# The Use of Public Morals Exception for Animal Welfare in the WTO: EC-Seal Products

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## Abstract

This article focuses on the interpretation and application of the GATT public morals exception to reconcile the conflict between trade and animal welfare. By examining public morals jurisprudence of the WTO, it aims to study the WTO's evolving interpretation of Article XX, general exceptions, to accommodate animal welfare concerns. The recent *EC-Seal Products* decision will be comprehensively analyzed to assess the progress and possible implications for the future. Also, this article argues that neither trade nor animal welfare should be disregarded. The outcome of the decision shows that the WTO is ready to recognize a new value under public morals exception, but sovereign regulatory autonomy may be restricted through the chapeau interpretation. Therefore, it is the work of the dispute settlement body to appropriately balance these competing interests although it was established to resolve trade disputes.

**Keywords:** World Trade Organization (WTO), Animal Welfare, Public Morals, EC-Seal Products

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## 1. Introduction

As the objectives of the World Trade Organization (WTO) are primarily relevant to economic and trade, other policy goals tend to clash with the WTO rules. Animal welfare legislations is not the exception to this case since it is a non-economic value that was recently challenged before the WTO for the first time. In this dispute, the European Union (EU) attempted to justify its ban on seal products by invoking public morals exception of the General Agreement and Tariffs and Trade (GATT).[2] What concerns the EU about the hunting of seals is the killing methods because animal welfare seeks to minimize animal suffering from human exploitation.[3] The excessive pain imposing on animals is unacceptable. This concern motivates a government to respond by imposing a measure relating to animal welfare standards regardless of the origins of goods.[4] In reality, a state's regulation addressing one value can affect another. Products derived from animals are traded cross-border to gain national income, which is subject to the WTO rules. These WTO commitments may impede the imposition of animal welfare legislation due to non-discrimination obligations.[5] Therefore, it is crucial to study how the WTO reconcile the tension between trade and public morals concerns for animal welfare.

The author proposes that trade and animal welfare should not have priority over another. In one interest trumps the other, there would be adverse impacts to both values

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[2] Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (enter into force 1 January 1995) annex 1A ('General Agreement on Tariffs and Trade 1994') ('GATT')

[3] Peter L. Fitzgerald, "Morality May Not Be Enough to Justify the Eu Seal Products Ban: Animal Welfare Meets International Trade Law," Journal of International Wildlife Law and Policy 14, no. 85 (2011): 85, 89-90.; Robert Howse and Joanna Langille, "Permitting Pluralism: The Seal Products Dispute Ad Why the Wto Should Accept Trade Restriction Justified by Noninstrumental Moral Values," *Yale Journal of International Law* 37, no. 2 (2012): 367, 380.

[4] Kate Cook and David Bowles, "Growing Pains: The Developing Relationship of Animal Welfare Standards and the World Trade Rules," last modified 2012, accessed April 1, 2015, http://trade.ec.europa.eu/doclib/docs/2012/november/tradoc_150113.pdf.

[5] Bruce A. Wagman and Matthew Liebman, *A Worldview of Animal Law* ( Durham, NC: Carolina Academic Press, 2011), 298.

in a long term. This article will examine the decision of *EC-Seal Products*.[6] It seeks to assess its implications since the GATT's General Exception have long been used to justify measures concerning non-trade interests. Also, this dispute is interesting because the EU seal ban does not only address the seal welfare. The interests of indigenous communities and the management of marine resource are included, which complicate the reasoning of WTO dispute settlement body.

## 2. Background to the dispute

The *EC-Seal Products* case arose from the imposition of the 'EU Seal Regime' comprising of several regulations in 2009-2010, which prohibited the placing of seal products on the EU market with some exceptions.[7] This section will discuss the historical background and motivation behind the EU's legislative response to animal welfare concerns as well as the context of controversial sealing industry. The content and rationale of the EU Seal Regime will also be explained.

