

## INDIGENOUS INTERESTS AND THE CHAPEAU OF ARTICLE XX: EQUALITY OF WHAT?

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### Introduction

My analysis focuses on a limited aspect of the Appellate Body's (AB) *EC—Seal Products*<sup>1</sup> decision under the chapeau of Article XX of the General Agreement on Tariffs and Trade (GATT)<sup>2</sup>. It is revelatory for the kind of discrimination at issue under the chapeau in surprising ways.

The general exceptions in Article XX serve to justify measures infringing other GATT provisions that have a close nexus to a list of types of public policies. The list of public policies is exhaustive. The chapeau prohibits application of those measures that arbitrarily or unjustifiably discriminate between countries where the same conditions prevail or that constitute a disguised restriction on international trade.

The purpose of the chapeau has already attracted the interest of several commentators. Lorand Bartels has suggested that the chapeau is concerned with unjustified under-regulation relative to the policy goal.<sup>3</sup> Cases such as *Brazil—Tyres* and *U.S.—Gambling* lend support to this construction. They contained limited exceptions for engaging in the activity that were not equally available to other members of the World Trade Organization (WTO).<sup>4</sup> Cases such as *U.S.—Shrimp* concern over-regulation, however, relative to the policy goal because the United States did not accept shrimp imports caught with turtle excluder devices (TED) in noncertified waters or with certain fishing methods that did not pose a risk to sea turtles.<sup>5</sup> Armin von Bogdandy has suggested that the chapeau sets forth regulatory due process obligations and a duty to cooperate internationally in addressing public policy risks.<sup>6</sup> Lorand Bartels disputes the existence of independent procedural obligations. According to him, procedural obligations only come into play if they lead to discriminatory economic effects.<sup>7</sup> Following the

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Originally published online 25 June 2015.

<sup>1</sup> Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R (Adopted June 18, 2014) [hereinafter Appellate Body Report, *EC—Seal Products*].

<sup>2</sup> *General Agreement on Tariffs and Trade 1994*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187.

<sup>3</sup> Lorand Bartels, *The WTO Legality of the Application of the EU's Emission Trading System to Aviation*, 23 EUR. J. INT'L L. 429, 452 (2012).

<sup>4</sup> Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, paras. 227-228, WT/332/AB/R (Adopted Dec. 17, 2007); Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, para. 351, WT/DS285/AB/R (Adopted Apr. 20, 2005); Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, para. 6.599, WT/DS285/R (Adopted Apr. 20, 2005).

<sup>5</sup> Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, paras. 261-65, WT/DS58/AB/R (Adopted Nov. 6, 1998).

<sup>6</sup> Armin von Bogdandy, *Law and Politics in the WTO - Strategies to Cope with a Deficient Relationship*, 5 MAX PLANCK Y.B. UN L. 609, 667-670 (2001).

<sup>7</sup> Lorand Bartels, *The Chapeau of the General Exceptions in the WTO GATT and GATS Agreement*, 109 AJIL 95 (2015).

AB's appreciation of the substantive content of the seals regime under the chapeau in *EC—Seals*, Lorand Bartels has tried to distinguish the purpose of the paragraphs of Article XX from those of the chapeau. To him, the paragraphs deal with the trade restrictive aspects of the measure while the chapeau deals with the discriminatory aspects of the measure. Quite naturally, this raises the question of 'discrimination in respect of what'? I will focus on paragraph 5.337 of the *EC—Seal Products* Appellate Body's report that sheds some light on this question.<sup>8</sup>

### *Analysis*

The *EC—Seal Products* case concerns an animal welfare-motivated ban on seals and seal products.<sup>9</sup> The ban contained an exception for seals hunted by Inuit (IC exception).<sup>10</sup> The exception was formally available to Inuit seals hunted from any country with a tradition of seal hunting in the relevant geographic area (including Canada). Seal products had to be partially used, consumed, or processed by the Inuit community in accordance with its tradition and had to contribute to the community's subsistence.<sup>11</sup> Neither the subsistence requirement nor the partial use requirement set any limits on how many seals could be hunted or exported.<sup>12</sup> They were almost nonconditions. No animal welfare standards applied. The main condition that the IC exception imposed was the limitation to seal hunts in areas where Inuit have a seal hunt tradition. Because of the absence of seal welfare standards and limits on quantity, the AB found problems of under-regulation relative to the goals of protecting animal welfare<sup>13</sup> and keeping commercial seal products out of the European Union.<sup>14</sup>

