



## **The EU seal regime in light of WTO law**

**A preview to the dispute “European Communities – Various Measures on  
Importation and Marketing of Seal Products”**

**Av Birte Hansen Nordgård**

*Liten masteroppgave i rettsvitenskap*

*ved Universitetet i Tromsø*

*Det juridiske fakultet*

*Våren 2012*

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## **1. Introduction**

In August 2010 the European Union (hereinafter “EU”) imposed a prohibition on importation of seal products into the EU and marketing of seal products within the EU.<sup>1</sup> The regulations imposing the prohibition will hereinafter be referred to as “the seal regime”. In this master thesis it will be examined whether the seal regime’s prohibition is in accordance with the EU’s obligations towards its trading partners under the agreements of the World Trade Organization (hereinafter “WTO”).

This has become a question after Canada and Norway claimed the seal regime to be inconsistent with the EU’s WTO obligations. Both countries asked separately for consultations with the EU in late 2009. Neither of the consultations led to agreements and both Canada and Norway requested the establishment of Dispute Settlement Panels.<sup>2</sup> Panels were established in the two disputes, and in April 2011 it was decided that the disputes were to go in front of one single panel.<sup>3</sup> The dispute “*European Communities-Measures Prohibiting the Importation and Marketing of Seal Products*” is waiting to be tried in front of a WTO dispute settlement panel.<sup>4</sup>

The theme was chosen because of its current relevance and because of the importance of the answer to the question posed. The debate over trade in seal products has been ongoing since 1983 when the EU prohibited importation and trade in seal pups products, but has since the extension of the prohibition in the seal regime become more relevant and important.<sup>5</sup>

One of the main questions in the debate has been the weight of the seal regime’s underlying interests against WTO Members’ interests in compliance with the WTO agreements. In answering whether the seal regime is inconsistent with WTO law, the objectives of the seal regime and the WTO agreements will be central. In the following it will be given an

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<sup>1</sup> Regulation 1007/2009/EC Adopted September 16th 2009, entered in to force August 20<sup>th</sup> 2010

Regulation 737/2010/EU Adopted August 10<sup>th</sup> 2010, entered in to force August 20<sup>th</sup> 2010

<sup>2</sup> Request for Consultations by Canada, document number 09-5994 (November 4th 2009), Request for Consultations by Norway, document number 09-5572 (November 10th 2009)

Request for the establishment of a Panel by Canada, document number 11-0756 (February 14th 2011), Request for the establishment of a Panel by Norway, document number 11- 1301 (March 15th 2011)

<sup>3</sup> Summary of *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*

<sup>4</sup> Canada has another dispute in the WTO, WT/DS369, with EU concerning EU Member’s legislation on trade in seal products.

<sup>5</sup> Council Directive 83/129/EEC Adopted March 28<sup>th</sup> 1983 (in 1983 it was the “European Communities”)

introduction to the seal regime, to the relevant WTO agreements and to dispute resolution within the WTO.

## 1.1 The seal regime

The seal regime consists of regulation EC No 1007/2009 of the European Parliament and of the Council on Trade in Seal Products (hereinafter “the basic regulation”) and Commission Regulation EU 737/2010 on implementation of EC 1007/2009 (hereinafter “the implementing regulation”).<sup>6</sup> The basic regulation lays down an almost complete prohibition on importation of seal products into the EU and the marketing of seal products within the EU. The implementing regulation stipulates more detailed rules on the prohibition and its exceptions, as well as rules of implementation.

The prohibition on importation and marketing of seal products was explained by a need to protect seals from the seal hunt. The EU’s objective is to enhance seal welfare through diminishing seal hunt. The EU seeks to decrease “the demand leading to the marketing of seal products and, hence, the economic demand driving the commercial hunting of seals”.<sup>7</sup> The EU is not opposed to the hunt in general, but its results which they claim are distress, fear and other forms of suffering caused to the seals.<sup>8</sup> The EU has found the current prohibition to be the only way to increase seal welfare.<sup>9</sup>

The EU also justifies the seal regime on the grounds of citizen’s moral beliefs. It was the citizens of the EU who demanded restrictions on trade in seal products. The concerns of citizens of the EU “extend to the killing and skinning of seals as such”.<sup>10</sup> The seal regime seeks to decrease commercial seal hunt in order to protect its citizen’s moral, and the seal regime seeks to make the citizens confident that the products they buy do not contain seal.

The prohibition is not complete, and there are three exceptions allowing the importation and marketing of certain seal products. All three are found in the basic regulation and are further detailed in the implementing regulation.

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<sup>6</sup> Regulation 1007/2009/EC Adopted September 16th 2009, entered in to force August 20<sup>th</sup> 2010  
Regulation 737/2010/EU Adopted August 10<sup>th</sup> 2010, entered in to force August 20<sup>th</sup> 2010

<sup>7</sup> Basic regulation preamble recital (10)

<sup>8</sup> The whole paragraph: Basic regulation preamble recital (11)

<sup>9</sup> Basic regulation preamble recitals (11) and (12)

<sup>10</sup> Basic regulation preamble recital (10)

The first exception is called “the Inuit-exception” and is found in the basic regulation Article 3 and in the implementing regulation Article 3. According to the implementing regulation seal products can be imported and marketed where it can be proven that the products derives from hunts which satisfy all of the following conditions:

- “(a) seal hunts conducted by Inuit or other indigenous communities which have a tradition of seal hunting in the community and in the geographical region;
- (b) seal hunts the products of which are at least partly used, consumed or processed within the communities according to their traditions;
- (c) seal hunts which contribute to the subsistence of the community.

Another exception is the “sustainable management exception”. According to the basic regulation Article 3 number 2 “the placing on the market of seal product” is allowed:

“where the seal products result from by-products of hunting that is regulated by national law and conducted for the sole purpose of the sustainable management of marine resources. Such placing shall only be allowed on a non-profit basis”.

To be regarded as hunted for sustainable management, the products must, according to the implementing regulation Article 5 criterion (a) derive from hunt conducted under a “natural resources management plan which uses scientific population models of marine resources and applies the ecosystem-based approach”, and according to criterion (b) not exceed the quota established in the natural resource management plan.

According to the implementing regulation Article 2 number 2 products are hunted on a “non-profit basis” when the products are placed on the market for a price less than or equal to the recovery costs reduced by the amount of any subsidies received in relation to the hunt.

A last exception is found in the basic regulation Article 3 and in the implementing regulation Article 4. This exception concerns goods for the personal use of travelers. These seal products are allowed imported with travelers for personal use, but are not allowed to be placed on the EU market and this exception thus falls outside the extent of this thesis.

## 1.2 The objectives of the WTO agreements relevant for this dispute

Canada and Norway have claimed the seal regime to be contrary to the EU's obligations under the Agreement on Technical Barriers to Trade (hereinafter "TBT Agreement"), the Agreement on Agriculture (hereinafter "Agriculture Agreement") and the General Agreement to Tariffs and Trade 1994 (hereinafter "GATT 1994").<sup>11</sup> All these are agreements within the WTO system.

The current WTO system has developed from the General Agreement on Tariffs and Trade (GATT 1947). The complexity of international trade and the interdependence between countries has increased since 1947, and in 1995 the Agreement Establishing the WTO (hereinafter "WTO Agreement") was signed.<sup>12</sup> The WTO Agreement seeks, according to its preamble, through mutually advantageous agreements, to reduce barriers to trade, and to eliminate discriminatory treatment in international trade relations. The WTO Agreement consists of several distinct agreements regulating different areas of international trade.

GATT 1994 regulates the area of international trade in goods. This agreement seeks to liberalize international trade by reducing tariffs and removing non-tariff barriers to trade. The agreement pursues four main objectives, two of which is relevant for this thesis.<sup>13</sup> The first objective relevant for this thesis is the objective of preventing discrimination in trade among Members. The second objective here relevant is the prevention of foreign products being imposed restrictions, different from those levied on similar domestic products.<sup>14</sup> It will in this thesis be examined whether the seal regime is in breach of provisions reflecting these two objectives. Article XX of the agreement expresses that nothing in the agreement shall be construed to prevent Members from adopting and enforcing certain policy objectives, and thus it must be examined whether the seal regime pursues such policy objectives.

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<sup>11</sup>According to *Request for the establishment of a Panel by Canada*, WT/DS400/1 (February 14th 2011) Canada claims the seal regime contrary to EU's obligations under TBT Agreement Articles 2.1, 2.2, 5.1, 5.2, 5.4, 5.6, 6.1, 7.1 -7.5, 8.1 and 8.2, Agriculture Agreement Article 4.2, and GATT 1994 Articles I:1, III:4, XI:1 and XXIII:1 (b). According to *Request for the establishment of a panel by Norway*, WT/DS401/1 (March 15th 2011) Norway has a similar claim with the exception of the claim of inconsistency with TBT Agreement Article 7.2

<sup>12</sup> WTO Secretariat, *From GATT To The WTO: The Multilateral Trading System In The New Millennium*, Hague 2000 preface

<sup>13</sup> The two others objectives are to only allow Members *protectionism* (protecting domestic products from foreign competition) through tariffs, and to prevent Members from increasing the negotiated tariffs. Tariffs are not relevant here since the seal regime prohibits importation.

<sup>14</sup> Inspired by <http://www.jurisint.org/pub/06/en/doc/C02.pdf>

Another WTO agreement relevant for this thesis is the TBT Agreement. According to the preamble of the TBT Agreement it seeks to further the objectives of GATT 1994 in the area of technical regulations. The agreement responds to the fact that technical regulations that vary from country to country could impose difficulties for producers and exporters. If regulations are set arbitrarily, they could be used as an excuse for protectionism, which the agreement seeks to prevent. The TBT Agreement further seeks to countervail that technical regulations create unnecessary obstacles to trade. At the same time, the agreement provides members with the right to implement measures to achieve legitimate policy objectives as long as the measures are not more trade-restrictive than necessary.<sup>15</sup> Under the TBT Agreement it will be examined whether the seal regime is a technical regulation creating unnecessary obstacles to trade, and whether the seal regime is more favourable to products of certain origin. In addition it will be examined whether the seal regime is more trade-restrictive than necessary for fulfilling a legitimate policy objective.

The third agreement relevant for this thesis is the Agriculture Agreement, regulating the area of trade in agricultural products. The objectives relevant for this thesis are those of improving market access and of ensuring a fairer competition for producers and exporters of agricultural products.<sup>16</sup> In this thesis it will be examined whether the seal regime breaches these objectives by imposing restrictions on trade in seal products.

### **1.3 Dispute Settlement within the WTO**

Within the WTO there is a separate agreement governing settlements of disputes; the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter “DSU”). According to DSU Article 1.1, read together with Appendix 1, the DSU covers all the agreements relevant for this thesis.

