Pluralism in Practice: Moral Legislation and the Law of the WTO After Seal Products

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INTRODUCTION

In 2009, the European Union banned the importation and sale of products made from seals.1 Citing animal welfare concerns regarding the manner in which seals are hunted and killed, which can cause prolonged and profound suffering,2 the EU imposed the

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1. 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 (EC) [hereinafter EU Seal Products Regime]. The ban contained three exceptions: (1) products made for subsistence purposes by indigenous communities; (2) seal products that were the result of marine management culls; and (3) seal products for the personal use of travellers or their families. In 2010, the European Union passed implementing legislation: Commission Regulation 737/2010, 2010 O.J. (L 216) 1 (laying down rules for the implementation of the EU Seal Products Regime). Throughout this Article, we sometimes use the term “ban” to describe the seal products regime, but it is important to note that it was a ban coupled with significant exceptions, rather than a complete ban.

2. 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, 610 EUR. FOOD SAFETY AUTH. J. 1, 4 (Dec. 6, 2007) [hereinafter EFSA Report] (explaining variety of ways seals suffer during the slaughtering process); see also David M. Lavigne & William S. Lynn, Canada’s Commercial Seal Hunt: It’s More than a Question of Humane Killing, 1
ban for explicitly and intrinsically moral reasons. The European Union concluded that the seal hunt involves unnecessary cruelty to animals, and that the sale of products derived from seals hunted in an inhumane way violates the moral beliefs of Europeans.³

This moral rationale for the European Union’s ban went beyond the instrumental goal of preventing seals from suffering unnecessary pain while being slaughtered, although this was also one of the objectives of the legislation.⁴ The European Union acted, in significant part, for non-instrumental or expressive reasons, to make a morally expressive statement about the problematic nature of cruelty to animals and the impermissibility of consumer behaviors that tolerate and encourage such cruelty.⁵

The European Union’s seal products regime was challenged by Canada and Norway, two of the largest sealing nations, at the World Trade Organization (WTO).⁶ The ensuing WTO dispute, European Communities–Measures Prohibiting the Importation and Marketing of Seal Products (or EC–Seal Products), presented a novel issue of interpretation for the law of the WTO: to what extent WTO law permits trade restrictions⁷ that, at least in part, express the moral

[3. See EU Seal Products Regime, supra note 1, pmbl. 36.]

[4. As the preamble to the European Union’s legislation indicates, the European Union determined that a ban on importing commercial seal products was an appropriate means by which to prevent unnecessary suffering of seals, which are sentient beings with the ability to feel pain and distress. EU Seal Products Regime, supra note 1, pmbl.]

[5. For a further exploration of this characterization of the European Union seal products regime, see generally Robert Howse & Joanna Langille, Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values, 37 YALE J. INT’L L. 367 (2012) [hereinafter Howse & Langille].]


[7. It should be noted that WTO law does not prohibit all restrictions on trade but (generally speaking) restrictions on trade that discriminate in favor of domestic producers or those of another trading partner. The European Union argued before the WTO that its seal products regime was not discriminatory, and therefore not even a prima facie violation of WTO law, because it applied to all seal products. As we discuss below, see infra Part II, this argument was not accepted, mainly on the basis of evidence proffered by Canada and Norway that more seal products from Norway fit into the exceptions to the ban than seal products from Canada and Norway. We have discussed elsewhere the potentially problematic and far-reaching implications of a discrimination analysis that begins and ends with the reduction of competitive opportunities for the complainant’s products. Rob Howse, Joanna Langille, & Katie Sykes, Sealing the Deal: The WTO’s Appellate Body Report in EC–Seal Products Regime, supra note 5.]
beliefs of particular societies and that are rooted in non-instrumental morality.8

Previous cases at the WTO had addressed animal protection regulations,9 but these earlier cases involved mainly environmental protection, animal life, and health—not (or only peripherally) concerns about animal welfare.10 In addition, two previous WTO cases had addressed the WTO- legality of morally based legislation.11 Yet the Seal Products case presented several new challenges for the WTO adjudicatory bodies.12

Most importantly, unlike the measures at issue in prior cases, Seal Products was concerned with moral legislation that has a significant non-instrumental or morally expressive dimension. One can distinguish between regulation that operates instrumentally to achieve a certain empirical consequence or practical result by discouraging or encouraging a particular behavior; and “non-instrumental” regulation that expresses moral convictions about normatively appropriate behavior, in addition to attempting to achieve concrete or measurable effects.13 In the context of the treatment of animals, non-instrumental legislation seeks as an

8. Howse & Langille, supra note 5, at 368.
10. These cases were primarily concerned with regulation that had conservation as its primary goal. However, dolphin suffering is recognized as an issue of “animal life and health” in US–Tuna/Dolphin II, supra note 9, ¶ 4.176. Nevertheless, Seal Products marks the first case in which animal welfare was the primary concern of the legislation in question.
12. For a description of the functioning of the WTO’s adjudicatory bodies, see Howse & Langille, supra note 5, at 396.
13. Think, for example, of laws criminalizing pornography or drugs, which might empirically do little to reduce identifiable harms, but that a society might nevertheless consider essential as a way of signaling that, say, pornography is contrary to its basic values, or that drug use is morally condemnable. As the Supreme Court of Canada has observed in connection with drug laws, a society may choose to criminalize or otherwise prohibit certain activities because of their “offensiveness to deeply held social values,” and not just to reduce harmful effects. R. v. Malmo-Levine, [2003] 3 S.C.R. 571, 635 (Can.).
imperative goal to make a statement regarding a society’s beliefs about the fundamental moral duties owed to animals, in addition to reducing the quantum of suffering experienced by animals.\textsuperscript{14} \textit{Seal Products}, therefore, required WTO law to address for the first time a measure explicitly concerned with non-instrumental regulation.

In addition, \textit{Seal Products} was the first public morals case in which the complainants contested, at least at the panel (first instance) level, whether the measure being challenged was in fact an example of bona fide public morals legislation. In \textit{United States–Gambling} and \textit{China–Audiovisuals}, there was little dispute that the measures in question did at least belong in the GATT Article XX(a) “public morals” category, and the complainants focused on whether they were applied in an impermissibly arbitrary way.\textsuperscript{15} In \textit{Seal Products}, by contrast, the complainants argued that the measure was motivated by reasons that should not qualify as moral at all, thus testing the boundaries of the public morals exception.\textsuperscript{16}

These novel interpretive questions create additional challenges for WTO adjudicators. As Howse and Langille have argued, non-instrumental moral justifications are particularly challenging for adjudicators to assess because their intended purpose is inherently unquantifiable and is not readily susceptible to a cost/benefit analysis.\textsuperscript{17} The implementation of instrumental moral legislation with respect to animal welfare, in which the goal is to reduce pain and suffering under a consequentialist moral framework, is relatively straightforward for a judge to understand and assess—pain and suffering can be substantiated by scientific and other types of empirical evidence that facilitates judicial analysis of the efficacy and thus the legality of legislation.\textsuperscript{18} By contrast, the impact of non-instru-

\textsuperscript{14} Indeed, the Supreme Court of Canada in the same case cited the criminal offences of bestiality and cruelty to animals as examples of such prohibitions, based on offensiveness to deeply held values as opposed to reducing harm. \textit{See generally} R. v. Malmo-Levine, [2003] 3 S.C.R. 571 (Can.).

\textsuperscript{15} For a discussion of how the complainants did not challenge the categorization of the measures in question as moral in \textit{Gambling} and \textit{Audiovisuals}, see infra Part II.A.

\textsuperscript{16} We summarize this argument infra Part II.A.

\textsuperscript{17} See also Howse & Langille, supra note 5, at 369 (discussing the unique aspects of non-instrumental morality).

mental moral reasoning, in which one essential purpose of regulation is to express moral opprobrium, is more difficult to assess and understand, at least in the objective, empirical, quantifiable way that is especially persuasive to WTO adjudicators.\textsuperscript{19}

Perhaps an even more fundamental challenge to legal analysis of what counts as public morals are the very significant differences that exist between WTO Member states. WTO Members are not homogenous, either in their domestic political structures or in their ethical, moral, or religious beliefs.\textsuperscript{20} These diverse societies have very different interpretations of what could count as a moral reason for legislation; in liberal democracies, secular liberal political theory will provide a boundary for appropriate reasons for legislating, whereas in religious societies moral beliefs derived from the religious ethics of the majority may define the morally appropriate reasons for actions. They also have different standards for what counts as public support for legislation, as between, for example, democratic societies and more authoritarian societies. Furthermore, societies are also \textit{internally} diverse; many contain minority groups with beliefs and levels of political participation that differ sharply from the majority, further complicating what it means for a country to act for moral reasons – if the moral beliefs are only shared by a majority of people, or even a minority of people, is that adequate to be considered to be legislation for moral reasons?

The challenge that the diversity of WTO Member states poses is even more difficult to negotiate in the context of laws that protect animal welfare. The manner in which a society protects animals is intrinsically linked to the cultural, religious, ethical, and moral mores of that society.\textsuperscript{21} While the protection of animal welfare is increasingly recognized as a global or universal value,\textsuperscript{22} the particular instantiation of that value will inevitably vary in societies with


\textsuperscript{20} There are currently 161 WTO Member states and 24 states with observer status, ranging from vast (e.g., the Russian Federation) to tiny (e.g., Burkina Faso), with very different histories, economies, and cultures. For a complete list of WTO Member states, see \textit{Understanding the WTO: The Organization}, WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm. (last visited July 6, 2015).

\textsuperscript{21} For a discussion of the development of animal welfare legislation, see Howse \\& Langille, \textit{supra} note 5, Part II.

\textsuperscript{22} For a discussion of the development of international law on animal welfare, see, e.g., Katie Sykes, Joanna Langille, \\& Robert Howse, \textit{Whales and Seals and Bears, Oh My! The Evolution of Global Animal Law and Canada’s Ambiguous Stance}, in \textit{Canadian Perspectives on
The treatment of cats and dogs is an obvious example, as their close cultural relationship to human society (as domesticated household pets) has led them to be granted special legal status in some societies (such as prohibitions on their killing and the taking of their fur), which is not offered in other societies where cats and dogs are consumed for food.

23. See Howse & Langille, supra note 5, Part V.

25. Id. art. 20(1)(a).
28. Howse & Langille, supra note 5.
tude for states to adopt morally motivated legislation. The WTO should permit all types of moral and religious reasons for restricting trade—it should not attempt to second-guess the moral and religious commitments of Members. In addition, the WTO should permit morally complex legislation; it should allow legislators to regulate for what we call complex reasons, which may involve internal trade-offs and multiple, possibly competing, motivations. The WTO should instead confine its role to a thorough analysis of any discriminatory aspects of the measure to determine whether the measure is protectionist; due process concerns and arbitrariness may be closely related to discrimination and thus may also fall within the proper ambit of WTO scrutiny.

This Article will build on the insights of Permitting Pluralism. It argues that WTO law should be generously interpreted to allow Member states to express their moral and religious beliefs through legislation. The WTO should not, as some commentators have urged, adopt a “strict scrutiny” approach that would second-guess those beliefs. It should not constrain the moral ends sought by its Member states, but only the means used to achieve those ends.

As such, this Article has three goals. First, in Part I, it considers the broad issue of how the WTO should address morally motivated legislation, given the diversity of its Members. Understanding that the WTO has an obligation to accommodate the regulatory diversity of its Member states is not a new concern in academic commentary on the WTO, but it remains a crucial issue confronting the WTO as an institution. This Article argues that in the case of morally motivated domestic legislation, WTO law should permit pluralism.

Second, in Part II, this Article analyzes the Seal Products dispute from a pluralist perspective and shows how the case has advanced WTO law. The case has important implications for two of the main “covered agreements” of the WTO—the General Agreement on

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30. Indeed, this Article should be considered a companion piece to Permitting Pluralism.

31. See infra Part I.C and III.C where this is addressed.

32. This approach, this Article argues, should be adopted in all aspects of the law of the WTO. While the most obvious place in which measures taken for moral reasons will interface with the law of the WTO is under the art. XX(a) public morals exception, we believe that a pluralist approach will influence one’s interpretation of virtually all areas of WTO law, including issues such as the applicability of the TBT Agreement (as we argue in Howse & Langille, supra note 5).

Tariffs and Trade (GATT) and the Agreement on Technical Barriers to Trade (TBT Agreement).\textsuperscript{34}

In Part III, our goal is to assess the *Seal Products* case from the perspective of pluralism. When the *Seal Products* reports are evaluated through the lens of our pluralist approach, how do the Panel and the AB fare, and are academic critiques of the decision correct?

Ultimately, the *Seal Products* decision is a highly significant if partial victory for a pluralist approach to the WTO. The Panel and the AB were right to adopt an open-textured approach to the public morals exception, and concerns that the Panel and the AB gave too much latitude to Members to define what counts as public morals in their states are overblown. Despite the positive aspects of the *Seal Products* decision, however, from a pluralist perspective there remain problems with the WTO’s approach to public morals cases.

*Seal Products* is a key case in which the fundamental challenge of normative pluralism, in the context of non-instrumental moral reasoning, was confronted directly by WTO adjudicators. This unique challenge required a reassessment of many fundamental aspects of WTO law, including the nature of non-discrimination under the GATT, the meaning of GATT Article XX(a), and the scope of the TBT Agreement. Faced with the realization that the WTO does not have the internal normative resources to strictly scrutinize the moral values of its Member states, the WTO Panel and the AB in *Seal Products* developed the WTO’s jurisprudence to better accommodate the inherent normative pluralism of its Members, sticking closely to the WTO’s original focus on non-discrimination and anti-protectionism. In essence, the WTO in *Seal Products* adapted the law of the WTO to meet the challenge of pluralism. This approach successfully preserves the WTO’s institutional legitimacy, scrutinizing the *means* used by Members (by looking for evidence of discrimination and protectionism in the way measures are applied), but remaining agnostic as to their chosen moral *ends*.\textsuperscript{35}

\textsuperscript{34} GATT, supra note 25; see generally Technical Barriers to Trade Agreement, Apr. 15, 1994, 1868 U.N.T.S. 121 [hereinafter TBT Agreement].

\textsuperscript{35} For further discussion of the concept of right as a doctrine of means, see Arthur Ripstein, *Means and Ends*, 6 JURISPRUDENCE 1 (2015).
PART I: PLURALISM AND PUBLIC MORALS IN THE WTO

A. The WTO’s Institutional Role

The regulation of international trade is distinct from other types of international regulation. While certain regimes of international law, such as international human rights law or the European Union’s integration agreements, could be understood to be aimed at creating communities of shared values and norms, international trade law does not have this explicit purpose, at least in the thick sense that international human rights law aspires to achieve.

The norms that undergird the WTO’s legal instruments are focused on ensuring that countries do not discriminate between their trading partners, or in favor of domestic goods—except as permitted under the regime’s various exceptions and safe harbors. Other aspects of the WTO’s disciplines make clear that its Members cannot regulate unnecessarily in a way that restricts trade—there must be some rational connection between the end sought and the means used to achieve the end, or at least some justificatory or evidence-based process. Still other parts of the WTO’s legal system seek to encourage legal integration and the use of international standards, as another means of reducing barriers to international trade. While these aspects of WTO law could be considered normative in a limited way, in the jurisprudence of the Appellate Body, their goals are generally seen as far more circumscribed and functional. This lies in contrast to the transformative aims of regimes like international human rights law, which seeks to foster a grand and ambitious normative ideal through legal norms that raise the moral bar in all societies.

Although the WTO regime became associated with neoliberal ideology in the 1990s, dragging the organization into the general legitimacy crisis of globalization, international trade law should


37. This is encapsulated in the most basic disciplines of the GATT. See GATT, supra note 25, art. III.

38. For example, this is seen in the concept of “necessity” in GATT art. and TBT Agreement art. 2.2.

39. See, e.g., TBT Agreement, supra note 34, art. 2.4.

40. In the 1990s, the WTO became a virtual symbol of the ills of globalization in the writing of popular critics such as Naomi Klein.
not be understood as an attempt to instantiate a neoliberal normative vision for world order. Certain limited aspects of the international trade law regime could be seen as reflecting a neoliberal technocratic outlook. But these aspects have been moderated to some extent through evolving jurisprudence and practice in the WTO, and the regime’s main purpose remains minimizing the negative externalities that flow to other states when countries impose discriminatory barriers to international trade.

Thus, it is incorrect to interpret the WTO as a “constitutional” regime designed to impose a particular normative vision on the global polity, notwithstanding certain scholarship that has attempted to interpret it as such. The law of the WTO says nothing about permissible ends that Member states can pursue in domestic regulation, except to prohibit protectionism and discrimination as ends in and of themselves. Instead, the WTO seeks to set some outer limits on the means available to Members to achieve their legislative goals.

