THE EFFECT OF THE EC-SEALS DECISION ON THE PUBLIC MORALS EXCEPTION

- **Arthad Kurlekar***

ABSTRACT

For over 50 years adjudicatory bodies were reluctant to address the precarious question of balancing public morals of a state with its obligations of non-discrimination and trade liberalization. Governments have adopted trade restrictive measures and seek to justify them under the exceptions including public morals. Some of these exceptions are legitimate while some other restriction may be covertly designed to escape onerous trade obligations upon the implementing party. Usually what constitutes public morals has been left open to each member state, with some commonalities such as slavery, child labour etc. are quintessential examples where the defence of public morals can be used. This essay addresses the contributions of the EC seals dispute in terms of its contribution to the available jurisprudence on public morality. To this effect, the essay seeks to compare and support the reasoning of the Panel Report in order to critique the Appellate Body report on two grounds: first on the threshold of animal welfare used in the Appellate Body report to justify public morals; and second on the unfettered power given to the State claiming an exemption to decide what constitutes public morals. Thereafter, the essay recommends certain measures which may be adopted by WTO Panels.

1. INTRODUCTION

For over 50 years, adjudicatory bodies were reluctant to address the precarious question of balancing public morals of a state with its obligations of non-discrimination and trade liberalization.[1] During this time, governments have adopted trade restrictive measures and seek to justify them under the exceptions present in the GATT including public

* Student, 4th year, BA. LL.B, West Bengal National University of Juridical Sciences, Kolkata.

1 Mark 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 215 (2008).

morals. Some of these exceptions are legitimate while in some other cases, the restriction may be covertly designed to escape onerous trade obligations upon the implementing party.[2] Usually what constitutes public morals has been left open to each member state. As an illustration, child labour, slavery etc., are quintessential examples where the defence of public morals can be used.[3]

2. BACKGROUND OF ARTICLE XX (a)

The public morals exception was first proposed by the United States in 1945 and is present in all subsequent drafts of the General Agreement on Trade and Tariff (GATT). However, due to disagreement or varying intentions, no preparatory text is available as to the reason for the inclusion of the public morals exception,[4] save the minutes of the London meeting in 1946 simply reveal the fact that a need to insert the clause was recognized by the participating states.[5] This clause remained without interpretation till 2005 when the *US-Gambling*[6] decision first sought to interpret the public morals exception.

In the *US-Gambling* decision, the phrase 'necessary to protect public morals', found in Article XIV of the GATS, was to be interpreted in addition to the meaning of the term public morals. In its interpretation, the WTO panel refused to consider the substance of the moral claim. In its opinion, the determination of the content of the public moral was part of the sovereign function. Thus, as per the panel, public morals may 'vary with time and space'.[7]

Two interpretations are possible from this difference: *first*, 'public order' was included within the scope of 'public morals' under the GATT 1994 or *second*, that it was an additional exception introduced for the GATS.[8]

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2 Peter Van den Bossche, *The Law and Policy of the World Trade Organization*, 679 (1st ed., 2005).

3 Edward.M. Thomas, *Playing Chicken at the WTO: Defending an animal welfare based trade restriction under GATT's Moral Exception*, 34 Boston College Environmental Affairs Law Review 605, 637 (2007).

4 Supra 3.

5 *Draft Report of the Technical Sub-committee*, United Nations Conference on Trade and Employment, 32, U.N. Document E/PC/T/C.II/54 (16/11/1946).

6 Panel Report, *United States – Measures Affecting The Cross-Border Supply Of Gambling And Betting Services,* WT/DS285/R (November 2004).

7 Ibid.

8 Supra 2.

However, the fact that the text of the clause remained obscure did not deter the States from adopting the clause. More than one hundred treaties (bilateral and multilateral) have 'protection of public morals' as an exception.[9] This exception has become a common feature in Free Trade Agreements as well. For e.g., the India-Sri Lanka FTA, the China-ASEAN Framework Agreement, and the Japan-Singapore regional trade agreement all contain a similar public morals clause.[10]

Thus in the opinion of the author, the prevailing use and ambiguous nature of the public morals exception warrants an analysis into its scope, which has been provided in the subsequent section.

3. SCOPE OF ARTICLE XX (a)

A bare reading of the Article XX (a) does not clarify the scope of this exception. It leaves much for interpretation by the individual State parties. Only a few WTO decisions have extensively interpreted this exception.

