

Growing Pains: The Developing Relationship of Animal Welfare Standards and the World Trade Rules

Kate Cook and David Bowles

This article looks at the reasons why animal welfare is likely to be an important issue in trade disputes in the future and in the clarification of policy on the World Trade Organization's (WTO's) Article XX exemptions. Trade disputes that are based on animal welfare issues, such as product differentiation, have historically been settled before discussion at the WTO. The growth in legislation based on animal welfare has increased the likelihood of a dispute being considered by a panel. A dispute is likely to look at cultural differences between countries, which is an area that the WTO is increasingly looking at. It is probable that any dispute will see further clarification on the use and limits of the Article XX exemptions and these are explored in the article.

INTRODUCTION

This article looks at the reasons why measures taken for animal welfare purposes are likely to increase, examines the evolving jurisprudence under the World Trade Organization (WTO) regimes and sets out a framework aimed at ensuring that legislation that is drawn up to meet public concerns on animal welfare also meets WTO requirements.

The WTO has yet to rule on a dispute involving a measure taken for explicit animal welfare purposes. However, given the adoption of animal welfare legislation across a range of sectors in the EU and North America, and the fact that much animal welfare legislation has a direct impact on trade,¹ animal welfare-

related disputes are likely to become more prevalent in the future. The decision by Canada in November 2009 to seek consultations with the EU over its import and marketing prohibition on seal skins underlines this.²

The recent rise in trade disputes brought before the WTO and the increasing focus on agricultural issues, which were first addressed in a meaningful way under the Uruguay Round, have focused attention on differing cultural issues between countries, particularly on the issues of consumer taste and behaviour. Over the past 15 years, disputes relating to trade in genetically modified organisms (GMOs),³ beef produced with hormones⁴ and shrimp fisheries⁵ have all underlined differing public attitudes to the way products are produced. These disputes also illustrate the fact that consumer concern extends beyond food safety, to include environmental issues and animal welfare.

The likelihood of an animal welfare-related dispute has been forecast for at least ten years,⁶ but now appears closer, with the commencement of consultations between Canada and the EU to assess the trade implications of recently published EU legislation on trade in sealskins⁷ (following calls from the European Parliament for measures to improve the killing techniques in the Canadian seal hunt).⁸ The demand from Canada for

to, or export from, the Community of cat and dog fur and products containing such fur, [2007] OJ L343/1.

² WTO Consultations DS400, *Canada Consultation with European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (2 November 2009).

³ WTO DS 21 November 2006, *EC Approval and Marketing of Biotech Products*, WT/DS291/R.

⁴ WTO DS 18 August 1997, *EC Measures affecting Meat and Meat Products (Hormones)*, WT/DS26/R/USA.

⁵ WTO AB 6 November 1998, *United States – Import Prohibition of Certain Shrimps and Shrimp Products*, WT/DS58/AB/R.

⁶ OECD Directorate for Food, Agriculture and Fisheries, *A Note on the Main Economic Issues Associated with Animal Welfare Considerations in Livestock Production* (AGR/CA/APM/MD, 27 October 2000); RSPCA, *Conflict of Concord: Animal Welfare and the World Trade Organisation* (RSPCA, 1998).

⁷ See Council Regulation 1007/2007/EC, n. 1 above.

⁸ European Parliament Declaration P6-DCL (2006) 308 calling for an import ban on the sale of harp and hooded seals products, [2006] OJ C306E/194.

¹ Among the measures adopted by the EU are Council Regulation 3254/91/EEC of 4 November 1991 on prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards, [1991] OJ L308/1; Council Regulation 1007/2009/EC of 16 September 2009 on trade in seal products, [2009] OJ L286/36; Council Directive 2003/15/EC of 27 February 2003 on the approximation of the laws of the member states relating to cosmetics products, [2003] OJ L66/26; and Council Regulation 1523/2007/EC of 11 December 2007 on banning the placing on the market and the import

consultations on the legislation has now been joined by Norway and Iceland.⁹

There are a number of other disputes that are being discussed at present and may evolve into formal disputes before the WTO. Although it is expected that measures relating to farm animals are most likely to raise issues between members of the WTO,¹⁰ it is also likely that other disputes could emerge, such as in relation to the EU's ban on the sale and marketing of cosmetics products tested on animals, which came into force in March 2009.¹¹

