Sealed with a Doubt

EU, Seals, and the WTO

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In EC-Seal Products, the WTO Appellate Body (AB) issued a(nother) controversial report. This paper argues that the analysis followed by the AB is wrong. To prove this point, we ask two questions. Would the AB have concluded the same way if it had constructed the EU measure as two separate measures and not one? Did the AB adequately control for the regulatory intent of the EU, indeed the quintessential element for deciding whether the EU was indeed pursuing a societal preference of no commercial character? We responded in the negative to both questions.

I. The Facts and Rulings in EC-Seal Products

The European Union (EU) adopted two regulations aiming to ban, in principle, sales of seal products in its market ('the EU Seals regime').[1] The measure aimed to address public concerns in the EU regarding the brutal manner in which seals would be killed around the world. A few exceptions were introduced, which actually provoked the litigation against the EU. The EU allowed seal products bought by travelling EU residents who returned home. It also allowed seal products originating in WTO Member countries that had in place resource management programmes aiming to secure that the population of seals in their sovereignty are not depleted. Most controversial of them all was the so-called 'Inuit exception': indigenous populations could sell seal products in the EU irrespective of the harvesting technology used, provided that harvesting was done for subsistence purposes. The EU imposed no limit on the quantities harvested by the Inuit community.

The complainants advanced their claims and attacked the EU measure from different angles. Norway felt that it was being harshly treated by the EU. Norway had in place a very sophisticated resource management programme, and was most certainly not practicing "brutal" killing of seals.[2] Canada on the other hand, could not see what could distinguish between the Greenlandic and the Canadian Inuit community.[3] Why would the EU allow the marketing of seal products in its market produced by the former and not the latter?

The Panel first, and the Appellate Body (AB) later, found that the EU measure was in violation of the GATT[4]. The AB, the report of which is the focus of this paper, found that the EU measure was indeed necessary to address public morals concerns regarding animal welfare, but had been applied in a manner that did not conform with the requirements of Art. XX GATT[5]. This provision is the 'general exception' clause in the GATT, and assuming its conditions have been met, can be used in order to justify any obligation assumed under the GATT. For various reasons that we discuss infra, the AB found that the EU had not been applying its regulations in a non-dis-

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1 Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on trade in seal products, OJ 2009 L 286. The exceptions are contained in Commission Regulation (EU) No. 737/2010 laying down detailed rules for implementation of the Basic Regulation, OJ 2010 L 216.

2 *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products,* Notification of an Appeal by Norway, WT/DS401/9, 29 Jan. 2014, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products*, Reports of the Appellate Body, WTO Doc., WT/DS400/AB/R, WT/DS401/AB/R, 22 May 2014, paras 2.1ff.

3 *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products,* Notification of an Appeal by Canada, WT/DS400/8, 29 Jan. 2014, Reports of the Appellate Body, *EC-Seal Products*, paras 2.2 ff.

4 *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products*, Reports of the Panel, WT/DS400/R, WT/DS401/R, 25 November 2013, para 7.1, Reports of the Appellate Body, *EC-Seal Products*, para 6.1.

5 Reports of the Appellate Body, *EC-Seal Products*, para 6.1.c-d.

criminatory manner, i.e. even-handedly across countries where the same conditions prevail.

The AB report was not a surprise for most observers. It was, for various reasons a much expected report. The legal issues of the case have been discussed and criticized by many, and, unsurprisingly, have led commentators to diametrically opposite conclusions.[6]

The purpose of this paper is not to provide a comprehensive analysis of the dispute. The paper focuses on one issue only, which, in our view, holds the key to understanding what went wrong with the analysis by (the Panel and) the AB. The AB did not properly define the 'measure' before it. It treated the EU Seals regime as if it was one measure. It is not. The EU introduced in one regulation two different measures aimed at two different objectives: one was the ban on seal products in order to protect the EU's public morals, since, as the EU argued, EU citizens opposed the brutal harvesting of the seal population; the other was an industrial policy measure aiming to compensate the Greenland Inuit community (and no other Inuit or indigenous community) for loss of income resulting from the ban. To this effect, the Greenland Inuit community could continue to harvest and sell seal products in the EU market irrespective of the manner used for harvesting, and irrespective of the total volume of production. The argument that we advance in what follows, is that it is very difficult, if not impossible, to achieve two objectives through the same means. Indeed, the EU used two means (ban on sales; permission for marketing) to achieve two different objectives (public morals; industrial policy). The AB should have separated the two measures, and analyzed the consistency of each of them with the relevant rules. It should have found that the exception for the Greenland Inuit community could not be justified under Art. XX GATT. This provision is not meant as a means to advance industrial policy. It was designed as a list of exceptional grounds, which justify violations of the obligations assumed under the GATT when noneconomic social preferences (like the protection of public morals) are being pursued.

