

**C. Pitschas/H. Schloemann**

WTO Compatibility of the EU  
Seal Regime:  
Why Public Morality is  
Enough (but May not Be  
Necessary)

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**WTO Compatibility of the EU Seal Regime:  
Why Public Morality is Enough (but May not Be  
Necessary)**

The WTO Dispute Settlement Case  
“European Communities – Measures Prohibiting the  
Importation and Marketing of Seal Products”

by

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## A. Introduction<sup>1</sup>

Can WTO law trump profound moral outrage over the suffering caused in the slaughter of seals? Does international trade law provide that trade in seal fur and other seal products has to remain undisturbed even though citizens, parliamentarians and governments in the EU are morally repulsed by the idea and believe that the EU should not take part in such trade? The answer is, indeed, no.

This is because the EU Seal Regime – attacked in the WTO by Canada and Norway – may not even violate any WTO provisions in the first place, as it is in principle designed as an all-encompassing, non-discriminatory ban on sales, not as a trade measure that targets imports and hence other countries. But even if it were to violate any such provisions, it would be justified under the general exceptions provision of the GATT as a measure to protect “public morals”.

Through WTO law the Members of the World Trade Organization aim to mutually discipline their use of trade-distorting trade policy tools – not less, but also not more. WTO law aims to take full account of other public policy objectives, and is designed to step back if and when such other objectives take centre stage. It does, however, aim to prevent the *abuse* of such policies where they operate as “smoke screens” for ulterior trade policy motives. There is, for example, no obligation to allow the importation of unsafe food. But if a country adopts measures to prevent unsafe imports by subjecting them to safety standards, inspections etc., WTO law requires that this be done on the basis of scientific evidence and principles and in a non-discriminatory way, so as to ensure that the measure is not arbitrary and does not just selectively target imports, but the actual problem – food safety.

The same basic principle applies to the protection of public morals: WTO law expressly permits governments to take any measures that are necessary to protect their countries’ public morals, provided they do so in a non-arbitrary, non-discriminatory – in other words: non-abusive – way. That is the principle. But the devil, as always, is in the (legal) detail, and interfaces between trade and other concerns may not always be as clear-cut. This paper takes a systematic look at these details as they emerge in the *EU-Seals* case and analyses them in light of applicable WTO rules and case law.

## B. The EU Seal Regime and the Dispute at the WTO

When the EU, after years of internal analysis and deliberation, in 2009/10 finally established a new legal regime for seal products, with a complete ban on sales (except for three narrow exceptions) as its centrepiece, Canada and Norway moved swiftly to challenge the EU Seal Regime under the WTO dispute settlement system.<sup>2</sup> Pursuant

<sup>1</sup> This article summarizes in abridged form the main findings of a more comprehensive background brief which the authors prepared for the International Fund for Animal Welfare (IFAW). We are very grateful to Fabrizio *Meliadò* for his support in the preparation of the background brief.

<sup>2</sup> WTO, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WTO/DS400 and 401. Canada and Norway in fact in late 2010 revived their earlier requests

to their requests, the WTO Dispute Settlement Body (DSB) in early 2011 established a single panel to examine their complaints.<sup>3</sup> Canada and Norway essentially claim that the EU Seal Regime is inconsistent with the Agreement on Technical Barriers to Trade (TBT Agreement) and the General Agreement on Tariffs and Trade 1994 (GATT 1994).<sup>4</sup>

The EU Seal Regime consists of two regulations: a Basic Regulation<sup>5</sup> and an Implementing Regulation.<sup>6</sup> The EU Seal Regime pursues the objective of reducing commercial seal hunting practices by prohibiting the placing on the Union market of any product derived or obtained from seals (seal products).<sup>7</sup> Said objective is explicitly motivated by animal welfare considerations related to the pain, distress, fear and other forms of suffering caused by the killing and skinning of seals.<sup>8</sup> The placing on the EU market of seal products is allowed only in three exceptional situations, each of which is subject to specific conditions: (i) the Inuit exception; (ii) the MRM exception; and (iii) the travellers' exception.

The Inuit exception requires that: (i) the hunters are either "Inuit" or "other indigenous communities"; (ii) the hunts form part of a tradition of seal hunting in the community and the geographical region; (iii) the products of the hunts are at least partly used, consumed or processed within the communities according to their traditions; and (iv) the hunts contribute to the subsistence of the community concerned.<sup>9</sup>

The MRM<sup>10</sup> exception necessitates that: (i) the hunts are conducted under a national or regional natural resources management plan which uses scientific population models of marine resources and applies the ecosystem-based approach; (ii) the hunts do not exceed the total allowable catch quota set by the aforementioned plan; and (iii) the by-products of the hunts are placed on the Union market only in a non-systematic way and on a non-profit basis.<sup>11</sup>

The travellers' exception demands that the seal products concerned are: (i) either worn by the travellers, or carried or contained in their personal luggage; or (ii) contained in the personal property of a natural person transferring his normal place of residence from a third country to the Union; or (iii) acquired on site in a third coun-

for consultations dating from 2009, which they had submitted in response to measures taken by some EU Member States. The consultations resulted in the Request for the Establishment of a Panel by Canada of 14 February 2011, WT/DS400/4 and the Request for the Establishment of a Panel by Norway of 15 March 2011, WT/DS401/5.

<sup>3</sup> WTO, decision of the DSB of 21 April 2011, available in the internet: <[http://www.wto.org/english/news\\_e/news11\\_e/dsb\\_21apr11\\_e.htm](http://www.wto.org/english/news_e/news11_e/dsb_21apr11_e.htm)> (visited on 15 May 2012).

<sup>4</sup> Norway also claims a violation of the Agreement on Agriculture but this claim appears to be of secondary importance only.

<sup>5</sup> Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, OJ of the EC, No L 286/36 of 31 October 2009.

<sup>6</sup> Commission Regulation 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, OJ of the EC, No L 216/1 of 17 August 2010.

<sup>7</sup> See Article 3 of the Basic Regulation.

<sup>8</sup> See fourth consideration of the Basic Regulation.

<sup>9</sup> See Article 3(1) of the Basic Regulation and Article 3 of the Implementing Regulation.

<sup>10</sup> "MRM" stands for "marine resources management."

