EC) 639/2003, of 9 April 2003, Laying down Detailed Rules Pursuant to Council Regulation (EC) 1254/1999 as Regards Requirements for the Granting of Export Refunds Related to the Welfare of Live Bovine Animals During Transport, 2003 O.J. (L 93) 10; and Council Regulation 1255/97 of 25 June 1997 Concerning Community Criteria for Staging Points and Amending the Route Plan Referred to in the Annex to Directive 91/628/EEC, 1997 O.J. (L 174) 1.

38. There are four important pieces of legislation regulating slaughter and killing: Council Regulation 1099/2009, of 24 September 2009 on the Protection of Animals at the Time of Killing, 2009 O.J. (L 303) 1; Council Directive 93/119, of 22 December 1993 on the Protection of Animals at the Time of Slaughter or Killing, 1993 O.J. (L 340) 21; European Convention for the Protection of Animals for Slaughter, 1988 O.J. (L 137) 27; and Council Decision 88/306/EEC, of 16 May 1988 on the Conclusion of the European Convention for the Protection of Animals for Slaughter, 1988 O.J. (L 137) 25.

39. Directive 2010/63, of the European Parliament and of the Council of 22 September 2010 on the Protection of Animals Used for Scientific Purposes, 2010 O.J. (L 276) 33-79 (revising Directive 86/609/EEC).

40. *Animal Welfare on the Farm—Pigs*, EUROPA (Apr. 20, 2011), http://ec.europa.eu/food/animal/welfare/farm/pigs_en.htm.

41. Council Directive 2001/88, of 23 October 2001 Amending Directive 91/630/EEC Laying Down Minimum Standards for the Protection of Pigs, 2001 O.J. (L 316) 1.

42. Council Directive 2007/43, of 28 June 2007 Laying Down Minimum Rules for the Protection of Chickens Kept for Meat Production, 2007 O.J. (L 182) 19.

43. Council Directive 1999/74, of 19 July 1999 Laying Down Minimum Standards for the Protection of Laying Hens, 1999 O.J. (L 203) 53.

regulates the amount of light that calves are to receive while being raised.[44] Cat and dog fur is completely banned from sale in the European Union.[45]

EU legislation also protects nondomesticated animals. For example, 1991 legislation prohibited the use of leghold traps to capture wild animals as a prima facie cruel method of entrapment.[46] The extent to which wild animals can be held in zoos and the conditions of their confinement are strictly regulated.[47] The European Cosmetics Directive[48] imposes a Europe-wide ban on testing finished cosmetic products and ingredients on animals and on marketing finished cosmetic products that have been tested on animals or that contain ingredients that have been tested on animals.[49]

The European Union has consistently sought to improve its record on animal welfare. It recently launched a feasibility study to create a European Centre for the Protection and Welfare of Animals.[50] In January 2012, it adopted its second four-year Animal Welfare Strategy, following its successful Community Action Plan on the Protection and Welfare of Animals 2006-10.[51]

In sum, the European Union is deeply committed to animal welfare. The seal products ban is only one example of a plethora of initiatives designed to preserve the "five freedoms" that Europeans feel are essential to animal welfare.

The European Union has also previously acted to protect seals specifically. Indeed, the most recent seal products ban is an extension of a series of measures taken within Europe to protect seals from cruelty and loss of population.[52]

The first European legislation on trade in seal products was the 1983 Seal Pups Directive.[53] This legislation prohibited products derived from certain seal pups (harp seals and hooded seals) from being imported to the European Union, although there was an exception for products from traditional Inuit hunts.[54] The

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44. Council Directive 1991/629, of 19 November 1991 Laying Down Minimum Standards for the Protection of Calves, 1991 O.J. (L 340) 28.

45. Regulation 1523/2007, of the European Parliament and of the Council of 11 December 2007 Banning the Placing on the Market and the Import to, or Export from, the Community of Cat and Dog Fur, and Products Containing Such Fur, 2007 O.J. (L 343) 1.

46. Council Regulation 3254/91, of 4 November 1991 Prohibiting the Use of Leghold Traps and the Introduction into the Community of Pelts and Manufactured Goods of Certain Wild Animal Species Originating in Countries Which Catch them by Means of Leghold Traps or Trapping Methods Which Do Not Meet International Humane Trapping Standards, 1991 O.J. (L 308) 1.

47. Council Directive 1999/22, of 29 March 1999 Relating to the Keeping of Wild Animals in Zoos, 1999 O.J. (L 94) 24-26.

48. Council Directive 76/768/EEC of 27 July 1976 on the Approximation of the Laws of the Member States Relating to Cosmetic Products, 1976 O.J. (L 262) 169.

49. For more information about the ban, see *Cosmetic Products*, EUROPA (Oct. 28, 2010), http://europa.eu/legislation_summaries/consumers/ product_labelling_and_packaging/l21191_en.htm.

50. *Proposal for a Regulation of the European Parliament and of the Council Concerning Trade in Seal Products*, 8 COM (2008) 469 final (July 23, 2008) [hereinafter *Proposal for a Regulation Concerning Trade in Seal Products*], *available at* http://www.europarl.europa.eu/sides/ getDoc.do?type=REPORT&reference=A6-2009-0118&language=EN#title1.

51. *See Animal Welfare*, *supra* note 30.

52. For a thorough discussion of Europe's animal welfare measures, see Thomas, *supra* note 1.

53. Council Directive 83/129/EEC, 1983 O.J. (L 91) 30.

54. *Id.*

ban was extended several times during the 1980s due to increased public pressure, and was eventually made permanent in 1989.[55]

A number of conservation-oriented measures taken by the European Union also sought to protect seal populations. In 1992, a Council Directive on the conservation of natural habitats and wild fauna and flora provided protections for all seal species in the European Community.[56] The Directive prohibited killing certain kinds of seals and prescribed the appropriate means for hunting nonendangered seal species, so as to minimize the suffering of the animals.[57] The Council passed a similar regulation in 1996, implementing the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and providing protections for certain seal species.[58]

The most recent seals regulation is the result of consultation and deliberation that began in 2006. The European Parliament adopted a declaration requesting that the European Commission draft legislation to ban the import, export, and sale of all harp and seal products;[59] the same year, the Parliamentary Assembly of the Council of Europe recommended to the Committee of Ministers that Europe ban seal products taken in a cruel manner.[60] This prompted the Commission to conduct an extensive analysis of the "animal welfare aspects of seal hunting . . . [that] involved an examination of regulatory frameworks and management practices for seal hunting and the identification of best practices on the basis of scientific findings by the European Food Safety Authority (EFSA)."[61] The EFSA examined the seal hunting practices of Canada, Finland, Greenland, Iceland, Namibia, Norway, Russia, Sweden, the United Kingdom, and the United States.[62] Thus it was only following an extensive scientific and regulatory analysis conducted over several years that the European Union banned all seal products.

Before the Europe-wide ban was implemented, preempting national legislative efforts, various European countries also contemplated or passed seal product bans. Belgium and the Netherlands passed complete bans.[63] Austria

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55. Council Directive 89/370/EEC, 1989 O.J. (L 163) 37; *see also Background Information on Seal Pups Directive*, EUR. COMM'N, http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/index_en.htm (last updated Feb. 22, 2012).

56. Council Directive 92/43/EEC, 1992 O.J. (L 206) 7.

57. *Id.* Annex VI (a); *see also The Habitats Directive*, EUROPEAN COMM'N (Feb. 22, 2012), http://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm.

58. Council Regulation 338/97, 1997 O.J. (L 61) 1.

59. *Written Declaration on Banning Seal Products in the European Union*, European Parliament (Sept. 26, 2006), *available at* http://europarl.europa.eu/sides/getDoc.doc?reference=p6_TA(2006)0369&language=EN.

60. The recommendation asked the Committee of Ministers "to ban all cruel hunting methods which do not guarantee the instantaneous death, without suffering, of the animals, [and to] prohibit[] the stunning of animals with instruments such as hakapiks, bludgeons, and guns." Eur. Parl. Ass., *Recommendation 1776 (2006), Seal Hunting* ¶ 13.1.2 (Nov. 17, 2006), *available at* http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/ EREC1776.htm.

61. CITIZENS' SUMMARY, TRADE IN SEAL PRODUCTS 1 (2008), *available at* http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/citizen_summary.pdf. [

62. *EFSA Report*, *supra* note 10, at 5-8.

63. For a description of the bans, see Assoc. Press, *Canada Goes to WTO over Belgian, Dutch Seal-Product Ban*, CBC NEWS (Sept. 26, 2007), http://www.cbc.ca/news/canada/north/story/2007/09/26/sealwto.html; *Canada Requests WTO Consultations on EU Seal Products Ban*, FOREIGN

banned the sale of seal products,[64] as did Germany.[65] In sum, European countries, both at the EU and member state level, have a long history of acting to protect seals from cruelty and population depletion. The current ban should be understood as a continuation of that process.

B. *Values Underlying the Animal Welfare Movement*

The animal welfare philosophy motivating European legislation is grounded in sincerely held religious and philosophical values. Each of the Abrahamic religions expresses concern with cruelty to animals and has prescribed certain methods of treatment and slaughter.[66] Eastern religions, most notably Jainism and Tibetan Buddhism, have also placed significant restrictions on the slaughter and use of animals.[67] Philosophers beginning with the ancient Greeks have debated the moral status of animals.[68] Though Descartes argued that animals are not objects of moral concern because they lack consciousness,[69] Enlightenment philosophers criticized his position.[70] Utilitarians and social reformers such as Jeremy Bentham and John Stuart Mill fought to reduce suffering for animals and humans alike, and drew awareness to the cruel consequences of animal husbandry and other common practices.[71] What has been termed the "new welfarism"[72] developed among philosophers in the 1970s and 1980s, most notably Peter Singer.[73] Its argument is often rooted in utilitarianism, whereby the rightness or wrongness of an action is justified by the pain or pleasure it produces.[74]

Philosophers and religious groups have argued that the need to minimize animal suffering is an important ethical principle. The concern of the animal welfare movement has an intrinsic moral dimension to it; the movement is most

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AFFAIRS & INT'L TRADE CANADA (Nov. 2, 2009), http://www.international.gc.ca/media_commerce/comm/news-communiques/2009/327.aspx?view=d.

64. *Austria Votes To Ban Seal Products*, INT'L FUND FOR ANIMAL WELFARE (Apr. 25, 2007), http://www.infaw.org/uk/node/1502.

65. Press Release, Int'l Fund for Animal Welfare, German Parliament Votes Unanimously To Ban Seal Product Imports (Oct. 20, 2006), *available at* http://www.marketwire.com/press-release/german-parliament-votes-unanimously-to-ban-seal-product-imports-617604.htm.

66. Paul Waldau, *Religion and Animals*, *in* IN DEFENSE OF ANIMALS: THE SECOND WAVE 69, 72-77 (Peter Singer ed., 2006).

67. *Id.* at 72.

68. RICHARD RYDER, ANIMAL REVOLUTION: CHANGING ATTITUDES TOWARDS SPECIESISM 17 (1989).

69. Tom Regan, *Introduction*, *in* ANIMAL RIGHTS AND HUMAN OBLIGATIONS 4-5 (Tom Regan & Peter Singer eds., 1976).

70. *See id.* at 5 (noting that Voltaire and Hume, among others, "submit that there is as much reason to believe that animals other than man think as there is for believing that man is able to do so").

71. *See* ANDREW LINZEY, ANIMAL RIGHTS: A HISTORICAL ANTHOLOGY (1990) (providing excerpts from Mill and Bentham's writings on animal welfare).

72. GARY L. FRANCIONE, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT 1 (1996) [hereinafter FRANCIONE, RAIN WITHOUT THUNDER]; Gary L. Francione, *Animal Rights and Animal Welfare*, 48 RUTGERS L. REV. 397, 399 (1996) [hereinafter Francione, *Animal Rights and Animal Welfare*].

73. *See* PETER SINGER, ANIMAL LIBERATION (1975) (providing perhaps the most famous exposition of the new welfarist position).

74. Elaine L. Hughes & Christiane Meyers, *Animal Welfare Law in Canada and Europe*, 6 ANIMAL L. 23, 32 (2000).

concerned with cruelty to animals, and how cruelty is understood will depend upon the complex of ethical, spiritual, and religious beliefs behind a particular individual's or society's understanding of animal welfare. Some animal welfare advocates are driven to minimize all suffering of animals to the extent possible, whether imposed by the harsh realities of nature or human will; but most place some emphasis on cruelty, the abolition of treatment of animals based upon specific human moral attitudes, ranging from pure perversity—pleasure from seeing an animal suffer—to commodification, the treatment of animals as if they are morally meaningless beings whose place in the world can be reduced to that of a commodity for limitless human exploitation.[75] Others focus on the degrading moral effect on the humans directly or indirectly implicated in such cruelty.[76]

C. *The Animal Welfare Movement and Resulting Legislation*

The animal welfare movement is characterized by a concern for animal suffering and the moral attitudes of humans in their relation to animals.[77] Animal welfarists seek to protect animals from unnecessary cruelty, pain, and suffering.[78] Unlike the more modern and radical animal rights movement, which argues that any killing and use of animals by humans is unacceptable,[79] much of the animal welfare movement permits the (limited) subjugation of animals to human needs.[80] For an animal welfarist, it may be acceptable to kill animals, provided that there is some basic human need or purpose served by killing the animal and that the animal does not suffer unnecessarily.[81] Animals must be raised and kept in humane conditions, designed to minimize suffering.[82] As Gary Francione describes, animal welfarists seek the regulation of animal exploitation, while animal rights activists seek its abolition.[83]

The United Kingdom has led the animal welfare movement. What would

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75. For a description of the various aspects of the movement, see Cass R. Sunstein, *Introduction*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 4-5 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

76. *Id.*

77. *See, e.g.*, 1 ENCYCLOPEDIA OF ANIMAL RIGHTS AND ANIMAL WELFARE 36-37, 47-57 (2d ed. 2010); FRANCIONE, RAIN WITHOUT THUNDER, *supra* note 72, at 1; HAROLD D. GUITHER, ANIMAL RIGHTS: HISTORY AND SCOPE OF A RADICAL SOCIAL MOVEMENT 9 (1998); Francione, *Animal Rights and Animal Welfare*, *supra* note 72, at 397; Robert Garner, *Animal Welfare: A Political Defense*, 1 J. ANIMAL L. & ETHICS 161, 162 (2006). There is, of course, significant variation among members of the animal welfare movement. *See, e.g.*, GUITHER, *supra*, at 11 (describing various strains of animal welfarism).

78. FRANCIONE, RAIN WITHOUT THUNDER, *supra* note 72, at 1; GUITHER, *supra* note 77, at 9.

79. This categorization of animal welfare versus animal rights is controversial, and has been most notably advocated by Francione. *See* FRANCIONE, RAIN WITHOUT THUNDER, *supra* note 72, at 1 (distinguishing between animal rights and animal welfare). Many modern activists who consider themselves to be concerned with animal *rights* are not abolitionists. Nevertheless, we adopt Francione's approach for ease and conceptual clarity.

80. FRANCIONE, RAIN WITHOUT THUNDER, *supra* note 72, at 1; GUITHER, *supra* note 77, at 9. Note, though, that the distinction between the welfare and rights movements is porous. *See* FRANCIONE, RAIN WITHOUT THUNDER, *supra* note 72, at 2.

81. Garner, *supra* note 77, at 162.

82. Francione, *Animal Rights and Animal Welfare*, *supra* note 72, at 16.

83. FRANCIONE, RAIN WITHOUT THUNDER, *supra* note 72, at 1.

become the Royal Society for the Prevention of Cruelty to Animals (RSPCA) was founded in London in 1824.[84] Parliament passed the first anticruelty law in 1822.[85] An 1835 act of Parliament sought to consolidate and amend the current laws on animal cruelty, and the 1911 Protection of Animals Act (still in force in Britain) was based on the animal welfarist principle that it is wrong for animals to suffer unnecessarily.[86] One of the first laws regulating experimentation on animals was passed in 1876;[87] the Act was updated in 1986 to provide even greater protections.[88] The 1965 Brambell Committee, composed of scientists and concerned citizens, recommended practices for farming and husbandry to prevent cruelty to animals (particularly poultry, cattle, and swine), which were then used by animal welfare supporters to demand greater legislative change.[89] As Harold Guither notes, the Brambell Report is "cited frequently as the landmark standard for farm animal welfare,"[90] spawning reform in other European countries.[91]

Other European countries have also implemented extensive animal welfare legislation. Denmark has enacted legislation prohibiting the use of animals for teaching purposes.[92] Germany prohibits testing weapons, cosmetics, and tobacco on animals.[93] France passed its first anticruelty legislation in 1850.[94]

Finally, there is a broader global legislative movement intended to prevent the cruel treatment of animals. The World Organisation for Animal Health, the leading international organization devoted to promoting animal health,[95] has adopted extensive measures devoted to preventing cruelty to animals, including standards regulating the slaughter of animals.[96] More

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84. GUITHER, *supra* note 77, at 2; ROD PREECE & LORNA CHAMBERLAIN, ANIMAL WELFARE & HUMAN VALUES 34 (1993).

85. Hughes & Meyers, *supra* note 74, at 25.

86. *See id.* at 25-26.

87. PREECE & CHAMBERLAIN, *supra* note 84, at 87. As the authors note, the Act was "remarkably progressive" for its time, requiring the use of anesthesia and other limitations. *Id.*

88. *Id.* at 88.

89. GUITHER, *supra* note 77, at 2.

90. *Id.*

91. The United States has also exhibited a long-standing concern for animal welfare. The Massachusetts Bay Colony's 1641 legal code protected domestic animals from cruelty. FRANCIONE, RAIN WITHOUT THUNDER, *supra* note 72, at 7. In 1822, a New York court found that wanton cruelty to an animal was a common law misdemeanor. *Id.* at 7. Groups seeking to prevent cruelty to animals were formed as early as 1866. GUITHER, *supra* note 77, at 4. The American Society for the Prevention of Cruelty to Animals was founded in 1866. The nineteenth century also saw the creation of many other such societies, including the American Humane Association (1877), the Animal Rescue League of Boston (1889), and the American Anti-Vivisection Society (1883). *Id.* Efforts to prevent cruelty to animals have resulted in the Wild Horses and Burros Act, Pub. L. No. 92-195, 85 Stat. 649 (1971), the federal Animal Welfare Act, Pub. L. No. 89-544, 80 Stat. 350 (1966), and the Humane Methods of Slaughter Act, Pub. L. No. 85-765, 72 Stat. 862 (1958), among others.

92. PREECE & CHAMBERLAIN, *supra* note 84, at 91.

93. *Id.*

94. Hughes & Meyers, *supra* note 74, at 26.

95. *Objectives*, WORLD ORG. FOR ANIMAL HEALTH (2012), http://www.oie.int/index.php?id=53#c203.

96. WORLD ORG. FOR ANIMAL HEALTH, TERRESTRIAL ANIMAL HEALTH CODE (2011), *available at* http://www.grandin.com/OIE.Terrestrial.Animal.Welfare.Guideline.1.7.5.pdf. For an analysis of the standards see A. Shimshony & M.M. Chaudry, *Slaughter of Animals for Human*

particularly, the Convention for the Conservation of Antarctic Seals (1972), a component of the Antarctic Treaty System, requires that the killing of seals be quick and painless.[97] The treaty reflects longstanding concerns of members of the international community (including European countries) concerning the manner in which seals are killed.

III. THE CURRENT *SEAL PRODUCTS* DISPUTE

Having established that animal welfare has long been a genuine ground for European regulation, we move on to discuss the specifics of the EU ban on seal products. Before analyzing the legal claims of the parties and arguing that the European Union should prevail, this Part will provide a background to the current *Seal Products* dispute at the WTO. We summarize the dispute between Canada, Norway, and the EU, describe the EU measures, and elaborate on the factual record, describing the sealing industry in detail. In doing so, we show the basis upon which the EU decision to ban seal products was made. We conclude that the decision was rooted in a long, evolving tradition of moral beliefs and justified by the ample evidence that seals are not hunted in a fashion that Europeans consider humane. The decision was not tainted by protectionism or favoritism towards particular WTO members; it was even-handed and is part of animal welfare measures that have imposed significant costs on commercial interests within the European Union itself. It was a bona fide attempt to give meaning to widely shared European beliefs about the status of these animals and the ways in which they can be treated.