This understanding of the GATT/WTO’s institutional role was best captured by John Ruggie, who described the GATT/WTO and other international economic institutions as a regime of “embed-

41. The harmonization of intellectual property rights in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs); the requirement in the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) that certain food safety measures be based on available scientific evidence; and a pro-deregulation and pro-privatization bias in parts of the General Agreement on Trade in Services are exceptional aspects of the international trade law regime that do reflect a neoliberal technocratic outlook.

42. For example, the discussion infra of the way in which the TBT Agreement’s impact has been blunted. See infra Part II.E.

43. See, e.g., Gene G. Grossman & Henrik Horn, Why the WTO? An Introduction to the Economics of Trade Agreements 5 (ALI Working Paper Apr. 28, 2012), http://www.econlaw.se/Papers/ALI%20-%20EconomicsofTradeAgreements.pdf (“Most economists believe that trade agreements are made to address the negative international externalities that would result if governments were to set their trade policies unilaterally and without regard to their effects on actors in other countries.”).

ded liberalism.” 45 Ruggie argued that the post-war international system of interstate economic relations was required to be open and non-discriminatory, but that states retained the ability to organize their internal structures and mores as they saw fit. 46 The international economic system therefore did not require transformative domestic change; states were permitted to organize their domestic systems as they liked, so long as interstate relations remained open and non-discriminatory, in order to prevent a recurrence of the disastrous policies of the interwar period. 47

B. The Interface Between WTO Law and Moral Legislation

However, even under this bounded conception of the goals of the WTO, the law of the WTO will still interface with domestic legislation that is morally or normatively motivated. This is because legislation adopted by the WTO’s Member states for moral reasons may come under scrutiny by the judicial apparatus of the WTO, if that legislation has an impact on international trade that violates the disciplines of the WTO. This scrutiny will take place at the prima facie violation stage and at the defense stage.

We begin with the prima facie violation stage, where it is common for legislation with a moral purpose to fall under the aegis of the WTO’s covered agreements. This is because legislation adopted for moral reasons can also have trade-restrictive effects. For example, import bans are a common means by which legislatures achieve moral ends, by prohibiting the importation and sale of products such as pornography, controlled substances, food, and alcohol prohibited by the state or region’s religion. 48 But import bans are regulated by Article XI of the GATT, which prohibits


46. See generally Ruggie, supra note 45, at 62.


48. For example, the United States bans the importation of illegal drugs and certain types of pornography. Certain Islamic states ban or limit the importation of alcohol for religious reasons. See Raj Bhala & Shannon B. Keating, Diversity Within Unity: Import Laws of Islamic Countries on Harām (Forbidden) Products, 47 Int’l L. 343, 345 (2015). Israel currently justifies its ban on non-kosher 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. See Import Policy, FOREIGN TRADE ADMIN., http://www.tamas.gov.il/NR/exeres/5EA6B0B6-D877-48D7-A21F-BE9337BFA06A.htm. (last visited July 10, 2015). 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
quantitative restrictions on imports in certain circumstances. Therefore, if a complaint is made, the WTO’s adjudicatory bodies may need to analyze a morally motivated import ban, to see if it is in compliance with the law of the WTO.

The WTO-compliance of a morally motivated piece of domestic legislation also arises at the defense stage of the analysis. For example, the Preamble of Article XX(a) of the GATT coupled with the text of Article XX(a) itself together state the following:

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 . . . .

The protection of “public morals” is an objective that WTO Members can invoke to justify measures that would otherwise be in violation of the rules of the WTO’s main legal instrument, the GATT. It is therefore necessary for WTO Panels and the AB to analyze Members’ legislation that is justified by the concept of “public morals”—to determine whether such justification is adequate.

The same issue arises in the context of the TBT Agreement, even though there is no explicit General Exceptions clause (like Article XX of the GATT) or express reference to public morals (as in Article XX(a) of the GATT). A GATT-like public morals exception exists due to the way the Agreement has been interpreted by the AB in a trilogy of decisions that will be discussed in more detail below. The text of the TBT Agreement includes an open-ended


49. The text of GATT art. XI(1) is as follows: “No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.” GATT, supra note 25, art. XI(1).

50. Id. art. XX(a).

51. A similarly worded provision under the General Agreement on Trade in Services or GATS also creates an express public morals defense to the requirements of that agreement. General Agreement on Trade in Services art. XIV(a), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 (1994) [hereinafter GATS].

52. See infra Part III.E.
carve-out for certain kinds of domestic regulation that have been interpreted by the AB to include “public morals” exceptions analogous to Article XX(a).53 This allows WTO Members to argue that their legislation is TBT-compliant even if a prima facie violation is established, if it was adopted in order to protect domestic “public morals.”54

An important question thus arises. Given that the WTO is not intended to be an international organization that imposes a particular normative vision or ordering beyond the concern with protectionist, discriminatory, or simply gratuitous barriers to trade, how should its jurisprudence relate to the morally motivated legislation of its Member states?

C. Prior Scholarly Approaches to Morally Motivated Legislation

How have prior scholars sought to answer this question? What has been the approach in the literature to determining how morally motivated legislation should be treated by the law of the WTO?

Scholars have long argued that the tension between morals and trade poses a deep and dangerous challenge to the law of the WTO. As Charnovitz argued in an early and “prescient”55 article, “[t]he danger of protectionist abuse is real. Virtually anything can be characterized as a moral issue.”56 For this reason, various commentators have sought to develop an account of how the law of the WTO can best limit or cabin what “counts” as a public moral to a manageable, objectively defined realm, focusing on how to define Article XX(a)’s public morals exception.57 As Charnovitz puts it, “[s]ome method to determine the legitimacy of a moral claim is needed in order to ensure that the moral exception does not begin to swallow the rules. Allowing each government to restrict imports

53. See EC Seal Products Panel Report, supra note 18, ¶ 7.419.
54. See id.
57. Note, though, that our view is that morally motivated legislation is not just relevant to the interpretation of WTO law at the defense stage. As we will describe further in Part II, we believe that the appropriate approach to moral legislation requires a pluralist sensibility that shapes one’s interpretation of many aspects of WTO law.
based on its own definition of morality could disrupt trade and allow imperialism by countries with market power.”

Scholars have adopted both substantive and procedural approaches to cabining public morals defenses. One popular substantive option is to “internationalize” the concept, as Charnovitz puts it.

Häberli has argued that the concept of public morals should be developed in line with other sources of public international law. More specifically, Charnovitz claims that international human rights law should be used to flesh out the meaning of “public morals” in the law of the WTO. By interpreting what is a legitimate moral reason for trade-restrictive legislation in line with public international law more generally, these scholars hope to cabin the concept through an “objective” (or at least universally shared) understanding of the term.

A second substantive strategy to cabin permissible moral legislation under WTO law is to look to domestic law and politics of the state in question—to determine whether or not it genuinely views the measure to be an appropriate or necessary moral regulation. One scholar has suggested that WTO scrutiny requires that the challenged moral measure be coherent and consistent with other domestic regulation.

Others have argued that a certain amount of domestic support, as evidenced by polling data, should be required for a measure to be considered representative of a country’s moral values. Still others have proposed that the measure in question be legislative, as opposed to one enacted through an executive order or decree, in order to ensure some broad-based domestic support for the values underlying a measure. Scholars have also distinguished between inwardly- and outwardly-directed public morals justifications, arguing that a stricter evidentiary and procedural test must apply to public morals legislation that

58. Charnovitz, supra note 56, at 742.
59. Id. Similarly, see Wu’s discussion of “transnationalizing” the concept. Wu, supra note 56, at 240.
61. Charnovitz, supra note 56.
62. This issue is discussed at length in Tamara Perišin, Is the EU Seal Products Regulation a Sealed Deal? EU and WTO Challenges, 62 INT’L & COMP. L. Q. 373 (2013) [hereinafter Perišin].
64. See Wu, supra note 56, at 243–44.
addresses foreign activity. These, too, are attempts to cabin the permissible substantive goals for public morals justifications.

Alternatively, one could adopt a procedural approach to cabining the concept of public morals. Scholars have urged the WTO to adopt a strict and exacting means-ends rationality test when determining whether a measure can be justified as a matter of public morals. On this view, the WTO should strictly examine whether a less trade restrictive measure could have been used to achieve the same goal. This would not cabin the types of goals that a Member can pursue but would strictly interrogate the means by which they are permitted to act on public morals defenses.

Finally, some scholars have called for the elimination of morally motivated exceptions from international trade law altogether. Bhagwati and Srinivasan have argued that international trade should not be restricted for moral reasons: “[u]nilateral suspension of trading access for reasons based on ethical preference should not be sanctioned by the WTO.” Morally motivated legislation opens the door to power politics in the law of the WTO. It allows countries to exploit their market power to enforce their will on less powerful countries. Instead, private action and persuasion should be used to achieve moral goals.

D. A Pluralist Approach to Morally Motivated Legislation

As Howse and Langille have argued, and as we argue below, the institutional role of the WTO and the very nature of non-instrumental moral reasoning make these previously articulated approaches to morally motivated legislation of limited utility in solving the conundrum of the “public morals” exception.

The vision of the WTO’s institutional role, argued for above, has implications for how the law of the WTO should respond to legislation adopted by its Member states for moral reasons; the WTO’s supervision of such legislation should be attentive to the

65. See id. at 235–36.

66. See Marwell, supra note 63, at 828–29. This was also suggested (but not stated outright) in Laura Nielsen & Maria-Alejandra Calle, Systemic Implications of the EU–Seal Products Case, 8 Asian J. WTO & Int’l Health L. & Pol’y 41, 63–64 (2013). Nielsen and Calle focus on how the E.U. should have used a less restrictive alternative (they suggested labelling).


68. Howse & Langille, supra note 5.

69. See supra Part IA.
institution’s goals and its legitimate, narrow function. Since the WTO’s mandate is not related to altering the general normative, internal commitments of its Member states, we argue that the WTO should adopt a pluralist attitude towards the morally motivated legislation adopted by its Member states, when that legislation comes under scrutiny for potential violations of the law of the WTO. In other words, to the greatest extent possible, the WTO should not seek to curtail the class of moral reasons that states are permitted to rely on to justify legislation they consider to be required by their public morality—both at the prima facie violation and at the defense stage. The WTO should not seek to regulate the moral views of states and should instead permit pluralism regarding the moral goals that its Members seek to achieve.

Accordingly, the WTO should not adopt a “closed set” approach to interpreting public morals justifications, at the defense stage. It should not adopt a position on what type of moral reasons count: it should not cabin the permissible moral ends available for Members, either through a strict reliance on international or domestic norms to provide a closed set of moral reasons. This follows from its lack of institutional expertise or juridical resources to limit the types of moral ends pursued by its Members. The WTO does not seek to make judgments about the moral goals pursued by its Members.

In addition, the law of the WTO should facilitate its Members’ ability to regulate based on all types of moral ends: it should consider instrumental and non-instrumental theories of morality to be equally likely sources of moral value. While some scholars have urged the WTO to adopt a strict means-ends rationality test when considering public morals defenses, doing so would improperly limit the scope of appropriate moral reasons to those that are instrumental or consequentialist in nature. Instead, there must be space available for non-instrumental or expressive legislation, which does not lend itself to a strict means-ends analysis because it

70. We began to introduce this argument in Part V of Permitting Pluralism. Howse & Langille, supra note 5.

71. However, as we discuss below, jus cogens norms may apply as they would to any other international treaty, and as art. 55 of the Vienna Convention requires. Vienna Convention on the Law of Treaties art. 55, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

72. Again, however, jus cogens must provide a floor. Id.

73. This argument is made at length in Permitting Pluralism. Howse & Langille, supra note 5.

74. This sentiment is evident in Canada’s submissions in Seal Products and in Perišin, supra note 62, at 400–03.
does not seek to achieve particular, concrete, harm-reducing, or risk-regulating goals.

We have also argued that the WTO should not limit public morals to secular reasons, since in many societies religion plays a significant role in determining moral values—and if the WTO were to exclude such reasons for moral legislation, it would go far beyond its narrow remit into moral adjudication. There is nothing in WTO law that prevents religious states from being WTO Members in good standing, and indeed there are WTO Members that are religious states. It is not the WTO’s role to take a stance in philosophical debates about the scope of morality—whether it includes both deontological and consequential moral reasons or both secular and religious reasons, for example. All sorts of recognizably moral reasons should be permissive grounds for domestic regulatory action under WTO law.

The WTO should also permit states to regulate for moral reasons that are complex and may include multiple justifications, some of which may even appear to conflict. While some scholars have urged for an internal consistency test to cabin public morals, this would improperly empower WTO adjudicators and constrain the ability of legislators to regulate for multiple integrated reasons. For example, a society’s prohibition on the use of marijuana on moral grounds could contain an exception for its use in medicinal circumstances. Such legislation would have two motivating principles—to prohibit the use of marijuana on the grounds that it is morally wrong to use a mind-altering substance, a claim about

76. See supra note 48 for examples of import bans motivated by a variety of secular and religious rationales.
77. Howse & Langille, supra note 5, at 410 (see discussion of Clove Cigarettes).
78. See supra Part I.C. This was also Norway’s argument on Appeal in Seal Products. They claimed that any exception to a ban would need to be independently justified by a distinct prong of art. XX. Therefore, since there was no exception in art. XX for the protection of indigenous groups, the indigenous exception could not be countenanced. Our view, as we argue here, is that a measure should not be considered less of a “moral” measure because it has exceptions that stem from other purposes, even prudential ones. Government regulation, by its very nature, must always balance competing objectives and governments must craft careful solutions to regulatory problems. If the WTO were to follow Norway’s argument and require that any exception or limitation on a ban be independently justified under a prong of art. XX, it would be acting inconsistently with its role in overseeing domestic regulation, and in a manner reflecting a failure to understand the very nature of regulation. For further exploration of this argument, see Howse & Langille, supra note 5. For a discussion of the Seal Products treatment of measures with multiple policy aims, see Julia Y. Qin, Accommodating Divergent Policy Objectives under WTO Law: Reflections on EC–Seal Products, AJIL UNBOUND (June 25, 2015), http://www.asil.org/blogs/accommodating-divergent-policy-objectives-under-wto-law-reflections-ec—seal-products.
social values, but to permit its use when it will relieve significant suffering of patients with terminal and long-term illnesses, which is also a moral claim. Legislation that seeks to instantiate a particular view of morality can be complex. A fanatical or draconian approach is not needed for legislation to be morally motivated; it can be crafted to recognize competing moral considerations and goals. Consider a societal prohibition on murder for moral grounds that also recognizes an exception for assisted suicide in instances in which individuals are facing terminal illnesses and in which their faculties are intact. Clearly, this general rule and its exception are morally motivated. But they may be motivated by different facets of moral reasoning. The WTO should not seek to prohibit such moral rules that instantiate complex reasoning—it should instead recognize that moral reasons can be manifold.

The WTO should also permit states to regulate for complex moral reasons that may include multiple justifications, some of which may even appear to conflict. While some scholars have urged that the public morals justification should only apply when a measure is internally consistent with respect to its moral objectives, this approach improperly constrains the ability of legislators to regulate for multiple integrated, and possibly conflicting, reasons. Moral legislation, like all legislation, can be complex. A simplistic or ‘pure’ approach is not needed for legislation to be considered genuinely moral; laws can be crafted to recognize competing moral considerations and goals. Consider a prohibition on murder that also recognizes an exception for assisted suicide where terminally ill patients are suffering. The rule and its exception could both be morally motivated, but they could be motivated by different moral reasoning; the prohibition on murder instantiates the norm that it is typically wrong to kill another human being, while the exception introduces the competing norm that it is per-

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79. Howse & Langille, supra note 5, at 410 (see discussion of Clove Cigarettes).
80. See supra Part I.C.
81. For example, a society’s prohibition on the use of marijuana for moral reasons could contain an exception for its use in medicinal circumstances. Such legislation would have two motivating principles—first, to prohibit the use of marijuana on the grounds that it is morally wrong to use a mind-altering substance, a claim about social values; and second, to permit its use when it will relieve significant suffering of patients with terminal and long-term illnesses, a separate moral reason.
82. See generally Carter v. Canada (Attorney General), [2015] 1 S.C.R. 331 (Can.) (holding that physician-assisted death is permitted when a competent adult consents to such assistance and suffers from a terminally ill condition, and describing the Netherlands and Belgium as examples of countries that permit some form of physician-assisted death).
missible to kill another human being with their consent and if they are undergoing great suffering that cannot be alleviated.

