

PIL and IEL: Will seal deaths resurrect the dream of international legal coherence?

*Arthur E. Appleton**

‘Most human beings have an almost infinite capacity
for taking things for granted.’
Aldous Huxley, *Brave New World*

1. Introduction

Some dream of Eldorado and others the Fountain of Youth; international lawyers of a certain breed dream of greater coherence between Public International Law (PIL) and International Economic Law (IEL). Many classify the dream as a mirage. Almost no one would argue that the cornerstone principles of IEL, such as most-favored-nation treatment, national treatment or transparency, have become principles of customary international law (no *opinio juris*), or general principles of international law (no consensus). They remain treaty obligations, binding the 160 Members of the World Trade Organization (WTO),¹ but not those outside the treaty regime.

Once upon a time, some contracting parties appeared to treat the GATT as self-contained regime. This view was not sustainable. In a now famous passage in *US – Gasoline*, the first Appellate Body ruling of the World Trade Organization, the Appellate Body stated that the WTO Agreement could not be *interpreted* in ‘clinical isolation’ from public international law.²

* © Arthur E. Appleton, J.D., Ph.D.; Partner, Appleton Luff; Adjunct Professor, Johns Hopkins University School of Advanced International Studies (SAIS – Europe); Board Member World Trade Institute (University of Bern). This article is based on a presentation delivered at the 4th Biennial Global Conference of the Society of International Economic Law (SIEL) on 11 July 2014.

¹ 160 Members as of 13 October 2014.

² WTO, *United States: Standards for Reformulated and Conventional Gasoline*–



The ‘general rule of interpretation’ set out above has been relied upon by all of the participants and third participants, although not always in relation to the same issue. That general rule of interpretation has attained the status of a rule of customary or general international law. As such, it forms part of the ‘customary rules of interpretation of public international law’ which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply in seeking to clarify the provisions of the General Agreement and the other ‘covered agreements’ of the Marrakesh Agreement Establishing the World Trade Organization (the ‘WTO Agreement’). That direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law.³

Relying on decisions of the International Court of Justice and other sources,⁴ the Appellate Body applied the Vienna Convention on the Law of Treaties to interpret the WTO Agreement. This position, based in part on Article 3.2 of the Dispute Settlement Understanding,⁵ constituted a significant acknowledgement of the importance of international law, or at least the customary rules of international law as applied to treaty interpretation, in WTO dispute settlement. This is not the only recognition of the importance of international law in WTO dispute settlement. The Appellate Body has also invoked the doctrine of state re-

Report of the Appellate Body (20 May 1996) WT/DS2/AB/R, 17.

³ *ibid* 17.

⁴ See *Territorial Dispute Case (Libyan Arab Jamahiriya v Chad)* [1994] ICJ Rep 6; *Golder v United Kingdom* (1995) Series A no 18; Inter-American Court of Human Rights, *Restrictions to the Death Penalty Cases* (1986) 70 ILR 449; E Jiménez de Aréchaga, ‘International Law in the Past Third of a Century’ (1978) 159 *Recueil des Cours de l’Académie de Droit International* 42; D Carreau, *Droit International* (3rd edn, Pedone 1991) 140; R Jennings, A Watts (eds) *Oppenheim’s International Law*, vol1 (9th edn, Longman 1992) 1271-1275.

⁵ Art 3.2 provides that ‘The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.’



sponsibility on several occasions, such as *US – Cotton Yarn*,⁶ *US – Line Pipe Safeguards*⁷ and *US – Continued Suspension*.⁸

But the debate continued, most prominently at the International Law Commission which discussed this issue in its well-known 2006 report on fragmentation.⁹ The ILC may have found that the WTO dispute settlement system was a self-contained regime in the sense that Article 23 of the Dispute Settlement Understanding (DSU) ‘excludes unilateral determinations of breach or countermeasures outside the “specific subsystem” of the WTO-regime’; but when it looked at the trade regime more broadly, it recognized that ‘Few lawyers would persist to hold the WTO covered treaties, whatever their nature, as fully closed to public international law.’¹⁰ The ILC concluded later in its report:

‘This does not exclude the emergence of a specific “WTO ethos” in the interpretation of the WTO agreements – just like it is possible to discern a “human rights ethos” in the work of the human rights treaty bodies. Nor does it prevent the setting aside of normal State responsibility rules in the government of the WTO treaties. Indeed, this was the *raison d’être* of the WTO system and receives normative force from the *lex specialis* rules of general law itself. Even as it is clear that the competence of WTO bodies is limited to consideration of claims under the covered agreements (and not, for example, under environ-

