EXCEPTION MEASURES: THE PURSUIT OF NON-TRADE OBJECTIVES IN LIGHT OF THE *EC - SEAL PRODUCTS* DISPUTE

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ABBREVIATIONS

AB	Appellate Body
EC	European Communities
EU	European Union
EEC	European Economic Community
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade 1994
GATT 1947	General Agreement on Tariffs and Trade 1947
IC exception	Indigenous Communities exception
MFN	Most-Favoured Nation
MMPA	Marine Mammals Protection Act
MRM exception	Marine Resource Management exception
PPM	Process and production methods
TBT Agreement	Agreement on Technical Barriers to Trade
TED	Turtle excluder devices
US	United States of America
WTO	World Trade Organisation
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organisation

CONTENTS

Introduction

The international trade system is an exceptionally complex and truly global phenomenon. The vast membership of the World Trade Organisation (WTO) and plethora of agreements within it reflect the economic and social benefits of participation in international trade. Trade without discrimination is the fundamental principle behind trade liberalisation and is a standard requirement of all WTO trade agreements. It requires that countries treat their trading partners equally and do not favour goods produced domestically over the same goods produced by another state. However, sometimes states need to restrict trade and breach key obligations in order to pursue certain non-trade interests such as environmental protection, the protection of human health or the defence of widely held moral or cultural beliefs. WTO agreements therefore include limited exceptions to trade obligations, which allow states a degree of regulatory autonomy.

The balance between the broader economic benefits of trade agreements and the protection of key non-trade interests is frequently the subject of debate. Unsurprisingly, legal conflicts between states over the legitimacy of trade-restrictive measures are common and are resolved exclusively within the WTO dispute settlement framework. *EC-Seal Products* is a recent trade dispute, which poses the question of whether the European Union (EU) public's moral opposition to seal hunting could justify a trade-restrictive measure that violated non-discrimination principles between states involved in the seal-hunting industry. The case has been hailed as a triumph for animal welfare and has broadened the scope of 'public morals' in international trade law. However, it also demonstrates that the supposed balance in WTO agreements between reducing trade barriers and respecting states' right to regulate is tenuous and that exercising exceptions clauses in practice can be a difficult task.

This dissertation addresses the implications of *EC-Seal Products* for addressing non-trade objectives in the international trade system. Chapter I provides a background to the WTO and the key non-discrimination provisions and exceptions. Significant cases that have clarified the AB's approach to non-trade objectives are then examined to give context to the recent *EC-Seal Products* dispute. Chapter II turns to the dispute itself, explaining the reasoning behind the EU ban on Seal Products and Canada and Norway's opposition to the ban. The key points raised by the panel and the Appellate Body reports are highlighted, including the clarification of obligations and exceptions in different WTO agreements relate to one another, and the

breakdown of the EU's reliance on Article XX(a). Chapter III then explores the implications of the *EC-Seal Products* case for future regulators seeking to justify trade-restrictions under exceptions clauses. The AB decision has helpfully refined different legal standards of non-discrimination obligations in the TBT Agreement and the GATT. It also demonstrates the strict interpretation of the *chapeau* of Article XX, which in light of successive failures to use the provision successfully, makes states' regulatory rights seem illusory. The GATT Article XX(a) exception for measures necessary to protect public morals is examined in light of interpretive theory and previous cases to demonstrate that the dynamic approach in *EC-Seal Products* is accurate. Chapter IV focuses on the future of animal welfare regulation in light of this dispute. It concludes by reflecting on the appropriate balance between the importance of trade and the increasing importance of non-trade values.

Chapter I: International Trade Law Obligations and Exceptions

1.1 International Trade Law and the World Trade Organisation

International trade law is concerned with the various organisations and agreements controlling trade between countries, principally those agreements made through the WTO. The WTO was created in 1995 through the Marrakesh Agreement Establishing The World Trade Organisation ("WTO Agreement"), as the principal intergovernmental body to regulate trade, negotiate trade agreements and settle trade disputes.[1] The overarching function of the WTO is to provide a common institutional framework for the conduct of trade relations among its members, based on the legal instruments contained in the Annexes to the WTO Agreement.[2] The WTO currently has 163 members,[3] who are parties to approximately 60 agreements, annexes, decisions and understandings, stemming from the most recent round of multilateral trade negotiations.[4] Together these agreements make up the multilateral trading system, a complex set of rules covering trade in goods and services and the protection of intellectual property rights.[5]

Prior to the WTO Agreement, international trade was governed by the General Agreement on Tariffs and Trade 1947 (GATT 1947), an agreement and *de facto* organisation that aimed to reduce trade barriers and tariffs between states. The restated GATT 1994 forms the main constituent trade deal administered by the WTO.

1.2 The dispute settlement system

Dispute settlement is one of the primary functions of the WTO. Considering the extensive rules in WTO agreements and members' conflicting interests, it is unsurprising that disputes and alleged violations of rights or obligations arise frequently between member states. The WTO dispute settlement system is the most prolific of international dispute settlement

[1] Marrakesh Agreement Establishing the World Trade Organization 1867 UNTS 3 (opened for signature 15 April 1994, entered into force 1 January 1995) [Marrakesh Agreement]
[2] Marrakesh Agreement, above n 1, Article II:1
[3] Aynur Karimova "Kazakstan to become WTO's 162nd Member" (23 June 2015) *Azernews* <www.azernews.az>
[4] "Understanding the WTO" (2015) World Trade Organization <www.wto.org> at 23
[5] Peter Van den Bossche and Werner Sdouc *The Law and Policy of the WTO* (3rd ed, Cambridge University Press, Cambridge, 2013) at 35

frameworks, with 454 disputes being brought to the WTO between 1 January 1995 and 31 December 2012, compared to 54 judgments of the International Court of Justice (ICJ) and 16 judgments of the International Tribunal for the Law of the Sea (ITLOS) in that same period.[6] Unlike the ICJ or the ITLOS, the jurisdiction of WTO dispute settlement bodies is compulsory and membership of the WTO constitutes consent to and acceptance of the dispute settlement procedures.[7] The jurisdiction of the WTO dispute settlement system is also exclusive with respect to other international frameworks - disputes can only be resolved through consultations between parties or adjudication by a WTO panel or Appellate Body (AB). Unlike ICJ and ITLOS, dispute settlement bodies only clarify the application of WTO law in the case at hand and are discouraged from making general statements of law outside the context of a particular dispute.[8] These features of the WTO dispute settlement process empower it with the ability to shape national laws and regulations in line with WTO obligations.

1.3 Trade Without Discrimination

Trade without discrimination is a fundamental tenet of WTO law. A free-flowing and efficient international trading system requires that members do not discriminate between products based on their origin, as this can result in market inefficiencies and more expensive, lower quality goods and services. The preamble to the WTO Agreement underlines the importance of non-discrimination, identifying the 'elimination of discriminatory treatment in international trade relations' as one of two means by which members are to attain WTO goals.[9] Trade without discrimination consists of two basic principles, most favoured nation treatment and national treatment.

a) Most Favoured Nation Treatment

The Most Favoured Nation (MFN) principle requires members to treat their trading partners equally. If one member grants another member favourable treatment in trade (such as lower customs rates) all other members must also be granted this treatment.[10] Somewhat paradoxically, it means that no single state is the most favoured nation. Exceptions to the

[6] Peter Van den Bossche and Werner Sdouc, above n 5, at 157
[7] Peter Van den Bossche and Werner Sdouc, above n 5, at 160
[8] Peter Van den Bossche and Werner Sdouc, above n 5, at 162
[9] Marrakesh Agreement, above n 1, preamble
[10] "Understanding the WTO" above n 4, at 10

MFN principle are permitted in limited circumstances, for example to allow special market access to developing countries or to establish agreements for goods traded only within a particular group of states.

GATT Article I:1 contains the MFN treatment obligation with respect to trade in goods and is recognised as a 'cornerstone of the GATT' and 'one of the pillars of the WTO trading system'.[11] It demands that any advantage, favour, privilege or immunity, granted by any member to any product originating in or destined for any other country, must be accorded immediately and unconditionally to like products originating in or destined for the territories of all other members.[12] Such advantages could take the form of customs duties or charges relating to importation, exportation or international payments for imports or exports, the method of levying such duties and charges, any rules relating to importation and exportation and any internal taxes or regulations affecting internal sale.[13] The comprehensive coverage of Article I:1 reinforces the significance of the MFN obligation. Article I:1 covers two kinds of discrimination. Discrimination *de jure* arises where it is evident from the text of the measure that it treats the product of one member less favourably than another. The more common and subtler form is *de facto* discrimination. This form arises whenever an ostensibly neutral measure is held to be discriminatory because in practice it results in less favourable treatment for one or more members, and such effects are unjustifiable.[14]

MFN treatment is also found in the Agreement on Technical Barriers to Trade ("TBT Agreement").[15] The TBT Agreement builds upon the GATT, by precluding parties from using technical regulations, standards or compliance procedures to restrict trade. Article 2.1 stipulates that in respect of technical regulations, products imported by one member from the territory of another member must be accorded 'treatment no less favourable' than that accorded to 'like products' of national origin and to 'like products' originating in any other country.[16] This encompasses both MFN treatment and the national treatment principle, discussed below at b). Article 2.2 goes on to require members to ensure technical regulations

[11] *Canada – Certain Measures Affecting the Automotive Industry* WT/DS139/AB/R, WT/DS142/AB/R, 19 June 2000, (Report of the Appellate Body) at [69]
[12] General Agreement on Tariffs and Trade 1994, 1867 UNTS 187 (opened for signature 15 April 1994, entered into force 1 January 1995) [GATT 1994] art I:1.
[13] GATT 1994, above n 12, art I:1
[14] *Canada – Pharmaceutical Patents* WT/DS114/R, 7 April 2000 (Report of the Panel) at [7.101]
[15] Agreement on the Technical Barriers to Trade 1868 UNTS 120 (opened for signature 15 April 1994, entered into force 1 January 1995) [TBT Agreement]
[16] TBT Agreement above n 15, art 2.1

are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. To this end, it demands that technical regulations are no more trade-restrictive than necessary to fulfill a legitimate objective.[17]

b) National Treatment

Trade without discrimination also applies between goods produced domestically and goods produced overseas. It requires that once imported goods enter the market, they must be treated equally to locally produced goods. It does not, however, apply to charging customs duties on imports upon entry into the market. The national treatment principle applies similarly between local and foreign services, trademarks, copyrights and patents.

