Case Note

Sealing the Fate on Animal Welfare: The Appellate Body Report on *EC – Seal Products*

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I INTRODUCTION

In May 2014, the World Trade Organisation ('WTO') Appellate Body ('AB') published its report on the *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*[1] ('*EC – Seals Products*') dispute confirming that the protection of animals is an aspect of public morals valid under the General Agreement on Tariffs and Trade 1994 ('GATT') Article XX(a). Article XX(a) allows countries to circumvent their WTO obligations if it is necessary to protect public morals.

This case note examines the AB's decision on the scope of the public morals exception under Article XX(a). Additionally, it will examine two critical aspects of the decision, namely, clarification on what is deemed a technical regulation under the *Agreement on Technical Barriers to Trade* ('TBT Agreement') and clarification of the legal standards required to fulfill the non-discrimination obligations under Articles I:1 and III:4 of the GATT.

At first blush, the AB appears to have made significant headway in recognising animal welfare under the public morals exception. However, this case note will discuss questions left unanswered as well as the broader implications of the AB's decision.

II BACKGROUND TO THE APPEAL

EC – Seal Products concerns a ban on trade in seal products instituted by the European Union ('EU') via two legal instruments, namely Regulation

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[1] Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/AB/R, AB-2014-1 (22 May 2014) ('EC – Seals').

(EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products ('Basic Regulation') and 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 ('Implementing Regulation'). The two legal instruments make up the EU Seal Regime which provides trade rules regarding the placing of seal products on the market.

The EU Seal Regime bans the trade of seal products, with the exception of three situations. First, if the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence ('the IC Exception').[2] Second, if the seal products are carried into the EU by travelers ('the travelers Exception').[3] Third, if the seal products are by-products of hunting regulated and conducted for the sustainable management of marine resources ('the MRM Exception').[4] Seal products are defined as 'all products, either processed or unprocessed, deriving or obtained from seals'.[5]

Canada and Norway claimed the EU Seal Regime was inconsistent with EU's obligations under the TBT Agreement. They also claimed the EU violated its obligations under Articles I:1, III:4 and XI:1 of the GATT. Furthermore, they claimed that the EU Seal Regime was not justified under Article XX of the GATT 'General Exception' Clause.

The Panel held that the IC and MRM Exceptions under the EU Seal Regime were inconsistent with Article 2.1 of the TBT Agreement. It also found that the IC Exception was inconsistent with Article I:1 whilst the MRM Exception was inconsistent with Article III:4.

Additionally, according to the Panel, whilst the general ban on seal products was justifiable under the public morals exception under Article XX(a) of the GATT, the IC and MRM exceptions were discriminatory in nature. Therefore, the EU Seal Regime was unjustifiable under the chapeau of Article XX. As a result, it was inconsistent with the Article XX General Exceptions.

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[2] Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products [2009] OJ L 286/36, art 3(1) ('Basic Regulation'); 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 [2010] OJ L 216/1, art 3 ('Implementing Regulation').

[3] Basic Regulation [2009] OJ L 286/36, art 3(2)(a); Implementing Regulation [2010] OJ L 216/1, art 4.

[4] Basic Regulation [2009] OJ L 286/36, art 3(2)(b); Implementing Regulation [2010] OJ L 216/1, art 5.

[5] Basic Regulation [2009] OJ L 286/36, art 2(2).

III THE APELLATE BODY DECISION

The disputing parties appealed against the Panel's decision. In response, the AB report focused on three issues. First, whether the EU Seal Regime was a technical regulation and if it was, whether the regime was inconsistent with the EU's obligations under the TBT Agreement. Second, whether the IC and MRM Exceptions accorded less favourable treatment to Canada and Norway, thereby violating Article I:1 of the GATT. Additionally, it examined whether, if an obligation is breached under Articles I:1 or III:4, the legal standard for these non-discrimination obligations is similar to that under the TBT Agreement. Third, even if there was a violation of the MFN obligation, the AB examined whether the ban on seal products is necessary for the protection of public morals under Article XX(a) of the GATT.

