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**EC – SEAL PRODUCTS: THE TENSION  
BETWEEN PUBLIC MORALS AND  
INTERNATIONAL TRADE AGREEMENTS**

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***INTERNATIONAL TRADE AND  
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## Abstract

The dispute in EC – Seal Products raises fundamental questions about the relationship between public morals and international trade. Can WTO members impose trade restrictions based on moral or ethical concerns? Under what conditions can these concerns trump existing trade liberalization commitments? The dispute was filed in 2009 by Canada and Norway against the EU, which in the same year had banned seal products from being imported and placed on its market. According to the EU, the policy was introduced in response to European moral outrage at the inhumane killing of seals. The EU seal regime included a series of exceptions. In particular, it allowed imports of seal products hunted by Inuit or other indigenous communities, as well as imports of seal products processed and re-exported by EU producers. This article discusses the Appellate Body's ruling in EC – Seal Products and some of the key legal and economic issues raised by this dispute.

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# ***EC – Seal Products: The Tension between Public Morals and International Trade Agreements***

Paola Conconi and Tania Voon

## **Abstract**

The dispute in *EC – Seal Products* raises fundamental questions about the relationship between public morals and international trade. Can WTO members impose trade restrictions based on moral or ethical concerns? Under what conditions can these concerns trump existing trade liberalization commitments? The dispute was filed in 2009 by Canada and Norway against the EU, which in the same year had banned seal products from being imported and placed on its market. According to the EU, the policy was introduced in response to European moral outrage at the inhumane killing of seals. The EU seal regime included a series of exceptions. In particular, it allowed imports of seal products hunted by Inuit or other indigenous communities, as well as imports of seal products processed and re-exported by EU producers. This article discusses the Appellate Body's ruling in *EC – Seal Products* and some of the key legal and economic issues raised by this dispute.

## **1. Introduction**

The case of *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seal Products)* poses the fundamental question of whether moral concerns can trump trade liberalization commitments and justify the introduction of protectionist measures. The case involved two overlapping disputes initiated in 2009<sup>1</sup> by Canada and Norway against the European Union (EU) in the World Trade Organization (WTO) concerning the EU regime regulating trade in seal products.<sup>2</sup> The same Panel heard the disputes brought by Canada and Norway.<sup>3</sup> Canada, Norway and the European Union all appealed aspects of the Panel Reports.<sup>4</sup>

The challenged EU regime concerned trade in various seal products, including meat, oil, fur skins and clothing. It comprised regulations of the European Parliament and Council (Basic Regulation)<sup>5</sup> and the

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<sup>1</sup> In 2007, Canada brought a dispute against the EU in respect of similar measures taken by Belgium and the Netherlands, but it withdrew that complaint in 2014 on the basis that the measures had been repealed. See WTO, *European Communities – Certain Measures Prohibiting the Importation and Marketing of Seal Products: Request for Consultations by Canada*, WT/DS369/1, 1 October 2007.

<sup>2</sup> WTO, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products: Request for Consultations by Canada*, WT/DS400/1 and Add.1, 4 November 2009; WTO, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products: Request for Consultations by Norway*, WT/DS401/1 and Add.1, 10 November 2009.

<sup>3</sup> Panel Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seal Products)*, WT/DS400/R, WT/DS401/R, 25 November 2013.

<sup>4</sup> Appellate Body Reports, *EC – Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R, 22 May 2014.

<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, *Official Journal of the European Union*, L Series, No 286 (31 October 2009).

European Commission (Implementing Regulation).<sup>6</sup> The regime banned seal products from being placed on the EU market. The EU said it enacted the ban in response to European moral outrage at the inhumane killing of seals, and to avoid participation in such inhumane killing by the purchase of seal products. The EU regulations included three explicit exceptions, covering products:

- (i) from seals hunted by Inuit or other indigenous communities (IC exception);
- (ii) from seals hunted for the purpose of marine resource management (MRM exception);
- (iii) brought into the EU by travellers under certain conditions (travellers exception).

These exceptions, and the IC exception in particular, triggered the dispute against the EU. In addition, as discussed below, the EU introduced implicit exceptions allowing imports of seal products for transit, inward processing, and importation for auction and re-export.

The Panel found the IC and MRM exceptions inconsistent with Article 2.1 of the *Agreement on Technical Barriers to Trade* (TBT Agreement) because they discriminate against imported products. However, the Panel found the seal regime consistent with Article 2.2 on the basis that it was not more trade restrictive than necessary to fulfil its legitimate objectives. In relation to the *General Agreement on Tariffs and Trade 1994* (GATT 1994), the Panel found the IC exception inconsistent with the most-favoured nation (MFN) obligation in Article I:1 – because it treated seal products from Canada and Norway less favourably than those from Greenland – and the MRM exception inconsistent with the national treatment obligation Article III:4 – because it treated imported seal products less favourably than like domestic products. The Panel found the IC and MRM exceptions not justified under Article XX(a) or (b).

The substance of the appeal focused on the GATT 1994, because the Appellate Body concluded that the EU seal regime was not a ‘technical regulation’ and was therefore not covered by the TBT Agreement. Upholding the Panel’s finding of inconsistency with GATT Article I:1,<sup>7</sup> the Appellate Body found the regime provisionally necessary to protect public morals under paragraph (a) of Article XX but not justified under the Article XX ‘chapeau’.

The WTO’s Dispute Settlement Body (DSB) adopted the reports at its meeting on 18 June 2014. The parties agreed that the ‘reasonable period of time’ for the EU to implement the DSB’s recommendations and rulings would expire on 18 October 2015. The EU advised the DSB of its proposal to amend the Basic Regulation to remove the MRM exception and modify the IC exception so that indigenous hunts must be ‘conducted in a manner which reduces pain, distress, fear or other forms of suffering of the animals hunted to the extent possible taking into consideration the traditional way of life and the subsistence needs of the community’.<sup>8</sup> Canada and the EU issued a joint statement indicating their

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<sup>6</sup> Commission Regulation (EU) No 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products, *Official Journal of the European Union*, L Series, No 216 (17 August 2010) 1.

<sup>7</sup> The EU did not specifically appeal the Panel’s finding of inconsistency with GATT Article III:4.

<sup>8</sup> European Commission, *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1007/2009 on trade in seal products*, COM(2015) 45, 6 February 2015.

agreement to work together to establish access to the EU of ‘seal products that result from hunts traditionally conducted by Canadian indigenous communities and which contribute to their subsistence’.<sup>9</sup>

This article reflects on the *EC – Seal Products* dispute from a legal and economic perspective. In Section 2, we discuss some legal aspects of the Appellate Body’s ruling, focusing on: procedural issues; the scope of the TBT Agreement; non-discrimination under the GATT 1994 and the TBT Agreement; and general exceptions under GATT Article XX. In Section 3, we examine the dispute from an economic perspective, focusing on three aspects: the trade impact of the EU seal regime; the political economy factors; and the evidence for the underlying public moral concern. Section 4 concludes.

