

## THE PUBLIC MORALS EXCEPTION AFTER THE WTO SEAL PRODUCTS DISPUTE: HAS THE EXCEPTION SWALLOWED THE RULES?

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*The public morals exception to the World Trade Organization (“WTO”) trade rules was explicitly invoked for the third time in the trade regime’s history in the WTO dispute over seal products. While shedding further light on the public morals exception, the WTO Appellate Body’s decision in this dispute has raised concerns about an overbroad public morals doctrine that could provide a cloak for protectionism. Some commentators argue that the decision has left the exception with no boundaries, leaving the door open for validation of otherwise illegal trade-restrictive measures disguised as measures intended to protect a public moral. This Note addresses such concerns about the unforeseen but far-reaching implications of the European Communities—Measures Prohibiting the Importation and Marketing of Seal Products (“EC—Seal Products”) decision, and argues that the Appellate Body properly and necessarily left the definition and scope of what constitutes a public moral to the discretion of individual WTO member countries. In discussing the WTO’s treatment of the public morals exception in the context of the trade-morality conflict, this Note argues that the implications of the EC—Seal Products decision are not as severe as they may seem. Given the increasingly diverse values, beliefs, and morals that exist among WTO member countries, as well as the crucial role of the WTO as adjudicator among them all,*

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*this Note argues that the decision necessarily protects member countries' sovereignty as well as the trade regime's legitimacy and resilience.*

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## I. INTRODUCTION

An increasingly important conflict in the realm of international trade systems is that between the level of regulatory autonomy that member states retain and their binding commitments to the free trade of goods and services. The evolution of the World Trade Organization (“WTO”) in particular has been characterized by the search for the right balance between disciplining trade restrictions and preserving regulatory autonomy. While the WTO’s main goal is to foster a fair and open trading system for the benefit of all its members, it provides for a margin of latitude to member countries’ sovereignty by allowing trade-restrictive measures aimed at certain national public policy purposes. One such purpose is to protect a public moral.

A recent dispute at the WTO, the *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products* (“EC—Seal Products”) dispute, involved a trade-restrictive measure designed to protect the European Union’s public moral values against animal cruelty. Until the last decade, the public morals exception was rarely invoked, with only three cases directly speaking on the subject to date, and the exception still lacks clarity in its definition and scope. A coherent doctrine guiding the application and limits of the public morals exception could have significant implications for WTO member countries and for world trade as a whole. Although the public morals exception has not been invoked often until now, there is a great likelihood that it will be utilized by countries more frequently to defend trade-restrictive measures, considering the growing diversity of the WTO’s membership and the increasing differences in values and morals among them. The public morals exception could potentially make room under the realm of the WTO rules for the protection of human and civil rights, and even animal rights, as seen in the *EC—Seal Products* dispute.

At the same time, a public morals doctrine that is too expansive could provide a cloak for protectionism, potentially undermining the immense progress made toward trade liberalization and even threatening the validity of existing trade agreements. This fear has been raised by an apparent

shift in the public morals doctrine in the WTO Appellate Body's recent *EC—Seal Products* decision. While this decision shed some further light on the public morals exception, some commentators argue that by leaving open the definition of which public morals fall within the scope of the exception, the Appellate Body left the doctrine with no boundaries at all, leaving the door open for validation of protectionist measures disguised as measures intended to preserve a public moral.

This Note will address concerns about the unforeseen but far-reaching implications of the *EC—Seal Products* decision, and will argue that the Appellate Body properly and necessarily left the definition and scope of what constitutes a public moral within the meaning of the public morals exception to individual WTO member countries. Part II of this Note introduces the trade-morality conflict generally and highlights the importance of a coherent public morals doctrine in international trade law. Part III describes how treatment of public morals in the WTO has evolved, and outlines the possible implications of the change brought by the recent *EC—Seal Products* decision. Part IV argues that these implications are not as severe as some may fear and that the public morals doctrine was properly broadened by the *EC—Seal Products* decision.

## II. BACKGROUND

### A. The WTO's Commitment to Free Trade

The underlying philosophy of the WTO, as was the case for its predecessor organization the General Agreement on Tariffs and Trade (“GATT”), now annexed therein, is that open markets, transparency, and nondiscriminatory trade policies accrue to the benefit of all participating nations.<sup>1</sup> Reflecting their desire to usher in a “new era of global economic cooperation” and to “operate in a fairer and more open multi-

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<sup>1</sup> BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND* 1 (3d ed. 2009).

lateral trading system for the benefit and welfare of their peoples,” the parties to the WTO agreement pledged “to resist protectionist pressures of all kinds” and “not to take any trade measures that would undermine or adversely affect the results of the Uruguay Round,” the negotiations which culminated in the formation of the WTO.<sup>2</sup>

The theory behind the WTO’s commitment to liberal trade policies and against protectionism is that free trade sharpens competition and spurs innovation, while protectionism ultimately results in stagnant, inefficient markets and low quality of products for consumers, eventually causing markets to contract and world economic activity to be reduced.<sup>3</sup> Thus, in accordance with their WTO commitments, member countries may not provide protection to domestic production or industries through internal policies, and discrimination between products or countries is condemned.<sup>4</sup> When a member country erects barriers to trade, such as import or export bans, another member may challenge that legislation through WTO consultations and a dispute settlement panel.<sup>5</sup> The obligation of non-discrimination in national regulation plays a fundamental role in the WTO’s promotion of free trade, and there are several disciplines on domestic regulation in the WTO agreement aimed at upholding this obligation.<sup>6</sup>

One of the cornerstones of the WTO agreement is the national treatment principle, found in all of the main WTO

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<sup>2</sup> Marrakesh Declaration of Apr. 15, 1994, 1867 U.N.T.S. 148.

<sup>3</sup> See *Understanding the WTO: Basics, The case for open trade*, WTO, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact3\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm) [<http://perma.cc/XXN8-BU8F>].

<sup>4</sup> George A. Bermann & Petros C. Mavroidis, *Introductory Remarks*, in *TRADE AND HUMAN HEALTH AND SAFETY* 1, 2 (George A. Bermann & Petros C. Mavroidis eds., 2006).

<sup>5</sup> See *Understanding the WTO: Settling Disputes, A unique contribution*, WTO, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm) [<http://perma.cc/PA2Q-DQWP>].

<sup>6</sup> Gabrielle Marceau & Joel P. Trachtman, *Responding to National Concerns*, in *THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW* 209, 211 (Daniel Bethlehem et al. eds., 2009).

agreements.<sup>7</sup> In accordance with this principle, Article III of the GATT requires that members refrain from using internal taxes and other internal regulations to favor domestic products and production over imported products.<sup>8</sup> The WTO Appellate Body has interpreted this article as having the purpose of prohibiting protectionism, although it has not clearly defined this term.<sup>9</sup> Similarly, Article XVII of the General Agreement on Trade in Services (“GATS”) holds that nations must give foreign services and service suppliers the same regulatory costs and benefits that they provide to domestic services and service suppliers.<sup>10</sup> The WTO Agreement on Trade-Related Aspects of Intellectual Property (“TRIPS”) likewise holds that nations must provide the same protections to intellectual property of foreign and domestic entities.<sup>11</sup>

Another key principle of the WTO agreement aimed at preventing discrimination is the most favored nation (“MFN”) principle, which essentially requires that all member countries of the WTO treat one another equally in trade.<sup>12</sup> Article I of the GATT provides that for all

matters referred to in paragraphs 1 and 2 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded . . . to the like product originating in or des-

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<sup>7</sup> *Id.* at 211–15.

<sup>8</sup> General Agreement on Tariffs and Trade art. III, Oct. 30, 1947, 55 U.N.T.S. 194 [hereinafter GATT]; *see also* General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT 1994] (incorporating provisions from GATT 1947).