The *US-Gambling decision*[11] defined public morals to mean "*standards of right and wrong conduct maintained by or on behalf of a community or nation*"[12]. The test for invoking this exception was first laid down in the *US Gasoline case*.[13] A three prong test was provided: *first* that the moral advances are a policy goal which fits under the exception public morals; *second*, the measure is necessary to protect the morals and *third* that it is not a violation of the Article XX chapeau.[14]

The first prong of the *US- Gasoline* test involves the demonstration of policy or legislative objectives for protecting the moral.[15] The necessity

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[9] Supra 1.

[10] Supra 2.

[11] Appellate Body Report, *United States - Measures Affecting The Cross-Border Supply Of Gambling And Betting Services*, WT/DS285/AB/R (November, 2004).

[12] Ibid.

[13] Appellate Body Report, United States - Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (May, 1996).

[14] A. Narlikar, M. Daunton, *Oxford Handbook on The World Trade Organization*, 447-450 (1st ed., 2012).

[15] In the EC Seals, the AB required the EU to show that its constitutional treaties included measures to prevent seal products and a diminishing trend in the use of seal products.

test, which is the second prong, is harder to prove. The necessity test was first interpreted in 2009 in the *China - Publications and Audio-visual Products decision.*[16] China had invoked the public morals exception to regulate the entry of foreign publications, audio-visuals and other media forms. The panel upheld the *US-Gambling* test while rejecting China's contention on the ground that the measures were not necessary. Thus, the necessity test involves *first*, that the act should not be oriented towards only foreign parties. This establishes a very high threshold, particularly in the case of animal welfare, because foreign players have to change their methods of production because of the import ban.[17]However, in the *Shrimp Turtle-I case*, the Appellate Body (AB) did not criticize the outwardly nature of the measure despite striking it down on other grounds.[18]*Second*, no other "less trade restrictive measure" must be possible to efficaciously protect the moral.[19] This is also very difficult to demonstrate before an arbitral panel.[20] One suggested way is to adduce evidence to the fact that bilateral or multilateral negotiations were undertaken to achieve a more desirable standard. Though, this in itself might not be entirely sufficient.[21]

The test laid down in *US- Gasoline case* and subsequently interpreted by other panels may seem to cull out the principle sufficiently.[22] However, in interpreting the extent and scope of each of these three prongs, each state must make its own determination.[23] Further, it is difficult to produce uniformly accepted objective evidence as to the existence of the exception itself. This is the most important difference between public morals and other exceptions such as natural resources or health.[24] As an

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[16] Panel Report, *China – Measures Affecting Trading Rights And Distribution Services For Certain Publications And Audio-visual Entertainment Products*, WT/DS363/R (August, 2009).

[17] J. C. Marwell, *Trade and Morality: The WTO Public Morals Exception after Gambling*, 81 New York University Law Review 802 (2006).

[18] Supra 15, at 2792.

[19] See Appellate Body Report, *European Communities - Measures Affecting Asbestos and Products Containing Asbestos,* ¶170, WT/DS135/AB/R (March 12, 2001); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶5.37, WT/DS58/RW (June 15, 2001).

[20] Ibid.

[21] Supra 19.

[22] The necessity test has been uniformly upheld in all relevant disputes by both the AB and the Panel.

[23] Appellate Body Report, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS/401/AB/R (June, 2014).

[24] Supra 19.

illustration, the *EC-Asbestos case*[25] relied on evidence from several health regulatory bodies to determine the carcinogenic nature of asbestos. Similarly in the *Shrimp-Turtle- I case*[26] several scientific data and survey were involved in the determination that the species are susceptible to extinction. But in the definition of a public moral, such an extent of scientific evidence is impossible to procure *vis-à-vis* a state which provides a reason of subjective nature to this exception.

4. CONTRIBUTION OF THE *EC SEALS DISPUTE*

This essay addresses the contributions of the *EC seals dispute* to the available jurisprudence on public morality. Towards this objective, the essay seeks to compare and support the reasoning of the Panel Report and the process it undertook to establish the existence of public morals in the *EC Seals dispute*. This analysis has been made as a critique of the AB report on two interlinked grounds: *first* on the threshold of animal welfare used in the AB report to justify public morals; and *second* on the unfettered power given to the State claiming an exemption to decide what constitutes public morals.

The recent AB decision warrants further analysis.[27] Canada and Norway initiated consultations with the European Union which concerned the implementation of the "EC Seals Regime".[28] Canada and Norway sought a declaration that these regulations were in violation of the Article I and III of the GATT along with Articles 2, 5, 6 and 7 of the TBT Agreement. In February 2014, a request for the establishment of the Panel was communicated by Canada and Norway, pursuant to which a panel was established.[29]

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[25] Ibid.

