The Trade in Seal Products and the WTO

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The World Trade Organisation (WTO) promotes the principle of global free trade. Member countries agree not to erect barriers to the import and sale (collectively, 'marketing') of products from other members. If they do, the exporting member can impose retaliatory measures.

There are exceptions to the free trade principle and whether they apply to animal welfare is of central importance, given the global nature of animal exploitation and the international trade in resulting products. Politicians can be reluctant to legislate for improved welfare if they cannot prevent home markets being flooded with cheap imports produced with worse welfare.

In May 2014, the Appellate Body (AB) of the World Trade Organisation (WTO), on appeal from the Disputes Settlement Panel (the Panel), gave its landmark ruling in the challenge brought by Canada and Norway to the prohibition on the trade in seal products in the European Union (EU).[2] The prohibition was introduced, in August 2010, by the European Parliament and the Council of Ministers via Regulation (EC) 1007/2009 (the seal products regulation) and Commission Regulation (EU) No 737/2010 (the implementing regulation). The two pieces of legislation are together known as the 'EU seal regime'.

The regime builds on the prohibition on the EU trade of the skins and products from harp and hooded seal pups introduced by Council Directive 83/129/EEC.[3] In addition, Directive 92/43/EEC (the habitats directive) prohibits certain methods of killing and capture of seals in protected areas in the EU.

The two principal WTO agreements at issue in the Canada/Norway challenge were the General Agreement on Tariffs and Trade (GATT) and the Agreement on the Technical Barriers to Trade (the TBT agreement).[4] There is an explicit public morals exception under GATT, in Article XX(a), and an implicit one under Article 2.2 of the TBT agreement.

Whether concerns about animal welfare can constitute public morals under GATT has been the subject of lengthy debate. When a marketing ban for cosmetics tested on animals was mooted around the turn of the century, the European Commission (the Commission) was firm in its view that Article XX(a) was not available for animal welfare, and it was supported by many member states, including the UK. Part of the debate was whether a measure prohibiting the import of goods produced by a cruel method had extraterritorial effect, by seeking to impose values on other WTO members – WTO case law disapproved of extraterritoriality. However, campaigners argued that the EU would not be seeking to change production (or testing) methods in other countries but rather to protect the moral sensibilities of its own citizens by banning the import of cruelly-produced goods.

The regime builds on the prohibition on the EU trade of the skins and products from harp and hooded seal pups

[1] Solicitor and Part-Time Judge

[2] *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* AB-2014-1 and AB-2014-2. There were two appeals, one brought by Canada and the other by Norway, with cross-appeals by the EU

[3] Extended by Commission Directive 85/444/EEC

[4] Article 4.2 of the Agreement on Agriculture also featured to some extent at the Panel

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The objective was inward – not outward – looking.[5]

The Parliament and Council of Ministers eventually agreed that a properly targeted ban could be WTO-compliant. That political precedent established, the EU has since invoked Article XX(a) on other occasions, for example when banning the import of cat and dog fur.

However, the trade in seal products was always likely to be the principal battleground for animal welfare under the WTO, given Canada's determination to protect the economic interests and cultural traditions of certain communities.

The WTO challenge was not the first to the EU seal regime. In 2011, Inuit organisations and individuals sought to argue that the regime was invalid under EU law. However, the Court of Justice of the European Communities (CJEU) held[6] that the applicants did not have standing to bring the case (the EU rules on standing are incredibly restrictive).

There are currently 161 members of the WTO. This includes all EU member states, although the EU deals with disputes on their behalf.

The trade

According to the Commission, around 900,000 seals are hunted each year, with Canada, Greenland and Namibia accounting for some 60% of those killed. Russia and Norway are other participants. Around one third of the world trade formerly either passed through or ended up in the EU. In Canada, there are some 6,000 hunters, mainly in Newfoundland.