<sup>11</sup> Article 3(2)(b) of the Basic Regulation and Article 5 of the Implementing Regulation.

try by travellers and imported by those travellers at a later date, provided they present to customs a written notification of import and a document giving evidence that the products were acquired in the third country concerned.<sup>12</sup>

The Canadian and Norwegian complaints focus on the prohibition of placing seal products on the Union market, as conditioned primarily by the Inuit and MRM exceptions. Under the EU Seal Regime, the determination of whether the relevant requirements of the Inuit or MRM exception are met is to be undertaken on the basis of “attesting documents” issued by “recognized bodies” which are included in a list drawn up by the European Commission.<sup>13</sup> The Commission will put an entity on said list if it meets a number of requirements pertaining to its capability to issue attesting documents, and submits a request to the Commission together with documentary evidence that it fulfils said requirements.<sup>14</sup> Seal products accompanied by an attesting document are deemed to be in compliance with the requirements of either the Inuit or the MRM exception.<sup>15</sup>

Moreover, Member States have to designate competent authorities who are responsible for, amongst others, verifying attesting documents upon request of the customs authorities as well as the “control of the issuing of attesting documents by recognized bodies established and active in that Member State”.<sup>16</sup>

The EU Seal Regime is likely to lead to trade-diverting effects:<sup>17</sup> it is estimated that trade in seal products with Canada and Norway will fall significantly since only a very small portion of Canadian and Norwegian seal hunts would be eligible for the Inuit or MRM exception.<sup>18</sup> In contrast, Greenland is likely not seriously affected by the ban given that 90 per cent of the population in Greenland is Inuit.<sup>19</sup>

### C. The EU Seal Regime and WTO Law: Analysis

In essence, Canada and Norway allege that the EU Seal Regime contravenes both the TBT-Agreement and the GATT 1994. As regards the relationship between the TBT Agreement and the GATT 1994, current case law suggests that the TBT Agreement is more specific than the GATT 1994.<sup>20</sup> Accordingly, we address the claims in relation to the TBT Agreement (*infra* I.) before turning to the claims in connection with the GATT 1994 (*infra* II.).

<sup>12</sup> Article 3(2)(a) of the Basic Regulation and Article 4 of the Implementing Regulation.

<sup>13</sup> Articles 6 and 7 of the Implementing Regulation.

<sup>14</sup> Article 7(1) and (2) of the Implementing Regulation.

<sup>15</sup> Article 7(5) of the Implementing Regulation.

<sup>16</sup> Article 9(1) of the Implementing Regulation.

<sup>17</sup> COWI, Study on implementing measures for trade in seal products (2010), 62 *et seq.*

<sup>18</sup> *Ibid.*, 64-66 (Canada), 69-70 (Norway).

<sup>19</sup> *Ibid.*, 28-29.

<sup>20</sup> WTO, *EC – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body of 12 March 2001, WT/DS135/AB/R, para. 80; WTO, *EC – Trade Description of Sardines*, Report of the Panel of 29 May 2002, WT/DS231/R, para. 7.16.

## I. TBT Agreement

The EU Seal Regime, of course, could only breach the TBT Agreement if the latter applied to the EU Seal Regime in the first place. For that to be the case, the EU Seal Regime would have to be either a technical regulation or a standard in the sense of the TBT Agreement. These terms are defined in Annex 1 to the TBT Agreement in a very similar way. The main difference between the two terms is their *legal* character: compliance with technical regulations is *mandatory* whereas compliance with standards is *voluntary*.<sup>21</sup> Canada and Norway appear to claim that the EU Seal Regime is a technical regulation (with a conformity assessment system) and as such violates multiple TBT provisions on technical regulations and related conformity assessment procedures.

Based on the definition of technical regulation in Annex 1, the Appellate Body has identified three criteria for determining whether a measure qualifies as a technical regulation:<sup>22</sup> (i) the measure in question must apply to an *identifiable* product or group of products; (ii) the measure in question must lay down one or more *characteristics* of the product; and (iii) compliance with the product characteristics must be *mandatory*. The EU Seal Regime has to be examined in light of these criteria in order to ascertain whether it is a technical regulation within the meaning of the TBT Agreement.

### 1. *Identifiable Product and Mandatory Compliance*

The EU Seal Regime applies to an identifiable group of products, namely seal products as defined in Article 2(1) of the basic regulation. Further, compliance with the EU Seal Regime is mandatory because EU regulations, such as those establishing the EU Seal Regime, are binding in their entirety and directly applicable in all EU Member States.<sup>23</sup>

<sup>21</sup> For purposes of the TBT Agreement, paragraph 1 of Annex 1 defines “technical regulation” as follows: “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 labeling requirements as they apply to a product, process or production method.” For purposes of the TBT Agreement, paragraph 2 of Annex 1 defines “standard” as follows: “Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.”

<sup>22</sup> WTO, *EC – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body of 12 March 2001, WT/DS135/AB/R, paras. 67-70; WTO, *EC – Trade Description of Sardines*, Report of the Appellate Body of 26 September 2002, WT/DS231/AB/R, para. 176. In three recent TBT cases, each panel referred to these two Appellate Body reports and assessed whether the US measures at stake were technical regulations on the basis of the three criteria set out by the Appellate Body; WTO, *US – Measures Affecting the Production and Sale of Clove Cigarettes*, Report of the Panel of 2 September 2011, WT/DS406/R, paras. 7.24-7.25; WTO, *US – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Report of the Panel of 15 September 2011, WT/DS381/R, paras. 7.53-7.54; WTO, *US – Certain Country of Origin Labeling (COOL)*, Report of the Panel of 18 November 2011, WT/DS384/R, WT/DS386/R, paras. 7.147-7.148.

<sup>23</sup> Article 288 TFEU.

## 2. Product Characteristics

The key question in the present context is whether the EU Seal Regime “lays down one or more characteristics” (or properties) of seal products. The Appellate Body has stated that a document may lay down product characteristics in one of two ways:<sup>24</sup> the document in question may prescribe characteristics *intrinsic* to the product in question, or the document may impose characteristics *related to* the product, including processes and production methods related to the product.

The prohibition of placing seal products on the Union market, in and of itself, does not prescribe any characteristics intrinsic or related to seal products. The regime, thus, could only qualify as a technical regulation if the exceptions, which are an integral part of the regime and as such closely linked to the general prohibition, led to the fulfillment of these criteria. The focus here is on the Inuit and MRM exceptions.

### a) Inuit Exception: *Who, not How*

The Inuit exception refers to seal products that “result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence”.<sup>25</sup> Consequently, this exception does not relate to *how* seal products are obtained, *e.g.* by prescribing certain means and methods of hunting seals. Rather, it relates to *who* hunts seals, regardless of how the hunting is performed. Essentially, the Inuit exception provides a “carve out” for one particular group of hunters: Inuit (and other indigenous communities). It follows, first, that the Inuit exception does not prescribe any characteristics intrinsic to seal products since it does not deal, in any way, with the properties of seal products as such.

