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Case Review

European Communities – Measures Prohibiting the Importation and Marketing of Seal Products[1]

1. INTRODUCTION

The case of *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seal Products)*[2] raised the issue of whether the EU Seal Regime[3], which prohibits the importation and marketing of seal products, was justified under the right to protect public morals. Besides this issue, the complainants – Canada and Norway – challenged the discriminatory nature of the ban, and the exceptions thereof, which allegedly discriminated against their industries. In May 2014, the Appellate Body (AB) issued its decision in a very complex and controversial case. Although on different grounds, the AB upheld the Panel's finding that the EU Seal Regime was in some respects discriminatory under Articles I:1 (Most-Favoured Nation) and III:4 (National Treatment) of the General Agreement on Tariffs and Trade 1994 (GATT). But, the AB confirmed the Panel's finding that the EU Seal Regime was justified under Article XX (a) of the GATT public morals exception. The AB, however, found that the EU Seal Regime was not applied in a manner that met the requirements of the Chapeau Article XX of the GATT. The AB asserted that the design of the EU Seal Regime could lead to the arbitrary and unjustifiable discrimination between countries where the same conditions for seal welfare prevailed. In addition to this, the AB decision provides an interpretation of *de facto* discrimination under Articles 1:1 and III:4 of the GATT, as well as shedding some light on the constitution of 'technical regulations' according to the WTO Agreement on Technical Barriers to Trade (TBT).

The significance of the AB decision lies in the recognition of animal welfare as a public moral basis for the legitimate restriction of trade. As such, intrinsic moral concerns are acknowledged as non-instrumental rationales for the establishment of trade restrictive measures.[4] The decision, which was received with great enthusiasm by animal welfare groups,

[1] WTO Appellate Body Report, WT/DS400/AB/R (Canada) and WT/DS401/AB/R (Norway), 22 May 2014 (hereinafter *EC – Seal Products* AB Reports).
[2] *Ibid*.
[3] Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products; Commission Regulation (EU) No. 737/2010 laying down detailed rules for the implementation of Regulation (EC) No. 1007/ 2009 of the European Parliament and the Council on trade in seal products.
[4] See: Robert Howse and Joanna Langille, 'Permitting Pluralism: The *Seal Products* Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values', the Yale Journal of International Law, 2012, 37: 367-432.

has arguably raised concerns about the abuse of the public morals exception for protectionist measures. The present note comments the implications of the decision with regard to the public morals exception, the interpretation of *de facto* discrimination in the GATT and the scope of the TBT Agreement. For such purposes, the case note has been divided into four sections. After the introduction, section two briefly presents the background of *EC – Seals Products*. Section three presents the key findings of the case in three subsections that delve into the rationales supporting the AB decision and their implications, i.e. technical regulation under the TBT Agreement, *de facto* discrimination in the GATT, along with the public morals exception and the Chapeau test under Article XX of the GATT. Section four presents some final remarks.

2. BACKGROUND OF *EC – SEAL PRODUCTS*

The basis for the claim giving rise to the AB decision is the EU Seal Regime, which was adopted by the European Union (EU) in 2009 to prohibit the marketing and the importation of seal products.[5] The EU Seal Regime comprises the Basic Regulation and the Implementation Regulation, which as an 'integrated whole' establishes the rules concerning the placing on the market of seal products.[6] As such, the EU Seal Regime prohibits the placing on the EU market of seal products but for three exceptions: a) seal products obtained from seal hunts by Inuit and other indigenous communities for the purpose of contributing to their subsistence (IC exception); b) seal products resulting from by-products of hunting that are regulated by national law, with the sole purpose of the sustainable management of marine sources and on a non-profit basis (MRM exception); and, c) seal products imported occasionally for the personal use of travellers and their families (Travellers exception)[7]. For the purposes of the MRM exception and the Travellers exception, Article 3 of the Basic Regulation adds that seal products should not be imported or marketed for 'commercial reasons'.

