

January 10, 2014

The WTO Panel Decision on the EU's Rules on the Marketing of Seal Products: Who Won and Who Lost?

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Decisions commented on: World Trade Organization (WTO) Panel Report, European Communities – [Measures Prohibiting the Importation and Marketing of Seal Products](#), 25 November 2013, and *Inuit Tapiriit Kanatami et al v European Commission*, Case T-526/10, Judgement of the General Court (EU), (Seventh Chamber), 25 April 2013, available [here](#) (currently on appeal)

Regulations commented on: Regulation (EC) No 1007/2009 on trade in seal products, (Framework Regulation) and Commission Regulation (EU) No 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products (Implementing Regulation) (collectively the Sealing Regulations) (both available [here](#) along with other background information and reports)

The WTO Panel handed down its decision in the complaints made by Canada and Norway in relation to the European Union's ban on placing seal products on the market on November 25, 2013. The reaction in the media was immediate with most outlets indicating that the Panel had upheld the ban. The [CBC](#), for example, reported that “[t]he WTO, while finding that the EU's so-called Seal Regime had violated international trade agreements, also determined that the ban was valid because of a controversial public morals clause”. Gloria Galloway in the [Globe and Mail](#) reported that “[a] WTO ruling released on Monday says the ban the EU imposed in 2010 undermines the principles of fair trade, but is justified because it ‘fulfills the objective of addressing EU public moral concerns on seal welfare’”.

Yet if one flips to the end of the 186 page decision the Panel concludes that the EU is in breach of certain provisions of both the Agreement on Technical Barriers to Trade (TBT) and the General Agreement on Tariffs and Trade (GATT) (1994) and therefore recommends that the WTO's Dispute Settlement Body request the EU to bring the inconsistent elements of the seal ban into conformity with the EU's obligations under the two agreements.

So who won and who lost? The short answer is that the WTO's decision is a serious loss for Canada and Norway. While the Panel finds that certain aspects of the Sealing Regulations are inconsistent with the EU's international trade obligations, the Panel upholds the core elements of the Regulations concluding that while the Regulations breach key obligations under the TBT and GATT, those violations can be justified on the grounds that the Sealing Regulations are motivated by a concern for public morals. According to the Panel, those parts of the Regulation that are inconsistent with international trade law are best thought of as ameliorative provisions designed to make the Ban more acceptable to economic and traditional interests *within* the EU that would otherwise be more affected by a blanket ban. As discussed

below, however, the reasons why the EU included these ameliorative provisions demonstrate the incoherence and self-serving nature of the EU's Regulation.

There is a second conundrum embedded in the EU's regulatory scheme and in the reporting of the Panel decision, and that relates to the effect of the scheme on indigenous communities and especially Inuit communities. The EU's Regulation contains an important exception (the "IC exception") to its main prohibition on placing seal products on the market to the effect that:

The placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence. (Article 3(1))

It is clear that this exception does nothing for the Newfoundland hunt but it does seem to offer cover for a continued Inuit harvest; and if that is the case why do Inuit leaders in Canada continue to be so exercised by the Regulation? The answer we think is at least two fold. First, the overall tenor of the Regulation is to demonize and condemn a cultural practice. It represents an effort by an economically powerful and dominant culture to marginalize the "other". Second, and as a practical matter, Inuit access to the global (and principally European) seal product markets depends upon being able to make use of (piggy back on) the marketing channels created and maintained by the much larger Atlantic seal hunt. If the Atlantic seal hunt is denied market access and collapses, then market access for Canadian Inuit harvested seals will *de facto* also be denied. The same is far less likely to be the case for the much larger Greenlandic Inuit harvest. This is attributable both to the size and central organization of that harvest which is subsidized and supported by the Greenlandic government. Indeed it is the large scale and commercial organization of the Greenlandic harvest which was one of the concerns that led the Panel to question the coherence of the EU's Regulation.