In addition, WTO law does not require that a country legislating for moral reasons be fanatical about achieving its moral purposes to avail itself of the public morals exception. If a country wishes to enact a moral rule through legislation, it can place limits on that rule even for purely prudential reasons that do not stem from a competing moral principle.\(^{83}\) Such exceptions do not make a measure less “moral” in nature.

Pluralism also means that the WTO cannot limit moral justifications to those that arise out of a particular domestic political structure, such as a democracy. While some scholars have suggested that only measures passed by elective representatives, or even measures supported by majority public opinion, deserve the protection of the public morals defense,\(^{84}\) we disagree. It is not the WTO’s prerogative to impose domestic political structures on Members or restrict legal defenses only to Members with particular political regimes. Unlike certain human rights instruments, which often contain minority rights protections and other guarantees of civil and political rights,\(^{85}\) the law of the WTO has little to say about the appropriate domestic political and legal structures that Member states can adopt (where it does the jurisprudence has generally evolved toward a flexible or permissive approach, as in domestic institutions to enforce intellectual property rights).\(^{86}\) It is possible

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\(^{83}\) For example, a society may prohibit the purchase and sale of marijuana, but permit such actions if the amount of marijuana purchased or sold is less than an ounce. A society may take this action not because it thinks that selling a small amount of marijuana is any less morally culpable in principle than selling a large amount (although may also be the case), but it may do so simply for prudential reasons, perhaps because it does not want to clog up its court system with trivial cases or because it would strain police resources that could be better spend on other areas of criminal activity. An exception for the sale of small amounts of marijuana for prudential reasons would not mean that the general prohibition on the purchase and sale of marijuana was not “moral” in nature.

\(^{84}\) This option is most clearly considered (but ultimately rejected) in Marwell, supra note 65, at 822.


\(^{86}\) For example, see generally China–Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WTO Doc. WT/DS362/R (Jan. 26, 2009) (taking a flexible approach to different approaches to intellectual property protection).
to be a WTO Member as a democracy or an autocracy, even if, as in
the *EC–Hormones* case the Appellate Body has suggested that there
might be a particular margin of appreciation for the decisions of
representative, responsible governments.\(^87\) Pluralism, which
requires accepting the existence and validity of all these different
conceptions of politics, law, and regulation under the WTO
umbrella, means that the WTO should not require a particular
type of evidence of public support for the claimed public morality
in question. The moral value in question should not have to be
supported by an entire society or even a majority of a society in
order for it to be considered a matter of “public morals.”

This approach is confirmed by the manifold difficulties involved
in attempting to inject moral standards into the law of the WTO; it
is difficult to understand how the WTO could legitimately and
strictly scrutinize the moral and religious norms of its Member
states. As previously noted,\(^88\) WTO Member states vary dramati-
cally in terms of their moral commitments and their domestic
political makeup. If the WTO were to adopt a strict approach,
requiring majoritarian support and/or evidence of authentic
moral beliefs to find that a measure was really a matter of public
morals, how would the standard be adjudicated and proven?
Would it look to opinion polls to figure out if a moral standard was
“really” widely held? What level of support would be required?
Would the WTO interpret religious and constitutional texts of its
Members to determine their founding values? If Israel’s current
ban on the importation of non-kosher meat products were chal-
 lenged, would the WTO question how widely Israelis supported the
ban on kosher products?\(^89\) Would they consult rabbis to figure out
if an import ban on non-kosher products was really required by
Judaism? Even posing these questions demonstrates the absurdity

\(^{87}\) *See European Communities — Measures Concerning Meat and Meat Products (Hormones), WTO Doc.*

\(^{88}\) *See supra Introduction.*

\(^{89}\) As discussed in *Permitting Pluralism*, Israel currently justifies its ban on non-kosher
meat on the basis of religious reasons. *See Howse & Langille,* *supra* note 5, at 369. 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](http://www.tamas.gov.il/NR/exeres/5EA6B0B6-D877-48D7-A21F-BE9337BFA06A.htm).
of a searching standard for adjudicating morally motivated legisla-

tion under the law of the WTO.

This is also why certain scholars’ position that the WTO should

permit no moral exceptions at all must fail.90 If the WTO were to

ban moral regulations, it would overstep its institutional role and

gravelly imperil its legitimacy. An international trading system with

no moral exceptions would dramatically impact the policy space

available to Members and fundamentally alter their domestic char-

acter. It is not the WTO’s place to determine that a Jewish state

cannot ban non-kosher products, that an Islamic state cannon ban

alcohol imports, or that a Hindu state cannot ban bovine products.
The WTO does not presume to override some of the most funda-

mental and important reasons for state regulation.

However, this pluralist perspective does not mean that public

morals in the WTO should be read in isolation from other sources

of public international law.91 In particular, and as suggested in Per-

mitting Pluralism,92 it may be impermissible to justify under Article

XX(a) an otherwise WTO-inconsistent measure that is also a violation

of jus cogens norms, which preempt any conflicting rules of

international law.93 For example, if a Member state were to ban

imports from countries based on racist hatred towards the individ-

uals residing in those countries, even if it claimed that this

reflected the Member’s “moral” values (and even if it actually was

based on what that state genuinely if misguidedly considered to be

moral imperatives), the ban would likely violate a jus cogens norm

against racial discrimination.94 In addition, human rights law may

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for accommodating states’ ethical preferences).

91. Charnovitz, supra note 56, at 702; Häberli supra note 60, at 1. Similarly, see Wu’s

92. Howse & Langille, supra note 5, at 431.

93. For comprehensive treatments of jus cogens, see Christos L. Rozakis, The Con-
cept of Jus Cogens in the Law of Treaties 1, 11 (1976); Lauri Hannikainen, Peremptory

norms (jus cogens), in International Law: Historical Development, Criteria, Present Sta-
tus (1988); Stefan Kadelbach, Jus Cogens, Obligations Erga Omnes and other Rules - The Identifi-
cation of Fundamental Norms, in The Fundamental Rules of the International Legal

Order: Jus Cogens and Obligations Erga Omnes 21, 29 (Christian Tomuschat & Jean

Marc Thouvenin eds., 2006).

94. Case Concerning the Barcelona Traction, Light and Power Company, Limited, Second

Phase, Judgment of 5 February 1970, ICJ Reports (1970), 3, 32 (describing the norm

against racial discrimination as an obligation erga omnes—an obligation binding on all,

which is not the same as jus cogens but conceptually related in that jus cogens norms argua-
bly give rise to universally binding obligations); Javad Reisman, The Weaknesses in the

International Protection of Minority Rights 120 (2000) (“it is highly persuasive to

argue that the prohibition on racial discrimination now forms part of the norm of jus

cogens.”).
be of interpretive assistance in determining the outer boundaries of public morals, while still adhering to a pluralist approach, since human rights law contains sensitivity to the concerns of pluralism. We therefore do not go as far as those scholars who have argued for a strictly unilateralist or self-judged interpretation of public morals.

E. The Appropriate Legal Test

What sort of legal standard is required under the pluralist approach, when the WTO’s dispute settlement bodies are analyzing whether a morally motivated piece of legislation can be justified? As noted above, the issue arises under two key WTO agreements: the GATT and the TBT Agreement. In the GATT context, Article XX(a) allows respondents to argue that a prima facie violation of the GATT is justified as a matter of domestic public morals. In the TBT Agreement, by contrast, there is no specific reference to public morals, nor is there a general exceptions clause regarding discriminatory regulations. However, defenses have been read into the text of the TBT Agreement that are similar in many respects to those set out in GATT Article XX. Therefore, WTO Members can argue that their legislation is TBT-compliant (even if a prima facie violation is established) if it protects domestic public morals.

Under a pluralist approach, there are several important elements that should be included in any legal test to determine whether a measure can be justified for moral reasons. The first of these elements is that public morals are not self-judging, in the way that the WTO’s national security justification is generally thought to be. As Alford and others have detailed, the GATT Article XXI

95. See Howse & Langille, supra note 5, at 431.
96. See Tamara S. Nachmani, To Each His Own: The Case for Unilateral Determination of Public Morality Under Article XX(a) of the GATT, 71 U. Toronto Fac. L. Rev. 31, 35–36 (2013) (arguing that a strictly unilateralist approach is most consistent with WTO jurisprudence).
97. See GATT, supra note 25, art. XX(I)(a); TBT Agreement, supra note 34, at 117.
98. See GATT, supra note 25, art. XX(I)(a).
99. See supra Part II.E.1, at 156–58.
exception for measures taken for reasons of national security information, nuclear materials, military goods and services, and war and international emergencies expressly exempts a measure if the WTO member “considers” that it is needed or important for reasons of national security. This implies that such Member decisions are not subject to review by WTO judicial authorities at all; Members themselves are the sole judges of the scope of their rights under Article XXI.

By contrast, pluralism does not require that public morals measures also be self-judging; justifications rooted in public morals are and should be justiciable. Members should not be given carte blanche to claim that any trade restrictive measure is acceptable by simply asserting, on a declaratory basis, that the measure accords with their public morality. The security exception is often argued to be non-justiciable because it is thought to entail a political question beyond the ability of courts to adjudicate, and because it involves judgments that are at the core of a state’s domaine réservé—and thus traditionally shielded from obligations under public international law. Morally motivated legislation, on the other hand, does not conform, at least as strongly, with these features. Domestic constitutional courts regularly review morally motivated legislation to see if it evinces a discriminatory intent or effect on minority groups. Furthermore, public international law instruments, such as human rights law, have subjected domestic legislation with moral aims to the same types of anti-discrimination and other analysis. Therefore moral legislation does not share the features that make us think of the security exception as self-judging; moral concerns are not political questions outside of the purview of the courts, nor are they sheltered from the judgment of public international law.

If public morals justifications are not self-judging, a court will have to conduct some type of analysis to see whether the rationale provided by a State can count as an adequate public morals ratio-

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102. Cann, supra note 101, at 430.

103. Including legislation prohibiting the importation of only certain kinds of pornography, see Little Sisters Book and Art Emporium v. Canada (Minister of Justice), [2000] 2 S.C.R. 1120, 1160, 1186 (Can.) or legislation that prohibits the importation, sale, and growth of marijuana, see R. v. Malmo-Levine, [2003] 3 S.C.R. 571, 629–30, 635 (Can.).

104. See supra note 85.
We have already said that a WTO adjudicatory body should adopt a permissive, pluralist approach to what counts as public morals, because of the WTO’s particular institutional role, purpose, and history. The question that should be asked is whether the proffered reason could count as a moral reason at all. That is, a WTO adjudicator analyzing a public morals justification should inquire whether the justification given is the type of justification that could legitimately be called a moral reason, under any recognizable conception of what is moral; this in turn requires awareness by the adjudicator of the plural nature of forms of moral reasoning in different political, religious, cultural, spiritual, and social contexts.

Typically, as the jurisprudence suggests, this will involve determining whether the rule in question is genuinely concerned with standards of right and wrong conduct within a society. This will also involve looking at jus cogens standards to see if the moral reason in question has been assessed by the international community as antithetical to the kind of moral reasoning that is indispensable to legitimate international legal order.

It might be asked if, under this approach, there is any sort of public policy that could not be couched as “moral” by some understanding of moral reasoning. Perhaps one instance is outright corruption, where policies are based exclusively on furthering the material self-interest of a governing elite rather than on any consideration of the values of society. Yet the commitment to non-discriminatory and non-protectionist regulation that is, as described above, the normative foundation of the WTO system itself, also places some limits on what can be considered “moral” reasoning. There are some moral views, propounded by philosophers such as Jean-Jacques Rousseau, which would consider proper morality to be that of community self-sufficiency—favoring autarchy over trade as a matter of principle, and regarding trade itself as something morally questionable.105 Measures motivated this way are unjustifiable under Article XX(a)—not because this kind of reasoning cannot in principle be “moral” but because there are at least some, albeit few, kinds of genuinely moral reasons incompatible with the core normativity of the WTO system.

Apart from the exception just discussed, because of the WTO’s limited institutional role, the application of Article XX(a) should not entail any assessment of the validity or desirability of the rea-

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sons given, but simply whether they count as moral reasons at all within the framework of WTO law.

This approach also suggests an evidentiary basis that a WTO Panel or the AB could adopt. If the focus is on whether the reasons are moral—and not how good or how consistent or how representative the moral reasons are, or whether the substance or content of those reasons fits with a particular moral or political theory—the type of evidence that a Member state will offer to substantiate their claim will shift. Members can try to show that their reason is an ethical, moral, or religious reason, for example, by pointing to scripture or past practice within their society. This evidence should not be used by the WTO to assess whether this is a good moral belief, a widely held moral belief, a consistent moral belief, or a rational moral belief, but whether the belief is of a moral nature.

This also means that evidentiary approaches typically employed to deal with other WTO law questions may not be appropriate in the special context of public morals. When determining whether a measure is taken to protect human or animal life and health, for example, a WTO adjudicatory body may look to relevant international standards or scientific evidence to determine whether the Member state’s rationale is sound.\(^\text{106}\) Similarly, when determining whether a measure was taken for the purposes of “conservation of exhaustible natural resources” under Article XX(g), as illustrated in the US–Shrimp/Turtle dispute, a number of objective, indeed international benchmarks might be invoked to determine whether the measure in question genuinely concerns “exhaustible natural resources.”\(^\text{107}\) A pluralistic approach to morally motivated legislation does not lend itself to this type of evidentiary analysis because international benchmarks and scientific evidence are generally irrelevant to whether a Member’s actions can be considered to be motivated by a concern for public morals—short of the very broad parameters that jus cogens, international human rights law, and basic compatibility with core WTO norms may establish.

The pluralist approach also acknowledges that moral legislation often has an expressive or non-instrumentalist dimension. When a WTO adjudicator is assessing a measure as a matter of public morals, it may need to think about it in a different way, and consider different evidence, than it would for a risk-regulating or harm-reducing measure. The adjudicator must also be open to the

\(^{106}\) See, e.g., Brown, Pauwelyn, & Smith, supra note 19, at 461–62.

\(^{107}\) See US–Shrimp/Turtle, supra note 9, ¶¶ 92–93, 104–06, 130.
possibility of multiple and sometimes conflicting purposes, since the purpose may not be an absolute reduction of risk along a single metric, but instead an expression of complex and interrelated values, potentially along several different dimensions.

Finally, a pluralist approach requires an accommodation of morally motivated legislation beyond the defense stage of the analysis. As Howse and Langille argued in *Permitting Pluralism*, a pluralist approach requires a more general sensitivity to protecting the “right to regulate”—the regulatory autonomy of WTO Member states. This approach should influence an adjudicator’s interpretation of all areas of WTO law that interface with moral regulation.

**PART II: ANALYSIS OF THE SEAL PRODUCTS CASE AND ITS IMPLICATIONS FOR THE LAW OF THE WTO**

Part I has sought to set out an approach that WTO adjudicatory bodies should adopt when assessing morally motivated legislation. This Part will turn to analyzing the *Seal Products* case, both outlining the implications of the case for WTO law generally and specifically how *Seal Products* reconciles WTO law with the challenge of pluralism. In the Panel and AB Reports, the law of the WTO bends to accommodate the dilemma that morally motivated domestic legislation poses for WTO adjudicators and was adapted to accommodate that challenge in several important respects. Nevertheless, *Seal Products* does not represent a complete reconciliation between the pluralist challenge and the law of the WTO. Certain aspects of the law of the WTO were developed in the *Seal Products* case in a matter that is not friendly to the proposed pluralist approach.

In challenging the European Union ban on seal products at the WTO, Canada and Norway argued that the exceptions in the ban, including one for seal products that were the result of subsistence hunting by indigenous communities (the IC exception), discriminated against products from their countries. The excep-

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108. See infra Part III.

109. As noted above, the EU seals regime contains three exceptions. EU Seal Products Regime, supra note 1.

110. For a summary of Canada and Norway’s claims at the WTO, see EC Seal Products Panel Report, supra note 18, ¶¶ 3.1–3.2; EC Seal Products AB Report, supra note 28, ¶¶ 2.1–2.2. The seal products regime contained two additional exceptions. The second exception permits the importation of goods purchased abroad by travelers for casual or noncommercial use. 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. For an extended discussion of these exceptions, see Howse & Langille, supra note 5, at 384–86.
tions made it easier for seal products produced in countries with a higher percentage of indigenous sealers, like Greenland, to import and sell seal products in Europe. The claimants also argued that the exceptions undermined the measure’s moral purpose. In addition, Canada challenged the EU’s argument that the measure was taken to promote animal welfare, arguing that there was no evidence to support the claim that the seal hunt posed risks to animal welfare.

