

Sign in for Full Access (/user/login?destination=community) | **Forgot Password/User ID?**
(https://online.asil.org/asilssa/ssaaauthmain.forget_password?p_referrer=&p_context=CEN) | **Join**
(/membership/membership)

[Log in](#)

[Home \(/\)](#) / [Sealing the Deal: The WTO's Appellate Body Report in EC – Seal Products](#)

Sealing the Deal: The WTO's Appellate Body Report in EC – Seal Products

 [Printer-friendly version \(/print/1089\)](#)

Volume: 18 Issue: 12

By: Rob Howse, Joanna Langille, and Katie Sykes

Date: June 04, 2014



Introduction

On May 22, 2014, the World Trade Organization's (WTO) Appellate Body (AB) issued its report in the *EC – Seal Products* dispute.[1] The decision arose from complaints by Canada and Norway against a legislative scheme adopted by the European Union (EU) in 2009 to prohibit the importation and marketing of seal products (EU Seal Regime).[2]

The AB's decision answers some questions that had been left open by the prior Panel decision in this case (although some doctrinal ambiguity remains, as we discuss below). The decision sets out important new doctrine on *de facto* discrimination under the General Agreement on Tariffs and Trade 1994 (GATT)[3] Articles I:1 (Most-Favored Nation) and III:4 (National Treatment). It also confirms that animal welfare is an aspect of public morals under GATT Article XX(a).

The AB upheld the Panel's finding (although on somewhat different legal reasoning from the Panel) that under GATT Articles I:1 and III:4 some aspects of the EU Seal Regime were discriminatory, but also affirmed the panel's finding that the measure was nevertheless provisionally justified under the public morals exception. However, the AB had several specific concerns about the way in which one feature of the EU Seal Regime, an exception from the general ban for products of traditional indigenous

hunting (the indigenous communities or IC exception), had been implemented. These concerns should be relatively easy for the EU to address. Animal rights supporters have rightly hailed the decision as a significant victory, as it is now clear that the protection of animal welfare for moral reasons can be a legitimate reason to restrict trade.

Finally, the AB made some important observations about the scope of the Agreement on Technical Barriers to Trade (TBT Agreement).[4]

Background: The EU Seal Regime

In 2009, the EU adopted a ban on importing seal products or placing them on the market, together with an implementing regulation setting out exceptions to the ban.[5] The most significant exception was the IC exception.[6]

Canada and Norway challenged the EU Seal Regime at the WTO, saying it discriminates against their industries. Indigenous sealers comprise a very small proportion of the seal industry in Canada, which is carried out mainly by non-indigenous fishermen on Canada's East Coast and in Newfoundland, whereas in Greenland the sealing industry is almost entirely Inuit. Canada and Norway argued that the EU Seal Regime entails *de facto* discrimination, as the seal products made by hunters in Greenland can more easily enter the EU's market, given the higher percentage of indigenous hunters as compared to Canada or Norway.

GATT: *De Facto* Discrimination

The EU Seal Regime does not involve *de jure* discrimination; on their face the rules apply to all seal products, whether originating in the EU or elsewhere. The difference in the effects of the measure is, however, significant. As the AB noted, "virtually all" Greenlandic seal products are eligible for the IC exception, but the vast majority of products from Canada and Norway are not.[7]

The AB had previously ruled, in *US - Clove Cigarettes*, that under the TBT Agreement a measure that has adverse effects on imported products in the form of reduced competitive opportunities is not discriminatory as long as those effects stem exclusively from a legitimate regulatory distinction.[8]

Following *US - Clove Cigarettes*, it was unclear whether the same was true under GATT; some scholars argued that it should be, because adverse impacts that are merely an unintended side effect of a perfectly legitimate regulatory measure should not be prohibited. In *EC - Seal Products*, the EU argued for this position.[9] The AB decisively rejected that argument and held that under both Article I:1 and Article III:4 of GATT all that matters is whether the measure has a detrimental impact on competitive opportunities.[10] The decision is somewhat helpful, in that it answers what had been an open question.

But the full implications remain unclear. Does the AB really mean that every regulation that results in different market opportunities for products from different countries, regardless of the reason for the regulation and no matter how incidental that effect, is a *prima facie* violation of GATT and has to be justified under Article XX? Very few legislative or regulatory distinctions between products would *not* fail that test; safety, environmental and health rules, for example, are quite likely to have a different impact on goods manufactured in different places. The logical implication is that a large universe of laws and regulations is now *prima facie* illegal under WTO law. That outcome seems extreme and hard to reconcile with the intent and text of GATT.

Perhaps in future decisions the AB will step back from this position. Some language in the decision suggests some remaining space for "innocent" regulation to pass muster under Articles I:1 and III:4. For example, the decision is clear that a violation of Article III:4 requires a "genuine relationship"[11] between the challenged measure and any adverse impact on competitive opportunities for imported products, suggesting that no violation arises if the adverse impact is caused by other factors - perhaps including factors within the control of the complainant.