A. *Summary of the Dispute*

This section will discuss the history of the seal products disputes between the sealing countries and Europe. First, we present the background to the WTO dispute. Second, we discuss the efforts taken by sealing proponents in European courts to quash the ban.

The current WTO seal products dispute arose after the EU Parliament and Council adopted a regulation banning the marketing and importing of seal products on September 16, 2009.[98] The ban was passed by an overwhelming majority—550 of 736 members of the European Parliament.[99] This ban preempted the prior bans on seal products by Belgium and the Netherlands.[100] Canada, a country with one of the world's largest sealing industries,[101] had

Consumption, 24 SCI. & TECH. REV. OFF. INT. DES EPIZOOTIES 293 (2005).

97. Convention for the Conservation of Antarctic Seals, June 1, 1972, 1080 U.N.T.S. 175.

98. EU Seal Products Ban, *supra* note 8.

99. *HSI Canada Exposes Seal Hunt Cruelty During Canada-EU Trade Talks*, HUMANE SOC'Y INT'L (Apr. 12, 2011), http://www.hsi.org/world/canada/news/releases/2011/04/trade_talks_screen_041211.html.

100. Simon Lester, *The WTO Seal Products Dispute: A Preview of the Key Legal Issues*, ASIL INSIGHTS, Jan. 13, 2010, at 1, 4 n.2, *available at* http://www.asil.org/files/insight100113pdf.pdf (discussing how the Europe-wide ban preempted the previous Belgian and Dutch measures).

101. For a discussion of the market supply for seal products, *see infra* Section III.C.

previously requested WTO consultations on the Belgian and Dutch bans.[102] When the Europe-wide ban was established, Canada and Norway (another country with a significant sealing industry) moved quickly to file separate requests for consultations.[103] Consultations were held with Canada and Norway on December 15, 2009.[104]

Following the consultations, the European Union developed implementing legislation to effectuate the ban.[105] Soon after, Canada and Norway requested supplementary consultations with the European Union.[106] These were held on December 1, 2010, and failed to resolve the dispute.[107]

After the second round of consultations failed, Canada and Norway both requested that the WTO establish a panel to adjudicate the issue.[108] The WTO's Dispute Settlement Understanding governs the process by which member states can sue for alleged violations of WTO law.[109] Countries must first attempt to work out the disagreement through consultations;[110] if these fail, they can request that the WTO establish an ad hoc panel to adjudicate the dispute.[111] Since consultations between Canada, Norway, and the European Union had failed to resolve the dispute, Canada and Norway were permitted to request that a panel be formed.

On March 25, 2011, the Dispute Settlement Body (DSB)[112] decided to establish a panel to resolve the dispute between Canada and the European Union. The DSB then later decided to merge the Canadian and Norwegian complaints, and to have one panel address both disputes.[113] At the time of printing, however, the panelists have not yet been selected, and a resolution to the dispute is likely to take at least a year.[114]

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102. Request for Consultations by Canada, *European Communities—Certain Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS369/1 (Oct. 1, 2007). WTO consultations initiate the WTO dispute settlement process. For a further description of the dispute settlement procedure, see *infra* Section IV.A.

103. Request for Consultations by Canada, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/1 (Nov. 4, 2009); Request for Consultations by Norway, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/1 (Nov. 10, 2009).

104. Canada's Panel Request, *supra* note 20 (stating that the consultations took place on Dec. 15, 2009); Norway's Panel Request, *supra* note 20 (same).

105. Commission Regulation 737/2010, 2010 O.J. (L 216) 1 (laying down detailed rules for the implementation of Regulation 1007/2009 of the European Parliament and of the Council of 16 September 2009 on Trade in Seal Products, 2009 O.J. (L 286) 36).

106. Canada's Panel Request, *supra* note 20; Norway's Panel Request, *supra* note 20.

107. Canada's Panel Request, *supra* note 20; Norway's Panel Request, *supra* note 20.

108. Canada's Panel Request, *supra* note 20; Norway's Panel Request, *supra* note 20.

109. Dispute Settlement Understanding, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 1, 1869 U.N.T.S. 401, *available at* http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm.

110. *Id.* art. 4.

111. *Id.* arts. 4.7, 6.

112. The DSB is the arm of the WTO dealing with dispute settlement issues, in which all member states are represented and have a vote. For a discussion of how the DSB operates, see *Understanding the WTO: Setting Disputes*, WORLD TRADE ORG. (2012), http://www.wto.org/english/thewto_e/whatis_e/tif_e/ disp1_e.htm

113. *WTO Establishes Panel in Seals Case*, WORLD TRADE ORG. (Apr. 21, 2011), http://www.wto.org/english/news_e/news11_e/dsb_21apr11_e.htm.

114. The WTO's website on the *Seal Products* dispute indicates that the panel has been

It is worth noting that there was also an unsuccessful challenge to the EU measure in European courts, and there remains a further active challenge to the detailed regulation implementing the indigenous exception.[115] A group of Inuit bands, aboriginal individuals, and industry associations (such as the Fur Institute of Canada and the Canadian Seal Marketing Group) from Canada, Norway, and Iceland brought an initial action at the European General Court on January 11, 2010, seeking interim measures to lift the European seal products ban and challenging the legislation on several grounds.[116] They argued that the ban violated Europe's obligations towards indigenous peoples under international law, the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR), and the First Additional Protocol to the ECHR, which safeguards, among other things, property rights and the right to respect for private life.[117] They also argued that interim measures suspending the ban should be granted because of the immediate harm that would be visited on the Inuit communities should the ban be permitted to stand.[118] The President of the Court rejected these arguments due to lack of urgency, and the suit was thrown out.[119] An appeal has been filed.[120]

Three months after their first petition was rejected, the petitioners filed a second suit for interim measures in European court, alleging that there were "new facts" that had emerged following the first unsuccessful action, which made interim measures necessary.[121] These "new facts" were the market effects of the European ban, which, the petitioners alleged, had already begun to harm the Inuit communities.[122] The court rejected the second petition on the grounds that the petitioners had not produced sufficient evidence of actual individual injury.[123]

"established, but not yet composed," as of April 21, 2011. *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WORLD TRADE ORG. (2012), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds401_e.htm.

115. Court documents are not yet available in the current challenge, C-583/11 P - *Inuit Tapiriit Kanatami and Others v Parliament and Council*, and the appeal from the prior decision, T-18/10 RII-INTP,- *Inuit Tapiriit Kanatami and Others v Parliament and Council* (2010). Documents are available as they emerge at *Case-Law of the Court of Justice*, INFOCURIA, http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=18/10&td=ALL (last visited April 11, 2012).

116. *See* Order of the President of the General Court, ¶ 9, Case T-18/10 R (Apr. 30, 2010) (describing the initial filing by the petitioners).

117. *Id.* ¶¶ 49-62.

118. *Id.* ¶¶ 96-103.

119. *Id.* ¶¶ 114-117.

120. Order of the President of the General Court, ¶ 9, Case T-18/10 R II, Inuit Tapiriit Konotami and Others v Parliament and Council (Oct. 25, 2010) (noting that no appeal was filed at that time); Order of the General Court, Case T-18/10 REC, Inuit Tapiriit Kanatami and Others v Parliament and Council (Dec. 6, 2011) (appearing to appeal this order).

121. Order of the President of the General Court, ¶ 13, Case T-18/10 R II.

122. *Id.* ¶¶ 29-50.

123. *Id.* ¶¶ 61-93. The European Union has strict standing rules for when an individual seeks to challenge an EU legislative act, as opposed to regulatory decisions or implementing administration actions. The applicants did not meet these restrictive rules, because the effect of the legislation on them was both indirect and of a general nature—i.e., not distinguishable from the possible economic effects on others caught by the law. *Id.*

B. *Purpose, Design, and Structure of the European Measure*

Before exploring the legal claims at stake in the *Seal Products* dispute, it is essential to understand the nature of the EU measures at issue. In this Section, we discuss the specifics of the European ban of seal products. We describe the moral and philosophical rationale behind the measure, using the legislative history to show that the ban was adopted for ethical reasons. We also show that the current measure was adopted after more limited legislation was found to be inadequate to prevent cruelty.

The World Organisation for Animal Health has stipulated that "animal welfare standards should be democratically and transparently adopted and *both science and ethics based*, bearing in mind the production systems and uses of animals of each Member and the relevant environmental, regional, geographic, economic, cultural and religious aspects."[124] Our discussion of the legislative history will demonstrate that the EU seal ban meets all of the desiderata in this recommendation of the World Organisation for Animal Health.

In demonstrating that the EU decision was rooted in long-held moral beliefs regarding the treatment of animals and justified by ample evidence, we aim to ground our argument in later Parts that such noninstrumental justifications for trade-restrictive measures should be considered legitimate under WTO law. Appreciating the moral grounds for a regulation of this kind confirms the limits of science and instrumental policy reasoning in deciding a dispute of this nature.

The European ban on seal products consists of a prohibition on trade in seal products within the European Union, including importation or sale. The ban extends to any and all products derived from seals[125] and prohibits the sale of seal products within the European Union.[126] This means that "transit trade" products—those that do not enter the EU market before being reexported—are not affected by the regulation.[127] This is consistent with the concern of the measure with the morality of consumer behavior within the European Union. The ban also only affects products placed on the market after the regulation was implemented, reflecting general legal notions of non-retroactivity of legislation.[128]

Three exceptions to the ban limit its scope. First, the EU measure allows for the import and sale of seal products that result from traditional hunts "conducted by Inuit and other indigenous communities [that] contribute to their subsistence."[129] This means that the ban excludes subsistence hunting by

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124. WORLD ORG. FOR ANIMAL HEALTH, *supra* note 7 (emphasis added).

125. EU Seal Products Ban, *supra* note 8, art. 2.2 (defining seal products).

126. *Id.* arts. 2.3, 3.1 (prohibiting "introducing [seal products] onto the Community market, thereby making available to third parties, in exchange for payment").

127. *See* DEP'T FOR ENVT., FOOD & RURAL AFF., WELFARE OF ANIMALS: REGULATION (EC) 1007/2009 OF THE EUROPEAN PARLIAMENT AND THE COUNCIL ON TRADE IN SEAL PRODUCTS: THE SEAL PRODUCTS REGULATION 2010: GUIDANCE ON IMPLEMENTATION IN THE UNITED KINGDOM 4 (Aug. 2010) [hereinafter DEFRA, IMPLEMENTATION GUIDE], *available at* http://archive.defra.gov.uk/wildlife-pets/wildlife/protect/documents/2010seal-regs-guidance.pdf.

128. *Id.*

129. EU Seal Products Ban, *supra* note 8, art. 3.1.

members of aboriginal and indigenous communities.[130] The measure specifies that this exception is meant to ensure compliance with the United Nations Declaration on the Rights of Indigenous Peoples,[131] which protects the rights of indigenous communities to live by traditional means. The implementing legislation further specifies the three conditions that must be fulfilled in order for this exception to be invoked:[132] (1) the sealing must be conducted by indigenous communities with a tradition of sealing; (2) the seals killed in the hunt must be at least partly "used, consumed, or proceeded in the community according to their traditions"; and (3) the seal hunt must contribute to the subsistence of the indigenous community.[133] In order to verify that these conditions are met, hunters must ensure that an "attesting document" is provided when the product is introduced to the European market.[134]

The second exception permits the importation of goods purchased abroad by travelers for casual or noncommercial use,[135] as long as the regulation's goal is not compromised. This exception can be invoked in one of three ways. European residents who travel abroad can bring back seal products on their person or in their luggage.[136] An individual moving to the EU can bring seal products along with his other personal property.[137] And European residents who travel abroad and purchase seal products can ship them home, provided that the products are accompanied by adequate documentation demonstrating their origin.[138] This exception insures that European nationals are not punished for consumption decisions that were legal in the territory where the purchase took place. In general, it is easier to reconcile regulation with the territorial principle of jurisdiction when the regulated *transaction* occurs within the territory of the EU, even if the regulation is concerned with events that take place outside that territory. By permitting importation of goods purchased abroad by travelers that are *not brought into the stream of commerce within the EU*, the regulation thus makes a legitimate distinction, grounded in an understanding of the desirable or acceptable degrees of extraterritoriality in EU regulation.

Taken together, the traveler's importation exception and the non-applicability of the regulation to transshipment, ensure that only where seal products are *sold* or destined for *sale within* the European Union are legal sanctions applied, even though the regulatory intervention is prompted by

130. Note that while "Inuit" is defined in the measure, "indigenous" is not. As we discuss below, this may mean that communities which engage in traditional, subsistence hunting may be eligible to sell seals into the EU under this exception. *See infra* note 261 and accompanying text.

131. EU Seal Products Ban, *supra* note 8, ¶ 14; European Commission Regulation (EU) 737/2010, art. 2.1, 2010 O.J. (L 216) 2 [hereinafter EU Implementing Legislation].

132. EU Implementing Legislation, *supra* note 131, art. 3.

133. *Id.*

134. *Id.* art. 3.2; *see also id.* arts. 6-10 (providing further details of how attesting documents must be prepared and presented).

135. EU Seal Products Ban, *supra* note 8, art. 3.2(a); EU Implementing Legislation, *supra* note 131, art. 2.2.

136. EU Implementing Legislation, *supra* note 131, art. 4.1.

137. *Id.* art. 4.2.

138. *Id.* art. 4.3.

events that take place outside the European Union (i.e., the cruel slaughter of seals). This reflects the spirit and letter of the territoriality principle as it is understood in EU law, based upon the European Court of Justice's interpretation of customary international law.[139]

Third, seal products that are a result of hunting conducted for the sustainable management of marine resources can be placed on the market on a not-for-profit basis,[140] so long as the regulation is not undermined.[141] Seal products eligible for this exception must meet three criteria: (1) they must be hunted in conjunction with a "national or regional natural resources management plan which uses scientific population models of marine resources and applies the ecosystem-based approach;"[142] (2) the hunt cannot exceed the total allowable catch specified in the resource management program;[143] and (3) the resulting seal products must be sold in a *nonsystematic, not-for-profit* fashion.[144] In order to demonstrate that these three criteria are met, the products must be accompanied by a document attesting to that fact.[145] The third exception is based on a regulatory distinction that is grounded in the objective of responsible and sustainable resource management. At the same time, it is carefully designed in such a way that the pursuit of this legitimate objective does not compromise the moral thrust of the overall ban. Thus, for this exception to apply, the resulting products must be sold in a nonsystematic, not-for-profit fashion. Sustainable resource management cannot be an excuse for commercial exploitation of the suffering of the seals that would detract from the fundamental noninstrumental purpose of the measure.

The regulation was designed to be enforced by EU member states, which are responsible for establishing penalties and processes sufficient to implement the seal products ban.[146] Members must notify the Commission of the measures

139. Thus, applying the territoriality principle, the European Court of Justice has held that in responding to the effects of fishing activities *outside* the European Union that are contrary to its conservation policies, the European Union is limited to legal sanctions that can be applied *within* the territory of the European Union. Case C-286/90, Anklagemyndigheden [Public Prosecutor] v. Peter Michael Poulsen, 1992 E.C.R. I-6019, ¶¶ 33-34. In theory, this would allow the EU to ban transshipment within the letter of the territoriality principle, as the goods would be turned back at the borders of the EU; but the effect would be to *prohibit* purchases and sales of seal products *outside* the territory of the EU, by *precluding* the goods from reaching the non-EU destination where the processing or ultimate consumption takes place and thus making their sale in that non-EU jurisdiction impossible or at least considerably more costly, if not prohibitively so (as alternative shipping routes would have to be found). This would seem to go some distance in undermining the spirit of the territoriality principle, and would not be justified by the noninstrumental purpose of protecting public morals *within* the EU. For the application of the territoriality principle in EU law generally, see Case C-366/10, Air Transp. Ass'n of America and Others, 2011, ¶ 129, *available at* http://curia.europa.eu/jcms/jcms/j_6/ (search case 366/10).

140. EU Implementing Legislation, *supra* note 131, art. 2.2.

141. *Id.* art. 3.2(b).

142. *Id.* art. 5.1(a).

143. *Id.* art. 5.1(b).

144. *Id.* art. 5.1(c).

145. *Id.* art. 5.2; *see also id.* arts. 6-10 (providing further details of how attesting documents must be prepared and presented).

146. EU Seal Products Ban, *supra* note 8, art. 6 (penalties must be "effective, proportionate and dissuasive").

taken to implement the ban,[147] and must provide the Commission with a report on the measures taken every four years.[148]

The text of the regulation and its implementing legislation, as well as the legislative and drafting history, make clear that the overall purpose of the regulation is to protect animal welfare—to prevent unnecessary cruelty to seals, to promote humane treatment, and to establish the appropriate moral attitude to the treatment of animals with the European Union. The text of the seal products ban sets out this goal explicitly.[149] The premise of the regulation is that seals are "sentient beings that can experience pain, distress, fear and other forms of suffering," and therefore are in need of protection from cruel treatment.[150] The preamble further explains that while it may be possible to kill seals in a way that minimizes their suffering, it is impossible for the European Union to verify that seals were, in fact, killed in a humane way.[151] The European Union therefore decided to adopt a full ban after carefully considering the alternatives (including labeling) and deeming them insufficient, because they were not adequate to ensure that products from seals killed in an inhumane way would not find their way onto the EU market, thus raising the possibility that the behavior of EU consumers on EU territory would be complicit with this cruelty.[152]

The legislative history of the EU measure also makes this purpose clear. The Commission established the seal ban because of "growing public concern about the animal welfare aspects of the killing and skinning of seals . . . the Commission . . . received massive numbers of letters and petitions expressing deep indignation about the trade in seal products."[153] This expression of public opinion on the ethics of the seal trade drove the EU action;[154] "[g]iven the animal welfare concerns expressed by the public, notably by the European Parliament and member states, standalone nonlegislative measures are not

147. *Id.*

148. *Id.* art 7.1.

149. *Id.* pmbl.

150. *Id.*

151. "Although it might be possible to kill and skin seals in such a way as to avoid unnecessary pain, distress, fear, or other forms of suffering, given the conditions in which seal hunting occurs, consistent verification and control of hunters' compliance with animal welfare requirements is not feasible in practice or, at least, is very difficult to achieve in an effective way, as concluded by the European Food Safety Authority . . . ." *Id.* ¶ 11; *see also* Nielsen, *supra* note 1, at 10 ("The most important point to note is that the EU regulation does not aim to give seals a 'right to life'. Rather, the policy is based on the rationale that although it may be possible to kill seals in a humane manner, most frequently this does not happen.").

152. EU Seal Products Ban, *supra* note 8. For a further discussion of the history of the measure and why labeling was not found to be an adequate alternative, see *Proposal for a Regulation Concerning Trade in Seal Products*, *supra* note 50.

153. *Citizens' Summary: Trade in Seal Products*, *supra* note 61.

154. Through the public consultation process established to assess public opinion on the seal hunt, the Commission received "73,153 answers . . . from citizens in 160 . . . countries worldwide." These responses showed "massive dissatisfaction with current seal hunting practices . . . . A clear majority of respondents in nearly all the geographical areas analysed preferred a ban." Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council Concerning Trade in Seal Products, Impact Assessment, Commission Staff Working Document, EUR. PARL. DOC. COM (2008) 469 final (July 7, 2008) [hereinafter Impact Assessment], *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2008:2290:FIN:EN:PDF.

considered sufficient to address the issue."[155] All of the legislative documents associated with the ban indicate that the overall motivation was to respond to widely held ethical beliefs about the cruelty of the hunt, both by attempting to reduce the suffering of the seals and by expressing moral outrage at the practices of the commercial hunters.[156]

As mentioned above, the legislative history also clarifies why the European Union thought that a *ban* was necessary, rather than a more limited measure. The original proposal to regulate the seal trade suggested banning only seal products that were the result of seals being killed in an inhumane manner.[157] However, an extensive scientific and regulatory analysis conducted by the European Food Safety Authority (EFSA), which suggested that it would be difficult to distinguish between seals killed humanely and those killed in a cruel fashion,[158] prompted the European Union to expand on its initial proposal and to institute a full ban. This process was transparent, democratic, and both science- and ethics-based.

