Trade Liberalization vs Public Morals. To what extent Members can justify its measures under Article XX (a) of the GATT
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1 Introduction

The main purpose of World Trade Organization (WTO) is promoting and facilitating trade between its Member nations. It aims at creating transparent, open, free and non-discriminatory trade. Therefore, nations that are Members of this organization agreed to convey these goals and to obey the principle of non-discrimination. Indeed, trade without discrimination is the core principle behind trade liberalization and this requirement is an obligation for the WTO Members. Under this principle, Members are obliged treat their trading partners equally and do not favor goods produced domestically over the same imported goods. However, in practice for the purpose of protecting non-trade values such as environmental, labor, health, religious belief or morals concerns the Members violate their obligations. Because of that under Article XX, there are exhaustive list of exceptions which allow Members to deviate from their responsibilities. The purpose of these exceptions to protect interests that the Member states consider to be of such high importance, that they override the objectives and fundamental principles of the WTO. One of these exceptions is “necessary to protect public morals” which gives right to Members regulate autonomy the issue of their morals in accordance to their culture, traditions or religion beliefs.

However due to the ambiguous and vague meaning of public morals within the scope of Article XX (a) of the GATT, the Members’ trade restrictions based on this exception are usually challenged by the WTO adjudicators. The fact is that the conception of public morals does not have the exact definition and sometimes the broad meaning of morals leads to protectionism and abuse by the Members. Therefore, the notion of public morals should be interpreted in a manner that keep balance between the Members’ rights to regulate autonomy its public morals interest and the fundamental principles of WTO.

It worth to mention that for over 50 years only recently in US-Gambling, China-Audiovisual, and EU-Seal Products, the WTO adjudicators were required to apply Article XX (a). Among these case EC Seal Products has been hailed as a triumph for animal welfare and has broadened the scope of ‘public morals’ in international trade law.

This case posed the question whether the EU trade restriction on importation seal products violating the non-discrimination principle could be justified under public morals exception. One of the special futures of this case is that in comparison to other previous cases (Tuna-Dolphin, US-Shrimp), EC Seal product besides improving animal welfare also dealt with

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1 T. S. Nachmani (2013), p 33
2 J. Cutfield (2015), p 4
community’s ethical beliefs about the nature of cruelty.\(^3\) Indeed, EU claimed that a prohibition on commercial seal products was appropriate because seals are sentient beings with the ability to feel pain and distress, and also because of public outcry within EU denouncing the treatment of seals as cruel as inhumane.\(^4\) Moreover, this kind of perception was also grounded on an extensive investigation by the European Food Safety Authority (EFSA), that the methods typically used to kill and skin seals cause significant and unnecessary pain and suffering.\(^5\) Based on all these facts the Panel and Appellate Body (AB) found that EU Seal Regime fell under the scope of Article XX (a). Both the Panel and the AB concluded that EU Seal Regime aligns with the moral concerns regarding the methods of killing seals and consequently addresses these concerns.\(^6\)

However despite the fact that the EU Seal Regime was justified by WTO law, seals killed in inhumane manners are still finding their way to the EU market if they are killed by either Inuits or for noncommercial reasons.\(^7\) The point is that both the AB and the EU ignored the fact that the way and methods of killing of seals was triggered by public morals, thus leading again to the assumption that WTO adjudicators are reluctant with regard to applying NRP PPMs.

Though NRP PPMs do not affect the product characteristic at the end they still have a significant impact on consumer's taste and habits. Indeed, in the EC Seal Products, the way and methods of killing of seals did not change the physical characteristic of seals, however, it changed the perception of European's consumers about how these products were derived and consequently, they refused to consume seal products hunted in inhumanly way. Based on this, it could be said that in EC Seal Products, the issue of PPMs and public morals merges and the interplay between them is very obvious.

Thus, this thesis will analyze the definition and the scope of public morals, to understand what kind of non-trade interests fall within the meaning of Article XX (a) of the GATT, since the concept of public morals is very individual, changeable and ambiguous. Moreover this thesis will address the interplay between public morals and NRP PPMs because NRP PPMs are triggered by public morals and vice versa in particular, in the context of animal welfare. Finally, this thesis will analyze the EC Seal Products and examine how the case was considered by the WTO adjudicators. I chose this case among others because its recognition that inhumanly

\(^3\) R. Howse and J. Langille (2012), p 370.
\(^4\) Ibid.
\(^6\) AB Report, EC Seal Products.
\(^7\) L, Nielsen and M, Calle (2013), p 63
treating animal welfare falls within the scope of ‘public morals’ broadened the scope and the definition of Article XX (a). Secondly, even though the NRP PPMs were refused to consider by AB, it showed that trade restrictions on inhumanly killing animals could be justified under one of the exceptions of Article XX. Finally, the EC Seal Products addressed to what degree the WTO Member can use its right to regulate autonomy.

1.1 Research question
My research question would be to what extent the WTO Members can justify its trade measures under the public morals exception of Article XX (a) of the GATT?

1.2 Methodology

During my analysis of public morals and addressing my research question I used different sources. While examining the concept of public morals I studied different articles and books, in particular with regard to thought of schools concerning unilateralism and universalism approaches in defining public morals. Moreover in addressing the history of public morals and the preparatory work of the GATT I referred more on Charnovit'z article. Furthermore, I examined Vienna Convention and GATT in order to find out how this concept was interpreted by these treaties.

Likely, with regard to PPMs issue, I used a lot of scholars' articles, in particular, concerning NRP PPMs. However, since the issue of NRP PPMS has never been considered in WTO adjudication experience, I faced a bit challenges while examining this issue in WTO adjudication. Nevertheless, I managed to compare the previous cases like EC-Asbestos, US-Shrimp, Tuna-Dolphin and based on the Panels and Appellate Bodies' report address the issue of NRP PPMs and their extraterritoriality scope with regard to public morals.

In the last part, I examined the EC Seal Products, the Panel and AB reports under rigorous scrutiny. Moreover, I used Council Regulations, Council Directives and EFSA Report (2007) in order to find out based on what arguments and facts was established the EU Seal Regime.

1.3 Outline and structure

The thesis is divided into four parts. The first part will address the meaning of public morals within the scope of Article XX (a) of the GATT (Chapter 2). In this, I will like to discuss the background and the history of public morals within the scope of the GATT and how this concept was perceived in the past by the international community and nations. Moreover, I will
examine the concept of public morals within the interpretation of Vienna Convention of Article 32. Finally, the last part of the second chapter will address how the WTO adjudicators interpreted Article XX (a) of the GATT. In Chapter 3 I will review the interplay between non-related products PPMs and public morals, furthermore, I will discuss the issue of extraterritoriality of public morals, to discuss to what extent trade measure can be used to address issues occurring outside the regulating state? In Chapter 4 I will analyze the EC Seal Products and find out to what extent trade measure can be justified under public morals exception. Furthermore, I will review the concept of public morals and the issue of PPMs in the light of the EC Seal Products case. In the final Chapter, I will sum up and based on all the arguments I will discuss to what extent I addressed the research question.
2 The interpretation of public morals within the meaning of Article XX (a)

2.1 An overview of the concept of public morals.

Free trade and public morals are closely linked to each other and they coexist in a precarious balance. While the international trading system obliges the World Trade Organization (WTO) Members to follow nondiscrimination principles, meanwhile this system allows members to deviate from these obligations when trade liberalization threaten their non-trade interests. For this purpose Article XX of the GATT allows Members to justify its trade restrictions under "general exceptions" clause of the GATT.

In a nutshell, Article XX aims to ensure that measures that are taken by the Members to protect non-trade policy goals do not harm trade more then necessary, and are not abused. Measures requiring justification under Article XX must pass a two tired test. First step requires that the measure at stake must satisfy one or more of the ten exceptions (a-j) of Article XX of the GATT. Each of these exceptions addresses a particular policy goal and nexus that is need to be established betweeen the measure and the policy goal pursued. These goals, include public morals, animal welfare or health and life. Second step requires that the measure satisfy the "chapeau" of Article XX of the GATT. The purpose of the chapeau is that albeit the measure might pursue the relevant policy goal, it can be applied in a way that leads to "arbitrary or unjustifiable discrimination" or act as a "disguised restriction on trade".

Thus, under Article XX Members are given the right to protect its non-trade policy goals under the "general exception clause", however this right is not limitless. Indeed, the Members should firstly prove that the measure at issue has nexus with its objectives and second it should prove that the measure at stake was not applied in "arbitrary or unjustifiable discrimination" or act "as a disguised restriction on trade".

In EC Seal Products, the measure at issue can be justified under two pontential exceptions under Article XX of the GATT. Firstly, since the measure at stake aims to prevent suffering, and pain it seems concievable to justify the measure under "animal health" within the scope of Article XX (b) of the GATT and secondly, due to concerns about the inhumanly killing of

8 M.Wu (2008), p.216
9 S.Pitschas and H.Schloemann (2012), p. 18
seals it may be justified as a measure to protect public morals under Article XX (a) of the GATT.\textsuperscript{10} However, on the appeal, the measure was considered under the latter exception.

So what constitutes public morals? Answer to this question is obviously difficult, since the meaning of public morals is so vague and individual that amongst 162 WTO Member States “public morals” could mean anything from religious views on drinking alcohol or eating certain foods to cultural attitudes toward pornography, free expression, human rights, labor norms, women’s right or general cultural judgments about education or social welfare.\textsuperscript{11} What one society defines as public morals the other one may deny.\textsuperscript{12}

Thus, this Chapter of my thesis will examine the vague and ambiguous meaning of public morals from the point of view of scholars, then I will try to find the answer in Vienna Convention and preparatory work of the GATT, I will examine how the concept of public morals was defined in the past national laws and treaties of pre-1947 period. In the last Chapter, I will address how did the WTO adjudicators interpret the concept of public morals, in particular in EC Seal Products?