According to the WTO Agreement Article XVI:4 Members must ensure that their laws and regulations are in compliance with WTO law. The parties are obliged to follow the rules laid

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<sup>15</sup> Preamble of TBT Agreement, and information on the TBT Agreement  
[http://www.wto.org/english/tratop\\_e/tbt\\_e/tbt\\_e.htm](http://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm)

<sup>16</sup> Preamble of the Agricultural Agreement and WTO information on the Agricultural Agreement  
[http://www.wto.org/english/tratop\\_e/agric\\_e/agric\\_e.htm](http://www.wto.org/english/tratop_e/agric_e/agric_e.htm)



down in the agreements and it is not possible to derogate from these rules.<sup>17</sup> Members who seek the redress of other Member's violation of WTO obligations can, according to DSU Article 23, invoke the dispute settlement system. The DSU is referred to as the backbone of the WTO, because it helps to ensure that Members comply with their WTO obligations.<sup>18</sup>

The EU has claimed that the WTO is not the proper forum for Norway's complaint, since they have regional trade agreement (hereinafter "RTA") with each other. However, within the WTO system it is clear that a RTA does not preclude a Member from invoking the DSU.<sup>19</sup>

According to DSU Article 2.1 it is the Dispute Settlement Body (DSB)<sup>20</sup> who has the authority to establish panels.<sup>21</sup> In disputes the parties provide evidence and the panel may call experts on different subjects to give statements. In a WTO dispute it is the party asserting the claim that bear the burden of proof, and the panels or the Appellate Body,<sup>22</sup> examine whether it has been proven that a measure is WTO-inconsistent.<sup>23</sup> When a report from a panel or the Appellate Body has been adopted by the DSB, the findings are binding on the parties.

## 1.4 Sources of Law

Panels and the Appellate Body shall interpret and clarify the WTO provisions claimed breached, pursuant to DSU Article 3, "in accordance with customary rules of interpretation of public international law". The Vienna Convention on the Law of Treaties is acknowledged as

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<sup>17</sup> Sharif Bhuiyan, *National Law in WTO law: Effectiveness and Good Governance in the World Trading System*, Cambridge 2007 page 33

<sup>18</sup> Andrew T Guzman and Joost H.B Pauwelyn, *International Trade Law*, United States 2005 page 150

<sup>19</sup> "in the context of a dispute between two WTO Members involving situations covered by both an RTA and the WTO Agreement, any WTO Member which considers that any of its WTO benefits have been nullified or impaired has the absolute right to trigger the WTO dispute settlement mechanism and to request the establishment of a panel." Kyung Kwak and Gabrielle Marceau "*Overlaps And Conflicts Of Jurisdiction Between The WTO And RTAs*" Conference on Regional Trade Agreements WTO, 26 April 2002) Paragraph 54

<sup>20</sup> The WTO Council Meeting

<sup>21</sup> The composition of a Panel is governed by DSU Article 8. Panels consist of three or five the panellists that are experts on the field of international law. The panellist are to be chosen in consultation with the parties of dispute, if the parties do not agree, the WTO director-general appoint the panellists.

<sup>22</sup> A permanent seven-member Appellate Body is established by the DSB. Three Appellate Body members serve on any one case. The members broadly represented the range of WTO members, and are individuals with recognized standing in the field of law and international trade, not affiliated with any government

<sup>23</sup> Appellate Body Report on Japan - Measures Affecting Consumer Photographic Film and Paper WT/DS44/AB/R (adopted April 22<sup>nd</sup> 1998), paragraph 10.372

customary international law regarding rules for interpreting treaties, and its rules of interpretation are used by panels and the Appellate Body.<sup>24</sup>

Precedents, in form of the *stare decisis* doctrine, do not exist within the WTO Dispute Settlement System.<sup>25</sup> However, the Appellate Body has found prior practice to be relevant when interpreting WTO provisions. The Appellate Body has found that panels are expected to follow previous decisions by the Appellate Body.<sup>26</sup> For panel reports the Appellate Body expressed that they could be used as sources of law, where relevant, in any dispute.<sup>27</sup> For unadopted panel reports the Appellate Body found that, even though they have no legal status in the WTO system, panels “could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant”.<sup>28</sup> This means that previous reports are important sources of law within the WTO system.

## 1.5 The continuation of the thesis

In the following the relevant provisions will be interpreted after the customary law on interpretation and the rules prescribed in the Vienna Convention on Law of Treaties. In addition, where the Appellate Body or a Panel has interpreted the provisions, their interpretation will be used as a basis for my interpretation. The use of their interpretations are justified on the grounds that their interpretations also are based on customary laws of interpretation, on the grounds of previous reports being important sources of law, and finally, on the grounds that the authors of these reports are experts on WTO law.

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<sup>24</sup> Vienna Convention on Law of Treaties, Vienna May 23rd 1969

<sup>25</sup> A legal principle of determining points in litigation according to precedents

Pursuant to the Statute of the International Court of Justice, acknowledged as representing sources of law in International Public Law, Article 38 (1) subparagraph (d) judicial decisions are to be subsidiary means for the determination of international rules of law

<sup>26</sup> Appellate Body Report on *United States- Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R (adopted November 28th 2005) paragraph 7.37, and Appellate Body Report on *United States - Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (adopted May 20<sup>th</sup> 2008) paragraph 161 largely based on that DSU Article 17.13 establishes a hierarchy by providing that the Appellate Body may “uphold, modify or reverse” the legal findings and conclusions of panels

<sup>27</sup> Appellate Body Report on *Japan- Taxes on Alcoholic Beverages*, WT/DS8/AB/R-WT/DS10/AB/R-WT/DS11/AB/R (adopted November 1st 1996) paragraph 108

<sup>28</sup> Ibid

Due to the size of this thesis all claims made in the dispute cannot be examined here. The goal of this thesis is to give an overview over the legal questions arising under the relevant provisions. At the time being it can be difficult to subsume facts to the questions posed, since the parties have not yet presented their evidence in this dispute. Despite the difficulties that may result from the lack of factual grounds, it will in this thesis be aimed after answering the posed legal questions as thoroughly and exhaustively as possible.

The focus of this thesis will be on the provisions expressing core principles of the WTO agreements. Since many of the core principles and objectives are common for all three relevant agreements; this thesis will be divided by the core principles, and not by agreements. The following will be divided in to four main parts. In the first three parts it will be examined whether the seal regime is inconsistent with the principles of non-discrimination, of removing obstacles to trade and of removing quantitative restrictions to trade. Subsequently, the last part will examine whether the EU can invoke exceptions to their WTO obligations.

## **2. The principles of non-discrimination**

The principle of non-discrimination is one of the cornerstones of the WTO. The idea is to hinder origin of products from influencing whether products are allowed into Member's markets. The Appellate Body has expressed; "The essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin".<sup>29</sup> The principle and its different sides are reflected in many provisions. The provisions that are relevant for this thesis are GATT 1994 Article I:1 and III:4, as well as TBT Agreement Article 2.1.

GATT 1994 Article I:1 reflects the principle of "Most-Favoured-Nations Treatment" (hereinafter "MFN-treatment"). According to the Appellate Body "The purpose of Article I:1 is to ensure unconditional MFN treatment" and to prevent discrimination amongst Members.<sup>30</sup> The idea is that WTO Members must accord the best-available treatment accorded to the most favoured nation, MFN-treatment, to all other Members.<sup>31</sup>

According to this provision;

"any advantage, favour, privilege or immunity granted by any contracting party to any product originating in ... any other country shall be accorded immediately and unconditionally to the like product originating in ... all other contracting parties".

GATT 1994 Article III:4 reflects the principle of National Treatment. The purpose of the National Treatment obligation is to avoid protectionism towards national products, and Members must accord foreign products the same treatment as national products.<sup>32</sup> According to the provision:

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<sup>29</sup> Appellate Body Report on *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (adopted February 5<sup>th</sup> 1995) paragraph 189

<sup>30</sup> Appellate Body Report on *Canada- Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R (adopted June 19<sup>th</sup> 2000) paragraph 7.42

<sup>31</sup> Andrew T Guzman and Joost H.B Pauwelyn page 287

<sup>32</sup> Appellate Body Report on *European Communities - Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R (adopted March 12<sup>th</sup> 2001) paragraph 97 Further in Appellate Body Report on *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (adopted February 5<sup>th</sup> 1995) paragraph 216 it was expressed that there however is no need for a consideration of whether the measure affords protectionism in determining breach of GATT 1994 Article III:4

“The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin”.

TBT Agreement Article 2.1 both expresses obligation for non-discrimination between foreign products (MFN-treatment), and between foreign and national products (National Treatment). According to this provision:

“Members shall ensure that ... products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country”.

This provision is similar to both GATT Article I:1 and III:4. The TBT Agreement furthers the objective of GATT 1994 “through a specialized legal regime that applies solely to a limited class of measures. For these measures, the TBT Agreement imposes obligations on Members that seem to be ... additional to, the obligations imposed on Members under the GATT 1994”.<sup>33</sup>

According to the Interpretive Note to Annex 1 WTO Agreement, in the case of a conflict between GATT 1994 and other agreements listed in Annex 1, the rules in the other agreements shall prevail in extent of the conflict. This and the above quoted indicates that the TBT Agreement is *lex specialis* on the area of technical regulations. A legal examination should therefore start out in the TBT Agreement. This is supported by several panel and Appellate Body reports which, based on the foregoing, found it appropriate to start their analysis by examining the claims under the TBT Agreement.<sup>34</sup>

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<sup>33</sup> Appellate Body Report on *European Communities - Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R (adopted March 12th 2001) paragraph 80

<sup>34</sup> Panel Report on Panel Report on *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna products*, WT/DS381/R (circulated December 15th 2011, appealed) paragraphs 7.38- 7.46, Appellate Body Report on *European Communities - Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R paragraphs 8.16-8.17, Appellate Body Report on *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R paragraph 204, Panel Report on Panel Report on *United States - Certain Country of Origin Labelling (COOL) Requirements*, WT/ DS384/R paragraphs 7.72 and 7.73, Panel Report *European Communities – Trade Description adopted Sardines*, WT/DS231/R paragraph 7.16

## 2.1 The principle of non-discrimination in the TBT Agreement

The EU is only obliged by the provision in the TBT Agreement if the seal regime falls under the scope of the TBT Agreement. The first question here is thereby whether the seal regime is a technical regulation.

According TBT Agreement Annex 1 number 1, *technical regulations* covered by the agreement are “Document which lays down product characteristics or ... production methods ... with which compliance is mandatory.”

In order to be considered a technical regulation the seal regime’s measures must lay down product characteristics and the compliance with the characteristics or production methods must be mandatory. In the prohibition of the seal regime the product characteristics is the product’s content. The characteristic of the exceptions is the reason for the hunt of the seal contained in the products. Only products containing seal fall under the seal regime, and only products fulfilling the exceptions are allowed into the EU market, thus compliance is mandatory.

In the introductory passage of TBT Agreement Article 2 lies another criterion for a measure to be considered a technical regulation covered by the article. The measures must be prepared, adopted and regulated by Central Government Bodies as described in TBT Agreement Annex 1 number 6. Both the basic regulation and the implementing regulation are prepared, adopted and regulated by Central Government Bodies within the EU, notably the European Parliament and the Commission, as described in Annex 1 number 6.

The Appellate Body has in its interpretation of Annex 1 number I found that the measures must apply to an identifiable product or group of products for falling under the definition “technical regulation”.<sup>35</sup> The seal regime applies to products derived from seal, which is an identifiable group of products.

The seal regime’s measures are technical regulations.

