IS THE EU SEAL PRODUCTS REGULATION A SEALED DEAL? EU AND WTO CHALLENGES

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IS THE EU SEAL PRODUCTS REGULATION A SEALED DEAL?
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Abstract In both the EU and the WTO there are currently pending cases on
the legality of EU Regulation 1007/2009 on trade in seal products and its
Implementing Regulation 737/2010. While seals seem to be very attractive
to the public so that raising arguments against these EU measures are not
popular, the Regulations do raise concerns about competences, subsidiarity
and proportionality which are relevant for compliance with EU primary law.
They also raise concerns about possible protectionism, the use of public
morals, coherence and necessity with regard to compatibility with WTO law.
This paper seeks to examine all these issues.

Keywords: animal welfare, competence, EU internal market, legal basis,
proportionality, protectionism, public morals, subsidiarity, WTO.

I. INTRODUCTION

It is rare that a piece of legislation gets challenged in multiple international
and transnational fora. However, EU Regulation 1007/2009 on trade in seal
products1 and its Implementing Regulation 737/20102 have been challenged
within the European Union (EU) and in the World Trade Organization (WTO).
Arguments raised in the two disputes are quite different, and mostly cannot be
applied interchangeably: WTO law does not care whether the Regulation is in
accordance with EU primary law, and likewise the EU does not grant WTO law
direct effect, so, in principle, WTO law cannot be used to review the legality of

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paper are the author’s.


the implementation of Regulation (EC) 1007/2009 of the European Parliament and of the Council
EU legislation before the Court of Justice of the European Union (CJEU), but solely before a WTO Panel or Appellate Body (AB).\(^3\)

This paper examines whether the Regulations are, or should be, able to resist these challenges.\(^4\) Two preliminary remarks should be made as regards the compliance of the challenged measures with EU and WTO law. First, as regards EU law, the EU legal system is certainly not about lowering the standards of protection of legitimate aims—it allows its Member States to justify restrictions on fundamental market freedoms for the purpose of protecting (other) values. Furthermore, the EU itself, when acting as a regulator, takes into account a high level of protection of various values. However, the question is which level of governance, that of the EU or of the Member States, is best suited and legally entitled to make certain policy choices and to regulate issues in a particular way. In this respect, the Regulation suffers from a very broad interpretation of its legal basis. This brings into question its compliance with the principle of conferred competence, while there are also problems with subsidiarity and proportionality. Second, as regards WTO law, the WTO as an international organization should not force any country to lower the standards of protection it affords to the protection of a legitimate aim. It should, however, check what the aims of a measure are, whether the measure chosen is consistent with those aims and whether it is proportionate (suitable and/or necessary). In this respect, the Regulation and its Implementing Regulation suffer from inconsistencies which raise the question of what the measures’ real aim is, and whether there are less restrictive alternatives which could achieve the same aim. The paper thus argues that the current regulatory scheme might not be compatible with EU primary law and WTO law.


Raising arguments against the Regulations is, however, not popular. Discussions\(^5\) reveal that many feel emotionally touched by the ‘cuteness’ of seals and that this makes them intuitively biased in supporting the EU measures. Setting aside these emotional attitudes towards seals, it is difficult to pin down what the rational basis behind special protection of seals (in contrast to that of other animals) is. This is especially so because a large majority of seal species are not endangered\(^6\) and hunting can be organized in accordance with the EU’s animal welfare standards. This article does not suggest that measures on animal welfare are per se not rational\(^7\) but that there are problems with the particular measure at hand. Further, the article does not advocate seal hunting nor does it argue that various animal species cannot be legally protected. It simply argues that it would be more appropriate to regulate this matter at the level of Member States and that other modes of regulation, such as those that would be responsive to the hunting methods used, would achieve the aim without breaching EU primary law or WTO law or the values that these legal systems seek to support. It also argues that there are measures compatible with EU and WTO law which could achieve even more for animal welfare than the disputed Regulations.

This article is divided into three parts: the first explains the background of both the WTO and the EU dispute, the second deals with the compliance of the measures with EU law and the third with compliance with WTO law.

II. BACKGROUND TO THE REGULATIONS AND TO THE EU AND WTO DISPUTES

In 2007, two years before the EU rules on these matters were adopted, Belgium and the Netherlands adopted legislation banning trade in seal products.

\(^5\) See activities listed above (n *).

\(^6\) Hunted seal species are, with one exception, not listed in the appendices of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Only the cape fur seal, hunted in Namibia, was listed in CITES Appendix II which means that this is one of the species that are ‘not necessarily now threatened with extinction but that may become so unless trade is closely controlled’. The Commission funded study on the potential impact of a seals ban of products derived from seal species conducted by the consultancy, ‘Assessment of the Potential Impact of a Ban of Products Derived from Seal Species’ April 2008, 26, 116 <http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/seal_hunting.htm>.

Similarly, the IUCN Red List <http://www.iucnredlist.org/> distinguishes seven levels of endangerment: least concern, near threatened, vulnerable, endangered, critically endangered, extinct in the wild, and extinct. Of the five seal species which are (according to the EU website <http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/seal_hunting.htm>) most hunted—harp seals, ringed seals, grey seals, hooded seals and Cape fur seals (also known as Afro-Australian fur seals)—four have the status ‘least concern’ while hooded seals have the status ‘vulnerable’.

\(^7\) There is an abundant literature on the reasons behind animal welfare and the pivotal work on speciesism by Peter Singer can also lend support to a regulatory system which would be aimed at protecting more than one selected, non-endangered, species. See P Singer, Animal Liberation: A New Ethics for our Treatment of Animals (New York Review 1975). For an analysis of animal welfare in the light of WTO law, see L Nielsen, The WTO, Animals and PPMs (Martinus Nijhoff Publishers 2007).
This led to Europe-wide discussion on seal hunting in order to determine whether an EU ban was needed.\(^8\) Canada reacted promptly to the Belgian and Dutch measures and the same year requested consultations with the (then) EC, which constituted the first step in a WTO challenge.\(^9\) At the time, one might have reasonably assumed that the WTO challenge would make the EU legislature reluctant to adopt a piece of EU legislation on the matter. However, this assumption would soon be proven wrong.

In 2009, Regulation 1007/2009 was adopted and banned the placing of seal products on the market. Seals are broadly defined as all pinnipeds (the families *Phocidae*, *Otaridae* and *Odobenidae*),\(^10\) thus covering more than 35 species.\(^11\)

The Regulation provides for three exceptions:\(^12\)

- The first exception allows ‘[t]he placing on the market of seal products . . . result[ing] from hunts traditionally conducted by Inuit and other indigenous communities and [which] contribute to their subsistence’;\(^13\)

- The second exception permits ‘the placing on the market of seal products . . . result[ing] from by-products of hunting that is regulated by national law and conducted for the sole purpose of the sustainable management of marine resources [and provided that this] placing on the market [is done] only on a non-profit basis [ie] 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’;\(^14\)

- The third exception allows ‘the import of seal products . . . 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’.\(^15\)

In 2010, the Commission adopted Implementing Regulation 737/2010. This Implementing Regulation sets conditions for the import and placing on the market of seal products covered by the exceptions.

Within the WTO, Canada was not satisfied with the EU ban providing only for narrow exceptions so it filed a new complaint, this time targeted against the

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9 WTO, European Communities: Certain Measures Prohibiting the Importation and Marketing of Seal Products (Complainant: Canada), DS36925 September 2007.
10 Art 2(11) Regulation (n 1).
12 Art 3 Regulation (n 1).
13 ibid art 3(1).
14 ibid art 3(2)b).
15 ibid art 3(2)a).
EU (and not national) measures. Norway also submitted a complaint challenging the EU measures. At the time of writing, the case is pending. One Panel has been established to examine both complaints and it has been composed, but there are no available submissions of the parties or other data. It seems that the EU preferred settling the issues outside the WTO—within EFTA in the case of the dispute with Norway, and perhaps in bilateral negotiations of a new agreement with Canada, but the WTO dispute is nonetheless underway.

Within the EU, both the Regulation and the Implementing Regulation have been challenged by Inuit associations. At first sight, these challenges are surprising since the Regulation contains an exception for the Inuit. Basically, of the three mentioned exceptions, only the first concerning the hunts of indigenous communities allows the placing on the market of seal products for commercial purposes. The second exception regarding the sustainable management of marine resources allows specified seal products to be placed on the market, but for non-commercial purposes. The third exception allows individuals who have bought a seal product outside the EU to import it for their own personal use.