Canada and Norway argued that the EU Seal Regime violated obligations under the GATT and the TBT Agreement.[8] Both complainants claimed that the IC and MRM exceptions included in the EU Seal Regime were inconsistent with non-discrimination obligations under Articles I:1 and III:4 of the GATT. Canada also alleged that these exceptions violated non-discrimination obligations under Article 2.1 of the TBT Agreement. For the complainants, the IC and MRM exceptions accorded seal products from Canada and Norway less favourable treatment in comparison to like seal products of domestic origin, namely from Sweden and Finland. Likewise, the complainants contended that the IC and MRM exceptions accorded seal products from Canada and Norway less favourable treatment than the one accorded to foreign products, in particular, from Greenland. Canada and Norway alleged that the EU Seal Regime

[5] *EC – Seal Products* AB Reports, para. 1.2.
[6] Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in Seal Products (Basic Regulation); and, Commission Regulation (EU) No. 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on trade in seal products (Implementing Regulation).
[7] Article 3 of the Basic Regulation; Also see: WTO Panel Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* WT/DS400/R, 25 November 2013 (Canada) and WT/DS401/R, 25 November 2013 (Norway), para. 7.1 (hereinafter *EC – Seal Products* Panel Reports).
[8] *Ibid*. para. 7.2.

was inconsistent with Article 2.2 of the TBT Agreement because it was more trade restrictive than necessary for the purpose of fulfilling a legitimate objective. Along with these claims, the complainants asserted that certain procedural aspects of the measures were inconsistent with Article 5 of the TBT Agreement regarding the requirements for conformity assessment procedures. Also, Canada and Norway alleged that the IC, MRM and Travellers exceptions were inconsistent with Article XI:1 of the GATT due to the manner in which they imposed quantitative restrictions on trade. As such, Norway argued that if the measures were to be found inconsistent with Article XI:1 of the GATT, consequently the measures would also violate Article 4.2 of the Agreement on Agriculture. Both Canada and Norway claimed that the application of the EU Seal Regime nullified or impaired benefits accrued to them under the covered agreements according to Article XXIII:1(b) of the GATT.[9]

On 25 November 2013, the Panel Reports were circulated to Members of the World Trade Organisation (WTO). Firstly, with respect to Canada's and Norway's claims under the TBT Agreement, the Panel concluded that the EU Seal Regime was a 'technical regulation'. Moreover, as alleged by Canada, the Panel concluded that the IC and MRM exceptions, which were included in the EU Seal Regime, infringed Article 2.1 of the TBT Agreement because the negative impact produced by the exceptions did not stem exclusively from legitimate regulatory distinctions. Nevertheless, the Panel found that the EU Seal Regime was consistent with WTO obligations under Article 2.2, since the regime fulfilled the objective of addressing EU public morals concerns on seal welfare, and there were no potential alternative measures in place that could provide an equivalent or greater contribution to the fulfilment of the objective. The Panel also found that the conformity assessment procedures under the EU Seal Regime did not allow trade in qualifying products as of the date of entry into force of the regime and thus, the EU had infringed its obligations under Article 5.1.2. However, the complainants did not demonstrate that the EU had breached its obligations under Article 5.2.1.18.[10]

Secondly, with regard to Canada's and Norway's claims under the GATT, the Panel found that the IC exception was inconsistent with Article I:1 because seal products originating from Greenland were granted an advantage not accorded 'immediately and unconditionally' to like products from Canada and Norway. Likewise, the Panel concluded that the MRM exception was inconsistent with the national treatment obligation under Article III:4 of the GATT because imported seal products were accorded a treatment less favourable that the one granted to domestic seal products. Furthermore, the Panel found that the IC, MRM and the Travellers exceptions did not violate Article XI:1 in terms of quantitative restrictions on trade. But, the Panel also found that the IC and the MRM exception were not justified under Article XX (a) of the GATT as a result of the failure to fulfil the requirements under the Chapeau of Article XX. The Panel concluded that the IC and MRM exceptions were not justified under Article XX (b) because the EU did not make a prima facie case for its claim concerning the necessity of the exceptions to fulfil the objective of protecting human, animal or plant life health.[11] Also, the

[9] *Ibid*. para. 7.2.
[10] *Ibid*. para. 8.2(Canada) and para. 8.2 (Norway).
[11] *Ibid*. paras. 8.3 (Canada) and 8.3 (Norway).

