EDITORS' INTRODUCTION: TRADE, ANIMAL WELFARE, AND INDIGENOUS COMMUNITIES: A SYMPOSIUM ON THE WTO EC—SEAL PRODUCTS CASE

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The World Trade Organization (WTO) Appellate Body's (AB) decision in the *EC—Seal Products*[1] case of May 2014 has stirred considerable debate among legal academics regarding several of its findings and interpretations. The decision touches upon hotly debated issues in WTO law's reading and application that have broad public policy implications. The policy implications include the ability of WTO members to ban imports based on public morals concerns regarding animal welfare, labor, or other human rights, and thus the implications for exporting countries, and, in particular, developing countries, as well as indigenous groups and other communities. The interpretive issues include the scope of coverage of the Agreement on Technical Barriers to Trade (TBT)[2] and whether processes and production methods (PPMs) fall within it; the assessment of regulatory purpose in the application of non-discrimination provisions; the type of exceptions permitted under the chapeau of Article XX of the General Agreement on Tariffs and Trade (GATT)[3]; the logical structure of the analysis of a measure's necessity in light of less trade restrictive alternatives; and the relationship of WTO law to other public international law such as human rights law. Some scholars have criticized the decision for its opacity and lack of public reason.[4] Others, with some caveats, have largely defended it.[5] This symposium's contributions explore and clarify the issues and provide novel approaches to understanding the case in broader context.

The legislation in dispute was simple enough. The European Union (EU) imposed a ban on the sale of seal and seal-containing products. It was motivated by animal welfare concerns and the desire to respond to European citizens' disapproval of seal hunting. Nowadays, seals increasingly have to be hunted on unstable artic ice. Hunting methods involve shooting seals from a distance, or stunning them, bleeding them, and then skinning

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

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

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

[4] Gregory Shaffer & David Pabian, *The WTO EC-Seal Products Decision: Animal Welfare, Indigenous Communities and Trade*, 109 AJIL 154 (2015).

[5] Robert L. Howse et al., *Pluralism in Practice: Moral Legislation and the Law of the WTO After* Seal Products, 48 GEO. WASH. INT'L L. REV. 81 (2015).

them. Because of unstable ice and weather conditions, there is a concern that inaccurate shots merely injure seals, which will escape and suffer.

The EU allowed for three exceptions to the ban of which two were contested. Inuit communities with a tradition of seal hunting that met certain conditions (such as being partly used or processed by the Inuit community in accordance with its tradition) could sell seal products on the EU market without any limit, and were not subject to animal welfare requirements (the indigenous communities or IC exception). The bulk of Greenland's large-scale seal production comes from Inuit hunts, as Inuit comprise almost 90 percent of Greenland's population. Individual seals hunted in accordance with a marine resources management (MRM) plan to protect local fish stocks could also be placed on the EU market on a non-profit basis, again not subject to any animal welfare regulation (the MRM exception). All seal products from European Member States were from MRM seals, and involved less than 100 seals per year. A third exception, which was not contested, allowed travelers to bring small consignments of seal and seal containing products into the EU for personal use. The regulations also allowed inward processing (for export) and through transit of seal and seal-containing products.[6]

Canada and Norway launched a WTO complaint against the EU, in support of their sealing communities, alleging violations of the TBT Agreement and the GATT. They contested both the EU's general ban and the IC and MRM exceptions. Canada's industries mainly involved rural Atlantic fishing communities and the Canadian Inuit. In essence, the case centered around the following questions: whether the EU measure reflected a genuine public morals concern regarding seal welfare cognizable under WTO law; if so, whether that concern justified imposing a ban against trade in seal and seal-containing products subject to the three exceptions; and, if so, whether the EU's distinction between commercial seal hunts, Inuit seal hunts, and MRM seal hunts was justified and applied even-handedly on a non-discriminatory basis.

A threshold question in the dispute concerned the applicability of the TBT Agreement to the European regulations. There is ambiguity in the definition of the agreement's scope of application, which applies to regulations laying down product characteristics and *their related* processes and production methods (PPMs). Commentators and WTO members have wondered, in particular, whether the TBT Agreement covers measures that regulate only PPMs, as opposed to a product's physical characteristics. Such regulations do not address the material externalities occurring in the importing WTO member from an imported product. Rather, they condition market access on the production process occurring in the producing state and they thus may target issues of a more political (than technical) concern. How the scope of application of the TBT Agreement is interpreted is therefore relevant to the question of whether trade benefits can be conditioned on particular policies, and whether panels and the AB have to confront the task of distinguishing acceptable from inacceptable policy choices, instead of attempting to avoid the issue through interpretation regarding the TBT Agreement's scope of application. The question in relation to the EU regulations was whether a measure that regulates both the composition of products (from seals) and production characteristics (based on the way seals are hunted) falls within the scope of the TBT Agreement. Joel Trachtman's and Don Regan's contributions critically examine the AB's and panel's reasoning on this point for their lack of clarity. In his contribution here, Regan stresses the need to develop a jurisprudence from the ground up that is more predictable in distinguishing measures that fall within the TBT Agreement's scope in light of their "technical content."

