

# “Morality” May Not Be Enough to Justify the EU Seal Products Ban: Animal Welfare Meets International Trade Law

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## 1. INTRODUCTION

Under recent European Union regulations that were promulgated with overwhelming popular support,<sup>2</sup> seal products may neither be placed on the European market internally nor imported into the EU.<sup>3</sup> Seal skins, fur, blubber, meat, and all other products derived from seals, including such things as omega-3 oil or pills, are all encompassed within the regulatory prohibition.<sup>4</sup> Three seal product exporting states, Canada, Norway, and

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<sup>2</sup> The seal products ban is found in *Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products*, OFFICIAL JOURNAL L 286 (31/10/2009) at 36, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32009R1007:EN:NOT>. The implementing details are found in *Regulation No. 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on trade in seal products*, OFFICIAL JOURNAL L 216 (17/8/2010) at 1, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32010R0737:EN:NOT>

<sup>3</sup> Fifteen species of seals, including harp, ringed, grey, hooded, and Cape Fur seals, are hunted for commercial purposes, subsistence, or cultural needs. Seal hunting is most commonly carried out around the Arctic, but also in Namibia. Canada, Greenland, and Namibia conduct the three largest hunts accounting for approximately 60 percent of the three quarters of a million seals that are killed annually worldwide. European Safety Authority, *Animal Welfare aspects of the killing and skinning of seals*, *Scientific Opinion of the Panel on Animal Health and Welfare* (Question No. EFSA-Q-2007–118), Adopted on 6 December 2007, at 87, at <http://www.efsa.europa.eu/en/efsajournal/doc/610.pdf>. [Hereinafter *AHAW Scientific Report*.] Some limited seal hunting occurs within the EU in Finland, Scotland, and Sweden. European Commission, *Proposal for a Regulation of the European Parliament and of the Council concerning Trade in Seal Products*, COM(2008) 469 final, 2008/0160 (COD) (Brussels, 23.7.2008) at 5, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0469:FIN:EN:PDF> [Hereinafter *Commission Proposal*.]

<sup>4</sup> The regulation comprehensively defines “seal products” as “all products, either processed or unprocessed, deriving or obtained from seals, including meat, oil, blubber, organs, raw fur skins and fur skins, tanned or dressed, including fur skins assembled in plates, crosses, and similar forms, and articles made from fur skins.” Regulation No. 1007/2009, *supra* note 2, at Article 2(2).

Iceland, filed complaints with the World Trade Organization (WTO), contending that the EU's actions were contrary to its commitments to free trade under international trade agreements.<sup>5</sup> Many animal advocates hope that this case will establish that the General Exception found in Article XX(a) of the General Agreement for Tariffs and Trade (GATT), for measures that are “necessary to protect public morals,” can be used to justify animal welfare laws and regulations that otherwise adversely affect trade.<sup>6</sup> Unfortunately, this hope may be misplaced. While GATT Article XX(a) might well support some animal welfare measures, the current challenge to the EU seal products ban may not be the case to establish such a precedent for the public morals exception.

The EU seal products import ban poses the question of whether “local” moral, ethical, or popular positions can trump agreed efforts at economic globalization reflected in various treaty instruments. Beyond implicating whether animals should be regarded as “sentient” beings, or simply as products to be used and traded, the seal products import ban touches upon fundamental issues such as the role of legal positivism and relativism,<sup>7</sup> the basic preference for multilateral rather than unilateral action on the international stage,<sup>8</sup> and the tension between the principle of *pacta sunt servanda* and national sovereignty.<sup>9</sup>

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<sup>5</sup> *Canada-European Communities—Measures Prohibiting the Importation and Marketing of Seal Products* (WT/DS400) 4 November 2009, at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds400\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds400_e.htm); and *Norway-European Communities—Measures Prohibiting the Importation and Marketing of Seal Products* (WT/DS401) 10 November 2009, at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds401\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds401_e.htm). Canada also challenged earlier similar actions by Belgium and the Netherlands, that were superseded by the EU seal products regulations. See *European Communities—Certain Measures Prohibiting the Importation and Marketing of Seal Products* (WT/DS369) 1 October 2007 at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds369\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds369_e.htm)

<sup>6</sup> See, e.g., Greenview, *Not so Thrilled by the Hunt: Europe's Ban on Imported Seal Fur Is under Fire*, THE ECONOMIST, 13 April 2010, at [http://www.economist.com/node/15900213?story\\_id=15900213](http://www.economist.com/node/15900213?story_id=15900213); Humane Society International, *A Complete Ban on Seal Products Is Justified Under the World Trade Organization (WTO) Agreements* (2009) at <http://bansealtrade.files.wordpress.com/2009/10/hsi-seals-wto-handout.pdf>; K. Cook & D. Bowles, *Growing Pains: The Developing Relationship of Animal Welfare Standards and the World Trade Rules*, 19 RECIEL 227 (2010); Prof. Dr. Ludwig Krämer, *The Derogations on the Ban of Trade In Seal Products and World Trade Organisation Provisions*, at [http://www.ifaw.org/Publications/Program\\_Publications/Seals/Seal\\_MP\\_Publications/asset\\_upload\\_file605\\_53612.pdf](http://www.ifaw.org/Publications/Program_Publications/Seals/Seal_MP_Publications/asset_upload_file605_53612.pdf); RSPCA, *Seals and Trade Rules, Can They Live Together?* (2007) at <http://www.rspca.org.uk/ImageLocator/LocateAsset?asset=document&assetId=1232712338227&mode=prd>.

<sup>7</sup> See, e.g., H. Berman, *The Historical Foundation of Law*, 54 EMORY L. J. 13 (2005); J. R. Paul, *Cultural Resistance to Global Governance*, 22 MICH. J. INT'L L. 1 (2000); and see generally, R. Lipsky, *Ethical Foundations of International Law*, 81 AM. SOC'Y INT'L L. PROC. 415 (1987).

<sup>8</sup> See, e.g., N. Crossley, MULTILATERALISM VERSUS UNILATERALISM: THE RELEVANCE OF THE UNITED NATIONS IN A UNIPOLAR WORLD (2008); M. E. Foster, *Trade And Environment: Making Room for Environmental Trade Measures within the GATT* 71 S. CAL. L. REV. 393, 410–418 (1998); M. U. Killion, *China's Foreign Currency Regime: The Kagan Thesis and Legalification of the WTO Agreement*, 14 MINN. J. GLOBAL TRADE 43, 53–56 (2004).

<sup>9</sup> *Pacta sunt servanda* is the fundamental principle that agreements or treaties are to be observed, i.e., that they are “binding upon the parties . . . and must be performed by them in good faith,” as reflected in Article 26 of the Vienna Convention on the Law of Treaties (1969), at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)

On the one hand, if international trade agreements prevail over measures such as the seal products ban, that might well undermine deeply held popular beliefs and national autonomy. On the other hand, if these sorts of local measures prevail over international trade commitments, that may in turn subvert the international application of the rule of law and raises the prospect of trade disputes, sanctions, or retaliation by other States.<sup>10</sup> At the very least, this case questions the degree to which the WTO Agreements, as written, may be regarded as friendly or hostile to animal interests, in a manner that is akin to the ongoing debate over whether the WTO Agreements need to be “greened” in order to accommodate environmental interests.<sup>11</sup> Thus, the discussion of the applicability of Article XX(a) to the EU seal products import ban implicates much more than animal welfare or rights, and this may not be the best case to address these larger issues.

A close reading of the WTO jurisprudence regarding the scope and application of Article XX’s General Exceptions, and the details of the European regulations, suggests that there are serious obstacles that might well lead a WTO dispute resolution Panel to conclude that the Article XX(a) public morals exception does not support the EU seal products import ban. However, that is not to suggest that animal welfare measures can never be justified under Article XX(a) in appropriate circumstances, or that the WTO Agreements are necessarily incompatible with efforts to promote animal welfare. Rather, it requires ensuring that whatever animal welfare measure is at issue is taken and applied with due regard for the obligations embodied in the WTO Agreements.

After highlighting, in Part 2 of this article, the popular but somewhat unusual scheme embodied in the EU seal products regulations, Part 3 will outline how trade law affects animal welfare measures generally—and the seal ban in particular—with special attention to the important role of GATT Article XX and the public morals exception. Before concluding that the WTO jurisprudence suggests the current regulatory scheme is not justified under the public morals exception it will also consider, in Part 4, some of the options available to the EU in the event such a decision is in fact issued by the WTO. Indeed, a modified version of the seal products ban might well benefit from the Article XX(a) exception for measures that are “necessary to protect public morals.” Moreover, even if this is not the case to establish such a precedent, there are other potential disputes that may be better suited to establishing that the WTO’s trade rules, animal welfare, and morality, can co-exist.

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<sup>10</sup> S. Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT’L L. 689, 691 (1998). [Hereinafter Charnovitz *Moral Exception*.]

<sup>11</sup> See, e.g., D. Esty, GREENING THE GATT (1994), and WTO, *WTO News: Speeches, Director General Pascal Lamay, The “Greening” of the WTO Has Started* (24 October 2007), at [http://www.wto.org/english/news\\_e/sppl\\_e/sppl79\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl79_e.htm)

## 2. THE EU SEAL PRODUCTS BAN IN CONTEXT

The Treaty on the Functioning of the European Union specifically recognizes, in Article 13, that animals are “sentient beings” and that their welfare must be given “full regard” when the EU’s agriculture, fisheries, transport, internal market, research and technological development, and space policies are formulated and implemented.<sup>12</sup> Moreover, the European Union intentionally strives to set some of the highest animal welfare standards in the world,<sup>13</sup> and the seal products ban is accordingly one of a host of measures that broadly address animal welfare,<sup>14</sup> including a variety of directives or regulations dealing with farm,<sup>15</sup> laboratory,<sup>16</sup> and companion animals,<sup>17</sup> and wildlife.<sup>18</sup>

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<sup>12</sup> Consolidated Version of the Treaty on the Functioning of the European Union. OFFICIAL JOURNAL C 83 (30/3/2010) at 54, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:EN:PDF>, Article 13 now incorporates the operative part of what was formerly the Protocol on the Protection and Welfare of Animals to the Treaty Establishing the European Community. See *id.*, Table of Equivalences, at 367.

<sup>13</sup> See European Parliament, Committee on Agriculture and Rural Development, REPORT ON EVALUATION AND ASSESSMENT OF THE ANIMAL WELFARE ACTION PLAN 2006–2010 (2009/2202(INI)), (23 March 2010), at 4, at [http://ec.europa.eu/food/animal/welfare/actionplan/100521\\_report\\_0052\\_2010\\_en.pdf](http://ec.europa.eu/food/animal/welfare/actionplan/100521_report_0052_2010_en.pdf)

<sup>14</sup> There definitions and applications of the terms “animal welfare” and “animal rights” vary greatly depending upon whether it is used by lawyers, scientists, ethicists, activist, or the general public. Generally, however, the animal welfare perspective seeks to mitigate “unnecessary” animal suffering related to their use by humans; whereas the animal rights perspective is generally opposed to “non-human” animal use or exploitation. See, L.S. Katz, *Animal Rights versus Animal Welfare*, Rutgers University NJAES Fact Sheet 753 (July 2010) at <http://njaes.rutgers.edu/pubs/publication.asp?pid=FS753>; and D.M. Broom, *Welfare Assessment and Relevant Ethical Decisions: Key Concepts*, 10 ARBS ANNUAL REVIEW OF BIOMEDICAL SCIENCES T79 (2008) at <http://arbs.biblioteca.unesp.br/index.php/arbs/article/view/1806-8774.2008.v10pT79>

<sup>15</sup> See, e.g., *Council Directive 98/58/EC of 20 July 1998 Concerning the Protection of Animals Kept for Farming Purposes*, OFFICIAL JOURNAL L 221, (8 August 1998), at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:221:0023:0027:EN:PDF>. See also, European Commission, Directorate General for Health and Consumers, *Animal Welfare on the Farm*, [http://ec.europa.eu/food/animal/welfare/farm/index\\_en.htm](http://ec.europa.eu/food/animal/welfare/farm/index_en.htm)

<sup>16</sup> See, e.g., *Council Directive 86/609/EEC of 24 November 1986 on the Approximation of Laws, Regulations and Administrative Provisions of the Member States Regarding the Protection of Animals Used for Experimental and Other Scientific Purposes*, 86/609/EEC of 24 November 1986, OFFICIAL JOURNAL L 358, (18 December 1986), at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31986L0609:EN:HTML>

<sup>17</sup> See, e.g., *Council 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*, OFFICIAL JOURNAL L 343, (27 December 2007), at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:343:0001:0004:EN:PDF>

<sup>18</sup> See, e.g., *Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora*, OFFICIAL JOURNAL L 206 (22 July 1992), at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992L0043:EN:HTML>; and *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*, OFFICIAL JOURNAL L 308 (9 November 1991), at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31991R3254:EN:HTML>

The EU seal products ban is the latest response to nearly a half century of increasingly popular protest and lobbying by a wide number of advocacy groups such as the Humane Society,<sup>19</sup> the International Fund for Animal Welfare,<sup>20</sup> the Sea Shepherd Conservation Society,<sup>21</sup> and many others. Kent Gavin's famous front page photo of a whitecoat seal being clubbed to death in *The Mirror* newspaper the UK in the 1960s is sometimes regarded as igniting "the first animal welfare campaign of the modern era,"<sup>22</sup> and photos of baby whitecoat seals remain icons in the animal movement today. Accordingly, the new EU regulations build upon the earlier bans on killing and importing skins from whitecoat or hooded blueback seal pups imposed by Europe in 1983<sup>23</sup> and by Canada in 1987<sup>24</sup>; and the protections afforded to common, grey, harp, and hooded seals in the 1992 European Habitats Directive implementing the Bern Convention for the Conservation and Protection of European Wildlife and Habitats.<sup>25</sup>

As public concern in Europe about the pain, suffering, and distress involved in the methods used to kill seals grew, it was reflected in a "massive number of letters and petitions . . . expressing citizens' deep indignation and repulsion regarding the trade in seal products in such conditions"<sup>26</sup> that led both the Council of Europe<sup>27</sup> and the European Parliament<sup>28</sup> to urge the consideration of a seal products ban in 2006. This prompted a broad examination of

<sup>19</sup> See HSI, *Protect Seals*, [http://www.hsi.org/issues/protect\\_seals/](http://www.hsi.org/issues/protect_seals/)

<sup>20</sup> See IFAW, *About IFAW*, [http://www.ifaw.org/ifaw\\_united\\_kingdom/who\\_we\\_are/index.php](http://www.ifaw.org/ifaw_united_kingdom/who_we_are/index.php)

<sup>21</sup> See Sea Shepherd, *History of Sea Shepherd Campaigns for Seals*, <http://www.seashepherd.org/seals/history-saving-seals.html>

<sup>22</sup> Jeremy Armstrong, *Thirty Years Ago The Mirror's Kent Gavin Took a Horrific Picture That Shocked the World. This Week He Returned to the Killing Fields of Canada. But Had Anything Changed?* THE MIRROR, April 4, 1998, at <http://www.thefreelibrary.com/Thirty±years±ago±The±Mirror±percent27s±Kent±Gavin±took±a±horrific±picture±that±.±.±-a061664975>

<sup>23</sup> Council Directive 83/129/EEC of 28 March 1983 Concerning the Importation into Member States of Skins of Certain Seal Pups and Products Derived therefrom, OFFICIAL JOURNAL L 091, 09/04/1983. This Directive was provisionally renewed two years later, Council Directive 85/444/EEC of 27 September 1985 Amending Council Directive 83/129/EEC Concerning the Importation into Member States of Skins of Certain Seal Pups and Products Derived therefrom, OFFICIAL JOURNAL L 259, 01/10/1985; and then made permanent in 1989, Council Directive 89/370/EEC of 8 June 1989 amending Directive 83/129/EEC Concerning the Importation into Member States of Skins of Certain Seal Pups and Products Derived therefrom, OFFICIAL JOURNAL L 163, 14/06/1989.

<sup>24</sup> See Regulations Respecting Marine Mammals, SOR/93-56, PC1993-89 (4 February 1993) at Part IV, at <http://laws.justice.gc.ca/PDF/Regulation/S/SOR-93-56.pdf>, and Fisheries and Oceans Canada, *Seals and Sealing in Canada-Improvements to Seal Hunt Management Measures*, at [http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/reports-rapports/facts-faits/facts-faits\\_regs-eng.htm](http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/reports-rapports/facts-faits/facts-faits_regs-eng.htm)

<sup>25</sup> See Council Decision on Conclusion: OFFICIAL JOURNAL L 038, 10/02/1982.

<sup>26</sup> Commission Proposal, *supra* note 3, at 2.

<sup>27</sup> Council of Europe Parliamentary Assembly, *Recommendation 1776 on Seal Hunting* (17 November 2006), at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta06/erec1776.htm>

<sup>28</sup> European Parliament, *Declaration 38/2006 on Banning Seal Products in the European Union*, OFFICIAL JOURNAL C 306 E, 15/12/2006, at [http://www.europarl.europa.eu/sides/getDoc.do?reference=P6\\_TA\(2006\)0369&language=EN](http://www.europarl.europa.eu/sides/getDoc.do?reference=P6_TA(2006)0369&language=EN)

the animal welfare aspects of seal hunting by the European Commission over the next two years, which studied the hunting practices and regulatory frameworks in Canada, Finland, Greenland, Namibia, Norway, Russia, Sweden, and the United Kingdom (Scotland); conducted extensive consultations with interested parties and stakeholders; requested a scientific animal welfare study and risk assessment by the European Food Safety Agency (EFSA),<sup>29</sup> and sought an independent evaluation of the issues by outside experts.<sup>30</sup> While those actions were ongoing at the European level, Belgium<sup>31</sup> and the Netherlands<sup>32</sup> passed their own seal products bans in 2007 in response to these same popular concerns, and various other national legislative bodies also began considering the issue as well.<sup>33</sup> The European Commission's proposal in 2008 for a common harmonized set of rules banning the sale and import of seal products across the entire EU<sup>34</sup> was in part aimed at forestalling the problems that might result from a proliferation of differing national level rules on the issue, and also at persuading Canada to suspend an earlier WTO complaint concerning these national seal bans.<sup>35</sup> The Commission's proposal was approved by the European Parliament in 2009 by an overwhelming vote of 550 to 49, and subsequently issued as Regulation 1007/2009.<sup>36</sup>

While the extraordinary level of popular interest and support that led to its promulgation perhaps helps distinguish the seal products ban from other European animal welfare measures, what is especially notable is the degree to which moral or ethical values motivated the regulation<sup>37</sup> in a manner arguably not seen in the various measures addressing the welfare interests of

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<sup>29</sup> See *AHAW Scientific Report*, *supra* note 3.