## 2. Legal Analysis

### 2.1 Procedural Issues

Upon the adoption of the reports in *EC – Seal Products*, the United States and some other Members questioned the circulation of the Appellate Body report beyond the 90-day deadline specified in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU, Article 17.5), with the United States maintaining that such a practice must be subject to the written agreement of the parties to the dispute, as has previously been the case. This comment relates to a significant procedural issue. As Guatemala pointed out, the DSU does not explicitly allow for exceptions to the specified deadlines, whether or not the disputing parties agree. Guatemala went on to emphasise (with the EU agreeing) that a delay in circulating a report does not affect or preclude the adoption of that report pursuant to DSU Article 17.14.<sup>10</sup>

Despite the clear rules of the DSU, such delays have routinely occurred at the level of WTO panels and, more rarely, at the appellate level with parties’ consent. Yet even the agreement of the disputing parties cannot substitute for the agreement of all WTO Members as would technically be required under WTO law to waive DSU requirements (e.g. Article 2.4), particularly on a matter of systemic importance. The same might be said of the opening of dispute settlement hearings at the WTO, at least at the appellate level, since the DSU states that panel ‘deliberations ... shall be kept confidential’ (Appendix 3, para. 3), whereas the ‘proceedings of the Appellate Body shall be confidential’ (Article 17.10). However, the matter of open hearings at both the panel and appellate levels has been litigated and appears to have been resolved in favour of transparency to the extent that the relevant participants agree (Hoekman and Trachtman 2010; Ehring 2008).<sup>11</sup>

In addition to the hearings at the panel and appellate levels in *EC – Seal Products* being open, the once controversial matter of *amicus curiae* submissions arose. The Panel received five unsolicited *amicus curiae* submissions, one of which the EU incorporated into its own submissions. Without specifying in its report its decision regarding these submissions, the Panel referred to two of them in footnotes. In contrast, the Appellate Body received three unsolicited *amicus curiae* submissions, deemed one inadmissible on

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<sup>9</sup> See European Commission, *Commission Decision on the Joint Statement by Canada and the European Union on Access to the European Union of Seal Products from Indigenous Communities of Canada*, C(2014) 5881, 18 August 2014, annex.

<sup>10</sup> DSB, *Minutes of Meeting Held in the Centre William Rappard on 18 June 2014*, WT/DSB/M/346, 28 August 2014 (*DSB Meeting*), paras. 7.8-7.12.

<sup>11</sup> See, example.g., Appellate Body Report, *US – Continued Suspension*, paras. 30-33, Annex IV.

the basis of ‘late filing’ on ‘the first day of the oral hearing’, and (in a now common refrain) ‘did not find it necessary to rely on the other two *amicus curiae* briefs in rendering its decision’ (para. 1.15). The public interest in these disputes arose from its significance for animal welfare and was also reflected in the extensive media and scholarly coverage that the oral hearings and final decisions received (e.g. Howse *et al*, 2015; Marceau, 2014).

## 2.2 *Implications for the Scope of the TBT Agreement*

The TBT Agreement applies to technical regulations, standards, and conformity assessment procedures, but to date most TBT disputes have involved alleged technical regulations. The TBT Agreement does not apply to sanitary and phytosanitary measures as defined in Annex A of the *Agreement on the Application of Sanitary and Phytosanitary Measures*, but the TBT Agreement can apply simultaneously to measures covered by the GATT 1994. To the extent of inconsistency between the TBT Agreement and the GATT 1994, the TBT Agreement prevails. Panels usually examine TBT claims first, because of their more specific and detailed nature, before turning to examine any related GATT claims.

At the DSB meeting that adopted the reports in *EC – Seal Products*, the United States, as a third party, welcomed the Appellate Body’s decision that the seal regime was not a technical regulation, because (in the United States’ words) the measure ‘concerned the characteristics of the type of hunt involved, not the characteristics of the product itself’.<sup>12</sup> On the one hand, this response may be seen as consistent with an attempt by the United States to retain policy space under WTO law (Inside US Trade 2014): the fewer measures covered by the TBT Agreement the lower the likelihood of interference by WTO tribunals with government regulation. On the other hand, the significance of the scope of the TBT Agreement in determining WTO members’ regulatory freedom depends on the alternative: that is, whether measures falling outside the TBT Agreement are ungoverned by WTO law or covered by other agreements, most obviously the GATT 1994.

Thus, in *EC – Seal Products*, the fact that the challenged measures were found not to be technical regulations did not preclude their examination under the GATT 1994. Indeed, TBT disputes typically involve claims of discrimination under both Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, sometimes in the alternative. Moreover, as discussed further below, a respondent might prefer resolution of the dispute on the basis of the TBT Agreement rather than the GATT 1994 because of the additional flexibility that appears to be granted to respondents under TBT Article 2.1 in view of the Appellate Body’s reasoning in *EC – Seal Products*.

Turning to the central question on the scope of the TBT Agreement in *EC – Seal Products*: what is a technical regulation? Annex 1.1 defines a technical regulation for the purposes of the TBT Agreement 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 labelling requirements as they apply to a product, process or production method.

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<sup>12</sup> *DSB Meeting*, para. 7.7.

In concluding that the EU seal regime constituted a technical regulation within the meaning of this definition, the Panel in *EC – Seal Products* drew an analogy to *EC – Asbestos*, where the Appellate Body characterized a European ban on asbestos-containing products as a technical regulation specifying ‘that all products must not contain asbestos fibres’ (para. 72). Similarly, the Panel in *EC – Seal Products* concluded that ‘the prohibition on seal-containing products under the EU Seal Regime lays down a product characteristic in the negative form by requiring that all products not contain seal’ (para. 7.106). However, the Appellate Body reversed that conclusion, criticizing the Panel for failing to conduct a ‘holistic assessment’ of the regime focusing on its ‘integral and essential’ aspects (paras. 5.28-5.29, 5.59). According to the Appellate Body (para. 5.58):

when the prohibitive aspects of the EU Seal Regime are considered in the light of the IC and MRM exceptions, it becomes apparent that the measure is not concerned with banning the placing on the EU market of seal products as such. Instead, it establishes the conditions for placing seal products on the EU market based on criteria relating to the identity of the hunter or the type or purpose of the hunt from which the product is derived. We view this as the main feature of the measure.<sup>13</sup>

Levy and Regan have described the Appellate Body’s ‘two distinct approaches’ of a ‘holistic’ assessment that identifies the ‘integral and essential’ aspects of the measure as ‘seemingly in tension’, and the Appellate Body’s identification of the exception as the most integral and essential aspect of the EU seal regime as ‘bizarre’ and indicative of the ‘fruitlessness’ of the exercise (Levy and Regan, 2015).

With little explanation, the Appellate Body determined that the Panel erred in treating the identity of the hunter, the type of the hunt, and the purpose of the hunt as ‘product characteristics’ within the meaning of Annex 1.1 of the TBT Agreement (para. 5.45). Although the Appellate Body explained in the abstract the meaning of the words ‘or their related processes and production methods’ that follow the words ‘product characteristics’ in Annex 1.1 (para. 5.12), it did not in its report examine whether the EU seal regime was a technical regulation on the basis that it prescribes processes and production methods (PPMs) that are *related to* product characteristics. The Appellate Body declined to examine this issue, on the basis that it could not ‘complete the analysis’ (see Yanovich and Voon, 2006) because neither the Panel nor the parties had fully explored the meaning of ‘related PPMs’ during the Panel proceedings (paras. 5.67, 5.69).

Accordingly, *EC – Seal Products* leaves open the controversial question of the extent to which the TBT Agreement covers measures prescribing the way a product is produced. WTO panels have previously found challenged *labelling* measures focused on PPMs to be technical regulations under the TBT Agreement.<sup>14</sup> Those decisions in themselves may be open to question (e.g. Crowley and Howse, 2014; Howse and Levy, 2013). The second sentence of Annex 1.1 does not clearly indicate that a labelling requirement that applies to a PPM lays down a ‘product characteristic’ or even a PPM ‘related’ to a product characteristic within the meaning of the first sentence. One might plausibly argue that the second sentence is not subsumed in the second but rather establishes a second type of technical regulation, separate from that set out in the first sentence. On that basis, a labelling requirement that applies to a PPM might be found to be a technical regulation regardless of whether the PPM is otherwise ‘related’ to the

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<sup>13</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.58.