### 2.1 The European Response to Animal Welfare Concerns

In the *Seal Products* dispute, the EU sought to justify the GATT violation of its seal regulations by invoking the GATT public morals exception. Although the seal regulations were recently adopted, the moral concern for seal welfare as well as other species is not a new one in the European society. In fact, the effort of the EU and its individual members to improve animal well-being, as one of local moral beliefs, has long been known and ongoing since the nineteenth century through various protective measures such as quota setting, licensing and ban.[8] At the regional level, the EU has adopted many moral legislations

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[6] Panel Report, European Communities — Measures Prohibiting the Importation and Marketing of Seal Products, WTO Doc WT/DS400/AB/R and WT/DS401/AB/R (25 November 2013); Appellate Body Report, European Communities — Measures Prohibiting the Importation and Marketing of Seal Products, WTO Doc WT/DS400/AB/R and WT/DS401/AB/R (22 May 2014) ('EC-Seal Products').

[7] Panel Report, *EC-Seal Products,* 15.

[8] Howse and Langille, "Permitting Pluralism: The Seal Products Dispute Ad Why the Wto Should Accept Trade Restriction Justified by Noninstrumental Moral Values," 280, 392.; Cook and Bowles, "Growing Pains: The Developing Relationship of Animal Welfare Standards and the World Trade Rules."

to address these concerns. In 1991, Regulation 3254/91[9] was enacted to ban the use of leg-hold traps for animal hunting in all EU members in order to address the cruel aspect of killing methods.[10] Other legislations were also passed to promote animal welfare enhancement in different areas such as farming, transportation and cosmetic testing.[11]

Regarding the welfare of seals, the sealing industry became the subject of a serious public debate in the European community due to the release of documentary films and other publications in the 1960s.[12] Revealing terrify scenes of seal hunting where the targeted seals were not instantly killed and suffered an undue pain, the films caused a public protest and a pressure to stop inhumane treatment to seals based on moral beliefs.[13] What disturbs the moral concerns of EU citizens about the seal hunting is not the activity itself but the methods of hunting that is considered to be inhumane. These slaughtering methods do not render an immediate death to seals; accordingly, they have to endure the excessive pain for a significant amount of time.[14] For instance, the most well-known hunting method is a hakapik, which is a club attached with a long hook at its head, traditionally used in Norway. Sealers use hakapiks to crush a seal's skull and drag it while it struggles for a survival. Since sealers often miss the targeted part of a

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[9] Council Regulation (EE) 3254/91 of 4 November 1991 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards [1991] OJ 308/1.

[10] Christoph T. Feddersen, "Ec Environmental Legislation and Wto Rules," *European Environmental Law Review* 7, no. 6 (1998): 207, 210.

[11] Howse and Langille, "Permitting Pluralism: The Seal Products Dispute Ad Why the Wto Should Accept Trade Restriction Justified by Noninstrumental Moral Values."; Feddersen, "Ec Environmental Legislation and Wto Rules," 208, 210.

[12] Katie Sykes, "Sealing Animal Welfare into the Gatt Exceptions: The International Dimension of Animal Welfare in Wto Disputes," World Trade Review 13, no. 3 (2014): 471, 475.; Fitzgerald, "Morality May Not Be Enough to Justify the Eu Seal Products Ban: Animal Welfare Meets International Trade Law," 89.

[13] Sykes, "Sealing Animal Welfare into the Gatt Exceptions: The International Dimension of Animal Welfare in Wto Disputes," 475-477.; Fitzgerald, "Morality May Not Be Enough to Justify the Eu Seal Products Ban: Animal Welfare Meets International Trade Law," 89.; Howse and Langille, "Permitting Pluralism: The Seal Products Dispute Ad Why the Wto Should Accept Trade Restriction Justified by Noninstrumental Moral Values," 392.

