

TITLE: For the Sake of the Seals

AUTHOR: Courtney Pope

SOURCE: Asper Review of International Business and Trade Law

CITED:

(2009) 9 Asper Rev. of Int'l Bus. and Trade Law 225 - 251

SECTION: Articles

Canada does not make trade decisions based on emotion and we expect others to act accordingly. We urge European Union Parliamentarians to consider all the facts about Canada's seal hunt and move forward with a proposal that includes a derogation clause that would work for Canada.¹

- The Honourable Gail Shea, Minister of Fisheries and Oceans

Introduction

1 In recent years, seal hunting in Canada has been a hotbed of debate in the international arena. Special interest groups and NGOs have been aggressively lobbying governments across the world to ban the import of seal products because of the inhumane and violent way in which the seals are hunted. These groups have been very successful, especially in their appeal to the public, and as a result some governments have succumbed to such pressure. Various partial bans already exist in the United States, Mexico, and the European Union. However, in 2007, Belgium and the Netherlands led the crusade in banning the importation, sale, transit, and exportation of all seal products in their countries.² Canada launched a complaint with the World Trade Organization (WTO) against the European Union (EU) on September 25, 2007, regarding these measures.³

2 In May 2009, the Members of the European Parliament overwhelmingly voted in favour of proposing a ban on all imports, exports, and sale of seal products within the European Union to its member states.⁴ The Canadian government is extremely worried that if such a ban was implemented across the EU, it would be detrimental to the seal hunt in Canada, which remains a source of livelihood for many remote communities in Atlantic Canada. The Department of Fisheries and Oceans has launched an aggressive campaign to educate the public, as well as the European Parliamentarians, about the actual realities of the seal hunt. Canada's efforts have also included

trying to negotiate with the EU, regarding specific measures that Canadian sealers can employ to satisfy public concerns. However, the EU has rejected Canada's efforts and is moving forward with the ban. As a result, Canada is threatening to take their case to the WTO.⁵

3 The object of this paper is to provide an examination of the possible arguments that both parties could present to the WTO regarding the ban. Part I of the paper will provide background information on the Canadian seal hunt and the history of the debate surrounding it. It will address the socio-economic importance of the seal hunt to Atlantic Canadians and Aboriginal communities, the legislation and enforcement mechanisms that are in place in Canada, and an explanation of the Belgium/Netherlands ban and the EU ban. Part II will examine the WTO's treatment of environmental disputes and how that can be applied in this situation. Specifically, the paper will address the various GATT provisions that both Canada and the EU may argue, with emphasis on Article XX of GATT. Conclusions will be drawn regarding the effectiveness of such arguments based on their interpretation and application in previous WTO jurisprudence.

Part I: Background Information on the Canadian Seal Hunt

(i) Facts About the Seal Hunt

4 The traditional seal hunt occurs in Canada in late March and early April. Over 70 per cent of the hunt occurs off the coast of Eastern Newfoundland, and approximately 30 percent occurs off of the Gulf of St. Lawrence, the Magdalen Islands, and the Quebec North Shore.⁶ Harp and grey seals are predominately hunted in Canada.⁷ Hunters are most interested in young seals because their coats are extremely valuable. However in 1987, the Marine Mammal Regulations⁸ were amended to prevent the killing of harp seal pups (whitecoats) and hooded seal pups (bluebacks). As a result, seals cannot be hunted legally until they are approximately 25 days old or they have moulted their first coat and are living independently from their mothers.⁹

5 In 2008, the Department of Fisheries and Oceans granted approximately 14,000 commercial sealing licences, but only 6,000 were used. It is also possible to attain a sealing licence for personal use, allowing the holder to hunt up to six seals for personal consumption.¹⁰

6 The largest markets for Canadian seal exports are Russia, China, and Norway. EU trading ports and routes are used to deliver seal exports to those markets.¹¹ The hunt is not subsidized by the Canadian government and licensed sealers earned approximately \$33 million dollars in 2006. However, in 2008, licensed sealers only earned approximately \$7 million. This difference is attributed to the sharp decline in the price paid for pelts, from \$97 in 2006 to \$33 in 2008.¹² Even with this decline, seal hunting is regarded as a vital aspect of Atlantic Canada's economy. In many remote communities in Newfoundland and the Gulf of St. Lawrence, the proceeds from the seal hunt can compose up to 35% of a household's annual income.¹³ The Canadian government argues that without the hunt, many families would be unable to stay in their communities because of the lack of other economic opportunities available. Protest groups dispute the claim that the hunt is of economic importance to the region. They argue that for most sealing communities, the hunt

comprises less than 5% of their annual income. Based on calculations done by researchers, the hunt is therefore economically significant to approximately 400 sealers.¹⁴ Since the affected group is so small, the government can use social spending programs to compensate for the difference. Even if the government is unwilling to intervene, the Newfoundland economy is growing stronger because of the development of the shellfish industry, and as a result, more economic opportunities will likely be created and replace the income from seal hunting.¹⁵

7 The Canadian government is predicting that the price of seal-derived products, if unaffected by the trade bans, will increase in value. This is because scientists and researchers have discovered other useful seal parts beside just its pelts and blubber. For example, seal oil contains Omega-3 acids, which is used to treat hypertension, diabetes, and arthritis. In addition, researchers have begun using seal heart valves in human heart valve transplants because of their durability. The demand for such valves could reach as high as 300,000 per year.¹⁶ However, the International Fund for Animal Welfare states that the scientific use of seal heart valves is unproven and alleges that Canada has jumped on this bandwagon as another way to justify the hunt.¹⁷

8 The hunt is not only necessary for economic reasons but also for practical reasons as well. Canada's seal population is healthy, at approximately 5.5 million. In 1995, the Department of Fisheries and Oceans (DFO) released a study which concluded that the increase in the seal population was negatively affecting the rate at which the commercial fish stocks, especially cod, were replenishing themselves.¹⁸ The increased population of seals can also increase the spread of cod worms, which cost the industry \$50 million to rectify in 1984.¹⁹

9 Greenpeace has attacked the management of the seal population by arguing that the quotas set by the DFO do not adequately take into account Greenland's expanded hunt. Since there is no joint management program in place with Greenland, Canada cannot accurately come up with a quota and thus effectively manage the seal population with certainty.²⁰ Also, the quotas do not properly take into account the number of seals that are "struck and lost" (i.e., seals that are fatally wounded by sealers, but manage to escape before they are skinned). Since there is no extensive data on this matter, the DFO assumes that approximately 5% of seals struck escape.²¹ It has also been argued that the quotas do not reflect the negative impact of climate changes on the seal population. It is essential that in order for the successful birthing of seals, there has to be stable ice floes available. However, it has been a trend that ice floes are becoming less stable. As a result, it was estimated in 2002 that 75% of pups born in the Gulf of St. Lawrence died as a result of such conditions. Therefore, if quotas remain consistently high, the population will decline.²² Finally, it has been advanced that there is no scientific proof which substantiates the position that seals are harming the fish populations. Rather, the marine ecosystem is carefully balanced and the depletion of seals would have a detrimental impact on the fragile system.²³