<sup>30</sup> COWI, ASSESSMENT OF THE POTENTIAL IMPACT OF A BAN OF PRODUCTS DERIVED FROM SEAL SPECIES, April 2008, at [http://ec.europa.eu/environment/biodiversity/animal\\_welfare/seals/pdf/seals\\_report.pdf](http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/seals_report.pdf)

<sup>31</sup> See *La Loi relative à l'interdiction de fabriquer et de commercialiser des produits dérivés de phoques*, F. 2007-1590 [C-2007/11138], 16 March 2007, cited in *European Communities Request for Consultations by Canada, Certain Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS369/1, G/L/827, G/TBT/D/31, 1 October 2007.

<sup>32</sup> *Decree of 4 July 2007 Amending the Designation of Animal and Plant Species (Flora and Fauna Act) Decree and the Protected Animal and Plant Species (Exemptions) Decree in Relation to the Ban on Trade in Products Originating from Harp seals and Hooded Seals*, cited in *European Communities Request for Consultations by Canada, Certain Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS369/1, G/L/827, G/TBT/D/31, 1 October 2007.

<sup>33</sup> *Commission Proposal*, *supra* note 3, at 2, 6.

<sup>34</sup> *Id.* at 5–6.

<sup>35</sup> See *European Communities—Certain Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS369/1, G/L/827, G/TBT/D/31, 1 October 2007, [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds369\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds369_e.htm)

<sup>36</sup> There were also 41 abstentions. See, European Parliament, *Legislative Resolution of 5 May 2009 on the Proposal for a Regulation of the European Parliament and of the Council Concerning Trade in Seal Products* (COM(2008)0469—C6-0295/2008—2008/0160(COD)), <http://www.europarl.europa.eu/oeil/resume.jsp?id=5668862&eventId=1076524&backToCaller=NO&language=en>

<sup>37</sup> The cat and dog fur ban in Regulation No. 1523/2007, *supra* note 17, was similarly motivated by ethical concerns. However, virtually none of the initial language expressing those concerns appeared in the final regulation. Compare Regulation No. 1523/2007 with European Commission, *Proposal for*

animals in other contexts.<sup>38</sup> A concern for the “ethical aspects of respect for animal life” and the widespread “public morality” debate generated by the “cruelty” of the seal hunt was expressly cited as motivating the Council of Europe’s 2006 Recommendation,<sup>39</sup> and endorsed in the European Parliament’s Written Declaration that same year.<sup>40</sup> Although the scientific opinion given by EFSA’s Animal Health and Welfare (AHAW) Committee in 2007 ostensibly considered the “ethical, social, and cultural” aspects of the seal ban as outside the scope of its study,<sup>41</sup> it nevertheless acknowledged their “important impact upon animal welfare.”<sup>42</sup> AHAW’s opinion also noted veterinary studies that concluded that, “[t]he quality of the seal hunt will depend on . . . the training and ethics of the sealers,”<sup>43</sup> while at the same time recognizing that there was nevertheless a serious paucity of reliable data concerning the sealers’ actual practices in the various seal hunts.<sup>44</sup> The Commission’s outside consultant’s report was more direct when it stated:

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*a Regulation of the European Parliament and of the Council Banning the Placing on the Market and the Import of or Export From the Community of Cat and Dog Fur and Products Containing Such Fur* {SEC(2006) 1448} COM(2006) 684 final (20 November 2006) at <http://eur-lex.europa.eu/smartapi/cgi/sga.doc?smartapi!celexplus!prod!DocNumber&lg=EN&type.doc=COMfinal&an.doc=2006&nu.doc=0684>

<sup>38</sup> Of all the various EU measures, only the regulation on protecting animals at the time of killing specifically mentions ethics in the preamble or text of its provisions. European Commission, *Council Regulation (EC) No. 1099/2009 of 24 September 2009 on the Protection of Animals at the Time of Killing*, OFFICIAL JOURNAL L 303 (18 November 2009) at Preamble (12). See also European Commission, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL ON A COMMUNITY ACTION PLAN ON THE PROTECTION AND WELFARE OF ANIMALS 2006–2010 {SEC(2006) 65} COM(2006) 13 final (23 January 2006) at [http://ec.europa.eu/food/animal/welfare/com\\_action\\_plan230106\\_en.pdf](http://ec.europa.eu/food/animal/welfare/com_action_plan230106_en.pdf). The Community Action Plan makes no mention whatsoever of moral or ethical values when addressing animal welfare. However, when the plan was reassessed by the Committee on Agriculture and Rural Development in 2010, the Rapporteur noted that “[t]here are ethical and cultural reasons, without for one moment forgetting the practical, economic and public health reasons, for maintaining a very high standard of animal welfare,” and that those “ethical reasons . . . in itself ought to be adequate grounds for more stringent legislation and compliance with it.” This suggests ethical values will play a larger role in future animal welfare measures in the EU. See European Parliament, Committee on Agriculture and Rural Development, REPORT ON EVALUATION AND ASSESSMENT OF THE ANIMAL WELFARE ACTION PLAN 2006–2010 (2009/2202(INI)), (23 March 2010), at 13–14, at [http://ec.europa.eu/food/animal/welfare/actionplan/100521\\_report\\_0052\\_2010\\_en.pdf](http://ec.europa.eu/food/animal/welfare/actionplan/100521_report_0052_2010_en.pdf)

<sup>39</sup> See *Recommendation 1776 on Seal Hunting*, *supra* note 27, at ¶s 9, 13.2.

<sup>40</sup> See *European Parliament Declaration 38/2006*, *supra* note 28.

<sup>41</sup> See *AHAW Scientific Report*, *supra* note 3, at 3.

<sup>42</sup> *Id.* at 12. AHAW also noted the ethical dimensions of different specific methods of killing seals, for example, when using firearms it noted that the seal hunter “must be sufficiently trained with the rifle used in the hunt and must have competence incorporating an ethical approach, and the discipline to judge under which conditions to withhold shooting.” *Id.* at 45

<sup>43</sup> *Id.* at 60.

<sup>44</sup> The opinion noted, “The degree to which such seal hunting is regulated by law and is routinely monitored by observers varies in different countries and range states. Commercial seal hunting is more regulated than traditional hunting. In some countries, regulations include references to the welfare aspects of killing of seals and in others they do not. Very little robust information is available on the extent of use of different hunting methods at different times of the year; the efficacy of each of these methods in the different environments.” *Id.* at 87.

What drives the whole discussion about seal hunt and seal hunt management systems are ethical concerns. However, it is important to acknowledge that an ethical concern is not an add-on to the assessment of the impacts of changes to seal hunting practices and trading in seal products. On the contrary, ethical concerns set to a large extent the frame for the assessments.<sup>45</sup>

In light of this background, the Commission's proposal appeared to acknowledge that the seal ban was qualitatively different than most of its other animal welfare directives and regulations.<sup>46</sup> Unlike those other measures, which are primarily aimed at encouraging humane practices to mitigate or avoid "unnecessary" suffering in the processes and production methods used for creating agricultural or other tangible (or intangible) products, both the seal product ban's motivation and its object are the same—to seriously discourage, if not eliminate, cruel killing practices applied to living, sentient creatures as an ethical matter. With the ban, the morality of what is actually done to the animal is the entire focus of the regulation, and the balancing of the necessity of such actions against the value of any resulting animal-related "product," as seen in other European animal welfare measures, is absent.<sup>47</sup> So, despite the popular support for taking such a stance with the seal products ban, the Commission noted that it was somewhat problematic to do so. In its proposal, it stated:

The Treaty establishing the European Community does not provide for a specific legal basis allowing the Community to legislate in the field of ethics as such. However, where the Treaty empowers the Community to legislate in certain areas and that the specific conditions of those legal bases are met, the mere circumstance that the Community legislature relies on ethical considerations does not prevent it from adopting legislative measures. It should be noted, in that respect, that the Treaty enables the Community to adopt measures aimed at establishing and maintaining an internal market, which is a market without internal frontiers according to Article 14 of the Treaty . . . .

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<sup>45</sup> COWI, *supra* note 30, at 9.

<sup>46</sup> Of all the other EU animal welfare measures, only the cat and dog fur ban shares a similar ethical motivation, and justification under Article 95 of the EU treaty, with the seal ban. *See* Regulation No. 1523/2007, *supra* note 17.

<sup>47</sup> The European Parliament's European Economic and Social Committee's recognized the unusual nature of the seal ban proposal when it stated that "[t]he Treaty establishing the European Community does not provide the EU with a specific legal basis for regulating animal welfare aspects . . . In this case, the controversial Article 95 'fragmentation of the internal market' enables the EU to harmonise legislation with an animal welfare background, a concept which has been described in Community case-law as being a matter of 'general interest.'" European Parliament, *Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council Concerning Trade in Seal Products* COM (2008) 469 final—2008/0160(COD) (2009/C 218/12) at ¶ 4.4, at <http://eescopinions.eesc.europa.eu/eescopiniondocument.aspx?language=EN&docnr=0339&year=2009> Now that animal welfare is formally incorporated into Article 13 of the Lisbon Treaty, there should be a stronger legal foundation for EU animal welfare measures without the need to resort to this sort of reasoning. *See supra* note 12 and accompanying text.



There are differences between the laws, regulations and administrative provisions of the Member States with respect to seal products. Two of them have already prohibited the marketing of such products and a third has notified its intention to do so. Other Member States have intense public discussions about the need for such legislation. Those measures are intended, according to their authors, to stop trade in seal products mainly on the basis of ethical reasons related to animal welfare. Those prohibitions of marketing contribute to a heterogeneous development of that market and are therefore such as to constitute obstacles to the free movement of goods.

Having regard also to the public's growing awareness and sensitivity to ethical considerations in how seal products are obtained, it is likely that obstacles to the free movement of those products would arise by reason of the adoption by the Member States of new rules reflecting those concerns.

Action by the Community legislature on the basis of Article 95 EC is therefore justified with respect to seal products.<sup>48</sup>

The Regulation, as issued, followed this reasoning, acknowledging that the widespread public and governmental concerns that seals, as “sentient beings,” experience “pain, distress, fear, and other forms of suffering” as a result of “cruel” hunting practices had prompted some Member States to restrict seal products while others did not, and accordingly there was a need for a harmonized EU-wide approach governing the trade, import, production, and marketing of seal products.<sup>49</sup> Moreover, the Regulation also concludes that, given the circumstances surrounding the seal hunt, a harmonized ban applicable to both internal and imported seal products is necessary to achieve its stated aims.

To eliminate the present fragmentation of the internal market, it is necessary to provide for harmonised rules while taking into account animal welfare considerations. In order to counter barriers to the free movement of products concerned in an effective and proportionate fashion, the placing on the market of seal products should, as a general rule, not be allowed . . . Since the concerns of citizens and consumers extend to the killing and skinning of seals as such, it is also necessary to take action to reduce the demand leading to the marketing of seal products and, hence, the economic demand driving the commercial hunting of seals. In order to ensure effective enforcement, the harmonised rules should be enforced at the time or point of import for imported products.

Although it might be possible to kill and skin seals in such a way as to avoid unnecessary pain, distress, fear or other forms of suffering, given the conditions in which seal hunting occurs, consistent verification and control of hunters' compliance with animal welfare requirements is not feasible in practice or, at least, is very difficult to achieve in an effective way, as concluded by the European Food Safety Authority on 6 December 2007.

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<sup>48</sup> *Commission Proposal*, *supra* note 3, at 3–4.

<sup>49</sup> *See Regulation No. 1007/2009 supra* note 2, at Preamble ¶ 1.

It is also clear that other forms of harmonised rules, such as labelling requirements, would not achieve the same result. Additionally, requiring manufacturers, distributors or retailers to label products that derive wholly or partially from seals would impose a significant burden on those economic operators, and would also be disproportionately costly in cases where seal products represent only a minor part of the product concerned. Conversely, the measures contained in this Regulation will be easier to comply with, whilst also reassuring consumers.

In order to ensure that the harmonised rules provided for in this Regulation are fully effective, those rules should apply not only to seal products originating from the Community, but also to those introduced into the Community from third countries.<sup>50</sup>

While these actions may be consonant with the European Union Treaty,<sup>51</sup> whether the seal products ban is justified under the WTO Agreements is another matter, one which depends upon the specifics found in the regulatory scheme.

So what is that regulatory scheme? Regulation 1007/2009, which became effective in late 2010,<sup>52</sup> broadly prohibits commercial transactions within the EU<sup>53</sup> involving any seal products, which specifically include:

All products, either processed or unprocessed, deriving or obtained from seals, including meat, oil, blubber, organs, raw fur skins and fur skins, tanned or dressed, including fur skins assembled in plates, crosses and similar forms, and articles made from fur skins.

Commercial imports, that is, any “entry of goods into the customs territory of the Community,” are also caught by the prohibition against placing seal products on the EU market.<sup>54</sup> The regulation does not apply, however, to goods that are merely transiting the EU en route to other markets.<sup>55</sup> Additionally, there are specific exceptions for commercial transactions involving products

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<sup>50</sup> *Id.* at ¶s 10–13.

<sup>51</sup> As a result of the Treaty of Lisbon, the text of Article 95 of the Treaty Establishing the European Community is now found in Article 114 of the Treaty on the Functioning of the European Union. See Annex, Tables of Equivalences Referred to in Article 5 of the Treaty of Lisbon, OFFICIAL JOURNAL C 306 (17/12/2007) at 213, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0202:0229:EN:PDF> and Consolidated Version of The Treaty on the Functioning of the European Union, OFFICIAL JOURNAL C 83 (30/3/2010) at 94, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:EN:PDF>

<sup>52</sup> The Regulation became effective on 20 August 2010. See Regulation No. 1007/2009, *supra* note 2, Article 8, and Regulation No. 737/2010, *supra* note 2, Article 12.

<sup>53</sup> The specific prohibition is on “placing [seal products] on the market” which is defined as, “introducing onto the Community market, thereby making available to third parties, in exchange for payment.” Regulation No. 1007/2009, *supra* note 2, Article 2.

<sup>54</sup> *Id.*

<sup>55</sup> The regulation initially included additional explicit bans on seal products transiting the EU or being exported from the EU, which were not included in the final regulation. Compare *Commission Proposal supra* note 3, at Article 3 with Regulation 1007/2009, *supra* note 2 at Article 3.

resulting “from hunts traditionally conducted by Inuit<sup>56</sup> and other indigenous communities and contribute to their subsistence”<sup>57</sup>; for noncommercial, non-profit, transactions in the by-products of regulated hunts “conducted for the sole purpose of the sustainable management of marine resources”<sup>58</sup>; and for noncommercial, occasional, imports “of goods for the personal use of travelers or their families.”<sup>59</sup> The regulation also states that the prohibition is to be enforced with “effective, proportionate, and dissuasive” penalties established by the Member States.<sup>60</sup>

Regulation 737/2010 augments this framework by providing additional detail regarding the exceptions to the basic seal products ban. It clarifies that the exception for commercial transactions in seal products from Inuit or other indigenous communities only applies where there is a tradition of such hunts contributing to the subsistence of the community.<sup>61</sup> A number of additional requirements are also specified for the exception for noncommercial, nonprofit, transactions conducted as the by-product of marine resources management efforts.<sup>62</sup> Regulation 737/2010 also elaborates upon the “personal use” import exception as involving seal products that are “either worn by . . . travellers, or carried or contained in their personal luggage.”<sup>63</sup> Additionally, in order to use any of these exceptions, the seal products must be accompanied by documentation recognized by competent European authorities.<sup>64</sup>

Taking a popular ethical or moral stance, as embodied in the seal products ban, is not necessarily at odds with international trade law. Rather it is the particulars of this scheme—the specific details and omissions found in these two regulations—that raises the greatest prospect of difficulty in light of the EU’s commitments under the WTO Agreements. Those international trade agreements recognize that individual States will legitimately wish to pursue a wide range of other policies that might nevertheless have an impact on trade, and that they should be permitted to implement those policies, so long as their trade commitments are also respected. The provisions of GATT Article XX provide a lens for assessing whether the laws and regulations implementing these other policies in particular jurisdictions, such as the animal welfare concerns reflected in the EU’s seal products ban, also give proper regard to the

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<sup>56</sup> The term “Inuit” is defined as including “indigenous members of the Inuit homeland, namely those Arctic and sub-Arctic areas where, presently or traditionally, Inuit have aboriginal rights and interests, recognized by Inuit as being members of their people and includes Inupiat, Yupik (Alaska), Inuit, Inuvialuit (Canada), Kalaallit (Greenland), and Yupik (Russia).” *Id.*

<sup>57</sup> *Id.* at Article 3(1).

<sup>58</sup> *Id.* at Article 3(2)(b).

<sup>59</sup> *Id.* at Article 3(2)(a).

<sup>60</sup> *Id.* at Article 6.

<sup>61</sup> Regulation No. 737/2010, *supra* note 2, Article 3.

<sup>62</sup> *Id.* at Article 5.

<sup>63</sup> *Id.* at Article 4.

<sup>64</sup> *Id.* at Articles 3(2), 5(2), 6–9.

obligations undertaken by all WTO Members. However, when the technicalities of the international trade law developed under the GATT/WTO dispute resolution process are applied to the specifics of the EU seal ban regulations, those hoping that a decision in this dispute will establish a general principle that the GATT Article XX(a) General Exception for laws and regulations “necessary to protect public morals” justifies animal welfare measures, may well be left frustrated.