Another reason why the Seals case has attracted the academic community's interest is because the AB was squarely confronted with the question of whether its recent case law on the meaning of discrimination under the TBT Agreement applies to GATT nondiscrimination provisions.[7] If so, the AB could expand the public

[6] Panel Report, European Communities—Measures Prohibiting the Importation and Marketing of Seal Products, para. 7.53, WT/DS400/R, WT/DS401/R (Adopted June 18, 2014).

[7] See, for instance, Ming Du, *Treatment No Less Favourable and the Future of National Treatment Obligation in Article III:4 of the GATT 1994 after EC—Seal Products*, 15 WORLD TRADE REV. 139 (2016). For an argument that regulatory purpose still matters after *EC—Seal*

policy exceptions available under the GATT to defend a measure beyond the ten listed in GATT Article XX. It also would then shift the burden of proof to the complainants to show that a measure is discriminatory in light of its regulatory purpose (and thus away from the respondent who otherwise has the initial burden of proof under an Article XX defense). The AB in *EC—Seal Products*, however, clearly decided that its approach under the TBT Agreement is not to be applied under GATT Articles I and II. As Julia Qin discusses, GATT Articles I and III are thus violated as soon as a regulatory measure detrimentally affects imports, making those Articles similar to the rule-like prohibition in Article XI, such that the measures can only be defended under the closed list of exceptions under GATT Article XX.

Joel Trachtman's contribution criticizes the AB for thus creating an inconsistency in the interpretation of the GATT and the TBT Agreement's non-discrimination provisions. He notes that the AB used a creative interpretation of TBT Article 2.1 in the recent *U.S.—Clove Cigarettes*[8] case to protect a country's regulatory autonomy in light of the agreement's object and purpose, but applied a textualist interpretation of GATT Articles I and III. Because GATT Article XX only contains a closed list of exceptions, the GATT and TBT Agreement now exhibit different degrees of permissiveness towards regulatory policies. Since both agreements can apply cumulatively to the same measure, Trachtman notes that the more permissive provision would yield to the more restrictive one, even though this result may violate the drafters' intent. To bring greater coherence to this situation, he hopes that the AB will liberally construe the list of Article XX exceptions in light of the GATT's object and purpose.

The EU seals regulations pursued multiple objectives relating to citizen concerns regarding the protection of animal welfare, the safeguarding of Inuit traditions, and the preservation of local fish stock. In the earlier *Brazil—Tyres*[9] case, the AB seemed to limit the regulator's freedom to pursue multiple objectives. *Brazil—Tyres* suggested that an exception (such as the exception for the Inuit in the EU seals regime constitutes arbitrary or unjustifiable discrimination under the chapeau of Article XX if it does not further the purpose of the underlying ban (such as public moral concerns over the protection of seal welfare). In *EC—Seal Products*, the AB quotes this proposition from *Brazil—Tyres* repeatedly and with seeming approval. Don Regan suggests that it is actually unclear how far the AB means to rely on the *Brazil—Tyres* proposition, and that any degree of reliance is too much. He contends that the proposition should be rejected out of hand since sensible regulation often involves trade-offs between conflicting purposes. Additionally, Regan argues that the *Brazil—Tyres* pronouncement was based on a misreading of *U.S.—Shrimp*[10], and that it was unnecessary to the resolution of *Brazil—Tyres* itself.

The AB's move to examine an exception under the chapeau (in addition to the closed list of Article XX exceptions) avoids the difficulty of relying on the current necessity test under the paragraphs of Article XX to distinguish legitimate regulations since these paragraphs address only single policy objectives. In this connection, Don Regan's contribution suggests a way to carry out the necessity analysis for policies with multiple legitimate purposes. He proposes a decision-theoretic approach through which the WTO member's trade-off

Products because of the centrality of the concept of competition in the nondiscrimination obligation, see Alexia Herwig, *Competition, Not Regulation – Or Regulated Competition? No Regulatory Purpose Test Under the Less Favourable Treatment Standard of GATT Article III:4 Following EC-Seal Products*, 3 EUR. J. RISK REG. 1 (2015).

[8] Appellate Body Report, United States—Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS206/AB/R (Adopted Apr. 24, 2013).

[9] Appellate Body Report, Brazil—Measures Affecting Imports of Retreaded Tyres, WT/332/AB/R (Adopted Dec. 17, 2007).