Panel rejected Norway's claim with regard to violations to the Agreement on Agriculture,[12] as well as refraining from examining the complainants' claim under Article XXIII:1 of the GATT.[13] Finally, the Panel concluded that the EU had nullified and impaired benefits accruing to Canada and Norway to the extent to which the EU had acted inconsistently with Articles 2.1 (Canada) and 5.1.2 of the TBT Agreement, and Articles I:1 and III:4 of the GATT.[14]

Canada and Norway and the EU appealed certain issues of law and legal interpretation in the Panel's Reports. Canada and Norway tried to overturn the Panel's finding that the EU Regime was provisionally necessary to address the public morals concerns of EU citizens regarding seal welfare. Both Canada and Norway, within their own right, contested the Panel's finding regarding the objective of the EU Seal Regime and thereby, the assessment of the contribution of such a regime to the objective. Conversely, the EU contended that the Panel erred in finding that the measures at issue, in particular the IC exception, was designed and applied in a manner inconsistent with the Chapeau of Article XX of the GATT. The EU alleged that the Panel erred in concluding that the EU Seal Regime is a 'technical regulation'. Furthermore, the EU argued that, conversely to the Panel finding, the legal standards of non-discrimination under Article 2.1 of the TBT Agreement apply equally to claims under Article I:1 and III:4 of the GATT.[15]

3. KEY FINDINGS OF THE APPELLATE BODY

On appeal, the AB reviewed a broad range of claims and counter-claims raised by Canada, Norway and the EU. The present case note delves into three key findings as a means of explaining generally the implications of the case. Thus there will be aspects of the decision that will not be covered by this case note.

3.1. Technical Regulation under the TBT Agreement

A 'technical regulation' within the meaning of Article 1.2 of the TBT Agreement has to fulfil a three-tier test, i.e. the panels have to assess a) whether the measure establishes product characteristics; b) whether it determines their related processes and production methods (inclusive of applicable administrative provisions) and, c) whether compliance must be mandatory.[16] In the present case, the Panel found that the EU Seal Regime fulfilled the three-tier test and thus, it was a 'technical regulation'. The rationale being that the EU Seal Regime applies to an 'identifiable group of products', namely, seal products. In addition to this, the Panel found that, as well as imposing mandatory compliance, the measure set forth product characteristics for all products that might contain seal, as well as applicable administrative provisions for the products qualifying under the exceptions.[17] On appeal, the EU contended the Panel's finding that the measure establishes products characteristics as well as applicable

[12] *Ibid*. para. 8.4 (Norway).
[13] *Ibid*. paras. 8.4 (Canada) and 8.5 (Norway).
[14] *Ibid*. paras. 8.5 (Canada) and 8.6 (Norway).
[15] *EC – Seal Products* AB Reports, para. 3.1.
[16] Agreement on Technical Barriers to Trade (Annex I.1), in *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge University Press, 1994).
[17] *EC – Seal Products* Panel Reports paras. 7.111 and 7.125.

administrative provisions and therefore, the determination of the measure as a 'technical regulation'.[18]

In *European Communities – Measures Affecting Asbestos and Asbestos Containing Products,* the AB clarified that characteristics of a product are those which constitute 'objectively definable "features", "qualities", "attributes", or other "distinguishable marks" of the product'.[19] The AB found that the EU Seal Regime did not set out product characteristics because the market access conditions under the exceptions were not features for such purposes. As such, the AB found that the type of hunter and the type and purpose of the hunt identified in the exceptions did not set out 'objectively definable features' as concluded by the Panel.[20] Whilst the ban on seal-containing products could be understood as establishing certain objective features or characteristics, this prohibition constitutes only one aspect of the EU Seal Regime.[21] The EU Seal Regime ought to be analysed as a whole taking into account both the prohibiting (ban) and the permissive elements (the IC, the MRM and the Travellers exceptions) of the measure. In so doing, the AB noted that the prohibition on seal-containing products does not rest solely on their seal content, but on conditions such as the identity of the hunter or the type and purpose of the hunt.[22]