According to Wu in defining public morals there two approaches: First, “public morals” include those moral principles that are universal or widely shared by all humankind and second each state can unilaterally define its own public morals.\textsuperscript{13} However, according to the author both approaches pose potential problems, since only actually qualified moral would be considered as a “public morals”, thus making the scope limited. For example, a handful of moral principles widely recognized in the international community such as; prohibitions against genocide, slavery or execution of mentally retarded.\textsuperscript{14} Furthermore in practice, when a norm is widely recognized, states will have less need to impose import or export restrictions to protect those morals.\textsuperscript{15} Additionally, imposing narrow universal standard would undermine many of the morality based trade restrictions that Members currently implement. For example, some Muslim countries banned the importation of alcohol based on the public moral; however, abstention from alcohol consumption is hardly a moral that is universally recognized, though it is shared among Muslim societies.\textsuperscript{16}

\textsuperscript{10} ibid.
\textsuperscript{11} J.C.Marwell (2006), p 816.
\textsuperscript{12} ibid.
\textsuperscript{13} M.Wu (2008), p 231.
\textsuperscript{14} Ibid, p 232.
\textsuperscript{15} Ibid.
\textsuperscript{16} Ibid.
Likely, the unilateral approach also entails certain problems. The main threat is that states will use the morals exception and under the guise of protecting public morals impose a large number of trade restrictions.\(^{17}\)

Inwardly –directed and outwardly directed issues also play an important role in defining “public morals”. Trade measures used to protect the morals of foreigners residing outside one's own country are described as ‘inwardly directed’.\(^{18}\) Outwardly directed, on the other hand, describes trade measures used to protect the morals of foreigners residing outside one's own country.\(^{19}\) Usually, countries use trade measures for inwardly-directed moral purposes. For example, the government of Israel bans the importation of non-kosher meat products or Thailand prohibits the exportation of Buddha images.\(^{20}\) These example are inwardly –directed since the government is safeguarding the moral and religious sensibilities of its citizens.\(^{21}\)

An outwardly-directed measure could be a ban on products, made by child labor. For instance, in 1997, the U.S. Congress forbade border officials from allowing importation of products made by forced or indentured child labor.\(^{22}\)

Other morality-based trade bans focus on animal welfare. For example, in 1983, the European Commission banned the importation of skins of certain seal pups because of public outrage at the killing of by seals by Canadians\(^{23}\) or in 2009 the EU adopted a law banning the import and export of most products made from seals because the way of killing of seals has been widely considered as a moral issue in EU.\(^{24}\)

According to Charnovitz trade measures also, can pursue humanitarian goals. For instance, in 1978, the Congress prohibited the importation of any product of Ugandan origin until the President certified "that the Government of Uganda is no longer committing a consistent of gross violations of human rights."\(^{25}\) In 1987, the Congress forbade the importation of "sugars, syrups [and] molasses" from Panama until the President certified that "freedom of the press and other constitutional guarantees, including due process of law, have been restored to the Panamanian people."\(^{26}\)

\(^{17}\) Ibid.
\(^{18}\) S.Charnovitz (1997-1998), p 693
\(^{19}\) Ibid.
\(^{20}\) Ibid.
\(^{21}\) ibid.
\(^{23}\) S.Charnovitz (1997-1998), p 697
\(^{24}\) Regulation 1007/2009/EC; Regulation 737/2010/EU.
\(^{26}\) Ibid, p 698.
2.2 Background of the public morals exception clause.

According to Article 32 of Vienna Convention on the Law of treaties, international treaties are often interpreted not solely on the basis of the text, but also in conjunction with their purpose and legislative history. Thus, Article 32 of Vienna Convention on the Law of Treaties authorizes a treaty’s drafting history as a supplementary means for determining the meaning of ambiguous term within that treaty.\textsuperscript{27} Consequently, in the following part, I would like to discuss the background and history of public clause as it plays an important role in assessing of the vague meaning of “public morals”.

The idea of justifying Members its trade measures based on public moral was first proposed by the United States.\textsuperscript{28} In December 1945, the government of the United States wrote the first outline of the International Trade Organization (ITO) Charter.\textsuperscript{29} That outline included a list of exceptions and one of these exceptions was measures “necessary to protect public als”.\textsuperscript{30} In September 1946, the US government issued a “Suggested Charter” consisting of the same exception.\textsuperscript{31} In early 1947, a drafting committee meeting in New York agreed to the language on public morals contained in the Suggested Charter.\textsuperscript{32} However, the negotiators did not provide a clear answer as to what the term “public morals” would encompass and whose morality would be protected. The clause was only addressed during the Norwegian delegate’s comments out Norway’s restrictions on the importation, production and sale of foreign alcohol.\textsuperscript{33} Norway justified its measure, because the ‘restrictions’ purpose was morally oriented in nature i.e., promotion of temperance.\textsuperscript{34} Unfortunately, besides from alcohol, the drafting history did not provide any further guidance on the scope and meaning of Article XX (a) of the GATT. Moreover within the three years of drafting process, the initial American proposal remained untouched, with no proposals for further clarifications. Thus, the clause remained as ambiguous at the end of the drafting process as it had been at its initial stage.

\textsuperscript{27} The Vienna Convention on the Law of Treaties, art.32, May 23, 1969
\textsuperscript{28} U.S. Dep’t of State, Proposals for the expansion of World Trade and Employment (1945).
\textsuperscript{29} S. Charnovitz (1997-1998), p.704
\textsuperscript{30} Ibid.
\textsuperscript{31} U.S. Dep’t of State, Suggested Charter for an International Trade Organization of the United Nation 24 (1946).
\textsuperscript{34} Ibid.
2.3 The Need for the Moral Exception

In the following subparagraph, I would like to discuss the pre-1946 trade measures based on moral and humanitarian issues. Even though this topic is not part of the official preparatory work of the GATT, however, this review provides a context of logical explanation in understanding the meaning of public morals under the Article XX (a) of the GATT. Moreover, reviewing these national laws and treaties I will answer to a certain degree the above mentioned question such as, what behavior is covered by public morals within the meaning of Article XX (a) of the GATT.

Anti-slavery treaties were the first global concern to prohibit trade for moral reasons. The Treaty of Vienna states that the slave trade “has been considered by just and enlightened men of all ages as repugnant to the principles of humanity and universal morality.” Therefore, in 1817, Great Britain and Portugal signed the Prevention of the Slave Trade Convention which banned the importation of slaves.

Another international regime concerning public morals was the General Act of 1890 prohibiting the importation liquor into the parts of sub-Saharan Africa where the use of liquor did not exist. However, there was an exception to provide liquor for non-native population. In 1919, was signed African Liquor Convention and according to this Convention because of the “moral and material consequences to which the use of spirituous liquors subjects the native population,” liquor importation was banned.

Another treaty regime restricted trade on the ground of public morals was the International Opium Convention of 1912. Parties to this Convention agreed to prohibit the importation and exportation of prepared opium. In the bilateral treaty between the Chinese and U.S governments, the parties agreed to forbid Chinese citizens from importing opium into the U.S and vice versa.

The obscene publications were also banned based on the ground of public morals. In 1924, International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications was signed by the parties. Members of this Convention agreed to prohibit the

36 Additional Convention between Great Britain and Portugal for the Prevention of the Slave Trade, July 28, 1817, art. III.
37 General Act for the Repression of the African Slave Trade, supra note 133, arts. XC, XCI
38 ibid
39 African Liquor Convention, Sept. 10, 1919, arts. 2-4,46
40 International Opium Convention, Jan. 23, 1912, art. 7, 38.
41 Treaty concerning Commercial Intercourse and Judicial Procedure, Nov. 17, 1880, China-U.S., art. II
export or import of any “obscene matters or things”. By the meaning of obscene matters or things was meant writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, and films. However, the meaning of obscenity was not clarified. The issue of animal welfare also was not ignored by the international community in the pre-1946 period. In 1921, the treaty regulating fishing banned the sale of fish caught by the methods “calculated to stun or stupefy the fish”. However, the treaty does not make clear whether the motivation was based on the ground of animal welfare or it concerned environment, public health or sportsmanship issues.

Thus, it seems clear that international community was indeed concerned with public morality in terms of slavery, opium, pornography, and animal cruelty. While some of them such as liquor treaties explicitly mentioned “moral consequences” or “public morals”.

With regard to national laws, governments were also used trade restrictions for the purpose of public morals. For example, in 1761, Portugal banned the importation of Negro slaves as being “shameful”. In 1807, the British government banned the importation of slaves. In 1913, the U.S government prohibited the importation of lottery tickets. In 1923, Persia banned the importation of writings and pictures opposed to the Moslem religion. Thus, by forbidding slavery, lottery tickets or anti-Muslims articles the governments aimed to protect the morals of their people.

2.4 Interpretation of Article XX (a) according to the Vienna Convention.

As was mentioned, for the interpretation of the treaties the best option would be the Vienna Convention on the Law of Treaties. Article 31 of the Vienna Convention states that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Since neither Article XX nor any other GATT provision contain a legal definition of the terms “public morals”, it would seem appropriate to examine the “ordinary meaning” of the term “morals” in a

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42 International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, Sept. 12, 1923, art 1.27
43 Ibid.
44 Agreement Concluded between the Delegates of the Kingdom of Italy and the Kingdom of the Serbs, Croats and Slovenes, Regarding a Draft Convention for the Regulation of Fishing in the Adriatic, Sept. 14, 1921, art. 28.
46 Ibid.
47 An Act for the obligation of the Slave Trade, Mar. 25, 1807.
48 An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes, Oct. 3, 1913
The Universal Dictionary of the English language defines “moral” as “relating to, concerned with, the difference between right and wrong in matters of conduct”. However this notion of public moral does not help much in addressing the meaning of “public morals” within the scope of Article XX (a), namely what morals are covered and whose morals should be protected. Thus the ordinary meaning of “public morals” remains open and ambiguous.

The second requirement of Article 31 (1) of the Vienna Convention for understanding the treaty terms is examining the object and purpose of the treaty. According to Charnovitz, the object and purpose of the GATT is to promote “reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.”

The object and the purpose of Article XX, on the other hand, is to provide “General Exceptions” that can be used as justification for breaching the GATT’s disciplines. Apparently, there is contradiction between the purpose of reducing trade barriers and the exception listed in Article XX. Thereby, considering the “object and purpose” of GATT does not make Article XX (a) of the GATT clearer.

Moreover, the Vienna Convention indicates several additional sources for treaty interpretation, but they are not helpful in the present case. For example, the convention beside the treaty text also refers to agreements or instruments of the parties in connection with the conclusion of the treaty. However, there are no such agreements or instruments for the original GATT. In addition to the context of the treaty in interpretation of the treaty, the Vienna Convention also points to “any subsequent agreement between the parties regarding the interpretation of the treaty.” Unfortunately, there are no such agreements in regards with Article XX (a). Lastly, the Vienna Convention requires that the interpretation shall take into account “subsequent practice in the application of the treaty.” There is no practice in terms of Article XX (a).

Article 32 of the Vienna Convention provides guidance for “supplementary means of interpretation”. Article 32 states that “recourse may be had to supplementary means in order to ‘confirm’ the meaning resulting from the application of Article 31, or to ‘determine’ the meaning when the interpretation according to article 31 would leave the meaning ‘ambiguous or ob-

51 GATT, supra note 1, Preamble.
53 Ibid.
54 Vienna Convention, supra note 55, art. 31(2)(a).
56 Ibid, art. 31(3)(b).
scure’ or would lead to a result which is ‘manifestly surd or unreasonable.’

