

# The impact of the World Trade Organisation rules on animal welfare

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## Introduction

A major impediment to the adoption of stronger animal protection legislation by the EU (and other countries) is the free trade legislation of the World Trade Organisation (WTO). The conventional view is that while a WTO member country may prohibit the use of cruel farming practices in its own jurisdiction, it cannot restrict the import of products derived from these practices in other countries. In effect this makes it difficult for any country to prohibit an inhumane system as it runs the risk that its own farmers will be undermined by lower welfare, and hence cheaper, imports.

EU officials often state that they cannot take a particular action because it would be incompatible with the WTO rules. This article will consider whether the WTO rules constitute as strong an obstacle to animal welfare measures as is often suggested by those in government. It will argue that in recent years WTO case law has moved to find a better balance between trade liberalisation and other legitimate public policy considerations including animal welfare. However, officials and governments continue to take a very cautious, restricted view of the scope under the WTO rules for introducing good animal welfare measures. This is not to suggest that the WTO rules no longer form an impediment to animal welfare; they remain a significant barrier but it is not as insurmountable as it used to be.

## Detrimental impact of GATT rules on animal protection measures

The 1994 Marrakesh Agreement establishing the World Trade Organisation<sup>1</sup> (the WTO Agreement) re-enacted the 1947 General Agreement on Tariffs and Trade (GATT) as the General Agreement on Tariffs and Trade 1994.<sup>2</sup> The World Trade Organisation (WTO) now comprises 160 member countries, and regulates government actions that affect trade or the conditions of competition for imports.

Probably the most damaging aspect of the GATT affecting animal welfare reform is the 'rule' that countries may not make distinctions between products on the basis of the method by which such products are processed or produced;<sup>3</sup> in GATT jurisprudence these are referred to as process or production methods (PPMs). In practice, this rule is extremely forbidding as trade restrictions that the EU (or any other WTO member) might wish to apply are likely to seek to distinguish between products derived from animals that are treated inhumanely and those coming from animals treated relatively humanely – in other words, on the basis of the manner in which the animals were “produced”.

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<sup>1</sup> Marrakesh Agreement Establishing The World Trade Organisation, 1994.

<[www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](http://www.wto.org/english/docs_e/legal_e/04-wto.pdf)>

<sup>2</sup> General Agreement on Tariffs and Trade 1947 [www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf) and General Agreement on Tariffs and Trade 1994 <[www.wto.org/english/docs\\_e/legal\\_e/06-gatt.pdf](http://www.wto.org/english/docs_e/legal_e/06-gatt.pdf)>

<sup>3</sup> This so-called 'rule' is discussed in greater detail, below.

Past EU attempts to improve animal protection have been undermined by the GATT rules. In 1991 the EU adopted a Regulation prohibiting leghold traps in the EU and the import of pelts from certain species of wild fur-bearing animals coming from countries where the animals are caught through the use of leghold traps.<sup>4</sup> When the EU Regulation was enacted, little thought was given to the GATT rules, as there was no effective enforcement mechanism in existence at that time. The 1994 WTO Agreement altered this situation dramatically by introducing effective dispute settlement and enforcement mechanisms. By the mid-1990s the EU had become concerned that the import ban aspect of the leghold trap Regulation would contravene the GATT rules if it were to distinguish furs on a PPM basis by according different treatment to fur depending on whether or not the animals were caught by the leghold trap.<sup>5</sup> Accordingly, the EU has not applied its import ban to the three main fur-exporting countries: the U.S., Canada and Russia. Instead it has negotiated weak agreements with these countries that do little to discourage the use of leghold traps.<sup>6</sup>

Turning to farm animals, the GATT rules are making it difficult for the EU to maintain its standards of animal welfare and introduce improvements. As a general rule, enhanced welfare standards such as those enacted for pigs and laying hens involve increased production costs. The danger that its farmers may be undermined by lower-welfare imports makes it difficult for the EU to enact more meaningful welfare improvements.

For example, the main reason for the weakness of the EU Directive on the welfare of chickens reared for meat<sup>7</sup> lies in the conventional interpretation of the GATT rules that, while they allow the EU (or any other WTO member) to adopt high animal welfare standards in its own territory, they do not permit it to require imported products to meet those standards. This led to the fear that, if the EU were to adopt good welfare standards for meat chickens, it would not be able to protect its farmers from lower welfare, and hence cheaper, imports. As a result the EU backed away from adopting good standards of chicken welfare and instead enacted a very weak Directive.

The same dilemma will arise every time that a WTO member wishes to enact good standards of farm animal welfare: dare it go ahead if its own farmers may be harmed by lower welfare imports?

The validity of this argument concerning the GATT rules will now be examined. It will be argued that the interpretation of the GATT rules that assumes that trade cannot be restricted on welfare grounds is not necessarily an accurate one. A careful reading of recent case law

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<sup>4</sup> *Council Regulation (EEC) No. 3254/91 of 4 November 1991 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards* [1991] O J L 308 p. 0001-0004.

<sup>5</sup> To be clear, the GATT would have no impact on the EU's ability to ban the leghold trap in its own jurisdiction. Its only potential impact would be to restrict the EU from banning the import of products derived from this mechanism.

<sup>6</sup> These Agreements are *Council Decision 98/142/EC of 26 January 1998 concerning the conclusion of an Agreement on international humane trapping standards between the European Community, Canada and the Russian Federation and of an Agreed Minute between Canada and the European Community concerning the signing of said Agreement* [1998] O J L 42 pp.40-57, and *Council Decision 98/487/EC of 13 July 1998 concerning the conclusion of an international Agreement in the form of an Agreed Minute between the European Community and the United States of America on humane trapping standards* [1998] O J L 219 pp.26-37.

<sup>7</sup> Council Directive 2007/43/EC of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production, art 3. Official Journal L 182, 12.7.2007, p. 19-28. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:182:0019:0028:EN:PDF>

indicates that GATT jurisprudence is more prepared than hitherto to recognise the need to balance the GATT's free trade rules and other legitimate public policy considerations. In addition, certain member countries have recently been bolder in introducing animal protection measures and in being prepared to defend them if challenged.

### **Principal GATT provisions**

The WTO differs from the GATT in that where one party alleges that another has breached its substantive obligations under the treaty, there is recourse to a bilateral dispute settlement mechanism. Disputes are referred to a quasi-judicial body known as a panel, while an appeal from a panel's findings lies to the Appellate Body of the WTO.

The substantive provisions of the GATT that we are primarily concerned with here are Articles I, III, XI and XX, all of which define the extent to which countries are required to keep their markets open to the movement of products from other countries.

Article XI prohibits countries from imposing quantitative bans or restrictions on imports or exports. Articles I and III are designed to prevent discrimination in international trade. Article I provides that each nation must, as regards imports and exports, treat all other nations as favourably as the "most-favoured-nation". Whereas Article I prevents a country from discriminating between imports from different nations, Article III prohibits discrimination as between domestic and imported products.

Article III:1 provides that internal legislation must not be applied "[S]o as to afford protection to domestic production". Article III:4 creates a substantial obligation to this effect, stating:

The products of the territory of any contracting party imported into the territory of any other contracting party **shall be accorded treatment no less favourable than that accorded to like products of national origin** in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use (emphasis added).<sup>8</sup>

A WTO member that wishes to defend a challenged measure will seek to argue that it should be considered under Article III rather than Article XI. The latter is an absolute ban on import restrictions, whereas Article III focuses on internal marketing regulations and gives a country scope to argue that the imported product and the domestic product concerned are not "like" one another and thus that according less favourable treatment to the imported products does not violate Article III. Where the restriction relates to an animal welfare measure, for example a ban on the sale of battery eggs, the argument would be that the banned product – battery eggs – is not "like" the permitted product, free range eggs.