One might think that the EU included the single exception allowing the commercial use of seal products by the Inuit precisely because it feared Canada’s challenge. Perhaps it thought that it could avoid the challenge if it took some political pressure off the Canadian government by trying (at least partly) to satisfy a large interest group. This is probably not true of the EU ban, as exceptions for the Inuit had already been provided for in the earlier Directive

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16 WTO, European Communities: Measures Prohibiting the Importation and Marketing of Seal Products (Complainant: Canada) DS400 2 November 2009.
17 WTO, European Communities: Measures Prohibiting the Importation and Marketing of Seal Products (Complainant: Norway) DS401 5 November 2009.
18 WTO <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds400_e.htm>.
on seal pups,\textsuperscript{21} as well as in national bans of seal products adopted by Belgium\textsuperscript{22} and the Netherlands.\textsuperscript{23} Still, it is interesting that no other piece of EU secondary legislation has special provisions for the Inuit, although there are (rare) examples of rules containing special provisions for traditional indigenous communities.\textsuperscript{24}

In any case, under the regime introduced by Regulation 1007/2009, the Inuit and other indigenous communities have been given a de facto monopoly of commercial trade within the EU market. One would think that the indigenous communities would be content with such a measure. This is not so—it is precisely the Inuit who are challenging the Regulation and the Implementing Regulation. So, what lies behind these surprising Inuit challenges?

First, the fact that the EU excluded a large part of all seal products from its market means that there is now a surplus of seal products on all other markets. This surplus lowers the price of seal products everywhere outside the EU. As non-EU countries do not distinguish (in their rules) between seal products derived from the traditional hunts of the indigenous communities and all other seal products, the global price reduction also affects the Inuit producers. It also seems that this lower global price cannot be compensated for with additional profits earned from the monopoly on the EU market. (This problem has recently become even more accentuated since Russia has also banned certain seal products.\textsuperscript{25})


\textsuperscript{24} The Leghold Trap Regulation, for example, did not contain any exceptions for indigenous communities. In 1995 there was a Proposal to amend the Regulation which referred to indigenous peoples, but it was never adopted. Instead, the Agreement on international humane trapping standards between the European Community, Canada and the Russian Federation was adopted in 1998, providing derogations for uses of ‘traditional wooden traps essential for preserving cultural heritage of indigenous communities’. A similar agreement between the EU and US has no such provision. See Council Regulation (EEC) 3254/91 of 4 November 1991 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards [1991] OJ L308/1; Proposal for a Council Regulation (EC) amending Council Regulation (EEC) 3254/91 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards, COM(95) 737 final – 95/0357 (SYN); art 10 – 1 d) Agreement on international humane trapping standards between the European Community, Canada and the Russian Federation [1998] OJ L42/43. Agreed Minute, L 219/26 <http://ec.europa.eu/environment/biodiversity/animal_welfare/nts/pdf/l_21919980907en00260037.pdf>.

\textsuperscript{25} Pravda <http://english.pravda.ru/opinion/columnists/21-12-2011/120030-russia_seals-0/>.
Second, not all products produced by the indigenous communities meet the conditions set out in the Regulation and the Implementing Regulation for placing on the market. There are three conditions which must be cumulatively met: ‘(a) seal hunts [have to be] conducted by Inuit or other indigenous communities which have a tradition of seal hunting in the community and in the geographical region; (b) the products of . . . [these hunts have to be] at least partly used, consumed or processed within the communities according to their traditions; [and] (c) seal hunts [have to] contribute to the subsistence of the community’.26 This limits what the indigenous communities can place on the EU market in the absence of EU legislation.

Third, the cost of proving that the hunt falls within the exceptions must raise the cost of production. An interested trader must submit a request for his products to be placed on the market to one of the ‘recognised bodies’ which are to be established in EU Member States.27 The body has to examine whether the conditions for placing on the market are met, which implies that some sort of evidence must be submitted by the interested party.28 The recognized body can then issue an ‘attesting document’ which must accompany seal products.29 A body may also require the attesting document to be translated into the official language of the Member State where the seal products are being placed on the market.30

For these reasons, the Inuit have challenged both the Regulation31 and the Implementing Regulation32 before the General Court (GC). The GC found the first application concerning the Regulation to be inadmissible,33 but the decision has been appealed to the CJEU.34 The second application on the Implementing Regulation is still pending. None of the privileged applicants is challenging the measures, which is unsurprising considering that EU Member States do not produce seal products.35 However, the case could also appear before the CJEU as an indirect challenge in the form of a preliminary reference.

26 Art 3(1) Implementing Regulation (n 2).
27 ibid arts 7, 9.
28 ibid art 7.
29 ibid.
30 ibid art 8(4).
35 The Commission funded study (n 6) mentions four EU members or overseas counties and territories which could be affected by then seal ban: Finland, Sweden, the UK (Scotland) and Greenland. In Finland and Sweden, the seal hunt is largely recreational and not commercial (35, 79). In the UK, seals are not hunted, but are killed to protect the fisheries industry (87). The Regulation does not apply to Greenland. Data on the seal hunt in the EU are also available in the EFSA’s ‘Scientific Opinion’ (n 8), which mentions Finland, Sweden and the UK as countries where seals are hunted, while only Sweden is listed among those where some commercial hunting takes place.
Thus, regardless of whether both Inuit challenges are rejected on formal grounds, it is still worth looking at the issues raised.

III. THE EU CHALLENGE

In the EU, the Regulations are challenged on the grounds of lack of competence, breach of subsidiarity and proportionality, and breach of fundamental rights.36 These grounds (with the exception of the last one37) will be examined below. It is worth recalling that the three principles of conferred competences, subsidiarity and proportionality are the basis of the division of power between the levels of government in the EU. They reflect the principle that decisions should be taken ‘as closely as possible to the citizen’.38 They guarantee the legitimacy of all levels of government in that each level should only be doing what it does best and what the lower levels could not achieve themselves. This fosters pluralism, diversity, experimentation, regulatory competition and other elements of good governance which have been extensively discussed in comparative legal discourse.39 For all these reasons, it is relevant that EU rules, including the Regulation on seal products, comply with these principles.

36 T-18/10 Inuit Tapiriit Kanatami, action for annulment (n 31).

37 The challenge on the basis of fundamental rights is tenuous, and it might have been incorporated into the application only to show how the applicants are affected by the Regulation and Implementing Regulation. The Inuit claim that the Regulation ‘unduly limits [their] subsistence possibilities’ and thereby violates art 1 of Protocol No I to the European Convention of Human Rights (ECHR) – Protection of property; and art 8 ECHR – ‘Right to respect for private and family life’, read in light of arts 9 ‘Freedom of thought, conscience and religion’ and 10 ECHR ‘Freedom of expression’, and the right to be heard. In the absence of any available material which would offer some explanation of these claims, the problems seem to be as follows. First, some of these rights are not recognized in the legal order of the EU or of its Member States, eg the right to be heard in the legislative process is not a fundamental right and exists only when another piece of legislation explicitly grants it. Second, all the other mentioned rights are not absolute and can be limited under certain conditions. Third, there would be serious problems with the extraterritorial application of fundamental rights if a regulation of one country or of the EU which applies on its territory could be found to breach the rights of persons leaving and working primarily in another country and on another continent. Similar cases have never been decided by the European Court of Human Rights or the CJEU.

38 Art 1(2) TEU.

A. Does the EU Have the Competence to Ban Seal Products?

Unsurprisingly, Regulation 1007/2009 was adopted on the basis of Article 114 TFEU (ex Article 95 EC; 100a EC) which has, ever since its introduction by the Single European Act, been the most used internal market competence. The Article provides that, when it is not otherwise provided in the Treaty, the EU legislature can, with a view to achieving internal market objectives, adopt ‘measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market’.\(^{40}\) This provision is the preferred legal basis since measures are adopted through what used to be a co-decision procedure and is now the ordinary legislative procedure, which requires qualified majority (and not unanimous) voting in the Council of Ministers.

But, does the Regulation really meet what the Court has interpreted as the conditions for using Article 114 TFEU as a legal basis? And which case law of the Court concerning these conditions is relevant, or at least should now be understood as relevant?

It is well known that in the famous Tobacco Advertising case\(^{41}\) (to which the Court still, at least formally, adheres\(^{42}\)), the Court placed limits on the use of what is now Article 114 TFEU. It explicitly held that that provision does not grant the Community legislature ‘general power to regulate the internal market’, as such power would be contrary not only to the provision itself, but also to the principle of conferred competences.\(^{43}\) The Court also stated that not all differences in national laws can trigger the application of this provision. Namely, ‘a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition’ is not sufficient for establishing competence.\(^{44}\) In contrast, the measure ‘must genuinely have as its object’ the removal of distortions of competition or of obstacles to trade.\(^{45}\) The Court allowed the EU legislature some space when it held that it can also act to remove future obstacles to trade but it required that the emergence of such obstacles be likely.\(^{46}\) Finally, the Court established a three-prong test according to which a measure can be based on Article 114 TFEU if it actually contributes to the elimination of obstacles to the free movement of

\(^{40}\) Art 114 TFEU (ex Art 95 EC; 100a EC).
\(^{42}\) Case C-58/08 The Queen on the application of Vodafone Ltd, Telefónica O2 Europe plc, T-Mobile International AG, Orange Personal Communications Services Ltd v Secretary of State for Business, Enterprise and Regulatory Reform [2010] ECR I-04999.
\(^{43}\) Tobacco Advertising (n 41) para 83.
\(^{44}\) ibid para 84.
\(^{45}\) ibid.
\(^{46}\) ibid para 86.
goods or to the free movement of services or to removing distortions of competition.\textsuperscript{47}

While it is true that the Court still formally cites \textit{Tobacco Advertising}, the \textit{Tobacco Advertising} test has de facto been substantially modified in several ways.