⁶ WTO, *United States: Transitional Safeguard Measure on Combed Cotton Yarn From Pakistan–Report of the Appellate Body* (8 October 2001) WT/DS192/AB/R, 120, stating that: ‘Our view is supported further by the rules of general international law on state responsibility, which require that countermeasures in response to breaches by states of their international obligations be commensurate with the injury suffered’ (Footnote omitted citing Article 51 of the International Law Commission’s draft articles on Responsibility of States on proportionality).

⁷ WTO, *United States: Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea–Report of the Appellate Body* (15 February 2002) WT/DS202/AB/R, 259.

⁸ WTO, *United States: Continued Suspension of Obligations in the EC – Hormones Dispute–Report of the Appellate Body* (16 October 2008) WT/DS320/AB/R, 382 (citing art 53 of the Articles on Responsibility of States for Internationally Wrongful Acts).

⁹ ILC, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi (13 April 2006) UN Doc A/CN.4/L.682, 134.

¹⁰ *ibid* (footnotes omitted). The ILC cited Gabrielle Marceau for the theory of a ‘specific subsystem’. See G Marceau, ‘WTO Dispute Settlement and Human Rights’ (2002) EJIL 757-779.



mental or human rights treaties), when elucidating the content of the relevant rights and obligations, WTO bodies must situate those rights and obligations within the overall context of general international law (including the relevant environmental and human rights treaties).¹¹

In 2006, Pascal Lamy, a former Director General of the WTO recognized the importance of the relationship between IEL and PIL in a speech intended to improve coherence between the two. He observed that the WTO treaty established an organized legal order and that 'In joining the international legal order, the WTO has ended up producing its own unique system of law.'¹² Mr Lamy noted that trade law is treaty-based, and that treaties are one of the primary sources of public international law. He also noted the importance of several international law concepts in the WTO legal system: (i) the sovereign equality of States (arising in part from the WTO's *consensus* system), (ii) international co-operation obligations (evident from the Appellate Body decision in *US – Shrimp*),¹³ (iii) the fact that the WTO is an international organization with its own legal status and privileges and immunities, (iv) good faith, (v) the obligation of States to settle disputes by peaceful means, and (vi) the application of the customary international law rules of treaty interpretation when panels and the Appellate Body are called upon to interpret the WTO Agreement.

In summary, then Director General Lamy confirmed that:

'I agree therefore with Professor Abi-Saab, from our Appellate Body, that in using general principles of public international law in its interpretation of the WTO provisions, the Appellate Body confirmed that the WTO is operating within the compound of international legal order.'

I have sympathy for many of Professor Abi-Saab's views. He was one of my dissertation advisors and he ably convinced many of us that

¹¹ ILC (n 9) para 170.

¹² WTO News: Speeches — DG Pascal Lamy, 19 May 2006, Sorbonne, Paris, The Place and Role of the WTO (WTO Law) in the International Legal Order, *Address before the European Society of International Law* <www.wto.org/english/news_e/sppl_e/sppl26_e.htm>.

¹³ WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products—Report of the Appellate Body* (6 November 1998) WT/DS58/AB/R, 161-184.



IEL is a branch of the greater tree of PIL. That of course is easy to say, but harder to actualize given the economic interests at issue which sometimes clash with the humanitarian interests that are often so present in PIL – a divide that seems to give rise to fragmentation. It is not an unfamiliar divide – money versus morality. However to view the international economic law in general and the WTO in particular as only concerned with money is to misunderstand the policy space accorded by the WTO Agreement in light of recent Appellate Body pronouncements. These decisions have opened a door to greater coherence, even if many in the trade community have been slow to pick up on this point. The problem is that the trade community often looks in the wrong place – they expect the WTO Appellate Body to act to achieve coherence, when the burden (as is often the case in PIL) is on the States who by and large form the membership of the WTO. After all, PIL is a state-centric system.