The AB also considered whether there was discrimination between Greenland's and Canada's Inuit communities.<sup>15</sup> Ninety percent of Greenland's population is Inuit and they engage in sealing on a significant scale, which includes more than one hundred sixty thousand seals hunted annually, large quantities of exports, and their own processing and distribution chain. Canada's Inuit hunt more occasionally (roughly thirty five thousand per year) and have relied on the Canadian commercial sealing industry for selling their seals (which industry is now no longer able to export to the European Union).<sup>16</sup> The de facto cause of the differential impact of the seals regime on market access for Canadian IC seals therefore lay in the removal of its distribution channel.

Given that there were doubts about whether there was much substance to the European Union's distinction between commercial and IC seal hunts due to the design of the IC exception, it would have only been reasonable to conclude that the differential de facto impact amounted to arbitrary or unjustifiable discrimination or a disguised restriction on trade. The AB, however, did not take this tack, or at least did not explicitly do so.

Instead, the AB faulted the European Union for not having engaged in comparable efforts to facilitate access of the Canadian Inuit to the exception, noting that Danish Customs processed Greenlandic IC seals pending

<sup>8</sup> Appellate Body Report, *EC—Seal Products*, *supra* note 1.

<sup>9</sup> Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products (Text with EEA relevance), 2009 O.J. (L 286) 36.

<sup>10</sup> Commission Regulation (EU) No 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products (Text with EEA relevance), 2010 O.J. (L 216) 1.

<sup>11</sup> Appellate Body Report, *EC—Seal Products*, *supra* note 1, at para. 5.322.

<sup>12</sup> *Id.* at paras. 5.324–5.

<sup>13</sup> *Id.* at para. 5.320.

<sup>14</sup> *Id.* at paras. 5.324–8.

<sup>15</sup> *Id.* at para. 5.317.

<sup>16</sup> *Id.* at para. 5.334; Panel Report, European Communities—Measures Prohibiting the Importation and Marketing of Seal Products, para. 7.266, WT/DS400/R, WT/DS401/R (Adopted June 18, 2014) [hereinafter Panel Report, *EC—Seal Products*].

the application for Greenland's recognized body status.<sup>17</sup> Note that the Canadian Inuit never submitted a request for recognized body status, which was the only condition to be fulfilled for obtaining temporary rights of access.<sup>18</sup> The AB also faulted the European Union for not having pursued cooperative arrangements with the Canadian Inuit to facilitate their access to the IC exception.<sup>19</sup> Referring to *U.S.—Shrimp*, the AB recalled that discrimination may be arbitrary or unjustifiable if it does not allow for an inquiry whether the regulation must be appropriate for the conditions in exporting countries. It then pointed to the fact that the setting up of a body recognized to certify IC hunts may entail significant burdens in some instances.<sup>20</sup>

Petros Mavroidis has characterized the Inuit exception as an illegitimate industrial policy measure designed simply to replace one type of commercially hunted seals with another.<sup>21</sup> The rather limitless partial use criterion, the lack of animal welfare standards, and the ambiguity of the subsistence criterion lend support to this characterization. Assuming Mavroidis is right, the AB faulting the European Union for not having made efforts to allow effective market access for seals hunted by Canadian Inuit would be illogical. Unlike in arithmetic math, two negatives (Greenland and Canada) do not make a positive. What I mean by this is, if Greenlandic IC exports really are commercial and the sheer number of seals killed leads to seal suffering, why encourage the killing of even more seals by allowing Canadian Inuit de facto more effective access to the market as well? Why not only put limits on the number of IC seals hunted and imported and define the subsistence criterion more strictly in a narrowly tailored way to support the preservation of the livelihood of Inuit communities and real traditional hunting?