There are several reasons why the European Union found that it is difficult to distinguish between seals killed humanely and those killed cruelly. First, it is hard to assess when an animal has been humanely killed, as it can be difficult to monitor when the animals lose consciousness.[159] Even if there is a stringent standard in place to ensure that an animal does not suffer unnecessarily when it is killed, it can be very difficult to implement the requisite techniques. Seals are hunted rapidly in dangerous conditions on ice floes, where they are skinned shortly after.[160] Hunters often cannot and do not take the time to ensure that the animals have been properly killed.[161] Second, there is a "lack of objective data" on humane killings; the individuals collecting data on whether seals are humanely killed are self-interested, and therefore their assessment cannot be trusted.[162] Third, individuals may differ in what they think is cruel. While the Canadian regulations, for example, do not include the separation of seal pups from their mothers as cruelty, the EU scientific assessment of the treatment of seals suggests that this could be considered cruel

155. Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council Concerning Trade in Seal Products, Summary of the Impact Assessment, Commission Staff Working Document, EUR. PARL. DOC. (COM 2008) 469 final (July 7, 2008), *available at* http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/ia_summary_en.pdf.

156. *Id.* "In line with its commitment to high animal welfare standards, the European Commission undertook to conduct an objective, in-depth analysis of the animal welfare aspects of seal hunting in sealing countries." *Id.* at 2; *see also Proposal for a Regulation Concerning Trade in Seal Products*, *supra* note 50, at 2 ("For several years, many members of the public have been concerned about the animal welfare aspects of the killing and skinning of seals and about trade occurring in products possibly derived from seals that have been killed and skinned with avoidable pain, distress, and other forms of suffering, which seals, as sentient mammals, are capable of experiencing. Those concerns have therefore been expressed by members of the public out of ethical reasons. The Commission received during the last years a massive number of letters and petitions on the issue expressing citizens' deep indignation and repulsion regarding the trade in seal products in such conditions.").

157. *Proposal for a Regulation Concerning Trade in Seal Products*, *supra* note 50, at 5.

158. *EFSA Report*, *supra* note 10, at 88.

159. *Id.* at 3, 39, 42, 44, 47.

160. LINZEY, *supra* note 12, at 115-29 (describing the problems with "regulated" seal hunts).

161. *Id.*

162. *EFSA Report*, *supra* note 10, at 3-4.

treatment, due to the trauma that it inflicts; this conclusion corresponds to widely held moral intuitions among Europeans about what is cruel.[163]

Clearly, the concern was not just lack of effective monitoring or enforcement of Canada's and Norway's standards; Europeans, as represented by their parliamentarians, require a higher level of protection for animal welfare than do the citizens of Canada and Norway. While the beliefs of Canadians as a whole may not be significantly different from those of Europeans,[164] the political sensitivity and importance of the region in Canada where the hunt occurs has made the attitudes in that region essentially the basis for Canadian policy. The ban does not arise solely out of a dispute over *how* to achieve a given level of protection effectively, but rather reflects a disagreement on the level of protection that is required based on the moral convictions of society. Canada and Norway simply cannot agree with the level of protection called for by European values.[165]

This is evident in the legislative history, which reveals how other less restrictive measures, such as labeling, voluntary measures, or member state legislative objectives were considered and rejected by the European Parliament[166] because they did not sufficiently meet the public demand for a more extensive measure:

> Labeling alone of seal products is not an alternative to a ban on trade in those products as labeling would only be relevant to assuage the ethical animal welfare concerns of citizens and consumers as and when the killing and skinning methods in force in the sealing countries would accord with the criteria provided for in this Regulation. There should therefore be incentives for sealing countries to adapt their legislation and practice to that effect, which can only be achieved by means of trade prohibitions.[167]

The European Commission also carefully considered the market and trade effects of the regulation. It conducted a detailed impact assessment of the projected market effects, predicting which countries would be economically harmed by a ban.[168] Notably, this included effects on EU member states such as Denmark and Italy that incur significant benefits from processing seal products.[169] The European Union also noted the potential economic effects on fur-producing countries both inside and outside the European Union—i.e., on Canada and Norway, as well as on EU seal producers such as Finland and the

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163. *Id.* at 77.

164. *See, e.g.*, *Nation-Wide Poll Shows Canadians Continue To Oppose Seal Hunt*, INT'L FUND FOR ANIMAL WELFARE (July 1, 2010), http://www.ifaw.org/ca/node/22521; *New Poll Shows Most Europeans Say 'NO' to Cruelty from Canada*, HUMANE SOC'Y INT'L (July 14, 2011), http://www.hsi.org/world/ europe/news/releases/2011/07/eu_poll_supports_ban_071411.html.

165. For a further discussion of why labeling was not a reasonable alternative, see Xinjie Luan & Julien Chaisse, *Preliminary Comments on the WTO Seal Products Dispute: Traditional Hunting, Public Morals and Technical Barriers to Trade*, 22 COLO. J. INT'L ENVTL. L. & POL'Y 79, 110-11 (2001).

166. *Proposal for a Regulation Concerning Trade in Seal Products*, *supra* note 50, at 11-12 (considering and rejecting labeling).

167. *Id.* at 12.

168. Impact Assessment, *supra* note 154, at 31-47.

169. *Id.* at 35-36.

United Kingdom.[170]

The legislative history also reveals the reasons behind the indigenous hunt exception. First, European lawmakers were genuinely concerned about inflicting grave harm on the Inuit way of life.[171] The animal welfarist theory underlying the seal products ban is based on the longstanding principle[172] that animals should be protected from cruelty as much as possible, but this does not mean that animal needs do not have to be balanced against human needs. The Inuit should not be forced to abandon their traditional way of life to protect seals. The importance of protecting traditional cultures was sufficient to justify an exception for traditional hunts.[173]

Second, the European Union felt compelled to allow this exception because of its international law commitments, including the Declaration on the Rights of Indigenous Peoples.[174] The Declaration requires that indigenous peoples be allowed to continue to subsist using traditional methods, and EU legislators did not want to violate this right. Both the indigenous exception and the sustainable management exception reflect an important dimension of the moral attitude that is expressed and supported by the EU scheme: a particular distaste for suffering inflicted on animals for reasons of large-scale commercial exploitation, which animal welfare or rights activists often call "commodification,"[175] and greater tolerance for suffering inflicted for purposes related to important social values, rather than the maximization of commercial profit. The European Union sought to ensure that exceptions based on regulatory distinctions connected to other legitimate purposes, such as the protection of indigenous peoples and sustainable resource management, did not undermine the fundamental moral thrust of the ban as a noninstrumental measure.

C. *Facts Underlying the WTO Dispute*

Before analyzing the legal claims made by Canada and Norway, it is important to have a clear sense of the facts underlying the WTO dispute. This Section will provide a brief overview of the sealing industry, a description of the animal welfare concerns associated with sealing, and a discussion of measures that other countries have taken to address this issue.

More than 900,000 seals are hunted annually worldwide.[176] The most significant hunts take place in Canada, Greenland, and Namibia,[177] but sealing

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170. *Id.* at 28-42.

171. *See id.* at 18.

172. *See supra* Part II.

173. *Proposal for a Regulation Concerning Trade in Seal Products*, *supra* note 50, at 5 ("The fundamental economic and social interests of Inuit communities traditionally engaged in the hunting of seals should not be adversely affected.").

174. EU Seal Products Ban, *supra* note 8.

175. GARY L. FRANCIONE & ROBERT GARNER, THE ANIMAL RIGHTS DEBATE: ABOLITION OR REGULATION? 63 (2010).

176. LINZEY, *supra* note 12, at 115; *EFSA Report*, *supra* note 10, at 19.

177. LINZEY, *supra* note 12, at 147. Canada is the largest single producer of seal products. The Total Allowable Catch (TAC), or number of seals permitted to be caught in a single year, was 330,000

also occurs in Norway, Russia, Finland, Sweden, Iceland, the United Kingdom (Scotland), and the United States (in Alaska and largely for subsistence purposes).[178] Seal processing occurs in these and other countries, including Italy and Denmark.

The types of seals hunted vary by region. The Canadian hunt largely targets harp seals; some hooded seals and a few grey seals are also killed each year.[179] The Norwegian hunt focuses on both harp and hooded seals, while ringed and harp seals are the most important species caught in Greenland.[180] By contrast, the hunt in Namibia is largely of cape fur seals.[181]

Seals are killed through a variety of methods. The traditional Norwegian hakapik, a club with a metal spike, is commonly used in Canada.[182] The spike is used to stun or crush the seal's skull. Clubs are also used in Namibia, to similar effect as the hakapik. Firearms are used in the Canadian, Norwegian, and Namibian hunts.[183] Underwater netting and trapping, where seals are drowned to death underwater, is conducted in Canada, Greenland, Iceland, Russia, and the United States.[184]

All of these methods of sealing have long been controversial from an animal welfare perspective. Hunting using the hakapik or club can result in nearly instantaneous death for seals, particularly for young seals with soft skulls who move less swiftly, if sufficient blows are administered appropriately to the head to crush the skull and destroy both cerebral hemispheres and calvaria.[185] The problem, according to the European Union and other critics, is that blows are often not administered effectively. If the first blow does not hit the calvaria but rather another part of the body, or if it hits only one side of the skull, the seal will experience significant pain.[186] Further, reports show that sealers do not take efforts to ensure that the seals are actually dead; they strike the seals until they are disabled and cannot move and then pursue other seals, leaving the seals in intense suffering.[187] Further, sealers do not always wait for the seals to die before skinning them (indeed, the Canada Marine Mammal Regulation requires only brain death, not a complete cessation of functioning, for skinning to commence).[188] There is significant evidence to suggest that seals are skinned alive, particularly in the Canadian hunt, where there is no

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in 2010, approximately one-third of the global catch. *Frequently Asked Questions About Canada's Seal Harvest*, MINISTRY OF FISHERIES & OCEANS (Mar. 17, 2011), http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/faq-eng.htm.

178. *EFSA Report*, *supra* note 10, at 14-19, 33.

179. *Frequently Asked Questions About Canada's Seal Harvest*, *supra* note 177.

180. *EFSA Report*, *supra* note 10, at 26, 29.

181. *Id*. at 30.

182. *Id*. at 37-38; *see Frequently Asked Questions About Canada's Seal Harvest*, *supra* note 177 (noting that Canadians use a modified version of the traditional hakapik).

183. *EFSA Report*, *supra* note 10, at 24, 42-45. Firearms are used in other countries as well, and are the most popular method worldwide. *Id.*

184. *Id.* at 24, 46-48.

185. *Id.* at 39.

186. *Id.* at 39-40.

187. *Id.* at 59.

188. LINZEY, *supra* note 12, at 117-18.

requirement that a "blink test" (or other test) be administered to ensure that the seal is dead before skinning begins.[189]

Firearms have also raised similar animal welfare concerns; indeed, they are considered even less humane than clubs or hakapiks because it is less likely that the seal will die immediately. A seal not shot in the head or neck can escape while wounded, suffering greatly.

Underwater trapping and netting are also problematic from an animal welfare perspective, according to the EU's findings. When seals are caught in this fashion, it can take them up to an hour to drown underwater (because of seals' unique capacity to retain oxygen for long dives), during which time the seals are fully conscious and thus experience very significant pain and suffering. Indeed, this approach is so problematic that it has been prohibited even by the Canadian government.[190]

Finally, an additional practice called "hooking" has added to the concerns about animal welfare in the seal hunt. Seals that are killed or partially immobilized are often dragged across the ice or out of the water by hooks, leading to further pain and suffering if the animal is not yet fully unconscious.[191]

Concerns about hunting methods, and a desire for conservation, have long led countries to place bans on hunting seals and to limit imports of seal products. The United States has been at the forefront of seal conservation efforts. Concerns about overhunting and depleted populations were raised as early as the 1880s, when the United States began restricting seal hunts. The 1911 North Pacific Fur Seal Convention between the United States, Russia, Japan, and the United Kingdom banned all pelagic sealing north of the thirtieth parallel in the Pacific hemisphere;[192] the treaty was followed by a five-year American moratorium on seal hunting in order to allow the seal populations to recover. The 1966 Fur Seal Act made it illegal for Americans to hunt or import fur seals.[193] Finally, in 1972, the Marine Mammal Protection Act prohibited the hunting or importation of any type of seals by Americans into the United States.[194]

Many other countries have also banned seal hunting and the importation

189. *Id.* at 118-20; *see also EFSA Report*, *supra* note 10, at 53-54, 58. However, the Canadians state that the blink test was required at one point but was discarded because it was allegedly unreliable. The current practice is to palpate the cranium. *See* Marine Mammals Regulations S.O.R./1993-56 sec. 28(2) (Can.), *available at* http://laws-lois.justice.gc.ca/PDF/SOR-93-56.pdf ("Every person who strikes a seal with a club or hakapik shall strike the seal on the top of the cranium until it has been crushed and shall immediately palpate the cranium to confirm that it has been crushed.").

190. *EFSA Report*, *supra* note 10, at 26 (describing the relevant Marine Mammal Regulation).

191. *Id.* at 58-59.

192. Pelagic sealing is sealing on the open sea. The Convention followed a lengthy arbitration dispute between the United States and the United Kingdom on the matter. For a complete history of the Convention, see Thomas A. Bailey, *The North Pacific Sealing Convention of 1911*, 4 PAC. HIST. REV. 1 (1935). Also note that Article IV of the Treaty contains an aboriginal exception. Convention Between the United States and Other Powers Providing for the Preservation and Protection of Fur Seals, July 7, 1911, 37 Stat. 1543 (The Fur Seal Treaty of 1911).

193. Fur Seal Act of 1966, Pub. L. No. 89-702, 80 Stat. 1091 (codified at 16 U.S.C. §§ 1151-1187).

194. Marine Mammal Protection Act of 1972, 16 U.S.C. § 31 (2006).

of seal products for both conservation and animal welfare reasons. South Africa ended the commercial hunt of fur seals in 1990.[195] Russia, perhaps the largest market for Canadian seal products, recently followed the European Union's lead and banned the importation of many seal products.[196] Belarus and Kazakhstan, which are in a customs union with Russia, have also recently imposed bans.[197] Mexico and Croatia have banned the import of seal products since 2006. None of these previous actions has ever been challenged by Canada or Norway in an international proceeding, despite the fact that the U.S. ban has existed for almost forty years.

The above analysis shows that animal welfare is a longstanding, independent, bona fide rationale for legislation. Historically and currently, in Europe and elsewhere, domestic legal regimes have expressed a real concern for animal welfare. This, along with the legislative history of the measure, demonstrates that the EU ban on seal products is based on a genuine, nonpretextual desire to protect animals from cruelty.

More generally, there has been an increasing recognition of animal welfare as a global value. As Myun Park and Peter Singer have recently argued:

> A new movement is emerging. With an increasing number of animals being raised for international markets, and with a growing ability for people to watch previously unseen footage of animal handling, policymakers, businesspeople, nongovernmental organizations, and ordinary citizens are showing greater interest in how animals are treated, wherever they may be. It is no longer sufficient for governments to be concerned for the welfare of animals within their own borders; animal welfare is quickly becoming an issue of international concern.[198]

As noted by Park and Singer, at its second Global Conference on Animal Welfare, the World Organisation for Animal Health (OIE) adopted recommendations that included a clear recognition that animal welfare measures should be based not only on science but also on ethics: "animal welfare standards should be democratically and transparently adopted and both science and ethics based, bearing in mind the production systems and uses of animals of each Member and the relevant environmental, regional, geographic,

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195. *Seal Slaughter in Namibia*, HUMANE SOCIETY INT'L (Aug. 30, 2011), http://www.hsi.org/issues/protect_seals/facts/about_namibia_seal_hunt.html.

196. For reports in the press, see, for example, Gloria Galloway, *Russian Ban 'Spells the End of Canadian Sealing,' Activists Say*, GLOBE & MAIL (Toronto), Dec. 19, 2011, http://www.theglobeandmail.com/news/politics/ottawa-notebook/russian-ban-spells-the-end-of-canadian-sealing-activists-say/article2276572, and *Province Wants Ottawa To Act on Proposed Russian Seal Ban*, CANADIAN PRESS (Toronto), Dec. 24, 2011, https://www.cbc.ca/news/canada/newfoundland-and-labrador/story/2011/ 12/24/nl-cp-russians-seal-ban-1224.html. News of the Russian decision broke when Russia reported its decision to the WTO. *Trade and Trade-Related Measures, Mid October 2010 – Mid October 2011*, WORLD TRADE ORG. (2012), *available at* http://www.wto.org/english/news_e/news11_e/table1/annual?overview11.xls. The ban was implemented by Decision 696 of the Customs Union Commission. It appears that the Russian ban, in conjunction with the European ban, has begun to affect the demand for Canadian seal products. *See Russia Bans Trade in Harp Seal Fur*, MRCVS.CO.UK (Mar. 15, 2012), http://www.mrcvs.co.uk/en/news-story.php?id=6808.

197. *Ban on Seal Products Extends Further*, ICE NEWS (Jan. 2, 2012), http://www.icenews.is/index.php/2012/01/02/ban-on-seal-products-extends-further.

198. Miyun Park & Peter Singer, *The Globalization of Animal Welfare: More Food Does Not Require More Suffering*, FOREIGN AFF. Mar.-Apr. 2012, at 122-33.

economic, cultural and religious aspects."[199] OIE is developing international animal welfare standards in a number of areas (although it has not yet addressed seal hunting). By referring to measures based both on science and on ethics, the OIE Recommendations indicate international endorsement of the appropriateness of animal welfare measures that have both instrumental and noninstrumental ethical components, the latter based at least partly on considerations other than those that can be established through science. The recommendations also acknowledge that, inter alia, religious and cultural considerations may play a part in the way in which animal welfare standards are formulated.

IV. LEGAL CLAIMS AND RESPONSES

Canada and Norway have made a variety of legal claims contesting the European ban. They range from violations of the traditional General Agreement on Tariffs and Trade (GATT) to violations of the Technical Barriers to Trade Agreement (TBT) and the Agreement on Agriculture.[200] The European Union, in turn, has argued that these claims do not have merit, and that in any case the EU ban can be justified by an affirmative defense: the General Exceptions clause in Article XX of the GATT.[201] This Part will evaluate the strength of these legal claims and the affirmative defenses offered by the European Union. We argue that Canada and Norway's arguments are without merit—the European Union should prevail with respect to each of the claims that Canada and Norway assert—and, most importantly, that Article XX provides a robust affirmative defense for the EU ban.[202] Before proceeding to analyze the legal claims at issue, however, we offer a brief introduction to WTO law and procedure.

A. *Overview of WTO Law and Procedure*

The WTO is an intergovernmental organization that deals with trade in goods, services, and intellectual property among nations.[203] The WTO is not the first multilateral trade regime, however; it evolved out of an earlier treaty called the GATT, which remains the most important agreement for regulating trade in goods within the WTO umbrella.[204] The GATT was signed by twenty-three

199. WORLD ORG. FOR ANIMAL HEALTH, *supra* note 7.

200. Canada's Panel Request, *supra* note 20; Norway's Panel Request, *supra* note 20.

201. This Clause permits states to justify otherwise impermissible restrictions on trade for a number of reasons, including health, environmental protection, and "public morals." *See infra* note 233.

202. In Part V, we will further defend this legal analysis through our vision of the WTO as a nonconstitutional order which should permit ethical pluralism among its member states. We argue that ethical choices should be left up to the individual members of the trade regime.

203. *What is the WTO?*, *supra* note 16 (explaining that the WTO defines trade as the exchange of goods, services, and intellectual property).

204. For histories of the GATT's origins and subsequent development, see KENNETH DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION (1993); RICHARD N. GARDNER, STERLING DOLLAR DIPLOMACY: THE ORIGINS AND PROSPECTS OF OUR INTERNATIONAL ECONOMIC ORDER (1969); JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS (1997); JOHN H. JACKSON, WORLD TRADE AND THE LAW OF THE GATT (1969); MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL

countries in 1948 and regulated only trade in goods.[205] It was a treaty through which countries committed to binding tariffs on imports, equal treatment of all trading partners in terms of tariff barriers, and non-discriminatory treatment of imported products and domestic products.[206] The purpose of these provisions was to facilitate trade among nations and to prevent nations from using trade as a political weapon.[207] Through a series of negotiations called "trade rounds", the GATT gradually expanded its membership as well as the goods regulated by the regime.[208]

The most important of these negotiations was known as the Uruguay Round.[209] Negotiations began in 1986, and were not concluded until 1994, when member nations signed the Uruguay Round Final Act.[210] The Round resulted in the most significant expansion of the GATT mandate and the creation of the World Trade Organization in 1995.[211] New multilateral agreements were established, governing trade in services, intellectual property, technical regulations, and sanitary measures.[212] All of these agreements were adopted on a consensus basis, and all parties had to adhere to all of the multilateral agreements in order to retain their membership in the WTO.[213] Thus, the package of multilateral agreements is often called the Single Undertaking.[214] More countries were brought into the GATT system during the Uruguay Round; by the end of the negotiations, 123 countries were part of the formal international trading regime.[215] Further, a permanent institution was created to regulate international trade, as distinct from the ad hoc treaty regime of the GATT: the WTO. The WTO's basic institutional framework was set out in a treaty called the WTO Agreement, also part of the Uruguay Round Final Act. The WTO include a strong system to resolve disputes between member states.[216]

TRADE (2005).