The thesis of this paper is that greater coherence will result – despite the fact that the Appellate body decision in the *US – Seals* dispute is flawed, not just for what it says, but for what it does not say (acceptance of an overly broad definition of public morality and an incomplete TBT interpretation). Now that trade laws that violate the non-discrimination principle in order to promote animal welfare are justifiable under Article XX(a) of GATT 1994, the door is open to justify trade measures taken to advance human rights, labor rights, environmental law and perhaps other aspects of PIL under Article XX(a). If we can protect cute animals under Article XX(a),¹⁴ we can certainly protect fundamental norms of PIL which, almost everyone would agree have a much stronger link with public morality. The same conclusion will be demonstrated with respect to labeling schemes falling under the disciplines of Article 2 of the TBT Agreement.

¹⁴ Perhaps the Appellate Body was mistaken when it refused to examine EU animal welfare practices in general. It would seem that George Orwell was correct in *Animal Farm*: ‘All animals are equal, but some animals are more equal than others.’



2. *The Vienna Convention on the Law of Treaties: No shortcut to systemic integration*

Since *EC – Biotech*,¹⁵ academics, attorneys and trade diplomats have been sparring in Geneva over the application of Article 31(3)(c) of the Vienna Convention as a means of integrating international treaty obligations into the WTO system.¹⁶ Much has been made of Article 31(3)(c) of the Vienna Convention, ever since its overly nuanced interpretation by the Panel in *EC – Biotech*,¹⁷ and the clearer and more cogent interpretation of the meaning of the phrase ‘the parties’ by the Appellate Body in *EC – Large Aircraft* where the Appellate Body recognized that:

‘An interpretation of “the parties” in Article 31(3)(c) should be guided by the Appellate Body’s statement that “the purpose of treaty interpretation is to establish the *common* intention of the parties to the treaty.” This suggests that one must exercise caution in drawing from an international agreement to which not all WTO Members are party. At the same time, we recognize that a proper interpretation of the term “the parties” must also take account of the fact that Article 31(3)(c) of the *Vienna Convention* is considered an expression of the “principle of systemic integration” which, in the words of the ILC, seeks to ensure that “international obligations are interpreted by reference to their normative environment” in a manner that gives “coherence and meaningfulness” to the process of legal interpretation. In a multilateral context such as the WTO, when recourse is had to a non-WTO rule for the purposes of interpreting provisions of the WTO agreements, a delicate balance must be struck between, on the one hand, taking due account of an individual WTO Member’s international obligations and, on the other hand, ensuring a consistent and harmonious approach to the interpretation of WTO law among all WTO Members.’¹⁸

¹⁵ WTO, *European Communities: Measures Affecting the Approval and Marketing of Biotech Products—Report of the Panel* (21 November 2006) WT/DS291/R, WT/DS292/R, WT/DS293/R.

¹⁶ In relevant part, the provision provides: ‘3. There shall be taken into account, together with the context: [...] (c) any relevant rules of international law applicable in the relations between the parties.’

¹⁷ WTO (n 15) 7.67-7.70.

¹⁸ WTO, *European Communities and Certain Member States: Measures Affecting Trade in Large Civil Aircraft—Report of the Appellate Body* (1 June 2011) WT/DS316/AB/R, 845.



Admittedly, *EC – Large Aircraft* leaves some room for Article 31(3)(c) to be an entry point for panels and the Appellate Body to consider international treaty commitments entered into by the Members in other fora. As a result, Article 31(3)(c) may be a means of achieving some coherence between IEL and PIL. But Article 31(3)(c) is very limited in scope, panels and the Appellate Body can only apply this principle when *interpreting* the WTO Agreement. It is therefore a relatively constricted entry point. The Appellate Body will rely on Article 31(3)(c) in rare cases. *Australia – Plain Packaging* may be such a case,¹⁹ but this seems unlikely given (i) the opposition to the Framework Convention on Tobacco Control by some WTO Members, (ii) the discriminatory nature of plain packaging vis-à-vis new entrants to a market pursuant to Article 2.1 of the TBT Agreement, (iii) questions of necessity that may arise under Article 2.2 of the TBT Agreement,²⁰ and (iv) Australia's probable violation of Article 20 of the TRIPs Agreement.²¹

My point is that while the Vienna Convention may be one driver of coherence, there are other more important drivers, in particular the trade policy of individual (perhaps 'more enlightened') Members – as eventually ratified by the Appellate Body and inevitably by the Dispute Settlement Body.

What can we learn from *EC – Seals* and *US – Tuna II* that may be relevant in a discussion about coherence between IEL and PIL? While

¹⁹ *Australia: Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* DS/434.

