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WTO Appellate Body deems EU seal ban “justified,” implementation flawed

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The WTO Appellate Body has found that the EU’s ban on imported seal products is justified under the right to protect public morals, specifically on the grounds of protecting animal welfare. However, the global trade arbiter said last week, the ban is discriminatory in the way it is applied, and should be modified in order to fully comply with global trade rules.

The dispute (DS400, DS401) is one of the most polarising and complex in the WTO’s recent history, and marks the first time that the Appellate Body has accepted “animal welfare” as moral grounds for justifying a country’s violation of the global trade body’s “most favoured nation” principle.

The measure at the heart of the case is a 2009 European Commission (EC) regulation and related measures, known together as the EU Seal Regime, which bans the sale of seal products in all EU member states, subject to certain exceptions. The ban specifically targets commercial sealing operations, such as those in Canada and Norway – the two complainants in the WTO case.

These commercial sealing operations, the regulation’s proponents have argued, are "inherently cruel" and "inhumane."

However, the regulation does allow the sale of seal products in the EU market in three exceptional circumstances: products derived from hunts carried out by indigenous peoples (IC), products from hunts that were conducted for the sustainable management of marine resources (MRM), and products brought in by tourists.

Last November, a dispute panel had found that while the ban does restrict international trade, the measures does fall within a carve-out for acceptable restrictions under the WTO’s General Agreement on Tariffs and Trade (GATT 1994). The panel therefore agreed with the EU that the

prohibition was necessary for the protection of public morals.

Canada and Norway subsequently filed appeals that each targeted different aspects of the original panel’s ruling. The Appellate Body therefore provided separate portions in its report to address the two sides’ respective claims. (See Bridges Weekly, 30 January 2014)

The European Union also filed its own cross-appeal, questioning certain legal issues and interpretation by the original panel.

Technical regulation

In its report last Thursday, the Appellate Body found that the European Union’s seal regime is not a technical regulation in the context of the WTO Agreement on Technical Barriers to Trade (TBT), and therefore does not fall within its ambit, thus overturning one of the original panel’s key findings.

Specifically, WTO judges found that the measure taken as a whole does not lay down “product characteristics,” which is an essential element of a technical regulation under Annex 1 of the TBT Agreement. As a result, the Appellate Body deemed that the any findings by the panel that were based on this characterisation of the measure were essentially moot and without legal effect.

Regarding whether the EU measure lays down “related processes and productions methods” in the context of Annex 1.1, the Appellate Body declined to complete the legal analysis in this area, explaining that the panel and the participants had not sufficiently explored this aspect.

As a result, the Appellate Body was unable to rule on this issue, while acknowledging that the relationship between PPMs and the scope of TBT Agreement is of systemic importance.

GATT 1994 versus TBT Agreement

The Appellate Body sustained the panel’s finding that the legal standard for the non-discrimination obligations under Article 2.1 of the TBT Agreement does not apply equally to claims under Article I:1 and III:4 of the GATT 1994.

Unlike Article 2.1 of the TBT Agreement, the Appellate Body said that neither Article I:1 nor Article III:4 of GATT 1994 requires an assessment of whether a measure’s detrimental impact on competitive opportunities for like imports stems exclusively from a legitimate regulatory distinction.

Since the EU’s appeal on the panel’s finding of inconsistency under Article I:1 of the GATT 1994 was based entirely on the alleged errors in the panel’s interpretation of that provision, the Appellate Body therefore upheld the panel's conclusion that the EU Seal Regime is inconsistent with Article I:1.

This, they explained, was because the seal ban does not “immediately and unconditionally” extend to Canadian and Norwegian seal products the same market access advantage as that it accords to seal products from Greenland.

Public morals as a justification

Rejecting the claims by Canada and Norway relating to GATT Article XX(a), the Appellate Body ruled that the EU Seal Regime is indeed necessary to protect public morals.

In reaching its conclusion, the Appellate Body conducted what is known as a necessity analysis, "weighing and balancing" a series of factors. These included the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measures, as well as a comparison between the challenged measure and possible alternatives.

The Appellate Body rejected Norway's argument that the panel should have considered the protection of IC and MRM as separate, independent objectives of the EU Seal Regime, thus sustaining the panel's finding that public concerns regarding seal welfare were the principal motivation behind the EU measure.

The Appellate Body considered that contribution of the EU seal ban to its objective is only one of several components of necessity and should be considered together with other factors, such as potential alternative measures, under Article XX.

Furthermore, the Appellate Body rejected the contention of Canada and Norway that the panel was required to use a standard of "materiality" as a generally applicable pre-determined threshold in its contribution analysis, since the level of contribution alone cannot determine whether a measure is necessary or not. The Appellate Body supported the panel's ultimate conclusion that the EU Seal Regime is both capable of making and does indeed make some contribution to its objective.