The seal regime is nominally origin neutral and does not separate between domestic and foreign products, or between foreign products. The non-discrimination obligation in TBT

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<sup>35</sup> Panel Report on *European Communities – Trade Description adopted Sardines*, WT/DS231/R (adopted September 26<sup>th</sup> 2002) paragraph 176

Article 2.1 covers both MFN-treatment and National Treatment. Because of the here mentioned it is not necessary to separately examine whether the seal regime breaches the EU's MFN-treatment obligation and National Treatment obligation.

The following discussion will be divided into two separate parts. The first part will focus on “like products” and will be divided into three examinations. The first to be examined is whether the seal regime discriminates between seal products and other “like” non-seal containing products through the general prohibition. The two subsequent examinations will be of whether the seal regime discriminates between seal products through the Inuit-exception and through the sustainable management exception. In the second part it will be examined whether the seal regime accords treatment “no less favourable” to like products from all Members.

### **2.1.1 a) The seal regime's general prohibition and “like products”**

The obligation of non-discrimination between like products does not only include the exact same products, but also products that must be considered to be “like”. In a legal examination it is customary to start in the letter of the law. A normal understanding of the wording “like products” is that the products share the same characteristics and are similar.<sup>36</sup>

Earlier practice has in interpreting the wording “like” in the TBT Agreement Article 2.1 used the same elements as those carved out for GATT 1994 Article III:4.<sup>37</sup> Regarding the wording in GATT 1994 Article III:4 the Appellate Body expressed the following:

“As products that are in a competitive relationship in the marketplace could be affected through treatment of *imports* ‘less favourable’ than the treatment accorded to *domestic* products, it follows that the word ‘like’ in Article III:4 is to be interpreted to apply to products that are in such a competitive relationship.”<sup>38</sup>

For finding products to be “like” after TBT Agreement Article 2.1 the Appellate Body has set out four criteria:

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<sup>36</sup> Catherin Soanes and Angus Stevenson, *Concise Oxford English Dictionary Luxury Edition*, Oxford 2008 p. 825

<sup>37</sup> Panel Report on *United States – Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/R (circulated to WTO members April 4th 2012) paragraph 7.121 and following on TBT Agreement Article 2.1

<sup>38</sup> Appellate Body Report on *European Communities - Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R (adopted March 12th 2001) paragraph 99

“(i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers’ tastes and habits ... in respect of the products; and (iv) the tariff classification of the products.”<sup>39</sup>

The seal’s meat, fur, fat and other components are used in many different products.<sup>40</sup>

According to the preamble in the basic regulation on seal products “it is difficult or impossible for consumers to distinguish them from similar products not derived from seals” because of “the nature of those products”. This suggests that there are competitive products with the same properties, nature and quality, intended for the same end-use as seal products.

Whether the third criterion is fulfilled is more uncertain since the EU partially justified the seal regime by a demand from the EU citizens.<sup>41</sup> If the citizens prefer non-seal-containing products the criteria might not be fulfilled.<sup>42</sup>

In earlier case law it has been expressed that measures’ underlying considerations and concerns could be relevant in determining the likeness of products. In *US-Clove* the panel expressed the following:

“we are not suggesting that the regulatory concerns underlying technical regulations may not play a role in the determination of whether or not products are like. In this respect, we recall that, in *EC – Asbestos*, the Appellate Body found that regulatory concerns and considerations may play a role in applying certain of the "likeness" criteria (that is, physical characteristics and consumer preferences) and, thus, in the determination of likeness”.<sup>43</sup>

This suggests that the objectives of the seal regime, notably the protection of seal welfare could lead to finding seal products to differ, in regards to consumer preferences, from those who do not contain seal. However, in *Tuna-Dolphin* the Panel found that tuna not labeled “dolphin-safe tuna”, was “like” “dolphin-safe tuna” despite of the latter being preferred by the

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<sup>39</sup> Appellate Body Report on *United States – Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/AB/R paragraph 120 and Panel Report on *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna products*, WT/DS381/R paragraphs 7.235 and 7.240.

<sup>40</sup> The EU’s list of products that may include seal product is long, see [http address in references](#)

<sup>41</sup> Preamble of the basic regulation

<sup>42</sup> It will be the parties challenging this Article (Norway and Canada) to prove that the criterion is fulfilled, and in absence of evidence on this third criterion one must conclude that there are differences in consumer’s tastes and habits. Simon Baughen page 25

<sup>43</sup> Panel Report on *United States – Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/R paragraph 117



citizens of the United States, and despite that the labeling requirement was imposed for the protection of dolphin life.<sup>44</sup>

The differences between product categories, such as that some contain seal, are relevant in determining competitiveness of the product categories, but are not sufficient to establish that competitive products are not like.<sup>45</sup> This suggests that if the EU consumers' preferences is the only thing to differ seal products from products not containing seal, their preferences is not sufficient to establish that non-containing seal products are not like.

It will not be looked into certain products which could be "like", and it is therefore not possible to look at unknown product's tariff classification.<sup>46</sup>

It will be for the claimants to prove that there are other like products not falling under the prohibition in the seal regime. In the following it will be presumed that there are "other like products".

### **2.1.1 b) The Inuit-exception and "like products"**

As mentioned above, products are like when they are in a competitive relationship and four criteria are fulfilled: "(i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits ... in respect of the products; and (iv) the tariff classification of the products."<sup>47</sup>

The Inuit-exception is explained by the fact that some indigenous communities depend on the commercial export of seal products.<sup>48</sup> It is not the products themselves that differs from other seal products, but the difference lies in who have hunted and produced the products. The difference does not lie in the end-uses of the products, and likely neither in the tariff

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<sup>44</sup> Panel Report on *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna products*, WT/DS381/R paragraphs 7.248-7.250

<sup>45</sup> <http://www.oneillinstitutetradeblog.org/inadvertent-discrimination-under-article-2-1-of-the-tbt-agreement>

<sup>46</sup> For tariff classifications the term "the like" in GATT 1994 Articles I and III are not necessary to be interpreted to allow the same difference in tariff classification, Robert E. Hudec, "like products"; *The Difference in Meaning in GATT Articles I and III*, Michigan 2000 page 124

<sup>47</sup> Appellate Body Report on *United States – Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/AB/R paragraph 120 and Panel Report on *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna products*, WT/DS381/R paragraphs 7.235 and 7.240.

<sup>48</sup> Preamble of the implementing regulation

classification. The question is if these products differ in nature and if consumers' tastes and habits are different for these products than other seal products.

Based on the reasoning of the seal regime's objective of protecting citizen's moral belief, one could imagine consumer's tastes and habits to be different for products derived from seal hunted and skinned in a manner the consumers were not opposed to. However this is not the case for products deriving from seal hunt falling under the Inuit-exception. As the consumers are opposed to the methods of hunting and skinning seals, it is presumable that they do not find the hunt more morally acceptable because the hunters are indigenous. The conclusion will be that consumer's tastes and habits do not make seal products falling under the Inuit-exception different from those not falling under the exception.

The next question that can be posed is whether the products deriving from indigenous people differ in nature from other seal products. According to a dictionary interpretation of the word "nature"; it regards "the basic or inherent features... or character of a ... thing".<sup>49</sup> The Inuit-exception products themselves do not differ in nature from other seal products.

As mentioned the seal regime's underlying considerations and concerns could be relevant in determining the likeness of products. The underlying reasoning for the Inuit-exception was the protection of the traditional way of life of indigenous groups.

The parties are bound by international law to protect and respect the traditional way of life of indigenous groups.<sup>50</sup> In interpreting the TBT Agreement the interpreter is to take into account "any relevant rules of international law applicable to the relationship between the parties".<sup>51</sup> If the EU is obliged to protect indigenous people's seal hunt, the question is whether such other treaty obligations will make the Inuit-exception products different so that the exception is allowed within WTO.<sup>52</sup>

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<sup>49</sup> Catherin Soanes and Angus Stevenson, *Concise Oxford English Dictionary Luxury Edition*, Oxford 2008 p. 954

<sup>50</sup> Such as such as the United Nations' (UN) International Labour Organization Convention nr. 169 (ILO 169) of June 27<sup>th</sup>1989 (Only some of EU's members have ratified the Convention), and the UN Convention on Civil and Political Rights (UNCCPR) Of 16<sup>th</sup> of December 1966

<sup>51</sup> Vienna Convention on Law of Treaties (May 23<sup>rd</sup> 1969) Article 31-3-(c)

<sup>52</sup> There is no provision in the WTO governing the overlap or conflict between WTO and non-commodity agreements, had it been a commodity agreement Article XX subparagraph (h) would have applied.

When interpreting treaties one shall interpret them so that they do not come in conflict with the essence of other treaties.<sup>53</sup> This means that the panel might have to examine whether there is a way to preserve the essence of both ILO 169 and the TBT Agreement.

The essence of treaties on indigenous people's rights is to protect and respect the traditional way of life of indigenous groups. The Inuit-exception seeks to preserve the traditional seal hunt and safeguard indigenous people's livelihood. The essence of the TBT Agreements, in furthering the objectives of GATT 1994, is to liberalize trade through, among other measures, prevent discrimination between trading partners.<sup>54</sup> Within the TBT Agreement there are certain safeguards preventing unwanted results from the imposed obligations. Preserving traditional hunting or production methods is not a legitimate reason to allow discrimination within the TBT or other WTO agreements. Nor is non-developing countries' or people's dependence on the export of a certain product.

Because protecting indigenous people's traditions and subsistence is not a legitimate objective for discrimination within the TBT Agreement or within WTO system, the difference that may lay in the nature of seal products from the Inuit, cannot be accepted as a difference capable of allowing discrimination between countries. This is because the TBT Agreement allows certain policy objectives, in so far as they do not discriminate between countries.<sup>55</sup>

For this thesis seal products allowed into the EU market based on the Inuit-exception will be regarded as like to other seal products that do not origin from indigenous groups falling under the exception.

### **2.1.1 c) The sustainable management exception and “like products”**

The difference between products allowed under this exception and those falling under the general prohibition, does not lie within the products themselves, nor in who have hunted the products and how, but in why the seal have been hunted.

The question will then be whether there are underlying considerations and concerns that could be relevant in determining the likeness of products.

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<sup>53</sup> Vienna Convention on Law of Treaties Article 26, supported by Article 31-1.

<sup>54</sup> Preamble second recital

<sup>55</sup> Preamble sixth recital

Within the WTO the sustainable management of natural resources is a legitimate objective able to trump WTO obligations. It is therefore plausible that the panel could find products hunted in accordance with sustainable management to differ in certain of the likeness criteria, from those hunted contrary to sustainable management. However, the amount of seal hunted in Canada and Norway are based on quotas for a sustainable management of ocean resources set in accordance with recommendations from the International Council for the Exploration of the Sea.<sup>56</sup> This should indicate that all seal products are hunted in accordance with sustainable management, and that the seal products allowed under the sustainable management exception is not different from other seal products.

That these products are hunted without a view to economical gain is the next difference that may lead to finding these products to differ from other seal products. In interpreting treaties one cannot interpret the provisions so as the treaty loses its essence. To prevent economical gain from products is contrary to both the WTO Agreement and the TBT Agreement as these seek to enhance economical gain through enhanced freer trade. This indicated that the panel will not find this difference to make the seal products falling under the sustainable management regarded as not like within the meaning of TBT Article 2.2.

