The Applicability of GATT Article XX(a) to Animal Welfare

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Abstract

This literature review synthesises recent academic commentary analysing whether there is evidence that trade restrictions aimed at protecting animal welfare can be justified under Article XX(a) of the General Agreement on Tariffs and Trade (GATT) 1994 and thus whether such measures can be complimentary to and comply with the World Trade Organisation's (WTO) free trade agenda. The literature review places particular emphasis on the EC – Seal Products case and the way the case has evolved interpretations of GATT Article XX(a).

Background and Conceptual Framework

This literature review assesses whether there is evidence that trade restrictions that protect animal welfare can be justified under Article XX(a) of the General Agreement on Tariffs and Trade 1994 (GATT) and thus whether such measures can be complimentary to and compliant with the World Trade Organisation's (WTO) free trade agenda.[1] Decision-makers in the EU often use the WTO as a scapegoat when they are not politically motivated to pursue animal welfare protection measures; they claim that WTO law acts as a barrier to such legal action.[2] This review demonstrates that the WTO is not a barrier to enacting carefully constructed trade restrictions aimed at protecting animal welfare. Enacting such measures will not expose the EU to any challenges at the WTO's Dispute Settlement Body (DSB) to which it would not be able to mount a strong defence.

> "WTO is not a barrier to enacting carefully constructed trade restrictions aimed at protecting animal welfare."

The assessment in this literature review was based on a synthesis of results from eleven articles reporting on the legality of barriers to trade intended to protect animal welfare for moral reasons. The limited number of articles available is due to the 2014 decision in the *EC – Seal Products* case which renders earlier commentary of limited use in determining the legality of animal welfare protecting trade measures under GATT Article XX(a).[3] This review is preceded by a contextual section which provides the relevant treaty terms and case law from the DSB. The literature review was conducted to analyse the state of understanding of the law. It consists of an overview of the relevant academic articles which provide insight and commentary into the use of GATT Article XX(a) as a justification for animal welfare protecting trade measures.

GATT Article XX(a) and Related Case Law

Introduction

The protection of animal welfare has traditionally been viewed as an antithesis to free trade and incompatible with the rules of the World Trade Organisation.[4]

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[1] General Agreement on Tariffs and Trade (1 Jan. 1948) 55 UNTS 194.

[2] Evidenced in, e.g., Dods EU, *Briefing: EP AGRI – Exchange of views with Andriukaitis,* on file with author (2016).

[3] *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R (A.B. 2014).

[4] AB Thiermann and S Babcock, 'Animal Welfare and International Trade' (2005) 24(2) Rev sci tech Off int Epiz 747, 748; and André Nollkaemper, 'The Legality of

However, as interpretation and application of the WTO treaties evolves, it is increasingly being understood that this is not the case. The WTO's free trade rules[5] have never permitted *absolute* free trade, seeking instead to strike an appropriate balance between trade and other societal values. This is important in order to address the danger posed to domestic standards on production which can be undermined by imports produced at a cheaper cost due to lower animal welfare standards (etc) which are less costly to comply with.[6] Article XX of the GATT contains an exhaustive list of justifications a WTO Member State may provide to defend otherwise GATT-inconsistent measures. It states:

> 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,[7] 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 …

Though it is often lamented that the list of exceptions in Article XX does not include one directly aimed at animal welfare, Article XX(a)[8] could be of use in light of recently proven public moral concern for animal welfare.[9] There is indeed space in WTO law and in the practice of the DSB for animal welfare protection that is compliant with the WTO's free trade rules because the WTO has sought to find a line of equilibrium between the substantive obligations in the GATT and the Article XX exceptions.[10] This is despite the claim by some authors of an accepted principle of interpretation that would require exceptions to be interpreted narrowly (*singularia non sunt extendenda*).[11]

There is concern regarding the fact that only one case in the history of the WTO's dispute settlement body (DSB) has permitted an otherwise GATT-inconsistent measure on the basis of Article XX.[12] However focusing on this statistic would ignore the fact that in most cases Member States have adopted otherwise GATT-inconsistent measures which fall unquestionably within the terms of Article XX and have not been challenged.[13] In other cases GATT-inconsistent measures have been modified to meet the conditions of Article XX and maintained by the Member State without being subject to further challenge.[14] Article XX presents an important opportunity to use trade measures to protect animal welfare and perhaps the best option in this regard is the exception to the substantive GATT rules for reasons of public morality in Article XX(a).

> "The WTO's free trade rules have never permitted *absolute* free trade, seeking instead to strike an appropriate balance between trade and other societal values."

