

WTO Extends 'Public Morals' Exception To Animal Welfare



Law360, New York (June 11, 2014, 10:49 AM ET) -- On May 22, the World Trade Organization's Appellate Body issued its ruling in the dispute over EU's restrictions on the importation and marketing of seals and seal products. In its "mixed ruling," the Appellate Body struck down the EU's regulatory scheme for seal products as arbitrary and unjustifiably discriminatory, while upholding the principle that the prevention of animal cruelty falls under the General Agreement on Tariffs and Trade 1994 exception for protecting "public morals."

The original complaint by Canada and Norway challenged the EU's ban of certain seal products from the EU market under various provisions of the Agreement on Technical Barriers to Trade and the GATT 1994. Under the EU seal regime, seal products cannot enter the EU market unless they are (1) obtained through the traditional hunting practices of Inuit or other indigenous communities (the IC exception), (2) obtained from an official marine resource management hunt and sold on a nonprofit basis (the MRM exception), or (3) brought into the EU by travelers in limited circumstances (the travelers exception).

In addressing the claims under the TBT Agreement, the original panel determined that the measure at issue was a "technical regulation" within the scope of the TBT Agreement. It used a "three-tier test" to arrive at its conclusion. First, it found that the EU seal regime applies to an "identifiable group of products;" i.e., seal products. Second, it determined that the EU seal regime "lays down characteristics for all products that might contain seal." Third, the panel found that the measure imposes "mandatory compliance." The panel then made several findings pursuant to Articles 2.1 and 2.2 of the TBT Agreement.

On appeal, the Appellate Body reversed the original panel's findings that the EU seal regime violated certain aspects of the TBT Agreement on the grounds that it is not a technical measure within the scope of that agreement. It reasoned that the seal regime does not provide "product characteristics," but rather describes the circumstances of the seal hunters involved in the production process. Accordingly, the Appellate Body declared all subsequent findings of the panel pursuant to the TBT Agreement to be moot and of no legal effect. It then proceeded to address the parties' claims under the GATT 1994.

The Appellate Body examined whether the panel erred in finding the EU seal ban inconsistent with Articles I:1 and III:4 of the GATT 1994. The panel found that the EU seal regime, although origin-neutral on its face, is de facto inconsistent with Articles I:1 and III:4 because virtually all Greenlandic seal products would qualify for the IC exception, while the vast majority of seal products from Canada and Norway would not. Thus, the panel found that the measure detrimentally impacted the competitive conditions for seal products from Canada and Norway vis-a-vis seal products from Greenland.

In upholding the panel's decision, the Appellate Body agreed that the legal standard for the nondiscrimination obligation of Articles I:1 and III:4 of the GATT 1994 do not require any findings as to the underlying regulatory distinction, unlike the analysis under Article 2.1 of the TBT Agreement.

Having determined that the EU seal ban violated the nondiscrimination obligations of Article I:1 and III:4 of the GATT 1994, the Appellate Body next analyzed whether this regime is nonetheless permissible under an Article XX exception. It determined that the carveouts included in the EU seal regime primarily benefiting indigenous seal hunters from Greenland created an arbitrary and unjustifiable barrier to trade outside the scope of any exception contained in Article XX.

Specifically, the Appellate Body noted that the EU failed to properly assess the risk to seals that are subject to indigenous hunts compared to the risk to seals in commercial hunts in creating its regulatory distinction. It also noted that the EU provided more guidance to indigenous populations in Greenland about qualifying for the exception than to indigenous populations in other countries. Thus, the Appellate Body affirmed the WTO inconsistency of the EU seal regime.

However, in reaching its conclusion, the Appellate Body found that the EU seal regime could (in principle) be exempted under GATT Article XX(a), which provides that WTO members may take measures that restrict trade if they are necessary to protect public morals. This was a departure from previous WTO cases in which animal welfare was analyzed under Article XX(b) (protection of animal life or health) or Article XX(g) (conservation of exhaustible natural resources). By affirming that measures seeking to limit cruelty to animals fall within the purview of protecting public morals, the Appellate Body has expanded the scope of that exception. The practical effect will be more frequent use of the Article XX(a) exception in cases involving animal welfare, which (unlike Articles XX(b) and (g)) does not require a particular showing of risk to public morals.

To come into compliance with the Appellate Body's ruling, the EU will be required to alter its seal regime to remedy the discriminatory carveouts. While one such solution would be to lift the seal product ban entirely, it is highly unlikely that the EU will do so. The more probable outcome is that the EU will conduct a risk assessment for indigenous versus commercial seal hunting and/or further restrict the exceptions to the seal ban.

The true significance of this case, however, will be found in subsequent WTO jurisprudence involving policy issues treated as matters of public morality under GATT Article XX(a). It remains to be seen how far the Appellate Body will extend this exception to the obligation of nondiscrimination in trade measures.

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