The sustainable management seal products are like those not falling under the exception.

### **2.1.2 “no less favourable treatment”**

For finding a breach of TBT Agreement Article 2.1 seal products have to be found to be accorded “less favourable treatment” than like products. A previous panel report found that “less favourable treatment would arise ...if imported products originating in any Member were placed at a disadvantage”.<sup>57</sup>

The first question is whether the general prohibition places seal products at a disadvantage, according them less favourable treatment. Seal products are prohibited from being imported into the EU and marketed in the EU, whilst the like products are not subject to the prohibition

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<sup>56</sup> <http://www.tromsfylke.no/LinkClick.aspx?fileticket=0j1UTUlj2PU%3D&tabid=135> Each year new quotas are in Canada by the Department of Fisheries and Oceans, in Norway by Fiskeri og Kystdepartementet

<sup>57</sup> Panel Report on *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna products*, WT/DS381/R paragraph 273.

are allowed imported and marketed. This means those seal products prohibited are placed at a disadvantage compared to like products, and thus that seal products falling under the prohibition are accorded “less favourable treatment”.

The second question is whether the exceptions accords less favourable treatment to seal products not falling under the exceptions. Seal products falling under the exception are allowed imported and marketed in the EU, whilst those not falling under the exception are not. This suggests that seal products not falling under the exception are placed at a disadvantage compared to like products, and thus they are accorded “less favourable treatment”.

However, for finding a breach of the non-discrimination obligation, it must be proven that products from certain Members are accorded less favourable treatment.<sup>58</sup> The questions are thereby whether seal products from certain Members are placed at a disadvantage or whether products imported from certain Members, outside or within the EU, are accorded more favourable treatment.

Within the Inuit-exception lies the seal regime’s only origin criterion. Only products from countries with indigenous populations that fulfill the criteria listed in the implementing regulation Article 3 can be imported as commercial products. Because of the vastness of criteria for products to fall under the Inuit-exception, it is possible that Norway will claim that seal products from indigenous communities other than the Inuit community on Greenland, do not fall under the exception. If Norway can prove that the Inuit-exception does discriminate between indigenous people from different countries, the Inuit-exception will be inconsistent with EU’s obligations of MFN-treatment since countries with a vast Inuit population then would be granted an advantage and thus more favourable treatment. It is outside the extent of this thesis to investigate such a claim, and here it will be presumed that the Inuit-exception accords the same “favourable treatment” and “advantage” irrespective of origin.

The sustainable management exception is, de jure, origin neutral, and so is the general prohibition. However, a breach of TBT Article 2.1 could be found if seal products de facto are accorded less favourable treatment than products originating in certain countries.<sup>59</sup> To find whether seal products are accorded “less favourable” treatment than like products from

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<sup>58</sup> Ibid

<sup>59</sup> Appellate Body Report on *United States – Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/R paragraph 181

certain Members, one must know whether like products not falling under the seal regime originate in certain countries. As it will not be looked into certain like products, it is not possible to answer this question here. For this thesis it will be presumed that the general prohibition and the sustainable management exception accord the same treatment to all Members.

The seal regime is consistent with EU's obligations under TBT Agreement Article 2.1

## **2.2 The principle of non-discrimination in GATT 1994**

The first examination to undertake is whether the seal regime falls under the scope of GATT 1994 Article I:1 and III:4.

GATT 1994 Article I:1 covers rules, formalities and charges of any kind imposed on or in connection with importation. The seal regime consists of rules imposed on importation of seal products. GATT 1994 Article III:4 covers laws, regulations and requirements affecting the sale, purchase, distribution or use of seal products. The seal regime consists of laws, requirements and regulations affecting the marketing and thus the sale, purchase and distribution of seal products within the EU. The seal regime falls under the scope of both provisions.

According to case law there are three main questions in an examination of whether the MFN-treatment obligation in GATT Article I:1 has been breached; whether there is granted advantages covered by the article, whether the advantage has been accorded (i) to like products (ii) "immediately and unconditionally".<sup>60</sup>

As above seen, the seal products falling under the prohibition, in general or because they do not fall under the exceptions, have been placed at a disadvantage. This harmonizes with the wording "advantage" in GATT 1994 Article I:1.<sup>61</sup> The products not falling under the prohibition are granted an advantage of access to the EU market.

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<sup>60</sup>Panel Report on *Indonesia- Certain Measures Affecting the Automobile Industry*, WT/DS54/R (adopted July 23<sup>rd</sup> 1998) paragraph 14.138

<sup>61</sup>Appellate Body Report on *Canada- Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R (adopted June 19th 2000) paragraph 79 implying that the wording "any advantage" implies that a broad scope of advantages falls under the provision

However, for finding a breach of the MFN-treatment obligation, certain members must be accorded more favourable treatment than others. According to the provision an advantage must be granted to products “originating ... in any country” to be covered by the provision. This advantage can be accorded either de jure or de facto.<sup>62</sup> For the same reasons as under the discussion on TBT Agreement Article 2.1, the lack of factual ground has the consequence that it is not possible to conclude on whether the seal regime grants advantages to products from certain countries. It is thus not possible to know whether the seal regime accords such advantages as covered by the provision.

If the panel finds the advantage to be covered by the provision, the subsequent question is whether the advantage has been accorded to “like products”.

The wording “like” is interpreted in the same way for GATT Article I:1 as for TBT Article 2.1 and the above quoted criteria derived from GATT Article III:4. This means that the findings of “like products” can be transferred to the analysis of GATT 1994 Article I:1. Above it was presumed that there are “like” products not falling under the prohibition. The advantage of not being prohibited from importation and marketing has not been accorded to “like products” falling under the prohibition, in breach of GATT 1994 Article I:1.

Since the advantage is not granted to all like products, the advantage is thus not accorded immediately or unconditionally.<sup>63</sup>

For GATT 1994 Article III:4, based on the similarities of the wording in TBT Agreement Article 2.1 the considerations are the same ones under both provisions, notably whether the seal regime discriminates between “like products” by not according “no less favourable treatment” to products of all origin.

In interpreting treaties the interpreter shall look at the context of the provision and the treaty, including other agreements made in connection of the conclusion of the treaty.<sup>64</sup> Both the TBT Agreement and GATT 1994 were made in the connection of the conclusion of the WTO Agreement, and are thus in the context of one another, meaning that one is relevant for interpreting the other. In case law the considerations under TBT Agreement Article 2.1 has

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<sup>62</sup> Ibid paragraph 78

<sup>63</sup> Panel Report on *Canada- Certain Measures Affecting the Automotive Industry*, WT/DS139/R paragraph 7.80 expressing that the word “unconditionally” pertains to the obligation of according the like products of all Members the same advantage accorded to any product in any country

<sup>64</sup> Vienna Convention on Law of Treaties Article 31 number 2

been found to be the same as under GATT 1994 Article III:4.<sup>65</sup> The discussion under the TBT Agreement Article 2.1 was largely influenced by practice referring to the considerations under GATT 1994 Article III:4, and the elements there listed were originally set for an examination of GATT 1994 Article III:4.<sup>66</sup> For GATT 1994 Article III:4 there is therefore no need for a separate examination here.

When transferring the questions and findings from the TBT Article 2.1 analysis, the findings for GATT 1994 Article III:4 will be that there are other products not falling under the prohibition, like those falling under the prohibition. Furthermore that it is presumed that the seal products not falling under the exceptions are like those falling under the exception. Neither for GATT 1994 Article III:4 can it be proven that the seal regime discriminates between like products of different origin, and no breach of the provision can thus be found.

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<sup>65</sup> Appellate Body Report on *United States – Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/R paragraph 180

<sup>66</sup> See for instance Appellate Body Report on *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R paragraphs 101-103



### **3. The objective of eliminating obstacles to trade**

The objective of eliminating obstacles to international trade is one of the core objectives of the WTO. All agreements within the WTO share this objective, and most of the articles reflect the aim of liberalizing and eliminating obstacles to international trade. According to the preamble of the TBT Agreement the signatories desired “to ensure that technical regulations ... *do not create unnecessary obstacles to trade*”. For this dispute, a relevant article directly reflecting this principle is TBT Agreement Article 2.2.

According to the provision:

“Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.”

The question under this provision is whether the seal regime is an unnecessary obstacle to international trade in seal products.

#### **3.1 Unnecessary obstacle to trade**

According to a dictionary interpretation “obstacle” is a blockade or a hindrance for progress.<sup>67</sup> The seal regime is an obstacle as it blocks trade of commercial seal products between EU and other WTO members. According to the preamble of the implementing regulation, the objective of the seal regime was sought reached through creating obstacles to international trade. The seal regime is hindering the progress of reaching the WTO objectives. The question is whether the seal regime, as an obstacle to international trade, is “unnecessary”.

TBT Agreement Article 2.2 prescribes what will be considered to be an unnecessary obstacle. In its second part one can read that for the purpose of not creating unnecessary obstacles to international trade:

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<sup>67</sup> Catherin Soanes and Angus Stevenson, *Concise Oxford English Dictionary Luxury Edition*, Oxford 2008 p. 987

“technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are inter alia, ... animal ... life or health ...”.

Reading the two quoted parts together, an obstacle to trade is unnecessary when it is not necessary to fulfill a legitimate objective, or if the technical regulation is more restrictive than necessary to achieve a legitimate objective.<sup>68</sup>

The first examination to undertake is whether the seal regime is trade-restrictive. This is the first question because the seal regime must be found to be trade-restrictive for there to be a reason to examine whether the trade-restrictiveness is justified through a legitimate objective. For finding the seal regime to be trade-restrictive it is sufficient to find the measures to impose limits on imports.<sup>69</sup> The seal regime restricts trade in seal products. It is certain that the seal regime is trade-restrictive.

In the following it will first be examined whether the sought objective is legitimate as prescribed by TBT Agreement Article 2.2, and if so whether the seal regime fulfills the legitimate objective. If the answers are affirmative, subsequently it will be examined whether the seal regime is more trade-restrictive than necessary for achieving the objective of protecting animal life and health. Under the latter examination it will be looked at alternatives, taken into account the risk non-conformity would create.

### **3.1.1 Legitimate objective**

In this part it will be examined whether the objectives are legitimate. In doing so the wording “legitimate” must be interpreted.<sup>70</sup> In *US-COOL* the panel used a dictionary interpretation and expressed that a measure will be “legitimate” when the objective is “conformable to law or principle” or “justifiable and proper”.<sup>71</sup>

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<sup>68</sup> Panel Report on *United States - Certain Country of Origin Labelling (COOL) Requirements*, WT/ DS384/R (circulated November 18<sup>th</sup> 2011, appealed), paragraph 7.558

<sup>69</sup> Panel Report on *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna products*, WT/DS381/R paragraph 7.455

<sup>70</sup> Panel Report on *United States - Certain Country of Origin Labelling (COOL) Requirements*, WT/ DS384/R, paragraphs 7.615 and 7.629

<sup>71</sup> *Ibid* paragraph 7.630

Protecting seal life and health falls directly within the wording of the article as a legitimate objective. The provision provides a non-exhaustive list for legitimate objectives.<sup>72</sup> For the objective of protecting seal welfare, one should find the objective to be conformable to law and principles on animal welfare, and that it is justifiable and proper. That the objective of protecting seal welfare is legitimate, is further supported by the wording “animal health”, since “health” today can be interpreted as including welfare.