<sup>9</sup> Marceau & Trachtman, *supra* note 6, at 211–12.

<sup>10</sup> General Agreement on Trade in Services art. XVII, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS].

<sup>11</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter WTO TRIPS Agreement].

<sup>12</sup> Marceau & Trachtman, *supra* note 6, at 214.

tined for the territories of all other contracting parties.<sup>13</sup>

Article 2.3 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (“SPS Agreement”) provides a similar obligation with respect to sanitary and phytosanitary measures,<sup>14</sup> and Article 2.1 of the WTO Agreement on Technical Barriers to Trade (“TBT Agreement”) follows both Articles III and I of the GATT closely, requiring “treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.”<sup>15</sup>

In essence, these provisions prohibit domestic policies and measures that discriminate against or between products or services from other WTO member countries. A trade-restrictive measure need not be discriminatory, however, to be held illegal under the GATT. The agreement also contains provisions requiring the gradual reduction of trade barriers in the form of customs duties or tariffs,<sup>16</sup> and limiting quantitative restrictions on imports and exports.<sup>17</sup> The agreement further discourages unfair practices such as export subsidies<sup>18</sup> and dumping products at below cost to gain market share.<sup>19</sup>

## B. Recognition of Legitimate Policy Exceptions

The WTO is ultimately committed to a fairer and more open multilateral trading system and condemns national pol-

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<sup>13</sup> GATT, *supra* note 8, art. I.

<sup>14</sup> WTO Agreement on the Application of Sanitary and Phytosanitary Measures art. 2.3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493 [hereinafter WTO SPS Agreement].

<sup>15</sup> Agreement on Technical Barriers to Trade art. 2.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120 (1994) [hereinafter WTO TBT Agreement]; *see generally* Marceau & Trachtman, *supra* note 6, at 214.

<sup>16</sup> GATT 1994, *supra* note 8, art. II.

<sup>17</sup> *Id.* art. XI.

<sup>18</sup> *Id.* art. XVI.

<sup>19</sup> *Id.* art. VI.

icies that have the effect of restricting trade. At least potentially or indirectly, however, almost all government policies affect trade in some way, even if they are only remotely related to trade. At the same time, national measures that impede international trade or restrict market access may or may not be intended to protect a country's domestic industry, and may even be intended to protect important national or public values—whether they focus on environmental, human rights, security or other concerns. In many cases, “the distinction between a protectionist measure—condemned for imposing discriminatory or unjustifiable costs—and a non-protectionist measure restricting trade incidentally (and thus imposing some costs) is difficult to make.”<sup>20</sup>

Since its inception, the GATT has recognized that legitimate government policies may justify measures that are contrary to the basic GATT obligations, and it contains several provisions to safeguard against those obligations that could encroach upon member countries' sovereignty. Article XX of the GATT carves out a list of general exceptions to any of the contractual obligations in the agreement, including the MFN and national treatment principles.<sup>21</sup>

Article XX is invoked frequently in response to challenges against trade-restrictive measures at the WTO dispute settlement panel, and has provided support for countries to restrict trade in order to protect certain public interests. The application of these exceptions are, however, subject to the requirement, or the “chapeau,” in Article XX's preamble that such measures not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.<sup>22</sup> Thus, analysis of whether a trade-restrictive measure is justified under Article XX requires a two-tiered analysis: first, it must come under one of the particular listed exceptions, and second, it must be appraised under the preamble clause.<sup>23</sup> One

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<sup>20</sup> Marceau & Trachtman, *supra* note 6, at 210.

<sup>21</sup> GATT 1994, *supra* note 8, art. XX.

<sup>22</sup> *Id.*

<sup>23</sup> Repertory of Appellate Body Reports—General Exceptions: Article XX of the GATT 1994, G.3.1 Article XX—Two Tier Analysis, WTO,

public policy exception that is frequently invoked in response to challenges to trade-restrictive measures and is often the subject of dispute is Article XX(b), which provides that “nothing in the agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . necessary to protect human, animal or plant life or health.”<sup>24</sup> Another example is the exception contained in Article XXI, providing that a contracting party may act in contravention of its obligations under the GATT when those actions are necessary for the protection of its essential security interests.<sup>25</sup>

### C. Relevance of the Public Morals Exception

This Note addresses a provision that allows member countries to act in contravention of their WTO obligations through measures “necessary to protect public morals.”<sup>26</sup> The concept of morality in the context of government regulation has been the subject of legal and philosophical debate since as early as the seventeenth century.<sup>27</sup> Historically, trade controls based on morality have included matters such as religion, human and fundamental rights, and attitudes on alcohol, drugs, sexuality, bigamy, gambling, corruption in business and politics, consumer protection, or cruelty toward animals.<sup>28</sup> In his leading work on the history of the public

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[http://www.wto.org/english/tratop\\_e/dispu\\_e/repertory\\_e/g3\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/repertory_e/g3_e.htm) [<https://perma.cc/E6BW-KTZR>].

<sup>24</sup> GATT 1994, *supra* note 8, art. XX(b).

<sup>25</sup> *Id.* art. XXI.

<sup>26</sup> *Id.* art. XX(a).

<sup>27</sup> See generally ALAN HUNT, *GOVERNING MORALS: A SOCIAL HISTORY OF MORAL REGULATION* (1999).

<sup>28</sup> Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689, 717 (1998) (explaining that “[t]he various ways morality-based trade measures had been employed before the GATT was written foreshadow many of the uses to which article XX(a) might be enlisted today”); see also Miguel A. Gonzalez, *Trade and Morality: Preserving “Public Morals” Without Sacrificing the Global Economy*, 39 VAND. J. TRANSNAT'L L. 939, 960–70 (2006) (summarizing the historical usage of public morals by courts and legislative bodies in the United States, Pakistan, Latin America, Australia, Canada, Hong Kong, and the United Kingdom).

morals exception, scholar Steve Charnovitz points out that these issues frame the backdrop against which the morality exception was written into the GATT.<sup>29</sup> But, in contrast to many of the other general exceptions, the public morals clause—which now appears in both GATT and GATS<sup>30</sup>—has only been invoked at the WTO Dispute Settlement Body on few occasions, and until recently its parameters remained largely unexplored. In light of the changing dynamics of the WTO, and in view of the recent *EC—Seal Products* decision, however, it is likely that the public morals exception will be utilized more frequently as a defense of trade-restrictive measures by member countries defending their domestic policies in the future. As noted at the time of the first WTO decision directly addressing the public morals exception, the increased heterogeneity and diversity of the WTO in conjunction with the growing economic importance of international trade to member countries may increase the frequency of trade-morality disputes.<sup>31</sup> The WTO has grown to 162 members as of November 2015, up from the original twenty-three members of the original 1947 GATT.<sup>32</sup> In addition, while originally the 1947 GATT was created with the overriding objective of liberalizing “the flow of trade in industrial products among its largely industrialized Contracting Parties,”<sup>33</sup> today it is made up mostly of developing nations with divergent socioeconomic and cultural backgrounds.<sup>34</sup> With

<sup>29</sup> Charnovitz, *supra* note 28, at 717.

<sup>30</sup> GATT 1994, *supra* note 8, art. XX(a); GATS, *supra* note 10, art. XIV.

<sup>31</sup> Jeremy C. Marwell, Note, *Trade and Morality: The WTO Public Morals Exception After Gambling*, 81 N.Y.U. L. REV. 802, 808 (2006).

<sup>32</sup> GATT, *supra* note 8, Preamble (listing original twenty-three member countries); *Understanding the WTO: The Organization: Members and Observers*, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) [<https://perma.cc/TDX3-NCH7>] (listing current member countries).