The supplementary means identified in Article 32 are “the preparatory work of the treaty and the circumstances of its conclusion.” However, as we discussed above, in the present case, the purpose and drafting history shed little light on the exact meaning of public morals within the scope of Article XX (a).

2.5 GATT Adjudication in interpreting the concept of public morals

As we discussed above the notion of public morals is neither revealed by the text of Article XX (a) nor by the travaux preparatoires. After studying morals exception in other trade treaties, it was found that international policymakers restricted trade with regard to narcotics, alcohol, slaves, pornography and animal cruelty. However, nowhere in the WTO Agreements are public morals defined and these historic examples do not offer much help.

Hence, this part of my paper focuses on WTO adjudication and how the AB and the Panel interpreted the conception of public morals. I would like to discuss in brief the Gambling case and focus only on the Panel and Appellate Bodies reports that are helpful to the development of an understanding of the public morals exception.

On March 13, 2003, 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.

Antigua argued that the U.S. anti-gambling laws could not possibly have intention to protect public morals since the federal and state governments are involved in promotion of gambling. Moreover, Antigua claimed that the U.S has a culture of gambling (with gambling in forty eight states and the largest national gambling market in the world).

The U.S on the other hand maintained that its law was a necessary measure for the protection of public morals under Article XIV of GATS. First, the remote supply of gambling services is particularly vulnerable to exploitation by organized crime due to low set-up costs, ease of

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58 Vienna Convention, supra note 55, art. 32.
59 Ibid.
60 S.Charnovitz (2002), p. 712
62 Ibid., para. 3.290
63 Ibid., para. 3.8
provision and geographical flexibility.\textsuperscript{64} Second, internet would facilitate gambling by children and have detrimental effects on compulsive gamblers.\textsuperscript{65}

The Panel’s in its analysis used the “ordinary meaning” approach in defining “public morals”. The Panel found that the concept of “public morals” could vary in “time and space, depending on a range of factors, including prevailing social, cultural, ethical, and religious values.”\textsuperscript{66} The Panel also stated when considering the issue of public morals, the regulating country has the right to determine the appropriate level of protection.\textsuperscript{67} Moreover, the Panel in defining public morals concluded that public morals are “standards of right and wrong conduct maintained by or on behalf of a community or nation.”\textsuperscript{68} On appeal, the AB agreed with the Panel’s ruling that the U.S measures fell within the scope of Article XIV (a) of GATS, however, the concept of public morals and its evidentiary approach in determining whether gambling could be considered an issue of public morals was left untouched by the AB.\textsuperscript{69} Likely, in China Audiovisuals case the Panel cited the Gamble approach with regard to the definition of public morals.\textsuperscript{70}

Thus, based on the statements made by the Panel and AB in both cases, it could be said that the notion of public moral is still vague and transformative in nature. Moreover, referring to the Panel statement in China-Audiovisuals case “public morals can vary from Member to Member”\textsuperscript{71} could be assumed that it is up to each State to identify the values it considers so essential to its nation.\textsuperscript{72} Members have the right to determine the appropriate level of protection, depending on their discretionary evaluation in the given situations, meaning that, if they deem it appropriate, they can also select very high or zero levels of protection.\textsuperscript{73}

However, it does not mean that if the content of public morals is discretionary, it can have solely unilateral definition. In accordance with Article XX (a) of the GATT, the Members are allowed to define public morals if the measure at issue passes the “necessity” test. In doing so, the Members avoid hiding protectionist policies under the guise of protecting public morals.

The EC Seals Products is another example that was challenged on the ground of public morals exception. I think this case has an important role in interpretation of Article XX, in partic-

\textsuperscript{64} Ibid., paras. 3.189, 3.279, 6.506
\textsuperscript{65} Panel Report, US-Gambling, paras. 3.211, 6.511
\textsuperscript{66} Ibid., para. 6.461
\textsuperscript{67} Ibid.,
\textsuperscript{68} Ibid., para. 6.465
\textsuperscript{69} J. C. Marwell (2006), p 814
\textsuperscript{70} Panel Report, China–Audiovisuals, para. 7.759
\textsuperscript{71} Ibid., para. 7.763
\textsuperscript{72} M. A. Gonzalez (2006), p.955
\textsuperscript{73} Panel Report, China–Audiovisuals, para. 7.819
ular with regard to public morals exception since Seal Products established for the first time that animal welfare could be considered as a concern for public morals on the state level and hence potentially justifiable under Article XX (a) of the GATT. Therefore, this paragraph would address and discuss in brief only those statements of the Panel and AB of the present case, that are helpful in determining the concept of “public morals”. A more detailed examination of this case would be carried out in the last Chapter.

In 2009, the EU banned the importation and sale of products made from seals, justifying its restriction on trade under Article XX (a). Consequently, Canada and Norway (two of the largest sealing nations at the WTO) challenged the measure. Canada argued that the seals regime does not fall within the scope of public morals. With regard to necessity test, Canada argued that the measure at stake is highly trade restrictive; that it does not actually prevent harm to the public morals of Europe, and particularly not on European territory. The EU, on the other hand, claimed that the seals regime should be considered a matter of EU’s public morals. Moreover, EU claimed that the seals regime met the necessity test because if the importance of the objective and the high degree of contribution of the measure to the European moral values.

While considering this case, the Panel concluded that the measure could be justified as a matter of public moral, because of the seal welfare concern this measure was adopted, which is component of the “standards of right and wrong conducted by or on the behalf of” the EU. It stated 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,

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75 Regulation 1007/2009/EU; Regulation 737/2010/EU.
77 Ibid., para. 7.627
78 Ibid., para. 7.362
79 Ibid., para. 7.625-7.626
80 Ibid.
81 Ibid., 7.409
illustrate that animal welfare is a matter of ethical responsibility for human beings in general.\textsuperscript{82}

With regard to necessity test, the Panel found that since protecting seal welfare was found to be a matter of European public morality, the measure met the requirements of Article XX (a).\textsuperscript{83} On appeal, the AB affirmed that the seals regime was provisionally justified under the public moral exceptions.\textsuperscript{84}

\section*{2.6 Conclusion}

In the present Chapter I tried to answer the following questions: what does mean the concept of public morals? What type of behavior is considered public morals? Could the standards of public morals differ from state to state or is it a uniform international requirement?

In order to answer these questions, I addressed in brief two approaches in defining the concept of public morals such as unilateralism and universalism. As it has been shown both of these approaches pose potential problems. If the concept of public morals would be defined by universalist approach, then it would not provide protection to countries, groups of countries making them unable to prove that their belief constitutes a matter of public morality.\textsuperscript{85} Moreover, when a norm is widely spread states will rear have a need to protect against it.

On the other hand allowing states to unilaterally define their public morals also would give rise to certain problems. State will use this exception under the guise of protecting public morals and pass a large number of trade restrictions.

Based on the above mentioned definitions of public morals, it could be said that there is no exact equivalence in defining the concept of public morals, thus, the meaning of Article XX (a) still remains unanswered.

Other issues that were covered by this Chapter in part I are inwardly-directed and outwardly-directed restrictions. These terminologies are usually used to answer question like if a practice of exporting state offend the morals of citizens of the importing state, can the importing state restrict trade with the exporting state? In other words, these terminologies are used to deter-

\textsuperscript{82} Ibid.
\textsuperscript{83} Ibid., paras. 7.635–7.636.
\textsuperscript{84} AB Report, EC Seal Products, para. 5.193
mine whose morality should be protected and to define the scope of public morals which
would be discussed in Chapter III of the present paper in more explicit way.

Next, I tried to identify the meaning of Article XX (a) in accordance with Vienna Convention
Article 31 and 32. However, as it was shown neither the text of Vienna Convention nor the
travaux preparatoires revealed the concept of public morals. Thus, the answer to my first
question what is public morals within the meaning of Article XX (a) of the GATT remained
unaddressed.

By reviewing the pre-1947 treaties and national laws it was found that even in that period
international community was concerned about public morality, in particular with regard to
slavery, pornography, alcohol, alcohol use, animal cruelty and narcotics. Though, the pre-
1947 period is not part of the preparatory work for the GATT, this review provided a context
that can answer to a certain degree the second question of this chapter, what behavior is cov-
ered by the open-ended language in article XX (a) of the GATT.86

Finally, in order to address the concept of public morals, I reviewed the GATT adjudication
and how the WTO adjudicators interpreted the concept of public morals in their statements.
Although the definition of public morals has been incorporated in trade law for over 50 years,
it is only recently in US-Gambling, China-Audiovisual, and EU-Seal Products, the WTO ad-
judicators were required to apply Article XX (a) of the GATT.87

As it has been shown in all three cases the Panels used the unilateral approach in defining
public morals. In US-Gambling case, the Panel noted 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’ in their respective territories, according to their own systems and scales of
values.”88 The same definition was used in China-Audiovisual and EC-Seal Products cases by
the Panels. However, it should be noticed that although the US-Gambling rejected a pure uni-
versalist approach, it does not mean that public morals can be defined purely unilaterally.89 In
order to adopt such kind of measure, a Member should pass the necessity and non-
discriminatory test.

87 T.S.Nachmani (2013), p.33
Hence, based on the arguments made by the WTO adjudicators I answered to a certain degree the abovementioned questions: what type of behavior is considered public moral? Could the standards of public morals differ from state to state or is it a uniform international requirement?
3 The role and need of PPMs in justification trade measures under public moral

3.1 PPMs and the related-unrelated distinctions

Processes and Production Methods (PPMs) have become one of the controversial topics in the trade and environment debate as a result of the growing concern of consumers over health, moral and environmental issues in industrialized countries. Therefore, there is strong connection between those exceptions that are listed in Article XX of the GATT and PPMs. Because through PPMs Members intend to condition and change the production methods abroad in order to protect its non-trade policy goals. Therefore, in nature PPMs have extraterritorial feature. In particular, it concerns NRP PPMs which do not affect the physical characteristics of the product. The second reason is that, if a trade measure is based on NRP PPMs it is considered by Article XX (a). Indeed, in EC Seal Products the AB contested the measure at issue under Article XX, since the way of hunting seals did not have impact on physical characteristics of the seals at the end.