The balance of this post proceeds as follows. The next section summarizes the EU regulation while the following sections summarize the Panel's main conclusions under the TBT and the GATT. We then briefly examine an earlier decision of the EU's General Court in which seal harvesters had sought to question the validity of the Seal Ban Regulation under EU law. The decision is revealing because it illustrates that the justifications that the EU offers for the legislation may differ depending upon the legal issue at stake and the forum. This tends to undermine the legitimacy of the EU's position.

The EU Regulation

The EU Regulation comprises 21 preambular paragraphs and 8 operative articles. The preamble is important in ascertaining the premises and intent of the regulation as well as establishing the legal basis for the Regulation in EU law. The preamble (paras 1 and 2) begins by reciting the history of the community's concerns with respect to sealing (cruel hunting of sentient beings) and the adoption of the prohibition on imports of skins from harp seal and hooded seal pups in 1983. Animal welfare concerns are also mentioned in other paragraphs of the preamble (e.g. paras 4 and 5) but another concern that emerges is that member states are responding to these concerns by passing domestic measures that regulate trade in seal products. The preamble expresses the concern that such a patchwork of initiatives may "adversely affect the operation of the internal market in products which contain or may contain seal products, and constitute barriers to trade in such products." Furthermore it may affect trade in goods where consumers cannot readily tell if such goods include ingredients from seals, such as leather goods or Omega-3 capsules and oils. Thus, to deal with both animal welfare concerns and concerns as to fragmentation of the internal market, the placing of seal products on the market should generally be prohibited (at para 10). The preamble effectively acknowledges that this is an extreme solution but justifies it on the basis that assessments have shown that it is not feasible in practice, given the conditions of the seal hunt, to provide assurances that seals will only (i.e. exclusively) be harvested in an effective way that satisfies concerns as to animal welfare (at para 11). For the same reason labelling solutions are also unable to offer the requisite assurances (at para 12).

The preamble also addresses the need to create some exceptions. The rationale for the indigenous harvest exception is laid out at some length:

[14] The fundamental economic and social interests of Inuit communities engaged in the hunting of seals as a means to ensure their subsistence should not be adversely affected. The hunt is an integral part of the culture and identity of the members of the Inuit society, and as such is recognised by the United Nations Declaration on the Rights of Indigenous Peoples. Therefore, the placing on the market of seal products which result from hunts traditionally conducted by Inuit and other indigenous communities and which contribute to their subsistence should be allowed.

By contrast, the preamble to the regulation does little more than allude to the two other exceptions, namely personal imports by travellers (hardly a case of putting seal products on the market in any event) and harvesting (and subsequent marketing) that occurs “for the sustainable management of marine resources” (at para 17).

The heart of the Regulation is Article 3, the relevant provisions of which state as follows:

Conditions for placing on the market

1. The placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence. These conditions shall apply at the time or point of import for imported products.
2. By way of derogation from paragraph 1:
 - (a) the import of seal products shall also be allowed where it is of an occasional nature and consists exclusively of goods for the personal use of travellers or their families. The nature and quantity of such goods shall not be such as to indicate that they are being imported for commercial reasons;
 - (b) the placing on the market of seal products shall also be 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 on the market shall be allowed only on a non-profit basis. The nature and quantity of the seal products shall not be such as to indicate that they are being placed on the market for commercial reasons.

The application of this paragraph shall not undermine the achievement of the objective of this Regulation.

Much of the balance of the Regulation is procedural in nature but Article 4 headed “Free Movement” is worth mentioning if only because it hearkens back to the proper functioning of the internal market providing as it does that “Member States shall not impede the placing on the market of seal products which comply with this Regulation”.

The more detailed Implementing Regulation specifies the conditions which must be met before seal products can qualify under either of the main exceptions. In order to qualify under the indigenous community exception, the products must originate from a seal harvest that satisfies 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.

