What are the next stages?

Canada will start discussions with Belgium and the European Commission on the Belgian legislation. They will assess its compliance with WTO rules, previous WTO panel decisions and existing legislation. In 1995 Canada also threatened to start WTO proceedings against the EU for its proposals to implement a ban on the imports of certain furs from Canada which were caught using the leghold trap, a device banned in the EU due to animal welfare During these discussions, the EU agreed to multilateral negotiations and a final agreement on trapping which meant the original proposed import ban was never fully implemented. If the bilateral negotiations do not resolve the issue, Canada could start proceedings at the WTO which could then lead to a panel being set up to decide on the appropriateness of the legislation. Once the panel has given is decision, it can be appealed and reviewed by the Appellate Body. Once the Appellate Body has given its judgement a country has to either change its legislation (eg the EU did this with banana imports from the Caribbean[19]) or keep its ban but expect trade retaliation (eg the US currently has trade bans against certain EU food products as the EU has defied the WTO decision on hormones in beef by keeping its ban in place[20]).

The only circumstances in which sanctions might arise would be if the EU decided to maintain the marketing ban and no compensation could be agreed with the complainant. It is important to note that the scale of any dispute could be equated to the trade in seal products into Belgium. Trade levels are low. In 2005 Belgium imported $3.5 million of seal skins from non-EU countries and $4,867 of seal oil[21].

Conclusion

There is no reasonable basis to assume that the seal import established in Belgium would certainly be challenged under WTO rules and subsequently found to contravene them. WTO juris prudence shows that the measure would be contrary to GATT rules but could justified under the exemptions in Article XX. The European Commission and Belgium should defend the import ban.

[19] WT/DS27 EC regime for the importation, sale and distribution of bananas
[20] Decision 89/15 OJ L 146/39 30.5.89. EC measures concerning meat and meat products WT/DS26/AB/R
[21] Eurostat, 2007.

CIWF advancing farm animal welfare

WSPA World Society for the Protection of Animals

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Seals and trade rules: can they live together?

Introduction

On the 1st August 2007 the Canadian Government announced that they would be seeking talks with the Belgium authorities on the compatibility of the Belgian law prohibiting imports of seal products with international trade rules. Belgium became the first EU country to establish a trade ban on seal products when it passed legislation on 25th January 2007. Subsequent to this, on 17th July, the Netherlands became the second EU nation to ban seal products. Germany is considering legislation and Italy established a temporary moratorium on the import of seal products in 2006 with a bill to transform this into a permanent ban presently being considered by the Parliament. These laws followed a 2006 written Declaration in the European Parliament signed by 425 MEPs calling for the Commission to draft legislation to ban the import, export and sale of all harp and hooded seals products[1] and call from the Parliamentary Assembly of the Council of Europe in November 2006 for its Member States to introduce national bans on seal derived products. This briefing examines the WTO implications of these laws.

Legislation

The EU already has two laws on seals which ban the commercial import of fur from harp seal whitecoats and hooded seals bluebacks[2]. This law has been in existence for nearly 25 years without challenge. Following the Parliament Declaration, the European Commission set up a scientific enquiry to look at the welfare aspects of the hunt before deciding if it was to extend the 1983 law to other types of seal imports. Whilst it is undertaking this exercise, some of its Member States, heeding a call by Commissioner Kyprianou, have implemented national bans.

Belgium passed the first full ban when it implemented Law 2007/11138 on 16th March 2007 which bans the import, distribution, sale and manufacture of all products derived from any seals from any country[3], except for those hunted by indigenous peoples. In a WTO context the European Commission always acts for each Member States in defending any national legislation so the Canadian challenge to Belgium will automatically trigger a Commission response.

Compatibility with the WTO rules

WTO rules enable its members to challenge national measures which they believe unfairly or unnecessarily restrict trade. The rules of the WTO do not prevent the EU from adopting measures that may restrict trade, but such measures must not contravene the GATT '47 articles, which were incorporated into the WTO rules in 1994. Canada could start proceedings against the European Commission in the WTO. A panel of trade experts would be set up to assess the compatibility of the Belgian law with WTO rules.

A summary of GATT rules relevant to animal welfare

The main Articles are:

Article I: requires that a Party does not give any unfair advantage, favour or immunity in relation to imports and exports unless it is also granted to all other contracting Parties;

Article III: states that the Party must treat like products from other countries the same as those produced in its own country. This has been interpreted to mean that non Product-related process and production methods (PPMs) should not be used to distinguish between products. If you cannot tell the difference between two products on inspection you cannot ban the import of one and allow it for the other – a free range egg is the same as a battery egg except for its production method and so cannot be differentiated in trade measures.