[14] Ibid., 391.

seal's brain that suddenly put it to death, many critics argue that seals have to experience unnecessary suffering before losing their consciousness.[15] Besides, some reports suggest that seals are skinned while their consciousness still remains partly because of the nature of seal hunting that is done in a harsh environmental conditions and required quick execution.[16] As a result of the controversial aspect of seal harvesting, the government were called to address the issue relating to the cruelty towards seals. Before the adoption of the EU Seal Regime that was challenged in this WTO case, the EU has introduced a series of regulations as a response to the growing public demand. In 1983, the European Community adopted Council Directive 83/129/EEC[17] to prohibit the importation of products derived from the pups of harp and hooded seals.[18] The ban was amended to be permanent in 1989.[19] Additionally, several EU members have passed legislation banning the seal products based on the similar ethical concerns such in the Netherlands, Belgium and Germany.[20] These regulatory actions of the EU and its members confirm that animal welfare has long been established as an important moral value in Europe.[21] Due to the public movement to address this morality issue, animal welfare has become a widely-accepted basis for legislations.[22] Thus, it can be said that the EU Seal Regime is a result of the EU's several attempts to improve the humane treatment on seals.[23]

**2.2 The content of the EU Seal Regime and the arising dispute**

The EU Seal Regime is composed of two regulations. The first one is Regulation

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[15] Ibid.

[16] Ibid.

[17] Council Directive 83/129/ECC of 28 March 1983 concerning the Importation into Member States of skins of Certain Seal Pups and Products Derived Therefrom [1983] OJ L 91/30.

[18] David B. Wilkins, *Animal Welfare in Europe: European Legislation and Concerns* (London: Kluwer Law International, 1997), 69.

[19] Ibid.

[20] Howse and Langille, "Permitting Pluralism: The Seal Products Dispute Ad Why the Wto Should Accept Trade Restriction Justified by Noninstrumental Moral Values," 377-378.

[21] Ibid.

[22] Ibid., 377-378.; Sykes, "Sealing Animal Welfare into the Gatt Exceptions: The International Dimension of Animal Welfare in Wto Disputes," 475.

[23] Howse and Langille, "Permitting Pluralism: The Seal Products Dispute Ad Why the Wto Should Accept Trade Restriction Justified by Noninstrumental Moral Values," 387.

1007/2009[24] (Basic Regulation), which prohibits the placing of 'product … deriving or obtained from seals, including meat, oil, blubber, organs, raw fur skins and fur skins …'[25] on the EU market.[26] To provide guidance on the implementation, Regulation 737/2010[27] (Implementing Regulation) was adopted in 2010 as a second regulation containing further implementation details.[28] According to the Preamble, the regulations aimed at improving animal welfare associating with the methods of killing seals and harmonizing the rules on trade in seal products across the EU.[29] They acknowledged that seals can suffer from unnecessary pain and should be prevented from inhuman treatment.[30]

However, the Basic Regulation provides three exceptions of the ban with certain conditions.[31] Firstly, it permits the placing on the market of seal products 'resulting from hunts traditionally conducted Inuit and other indigenous communities' (IC exception).[32] Secondly, seal products, which are purchased outside the EU for 'the personal use of travelers and their families' on a non-commercial and occasional basis, are excluded from the ban (Travelers exception).[33] Thirdly, seal products, as a result of hunts that are conducted for the sustainable management of marine resources purpose, are exempted from the prohibition (MRM exception).[34] The Implementing Regulation sets out additional requirements of the three exceptions that must be met before allowing the exemption.[35] For example, it lays down the characteristics of Inuit hunters who are qualified under IC

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[24] Regulation (EC) 1007/2009 of the European Parliament and of the Council of 16 September 2009 on Trade in Seal Products [2009] OJ L 286 ('Basic Regulation').

[25] Basic Regulation art 2 (2).

[26] Ibid., art 2.3, 3.1.

[27] Commission Regulation (EU) 737/2010 of 10 August 2010 Laying Down Detailed Rules for the Implementation of Regulation (EC) 1007/2009 of the European Parliament and of the Council on Trade in Seal Products [2010] OJ L 216 ('Implementing Regulation').

[28] Appellate Body Report, *EC-Seal Products,* 96.

[29] Basic Regulation Preamble.

[30] Ibid.

[31] Ibid., art 3.

[32] Ibid., art 3 (1).

[33] Ibid., art 3 (2) (a).

[34] Ibid., art 3 (2) (b).