It is important to recognise that a defending country has to overcome a two-fold hurdle: first to show that its challenged measure falls within Article III rather than Article XI, and secondly to establish that the imported and domestic products concerned are not "like" each other.

Assuming that a violation of Article III or XI is upheld, the inquiry then turns to the "exceptions" clause in Article XX. A country that is found to have breached one of the

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<sup>8</sup> Article I uses language almost identical to Article III:4, prohibiting countries from offering import arrangements more favourable to one nation than another in respect of "like" products. While I have chosen to focus on Article III because this clause is more likely to arise in the context being discussed, it follows that the analysis would apply in a similar manner under Article I if the measure in question were challenged on the basis that it discriminated in respect of imports from different nations, as opposed to between domestic and imported products.

substantive provisions of the GATT may be able to justify this on one of the grounds set out in Article XX.

### **Consideration of Articles I and III in EC – Seal Products**

EU legislation (the Seal Regime) in effect prohibits the placing on the market of seal products unless the products fall within certain exceptions.<sup>9</sup> The two principal exceptions relate to:

- seal products resulting from hunts traditionally conducted by Inuit and other indigenous communities and that contribute to their subsistence (the 'IC exception')
- seal products resulting from hunting that is regulated by national law and conducted for the sole purpose of the sustainable management of marine resources. Such placing on the market is allowed only on a non-profit basis (the 'MRM exception').

In considering Article I, the Appellate Body pointed out that "an interpretation of the legal standard of the obligation under Article I:1 must take into account the fundamental purpose of Article I:1, namely, to preserve the equality of competitive opportunities for like imported products from all Members".<sup>10</sup>

The Panel found that under the EU legislation the IC Exception would only apply to about 5% of Canada's seal harvest whereas most or all of Greenland's seal products are eligible as about 90% of Greenland's population is Inuit.<sup>11</sup> However, the Greenland hunt (which benefits from the IC exception) is a highly developed hunt that bears similarities to the characteristics of commercial hunts such as the Canadian hunt (which is denied access to the EU market).<sup>12</sup> In light of the above, the Panel found that the EU Seal Regime "has a detrimental impact on the competitive opportunities of Canadian imported products *vis-à-vis* Greenlandic imported ... products".<sup>13</sup>

The Appellate Body noted that "the Panel concluded that the measure at issue, although origin-neutral on its face, is *de facto* inconsistent with Article I:1. The Panel found that, while virtually all Greenlandic seal products are likely to qualify under the IC exception for access to the EU market, the vast majority of seal products from Canada and Norway do not meet the IC requirements for access to the EU market. Thus, the Panel found that, "in terms of its design, structure, and expected operation", the measure at issue detrimentally affects the conditions of competition for Canadian and Norwegian seal products as compared to seal products originating in Greenland. Based on these findings, the Panel considered, correctly in our view, that the measure at issue is inconsistent with Article I:1 because it does not, "immediately and unconditionally", extend the same market access advantage to Canadian and Norwegian seal products that it accords to seal products originating from Greenland."<sup>14</sup> Accordingly, the Appellate Body upheld the Panel's ruling that the EU Seal Regime is inconsistent with the EU's obligation under Article I:1.<sup>15</sup>

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<sup>9</sup> Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, *Official Journal of the European Union*, L Series, No. 286

<sup>10</sup> Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R and WT/DS401/AB/R, adopted 22 May 2014, Paragraph 5.87

<sup>11</sup> Panel Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R / WT/DS401/R / and Add.1, circulated to WTO Members 25 November 2013, footnotes 214, 921 & 922

<sup>12</sup> *Ibid*, paragraph 7.317

<sup>13</sup> *Ibid*, paragraph 7.170

<sup>14</sup> Appellate Body Report in *EC – Seal Products*, above n.10, paragraph 5.95

<sup>15</sup> *Ibid*, paragraph 5.96

As regards Article III, the Panel stated that “it appears that the vast majority of seal products from Canada and Norway are excluded from the EU market by the terms of the MRM exception. In contrast, evidence shows that virtually all domestic [EU] seal products are likely to qualify for placing on the market.”<sup>16</sup> The Panel concluded that the EU Seal Regime grants Canadian and Norwegian seal products a treatment less favourable than that accorded to EU seal products within the meaning of Article III:4.<sup>17</sup> The Panel’s conclusion was not appealed by the EU.

### Process and production methods

Where animal welfare measures are concerned, a key problem lies in the marked reluctance of the GATT to permit distinctions to be made between products on the basis of the way in which they are produced, i.e. on the basis of their PPMs. Both the issue of whether a challenged measure should be considered under Article III or Article XI and that of whether two products can be differentiated under Article III as not being “like products” turn on the question of whether PPMs may be taken into account in analysing trade measures.

As indicated earlier, the first obstacle to overcome in defending an animal welfare measure is convincing a WTO panel that the restriction relates to Article III, rather than Article XI. The advantage of having measures examined under Article III is that this Article is not contravened if a country can establish that the imported product is not “like” the domestic product.

The question of which Article applies first arose in two cases involving the U.S. ban on the import of tuna caught in a way that leads to the incidental killing of dolphins.

In *US – Tuna I*, Mexico argued that the prohibition on the import of tuna by the U.S. was inconsistent with the Article XI ban on import restrictions.<sup>18</sup> The U.S. countered that its measures were internal regulations that should be examined under Article III (imports to be treated no less favourably than like domestic products).<sup>19</sup>

Assistance in determining whether a challenged measure falls within Article XI or III is provided by an interpretive Note Ad [to] Article III which provides that certain measures, although applied to imports at the border, fall to be examined as internal regulations under Article III. The Note to Article III states that:

any law, regulation or requirement of the kind referred to in paragraph 1 [i.e. affecting, *inter alia*, the internal sale of products] which applies to an imported product and to the like domestic product and is . . . enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as . . . a [internal] law, regulation or requirement . . . and is accordingly subject to the provisions of Article III.

In *US – Tuna I* the Panel concluded that the Note to Article III covers only measures that are applied to the *product as such*.<sup>20</sup> The Panel noted that the tuna regulations designed to reduce the incidental killing of dolphins could not possibly affect tuna *as a product*.<sup>21</sup> Consequently, the Panel concluded that the U.S. import ban was not covered by the Note to Article III and so did not constitute internal regulations falling to be considered under Article

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<sup>16</sup> Panel Report in *EC – Seal Products*, above n.11, paragraph 7.608

<sup>17</sup> *Ibid*, paragraph 7.609

<sup>18</sup> Report of the Panel on *United States-Restrictions on Imports of Tuna*, DS 21/R. 3 September 1991, paragraph 3.10.

<sup>19</sup> *Ibid*, paragraph. 3.11.

<sup>20</sup> *Ibid*, paragraph 5.14.

<sup>21</sup> *Ibid*, paragraph 5.14.

