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# Too much zeal on seals? Animal welfare, public morals and consumer ethics at the bar of the WTO

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**Abstract:** The Seals Regime at issue in *EC-Seals* pursued conflicting policy objectives of animal welfare, protection of public morals, Inuit and the marine environment through regulation of product composition and hunting. The panel's TBT findings are problematic: The panel empties the term 'related' PPMs in the definition of technical regulations of content and it does not distinguish and sequence the legal tests of TBT Articles 2.1 and 2.2 clearly enough. It fails to analyse properly how the necessity analysis should be performed for a multipurpose policy and reduces the ability of WTO members to defend them. The panel also adopts an unduly empiricist definition of public morals and legitimate objectives. The article argues that the content of public morals and legitimate objectives in Article 2.2 should be informed by moral philosophy. Its analysis suggests that collectively binding regulation of ethical standards can generally not be considered to be about public morals.

## I. INTRODUCTION

The Seals case concerns an EU ban on placing seal and seal products on the market. Three exceptions to the ban apply: (i) seal products from hunts traditionally conducted by Inuit and other indigenous communities in a region, contributing to their subsistence and being partially used, consumed or processed within the community according to their traditions can be placed on the EU market (IC exception) (ii) travelers may import small consignments of seal products for personal use and (iii) seal products resulting from hunts for the sole purpose of sustainable marine resources management may be placed on the market on a non-profit, non-systematic basis (MRM exception).<sup>1</sup>

Most Canadian seal products are commercially hunted and are therefore excluded from the EU market. Canada's large Inuit population also hunts seals but has not exported seals to the EU under the IC exception. Most Greenlandic seal products are hunted by Inuit and distributed and exported by their own processing facilities on a large scale. Most Norwegian commercial seals are hunted according to a marine resources management plan but remain excluded because they are sold to make profit and are conducted systematically. A small number of European seals are placed on the market under the MRM exception.

At the panel stage, the main legal issues were whether or not the TBT Agreement applies to the Seals Regime and whether or not it complies with its Article 2.1, and in particular whether or not the difference in treatment of seals hunted commercially, by Inuit communities and for marine protection purposes stemmed exclusively from a legitimate regulatory distinction and was applied even-handedly. Under Article 2.2, the legitimacy of the objectives, the number of objectives pursued and the necessity of the Seals Regime were contested. More particularly, the issues were whether the seal welfare and consumer ethics objectives were legitimate objectives, whether the purposes of the exceptions set forth additional objectives and how the

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<sup>1</sup> Regulation (EC) No. 1007/2009 of the European Parliament and of the Council, adopted on 16 September 2009 on trade in seal products, Article 3. This regulation is also called the Basic Regulation. The implementing regulation of the Basic regulation was also challenged before the panel. Its title is Commission Regulation (EU) No. 737/2010 laying down detailed rules for implementation of the Basic Regulation, adopted 10 August 2010.

ban and exceptions together contributed to fulfilling the legitimate objective, weighed against their trade-restrictiveness taking account of the risk non-fulfillment of the objective would create. The complainants also proposed less trade-restrictive alternatives to the ban on commercially hunted seal and seal products in the form of animal welfare regulation, certification and labels. Claims in respect of certification were also made under Articles 5.1.2 and 5.2.1 of the TBT Agreement. The main legal issues under the GATT were whether or not the Seals Regime violates Articles I:1, III:4 and XI:1 and whether or not such violation can be justified under Article XX. The complainants also made claims under Article 4.1 of the Agreement on Agriculture and the non-violation remedy. The appellants and appellee appealed panel findings on the applicability of the TBT Agreement and several findings under Articles 2.1 and 2.2. Since the Appellate Body reversed the panel's findings on the applicability of the TBT Agreement and refused to complete the analysis on this point, it did not review any of the panel findings under Articles 2.1, 2.2, 5.1.2 and 5.2.1 but instead declared them moot. In relation to the GATT, the parties appealed findings of a violation of Article I:1, the rejection of the legitimate regulatory purpose test of the TBT Agreement under Articles I:1 and III:4, and Article XX findings on necessity of the Seals Regime for the protection of public morals and under the chapeau.

The case throws up interesting questions concerning the interaction of animal welfare concerns and the ethical-expressive preferences of European citizens against animal cruelty,<sup>2</sup> the interpretation and applicability of key provisions in the Agreement on Technical Barriers to Trade (TBT) and the General Agreement on Tariffs and Trade (GATT), the concept of public morals and the ability of WTO members to reconcile legal obligations they have stemming from the functionally differentiated sub-systems of WTO law, international human rights law on protection of indigenous communities and minorities and emergent international law principles on animal welfare.<sup>3</sup>

This contribution focuses on the TBT aspects of the case. The main focus is on how public morals objectives of multipurpose technical regulations can be justified under Articles 2.1 and 2.2 of the TBT Agreement. The prior question of how detrimental impacts on like products are established will not be addressed. The article first analyses the question of whether the TBT Agreement applies to the Seals Regime or whether, instead, only the GATT applies. It is argued that measures that apply to production or processing methods (PPMs) that leave no physical traces in a product can nevertheless be considered to be technical regulations as long as they pertain to production or processing aspects with an inherent relation to the product. The article then reviews the panel's non-use of other international law in its Article 2.1 analysis and discusses the distinction between the legal tests in Article 2.1 and 2.2. Subsequently, the article examines how the concepts of 'public morals' and 'legitimate objectives' were interpreted in the case. It criticizes the heavy weight attributed to public opinion in determining the content of public morals. Next, the article evaluates how the panel

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<sup>2</sup> R. Howse and J. Langille, 'Permitting Pluralism: the Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values', 37 *Yale Journal of International Law* (2012), 367. The case is Panel Report, *European Communities, Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R, WT/DS401/R and Appellate Body Report, *European Communities, Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R, WT/DS401/AB/R, adopted 18 June 2014.

<sup>3</sup> On the international human rights instruments affected by the Seals case, see J. Beqiraj, 'The Delicate Equilibrium of EU Trade Measures: The Seals Case' 14 *German Law Journal* (2013), 279. On an emerging general principle of international law for the protection of animal welfare relevant to the interpretation in this case, see K. Sykes, 'Sealing Animal Welfare into the GATT Exceptions: the International Dimension of Animal Welfare in WTO Disputes', *World Trade Review*, available on CJO 2013 doi:10.1017/S1474745613000232.

examined a regulatory measure embodying complex cost-benefit analysis under Articles 2.1 and 2.2. Drawing on normative political theory, section IV then proposes an alternative interpretation of the term ‘public morals’ that differentiates ethical-expressive values from deontological morality and explains why the former should not normally be considered to fall under the term ‘public morals.’

## **II. SUMMARY OF RELEVANT FINDINGS**

### **A. The analysis of whether the Seals Regime is a technical regulation**

The panel found that the Seals Regime with the ban and the exceptions considered together was a technical regulation.<sup>4</sup> It found that the prohibition on seal products laid down product requirements in the negative form (products must not contain seal).<sup>5</sup> It also drew on the Appellate Body’s determination in *EC – Asbestos* that the chrysotile exception set down mandatory provisions for products with certain objective characteristics and thus fell within the definition of a technical regulation.<sup>6</sup> The panel determined that the criteria of the IC, MRM and travelers exceptions also laid down objectively definable features of products (products must meet the terms of the exceptions) and, for this reason, set down product characteristics.<sup>7</sup>

The Appellate Body reversed the panel’s finding that the Seals Regime constituted a technical regulation.<sup>8</sup> It faulted the panel for not having carried out a holistic assessment of the weight and relevance of all the components of the measure but rather gave the most weight to the fact that the Seals Regime laid down product requirements in the negative form.<sup>9</sup> In the Appellate Body’s assessment, the panel failed to examine the integral and essential characteristics of the measure by not taking proper account of the fact that the Seals Regime also contained a prohibition on seal as such and created exceptions depending on the way seals were hunted and therefore did not prescribe product characteristics.<sup>10</sup> It also considered that the applicable administrative provisions of the Seals Regime pertained to the way seals were hunted rather than laying down product characteristics.<sup>11</sup> The Appellate Body refrained from determining whether or not the exceptions set out PPMs related to product characteristics out of concern for due process as the parties had only made limited arguments on this point.<sup>12</sup> As a result of having reversed the panel’s finding that the Seals Regime was a technical regulation, the Appellate Body also declared moot all other legal findings under the TBT Agreement of the panel.<sup>13</sup>

### **B. The panel’s analysis of Article 2.1 TBT**

The panel followed the analytical approach to Art. 2.1 of prior TBT cases by examining whether any detrimental impact on foreign products stemmed exclusively from a legitimate

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<sup>4</sup> Panel Report, *EC-Seals*, paras. 7.100, 7.125.

<sup>5</sup> *Ibid.*, para. 7.106.

<sup>6</sup> *Ibid.*, para. 7.108; Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, para. 74.

<sup>7</sup> Panel Report, *EC – Seals*, paras. 7.108-7.112.

<sup>8</sup> Appellate Body Report, *EC-Seals*, para. 5.29.

<sup>9</sup> *Ibid.*, paras. 5.28-5.29, 5.38.

<sup>10</sup> *Ibid.*, paras. 5.36, 5.41, 5.45.

<sup>11</sup> *Ibid.*, 5.57.

<sup>12</sup> *Ibid.*, 5.67-5.69.