Article XI: aims to eliminate quantitative restrictions on trade by limiting the power of Parties to implement unilateral bans on the import of products.

Article XX: these are the general exceptions that the GATT gives. These exemptions do allow trade related measures that are necessary to protect public morals (XXa), human, animal and plant life (XXb) and related to the conservation of exhaustible natural resources (XXg). In addition any measure must pass the Article XX chapeau test which requires that the defending country must prove the trade measures taken were not arbitrary discrimination and that there was no other less trade restrictive method available.

If a panel were to be convened with respect to the Belgian law, its decision would hinge upon whether the measure was considered to contravene either Article III or XI.1 of GATT'47. If it did, then the panel would consider if the measure could be justified by one of the general exceptions established under Article XX, in particular XX(a) and XX(b).

The application of WTO rules relating to animal welfare is uncertain because there has never been a GATT panel to date on any animal welfare issue. However there have been GATT panels which have considered all the aspects than a panel looking at the seals ban would consider and it is possible to look at the lessons from these to assess the applicability of the Belgian ban under the WTO.

What do previous panels tell us

Previous WTO dispute panels have stressed the importance of a case-by-case approach to the application and interpretation of WTO rules[4].

Compatibility with Article III.4

Three elements need to be satisfied to violate Article III.4: the imported and domestic products are like products; the measure is a law or regulation effecting internal sale and imported products are accorded less favourable treatment than domestic products. The Belgian law does comprise an internal sale. Case law on the likeness of a product (the non-product PPM issue) has been analysed in three disputes:

1. the right of the EU to ban imports of asbestos from Canada whilst allowing imports and production from other countries. This stated that a 'key element of determining whether products are in a competitive relationship is the extent to which the consumer is willing to use the products to perform their functions (tastes and habits)[5]. If there is no competitive relationship between products a member cannot intervene to protect domestic production'. The EU won this dispute but only because it argued that it was a human health problem, and the definition on differences in likeness seems to be only applicable to distinguishing between harmful and non harmful products. This is not applicable for the seal issue.

[1] P6-DCL (2006)0038
[2] 83/129 OJ No L 91 9.4.83 p.30
[3] Moniteur Belge 18.4.07 20864-5

[4] e.g. United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/9
[5] EC- measures affecting asbestos and products containing asbestos. WT/DS135/AB/R

2. Imported retreaded tyres which Brazil prohibited, were deemed to be a 'like' product with domestically produced retreaded tyres as they had the same physical properties, the same end uses, the same tariff headings and there was no difference in consumer perceptions or buying tastes[6].
3. The US is allowed to stop imports of shrimps from SE Asia (ie a non-product PPM import ban)[7] but it is not clear if it is allowed to do this as the target is an endangered species or if the precedent can be more general and apply to seals.

Summary: Belgium prohibits imports of all seal species and products from all countries. So no competitive advantage is given to either domestic or other country producers by banning imports of only Canadian seal products. There is an exemption for imports from products obtained from indigenous hunts and it would have to be argued that this is a small trade and given for human rights issues rather than to give indigenous traders a competitive advantage. Given this it may be argued that no disadvantage is given to Canadian makers of other seal products and the ban may be compatible with Article III.

Compatibility with Article XI

There have been a number of environmental cases.

1. The USA admitted that the trade embargo on shrimp products from certain Asian countries was a quantitative restriction. The panel agreed and this was not appealed by the USA[7].
2. Both panels considering the US ban on imports of certain tuna species from Mexico found that the ban was against Article XI[8,9],
3. Brazil admitted that its import ban on tyres from the EU was a quantitative restriction and contrary to XI.1[10]

Summary: as Belgium has enacted a trade restriction on imports and sale, this would probably be ruled as contrary to Article XI. So Belgium would have to rely on the Article XX exemptions.

Article XX exemptions

There have been a number of panels which looked at applicability of import bans under Article XX. These have established a set three tiered process for looking at Article XX exemptions:

Step 1: does the measure fall under one of the ten exceptions;

Step 2: is the measure 'necessary';

Step 3: does it satisfy the requirements of the chapeau ie is the ban a disguised restriction or a means of arbitrary discrimination or a means of unjustified discrimination.