(ii) Regulation and Enforcement

10 The DFO sets annual quotas and regulations, and manages how the hunt is conducted. All

sealers must be licensed and follow procedures as outlined in the Regulations.²⁴ Commercial sealers must work under an experienced sealer for two years before becoming eligible to receive a professional licence, and they must attend annual workshops.²⁵

11 The Regulations were updated in December of 2008, in accordance with recommendations by the Independent Veterinarians Working Group, to ensure that the hunt is carried out in a humane fashion and that the seals are not unduly suffering. For the 2009 hunt, sealers will be required to follow a three-step process before skinning the seal. The first step is called "striking". The sealer must shoot or strike the seal at the top of their head with an approved firearm or hakapikspiked club. The hakapik can be used on seals of less than one year of age because their skulls are thin. However, a seal must be shot in the head if it is over one year of age. The second stage is called "checking", in which the sealer must feel both the right and left halves of the skull to see if they are crushed. If the skull is not crushed, the sealer must strike the seal again until it is crushed. This step must follow immediately after the striking stage. The third stage is called the "bleeding stage", in which the sealer must sever the two axillary arteries of the seal underneath both front flippers. The sealer must then wait one full minute before they begin to skin the seal.²⁶

12 The DFO regulates the hunt in order to ensure that the seals are killed in a humane manner. Fishery officers, in conjunction with the RCMP and Quebec Provincial Police, often monitor the sealers using various forms of aerial and satellite surveillance, at-sea inspections, landing inspections, and inspections at processing or buyer facilities. The DFO also employs at-sea observers. These independent observers conduct random inspections of sealing vessels and report any suspicious activities to the Fishery Officers.²⁷

13 A breach of the Regulations results in criminal charges.²⁸ A court can impose jail time, fines, confiscate gear and vessels, revoke licences, ban the sealer from future hunts, and forfeit catches.²⁹

14 Various studies have questioned the DFO's ability to properly monitor the hunt. First of all, there is an inherent conflict of interest since the DFO is charged with both monitoring the hunt and defending its humaneness. Secondly, the officers who are charged with enforcing the Regulations during the hunt are often residents of the community. Therefore, they can be put in the position of having to lay charges against a friend, business associate, or neighbour. As a result, it may be possible for offences to go uncharged.³⁰

(iii) The International Controversy

15 The debate surrounding the humaneness of the hunt is not a new issue. In 1987, as mentioned previously, Canada passed legislation making it illegal to hunt whitecoats or bluebacks. Similar legislation in the United States, Mexico, and the EU also makes it illegal to import, market, sell, or export products derived from young seals. A notable exception to the list was Russia, who allowed the importation of white coats. However, as recently as March 19, 2009, the Russian Government announced an unprecedented move to ban the hunting of seals under the age of one.³¹

16 Belgium was the first country to ban the import, transit, sale, and export of all seal products in March of 2007.³² The Belgian government stated that the move was necessary because of the inhumane and cruel way in which the seal hunt in Canada is performed. The Netherlands quickly followed Belgium's lead. In addition, Germany and Italy are also looking into implementing similar bans.³³

17 NGOs and special interest groups have been heavily lobbying European governments in the last five years to ban seal products. They argue that the hunt is carried out in an inhumane manner and the animals suffer with the processes used. There have been numerous demonstrations held in France, England, and Denmark. Activists claim that the methods used by Canadian sealers result in up to 42% of seals being skinned alive, causing them prolonged pain and suffering.³⁴ The figures are based on an independent study of veterinarians in 2001, known as the "Burdon Report".³⁵ The study found that of the 76 seal carcasses studied, 17% did not have any skull fractures and 25% had only minimal fractures, thus leading to the conclusion that the seals were skinned alive.³⁶ The Canadian government claims that such statistics are greatly fabricated and that European Parliamentarians are making decisions regarding the seal hunt on misinformation. According to the DFO, only humane methods of killing are permitted and tolerated, and such methods are in accordance with the recommendations of the Independent Veterinarians Working Group and the European Food Safety Authority.³⁷ The DFO asserts that the hakapik is often a more humane method of killing than those used in commercial slaughterhouses.³⁸

18 In response, special interest groups allege that due to the adverse conditions in which the hunt is conducted, such as the cold weather, slippery ice, and the speed of the animal, it is nearly impossible for a sealer to deliver a life-ending blow to the seal's cranium.³⁹ They also state that the most effective way of killing a mammal is by striking the brain stem. However, in seals, the brain stem is highly protected by blubber. Therefore, the striking of the skull is not usually an effective way of instantaneously killing a seal.⁴⁰

19 The method of shooting seals has also been brought into question. Studies have found that it is unlikely that most seals are killed with a single gunshot wound. This is attributed in large measure to the fact that often a hunter's ability to accurately shoot the seal is negatively affected by weather conditions such as fog or rain; and the movement of the boat, seal, or ice floe on which the seal is located.⁴¹ In addition, if the seal is not killed instantly, it will likely suffer as the sealer must manoeuvre around ice floes and other obstacles to reach the seal.⁴² A study conducted by the Independent Veterinarians' Working Group recommended that a seal never be shot in open water or near the edge of an ice floe, since it is likely that the injured seal could escape. Additionally, the study stated that in order to improve humane practices, the sealer must have the discipline to know when not to shoot.⁴³

20 Much of the controversy centres around the different interpretations given to studies performed to determine the humaneness of the hunt. Canada alleges that special interest groups and NGOs are still basing their campaign on images of young seals, less than 25 days old, being killed. However,

such hunting has been illegal in Canada since 1987 and the pictures they are using do not reflect the current state of the hunt. The Government of Canada has provided evidence of a Canadian Veterinary Journal study which found that, of the seals examined after the hunt, only 2% of them had been killed improperly.⁴⁴ The report stated, "...because of the wide open environment, coupled with the relative docile behaviour of the targeted animals, the seal hunt has the potential to be among the most humanely conducted hunts of wild animals, whether for commerce or for sport".⁴⁵ It is also important to emphasize the fact that seals have a "swimming reflex". This means even though the seal is brain dead, their neurons continue to fire, which causes the seal to move, giving the impression that it is still alive.

21 In contrast, a report released by the EFSA stated that "it is scientifically incorrect to conclude that 98% of the seals in the sample were killed humanely".⁴⁶ This is because of the lack of continuous evidence that researchers have regarding what actually happened to the seals. Another study found that the method employed in the Regulations for the killing of seals is humane if it is carried out in rapid succession. However, because of the inherently competitive nature of the hunt and the environmental conditions, the process is often not carried out properly or there are delays, which can cause unnecessary suffering for the animal.⁴⁷ A study conducted in 2007 found that a maximum of 15% of seals are killed according to the guidelines set out in the Regulations.⁴⁸ While the Regulations may to the standard suggested by the Independent Veterinarians' Working Group, protesters argue that they are not being employed properly during the hunt.