[35] Implementing Regulation art 3, 4, 5.

exception.[36] Also, the hunt must 'contribute to the subsistence of the community'.[37]

## 3. Analyzing the EC-Seal Products decision

After the consultations with the EU were not successful, Canada and Norway challenged the WTO-consistency of the EU Seal Regime. Both Canada and Norway claimed that the EU Seal Regime was inconsistent with the GATT's MFN and national treatment obligations.[38] The public morals exception under Article XX(a) was invoked to justify the moral regulations after the ruling in *US-Gambling* and *China-Publication and Audiovisual Products*.[39] Although the complainants alleged that the EU violated obligations under the Technical Barriers to Trade Agreement and the Agreement on Agriculture, this essay primarily involves the claims under the GATT. This section will discuss this ruling by focusing on the GATT obligations.

### 3.1 GATT: Non-Discrimination

Non-discrimination is the fundamental principles underlying WTO's various obligations. The MFN and national treatment obligations under Article I:1 and III:4 seek to provide equal competitive opportunities for all members.[40] Determining the 'less favorable treatment' element, the panel and AB primarily assessed whether the EU measure caused the detrimental impact on competitive opportunities for imported products.[41] They found that the IC exception opened the opportunities for almost seal products from Greenland to enter the EU market; however, it bars the large number of Canadian and Norwegian seals. This rendered differential treatment between domestic and imported products.[42]

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[36] Ibid., art 3 (a).

[37] Ibid., art 3 (c).

[38] Panel Report, *EC-Seal Products,* [1.6].

[39] Ibid.

[40] Appellate Body Report, EC-Seal Products, [5.82] cited in Paola Conconi and Tana Voon, "Ec-Seal Products: The Tension between Public Morals and International Trade Agreement," *World Trade Review* 15, no. 2 (2016): 211, 217.

[41] Panel report, EC-Seal Products, [7.132] cited in Gregory Shaffer and David Pabian, "The Wto Seal Products Decision: Animal Welfare, Indigenous Communities and Trade," *American Journal of International Law* 190 (2015): 154, 156.; *Appellate Body Report,* EC-Seal Products, [5.95].

[42] Appellate Body Report, EC-Seal Products, [5.95].

Accordingly, the measures constituted *de facto* discrimination, which led to the breach of Article I:1 and III:4, because it modified the conditions of competition for Canadian and Norwegian products.[43]

**3.2 Article XX(a): Public Morals and Animal Welfare**

As the EU Seal Regime was found to be inconsistent with the GATT non-discrimination obligations, the AB proceeded to determine whether the measure could be justified under Article XX(a). As the WTO acknowledges that there are other competing interests that should not be undermined by trade, Article XX provides flexibilities for members to pursue non-trade policy objectives.[44] It gives the opportunity for the WTO adjudicators to strike a balance between trade liberalization and state regulatory autonomy.[45]

To determine the justification, members are required to prove that their measures pass a two-tier test under Article XX.[46] Firstly, the measures must fulfill one of the subparagraph (a)-(j). In *EC-Seal Products*, the measure must fall within the scope of public morals protection and a necessity test under subparagraph (a). Secondly, the requirements under the chapeau must be met to justify the infringement.

**3.2.1 'To Protect Public Morals'**

To decide whether the EU measure falls within the scope of public moral protection, the panel began the analysis by identifying its objective.[47] Considering the

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[43] Panel Report, EC-Seal Products, [7.600], [7.608].

[44] Anton Vedder, *The Wto and Concerns Regarding Animals and Nature,* ed. Anton Vedder (Nijmegen: Wolf Legal Publishers, 2003), 11.; Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization*: *Text, Cases and Materials,* 3rd ed. (Cambridge, UK: Cambridge University Press, 2013), 544, 546-547.

[45] Robert Howse, Joanna Langille, and Katie Sykes, "Pluralism in Practice: Moral Legislation and the Law of the Wto after Seal Products," *George Washington International Law Review* 48 (2015): 81, 109.