<sup>14</sup> Panel Reports, *US – COOL*, paras. 7.213-7.216 (this finding not appealed); Panel Report, *US – Tuna II (Mexico)*, para. 7.78; Appellate Body Report, *US – Tuna II (Mexico)*, para. 199.

product or a product characteristic. For the moment, the Appellate Body appears to have sidestepped (perhaps intentionally) this difficult issue of the relationship between PPMs and the TBT Agreement.

### 2.3 *Implications for Non-Discrimination*

The discrimination arising from the EU seal regime played a central role in the dispute, in relation to both the substantive obligations in GATT Articles I:1 and III:4 and the general exceptions in GATT Article XX. The appeal centred on the applicable legal standard for establishing discrimination contrary to GATT Articles I:1 (MFN treatment) and III:4 (national treatment), in comparison to discrimination contrary to TBT Article 2.1 (encompassing obligations of both national treatment and MFN treatment). Pursuant to relatively recent Appellate Body jurisprudence under TBT Article 2.1 (*US – Clove Cigarettes*; *US – Tuna II (Mexico)*; *US – COOL*), a measure that has a detrimental impact on competitive opportunities for imported products (as compared with like domestic products, in the case of national treatment, or like products imported from another country, in the case of MFN treatment) entails less favourable treatment of the imported products contrary to GATT Article I:1 or III:4 *only* if the detrimental impact *stems exclusively from a legitimate regulatory distinction* (see Voon et al, 2013). In *EC – Seal Products*, the EU unsuccessfully appealed the Panel’s conclusion that the legal standard for identifying less favourable treatment under TBT Article 2.1 *does not apply* to claims under GATT Articles I:1 and III:4.

In its report, the Appellate Body explained that Articles I:1 and III:4 of the GATT 1994 are ‘concerned, fundamentally, with prohibiting discriminatory measures by requiring ... equality of competitive opportunities’ and thus do not ‘require a demonstration of the *actual* trade effects of a specific measure’ (para. 5.82). The Appellate Body took note of the Panel finding (with respect to Article I:1) that, ‘while virtually all Greenlandic seal products are likely to qualify under the IC exception for access to the EU market, the vast majority of seal products from Canada and Norway do not meet the IC requirements for access to the EU market’ (para. 5.95). The Panel also found (with respect to Article III:4) that ‘the vast majority of seal products from Canada and Norway are excluded from the EU market by the terms of the MRM exception’, whereas ‘virtually all domestic seal products are likely to qualify for placing on the market’ (para. 7.608). These aspects of the EU seal regime do seem to impose a detrimental impact on imported products from Canada and Norway as compared to products from Greenland and the EU. However, that discrepancy alone does not answer the question of the correct legal standard in establishing WTO-inconsistent discrimination under GATT Articles I:1 and III:4.

The United States has suggested that the Appellate Body’s refusal to apply the same legal standard to the non-discrimination provisions in the GATT 1994 and the TBT Agreement raises the possibility ‘that Article 2.1 of the TBT Agreement would become superfluous, and the legal approach developed in the recent TBT disputes would become just an historical footnote’.<sup>15</sup> The EU made similar arguments during the appeal (para. 5.118). The Appellate Body decision does raise questions about the significance and consistency of the non-discrimination obligations in WTO law. If the TBT obligations are in essence more lenient than the corresponding GATT obligations, because they allow for consideration of regulatory purpose in assessing less favourable treatment and they include an inclusive list of legitimate objectives (in contrast to the exhaustive list in GATT Article XX), WTO members’ policy space with respect to technical regulations seems to be undermined. A measure that is found to be a lawful technical

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<sup>15</sup> *DSB Meeting*, para. 7.7.

regulation under the TBT Agreement may nevertheless be found to be an unlawful discriminatory measure under the GATT 1994.

In *EC – Seal Products*, although the Appellate Body agreed that provisions of the GATT 1994 and the TBT Agreement ‘should be interpreted in a coherent and consistent manner, giving meaning to all applicable provisions harmoniously’, it maintained that the EU had ‘not pointed to any concrete examples of a legitimate objective that could factor into an analysis under Article 2.1 of the TBT Agreement, but would not fall within the scope of’ GATT Article XX (paras. 5.123, 5.128). But the Appellate Body was arguably facing just such a case. As Levy and Regan state, ‘[o]ne has to stretch ... to bring the Inuit culture purpose within GATT XX’.

In refusing to adopt a consistent approach to discrimination under the GATT 1994 and the TBT Agreement in *EC – Seal Products*, the Appellate Body relied on a key distinction between these agreements, namely that the TBT Agreement lacks an equivalent to GATT Article XX. Notwithstanding that distinction, in *US – Clove Cigarettes* the Appellate Body insisted that regulatory purpose is not an independent factor for consideration in identifying ‘like products’ under Article 2.1 of the TBT Agreement (paras. 109-116), consistent with its reasoning under GATT Article III:4 (e.g. *EC – Bananas III*; see Hudec 1998). Together, these two rulings on the relationship and consistency of GATT/TBT standards for non-discrimination restrict the significance of regulatory purpose in defending a measure in the WTO, forcing respondents to rely on the later analytical steps of Article XX (rather than ‘less favourable treatment’) in the context of the GATT 1994 and ‘less favourable treatment’ (rather than ‘like products’) in the context of the TBT Agreement. Overall, the Appellate Body’s progression of reasoning under both agreements may be seen as narrowing the flexibility for policy-making by WTO members.

One potential avenue for maintaining policy space for WTO members in assessing claims of discrimination, at least in relation to the national treatment obligation under GATT Article III:4, is found in the Appellate Body’s statement in *EC – Seal Products* that, ‘for a measure to be found to modify the conditions of competition in the relevant market to the detriment of imported products’ contrary to Article III:4, ‘there must be a “genuine relationship” between the measure at issue and the adverse impact on competitive opportunities for imported products’ (para. 5.101). This requirement stems from a line of jurisprudence encompassing both GATT Article III:4 and TBT Article 2.1 (e.g. *US – COOL*; *US – Tuna II (Mexico)*). Although the analysis of genuine relationship involves neither ‘an assessment of whether such detrimental impact stems exclusively from a legitimate regulatory distinction’<sup>16</sup> nor a clear focus on regulatory purpose, it does appear to entail an examination of the causal nexus between the challenged measure and the detrimental impact. This examination may at least provide an opportunity to consider the connection between the measure and the detrimental impact, potentially allowing respondents to explain the impact in terms unrelated to the measure.

For example, in *EC – Seal Products*, Levy and Regan suggest that a non-discriminatory explanation for the adverse impact of the IC exception on Canadian seal products is ‘the difference in scale of the Greenland and Canadian hunts’, with the small scale of Canadian Inuit hunts meaning that they rely on commercial processing facilities and cannot comply with the segregation requirement for the purposes of

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<sup>16</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.105.

certification under the IC exception. Similarly, in *Dominican Republic – Cigarettes* (para. 96), the Appellate Body upheld the Panel’s finding of consistency with GATT Article III:4 because:

The difference between the per-unit costs of the bond requirement alleged by Honduras is explained by the fact that the importer of Honduran cigarettes has a smaller market share than two domestic producers ... In this case, the difference between the per-unit costs of the bond requirement alleged by Honduras does not depend on the foreign origin of the imported cigarettes. Therefore ... the Panel was correct in dismissing the argument that the bond requirement accords less favourable treatment to imported cigarettes because the per-unit cost of the bond was higher for the importer of Honduran cigarettes than for two domestic producers.