First, in \textit{BAT},\textsuperscript{48} where a preliminary reference inquired about the validity of Directive 2001/37\textsuperscript{49} regulating cigarette warnings, it was established that the EU legislature is authorized to regulate even when there are no obstacles to trade. In this case, there were no obstacles to free movement as an earlier directive which regulated warnings on cigarettes did allow Member States to adopt stricter rules, but it also guaranteed the free movement of products which complied with it.\textsuperscript{50} One might accept that Union competence cannot be reduced by its own acts (otherwise it would first have to remove its act in order to legislate afresh). And one might also accept that the Union always remains free to legislate afresh in order to adjust legislation to new scientific evidence, as well as to the social and political changes occurring in some Member States (lately restated in \textit{Vodafone}\textsuperscript{51}). This is a reasonable interpretation and is in line with previous case law that states that Community legislation can have two aims: to remove obstacles and to set common standards.\textsuperscript{52} However, this is a modification of the \textit{Tobacco Advertising} test as the existence of obstacles to trade seemed to be one of the crucial elements for triggering the application of Article 114 TFEU. In contrast, following \textit{BAT}, a Union measure does not have to contribute to trade liberalization.

Second, the possibility of future obstacles frequently suffices. More strikingly, it seems that diverse national rules or even a Member State’s announcement of new rules are taken as proof of future obstacles. This ‘proof’ then authorizes the EU legislature to adopt any type of measure on the basis of what is now Article 114 TFEU. For example, in \textit{Swedish Match}, it was stated that three Member States banned ‘snus’, and others considered doing the same;\textsuperscript{53} this was then taken as proof of future obstacles to free movement.

\textsuperscript{47} ibid para 95. Actually, in \textit{Tobacco Advertising} the CJEU did not use the connector ‘or’, but instead the connector ‘and’. However, it can be seen from the application of this test that the three elements do not have to be cumulatively met. In other words, only one of the three elements of the test had to be fulfilled for a directive to be valid. This is confirmed by the \textit{BAT} case where the CJEU adjusted its wording, \textit{BAT} para 60. Case C-491/01 \textit{The Queen and Secretary of State for Health, ex parte: British American Tobacco Investments Ltd and Imperial Tobacco Ltd, supported by Japan Tobacco Inc and JT International SA} [2002] ECR I-11453 (hereinafter: \textit{BAT}).

\textsuperscript{48} \textit{BAT} (n 47).


\textsuperscript{51} \textit{Vodafone} (n 42) paras 34–36.

\textsuperscript{52} See eg Case C-382/92 \textit{Commission v United Kingdom} [1994] ECR I-2435, para 15.

\textsuperscript{53} Case C-210/03 \textit{Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health} [2004] ECR I-11893; the Court in para 9 cites recital 17 of the Preamble to Council Directive 92/
which triggered an EU ban (except in Sweden due to the special provision in their accession agreement). Similarly, in Vodafone, it was stated that it was likely that Member States would regulate retail charges of roaming;\textsuperscript{54} this was taken as proof of future distortions of competition which consequently triggered EU caps on retail and wholesale roaming charges.

Third, BAT and Swedish Match seem to tell us that measures adopted on the basis of Article 114 TFEU can even cause obstacles to the free movement of goods. In BAT, rules on the size of the warning created immense obstacles to the free movement of goods. As the contested Directive requires one of the prescribed warnings to cover 40 per cent of a specified packet surface, and as the warning has to be in the official language, then it is possible to put at the most two such warnings on every packet.\textsuperscript{55} So, for example, a cigarette pack can be labelled both in Spanish and Portuguese, but then there is simply no space on the pack for a third language version. The pack can thus move back and forth between Spain and Portugal, but not to any other EU Member State. Free movement of the regulated products is destroyed and the market in those goods is significantly partitioned. Even more restrictive was the complete ban of tobacco for oral use challenged in Swedish Match. The CJEU accepted in that case the explanation of the Commission that three Member States had already banned tobacco for oral use (‘snus’) and that with growing public awareness about the harmfulness of tobacco, there would be more trade obstacles.\textsuperscript{56} However, it is not logical that in order to avoid obstacles to trade, one completely bans a product. That would mean that obstacles to the free movement of goods could be eliminated by eliminating the goods. If one were to accept this logic, the internal market would function perfectly if there were no goods on the market. That is pure sophism.

All these developments appear as inconsistencies in the CJEU’s case law. It remains unclear whether the Court still considers that Article 114 TFEU does not confer upon the Union the general power to regulate the market, as it explicitly held in Tobacco Advertising, or whether the interpretation has changed, as Swedish Match would suggest.\textsuperscript{57} It is also uncertain whether Union action on the basis of Article 114 TFEU can be triggered not only to

\textsuperscript{54} Vodafone (n 42) paras 45–47.
\textsuperscript{56} Swedish Match (n 53) paras 37, 38.
\textsuperscript{57} See on this point the Vodafone (n 42), Opinion of AG Poiares Maduro, especially fn 15. On whether the Community has general power to regulate the internal market, see Wyatt, ‘Community Competence’ (n 55).
prevent obstacles to the free movement of goods and distortions of competition, as *Tobacco Advertising* said, but also with the aim of eliminating diversions in trade such as those that existed in the trade of oral ‘snus’ prior to the directive and the elimination of which the Court upheld in *Swedish Match*. Furthermore, if the Union is authorized to act in order to eliminate trade diversions, can it be possible that it is also authorized to create trade diversions through its legislation, as was the case with the provisions on the size of warnings on tobacco packages which the Court upheld in *BAT*?58 One has to bear in mind that a broad reading of Article 114 TFEU would not only go against the principle of conferred competences but it would make the principle nugatory—there is no aspect of law or life which is not in some way connected to the internal market so, if Article 114 TFEU were to be interpreted broadly, then anything could be regulated on the basis of that Treaty provision.

The same objections can be raised in connection with Regulation 1007/2009 on trade in seal products. Before the Regulation’s adoption, two Member States banned the placing on the market of seal products and one Member State notified its intention of imposing the ban.59 The Commission could have tried removing these obstacles through infringement proceedings, claiming that the measures were contrary to the EU free movement of goods provisions. The Commission would have had no problem proving that the national bans constituted measures having equivalent effect to quantitative restrictions which are covered by Article 34 TFEU (ex Article 28 EC). The only question would have been whether the measures were pursuing a legitimate aim and whether they were proportionate. As a general rule in EU law, negative integration or deregulation set out in the Treaty rules on the four freedoms is the primary way of removing obstacles to free movement. Only when negative integration is not able to remove an obstacle, eg because the obstacle is justified, does the mechanism of positive integration become activated in the sense that harmonizing EU measures can be adopted.60 In this respect, there is no requirement for the Commission to first obtain a decision of the Court establishing that a national obstacle is justified before it can propose a measure. However, one would at least expect the Commission itself to be convinced that a national measure is justified so that harmonization is the only possible way of removing an obstacle. In contrast, in the case of national bans of seal products, it seems that even the Commission did not consider these measures to be

58 cf case law from *Tobacco Advertising* (n 41) and *Swedish Match* (n 53) with US Supreme Court cases *United States v Morrison* [2000] 529 US 598 and *United States v Gonzalez-Lopez* [2006] 548 US 140 on the one hand, and *Gonzales v Raich* [2005] 545 US 1 on the other hand.


60 See eg Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in Case 120/78 (*Cassis de Dijon*) [1980] OJ C256/2.
justified. Nevertheless, the Commission did not try removing these obstacles through negative integration but through a positive one.

This can be seen from the original Proposal for the Regulation.61 This Proposal shows that the original intention of the Commission was not to introduce a ‘total’ ban but a conditional one. Article 4 of the Proposal entitled ‘Conditions of placing on the market, import, transit and export’ stated that ‘the placing on the market, and the import in, transit through, or export from, the Community of seal products shall be allowed’ under four conditions which were responsive to the hunting and skinning techniques.62 These conditions were the following: first, ‘that ... [seal products] have been obtained from seals killed and skinned in a country where, or by persons to whom, adequate legislative provisions or other requirements apply ensuring effectively that seals are killed and skinned without causing avoidable pain, distress and any other form of suffering’; second, that these rules have been ‘effectively enforced’; third, that seal products have been ‘certified as coming from seals’ for which the previous two conditions were met; and fourth, that ‘the fulfilment of ... [all three previous conditions] is evidenced by: (i) a certificate, and (ii) a label or marking, where a certificate does not suffice to ensure the proper enforcement of this Regulation’.63 Furthermore, Article 4(2) of the Proposal guaranteed the free movement within the EU of products which would comply with these conditions by stating that ‘Member States shall not impede the placing on the market, import and export of seal products which comply with the provisions of this Regulation.’64 This would mean that Belgium and the Netherlands would have to remove their national total bans.