III.<sup>22</sup> Instead, the Panel found the U.S. import ban to be inconsistent with Article XI.<sup>23</sup> A similar approach was taken in the *US - Tuna II* case.<sup>24</sup>

This approach would obviously have significant ramifications for the possibility of defending measures designed to restrict the sale of certain products on the basis that they do not comply with a country's animal welfare standards. Nonetheless, the *US-Tuna* cases do not provide a definitive interpretation of Article III and the note to Article III. In neither case was the Panel report adopted and the Appellate Body has stated that unadopted panel reports "[H]ave no legal status in the GATT or WTO system since they have not been endorsed through decisions by the contracting parties to GATT or WTO Members".<sup>25</sup>

Taking a different view from the *US-Tuna* cases, the English barrister Philippe Sands, Q.C. has argued that a ban on the sale in the EU of cosmetics that have been tested on animals enforced with respect to imported cosmetics at the border is not likely to be found to be a quantitative restriction on trade, but rather an internal measure enforced at the time of importation. Accordingly, it would fall within the scope of Article III:4 rather than Article XI.<sup>26</sup> He states that:

It has been argued [in *US - Tuna*] that any measure that affects trade in products on the basis of product characteristics that are not physically present in the product must be analysed as a prohibited "quantitative restriction" under Article XI. This argument turns on an interpretation that Article III:4 and Ad Article III cover only measures applied to a product *as such*, and not non-product related process and production methods (NPR-PPMs). *This interpretation has not been formally accepted by the GATT/WTO, and therefore remains open to argument either way.*

In my Opinion, an interpretation of GATT that subjects all NPR-PPMs to Article XI is not likely to be supported by the text of the GATT. Such an interpretation is based on broad policy justifications that seek to prohibit an entire category of types of measures on the grounds that if WTO Members were allowed to make distinctions on the basis of NPR-PPMs, there would result a flood of subjective distinctions that would provide the means for disguised protectionism. The Appellate Body, in an analogous context, has recently rejected this type of categorical approach to reasoning as constituting an "error in legal interpretation" that cannot be used to replace a case-by-case assessment of the product and the measure before the Panel.<sup>27</sup> [Emphasis added].

Based on this reasoning, it may well be that certain measures that make PPM distinctions between products derived from animals will fall to be considered under Article III rather than Article XI.<sup>28</sup> However, in order to establish that a measure is compatible with Article III, it will still be necessary to demonstrate that the imported product is not "like" the domestic product.

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<sup>22</sup> *Ibid*, paragraph 5.14.

<sup>23</sup> *Ibid*, paragraph 5.18.

<sup>24</sup> Report of the Panel on *United States-Restrictions on Imports of Tuna*, DS 29R. 16 June 1994, paragraphs 5.8-5.10.

<sup>25</sup> Appellate Body Report *Japan - Taxes on Alcoholic Beverages*, WT/DS8; DS10;DS11/AB/R. 1 November 1996, pp. 14-15.

<sup>26</sup> Opinion by Philippe Sands for the British Union for the Abolition of Vivisection, on file with the author. In re proposed prohibition of sale of animal-tested cosmetics and in re the rules of the World Trade Organisation. 2 November 2001.

<sup>27</sup> Sands is referring to the Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, paragraph 122.

<sup>28</sup> It is beyond the scope of this article to fully explore the interaction between Article III:4 and Article XI, but see Raj Bhala *Modern GATT law : a treatise on the General Agreement on Tariffs and Trade* (Sweet &

### **Determining Likeness under Article III**

Article III:4 stipulates that imported products must be accorded treatment no less favourable than that accorded to like domestic products. At first sight, this seems not to cause any difficulty. Thus, for example, Article III:4 would not appear to prevent a country from prohibiting both the domestic production *and* the import of battery eggs provided that it ensured that imported free range eggs were treated as favourably as domestic free range eggs. Most people accept, and these observations are supported by scientific research, that battery and free range eggs are not “like” each other as the former are produced in a manner that is inherently inhumane, while the latter are produced in a system that is relatively humane.

However, as we have seen, GATT jurisprudence is usually interpreted as preventing, when determining whether two products are “like” each other, any consideration being given to PPMs, that is *the way in which* they are produced unless this affects the physical characteristics of the final product.<sup>29</sup> Thus using this interpretive approach, battery and free range eggs are like each other and a country must treat imported battery eggs no less favourably than free range eggs even if it has prohibited the production of battery eggs in its own territory.

The first few cases raised on this point supported this interpretation. Crucially, the Panel in *US - Tuna I*, having ruled that the U.S. import ban fell to be considered under Article XI, added that, even if the ban were to be considered under Article III, it would not meet the requirements of that Article.<sup>30</sup> The Panel stressed that Article III:4 “[C]alls for a comparison of the treatment of imported tuna as a product with that of domestic tuna as a product. Regulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product”.<sup>31</sup> In *US - Tuna II* the Panel similarly noted: “Article III calls for a comparison between the treatment accorded to domestic and imported like *products*, not for a comparison of the policies or practices of the country of origin with those of the country of importation”.<sup>32</sup>

The two *US-Tuna* cases made it clear that, from the point of view of the GATT rules, dolphin-friendly tuna and dolphin-deadly tuna are “like products” and that accordingly imported dolphin-deadly tuna must be accorded treatment no less favourable than dolphin-friendly tuna. More broadly, the cases indicate that PPMs may not be taken into account in determining the likeness of two products. Indeed, the proposition from these cases that PPMs may not be considered in assessing likeness appears to have been elevated into an absolute, inflexible rule by many who work in the field of trade policy.<sup>33</sup> However, a careful examination of GATT case law shows that an approach which provides scope for differentiating between products according to their methods of production remains possible.

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Maxwell, London, 2005) Chapters 14-15; Laura Nielsen *The WTO, Animals and PPMs* (Martinus Nijhoff Publishers, Leiden, 2007) 146, 150–153.

<sup>29</sup> It is important to realise that since the WTO dispute settlement body is an arbitral body intended to secure a positive solution to a dispute, not a court, and it is not bound by formal rules of *stare decisis*. Adopted panel reports bind only those parties involved in the dispute, however they do create a ‘legitimate expectation’ (*Japan-Alcohol* at 15) for subsequent disputes. In practice, precedent is closely observed and both panels and appellate bodies try not to deviate from it – see Matsushita, Mitsuo *The World Trade Organisation: Law, Theory and Practice* (Oxford University Press, Oxford, 2004) 25.

<sup>30</sup> *US-Tuna I*, above n.18, paragraph 5.15.

<sup>31</sup> *Ibid*, paragraph 5.15.

<sup>32</sup> *US-Tuna II*, above n.24, paragraph 5.8.

<sup>33</sup> See for example, Robert Howse and Donald Regan “The Product/Process Distinction – An Illusory Basis for Disciplining ‘Unilateralism’ in Trade Policy” (2000) 11 (2) EJIL 249; Sol Picciotto “Private Rights vs Public Standards in the WTO (2003) 10(3) Review of International Political Economy 377.