The Appellate Body later resiled from its suggestion in that case that a panel needs to determine whether ‘the detrimental effect is unrelated to the foreign origin of the product’.<sup>17</sup> Nevertheless, the Appellate Body would arguably still find an absence of discrimination today under Article III:4 in the circumstances of *Dominican Republic – Cigarettes*, on the basis that the detrimental impact was not in a genuine relationship with the challenged measure but rather arose from the smaller market share of the importer of Honduran cigarettes. The Dominican Republic might however have slightly greater difficulty in demonstrating an absence of a genuine relationship between the adverse effect and the challenged measure than in demonstrating that the effect, while related to the measure, was not related to the foreign origin of the product.

## 2.4 Implications for General Exceptions

### 2.4.1 Article XX(a): Necessary to Protect Public Morals

In justifying a WTO-inconsistent measure under Article XX, a respondent first needs to establish that the measure falls within the general parameters of one of the sub-paragraphs of Article XX—that is, whether it is designed to achieve the objective specified in that paragraph (e.g. *US – Shrimp*; *Korea – Beef*). In determining the objective of the measure, a panel must consider not only the respondent’s characterization of its objective but also evidence such as the wording of relevant regulations, legislative history, and the ‘structure and operation’ of the measure.<sup>18</sup>

In *EC – Seal Products*, the EU’s primary justification was under paragraph (a), which covers measures ‘necessary to protect public morals’. In the context of the corresponding exception in Article XIV(a) of the *General Agreement on Trade in Services* (GATS), the Panel in *US – Gambling* defined ‘public morals’ as ‘standards of right and wrong conduct maintained by or on behalf of a community or nation’, noting that the content of public morals can therefore ‘vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values’ (paras. 6.461, 6.465). The Panel used the same definition in *China – Publications and Audiovisual Products*, this time in the context of GATT Article XX. In *EC – Seal Products*, the Panel stated that these ‘interpretations are equally applicable’ in the context of TBT Article 2.2 and applied them in its analysis under GATT Article XX(a) (paras. 7.382, 7.631).

In these three cases—*EC – Seal Products*, *China – Publications and Audiovisual Products*, and *US – Gambling*—the Appellate Body neither questioned nor specifically ruled on the definition of public

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<sup>17</sup> Appellate Body Report, *US – Clove Cigarettes*, n 372.

<sup>18</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.144.

morals used by the panel. While broad, this definition does not seem to have created problems for WTO members, for example in promoting invocation of the public morals exception in WTO disputes. Indeed, WTO members probably appreciate the restraint of panels and the Appellate Body in allowing them to ‘define and apply for themselves the concepts of “public morals” in their respective territories, according to their own systems and scales of values’.<sup>19</sup>

The Appellate Body rejected Norway’s claim that the Panel had, in identifying the objective of the EU seal regime, acted inconsistently with its obligation under Article 11 of the DSU to make ‘an objective assessment of the matter’. The Appellate Body, like the Panel, found that ‘the principal objective of the EU Seal Regime is to address EU public moral concerns regarding seal welfare, while accommodating IC and other interests so as to mitigate the impact of the measure on those interests’ (para. 5.167). Thus, in order to take advantage of the general exceptions under GATT Article XX, the EU did not need to establish that the seal regime was *solely* motivated by public morals. This finding is consistent with the Appellate Body’s recognition in previous disputes that a measure may have multiple policy objectives (eg *US – Clove Cigarettes*; *US – Tuna II (Mexico)*).

The next question in assessing a challenged measure under Article XX(a) is whether the measure is ‘necessary’ to protect public morals. In answering that question, one relevant factor is the extent to which the measure contributes to the objective of protecting public morals, which can be demonstrated through qualitative or quantitative evidence.<sup>20</sup> In *EC – Seal Products*, the Appellate Body explained that ‘the Panel opted for a qualitative analysis that focused mainly on the design and expected operation of the measure’, based on ‘limited information’ and ‘incomplete data’ regarding the ‘actual’ operation and impact of the measure (paras. 5.221-5.228). The Appellate Body found that many of the points raised by the complainants on appeal in relation to the contribution of the EU seal regime to its moral objective were factually based and concerned the Panel’s ‘weighing and appreciation of the evidence’, which the Appellate Body was unwilling to disturb in the absence of grounds under DSU Article 11 (eg para. 5.243). Ultimately, the Appellate Body upheld the Panel’s finding that the EU seal regime was provisionally justified under paragraph (a) of GATT Article XX.

#### 2.4.2 *Article XX Chapeau: Arbitrary or Unjustifiable Discrimination*

The final step in an Article XX defence involves establishing that the challenged measure complies with the chapeau to Article XX, which specifies:

the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade ...

The EU appealed the Panel’s conclusion that the IC exception does not comply with the chapeau, and Canada and Norway appealed the Panel’s reasoning in reaching that conclusion. The Appellate Body agreed that the Panel erred in applying the same test under the chapeau as under TBT Article 2.1, ‘instead of conducting an independent analysis’ under the chapeau, given the different legal standards, function and scope of the two provisions. The Appellate Body therefore reversed the Panel’s finding that the EU

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<sup>19</sup> Panel Reports, *EC – Seal Products*, para. 7.409.

<sup>20</sup> Appellate Body Reports, *EC – Seal Products*, paras. 5.169, 5.215, 5.221.

seal regime was not shown to be justified under GATT Article XX and completed the analysis of the regime under the chapeau (paras. 5.311-5.315).

In doing so, the Appellate Body had to address its previous statement in *Brazil – Retreaded Tyres* (para. 227) that arbitrary or unjustifiable discrimination arises under the chapeau of Article XX:

when a measure provisionally justified under a paragraph of Article XX is applied in a discriminatory manner ... 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.

In *Brazil – Retreaded Tyres* (para. 228), the Appellate Body found that an exemption from Brazil's ban on retreaded tyres (designed to protect human or animal life or health under Article XX(b)) that was granted to MERCOSUR countries pursuant to a:

ruling issued by the MERCOSUR arbitral tribunal is not an acceptable rationale for the discrimination, because it bears no relationship to the legitimate objective pursued by the Import Ban that falls within the purview of Article XX(b), and even goes against this objective, to however small degree.

The IC, MRM, travellers and transit/processing exceptions could arguably be analysed in a similar manner. The Panel found that: 'the risks of inhumane killing of seals are present in ... commercial, IC, and MRM hunts';<sup>21</sup> the IC, MRM and travellers exceptions diminish the contribution of the EU seal regime to its objective; and the transit/processing exceptions 'undermin[e] the objective of the measure' (paras. 7.448, 7.459-7.460). In this context, the Panel referred to the 'incoherency of the measure' and suggested that the transit/processing exceptions 'expos[e] the EU citizens to other types of commercial activities directly related to the production and supply of seal products that may have been derived from seals killed inhumanely' (para. 7.455). Thus, all these exceptions seem to bear no relationship to the EU's public morals objective in relation to seal welfare and even go against that objective, as in *Brazil – Retreaded Tyres*.

Howse, Langille and Sykes have argued that the IC exception in *EC – Seal Products* is distinguishable from the Mercosur exemption in *Brazil – Retreaded Tyres*. The latter entailed a discriminatory *application* of Brazil's ban on retreaded tyres (noting that the Article XX chapeau is directed at the application of measures rather than measures themselves) (e.g. *US – Gasoline*; *US – Shrimp*), and not differentiation within the measure itself, arising from the multiple purposes of the EU seal regime (Howse et al 2015). They add that the Mercosur exemption might have been justified under WTO law, if at all, on the basis of Article XXIV rather than Article XX (whereas the IC exception might have been justified under Article XX(a) on moral grounds). However, most commentators would agree that Article XX does not exhaustively list all possible legitimate objectives of WTO members (see Roessler 1996). For example, Article XX does not obviously cover wealth redistribution (a luxury tax), core labour standards (as opposed to prison labour), or the protection of privacy. Accordingly, determining whether discrimination is *arbitrary or unjustifiable* for the purpose of the chapeau to Article XX seems different from determining whether the discrimination can be traced to one of the paragraphs of Article XX, as opposed to another WTO provision or indeed a legitimate objective that is not reflected explicitly in WTO law.