Unlikely previous cases (Tuna-Dolphin, EC Seal Products) which sought to protect environmental policy, the EC Seal Products is the first case that dealt with public morals concerns. The cruel hunting and inhumanly treatment of seals made the European Parliament to adopt laws that can protect the moral's of its citizens and in the meanwhile improve the animal welfare. Based on this it could be said that on the ground of the production methods was triggered public morals. Therefore, the matter of PPMs and public morals have strong connection with each other in the present case, albeit the AB found that products derived from traditionally hunting does not relate to how seal products are obtained, rather it relates to who hunts seals. Thus showing again that WTO adjudicators are reluctant with regard to applying NRP PPMs.

Nevertheless I think NRP PPMs still have an important role in invoking "general exception" clause, firstly Members aims at protect its non-trade policy goals through Article XX, and secondly, through its trade measures, Members intend to condition and change the production methods outside of its territory.

Thus, in the present Chapter I will discuss firstly, the differences of NRP PPMs and RP PPMs, in the second part, I will try to address the interplay between the "likeness" of the products and PPMs in particular, NRP. In the last Chapter I will focus on the extraterritoriality nature of NRP PPMs and meanwhile, I will try to address the scope of public morals.
Moreover, in this Chapter, I will examine in brief NRP PPMs in the light of different WTO cases such as EC-Asbestos, US-Shrimp, Tuna-Dolphin and EC Seal Products.

A central element in the PPMs debate is the distinction between product related (PR) PPMs and non-product related (NPR) PPMs.\textsuperscript{90} There is no generally accepted legal definition of PR PPMs and NPR PPMs. The traditional view defines PR PPMs as those that alter, leave trace, effect or are detectable in the final product.\textsuperscript{91} Such PPMs help assure that consumers receive a product at the anticipated quality level.\textsuperscript{92} Food safety and process–based sanitary rules could be the best example of PR PPMs.\textsuperscript{93}

In comparison with the abovementioned PPMs NPR PPMs are designed to achieve a social purpose that may or may not matter to a consumer.\textsuperscript{94} A well–known example could be the famous case of shrimp without devices that ensure the safety of sea turtles. In this case, such a method will not affect the physical characteristics of the product in the final stage when it is imported to exporter’s country. Another example could be the importer’s products that produced inhumanly and concerns moral beliefs of consumers. For example, the EU Seal regime banned the importation of seal products within EU, since inhumanly killing of seals has been widely considered as moral issue in EU.

Although the distinction between related and unrelated PPMs is not explicitly covered in the WTO agreements, nonetheless PPMs are used in the scope of the TBT and SPS agreement. The TBT agreement defines a covered regulation as a document which “lays down products characteristics or their related process and production methods…” Based on this it appears to suggest that NRP PPMs are outside the scope of the TBT agreement. Likely, the SPS agreement also excludes the NRP PPMs, since it applies only to measures seeking to protect life or health within the territory of importing country. A testable food safety standard (e.g. pesticide residue) or (e.g., the use of hormones in meat production) covered by the SPS agreement could be the typical PR PPMs.

Thus, if NRP PPMS are covered neither by the TBT agreement nor by SPS agreement, possibly in certain circumstances they are covered by Article XX of the GATT.\textsuperscript{95} Marceau in her article justifies this argument by recalling that the distinction between shrimp that are fished

\begin{itemize}
\item \textsuperscript{90} Ibid, p.66
\item \textsuperscript{91} G.Marceau (2014), p.326
\item \textsuperscript{92} S.Charnovitz (2002), p.65
\item \textsuperscript{93} Ibid.
\item \textsuperscript{94} Ibid.
\item \textsuperscript{95} G.Marceau (2014), p.326.
\end{itemize}
while accidentally killing turtles and shrimp that are fished without killing turtles was considered legitimate in US –Shrimp.

Nevertheless, there are still controversies surrounding PPMs, particular in terms of NRP PPMs. The problem is that the NRP PPMs are often disregarded when deciding what products should be treated alike for trade purposes since such PPMs do not affect the physical characteristics of the final product. However, they define the characteristics of the production process. For example, it is clear that a consumer would not be able to tell that the eaten fish was caught with a driftnet (that endangered dolphins for example) or the seals were hunted in a cruel manner. However once the consumer finds out that the fish was caught with driftnet or the seals were hunted inhumanly, she/he may not want to consume such a product. Moreover, it can be impossible to convince consumers that their concerns out unsustainable fishing practice or cruel hunting methods of seals are not physically related to the fish or seal products.

Therefore, in the present chapter, I would like to discuss to what extent the NRP PPMs are taken into account while determining the “likeness” of the imported products. I would like to examine to what extent the public morals exception can be invoked in order to protect NRP PPMs based regulations. Moreover, I would like to address the issue of extraterritoriality of public moral based on NRP PPMs. As was mentioned above by referring to PPMs the imported country imposes its values and standards to exporting country, thus interfere the sovereign state. Therefore, I would like examine to what extent PPMs and public moral can be used to address maters accruing outside of the regulating state.

3.2 PPM distinctions under Article I and III of the GATT.

The PPMs distinction under Article I and III is very important since under these Articles nations can argue that the imported products are not “like” the domestic products, and can, therefore, be regulated differently.

The fact is that, while the supporters of NRP PPMs concern with the way in which the animals are treated, the approach of GATT is much more out with the end of product of meat, fur or skin. Therefore under the GATT, an egg is an egg whether it is free range or caged, and the

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98 S.Charnovitz (2002), p.66
tuna is tuna whether or not the catching of it results in the killing of dolphins.\textsuperscript{100} According to
the WTO panels in determining the likeness of two products, should be considered the end
product and not the way in which it is produced.\textsuperscript{101} Moreover, the WTO’s basic explanation,
Understanding the WTO asserts that “the WTO agreements are interpreted to say … trade
restrictions cannot be imposed on a product purely, because of the way it has been pro-
duced.”\textsuperscript{102}

The first interpretation of “like” products on animal laws developed in 1990 in the two Tuna –
Dolphin cases. At that time, the United States imposed an import ban on tuna from countries
that did not have a regulatory regime to protect dolphins comparable to the US regime.\textsuperscript{103}
Mexico as one of the embargoed countries argued that the prohibition on the import of tuna
by the US was inconsistent with Article XI, the US, on the other hand, argued that its
measures were internal regulations and should be examined under Article III of GATT.\textsuperscript{104} The
advantage of considering measures under Article III rather than Article XI is that if a country
can show that the imported product is not “like” the domestic product, Article III is not violat-
ed.\textsuperscript{105} However, the panel in Tuna –Dolphin I concluded that tuna caught with nets which led
to the death of many dolphins was deemed indistinguishable from tuna caught with more
“dolphin safe” methods. Specifically, the Panel stated:

\begin{quote}
III:4 calls for a comparison of the treatment of imported tuna as a product with that
domestic tuna as a product. Regulations governing the taking of dolphins incidental to
the taking of tuna could not possibly affect tuna as a product. Article III:4, therefore,
obliges the United States to accord treatment to Mexican tuna no less favorable than
that accorded to United States tuna, whether or not the incidental taking of dolphins by
Mexican vessels corresponds to that of the United States vessels.\textsuperscript{106}
\end{quote}

Accordingly, imported “dolphin deadly” tuna must be treated no less favorable then domestic
“dolphin friendly” since in accordance with GATT rules they are both just tuna and there is
no differences between them. Because of this non adopted GATT Tuna reports, there is as-
sumption that the NPR PPMs would not be allowed under GATT.

\begin{footnotes}
\item[100] P. Stevenson (2002), p.111
\item[101] Tuna – Dolphin I para.5.14
\item[102] Understanding the WTO, supra note 18
\item[104] Tuna – Dolphin I, para. 3.10
\item[105] P. Stevenson (2002), p.133
\item[106] Tuna – Dolphin I
\end{footnotes}
However based on the fourth element, e.g., consumer’s taste and behavior of assessing the “likeness” of product, some authors argue that the dolphin safe tuna and dolphin – unsafe tuna should not be recognized as “like” products under Article III:4. In the Asbestos case, the AB emphasized the need to consider all the criteria in assessing the “likeness” of one product for another includes the important element of consumer tastes and behavior.\textsuperscript{107} Although it does not deal with non-NRP PPMs, this case is extremely helpful in determining the “likeness” of the product within the meaning of Article III: 4.

In the European Communities – Asbestos case, France for the purpose of protecting workers and consumers, prohibited the manufacture, import, and sale of all varieties of asbestos fibre.\textsuperscript{108} The import ban was challenged by Canada.

Asbestos has been long known as a highly toxic material which poses a significant threat to human health.\textsuperscript{109} For example, exposure to chrysotile asbestos may increase the risk for asbestosis, lung cancer, mesothelioma or pneumoconiosis.\textsuperscript{110} Despite this fact, the panel stated that chrysotile asbestos and various substitute fibres are “like” products within the meaning of Article III:4.\textsuperscript{111} It should be noted that the physical and chemical characteristics of chrysotile asbestos and substitute asbestos fibres are different. In accordance with Article 2 of French Decree the use of substitute, fibres is tied to two conditions. First, according to the state of the art in science, such substitutes must pose smaller health risks to workers exposed to them. Secondly, it guarantees all the technical safety. Nonetheless, the panel took the view that physical characteristics and chemical elements were not decisive in determining the likeness of the product in the present case.\textsuperscript{112} This was based on the notion that the physical differences did not concern the functionality of the product, i.e. to its end use in construction, etc.\textsuperscript{113} Having found that the products had similar physical characteristics and end uses, the Panel did not examine consumer tastes and habits.\textsuperscript{114} Moreover, the panel rejected the EU argument in the present case the issue of health risk associated with chrysotile asbestos fibres should be taken into account in determining the “likeness” of the product.\textsuperscript{115}

\textsuperscript{107} European Communities-Asbestos, supra note 88
\textsuperscript{108} ibid
\textsuperscript{109} The World Trade Organization Report on Asbestos case, para. 8119
\textsuperscript{110} WHO’s International Programme on Chemical Safety (IPCS), Environmental Health Criteria 203—Chrysotile Asbestos (1998) at paras. 144
\textsuperscript{111} The European Communities – Asbestos (2000), para. 8.150
\textsuperscript{112} Ibid, para. 8.126
\textsuperscript{113} R.House, E. Tuerk, p. 295
\textsuperscript{114} Panel Report on The European Communities – Asbestos (2000), para. 8.126.
\textsuperscript{115} EC first submission, supra n. 18, paras. 8.127
However, the AB emphasized that “evidence relating to the health risk associated with a product may be pertinent in an examination of ‘likeness’ under Article III:4.” It came to conclusion that asbestos and the substitutes are “very different” physically because of the health significance of the differences. The AB concluded that the Panel erred “in excluding the health risk associated with chrysolite asbestos fibres from its examination of the physical properties of a product.”

