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Sealing: It's a Moral Not a Technical Issue and Animals Outweigh Indigenous Communities

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Decision commented on: World Trade Organization, Appellate Body Report - European Communities - Measures Prohibiting the Importation and Marketing of Seal Products (22 May 2014)

Just a few short weeks ago the World Trade Organization (WTO) issued its final word on the legality of a regime that bans seal products from the European Union (EU) market. In a decision that has Canadian and EU officials claiming victory, the WTO Appellate Body (AB) determined that the EU's ban on seal products is justified under the right to protect public morals, specifically on the grounds of protecting animal welfare. The AB also found, however, that the ban is discriminatory in the way it is applied, and should be modified in order to fully comply with international trade obligations.

Briefly summarized, the measure at issue in this case bans the sale of seal products in all EU member states, subject to certain implicit and explicit exceptions. Explicitly, the measure permits the sale of seal products in the EU market if those products are: (i) derived from hunts carried out by indigenous peoples (IC), (ii) derived from hunts that were conducted for the sustainable management of marine resources (MRM), (iii) or personally imported into the EU by travellers. Implicitly, the measure also permits the import of seal products into the EU for process and re-export, a convenient loophole that protects commercial interests within the EU.

The AB's decision comes some six months after a Panel ruled that the EU's Seal Regime could be justified on public morals grounds despite the fact that certain aspects of the Regime discriminated against Canadian Inuit interests. Shortly after that decision all parties to the dispute issued notices of appeal, resulting in a wholesale challenge to many aspects of the Panel's ruling. While the AB upholds some of the Panel's findings, it does depart from the Panel's reasoning in significant ways. Most importantly, the AB takes steps to clarify and distinguish between the analysis of measures challenged under the General Agreement on Tariffs and Trade (GATT) from the analysis of measures challenged under the Agreement on Technical Barriers to Trade (TBT).

Applicability of TBT Agreement

On appeal the EU challenged the Panel's conclusion that the TBT Agreement was applicable to the dispute. Specifically, the EU argued that its Seal Regime did not meet the definition of a technical regulation as contemplated in the TBT Agreement. The first paragraph of Annex 1.1 defines the term "technical regulation" as follows:

> Document which *lays down product characteristics* or their related processes and production methods, including the applicable administrative provisions, with which

> compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product process or production method.

In its challenge the EU claimed that its Seal Regime (more specifically the exceptions within the Regime) did not lay down product characteristics. Urging the AB to consider the measure in its entirety, the EU argued the IC and MRM exceptions impose requirements relating to the identity of the hunter or the purpose of the seal hunt, *not* characteristics of the products that are later created as a result of seal harvesting (see paras 5.2-5.4). In siding with the EU, the AB expressed concern that the Panel did not conduct "a holistic assessment of the weight and relevance of each of the relevant components of the EU Seal Regime…" (at para 5.28). The AB acknowledged that the ban on products containing seal could be conceptualized as imposing characteristics on products by providing that they may not contain seal (para 5.39). In considering the permissive aspects of the EU Seal Regime, however, the Panel found no textual or jurisprudential basis to suggest that the identity of the hunter, the type of hunt or the purpose of the hunt could be viewed as product characteristics (para 5.45).

Overturning one of the fundamental findings of the Panel, the AB held that the EU Seal Regime is not a technical regulation as defined in Annex 1.1 of the TBT Agreement. As a result, the AB declared the bulk of the Panel's decision "moot and of no legal effect" (see paras 5.58-5.59). Thus the AB's decision on the validity of the EU's dealing regime turns entirely upon GATT rather than the TBT.

Non-Discrimination Provisions under GATT distinguished from Non-Discrimination under TBT Agreement

Having so found, the AB proceeded to distinguish between non-discrimination analyses under Articles I (Most Favoured Nation (MFN) obligation) and III:4 (National Treatment (NT) obligation) of GATT and the non-discrimination obligation in Article 2.1 of the TBT Agreement (paras 5.71-5.130). On appeal the EU tried to conflate these analyses. For example, in its analysis of non-discrimination under Article 2.1 of the TBT Agreement, the EU contended that determinations of discrimination under GATT should include a consideration of whether a measure's detrimental impact on imports stems exclusively from a legitimate regulatory distinction (para 5.72). The AB rejected this assertion. Specifically, it indicated that "…the principle that the provisions of the WTO covered agreements should be read in a coherent and consistent manner [does not mean] that the legal standards for similar obligations – such as Articles I:1 and III:4 of the GATT 1994 on the one hand, and Article 2.1 of the TBT Agreement, on the other hand – must be given identical meanings." (para 5.123). In coming to this conclusion the AB upheld the Panel's reasoning on the distinct nature of non-discrimination analyses under GATT and the TBT and easily supported a violation of GATT Article I:1 on grounds that the EU Seal Regime detrimentally affects the conditions of competition for Canadian and Norwegian seal products when compared to Greenlandic seal products (paras 5.90, 5.95).