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<sup>21</sup> Ibid para. 5.241.

The fundamental difficulty with the *Brazil – Retreaded Tyres* reasoning, if applied to *EC – Seal Products*, is that it limits WTO members’ ability to construct multi-purpose measures, notwithstanding the Appellate Body’s recognition that such measures exist. The Panel and Appellate Body in *EC – Seal Products* dealt with this difficulty in different ways. The Panel seemed to assume that the Appellate Body had not established an irrevocable rule that the Article XX chapeau allows only differentiation connected to the identified purpose of the measure falling within the relevant paragraph of Article XX (that is, the paragraph that the respondent has invoked to justify the measure). The Panel stated (see paras. 7.298, 7.650):

Unlike ... in ... *Brazil – Retreaded Tyres*, the cause or rationale for the [IC] exception ... is justifiable despite the rational disconnection to protecting seal welfare, because it is founded on the unique interests of Inuit and indigenous communities, which are and have been recognized broadly.

The Appellate Body itself may be understood as reinterpreting its statement in *Brazil – Retreaded Tyres*, creating an *emphasis* on the identified objective of the measure rather than a *requirement* that differentiation be connected to that objective. The Appellate Body stated (para. 5.306):

One of the most important factors in the assessment of arbitrary or unjustifiable discrimination is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX.

The Appellate Body supported this reasoning by reference to the much earlier case of *US – Shrimp*, in which it had ‘considered this factor as *one* element’ in such an assessment. Whether or not this is what the Appellate Body meant (or should have said) in *Brazil – Retreaded Tyres*, the *EC – Seal Products* approach must be welcomed as a more rational means of dealing with measures with multiple purposes and even measures that may need to accommodate other objectives in their implementation.

Applying this approach to the EU seal regime, the Appellate Body found that the EU had failed to justify the seal regime (and in particular the IC exception) under the chapeau, including because (para. 5.338):

the European Union did not show that the manner in which the EU Seal Regime treats seal products derived from IC hunts as compared to seal products derived from ‘commercial’ hunts can be reconciled with the objective of addressing EU public moral concerns regarding seal welfare.

The flexibility introduced by the Appellate Body into the *Brazil – Retreaded Tyres* reasoning facilitates EU compliance with this adverse ruling. Since the EU need not try to squeeze its desire to protect Inuit interests into its public morals objective concerning seal welfare, it may retain the IC exception provided that it modifies it to address seal welfare and thus bring it closer in line with the primary objective of the seal regime. This modification appears to have been achieved in the EU’s proposed revision.

The maintenance of the travellers and transit/processing exceptions in the proposed EU regime is less easily justified, although they were not expressly targeted in the Appellate Body’s finding of non-compliance with the chapeau requirements. The travellers exception may involve minimal quantities and perhaps be justified on logistical grounds. The transit/processing exceptions, as discussed further below, seem to cover significant quantities of products without reference to a legitimate, non-protectionist justification, other than political economy.

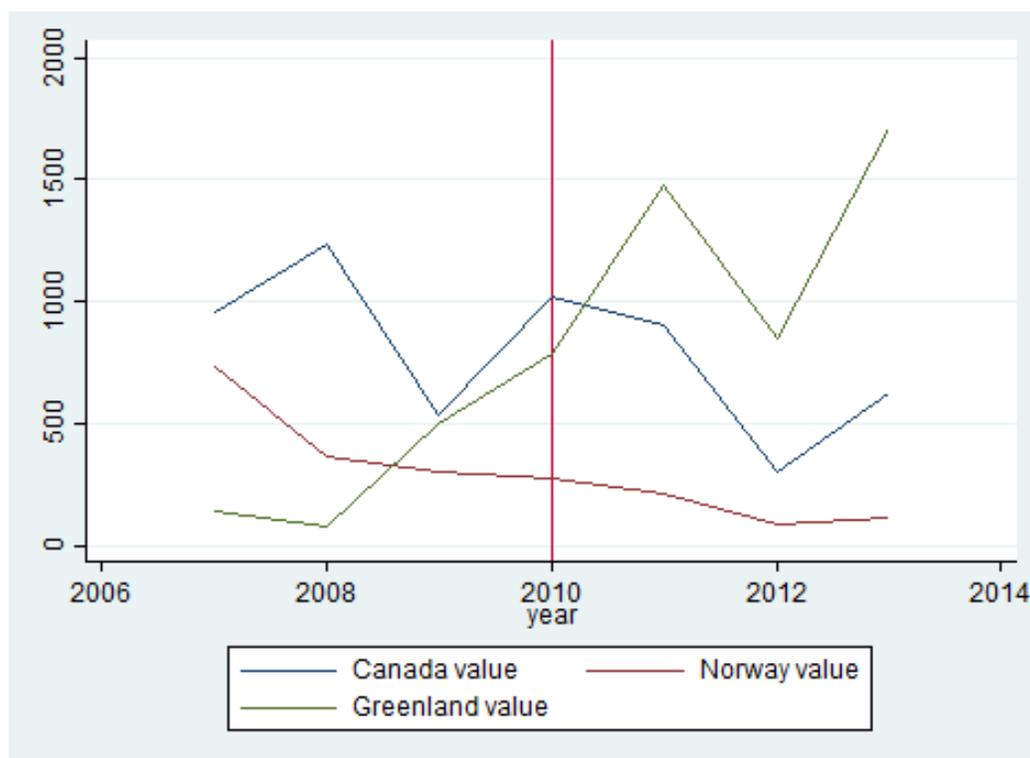
### 3. Economic Analysis

This section examines the *EC – Seal Products* dispute from an economic perspective. We consider three aspects: first, EU imports of seal products before and after implementation of the EU regime; second, the political economy factors that shaped the EU regime; finally, the public morals justification for trade restrictions.

#### 3.1 Evolution of EU Imports of Seal Products

We first study the evolution of EU imports of seal products during the 2007-2013 period, i.e. three years before and three years after the implementation of the EU seal regime in 2010. We focus on ten products listed as core seal products in official EU documents.<sup>22</sup> These include seal meat (CN02089055), various types of raw furskins (CN43017010, CN43017090), and tanned or dressed furskins (CN43021941, CN43021949, CN43023010, CN43023051, CN43023055), as well as articles of apparel, clothing accessories and other articles of furskin (CN43031010, CN43031090).

**Figure 1: EU imports of seal products from selected countries (in thousands of euros)**



Source: Eurostat.