The Inuit exception, however, could still qualify as a technical regulation for purposes of the TBT Agreement if it prescribed characteristics “related”<sup>26</sup> to seal products, including processes and production methods related to seal products. This seems clearly not the case, however: the exemption of (seal products hunted by) a particular group of hunters from the prohibition of placing seal products on the Union market – without stipulating the manner in which these hunters have to perform the seal hunt – does not in any way prescribe a process or production method related to (the characteristics or properties of) seal products. The exemption, again, relies on *who* hunts, but not on *how* it is done.

Even if the EU Seal Regime were to be read to make a reference to certain means and methods of hunting seals, however, it is far from clear whether that would satisfy the requirements of the definition of a technical regulation under the TBT Agreement. While it is true that laying down certain hunting methods for seals would relate to “production methods” of seal products, it would likely not *affect* the characteristics (or properties) of these products, that is, it would not have any physical “impact” on

<sup>24</sup> WTO, *EC – Trade Description of Sardines*, Report of the Appellate Body of 26 September 2002, WT/DS231/ABR, para. 176.

<sup>25</sup> Article 3(1) of the Basic Regulation.

<sup>26</sup> Annex 1 of the TBT Agreement speaks of “product characteristics or their *related* processes and production methods” (see *supra* note 21 for the full texts).

the characteristics (or properties of) seal products. Admittedly, there is considerable debate as to whether the definition of a technical regulation under the TBT Agreement requires process and production methods to affect the characteristics (or properties) of a product in order to be covered by TBT disciplines.<sup>27</sup> Yet this issue does not need to be addressed here since the EU Seal Regime simply does not lay down any particular hunting methods.

*b) MRM Exception: Why, not How*

The situation is somewhat similar for the MRM exception. The exception relates to those seal products which „result from by-products of hunting that is regulated by national law and conducted for the sole purpose of the sustainable management of marine resources“.<sup>28</sup> The MRM exception thus does not refer to any means or methods of hunting seals. Rather, this exception is concerned only with the *reason* for hunting seals, irrespective of how that hunting is performed.

Therefore, the conclusions regarding the Inuit exception also apply to the MRM exception: the latter neither prescribes any characteristics intrinsic to seal products nor any process or production method related to (the characteristics or properties of) seal products since this exception has no bearing on the manner in which the seal hunt is carried out. Instead, this exception only asks for the *rationale* of conducting the hunt but this rationale is not in any way connected to the (characteristics or properties of) seal products resulting from the hunt (and also does not physically affect these products or their characteristics or properties).

*c) Interim Conclusion*

In light of the foregoing considerations, we consider that the TBT Agreement does not apply to the EU Seal Regime because the measure – through the Inuit and MRM exceptions – neither defines characteristics of, nor prescribes processes or production methods related to, the seal products that can be exceptionally sold in the EU.

## II. GATT 1994

With respect to the GATT 1994, Canada and Norway contend that the EU Seal Regime infringes Articles I:1, III:4, and XI:1.<sup>29</sup>

<sup>27</sup> For an overview see *van den Bossche*, *The Law and Policy of the World Trade Organization*, 808.

<sup>28</sup> Article 3(2)(b) of the Basic Regulation.

<sup>29</sup> In this section, provisions without reference to a multilateral trade agreement are those of the GATT 1994.

## 1. *Most-Favoured-Nation Treatment Obligation*

Article I:1 requires WTO Members to abide by the principle of most-favoured-nation treatment (MFN-principle)<sup>30</sup> which is a “cornerstone” of the GATT 1994.<sup>31</sup> For Article I:1 to be applicable in the present context, the EU Seal Regime must be a rule or formality in connection with importation and exportation. This is the case because the prohibition of placing seal products on the Union market, as conditioned by the Inuit and MRM exceptions, “shall apply at the time or point of import for imported products”.<sup>32</sup>

Next, the EU Seal Regime must grant an advantage, favour, privilege or immunity to a product originating in or destined for any other country. At the outset, it should be noted that Article I:1 refers to “any advantage”; this notion has a broad meaning.<sup>33</sup> An obvious case of an advantage is the exemption from an otherwise burdensome rule. For instance, an “import duty exemption” accorded to motor vehicles was considered to be an advantage within the meaning of the MFN-principle.<sup>34</sup> The EU Seal Regime grants an advantage to seal products that meet the requirements of the Inuit or MRM exceptions since such products are *exempted* from the prohibition of placing seal products on the Union market. It appears that (almost) all seal products originating in Greenland satisfy the requirements of the Inuit exception as these products result from hunts traditionally conducted by Inuit.<sup>35</sup> Accordingly, Canada and Norway might argue that the EU Seal Regime is granting an advantage to seal products originating in Greenland.<sup>36</sup>

<sup>30</sup> Article III:4 reads in relevant parts as follows: “... with respect to all rules and formalities in connection with importation and exportation, ... any advantage, favour, privilege or immunity granted by any contracting party 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 contracting parties”.

<sup>31</sup> WTO, *Canada – Certain Measures Affecting the Automotive Industry*, Report of the Appellate Body of 31 May 2000, WT/DS139/AB/R, WT/DS142/AB/R, para. 69.

<sup>32</sup> Article 3(1) of the Basic Regulation.

<sup>33</sup> WTO, *EC – Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body of 9 September 1997, WT/DS27/AB/R, para. 206.

<sup>34</sup> WTO, *Canada – Certain Measures Affecting the Automotive Industry*, Report of the Appellate Body of 31 May 2000, WT/DS139/AB/R, WT/DS142/AB/R, paras. 76, 80-81.

<sup>35</sup> See *COWI*, Study on implementing measures for trade in seal products (2010), 28.

<sup>36</sup> Greenland qualifies as a “country” within the meaning of Article I:1. The notion of “country” (“pays” in the French and “país” in the Spanish version) is not restricted to states but also covers customs territories that possess full autonomy in the conduct of their external commercial relations and the other matters provided for in the multilateral trade agreements. This reading derives contextual support from Article XXVI:5(c) as well as Article XII.1 WTO-Agreement which both refer to (separate) customs territories (in addition, Article XII.1 WTO-Agreement distinguishes between “state” [“état” in the French and “estado” in the Spanish version] and “separate customs territory”, thereby further corroborating the understanding that the term “country” has a broader scope than the term “state”). As Denmark only retains the competence for external affairs and security pursuant to the agreement on autonomy of Greenland, Greenland is a separate customs territory in the aforementioned sense. Therefore, the fact that Greenland is still formally part of the state of Denmark does not exclude the applicability of Article I:1 to (seal products originating in) Greenland.

