

The Untouchable Nature of the ‘EU Seal Regime’ - Is the European Union Liable for the Damages Suffered by the Canadian Inuit due to the Violation of WTO Law in *EC – Seal Products*?

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Abstract:

In this article, the author assesses whether Canadian Inuit sealers, which have suffered economic damage in the wake of the introduction of the EU ban on seal products, can bring an action for damages against the EU before the European Court of Justice. The author reviews why the EU ban on seal hunting violates WTO law and discusses if, and why, Canadian Inuit sealers can rely on a violation of the WTO Agreements as a legal basis in a potential claim for damages under EU law. Moreover, the author criticizes the current state of EU law, which does not grant reparation of the economic damage suffered by indigenous communities when carrying out their traditional seal hunts that are protected under UN human rights law.

Keywords: European Union, EU Law, WTO Law, Seal Products, Rights of Indigenous Peoples, the Arctic, Law of Damages.

Introduction

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In 2009, the EU legislators put in place what is commonly known as the ‘EU Seal Regime.’ The regime consists of a package of secondary legislation, which seeks to address the ever-increasing public demand for improved animal welfare conditions.¹ In order to achieve this goal, the EU introduced a general ban on the import and selling of seal products on the internal market. The ban came into force in 2010. However, the EU did not wish to ban the marketing of *all* seal products. The ban targets primarily ‘commercial’ seal products, and contains an exception for the continued marketing of products derived from seal hunts traditionally conducted by Inuit or other indigenous communities that contribute to their subsistence. The exception is henceforth referred to as the ‘IC exception.’ One of the most problematic aspects of the Seal Regime is the exclusionary effect the ban has had on Canadian Inuit sealers. Since the ban came into force, and up until 2015, the Canadian Inuit have not been able to benefit from the exception.

Shortly after the introduction of the EU Seal Regime in 2009, Canada filed a complaint against the EU under the WTO dispute settlement system.² Canada claimed, inter alia, that the Regime violated the obligations of the EU under the WTO agreements. The dispute was finally settled in 2014, when the WTO Appellate Body in *EC Seal Products* at long last concluded that EU Seal Regime was inconsistent with WTO law.

¹ The ‘EU Seal Regime’ consists of Regulation 1007/2009/EC of the European Parliament and of the Council of 16 September 2009 on trade in seal products [2009] OJ L286/36. This Regulation has been amended by Regulation 2015/1775/EU of the European Parliament and of the Council of 6 October 2015 amending Regulation 1007/2009/EC on trade in seal products and repealing Commission Regulation 737/2010/EU [2015] OJ L262/1. The key provisions concerning the implementation of the ban are now found in Commission Implementing Regulation 2015/1850/EU of 13 October 2015 laying down detailed rules for the implementation of Regulation 1007/2009/EC of the European Parliament and of the Council on trade in seal products [2015] OJ L271/1.

² *EC Seal Products*, European Communities - Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R (May 22, 2014). The dispute involving Norway in the associated dispute European - Communities Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS401/AB/R (May 22, 2014), will not be dealt with here.

In *EC Seal Products*, the WTO Appellate Body found that the EU Seal Regime violated the ‘most-favoured-nation’ principle in Article I:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994). The reason for the WTO inconsistency was that the EU Seal Regime operated with a distinction between ‘commercial’ seal products, which were all out banned, and seal products which could be imported into the EU under the IC exception. The IC exception applied to seal products which derived from traditional hunts conducted by Inuit or other indigenous communities and contributed to their subsistence.³ However, although the IC exception was origin-neutral on its face, it was *de facto* inconsistent with Article I:1. The reason for this was that virtually all Greenlandic seal products were likely to qualify under the IC exception, but that the vast majority of Canadian seal products were unable to meet the requirements of the IC exception. Based on this finding, the IC exception was inconsistent with Article I:1, since it did not ‘immediately and unconditionally’ extend the same market access advantage to Canadian seal products.⁴

Having confirmed that the IC exception was inconsistent with the ‘most-favoured-nation’ principle, the WTO Appellate Body then turned to examine whether the difference in treatment between Greenlandic and Canadian Inuit seal products could be justified under Article XX of the GATT 1994. Article XX allows differential treatment based on objective criteria, provided that the measure imposed does not constitute ‘arbitrary or unjustifiable discrimination.’ According to the EU, the IC exception could be justified under Article XX subparagraph (a) of the GATT 1994 as a measure ‘necessary to protect public morals.’ The WTO Appellate Body agreed that, in principle, a ban on sealing could be regarded as ‘necessary to protect public morals.’⁵ However, the WTO Appellate Body found that the exclusion of Canadian Inuit products from the EU market constituted ‘arbitrary or unjustified’ discrimination.