A *Whether the EU Seal Regime Constituted a Technical Regulation*

1 *Decision*

To determine if the EU Seal Regime was inconsistent with the TBT Agreement, the AB had to decide whether the Regime is a technical regulation. The AB found the EU Seal Regime did not constitute a technical regulation and therefore, it did not have to consider if there were any violations to the TBT Agreement. Consequently, it declared the Panel's findings in this regard 'moot and of no legal effect'.[6]

Annex 1.1 of the TBT Agreement provides that 'a technical regulation is a document which lays down product characteristics or their related processes and production methods'.[7]

The AB rejected the Panel's findings that a prohibition of seal-containing products provides, in itself, a form of product characterisation. The AB disagreed because solely examining the prohibitive aspect of the Regime does not take into account the fact that the Regime allows for other exceptions. Therefore, the AB criticised the Panel for not undertaking a 'holistic assessment of the weight and relevance' of each component of the Regime.

The AB stated that a decision on whether a measure constitutes a technical regulation should be 'made in light of the characteristics of the measure at issue and circumstances of the case'.[8] The AB contrasted the

[6] Appellate Body Report, *EC – Seals*, WTO Doc WT/DS400/AB/R [2.151].
[7] Agreement on Technical Barriers to Trade, opened for signature 15 April 1994, 1868 UNTS 120 (entered into force 1 January 1995) annex 1.1 ('TBT Agreement').
[8] Appellate Body Report, *EC – Seals*, WTO Doc WT/DS400/AB/R [5.19].

EU Seal Regime from that in *EC – Asbestos*.[9] It reasoned that asbestos-containing products were regulated due to their carcinogenicity. In contrast, seal-containing products were banned simply because they contained seal.[10] In fact, the ban on seal products was only one component of the Regime. If the Regime was examined in totality, it would account for the exceptions which were dependent on the 'identity of the hunter, the type of hunt, or the purpose of the hunt'.[11] It categorised these exceptions as 'market access conditions'[12] rather than product characteristics. Hence, the EU Seal Regime was not a technical regulation and any violation of obligations under the TBT Agreement need not be considered.

2 *Analysis*

The AB report stated the legal test requires an analysis of 'the weight and relevance of the essential and integral elements'.[13] Whilst the AB report referred to *EC – Asbestos* to illustrate the 'integral and essential' aspects of the measure, neither the *EC – Asbestos* AB report[14] nor the *EC – Seal Products* AB report defined the phrase.[15] Additionally, an assessment of 'weight and relevance' does not provide guidance as to the weight that should be accorded to the general ban on seal products and to the exceptions. This meant the test is dependent on the subjective judgment of the Panel and Appellate Body.

B *Whether the EU Seal Regime was Inconsistent with Articles I:1 and III:4 of the GATT*

1 *Decision*

The EU argued that the test for violation of Articles I:1 and III:4 of the GATT is similar to that of Article 2.1 of the TBT Agreement. Under Article 2.1 of the TBT Agreement, the Panel examined whether the 'detrimental impact of a measure on competitive opportunities stemmed exclusively from a legitimate regulatory distinction'.[16] The Panel rejected the EU's assertion that the tests were similar. The AB agreed and upheld the Panel's decision that the requirement under Article 2.1 of the TBT

[9] Appellate Body Reports, *European Communities – Measures Affecting Asbestos and Asbestos-containing Products*, WTO Doc WT/DS135/AB/R, AB-2000-11 (12 March 2001) ('EC – Asbestos').
[10] Appellate Body Report, *EC – Seals*, WTO Doc WT/DS400/AB/R [5.41].
[11] Ibid [5.45].
[12] Ibid [5.41].
[13] Ibid [5.29].
[14] Appellate Body Reports, *EC – Asbestos*, WTO Doc WT/DS135/AB/R [72].
[15] Appellate Body Report, *EC – Seals*, WTO Doc WT/DS400/AB/R [5.29].
[16] Ibid [5.89].