However, this originally planned conditional ban was never adopted. Amendments to the proposal were added by various committees within the European Parliament.65 The measure finally adopted was thus a total ban. It would seem from the final version of the Regulation that the EU legislature took national measures banning seal products as proof of obstacles to free movement66 which then triggered the EU ban. But even if one accepted that obstacles existed and that they could not have been removed in other ways, it does not seem logical that in order to eliminate obstacles to trade with two Member States or any likely future obstacles, the EU legislature was authorized to adopt immediate and maximal obstacles to trade, ie to entirely ban a product (with three narrow exceptions).

It is worth mentioning here that the drafters of the Regulation made an effort not to use the word ‘ban’ so that the measure would look as if it were regulating the market, ie setting conditions for placing seal products on the market instead of banning them. The Regulation does not use what would probably be the

62 ibid art 4(1).
63 ibid.
64 ibid art 4(2).
65 For a detailed analysis of the Regulation’s legislative history, see De Ville (n 4).
66 Preamble of the Regulation (n 1) recital 6.
most logical structure—a general clause banning all seal products and then enumerating the exceptions. Instead, its Article 3 entitled ‘Conditions for placing on the market’ states in paragraph 1 that ‘[t]he 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 . . .’. The second paragraph of this Article includes the other two exceptions. Basically, the Regulation lists only products which can be placed on the market. However, despite this clever wording, the Regulation de facto bans almost all seal products. It can be understood as a total ban on placing on the market for commercial purposes of all seal products except certain products of indigenous communities which meet the conditions specified in the Regulation and the Implementing Regulation. This small exception does not prevent the measure from being understood as a ban.

Generally speaking, competence for a ban is especially problematic if the ban of a product does not promote trade in something else. For example, the Directive on general product safety\(^67\) bans ‘unsafe’ products but in doing so it promotes trade and consumer confidence in products on the market.

The key question for determining competence for introducing a ban should be whether that ban of certain goods contributes to the movement of other goods. Does the ban of seal products contribute to trade in something else?

The answer to this question seems to be given in the Regulation’s Preamble. According to the Preamble, the ban of certain seal products promotes the movement of other types of goods. These are goods ‘not made from seals, but which may not be easily distinguishable from similar goods made from seals or products which may include elements or ingredients obtained from seals without this being clearly recognizable, such as furs, Omega-3 capsules and oils and leather goods’.\(^68\) In addition, according to the Preamble, the Regulation prevents ‘the disturbance of the internal market in the products concerned, including products equivalent to, or substitutable, for seal products’.\(^69\)

All this might well be true. It sounds possible that the ban of seal products creates confidence among consumers that they are not buying seal products, provided that they indeed do not want to buy such goods (which is not really proven, see below). In this scenario, the ban could make consumers more comfortable in buying other goods. So, unlike the preambles of earlier pieces of legislation containing total bans, eg the Preamble of the Directive banning tobacco for oral use, this Preamble offers an explanation. However, while the


\(^{68}\) Preamble of the Regulation (n 1) recital 7.

\(^{69}\) ibid recital 8.
EU legislature is getting better at writing legislation,\textsuperscript{70} the problem is that apart from the smooth wording of the Preamble, one cannot find any evidence that there are problems in the movement of these non-seal products, that a ban on seal products indeed contributes to their movement, or that a less restrictive measure (such as labelling) could not ensure their movement. This is problematic as the burden of proving compliance with the principles of conferred competence as well as subsidiarity and proportionality lies with EU institutions.

\textit{B. Does the Regulation Breach Subsidiarity and Proportionality?}

It will be recalled that the Protocol on Subsidiarity and Proportionality especially mentions qualitative and quantitative data which must support each EU measure, as these data must substantiate ‘[t]he reasons for concluding that a Union objective can be better achieved at Union level’.\textsuperscript{71} Before the adoption of the Regulation, the Commission did indeed obtain a lot of data—both qualitative and quantitative. Preparatory documents, such as the EFSA Scientific Opinion,\textsuperscript{72} a Commission funded study on the potential impact of a seal product ban,\textsuperscript{73} and impact assessments\textsuperscript{74} are available on the web.\textsuperscript{75} However, while there is an abundance of data that might be selectively chosen to support any type of measure, it is not really clear from all the data taken together why a ban was chosen as the most suitable type of measure.

For example, there is no conclusive evidence that less restrictive measures (such as humane hunting requirements and labelling rules) could not achieve the same aim. Even the Commission funded study on the potential impact of a ban of products derived from seal species in its recommendations suggests these less restrictive alternatives, stating that:

\begin{quote}
[...] the Commission should recognize... the differences between the range states’ seal hunt management systems. Hence, the designs of policy measures should aim to pursue good practices and avoid bad practices. This implies that any labelling schemes or prohibitions on imports or on placing on the market of seal products should address such good and/or bad practices and so should be targeted—also in the sense that the economic and social impacts as far as possible are limited to the areas where the targeted hunting practices take place.
\end{quote}

\textsuperscript{70} See on this point S Weatherill, ‘The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court’s Case Law Has Become a “Drafting Guide”’ (2011) 12 German Law Journal 827.


\textsuperscript{72} EFSA Scientific Opinion (n 8).

\textsuperscript{73} Commission funded study (n 6).


The measure, however, instead of responding to good and bad practices of different seal hunts, entails a ban with three narrow exceptions (which are also not based on any differentiation between humane and inhumane hunts). This is not responsive to good or bad practices. Even seal products from animals caught in a humane way are banned (unless they fall within the exceptions), while seal products which fall within one of the exceptions are permitted even if they are derived from inhumane hunts.

Basically, the legislature did ensure that the travaux préparatoires contained a lot of qualitative and quantitative data but it then picked which parts of the documentation it would take into account and which it would ignore. This is not only procedurally unsatisfactory but equally, in terms of substance, it seems that the measure meets neither the subsidiarity nor the proportionality principle. The measure does not follow the study on which it is based which recommends less restrictive measures that would be less intrusive in national regulatory autonomy.

It is true that many EU rules that suffer from a broad interpretation of legal bases and the lack of application of the principles of conferred competences, subsidiarity and proportionality are very popular measures that do achieve valuable aims. These are, for example, bans of tobacco advertising, rules on cigarette pack warnings, bans of oral tobacco, the reduction of roaming charges and the ban of seal products. The question is, however, whether the EU central level is the most appropriate level of governance to be making these policy choices. It is likely that if the decision-making was left at levels closer to the citizen that different EU Member States would choose different regulatory solutions.

It should also be stressed that when the EU adopts rules which are more trade restrictive than Member States’ rules, this creates so-called ‘regulatory peaks’,76 which are de facto obstacles to external trade. It is well known that the EU internal market has significant external effects. On the one hand, rules on negative integration (with mutual recognition) and partial harmonization as a type of positive integration benefit both internal and external trade because once a product satisfies conditions for being placed on the market in one Member State it will have to be granted access to the market in another Member State, unless there is a justified reason for denying such access. On the other hand, some positive integration can easily lead to obstacles to external trade. Sometimes the very process of adopting rules at the common level can lead to obstacles to internal and external trade (for example because disagreements can cause moratoria, such as those on the approval of GMO products which were challenged in EC—Biotech77). Common rules

themselves might not have a positive effect on external trade, depending largely on the type of rules adopted. In particular, very detailed or very restrictive types of positive integration, ‘regulatory peaks’, can present significant obstacles to imports from third countries.

IV. THE WTO CHALLENGE

In the WTO, the EU measures were challenged by Canada and Norway. The claimants invoked several provisions of the GATT, of the Agreement on Technical Barriers to Trade (TBT), and of the Agriculture Agreement but not all will be relevant for deciding the case. For example, the claimants invoked Article XI GATT requiring a general elimination of quantitative restrictions but the settled case law suggests that this provision would not be applicable. The crux of the case should be an analysis of Article III: 4 GATT, which entails the principle of national treatment as regards non-fiscal (non-pecuniary) measures, and Article XX GATT, which contains a list of justifications for measures which prima facie breach the GATT.

This paper will focus below on three issues which will be crucial for the decision in the case: the aims of the measure, its coherence and its proportionality in pursuing its aims.