The AB's statement at paragraph 5.337 can only mean that the Canadian Inuit encountered a heavy burden because the scale of their hunting activities was small. Or, put differently, because it requires certification, the IC exception privileges larger over smaller IC sealing operations. Lorand Bartels suggests that the duty to cooperate that the AB established may have set forth an obligation to discriminate positively.<sup>22</sup>

Such a duty to discriminate positively to help economic operators adapt to new regulations seems contrary to the law and policy of the WTO. As regards policy, the economic theory of comparative advantage welcomes international competition precisely because by pushing less competitive competitors out of the market, it helps countries specialize in the production of the goods in which they enjoy a comparative advantage. Specialization and trade in turn lead to welfare gains for all the trading partners involved. Pursuant to this logic, economic operators should suffer the consequences of bad business decisions that they have taken. The decision of the Canadian Inuit to rely on the commercial sealing industry for distribution may be seen as just that. Perhaps the Canadian Inuit failed to realize that the tide of public and consumer opinion was swinging against the brutal killing of many seals. Perhaps they failed to develop their own distribution channel in time.

As regards the law, a duty of positive discrimination seems inconsistent with the gist of nondiscrimination obligations and is unsupported by the case law. Concerning Article III, the AB has found that its purpose is to safeguard the equality of competitive opportunities and prevent modifications of conditions of competition to the detriment of imported products.<sup>23</sup> Of course, that very same logic cannot apply to the chapeau because Article XX accepts that public policies may affect the equality of competitive opportunity. Nevertheless, the

<sup>17</sup> Appellate Body Report, *EC—Seal Products*, *supra* note 1, at para. 5.337.

<sup>18</sup> *Id.* at para. 5.337 n.1612; Panel Report, *EC—Seal Products*, *supra* note 15, at para. 7.316.

<sup>19</sup> Appellate Body Report, *EC—Seal Products*, *supra* note 1, at para 5.337.

<sup>20</sup> *Id.*

<sup>21</sup> Petros Mavroidis, Sealed with a Doubt: EU, Seals and the WTO 7 (unpublished manuscript) (on file with author).

<sup>22</sup> Bartels, *supra* note 7.

<sup>23</sup> Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, 16-17, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Adopted Nov. 1, 1996); Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, para. 137, WT/DS161/AB/R, WT/DS169/AB/R (Adopted Jan. 10, 2001).

inquiry under the chapeau should be relevantly similar. The inquiry should focus on whether measures provisionally justified under the Article XX list of exceptions otherwise preserve equalities of competitive opportunities and if not, whether such difference can be justified. As the various cases above of under- and overregulation with mono-purpose policies show, the inquiry under the chapeau is really just a finer-grained inquiry into whether any formal difference in treatment is rationally linked with attaining the purpose of the measure.<sup>24</sup>

In *U.S.—Shrimp*, U.S. negotiations about sea turtle protection, and its provision of phase-in periods and technical assistance, were all discriminatory because they were not provided equally to all WTO members.<sup>25</sup> They also arguably had an indirect bearing on the U.S. justification for its de facto exclusive acceptance of TEDs. Negotiation, technical assistance, and phase-ins would have helped establish whether TEDs were the only effective technology and whether the shrimpers were in fact capable of using this technology. In *U.S.—Gasoline*, the duty of the United States to cooperate with Venezuela and Brazil in the establishment of baselines was directly relevant to the question of whether the less favorable statutory baseline was necessary to protect clean air because data verification from uncooperative refiners was too difficult, lowering the level of protection sought by the United States.<sup>26</sup> The AB invoked this duty of cooperation in *U.S.—Gasoline* as well as in *EC—Seal Products*.<sup>27</sup> However, the issues in *EC—Seal Products* are very different. In *Gasoline*, the failure to cooperate resulted in a difference in legal treatment because the United States provided less favorable statutory baselines for foreign refineries than for U.S. refineries. Engaging in greater efforts at cooperation would have helped verify if this legal treatment was justified. In *EC—Seal Products*, nothing changed legally as a result of the lack of cooperative efforts by the European Union. Legally, the Canadian Inuit remain just as entitled to export to the European Union. Cooperation would not have had the purpose of verifying that the Inuit were indeed Inuit. It also would not have had the purpose of establishing that they had a tradition of seal hunting. Further, it would not have had the purpose of allowing temporary access pending their application for recognized body status. The European Union never refused this temporary opportunity for access because the Canadian Inuit never submitted a request for recognized body status, which was the only condition to be fulfilled for obtaining temporary rights of access.<sup>28</sup> Rather, the purpose of the cooperation would have been technical assistance where there is no evidence in the case that the European Union offered any such technical assistance on a discriminatory basis.