22 Canadian public opinion regarding the hunt also lends influence to the protestors' position. In a nationwide poll conducted in 2008, 58% of Canadians were opposed to the commercial seal hunt, and 86% felt that the EU had the right to ban seal products if it chose to.⁴⁹ 72% of Canadians agreed with the statement that the EU ban was a signal that in the future, the hunt will no longer be economically viable, so the Federal Government should begin investing in other employment programs in order to help those affected.⁵⁰ (iv) The EU Ban

23 The remainder of this paper will focus on the EU ban on seal products. The objective of the legislation is to respond to overwhelming public concern regarding the inhumane way in which seals are killed. The European Union Parliament Committee on Internal Market and Consumer Protection (Committee) feels that since various EU member states have begun enacting their own legislation regarding seal products, it is necessary that the Community maintain consistency and predictability. In order to accomplish this, an EU-wide ban would be appropriate.⁵¹ The ban was also based on the fear that the market for products which resemble those derived from seals (such as leather goods and Omega-3) would be adversely affected because consumers would not be able to distinguish between the products and opt instead not to purchase the goods.⁵²

24 The import, export, and sale of seal products are banned within the EU. Seal products are defined as "all products, either processed or unprocessed, deriving or obtained from seals, including meat, oil, blubber, organs, and fur skins...".⁵³ There is an exemption for seal products that are from subsistence hunts traditionally conducted by Inuit and other indigenous communities.⁵⁴ A second

exemption is that the import of seal products is allowed "where it is of an occasional nature and for the exclusive use of the travellers or their families".⁵⁵ The third exemption is for seal products that are the "by-product of hunting that is regulated by national law and conducted for the sole purpose for the sustainable management of marine resources" but only on a non-profit basis.⁵⁶

25 It is significant to note that earlier versions of the legislation banned the transit of seal products through the EU. Such a restriction is not found in the actual legislation. A transit ban would have presented enormous problems for Canadian sealers since many EU ports are used to deliver the goods to their final destinations. The original proposal also included a certification process whereby countries which could satisfy the EU that they have adequate regulations and enforcement measures in place to ensure that the seals are killed without any "avoidable pain, distress and any other form of suffering",⁵⁷ would be exempted from the ban. Before March of 2009, Canada was satisfied because they felt that they would easily meet the derogation requirements listed in Annex II of the Proposal.⁵⁸ However, at the actual vote, the majority of MEPs voted against such an exception. The reason for the rejection was that it would be impossible to ensure that all countries were complying with the requirements, thus undermining the effectiveness of the ban.⁵⁹ Canada was extremely upset about the rejection of the derogation clause because it perceives the EU as imposing stringent and inflexible standards without taking into account the actual circumstances that exist in Canada.⁶⁰

26 Labelling alone was rejected as an alternative to the ban because it would not provide the necessary incentive for countries to change their practices. As a result, a total prohibition was seen as the only route that the EU could take in order to achieve their animal welfare objectives.⁶¹ Canada has consistently maintained the position that they are willing to negotiate with the EU to discuss possible alternatives to a ban. The DFO also implemented updated regulations which conform to humane sealing requirements.⁶² However, Canada alleges that the EU is not responding to their efforts and, as a result, they may have to resort to the WTO to solve the dispute.⁶³

Part II: The WTO and This Dispute

(i) General Comments on the Relationship between the WTO and the Environment

27 Environmental measures are often classified as contrary to a country's obligations under the General Agreement on Tariffs and Trade.⁶⁴ To most critics, environmental measures and trade liberalization stand at opposite ends of the spectrum and are irreconcilable with one another. As Mark Edward Foster explained:

The tension that exists between the contending goals of environmental protection and trade liberalization stems from three sources: (1) different valuations of environmental priorities between states, (2) the extraterritorial nature of global environmental problems and the extraterritorial nature of measures designed to remedy them, and (3) the perceived incompatibility of free-trade goals and trade measures directed at the environment.⁶⁵

28 It has also been the view of critics that the trading system takes precedence over environmental concerns and measures. For example, the Dispute Settlement Body is composed of trade experts and does not specifically include environmental experts. Even though the DSB has the power to consult experts, such as environmentalists, and consider relevant extrinsic evidence, they rarely do so. The exclusion of an environmental expert's voting input greatly disadvantages the panel because it is not fully aware of an environmental perspective regarding these issues.⁶⁶

29 In contrast to such views, the WTO is much more enthusiastic about the dynamic relationship between the multilateral trading regime and environmental measures. Even though there is not a formal environmental agreement, WTO members have the inherent right to enforce environmental measures, as long as those measures are not used as a front for protectionist objectives. The measures must be for legitimate objectives while still respecting other members' rights.⁶⁷

(ii) Previous Jurisprudence

30 There are two fundamental decisions regarding animals that are of central importance to this analysis. A brief overview of the facts and conclusions in each case are provided in order to offer context to this debate.⁶⁸

31 The first decision, *Tuna-Dolphin*,⁶⁹ was rendered by a GATT panel in 1991 in response to the United States' ban on import yellowfin tuna harvested with purse seine nets. The ban addressed the problem of the incidental trapping and death of dolphins in nets used to catch tuna. An exception was available if the government of the harvesting country had a regulatory program that was comparable to the United States' and the average rate of incidental taking of dolphins was the same or less than the United States' average rate. A GATT Panel concluded that the US's ban was in contradiction to Articles XI, XII, and III of GATT and did not qualify for an exemption under Article XX. This was because the application of the measure was unpredictable and conferred an unfair advantage on domestic producers, because domestic producers set the quota.⁷⁰ The case was highly criticized for placing environmental concerns in a secondary position to the trading system.

32 The second decision, *Shrimp-Turtle*,⁷¹ dealt with measures taken by the United States in order to protect against the incidental killing of sea turtles while harvesting shrimp. The US banned shrimp exports if the vessel used did not employ Turtle Excluder Devices (TEDs). The ban allowed an exception for vessels that used "comparable measures" as the US, which was interpreted as requiring the use of TEDs. Sea turtles were an endangered species, and the WTO held that the US had the right to institute measures for environmental purposes, in order to protect animal life. However, the measure was not upheld because it was found that the US had discriminated against various WTO members. They had provided Caribbean countries with financial and scientific resources and gave them longer transition periods to develop the technology but failed to provide the same assistance to Asian countries. The Appellate Body stated that the US had a duty to negotiate in good faith with affected countries in an attempt to reach a multilateral or bilateral agreement before resorting to unilateral measures. It was also found that the ban was rigidly applied

and did not take into account differing factors in other countries.⁷²

33 In 2001, the Appellate Body released a second decision regarding amendments that the US had made to the legislation following the first decision. In *Shrimp-Turtle* (Article 21.5)⁷³, the US imposed a ban on shrimp imports unless a country could prove that they were enforcing "comparably effective" regulations to protect sea turtles, which fully took into account the varying circumstances in the exporting country. As part of that decision, the Appellate Body concluded that the US had conducted negotiations in good faith. Therefore, the ban was upheld by the WTO. This case was seen as a significant step away from the *Tuna-Dolphin* approach because it affirmed the position that environmental measures which restrict trade may be upheld if: domestic and imported products are subjected to the same standards, the country participated in good faith negotiations in attempt to come to an agreement, and the standards are sufficiently flexible.⁷⁴

34 Since *Shrimp-Turtle* (Article 21.5) was the most recent environmental case decided by the WTO regarding animals, the theme of that case will likely animate the seal conflict if it goes before a WTO dispute panel.