There is of course, in this particular case, reason to cast doubt as to whether the EU was genuinely pursuing protection of public morals. The likelier scenario is that the EU lawmakers were torn between those arguing for similar protection, and those caring more for the economic impact the measure would have on the Greenland Inuit community. Instead of introducing a new entry in the EU budget to this effect, the latter group managed to introduce late in the proceedings the exception in favour of the Greenland Inuit community.[7]

In Section 2, I try to briefly present the quintessential elements of the AB findings, because there is some confusion as to what exactly the AB ruled, and where it saw the EU violating its obligations. Section 3 is the "heart" of the argument, where I explain the main reasons for my dissatisfaction with the outcome, whereas Section 4 briefly recaps the main conclusions.

II. Understanding the Ruling by the AB

1. Substantive Consistency v. Application: a Genuine Distinction?

The AB has consistently interpreted Art. XX GATT as reflecting a two-tier test: the substantive consistency of a measure with the GATT will be assessed using one of the sub-paragraphs as legal benchmark for evaluation.[8] If the first test has not been passed successfully, there is no need to proceed with this second step.[9] It is clear that, when moving to Art. XX GATT, the burden of production of proof moves from the complainant to the defendant, the complainant

6 Compare for example, Howse and Langille on the one hand, to Perisin on the other. Robert Howse, and Joanna Langille, "Permitting Pluralism: the Seals Products Dispute and why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values",37 *The Yale Journal of International Law* (2012) pp. 368 *et sqq*.; Tamara Perisin, Tamara. 2013. "Is the EU Seals Regulation a Sealed Deal? EU and WTO Law Challenges", 62 *International and Comparative Law Quarterly* (2013), pp. 373 *et sqq*. Howse, Langille and Sykes briefly discuss the Appellate Body Report here; Rob Howse, Joanna Langille and Katie Sykes, "Sealing the Deal: The WTO's Appellate Body Report in EC – Seal Products" *ASIL Insights,* available on the internet at http://www.asil.org/insights/volume/18/issue/12/sealing-deal-wto%E2%80%99s-appellate-body-report-ec-%E2%80%93-seal-products#_edn15 (accessed 20 July 2014)..

7 See Paola Conconi and Tania Voon, "EC-Seal Products: The Tension between Public Morals and International Trade Agreements", *World Trade Review*, 2016, forthcoming. The authors show in their paper that the original draft of the EU regulation contained no exception at all. Exceptions were introduced at a later stage in order to take care of concerns advanced by Germany and Finland (since both countries engaged in transshipping seal skins), as well, the processing industry mainly in Denmark, and Italy. Denmark emerged as a key player in this discussion because of its special ties to Greenland.

8 *United States-Standards for Reformulated and Conventional Gasoline,* Appellate Body Report (adopted 26 April 1996) WT/DS2/AB/R, p. 22; *United States –Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report (adopted 12 October 1998) WT/DS58/AB/R paras 119-121.

9 *ibid.*

having honored its part of the deal by establishing the violation of an obligation.[10]

The intellectual legitimacy of this distinction is doubtful, and now blurred: doubtful, because nowhere does the letter of this provision or its negotiating history summarized in the Analytical Index support this reading; blurred, because after insisting for years that the inquiry under the chapeau concerns only the application of a measure, the WTO made a U-turn in this case, and now opened the door to a more 'expansive' review of the challenged measure in this context. In EC-Seal Products, the AB held that it can entertain elements from the design, and overall architecture of the measure, in order to decide whether a measure observes the requirements of the chapeau.[11] Why is that necessary? Is not the examination under the chapeau supposed to be confined to a review of the application only? Should not the AB simply check whether the same law has been consistently applied to identical transactions irrespective of the origin of the goods concerned? Is the AB being overly analytical in this situation?