To begin with, the *US-Tuna* cases can hardly be considered unassailable precedents. As indicated earlier, unadopted panel reports have no legal status at the WTO. While no Appellate Body decision has focused squarely upon the effect of PPMs in the animal product context, in *European Communities-Asbestos* the Appellate Body produced a helpful analysis in relation to the term “like product” in Article III:4, stating that it must be interpreted to give proper scope and meaning to the “general principle” in Article III:1 which “[S]eeks to prevent Members from applying internal taxes and regulations in a manner which affects the competitive relationship, in the marketplace, *between the domestic and imported products involved*, so as to afford protection to domestic production.”<sup>34</sup> The Appellate Body stressed that “[A] determination of ‘likeness’ under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products.”<sup>35</sup>

The Appellate Body recognised the value of the principles for interpreting the term “like products” laid down in the report of the Working Party on *Border Tax Adjustments*, which suggested “some criteria” for determining likeness: (i) the product’s properties, nature and quality; (ii) the product’s end-uses in a given market; and (iii) consumers’ tastes and habits which, said the report, “change from country to country.”<sup>36</sup> It stated that all these criteria must be examined.<sup>37</sup> They added that the adoption of this framework to aid in the examination of the evidence does not dissolve the duty or the need to examine, in each case, *all* of the pertinent evidence.<sup>38</sup> The Appellate Body also emphasised the importance of considering consumers’ tastes and habits — which, it said, are more comprehensively termed consumers’ perceptions and behaviour — in assessing “likeness”.<sup>39</sup>

The Appellate Body noted that consumers’ tastes and habits are one of the key elements in the competitive relationship between products in the marketplace. The extent to which consumers are willing to choose one product instead of another to perform the same end-use is highly relevant in assessing the “likeness” of those products.<sup>40</sup> The Appellate Body pointed out that if there is—or could be—*no* competitive relationship between products (for example, because consumers view them as different products) a Member cannot intervene, through internal taxation or regulation, to protect domestic production.<sup>41</sup> So, a key question is whether there is a high degree of substitutability of the products from the perspective of the consumer. If there is not, it may be argued that those products - even though they are similar in some ways—cannot be viewed as “like” each other.

The belief that there is an inflexible rule that differences in PPMs can never be used to establish that two products are not “like” each other runs counter to the statement by the Appellate Body in *Japan-Alcoholic Beverages* that panels must use their best judgment when determining likeness and that no single approach would be appropriate to every single case.<sup>42</sup> In *European Communities-Asbestos*, the Appellate Body stressed the need, in

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<sup>34</sup> Report of the Appellate Body in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R. 12 March 2001, paragraph 98.

<sup>35</sup> *Ibid.* paragraph. 99.

<sup>36</sup> Report of the Working Party on *Border Tax Adjustments*, BISD 18S/97, paragraph. 18. Adopted on 2 December 1970.

<sup>37</sup> *EC-Asbestos*, above n.34, paragraph. 101.

<sup>38</sup> *Ibid.*, at paragraph. 102. This echoes the Appellate Body’s statements in *Border Tax Adjustments*: ‘the kind of evidence to be examined in assessing the “likeness” of products will, necessarily, depend upon the particular products and the legal provision at issue.’ Above, n 36, paragraphs 102-103.

<sup>39</sup> *Ibid.*, at paragraph. 101.

<sup>40</sup> *Ibid.*, at paragraph. 117.

<sup>41</sup> *Ibid.*, at paragraph. 117.

<sup>42</sup> Appellate Body Report, *Japan –Alcoholic Beverages*, above n.25 DSR 1996:I, 97.

determining likeness, for an assessment utilising an unavoidable element of individual, discretionary judgment to be made on a case-by-case basis.<sup>43</sup>

These cases hold great promise for those seeking to uphold animal welfare measures. If WTO members were permitted to make PPM distinctions in their marketing regulations, a country could, for example, not only ban the use of battery cages in its own territory but could also ban the *sale* of battery eggs. Such a sales ban would apply equally to domestic and imported battery eggs. It may already be that, if a WTO member can show that consumers in its territory regard two products as different and do not in practice readily substitute one for the other, these products would not be viewed as “like” each other by WTO panels.<sup>44</sup> At present, however, WTO members are wary of arguing that an animal-welfare related trade measure is not inconsistent with Article III on the basis that the products in question are not “like” each other. This is regrettable as it leads to considerable caution in adopting good animal welfare measures.

The ability of WTO members to enact strong animal protection legislation will continue to be frustrated unless the position under the GATT is relaxed and countries are clearly permitted to make PPM distinctions. To prevent abuse, the ability to make PPM distinctions could be made subject to certain provisos. For example, rules or guidelines could provide that PPM distinctions must: i) be transparent, non-discriminatory, and proportionate; and must not constitute a disguised restriction on trade; ii) be science-based; iii) be of importance to a significant proportion of consumers in the country making the PPM distinction; and iv) relate to a matter of substance—for example, countries should be able to distinguish between battery eggs and free-range eggs, but not between two kinds of battery eggs, where one kind come from cages giving hens just a small amount of additional space.

### **The Article XX Exceptions**

Where a measure is found to be inconsistent with the trade obligations found in Articles I, III or XI, a country may still be able to justify that measure under Article XX (General Exceptions). In the past, the Article XX exceptions have been interpreted very narrowly, with panels apparently taking the view that the exceptions should never permit an animal protection measure to take precedence over the GATT’s substantive free trade provisions.<sup>45</sup> However, as indicated below, in recent years panel and Appellate Body rulings have recognised that the Article XX exceptions represent legitimate public policy considerations and accordingly should in certain circumstances enable a country to justify a measure that would otherwise be inconsistent with the GATT.

The Article XX exceptions that may be relevant to animal protection measures are:

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health; ...

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<sup>43</sup> *EC-Asbestos*, above n.34, at paragraph. 101.

<sup>44</sup> See earlier for Appellate Body’s analysis in *European Communities-Asbestos*

<sup>45</sup> For example, Panel report *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R, 15 May 1998, paragraph 7.44.

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”<sup>46</sup>

In *Brazil-Retreaded Tyres* the Appellate Body reiterated previous rulings indicating that a measure a Member is seeking to justify under Article XX must be subjected to a two-tiered analysis: first the measure must be provisionally justified under one of the specific exceptions listed in Article XX; second, the measure must satisfy the requirements of the “chapeau” of Article XX, the introductory words of the Article that prohibit measures being applied in a way that constitutes arbitrary or unjustifiable discrimination or a disguised restriction on international trade.<sup>47</sup>

### **Extra-territoriality**

Before considering any of the specific exceptions, it is important to first address concerns that are occasionally raised about the Article XX exceptions being applied too broadly, with the argument being that their use amounts to a form of legislative extra-territoriality. Many in the trade policy world assert that there is a strict rule that, while a WTO member may act to protect animals within its own territory, it may not adopt measures that affect animals located outside its territorial jurisdiction, for doing so involves one country unilaterally forcing their legislation onto another country, which is viewed as an affront to that nation’s sovereignty. However, as with the issue of “like products” and PPMs, the position on extra-territoriality is much less clear-cut and absolute than is often thought to be the case.

In *US-Tuna I* the Panel accepted that the question as to whether Article XX (b) extends to measures to protect animals outside the jurisdiction of the country taking the measure “[I]s not clearly answered by the text of that provision.”<sup>48</sup> Moreover, in *US-Tuna II* the Panel pointed out that the text of Article XX (b) and (g) does not spell out any limitation on the location of the living things to be protected, or in the case of paragraph (g), the natural resources to be conserved.<sup>49</sup> The Panel added that under general international law states are not in principle barred from regulating the conduct of their nationals with respect to persons, animals, plants and natural resources outside of their territory.<sup>50</sup>

The question of extra-territoriality also arose in *US-Shrimp*. In that case the U.S. had prohibited the import of shrimp from countries that did not require the use of turtle excluder devices designed to prevent sea turtles from getting caught up and drowning in shrimp nets. The Appellate Body observed that sea turtles are highly migratory animals, passing in and out of waters subject to the rights of jurisdiction of various coastal states and the high seas.<sup>51</sup> The Appellate Body recognised that the species of sea-turtles in question are all known to occur in waters over which the U.S. exercises jurisdiction.