The Appellate Body also agreed with the panel that the alternative measures proposed by the complainants are not reasonably available to the EU.

Article XX chapeau test

Despite finding that the seal ban was justified in its objective of protecting public morals – as outlined in GATT Article XX(a) – the Appellate Body did say that the EU has not demonstrated that the measure met the overall "chapeau" requirements of that same article.

In other words, even though the ban met the "public morals" justification, it was applied in a way that constituted a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, particularly with respect to the IC exception – thus running contrary to WTO rules.

The EU, they explained, failed to show how the different treatment of seal products derived from IC hunts – versus those derived from "commercial" hunts – can be reconciled with the 28-nation bloc's objective of addressing public moral concerns regarding seal welfare.

The same animal welfare conditions prevail in all countries where seals are hunted, the Appellate Body noted, and therefore "the same animal welfare concerns as those arising from seal hunting in general also exist in IC hunts."

WTO judges also found the "subsistence" and "partial use" criteria of the IC exception to be ambiguous, and may result in seal products derived from what should, in fact, be properly characterised as "commercial" hunts gaining entry into the EU market.

Moreover, the Appellate Body was not persuaded that the European Union has made "comparable efforts" to facilitate the access of the Canadian Inuit to the IC exception as it did with respect to the Greenlandic Inuit.

Both sides claim victory

In their public statements, the parties involved in the case each highlighted the aspects of the Appellate Body ruling that were in their favour, further underscoring the complex nature of the case.

“The ban on seal products adopted in the European Union was a political decision that has no basis in fact or science,” Canadian Trade Minister Ed Fast, Fisheries and Oceans Minister Gail Shea, and Environment Minister Leona Aglukkaq said in a joint statement.

“We are pleased that today’s decision by the WTO Appellate Body confirms what we have said all along, namely that the EU’s seal regime is arbitrarily and unjustifiable applied and is therefore inconsistent with the EU’s obligations,” the Canadian officials added.

Norwegian officials similarly welcomed the ruling, with Fisheries Minister Elisabeth Aspaker saying that it established “that the EU cannot impose arbitrary measures in this way.”

The EU, for its part, welcomed the Appellate Body’s finding that Brussels was within its rights to ban seal products on moral grounds, while acknowledging that the WTO did criticise the design and implementation of the IC exception.

“The European Commission will review the findings on these exceptions to the ban and consider options for implementation,” the EU said. “Overall, the Commission welcomes today’s ruling as it upholds the ban imposed in reaction to genuine concerns of EU citizens.”

Sealing, Canadian Inuit communities speak out

The ruling received a colder welcome from Canadian Inuit, and trade watchdog groups alike, while being praised by some sealing groups.

Canadian Inuits have long criticised the IC exception of the EU seal ban, claiming that it was designed without the input of indigenous peoples. They have also openly lambasted the public morals argument that the EU used as justification for the ban, calling it “abhorrent.”

“Inuit live according to the principles of fairness and compassion and we seek nothing more than to feed our families and make an honest living in the modern economy,” said Canadian National Inuit Leader Terry Audla last week. “It is morally reprehensible for anyone to impede those goals – which are the basic rights of any citizen of the world.”

The Inuit leader further said that the EU should have “substantially and meaningfully consulted with all circumpolar Inuit” ahead of implementing the seal regime, noting that this would likely have led to Inuits “unanimously” advising the European institutions not to move forward with the measure.

“While Greenland is attempting to implement the exemption, I know that they are in principle against the ban, and are fighting an uphill battle against the negative market impacts the ban has brought to the EU,” he added.

The Canadian-based Seals & Sealing Network, which is said to comprise industry, government, Inuit, and conservationist representatives for the domestic sealing community, has meanwhile said that it is “encouraged” with the result of the Appellate Body ruling.

"Today's ruling by the WTO Appellate Body has thankfully confirmed that the EU ban is discriminatory and unfair," said Dion Dakins, Chair of the Seals & Sealing Network. "The ruling sends a clear message to the EU to sit down and negotiate with Canada and Norway on a more reasonable approach."

Public Citizen's Global Trade Watch, a US-based advocacy group, has also been among those criticising the ruling, on the grounds that the "litany of conditions" needed for the EU ban to qualify as a General Exception under Article XX were too stringent.

Next steps

Under WTO dispute settlement practices, if immediate compliance is impracticable, the parties can seek a mutual agreement on the reasonable period of time within 45 days after the adoption of the Appellate Body report by the WTO's Dispute Settlement Body.

Otherwise, the parties can resort to arbitration under Article 21.3 of the Dispute Settlement Understanding if no mutual agreement is reached.

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