The objective of diminishing the economical demand leading to commercial seal hunt does not fall under the wording, and it is not similar to the directly mentioned objectives. In the last Panel Report on *Tuna-Dolphin* it was found that protecting dolphin life or health by ensuring that consumers’ behavior does not encourage fishing methods that effect dolphins, was legitimate.<sup>73</sup> For the EU this can mean that protecting seal life or health by diminishing seal hunt through ensuring that consumers cannot buy seal products, and thereby not encourage commercial seal hunt, can be considered a legitimate objective.

For the EU, another objective is preventing consumers’ uncertainty as to whether the products contain seal. In *US-COOL* the panel used another WTO Agreement, the General Agreement on Trade in Services (hereinafter GATS), for interpreting whether consumer information is legitimate objective under TBT Agreement Article 2.2. In GATS Article VI:4, a provision similar to TBT Agreement Article 2.2, consumer information is mentioned as a legitimate objective. The panel found this to mean that consumer information could be a legitimate objective also under TBT Agreement Article 2.2. They further expressed that “Social norms must be accorded due weight in considering whether a particular objective pursued by a government can be considered legitimate”.<sup>74</sup>

It is known that the citizens of the EU want to know whether products contain seal and that buying seal products is against social norms. The difference lies in that the seal regime prohibits import, and does not as the United States in *US-COOL*, require information through labeling. This may lead to it being harder to find the seal regime as pursuing a legitimate objective in this dispute.

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<sup>72</sup> The wording “inter alia”, Panel Report on *United States - Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R paragraph 7.634

<sup>73</sup> Panel Report on *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna products*, WT/DS381/R

<sup>74</sup> Panel Report on *United States - Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R paragraph 7.650

The consumer information for the seal regime is a consequence of protecting citizen's moral. In *China-Audiovisuals* the panel expressed that "the protection of public morals ranks among the most important values or interests pursued by Members".<sup>75</sup> This quote, read together with the extracts from the last *Tuna-Dolphin*, leads to finding the objective of protecting public moral through consumer information, a legitimate objective covered by TBT Article 2.2

The seal regime's objectives are legitimate under TBT Agreement Article 2.2.

### 3.1.2 The fulfilling of the objective

The question now becomes whether the seal regime fulfills its legitimate objectives. The term "fulfil" can be defined as providing fully what is wished for. The Panel in *US-COOL* used this interpretation and expressed a need for the measure at issue to carry out and perform the objective.<sup>76</sup> For finding the measure to fulfill the objective, they further expressed that there must be a genuine relationship of the ends and means between the objective pursued and the measure at issue.<sup>77</sup>

First it can be stated for the objective of consumer information, that the seal regime does not fulfill the legitimate objective. This is because seal products still are allowed imported and marketed within the EU, without other labeling requirements than those present prior to the seal regime.

Next, for the objective of protection of seal life it will be looked into whether the seal regime provides protection. The seal regime has made seal hunting less advantageous, and the amount of seals hunted may have decreased due to the seal regime.<sup>78</sup> However, as above mentioned, the number of seals allowed hunted in Canada and Norway, is based on quotas. The quotas reflect the amount of seal necessary to be taken out for a sustainable management of the ocean resources. The amount of seal hunted might not decrease in the future as

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<sup>75</sup> Appellate Body Report on *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (adopted January 19th 2010) paragraph 243 quoting the Panel Report

<sup>76</sup> Panel Report on *United States - Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R paragraph 7.629

<sup>77</sup> Ibid paragraph 7.693

<sup>78</sup> Canada expresses that a high Canadian dollar and the global economic downturn may be other reasons: [http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/faq-eng.htm#faq\\_4](http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/faq-eng.htm#faq_4)

countries with seal populations will have to regulate the seal populations for a sustainable management of their marine resources, regardless of whether there is a demand for the products. It is uncertain how the panel will weigh the mentioned elements, and whether they rather would examine the actual decrease in the amount of seals hunted.

The next legitimate objective to be examined whether it is fulfilled by the seal regime, is the protection of animal welfare. Seal welfare was the main reasoning of the seal regime. Seal hunt is by some regarded as brutal and inhumane, and the citizens' main concerns were the seal's pain and distress caused by the hunting methods. The EU citizens were opposed to the skinning of live seals. Since the protection of public moral is directly linked to seal welfare, the protection of public moral will not be fulfilled if the protection of seal welfare is not fulfilled.

Seal hunting has developed during the last century and there might not be reason for the concerns. Regulations with regard to quotas, a limited hunting season, protection of certain animals as well as restriction on hunting methods, have been placed on the industry in all the participating countries.

The reality is that today's modern seal hunt is deeply regulated for animal welfare purposes. Examples on the strict regulation can be that Norwegian hunters are obliged to use certain firearms, ammunition and must pass tests with the authorized weapons and ammunitions before each season. They also have to carry a hakapik to club the head of the already shot seal to make sure it is dead.<sup>79</sup> Only adult seals are allowed hunted. It is forbidden to skin seals alive, and the regulations on how to drain and skin the animal are very detailed.<sup>80</sup> Furthermore a veterinarian must be onboard at all times to make sure animal welfare rules are applied. The Canadian Law is not as detailed, however the essence of the obligations to treat seals humanely is the same.<sup>81</sup>

By comparing EU and Norwegian legislation on animal welfare, and Norwegian, Canadian and EU rules of slaughtering and treatment of seals, one finds that the principles are the same

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<sup>79</sup> For Canada; Marine Mammal Regulations Article 28 number 1.1

<sup>80</sup> My translation and summary of the rules in Lov 6. juni 2008 nr 37 om forvatning av villlevande marine ressurser (Havressurslova) and Forskrift 2. desember 2003 nr. 151 om utøvelse av selfangst i Vesterisen og Østisen and Marine Mammal Regulations Article 29

<sup>81</sup> Regulations Respecting Marine Mammal of 1993-02-04 SOR/93-56; Part IV Seals.

ones.<sup>82</sup> Both the seal regime's and the claimant's legislation on seal hunt are *lex specialis* to protect seal welfare. This suggests that the seal regime does not fulfill the objective.

There has not been found to be a genuine relationship between the seal regime and the factual protection of seal life or welfare. Even though the seal regime has cut off one of the biggest markets for seal products, this does not mean that the amount of seal hunted will diminish. Nor does it imply that the hunting methods will change.

Even though the factors looked at imply that the seal regime does not fulfill the objective, the limited facts, together with the burden of proof, leads to uncertainty. It will not be concluded on whether the seal regime fulfills the objective; rather it will be looked into the second criteria for finding the seal regime not to be an unnecessary obstacle to trade.

### **3.2 More trade restrictive than necessary**

The question now is whether the seal regime is more trade-restrictive than necessary for achieving the objective of protecting seal life and health. The preamble of the implementing regulation states that the objective of the seal regime is protection of seal life and health, and that the seal regime is necessary to fulfill this objective. The preamble also expresses that the mechanism verifying compliance with the requirements of the seal regime, "should not be more trade-restrictive than necessary". The wording of the preamble does not, however, lead to finding the seal regime not to be more trade-restrictive than necessary.

For finding a measure to be necessary there should not be alternatives, since alternative measures imply that the existing measure can be replaced and thereby not "necessary". For finding the seal regime not to be more trade restrictive than necessary, there should not be less trade-restrictive alternatives. This is supported by the *US-COOL* dispute where the panel expressed that whether a measure is more trade restrictive than necessary, is based on the availability of less trade-restrictive alternatives.<sup>83</sup> To be considered as a reasonable available

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<sup>82</sup> Lov 19. juni 2009 nr 97 om dyrevelferd (Dyrevelferdsloven) (ex. § 3: "Dyr har en egenverdi... De skal behandles godt og beskyttes mot fare for unødige påkjenninger og belastninger» and § 12 «avlinningen skal skje på dyrevelferdsmessig forsvarlig måte»). Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing (ex. Article 3.1 1." Animals shall be spared any avoidable pain, distress or suffering during their killing and related operations.")

<sup>83</sup> Panel Report on *United States - Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R paragraph 7.719

alternative, the panel further found that the alternatives must equally fulfill the objective pursued.

### **3.2.1 Less trade-restrictive alternatives**

It will now be examined whether there are less trade-restrictive alternatives which equally fulfill the objective pursued.

In the preamble of the basic regulation other options are mentioned. One option mentioned is labeling. The EU has found labeling not to reach the same result, to be disproportionately expensive and to impose a significant burden on manufacturers, distributors and retailers.<sup>84</sup>

Labeling products could be WTO-consistent and are less trade-restrictive as they do not impose a ban. The products that could have been labeled are those containing seal. Labeling requirements are normal, and there is thus a presumption for considering labeling not to be burdensome. Requiring labeling of products should not be more burdensome than implying the requirements of the current seal regime. The conformity assessment procedures would not be disproportionately expensive for the EU as it generally is the exporters who bear the costs.

To be a reasonable alternative, labeling must fulfill the objective equivalent to the seal regime. The EU Parliament Rapporteur Diana Wallis concluded in her report that “the labelling of products is the best way to help ensure high animal welfare standards”. Labeling would also protect citizen’s moral as they by labeling will know whether products contain seal.

The EU is not imposed to seal hunting in general, but to the way it is done. Based on this, another alternative would have been to allow into the EU market those seal products which have been hunted in an, for the EU, acceptable manner. In a proposal for regulation on trade in seal products, the commission proposed a ban with exceptions similar to the alternative here mentioned.<sup>85</sup> The regulation was not adopted with the proposed exception, and this alternative exception was dismissed in the preamble of the basic regulation. The EU argues

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<sup>84</sup> Preamble of the basic regulation paragraph (12)

<sup>85</sup> Proposal for a Regulation of the European Parliament and of the Council concerning trade in seal products, see [http. address in reference](#)

that “a verification and control of hunters’ compliance with animal welfare requirements is not feasible in practice or, at least, is very difficult to achieve in an effective way”.<sup>86</sup>

The EU has no authority to investigate foreign hunters’ compliance with EU animal welfare requirements.<sup>87</sup> However an alternative is to examine the national law of the countries exporting seal products into the EU, and whether their laws comply with EU’s requirements. If they do, the EU should trust that the exporting countries control and verify their hunters’ compliance with laws. This solution requires less of the EU than the existing seal regime since the hunters are obliged to follow these laws, irrespectively of the seal regime.

The options must provide an equivalent contribution to the achievement of the objective pursued in order to be reasonable available. When seal is hunted in a way that fulfills animal welfare requirements, the objective of protecting seal welfare is achieved. This alternative could lead to hunters seeking to use methods accepted by the EU, and thereby contribute to enhanced seal welfare.

According to the letter of the law, it must be taken into account the risk non-fulfillment would create. In this analysis a previous panel found that it must be looked into the gravity of potential risks to arise in the event that the legitimate objective was not fulfilled.<sup>88</sup> The alternatives here looked at would protect animal life and welfare and thus also protect public moral, equivalently to the current measures in the seal regime. The alternatives mentioned would not entail grave potential risks of non-fulfilment of the EU’s objectives.