### 3. THE APPLICATION OF INTERNATIONAL TRADE LAW TO THE EU SEAL PRODUCTS BAN

#### 3.1. General International Trade Law and Animal Welfare

International trade law is largely unconcerned with animal welfare, except where governmental animal welfare measures conflict with the general emphasis upon promoting the free movement of goods, services, or capital across national borders that are its primary objects.<sup>65</sup> That is, animal welfare measures are not usually regarded as a particular focus for trade law, unless they disrupt trade flows.<sup>66</sup> Indeed, animal welfare measures are primarily the province of domestic law and typically reflect local values and customs rather than a broad international consensus.<sup>67</sup> Accordingly, the WTO Agreements do not specifically regulate animal welfare, and the issues animal welfare measures such as the EU seal products ban pose must be analyzed under the provisions of the Agreements that are applicable to trade generally.<sup>68</sup>

The obligations and commitments that apply to the 153 WTO Member States<sup>69</sup> are found in a package of over 60 interrelated agreements, decisions, and declarations, rather than in any single document.<sup>70</sup> This reflects the history

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<sup>65</sup> As stated by the WTO, “[t]he system’s overriding purpose is to help trade flow as freely as possible—so long as there are no undesirable side-effects—because this is important for economic development and well-being.” WTO, *UNDERSTANDING THE WTO* (2010) at 10, at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/understanding\\_e.pdf](http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf)

<sup>66</sup> See, for example, the ten Council of Europe agreements addressing keeping, transport, slaughter of farm animals; animal experimentation; habitat protection; and the only international agreement addressing companion animals, at <http://www.conventions.coe.int/Treaty/Commun/ListeTraités.asp?MA=42&CM=7&CL=ENG>

<sup>67</sup> L. Nielson, *THE WTO, ANIMALS, AND PPMs*, (2007) at 7.

<sup>68</sup> Animal welfare is, however, being addressed as a “non-trade concern” in the WTO Doha Round negotiations to revise the Agriculture Agreement. See WTO, *Agriculture Negotiations: Background Phase 1: Animal Welfare and Food Quality*, at [http://www.wto.org/english/tratop\\_e/agric\\_e/ngs\\_bkgmd12.animalw\\_e.htm](http://www.wto.org/english/tratop_e/agric_e/ngs_bkgmd12.animalw_e.htm), and WTO, *Agriculture Negotiations: Background Update Phase 2: Consumer Information and Labelling*, at [http://www.wto.org/english/tratop\\_e/agric\\_e/ngs\\_bkgmd26\\_ph2consumer\\_e.htm](http://www.wto.org/english/tratop_e/agric_e/ngs_bkgmd26_ph2consumer_e.htm)

<sup>69</sup> See WTO, *Understanding the WTO: Members and Observers*, at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)

<sup>70</sup> See WTO, *WTO Legal Texts*, at [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm)

of how the multilateral trading system evolved over the last half of the 20th century.<sup>71</sup> The aim of this complex regime is to promote a rules-based world trading system of “open, fair, and undistorted competition,” while at the same time encouraging development and economic reform.<sup>72</sup> This system is predicated on the premise that

Liberal trade policies—policies that allow the unrestricted flow of goods and services—sharpen competition, motivate innovation, and breed success. They multiply the rewards that result from producing the best products, with the best design, at the best price.<sup>73</sup>

The GATT Agreement was the cornerstone of the post-WWII multilateral trading system, even though it was only a provisional agreement.<sup>74</sup> When the WTO was created as a permanent international organization in 1995, the GATT was re-enacted and incorporated into the overall package of WTO Agreements and commitments.<sup>75</sup> The GATT/WTO system initially focused on reducing trade tariffs, the customs duties or taxes imposed on imported goods as they cross a border, as tariffs are the most obvious barrier to trade—and the easiest to quantify. Through successive “rounds” of negotiations, each extending over several years, the Members committed to lower the very high protectionist tariffs that characterized the times just before and after WWII to a current average of roughly 5 percent or less for most products, greatly reducing the distortions in trade flows attributable to customs duties and facilitating the ability of international markets to supply the best goods and the lowest prices. As this occurred, the focus of the international trade community shifted to the much more difficult problem of reaching agreement on the broad range of “non-tariff barriers” to trade, which are both more difficult to identify and whose effect is much more difficult to assess than is the case with tariffs.<sup>76</sup> Addressing the breadth and complexity of the various potential

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<sup>71</sup> See generally, M. Matsushita, T. J. Schoenbaum, P. Mavroidis, *THE WORLD TRADE ORGANIZATION* (2006) at Ch. 1.

<sup>72</sup> See *UNDERSTANDING THE WTO*, *supra* note 65, at 12.

<sup>73</sup> This also reflects the principle of “comparative advantage,” i.e., that countries prosper by taking advantage of their assets and concentrating on what they can produce most efficiently, and then trading for products that other countries produce more efficiently. *Id.* at 13.

<sup>74</sup> At the time the World Bank and the International Monetary Fund were established in the late 1940s, a third institution, the International Trade Organization, was also proposed but never came into being due to U.S. failure to ratify the 1948 Havana Charter. As a result, the provisional GATT agreement, negotiated in anticipation of the ITO, governed the multilateral trading system until the advent of the WTO in 1995. *Id.* at 15–16.

<sup>75</sup> See Uruguay Round Agreement: Marrakesh Agreement Establishing the World Trade Organization, at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto\\_e.htm](http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm)

<sup>76</sup> The breadth of this category can be inferred by its title, which defines the problem by what it is not—a barrier to trade that is unrelated to tariffs. Virtually any governmental law, regulation, standards or practices that hinders trade is a potential non-tariff barrier. See *UNDERSTANDING THE WTO*, *supra* note 65, at 49–51.

non-tariff barriers to trade remains among the most contentious areas of trade law today, and a good part of the reason why there are so many separate documents in the package of WTO Agreements.<sup>77</sup>

Most animal welfare measures would typically be analyzed as potential non-tariff barriers to trade under the GATT or, in appropriate cases, under some of the other accompanying WTO Agreements such as the Agriculture Agreement,<sup>78</sup> the Sanitary and Phytosanitary Measures Agreement,<sup>79</sup> the Subsidies and Countervailing Duties Agreement,<sup>80</sup> or the Technical Barriers to Trade Agreement.<sup>81</sup> In the dispute over the seal products ban, although there are allegations relating to the TBT Agreement, the analysis primarily involves the GATT, and especially GATT Article XX.

The basic principle that trade should be conducted on a nondiscriminatory basis that is fundamental to all the WTO Agreements can be seen in GATT Articles I, III, and XI. Under the “General Most Favored Nation (MFN) Treatment” obligation detailed in Article I, WTO Members cannot discriminate among foreign countries; they must treat their various foreign trading partners alike.<sup>82</sup> That is, imports from each WTO Member automatically and

<sup>77</sup> *Id.* at 16–22.

<sup>78</sup> Uruguay Round Agreement: Marrakesh Agreement Establishing the World Trade Organization, Appendix 1A Multilateral Agreements on Trade in Goods, Agreement on Agriculture, at [http://www.wto.org/english/docs\\_e/legal\\_e/14-ag\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/14-ag_01_e.htm). Direct payments to agricultural producers to support animal welfare would be an example of something that might fall under this agreement. See European Commission, COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT ON ANIMAL WELFARE LEGISLATION ON FARMED ANIMALS IN THIRD COUNTRIES AND THE IMPLICATIONS FOR THE EU, COM(2002) 626 final (18 November 2002) at ¶s 78–90, at [http://ec.europa.eu/food/animal/welfare/references/2002\\_0626\\_en.pdf](http://ec.europa.eu/food/animal/welfare/references/2002_0626_en.pdf). [Hereinafter *Legislation in Third Countries*.]

<sup>79</sup> Uruguay Round Agreement: Marrakesh Agreement Establishing the World Trade Organization, Appendix 1A Multilateral Agreements on Trade in Goods, Agreement on the Application Of Sanitary and Phytosanitary Measures, at [http://www.wto.org/english/docs\\_e/legal\\_e/15sps\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/15sps_01_e.htm). Animal health codes welfare would be an example of something that might fall under this agreement. See *Legislation in Third Countries*, *supra* note 78, at ¶ 46.

<sup>80</sup> Uruguay Round Agreement: Marrakesh Agreement Establishing the World Trade Organization, Appendix 1A Multilateral Agreements on Trade in Goods, Agreement on Subsidies and Countervailing Duties, at [http://www.wto.org/english/docs\\_e/legal\\_e/24-scm\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm). Direct payments to agricultural producers to support animal welfare would be an example of something that might fall under this agreement, if they fell outside the scope of the Agriculture Agreement. See *Legislation in Third Countries*, *supra* note 78, at ¶s 78–90.

<sup>81</sup> Uruguay Round Agreement: Marrakesh Agreement Establishing the World Trade Organization, Appendix 1A Multilateral Agreements on Trade in Goods, Agreement on Technical Barriers to Trade, at [http://www.wto.org/english/docs\\_e/legal\\_e/17-tbt\\_e.htm](http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm). Product labelling requirements for animal welfare purposes would be an example of something that might fall under this agreement. See *Legislation in Third Countries*, *supra* note 78, at ¶ 49.

<sup>82</sup> Article I(1) states that “[w]ith respect to customs duties and charges of any kind . . . and . . . rules and formalities in connection with importation and exportation and . . . with respect to Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.” GATT (1947), Article I, at [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm)

unconditionally receive the same treatment as that otherwise accorded to the importing country's most favored trading partner. If a country provides for the duty-free importation of a given product from one of its trading partners, for example, then the country must permit imports of that product by any and all other WTO Members on a duty-free basis as well.

The "National Treatment" (NT) obligation in Article III complements the Article I MFN requirement, and generally prohibits either explicit (*de jure*) or tacit (*de facto*) discrimination between domestic and foreign goods.<sup>83</sup> Thus, the NT provision is specifically aimed at preventing the use of domestic regulations or taxes for protectionist purposes, and requires that imports are not treated any less favorably than domestic goods.<sup>84</sup> Accordingly, GATT Article I is often regarded as applying the non-discrimination principle externally or "at the border," whereas Article III seeks to avoid trade distorting "internal" measures that are applicable after a foreign good has entered a given country.

Article XI specifically focuses upon non-tariff barriers that are applied at the border, such as import or export quotas, bans, or similar measures that limit market access.<sup>85</sup> It reflects an institutional preference within the GATT/WTO system for the use of tariffs over other forms of border protection. This is in part because it is easier to quantify the impact of tariffs upon trade, and to negotiate their reduction, than to ameliorate the effects of other more indirect forms of border regulation. Article XI is accordingly viewed as imposing a general prohibition on "quantitative restrictions" or similar measures—other than customs duties—that inherently discriminate and distort trade.

In assessing compliance with the non-discrimination principle under the GATT, a key question is whether impermissible distinctions are made when comparable products are traded. As with other areas of economic regulation, such as in antitrust or competition law, the decision as to what products are comparable often dictates the legal result. The more broadly the comparison is drawn, the easier it is to make a case; conversely, the more narrowly or

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<sup>83</sup> The substance of the NT obligation is detailed in Article III(2) and Article III(4). Article III(2) states, "The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products . . ." Article III(4) states, "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 . . ." GATT (1947), Article III, *at* [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm)

<sup>84</sup> See GATT (1947), Article III(1), *at* [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm)

<sup>85</sup> Article XI(1) states, "[n]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party." GATT (1947), Article XI, *at* [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm)

precisely the market or product category is defined, the easier it is to defend any distinctions—for example, is it “fruit,” or rather different treatment for “apples” and “oranges” that is at issue?

The GATT itself does not define the scope of the comparison, and the interpretative question of what are the “like products” to which the NT and MFN obligations apply<sup>86</sup> remains one of the thorniest issues in GATT/WTO jurisprudence.<sup>87</sup> These comparisons are made on a case-by-case basis. The WTO Appellate Body describes the scope of the comparison as similar to an “accordion [that] stretches and squeezes in different places as different provisions of the WTO Agreement are applied . . . as well as by the context and the circumstances that prevail in any given case.”<sup>88</sup> Nevertheless, a non-exhaustive but commonly used set of criteria for assessing “likeness” involves examining, (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers’ tastes and habits—more comprehensively termed consumers’ perceptions and behavior—in respect of the products; and (iv) the tariff classification of the products.<sup>89</sup>

While the even-handedness and neutrality that the non-discrimination principle encourages does not immediately appear as an obvious problem for animal welfare regulation, the GATT/WTO jurisprudence on the “like product” question nevertheless poses some unexpected issues. There are numerous unresolved issues regarding how the “like product” test is actually applied in particular cases, how the case-by-case “accordion” approach influences policy, and its impact on Member state sovereignty and autonomy.

Firstly, when assessing “likeness” in particular cases the focus is primarily on the end-products that are traded, that is, the physical nature and characteristics of the products themselves and how they relate competitively. The conventional wisdom is that the processes and production methods (PPMs) used to create those goods are not relevant to the analysis. Thus, in the famous *Tuna–Dolphin* cases in the early 1990s,<sup>90</sup> tuna caught with nets which

<sup>86</sup> The term “like product” appears in GATT Articles. I; II(2)(a); VI(1)(a), (b)(i), and (4); IX(1); XI(2)(c)(i) and (ii) XIII(1); XVI(4); and XIX(1)(a) and (b). A related but different term with a slightly broader scope, “directly competitive or substitutable product,” appears in Article III(2). GATT (1947), at [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm)

<sup>87</sup> THE WORLD TRADE ORGANIZATION, (2006), *supra* note 71, at 236.

<sup>88</sup> Report of the Appellate Body, *Japan — Taxes on Alcoholic Beverages* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (4 October 1996) at ¶ H(1)(a).

<sup>89</sup> See 1970 Report of the Working Party on Border Tax Adjustments cited in Report of the Appellate Body, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (12 March 2001) at ¶s 101–102, at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/135ABR.doc>

<sup>90</sup> Report of the Panel, *United States—Restrictions on Imports of Tuna*, DS21/R—39S/155 (3 September 1991) [Tuna-Dolphin I] *unadopted*, at <http://www.worldtradelaw.net/reports/gattpanels/tunadolphinI.pdf>; Report of the Panel, *United States—Restrictions on Imports of Tuna*, DS29/R (16 June 1994) [Tuna-Dolphin II] *unadopted*, at <http://www.worldtradelaw.net/reports/gattpanels/tunadolphinII.pdf>



incidentally killed substantial numbers of dolphins was deemed indistinguishable from tuna caught with more “dolphin safe” methods. Fishing methods employed to protect dolphins, “could not be regarded as being applied to tuna products as such because they would not directly regulate the sale of tuna and could not possibly affect tuna as a product,” and the U.S. regulatory scheme was deemed incompatible with the GATT.<sup>91</sup>

Since animal welfare measures are often concerned with the manner in which individual animals are treated, rather than the resulting animal-related goods, the focus is primarily on the question of “how” those goods are produced. In common with a great deal of environmental regulation, as seen in the *Tuna–Dolphin* cases for example, that is a PPM issue which might not impact the physical characteristics of the final end product.<sup>92</sup> Thus, while the typical GATT/WTO analysis leads to the view that “an egg is simply an egg,” from the animal welfare perspective eggs produced by chickens on free range farms are “unlike” those produced by hens in large battery cage factory farms.<sup>93</sup> That is, animal welfare measures distinguish, for example, between cruel and humane PPMs for animal-related products.<sup>94</sup> Disregarding PPMs when deciding what products should be treated alike for trade purposes therefore potentially frustrates the objective behind a good deal of animal welfare regulation.

Interestingly, there is a significant body of commentary suggesting that the conventional wisdom is wrong in that the GATT/WTO Agreements do recognize the legitimacy of regulating PPMs in a number of areas.<sup>95</sup> Moreover, the jurisprudence from the WTO Dispute Settlement Body (DSB) potentially does so as well, having evolved from the GATT-era approach embodied in the *Tuna–Dolphin* cases. Notably, as the WTO Appellate Body emphasized in its *EC–Asbestos* decision where it upheld French controls on building products containing asbestos,<sup>96</sup> the need to consider all the criteria outlined above in

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<sup>91</sup> *Tuna–Dolphin I* at ¶15.14.

<sup>92</sup> See also *infra* note 99 and accompanying text discussing the difference between “product-related,” and “non-product-related,” PPMs.

<sup>93</sup> “Battery cages” are a system whereby a flock is kept in a large number of usually tiered cages. For one study of the effects of such a system, see M. C. Appleby, *Do Hens Suffer in Battery Cages?* Institute of Ecology and Resource Management, the University of Edinburgh (1991) at [http://www.ciwf.org.uk/includes/documents/cm\\_docs/2008/d/do\\_hens\\_suffer\\_in\\_battery\\_cages\\_1991.pdf](http://www.ciwf.org.uk/includes/documents/cm_docs/2008/d/do_hens_suffer_in_battery_cages_1991.pdf)

<sup>94</sup> M. Radford, ANIMAL WELFARE LAW IN BRITAIN: REGULATION AND RESPONSIBILITY (2001) at 132–137; P. Stevenson, *The World Trade Organisation Rules: A Legal Analysis of Their Adverse Impact on Animal Welfare*, 8 ANIMAL L. 107 (2001).

<sup>95</sup> See generally *id.*; Nielsen, *supra* note 67; S. Charnovitz, *The Law of Environmental “PPMs” in the WTO: Debunking the Myth of Illegality*, 27 YALE J. INT’L L. 59 (2002); D. A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, (2004). See also GATT Articles III(4); XI(2)(b) and XX(a), (b), and (g), which all address PPMs.

<sup>96</sup> Report of the Appellate Body, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, (12 March 2001), at [http://www.wto.org/english/tratop\\_e/dispu\\_e/135abr\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/135abr_e.pdf)

assessing the “likeness” of one product for another includes the important element of consumer tastes and behavior.<sup>97</sup> In that case, consumer perception of the health risks posed by products containing asbestos was sufficient to distinguish them from similar products not containing asbestos fibers and alter their competitive relationship.<sup>98</sup> As the Appellate Body stated,

Evidence about the extent to which products can serve the same end-uses, and the extent to which consumers are—or would be—willing to choose one product instead of another to perform those end-uses, is highly relevant . . . in assessing the ‘likeness’ of those products under . . . the GATT.<sup>99</sup>

If consumer preferences as to potential human health risks can be used to distinguish one product from another, perhaps evolving consumer preferences as to humane animal welfare practices are potentially relevant when assessing “likeness” as well? Nevertheless, the conventional wisdom against considering PPMs is deeply held, and even reflected in the WTO’s current basic explanation of itself, *Understanding the WTO*, which flatly asserts that “[t]he WTO agreements are interpreted to say . . . trade restrictions cannot be imposed on a product purely because of the way it has been produced.”<sup>100</sup>

This leads to the second issue posed by the “likeness” question—the chilling effect which results from uncertainty regarding the actual requirements of GATT/WTO law in this area. Policy makers and others often point to the conventional wisdom that PPMs are disregarded when determining which products are comparable under GATT/WTO law as justifying inaction, or limiting action, on animal welfare issues.<sup>101</sup> For example, implementation of the original regulation prohibiting the use of leghold traps in the European Community, and the import of pelts from animals caught with such traps,<sup>102</sup> was postponed and then subsequently modified to no longer apply to the three

<sup>97</sup> See *supra* note 88 and accompanying text.