Article XX(a): Regulating the Content of Trade Measures

i. Article XX(a)'s Relevance to Animal Welfare

Article XX(a) offers a promising opportunity for the EU to be able to pass GATT-consistent trade restricting measures that safeguard animal welfare if those measures are 'necessary to protect public morals'. There exists proven European public

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Moral Crusades Disguised in Trade Laws: An Analysis of the EC 'Ban' on Furs from Animals Taken by Leghold Traps' (1996) 8(2) J Environmental Law 237, 238.

[5] Those relevant to this review are in the GATT, *supra* n. 2, Articles XI:1, I:1 and III:2 and 4.

[6] Harald Grethe, 'High animal welfare standards in the EU and international trade – How to prevent potential "low animal welfare havens"?' (2007) 32 Food Policy 315, 318.

[7] This is Article XX's so-called 'chapeau'.

[8] Along with Article XX(b) for measures necessary to protect human, animal and plant life or health, and Article XX(g) for measures related to the conservation of natural resources.

[9] For the case of the EU, see the results of: European Commission, *Special Eurobarometer 442: Attitudes of Europeans towards Animal Welfare,* http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/Survey/getSurveyDetail/instruments/SPECIAL/surveyKy/2096 (accessed 24 Aug. 2016).

[10] See: *Thailand – Customs and Fiscal Measures on Cigarettes from the Phiilippines,* WT/DS371/AB/R, para. 173 (A.B. 2011), and *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, para. 18 (A.B. 1996).

[11] Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* 18 (3d ed., Cambridge University Press 2013) citing C de Montesquieu, *De l'Espirit des Lois* (Barillot 1748).

[12] This was *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/R (A.B. 2001).

[13] See Van den Bossche and Zdouc, *supra* n. 12.

[14] See Van den Bossche and Zdouc, *supra* n. 12.

moral concern for animal welfare[15] though the usefulness of public surveys in this regard is questionable.[16] However, before the recent *EC – Seal Products* case, only one case had invoked Article XX(a)[17] before the DSB and so the DSB's attitude toward Article XX(a) had been somewhat of a mystery. It has however been noted that various trade measures passed by the WTO Member States have used Article XX(a) as justification – whether implicitly or explicitly – for breaches of other terms of the GATT.[18] The *EC – Seal Products* case now provides a modern analysis and confirmation of the applicability of Article XX(a) directly to the issue of animal welfare. The results of the literature review below confirm that it is generally accepted that in the *EC – Seal Products* case the DSB made clear that animal welfare protecting trade measures can be justified by Article XX(a). The following will address (1) the Article XX(a) requirement that a measure must be aimed at protecting public morals, (2) the Article XX(a) requirement that a measure must be necessary to ensure this protection, and (3) the problems posed by a possible jurisdictional limit to Article XX.

ii. Public Morals

The concept of public morality is undefined in the GATT and could thus be subject to varying interpretations. The treaty gives no indication as to whether animal welfare could rightly be defined as an issue of public morality. In his seminal piece on public morality under the GATT, Charnovitz sets out the difficulties in interpreting what Article XX(a) is intended to include.[19] He states in particular that the ordinary wording of the Article does little to reveal what it ought to include.[20] Further, he states that there are no relevant instruments between the parties connected to the conclusion of this Article, no subsequent agreement regarding this Article and no subsequent explicit practice.[21] The travaux preparatoires of Article XX(a) further reveals little about its intended scope.[22] Charnovitz thus resorts to studying moral exceptions in other trade treaties where he finds references to 'narcotics, pornography, and lottery tickets'.[23] Nonetheless, the WTO's DSB has provided some answers regarding the scope of Article XX(a) since Charnovitz' work was completed.

The case of *US - Gambling* provides a helpful analysis of the concept of public morality as set out in the General Agreement on Trade in Services[24] which highlights that Member States have considerable freedom to define what public morality means for themselves. The panel in this case found that public morality 'denotes standards of right and wrong conduct maintained by or on behalf of a community or nation'.[25] It found that the content of the public morality concept can vary between Member States 'depending upon a range of factors, including prevailing social, cultural, ethical and religious values' and that Member States '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'.[26] This analysis was quoted with approval in the later *China – Audiovisuals* case which applied the interpretation explicitly to Article XX(a) of the GATT.[27] This is a favourable ruling for members such as the EU where animal welfare has been proven to be important to the public.[28]

> "…it is generally accepted that in the *EC – Seal Products* case the DSB made clear that animal welfare protecting trade measures can be justified by Article XX(a)."

iii. *Necessity*

The necessity test requires that the measure at issue is necessary in order to protect the public morality objective of the WTO Member State. It has been held by the WTO's DSB that states have the freedom to decide what they feel is an appropriate level of protection to be given to public morals. This fact has been stated