Prior to the introduction of the seal products regulation, several EU member states had banned or were considering banning the trade in seal products (especially seal skins). The regulation, although motivated by animal welfare, has as its formal aim the harmonisation of laws in the EU. The consensus was that regulation needed to be at EU rather than member state level.[7]

In the appeal, the EU argued that, as a result of the ban, there had been a 'precipitous reduction in the number of [Canadian] seals hunted', with statistics showing a decline in Canada's seal exports.[8]

The welfare concerns

There is widespread revulsion at the manner in which seals are hunted and killed. The Commission, after obtaining expert evidence and discussions with the sealing nations, eventually came to the conclusion that the methods are *inherently* cruel, given the inhospitable conditions in which the hunts take place. Canada and other sealing countries disagreed, but the EU's view was that improvements in the methods of killing, such as those promised, could only be largely cosmetic.[9] Labelling and other harmonising measures would not address the welfare concerns, either.[10]

The seal products regulation

The seal products regulation is short and straightforward. With effect from 20 August 2010, it prohibits the 'placing on the [EU] market' of seal products. The prohibition applies whether the products originate within the EU (there have traditionally been limited seal hunts in Finland, Sweden and Scotland) or elsewhere.

There are, however, three exceptions:

- Seal products which come from 'hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence' (the IC exception)
- The import of seal products where they are for personal use (the personal use exception)
- Seal products, marketed on a non-commercial basis, which are the by-product of hunting regulated by national law and conducted for the sole purpose of the sustainable management of marine resources (the MRM exception)

[5] In its report (para 5.173), the AB, noting that the preamble to the seals regulation recited that it was designed to address seal hunting 'within and outside the Community', left open the question of extra-territoriality, given that (perhaps surprisingly) the parties had not addressed it.

[6] Case C-583/11 P *Inuit Tapiriit Kanatami and others v Parliament and Council* (3 October 2013). The Court ruled that the seal products regulation was a 'legislative act' (as opposed to a 'regulatory act') within what is now Article 263 of the Treaty on the Functioning of the European Union and that the applicants were unable to show that the regulation was of 'individual concern' to them – it applied indiscriminately to any trader falling within its scope and was not directed specifically at the applicants. The CJEU upheld the decision of the General Court: Case T-18/10 *Inuit Tapiriit Kanatami and others v Parliament and Council* (6 September 2011)

[7] Recital (21). EU regulation could be done without breaching the principle of subsidiarity

[8] See para 5.245 of the AB report

[9] Recital (11) of the seal products regulation says: *'Although it might be possible to kill and skin seals in such a way as to avoid unnecessary pain, distress, fear or other forms of suffering, given the conditions in which seal hunting occurs, consistent verification and control of hunters' compliance with animal welfare requirements is not feasible in practice or, at least, is very difficult to achieve in an effective way, as concluded by the European Food Safety Authority on 6 December 2007'*

[10] See recital (12)

> **an absolute ban on an activity can be easier to defend than one which represents a compromise between different interests**

The exceptions were the EU's attempt to balance animal welfare against other concerns. As with other social reform legislation, however, the exceptions have enabled opponents to claim that the legislation creates arbitrary distinctions. The numerous exemptions in the Hunting Act 2004 have enabled proponents of hunting with dogs to run similar arguments. The irony is that legislation which contains an absolute ban on an activity can be easier to defend than one which represents a compromise between different interests. So it has proved with the seal products regulation, at least with regard to GATT.

The IC exception dominated the appeal before the AB.

The implementing regulation
The implementing regulation fleshes out conditions for compliance. For example, to qualify under the IC exception, an attesting document, issued by a recognised body, is required to show that (i) the seal product originates from a hunt conducted by Inuit or other indigenous communities with a tradition of seal hunting; (ii) the products of the hunt are at least partly used, consumed or processed within the communities according to their traditions; and (iii) the hunts contribute to the subsistence of the communities.

The relevant member state is ultimately responsible for checking the authenticity and accuracy of an attesting document.