<sup>98</sup> *EC-Asbestos*, *supra* note 96, at ¶¶ 109, 120–122, 130.

<sup>99</sup> *Id.* at ¶ 117. This is especially so where the consumer preference involved a PPM that is reflected in the physical characteristics of the final end products being compared—so-called product-related, PPMs—where the initial burden on the complaining party is establishing “likeness” as a prima facie matter is higher. That, in turn, leads those favoring the exclusion of PPMs from a likeness determination to an argument that at least “non-product-related, PPMs”—those which have no impact whatsoever on the physical characteristics of the final end product—should remain outside the analysis, although the Appellate Body’s language neither mandates such a distinction nor endorses that result. See *id.* at ¶ 118.

<sup>100</sup> UNDERSTANDING THE WTO, *supra* note 65, at 47.

<sup>101</sup> Charnovitz, *PPMs*, *supra* note 95, at 76–80; Stevenson *supra* note 94, at 118; Cook & Bowles, *supra* note 6, at 228; A. Nollkaemper, *The Legality of Moral Crusades Disguised in Trade Laws: An Analysis of the EC ‘Ban’ on Furs From Animals Taken by Leghold Traps*, 8 J. ENVIRON. L. 237 (1996); Radford, *supra* note 94, at 135–136; E. M. Thomas, *Playing Chicken with the WTO: Defending an Animal Welfare-Based Trade Restriction under GATT’s Moral Exception*, 34 B.C. ENVTL. AFF. L. REV. 605 (2007) at 608–612.

<sup>102</sup> Regulation No. 3254/91, *supra* note 18.

largest fur exporting countries, Canada, Russia, and the United States, because of concerns that the GATT/WTO agreements would not permit distinguishing between animals killed with leghold traps and those caught in a more humane—or at least different—manner.<sup>103</sup>

The effectiveness of the European Directive prohibiting animal testing in connection with cosmetics marketed in the EU,<sup>104</sup> when alternatives are available, was similarly postponed so many times<sup>105</sup> that it was recently recast into an entirely new regulation.<sup>106</sup> Additionally, the EU's only current mandatory animal welfare labelling scheme, for eggs, also reflects concerns over the ability to distinguish products based upon PPMs.<sup>107</sup> Packages of shell eggs produced within the EU are labeled as to the farming method used, i.e., eggs from caged hens, barn eggs, free-range eggs, and organic eggs, based upon legislated standards.<sup>108</sup> Eggs from countries outside the EU, however, need only be marked with their origin and “farming method not specified,” a less rigorous and less informative requirement.<sup>109</sup> The issue with making such policy decisions based upon the conventional wisdom is that the GATT/WTO jurisprudence is actually very nuanced and does not point to a blanket prohibition on PPMs.<sup>110</sup>

<sup>103</sup> Charnovitz, *Moral Exception*, *supra* note 10, at 736–740; S. R. Harrop, *The Dynamics of Wild Animal Welfare Law*, 9 J. ENVIRON. L. 287 (1997) at 290–292; M. Radford, *supra* note 94, at 135.; Nollkaemper, *supra* note 101; Stevenson *supra* note 94, at 118–119; Cook & Bowles, *supra* note 6 at 228. *See also*, European Commission Directorate General for Environment, *Implementation of Humane Trapping Standard in the EU*, at [http://ec.europa.eu/environment/biodiversity/animal\\_welfare/hts/index\\_en.htm](http://ec.europa.eu/environment/biodiversity/animal_welfare/hts/index_en.htm)

<sup>104</sup> Council Directive (76/768/EEC) of 27 July 1976 on the Approximation of the Laws of the Member States Relating to Cosmetic Products, OFFICIAL JOURNAL L 262 (27 September 1976) at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1976L0768:20100301:en:PDF>. *See also*, Europa Summaries of European Legislation, *Cosmetic products: composition, labelling, animal testing*, at [http://europa.eu/legislation\\_summaries/consumers/product\\_labelling\\_and\\_packaging/l21191\\_en.htm](http://europa.eu/legislation_summaries/consumers/product_labelling_and_packaging/l21191_en.htm)

<sup>105</sup> *See*, Cook & Bowles, *supra* note 6 at 228; Radford, *supra* note 94, at 136; Stevenson *supra* note 94, at 119–120; Thomas, *supra* note 101, at 608–614.

<sup>106</sup> Regulation (EC) No. 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products Text with EEA relevance, OFFICIAL JOURNAL L 342 (22/12/2009), at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:342:0059:0209:EN:PDF>. *See also*, Europa Summaries of European Legislation, *Cosmetic Products: Composition, Labelling, Animal Testing (from 2013)*, at [http://europa.eu/legislation\\_summaries/food\\_safety/animal\\_welfare/co0013\\_en.htm](http://europa.eu/legislation_summaries/food_safety/animal_welfare/co0013_en.htm)

<sup>107</sup> Council Regulation (EC) No. 5/2001 of 19 December 2000 amending Regulation (EEC) No. 1907/90 on certain marketing standards for eggs, OFFICIAL JOURNAL L 2 (5 January 2001), at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:002:0001:0003:EN:PDF>

<sup>108</sup> Council Regulation (EEC) No. 1907/90 of 26 June 1990 on certain marketing standards for eggs, *Official Journal L 173*, (6 July 1990) at Article 10(3) at <http://eur-lex.europa.eu/LexUriServ/site/en/consleg/1990/R/01990R1907-20050701-en.pdf>. *See also*, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Options for Animal Welfare Labelling and the establishment of a European Network of Reference Centres for the Protection and Welfare of Animals*, COM(2009) 584 final (28/10/2009) at 4, at [http://ec.europa.eu/food/animal/welfare/farm/options\\_animal\\_welfare\\_labelling\\_report\\_en.pdf](http://ec.europa.eu/food/animal/welfare/farm/options_animal_welfare_labelling_report_en.pdf)

<sup>109</sup> Regulation No. 5/2001, *supra* note 107, at Article 1(2) and (5).

<sup>110</sup> *See*, e.g., Charnovitz, *PPMs*, *supra* note 95, at 79, 102.

Thirdly, assessing the comparability of products has implications for sovereign autonomy, making it more difficult for individual jurisdictions to make their own choices regarding animal welfare in the absence of multilateral consensus on the topic in the GATT/WTO Agreements. Recognizing that “there is increasingly wide acceptance of the link between animal welfare and animal health, and even, by extension, between animal welfare and food safety and food quality,”<sup>111</sup> the EU has actively legislated in the area since 1974.<sup>112</sup> As a consequence, maintaining those “higher” European standards in a global world poses a series of problems with regard to imports that do not meet those same standards are quite possibly produced at a lower cost as result.<sup>113</sup>

On the one hand, if the imports are deemed to be “like” the domestic products, and the presumably more costly local humane PPM requirements are disregarded, then the foreign and domestic goods must otherwise be treated alike—and imports not meeting the local PPM standards permitted to enter the EU. As a consequence, not only are domestic producers placed at a disadvantage relative to their foreign competitors, but the objective of the regulatory scheme is undermined. On the other hand, if the local humane PPM standards are not disregarded, but applied equally to both imported and domestic goods, the concern behind the nondiscrimination principle in GATT Articles I and III is that applying those PPM standards to imports may be more focused on protectionism than on legitimate local policies—and therefore actually constitute an impermissible disguised restriction on trade. Alternatively, even if a PPM-based distinction between the imported and domestic goods is permitted, any special restrictions aimed at imported products—such as an import ban on goods that do not conform to the local animal welfare requirements—can distort trade flows and may be a problem under GATT Article XI.

However, rather than deciding whether to wholly disregard or wholly defer to local animal welfare standards, the issue is finding the right balance between the autonomous local sovereign interest and international trade in formulating those standards and requirements. Accommodating both interests can be difficult.

The EU fully subscribes to the view that animal welfare provisions must not be used for protectionist purposes. . . . The Agreements of the World Trade Organisation—most relevantly here the GATT (General Agreement on Tariffs and Trade) . . . make it illegal to resort to measures that unnecessarily restrict trade or discriminate among members or between imported and domestic products. As there are diverging views on the extent to which animal welfare constitutes a legitimate policy objective and also taking into account the absence of interpretative guidance

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<sup>111</sup> *Legislation in Third Countries*, *supra* note 78, at ¶ 36. See also Stevenson, *supra* note 94, at 126, 134–140.

<sup>112</sup> *Legislation in Third Countries*, *supra* note 78, at ¶s 7–11, and Appendix 5.

<sup>113</sup> *Id.* at ¶s 3–5.

by dispute settlements, unilateral application by the EU of its animal welfare standards as condition for the importation of products from third countries could risk being challenged by the EU's trading partners.<sup>114</sup>

Accordingly, as a result:

[a]nimal welfare advocates view global free trade agreements as a major reason for the lack of progress on welfare issues to date. . . . [These] [a]dvocates argue that the WTO's apparent unwillingness to distinguish between products on the basis of PPMs means that standards on animal welfare are ignored in favor of commercial interests, and that nations with the lowest standards end up setting the bar for others. Similar arguments are made in regard to the treatment of environmental, human rights, and labor standards under the WTO.

Many free trade advocates, however, seek to prevent one nation from imposing its own animal welfare, environmental, or any other standard on other nations. Such advocates, including many developing world representatives, view the WTO as a bulwark against regulations that curb trade and/or advance protectionist policies. Their most compelling argument is that free trade should expand the prosperity of the developed world to poorer nations. For such advocates, the argument that PPMs should be taken into account amounts to a defense of expensive and resource-consuming regulations that disfavor developing world producers.

Attempting to reconcile these two valid objectives has proven highly problematic.<sup>115</sup>

Indeed, in the absence of any specific provisions in the WTO Agreements, this balancing between autonomy and open trade interests occurs primarily in the cases considered in the GATT/WTO dispute settlement process, and particularly in those cases where the Dispute Settlement Body is called upon to interpret the scope of GATT Article XX. If the challenge to the EU seal product regulations proceeds to a decision, it would be the first case to specifically attempt to strike this difficult balance in the context of animal welfare under the GATT/WTO Agreements.<sup>116</sup>

### **3.2. The Dispute Settlement Process, GATT Article XX General Exceptions, and Animal Welfare**

Dispute settlement under the WTO Agreements is a quasi-judicial rule-oriented process,<sup>117</sup> which emphasizes state-to-state consultations and conciliation at every stage, and where the focus is more on resolving given

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<sup>114</sup> *Legislation in Third Countries*, *supra* note 78, at ¶ 38.

<sup>115</sup> Thomas, *supra* note 101, at 609–610.

<sup>116</sup> *See*, e.g., Cook & Bowles *supra* note 6, at 227.

<sup>117</sup> *See* THE WORLD TRADE ORGANIZATION, (2006), *supra* note 71, at 107–108. *See also* UNDERSTANDING THE WTO, *supra* note 65, at 59–61.

disputes rather than passing judgment.<sup>118</sup> When a Panel or Appellate Body final decision is adopted,<sup>119</sup> any non-compliance with the WTO Agreements must either be corrected within a reasonable time<sup>120</sup> or compensatory trade concessions voluntarily provided as compensation,<sup>121</sup> or the losing party potentially becomes subject to a suspension of GATT concessions and retaliatory trade sanctions by the prevailing party.<sup>122</sup>

The decisions by individual dispute Panels and the permanent Appellate Body have traditionally been regarded as binding on the parties to the particular dispute, but lacking any force as legal precedents.<sup>123</sup> However, in the *U.S.—Stainless Steel* case, the Appellate Body recently appeared to give greater emphasis to the force of precedents, when it chastised the Panel for giving insufficient regard to the rulings and reasoning in prior decisions.

The creation of the Appellate Body by WTO Members to review legal interpretations developed by panels shows that Members recognized the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements. This is essential to promote “security and predictability” in the dispute settlement system, and to ensure the “prompt settlement” of disputes. The Panel’s failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members’ rights and obligations under the covered agreements as contemplated under the DSU. . . . While the application of a provision may be regarded as confined to the context in which it takes place, the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case. We are deeply concerned about the Panel’s decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel’s approach has serious implications for the proper functioning of the WTO dispute settlement system. . . .<sup>124</sup>

Accordingly, even though the Marrakesh Agreement formally vests the “exclusive authority to adopt interpretations” of the various treaty texts in the

<sup>118</sup> UNDERSTANDING THE WTO, *supra* note 65, at 55–58. *See also* Uruguay Round Agreement: Marrakesh Agreement Establishing the World Trade Organization, Appendix 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, at [http://www.wto.org/english/docs\\_e/legal\\_e/28-dsu\\_e.htm](http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm)

<sup>119</sup> *See* THE WORLD TRADE ORGANIZATION, (2006), *supra* note 71, at 117–121; UNDERSTANDING THE WTO, *supra* note 65, at 58–59. Under the WTO, a reverse consensus rule applies to DSB rulings, that is, decisions are automatically adopted unless all the members object—effectively preventing the losing party from vetoing the adoption of a report. *Id.* at 56.

<sup>120</sup> Uruguay Round Agreement: Marrakesh Agreement Establishing the World Trade Organization, Appendix 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 21, at [http://www.wto.org/english/docs\\_e/legal\\_e/28-dsu\\_e.htm](http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm)

<sup>121</sup> Uruguay Round Agreement: Marrakesh Agreement Establishing the World Trade Organization, Appendix 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 22, at [http://www.wto.org/english/docs\\_e/legal\\_e/28-dsu\\_e.htm](http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm)

<sup>122</sup> *Id.*

<sup>123</sup> *See* THE WORLD TRADE ORGANIZATION (2006) note 71, at 111–112; Nielsen, *supra* note 67, at 115–123.

<sup>124</sup> Report of the Appellate Body, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (30/4/2008) at ¶s 161–162, at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/344ABR.doc>

Ministerial Conference and the General Council,<sup>125</sup> heavy weight—at least on a *de facto* basis—should be placed on the Appellate Body’s interpretations of the WTO Agreements, including GATT Article XX.<sup>126</sup>

GATT Article XX balances the multilaterally agreed rights accorded to all WTO Members—when acting as an exporters—to participate in an open, fair, and undistorted trading system; against their ability to unilaterally pursue other aims or policies—when acting as importers—based upon one of the listed General Exceptions. In WTO jurisprudence, GATT Articles I, III, and XI are viewed as conferring substantive rights, with Article XX justifying possible violations of those rights in certain limited circumstances.<sup>127</sup> In the Appellate Body’s words:

WTO Members need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions in Article XX, specified in paragraphs (a) to (j), on the one hand, and the substantive rights of the other Members under the GATT . . . on the other hand. Exercise by one Member of this right to invoke an exception . . . if abused or misused, will, to that extent, erode or render naught the substantive treaty rights . . . of other Members. . . . The same concept may be expressed from a slightly different angle of vision, thus, a balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members.<sup>128</sup>

The Article lists ten exceptions that might be used to justify an otherwise problematic local law or measure.<sup>129</sup> Each of these exceptional categories,

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<sup>125</sup> Uruguay Round Agreement: Marrakesh Agreement Establishing the World Trade Organization, Article IX(2), at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto\\_e.htm](http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm). This is not as startling as it may first appear, because the WTO Dispute Settlement Body consists of all the members of the General Council “in another guise.” See *id.* at Article IV, and UNDERSTANDING THE WTO, *supra* note 65, at 56.

<sup>126</sup> See F. David, *The Role of Precedent in the WTO—New Horizons*, Maastricht Working Papers, University of Maastricht Faculty of Law at <http://www.unimaas.nl/bestand.asp?id=12766>

<sup>127</sup> Charnovitz, *PPMs*, *supra* note 95, at 80–82.

<sup>128</sup> Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R (12/10/1998) at ¶ 156, at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/58ABR.doc> [Hereinafter *Shrimp-Turtle II*.]

<sup>129</sup> GATT Article XX reads:

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;

\* \* \*

- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

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GATT (1947), Article XX, at [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_02\\_e.htm#articleXX](http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm#articleXX)

however, is also subject to the caveat that they not be abused by becoming either a “disguised restriction” on trade or “a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.”<sup>130</sup> This limiting language is found in Article XX’s introductory paragraph, or “chapeau,” and both the terms of the specific exception being invoked and the overarching requirements of the chapeau must be met in order to invoke Article XX.

In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions—paragraphs (a) to (j)—listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under [the particular exception relied upon]; second, further appraisal of the same measure under the introductory clauses of Article XX.<sup>131</sup>

While none of the listed exceptions specifically address animal welfare, three of the General Exceptions are of potential interest. The Article XX(b) exception for measures “necessary to protect human, animal or plant life or health,”<sup>132</sup> and the XX(g) exception for measures “relating to the conservation of exhaustible natural resources if . . . made effective in conjunction with restrictions on domestic production or consumption,”<sup>133</sup> have been repeatedly litigated in the context of environmental regulation. As the Article XX(a) General Exception for measures “necessary to protect public morals”<sup>134</sup> has only been directly addressed in a single case,<sup>135</sup> the interpretations drawn from the environmental disputes might well significantly influence the interpretation the DSB will give to the “public morals” exception in the seal products ban case, especially in the wake of the *U.S.—Stainless Steel* decision.

However, the provisions of Article XX, as interpreted by the DSB, may be less useful in justifying the EU seal products regulations than first appears. Other commentators have noted that while

[m]ost animal protection measures are adopted in the interest of public morality, are designed to protect the life or health of animals, or relate to the conservation of endangered species; [t]he common sense interpretation of the exceptions has . . .

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<sup>130</sup> *Id.* See also Report of the Appellate Body, *United States—Standards for Reformulated and Conventional Gasoline* WT/DS2/AB/R (29 April 1996) at fns. 43–44 and accompanying text, at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/2ABR.WPF> [Hereinafter *Reformulated Gas*]; and *Shrimp-Turtle II*, *supra* note 128, at ¶s 153–155.

<sup>131</sup> *Reformulated Gas*, *supra* note 130, at Part IV.

<sup>132</sup> GATT (1947), Article XX(b), *supra* note 129.

<sup>133</sup> GATT (1947), Article XX(g), *supra* note 129.

<sup>134</sup> GATT (1947), Article XX(a), *supra* note 129.