This leads neatly to the second legal point, which is about attribution. As the AB noted, if the de facto exclusivity for Greenland's Inuit community was entirely due to private choice, the exclusivity could not be attributed to the seals regime.<sup>29</sup> In support of this argument, the AB pointed to the same rationale in other nondiscrimination cases. The AB has now confirmed that the reason why the fixed bond requirement in *Dominican Republic—Import and Sale of Cigarettes* did not confer less favorable treatment had to do with

<sup>24</sup> Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, *supra* note 4, at para. 232.

<sup>25</sup> Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, *supra* note 5, at paras. 169-75.

<sup>26</sup> Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 25-28, WT/DS2/AB/R (Adopted May 20, 1996).

<sup>27</sup> Appellate Body Report, *EC—Seal Products*, *supra* note 1, at para. 5.337 n.1615.

<sup>28</sup> *Id.* at para. 5.337 n.1612; Panel Report, *EC—Seal Products*, *supra* note 15, at para. 7.316.

<sup>29</sup> Appellate Body Report, *EC—Seal Products*, *supra* note 1, at para. 5.336.

nonattribution.<sup>30</sup> If the detrimental effect arises just because consumers prefer domestic cigarettes over Honduran ones, the fixed bond requirement cannot be faulted for this effect. I suggest parts of the decision in *Korea—Beef* are also about attribution. In that case, the AB found that any perception of difference between domestic and imported beef linked with the dual retail system was merely incidental.<sup>31</sup> When seen in conjunction with the AB's statement in paragraph 149 that Article III:4 is concerned with governmental interventions and not private choices producing detrimental effects, it becomes understandable why the AB decided this issue the way it did. The effect on consumer perception from the dual retail system was simply not direct enough to be attributable to it.

Is not the situation of the Canadian Inuit just like that of the Honduran cigarette manufacturers? Have they not, in failing to develop their own distribution channel, missed a commercial opportunity they could have taken? And should they not therefore suffer the consequences? Further, is not the AB in some sense seeking to protect volumes of trade based on the notion that the Canadian Inuit have some kind of substantive entitlement to export seals to the European Union? And is this not against the fundamental purpose of non-discrimination in WTO law of just ensuring that governmental measures do not skew equality of competitive conditions? Is the AB's decision wrong because it holds a wrong view of what discrimination under the chapeau is about?

I would like to suggest that the AB was not wrong. To see why requires a shift in heuristic perspective—to human rights. Indigenous peoples' human rights were at stake with the IC exception and two international legal instruments were specifically relevant. One is the binding ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries.<sup>32</sup> Its Article 2 requires states to cooperate with indigenous peoples to develop coordinated and systematic action to (i) promote the full realization of economic, social and cultural rights with respect for their cultural identity, customs and traditions; and (ii) to assist indigenous peoples to eliminate socioeconomic gaps relative to other members of the national community. Article 3(1) prohibits discrimination in their enjoyment of human rights. Article 5 requires states to adopt policies aimed at mitigating the difficulties of indigenous people in facing new conditions of life and work and Article 7(2) makes the improvement of conditions for life and work a priority in plans for the economic development of areas they inhabit. Article 2 recognizes that the protection of economic rights of Inuit should respect their traditions. Put differently, Inuit may exercise their economic rights by pursuing traditional activities, subject of course to respect for human rights in the exercise of these traditions (as per Article 35). Articles 2, 5, and 7 recognize that states have to mitigate past disadvantages of indigenous communities. Based on these provisions and Article 3(1), it is not a far-fetched argument to say that the Convention envisages that the failure to take differentiated positive discriminatory measures to mitigate past disadvantages of indigenous communities could fall short of the Convention's requirements. Note also that the International Covenant on Economic, Social and Cultural Rights, which protects the right to an adequate standard of living (Article 11(1)) and to take part in cultural life (Article 15(1)(a)), does not explicitly limit the states' human rights obligation to people within their own territory (see Article 2).<sup>33</sup>

The UN Declaration on the Rights of Indigenous Peoples affirms the right of indigenous peoples to practice, revitalize and develop their cultural traditions and customs (in Articles 11(1) and 15(1)), to be free from

<sup>30</sup> Appellate Body Report, *Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes*, para. 179, n. 372 174, 182, and 194, WT/DS302/AB/R (Adopted May 19, 2005); Appellate Body Report, *EC—Seal Products*, *supra* note 1, at para. 5.336.