The case was heard by both a WTO Panel and the AB. The Panel found that the European Union’s ban violated articles of both the GATT and the TBT Agreement. But the Panel also found that the measure could be justified as a matter of public morals under both treaties, since morally motivated concerns regarding animal welfare could be considered a component of public morals. Ultimately, however, the Panel concluded that the way in which the exceptions to the measure were designed and implemented could not be justified.

The AB agreed with the Panel that the European Union’s ban violated the GATT’s primary non-discrimination provisions, but did not agree that the TBT Agreement applied. It also agreed with the Panel that the ban could be provisionally justified as a matter of public morals, but that the way in which the exceptions to the measure were implemented meant that ultimately it could not be justified consistent with the requirements of the chapeau. The problem with the European Union’s measure, then, is not the ban on seal products for reasons of public morals, but the way in which the exceptions are designed and implemented.

The remedial stage of the case is ongoing.

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111. EC Seal Products Panel Report, supra note 18, ¶ 7.597.
112. Id. ¶ 6.7.
113. See id. ¶ 7.412.
114. See id. ¶¶ 8.1–8.7.
115. See id. ¶ 7.639.
116. See id. ¶ 7.651.
117. See EC Seal Products AB Report, supra note 28, ¶¶ 5.96, 5.130.
118. See id. ¶ 5.70.
119. See id. ¶ 5.290.
120. See id. ¶ 5.339.
121. See id.; see Howse, Langille, & Sykes, supra note 7.
122. The reasonable period of time for the European Union to implement the ruling expires on October 18, 2015, and at that time the claimants could choose to bring further proceedings if they view the implementation as inadequate. See World Trade Organization, European Communities—Measures Prohibiting the Importation and Marketing of Seal Products, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds400_e.htm. In 2014, Canada and the EU signed a joint statement agreeing to cooperate so that Canadian indigenous
A. Test for the Application of GATT Article XX(a)

As a general matter, Article XX permits WTO Member states to justify actions that violate GATT disciplines if the regulation under consideration is for one of the enumerated grounds listed in Article XX and if it does not violate the “chapeau” of Article XX. The structure of Article XX is thus bifurcated; a respondent must demonstrate both that the measure under consideration qualifies under one of the reasons listed in the Article, and that it does not violate the requirements of the chapeau.

In its original pleadings, the European Union argued that the seals regime should fall under two of the enumerated grounds of Article XX. The European Union claimed that the seal products regime was adopted because it was “necessary to protect public morals” (Article XX(a)) and because it was “necessary to protect human [or] animal . . . health” (Article XX(b)). The European Union’s second argument—that the seals regime was necessary to protect animal health, and that it therefore also had an instrumental dimension—was not extensively considered by either the Panel or the Appellate Body. The Panel held that since the European Union focused on the morally motivated aspects of the ban on seal products, the ban was best considered under Article XX(a). While the Panel stated that they did not address the European Union’s Article XX(b) claim because the European Union had failed to make a prima facie case that the matter was adopted as a matter of animal health, the Panel’s holding is better characterized as having been adopted as a matter of judicial economy. The Panel felt that they did not need to reach the XX(b) claim because it had determined that the matter was provisionally justified as a matter of XX(a). On appeal, the AB repeated this hold-

123. The chapeau requires that the measure not be applied in a manner that “would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.” GATT, supra note 25, art. XX.
124. See EC Seal Products Panel Report, supra note 18, ¶ 7.82.
125. GATT, supra note 25, art. XX(1)(b).
126. See EC Seal Products Panel Report, supra note 18, ¶ 7.640.
127. See id.
128. See House, Langille, & Sykes, supra note 7.
129. EC Seal Products Panel Report, supra note 18, ¶ 7.640 (explaining that if the matter is provisionally justified under art. XX(a) before reaching their conclusion on
Thus the main focus of the Panel and the Appellate Body’s analysis in Seal Products was on the applicability of Article XX(a), the public morals exception.

1. Prior Article XX(a) Cases

GATT Article XX(a) allows respondent states to argue that even if the legislation under examination violates the GATT’s disciplines, a defense is available to them: That the measure was necessary as a matter of “public morals.” GATT Article XX(a) thus is clearly meant to provide states with the ability to regulate for reasons that are important to them, balancing between the goal of trade liberalization and the importance of allowing states domestic regulatory autonomy. As the AB has suggested in China–Audiovisuals and US–Clove Cigarettes, Article XX as a whole should be understood as a means of ensuring Member states’ “right to regulate.”

In line with our thesis that the WTO should adopt a pluralist approach to public morals, prior cases that touched on the definition of the public morals defense have taken a deferential and dynamic approach to interpreting the meaning of this provision. The two key prior cases on point are US–Gambling and China–Audiovisuals.

As developed in these cases, the test for the applicability of Article XX(a) is “two-tiered.” First, the respondent must establish that the objective of the measure under analysis fits within the concept of public morals. In both Gambling (which concerned the similarly worded public morals exception in Article XIV of GATS) and Audiovisuals, states were given a wide berth to define what should be considered to be a matter of public morals. In Gambling, the United States argued that measures taken to prohibit offshore gambling could be justified as a matter of public morals, some-

XX(b); it therefore strongly implies that the provisional justification is relevant to their decision not to examine the EU’s art. XX(b) claim.

130. See EC Seal Products AB Report, supra note 28, ¶ 5.290.
132. See China–Audiovisuals, supra note 11; see also US–Gambling, supra note 11. Note, though, that in the Gambling case, the relevant provision was the public morals defense in the General Agreement on Trade in Services (GATS).
134. See id., ¶ 6.455.
thing that Antigua did not challenge. The Gambling Panel adopted a deferential approach to what constitutes a measure taken for public morals purposes; it held that “the term ‘public morals’ denotes standards of right and wrong conduct maintained by or on behalf of a community or nation.” Thus “Members should be given some scope to define and apply for themselves the concepts of ‘public morals’ and ‘public order’ in their respective territories, according to their own systems and scales of values.” The Gambling Panel therefore recognized that what counts as public morals will vary across societies, given the wide variety of different ethical, moral, and religious beliefs that societies hold. This approach was reiterated in China–Audiovisuals, in which the Panel cited with approval the Gambling approach to the definition of public morals—one in which Members can define their own standards of public morality, and thus one in which the meaning of public morals will “vary in time and space.”

The second step under Article XX(a) is the “necessity test,” in which the respondent must make a *prima facie* showing that the measure is “necessary” for the protection of public morals. As set out in Korea–Beef and Brazil–Tyres, this analysis entails “weighing and balancing” several factors: the relative importance of the interests at stake; the contribution of the measure to meeting the objective; and the trade restrictive impact of the measure on international commerce. In addition, the respondent should consider alternative measures that could achieve the same objective.

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135. See id. ¶ 3.253–9 (in which the summary of Antigua’s argument does not mention a challenge to classifying the US measure as one of public morals).

136. Id. ¶ 6.465 (quoting the Oxford English Dictionary).

137. Id. ¶ 6.461.

138. As the Panel notes, “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.” Id. ¶ 6.461.


141. See Appellate Body Report, Brazil–Measures Affecting Imports of Retreaded Tyres, ¶ 143 WT/DS332/AB/R (June 12, 2007) [hereinafter Brazil–Tyres].

142. See id.

143. See id. ¶ 156. But it is not the burden of the respondent to eliminate all reasonably available alternatives. If the measure is shown to be “necessary,” then the burden of proof shifts to the complainant, who can rebut the conclusion by showing that there is a reasonably available alternative measure that the respondent could have taken. Id.
Seal Products posed a novel question of interpretation for Article XX(a) purposes: it was the first time in the WTO’s jurisprudence that a complainant has contested the applicability of the public morals defense at the first stage of the analysis—whether the measure can fall within the scope of public morals. Canada argued that the seals regime did not fall within the scope of public morals. The exceptions to the measure suggest that its moral aim is not the primary or driving force behind it. Finally, Canada argued that any moral concerns result from a false assumption that the seal hunt is inhumane; an assumption that can be disproven on the facts when one examines the precise circumstances in which the seal hunt takes place. Regarding the necessity test, Canada argued that the measure is highly trade restrictive; that it does not actually prevent a harm to the public morals of Europe, and particularly not on European territory; and that while in principle public morals are important, the exceptions to the measure mean that it does not actually protect any moral value.

The European Union contested these positions. It argued that the seals regime could meet both tiers of the test for the applicability of the public morals defense. Regarding the first tier, they argued that the seals regime should be considered a matter of the European Union’s public morals. In Europe, animal welfare is of paramount importance, even protected within the treaties constituting the European Union. The seal products regime therefore clearly relates to an important moral value held by Europeans. The European Union argued that the seals regime met the necessity test because of the importance of the goal and the high degree of contribution of the measure to European moral values.

2. The Seal Products Approach

In the Seal Products dispute, the Panel applied the two-tiered approach to the European Union seals regime. First, the Panel concluded that the measure could be justified as a matter of public

144. See supra, Introduction.
145. As is evident from the Panel’s review of the parties’ arguments, Norway did not make these claims, although it did challenge the necessity of the measure under public morals. See EC Seal Products Panel Report, supra note 18, ¶ 7.629.
146. See id. ¶ 7.627.
147. See id.
148. See id. ¶ 7.361.
149. See id. ¶ 7.362.
150. See id. ¶¶ 7.625–7.626.
151. See id. ¶ 7.625.
152. See id. ¶¶ 7.625–7.626.
morals, since the measure was adopted out of concern for seal welfare which is a component of the “standards of right and wrong conduct maintained by or on behalf of” the European Union. In reaching this conclusion, the Panel adopted a deferential approach to the meaning of public morals. It noted that:

[A]scertaining the precise content and scope of morality in a given society may not be an easy task. As the panel in US–Gambling stated, we are mindful that Members should be given some scope to define and apply for themselves the concepts of “public morals” in their respective territories, according to their own systems and scales of values. Although not all evidence presented to us makes an explicit link between seal or animal welfare and the morals of the EU public, we are nevertheless persuaded that the evidence as a whole sufficiently demonstrates that animal welfare is an issue of ethical or moral nature in the European Union. International doctrines and measures of a similar nature in other WTO Members, while not necessarily relevant to identifying the European Union’s chosen objective, illustrate that animal welfare is a matter of ethical responsibility for human beings in general.

Second, the Panel found that the measure met the Article XX(a) necessity test. Since all the parties conceded that the protection of public morals is of the highest importance, and since protecting seal welfare was found to be a matter of European public morality, the measure’s goal is very important. Since the measure is highly trade restrictive, the Panel relied on Brazil–Tyres to conclude that in such a circumstance the contribution to the measure’s objective must be “material.” While the Panel found that the exceptions to the measure detracted from its contribution to the measure’s objective, it nevertheless concluded that the seals regime made a material contribution to the objective of protecting European public morals.

On appeal, the AB affirmed that the seals regime was provisionally justified under the public morals exception. The AB rejected Norway’s argument that the Panel should not have analyzed both the ban and the exceptions, and instead focused on the exceptions and argued that the measure needed to be taken as a whole for the prima facie violations of the GATT to be cognizable, and thus the measure must be analyzed in both its prohibitive and permissible

153. Id. ¶ 7.409.
154. Id. (discussed in the context of TBT Agreement art. 2.2).
155. See id. ¶ 7.639.
156. See id. ¶ 7.631.
157. Id. ¶¶ 7.635–7.636.
158. See id. ¶ 7.637.
elements. The AB also rejected Norway’s claim that the Panel had improperly characterized the European Union’s objective. It rejected Canada’s claim that for a measure to be justified as a matter of public morals, it must be philosophically consistent with the other measures a Member has taken for the same moral rationale; it also rejected Canada’s argument that the risks to public morals were insufficiently specified. Finally, and importantly, it rejected Canada and Norway’s argument that the measure failed to make a material contribution to the objective, holding that Brazil–Tyres does not require that a ban make a “material” contribution to the objective in question; instead, a weighing and balancing is required.

3. Consequences for Article XX(a) Jurisprudence

The Article XX(a) analysis undertaken by the Panel and the AB in Seal Products has several important implications for the law of the WTO. First, Seal Products established for the first time that moral concern for animal welfare could be a matter of a state’s public morals and thus potentially justifiable under GATT Article XX(a). Since the European Union was able to adduce evidence that the seals regime was adopted in response to a European concern regarding animal welfare, the Panel accepted that the public morals exception was at play. The AB did not disturb these holdings.

In addition, the Panel took into account the growing global tendency towards taking animal welfare seriously in concluding that it could be a component of the public morals exception. It noted that protecting animal welfare is a “globally recognized issue” that is “a matter of ethical responsibility for human beings in general.” Again, the AB did not alter these conclusions. These holdings open the door to future animal welfare defenses and provide an important endorsement for the protection of animal welfare. At the same time, and in keeping with our pluralist

159. See EC Seal Products AB Report, supra note 28, ¶ 5.193.
160. See id. ¶ 5.256.
161. See id. ¶ 5.200.
162. See id. ¶ 5.216.
163. This point is made most clearly in the context of TBT Agreement art. 2.2, ¶ 7.409, but this analysis is adopted in the Panel’s art. XX(a) analysis as well.
165. EC Seal Products Panel Report, supra note 18, ¶ 7.420.
166. Id. ¶ 7.409.
168. See Sykes, Langille, & Honse, supra note 22, at 211–12.
approach, neither the Panel nor the AB suggested that *global recognition* of a moral precept is *required* for it to support the public morals exception under WTO law.\(^{169}\)

The second important aspect of the *Seal Products* case for the law on Article XX(a) is the Appellate Body’s rejection of Canada’s “philosophical consistency” notion.\(^{170}\) On appeal, Canada argued that the Panel had erred in finding that the seals regime could count as a measure “to protect public morals” because the European Union had failed to identify the precise content of the public moral concern at issue. Since the European Union does not seek to protect animal welfare in all instances—for example, it permits deer hunting and slaughterhouses—it must be assumed to have a high level of tolerance for risks to animal welfare. Thus it should not be permitted to regulate for purposes of animal welfare in the context of seals.\(^{171}\) In essence Canada proposed that there should be a philosophical consistency test embedded in Article XX(a): unless a country is willing to regulate in a philosophically consistent fashion, it should not be permitted to justify legislation on the basis of public morals.\(^{172}\)

The AB rejected Canada’s argument, stating that Member states have a right to set the level of protection that they desire, and that they may do so “even when responding to similar interests of moral concern.”\(^{173}\) Whether an action can count as a matter of public morals is therefore not assessed against similar moral actions that could be taken by a society. Instead, the matter should be taken on its own terms, to see whether the rationale that supports the particular action is a matter of public morals within the society in question. It cannot be undermined by the theory that the society is not acting in a perfectly consistent fashion.

Importantly, this approach allows for the gradual evolution of domestic law on issues with a moral aspect.\(^{174}\) If a society were forced by the WTO to regulate (for example) all animal welfare matters in a perfectly simultaneous and consistent fashion, that society would be able to take no changes on animal welfare at all

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169. As we note above, requiring universal acceptance of a particular value before it can be included in the public morals exception, as some commentators have argued, would impermissibility limit the regulatory autonomy of WTO Member states and impermissibility impose homogeneity.
170. This issue is raised by Perišin, *supra* note 62, at 401–02.
172. See *id.* ¶¶ 2.33, 5.196.
173. *Id.* ¶ 5.200.
174. This is also a point made in Howse & Langille, *supra* note 5, at 419.
until it was ready to regulate every aspect of animal welfare to an equally high standard. But legislation, particularly in democratic societies, is typically done in a piecemeal, gradual fashion, as moral standards evolve and as political coalitions form. It would be a gross overreach on the part of the WTO if it were too insistent that any morally motivated legislation should be enacted in a way that is perfectly philosophically consistent with all other morally motivated legislation taken by that society. This approach would make the WTO a sort of constitutional court—and an extraordinarily interventionist one at that. It would be reviewing legislation for its philosophical coherence rather than its compatibility with trade commitments, and interfering in legislative choices to an extent that would only be acceptable, say, for a domestic constitutional court enforcing fundamental rights. It would also mean that the WTO would inhibit legislative evolution grounded in the legitimate realities of democratic procedure, wherein change on an issue can be gradual, such that laws on the books can seem to be philosophically inconsistent.

In addition, Canada’s argument implies that the European Union does not have the right to treat certain animals differently from others if it wishes to do so. This flies in the face of Canada’s own legislation on animal welfare, which in practice provides protection to cats and dogs from cruelty but not other animals with a similar level of sentience. There is a wide range of differences in the ways different societies value different animals, and it is not the WTO’s place to second guess the appropriate level of protection for each species. The AB’s stance in this instance is therefore a welcome development in the law of the WTO.