³ See Regulation 1007/2009/EC of the European Parliament and of the Council of 16 September 2009 on trade in seal products [2009] OJ L286/36, Article 3(1).

⁴ *EC Seal Products*, European Communities - Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R (May 22, 2014), at para. 5.95.

⁵ *Ibid.*, at para. 5.290.

The first and foremost reason for the finding that the discrimination was ‘arbitrary or unjustified,’ was the lack of a sufficient explanation from the EU as to how the IC exception was related to the objective of the EU Seal Regime.⁶ The WTO Appellate Body stressed that the EU had failed to explain how an exception for seal products hunted by Inuit or other indigenous peoples, could be reconciled with, or was in any way related to, the policy objective of addressing public moral concerns regarding animal welfare. Based on the fact that seal hunting carried out by Inuit or other indigenous causes the same pain and suffering for seals as ‘commercial’ hunts, the EU had failed to explain how the IC exception could be reconciled with the policy objective of reducing EU public moral concerns regarding animal welfare.⁷

Furthermore, the WTO Appellate Body found that another ‘arbitrary or unjustifiable’ aspect of the EU Seal Regime, was the requirement in the EU Seal Regime to set up a ‘recognized body’ in the state that wished to benefit from the IC exception.⁸ Among the tasks of the ‘recognized body’ was to certify that seal products cleared for export to the EU derived from proper Inuit hunts and to ensure that no ‘commercial’ seal products were among the products selected. The WTO Appellate Body pointed out that the establishment of a ‘recognized body’ entailed significant burdens for those who wished to apply the IC exception. Moreover, the EU had contributed to the establishment of a ‘recognized body’ in Greenland, but had not made comparable efforts to facilitate the setting up of a ‘recognized body’ in Canada.⁹

It was only after the 2014 panel report presented by the WTO Appellate Body in *EC Seal Products*, which concluded that the design of the legal regime constituted unjustified

⁶ *Ibid.*, at para. 5.319.

⁷ *Ibid.*, at para. 5.320.

⁸ See [now repealed] Commission Regulation 737/2010/EU of 10 August 2010 laying down detailed rules for the implementation of Regulation 1007/2009/EC of the European Parliament and of the Council on trade in seal products [2015] OJ L262/1, Article 6.

⁹ *EC Seal Products*, European Communities - Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R (May 22, 2014), at para. 5.337-5.338.

discrimination under WTO law, that the EU decided to amend its regime and took steps to restore market access for Canadian Inuit seal products. In the wake of the report of the WTO Appellate Body, the EU has gone to lengths to address the elements in the Seal Regime that were considered to violate WTO law.¹⁰ Most notably, the EU has attempted to address the lack of relationship between the IC exception and the protection of animal welfare. The 2015 amendment to Regulation 1007/2009/EC on trade in seal products, now stresses in Article 3(1)(c) that IC seal products can only be placed on the EU market if ‘the hunt is conducted in a manner which has due regard to animal welfare taking into consideration the way of life of the community and the subsistence purpose of the hunt.’ However, it is difficult to comprehend how this subtle request aimed at indigenous hunters to respect animal welfare, can fully remedy the lack of coherence between the IC exception and the policy objective of reducing EU public moral concerns regarding such hunts.

Besides addressing the legal aspects of the Seal Regime that were in violation of the obligations WTO agreements, the EU engaged with Canada in order to facilitate the establishment of an attestation mechanism, which would allow the Canadian Inuit to export seal products to the EU market.¹¹ More specifically, since 30 July 2015, the Government of Nunavut has been recognized as an attestation body that is qualified to certify Inuit seal products under the EU Seal Regime.¹² The establishment of the Government of Nunavut as an attestation body now allows Canadian Inuit to invoke the IC exception, and brought an end to the five year exclusion of Canadian Inuit seal products from the EU market.

¹⁰ For a complete reference to the updated ‘EU Seal Regime’, see fn. 1 above.

¹¹ See Status Report Regarding Implementation of the DSB Recommendations and Rulings in the Dispute European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (WT/DS400 and WT/DS401), 16 October 2015.

¹² See Commission Decision of 26 October 2015 recognising the Department of Environment, Government of Nunavut in accordance with Article 3 of Implementing Regulation 2015/1850/EU laying down detailed rules for the implementation of Regulation 1007/2009/EC of the European Parliament and of the Council on trade in seal products [2015] OJ C355/4.

