

ACCOMMODATING DIVERGENT POLICY OBJECTIVES UNDER WTO LAW: REFLECTIONS ON *EC—SEAL PRODUCTS*

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Introduction

*EC—Seal Products*¹ raises an important issue in World Trade Organization (WTO) law: How can WTO treaties be interpreted to accommodate divergent legitimate purposes of a domestic regulation? The European Union (EU) measure² at issue is a ban on the placing of seal products on the EU market, coupled with exceptions³ for seal products produced by Inuit and other indigenous communities (IC exception), and for seal products obtained from seals hunted for the purpose of marine resource management and sold on a nonprofit basis (MRM exception). The seal ban was imposed out of the public concern over the cruel manner in which seals are hunted and killed, whereas the IC exception was made to protect the traditional lifestyle of indigenous peoples and the MRM exception accommodated the need for sustainable management of marine resources. The EU regulation, therefore, was designed to achieve divergent policy objectives. The exceptions derogate from the ban because they permit hunting and killing of seals which can cause the very pain and suffering for seals that concerns the EU public.

The EU regulation is de jure nondiscriminatory since it applies to the sale of all seal products, irrespective of their national origin. It however has a disparate impact on different countries. Under the IC exception, most seal products from Canada and Norway are no longer eligible to enter the EU market, whereas almost all the seal products from Greenland remain eligible, as 90 percent of the Greenland population (56,600) is Inuit. Similarly, under the MRM exception, seal products produced by certain EU countries (such as Sweden) were expected to qualify, whereas Canada and Norway were unlikely to be able to benefit from this exception. Based on such disparate impact, the complainants in this case, Canada and Norway, claimed that the EU regulation is de facto discriminatory, in violation of the most-favored nation treatment (MFN) and national treatment (NT)

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

² *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.

³ *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.

provisions of the General Agreement on Tariffs and Trade (GATT)⁴ and of the Agreement on Technical Barriers to Trade (TBT)⁵, and that these violations cannot be justified by EU public moral concerns for seal welfare.

The novel challenge to WTO judges in this case was how to balance, under WTO law, between multiple legitimate, yet inherently conflicting, objectives of the EU regulation. The challenge is novel because this is the first dispute adjudicated in WTO/General Agreement on Tariffs and Trade (GATT) history that involves conflicts between different nontrade values—the IC and MRM exceptions were not designed to promote liberal trade despite their pro-trade effect. Previously, numerous WTO/GATT disputes involved domestic regulations protecting nontrade values, but in each case the conflict arose between trade interests and a single nontrade objective, be it public health, public morals, or environmental conservation. Correspondingly, WTO/GATT jurisprudence had evolved along the line of balancing between trade and nontrade values, rather than between divergent nontrade values.

The two most important nontrade values involved in *EC—Seal Products* are animal welfare and the welfare of indigenous peoples (IC welfare). Although the Appellate Body (AB) decision can be seen as having eventually accommodated both values – it did not require the EU to withdraw the ban or get rid of the IC exception entirely—the decision explicitly recognized only the legitimacy of concerns for animal welfare.⁶ As a result, the AB has missed the opportunity to establish an interpretive framework for accommodating multiple and divergent nontrade objectives under WTO law. This paper reflects on the causes and effects of such failure and makes suggestions on how relevant jurisprudence might be improved.

Recognizing Divergent Nontrade Values under the TBT: The Panel's Approach

Before examining the AB's decision, it is instructive to observe how the Panel in this case managed to recognize both animal welfare and IC welfare as legitimate regulatory purposes under Article 2.1 TBT⁷. Article 2.1 sets out the MFN and NT obligations in a single sentence: “Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country.” Although the TBT does not contain any general exceptions, the AB has interpreted the “treatment no less favorable” requirement of Article 2.1 as not prohibiting detrimental impact on imports that “stems exclusively from a legitimate regulatory distinction” in *U.S.—Clove Cigarettes*,⁸ *U.S.—Tuna IP* and *U.S.—COOL*¹⁰. Guided by this interpretation, the Panel in *EC—Seal Products* examined (a) what are the relevant regulatory *distinctions* drawn by the EU regulation, and (b) whether such *distinctions* are legitimate.¹¹ Note that what the Panel did here

⁴ *General Agreement on Tariffs and Trade 1994*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187.