Relatedly, and crucially from the perspective of pluralism, the AB rejected arguments by Canada and Norway that the European Union seals regime could not be motivated by public morals because it balanced the main purpose of addressing cruelty to seals with an additional purpose of protecting the interests and way of life of indigenous communities. The AB rejected the complain-

175. See Katie Sykes, Rethinking the Application of Canadian Criminal Law to Factory Farming in Perspectives on Animals and the Law in Canada 33–56 (Peter Sankoff, Vaughan Black & Katie Sykes, eds., 2015) (arguing that agriculture and other animal-use industries benefit from an implicit exemption from the criminal offence of animal cruelty).

176. In particular, as noted above, Norway had argued that any exception to a measure should have to undergo an independent art. XX analysis, considered essentially as a separate measure. So in this case, the indigenous exception should have been analysis as an entirely separate provision that would ultimately fail because of the lack of an indigenous exception in art. XX. This claim was rejected. See GATT, supra note 25.

ants’ argument that the coexistence of multiple objectives disqualified the measure for the public morals justification. As we argued in Part I, this is a critical aspect of a pluralistic approach, given that morally motivated legislation, such as the seals regime, will frequently involve multiple objectives that may even be in tension with one another.

The third important aspect of Seal Products for the interpretation of Article XX(a) is its holding that it is not necessary to find that a measure that is highly trade restrictive makes a material contribution to the objective under consideration. The Panel in Seal Products suggested an interpretation of Brazil–Tyres that held that if a measure is highly trade-restrictive (such as a ban) then the measure must make a “material” contribution to the objective at hand in order to be provisionally justified as “necessary” to protect public morals under the necessity test. The AB rejected this reading of the necessity test. It held that even highly trade restrictive measures do not need to make a particular level of contribution to the identified objective. Instead, the panel must weigh and balance the three components of the necessity test: the importance of the objective, the degree of contribution, and the degree of trade restrictiveness. There is no automatic requirement that the contribution must be material, even for highly trade-restrictive measures.

This interpretation of necessity and contribution allows states more autonomy for their regulatory design and requires a more thoughtful analysis on the part of a panel. It is also essential in the context of non-instrumental moral goals, in which the regulation cannot actually be subject to a strict consequentialist analysis because its goal, or part of its goal, is expressive.

178. See supra Part I.D.
179. As we discussed above, clear examples from the criminal context would be a prohibition on murder with an exception for assisted suicide for terminally ill patients, or a prohibition on the sale of marijuana with a medical exception. See supra notes 79–84 and accompanying text.
180. See EC Seal Products AB Report, supra note 28, ¶ 5.216.
182. See EC Seal Products AB Report, supra note 28, ¶ 5.216.
183. See id. ¶ 5.215.
184. Id.
185. This means that a Panel must more thoroughly examine the measure, weighing and balancing the relevant factors even if its contribution to the objective is not material. In essence, this requires panels not to dismiss measures with a non-instrumental objective out of hand.
Finally, the fourth important aspect of the *Seal Products* case on Article XX(a) jurisprudence is that it continues the trend established in *Gambling* and *Audiovisuals* of adopting a highly deferential definition of public morals. As noted above, *Gambling* and *Audiovisuals* established that public morals are a relative concept.\(^\text{186}\) It is not objective, timeless, or unitary. Rather, it will vary from place to place, over time, and even within societies. This jurisprudence recognizes the inherent diversity of WTO Member states, and implicitly acknowledges that the WTO could not legitimately attempt to homogenize the moral, ethical, and religious reasons for which states regulate within their sovereign purview.

The *Seal Products* case continues this approach; both the Panel and the AB took a deferential approach to the determination of what can count as public morals. All of the aspects of the case highlighted above demonstrate the permissive approach taken in *Seal Products*: the inclusion of animal welfare as a part of public morals; the rejection of Canada’s consistency argument; and the rejection of a “material contribution” in the necessity test.

Furthermore, the AB stressed that Member states invoking the public morals exception do not need to define precisely the level of risk that they are seeking to address, because that type of analysis (which is applicable for example, to public safety and health risks) is incongruent with the nature of public morals, and with non-instrumental moral reasons in particular.\(^\text{187}\) The Panel and the AB also echoed the analysis in *Gambling* that stated that public morals should be defined by each state individually, according to its “systems and scales of values.” Finally, the AB echoed the importance of allowing each state to set its own “level of protection.”\(^\text{188}\)

### B. Chapeau of GATT Article XX

Having found the seals regime to be necessary for the protection of public morals, the Panel and the AB both considered whether the European Union had met the conditions in the “chapeau” of Article XX—the preamble, which requires that the measure not be applied in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.\(^\text{189}\) Before considering the Appellate Body’s findings, it is useful to consider the spe-

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186. *See supra* notes 136–139.
188. *Id.*
189. *GATT*, *infra* note 25, art. XX.
cific functionality of the chapeau in Article XX and its relationship to the protection of pluralism that Article XX provides.

In articulating what the chapeau adds to the justificatory exercise in Article XX, the AB in prior jurisprudence has emphasized two distinct dimensions. First, the focus of the chapeau is on the application of the measure, not the intrinsic fit or conceptual connection between the measure and its declared objective. Second, the chapeau goes to “good faith” in the invocation of the Article XX exceptions, and the prevention of their misuse or abuse (above all for discriminatory, protectionist purposes). These dimensions are interrelated.

To start with the first, it is not difficult to understand why there might be concerns with application of a measure in practice, as aspects of vagueness or ambiguity in the design or language of a scheme may open the door to abuse or misuse in its application. More particularly, in the case of sincere or authentic public morals measures that affect trade, the non-commercial constituencies may be quite different from the constituencies that typically influence or affect customs officials or others who are routinely charged with, for example, enforcing border measures. A legislative scheme that is genuinely non-protectionist and oriented towards public morals objectives may well be applied and enforced in a manner that is tainted by commercial protectionist considerations unrelated to the original public morals purposes.

In the US–Shrimp/Turtle case, there was a clear, explicit discrepancy between the design of the legislation and the way it was applied. Thus, in that case the application of the measure in a manner that raised chapeau concerns was actually at odds with the legislative scheme itself. Some commentators interpreted this holding to mean that the chapeau only addresses problems with application of the measure that arise subsequent to or exogenous of the measure’s basic design or architecture. In Seal Products, the AB corrected this misapprehension, determining that some

190. This distinction explains the AB’s discussion of the “conditions” of the measure’s application. EC Seal Products AB Report, supra note 28, ¶ 5.299.

191. For a summary of this traditional interpretation, see Lorand Bartels, The Chapeau of Article XX GATT: A New Interpretation 2 (Univ. of Cambridge Faculty of Law Legal Stud. Research Paper Series No. 40/2014, July 2014) [hereinafter Bartels].

192. These dimensions are interrelated because it is frequently within the application of a measure that its “good faith” invocation can be demonstrated.

193. See US–Shrimp/Turtle, supra note 9, ¶ 165.

194. For a summary of this tradition perspective, see Bartels, supra note 191; for a critique, see Sanford Gaines, The WTO’s Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures, 22 U. PENN. J. INT’L ECO. L. 739, 779 (2001).
concerns with the application of the measure arose from its actual design (a clear example, as will be discussed below, was the failure to clearly delimit the concept of a “subsistence” hunt such that in the application of the seals regime it might be possible to circumvent the prohibition on products from commercial hunts through an overly loose or flexible interpretation of what is a “subsistence” indigenous hunt).\(^\text{195}\)

This brings us to the dimension of “good faith,” or prevention of abuse or misuse of the Article XX exceptions. Because of the need to protect pluralism in the way in which the public morals exception is interpreted, the techniques available in the case of other exceptions to test the authenticity or genuineness of the measure as a non-protectionist policy intervention may not be quite as effective or may not offer the same promise of careful scrutiny. As we have argued, and as is reflected in the AB’s findings in \textit{Seal Products}, under Article XX(a), pluralism requires considerable deference to a State’s own determination of the public policy fields that engage public morals. This differs from the analysis related to the other listed exceptions under Article XX, in which international benchmarks might be used to determine whether a measure qualifies as a matter of “conservation of exhaustible natural resources” or “health.”\(^\text{196}\)

In addition, public morals measures may have a significant expressive or non-instrumental dimension; thus policy tools premised on instrumental rationality, such as risk analysis or cost-benefit analysis, are likely to provide less purchase on whether a measure is “necessary for the protection of public morals” than in the case of other objectives in Article XX. The AB acknowledged this explicitly in \textit{Seal Products}, observing:

\begin{quote}
[I]t may be that the protection of human, animal or plant life or health implies a particular focus on the protection from or against certain dangers or risks. . . . However, scientific or other methods of inquiry, such risk assessment methods do not appear to be of much assistance or relevance in identifying or assessing public morals. . . . Members should be given some scope to define and apply for themselves the concept of public morals according to their own systems and scales of values.\(^\text{197}\)
\end{quote}

Due to these considerations, the chapeau can be expected to play an especially important role in public morals disputes in ensuring “good faith.” Adjudicative legitimacy will depend heavily on

\(^{195}\) EC Seal Products AB Report, supra note 28, ¶¶ 5.302, 5.316.

\(^{196}\) US–Shrimp/Turtle, supra note 9, ¶ 130.

\(^{197}\) EC Seal Products AB Report, supra note 28, ¶¶ 5.197–5.198.
deploying the chapeau to find the appropriate balance in protecting pluralism and avoiding protectionist abuse. Therefore, particular attention should be paid to the findings of the AB under the chapeau in \textit{Seal Products}.\footnote{See id. ¶¶ 5.290–5.339.}

The AB’s findings regarding the chapeau concerned the application of the IC exception; the AB found no issues of good faith in the application of the general ban.\footnote{None of the problems identified by the AB went to the issue of good faith; it determined that ambiguity in the criteria for the exceptions to the general ban meant that some products potentially could enter the EU market even though they should properly be characterized as products of commercial hunts, but in no way suggested any bad-faith attempt to exploit that ambiguity with the purpose of providing preferential treatment to certain products and disadvantaging others. See id. ¶ 5.338.}

The AB determined that the European Union seal products regime does not meet the requirements of the chapeau because of specific aspects of how the IC exception operates in practice, amounting to arbitrary or unjustifiable discrimination.\footnote{Id.} The AB was concerned about arbitrary inconsistency in the measure, given that the European Union did not seek to ameliorate the animal welfare conditions of indigenous hunts.\footnote{See id. ¶¶ 5.317, 5.319–5.320.} The AB also noted that ambiguities in the language of the IC exception meant that products from hunts that should really be characterized as commercial could nevertheless slip in under the IC exception.\footnote{Id. ¶¶ 5.324–5.327 (noting for example that “the lack of a precise definition of the subsistence criterion introduces a degree of ambiguity into the requirements for the IC exception under the EU Seal Regime.”).} The AB stated that Europe could have done more to facilitate access of Canadian Inuit to the exception.\footnote{Id. ¶ 5.337 (“we are not persuaded that the European Union has made ‘comparable efforts’ to facilitate the access of the Canadian Inuit to the IC exception as it did with respect to the Greenlandic Inuit.”). As noted above (\textit{supra} note 122), Canada and the European Union have now worked out a joint framework to cooperate on this matter.}

The IC exception might thus be made WTO-compliant with some modifications, as some steps could be taken to encourage improved welfare standards in IC hunts. Any loopholes that might admit products of commercial hunts should be addressed, and steps should be taken to facilitate Canadian Inuit hunters’ access to European markets under the IC exception.\footnote{As of this writing, we are currently in the compliance phase of the WTO proceedings on \textit{Seal Products}. On February 9, 2015, the European Commission proposed a modification to the original seal products regime that is intended to address the Panel and the AB’s holdings. There have been more recent developments please add something about these.}
Nevertheless, the first of the AB’s findings under the chapeau does pose some important challenges to one of the dimensions of pluralism: WTO Members must be able to take measures for particular public morals purposes even where the design of those measures reflects a compromise or balance with other values and purposes. This was acknowledged by the AB in rejecting arguments by Canada and Norway in its analysis of Article XX(a) that the overall European Union seals regime could not be considered to be motivated by public morals because it balanced the main purpose of addressing cruelty to seals with an additional purpose of protecting the interests and way of life of indigenous communities. That is, the AB rejected the complainants’ argument that a measure with multiple objectives could not employ the public morals justification.

Permitting indigenous hunts meant sacrificing animal welfare concerns in those hunts, prompting the AB to hold that:

[T]he European Union has failed to demonstrate, in our view, how the discrimination resulting from the manner in which the EU Seal Regime treats IC hunts as compared to “commercial” hunts can be reconciled with, or is related to, the policy objective of addressing EU public moral concerns regarding seal welfare.

Here the AB appears to be saying, in tension with the analysis under Article XX(a), that the chapeau is inherently incompatible with policy pluralism—a Member cannot trade off or compromise one policy objective for another. Under the chapeau, any element of discrimination must be justified in terms of the main objective of Article XX(a).

To understand the AB’s reasoning it is useful to analyze an earlier AB ruling, Brazil–Tyres. There, the AB was faced with de jure discrimination that was not part of the measure itself, but that was generated by another legal obligation. Brazil had banned the importation of retreaded tyres, but a ruling of MERCOSUR, another trade agreement of which Brazil was a member, meant that it could not apply that ban to its fellow MERCOSUR members. The discriminatory application was therefore unrelated to any distinctions or classifications in the actual scheme being justified under Article XX. Indeed, the rationale for discriminatory application could only be assessed under a different provision of

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205. See id. ¶ 5.167.
206. Id. ¶ 5.320.
207. See Brazil–Tyres, supra note 141.
208. See id. ¶ 27.
the GATT altogether, Article XXIV, which relates to measures taken to maintain a customs union or free trade area.\textsuperscript{209} Instead of saying explicitly that the kind of discrimination entailed in applying a regional trade agreement (or RTA) had to be assessed under Article XXIV rather than the framework of Article XX, the AB rather clumsily opined:

\begin{quote}
[T]here is arbitrary or unjustifiable discrimination when a measure provisionally justified under a paragraph of Article XX is applied in a discriminatory manner “between countries where the same conditions prevail,” and when the reasons given for this discrimination bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective. The assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure.\textsuperscript{210}
\end{quote}

Taken out of context, this statement might appear fatal to pluralism, as it might suggest that under the chapeau distinctions made within a measure, including moral measures can only be justified if they are linked to the main objective of the measure invoked under the paragraph in question. Discrimination that might be based on competing, but equally non-protectionist and thus legitimate goals, would fail the chapeau. It is not surprising that commentators such as Lorand Bartels, who read the Brazil–Tyres report in this way, have engaged in strong criticism of the Appellate Body.\textsuperscript{211}

However, the context must be borne in mind. In \textit{Seal Products}, the competing objective of protecting indigenous communities was built into the regime itself through an exception. By contrast, the discrimination in Brazil–Tyres occurred through the application of an international agreement that was autonomous from and superimposed upon the legislative scheme justified under Article XX. The MERCOSUR ruling in Brazil–Tyres arose from a separate international agreement, an RTA, which comes under a different GATT exception (Article XXIV) with a different justificatory framework from Article XX.

It is difficult to understand what the AB intends when it suggests that there is arbitrary or unjustifiable discrimination. The Euro-

\textsuperscript{209} GATT, supra note 25, art. XXIV.
\textsuperscript{210} Brazil–Tyres, supra note 141, ¶ 227.
\textsuperscript{211} Bartels, supra note 191. Bartels rightly points out that there may be features of a measure and its application that are in the service of entirely legitimate objectives other than the one being invoked under art. XX to justify its main or central feature, in the \textit{Seal Products} dispute the general ban. There is no reason in principle why a WTO Member should not be able to operate these ancillary features just because it does not serve the main objective but rather other entirely legitimate public policy objectives.
pean Union has not shown that the IC exception is related to or reconcilable with the main public morals objective of animal welfare; in its analysis under Article XX(a), the AB fully accepted that the measure was capable of accommodating and serving both the objective of protecting public morals and indigenous way of life, and indeed that balancing them was compatible with its justification as necessary for the protection of public morals.

The answer may be sought, at least to some extent, in the concept of “reconciliation.” What does this mean in terms of moral reasoning under conditions of pluralism, where governments and citizens typically pursue more than one value and constantly have to trade-off between values? A position that such trade-offs are per se incompatible with the chapeau, and therefore with the justificatory framework of Article XX, would be clearly fatal to pluralism and inconsistent with the structure of the AB’s reasoning concerning preliminary justification under Article XX(a). The most logical view of reconciliation, which rescues pluralism to some significant degree, is that “good faith” with respect to the main objective being invoked under Article XX(a) requires that a measure being aimed at more than one objective be applied so as to minimize or reduce to what is necessary the sacrifice of the main objective to the other competing objective(s).