²⁰ Note however, that by ignoring the definition of necessity in art 2.2 of the TBT Agreement and applying the weaker necessity test that emerged in the art XX jurisprudence (*Korea – Beef*, *Brazil – Retreaded Tires*, etc.), the Appellate Body has made it relatively easy to satisfy the necessity test. I may be partially responsible for this state of affairs which has its origin in the poor drafting of Article XX of GATT 1947. See A E Appleton, 'GATT Article XX's Chapeau: A Disguised 'Necessary' Test? The WTO Appellate Body Ruling in United States - Standards for Reformulated and Conventional Gasoline' (1997) Rev EC Intl Environmental L 131.

²¹ Art 20 (Other Requirements) provides: 'The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. This will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking.'

panels and the Appellate Body have an important role to play in achieving coherence, it is the action of the Members (mostly States) that will define the debate. International law remains a state-centric system wherein panels and the Appellate Body are charged with applying the WTO's covered agreements after the Members have acted. If coherence is going to result, as demonstrated below, it is the Members that must take the first step.

3. EC – Seals: *International legal obligations as a source of public morals*

The Appellate Body's decisions in *US – Shrimp*²² established that under certain limited circumstances Members are permitted to discriminate against imports to conserve exhaustible natural resources. In order to satisfy the conditions of Article XX's chapeau, the United States was required to meet flexibility and cooperation requirements.²³ In the subsequent Article 21.5 case, the Appellate Body ratified the US decision to ban shrimp imports from Malaysia that did not meet US fishing standards for conservation of sea turtles based on its satisfaction of the environmental exception contained in GATT Article XX(g) and its chapeau.²⁴ Although *US – Shrimp* was an Article XI case, and *EC – Seals* an Article I and III case, both Appellate Body decisions are significant for suggesting that a Member may discriminate against a product based on how the product is produced, even when the production process is not discernible in the final product.

The so-called non-product-related processes and production method debate (NPR-PPMs) had its origin in the *US – Tuna I* GATT decision,²⁵ which poisoned the relationship between the environmental community and the international trade community until the Appellate Body report in *US – Shrimp*. Professor John Jackson notes that some

²² WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products—Report of the Appellate Body* (6 November 1998) WT/DS58/AB/R.

²³ *ibid* 161-184.

²⁴ WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia—Report of the Appellate Body* (21 November 2001) WT/DS58/AB/RW.

²⁵ *United States: Restrictions on Imports of Tuna—Report of the Panel* (not adopted, circulated on 3 September 1991) DS21/R GATT BISD 39S/155.

observers credit the *US – Shrimp* decision for saving the WTO.²⁶ The *EC – Seals* decision may someday receive similar praise – for establishing a framework to further coherence between IEL and PIL by permitting Members to apply Article XX(a) of GATT 1994 to justify discrimination against goods when their production is not in conformity with certain principles of public international law, such as human rights, labor and environmental obligations.²⁷ In other words, the Appellate Body decision in *EC – Seals* can be extrapolated to support a Member's right to use the trade system to enforce principles of public international law based on the public morals exception.

Panels and the Appellate Body have accepted a very broad interpretation of the public morals exception. This is a departure from earlier interpretations of Article XX that viewed the sub-paragraphs as 'limited and conditional',²⁸ but in line with other recent cases interpreting the sub-paragraphs.²⁹ In *US – Gambling* the Panel noted that 'there may be sensitivities associated with the interpretation of the terms 'public morals' and 'public order' in the context of Article XIV' and that 'the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values.'³⁰ It observed that 'the Appellate Body has stated on several occasions that Members, in applying similar societal concepts, have the right to determine the level of protection that they consider appropriate.' Importantly, it went on to find that 'the term "public

²⁶ J H Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (CUP 2009) 189.

²⁷ Art XX(a) provides: 'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; [...].'

²⁸ See e.g., WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products*—Report of the Appellate Body (6 November 1998) WT/DS58/AB/R, 157 (citing *United States:—Section 337 of the United States Tariff Act of 1930* (7 November 1989) GATT BISD 36S/345, 5.9).

²⁹ See, e.g., WTO, *European Communities: Measures Affecting Asbestos and Products Containing Asbestos*—Report of the Appellate Body (5 April 2001) WT/DS135/AB/R, which broadened the necessary test in art XX(b).