Article III of the GATT provides the general statement of the national treatment principle with respect to goods. Paragraph 1 states that internal taxes or charges, laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products should not be applied to imported or domestic products so as to afford protection to domestic production.[18] Paragraph 2 stipulates that products of the territory of any member imported into the territory of another member shall not be subject to internal taxes or charges in excess of those applied to like domestic products.[19] Paragraph 4 obliges members to provide equality of competitive conditions for imported and domestic products. Imported products must therefore be accorded treatment no less favourable than that accorded to like products of national origin, with respect to any laws, regulations and requirements affecting sale, purchase, transportation distribution and use.[20]

1.4 Exceptions provisions

Several WTO agreements contain exceptions provisions that allow members to avoid their obligations and adopt trade-restrictive measures in order to pursue and protect other societal values and interests. Article XX of the GATT provides 'general exceptions' to GATT obligations, including non-discrimination obligations in Articles I and III. If a member adopts a measure that is inconsistent with these obligations, they may invoke Article XX to justify

[17] TBT Agreement above n 15, art 2.2
[18] GATT 1994 above n 12, art III:1
[19] GATT 1994 above n 12, art III:2
[20] GATT 1994 above n 12, art III:4

the measure provided all elements of the article are met. The measure in question must first fall within the scope of one of ten subparagraphs of Article XX. These include measures:

> (a) necessary to protect public morals;
> (b) necessary to protect human, animal or plant life or health
> (c) …
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
> (e) relating to the products of prison labour
> (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption …[21]

A challenged measure must address the particular interest specified in one of the above subparagraphs, and there must be a 'sufficient nexus' between the measure and the protected interest, meaning that the measure is 'necessary' or 'relates to' the interest.[22] After provisional justification, the measure is then assessed under the *chapeau* of Article XX, which focuses not on the content of a measure, but on the way it is applied. It incorporates an additional element of non-discrimination into Article XX for the purpose of preventing abuse of the exceptions. Under the *chapeau,* measures must not be applied in a way that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.[23] The AB has previously interpreted these words as a single test, but recently undertook separate analyses of 'arbitrary discrimination', 'unjustifiable discrimination' and 'disguised restriction on trade'.[24] This demonstrates the rigorous nature of non-discrimination obligations in the GATT. The *chapeau* is possibly the most difficult hurdle in the assessment of whether a trade-restrictive measure is defensible

[21] GATT 1994 above n 12, art XX
[22] *United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services* WT/DS285/AB/R, 20 April 2005 (Report of the Appellate Body) at [292]
[23] GATT 1994 above n 12, art XX
[24] Radhika Chaudhri "Animal Welfare and the WTO: The Legality and Implications of Live Export Restrictions Under International Trade Law" (2014) 42 Federal Law Review 279 at 298

under Article XX. It has played a prominent role in GATT and WTO disputes, most recently in *EC-Seal Products*.

The counterpart to Article XX(a) of GATT is Article XIV(a) of GATS, which contains a similar exception for measures protecting public morality, subject to two minor differences; Article XIV(a) also covers measures necessary to "maintain public order" and may only be invoked when a "genuine and sufficiently serious threat is posed to one of the fundamental interests of society".[25] Public morals exceptions in the GATT and GATS have nevertheless been interpreted identically to date.

The TBT Agreement also reflects the values in GATT Article XX by allowing for technical regulations created for a "legitimate objective", such as protection of animal, plant and human life or health, protection of the environment or national security interests and the prevention of deceptive practices.[26] This is emphasised in the sixth recital of the preamble, which states:

> no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices… subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between where the same conditions prevail or a disguised restriction on international trade…[27]

Exceptions provisions represent the WTO's acceptance that various societal values may sometimes trump trade interests, and states should therefore retain a degree of regulatory freedom to impose trade-restrictive measures.

[25] GATT 1994 above n 12, art XVI
[26] TBT Agreement above n 15, art 2.2
[27] TBT Agreement above n 15, preamble

1.5 Significant cases concerning non-trade objectives

a) Tuna - Dolphin I and II

The *Tuna - Dolphin* disputes took place under the GATT dispute-settlement system before the WTO system was established, but remain significant cases in Article XX jurisprudence. *Tuna - Dolphin I* involved the US Marine Mammals Protection Act (MMPA), which restricted imports of yellow fin tuna caught using methods harmful to dolphins.[28] In 1991 Mexico brought a claim to the GATT dispute settlement body claiming that MMPA imposes an illegal non-tariff restriction contrary to GATT Articles XI and XIII, and violates the national treatment principle in Article III. The US argued the MMPA could be justified by invoking the exceptions under articles XX(b), (d) and (g).[29] First, the GATT Panel held ban was illegal because it was rooted in the way the tuna was produced, rather than being based on its quality or content. The methods used to produce goods are not considered when determining their 'likeness' under international trade law. Secondly, the Panel found that to uphold the MMPA restriction would be using national law to enforce environmental standards outside of US territory. The Panel reasoned that to allow this would permit members to impose their environmental, health or social standards on other member states and could trigger protectionist abuses.[30] The Panel rejected the US argument that the measure was nonetheless consistent with Article XX, holding that the general exceptions could not be invoked when 'extraterritorial' measures are enacted unilaterally. [31]

The US embargo was also imposed on 'intermediary' nations, banning imports from countries that were themselves importing tuna from countries using prohibited fishing methods. This led to the *Tuna - Dolphin II* dispute in 1994, brought before the GATT dispute panel by the European Economic Community (EEC) and the Netherlands as intermediary nations. The same issues in *Tuna - Dolphin I* were brought before the Panel, with broadly the same conclusions reached.[32] Neither panel reports were adopted due to a lack of consensus between parties, a requirement under the former GATT system.[33] Despite this, the *Tuna - Dolphin*

[28] Particia Birnie, Alan Boyle and Catherine Redgwell *International Law and the Environment* (3rd ed, Oxford University Press, Oxford, 2009) at 769
[29] "Mexico etc versus US: 'Tuna - dolphin'" (2014) World Trade Organisation <www.wto.org>
[30] "Mexico etc versus US: 'Tuna - dolphin'" above n 29
[31] Aaron Cosbey and Petros Mavroidis "Heavy Fuel: Trade and Environment in the GATT/WTO Case Law" (2014) 23 Review of European Community and International Environmental Law 288 at 292
[32] "Mexico etc versus US: 'Tuna - dolphin'" above n 29
[33] "Mexico etc versus US: 'Tuna - dolphin'" above n 29

disputes were some of the first involving trade restrictions applied on ethical grounds, and show that such measures must be applied legitimately in accordance with GATT obligations.

b) US - Tuna II (Mexico)

US - Tuna II was a dispute brought by Mexico in 2008 contesting conditions for 'dolphin-safe' labeling on tuna products sold in the US. 'Dolphin-safe' labeling depended on where the tuna was harvested and the vessel and fishing method by which it was harvested.[34] Mexico claimed that these measures were inconsistent with the non-discrimination obligations in both the TBT Agreement and the GATT, although both the Panel and AB reports are predominantly centered on the TBT Agreement. The Panel decision, released in September 2011, was appealed by the US and Mexico on certain issues of law and legal interpretation.[35] The AB found the labeling provisions to be inconsistent with Article 2.1 of the TBT Agreement, because the labeling requirements resulted in detrimental impact on competitive opportunities for Mexican tuna products compared to US tuna products and tuna products from other countries. This detrimental impact was not found to be the result of 'legitimate regulatory distinctions'. [36] The AB overturned the Panel's finding that the labeling requirements were more trade-restrictive than necessary to achieve the objective of dolphin-protection and therefore inconsistent with TBT Article 2.2.