(iii) Possible Arguments Raised by Canada and the EU

35 In the Request for Consultations,⁷⁵ Canada alleged that the Belgium and Netherland bans violated Articles I:1, III:4, V:2, V:3, V:4, and XI:1 of GATT 1994. It is likely that Canada will argue that an EU ban would violate the same provisions of GATT (with the exception of Article V). In response, the EU will primarily rely on the Article XX exceptions to justify the ban. The following is an analysis of the relevant sections with regard to the arguments that each side might possibly make and the likelihood of such arguments being successful.

Article I:1

36 Article I:1 states that a violation occurs when an advantage is provided that is not accorded to all 'like products'. This is commonly referred to as the non-discrimination principle.⁷⁶ Basically, the question to be answered is whether the ban affects some exporters and not others.

37 In this case, if the exception applied only to Inuit and other aboriginal communities that have traditionally hunted seals for subsistence purposes, Canada could argue that the ban does not treat all 'like' products equally. A small group of exporters are receiving an advantage (i.e. -- their seal products are allowed to be exported to, moved through, sold, and marketed in the EU) that all other sealers are not granted. Thus, this constitutes discrimination because all other sealers are barred from selling, exporting, and marketing their goods in the EU.

38 In defence, the EU will have to make the argument that the ban is non-discriminatory because it applies to all seal products from all countries. The exception only applies to a very small group of sealers and is necessary for policy reasons because the hunt is essential for the survival of such communities.⁷⁷ Also, the exception is only available if the two conditions of tradition and

subsistence are met. Therefore, it is a very narrow exception and will only be granted in rare circumstances.

39 It is difficult to predict whether a dispute panel will find a violation of Article I:1 just because the exception applies to such a limited group of sealers. However, in most cases, the dispute panel will first investigate whether there is a violation of Article XI:1. If there is one, then generally the analysis under Article I:1 is bypassed and the panel moves on to consider possible defences.⁷⁸

Article III:4

40 Article III:4 prohibits the conferring of a benefit on domestic products that is not given to 'like' imported products. In order to find a violation of Article III:4, the aggrieved WTO member must prove that: (1) the imported and domestic products are 'like' products; (2) that a law, regulation, or requirement is affecting their internal sale, transportation, use, etc.; and (3) the domestic products are treated more favourably than the imported products.⁷⁹ A determination of what constitutes a 'like' product is premised on the competitive relationship between the products.⁸⁰

41 After establishing that the products are 'like', then the complaint must prove that a measure is in place which treats domestic products more favourably than imported products.

42 In applying Article III:4 to the seal case, Canada will have a difficult time proving that the EU is treating domestic seal products more favourably than imported Canadian products. The first threshold of whether or not the products are 'like' will not be difficult to cross. If it is a product from a seal, then they are 'like' products. However, the EU does not have a domestic seal industry. The seal hunt mainly occurs in Canada and Greenland. It is unclear whether Canada suspects that Greenland imports will be treated more favourably than Canadian imports.⁸¹ The other alternative may be that Canada will try to draw an analogy between seals and some other animal that is hunted in the EU and argue that the methods used to hunt that animal resemble those of the seal hunt but no bans apply to the trade of such animals.

43 The EU could argue that the ban applies to all seal products and that no domestic seal products are treated more favourably. The EU will likely win on this point because of the lack of a domestic sealing industry in the EU and the fact that it would be difficult for Canada to establish that another animal is a 'like' product with a seal because of the requirement that the products be in a competitive relationship with one another. This would be a hard analogy to draw because of the unique industries which seal products appeal to (i.e., medicinal industry, fashion industry, etc.).

Article XI:1

44 Article XI:1 forbids restrictions or prohibitions, other than duties, taxes or other charges, on the importation or exportation of any product. The application of the Article XI:1 has been used extensively and in Canada-Periodicals, the Panel found that a complete ban on imports of a product constitutes a violation of Article XI:1.⁸² Also, in Shrimp-Turtle, the Appellate Body found a

violation of Article XI:1 when the US banned the importation of shrimp caught without using TEDs.⁸³

45 Canada would likely argue that the EU had instituted a complete ban on imports, sales, and exports of seal products which does not fall within the exceptions listed in Article XI:1 of 'duties, taxes, or other charges'. Based on previous jurisprudence from the Panel and Appellate bodies, a complete ban is sufficient for a finding of a violation of Article XI:1.

46 The EU does not have a strong argument to refute this position. Since it is a complete quantitative prohibition on the import, export, and sale of the seal products, the EU will probably have to concede this violation and instead rely on an exemption available under Article XX.

Article XX

(i) General Overview

47 Article XX is an important section for this issue because it allows member countries to adopt GATT-inconsistent laws, regulations, and trade measures if the measures fall into one of the exceptions provided in paragraphs (a) to (j). Article XX has been a contentious item of the GATT, with dispute bodies initially hesitant to give too broad of an interpretation to the section for fear that it would undermine the multilateral trading regime.⁸⁴

48 However, in the Shrimp-Turtle cases⁸⁵, the WTO Appellate Body further defined the requirements under Article XX and in doing so, gave individual countries more extensive powers to unilaterally implement trade regulations which are aimed at conservation and protection of the environment.

49 The Article XX analysis is two tiered. First, the country that has been found to be in violation of GATT trading rules must establish that the environmental measure falls into one of the exceptions specified in paragraphs (a) to (j). If that condition has been satisfied, then the defending country must demonstrate that the measure conforms with the requirements of the chapeau of Article XX in that it is not applied in a manner which "arbitrarily or unjustifiably discriminates between countries where the same conditions prevail", and that the measure is not "a disguised restriction on international trade".⁸⁶

50 The analysis must take place in that order and the Appellate Body has stressed that meeting the requirements of the chapeau is more difficult than fitting the measure within one of the outlined exceptions.⁸⁷

51 If the ban on seal products is found to violate GATT trading rules, then the EU must justify the exception under Article XX. The main exceptions that the EU may rely on for justification are: Articles XX(b), (g), and (a). The following is an analysis of how the courts have interpreted each exception in previous jurisprudence and how it may be applied in this specific case.

(ii) Article XX(b)

52 Article XX(b) states:

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:

...

(b) necessary to protect human, animal or plant life or health;⁸⁸

53 US-Gasoline⁸⁹ identified the two step approach in determining whether an environmental measure qualifies under XX(b):

- (1) The policy in which the measure was invoked to address is a policy which is designed to protect human, animal, or plant life or health; and
- (2) The measure was necessary to fulfill the policy objective.

54 With regards to the policy question, in Tuna-Dolphin, the Panel found that the protection of dolphin life or health was a policy that could be justified under Article XX(b).⁹⁰ Stretching that reasoning to the seal issue, the EU could argue that the protection of seals from inhumane methods of killing is a policy which can fall under XX(b). However, Canada could argue that Tuna-Dolphin can be distinguished from this situation. In former instance, the dolphins were being killed incidental to the harvesting of tuna. In this case, seals are being killed as part of a traditional and highly regulated hunt which is necessary for economic as well as sustainability reasons. It is likely though that a dispute settlement body will find the protection of animal welfare as a valid policy under XX(b).