³⁰ WTO, *United States: Measures Affecting the Cross-Border Supply of Gambling and Betting Services*—Report of the Panel (10 November 2004) WT/DS285/R, 6.461.



morals” denotes standards of right and wrong conduct maintained by or on behalf of a community or nation.”³¹ The Appellate Body, in a somewhat nuanced affirmation, upheld the Panels findings that the acts in question ‘fall within the scope of “public morals” and/or “public order” under GATS Article XIV(a).’³²

The Panel in *China – Publications*³³ also took an expansive view of what constitutes public morals adopting the Panel’s finding in *US – Gambling* within the context of GATT Article XX(a):

‘We note that the panel and Appellate Body in *US – Gambling* examined the meaning of the term ‘public morals’ as it is used in Article XIV(a) of the GATS, which is the GATS provision corresponding to Article XX(a). The panel in *US – Gambling*, in an interpretation not questioned by the Appellate Body, found that “the term “public morals” denotes standards of right and wrong conduct maintained by or on behalf of a community or nation”. The panel went on to note that “the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values.” The panel went on to note that Members, in applying this and other similar societal concepts, “should be given some scope to define and apply for themselves the concepts of ‘public morals’ ... in their respective territories, according to their own systems and scales of values.” Since Article XX(a) uses the same concept as Article XIV(a), and since we see no reason to depart from the interpretation of “public morals” developed by the panel in *US – Gambling*, we adopt the same interpretation for purposes of our Article XX(a) analysis.’³⁴

The Panel in *EC – Seals* found the above reasoning applicable in its analysis of protection of public morality pursuant to Article 2.2 of the TBT Agreement.³⁵ While the Appellate Body rejected the Panel’s view

³¹ *ibid* 6.465.

³² WTO, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*–Report of the Appellate Body (7 April 2005) WT/DS285/AB/R, 299.

³³ WTO, *China Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*–Report of the Panel (12 August 2009) WT/DS/363/R, 7.759.

³⁴ *ibid* (footnotes omitted).

³⁵ WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products*–Report of the Appellate Body (18 June 2014) WT/DS400/AB/R and WT/DS401/AB/R, 7.382.

that the TBT Agreement was applicable, the Panel's conclusion that Article 2.2 of the TBT Agreement would encompass public morality seems correct.

Leaving aside the fundamental question of whether animal welfare concerns should be justified under Article XX(a) or instead under Article XX(b), the Appellate Body decision has the effect of opening Article XX(a) widely for the imposition of trade restrictions *against products* produced under conditions that do not satisfy international legal obligations. If trade measures designed to advance animal welfare concerns fall under the public morality exception, so must trade measures addressed at serious international law violations, such as violations of core labor standards, human rights norms and international environmental law including, perhaps eventually, carbon emitted in the production of a product beyond certain agreed limits.

This is a significant proposition, but it is subject to important limitations:

i) There must be a link between the product being traded and the perceived wrong pursuant to international law – it is not enough that a country permits child labor – the product subject to an import ban must be produced by child labor. *EC – Seals* and *US – Shrimp* both dealt with issues related to the production of the product in question and not to issues unrelated to its production (i.e., they did not involve general trade sanctions addressed at a practice unrelated to the product in question). This limitation gives rise to an important observation. In *EC – Seals* the Appellate Body refrained from interpreting the phrase 'related processes and production methods' which is found in Annex 1.1 of the TBT Agreement.³⁶ The Appellate Body could have chosen to have given meaning to the term 'related' by limiting the application of Annex 1.1 to trade measures taken in response to the production method employed to produce the product being traded. This would limit the

³⁶ Annex 1.1 defines a technical regulation as a: 'Document which lays down product characteristics or their *related* processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.' (emphasis added).

ability of Members to ban the import of products for reasons unrelated to the production of the product in question.

ii) The requirements of both Article XX(a) and the chapeau must be met. Panels and the Appellate Body have accepted a broad and fluid definition of public morals which appears to be, at least to some extent, capable of self-definition by individual Members. Furthermore, the ‘necessity test’ in Article XX(a) is now easy to satisfy (having evolved from the strict ‘least trade restrictive measure test’ to a continuum approach under which the Appellate Body tends to examine whether a measure is ‘apt to produce a material contribution’).³⁷ This means that most cases involving Article XX(a) or (b) will turn on whether the conditions of the chapeau are satisfied. The chapeau of Article XX will become ever more important as a safeguard against abuse of Article XX(a) and XX(b). Members invoking these exceptions will need to assure that they are *administering* their trade measure in a manner that does not result in arbitrary and unjustifiable discrimination or a disguised restriction on international trade. Other obligations that the Appellate Body has discussed in its Article XX decisions, such as the *flexibility* and *cooperation* obligations, will inevitably become more important.