The AB also rejected the Panel's assumption that the non-discrimination obligations under TBT Article 2.1 and GATT Articles I:1 and III:4 were substantially the same. However given that the AB found the measure to be a violation of the TBT Article 2.1, Mexico did not demand a completion of the analysis under the GATT.[37]

[34] "United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products" (2015) World Trade Organisation <www.wto.org>
[35] "United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products" above n 34
[36] *United States – Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/AB/R, 4 April 2012 (Report of the Appellate Body). [*US-Clove Cigarettes*] This decision will be discussed further in Chapters II and III.
[37] "WTO Dispute Settlement: One-Page Case Summaries 1994-2014" (2015) World Trade Organization <www.wto.org> at 154

c) Shrimp-Turtle

The US Endangered Species Act 1973 lists five species of endangered or threatened sea turtles, and stipulates that all US shrimp trawlers use 'turtle excluder devices' (TEDs) in areas where such sea turtles are high likely to be swimming. The *Shrimp-Turtle* dispute[38] concerned another US law prohibiting the importation of commercially harvested shrimp and shrimp products harvested using a technology that adversely affects certain sea turtles.[39] This ban was subject to certain exceptions, such as whether the harvesting nation had a certified regulatory programme and incidental take-rates of turtles equivalent to the US, or the fishing environment of the harvesting nation was not one in which sea turtles were threatened.[40] Consequently those countries with any of the five protected species of sea-turtle in their waters were required to use TEDs if their products were to be imported into the US.[41] India, Malaysia, Pakistan and Thailand were four affected states that claimed that the measure was contrary to GATT Articles XI and III(4) and could not be justified under article XX, as argued by the US. On appeal, the AB held that the US measure fell within article XX(g) concerning the conservation of natural resources but that it was inconsistent with the *chapeau*. It was found to be applied in an 'arbitrary or unjustifiable' way because the US had negotiated different arrangements for when the measure would phase in for different countries and because the measure discriminates on the basis of process and production methods that are not related to the product itself. Despite having failed at the *chapeau* stage, the case was celebrated as a landmark decision that indicated a positive trend in international trade law for environmental protection through unilateral trade bans.[42]

1.6 Summary

While the *Tuna - Dolphin*, *US - Tuna (Mexico)* and *Shrimp - Turtle* disputes demonstrate an acceptance of regulatory diversity and the ability of members to unilaterally regulate their markets, they also emphasize that measures must be applied in strict adherence to international trade obligations. In other words, non-trade objectives are encouraged but only

[38] *US – Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/RM, 6 November 1998 (Report of the Appellate Body) [*US-Shrimp* AB Report]
[39] Public Law 101-102 16 USC § 1537 1989, section 609
[40] "India etc versus US: 'shrimp-turtle'" (2015) World Trade Organisation <www.wto.org>
[41] "India etc versus US: 'shrimp-turtle'" above n 40
[42] Stanford Gaines "The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures" (2001) 22 University of Pennsylvania Journal of International Economic Law 739 at 742

within the limits contained in the wording of exceptions in the GATT and the TBT Agreement. The *EC - Seal Products* dispute broadly echoes this message by recognising states regulatory autonomy with respect to public morals, while refining the legal boundaries of how states are to pursue non-trade objectives in the context of international trade.

Chapter II: The *EC - Seal Products* Dispute

2.1 Background to the *EC-Seal Products* dispute

Seal hunting occurs around the world for various commercial and cultural reasons, as well as for subsistence and marine resource management.[43] There has been growing concern that methods of seal hunting are unacceptably inhumane. For seal pelts to maintain their full market value, they must be undamaged, so seals are often clubbed to death to keep the pelts in tact. Alternatively a *hakapik* is used to penetrate the skulls of the seals, which are then bled and dragged by a hook to the hunting vessel, where they are skinned. Several studies have indicated that these methods of seal hunting cause the animals intolerable levels of pain, distress and suffering.[44]

In Europe, seal welfare has been a subject of particularly widespread popular concern, as was evidenced by a mass of letters and petitions to the European Commission expressing outrage at the continuing trade in seal products.[45] In response, the European Union adopted a regulatory regime restricting the sale and importation of seal products in the EU market ("EU Seal Regime"), which entered into force on 20 August 2010.

The EU Seal Regime is made up of two separate regulations: Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on trade in seal products[46] (the Basic Regulation) and the Commission Regulation (EU) No. 737/2010 which outlines further details about implementing the Basic Regulation (the Implementing Regulation).[47] The parties to the dispute agreed that the two component regulations should be treated as an integrated whole. 'Seal products' is defined by the Basic Regulation as "all products, either processed or unprocessed, deriving or obtained from seals, including meat, oil, blubber, organs, raw fur

[43] "Trade in Seal Products" (2015) European Commission <ec.europa.eu>
[44] Rosemary Burdon, John Gripper, Alan Longair, Ian Robinson and Debbie Ruehlmann, "Canadian Commercial Seal Hunt: Prince Edward Island" (Veterinary Report, International Fund for Animal Welfare, March 2001) <www.ifaw.org>; David M Lavigne "Canada's Commercial Seal Hunt is Not "Acceptably Humane" (Independent Veterinarians Working Group Report, International Fund for Animal Welfare, January 2005) <www.ifaw.org>; Bruce Smith "Improving Humane Practice in the Canadian Harp Seal Hunt" (Report of the Independent Veterinarians' Working Group on the Canadian Harp Seal Hunt, August 2005) <www.thesealfishery.com>
[45] "Citizens Summary on Trade in Seal Products" (2015) European Commission <ec.europa.eu>
[46] Regulation 1007/2009 of the European Parliament and of the Council on trade in seal products [2009] OJ L 286/36
[47] Regulation 737/2010 laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products [2010] OJ L 216/1

skins and fur skins, tanned or dressed, including fur skins assembled in plates, crosses and similar forms, and articles made from fur skins".[48]

The EU Seal Regime contains a general prohibition on the importation of seal products into the EU, subject to certain exceptions. The first exception permits seal products obtained from seals hunted by Inuit or indigenous communities to enter the EU market ("IC exception"), the second permits the import of seal products for the personal use of travellers or their families for non-commercial reasons ("Traveller's exception") and the third exception allows for seal products obtained from seal hunts with the sole purpose of sustainable marine resource management ("MRM exception").[49] To qualify under the MRM exception, the seal hunt must be conducted under a national or regional resource management plan, applying scientific population models of marine resources and an eco-system based approach, and which does not exceed catch quotas for seals.

2.2 Opposition to the EU Seal Regime

Canada and Norway are two of only five countries where commercial sealing is carried out. In Canada, the sealing industry has a value of approximately $35-40 million annually, provides part-time employment for up to 6,000 people and is a significant enterprise to communities with limited economic opportunities.[50] In 2006, Canadian seal product exports reached C$18 million, C$5.4 million of which went to the EU. Norway is Canada's biggest market for seal products, and its own commercial sealing industry was subsidised by the Norwegian government by NZ$2.6 million until 2015.[51] For Norway, the seal hunt is of more traditional than economic significance.

Canada and Norway initiated proceedings against the EU through the WTO dispute resolution process. They claimed that the EU Seal Regime, the IC and MRM exceptions in particular, breached GATT non-discrimination provisions in Articles I.1, III:4 and TBT Agreement Articles 2.1, 2.2, 5.1.2 and 5.2.1. The EU argued that the regime was not in violation of the

[48] Regulation 1007/2009 above n 46 art 2(2)
[49] Regulation 1007/2009 above n 46 art 3
[50] A "conservative estimate" before the 2010 EU Seal Regime ban. "Canada's Seal Hunt" (25 March 2013) The Government of Canada <www.canadainternational.gc.ca>
[51] "Norway parliament ditches seal hunting subsidy" (13 December 2014) 3 News <www.3news.co.nz>

GATT and the TBT Agreement and in the alternative, that GATT Article XX(a) relating to measures necessary to protect "public morals" could be invoked to justify the regime.

2.3 Key Findings of the Panel and the Appellate Body

The Panel found that the exceptions to the EU Seal Regime contravened the non-discrimination obligations under the TBT Agreement and the GATT, and were not justified under Article XX(a). Canada, Norway and the EU appealed the Panel's decision on its analysis of various points of law.

a) TBT Annex 1.1

The first issue was whether the EU Seal Regime fell within the scope of the TBT Agreement and could therefore be in breach of two WTO agreements. For the TBT Agreement to apply to a measure it must constitute a technical regulation as defined in Annex 1:1. A technical regulation is one that "lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory".[52] The Panel held that the EU Seal Regime was a technical regulation, referring to the three-tier test in *EC - Asbestos.*[53] First, it found that the measure applies to an 'identifiable group of products', namely seal products. Second, the measure was found to lay down 'product characteristics' in so far as it prohibits products containing seal, while outlining administrative provisions for certain products exempted from the prohibition. It saw the prohibition and exceptions as separate components, and held that it was not necessary for both to lay down product characteristics so long as the regime "as a whole" did so. Third, the Panel found that compliance with the measure was mandatory.