C. Extraterritoriality and Article XX(a)

The law of the WTO is unsettled on the extent to which it permits a Member state to take legislative action designed to have an impact exclusively beyond that Member’s borders. That is, there are ambiguities in the law of the WTO law regarding the permissible extraterritorial scope of measures adopted by Members. This uncertainty also extends to Article XX(a).

This issue was taken up in the Seal Products dispute by the AB, but it still remains open. The AB made the following remarks:

[W]e note that, in US–Shrimp, the Appellate Body stated that it would not “pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation”. The Appellate Body explained that, in the specific circumstances of that case, there was “a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)”. As set out in the preamble of the Basic Regulation, the EU Seal Regime is designed to address seal hunting

212. As scholars such as Mark Wu have argued. Wu, supra note 91.
213. See id.
activities occurring “within and outside the Community” and the seal welfare concerns of “citizens and consumers” in EU member states. The participants did not address this issue in their submissions on appeal. Accordingly, while recognizing the systemic importance of the question of whether there is an implied jurisdictional limitation in Article XX(a), and, if so, the nature or extent of that limitation, we have decided in this case not to examine this question further.\(^{214}\)

How is one to interpret this terse statement of the AB? One reading is that the AB has chosen to say nothing because the parties have implicitly agreed that this is not an issue in the Seal Products case (as above quote indicates, the AB decided not to examine the issue further). If that were so, then the AB arguably misunderstood its role as a high court, not only to settle the dispute between parties, but also, in the words of the Dispute Settlement Understanding Article 3.2, to clarify the law.\(^{215}\) It is difficult to imagine that the AB could find the measure justified simply because the parties failed to turn their attention to the extraterritoriality issue.

However, a careful reading of the paragraph above reveals something more. The AB is suggesting that there are features of the seal products regime that, had the issue of territorial nexus been raised and therefore mooted, would have satisfied the WTO’s territorial requirements. Thus, the above quoted language about the seals regime follows analogous language that the AB cites from the US–Shrimp/Turtle case, where the AB reasoned that the presence of some of the protected species of turtles in United States waters would count as a sufficient territorial nexus under Article XX(g).\(^{216}\)

A number of observations are in order about the application by the AB of the territorial nexus concept to public morals. First, we question why it is relevant that some of the sealing activity occurs within the European Union. In the US–Shrimp/Turtle case, the nature of the harm was a threat to endangered species that belong to the global commons; the main interest of the United States was in the protection of sea turtles species as a part of the biosphere, not in the protection of those turtles that came into its waters or on its shores.\(^{217}\) One may therefore question whether in US–Shrimp/

\(^{214}\) EC Seal Products AB Report, supra note 28, ¶ 5.173.


\(^{216}\) US–Shrimp/Turtle, supra note 9, ¶ 133.

\(^{217}\) Though it might have an independent interest in that too, which could lead to a separate justification under art. XX(b), protection of animal life and health.
Turtle the AB identified the correct test for identifying a genuine regulatory interest of the United States in how shrimp were fished beyond its waters.

Indeed, there are numerous countries that ban seal products,\textsuperscript{218} even though there is no sealing activity within their borders; they do so in large part due to the moral concerns of their own citizens about the cruelty of the hunt elsewhere. The approach to public morals in the WTO would be in tension with many of the fundamental shifts in international law generally, such as human rights law and international criminal law,\textsuperscript{219} if the occurrence of some of the activity in question within a country’s own borders were a precondition for genuine moral concern justifying actions by that country. Any territorial nexus (assuming one is required) should be satisfied, because the regulating state is acting based on the moral concerns of its own citizens and consumers.

This point is reflected in the second element that, as the AB says, the seal regime is designed to protect the seal welfare concerns of European “citizens and consumers.”\textsuperscript{220} Perhaps what the AB was trying to communicate is that it would be a problem for justification under Article XX(a) if the activity in question occurred both within the territory of the regulating Member and outside, but the scheme only addressed moral concern about activity taking place abroad. The problem with that scenario is that it would most likely result in arbitrary and unjustifiable discrimination under the chapeau of Article XX. If indeed a regime simply did not address cruelty to seals within the territory of the regulatory Member at all, this would give rise to concerns as to whether there is a genuine or bona fide invocation of public morals, if the moral concerns of citizens and consumers somehow do not extend to cruelty inside their nation’s own borders. But this does not give any reason to question the genuineness of a moral concern with cruelty inflicted elsewhere, in the very different situation where there happens to be no seal hunting within one’s own borders—but the activity elsewhere

\textsuperscript{218} Thirty-four countries now ban the importation and sale of seal products, including the United States, Russia, and Mexico. Suzanne Goldenberg, World Trade Organisation Upholds EU Ban on Imported Seal Products, GUARDIAN (Nov. 25, 2013), http://www.theguardian.com/environment/2013/nov/25/world-trade-organisation-eu-ban-seal. The United States has banned the importation and sale of seal products since 1972, with the Marine Mammal Protection Act.


\textsuperscript{220} EC Seal Products AB Report, supra note 28, ¶ 5.173.
does raise moral concerns linked to citizens within the nation’s borders.

There is a further sense in which the public morals concern being addressed by the Seals Regime has not been captured by the brief remarks of the AB quoted above: not only is the moral concern one of or by European Union citizens and consumers; it is to a significant extent a concern about the conduct of European Union citizens and consumers, for instance, the moral demand that they not be complicit with commercialized cruelty to seals through the purchase or use of seal products.

Morally motivated legislation, as we have argued, can be expressive and non-instrumental—it can be aimed at expressing a moral wrong rather than exclusively concerned with regulating conduct. If the WTO wishes to permit pluralism, it should allow Members to regulate for a very broad range of reasons, including to express the views of a Member’s citizens concerning the wrongfulness of conduct of non-nationals occurring beyond its borders.

D. De Facto Discrimination Under the GATT

The Seal Products case has important implications for the development of the most central GATT disciplines: the Most Favoured Nation (MFN) obligation (GATT Article I:1)221 and the National Treatment obligation (GATT Article III).222 Together, these obligations form the backbone of the GATT’s commitment to non-discrimination and anti-protectionism, whereby the WTO’s Member states are prohibited from discriminating in favor of domestic products over imported-like products,223 and from discriminating among the like products of their trading partners.224 The MFN and National Treatment obligations have been interpreted to prohibit both de jure discrimination—laws that facially discriminate between products based on their origin—and de facto discrimination—laws that are facially origin-neutral but that would have a discriminatory impact in the form of reduced competitive opportunities for imported like products.225 But the precise meaning of de facto discrimination under the GATT has long been

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221. See GATT, supra note 25, art. I:1.
222. Id. art. III. The importance of the non-discrimination principles is emphasized in EC Seal Products AB Report, supra note 28, ¶ 5.86.
224. See id. art. I:1.
fraught with ambiguity. The *Seal Products* case has rejected one possible interpretation, helping to clarify what should be considered *de facto* discrimination. While it is a welcome development in the law of the WTO that the AB has provided needed guidance on the nature of *de facto* discrimination, the substance of the AB’s interpretation of the concept, which expanded it to its outer limits, may also have undesirable consequences for the scope of the GATT’s non-discrimination obligations and may not serve to further a pluralist vision of the law of the WTO.

1. The Ambiguous Meaning of GATT De Facto Discrimination

While it has long been established in the GATT jurisprudence that its non-discrimination obligations apply to *de facto* discrimination (in addition to *de jure* discrimination), the precise meaning of *de facto* discrimination under WTO law has always been controversial. It is clear that the test for *de facto* discrimination involves analyzing whether there are reduced competitive opportunities for like products from foreign countries (National Treatment) or between foreign countries (MFN) due to the regulation in question. But what is unclear is whether the *reasons for* those reduced competitive opportunities are relevant. Does it matter that the Member state accused of discrimination did not intend to change the conditions of competition to the detriment of one of its trading partners; or if the Member state changed the conditions of competition for some legitimate reason that had nothing to do with protecting its own products? In short, we know that the *effects* of legislation matter for a determination of non-discrimination—but do the *aims* also matter? In the language of American constitutional law, is a disparate impact sufficient for a finding of discrimination, or is an intent to discriminate also required?

In an early case on GATT Articles III:2, III:4, and I:1, the AB rejected an “aims and effects” test, suggesting that determining whether a measure is discriminatory is simply a matter of examining the potential market effects on competing products and the intentions of the Member state in question are not relevant. At least in the case of Article III (National Treatment), this approach

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226. See Ehring, supra note 225, at 921–22.


was based on an economic or competition-focused determination of whether products are “like,” and it emphasized considerations such as physical characteristics, end uses, and consumer preferences. The analysis excluded consideration of differences related to regulatory objectives, such as environmental impacts of products or their production methods. The competition-based approach to likeness and the market effects approach to the meaning of “treatment no less favourable” resulted in the exclusion of the exercise of determining whether a measure was on the one hand legitimate regulation for non-protectionist policy purposes or on the other protectionism, either de jure or de facto, from the exercise of establishing whether the National Treatment norm had been violated. This left for the exceptions, principally in Article XX, the role of protecting policy space for legitimate regulatory measures.

Later, in the Chile–Alcoholic Beverages case, the AB suggested that objective regulatory purpose, as reflected in the design and structure of the measure, could be relevant to assessing whether differential treatment amounts to discrimination. Some academics and litigants continued to push for the adaptation of some kind of “aims and effects” test for non-discrimination, and cases such as DR–Cigarettes and Thailand–Cigarettes seemed to require a causal relationship between the detrimental impact and the foreign origin of the imported product, thus foreclosing a finding of violation, if the differential impact on imports was due to entirely unrelated, and especially origin-neutral legitimate regulatory considerations. Additionally, in the EC–Asbestos case, the AB introduced an element of flexibility into the competition-based approach to determining whether one product is “like” another within the meaning of Article III (and by extension Article I): in that case, the AB held that effects on health could be relevant in determining whether differences in both physical characteristics and consumer preferences are significant, such that a product (building materials containing asbestos) posing significant risks to health might not be “like” another otherwise similar product (building materials not containing asbestos), even if the two prod-

229. Id.


ucts competed for the same market.\textsuperscript{232} Thus, the AB found a way of introducing the underlying human interest that the regulation was aimed at safeguarding into the test for “likeness,” which under older (and less pluralism-friendly) approaches had focused on whether products competed with one another in the marketplace.\textsuperscript{233}

2. TBT 2.1 and the “Legitimate Regulatory Distinction” Prong of the Non-Discrimination Test

The test for non-discrimination was further destabilized by the three recent cases under the TBT Agreement known as the TBT trilogy.\textsuperscript{234} The TBT Agreement has its own rule, similar to GATT Articles I and III, requiring Member states to refrain from discriminating among their trading partners or in favor of domestically produced goods (TBT Article 2.1). But, notably, the TBT does not contain an express exceptions provision akin to GATT Article XX. Potentially, then, the treaty text could be interpreted so that the non-discrimination obligation on the TBT would be significantly more restrictive than that contained in the GATT, where an Article XX defense is available.

The apparent difference between the GATT and the TBT Agreement narrowed when the AB, in \textit{Clove Cigarettes}, read a new requirement into the TBT 2.1 non-discrimination provision, which is not evident on the face of the text. The \textit{Clove Cigarettes} report held that under the TBT Agreement a measure that has adverse effects on imported products in the form of reduced competitive opportunities is not discriminatory as long as those effects “stem[ ] exclusively from [a] legitimate regulatory distinction[ ].”\textsuperscript{235} The concept of a “legitimate regulatory distinction” is not found in the text of the TBT; indeed, the phrase is not mentioned anywhere else in the law of the WTO.

The ruling in \textit{Clove Cigarettes} made it possible to infer that the AB was revisiting the concept of non-discrimination in general (that is, not only in the context of TBT), to add in the idea that \textit{de facto}

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\textsuperscript{234} As discussed \textit{infra} Part II.E.

\textsuperscript{235} \textit{US–Clove Cigarettes}, \textit{supra} note 131, ¶ 174.
discrimination must require more than mere market effects and instead must include an analysis of the rationale for the legislative action taken—its aims. Since the AB has repeatedly stated that the TBT and the GATT must be interpreted together, it seemed possible that the AB wanted the “legitimate regulatory distinction” prong of the TBT non-discrimination test to also be read into the GATT. Given that there was little textual foundation for this choice in the TBT context, it seemed plausible that this prong should also be part of the GATT non-discrimination analysis.

The resulting ambiguity was as follows: Is a detrimental impact on the complainant enough for a GATT discrimination claim, after Clove Cigarettes? Or is there no claim if the discrimination arises from a “legitimate regulatory distinction” as in TBT 2.1?

3. The AB in Seal Products: Insisting on an Effects-Based Discrimination Analysis

On appeal in the Seal Products dispute, the European Union argued that the TBT non-discrimination standard, including the legitimate regulatory distinction prong, should have been included in the GATT conception of non-discrimination employed by the Panel. This, according to the European Union, would have eliminated the GATT non-discrimination finding. For example, take the fact that the market conditions for Canadian and Norwegian sealers had been more negatively affected than the conditions in Greenland because one hundred percent of Greenlandic sealers were able to take advantage of the IC exception whereas only five percent and four and a half percent of Canadian and Norwegian sealers, respectively, could take advantage of the exception. This effect, which gave rise to a finding of an MFN violation, actually stemmed from a legitimate regulatory distinction—in this case, the intention to help indigenous communities and due to the fact that sealing for indigenous subsistence is not as morally problematic as sealing conducted without such a purpose.

The AB decisively rejected the European Union’s argument, holding that the TBT’s Article 2.1 “legitimate regulatory distinction” prong did not also apply to GATT non-discrimination. Instead, it insisted that the only thing that matters for a finding of

236. “[T]he TBT Agreement expands on pre-existing GATT disciplines and emphasizes that the two Agreements should be interpreted in a coherent and consistent manner.” Id. ¶¶ 90–91.
237. See EC Seal Products AB Report, supra note 28, ¶ 5.72.
238. Id. ¶ 5.93.
de facto discrimination under the GATT is whether the measure has a detrimental impact on the competitive opportunities of like products—the legislative intent behind the measure is irrelevant. The AB argued that there was no textual basis for adding a “legitimate regulatory distinction” requirement, and that this follows from prior cases such as _DR–Cigarettes_. The AB also argued that its approach preserved the appropriate balance between the right to regulate, encapsulated in Article XX, and the need to promote trade liberalization, as required by the non-discrimination provisions of the GATT. In addition, the AB rejected an interpretation of _DR–Cigarettes_ and _Thailand–Cigarettes_ that would have required some relationship between the alleged detrimental impact and the origin of the product.

4. Implications of the AB’s ruling

The AB’s ruling in _Seal Products_ has significant consequences. To a great extent, it clarifies one of the longest-running debates in the law of the WTO: it specifies that a finding of de facto discrimination requires only a change in the competitive opportunities available for the like products, and not some analysis of the legislative intent or purpose. Still, ambiguities in the legal rule and its implications remain.

First, this ruling makes the relationship between the GATT and the TBT more difficult to understand. In both agreements there is a non-discrimination provision, but the list of exceptions available in the GATT is a closed list (the enumerated exceptions in Article XX) whereas in the TBT it is an open list (any legitimate regulatory distinction). This seems to make the TBT less demanding than the GATT, which makes no sense from a historical perspective, given that the TBT was meant to add to the obligations of the GATT to create further and deeper integration. This interpretation could also render Article 2.1 of the TBT Agreement inutile since any measure that violates the GATT’s nondiscrimination rules would seem necessarily also to violate Article 2.1 of the TBT Agreement.

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239. *Id.* ¶ 5.90.
240. See *id.* ¶ 5.125.
241. See *id.* ¶¶ 5.103–5.110.
243. See infra Part II.E for a discussion of the historical context in which the TBT Agreement developed.
In light of this odd relationship between the GATT and the TBT, this may mean that we should interpret GATT Article XX in broad terms, such that its provisions offer more or more generously construed defenses. This in turn may bolster the deferential and broad interpretation of GATT Article XX(a) that we argue above is required by a pluralist approach to the “public morals” exception.

However, despite the AB’s move to clarify the non-discrimination standard, there is language in the AB’s report that suggests it does not want to abandon the concept of intentionality entirely. For example, the AB emphasizes that there must be a “genuine relationship” between the impugned regulation and the detrimental impact on competitive opportunities,244 and that “Article III:4 does not require the identical treatment of imported and like domestic products, but rather the equality of comparative conditions between these like products.”245 This leaves some remaining ambiguity in the non-discrimination standard going forward, that arguably could be used to incorporate a concept of intention to discriminate.

