Finding Refuge in the Exceptional: Using Public Morals as a Basis for Managing Natural Resources in the Arctic

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Presentation Outline

• Introduction
• International trade law framework
• Environmental exceptions under GATT
• Public morals & the *EC – Seal Products* case
• Concluding remarks
Introduction

- International trade law
- Domestic and regional environmental regulation
- Competing views
  - free trade & sovereignty over natural resources = environmental degradation and unsustainable consumption of natural resources
  - environmental regulation = disguised protectionism & circumvention of international trade obligations
International Trade Law Framework

- **GATT**
  - “substantial reduction of tariffs and other trade barriers and the elimination of preferences, on a reciprocal and mutually advantageous basis.”
  - Non-discrimination principles (MFN and NT)
  - Article XX exemptions
  - Article XX “chapeau” – measure must not be applied “in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail” and must not be a “disguised restriction on trade.”
Environmental Exceptions Under GATT

• Article XX(b)
  – measures that are “necessary to protect human, animal, or plant life or health”

• Article XX(g)
  – measures that “relat[e] to the conservation of exhaustible natural resources’ as long as such measures ‘are made in conjunction with restrictions on domestic production or consumption”

• Article XX(a)
  – “…nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures…necessary to protect public morals”
Public Morals and the EC – Seal Products Case

- Canada and Norway challenge EU ban on seal products pursuant to GATT and related agreements
- EU ban included exceptions for
  - indigenous community hunts
  - sustainable management of marine resources
  - import by travellers
  - import for processing and re-export
- Appellant Body found EU ban provisionally justified under GATT XX(a) (public morals), but required EU ban modified to fully comply with GATT XX (chapeau)
  - Primary objective construed narrowly as “protecting animal welfare”
  - “Potential” to contribute to seal welfare
Concluding Remarks

- How could Article XX(a) apply to fisheries?
- Objective(s) of regulation must be based on public morals
  - redefine management of fisheries as a public moral concern
  - evidence of domestic public morals
  - reflected in legislative drafting & debate
- Impugned measure must at least have the “potential” to satisfy the objectives
- Regulating state’s public morals trump?
- Consistent with Article XX(b) & (g) exceptions