<sup>135</sup> See *China—AV Products* *infra* note 169. A similar but different “public morals” exception in the General Agreement on Trade in Services (GATS) was addressed in *U.S.—Gambling*, *infra* note 171.



been eroded over the years by dispute panels which have interpreted them extremely restrictively.<sup>136</sup>

Indeed, the Dispute Settlement Body's general interpretive approach to the WTO Agreements is described by one critic as "textualism run amok," which employs a "disorienting array of references to dictionaries, alternate meanings, and definitions"<sup>137</sup>; and another quipped that the DSB uses the *Shorter Oxford Dictionary* so often that it has become one of the WTO's "covered agreements."<sup>138</sup> Some commentators go so far as to suggest that the DSB's emphasis upon narrow textualism provides little, if any, guidance as to the actual scope of the obligations at issue, leads to counter-intuitive or counter-productive results, and unnecessarily interferes with democratic processes within the Member states.<sup>139</sup> Partly as a consequence of this interpretative approach, the Appellate Body has upheld import bans such as that found in the EU seal products regulations only twice before, in the *Shrimp-Turtle (Article 21.5)*<sup>140</sup> and *EC-Asbestos*<sup>141</sup> cases, and neither of those decisions relied upon the Article XX(a) public morals exception.

In the *Shrimp-Turtle* decisions,<sup>142</sup> the WTO's DSB addressed the GATT Article XX(g) conservation exception under facts that were quite similar to the GATT-era *Tuna-Dolphin* cases.<sup>143</sup> The United States imposed a domestic requirement that its commercial shrimpers use "turtle excluder devices" (TEDs) in an effort to protect endangered sea-turtles from being incidentally killed during shrimp harvesting. The U.S. regulatory scheme also included

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<sup>136</sup> Stevenson, *supra* note 94, at 122.

<sup>137</sup> W. Magnuson, *WTO Jurisprudence and Its Critiques: The Appellate Body's Anti-Constitutional Resistance*, 51 HARV. INT'L L.J. ONLINE 121, 124–125, 128 (2010), at [http://www.harvardilj.org/2010/06/online\\_51\\_magnuson](http://www.harvardilj.org/2010/06/online_51_magnuson)

<sup>138</sup> C-Dieter Ehlermann, *Six Years on the Bench of the World Trade Court, Some Personal Experiences as Member of the Appellate Body of the World Trade Organization*, 36 JOURNAL OF WORLD TRADE 605, 615 (2002).

<sup>139</sup> See, e.g., R. Howse, *Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization*, 98 MICH. L. REV. 2329 (2000); G. C. Shaffer, *The World Trade Organization under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and the Environment Matters*, 25 HARV. ENV'T L. REV. 1 (2001); H. Horn & J. H. H. Weiler, *European Communities—Trade Description of Sardines; Textualism and Its Discontent*, THE WTO CASE LAW OF 2002: THE AMERICAN LAW INSTITUTE REPORTER'S STUDIES (2005); F. Ortino, *Treaty Interpretation and the WTO AB Report in U.S.-Gambling: A Critique*, 9 J. INT'L ECON. L. 117 (2006).

<sup>140</sup> Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW (22 October 2001) at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/58ABRW.doc> [Hereinafter *Shrimp-Turtle (Article 21.5)*.]

<sup>141</sup> *EC-Asbestos*, *supra* note 96.

<sup>142</sup> Report of the Panel, *United States—Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/R (15 May 1998) at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/58R00.WPF> [Hereinafter *Shrimp-Turtle I*.] See also *Shrimp-Turtle II*, *supra* note 128; *Shrimp Turtle (Article 21.5)* *supra* note 140.

<sup>143</sup> See notes 90–91 *supra* and accompanying text.

a ban on shrimp imports, unless they came from countries certified as using “comparable” measures to protect turtles—but the certification guidelines issued under this scheme essentially made the use of TEDs mandatory.

Malaysia, Thailand, Pakistan, and India challenged this scheme at the WTO. Both the Panel (in *Shrimp-Turtle I*) and Appellate Body (in *Shrimp-Turtle II*) initially held that the U.S. import ban contravened GATT Article XI, and was not justifiable under Article XX.<sup>144</sup> Although provisionally justified as measures “relating to the conservation of exhaustible natural resources” under the language of Article XX(g), the Appellate Body found that the manner in which the U.S. regulatory scheme was actually applied failed to meet the requirements of the chapeau to Article XX, in that it was characterized by “arbitrary” and “unjustifiable” discrimination.

The Appellate Body found that the U.S. scheme was unjustifiably discriminatory, in *Shrimp-Turtle II*, for three reasons. First, the U.S. scheme was essentially unilateral, and not the product of negotiation with its trading partners.<sup>145</sup> Second, the U.S. certification guidelines required other countries to adopt virtually the same measures as those it employed—the use of TEDs—“without taking into consideration different conditions which may occur in the territories of those other Members.”<sup>146</sup> Third, as the import ban only looked to whether a country was certified, and not to how shrimp were actually caught, even

shrimp caught using methods identical to those employed in the United States have been excluded from the United States market solely because they have been caught in waters of countries that have not been certified by the United States.<sup>147</sup>

The Appellate Body stated that:

[t]he resulting situation is difficult to reconcile with the declared policy objective of protecting and conserving sea turtles. This suggests to us that this measure, in its application, is more concerned with effectively influencing WTO Members to adopt essentially the same comprehensive regulatory regime as that applied by the United States to its domestic shrimp trawlers, even though many of those Members may be differently situated. We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.<sup>148</sup>

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<sup>144</sup> See *Shrimp-Turtle II*, *supra* note 128. The U.S. arguments centered on the Article XX(g) conservation exception rather than disputing whether shrimp caught with TEDs were and shrimp caught without TEDs were “like products,” or whether the certification scheme was an issue under GATT Article XI. *Id.*

<sup>145</sup> *Shrimp-Turtle II*, *supra* note 128, at ¶s 162–171.

<sup>146</sup> *Id.* at ¶ 160.

<sup>147</sup> *Id.* at ¶ 161.

<sup>148</sup> *Id.* at ¶ 165.

Moreover, the Appellate Body found this lack of flexibility in the U.S. regulatory scheme and guidelines also constituted “arbitrary” discrimination within the meaning of the chapeau.<sup>149</sup>

It’s notable that while it was rejecting the U.S. environmental measures with this decision, the Appellate Body was nevertheless very mindful of the uproar that followed a similar result in the GATT Panel decisions in *Tuna-Dolphin*, and the resulting criticism that the GATT/WTO system disregarded important environmental and conservation concerns in favour of promoting trade.<sup>150</sup> The Appellate Body was careful to point out that:

[i]n reaching these conclusions, we wish to underscore what we have not decided in this appeal. We have not decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have not decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have not decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do . . . .

As we emphasized in *United States-Gasoline* WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfil their obligations and respect the rights of other Members under the WTO Agreement.<sup>151</sup>

Interestingly, even this careful endorsement of national autonomy and the ability to pursue appropriately crafted environmental measures would not keep both the *Tuna-Dolphin* and *Shrimp-Turtle* cases from being cited as examples of GATT/WTO hostility to such concerns in the anti-WTO public sentiment seen in the “Battle in Seattle” at the 1999 ministerial meeting and in subsequent protests.<sup>152</sup> These sentiments also helped prompt the extensive ongoing debates over whether the multilateral trade regime needs to be amended to be more friendly to environmental and other “social” policies—which includes animal welfare—or whether the GATT/WTO system can adapt to encompass other concerns and objectives besides liberalizing trade.<sup>153</sup>

<sup>149</sup> *Id.* at ¶s 177–184. The Appellate Body also exercised judicial economy and decided that, in light of these findings, it did not also need to consider whether the U.S. regulatory scheme constituted a “disguised restriction on trade.” *Id.* at ¶ 168.

<sup>150</sup> See, e.g., Dan Esty, *GREENING THE GATT: TRADE, THE ENVIRONMENT, AND THE FUTURE* (1994).

<sup>151</sup> *Shrimp-Turtle II*, *supra* note 128, at ¶s 185–186.

<sup>152</sup> See, Kit Oldham, *WTO Meeting and Protests in Seattle (1999), Part 1*, HistoryLink.org Essay 9183 (13 October 2009), at [http://www.historylink.org/index.cfm?displaypage=output.cfm&file\\_id=9183](http://www.historylink.org/index.cfm?displaypage=output.cfm&file_id=9183), and Kit Oldham, *WTO Meeting and Protests in Seattle (1999), Part 2*, HistoryLink.org Essay 9213 (13 November 2009), at [http://www.historylink.org/index.cfm?DisplayPage=output.cfm&file\\_id=9213](http://www.historylink.org/index.cfm?DisplayPage=output.cfm&file_id=9213)

<sup>153</sup> See, THE WORLD TRADE ORGANIZATION, (2006), *supra* note 71, at 786–793; M.J. Trebilcock and R. Howse, *THE REGULATION OF INTERNATIONAL TRADE* (2010) at 507–514. See also generally K. N. Schefer, *SOCIAL REGULATION IN THE WTO: TRADE POLICY AND INTERNATIONAL LEGAL DEVELOPMENT* (2010).

Following the *Shrimp-Turtle II* decision, the United States revised its implementing guidelines to introduce added flexibility in the use of other means besides TEDs to protect turtles. Malaysia then challenged the consistency of the revised measures with the Appellate Body's earlier decision. The Appellate Body subsequently ruled, in the *Shrimp-Turtle (Article 21.5)* proceedings, that while the U.S. measures and revised guidelines still contravened GATT Article XI, with the flexibility introduced in the revised guidelines they now met the requirements of Article XX's conservation exception and its chapeau.<sup>154</sup>

The Appellate body found that serious, good faith efforts by the United States to negotiate international agreements on improved means to protect endangered turtles in the interim, combined with the greater flexibility to consider other means of protection found in those revised guidelines, remedied the earlier nonconformity with the requirements of Article XX's chapeau.<sup>155</sup> Moreover, the flexibility provided in the revised U.S. guidelines meant that domestic U.S. requirement to use TEDs was no longer perceived as being impermissibly imposed on importers. In reaching this conclusion, the Appellate Body recognized 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" was not only legitimate, so long as it did not demand identical treatment, but that such conditioning was in fact "to some degree . . . a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX."<sup>156</sup>

What does this suggest about the prospects for relying upon Article XX(g) to defend the EU's seal products import ban? Given the DSB's narrow textual approach to interpreting the GATT/WTO obligations and commitments it would be extremely difficult to fit the seal products ban within Article XX(g)'s conservation objective. Animal welfare is not expressly mentioned in Article XX(g), nor in any of the other General Exceptions. Additionally, unlike the case with national environmental measures, where the DSB was able to look to the "sustainable development" language in the preamble to the Marrakesh Agreement for support, there is no obvious language elsewhere that would invite a broadening interpretation of the WTO Agreements to encompass animal welfare interests. Moreover, against that background, there is ample evidence in and surrounding the EU seal products regulations themselves that they are motivated not by a conservation concern but rather by abhorrence of cruel methods of killing seals.<sup>157</sup> Therefore, even though living species, including migratory marine mammals, might be subject to national

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<sup>154</sup> *Shrimp-Turtle (Article 21.5)*, *supra* note 140.

<sup>155</sup> *Shrimp-Turtle (Article 21.5)*, *supra* note 140, at ¶s 153–154.

<sup>156</sup> *Id.* at ¶s 137–138, 144.

<sup>157</sup> *See supra* notes 37–55 and accompanying text.

conservation measures when there is an appropriate nexus with the regulating state, the motivation for the seal product regulations is not a good fit with Article XX(g).

The close companion to Article XX's conservation exception, the Article XX(b) General Exception for measures "necessary to protect human, animal or plant life or health" was addressed in the *EC-Asbestos* decision.<sup>158</sup> Despite the usefulness of asbestos in a variety of applications, France broadly prohibited marketing, using, or importing asbestos or products containing asbestos due to its associated health risks.<sup>159</sup> As a major producer and exporter of asbestos, Canada challenged the French import ban, arguing that while asbestos is a hazardous substance a distinction should be drawn between chrysotile asbestos fibres themselves and chrysotile encapsulated in a cement matrix which limits release of the fibres, and that therefore the French measure discriminated amongst like products—asbestos, cement matrix products containing asbestos, and products containing substitute fibres produced in France.<sup>160</sup> The Appellate Body disagreed and significantly found that these were not like products, reversing the Panel on that point,<sup>161</sup> and then went on to uphold the Panel's determination that the French asbestos ban was justified under the Article XX(b) General Exception for measures "necessary to protect human . . . life or health."<sup>162</sup>

Although the EU regulations' focus on cruel killing methods might arguably be viewed as outside the scope of a provision addressing disease-preventing measures "necessary to protect" the "life or health" of animals, the seal products ban certainly appears to be a better fit under Article XX(b) than under the conservation exception of Article XX(g). Indeed, the pre-WTO *Tuna-Dolphin* cases recognized that the "protection of dolphin life and health was a policy that could come within Article XX(b)."<sup>163</sup> When looking at possible provisional justification under Article XX(b), however, the issue is not so much whether the governmental policy aim or objective fits under that particular exception, but rather whether the means chosen—the detailed regulatory scheme—is "necessary" to meet that objective.

The "necessity test" is a limitation found not only in GATT Article XX(b) but also in XX(d)—the regulatory compliance exception—as well as in the

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<sup>158</sup> *EC-Asbestos*, *supra* note 96.

<sup>159</sup> *Id* at ¶ 2.

<sup>160</sup> *Id* at ¶ 4. See also WTO, *Environment: Disputes 9, European Communities—Asbestos*, at [http://www.wto.org/english/tratop\\_e/envir\\_e/edis09\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/edis09_e.htm)

<sup>161</sup> *EC-Asbestos*, *supra* note 96 at ¶s 131–154.

<sup>162</sup> *EC-Asbestos*, *supra* note 96, at ¶ 192. The Appellate Body was not asked to re-examine the panel's conclusion that the French ban was applied in a nondiscriminatory fashion that fully met the requirements of the "chapeau" to Article XX. See Report of the Panel, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R, (18 September 2000), at ¶s 8.224–8.240, at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/135R-02.doc>

<sup>163</sup> *Tuna Dolphin II*, *supra* note 90, at ¶ 5.30.

XX(a) public morals exception.<sup>164</sup> The term has been repeatedly examined, and was initially interpreted quite restrictively as requiring the use of the “least trade restrictive” means available.<sup>165</sup> In *EC-Asbestos* and other more recent decisions, however, assessing the necessity of a measure is seen as a process that involves balancing a number of factors regarding the specific measure at issue, the objective to be achieved, and any reasonably available alternatives to achieving that objective. The Appellate Body in *EC-Asbestos* explained that:

a contracting party cannot justify a measure inconsistent with another GATT provision as “necessary” in terms of Article XX . . . if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.

We indicated in *Korea-Beef* that one aspect of the “weighing and balancing process . . . comprehended in the determination of whether a WTO-consistent alternative measure” is reasonably available is the extent to which the alternative measure “contributes to the realization of the end pursued.” In addition, we observed, in that case, that “[t]he more vital or important [the] common interests or values” pursued, the easier it would be to accept as “necessary” measures designed to achieve those ends. In this case, the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibers. The value pursued is both vital and important in the highest degree. The remaining question, then, is whether there is an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition.<sup>166</sup>

The Appellate Body then went on to find that Canada’s proposed alternative to the import ban, regulating the use of products containing asbestos, would not achieve the level of health protection France sought, which was completely “halting the spread of asbestos-related health risks.” Therefore, it concluded that the asbestos ban not only made a material contribution to France’s “zero-tolerance” health objective, but that Canada’s proposal was not a reasonably available alternative; thus the Article XX(b)’s necessity requirement was met.<sup>167</sup>

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<sup>164</sup> GATT (1947), Article XX, *supra* note 129.

<sup>165</sup> See, e.g., Report by the Panel, *U.S.—Section 337 of the Tariff Act of 1930*, L/6439—BISD36S/345 (7 Nov 1989) at ¶ 5.26, at [http://www.wto.org/english/tratop\\_e/dispu\\_e/87tar337.pdf](http://www.wto.org/english/tratop_e/dispu_e/87tar337.pdf); Report of the Panel, *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R—BISD 37S/200 (7 November 1990) at ¶¶ 74–75, at [http://www.wto.org/english/tratop\\_e/dispu\\_e/90cigart.pdf](http://www.wto.org/english/tratop_e/dispu_e/90cigart.pdf)

<sup>166</sup> *EC-Asbestos*, *supra* note 96, at ¶¶ 171–172.

<sup>167</sup> *Id.* at ¶¶ 174–175.

In upholding the French asbestos ban, this became the first case where an environmental measure satisfied all the requirements of Article XX. However, *EC-Asbestos* involved efforts to protect human health—an objective recognized as embodying a “vital” value with the “highest degree of importance.”<sup>168</sup> It remains to be seen whether a measure aimed at protecting animals instead of humans would be deemed as “vital,” and if not, what degree of deference or scrutiny the DSB would apply to unilateral national choices as to the means chosen to achieve those aims in the balancing of interests that occurs under the necessity test. This same question figures prominently in the analysis of the GATT Article XX(a) “public morals” exception.

The GATT Article XX(a) exception for measures “necessary to protect public morals,” has only been directly addressed once, in the recent *China-AV Products* decision.<sup>169</sup> However, a similar provision in another WTO Agreement, the General Agreement on Trade in Services (GATS) Article XIV(a) General Exception for measures “necessary to protect public morals or to maintain public order,”<sup>170</sup> was addressed previously in the *U.S.-Gambling* decision.<sup>171</sup> In both instances resort to the “public morals” exceptions

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<sup>168</sup> See *id.* at ¶s 171–172. The same is true of *Brazil-Retreaded Tyres*, a subsequent case where a domestic environmental measure imposed to limit the spread of mosquito borne diseases was deemed “necessary” to protect human health (but then failed under the Article XX “chapeau”). Report of the Appellate Body, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (3 December 2007) at ¶s 179–183 at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/332ABR.doc>

<sup>169</sup> Report of the Panel, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R (12 August 2009) at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/363R-00.doc> [Hereinafter *China-AV Products Panel*.] Report of the Appellate Body, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (21 December 2009) at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/363ABR.doc> [Hereinafter *China-AV Products*.]

