A Comment and Epilogue

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The Appellate Body report in *EC-Seal Products* is a landmark decision in several respects: for its recognition that animal welfare is a matter of public morality that may justify a trade ban in response to cruelty; for the AB's new-found clarity with respect to the irrelevance of regulatory purpose in the determination of "treatment no less favourable" under the National Treatment and MFN provisions of the GATT; for its suggestion that trade measures not defined by product-related distinctions but other criteria are not covered by the TBT Agreement; and for its partial acknowledgement that a Member may maintain a measure consistent with Article XX even if the measure represents a complex trade-off between a main purpose and other purposes that may limit the extent the main purpose can be furthered.

But the decision arguably raises as many questions as it answers, and some have already complained about the rather sphinx-like quality of the judgment. To give one instance, the determination that the TBT Agreement did not apply was made without considering whether the seal ban taken together with the indigenous exception could be characterized as a product-related PPM within the meaning of the definition of a technical regulation in the text of the TBT Agreement. The jurisprudential foundation for excluding the applicability of TBT is obscure. Another instance is the failure to address how the clarified approach to regulatory purpose and "treatment no less favourable" affects the "like products" determination, if at all.

Each of the contributions to this symposium is helpful, in one way or another, in thinking about the fundamental questions raised or left open by the AB report in *Seals*.

Petros Mavroidis' essay raises an issue that is often crucial to the result and reasoning in WTO case law, namely the characterization of the challenged state conduct in terms of a measure or measures. In *Seals* as he rightly notes it was the decision to consider the seal ban and its exceptions that led to considerable difficulty in the AB's analysis under the chapeau of Article XX. Briefly, having characterized the ban and exceptions as a single measure, the AB was led down the path of considering that the measure as a whole had to be put through a single justificatory exercise under Article XX. This entailed, given the different purposes of the ban and the indigenous exception for instance, having to make the rather forced characterization of the main purpose as public morality with respect to animal welfare and the other purpose, implicitly secondary, as that of protecting the traditional way of life of indigenous peoples.[1] In pursuing the secondary purpose, the EU simply dropped its concern about animal welfare, such that it imposed no conditions that were animal welfare-related on seal products that came from indigenous hunts. Seen in this way, under the chapeau it was possible to consider the exception as incoherent, arbitrary or unjustified in relation to the "main" purpose. The AB demanded of the EU some kind of "reconciliation", which Langille, Sykes and I interpret as meaning that the EU cannot be simply indifferent to animal welfare in its pursuit of the main purpose; it must make some effort to avoid sacrificing the main purpose to the extent possible while at the same time pursuing its other purpose.[2] But an approach truly respectful of the trade-offs that democracies make in pursuing multiple goals would not have imposed such a duty of reconciliation.

Jurisprudentially the source of the difficulty may have its origin in the chapeau analysis of the *Brazil-Tyres* case. In that case, the exception in the law pertained to its non-application to Mercosur countries,

* NYU Law School; howserob@gmail.com. These comments draw extensively from the ideas in Robert Howse and Joanna Langille, "Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Permit Trade Restrictions Justified by Noninstrumental Moral Values", 37 *Yale Journal of International Law* (2012), 367 *et sqq.* and in Robert Howse, Joanna Langille and Katie Sykes, "Moral Legislation and the Law of the WTO After *Seal Products*", *George Washington International Law Review*, (2015 forthcoming); NYU School of Law, Public Law Research Paper No. 15-05. Available at SSRN: http://ssrn.com as well as amicus curiae briefs submitted to the panel and the Appellate Body in this case by Howse, Langille and Sykes.

1 *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, Reports of the Appellate Body, WTO Doc. WT/DS400/AB/R and WT/DS401/AB/R, 18 June 2014, para. 5.167.

2 Howse, Langille and Sykes, "Pluralism in Practice", *supra* note 1.

in light of Brazil's obligations under that regional trade agreement. The AB held that the chapeau requires that an exception of this kind requires a demonstration of its rational relationship or connection to the purpose being invoked under the paragraph of article XX in question (in this case XX (b)). Of course, the Mercosur exception had nothing to do with the purpose of Brazil's scheme on retreaded tyres. In fact, it would need to be evaluated under an entirely different provision of the GATT, which concerns departure from MFN for purposes of establishing or maintaining a free trade area or customs union, Article XXIV. The AB found that, on account of the Mercosur exception, Brazil's measure was not being applied consistent with the chapeau and therefore that it failed Article XX (b) justification.[3] But what the AB should have done was to apply the correct provision to address the Mercosur exception, Article XXIV.

