Ambiente

Public Morals, Animal Welfare and Indigenous Peoples *vs.* International Trade Law? The *EC – Seal Products* Case

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WTO Dispute Settlement Body, Panel, *European Communities, Measures Prohibiting the Importation and Marketing of Seal Products*, Dispute DS401, Report of 25 November 2013
(www.wto.org)

1. The *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (hereinafter *EC – Seal Products*) dispute arose from complaints made by Canada and Norway on the alleged inconsistency of certain provisions of the so-called 'EU Seal Regime' with, *inter alia*, the non-discrimination obligations under the WTO Agreement on Technical Barriers to Trade (TBT Agreement) and under the 1994 General Agreement on Tariffs and Trade (GATT 1994). The challenged measure consists, respectively, of Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 19 September 2009 on trade in seal products (in OJ *L* 286 of 31 October 2009, p. 36 ff.), referred to as 'Basic Regulation', and of Commission Regulation (EU) No. 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation No. 1007/2009 (in OJ *L* 216 of 17 August 2010), referred to as 'Implementing Regulation'.

Concerned about the alleged discrimination of their seal products on the EU market and by the compression of trade volumes caused by the adoption of the measure, in late 2009 and 2010 Canada and Norway requested consultations with the EU pursuant to Article 4 of the WTO Understanding on rules and procedures governing the settlement of disputes (DSU). As the divisive issues were not solved through consultation rounds, on 11 February and on 14 March 2011 both claimants requested the establishment of a Panel pursuant to Article 6 DSU. The Dispute Settlement Body (DSB) then established a Panel entrusted with the mandate to examine jointly the complaints, as required by Article 9.1 DSU. The Reports of the Panel (WTO Panel Reports, *EC – Seal Products*, WT/DS400/R and WT/DS401/R, hereinafter *Panel Reports*) circulated on 25 November 2013. Canada and Norway, on the one side, and the European Union, on the other side, appealed against certain issues of law and legal interpretation (see respectively, WT/DS400/8 of 24 January 2014, WT/DS400/9 and WT/DS401/10 of 31 January 2014), leading the Appellate Body (AB) to eventually hand down its Reports (see WTO Appellate Body Reports, *EC – Seal Products*, WT/DS400/AB and WT/DS401/AB of 22 May 2014, hereinafter *Appellate Body Reports*).

The procedural summary of the case before the DSB and the identification of the object of the dispute allow to address the challenged aspects of the EU Seal Regime and the Parties' requests for findings and recommendations in more detail.

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It is useful to clarify from the outset how the EU Seal Regime has been characterized, that is, as a measure consisting of both «prohibitive and permissive components» (see *Panel Reports*, paras. 7.54-7.55). According to the Panel (for a full comment on its Reports, see B. McGivern, "The WTO Seal Products Panel – The "Public Morals" Defense", in *Global Trade and Customs Journal* 2014, p. 70 ff.), the measure introduces a general ban on the import and marketing of seal products combined with an exception and two derogations. In fact, Article 3.1 of the Basic Regulation establishes that placing on the market is admitted only if seal products result from hunts traditionally conducted by Inuit and other indigenous communities (referred to as 'IC hunts'). Additionally, Article 3.2 (a) and (b), by way of derogation, allow imports of seal products if they occur occasionally and consist exclusively of «goods for the personal use of travellers and their families» ('Travellers exception') and, «only on a non-profit basis», where seal products result from by-products of hunting activities complying with domestic schemes for the sustainable management of marine resources ('MRM exception').

The conditions thus established have been further specified by the Implementing Regulation, which sets out the criteria for the import and placing on the market of certain seal products (Articles 3, 4 and 5) as well as the principles applicable to the procedures for the adequate verification of compliance and for the control of attesting documents (Articles 6 to 10). It is necessary to recall here the first set of provisions since the analysis of the dispute, as we shall see, also revolves widely on the issues raised by those provisions.