The absence of any ruling on the compatibility of an explicitly animal welfare-based measure with the rules of the WTO appears to have led to a high degree of caution on the part of some legislators, in particular in the European Community. Historically, a number of measures which incorporated a trade element such as the import of fur or the mandatory labelling of eggs have been weakened due to assumed incompatibility with the WTO.¹² Animal welfare groups have criticized the high degree of caution exercised by the Community in this area.¹³ The outcome of the first WTO dispute to address the legitimacy of animal welfare concerns as a basis for restrictions on trade will be viewed either as vindication or rebuttal of such caution.

Any WTO dispute relating to a measure adopted for reasons of animal welfare is likely to result in further clarification of two important but as yet largely unresolved issues: first, the legitimacy, under the rules of the WTO, of measures taken to improve animal welfare, which are 'non-process and production methods' (NPR-PPMs); second, the extent to which trade-restrictive animal welfare measures may be justified on moral grounds.¹⁴ Although trade measures taken for moral purposes are permitted under the General Agreement on Tariffs and Trade (GATT),¹⁵ this ground of exemp-

tion has only been tested twice, once under the General Agreement on Trade in Services¹⁶ (GATS)¹⁷ and once under GATT.¹⁸

GROWTH OF LEGISLATION ON ANIMAL WELFARE GLOBALLY AND THE LINK BACK TO PUBLIC CONCERNS AND NATIONAL STANDARDS

The first law specifically designed to protect animals was passed in England and Wales in 1822,¹⁹ but in the past 187 years, a vast amount of further legislation has been adopted to protect domestic, wild and farmed animals. Each of the 27 EU members has legislation protecting domestic animals from cruelty and suffering and all are bound by, and have adopted, the *acquis communautaire*,²⁰ which extends to over 30 different pieces of regulations on farmed, wild and animals used in research.²¹ But legislation is no longer confined to developed countries. In the Americas, Peru²² and Costa Rica²³ have animal welfare legislation. In Asia, where animal welfare legislation dates back over 50 years in Malaysia, it has recently been adopted in South Korea (1991),²⁴ the Philippines²⁵ and Taiwan (both 1998).²⁶ Also, in September 2009, China released its draft animal welfare law for comments and is expected to proceed on this in 2010.²⁷

¹⁶ General Agreement on Trade in Services (Marrakesh, 15 April 1994) (GATS).

¹⁷ WTO AB 7 April 2005, *United States – Measures affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/ABR.

¹⁸ WTO DS 12 August 2009, *China – Measures affecting Trading Rights and Distribution Services for Certain Publications and Audio-visual Entertainment Products*, WT/DS363/R.

¹⁹ M. Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (Oxford University Press, 2001).

²⁰ The *acquis communautaire* is the existing body of EU laws. It is expected to be agreed to by any country becoming a member of the EU.

²¹ D. Wilkins, 'Index to Principal Legislation', in D. Wilkins (ed.), *Animal Welfare in Europe: European Legislation and Concerns* (Kluwer International Law, 1997), 154.

²² Protection of domestic animals, Law No 27265, *El Peruano* 7273 (22 May 2000).

²³ La ley de bienestar de los animales No 7451, 4 *La Gazeta Diario Oficial Publication* (26668-MICIT, 13 December 1994).

²⁴ Korea Animal Protection Act 1991, Law 07167 Revised 2008 (28 February 2008), available at <<http://www.aapn.org/koreanlaw.html>>.

²⁵ Republic of the Philippines Act No 8485, An Act to promote animal welfare in the Philippines otherwise known as 'The Animal Welfare Act of 1998' (28 July 1997), available at <http://www.internationalwildlifelaw.org/phil_animal_act.html>.

²⁶ Taiwan Animals Protection Law 1998, *The Gazette of the Office of the President* 6244 (4 November 1998).

²⁷ Prevention of Cruelty to Animals Law of the PRC, Experts Draft Proposal (1 March 2010), available at <http://www.china.com.cn/news/law/2010-03/17/content_19623441.htm>.