The Appellate Body stated that it would not rule on whether there is an implied jurisdictional limit in Article XX (g), and if so, the nature or extent of that limitation. It concluded: “[W]e note only that in the specific circumstances of the case before us, there is a sufficient nexus

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<sup>46</sup> While Article XX (g) is likely to be relevant in certain instances involving endangered species, it is unlikely to play a role in measures relating to farm animals and their welfare.

<sup>47</sup> Appellate Body Report, *Brazil-Measures affecting imports of retreaded tyres*, WT/DS332/AB/R, adopted December 2007.

<sup>48</sup> *US-Tuna I*, above n. 18, paragraph 5.25.

<sup>49</sup> *US-Tuna II*, above n. 24, paragraphs 5.15 and 5.31.

<sup>50</sup> *Ibid.*, paragraph. 5.17.

<sup>51</sup> Appellate Body Report in *US- Shrimp*, above n.27, paragraph. 133.

between the migratory and endangered marine populations involved and the U.S. for purposes of Article XX(g)”.

The Panels’ central reason in both *US-Tuna* cases for rejecting the U.S. defence under Article XX (b) and (g) was that a country could not use trade measures to compel another country to change its conservation policies.<sup>52</sup> However, in *US-Shrimp* the Appellate Body took a very different approach stressing, in a passage of major significance, that:

It appears to us, however, that conditioning access to a Member’s domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognised as *exceptions to substantive obligations* established in the GATT 1994, because the domestic policies embodied in such measures have been recognised as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies ... prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.<sup>53</sup>

When *US-Shrimp* was first considered in 1998 the Appellate Body ruled against the U.S. import ban, *inter alia*, because the U.S. applied its measure in a manner that led to differential treatment as between various exporting countries. The U.S. decided to comply with the Appellate Body’s ruling not by lifting its import ban, but by changing the way in which it applied the ban. In 2000, Malaysia requested that a panel be established to examine its complaint that by not removing its import ban, the U.S. had failed to comply with the Appellate Body’s ruling.

A panel was formed and in 2001, in a ruling of great importance, the Panel stated that while a country could not condition access to its markets on another country adopting essentially the same conservation regime as its own, it could require would-be exporting countries to adopt programmes “comparable in effectiveness” to its own.<sup>54</sup> The Panel’s approach was confirmed as correct by the Appellate Body which stated that “[T]here is an important difference between conditioning market access on the adoption of essentially the same programme, and conditioning market access on the adoption of a programme *comparable in effectiveness*”.<sup>55</sup> The Appellate Body concluded that conditioning market access on the adoption of a programme comparable in effectiveness to that of the importing country is permissible under Article XX. This means parties seeking to achieve a particular policy objective are not necessarily forcing their legislative intent upon other parties, since reciprocating parties are only required to institute measures comparable in effectiveness to achieve the same policy aims.

The most recent tuna-dolphin dispute, *U.S. - Tuna II (Mexico)*, concerned U.S. dolphin-safe labelling provisions. These did not require use of the dolphin-safe label as a condition of

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<sup>52</sup> *US-Tuna I*, above n. 18, paragraph 5.27 & 32 and *US-Tuna II*, above n. 24, paragraphs 5.24-27 & 37.

<sup>53</sup> Appellate Body Report in *US- Shrimp*, above n.27, paragraph 121

<sup>54</sup> Report of the Panel in *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS 58/RW. 15 June 2001, paragraph 5.93.

<sup>55</sup> Appellate Body Report in *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS 58/AB/RW. 22 October 2001, paragraph 144.

marketing tuna in the U.S.; the provisions simply laid down the conditions under which a product may be labelled as dolphin-safe. At no point did the Panel or the Appellate Body suggest that the U.S. measure could not be aimed at the protection of dolphins located outside its territory.<sup>56 57</sup>

*EC – Seal Products* focussed on EU legislation that in effect prohibits the placing on the market of seal products unless the products fall within certain exceptions (the EU ‘Seal Regime’).<sup>58</sup> The Appellate Body considered whether there was a jurisdictional limit to the Article XX exception concerning measures necessary to protect public morals. It noted that the EU Seal Regime is designed to address seal hunting activities occurring "within and outside the Community" and the seal welfare concerns of "citizens and consumers" in EU member States. The Appellate Body said that "the participants did not address this issue in their submissions on appeal. Accordingly, while recognizing the systemic importance of the question of whether there is an implied jurisdictional limitation in Article XX(a), and, if so, the nature or extent of that limitation, we have decided in this case not to examine this question further."<sup>59</sup>

### ***Ensuring that consumer demand does not act as an incentive to inhumane practices in other countries***

In some cases, import or marketing restrictions are imposed by countries not because they seek to impose their legislation on other countries but rather because they wish to act responsibly in ensuring that consumer demand in their territory does not act as an incentive to practices they believe to be cruel. The U.S. adopted this position in the Dog and Cat Protection Act of 2000 that bans the import and export of dog and cat fur products, as well as the manufacture and sale of such fur products for interstate commerce.<sup>60</sup> The Act's purposes include ensuring "that U.S. market demand does not provide an incentive to slaughter dogs or cats for their fur." The EU and Australia have also now banned the import and export of cat and dog fur.<sup>61</sup>

Article 2.2 of the WTO Agreement on Technical Barriers to Trade (TBT)<sup>62</sup> was considered in *U.S. - Tuna II (Mexico)*. This provides that:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security

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<sup>56</sup> Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R

<sup>57</sup> Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012

<sup>58</sup> Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R and WT/DS401/AB/R, adopted 22 May 2014.

<sup>59</sup> Report of the Appellate Body in *EC- Seal Products*, above n.54, paragraph 5.173

<sup>60</sup> 19 U.S.C. § 1308 (2000)..

<sup>61</sup> *Regulation (EC) No 1523/2007 of the European Parliament and of the Council of 11 December 2007 banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur*. OJ L 343, p 0001-0004. Amendments to the *Customs (Prohibited Imports) Regulations 1956* and *Customs (Prohibited Exports) Regulations 1958* (Australia)

<sup>62</sup> The WTO website explains that the TBT "Agreement aims to ensure that technical regulations, standards, testing and certification procedures do not create unnecessary obstacles to trade. At the same time it also provides WTO members with the right to implement measures to achieve legitimate policy objectives, such as the protection of human health and safety, or protection of the environment."