The roles of the Panel and the AB
Under the WTO system, the Panel is the primary decision-maker. Under Article 11 of the Dispute Settlement Understanding, it has to consider the arguments of the parties and make an objective assessment of the evidence.[11] The AB will only interfere with its findings in the circumstances the High Court will step in on judicial review, and so the Panel has discretion as to which parts of the evidence to focus on and what weight to give it and so forth.

The Appellate Body Report
The AB report, given on 22 May 2014, runs to 208 pages, closely-typed, tightly-reasoned, exhaustively-referenced. A light read it is not. These are the main findings.[12]

TBT agreement
In the words of the WTO website, '[t]he [TBT] Agreement aims to ensure that technical regulations, standards, testing and certification procedures do not create unnecessary obstacles to trade... Technical regulations and standards may vary from country to country, posing a challenge for producers and exporters. The TBT Agreement strongly encourages the use of international standards and aims to create a predictable trading environment through its transparency requirements'.

Article 2.1 obliges WTO members not to discriminate against imported products through technical regulations. Article 2.2 sets out a non-exhaustive list of exceptions, including the protection of human health, animal life and health and the environment, providing that the least trade-restrictive measure is taken. Unlike GATT, there is no *explicit* exception for public morals but caselaw has accepted that they can be a legitimate objective (as indeed the Panel accepted in the present case).[13]

Annex 1.1 defines 'technical regulations' as:

'Document which lays down product characteristics or their related processes and production methods, including any applicable administrative provisions, with which

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[11]Para 5.288 of the AB report

[12]The Panel had given its ruling on 25 November 2013: *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* T/DS400/R (Canada) and WTDS401/R (Norway). It decided that (i) the EU seal regime was a 'technical regulation' within Annex 1.1 to the TBT agreement (because it lays down 'product characteristics'); (ii) the IC and MRM exceptions violated Article 2.1 because they accorded imported seal products less favourable treatment than that accorded to like domestic and other foreign products and the less favourable treatment did not stem exclusively from legitimate regulatory distinctions; (iii) however, Article 2.2 of the TBT agreement was not violated because the EU seal regime fulfilled the objective of addressing public moral concerns, and no alternative measure was shown to make an equivalent or greater contribution to that objective; (iv) the IC exception breached Article 1:1 of GATT (the most-favoured nation rule) because an advantage accorded to seal products originating in Greenland was not accorded to like products originating in Canada (Greenland's WTO status is anomalous: it is not a member, nor is it a member state of the EU, but it has links with Denmark, which is a member of both institutions); (v) the MRM exception fell foul of Article III.4 of GATT (the like products rule) because it accorded imported seal products treatment less favourable than that accorded to domestic seal products: (vi) the three exceptions in the EU seal products regulation did not breach Article XI of GATT (general elimination of quantitative restrictions); and (vii) Article XX(a) (the public morals exception) provisionally applied but could not save the IC and MRM exceptions because they were arbitrarily and unjustifiably discriminatory, within the chapeau to Article XX.

[13]The Panel noted that the second recital of the TBT agreement says that one of the objectives of the agreement is to further the objectives of GATT (including, therefore, the protection of public morals).

> **if WTO member X gives trading advantages to member Y, it must give the same advantages to member Z**

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).

The AB ruled in EC-Asbestos[14] (where France banned asbestos-containing products from Canada) that 'product characteristics' included definable features, qualities, attributes or other distinguishing marks of a product.[15] The Panel, drawing on this decision, decided that the EU seal regime also involved product characteristics. The AB disagreed,[16] noting (perhaps surprisingly):

'… it becomes apparent that the measure is not concerned with banning the placing on the EU market of seal products as such. Instead, it establishes the conditions for placing seal products on the EU market based on criteria relating to the identity of the hunter or the type or purpose of the hunt from which the product is derived. We view this as the main feature of the measure. That being so, we do not consider that the measure as a whole lays down product characteristics. This is not changed by the fact that the administrative provisions under the EU seal regime may "apply" to products containing seal [a reference to the phrase "any applicable administrative provisions" in the definition of "technical regulation"]'

The AB could have gone on to consider whether the regime laid down 'related processes and production methods', another part of the definition of 'technical regulation'. However, it felt it was not in a position to make a ruling about this, given the way the case had proceeded.