The Appellate Body (AB) took a different approach to Annex 1.1. It first emphasised the interpretation of the AB in *EC - Asbestos,* which defined product characteristics as including "objectively definable 'features', 'qualities', 'attributes', or other 'distinguishing mark[s]' of a product", and required such characteristics to be intrinsic to the product itself.[54] The AB, following *EC - Asbestos,* held that the Panel should have evaluated the weight and relevance

[52] It may also include "terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method". TBT Agreement above n 15, Annex 1.1
[53] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* WT/DS135/AB/R, 12 March 2001(Report of the Appellate Body) [*EC-Asbestos*] at [66]-[70]
[54] *EC-Asbestos,* above n 52 at [67]

of the 'essential and integral' elements of the measure, as an integrated whole.[55] The AB concluded that essentially, the measure was not based on whether the products contain seal as an input, but on criteria relating to the identity of the hunter and the type or purpose of the hunt from which the seal product is derived.[56] These distinctions were not features, qualities or attributes of the product itself, so were not product characteristics properly defined. Thus having reversed the Panel's finding that the EU Seal Regime falls within the scope of the TBT Agreement, the AB declared the Panel's findings under the TBT Agreement to be of no legal effect and moved on to points of appeal with respect to the GATT.[57] The AB's analysis is notable for its more nuanced approach to product characteristics. Being a more specified agreement, alleged breaches of non-discrimination provisions in the TBT Agreement are likely to be accompanied by equivalent complaints under the GATT. The refined definition of product characteristics in *EC - Seal Products* could therefore lessen the number of measures that face liability under both WTO agreements.

b) Process and production methods

In its discussion of the TBT Agreement, the AB reviewed the meaning of related 'processes and production methods' (PPMs) contained within the second limb of the definition of technical regulation in Annex 1.1. It confirmed that a technical regulation may involve a PPM that is related to a product's characteristics. The AB stated that a panel must examine whether the PPMs prescribed in a measure have a 'sufficient nexus' to the characteristics of a product in order to be considered 'related' to those characteristics.[58] Although the AB found the EU Seal Regime to not lay down product characteristics, in theory it could have examined whether the regime prescribes PPMs (such as seal-hunting methods) and whether any such PPMs have a sufficient nexus to the characteristics of the seal products. However the AB refused to complete this legal analysis due to the complexity of the legal issues involved and because such issues had not been examined before the Panel, which could have infringed upon parties' due process rights. The lack of engagement with PPM analysis in this dispute was also due to the controversial nature of the product-related and non-product-related PPM

[55] *EC-Asbestos* above n 52 at [72]
[56] *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* WT/DS400/AB/R / WT/DS401/AB/R, 18 June 2014 (Report of the Appellate Body) [*EC-Seal Products* AB Report] at [5.58]
[57] *EC-Seal Products* AB Report above n 56 at [5.70]
[58] *EC-Seal Products* AB Report above n 56 at [5.12]

issue, the AB noting that "the line between PPMs that fall, and those that do not fall, within the scope of the TBT Agreement raises important systemic issues."[59]

c) The relationship between obligations in the GATT and TBT Agreement

In submissions to the Panel and the AB, the EU argued that the non-discrimination obligations in GATT Article I:1 and III:4 should include an exception for legitimate regulatory distinctions. The legitimate regulatory discrimination analysis was incorporated into the non-discrimination provision in TBT Article 2.1 by the AB in *Clove Cigarettes*.[60] In applying this same interpretation to the GATT, the IC and MRM distinctions could be considered legitimate regulatory distinctions, and therefore be held to be consistent with non-discrimination obligations.

In light of this submission the Panel reviewed the relationship between, and legal standards under, the GATT and the TBT Agreement.[61] Both the Panel and AB held that inconsistency with GATT Articles I:1 and III:4 cannot be justified by the legitimate regulatory distinction standard. The AB emphasised that while WTO agreements should be interpreted in a coherent manner, this does not mean that legal standards for obligations under the TBT and the GATT must have the same meaning**.** In reaching this conclusion, the AB noted that the legitimate regulatory distinction test was incorporated into the requirement for 'treatment no less favourable' in TBT Article 2.1. Because the words 'treatment no less favourable' do not appear in Article I.1, there is no textual basis for applying the legitimate regulatory distinction test.[62] Although Article III:4 does requires 'treatment no less favourable', both the Panel and AB held that the incorporating the legitimate regulatory distinctions test was not appropriate under the GATT. The AB upheld that under the GATT, the more difficult *de facto* discrimination analysis applies, meaning that any discrimination in fact is deemed to be a breach of Article III:4 or I:1.

The EU claimed that this varied approach in the two agreements could result in a measure being considered non-discriminatory under Article 2.1 of the TBT Agreement, but

[59] *EC-Seal Products* above n 56 at [5.69]
[60] *US – Shrimp* above n 38 at 96
[61] *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* WT/DS400/R, WT/DS401/R, 25 November 2013 (Report of the Panel) [*EC-Seal Products* Panel Report] at [7.581]
[62] *EC-Seal Products* AB Report above n 56 at [5.90]

discriminatory under the GATT. The EU argued this could render the TBT Agreement irrelevant, by encouraging complaints only under the GATT.[63] In response to this the AB explained that the balance to non-discrimination obligations in the GATT is found in the right of members to regulate under Article XX. As the TBT Agreement does not have such an exception clause, the 'legitimate regulatory distinction' test acts as the balancing factor in the TBT.[64]

On application of the clarified legal standards under the GATT, it was found that exclusion of Canadian and Norwegian seal products from the EU market constituted *de facto* discrimination by affording less favourable treatment to member states who did not fall within the exceptions of the EU Seal Regime.

d) GATT Article XX(a) and the *chapeau*

To justify its breach of GATT Articles I.1 and III:4, the EU invoked the Article XX(a) exception for measures necessary to protect public morals. The Panel and AB analysed whether the exception was met using the three requirements set out in *US - Gasoline*: the measure must first fall within the scope of the exception invoked, second satisfy the relational clause of the subparagraph, and third meet the requirements of the *chapeau*.[65]

It was found that the main policy objective of the EU Seal regime was to address public concern for seal welfare, while accommodating other interests through the exceptions.[66] The parties disagreed about whether public concerns for seals were in fact *moral* concerns for the EU public. The Panel considered the legislative history of the EU Seal regime and other actions taken by the EU to address animal welfare protection, including various pieces of legislation, conventions on animal welfare and international instruments. Both the Panel and AB held that while there may not be an explicit link between seal or animal welfare and the morals of the EU public, the evidence taken as a whole demonstrated that animal welfare is an ethical concern in the EU.[67] The concern for seal welfare related to the incidence of inhumane killing of seals, and individuals desire to avoid involvement in trade that perpetuated

[63] *EC-Seal Products* AB Report above n 56 at [5.118]
[64] *EC-Seal Products* AB Report above n 56 at [5.127]
[65] *United States – Standards for Reformulated Gasoline* WT/DS2/AB/R, 20 May 1996 (Report of the Appellate Body) [*US-Gasoline* AB Report]
[66] *EC-Seal Products* AB Report above n 56 at [5.161]
[67] *EC-Seal Products* Panel Report above n 61 at [7.409]

inhumane seal hunts. The EU Seal Regime was found to contribute sufficiently to its policy objective, and no reasonable, less trade-restrictive options were found to be available. The regime was considered 'necessary' to protect public morals with respect to the sealing industry, thereby satisfying the second limb of the test in *US-Gasoline.*

The AB nevertheless found that the requirements of the *chapeau* to Article XX had not been met. The Panel applied the same legal test to the Article XX *chapeau* as it applied under TBT Article 2.1, considering whether competitive disadvantage stemmed solely from a legitimate regulatory objective. The Panel adopted this interpretation on the basis of earlier decisions in which the AB had incorporated the fifth and sixth recital of the preamble into TBT Article 2.1 in order to create an almost identical legal standard to that in the Article XX *chapeau*. The AB unequivocally rejected this approach and highlighted the key differences between the two legal standards that justify their inconsistent interpretation. The AB explained that under Article 2.1 only the regulatory distinction that causes detrimental impact on imported products is examined to determine the legitimacy of a measure. By contrast, under the *chapeau*, a measure could be applied in a way that results in arbitrary or unjustifiable discrimination based on some other ground than the discrimination found to violate GATT Articles I and III.[68] These differences justify the AB's strict textual interpretation of both provisions.

Having clarified its interpretation of the *chapeau*, the AB concluded that the EU Seal Regime was applied in an arbitrary and unjustifiable manner because the IC exception facilitated access of Greenlandic Inuit to the EU market, but the EU had not made similar efforts to facilitate access of Canadian Inuit.[69] The way the implementing regulation was drafted meant that it was more difficult for the Canadian Inuit to apply for the IC exception and this resulted in *de facto* exclusivity of the IC exception. The AB relied on a statement in *US - Shrimp* that a measure may not meet the *chapeau* requirements where application of the measure does not allow for inquiry into the appropriateness of the regulatory program for the conditions prevailing in exporting countries. Despite claiming to have engaged in multiple efforts to assist the Canadian Inuit, the AB found that this was not sufficient. Furthermore, the distinction between commercial and IC hunts was unrelated to the overall objective of

[68] Stephanie Hartmann "Comparing the National Treatment Obligations of the GATT and the TBT: Lessons Learned from the EC-Seal Products Dispute" (2015) 40 North Carolina Journal of International Law and Commercial Regulation 629 at 655
[69] *EC-Seal Products* AB Report above n 56 at [5.338]

addressing EU concerns regarding seal welfare, as inhumane hunting methods could still be used under the IC and MPM exceptions. The way the EU Seal Regime was applied meant it could not be justified under Article XX(a) and was therefore inconsistent with the EU's non-discrimination obligations under the GATT.