<sup>170</sup> Uruguay Round Agreement: Marrakesh Agreement Establishing the World Trade Organization, Annex 1B General Agreement on Trade in Services, Article XIV(a), at [http://www.wto.org/english/docs\\_e/legal\\_e/26-gats.01\\_e.htm#articleXIV](http://www.wto.org/english/docs_e/legal_e/26-gats.01_e.htm#articleXIV)

<sup>171</sup> Report of the Appellate Body, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (7 April 2005) at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/285ABR.doc> [Hereinafter *U.S.-Gambling*.] See also Report of the Panel, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/RW (10 November 2004), at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/285R-00.doc>. [Hereinafter *U.S.-Gambling Panel*]; Award of the Arbitrator, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Arbitration by the United States under Article 21.3(c) of the DSU*, WT/DS285/13 (19 August 2005), at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/285-13.doc> [Hereinafter *U.S.-Gambling (Article 21.3)*]; Report of the Panel, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Recourse to Article 21.5 of the DSU by Antigua and Barbuda*, WT/DS285/RW (30 March 2007), at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/285RW-00.doc> [Hereinafter *U.S.-Gambling (Article 21.5)*.]; and Decision by the Arbitrator, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS285/ARB (21 December 2007), at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/285ARB.doc> [Hereinafter *U.S.-Gambling (Article 22.6)*.]

ultimately failed to justify noncompliance with WTO commitments, because of issues under either the necessity test or the chapeau.

The United States sought to invoke the “public morals” or “public order” exception from the GATS Agreement in the *U.S.-Gambling* case in defence of several laws which prohibited cross-border gambling and betting services. Antigua and Barbados argued that these U.S. measures (the Wire Act, the Travel Act, and the Illegal Gambling Business Act) limited the ability of its Internet-based gaming industry to provide gambling and betting services to U.S. consumers, contrary to various market access commitments made by the United States in the WTO Agreements, and the DSB agreed.<sup>172</sup> The Appellate Body also concluded that the U.S. laws were “necessary to protect public morals or maintain public order,” and therefore provisionally justified under GATS Article XIV(a), but that they failed to meet the requirements of the chapeau to that Article, which are identical to those found in GATT Article XX.<sup>173</sup>

The Panel initially looked to the Shorter Oxford Dictionary to determine that that “the term ‘public morals’ denotes standards of right and wrong conduct maintained by or on behalf of a community or nation,”<sup>174</sup> although it also noted that there may well be some overlap between the notion of “public morals” and “public order.”<sup>175</sup> Accordingly, it accepted the U.S. assertion that these particular measures, aimed at controlling underage gambling, money laundering, and other criminality, served “very important societal interests,”<sup>176</sup> and were within the scope of the exception.<sup>177</sup> In doing so the DSB followed other cases in deferring to national policy aims:

We are well aware that there may be sensitivities associated with the interpretation of the terms “public morals” and “public order” in the context of Article XIV. In the Panel’s view, the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical, and

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<sup>172</sup> See *U.S.-Gambling*, *supra* note 171, at ¶ 373.

<sup>173</sup> *Id.*

<sup>174</sup> *U.S.-Gambling Panel*, *supra* note 171, at ¶s 6.463–6.465. However, commentators have noted that “dictionary definitions do not help much in answering the two key questions about ‘public morals’ in Article XX(a), namely what morals are covered and whose morals are covered.” Charnovitz, *Moral Exception* *supra* note 10, at 700.

<sup>175</sup> The panel stated, “[f]or example, in this case, it could be argued that the prevention of underage gambling and the protection of pathological gamblers relates to public morals, while the fight against organized crime is rather a matter of public order. The prevention of money laundering and of fraud schemes could arguably relate to both public morals and public order. However, we are of the view that, in this dispute, it is not necessary to qualify various policy considerations relied upon by the United States as relating either to ‘public morals’ or to ‘public order.’” *U.S.-Gambling Panel*, *supra* note 171, at ¶ 6.469.

<sup>176</sup> *Id.* at ¶ 6.492. See also *U.S.-Gambling*, *supra* note 171, at ¶ 323.

<sup>177</sup> *U.S.-Gambling Panel*, *supra* note 171, at ¶s 6.444; 6.460; 6.487. See also *U.S.-Gambling*, *supra* note 171, at ¶ 299.



religious values. . . . More particularly, Members should be given some scope to define and apply for themselves the concepts of “public morals” and “public order” in their respective territories, according to their own systems and scales of values.<sup>178</sup>

Turning to the independent and objective balancing of interests required by the necessity test, the Appellate Body explained that the “process begins with an assessment of the ‘relative importance’ of the interests or values furthered by the challenged measure,” and then turns to the other factors to be considered.<sup>179</sup> Typically those factors include the contribution to the measure towards achieving its aims, the restrictive effect the measure has on international commerce, and a comparison with reasonably available alternatives.<sup>180</sup> Moreover, the Appellate Body clarified that this implies a burden-shifting process:

It is well established that a responding party invoking an affirmative defence bears the burden of demonstrating that its measure, found to be WTO-inconsistent, satisfies the requirements of the invoked defence. [T]his means that the responding party must show that its measure is “necessary” to achieve objectives relating to public morals or public order. In our view, however, it is not the responding party’s burden to show, in the first instance, that there are no reasonably available alternatives to achieve its objectives . . . .

Rather, it is for a responding party to make a *prima facie* case that its measure is “necessary” by putting forward evidence and arguments that enable a panel to assess the challenged measure in the light of the relevant factors to be “weighed and balanced” in a given case . . . . If the panel concludes that the respondent has made a *prima facie* case that the challenged measure is “necessary”—that is, “significantly closer to the pole of ‘indispensable’ than to the opposite pole of simply ‘making a contribution to’”—then a panel should find that challenged measure “necessary.”<sup>181</sup>

When all the factors were balanced in accord with this process, the necessity of these measures was established.<sup>182</sup> Thus, even though the U.S. laws effectively amounted to a total prohibition on remote gambling, the most trade restrictive approach possible, while incidentally still permitting presumably less risky in-person gambling services to continue, the U.S. measures were provisionally justified under the “public morals” or “public order” exception.<sup>183</sup>

The final question in the case was whether the application of these particular laws involved “arbitrary” or “unjustifiable” discrimination, or a disguised restriction on trade, which ultimately was an easier issue. Although

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<sup>178</sup> *U.S.-Gambling Panel*, *supra* note 171, at ¶ 6.461.

<sup>179</sup> *U.S.-Gambling*, *supra* note 171, at ¶ 306.

<sup>180</sup> *See id.* at ¶s 304–308.

<sup>181</sup> *Id.* at ¶s 309–310.

<sup>182</sup> The Appellate Body determined that the *United States* met the “necessity” requirement, in part, because Antigua was unable to suggest a reasonably available alternative. *See id.* at ¶ 326.

<sup>183</sup> *See U.S.-Gambling Panel*, *supra* note 171, at ¶ 6.495.

the United States asserted that its laws were uniformly applied on a nondiscriminatory basis to prohibit remote gambling by both domestic and foreign suppliers, when it was shown that another U.S. gambling law—the Interstate Horseracing Act—might nevertheless permit domestic remote gambling, the DSB held that the United States failed to show its remote gambling restriction was actually applied in a manner that was consistent with the chapeau’s standards.<sup>184</sup>

The *China-AV Products* decision in 2009 built upon all of these earlier cases, and is currently the only decision to directly address the GATT Article XX(a) “public morals” exception.<sup>185</sup> The United States challenged a number of laws which only permit wholly Chinese state-owned enterprises to import and distribute a variety of publications, films, sound recordings, or other audiovisual materials as contrary to China’s WTO commitments. The DSB agreed that these measures were inconsistent with China’s obligation, under the accession protocol it negotiated when joining the WTO, to grant import and export “trading rights” on a nondiscriminatory basis. The DSB found China’s measures impermissibly restricted the ability of other domestic enterprises, foreign enterprises, and foreign individuals to import AV products into China.<sup>186</sup> When China attempted to justify its trading rights restrictions under the GATT XX(a) “public morals” exception, the DSB determined that the Chinese measures failed the necessity test. Accordingly, and unlike what occurred in the *U.S.-Gambling* case, the Chinese measures were not provisionally justified under the General Exception.<sup>187</sup>

The DSB accepted the notion that China’s desire to control the content of the AV products being imported and distributed involved measures aimed at protecting “public morals.” The Panel specifically adopted the definition and approach to “public morals” found in *U.S.-Gambling*,<sup>188</sup> and the Appellate Body noted that,

China emphasized particular characteristics of cultural goods, including the impact they can have on societal and individual morals. It is for this reason, according to China, that it has adopted a regulatory regime under which the importation of reading materials, audiovisual products, and films for theatrical release containing specific types of prohibited content is not permitted. To this end, China explained, its existing

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<sup>184</sup> *U.S.-Gambling*, *supra* note 171, at ¶ 369.

<sup>185</sup> *China-AV Products*, *supra* note 169.

<sup>186</sup> When China joined the WTO it undertook an obligation to grant “all enterprises in China . . . the right to trade,” which means “the right to import and export goods,” although it could continue to regulate that right in any manner consistent with the WTO Agreements. *Id.* at ¶ 6.

<sup>187</sup> See *China-AV Products*, *supra* note 169, at footnote 614; and WTO, *Dispute Settlement: Summary of the Dispute to-Date, Dispute DS363 China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Product*, at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds363\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm)

<sup>188</sup> *China-AV Products Panel*, *supra* note 169, at ¶ 7.759.

regulatory regime defines the content that China considers to have a negative impact on public morals and, in order to ensure that such content is not imported into China, establishes a mechanism for content review of relevant products that is based upon the selection of import entities. China submitted that, because these import entities play an essential role in the content review process, and because, in the case of imported products, it is critical that content review be carried out at the border, only “approved” and/or “designated” import entities are authorized to import the relevant products.<sup>189</sup>

The Appellate Body then turned to the central issue in the case, analyzing the necessity of the Chinese measures by balancing all the pertinent factors.<sup>190</sup> Although the objective of protecting public morals was characterized as “among the most important values or interests pursued by Members as a matter of public policy,” and it was recognized that China sought “a high level of protection of public morals,”<sup>191</sup> the DSB appeared more willing to scrutinize the actual means chosen to achieve that objective than in either *EC-Asbestos* or *Brazil—Retreaded Tyres*, where a “vital value” of the “highest importance”—human health—was at issue.<sup>192</sup> In particular, the Appellate Body looked back to its earlier decision in *Korea-Beef*, assessing the necessity test in the context of Article XX(d), where it stated:

[i]t seems to us that a treaty interpreter assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as “necessary” a measure designed [to achieve those aims].

There are other aspects . . . to be considered in evaluating that measure as “necessary.” One is the extent to which the measure contributes to the realization of the end pursued, the securing of compliance with the law or regulation at issue. The greater the contribution, the more easily a measure might be considered to be “necessary.”

<sup>189</sup> *China-AV Products*, *supra* note 169 at ¶ 243.

<sup>190</sup> The Appellate Body recalled that it had, “previously considered the proper approach to take in analyzing the “necessity” of a measure in several appeals, in particular: *Korea—Various Measures on Beef* (in the context of Article XX(d) of the GATT . . .); *U.S.—Gambling* (in the context of Article XIV(a) of the GATS); and in *Brazil—Retreaded Tyres* (in the context of Article XX(b) of the GATT . . .). In each of these cases, the Appellate Body explained that an assessment of “necessity” involves “weighing and balancing” a number of distinct factors relating both to the measure sought to be justified as “necessary” and to possible alternative measures that may be reasonably available to the responding Member to achieve its desired objective. *Id.* at ¶s 239.

<sup>191</sup> *Id.* at ¶s 243. Interestingly, the *United States* did not challenge the DSB’s assumption that the specific materials controlled under the Chinese regulatory scheme genuinely posed threats to “public morals,” i.e., the issue of “what” was being censored rather than “who” was doing the censorship. See J. Pauwelyn, *Squaring Free Trade in Cultural Goods and Services with Chinese Censorship: The Appellate Body Report in China-Audiovisuals*, 11 MELBOURNE JOURNAL OF INT’L L 1, 14–17 (2010).

<sup>192</sup> See *supra* notes 166–167 and accompanying text.

Another aspect is the extent to which the compliance measure produces restrictive effects on international commerce . . . . A measure with a relatively slight impact upon imported products might more easily be considered as “necessary” than a measure with intense or broader restrictive effects.<sup>193</sup>

The Appellate Body, also bearing in mind the *U.S.-Gambling* characterization of a total prohibition as “the most trade restrictive approach possible,”<sup>194</sup> was especially concerned with the restrictive effects of the Chinese measures. It stated:

[t]he less restrictive the effects of the measure, the more likely it is to be characterized as “necessary.” Consequently, if a Member chooses to adopt a very restrictive measure, it will have to ensure that the measure is carefully designed so that the other elements to be taken into account in weighing and balancing the factors relevant to an assessment of the “necessity” of the measure will “outweigh” such restrictive effect. In the present case, the Panel identified differences in the restrictive effect on potential importers of the different measures at issue in this dispute. The Panel found that the State-ownership requirement and the provisions excluding foreign-invested enterprises from engaging in the importation of the relevant products are the most restrictive provisions, because they *a priori* exclude certain enterprises from the right to engage in importing the relevant products.<sup>195</sup>

As part of its analysis of the potential contribution of these restrictions to the policy objective, it also noted that “China did not establish a connection between the exclusive ownership of the State in an import entity and that entity’s contribution to the protection of public morals in China.”<sup>196</sup> It stated:

[t]he mere fact that an entity involves some foreign investment does not necessarily imply that content review would be carried out by professionals who are not familiar with Chinese values and public morals, or incapable of efficiently communicating with and understanding the authorities. In fact, those carrying out these functions could be the same individuals, with the same qualifications and capabilities, irrespective of the ownership of the equity of the import entity. Thus, China did not establish that the exclusion of foreign-invested enterprises from engaging in the importation of the relevant products contributes to the protection of public morals in China.<sup>197</sup>

And, finally, the Appellate Body turned to the question of whether there might be a reasonably available alternative that could achieve the same objective. The United States, ironically, suggested that an exclusively governmental

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<sup>193</sup> Report of the Appellate Body, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R WT/DS169/AB/R (11 December 2000) at ¶s 162–163, at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/169ABR.doc>, and see *China—AV Products supra* note 169 at ¶ 304.

<sup>194</sup> *Id.* at ¶ 308, and footnote 567.

<sup>195</sup> *Id.* at ¶ 310.

<sup>196</sup> *Id.* at ¶ 268.

<sup>197</sup> *Id.* at ¶ 276.

approval/censorship process might provide the desired level of protection with less disruption to trade as there would be no restriction whatsoever on who could be an importer.<sup>198</sup> China objected that the proposed alternative was theoretical, potentially expensive, and unduly burdensome.<sup>199</sup> However, looking back to the mechanism it described in *U.S.-Gambling*, the Appellate Body noted that while a responding party seeking the protection of one of the General Exceptions does not have to “take the initiative to demonstrate that there are no reasonably available alternatives” the burden shifts yet again once the complaining party identifies an alternative measure.<sup>200</sup> At that point:

the responding party will be required to demonstrate why its challenged measure nevertheless remains “necessary” in the light of that alternative or, in other words, why the proposed alternative is not a genuine alternative or is not “reasonably available.” If a responding party demonstrates that the alternative is not “reasonably available,” in the light of the interests or values being pursued and the party’s desired level of protection, it follows that the challenged measure must be “necessary.”<sup>201</sup>

The DSB said that China failed to do this, that it failed substantiate its claims about the added costs or burdens the alternative would entail, that evidence that was before the DSB suggested China did have the ability to institute such an approval process, and therefore it failed to demonstrate that the proposed alternative was not “reasonably available.”<sup>202</sup>

In reaching this conclusion, however, it appears that it was not so much the arguments but, rather, the nature and quantum of proof submitted for DSB scrutiny that was deemed insufficient. In other words, the deference shown to national autonomy in electing to pursue the protection of “public morals,” and establishing a particular level of desired protection under that policy, definitely did not extend to the analysis of whether the means actually selected were appropriate to the task.

In the present case, China did not provide evidence to the Panel substantiating the likely nature or magnitude of the costs that would be associated with the proposed alternative, as compared to the current system. Nor has China, in its appeal, pointed to specific evidence in the Panel record that would allow us to conclude that the Panel erred in failing to attribute sufficient significance to the evidence of financial and administrative burden that may attach to the proposed alternative measure. Instead, China simply argues that the proposal would involve “tremendous restructuring” and would “obviously put on China an excessively heavy financial and administrative

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<sup>198</sup> The panel also found that the U.S. “proposal would make a contribution that is at least equivalent to that of the relevant [measures]” and “would have a significantly less restrictive impact on importers” *China-AV Products Panel*, *supra* note 169, at ¶ 7.898.

<sup>199</sup> *China-AV Products*, *supra* note 169, at ¶ 313.

<sup>200</sup> *Id.* at ¶s 319, 324.

<sup>201</sup> *Id.*

<sup>202</sup> *See id.* at ¶s 320–337.

burden.” However, as we see it, adopting any alternative measure will, by definition, involve some change, and this alone does not suffice to demonstrate that the alternative would impose an undue burden.<sup>203</sup>

The Appellate Body concluded, not unlike what it had previously done in *Shrimp-Turtle II*, by diplomatically attempting to put its decision in *China-AV Products* into perspective:

Finally, it may be useful to indicate what we are *not* saying in reaching the above conclusion. We are *not* holding that China is under an obligation to ensure that the Chinese Government assumes sole responsibility for conducting content review. Rather, we are agreeing with the Panel that the United States has demonstrated that the proposed alternative would be less restrictive and would make a contribution that is at least equivalent to the contribution made by the measures at issue to securing China’s desired level of protection of public morals. China, in turn, has not demonstrated that this alternative is not reasonably available. This does not mean that having the Chinese Government assume sole responsibility for conducting content review is the *only* alternative available to China, nor that China *must* adopt such a scheme. It does mean that China has not successfully justified under Article XX(a) of the GATT . . . the provisions and requirements found to be inconsistent with China’s trading rights commitments under its Accession Protocol and Working Party Report.<sup>204</sup>

As such, the Chinese measures failed to meet the necessity test, and were not provisionally justified under the GATT Article XX(a) General Exception for measures “necessary to protect public morals.”

In sum, the jurisprudence shows that other values besides simply liberalizing trade can be accommodated within the GATT/WTO system. Moreover, that accommodation can extend to PPMs that are not physically reflected in the products being traded, such as a desire to protect other species as seen in *Shrimp-Turtle*, or the consumer preferences and health concerns addressed in *EC-Asbestos*. While non-trade concerns might most easily be accommodated where there is an explicit textual reference of some sort in the WTO Agreements themselves, as with the use of the “sustainable development” language, in the preamble to the WTO Agreement, to facilitate entertaining environmental objectives, for example, the absence of an explicit mention of a particular policy aim—such as controlling Internet gambling—does not necessarily preclude its pursuit if it might otherwise fit within one of the General Exceptions. However, reconciling the GATT/WTO objective of liberalizing trade with other, potentially incommensurate, policy objectives is inherently a difficult task,<sup>205</sup> as seen in *U.S.-Gambling* and *China-AV Products*, and a

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<sup>203</sup> *Id.* at ¶ 328.