As there are other less trade-restrictive alternatives, the seal regime is more trade-restrictive than necessary.

### **3.3 Conclusion**

The seal regime is an unnecessary obstacle to international trade.

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<sup>86</sup> Preamble of the basic regulation recital (11)

<sup>87</sup> One of the main reasons for the seal regimes prohibition was that the EU could not legislate in non-EU countries <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20090120IPR46690+0+DOC+XML+V0//EN>

<sup>88</sup> Panel Report on *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna products*, WT/DS381/R paragraph 7.467



Due to the preamble of the TBT Agreement it can be asked whether there are exceptions from EU's obligation.<sup>89</sup> The preamble indicates that exceptions similar to the ones in GATT 1994 Article XX can be invoked under the same conditions as for GATT Article XX.<sup>90</sup> Because of this, it has been a question in earlier practice whether exceptions in GATT Article XX can be invoked for TBT Agreement obligations. In the last Appellate Body report the question was answered, implicitly, but negatively for Article 2.1. The reasoning was the fact that the balance between the interest of compliance with the agreement and the Member's right to regulate on policy objectives, are to be found within the provision itself, read together with the preamble.<sup>91</sup> The balance laid out in Article 2.1 in the wording "not be more trade-restrictive than necessary to fulfil a legitimate objective" is to be applied to Article 2.2.

By comparing the preamble's second and sixth recital with GATT Article XX, it is certain that the panel, regardless of their findings on the question, will not find the preamble to allow regulation for a wider range of policy objectives than after GATT Article XX. Because of this it will be presumed that the EU cannot invoke other policy objectives than under GATT Article XX for nullifying their obligations under TBT Agreement Article 2.2, and it will therefore only be examined whether the EU can invoke GATT 1994 Article XX. If the answer to this question is affirmative, it should be examined whether this implies that such objectives also should nullify the EU's obligations under TBT Agreement Article 2.2

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<sup>89</sup> The second recital expresses that the TBT Agreement is to further the objectives of GATT 1994

<sup>90</sup> The sixth recital expresses that no country should be prevented from taking "measures necessary to ensure ... protection of animal ... life or health ... 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 ... and are otherwise in accordance with the provisions of this Agreement"

<sup>91</sup> Appellate Body Report on *United States – Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/AB/R paragraph 109

#### **4. The prohibition on quantitative restrictions**

One of the cornerstones of the earlier GATT system is the prohibition on quantitative restrictions.<sup>92</sup> Quantitative restriction is a non-tariff barrier and the principle reflects that tariffs are preferred before quotas or other non-tariff restrictions in the WTO system.<sup>93</sup> This is because tariffs allow import from the most-efficient competitor, while quantitative restrictions have a trade distorting effect by only allowing importation of a certain quantum. Furthermore the allocation of quotas can be problematic for the non-discrimination objectives of the WTO.<sup>94</sup>

The objective of prohibiting quantitative restrictions is today found in GATT 1994 Article XI:1 and in Agriculture Agreement Article 4.<sup>95</sup> In a previous case the panel established that a violation of GATT 1994 Article XI would be a violation of the Agriculture Agreement Article 4.2.<sup>96</sup> Based on this report it is possible to base a discussion on the prohibition on quantitative restriction, solely on GATT 1994 Article XI:1.<sup>97</sup> In the following the question will be if the seal regime is in breach of this provision.

GATT 1994 Article XI:1 obliges that:

“No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party”.

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<sup>92</sup> Panel Report on *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, (adopted May 31<sup>st</sup> 1999) paragraph 9.63

<sup>93</sup> Andrew T Guzman and Joost H.B Pauwelyn page 199

<sup>94</sup> Panel Report on *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R paragraph 963

<sup>95</sup> “Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted in to ordinary customs duties”.

<sup>96</sup> Appellate Body Report on *Korea, Republic of - Measures Affecting Imports of Fresh, Chilled and Frozen Beef*; WT/DS161/169/AB/R (adopted December 11th 2000) paragraph 762

<sup>97</sup> In case of conflict between agreements listed in Annex 1 of the WTO, such as the Agriculture Agreement and GATT 1994, according to the Article XXIX of the WTO agreement (Interpretative Note to Annex 1A) and the principle of *lex specialis*, the rules in Agriculture Agreement would prevail over those in GATT 1994 in the extent of the conflict.

The seal regime is “prohibitions ... other than duties, taxes or other charges”. The seal regime is part a quantitative restriction as it allows importation of the quantum “zero” commercial seal products (not falling under the Inuit-exception) into the EU market.<sup>98</sup> The seal regime imposes restriction made effective through import licences.

In a similar case, the panel found that it was contrary to Article XI:1 that a Member banned imports of “products from any country not meeting certain policy conditions.”<sup>99</sup> In our case EU bans imports of seal products not falling under the exceptions of the seal regime.

#### **4.1 Conclusion on the prohibition on quantitative restrictions**

The seal regime is inconsistent with the prohibition on quantitative restrictions in GATT Article XI:1 and thereby inconsistent with Agriculture Agreement Article 4.2. There are however several exceptions to the prohibition on quantitative restrictions. Some exceptions are set out in GATT Article XI:2. Neither of these exceptions are applicable in our case.<sup>100</sup> Furthermore the general exception rule in GATT 1994 Article XX applies to GATT Article XI:1. This means that one must examine whether the seal regime falls under this provision before making a final conclusion on whether the seal regime is contrary to the prohibition on quantitative restrictions.

For Agriculture Agreement Article 4.2 there are no explicit exceptions, but in practice it has been discussed whether the exception in GATT Article XX in a specific case can cover other WTO Agreements such as the Agriculture Agreement.<sup>101</sup> This means that one must examine whether the seal regime falls under one of the exceptions in GATT 1994 Article XX before a final conclusion can be reached on whether the seal regime is contrary to the prohibition on

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<sup>98</sup> In Panel Report on *Canada- Certain Measures Concerning Periodicals*, WT/DS31/R (adopted March 14<sup>th</sup> 1997) paragraph 5.5 it was stated that “Since the importation of certain foreign products ... is completely denied ... it appears that this provision by its terms is inconsistent with Article XI”.

<sup>99</sup> Appellate Body Report on *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (adopted October 12<sup>th</sup> 1998) paragraph 7.16 and Appellate Body Report on *United States- Customs Bond Directive Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS345/AB/R (adopted August 1<sup>st</sup> 2008) paragraph 310

<sup>100</sup> The exceptions are, in short, remedies to remove a surplus and restrictions to safeguard balance of payments

<sup>101</sup> DS 394/395/398 *China - Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R-WT/DS395/AB/R-WT/398/AB/R (adopted February 22<sup>nd</sup> 2012) paragraph 307

quantitative restrictions. If answered affirmative, it should be examined whether these exceptions are applicable for the Agricultural Agreement in this case.

## **5. Exceptions to WTO obligations in GATT 1994 Article XX**

The General Exception rule found in GATT 1994 Article XX is applicable to all GATT 1994 provisions, and as above seen, maybe also to provisions of the TBT Agreement and the Agricultural Agreement. GATT 1994 Article XX allows some important non-economic objectives, under certain conditions, to trump WTO obligations to liberalize trade.<sup>102</sup> This means that the seal regime's measures which are in breach of the EU's obligations under the mentioned GATT articles might be justified under GATT 1994 Article XX.

The article is build up by a general opening clause (often referred to as "the chapeau") and by particular exceptions divided in subparagraphs (a)-(j). The subparagraphs that could be relevant in this case are (a) and (b).<sup>103</sup>

When applying article XX one must examine whether the regulations fall within one of the exceptions in Article XX and if this is answered affirmative, examine whether the regulations comply with the opening clause.<sup>104</sup> One of the reasons for this is that the chapeau has been "worded so to prevent the abuse of the exceptions in Article XX".<sup>105</sup> In the following it will be examined whether the seal regime falls within subparagraph (a) and subsequently whether it falls within subparagraph (b). It is the EU seeking to invoke the exception to carry the burden of proof.<sup>106</sup>

### **5.1 GATT 1994 Article XX subparagraph (a)**

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<sup>102</sup> Andrew T Guzman and Joost H.B Pauwelyn page 339

<sup>103</sup> Even though also "living natural resources" can fall under subparagraph (g) according to Thorbjørn Daniel Bugge pages 430-431, the exception in subparagraph (g) is not relevant in this dispute, since the objective of the seal regime is not to conserve the seal population as such, and since the seal population is managed in accordance with sustainable management.

<sup>104</sup> Appellate Body Report on *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R paragraphs 119-120. Also Panel Report on *United States- Standards for Reformulated and Conventional Gasoline*, WT/DS2/R paragraph 6.20

<sup>105</sup> [http://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/gatt1994\\_07\\_e.htm#article20](http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_07_e.htm#article20) paragraph 583, based on Appellate Body Report on *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R

<sup>106</sup> Panel Report on *United States- Standards for Reformulated and Conventional Gasoline*, WT/DS2/R page 22

This exception applies to measures that are “necessary to protect public morals”. The wording implies a twofold analysis; whether the seal regime protects public morals and whether the seal regime is necessary for accomplishing this objective.

### 5.1.1 Protection of public morals

The exception in GATT 1994 Article XX subparagraph (a) has only been tried in one dispute; *China-Audiovisuals*.<sup>107</sup> In this dispute the panel referred to the interpretation of the wording “necessary to protect public morals” in another case regarding an almost identical article in another WTO Agreement; the General Agreement on Trade in Service (hereinafter “GATS”) Article XIV (a).<sup>108</sup>

Against using such jurisprudence speaks the fact that it here is dealt with two different articles in two different agreements. In interpreting treaties one “should not automatically transpose jurisprudence developed in the context of one provision to another. Rather, a treaty interpreter must carefully consider any differences in the wording, context and purpose of different provisions, and assess the significance of any such differences”.<sup>109</sup>

However, the Appellate Body has previously found that jurisprudence under the GATT 1994 Article XX could be relevant for the interpretation of analogous provisions in GATS Article XIV. GATT 1994 Article XX subparagraph (a) is analogous to GATS Article XIV (a).<sup>110</sup> Jurisprudence under GATS Article XIV (a) is thus relevant for interpretation of the wording “public morals” in GATT Article XX (a).<sup>111</sup>

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<sup>107</sup> Panel Report on *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, paragraph 7.759

<sup>108</sup> “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any member of any measure: (a) necessary to protect public morals”.

<sup>109</sup> Panel Report on *United States – Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/R paragraph 7.356

<sup>110</sup> Appellate Body Report on *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (adopted April 20th 2005) paragraph 291

<sup>111</sup> Andrew T Guzman and Joost H.B Pauwelyn page 353, and the fact that both the Panel Report and the Appellate Body Report on *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R often refer to Appellate Body Report on *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R a case on GATS Article XIV (a)

In *US-Gambling* the panel used the Shorter Oxford English Dictionary to interpret the term “public” and “moral”. They found the wording “public moral” to denote to “standards of right and wrong conduct maintained by or on behalf of a community or nation”, here the EU.<sup>112</sup> This interpretation is the same for GATT 1994 Article XX subparagraph (a).<sup>113</sup>

According to case law, the EU “should be given some scope to define and apply for themselves the concept of “public moral”” within the union “according to their own systems and scales of values”<sup>114</sup> The EU explains the seal regime in part by the citizen’s demand for measures prohibiting import and trade of seal products. The citizens find the hunting of seal to be unmoral. One might therefore say that the seal regime is aimed at protecting the public moral as standards of right and wrong conduct maintained by EU citizens.