Step 1 does the Belgian ban on seal products fall under one of the exceptions? The exceptions will be examined in turm:

Article XX (g)

There has been one major case, the US shrimp ban that has two Panels and two Appellate Body opinions:

1. The Appellate Body that looked at the US ban on imports of shrimp concluded that turtles were an exhaustible natural resource; it also stated that as the measure was not a blanket ban without regard to methods of harvesting the shrimp and that the means where related to the ends that it was justified under Article XX (g)[11].

Summary: Belgium could argue that seals are an exhaustible natural resource and so fall under this exception. The test to allow inclusion in XX (g) is less restrictive than under XX (a) or (b) as the Commission would only have to prove that the import ban was related to conservation rather than necessary to protect conservation. The WTO has already established that endangered animals fall under this exemption[11]. Although Directive 83/129 was taken under an conservation legal base, and there are concerns about the sustainability of the hunt, both species of seal in question are not listed by IUCN or CITES as endangered so it is likely that this exception could not be used.

Step 2 is the Belgian ban necessary?

Article XX (b)

The main reason for the import ban is the cruelty of the hunt. Although this is not explicitly mentioned in the law, it could easily be argued from the debate leading up to the law that this was the cause of the law. So it could be argued that the killing methods are so cruel that they are contrary to animal health and so fall under the human, animal and plant life exception.

Article XX (b) has been interpreted quite narrowly to only refer to the import impacting on the life and health of animals in the importing country rather than the exporting one.

Two tests are set under this clause – that the measure is for animal life and health and that it is necessary. There have been a number of environmental panels on this issue which have evolved the WTO juris prudence:

1. The USA failed this test in tuna-dolphin I in 1991. The Panel defined this exception as only allowing Parties to impose restrictions for overriding public policy goals and that the measure has to be proved by the defending country as being necessary ie the only resort available[8].
2. The USA passed the test in tuna-dolphin II in 1994 when the panel agreed that measures could be taken outside the jurisdiction of the defending country and measures taken to protect the welfare of animals (in this case dolphins) would fall under the definition of animal life and health[8]. However the measure was deemed to be not necessary as it compelled a country to change its policies operating in its own jurisdiction. The same logic could be applied to the Belgian ban.
3. Brazil successfully argued that its measure to stop imports of retreaded tyres from the EU was justified under Article XX(b). This clarified that the risk may not be limited to the prohibited imports and that the import of these tyres was a risk to animal life and health[10]. The panel also agreed that the measure was "necessary" The panel considered three issues to assess if it was necessary: if the import ban could make a contribution to the overall objective being pursued, the relative importance of the values furthered by the import ban and restrictive impact on international commerce and if there was a more WTO consistent method available. The Brazil measure passed all these tests. It successfully argued that the more WTO consistent methods proposed by the EU could not achieve the same result as an import ban and so created important juris prudence for the Belgian ban. However this is now being appealed by the European Comission.[22]

Summary: the Belgian ban falls into the same measure as the US tuna-dolphin ban i.e. to achieve a welfare aim. But they would additionally have to argue that no other trade measure would have achieved the same objective as stopping the hunt. This may be possible in view of the long history of EU disapproval of the Canadian seal hunt and the fact that Directive 93/129 had not stopped the increase in seals being killed in an inhumane manner.

[6] Brazil measures affecting imports of retreaded tyres WT/DS332/R 12.6.07
[7] United States – Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia" (WT/DS58/AB/RW)
[8] US restrictions on imports of tuna DS21/R 3.9.91;
[9] US restrictions on imports of tuna DS29/R 6.94
[10] Brazil – measures affecting imports of retreaded tyres WT/DS332/R 12.6.07
[11] US – import prohibition of certain shrimp and shrimp products WT/DS58/AB/R 6.11.98
[22] WT/DS332/9 4.9.07

Article XX (a)
The test on allowing measures to protect morals is one of the most untested areas in the WTO. It has only been considered in one case and this was under the General Agreement on Trade in Services (GATS) rather than the GATT '47, although the language on morals is similar. There are two important outcomes:

1. The Panel agreed that a measure allowed to protect morals must be aimed at protecting the interests of a nation or people in the community and denotes standards of right and wrong in a nation[12]. The panel agreed that the prevention of underage gambling, the subject of the US defence, did fall within the public morals definition.
2. The Appellate Body upheld the view that the US laws were done to protect public morals. In examining if the ban was "necessary" it looked at if there were other methods available, and how the measure contributed to the overall objective. As the USA proved a link to fraud and underaged gambling the ban was deemed to contribute to the objective[12,13]. The Appellate Body on the US gambling ban agreed that the USA did not have to enter into negotiations with the complainant country, Antigua, to resolve the issue as a method of good faith and also Antigua had not made any reasonable alternatives the US laws. So the bans were 'necessary' to achieve the objective[11]. The ban was ultimately deemed not compatible with the GATS as it failed the chapeau test.