<sup>13</sup> *Ibid.*, para. 5.70.

regulatory distinction.<sup>14</sup> The likeness of commercial, IC and MRM seal was not contested.<sup>15</sup> As the majority of Canadian products were banned while virtually all Greenlandic products qualified under the IC exception and an absolutely small number of products representing the bulk of the EU's total seal production qualified under the MRM exception, the panel found a detrimental impact.<sup>16</sup>

Turning to the facts and the legitimacy of the regulatory distinction between commercial, IC and MRM seals, the panel first reviewed the conditions for seal hunting in general and found certain inherent animal welfare risks.<sup>17</sup> Next, the panel established enhanced animal welfare risks in commercial hunts due to the competitive pressure to kill more seals.<sup>18</sup> Having reviewed the characteristics of IC hunts, the panel also found seal welfare concerns to be present and a lack of rational connection with the principal animal welfare objective of the Seals Regime.<sup>19</sup>

Subsequently, the panel analyzed whether commercial and IC hunts differed in their purpose and whether this difference justified the regulatory distinction between the products.<sup>20</sup> Although the panel saw a resemblance to the purpose of commercial hunts when IC seals were sold on the market to generate family income, it considered that the subsistence purpose of personal consumption and the link to IC traditions constituted a difference in purpose.<sup>21</sup> It found that the objective of protecting IC traditions justified the regulatory distinction drawn by the IC exception.<sup>22</sup> However, the EU Seals Regime was not applied in an even-handed manner. The panel suggested that the Greenlandic IC hunts exhibited commercial scale activities and were able to avail themselves of the exception while for Canadian IC hunts, which had relied on the commercial sealing industry for distribution and hunted a low number of seals, accessing the exception through development of their own distribution channels was not cost effective.<sup>23</sup>

The panel conducted its analysis of the MRM exception along similar lines as the IC exception. According to the EU, the purpose of the MRM exception was protection of local fish stock from nuisance seals and population control if seals posed ecosystem threats. The panel found an absence of a connection to the seal welfare purpose of the Seals Regime *inter alia* due to relaxed requirements on hunting methods, and considered the commercial motives of the hunt (protection of fisheries) similar to the motives of commercial hunts.<sup>24</sup> It rejected the even-handedness of application, because of evidence from the legislative history that the

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<sup>14</sup> Panel Report, *EC-Seals*, para. 7.132. The prior cases are Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 14 April 2012, paras. 175, 181-2; *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R, adopted 23 July 2012, paras. 271, 373-379, Appellate Body Report, *United States, Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, paras. 215, 315-322.

<sup>15</sup> Panel Report, *EC-Seals*, paras. 7.138-7.140. For a skillful analysis of the unlikeness of commercially hunted and Inuit-hunted seals, see Robert Howse, Joanna Langille, Katie Sykes, 'Written Submission of Non-Party Amicus Curiae', available at , <http://www.worldtradelaw.net/amicus/howseasealsamicus.pdf>, paras. 77-83.

<sup>16</sup> Panel Report, *EC-Seals*, paras. 7.164, 7.168, 7.170.

<sup>17</sup> *Ibid.* paras. 7.185-7.224.

<sup>18</sup> *Ibid.*, paras. 7.225-7.245.

<sup>19</sup> *Ibid.*, paras. 7.261-7.271, 7.275,

<sup>20</sup> *Ibid.*, para. 7.282.

<sup>21</sup> *Ibid.*, paras. 7.285-7.289.

<sup>22</sup> *Ibid.*, paras. 7.292-7.298.

<sup>23</sup> *Ibid.*, paras. 7.302-7.319.

<sup>24</sup> *Ibid.*, paras. 7.330-7.331, 7.335, 7.343-7.347.

MRM exception was designed to fit European MRM hunts.<sup>25</sup> The panel's overall conclusion on the Seals Regime was that it violated Art. 2.1 of the TBT Agreement.<sup>26</sup>

### C. The panel's analysis of Article 2.2 TBT

The EU argued that the purpose of its seals regulation was to protect public morals related to seal welfare (reduction in number of animals killed inhumanely) and to prevent the participation of consumers in sustaining the market in seals and seal products.<sup>27</sup>

The panel asked itself whether there was evidence of EU public opinion of a concern with seal welfare and their participation as consumers in sustaining trade in seals and seal products.<sup>28</sup> Then it looked at whether the public's concern with seal welfare was described as an issue of public morals in EU legislative instruments.<sup>29</sup> It affirmed both and therefore concluded that the public's concerns about seal welfare constitute a moral issue for EU citizens.<sup>30</sup> Given that both GATT Art. XX (a) and GATS Art. XX (a) mention public morals, the panel concluded that public morals was a legitimate objective within Art. 2.2 of the TBT Agreement.<sup>31</sup> The panel then assessed whether addressing public morals concerns on seal welfare was a legitimate objective (LO). It made a positive conclusion because the concerns of the EU public had been demonstrated to involve standards of right and wrong and because animal welfare is a globally recognized issue in other national and international legal instruments.<sup>32</sup>

The panel considered that the objective of the Seals Regime was to protect public morals concerns in respect of seal welfare and rejected that the IC, MRM and travelers exceptions added further objectives.<sup>33</sup> It drew a distinction between IC, MRM and travelers' interests accommodated in a measure and the main objective of the measure as a whole.<sup>34</sup> It did so because the Seals Regime was formulated as a ban with exceptions operating as a prohibition against seal products subject to the exceptions, because the legislative history referred only to ensuring that the interests of Inuit were not affected and because the interests addressed in the exceptions were not reflected in the concerns of EU citizens.<sup>35</sup>

The panel determined the measure was trade-restrictive.<sup>36</sup> It then examined the degree of contribution of the ban to animal welfare.<sup>37</sup> It found that the exceptions reduced the contribution towards fulfilling the LO because they allowed seals to be killed inhumanely, while EU public concerns did not distinguish between the purposes of the hunt in their rejection of seal hunting.<sup>38</sup> The panel concluded that the measure made only some

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<sup>25</sup> Ibid., paras. 7.351-7.352.

<sup>26</sup> Ibid., para. 7.353.

<sup>27</sup> Ibid., para. 7.374.

<sup>28</sup> Ibid., para. 7.383.

<sup>29</sup> Ibid., 7.404-7.410.

<sup>30</sup> Ibid., paras. 7.386-7.398.

<sup>31</sup> Ibid., paras. 7.417-7.418.

<sup>32</sup> Ibid., paras. 7.419-7.420.

<sup>33</sup> Ibid., paras. 7.401-7.402.

<sup>34</sup> Ibid., para. 7.402.

<sup>35</sup> Ibid., paras. 7.401-7.402.

<sup>36</sup> Ibid., para. 7.426.

<sup>37</sup> Ibid., para. 7.442.

<sup>38</sup> Ibid., paras. 7.445, 7.447, 7.451-2, 7.453-7.455. The processing exception allows imports of seal products regardless of the origin of the hunt for processing for export.

contribution to its stated objective.<sup>39</sup> In its evaluation of the risk non-fulfilment created, the panel reiterated the measure's limits to protecting seal welfare.<sup>40</sup> The panel rejected the complainants' proposed less restrictive alternatives of market access on the basis of labels and certification of seals and seal products to humane killing methods.<sup>41</sup> As a result, the panel concluded that the EU seal regime was not more restrictive than necessary to fulfil legitimate objectives.<sup>42</sup>

### III. ANALYSIS OF THE MAIN FINDINGS

#### A. Is the Seals Regime a technical regulation?

The EU's Seals Regime is essentially a ban on seal and any product containing seal subject to the IC and MRM exceptions, which regulated how seals are hunted.<sup>43</sup> The issue arises whether a measure is a technical regulation as soon as one of its elements meets the definition or whether the nature of the whole measure must be such that it can be classified as a technical regulation. The other question is whether the IC and MRM exceptions, which did not affect or change the physical characteristics of the seal products and were therefore unincorporated PPMs, set down product characteristics or related PPMs such as to fall under the definition of a technical regulation.<sup>44</sup>

Concerning the first issue, it would be problematic if a multi-element measure could be considered as a technical regulation as soon as one of its elements meets the definition of a technical regulation because this element could be relatively unimportant within the overall regulatory scheme. The result would be that multi-element measures would have to be justified under the TBT Agreement not designed to regulate non-technical regulations in the first place. The Appellate Body's approach arguably gives more weight to all the elements of the measure and understands that the essence of the Seals Regime is a PPM related to the way seals are hunted (commercial vs. IC or MRM seals).

On the second issue, the panel had found that the terms of the exceptions set down objectively definable features of products containing seal and therefore laid down product characteristics. This interpretation empties the term 'related PPMs' in the definition of a technical regulation of independent legal meaning because, any PPM, whether related or unrelated to product characteristics, would do so.<sup>45</sup> Such a result goes against the principle of effective treaty

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<sup>39</sup> Ibid., para. 7.460.

<sup>40</sup> Ibid., paras. 7.465-7.466.

<sup>41</sup> Ibid., paras. 7.480-7.482, 7.496-7.497, 7.499, 7.502.

<sup>42</sup> Ibid., para. 7.504.

<sup>43</sup> Pitschas and Schloemann disagree that the EU Seals Regime sets down PPM measures. According to them, the Seals Regime stipulates the identity of the hunter (Inuit) and the purpose (MRM exception) but not the process through which the hunt must occur. See C. Pitschas and H. Schloemann, 'WTO Compatibility of the EU Seal Regime: Why Public Morality is Enough (but May not Be Necessary),' *Beiträge zum transnationalen Wirtschaftsrecht* (Institute of Economic Law, 2012) at 9-10. However, their distinction is unduly formalistic. A regulation stipulating that only persons with a certain qualification may be engaged in the production of a product (for instance in the mixing of chemicals) attaches to persons but is really concerned with product characteristics, such as explosiveness. Such a regulation is therefore fully within the scope of the definition of a technical regulation in the TBT Agreement.