Article 3 of the Implementing Regulation enunciates the cumulative conditions to be satisfied by products in order to qualify under the IC category, while Articles 4 and 5 lay down the prescriptions for the Travellers import category and for the MRM hunts category.

Seal products falling under the IC exception must originate from a) hunts conducted by Inuit or other indigenous communities with a tradition in seal hunting; b) hunts the products of which are at least used, consumed and processed within the communities according to their traditions; c) hunts contributing to the subsistence of the community.

In order to fall under the Travellers import category, instead, seal products only need to fulfill one of the three following requirements: a) they are either worn by the travellers, carried or contained in their personal luggage; b) they are contained in the personal property of a natural person transferring his normal place of residence from a third country to the Union; c) they are acquired on site in a third country and imported at a later stage, provided that a written notification of import and a document attesting that the products were acquired in the third country concerned are presented to the customs authorities.

The MRM category, on its part, is valid for seal products originating from a) hunts conducted under national or regional natural resources management plans applying the 'ecosystem based approach'; b) hunts not exceeding the 'total allowable catch quota' established by domestic management schemes; c) hunts the by-products of which are placed on the market in a non systematic way and on a non-profit basis.

According to the complainants, the EU Seal Regime was inconsistent with the non-discrimination obligations enshrined by Articles I:1 and III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement, for according their seal products a treatment less favorable than that accorded to like products of domestic origin and to other foreign products (*i.e.* Greenlandic seal products). The claimants also contended that the measure constituted an unnecessary obstacle to trade, therefore in breach of Article 2.2 of the TBT Agreement. While they also pointed to the violation of other provisions of the GATT 1994 and of the TBT Agreement, the following sections will focus mostly, but not exclu-

sively, on the analysis undertaken by the WTO judiciary in order to verify the consistency of the measure with the non-discrimination obligations under these agreements.
2. The Panel preliminary ascertained whether the EU Seal Regime is a 'technical regulation' within the meaning of Annex I:1 of the TBT Agreement. By following the 'three-tier test' developed by the AB in *EC – Sardines* (see Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/R and Corr. 1, of 23 October 2002, para. 196), it found that the measure is a technical regulation since *i*) it applies to an identifiable group of products and *ii*) it lays down product characteristics *iii*) compliance of which is mandatory for seal products in order to access the market of the Union. More specifically, the EU Seal Regime was found to establish product characteristics «in the negative form, by requiring that all products do not contain seal» and the exceptions, implicitly defining the scope of the prohibition, were seen as constituting the «applicable administrative provisions with which compliance is mandatory for products with certain objective characteristics» (see *Panel Reports*, paras. 7.106-7.108). Pursuant to Article 2.1 of the TBT Agreement, WTO Members shall ensure that, in respect of technical regulations, imported products are accorded a treatment that is not less favourable than that accorded to like domestic products and to like foreign products. In *US – Clove Cigarettes*, the AB had explained that the 'less favourable treatment' under the provision *a quo* amounts to a modification of «the conditions of competition in the market of the regulating Member to the detriment of the group of imported products *vis-à-vis* the group of like domestic products» (see Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R of 24 April 2012, para. 180). However, it had also affirmed that detrimental impact alone does not demonstrate the existence of a 'less favorable treatment' if this stems exclusively from a legitimate regulatory distinction (*ibidem*, paras. 180-182).

The Panel easily determined that all products containing seal are like products regardless of whether or not they conform to the IC/MRM requirements. Relying upon the evidence indicating that only 5 per cent of Canadian seal products would conform to IC requirements and that virtually all Canadian hunts conducted for the sustainable management of marine resources would not qualify under the MRM exception as they do not follow the ecosystem-based approach, it acknowledged the existence of a detrimental impact on the competitive opportunities of Canadian imported products *vis-à-vis* Greenlandic imported and EU domestic products (see *Panel Reports*, para. 7.170). Hence, it focused in depth on the distinction between commercial hunts and IC/MRM hunts.