Similarly the conditions applicable to the marine resources exception are:

- a) seal hunts conducted under a national or regional natural resources management plan which uses scientific population models of marine resources and applies the ecosystem-based approach;
- b) seal hunts which does not exceed the total allowable catch quota established in accordance with the plan referred to in point (a);
- (c) seal hunts the by-products of which are placed on the market in a non-systematic way on a non-profit basis.

In addition, any product put on the market pursuant to either form of hunt must also be accompanied by “an attesting document” submitted by a “recognized body” approved by the Commission. At the time of the panel decision the Commission had approved two applications, one approving a number of County Administrative Boards in Sweden (see [here](#)) and the other approving the Greenland Department of Fisheries, Hunting and Agriculture ([here](#)). One of the things that the panel discusses in its report is the time consuming nature of the process for becoming a “recognized body”, although such delays were not considered sufficient to establish a violation of the TBT Agreement (Panel Report at paras 7.555-7.580).

The WTO Panel Report

The bulk of the Panel’s decision focuses on arguments raised by Canada and Norway under the TBT Agreement (available [here](#)). Both countries disputed the EU’s regulation under Articles 2.2, 5.1.2 and 5.2.1 with Canada raising an additional claim under Article 2.1, namely that the EU’s Seal Regime provides less favourable treatment to Canadian imports of seal products when compared to seal products from Greenland and the EU. The following discussion largely focuses on the Panel’s analysis under Articles 2.1 and 2.2 of the TBT Agreement. But before moving to that discussion it is important to note that the Panel did take issue with some of the procedural components of the EU’s measure in this case. Particularly troubling for the Panel was the fact that the EU failed to ensure that a competent body was in place to assess compliance with the Sealing Regulations, a failure which meant that the EU’s conformity assessment procedures (CAP) were not capable of permitting trade in conforming seal products on the date its Regulations came into force. In the Panel’s view that procedural gap created an unnecessary obstacle to trade and violated Article 5.1.2 of the TBT Agreement (Panel Report paras 7.521-7.529). The Panel however rejected other claims by Norway and Canada that the EU’s proposed CAP created an unnecessary obstacle to trade in violation of Article 5.1.2 (Panel Report paras 7.539-7.547).

Non-Discrimination under the TBT Agreement: Article 2.1

On the substantive portions of the EU’s Sealing Regulation, Canada’s arguments about the discriminatory nature of the EU’s regulation (in particular the regulation’s exemption for indigenous community (IC) and marine resource management hunts (MRM)) were compelling to the Panel; it found that the IC and MRM exceptions under the EU’s Sealing Regulations violated Article 2.1 of the TBT Agreement. The relevant provision (Article 2.1) of the TBT Agreement provides:

With respect to their central government bodies...Members shall ensure that in respect of technical regulations, 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.

The Panel began its analysis by first establishing that all seal products are “like” products whether they can be placed on the EU market or not (Panel Report at paras 7.134-7.140). In addition, it found that the EU Regulations had a detrimental impact on the competitive opportunities of Canadian seal products versus Greenlandic imported and EU-originating goods (Panel Report at paras 7.149-7.170). Such differential treatment does not necessarily mean, however, an automatic violation of the TBT Agreement. In an attempt to balance the rigors of trade law obligations with a state’s right to regulate, WTO Panels and the Appellate Body have held that where the competitive relationship between like goods is negatively affected because of legitimate regulatory distinctions, a State’s measure will not run afoul of the non-discrimination disciplines articulated in Article 2.1 (Panel Report at paras 7.171-7.172). As a result, the key question addressed by the Panel under this provision was whether the distinctions made under the EU Regulations between commercial seal hunts on the one hand, and IC and MRM hunts (and the products derived therefrom) on the other hand, are legitimate.

Referring to jurisprudence considering GATT Article XX the Panel explains that the legitimacy of distinctions made under the EU Regulations can be established in one of two ways: (1) if the distinctions are rationally connected to the objective of the EU Regulations, or (2) if the distinctions can be explained and are applied in an even-handed manner (Panel Report at paras 7.256-7.259). Under both of these tests, the EU failed to persuade the Panel that the distinctions made under its Regulations between commercial seal hunts on the one hand and the IC and MRM hunts on the other hand were legitimate.