Moreover, the AB emphasized that “in this case especially, we are also persuaded that evidence relating to consumer’s taste and habits would establish that the health risks associated with chrysolite asbestos fibres influence consumer’s behavior with respect to the different fibres at issue.” Since the initial consumers of the products are industrial users, the AB stated: “a manufacturer cannot, for example, ignore the preferences of the ultimate consumer of its products. If the risks posed by a particular product are sufficiently great, the ultimate consumer may simply cease to buy that product. This would, undoubtedly, affect a manufacturer’s decisions in the marketplace. Moreover, in the case of products posing risks to human health, it is likely that the manufacturer’s decisions will be influenced by other factors, such as potential civil liability that might flow from marketing products posing a health risk to the ultimate consumer, or the additional costs associated with safety procedures required to use such products in the manufacturing process.”

So if consumer’s preferences as to the potential human health risks can be used to distinguish one product from another, then consumer preferences as to humane animal welfare practices can be used in examining the “likeness” of the product. Similarly to Asbestos case, the NRP PPMs should be considered in assessing the “like” products. Since, in the abovementioned case the AB stated that the presence of a known carcinogen in the products can have influence on consumers taste and habits, the inhumanly hunted seals or unsafe dolphin methods which can affect animal welfare, should be considered likely to have impact on consumer tastes and habits. Thus, knowledge of a known negative animal welfare or environmental might have impact on consumer’s desire to buy that product. This can be strong argument for future environmental, moral or health cases based on at least three reasons: First, it is internationally recognized that the environment is suffering from severe stress. Second, this severe stress affects human and animals. Finally, the preamble to the WTO specifically recognizes the goals of

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117 Ibid.
118 Ibid, para. 122
119 Ibid.
120 C.J. Archibald (2008), p. 26
environmental protection, which should have influence in determining the ambiguous term of “like” product.\textsuperscript{121}

3.3 Extraterritoriality of public morals and NRP PPMs

Inhumanly skinning and killing of seals, testing cosmetics on animals, products made by child labor, polluting of water and atmosphere by industries – all these examples are stemming from animal welfare, labor standards, and environmental protection concerns. When these concerns are ignored by the international community or a responsible state, a third country may seek the way to address these issues adequately. Thus, a country may use trade measures as a tool to address moral, environmental or labor concerns outside the regulating state based on the process and production methods of a good (PPMs). Furthermore, in case of being challenged its measure by affected state, the regulating country can invoke the public moral exceptions or one of those listed exceptions in Article XX. So, this part of my paper will address the territorial limitation of public morals exception deriving from NRP PPMs.

By their very nature, PPMs have extraterritorial character, since the trade measures condition market access over the production process occurring outside the territory of regulating state. This is particular relevant where production has no impact on the final product (i.e., NRP PPMs).\textsuperscript{122} As states are not regulating the end product, but focus on the production method (especially non –related) occurring outside their territory, the legality of these measures may be challenged.

Moreover, the issue of NRP PPMs and the scope of public morals is still controversial issue among scholars and in WTO Law. Therefore, it is still not clear whether the aim of NRP PPMs measures justified under Article XX (a) is only to protect the morals of respondent’s own population or it aim to protect the morals of another state’s population. This issue has not yet been definitively decided by the WTO adjudicating bodies. However, there are some cases that that the measures based on NRP PPMs were justified under one of the exceptions of Article XX of the GATT.

In the recent EC –Seal case the public morals exception under Article XX (a) of GATT was invoked by the EU to justify its measure on prohibition of import seal products. Since the EU regulation dealt both with seals within and outside of the EU, the issue of territorial limitation of public morals was not explicitly addressed by the AB and Panel in the Seals dispute.\textsuperscript{123} The

\textsuperscript{121} Ibid.
\textsuperscript{122} Barbara Cooreman (2015), p. 40
\textsuperscript{123} EC – Seals Products, 2014, Report.
AB stressed the systematic importance of determining the jurisdictional limitations of Article XX GATT, however due to the lack of facts made by parties, the issue was not examined further.\(^\text{124}\)

Another case that was adjudicated by the WTO within the scope of Article XX is the US-Shrimp case. In order to protect endangered sea turtles, the US prohibited the importation of shrimp fished in a manner not complying with the US standards.\(^\text{125}\) The AB in the present case found that the measure can be justified if there is sufficient nexus between the ‘extraterritorial’ policy objective and the respondent’s territory. Since some of the turtles were known to swim through US waters, the AB found that there is “sufficient nexus” between the US policy objective and the sea turtles. The AB failed to define the required nexus and thus it is still unclear the scope of Article XX.\(^\text{126}\) Nonetheless, after this case, it is clear that environmental concerns require some sort of nexus between the regulating state. This link could be interpreted as the environmental effects on that territory.\(^\text{127}\) However, it is still ambiguous, whether there is similar nexus required for public moral under Article XX (a) or domestic concern of regulating state can be considered as a sufficient nexus.\(^\text{128}\)

There is another view that public moral exception likely health exception does not provide any guidance on the issue of “whose” morals should be protected.\(^\text{129}\) Hence, there is no territorial limitation of public morals.

For example, Member A bans the suitcase made by child labor from Member B. If Member A protects the moral of Members B’s population, could such a measure be justified? Probably not, since it means that Member A is imposing its moral values on Member B. However, if the measure is looked at from the opposite angle, namely that the policy objective of Member A is designed to protect the moral of its own population, the issue of extraterritorial measure can be justified. Hence, Member A aims to prevent its population from being offered suits that are the products of child labor.\(^\text{130}\) In this case, the issue of extraterritoriality and nexus does not even arise since Member A protects purely its national policy.\(^\text{131}\)

Assume another case, Member B produces products that has detrimental effects on animal welfare. Due to the lack of sufficient nexus Member A cannot ban the products from Member

\(^{124}\) AC – Seals Products, Report, para.5.173
\(^{125}\) US – Shrimp, Report, para. 133
\(^{126}\) Barbara Cooreman (2015), p. 6
\(^{127}\) ibid
\(^{128}\) ibid
\(^{129}\) N. F. Diebold (2007), 69
\(^{130}\) Ibid.
\(^{131}\) Ibid.
B for the protection of animal health or natural resources. However, Member A can ban the import of product from Member B on grounds of public morals since the NRP PPMs in the territory Member B can affect A’s national public morals without affecting its national natural resources or animals. However, it is worth to mention that in order to justify successfully the NRP PPMs measure based on moral grounds the regulating state should prove that that the objective of the measure at issue is not the protection of foreign children or animals. It should show that the policy objective is aimed at the protection of national morals.\textsuperscript{132}

While analyzing the public morals exception from the view of extraterritoriality, it would be impossible to apply the sufficient nexus, since the objective of protection are different. For instance, applying the US-Shrimp case to the child labor example, the nexus would require the children themselves migrate to the territory of the importing Member. Therefore, comparing these moral exception’s objectives and environmental objectives is out of question. In US Shrimp case the measure was aimed at the protection of sea turtles (which migrate to US waters) while in the moral examples the measure is not aimed at the protection of children or animals, but at the protection of public morals.\textsuperscript{133} Logically, public morals cannot migrate to the territory of regulating state. Thereby, the “nexus” could have been established only, if the child manufactured suits ‘physically’ had crossed the border into the regulatory Member.\textsuperscript{134}

Based on all the above mentioned, it could be said that the extraterritorial scope of moral concerns is no impediment for justifying a NRP PPM measure under Article XX GATT.\textsuperscript{135} By invoking the public morals exception the WTO Member need to prove, firstly that its citizens and are indeed concerned out the activity that regulated. Secondly, the measure is necessary to attain the objective and lastly it must be in compliance with the requirements of the chapeau under Article XX.\textsuperscript{136}

### 3.4 Conclusion

The main purpose of this chapter was to address the role and need of PPMs (NRP PPMs) in invoking the public morals exception under Article XX of GATT. The first part of this chapter discussed the interplay between the “likeness” of the product and NRP PPMs under Article III:4 of the GATT. It was examined to what extent the NRP PPMs are taken into account while determining the “likeness” of the product. Unfortunately, in most cases the non-related products are ignores by the WTO adjudicators in assessing the likeness of the product, though one of the criteria of determining the “likeness” of the product is consumers taste and habits.

\textsuperscript{132} Ibid.
\textsuperscript{133} Ibid.
\textsuperscript{134} Ibid.
\textsuperscript{135} Barbara Cooreman (2015), p.9
\textsuperscript{136} EC-Seals Product, Report, paras. 5.136-5.39
As was discussed above, the assumption that NRP PPMs would not be allowed under GATT stems from the non-adopted GATT Tuna reports. Indeed in both Tuna – Dolphin cases, GATT Panel held that likeness of the product should be determined based on the physical characteristics of a product and not on the way they were produced.\textsuperscript{137} The fact that distinction based on PPMs may not be deemed discriminatory, if the products are unlike or if the differentiation is not deemed to be protective to domestic products.\textsuperscript{138} However, in EU – Asbestos case, the AB stressed the importance of consumer’s habits and taste in determining the “likeness” of the product. It emphasized that products cannot be deemed to be “like”, if one is a known carcinogen and the other is not, hence the consumers view them differently. Even though it has limited relevance for animal welfare issues, since it concerned human health issue, nevertheless it will have positive effects on the future WTO legislation. Indeed, the day may come when WTO adjudicators recognize that two similar animal derived products are unlike if consumers view them different since the one is produced in a humanly manner and the other derived in a cruel way.\textsuperscript{139}

The last part of this chapter discussed NRP PPMs, their extraterritoriality nature and the scope of public morals. It has been addressed that NRP PPMs serves as a signal from importing countries to exporting countries out the environmental or moral practices and laws that the importing country should have.\textsuperscript{140} Thus, the regulating country imposes its values and standards through its measures based on PPMs (NRP) on other countries. Therefore, these measures may still raise questions on their legality and acceptability under the WTO law. The scope of public morality is also not clear under the WTO legislation. As was examined above in the US Shrimp case, the AB failed to define the required nexus and thus missed the opportunity to shed more light on the scope of Article XX.\textsuperscript{141} Therefore applying “sufficient nexus” in case of public morals exception is impossible, due to the fact that the objectives of environmental exception and morals exception are different. For example, comparing EC – Seal and US – Shrimp case, the measure of US was aimed to protect sea turtles, while in EC – Seal case the EU wanted to protect its citizens’ morals from inhumanly killing seals.