[46] Cook and Bowles, "Growing Pains: The Developing Relationship of Animal Welfare Standards and the World Trade Rules."; Bossche and Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials,* 552., see GATT art XX(a):

'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 …'

[47] Appellate Body Report, *EC-Seal Products,* 130.

legislative history and the text of the measure, the panel ruled that the 'principal' objective of the EU Seal Regime is 'to address the moral concerns of the EU public [in relation to] seal welfare' by decreasing the inhumane hunting of seals and the participation of EU citizens as consumers in economic activity, which encourages the sale of products from inhumanely killed seals.[48] Regarding the scope of 'public morals', the panel asserted the definition established in *US-Gambling*.[49] It agreed with the previous cases that the content can differ in different times and places due to various factors including social, cultural, ethical and religious values.[50] This interpretative approach provided the broad scope of public morals, which allowed members to have some latitude to define public morals value and choose a level of protection that they see appropriate.[51]

Acknowledging members' right to regulate public morals within their territories, the panel concluded that the principal objective of the EU Seal Regime, i.e. enhancing seal welfare, could be recognized as public morals protection.[52] Thus, the EU measure fell within the scope of subparagraph (a). The AB also sided with this ruling.

**3.2.2 'Necessity Test'**

The next question needed to be answered is whether the EU measure is 'necessary' to protect public morals. Following the previous decisions,[53] the AB weighed and balanced relevant factors such as the importance of the concerned value and the degree of the measure's contribution to the objectives.[54] The ruling has extensively

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[48] Panel Report, *EC-Seal Products,* 123.

[49] The terms 'public morals' denotes standards of right and wrong conduct maintained by or on behalf of a community or nation, see Panel Report, *EC-Seal Products,* 114.

[50] Panel Report, *United States – Measures Affecting the Cross Border Supply of Gambling and Betting Services,* WTO Doc WT/DS285/R (20 April 2005) ('US-Gambling') 237.

[51] Panel Report, *EC-Seal Products,* 114.

[52] Ibid., 170.

[53] See Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres,* WTO Doc WT/DS332/AB/R (17 December 2007) ('Brazil-Retreaded Tyres') and Appellate Body Report, United States – Measures Affecting the Cross Border Supply of Gambling and Betting Services, WTO Doc WT/DS258/AB/R (20 April 2005) DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475) ('US-Gambling').

[54] Panel Report, US-Gambling, 240 cited in Bossche and Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials,* 63.; Panel Report, China – *Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products,* WTO Doc WT/DS363/AB/R and Corr.1 (19 January 2010) ('China-Publication and Audiovisual Products') 291, 286 cited in Bossche and Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials,* 570.

explained the contribution of the measure to the objective. It rejected a materiality of the contribution as a pre-determined threshold in this analysis as other factors should also be taken into account.[55] In this respect, the AB agreed with the panel's qualitative approach, which anticipated the possible contribution of the measure, despite basing on the limited information.[56] Given the ban's contribution to the reduction of the demand on seal products and the discouragement of EU citizen's participation in inhumanely killed seal industry, the AB agreed that the EU measure made some contribution to the objective 'to a certain extent'.[57]

Moreover, the AB analyzed the requirement of reasonably available alternative measure that were less trade-restrictive. Although there were other possible measures such as certification system and labelling requirements, those were not reasonably available because they were 'merely theoretical in nature, not capable for a member to implement or [imposed] an undue burden on the member'.[58] The AB came to conclusion that the EU Seal Regime met the necessity requirement under Article XX(a).[59]

**3.3 The Chapeau of Article XX**

The second tier of the justification is the compliance with its chapeau. The chapeau is included to prevent the abuse of Article XX for protectionism.[60] It attempts to balance a member's right to defend itself and other members' rights to exercise the substantive rights under the GATT.[61] The chapeau focuses on the application of the measure, which must not constitute 'a mean of arbitrary or unjustifiable discrimination between countries where the same conditions prevail'.[62]

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[55] Appellate Body Report, *EC-Seal Products,* 153.

[56] Ibid., 154-155.

[57] Ibid., 156.

[58] Panel Report, *EC-Seal Products,* 135, 142; Appellate Body Report, *Brazil-Retreaded Tyres*, 63 cited in Appellate Body Report, *EC-Seal Products,* 171.

[59] Appellate Body Report, *EC-Seal Products,* 171, 174.

[60] Bossche and Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials,* 573.

[61] Ibid.

[62] GATT art XX Chapeau.