The advantage granted to seal products originating in Greenland triggers the query whether the same advantage has been accorded “immediately and unconditionally” to like products originating in all other contracting parties. Two issues have to be clarified in this regard: first, the *likeness* of seal products originating in Canada and Norway, on the one hand, and seal products originating in Greenland, on the other; second – provided the seal products in question are alike – the question whether seal products originating in Canada and Norway are accorded immediately and unconditionally the same advantage than that granted to seal products originating in Greenland.

a) *Like Products*

The interpretation and assessment of what constitutes “like products” has been at the heart of numerous GATT/WTO dispute settlement reports. In the context of Article III:4, the term “like products” has been interpreted as referring to products that are in a “competitive relationship”.<sup>37</sup> In order to ascertain the nature and extent of such a competitive relationship, WTO adjudicating bodies rely in particular on four general criteria:<sup>38</sup> (i) properties, nature and quality of the products; (ii) end uses of the products; (iii) consumers’ tastes and habits in respect of the products; and (iv) tariff classification of the products. Although the Appellate Body cautioned that “the accord of ‘likeness’ stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied”,<sup>39</sup> there are good reasons to assume that the aforementioned criteria may be relied upon to elucidate the concept of “like products” under the MFN-principle when applied in the context of this dispute.

The critical issue here is whether seal products originating in Canada and Norway are in a *competitive relationship* with seal products originating in Greenland. Based on the abovementioned four criteria, there appears to be no, or little, appreciable difference between the two groups of seal products, if looked at as groups of national products: the physical properties, the end uses, the consumers’ perceptions and behaviour as well as the tariff classification of seal products do not seem to depend on whether these products originate in Canada, Norway or Greenland. Consequently, there seems to be a *competitive relationship* between seal products originating in Canada and Norway, on the one hand, and seal products originating in Greenland, on the other. Hence, seal products originating in Canada, Norway and Greenland are arguably *like* products. That being said, a closer look by industry experts may in fact reveal differ-

<sup>37</sup> WTO, *EC – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body of 12 March 2001, WT/DS135/AB/R, paras. 99, 103; WTO, *Philippines – Taxes on Distilled Spirits*, Report of the Appellate Body of 21 December 2011, WT/DS396/AB/R, WT/DS403/AB/R, para. 119.

<sup>38</sup> WTO, *EC – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body of 12 March 2001, WT/DS135/AB/R, para. 101; see also WTO, *Japan – Taxes on Alcoholic Beverages*, Report of the Appellate Body of 4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 20; WTO, *Philippines – Taxes on Distilled Spirits*, Report of the Appellate Body of 21 December 2011, WT/DS396/AB/R, WT/DS403/AB/R, para. 131.

<sup>39</sup> WTO, *Japan – Taxes on Alcoholic Beverages*, Report of the Appellate Body of 4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, para. 21.

ences which may or may not be of relevance for this analysis. This is because seal skins from Greenland tend to be of older seals than those originating in Canada.

It would seem possible, however, to argue that the specific products to be compared here in this case are, in fact, not like products in view of the very rationale of the Inuit exception. In the EU consumers' perception ("consumer tastes and habits"), products from seals hunted by Inuit or other indigenous people as part of their traditional subsistence practices would seem to be very different from products derived from seals hunted by a commercial sealing industry: the former are arguably the result of a practice whose inherent legitimacy (traditional subsistence of indigenous people) overrides the concerns over the killing methods for purely commercial motives.<sup>40</sup>

#### *b) Discriminatory Treatment*

Assuming *arguendo* that the Panel and/or the Appellate Body find that the seal products to be compared here are "like" for purposes of the MFN-principle, it remains to be assessed whether the EU Seal Regime accords immediately and unconditionally the same advantage to seal products originating in Canada and Norway than that accorded to seal products originating in Greenland. It should be emphasized that the MFN-principle prohibits *discrimination* among like products, irrespective of whether this discrimination appears on the face of the measure at issue (discrimination in law) or is an implicit, but typical, consequence of the measure in question (discrimination in fact).<sup>41</sup>

On its face, the Inuit exception is *origin-neutral*: it is available to all seal products, irrespective of their origin. This raises the question whether the advantage under the Inuit exception hinges *implicitly* on the origin of the seal products. Although formulated in an origin-neutral manner, it could be argued by Canada and Norway that the exception implicitly favours seal products originating in Greenland. This is because (almost) all seal products originating in Greenland benefit from the Inuit exception<sup>42</sup> whereas the overwhelming majority of seal products originating in Canada and Norway do not since only a very small percentage of the latter products are hunted traditionally by Inuit (and other indigenous communities).<sup>43</sup> If one follows this line of argument, the EU Seal Regime does not accord immediately and unconditionally the same advantage to seal products originating in Canada and Norway than that accorded to seal products originating in Greenland.

However, an argument could be made that there is in fact no relevant discrimination.<sup>44</sup> Some recent WTO case law can be read to suggest that a discrimination, in-

<sup>40</sup> This argument is put forward by *House/Langille*, *Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Permit Trade Restrictions Justified by Non-Instrumental Moral Values*, 38-45.

<sup>41</sup> WTO, *Canada – Certain Measures Affecting the Automotive Industry*, Report of the Appellate Body of 31 May 2000, WT/DS139/AB/R, WT/DS142/AB/R, paras. 78, 84.

<sup>42</sup> See *COWI*, *Study on implementing measures for trade in seal products* (2010), 28.

<sup>43</sup> *Ibid.*, 64 (Canada), 69 (Norway).

<sup>44</sup> *House/Langille*, *Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Permit Trade Restrictions Justified by Non-Instrumental Moral Values*, 44-45.

cluding a *de facto* discrimination, must in one way or another be *based on the country of origin* of the goods.<sup>45</sup> In the present case, it may thus be argued that the Inuit exception relies on a legitimate, inherently origin-neutral concern for the protection of indigenous lifestyles, in line with international law protecting indigenous populations. The result of the exception is unrelated to the origin of the products, and hence does not amount to a relevant discrimination.

### c) *Interim Conclusion*

Against this backdrop, it would be quite possible to argue that the EU Seal Regime does not violate Article I because the Inuit exception does not constitute a discrimination related to the national origin of the products. However, the Panel and/or the Appellate Body may favour a stricter approach (given that Article XX provides sufficient room to take account of the public policy objective underlying the EU Seal Regime) and reach the conclusion that the EU Seal Regime is incompatible with the MFN-principle.

## 2. *National Treatment Obligation*

Article III:4 embodies one type of the national treatment principle (NT-principle). Three elements must be demonstrated in order to establish inconsistency with this proviso:<sup>46</sup> (i) the measure at issue constitutes a law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of the products at issue; (ii) the imported and domestic products are “like products”; and (iii) the treatment accorded to imported products is “less favourable” than that accorded to like domestic products.