It has been shown that there is no territorial limitation to the public morals exception, except that the government, citizens, and consumers of the regulating state must be indeed concerned. However, Article XX (a) can be justified only if the measure at issue protects the moral of its own population within the regulating state’s territory, (for example an import ban

\textsuperscript{137} Tuna – Dolphin (1991), GATT Panel, para. 5.14.
\textsuperscript{138} Bara Cooreman (2015), p.5.
\textsuperscript{139} P.Stevenson (2002), p. 141.
\textsuperscript{140} S.Charnovitz (2002), p.62.
\textsuperscript{141} B. Cooreman (2015), p.6.
on seal products, or products produced by child labor). If the measure at issue protects the moral of population outside its territory, it means that the regulating state is imposing its policy and therefore cannot be justified under Article XX (a).
4 Case study: An analysis of public morals exception in the EC Seal Products Ban case.

4.1 Background

The EC Seal Products is the first case in the WTO jurisprudence that has sent a strong message that moral values and animal welfare hold a significant weight in international trade law. Moreover, this case presented a novel issue of interpretation in the international trade law. The EC Seal Products addressed the issue to what extent WTO legislation permits trade restrictions? Because of this, I chose to analyze this case while addressing my research question. By analyzing this case I answered to a certain degree questions such as the notion of public morals and how broad could it be? To what extent the Members can rely on the public morals clause under Article XX (a) of the GATT.

On September 16, 2009, the EU adopted a law banning the import and export of most products made from seals (the EU Seal Regime). The EU Seal Regime consists of Regulation EC No 1007/2009 of the European Parliament (basic regulation) and Commission Regulation EU 737/2010 on implementation of EC 1007/2009 known as the implementing regulation. The basic regulation lays down a prohibition on importation of seal products within the EU, but there are three exceptions which provide for the placement of seal products on the European market. These exceptions are the Inuit Communities (IC), Marine Resource Management (MSR) and the Traveler’s Exceptions. The implementing regulation, on the other hand, stipulates specific conditions which should be followed when implementing the basic regulation and sets up more detailed rules on its exceptions.

The EU Seal Regime was justified by the EU on the ground that protecting the seals from the seal hunt and to enhance seal welfare through diminishing seal hunts. The EU also explained its restrictions on trade in seal products as a result of its citizen’s moral beliefs. The concerns of citizens of the EU “extend to the killing and skinning of seals such”. According to the basic regulation, the EU considers hunting methods cruel because it does not guarantee instantaneous death of animals which are subjected to unnecessary pain, distress, and suffering. The way of killing of seals has been widely considered as a moral issue in EU.

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142 R. House, J. Langille and K.Sykes (2015), p. 84
143 Regulation 1007/2009/EC (hereafter referred to) as the basic regulation.
144 Regulation 737/2010/EU (hereafter referred to) as the implementing regulation.
145 Basic regulation preamble (10)
146 Basic regulation preamble (1)
147 EC- Seal Products, supra note 8, at 36
Animal welfare concerns are a well-established and universally accepted ground for legislation in Europe. The current EU Seal Regime is just one of the many regulations which objectives are to prevent unnecessary animal suffering. With regard to animal welfare EU legislation covers the areas such as transport, slaughter, battery hens, veal, calves, pigs, animals used in experimentation, seals, trapping, conservation of wild birds and animals kept in the zoo. Moreover through the Animal Welfare Act, the EU has sought to protect “five freedoms for animals”: freedom from discomfort; freedom from hunger and thirst; freedom from fear and distress; freedom from pain, injury and disease; and freedom to express natural behavior.

The first European legislation on trade in seal products was the 1983 Seal Pups Directive. It prohibited products derived from certain seal pups (harp seals and hooded seals). The ban was extended several times during the 1980s due to increased public pressure and was eventually made permanent in 1989.


In 1999, the protection of animals became so important that the EU agreed to annex a protocol on animal welfare to the Amsterdam Treaty. The main purpose of this effort was firstly, to impose an obligation on all the member States to pay full regard to animal welfare in formulating and implementing their national policies in agriculture, transport, internal market and research. Secondly, animals were being recognized as “sentient beings.”

The current seal regime is the result of massive public outcry out the cruelty involved in the seal hunt, which was reflected in “a massive number of letters and petitions…. expressing citizens’ deep indignation and repulsion in such conditions” that led both the Council of Europe and the European Parliament to urge the consideration of a seal products ban in

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148 R. Howse, J. Langille (2012), pp. 373-376
150 Ibid.
155 Protocol on protection and welfare of animals- Annex to Amsterdam Treaty.
2006. Over the next two years the European Commission examined the hunting practices and regulatory frameworks in Canada, Finland, Greenland, Namibia, Norway, Russia, Sweden, and the United Kingdom (Scotland); requested a scientific animal welfare study and risk assessment by the European Food Safety Agency (EFSA), conducted extensive consultations with all interested parties and stakeholders and required an independent evaluation on this issue by outside experts. Meanwhile, Belgium and the Netherlands passed their own seal products ban in 2007. Other EU members like Germany, Italy, Czech Republic, Austria, UK and France also considered enacting seal ban products in their legislation. Therefore, EU considered it important to harmonize this policy at EU level. In 2008, the European Commission submitted its proposal to European Parliament and in 2009 the proposal was approved and subsequently issued as Regulation 1007/2009.

4.1.1 The current seal regime

As earlier mentioned, the EC Seal Products ban consists of two regulations known as the basic regulation and the implementing regulation. In accordance with the basic regulation, there are three exceptions which provide for the placement of seal products on the European market such as the Inuit communities, MRM, and the travelers’ exceptions.

The Inuit exception is found in Article 3 of the basic regulation and Article 3 of the implementing regulation. The basic regulation defines the Inuits as:

“indigenous members of the Inuit homeland, namely those Artic and sub - Arctic area where, presently or traditionally, Inuit have original rights and interests, recognized by Inuit as being members of their people and includes Inupiat (Alaska), Inuit Inuvialuit (Canada), Kalaallit (Greeenland) and Yupik (Russia)”.

According to the implementing regulation, seal products can be imported and marketed if the products derive from hunts which satisfy all the following conditions:

(a) seal hunts conducted by Inuit or other indigenous communities which have a tradition of seal hunting in the community and in the geographical;

(b) Seal hunts the products of which are at least used, consumed or processed within the communities according to their traditions;

158 EFSA Report, supra note 10, at 5-8
159 COWI, Assessment of the potential Impact of a ban of products derived from seal species, (2008)
161 ibid
(c) Seal hunts which contribute to the subsistence of the community.

The second exception relates to MRM. According to Article 3(2) of the basic regulation, seal products can be imported on the European market:

“Where are the seal products result by – products of hunting that is regulated by national law and conducted for the sole purpose of the sustainable management of marine resources. Such place shall be only allowed on a nonprofit basis”.

Article 2 of the implementing regulation determines the hunted products on a “non-profit basis” when the products are placed on the market for a price less than or equal to the recovery cost reduced by the amount of any subsidies received in relation to the hunt.

According to the implementing regulation Article 5 such seal products are regarded as hunted for sustainable management if: (a) they derive from a hunt conducted under a “natural resource management plan which use scientific population models if marine resource and applies the ecosystem-based approach” and (b) do not exceed the quota determined in the natural resource management plan.

The last exception concerns those goods aimed for personal use of travellers. Under Article 4 of the implementing regulation in order to meet the requirements of travellers exception the seal products must be either worn by the travellers, or carried or contained in their personal luggage; the seal products contained in the personal property of a natural person transferring his normal place of residence from a third country to the EU; and such products should be accompanied by sufficient documents to indicate the origin of the products.

4.2 The EU Seal regime and the application of WTO Law.

Since the main purpose of this chapter is to analyze article XX (a), in this part I would like to discuss in brief the alleged violations of the present case which were focused by the AB. First, whether the EU Seal Regime was a technical regulation and if it was, whether the regime was inconsistent with the EU’s obligations under the TBT Agreement. Second, whether the IC and MRM Exceptions accorded less favorable treatment to Canada and Norway, thereby violating Article 1:1 of the GATT. Finally, whether EU Seal Regime violated Article III:4.

4.2.1 Whether the EU Seal Regime constituted a technical regulation.
Canada and Norway argued that the EU Seal Regime violated obligations under the GATT and the TBT Agreement. Canada also alleged that the IC and MRM exceptions breached non-discrimination obligations under Article 2.1 of the TBT Agreement. The complainants claimed that EU Seal Regime was inconsistent with Article 2.2 of the TBT Agreement because it was more trade restrictive than necessary for the purpose of fulfilling a legitimate objective. Moreover, Canada and Norway argued that certain procedural aspects of the measures were inconsistent with Article 5 of the TBT Agreement regarding the requirements for conformity assessment procedures.

With regard to Canada's and Norway’s claim under the TBT Agreement, the Panel concluded that the EU Seal Regime was a “technical regulation”. Furthermore, the Panel stated that the EU Seal Regime violated Article 2.1 of the TBT Agreement since negative consequences stemmed from IC and MRM exceptions did not derive from legitimate regulatory distinctions. However, the Panel concluded that the EU Seal regime did not breach Article 2.2 of the TBT Agreement, because the regime complied with the objective of addressing EU public moral concerns on seal welfare, and there were no potential alternative measure that could provide an equivalent or greater contribution to the fulfillment of the objective.

On appeal, The AB found the EU Seal Regime did not constitute a technical regulation and therefore, it did not have to consider if there were any violations to the TBT Agreement. Consequently, it declared the Panel's findings in this regard 'moot and of no legal effect.'

The AB found that the EU Seal Regime did not set out product characteristics because the market access conditions under the exceptions were not features for such purposes. The AB stated that in EC – Asbestos, asbestos containing products were regulated due to their carcinogenicity. In the present case, seal products were prohibited because they contained seal. As such, the AB found that the type of hunter and the type and purpose of the hunt identified in the exceptions did not set out 'objectively definable features' as concluded by the Panel. According to AB, the EC Seal Regime ought to be analyzed as a whole taking into account both the prohibiting (ban) and the permissive elements (the IC, the MRM, and the Travellers

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162 Panel Report, EC Seal Products, para. 7.2
163 Canada’s appellee’s submission, para. 40; Norway’s appellee’s submission, paras. 46-64.
164 Panel reports, EC Seal Products, para. 7.104
165 Ibid.
166 AB Report, EC Seal Products, para. 5.70
167 A 'technical regulation' within the meaning of Article 1.2 of the TBT Agreement has to fulfil a three-tier test: (a) whether the measure establishes product characteristics; (b) whether it determines their related processes and production methods (inclusive of applicable administrative provisions) and, (c) whether compliance must be mandatory.
168 AB Report, EC Seal Products, para. 5.41
169 Ibid., para. 5.47
exceptions) of the measure. In so doing, the AB noted that the prohibition on seal-containing products does not rest solely on their seal content but on conditions such as the identity of the hunter or the type and purpose of the hunt. It categorized these exceptions as 'market access conditions' rather than product characteristics. Thereby, the EU Seal Regime was not a technical regulation and therefore it does not require further considerations.

