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Marine Mammals and International Trade: Balancing Social Conscience with Trade Obligations – A Summary and Update on the World Trade Organization Seal Products Dispute

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ABA SECTION OF ENVIRONMENT ENERGY AND RESOURCES

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MESSAGE FROM THE CHAIRS

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Welcome to this very special joint newsletter for the SEER Marine Resources and SEER and SIL International Environmental Law Committees! The oceans have always had a very clear connection to international law, dating back to ancient custom. Attempts to conform the international rules that apply to the oceans range from Hugo Grotius's 1609 *Mare Liberum* to the most recent incarnation of the United Nations Convention on the Law of the Sea and the United States's recurring debate over whether to ratify that treaty. Our three committees are therefore very happy to present this joint newsletter recognizing that connection.

The articles in this newsletter address a variety of current topics at the intersection of marine resources and international law. One article, for instance—"Papahânaumokuâkea Inscribed as World Heritage Site"—describes how the World Heritage Convention recently changed the status of an American marine resource, the Papahânaumokuâkea Marine National Monument. This huge marine reserve protects the coral reef ecosystem of the Northwestern Hawaiian Islands, and it is now one of the few World Heritage Sites that was designated for both its ecological and its cultural importance.

Other articles address emerging issues of global importance. In "Before the Sun Sets: Changing Ocean Chemistry, Global Marine Resources, and the Limits of Our Legal Tools to Address Harm," Mark Spalding discusses the increasingly recognized—and increasingly concerning—problem of ocean acidification, which has been described by some as climate change's "evil twin." Like climate change itself, ocean acidification requires a global solution—and it also provides perspectives regarding reliance on geo-engineering as a solution to more conventional climate change problems. Chad McGuire, in turn, takes up the

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Brett Grosko, Editor

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intersection of international trade and marine species in "Marine Mammals and International Trade: Balancing Social Conscience with Trade Obligations—A Summary and Update on the World Trade Organization Seal Products Dispute."

Finally, of course, the oceans and associated coastal areas play important roles in both domestic energy development and world energy and environmental issues, and two articles in this newsletter discuss that intersection. Oil spills have long been a concern in marine environmental protection, and the summer 2010 Gulf oil spill focused world attention on the continuing threat that oil spills pose to the marine environment, prompting reformation of offshore drilling regulation both in the United States and abroad. Moreover, Gulf oil spill issues were the subject of sessions at both the ABA SEER 18th Section Fall Meeting in New Orleans in September 2010 and the ABA SEER 40th Annual Conference on Environmental Law in Salt Lake City in March 2011. "Ban on the Use and Carriage of Heavy Grade Oils in Antarctica" discusses this persistent environmental threat in a different environment, examining the growing threat of an oil spill in Antarctica and its surrounding waters. This threat, the author argues, could undermine the international agreements to keep Antarctica as an international and peaceful ecological preserve. In turn, Roberto Liesegang and Maristela Abla Rossetti discuss Brazil's development of its vast oil fields in "Brazilian Pre-Salt Oil Reserve Exploration: Regulatory and Environmental Aspects."

We hope you enjoy this informative exploration into these new developments and critical matters. Please contact Brett Grosko at bgrosko@verizon.net, if you would like to contribute to future issues of our newsletters.

MARINE MAMMALS AND INTERNATIONAL TRADE: BALANCING SOCIAL CONSCIENCE WITH TRADE OBLIGATIONS—A SUMMARY AND UPDATE ON THE WORLD TRADE ORGANIZATION SEAL PRODUCTS DISPUTE

Chad J. McGuire

Introduction

It should come as no surprise that the use and trade in marine mammals have generated a great deal of international debate. Domestically in the United States, federal laws including the Endangered Species Act (16 U.S.C. § 1531 et seq.) and the Marine Mammal Protection Act (16 U.S.C. §1361 et seq.) have often highlighted the morality questions surrounding our treatment of marine mammals. In addition, the commercial success of programs such as Animal Planet's *Whale Wars*, and documentaries such as *The Cove*, have heightened a global public awareness focusing on the treatment of marine mammals.

One marine mammal species presently at the center of an international dispute is the pinnipeds, or fin-footed mammals, commonly referred to as seals. Currently, the European Union is attempting to expand trade restrictions associated with the importation of seal products that began in the 1980s. The new restrictions are frustrating a few northern hemisphere countries and co-signatories to international trade agreements, specifically Canada and Norway. Seal hunting occurs in these countries, and the products form the basis of certain exports aimed at European markets. Thus, the expansion of the ban by the European Union has the potential to impact international trade between World Trade Organization countries. As such, there are legal issues touched upon by the proposed expansion.