Throughout the case the EU contended that the objective of its regulations was to address moral concerns about the incidence of inhumane killing of seals and economic activities carried out to sustain such practices (see e.g. Panel Report at para 7.274). However, after comparing the features of seal hunts carried out for commercial purposes with features of seal hunts carried out by indigenous communities (Panel Report at paras 7.185-7.245), the Panel concluded that hunting methods used by indigenous hunters (e.g. trapping and netting) “...can cause the very pain and suffering for seals that the EU public is concerned about” with the result that the IC exception under the EU Seal Regime bore no rational connection to the EU’s alleged concern for animal welfare (Panel Report at para 7.275). The EU did manage to convince that Panel that the protection of Inuit interests (i.e. tradition, culture and subsistence) was a sufficient basis for distinguishing IC seal hunts from commercial seal hunts through the IC exception. However, serious doubts about the even-handedness of the design and application of the IC exception led the Panel to conclude that the IC exception was inconsistent with Article 2.1 of the TBT Agreement (Panel Report at para 7.319). Of particular relevance were findings that the exception had so far only been available to products derived from the Inuit seal hunt in Greenland, where such hunts (unlike the Inuit hunts in Canada, Russia or Alaska) were highly organized to capture a high volume of seal in order produce quality furs and leather for commercial purposes, all factors which made those hunts look more like commercial seal hunts than IC hunts carried out for subsistence purposes (Panel Report at paras 7.309-7.317).

The MRM exception, like the IC exception, was also found to violate Article 2.1 of the TBT Agreement. While noting that MRM seal hunts take place only occasionally and on a small-scale for the purpose of controlling nuisance seals and seal culling, the Panel concluded that these types of hunts still give rise to animal welfare concerns (Panel Report at paras 7.336-7.337). Bolstered by evidence that there is little monitoring of seal hunts conducted for management of marine resources, the Panel determined (as it did with the IC exception) that there is a disconnect between the MRM exception and the stated purpose of the EU’s Regulations (Panel Report at para 7.338). Additionally, the EU was unable to convince the Panel that there was a justifiable rationale for distinguishing MRM hunts from commercial seal hunts. Particularly persuasive to the Panel were arguments raised by Canada that MRM hunts are motivated, at least in part, to support commercial fishing industries. Thus, in contrast to its determination that the protection of Inuit interests could justify differential treatment between IC hunts and commercial hunts, the Panel held that “...there is a commercial dimension to seal hunts conducted for the purpose of managing marine resources” (Panel Report at para 7.343). As a result, the Panel found that the EU’s Regulation made an illegitimate distinction between MRM and commercial seal hunts (Panel Report at paras 7.344-347).

Unnecessary Trade Obstacles: Article 2.2

Despite the discriminatory nature of the exceptions within the EU's Sealing Regulations, Canada and Norway were unable to successfully challenge the regime as an "unnecessary obstacle to international trade" under Article 2.2 of the TBT Agreement. Article 2.2 provides:

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. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.

The dispute under this provision began with a disagreement between the parties over the objective of the EU's Regulations. While all parties agreed that one of the objectives of the EU's Sealing regulation was animal welfare, they disagreed about characterizing that objective as a moral concern of the EU public (see Panel Report at para 7.377). Incorporating previous interpretations of the "public morals" exception under GATT and GATS, the Panel indicated that in order for a TBT measure to address public morals within the society of a regulating member, it must consider whether the concern in question actually exists in that society and whether that concern falls within the scope of "public morals" as "defined and applied" by a regulating Member "in its territory, according to its own systems and scales of values" (Panel Report at paras 7.379-7.383). After considering the text and legislative history of the Sealing Regulation, the Panel easily found that seal welfare was a concern that existed within the EU. In addition, the Panel found that legislative action taken by the EU and its member states demonstrated that animal welfare is a moral issue within the EU. As a result, the Panel concluded that the objective of the Sealing Regime is "to address the moral concerns of the EU public with regard to the welfare of seals" (Panel Report at paras 7.406-7.410).