[10] Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Adopted Nov. 6, 1998).

of policy objectives could be preserved while still inquiring into the availability of less trade-restrictive alternative measures through the use of indifference curves. In that way, "the alternative should leave the regulator at least as well off as the actual measure, *by the regulator's own lights*, *in view of the trade-offs it would make*."

Agreeing with Regan on *Brazil—Tyres*, Julia Qin emphasizes that *EC—Seals Products* is the first case adjudicated by the world trade regime that centers on the conflict between multiple *nontrade* interests, rather than the traditional conflict between a trade interest and a single nontrade value such as public morals, public health, or environmental conservation. A chief reason why this case has attracted so much public attention as well as scholarly interest is because the dispute pitted the welfare of seals against the economic welfare of indigenous communities, thereby implicating the issue of human rights. In Qin's view, the AB struggled to apply the interpretive framework developed in the context of a conflict between trade and nontrade values, and in doing so was unnecessarily constrained by its previous (problematic) analyses of Article XX chapeau. Qin believes that the AB committed a legal error by not referring to the regulatory objective of the IC exception when finding that the IC exception constituted a means of arbitrary and unjustified discrimination under the Article XX chapeau. Furthermore, Qin questions whether the WTO should be involved in making a judgment on how to balance between nontrade interests under the laws of its members. She suggests that the AB should have refrained from rendering such a judgment, and that it could have done so by making a legally sound finding that the IC exception is not discriminatory within the meaning of the Article XX chapeau because the prevailing "conditions" relevant to the regulatory objective of the IC exception are not the same in Greenland and Canada.

Alexia Herwig's contribution uses the AB's approach under the chapeau to prompt an inquiry into the kind of discrimination at issue under the chapeau of Article XX. One of the reasons why the IC exception fell short of the requirements of the chapeau was because the EU did not undertake positive efforts to facilitate market access of the commercially less organized Canadian Inuit to the EU market. She wonders whether the AB thereby required positive accommodation of particularly marginalized economic actors. While such positive trade discrimination would be inconsistent with the idea that interferences with competition created by the importing WTO member are the target of WTO law, such positive accommodation would be consistent with human rights reasoning related to protecting minority rights effectively. She shows that the IC exception creates a market entirely through governmental intervention with the purpose of advantaging disadvantaged communities. When this is the case, she maintains that the chapeau of Article XX requires extending that special advantage to all those who are disadvantaged in order to preserve an equal competitive playing field. She contends that the AB did not therefore depart from the logic of addressing governmental interferences in competition in this part of its decision.

Adopting a more constitutionalist perspective, the contribution by William Moon and Alec Stone Sweet highlights how international courts and in this case the AB have found a way to maneuver around the legitimacy problems that come with judicial review of member's public policy-based exceptions to treaty obligations. They maintain that international courts in general, and the AB in this case, rely on analysis of states' practice and international legal instruments as proxies for a genuine international legislative process to assess the extent of consensus around particular policy choices. Sufficient consensus weighs in favor of the justifiability of a WTO member's public policy-based regulation. Their analysis suggests that the international legal instruments regarding indigenous community rights had an important indirect influence on the outcome of the *EC—Seal Products* case.

The case implicated several non-WTO international legal instruments relating to the rights of indigenous peoples. To the disappointment of many, the AB did not formally use those instruments in support of its interpretation and application of the WTO agreements. In practice, as Michael Fakhri shows, "the WTO legitimized the European Union, instead of indigenous communities themselves, as the body that gets to define what constitutes legitimate hunting," in this case hunting that affects seal suffering. However, as Fakhri's analysis

also shows, because the AB decision affirmed the justifiability of preserving the EU market for indigenous communities, in practice, it could empower indigenous communities and support the objective of protecting indigenous rights pursued by international human rights instruments. As Fakhri notes, trade law thereby could become an instrument in the menu of institutional options to advance claims over indigenous rights and sovereignty in the Arctic. The AB decision could spur Canada to advance the cause of traditional indigenous rights on this issue notwithstanding Canada's tense relationship with its own indigenous communities and its refusal to sign the UN Declaration on Indigenous Peoples Rights[11]. As a result, indigenous communities could become more involved in decisions over the design and implementation of revised EU legislation.

The *EC—Seal Products* case illustrates that the balancing of trade and multiple non-trade concerns raises difficult interpretive questions under WTO law, as well as challenges concerning the institutional legitimacy of a WTO tribunal engaged in balancing exercises. It also shows that domestic concerns and international legal guarantees related to human rights, such as the protection of indigenous communities, potentially can be advanced through the WTO's dispute settlement system. This development may provide an opportunity for the betterment of the human condition through law, but it also poses the risk of politically inflected dispute settlement decisions written to avoid controversies, with the result that they are doctrinally poorly reasoned and produce ambivalent results, constituting a diplomat's jurisprudence in highly technical garb.

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