

The WTO Seal Products Dispute: A Preview of the Key Legal Issues

By Simon Lester

Introduction



The recent adoption by the European Parliament and Council of a Regulation banning marketing and importation of all seal products from commercial hunting^[1] has triggered open opposition by Canada, Norway, and other countries with seal hunting traditions. Canada requested dispute settlement consultations under the World Trade Organization (WTO)

Agreement concerning this legislation – the WTO's 400th trade dispute – and was quickly joined by Norway.^[2]

It is hard not to be emotional about the underlying issues, whichever side you may be on. For those supporting the ban, it is an important step against the cruel and inhumane practice of clubbing seals to death. But for those who hunt seals, the hunt is their livelihood, and they claim it is practiced in a manner that makes every effort to be responsible and is no worse than many other common practices related to killing animals.

Background

The debate over trade in seal products has been ongoing since the 1980s, when the European Council (EC) adopted a Directive banning importation of seal pups' skins and related products, and Canada ended commercial hunting of "whitecoat" seal pups.^[3] The latest EU ban, which covers all products of commercial seal hunting, and the recent WTO consultation requests filed in response, may open a new chapter in the debate. As the chances of adjudication in the WTO's dispute settlement system increase, the role of WTO law becomes more important. There is still time for negotiation. Indeed, the complainants' preferred option may be to reach a compromise settlement with the EU on these issues; for example, the parties could reach agreement on humane standards for harvesting seals, thus allowing the export of seal products to the EU as long as the standards are met. Nonetheless, as the consultation process moves forward, it is worth examining the relevant WTO law.

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WTO Provisions

The key provisions cited in the requests for consultations are the following: General Agreement on Tariffs and Trade (GATT) Article XI:1 (Import Restrictions); GATT Article I:1 (Most Favored Nation Treatment); GATT Article III:4 (National Treatment); Agreement on Technical Barriers to Trade (TBT Agreement) Article 2.1 (National Treatment and Most Favored Nation Treatment); and TBT Agreement Article 2.2 (Necessity). In addition, the European Union is almost certain to invoke some of the exceptions in GATT Article XX as a defense, most likely sub-paragraph (a) (public morals), sub-paragraph (b) (the part related to animal health), or sub-paragraph (g) (conservation of exhaustible natural resources).

A full analysis of all of the legal issues involved would require a review of some very detailed WTO jurisprudence, and is thus beyond the scope of this piece. However, it is possible to briefly introduce some of the key legal considerations at the heart of the case.

Non-discrimination

An important question in this case is whether the EU ban *discriminates against (or among) foreign products*. This issue arises under TBT Agreement Article 2.1, GATT Articles I: 1 and III:4, and the GATT Article XX introductory clause.

The principle of *non-discrimination* is at the core of WTO rules. At first glance, the EU ban seems consistent with this principle, as it is neutral on its face. It does not single out “foreign” or “imported” products, but rather applies to all products, regardless of their country of origin. In practice, however, the impact of the ban will fall most heavily upon foreign entities, in particular those of Canada and Norway. Moreover, the law’s impact on some foreign entities looks even more significant when it is pointed out that the EU does not ban bullfighting or other arguably similar cruel or inhumane practices involving livestock or other animals. The question might be raised why the EU did not pass a broad animal welfare law that sets out rules for both foreign and domestic products, instead of focusing only on the narrow sub-category of seal products, a sub-category made up almost exclusively of foreign goods.

Necessity of the Measure

A second overarching legal issue is whether the ban is *necessary* to achieve the EU’s animal welfare goals. Considerations of necessity arise under TBT Agreement Article 2.2, as well as affirmative defenses under GATT Articles XX (a), for measures necessary to protect public morals, and XX (b), for measures necessary to protect human, animal, or plant life or health.