The Basic and Implementing Regulations establishing the EU Seal Regime are binding on, and directly applicable in, all Member States.<sup>47</sup> Accordingly, these regulations qualify either as a law or a regulation within the meaning of Article III:4.<sup>48</sup> Further, it has to be assessed whether the EU Seal Regime affects the internal sale, offering for sale or purchase of seal products on the Union market. Bearing in mind that the notion “affecting” in Article III:4 has a “broad scope of application”,<sup>49</sup> it seems clear that the EU Seal Regime “affects the internal sale, offering for sale and purchase”

<sup>45</sup> See WTO, *Canada – Certain Measures Affecting the Automotive Industry*, Report of the Panel of 11 February 2000, WT/DS139/R and WT/DS142/R, paras. 10.14-10.50, in particular para. 10.29: “[w]hether conditions attached to an advantage granted in connection with the importation of a product offend Article I:1 depends upon whether or not such conditions discriminate with respect to the origin of products.”; WTO, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, Report of the Panel of 27 April 2009, WT/DS366/R, for example para. 7.366.

<sup>46</sup> WTO, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, Report of the Appellate Body of 17 June 2011, WT/DS371/AB/R, para. 127.

<sup>47</sup> See Article 288 TFEU.

<sup>48</sup> For purposes of the present case, there is no need to determine definitively whether a EU Regulation is a “law” or a “regulation” in terms of Article III:4.

<sup>49</sup> WTO, *USA – Tax Treatment for “Foreign Sales Corporations” (Article 21.5 – EC)*, Report of the Appellate Body of 14 January 2002, WT/108/AB/R/W, paras. 208-210.

of seal products on the Union market. This effect is a direct result of the *prohibition* to place seal products on the Union market: except where one of the three abovementioned exceptions is applicable, seal products may not be introduced onto the Union market, i.e. they must not be made available to third parties, in exchange for payment.<sup>50</sup>

Seal products imported from Canada and Norway are in a competitive relationship with seal products originating in the EU.<sup>51</sup> Thus, the former and the latter are (in all likelihood) *like* products for purposes of the NT-principle. Given the likeness of imported and domestic seal products, it has to be examined whether the EU Seal Regime accords to the former “less favourable treatment” than that accorded to the latter.

A determination of “less favourable treatment” of imported products as compared to like domestic products in the framework of Article III:4 rests on two propositions:<sup>52</sup> first, the imported and like domestic products are treated differently; secondly, the difference in treatment leads to a distortion of competition to the detriment of imported products.<sup>53</sup> The Appellate Body recently highlighted these propositions as follows:

„... the mere fact that a Member draws regulatory distinctions between imported and like domestic products is, in itself, not determinative of whether imported products are treated less favourably within the meaning of Article III:4. Rather, what is relevant is whether such regulatory differences distort the conditions of competition to the detriment of imported products. If so, the differential treatment will amount to treatment that is ‘less favourable’ within the meaning of Article III:4.”<sup>54</sup>

#### a) *Differential Treatment*

As a first step in the “less favourable treatment” analysis, it has to be ascertained whether seal products imported from Canada and Norway are treated differently than like seal products originating in the EU.

<sup>50</sup> Article 3(1) in conjunction with Article 2(3) of the Basic Regulation.

<sup>51</sup> See *supra* 1. a) for the criteria determining the likeness of products.

<sup>52</sup> WTO, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body of 11 December 2000, WT/DS161/AB/R, WT/DS169/AB/R, para. 135; WTO, *EC – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body of 12 March 2001, WT/DS135/AB/R, para. 100; WTO, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, Report of the Appellate Body of 17 June 2011, para. 128.

<sup>53</sup> WTO, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body of 11 December 2000, WT/DS161/AB/R, WT/DS169/AB/R, para. 137; WTO, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, Report of the Appellate Body of 25 April 2005, WT/DS302/AB/R, para. 93; WTO, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, Report of the Appellate Body of 17 June 2011, WT/DS371/AB/R, para. 128; see also WTO, *China – Measures Affecting Imports of Automobile Parts*, Report of the Appellate Body of 15 December 2008, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, para. 195.

<sup>54</sup> WTO, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, Report of the Appellate Body of 17 June 2011, WT/DS371/AB/R, para. 128 (footnotes omitted).

The prohibition of placing seal products on the Union market applies to both imported and like domestic seal products, without any distinction in law. Thus, *on its face*, the EU Seal Regime does not draw a regulatory distinction between seal products imported from Canada and Norway and like seal products originating in the EU.

This invites the question whether the EU Seal Regime differentiates *in fact* between seal products imported from Canada and Norway, on the one hand, and like seal products originating in the EU, on the other. Arguably, this is the case: the EU Seal Regime prevents the overwhelming majority of seal products originating in Canada and Norway from being placed on the EU market since only a tiny fraction of these seal products could potentially benefit from the Inuit exception; and the MRM exception is clearly not available for the overwhelming majority of seal products of Canadian and Norwegian origin as seals are almost exclusively hunted for *commercial* purposes in these countries. In contrast, it seems that all seal products originating in Finland and Sweden qualify for the MRM exception.<sup>55</sup>

#### *b) Distortion of the Conditions of Competition*

As a second step in the analysis of the “less favourable treatment” standard, it must be determined whether the aforementioned differential treatment modifies the *conditions of competition* to the detriment of the seal products imported from Canada or Norway, thereby giving like domestic (EU) seal products a competitive advantage.<sup>56</sup>

The EU Seal Regime would seem to modify the conditions of competition to the detriment of Canadian and Norwegian seal products since most of these products cannot be placed on the Union market any more, contrary to (most of the) seal products of EU origin which benefit from the MRM exception. However, it must be noted that the MRM exception only allows for *non-commercial* sales of seal products resulting as byproducts from non-commercial marine resource management measures. Therefore, one may very well argue that there is no relevant commercial *competition* in the first place which would have to be protected by Article III:4. All commercial sales are equally prohibited, and no EU player derives any commercial benefits from the operation of the exception. Hence, no (economically relevant) discrimination takes place.

#### *c) Interim Conclusion*

Accordingly, we conclude that the EU Seal Regime does not infringe Article III:4.

<sup>55</sup> Although seal products originating in the UK currently do not qualify for the MRM exception that situation could apparently be changed rather easily, see *COWI*, Study on implementing measures for trade in seal products (2010), 71.