Despite the recent efforts, the EU Seal Regime has already had a significant impact on the sealing industry. Following the announcement, and the subsequent introduction of the ban, international demand for seal products declined sharply and caused a collapse of the entire market for such products.¹³ The impact on Canadian Inuit sealers was especially harsh.¹⁴ As observed by Canada, speaking on behalf of Inuit and non-Inuit sealers in the course of the proceedings before the WTO dispute settlement system, the ban has already affected the entire sealing industry, and has had a particularly negative effect on the Inuit community:¹⁵ ‘The effect of the EU Seal Regime is to exclude from the EU market all seal products derived from seals killed in commercial hunts, regardless of whether they were harvested humanely. In doing so, the EU Seal Regime has effectively shut out Canadian seal products from the EU market. The negative economic impacts of this measure have reverberated through coastal communities in the Canadian Maritimes, where economic opportunities are limited, and in Canada's Inuit communities, where the Inuit have historically relied on the income generated from seal skin sales to supplement their subsistence-oriented lives.’

Although the EU has now amended the features of its Seal Regime that violate WTO law, challenging issues remain unsolved. A mere re-establishment of access to the EU market is not, in and of itself, sufficient to remedy negative consequences suffered by Canadian Inuit sealers as a result of the five-year exclusion from the market. Thus, the main purpose of this article is to discuss whether the EU legislators can be held legally accountable for the discriminatory exclusion of Canadian Inuit sealers from the EU market. The form of accountability looked into here concerns the possibility for individual Canadian Inuit Sealers

¹³ D. Cambou, ‘The Impact of the Ban on Seal Products on the Rights of Indigenous Peoples: A European Issue’ (2013) 5 *Yearbook of Polar Law* 389-415, at p. 391 fn. 8 and p. 414.

¹⁴ The market value for sealskin decreased by over 50% within a year of the entry into force of Regulation 1007/2009, despite a significant reduction in the numbers of seals harvested: Nikolas Sellheim, ‘The Goals of the EU Seal Products Trade Regulation: From Effectiveness to Consequence’ (2015) 51 *Polar Record* 274-289, at p. 284.

¹⁵ See the Integrated executive summary of Canada, in *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, Reports of the Panel, WT/DS400/R, WT/DS401/R, Addendum, Annex B-1, (November 25, 2013), at para. 2.

to claim reparations in an action for damages before the Court of Justice of the European Union (CJEU). The question discussed is whether a potential action for damages filed by Canadian Inuit sealers, can be based on the claim that that the EU Seal Regime constituted unlawful discrimination under WTO law.

In the second part of this article, 'Overcoming Formalities', it is asked whether a potential lawsuit against the EU for its violation of its violation of WTO law is admissible before the European Courts. The third part of the article is called 'WTO law in the EU legal order – Can the Canadian Inuit base a claim for damages on a violation of the WTO Agreements?' This part concerns the question of the direct effect' of WTO law, i.e. whether individuals, such as Canadian Inuit sealers, can rely on a violation of the WTO Agreements as a legal basis in a claim for damages against the EU. In the fourth and final part, the author concludes, and provides a critical assessment concerning the current state of the rights of indigenous peoples under EU law.

Overcoming Formalities – Is a potential lawsuit against the EU for its violation of WTO law admissible before the CJEU?

Before the substantive criteria of liability of the EU legislators can be assessed, it is necessary to discuss whether a potential plea by Canadian Inuit sealers based on a violation of WTO law is admissible before the CJEU. When an action for damages is directed at one or more EU institutions, Article 268 TFEU (Treaty on the Functioning of the European Union) lays down that '[t]he Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340.'¹⁶ In turn, the second paragraph of Article 340 TFEU declares that, '[i]n the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.'

¹⁶ Consolidated Version of the Treaty on the Functioning of the European Union (Lisbon, 13 December 2007, in force 1 January 2009) 2008 O.J. C 115/47.