Figure 1 plots the value of EU imports from the three main countries involved in the dispute. We focus on trade values rather than volumes. Trade volumes are rarely used, since they cannot be aggregated (e.g. it

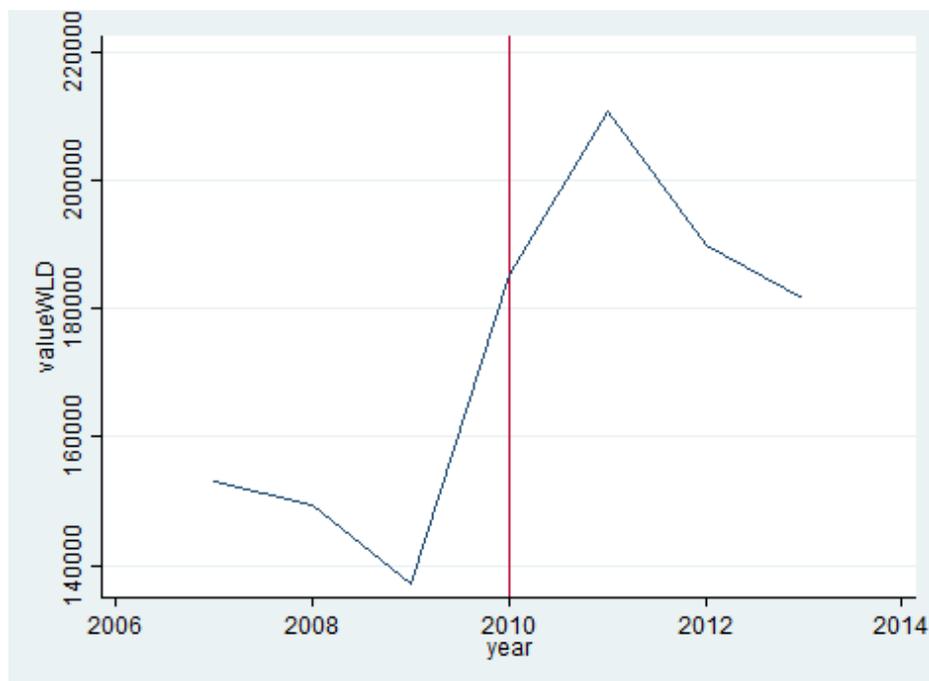
<sup>22</sup> See European Commission, *Impact Assessment on the Potential Impact of a Ban of Products Derived from Seal Species*, SEC(2008) 2290 (23 July 2008) (*Impact Assessment*); European Commission Directorate-General Environment, *Study on implementing measures for trade in seal products: Final Report* (January 2010) (*COWI 2010*). We exclude CN43018070 (a type of raw furskin), because of possible measurement errors in EU trade statistics (e.g. the value of a ton of this product varies dramatically within countries over time and across countries in a given year).

makes little sense to add tons of seal meat to tons of processed furskins).<sup>23</sup> Figure 1 provides support for the complainants’ argument that the EU regime discriminates against their products: during the sample period, EU imports from Canada and Norway declined, while imports from Greenland grew exponentially. This discrepancy suggest that the IC exception of the EU regime may have reduced the effectiveness of the import ban, leading to substitution of imports from Canada and Norway with imports from Greenland.

The EU claimed that it had two main objectives when drafting its seal regulations: reduce the killings of seals and guarantee the subsistence of the Inuit community. Mavroidis (2015) argues that the second objective cannot be justified through recourse to Art. XX(a) or any other provision of Art. XX GATT, since ‘subsistence of indigenous communities’ is not featured anywhere in this provision. He also points out that, instead of introducing an import ban with an IC exception, the EU could have introduced an overall ban on imports of seal products and provided a decoupled income payment to the Inuits, which could lead them to kill fewer seals. This could have been a more efficient way to achieve the EU’s two objectives, without diverting trade, in line with the targeting principle (Bhagwati and Ramaswami, 1963).

Figure 2 plots EU imports of seal products from all non-EU countries, confirming that the EU regime did not eliminate such imports. As discussed further below, the effectiveness of the import ban was reduced not only by the three explicit exceptions (IC, MRM and travellers exceptions), but also two implicit exceptions (for transit and processing activities).

**Figure 2: EU imports of seal products from all non-EU countries (in thousands of euros)**



Source: Eurostat.

<sup>23</sup> Also, volumes are badly monitored by customs, as trade taxes are not usually assessed on volumes. See WTO/UNCTAD (2012), *A Practical Guide to Trade Policy Analysis*. Eurostat trade data do not cover goods in transit, i.e. extra-EU trade where the goods are placed in a customs warehouse or given temporary admission inside the EU borders for trade fairs, temporary exhibitions, tests etc.

According to various sources, the EU seal regime has led to a reduction in world demand and prices for the world market price of raw skins – the price has dropped to less than half that of 2007, according to a report by COWI (2010). A comparison of unit values in the three years before and after the implementation of the regime gives a sense of the evolution of prices of seal products. Due to missing information from Eurostat, this comparison is only possible for some seal products. For various types of imported skins, the unit value of EU imports has indeed fallen. For example, for imports of product CN43023010 ('Whole skins and pieces or cuttings thereof'), the average price of a ton fell from 97720 euros in 2007-2009 to 84000 euros in 2011-2013.<sup>24</sup>

By contrast, the price of processed seal products has increased during the same period. For example, for products CN43031010 and CN43031090 ('Articles of Apparel and Clothing Accessories' made from seal furskins), the average value of a ton of exports increased respectively from 508309 euros to 745232 euros and from 534324 euros to 586487 euros.<sup>25</sup>

### 3.2 *The Political Economy of the EU Seal Regime*

In what follows, we discuss the political economy factors that shaped the EU seal regime. We will show that, responding to pressure by domestic producers, the EU included transit and processing exceptions, which undermined the effectiveness of the import ban.

The Basic Regulation broadly prohibits commercial transactions within the EU involving any seal products, which specifically include:

All products, either processed or unprocessed, deriving or obtained from seals, including meat, oil, blubber, organs, raw fur skins and fur skins, tanned or dressed, including fur skins assembled in plates, crosses and similar forms, and articles made from fur skins.

The initial 2008 proposal for the seal regulation included additional explicit bans on seal products transiting the EU or being exported from the EU.<sup>26</sup> In particular, Article 3 of that proposal stated:

The placing on the market and the import in, transit through, or export from, the Community of seal products shall be prohibited.

In the Explanatory Memorandum of the proposal, the Commission stressed the importance of extending the ban to transit and process trade:

A ban on transit and exports should also ensure that seal products do not transit through the Community nor are produced in the Community for export. Such bans would contribute to render the ban on intra-Community trade more effective, as there is a risk that seal products placed under a transit procedure or allegedly produced for export may be fraudulently brought on to the Community market.

Interestingly, this clause was removed from the Basic Regulation as adopted in 2009, which allowed imports of seal products for re-exportation and processing (Article 3). The exclusion of transit and

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<sup>24</sup> Similarly, the unit value of exporting a ton of product CN43023010 has fallen between 2007-2009 and 2011-2013.

<sup>25</sup> The unit value of importing these products has also increased after the implementation of the EU regime.

<sup>26</sup> European Commission, *Proposal for a Regulation of the European Parliament and of the Council concerning Trade in Seal Products*, COM(2008) 469 final, 2008/0160 (COD) (Brussels, 23 July 2008).

processing trade from the ban may seem surprising, since these exceptions are at odds with the broad objective of the EU regulation. To justify the regulation, the EU stressed that the public moral concerns are ‘not confined to the act of killing of seals as such, but extend also to other acts that take place within the territory of the European Union, such as selling and purchasing seal products, which are deemed morally reprehensible in themselves’.<sup>27</sup> This argument, however, raises the question: by which logic isn’t the transit and processing of seal products for export similarly reprehensible?

To understand why the EU introduced the transit and processing exceptions in its final regulation, it is helpful to notice that, although the EU is a very small player in the production of raw seal products, it has a sizeable transit and processing industry. In 2008, the European Commission carried out a detailed study to assess the potential impact of a ban on seal products. This study emphasized that seal hunting takes place primarily outside EU territory. EU seal businesses are mostly involved in transit activities or in processing products for non-EU markets and would have been harmed by a total trade ban:

A total prohibition of imports and exports would have medium economic impacts on the EU Member States, although those impacts could be significant for Finland and Germany, if such ban would also cover transit trade. ... Denmark and Italy are by far the two largest EU importers of raw fur skin from seal for further processing/sales on the EU market, and will thus also be affected by such regulation. Denmark imports the raw fur skins directly coming from Canada and Greenland (that are not categorised as goods in transit), while Italy imports the raw fur skins from Russia, Finland and the UK (Scotland). Greece also has a noticeable trade in raw skins originating in the two latter range states.<sup>28</sup>

By contrast, the study pointed out that a partial trade ban – not applying to goods in transit (e.g. large transshipments of seal skins taking place in Germany and Finland) and to processing trade businesses (e.g. tanneries and other processing firms in Italy, Denmark and Greece) – would have a minor impact on the EU producers.