<sup>56</sup> The Appellate Body clarified in its latest report that any detrimental effect on the conditions of competition for imported products does not have to be related to the foreign origin of these products, WTO, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, Report of the Appellate Body of 04 April 2012, WT/DS406/AB/R, para. 179 and footnote 372.

### 3. Prohibition of Quantitative Restrictions

Canada and Norway also allege that the EU Seal Regime violates Article XI:1. This allegation runs counter to the traditional view that a measure cannot fall simultaneously under both Articles III and XI.<sup>57</sup> In particular, the Note *Ad Article III* appears to exclude a simultaneous application of Articles III and XI to one and the same measure.<sup>58</sup> According to that Ad Note, two conditions must be met for a measure to fall under Article III: (i) the measure must apply to an imported and the like domestic product; and (ii) the measure is enforced in the case of the imported product at the time or point of importation. The EU Seal Regime meets both conditions: first, the EU Seal Regime applies to both imported *and* like domestic seal products; second, the prohibition to place seal products on the EU internal market applies, for imported products, at the time or point of import.<sup>59</sup> Our consideration that Article III is *not* violated does not affect this conclusion. The EU sales ban clearly applies to all seal products, not just imported ones, and hence is to be examined under Article III.

Notwithstanding the foregoing, it should be noted that in the case *India – Autos*, the Panel took the view that

“it therefore cannot be excluded a priori that different aspects of a measure may affect the competitive opportunities of imports in different ways, making them fall within the scope either of Article III (where competitive opportunities on the domestic market are affected) or of Article XI (where the opportunities for importation itself, i.e. entering the market, are affected) ...”.<sup>60</sup>

Yet the Panel did not suggest that one and the same measure be subject to scrutiny under both Articles III and XI. Rather, the Panel only suggested that “different aspects of a measure” may be scrutinized under either Article III *or* Article XI.<sup>61</sup> In the present case, there is no room for such a split application of the two provisions: the measure at issue is an integrated whole that cannot be dissected into different aspects.

We conclude therefore that the EU Seal Regime does not come under the scope of application of Article XI:1, as it is not an import ban but a general sales ban.

<sup>57</sup> WTO, *EC – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Panel of 18 September 2000, WT/DS135/R, paras. 8.91-8.92; see also *Mavroidis*, *The General Agreement on Tariffs and Trade*, 46; *van den Bossche*, *The Law and Policy of the World Trade Organization*, 347.

<sup>58</sup> This Ad Note states, *inter alia*: “... any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and the like domestic product and is ... enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as ... a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.”

<sup>59</sup> See Article 3(1) of the Basic Regulation.

<sup>60</sup> WTO, *India – Measures Affecting the Automotive Sector*, Report of the Panel of 21 December 2001, WT/DS146, 175/R, para. 7.224.

<sup>61</sup> See *Mavroidis*, *The General Agreement on Tariffs and Trade*, 46-47.

#### 4. *General Exceptions: “Public Morals” and “Animal Health”*

Even if the EU Seal Regime were found to run counter to Articles I or III, it is likely to be justified under Article XX, the “general exceptions” clause of the GATT.<sup>62</sup>

In a nutshell, Article XX aims to ensure that measures taken to achieve non-trade policy goals do not affect trade more than necessary and are not abused to advance trade policy goals. Conversely, Article XX fully recognizes that where a WTO Member takes measures to pursue legitimate non-trade policies in a non-abusive manner, the GATT does not prevent it from doing so even if such measures affect trade in a way that violates other GATT provisions.

In particular two potential justifications under Article XX can be invoked to defend the EU Seal Regime. First, since the EU Seal Regime at its root responds to moral concern about the methods used in hunting seals, it may be justified as a measure to protect “public morals” (Article XX (a)). Second, since a key part of the problem is the suffering of the seals during their slaughter, it seems conceivable to justify the measure as serving to protect “animal health” – physical and/or mental – in that it serves to prevent suffering, anguish and pain (Article XX (b)).

##### *a) Two-Tiered Test*

Measures requiring justification under Article XX must pass a two-tiered test. In a first step, the measure at issue must satisfy the requirements of one or more of the ten paragraphs (a–j) of Article XX. Each of these paragraphs addresses a specific policy goal that countries may wish to pursue as well as the (intensity of the) connection that is needed to be established between the measure and the policy goal pursued. These goals, as indicated, include public morals and animal health and life. In a second step, and if the measure at stake passes the first step of the test, it is subsequently measured against the “chapeau” of Article XX. The chapeau aims to exclude measures that – although in principle suitable to pursue the relevant policy goal – are applied in a way that leads to “arbitrary or unjustifiable discrimination” and/or act as a “disguised restriction on trade”.

The sequence of this two-tier test under Article XX is necessary because compliance with the “chapeau,” as interpreted by the Appellate Body, can only be meaningfully assessed once it is clear whether (and how) a measure satisfies one of the specific paragraphs of Article XX. This is because the specific justification informs the question whether the measure in question amounts to “arbitrary or unjustifiable discrimination” or a “disguised restriction on international trade.”

<sup>62</sup> In addition to Article XX, the EU could possibly also invoke Article XXIV as a justification for the (alleged) breach of Articles I and III, given that the EU maintains a free-trade area with Greenland, in accordance with Articles 198 *et seq.*, 204 TFEU. Yet it will not be examined here whether the conditions of Article XXIV, as interpreted by the Appellate Body in the case *Turkey – Textiles* (WTO, *Turkey – Restrictions on Imports of Textile and Clothing Products*, Report of the Appellate Body of 22 October 1999, WT/DS34/AB/R), are met.

b) *Public Morals (Article XX (a))*

What constitutes “public morals” is obviously difficult to apprehend in the abstract. The Panel in the case *US – Gambling* found that the “the term ‘public morals’ denotes standards of right and wrong conduct maintained by or on behalf of a community or nation.”<sup>63</sup> While on the basis of jurisprudence and scholarly writing the exact reach of the concept may remain somewhat imprecise,<sup>64</sup> it seems safe to assume that animal welfare, or the human concern for it, is seen by many societies as forming part of public morals.<sup>65</sup>

The EU would be able to point to significant evidence in support of a claim that animal welfare in general forms part of its collective, or public, morals. Numerous pieces of legislation as well as pronouncements by representative bodies such as parliaments provide ample testimony. The same can be said, more specifically, about the protection of seals. Public concern over the killing methods applied by sealers is well-documented and has found expression *inter alia* in the 1983 EU ban on seal pups products as well as, more recently, in vocal pronouncements by the European Parliament<sup>66</sup> and by the Parliamentary Assembly of the Council of Europe.<sup>67</sup>

It is rather obvious that moral concerns are indeed the main rationale for the EU Seal Regime and the national legislations of its Member States it is intended to harmonize. There is, as discussed, clearly no other motive, in particular no economic one. The EU, in fact, is hurting its own economic interests, namely the business interests of some sealers and, more importantly, several important fur processing and trading operations.