55 In order for a measure to be considered 'necessary', there cannot be another alternative available that is consistent with GATT, or less inconsistent with it, which the offending party could have used to achieve the same objectives.⁹¹

56 The EU can argue that the total ban on seal products is necessary to achieve the objectives of animal welfare. This is because no other alternatives are available. The EU Parliament specifically ruled out labelling as an alternative to the ban because it would not assure the public that humane methods of killing seals were being employed. "There should therefore be incentives for sealing

countries to adapt their legislation and practice to that effect, which can only be achieved by means of trade prohibitions".⁹² Therefore, the EU did not consider any other alternatives as effective in achieving their policy objective.

57 In response, Canada could argue that the EU did not institute the least-trade restrictive measure. The total ban, without any possible exemptions for countries which use humane methods, does not constitute a necessary measure. If the EU adopted a ban with a derogation clause which exempted seal products that have been killed using certified humane tactics, this would encourage countries to change their regulations in order to comply. Thus, the policy objective of seal welfare would be promoted. The EU also could have chosen a labelling system which would give consumers the option to purchase seal items that are the result of a humane hunt. Such labelling requirements would encourage sealers to update their methods if they want to appeal to such consumers.

58 Canada has a strong argument regarding this exception. The total prohibition on all seal products does not appear to be necessary in the sense that there are other measures, which are less-inconsistent with the GATT, which could be used to achieve the same policy objectives.

(iii) Article XX(g)

59 Article XX(g) reads:

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:

...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;⁹³

60 Shrimp-Turtle set out the basic approach under XX(g). First, the measure must be related to the conservation of 'exhaustible natural resources'. Secondly, the measure must 'relate to' the conservation of the exhaustible natural resource. Thirdly, the measure must also apply to domestic production or consumption.⁹⁴

61 The term 'exhaustible resource' has been given a broad interpretation by dispute settlement bodies. It not only includes mineral and non-living resources but also living species. Dolphins, salmon stocks, herring stocks, and clean air have all been classified as 'exhaustible resources'. The

main criteria for assessing whether it is an exhaustible resource is whether it can be depleted.⁹⁵

62 In the seal case, the EU will likely argue that seals are an exhaustible resource. This is because their population is susceptible to depletion or exhaustion from human activity. In response, Canada could argue that although seals can be subject to depletion, they are currently are not in any danger of becoming extinct. Quotas for the hunt are set annually after a careful consideration of a variety of factors which affect the seal population. The population of seals is healthy, in contrast to the situation in Shrimp-Turtle where sea turtles were listed as an endangered species on CITES. Therefore, there is less justification for a finding that seals are an 'exhaustible resource' within XX(g).

63 It will be interesting to see how the WTO will handle this distinction. If a broad interpretation is given to the term 'exhaustible resource', then seals may be included. However, since the hunt is regulated and the seal population is not in danger of extinction, it is likely that seals will not classify as an exhaustible resource for the purposes of this exception.

64 If such an analysis is incorrect, however, it is then necessary to move onto the second branch, which requires a trade measure to relate to the conservation of an exhaustible resource. Dispute settlement panels have concluded that the trade measure does not have to be necessary but primarily aimed at the conservation of an exhaustible resource.⁹⁶ It will fail this requirement if the measure was based on "unpredictable conditions"⁹⁷ or used solely to force other countries to change their policies.⁹⁸ The requirement will be fulfilled when the measure "exhibits a 'substantial relationship' with, and is not merely 'incidental or inadvertently aimed at' the conservation of exhaustible natural resources".⁹⁹ A substantial relationship was found in the Shrimp-Turtle case because the means of the measure were reasonably related to the end policy objective of conservation of the sea-turtles.

65 The EU will argue that there is a substantial relationship between the ban on all seal products and the objectives of animal welfare. The measure is not based on unpredictable conditions and it is not aimed at forcing other countries to change their policies. As a result, it satisfies the second branch of the exception.

66 The EU's argument is extremely weak on this point, however. Canada can argue that the requirement is that the measure has a substantial relationship with the goal of the conservation of exhaustible natural resources. Conservation, in plain language, refers to preservation of a resource which is susceptible to depletion. Such a relationship does not exist in this case. The ban on seal products addresses the way in which the seals are hunted. The number of seals which are hunted is not the source of the debate. The seal population is at a healthy number and annual hunts are required to sustain an ecological balance. Seals are not in danger of becoming extinct. This case is different from Shrimp-Turtle where the turtles were listed as an endangered species and the measures taken by the United States government were aimed at conserving the sea turtles. No such situation exists in this case and therefore, there is no substantial link between the measure and the ends.

67 The third branch of XX(g) requires that the same restrictions which are placed on imports are also placed on domestic production or consumption. That is not an issue in this case because the EU does not have a domestic seal industry.

(iv) Article XX(a)

68 Article XX(a) reads:

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;¹⁰⁰

69 Article XX(a) has never been considered by a dispute settlement body, therefore, it is unclear how the exception will be interpreted. The use of the word 'necessary' may be interpreted in the same manner as it was in paragraph (b).¹⁰¹ That would require that the least-trade restrictive measure be used. If another alternative is available, which is consistent with GATT obligations (or less inconsistent with GATT than the measure chosen), then the measure will fail this test.

70 The reference to "public morals" in this section can be interpreted as a nation's perceptions of right and wrong.

71 It is clear that the EU is going to invoke this exception if the ban is implemented. In the Proposal by the Committee on Internal Market and Consumer Protection, the Committee stated that, "as to the import ban, it is in conformity with Article XX(a) of the General Agreement on Trade and Tariffs, under which the adoption or enforcement by any contracting party of measures necessary to protect public morals..."¹⁰² Such a statement indicates the EU's desire to rely on Article XX(a). They will argue that public opinion overwhelmingly supports the ban on seal products. The Commission, in the Proposal, made reference to the "massive amount of letters and petitions" calling for the ban.¹⁰³ The EU may argue that even though the Canadian government labels the seal hunt as a 'fishery', thus indicating that seals are considered a disposable resource, they are mammals that are capable of emotions and as such, it is evident that the undue pain and suffering the seals experience when being killed is against the nation's sense of morality.¹⁰⁴ It is innate to one's sense of morality that the defenceless should be protected. This is evident throughout the Western world with laws protecting children, those with disabilities, etc. In this case, defenceless seals are being killed in a manner which causes them emotional and physical pain and suffering. It is the job of a

government, through its laws, to protect those that cannot protect themselves, and this is exactly what the ban is doing.¹⁰⁵ No other alternative measures are available to address the public horror surrounding the suffering of the seals except for a complete ban. Labelling and partial bans would not be effective at addressing the concerns of its citizens.¹⁰⁶

72 In response, if 'necessary' is interpreted in the same manner as XX(b), Canada will likely argue that there were other alternative measures available that are consistent with the EU's GATT obligations, such as labelling. By labelling seal products to indicate whether the product was hunted using humane methods, it would give consumers the choice about whether or not to buy the product. Also, as mentioned earlier, it may inadvertently force countries to change their standards in order to appeal to the EU market.