<sup>31</sup> Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, *supra* note 23, at para. 141.

<sup>32</sup> *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (ILO No. 169), June 27 1989, 28 ILM 1382 (1989).

<sup>33</sup> *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, 6 ILM 360 (1967).

discrimination in the exercise of their rights due to their origin and identity (in Article 2), and to enjoy all human rights recognized in international human rights law (in Article 1).<sup>34</sup> Article 21(2) requires states to adopt special measures to ensure the continued improvement of the economic and social conditions of indigenous peoples. Article 26 recognizes that indigenous peoples have rights to resources that they have traditionally owned or otherwise used or acquired, which include rights to own, use, and develop these resources. Lastly, Article 38 sets forth an obligation of states to protect and fulfill the rights of the Declaration, while Article 39 creates a right to financial and technical assistance from states, and through international cooperation, for the enjoyment of the rights contained in the Declaration. If we characterize the IC exception in the EC seals regulations as a special measure adopted by the European Union for improving the economic conditions of Inuit, or as a way to protect the present or future traditional yet modern, if not commercial, manifestation of their culture and tradition, the absence of more targeted efforts to recognize the more precarious economic situation of the Inuit of Canada compared to those from Greenland might also amount to discrimination based on origin and identity, contrary to Article 2.

This interpretative result is bolstered by the preamble of the UN Declaration on the Rights of Indigenous Peoples, which recognizes both that indigenous peoples have suffered from historic injustices preventing them from exercising their right to development, and that the situation of indigenous peoples varies by region and country and that such particularities and historical backgrounds have to be taken into consideration. It is also bolstered by Article 46(3), which calls for interpreting the Declaration in accordance with principles of “justice, . . . , respect for human rights, equality, [and] non-discrimination.” Since political philosophy is concerned with the development of principles of social justice, its insights become relevant for interpreting the Declaration. Theories of egalitarian distributive justice have recognized that the polity has a duty to mitigate differences in the ability of people to access formally equal opportunities that derive from undeserved structural factors, including class, upbringing, culture, and others.<sup>35</sup> Mere formal equal opportunity is not enough; instead, substantively equal treatment needs to be given that removes the influence of undeserved social factors on the ability to access opportunities. More drastically, luck egalitarians hold that *any* distributive effects from *any* undeserved factor have to be equalized across the population.<sup>36</sup> Current structural disadvantages of Inuit individuals due to historic marginalization, de-valorization, and dispossession would certainly count amongst those undeserved factors. Consequently, the application of the Declaration would have to take different levels of disadvantage into account as well.

Aside from these specific human rights instruments, the thinking that human rights protection needs to be sensitive to situational differences of right holders that affects their enjoyment of human rights has taken hold in human rights jurisprudence and scholarship more generally. In paragraph 51 of *Yakye Axa Indigenous Community v. Paraguay*, the Inter-American Court of Human Rights has recognized that in cases concerning the human rights of indigenous communities,

the States must take into account the specific characteristics that differentiate the members of the indigenous peoples from the general population and that constitute their cultural identity. The Court must apply that same reasoning, as indeed it will do in the instant case, to assess the scope and content of the articles of the American Convention . . . .<sup>37</sup>

<sup>34</sup> United Nations Declaration on the Rights of Indigenous Peoples, GA Res. 61/295 (Oct. 2, 2007).

<sup>35</sup> JOHN RAWLS, A THEORY OF JUSTICE 62–63 (rev. ed. 1999).

<sup>36</sup> Richard Arneson, Egalitarianism, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2013).

<sup>37</sup> Yakye Axa Indigenous Community v. Paraguay, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 125 (June 17, 2005).

In human rights scholarship, crisscrossing features of identity that make rights holders vulnerable to discrimination is discussed under the term “intersectionality,” and it is increasingly argued that human rights protection needs to be sensitive to these multiple vulnerabilities.<sup>38</sup> In the case of the Canadian Inuit, it might be argued that they are vulnerable as an ethnic and cultural minority but also as an economically marginalized group that has suffered injustices in the past.