<sup>33</sup> Melaku Gebeye Desta, *The Organization of Petroleum Exporting Countries, the World Trade Organization, and Regional Trade Agreements*, 37 J. WORLD TRADE 523, 531 (2003).

<sup>34</sup> See *Development: Definition—Who are the Developing Countries in the WTO?*, WTO, [http://www.wto.org/english/tratop\\_e/devel\\_e/d1who\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm) [<https://perma.cc/2QXQ-4JYM>].

increased size comes increased diversity of social, political, religious, and cultural values as well as greater potential for clashes over which public morals justify a restriction on trade.

As world trade continues to rapidly grow, the economic interdependence of these countries and the rest of the world is also continuously increasing,<sup>35</sup> presenting both a greater significance of potential trade barriers as well as a growing challenge to national governments regarding their control over domestic policy. Charnovitz highlights two key ways in which trade and morality clash in the context of a domestic trade policy:

First, if a morally-motivated trade measure violates international trade rules, then employing it anyway undermines the rule of law and subverts values that may be dear to the country contemplating a trade measure. Second, if the trade measure is adjudged a violation of the GATT, then the target country might retaliate if the measure is not repealed.<sup>36</sup>

A coherent doctrine on the boundaries and depth of this exception could thus have profound implications for member countries of the WTO as well as countries outside of the organization.

#### D. Historical Context of the Public Morals Exception Prior to Judicial Interpretation

The public morals exception was introduced to the trade regime in 1945, and was consistently incorporated into later

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<sup>35</sup> See HOEKMAN & KOSTECKI, *supra* note 1, at 8–27 (discussing statistics on the growth of world trade and global integration).

<sup>36</sup> Charnovitz, *supra* note 28, at 691; see also *Dispute Settlement System Training Module: Chapter 6, The process—Stages in a typical WTO dispute settlement case*, WTO, [http://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c6s10p1\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s10p1_e.htm) [<http://perma.cc/9ESH-GHP8>] (explaining that if a WTO member is held to have violated GATT rules, and the illegal measure is not brought into conformity with WTO rules within a reasonable time, the complaining party may, with prior approval from the Dispute Settlement Body, adopt countermeasures as “retaliation” or “sanctions” against the violating member).

drafts.<sup>37</sup> Its adoption, however, was not accompanied by any explanatory text, and remains mostly unmodified to date.<sup>38</sup> Some scholars say this suggests that, “while the drafters continually recognized the importance of enacting such an exception, they either did not see the need to further elaborate upon the concept of ‘public morals’ or they could not agree on its meaning.”<sup>39</sup> Following conventional international law, several scholars have interpreted the public morals clause under the Vienna Convention, which provides rules for treaty interpretation—including allowing for consideration of the treaty’s preparatory work and legislative history and interpreting the treaty in good faith, in accordance with the ordinary meaning of its terms, in context, in light of its object and purpose, and in light of subsequent agreements, practice, and laws.<sup>40</sup> Under this approach, Charnovitz found that the legislative history also shed little light on the meaning of the public morals clause, and that ultimately it is difficult to ascertain the meaning of the clause, in terms of “what morals” and “whose morals” are covered, under the Vienna Convention’s rules.<sup>41</sup> Even so, this does not mean the public morals clause has been entirely overlooked. Mark Wu, who has written about the evolution of the public morals exception in the WTO, argues that the lack of clarity from legislative history and other Vienna Convention rules is not an indication that the public morals clause has been ignored,

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<sup>37</sup> See Uyen P. Le, *Online and Linked In: “Public Morals” in the Human Rights and Trade Networks*, 38 N.C. J. INT’L L. & COM. REG. 107, 119 (2012) (discussing the history of public morals in the WTO).

<sup>38</sup> Mark Wu, Note, *Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine*, 33 YALE J. INT’L L. 215, 218–21 (2008).

<sup>39</sup> *Id.* at 218 (citing Charnovitz, *supra* note 28, at 704–05 n.94 (suggesting that the negotiators knew “that [public morals] was an amorphous term covering a wide range of activities”)).

<sup>40</sup> Vienna Convention on the Law of Treaties arts. 31–32, May 23, 1969, 1155 U.N.T.S. 331.

<sup>41</sup> See Charnovitz, *supra* note 28, at 704–05 (discussing the lack of debate on Article XX(a) during the preparatory meetings).

pointing to the nearly 100 treaties and bilateral free trade agreements that incorporate such a clause.<sup>42</sup>

Yet, for nearly sixty years after its introduction, the public morals exception was never utilized in the face of a challenge to a member country's trade-restrictive measure at the WTO Dispute Settlement Body.<sup>43</sup> Again, this is not to say that public morals were not an important basis for countries' trade-restrictive measures during this time. Many countries placed various restrictions on imports throughout this period but did not need to invoke the public morals exception, either because their measures were not challenged at the WTO Dispute Settlement Body, or because they were challenged under a different, more concrete, exception that was also applicable.<sup>44</sup> This changed in March 2003, when Antigua and Barbuda ("Antigua") brought a complaint against the United States, alleging that certain U.S. federal and state laws constituted a ban on the cross-border provision of Internet gambling services in violation of GATS Article XVI.<sup>45</sup>

### III. AN OVERVIEW OF THE BRIEF EVOLUTION OF THE PUBLIC MORALS DOCTRINE AND THE POTENTIAL IMPLICATIONS OF THE SEAL PRODUCTS DISPUTE

While public morals have been a part of the WTO regime since its inception, judicial interpretation of the clause is largely limited to three cases all occurring in the past decade. In this Part, this Note provides an overview of the *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* ("U.S.—Gambling"), *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment*

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<sup>42</sup> See Wu, *supra* note 38, at 221–22, for examples of treaties and free trade agreements that incorporate a public morals clause.

<sup>43</sup> See *id.* at 225.

<sup>44</sup> *Id.* at 222–23.

<sup>45</sup> See Request for the Establishment of a Panel by Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, at 1, WTO Doc. WT/DS285/2 (June 13, 2003).

*Products* (“*China—Audiovisuals*”), and *EC—Seal Products* cases. It focuses on the portions of the decisions that contribute to the development and understanding of the public morals exception in the WTO. It then discusses the potentially far-reaching implications of the *EC—Seal Products* decision that have raised fears of a limitless public morals exception.

#### A. *U.S.—Gambling*

##### 1. Factual Background

The *U.S.—Gambling* decision was the first ever to speak directly on the public morals exception in the WTO, and is important for setting the precedent for future public morals defenses. The dispute arose out of the United States’ decision to ban the cross-border provision of Internet gambling and betting services.<sup>46</sup> Antigua brought a complaint against the United States alleging that the U.S. ban was in violation of obligations under GATS Article XVI.<sup>47</sup> The U.S. federal and state laws constituting the ban had significant ramifications for Antigua’s small and developing economy, which as a result of an economic diversification program had come to depend largely on Internet gambling.<sup>48</sup>

Antigua alleged that the new laws had a discriminatory impact on Antigua’s economy because “‘the proposed U.S. ban on the use of credit cards and other financial instruments for Internet gambling effectively bans the supply of any offshore gambling and betting services to the [United States],’ while gambling institutions located within the [United States] remained unaffected.”<sup>49</sup>

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<sup>46</sup> See Marwell, *supra* note 31, at 811.

<sup>47</sup> *Id.*; see also Request for the Establishment of a Panel by Antigua and Barbuda, *supra* note 45, at 1.

<sup>48</sup> See Wu, *supra* note 38, at 226.