The lawfulness or otherwise of the seal regime would be determined under GATT, in particular Articles 1.1 and III.4 and the Article XX(a) exception.

Article 1:1 GATT
This is the so called 'most-favoured nation treatment' rule. Article 1:1 reads (insofar as relevant):

'… with respect to all rules and formalities in connection with importation and exportation … any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members'.

In other words, if WTO member X gives trading advantages to member Y, it must give the same advantages to member Z. The argument by Canada and Norway was that the EU in practice gave preferential treatment to Greenland because most seal hunters in Greenland, as Inuits, could take advantage of the IC exception, whereas most seal hunters in Canada and Norway, as non-Inuits, could not.

The AB agreed: what mattered was simply that there was competitive disadvantage.[17] Commentators have suggested that the AB's broad approach means that a great many laws will *prima facie* breach Article 1.1.[18]

Article III:4 GATT
Article III.4 GATT provides:

'The products of the territory of an Member imported into the territory of any other Member shall be

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[14] *European Communities – Measures affecting asbestos and asbestos-containing products* WT/DS135/AB/R (5 April 2001)

[15] Para 67

[16] Para 5.1.2.3.4. This is, it seems, the first time that the AB has found a measure not to constitute a technical regulation

[17] In *US – Clove Cigarettes* WT/DS406/AB/R (adopted 4 April 2012), the AB had held that a disadvantageous competitive position for imported products was not contrary to the TBT agreement if that stemmed exclusively from a legitimate regulatory distinction. The EU argued that the same approach should be taken under Article 1 (and Article III.4) of GATT but the AB disagreed: with GATT measures, all that mattered was whether there was a competitive disadvantage. There was here between hunters in Greenland and those in other countries.

[18] For example, in *Sealing the Deal: The WTO's Appellate Body Report in EC – Seal Products* American Society of International Law Volume 18 issue 12 by Rob Howse, Joanna Langille and Katie Sykes (4 June 2014) http://www.asil.org/insights/volume/18/issue/12/sealing-deal-wto%E2%80%99s-appellate-body-report-ec-%E2%80%93-seal-products, the authors argue: *'Does the AB really mean that every regulation that results in different market opportunities for products from different countries, regardless of the reason for the regulation and no matter how incidental that effect, is a prima facie violation of GATT and has to be justified under Article XX? Very few legislative or regulatory distinctions between products would not fail that test: safety, environmental and health rules, for example, are quite likely to have a different impact on goods manufactured in different places. The logical implication is that a large universe of laws and regulations is now prima facie illegal under WTO law. That outcome seems extreme and hard to reconcile with the intent and text of GATT'* They do make the point, however, that the AB says that a violation of Article III.4 requires a 'genuine relationship' between the measure in question and any adverse effect on competitive opportunities for imported products.

accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use …'

So, Article III.4 deals specifically with imports.[19]

The EU did not appeal the Panel's finding that the MRM exception breached Article III.4 (on the basis that it accorded less favourable treatment to Canadian and Norwegian seal products than to domestic seal products).

The exception in Article XX(a) GATT

Because the EU seal regime *prima facie* breached Articles 1.1 and III.4 of GATT, it could only be saved if one of the exceptions in Article XX applied, in particular Article XX(a) (public morals).

Article XX opens with the so-called 'chapeau':

'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 Member of measures …'

Paragraph (a) then follows on: 'necessary to protect public morals'.

Case law says that one must first consider whether the measure in question is provisionally justified as 'necessary to protect public morals' and then move onto the chapeau. Both limbs must be satisfied.

Necessary to protect public morals

The Panel had adopted its definition of 'public morals' in *US-Gambling:*[20] 'standards of right and wrong conduct maintained by or on behalf of a community or nation'. It had also said that, because public morals vary, a WTO member should be 'given some scope to define and apply for themselves the concept of public morals according to their own systems and scales of values'. It acknowledged that public moral concerns with regard to animal welfare were 'an important value or interest'.[21] The AB appeared to accept all this.