After considering many aspects of the application of the EU Seal Regime, particularly the IC exception, the AB reached the conclusion that the EU measure failed to meet the chapeau requirements.[63] The AB stated that in order to defend that the discriminatory effect is not unjustifiable or arbitrary, there must exist a rational relationship between the policy objective relating to seal welfare and the discrimination resulting from the IC exception.[64] It added that this requirement was not the sole test as there were other factors that should be assessed.[65] Although the IC exception was included to address the IC interests, the EU failed to show how the conflict between the discrimination derived from 'the manner in which the EU Seal Regime treats IC hunts as opposed to commercial hunts' and policy objective of animal welfare could be reconciled.[66]

Other elements in the design of the exception also demonstrated the arbitrary or unjustifiable discrimination. The language used in the qualification criteria[67] under the IC exception was too ambiguous that 'commercial hunts' may unintentionally fall within the exception mainly aiming at IC hunts.[68] Additionally, it viewed that the EU had not made 'comparable efforts' to facilitate Canadian Inuit to access the EU market as similarly as it has done for Greenlandic Inuit.[69] In conclusion, the EU Seal Regime constituted a violation of non-discrimination obligations and could not be justified under Article XX(a) of public moral exception.

## 4. Implications for Future Cases

The finding in *EC-Seal Products* are appreciated by supporters from both sides. Canada and Norway readily embraced the result since they have long argued that the

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[63] Appellate Body Report, *EC-Seal Products,* 189.

[64] The Appellate Body referred to Brazil-Retreated Tyres, see Appellate Body Report, *EC-Seal Products,* 182.

[65] Appellate Body Report, *EC-Seal Products,* 178.

[66] Ibid., 182.

[67] The components of IC hunts, the identity of the hunter, the manner of the use of hunted seal products and the contribution to the subsistence of the community.

[68] Appellate Body Report, *EC-Seal Products*, 189.

[69] Ibid., 188-189.

EU Seal Regime was applied in an arbitrarily or unjustifiably discriminatory manner.[70] For the EU, despite losing the dispute, the outcome was acceptable to some extents because the seal regulations were not inherently inconsistent with WTO law.[71] From the animal welfare standpoint, although the EU measure could not fit with the WTO obligations, animal welfare advocates have appraised the result as the AB recognized animal welfare as a legitimate ground of public moral exception.[72]

**4.1 Concerned Issues**

The WTO adjudicating bodies have furthered and clarified several GATT provisions, especially public moral exception. However, other consequences from this recent decision should not be overlooked as there are some doubtful issues emerging from the ruling.

Firstly, the interpretative method on the scope of public morals is problematic. It could open opportunities for arbitrary regulatory actions since it can be implied that the EU does not have to demonstrate the legitimate authority that animal welfare is inherently local value to fulfil Article XX(a) element.[73] Additionally, the AB should take this opportunity to elaborate the concept of public morals and a method to prove its existence and legitimacy; however, it did not do so.[74] To prevent the abuse of public morals exception, there must be a required proof of the existence that is stronger than considering the legislative history and the measure itself.[75] Various proofs of legitimacy range from legislator's views, international agreements that states have committed, non-governmental organizations

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[70] International Centre for Trade and Sustainable Development (ICTSD), (27 May 2014), "WTO Appellate Body Deems EU Seal Ban 'Justified' Implementation Flawed," last modified n.d., March, 15, 2015, from http://www.ictsd.org/bridges-news/biores/news/wto-appellate-body-deems-eu-seal-ban-%E2%80%9Cjustified%E2%80%9D-implementation-flawed

[71] Ibid.

[72] CBC News, "Eu Seal Products Ban Upheld in WTO Appeal," last modified May 22 2014, accessed January 20, 2015, http://www.cbc.ca/news/canada/newfoundland-labrador/eu-seal-product-ban-upheld-in-wto-appeal-1.2650791

[73] Shaffer and Pabian, "The Wto Seal Products Decision: Animal Welfare, Indigenous Communities and Trade," 159.

[74] Ibid., 8.