The CJEU has confirmed that cases concerning the non-contractual liability of the EU under Article 340(2) TFEU is an independent form of action.¹⁷ In the case *Van Parijs and Others*, the CJEU laid down that although an action for annulment has been declared as inadmissible, this does not automatically imply that an action for damages is also inadmissible.¹⁸ In relation to the Canadian Inuit, access to an autonomous legal action under Article 340(2) can prove important. The reason for this is that Canadian Inuit sealers and interest groups have on previous occasions brought unsuccessful actions for annulment of the EU Seal Regime before the CJEU. In the 2013 case, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, the CJEU dismissed the action brought by the litigants for the annulment of Regulation 1007/2009/EC as inadmissible.¹⁹ Again, in 2015, in *Inuit Tapiriit Kanatami and Others v Commission*, the litigants sought the annulment of the implementing Regulation (EU) No 737/2010.²⁰ In the 2015 case, the CJEU decided to conduct a material review of the action for annulment EU Seal Regime, but the plea failed on its merits. Inter alia, the litigants claimed that Article 114 TFEU could be relied upon as a legal basis for the ban and that the Regime violated the fundamental economic and social interests of Inuit communities engaged in seal hunts.²¹ However, none of the arguments put forward by the litigants were successful and the case was subsequently dismissed.

In previous cases concerning compensations for alleged infringements of WTO law, the CJEU has been willing to consider the substantive claims brought forward by the litigants. For example, in the case *FIAMM and others*, the EU Court of First Instance conducted a full

¹⁷ See A Davies, 'Bananas, Private Challenges, the Courts and the Legislature' (2001) Yearbook of European Law, Volume 21, issue 1, 299-326, at p. 309.

¹⁸ *Van Parijs and Others v Council and Commission*, Case C-257/93 [1993] ECR I-3335, at para. 14.

¹⁹ *Inuit Tapiriit Kanatami and Others v Parliament and Council*, Case C-583/11 [2013], ECLI:EU:C:2013:625.

²⁰ *Inuit Tapiriit Kanatami and Others v Commission*, Case C-398/13 [2015], ECLI:EU:C:2015:535.

²¹ For a critique of the reliance upon Article 114 TFEU as the legal basis for the adoption of Regulation 1007/2009/EC of the European Parliament and of the Council of 16 September 2009 on trade in seal products [2009] OJ L286/36, see M Hennig, 'The EU Seal Products Ban – Why Ineffective Animal Welfare Protection Cannot Justify Trade Restrictions under European and International Trade Law' (2015) Vol. 6, No. 1 *Arctic Review on Law and Politics* 74–86.

assessment of the substantive questions concerning a claim for damages presented by two Italian companies directed at the EU Council and the EU Commission.²² This case arose in the wake of the turmoil caused by the adoption of the so-called EU ‘bananas regime,’ and the finding of the WTO Appellate Body in *EC – Bananas III*, where it was confirmed that the EU import regime was incompatible with the obligations under the WTO agreements.²³ The EU ‘bananas regime’ discriminated against certain third countries, and the United States was authorised to retaliate by way of increased import taxes on a number of products manufactured in the EU.²⁴ The increased import taxes caused economic damage to the Italian companies, and these companies thus requested compensation from the EU on the basis of Articles 235 and 288(2) EC [now Articles 268 and 340(2) TFEU]. The action for damages was accepted as admissible, but eventually failed on its merits by reason that the substantive conditions for EU liability were not met.²⁵

In sum, Articles 268 and 340(2) TFEU establish a low threshold for admissibility, and it is likely that a potential action for compensation for the damage suffered by Canadian Inuit sealers will be brought forward and decided on its merits by the CJEU. However, although the procedural facets of a lawsuit can be overcome, the pressing issue is the seemingly insurmountable threshold for establishing liability on part of the EU, even in the face of blatant violations of WTO law. This is dealt with in the following section.

²² *FIAMM and FIAMM Technologies v Council and Commission*, Case T-69/00 [2005] ECR II-5393.

²³ *European Communities - Regime for the Importation, Sale and Distribution of Bananas* - AB-1997-3 - Report of the Appellate Body, (September 9, 1997).

²⁴ For a detailed recount of the trade war between the United States and the EU leading up to, see Opinion of Advocate General Poiares Maduro, 20 February 2008, in *FIAMM and Fedon*, Joined Cases C-120/06 and C-121/06 ECLI:EU:C:2008:98, at paras. 1-2.

²⁵ In the appeal case *FIAMM and Fedon*, the European Court of Justice came to the same conclusion concerning the admissibility of the claim for damages, *FIAMM and Fedon*, Joined Cases C-120/06 and C-121/06 [2008] ECLI:EU:C:2008:476.

WTO law in the EU legal order – Can the Canadian Inuit base a claim for damages on a violation of the WTO Agreements?