<sup>44</sup> On these grounds, the US argues that the Seals Regime is not a technical regulation. See US Third Party Submission, available at [http://www.ustr.gov/sites/default/files/DS400.AB\\_US3rdPtySub.Public.pdf](http://www.ustr.gov/sites/default/files/DS400.AB_US3rdPtySub.Public.pdf), paras. 40-41.

<sup>45</sup> Other Appellant Submission by the European Union, available at [http://trade.ec.europa.eu/doclib/docs/2014/january/tradoc\\_152142.pdf](http://trade.ec.europa.eu/doclib/docs/2014/january/tradoc_152142.pdf), paras. 66-67. The 'original sin' goes back

interpretation, according to which all the terms in a treaty must be given meaning. For example, even a political trade sanction because country X is non-democratic puts forth objectively definable features of products because it stipulates: ‘a product must not come from country X’ and would lay down product characteristics for the panel. Arguably, such a measure is not dealing with product characteristics but with the general political situation in the country of export because no change in the physical characteristics of the product could ever confer access to this market. The fact that the WTO members included related PPMs in the definition of a technical regulation suggests that there must also be some category of unrelated PPMs that are excluded from the definition of a technical regulation, yet under the panel’s approach such a category would have ceased to exist.

Are the exceptions of the Seals regime excluded from the definition of a technical regulation because they contained an unincorporated PPM not affecting product composition? Howse and Levy have suggested that only PPMs unrelated to traded goods (such as PPMs applicable to trade in services) were meant to be excluded from the scope of the TBT Agreement.<sup>46</sup> Their broad view ignores that the term ‘their related PPMs’ does not refer simply to products but rather to product characteristics. Of course, any product has the characteristic of being tangible but this feature is arguably inherent in the term ‘product’ itself and would not require the addition of the term ‘characteristics’.

I submit that the term ‘their related PPMs’ should be taken to refer to incorporated or unincorporated PPMs that relate to inherent characteristics of the product. Some unincorporated PPMs can in my view relate to product characteristics. By way of example: Seals have the inherent characteristic of living in the wild in certain geographical areas. Assume, *arguendo*, that there is no way to farm them for commercial exploitation. It seems to me that the product seal would have the inherent characteristic of living in and having to be hunted in the wild. Any PPM that allows seals hunted by Inuit also prevalent in this area on the market but bans others is an unincorporated PPM that nevertheless relates to this product characteristic. Two considerations support my interpretation. First, the TBT Agreement refers to product characteristics and not physical properties of the product. Second, the Appellate Body in *EC-Asbestos* referred to product characteristics as ‘objectively definable features...intrinsic to the product itself’.<sup>47</sup> In the example given, it is an objectively definable feature of the product seal that the animal lives and has to be hunted in the wild in certain regions because this feature is independent of any circumstances of production in the country but rather has an inherent link with the seal itself. In *EC-Seals*, the Appellate Body noted that a PPM that is connected with or has a relation to any such intrinsic or objectively definable

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to the earlier not appealed finding in the Panel Report, *US – Tuna II*, paras. 7.71-7.79 that the US labelling requirement on ways of hunting tuna laid down product characteristics and was a technical regulation. There, the panel reasoned that the second sentence of the definition of a technical regulation which included ‘labelling requirements’ sets down examples of technical regulations. As the US measure clearly was a labelling requirement that applied to a product (tuna), the panel considered it fell under the second sentence and that it therefore was a technical regulation. The cardinal mistake the panel made was that any labelling requirement applicable to a product but aiming at regulating unrelated PPMs or the general political situation in the country of production would then be a technical regulation. This empties the term ‘their related PPMs’ of any definitional weight. Moreover, if the second sentence of the definition sets down examples of technical regulations, such examples would arguably have to be read in light of the general definition in the first sentence. The panel instead treated the second sentence as definitive. In a comment on the case, Pauwelyn has wondered whether the case has put an end to the PPM debate. See J. Pauwelyn, ‘Tuna: The End of the PPM distinction? The Rise of International Standards?’, *International Economic Law and Policy Blog*, 22 May, 2012.

<sup>46</sup> R. Howse and P. I. Levy, ‘The TBT panels: US-Clove, US-Tuna, US-COOL’, 12 *World Trade Review* 2 (2013), 327, at 359.

<sup>47</sup> Appellate Body Report, *EC-Asbestos*, para. 67.

features relates to product characteristics.<sup>48</sup> Clearly, in the example given, requirements pertaining to the way seals are hunted relate to an intrinsic aspect of the product and are therefore ‘related PPM’s. If my argument on related PPLs is correct, then the balance may well be tipped in favour of the definition of a technical regulation being met.

## **B. The panel’s non-use of other international law in Art. 2.1**

In this subsection, I only want to focus on the panel’s non-use of other international law as context for the interpretation of Article 2.1 because this aspect is important for the argument that terms such as ‘public morals’ and ‘legitimate’ need to be given some normative – or moral – content. The international human rights covenants shedding light on the reasons for protecting Inuit communities from the ban are arguably a positivization of international standards of morality.

It is submitted that the panel should have taken into account the existence of international human rights documents protecting indigenous people and minorities as context in its interpretation of Article 2.1.<sup>49</sup> Indigenous rights are protected in the ILO Indigenous and Tribal Peoples Convention of 1989, the non-binding Declaration on the Rights of Indigenous People but more importantly also in the form of minority rights to enjoy their own culture in Article 27 of the International Covenant on Civil and Political Rights (ICCPR) and Articles 11 and 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) as well as in interpretations of these provisions.<sup>50</sup>

WTO law should be interpreted in accordance with Article 31 of the Vienna Convention on the Law of Treaties, which requires the treaty interpreter to take into account relevant rules of international law applicable in the relations between the parties in interpreting the treaty provision at issue.<sup>51</sup> The ICCPR and ICESCR enjoy near universal support and bind almost all WTO members.<sup>52</sup> In *EC- Aircraft*, the Appellate Body has relaxed the conditions under which other international law documents not strictly binding on all WTO members can be taken into account and effectively overruled the panel in *EC - Biotech*.<sup>53</sup> It considered that a balance had to be struck between ascertaining the common intentions of all WTO members and the need for systemic unity of international law in deciding which international legal instrument to have recourse to for interpreting WTO law.<sup>54</sup> This *obiter dictum* suggests that there is no strict rule of parity of membership before a non-WTO international legal instrument can be used for a contextual interpretation. Because of the near universal support the ICCPR and ICESCR enjoy, it is suggested they would be an appropriate instrument to take account of in interpreting the TBT Agreement.

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<sup>48</sup> Appellate Body Report, *EC-Seals*, para. 5.12.

<sup>49</sup> The same criticism applies in respect of the panel’s reasoning under Article 2.2 of the TBT Agreement and GATT, Article XX (a). The panel referred to various international agreements on indigenous interests in paras. 7.292 and 7.295 but it did so only as a matter of evidence to establish that such interests are broadly recognized.

<sup>50</sup> Beqiraj, n. 3, at 309-313.

<sup>51</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, Article 31.3(c).

<sup>52</sup> Information on the states parties to the ICCPR and the ICESCR is available here:

[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) and here: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en).

<sup>53</sup> Howse and Levy, n. 46, at 366-367 and Sykes, n. 3, at 17.

<sup>54</sup> Appellate Body Report, *European Communities and Certain Member States - Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, para. 845.

According to Beqiraj's analysis, the Human Rights Committee considered that Article 27 of the ICCPR extended to economic activities, including ways of life associated with the use of land, even if modern technologies are used.<sup>55</sup> It also affirmed that states are under a duty to ensure that the cumulative effects of measures are not such as to erode the right in Article 27.<sup>56</sup> The Sami population in Sweden is a minority with a seal hunting tradition. Sweden therefore has a human rights obligation vis-à-vis its minority to ensure their culture and culture-related economic activities are protected. Given that Sweden is so obliged and that all other EU Member States are bound by the ICPR, it is not so far-fetched to argue that it was legitimate in the sense of Art. 2.1 for the EU to take account of the human rights obligations of its Member States in drawing up its regulatory policy on seals. Note that once the legitimacy and necessity is acknowledged, a requirement of even-handedness in the application of the measure stemming from WTO law would require giving the same exceptions to similarly situated products of indigenous communities outside of the EU.

In addition to Article 2.2, international human rights documents arguably also are relevant to interpreting the content of public morals since they express normative commitments of the international community to concept such as dignity and justice. As a result, they are also relevant to the question of whether or not the objectives of a technical regulation are legitimate. Sub-sections D, E and Section IV indirectly show why such documents would be relevant.

### **C. The relationship between Art. 2.1 and 2.2**

Articles 2.1 and 2.2 both aim at verifying whether or not a trade-affecting technical regulation is legitimate. In the way they have been interpreted, Article 2.1 contains an inquiry into the rational connection of the policy to a regulatory objective and the way it is applied but not an inquiry into less trade restrictive alternatives and Article 2.2 sets out a necessity test, including whether less trade-restrictive alternatives are available.<sup>57</sup>

This sequence of analysis has been criticized by Mavroidis who argues that the panel should examine necessity under 2.2 first (similar to the paragraphs of GATT Article XX) and then whether the manner of application is non-discriminatory under Article 2.1 (similar to the chapeau analysis of Article XX).<sup>58</sup> Indeed, why should a panel even consider the even-handedness in application of a measure under Article 2.1 before it has satisfied itself that no less trade restrictive but equally effective alternative is available, which might have to replace the contested measure?