Having clarified that seal welfare qualified as a moral concern within the EU, the Panel went on to consider whether this objective is legitimate within the meaning of Article 2.2 of the TBT Agreement. Unlike "national security requirements" or "the prevention of deceptive practices", "public morals" is not expressly mentioned as a legitimate objective in Article 2.2. With relative ease the Panel found that "public morals" is a legitimate objective within the meaning of Article 2.2. In so finding, the Panel was cognizant of the need for interpretive consistency between the TBT Agreement and other international trade treaties like GATT and GATS. In particular, the Panel observed that the TBT Agreement is intended to further the objectives of GATT and it noted the existence of a "public morals" exception in GATT and GATS, making the inclusion of such an objective in Article 2.2 a natural extension of the listed legitimate objectives (Panel Report at paras 7.415-7.421).

In its examination of the Sealing Regulation as an unnecessary obstacle to trade, the Panel considered a number of different factors, including the extent to which the Sealing Regulations actually contribute to the objective of protecting seal welfare. Canada and Norway attacked the EU's measure by arguing that the Sealing Regulations do not condition market access on compliance with animal welfare requirements and do not protect EU consumers from seal products derived from an inhumane hunt. In considering all of the arguments raised, the Panel acknowledged that the actual contribution of the Sealing Regulation to seal welfare was undermined by the IC and MRM exceptions (i.e. because both types of hunt permit the inhumane hunting of seals) (Panel Report at paras 7.444-7.448) and by the fact that the measure allows commercial activities in the EU related to the processing of seal products that are otherwise prohibited under the Seal Regulations (Panel Report at paras 7.449-7.455). In a somewhat confusing twist, however, Panel sided with the EU and determined that the Sealing Regulations are "...capable of making and do make some contribution to its stated objective of addressing the public moral concerns"

(Panel Report at para 7.460). Without an alternative measure reasonably available to make an equivalent or greater contribution to the welfare of seals, the Panel determined that the Sealing Regulations are not unnecessary obstacles to the international trade in seal products (Panel Report at paras 7.468-7.505).

The GATT Analysis

Given the Panel's findings under the TBT Agreement, it had little difficulty concluding that the EU Regulations breached two basic GATT disciplines:

- (1) the most favoured nation standard of Article I(1) (seals harvested in Canada and Norway are not "immediately and unconditionally" entitled to the same treatment as seals harvested in Greenland, at paras 7.592 – 7.600);
- (2) the national treatment standard of Article III.4 (seals harvested in Sweden under an MRM program may be placed on the market but not seals harvested in Norway or Canada – the seal products in each case are "like products");

The Panel did not, however, find a breach of Article XI:1 which is the prohibition on quantitative restrictions. The Panel reached this conclusion (at paras 7.657 – 7.663) on the basis that Article 3 of the Framework Regulation functions as a prohibition on placing goods on the market and not as a quantitative restriction on imports. The scope of the prohibition is informed by the exceptions but the exceptions do not themselves constitute a prohibition or quantitative restriction on imports.

Since the Sealing Regulations were inconsistent with Article I:1 and III:4 it fell to the EU to seek to justify the measures under Article XX and in particular the so-called chapeau of Article XX and paragraphs (a) and (b):

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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health ...

The Panel concluded that the Sealing Regulations could *prima facie* be justified as a measure necessary to protect public morals and in particular "moral concern with regard to the protection of animals". In assessing necessity the Panel noted that it needed to assess the importance of the interests and values at stake (at para 7.630) as well as the contribution that the measure made to the achievement of the objective (at para 7.635): "The more vital or important the values or interests furthered by the measure are, the easier it will be to accept that measure as necessary" (7.630). In its assessment the Panel concluded that the value at stake was "an important value or interest" and that the ban made a material contribution to reaching the EU's objective:

The ban does contribute to the European Union's objective by reducing, to a certain extent, the global demand for seal products and by helping the EU public avoid being exposed to seal products on the EU market that may have been derived from seals killed inhumanely. To the extent that such seal products are prohibited from the EU, we find that the ban makes a material contribution to the objective of the measure.