Concerning the right to culture in Article 27 of the International Covenant on Civil and Political Rights (ICCPR)<sup>39</sup>, the UN Human Rights Committee in *Apirana Mahuika v. New Zealand* has recognized that the acceptability of measures interfering with culturally significant economic activities of a minority depends on their opportunity to participate in the decision-making process on those measures and on whether they continue to benefit from their traditional economy.<sup>40</sup> From a human rights perspective, it consequently cannot be argued that the mere status of the Inuit as economic operators who did not foresee business risk is enough to make interferences with culturally significant seal hunting acceptable. Paragraph 5.337 of the AB report might possibly extend this line of thinking to the transnational situation involving the European Union and Canadian Inuit, notwithstanding the jurisdictional limitation in Article 2(1) of the ICCPR.

### *Conclusion*

So did the AB really hold by implication that discrimination violating the chapeau can involve the failure to extend *substantively* the same regulatory protection by removing the influence of undeserved factors affecting market access opportunities? Did it implicitly use the cited human rights instruments to interpret the chapeau, even though it had declined to consider them to analyze the justifiability of the IC protection and the panel had merely treated them as factual evidence in paragraph 7.295 of its report?<sup>41</sup> Even further, did the AB implicitly craft an extraterritorial human rights obligation for the European Union to protect the rights of Inuit outside of its jurisdiction? Would all this not be inconsistent with the freedom of the European Union to determine its own level of protection regarding Inuit rights and turn WTO law into an enforcement instrument for international legal obligations of its members?

Not necessarily so. I suggest there is another way of looking at the AB's statement that is much closer to the mainstream of WTO law. What the AB really might have implied (although it was far from clear) is that where the nature of the policy is such that it inherently requires additional positive efforts to stay true to its purpose, and this is also recognized in the international legal instruments invoked, then the AB will hold the WTO member to this policy. In *U.S.—Shrimp*, the AB essentially said the same when it noted that migratory species inherently require internationally coordinated efforts for their protection and that different international environmental instruments recognized this as well.<sup>42</sup> Migratory species will not be well protected if they are unprotected in adjacent areas. Something similar goes for economically marginalized minorities. Their economic rights and their cultural rights with an economic manifestation will not be well protected if, aside from being a minority, their special disadvantage is ignored. Hence the emphasis that the cited international human rights instruments place on duties to mitigate disadvantage and cooperate internationally.

<sup>38</sup> Katrien De Graeve, *Children's Rights from a Gender Studies Perspective. Gender, Intersectionality and Ethics of Care*, in ROUTLEDGE INTERNATIONAL HANDBOOK OF CHILDREN'S RIGHTS STUDIES 147, 152-54 (Wouter Vandenhoe et al. eds., 2015).

<sup>39</sup> *International Covenant on Civil and Political Rights*, Dec. 16, 1966, 6 ILM 368 (1967).

<sup>40</sup> Human Rights Committee, *Apirana Mahuika v. New Zealand*, Communication No. 547/1993, para. 9.5, UN Doc. CCPR/C/70/547/1993 (2000).

<sup>41</sup> For a critique of the AB ignoring the international human rights instruments invoked by the EU, see Gregory Shaffer and David Pabian, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, 109 AJIL 154 (2015).

<sup>42</sup> Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, *supra* note 5 at para. 168.

To summarize, the AB took the view in paragraph 5.337 that if a WTO member seeks to advantage the disadvantaged, it must do so consistently. Put differently, in a market whose entire existence depends on a positive discriminatory measure in the first place (the IC exception), a member cannot cherry-pick amongst those in whose favor it wishes to discriminate by failing to recognize needs for additional accommodation due to undeserved disadvantages. This type of inconsistency seems to me to be perfectly reconcilable with the notion of arbitrariness or unjustifiability under the chapeau. It is also reconcilable with the economic nondiscrimination purposes of WTO law provided one understands the market as embedded in regulation. It also happily coincides with the approach in human rights law and philosophical theories on equality of opportunity. It may, however, not coincide so happily with the animal welfare concern with reducing the numbers of seals killed. How to square these conflicting objectives given the AB's terse reasoning in paragraph 5.337 will likely remain difficult for the European Union when it has to implement the findings.