The question is now whether the seal regime is necessary the protection of public moral.

### **5.1.2 “Necessary for the protection of public moral”**

Synonyms to the wording “necessary” are essential, indispensable, crucial and obligatory. According to the Appellate Body the wording could be reflecting degrees of necessity, and found the wording “necessary” to generally lay close to the most demanding degree of necessity; indispensable.<sup>115</sup>

According to a previous panel report there should be a case by case weighing and balancing of a series of factors when examining the necessity of a measure. These factors include the contribution of the seal regime to the objective pursued, the importance of the common interests and values protected by the seal regime and the impact the seal regime has on import.<sup>116</sup>

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<sup>112</sup> Panel Body Report on *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R paragraph 6.465

<sup>113</sup> Appellate Body Report on *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R paragraph 7.759

<sup>114</sup> Panel Report on *United States- Standards for Reformulated and Conventional Gasoline*, WT/DS2/R paragraph 6.461 and Appellate Body Report on *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R paragraph 243

<sup>115</sup> Panel Report on *Brazil- Measures Affecting Imports of Retreated Tyres*, WT/DS332/R (adopted December 17th 2007) paragraph 141

<sup>116</sup> Ibid paragraph 142 and Appellate Body Report on *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R paragraph 305; both with references to Appellate

If one find the seal regime to be “necessary” for achieving a certain objective; the “result must be confirmed by comparing the measure with its possible reasonable available alternatives”.<sup>117</sup>

This means that when examining whether the seal regime is necessary to achieve the objectives in the relevant subparagraphs of GATT Article XX there are four different examinations to undertake; first the relationship between the contribution of seal regime and the stated objective sought reached, second the importance of the values and interest protected by the seal regime, third the impact on those seeking to import seal products into the EU, and fourth if WTO-consistent alternatives are reasonable available.<sup>118</sup> These four factors will be divided into four subtitles.

#### *5.1.2. a) The contribution of the seal regime for the protection of public moral*

For the contribution factor the Appellate Body has previously noted that the party invoking the exception, here the EU, should demonstrate that measure is necessary by evidence establishing that the measure contributes to achieving the objectives.<sup>119</sup> The evidence does not need to be “immediately observable”, it could be demonstrated that the measure is suitable to produce such contribution.<sup>120</sup>

As we saw above the seal regime is aimed at protecting public moral. This does not however mean that the seal regime in fact contributes to the protection of public moral. On one side one can argue that there are other animals treated inhumanly and that the seal regime therefore does not contribute to the objective of protecting public morals concerning animal welfare in general. One could also argue that others do not find seal hunting unmoral, and one can say that seal hunt in fact is not inhumane. However the citizens of the EU made a demand specifically regarding trade in seal products, and not in other animal products. There is

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Body Report on *Korea, Republic of - Measures Affecting Imports of Fresh, Chilled and Frozen Beef* WT/DS161/169/AB/R

<sup>117</sup> Panel Report on *Brazil- Measures Affecting Imports of Retreated Tyres*, WT/DS332/R paragraph 155

<sup>118</sup> Appellate Body Report on *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R paragraphs 239 to 245

<sup>119</sup> Ibid. paragraph 252, referring to Panel Report on *Brazil- Measures Affecting Imports of Retreated Tyres*, WT/DS332/R

<sup>120</sup> Panel Report on *Brazil- Measures Affecting Imports of Retreated Tyres*, WT/DS332/R paragraph 151 (on GATT 1994 Article XX (b))



presumption for that the seal regime is suitable for the protection of public moral since this is one of the reasons for the seal regime.

#### *5.1.2 b) The importance of the values and interest sought protected*

In *China-Audiovisuals* the panel found that "the protection of public morals ranks among the most important values or interests pursued by Members".<sup>121</sup> This should mean that the relative importance of the protection of public morals is high. When the importance of the protection is high, it should be easier to find the seal regime to fall within the exception in GATT 1994 subparagraph (a). This is supported by *EC-Asbestos* where it was expressed that the more vital or important the common interests or values pursued, the easier it is to accept as necessary measures designed to achieve those ends.<sup>122</sup>

#### *5.1.2. c) The impact of the seal regime*

Before the entry into force of the seal regime, the EU was one of the biggest markets for seal products.<sup>123</sup> This means that there is a presumption that seal regime has a big impact on seal product exporters.

The exceptions in the seal regime are narrow, and few exporters fall under the exceptions. The only exporters who are allowed to gain on exporting seal products are the once falling under the Inuit-exception. The sustainable management exceptions prohibit exporting nations to gain on a sustainable management of their marine eco-system. As earlier mentioned, seal is hunted according to quotas set for the sustainable management of marine resources. Countries still need to manage their amount of seal in the future, and the seal regime's impact on those countries will be that they will have to subsidize a bigger part of their seal hunting vessels and that they will lose income from taxation.

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<sup>121</sup> Appellate Body Report on *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R paragraph 243 quoting the Panel Report

<sup>122</sup> Appellate Body Report on *European Communities - Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R paragraph 172

<sup>123</sup> According to the EU more than 1/3 of all seal products passed through or ended up at the EU market.  
[http://ec.europa.eu/environment/biodiversity/animal\\_welfare/seals/seal\\_hunting.htm](http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/seal_hunting.htm)

The seal regime has and will continue to have a big impact for the seal hunters, those seeking to import and export seal products and the countries where they reside.

#### *5.1.2 d) Alternative measures*

The consideration here is whether WTO-consistent less trade-restrictive alternatives are reasonable available. For being reasonable available the alternatives must provide an equivalent contribution to the achievement of the objective pursued and not be too burdensome compared to the existing measures.<sup>124</sup>

Above under the examination of TBT Agreement Article 2.2 it was found to be reasonable available alternatives to the seal regime. The question under this subparagraph is whether the alternatives provide an equivalent contribution to the achievement of the objective of protecting public moral.

When the protection of public moral was based in a demand for seal welfare, the objective of protecting public moral is achieved when seals are hunted in a way that fulfills animal welfare requirements. It can be repeated here that if the EU opens up for importation of products that fulfill the animal welfare requirements; more producers of seal products would be likely to follow the requirements, and the objective would then be better reached than by existing the seal regime. The alternatives equally contribute to the protection of public moral.

#### *5.1.2 e) Conclusion*

To conclude one must consider the weight and balance the three first above mentioned elements. It has been shown that the importance of the protection of the public moral is to be applied much weight, and that the EU's regulation contributes to protect the public moral. However it has been shown that the seal regime has a big impact on trade in seal products. Further the solution legislated by the EU is not the only reasonable available alternative for protecting public moral. As one need the fourth consideration to confirm that the seal regime

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<sup>124</sup> Andrew T Guzman and Joost H.B Pauwelyn page 349

is necessary for protecting public moral, the seal regime does not fall under the exception “necessary to protect public morals”.

## **5.2 GATT 1994 Article XX subparagraph (b)**

This exception applies to measures which are “necessary to protect ... animal ... life or health”. The same twofold examination must be done here, notably whether the seal regime protects animal life or health, and whether it is necessary for such protection. For the necessity examination the same four factors must be looked into under subparagraph (b). Here it can be mentioned that the impact of the seal regime will be the same as found under subparagraph (a). Furthermore it can quickly be stated that animal life and health are important values. Under subparagraph (b) one must examine whether the alternatives contributes equivalent to the protection of animal life and health. This was done under the discussion on TBT Agreement Article 2.2 where we saw that the alternatives equally fulfill, here contributes to, the objective.<sup>125</sup>

The focus under this subparagraph will be the whether the seal regime itself contributes to the protection of seal life or health. The objective of reducing the amount of seal hunted, falls directly under the wording “protection of ... animal life”. The objective of enhancing seal welfare falls within the wording “animal ...health”.

As it within the EU already was a prohibition on commercial seal hunt in the Habitats Directive, the EU’s pursuit to reduce commercial seal hunt was mainly pointed towards hunt outside their territory.<sup>126</sup> An additional question to arise under this subparagraph is thus whether extraterritorial protection falls under the exception in this subparagraph.<sup>127</sup>

### **5.2.1 Extraterritorial protection of animal life and health**

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<sup>125</sup>Panel Report on *United States- Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R, paragraph 7.380 expressing that the legal interpretive approach is similar for TBT Article 2.2 and GATT 1994 Article XX (b)

<sup>126</sup> The Habitat Directive Article 14

<sup>127</sup> This question is posed here, and not under TBT Agreement Article 2.2, as practice on TBT Agreement Article 2.2 does not problematize extraterritorial jurisdiction (see for example the last Panel Report on the Tuna Dolphin dispute), but practice on GATT Article XX does problematize extraterritorial jurisdiction.

The letter of the law is quiet on the question and does not preclude extraterritorial jurisdiction.<sup>128</sup>

This question of whether extraterritorial measures are to be accepted under subparagraph (b) has been discussed two times in front of WTO panels, in the two first *Tuna-Dolphin* disputes.<sup>129</sup> The question there posed was one similar to our dispute; whether a United States prohibition on import of Tuna could be allowed based on an objective of protecting dolphin life or health outside the territory of the United States.

Neither of the panels found any guidance in the letter of the law, nor in the objective and purpose of the GATT 1994 and Article XX subparagraph (b).<sup>130</sup> The first panel found guidance in the drafting history as it showed that the drafters was concerned mainly by the use of sanitary measures to safeguard life or health of animals within the territory and jurisdiction of importing country.<sup>131</sup> In other words the drafting history pointed towards not including extraterritorial protection of animal health and life.<sup>132</sup> The second panel found that the wide wording of the article did not exclude extraterritorial jurisdiction.<sup>133</sup>

Another factor in the interpretation of a treaty article is its context. The second panel used the wording and practice on subparagraphs (e) and (g) for showing that the article allows certain measures to be taken outside the territory of the party taking the measure.

A case regarding the extraterritoriality within subparagraph (g) was *US-Shrimp*, where the Appellate Body carved out some connection requirements between the object of the protection and jurisdiction.<sup>134</sup> In this case they found that the United States should have some jurisdiction over the protection of sea turtles (here as an exhaustible resource after subparagraph (g)) because they are “highly migratory animals” and that some were known to

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<sup>128</sup> This was also the finding of the Second Panel in *United States- Restrictions on Imports of Tuna*, paragraphs 5.31 and 5.31.