Note that the panel considered the distinction between commercial and IC hunts to be legitimate in principle under Article 2.1 and yet found that this legitimate regulatory

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<sup>55</sup> Beqiraj, n. 3, at 310-311.

<sup>56</sup> *Ibid.*, at 311.

<sup>57</sup> Nielsen and Calle maintain that the 2.1 approach omits the necessity step of an Article XX-type analysis. L. Niesen and M.-A. Calle, 'Systemic Implications of the EU-Seal Products Case', 8 *Asian Journal of WTO & International Health Law & Policy* (2013), 41, at 57. It is true that the Appellate Body in *US – Clove* did not use the word 'necessary' when it found that Article 2.1 of the TBT Agreement permits legitimate regulatory distinctions. However, it did require that the detrimental impact stems *exclusively* from a legitimate regulatory distinction. The word 'exclusively' therefore, too, embodies a rational connection test between the measure and the objective that asks whether the measure is narrowly focused, similar to the necessity test.

<sup>58</sup>P. Mavroidis, 'Driftin' too Far from Shore – Why the Test for Compliance with the TBT Agreement Developed by the WTO Appellate Body is Wrong, and What Should the AB Have Done Instead', 12 *World Trade Review* 3 (2013), 509, at 516-7, 525-6.

distinction reduced the Seals Regime's contribution to the protection of public morals concerns on seal welfare under Article 2.2. How a regulatory distinction can be legitimate under one legal test and yet count against the justifiability of the regulation under a different legal test escapes me. This aspect will be returned to in subsection E.

#### **D. Public morals on seal welfare as legitimate objectives under Article 2.2**

The panel's approach towards LOs is problematic for conceptual and technical legal reasons, taking also account of its approach to assessing whether the EU's concerns about seal welfare and public opinion were about public morals. At the outset, it is useful to recall panel's definition of public morals in *US – Gambling* as 'standards of right or wrong conduct maintained by or on behalf of a community or a nation,' which can vary depending, *inter alia*, on prevailing values.<sup>59</sup> The Gambling panel considered that WTO members should be given *some* discretion to define and apply this concept in accordance with their own system and scales of values.<sup>60</sup> For most philosophers, bar moral relativists, 'morality' expresses the notion of a regulative idea, of a norm with which human behavior must comply even if people actually have other preferences and opinions.<sup>61</sup>

Recall how the panel established that public seal welfare concerns were about public morals: It asked itself: do EU citizens say that killing seals is bad? Does EU law and the legislative process state that EU citizens consider the killing of seals to be bad? Both elements (what people say and what the law and the process of its making say they say) are empirical facts. EU public opinion is an empirical fact of what people think is good or bad.

The conceptual problem is that empirical facts cannot ground moral obligations because the obligations are supposed to regulate the facts and we would end in a tautology where the facts auto-justify themselves. To clarify: the mere fact that I think something does not make it right for me to think this. And the mere that that someone else says that I really do think this does not make it right for me to think this either. The panel's approach, by giving so much weight to the evidence on public opinion adduced by the EU, emptied the terms 'morals' and 'right or wrong conduct' of prescriptive normative content. Indeed it behaved as if the terms meant 'in accordance with expressed moral feelings of the public that the technical regulation also describes as moral feelings'.

Let us now look at how the panel analyzed whether public concerns on seal welfare were LO. It essentially asked itself: Does WTO law make reference to public morals? Answer: 'yes'. Do EU citizens express the opinion that killing seals is bad? Does EU law state that EU citizens think that killing seals is bad? Answer: 'yes'. Is the Seals Regime therefore about public morals? Answer: 'yes'. Is a technical regulation with public morals as its objective legitimate? Answer: 'yes'. Do other national and international legislative instruments address animal welfare concerns and is the EU's seal welfare concern therefore legitimate? Answer: 'yes'. The panel thus attached decisive importance to two empirical facts: public opinion and the positive law (EU, TBT, GATT, GATS, other national and international legal instruments) for qualifying seal welfare as being about legitimate public morals objectives.

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<sup>59</sup> Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, paras. 6.465 and 6.461.

<sup>60</sup> *Ibid.*, para. 6.461.

<sup>61</sup> 'The Definition of Morality', *Stanford Encyclopedia of Philosophy*, available at <http://plato.stanford.edu/entries/morality-definition/>, accessed 14 January 2014.

I submit that by doing so, the panel never properly asked itself whether or not protection of the welfare of seals and ethical consumer behavior was legitimate. It asked itself whether public morals in the abstract are recognized somewhere in WTO law, repeated that the EU had been successful in showing that EU law confirmed that EU citizens said that killing seals was bad and considered that various national and international legal instruments evidenced that seal welfare was a globally recognized issue. Let me explain why this is problematic conceptually.

If the answer 1 to the question ‘is seal welfare legitimate?’ is: ‘yes, because EU law confirms that EU citizens think it is about good morals and EU citizens actually say they think so’<sup>62</sup> this just begs the further question why it is legitimate for the law to say and EU citizens to think so. If the answer to that question is ‘it is legitimate because it is also recognized as a concern in other laws’,<sup>63</sup> this again just begs the question in respect of these other laws. In other words, if we let empirical facts define legitimacy, we quickly end up begging the question. One might be tempted to reply that animal welfare is legitimate because it is about public morals, which is in turn about standards of right or wrong and that the panel had said so.<sup>64</sup> And if something is right, surely it must also be legitimate. But recall at this point how the panel determined that seal welfare was about public morals. It asked itself: do EU citizens think about seal welfare as good morals and does EU law confirm that EU citizens think this way? In other words, we are back at square 1- or rather - answer 1 and end up going in circles. So the panel commits a logical and a conceptual fallacy.

It is useful in this context to examine how the Appellate Body has defined legitimacy to get a sense of the origin of the problem in the case law. In *US-Tuna II*, it quoted the Shorter Oxford English Dictionary definition of ‘lawful; justifiable; proper.’<sup>65</sup> It then went on to state that ‘this suggests that a “legitimate objective” is an aim or target that is lawful, justifiable *or* [my emphasis] proper’.<sup>66</sup> Note the Appellate Body’s interpretative slippage. It treats the terms ‘lawful; justifiable; proper’ as alternatives by inserting the word ‘or’ even though those terms are joined by semicolons, whose grammatical function is to link elements that are interdependent in the sense that they depend on each other for complete meaning.<sup>67</sup> The Appellate Body here commits a grammatical and a conceptual fallacy. As the Shorter Oxford English Dictionary evidences, the ordinary meaning of the term ‘legitimate’ therefore goes beyond lawfulness and law as a positive fact and points towards dimensions such as justice and rightfulness.

Let me gesture at an interim conclusion. Only if regulative ideas like legitimacy connote these dimensions of justice and rightfulness can we get a meaningful argumentative scheme about legitimacy going that increases in depth. Let me explain: If we understand legitimacy this way, we can reply to the question begging for instance in the following way: ‘the law is legitimate because it protects positive human rights and it is legitimate to protect positive human rights because they enable positive and negative freedom and it is legitimate to protect freedom because being free is a crucial aspect of what it means to be an autonomous human

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<sup>62</sup> Panel Report, *EC-Seals*, para. 7.419.

<sup>63</sup> *Ibid.*, para. 7.420.

<sup>64</sup> *Ibid.*, para. 7.418.

<sup>65</sup> Appellate Body Report, *US – Tuna II*, para. 313.

<sup>66</sup> *Ibid.*

<sup>67</sup> Penn State Style for Students online, available at [https://www.education.psu.edu/styleforstudents/c2\\_p5.html](https://www.education.psu.edu/styleforstudents/c2_p5.html), accessed 18 December 2014.

being.’ Contrariwise, as I have shown, if we limit the meaning of legitimacy to empirical facts, our argumentation quickly ends up being tautological.

Let me drive these points home with a hypothetical example closer to the WTO context. Assume that citizens in a WTO member A think that it is right to discriminate against Muslims. Assume WTO member A bans all halal labels on meat with the justification that its citizens think it is right to discriminate against Muslims. Assume that most other WTO members have similar legislation. The halal way of slaughter is likely reflected in the characteristic of the product in that the meat will have fewer residues of blood. As a result, it could be argued that the ban on the label relates to product characteristics or that it addresses a related PPM and that the TBT Agreement applies. Following the panel’s approach to LOs in the Seals case, a WTO panel would have to find that the policy pursues LOs. Surely, this result would be absurd in an international treaty aimed in part at dismantling discriminatory trade barriers.

### **E. The panel’s appreciation of a policy with multiple, conflicting concerns**

Through its combination of a concern with seal welfare, addressing ethical consumer concerns, protecting Inuit traditions and marine resources, the Seals Regime pursues multiple, conflicting concerns.<sup>68</sup> This may often be the regulatory reality, because trade-offs have to be made and influence the legitimacy of regulatory objectives being pursued.<sup>69</sup> The reason we need law is precisely to deal with the problem of conflicting concerns in a legitimate manner.<sup>70</sup> Against this backdrop, any requirement to pursue animal welfare without exceptions, as Canada would have it, is unattainable, illegitimate and inconsistent with prior TBT case law which has recognized the possibility of conflicting multiple purpose technical regulations implicitly in *US -Clove*.<sup>71</sup>

Note that, for the purpose of the Article 2.1 analysis, the panel accepted that the protection of Inuit traditions was legitimate and found fault only with the manner of application of the exception. In other words, the panel acknowledged that the IC exception pursued a different aim than the ban and that it was a legitimate regulatory distinction. For the Article 2.2 analysis the panel declined that the IC and MRM exceptions established additional objectives

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<sup>68</sup> For example, seal welfare cannot be 100% protected without infringing on traditional hunts of the Inuit and vice versa.