A. What Is the Aim of the EU Measure?

Generally speaking, WTO law bans protectionism and certain other types of trade restrictions (such as TBT and SPS measures not based on science).
By contrast, WTO law allows measures with legitimate aims which are being pursued in consistent and proportionate ways. For that reason, it is relevant to establish what the aim of the measure is. In WTO case law and academic writing, the point of the analysis at which the purpose of a measure becomes relevant is a controversial matter. It remains unsettled whether this point comes in the analysis of a possible breach of Article III GATT or when assessing whether the measure which is found to have prima facie breached the GATT is justified under Article XX GATT. However, it is uncontroversial that determining the aims of the measure is relevant.

As a preliminary point, one should also examine whether there is any suspicion that the aim of the measure is protectionism. There is some indication of protectionism in that this Regulation banned only trade in seal, while allowing trade in other types of fur. The EU does protect many other species of wild animals through its legislation, such as in the Habitats Directive and the Birds Directive, and it protects farmed animals through rules on farming, transport and slaughter. However, most frequently, animals are protected by means other than by banning trade in their products. Still, the fact that the EU banned seal products while many other types of fur can be traded is certainly not sufficient proof of protectionism. In other areas, both the CJEU and the AB were open to the possibility that a regulator is allowed to address just a part of an environmental problem so, by analogy, it would be possible to protect seals more than other animals. It is interesting, however, that the banning starts, first with dogs and cats and then, with the products of animals


that are not hunted or farmed in the EU at a time when there is pressing public opinion requiring better regulation or bans of domestically produced animal products, fur in particular. It is also worth mentioning here that the term ‘seal’ is broadly defined in the Regulation to mean ‘specimens of all species of pinnipeds’ and this covers in total more than 35 species, the large majority of which are not even nearly endangered. Furthermore, certain seal pups (at one time the most frequently caught seals) were already protected in 1983 by the EU Directive on skins of certain seal pups and the products derived therefrom, which banned commercial imports of those goods. A further point of relevance is the fact that the EU itself is not a significant producer of seal products. The only ‘EU’ production of seal products is that of Greenland (Denmark) which is an EU overseas territory so the Regulation does not apply to it. Nor are Greenland’s exports significantly affected by the trading ban, since they are covered by the Inuit exception. Hence, Greenland’s seal fur coats can still be found in high-street stores in Denmark and in the rest of the EU. In addition, while seal products are or were imports into the EU, many other furs are domestic products. The EU is the world’s largest producer of farmed fur (with, allegedly, 64 per cent of mink-fur and 56 per cent of fox-fur production in the world). The world’s largest fur marketing company, Saga Furs, is based in the EU (Finland) and it specializes in fox, mink and Finn raccoon fur. The world’s largest fur fairs take place in the EU, with the Copenhagen Fur Center (Denmark) being the world’s largest fur auction house, largely focusing on trade in mink.

In legal terms, if Canada and Norway wanted the measure to be found contrary to the national treatment principle in Article III GATT, they would have to argue that banned seal products are ‘like products’ in relation to some products which are permitted on the EU market. In this respect, there are at least three possible comparisons which the claimants could invoke. First, the complainants could argue that banned seal products are ‘like’ products in relation to permissible seal products covered by the Regulation’s three exceptions. For example, it could be argued that seal products derived from hunts of non-indigenous hunters are ‘like’ those seal products which result from the hunts of indigenous communities, especially since there is no
requirement for seal products of indigenous communities to be derived from humane hunts. Second, the complainants could argue that banned seal products are ‘like’ some animal non-seal products which are permitted on the EU market. For example, one could argue that seal furs are ‘like’ mink or fox furs. It is an important point here that the comparison is not between seals and mink or fox but between, for example, a seal coat and a mink or fox coat. Third, they could argue that products which contain seal elements that are not clearly recognizable (such as Omega 3 capsules) are ‘like’ products in relation to products with which they are substitutable (such as Omega 3 capsules which do not contain seal ingredients or perhaps which do not contain any animal ingredients). In this respect, it is relevant that even the Regulation’s Preamble explicitly mentions that it seeks to promote the movement of goods which cannot be easily distinguished from seal, products including seal ingredients without this being clearly recognizable and products equivalent to, or substitutable for, seal products.99

In respect of all three comparisons, the determination of ‘likeness’ would depend on the type of test the Panel applies. For example, under the Border Tax Adjustments test, the Panel would look at physical properties, consumer tastes, end uses and customs classification.100 Under the regulatory purpose test, which was, arguably, used by the WTO AB in Chile–Alcohol (in connection with a different paragraph of Article III GATT concerning national treatment and taxes), the Panel would look at whether there is a legitimate regulatory purpose on the basis of which two products can be differentiated.101 More recently, it seems that the AB (in EC–Asbestos and Philippines–Spirits) has adopted a test that primarily looks at whether two products are in a competitive relationship.102 Under this test, products would be ‘like’ if there was a competitive relationship between them which would ‘overcom[e] the inference [which could be] drawn from the different physical properties, that the products are not “like”’.

In any case, the burden of proof that the products are ‘like’ lies on Canada and Norway. The complainants will also have to prove other elements which are required to determine that a national non-fiscal measure breached the national treatment principle (ie they will also have to prove that foreign ‘like’ products are ‘treated less favourably’ than domestic ‘like’ products, and that

99 Preamble of the Regulation (n 1) recitals 7, 8.
103 EC–Asbestos, AB Report (n 102) para 139.
this is done ‘so as to afford protection’ to domestic production). But as this paper focuses on determining the purpose of the measure, it is relevant that Canada and Norway will be trying to prove protectionism, while the EU at some point in the procedure has to offer a non-protectionist aim of the measures which could serve as justification.

From the available material, it is still unclear which GATT justifications the EU will invoke. Three possible justifications of the measure have been raised in discussions on the seals ban: public morals; protection of the life or health of animals; and the protection of exhaustible natural resources. It would seem that the third of these aims is less persuasive as a justification since most seal species are not endangered. The AB in Shrimp/Turtle accepted that living creatures can also be covered by the concept of ‘exhaustible natural resources’, but it applied that concept to species which were classified in relevant international documents as ‘threatened with extinction’. Hunted seal species are, by contrast, classified in the category of ‘least concern’ so it is not probable that a Panel or the AB would accept the justification of the Regulation on this ground. The analysis will thus focus on the other two justifications.

The Regulation’s Preamble states that the Regulation was adopted with a view to achieving ‘animal welfare’ since seals can feel ‘pain, distress, fear and other forms of suffering which the killing and skinning of seals, as they are most frequently performed, cause to those animals’. In terms of the GATT, this would translate into protection of animal life or health in Article XX (b) GATT.

The Regulation’s Preamble also refers to the concerns of the public, suggesting that another possible justification which the EU could invoke to justify the entire measure is public morals. The Commission’s Proposal of the Regulation also mentions ‘ethical considerations’.

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104 To determine a breach of art III:4 GATT, the complainant will have to prove three elements: that there are domestic and foreign products which are like; that foreign like products are treated less favourably than domestic ones; and that this is done so as to afford protection to domestic production. To prove that a measure is justified on the basis of art XX GATT, one has to prove that it is covered by one of the listed justification grounds, that it is suitable or necessary to achieve that aim and that it is not contrary to the chapeau which requires measures not to be ‘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’ (chapeau of art XX GATT). The Panel can approach these issues in technically different ways. For example, in the analysis of art III: 4, the analysis of ‘likeness’ of domestic and foreign products precedes the analysis of ‘less favourable treatment’ of foreign products, but there are cases where the Panel reversed the order of analysis (eg EC–Biotech, Panel Report (n 77)). The Panel can also take different approaches to ‘likeness’, to non-written justification grounds, etc.


106 Preamble of the Regulation (n 1) recital 4.

In WTO law, public morals have rarely been used as a justification for measures which have a restrictive effect on trade. In *US–Gambling*, the AB upheld the use of a public morals provision of the GATS (Article XIV (a) GATS) for justifying a measure prima facie contrary to that agreement,\(^\text{108}\) and in *China–Audiovisuals*, a public morals provision of the GATT (Article XX (a) GATT) was permitted for justifying measures found to be inconsistent with China’s trading rights commitments under its Accession Protocol and Working Party Report.\(^\text{109}\) However, in both cases the AB found the measures, at least partly, not to be justified.\(^\text{110}\)

In *US–Gambling*, public morals were defined very broadly as ‘standards of right and wrong conduct maintained by or on behalf of a community or nation’.\(^\text{111}\) But the question is whether public morals are broad enough to cover this situation.

The first issue here is whether public morals which the EU seeks to protect should (arguably) be EU public morals. In this respect, it is relevant that the public consultations on which the EU based its measure entailed 73,153 answers. Those comprised not only answers from EU citizens or residents but from people in 160 countries around the world.\(^\text{112}\) The EU studies state that ‘the majority of respondents reside in the Anglo-Saxon countries UK, US and Canada’ and that their views are more against seal hunting than those of other respondents—‘[a]round 50% of the pro-banners come from two non-EU countries: the US and Canada’.\(^\text{113}\) It seems that the EU bases its measure not only on EU citizens’ opinions but also on some sort of globalized notion of public morals.