⁵ *Agreement on Technical Barriers to Trade*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 UNTS 120.

⁶ Appellate Body Report, *EC—Seal Products*, *supra* note 1.

⁷ Panel Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R, WT/DS401/R (Adopted Jun. 18, 2014) [hereinafter Panel Report, *EC—Seal Products*].

⁸ Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, paras. 169, 174, 182, and 194, WT/DS206/AB/R (Adopted Apr. 24, 2013).

⁹ Appellate Body Report, *United States—Measures Concerning Importation, Marketing and Sale of Tuna and Tuna Products*, para. 215, WT/DS381/AB/R (Adopted June 13, 2012).

¹⁰ Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, para. 271, WT/DS384/AB/R, WT/DS386/AB/R (Adopted July 23, 2013).

¹¹ Panel Report, *EC—Seal Products*, *supra* note 7, at para. 7.174.

was to construe the phrase “a legitimate regulatory distinction” to mean *each* legitimate regulatory distinction, rather than a singular regulatory distinction.

This liberal construction enabled the Panel to examine the multiple and divergent regulatory purposes of the EU measure. With respect to the IC exception, the Panel found it had a legitimate purpose: to preserve Inuit culture and tradition and to sustain their livelihood through seal hunting. In this context, the Panel noted that the need to protect the interests of indigenous peoples has been recognized broadly in national legislation and international instruments, such as the UN Declaration on the Rights of Indigenous Peoples (UN Declaration)¹² and the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention)¹³, and that such interests are “to be balanced against” seal welfare, the main objective of the EU measure.¹⁴ Accordingly, the Panel was persuaded that “the protection of Inuit interests justifies the distinction between commercial and IC hunts.”¹⁵ However, due to the manner in which the IC exception was designed and applied (i.e., to benefit highly commercialized Inuit hunts in Greenland), the Panel ultimately concluded that the European Union had failed to establish that the detrimental impact caused by the IC exception on Canadian seal products stems exclusively from a legitimate distinction.¹⁶

The above analysis of the Panel was declared by the AB as “moot and of no legal effect” after it reversed the Panel’s finding that the EU measure constitutes a technical regulation.¹⁷ Nonetheless, the Panel’s analysis has demonstrated how multiple nontrade values can be accommodated through sensible and creative treaty interpretation.

Failure to Recognize Divergent Nontrade Values under GATT: The AB’s Approach

Having held that the EU measure is not a technical regulation, the AB examined the discrimination claims in this case under the GATT. Unlike TBT, GATT has a complex and peculiar treaty structure concerning non-discrimination. The main obligations of MFN and NT, set out in GATT Articles I and III, are defined by comparing treatment between “like products” originating from different countries. A measure found to violate the MFN or NT obligation may be excused by one of the ten policy exceptions set out in GATT Article XX(a)-(j). To qualify for these policy exceptions, however, the measure has to meet the requirement of another non-discrimination obligation provided in the chapeau of Article XX. The type of discrimination prohibited under the chapeau is defined as “arbitrary or unjustifiable discrimination between countries where the same conditions prevail.” The nature of such discrimination, and its relationship with the MFN and NT obligations, has not been fully settled in WTO case law. For example, does the type of discrimination prohibited under the chapeau include MFN and NT violations? Should the justification for discrimination under the chapeau be the same as one of the policy exceptions listed in Article XX(a)-(j)? The AB’s position on these key issues has changed significantly over time.