Arbitrary or Unjustifiable Discrimination under GATT Article XX Chapeau distinguished from Non-Discrimination under TBT Agreement

While the Panel analytically distinguished between GATT and TBT non-discrimination provisions, Canada and Norway challenged the Panel's reasoning under the chapeau of GATT Article XX. In particular, they contended that the Panel wrongly applied the same test to determine the existence of arbitrary or unjustifiable discrimination under the chapeau of GATT Article XX as it applied to determine whether the measure was inconsistent with Article 2.1 of the TBT Agreement (para 5.308). The AB agreed with Canada and Norway on this point. Consistent with its previous findings that the TBT Agreement and GATT are analytically distinct agreements, the AB contrasted the legal standards applicable under the chapeau and Article 2.1 of the TBT Agreement, indicating that "under Article 2.1…a panel has to examine whether the detrimental impact that a measure has on imported products stems

exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products" (para 5.311). This, along with other differences between the two provisions, justified a separate analysis of the consistency of the EU Seal Regime with the requirements of the chapeau (paras 5.311-5.313). Under this examination the EU failed to justify its Seal Regime. Most notably, the AB had trouble with the distinction between IC and commercial seal hunts in the EU Seal Regime. Noting "the same animal welfare concerns as those arising from seal hunting in general also exist in IC hunts," the AB struggled to see how the measure operated to address public moral concerns regarding seal welfare (para 5.320, 5.338). Additionally, the AB was not persuaded that the EU had made "comparable efforts" to facilitate the access of the Canadian Inuit to the IC exception as it did with respect the Greenlandic Inuit (para 5.337). As a result, the AB requested the EU to bring its measure into conformity with its international trade obligations (para 6.2).

For many, the above findings come as a welcome development insofar as it places some parameters around the definition of a technical regulation and further clarifies the relationship between the TBT Agreement and GATT. In result, the ruling also seems more palatable than the Panel's decision because it acknowledges the EU's failure to meaningfully facilitate access to the IC exception by the Canadian Inuit. This acknowledgment, along with the message that the EU must make *bona fide* attempts to accommodate seal products derived from Canada's Inuit population, undoubtedly explain the Canadian government's positive response to the decision. However, Canada's Inuit community remains less than enthused about the AB's decision. On the day the decision was released National Inuit Leader, Terry Audla, blasted the decision as "morally reprehensible." Such reactions are almost certainly a response to the AB's decision about the moral justifications for the EU's ban on seal products. As noted at the start of this post the AB did find that the EU's ban on seal products is justifiable under the public morals exception articulated in GATT Article XX(a). The AB reached this conclusion notwithstanding the discriminatory nature of the EU Seal Regime and with little recognition that the prohibition will effectively destroy a cultural and economic practice of certain indigenous communities.

In a previous post we criticized aspects of the Panel's analysis under the public morals exception. Specifically, we questioned the Panel's narrow characterization of the objectives of the EU Seal Regime and whether the evidence in the case supported a finding that the Regime does in fact contribute to seal welfare. Both issues featured prominently in this appeal. Norway argued that the panel should have considered the protection of IC and MRM as separate, independent objectives of the EU Seal Regime (paras 5.141-5.167). Additionally, Norway (along with Canada) argued that the EU Seal Regime should materially contribute to protecting seal welfare, a fact not established by the evidence in the case (paras 5.204-5.259). In a disappointing ruling, the AB rejected these arguments. By narrowly construing the primary objective of the EU Seal Regime as "protecting animal welfare" and choosing to emphasize the ban's *potential* to contribute to seal welfare, the AB's decision does little to alleviate the troublesome aspects of the Panel's decision. Despite evidence of discrimination against indigenous communities and spurious evidence that the EU Seal Regime actually protects seals from inhumane treatment, it is ironic that animal welfare concerns appear to outweigh concerns for the welfare and human rights of indigenous communities to pursue their own means of subsistence (Article 1(2) of the International Covenant on Civil and Political Rights).