Chapter III: Implications of the Appellate Body Report in *EC - Seal Products*

3.1.The relationship between the TBT Agreement and the GATT

Setting clear legal standards for non-discrimination obligations and exceptions from them is necessary for states to know how to comply with WTO law. Uncertainties have high stakes considering the ability of dispute settlement bodies to demand compensation or penalties for breaches. What may seem to be a technicality can in fact define the regulatory space states have to enact measures that serve important public policy goals, as demonstrated by the reading of national treatment obligations in *EC - Seal Products.*

EC - Seal Products confirms recent jurisprudence that Article XX exceptions should not be directly applied to breaches of the TBT Agreement. The absence of exceptions clauses in specialised WTO agreements has led to concerns that legitimate policy measures could be invalidated.[70] The scope of Article XX beyond the GATT has therefore been unclear until the *China - Raw Materials* dispute in 2012. China claimed that a censorship program in breach of its Accession Protocol could be justified according to Article XX(a) to protect China's public morals. The Panel and AB held that Article XX can only be used to justify a non-GATT violation where it is specifically or impliedly referenced in the breached provision.[71] China's attempted reliance on Article XX failed on this basis. A few months later, the AB report in *Clove Cigarettes* stipulated that where a provision does not reference Article XX it may still be interpreted consistently with Article XX. Reading Article 2.1 in light of the preamble to the TBT Agreement, the AB incorporated a concept of 'legitimate regulatory distinctions' into Article 2.1 to offer the same regulatory space provided by GATT Article XX.[72] The decision in *EC - Seal Products* confirms how this balance between trade liberalisation and states right to regulate is reached in the TBT Agreement.

The AB in *EC - Seal Products* went on to clarify that the TBT Article 2.1 and GATT Article III:4 (national treatment) impose different legal standards on allegedly discriminatory

[70] Danielle Spiegel Feld and Stephanie Switzer "Whither Article XX? Regulatory Autonomy Under Non-GATT Agreements After *China-Raw Materials* (2012) 38 Yale Journal of International Law Online 16 at 19
[71] Danielle Spiegel Feld and Stephanie Switzer above n 70 at 26
[72] Danielle Spiegel Feld and Stephanie Switzer above n 70 at 29

measures that fall under both agreements. TBT Article 2.1 allows detrimental impact on competitive opportunities for imports where this impact stems exclusively from a legitimate regulatory distinction. Under GATT Article III:4, however, detrimental impact on competitive opportunities constitutes *de facto* discrimination, irrespective of any legitimate regulatory distinctions. On this interpretation, the national treatment obligation in the TBT Agreement is less strict than the same obligation contained in GATT Article III:4. As noted in *EC - Seal Products*, this has the potential to encourage states to only pursue breaches of the GATT, because they have a greater chance of success, thereby making the TBT obligation redundant.[73] Reliance on GATT is even more likely given the narrowing of the meaning of 'technical regulation' under the TBT Agreement in *EC - Seal Products*. As the AB explained, the varied legal standards are justified on the basis of the exceptions available under each agreement. Although the GATT national treatment obligation is tougher, members are able to invoke Article XX where appropriate to justify measures that would otherwise be prohibited. The TBT Agreement contains no equivalent exceptions clause, but since *Clove Cigarettes* it allows for a similar kind of exception in Article 2.1. Importing a requirement to consider legitimate regulatory distinctions into GATT Article III:4 would therefore repeat what is an almost identical analysis under Article XX, depriving the latter of its purpose.[74] The AB's interpretation emphasises that the similar wording should not detract from the surrounding context in each agreement. An important difference is that under the GATT, the burden of proof shifts to the party invoking Article XX to show a measure is justified.

The clarification offered by the AB on the relationship between these two key WTO agreements is significant given that disputes frequently rest on technicalities in wording and interpretation. The conclusion that GATT Article XX is the more onerous non-discrimination provision is also important, as it places greater emphasis on Article XX as a counterweight to non-discrimination obligations.

[73] *EC-Seal Products* AB Report above n 56 at [5.118]
[74] Laura Nielsen and Maria-Alejandra Calle "Systematic Implications of the EU-Seal Products case" (2013) 8 Asian Journal of WTO and International Health Law and Policy 41 at 57

3.2 The hurdles of Article XX

EC - Seal Products highlights the difficulty of successfully employing the general exceptions in GATT Article XX and the near impossibility of satisfying the *chapeau*. It adds to the list of failed attempts to invoke Article XX, many of which have fallen down at the *chapeau* stage.

a) The AB approach to the *chapeau*

The AB's analysis of the *chapeau* was not novel; it cited and followed the approach established in previous AB reports. In *US - Gasoline* the AB emphasised that the purpose of the *chapeau* is to prevent the abuse of the right to invoke the exceptions in Article XX.[75] It thereby operates to balance a members right to invoke exceptions, with the right of other members to have their rights in the GATT upheld. An appropriate balance is sought such that "neither of the competing rights cancel out the other and thereby distort and nullify or impair the balance of rights and obligations… in that Agreement".[76] The AB in *US - Shrimp* reiterated that because the GATT makes the general exceptions available, in recognition of the legitimacy of the policies and interest embodied in the subparagraphs of Article XX, the right to invoke those exceptions "is not to be rendered illusory".[77]

Despite apparent attempts to reach this balance, the vast majority of disputes have nevertheless seen the AB fall on the side of upholding members' rights in the GATT. As at August 2015, only one of 44 attempts to invoke Article XX, or the equivalent provision in GATS, had ever been successful.[78] Article XX was deemed to be relevant in only 33 cases and of these, five failed to fall within the subparagraphs of Article XX, 18 failed on the necessity test and nine failed at the *chapeau* stage.[79] Recall that the necessity test demands that a measure is 'necessary' or 'relates to' the legitimate policy objective, in some cases requiring a strict 'least trade restrictive' test and in others a more balanced approach.[80] Likewise, the AB's interpretation of what exactly is required by the *chapeau* varies on a case-

[75] *United States – Standards for Reformulated Gasoline* above n 65 at [20]
[76] *US-Shrimp* AB Report above n 38 at [159]
[77] *US-Shrimp* AB Report above n 38 at [156]
[78] "Only one of 44 attempts to Use the GATT Article XX/GATS Article XIV 'General Exception' Has Ever Succeeded: Replicating the WTO Exception Construct Will Not Provide for an Effective TPP General Exception", Public Citizen (August 2015) <www.citizen.org>
[79] "Only one of 40 attempts to Use the GATT Article XX/GATs Article XIC 'General Exception' Has Ever Succeeded..." above n 78
[80] *Brazil – Measures Affecting Imports of Retreaded Tyres* WT/DS332/AB/R, 3 December 2007 (Report of the Appellate Body) [*Brazil –Retreaded Tyres* AB Report] at [156]

by-case basis, sometimes demanding that members take affirmative action to ameliorate the discriminatory effects of the measure in question.[81] This may involve serious attempts at bilateral or multilateral negotiation with all member states that could be affected, before the measure is implemented and any discriminatory effects become apparent. As noted above, one reason for the EU Seal Regime not meeting the *chapeau* requirements was because the EU had not made adequate efforts to confer with the Canadian Inuit about the appropriateness of the IC exception for the prevailing conditions in Canada. Similarly in *US - Gasoline,* a regulation on gasoline emissions was held to be unjustifiable because the US allowed domestic gasoline producers time to restructure but did not seek the cooperation of foreign producers before imposing the regulation. These cases exemplify the burdensome and time-consuming efforts required to satisfy the *chapeau* test.

b) The difficulty of exceptions within regulations

In *EC - Seal Products* the lack of connection between the grounds of the IC and MRM connections and the overall objective of addressing public concern for seal welfare was held to constitute arbitrary or unjustifiable discrimination. The exceptions in the EU Seal Regime were, as exceptions often are, political considerations to ensure the regulation accommodated the interests of concerned parties. Blanket bans, although ideal in a world of non-discriminatory free trade, can be impractical and equally contentious. In *Brazil - Retreaded Tyres,* for example Brazil banned the import of retreaded tyres because of the associated dangers to public health and the environment.[82] Brazil included an exception for MERCOSUR countries because the tyre restriction was inconsistent with a MERCOSUR legal ruling that banned any new trade restrictions between those states. Although the measure was provisionally justified under Article XX(b), the carve out necessitated by MERCOSUR law was held to constitute arbitrary or unjustified discrimination under the *chapeau*.[83] Exceptions and carve outs clearly have a problematic relationship with the *chapeau* because they are discriminatory by their very nature, and because the reason behind them often does not relate directly to the objective of the restriction.

[81] Stephanie Hartmann above n 68 at 661
[82] *Brazil-Retreaded Tyres* AB Report above n 80
[83] *Brazil-Retreaded Tyres* AB Report above n 80 at [228]. MERCOSUR full members are Argentina, Bolivia, Brazil, Paraguay, Uruguay and Venezuela. Associate countries are Chile, Peru, Columbia and Ecuador.