In his essay, Petros Mavroidis suggests and elegant and straightforward solution to avoid these kinds of unprincipled treatment of different aspects of regulatory schemes that address different (and potentially conflicting) purposes: the individual aspects, the ban and the exception as it was in the case of Seals and Tyres ought to be viewed as different measures, each subject to justification within the justificatory framework appropriate to the purpose in question. Thus, in Seals the AB would have considered the ban and the indigenous exception separately, applying Article XX (a) public morals and the chapeau to each individually. This would have avoided it would seem imposing a duty of "reconciliation", which, as noted above, arguably intrudes on legitimate trade-offs made in a democracy between competing objectives and how they are struck. This being said I disagree with Mavroidis that the indigenous exception, on this approach, could not have been found to be necessary for the protection of public morals, because it is in essence an "industrial policy." According to Mavroidis, "The term 'public morals' cannot and should not, by any stretch of the imagination encompass similar measures. Were we to understand "public morals" as encompassing industrial policy, the whole GATT edifice the whole GATT edifice would tumble down." Indeed, there is not one single case where a WTO Member has even attempted to justify industrial policy (e.g. financial or pecuniary subsidies) by invoking Article XX GATT to this effect." (p. 7). Yet, in fact, Article XX does not inherently limit the policy instruments used to achieve its objectives; if subsidies have never been defended under Article XX, it is that they are not inherently illegal under GATT, and many of them subject to an explicit exception from the National Treatment obligation; also, while some have argued differently, the mainstream view is that Article XX GATT is not available to a Member to justify subsidies otherwise in violation of the SCM Agreement.

I believe the concern of Mavroidis is not about industrial policy instruments but that a frequent *objective* of industrial policy is to preserve local jobs and industries. If this preference were acceptable as the kind of moral belief that is encompassed by Article XX, then the very measures the GATT was designed to discipline would now be, in principle, exempt, at least if maintained in a manner that does not entail arbitrary or unjustified discrimination. The GATT arguably represents a bargain on precisely which kinds of instruments are permitted or not for purposes of protecting local jobs and firms (many subsidies okay, tariffs acceptable within the MFN-bound limit or as safeguards, quotas and import bans, discriminatory domestic regulations not okay). Thus if a Member were invoking protecting local jobs and firms as the relevant moral concern under Article XX, it should not be able to do so in such a manner as to upset a very specific bargain as to the permissible instruments for the purpose in question, for example to justify increasing tariffs beyond the MFN bound rate, then resort to XX (a) would not be permissible. I think something like this reasoning was indeed at play when in *China-Raw Materials* the AB held that China could not upset the specific bargain it had made in its Protocol of Accession to eliminate export taxes (while on the other hand in *China-Publications* the AB had suggested that in principle Article XX could be applicable to the general "right to regulate" under the Protocol).[4] On a similar reasoning, if the indigenous exception were held to be a discriminatory domestic regulation when considered as a separate measure, as Mavroidis sensibly suggests was the right methodology, the EU would not then be able to then

3 *Brazil — Measures Affecting Imports of Retreaded Tyres*, Report of the Appellate Body, WTO Doc. WT/DS332/AB/R, 12 June 2007, para. 143.

4 *China – Measures Related to the Exportation of Various Raw Materials*, Reports of the Appellate Body, WTO Doc. WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, 22 February 2012, para. 306.

invoke the moral concern of protecting local jobs and industries.

This leads me to the real difficulty with Mavroidis' position. Mavroidis simply assumes that measures to protect the traditional way of life of indigenous people are part of a fungible industrial policy to protect local jobs and industries as such. But the moral concern for the traditional way of life of indigenous people has a different source: it responds to the moral belief that the historical disruption, often by brutal violence, of indigenous communities through European conquest and domination of their sovereignty demands redress. It also may in some instances be traced back to specific historical bargains, treaty rights, which not to honor would in fact intensify or reinstantiate the historical situation of oppression and exploitation. Much of this is explained by Langille and I in our original article on the *Seals* case, in referring to specific treaties and conventions that state these values at the international level.