In this section, it is discussed whether the EU can be held responsible for the economic damage suffered by Canadian Inuit sealers. In this regard, it will be assessed whether the violation of WTO law between 2010 and 2015 implicates non-contractual liability for unlawful conduct on the part of the EU. In the case law of the CJEU, Article 340(2) TFEU has consistently been interpreted as meaning that the right to compensation depends on the satisfaction of three cumulative conditions.²⁶ Firstly, the claimants must have suffered economic loss that is not the result of their own decisions. Secondly, one or more EU institutions must have acted unlawfully and thirdly there must be a causal link between the unlawful conduct of the EU and the damage inflicted.

Only the second condition will be discussed in further detail here. Of the three cumulative conditions for compensation, it is the question whether or not a violation of WTO induces liability under EU law, which involves the most significant and pressing matters of principle. As to the first and third conditions, it is for the Canadian Inuit to demonstrate that the EU Seal Regime has caused an economic loss and to prove that the alleged unlawful conduct of the EU is the cause of this loss.

In order to assess whether the establishment of the EU Seal Regime was unlawful, it must first be asked what effect the WTO Agreements, like other international agreements, have within the EU legal order.²⁷ The general, and obvious, starting point for answering this question is in the wording of Article 216 (2) TFEU, which states that '[a]greements concluded by the Union are binding upon the institutions of the Union and on its Member States.' However, although it is clear from this provision that an agreement concluded by the EU is 'binding', this does not automatically mean that a violation of the agreement in question implicates liability on the

²⁶ *FIAMM and Fedon*, Joined Cases C-120/06 and C-121/06 [2008] ECLI:EU:C:2008:476, para. 164.

²⁷ See generally, P Craig and G de Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press, Oxford 2015), at p. 361.

part of the EU. In the case law of the CJEU, in order for EU non-contractual liability to incur, a further condition must be met. This is the condition that the agreement which has been infringed, must confer rights on individuals.²⁸ Another way of phrasing this condition, is to ask whether an agreement is capable of having ‘direct effect.’ In the context of a possible action against the EU concerning the infringements of WTO law in the Seal Regime, the question that has to be answered is whether the WTO agreements are capable of having such ‘direct effect.’²⁹

The ‘direct effect’ of the WTO Agreements was considered by the CJEU in *Portugal v Council*.³⁰ In this case, the Portuguese Government claimed that an EU regulation, giving textile products from third countries access to the EU market, constituted a breach of certain rules and fundamental principles of the WTO Agreements, and in particular the rules and principles laid down in GATT 1994. The Portuguese Government requested an annulment of the contested EU regulation, and claimed that it was entitled to rely on the WTO Agreements before the CJEU for the purpose of reviewing the legality of the Council measure.

The CJEU was not convinced that the WTO agreements were in principle among the rules, which were capable of producing a ‘direct effect’, and furthermore not among the rules in the light of which the CJEU would conduct a review of the legality of EU law.³¹ The reason for rejecting the ‘direct effect’ of the WTO agreements lies in the nature of these agreements.

²⁸ *Cordis v Commission*, Case T-18/99 [2001] ECR II-913, at para. 45.

²⁹ See generally A Davies, ‘Bananas, Private Challenges, the Courts and the Legislature’ (2001) 21(1) *Yearbook of European Law* 299-326, at pp. 301-303.

³⁰ *Portugal v Council*, Case C-149/96 [1999] ECR I-8395. Prior to *Portugal v Council*, the CJEU held in *Germany v Council* that the GATT rules do not have direct effect and that individuals cannot rely on them before the EU courts in actions concerning the lawfulness of an EU act. The only exception to this general rule arises if the EU has intended to implement a particular obligation entered into within the framework of the GATT or if the EU act in question refers to specific provisions in the GATT, see Case C-280/93 *Germany v Council* [1994] ECR I-4973, paragraphs 103 to 112.

³¹ *Portugal v Council*, Case C-149/96 [1999] ECR I-8395, para. 47.

According to the CJEU, “the agreement establishing the WTO, including the annexes, is still founded, like GATT 1947, on the principle of negotiations with a view to ‘entering into reciprocal and mutually advantageous arrangements.’”³² Furthermore, the CJEU placed emphasis on the fact that other third country external trading partners of the EU, had concluded that the provisions of the WTO agreements were not among the rules applicable by their judicial organs when reviewing the legality of their domestic laws.³³ Thus, if the EU were placed under an obligation to ensure that EU law was in compliance with WTO law, it would ‘deprive the legislative or executive organs of the Community of the scope for maneuver enjoyed by their counterparts in the Community's trading partners.’³⁴ The CJEU therefore laid down that the WTO agreements do not have ‘direct effect’ and could not be invoked as measures in the light of which the legality of EU law could be reviewed.