Public Morals, Animal Welfare, and the Article XX Chapeau

The AB upheld the Panel's conclusion that the EU Seal Regime falls within paragraph (a) of GATT Article XX because it is necessary to protect public morals.[12]

Although the complainants did not directly challenge the Panel's findings that the protection of animals is a value of high importance and a matter of public morals in Europe, Canada argued that the EU could regulate in respect of this moral value only if it did so consistently, applying equivalent restrictions in other contexts where animals suffer, like terrestrial hunting and slaughterhouses.[13] The AB rightly rejected this argument.[14] A requirement of consistency would be unworkable in the real

world of policymaking, where different considerations and priorities have to be balanced against one another, and the ideal of treating like moral challenges alike can never be perfectly achieved. The proposed approach would also have dramatically expanded the WTO's powers of legislative review, contrary to the WTO's institutional mandate.

Some commentators have expressed concern that the public morals exception could be used as a catch-all justification for all sorts of protectionist measures, given that WTO Members have (as *EC v Seal Products* confirms) fairly wide latitude to define and apply for themselves the concept of public morals according to their own systems and scales of values.^[15] But built-in safeguards should allay those concerns. The AB's decision emphasizes that animal welfare is a genuinely important moral value in Europe, which seems to be a minimum requirement; a WTO member could not disguise protectionist measures behind some fabricated moral pretext. Furthermore, the chapeau of Article XX prohibits the abuse of Article XX exceptions, including the public morals exception, as a cover for arbitrary or unjustifiable discrimination or disguised protectionism.

The AB determined that the EU Seal Regime does not meet the requirements of the chapeau, because the IC exception operates in a way that amounts to "arbitrary or unjustifiable discrimination."^[16] The AB was concerned about inconsistency in the measure, given that the EU did not seek to ameliorate the animal welfare conditions of indigenous hunts. The AB also noted that ambiguities in the language of the IC exception mean that products from hunts that should really be characterized as commercial could nevertheless slip in under the IC exception. And the AB stated that Europe could have done more to facilitate access of Canadian Inuit to the exception.^[17]

The IC exception might thus be made WTO-compliant with some modifications that would amount to gestures of good faith. Some steps could be taken to encourage improved welfare standards in IC hunts. Any loopholes that might admit products of commercial hunts should be addressed, and steps should be taken to facilitate Canadian Inuit hunters' access to European markets under the IC exception.

Finally, the AB left open the question whether purely extraterritorial public morals measures can be justified under Article XX(a), noting that the EU Seal Regime clearly addresses the morality of persons on EU territory consuming seal products from inhumane commercial hunts.

The Scope of the TBT Agreement

The TBT Agreement applies to "technical regulations", which are defined in a three-part test: (i) the measure must identify a group of products; (ii) it must prescribe either characteristics for those products, or their related processes and production methods; and (iii) compliance must be mandatory.^[18]

The AB found that the EU Seal Regime does not lay down product characteristics and thus is not covered by the TBT.^[19] Whether a particular seal product can be imported into or placed on the market in the EU turns on factors such as the identity of the hunter or the purpose of the hunt. These, the AB stated, are not characteristics of the product itself.

EC v Seal Products is the first case in which the WTO has determined that a measure challenged under the TBT Agreement is *not* a technical regulation. This decision follows a series of cases in which the language defining technical regulations was interpreted very broadly, and the TBT Agreement was applied to measures that at first blush might seem not to meet the test.^[20]

The AB's decision narrows the scope of the TBT Agreement, making clear that it does not apply to all rules. This is a welcome development.

But the scope of the term "technical regulation" is still unclear. The AB did not determine whether the EU Seal Regime prescribes "related processes or production methods" for seal products (a question that the Panel did not answer), because, according to the Appellate Body, such a determination would have required further argumentation from the parties. Even if the identity of the hunter and the purpose of the hunt are not "product characteristics," which does seem fairly self-evident, they are similar in nature to the types of things that are described by the international trade law term of art "processes and production methods" or PPMs. The question of whether animal welfare requirements are PPMs could be significant in future cases.

About the Authors: Rob Howse is Lloyd C. Nelson Professor of International Law at New York University School of Law. Joanna Langille is a Trudeau Scholar and a doctoral candidate at the University of Toronto Faculty of Law. Katie Sykes is an assistant professor at the Thompson Rivers University Faculty of Law and a doctoral candidate at the Schulich School of Law,