⁹ WTO Consultations DS401, *Norway Consultations with European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (5 November 2009).

¹⁰ D. Bowles and C. Fisher, 'Trade Liberalisation in Agriculture: The Likely Implications for European Farm Animal Welfare', in S. Bilal and P. Pezaros (eds), *Negotiating the Future of Agricultural Policies: Agricultural Trade and the Millenium WTO Round* (Kluwer Law International, 2000), at 199.

¹¹ See Council Directive 2003/15/EC, n. 1 above.

¹² See A. Nollkaemper, 'The Legality of Moral Crusades Disguised in Trade Laws: An Analysis of the EC Ban on Furs from Animals taken from Leghold Traps', 8:2 *Journal of Environmental Law* (1996), 237; and Council Regulation 2001/5/EC on certain marketing standards for eggs, [2001] OJ L2/1, which sets mandatory labelling requirements on the production methods of eggs for domestically produced eggs but allows country-of-origin labelling for imported eggs.

¹³ C. Fisher, 'Animal Welfare likely to be on the WTO Negotiating Menu', 3:6 *Bridges* (1999), 13.

¹⁴ General Agreement on Tariffs and Trade (Geneva, 1 January 1948) (GATT), Article XX(a).

¹⁵ *Ibid.*

There is a strong correlation between public concern for animal welfare and legislative response, although the lag period between the two may be measured in decades. In the EU, surveys on animal welfare have shown a strong regard for concern for animals in a variety of countries. For instance, in the first Eurobarometer survey of animal welfare in the EU-27 countries, higher concern for animal welfare was recorded in Greece (over 70% of citizens felt that animal welfare did not receive sufficient protection under legislation) than in the UK (62%) or Denmark (60%).²⁸ This aspirational behaviour can translate into actual buying behaviour. So, in the same Eurobarometer, 61% of British citizens, 63% of Swedes and 51% of Danes polled expressed a desire to purchase free-range eggs.²⁹ When this is transposed against the actual production of free-range eggs in these countries (37%, 61%, 47%)³⁰ it underlines the difference that public concern can make to trade and production patterns.

In certain surveys, the public concern for animal welfare can outrank issues such as the environment and climate change.³¹ This concern does not just translate into consumer patterns, it also prompts a desire on the part of governments to ensure that imported food and other products meet the same safety and animal welfare standards as those produced domestically.³² This is obviously where global trade rules and consumer preferences have the potential to collide.

But is it solely an EU issue? Whilst it is true that there is more historic public concern for and legislation on animal welfare in the EU Member States, recent legislative changes in non-European countries are underpinned by a greater understanding of public concerns regarding animal welfare. In Argentina, the first surveys of consumer opinions on meat quality and the importance of animal welfare found that 66% of the people polled found that animal welfare is an important factor in the quality of beef and 65% would pay a higher price for beef if it was produced according to good

welfare standards.³³ In China, surveys in 1998 on the public, and in 2003 on students at Beijing universities, showed that 93% and 96%, respectively, felt animals had emotions.³⁴ This is an important finding as it is a first stage to recognizing that animals are sentient and therefore have welfare needs.

Some countries have used improvements in animal welfare to bring trade advantages, as in Namibia, to improve its market share of beef exports to the EU, and Thailand, to improve its chicken export market.³⁵

TYPES OF MEASURES

The rules governing the operation of a trade-restrictive measure depend on which trade agreement is relevant. Broadly speaking, two types of measure are likely to be at issue in an animal welfare-related dispute: (1) labelling schemes; and (2) more explicitly restrictive measures such as import restrictions or subsidies. This article considers the latter type of restrictive measures. These types of measures are likely to raise issues under the rules of the Agreement on Technical Barriers to Trade (the TBT Agreement)³⁶ and/or under the rules of GATT itself.³⁷

GATT is designed to encourage free trade between States by regulating and reducing trade barriers and providing a forum to resolve trade disputes. Measures taken to improve animal welfare, such as import bans on products, could be referred to the dispute body for resolution. The TBT Agreement aims to ensure that any nation's regulations, standards and testing do not constitute unnecessary trade barriers. Its relevance to animal welfare is centred on labelling regimes that may be used to improve consumer awareness of animal welfare provenance in products.