The other issue is that this global standard of public morals towards seal hunting does not exist. The standard of morals is actually culturally biased (which could partly lead to protectionism, as domestic producers conform to domestic morals). Indeed at, it is striking that the Canadian Inuit find the Regulation insulting and culturally arrogant.\(^\text{114}\) That raises the issue of whether regional morals can be used as a justification in the world trading system. The answer is probably yes, as WTO law generally does not require countries to


\(^{110}\) In *US–Gambling* (n 108) the measure was not justified because it did not meet the conditions from the chapeau to art XIV GATS; and in *China–Audiovisuals* (n 109) the measures failed the necessity test.

\(^{111}\) *US–Gambling* (n 108) para 296. The AB upheld the Panel which defined public morals in such a way.

\(^{112}\) Commission funded study (n 6) 5, 125.

\(^{113}\) ibid 5.

\(^{114}\) Impact assessment (n 74) 11.

\(^{115}\) Excerpt from the speech of Mary Simon, president of ‘Inuit Tapiriit Kanatami’ (‘Inuit are united in Canada’), ‘The European Union, Canada, and the Arctic: Challenges of International Governance’, delivered at Carleton University, Ottawa, 23 September 2011 <www.itk.ca/media/speech/european-union-canada-and-arctic-challenges-international-governance>. 
have the same views on issues (eg on hormone-treated meat, biotech products, etc) but it has to be proven that the protected interest corresponds to the EU’s public morals.

Another issue is whether the public is really concerned for seals in particular, and, if so, for what reason? Is there some clear criterion for distinguishing animals or hunts which make, on the one hand, seal products or seal hunts immoral and, on the other hand, other animal products (including fur and leather), moral? One might reason that EU morals are gradually evolving so that fur is generally becoming unacceptable and that other types of fur will also subsequently be banned. However, this is not the case as even this Regulation does not ban seal fur—it merely bans the placing on the market of those seal products which are not covered by the Regulation’s exceptions. Whoever wants to buy a seal fur coat abroad, or has an old one, or buys a seal fur coat covered by the exceptions on the EU market, is welcome to wear it. One wonders if there are objective criteria for giving seals more protection than other animals, but it seems that no such criteria for distinguishing animals or hunts apply here. The first possible criterion for differentiation is whether an animal is endangered. This criterion would not explain the interest for a wide ban on seal products, as most seal species are not even nearly endangered. The second criterion might be whether the meat of an animal is used for food. Again, this criterion does not explain the seals products ban. Seal meat is eaten in some countries, while in contrast, fox and mink are not eaten and their fur is permitted on the EU market. The third criterion might be whether animals are domesticated as pets, since, for example, EU law bans dog and cat fur.116 However, no one would argue that seals are pets. The fourth criterion might be that seals are sentient beings but again, so are pigs and their products are not banned. What makes differentiation between seals and other animals even more puzzling is that there are many species of seals which all do not have the same characteristics but all of their products are equally prohibited. The public seems to be concerned for seals’ welfare because they are more attractive (‘cuter’) to the public117 than many other species such as, for example, the fox or mink which are even traditionally considered as pests in some countries (although in some countries seals are also considered as pests).118 The question is whether the public’s emotional attachment to seals (which does not seem to be based on any rational differentiation between seals and other animals) affects the notion of public morality? Or should public morality, which can be used as a justification for a prima facie trade barrier, be based on rational grounds?


118 eg in Sweden and the UK. Commission funded study (n 6) 8, 80, 130.
Even if one were to accept a public morals justification based on views that do not have to be rational, should these be views which per se cannot be rationally proven? For example, religious views are based on belief rather than on scientific evidence. So if a State had to justify a trade restrictive measure (e.g., rules on the importation of non-halal or non-kosher foods) by invoking a religious belief, it would not try to support the belief with scientific evidence. The situation with Europeans’ attitudes towards seals is quite different, as EU citizens do think that their views in this regard are based on facts and scientific evidence, which is arguably untrue. In this respect it is relevant that the EU’s own study shows that the public has several misconceptions regarding seal hunting methods. According to this study, 79.2 per cent of respondents think that ‘hitting weapons are most commonly used’ in seal hunts, which, according to the study, is incorrect. Furthermore, the respondents considered that these weapons are ‘the least appropriate to avoid unnecessary pain, distress and suffering of the seal’, which is again false and contrary to the EU’s own scientific evidence provided in the EFSA Scientific Opinion. These misconceptions influence public attitudes towards seal hunting. Similar data showing the lack of information about the issues are available in other studies not conducted by the EU or called upon by the EU. For example, IPSOS Mori, a UK-based market research company, conducted 6,102 interviews in 11 EU Member States to examine public opinion on the EU ban on seal products. The survey was conducted only after the ban had already been put into place. When asked about how much they know about the commercial seal hunt, 79 per cent of respondents answered in one of the following ways: ‘not very much’, ‘nothing at all, but have heard of it’, ‘never heard of it’, ‘not sure’. However, when asked what they thought about the ban of seal products deriving from commercial seal hunts, 72 per cent supported the ban. One can only wonder whether it would be acceptable in an international forum such as the WTO to accept a standard of public morals based on lack of knowledge or even on misconceptions about facts and scientific evidence.

The question is, how broad are public morals? In general, in WTO law, there are discussions on whether public morals are so broad as to embody all the possible unwritten justification grounds. It remains unresolved in the WTO whether and how States can invoke justifications that go beyond the exhaustive list of legitimate aims contained in Article XX GATT. This is a problem of allowing regulators more space in achieving their legitimate aims.

119 See arguments put forward by Howse and Langille (n 4) 369.
120 Commission funded study (n 6) 26.
121 ibid.
122 ibid.
124 ibid 2.
125 ibid 3.
126 See Mavroidis on the argument that not all public anxiety should be followed by government intervention, but that public anxiety should be subject to rational scrutiny, and that the WTO should have a cautious attitude towards the precautionary principle. P Mavroidis, Trade in Goods (2nd edn, OUP 2012) 83, 84.
For EU lawyers, this is a problem of how to allow the use of ‘mandatory requirements’ in the WTO. If it is possible in the WTO to invoke unwritten justification grounds, then there are at least four ways that this can be done. The first option argues that this should be done within the ‘likeness’ test which is part of the national treatment principle. The national treatment principle requires that ‘like’ products are treated alike, so that one can argue that two products which can be distinguished on the basis of a legitimate regulatory purpose (e.g. environmentally friendly products versus environmentally unfriendly products) are not ‘like’. Treating these products differently is not even a prima facie breach of national treatment. The second option is to invoke the unwritten justification grounds, again within the national treatment principle but as a part of the ‘less favourable treatment’ analysis which could look at the purpose of the measure (as perhaps the AB in EC–Asbestos suggests). The third possibility is using the chapeau of Article XX GATT as in Brazil–Tyres, where the AB held that ‘[t]he assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure’. The fourth possibility is to use public morals as a broad concept embracing a wide spectrum of interests.

B. Is the Measure Coherent?

The main problem with justifying these two EU Regulations is their coherence or consistency. Coherence or consistency is here understood in a broad way. It can be a requirement of consistency under the SPS agreement and an element in an analysis of a measure’s real aim. It can be an analysis of a measure’s compliance with the chapeau of Article XX GATT, which requires measures not to be ‘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’; Alternatively, it can be an analysis of a measure’s necessity.

127 United States–Measures Affecting Alcoholic and Malt Beverages (1992) GATTBISD 39S/206, paras 5.23–5.26; United States–Taxes on Automobiles, unadopted Report of the GATT Panel, DS31/R 11 October 1994, para 5.10; Japan–Alcohol, AB Report (n 100); Chile–Alcohol, AB Report (n 101) paras 62, 71. See also Hudec (n 81); Regan, ‘Regulatory Purpose’ (n 81); Regan, ‘Further Thoughts’ (n 81).

128 In the obiter dictum of the decision in EC–Asbestos, AB Report (n 102), the AB mentioned that the term ‘less favourable treatment’ was a reflection of the general principle from art III:1 that internal regulations should not be ‘applied so as to afford protection’ (para 100). So, ‘[i]f there is “less favourable treatment” of the group of “like” imported products, there is, conversely, “protection” of the group of “like” domestic products. However, a Member may draw distinctions between products which have been found to be “like”, without, for this reason alone, according to the group of “like” imported products “less favourable treatment” than that accorded to the group of “like” domestic products’ (para 100). For a useful overview of the possible interpretations of para 100 in the AB’s Report in EC–Asbestos, see L Ehring, ‘De Facto Discrimination in WTO Law: National and Most-Favoured-Nation Treatment – or Equal Treatment?’ (2002) 36 JWT 921.