In short, practitioners of PIL, in particular human rights and labor lawyers, should be quietly celebrating the *EC – Seals* decision. Trade officials have reason to be more circumspect. The floodgates are now open for the protection of fundamental rights through economic means and this will have ramifications for the international trade system. A new form of conditionality is in the making whereby trading partners will be able to discriminate against products based on a multitude of ‘moral’ grounds associated with their manufacture – many of which will receive widespread public support from civil society in western democracies.

4. US – Tuna II: *Labeling as a means to discriminate based on public international law considerations*

US – Tuna II provides a second modality for moving towards greater coherence between IEL and PIL based on the TBT Agreement. The solution lies in labeling and as above, action must come from WTO

³⁷ See *EC – Seals*, *Korea – Beef*, *Brazil – Retreaded Tyres* and the ‘Trilogy cases’.

Members. Leaving aside the question of whether the Complainants erred in the *EC – Seals* case by failing to argue that the TBT Agreement applied because the EU ban constituted a ‘related process and production method,’³⁸ *US – Tuna II* supports product labeling for environmental and conservation purposes. If products can be labeled to reflect dolphin safety, there is no reason why labels cannot be applied to reflect whether the manufacture of a product complies with human rights norms, international labor agreements, or other norms derived from PIL.

In many instances product labeling may be an easier route than an import ban such as that applied by the European Union against seal products. Article XX of GATT 1994 once appeared to be a relatively closed list, but thanks to the Appellate Body’s interpretations of Article XX(a) in *EC – Seals* (as well as earlier WTO rulings), there is now considerable flexibility in what constitutes public morality. In contrast, Article 2.2 of the TBT Agreement provides for an open list of legitimate objectives,³⁹ and based on the Panel Report in *EC – Seals*, there would appear to be a strong argument that public morality would fall within this list. If Article 2.2 includes moral considerations, it surely must also include human rights, labor rights and other norms – either as a measure to uphold public morals, or as a measure to protect human health.

Of course, again there are conditions imposed by the recent TBT jurisprudence. Labeling schemes by their nature discriminate against like products. As there is no rule/exception relationship in Article 2.2, the Trilogy cases make clear that a Respondent will need to demonstrate that the detrimental impact on imports caused by its trade measure stems from a legitimate regulatory distinction and that the labeling scheme in question is applied in an evenhanded manner.

5. Conclusion

Now, to answer the question posed in the title: ‘Will seal deaths resurrect the dream of international legal coherence?’ To devout public international lawyers, the question may be somewhat offensive since it

³⁸ This could be argued pursuant to Annex 1.1 of the TBT Agreement. The Appellate Body left this point open for a decision in a future case. WTO (n 35) 5.69.

³⁹ Through use of the term *inter alia*.



assumes that coherence is a dream, that the dream is dead, and that dreams can be resurrected. Regardless, the answer to the question is yes. *US – Tuna II* and *EC – Seals* have the potential to move IEL towards greater coherence with PIL. But, as usual, progress rests largely in the hands of the Members.⁴⁰ They must take affirmative action as we enter, for better or worse, this *Brave New World*.

⁴⁰ I say 'largely' because, the Appellate Body will inevitably be called upon to resolve disputes that lie at the intersection of fragmentation and coherence. One such dispute that would have truly tested the system was *Chile: Measures affecting the Transit and Importing of Swordfish*, DS193. As Pascal Lamy notes in his aforementioned speech, this dispute, which eventually settled, juxtaposed UNCLOS disciplines against WTO rules. Had it proceeded, it would have demonstrated the extent to which a Panel or the Appellate Body can take into consideration conservation norms stemming from a distinct treaty obligation. In many ways Mr. Lamy's speech is prescient. He also raised the possibility of ILO standards being raised at the WTO through the public morals exception contained in art XX(a).

In light of the contribution his speech made to this debate, it is fitting to conclude with the closing passage of his speech (Lamy, n 12): 'In this sense the WTO is an engine, a motor energizing the international legal order. This is, in my view, the place and the role of the WTO and its legal order in the international legal order: a catalyst for international mutual respect towards international coherence and even for more global governance, which I believe is needed if we want the world we live in to become less violent, be it social, political, economic or environmental violence.'