A measure can, in principle, fall within the scope of both agreements. The Appellate Body of the WTO has confirmed that the TBT Agreement establishes a 'specialized legal regime' which is 'different from, and

²⁸ EuroBarometer, *Attitudes of Consumers towards the Welfare of Farmed Animals* (European Commission, 2005).

²⁹ Ibid.

³⁰ EUROSTAT, *Data on Production of Eggs in the European Community* (European Commission, 2007).

³¹ Co-operative Bank, *100,000 Co-op Shoppers Register Support for Food Ethical Policy* (Co-operative Bank, 6 February 2008), available at <http://www.naturalchoices.co.uk/100-000-Co-op-Shoppers-Register?id_mot=7>. In the survey, 25% said that they were concerned about animal welfare, compared to 4% who said they were concerned with climate change. DEFRA, *Survey of Public Attitudes and Behaviours Toward the Environment* (DEFRA, 2007), at 22, available at <<http://www.defra.gov.uk/evidence/statistics/environment/pubatt/download/pubattsum2007.pdf>>, found that 40% of respondents were concerned about animal welfare, compared to 31% about biodiversity in the UK.

³² EuroBarometer, *Europeans, Agriculture and the Common Agriculture Policy* (European Commission, 2008). It states that 61% of those polled said agricultural imports should only enter the EU if they fully comply with EU standards on safety and quality.

³³ *Report on Animal Welfare and Cattle Meat Consumption for the Asociacion bien-etre para animal* (Fundacion Construir, February 2008).

³⁴ P. Li et al., *Animal Welfare Consciousness of Chinese College Students: Findings and Analysis* (University of Leiden, 2003).

³⁵ D. Bowles et al., 'Animal Welfare and Developing Countries: Opportunities for Trade in High-Welfare Products from Developing Countries', 24:2 *Revue scientifique et technique* (2005), 783.

³⁶ Agreement on Technical Barriers to Trade (Marrakesh, 15 April 1994), available at <http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf>.

³⁷ In contrast to many environmental disputes, the SPS Agreement (WTO Agreement on the Application of Sanitary and Phytosanitary Measures (Marrakesh, 15 April 1994)) is not likely to be as relevant for animal welfare disputes as it covers sanitary and phytosanitary standards and does not refer to animal welfare.

additional to' GATT.³⁸ Both agreements have been invoked in a number of disputes brought before the WTO, but the order in which the two agreements are considered has varied. In one case, the panel considered the application of the TBT Agreement first on the basis that it was the *lex specialis*.³⁹ GATT was only considered once where the panel had determined that the TBT Agreement did not apply. In another dispute, the panel considered the application of GATT first and, having found a violation, did not consider it necessary to proceed to consider the TBT Agreement.⁴⁰

DOES THE MEASURE FALL WITHIN THE SCOPE OF GATT?

Article I Measures which specifically ban or limit the import of animal products from a particular country have been found to contravene Article I of GATT⁴¹ (the most favoured nation clause).⁴² This clause states a country must apply the same conditions to all countries with which it trades compared to the country it sets the lowest number of trade restrictions.

Article XI.1 Any ban on imports will almost certainly be caught by Article XI.1 of GATT, which forbids both 'prohibitions' and 'restrictions' with respect to importation of any goods from other members.⁴³ Article XI aims to eliminate quantitative restrictions on trade by limiting the power of members to implement unilateral trade bans. In cases involving import bans of certain types of animal product, the focus of the dispute is likely to shift directly to the issue of justification under Article XX of GATT, which provides for general exceptions.⁴⁴ In such cases the defending member is unlikely to contest the applicability of Article XI.1 with any vigour.⁴⁵

³⁸ WTO AB 5 April 2001, *European Communities – Measures affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, para. 80.

³⁹ WTO DS 18 September 2000, *European Communities – Measures affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R, para. 8.17.

⁴⁰ WTO DS 20 May 1996, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R.

⁴¹ GATT, n. 16 above, Article I provides that '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'.