This passage is puzzling indeed. The AB nevertheless, did not indicate or even imply that it was deviating from prior case law.

2. What did the EU do Wrong (in the Eyes of the AB)?

The EU claimed that its measure was consistent with Art. XX(a) GATT; that is, the provision allowing WTO Members to deviate from their obligations if this is necessary to protect their 'public morals'.[12] In respect of the ban imposed on animal welfare grounds, the AB accepted that this had indeed been the case.[13] In the AB's view, Art. XX(a) GATT covered 'standards of right and wrong', a sufficiently wide term that encompasses protection of animal welfare as well.[14] Following this finding, it moved to examine whether the EU measure had been applied consistently. This was the heart of its overall finding.

In this context, the AB is asking the following question: does the EU, by allowing marketing of seal products by the Greenlandic Inuit community while disallowing the sale of similar goods by the Canadian Inuit community, act consistently with the chapeau of Art. XX GATT?[15]

The EU had argued that the two Inuit communities did not represent similar situations: while the Greenlandic Inuit harvest seals for subsistence purposes, Canadian Inuit do so for commercial reasons.[16]

The AB did not find the EU claim persuasive.[17] It did not reject the 'subsistence purposes'-criterion. It simply stated that the statutory criteria for defining 'subsistence' were unclear, and that the administrative body deciding this issue enjoyed very wide discretion, which was hard to discern.[18] As a result, it was unclear whether the criterion had been applied consistently with the chapeau of Art. XX GATT. The EU thus did not absolve its burden of persuasion, and its measure as a result was pronounced GATT-inconsistent.

III. Is the AB Ruling Plausible?

In what follows, we advance, in our view, the two most important grievances, against the AB report. One could of course criticize various other aspects of this report.

1. Are we in Presence of One or Two Instruments?

There is no case law regarding what a 'measure' is. WTO courts accept the claims by complainants and/or defendants to this effect. In this case, the complainant did not advance any claims regarding this issue. There is undeniably an issue, however.

According to the AB, the EU has one 'measure' in place that aims to address two different regulatory objectives: protection of public morals regarding animal welfare, and subsistence of the Inuit community of Greenland. One can qualify this last point in var-

10 Appellate Body Report, *US-Gasoline*, p. 22-23.

11 Reports of the Appellate Body, *EC-Seal Products*, para 5.302.

12 Reports of the Appellate Body, *EC-Seal Products*, para2.107, para 2.134, para 2.140.

13 Reports of the Appellate Body, *EC-Seal Products*, para5.203, para 6.1.

14 Reports of the Appellate Body, *EC-Seal Products*, para5.194 ff.

15 Reports of the Appellate Body, *EC-Seal Products*, para 5.316, paras 5.336-339.

16 Reports of the Appellate Body, *EC-Seal Products*, para2.104.

17 Reports of the Appellate Body, *EC-Seal Products*, para 5.339.

18 Reports of the Appellate Body, *EC-Seal Products*, para 5.326.

ious ways, and indeed Perisin questions whether the EU measure could qualify as a means to support minority cultural rights.[19] If this were indeed the case, something that it is impossible to deduce from a straightforward reading of the relevant EU statutes, then a number of issues arise. Let us state first that the advantage in this construction is that protection of minority cultural rights can only come under Art. XX(a) GATT.

Firstly, two distinct measures can come under the same heading ('public morals'). The fact that two measures share the same generic objective does not necessarily make them 'one measure'. It can also be considered in the following way: banning imports of beef contaminated with 'mad cow disease', establishing controls at the border for all beef originating in areas where 'mad cow disease' incidents have been observed, and requiring the production at the border of certificates proving that imported cheese has not been contaminated with salmonella, are all measures that arguably come under Art. XX(b) GATT. They are three distinct measures all the same. In a similar vein, protection of animal welfare and protection of cultural minority rights are two distinct measures.