<sup>49</sup> Georgia Hamann, Note, *Replacing Slingshots with Swords: Implications of the Antigua-Gambling 22.6 Panel Report for Developing Countries and the World Trading System*, 42 VAND. J. TRANSNAT’L L. 993, 999 (2009) (citing Caroline Bissett, Note, *All Bets Are Off(ine): Antigua’s Trouble in Virtual Paradise*, 35 U. MIAMI INTER-AM. L. REV. 367, 369 (2004)).

In response, the United States put forth several reasons why the U.S. laws, even if found to violate the United States' obligations under GATS, could be justified under the public morals exception in GATS Article XIV(a):

First, the remote supply of gambling services is particularly vulnerable to exploitation by organized crime due to low set-up costs, ease of provision, and geographic flexibility. Protecting American society against the “destructive influence” of organized crime on persons and property was a matter of public morality. Second, the Internet could introduce gambling into inappropriate settings, such as homes and schools, where it would not be subject to traditional, in-person controls. Internet gambling would facilitate gambling by children and have detrimental effects on compulsive gamblers by allowing anonymous, twenty-four-hour access.<sup>50</sup>

## 2. The Panel and Appellate Body Decisions

The WTO Dispute Resolution Panel ruled in favor of Antigua. The Panel first defined public morals as “standards of right and wrong conduct maintained by or on behalf of a community or nation.”<sup>51</sup> Although the Panel found that gambling was an issue of public morality that could be included in the GATS public morals exception, and that the U.S. measures were in fact designed to protect such public morals within the meaning of this exception, it ultimately held that the U.S. measures were not “necessary” to protect public morals and thus were not justified by GATS Article XIV(a).<sup>52</sup>

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<sup>50</sup> See Marwell, *supra* note 31, at 811–12 (citations omitted) (citing Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 3.189–192, 3.211, 3.279–281, 6.506–.507, 6.511, WT/DS285/R (Nov. 10, 2004) [hereinafter U.S.—Gambling Panel Report]; Executive Summary of the Second Written Submission of the United States, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 37, WT/DS285 (Jan. 16, 2004)).

<sup>51</sup> See U.S.—Gambling Panel Report, *supra* note 50, ¶ 6.465.

<sup>52</sup> *Id.* ¶¶ 6.474, 6.482–.483, 6.485–.488, 6.535.

The Panel came to this conclusion by applying a three-factor balancing test developed in earlier GATT jurisprudence that focused on “the vitality of the interests to be protected, the extent to which the measure contributes to the stated goal, and the measure’s overall effect on trade.”<sup>53</sup>

On appeal, the Appellate Body overturned the Panel’s finding that the U.S. measures were not “necessary,” holding that Antigua failed to identify a reasonably available alternative measure.<sup>54</sup> But the Appellate Body ultimately also ruled against the United States, holding that the United States failed to show that its laws met the non-discrimination requirement of the “chapeau” (preamble) of Article XIV<sup>55</sup> because it could not show the laws applied equally to both foreign and domestic suppliers of betting services.<sup>56</sup>

### 3. Implications for the Public Morals Doctrine

As a matter of first impression under WTO law, this case made important doctrinal clarifications of the public morals exception. First, several scholars have marveled that the decision seemed to endorse a dynamic interpretation of public morals, with the Appellate Body choosing not to disturb the Panel’s statement that “the content of [public morals] can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious

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<sup>53</sup> See Marwell, *supra* note 31, at 813 (citing U.S.—Gambling Panel Report, *supra* note 50, ¶ 6.488).

<sup>54</sup> See Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 326, WTO Doc. WT/DS285/AB/R (adopted Apr. 7, 2005) [hereinafter U.S.—Gambling Appellate Body Report].

<sup>55</sup> As in the preamble to GATT Article XX, see *supra* note 22, the preamble to GATS Article XIV makes the general exceptions 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 like conditions prevail, or a disguised restriction on trade in services . . . .” GATS, *supra* note 10, art. XIV.

<sup>56</sup> See U.S.—Gambling Appellate Body Report, *supra* note 54, ¶¶ 372–73.

values,” and that the regulating country has the right to determine the appropriate level of protection.<sup>57</sup> Second, the decision clarified that when determining if a public moral is “necessary,” the same three-factor balancing test should be used as that applied by the court to measures “necessary to protect human, animal or plant life or health” under GATT Article XX(b) and GATS Article XIV(b), and the burden of proof falls on the complaining party to identify a reasonably available WTO-consistent alternative if said party disputes the necessity of the initial measure.<sup>58</sup> Third, this decision clarified that established principles for evaluating nondiscrimination should guide the interpretation of the public morals exception.<sup>59</sup> But *U.S.—Gambling* left open the fundamental questions of what morals qualify as public morals and whether a state can unilaterally define its own public morals within the WTO exception.<sup>60</sup>

## B. *China—Audiovisuals*

### 1. Factual Background

In April 2007, the United States launched a case against China at the WTO, alleging that China imposed measures on the sale and distribution of imported audiovisual entertainment products that restricted trade in violation of China’s WTO commitments.<sup>61</sup> The United States argued that China violated its obligations of market access under Article XVI and national treatment under Article XVII of the GATS—in

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<sup>57</sup> See Nicolas F. Diebold, *The Morals and Order Exceptions in the WTO Law: Balancing the Toothless Tiger and the Undermining Mole*, 11 J. INT’L ECON. L. 43, 49–50 (2008); Gonzalez, *supra* note 28, at 958; Wu, *supra* note 38, at 231.

<sup>58</sup> See U.S.—Gambling Appellate Body Report, *supra* note 54, ¶ 291 n.350; see also Wu, *supra* note 38, at 229–30.

<sup>59</sup> Wu, *supra* note 38, at 230.

<sup>60</sup> *Id.* at 231–32.

<sup>61</sup> Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 1.1, WTO Doc. WT/DS363/R (adopted Aug. 12, 2009) [hereinafter *China—Audiovisuals Panel Report*].

addition to China's Accession Protocol—because the measures limited the rights of foreign companies to import and distribute the goods in question, discriminating against them in favor of domestic companies.<sup>62</sup> As part of its defense, China claimed that its measures were justified by the public morals exception under Article XX(a) of the GATT because the measures in question were designed to review the content of foreign cultural goods and forms of expression that could potentially collide with significant values in Chinese society.<sup>63</sup>

## 2. The Panel and Appellate Body Decisions

In contrast to *U.S.—Gambling*, where Antigua challenged the assertion that the U.S. measures were justified on the grounds of protecting public morals, here, the United States did not dispute that the publications affected by the measures could be harmful to Chinese perceptions of public morality and societal values.<sup>64</sup> Thus, after establishing that the same interpretation of public morals developed by the *U.S.—Gambling* Panel under Article XIV(a) of the GATS applies under Article XX(a) of the GATT, the Panel conducted its analysis with the assumption that if the affected products were brought into China, they could have a negative effect on public morals.<sup>65</sup> The more determinative question was whether the measures satisfied the “necessity” requirement of the exception.<sup>66</sup> In applying the three-factor balancing test

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<sup>62</sup> See *id.* ¶¶ 2.1–.3(c). For a detailed overview of the challenged Chinese measures, see Raj Bhala & David A. Gantz, *WTO Case Review 2010*, 28 ARIZ. J. INT'L & COMP. L. 239, 247–57 (2011).

<sup>63</sup> See China—Audiovisuals Panel Report, *supra* note 61, ¶¶ 7.751–.752.

<sup>64</sup> Panagiotis Delimatsis, *Protecting Public Morals in a Digital Age: Revisiting the WTO Rulings on US—Gambling and China—Publications and Audiovisual Products*, 14 J. INT'L ECON. L. 257, 282–83 (2011); see also China—Audiovisuals Panel Report, *supra* note 61, ¶ 7.763.

<sup>65</sup> See China—Audiovisuals Panel Report, *supra* note 61, ¶ 7.763.