Another reason that it is difficult if not impossible to know just how completely the AB has shut the door in Article III jurisprudence to sensitivity with regard to policy space or the human interests underlying regulatory intervention is that, although a critical step in Article III analysis is whether there is discrimination between “like products,” “likeness” was not at issue in Seal Products, either at the Panel level or before the Appellate Body. The EC did not argue that, for example, seal products from cruelly slaughtered seals were not “like” seal products from more humane hunts. Reflecting the reality that humane hunting standards could not be effectively and practically enforced under the conditions of the seal hunt in places like Canada and Norway, its measure banned seal products outright. More questionably, the European Union also did not seem to argue that seal products that were the result of indigenous subsistence hunts were not “like” those produced by large-scale commercial hunts, even though the moral circumstances of the two types of hunts differs substantially, since commercial hunts involve a moral taint of inflicting extreme suffering for merely economic motives. There is no evidence either of removing the flexibility that the AB built into the “like products” test in EC–Asbestos, or expanding that flexibility.246 In the relatively

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244. EC Seal Products AB Report, supra note 28, ¶ 5.101.
245. Id. ¶ 5.108.
246. See supra notes 232–33.
recent case of *Clove Cigarettes*, albeit in the course of interpreting the TBT Agreement provision on non-discrimination, the AB did berate the Panel for introducing regulatory objectives into the determination of likeness.\(^{247}\) However, the AB also preserved the *Asbestos* proviso that human interests that underlie the regulatory intervention might nevertheless be taken into account through flexibility in the application of the competition-based criteria for likeness.\(^{248}\)

More generally, one should consider the movement toward an approach under the non-discrimination provisions of the GATT that is blind to regulatory concerns in the context of the overall development of the AB’s jurisprudence on Article XX. While certainly not removing the formal requirement that the regulating Member bears the burden of proof under Article XX,\(^{249}\) by steps the AB has introduced various margins of deference into for example the concept of necessity that applies to most of the provisions of Article XX. And it is arguable that following *Brazil–Tyres* the determination of the relationship between the policy objectives stated in Article XX and the measure has become a matter of determining the reasonableness of the regulating Member’s choice of instrument relative to other possible available alternatives, and taking in account all relevant circumstances, such as feasibility, limited information/uncertainty (the AB mentioned the evolving and novel challenge of addressing climate change as an example), and administrative and other costs.\(^{250}\) If one considers this body of jurisprudence, it is far from clear that the approach to non-discrimination in *Seal Products* really signals a less deferential or more intrusive approach to regulatory sovereignty than before.

This is connected to a very important aspect of the AB’s reasoning in rejecting the notion of a “legitimate regulatory distinction” test in Article III. The European Union had argued that this was necessary because not all legitimate regulatory measures would fall under one or several of the heads of Article XX.\(^{251}\) When questioned by the AB, the European Union failed to give any examples.\(^{252}\) It is understandable that, since the European Union would not want to preclude an argument in future disputes, it would not want to state that a particular measure might not fit within any

\(^{247}\) See *US–Clove Cigarettes*, supra note 131, ¶ 112.

\(^{248}\) See id. ¶ 117.


\(^{250}\) See *Brazil–Tyres*, supra note 141, ¶ 151.

\(^{251}\) See *EC Seal Products AB Report*, supra note 28, ¶ 2.183.

\(^{252}\) See id. ¶ 5.128.
head of Article XX, if in future it would be required to defense that measure through recourse to Article XX. Given the EU’s likely rationale for failing to provide an example, this seems a rather flimsy way of dismissing the important issue that the European Union was raising, unless the AB is assuming, as it might well be, that Article XX alone has the exclusive, or almost exclusive role, for protecting Members’ policy space where legitimate regulations are challenged due to the negative impact on imports. On that approach, Article XX(a) becomes a kind of residual clause, that protects any public policy of declared social importance. In this way, one can see a further reason for the AB’s considerable deference to Member’s judgments as to what is considered a matter of public morality in their society.

E. Scope of the Application of the TBT Agreement

*Seal Products* may mark a turning point in the WTO’s approach to the scope of the TBT Agreement. It is the first decision in which the AB declined to find that a measure challenged under the TBT Agreement was a “technical regulation” subject to that Agreement. Prior case law under the TBT Agreement had interpreted the definition of a technical regulation, and thus the scope of the Agreement, expansively—sometimes surprisingly so. The Appellate Body’s report in *Seal Products* appears to mark the limit of that expansive approach and indicates the need for careful consideration of nature of the measures that the TBT Agreement applies to, in light of that Agreement’s purpose, its substantive requirements, and its relationship to the GATT.

This new chapter in the WTO’s analysis of the TBT Agreement is a significant shift, considered from the point of view of permitting pluralism in the legal framework of WTO law. To understand why, it is helpful to review the background of the TBT Agreement and the interpretive questions that the AB had grappled with in the (limited) prior TBT jurisprudence.

1. TBT Agreement: Background, Interpretation, and Scope

The TBT Agreement was one of a suite of new trade agreements adopted in the Uruguay Round of trade negotiations that created the WTO, building on the older legal and institutional foundation of the GATT. Like its companion treaty the Agreement on Sanitary
and Phytosanitary Measures (SPS Agreement), it is *lex specialis* to the GATT, establishing specific commitments regarding certain rules affecting trade in goods.\(^{254}\) While the SPS Agreement is concerned mainly with food safety rules, the central idea of the TBT Agreement can be roughly summed up as a commitment to facilitate trade by harmonizing technical regulations and minimizing unnecessary cross-border differences in technical standards.

Inherently implicated in that purpose are complex questions about the balance between harmonization and regulatory diversity under the TBT Agreement. In a world of proliferating complex regulation, there was a perceived need for a new trade agreement to reduce the frictions and costs that come from divergent technical rules in different countries and across supply chains.\(^{255}\) Those problems can arise simply because regulations are different, made by authorities in different countries who do not (and are not required to) coordinate with one other—even if the regulations do not discriminate against imports or protect domestic producers.

In other words, in this sense at least the purpose of the TBT Agreement goes beyond the central GATT objective of disciplining discrimination or protectionism, and moves towards uniformity rather than pluralism. The TBT Agreement requires the elimination of technical regulations that unnecessarily burden trade (even if they are not discriminatory),\(^{256}\) and thus—one the face of its text—calls for a type of “GATT-plus” level of regulatory harmonization. In trade law circles it is often said that refraining from erecting discriminatory and protectionist barriers to trade reflects a model of “negative integration,” or obligations on Member states. A step further towards global economic integration is “positive integration,” which to some extent entails positive obligations on governments to harmonize their rules and procedures, moving closer to some kind of globally integrated approach to regula-

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255. Michael J. Trebilcock, *Foreword, in Epps & Trebilcock, supra* note 254, at x.

256. Art. 2.2 of the TBT Agreement provides that “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” and that “technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create.”
tion. The TBT Agreement reflects, at least on its face, some elements of positive integration.  

At the same time, it is important to note that the AB has stated clearly that the TBT and the GATT should be “interpreted in a coherent and consistent manner” and that the balance between trade liberalization and WTO Members’ right to regulate is in principle no different under the TBT Agreement than under the GATT. This “important philosophical statement” about the overall aim of the TBT Agreement indicates that it cannot be construed in a way that significantly alters that balance. But it also leads to complex interpretive questions in determining what specific provisions of the TBT Agreement actually require and how exactly the Agreement can function as another tool in the WTO kit for achieving essentially the same purpose as the GATT—as Howse proposes, “a more refined or at least additional set of tools for addressing ‘regulatory protectionism,’ rather than striking out boldly in the direction of positive integration.”

The legal text governing the scope of application of the TBT Agreement to mandatory regulatory measures is the definition of a “technical regulation” in Annex 1 of the TBT Agreement. In EC–Asbestos, the AB set out a three-part test to determine whether a measure is a technical regulation, drawn directly from the text: (i) the measure must identify a group of products; (ii) it must prescribe either characteristics for those products, or their related processes and production methods (known as PPMs); and (iii) compliance must be mandatory. The test, and the language of
Annex 1 on which it is based, leave the door open to a wide range of interpretive approaches.

Intuitively, one might think that a narrow interpretation would be the best way to square the interpretive circle confronting the WTO. The TBT Agreement potentially imposes new requirements for homogenization of domestic measures, even non-discriminatory ones. To the extent that these new requirements might constrain fundamental domestic policy choices and the expression of normative preferences, they could quite profoundly alter the basic bargain reflected in the GATT. The answer—or one answer—to that conundrum would be to limit the category of “technical regulations” to a small, specialized subset of domestic measures, and to certainly not include those that express fundamental normative values. Such a relatively narrow approach to the scope of the Agreement would counterbalance its potentially broad substantive implications. It would also be consistent with the Appellate Body’s statement in *EC–Asbestos* that the TBT Agreement is “a specialized legal regime that applies solely to a limited class of measures.”

In this vein, Howse and Langille have argued that the TBT Agreement should not apply at all to legislation that expresses a community’s moral convictions (such as moral condemnation of seal hunting). After all, laws that express a society’s fundamental moral values are hardly what most of us associate with the term “technical regulations.” And it is particularly important that morally-based laws not be subject to any requirement of homogeneity, given the diversity of moral worldviews in different societies around the world.

2. The TBT Trilogy: Technical Regulations Take over the World

As it turned out, however, in the case law prior to the AB’s decision in *Seal Products* (and including the *Seal Products* Panel report), the WTO imposed almost no limitation on the meaning of “technical regulations” and adopted a very expansive approach to the Agreement’s scope, counterbalanced with a careful interpretation of its substantive provisions that sought to preserve an overall balance between liberalization and regulatory diversity equivalent to that under the GATT. This model, in turn, created interpretive tangles of its own.

265. *Id.* ¶ 80.
266. See Howse & Langille, *supra* note 5, at 422.
There was relatively little case law under the TBT Agreement until the AB released the TBT trilogy of decisions in 2012: US–COOL, US–Clove Cigarettes, and US–Tuna II. The trilogy articulated and developed the interpretative framework for the Agreement, and established TBT claims as an important battleground in trade disputes. A salient aspect of the Appellate Body’s interpretive approach in the trilogy was its very broad interpretation of the term “technical regulation.” The measures challenged in those cases were: US–COOL267 (labels informing consumers of the country of origin of certain meat products), US–Clove Cigarettes268 (a ban on flavored cigarettes), and US–Tuna II269 (a labeling scheme certifying tuna caught using dolphin-safe methods). All of these measures were found to be technical regulations and in each case the AB rejected interpretive avenues that might have narrowed the scope of that term.

Perhaps the most vivid illustration of the expansiveness of the Appellate Body’s approach is the fact that it found that the labeling scheme in US–Tuna II met the “compliance must be mandatory” prong of the EC–Asbestos test, even though it was a voluntary scheme; the only mandatory aspect was that companies opting to use the dolphin-safe label could not do so unless they complied with specified rules. After the US–Tuna II ruling, the distinction between mandatory regulations and standards with which producers may choose whether or not to comply, which are subject to quite different and mainly hortatory provisions of the TBT Agreement, seemed all but indiscernible—especially with respect to labeling requirements, which would “virtually all” seem to be technical regulations on this approach.270

The AB did reiterate in US–Clove Cigarettes that only technical regulations are subject to the TBT Agreement,271 and technical regulations logically must be a subset of the measures subject to the GATT. But after the 2012 trilogy, the AB had yet to identify the boundaries of that subset in a concrete way by determining that a challenged measure was not a technical regulation. The only category of measures that are clearly not “technical regulations” are


268. See generally US–Clove Cigarettes, supra note 131.

269. See generally Appellate Body Report, United States–Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/AB/R (May 16, 2012).

270. Wagner, supra note 257, at 251; see also further discussion of this decision at both the Panel and Appellate Body levels, id. ¶¶ 249–253.

271. See US–Clove Cigarettes, supra note 131, ¶ 97.
SPS measures, which are expressly removed from the application of the TBT Agreement if they are covered by the SPS Agreement, and possibly outright prohibitions on a substance or product, which the AB indicated in EC–Asbestos “might not” be technical regulations.

The counterweight to this extension of the TBT Agreement’s coverage was the Appellate Body’s interpretation of the TBT’s substantive provisions, especially Articles 2.1 (non-discrimination) and 2.2 (no more trade restrictive than necessary), as much closer in meaning to the GATT than is immediately obvious from the text. The MFN and National Treatment obligations in Article 2.1 are not subject to any express exceptions clause equivalent to GATT Article XX, but the AB has interpreted Article 2.1 to mean that technical regulations enacted in pursuit of legitimate objectives are permitted (at least in the case of de facto rather than de jure discrimination), as long as they do not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade—that is, as long as they stem exclusively from a legitimate regulatory distinction. In effect, this construction reads in something very much like an implicit GATT Article XX-type savings clause, plus a GATT Article XX chapeau-like proviso to the savings clause, under TBT Article 2.1.

In short, after the trilogy, while almost any measure (other than SPS measures) that could be challenged under the GATT now also appeared to be subject to challenge under the TBT Agreement, the AB held the line on preserving the balance between trade liberalization and the right to regulate with an interpretation of the operative TBT provisions that arrived at substantially the same place the GATT would have led to. But this position is inherently unstable. First, interpreting the TBT Agreement to mean much the same thing as the GATT requires a certain amount of judicial creativity. In a sense, in the trilogy, the AB was pushing against the text’s momentum towards positive integration. This is important in connection with our pluralist approach, because it might not be feasible to counteract that momentum in every future case; if that is true, then the extension of the TBT Agreement’s scope is a development that is likely to shrink the space for pluralism in the long run. Secondly, there is the question of what role was left for the GATT itself. In the framework set out in the trilogy, assessing a

272. TBT Agreement, supra note 34, art. 1.5
273. EC–Asbestos, supra note 232, ¶ 71.
274. See US–Clove Cigarettes, supra note 131, ¶ 182.
measure under the TBT Agreement covers more or less all the same analytical bases as an assessment under the GATT. The rather strange outcome is that the GATT, the foundational WTO treaty, seems to have no work left to do.

3. The TBT Agreement in the Seal Products Panel Report

The prior case law explains why the Panel in Seal Products came to carry out its analysis almost entirely under the TBT Agreement. Taking a step back from precedent, this might seem incongruous, considering that a ban on products of seal hunting motivated by moral outrage towards the cruelty of the seal hunt is not the most obvious example of a “technical regulation.” But the Panel’s approach is at least understandable in light of the Appellate Body’s interpretive moves in the TBT trilogy.

Reflecting the maximalist thrust in the trilogy’s interpretation of “technical regulations,” the Seal Products Panel found that the European Union seals regime was subject to the TBT Agreement because it lays down characteristics that seal products are required to have in order to be placed on the market in the European Union. The Panel observed that a technical regulation could lay down either required characteristics or their related PPMs. Somewhat curiously, it found that the European Union seals regime laid down product characteristics, and it was therefore unnecessary to determine whether it also met the second prong of the test (laying down PPMs). Curiously, the requirements of the seals regime all relate to the way seals are hunted and who conducts the hunting, factors that are not characteristics of the product itself but rather have to do with the way it was produced. In this way, the Panel once again expanded the language of the definition it applied: rules that have nothing to do with physical or discernible properties of the product were nevertheless found to “lay down product characteristics.”