<sup>69</sup> Howse and Levy, n. 46, at 348. Similarly, Howse, Langille, Sykes, n. 15, para. 97.

<sup>70</sup> ‘Authority’, Section 7, Stanford Encyclopedia of Philosophy, available at <http://plato.stanford.edu/entries/authority/#4>, accessed 14 January 2014.

<sup>71</sup> See Canada’s Appellant Submission, on file with the author, paras. 78-106. The EU’s Appellee Submission, available at [http://trade.ec.europa.eu/doclib/docs/2014/february/tradoc\\_152187.pdf](http://trade.ec.europa.eu/doclib/docs/2014/february/tradoc_152187.pdf), para. 92 explains that the Appellate Body in *US – Clove* was willing to consider concerns about withdrawal symptoms of addicted smokers alongside the main public health objective of the measure. In paras. 278-290 of its Appellant Submission, Canada calls into question the necessity of the Seals Regime because the EU fails to adopt consistent levels of animal welfare protection in respect of terrestrial hunts and farm animals. Given the need for multipurpose policies, the examination of necessity through comparison with levels of protection for similar risks needs to proceed with caution since those levels of risk or the trade-offs required may be different. Canada makes similar claims with respect to GATT Article XX(a) in paras. 347-430. The EU, Howse, Langille and Sykes argue that such a kind of moral absolutism in regulatory policies for animal welfare is problematic because it undermines the possibility for incremental change and is inconsistent with the absence of a consistency provision akin to Article 5.5 of the SPS Agreement. See EU’s Appellee Submission, paras. 271-276 [on the TBT] and 347-352 [on the GATT], Howse, Langille, Sykes, n. 15, paras. 145-157.

to seal welfare and public morals and considered they were merely an accommodation of interests.<sup>72</sup>

I submit that the panel's approach under Art. 2.2 ignored the character of the IC and MRM exception as exceptions, that is, as instruments that are legally necessary to advance a special purpose unrelated to the principal animal welfare purpose because the two distinct purposes cannot be expressed otherwise than through a prohibition-exception mechanism. It is unconvincing to characterize an exception that trumps the objective of halting all trade in seal and seal products as not establishing another, independent objective. A mere accommodation of interests looks different to me. Accommodating the interest of Inuit might, for instance, comprise longer transition periods for phasing in the ban towards IC hunts, possibly coupled with some assistance to develop other economic activities. Obviously, the IC and MRM are very different from phase-in periods. Note that the EU in its Appellee Submission criticises the inconsistency of the panel's finding under Article 2.2 that the IC and MRM exceptions are not really independent of the main animal welfare public morals objective and then finding that they bear no rational relationship to the objective.<sup>73</sup> The EU's critique is instructive. Interest accommodation in the way I just characterized it would still acknowledge that the aim ultimately is to terminate seal hunting. A policy with a trumping concern does not, so the question is why the exceptions should be measured against goals they do not ultimately recognize under Article 2.2.

More troubling, as a result of the panel's approach, the exceptions diminished the ability of the EU to justify its policy under Art. 2.2 because the panel considered that they reduced the contribution to fulfilling the principal seal welfare objective. This is problematic for several reasons: The panel's approach to Art. 2.2 encourages WTO members to pursue single-purpose policies because policies without trumping exceptions for conflicting purposes or accommodation of other interests can be more easily justified as necessary.<sup>74</sup> However, we have reasons to want governments to pursue conflicting objectives and make hard trade-offs because, as stated above, this is what law is for.

Single purpose policies can be more easily justified as necessary because no exceptions will be deemed to reduce the contribution to fulfilling the primary objective of the measure, whereas this can be the case for a policy with exceptions. Note in this connection that the panel also did not positively take account of the trade-permissiveness of the Seals Regime's IC and MRM exceptions in its assessment of the trade-restrictiveness.<sup>75</sup> It did not even ask

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<sup>72</sup> Panel Report, *EC-Seals*, paras. 7.401-7.402.

<sup>73</sup> This leads the EU to the conclusion that the panel should have found that the IC and MRM exception derive from the same standard of morality. See EU's Appellee Submission, n. 71, paras. 8, 140, 145. However, paras. 156-159 of the EU's Appellee Submission acknowledge that a conflict is present.

<sup>74</sup> The same follows from Nielsen's and Calle's and Perisin's position. Nielsen and Calle seem to be making the argument that the fact that the IC exception and MRM exception engender poor seal welfare and pursue different objectives constitutes *per se* arbitrary or unjustifiable discrimination. As I point out later on, this conflict *per se* is not the issue, rather, the issue is whether the policy is sufficiently well supported with arguments all the way down to the details. Nielsen and Calle, n. 57, at 58. Perisin argues that the EU should not have had exceptions in its policy had it wanted to achieve a zero risk of having products from seals killed inhumanely. See T. Perisin, 'Is the EU Seal Products Regulation a Sealed Deal? EU and WTO Challenges', 62 *International & Comparative Law Quarterly* (2013), 373, at 400. In my view, this does not follow. The EU could very well have had the aim of zero risk to seal welfare but this aim was simply overridden by a weightier normative concern to protect minority and Inuit rights and fisheries. The essential question was whether the complete absence of animal welfare standards were necessary to attain these other policy objectives and whether the exceptions were sufficiently narrowly focused actually to benefit Inuit communities without allowing commercial scale imports.

<sup>75</sup> Panel Report, *EC-Seals*, paras. 7.425-7.427.

itself to what extent the trade-permissiveness of the exceptions outweighed the reduction to the fulfillment of the objective of seal welfare in its necessity analysis. However, even allowing for the netting of trade-permissiveness and reduction to fulfillment of objectives remains unsatisfactory because an exception for an ostensibly valid regulatory reason might be only insignificantly trade-permissive yet reduce the contribution to the fulfillment of the primary objective a lot. In other words, it is just not the case that trade-permissiveness of exceptions and reduction to fulfillment of the primary objective will always cancel each other out. But even if they do not, it would be troubling if such policies should fare less well under the necessity test in Article 2.2 than policies where such evening out effect is present or that only pursue one objective.

By finding the contribution to fulfilling LOs reduced just because of the multi-purpose nature of the Seals Regime, the panel would also in effect treat exceptions in multi-purpose policies with a possibly illegitimate and those with a possibly legitimate secondary purpose the same. The approach of the panel is all the more unconvincing as the TBT Agreement contains an open-ended list of objectives, which should make it easier to justify the necessity of technical regulations with multiple purposes under the TBT Agreement.

It might be argued that multi-purpose policies would not be disfavoured compared to single-purpose policies under the necessity analysis if the contribution to the fulfillment of the primary objectives only gets reduced to the extent that exceptions have been shown to create an unnecessary cost on the primary objective under the Article 2.1 analysis. However, this is not what the panel said it did under the Article 2.2 analysis. For the comparable situation under GATT Article XX, Bartels has suggested that the paragraphs of that Article should focus on the justification of the trade-restrictiveness of the measure whereas the chapeau should focus on the justification of discriminatory aspects of the measure.<sup>76</sup> In respect of the sequencing of these two tests, he argues it is possible to vet the justification of discriminatory effects before vetting the trade-restrictive effects.<sup>77</sup> In the TBT context, this would amount to an analysis of Article 2.1 prior to an Article 2.2 analysis for multipurpose policies. A complainant may not, however, have invoked Article 2.1. This approach gives rise to the sequencing problem detected by Mavroidis and discussed in section III.C that the manner of application of a regulatory measure is assessed first even though the measure would have to be replaced by a more trade-permissive but equally effective policy. Additionally, the justifiability of a regulatory distinction with differential impacts may also still have a role to play in the inquiry of whether or not a less-trade restrictive means is reasonably available. If the less trade-restrictive alternative would endanger the other policy goal, it would not be a reasonably available alternative. Consequently, a neat delineation of Article 2.2 as being about trade-restriction and 2.1 being about the justifiability of regulatory distinctions with differential impacts seems impossible.

Howse and Levy have also forcefully argued that a panel second-guesses the right of a WTO member to set its level of protection if it considers the contribution towards fulfillment of LO reduced because a policy contains exceptions.<sup>78</sup> They suggest that the one question under Article 2.2 is whether there is a less trade-restrictive alternative to achieve the level of

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<sup>76</sup> L. Bartels, 'The Chapeau of Article XX GATT: A New Interpretation', University of Cambridge Faculty of Law Legal Studies Research Paper Series No. 40/2014, 1, 2, 7, 16.

<sup>77</sup> *Ibid.*, at 4.