<sup>204</sup> *Id.* at ¶ 335.

<sup>205</sup> Some would argue the task of reconciling policies aimed at liberalizing trade with other non-trade policies is a task that is institutionally ill suited to resolution in a dispute process managed and run by trade experts. See Charnovitz, *PPMs supra* note 95, at 100–101.

task which is only made more difficult when the policy aim—such as promoting animal welfare—is not referenced in the Agreements or in the General Exceptions.

Nevertheless, GATT Article XX is an important vehicle for reconciling these sorts of interests, and the jurisprudence interpreting Article XX shows the GATT/WTO system adapting over time to encompass other concerns. The pre-WTO *Tuna-Dolphin* decisions strongly favored free trade interests, to the consternation of environmentalists and animal welfare proponents alike.<sup>206</sup> However, the more recent decisions in *EC-Asbestos* and *Shrimp-Turtle* show that other interests can be entertained in the WTO system. The key message from all the cases, however, is that in pursuing any policy there is a right way and a wrong way to proceed. Animal welfare measures, or indeed any non-trade policy measures, that are narrowly tailored, and designed and applied so as to be as even-handed and as minimally disruptive to trade flows as possible will have the greatest probability of passing scrutiny under GATT Article XX.

### 3.3. The EU Seal Products Regulations and the “Public Morals” Exception

What does this jurisprudence suggest about the pending dispute, and the potential usefulness of GATT Article XX in justifying the EU seal products ban?

The EU regulations are governmental measures intended to restrict the marketplace for seal-related products and thereby affect trade flows in such products. While ostensibly a neutral regulatory scheme, given the tiny European production levels for seal-related products, its greatest impact is upon exports from a few non-EU countries, especially Canada.<sup>207</sup> As such, even the internally focused aspects of the EU ban might arguably be said to have a *de facto* impact that contravenes the GATT/WTO non-discrimination principle.<sup>208</sup>

Moreover, the portion of the regulatory scheme that expressly imposes an import ban on seal products is clearly an issue under GATT Article XI. Accordingly, the EU will need to justify the unilateral restrictions it is imposing on the substantive rights accorded to its trading partners under the multilateral commitments it made in the WTO Agreements, by resorting to GATT Article XX.

While the cases show a great deal of deference toward the characterization of the policy motivating a particular measure, as the EU seal products ban is aimed at discouraging cruel killing methods it fails to exhibit the focus on

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<sup>206</sup> See, e.g., Cook & Bowles, *supra* note 6 at 228; Stevenson, *supra* note 94 at 108, 111, 113–115; Thomas, *supra* note 101 at 610.

<sup>207</sup> See COWI, *supra* note 30.

<sup>208</sup> Of course this also assumes that the discrimination involves trade in “like products.” See *supra* notes 82, 86–89 and accompanying text.

species conservation, or on concerns for food safety, health, or the spread of disease or pests, which might bring the Article XX(b) or (g) exceptions into play.

If the seal products ban is to be justified under Article XX, it must be justified under the “public morals” exception found in Article XX(a). The EU seal products regulation itself expressly states that it is aimed at imposing a “ban on all cruel killing methods” used in the seal hunt—especially using hakapiks, bludgeons, or guns in a manner that does not guarantee instantaneous death.<sup>209</sup> The Commission’s proposal also acknowledged that the seal ban was driven by ethical concerns. As such, it is not dissimilar from the “social, cultural, and ethical” concerns over underage betting and criminality at issue in *U.S.-Gambling* or the impact of distributing “cultural goods” with prohibited content in *China-AV Products*, and should easily be regarded as falling within the type of conduct that governments regulate on a moral basis, the policy focus of Article XX(a).

However, that is perhaps the easiest part of the analysis, as it is not a sovereign nation’s choice of policy that most concerns the WTO, but rather whether the specific means used to implement a given policy properly respects the rights of other Members to the WTO Agreements. Thus, it is the details of the scheme created by EU seal products regulations that will be closely examined if the dispute proceeds through the DSB process. Those details reveal a regulatory scheme that is characterized by potential issues with what other areas of law might describe as both over- and under- inclusiveness, and proportionality. When these issues are addressed in the context of the “necessity” test under XX(a) and the chapeau’s “arbitrary or unjustifiable discrimination” standard as developed through the DSB’s interpretation of the treaty, the EU seal products ban—as currently structured—may well fail.

The decisions readily acknowledge the value and importance of the policy objective influences the level of scrutiny applied to the means chosen to achieve those aims, under the balancing that occurs in the necessity test. The more important the value attached to the objective, the easier it is to find measures designed to achieve those ends are necessary. In *EC-Asbestos* and *Brazil -Retreaded Tyres* protecting human health was deemed to be “vital” and important “in the highest degree”; the concern expressed over online criminality was a “very important societal interest” in *U.S.-Gambling*;<sup>210</sup> and in *China-AV Products* the objective of protecting public morals was said to be “among the most important values” that could be pursued. This seems to

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<sup>209</sup> Regulation No. 1007/2009, *supra* note 2, Preamble at (1). Hakapiks are clubs with a metal head and sharp spike at the blunt end. *AHAW Scientific Report*, *supra* note 3, at ¶ 3.1.

<sup>210</sup> Interestingly, the panel equated the value of this objective with that found in *EC-Asbestos*, but the Appellate Body—while not addressing any possible distinction—did not mirror that language. See *supra* note 176 and accompanying text. See *AHAW Scientific Report*, *supra* note 3.



suggest that while protecting “public morals” is generally valued highly, there is some degree of gradation in the perceived importance of the various specific policies examined under that exception, which affects how the measures at issue will be regarded. Protecting human life and health is clearly paramount as seen in the environmental cases. While the U.S. criminal laws in *U.S.-Gambling* were deemed sufficiently necessary to be provisionally justified under Article XX(a), by the time we reach *China-AV Products* it appears that the Appellate Body was very willing to examine whether the specific means China was employing were truly necessary to meet a policy objective that was “among” those that are most important. Thus, when dealing with an animal welfare issue the expectation should be that, rather than deferring to the EU’s choice of means, the detailed mechanisms set forth in the EU seal products regulations will be subject to serious scrutiny by the DSB.

One of the first elements of the regulatory scheme that might be scrutinized is why the EU regulations impose a ban on seal products themselves? Unlike the *EC-Asbestos* case, where the product was itself the cause for concern because of its carcinogenic properties, the concern here is over cruel killing methods, such as clubbing the animals with hakapiks. The ban on marketing or importing seal products is imposed as a means of making seal hunts generally unprofitable, and thereby indirectly reducing the occasions when seals might be culled by cruel or inhumane methods. However, by focusing only on transactions involving seal products, this scheme makes no distinction between seals that are cruelly killed and those that are more humanely culled.<sup>211</sup> There is no distinction, for example, between the improper use of a hakapik, or the proper use of a firearm to instantaneously kill a seal.<sup>212</sup> In either case, the resulting seal-related products are subject to the ban.

This is in contrast to the leghold trap regulation, which embodies a scheme that not only is more directly targeted at the particular hunting practice that is deemed offensive,<sup>213</sup> and completely prohibits the use of such traps without exception, but employs a certification scheme to ensure that imports of specified animal pelts do not originate in countries where leghold traps

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<sup>211</sup> This was also one of the concerns commentators expressed regarding a potential weakness in the leghold trap regulation, in that the regulation would ban even humanely harvested pelts, if the exporting government had not adopted regulations conforming to the EU approach. See, e.g., Charnovitz, *Moral Exception*, *supra* note 10, at 739.

<sup>212</sup> Of course, as the AHAW scientific committee’s report makes clear, while some techniques are more likely than others to result in instantaneous death of the animal, any technique used to cull the animals may be misused or misapplied, entirely apart from the complications introduced by the difficult conditions under which the seal hunt is conducted. See *AHAW Scientific Report*, *supra* note 3, at Chapters 3–4.

<sup>213</sup> Leghold traps are defined in Article 1 as “a device designed to restrain or capture an animal by means of jaws which close tightly upon one or more of the animal’s limbs, thereby preventing withdrawal of the limb or limbs from the trap.” Regulation No. 3254/91, *supra* note 18.

are used or which otherwise fail to meet “international trapping standards.”<sup>214</sup> As such, pelts that are obtained from animals killed by less offensive means, within and without the EU, are not restricted—unlike what occurs in the seal products ban.<sup>215</sup> Indeed, products derived from seals killed by commercial hunters in Canada using firearms—in exactly the same manner as Finnish, Scottish, or Swedish fishermen who legally shoot seals in order to protect their salmon or other marine resources—would be caught by the import ban.<sup>216</sup> This is precisely the type of anomaly that caused the Appellate Body to rule against the United States when applying the chapeau standards of Article XX in *Shrimp-Turtle II*.

Moreover, since import prohibitions are among the most trade disruptive measures possible, the scrutiny applied to the necessity of such a ban, as compared any reasonably available alternatives, is quite high. In this case a labeling or certification scheme distinguishing between humane and inhumane methods of culling seals would be much less disruptive to trade than the import ban. Interestingly, labeling was explicitly rejected when the seal products ban was promulgated in Regulation No. 1009/2009, in part based upon the AHAW scientific committee report’s finding that verifying what seal hunters do in the field is difficult, and in part because of the costs and burdens that would place on those dealing in seal products if they were not banned.<sup>217</sup> However, when the implementing provisions for the seal ban were subsequently issued, in Regulation No. 737/2010, they nevertheless contained a detailed set of provisions for “attesting documents” to accompany those seal products that could be placed on the market under one or more of the regulatory exceptions, a process that appears to undermine some of the objections to labeling or a certification alternative to the import ban. Although the proper design of a nondiscriminatory labeling scheme under WTO law is a complex matter

<sup>214</sup> See *id.* at Articles 2 and 3. See also European Commission, *Commission Decision of 14 October 1998 Amending Council Decision 97/602/EC Concerning the List Referred to in the Second Subparagraph of Article 3(1) of Regulation (EEC) No. 3254/91 and in Article 1(1)(a) of Commission Regulation (EC) No. 35/97*, OFFICIAL JOURNAL L 286 (23 October 1998). This assumes, however, that the exporting country is following international standards. Otherwise humanely harvested pelts might still be caught by the ban. See *supra* notes 211–212 and accompanying text.

<sup>215</sup> This is not to suggest that the Leghold Trap Regulation is necessarily an ideal model. There are numerous issues surrounding the leghold trap scheme, which actually led to the failure to pass a harmonizing directive on broader “humane” trapping standards in 2004. See European Commission, *Implementation of Humane Trapping Standard in the EU 1991–2005*, at [http://ec.europa.eu/environment/biodiversity/animal\\_welfare/hts/index\\_en.htm](http://ec.europa.eu/environment/biodiversity/animal_welfare/hts/index_en.htm)

<sup>216</sup> Compare *AHAW Scientific Report*, *supra* note 3, at ¶s 1.3.1 with 1.3.6 and 1.3.8. See also Marine (Scotland) Act 2010, Part 6 Conservation of Seals at <http://www.legislation.gov.uk/asp/2010/5/part/6>. To fit under the exception for by products of marine resource management programs in the EU regulations, the Finnish, Scottish, and Swedish transactions would need to be conducted on a non-profit basis. See Regulation No. 737/2010 *supra* note 2, at Article 5.

<sup>217</sup> European Parliament Press Release, *Ban on Seal Products Moves a Step Closer* (2009) at <http://www.europarl.europa.eu/document/activities/cont/200903/20090305ATT51008/20090305ATT51008EN.pdf>

raising a number of issues under the WTO Agreements, labeling a product to explain the way it is produced is generally endorsed—particularly in the environmental field.<sup>218</sup>

While essentially closing the EU market to seal products logically contributes to a reduction in cruel killings, a labeling scheme addressing humane hunting techniques might equally contribute to the aim discouraging cruel killing methods—and would certainly be less disruptive to trade than a ban which makes no distinctions among culling methods. The question is whether the labeling or certification alternative is reasonably available or actually too impracticable or too costly. Given the emphasis the Appellate Body placed upon providing data to support such claims in *China-AV Products*, the DSB might well scrutinize any claimed inability to use a labeling or certification alternative quite closely, especially since a form of labeling is used for the products which are exceptionally permitted into the EU market under Regulation No. 737/2010.

The availability of other less trade disruptive alternatives was part of the reason China's attempted justification of its regulatory scheme failed in *China AV-Products*. In the *EC-Asbestos* decision, on the other hand, the Appellate Body found that there were no reasonably available alternatives. Its reason for doing so in that case was not just the great value placed on the objective of protecting human health, but the level of protection France sought to provide with its regulatory scheme—it is “zero-tolerance” of any asbestos-related, health risks. While broad, the regulatory scheme implementing the EU seal products ban nevertheless includes exceptions to its coverage, exceptions to its “ethical” stance on dealing with seal products.

Unlike a total ban in the *EC-Asbestos* case, the EU tolerates importing or placing on the market seal products derived from Inuit hunts, marine resources management efforts, or certain personal imports, and even permits the prohibited good to transit the EU to other markets in Asia and elsewhere. While the rights of indigenous peoples are recognized in other treaties and international law, both the personal import exception and the wholesale exclusion from the regulatory scheme for seal products transiting the EU would appear to be especially difficult to justify under the Article XX tests. One Member of the European Parliament characterized the exception for “consumers and tourists importing products they bought as souvenirs” as simply motivated by a desire to spare them from a “witch hunt . . . [at the border] . . . a good course of action . . . befit[ting] today's European Union of freedom.”<sup>219</sup> Additionally, a major

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<sup>218</sup> See, e.g., UNDERSTANDING THE WTO, *supra* note 65, at 70; *Legislation in Third Countries*, *supra* note 78 at ¶s 61–71.

<sup>219</sup> Remarks of Toine Manders (NL) in European Parliament, Debates 4 May 2009, Strasbourg; Trade in Seal Products—Debate, CRE 04/05/2009–21, at <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20090504&secondRef=ITEM-021&language=EN&ring=A6-2009-0118>

reason for not extending the ban to seal products that were merely transiting the EU, that is warehoused or processed in duty-free zones without entering local commerce, was the significant potential impact on logistics firms and traders in Germany and Finland and processing and sale operations in Denmark and Italy, who facilitate the trade in seal products to Russia and Asia.<sup>220</sup> Neither of these fit particularly well with the notion of that a seal products ban is necessary to protect public morals.

Moreover, none of these exceptional categories or exclusions address whether the seals were cruelly killed or humanely culled. The result is that products derived from seals that are not instantly killed and may even have been killed with the hakapiks or other tools specifically named in the preamble to the regulation may nevertheless escape the regulatory prohibitions altogether if they fall into one of the exceptional categories or are destined for other markets. This is problematic under both the necessity test and under the chapeau standards as well, as seen in *Shrimp Turtle II, U.S.-Gambling*, and *China-AV Products*.

This anomaly also poses something of a philosophical issue, one that has yet to be addressed by the DSB. If justifications under Article XX(a) are based upon moral positions, which the DSB recognizes “can vary in time and space depending upon a range of factors, including [locally] prevailing social, cultural, ethical, and religious values,” perhaps that necessarily implies placing a greater weight on consistency in an Article XX(a) justification than might be the case with the other provisions of Article XX? If the justification for the regulatory scheme is that it is “morally” wrong to use hakapiks or clubs to kill seals, how can there be exceptions where their use might be tolerated?

Gary Francione, a noted animal advocate, makes a similar argument for his abolitionist views over those of “animal welfarists.”<sup>221</sup> His abolitionist theory of animal rights seeks an end to all exploitation of animals in any form, as opposed to focusing on mitigating any unnecessary suffering caused by humans’ use of animals. Francione suggests that if something is “morally” wrong, such as pedophilia (or animal suffering and exploitation), then there can’t be an exception for “humane” or “compassionate” pedophilia (or animal suffering and exploitation)—the moral position does not tolerate exceptions.<sup>222</sup> Interestingly, unlike the approach taken in the EU seal products regulations with its various exceptions, Regulation No. 1523/2007 banning the marketing,

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<sup>220</sup> COWI, *supra* note 30, at 119–120, 135.

<sup>221</sup> See Rutgers School of Law, Faculty Profile, Gary Francione, Distinguished Professor of Law and Nicholas deB. Katzenbach Scholar of Law and Philosophy, at <http://law.newark.rutgers.edu/our-faculty/faculty-profiles/gary-l-francione>, and Rutgers School of Law, Spotlight on Professor Gary Francione—How True Animal Rights Diverge from Animal Protection, at <http://law.newark.rutgers.edu/home/professor-gary-francione-how-true-animal-rights-diverge-animal-protection>

<sup>222</sup> See, e.g., Animal Rights: The Abolitionist Approach Blog, “Humane” and “Compassionate” Pedophilia (11 November 2010) at <http://www.abolitionistapproach.com/?s=pedoph&x=0&y=0>

import, export, or transshipment of dog or cat fur—or products containing such fur—is an example of an ethically motivated measure taking a more consistent position.<sup>223</sup>

The comparison to the dog and cat fur regulation also highlights another issue that may arise when the seal products ban is tested against the “arbitrary” or “unjustifiable” standards of the “chapeau,” which is the question of why are only seals and seal products addressed by this scheme? While the *hakupik* was designed for killing seals, if the concern is over the particular killing methods identified in the preamble to Regulation 1007/2009, the additional tools mentioned—bludgeons and guns—are used to kill a variety of other animals. If the motivation for the regulation goes beyond just the tools specified to a more general concern over “other cruel killing methods which do not guarantee the instantaneous death, without suffering, of the animals,” as also set forth in the preamble, focusing only on seals and seal products is again misplaced. Bears, beavers, fox mink, rabbit, and many other species are also killed with a variety of sometimes inhumane means, and then used for fur and other products that are similar to those obtained from seals, but are not subject to this regulatory scheme.<sup>224</sup> As one Member of the European Parliament noted,

[t]here is something not strictly rational about singling out seals for special treatment. They are not an endangered species—even the WWF says so. We do not get anything like the clamour about hunting seals on behalf of wasps or woodlice or wolverines or worms. Then again, democracy is not strictly rational.<sup>225</sup>

However, irrespective of whether the reason for focusing only on seals is purely historical and political, reflecting the growth and popularity of the anti-seal hunt movement since the publication of Kent Gavin’s famous photograph,<sup>226</sup> or simply the appeal of charismatic megafauna,<sup>227</sup> once again the question of the consistency of the means and aims of this regulatory scheme may be problematic under the chapeau to Article XX—especially when

<sup>223</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, OFFICIAL JOURNAL L 343 (27 December 2007) at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:343:0001:0004:EN:PDF>. There is, however, a limited exception for taxidermy and educational purposes. *Id.* at Article 4.