Treatment of exceptions is complicated by the WTO's aversion to considering regulatory intent, including that revealed through legislative history, due to a desire to avoid considering subjective evidence.[84] The Panel and AB in *EC - Seal Products* had conflicting views on the issue of intent. The Panel relied on subjective evidence that the EU was aware the IC exception would only be feasible for the Greenland Inuit, and that the MRM exception was designed to apply to seal products from EU countries. This evidence is fairly damning to the EU Seal Regime, but nevertheless highlights how subjective evidence of regulatory intent can determine whether a measure is applied in a purposefully discriminatory or protectionist manner. On the other hand, if there is no discriminatory or protectionist intent, this can also be brought to light through subjective evidence. The AB in *EC - Seal Products* wholeheartedly refused to consider intent, although it ultimately reached the same conclusions. It stated that it is entirely unnecessary to consider the reasons regulators have for what they do or to weigh the relative significance of such reasons when examining how a measure is applied.[85] Which approach is desirable depends on how one views the purpose of WTO agreements, and the proper role of the dispute settlement body.

c) The overall *chapeau* effect

Advocates of Article XX and the *chapeau* emphasise that many trade-restrictive measures are not disputed because they are so clearly justified under Article XX. Examples include the ban on importation of non-Kosher meat in Israel justified on the basis of public morals[86] and the EU ban on importing polychlorinated biphenyls which are recognised carcinogens and environmentally harmful.[87] Although trade-restrictive, these examples are unlikely to be discriminatory as they apply to all states and the same standards apply domestically. These cases also do not change the strict interpretation of the *chapeau* for those cases that are brought to dispute. The ambiguities within the necessity and *chapeau* analyses make it likely that any regulation affecting vital trade interests would be contested.

It is also important to note that several GATT-inconsistent measures that were not justified under Article XX have been subsequently amended in accordance with Panel and AB

[84] Referring to exceptions or carve outs in state regulation, not to be confused with exceptions provisions in WTO Agreements.
[85] Stephanie Hartmann above n 68 at 667
[86] Tamara S Nachmani "To Each His Own: The Case for Unilateral determination of public morality under article XX(a) of the GATT." (2013) 71 University of Toronto Faculty Law Review 33 at 39
[87] "PCB Information Leaflet" (2013) Environmental Protection Agency Ireland <www.epa.ie>

recommendations. This is positive if the modified measures still pursue their societal interests to the same extent they did before modification and are subtly brought into line with WTO requirements. This has occurred recently with the EU Seal Regime, with the EU voting to tighten the regulation to bring it in line with the AB report.[88]

Within Article XX jurisprudence however, the AB's strict interpretation of the *chapeau* and the failure rate of Article XX gives the impression that states' rights under Article XX are in fact illusory. This calls into question whether Article XX is adequate to protect states' regulatory autonomy, especially in light of the conclusion that GATT non-discrimination obligations are harsher than those in the TBT Agreement.

3.3 Animal Welfare and the Public Morals Exception

EC - Seal Products marks the first time the WTO has sent a strong message that moral values, and animal welfare in particular, hold significant weight in international trade law. The AB's acceptance that concern for animal welfare falls within the scope of 'public morals' in the EU sets a precedent for further measures which ban or restrict other products involving inhumane treatment of animals. This is an interesting development in the law surrounding Article XX(a), which has received minimal attention in international trade law to date.

Conflict between trade and concern for animals has been the centre of several significant international trade disputes, notably the *Tuna - Dolphin* disputes and *US - Shrimp*. In a sense, *EC - Seal Products* continues this theme but through the lens of public morality. Because the threatened seals in this case are not endangered, the exceptions for measures necessary to protect animal life or health,[89] or relating to the conservation of exhaustible natural resources,[90] were unlikely to be employed successfully. Furthermore, the principles behind animal welfare are somewhat different to those of environmental protection. While the latter are centered on ecological sustainability, biodiversity and the importance of a particular

[88] Arthur Nelsen "Europe strengthens ban on seal products after WTO Challenge (8 September 2015) The Guardian <www.theguardian.com>
[89] GATT 1994 above n 12, art XX(b)
[90] GATT 1994 above n 12, art XX(g)

species, the former focuses on the well-being of animals regardless of whether they are endangered or not.[91]

How public morality in Article XX(a) is construed depends on two questions: what constitutes a legitimate moral issue and how widespread a moral sentiment must be to be considered 'public'. Both questions are key to shaping the scope of the exception. The AB in *EC - Seal Products* endorses a unilateral view of public morals sketched in the two preceding Article XX(a) disputes, but provides little guidance on how widely a view must be held within a state itself to fall within the exception. An examination of Article XX(a) jurisprudence and possible theories of interpretation confirms the appropriateness of the AB's current approach.

a) Jurisprudence on the public morals exception

There is little legislative history on the drafting of Article XX(a) from which a conclusive purpose or definition can be drawn.[92] The GATT was intended as an interim agreement or precursor to the International Trade Organisation (ITO) Charter, which did not ultimately come into existence.[93] While the first outline of the ITO Charter included the public morals exception, it does not appear to have set out any substantive definition of or limitations on public morals at the time of drafting.[94]

Judicial guidance on the meaning of public morals is similarly scarce. The public morals exception has been incorporated into international trade law for over 50 years but did not require interpretation until 2005 in *US - Gambling* and more recently in *China - Audiovisual.*[95] *EC - Seal Products* is therefore only the third time Article XX(a) has been considered through the WTO dispute settlement process. This does not imply the exception is redundant, as the public morals exception has been used to support a number of trade-restrictive measures that have not been the subject of GATT or WTO complaints. These include a ban on importation of all non-kosher meat in Israel, restrictions on the importation

[91] Laura Nielsen "Emotional and Legal Stakes Are High in the Seals Dispute" (17 December 2010) International Centre for Trade and Sustainable Development <www.ictsd.org>
[92] Steve Charnovitz "The Moral Exception in Trade Policy" (1998) 38 Virginia Journal of International Law 689 at 704
[93] Tamara S Nachmani above n 85 at 37.
[94] Steve Charnovitz above n 91 at 704-705
[95] Tamara S Nachmani above n 85 at 33

of alcohol in Indonesia, a US ban of all products made by indentured child labour and restrictions on pornography in a number of countries.[96]

In 2005, the WTO was required to interpret the meaning of the public morals exception in GATS Article XIV(a) for the first time, in *US - Gambling*. The case involved a US prohibition on cross-border gambling and betting services in the form of a series of Acts ("the Acts"). The US defended these as being necessary to protect public morals and public order. In the context of Article XIV(a) GATS, the Panel defined public morals as "standards of right and wrong conduct maintained by or on behalf of a community or nation", and held that public morals should be interpreted based on a dynamic, flexible approach. In the Panel's view, which was uncontested by the AB, concepts of public morals can "vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values."[97] This dynamic approach was also taken by the AB in *Shrimp - Turtle,* noting that Article XX(g) must be interpreted "in the light of contemporary concerns of the community of nations".[98] The AB upheld the Panel's finding that ambiguity surrounding the application of the Acts to the Interstate Horseracing Act (IHA) had discriminatory effects, namely the possibility that domestic, but not foreign, suppliers could offer remote betting services.[99] Therefore the Acts did not satisfy the *chapeau* requirements and US reliance on the public morals exception in Article XIV(a) was invalid. The broad definition of public morals and the dynamic approach taken by this case are the most important aspect to note. However it is interesting to document a further case which has fallen down at the *chapeau* stage.

China - Audiovisual involved a regulation stipulating that all foreign publications and audiovisual products imported into China be channeled through state-owned censorship enterprises to censor goods offensive to Chinese public morals.[100] The US argued these import restrictions breached the national treatment obligation because domestic products were not subject to the same censorship practices. China defended the measures on the grounds of Article XX(a) GATT. In examining China's defence under Article XX(a), the Panel adopted the dynamic interpretation of public morals in *US - Gambling.* It also held that public morals

[96] Tamara S Nachmani above n 85 at 39
[97] *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WT/DS285/R, 10 November 2004 (Report of the Panel) [*US-Gambling* Panel Report] at [6.465]
[98] *Shrimp-Turtle* AB Report, above n 38 at [129]
[99] Tamara S Nachmani above n 85 at 43
[100] *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* WT/DS363/R, 12 August 2009 (Report of the Panel) [*Audiovisual* Panel Report]

should be interpreted analogously in GATT Article XX(a) and GATS Article XIV(a). Ultimately the Panel found, and the AB upheld, that China had not made a *prima facie* case that the import restrictions were necessary to protect public morals, and that the US proposal for foreign entities to conduct the censorship reviews was a viable, less-trade restrictive alternative.[101] Therefore China was unable to rely on Article XX.

b) Interpretive models

The interpretation of public morals in *US - Gambling*, *China - Audiovisual* and *EC - Seal Products* excludes three potential interpretive models of the public morals exception. Originalism would require restricting the concept of public morals to how it was perceived at the time the article was drafted. This would not only be difficult due to the lack of evidence of intention behind Article XX(a), but would also contradict the dynamic interpretation emphasised by the AB and the changeable nature of societal values generally.[102] Transnationalism on the other hand, suggests the existence of certain universally shared morals and would require states seeking to invoke Article XX(a) to demonstrate that the public moral in question was 'widely held' by 'similarly situated countries'.[103] Universalism goes further than this, requiring 'near-universal practice'. Both interpretive frameworks are contradicted by the AB's statement in *US - Gambling* that public morals are "maintained by or on behalf of a community or nation", which suggests that even a single state could have its own unique set of public morals.[104]

Two remaining interpretive models are consistent with the AB's approach to public morals: Jeremy Marwell's evidentiary unilateralism and Mark Wu's restriction-sensitive approach.[105] Under Marwell's approach, states may define what constitutes public morals unilaterally, but must provide evidence for the existence of the public moral in question. In response to criticism that such a model could lead to a range of protectionist measures under the guise of public morality, Marwell points to the necessity and *chapeau* analyses. As discussed above, these two further hurdles prevent any such misuse of Article XX as well as unintended discriminatory effects of regulation.