One consequence that Mavroidis does not discuss in relation to his approach that the ban and the exception ought to be analyzed as separate measures is for the applicability of the TBT Agreement. The AB held that the TBT did not apply given that, due to the interaction of the ban and the exception, the single measure operated based not on any characteristic of the product, but rather the hunt and identity of the hunter. The AB explicitly refused to consider whether these might be product-related PPMs within the meaning of TBT, on the rather dubious grounds that the matter had not been thoroughly enough pleaded by the parties and was an issue of first impression for the AB; this last consideration might have been valid back at the time, say, of *EC Asbestos* when the WTO legal system and the AB itself were relatively new, but given the jurisprudential acquis of now almost 25 years, it seems preposterous-isn't deciding such systemic issues of first impression in part what an Appellate Body is for? As for the pleadings, is not the operative international law principle *iura novit curia*? In any case, if the AB had considered, along the lines Mavoridis, suggests that the ban and the exception be considered as two separate measures, then the TBT Agreement would almost certainly have applied to the ban, which referred to the absence of seal as a characteristic of the permitted product (see *EC-Asbestos*), while the exception was based on the hunt and the identity of the hunter, and thus on the reasoning of the AB, since these considerations are not product characteristics, and may not be product-characteristic-related PPM, TBT might not apply.

In his excellent contribution to the symposium, Ming Du tackles head on the issue avoided by the Appellate Body: the meaning of the definition of a technical regulation as encompassing not only product characteristics but "their related process and production methods." As he puts it, the question is whether a PPM has a "sufficient nexus to the characteristics of a product in order to be considered related to those characteristics." Du rightly notes that "nothing in the text of Annex 1.1 shows that product characteristics only refer to physical characteristics." For Du, the real issue is whether the characteristic is "specifically related to the production of specific products." As a general matter, I believe this is correct; thus as Trebilcock, Eliason, and I have argued, the TBT is a lex specialis concerning trade in goods, and thus PPMs detached from traded goods (for example an engineer's diagram for the method of construction of a bridge) or pure intellectual property (a process patent may be covered by WTO norms, but in these cases, GATS and TRIPs respectively apply, because the trade issues are unrelated to a specific product that is being imported, the TBT as an agreement that concerns the characteristics specified for traded goods, does not apply.

One implication of this that is drawn by Du is that measures that deal with labor standards and human rights would be excluded from the definition of a technical regulation. However, this would only be so, on his reasoning, if the labor rights concerns were unconnected to the production of the specific products in question (e.g. child labor in the garment industry where the measure is directed specifically at textile products) or slave labor in extractive industries, to give an example that pertains to both labor standards and human rights more generally. Clearly, and I believe he is correct on this, horizontal human rights sanctions such as those that were imposed on Burma would not be "technical regulations." There is another issue related to the applicability of TBT to public morals measures, and that is the non-instrumental aspect of many moral regulations, which Langille and I discuss in our initial article on the *Seals* dispute: the use of the expression "technical" must play some role in understanding the general scope of applicability of the TBT Agreement, even aside from the definitions that apply to specific kinds of measures under TBT: "technical regulations", "stan-

dards", "conformity assessment". Measures that are "technical" seem almost inherently instrumental, as opposed to measures that have an aspect that is simply expressive of moral belief or opprobrium. Moreover, as Langille and I argue, the focus of TBT Agreement Article 2.2 on the assessment of the relationship of the technical regulation to its objective in light of the risks of non-fulfillment suggests an inherently instrumental analysis of the suitability of technical regulations for controlling risks.[5] So even one aspect of a measure such as that in *Seals* is the protection of seals from the risk of cruelty (which would be instrumental, and addressable by TBT) another is the expression of moral outrage at this cruelty and opprobrium at the complicity with it of those who would purchase seal products. These aspects would not be appropriately assessable under TBT, while they could well be justifiable under GATT Article XX (a).