[15] Special Eurobarometer, *supra* n. 10, at 442.
[16] See discussion below in section E.2.
[17] This was *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products,* WT/DS/363/AB/R (A.B. 2009).
[18] Van den Bossche and Zdouc, *supra* n. 12, at 571.
[19] Steve Charnovitz, 'The Moral Exception in Trade Policy' (1998) 38 Va J Int'l L 689.
[20] *Ibid*, 716.
[21] *Ibid*.
[22] *Ibid.*
[23] *Ibid.*
[24] General Agreement on Trade in Services (01 Jan 1995) 1869 UNTS 183.
[25] *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* WT/DS285/AB/R, para. 6.465 (Panel 2005).
[26] *Ibid*, para. 6.461.
[27] *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products,* WT/DS/363/R, para. 7.759 (Panel 2009).
[28] Special Eurobarometer, *supra* n. 10, at 442.

to be a 'fundamental principle'[29] of WTO law and an 'undisputed right'[30] of the WTO Member States. The test has been found to involve a 'sequential process of weighing and balancing a series of factors' including the objective being pursued and its relative importance, the contribution of the measure to the objective, the restrictive effects on trade of the measure, and whether less trade restrictive alternatives are reasonably available.[31] The results of the literature review below synthesise current understanding of this requirement following the *EC – Seal Products* case.

iv. Jurisdictional Limit

There is debate as to whether or not a jurisdictional limit applies to Article XX;[32] such a limit would mean that WTO Member States can protect societal values within their own jurisdiction but not outside of it. Most animal welfare protecting trade measures will have the effect of improving the welfare of animals abroad and so such a jurisdictional limit could be harmful to European efforts to restrict trade in animal products. There is no express jurisdictional limit in Article XX[33] and so it has been left up to the DSB to settle the issue.

The popular opinion is that the DSB has not provided a definitive answer to this question but the case law does shed some light on the issue. Early DSB rulings were unfavourable toward measures having such extra-territorial effects stating that an importing state can't use trade measures to compel another country to change its policies.[34] Recent case law departs from this position. For example, in *US – Shrimp* the appellate body stated that measures requiring exporting countries to comply with, or adopt, certain policies prescribed by the importing state will not render the measure *a priori* incapable of justification under Article XX.[35] It went on to state that: '[s]uch an interpretation renders most, if not all, of the specific exceptions under Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply'.[36] The DSB has ruled that importing states can require exporters to adopt policies that are 'comparable in effectiveness' to their own in order to protect one of the values listed in Article XX. [37] It is also stated in *US – Tuna II* that in principle there is no prohibition in general international law that would bar states from passing such measures regulating the conduct of persons within their jurisdiction that affects animals outside of that jurisdiction.[38]

The case law is thus increasingly favourable towards efforts to protect animal welfare through trade measures, despite the extra-territorial effect of such measures. It has also been theorised that Article XX(a) might be less problematic in this regard.[39] The position following the *EC – Seal Products* case is commented upon in the literature review below.

> "…case law is increasingly favourable towards efforts to protect animal welfare through trade measures…"

Article XX Chapeau: Regulating the Application of Trade Measures

The opening words to Article XX[40] determine the way animal welfare protecting trade measures must be applied in order to be justifiable. It requires that 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.

[29] *Brazil – Measures Affecting Imports of Retreated Tyres* WT/DS332/AB/R, para. 210 (A.B. 2007).
[30] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* WT/DS135/AB/R, paras 80 and 168 (A.B. 2001).
[31] *Brazil - Measures Affecting Imports of Retreated Tyres,* WT/DS332/R, para 7.104 (Panel 2007) cited with approval by the Appellate Body in *China - Publications and Audiovisual Products*, *supra* n. 18, at para. 242.
[32] See, for example, Peter Stevenson, *The impact of the World Trade Organisation rules on animal welfare*, 10, http://www.ciwf.org.uk/research/animal-welfare/the-impact-of-the-world-trade-organisation-rules-on-animal-welfare/ (accessed 23 Apr. 2016).
[33] *United States – Restrictions on Imports of Tuna* DS 21/R, para. 5.25 (Panel 1991).
[34] *US – Tuna I, supra* n. 24, at paras 5.27 and 5.32; *United States – Restrictions on Imports of Tuna,* DS 29/R, paras 5.24-5.27 and 5.37 (Panel 1994).
[35] *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* WT/DS58/AB/R, para. 121 (A.B. 1998).
[36] *US – Shrimp, supra* n. 36, at para. 121.
[37] *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia,* WT/DS58/RW, para 5.93 (Panel 2001) and confirmed in *US –Shrimp (Malaysia), supra* n. 11, at para. 144.
[38] *US – Tuna I, supra* n. 34, at para. 5.17.
[39] Kate Cook and David Bowles, *Growing Pains: The Developing Relationship of Animal Welfare Standards and the World Trade Rules,* 19(2) RECIEL 227, 234 (2010).
[40] Referred to as the Article XX 'chapeau' because they sit at the head of the section without being set out as an independent paragraph.