Secondly, it would have been difficult for the EU ipso facto to accept that protection of minority cultural rights of the 'Inuit community' takes precedence over its own public morals, since it would be accepting seal products in its market made from seals that had been brutally killed. The EU would be making a rather important concession to the 'main' objective it was pursuing through the enactment of the law, namely, protection of animal welfare. In the circumstances, one could legitimately ask what the 'main' objective was in the first place: animal welfare or protection of cultural rights?

Finally, it would have been very difficult to justify this measure under Art. XX(a) GATT. Indeed, why is it necessary for the EU to block imports to all seal products originating anywhere in the world in order to protect the Inuit community 'way of life'? Could it not have used a less restrictive measure? Why, for example, could the EU not subsidize the Greenlandic Inuit community, a measure that is definitely less restrictive than a worldwide ban on imports, and 'reasonably available' to the EU in light of the Greenlandic Inuit population? The EU, we conclude, would have found it very difficult to persuade the Panel, had it mounted this argument to justify its measures.

Following this digression, we return to the main argument we advance against the AB ruling. Is there only one as the AB held, or two distinct measures in this case? Should the AB simply state as much, and proceed to examine the consistency of each measure (ban on imports of seal products; subsistence of the Inuit community) with the relevant WTO rules? This is an important consideration. Had the AB decided that two measures are in place, it would have found that the EU could keep its ban on sales of seal products in place, while it would have to withdraw the measure in favour of the Inuit community.

We need to nuance the response with respect to the first measure, which could be called the "public morals"-based intervention. It would be judged GATT-consistent, if it were to meet the legal requirements embedded in Art. XX GATT.

There is no need to nuance the response with respect to the second measure; that is, the exception in favour of the Greenlandic Inuit community. This is because this measure is for all practical purposes an industrial policy measure. The term 'public morals' cannot and should not, by any stretch of the imagination, encompass similar measures.

The list of this provision reflects non-trade objectives ranging from public morals to protection of exhaustible natural resources. Commodity agreements are not common, but they are allowed under the very strict conditions embedded in the corresponding provision. Were we to understand 'public morals' as encompassing industrial policy, then the whole GATT edifice would collapse. 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 Art. XX GATT to this effect.

If this is the correct response in case we are dealing with two measures, and we believe it is, is there any reason why the response should be different in case the two measures are merged into one? In other words, should it matter if we are dealing with one measure with an exception, or with two measures? It seems unnecessary. The EU can qualify its measures as it wishes; the end result should be the same. This brings us straight into the discussion of 'measure' in WTO law.

The challenged EU measure, as described in the relevant EU statute and as understood by both the Panel and the AB, was the 'EU Seals Regime', which

19 Perisin (2013) op cit..

consisted of a ban on sales in principle, with an exception made, inter alia, for IC hunts. Through this 'measure' therefore, the EU was effectively addressing a social concern (vicious killing of seals) while addressing the subsistence needs of the Inuit community of Greenland. However, there was a complication, that we underlined supra, and not an easy one to manage. The Inuit community of Greenland was harvesting seals using rather primitive, indeed brutal, methods. By accepting seals harvested by the Inuit community of Greenland while banning similar sales by others (including the Inuit community in Canada), the EU was effectively applying different standards to the different parties. Under the circumstances, the complaint should not come as a surprise. The Panel and the AB, drawing on the negotiating history of the measure, found that the 'main' aim of the EU Seals Regime was the protection of animal welfare, and reviewed its consistency under Art. XX(a) GATT, as we will see infra in this chapter.[20] It was the AB that characterized 'animal welfare' as the 'main' objective of EU law, since no statement to this effect was present in the challenged EU regulation.

The AB discussed IC hunts only in the context of their evaluation of the consistency of the measure with the requirements of the chapeau of Art. XX GATT. Subsistence of the Inuit community was thus not treated as a separate or even ancillary objective of the EU. It was treated as 'something' limiting the scope of the main objective. What would have occurred if the AB had treated the 'measure' as two 'measures'? What if the AB had decided that it was facing an import ban on seal products, and an MFN violation since only some could export seal products? In this case, it would have found that the ban was probably justifiable under Art. XX(a) GATT. It would then probably have also found that, by allowing for imports of seal products produced by the Inuit community, the EU was violating Art. I GATT, since seal products (like products) originating elsewhere could not be imported into the EU market.