- [1] Appellate Body Report, *European Communities â Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R and WT/DS401/AB/R (May 22, 2014) [hereinafter *EC â Seal Products*], available at [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(%20Symbol=%20wt/ds400/ab/r*%20not%20rw*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#\(https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(%20Symbol=%20wt/ds400/ab/r*%20not%20rw*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#\)](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%20Symbol=%20wt/ds400/ab/r*%20not%20rw*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#(https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%20Symbol=%20wt/ds400/ab/r*%20not%20rw*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#)).
- [2] Request for the Establishment of a Panel by Norway, *European Communities â Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/5 (Mar. 15, 2011); Request for the Establishment of a Panel by Canada, *European Communities â Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/4 (Feb. 14, 2011); Regulation (EC) No. 1007/2009, of the European Parliament and of the Council of Sept. 16, 2009 on Trade in Seal Products, 2009 O.J. (L286), 36.
- [3] General Agreement on Tariffs and Trade 1994, 1867 U.N.T.S. 187, available at http://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm (http://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm) [hereinafter GATT].
- [4] Agreement on Technical Barriers to Trade, 1868 U.N.T.S. 120, available at http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm (http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm).
- [5] Regulation (EC) No. 1007/2009, of the European Parliament and of the Council of Sept. 16, 2009 on Trade in Seal Products, 2009 O.J. (L286), 36; Regulation (EC) No. 737/2010, of the European Parliament and of the Council, 2010 O.J. (L216) 1.
- [6] Regulation (EC) No. 1007/2009, of the European Parliament and of the Council of Sept. 16, 2009 on Trade in Seal Products, 2009 O.J. (L286), Art. 3 (âThe placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence. These conditions shall apply at the time or point of import for imported products.â).
- [7] *EC â Seal Products*, *supra* note 1, Â¶ 5.95. This was an Article I:1 issue; Canada and Norway claimed that Greenland is granted advantages they were not, violating the most-favored nation commitment. National treatment under GATT Article III:4 was also in issue because another exception in the EU seal regime, for byproducts of marine management culls, is disproportionately available for products from within Europe, largely because of the way seal hunting is regulated there.
- [8] Appellate Body Report, *United States â Clove Cigarettes Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R (adopted Apr. 4, 2012), Â¶ 182.
- [9] *EC â Seal Products*, *supra* note 1, Â¶ 2.183 (describing the EUâs argument).
- [10] *Id.* Â¶Â¶ 5.94, 5.105, 5.110.
- [11] *Id.* Â¶ 5.101.
- [12] *Id.* Â¶ 5.167.
- [13] *Id.* Â¶ 5.194.
- [14] *Id.* Â¶ 5.201.
- [15] *Id.* Â¶ 5.199 (citing Report of the Panel, *United States â Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Nov. 10, 2004) para 6.461).
- [16] *Id.* Â¶ 5.328.
- [17] *Id.* Â¶ 5.337.
- [18] Appellate Body Report, *European Communities â Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001), Â¶Â¶ 67â70.

[19] *EC v Seal Products*, *supra* note 1, ¶ 5.59.

[20] For example, in *US v Tuna II (Mexico)*, an optional dolphin-safe labeling scheme was found to be mandatory because if vendors did opt to avail themselves of the scheme they were legally required to follow its rules. Appellate Body Report, *United States v Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R (May 16, 2012), ¶ 196.



[\(/insights\)](#)

[Insights Home \(/insights\)](#)

[Sign up to receive Insights via email \(/join\)](#)

Copyright by The American Society of International Law

The purpose of *ASIL Insights* is to provide concise and informed background for developments of interest to the international community. The American Society of International Law does not take positions on substantive issues, including the ones discussed in *ASIL Insights*. Educational and news media copying is permitted with due acknowledgement.

The *Insights* Editorial Board consists of Cymie Payne (<http://www.cymiepayne.org/>), Shana Tabak (<http://law.gsu.edu/profile/shana-tabak/>), and Tania Voon (<http://www.law.unimelb.edu.au/melbourne-law-school/community/our-staff/staff-profile/username/tania%20voon>). Caitlin Behles serves as the managing editor.

Submit an idea for *ASIL Insights*

Persons with expertise in international law who are interested in writing *Insights* are encouraged to submit proposals. Please click the button below to get started.

[Submit an *Insights* Proposal \(/insights-proposal\)](#)

[Guidance for *Insights* Authors
\(/sites/default/files/AUTHORINFORMATIONANDDRAFTINGGUIDELINES.pdf\)](#)

Related Resources

[One View of the Arena: The Agent's Perspective ... \(/blogs/one-view-arena-agents-perspective-international-dispute-settlement\)](#)

[One View of the Arena: The Agent's Perspective ... \(/blogs/one-view-arena-agents-perspective-international-dispute-settlement\)](#)

Re-examining International Law at the Internati... (/blogs/re-examining-international-law-international-regional-and-state-levels)

Steering Africa's Blue Economy: The Role of I... (/blogs/steering-africa%E2%80%99s-blue-economy-role-international-law-lessons-other-maritime-regions)

A Critical Assessment of Reparation in Internat... (/blogs/critical-assessment-reparation-international-law)

© 2016 The American Society of International Law
2223 Massachusetts Ave., NW, Washington DC 20008
Phone +1-202-939-6000
All rights reserved.