The Panel went on to find a violation of Article 2.1 of the TBT Agreement based on a very GATT-like analysis, consistent with the trilogy’s interpretation of TBT as a rough functional duplicate of the GATT. The Panel found that the European Union seals regime violated Article 2.1 of the TBT Agreement, based on the following reasoning. The regulatory scheme, in particular the IC exception, had a detrimental impact on the complainant’s prod-

275. See EC Seal Products Panel Report, supra note 18, ¶ 7.112.
The objective of the regime, protecting animal welfare, was legitimate, but the IC exception was not rationally connected to that objective because IC hunts caused animal suffering. The distinction between IC and commercial hunts was, however, justified by a different purpose, protecting the traditional culture and livelihood of indigenous peoples. But this distinction was not designed and applied in an even-handed manner, given the Panel’s finding that the Greenland Inuit seal hunt had significant commercial characteristics and yet was the principal beneficiary of the exception. In other words, the analysis was effectively a duplicate of the GATT analysis, especially provisional justification under Article XX of the GATT and the question of arbitrary or unjustifiable discrimination under the Article XX chapeau. Indeed, the Panel expressly noted that it was borrowing from the Article XX and chapeau jurisprudence, in light of the “close relationship” between the TBT Agreement and the GATT. 277

The Panel determined that the European Union seals regime was not “more trade-restrictive than necessary” under Article 2.2. One question that had arisen in connection with this dispute was whether the open-ended list of exceptions in Article 2.2 of the TBT Agreement implicitly included a moral exception, equivalent to GATT Article XX(a), even though public morals are not explicitly referenced in the text of Article 2.2. The Panel did find an implicit moral exception in Article 2.2 and imported the legal analysis of the public morals justification from prior case law under GATT Article XX(a) and GATS Article XIV. 278 Thus the Panel cemented the GATT-like-ness of the TBT Agreement in yet another respect. After this analysis under the TBT Agreement, there was very little left to say in connection with the GATT, and the Panel’s GATT analysis has been no more than cursory, consisting of little more than summary repetition of its conclusions from the TBT sections of the report. 279

The Panel report in EC–Seal Products may turn out to have been the high water mark of TBT expansionism. On the one hand, it could be said that the Panel simply followed the direction that the AB had pointed to in the TBT trilogy. On the other, the Panel report highlights that it is possible to travel only so far in that direc-

276. Canada, but not Norway, raised a complaint under TBT art. 2. See EC–Seal Products Panel Report, supra note 18 at ¶ 3.1 (Canada’s claims) and ¶ 3.4 (Norway’s claims).
277. EC Seal Products Panel Report, supra note 18, ¶ 7.258.
278. See id., ¶¶ 7.382, 7.418.
tion without running into significant interpretive difficulties and incongruous outcomes. It is therefore not surprising that the AB took the opportunity to rein in the expansion of the TBT Agreement, even if only incrementally, and to gesture towards a reappraisal of the Agreement’s purpose and meaning—or perhaps a reconfirmation of first principles.


The AB found that the Panel had erred in finding that the European Union seals regime “laid down product characteristics,” making the rather commonsensical observation that “the identity of the hunter, the type of hunt, or the purpose of the hunt” are not characteristics of products containing seal280 (if anything, they might be characteristics of the way those products were produced). The “main feature” of the measure was concerned with regulating the conditions under which seal products could be placed on the market281—and, by extension, regulating what kind of seal hunting was tolerable and entitled to exempted treatment in light of the balance of moral considerations that the legislation sought to strike. Accordingly, the AB reversed the Panel’s finding that the European Union seals regime was a “technical regulation.” The bulk of its analysis (by contrast to the Panel’s) was under the GATT, notably the GATT Article XX(a) public morals exception. This does seem to be a more natural framework for working out the trade law questions implicated by legislation that expresses the moral opprobrium of the European public regarding seal hunting.

Furthermore, the AB offered interpretive guidance that went beyond the immediate question before it and indicated that the expansion of the TBT Agreement might be reined in in future cases. The AB suggested that panels “may find it helpful to seek further contextual guidance in other provisions of the TBT Agreement . . . in delimiting the contours of the term ‘technical regulation.’”282 The AB also stated that it might be relevant for a panel to look at “supplementary means of interpretation such as the negotiating history of the TBT Agreement or the types and the nature of claims that have been brought by the complainants.”283 Reading between the lines, one could see this as the AB asking panels to step back and evaluate whether it really makes sense to

280. EC Seal Products AB Report, supra note 28, ¶ 5.45.
281. Id. ¶ 5.58.
282. Id. ¶ 5.60.
283. Id.
classify the measure under consideration, taking into account the nature and purpose of a special trade-law regime that applies only to technical regulations.

And yet the AB decision in *Seal Products* still leaves key questions open regarding the effect of the TBT Agreement on morally based legislation and regulatory pluralism. The AB did not complete the analysis and determine whether or not the European Union seals regime lays down PPMs, the second and alternative branch of step two in the test for a technical regulation, because the parties had not argued that point before it. In this sense, the Appellate Body’s reversal of the Panel could be seen as a mere technicality and a chance outcome of the complainants’ pleading choices. The nature and purpose of a seal hunt and the identity of a hunter are not characteristics of the end product; that is clear. But they are close enough to what is generally understood to constitute PPMs (that is, factors relating to the way a product was produced) to suggest that a completion of the analysis could actually have found that this was a technical regulation after all—or, at least, that a future panel bent on a maximalist interpretation of the TBT Agreement’s scope would not necessarily be foreclosed from reading it that way.284

It remains to be seen in future cases whether the contextual and purposive interpretation that the AB suggested was called for in this kind of case will develop further. Stepping back from the minutiae of text and tests and looking at context, purpose, and negotiating history could materially narrow the scope of the TBT Agreement in future cases. This is an important question from the perspective of permitting moral and regulatory pluralism.

**PART III: ASSESSING THE SEAL PRODUCTS DECISION FROM A PLURALIST PERSPECTIVE**

When the *Seal Products* decision is considered as a whole, did the WTO’s adjudicatory bodies adopt the pluralist approach advocated for in Part I above and in Howse and Langille’s prior article? Broadly speaking, in our view the *Seal Products* decision was a positive development from the perspective of pluralism. Yet there are certain troubling aspects of the decision that should be addressed and clarified in WTO jurisprudence going forward, if the WTO is to play an appropriate institutional role, attendant to the funda-

284. It should be noted, however, that to meet the EC–Asbestos definition of a technical regulation the measure would have to lay down processes and production methods related to product characteristics.
mental moral diversity of its Members. Some scholars have criticized *Seal Products* for an opposite shortcoming: giving too much room for WTO Members to engage in protectionism under the guise of morality. In our view, those criticisms are overblown, both in terms of their analysis of the likely effects of the case, and because they disregard the fundamental importance of the idea of moral pluralism.

A. **Permitting Pluralism: What the Seal Products Ruling Got Right**

From a pluralist perspective, the first great success of the *Seal Products* dispute was the AB’s restriction of the scope of the TBT Agreement. The concept of risk regulation and efficacy of regulation that is contained within the TBT’s disciplines (particularly Article 2.2) seems deeply unsuited to apply to regulation that is not concerned with risk reduction or an abatement of harms, again such as non-instrumental moral regulation. This lack of fit between the TBT’s disciplines and the types of measure it was applied to is evident in the *Seal Products* Panel report, as discussed above (in what we have termed the high water mark of TBT expansionism).

Fortunately, the AB seems to have realized the problem with applying the TBT Agreement to all types of measure including non-instrumental moral regulation. *Seal Products* marks a watershed moment in the jurisprudence on the TBT Agreement, in which the AB (without saying so explicitly) has indicated that the TBT Agreement cannot be applied to measures that do not have a technical purpose. It has urged future Panels to adopt a contextual approach to determining whether the measure at issue is suitable for TBT analysis. This is a great victory for pluralism because it recognizes that all legislation is not amenable to cost-benefit analysis or an assessment of its effectiveness in achieving material goals. And this is particularly so in the context of non-instrumental moral legislation such as that at stake in the *Seal Products* dispute.

A sensitivity to the inherent diversity of viewpoints and approaches of the WTO’s Member states is also evident in the *Seal Products* approach to Article XX(a). In *Seal Products*, the AB wisely continued the deferential approach that it had initiated in *Gambling* and *Audiovisuals* to the determination of whether a measure is a matter of domestic public morals. It insisted, rightly, that public morals are a matter of the “systems and scales of values” relevant to each society, and rejected a “material contribution” standard that is inappropriate for non-instrumental moral reasoning. It did not
undertake a searching evidentiary inquiry into the nature of the beliefs that undergirded the European Union’s ban on the importation of seal products. It strongly endorsed the idea that animal welfare could be a constituent part of the concept of public morals. It rejected Canada’s “philosophical consistency” argument that would have made the WTO the arbiter of the philosophical reasonableness of the moral beliefs of the societies of its Member states and prevented any incremental change of moral positions through legislation. It did not see the fact that the European Union’s regulation had multiple objectives, moral and otherwise, as a problem when attempting to invoke Article XX(a) as a defense, an essential conclusion when moral legislation is at stake. Ultimately, then, the Seal Products approach to the public morals defense in Article XX(a) is laudable from the perspective of pluralism.

B. Where the Seal Products Ruling Went Wrong

Seal Products leaves many unanswered questions regarding the nature of the TBT Agreement, which could in future cases limit the ability of Member states to regulate for diverse reasons. Crucially, the AB did not tackle the meaning of PPMs, which have never been adequately defined in the jurisprudence of the WTO. On its face, the concept of “processes and production methods” seems to be an elastic and inclusive category. Thus, the work that the Seal Products AB report has done in limiting the scope of the TBT Agreement could be undone by a future Panel’s interpretation of PPMs. This would once again open non-instrumental moral legislation to analysis under the TBT Agreement, a result that we have argued here and elsewhere would be illogical and unfortunate.285

In addition, the relationship between the TBT and the GATT remains unstable, with potential consequences for a pluralist approach to interpreting the law of the WTO. Seal Products affirms that the balance between the right to regulate and trade liberalization is in principle no different in the GATT and the TBT Agreement. But given their different texts and negotiating histories, it is difficult to understand how the AB will maintain the position that the GATT and the TBT Agreement have the same effect on regulatory autonomy of Member states. The ultimate space for regulation remains unclear, and therefore a satisfactory understanding of

how the WTO’s disciplines should be reconciled with the regulatory diversity of its Member states also remains unsettled. The AB’s approach to *de facto* discrimination in the GATT is also worrying from a pluralist perspective. As described above, the AB chose not to import an “aims and effects” test (the idea of a “legitimate regulatory distinction” that could insulate legislation from the charge of discrimination) from the TBT into the concept of discrimination in the GATT. Instead, the AB insisted that a *prima facie* case of discrimination is made out under the GATT if the complainant can show that the measure has a detrimental impact on the competitive opportunities of like products—any non-discriminatory legislative intent behind the measure is irrelevant. This paves the way for more findings of discrimination and limits the defenses a Member state can use to those captured by Article XX, a distinctly non-pluralist approach. However, as we argue above, there is language in the AB’s Report that suggests that it still may be possible to argue that legislative intent remains relevant to a finding of discrimination, both because the AB required a “genuine relationship” between the impugned measure and its discriminatory effects, and because the question of “likeness” was not at issue. It is therefore possible that the regulatory space available to Member states can be preserved.

Finally, the AB’s approach to interpreting the chapeau of Article XX is problematic from a pluralist perspective. As discussed above, the AB found that the European Union seals regime did not comply with the requirements of the chapeau, chiefly because of the manner in which the IC exception was to be administered. The problem that the AB identified was that the IC exception undercut the objectives of the more general ban on the importation of seal products. The chapeau therefore seems to be inherently incompatible with a crucial aspect of our theory of pluralism, if Members are not allowed to trade off between different goals or incorporate different goals (moral or otherwise) in their legislation. However, the problematic implications of the AB’s holding here may be mitigated through an improved understanding of the meaning of “reconciliation” between a measure’s primary and subsidiary objectives.

C. **Responding to the Critics of the WTO’s Pluralist Approach**

Critics of the decision in *Seal Products* have fallen into several camps. The first is a group concerned with a “floodgates” argu-

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286. *See supra* Part II.D.
The concern of this camp is that the approach to moral legislation in *Seal Products* will open the floodgates to all manner of protectionist legislation. Essentially, their claim is that the WTO has been too permissive, opening the door to protectionism by WTO Members, and that it needs to conduct a more searching inquiry into what qualifies as public morals. Simply leaving it up to states to determine what public morals are (in large part) and not demanding any particular form of evidence to support a public morals claim, introduces a specter of “mixed motives.” A more searching review would impose moral consistency, or employ a more stringent test for whether there is a reasonably available and less trade-restrictive measure.

This criticism has several flaws. As a practical matter, it is unlikely that employing a deferential approach to public morals will “open the floodgates” to protectionism. The chapeau of Article XX prohibits the application of measures in a way that constitutes arbitrary or unjustifiable discrimination and requires WTO Members to comply in good faith with their obligations not to discriminate. A deferential approach to Article XX(a) does not negate the impact of the chapeau and its important protections. The indeterminacy and vagueness of the notions in current antidumping law offer a much easier route to protectionism than mobilizing constituencies for the protection of moral beliefs to pass new legislation likely to affect domestic as well as foreign economic actors to the extent it is non-discriminatory (and therefore generally defensible under WTO norms, including those of the chapeau).

Moreover, the remedies that the critics propose for the problems they perceive are insensitive to the many practical and normative challenges that a more intrusive review of the standard for public morals would involve. For example, for WTO adjudicators to assess the precise meaning of the Torah or question whether a Hindu society truly requires a prohibition on the importation of bovine products would be ridiculous, and it would undermine the WTO’s

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288. See id.


290. As discussed by other commentators summarized supra Part I.C.
legitimacy. It is also difficult in the context of non-instrumental legislation to understand how stricter scrutiny of public morals would operate. Therefore, a pluralist approach is most appropriate, requiring deference and sensitivity to the policy space of WTO Members.

The second school of criticism of the decision has sought to propose an objective or external standard for what counts as public morals. For example, Christian Häberli has argued that the public morals exception should be interpreted in conjunction with other international instruments, such that the European Union’s argument in Seal Products would have focused more on their legal obligation to comply with the UN Declaration on the Rights of Indigenous Peoples (for the indigenous exception) and international animal welfare obligations when justifying their Article XX(a) claim. This follows the traditional attempts of scholars to propose an external or objective benchmark for what can “count” as a reason for invoking a public morals defense.

While we do not deny that the WTO covered agreements should be interpreted in conjunction with other instruments of public international law, and that human rights treaties and other normative agreements could certainly help to elucidate the scope of the public morals defense, we do not agree that an international standard should be in any way required to make out a public morals argument. Demonstrating international agreement on a norm should not be a required component of a public morals defense. It is obviously not the role of the WTO to mandate international coherence regarding moral issues.

Other scholars have criticized Seal Products for its reasoning, rather than its outcome. Shaffer and Pabian argue that the case is a landmark in the law of the WTO, and yet the bureaucratic legalese used to articulate the reasons given by the Panel and the AB belies its importance. The decision is an example of a failure of public reasoning, as the WTO’s adjudicative bodies did not give any guidance to Member states as to how to regulate on a moral basis without violating WTO law.

Shaffer and Pabian’s criticism does reflect the rather technocratic and difficult nature of the Panel and the AB’s reasons in Seal Products.  

291.  See Häberli, supra note 91.


293.  See id.
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Products. This was not a case in which the underlying rationale for the decision was in full view, nor was it explained in terms most likely to enhance respect for and the legitimacy of the AB’s ruling. The opacity of the decision also masks some of the tensions in the ruling, such as the extraterritoriality and PPMs discussions, which we have sought to expose in this Article. Still, we believe that the AB’s approach was ultimately not as problematic as Shaffer and Pabian have claimed. The decision was generally rooted in an appropriate and subtle understanding of the WTO’s institutional role. While the reasons may have at times been overly technocratic and opaque, the AB in particular seemed alive to the critical importance of legitimacy and the WTO’s limited institutional remit. The logic of pluralism we have provided can, to a great extent, account for the reasons in Seal Products.

In addition, there may have been wisdom in the AB’s choice not to make sweeping pronouncements about the state of public morals going forward. As we have stated, the development of the law of the WTO regarding morally motivated legislation is in its infancy, and thus the AB’s approach may reflect a prudent “one case at a time” approach to adjudicating a sensitive issue.294 This “judicial minimalism” may well be purposeful, adopted in order to evolve the jurisprudence in a sensitive dialogue with diverse stakeholders and with sensitivity to different contexts. Yet ideally “judicial minimalism” of this kind should not have to sacrifice clarity; economy of reasoning can be made consistent with clarity and openness.

CONCLUSION

The World Trade Organization is often seen as one of the most legally effective international organizations.295 It has a successful and respected dispute settlement regime, concrete legal rules fully articulated in treaty obligations, and a reasonably high degree of compliance with those rules among its Member states. And yet the legitimacy of the WTO rests on its ability to be faithful to its institutional role, one that is focused on trade liberalization, non-discrimination, and anti-protectionism. This role does not involve limiting the reasons for which WTO Member states are permitted to regulate, particularly when those reasons are moral, ethical, or religious.

294. For an articulation of the benefits of this approach in a different context, see Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (2001).
in nature. The WTO’s institutional role is best fulfilled if it allows Member states latitude to adopt the moral regulations appropriate for their respective societies.

The *Seal Products* dispute went a long way towards inscribing a pluralist approach to moral legislation into WTO law, especially in its interpretation of the scope of the TBT Agreement and in the application of GATT Article XX(a)’s public morals exception. While the decision could have done more to facilitate regulatory autonomy and a plurality of reasons for regulating, the AB was able to permit pluralism in practice through its interpretation of the WTO’s legal disciplines.