Called upon to justify the distinction, the EU claimed that while seal hunting is inherently inhumane and raises moral concerns, in the absence of effective humane killing methods, it does so even more when seal hunts have a profit-oriented nature that increases the risks of inhumane killing (*ibid.*, para. 7.182). However, the fact that risks leading to poor animal welfare outcomes exist in all seal hunts emerged with great clarity and was not disputed by the Parties (*ibid.*, paras. 7.222 and 7.245).

As for the IC exception, the Panel found that, although it did not bear any rational relationship with the objective of the EU Seal Regime, it was nevertheless justified for its contribution to the protection of the interests of Inuit and other indigenous communities, which had been sufficiently substantiated by the EU (*ib.*, paras. 7.275 and 7.298). Following the guidance of the AB in previous cases (see *US – Clove Cigarettes*, para. 182), the even-handedness of the regulatory distinction was scrutinized by the Panel, which concluded that its text, legislative history and actual application made it *de facto* available only to Greenland, «where Inuit hunt bears the greatest similarities to the commercial

characteristics of commercial hunts» (see *Panel Reports*, para. 7.317). With regard to the MRM exception, again, no connection was observed with the object of addressing EU public morals concerning seal welfare. Furthermore, no cause or rationale justifying the absence of a connection (unlike for the IC exception) and no even-handedness in its design and application were ascertained (*ibidem*, 7.336-7.352). Hence, the Panel found the that both exceptions breached Article 2.1 of the TBT Agreement.

These and other findings on the consistency of the EU Seal Regime with the TBT Agreement were declared moot and of no legal effect by the AB (see *Appellate Body Reports*, para. 5.60) because, in its view, the measure should have not been characterized as a technical regulation. However, the claims of the Parties as well as the reasoning developed by the Panel for the claims under Article 2.1 TBT provide meaningful insight on issues of seal welfare and indigenous people addressed hereinafter.

3. Canada and Norway claimed that the IC exception violated Article I:1 of the GATT 1994 (most-favoured nation clause) because, by discriminating on grounds of origin, it had granted a market access advantage to certain seal products from Greenland without extending such advantage «immediately and unconditionally» to their imports (see *Panel Reports*, para. 7.589). According to the Panel, which recalled its findings concerning Article 2.1 of the TBT Agreement, the exception did not discriminate *per se* on ground of origin, but it certainly did not extend «immediately and unconditionally» the same market access advantage on the EU market to the complainants' imports (*ibidem*, para. 7.600).

The complainants also challenged the consistency of the MRM requirements with Article III:4 of the GATT 1994 (national treatment clause) because, «by introducing the "non systematic", "non-profit" and "sole purpose" requirements, the EU had tailored the MRM exception to the realities of the seal hunt in the EU», consequently according to their imports a treatment less favourable than that accorded to like domestic products (*ibid*., para. 7.602), a view eventually upheld by the AB.

The IC/MRM requirements were examined thereafter to see whether they could be justified under one of the policy objectives under Article XX of GATT 1994 (general exceptions). The EU, on its part, sought justification claiming that they were necessary to protect public morals within the meaning of Article XX(a) of GATT 1994. Conversely, Canada and Norway maintained that the challenged aspects of the measure could not fall within the scope of protecting public morals because they were not linked to any «clearly discernible and unambiguous rule of moral conduct», which the EU proved unable to show (*ibid*., paras. 7.625-7.629). The Panel thus referred to the 'necessity test' under Article XX(a) of the GATT 1994 developed by the AB in *Brazil – Retreated Tyres* (see Appellate Body Report, *Brazil – Measures Affecting the Imports of Retreated Tyres*, WT/DS56/AB/R of 17 December 2007, para. 156) and constituted by three elements, namely, *i)* an assessment of the extent of the contribution of the measure to the achievement of its objective, *ii*) an examination of its trade-restrictiveness and, where a measure is preliminary found to be necessary, *iii*) a comparison with less trade-restrictive alternatives providing an equivalent contribution to the achievement of the objective pursued.