73 Canada may also argue that the strong surge of indignation towards the seal hunt is based on misinformation fed to the public by special interest groups. Canada would rely on the Daoust report, in which independent researchers found that only 2% of seals examined had been killed incorrectly.¹⁰⁷ The methods used by Canadian sealers also conform to the Veterinarian guidelines to ensure that the seal does not suffer any more than an animal at a slaughterhouse would. The DFO also claims that special interest groups in the EU are using footage of baby seals being clubbed, even though such methods have been banned in Canada since 1987. Therefore, the public's sense of morality is misinformed and allowing special interest groups to influence trade policies in such a way is a dangerous route to embark upon.

74 In order to be more persuasive with respect to this argument, Canada should be enforcing the Regulations more stringently. This could be done by increasing the number of fisheries officers overseeing the hunt, and laying charges for breaches of the Regulations. By doing so, Canada could argue that the sealers are following humane practices.

(v) Chapeau of Article XX

75 If the measure falls into one of the exceptions in paragraphs (a) to (j), the final hurdle that it must cross is the introductory paragraph of Article XX (the 'chapeau'). The three conditions that must be met are: (1) the measure is not a means of unjustified discrimination; (2) the measure is not a means of arbitrary discrimination; and (3) the measure is not a disguised restriction on international trade.¹⁰⁸ When determining whether or not the measure satisfies these three conditions, what must be examined is not the measure itself but its application.¹⁰⁹

Unjustified Discrimination

76 In determining whether a measure constitutes a means of unjustified discrimination, the dispute settlement body must embark upon two different inquiries. First, the question is asked whether the offending party made serious efforts to negotiate with affected parties in order to come to an agreement before resorting to unilateral action.¹¹⁰ In *Shrimp-Turtle* (Article 21.5), the Appellate Body held that an offending country has the duty to consult affected countries in good faith but

there is no duty to conclude an agreement. If, after good faith efforts to negotiate have been made and an agreement still cannot be reached, a measure will not be found to be unjustifiably discriminatory if imposed unilaterally.¹¹¹ No effort or minimal effort in trying to reach an agreement regarding policy goals will constitute a finding of unjustified discrimination.¹¹² Also, if the offending country negotiates heavily with some affected countries but not all, the measure will be struck down.¹¹³

77 Secondly, it must be determined whether the measure is sufficiently flexible. A lack of flexibility in the application of the measure has been found to result in unjustifiable discrimination. This occurs when a trade measure is applied universally without taking into account circumstances in different countries. For example, in *Shrimp-Turtle*, the legislation was found to be unjustifiably discriminatory because it required turtle-exporting states to enact essentially the same regulatory regime that the US had, without taking into consideration the differing circumstances in each country.¹¹⁴ Therefore, to avoid a finding of inflexibility, the legislation should require other countries to adopt measures of comparable effectiveness.¹¹⁵

78 The EU will argue that the measure fulfills the good faith negotiation requirement because EU Parliamentarians have negotiated with Canadian government officials to reach an agreement. Thus, the unilateral measure was justified.¹¹⁶ They will also argue that the measure is flexible because the ban applies equally to all countries. It is simply a prohibition with no exceptions and thus, it does not require a country to adopt the same measures as the EU.

79 Canada will argue that the EU has not satisfied the requirement of good faith negotiating because it has not actively pursued the avenue of negotiations aggressively enough before invoking the unilateral measure. Canada has publicly announced numerous times that it is interested in reaching a bilateral or multilateral agreement with the EU regarding sealing. For example, the EU may require that certain extra precautions be carried out to ensure that the seal does not unduly suffer. Canada is committed to reaching an agreement in lieu of a complete prohibition.¹¹⁷ Canada may also argue that the EU never intended to reach any type of agreement and always planned to institute the total ban, and thus, the negotiations were not bona fide because they had already made up their mind about the measures that they would take.

80 If a panel finds that the EU satisfied its good faith negotiation obligations, then Canada will have to argue that the measure is inflexible because it provides no reasonable exceptions to the overall ban. There is no exception for products that were the result of a hunt employing humane tactics, unless the hunt is for sustainability purposes. As a result, the measure did not take into account the differing factors in other countries.

81 It is difficult to determine whether the EU would satisfy this requirement. It depends entirely on the evidence regarding negotiations and whether the EU carried them out in good faith. It will also be interesting to see how a panel would determine whether the measure was flexible enough. All prior jurisprudence has dealt with prohibitions with exceptions if an exporting country met certain

criteria. In this case, it is just a blanket prohibition with no exceptions, so the panel would have to determine whether the flexibility component is satisfied.

Arbitrary Discrimination

82 A measure will be arbitrarily discriminatory if its application is unpredictable, inconsistent, unbending, or inflexible. One way of avoiding a finding of arbitrariness is to base the measure on the particular achievement of an objective, rather than on the application of specified method or standard.¹¹⁸

83 The EU could argue that the measure is not arbitrarily discriminatory because its application is predictable and consistent. There is one ban that applies to all countries, with no exemptions except for Inuit communities, sustainability hunts, and personal consumption. Also, they could argue that the ban is based on the achievement of animal welfare objectives and to address the inhumane suffering of seals at the hands of hunters. Therefore, the ban is modelled on the achievement of the objective and not on the application of a specified method or standard. These two arguments, if supported with empirical evidence, would be strong enough to meet this requirement.

84 In response, Canada could possibly argue that the measure is arbitrary because it provides one unbending and inflexible standard that applies to all countries, regardless of the regulations of the hunt. Therefore, such inflexibility constitutes arbitrary discrimination.

Disguised Restriction on Trade

85 One of the purposes of the chapeau is to avoid abuses of the exceptions. Therefore, it is also necessary to determine whether the measure is a disguised restriction on trade. The dispute settlement bodies have employed three tests in order to determine the question. The first is the publicity test, which asks whether the imposing country has publicly announced that the measures were trade restrictions. The second test involves a consideration of whether the application of a measure amounts to arbitrary or unjustified discrimination.¹¹⁹ The third test examines the "design, architecture, and revealing structure of the measure".¹²⁰

86 These three steps are guidelines and it is not clear which applies in the circumstances of this case. Overall, it is unlikely that there would be a finding that this is a disguised restriction on trade because the EU has stated that a trade ban is the only feasible route to achieve their policy objectives. Also, there is no domestic seal industry that the EU could be accused of protecting by instituting such a ban. Therefore, the measure would likely pass this branch of the chapeau.

(vi) Overall Findings Regarding the Chapeau

87 It is unclear how the chapeau will apply to the seal case because the circumstances are much different from other cases, such as Shrimp-Turtle, where it has been previously applied. However, it is likely that the EU will not satisfy the chapeau if it is found that they have not made good faith

efforts to negotiate and/or that the measure is rigidly inflexible.

Conclusion

88 After an analysis regarding the background of the seal hunt, the regulations in place, the proposed EU ban, and the relevant GATT sections and case law, it is the position in this paper that the EU ban does not conform with its international trade obligations under GATT and does not qualify for an exception under Article XX.