<sup>66</sup> See Elanor A. Mangin, Note, *Market Access in China—Publications and Audiovisual Materials: A Moral Victory with a Silver Lining*, 25 BERKELEY TECH. L.J. 279, 298 (2010).

detailed in *U.S.—Gambling*,<sup>67</sup> the Panel recognized that protection of public morals was a highly important government interest in China, but ultimately found that all but one of the measures could not be considered necessary to protect public morals because the measures completely denied the right of certain enterprises to engage in importing and, therefore, failed to strike a reasonable balance.<sup>68</sup> The Publications Measure, the one measure found to be necessary, was also struck down because of the existence of “reasonably available” alternatives.<sup>69</sup>

On appeal, the Appellate Body overturned the Panel’s preliminary finding that the Publications Measure was “necessary” due to the lack of reference to supporting evidence of a material contribution to the protection of public morals.<sup>70</sup> The Appellate Body, however, affirmed all other findings by the Panel, including that the challenged measures were not necessary to protect public morals and thus were not justified under Article XX(a) of the GATT.<sup>71</sup>

### 3. Implications for the Public Morals Doctrine

The decision in this case affirmed the general definition of a public moral put forth in *U.S.—Gambling* and reiterated the court’s deference to an individual country’s choice of the appropriate level of protection for public morals.<sup>72</sup> As previously mentioned, however, the relation of the challenged measures to public morals is only the first tier of the exception’s requirements. While the decision gave deference to the cultural specificity of morality in China and did not question whether the measures were related to public morals, it

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<sup>67</sup> See *supra* note 53 and accompanying text.

<sup>68</sup> See Mangin, *supra* note 66, at 299–300.

<sup>69</sup> See *China—Audiovisuals* Panel Report, *supra* note 61, ¶ 7.886–.909.

<sup>70</sup> See Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 415(b)(iii), WTO Doc. WT/DS363/AB/R (Dec. 21, 2009).

<sup>71</sup> *Id.* ¶ 415(e).

<sup>72</sup> See Mangin, *supra* note 66, at 302.

seemed to set the bar quite high in employing the “necessity” test, possibly making it extremely difficult, if not impossible, for countries to prove that any measure is necessary to protect public morals in the future.<sup>73</sup>

Simultaneously, *China—Audiovisuals* left a great deal of ambiguity regarding the meaning of public morals. The analysis assumed, *arguendo*, that public morals may be affected by the challenged measures, and neither the Panel nor the Appellate Body analyzed the issue of what constitutes a public moral and whether a country may unilaterally define the term.

### C. *EC—Seal Products*

#### 1. Factual Background

The third and most recent decision directly speaking on the doctrine of the public morals exception was decided on May 22, 2014. The dispute arose when the European Union (“EU”) adopted a legislative scheme banning the importation and marketing of most products made from seals.<sup>74</sup> The ban was the result of a general public denouncement within the European community of the cruel and inhumane methods typically used to kill seals, and was thus justified on the ground that it protected EU citizens’ morals by shielding them from products made through such inhumane treatment.<sup>75</sup> The EU seal regime, however, carved out several exceptions from the ban, the key limitations being for seal products made by indigenous communities such as the Inuit (“IC exception”) and those made from seals hunted for purposes of marine resource management (“MRM exception”).<sup>76</sup>

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<sup>73</sup> *Id.* at 304.

<sup>74</sup> Regulation (EC) 1007/2009 of the European Parliament and of the Council of 16 September 2009 on Trade in Seal Products, 2009 O.J. (L 286) 36.

<sup>75</sup> *Id.* at 36; *see also* Ian Traynor, *Europe Votes to Ban Seal Product Trade*, GUARDIAN (May 5, 2009), <http://www.theguardian.com/environment/2009/may/05/eu-bans-seal-products> [<http://perma.cc/7T6E-LLTX>].

<sup>76</sup> *See* Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 1.4, WTO

Sealing is both economically and culturally important for Canada and Norway, which have two of the largest sealing industries in the world.<sup>77</sup> In 2010, Canada and Norway challenged the ban at the WTO, arguing that it is discriminatory and restricts trade in violation of the EU's obligations under Articles 2.1 and 2.2 of the TBT Agreement, Articles I:1, III:4 and XI:1 of the GATT 1994, and Article 4.2 of the Agriculture Agreement.<sup>78</sup> The crux of the challenge was that the EU legislative scheme was more trade-restrictive than necessary to protect public morality in the EU because there existed reasonable, less restrictive alternatives, such as simply labeling the products based on whether animal welfare standards had been met.<sup>79</sup> Canada and Norway also argued that the implementation of the ban's exceptions resulted in discrimination, or less favorable treatment, against products from Canada and Norway in favor of those from countries within and outside of the EU.<sup>80</sup> The complainants further argued that although the EU seal regime was aimed at addressing public concerns regarding seal welfare, those public concerns are not moral concerns for the EU public and are thus not justified under Article XX(a) of the GATT.<sup>81</sup>

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Doc. WT/DS400/AB/R, WT/DS401/AB/R (May 22, 2014) [hereinafter EC—Seal Products Appellate Body Report].

<sup>77</sup> See 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, 370 (2012).

<sup>78</sup> See Request for the Establishment of a Panel by Canada, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/4 (Feb. 14, 2011); Request for the Establishment of a Panel by Norway, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS401/5 (Mar. 15, 2011).

<sup>79</sup> See EC—Seal Products Appellate Body Report, *supra* note 76, ¶ 1.5; Simon Lester, *Lessons From the WTO Seal Products Case for the World Trading System*, HUFFINGTON POST (Dec. 9, 2013), [http://www.huffingtonpost.com/simon-lester/lessons-from-the-seal-products-case\\_b\\_4384219.html](http://www.huffingtonpost.com/simon-lester/lessons-from-the-seal-products-case_b_4384219.html) [<http://perma.cc/ZJK3-ZTB7>].

<sup>80</sup> See EC—Seal Products Appellate Body Report, *supra* note 76, ¶ 1.5.

<sup>81</sup> See *id.* ¶ 5.134.

## 2. The Panel and Appellate Body Decisions

### a. TBT Agreement Claims

For the TBT Agreement to apply, the challenged measures must constitute a “technical regulation,” which requires that the measures be mandatory, apply to identifiable products, and lay down product characteristics or their related production methods.<sup>82</sup> Finding that the TBT Agreement applies to the EU seal regime, the Panel analyzed Canada’s and Norway’s claims primarily under this Agreement; its analysis of the GATT claims was brief and referred back to the TBT analysis.<sup>83</sup> The Appellate Body, however, reversed the finding that the TBT Agreement applies, holding that the EU seal regime does not set out product characteristics because the exceptions only “establish[] the conditions for placing seal products on the EU market.”<sup>84</sup> Thus, the Appellate Body held the Panel’s substantive findings under the TBT Agreement moot and of no legal effect.<sup>85</sup>

### b. GATT Discrimination Claims

Canada and Norway alleged that the EU seal regime was discriminatory in violation of Articles I.1 and III.4 of the GATT because, although the legislation did not on its face differentiate based on the origin of the seal products, the exceptions accorded less favorable treatment to imports of seal products from Canada and Norway as opposed to those of domestic origin, mainly from Sweden and Finland, or those of other foreign origin, particularly from Greenland.<sup>86</sup> The nondiscrimination requirement under these GATT provi-

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<sup>82</sup> See WTO TBT Agreement, *supra* note 15, Annex 1, ¶ 1.

<sup>83</sup> Gregory Shaffer & David Pabian, *The WTO EC—Seal Products Decision: Animal Welfare, Indigenous Communities and Trade* 2–3 (Univ. of Cal. Irvine Sch. of Law, Research Paper No. 2014-69, 2014).