[https://www.wto.org/english/tratop\\_e/tbt\\_e/tbt\\_e.htm](https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm) Accessed 10 March 2015

requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

In *U.S. - Tuna II (Mexico)* the Appellate Body agreed with the Panel that the U.S. objective of "contributing to the protection of dolphins, by ensuring that the U.S. market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins" is a legitimate objective for the purposes of TBT Article 2.2.<sup>63</sup>

Further, in *EC – Seal Products* the Panel concluded that the objective of the EU Seal Regime is to address the moral concerns of the EU public with regard to the welfare of seals and that one aspect of these concerns is EU citizens' "individual and collective participation as consumers in, and exposure to ('abetting'), the economic activity which sustains the market for seal products derived from inhumane hunts".<sup>64</sup> The Appellate Body agreed with the Panel that this objective fell within the scope of Article XX(a) on the protection of public morals.<sup>65</sup>

### **Conclusion on extra-territoriality**

WTO case law has come a long way from the initial presumption that measures that affect animals located outside a country's territorial jurisdiction cannot be justified under the WTO rules. In *U.S. – Shrimp* the Appellate Body made it clear that "is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies ... prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX".<sup>66</sup> In *U.S. – Shrimp (Article 21.5 – Malaysia)* the Appellate Body concluded that conditioning market access on the adoption of a programme comparable in effectiveness to that of the importing country is permissible under Article XX.<sup>67</sup>

Moreover, in both *U.S. - Tuna II (Mexico)* and *EC – Seal Products* the Appellate Body has recognised the legitimacy of a country wishing to prevent market demand in its territory from fuelling inhumane practices in other countries.<sup>68 69</sup>

### **Right of WTO Members to determine their level of protection**

Panels and the Appellate Body have stated on several occasions that Members have the right to determine the level of protection that they consider appropriate to achieve a given policy aim, for example as regards public health, conservation, prevention of deceptive practices or public morals.<sup>70 71 72</sup> Indeed, in *Brazil-Retreaded Tyres* the Appellate Body referred to the right that WTO Members have to determine the level of protection that they consider appropriate in a given context as a "fundamental principle".<sup>73</sup> In *EC – Asbestos* the

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<sup>63</sup> Appellate Body Report in *US-Tuna II(Mexico)*, above n.57, paragraphs 342 & 407

<sup>64</sup> Panel Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R / WT/DS401/R / and Add.1, circulated to WTO Members 25 November 2013, paragraph 7.410

<sup>65</sup> Appellate Body Report in *EC- Seal Products*, above n.58, paragraph 5.167

<sup>66</sup> Appellate Body Report in *US- Shrimp*, above n.27, paragraph 121

<sup>67</sup> Appellate Body Report in *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS 58/AB/RW. 22 October 2001, paragraph 144.

<sup>68</sup> Appellate Body Report in *US-Tuna II(Mexico)*, above n.57, paragraphs 342 & 407

<sup>69</sup> Appellate Body Report in *EC- Seal Products*, above n.58, paragraph 5.167

<sup>70</sup> Report of the Appellate Body in *EC – Asbestos*, above n. 34, paragraph 168.

<sup>71</sup> Report of the Panel in *US-Tuna II(Mexico)*, above n. 56, paragraph 7.460

<sup>72</sup> Panel Report in *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R. 10 November 2004, para. 6.461

<sup>73</sup> Report of the Appellate Body in *Brazil-Retreaded Tyres*, above n. 47, paragraph 210.

Appellate Body stated that it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation.<sup>74</sup> In *China - Publications and Audiovisual Products* the Panel noted “that it is up to each Member to determine what level of protection is appropriate in a given situation”, finding that China was entitled to adopt a high level of protection of public morals in its territory.<sup>75</sup> In *U.S. - Tuna II (Mexico)* the Panel recognised the right of WTO members to pursue legitimate objectives within the meaning of TBT Article 2.2 at their “chosen level of protection”.<sup>76</sup>

### **Does animal welfare fall within the public morals exception?**

The public morals exception was considered for the first time in *US-Gambling*. The Panel stressed that the content of this concept for Members can vary in time and space depending upon a range of factors, including prevailing social, cultural, ethical and religious values. It added that the Appellate Body has stated on several occasions that Members, in applying similar societal concepts, have the right to determine the level of protection that they consider appropriate; accordingly, Members should be given some scope to define and apply for themselves the concept of "public morals" in their respective territories, according to their own systems and scales of values.<sup>77</sup> The Panel considered that the term "public morals" denotes standards of right and wrong conduct maintained by or on behalf of a community or nation.<sup>78</sup>

The concept of 'public morals' has been used in a trade context to include animal welfare. The U.S. Dog and Cat Protection Act of 2000 states in its preamble that “the trade of dog and cat fur products is ethically and aesthetically abhorrent to U.S. citizens”. It may well be that a WTO member could successfully defend a trade restriction that requires imported meat or eggs to attain welfare standards equivalent to those produced domestically under the public morals exception.

The EU Seal Regime prohibits the placing on the market of seal products unless the products fall within certain exceptions. The Panel in *EC – Seal Products* concluded that the text and legislative history of the measure established the existence of the EU public's concerns on seal welfare.<sup>79</sup> It also concluded that “the evidence as a whole sufficiently demonstrates that animal welfare is an issue of ethical or moral nature in the European Union”.<sup>80</sup> The Panel added that “International doctrines and measures of a similar nature in other WTO Members ... illustrate that animal welfare is a matter of ethical responsibility for human beings in general”.<sup>81</sup>

The Panel summed up by concluding that “the objective of the EU Seal Regime is "to address the moral concerns of the EU public with regard to the welfare of seals". Specifically, these concerns have two aspects as claimed by the European Union: (a) "the incidence of inhumane killing of seals"; and [as discussed above], (b) EU citizens' "individual and collective participation as consumers in, and exposure to ('abetting'), the economic activity which sustains the market for" seal products derived from inhumane hunts”.<sup>82</sup>

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<sup>74</sup> Appellate Body Report in *EC-Asbestos*, above n.34 paragraph 168.

<sup>75</sup> Panel Report in *China - Publications and Audiovisual Products*, WT/DS363/R, 12 August 2009, paragraph 7.819.

<sup>76</sup> Panel Report in *US-Tuna II(Mexico)*, above n. 56, paragraph 7.460

<sup>77</sup> Panel report in *United States – measures affecting the cross-border supply of gambling and betting services*. WT/DS285/R. 10 November 2004, paragraph 6.461.

<sup>78</sup> *Ibid*, paragraph 6.465.

<sup>79</sup> Panel Report in *EC-Seal Products*, above n. 64, paragraph 7.404

<sup>80</sup> Panel Report in *EC-Seal Products*, above n. 64, paragraph 7.409

<sup>81</sup> *Ibid*

<sup>82</sup> Panel Report in *EC-Seal Products*, above n. 64, paragraph 7.410

The Appellate Body agreed with the Panel that the “principal objective of the EU Seal Regime is to address EU public moral concerns regarding seal welfare” and that this objective falls within the scope of Article XX(a).<sup>83</sup>

The ruling that animal welfare can be a matter of public morals and hence be covered by Article XX(a) is of immense importance. It should be noted that this will only be the case if there is evidence that the public in a particular jurisdiction does indeed have concerns of a moral nature about the animal welfare issue at stake.

The ruling in *EC – Seal Products* applies only to GATT Article XX(a) but the Panel made interesting observations regarding TBT Article 2.2. This provides that “technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective” and goes on to give examples of legitimate objectives. Public morals are not included in the non-exhaustive list of legitimate objectives in Article 2.2.