In this context, the AB ruled that the EU Seal Regime does not lay down 'applicable administrative provisions' through the IC, MRM and Travellers exceptions. In this respect, the AB argued that the clause 'including the applicable administrative provisions' is understood as a 'governmental mandate in relation to either product characteristics or their related processes and productions methods'.[23] Given that the AB had already found that the EU Seal Regime did not lay down product characteristics, the administrative provisions cannot be found to be applicable to product characteristics. For the AB, in the present case, the administrative provisions are a means for identifying the products qualifying under the EU Seal Regime exceptions, but not a technical regulation as such.[24]

Prior to the ruling in *EC – Seal Products,* the measures challenged under the TBT Agreement were generally characterised as a technical regulation. In this regard, the jurisprudential implication of *EC – Seal Products* is that it sets forth limits to the broad interpretation of technical regulations. In addition to restricting the interpretation of 'objectively definable features' for the purpose of identifying product characteristics, the AB interpretation clarifies the link between the 'applicable administrative provisions' and the product characteristics. Indeed, the AB notes that panels should make the determination of whether a measure is a technical regulation taking into account the particularities of the case,[25] for which they could seek guidance from other provisions in the TBT Agreement, for example, 'standards',

[18] *EC – Seal Products* AB Reports, para. 2.151 (referring to the European Union appellee's submission para. 88-90).
[19] WTO Appellate Body Report, WT/D135/AB/R, 12 March 2001, para. 67.
[20] *EC – Seal Products* AB Reports, para. 5.47.
[21] *Ibid*. para. 5.39.
[22] *Ibid*. para. 5.41.
[23] *Ibid*. para. 5.52.
[24] *Ibid*. para. 5.57.
[25] *Ibid*. para. 5.60 (referring to WTO Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Mexico)*, WT/DS381/AB/R, 16 May 2012, para. 88.

'international standards' and 'conformity assessment procedures'.[26] Unfortunately, the meaning of technical regulation regarding 'their related processes or production methods' will remain unclear. As the AB noted, this phrase has not yet been interpreted in the WTO.[27] Both Canada and Norway had requested the AB to complete the analysis of whether the measure constituted a technical regulation because the EU Seal Regime set out 'related processes and production methods'.[28] The Panel found that in order to complete the analysis and interpret the phrase, there would need to be further argumentation from the participants.[29] Bearing in mind the AB conclusions, the Panel findings under the TBT Agreement were declared moot and of not legal effect. Whilst the AB provided instruments for the future analysis of technical regulations, still more clarity is needed. Arguably, the exceptions in the EU Seal Regime have traits that at least in some respects could be characterised as processes and production methods – for example, the identity of the hunter and the type of hunt. Thus it seems likely that this question will arise in future claims.

3.2. *De Facto* Discrimination under the GATT 1994

The AB clarification of *de facto* discrimination derives from the Panel's finding that the legal standards for the non-discrimination obligations under Article 2.1 of the TBT Agreement does not apply equally to claims under Articles I:1 and III:4 of the GATT. On appeal, the EU requested the AB to reverse this finding as well as the Panel's conclusion that the EU Seal Regime is inconsistent with Article I:1 of the GATT. Specifically, the EU argued that, if a measure were to be found to have a detrimental impact on competitive opportunities under the GATT, it would be necessary to consider the rationale of the impact, i.e. whether the negative impact stemmed exclusively from a legislative regulatory distinction.[30] The AB upheld the Panel's findings and therefore, maintained that from the text of Article I:1 and III:4 of the GATT there was no provision to support that for the purpose of determining inconsistency with such articles, there was a need to demonstrate that 'the detrimental impact of the measure on competitive opportunities for like imports does not stem exclusively from a regulatory distinction'.[31]