<sup>78</sup> Howse and Levy, n. 46, at 369.

protection.<sup>79</sup> The right to set the level of protection autonomously has been affirmed by the Appellate Body repeatedly so that the panel should have taken care not to interfere with it.<sup>80</sup>

It might be argued that Article 2.2 excludes the possibility of justifying multi-purpose policies because it speaks of technical regulations not being more trade-restrictive than necessary ‘to fulfil a [my emphasis] legitimate objective’. The word ‘a’ could imply that technical regulations may pursue only one legitimate objective. Note that the panel never even addressed this issue. I consider that the word ‘a’ should not have this limiting effect on the number of LOs a technical regulation may pursue because the preamble of the TBT Agreement recognises that a WTO member may take regulatory measures ‘at the level it considers appropriate’. This implies the freedom to conduct a comprehensive regulatory cost-benefit analysis and therefore necessarily also the possibility to opt for exceptions with a lower or no level of protection should another important regulatory objective so warrant. Additionally, the word ‘fulfil’ does not require that a technical regulation completely attains a legitimate objective and more partial contributions should therefore be allowed, especially if the WTO member has policy reasons for them. Lastly, the TBT Agreement intends to further the objectives of the GATT. A possible *telos* of the GATT is considered to lie in preventing the imposition of unjustified externalities on foreign trade interests but not in the pursuit of uniform conditions of competition and regulatory uniformity across WTO members.<sup>81</sup> The preamble and the word ‘fulfil’ as context and the *telos* in the interpretation of Article 2.2 mitigate against interpreting the word ‘a’ as restricting LOs to only one.

There are further legal arguments in favour of my position. Article 2.2 requires that technical regulations not be ‘more trade-restrictive than necessary to fulfil a legitimate objective, *taking account of the risk non-fulfillment would create*’. The Appellate Body has confirmed that this requires an assessment of the nature of the risks at issue and the gravity of the consequences of non-fulfillment.<sup>82</sup> Concerning non-fulfillment, the Seals panel limited itself to evaluating the seal welfare and ethical risks.<sup>83</sup> However, nothing in the text requires the panel to limit itself only to the primary objective here. In fact, the panel could have characterised the nature of the risk to animal welfare EU public concerns relative to the minority rights-related concerns of the IC exception and it could have accordingly assessed that the gravity of non-fulfillment of the seal welfare EU public concern through the IC exception was not severe and mitigated (or justified in principle) the reduction in the contribution to seal welfare under the earlier part of the necessity test. Note that room would still be left to fine-tune the exact balancing of the conflicting concerns under the test of Article 2.1 pertaining to the even-handedness of application of the regulatory distinction.

Arguably, the panel should also have drawn in its interpretation of necessity on the emergence of a general principle of international law concerning animal welfare and on human rights law obligations in respect of indigenous communities.<sup>84</sup> Had it done so, it could have realized that the international legal context of the terms ‘necessary for the fulfilment of a LO taking account of the risks not fulfillment would create’, constituted by human rights norms and

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<sup>79</sup> Ibid.

<sup>80</sup> Appellate Body Report, *EC-Asbestos*, n.6, para. 168; Appellate Body Report, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, para. 176.

<sup>81</sup> On the regulation of externalities as a purpose of the GATT, see Petros Mavroidis, *Trade in Goods. The GATT and the Other Agreements Regulating Trade in Goods* (Oxford University Press, 2007) at 14-18.

<sup>82</sup> Appellate Body Report, *US-Tuna II*, para. 321, Appellate Body Report, *US – COOL*, para. 377.

<sup>83</sup> Panel Report, *EC-Seals*, para. 7.465.

<sup>84</sup> Sykes, n. 3, at 3-4, 9-19.

emergent animal welfare protection, pulls in opposing directions, making it trade-offs between the two necessary.<sup>85</sup> As shown, Article 2.2 does allow for trade-offs to be made without ‘punishing’ such policies relative to the treatment of single-purpose policies.

So how should the analysis of necessity be conducted further for a multi-purpose technical regulation? Clearly, it still is necessary to assess whether there was a necessary reason for killing nuisance seals inhumanely under the IC and MRM exception, for instance, whether protecting traditional Inuit ways of lives necessarily required the inhumane nature of the killing but this should be done under Article 2.1.<sup>86</sup> The ultimate burden for a multipurpose policy with conflicting objectives it to show that the policy allows poor seal welfare outcomes only to the extent that the conflict with the other policy purpose is unavoidable. Put differently, the EU should have shown that poor seal welfare outcomes are necessary to attain the other purposes of its seals policy (IC and MRM protection).<sup>87</sup> It is exactly this kind of inquiry that the Appellate Body has carried when it completed the analysis of the chapeau of GATT Article XX.<sup>88</sup> Its inquiry on this aspect is nothing other than a regulatory necessity test between two conflicting regulatory objectives that produce a differential impact on trade.<sup>89</sup>

The panel’s problematic approach to multipurpose policies with conflicting objectives also becomes apparent in the uncritical importance it attached to EU public opinion on seal welfare. It noted that EU public opinion did not distinguish between the origin of the hunt in its rejection of killing seals inhumanely and therefore determined that the IC and MRM exceptions reduced the measure’s contribution to addressing public morals concerns.<sup>90</sup> By attaching so much weight to public opinion, the panel ignored the statement of the panel in *US – Gambling* that relevant public morals standards of right or wrong conduct can be maintained ‘by or on behalf of [my emphasis] of a community or nation.’<sup>91</sup> As the EU points out in its submission on appeal, the reference to standards of public morals being maintained on behalf of a community suggests that the government can enact standards of right or wrong conduct without support from public opinion.<sup>92</sup>

The panel’s implicit requirement to follow public opinion is indicative of its profound misunderstanding of regulation and of the role public opinion should play in shaping regulatory policy-making. Regulatory intervention going against public opinion can be justified for instance if public opinion is unjust or unconstitutional. Perhaps EU public opinion failed to attach sufficient importance to protecting the rights of minorities, traditional cultural ways of life and marine resources forming the basis of the livelihood of fishermen in the eyes of the EU so that it decided to change conduct. So it should certainly not be *per se* impossible to justify departures from public opinion in overall public opinion-related policies as long as these departures are rationally connected to another legitimate purpose. Anything less would seriously undermine the right of WTO members to regulate.

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<sup>85</sup> Sykes argues that a principle of animal welfare would call for a balancing approach against human needs and other purposes. See Sykes, n. 3, at 23.

<sup>86</sup> In paras. 156-157 of its Appellee Submission quoted at n.71, the EU gives some arguments why the requirement that IC hunts meet animal welfare standards fails to achieve a sufficient level of protection of IC interests and in paras. 186-222 it demonstrates how the Regime as a whole contributes to reducing demand and falling prices, including for IC seals.

<sup>87</sup> See also Perisin, n.74, at 399-400.

<sup>88</sup> Appellate Body Report, *EC-Seals*, paras. 5.320, 5.324-5.328.

<sup>89</sup> Bartels, n. 76, at 16. See also p. 1, 2, 7, 10, 12.

<sup>90</sup> Panel Report, *EC-Seals*, para. 7.398, 7.445.

<sup>91</sup> Other Appellant Submission by the European Union, n. 45, para. 108.

<sup>92</sup> *Ibid.*

As regards technical regulations pursuing multiple, conflicting objectives related to public morals, it is arguably inherent in the concept of public morals itself that trade-offs or accommodations need to be made. In the following section, I will develop an interpretation of the term ‘public morals’ that brings it close to deontological standards of justice and morality. If the requirement of a public morals policy is that it be reciprocally justifiable to legal subjects with different interests and views of the good, a WTO member would sometimes even have to make trade-offs in order to succeed in demonstrating that its technical regulation relates to public morals.

The pursuit of one demand of justice completely at the expense of a conflicting demand of justice would violate the condition of reciprocal justifiability because it would entail that the interests of people protected by the conflicting demand of justice are entirely set aside, which no-one would reasonably consent to. The following example should make the argument accessible: an unlimited right to freedom of expression would not be reciprocally justifiable because it would mean that people cannot protect themselves against speech that violates their dignity or their privacy. Because the EU’s ban on seals and seal products concerned civil, political, economic, social and cultural rights of Inuit minorities, the EU arguably had to give sufficient protection to their rights in order to succeed with its claim that the Seals Regime’s objective was to protect public morals. Whether or not the seal welfare and consumer concerns can also be seen as related to public morals will be examined in the next section.

#### IV. ETHICAL-EXPRESSIVE POLICIES UNDER WTO LAW

Commentators have wondered whether WTO law should allow regulation based on moral feelings and which agreement would be applicable to such a measure. An *amicus curiae* brief to the Appellate Body argues that only GATT Article XX (a) but not the TBT Agreement applies to regulatory measures motivated by non-instrumental moral concerns.<sup>93</sup> Moral philosophy knows of three principal types of moral standards: instrumental or utilitarian standards, deontological standards and finally ethical standards. The *amici* point to the word ‘technical’ in the term ‘technical regulation’ and to the omission of the term ‘public morals’ in Article 2.2 to make an argument that the TBT Agreement excludes moral matters from its scope.<sup>94</sup> They also argue that the necessity test inherently requires an instrumentalist or consequentialist inquiry into effectiveness that is at odds with measures whose central purpose is to express moral opprobrium.<sup>95</sup>

It is unconvincing to argue that the absence of the term ‘public morals’ in the TBT Agreement excludes only one specific type of moral standard, namely ethical-expressive ones. But even the complete exclusion of any moral policies from the TBT Agreement is impossible to sustain. Article 2.2 makes reference to the protection of human health or safety and national security policies that are of a moral character in that they embody the moral obligation of the state to protect the right to life and physical integrity of its citizens. Another problem is that the *amici* place strong reliance on the word ‘technical’ in order to interpret the definition of the term ‘technical regulation’. The effect would be that even measures that regulate physical product characteristics on moral grounds would have to be considered as outside of the definition of a technical regulation (e.g. a ban on human embryonic stem cells in a drug). It is not clear that Article 31.1 of the Vienna Convention on the Law of Treaties would condone

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<sup>93</sup> Howse, Langille and Sykes, n. 15, at paras. 50-54.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*, at 55-56.

such heavy reliance on words in the context in the interpretation of treaty terms, all the more so when the terms are meant to be a definition of those words.