The Article XX(a) exception to the substantive GATT rules is 'limited and conditional' upon the terms of the chapeau. [41] The chapeau is used to mark out a 'line of equilibrium' between the rights of Member States to invoke exceptions under Article XX and the substantive rights of other Member States under the GATT.[42] It has been ruled by the Appellate Body that this line of equilibrium will move depending upon the 'kind and the shape of the measures at stake … and … the facts making up specific cases'.[43]

Essentially the chapeau is about making sure that the Article XX exceptions are not abused[44] and that measures are applied in all situations where they ought to be applied, so that there are no 'unexplained gaps in the application of a measure' which might constitute discrimination and which are unfavourable to the protection of the value at issue.[45] The majority of GATT-inconsistent measures that have met the conditions of a specific exception in Article XX have fallen short of the chapeau's requirements but the chapeau need not pose a problem to a trade restriction constructed in a non-discriminatory manner. The literature review below synthesises present understandings of the chapeau's application in Article XX(a) cases.

The EC – Seal Products Case

The literature reviewed below largely focuses on the outcome of the *EC – Seal Products* case because this is the only time the DSB has considered the application of GATT Article XX(a) to public morality related to animal welfare. The case consisted of a challenge by Norway and Canada to the EU's seal regime[46] which bans the placing on the market of seal products, with a few exceptions. Moral concern regarding seal hunting exists because the killing often entails inhumane suffering: the seals are usually located in inhospitable places making their killing and recovery – and oversight of the killing – particularly difficult.[47] Paragraph 4 of the preamble to the EU seals regime regulation 1007/2009 refers to:

> expressions of serious concerns by members of

[41] *US – Shrimp, supra* n. 36, at para. 157.
[42] *US – Shrimp, supra* n. 36, at para. 156-159.
[43] *US – Shrimp, supra* n. 36, at para. 159.
[44] *Brazil – Retreated Tyres, supra* n. 30, at para. 224.
[45] L Bartels, *The WTO Legality of the Application of the EU's Emission Trading System to Aviation,* 23 EJIL 429, 452 (2012).
[46] Regulation (EC) 1007/2009 of the European Parliament and of the Council on Trade in Seal products (20 Nov. 2009), OJ L 286/36.
[47] Gregory Shaffer and David Pabian, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* 109 AJIL 154, 155 (2015).

> the public and governments sensitive to animal welfare considerations due to the pain, distress, fear and other forms of suffering which the killing and skinning of seals, as they are most frequently performed, cause to those animals.

The problem with the regime largely arises from the fact that exceptions to the import ban are permitted for, *inter alia*, seal products resulting from indigenous or marine management hunts. Canada and Norway challenged the measure alleging inconsistency with Article I and Article III:4 of the GATT – as well as arguments based on the Agreement on Technical Barriers to Trade – because the exceptions did not apply to Canadian and Norwegian Inuit in the same way as they applied to Greenlandic Inuit in practice.[48] The panel ruled that the measure breaches both articles; the appellate body agreed with the ruling on Article I:1[49] and the panel's ruling on Article III:4 was not appealed.[50]

The panel concluded in this case that the measure was based on the EU's public moral concern regarding seal welfare[51] and stated that 'the evidence as a whole sufficiently demonstrates that animal welfare is an issue of ethical or moral nature in the European Union' and 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'.[52] The appellate body agreed with this ruling.[53] However, it found that the measure was inconsistent with the requirements of the chapeau to Article XX stating that the exceptions for indigenous hunts are not justified in a way that can reconcile them with the objective of the measure to protect public morals.[54] It concluded that the indigenous hunt exception was 'designed and applied in an arbitrary and unjustifiable manner'.[55] The literature review below synthesises current understandings of the state of the law following this case, specifically with regard to the potential for Article XX(a) to be used to defend animal welfare protecting trade measures that are otherwise GATT-inconsistent.

Methods and Material of the Literature Review

To conduct this study the international journal databases provided by 'Westlaw', 'LexisNexis' and 'HeinOnline' were utilized in order to determine the current state of knowledge regarding the legality of using Article XX(a) of the GATT to justify trade restrictions used to protect animal welfare. The focus is on academic commentary on the current state of the law.