The Panel in *EC – Seal Products* said that in *US – Tuna II (Mexico)*, the Appellate Body considered that the following would be relevant factors in assessing the legitimacy of a non-listed objective: (a) objectives provided in Article 2.2 of the TBT Agreement; (b) objectives listed in the sixth and seventh recitals of the preamble of the TBT Agreement; and (c) objectives recognized in other provisions of the covered agreements.<sup>84</sup>

The Panel stated “With respect to policy objectives in other covered agreements, the objective of protecting public morals is recognized in both Article XX of the GATT 1994 and Article XIV of the GATS<sup>85</sup>. The explicit inclusion of “public morals” as one of the general exceptions for a GATT- or GATS inconsistent measure demonstrates that WTO Members considered this objective to be particularly significant. In light of this, and considered together with the objective of the TBT Agreement to further the objectives of the GATT 1994 as referenced in recital (2) of its preamble, we conclude that “public morals” falls within the scope of “legitimate” objectives under Article 2.2.”<sup>86</sup> The Panel stated that addressing the EU public moral concerns on seal welfare, identified as the objective of the measure at issue, is “legitimate” under Article 2.2.<sup>87</sup>

The Appellate Body reversed the Panel’s finding that the EU Seal Regime is a ‘technical regulation’ as defined in Annex 1.1 of the TBT Agreement. As a result the Seal Regime is not covered by the TBT Agreement; accordingly the Appellate Body declared the Panel’s findings under the TBT Agreement to be of no legal effect.<sup>88</sup> Although the Panel’s TBT findings have no legal effect they may be thought of as throwing some light for future purposes on the interpretation of certain TBT provisions, particularly Article 2.2.

To sum up, animal welfare can be a matter of public morals and hence be covered by GATT Article XX(a). Public morals, including moral concerns about animal welfare, may also be a “legitimate objective” under TBT Article 2.2.

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<sup>83</sup> Appellate Body Report in *EC- Seal Products*, above n.58, paragraphs 5.167 & 5.201

<sup>84</sup> Panel Report in *EC-Seal Products*, above n. 64, paragraph 7.416

<sup>85</sup> General Agreement on Trade in Services

<sup>86</sup> Panel Report in *EC-Seal Products*, above n. 64, paragraph 7.418

<sup>87</sup> Panel Report in *EC-Seal Products*, above n. 64, paragraph 7.419

<sup>88</sup> Appellate Body Report in *EC- Seal Products*, above n.58, paragraph 5.70

### **Does animal welfare come within the animal life or health exception?**

In *US-Shrimp* the Appellate Body held that animals may fall within Article XX(g) as “exhaustible natural resources.”<sup>89</sup> Until recently it was not clear whether an animal welfare exception could be formulated under Article XX(b), as being “necessary to protect human, animal or plant life or health”. At least one WTO Member – the U.S. – has interpreted Article XX(b) as including animal welfare. The preamble to the Dog and Cat Protection Act of 2000 states that the import ban is “[C]onsistent with provisions of international agreements to which the U.S. is a party that expressly allow for measures designed to protect the health and welfare of animals”; in the context of the Act this can only be a reference to GATT Article XX(b).

In *Brazil-Retreaded tyres* the Panel acknowledged that the preservation of animal and plant life and health, which constitutes an essential part of the protection of the environment, is an important value, recognized in the WTO Agreement.<sup>90</sup> The Panel stressed that the objective of protection of animal and plant life and health should be considered important.

The Panel in *U.S. - Tuna II (Mexico)*, in considering TBT Article 2.2, stated that the U.S. had identified two objectives for its dolphin-safe labelling provisions:

- ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins; and
- contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins.<sup>91</sup>

The Panel accepted that the U.S. objectives aimed at protecting consumers from deceptive practices and contributing to the protection of dolphins by discouraging certain fishing practices and that both these objectives are legitimate within the terms of Article 2.2.<sup>92</sup> The Panel said that the “objective of preventing consumers of tuna products from being deceived by false dolphin-safe allegations falls within the broader goal of preventing deceptive practices” which is included in the list of legitimate objectives set out in Article 2.2.<sup>93</sup>

The protection of animal life or health also appears among the Article 2.2 legitimate objectives. In an important passage the Panel said “the protection of dolphins may be understood as intended to protect animal life or health or the environment. In this respect, a measure that aims at the protection of animal life or health need not, in our view, be directed exclusively to endangered or depleted species or populations, to be legitimate. Article 2.2 refers to “animal life or health” in general terms, and does not require that such protection be tied to a broader conservation objective. We therefore read these terms as allowing Members to pursue policies that aim at also protecting individual animals or species whose sustainability as a group is not threatened”.<sup>94</sup>

This is a major development. The Appellate Body in *U.S. – Shrimp* had held that sea turtles may fall within Article XX(g) as “exhaustible natural resources.”<sup>95</sup> Nearly all species of sea turtles are classified as endangered and there remained doubts as to whether panels and the Appellate Body would take a positive approach in the case of non-endangered species. It is

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<sup>89</sup> Report of the Appellate Body in *US-Shrimp*, above n. 27, paragraph 131.

<sup>90</sup> Report of the Panel, *Brazil-Measures affecting imports of Retreaded Tyres*, WT/DS332/R, paragraph 7.112. 12 June 2007.

<sup>91</sup> Panel Report in *US-Tuna II(Mexico)*, above n. 56, paragraphs 7.401 & 7.425

<sup>92</sup> Panel Report in *US-Tuna II(Mexico)*, above n. 56, paragraphs 7.437 & 7.444

<sup>93</sup> Panel Report in *US-Tuna II(Mexico)*, above n. 56, paragraph 7.437

<sup>94</sup> *Ibid*

<sup>95</sup> Appellate Body Report in *US-Shrimp*, above n. 27, paragraph 131.

extremely helpful that the Panel in *U.S. - Tuna II (Mexico)* has said that Members may pursue policies that aim at protecting individual animals or species whose sustainability as a group is not threatened. This point could be of particular importance in interpreting GATT Article XX(b) which deals with measures necessary to protect animal life or health.

It remains unclear as to whether the term “animal health” in GATT Article XX(b) and TBT Article 2.2 can reasonably be interpreted as including matters of animal welfare. Many factors that have an adverse impact on animal welfare also negatively affect animal health. Accordingly certain animal welfare issues may well be covered by the reference to animal health in GATT Article XX(b) and TBT Article 2.2.

### **Conclusion on animal welfare**

Earlier cases - *US – Tuna 1*, *US – Tuna II* and the 1998 Panel in *US-Shrimp* – appeared to take the view that matters of animal welfare must never be allowed to impede trade liberalisation. Since then there has been a remarkable turn round. Animal welfare concerns are now accepted as being an aspect of public morals and hence covered by GATT Article XX(a) and perhaps also qualifying as a legitimate objective under TBT Article 2.2. In addition, the TBT Article 2.2 legitimate objective of protecting animal life and health has been held to apply not just to endangered species but also to individual animals or species whose sustainability as a group is not threatened. A future panel or the Appellate Body may apply this thinking to the GATT Article XX(b) exception regarding animal life and health.

### **“Necessity” under Article XX(a) & (b)**

While there is considerable potential under Article XX(a) & (b) for countries to mount successful defences to claims of unfair trade restrictions imposed for the purposes of animal welfare, measures falling within the scope of these clauses, must still be “necessary to” fulfil the policy objective of protecting public morals or protecting animal life or health.