The US ban on imports of cat and dog fur has never been tested but the USA implemented it and justified its WTO compliance as under the public moral clause.[17]

Summary: the Belgian ban should be justified under protection of public morals. The US case shows that the WTO panels do allow measures to achieve this and the public opinion polls in Belgium, Canada and other countries show a desire for such a ban[16]. It could be justified as necessary as no other methods could achieve the same effect. The US case shows that Belgium does not need to have entered multilateral negotiations on the issue which is a significant change on previous panels such as shrimp-turtle where this was a requirement[14].

Step 3 does the ban meet the requirements of the Article XX chapeau?

Article XX chapeau
This states that measures should not be applied in a manner of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or be a disguised restriction on international trade. This is the most difficult test as it has never been met. It has been tested in a few cases:

1. The USA failed this test when the Appellate Body stated that its measure to ban imports of shrimp from Malaysia fell within XX (g) but was arbitrary and unjustifiable discrimination as it was a rigid rule that had no flexibility. The Body stated that the USA did not need an international agreement to show flexibility but should be negotiating in good faith with the exporting country[7].
2. The panel in the Brazil tyre case continued this by dividing the tests into three areas: is it arbitrary or unjustified discrimination and is it a disguised restriction. The import ban was found to be discriminatory and was unjustified discrimination as it allowed in imports from tyres from other countries. It was examined as to whether it was a disguised restriction by looking at if is was a restriction, whether it was disguised and how it was applied. Brazil successfully argued that the measure was being applied to achieve its objectives but the Panel found it was a disguised restriction as other imports were allowed in. It therefore failed the Article XX test.[10]
4. The Appellate Body and the panel in the US gambling case failed the measure under the chapeau tests as it allowed other gambling and it was an arbitrary and unjustified discrimination[12,15].

Summary: the Belgian ban would have to be argued that it is not an arbitrary and disguised restriction on trade. As it is not giving an advantage to home producers this may be achieved. It is also not a disguised restriction as it is being applied to achieve a set objective and welfare aim. So the ban could pass the chapeau test.

What existing laws are there which enact trade bans to promote animal welfare?

The USA enacted its Dog and Cat Fur Act[17] in 2000 which bans the sale, imports and export of products made with dog and cat fur. The USA stated that this 'is consistent with the international obligations of the US because it applies equally to domestic and foreign producers' and 'is also consistent with provisions of international agreements to which the US is a party that expressly allow for measures designed to protect the health and welfare of animals'. Similar national bans have been enacted by Italy and Belgium and in June 2007 the EU agreed on a community ban for reasons of public morals[18]. None of these laws have been challenged in the WTO.

In summary the relevant key arguments would include:

- The measure is scientifically based to achieve a reduction in the cruelty in the Canadian seal hunt as all other methods had failed.
- It is not protectionist as it applies equally to domestic and foreign companies.
- The ban does not discriminate between countries as it bans seal products from all countries.
- It is not an arbitrary and disguised restriction on trade as it not giving an advantage to home producers or other exporters of seal products.
- It can be justified under protection of public morals. WTO panels do allow measures to achieve this and the public opinion polls in Belgium and Canada[16] show a desire for such a ban.
- The WTO allows bans to achieve a welfare aim and the Belgian ban falls into the same category as the US tuna-dolphin ban.
- Belgium would have to argue that no other trade measure would have achieved the same objective as stopping the hunt and rely on the increasing numbers of seals being killed the lack of control and enforcement in the hunt.

[12] US measures affecting cross-border supply of gambling and betting services WT/DS285 2004
[13] US measures affecting cross-border supply of gambling and betting services WT/DS285/ABR 2005
[14] US – import prohibition on certain shrimp and shrimp products WT/DS58/R 15.5.98
[15] US measures affecting cross-border supply of gambling and betting services WT/DS285/ABR 2005
[16] ORB poll 9.2.07 shows 78% of the in public in UK wanting the hunt to be stopped; Environics Research poll in Canada 18.7.05 showed 63% opposed the hunt.
[7] United States: Prohibitions on Importation of Products made with Dog or Cat Fur , 2000
[18] Com (2006) 684 20.11.06