The Boolean search term used was kept intentionally general accounting for the author's knowledge that limited legal research has been conducted in this area and that the majority of recent legal research done regarding morality and animals are likely to relate to Article XX(a) of the GATT. The following Boolean search term was used:

> (trade) AND (moral!) AND (animal!) AND XX OR 20 OR twenty.

Only results in English were used and those published at the earliest in 2013 but written after the WTO's DSB panel had published its report on the *EC – Seal Products* case. No function was available to narrow the results by date in 'Westlaw' and 'LexisNexis' so this elimination was done manually. Articles prior to conclusion of the appeal are relevant because the appellate body reached some of the same conclusions with regard to Article XX(a) as did the panel. There is helpful commentary written in between the two DSB reports that remains of relevance. The search concluded on 19 July 2016.

The 'Westlaw' search produced 210 results, the 'LexisNexis' search produced 989 results, and the 'HeinOnline' search produced 560 results. The titles, abstracts, and keywords of these articles were searched for relevance. Fifteen articles were included in the preliminary list of relevant literature. Four were eliminated because they dealt with Article XX(a) only briefly and instead focused on other issues raised by the *EC – Seal Products* case.[56] A

[48] Agreement on Technical Barriers to Trade (1 Jan. 1995), 1868 UNTS 120.
[49] *EC – Seal Products, supra* n. 4, at para. 5.96.
[50] *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products,* WT/DS400/R and WT/DS401/R (Panel 2013).
[51] *EC – Seal Products, supra* n. 51, para. 7.404.
[52] *EC – Seal Products, supra* n. 51, para. 7.409.
[53] *EC – Seal Product, supra* n. 4, at paras 5.167 and 5.201.
[54] *EC – Seal Products, supra* n. 4, at para. 5.337-5.339.
[55] *EC – Seal Products, supra* n. 4, at para. 5.339.
[56] These were: Alexia Herwig, *Too much zeal on seals? Animal welfare, public morals, and consumer ethics at the bar of the WTO*, 15(1) World TR 109 (2016); Philip I Levy and Donald H Regan, *EC – Seal Products: seals and sensibilities (TB) aspects of the panel and appellate body reports*, 14(2) World TR 337 (2015); Petros C Mavroidis, *Symposium on the EU – Seal Products Case: Sealed with a Doubt, EU, Seals, and the WTO* 6 Eur J Risk Reg 388 (2015); Natalya Mosunova, *Are*

manual search of the footnotes in the relevant articles was also conducted; this confirmed that no other directly relevant material had been published on the subject since 2013. The results of this study are based on a qualitative synthesis of the results from the eleven articles reviewed.[57]

Results of the Literature Review

EC – Seal Products

The totality of articles written on GATT Article XX(a) and animals in the last three years have focused on the results and the impact of the *EC – Seal Products* dispute at the WTO's DSB. There is consensus amongst legal commentators that this is the most important insight into the legality of trade restrictions aimed at improving animal welfare in order to protect public morality. Every article reviewed is in agreement that the *EC – Seal Products* case acknowledges that intrinsic moral concerns *are* permissible, non-instrumental rationales for the establishment of trade restrictive measures[58] and they *can* take precedence over core WTO obligations of trade liberalization. As pointed out by a few of the articles, the *EC – Seal Products* case is the only instance at the WTO to have dealt with the issue of GATT Article XX(a)'s applicability to public moral concerns regarding animal welfare.[59]

> "It was further noted by many of the articles that the objective of the measure is a subjective choice and need not reflect animal welfare as an objective and universally shared moral concern."

Objective of Measure

Some of the articles discuss the first requirement for a measure to fall under Article XX(a): the objective of the measure must be to protect public morals.[60] It is essential to know what the objective of the measure is to determine whether the measure is necessary to protect public morals. This case makes it law that any animal welfare trade restriction must have public morality as its principle objective to fall under Article XX. One article emphasises that Article XX(a) will permit non-instrumental regimes, namely: those that aim not just to discourage a particular behaviour but also to express moral convictions about normatively appropriate behaviour.[61]

It was further noted by many of the articles that the objective of the measure is a subjective choice and need not reflect animal welfare as an objective and universally shared moral concern. It is only required that the issue at hand – animal welfare in this case – is an issue of public morality for the relevant society at a particular time. The appellate body doesn't require that animal welfare be regarded as a moral issue universally in order for Article XX(a) to be used, it only requires it is recognised as such for the particular legislator at that particular instance.[62]

Non-Trade Values Adequately Protected under GATT Art.XX?, 2 Russ LJ 101 (2014).