[101] *China-Audiovisual* Panel Report above n 99 at [7.911]-[7.912]
[102] Tamara S Nachmani above n 85 at 46
[103] Tamara S Nachmani above n 85 at 46
[104] *US-Gambling* Panel Report above n 96 at [6.465]
[105] Tamara S Nachmani above n 85 at 34

Wu argues that these restraints are not enough to prevent protectionism and could result in the destabilisation and politicisation of the international trade regime.[106] He outlines an approach that differentiates between three kinds of restrictions. Type I restrictions are 'inward-directed' in that the state uses the restriction to protect the moral beliefs of its own inhabitants, for example by banning gambling, pornography, or alcohol. Type II restrictions are directed at protecting those involved in the production of goods and services in the exporting state, whereas Type III restrictions concern goods or services of an exporting state whose practices are considered immoral by the importing state, but which are not directly involved in the production of banned goods or services.[107] Wu asserts that only inward-looking Type I restrictions have been accepted in *US - Gambling* and the status of outward-looking Type II and III restrictions is unclear. Wu's approach is flawed, in part for creating a three-part distinction that is overly rigid and does not exist in Article XX jurisprudence.[108] For example a ban on child pornography, widely accepted as being justifiable under the public morals exception, could be both a Type I restriction for protecting the states citizens or a Type II restriction aimed at protecting exploited children.[109] Furthermore, the AB has addressed policies that Wu describes as 'outward-directed' in *Shrimp - Turtle,* stating that the fact that a measure requires the compliance of exporting countries with polices imposed by the importing country does not exclude the measure from justification under Article XX.[110]

Nachmani argues that evidentiary unilateralism is the only appropriate interpretation of the public morals exception.[111] Given the broad scope of what could constitute public morals, the question becomes how prevalent a view must be before it is considered held by the 'public' within a particular state. The evidentiary aspect of Marwell and Nachmani's model requires that a state must prove that the public moral is widely held, using evidence such as historical practices, public opinion polls or referendum results. It is then a matter of judgment as to whether the evidence demonstrates the issue addressed by a trade restriction is supported by public morality. This suggests a simple majority of the population could be enough to constitute the general public's views towards a particular issue. Alongside the necessity and

[106] Mark Wu, "Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine" (2008) 33 Yale Journal of International Law 215 at 240
[107] Mark Wu above n 105 at 235
[108] Michael Trebilcock, Robert Howse and Antonia Eliason *The Regulation of International Trade* (4th ed, Routledge, London, 2013) at 735
[109] Michael Trebilcock, Robert Howse and Antonia Eliason, above n 107 at 735
[110] *Shrimp-Turtle* AB Report above n 38 at [121]
[111] Tamara S Nachmani above n 85 at 46

chapeau tests, this framework is more than adequate to address concerns about protectionism. It also demonstrates a respect for pluralism in the international trade sphere, which Howse and Langille argue is necessary to uphold the proper institutional role and legitimacy of the WTO.[112] They note that neither the WTO nor the GATT before it can claim to be a comprehensive governance regime or a general world administrative agency. Unlike domestic governments, which weigh up various competing factors, the WTO's mandate is limited to regulating international trade to ensure there are no unnecessary barriers to trading.[113] Evaluation of the moral content of a states regulation is therefore not a legitimate function of the WTO.

[112] Robert Howse and Joanna Langille "Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values" (2012) 37 Yale Journal of International Law 367 at 427

[113] Robert Howse and Joanna Langille above n 111 at 428

Chapter IV: Beyond *EC - Seal Products* - Animal welfare and the balance between trade and non-trade Objectives

4.1 The future of animal welfare regulation

EC - Seal Products demonstrates how conflicting values can be reconciled through the WTO system. Despite the initial finding that the EU Seal Regime breached the *chapeau*, in its amended form it achieves its objective and is in line with the EU's trade obligations. Labeled as a "watershed case in the global animal protection movement", this dispute has set the stage for further regulations that address animal welfare concerns.[114] The growth of international norms relating to animal welfare has led some commentators to claim the existence of a general principle of international law concerning animal welfare.[115] Sykes argues that prevailing international views about moral priorities are highly persuasive, noting that the condemnation of seal hunting behind EU ban was an international phenomenon. Lurié and Kalinina see the AB reports in *US - Tuna* and *EC - Seal Products* as an acknowledgement by the WTO of an increasing global awareness that animal welfare is an ethical issue that can trump free trade in some circumstances.[116] This global awareness could see many more regulations imposed under the public morals exception, whether these are contested under the WTO dispute settlement system or not.

a) Applying *EC - Seal Products* to other animal welfare contexts

The reasoning in *EC - Seal Products* can be applied to other animal welfare contexts such as the treatment of farm animals and research animals[117] In most cases a blanket ban on the importation of an animal product is not feasible, so regulations will be centered on whether goods from animals are produced using humane methods. This is problematic because distinguishing between 'like' products on the basis of PPMs is a prima facie breach of non-discrimination obligations in the GATT and TBT Agreement. As noted above, WTO dispute settlement bodies do not consider how a product is produced in determining its likeness to

[114] Andrew Lurié and Maria Kalinina "Protecting Animals in International Trade" (2015) 30 American University International Law Review 431 at 444
[115] Katie Sykes "Sealing animal welfare into GATT exceptions: the international dimension of animal welfare in WTO disputes"(2014) 13 World Trade Review 471 at 472
[116] Andrew Lurié and Maria Kalinina above n 113 at 435
[117] Andrew Lurié and Maria Kalinina above n 113 at 435

another product. This means that under international trade law, all eggs are created equal, regardless of whether they were produced by hens in battery cages or hens allowed to roam freely and meat from animals treated or killed humanely is the same as meat from animals treated or killed inhumanely. Discrimination based on PPMs was an issue in the *Tuna - Dolphin* disputes and was touched upon in *EC - Seal Products.* The AB commented on which PPMs are 'product-related' under the TBT Agreement, but did not carry out a complete analysis due to the lack of submissions and the controversial nature of the issue.

In absence of any clarification of the PPM issue, distinctions based on PPMs that address animal welfare would need to rely on justification under Article XX. This is contingent on there being a sufficient degree of public sentiment towards a particular trade or issue to ensure the regulation can be justified as reflecting public morals, as well as satisfaction of the necessity and *chapeau* tests. Future regulators can learn from *EC - Seal Products* and ensure that regulations are preceded by serious attempts to negotiate with any affected parties. Likewise, all aspects of a regulation, especially any exceptions or differential treatment, need to be linked to the overall animal welfare objective. This will avoid the defect in the original EU Seal Regime that did not include any requirement for humane hunting methods in seal hunts falling within the IC and MRM exceptions.

The livestock trade in Australia has faced serious public opposition due to the transportation practices and animal mistreatment associated with live exports. Forthcoming regulation of this practice was analysed in light of *EC - Seal Products*, finding that the public support for animal rights in Australia could enhance a claim under Article XX(a).[118] Chaudhri notes that a complete embargo on live exports sought by animal welfare activists is unlikely to satisfy the *chapeau* because it imposes a rigid, inflexible standard on states where different conditions prevail and does not provide any opportunity for states to challenge the trade restriction.[119] The licensing system proposed in the *Export Control (Animals) Amendment Order 2012 (No 1)* ensures all elements of the supply chain meet the World Organisation for Animal Welfare standards. This proposal is more likely to satisfy the *chapeau* requirements because it applies international, instead of Australian, standards and it allows for the different conditions

[118] Radhika Chaudhri above n 24 at 306
[119] Radhika Chaudhri above n 24 at 306

prevailing in other states.[120] It will be interesting to observe how this framework is applied in practice and if any WTO disputes surface, whether Article XX(a) is employed successfully.

b) Labeling requirements

A potential alternative to relying on Article XX is requiring product labels that provide consumers with information about how a product is produced. This form of animal welfare regulation may be permissible under the TBT following the *US - Tuna* decision, in which requirements for a 'dolphin-safe' label on tuna were based on whether the fishing methods used were harmful to dolphins. The measure was found to violate the TBT Agreement only because it did not address harms to dolphins outside of the East Tropical Pacific Ocean and was therefore considered arbitrary. It was only the application of and not the impetus behind the labeling requirements that was disputed, and the revised labeling regime has not been disputed.