130 Chapeau of art XX GATT.
In this case, the Regulations’ coherence is questionable, regardless of whether one considers their aim the protection of animal life and health or reflective of public morals.\textsuperscript{131} In both cases, it is problematic that the ban does not differentiate in any way between seal products derived from animals caught in a humane and inhumane way.

On the one hand, the Regulation does not allow countries or individual traders to prove that their seal products are derived from humane hunts. Instead, all products that do not fall within the three narrow exceptions are automatically banned. This somewhat resembles the measures challenged in \textit{Tuna/Dolphin}\textsuperscript{132} and \textit{Shrimp/Turtle}.\textsuperscript{133} Particularly, in \textit{Shrimp/Turtle}, the AB found that the fact that the US did not allow countries to prove the effectiveness of their protection of sea turtles (but required them to have the same method of protection as the US)\textsuperscript{134} and the fact that the US did not allow individual traders to prove the effectiveness of their methods for protecting sea turtles\textsuperscript{135} rendered the US measure contrary to the chapeau of Article XX GATT as ‘arbitrary or unjustifiable discrimination’.\textsuperscript{136} The EU measure is different from that of the US in the sense that the former entails a much broader ban not present in the latter. However, the EU measure is similar in the sense that it does not take into account whether certain seal products are derived from seals caught in a humane way.

Furthermore, it should be recalled (see above, Part IIIA) that the original intention of the Commission was not to introduce a total ban but to introduce a conditional ban which would be responsive to the hunting methods used. Article 4 of the Proposal for the Regulation contained detailed rules that would allow seal products produced in accordance with certain animal welfare standards enforced in another country to be placed on the EU market, properly certified and labelled. One might assume that the Commission was aware of its WTO obligations. It was only after discussions in several committees of the European Parliament that the measure was amended in a way which was not responsive to any compliance with animal welfare standards. It is also noteworthy that other comparable EU rules such as the Leghold Trap Regulation are responsive to different hunting techniques. Under that Regulation, certain animal pelts are allowed on the EU market if ‘in the country where the pelts originate . . . there are adequate . . . provisions in

\footnotesize\textsuperscript{131} WTO, \textit{Australia Measures Affecting Importation of Salmon—Report of the Appellate Body} (20 October 1998) WT/DS18/AB/R, para 3 (citing the Panel Report), 153, 158, 177, 178. For the CJEU’s attitude towards consistency, see Cases C-570/07 and C-571/07 José Manuel Blanco Pérez, María del Pilar Chao Gómez v Consejería de Salud y Servicios Sanitarios, Principado de Asturias \textsuperscript{[2010]} ECR I-04629, para 94.


\footnotesize\textsuperscript{133} Shrimp/Turtle, Panel Report and AB Report (n 105).

\footnotesize\textsuperscript{134} ibid para 163.

\footnotesize\textsuperscript{135} ibid para 165.

\footnotesize\textsuperscript{136} ibid para 176, 186.
force to prohibit the use of the leghold trap; or... the trapping methods used... meet internationally agreed humane trapping standards’.\textsuperscript{137}

On the other hand, the Regulation grants entry on the market to seal products covered by the exceptions, without requiring them to be derived from humane hunts. First, products derived from traditional hunts of the Inuit can be placed on the market regardless of the method in which the seals have been hunted. The Implementing Regulation merely specifies that hunts have to be conducted by indigenous communities having a tradition of seal hunting, that seal products have to be ‘at least partly used, consumed or processed’ within the community according to their traditions and that the hunts must contribute to the community’s subsistence.\textsuperscript{138} The Implementing Regulation does not require these hunts to be humane. Similarly, products covered by the second exception, which result from hunts that have the purpose of sustainable management of marine resources can be placed on the market (albeit for non-commercial purposes) regardless of the hunting method. And, finally, individual travellers can import seal products for personal use, again regardless of the way in which the seals were killed. One could conclude from this that the EU values the life and health of seals, as well as the traditions of indigenous communities, marine management and the protection of travellers and their property. In regulating, the EU gives priority to the latter. However, the problem lies not in the exceptions to the justifications per se but rather, in the precise way that these exceptions are construed. These exceptions entail no consideration for the possible main legitimate aim of the measure (animal life or health or public morals).

Contrary to the present solution, it would have been and still is possible to construe the exceptions to the ban in a way which would be in accordance with the aim of animal life or health or public morals. All of these aims are not mutually incompatible—it is possible to ensure seal protection, the protection of indigenous communities, marine management, etc, in a single measure. The Regulation could have merely required seal products covered by the exceptions to be in compliance with humane hunting practices. First, as regards the exception for indigenous communities, it is certainly laudable that the EU aims to protect their way of life and there is nothing controversial about that in itself. Preservation of indigenous communities is mandated by many international documents\textsuperscript{139} and special provisions for such communities in rules on hunting are already provided for in other fields. For example, the International Convention for the Regulation of Whaling (IWC) provides an exception for indigenous hunts. That exception is much stricter than the one contained in the EU Regulations: under the IWC it is necessary to prove a

\textsuperscript{137} Art 3 Leghold Trap Regulation (n 24); see also European Commission <http://ec.europa.eu/environment/biodiversity/animal_welfare/hts/index_en.htm>.

\textsuperscript{138} Art 3(1) Implementing Regulation (n 2).

\textsuperscript{139} Recital 14 of the Preamble to the Implementing Regulation explicitly refers to the United Nations Declaration on the Rights of Indigenous Peoples.
cultural and subsistence need of the indigenous community and the International Whaling Commission sets a catch quota. In any case, it should be stressed that inhumane seal hunting is not part of the heritage of Inuit or other indigenous cultures. There is nothing inherently inhumane in the hunting methods of indigenous communities which would make it impossible to achieve both sets of aims—animal health and morals on the one hand and the protection of the indigenous communities on the other hand. The traditional hunting tool of the Inuit is the hakapik which is, according to the EU’s own studies, one of the most humane hunting tools. EU studies show that the Inuit nowadays also hunts with rifles, and these are also considered to be humane tools. Thus, the preservation of an indigenous way of life does not require any inhumane hunting practices, so imposing the requirement of a humane hunt on those communities would not mean destroying a culture. Second, as regards the exception for seal products derived from marine management, it is also possible to achieve both sets of aims—animal health and morals on the one hand and sustainable marine management on the other hand. There is nothing inherently inhumane in sustainable marine management. The Regulation could also have required those products to conform to humane hunting practices but it does not do so.

These exceptions, which are, for no clear reason, unresponsive to the proclaimed aims of the Regulations make the EU measure incoherent in the sense that one wonders what its real aims are, whether it is contrary to the chapeau of Article XX GATT and whether it is necessary.

C. Is the Measure Necessary?

The GATT requires measures taken for the purpose of protecting public morals as well as for the life or health of animals to be ‘necessary’. This means that less restrictive alternatives are not reasonably available to achieve the same aim. However, in our case, there are two possible less restrictive alternatives which are brought into the discussion—the requirement of humane hunting and labelling rules.

The question is whether they achieve the measure’s aim in the same way. It is certain that neither of these alternatives can achieve 100 per cent protection of seals or the prevention of inhumane hunting. But, this is anyhow not the level of protection that the EU seeks to achieve. If the EU wanted to achieve zero risk of having products from inhumanely killed seals, then it would have no exceptions permitting seal products. But the Regulation has three types of exceptions and it is also striking that products which fall within those categories can be imported and placed on the market even when derived from seals caught in an inhumane way.

On the one hand, regarding the less restrictive alternative of allowing on the market only seal products caught in a humane way, the Preamble of the Regulation states that it is possible to kill and skin seals in such a way as to avoid unnecessary pain and other forms of suffering, although control of hunters’ compliance with animal welfare requirements is difficult in practice.\textsuperscript{142} According to the AB in \textit{EC–Hormones}, the EU is permitted to take ‘into account . . . risks arising from failure to comply with the requirements of good . . . practice . . . as well as risks arising from difficulties of control, inspection and enforcement of the requirements of good practice’.\textsuperscript{143} Canada certainly claims ‘it had long made efforts to ensure that the seal hunt was humane, well managed and sustainable’\textsuperscript{144} but EU studies found problems with Canada’s enforcement of its rules. According to the EU’s study, the enforcement problems include the fact that two thirds of the hunt are not monitored, that ‘enforcement officers typically reside in sealing communities and are reluctant to press charges against community members’, that ‘monitoring licences are extremely difficult to get’, that hunt observation permits are valid for only one day, and that ‘third-party observers routinely report apparent violations’ of the law, ‘including the apparent use of illegal weapons’, etc.\textsuperscript{145} This might be sufficient proof that the EU would have to make a submission to the WTO Panel showing why a less restrictive alternative proposed by the claimant would not achieve the desired level of protection.\textsuperscript{146}

However, even if Canada’s system of enforcement is not good, as the EU study states,\textsuperscript{147} one wonders whether the EU should give individual traders the possibility of proving that their products are obtained through humane hunts. There are several countries affected by the ban, including Canada and Norway, which are challenging the measures. It would be possible for some of those countries or their traders to start conforming—to the extent they do not already do so—to whatever are or will be the humane hunting standards of the EU. Yet, even if that were the case, their products would still be banned from the EU. The measure is apparently unconcerned whether the seal hunt is actually inhumane (in which case the ban contributes to animal health or public morals) or whether the hunt is humane (so the ban does not contribute to its alleged aims) (above Part IVB).