Agreement that the measure stemmed from a legitimate regulatory distinction created a more stringent test than that required under Articles I:1 and III:4.

(a) Article I:1 of the GATT

The AB report stated that the test for a violation of Article I:1 was whether a measure 'modifies the conditions of competition between like imported products to the detriment of the third-country imported products'.[17]

The AB report upheld the Panel's findings that the EU Seal Regime was inconsistent with Article I:1. It agreed with the Panel that there was *de facto* discrimination because 'virtually all Greenlandic seal products are likely to qualify under the IC exception' while the majority of seal products for Canada and Norway do not meet the IC exception.[18] Hence, this 'detrimentally affected' the conditions of competition for Norway and Canada.

This AB decision was significant as it clarified the scope of the Article I:1 test. The EU had argued that a mere examination of the detrimental impact on a third country caused by the changes in conditions of competition was insufficient to warrant a violation of Article I:1.[19] Rather, there was a further test which was similar to that under Article 2.1 of the TBT Agreement. The EU argued that the 'rationale for' such detrimental impact and the fact that the impact originated exclusively from a 'legitimate regulatory distinction' were determinative factors.[20] However, the AB rejected the EU's argument, stating that the Article I:1 test should not be expanded.

(b) Article III:4 of the GATT

The EU argued the test under Article III:4 did not simply involve an examination of whether there was a modification of the conditions of competition to the detriment of groups of imported products vis-à-vis like domestic products. Rather, it involved a further examination of whether the impact stemmed exclusively from a legitimate regulatory distinction.[21]

The AB did not delve into a factual examination of the test under Article III:4 but merely said that since the test for both WTO fundamental

[17] Ibid [5.90].
[18] Ibid [5.95].
[19] Ibid [5.89].
[20] Ibid.
[21] Ibid [5.117].

obligations did not change, it would not result in a different outcome from what was decided by the Panel. The Panel previously found the MRM Exception discriminated against the majority of seal products from Canada and Norway as evidence showed that 'virtually all domestic EU products were likely to qualify'[22] under the exception.

2 *Analysis*

It is clear from the AB report that the non-discrimination obligations under GATT and the TBT Agreement are different and separate. The AB noted that whilst the wording of the TBT Agreement showed that the agreement expanded on 'pre-existing GATT disciplines' and that the GATT and TBT should be 'interpreted in a coherent and consistent manner'[23], the legal standards for these obligations need not be identical. The AB further explained that obligations under the GATT were 'balanced'[24] by the General Exceptions under Article XX whilst the TBT Agreement had no such safeguard. Hence, there was no need for a further test under Articles I:1 and III:4.

C *Whether the EU Seal Regime was Justifiable under Article XX(a) of the GATT*

The examination of Article XX(a) requires two separate tests. First, whether the measure falls within the scope of the public morals exception under Article XX(a). Second, whether the measure constituted a means of arbitrary or unjustifiable discrimination between countries under the chapeau of Article XX.

1 *Whether the Measure Fell under Article XX(a)*

(a) Decision

Article XX(a) is satisfied if it is found that the measure was necessary to protect public morals. The AB agreed with the Panel the main objective of the EU Seal Regime is to address public moral concerns in the EU regarding seal welfare and that the exceptions were not to be considered separately. Rather, these exceptions have already been 'accommodated' as part of the objective.[25] The Panel had previously relied on evidence of the EU's legislative history and public survey results by the EU.[26]

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[22] Panel Report, *EC – Seals*, WTO Doc WT/DS400/R (25 November 2013) [7.608].
[23] Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, AB-2012-1 (4 April 2012) [91].
[24] Appellate Body Report, *EC – Seals*, WTO Doc WT/DS400/AB/R [5.125].
[25] Ibid [5.161].
[26] Panel Report, *EC – Seals*, WTO Doc WT/DS400/R [7.398].