Since WTO law has not been granted direct effect in actions for annulment of EU legislative acts is high, one might be tempted to believe that the threshold for granting direct effect to the WTO agreements in actions concerning compensation would be lower. Compensation for economic damage does not characterize EU legislative acts as unlawful, but merely corrects the financial wrongdoing suffered by individuals. Thus, compensation for damages seems like a reasonable remedy, especially in those instances where it is up and clear that EU legislation is in violation of WTO law. Such an example is where the WTO panels have firmly concluded that an area of EU law is in violation of the WTO agreements. As mentioned above, the Canadian Inuit sealers are currently in this situation in the wake of the report of the WTO Appellate Body where it was concluded that the EU Seal Regime had a discriminatory effect.

Nevertheless, even in the face of blatant violations of WTO law, the CJEU has not shown willingness to allow litigants to rely on the WTO agreements in actions for damages. In the *FIAMM and others*-case referred to above in the second part of this article, the litigants found themselves in a situation with similarities to the current position of Canadian Inuit sealers.³⁵

³² *Ibid.*, para. 42.

³³ *Ibid.*, para. 43.

³⁴ *Ibid.*, para. 46.

³⁵ *FIAMM and FIAMM Technologies v Council and Commission*, Case T-69/00 [2005] ECR II-5393.

As a result of the ‘banana war’, the two Italian companies in question had suffered an economic loss due to the retaliatory customs duties imposed by the United States on certain products from the EU. After the finding by the WTO Appellate Body that the ‘EU Banana Regime’ was in violation of the WTO agreements, the EU eventually amended the Regime and the United States lifted its custom duties.

The Court of First Instance rejected the claim for compensation for damages brought forward by the two companies. The European Court of Justice dismissed the subsequent appeals.³⁶ Although the WTO Appellate Body unequivocally had found that the EU ‘Banana Regime’ was in violation of WTO law, the CJEU was not, in parallel with cases concerning the validity of secondary EU legislation, willing to give ‘direct effect’ to the WTO agreements for the purpose of deciding an action for compensation. According to the CJEU, there was no reason to draw a distinction between the possible ‘direct effect’ of WTO law in cases concerning the review of the legality of EU law in annulment proceedings and in actions concerning claims for compensation.³⁷ Furthermore, the CJEU added that although a WTO body finds an infringement it ‘cannot have the effect of requiring a party to the WTO agreements to accord individuals a right which they do not hold by virtue of those agreements in the absence of such a decision.’³⁸

Based on the case law of the CJEU, it thus seems highly improbable that an action for damages based on the violation of WTO in the EU Seal Regime will be successful. Under the current state of EU law, even in the face of blatant violations of the WTO commitments, the EU institutions seem ‘immune’ to actions requesting review of legality or in cases concerning compensation.

Conclusion

³⁶ *FIAMM and Fedon*, Joined Cases C-120/06 and C-121/06 [2008] ECLI:EU:C:2008:476.

³⁷ *Ibid.*, at para. 120.

³⁸ *Ibid.*, at para. 131.

It is, of course, understandable that the EU institutions must retain a certain scope for maneuver in negotiations with external trading partners. It is furthermore reasonable that the EU institutions retain a certain element of discretion and leeway in dealings with trading partners under the WTO Agreements. It cannot, and should not, be so that the WTO Agreements have a more severe impact on the EU institutions than on other WTO members. The EU must be awarded the same discretion as individual WTO member states. The general stance of the CJEU is that the WTO rules cannot be relied on, even in the cases where a WTO panel, or the Appellate Body, has found one or more violations of the agreements. In this way, the lack of any 'direct effect' of the WTO agreements protects the EU from potential actions from individuals seeking compensation for the losses incurred by EU institutions acting in disregard of their obligations under the agreement.

Thus, under current EU law, the prospects of bringing an action for damages before the CJEU seeking damages for the five year exclusion from the EU market of Canadian Inuit seal products, are grim. At least from a purely legal perspective, it is highly unlikely that the CJEU will rule in favour of any possible litigants seeking to address the financial damage caused by the exclusion from the EU market in the period from 2010 to 2015. However, from a political point of view and a consideration of the fairness of the situation, the EU should make efforts to compensate the financial losses incurred by Canadian Inuit sealers.