This second 'measure' could not have been justified through recourse to Art. XX(a) or any other provision of Art. XX GATT, since 'subsistence of indigenous communities' is not featured anywhere in the body of this provision. Even a wide understanding of the term 'public morals' cannot lead to similar results, otherwise, in the name of 'public morals', the GATT-edifice could be at peril. As a result, the EU would have the de facto choice between rescinding the measure, or keeping it and facing countermeasures by affected traders. It would thus be 'paying' the Inuit community of Greenland through the reduced export income of other segments of the EU society.

The AB found against the 'Inuit exception' under the chapeau.[21] This means that the EU law was judged GATT-consistent, but applied in GATT-inconsistent manner. If the EU opens its doors to Inuit (indigenous communities)-harvested seals around the world, then it will have complied with the AB ruling. This is the solution to the dispute, since the AB held that it was dealing with one measure. Had it found that two measures were present, then the 'Inuit exception' would have never been 'legalized'.

The AB did not explain why the 'measure' as challenged should be considered as 'one measure' either. We thus do not know what kind of nexus is necessary for the two 'measures' in our example to be treated as one. And obviously, it did not matter, in the eyes of the AB at least, that the 'rule' and the 'exception' were pursuing two different objectives (since two different objectives were assigned in the challenged EU statute). One would expect the AB to at least ask the question whether the EU was genuinely protecting its 'public morals' when allowing for seal products from seals killed in the most brutal manner into its market? In the context of Art. XX GATT, the regulatory objective matters. Measures, however defined, that are in violation of a GATT provision, must fit in one of the paragraphs listed in the body of Art. XX GATT. Protection of animal welfare, assuming the animal at hand is not an 'exhaustible natural resource', possibly fits under Art. XX(a), and definitely under Art. XX(b) GATT. Subsistence of the Inuit community does not.

Bartels advances a series of arguments in favour of the approach taken by the AB in this respect. He distinguishes between 'restrictive' and 'discriminatory' effects of 'measures', and sees nothing wrong in applying a different test to either type of effect when it comes to justifying them.[22] In his view, this is almost necessary since we are increasingly facing reg-

20 *EC-Seals,* Reports of the Appellate Body, para. 5.141ff., and especially paras. 5.145–146.

21 Reports of the Appellate Body, *EC-Seal Products*, para 5.339 and para. 6.1.

22 Lorand Bartels, "The Chapeau of Article XX GATT: A New Interpretation", University of Cambridge Faculty of Law Legal Studies Research Paper Series, Paper No. 40/2014 (July 2014), pp. 7, 10-14.

ulation which aims to hit two birds with one stone. This is not an undisputed opinion however. The distinction between 'restriction' and 'discrimination' is artificial, since discrimination by definition amounts to restriction for one and expansion for the other. More importantly, why would the WTO accommodate a domestic political economy? Since time immemorial, regulation is a compromise, at least in democracies. A law imposing compulsory use of catalysts in cars could be the outcome of lobbying by the 'green' lobby, the producers of catalysts, or the workforce. It could be the outcome of a joint initiative by all of the above. Worse, this is what happens. The role of the WTO (and the WTO judge) is to distinguish the good from the bad. The WTO judge cannot inquire into the workings of domestic constitutional procedures to see what is feasible and what is not, and thus be led to accepting something bad, along with a lot of good. It is not his/her role either. Its role is to apply the law. Art. XX GATT contains a list of public order measures. It contains no exception for industrial policy. Accepting similar arguments would lead the WTO to accept the Ontario legislation in Canada-Renewable Energy and open up the door to worldwide industrial policy in the name of also promoting 'green' energy'. The GATT's role was to outlaw the former and allow trading nations the choice to pursue the latter. This looks like a very sensible equilibrium.

2. The Relevance of Regulatory Intent

This case was discussed under Art. XX GATT because the EU had in place an import quota, and accepted the violation of Art. XI GATT. It could have been discussed under Art. III GATT of course, if, instead of an import ban, the EU had in place a sales ban on seal products. Then the Panel (and the AB) would be facing two interesting questions:

(a) Are say wallets made of seal 'like products' to wallets made of another material?

(b) More intriguingly, are wallets made of seal harvested by the Greenlandic Inuit community like products to wallets made of seal harvested by the Canadian Inuit community?