205. *See generally* BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: FROM GATT TO WTO 13, 17 (1995) (describing the complex history of the GATT's development).

206. *Id.* at 12-13.

207. *Id.*; *Principles of the Trading System*, WORLD TRADE ORG. (2012), http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm.

208. For a description of the various trade rounds, see *The GATT Years: From Havana to Marrakesh*, WORLD TRADE ORG. (2012), http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm; and *The Uruguay Round*, WORLD TRADE ORG. (2012), http://www.wto.org/english/thewto_e/whatis_e/ tif_e/fact5_e.htm.

209. This Round of negotiations is known as the Uruguay Round because it began in Punta del Este, Uruguay, in 1986. *The Uruguay Round*, *supra* note 208.

210. *Id.*

211. *See What is the WTO?*, *supra* note 16; *see also* HOEKMAN & KOSTECKI, *supra* note 205, at 37-40 (describing the move from GATT to WTO).

212. Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 25 (2005).

213. *Whose WTO Is It Anyway?*, WORLD TRADE ORG. (2012), http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm.

214. *How the Negotiations Are Organized*, WORLD TRADE ORG. (2012), http://www.wto.org/english/tratop_e/dda_e/work_organi_e.htm.

215. Perhaps the best history of the Uruguay Round can be found in HOEKMAN & KOSTECKI, *supra* note 205, at 19-20.

216. Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 2-3 (1999); *The Uruguay Round*, *supra* note 208.

WTO law, then, is a complex series of treaties and agreements that evolved over a half-century of trade rounds. The original GATT is now but one part of the WTO legal regime. The multilateral agreements negotiated during the Uruguay Round, plus the GATT, are termed the "covered agreements."[217] These are the main sources of WTO law.[218] When analyzing whether a country has met its WTO commitments, one must examine whether it has complied with its obligations under all of the covered agreements. Further, many of the WTO treaties contain exceptions and limitations clauses, so even if a measure is a prima facie violation of an obligation, the defending member may seek to justify this violation under one of those clauses. In the *Seal Products* case, Canada and Norway have challenged the EU's actions under various covered agreements. Therefore, the legal analysis below considers all of the covered agreements referenced in the case.

The original GATT regime included an informal dispute settlement process. If one country felt that another was violating its GATT obligations in some fashion, it could request that the GATT Council establish a panel to adjudicate the dispute.[219] However, there was no means of appeal, and the decision was not legally binding unless adopted by a consensus of the GATT parties. Thus, the losing party could in effect "veto" a panel ruling. Under the WTO, this dispute settlement system changed significantly into a system of compulsory third-party, two-instance adjudication.[220] First, countries take their disputes to ad hoc panels of neutral decisionmakers established by the WTO. Either party can appeal the panel ruling to the permanent Appellate Body (AB), which has the power to reverse, affirm, or modify panel reports.[221] Panels and the AB can instruct a member state to bring its measures into compliance.[222] If one party believes that another has not complied with the order, it can take the opposing party to a compliance panel, which may determine whether the losing party has adequately implemented the ruling. If the panel determines that the member has not complied, further procedure can result in the imposition of countermeasures.[223] Panels and the AB issue reports, which form the "case law" of the WTO.

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217. There are also plurilateral codes that bind only the subset of WTO members that have signed onto them. *See supra* note 16.

218. For a complete description of the sources of WTO law, see Petros C. Mavroidis, *No Outsourcing of Law? WTO Law as Practiced by WTO Courts*, 102 AM. J. INT'L L. 421 (2008).

219. Hudec, *supra* note 216, at 5.

220. *See* BERNARD M. HOEKMAN & PETROS C. MAVROIDIS, THE WORLD TRADE ORGANIZATION: LAW, ECONOMICS, AND POLITICS 77 (2007) (describing new dispute settlement procedures); *see also* Petko D. Kantchevski, *The Differences Between the Panel Procedures of the GATT and the WTO: The Role of GATT and WTO Panels in Trade Dispute Settlement*, 3 INT'L L. & MGMT. REV. 79 (2006) (summarizing the differences between the old GATT and new WTO proceedings); Peter Lichtenbaum, *Procedural Issues in WTO Dispute Resolution*, 19 MICH. J. INT'L L. 1195 (1998) (summarizing politics and procedures of the new dispute resolution system).

221. HOEKMAN & MAVROIDIS, *supra* note 220, at 81. The Appellate Body is a "permanent body composed of renowned experts . . . seen as a definitive departure from a diplomacy oriented jurisprudence." *Id.* at 78.

222. *Id.* at 81.

223. *Id.* at 81-82. A countermeasure is a measure taken against the infringing party, which would normally violate WTO disciplines (for example, raising tariffs above MFN levels) but which is permitted against a country found to be in breach of the Agreement.

This new system of dispute resolution gives significant clout to the WTO legal regime, which commentators have called the strongest dispute settlement system in international law.[224] Canada and Norway's case against the European Union will result in a legally binding decision by the panel, which can be appealed to the AB, and which can be enforced by way of countermeasures, as affirmed or modified by the AB.

With the legal and procedural context of the *Seal Products* dispute established, we can now proceed to examine the substance of the claims Canada and Norway make against the European Union.

B. *The EU Seal Products Ban Does Not Violate the GATT*

Canada and Norway both argue that the European ban on seal products violates three provisions of GATT 1994.[225] The GATT imposes two main requirements concerning a WTO member's obligations with respect to domestic policies. These requirements are meant to prevent members from circumventing agreed tariff concessions and other border restrictions on trade through protectionist or discriminatory domestic regulation. First, there is the "most favored nation" (MFN) obligation,[226] which requires states to treat all of their trading partners alike; they cannot discriminate by giving more favorable treatment (by way of tariffs and other barriers to trade) to some countries without offering them to all WTO members.[227]

The second major obligation is national treatment.[228] National treatment requires, with respect to domestic laws, regulations, and requirements, that WTO members treat imported products no less favorably than domestically produced products once goods are within the country.[229]

The third provision that Canada and Norway claim has been violated is the elimination of Quantitative Restrictions in GATT Article XI.[230] As we argue below, it is misleading to claim both a violation of Article III and Article XI, since these are designed to capture different kinds of measures, and the appropriate categorization of the EU regulation on seals would exclude the

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224. Jose Alvarez has termed the perception that the WTO has the strongest legal regime in international law "penance-envy." Jose E. Alvarez, *The New Treaty Makers*, 25 B.C. INT'L & COMP. L. REV. 213, 226 (2002).

225. As noted above, the GATT has been the primary international agreement governing trade in goods since 1994. *See supra* notes 204-208 and accompanying text.

226. General Agreement on Tariffs and Trade, art. 1, Oct. 30, 1947, 61 Stat. A-3, 55 U.N.TS. 194 [hereinafter GATT].

227. An essential exception to MFN is GATT Article XIV(3), which permits countries to form regional trade agreements, allowing them to treat some of their trading partners differently from others. However, Article XIV was designed to mitigate violations of the MFN obligation and has been interpreted by the Dispute Settlement Body to preserve the obligation to the greatest extent possible. *See* Joanna Langille, Note, *Neither Constitution nor Contract: Understanding the WTO by Examining the Legal Limits on Contracting Out Through Regional Trade Agreements*, 86 N.Y.U. L. REV. 1482 (2011) (describing how Article XIV was designed to mitigate MFN violations and how MFN has been interpreted to be an "essential" WTO obligation which should not be varied).

228. GATT, *supra* note 226, art. III. There is also a somewhat differently framed National Treatment obligation that concerns taxation or fiscal measures.

229. *Id.*

230. GATT, *supra* note 226, art. XI.

application of Article XI to this dispute altogether.

The GATT also contains a General Exceptions clause in Article XX.[231] Under Article XX, a measure may be justified even if it violates another article of the GATT.[232] The Article contains a list of public policy rationales that can justify what would otherwise be a violation of other GATT rules. The public policy exceptions include measures taken to protect human or animal health, public morals, and those taken in relation to the conservation of exhaustible natural resources.[233]

In sum, Canada and Norway have claimed that the EU seal products ban violates Articles I, III and XI of the GATT, and that the Article XX General Exceptions do not justify the European Union's action.[234] This section will discuss each of the claims made by Canada and Norway, and will argue that, under current WTO law, the EU seal products ban does not violate either the Most Favored Nation obligation or the National Treatment obligation.[235] Further, we argue that *even if* the European Union's action violated the MFN or National Treatment requirements, the measure could be justified under the GATT General Exceptions.[236]

1. *Most Favored Nation Obligation*

Canada and Norway claim that the EU seal products ban violates the MFN obligation.[237] Set out in GATT Article I:1, the MFN obligation requires that WTO members not discriminate among their trading partners who are also WTO members.[238] Countries are permitted to impose tariffs up to the limit specified in their tariff bindings (based on thresholds agreed to in negotiations with other members).[239] However, the same tariff must apply to imports of all WTO members, unless there is a relevant exception (such as those for tariff-free trade between members of customs unions and free trade areas or for preferential treatment of developing country imports).[240]

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231. GATT, *supra* note 226, art. XX.

232. *Id.*

233. *Id.*

234. *See* Canada's Panel Request, *supra* note 20; Norway's Panel Request, *supra* note 20; Dispute Settlement Body, 24 February 2011, Minutes of Meeting, WT/DSB/M/293 (May 2, 2011), ¶ 74.

235. *See infra* Subsections IV.B.1 and IVB.2.

236. *See infra* Subsection IV.B.3.

237. Canada's Panel Request, *supra* note 20; Norway's Panel Request, *supra* note 20.

238. The relevant text of Article I:1 is as follows:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation . . . any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

GATT, *supra* note 226, art. I:1.

239. HOEKMAN & KOSTECKI, *supra* note 205, at 149.

240. *Id.* at 148. Hoekman and Kostecki refer specifically to "countries [who] are members of regional integration agreements." *Id.*

Canada and Norway both contend that the European Union is violating the MFN obligation with the seal products ban, but they differ in their reasons. Canada asserts that the ban violates MFN "because Canadian seal products are not accorded immediately and unconditionally any advantage, favour, privilege or immunity granted to like products originating in any other country."[241] This is simply a repetition of the language of GATT Article I:1, without a concrete argument as to why Canadian products are treated differently from those of the European Union's other trading partners.

Norway makes a different argument than does Canada. It claims that the European measure violates MFN because "[t]hrough the general prohibition and the exceptions set out therein, the EU seal regime appears to discriminate among like products originating in different countries . . . ."[242]

As the Certain Country of Origin Labeling (COOL) WTO panel recently observed in interpreting the TBT, as a general matter, exceptions are to be expected in a WTO member's legitimate policy measures and do not necessarily point to discrimination: "In fact, it is not atypical for any kind of regulation to have exceptions in terms of the products and entities that are subject to it. Some of the exceptions might be justifiable for practical reasons and facilitate implementing the measure at issue."[243] While it is not clear what claim Norway is making, it appears that Norway's argument focuses on the exception in the EU measure for indigenous peoples. Since only certain countries have indigenous populations, arguably the measure does not treat all of the European Union's trading partners equally. Some countries (such as Canada and Norway) may benefit from the exception, while others without indigenous populations will not.[244] This amounts to effective discrimination among trading partners in violation of the MFN obligation.

When analyzing whether a measure violates the MFN obligation, one must ask several questions.[245] First, does the measure facially and explicitly discriminate *based on the national origin* of the products in question or is it *origin-neutral*? If the former, the measure is a prima facie violation of Article I:1 and can only be justified under the General Exceptions clause of Article XX. Second, if there is no facial discrimination among trading partners, is there a difference in treatment when the measure is applied to different trading partners? In other words, is there a *disparate impact* created by the measure? In

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241. Canada's Panel Request, *supra* note 20.

242. Norway's Panel Request, *supra* note 20.

243. Panel Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, ¶ 7.684, WT/DS384/R (Nov. 18, 2011) [hereinafter *COOL*].

244. We pause to note that whether Norway will benefit from the exception is ambiguous. While Norway does have an indigenous group within its borders—the Sami people—it appears to have structured its legal argument on the premise that it will not benefit from the exception. For background on the Sami, see HARALD GASKI, SAMI CULTURE IN A NEW ERA: THE NORWEGIAN SAMI EXPERIENCE (1997); ROBERT PAINE, CAMPS OF THE TUNDRA: POLITICS THROUGH REINDEER AMONG SAAMI PASTORALISTS (2009); and TROND THUEN, QUEST FOR EQUITY: NORWAY AND THE SAAMI CHALLENGE (1995).

245. This method for approaching MFN questions has been articulated through a series of WTO cases, as discussed below. This approach began to be articulated in a GATT Panel Report, *Canada/Japan—Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber*, L/6470 - 36S/167 (July 19, 1989) [hereinafter *Japan—Lumber*].

some cases, a disparate impact could lead to a characterization of "de facto" discrimination; for example, the design and structure of the scheme could indirectly favor imports of some WTO Members over those of others, even though national origin is not explicitly mentioned. Third, is there an *intent* to discriminate among trading partners with respect to like products? Fourth, if there is discrimination (intentional or otherwise), is there a legitimate interest protected by the discriminatory policy that could justify it?

For a measure to violate MFN on its face, it must explicitly treat some trading partners less favorably than others with respect to like products.[246] The meaning of what a like product is for purposes of the MFN obligation is not straightforward. In the *Colombia—Ports* case, the WTO adjudicator appeared to view the entire universe of products affected by the regulatory scheme in question as "like."[247] If such an approach were taken here, the issue would be whether, with respect to seal products as defined by the ambit of the EU regulation, there is less favorable treatment of some products due to their national origin. This approach to likeness seems apposite, since Norway, at least, is challenging an exception to the scheme as an MFN violation, not the ban as such.

The EU measure makes no explicit distinctions between the countries with which the European Union trades.[248] Indeed, it does not mention any trading partners by name or differentiate between them in any other way. It is therefore origin-neutral. Thus, the measure is not facially discriminatory and in violation of MFN. Canada's bald assertion that the European measure discriminates among its trading partners is not supported by the substance of the European measure.

An origin-neutral measure can still violate MFN if it has the kind of disparate impact that constitutes de facto discrimination.[249] In the *Canada—Autos* case, the panel clarified that the MFN obligation allows WTO members to make *distinctions* between products, even if they are like, provided that those distinctions are not structured in such a way as to lead to differential treatment due to the national origin of the products.[250] This will occur when the distinctions in the scheme are, in effect, proxies for explicit national origin-

246. *Id.*

247. Panel Report, *Colombia—Indicative Prices and Restrictions on Ports of Entry*, ¶ 7.355 WT/DS366/R (Apr. 27, 2009) [hereinafter *Colombia—Ports*] ("In the Panel's view, it is not necessary to determine through lengthy analysis whether textiles, apparel or footwear arriving from other countries are in fact like products to those goods originating in and arriving from Panama. *Based on the design of the ports of entry measure, any textiles, apparel or footwear imported from territories other than Panama or the CFZ, are like products*, and would necessarily be allowed entry at 11 ports of entry in Colombia without presenting an advance import declaration, as long as the product did not circulate through Panama or the CFZ prior to arrival in Colombia.") (emphasis added).

248. *See* EU Seal Products Ban, *supra* note 8.

249. *See, e.g.*, Appellate Body Report, *Canada—Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R (June 19, 2000) [hereinafter *Canada—Autos*] ("Nevertheless, we observe that Article I:1 does not cover only 'in law', or *de jure*, discrimination. As several GATT panel reports confirmed, Article I:1 covers also 'in fact', or *de facto*, discrimination" (footnote omitted citing inter alia *Spanish Coffee*)); Panel Report, *Spain—Tariff Treatment Of Unroasted Coffee*, L/5135 - 28S/102 (June 11, 1981) [hereinafter *Spanish Coffee*].

250. *Canada—Autos*, *supra* note 249.

based criteria. In *Canada—Autos*, there was a closed list of automobile manufacturers who qualified for certain benefits.[251] In theory, these manufacturers could produce autos anywhere in the world, but in practice each of the manufacturers concentrated its production in one or several specific WTO member countries. Thus, the distinction in question was structurally designed to favor products from those WTO member countries in which the listed manufacturers had existing production facilities.

In the *Seal Products* case, Norway argues that the exception for indigenous products has a disparate impact.[252] The European Union permits the importation of products from countries with indigenous populations that hunt seals and bans products entirely from countries without indigenous populations.[253] Arguably, the exception operates to provide *more* favorable treatment, not less, to countries like Norway with indigenous peoples engaged in sealing than to those countries without indigenous sealing activity.

More profoundly, the concept of discrimination in the WTO is not based on the notion of *identical* treatment. The Appellate Body of the WTO made this clear in the *Shrimp/Turtle* case[254] in which it interpreted the nondiscrimination provisions that applied where WTO members were seeking to invoke GATT's Article XX General Exceptions clause in order to justify their measures. The AB held that the obligation not to discriminate between countries where the same conditions prevail also implied the obligation to treat differently countries where different conditions prevail.[255] Interpreting the meaning of "treatment no less favorable" in the context of the National Treatment obligation, an important GATT panel indicated that in some circumstances identical treatment can be less favorable.[256] In the *EC—Generalized System of Preferences* case, the AB also held that treating different countries differently could in some circumstances serve rather than undermine the relevant purposes of WTO law.[257] The AB held in *Canada—Wheat Exports and Grain Imports*:

> When viewed in the abstract, the concept of discrimination may encompass both the making of distinctions between similar situations, as well as treating dissimilar situations in a formally identical manner. The Appellate Body has previously dealt with the concept of discrimination and the meaning of the term "non-discriminatory", and acknowledged that, at least insofar as the making of distinctions between similar situations is concerned, the ordinary meaning of discrimination can accommodate both drawing distinctions *per se*, and drawing distinctions *on an improper basis*. Only a full and proper interpretation of a provision containing a prohibition on *discrimination* will reveal which type of differential treatment is prohibited. In all cases, a claimant alleging discrimination will need to establish that differential treatment has occurred in

251. *Id.* ¶ 80.

252. *See* Norway's Panel Request, *supra* note 20.

253. EU Seal Products Ban, *supra* note 8.

254. *US—Shrimp/Turtle*, *supra* note 3.

255. *Id.* ¶ 177.

256. Panel Report, *United States—Section 337 of the Tariff Act of 1930*, ¶ 5.11, L/6439 - 36S/345 (Nov. 7, 1989).

257. Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (Apr. 7, 2004) [hereinafter *EC—GSP*].

order to succeed in its claim.[258]

Indeed, the accommodation of WTO members who have indigenous communities and international legal obligations towards those communities may constitute a fulfillment rather than a breach of the relevant concept of nondiscrimination in the WTO. Here, one would need to interpret the relevant non-WTO international law and construct an interpretation of WTO law that heeds both legal regimes.

Further, we have been assuming that, like the closed list of manufacturers in the *Canada—Autos* case,[259] the indigenous communities exception inherently operates so as to exclude some WTO members' exports that otherwise meet the criteria of subsistence sealing, favoring those of Canada, with its Inuit community, and Norway, with its Sami population.[260] But the EU measure actually provides an exception for hunts "conducted by Inuit and *other indigenous communities [which] contribute to their subsistence*."[261] The word 'indigenous' is not defined by the EU measure,[262] and has eluded definition at the international level.[263] If the word is interpreted to include *any* indigenous group hunting seals for subsistence purposes, then in principle products that are produced in the required manner would be equally eligible for the exception regardless of where they came from. Norway then would not be able to make out a case for an "as such" violation of WTO law on the face of the regulation; whether the measure actually violated WTO law would be determined on the basis of how the European Union applies the scheme.[264]

Finally, we have suggested that, at first glance, an approach to the meaning of "like products" in this case could be appropriately based on the analytic at work in the *Colombia—Ports* panel ruling.[265] One might view the indigenous exception not as an exception to a general regulatory scheme that applies in seal products, but rather as a principle governing the general application of the law concerning the rights of indigenous peoples to the specific situation of seal hunting. In the *Seal Products* dispute, a panel could find that the seal products produced by aboriginals and those not produced by aboriginals are not like products. The consumer needs met by the two products

258. Appellate Body Report, *Canada—Measures Relating to Exports of Wheat and Treatments of Imported Grain*, ¶ 87, WT/DS276/AB/R (Aug. 31, 2005).