89 It is likely that a dispute panel will find a violation of Article XI:1, of the GATT. The ban will also preliminarily fit into an exception under Article XX(a), provided a panel does not find that another alternative measure, which would achieve the same objectives and would be less inconsistent with the trading system, is available. It is difficult to determine if the trade measure can be saved by paragraphs (b) and (g). However, it is unlikely that the ban will withstand the scrutiny of the chapeau of Article XX. The EU will have to prove that they had negotiated in good faith and that the lack of an exception is not so inflexible as to render the ban unjustifiably discriminatory.

90 Now that the ban has been passed by the EU, it will be interesting to see whether Canada will fulfill its promise and take the dispute to the WTO. If it does, the WTO will have an opportunity to clarify its position on the tension between trade liberalization and a country's autonomy to institute environmental measures.¹²¹

* * *

RE AUTHOR:-- Courtney Pope, B.A. (with distinction), LL.B. Student Class of 2010.

* * *

Notes

QL UPDATE: 20100317
qp/e/qlsls

1 Fisheries and Oceans Canada, Media Release, "Canada Disappointed with Vote by European Parliament's Committee on Internal Market and Consumer Protection" (2 March 2009), online: Fisheries and Oceans Canada <www.dfo-mpo.gc.ca/media/statement-declarations/2009/20_090302-eng.htm> [Canada Disappointed].

2 See la Loi relative a l'interdiction de fabriquer et de commercializer des produits derives de phoques, F. 2007 -- 1590 [C -- 2007/11138], 16 March 2007 ('Belgian trade ban'). Also see Decree of 4 July 2007, amending the ('Dutch trade ban').

3 European Communities -- Certain Measures Prohibiting the Importation and Marketing of Seal Products (Request for Consultations by Canada) (2007) WTO Doc. WT/DS369/1, online: WTO <docsonline.wto.org/gen_search.asp?searchmode=simple> [Request for Consultations].

4 European Parliament, Media Release, "MEPs adopt strict conditions for the placing on the market of seal products in the European Union" (5 May 2009), online: European Parliament, <[www.europarl.europa.eu/news/expert/infopress_page/063-54953-124-05-19-911-20090504IR54952-04-05-2009-true/default_en .htm](http://www.europarl.europa.eu/news/expert/infopress_page/063-54953-124-05-19-911-20090504IR54952-04-05-2009-true/default_en.htm)>. Adopted with 550 votes for, 49 votes against, and 41 abstentions.

5 Supra note 1.

6 Fisheries and Oceans Canada, "Frequently Asked Questions About Canada's Seal Hunt" (11 March 2009), online: Fisheries and Oceans Canada <www.dfo-mpo.gc.ca/fm-gp/seal-phoque/faq-eng.htm> ["Frequently Asked Questions"].

7 Ibid.

8 S.O.R./93-56, s.27 [Regulations].

9 Supra note 6.

10 Ibid.

11 A.G. Sulzberger, "Russia to Ban Hunting of Baby Seals" The New York Times (18 March 2009), online: The New York Times <www.nytimes.com/2009/03/19/world/europe/19seal.html?_r=1>.

12 Ibid.

13 Fisheries and Oceans Canada, "Seals and Sealing in Canada", (23 February 2008), online: Fisheries and Oceans Canada <www.dfo-mpo.gc.ca/fm-gp/seal-phoque/index-eng.htm>.

14 Andrew Linzey, "An Ethical Critique of the Canadian Seal Hunt and an Examination of the Case for Import Controls on Seal Products" (2006) 2 Journal of Animal Law 87 at para. 5.6.

15 Ibid. at 5.7.

16 Fisheries and Oceans Canada, "Socio-economic Importance of the Seal Hunt" (1 October 2008), online: Fisheries and Oceans Canada <www.dfo-mpo.gc.ca/fm-gp/seal-phoque/reports-rapports/facts-faits/facts-faitsSE-eng.htm>. Also see: Ivan Morgan, "Greek surgeon says seals may be harvested for organs"

Newfoundland and Labrador Independent (19 July 2008), online: The Newfoundland and Labrador Independent <www.theindependent.ca/article.asp?id=1335>.

17 IFAW, "Canada's Commercial Seal Slaughter 2009" (2009) online: <www.ifaw.org/Publications/Program_Publications/seals/asset_upload_file644_54094.pdf> at page 18.

18 Donald Barry, *Icy Battleground: Canada, the International Fund for Animal Welfare and the Seal Hunt* (St. John's: Breakwater Books, 2005) at 127.

19 *Ibid.* at 107.

20 Paul Johnston & David Santillo, *The Canadian Seal Hunt: No Management and No Plan*, Technical Note (N.p.: Greenpeace International, 2005) at 14.

21 *Ibid.*

22 *Supra* note 17 at 22.

23 *Ibid.* at 26.

24 *Supra* note 8, ss. 26-37.

25 "Frequently Asked Questions", *supra* note 6.

26 *Supra* note 8, ss. 28-29. See also Fisheries and Oceans Canada, "Amendments to the Marine Mammal Regulations: Seal Hunt" (12 March 2009), online: Fisheries and Oceans Canada <www.dfo-mpo.gc.ca/media/back-fiche/2009/seal_hunt-chasse_au_phoque-eng.htm>.

27 *Supra* note 6.

28 The Fisheries Act, R.S. 1985, c.F-14, s.78.

29 *Supra* note 6.

30 Mary Richardson, "Inherently Inhumane: A half century of evidence proves that Canada's commercial seal hunt cannot be made acceptably humane" Submission to the European Food Safety Authority Animal Health and Animal Welfare Panel's Working Group on the Humane Aspects of Commercial Seal Hunting, at 46,

31 See Sulzberger, *supra* note 12 at 11.

32 See *Supra* note 2.

33 See RSPCA, *Seals and trade rules: can they live together* (West Sussex: RSPCA, 2007) at 2, online: Eurogroup for Animals <[www.eurogroupanimalwelfare.org/policy/pdf/SealBriefing RSPCA.pdf](http://www.eurogroupanimalwelfare.org/policy/pdf/SealBriefing%20RSPCA.pdf)>.

34 See Fisheries and Oceans Canada, "Canadian Seal Hunt: Myths and Realities" (9 March 2009), online: Fisheries and Oceans Canada <www.dfo-mpo.gc.ca/fm-gp/seal-phoque/myth-eng.htm> ["Myths and Realities"].

35 See Linzey, *supra* note 14 at para. 2.3.

36 *Ibid.*

37 Please see discussion in the "Regulation and Enforcement" section.

38 "Myths and Realities", *supra* note 34.

39 See Linzey *supra* note 14 at para. 2.23.

40 *Ibid.* at 2.17.

41 European Food Safety Authority, "Animal Welfare aspects of the killing and skinning of seals". (6 December 2007) *The EFSA Journal* 610:1-123 at pg. 43.

42 *Ibid.*, at 44.

43 Bruce Smith, "Improving the Humane Practice in the Canadian Harp Seal Hunt" (2005). A Report of the Independent Veterinarians' Working Group on the Canadian Harp Seal Hunt, at pg. 9.