Additionally, the AB rejected Canada's argument that there should be a higher threshold as the word 'protect' implied a risk against which the measure may be justified.[27] The AB reaffirmed the Panel report in *US-Gambling* that each WTO member has the discretion to set different levels of protection for similar interests of moral concerns.[28]

Finally, the AB rejected the argument that there has to be a pre-determined level of a measure's contribution towards achieving the objective of Article XX(a).[29] It reasoned that a pre-determined level is not indicative of a measure's contribution as there are qualitative factors involved, including the presence of alternative measures that could have been undertaken.[30]

(b) Analysis

The Panel and AB both examined the EU Seal Regime as a whole rather than separately examining each exception. This is the correct approach as it help build future jurisprudence in the same direction. Should the Regime have been separated into its different components, it would be hard for the Panel or AB to assess each component individually and then accord a suitable weight for each component to the overall assessment of the measure.

Additionally, the AB's reluctance to include a risk assessment under Article XX(a) as well as a pre-determined threshold level demonstrates that the AB has intentions to keep the threshold for fulfilling the public morals exception low. This is further supported by the discretion conferred upon WTO members to decide the level of protection they desire.

It is possible that the AB intended to keep this threshold low to make Article XX a catchall provision as the measure is still subject to the fulfillment of the chapeau of Article XX.

2 *Is there Arbitrary or Unjustifiable Discrimination?*

(a) Decision

The chapeau of Article XX requires an examination of whether there is arbitrary or unjustifiable discrimination between countries where the same conditions prevail. The Panel had based its findings under Article

[27] Appellate Body Report, *EC – Seals*, WTO Doc WT/DS400/AB/R [5.197].
[28] Ibid [5.200]; Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/R [6.461].
[29] Appellate Body Report, *EC – Seals*, WTO Doc WT/DS400/AB/R [5.215].
[30] Ibid.

2.1 of the TBT Agreement that the exceptions under the EU Seal Regime are 'not designed and applied in an even-handed manner' to arrive at the conclusion that the measure did not meet the requirements of the chapeau of Article XX. However, the AB rejected this finding and emphasised that the legal standard of Article 2.1 of the TBT Agreement is different from that of the chapeau of Article XX. It applied the same legal reasoning as that differentiating the legal tests of Article 2.1 of the TBT Agreement with Articles I:1 and III:4 of the GATT.

The AB held that there were several aspects of the EU Seal Regime that caused arbitrary and unjustifiable discrimination. First, the EU failed to show how the IC Exception could be reconciled with the objective of addressing the public morals concern. Second, there was ambiguity as to certain criteria in the IC Exception. Third, the EU had not made 'comparable efforts' to allow Canadian Inuit to gain access to the market.[31]

(b) Analysis

It appears from the AB report that a fulfillment of the chapeau requires an examination of the circumstances of the case. However, it also triggers the likelihood of a circular argument where a discriminatory measure which breaches a WTO obligation would still not satisfy the General Exception under Article XX due to the strict chapeau requirements. The test of 'arbitrary and unjustifiable discrimination' serves as a safeguard measure to prevent abuse or misuse of the exceptions listed in the sub-paragraphs of Article XX.[32] This means once a measure is justifiable, it should not constitute 'arbitrary and unjustifiable discrimination'.In the present case however, the AB were not satisfied with any justification simply because there were elements of discrimination – the very reason why Article XX was invoked in the first place. Therefore, the justifications disputing parties may use in order to fulfill the requirements of the chapeau remain unclear.

IV CONCLUSION

It is clear from the AB decision that the TBT Agreement is separate from the GATT and legal tests under both agreements are not the same.

On a political note, the AB report has been applauded by animal welfare organisations as the AB has provided a low threshold for the public

[31] Ibid [5.338].
[32] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998) [119]–[120].

morals exception under Article XX(a), allowing animal welfare to be recognized as a legitimate reason for trade regulation. The concern remains, however, as to whether this decision will be followed through in future animal welfare disputes.