<sup>84</sup> See EC—Seal Products Appellate Body Report, *supra* note 76, ¶ 5.58.

<sup>85</sup> See *id.* ¶ 5.70.

<sup>86</sup> See *id.* ¶ 1.5.

sions mirrors that under TBT Article 2.1.<sup>87</sup> The court's standard for finding less favorable treatment under TBT Article 2.1 requires a showing of a detrimental impact for imports that is not the cause of a "legitimate regulatory distinction."<sup>88</sup> In the dispute over the seal products ban, both the Panel and the Appellate Body rejected the EU's argument that this same standard should apply to the GATT provisions.<sup>89</sup> Rather, the Panel and Appellate Body held that only a finding of a detrimental impact on the competitive opportunities for imports is necessary to find a violation of the GATT nondiscrimination provisions, and whether or not it is the cause of a "legitimate regulatory distinction" is irrelevant.<sup>90</sup> Based on this standard, the Panel and Appellate Body found that the ban was discriminatory because it did not "immediately and unconditionally" extend the same market access advantage to Canadian and Norwegian seal products that it did to like products from Greenland.<sup>91</sup> Thus, even though the legislative scheme was origin-neutral on its face, it was held to violate the GATT's nondiscrimination provisions.<sup>92</sup>

### c. The Public Morals Exception

After examining the text and legislative history of the EU seal regime as well as other evidence pertaining to its design, structure, and operation, the Panel found that the regime's objective is to "address the moral concerns of the EU public

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<sup>87</sup> Compare Article 2.1 of the WTO TBT Agreement, *supra* note 15, with Articles I.1 and III.4 of the GATT, *supra* note 8.

<sup>88</sup> Panel Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶¶ 7.127, 7.132, WTO Doc. WT/DS400/R, WT/DS401/R (Nov. 25, 2013) [hereinafter EC—Seal Products Panel Report].

<sup>89</sup> See *id.* ¶ 7.585; EC—Seal Products Appellate Body Report, *supra* note 76, ¶¶ 5.82, 5.125; Shaffer & Pabian, *supra* note 83, at 4.

<sup>90</sup> Shaffer & Pabian, *supra* note 83, at 3.

<sup>91</sup> See EC—Seal Products Panel Report, *supra* note 88, ¶ 7.600; EC—Seal Products Appellate Body Report, *supra* note 76, ¶ 5.95.

<sup>92</sup> Shaffer & Pabian, *supra* note 83, at 3.

with regard to the welfare of seals,”<sup>93</sup> and that addressing public concerns about seal welfare is a “legitimate” objective within the meaning of the public morals exception.<sup>94</sup> Citing the flexibility afforded WTO members in *U.S.—Gambling* to define and apply standards of morality for themselves, the Appellate Body did not disturb this finding despite challenges by both the complainants and respondent.<sup>95</sup>

The Appellate Body seemed to show great deference to a member country’s definition of public morals. First, it rejected Canada’s argument that the Panel should have required the EU to demonstrate the existence of a risk to the EU public moral of seal welfare.<sup>96</sup> The Appellate Body noted that in its decision in *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*,<sup>97</sup> the Panel noted that the term “to protect human, animal, or plant life or health” within the meaning of Article XX(b) implies the existence of a health risk.<sup>98</sup> In *EC—Seal Products*, the Appellate Body noted, however, that while a focus on dangers or risks to human, animal, or plant life or health “may lend itself to scientific or other methods of inquiry,” such risk-assessment methods “do not appear to be of much assistance or relevance in identifying and assessing public morals” under Article XX(a).<sup>99</sup> Thus, a member country invoking the public morals exception need not show that a particular public moral is actually at risk in order to justify its protection of that moral. Second, the Appellate Body also rejected Canada’s argument that the Panel should have identified the ex-

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<sup>93</sup> See *EC—Seal Products Panel Report*, *supra* note 88, ¶ 7.410.

<sup>94</sup> *Id.* ¶ 7.419.

<sup>95</sup> See *EC—Seal Products Appellate Body Report*, *supra* note 76, ¶¶ 5.167, 5.199–201.

<sup>96</sup> *Id.* ¶ 5.198.

<sup>97</sup> Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 8.170, WTO Doc. WT/DS135/R (Sept. 18, 2000).

<sup>98</sup> See *EC—Seal Products Appellate Body Report*, *supra* note 76, ¶ 5.197.

<sup>99</sup> *Id.* ¶ 5.198.

act content of the EU public morals standard at issue.<sup>100</sup> And finally, the Appellate Body further rejected the assertion that a member country “must regulate similar public moral concerns in similar ways for the purposes of satisfying the requirement ‘to protect’ public morals under Article XX(a).”<sup>101</sup> Canada argued that the EU would fail such a requirement because it did not similarly impose bans or trade restrictions to protect the welfare of other animals subjected to similar conditions.<sup>102</sup> The Appellate Body, however, rejected such a requirement of consistency in a member country’s protection of an asserted moral, noting that member countries “may set different levels of protection even when responding to similar interests of moral concern.”<sup>103</sup>

The Appellate Body also affirmed the Panel’s finding that the EU Seal Regime is “necessary to protect public morals” within the meaning of Article XX(a).<sup>104</sup> After applying the required balancing test and assessing whether a reasonably available alternative existed, the Appellate Body rejected the complainants’ assertion that the Panel erred in holding that the “necessity” test of Article XX(a) had been met.<sup>105</sup> This part of the ruling was momentous because it established that, notwithstanding the way in which the ban was applied, the ban was not inappropriate and labeling did not have to be used instead. Nonetheless, the Panel and Appellate Body held that the ban was not justified under the general exception because it did not meet the requirement of the Article XX chapeau, as it “applied in a manner that constitute[d] a means of arbitrary or unjustifiable discrimination.”<sup>106</sup> Finding that the EU failed to show that (1) the ban’s exception is rationally related to the public moral objective, (2) the ban safeguards against potential abuse, and (3) the EU made “comparable efforts” to facilitate access to the IC exception

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<sup>100</sup> *Id.* ¶ 5.199.

<sup>101</sup> *Id.* ¶ 5.200.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* ¶ 5.289.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* ¶ 5.338.

for the Canadian Inuit as it did with the Greenlandic Inuit, the Appellate Body held that the IC exception resulted in arbitrary and unjustifiable discrimination.<sup>107</sup>

### 3. Potential Implications

The *EC—Seal Products* decision was thus a mixed ruling. The EU's seal product ban was "necessary to protect public morals" under Article XX(a) of the GATT, and therefore "such a ban does not inherently violate trade rules."<sup>108</sup> While in *U.S.—Gambling* and *China—Audiovisuals* the tribunal held that there were reasonably available alternatives that were less trade-restrictive,<sup>109</sup> here the body rejected the asserted labeling alternative to the seal products ban. This holding carries great systemic importance and could possibly open the door to legal justifications of trade restrictions for a wide range of animal welfare objectives.<sup>110</sup> At the same time, the way in which the EU implemented the ban was found to be illegal because it unjustifiably discriminated against certain countries' seal products by allowing an exception for indigenous communities. The court held that regardless of the reason for a discriminatory effect, such as a legitimate regulatory purpose, a measure violates the GATT nondiscrimination requirements when it has a detrimental impact on competitive opportunities.

This results in an asymmetry between complaints falling under the GATT and those falling under the TBT Agreement, the latter of which allows for disparate impact on competitive opportunities if a party can show that a legitimate regulatory purpose caused the disparate impact.<sup>111</sup>

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<sup>107</sup> *Id.*

<sup>108</sup> See Lester, *supra* note 79.

<sup>109</sup> See *supra* notes 54 and 69 and accompanying text.