The *EC—Seal Products* decision has developed GATT jurisprudence on nondiscrimination in several important respects. First, the AB has clarified that a violation of MFN or NT under GATT Article I or III is to be established solely by disparate impact on market competition, without regard for the regulatory purpose of the measure at issue. Since the impact of a domestic regulation is likely to be disparate on different countries,

¹² United Nations Declaration on the Rights of Indigenous Peoples, GA Res. 61/295 (Oct. 2, 2007).

¹³ Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), June 27 1989, 28 ILM 1382 (1989).

¹⁴ Panel Report, *EC—Seal Products*, *supra* note 7, at paras. 7.296-298.

¹⁵ *Id.* at para. 7.298.

¹⁶ *Id.* at paras. 7.317-319.

¹⁷ Appellate Body Report, *EC—Seal Products*, *supra* note 1, at paras. 6.1, 5.70.

in the future it can be much easier to establish a MFN or NT violation. And the regulating government must always resort to the general exceptions of GATT to justify such a violation. In this sense, *EC—Seal Products* has made GATT MFN and NT obligations similar to GATT Article XI, which prohibits any quantitative restriction on imports and exports regardless of the reason for such restriction.

Second, the AB has established that the same discrimination found to violate the MFN or NT obligation may be scrutinized again under the chapeau of Article XX. This position is at odds with the AB's holding in *U.S.—Gasoline*¹⁸ that the “nature and quality” of the discrimination under the chapeau is different from the discrimination found to be inconsistent with the substantive obligations of GATT.¹⁹ But the AB's new position makes sense in light of its decision to turn the MFN and NT provisions into an impact-only analysis, leaving regulatory purposes to be dealt with solely under the general exceptions of Article XX. In effect, the AB has combined the provisions of Articles I and III with the chapeau of Article XX in order to determine the type of discrimination to be condemned under GATT.

Third, the AB has further modified its previous positions on the relationship between the justification for discrimination under the chapeau and the policy exceptions listed in Article XX(a)-(j). The AB first held in *U.S.—Shrimp* that the policy objective of a measure is to be examined under the subparagraphs of Article XX and cannot provide its rationale or justification under the chapeau.²⁰ Subsequently in *Brazil—Tyres*, the AB reversed its position, holding that the rationale for discrimination under the chapeau must bear a rational connection with, and must not go against, the objective falling under the subparagraphs of Article XX.²¹ In *EC—Seal Products*, the AB has modified its position in *Brazil—Tyres*, stating that the relationship of the discrimination to the policy objectives under Article XX(a)-(j) “is one of the most important factors, but not the sole test, that is relevant to the assessment of arbitrary or unjustifiable discrimination” under the chapeau.²² This statement opens the door for considering a broader scope of policy rationales under the chapeau, beyond the list of policy objectives specified by the subparagraphs of Article XX.

However, the AB did not follow through on its latest position. The need to protect the interests of indigenous peoples is not mentioned in the subparagraphs of Article XX.²³ Yet, instead of recognizing such need as an independently justifiable policy objective under the chapeau, the AB found that IC exception violated the chapeau because “the manner in which the EU Seal Regime treats IC hunts as opposed to ‘commercial’ hunts” cannot be reconciled with the policy objective of seal welfare, which was found to fall under the public morals exception of Article XX(a).²⁴ Having done so, the AB nonetheless cited two additional reasons for its finding: (1) the IC exception does not prevent seal products derived from commercialized IC hunts from entering the EU market; and (2) the European Union failed to make “comparable efforts” to facilitate the access of the

¹⁸ Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 28-29, WT/DS2/AB/R (Adopted May 20, 1996).

¹⁹ In an effort to reconcile with its previous holding, the AB explained that in *EC—Seal Products* “the causes” of the discrimination found to exist under GATT Article I are the same as those to be examined under the chapeau. Appellate Body Report, *EC—Seal Products*, *supra* note 1, at para. 5.318.

²⁰ Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, para. 149, WT/DS58/AB/R (Adopted Nov. 6, 1998).

²¹ Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, paras. 227-228, WT/332/AB/R (Adopted Dec. 17, 2007).

²² Appellate Body Report, *EC—Seal Products*, *supra* note 1, at para. 5.321.