At the heart of this argument is the interpretation of *de facto* discrimination. In the present case, the AB confirmed that the EU Seal Regime *de facto* discriminated against Canadian and Norwegian imports, because 'virtually all' Greenlandic products were likely to have access to the EU market under the IC exception, in comparison to those from Canada and Norway.[32] In *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, the AB found that in cases of *de facto* discrimination, the mere existence of a detrimental impact on competitive opportunities between domestic and imported like products does not have to constitute 'less favourable treatment' under Article 2.1 of the TBT Agreement.[33] According to

[26] *EC – Seal Products* AB Reports, para. 5.60.
[27] *Ibid*. para. 5.67.
[28] *Ibid*. para. 5.61.
[29] *Ibid*. para. 5.41.
[30] *Ibid*. para. 5.89.
[31] *Ibid*. para. 5.90.
[32] *Ibid*. paras. 5.95 and 5.117.
[33] WTO Appellate Body Report, WT/DS406/AB/R, 4 April 2012, para. 182 (hereinafter *US – Clove Cigarettes*).

the AB, for such a determination, it is necessary to assess whether the detrimental impact 'stems exclusively from a legitimate regulatory distinction'.[34] However, *US – Clove Cigarettes* is unclear whether this analysis extends to the GATT. Furthermore, the AB in *US – Clove Cigarettes* considered that the TBT Agreement and the GATT overlapped and were similar in scope; therefore, both agreements had to be interpreted in a coherent manner.[35] For the AB, the principle that WTO agreements ought to be interpreted in a coherent and consistent manner does not mean that the legal standards for non-discrimination obligations under the TBT Agreement have identical meaning to those of the GATT. In the AB's view, the balance between the non-discrimination obligations in the GATT is found in the Member's rights to regulate under Article XX of the GATT.[36] Although the TBT Agreement does not have a general exception clause, such a balance is found in terms of the fifth recital which prevents unnecessary restrictions to trade and the Member's right to regulate under the sixth recital.[37] Thus, for the purposes of Article I:1 and III:4 of the GATT, the discriminatory treatment does not lie merely in the regulatory distinctions between like products, but most importantly, derives from the distortion of the conditions of competition between like products from all Members (in the case of Article I:l). Also, it derives from the distortion of competitive opportunities of imported products as compared to domestic like products (in the case of Article III:4).[38] As such, the AB confirmed that the EU Seal Regime is inconsistent with Article I:1 of the GATT because the measure does not provide 'immediately and unconditionally', the same market access advantages to products from Canada and Norway, as compared to the advantages accrued to Greenlandic seal products.[39]

The AB decision in *EC – Seal Products* has shed some light with regard to *de facto* discrimination. Yet the determination of discriminatory treatment based on the distortion of competitive opportunities under Articles I:1 and III.4 of the GATT is arguably broad in scope. It is worth noting that the AB emphasised the interpretation in *Thailand – Cigarettes (Philippines)*, in which the AB established that under Article III.4 of the GATT the 'genuine relationship' between the measure at issue and the detrimental impact on conditions of competition of like products had to be proven.[40] Therefore the adverse impact needs to be attributable to the measure at stake,[41] in the present case, the EU Seal Regime. The issue is the extent to which the broad interpretation of *de facto* discrimination will give rise to claims under the WTO. Even when the connection between the adverse impact and the challenged measure would need to be proven, trade rules have different consequences according to factors such as the place of manufacture. Certainly, restrictive measures would have to be justified under the Member's rights to regulate under Article XX of the GATT. However, it seems that in the light of this interpretation, the future development of *de facto* discrimination remains to be seen.