Under the necessity provisions, adjudicators will weigh the measure’s contribution to its goals against its negative impact on trade. A question that might arise in this regard is whether there is a less onerous measure that would accomplish the same policy goals without affecting trade as much. For example, instead of a ban, the EU could label seal products to inform consumers about the harms to seals, thus allowing the consumers to make

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an informed purchasing decision (this alternative was proposed during the EU parliamentary debate on the measure). The exemption for products of seal hunting by Inuits^[4] or non-profit entities also may call into question the contribution the measure makes to its purported goals.

As an additional point, if the EU argues that its ban is justified under GATT Article XX (a) or (b), a WTO panel could be faced with the difficult task of determining whether an importing WTO Member can justify import bans reacting to events occurring *outside* its own territory. And if the WTO were to accept the EU's justification for an import ban on seal products based on EU consumers' moral concerns about seal harvesting practices abroad, then what happens if a WTO Member's law punishes imports from countries that do not legally guarantee labor rights based on moral concerns?

Issues under the TBT Agreement

The TBT Agreement is a relatively new trade agreement with little jurisprudence to help explain the scope of its provisions. As a result, the likely outcome of claims under this Agreement is difficult to assess. One initial consideration is whether the Agreement even applies, as the EU may argue that the seal products ban is not a "technical regulation" that is covered by the Agreement.

Assuming the TBT Agreement applies, a systemic issue that may be of importance in this case is the relationship between GATT Article XX and the TBT Agreement. While the TBT Agreement establishes non-discrimination as an obligation, the TBT Agreement (unlike the GATT) does not have an exception for health/environment/public morals measures. Instead, it establishes a separate obligation related to measures used for these purposes. Thus, instead of the rule-exception framework of GATT Articles I and III, on the one hand, and GATT Article XX, on the other hand, the TBT Agreement appears to set out two separate rules: one rule requiring most-favored nation/national treatment and another rule requiring that measures be no more trade-restrictive than necessary.

One result of this structure is that the TBT Agreement, unlike the GATT, appears to provide no legal shelter for measures that deny national treatment. Thus, where under the GATT a national treatment violation could be defended under GATT Article XX, under the TBT Agreement no such defense exists. At first glance, it appears that the TBT Agreement rules are much stricter. However, it may be worth noting the following preambular language in the TBT Agreement:

Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they 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, and are otherwise in accordance with the provisions of this Agreement.

While this language does not create an obligation, it does “recognize” that certain measures should not be prevented. In this regard, it loosely tracks the language of GATT Article XX, including the sub-paragraphs that allow countries to pursue specific policies, as well as the non-discrimination requirement of the Article XX introductory clause (the “chapeau”). In particular, the preambular language refers to measures “necessary . . . for the protection of human, animal or plant life or health, of the environment”—similar to the language of Articles XX(b) and (g)—and “the requirement that they 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 language of Article XX's introductory clause). In a sense, the language reads like an exception, although the use of the terms “should” and “recognize” appears to prevent it from being operative. Thus, a key question in the seal products dispute may be, what impact does this language have on the interpretation of the TBT Agreement obligations?^[5]

Conclusions

One might expect that core WTO principles, such as non-discrimination and necessity, would have clear legal standards. However, trade adjudicators have gone back and forth over the years on the issue of non-discrimination, while the “necessity” standard has evolved and has yet to be examined in the TBT Agreement context. There is a great deal of uncertainty as to how a WTO panel would address these issues in the context of the seal products ban in dispute. Thus, the outcome of a panel dispute would be far from sure.

In addition to all of the legal arguments, a more general question underlying this dispute is the following: To what extent should WTO rules intrude into the domestic policies of member governments? Most people can see the connection to trade of an explicitly discriminatory measure that says, for example, “foreign products are not allowed.” However, when a WTO panel rules on laws that are nominally origin-neutral, like the seal products ban, a finding of WTO-inconsistency may be viewed as meddling in domestic regulation, undercutting the WTO's legitimacy. It would matter very much how a WTO panel hearing this case approached its review. Any ruling that this ban violates WTO rules should be spelled out in plain and simple terms that ordinary people can understand, and not buried in legal jargon. Otherwise, the strong emotions of the case may rise up to overshadow and undermine the legal aspects.