The AB explained that one had, first, to identify the objective of the EU seal regime and, second, consider whether the regime was necessary to further that objective or whether some other method, less trade-restrictive, could have been chosen.

The EU argued that the seal regime reflected a standard of animal welfarism, pursuant to which 'humans ought not to inflict suffering upon animals without a sufficient justification'.[22] However, it also maintained that the subsistence of Inuit and other indigenous communities and the preservation of their cultural identify 'provide benefits to humans which, from a moral point of view, outweigh the risk of suffering inflicted upon seals

"public moral concerns with regard to animal welfare were 'an important value or interest'"

as a result of the hunts conducted by those communities'. The Panel nevertheless decided that seal welfare was the main objective of the EU seal regime, with the Inuit and other interests being 'accommodated' as well.

The AB said[23] that a necessity analysis involves weighing and balancing a series of factors, including the importance of the identified objective, the contribution the measure makes to that objective and its trade-restrictiveness (which involves consideration of alternative means of achieving the objective).[24] The burden of proving necessity lies on a responding party (the EU here), although a complaining party must identify any relevant alternative measures.[25]

The Panel had noted that there has to be a 'genuine relationship of ends and means between the objective pursued and the measure at issue'.[26] However, the AB ruled that it was not necessary for the contribution of the measure to the objective in question to be material.[27] It was sufficient that, as the Panel had properly found, the EU seal regime was 'capable of and

[19]There is then an exception for internal transportation charges based exclusively on economic factors and not the national origin of the product

[20]Para 6.465 of *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WT/DS285/25

[21]Para 7.632, referring to its report in *China – Publications and Audiovisual Products* para 7.817

[22]Para 5.143 of the AB decision

[23]Para 5.169

[24]See *Korea Various Measures on Beef* para 164: *US – Gambling* para 306; *Brazil – Retreated Tyres* para 182

[25]*US – Gambling* paras 309-311

[26]Panel report para 7.635, referring to the AB report in *Brazil – Retreated Tyres* paras 150-151

[27]Para 5.216 of the AB report

does make some contribution' to its objective.[28] Similarly, the Panel was entitled to conclude, on the evidence, that a reduction in exports to the EU would result in a reduction in the number of seals killed (and therefore inhumanely killed).[29] And, it was entitled to reject Canada's argument that the EU seal regime would lead to worse seal welfare (the argument was that IC and MRM hunts would be given a boost and those hunts lead to a higher rates of inhumanely killed seals compared to commercial hunts).

The AB rejected Canada's further argument that the EU was inconsistent because it tolerated animal suffering, in slaughterhouses and wildlife hunts, similar to that involved in seal hunting.[30] The argument was wrongly predicated on a need to identify the precise content of a risk to public morals: unlike Article XX(b) (public and animal health and life), paragraph (a) did not require an analysis of risk. More prosaically, the AB thought that policy-makers do not have to be perfectly consistent.[31]

Reasonable availability of alternative measures

Part of the necessity test involves considering whether the identified objective could have been achieved with a less trade-restrictive measure. An alternative measure may not be reasonably available where it is 'merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties'.[32] Cost to, or practical difficulties for, industry might also be relevant, especially if they could affect its ability or willingness to comply with the requirements of the alternative measure.[33] The alternative measure must achieve the desired level of protection.

The principal alternative measure identified by Canada and Norway comprised EU market access for seal products where higher animal welfare standards were met, with certification and labelling schemes. The Panel accepted that would be less trade-restrictive, but ruled that hunters would have difficulty meeting higher animal welfare standards in light of the physical conditions in which seal hunts take place, and might not be willing to anyway.[34] An attempt to conform might result in more seals killed, and therefore more inhumanely killed seals.[35]

The AB decided that the Panel was entitled to reach these conclusions on the evidence, and rejected the complainants' argument that the Panel had assessed the alternative measure against *complete* fulfilment of the objective of protection of the morals of EU citizens instead of against the *actual* contribution the EU seal regime made (taking into account the exceptions).