Concerns about the EU transit and processing industries were also raised in a Commission-funded report, which stressed that a complete ban on trade in seal products would have a significant negative impact on businesses involved in transit trade and manufacturing of processed seal products (COWI 2010). Had Article 3 of the initial proposal been retained, EU businesses would thus have been hurt. The inclusion of the transit exception benefited auction houses that serve as intermediary between non-EU sellers and non-EU buyers, as well as companies that transport of goods from one non-EU country to another non-EU country. Processing companies also benefited from the modification, which allows them to continue importing raw fur skins and exporting processed seal products to non-EU markets around the world.

When questioned by the WTO Panel about how ‘allowing the transit and processing of seal products within the European Union contributes to the objective of the EU Seal Regime’, the EU stated:

The European Union does not claim that allowing the transit and inward processing of seal products makes a positive contribution to the public morals objective pursued by the EU Seal Regime. To be clear, the EU Seal Regime would make an even greater contribution to that objective if it banned also transit and inward processing, in addition to the placing of seal products on the EU market. A Member is not required to pursue the

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<sup>27</sup> *European Union’s Responses to the Questions from the Panel following the Second Meeting* (23 May 2013) para. 39 (*EU Responses to Panel Questions*).

<sup>28</sup> *Impact Assessment*, p. 135.

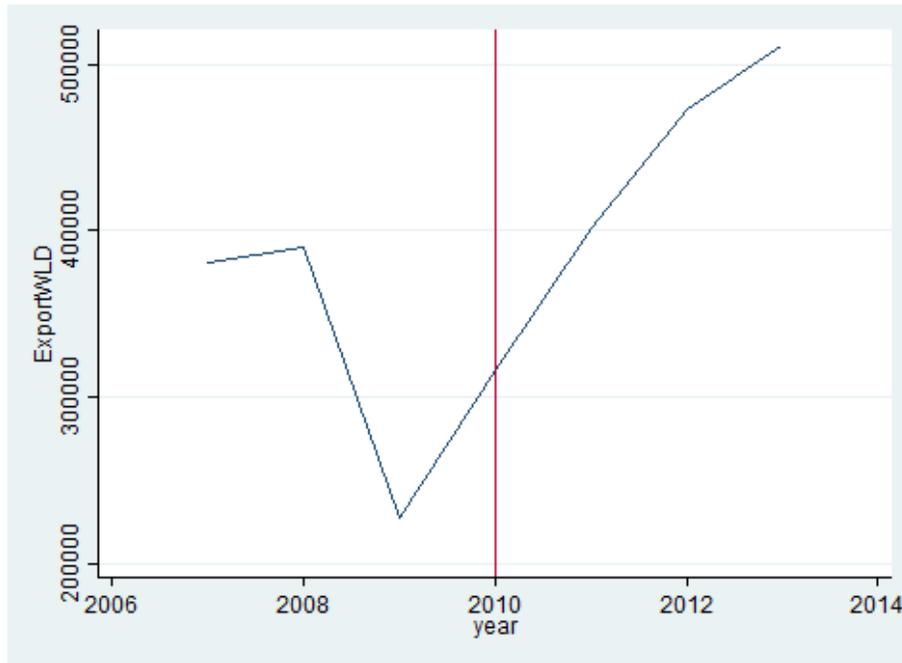
complete achievement of its intended objectives. A Member may choose instead to pursue each of its objectives to a limited extent only, so as to take into account other policy objectives.<sup>29</sup>

The EU also claimed that ‘Allowing the transit of seal products through the EU territory confers no benefit upon the EU processing industry.’<sup>30</sup> This last statement makes little economic sense. As pointed out in the impact assessment by the European Commission, the processing exception clearly benefited firms involved in the seal processing industry in Italy, Denmark and other EU countries.

As discussed above, a complete trade ban would have been more effective at reducing EU imports of seal products. It would also have drastically reduced EU exports of processed seal products. Thanks to the exceptions, EU exports of seal products have actually increased since 2009, as shown in Figures 3 and 4.

Figure 3 includes EU exports of all seal products, identified by the ten CN codes used to generate Figures 1 and 2 above. In Figure 4, we exclude seal meat and raw and dressed furskins, focusing on articles of apparel and clothing accessories made of fur skins identified by CN43031010, CN43031090. Not surprisingly, the increase in EU exports is even more apparent. Our analysis of the evolution of unit values for imports and exports of seal products suggests that EU producers of these processed seal products benefited from a fall in the price of their imported inputs and experienced a slight increase in their export prices.

**Figure 3: EU exports of seal products (in thousands of Euros)**

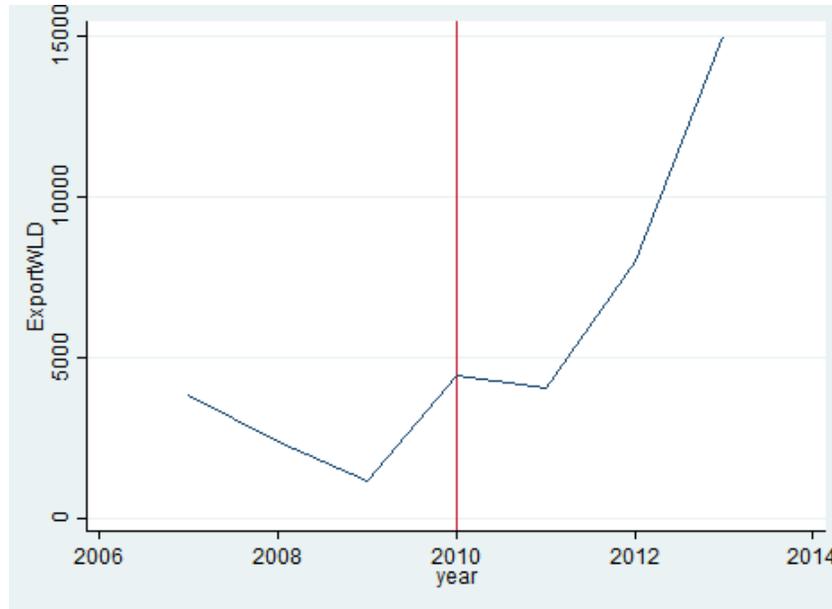


Source: Eurostat.

<sup>29</sup> *EU Responses to Panel Questions*, para. 120.

<sup>30</sup> *Ibid* para. 121.

**Figure 4: EU exports of processed seal products (in thousands of Euros)**



Source: Eurostat.