[26] Supra 19.

[27] Supra 23.

[28] This is a collective nomenclature for Regulation (EC) No. 1007/2009 of the European Parliament and of the Council, of 16 September 2009 on trade in seal products; Regulation (EU) No 737/2010 positing rules for the implementation of the above-mentioned 2009 regulation of the European Parliament and of the Council on trade in seal products.

[29] Supra 23.

The dispute concerned the ban, which the EU adopted, on the importation or sale of seal products.[30] The ban exempted the Inuit population from Greenland as they were indigenous seal hunters. Canada and Norway challenged the Seals regime, stating that it was discriminatory towards their manufacturers.

The Panel Report found that the EU had violated its obligations under GATT but apart from its regulation on travellers carrying seal products, which was found to violate the chapeau of Article XX, the regulations were protected by the morals concern.[31] The Panel undertook a comprehensive analysis to establish the legitimate objective of the morals exception. It employed a threshold which consisted of two prongs: *first,* the identification of a risk and *second,* an overall assessment.[32] Having considered this, it upheld the EU's claim, save in case of certain hunting methods such as 'trapping and netting' which were considered indispensable for the subsistence of the Inuit. The Panel found that these methods although inhuman, were necessary for the subsistence of the Inuit and therefore, overrode the animal welfare concerns in this case.

It could be argued that the test expounded in the Panel Report serves the purpose of balancing the use of the public morals exception as well as the obligations of a State under GATT. The balance is consistent with the approach adopted by the AB on numerous occasions. The AB in the *US Gasoline*[33] and *Shrimp Turtle* I[34] decided to adopt a harmonious view of balancing the general obligations and the exceptions.[35] In the *US-Gasoline case* the AB stated:

> "the phrase 'relating to the conservation of exhaustible natural resources' may not be read so expansively as seriously to subvert the purpose and object of Article III:4. Nor may Article III: 4 be given so broad a reach as effectively to emasculate Article XX (g)… the 'General Exceptions' listed in

[30] Panel report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/R (November 25, 2013).

[31] Ibid.

[32] Supra 30. The Panel Report considers the conservation measures undertaken for the specific species in its determination as opposed to the AB which by opposing this threshold indirectly purports to support general animal welfare as a threshold to accept the exception of public morals.

[33] Supra 15.

[34] Supra 19.

[35] Supra 1.

> Article XX, can be given meaning within the framework of the General Agreement and its object and purpose by a treaty interpreter only on a case-to-case basis"[36]

In the *EC Seals case* however, despite the Panel Report and the AB striving to achieve a common end, differed on the thresholds to be used. As stated above, the Panel report sought to objectively determine the existence of a public moral by using the identifiable risk and overall assessment approach while the AB resorted to a lower standard that of deference.

In contrast, the AB stated that the approach of the EU towards animal welfare (not focussed on seals) had to be considered; the evidence for the same being in the legislative history and the policies implemented by the EU. The AB used a 'deference review', whereby it adopted an approach which allowed States to decide the content of their public morals.[37] By using this test, the AB failed to distinguish between a social concern and a moral concern, a point which the Panel report emphasized upon. The importance of this distinction stems back to the *US-Gambling* decision. The GATS undisputedly contains an exception to public order which is missing from the GATT. Thus, especially after the distinction was discussed in both *US-Gambling* and the *EC-Seals Panel*, it was imperative for the *EC-Seal* AB report to ensure that what the EU sought to protect was a moral concern and not a social concern. This determination would require making an objective analysis of the public moral in question using the identifiable risk and overall assessment test as done by the Panel. In failing to draw this distinction, the AB allowed an escape route to a Member State to use the public moral defence even in situations of public order thereby inappropriately and indirectly expanding the scope of the exception.

In its report, the AB has cited the *EC-Asbestos decision* as justification for the use of the deference standard. *EC- Asbestos* itself favours a deference review with respect to the health exception under Article XX (b).[38] Yet, what the AB failed to consider and what indeed the Panel Report has considered is the abstract nature of the morals claim. With respect to the health exception, the *EC-Asbestos decision* while allowing for deference, cautions against exploitation and warrants the existence of a scientific

[36] Supra 15.
[37] Supra15.
[38] Supra 19.

evidence of a link between the health objective and the measure.[39] However, there is no similar link envisaged by the AB with respect to public morals. Merely historical evidence of regulation, as it has suggested, does not further any objective criteria on the basis of which a determination could be made.

