COMMENTS ON THE COUNCIL'S LEGAL SERVICE'S PAPER ON THE WTO COMPATIBILITY OF MEASURES REGULATING THE SEAL PRODUCTS TRADE

We have been asked to comment on the Council Legal Services (CLS) opinion dated 17 March 2009 on the WTO compatibility of a ban on the European Community trade in seal products.

The CLS is wrong to suggest that a ban might not comply with the WTO agreements.

The CLS opinion discusses technical aspects of WTO law. In any legal challenge, the focus is likely to be on the exception to the free trade principle contained in Article XX(a) of GATT (public morality).

Our clear opinion is that a ban on the trade in seal products would comply with Article XX(a) (and the Article XX chapeau).

ARTICLE XX(A) GATT

There are two relevant principal aspects to Article XX(a): (i) whether a complete or near-complete ban is capable of coming within its scope; and (ii) if so, whether the conditions of the 'chapeau' to Article XX as a whole are met. As part of (i), the 'necessity' test must be met.

Together with the chapeau, 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'*

(i) Can a ban on the Community trade in seal products fall within Article XX(a)? YES.

1. As the CLS points out, a disputes panel has said that 'public morals' refers to *'standards of right and wrong conduct maintained by or on behalf of a community or nation'*. This is a good working definition, derived from *US-Gambling*.

2. It is for the WTO member considering introducing a trade restrictive measure to identify those standards. The fact that other members may not share them is irrelevant. The fact that many countries do not share the moral objection to the consumption of alcohol held by Muslim countries is no reason why the latter cannot ban or restrict its trade. The panel in US–Gambling also said: *'Members should be given some scope to define and apply for themselves the concepts of "public morals" ... in their respective territories, according to their own systems and scales of values'.* [1]

3. There is overwhelming evidence that EC citizens regard animal welfare including methods of killing seals as a matter of morality. The trade in seal products can therefore properly fall

[1] In the context of paragraph (b) of Article XX (protection of human, animal or plant life or health), the Appellate Body said in *EC – Asbestos* (WT/DS135/AB/R (2001)): 'It is undisputed WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation'. By analogy, here it is for the EC to determine the level of moral protection to give its citizens.

within Article XX(a). The fact that there are different views around the world as to how seals should be treated is irrelevant – it is the views of EC citizens which matter.

4. With EC legislation of the sort contemplated, members of the European Parliament and the Council of Ministers are together the determiners of the moral concern. Those institutions should consider and give appropriate weight to all reliable evidence on the issues. They would not be limited to the evidence relied on by the Commission, although they should give appropriate weight to the EFSA and COWI reports (properly analysed).

5. On the evidence, EC citizens and their representatives will (at best) only accept the trade in seal products if they can be satisfied, by robust, independent evidence, that it is capable *in practice* of being *consistently humane*, involving no suffering (or, at worst, only transient and negligible suffering). This, importantly, is a different test to that posited by the Commission both when instructing EFSA and in its proposal, namely whether seal hunting can be conducted without causing '*avoidable* pain, distress and any other form of suffering'. Suffering which is avoidable could still be very high, such that moral sensibility would not be satisfied. CLS does not properly identify the moral concern in its paper.

6. The factual issue for the Parliament and the Council is whether commercial seal hunts are in practice capable of being consistently humane (see below).

7. Under Article XX(a), a measure must also be '*necessary*' to meet the policy objective. An important part of the necessity question is whether there is a reasonably available alternative measure which is less trade-restrictive than the contemplated measure but which would meet the identified policy objective. There are two main alternatives to an outright ban:

    - **A derogation such as that in Article 4 of the Commission proposal (products of humanely killed seals):** despite the Commission having incorrectly identified the moral concern, an analysis of the findings by EFSA and COWI and the evidence on which they are based amply justify a complete ban on the EU trade in seal products. Commercial seal hunts, particularly in the environments in which they take place, cannot be consistently humane. A ban with the proposed derogation would therefore not meet the identified policy objective.

    - **A labelling scheme:** labeling gives consumers information with which to make purchasing decisions. There are occasions where giving such information meets the moral concern. There are other occasions when moral sensibility demands that trade in an inhumanely produced product is banned – in other words, that public morality is offended by the very presence on the market of something which is inhumanely produced and is not assuaged by the fact that it is identified as such.

      The EU is entitled, on the evidence, to conclude that commercial seal hunting cannot be consistently humane in any of the countries operating commercial seal hunts. It follows that a labelling scheme would not meet the identified policy objective either.

ii. Would a ban satisfy the Article XX chapeau? YES.