<sup>129</sup> Panel Report on *United States- Restrictions on Import of Tuna*, WT/DS21/R (unadopted September 3rd 1991) and Panel Report on *United States- Restrictions on Import of Tuna*, WT/DS29/R (unadopted June 16th 1994) In Panel Report on *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna products*, WT/DS381/R the panel did not look into GATT 1994 provisions

<sup>130</sup> Thorbjørn Daniel Bugge, *WTO Adjudication An institutional analysis of adjudicative balancing of interests – exemplified with developments in interpretation of GATT Article III and XX*, København 2005 pages 419-421

<sup>131</sup> Panel Report on *United States- Restrictions on Import of Tuna*, WT/DS21/R paragraph 5.26

<sup>132</sup> According to Vienna Convention on Law of Treaties Article 32 supplementary means of interpretation are preparatory work and the circumstances of the conclusion of the treaty

<sup>133</sup> Panel Report on *United States- Restrictions on Import of Tuna*, WT/DS29/R (unadopted June 16th 1994), paragraphs 5.31 and 5.31. Summary of, under “key finding”

<sup>134</sup> Appellate Body Report on *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R

occur in waters over which the United States had jurisdiction. They did not “pass upon the question of whether there is an implied jurisdictional limitation”, but concluded that because of the specific circumstances in the case there was “sufficient nexus” to allow extraterritorial jurisdiction.<sup>135</sup>

In interpreting treaty articles one cannot reach an interpretation that would breach the object and purpose of the treaty. The first Panel in the *Tuna-Dolphin* disputes considered that a too wide interpretation of GATT 1994 Article XX subparagraph (b) would lead to the possibility of each contracting party determining measures on the protection of life and health of animals, measures which other parties could not deviate without jeopardizing their trade rights.<sup>136</sup> This would be against the object of GATT 1994 and of Article XX. This implies that the demand to the level of nexus could be higher for subparagraph (b).

Another factor pointing towards requiring stronger nexus for subparagraph (b) is the fact that the sea turtles concerned in *US-Turtles* were endangered, and preventing species from exhaustion must be done across borders. Protecting animal life or health for migrating species must also be done across borders, but unlike subparagraph (g); subparagraph (b) was not originally intended for protection of animal life and health outside the Member’s jurisdiction.

It will be outside the extent of this thesis to investigate the migration of the seal species hunted for outside the EU. One can however point to that seals are migratory to a certain extent. Whether this means that the seals hunted for outside the EU often enough are within EU jurisdiction, will depend on the evidence provided to the Panel by the EU. It is here difficult to conclude on whether there is “sufficient nexus to allow extraterritorial jurisdiction”. As it is for the EU to prove that the objective of protecting seal life or health outside the EU is a legitimate objective, it will in the following be presumed that the objective of protecting seal life and welfare outside the EU is not a legitimate objective under GATT 1994 Article XX subparagraph (b).

As extraterritorial protection is not a legitimate objective here, the seal regime cannot contribute to the objective of protecting seal life and health, and the seal regime does not fulfill the criteria for invoking the exception.

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<sup>135</sup> Ibid paragraph 133

<sup>136</sup> Panel Report on *United States- Restrictions on Import of Tuna*, WT/DS21/R (unadopted September 3rd 1991) paragraph 5.27

### 5.3 The chapeau

Because the conclusions above have been based on certain presumptions, it seems necessary for providing an overview to include a brief analysis of the chapeau.

According to the Appellant Body, when applying GATT 1994 Article XX “the measure at issue must not only come under one or another of the particular exceptions ... it must also satisfy the requirements imposed by the opening clauses of Article XX”<sup>137</sup>.

The opening clause states that exceptions in the subparagraphs only can be invoked

“Subject to 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”.

In applying the chapeau “a balance must be struck between the right of a Member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members.”<sup>138</sup> It is not certain how the panel will balance the EU’s rights of invoking the exceptions on one side, with EU’s obligations to respect Canada’s and Norway’s right under WTO agreements. It is plausible that the reasonable availability of alternatives will influence also this balancing.

Here it will be examined whether the seal regime is applied in a manner that constitutes arbitrary or unjustifiable discrimination.

As both the protection of public moral and the protection of animal life and health pertain to the objective of enhancing seal welfare, it is likely that Canada and Norway will claim that the prohibition on trade in the narrow subgroup of seal, is an arbitrary or unjustified discrimination preventing the EU from invoking subparagraphs (a) and (b). They are likely to base such a claim on that products resulting in inhumane treatment and killing of other animals are allowed traded within the EU. Further it seems likely that they will claim that for

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<sup>137</sup> Appellate Body Report on *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/R (adopted December 22<sup>nd</sup> 1995) page 17

<sup>138</sup> Appellate Body Report on *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R paragraph 156

treatment of animals, the same conditions prevail in all countries since the principles of animal welfare are universal.<sup>139</sup>

For finding the seal regime to be means of “arbitrary or unjustifiable discrimination” the panel must find the nature or quality of the discrimination to be graver than simply constituting a violation of another GATT 1994 article.<sup>140</sup>

It is plausible to find the focus on a narrow subgroup, to be an “arbitrary and unjustifiable” discrimination against the few countries practicing seal hunt, since the hunt has been found to be in accordance with international sustainable management principles and in accordance with animal welfare rules.

## **Conclusion**

The EU cannot invoke the exceptions in GATT Article XX.

When the EU cannot invoke the exceptions in GATT Article XX, it is not necessary in this thesis to examine whether the exceptions could have been invoked for EU’s obligations under Agriculture Agreement Article 4.2 in this dispute. Nor is it necessary here to examine whether exceptions like those in GATT 1994 Article XX could be invoked for nullifying EU’s obligations under TBT Agreement Article 2.2 as the exceptions that may lay there, does not go beyond the exceptions in GATT 1994 Article XX.

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<sup>139</sup> As earlier mentioned, Norway’s and EU’s legislation on seal hunt is *lex specialis* for general legislation on animal welfare. Furthermore, the United Nation’s Educational, Scientific and Cultural Organization has adopted the *Universal Declaration of Animal Rights* (proclaimed in Paris on 15 October 1978) and proposed a *Universal Declaration on Animal Welfare*.

<sup>140</sup> “the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994”: Appellate Body Report on *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R paragraph 150. And “The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred.” Panel Report on *United States- Standards for Reformulated and Conventional Gasoline*, WT/DS2/R,(adopted January 29<sup>th</sup> 1996) page 23

## **6. The EU seal regime as inconsistent with EU's obligations under WTO law**

In the foregoing it was concluded that the seal regime is contrary to EU's obligations under the TBT Agreement Article 2.2, the Agricultural Agreement Article 4.2 and GATT 1994 Article XI. It was not found proven that the seal regime is inconsistent with the non-discrimination obligations in TBT Agreement Article 2.1 and GATT 1994 article I:1 and III:4. In this final part it will be speculated in how the panel will decide the dispute, and the consequences of the panel's findings.

### **6.1 "European Communities - Various Measures on Importation and Marketing of Seal Products" in front of the panel**

The questions posed in this thesis are based on thorough investigations of earlier case law and the panel is likely to pose the same questions as posed in this thesis under the same provisions. The dispute in front of the panel will be more enlightened by facts as the parties provide evidence for their claims. Because of this, the subsumption might in parts differ from the subsumption in this thesis, leading the panel to reach different conclusions. However it is plausible that the panel will reach the same main conclusion; notably that the seal regime is inconsistent with the EU's obligations under WTO law.

The panel is likely to divide the claims by agreements in accordance with normal practice. The panel will probably start by examining the claims under the special agreements in accordance with the principle of *lex specialis*. For this dispute this, based on the findings of the seal regime to be inconsistent with several provisions, the panel is likely to exercise judicial economy and only examine some of the claims, and not examine provisions under all three agreements.

Within the WTO dispute settlement system exercising judicial economy is normal, and the practice of judicial economy has been approved by the Appellate Body, as long as the panel resolves the dispute in front of it.<sup>141</sup> A negative consequence of exercising judicial economy is that the parties might feel that their arguments and objectives have not been fully taken into

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<sup>141</sup>Andrew T Guzman and Joost H.B Pauwelyn, page 122



consideration. For this dispute the elements of considerations are the similar under all the agreements, and there is thus little against the panel exercising judicial economy.

## **6.2 The WTO consequences if the panel finds the seal regime to be inconsistent with EU's obligations**

If the panel finds that the EU has breached its WTO trade obligations, the seal regime will be considered to constitute nullification or impairment of Canada's and Norway's benefits accruing under the WTO agreements, to the extent of the breach.<sup>142</sup> Pursuant to DSU Article 19.1 the Panel will, having found the EU to breach its WTO obligations, recommend the DSB to request that the EU brings the inconsistent seal regime into conformity with the breached WTO obligations. The panel might suggest how the seal regime can be brought into conformity, and if so the DSB might include this in their request to the EU.<sup>143</sup>

If the EU does not comply with the recommendation within a reasonable period of time, the DSB can impose trade sanctions on the EU or the EU has to enter into negotiations with Canada and Norway for determining a mutually acceptable compensation.<sup>144</sup>

## **6.3 Final remarks**

The dispute consists of many sides of interests. Animal welfare groups from all over the world, as well as EU citizens are concerned by seal welfare. Even though many of their concerns are not based on the realities of seal hunt, some concerns could be reasonable. On the other side there are the interests of those economically dependent on the seal hunt, claiming that the hunt is practiced in a manner consistent with principles of animal welfare and not worse than other common practices of killing animals.<sup>145</sup> The EU has imposed an origin neutral prohibition and has an interest in preserving their ability to legislate on matters such as the seal regime, where they find it necessary. Canada and Norway have an interest in

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<sup>142</sup> DSU Article 3.8

<sup>143</sup> Based on the typical recommendations from panels having found WTO-inconsistency

<sup>144</sup> WTO introduction to the DSU [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm)

<sup>145</sup> Simon Lester, *The WTO Seal Products Dispute: A Preview of the Key Legal Issues* (2010) page 1

being able to decide over their national resources in accordance with the principle of sovereignty. For all the concerned the findings of the panel is important.

Even though the questions posed here have arisen as a consequence of the seal regime, the debate on trade in seal has, as mentioned in the introduction, been ongoing since 1983. Addressing sensitive issues, for this dispute the weight of animal welfare, has been controversial within WTO dispute settlement.<sup>146</sup> However, for the sake of ending the debate, the importance of seal welfare within WTO needs to be defined.

It is important that the panel, if it finds the seal regime to be inconsistent with WTO law, explains the reasons behind its conclusion rather than hiding behind trade law terms and obligations. All those fighting for enhanced seal welfare need to understand that the current seal regime is not the best way of accomplishing their objective, and that there are less trade-restrictive measures capable of fulfilling the same objective. If not there might be “a public outcry sparked by news paper headlines reporting that the WTO approves of animal cruelty”.<sup>147</sup> Furthermore, since the seal regime is nominally origin neutral and thereby nominally non-discriminatory the finding of WTO-inconsistency may be “viewed as meddling in domestic regulations, undercutting the WTO’s legitimacy.”<sup>148</sup>

Hopefully the panel will explain that protection of seal welfare can be a legitimate objective for the EU to impose trade restrictions, but that the measures imposed must be consistent with the WTO agreements for being acceptable under WTO law.

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<sup>146</sup> Simon Lester, page 3

<sup>147</sup> ICTSD Publications, *Emotional and Legal Stakes Are High in the Seals Dispute* (2010) <http://ictsd.org/i/news/bridges/98808/>

<sup>148</sup> Simon Lester, page 3

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