259. *See supra* note 249 and accompanying text.

260. As noted *supra* at note 244, it is unclear whether Norway feels that the Sami will be able to benefit from the indigenous exception. But there is nothing on the face of the EU measure to suggest such non-applicability.

261. EU Seal Products Ban, *supra* note 8, art. 3.1 (emphasis added).

262. *Id.*

263. For a discussion of the elusive nature of the term "indigenous peoples," see, for example, Benedict Kingsbury, *"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT'L L. 414 (1998).

264. For a discussion of the difference between "as such" violations and violations through the exercise of discretion, see Appellate Body Report, *United States—Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, ¶¶ 165-66, WT/DS268/AB/R (Nov. 29, 2004); and Robert Howse & Robert W. Staiger, *United States—Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, AB-2003-5, WT/DS244/AB/R: A Legal and Economic Analysis of the Appellate Body Ruling*, 5 WORLD TRADE REV. 471 (2006).

265. *Colombia—Ports*, *supra* note 247.

may be very different.[266] The exception for aboriginal products in the EU measure applies only to seal products made for *subsistence* purposes.[267] It is likely, therefore, that only small-scale production methods will be eligible for the exception to the EU measure. Thus the seal products made by indigenous communities for subsistence purposes could well serve different consumer needs than those produced through larger operations and by nonindigenous peoples for commercial purposes. Therefore, under the criteria for likeness, as established by *Spanish Coffee*,[268] there is a good argument that indigenous products are not 'like' products produced by nonindigenous peoples.

The distinction, tenable under the *Spanish Coffee* criteria, between indigenous-produced goods and nonindigenous goods is also made in other contexts.[269] The United Nations Declaration of the Rights of Indigenous Peoples, adopted by the General Assembly in 2007, enshrines the rights of aboriginals to maintain their culture and pursue their traditional livelihood.[270] This suggests that goods produced by aboriginals through traditional methods are not viewed as 'like' other goods, because they are fundamentally connected to the rights of indigenous peoples to maintain their culture and pursue a traditional livelihood. One hundred forty-four countries voted in favor of adopting the Declaration,[271] suggesting that most countries in the world consider aboriginal products distinct from non-aboriginal products. Since abiding by the Declaration and other international law instruments protecting the rights of aboriginal peoples was the explicit motivation for the EU exception for aboriginal-produced seal products,[272] aboriginal products are rightly viewed as not "like" other products. It will thus be difficult for Norway to substantiate its claim that the EU violates the MFN obligation.

The absence of intent by the European Union to discriminate against particular WTO members in favor of others may also be relevant, and point against a finding of an MFN violation. The GATT-era *Japan—Lumber* case holds that the party claiming discrimination has the burden of proving that there was an intent to discriminate.[273] This is generally shown by demonstrating that there was a diversion from 'normal,' objective categories to single out a particular imported product for special treatment.[274] While more recent case law does not insist on an intent requirement, recent panel rulings such as *Canada—Autos* and *Colombia—Ports* have stressed that the purpose of the MFN obligation is to prohibit discrimination based on country of origin.

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266. *See generally Spanish Coffee*, *supra* note 249 (including consumer needs in the definition of likeness).

267. EU Seal Products Ban, *supra* note 8, art 3.1.

268. *Spanish Coffee*, *supra* note 249.

269. *Id.*

270. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

271. *Declaration on the Rights of Indigenous Peoples*, UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES, http://social.un.org/index/IndigenousPeoples/DeclarationontheRightsof Indigenous Peoples.aspx (last visited Apr. 15, 2012).

272. EU Seal Products Ban, *supra* note 8.

273. *Japan—Lumber*, *supra* note 245.

274. *Id.*

The European Union did not adopt the indigenous exception so that it could discriminate among its trading partners; it argues that it implemented this measure simply to comply with its international law obligations. This is well established in the legislative history, as discussed above.[275] There is no indication that the European Union intended to privilege certain trading partners over others.[276] The fact that some countries happen to have indigenous populations and others do not may create an incidental disparate impact, but the EU scheme is not structured or designed to benefit those countries. Further, this classification into aboriginal and non-aboriginal products is (as discussed above and below) appropriate and sanctioned by international legal mechanisms.

Further, the EU measure, in addition to not being intentionally discriminatory under *Japan—Lumber*,[277] is justified by a legitimate interest. According to *Japan—Lumber*, the party defending has the burden of proving that there is a rational basis for a legitimate interest, and legitimate interests are defined extremely broadly.[278] In essence, the defending country must show a rational basis rooted in domestic policy.

In this case, it will be easy for the European Union to show a legitimate interest at stake in the exception for aboriginal products. The exception is arguably required by various international law instruments that recognize the right of aboriginal peoples to pursue traditional livelihoods and maintain their cultural practices. Therefore, the claim that there is an MFN violation will fail at this prong of the test as well. Indeed, in light of established WTO case law, the Canadian and Norwegian arguments seem farfetched. They are unlikely to succeed by claiming an MFN violation.

One final comment on the indigenous exception more generally is in order. Some scholars have argued that if the EU ban on seal products has the effect of harming the livelihood and traditional way of life of aboriginals, then the ban can be understood to violate the rights of indigenous peoples.[279] The determination of whether the aboriginal exception in the EU ban adequately fulfills the European Union's obligations to protect the rights of indigenous peoples is outside the jurisdiction of the WTO dispute settlement organs, which cannot address claims that non-WTO international agreements have been violated (unless those agreements are incorporated into or referenced in WTO law itself).[280] There is of course the question of whether the aboriginal exception in the EU ban is sufficiently sensitive to the different conditions of countries with particular aboriginal populations. This question is largely one of the effects that specific instances of the application of the aboriginal exception have on aboriginal communities where applications for aboriginal imports have

275. *See supra* notes 171-175 and accompanying text.

276. EU Seal Products ban, *supra* note 8.

277. *See Japan—Lumber*, *supra* note 245, at 27.

278. *Id.* at 31-32.

279. Kamrul Hossain, *The EU ban on the Import of Seal Products and the WTO Regulations: Neglected Human Rights of the Arctic Indigenous Peoples?*, POLAR RECORD (forthcoming 2012).

280. Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶ 56, WT/DS308/AB/R (Mar. 6, 2006) ("We see no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes.").

been refused. Canada's and Norway's WTO challenge is, by contrast, a claim that the EU scheme "as such" violates WTO law. Canada and Norway have challenged the EU scheme as a whole and have not identified any individual instances in which the European Union has refused to allow in aboriginal imports in violation of WTO law. We would further observe, as mentioned above, that the EU implementation of the aboriginal exception is the subject of active litigation in the European Union; it would be inappropriate for the WTO panel to operate on the hypothesis that the outcome of this litigation would be an interpretation of the aboriginal exception that results in a violation of WTO law.[281]

2. *National Treatment and Quantitative Restrictions*

Canada and Norway have also argued that the EU measure violates the National Treatment obligation and the prohibition on quantitative restrictions in Article XI. GATT Article III, the National Treatment obligation, requires WTO member states to treat imported products the same way they treat products produced domestically, under internal regulatory and taxation schemes.[282] GATT Article XI, a related article regarding Quantitative Restrictions, requires WTO members to refrain from banning or restricting imports of particular products.[283] Unlike Article III, Article XI is aimed at border measures rather than internal regulations.[284] Canada and Norway claim both an Article III and an Article XI violation.[285] As will be discussed later, these are best understood as arguments in the alternative. The architecture of the GATT would make little sense if internal laws, regulations and requirements could also be viewed as restrictions and prohibitions on imports or exports. If that were so, then internal laws, regulations, and requirements would be prima facie violations of the GATT, even if they were nondiscriminatory. The permissiveness of nondiscriminatory internal laws, regulations and requirements as provided by the National Treatment obligation—an essential feature of the balance between trade liberalization and domestic policy space—would be undermined, because once a measure falls under Article XI, and provided it does not qualify under any of Article XI's specific exceptions, the measure is prima facie a violation of the GATT, whether discriminatory or not.

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281. *See* Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, § V, ¶ 13 (Oct. 22, 2001) (adopted Nov. 26, 2001) ("There is no way of knowing or predicting when or how that particular legal proceeding will conclude in the United States. The *Turtle Island* case has been appealed and could conceivably go as far as the Supreme Court of the United States…. It would have been an exercise in speculation on the part of the Panel to predict either when or how that case may be concluded … The Panel was correct not to indulge in such speculation, which would have been contrary to the duty of the Panel, under Article 11 of the DSU, to make 'an objective assessment of the matter … including an objective assessment of the facts of the case'").

282. GATT, *supra* note 226, art. III.

283. GATT, *supra* note 226, art. XI.

284. Article XI is not part of the National Treatment obligation. Instead, it is termed "Quantitative Restrictions." However, it is related to the National Treatment obligation for reasons discussed below.

285. Canada's Panel Request, *supra* note 20; Norway's Panel Request, *supra* note 20.

a. *Article III v. Article XI*

The test that has been adopted by the WTO dispute settlement organs to determine whether a measure is a ban (Article XI) or a regulation (Article III:4) looks to what is called "Ad Note III" of Article III of the GATT.[286] Ad Notes are legally binding interpretive notes inserted by the drafters of the GATT. The note accompanying Article III suggests that the way to distinguish between Article XI and Article III is to look at whether the measure affects the 'importation' of products (Article XI), or whether it affects 'imported products' (Article III).[287] In other words, Article XI does not refer to internal requirements, but measures imposed at the border, while Article III applies to internal requirements and regulations.[288] As interpreted by the panel in *Canada—Alcoholic Beverages*, this means that if a measure applies both to domestic products and to imported products, it should fall under the Article III rubric, even if its application to imports occurs at the border.[289] If it applies exclusively to imported products, and is solely a border measure, then Article XI is the relevant clause.[290] The panel offered a similar analysis in *EC—Asbestos,* in which the panel applied Ad Note III in finding that France's ban on asbestos and asbestos products was to be assessed under Article III:4 and not Article XI, because it applied to both domestic and imported products. In *EC—Asbestos* the panel also rightly noted that for Article III to govern, the measure applied to imported products need not be identical to that aspect applied to domestic products.[291] These findings of the panel in *EC—Asbestos* were not challenged on appeal.

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286. Interpretative Note to GATT Article III ("*Ad* Art. III") provides that:

> Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

GATT, *supra* note 226, art. III. Annex I, *Ad* Art. III (Interpretative Note).

287. *See* Panel Report, *Canada—Administration of the Foreign Investment Review Act*, ¶ 3.13, L/5504 - 30S/140 (Feb. 7, 1984) [hereinafter *Canada—FIRA*].

288. The 1984 Panel Report on *Canada—FIRA* notes that:

> The Panel shares the view of Canada that the General Agreement distinguishes between measures affecting the 'importation' of products, which are regulated in Article XI:1, and those affecting 'imported products', which are dealt with in Article III. If Article XI:1 were interpreted broadly to cover also internal requirements, Article III would be partly superfluous. Moreover, the exceptions to Article XI:1, in particular those contained in Article XI:2, would also apply to internal requirements restricting imports, which would be contrary to the basic aim of Article III. The Panel did not find, either in the drafting history of the General Agreement or in previous cases examined by the CONTRACTING PARTIES, any evidence justifying such an interpretation of Article XI. For these reasons, the Panel, noting that purchase undertakings do not prevent the importation of goods as such, reached the conclusion that they are not inconsistent with Article XI:1.

Id.

289. Notification of Mutually Agreed Solution, *Canada—Tax Exemptions and Reductions for Wine and Beer*, WT/DS354/2 (Dec. 23, 2008) [hereinafter *Canada—Alcoholic Beverages*].

290. *Id.*

291. Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 8/92-8.99. 893, WT/DS135//R, (Mar. 12, 2011) [hereinafter *EC—Asbestos (Panel)*].

In this case, the EU measure applies both to internal and imported products. It reaches equally products made within the European Union and those made outside of the European Union. It should therefore be considered an Article III internal regulation rather than an Article XI quantitative restriction, under the Ad Note III analysis. However, given that Canada and Norway have argued that the EU measure violates Article III and Article XI, we consider both claims below.

b. *GATT Article III:4*

As argued above, since the EU measure is an internal law, regulation, or requirement applied to both domestic and imported products, it should be evaluated under GATT Article III:4. Article III requires WTO member states to provide even-handed treatment to imported products and like domestic products.[292] Article III distinguishes between taxation and regulation: Article III:2 deals with taxation[293] and III:4 with regulation.[294] The EU measure does not impose a tax but rather seeks to regulate the importation of seal products;[295] it therefore must be analyzed under Article III:4. Canada and Norway have both claimed that the seals measure violates III:4.[296] Canada states that III:4 is violated because "the measures result in less favourable treatment of seal products from Canada than like products originating in the European Union."[297] Norway submitted that "[t]hrough the general prohibition and the exceptions set out therein, the EU seal regime appears to discriminate between imported products and like products originating in the European Union, in violation of Article III:4 of the GATT 1994."[298]

The approach of the WTO Appellate Body to Article III:4 has generally involved a two-step process. The first step considers what is the appropriate universe of "like" products applicable to the dispute, and the second step determines whether the group of imported like products is treated less

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292. GATT, *supra* note 226, art. III.

293. The full text of Article III:2 is as follows:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

GATT, *supra* note 226, art. III:2.

294. The full text of Article III:4 is as follows:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

GATT, *supra* note 226, art. III:4.

295. EU Seal Products Ban, *supra* note 8.

296. Canada's Panel Request, *supra* note 20; Norway's Panel Request, *supra* note 20.

297. Canada's Panel Request, *supra* note 20, at 2.

298. Norway's Panel Request, *supra* note 20, at 2.

favorably than the group of domestic like products.[299] The "right to regulate" principle in the WTO system is discussed by the Appellate Body in recent case law.[300] The idea, already expressed in the introduction to this Article,[301] is that the WTO is not a constitutional regime, a super-regulator, or a global governmental authority at the bar of which states must justify themselves before regulating.[302] On the contrary, regulations are presumed to be legitimate unless they have specific features that engage the precise treaty obligations of the WTO system. Merely because, actually or hypothetically, a measure has some effect on trade does not make it suspect or subject to scrutiny. The seal products regulation is neutral on its face as between domestic and imported products,[303] and it has no features that raise suspicions that it has any aim other than to further legitimate animal welfare goals, and certainly no features to favor domestic products over imported ones. The exceptions provisions, if anything, advantage imported over domestic products as they provide some exceptions for personal property imported into the European Union, and the "indigenous" exception may actually operate to give *more* favorable treatment to some products from outside the European Union, depending on how "indigenous" is interpreted. In any case, there is nothing in the design and structure of the EU scheme that suggests that it would operate with the kind of discriminatory effect or intent that it is the purpose of Article III to discipline.

Based on the two-step approach endorsed by the Appellate Body[304] the panel will first assess whether domestic and imported products are "like." The likeness test used in the National Treatment-regulation context has been interpreted to include both like products and those that are directly competitive and substitutable.[305] Determining whether products are "like" involves comparing physical characteristics, consumer tastes and preferences, end uses, and customs classifications.[306] The likeness test also includes factors such as health—if a product has a different effect on health than another product, and this affects consumer's perceptions of the two products, they may not be considered "like."[307] In the recent *US-Clove Cigarettes* report, the Appellate Body affirmed its earlier ruling in *EC-Asbestos*: "regulatory concerns and considerations may play a role in applying certain of the 'likeness' criteria (that is, physical characteristics and consumer preferences) and, thus, in the determination of likeness under Article III:4 of the GATT 1994."[308]

In the *EC—Seal Products* case, domestically produced seal products seem

299. Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 84-141, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *EC—Asbestos (Appellate)*].

300. *China—Publications and Audiovisual*, *supra* note 28, ¶¶ 136-138, 206-207, 218-233; *US—Clove Cigarettes*, ¶¶ 95-96.

301. *See supra* Introduction.

302. *See infra* Part IV.

303. EU Seal Products Ban, *supra* note 8.

304. *See supra* note 299 and accompanying text.

305. *EC—Asbestos (Appellate)*, *supra* note 299.

306. *See id.*

307. *Id.* ¶ 151.

308. *US-Clove Cigarettes*, ¶ 117.

to be "like" imported seal products. Seal products are harvested and processed in Europe, as they are in the rest of the world; seals are caught in Finland and Sweden and processed in Scotland, Denmark, and Italy, just as they are in Canada, Norway, etc.[309] There is no discernible difference in terms of end use between European products and those hunted and produced elsewhere. They appear to be in competition, to meet similar needs, and so on. As noted, the EU ban applies identically to EU and non-EU seal products, as does the aboriginal exception, which may actually result in more favorable treatment of imports from countries with aboriginal communities outside the European Union.

Thus, in order for Canada or Norway to make a prima facie case of a violation of National Treatment, they would have to identify some group of internally produced *non*-seal products that are permitted in the European Union and that are "like" seal products. This would be very difficult to do, and Canada and Norway have not suggested that their complaint centers on the view that the EU scheme favors domestic EU products that are substitutes for banned seal products. First of all, non-seal products have, by definition, different physical characteristics than seal products. As the AB held in *EC—Asbestos*, it would generally be difficult to find that products are "like" where there are significant differences in physical characteristics. These physical differences, namely the species used in the making of the product, are highly salient from the perspective of consumer preferences, given that it is precisely the physical characteristic of being made from seals that has led to widespread public concern about these products, given moral beliefs about the cruel treatment of seals in their making. Secondly, considering consumer preferences as a criterion independent of physical characteristics, to the extent that the non-seal products do not carry with them the same animal welfare concerns as seal products, and for other reasons too, perceptions of the vast majority of European Consumers of seal products are different, pointing to a finding of "unlikeness." As we have noted above, the EU regulation reflects widespread public outrage at the treatment of seals in particular.[310]

If Canada or Norway were to establish that there is a category of "like" domestic EU non-seal products to which the treatment of imported seal products should therefore be compared, then Canada or Norway would need to establish that the treatment of the entire *group* of like imported products (seal *and* non-seal) is less favorable than the entire *group* of like domestic products (seal *and* non-seal). But there are simply no elements of the scheme that indicate a de jure or a de facto bias in favor of domestic products. Hypothetically, this could be the case if, for example, the prohibited seal products were almost exclusively imported while the permitted like products were almost entirely of internal EU origin.[311] But there are several EU

309. *EFSA Report*, *supra* note 10.

310. *See supra* note 153 and accompanying text.

311. *See* Lothar Ehring, *De Facto Discrimination in World Trade Law: National and Most-Favored-Nation Treatment—or Equal Treatment?*, 36 J. WORLD TRADE 921 (2002); Nicolas F. Diebold, *Non-discrimination and the Pillars of International Economic Law* (IILJ Emerging Scholars Paper 18, 2010) (describing how the nondiscrimination principle is the "cornerstone" of the international trading regime).

countries which profit from sealing—Denmark, Italy, Finland, and Scotland, among others—and which will be harmed by the ban. Thus, within the group of "like" domestic products there are some products the competitive opportunities for which are also negatively affected by the ban. This points strongly in favor of a conclusion of even-handedness.