The CLS states that "it would be very difficult (and even excluded for a ban without derogations) to prove compliance with the chapeau of Article XX as concerns the flexibility test and in the

absence of any effort to reach a multilateral agreement on the issue." This conclusion is factually incorrect and legally flawed insofar as it relates to a complete ban.[2]

The correct analysis is as follows:

The objective of the WTO agreements is to avoid protectionism and discrimination between different products depending on their origin. The chapeau is particularly focused on these objectives. Its purpose is to prevent '*abuse of the exceptions of [Article XX]*.'[3]

1. With this purpose in mind, the WTO will consider various factors in determining whether a measure is consistent with the Article XX chapeau, including whether the measure is inflexible, whether multilateral negotiations have been or are being pursued, and whether the measure is actually a disguise of protectionist intent/application. Depending on the circumstances of each dispute, different factors may be considered more prominently than others (flexibility may not be a factor at all in particular circumstances).

2. CLS cites *US-Shrimp* for the proposition that the Article XX chapeau requires the EU ban on seal products to be applied in a manner that "permits sufficient flexibility to take into account the specific conditions which exist in different exporting nations." In the *US-Shrimp* case, "flexibility" meant allowing exports to the US that were produced using a "comparable" method to the US (but not an "identical" method). While such an analysis could apply to the Commission's proposed certification scheme for seal products, it would not apply in the case of a total ban since this would not require exporting countries to adopt an identical approach as that adopted by the EU – it simply prohibits them from exporting seal products to the EC. CLS then further contends that a total ban will always fail the flexibility test. If this were the case, the EC would not have been able to win the *EC-Asbestos* dispute. The EC is entitled to legislate for a complete ban if a reasonable view of the evidence is that commercial seal hunts cannot be consistently humane, no matter which country they take place in.

3. CLS next contends that a seal products ban also fails the Article XX chapeau test by virtue of the fact that the EU has not pursued a multilateral agreement on the animal welfare aspects of seal hunting. In fact, this has been a topic of discussion for some time within the EU and with major exporting nations of seal products such as Canada.[4] For example, in October 2004, the Council of Europe held a hearing on seal hunting. Canada was represented by 4 parliamentarians from the Canada-Europe Parliamentary Association and two experts put forward by Canada and a pro-hunt Norwegian expert were heard. More recently, in the 2008 Canada-EU summit, the EU and Canada agreed to continue dialogue on the EU proposal to ban seal products.[5] The EU has in good faith

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2 We do not comment on CLSs opinions about whether a conditional ban could satisfy the chapeau as it is our strong position that a conditional ban is wholly inadequate to address the public concern about seal hunting and the trade in seal products.

3 *US-Gasoline*, Appellate Body Report, p. 21.

4 For example, nearly twenty-five years ago the EU adopted the Seal Pups Directive to prohibit the import of seal pup products due to "widespread concerns about the annual killing of certain seal pups." *See* http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/index_en.htm.

5 *See 2008 Canada-EU Summit Statement, available at* http://www.international.gc.ca/missions/eu-ue/summits_sommets/summit_quebec-2008_joint-declaration-eng.asp

tried to work towards a transparent multilateral solution that would allay its citizens, concerns without resort to a ban - all that is required under the chapeau.

4. In addition, a complete ban would satisfy the Article XX chapeau because:

   - First, if applied equally to all seal products from all sources, including EU Members, a total ban does not discriminate against one set of products to the detriment of others.

   - Second, a total ban on seal products is not a disguised restriction on trade since the ban would not favour EC products over products from other countries. There is nothing to suggest that the EC is hiding a protectionist motive.

Thus, contrary to the CLS's paper, these factors demonstrate that a total ban on products from commercial seal hunts would satisfy the requirements of the Article XX chapeau.

COMPATIBILITY WITH ARTICLES I AND III OF GATT 1994

The CLS paper argues that exemptions for products from Inuit subsistence hunts and products from small-scale hunts conducted for management of fish stocks would violate Articles I and III:4 of the GATT 1994.

Contrary to the conclusion of the CLS, a limited exemption for Inuit or other aboriginal products solely for subsistence purposes is not inconsistent with GATT Articles I or III:4. The Inuit exchange of seals or their parts for personal or family consumption does not raise issues of discrimination under GATT Articles I and III:4 because the Inuit products will not be competing with products from commercial seal hunts.

We do agree with the CLS, however, that an exemption for products from small-scale hunts does raise concerns under GATT Articles I and III:4 because these products would be treated more favourably than products from large-scale commercial hunts by virtue of being permitted to be traded in the EU market.

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