Perisin wonders whether WTO law should allow its members to regulate based on irrational feeling where the policy is not scientifically supported or where it singles out one species even if others suffer, too. In discussing the public morals justification, Perisin has tried to establish a difference between moral views that inherently cannot be rationally proven (her example is religion) and views that rest on misconceptions about facts and scientific evidence.<sup>96</sup> For the former, she seems to concede the possibility that a public morals justification could be available but not for the latter.<sup>97</sup>

An obvious difficulty with Perisin's proposal is that it would open the door to abuse and all kinds of morally objectionable policies. For instance, countries could declare that the reason to prohibit halal labels is not rooted in any facts about Muslims but simply in their belief in the inferiority of Muslims and on this ground advance a public morals justification for the ban. Why a view should automatically be immune from factual contestation as soon as it claims to be based in belief is unclear to me.

Perisin also mischaracterizes the EU's policy. Howse and Langille argue that the EU policy was about the ethical-expressive preferences of EU consumers and not only about some instrumentally valued aim of animal welfare.<sup>98</sup> Utilitarian political philosophers have defended animal welfare policies as an *instrument* to attain a *telos*, namely to minimize pain and maximize pleasure of sentient beings.<sup>99</sup> Singer argues that we have a moral duty to become vegetarian because modern farming techniques inevitably cause animal suffering.<sup>100</sup> The Seals Regime went beyond attaining only this utilitarian or instrumental *telos* of minimizing suffering. Howse and Langille submit that the EU seals policy was partly about the expression of intrinsic ethical beliefs of what constitutes cruelty, which cannot be substantiated by scientific policy analysis.<sup>101</sup>

I suggest they are correct. Utilitarian consequentialism does not require all future or avoidable consequences but only reasonably foreseeable ones be anticipated.<sup>102</sup> Utilitarian philosopher Singer, a key advocate of animal rights, *does not* argue that we may not consume meat from animals raised and killed humanely and he also does not postulate a moral duty to abstain from non-meat purchases in supermarkets and restaurants even though we thereby provide income to firms complicit in immoral animal suffering.<sup>103</sup> The EU claimed that *any* trade in seal products would sustain the market for commercially hunted seal products indirectly by creating more market demand and higher prices.<sup>104</sup> This shows that the EU's policy went beyond consequentialist utilitarianism and is more properly described as motivated by virtue ethics.

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<sup>96</sup> Perisin, n. 74, at 395-396.

<sup>97</sup> Ibid.

<sup>98</sup> Howse and Langille, n. 2, at 412.

<sup>99</sup> P. Singer, *Animal Liberation. The Definitive Classic of the Animal Movement* (HarperCollins Publishers, 2009) at 7-8, 20; J. Bentham, 'A Utilitarian View', section XVIII, IV from *An Introduction to the Principles of Morals and Legislation*, reprinted in H. Kuhse and P. Singer, *Bioethics. An Anthology* (Blackwell Publishing, 2006) at 566-567.

<sup>100</sup> Singer, n. 99, at 159-164, 170.

<sup>101</sup> Howse and Langille, n. 2, at 412, 417-418.

<sup>102</sup> T. L. Beauchamp and L. Walters, *Contemporary Issues in Bioethics* (Thomson Wadsworth, 2003) at 13.

<sup>103</sup> Singer, n. 99, at 17-21, 159, 229-30.

<sup>104</sup> Panel Report, *EC – Seals*, paras. 7.375, 7.410.

Virtue ethics is about installing in individuals the traits required in order to be virtuous. Unlike utilitarianism and deontology, the other two strands of moral philosophy, its concern goes beyond action to character building. For a person to be virtuous, the virtues must apply all the way down, that is, the person must make these virtues her own and hold these all the time.<sup>105</sup> So a person subscribing to animal welfare ethics must live virtues of compassion and beneficence in her direct dealings with animals but also in situations whenever her behavior remotely affects animals or implicates her moral feelings (such as market purchases of humanely hunted seals).

Once we understand the aim of the Seals Regime as one of consumer virtue, we can see that its validity does not hinge on scientific evidence on whether humane hunting is possible as long as inhumane hunting is also practiced and supported by any commercialization of seal products. Positions in virtue ethics derive validity from how the virtues are necessary to attain human well-being and flourishing and an appreciation on the basis of practical wisdom of their situational appropriateness.<sup>106</sup> It is not the consequences of an action that matter for its rightfulness; it is the fit between what we ought to do in the abstract and our beliefs and dispositions in specific instances. Consumer ethics, like the ones at issue in the EU Seals Regime, therefore *can* have a rational basis.

Given considerable, reasonable pluralism in society about which virtues to follow, some political philosophers consider collective regulation binding as to the observance of ethical standards to be illegitimate.<sup>107</sup> In contrast, deontological moral standards, set as a result of reflective processes in which persons treat each other as ends in themselves and not means, can be subscribed to by all reasonable people regardless of their different views about what it means to lead a virtuous life.<sup>108</sup> Deontological moral standards are *public*:<sup>109</sup> They are shared, reciprocal and generalizable agreements about how to order our public life together so that inherent interests of every human can be equally protected (e.g. in physical safety, education, income, etc.).

This understanding of deontological moral standards comes close to the WTO panel's definition of the term 'public' in *US – Gambling* as 'of or *pertaining to the people as a whole*; belonging to, affecting, or concerning the community or nation [my emphasis].'<sup>110</sup> According to the panel, the measure for which a public morals justification is claimed 'must be *aimed at protecting the interests of the people* within a community or a nation *as a whole* [my emphasis].'<sup>111</sup> This suggests that the relevant standards must be generalizable. Because deontological moral standards are public, they fit under the WTO term of public morals whereas ethical-expressive standards are moral but not public in this sense.

I would argue that the interpretation of the terms 'legitimate objectives' and 'public morals' necessarily connects WTO law to a knowledge system beyond law, namely to moral

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<sup>105</sup> 'Virtue Ethics', Stanford Encyclopedia of Philosophy, available at <http://plato.stanford.edu/entries/ethics-virtue/>.

<sup>106</sup> Id.

<sup>107</sup> Id. and see also Thorsten Hüller, *Deliberative Demokratie: Normen, Probleme und Institutionalisierungsformen* (Lit Verlag, 2005) at 32-33.

<sup>108</sup> 'The Definition of Morality', Stanford Encyclopedia of Philosophy, available at <http://plato.stanford.edu/entries/morality-definition/#NorDefMor>.

<sup>109</sup> Id.

<sup>110</sup> Panel Report, *US – Gambling*, n. 59, para. 6.463.

<sup>111</sup> Ibid.

philosophy, because it is this system of knowledge that expounds the demands of legitimacy of authority and morality. The notion of ‘legitimate objectives’ in the TBT Agreement and GATT Art. XX (a) are just like other terms in WTO law such as ‘sufficient scientific evidence’ in the Agreement on Sanitary and Phytosanitary Measures, which connects law with the exact sciences.<sup>112</sup>

Reliance on moral philosophy to interpret these WTO terms would also address the scope of ‘public morals’: whether the relevant normative standards must be universally shared or may be particularistic, culture-relative standards defined by each WTO member and whether only interests within the jurisdiction of the regulating WTO member or also those located outside of its jurisdiction may be protected. Scholars in favour of evidentiary unilateralism argue that WTO members should be free to define the content of public morals themselves as long as they can provide relevant evidence of widespread public support.<sup>113</sup> Other scholars argue that the content of public morals requires actual universal agreement today or in the past arguing for an evolutionary or originalist interpretation.<sup>114</sup> The scholars differ in what they accept as evidence of actual endorsement, ranging from opinion polls, to legislative enactment, international law obligations, *ius cogens*, the type of national law and its hierarchy within the domestic legal system, national *ordre public* and religious texts.<sup>115</sup> This difference is not material for my further argument because all share the view that the support must be an empirical convergence of opinion.

The central difficulty with their approach is that they disregard the ordinary meaning of the term ‘moral’ (or ‘morals’ in the plural) as a being a normative judgment about right or good conduct.<sup>116</sup> Because the concept of morality expresses a regulative ideal, not an empirical fact, convergence of opinion is not decisive. Normatively speaking, actual consensus given under the right circumstances is only indicative of moral standards. The notion of ‘right circumstances’ points to free consent without coercion from force or material need, etc. and is already a moralized notion of consent and not just a fact of convergence of opinion.<sup>117</sup>

Obviously, actual international consensus is still relevant for interpreting the term ‘public morals’ as a relevant rule of international law binding in the relations between the parties in the sense of Article 31.3(c) of the Vienna Convention on the Law of Treaties.<sup>118</sup> However, context is only one of three factors in interpretation, the other two being textual meaning and *telos*.

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<sup>112</sup> Agreement on Sanitary and Phytosanitary Measures, Art. 2.2.