⁴² WTO AB 9 September 1997, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, para. 205.

⁴³ GATT, n. 16 above, Article XI (General Elimination of Quantitative Restrictions) prohibits prohibitions or restrictions, including quotas, import or export licences or other measures, on the import or export of any product from or to another contracting party.

⁴⁴ WTO DS 15 May 1998, *United States – Import Prohibition of Certain Shrimps and Shrimp Products*, DS58/R, para. 7.117.

⁴⁵ See GATT, n. 16 above. Where Article XI.1 does apply, the approach taken in a series of disputes relating to measures based on

Article III Article III.1 of GATT provides that internal laws on sales, etc. 'should not be applied to imported or domestic products so as to afford protection to domestic production'. Under Article III.4, products imported from other members must be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws affecting internal sales.⁴⁶

Article III is likely to be of most relevance in relation to measures where there is arguably a domestic market to protect. Where there is domestic production of a product, whether it is a cosmetic or a type of fur, and the restriction relates to the method of processing or production of that product, Article III is likely to be raised by the complaining country. It is probably more likely to be an issue in relation to a dispute relating to restrictions on trade in cosmetics tested on animals than in relation to a ban on skins or furs for which there is no domestic equivalent. In relation to the latter, a complaining country may argue that a degree of protection is afforded to near equivalent furs or skins and the discussion will be about defining 'like products'.

The Appellate Body of the WTO has considered the correct approach to determining what are 'like products' for the purposes of Article III.4 on a number of occasions. In its decision in *European Communities – Asbestos*, the Appellate Body indicated that this is an area where there is 'an unavoidable element of discretionary judgment'⁴⁷ but that the properties, nature and quality of the products in question, their end-uses, consumers' tastes and habits, and tariff classifications would all be considered. These factors are used to determine the nature and extent of a competitive relationship between the products in question.

In the case of a measure that would prohibit the import and sale of products from a particular species, regardless of origin, there is unlikely to be an issue under Article III, since the measure does not on its face discriminate between domestic products and those 'like products' imported from other parties, since they are all subject to a sales ban.

There might, however, be an issue as to indirect or *de facto* discrimination if, in fact, there are domestically

environmental and/or consumer concerns indicates that the attention of both parties and panels is likely to be focused on the scope for justification of a trade-restrictive measure under Article XX (see below), rather than on defending a measure as one which does not engage/contravene the rules of the GATT at all. See *ibid*.

⁴⁶ See GATT, n. 16 above. Article III(4) requires that imported products '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'.

⁴⁷ See *European Communities – Measures affecting Asbestos and Asbestos-Containing Products*, n. 38 above, paras 100–103.

produced products from *other* species which are not subject to any sale (or import) ban and it can be shown that, in practice, these are the products competing with banned products. This could constitute *de facto* discrimination which is a basis for complaint under Article III.4 (and Article XI).⁴⁸ It should be noted that, in the context of Article III.4, the Appellate Body has repudiated the relevance of the aim or purpose of a measure and confirmed that it will consider only whether the measure has a protectionist *effect*.⁴⁹

Even where there is no competitive relationship, such as to bring the measure within the scope of Article III, the presence or absence of sales or import bans in respect of other similar products, such as skins or furs from other wild animals, may raise issues of arbitrary or unjustified discrimination under the chapeau of Article XX.

The scope of Article III in this context is only likely to be a key issue where Article XI.1 does not apply but, in practice, it is difficult to envisage such a case in relation to restrictions imposed for reasons of animal welfare, since such measures will generally control both imports and domestic sales. It is, however, possible that only one of the provisions is applicable: in the *Tuna Dolphin* cases the measure was found not to be caught by Article III since it concerned fishing techniques rather than the tuna product itself, but Article XI.1 was found to be applicable.⁵⁰

Whilst other provisions of GATT may be engaged,⁵¹ the focus of any dispute involving animal welfare measures is likely to be Articles I.1, III and XI.1 of GATT and, for the reasons explained above, it is likely that there will be a *prima facie* violation of at least one of these provisions. This leads on to examining the justification for the measure under Article XX.