It would have been impossible for the Panel to provide a negative response to question (b) supra. Seals are seals are seals and it would be tenuous to argue that consumers face lower risk probability when purchasing seal products made from seals harvested by the Greenlandic Inuit community only. Point (a) is immaterial, for the EU did not ban all seal products from its market. If it did, the Panel would be facing a very interesting issue, one faced for the first time. In EC-Asbestos, the 'reasonable consumer'-test established by the AB called for some sort of 'internalization' of health risks when deciding on consumption.[23] We have no case law regarding how 'moral' external effects might affect likeness of goods. Would the Panel be prepared to extend the EC-Asbestos case law to 'moral' externalities as well and the manner in which they affect purchasing decision by 'reasonable consumers'? It is difficult to know for certain.

One way or the other, the Panel would find itself squarely within the four corners of Art. XX GATT, no matter what the chosen path had been. Consistent case law has held that, in this context, an inquiry into regulatory intent is necessary. The question is simple: is the EU pursuing a non-commercial value protected under Art. XX GATT? The answer is complicated.

The judge will typically be dealing with a scenario where there is private information (the regulator knows the rationale for the challenged measure). The party possessing private information has a strong incentive to act opportunistically since, if the regulator did intend to violate the GATT when enacting the challenged measure and reveals the truth, it will have to pay the consequences. If, in the same constellation of facts, it pretends that its measure was enacted to protect seals, then it might get away with it. It is important to remember, that there is nothing like a 'complete' disciplining of each and every domestic policy. The icing on the cake is that the WTO judge will have to interpret one incomplete contract, (the GATT), through another (the Vienna Convention on the Law of Treaties, the VCLT).[24]

Under the circumstances, recourse to proxies is inevitable. Recourse to proxies, by definition, does not exclude the potential for error. There are two considerations that one should keep in mind though, besides the intellectual necessity to have recourse to

23 *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body (adopted 12 March 2001) WT/DS135/AB/R, paras 115, 122-123.

24 This is so because the VCLT does not explain what is the relevance of each and every one of the elements included therein.

this technique. Firstly,there is the size of the problem that proxies can take care of. Secondly, there is the fact that the system can probably adjust better to some type II errors (where some protectionist behaviour is tolerated), rather than in a world filled with type I errors (where non-protectionist behaviour is punished). The latter provoke the distrust towards the system that punishes them, and eventually might even provoke its collapse.

The work for the AB would have been facilitated had, for example, the EU been obliged to use the first-best instrument[25] to address the distortions it was trying to address through its regulation. Recourse to the first-best instrument to address the perceived distortion should be taken into account as indicating absence of protectionist intent. In this case, the best way to advance the 'moral' preference would be by imposing an absolute import ban, that is, an embargo. The best way to help the Greenland Inuit community could be through decoupled income payments to avoid over-harvesting of seals.

There is no similar obligation though, since all the GATT requests from trading nations is to use a "necessary" measure. The problem with "necessity" though is that it leaves substantial leeway to the regulating state. It is true that other things which equal a "necessary" measure take us closer to the genuine regulatory intent than an "unnecessary" measure. This is so because in the former case, the regulator will be required to adopt a measure that least impacts on international trade, whereas in the latter no such requirement exists. The choice thus of "necessary" (e.g. not more trade-restrictive than warranted to achieve the objective sought) measures should indicate a, in principle, lack of protection motives, since through similar measures the regulating WTO Member will not be significantly burdening international trade.

Moreover, it seems that the necessity-analysis adopted by the AB in this report 'expanded' the amount of discretion reserved to the regulator. Actually, the AB, without stating so, seems to have deviated from its own case law on this score. This can be be further explained. The AB, in a lengthy passage[26] , first repeated that the Panel had stated that the EU measure 'may have contributed to a certain extent' to the attainment of the objective.[27] By the material contribution standard adopted for bans in Brazil-Retreaded Tyres,[28] the 'EU Seals Regime' would have fallen short of the requirements. It then went on to underscore that Panels have discretion in setting out the approach to determine 'contribution',[29] and that in this case it was only normal that the Panel used 'qualitative' and not 'quantitative' analysis because of lack of evidence to this effect.[30] It finally found nothing wrong with the Panel's conclusion that the measure 'may' have contributed to the objective .[31]