On this point the Panel based its reasoning on the recognition that «the GATT 1994 and the TBT Agreement should be interpreted in a coherent and consistent manner» (see *US – Clove Cigarettes*, para. 91) and ended up relying entirely on its previous findings under Article 2.2 of the TBT Agreement. Such findings had been reached by applying the 'necessity test' developed for claims under this provision in the absence of general exceptions to the TBT discipline (*e.g.* Appellate Body Report, *United States – Measures Con-*

cerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/AB/R of 13 June 2012, paras. 314-322).

Article 2.2 of the TBT Agreement establishes that technical regulations adopted to pursue legitimate policy objectives shall not be prepared, adopted or applied for creating unnecessary obstacles to international trade. Verification of compliance requires to consider *i*) the degree of the contribution made by the measure to the fulfilment of a legitimate policy objective, *ii*) its trade restrictiveness, *iii*) the risks that would arise from non-fulfilment of the objective and *iv*) a comparison of the challenged measure with possible alternative measures.

In its analysis under Article 2.2 TBT, the Panel had found that the ban introduced by the EU Seal Regime made a material contribution to the objective of protecting public morals by preventing the exposure and participation of the EU public to the marketing of seal products. Nevertheless, in the Panel's view, the degree of such contribution was ultimately diminished both by the IC/MRM exceptions and by the «implicit» exceptions admitted by the measure. Specifically, the Reports had affirmed that the IC/MRM exceptions reduced the effectiveness of the ban by granting seal products access to the EU market and that the absence of any mechanism to inform consumers on the presence of such products on the EU market, along with liberty of EU enterprises to undertake commercial activities involving seal products (*e.g.* transit, inward processing for export, etc.), further exacerbated the lack of effectiveness. However, it had been determined that the EU Seal Regime contributed «to a certain extent» to the objective of addressing the moral concerns on seal welfare in the EU (see *Panel Reports*, paras. 7.372-7.505). As anticipated above, this finding was re-used by the Panel, which, in the absence of viable alternatives, deemed the measure to be provisionally necessary within the meaning of article XX(a) of the GATT 1994 (*ibidem*, para. 7.639).

The *chapeau* of Article XX requires to verify that a measure found to be inconsistent with the obligations of the GATT 1994, but falling under Article XX, does not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

In the case *a quo*, the Panel found that the distinction drawn by the IC/MRM exceptions was inconsistent with the *chapeau* and thus concluded that the EU had failed to demonstrate that their discriminatory impact was justifiable under Article XX(a) of the GATT 1994 (*ibid*., paras. 7.650-651). The reasoning and the methodology employed for addressing claims under Article 2.1 of the TBT Agreement and replicated here to reach this conclusion, were thoroughly rejected on appeal because the legal standards applicable under the two provisions are fundamentally different: whereas the latter is a non discrimination provision which permits detrimental impact on imported products if stemming from a legitimate regulatory distinction, the *chapeau* allows discrimination if not arbitrary or unjustifiable (see *Appellate Body Reports*, paras. 5.310-5.313 and 5.339).

The AB subsequently completed the analysis on this point and found several features of the measure, mostly related to the IC exception, attesting its inconsistency with the requirements of the *chapeau*. In fact, when focusing on the 'subsistence' and 'partial use' criteria (Article 3.1 (b) and (c) of the Implementing Regulation), it contended that the manner in which such criteria were designed gave appreciable leeway to the recognized bodies (Articles 6 to 9 of the Implementing Regulation), ultimately able to open the EU market to seal products derived from commercial hunts. This, together with the failure in proving how the discrimination between IC hunts and commercial hunts was functional to the attainment of policy objective of addressing public moral concerns in the EU, led

the AB to ascertain an inconsistency with the *chapeau* requirements and to ultimately rule against the justification of the EU Seal Regime under Article XX(a) of the GATT 1994 (*ibidem*, paras. 5.316-5.339)