44 See "Myths and Realities", *supra* note 34. Also see: Pierre-Yves Daoust, Alice Crook, Trent Bollinger, Keith Campbell, and James Wong. "Animal welfare and harp seal hunt in Atlantic Canada" (2002) *Can Vet J* 43, at pg. 687.

45 *Ibid.* at 493.

46 *Supra* note 41 at 57.

47 *Supra* note 43.

48 Andy Butterworth, "Welfare aspects of the Canadian seal hunt: preliminary report" (2007) Submission to the European Food Safety Authority Working Group, at pg. 25.

49 Sheryl Fink, "Canadian Public Opinion on a European Trade Ban on Seal Products & the Federal Government's Support for Canada's Commercial Seal Hunt"(11 July 2008) IFAW Technical Briefing 2008-02, at 2.

50 Ibid. at 3.

51 See Meeting of the European Parliament Committee on Internal Market and Consumer Protection, Proposal for a Regulation of the European Parliament and of the Council Concerning Trade in Seal Products, (SEC (2008) 2290) (Brussels: 23 July 2008) at 2-4, online: <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0469:FIN:EN:PDF>.[Proposal]

52 European Parliament, Regulation of the European Parliament and of the Council on trade in seal products" (PE-CONS 3668/09) (17 July 2009) at 5, online: <register.consilium.europa.eu/pdf/en/09/st03/st03668.en.09.pdf>.

53 Ibid. at 8, Article 2.

54 Ibid. at 9, Article 3.1.

55 Ibid. at 9, Article 3.2(a).

56 Ibid. at 10, Article 3.2(b).

57 Ibid. art. 4.1(a) at 20.

58 Supra note 51 Annex II at 25-26.

59 See European Parliament, Media Release, "Ban on Seal Products Moves a Step Nearer"(3 March 2009), online: European Parliament, <www.europarl.europa.eu/news/expert/infopress_page/054-50624-061-03-10-909-20090302IPR50623-02-03-2009-false/default_nl.htm>. The vote was: 25 MEPs in favour of the ban and 7 MEPs against it

60 See Lee Berthiaume, "One Thing EU Seal Ban Can't Do is Stop the Seal Hunt: Shea" Embassy Magazine (18 March 2009), online: Embassy <www.embassymag.ca/page/view/she-a-3-18-2009>.

61 See Proposal, supra note 51 at 8.

62 See discussion above in "Regulations and Enforcement Section".

63 Supra note 1.

64 30 October 1947, 58 U.N.T.S. 187, Can. T.S. 1947 No. 27 (entered into force 1 January 1948) [GATT].

65 Mark Edward Foster, "Trade and Environment: Making Room for Environmental Trade

Measures Within the GATT" (1997-1998) 71 S. Cal. L. Rev. 393 at 407.

66 Carol J. Miller & Jennifer L. Croston, "WTO Scrutiny v. Environmental Objectives: Assessment of the International Dolphin Conservation Program Act" (1999), 37 Am. Bus. L.J. 73.

67 World Trade Organization, WTO and the Environment (2009), online: WTO <www.wto.org/english/tratop_e/envir_e.htm>.

68 These cases will be described more in depth in section (iii) of Part II. The purpose of this introduction is to set the context for the analysis and application under section (iii).

69 United States -- Restrictions on Imports of Tuna (Complaint by Mexico) (1991), GATT Doc. DS21/R (Panel Report Unadopted), online: WTO <docsonline.wto.org/gen_search.asp?searchmode=simple> [Tuna-Dolphin].

70 Ibid.

71 United States -- Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by India, Pakistan, Thailand, and Malaysia) (1998), WTO Doc. WT/DS58/AB/R (Appellate Body Report), online: WTO <docsonline.wto.org/gen_search.asp?searchmode=simple> [Shrimp-Turtle].

72 Ibid.

73 United States -- Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia (2001), WTO Doc. WT/DS58/AB/RW (Appellate Body Report), online: WTO <docsonline.wto.org/gen_search.asp?searchmode=simple> [Shrimp-Turtle (Article 21.5)].

74 Catherine Jean Archibald, "Forbidden by the WTO? Discrimination Against a Product When Its Creation Causes Harm to the Environment or Animal Welfare" (2008) 48 Nat. Resources J. 15 at 48.

75 Request for Consultations, *supra* note 3.

76 *Supra* note 64.

77 *Supra* note 33 at pg 3.

78 United States -- Import Prohibition of Certain Shrimp and Shrimp Products (1998), WTO Doc. WT/DS58/R (Panel Report) at para. 7.22-7.23.

79 Korea -- Measures Affecting Imports of Fresh, Chilled, and Frozen Beef (2000), WTO

Doc. WT/DS161/AB/R (Appellate Body Report) at para. 133.

80 Criteria for determining likeness include: (1) the properties, nature, and quality of the products; (2) the end-uses of the products; (3) consumers' tastes and habits in respect of the products; and (4) the tariff classification of the products.

81 Note: even though Greenland is not an EU member, its citizens have EU citizenships.

82 Canada -- Certain Measures Prohibiting Periodicals (1997), WTO Doc. WT/DS31/R (Panel Report) at para. 5.5.

83 Supra note 71 at 188.

84 As evidenced in the case of Tuna-Dolphin.

85 Supra notes 71 & 73.

86 US -- Gasoline (1996), WTO Doc. WT/DS2/AB/R (Appellate Body Report) at pg 21.

87 US- Measure Affecting Imports of Woven Wool Shirts and Blouses from India (2000), WTO Doc. WT/DS/33/AB/R (Appellate Body Report) at pg 335.

88 Supra note 64.

89 US -- Gasoline (1995), WTO Doc. WT/DS2/R (Panel Report) at para. 6.20.

90 Supra note 69 at 5.30.

91 WTO, GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, Paragraphs (b), (d), and (g), WTO Doc. WT/CTE/W/203 (2002), online: <docsonline.wto.org/DDFDocuments/t/wt/cte/w203.doc> at 37.

92 Supra note 51 at 12.

93 Supra note 64.

94 Supra note 71 at paras. 127-145.

95 Supra note 89 at para. 6.37.

96 Supra note 9189 at para. 44.

97 Supra note 69 at para. 5.33.

98 Supra note 9189 at para. 47.

99 Supra note 78 at pg 18.

100 Supra note 64.

101 See discussion above.

102 Supra note 51 at pg 9.

103 Ibid. at pg 3.

104 Supra note 14 at para. 6.4.

105 Ibid. at para. 8.13.

106 Supra note 51 at pg 12.

107 Supra note 34.

108 Supra note 71 at para. 150.

109 Supra note 86 at pg 21.

110 Ibid. at para. 81.

111 Supra note 73 at para. 115.

112 Ibid, at para. 122.

113 Supra note 71 at para. 172.

114 Ibid. at para. 161-164.

115 Supra note 91 at para. 73.

116 Supra note 59.

117 Supra note 1.

118 Supra note 89 at 25-26.

119 The analysis is the same that was discussed in the two preceding sections.

120 Supra note 91 at 79.

121 The author would like to thank Sheryl Fink at the International Fund for Animal Welfare for her valuable time and input.