Canada and Norway may try to claim that the EU oversteps its authority under Article XX by aiming to protect matters beyond its jurisdiction, namely seals located in Canada, Norway or other third jurisdictions. However, while this argument may carry some weight in the context of Article XX (b), namely insofar as the seals whose health would be the concern under paragraph (b) are indeed located outside of the EU, a strong argument can be made that this is not the case when it comes to public morals under Article XX (a) in this case. This is because the value protected is the moral concern of EU citizens associated with the method of killing seals. These EU citizens are obviously under the EU jurisdiction, and the protection of their moral concerns is thus a legitimate object of EU action under Article XX (a).

*“Necessary” to protect public morals: “weighing and balancing”*

<sup>63</sup> *US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of the Panel of 10 November 2004, WT/DS285/R, para. 6.465.

<sup>64</sup> For a comprehensive overview see *Feddersen*, *Der ordre public in der WTO*, 151 *et seq.*, 206 *et seq.*, 237 *et seq.*

<sup>65</sup> *Charnovitz*, *Virginia Journal of International Law* 38 (1998), 689, finds ample traces in pre-GATT and post-GATT national legislation and treaties dealing with animal welfare; *cf.* pages 4-5 (national legislation) and 11 (early treaties) in the pdf version of the article made available on the internet: <<http://www.worldtradelaw.net/articles/charnovitzmoral.pdf>> (visited on 15 May 2012).

<sup>66</sup> European Parliament, Resolution on a Community Action Plan on the Protection and Welfare of Animals 2006 – 2010, OJ of the EC No C 308 E/170 of 16 December 2006.

<sup>67</sup> Parliamentary Assembly of the Council of Europe, Recommendation 1776 (2006) of 17 November 2006, available on the internet: <<http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta06/erec1776.htm>> (visited on 15 May 2012).

According to Article XX (a), the measure concerned has to be “necessary” to protect public morals. In the case *Korea – Various Measures on Beef*, the Appellate Body concluded that for a measure to be “necessary” it would, in a continuum between two extreme poles, be located significantly closer to “indispensable” than to “making a contribution to.”<sup>68</sup> There and in subsequent jurisprudence, the Appellate Body further explained that necessity would have to be established through a process of “weighing and balancing”.<sup>69</sup> The relevant measure would have to be assessed against three criteria, namely: (i) the *importance* of the policy objective pursued; (ii) the *contribution* of the measure to the objective pursued; and (iii) the *trade-restrictiveness* of the measure. Finally, there must not be a readily available *alternative measure* which would achieve the same level of protection for the chosen policy goal but is WTO-consistent or less trade-restrictive.<sup>70</sup>

The more important a policy goal is, the more likely it is that a measure advancing it is “necessary.” The more a measure contributes to the chosen policy objective, the more likely it is “necessary”. And the more trade-restrictive a measure is, the less likely it is to be found “necessary”. However, there is no denying the fact that the aforementioned process of “weighing and balancing” remains a somewhat subjective exercise and no other exception may be more susceptible to a subjective approach than the “public morals” exception.<sup>71</sup>

#### *“Importance”*

Relying on WTO case law, the EU can strongly argue that public morals is a value of the highest importance. First, public morals as such can be safely said to be a value of the highest order for most, if not all, governments. This was stated, for example, by the panel in the recent *China – Audiovisuals* case.<sup>72</sup> Probably all states maintain laws to protect public morals, from the regulation of prostitution to, indeed, the protection of animal welfare.

Second, moral concerns over animal welfare are among the long-standing expressions of public morality in many countries. Very significant evidence can be adduced that EU citizens care indeed deeply about the welfare of animals generally and certain animals in particular. Among these are certainly pets such as dogs and cats, but also seals (at least as regards the method of their killing). This is reflected *inter alia* in pertinent legislation, including the 1983 seal pups ban, and political statements by representative bodies such as parliaments, as mentioned above.

<sup>68</sup> WTO, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body of 11 December 2000, WT/DS161/AB/R, WT/DS169/AB/R, para. 161.

<sup>69</sup> WTO, *Brazil – Measures Affecting Imports of Retreaded Tyres*, Report of the Appellate Body of 3 December 2007, WT/DS332/AB/R, para. 182; see also WTO, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of the Appellate Body of 7 April 2005, para. 305.

<sup>70</sup> For a review of this case law, see *Delimatsis*, JIEL 14 (Nr. 2, 2011), 257 (261 *et seq.*); *Ming Du*, JIEL 14 (Nr. 3, 2011), 639 (664-668).

<sup>71</sup> See the criticism of the Appellate Body’s necessity analysis in the case *China – Audiovisuals* by *Delimatsis*, JIEL (Nr. 2, 2011), 257 (284 *et seq.*).

<sup>72</sup> WTO, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, Report of the Panel of 12 August 2009, WT/DS363/R, para. 7.817 (“the protection of public morals ranks among the most important values or interests pursued by Members as a matter of public policy”).

### “Contribution”

The EU would further have to establish that its Seal Regime makes a material contribution to the objective pursued – protection of public morals. In the case *Brazil-Retreaded Tyres*, the Appellate Body stated that

“[s]uch a contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. The selection of a methodology to assess a measure's contribution is a function of the nature of the risk, the objective pursued, and the level of protection sought.”<sup>73</sup>

Importantly, contribution can be established in two ways: quantitative or qualitative. The Appellate Body has held that a Panel must always assess the *actual* contribution made by the measure to the objective pursued.<sup>74</sup> However, should such an actual contribution not be “immediately observable” or difficult to isolate,

... a panel might conclude that [a measure] is necessary on the basis of a demonstration that [it] is apt to produce a material contribution to the achievement of its objective. This demonstration could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence.”<sup>75</sup>

Thus, while hard data remain welcome (if not preferable), qualitative or quantitative induction on the basis of reasonable hypotheses is acceptable.

The question is whether the required effect, namely the protection of public morals, is measurable – in quantitative terms – in the first place. We believe it is not.

To address a possible desire for such quantification the EU could argue that its Seal Regime reduces the sale of seal products in the EU to those produced or imported under the three exceptions. Assuming that the EU can demonstrate on the basis of actual data that this leads to an actual reduction in EU consumption and thereby to a reduction in inhumane killings of seals, the Panel should find for that reason alone that the measure makes a contribution to the stated objective: the protection of public morals.