Earlier panels have taken a restrictive view in determining what is “necessary”. They have ruled that a measure is necessary only if no alternative which is consistent with—or less inconsistent with—GATT rules is reasonably available to fulfil the policy objective.<sup>96</sup> More recently, however, dispute settlement has followed a more balanced approach. In *Brazil-Retreaded Tyres* the Panel noted that the necessity of a measure should be determined through “a process of weighing and balancing a series of factors”, which usually includes the assessment of the following three factors: the relative importance of the interests or values furthered by the challenged measure; the contribution of the measure to the realization of the ends pursued by it; and the restrictive impact of the measure on international commerce.<sup>97</sup> This approach was also taken by the Appellate Body in *EC – Seal Products*.

The Appellate Body has further explained that, once all those factors have been analyzed, a comparison between the challenged measure and possible alternatives should in most cases then be undertaken to determine whether a WTO-consistent alternative measure, or a less WTO-inconsistent measure, which the Member concerned could reasonably be expected to employ, is available.<sup>98</sup>

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<sup>96</sup> For example, Report of the Panel in *United States – Section 337 of the Tariff Act of 1930*, BISD 36S/386. Adopted on 7 November 1989.

<sup>97</sup> Panel report *Brazil-Retreaded Tyres*, above n. 90, paragraph 7.104.

<sup>98</sup> Appellate Body Report, *U.S. - Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (Corr.1, DSR 2006:XII, p. 5475), paragraph. 307 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, paragraph. 166). See also Appellate Body Report, *US – Tuna II (Mexico)*, paragraph. 321 (referring to Appellate Body Report, *US – Gambling*, paragraphs. 307). See also Appellate Body in *Brazil – Retreaded Tyres*, above n.47, paragraph 174

The burden of proving that a measure is "necessary to protect public morals" within the meaning of Article XX(a) resides with the responding party, although a complaining party must identify any alternative measures that, in its view, the responding party should have taken.<sup>99</sup> The Appellate Body has noted that a responding party need not identify the universe of less trade-restrictive alternative measures and then show that none of those measures achieves the desired objective.<sup>100</sup> The WTO agreements, the Appellate Body stated, do not contemplate such an impracticable and impossible burden.<sup>101</sup>

The Appellate Body has stressed that an alternative measure must be one that is "reasonably available" and that a reasonably available alternative measure must be one that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued.<sup>102</sup> An alternative measure may be found not to be "reasonably available" where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties.<sup>103</sup>

### **The chapeau**

Once a measure has been found to come within one of the specific exceptions listed in Article XX, the Panel must finally consider whether it satisfies the requirements of the "chapeau" of the Article, the introductory words of the Article that prohibit measures being applied in a way that constitutes arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

The role of the chapeau is to ensure that the exceptions invoked as of right under Article XX are not applied in a manner that would "frustrate or defeat the legal obligations of the holder of the right under the substantive rules".<sup>104</sup> In the past the requirements of the chapeau have been interpreted restrictively, particularly by the Panel in *US-Shrimp*.<sup>105</sup> However, a more balanced approach has been developed by the Appellate Body in recent years. In *Brazil-Retreaded Tyres* the Appellate Body stressed that the function of the chapeau is the prevention of abuse of the exceptions specified in Article XX.<sup>106</sup> In *US – Shrimp*, the Appellate Body stated that "[T]he chapeau of Article XX is, in fact, but one expression of the principle of good faith."<sup>107</sup> The Appellate Body added that the task of interpreting and applying the chapeau is:

[T]he delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of this line of equilibrium ... is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.<sup>108</sup>

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<sup>99</sup> Report of the Appellate Body in *EC- Seal Products*, above n.54, paragraph 5.169

<sup>100</sup> Appellate Body Report, *US – Gambling*, above n. 98, paragraphs. 309-311.

<sup>101</sup> *Ibid*, paragraph 309

<sup>102</sup> Appellate Body Report, *US – Gambling*, above n. 98, paragraphs 307- 308.

<sup>103</sup> *Ibid*, paragraph 308

<sup>104</sup> *United States - Standards for the Reformulated and Conventional Gasoline*, WT/DS2/AB/R (20 May 1996), para 121.

<sup>105</sup> Panel Report *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R, 15 May 1998, paragraph 7.44.

<sup>106</sup> Appellate Body Report in *Brazil-Retreaded Tyres*, above n. 47, paragraph 224.

<sup>107</sup> Appellate Body report in *US-Shrimp*, above n. 27, paragraph 158.

<sup>108</sup> *Ibid*, paragraph 159.

In *EC – Seal Products* the Appellate Body noted that one of the most important factors in the assessment of arbitrary or unjustifiable discrimination is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX.<sup>109</sup>

The Appellate Body identified several features of the EU Seal Regime that indicate that it is applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, in particular with respect to the IC (Inuit communities) exception. First, the Appellate Body found that the EU did not show that the manner in which the EU Seal Regime treats seal products derived from IC hunts as compared to seal products derived from "commercial" hunts can be reconciled with the objective of addressing EU public moral concerns regarding seal welfare.<sup>110</sup>

Second, the Appellate Body found considerable ambiguity in certain criteria of the IC exception. Finally, it was not persuaded that the EU 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.<sup>111</sup>

## **Conclusion**

The GATT rules remain an important impediment to strengthening EU legislation (or that of other WTO members) on the protection of animals. As this article seeks to demonstrate however, it may well be that governments are taking too cautious a view of the GATT restrictions and using them as an excuse for not making more meaningful changes to benefit the welfare of animals.

Recently, there have been some positive signs. The Panels and the Appellate Body recognise that measures designed to protect animals can be covered by the public morals and the animal life or health exceptions. The Appellate Body has ruled that legislation that aims to address EU public moral concerns regarding seal welfare can be justified under the Article XX public morals exception although the EU measure was ruled to be inconsistent with the chapeau in discriminating unjustifiably between different exporting countries. The EU can, however, address this flaw by amending its legislation.

The Panel accepted that one objective of the U.S. dolphin-safe labelling provisions is the protection of dolphins and that this falls within one of the legitimate objectives specified in TBT Article 2.2 i.e. the protection of animal life or health. The Panel in *U.S. - Tuna II (Mexico)* stressed that this reference to animal life or health is not confined to endangered species but allows Members to pursue policies that aim at protecting individual animals or species whose sustainability as a group is not threatened.

Panels and the Appellate Body have increasingly emphasised the right of WTO members to determine the level of protection that they consider appropriate to achieve a given policy aim.

The 'rule' on process and productions methods begins to look less rigid and perhaps the way is now more open to argue that products produced in a relatively animal-friendly manner are not 'like' products that emanate from inherently inhumane systems or processes.

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<sup>109</sup> Appellate Body Report in *EC- Seal Products*, above n.58, paragraph 5.318

<sup>110</sup> Appellate Body Report in *EC- Seal Products*, above n.58, paragraph 5.338

<sup>111</sup> *Ibid*

The 'rule' on extra-territoriality also appears less forbidding; it is invoked less often and moreover there is increasing acceptance that it is legitimate for a WTO member to wish to ensure that its own market demand does not stimulate unacceptable practices in other countries.

The Appellate Body has accepted that while a country cannot condition access to its markets on another country adopting essentially the same conservation regime as its own, it could require would-be exporting countries to adopt programmes "comparable in effectiveness" to its own.

These moves are welcome and show that WTO panels and the Appellate Body are developing a more balanced relationship between the GATT free trade rules and other legitimate public policy considerations. It follows that there are many strong arguments that can be made in defence of animal protection initiatives.