<sup>110</sup> See Ben Hancock, *WTO Holds Animal Welfare Is 'Public Moral', But Hands EU Mixed Ruling*, 32 INSIDE U.S. TRADE 22, May 30, 2014.

<sup>111</sup> See Shaffer & Pabian, *supra* note 83, at 7 ("[The Appellate Body] appears to be moving toward accommodating any *legitimate regulatory purposes* under the chapeau . . . . The Appellate body could have clarified that, under the chapeau, there is no 'unjustifiable discrimination' if differentiation between products of different national origins reflects a legiti-

Some commentators have also criticized this portion of the ruling because it seemed to suggest that “every regulation that results in different market opportunities for different countries, regardless of the reason for the regulation and no matter how incidental that effect, is a *prima facie* violation of GATT and has to be justified under Article XX.”<sup>112</sup> This interpretation of the ruling would open the door to holding illegal a long stream of regulations intended to protect national public policies, including environmental, safety, and health rules—most of which are likely to have different effects on goods made in different countries.<sup>113</sup>

As previously discussed, prior to the *EC—Seal Products* ruling there was not a precise standard for how a public moral may be defined. Rather than clarifying the scope of the public morals exception, however, the *EC—Seal Products* decision has raised new questions and has further stoked fears of an exception without boundaries. The Appellate Body held that a member state invoking the exception “may set different levels of protection even when responding to similar interests of moral concern,” and that the member state need not show the existence of a threat to a particular moral, define the content of the public moral at issue, nor be consistent in its protection of the public moral.<sup>114</sup> Some commentators have raised the concern that this ruling will allow the public morals exception to be used as “catch-all justification” for a stream of protectionist trade measures.<sup>115</sup> Another

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mate regulatory objective. Had it done so, it would have brought its reasoning under the GATT chapeau and TBT Article 2.1 into closer alignment. But it did not.”).

<sup>112</sup> Rob Howse et al., *Sealing the Deal: The WTO’s Appellate Body Report in EC—Seal Products*, ASIL INSIGHTS (Am. Soc’y Int’l Law, Wash., D.C.), June 4, 2014, <https://www.asil.org/insights/volume/18/issue/12/sealing-deal-wto%E2%80%99s-appellate-body-report-ec-%E2%80%93seal-products> [<https://perma.cc/2RYP-8YQF>].

<sup>113</sup> *Id.*

<sup>114</sup> See *supra* notes 96–103 and accompanying text.

<sup>115</sup> See Howse et al., *supra* note 112. See also Adam Behsudi, *WTO rules on seal furs imports*, POLITICO (May 22, 2014), <http://www.politico.com/story/2014/05/wto-eu-seal-product-ban-canada-norway-107004?o=0> [<http://perma.cc/FA89-VYP2>].

scholar has pointed out that this ruling may mean that member countries will not even have to identify a precise standard or level of protection, nor a precise concern or risk that they are trying to protect through a trade restriction.<sup>116</sup> The Appellate Body did not provide guidance to assess whether a public morals defense is genuine, such as requiring the submission of evidence or surveys to prove that a society truly holds certain beliefs or concerns; a government's assertion that such a concern exists may be sufficient.<sup>117</sup>

The decision thus appears to leave the definition of a public morals defense largely to a WTO member's discretion, signifying that any rational assertion that a measure is necessary to protect a public moral will be accepted and leaving the analysis of any abuse to the Article XX(a) chapeau. Such broad discretion in using the public morals exception could allow for morality-based disguises for illegal protectionist measures. "Virtually anything can be characterized as a moral issue," and so "[t]he danger of protectionist abuse is real."<sup>118</sup> Further, public morals can be highly subjective and there can be vast differences in the approaches of WTO members to what products are and are not morally abhorrent to their society.<sup>119</sup> In sum, many fear that this discretionary approach is a shift toward unilateralism and that allowing countries to justify trade restrictions by any possible asserted public moral may open the gates for abuse and even threaten the validity of the trade agreement itself.

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<sup>116</sup> Joost Pauwelyn, *The Public Morals Exception After Seals: How to Keep It in Check?*, INT'L ECON. L. & POL'Y BLOG (May 27, 2014, 3:55 AM), <http://worldtradelaw.typepad.com/ielpblog/2014/05/the-public-morals-exception-after-seals-how-to-keep-it-in-check.html> [http://perma.cc/B6CP-QRN8].

<sup>117</sup> *Id.*

<sup>118</sup> Charnovitz, *supra* note 28, at 731.

<sup>119</sup> Brendan McGivern, Commentary, *The WTO Seal Products Panel—The "Public Morals" Defense*, 9 GLOBAL TRADE & CUSTOMS J. 70, 70 (2014).

#### IV. THE *EC—SEAL PRODUCTS* DECISION DID NOT OVERLY BROADEN THE PUBLIC MORALS EXCEPTION

Although the fears of protectionist abuse of the public morals exception are not completely unfounded, Part IV of this Note argues that the *EC—Seal Products* ruling did not stray far by leaving the discretion of defining a public moral to individual WTO member countries. First, as demonstrated by the above cases, there exist significant built-in procedural safeguards against such abuse in the ambit of Article XX of the GATT and Article XIV of the GATS. It is highly unlikely that surpassing these hurdles will be easy for any member country even after *EC—Seal Products*. Second, the alternatives to such broad discretion to member countries in the realm of public morality would overly impinge on national sovereignty and could possibly threaten the stability of the trade regime as a whole.

##### A. Built-In Procedural Safeguards

Even if the *EC—Seal Products* decision is interpreted as giving a WTO member country broad discretion to define its morals within the meaning of the public morals exception, it is not likely that this will legitimize a future stream of trade restrictions. Professor Robert Howse, among other scholars, points out that built-in safeguards within the agreement itself should allay these concerns.<sup>120</sup>

To begin with, the burden of proof serves as an instrument for preventing abuse of the member countries' discretion.<sup>121</sup> The general exception of preserving public morals is a defense that the respondent must invoke and for which it must prove all constituent elements.<sup>122</sup> At the very least, *U.S.—Gambling* created a minimum threshold—later reiterated in *China—Audiovisuals* and *EC—Seal Products*—for a member to establish that its policy objective pursued by the

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<sup>120</sup> Howse et al., *supra* note 112.

<sup>121</sup> Diebold, *supra* note 57, at 59.

<sup>122</sup> *Id.*

challenged measure falls within the scope of the public morals exception. Although member countries have the right to define their own public morals and choose their level of protection, they must still prove that the policy objective relates to “matters of *domestic* public morals.”<sup>123</sup> In the *EC—Seal Products* decision, the Panel and Appellate Body emphasized evidence that showed animal welfare is truly an important value to the European community.<sup>124</sup> The Appellate Body reiterated that the panel must consider all evidence placed before it, including “the texts of statutes, legislative history, and other evidence regarding the structure and operation of the measure at issue,” in establishing that a policy objective is within the scope of the exception.<sup>125</sup> Thus, an obligation of good faith exists. A simple assertion that a certain value or set of beliefs exists would not be sufficient to bring a measure within the scope of the public morals exception. But the question does arise as to what sort of evidence would be considered in the case of a non-democratic member country, where it is unclear what the public truly believes or values. In an authoritarian regime or system where the government crafts national policy not on societal consensus but rather through top-down imposition, it will be more difficult for the WTO to ascertain whether the assertion of a public moral is being made in good faith. Even these countries, however, will have to put forth evidence beyond a mere declaration that a certain moral is important to the country as a whole. It would therefore be difficult to disguise an illegal protectionist measure as a policy objective.