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[34] *US – Clove Cigarettes*, para. 182.
[35] *Ibid*. para. 91.
[36] *EC – Seal Products* AB Reports, para. 5.125.
[37] *Ibid*. para. 5.127 (referring to *US – Clove Cigarettes* para. 96).
[38] *EC – Seal Products* AB Reports, para. 5.95.
[39] *Ibid*. paras. 5.88 and 5.109.
[40] *Ibid.* para. 5.104. (referring to WTO, Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, 17 June 2011).
[41] *Ibid*. para. 5.105 (referring to *US – Clove Cigarettes*).

3.3. Article XX of the GATT 1994: The Public Morals Exception and the Chapeau Test

In what is deemed a controversial decision, the Panel found, and the AB confirmed, that the objective of the EU Seal Regime is 'to address EU public morals concerns regarding seal welfare'.[42] The AB also upheld the Panel's finding that the EU Seal Regime was provisionally necessary to address the objective according to Article XX of the GATT.[43] Nevertheless, the AB concluded that the measure, in particular the IC exception, was designed and applied in an 'arbitrary and unjustifiable' manner and thus, the EU Seal Regime did not satisfy the requirements set out in the Chapeau of Article XX of the GATT.[44]

In that context, both Canada and Norway appealed the Panel's conclusion that the EU Seal Regime was necessary to protect public morals under Article XX (a) of the GATT. Article XX (a) of the GATT requires an assessment of the necessity of the measure to protect public morals: a) the importance of the objective; b) the contribution of the measure to the objective; and c) the trade-restrictiveness of the measure.[45] As such, the Panel's conclusion that the objective of the EU Seal Regime was to address public morals concerns was only indirectly argued by both Canada and Norway.[46] Indeed, the appellants did not contend the important value and interest of animal welfare. However, Norway claimed that the Panel should have found that the EU Seal Regime also pursued other objectives, specifically, the interests in the exceptions. For the AB, the Panel rightly concluded that the main objective of the EU Seal Regime was to address public morals concerns whilst accommodating other interests as a means of extenuating the impact of the ban on those interests.[47] Furthermore, contrary to Norway's claim that the Panel should have justified those aspects of the EU Seal Regime infringing Articles I:1 and III.4 of the GATT, the AB confirmed that the EU Seal Regime had to be justified under Article XX of the GATT taking into account both the prohibitive (ban) and the permissive (exceptions) elements of the measure.[48]

On appeal, Canada raised a claim regarding the Panel's omission to assess the 'risk to public morals against which the EU Seal Regime seeks to protect'. In other words, Canada argued that in assessing the standard of right and wrong in the EU, it was necessary to examine whether seal hunts exceeded the level of animal suffering that was tolerated for other animals, particularly for slaughterhouses and wildlife hunts.[49] Following *US – Gambling*, the AB concluded that there is flexibility for Members to determine the level of protection according to their systems and scales of values, even if dealing with similar interests of moral concern.[50]

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[42] *EC – Seal Products* AB Reports, para. 5.167.
[43] *Ibid*. para. 5.289, 5.290.
[44] *Ibid*. para. 5.338, 5.339.
[45] *Ibid*. para. 5.169 (referring to AB decisions in WTO Appellate Body Report, *Korea – Measures Affecting Imports of Fresh and Frozen Beef*, WT/DS161/AB/R and WT/DS169/AB/R, 11 December 2000, para. 164; WTO Appellate Body Report, *US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* 12 March 2001, para. 306; WTO Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, 3 December 2007, para. 182).
[46] *EC – Seal Products* AB Reports, paras. 5.141, 5.199.
[47] *Ibid*. para. 5.161.
[48] *Ibid*. paras. 5.192, 5.193.
[49] *Ibid*. para. 5.194.
[50] *Ibid*. paras. 5.214 - 5.200.

The strict consistency in assessing public morals concerns issues amongst different areas would certainly reduce the right of Members to determine their own policies as appropriate. Such a restriction does not seem to be desired. Most importantly, it seems that the establishment of a strict consistency assessment would have gone beyond the AB's mandate under the Dispute Settlement Mechanism.