²³ Arguably, IC welfare, like animal welfare, can be considered as a matter of public morals. The Panel in this case found, however, that based on evidence, the level of concern of the EU public over Inuit welfare did not amount to “public morals” under Article XX(a). Panel Report, *EC—Seal Products*, *supra* note 7, at para. 7.300.

²⁴ Appellate Body Report, *EC—Seal Products*, *supra* note 1, at paras. 5.320, 5.338.

Canadian Inuit to the EU market as it did with respect to the Greenlandic Inuit.²⁵ Note that these two reasons merely fault the way the IC exception is designed and implemented, and do not challenge its rationale. In citing these two reasons, therefore, the AB appears to have shifted grounds and simply assumed the legitimacy of the regulatory purpose of the IC exception. This assumption, however, contradicts the AB's first finding that the rationale of the IC exception cannot be reconciled with the objective of seal welfare.

The apparent incoherence in the AB's findings under the chapeau stems directly from its failure to declare that the IC exception has a justifiable purpose independent of the policy objective of seal welfare. Moreover, its decision not to recognize *explicitly* the legitimacy of the purpose of the IC exception may have led the AB to omit any reference to the UN Declaration and ILO Convention, which had been invoked by the European Union and cited by the Panel as evidence for the rationale of the IC exception. By ignoring these international legal instruments, as Shaffer and Pabian duly criticized, the AB read WTO provisions "in clinical isolation of public international law," departing from its earlier jurisprudence.²⁶

Interpreting the Chapeau of Article XX to Accommodate Diverse Nontrade Values: A Recommendation

As noted above, the AB decision in *EC—Seal Products* has made the chapeau of Article XX an indispensable part of the analysis of GATT nondiscrimination obligations. Consequently, chapeau interpretation becomes absolutely critical, not only in balancing trade and nontrade values, but also in determining whether multiple and diverse nontrade values can be accommodated under the GATT. Despite its importance, chapeau jurisprudence remains underdeveloped and confused. To improve, in my opinion, the AB needs to make changes in two major respects.

Establishing the principle that the justification for discrimination to be examined under the chapeau may or may not be based on the policy objectives contained in Article XX(a)-(j)

This principle will allow the types of policy exceptions under GATT to be expanded beyond the exhaustive list of Article XX(a)-(j), thereby providing more policy space for WTO members to pursue diverse nontrade values. Textually, there is no obstacle for taking this interpretive position. The type of discrimination prohibited by the chapeau is defined as "arbitrary or unjustifiable discrimination between countries where the same conditions prevail," which is a very broad and flexible concept. The chapeau does not limit the scope of the "conditions" to be compared for finding the existence of discrimination between countries (hence the discrimination may or may not cover a violation of MFN or NT); nor does it limit the scope of reasons that may be used to justify such discrimination. Thus, it is legally unnecessary for the AB to hold the policy objectives under Article XX(a)-(j) as "one of the most important factors" in assessing the justifiability of discrimination under the chapeau. Freeing itself from this self-imposed interpretive shackle would have allowed the AB to recognize *explicitly* the legitimacy of the purpose of IC exception, as well as creating greater coherence between the interpretation of GATT nondiscrimination provisions and the sensible interpretation of TBT Article 2.1 made by the Panel described above.

²⁵ *Id.* at para. 5.338.

²⁶ Gregory Shaffer & David Pabian, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, 109 AJIL 154 (2015) (quoting Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, *supra* note 18).

Choosing the right policy objective for comparing the “conditions” prevailing in different countries

The type of discrimination under the chapeau is established by comparing the conditions prevailing in the countries in question. If the conditions are the same while treatment of the countries is different, discrimination can be established although it may or may not be found to be arbitrary or unjustifiable. Conversely, if the conditions are not the same, the different treatment of the countries in question may not constitute any discrimination, let alone one that is arbitrary or unjustifiable in character. Hence, identifying relevant conditions for comparison is critical for the nondiscrimination analysis under the chapeau.