Contrarily, the Panel Report's approach does entail objective criteria which may be justified by illustration. Country A has a morals ban on the import of refrigerated perishable products due to the excessive emission of Chlorofluorocarbons in the process of refrigeration of perishable goods. In the opinion of Country 'A', CFCs are a key factor in global warming. Country B takes objection citing that although regulations for reduction of CFCs are in place, the country cannot raise a morals exception because the amount of carbon emission from the country is in excess of its Kyoto Protocol obligations.[40]

In a hypothetical proceeding, if the panel or the AB held that merely because carbon emissions of Country A were excessive, specifically banning refrigeration of CFC emissions could not be done, such a decision would be erroneous.

To elucidate, when considering a morals claim, the Panel or the AB would have to consider not the fact that the carbon emissions of country A were higher but the fact that the CFCs in particular were heavily regulated in State A. This is because the carbon emissions of Country A could be higher as a result of multiplicity of factors such as unavailability of unclean technology etc. However, Country A should not be denied of its claim of public morals.

Inverting the situation, if the country has stringent carbon-emission regulations, except of emission of CFC from refrigeration, a morals claim would not be sustainable for a ban on refrigerated perishable goods. In this situation, the Panel or AB would have to consider the fact that CFCs form a special category which cannot be clubbed in the broader sphere of carbon emission in the particular factual matrix. Therefore, if Country A were to ban refrigerated perishable goods on the ground of morals, it would not be able to avail the defence of public

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[39] Ibid.

[40] In this example the premise is that Carbon-emissions from anthropogenic sources affect the climate in an adverse manner. See Climate Change 2001: Inter Governmental Panel for Climate Change Third Assessment Report (T.A.R.).

morals as it did not have or have had relaxed norms on the emission of CFCs. Thus, the question in either situation would be to consider the standard of regulation of CFCs and not the standard of regulation of carbon emissions.

Applying the example in the *EC-Seals case*, the Panel Report was right in considering the processes involved in sealing and the nature of the trade (akin to the CFCs in the hypothesis). The threshold which should have been applied is whether there was an identifiable risk to seals and whether the regulations of the EU were justified on an overall assessment and not on the basis that the EU considered conservation of animals or on a 'global norm of conservation' as a moral concern.[41]

The AB report focuses on animal welfare as a general measure across species (akin to considering regulation of carbon emission in general). Although, *prima facie*, it may seem that the threshold used by the AB is more stringent such as inference is erroneous. This is because the AB leaves the content of the morals entirely to the determination by the State claiming the observation.

Applying this approach to the previous hypothesis, the AB would merely ensure that the State claiming the exception has certain norms or a history of regulating carbon emissions. If in its opinion that occurs, then the ban on CFCs or any other pollutants, which Country A deems fit, would be upheld despite the fact that the state has less stringent norms or no norms on governing CFCs.[42]

Therefore, what needs to be considered next is whether the AB threshold of allowing the State claiming the exception to freely decide what constitutes public morals, is in furtherance of the balance sought to be achieved by the WTO: that of international obligations and the ability of the state to govern its domestic matters.

The AB decision states that "*we … have difficulty accepting Canada's argument that, for the purposes of an analysis under Article XX (a), a panel is required to identify the exact content of the public morals standard at issue.*"[43] Thus the AB has made it clear, that the exact demonstration of the existence of a moral value and its contravention need not be shown. To this effect, in

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[41] Supra 19.

[42] Contrary to this the ban would not be upheld using the threshold of the Panel Report in EC Seals.

[43] Supra 23, at ¶5.199.

the subsequent paragraph, the AB report states "*Members may set different levels of protection even when responding to similar interests of moral concern*".[44]

The AB thus, required the EU to demonstrate, through legislative text and history, the existence of the public morals against seal products. Further, it has held that a representation by the government to the effect that public morals have been affected in addition to the legislative history is sufficient evidence. It did not even require the demonstration of an identifiable risk. Canada contended that the words "to protect" mean that there had to be an identifiable risk. It based its argument on the fact that similar phrasing has been used in Article XX (b) where the AB in *EC Asbestos* required the identification of a health hazard.[45] Rejecting the argument, the panel body was of the opinion that public morality was a fluid concept and thus there could not be an identifiable risk to public morals.