Even if it were the case that the EU ban were de facto detrimental to the competitive opportunities for imported products relative to like domestic products, there should still be no violation of National Treatment if the detrimental effects are exclusively attributable to a legitimate regulatory distinction.[312] While the Appellate Body has held that the concept of National Treatment in WTO law encompasses disciplines on both de jure and de facto discrimination,[313] it has also excluded from the meaning of de facto discrimination a situation where the "detrimental impact on imports . . . stems exclusively from a legitimate regulatory distinction."[314]As we have shown in the earlier parts of this Article, the regulatory distinctions in the EU seals measure are based on legitimate nondiscriminatory policy objectives. This includes the exceptions in the EU scheme. Given that a measure may have multiple objectives,[315] it may contain regulatory distinctions that serve these different purposes. Provided that all of the objectives are legitimate, i.e. non-protectionist, any differential treatment that results from the application of those distinctions will not be deemed less favorable within the meaning of Article III:4; thus, there will be no violation of National Treatment.[316]

c. *GATT Article XI*

If the panel concludes that GATT Article XI applies instead of Article III (a conclusion which would be incorrect under the current case law, as discussed above),[317] there will almost certainly be a violation of Article XI found. The

312. *US—Clove Cigarettes*, ¶ 182. Although the approach here described was developed by the Appellate Body in interpreting the National Treatment provision of the Technical Barriers to Trade Agreement, not Article III:4 of the GATT, in the same decision the Appellate Body held that the same conception of the right to regulate applies to the interpretation of both Agreements, and particularly that "[t]he balance set out in the preamble of the *TBT Agreement* between, on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members' right to regulate, is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX." *Id.* ¶ 96.

313. *See supra* note 249, *Canada—Autos*, ¶ 6.87.

314. *US—Clove Cigarettes*, ¶ 181.

315. *Id.* ¶ 115. Thus, in *US—Clove Cigarettes*, the AB held that it was legitimate for the US to consider, in determining the scope of its regulation of flavored cigarettes, both the public health objective of preventing young people from becoming addicted to tobacco as well as the concern that banning a product to which a large population group were already addicted would cause undue suffering. However, based on the factual record of the panel, the AB found that balancing the two different legitimate objectives could not justify in this case banning clove cigarettes and not menthol ones, since the significant population of menthol smokers could continue to satisfy their addiction by switching to permitted non-menthol tobacco cigarettes. The two US objectives were both perfectly legitimate, even if on the facts, the Appellate Body held that the regulatory distinction the US drew between clove and menthol cigarettes could not be justified by the need to balance those legitimate objectives.

316. *US-Clove Cigarettes*, ¶ 215.

317. *See supra* Subsection III.2.A.

Article holds that any quantitative restriction or any measure having the effect of such a restriction is impermissible.[318] Therefore, if the EU measure counts as such, then it is prohibited. Article XI does contain certain exceptions,[319] but they do not seem likely to apply in this case.

If Article XI is found to apply, therefore, the EU measure can only be justified under the General Exceptions clause of the GATT.[320] This exceptions clause applies to all GATT violations and is analyzed in detail below.

3. *General Exceptions (Article XX)*

If a claimant can establish a prima facie violation of a provision of the GATT, the burden shifts to the respondent to justify the measure under the General Exceptions clause of Article XX.[321] Article XX has two parts.[322] First, there is the so-called "chapeau" of the Article, which requires that measures not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade . . . ."[323] Second, Article XX contains a list of policy justifications, which allows member states to justify trade restrictive measures that would otherwise violate the GATT. These justifications include, among others, the protection of public morals, public health, environmental protection, and natural resource conservation.[324]

As indicated by the Appellate Body in *China—Publications and Audiovisual* and in *US—Clove Cigarettes*, Article XX as a whole can be understood as a reflection of the "right to regulate" under WTO law, especially when considered in conjunction with other norms such as National Treatment.[325] The structure of Article XX shows that the Article is designed to cope with both instrumental forms of regulation and regulation that is expressive of intrinsic moral values. Listed as legitimate objectives under

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318. GATT, *supra* note 226, art. XI.

319. *Id.*

320. *Id.* art. XX.

321. *Id.* art. XX. The relevant portions of Article XX are as follows:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
> (a) necessary to protect public morals;
> (b) necessary to protect human, animal or plant life or health;
> . . . .

Id. GATT Article XX is rightly understood as a type of affirmative defense. *See* Panagiotis Delimatsis, *Protecting Public Morals in a Digital Age: Revisiting the WTO Rulings on* US—Gambling *and* China—Publications and Audiovisual Products, 14 J. INT'L ECO. L. 257, 261 (2011). For a discussion of how the EU envisaged defending the seal products ban under Article XX, see *Proposal for a Regulation Concerning Trade in Seal Products*, *supra* note 50, at 11-13.

322. Nicolas F. Diebold, *The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole*, 11 J. INT'L ECO. L. 43, 47 (2007); Feddersen, *supra* note 1, at 84, 91.

323. GATT, *supra* note 226, art. XX; *see also* Delimatsis, *supra* note 321, at 261-62.

324. GATT, *supra* note 226, art. XX (a)-(b), (g).

325. *China—Publications and Audiovisual*, *supra* note 28, ¶ 415(a).

Article XX are not only human and animal life and health, but also public morals.[326] What we call "public morals" regulation may, however, be justified as either instrumental regulation designed to counter certain social ills or as expressive regulation designed to express or give force to intrinsic moral intuitions or shared values.

Thus, in the *US—Gambling* case, in seeking to justify its ban on internet gambling under the General Agreement on Services (GATS)[327] equivalent to the GATT public morals exception, the United States cited a range of concrete social harms associated with gambling, including organized crime and underage gambling.[328] The United States, in other words, used instrumental, material reasons to justify its gambling ban. It did not argue for the ban in terms of what was necessary to express moral opprobrium at gambling. The United States is a constitutional regime founded on separation of church and state, and such moral judgments are arguably anathema to the American approach to regulation; indeed, they may raise serious issues of constitutionality.[329] One can imagine that another WTO member with a different kind of domestic political regime might be more inclined to justify prohibitions on gambling as expressions of what is regarded as intrinsic right or wrong under the creed followed by the majority of its society.

In the case of the EU regulation, as it applies to animal welfare, we are faced with a dual-purpose measure: it is aimed instrumentally at reducing unnecessary animal suffering, a goal that engages public morals as well as the protection of animal life and health as such; it is also a noninstrumental expression of moral opprobrium at animal cruelty, and consumer behavior that is complicit with that cruelty.[330]

Thus, under Article XX of the GATT, the justification for the EU ban must be assessed in light of this dual purpose. Even if empirical issues exist concerning the necessity of this measure for reducing the gratuitous suffering of seals, still the law may reflect what is morally unacceptable in terms of the complicity of EU consumers with animal cruelty, and thus the EU seal regulation may also be a *direct* expression of the community's intrinsic ethical or spiritual beliefs about what constitutes cruelty, and a statement of outrage against such practices. Beliefs about animal welfare cannot themselves be challenged, or indeed substantiated, by scientific policy analysis. As a direct expression of such beliefs (indeed, perhaps the most direct expression in our tradition of disapprobation—a ban), the measure is "necessary" for the protection of public morals. This appreciation of the dual purpose of animal

326. GATT, *supra* note 226, art. XX.

327. The GATS was one of the new agreements that resulted from the Uruguay Round of trade negotiations, extending the multilateral trade rules to cover trade in services. *See supra* Section III.A. For a discussion of how the GATS provision on public morals follows that of the GATT, see Delimatsis, *supra* note 321, at 276.

328. *US—Gambling, supra* note 28, ¶ 74.

329. Most obviously, an Establishment Clause issue. *See* U.S. CONST. amend. I; *see also* FRANK J. SORAUF, THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE (1976); PAUL J. WEBER, EQUAL SEPARATION: UNDERSTANDING THE RELIGION CLAUSES OF THE FIRST AMENDMENT (1990).

330. *See supra* Part II for a description of the purpose of the regulation.

welfare regulation, reflected in the World Organisation for Animal Health's notion that animal welfare should be addressed by *both* science- and ethics-based standards, will pervade our discussion of the specific legal issues arising under the Article XX exceptions provision, and in particular, the complexity in the application of the necessity test found in both Article XX(a) and Article XX(b) to such dual purpose measures. Since the EU measure seeks both to protect public morals and the health of animals, it can be justified under both paragraphs of Article XX. As long as the EU ban can be justified under *either,* it will be WTO-compliant. This subsection will lay out the legal argument which justifies the EU seal products measure under both Article XX(a)—public morals—and Article XX(b)—animal health. We argue that the EU measure is well within the protection afforded by Article XX and therefore should be upheld by a WTO panel.

a. *Article XX(a): Public Morals*

In the *US—Gambling* case, in interpreting the 'public morals' exception in Article XIV of GATS, the panel favored a dynamic approach to the meaning of 'public morals.'[331] "In the panel's view, the content of these concepts for members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values."[332] The panel suggested that each WTO member has considerable discretion to determine what practices would violate the moral code of the community. Based on the panel's deferential reasoning as to the content of public morals, there is no reason why the content of 'public morals' could not extend to beliefs of the importing country concerning the wrongfulness of consuming products produced in a manner that is perceived to constitute cruelty to animals. In this Article, we have marshaled considerable evidence to suggest that the EU measure reflects widespread contemporary beliefs that the practices in question constitute cruelty, rooted in living European religious and philosophical traditions[333]—beliefs that are common not to only one state but to an otherwise diverse community of states. It is clear from the jurisprudence that the currently prevailing or widespread societal beliefs and values are relevant; this is consistent with the general principle of dynamic or evolutionary interpretation of treaty terms, including the categories of public policy enumerated in the paragraphs of Article XX, which have been repeatedly affirmed by the WTO Appellate Body.[334] We note here the overwhelming majority vote in favor of the regulation by popular representatives of the European people in their Parliament.[335] Especially given the dynamic nature of the public morals

331. *US—Gambling*, *supra* note 28. For a detailed history of the development of the public morals doctrine (and the many changes it underwent), see Feddersen, *supra* note 1.

332. Report of the Panel, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.461, WT/DS285/AB/R (Nov. 10, 2004).

333. *See supra* Parts I and II (describing the long history of animal welfare regulation in Europe and the purpose behind the European measure).

334. *China—Publications and Audiovisual*, *supra* note 28, ¶ 396 (affirming earlier Appellate Body decisions such as *US—Shrimp/Turtle*).

335. *See supra* note 55.

justification, the EU measure should clearly be permitted under the Article XX(a) exception.[336]

One objection to this straightforward argument comes from Mark Wu.[337] In discussing the WTO jurisprudence on public morals, Wu creates a distinction absent from the jurisprudence, and contrary to the structure of Article XX, between "inward-directed" and "outward-directed" measures.[338] Inward-directed measures concern interests solely within the territory of the restricting WTO member. Outward-directed measures are those that aim to protect interests outside as well as inside the territory of the trade-restricting measure.[339] In terms of Wu's categories, the EU regulation would be outward-directed even though the moral concern is directly with the conduct of consumers within the territory of the European Union, because the measure also has the intent or effect of protecting animals that are located, in part, outside the territory of the European Union. According to Wu, in *US—Gambling*, the Appellate Body only endorsed inward-directed measures under the public morals rubric, leaving uncertainty whether outward-directed measures are covered.[340]

However, Wu's distinction has no basis in the text of the provision.[341] It is widely accepted, for example, that imports of child pornography can be banned on the basis of public morals;[342] under Wu's analysis such a ban would now become unsupportable on the grounds that, in as much as it protects children in other countries against exploitation by pornographers, this would be an outward-directed measure. Wu's approach is intrinsically flawed as it does not address the basic fact, central to our analysis in this Article, that much, if not most, moral regulation has a dual purpose Such regulation is required both to express intrinsic moral beliefs *and* to protect defined interests.

Although the Appellate Body did not opine on this matter in *US—Gambling*, in *Shrimp/Turtle* the AB explicitly mentioned Article XX(a) as among the provisions of Article XX that would allow WTO members to condition imports on the exporting country adopting certain policies.[343] These are trade restrictions that Wu explicitly puts in the outward-directed category. Thus, even though Wu's categories have no basis in themselves in WTO law or jurisprudence, what he has chosen to define as outward-directed measures have already been contemplated by the AB to be, in principle, within the ambit of

336. For a discussion of the use of dynamic interpretation in an Article XX(a) context, see Feddersen, *supra* note 1. *But see* Peter L. Fitzgerald, *"Morality" May Not Be Enough To Justify the EU Seal Products Ban: Animal Welfare Meets International Trade*, 14 J. INT'L WILDLIFE L. & POL. 85, 128 (2011) (arguing that the current form of the EU ban may pose Article XX problems).

337. Wu, *supra* note 4; *see also* Thomas, *supra* note 1, at 626 (addressing this counterargument in the animal welfare context).

338. Wu, *supra* note 4.

339. *Id.* at 216.

340. *Id.* at 334.

341. *Cf.* GATT, *supra* note 226, art. XX (containing no provision related to internally or externally directed measures).

342. *See* FRANCESCO FRANCIONI, ENVIRONMENT, HUMAN RIGHTS AND INTERNATIONAL TRADE 11 (2001); Judith Matloff, *As Porn Proliferates, S. Africa Debates Free Speech*, CHRISTIAN SCI. MON., Aug. 8, 1997, at 5.

343. *US—Shrimp/Turtle*, *supra* note 3, ¶ 121.

Article XX(a).

The next issue in the Article XX analysis is whether the EU measure is "necessary"—i.e. whether it is the "least restrictive measure" available.[344] The text of Article XX(a) states that for a measure to be justified, it must be "necessary to protect public morals."[345] One of the most fundamental aspects of the "right to regulate" under Article XX is a WTO member's sovereign prerogative to determine the "level of protection" it is seeking. This is a notion that has been repeatedly affirmed by the WTO Appellate Body.[346] The complaining member cannot challenge the decision of the regulating member to seek a very high level of protection—and indeed a key weakness of Canada's and Norway's case is that they appear simply not to accept the level of protection the European Union seeks, on the basis of ethical beliefs among its citizens about what constitutes "cruelty."

The concept of "necessity" in relation to public morals was elaborated by the AB in the *US—Gambling* ruling.[347] The regulating member need only make a prima facie case of necessity, showing there is a plausible or reasonable fit between the measure and its objectives, taking into account both the objectives it is intended to achieve and the degree of trade restrictiveness involved in obtaining them. Once this burden is met, the onus of proof is reversed and it is the complaining party that must prove that there is a reasonably available, less restrictive alternative for the regulating member; otherwise the measure will be found to meet the necessity test.[348] With respect to what is a "reasonably available" less restrictive alternative, the AB has opined: "[a]n alternative measure may be found not to be 'reasonably available' . . . where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties."[349] As the panel held in the recently decided *US—Clove Cigarettes* case (applying the notion of a least restrictive alternative in the context of the TBT), it is not enough for the complainant merely to list possible or hypothetical less trade restrictive alternatives; rather, the complainant must show that the alternative in question will provide an equivalent contribution to the defending member's legitimate objective.[350]

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344. For an argument that the EU measure fails the necessity test, see Fitzgerald, *supra* note 336.

345. GATT, *supra* note 226, art. XX(a). For further discussion of the meaning of necessity, see Christopher Doyle, *Gimme Shelter: The "Necessary" Element of GATT Article XX in the Context of the* China—Audiovisual Products *Case*, 29 B.U. INT'L L.J. 143 (2011).

346. *EC—Asbestos (Panel)*, *supra* note 291, ¶ 168; Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 57, WT/DS332/AB/R (Dec. 3, 2007) [hereinafter *Brazil—Tyres*].

347. *US—Gambling*, *supra* note 28.

348. *Id.* ¶ 310

349. *Id.* ¶ 308.

350. *United States—Clove Cigarettes*, *supra* note 311, ¶ 7.423:

> The problem is that the mere listing of two dozen alternative measures without more does not show that such measures would make an equivalent contribution to the achievement of the objective at the level of protection sought by the United States. We further note that Indonesia does not specify whether it is any one of these measures, or some

As noted, in *US—Gambling* the United States sought to justify the challenged measure instrumentally under Article XX solely on the basis of its contribution to the avoidance of certain material social ills, and not as an expression of intrinsic moral beliefs or intuition.[351] The analysis of "necessity" in *Gambling* would thus be applicable to the instrumental aspect of the EC measure, namely the actual reduction or avoidance of gratuitous suffering of seals. Just as the AB held in *Shrimp/Turtle* that a ban on imports of shrimp fished in a way that leads to deaths of turtles was related to conserving those turtles,[352] so with respect to seals, the ban unquestionably reduces to some extent the market for seal products, and thus the number of seals killed.[353]

Since the European Union can easily establish a logical relationship between the measure and the reduction of suffering of seals, Norway and Canada would then face the burden of proving the existence of a less trade-restrictive alternative that would achieve the same amount of reduction in suffering. The manifest evidence of Canada's inability or unwillingness to enforce even its own (inadequate relative to the moral beliefs expressed in the European ban) domestic standards for humane killing will make it very difficult for Canada to show that a less restrictive alternative is reasonably available that will be effective in the real world.[354]

Some commentators have suggested, however, that a less deferential approach to the necessity test under Article XX(a) is visible in the later WTO ruling in *China—Publications and Audiovisual*.[355] In that case, China sought to justify restrictions on modalities by which publications could be imported and distributed in China on the theory that the importer/distributor performed the role of vetting the materials for conformity with China's censorship laws.[356] China argued that these laws were aimed at the protection of public morals. The AB appeared to be subjecting the Chinese measure to greater scrutiny than it did the US measure in *US—Gambling*, finding that China had not shown that a proposed less restrictive measure was unavailable. (That measure was the direct enforcement of censorship by Chinese government authorities.)

We submit that the AB's approach was justified because the actual

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> combination of these measures, or all of these measures, that would be the alternative measure(s).

This finding of the panel was not appealed. It is true that under the TBT, the general burden of proof is on the complainant, while under Article XX of the GATT, the general burden is on the respondent. *See supra* text accompanying note 321. However, as just discussed, pursuant to the AB ruling in *US—Gambling*, under Article XX the specific burden of proof with respect to the existence of less restrictive measures is on the complainant as well.

351. *See supra* notes 327-328 and accompanying text.

352. *US—Shrimp/Turtle*, *supra* note 3, ¶ 141.

353. Note that other major markets are also off-limits, such as the United States and now Russia, so it is unlikely that production could be simply diverted to other places where seal products are permitted. Canada has been attempting to open up other markets, such as China. *Canada To Sell Seal Meat to China*, CBC NEWS (Jan. 12, 2011), http://www.cbc.ca/news/canada/newfoundland-labrador/story/2011/01/12/nl-china-seal-112.html.

354. For a complete description of Canada's intransigence and spotty enforcement record in preventing cruelty to seals, see *EFSA Report*, *supra* note 10.

355. Delimatsis, *supra* note 321; Doyle, *supra* note 345.

356. *China—Publications and Audiovisual*, *supra* note 28, ¶ 127.

measure under scrutiny was not itself an expression of public morals. Rather, the impugned measure was a modality claimed to be supportive of the underlying moral regulation.[357] This makes the measure different from the one at issue in *US—Gambling*. Especially where a WTO member is justifying a regulation in its noninstrumental aspect as an expression of intrinsic moral beliefs or intuitions, scrutiny should be higher where a measure looks like some kind of commercial restriction rather than the kind of sanction usually associated with an expression of moral disapprobation, such as a ban that directly targets conduct that is the object of moral opprobrium. Canada's Prohibition-era ban on alcohol could be understood in part as a noninstrumental expression of moral opposition to drinking (like bans in some Islamic countries); but the operation of governmental liquor monopolies would require a much more elaborate justificatory logic on noninstrumental grounds, for instance. The EU seals ban is a clear example of a direct expression of intrinsic moral disapprobation, and as the disapprobation reflects the widely held beliefs of the community, the measure is certainly "necessary" in its noninstrumental aspect.[358]

Any alternative approach to assessing the noninstrumental aspect of moral regulation that mimics the approach to instrumental regulation may well result in intractable dilemmas of legitimacy and institutional competence for the WTO adjudicator.[359] Various Islamic countries and Israel have restrictions on importing swine and pork products. There may be arguments within the relevant religious communities as to whether consumption of the products in question is actually incompatible with religious strictures. Is the WTO adjudicator then to summon different leaders within those religious communities, and make a determination about whether the ban is necessary for purposes of upholding the underlying religious creed or law? Or with respect to India's restrictions on imports of beef, should the WTO adjudicator really interrogate Hindu beliefs about the sanctity of cows, therefore raising the question of whether the ban on beef is really necessary to avoid offending Hindu sensibilities? Such decisionmaking would be inherently at odds with one of the major purposes of allowing moral regulation under the WTO in the first place: preserving the pluralism of the members of the international community that constitute the WTO.[360]

Canada and Norway claim that their sealing practices are humane. The EU ban expresses widely held beliefs that these practices are inhumane or cruel. This expressive function of the law cannot fully be assessed through the weighing or debating of scientific evidence of how much or little seals suffer from a given method of killing. It may be widely believed in the European

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357. As such, it could not be considered to be a measure that directly regulated public morals at all.