Curiously, the AB in the past had rarely focused on the element of “the same conditions” in its chapeau analysis. This state of affairs began to change in *EC—Seal Products*. For the first time, the AB attempted to define the term “conditions,” noting that the term has a number of meanings. It correctly observed that “only ‘conditions’ that are relevant for the purpose of establishing arbitrary or unjustifiable discrimination” in a particular case should be considered under the chapeau.²⁷ In determining which “conditions” prevailing in different countries are relevant, the AB stated that “‘conditions’ relating to the particular policy objective under the applicable subparagraph [of Article XX] are relevant for the analysis under the chapeau.”²⁸ Accordingly, the AB decided that the relevance of the conditions to be compared between Greenland and other countries, which received different treatment under the EU regulation, is to be determined by reference to the public concerns for seal welfare. Since the same seal welfare conditions prevail in all countries where seals are hunted, and since the same animal welfare concerns arising from seal hunting in general also exist in IC hunts, the AB found that the conditions prevailing in these countries are “the same” for the purpose of the chapeau.²⁹

In identifying the relevant conditions, however, the AB completely ignored the policy objective of the IC exception, which draws the distinction between commercial and IC hunts, thus causing disparate impact on the countries in question. When examined against the policy objective of the IC exception—protecting the traditional lifestyle of Inuit through seal hunting—the relevant conditions in the countries concerned are vastly different. While the Inuit constitute most of the Greenlandic population and the Greenlandic government has actively promoted the products of IC hunts, the Inuit population is very small in Canada and the Canadian government has not made similar efforts to promote the exports of the Canadian Inuit. Thus, to the extent the disparate impact of the IC exception is attributable to such different conditions prevailing in these countries, it cannot constitute the type of discrimination prohibited by the chapeau.

Conceptually, whether two things are deemed “same” depends on the criteria for comparison. In choosing seal welfare as the sole criterion for comparing the conditions between countries, the AB made a normative decision that pre-determined the outcome of the discrimination analysis under the chapeau. However, the failure to identify relevant conditions by the policy objective of the IC exception was a mistake because it was the IC exception, not the seal ban, that caused the alleged discrimination.³⁰ This mistake might have been avoided if the AB had explicitly recognized the legitimacy of the policy objective of the IC exception in its chapeau analysis.

²⁷ Appellate Body Report, *EC—Seal Products*, *supra* note 1, at para. 5.299.

²⁸ *Id.* at para. 5.300.

²⁹ *Id.* at para. 5.317.

³⁰ For a study on relevant criteria for identifying different types of discrimination under WTO law, see Julia Y. Qin, *Defining Non-Discrimination Under the Law of the World Trade Organization*, 23 B.U. INT'L L.J. 215 (2005).

Should the WTO be making a judgment on the balance between nontrade values?

To implement the WTO ruling, the EU has proposed an amendment to its seal regulation,³¹ which will tighten the conditions for the IC exception to prevent commercialized IC hunts. The amended regulation, therefore, will enhance the welfare of seals at the expense of the economic welfare of the Inuit. In this regard, it should be noted that the EU public has never expressed a moral objection to the IC hunts as previously practiced. Thus, it is the WTO ruling that has compelled the EU to rebalance the two nontrade interests in its public policy, so as to achieve a “nondiscriminatory” application of EU’s public moral standard.

But should the WTO be involved in judging the proper balance between two nontrade values, here animal welfare and the welfare of indigenous peoples, under the laws of its Members? Thus far, no one seems to have posted this highly relevant question. In the view of this author, the AB should have refrained from making such a judgment as a matter of policy. And the AB could have done so by making a legally sound finding that the EU Seal Regime is not discriminatory within the meaning of GATT Article XX chapeau, because the prevailing conditions relevant to the policy objective of the IC exception are not the same between Greenland and Canada.

³¹ European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) 1007/2009 on trade in seal products, COM(2015) 45 final (Feb. 6, 2015).