4. *EC – Seal Products* tells two essential issues on public morals in the context of the international trade law. Firstly, it reasserts that a measure designed to protect public morals must have a «sufficient nexus» with the interest to be achieved (*e.g.* Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R of 20 April 2005, para. 292), unlike what has been concluded in respect of the IC/MRM exceptions. Secondly, it explains that while WTO Members certainly maintain the right to adopt measures addressing public morals that affect international trade, they lawfully exert such right insofar as they enact legislation featured by obligations that guarantee a strict use of exceptions, both in terms of their specific content and their actual operation (hence only partially welcoming the arguments of R. Howse, J. Langille, "Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Non instrumental Moral Values", in *The Yale Journal of International Law* 2012, 367 ff.). In fact, it was the exceptions, and precisely the loopholes in their design and operation, rather than the ban, to ultimately allow commercial discrimination between national and imported foreign products, thus breaching WTO law. Developing exceptions consistent with the GATT 1994 proved particularly troublesome for the EU which failed in a) determining with clarity where to draw the line between traditional Inuit hunts, Inuit hunts with a commercial aspect and purely commercial hunts and b) identifying unambiguous standards for the subsistence of indigenous peoples.

Other issues raised by *EC-Seal Products* concern the weight of emerging international norms on animal welfare and/or animal welfare as 'an aspect of general public policy or morality' (see K. Sykes, "Sealing Animal Welfare into the GATT Exceptions: the International Dimension of Animal Welfare in WTO Disputes", in *World Trade Review* 2014, p. 471 ff.) and of the characterization of a measure as a technical regulation under the TBT Agreement.

With regard to the first one, no international norm on animal welfare was considered by the WTO judicial organs in their interpretation of relevant rules. This, however, hardly comes as a surprise given the lack of a shared view on supranational standards (let alone of a *consensus* between the Parties on binding rules) on seal welfare and/or humane killing methods. Furthermore, given that the claims primarily required an assessment of the objective pursued by a measure adopted by a regulating Member in its territory, any consideration of this kind was not strictly necessary. However, it must be noted that the Panel described animal welfare as a «globally recognized issue» (see *Panel Reports*, para. 7.420).

With regard to the second issue, it had been pointed out (see, precisely, X. Luan, J. Chaisse, "Preliminary Comments on the WTO Seal Products Dispute: Traditional Hunting, Public Morals and Technical Barriers to Trade", in *Colorado Journal of International Environmental Law & Policy* 2011, pp. 86-87) that the admission of "traditional seal hunts conducted by Inuit and other indigenous communities" did actually entail the prescription of a process and production method (PPM) within the meaning of Annex 1.1 of the TBT Agreement. Had the Panel considered this aspect, instead of focusing only on 'product characteristics', it would have given the AB further elements which might have influenced the decision on appeal.

Turning to the nexus between animal welfare and indigenous people, the AB characterized the EU Seal Regime as a measure addressing moral concerns on seal welfare «*while accommodating IC and other interests* so as to mitigate the impact of the measure on those interests» (see *Appellate Body Reports*, para. 5.167, *emphasis* added). Nevertheless, it questioned thereafter the genuineness of the IC exception (on the point, see R. Howse, "WTO Seals: the gesture of good faith the AB is demanding of the EU in return for public morals justification" of 25 May 2014, available at www.worldtradelaw.typepad.com/ielpblog) ultimately allowing poor animal welfare outcomes. In the AB's view, addressing «the need to protect the economic and social interests of the Inuit and other indigenous peoples» should have not prevented the EU from contextually addressing the animal welfare concerns arising from IC hunt, which «can cause the very pain and suffering for seals that the EU public is concerned about» (see *Appellate Body Reports*, para. 5.320).