4.2.2 De Facto Discrimination under the GATT 1994

(a) Article I: 1 of the GATT

The EU asserted that the test for violation of Articles 1:1 and III: 4 of the GATT is the same as Article 2.1 of the TBT Agreement. Under Article 2.1 of the TBT Agreement, the Panel examined whether the 'detrimental impact of a measure on competitive opportunities stemmed exclusively from a legitimate regulatory distinction'. However, the Panel rejected the EU argument that the tests were similar.

On the appeal, the AB agreed with the Panel’s finding that the EU Seal Regime was inconsistent with Article 1:1. The AB confirmed that the EU Seal Regime de facto discriminated against Canadian and Norwegian imports, because 'virtually all' Greenlandic products were likely to have access to the EU market under the IC exception, in comparison to those from Canada and Norway. Thus, this 'detrimentally affected' the conditions of competition for Norway and Canada.

The EU had argued that a mere examination of the detrimental impact on a third country caused by the changes in conditions of competition was insufficient to warrant a violation of Article 1:1. However, the AB rejected the EU's argument.

(b) Article III:4 of the GATT

With regard to Article III: 4 the Panel found the MRM Exception discriminated against the majority of seal products from Canada and Norway as evidence showed that 'virtually all domestic EU products were likely to qualify' under the exception.

170 Ibid.
171 Ibid.
172 Ibid., para. 5.45
173 Ibid., para. 5.89
174 Ibid., paras. 5.95, 5.117.
175 Panel Report, EC Seal Products, para. 7.608
On the appeal, the AB did not further examined the test under Article III: 4, but merely said that the test for both WTO fundamental obligations did not change, and it would not result different outcome from what was decided by the Panel.

In accordance with the AB’s report, the non-discrimination obligations under GATT and the TBT Agreement are different and separate. For the AB, the principle that WTO agreements ought to be interpreted in a coherent and consistent manner does not mean that the legal standards for non-discrimination obligations under the TBT Agreement have identical meaning to those of the GATT. The AB further explained that obligations under the GATT were 'balanced' by the General Exceptions under Article XX whilst the TBT Agreement had no such exceptions. Thus, for the purposes of Article 1:1 and III:4 of the GATT, the discriminatory treatment does not depend only on the regulatory distinctions between like products, but most importantly, stems from the distortion of the conditions of competition between like products from all Members (in the case of Article 1:1). Also, it derives from the distortion of competitive opportunities of imported products as compared to domestic like products (in the case of Article III: 4).\(^{176}\)

4.3 **Analysis of public morals.**

4.3.1 The Panel’s findings on EC – Seal Products in relation to the Article XX (a)

The examination of Article XX (a) requires two separate tests. First, whether the measure falls within the scope of the public morals exception under Article XX (a), and whether the measure passes the necessity test. Second, whether the measure constituted a means of arbitrary or unjustifiable discrimination between countries under the chapeau of Article XX.\(^{177}\)

With regard to first test, whether the measure falls within the scope of the public morals exception, the Panel stated that that the objective of the EU Seal Regime is 'to address EU public morals concerns regarding seal welfare.'\(^{178}\) Moreover, the Panel found that the EU Seal Regime was provisionally necessary to address the objective according to Article XX of the GATT.\(^{179}\) The AB also upheld the Panel’s finding, however, it concluded that the measure, in particular, the IC exception, was designed and applied in an 'arbitrary and unjustifiable' man-

\[^{176}\text{AB Reports, EC Seal Products, para. 5.95}\]
\[^{177}\text{Under Article XX (a) of the GATT “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals...”}\]
\[^{178}\text{Ibid., paras. 5.289, 5.290}\]
\[^{179}\text{Ibid.}\]
ner and thus, the EU Seal Regime did not satisfy the requirements set out in the Chapeau of Article XX of the GATT.

On appeal, Canada argued that the Panel failed in assessing the 'risk to public morals against which the EU Seal Regime seeks to protect'. In other words, Canada argued that in assessing the standard of right and wrong in the EU, it was necessary to examine whether seal hunts exceeded the level of animal suffering that was tolerated for other animals, particularly for slaughterhouses and wildlife hunts. However, the AB reaffirmed the Panel report in US-Gambling and stated that the Members are flexible in determining the level of protection according to their systems and scales of values, even if dealing with similar interests of moral concern.

Concerning the second test, the Panel found that under Article 2.1 of the TBT Agreement the exceptions under the EU Seal Regime are 'not designed and applied in an even-handed manner', therefore the EU Seal Regime does not meet the requirements of the chapeau of Article XX. However, the AB rejected this finding and emphasized that the legal standard of Article 2.1 of the TBT Agreement is different from that of the chapeau of Article XX.

Nonetheless, the AB found that the regime is applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, in particular with respect to the IC exception. First, the EU failed to show that the manner in which the EU Seal Regime treats seal products derived from IC hunts as compared to seal products derived from "commercial" hunts can be reconciled with the objective of addressing EU public moral concerns regarding seal welfare. Although the AB noted the EU argument that the IC exemption was intended “to mitigate the adverse effects on those communities,” it found that the EU failed to show such a rational relationship and that it could not “do anything further” to protect the welfare of seals in indigenous hunts. Second, the AB found that the terms "subsistence" and "partial use" have ambiguous meaning under the IC exception. Under these criteria EU allowed the importation and placing on the market of seal products that would otherwise be characterized as commercial hunts.

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180 Ibid., para. 5.194.
181 Ibid., paras. 5.214 - 5.200.
182 Ibid., para. 5.313.
183 Ibid., para. 5.338.
184 Ibid., para. 5.318.
185 Ibid.
Finally, EU failed to make "comparable efforts" to facilitate the access of the Canadian Inuit to the IC exception as it did with respect to the Greenlandic Inuit.\(^\text{186}\) It explained, in particular, that Danish authorities had processed imports from Greenland prior to the establishment of a recognized Greenlandic authority, as required under the EU regulation, and that the Union could have pursued further “cooperative arrangements” with the Canadian Inuit.\(^\text{187}\) The AB therefore concluded that the IC exception was designed and applied in an arbitrary and unjustifiable manner, and thus failed to meet the chapeau’s requirements.\(^\text{188}\)

With regard to the scope of Article XX (a) of the GATT, the AB recognized that the purpose of the design of the EU Seal regime is to address seal hunting both inside and outside the EU. However, the AB restrained from examining the issue of whether there could be an ‘implicit jurisdictional limitation' regarding Article XX (a) of the GATT, since the parties did not raise this question on appeal.\(^\text{189}\)

4.3.2 Analysis of Article XX (a) of the GATT

In this part I would like to analyze the special aspects of the EC Seal Products that made me to choose exactly this case among other cases justified under Article XX (a), moreover I would like in brief to analyze the chapeau of Article XX and with regard to this I would like to discuss the matter of PPMs in the light of ES Seal Products adjudication.

In EC Seal Products the Panel and the AB reports represent an important landmark recognizing a public morals exception on animal welfare grounds. Its recognition that inhumanly treating animal welfare falls within the scope of ‘public morals’ in the EU sets a precedent for further measures which ban or restrict other products involving cruel treatment of animals. In comparison to the present case, the previous cases like Tuna – Dolphin and US-Shrimp involved mainly environmental protection, animal life, and health and neither of these cases dealt with animal welfare. However, in EC Seal Products regardless that the threaten seals were endangered or not, the main focus was on the well-being of animals.

Moreover, EC Seal Products was the first public moral case in which the complainants asserted whether the measure being challenged was in fact an example of public morals legislation at first instance.\(^\text{190}\) In United States–Gambling and China–Audiovisuals, the dispute was much

\(^{186}\) Ibid., para. 5.338
\(^{187}\) Ibid., para. 5.337
\(^{188}\) Ibid., para. 5.339
\(^{189}\) Ibid., para. 5.173
\(^{190}\) R. House, J. Langille and K.Sykes (2015), p. 84
more about whether the measures were applied in an impermissibly arbitrary way.\textsuperscript{191} In Seal Products, by contrast, the complainants claimed that the measure was motivated by reasons that should not qualify as moral at all, thus testing the boundaries of the public morals exception and create additional challenges for WTO adjudicators.\textsuperscript{192} Moreover, it has several important consequences for the WTO legislation in particular, with regard to Article XX (a) of the GATT.

First, EC Seal Products has shown that the issue of public morals concern for animal welfare can be recognized on the state’s level and thus potentially can be justified under WTO Law. Since, in the present case the Panel and AB agreed with the EU argument that the main policy objective of the EU Seal regime was to address public concern for seal welfare.\textsuperscript{193} Additionally, the Panel considered the growing global tendency towards animal welfare in concluding that it could be ground for 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.”\textsuperscript{194}

Another vital aspect of EC Seal Products on Article XX (a) is the AB’s rejection on Canada’s argument based on “philosophical consistency” notion.\textsuperscript{195} On appeal Canada argued that, the Panel had erred in concluding that the measure at issue fell within the scope of Article XX (a), since the EU had failed to identify the precise content of the public moral concern. Canada claimed that as the EU 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.\textsuperscript{196} Hence, the EU should not be allowed to protect animal welfare in the context of seals.\textsuperscript{197} In other words, in accordance to the Canada’s argument EU does not have the right to protect certain animals differently, as it wishes to do so.\textsuperscript{198} The AB rejected Canada’s argument, stating that Members 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.”\textsuperscript{199}

According to House, Langille and Sykes this kind of approach by the Panel and AB will allow for the gradual evolution of domestic law on issues with a moral aspect. Moreover it would be

\textsuperscript{191} Ibid.
\textsuperscript{192} ibid
\textsuperscript{193} Ibid.
\textsuperscript{194} Panel report, EC Seal Products, paras. 7.420, 7.409
\textsuperscript{195} R. House, J. Langille and K.Sykes (2015), p. 114
\textsuperscript{196} AB Report, EC Seal Products, para. 2.33
\textsuperscript{197} Ibid.
\textsuperscript{198} R. House, J. Langille and K.Sykes (2015), p. 115
\textsuperscript{199} AB Report, EC Seal Products, para. 5.200
gross overreach if the WTO forces Members to regulate the animal welfare in a way that is perfectly philosophically consistent with all other morally motivated legislation taken by that society.  