The purpose of this article is to provide a summary of the current debate surrounding the proposed European Union expansion of barriers to trade in seal products. This article will also identify some of the potential legal issues at the heart of the ban. Finally, some policy considerations that may arise depending on how this case ultimately resolves itself will be highlighted. What is reinforced in this case study is the notion that the interaction between domestic policy and international law can often create unique frustrations where seemingly independent goals can lead to legal conflicts. This case study is an example of how these legal conflicts can arise, how such conflicts may be resolved, and the impact of such resolutions for the international community.

I. History of the European Ban on the Importation of Seal Products

Beginning in the 1980s, Western European countries (hereinafter collectively, the EU) have consistently espoused a policy of limiting the importation of seal-related products. In the 1980s, the focus was largely on the seal pup skins and related products. This coincided with a ban by Canada that ended commercial hunting of white coat seal pups. This undoubtedly was due, in part, to the pressure placed on the respective governments through citizen awareness and action at this time.

More recently, the EU has adopted regulations expanding this earlier ban to all types of seal products from commercial hunting. For example, the more recent regulations of 2009 expand the ban from white coat pups to seals of any age hunted for commercial purposes, including products derived from those activities (*see* Regulation (EC) No 1007/2009 of the European Parliament and of the Council, 2009 O.J. (l286) 36, *available at* http://trade.ec.europa.eu/doclib/docs/2009/november/tradoc_145264.pdf). Certain countries that hunt seals and use their products in trade, led by Canada, have challenged the new EU regulations as being prohibitive to trade in violation of World Trade Organization agreements. (A summary of the Canadian complaint, and associated documents, can be found here: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds400_e.htm.)

The Canadian position against the EU's action is centered on free trade principles, where the main argument suggests the EU cannot take unilateral steps to prevent the importation of seal products when doing so impacts free trade agreements to which the EU is a signatory. The EU, in turn, believes its actions do not

directly implicate these free trade agreements, and further, even if the EU seal product ban did implicate certain free trade agreements, such agreements contain important exceptions that apply in this case.

The current status of this case is pending as of January 2011. Canada filed an official request for consultation with the World Trade Organization in November 2009 (joined by a request by Norway in 2010 for similar consultations), and the parties are now in dispute resolution consultations. While the ultimate outcome of this process is unknown, the legal and policy issues raised are worth considering. This article will now highlight a few of the legal issues presented in the case, as well as some of the policy considerations that may arise depending on the ultimate resolution of this case.

II. Legal Issues Presented

The countries of Canada and Norway have identified a number of international legal issues relevant to the proposed EU action. Specifically, Canada claims the proposed EU regulation for implementation of the seal product ban is inconsistent with various articles of the Technical Barriers to Trade (TBT) Agreement; various articles of the General Agreement on Tariffs and Trade 1994 (GATT); and Article 4.2 of the Agriculture Agreement. Norway essentially mirrors the arguments made by Canada in its complaint for consultation with the WTO.

The basis for these legal claims includes the following logic: The EU seal product ban establishes a prohibition on the importation of certain seal products, but makes exceptions that discriminate in favor of EU countries, as well as certain non-EU countries beyond Norway and Canada. In addition, there is a basis for argument that the EU regulation contains a certification process that is discriminatory and trade restrictive in violation of a number of international agreements, which the EU is signatory to. There is also a more technical safeguarding argument that suggests the proposed regulations do not establish adequate procedures to ensure the seal produce ban is capable of being fully enforced after implementation.

The common characteristics of the arguments for and against the legitimacy of the EU seal ban may be divided into the following categories: discrimination claims, necessity defenses, and protectionism. The basis for each categorical legal claim is explained in further detail below.

A. Discrimination Claims

The discrimination claims made by Canada and Norway focus on preference, or where the EU action is resulting in discrimination against or amongst foreign products. One of the main tenets of the World Trade Organization is to ensure fairness and nondiscrimination in global trade. The EU argues its ban is nondiscriminatory because it is neutral, applying to all seal products regardless of origin. Canada and Norway counter the impact of ban is discriminatory because it focuses unnecessarily on seal products. For example, the seal exporting countries argue that if the EU wanted to prevent acts of animal cruelty (obviously a purpose behind the EU ban), then why limit the action to seal products? Why not include such EU member actions as bullfighting, which can be rationally argued to be rife with animal cruelty. This argument is bolstered by the fact that EU member countries do not themselves engage in the exportation of seal products, the target of the importation ban, but EU members do engage in other acts of arguable immorality toward animals such as bullfighting. If the purpose of the regulation is to protect animal welfare, then an honest policy movement by the EU would capture all aspects of animal cruelty. By focusing only on activities existing outside of EU-member countries (or creating exceptions for EU-member activities), the regulation is facially discriminatory.