Another procedural safeguard exists within the text of the public morals exception itself—namely, the “necessity” requirement. The *China—Audiovisuals* decision held that while China had a legitimate interest in protecting its public morality from the potential harms of the publications and audiovisual products, the challenged measures were not “necessary to protect public morals” within the meaning of

<sup>123</sup> *Id.*

<sup>124</sup> See *EC—Seal Products* Appellate Body Report, *supra* note 76, ¶ 5.203.

<sup>125</sup> *Id.* ¶ 5.144.

the exception because there was not a real contribution by the trade-restrictive measures to the asserted policy objective.<sup>126</sup> While in *U.S.—Gambling* and *EC—Seal Products*, the challenged measures were found to be “necessary to protect public morals,” those cases also demonstrated that the balancing test required for the necessity determination is a crucial step in the analysis and is subject to review on appeal.

Even further, once these hurdles have been passed, the chapeau, or preamble, of Article XX of the GATT and Article XIV of the GATS serves as still another safeguard against potential abuse of the general exceptions, including use of the public morals exception as a cloak for “arbitrary or unjustifiable discrimination or disguised protectionism.”<sup>127</sup> The *EC—Seal Products* decision demonstrated, as did the two cases before it, that the chapeau is not an easy fence to jump. Even though the seal products ban was found to be necessary to protect public morals—both coming within the scope of the exception and satisfying the necessity test—the ban was nonetheless struck down on the grounds that it constituted arbitrary and unjustifiable discrimination in violation of the Article’s chapeau.<sup>128</sup> As previously discussed, this finding was based partially on the lack of safeguards against potential abuse of the ban’s exceptions. As Nicolas Diebold points out, the chapeau “focuses on the good faith of the respondent with regard to the elements of discrimination and disguised trade restriction.”<sup>129</sup> The necessity requirement and the chapeau thus serve as “instruments to prevent an abusive *application* of the morals and other exceptions.”<sup>130</sup>

<sup>126</sup> See *China—Audiovisuals* Panel Report, *supra* note 61, ¶ 7.868.

<sup>127</sup> Howse et al., *supra* note 112; see also Diebold, *supra* note 57, at 67.

<sup>128</sup> *EC—Seal Products* Appellate Body Report, *supra* note 76, ¶¶ 5.338–.339; see also *supra* notes 104–07 and accompanying text.

<sup>129</sup> Diebold, *supra* note 57, at 67.

<sup>130</sup> *Id.* at 66.

## B. Broad Discretion is Appropriate and Necessary for the Good of the Trade Regime

While there is understandable fear of overbroad discretion, member countries must recognize the potential implication of curtailing such choice. Public morals, unlike any other exception in the trade agreement, is an area that is extremely sovereignty-sensitive. In arguing for a pluralistic approach to the role of the WTO in regulating trade, Professor Robert Howse and Joanna Langille point out that “one of the most fundamental aspects of the ‘right to regulate’ under Article XX is a WTO member’s sovereign prerogative to determine the ‘level of protection’ it is seeking.”<sup>131</sup> They add that this is a notion that has been repeatedly affirmed by the WTO Appellate Body, and stress that any alternative approach to assessing morality-based regulations could possibly result in “intractable dilemmas of legitimacy and institutional competence for the WTO adjudicator.”<sup>132</sup> As discussed in Part II of this Note, the WTO member countries came together with the belief that a fairer and more open trading environment would be for the benefit and welfare of each member.<sup>133</sup> In committing to the rules of the trade regime, each successive member undoubtedly recognized that some sovereignty would be forfeited to foster the trade goals of the organization. At the same time, member countries incorporated general exceptions such as the public morals exception into the agreement at its inception, indicating respect for the autonomy of fellow countries in certain areas. The Panel in the *EC—Seal Products* dispute noted that GATT 1994 and GATS expressly include the protection of “public morals” as a general exception, which “demonstrated that ‘WTO Members considered this objective to be particularly significant.’”<sup>134</sup>

At the intersection of trade and public morality, finding the correct or appropriate balance is a complex struggle. In

<sup>131</sup> Howse & Langille, *supra* note 77, at 415.

<sup>132</sup> *Id.* at 417.

<sup>133</sup> See *supra* notes 1–2 and accompanying text.

<sup>134</sup> See *EC—Seal Products* Appellate Body Report, *supra* note 76, ¶ 5.140.

the context of world trade, Charnovitz argues for the acceptance of only internationally agreed-upon notions of public morals, proclaiming that “[a]llowing each government to restrict imports based on its own definition of morality could disrupt trade and allow imperialism by countries with market power.”<sup>135</sup> But a universal approach to the definition of public morals would be extremely problematic. First, the composition of a country’s national public values is not immutable, but rather is likely to change as time passes. The WTO trade system itself is meant to survive and strengthen through time, and its endurance thus calls for flexible mechanisms that will accommodate changes occurring within its member countries.

Further, the vast differences in cultural, religious, social, and political values across nations render agreeing on a particular set of valid morals extremely difficult, to say the least. Professor Mark Wu gives the example of import restrictions on swine and pork products for religious reasons by Israel and several Islamic countries, demonstrating the difficulties in attributing to the WTO the role of deciding whether these beliefs and values are genuine.<sup>136</sup> Judicial interpretation has only begun to shed light on the public morals exception over the last decade, but member countries have taken measures to protect their moral beliefs and values since the regime’s inception. Differences in national public values will always exist, and the diversity of these values within the WTO continues to broaden. Imposing on a member country an internationally uniform definition of morals would contradict the very basis on which the exception was incorporated into the agreement. Diebold argues that this approach would be “contrary to the object and purpose of Articles XIV(a) [of the] GATS and XX(a) [of the] GATT.”<sup>137</sup> He adds that an interpretation “that fails to protect the subjective values of individual Members would render the morals and order exceptions largely ineffective, turning it into a

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<sup>135</sup> Charnovitz, *supra* note 28, at 742.

<sup>136</sup> See Wu, *supra* note 38, at 223, 250–51.

<sup>137</sup> Diebold, *supra* note 57, at 54.

toothless tiger.”<sup>138</sup> If the Appellate Body had chosen instead to examine and interrogate the existence, substance, and legitimacy of the public morals asserted, it would likely produce backlash from member countries who perceive it as an overstep of the WTO’s role. As Howse and Langille point out, “it becomes evident that narrowing the kind of rationale permitted as a basis for justified regulation under WTO law, while the WTO’s diversity broadens and deepens, would be setting the scene for a significant legitimacy crisis.”<sup>139</sup> This is a very real concern that should not be taken lightly. The trade regime’s continuance and stability depends upon its members’ willingness to follow its rules and cooperate with its decisions and rulings. While there exist many incentives to do so, including the enormous benefits that have resulted from open and free trade, member countries will examine these incentives relative to the sovereignty that they must surrender.

## V. CONCLUSION

One of the most emotionally charged debates in the realm of international trade law has been the conflict between trade and national autonomy and, to an even greater extent, between trade and morality. As countries become increasingly interconnected through globalization and international trade, and the WTO continues to expand and diversify, these conflicts only deepen and their implications become more significant for each individual nation. The evolution of the judicial interpretation of the public morals exception to members’ trade commitments has begun only recently, but has already set important milestones. Although some may fear that the Appellate Body has gone too far in leaving the discretion of defining public morality to individual member countries, this Note has argued that the court’s decisions appropriately and necessarily gave this role to the members. There exist substantial procedural safeguards within the trade agreement itself that protect against abuse of the pub-

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<sup>138</sup> *Id.*

<sup>139</sup> Howse & Langille, *supra* note 77, at 428.

lic morals exception following these decisions. Given the increasingly diverse values, beliefs, and morals that exist among the members, as well as the crucial role of the WTO as adjudicator among them all, any other decision would have compromised the trade regime's legitimacy and resilience.