[75] Katarina Jakobsson, "The Dilemma of Moral Exception in the WTO," (Independent Thesis Advanced Level Master's thesis, Stockholm University, 2013), 36.

within the state ad opinion polls, which the EU has presented in this case.[76]

Secondly, some interpretations on the chapeau requirement pose doubts on the AB's view regarding measures with multiple policy objectives. Despite primarily protecting seal welfare, the EU Seal Regime is not a measure with a single regulatory purpose. While the AB considered the 'reconciliation' between seal welfare and the interests of indigenous communities, it did not explicitly recognize the legitimacy of the regulatory purpose of IC exception as an independent policy objective.[77] This was partly because indigenous rights is not listed in the subparagraphs of Article XX although the AB has opened the opportunity for other legitimate policy objectives by stating that the 'relationship' of the discrimination to the objective was not the sole test.[78] This way of interpretation constitutes incoherence that can undermine the chapeau's original purposes and functions in counteracting protectionist measures. It also causes uncertainties for a member to regulate non-trade areas since the AB did not go further on the extent of 'reconciliation' that the EU had to demonstrate.[79] Therefore, this approach tends to restrain members' regulatory autonomy because it would be difficult for measure with divergent policy objectives to pass the test.

Thirdly, *EC-Seal Products* demonstrates the rigid interpretative method.[80] Although the dispute involves animal welfare and indigenous rights that are addressed in other areas of international law, the WTO did not consider the EU's reference to other international law.[81] Also, it did not discuss the international treaties relating to animal welfare in determining the importance of this moral value. Only the EU's perspective on this concern was discussed, which is contradictory to the real global development of

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[76] Ibid., 34-36; Mark Wu, "Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine," Yale Journal of International Law 33, no. 6 (2008): 215, 235.

[77] Julia Y. Qin, "Accommodating Divergent Policy Objectives under Wto Law: Reflections on Ec-Seal Products," *American Society of International Law* (2015), last modified June 25, 2015, accessed April, 20, 2015, https://www.asil.org/blogs/accommodating-divergent-policy-objectives-under-wto-law-reflections-ec%E2%80%94seal-products

[78] Ibid.

[79] Howse, Langille, and Sykes, "Pluralism in Practice: Moral Legislation and the Law of the WTO after Seal Products," 146.

[80] Shaffer and Pabian, "The Wto Seal Products Decision: Animal Welfare, Indigenous Communities and Trade," 161, 163.

[81] Ibid., 9.

animal welfare. Furthermore, it is argued that the WTO only reasoned its ruling by referring to only its own previous decision and not clearly explaining principles and definition.[82] To maintain its legitimacy in a global trade arena, more elucidation is needed.[83]

Lastly, this conflict between trade liberalization and animal welfare implicates the constant attempt to reconcile sovereign autonomy and economic globalization.[84] The WTO put considerably efforts in delivering a reasonable outcome because it did not disregard the importance of animal welfare and was able to preserve the coherence of global trade regime. After all, the WTO is an economic organization and thus its main mandate is to govern international trade to function as it was intended. It is understandable that free trade interest should not be undermined. Nevertheless, this balance between trade and animal welfare may be ineffective in practice although it has cleared the path for states to achieve their local value of animal protection.

**4.2 Recommendations**

Certainly, there will be more disputes concerning trade and animal welfare coming up in the future. As the WTO's dispute settlement system is at the heart of international trading system, the work of its adjudicators will have significant impacts on various issues including the tension between trade and animal welfare. For animal welfare to survive the WTO challenge, it is crucial to properly strike a balance between trade and non-trade values in the WTO forum. This section will suggest some recommendations for reconciling these competing interests and increasing the WTO's legitimacy both in trade and other regimes.

Firstly, as the seal regulations sought to address diverse local values, this ruling shows that the text of Article XX cannot keep up with emerging non-trade concerns such as the protection of indigenous communities and animal welfare as public morals. Whether or not these non-trade values fit with the WTO obligations depends on how the WTO adjudicators approach Article XX interpretation. Accordingly, Article XX should be amended to have a non-exhaustive list of exceptions and more detailed rules in guiding the dispute

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[82] Ibid., 7.

[83] Ibid.