358. *See* STEVEN KELMAN, WHAT PRICE INCENTIVES? ECONOMISTS AND THE ENVIRONMENT 27-28 (1985) (arguing that the ethical dimensions of regulation, including moral stigmatization, may not be more appropriately served by economic forms of regulation).

359. For further discussion of the institutional problems with adjudicating moral and religious claims, see *infra* Part V.

360. *See infra* Part V.

Union that the very spectacle of the animals being slaughtered for commercial exploitation in callous indifference to their suffering is dehumanizing and an affront to the proper relation of man to animal—just as the Puritans found that bear-baiting was inherently degrading or dehumanizing.[361] It is erroneous for Canada and Norway to maintain that science can establish that any particular method of slaughter is not cruel or that any particular level of suffering is necessarily acceptable as humane. This is contrary to the fundamental principle, articulated in numerous cases, that a WTO member is entitled, as a sovereign prerogative, to determine the level of protection it is seeking from its regulation. Consistent with the pluralist approach of this Article, the role for the WTO adjudicator is to assess the contribution of the measure to the level of protection chosen by the regulating member.

The importance of sincerity, and of assuring that the measure is not a pretext for protectionist, discriminatory treatment of imports, is sometimes confused with the notion that invocation of the public morals exception requires moral purity. In the *US—Gambling* case, for example, Antigua unsuccessfully questioned the legitimacy of the United States' objective, given that the United States did not ban all gambling but only Internet gambling. In the context of animal welfare, critics of the European Union may point to practices permitted with respect to treatment of animals other than seals that seem prima facie to be as cruel and inhumane as the treatment of seals that is the concern of the EU regulation. Yet, properly interpreted from a pluralist point of view, this reality does not undermine the sincere or bona fide character of the seals regulation as an animal welfare measure. A number of observations to support this contention are in order. First, moral or spiritual beliefs about animals and the acceptability or unacceptability of certain practices in the treatment of them may well result in different animals being viewed as having different kinds of relationships to human beings, just as the purpose of the infliction of suffering, as well as its level or intensity, may well matter, as we have already noted (the significance of "commodification" in many animal welfarist moral theories). Accusing Hindus of hypocrisy, for example, because they view cows as sacred but not chickens, is simply not taking pluralism seriously.

Second, there is nothing in the text of Article XX(a) that requires, for the invocation of the public morals exception, that the moral beliefs or values at issue be of such a priority that they trump all other moral beliefs, values, or social interests. This would render regulatory schemes that balance or harmonize some beliefs or values with other beliefs or values indefensible in light of their supposed objective to protect public morals. But sincerity does not imply fanaticism. Recognizing pluralism, the recent WTO panel report in the *COOL* case notes: "it is not inconceivable that parliaments and governments pursue more than one objective through a certain measure. Different constituencies and legislators may have different objectives, which nonetheless

361. *See* MACAULAY, *supra* note 25.

lead to the adoption of a particular measure."[362] Indeed, it would be odd if Article XX operated only to protect absolutist moral positions, thereby opposing elements of value pluralism in WTO member societies.[363] As we have already noted in discussing the indigenous exception to the EU regulation in connection with the MFN clause in Article I of the GATT, concern for the existence and way of life of certain human communities may need to be balanced against the moral concern of animal welfare—but this does not make the latter any less of a genuine reflection of the prevailing beliefs or values of the society in question.

Third, as we have already noted, the beliefs and values that are relevant for purposes of Article XX(a) are those prevailing today.[364] The process of changing laws, regulations and practices to reflect today's values (which, as we have discussed, is ongoing in many contexts in the European Union regarding treatment of animals) is not an instantaneous one. Only a despotic regime could change at once or in a short period of time hundreds if not thousands of laws and regulations to conform in such a diverse federal community as the European Union. Thus, it is totally unreasonable, indeed absurd, to expect the European Union to have *already* reflected the prevailing values and beliefs behind the EU regulation on seals with respect to every other context of treatment of animals. Here the observations of the recent *Tuna/Dolphin III* panel are apposite:

> As established above, the US dolphin-safe provisions aim at protecting dolphins. That a particular piece of legislation does not afford protection to other animals or marine species should not be sufficient reason to consider the goal of the measure to be illegitimate. As the Appellate Body has recognized, 'certain complex public health or environmental problems may be tackled only when [sic] a comprehensive policy comprising a multiplicity of interacting measures.'[365]

b. *Article XX(b): Health*

The EU measure is also justifiable insofar as it is necessary for the protection of animal "health" within the meaning of GATT Article XX(b). The meaning of animal health includes mental or psychological health, which is obviously impaired by intense suffering and trauma in the manner of killing. Interpreting language in Article 2.2 of the TBT that is essentially identical to that in GATT Article XX(b), the *Tuna/Dolphin III* panel held:

> The protection of dolphins may be understood as intended to protect animal life or health or the environment. In this respect, a measure that aims at the protection of animal life or health need not, in our view, be directed exclusively

362. *COOL*, *supra* note 243, ¶ 7.691.

363. As noted above, *supra* note 331, in the *US—Clove Cigarettes* case the Appellate Body has reaffirmed the pluralist approach that a Member may, in principle, balance different and to some extent even conflicting objectives in a legitimate regulatory scheme, provided that the regulatory distinctions it draws can indeed be justified by such balancing.

364. However, the history of a belief can be probative of its bona fide or sincere character. *See supra* Sections I.A and B.

365. Panel Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 7.442, WT/DS381/R (Sept. 15, 2011) [hereinafter *US—Tuna/Dolphin III*].

> to endangered or depleted species or populations, to be legitimate. Article 2.2 refers to "animal life or health" in general terms, and does not require that such protection be tied to a broader conservation objective. We therefore read these terms as allowing Members to pursue policies that aim at also protecting individual animals or species whose sustainability as a group is not threatened.[366]

The Appellate Body upheld the panel's finding that the use of trade measures to protect dolphins was a "legitimate objective" within the meaning of TBT 2.2.[367]

Just as Article XX(a) may be used to condition imports on policies of other countries that relate to the protection of public morals, so may Article XX(b).[368] Nor is the ambit of "animal health" under Article XX(b) confined to animals on the territory of the regulating WTO member. The disciplines of the Sanitary and Phytosanitary Agreement (SPS)[369] explicitly confine the concept of animal health in this way, indicating that the drafters realized that, since the concept in the GATT was not so limited, they would require specific language to cabin the ambit of SPS to only those measures affecting animal health within the regulating jurisdiction. In any case, the principle of effectiveness in treaty interpretation[370] compels a reading of animal health within Article XX(b) that is not restricted to the health of animals in the territory of the regulating member. Many species of animals are migratory and may appear in more than one WTO member's territory over their lifetime or even over a rather short span of time. Some often dwell in the high seas.[371] Effective protection of the health of such migratory animals would be undermined by imposing a territorial restriction not required by the text of Article XX(b), given the uncertainty that would be created concerning which WTO members, if any, could protect those animals consistent with Article XX(b).

The Appellate Body has held that human life and health are among the most pressing or fundamental interests protected under Article XX, thus requiring a high degree of deference to domestic regulation. This suggests that the Appellate Body would afford a lesser margin of deference to the European Union's measure in *Seal Products* than it did to the French asbestos ban in *EC—Asbestos*. However, as is clear from cases like *US—Gambling* and *Brazil—Tyres*, the AB's general jurisprudence of Article XX has increasingly

366. *Id.* ¶ 7.347. This reading is strongly confirmed by the fact that the World Organisation for Animal Health has, since the beginning of this millennium, viewed animal welfare as an essential and growing part of its mandate, and has emphasized the close connection of animal welfare to animal health. WORLD ORG. FOR ANIMAL HEALTH, THE OIE'S ACHIEVEMENTS IN ANIMAL WELFARE (Dec. 14, 2011), http://www.oie.int/animal-welfare/animal-welfare-key-themes/.

367. Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 342 (May 16, 2012), *available at* www.wto.org/english/tratop_e/dispu_e/381abr_e.doc [hereinafter AB Report, *US—Tuna/Dolphin III*].

368. *US—Shrimp/Turtle*, *supra* note 3, ¶ 121.

369. The SPS regulates measures that WTO members can take to protect health, and is one of the agreements to come out of the Uruguay Round of trade negotiations.

370. For a description of this principle, see generally H. Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. Y.B. INT'L L. 48 (1949).

371. *See, e.g.*, *US—Shrimp/Turtle*, *supra* note 3.

recognized the difficulty of scientifically proving or establishing that a measure is the least restrictive alternative to achieve a given objective, or of determining whether in fact a hypothetical less restrictive alternative is likely to be affordable and effective in the circumstances. As we have discussed earlier in this Article,[372] the EU ban is supported by ample evidence of the negative health effects of the killing methods in question, and considerations of less restrictive alternatives have resulted in considerable doubt as to whether these could ever be effective, especially given that Canada and Norway do not accept the level of protection sought by the European Union.

A 2008 scientific report to the Animal Welfare Working Group of the World Organisation for Animal Health found that "[a]nother problem is that implementation of the legal conditions laid down [by Canada and Norway] depends on the climatic conditions under which the sealers operate. Enforcement is also difficult and in many circumstances impossible."[373] Indeed, the scientific report questioned whether the type of standards that the Organisation had developed could be applied practicably at all to ensure the humane killing of seals "on the ice in extreme weather conditions." This further shows that accepting seal products based on humane hunting standards is not a reasonable available alternative to a ban, given the conditions in which the hunt takes place, and the constraints of existing monitoring and enforcement methods.

Even if, in theory, these obstacles could be overcome, without the support of the governments and industries in Canada and Norway, it is impossible to imagine an effectively monitored and implemented labeling or code of conduct scheme that could achieve the European Union's chosen level of protection. Only through agreement with Canada and Norway could the EU participate directly in the monitoring and enforcement of the standards in question; otherwise, it would be impossible for the EU to insure that, in fact, any labeled or certified product arriving at its borders was in fact made from an animal killed humanely. As the Appellate Body held in *US—Gambling*, interpreting the public morals exception in GATS, a reasonably available alternative is one that a Member can implement without requiring the consent or cooperation of other WTO Members.[374]

C. *The EU Seal Products Ban Does Not Violate the TBT*

As discussed above, the Uruguay Round of trade negotiations, which

372. *See supra* Section III.B.

373. DAVID WILKINS, COMMERCIAL KILLING OF WILDLIFE, SECOND REPORT TO THE ANIMAL WELFARE WORKING GROUP 3, World Organisation for Animal Health (OIE) (2008), *available at* http://www.oie.int/doc/ged/D6547.pdf.

374. *US—Gambling*, ¶ 317 ("In our view, the Panel's "necessity" analysis was flawed because it did not focus on an alternative measure that was reasonably available to the United States to achieve the stated objectives regarding the protection of public morals or the maintenance of public order. Engaging in consultations with Antigua, with a view to arriving at a negotiated settlement that achieves the same objectives as the challenged United States' measures, was not an appropriate alternative for the Panel to consider because consultations are by definition a process, the results of which are uncertain and therefore not capable of comparison with the measures at issue in this case.").

resulted in the creation of the World Trade Organization to replace the previous treaty regime of the GATT, also resulted in the creation of several new agreements to regulate trade. One of the most important was the TBT, which is notable because it goes beyond the traditional GATT principle of eliminating discrimination in trade policy, to promoting regulatory efficiency "beyond the border."[375] The TBT does this by requiring particular procedures when countries assess risk and establish regulations. For example, if there is an international standard on point, the domestic standard must be "based on" the international standard.[376] Countries must eliminate "unnecessary obstacles" to trade.[377] Countries must also, in certain circumstances, accept the standard setting procedures of other countries.[378] In short, regulations must be rationally related to established risks.

While the TBT Agreement contains a set of additional obligations to those of the GATT, the Appellate Body has nevertheless held that the TBT Agreement should be interpreted so as to preserve the same kind of balance between trade liberalization goals and regulatory autonomy that is reflected in the "right to regulate" in GATT.[379]

Canada and Norway argue that the European measure violates virtually every article of the TBT Agreement.[380] These claims run from procedural to substantive violations of the TBT.

These claims confront a central difficulty at the outset. Arguably, TBT does not apply to this type of measure to the extent that it is an expression of moral opprobrium. Therefore, even if the measure were found not to be justified as instrumentally necessary for one of the legitimate objectives covered by the TBT, it may still be justified for its noninstrumental, morally expressive function as necessary for the protection of public morals under GATT Article XX.

To what sort of measure does the TBT apply?[381] The criteria for the application of the TBT are set out in Annex 1 to the TBT, and clarified in the *EC—Asbestos* case. For the TBT to apply, according to Annex 1, there must be a document that lays down, sets out, or stipulates product characteristics, including administrative provisions, with which compliance is mandatory.[382] As clarified in *EC—Asbestos*, the regulation in question must: (1) apply to an

375. For a discussion of the concept of a "beyond the border" measure, see P.J. Lloyd, *The Architecture of the WTO*, 17 EUR. J. POL. ECON. 327, 331 (2001).

376. Technical Barriers to Trade Agreement, arts. 2.4-.5, Apr. 15, 1994, 1868 U.N.T.S. 121 [hereinafter TBT]; *see also* Appellate Body Report, *European Communities—Trade Description of Sardines*, WT/DS231/AB/R (Sept. 26, 2002) [hereinafter *EC—Sardines*] (discussing the meaning of the term "based on").

377. TBT, *supra* note 376, art. 2.2.

378. *Id.* art. 2.7.

379. *US—Clove Cigarettes*, ¶ ¶ 95-96.

380. Canada's Panel Request, *supra* note 20 (claiming that the seal products ban violates Articles 2.1, 2.2, 5.1, 5.2, 5.4, 5.6, and 7.1; Norway's Panel Request, *supra* note 20, claiming that the seal products ban violates Articles 2.1, 2.2, 5.1, 5.2, 5.4, 5.6, 5.8, 6.1, 6.2, 7.1, 7.4, 7.5, 8.1, 8.2, 9.2 and 9.3).

381. For another perspective on whether the TBT applies in the *Seal Products* case, see Nielsen, *supra* note 1.

382. TBT, *supra* note 376, Annex 1.

identifiable product or group of products, (2) lay down one or more characteristics of the product, and (3) make compliance with the product characteristic mandatory.[383]

There is a strong case that the TBT should not apply in the *Seal Products* case to the extent that the structure and provisions of the TBT do not contemplate the assessment of measures of a noninstrumental character that are intended to express intrinsic moral beliefs.[384] This is evident in the use of the very word "technical" to qualify the kinds of measures that fit within the ambit of TBT as well as the exclusion of "public morals" from the (admittedly non-exhaustive) list of "legitimate objectives" in TBT. While "technical regulation" is a defined term in the TBT,[385] it has not been suggested that "Technical Regulation" is a special term within the meaning of Vienna Convention Article 31(4). Thus, in light of the requirement to interpret the "ordinary meaning" of the words of a treaty, the WTO adjudicator must not only consider the defining language with respect to "Technical Regulation" but must not ignore the ordinary meaning of the word "technical" which, tracing its Greek roots in the notion of *technē*, implies something instrumental, not a moral expression or valuation. It may be true that some secondary regulation and administrative action to enforce or apply the EU ban could be characterized as technical, or instrumental, to the direct expression of moral opprobrium that constitutes the ban itself. But the provisions of the TBT are inherently unsuited to the determination of whether the EU ban, taken in its aspect as noninstrumental moral regulation, is inconsistent with the purposes of the WTO system. One need only examine the nature of the least restrictive means test embodied in Article 2.2 of the TBT, which refers to measures that are least trade-restrictive, taking into account the risks of non-fulfillment of the member's objective.[386] This suggests a test that is oriented to an instrumental balancing of some kind.[387]

The result of such an interpretation is that any measure of a noninstrumental character would risk violating Article 2.2 if it has any trade-restrictive effect. India's restrictions on beef and certain Islamic countries' and Israel's on pork would be illegal under the TBT. And many other such measures are simply not tractable to an analysis based on risk assessment. Noninstrumental moral regulation would violate TBT even if it could be

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383. *EC—Asbestos (Appellate)*, *supra* note 299.

384. More than one commentator has suggested that TBT may not apply. *See, e.g.*, Lester, *supra* note 100.

385. *EC—Asbestos (Panel)*, *supra* note 291; *EC—Sardines*, *supra* note 376.

386. TBT, *supra* note 376, art. 2.2. The full text of Article 2.2 is as follows:

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia:* national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia:* available scientific and technical information, related processing technology or intended end-uses of products.

387. *Id.*

justified under GATT Article XX(a), "public morals." Such an outcome would be contrary to the axiom of the Appellate Body that "[t]he balance set out in the preamble of the *TBT Agreement* between, on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members' right to regulate, is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX."[388]

Canada's *reductio ad absurdum* is that the EU seals ban is not oriented, in its instrumental aspect, towards a legitimate objective under the TBT. However, as already noted, in *Tuna/Dolphin III*, the panel held that animal welfare (as distinct from conservation or sustainability objectives) was a legitimate objective under the TBT, a finding that was upheld by the Appellate Body[389]; thus, with respect to the *instrumental* aspect of the EU regulation, the TBT is arguably applicable. Moreover, in the recent *COOL* case, the panel found that the fact that other WTO members have policies aimed at an objective is an indication of its legitimacy under TBT Article 2.2; as we have set out in detail in an earlier section of this Article, many countries have legislated to protect animal welfare, and a number of different WTO members have taken measures to protect seals.[390] This enhances confidence that the measure is based on genuine or sincere ethical concerns, rather than the demand for protection of some local producer interests.

The application of the MFN and National Treatment obligations in Article 2.1 of TBT to the EU seals regulation should be similar to that of Articles I and III:4 of the GATT, discussed above. In the *US—Clove Cigarettes* ruling, the Appellate Body noted: "The national treatment obligations of Article 2.1 and Article III:4 are built around the same core terms, namely, 'like products' and 'treatment no less favourable.'"[391] The AB has emphasized: "the object and purpose of the *TBT Agreement* is to strike a balance between, on the one hand, the objective of trade liberalization and, on the other hand, Members' right to regulate. This object and purpose therefore suggests that Article 2.1 should not be interpreted as prohibiting any detrimental impact on competitive opportunities for imports in cases where such detrimental impact on imports stems exclusively from legitimate regulatory distinctions."[392]

As we have set forth in detail above, the regulatory distinctions in the EU seals ban, including the exceptions, are all connected to legitimate purposes, including animal welfare in both its instrumental and noninstrumental aspects, respect for the territoriality principle as understood in EU law, protection of aboriginal rights, and sustainable resource management.

While, as stated in our GATT National Treatment analysis, we do not believe that Canada or Norway can establish that the EU ban is detrimental to

388. *US—Clove Cigarettes*, ¶ 96.
389. AB Report, *Tuna/Dolphin III*, *supra* note **Error! Bookmark not defined.**, ¶ 342.
390. *See supra* Section I.A.
391. *US—Clove Cigarettes*, ¶ 100.
392. *Id.* ¶ 174.

the competitive opportunities of the "group" of "like" imported products in relation to the group of "like" EU products, in any case, any such effects would simply derive from the operation of the legitimate regulatory distinctions in the scheme, and thus, under the approach of the Appellate Body in *US—Clove Cigarettes*, there would be no violation of 2.1. *In Tuna/Dolphin III*, the Appellate Body found a violation of TBT 2.1, based on the analytical framework it set out in *US—Clove Cigarettes*: the United States imposed, facially and explicitly, a greater regulatory burden on imports of tuna from Mexico seeking the "dolphin-safe" regulation than on other tuna that was harvested outside the Eastern Tropical Pacific, where Mexico's tuna fishing industry is located, and the AB accepted the factual finding of the panel that the US had not shown that the much greater risk to dolphins from the tuna fishery within the ETP justified the different burden.[393] Regardless of whether the panel's fact finding was objective and accurate in *Tuna/Dolphin III*, the EU seals regulation does *not* impose any additional regulatory burden with respect to Canadian or Norwegian seal products as opposed to products from sealing within the EU or in third countries. The requirements of the ban are identical regardless of the particular geographic location of the sealing. As already noted, the indigenous exception in the ban applies regardless of where the aboriginal communities are located.