We do not know if this is the last word on this issue. The line adopted in EC-Seal Products is consonant with the overarching point that Panels should not tinker with the level of enforcement sought at all. It is doubtful though, that the standard was applied correctly in this case. Indeed, any violation of MFN can, in principle, contribute to fewer imports (than if MFN had been respected) and thus expose a society to less of a risk. When assessing contribution, some quantification of the impact of the measure is unavoidable, otherwise the overall conclusion risks being speculative. One needs to properly construct the counterfactual, e.g. what would have happened had the challenged measure not been adopted? Alas, this is what Panels routinely avoid doing.

IV. Recap

The discussion above supports the view that the AB did not add a page it can be proud of in its book of jurisprudence through its report on EC-Seal Products. It created confusion, added to existing questions, and most likely resulted in a report which is hardly reconcilable with prior case law on this issue, although it did not point to any distinguishing factor.

When reading the report, one can only wonder what the theory of the case has been for the AB. Does the AB really believe that there is nothing wrong with the EU measure and all that matters is different ap-

25 Aaditya Mattoo, and Petros C. Mavroidis. 1997. "Trade, Environment and the WTO: The Dispute Settlement Practice Relating to Art. XX of the GATT", in Ernst Ulrich Petersmann (ed.), International Trade Law and the GATT/WTO Dispute Settlement System (Kluwer: Amsterdam, 1997) , pp. 325 *et sqq*.

26 *EC_Seals,* Report of the Appellate Body, para. 5.211.

27 Ibid., at para. 5.218.

28 *Brazil-Measures Affecting Imports of Retreaded Tyres*, Appellate Body Report (adopted 3 December 2007) WT/DS332/AB/R, para 227.

29 Reports of the Appellate Body, *EC-Seal Products*, para. 5.221.

30 Ibid., at paras. 5.222-223.

31 Ibid. at para. 5.225.

plication? A quick fix usually could take care of the problem of discriminatory application, since all that is required is that a measure that is otherwise GATT-consistent, like the EU Seals regime here, is applied in a non-discriminatory manner as well. Finding against the EU measure because of its inconsistency with the chapeau thus means that all the EU has to do is correct the application of its legislation. Is this the case here? Is a quick fix possible?

Firstly, it should be stated that it is beyond the scope of this paper to discuss the intellectual legitimacy of the distinction between 'substantive consistency' and 'application' of legislation that the AB has introduced when analyzing the consistency of measures with Art. XX GATT. Recent reports have confused the distinction, but have not eliminated it. With this in mind, were the EU, for example, to allow all Inuit (and other indigenous communities') seal products to access its market, it would be taking away effectively the rationale for the measure since it would be inundated with seal products. Were the EU on the other hand to ban all imports of seal products, then it would be doing away with its (auxiliary) objective to subsidize the Inuit community by carving out a market for its exclusive use. In short, it seems to us at least, quite difficult for the EU to craft a mechanism whereby, without touching upon the 'substance' of its measure, it will end up being in compliance with the AB ruling.

The EU could have, of course, imposed a regulatory condition whereby, unless a particular process of production had been followed, no imports of seal products would be allowed in the EU market in the first place. Then, it would be effectively adopting an origin-neutral manner and once again doing away with its (auxiliary) objective to subsidize the Inuit community by carving out a market for its exclusive use. Or, it could, as argued supra, keep the ban and subsidize the Inuit community, provide them with a decoupled income payment that will lead the community to even less killings of seals (and thus serve the 'main' purpose of the EU measure).

The EU legislator was probably under extreme lobbying pressure when enacting this measure. And it might very well be the case that it was not prepared to pass a less than genuinely effective measure. The outcome nevertheless, leaves a lot to be desired in terms of 'authenticity' and 'efficiency' of the policy pursued. Worse, the AB almost 'bought' into this line of thinking. We say 'almost', since it finally condemned the EU, albeit in a rather 'soft' manner. Indeed, it will be interesting to see how the EU will implement this report. Will it extend market access to all Inuit, all indigenous communities? Or will it simply scrap the IC hunts-exception? No matter what it decides, it will make few(er) friends, either in Brussels or in Geneva, or in both places.