> **a reduction in exports to the EU would result in a reduction in the number of seals killed**

The chapeau

The function of the chapeau is to prevent abuse of the exceptions.[36] To qualify, a measure must not be protectionist in intent or effect. The burden of proof rests on the party invoking the exception (the EU in the present case),[37] and is heavier than showing that an exception provisionally applies.[38]

Although there may be overlap, the fact that a measure has been found to be discriminatory under one of the substantive GATT provisions (such as Article 1.1 or III.4) does not mean that it constitutes unjustifiable or arbitrary discrimination under the chapeau - otherwise, the chapeau could never be satisfied. Because the focus is on the application of a measure, as well as intent, one has to consider '[its] design, architecture, and revealing structure' in order to establish whether it passes.[39]

The AB said[40] that one of the most important factors is whether the discrimination can be reconciled with, or is rationally related to, the policy objective (public morals in the present case).

After closely examining the exceptions permitted by the EU seal regime, and in particular the IC

[28]Para 5.228

[29]Para 5.247

[30]Para 5.198

[31]Paras 5.200 and 5.201

[32]AB report in *Brazil – Retreaded Tyres* para 156 (quoting AB report *US – Gambling* para 308).

[33]Para 5.277 of the AB report in the present case

[34]Para 7.496 and footnote 798

[35]Paras *7.480, 7.496 and 7.498*

[36]AB report para 5.297

[37]AB report in US – *Gasoline* pp 22-23

[38]AB report in US – *Gasoline* p23

[39]Para 5.302 of the AB report. The measure at issue in *US – Shrimp* failed in part because of a 'rigid and unbending requirement' that countries exporting shrimp to the US had to adopt a regulatory programme which was essentially the same as the US programme and because the US negotiated seriously with only some WTO members over the protection and conservation of sea turtles in relation to shrimp harvesting.

[40]Para 5.306

exception, the AB agreed with the Panel that the regime fell foul of the chapeau, for these reasons:[41]

- The EU had failed to show how its approach to seal products from IC hunts could be reconciled with its approach to those from commercial hunts, given that the welfare issues were the same
- There was considerable ambiguity in the subsistence and partial use criteria of the IC exception
- The EU had not made comparable efforts to facilitate access of Canadian Inuits to the IC exception as it had with respect to Greenlandic Inuits.

As a result, the EU could not rely on Article XX(a).

What happens now
The EU has to address the problems identified with the chapeau, and the parties have agreed that it may have until October this year to do so. Provided it does so, the seal regime can remain in place.

In February 2015, the Commission published a Proposal to amend the seal regime.[42] It removes the MRM exception and adds a condition to the IC exception that 'the hunt is conducted in a manner which reduces pain, distress, fear or other forms of suffering of the animals hunted to the extent possible taking into consideration the traditional way of life and the subsistence needs of the community'. The amendment also stipulates that an IC hunt must not be conducted primarily for commercial reasons and empowers the Commission to introduce a measure to limit the quantity of products which can be placed on the

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EU market if there are indications, such as the quantity of seal products marketed, that a hunt is conducted primarily for commercial reasons.

If the Proposal is adopted by the EU legislature and accepted by the WTO, the effect will, therefore, actually be to strengthen the welfare aspects of the seal regime.

Conclusion
The EU won the central point of principle that the seal regime was provisionally justified under Article XX(a). That is key for maintaining the general ban on seal imports (and therefore undermining the financial viability of seal hunts) and, more generally, hugely important for animal welfare in the context of international trade.

That in turn may embolden the CJEU to allow greater reliance on the similar public morals exception in Article 36 TFEU for animal welfare reasons and may also be important for the other free trade agreements which are mushrooming.

The message is clear: the principles of free trade need not be a reason to trample over animal welfare.

[41] Summarised in para 5.338

[42] 2015/0028 (COD): http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/proposal.pdf