[57] These articles are:

- Zia Akhtar, *Seal Hunting, EU Regulation and Economies of Scale,* Manchester J Int'l Econ L 459 (2014);
- Raj Bhala, David A Gantz, Shannon B Keating and Bruno Germain Simões, *WTO Case Review 2014,* 32 Ariz J Int'l & Comp L 497 (2015);
- Ling Chen, *Sealing Animal Welfare into Free Trade: Comment on EC-Seal Products,* 15 Asper Rev Int'l Bus & Trade L 171 (2015);
- Paola Conconi and Tania Voon, *EC – Seal products: the tension between public morals and international trade agreements*, World TR 15(2) 211 (2016);
- Cecilia Elizondo, *Case Review: European Communities – Measures Prohibiting the Importation and Marketing of Seal Products,* 11 Manchester J Int'l Econ L 312 (2014);
- Juan He, *China – Canada Seal Import Deal After the WTO EU-Seal Products Case: At the Crossroad*, 10 Asian J WTO & Int'l Health L & Pol'y 223 (2015);
- Alexia Herwig, Lost in Complexity? *The Panel's Report in European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* 5 Eur J Risk Reg 97 (2014);
- Alexia Herwig, *Symposium on the EU – Seal Products Case: Regulation of Seal Animal Welfare Risk, Public Morals and Inuit Culture under WTO Law: Between Techne, Oikos and Praxis – Editor's Introduction*, 6 Eur J Risk Reg 382 (2015);
- Rob Howse, *Symposium on the EU – Seal products Case: A Comment and Epilogue*, 6 Eur J Risk Reg 418 (2015);
- Robert Howse, Joanna Langille and Katie Sykes, *Pluralism in Practice: Moral Legislation and the Law of the WTO after Seal Products*, 48 Geo Wash Int'l L rev 81 (2015-2016);
- Katie Sykes, *Sealing animal welfare into the GATT exceptions: the international dimension of animal welfare in WTO disputes*, 13(3) World TR 471 (2014); and
- Elizabeth Whitsitt, *A comment on the public morals exception in international trade and the EC-Seal Products case: moral imperialism and other concerns*, 3(4) CJICL 1376 (2014).

[58] See, for example, Bhala et al, *supra* n. 49, at 523, Conconi and, *supra* n. 49, at 229 and Elizondo, *supra* n. 49, at 312.

[59] Akhtar, *supra* n. 58, at 462 and Howse, Langille and Sykes, *supra* n. 58, at 84 and 111.

[60] Bhala et al, *supra* n. 58, at 523 and Chen, *supra* n. 58, at 176.

[61] Howse, Langille and Sykes, *supra* n. 58, at 83.

[62] Bhala et al, *supra* n. 58, at 526, Conconi and Voon, *supra* n. 58, at 220, He, *supra*

One article in particular spends some time arguing for the existence of an international law principle of animal welfare which would provide support to arguments that it is a legitimate matter of public moral concern.[63] The author notes that the DSB gives deference to local choices regarding public morality but notes that there is a limit to this deference and 'prevailing international views about moral priorities' could have some relevance when weighing and balancing the application of the necessity test after the threshold step of determining the objective is complete. It could help to 'distinguish justifiable morality-based regulation from impermissible protectionism'.[64] This argument is not taken up by the other articles; it cannot be said to represent popular opinion but it could point to further potential evidence for the applicability of Article XX(a) to public morality related to animal welfare in the future, if the existence of an international law principle of animal welfare becomes more widely accepted.

Further, some of the articles stress that the protection of public morals related to animal welfare can exist alongside other objectives in a measure and still fall within the terms of Article XX(a).[65] Two articles highlight the fact that – in *EC – Seal Products* – the DSB says the measure can't be indifferent to animal welfare in its pursuit of the main purpose; it must make an effort to avoid sacrificing the main purpose whilst pursuing its other purposes. One article does not think this requirement is realistic given the trade-offs democracies are required to make whilst pursuing multiple objectives and so it recommends that the WTO instead treat measures with multiple objectives as separate measures.[66] In the *EC – Seal Products* case, treatment of the two measures as one meant the EU was required to remove the exception for Inuit communities and to protect animal welfare further than it originally intended. By doing what this author suggests, states may be more likely to protect animal welfare if they know they can preserve other interests in tandem. This, however, is merely a suggestion for the approach the DSB should take in the future and does not reflect the current state of understanding of the law.