<sup>113</sup> J. C. Marwell, ‘Trade and Morality; the WTO Public Morals Exception after Gambling’, 81 *New York University Law Review* (2006) 802; N. F. Diebold, ‘The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole’, 11 *Journal of International Economic Law* (2008), 43; Tamara S Nachmani, ‘To Each His Own: the Case for Unilateral Determination of Public Morality under Article XX(a) of the Gatt’, 71 *University of Toronto Faculty of Law Review* (2013) 31.

<sup>114</sup> M. Wu., ‘Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine’, 33 *Yale Journal of International Law* (2008), 215, at 243-248; T. M. Smith, ‘Much Needed Reform in the Realm of Public Morals: A Proposed Addition to the GATT Article XX(a) ‘Public Morals’ Framework Resulting from *China – Audiovisual*, 19 *Cardozo Journal of International and Comparative Law* (2011), 733.

<sup>115</sup> Marwell, n. 113, at 824-825, Diebold, n. 113, at 63-66, Nachmani, n.113, 57, Wu, n. 114, at 243-246, Smith, n. 114, 769-773.

<sup>116</sup> See the entry ‘moral’ in the Merriam-Webster online dictionary, available at <http://www.merriam-webster.com/dictionary/moral>.

<sup>117</sup> For a complete elaboration of right circumstances for valid consent to principles of social interaction, see John Rawls, *A Theory of Justice*, rev. ed. (Oxford University Press, 1999) 10-13.

<sup>118</sup> Vienna Convention on the Law of Treaties, n. 51.

The TBT Agreement intends to further the objectives of the GATT.<sup>119</sup> If its *telos* is not the harmonization of regulatory conditions of competition across WTO members it might be objected that my endorsement of moral unity imposes unwarranted regulatory unity. I think this does not follow because my position does not imply that facts affecting feasibility have to be disregarded completely and that incremental steps towards the ideal are not allowed. Feasibility refers to the relatively immutable facts inherently necessary for the realization of the moral requirement.<sup>120</sup> Since these facts can differ between WTO members, regulatory responses can also legitimately differ.

It might be objected that the *US-Gambling* panel confirmed that the content of public morals is unilaterally to be determined.<sup>121</sup> I would counter that my interpretation is *more* consistent with its statement that public morals denotes ‘standards of right or wrong conduct maintained by or on behalf of a community or a nation.’<sup>122</sup> The panel might have simply been saying that actual commitment to the moral requirement is a precondition for being able to invoke the requirement as a justification. The scholars who interpret this statement as allowing for unilateral relativism commit the interpretative mistake of ignoring the terms ‘standards of right or wrong conduct’ by stressing only the last element. They also ignore that the panel had clearly suggested that a *public* morals policy must be *in the interest* of the members of a nation or community.<sup>123</sup> This statement suggests some check on the substantive fairness of a policy.

It is true that the *Gambling* panel gave some scope to members to ‘define and apply for themselves the concepts of "public morals" and "public order" in their respective territories, according to their own systems and scales of values.’<sup>124</sup> It also recognized that the content of public morals can vary in time and space, depending on prevailing social, cultural, ethical and religious values, amongst other factors.<sup>125</sup> But this can be interpreted as a concession to feasibility, which is different from complete relativism regarding the content of morality.

Moral philosophy indicates also the permissibility of protecting interest outside of the state’s territory.<sup>126</sup> When an action is morally required between strangers, such as not harming a stranger’s life or health, the fact that the person is protected is located in another state should be immaterial.<sup>127</sup> In contrast, where moral obligations only arise in virtue of special relationships within the state, extraterritorial action would not be warranted.<sup>128</sup>

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<sup>119</sup> Preamble, TBT Agreement.

<sup>120</sup> [Reference omitted for peer-review]. If a moral position is unrealizable, the feasibility argument suggests that we should adjust the moral position. For instance, if societal wealth is severely limited, taxation of the rich may not have to be used to equalise opportunities of the less fortunate but to meet basic needs instead.

<sup>121</sup> For such a suggestion, see Nachmani, n. 113, at 56.

<sup>122</sup> Panel Report, *US – Gambling*, n. 59, para. 6.464.

<sup>123</sup> *Ibid.*, para. 6.463.

<sup>124</sup> *Ibid.*, para. 6.461.

<sup>125</sup> *Ibid.*

<sup>126</sup> I realise that the distinction between intra- and extraterritorial measures is not without problems because, as Smith, n. 111, at 766-767 points out, a ban on child pornography or illegal drugs protects inside the territory of the regulating WTO member but also outside of its territory. A problem of boundary-drawing at the margin, the distinction has analytical value if it hinges on which state is principally considered to be responsible to protect the relevant interests at stake.

<sup>127</sup> See also K. Nadakavukaren Schefer’s ‘law-enabling’ social regulation in *Social Regulation in the WTO. Trade Policy and International Legal Development* (Edward Elgar, 2010) at 5.

<sup>128</sup> For instance, obligations of egalitarian distributive justice are claimed by moral theorists to arise in virtue of particular forms of human interaction and some theorists claim that the relevant human interactions take place

Does my analysis imply that an ethical-expressive regulation can never be ‘public’ and justifiable as a public morals policy under WTO law? With Hüller, I would suggest that ethical-expressive matters can legitimately become matters for public regulation in two ways.<sup>129</sup> First, because everyone reasonably agrees on the content of the ethical-expressive standard and no deontological moral standard (such as a human right) is infringed.<sup>130</sup> In this instance, there is no need for permitting pluralism because ethical judgments are not plural. Second, because the matter inherently requires a decision in favour of one or the other ethical view: Hüller gives the examples of the decisions of whether or not to include religious education in the curriculum of primary school education or which city to choose as the capital.<sup>131</sup> Either religious education is in or it is out of the curriculum (even if non-believers can opt-out) and the capital can be located in only one place. These decisions therefore inherently require a collective disposition. I suggest that a panel tests the ‘public’ dimension of ethical-expressive matters in this way.

It might be objected that collectively binding regulation is *per se* unnecessary if there is collective agreement on the ethical standard of right conduct. I submit that collectively binding regulation can nevertheless be necessary to ensure that foreign traders who do not share in the ethical judgment conform to it, to enhance legal certainty by stipulating clearly the requirements or to provide non-apparent information relevant for the ethical-expressive judgment to consumers.

Was there European consensus on consumer ethics? Only Belgium and the Netherlands had had in place bans on seal products prior to the EU Seals Regime, suggesting there possibly was European disagreement about the demands in consumer virtue ethics (*not* animal welfare). Consumers committed to the standard of virtue ethics can also follow it without collectively binding regulation. All they require is information about whether certain products are free of seal products.

For the foregoing reasons, I thus beg to differ with Howse and Langille who maintain that the ethical-expressive element of the EU Seals Regime should be considered a WTO-legal public morals measure, pointing to some internationally shared opinion about what constitutes animal cruelty and the large majority vote in the European Parliament.<sup>132</sup> If there is no normative – or philosophical – reason for regulating the content of an ethical-expressive matter in a collectively binding manner, the fact that a majority supports the policy is not enough to confer legitimacy or a *public* morals dimension on a policy with prescriptive content.

Note that the reasons I offered for why collectively binding dispositions on ethical-expressive preferences are legitimate takes account of Howse’s and Langille’s policy concern with permitting pluralism of ethical views because it also permits intra-societal pluralism without requiring panels or the Appellate Body to examine the substance or validity of ethical-expressive beliefs.<sup>133</sup>

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only within the state. See e.g. T. Nagel, 'The Problem of Global Justice', 33 *Philosophy & Public Affairs* (2005) 113, at 120-121.

<sup>129</sup> Hüller, n. 107, at 119-124.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> Howse and Langille, n. 2, at 413-414.

<sup>133</sup> For their concerns, see *ibid.*, at 417.

My conclusion notwithstanding, the factual evidence before the panel about inherent seal suffering regardless of the method used to kill them suggests that the prescriptive aspect of the regime (the ban on *any* seal products regardless of the hunting method) could nevertheless be justified: As an animal welfare policy designed to protect life and health of animals under GATT Art. XX (b) that adopts a very conservative level of protection necessary because of the inherent difficulty to hunt seals humanely.<sup>134</sup> Health of animals, the panel in *US – Tuna* has recognized, includes also animal welfare aspects.<sup>135</sup>

## V. CONCLUSION

Overall, the panel's findings in the Seals case reveal profound misunderstandings of the role, purpose and the interaction of WTO provisions and of the aims of and policy decisions being made in regulatory processes. This leads the panel into problematic findings on Article 2.1 and 2.2 and into giving too little leeway for them to defend standard regulatory cost-benefit analysis under the necessity test of Article 2.2. The panel also equates normatively loaded concepts like public morals or legitimacy with empirical facts. I have shown that such type of reasoning becomes tautological. It would have been desirable had the panel shown more zeal in understanding regulatory trade-offs and terms whose content points beyond the positive law to the law's claim to moral correctness. The *excursus* into normative political theory explains why the EU exhibited excessive zeal in regulating consumer virtues. It also explains why, absent the availability of another public policy justification, such types of policies are best regulated on the basis of positive product labels enabling high-standards consumers to exercise their ethical-expressive preference for products with the positive attributes rather than through a prescriptive public morals policy. In this connection, I have also defended the view that the concept of public morals should be understood to refer to deontological moral standards of right and wrong – such as are generally considered to be embodied in human rights.

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<sup>134</sup> Note that the EU in para. 591 of its first written submission to the panel had also claimed GATT Article XX (b) as a justification of its measure.

<sup>135</sup> Panel Report, *US-Tuna*, paras. 7.437, 7.499.