In fact, in the analysis carried out to see whether the regulatory distinction between commercial and IC/MRM hunts was legitimate, the Panel exhaustively assessed the evidence clearly pointing to the difficulties in the application and enforcement of humane killing methods and, to a certain extent, to the occurrence of inhumane killing methods in *all* types of hunts, with indigenous communities using rifles, clubs (employed also in commercial hunts), nets and trapping (prohibited in Norway and Canada and generally not compatible with the concept of humane killing).

It is therefore necessary for the EU to take care of this inconsistency, which leaves some of the EU public's concerns on seal welfare unaddressed. For instance, it could review the measure by introducing basic principles of animal welfare and/or humane killing requirements to better serve its main objective (see T. Perišin, "Is the EU Seal Products Regulation a Sealed Deal?", in *International and Comparative Law Quarterly* 2013, pp. 403-404). Such a solution would be preferable than simply repealing the measure because this would run counter the interest of increasing the overall level of seal welfare (see P. L. Fitzgerald, "'Morality' May Not Be Enough to Justify the EU Seal Products Ban: Animal Welfare Meets International Trade Law", in *Journal of International Wildlife Law & Policy*, 2011, p. 132). The review of the EU Seal Regime, would necessarily have to engage all relevant stakeholders, starting from Inuit representatives and animal welfare experts. In this regard, Howse has proposed the appointment of a «special commission» (see R. Howse, cit.).

Such a process should also address the key issue of defining what subsistence and partial use of seal resources can mean. In establishing this, the EU should refrain from imposing on indigenous peoples a model of development which gives prominence to the dynamics of global trade privileging, instead, a «human rights based approach to development» (see extensively, C. Doyle, J. Gilbert "Indigenous People and Globalization: From 'Development Aggression' to 'Self-Determined Development'", in *European Yearbook of Minority Issues*, vol. 9, 2008, p. 220 ff.).Otherwise it will run the risk of not fully complying with «a consistent body of international law», including the United Nations Declaration on the Rights of Indigenous Peoples (General Assembly, UN Doc. A/RES/61/295 of 13 September 2007), with which, as portrayed before the Panel, the EU Seal Regime was already «in line» (see *Panel Reports*, para. 7.254).

A final note on the notion of public morals in the EU. By contending that it would be «morally wrong» not to import seal products from IC subsistence hunts by virtue of their «inherent legitimacy», which overrides the concerns on seal welfare (*ibidem*, para. 7.254), the EU underlined the weighing and balancing which characterized the drafting of the EU Seal Regime. As upheld by the AB, the adoption of the measure was prompted by genuine and widespread moral concerns of the EU public on seal welfare which, *inter*

alia, had led to political and institutional actions (see *e.g.*, European Parliament, Declaration of the European Parliament on banning seal products in the European Union, in *OJ* C 306E of 15 December 2006). Any change in the design of the measure should, therefore, aim at striking a more effective balance, without undermining the rights of indigenous peoples practicing seal hunt, a concern raised, albeit not successfully, by organizations representing Inuit from Canada and Greenland, against the ban and the IC/MRM exceptions (see European Court of Justice, C-583/11, *Inuit Tapiriit Katanami and Others*, judgment of 3 October 2013 and K. Hossain, "The EU ban on the import of seal products and the WTO regulations: neglected human rights of the Arctic indigenous peoples?", in *Polar Record* 2013, p. 154 ff.).

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ABSTRACT. Public Morals, Animal Welfare and Indigenous Peoples *vs.* International Trade Law? The *EC – Seal Products* Case

The article deals with the main aspects of the *EC – Seal Products* case, concerning the WTO law consistency of a measure adopted by the EU in order to introduce a ban on the import and marketing of seal products. Prompted by mounting concerns on seal welfare, the measure also aims at accommodating the socio-economic interests of indigenous peoples practicing seal hunt through one of the exceptions to the general prohibition. Decisions on the violation of non-discrimination clauses are briefly illustrated. A comment on the relationship among public morals, animal welfare and indigenous peoples, as emerged from the case, is provided in the last section.

Keywords: WTO law; EU seal regime; international trade; public morals; animal welfare; indigenous peoples.

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