Many of the articles highlight that it is permissible for the EU to accord different treatment to different animal species in line with varying levels of public concern and support for protection.[67] Canada's claim that the EU should accord equal concern to all animal species in order to be able to claim a valid defence under Article XX(a) was not accepted. This is because the WTO Member States are given discretion to set their own standards of morality and so, limiting trade in one animal product does not mean the EU will have to limit trade in all animal products. One article quotes directly the appellate body's ruling that states: 'just because animal welfare cannot be protected across all species does not mean it should not be protected for any of them'.[68]

One article points out that despite this, states are permitted to use *partial* bans on trade; they do not always have to resort to complete bans.[69] For example, in the *EC – Seal Products* case the ban didn't include a ban on transit or inward processing of seal products and this was deemed acceptable.

Finally, two articles discuss what is required to convince a DSB panel that genuine moral concern exists.[70] They state that little more than some appropriate language in the measure's preamble together with mention of the moral concern in the text of the legislation is likely to be enough. Though a public survey was presented in the *EC – Seal Products* case, this was not necessary. These authors are concerned by potential abuse of the exception because they regard this test as quite easy to navigate, but another article counters such arguments by stating that Article XX's chapeau exists exactly for this reason: to stop the floodgates opening and abuse of the exception taking place.[71] Thus there is agreement regarding what is required by the DSB to prove public moral concern but there are varying opinions regarding what the consequences of this might be.

Necessity of Measure

Once the objective of the measure is determined to be the protection of public morality relating to animal welfare issues, it must be determined that the measure is necessary in order to

n. 58, at 224, Howse, Langille and Sykes, *supra* n. 58, at 105 and 117 and Sykes, *supra* n. 58, at 494.

[63] See Sykes, *supra* n. 58.

[64] Sykes, *supra* n. 58, at 496.

[65] Howse, *supra* n. 58, at 418 and Howse, Langille and Sykes, *supra* n. 58.

[66] Howse, *supra* n. 58, at 419.

[67] Bhala et al, *supra* n. 58, at 503, Elizondo, *supra* n. 58, at 319, He, *supra* n. 58, at 242 and Howse, Langille and Sykes, *supra* n. 58, at 115.

[68] Quoted in Bhala et al, *supra* n. 58, at 528.

[69] Conconi and Voon, *supra* n. 58, at 229.

[70] Conconi and Voon, *supra* n. 58, at 232 and Elizondo, *supra* n. 58, at 312 and 320.

[71] Howse, Langille and Sykes, *supra* n. 58, at 147.

ensure that objective is met. Comments made by a number of the articles make it clear that the necessity requirement is not an insurmountable obstacle, indeed the seals regime at issue in *EC – Seal Products* passed this test. The articles that discuss this requirement in depth all agree on the (non-binding) criteria which have been used with some consistency by the DSB to determine necessity. [72] The appellate body will typically analyse the importance of the objective, the contribution of the measure to the objective, the trade restrictiveness of the measure, and whether there are any less trade restrictive alternatives that are reasonably available.

> "It was noted in particular that EU measures restricting trade in animal products for moral reasons may undermine the competitiveness of animal products from developing countries which may not have adequate resources to ensure comparable protection."

Some of the articles further discuss the requirement in the case law that the measure must make some contribution to the objective in order to be considered necessary. In *Brazil – Retreated Tyres* it is ruled that this contribution should be 'material' but in *EC – Seal Products* the appellate body decides that a material contribution can be any contribution not considered 'marginal or insignificant'. Many of the articles highlight that: following the *EC – Seal Products* case there is no pre-determined threshold of contribution that must be achieved before a measure can be said to be necessary.[73] One author seeks to explain what is required further and states that in the *EC – Seal Products* case, all that was needed was for the measure to result in a decrease in European demand for the product at issue.[74] This in turn contributes to a decrease in global demand and it can be assumed that a reduction in the number of seals killed due to reduced demand will lead to reduction in the number of seals killed inhumanely. Thus the information required by the appellate body was not too demanding here and this test is actually quite easy to satisfy. This article further states that necessity isn't a black or white issue and that there are degrees of necessity ranging from indispensable to making a contribution to the objective.[75] The fact that this is recognised by commentators and the case law makes it easier for animal welfare measures to be defended as necessary to protect public morals.

Article XX Chapeau

All of the articles are in agreement that Article XX's chapeau poses the most difficulty for a successful use of Article XX(a) to defend trade restrictions aimed at protecting public morality related to animal welfare. This is partly in light of the failure of the EU's seal regime to pass this stage of the analysis. Some of the articles make a particular effort to emphasise that although the EU's seal regime did not draw an appropriate equilibrium line between trade and morality, other trade measures could.[76]

Many of the articles highlight the reasons that the EU's seal regime failed to pass the chapeau's test.[77] These are that (1) there was no rational relationship between the objective of the measure and the IC exception, (2) the design and application of the exception indicated arbitrary or unjustifiable discrimination (ambiguity in the terms of the exception meant that it could be applied with wide discretion and could potentially fail to cover all commercial seal products), and (3) the EU didn't make comparable efforts to facilitate access to their market for Canadian Inuit as they did for Greenlandic Inuit. These failings provide concrete evidence regarding what the EU must do when framing future trade measures in order to comply with the requirements of the chapeau.