The *EC – Seal Products* confirms that Member States have a broad scope in determining their policies according to their own set of values and thereby, their public morals. Arguably, this decision has given rise to concerns about the potential abuse of the public morals exception as a protectionist measure. The issue is the extent to which Member States could use the public morals exception to restrict trade – for instance, based on public morals concerns regarding the means of production in another Member State. Perhaps Member States will make use of the public morals exception to take protectionist measures. How the public morals exception develops in the future remains to be seen. But, even if this were the case, Member States would have to demonstrate the significance of the objective and the necessity of the measure to fulfil such an objective. The public moral exception, as any other exception under Article XX of the GATT, has to be proven to be provisionally necessary to address the objective, in addition to be justified under the Chapeau of Article XX of the GATT. In the present case, for instance, the AB concluded that, although the EU Seal Regime was provisionally necessary because it contributed to a certain extent to the fulfilment of the objective, the EU had designed and applied such a measure in an arbitrary and unjustified manner to countries in which similar conditions for seal welfare prevailed.[51] Specifically in the context of the IC exception, the AB concluded that the EU had not demonstrated that it had taken steps to reduce the suffering for seals in the IC exception as compared to commercial hunts. Also, the language of the IC exception gave rise to ambiguity regarding the 'subsistence' and 'partial use' criteria that could allow the importation and placing on the market of seal products that would otherwise be characterised as commercial hunts.

Finally, the 'jurisdictional limitation' in Article XX (a) of the GATT, and thereby the extent of such a limitation, remains unanswered. The AB recognised that the design of the EU Seal Regime aimed to address seal hunting both inside and outside the EU, as well as the EU public's seal welfare concerns. But, the AB refrained from examining the question of whether there could be an 'implicit jurisdictional limitation' regarding Article XX (a) of the GATT because the parties did not raise the issue on appeal.[52] Indeed, the parties conceded that there was a sufficient nexus between the public morals concerns and the hunting activities addressed by the EU.[53] However, the issue at stake is whether trade could be legitimately restricted on the grounds of external public morals measures, and if so, the extent to which this would be possible. Accordingly, this question may be raised in future claims.

[51] *Ibid.* para. 5.338.
[52] *Ibid.* para. 5.173.
[53] Footnote 1191 of *EC – Seal Products* AB Reports.

4. CONCLUSION

The *EC – Seal Products* case sets precedent on the recognition of animal welfare concerns as a legitimate reason to restrict trade. In spite of the concerns about the abuse of the public morals exception under Article XX (a) of the GATT, the decision has to be interpreted in light of the particular characteristics of the case. In the present case, the AB recognised that for the EU, animal welfare, specifically seal welfare, was of significant interest and value. Despite appealing certain aspects of the Panel's decision, the parties did not contend the interests and values in the protection of animal welfare as such. As discussed, Member States would have to justify their right to regulate by establishing the necessity of the trade measure as a means of fulfilling the objective of protecting public morals, in addition to fulfilling the requirements of the Chapeau under Article XX of the GATT. Therefore, raising public morals concerns as an exception would have to be subjected to further tests. Also, of great interest is the interpretation of *de facto* discrimination under Article I:1 and III:4 of the GATT. The AB has given a broad interpretation in which discrimination arises from the distortion of competitive opportunities. This interpretation provides some clarity. But, as it has been noted, the future development of *de facto* discrimination remains to be seen. Although Member States have to justify their trade restrictive measures under their right to regulate as set out in Article XX of the GATT, there are measures that could possibly distort competitive opportunities indirectly.

Finally, the AB has limited the scope of the TBT Agreement. The AB has shed some light on how the panels would have to assess in future cases whether a measure is a technical regulation. However, the question of whether the requirements for animal welfare, such as those established in the EU Seal Regime, constitute 'processes and production methods' was left unanswered. The AB also left open the question of whether there is an 'implicit jurisdictional limitation' in Article XX (a) of the GATT. But overall, the decision has set precedent concerning animal welfare, which has been welcomed by campaigning groups. However, it seems to be too early to see the full implications of the case.

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