### 3.3 Public Morals as a Justification for Trade Restrictions

The *EU – Seal Products* dispute raises a key question: can WTO Members impose trade restrictions based on moral or ethical concerns? In the words of Fitzgerald (2011), can ‘local moral, ethical or popular positions trump agreed efforts at economic globalization reflected in various treaty instruments’? Article XX(a) of the GATT 1994 clearly recognizes the possibility of measures necessary to protect public morals trumping core obligations of trade liberalization. Nevertheless, identifying the moral or ethical concerns of a country is complicated. In *EU – Seal Products*, the WTO panel identified a moral concern in the EU about the welfare of seals:

EU seal regime’s objective is to address the moral concerns of the EU public with regard to the welfare of seals, including the incidence of inhumane killing of seals and EU participation as consumers in and exposure to economic activity which sustains the market for seal products derived from inhumane hunts. EU public concerns on seal welfare appear to be related to seal hunts in general and not to any particular type of seal hunts. In other words, all inhumane seal hunts are of concern, not just commercial hunts.<sup>31</sup>

The European Union submitted a series of opinion polls to support the idea that the objective of its import ban – the welfare of seals – is regarded as a matter of moral concern by the EU population. In particular, it stressed:

Confirmation of the public moral concerns at issue is provided by a multicountry survey conducted after the adoption of the measure at issue by Ipsos-MORI in 11 Member States of the European Union (Belgium, France, Germany, United Kingdom, Italy, Lithuania, Netherlands, Poland, Romania, Spain and Sweden) The surveyor summarized the main findings as follows: ‘Over seven in ten adults (72 %) across the 11 European countries surveyed say they support the EU’s ban on the sale of seal products in Europe. The overall ratio of support to

<sup>31</sup> Panel Reports, *EC – Seal Products*, para. 7.410.

opposition across the 11 countries is over 5:1. While the results vary from country to country, they clearly show that the majority of the general public in these European countries supports the EU ban.’<sup>32</sup>

This statement might suggest that support by the overwhelming majority of EU citizens drove EU institutions to introduce the seal regime in 2009. However, a closer examination of the Ipsos-MORI survey shows:

- a) It was commissioned by the International Fund for Animal Welfare, an organization created in 1969 to stop the ‘cruel hunt’ of seals.<sup>33</sup>
- b) It was conducted in 2011, after the EU seal regime was already implemented.
- c) The sample was not representative of the EU population: only eleven EU countries were included; only 500 interviews took place in each country; the interviews were conducted only in English.
- d) Important framing effects: In question 2, individuals were asked whether they support or oppose the EU ban on the sale of seal products in Europe.<sup>34</sup> The preamble to this question was written so as to encourage a positive response (it mentions ‘newborn seals’ and ‘pups’, ‘killed when they are as young as 12 days old’, suffering ‘too much pain or distress’). In Great Britain, half of the survey was conducted with the preamble and half without it. With the preamble, 56% of respondents were ‘strongly opposed’ to a ban. Without the preamble, this figure dropped to 46%, while the ‘Neither/nor’ or ‘Don’t know/no opinion’ options combined increased by 10%.
- e) Ambiguous results: The EU argued that the Ipsos-MORI survey shows that the European public overwhelmingly supports the seal regime. Indeed, 72% of Europeans responded positively to question 2. However, this number should be viewed cautiously, given the framing effects mentioned above. More importantly, the survey shows that the overwhelming majority of Europeans know little or nothing about the issue at stake. When asked in question 1 about their knowledge of seal hunting, 79% of respondents stated that they knew ‘not very much’, ‘nothing at all, but have heard of it’, ‘never heard of it’, or ‘not sure’.

In the WTO, the Panel ruled that governments do not need to provide survey evidence to justify a *prima facie* violation of international trade rules based on GATT Article XX(a). The public morals exception can be invoked taking account of the text of the relevant regulations and their legislative history:

The references above to ‘ethical considerations’ in the Commission Proposal, combined with the reference to a ‘public morality debate’ in the Council of Europe Recommendation, provide evidence that the public concerns about seal welfare constitute a moral issue for EU citizens.<sup>35</sup> ... The legislative history of the measure demonstrates the existence of the EU public’s concerns about seal welfare.<sup>36</sup>

According to Alford, the Panel’s ruling introduces considerable uncertainty:

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<sup>32</sup> First Written Submission by the European Union (21 December 2012), para. 194.

<sup>33</sup> See <http://www.ifaw.org/european-union/node/66>.

<sup>34</sup> See Humane Society International (EU), ‘New Poll Shows Most Europeans Say “NO” to Cruelty from Canada’ (Press Release, 14 July 2011).

<sup>35</sup> Panel Reports, *EC – Seal Products*, para. 7.396.

<sup>36</sup> *Ibid* para. 7.398.

[S]atisfying a WTO panel that a matter is of ethical concern requires little more than the sponsor of the legislation making sure to include appropriate language in the preamble of the draft regulation and raising moral concerns on the floor of the legislature. The test is easily met in the hands of a skillful legislator. The indeterminacy of establishing a genuine moral or ethical public concern regarding a particular practice is fraught with uncertainty. (Alford 2013)

The risk of abuse of the public morals exception has also been stressed by Joost Pauwelyn:

Knowing that (i) public morals is merely about ‘standards of right and wrong conduct’ maintained by people and (ii) a WTO Member can invoke public moral concerns of its people simply by putting these concerns in the text and legislative history of the measure (no need, apparently, to submit evidence or surveys confirming that your people really hold these concerns; if the government says so, that is enough), what stops a WTO Member from saying that its people abhor this or that product (or, for that matter, any imported product)?<sup>37</sup>

Rob Howse’ reply, based on Howse and Langille (2012), states:

(...) In our article, we address the concern you raise about how then to ensure that the measure is genuinely or sincerely directed towards public morals rather than being protectionism with a public morals pretext. One suggestion we have is to look to the form of the measure – is it a ban that applies to both domestic and imported products or is it targeted at imports? It will be easier to show the genuine public morals nature of the regulation of alcohol if it is in the form of a ban that affects negatively significant domestic commercial interests.<sup>38</sup>

Applying this criterion raises some doubts about the applicability of the public morals exception to the EU seal regime. As discussed in Section 3.2 above, the EU Commission initially proposed a comprehensive ban on seal products – which applied to all imported seal products, including those used in the transit and processing industries. Following an impact assessment of the proposed legislation, the EU Parliament and Council removed from the original proposal precisely those clauses that would have generated the largest losses to domestic commercial interests. Looking at the evolution of EU exports of seal products suggests that EU producers involved in processing activities may have actually benefited from the seal regime.

#### 4. Conclusion

In 2009, the EU introduced an import ban on seal products, which it justified based on public moral concerns about the welfare of seals. At the same time, it introduced a number of explicit and implicit exceptions. The economic analysis carried out in Section 3 suggests that: i) these exceptions reduced the effectiveness of the import ban; ii) the IC exception gave rise to trade diversion, shifting imports from Canada and Norway to Greenland; iii) EU exports of processed seal products have actually increased since the implementation of the EU seal regime; and iv) most EU citizens know little or nothing about seal hunting.

These conclusions highlight the difficulties associated with an intergovernmental assessment of national policies relating to moral concerns. As WTO Panels and the Appellate Body have recognized, public morals may differ between WTO members and between sub-groups of a given population. Moreover,

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<sup>37</sup> Joost Pauwelyn, ‘The Public Morals Exception After Seals: How to Keep It in Check?’, *International Economic Law and Policy Blog* (27 May 2014) at <http://worldtradelaw.typepad.com/ielpblog/2014/05/the-public-morals-exception-after-seals-how-to-keep-it-in-check.html>.

<sup>38</sup> Rob Howse, reply to Joost Pauwelyn, *International Economic Law and Policy Blog* (27 May 2014) at <http://worldtradelaw.typepad.com/ielpblog/2014/05/the-public-morals-exception-after-seals-how-to-keep-it-in-check.html>.

trade measures motivated by moral issues may be intertwined with commercial issues and demands to mitigate the impact on local business, complicating the question of whether a measure as ultimately designed and applied is truly necessary to protect public morals. Finally, moral measures may also intersect with other legitimate public policy objectives (whether or not they are explicitly identified in GATT Article XX), such as the protection of the environment, the protection of human life or health, or the promotion of the interests of minority communities. This case demonstrates the complexity of the legal issues that face the WTO dispute settlement system in such circumstances, and the tension between the objectives listed in GATT Article XX and the rationale for any discrimination highlighted under the Article XX chapeau.

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