The third significant aspect of the present case on Article XX (a) is the AB’s decision that there is no requirement that the contribution must be material, even for highly trade-restrictive measures. The Panel in EC Seal Products followed the Panel’s interpretation in Brazil–Tyres in which it 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. However, the AB rejected the Panel’s finding, stating that even if the trade measure is highly restrictive it does not mean it will make a particular level of contribution to the identified objective. Therefore, the Panel must weigh and balance the tree requirements of necessity test: the importance of the objective, the degree of contribution, and the degree of trade restrictiveness. Thus it is not necessary to find that a measure that is highly trade restrictive makes a material contribution to the objective under consideration.

This kind of interpretation of necessity and contribution gives states autonomy in designing their measures and regulating trade.

Finally, interpretation of public morals in EC Seal products also plays an important role in defining the concept of public morals. As it was seen in the previous Chapters, in determining Article XX (a) the Panel resorted to the same definition that was interpreted in US-Gambling and China-Audiovisuals. Based on this interpretation, it could be said that the concept of public morals does not have an exact definition; it rather varies from place to place, over time and even within societies. Moreover, the WTO jurisprudence in both cases including EC Seal Products recognizes the diversity of WTO Member states acknowledges that it is impossible to harmonize the moral, ethical and religious aspects of regulations within sovereign territory of each state.

Based on the above mentioned facts it could be concluded that, the EC Seal Products will have positive effects on future WTO legislation. Even though it was unable to satisfy the re-
quirements of the chapeau of Article XX, it broadened the scope of Article XX (a). The per-
missive approaches taken in the case\textsuperscript{207}, show that Members can independently design their
measures and regulate their trade in terms of public morals and animal welfare.

However, the chapeau of Article XX (a) limits the independence and autonomy of policymak-
ers, since the purpose of this Article is to prevent protectionism and abuse of the Article XX
exceptions. Moreover, the chapeau plays a significant role in public morals disputes in ensur-
ing “good faith.”\textsuperscript{208}

In the present case The AB found that the EC Seal Products Regime does not meet the re-
quirements of the chapeau, because of specific aspects of how the IC exception operates in
practice, amounting to arbitrary or unjustifiable discrimination.\textsuperscript{209} As was mentioned above
the EU could have done more to facilitate access of Canadian Inuit to the exception. The AB
also noted that the ambiguous meaning of IC exception products derived from hunts that
should be characterized as commercial could nevertheless place in the EU market. Finally, the
EU did not seek to mitigate the animal welfare conditions of indigenous hunts.\textsuperscript{210}

Indeed, with regard to the last point of the AB one might be able to argue that, since the EU
considers hunting methods cruel, because it does not guarantee instantaneous death of animals
then seals hunted by Inuit also does not guarantee instantaneous death of seals and it does not
guarantee more humanly methods.

Moreover, as it was shown in Chapter 3 in the EC -Asbestos case the AB stated that the pres-
ence of a known carcinogen in the products can have influence on consumers taste and habits.
Based on these findings it was argued that knowledge of a known negative animal welfare or
environmental might have impact on consumer’s desire to buy that product. Therefore it may
raise the following questions - how might it have impact on EU’s consumers taste and habits,
if they know that the seals hunted by Inuits were killed in the same inhumanly way? Do they
restrain from buying these seal products? Or whether Europeans policymakers adopt trade
measure that can change or mitigate the hunting methods of indigenous people?

Thereby, I think the interplay between public morals and PPMs in particular NRP in the pre-
sent case is very obvious. According to Sellheim, since the EU Seal Regime does not aim to
alter the ways in which seals are hunted by imposing specific European hunting methods onto

\textsuperscript{207} Ibid.
\textsuperscript{208} ibid
\textsuperscript{209} AB Report, EC Seal Products, para. 5.338
\textsuperscript{210} Ibid., para., 5.337
non-European hunters, the EU Seal Regime cannot be considered a PPMs-based trade barrier.\textsuperscript{211} Instead, it is the PPMs that trigger moral opposition of the European public.\textsuperscript{212} Indeed, as we addressed in previous chapter in nature NRP PPMs serves as a signal from importing countries to exporting countries out the environmental or moral practices and laws that the importing country should have. However, in the present case, the measure at stake is not intending to impose or change the hunting methods outside or within its territory. Maybe in future the policymakers alter the hunting methods through its trade measures, however yet this is not achieved through directly PPMs (NRP) based trade regime, instead by proxy-the morality clause.\textsuperscript{213}

I would restrain from this point of view of the author since I think regardless whether the measure was intended to change the hunting methods directly or by proxy – the morality clause, the EU Seal Regime is PPMs (NRP) based trade regime. Firstly, the EU public morals concern is based on the way and hunt methods that the seals are derived. Secondly, while considering the necessity test the Panel and AB examined whether the EU Seal Regime does, in fact, address the public’s moral concerns concerning seal hunting. Thus, at first, place was examined whether there is a European public concern regarding seal welfare, which is based on NRP PPMs and second whether these concerns correspond to the ‘standards of right and wrong’. On the ground of the above mentioned, I think in the EC Seal Products, PPMs (NRP) and public morals have very strong link with each other and this case would be considered as a landmark for the direct application of public morality.

On the appeal, while considering the TBT agreement the AB reviewed the meaning of PPMs within the scope of Article 1.1 of the TBT agreement. The AB stated that panel must take into account whether the PPMs prescribed that a measure have a ‘sufficient nexus’ to the characteristics of a product in order to be considered ‘related’ to those characteristics.\textsuperscript{214} However, the AB found that the EU Seal Regime does not lay down product characteristics and refused complete this legal analysis due to the complexity of the legal issues involved and because such issues had not been examined before the Panel.\textsuperscript{215}

I think the AB should have considered the issue of PPMs, even though the way of killing and hunting seals does not affect the characteristics of the product. Indeed, it is worth to mention that only on the ground of NRP PPMs the issue of public morals was triggered. Unfortunately, as the practice shows again NRP PPMs is still ignored by the WTO legislation, even though

\textsuperscript{211} N. Sellheim (2016), p. 7
\textsuperscript{212} Ibid.
\textsuperscript{213} Ibid.
\textsuperscript{214} The AB Report, EC Seal Products, para.
\textsuperscript{215} Ibid., para. 5.12
the issue of public morals concerns regarding seal hunting was justified under public morals exceptions.

With regard to questions raised above in terms of products derived from inhumanly hunted by Inuits and the consumer’s preference to those products, the EU justified the IC exception simply to comply with its international obligations. Abiding by the Declaration of the Rights of Indigenous Peoples and other international law instruments protecting the rights of aboriginal peoples was the explicit motivation for its exception for aboriginal-produced seal products.

On the appeal, Canada and Norway argued 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. However the AB rejected this argument by stating that, 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.

House, Langille and Sykes in its analysis reject the AB’s statement by noting that 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) of the GATT. I do agree with this point of view when a government and its citizens pursue simultaneously more than one value and regularly trade-off between these two values, it could be not justified under the chapeau of Article XX (a) of the GATT.

Nevertheless, the AB agreed 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.

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216 Ibid., supra note 8
217 Ibid.
218 Ibid., para. 5.167
219 Ibid.
221 AB Report, EC Seal Products, para., 5.320
5 Conclusion

The aim of this thesis was to examine to what extent Members can justify its trade restriction under the public morals exceptions and how strong is the clause of public morals. For this purpose, it was necessary at first place to define the meaning of the concept of public morals, second to examine the trade measures based on PPMs since PPMs have an important role in triggering public morals clause. Moreover, it was discussed the scope of public morality and whether an implied jurisdictional can be found. In the final part of this paper was reviewed EC Seal Products case and in the light of this case were analyzed the concept of public morals and PPMs issues.

Based on this analysis I found out that the meaning of public morals clause remained as ambiguous as it was in the beginning of my examination. The AB likely in US Gambling and China-Audiovisuals case took unilateral approach stating that “public morals varies from place to place, over time and even within societies” It means that every state has the right to determine its own morals in accordance with its culture, tradition, religious, belief or social welfare. Therefore, the AB recognized that the EU Seal Regime fall under the scope of Article XX (a).

However, this unilateralism approach of states is not limitless. As it was shown the AB found that the application of IC exception was not in a good faith, because the specific aspects of how the IC exception operates in practice, amounting to arbitrary or unjustifiable discrimination.

With regard to PPMs issue, the AB found that the EU Seal Regime does not lay down product characteristics and refused complete this legal analysis due to the complexity of the legal issues involved and because such issues had not been examined before the Panel. The AB stated that the nature and purpose of a seal hunt and the identity of a hunter are not characteristics of the end product, thus ignoring PPMs again.

Nonetheless, the EC Seal Products case is a landmark for further regulations that address animal welfare concerns. Based on this case the regulators just have to prove a sufficient degree of public sentiment towards a particular trade or issue as well as satisfaction of the necessity and chapeau tests, and the measure can be justified under Article XX (a). Another aspect that the policy makers should take into account its negotiation with affected parties. Moreover, the policymakers should link all the aspects of regulation in particular, the differential treatment with the objective e.g., animal welfare. Unlike, in the EC Seal Products, the AB found that
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.

From the point of view of supporters of free trade the EC Seal Products gave too much room for WTO members who under the guise of public morals employ protectionism. Indeed, the recognition of animal welfare as a part of public morals, the rejection of Canada’s consistency argument and the rejection of a “material contribution” in assessing necessity test shows that in the future cases the WTO Members can abuse this interpretation and it would lead to protectionism.
6. Table of reference

6.1 Books


6.2 Articles


6.3 List of Legal Sources

6.3.1 Laws Directives and Regulations:


Council Regulation No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein

Regulation (EU) 737/2010-adopted 10th of August

Regulation Respecting Marine Mammal (Short title: Marine Mammal Regulations) 1993-02-04. (SOR/93-56) Part IV

6.3.2 Treaties

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Agreement on the Application of Sanitary and Phitosanitary Measures (Anex 1A to the WTO Agreement)

The Agreement to Technical Barriers to Trade (Annex 1A to the WTO Agreement)

The General Agreement on Trade and Tariffs (Annex 1A to the WTO Agreement)

The General Agreement on Trade in Services (Annex 1A to the WTO Agreement)

The United Nation Declaration on the Rights of Indigenous Peoples (13 September 2007)

Understanding on Rules and Procedures Governing the Settlement of Dispute (Annex to the WTO Agreements)

Vienna Convention on law of Treaties (Vienna May 23rd 1969)

6.3.3 Documents from WTO Disputes

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6.4 Other Documents

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