This, in the opinion of the author, is an excessively low threshold and is contrary to the objectives laid down in the preamble of the GATT namely, "*entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction… barriers to trade and to the elimination of discriminatory treatment in international commerce*".[46] It is possible that without an identifiable risk, every state may use this exception to escape its obligations. In agreement with the author's opinion, the Panel report too requires the existence and demonstration of an identifiable risk to the public morals.[47]

Analysing it from the example cited previously, if country A succeeds to demonstrate that there is an identifiable risk in trading in CFCs then the exception of country A would be upheld.

The fallacy in the view of the AB in this regard can best be brought out by another example. If one country makes a declaration that no neem products will be imported due to moral concerns. As per the AB report, that country is not required to furnish any evidence except the fact that neem regulation has happened in its domestic market and legislative history. Whereas, the Panel Report threshold would mandate the country to demonstrate why import of neem products conflicts with its

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[44] Supra 23, at ¶5.3.3.4.
[45] Supra 19.
[46] Preamble, General Agreement on Trade and Tariffs (1994), 1867 UNTS 187; 33 ILM 1153 (1994).
[47] Supra 30.

morals. The latter approach would minimize the chance of arbitrary declarations by states on the grounds of public morals to avoid trade obligations as it imposes a higher threshold.

Elaborating further upon the distinction, the Panel does not remain satisfied by the *prima facie* evidence of the long-standing history of regulation. The Panel looks at a higher degree of analysis, first between commercial and non-commercial use of seal products and how it ties in with the justification of public morals. In determining this question, the Panel looked into several factors such as the characteristics and the methods of hunting seals, the anatomical structure of seals etc. It considered arguments on the humane method of killing seals and accepted EU's notion that practically the unique conditions make it improbable to conduct those in sealing. It identifies concerns of inhumane treatment such as delay[48], struck and lost[49] and hooking a conscious seal[50] having considered this the Panel states:

> "The challenge of reconciling the requirements of humane killing with the practical risks and difficulties of seal hunting, together with the potentially large territory of the hunt, poses an obstacle to monitoring and enforcement of the application of humane killing methods. Our assessment of the evidence taken together indicates that these risks to seal welfare are present in seal hunts in general."[51]

The Panel report considers an overall assessment of the sealing regime prior to deciding upon the grant of the morals exception. Contrarily, the AB relies on the principle of sovereign deference. Thus in the opinion of the author, the balance between the international obligations to which a state has itself consented to, and exceptions from these obligations in exercise of its regulatory powers had been well-achieved by the panel report.

Further, the author emphasizes that the proving of an exception under the GATT regime is a mixed question of fact and law. If the AB report is adopted, it no longer remains a question of law. It is reduced to a question of fact namely- whether the state envisages that degree of regulation, a question to which the answer is to be given by the State

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[48] Supra 30.
[49] Supra30.
[50] Supra 30.
[51] Supra 30, at ¶7.224.

invoking the exception itself. If however, the Panel report is adopted, it deals with the issue keeping in mind both that a discovery of fact is necessary along with an equally important question of law.

For these reasons, the author is of the opinion that the AB report suffers from a deficiency, in that it renders a mixed question of fact and law, solely one of fact and contrarily the Panel report was accurate in adopting the 'overall assessment threshold'. A vital question however may be with regard to the difficulty in the availability of reliable sources and measures of objective analysis. This question has been addressed in the subsequent section.

5. RECOMMENDATIONS

Although the EC-Seals dispute has shed new light upon the public morals exception, there is little jurisprudence to clearly spell out the contours of this exception. The *EC-Seals dispute* is itself disharmonious, where the AB overruled the Panel. Thus, the author notes a need to diversify sources from which an analogical extension may be made to administer an 'overall assessment threshold' akin to the one used by the EC-Seals Panel, which the author advocates for the aforementioned reasons. The author recommends a mechanism *first*, an analogy to arbitral awards, and *second*, other sources of law which need to be looked at in order to develop the concept and content of public morals. For this the author relies on customary international law.[52]

The author suggests that one way to look at the threshold of public morality is to equate it with the exception of public policy under the New York Convention.[53] The New York Convention imposes an obligation upon the member States to enforce arbitral awards. As an exception, it provides that member states may escape the obligation to enforce an award if it contravenes its public policy.

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[52] There is a long standing debate on the role of Public international law in WTO Law, but at this juncture the author does not seek to venture in this debate. The proponents of the pro-interaction theory may look at custom as one of the sources, the proponents of the *legesspecialis* notion may look at it from analogical terms.

[53] The New York Convention on the Recognition and Enforcement of foreign Arbitral Awards, 330 UNTS 38; 21 UST 2517.