In that respect, Canada’s strong counter-argument could be that under the system established by the Regulation and Implementing Regulation, EU Member States have to set up competent authorities to check whether certain seal products fall within the permitted exceptions so that they can be placed on the market. These authorities have to conduct certain procedures,

\begin{itemize}
  \item \textsuperscript{142} Preamble to the Regulation (n 1) recital 11.
  \item \textsuperscript{143} \textit{EC–Hormones}, AB Report (n 80) para 205.
  \item \textsuperscript{144} Dispute Settlement: WTO establishes panel in seal case (n 19).
  \item \textsuperscript{145} Commission funded study (n 6) 32, 33.
  \item \textsuperscript{146} \textit{EC–Hormones}, AB Report (n 80) para 207.
  \item \textsuperscript{147} Commission funded study (n 6) 32, 33.
\end{itemize}
assess evidence and issue attesting documents. They could do the same task for all traders. Presumably, the cost of this procedure and of issuing the attesting document would anyhow be borne by the individual traders who want their products to be placed on the market. For example, comparable rules on leghold trapping provide for similar procedures for checking whether humane trapping standards are observed in other countries.\textsuperscript{148}

On the other hand, the Preamble also discusses labelling requirements as a possible alternative to a ban. The Preamble says that labelling would not achieve the same result as a ban.\textsuperscript{149} It is true that there are situations where labelling cannot be used as a less restrictive alternative because it cannot achieve the same aim as a ban. This would be a situation where consumer preferences would be different from the general public’s (voters’) preferences in the sense that non-sensitive consumers would continue buying goods labelled as non-complying with animal welfare standards and such behaviour would not be acceptable to the general public. However, that is not what the EU legislature argued anywhere in the \textit{travaux préparatoires} for the present Regulations. It does not seem that there is any difference between the preferences of the consumer and those of the general public.

The Preamble also states that labelling is not a less restrictive alternative because it would impose a significant burden on economic operators and would also be disproportionately costly in cases where seal products represent only a minor part of the product concerned.\textsuperscript{150} It is hard to see how a ban is better for economic operators than a labelling requirement. A ban leaves traders no choice. The labelling requirement leaves traders with a choice—to label or to stop trading in that product. For an economic operator, it would be preferable to make his own economic analysis instead of being forced to take the option of not trading. For example, the Inuit explicitly submit in their action for annulment that, for them, labelling rules are preferable to the ban (despite the fact that the ban gives them a monopoly within the EU).\textsuperscript{151}

It is also worth mentioning that the EU has already developed a Report on Animal Welfare Labelling,\textsuperscript{152} which seeks to develop labelling rules to ‘make it easier for consumers to identify and choose welfare-friendly products and thereby give an economic incentive to producers to improve the welfare of animals’.\textsuperscript{153} While this Report largely focuses on products derived from farmed animals (including those from third countries), there is no reason why similar labelling standards could not be required for hunted wild animals.

\begin{thebibliography}{100}
\bibitem{148} Art 3 Leghold Trap Regulation (n 24).
\bibitem{149} Preamble to the Regulation (n 1) recital 12.
\bibitem{150} ibid.
\bibitem{151} This is explicitly stated in the Inuit associations’ Action for annulment, T-18/10 Inuit Tapiriit Kanatami (n 31).
\end{thebibliography}
The cumulative application of humane hunting requirements and labelling rules cannot completely prevent inhumane seal killing but neither does the current Regulation. Once Canada and Norway raise these issues before the Panel, the EU will have to prove that the Regulation achieves a greater level of protection of its aim than these two alternatives could.

V. CONCLUSION

The aims of Regulation 1007/2009 are not entirely clear. Internally, the aim of Regulation 1007/2009 must be the removal of internal obstacles to trade, as the Regulation was adopted on the basis of Article 114 TFEU, which serves to contribute to the establishment and functioning of the internal market. The Regulation claims that it is promoting the movement of goods which cannot easily be distinguished from seal, from products including seal ingredients without this being clearly recognizable, and from products equivalent to, or substitutable for, seal products. However, the legislature has not offered evidence that obstacles to the movement of such goods exist. Even if competence exists, it is not clear that the principles of subsidiarity and proportionality are complied with. Abundant qualitative and quantitative data exist that should serve as evidence that these principles are complied with but they do not unequivocally support the ban as a regulatory option.

Again, internally, if internal market competence exists, then the measure can and must take into account a high level of protection of public morals or of animal life or health grounds. Article 114(3) TFEU states that internal market measures which affect ‘health, safety, environmental protection’, etc., ‘will take as a base a high level of protection, taking account in particular of any new development based on scientific facts’.154 The CJEU interpreted this provision as meaning that the EU legislature should take into account not only new scientific evidence but other considerations as well (eg when regulating tobacco products, the legislature could take into account social and political aspects of the anti-smoking campaign).155 Furthermore, Article 13 TFEU states that ‘[i]n formulating and implementing the Union’s … internal market … policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals …’.156 Basically, there is no independent competence to regulate issues on the grounds of public morals or animal life and health, but these aims have to be taken into account when regulating on the basis of other legal bases.

Externally, in the WTO, it is precisely these incidental aims that are relevant. The possible legitimate aims of the Regulation could be public morals, animal life or health (and less likely the protection of exhaustible natural resources). In the case of public morals, the EU would first have to prove that opposing seal hunts is part of its public morality. While preparatory documents somewhat

154 Art 114(3) TFEU. 155 BAT (n 47) para 80. 156 Art 13 TFEU.
support this, they also show that opposition to seal hunting is largely based on
misconceptions. As regards both aims, the preparatory documents also do not
support the claim that alternative measures such as humane hunting
requirements and labelling rules would not achieve the EU’s aims—the
documents even recommend that the EU adopts a measure which differentiates
between good and bad practices. The EU measures have a significant problem
of coherence in that the basis for differentiating between permissible and
impermissible products is not humane hunting: products not covered by the
exceptions cannot be placed on the market even when resulting from humane
hunts and, in contrast, products covered by the exceptions can be imported and
even placed on the market even when resulting from inhumane practices.
These exceptions to the trade ban which allow on the EU market seal products
not having to meet any humane hunting requirements (and which thereby do
not achieve any aim which could not equally be achieved through humane
hunts) bring the proclaimed aims of EU measures into question. The present
measure would be more persuasive if there were no exceptions to it or if they
were differently construed. What the EU should generally bear in mind when
constructing its measures is that a single poorly construed measure might
weaken its credibility on the world trading scene and render its other measures
which pursue legitimate aims more susceptible to challenges.

All this does not mean that the EU and/or its Member States cannot do
anything to protect seals. So what could the EU or its Member States do in this
respect? From the perspective of internal legitimacy, national bans on seal
products adopted by Member States (such as those adopted by Belgium and the
Netherlands) would not suffer from the same legitimacy problems as does the
EU ban. National measures would internally be considered as measures having
equivalent effect to quantitative restrictions which could be challenged by
individuals before a national court seeking to enforce free movement rights.
The question remains whether a national court deciding the case would
consider these measures to be justified. (Of course, these measures could
internally also be challenged by the Commission or an interested Member State
before the CJEU, but such potential applicants have shown no interest in
initiating infringement proceedings; see above Part IIIA.) Here, issues arise
regarding legitimate aims, coherence and proportionality that are similar to
those encountered in the WTO, so national measures and states would have to
frame their measures in accordance with the EU’s free movement of goods
rules. From the external perspective, these national measures would be subject
to external challenges in the same way as EU Regulations, since WTO law
does not care whether a measure is adopted by EU Member States or by the EU
itself. So, as regards external legitimacy, either the States or the EU as a
supranational organization might also adopt numerous measures for the
protection of seals—ranging from rules on habitats all the way to trade bans. In
respect of a trade ban, it should be stressed that this paper does not argue that
WTO law prevents the EU or Member States from banning seal products.
It merely argues that a trade ban must have a genuine legitimate aim, which it must achieve with coherent and necessary means. That does not mean that the EU should do less to protect seals. If there are genuine concerns for animal welfare, then the EU can do even more to protect seals—it can ban seal products without any (incoherent) exceptions. Or, to put it another way, it can require all seal products provided for in the exceptions to comply with humane hunting rules. The EU or its Member States could also ban many other animal products, particularly the furs of animals not used for food which are currently being imported into, as well as being produced in, the EU.