Should the available data be inconclusive, the EU would have to demonstrate that the seal products ban is nonetheless “apt to make a material contribution,” using inductive reasoning. This seems straightforward. The EU will be able to argue that because the EU market was previously a major consumer of seal products and is still a major consumer of luxury items generally it is reasonable to assume that cutting off its purchasing power from the world market in seal products would lead to a reduction of seal hunting, and hence a reduction of inhumane killings.

However, irrespective of whether the EU Seal Regime actually contributes to an overall reduction in killings of seals, the EU can and should argue that its Seal Regime is “apt to make a material contribution” to the protection of public morals because

<sup>73</sup> WTO, *Brazil – Measures Affecting Imports of Retreaded Tyres*, Report of the Appellate Body of 3 December 2007, WT/DS332/AB/R, para. 145 (underlined added).

<sup>74</sup> WTO, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, Report of the Appellate Body of 21 December 2009, WT/DS363/AB/R, para. 252.

<sup>75</sup> WTO, *Brazil – Measures Affecting Imports of Retreaded Tyres*, Report of the Appellate Body of 3 December 2007, WT/DS332/AB/R, para. 151 (underlined added).

EU consumers can now be sure that they do not consume seal products resulting (in particular) from commercial sealing in Canada and Norway, and thus do not contribute to the moral hazard involved. This argument is consequent, as it is arguably the human concern that makes animal welfare a matter of public morals. As one (non-lawyer) observer noted, “[s]urely the international community cannot and should not be able to, force a country to purchase products the production of which offends the sensibilities of its citizenry.”<sup>76</sup>

Would the contribution be seen as “material”? Here the same focus on the very mechanism of the moral challenge would appear to matter, namely the idea of non-participation in immoral trade. This non-participation is “material” since it would significantly alleviate the moral burden of EU consumers who no longer have to fear that their possibly inadvertent purchase of seal products (e.g. Omega 3 pills) contributes to the inhumane killing of seals.

#### *Trade-restrictiveness*

As a sales ban the EU Seal Regime is arguably by definition highly trade-restrictive.

#### *Alternative measures*

Canada and Norway may try to put forward possible alternative measures that are less trade restrictive than the EU Seal Regime in its current form – a ban, by nature a rather rigid measure. However, it is hard to imagine which measure may be equivalent in terms of effectiveness to protect public morals. A labeling scheme singling out products from “humanely” killed seals, it seems, is simply not effectively feasible in practice, in particular with regard to downstream seal products, such as Omega 3 pills. The EU’s Basic Regulation hence explicitly finds that labeling requirements would not achieve the same result as a ban.<sup>77</sup>

#### *Chapeau*

Canada and Norway may be successful in arguing that the Inuit and MRM exceptions lead to relevant “discrimination between countries where the same conditions prevail” (Canada/Norway – Greenland; Canada/Norway – Sweden/Finland). The EU, however, is likely to succeed in arguing that these are not “arbitrary or unjustifiable” and hence satisfy the “chapeau” of Article XX because both exceptions find their rationale within the same realm of public morals<sup>78</sup> and thus do not constitute an “abus de droit”.<sup>79</sup> The Inuit exception serves a moral purpose, namely the protection of in-

<sup>76</sup> Cooper, Environment and Resource Policies for the World Economy, 30, quoted in Charnovitz, Virginia Journal of International Law 38 (1998), 689, text at footnote 244.

<sup>77</sup> Basic Regulation, *supra* note 5, recital 12.

<sup>78</sup> The Appellate Body in *Brazil-Tyres* found that in order to satisfy the *chapeau* any discrimination would have to find its basis in the rationale underlying the relevant specific exception paragraph of Article XX – here thus paragraph (a): the protection of public morals. Cf. WTO, *Brazil – Measures Affecting Imports of Retreaded Tyres*, Report of the Appellate Body of 3 December 2007, WT/DS332/AB/R, para. 227: “In our view, there is such an abuse, and, therefore, there is arbitrary or unjustifiable discrimination when a measure provisionally justified under a paragraph of Article XX is applied in a discriminatory manner “between countries where the same conditions prevail”, and when the reasons given for this discrimination bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective.”

<sup>79</sup> Article XX is an expression of the general principle of good faith and one application of this principle is the doctrine of “abus de droit”, see WTO, *US – Import Prohibition of Certain Shrimp and*

digenous communities, which, where in conflict, legitimately trumps – but otherwise does not question – animal welfare. The MRM exception, it can be argued, simply avoids unnecessary waste (as a certain number of seals has to be killed as part of the marine resource management system) and hence does not undermine the “public morals” logic of the sales ban.

*c) Animal Life or Health (Article XX (b))*

The EU could further argue that since its (moral) concern relates primarily to the seals’ unnecessary suffering due to inhumane hunting methods, the measure serves simultaneously to protect animal health by seeking to avoid the pain and distress during the slaughter. Yet the case for necessity is arguably weaker in this instance than under the public morals exception, *inter alia* because animal health as such (distinct from animal welfare as a moral concern) may rank lower in terms of “importance” and because the claimants may challenge the extraterritoriality of the measure.

Applying the Appellate Body’s reasoning in *Brazil – Retreaded Tyres*, the Inuit exception and hence the (alleged) discrimination in favour of seal products from Greenland may not be justifiable under Article XX (b) since the Inuit exception is unrelated to animal health. In contrast, the (alleged) discrimination resulting from the MRM exception may be justified as it can be argued that its conservational purposes include consideration of animal health in the wider sense.

#### D. Conclusions

The EU Seal Regime is a measure taken to protect deep-rooted moral concerns within the EU and its Member States. As it seems without alternative, it is rather clearly justified under the “public morals” exception set forth by Article XX of the GATT 1994: Contrary to one early commentators’ pointed statement<sup>80</sup> morality, in fact, is enough to justify the measure. However, it may not even be necessary to rely on the aforementioned exception, because it can be argued that the EU Seal Regime does not violate the relevant GATT rules – Articles I:1 and III:4 – in the first place.

But *even if* the EU were found in violation of the said non-discrimination provisions as a result of the Inuit and MRM exceptions, it would be possible to remedy the situation by eliminating these exceptions, leaving the sales ban otherwise intact.

The allegations by Canada and Norway that the TBT Agreement is violated are already *ab initio* without merit since the EU Seal Regime simply does not qualify as a “technical regulation” within the meaning of that agreement.

*Shrimp Products*, Report of the Appellate Body of 12 October 1998, WT/DS58/AB/R, para. 158; see also *Delimatsis*, JIEL 14 (Nr. 2, 2011), 257 (266).

<sup>80</sup> *Fitzgerald*, Journal of International Wildlife Law & Policy 14 (2011), 85.

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