Along with the relationship between WTO law and domestic regulatory autonomy, the panel may also have to navigate the connection between WTO law and international law. For example, in support of arguments that the ban is not justified, the complainants may emphasize the role of international agreements in the protection of animal welfare. In the absence of such agreements on seal hunting, the claimants may argue that unilateral trade action is not permitted. Addressing such international law issues in GATT/WTO dispute settlement has been controversial in the past and is likely to be so here as well.

As a final point, given the legal uncertainties and the sensitive issues

involved, it is possible that “politics” could play an important role as well. In this regard, it may be worth recalling a dispute between Canada and the EU from a few years ago with similar legal claims and sensitivities: the *EC - Asbestos*^[6] dispute, which involved an EU ban on certain asbestos products. There, Canada’s legal claims were rejected. However, a good deal of legal uncertainty remained even after the panel and Appellate Body reports were circulated.^[7] While the cases have a number of differences, and thus drawing guidance from *Asbestos* should be done with caution, one lesson may be the following: when confronted with difficult legal issues, in a situation where the legitimacy of the WTO might be called into question, the panelists hearing a case will almost certainly feel the pull of “politics,” as much as they may try their best to ignore it.

About the Author

Simon Lester, a former Legal Affairs Officer at the Appellate Body Secretariat of the World Trade Organization, is co-founder of WorldTradeLaw.net. He blogs at the International Economic Law and Policy Blog, at <http://worldtradelaw.typepad.com/ielpblog/>.

Endnotes

[1] See European Parliament and Council Regulation (EC) 1007/2009, 2009 O.J. (L286) 36, available at http://trade.ec.europa.eu/doclib/docs/2009/november/tradoc_145264.pdf.

[2] Request for Consultations by Canada, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/1 (Nov. 2, 2009); Request for Consultations by Norway, *European Communities-Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/1 (Nov. 5, 2009). Canada requested WTO consultations two years ago in relation to import bans of Belgium and the Netherlands (which are now pre-empted by Regulation (EC) No. 1007/2009). See Request for Consultations by Canada, *European Communities - Certain Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS369/1 (Sept. 25, 2007).

[3] Council Directive 83/129, 1983 O.J. (L 91) 30 (EEC). Similar concerns have been raised in the past with respect to the long-standing U.S. ban on sale or importation of any seal products. See Request by Inuit Circumpolar Conference to Have the U.S. Import Ban on Marine Mammal Products Removed, available at http://www.highnorth.no/Library/Trade/GATT_WTO/re-to-h.htm; for a legal analysis of the United States’ bans consistency with the GATT carried out by a Canadian law professor, see TED L. MCDORMAN, HIGH NORTH ALLIANCE, THE GATT CONSISTENCY OF THE U.S. U.S. IMPORT EMBARGO ON HARP-SEAL FUR COATS FROM GREENLAND (2007), available at http://www.highnorth.no/Library/Trade/GATT_WTO/th-ga-co.htm.

[4] Inuit is a term for a group of culturally similar indigenous peoples inhabiting the Arctic regions of Canada, Greenland, Russia, and the United States.

[5] See Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶¶ 205-233, WT/DS363/AB/R (Dec. 21, 2009). In this decision, the Appellate Body concluded that Article XX was available outside the context of the GATT, as it applied this provision to China's Accession Protocol. This result probably gives some hope to those who would like to apply Article XX to the TBT Agreement, although the specific textual language differs.

[6] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Apr. 5, 2001).

[7] For example, the TBT Agreement claims were never addressed on their substance, and the Appellate Body's reversal of the GATT Article III:4 claims pushed the jurisprudence in a very different direction than the panel had gone.