However, the effectiveness of the measure was reduced by the scope of both the IC and MRM exceptions.

Further, the measure could not be justified on the basis of paragraph (b) since the EU had never really argued that the Regulations were developed for the protection of seal welfare.

While the Panel found that the Regulations could *prima facie* be justified under paragraph (a), the *exceptions* could not meet the test established by the chapeau. In particular (at para 7.650) the IC exception could not be justified “due to the lack of even-handedness in the design and application”; similarly the MRM exception could not be justified because the distinction inherent in that exception between commercial and MRM hunts “is neither rationally connected to the objective nor based on any justifiable grounds” and neither was “the MRM exception ... designed and applied in an even-handed manner.”

Comments

In addition to the concerns raised in the introduction to this post, the WTO Panel’s decision is problematic for Canada and Norway for a number of reasons. One of the fundamental concerns raised by the decision relates to the Panel’s characterization of the EU’s sealing Regulation. According to the Panel, the primary objective of the EU’s measure is animal welfare. Yet, there was compelling evidence before the Panel that the EU’s measure did little to ameliorate concerns about the well-being of seals. The Panel’s conclusion under Article 2.2 of the TBT Agreement is particularly troublesome. Despite evidence that the contribution of the EU’s ban on seal products to the objective of seal welfare was significantly undermined by the IC and MRM exceptions and by the fact that the measure allows commercial activities in the EU related to the *processing* of seal products imported from outside the EU, the Panel concludes that the EU’s measure does not unnecessarily restrict trade because it “make[s] *some* contribution” to its stated objective. In the context of a measure (i.e. a ban), which by its very nature restricts trade in goods, one would have expected the Panel to require a closer connection between the operation of the Sealing Regulations and its alleged primary objective – animal welfare – than merely “some contribution”. If anything, the features of the measure that undermine its contribution to animal welfare evince a protectionist motive behind the Sealing Regulations and the structure of those Regulations that is largely ignored in the Panel’s analysis. The protectionist objectives include the preservation of the commercially organized seal hunt in Greenland and the management harvest in the principal Baltic states of the EU.

The Panel’s characterization of the primary objective of the EU’s Sealing Regulation as animal welfare is also interesting in light of the ruling of the EU’s General Court in April 2013. In that case, seal harvesters challenged the validity of the Sealing Regulations under EU law. In dismissing that action, the General Court upheld the Regulations on the basis of Article 95 of the EC Treaty and observed that the principal objective of the EU’s Sealing Regulations “...is not to safeguard the welfare of animals but to improve the functioning of the internal market” (Judgement at para 35). Particularly compelling for the Court were recitals 6 to 8 of the EU’s Framework Regulation, which, according to the General Court, evinced a decision by EU legislators to harmonize rules about the commercial activities associated with seal products within the Union (Judgment at para 39). This supported the Court’s conclusion that the EU’s measure was not *ultra vires* the powers of the Union legislature (Judgment at paras 79-102). Finding that the applicants’ arguments were grounded on “...the erroneous assertion that the objective of the regulation is the protection of animal welfare...” (Judgment at para 83), the Court found that the EU’s Sealing Regulations was consistent with the principle of subsidiarity.

This decision of the EU’s General Court stands in contrast to the WTO panel decision regarding the “primary objective” of the Sealing Regulations. It is clear that the justifications offered for the regulations have differed depending upon the legal issue at stake – jurisdiction of the EU legislators versus the EU’s international trade obligations. In result, the Sealing Regulations seem destined to be upheld regardless of the basis of the complaint. This is a serious defeat for Canada and Norway or for those who harvest seals within those jurisdictions for both cultural and economic reasons.

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