The EU may rationally counter such arguments by articulating the specific reasons for the ban, its relation to sovereign self-determination, and highlighting where exceptions exist within existing international trade agreements. One such exception is the defense of necessity, which is described next.

B. Necessity

Beyond the discrimination claims, there is also the question of whether the EU seal product ban is necessary to achieve its animal welfare goals, and

tangentially whether this form of ban is the least restrictive means of achieving animal welfare goals. Necessity is often presented as a defense to a claim that a nation is violating international trade obligations. For example, it may be possible for a country to technically violate a trade obligation if the reason for the violation is to protect public morals (GATT Article XX(a)), or the violation is being done to protect life or health (GATT Article XX(b)).

The EU will likely focus much of its rationale for the expanded regulations on necessity grounds. For example, the EU may argue the regulations are simply a natural extension of the original ban on certain seal products from the 1980s. The current expansion now simply codifies preexisting public moral concerns allowed under GATT Article XX(a), and also to protect fundamental public health considerations under GATT XX(b). The Canada/Norway response will likely focus on the discriminatory impact this expansion has, limiting the necessity argument by noting the acceptance by the EU of these seal products since the 1980s even while the EU has limited other seal products since that time, thus casting doubt on the genuineness of the authenticity defense.

C. Protectionism

Protectionism claims can be made under both the GATT and TBT Agreements identified above. However, a major difference between these two international agreements is the GATT allows for exceptions to protectionism when there is a valid basis, such as the *necessity* defenses under Articles XX(a) and XX(b) identified above. The Technical Barriers to Trade Agreement or, TBT , in contrast, has limited exceptions when it comes to protectionism. Thus, under a direct reading, one may find the EU ban violates the TBT because the ban actually engages in protectionism of animals beyond EU borders, also known as extraterritorial protectionism. However, the extent to which the TBT Agreement is applicable in this case is not presently known. This is mainly because the TBT is a newer trade agreement with limited legal precedent from which insights may be drawn.

Defenses to TBT violation claims include possible subject matter jurisdiction. For example, the TBT prohibits *technical* barriers to trade. A prohibition on seal products has little to do with "technical" barriers per se, and thus it may be argued the TBT simply does not apply to the proposed EU regulation. It may also be argued that the EU regulation is no more restrictive than necessary to achieve a fundamental purpose, that purpose being to protect animal welfare. Indeed, the TBT Agreement, while providing no substantive provisions allowing the current EU action, does suggest in its preamble that countries should be free to take necessary measures to ensure the protection of, amongst other national interests, animal health and the environment. This preamble language alone may be argued to justify the actions of the EU, even under TBT scrutiny, so long as the actions themselves are not arbitrary, but rather reasonable in scope and application.

Questions do arise as to the merits of these defenses. For example, the TBT Agreement does not have substantive exceptions for health, safety, or public moral enforcement. In short, the TBT Agreement's mandatory language suggests, if it applies in this case, the EU ban might be seen as restrictive. Meanwhile, the more permissive language included in the TBT preamble suggests there are exceptions for health, safety, and animal welfare that might be implicated to support the EU seal product ban. Ultimately, the resolution will likely depend on which areas of the TBT Agreement are given weight as negotiations unfold during the WTO consultation process.

III. Policy Issues for Consideration

Now that some of the legal issues have been considered, the remainder of this article turns to a few policy questions. Relevant areas of inquiry include how the resolution of this case might impact the perceived validity of international trade agreements. For example, a restrictive interpretation favoring free trade might suggest important moral considerations of nations will be limited in favor of international trade. A more liberal interpretation favoring the EU ban might leave some countries questioning the overall validity and enforcement of international trade agreements. These policy questions are further outlined below.

A. Policy Implications of a Restrictive "Pro-Trade" Interpretation

Any resolution of this current dispute that leads to a restrictive interpretation would likely favor the enforcement of international trade obligations over individual country norms. While this may be a good result for those who favor freedom of international trade, it carries a heavy lesson for countries that value their capacity to make unilateral decisions supporting moral convictions. For the EU, the lesson of a restrictive resolution might be that certain international trade agreements come at the expense of advocating a particular moral position, or at the very least finding alternative ways to express moral convictions that are less directly connected to trade, especially importation bans.

Some might argue a resolution favoring trade over individual nation norms will ultimately benefit goals of globalization, while having a limited impact on national sovereignty. This is especially true where alternative mechanisms to express preferences exist in the marketplace. For example, the United States proposed tuna importation ban in the 1980s, aimed at protecting against dolphin bycatch, was struck down as an unlawful barrier against trade. However consumer preference, where dolphin safe tuna was chosen by the American public, ultimately led to an effective result because pressure was placed on exporters to alter their fishing techniques in order to protect dolphins. Consumer choice, rather than direct government action, limited demand on moral grounds, ultimately achieving the intended goal.