Once we accept that under TBT Article 2.2, protection of animal welfare is a legitimate objective, the EU's measure is justifiable for much the same reason that it is justified under Article XX paragraphs (a) and (b), as discussed above.[394] Indeed, under the TBT the burden of proof is in the first instance on the complainant to show that the measure is not justified, since there is no prima facie violation of general provisions of the GATT presumed when a measure is examined under the TBT.[395] Further, just as is the case with Article XX, under TBT Article 2.2, a WTO member's right to determine its level of protection—however strict—is inviolate,[396] a necessary implication, one might

393. AB Report, *US—Tuna/Dolphin III*, *supra* note **Error! Bookmark not defined.**.

394. *See supra* Subsection IV.B.3.

395. Thus, in *US—Tuna./Dolphin III*, the Appellate Body explained:

> "With respect to the burden of proof in showing that a technical regulation is inconsistent with Article 2.2, the complainant must prove its claim that the challenged measure creates an unnecessary obstacle to international trade. In order to make a *prima facie* case, the complainant must present evidence and arguments sufficient to establish that the challenged measure is more trade restrictive than necessary to achieve the contribution it makes to the legitimate objectives, taking account of the risks non-fulfilment would create. In making its *prima facie* case, a complainant may also seek to identify a possible alternative measure that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available. It is then for the respondent to rebut the complainant's *prima facie* case, by presenting evidence and arguments showing that the challenged measure is not more trade restrictive than necessary to achieve the contribution it makes toward the objective pursued and by demonstrating, for example, that the alternative measure identified by the complainant is not, in fact, "reasonably available", is not less trade restrictive, or does not make an equivalent contribution to the achievement of the relevant legitimate objective."

AB Report, *US—Tuna/Dolphin III*, *supra* note **Error! Bookmark not defined.**, ¶ 323 (internal citation mitted).

396. *COOL*, *supra* note 243, ¶¶ 7.611-7.613. In *US-Tuna III*, the Appellate Body emphasized the language in the preamble of the TBT Agreement to the effect that a Member has a right to achieve its legitimate objective "at levels it considers appropriate." AB Report, *US—Tuna/Dolphin III*, *supra* note

say, of the very principle of "the right to regulate."

But how then to do justice to the measure as a whole, given that it contains noninstrumental morally expressive features that are not suited to scrutiny under an agreement designed to address technical or instrumental regulations?[397] One approach to this difficulty is suggested in the analysis of the panel in *EC—Biotech* of a measure that the European Community argued had a dual purpose (partly food and agricultural safety, and partly general consumer protection). The *EC—Biotech* panel took a bifurcated approach to justification. The panel held that even if the measure failed the requirements of the SPS Agreement to the extent that is purpose was covered by SPS, it still could be justifiable in principle due to its non-SPS purposes, which would be assessed under different legal provisions.[398] Thus, on this reasoning, even if instrumental aspects of the EU seals regulation were to fall afoul of the TBT, to the extent that it served the purpose of an expression of intrinsic moral beliefs and intuitions, it would still be capable of justification within the framework of Article XX(a) of the GATT.

D. *The EU Seal Products Ban Does Not Violate the Agreement on Agriculture*

The Norwegian request for a panel also argues in passing that the EU measure violates Article 4.2 of the Agreement on Agriculture.[399] The Agreement on Agriculture resulted from the Uruguay Round of trade negotiations. The purpose of the agreement was to bring agriculture within the fold of the GATT system, from which it had traditionally been excluded.[400] It subjected the agricultural industry to many of the provisions of the GATT.

Norway has argued that the European Union has violated Article 4.2, which states that "[m]embers shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties, except as otherwise provided for in Article 5 and Annex 5."[401] In essence, Article 4.2 prohibits the use of agriculture-specific non-tariff barriers. Non-tariff barriers include quantitative restrictions, voluntary export restraints, and other measures designed to restrict flows of trade through means other than imposing tariffs at the border. Norway's argument is likely to be that since the European Union is imposing a regulation that limits the importation of seal products, this is a non-tariff barrier on an agricultural product that is prohibited by Article 4.2.

Error! Bookmark not defined., ¶ 316.

397. For a history of the development and purpose of the TBT, see HOEKMAN & KOSTECKI, *supra* note 205, at 112-16.

398. *Id.* ¶¶ 7.162-7/171.

399. Norway's Panel Request, *supra* note 20, at 2; Agreement on Agriculture, Annex 1A, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 410 [hereinafter Agreement on Agriculture]. Notably, Canada has not made this claim. *Compare* Canada's Panel Request, *supra* note 20, *with* Norway's Panel Request, *supra* note 20.

400. This has been termed "agricultural exceptionalism." Randy Green, *The Uruguay Round Agreement on Agriculture*, 31 LAW & POL'Y INT'L BUS. 819, 820 (2000).

401. Agreement on Agriculture, *supra* note 399, art. 4.2.

There are two reasons why this argument will not succeed. First, it is possible that hunting seals in the wild will not be considered agricultural in nature. Annex 1 of the Agreement defines which products are covered by the Agreement. While raw furskins, hides, and skins are included,[402] it is unclear whether this refers to products produced through farming techniques or captured in the wild. The nature and purpose of the Agreement on Agriculture was to cover traditional farming practices, which are often subject to protectionism.[403] Sealing is not a traditional farming practice, and therefore may not be covered by the agreement.

Second, Article 4.2 of the Agreement on Agriculture "does not prevent the use of non-tariff import restrictions consistent with the provisions of the GATT or other WTO agreements which are applicable to traded goods generally (industrial or agricultural)."[404] Therefore, if the analysis above regarding the General Exceptions clause and other GATT provisions is correct, Article 4.2 does not present a problem for the ban. For these reasons, Norway's claim under Article 4.2 of the Agreement on Agriculture is unlikely to succeed.

V. PERMITTING PLURALISM: WHY PLURALISM MATTERS FOR THE LEGITIMACY OF THE WTO AND THE CHALLENGE OF ACCOMMODATING NONINSTRUMENTAL MORALITY

Thus far, this Article has argued that the European Union's measure restricting trade in seal products was enacted because of a genuine concern for animal welfare, and that this moral motivation for restricting trade should be a sufficient justification, under WTO law, for the European Union to enact a trade-restrictive measure.[405] These legal interpretations are based on the prior jurisprudence of the WTO Appellate Body as well as structural and textual considerations in the relevant WTO treaties. But we have also brought to bear in our analysis a perspective that we call "pluralism." In this section of the Article, we seek to articulate more explicitly and conceptually what pluralism entails and why it is particularly important to preserving the proper institutional role and the legitimacy of the WTO.

As discussed above,[406] the WTO grew out of the GATT, an informal treaty regime that was meant to provide simple rules to facilitate trade among nations. It was not meant to be an invasive or revolutionary regime; indeed, the GATT was the result of the failure to develop a comprehensive international organization to cover international trade (the failed International Trade Organization).[407] The GATT placed certain basic limits on the ways in which states could regulate trade, to prevent another depression by ensuring openness and guarding against spiraling protectionist, discriminatory, beggar-thy-

402. *Id.* Annex 1.

403. *See* Green, *supra* note 400, at 830-831.

404. *Agriculture: Explanation*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/agric_e/ag_intro02_access_e.htm (last visited Mar. 5, 2012).

405. *See supra* Parts II and III.

406. *See supra* Section IV.A.

407. *See* HOEKMAN & KOSTECKI, *supra* note 205.

neighbor responses to domestic economic and social pressures.[408]

The move from GATT to WTO certainly expanded the number of topics that the international trade law regime governed but the WTO can no more claim to be a legitimate comprehensive governance regime than could the GATT. It is not like a domestic government, which can weigh all relevant, competing factors and reconsider de novo the policy choices of its members, nor is it a general world administrative agency. The WTO has a narrow remit: regulating international trade to ensure that there are not unnecessary or discriminatory barriers to trading. But second-guessing bona fide moral regulation is not part of its mandate.

While the WTO has had to assess whether rationales for legislation are legitimate, in the sense that they are not merely pretextual reasons or false barriers to trade, it is not designed to pass judgment on the substance of those legislative rationales. As we have noted, in the *US—Clove Cigarettes* decision, the AB has held that both the GATT and the TBT Agreement reflect a balanced "right to regulate"; WTO Members may pursue legitimate goals provided they do so in an even-handed, nondiscriminatory manner, avoiding where possible harmful effects on trade. If noninstrumental motivations are excluded from the grounds that justify trade policy, the WTO will, in effect, conclude that only material concerns such as health and security are legitimate policy goals. All moral considerations will have to be argued in instrumentalist terms.

Such a development would be on a collision course with the changing character of the WTO's membership. As John Ruggie famously argued, the post-war international economic institutions were premised on "embedded liberalism," a loose consensus among more or less like-thinking Western developed nations on the appropriate degree and kind of regulatory diversity consistent with effective global economic governance.[409] While at the time, regulatory diversity was likely understood in terms of instrumentalist views of matters such as health, environment, and so forth, the drafters did still feel the need to include the concept of "public morals." When we turn to today's WTO and realize that some of the most economically significant members, including China, Russia, Saudi Arabia, and India, have policy and regulatory cultures deeply shaped by traditions very different from what might be called "Western" secular instrumental reason, it becomes evident that narrowing the kind of rationale permitted as a basis for justified regulation under WTO law, while the WTO's diversity broadens and deepens, would be setting the scene for a significant legitimacy crisis.

From the outset, under "embedded liberalism," a key challenge for the multilateral trading system was to reconcile a commitment to regulatory diversity with an effective set of treaty norms and interpretative canons to provide confidence that diverse regulatory goals are not used as pretexts for protectionist measures—undermining the basic trade liberalization bargain and the effectiveness and credibility of the institution.

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408. For a discussion of the basic obligations of the GATT, see *supra* Section IV.B.

409. *See* Robert Howse, *From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT'L L. 94, 96 (2002).

Yet many of the devices that have been used to achieve this balance need to be applied with particular sensitivity, where regulatory differences are not simply rooted in the divergent policy choices of regulatory authorities (a kind of regulatory diversity long accepted as part of the "embedded liberalism" vision), but in differences in underlying values and beliefs in different societies.

It is often easy for WTO officials or adjudicators to begin by assuming that a rationale for government action is sincere or not pretextual when the claimed value is universally shared or itself stated with specificity in the WTO treaties. Protection of human health is an example. The test for pretextualism in such instances focuses on the relationship between means and ends: the assurance that health is not merely a pretext comes from scientific and other evidence that the measure in question is instrumentally rational from the perspective of protecting human health. By contrast, where the basis for arguing that a measure is not pretextual is at least partly motivated by noninstrumental moral concerns not universally shared by WTO members, there is a risk that a WTO official or adjudicator who does not share the value in question, or is unfamiliar from its own moral experience with this kind of belief, will begin from a presumption that there is a strong risk of pretextualism. As Joseph Weiler has articulated[410] and as Robert Keohane and Joseph Nye have also argued,[411] the WTO insider community is drawn from a world of diplomats and bureaucrats where a certain kind of instrumental—often economic—rationality dominates conceptions of appropriate public policy. As our analysis of the *Seal Products* dispute has illustrated, using tests or devices that employ instrumental rationality, such as means/ends reasoning, simply does not work to establish the non-pretextual character of noninstrumental moral regulation. Under an instrumental approach, that a member has chosen a ban, the most trade restrictive kind of measure, over other means such as consumer labeling, may well be a strong indication that the measure is strongly oriented to protectionism of a kind that would undermine the basic trade liberalization bargain; this is the logic, as we noted, of Article 2.2 of the TBT Agreement. But in the case of noninstrumental moral regulation, the use of outright prohibition may be essential to express the moral sentiment underlying the measure.[412]

Accustomed to judging instrumental regulation, WTO officials and adjudicators may also be inclined to consider elements of apparent inconsistency or exceptions in a regulation as prima facie indicators that it may not be genuinely or sincerely an expression of the values in question. They may simply not appreciate just how finely differentiated noninstrumental moral beliefs are, or that the same citizens may genuinely hold with equal sincerity two different noninstrumental moral beliefs (for instance, animal welfare, as

410. J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 J. WORLD TRADE 191 (2001).

411. *See, e.g.*, Robert O. Keohane & Joseph S. Nye Jr., *The Club Model of Multilateral Cooperation and the World Trade Organization: Problems of Democratic Legitimacy*, *in* EFFICIENCY, EQUITY, AND LEGITIMACY 264 (Roger B. Porter et. al. eds., 2001).

412. Robert Howse, *Retrenchment, Reform or Revolution? The Shift to Incentives and the Future of the Regulatory State*, 31 ALBERTA L. REV. 455, 461 (1993).

well as the intrinsic value of traditional indigenous ways of life) that require a complex reconciliation. That a measure reflects such a reconciliation does not thereby impugn, even presumptively, the sincerity of either of the noninstrumental moral beliefs in question. Thus the perspective of pluralism entails a sensitivity to the varied totality of deeply held beliefs within each society, and even within the value system of a given individual.

Where noninstrumental moral concerns are at issue, to avoid a presumption of pretextualism, WTO officials and adjudicators need to become familiar with and have the imagination to see the workings of a system of values that may be alien to their own moral sensibilities, especially at first glance. This is in part an exercise of imagining otherness. It entails, as early sections of this Article illustrate—examining, in depth and with sympathy or at least a presumption of respect, the origins of the seal regulation in moral concerns about animal welfare—a judgment about sincerity or genuineness of the measure that does not inappropriately import conceptions applicable to different kinds of moral values or policy aims.

Thus, by permitting pluralism, the WTO fulfills its own institutional mandate more effectively and does not unnecessarily encroach on the regulatory autonomy of member states. This does not mean that the WTO is, or should be, value-neutral. There may be some kinds of moral commitments that are inconsistent with the values that underpin the WTO itself; it would, for instance, be impossible to reconcile measures that are based on a visceral dislike of or prejudice concerning a particular people or nation with the concept of nondiscrimination in the WTO system. How the WTO should manage the possible tension between the commitment to pluralism and the demands of international law and morality beyond the WTO regime itself is a complex question, deeply connected to the debate over the "fragmentation" of the international legal order.[413] So far, the Appellate Body has considered the remit of WTO dispute settlement not to include the enforcement of norms from elsewhere in the international legal order,[414] but has taken into account such norms in the way in which the law of the WTO itself is applied.[415] Whether this approach strikes the right balance will be an important question for future scholarship, especially if, as we hope, the case in this Article that the WTO should in general be open to and respectful of pluralism is persuasive.

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413. Chairman of the Study Group of the Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, U.N. Doc. A/CN.4/L682 (Apr. 13, 2006) (by Martti Koskenniemi), *available at* http://untreaty.un.org/ilc/documentation/english/a_cn4_l682.pdf. Scholars concerned about the fragmentation of the international order are concerned about the proliferation of new sources of international legal rules, such that the hierarchy or interrelation of legal rules is difficult to ascertain, especially given the parallel trends of the proliferation of international and regional courts and tribunals.

414. Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (Mar. 6, 2006).

415. *See, e.g.*, Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R (Jan. 16., 1998) (describing the precautionary principle); Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS5379/AB/R (Mar. 11, 2011) (applying ILC Articles on State Responsibility).

In a recent dispute with China, trade measures that were linked to its censorship laws were considered to be justified in principle under the public morals exception, even though aspects of these laws may collide with international human rights norms. Notably, the United States did not raise issues of human rights in its arguments against China's invocation of public morality.[416] Even if WTO law cannot plausibly be used to enforce human rights (at least without a prior ruling of a human rights body on which the WTO dispute settlement organs could rely), it is certainly the case that human rights norms, especially those that have the status of customary international law or to which the member invoking public morals is bound by treaty, could be relevant in interpreting the proper meaning of public morals.

But here also pluralism remains relevant, for international human rights law itself contains various limiting or balancing features that provide a margin of appreciation to different states to implement human rights in a manner sensitive to cultural and religious difference, for example. What is certainly consistent with pluralism in the WTO is the ability of individual WTO members to use their own trade sanctions against states that violate human rights; precisely in this instance, the content of public morals would be interpreted to include international human rights concerns, such that sanctions are justified under Article XX(a). For example, the United States and the European Union have maintained trade sanctions against Burma in response to human rights violations there; these sanctions have not been challenged as in violation of WTO law.[417] The two-sided approach, where the WTO does not itself enforce non-WTO international norms such as human rights, but allows its individual members to take enforcement action through trade sanctions, is defensible in practice. As we suggest, however, the question of the conceptual limits to pluralism imposed by the essential morality of the international system is one that requires further analysis, beginning from the premise that, in general, pluralism is desirable in the WTO.

VI. CONCLUSION

This Article has considered whether morality is an adequate justification for restricting trade measures under WTO law. We have examined this question in relation to the current *Seal Products* dispute at the WTO. Analyzing the legal issues at stake in the *Seal Products* dispute, we have argued that the EU's restriction on the import and export of seal products for moral reasons does not violate WTO law. Even if it does violate a positive obligation under WTO law, the restriction can be justified for public policy reasons under the General Exceptions clause, Article XX. Moral, ethical, and philosophical reasons should be considered adequate to justify trade-restrictive measures. If the WTO does not recognize these types of justifications, it risks imposing a secular, materialist vision of politics on all its member states. Instead, the WTO should respect pluralism, allowing countries to justify their trade-related actions

416. *Id.* at 51-85.

417. *See* Robert L. Howse & Jared M. Genser, *Are EU Trade Sanctions on Burma Compatible with WTO Law?*, 29 MICH. J. INT'L L. 165, 174-79 (2008).

through noninstrumental reasoning that may seem compelling to certain countries or peoples, even if frivolous or perhaps superstitious to others. The fact that one group of veterinarians in one country has come to the conclusion that the killing of seals by a particular method is humane or not cruel need not preclude another country or people from interpreting differently, according to their own moral commitments and attitudes, what is humane on the one hand and cruel on the other. This position best accords with the institutional competence and role of the WTO. Our analysis suggests a vision of the WTO's institutional role, and its relationship to the regulatory autonomy of its member states, which is deeply compatible with the embedded liberalism that characterized the perspective of the founders of the original GATT;[418] it is a vision at odds with the expansive constitutionalist vision of the WTO as a global economic regulator, assessing the rationality of all governmental policies from a right to trade perspective. The latter vision has led to the legitimacy crises the WTO has suffered from Seattle onward.[419] Fortunately, these crises have not led to the loss of legitimacy for the WTO dispute settlement organs in their application of the basic rules of the system to discipline discrimination and protectionism. And this is precisely due to a number of the jurisprudential moves by the AB that we have discussed in this Article. There is no "right to trade" in the WTO system, only a set of specific obligations to avoid certain kinds of defined trade-restricting measures—in the case of domestic policies, largely ones that are either discriminatory or gratuitously trade-restrictive. But, as the AB has held, there is a foundational "right to regulate." This notion of "the right to regulate" is perhaps where the AB comes closest to expressing the pluralist perspective offered in this Article. According to the AB, the WTO legal system does not itself grant to WTO members the right to regulate subject to certain justifications, unlike—one should add—a domestic constitution.[420] Instead, it only confines or restricts the inherent right to regulate by certain very limited, textually defined disciplines, some of which, like Article XX, are aimed at clearly preserving important elements of the right to regulate even within the specific disciplines provided in the WTO Agreements. There is no requirement that, just because they affect trade, all of a member's policies be rational or conform to any other general condition of a right to regulate that might exist in a domestic constitution, for example. Legitimate, well-founded, moral justifications such as respect for animal welfare and repugnance at complicity with cruelty to animals should not be dismissed as grounds for regulation, nor treated in a narrow and skeptical fashion.

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418. JOHN G. RUGGIE, *Embedded Liberalism and the Postwar Economic Regimes*, *in* CONSTRUCTING THE WORLD POLITY: ESSAYS ON INTERNATIONAL INSTITUTIONALIZATION 62 (1998); Jeffrey L. Dunoff, *The Death of the Trade Regime*, 10 EUR. J. INT'L L. 733 (1999); Howse, *supra* note 409.

419. *See, e.g.*, ROBERT HOWSE, THE WTO SYSTEM: LAW, POLITICS, AND LEGITIMACY (2007); Daniel C. Esty, *The World Trade Organization's Legitimacy Crisis*, 1 WORLD TRADE REV. 1 (2002).

420. *China—Publications and Audiovisual*, *supra* note 28.