[84] Fitzgerald, "Morality May Not Be Enough to Justify the Eu Seal Products Ban: Animal Welfare Meets International Trade Law," 104.

settlement bodies to appropriately balance trade with other concerns.[85] Such rules will allow members to achieve diverse legitimate policy goals while preventing the abuse of Article XX from protectionist measures. Yet, this proposal might be unrealistic since it would be difficult and time-consuming for members to negotiate the textual modification.

Secondly, the WTO could address animal welfare more rigorously by providing a new legal interpretation of Article XX to allow for greater consideration of animal welfare.[86] This is a more flexible solution comparing the previous one. The AB has always adopted evolutionary interpretation for acknowledging contemporary rules, which can be seen in this ruling recognizing animal welfare as public morals.[87] For example, the AB could take the rights of indigenous people and member's obligation to other international treaties into account when interpreting and applying Article XX chapeau. Using this method would give a new perspective in evaluating 'arbitrary and unjustifiable discrimination' because it emphasize the EU's effort to adopt WTO-consistent animal welfare regulations while trying to preserve indigenous communities' interests. It is true that if the EU really seeks to support indigenous communities, it should facilitate Canadian Inuit to access the IC exception as well. Yet, we should bear in mind that a state would prioritize its own nationals over foreigners, regardless of indigenous status. Accordingly, the adjudicators should apprehend the conflicting obligations and a state's policy choices although their primary concern is economic matters. The result of this approach would principally depends on the willingness of the judicial bodies whether to maintain the same approach or expand the interpretation. This is a difficult decision to make since whichever path they choose will be followed by strong critics.

Lastly, bringing the measure into conformity with WTO law, the EU has modified its seal regulations to be more comprehensive. Regulation 2015/1775[88] and Regulation

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[85] Shaffer and Pabian, "The Wto Seal Products Decision: Animal Welfare, Indigenous Communities and Trade," 162.

[86] Wagman and Liebman, *A Worldview of Animal Law*, 307.

[87] Ibid.

[88] Regulation (EU) 2015/1775 of The European Parliament and of the Count of 6 October 2015 amending Regulation (EC) No.1007/2009 on Trade in Seal Products and Repealing Commission Regulation (EU) No 737/2010 [2015] OJ L 262 ('Regulation 2015/1775').

2015/1850[89] were passed to amend and repeal the Basic and Implementing Regulation respectively. The MRM exception is abolished because the difficulty in distinguishing MRM and commercial hunts may constitute unjustified discrimination.[90] Correspondingly, given the added texts, the EU significantly regarded the WTO ruling. For instance, the reference to public morals for animal welfare can be found in the preamble. The consideration of animal welfare is also emphasized since it is included as a separate criteria of the IC exception. The effectiveness of this new law in protecting the welfare of seals and the interests of indigenous people, without creating 'unjustifiable or arbitrary' discrimination, will largely depend on the implementing process.

## 5. Conclusion

The outcome of the *EC-Seal Products* is aligned with the previous decision on Article XX. The AB made a considerable and understandable effort to balance trade and public morals concerning animal welfare. It resolved this tension by recognizing animal welfare as public morals while assessing discriminatory effect of the application of the EU measure. Nonetheless, some points remain unclear. The chapeau of Article XX plays a significant role in permitting states to regulate legitimate regulations without distorting trade. This case demonstrates the inconsistency in its interpretation, which can be problematic for members who want to pursue other policy objectives. In particular, a measure with multiple policy goals, similarly to the EU Seal Regime, has to pass tighter requirements before being adopted. I am with the opinion that being more aware of trade's adverse impacts on other values will support the WTO to maintain it importance in governing international trade. As the EU has already amended its measure according to the decision, the implementation will prove the effectiveness of the WTO's work in balancing trade, animal welfare and the well-being of indigenous communities.

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[89] Commission Implementing Regulation (EU) 2015/1850 of 13 October 2015 Laying Down Detailed Rules for the Implementation of Regulation (EC) No.1007/2009 of the European Parliament and of the Council on Trade in Seal Products [2015] OJ L 271.

[90] Regulation 2015/1775 Preamble (4).

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