While the results may be different, the alternative of relying on consumer choice to advocate a moral position can play a significant, and maybe more appropriate, role in expressing specific nation preferences. The EU citizenry can always choose to not purchase imported seal products, thus creating an effective ban their importation. With no viable market, the sourcing countries must either find other markets, or alter their exporting strategy. As with the U.S. dolphin-safe tuna saga, the moral debate may likely be better played out in the marketplace rather than through a government-based ban. This is especially true when such a ban has implications that go beyond the moral question, and begin to impact fundamental assumptions about the assurances free trade agreements provide between countries.

B. Policy Implications of a Liberal "Pro National Morals" Interpretation

A more liberal interpretation, one that favors the EU ban in the face of free trade challenges, presents a different set of policy considerations. As suggested above, the more obvious impact of a decision supporting the EU ban is the reduced confidence member countries might have in the validity and enforceability of free trade agreements in general. If a signatory to a free trade agreement can rely on individual moral convictions to prevent the importation of certain products, then one can imagine countries employing "morality" as a means to block the importing of certain "immoral" products in specific situations. Even when such morality claims may be successfully challenged in a dispute resolution forum, like the WTO, a reduced confidence in the enforceability of the trade agreement can result from the possibility that countries may successfully challenge trade obligations on morality grounds. The lack of clarity alone can have consequences for free trade.

Thus, the policy considerations surrounding a liberal interpretation are focused largely on the impacts such an interpretation can have on fostering free trade agreements, as well as supporting incentives for countries to become signatories to such agreements. There is little doubt most market economy countries favor free trade. However, most of these countries also enjoy the fruits of sovereignty, which include fundamental rights like self-determination. The balance to be struck here may be between the relative merits of exceptions to free trade for reasons such as defending morals, as outlined in Article XX(a) of GATT for example, and the need to ensure free trade agreements meet their fundamental tenet, free trade, while also fostering assurance that other countries will not readily be capable of frustrating the fundamental purpose of such agreements. Such a balancing act can be difficult, and the ultimate resolution of this present dispute will provide some interesting insights into how the mandates of free trade agreements are currently viewed in the international community.

Conclusion

As suggested at the beginning of this article, there is an inherent frustration that arises when a country yields some measure of sovereignty for the benefits connected to international free trade agreements. This case study of the expanded EU ban on seal product imports is a prime example of how these frustrations may arise. In this case, the EU desires to enforce basic moral principles it associates with the protection of marine mammals. However, its capacity to do so impacts international trade agreements that help to support open markets from which the EU benefits. The question then becomes one of balancing national sovereignty, and specifically moral expressions within a sovereign, against the impacts such actions have on the fundamental purpose of international agreements, in this case freedom of trade.

What this article points out is the legal basis for the EU's actions is both potentially supported (GATT), while also potentially violating international agreements (TA). While there may be no clear basis to legally call an outcome of this present case, the consultation and negotiations that occur between the countries within the WTO framework will be telling in determining the current state of this balance between sovereign rights and international obligations. From a policy standpoint, the ultimate resolution of this case may impact the future expectations of countries when it comes to free trade agreements. A liberal result might diminish the expectations that free trade agreements can be relied upon to enforce free trade obligations. Meanwhile, a conservative result might work to diminish the capacity of nations to enforce their moral voices. Whatever the result, this case is likely to have impacts that extend well beyond the boundaries of the seals that are at the heart of the present controversy.

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CALL FOR NOMINATIONS

The Section invites nominations for three awards:

The Environment, Energy, and Resources Government Attorney of the Year Award will recognize exceptional achievement by federal, state, tribal, or local government attorneys who have worked or are working in the field of environment, energy, or natural resources and are esteemed by their peers and viewed as having consistently achieved distinction in an exemplary way. The award will be for sustained career achievement, not simply individual projects or recent accomplishments. Nominees are likely to be currently serving, or recently retired, career attorneys for federal, state, tribal, or local governmental entities.

The Law Student Environment, Energy, and Resources Program of the Year Award will recognize the best student-organized educational program or public service project of the year addressing issues in the field of environmental, energy, or natural resources law. Nominees are likely to be law student societies, groups, or committees focused on these three areas of law.

The State or Local Bar Environment, Energy, and Resources Program of the Year Award will recognize the best CLE program or public service project of the year focused on issues in the field of environmental, energy, or natural resources law. Nominees are likely to be state or local bar sections or committees focused on these practice areas.

Nominations for all three awards are due at the ABA Section office by May 16, 2011. The Award will be presented at the ABA Annual Meeting in Toronto in August 2011. Award recipients should plan to be present at the award presentation.

For more information, visit http://www.americanbar.org/groups/environment_energy_resources/projects_awards/awards.html