One particularly controversial animal welfare issue is the traditional Halal and Shechita slaughter of animals, because it involves a trade off between two moral beliefs; Muslim and Jewish religious teachings and concern for animal welfare. Both Halal and Shechita methods involve slitting the animal's throat, sometimes without stunning the animal beforehand.[121] Although there are different interpretations, some communities see stunning as against their respective religious laws. EU law ensures states set out requirements for Jewish and Muslim methods, including cutting techniques and knife inspection, but does not address pre-slaughter handling or the pain and distress that occurs until loss of consciousness without pre-stunning.[122] A significant amount of meat from these animals is declared non-Kosher for other reasons, and is subsequently sold on the open market without any labeling. Similarly, meat labeled 'Halal' for religious reasons does not generally indicate whether the animal was pre-stunned or not.[123] There have been several calls for the European Commission to require labeling of meat from animals that are not stunned prior to killing, with one study indicating 72% of people would welcome these labels when purchasing meat products.[124] Reconciling

[120] Radhika Chaudhri above n 24 at 306
[121] "Slaughter without pre-stunning (for religious purposes) – Information Sheet" (February 2015) RSPCA <www.rspca.org.uk>
[122] "Slaughter without pre-stunning (for religious purposes) – Information Sheet" above n 120
[123] "Slaughter without pre-stunning (for religious purposes) – Information Sheet" above n 120
[124] Michelle Perrett "European Commission called on to label non-stun meat" (10 June 2015) Global Meat News <www.globalmeatnews.com>

the conflicting ethical interests under Article XX(a) would be highly inflammatory because it could involve raising some societal values above others. Labeling is a far more suitable means of addressing animal welfare concerns provided regulations remain consistent with the TBT Agreement.

The interaction between animal welfare and trade is just one example of conflicting trade and non-trade objectives that are mediated through the WTO framework. Because of the pervasive nature of the international trade system it seems inevitable that these conflicts will be carried out through the forum of the WTO, and in particular through exceptions clauses in individual agreements. These exceptions are the only way of achieving an appropriate balance between trade and non-trade interests in our trade-reliant global economy.

4.2 The balance between trade and non-trade values

The WTO is first and foremost a body to promote and regulate international trade. Economic globalisation and international trade have contributed to economic development and prosperity in both developed and developing countries.[125] The benefits of participation in the international trade system explain why membership of the WTO is so vast. However it is widely understood that other important objectives may conflict with trade liberalisation, values which in some cases have been harmed by un-restricted trade and globalisation. Environmental degradation is one such example, highlighted in the abundance of literature on the 'trade and environment debate'. Increasing awareness of animal welfare has shed light upon the cost of food, fashion and cosmetic industries and the disturbing effects of various productive industries on the people involved are not to be understated. Addressing these concerns requires a willingness on the part of governments to protect certain societal interests through regulation, even when doing so involves restrictions on trade.

Although these non-trade concerns are in no way the WTO's primary objective, the preamble to the WTO Agreement acknowledges that trade liberalisation should not be pursued without regard for the sustainability of economic development, environmental degradation and global poverty.[126] This is the basis of GATT Article XX and other exceptions provisions. They

[125] Peter Van den Bossche and Werner Sdouc, above n 5, at 71
[126] Peter Van den Bossche and Werner Sdouc, above n 5, at 83

represent the balance apparently sought by the AB between trade obligations and the right of states to retain their regulatory autonomy.

The AB's lenient approach to the subject matter of measures is evidenced by its acceptance of unilaterally determined public morals and animal welfare concerns in *EC - Seal Products*. This is in stark contrast to its rigorous approach to the necessity and *chapeau* tests in Article XX. The failure of successive attempts by states to satisfy all technical hurdles in Article XX indicates that the framework that is too rigid. With respect to environmental regulation, Walter argues that the EU is unable to fully pursue its environmental policies under the current interpretation of Article XX.[127] Defenders of the Article XX interpretation as it stands may argue that states have an adequate tool for pursuing non-trade objectives before them, but through self-interest or carelessness they are unable to employ it successfully. It is likely to be a combination of both factors, but assuming that regulators are at fault in every case appears suspect. This is because the requirements of Article XX are as ambiguous as they are demanding. The line of equilibrium "moves as the kind and shape of the measures at stake vary and as the facts making up the specific cases differ."[128] This flexible case-by-case approach makes it difficult to predict whether an Article XX defence will be successful.[129]

A few interpretive changes could make all the difference for bona fide attempts at pursuing non-trade objectives in the GATT. A *chapeau* construction that considers the intentions behind regulation instead of simply its effects could distinguish protectionist measures from measures made in a genuine attempt to comply with WTO obligations. Furthermore, the *chapeau* test should function as a whole, instead of three separate standards which have the same underlying objective of catching blatant protectionism. However the AB stated that ultimately any perceived imbalance between existing rights and obligations under the GATT, WTO members have the authority to address such an imbalance.[130] If the GATT were to be amended in future WTO negotiation rounds, providing for more explicit *chapeau* terms would limit the dispute settlement panels' discretion and offer greater predictability for states

[127] Antonia Walter "Environmental Protection in the EU and the WTO: Is Article XX GATT in its Present Interpretation Consistent with the Current Standard of Environmental Protection of the EU?" (2014) 23 European Energy and Environmental Law Review 2 at 20
[128] *US-Shrimp* AB Report above n 38 [159]
[129] Radhika Chaudhri above n 24 at 298
[130] *EC-Seal Products* AB Report above n 56 at [5.129]

seeking to invoke Article XX.[131] Greater regulatory flexibility would also be achieved if states did not have to impose the 'least trade-restrictive' measure possible under the necessity test. The necessity analysis should be limited to determining a rational connection between the measure and its stated objective.

The balance between trade and non-trade objectives and between obligations and exceptions, is essentially the WTO's demarcation between legitimate and illegitimate state intervention in the global market.[132] Where it sits currently puts a great deal of emphasis on preventing protectionism. The fear of discrimination and protectionism embedded in the GATT may not be as relevant today as it was in times of post world war recovery or at the height neoliberalism when the WTO was established. Other global issues such as climate change and food security are challenging the traditional international trading system and will require a more moderated approach. Ultimately, resource sustainability is not only necessary for the environment but for the continuation of the international trading system.[133] In a similar vein, acceptance of public morals and the protection of human life and health is key to a socially sustainable international trade system. These values are what is at stake in discussions about the appropriate balance between trade and non-trade objectives in the WTO framework.

[131] "Only one of 44 attempts to Use the GATT Article XX/GATS Article XIV 'General Exception' Has Ever Succeeded…"above n 78 at 8

[132] Kristen Hopewell "Shifting Power: The Rise of Brazil, India and China at the WTO" (PhD (Sociology) Dissertation, University of Michigan, 2012)

[133] Peter Allgeier "The Trade Toolbox and Environmental Sustainability: The Case for Fisheries" in Ricardo Meléndez-Ortiz, Christophe Bellmann and Miguedl Rodriguez Mendoza (eds) *The Future and the WTO: Confronting the Challenges - A Collection of Short Essays* (International Centre for Trade and Sustainable Development, Geneva, 2012) 167 at 171

Conclusion

EC - Seal Products is a case that illustrates the potential conflicts between public policy and efforts at trade liberalisation in WTO agreements. In this instance, the strength of public concern for the inhumane treatment of seals was almost enough to override the EU's trade obligations. Although the EU Seal Regime was unable to satisfy the *chapeau* to Article XX, subsequent negotiations have meant the essential aspects of the EU Seal Regime have been upheld, and the significance of the case as a triumph for animal welfare still stands. However the dispute is notable for a number of other reasons. The refining of technical boundaries of agreements can influence the overall balance between states' trade obligations and policy space. The narrowed scope of the TBT Agreement based on the AB's analysis of a technical regulation could prevent double liability in some cases. Similarly, the AB helpfully clarified the relationship between legal standards in the TBT Agreement and the GATT. As it stands, violations of the TBT Agreement cannot be justified under GATT Article XX, and the legitimate regulatory distinction test can justify measures under the TBT Agreement but not the GATT. The AB's approach towards the largely unknown area of public morals is also positive development in light of commentators' support of evidentiary unilateralism. Within this analysis, the acknowledgement by the WTO of the importance of animal welfare is a huge step in an increasingly global movement. This dispute will undoubtedly form an integral part of discussions on the meaning of public morals and the development of animal welfare regulations globally. However with respect to the overall equilibrium between trade and non-trade interests, the *chapeau* to Article XX remains the biggest roadblock for regulators. While its presence is necessary to prevent blatant protectionism, the flexibility of the AB's interpretation of the *chapeau* makes it unpredictable but at the same time over-exacting, as evidenced by the number of failed attempts to invoke Article XX. In the GATT, it represents the boundary between legitimate and illegitimate state intervention into the functioning of the international trade system. It must be remembered however, that the international trade system is the result of negotiations between its member states and can therefore be amended. One can only hope that the treatment of non-trade objectives will shift to reflect the desires of member states as they are confronted by social, political and environmental forces in the future.

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