At the outset, the author admits that the manner of interpretation, as put forth by the *US- Gasoline* and *the US- Gambling test,* are different and from the manner of interpretation of public policy exception.

However, the situations where public policy violations are claimed are analogous to that of public morals. For ex, where the enforcement of an arbitral award risks the fundamental conception of justice in a State, it may be a ground to refuse enforcement.[54] The author in no way posits that arbitral or court decisions on enforcement in investment or commercial arbitration would be persuasive in the determination of public morals under trade law. However, the author finds scope to derive an analogical extension in the absence of other substantial jurisprudence to be helpful in this quest.

Arbitral awards enforcing contracts performed on child labour or slavery or in some cases violation of environmental norms etc. pose a risk to the public policy of the state and are good examples when enforcement of arbitral awards are refused.[55] The function of the sovereign in its exercise of the public policy exception and in its exercise of the public morality exception, it is the same to shield the citizens' values which are required to be protected. Thus, hypothetically, if country A is exporting a product engaged in child labour the importing country may use the morals as exceptions. Crucially, though the Panel should look at situations where arbitral awards have been refused enforcement in these circumstances as similar situations to favourably consider these exceptions.

6. DRAWING FROM CUSTOMARY INTERNATIONAL LAW

As regards the content of what constitutes morals, customary international law holds various values which are to be followed as law by all States.[56] With the call for a dynamic interpretation of public morals, not only to protect the citizens of the nations but also outwardly measures designed to protect other values, customary international law has become all the more important. Values such as prevention of torture, *pacta sunt servanda* etc. are upheld by states as custom under

[54] Zimbabwe Electricity Supply Authority v. Genius Joel Maposa,[1999] (Supreme Court of Zimbabwe).

[55] See Ch. Setting Aside Arbitral Awards: Public Policy, Gary B. Born, International Commercial Arbitration Vol. I & II Kluwer Law International (2009).

[56] Ian Brownlie, *Principles of Public International Law* (7th ed., 2008)

international law. These values could thus be looked at in order to form the minimum content.

These two methods seek to meet the deficiency in evidence which may arise in considering cases of public morals. The AB's scepticism in addressing the content of the 'moral' and consequently its deference threshold may be nullified in future with these analogical tools as they grant more liberty to panels to gather evidence for an 'overall assessment'. It is submitted these two analogical tools would aid is outlining a content of the moral which would be invoked from an 'overall assessment' threshold.

7. CONCLUSION

Scholars such as Prof Van den Bossche argue that public morals as an exception has been deliberately phrased in a vague manner or that the drafters were unable to come to an agreement as to its meaning.[57]. The *US-Gambling case* of 2005 and the EC- Seals decision, the AB decision being given in June 2014 are the only specific interpretations of the public morals exception. The EC Seals AB decision relaxes the thresholds which were put in place by the Panel decision which in the opinion of the author is an ill-advised.

The AB decision is in consonance with the *US-Gambling* decision as regards the manner of determination of public morals: that what constitutes public morals is the prerogative of the state. Although the Dispute Resolution Body decisions do not constitute precedent, both the decisions together constitute a pattern of non-interference of the sovereign power of the state with respect to the content or identification of public morals. This pattern remains unchallenged by any other AB report and thus, becomes highly persuasive. It is detrimental in nature as it could be prone to misuse by the states to avoid certain products.

In the opinion of the author, the AB decision to recognize existence of animal welfare in the legislative history of the State raising the exception as opposed to recognition to specific efforts in the conservation of that species is erroneous. If the "morals" of the citizens of a State are being jeopardized by the hunting of a particular animal or a particular method of hunting, it is reasonable to assume that the measures are reflected

[57] Supra 2.

even in the domestic sphere of the State. The author is of the opinion that the Panel's enquiry into the factual circumstances was well-warranted as it must also be ascertained that the ban imposed on that species is not a sham to avoid trade obligations but arises out of a *bona fide* morals concern. These specific measures ensure that the exception does not allow a state to unnecessarily escape its trade obligations.

Finally, as regards the use of the exception, the author argues that the Panel Report decision of requiring an 'identifiable risk' to the moral on an 'overall assessment' is a reasonable approach. Requiring the demonstration of identifiable risk institutes a check on an unsubstantiated claim of "morals" being affected as the risk would have to be evidenced in fact. An overall assessment ensures that States do not unreasonably exploit the exception to avoid trade-obligations. This would further reduce the probability of misuse or would in the least, require a state to demonstrate its *bonafides* while raising the exception.