Some of the articles highlight the difficulty posed by the fact that both de jure *and* de facto discrimination are forbidden by Article XX's chapeau.[78] For example, the Inuit exception in the EU's seal regime was available to all Inuit communities on its face but it was not as easily available

[72] Bhala et al, *supra* n. 58, at 537, Chen, *supra* n. 58, at 177, Howse, Langille and Sykes, *supra* n. 58, at 110 and Whitsitt, *supra* n. 58, at 1380.
[73] Bhala et al, *supra* n. 58, at 533, Chen, *supra* n. 58, at 177, Conconi and Voon, *supra* n. 58, at 221 and Howse, Langille and Sykes, *supra* n. 58, at 110.
[74] Bhala et al, *supra* n. 58, at 535.
[75] Bhala et al, *supra* n. 58, at 532.
[76] For example, Chen, *supra* n. 58, at 179.
[77] Bhala et al, *supra* n. 58, at 553, Chen, *supra* n. 58, at 178, Conconi and Voon, *supra* n. 58, at 222-223, Elizondo, *supra* n. 58, at 320, He, *supra* n. 58, at 248 and Howse, Langille and Sykes, *supra* n. 58, at 120 et seq.
[78] See, for example, Bhala et al, *supra* n. 58, at 542.

to Canadian and Norwegian Inuit as it was to Greenlandic Inuit in practice. It was thus deemed de facto discriminatory by the DSB. The articles focus on this point to highlight the efforts that must be taken by the EU to avoid being accused of legislating in a discriminatory manner.

Jurisdictional Limit

The question of a jurisdictional limit to the applicability of the exceptions in Article XX is important if the EU is to use the exceptions to justify trade restrictions. Some articles noted that the question of whether there is an implied jurisdictional limit on Article XX officially remains unanswered following the *EC – Seal Products* case because the appellate body did not rule on the issue.[79] However, it is convincingly argued by one article in particular that the possibility of a jurisdictional limitation to Article XX is unlikely to hinder the implementation of trade limitations based on Article XX(a) because such measures will aim to protect the morality of citizens within the state's jurisdiction, rather than aiming to protect the welfare of animals outside of the state.[80] None of the other articles state anything contrary to this point but merely fail to pick up on the jurisdictional limitation issue.

Impact of Using Article XX(a)

The final common theme in the articles reviewed was discussion of the impact of using Article XX(a) to justify animal welfare protecting trade measures. This discussion does not relate to the legality of such measures but it is nonetheless interesting to note views to this effect. There was general agreement that trade bans protecting public morals in this way could have a real and concrete impact on animal welfare. This was highlighted by one article in particular that discusses the dramatic decline of consumer demand for seal products in Europe due to the moral undertones of the ban.[81]

However, there were some fears regarding side-effects of such measures. It was noted in particular that EU measures restricting trade in animal products for moral reasons may undermine the competitiveness of animal products from developing countries which may not have adequate resources to ensure comparable protection.[82] Another article notes that the restriction of imports based on states' self-defined morality could allow imperialism by countries that hold disproportionately high amounts of market power.[83] Finally, one article focused on the fact that such trade restrictions by the EU might lead to a displacement rather than a reduction of harm to animals.[84] The example discussed in this article was the increase in exports of Canadian seal products to China following the *EC – Seal Products* case.

Conclusion

The most important finding of this literature review is the consensus on the impact of the *EC – Seal Products* case. There is agreement that animal welfare protecting trade measures can be permissible if they are enacted due to public moral concern and thus justified under Article XX(a) of the GATT. The articles further discuss what form such trade restrictions must take in order to fall within the terms of Article XX(a). Such requirements are generally considered not to be insurmountable and it is not seen as a problem that the EU seal regime failed to pass the test of the Article XX chapeau. Thus any use of the WTO as an excuse by the EU for failing to protect animal welfare is largely discredited following this review of the relevant literature.

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[79] Elizondo, *supra* n. 58, at 320 and Howse, Langille and Sykes, *supra* n. 58, at 123 et seq.

[80] Howse, Langille and Sykes, *supra* n. 58, at 125.

[81] Akhtar, *supra* n. 58, at 466.

[82] Chen, *supra* n. 58, at 179.

[83] Howse, Langille and Sykes, *supra* n. 58, at 93-94.

[84] See He, *supra* n. 58generally.

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