One of the most important, and controversial aspects of the AB ruling in *Seals* is the AB's clarification that considerations of regulatory purpose play no role in the analysis of "treatment no less favourable" under the MFN and National Treatment obligations (Herwig appears to focus explicitly only on National Treatment, but the AB's analysis seems to apply to both MFN and National Treatment, and Herwig does not give any explicit indication that she would not see same considerations at play in the determination of treatment no less favourable under GATT Article I. In her brilliant and provocative essay, Alexia Herwig argues that such a conclusion of the AB (or at least interpretation of its bottom line) is too hasty, and is not based upon an adequate analysis of the problem of determining whether conditions of competition or competitive opportunities have been distorted by a measure challenged as a violation of Articles I and/or III. Herwig sensibly argues that the assessment of whether a measure changes or distorts the competitive relationship between like products must be determined against some benchmark or baseline that implies an ideal competitive relationship. Relative market shares of like domestic and imported products prior the intervention is not a principled benchmark or baseline, because we do not know whether those market shares themselves reflect undistorted conditions of competition. Rather the benchmark must be one of perfect competition, or a perfect market. There follows from this that a regulatory intervention could, in certain circumstances, correct a status quo ante where competition is distorted due to a market failure, for example imperfect information. Thus, Herwig is driven to the conclusion that Article XX justification applies in the case where there are "genuine impossibilities to approximate a perfect market with regulation or the undesirability of the market as an allocative instrument" (p. 8). Some observers may see an analogy (not drawn by Herwig herself) to the jurisprudence on the meaning of "benefit" under the SCM Agreement. In effect, the AB has held that "benefit" means a competitive advantage is provided by the subsidy as determined against some kind of normal market benchmark.[6] In cases where there are fundamental distortions in competition in the market in question, including because of other pre-existing regulatory interventions, it may be necessary to use a benchmark other than the actual market, but rather some constructed normal market. I would push Herwig to extend her analysis further, not only to situations where the measure being challenged is a corrective to market imperfections, but more generally where the relative market share of like domestic and imported products in itself, *absent* the measure being challenged, can be traced to some kind of distortion of competition including by regulation. In such a situation, the challenged measure would not have to be shown to be a corrective to the distortion, but rather that the reason for the *disparate impact* on imports is that the market shares reflect distortions in consumer choice. Thus, for example I argued with Joanna Langille and Katie Sykes in our amicus brief to the Appellate Body in *Seals* that the disparate impact identified by the panel as treatment less favourable was due to the large commercial sealing industry in Canada relative to indigenous hunts, which meant that a relatively small proportion of Canadian seal products could benefit from the indigenous exception; however the existence of this large commercial sealing industry was not due to market demand, but rather to a range of government aids, including subsidies, that kept the commercial industry in existence, and without which the industry would not be profitable. In an

5 Howse, and Langille, "Permitting Pluralism", *supra note* 1, at pp. 423-424.

6 *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, Reports of the Appellate Body, WTO Doc. WT/DS412/AB/R / WT/DS426/AB/R, 24 May 2013, paras. 5.163-5.164.

undistorted market, not only would there not be a large percentage of Canadian seal products that would not qualify for the indigenous exception, but perhaps none at all, as the industry would cease to be viable.

I suspect that one concern about Herwig's approach is the extent to which it imports economic analysis and economic concepts into Articles I and III. She might plausibly respond that the notion of a distortion of conditions of competition already implies that such concepts are at play, and so the AB has long made the choice to import some notion of undistorted or ideal competition into the GATT. However, the difficulty is that, unlike EU law, there are no agreed anti-trust principles among WTO Members, i.e. negotiated understandings about what constitutes imperfect or distorted competition, or the meaning of a normal competitive market. This already creates great difficulties in the application of the concept of "benefit" under the SCM Agreement, as is displayed by cases such as *US-Softwood Lumber* and *Canada Renewable Energy*. At the same time, Herwig notes that Article XX is a closed list, and it would seem strange that (apart arguably from an expansive interpretation of XX(d)), it does not seem to offer a basis for justifying measures that are aimed as such at correcting market failures or addressing imperfect competition, for example consumer information measures for purposes of enhancing consumer choice as opposed to as instrumental to goals such as public morals or public health, which are explicitly recognized in Article XX. Perhaps then the drafters of the GATT had understood or assumed that such measures, inherently consistent with the object and purpose of National Treatment for example, would not need to be justified by Article XX?