<sup>224</sup> See, e.g., Coalition to Abolish the Fur Trade, *CAFT Fact Sheets*, at <http://www.caft.org.uk/factsheets/>; Fur Commission USA, *Fur Facts*, at <http://www.furcommission.com/resource/Resources/FAF.pdf>

<sup>225</sup> Remarks of Daniel Hannan (NI) in European Parliament, Debates 5 May 2009, Strasbourg; Explanations of Vote, Report: Diana Wallis (A6-0118/2009), at <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20090505&secondRef=ITEM-006&language=EN&ring=A6-2009-0118#2-119>

<sup>226</sup> See *supra* note 22 and accompanying text.

<sup>227</sup> See, e.g., R. Scruton, Animal Rights, CITY JOURNAL (Summer 2000), at [http://www.city-journal.org/html/10\\_3\\_urbanities-animal.html](http://www.city-journal.org/html/10_3_urbanities-animal.html) and R. Scruton, ANIMAL RIGHTS AND WRONGS (2000).

contrasted with, for example, the much more targeted leghold trap regulation's focus on a particular inhumane tool.

Lastly, the Appellate Body in *Shrimp-Turtle II* was particularly concerned with a U.S. regulatory scheme that took only one approach to protecting sea turtles and effectively “exported” that scheme to other countries, without any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries. It was not until the United States issued its revised, more flexible, guidelines that the Appellate Body indicated that it was comfortable that the requirements of Article XX were met in its *Shrimp Turtle (Article 21.5)* decision. It's clear that a variety of different choices might be made when deciding how to best protect seals from cruel killing practices.<sup>228</sup> Nevertheless, given the very small size of the seal hunt in the EU, the means it chose—and particularly the import ban—appear aimed in no small part at exporting the EU's values and market-driven regulatory approach to other countries.<sup>229</sup> While the Appellate Body recognized, in *Shrimp-Turtle (Article 21.5)*, that importing countries could legitimately unilaterally condition access to their own markets on compliance with domestic policies and programs, it held they could not insist that other WTO Members adopt measures identical to their own without regard to the specific conditions prevailing in the exporting country's territory.

The uniform French import ban in *EC-Asbestos*, on the other hand, was deemed a legitimate market access condition. Other commentators note that the more “outward looking” a measure is—the more it seeks to affect the morals of a foreign population—the greater the scrutiny that is applied to their GATT/WTO consistency.<sup>230</sup> Unfortunately, the design of the regulatory scheme in the EU seal products regulations—not to mention the focus on foreign hunting practices found in various accompanying public pronouncements—is more akin to the U.S. scheme in *Shrimp-Turtle II* than it is to the French

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<sup>228</sup> This goes beyond the choices made as to the specific means found in the EU seal products regulations. Canada, and the other exporting countries, have extensive regulations governing the seal hunt to ensure that it is conducted in what it believes is a humane manner. See AHAW *Scientific Report*, *supra* note 3, at ¶ 1.3.1.2; Fisheries and Oceans Canada, *Six Facts about Canada's Seal Hunt*, at <http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/reports-rapports/facts-faits/factsheet-eng.htm#re2>; and Fisheries and Oceans Canada, *Seals and Sealing in Canada- Improvements to Seal Hunt Management Measures*, at [http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/reports-rapports/facts-faits/facts-faits\\_regs-eng.htm](http://www.dfo-mpo.gc.ca/fm-gp/seal-phoque/reports-rapports/facts-faits/facts-faits_regs-eng.htm). But see, *supra* note 212 and accompanying text. The debate over whether seal hunts are conducted humanely or not is both contentious and unresolved. See C. Pope, *For the Sake of the Seals*, 9 *ASPER REV. INT'L BUS. & TRADE L.* 225 (2009) at 230–234.

<sup>229</sup> This represents something of a shift from the position the European Commission argued in *Tuna-Dolphin II* that under Article XX(a) it would “only make sense for a country to take border measures to protect its own morals, not the public morals outside its national jurisdiction.” *Tuna-Dolphin II*, *supra* note 90, at ¶ 3.35.

<sup>230</sup> See, e.g., Charnovitz, *Moral Exception*, *supra* note 10, at 731. Some would go so far as to suggest that the WTO should guard not just against protectionism but also against “an excess of zeal” over moral claims. *Id.*

approach in *EC-Asbestos*. This, too, is another issue to be addressed under the Article XX chapeau.

In sum, attempting to justify the EU seal products regulations under GATT Article XX(a) and the “necessity test,” and the chapeau’s “arbitrary and unjustifiable discrimination” standards, will require overcoming significant hurdles. Protecting animals as a moral or ethical matter is certainly important, but the means chosen to do so in the seal products ban may be insufficiently attuned to that objective as to outweigh their adverse impact on trade. The lack of any distinction between cruel or humane practices, the failure to address similar animals and their related “like” products, the inconsistencies in the scope and application of design of the regulatory prohibitions, and its lack of flexibility combined with the availability of other alternatives make it unlikely that the DSB will uphold this particular scheme as a moral proposition. The EU has the right to pursue animal welfare as an ethical matter, but it must also fulfill its duty to respect to substantive rights of other Members under the WTO Agreements.

#### 4. LOOKING FORWARD

It is by no means certain that the challenge to the EU seal products regulations will proceed to a Panel or Appellate Body decision, given the emphasis placed upon the cooperative non-judgmental resolution of disputes through consultations within the WTO system. However, if it does, it’s quite possible that the seal products ban would fail to obtain provisional justification under GATT Article XX(a), because of the numerous potential issues with the DSB’s application of the “necessity test” to the specific provisions found in the regulatory scheme. It is even less likely that the current EU measures would meet the standards imposed by the chapeau to Article XX, should they get through the provisional justification hurdle. Accordingly, this is not the best candidate to produce the long hoped for decision that the GATT Article XX(a) “public morals” exception is available to justify local animal welfare laws and regulations that otherwise adversely affect trade. Indeed, there is some risk that a decision that the EU measures failed to meet the requirements for provisional justification under Article XX(a) might be a considerable setback for the use of the “public morals” exception in aid of animal welfare—depending upon the details of the decision.

If an adverse decision were rendered in the EU seal product ban case, what might be its impact? The usual direction from the DSB is that a losing party should bring its measures into “conformity” with its obligations under the WTO Agreements. That does not require, as many environmentalists erroneously feared in the wake of the *Tuna-Dolphin* decisions, that the losing party repeal the nonconforming measures or that they are rendered void and

unenforceable. Rather, as seen in the *Shrimp-Turtle* case, the losing party should remedy the nonconformity within a reasonable time. Although the EU could certainly respond to an adverse decision by repealing the seal products ban altogether, that would completely defeat any animal welfare objective and run counter to the massive public support that led to these measures in the first place and is therefore highly unlikely. A much more likely response would be to address the various inconsistencies in the regulatory scheme by tightening the ban, and striving to make it more like the uniform total ban found in *EC-Asbestos* and less like *Shrimp-Turtle II*. Under these circumstances, an initial loss at the WTO might ultimately be more beneficial to those seeking to bolster animal welfare and, ironically, less favorable to free trade interests—because in order to be more compatible with GATT Article XX, the revised scheme would be more restrictive than the current one.

While perhaps counterintuitive, that sort of response to an adverse decision is not unknown within the WTO system. In *Australia-Salmon*, for example, salmon imports were prohibited in order to prevent the spread of disease or contaminants to protect the domestic Australian salmon industry from irreversible damage, which was a very popular measure. Canada challenged the import ban, and the Appellate Body, in a narrow and textually oriented decision, found that Australia's technical risk analysis for the ban was flawed—as the risk of infection or contamination was actually lower from salmon than from other species of fish that were not subject to the import ban—and therefore Australia's ban was arbitrary and unjustified.<sup>231</sup> Australia's response was not repeal, but, rather, to bring its import ban into conformity with its WTO obligations by converting it into a permitting and certification scheme that applied both to salmon and to the other species of fish as well.<sup>232</sup> As one commentator has noted:

The GATT and the WTO were envisioned as world trade bodies that would improve individual welfare by reducing barriers to trade. But the AB's decision in *Australia-Salmon* and other cases permit precisely the opposite result, that is, the raising of trade barriers. This paradox in WTO jurisprudence is in part inherent in all discrimination cases. After all, if the problem is disparate treatment, the solution is to treat different products alike.<sup>233</sup>

Ironically, as initially proposed the seal products ban addressed many of the weaknesses described above, and was in fact a tailored and uniform

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<sup>231</sup> Report of the Appellate Body, *Australia—Measures Affecting Importation of Salmon*, WT/DS18/AB/R, (20 October 1998) at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/18ABR.DOC>

<sup>232</sup> Canada lost its subsequent challenge to the revised regulatory scheme. Report of the Panel, *Australia—Measures Affecting Importation of Salmon Recourse to Article 21.5 by Canada*, WT/DS18/RW, (18 February 2000) at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/18RW.DOC>

<sup>233</sup> Magnuson, *supra* note 137, at 145.



measure that was more consistent with WTO requirements. Notably, the proposal distinguished between humanely culled seals—flexibly defined—which were exempt from the regulation, and other killing methods, which were fully subject to the regulatory scheme<sup>234</sup>; and it provided for a labeling/certification scheme to distinguish the resulting products.<sup>235</sup> The proposed ban also applied to all transactions in seal products, including transit and exports in addition to domestic sales or imports,<sup>236</sup> and the only exemption from its coverage was for traditional Inuit hunts.<sup>237</sup> When one of the UK Members of the European Parliament suggested that these elements were necessary for an effective scheme that was compatible with international trade rules, another MEP declared that “in this debate we are not dealing with a legal dilemma but a political one, to which [the European] Parliament must give a political response”<sup>238</sup> and it was politics that shaped the revisions to the EU seal products ban. If the EU were to return to something along the lines of the regulatory scheme as initially envisioned, it would be more likely to survive scrutiny by the DSB.<sup>239</sup>

Yet another political response would be called for if the WTO issues an adverse decision on the seal products regulations. Moreover, it’s also important to recall that it is entirely permissible under the WTO system for a losing party to make no changes whatsoever in response to an adverse decision. This option may be particularly important when the measures found to be incompatible with the WTO Agreements nevertheless embody important local values or moral or ethical positions that cannot be readily conceded or abandoned, that is, the types of measure most likely to be examined under Article XX(a). So, even following an adverse decision, the EU could decide that its seal products ban was sufficiently important

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<sup>234</sup> Seal products “obtained from seals killed and skinned in a country where, or by persons to whom, adequate legislative provisions or other requirements apply ensuring effectively that seals are killed and skinned without causing avoidable pain, distress and any other form of suffering” were not caught by the proposed ban. *Commission Proposal*, *supra* note 3, at Article 4(1)(a).

<sup>235</sup> *Id.* at Articles 4, 6, and 7.

<sup>236</sup> *Id.* at Article 3.

<sup>237</sup> *Id.* at Article 3(2).

<sup>238</sup> *Ban on Seal Products Moves a Step Closer*, *supra* note 217.

<sup>239</sup> Once the issues raised by the other exceptions and omissions in coverage were addressed, the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295, 13 September 2007), at [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf), might well affect the balancing called for in the WTO analysis such that the seal products ban would pass WTO scrutiny even with the presence of the Inuit exception. Moreover, as noted during the debates on the original proposal an exception for traditional Inuit hunts recognized both by the International Whaling Commission and in the U.S. MMPA. See *Opinion of the Committee on the Environment, Public Health and Food Safety for the Committee on the Internal Market and Consumer Protection on the Proposal for a Regulation of the European Parliament and of the Council Concerning Trade in Seal Products* (COM(2008)0469-C6-0295/2008-2008/0160(COD)) (26 January 2009) at <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A6-2009-0118&language=EN#title3>. See also generally *supra* Part III(c).

politically that it wanted to leave it in place, unchanged, despite any non-conformity with the EU's WTO obligations. In such circumstances mutually agreed compensation is offered by the losing party, for example, the EU and might agree to special tariff reductions on other products of interest to the Canada, Iceland, and Norway. If no agreement on compensation is reached, the prevailing party may seek authorization to suspend trade concessions it otherwise owes, preferably in the same trade sector, to the losing Member state.<sup>240</sup> That is, Canada, Iceland, and Norway, with permission from the DSB, might seek to unilaterally suspend trade benefits or obligations owed to the EU, such as by limiting European imports. In either case, it's also important to note that the impact will typically be felt by others in the Member state economy than those directly concerned with the particular measures. While compensation and retaliation are both intended to be temporary alternatives to remedying any nonconformity, this has not always been the result in practice.<sup>241</sup>

In the aftermath of the *U.S.-Gambling* case, for example, the United States was requested to bring its measures "into conformity with its obligations" under the WTO Agreements.<sup>242</sup> It initially indicated its intention to do so, and requested a "reasonable time" to make the appropriate changes.<sup>243</sup> As the parties were unable to agree on what would constitute a reasonable time, an arbitrator determined the time allowed was a little over 11 months.<sup>244</sup> The United States, however, failed to take any steps to bring its laws into conformity with the original decision at the end of that time period, as subsequently confirmed in an Article 21.5 report issued in 2007.<sup>245</sup> As a consequence, Antigua and Barbuda sought to suspend \$3.4 billion in trade concessions owed to the United States under the WTO Agreements, an amount that was subsequently reduced in another arbitral proceeding to an annual amount of \$21 million.<sup>246</sup> In the interim, rather than pursuing any changes in its domestic laws, the United States modified its commitments under GATS to exclude Internet gambling altogether.<sup>247</sup> China similarly indicated its initial intent to bring its laws into conformity with the *China-AV Products* decision, and was initially

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<sup>240</sup> See UNDERSTANDING THE WTO, *supra* note 65, at 58.

<sup>241</sup> See generally, M. Bronckers and N. van den Broek, "Financial Compensation in the WTO: Improving Remedies in WTO Dispute Settlement," 8 JIEL 101 (2005). *Law, Vol. 8, No. 1, 2005, 101-126.*

<sup>242</sup> *U.S.-Gambling*, *supra* note 171 at ¶ 374.

<sup>243</sup> See WTO, *Dispute Settlement: Summary of the Dispute to Date, Dispute DS285 United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds285\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm)

<sup>244</sup> *Id.*; and *U.S.-Gambling (Article 21.3)*, *supra* note 171.

<sup>245</sup> *U.S.-Gambling (Article 21.3)*, *supra* note 171.

<sup>246</sup> *U.S.-Gambling (Article 22.6)*, *supra* note 171.

<sup>247</sup> Office of the U.S. Trade Representative, *Statement of Deputy United States Trade Representative John K. Veroneau Regarding U.S. Actions under GATT Article XXI* (3 May 2007) at <http://www.ustr.gov/about-us/press-office/press-releases/archives/2007/may/statement-deputy-united-states-trade-represen>

given until March 19, 2011 to do so, a deadline it failed to fully meet.<sup>248</sup> Given the number of changes that would be required to bring the Chinese measures into full conformity with the WTO Agreements, it remains to be seen what will be done.

Interestingly, that means that in the two decisions touching upon the “public morals” exception, not only has the defending Member state lost in both instances, but neither case resulted in repeal of the noncompliant domestic measures. What this suggests is that if the particular policy is truly important the WTO Agreements do not necessarily preclude its continued implementation, even in the wake of an adverse WTO decision.

## 5. CONCLUSION

It is very unlikely that the DSB will find that the EU seal products ban—as currently structured—is justified under the GATT Article XX(a) General Exception for measures “necessary to protect public morals.” While animal welfare polices certainly should fit under this exception, in appropriate cases, the details of this particular regulatory scheme do not comport with either the “necessity” requirement of the exception or the requirement to avoid “arbitrary and unjustifiable discrimination” imposed by the chapeau. The DSB jurisprudence shows that the lack of a distinction between inhumane and humane practices, the exclusion of trans-shipments from any controls whatsoever, and the presence of exceptions that are not narrowly tailored to the objective, will all pose significant hurdles under these requirements. Ironically, from both the free trade and animal welfare perspective, a more comprehensive and uniformly restrictive seal products ban would present fewer issues under Article XX and the EU’s obligations under the WTO Agreements.

Accordingly, if this case proceeds to a full Panel or Appellate Body decision, animal advocates are likely to be disappointed. The best they can expect is for a decision similar to *Shrimp-Turtle II*, a pronouncement that the “public morals” exception might well be useful in an animal welfare context, but that such measures must also respect the rights of exporting States under the WTO Agreements in a manner which this particular regulatory scheme fails to do. The EU will then need to decide whether to essentially ignore the WTO decision, and bear the costs of compensation or retaliation, or to more fully embrace the animal welfare objective and abandon the various exceptions and gaps in coverage found in the current regulations. The domestic and political pressures, however, may not be particularly well aligned for either option, making the prospects uncertain.

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<sup>248</sup> See WTO, *Dispute Settlement: Dispute DS363, China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds363\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm)

As a consequence, it may be that the potential application GATT Article XX(a) “public morals” exception to animal welfare measures will be resolved another time and in another, better, case. Quite possibly that might be a challenge to Regulation 1223/2009 banning animal testing in connection with cosmetics,<sup>249</sup> the implementation of the Laying Hens Directive that abolishes the use of battery cages,<sup>250</sup> or any of a number of measures that might be needed to defend the concerted effort to establish higher animal welfare standards within the European Union under the second EU Strategy on the Protection and Welfare of Animals 2011–2015.<sup>251</sup> Whenever it occurs, a properly designed set of measures, that balance the objectives and the means to achieve those objectives as described in *EC-Asbestos* and *Shrimp-Turtle (Article 21.5)* will show that the GATT Article XX(a) “public morals” exception is available, and does support animal welfare.

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<sup>249</sup> See *supra* note 104 and accompanying text.

<sup>250</sup> Council Directive 1999/74/EC of 19 July 1999 Laying Down Minimum Standards for the Protection of Laying Hens, OFFICIAL JOURNAL L 203(3 August 1999) at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:203:0053:0057:EN:PDF>

<sup>251</sup> See generally Evaluation of the EU Policy on Animal Welfare (EUPAW) at <http://www.eupaw.eu/>