Justification under Article XX Article XX of GATT provides for general exceptions to the rules of the agreement. In order to justify a measure under Article XX, a member must show not only that the measure pursues one of the specified policies (provisional justification), but also that it meets all the requirements of the chapeau⁵² to Article XX, which essentially aims to prevent

abuse of the exceptions.⁵³ In the case of two of the relevant grounds of exception, the member must also show that the measures are 'necessary' for the aim pursued.⁵⁴ The party relying on an exception to justify a trade-restrictive measure will bear the burden of proving that all the elements of Article XX are satisfied. In a decision under Article XX(b), the Appellate Body considered the issue of the standard of proof to be applied by panels when evaluating scientific evidence presented in support of a measure and concluded that it was sufficient for a party to rely in good faith on scientific sources that represent a divergent but qualified and respected opinion.⁵⁵ This may be relevant to a case where the degree of suffering inflicted on animals is disputed between the parties and suggests that the party defending the measure does not need to show that all scientific opinion supports its case.

Provisional Justification The three policy areas referred to in Article XX that are likely to be of most relevance to a dispute involving animal welfare are the protection of public morals (paragraph (a)); the protection of human, animal or plant life or health (paragraph (b)); and, possibly, the conservation of exhaustible natural resources (paragraph (g)). As discussed below, there are specific conditions attached to reliance on each of these policy exceptions but the boundaries between them, particularly in the area of animal welfare, are not at present entirely clear.

Paragraph (a) of Article XX There have been two cases interpreting the public morals exception of Article XX(a): the *US – Gambling Case* was decided under GATS;⁵⁶ and, later, *US – China Publications* was decided under GATT. In *US – China Publications*, the panel noted the findings of the panel and the Appellate Body in *US – Gambling* and held that, since Article

tute 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 [the specified] measures'. See GATT, n. 16 above, Article XX.

⁵³ See *United States – Standards for Reformulated and Conventional Gasoline*, n. 40 above, paras 22–23.

⁵⁴ See *United States – Import Prohibition of Certain Shrimps and Shrimp Products*, n. 5 above, para. 118. As confirmed by the Appellate Body in *Shrimp Turtle*, a panel should approach Article XX in the following way: (i) an examination of whether the policy reflected in the measure in question falls within the relevant range of policies set out in Article XX (provisional justification of the measure); (ii) (in relation to paragraphs (a) and (b) of Article XX) a determination as to whether the inconsistent measures for which the exception is being invoked is 'necessary' to fulfill the policy objective; and (iii) the measure is applied in conformity with the requirements of the chapeau to Article XX. See WTO DS 1 December 2003, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, para. 7.199.

⁵⁵ See *European Communities – Measures affecting Asbestos and Asbestos-Containing Products*, n. 38 above, para. 198.

⁵⁶ See *United States – Measures affecting the Cross-Border Supply of Gambling and Betting Services*, n. 17 above.

⁴⁸ GATT Panel 10 November 1987, *Japan – Alcoholic Beverages Case*, GATT BISD (34th Supp) (1988).

⁴⁹ See *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, n. 42 above, paras 215–216.

⁵⁰ WTO DS, *United States – Restrictions on Imports of Tuna* 30 ILM 1594 (unadopted) (*Tuna I*); and see WTO DS 16 June 1994, *United States – Restrictions on Imports of Tuna*, DS29/R (*Tuna II*).

⁵¹ In the 2009 consultations on sealskins, Canada suggested that measures taken by the EU are inconsistent with Articles 2.1 and 2.2 of the TBT Agreement and with Article III.4, V.2–4 of GATT and the measures nullify benefits within the meaning of Article XXIII.1(b) of GATT. See WTO Consultations DS400, n. 2 above.

⁵² The chapeau to Article XX provides: 'Subject to the requirement that such measures are not applied in a manner which would consti-

XX(a) of GATT uses the same concept of public morals as Article XIV(a) of GATS, they would adopt the same interpretation as applied in that case. The panel referred to the Appellate Body's finding that: 'the term public morals denotes standards of right and wrong conduct maintained by or on behalf of a community or nation' and to the panel's view in that case that members 'should be given some scope to define and apply for themselves the concepts of "public morals"'.⁵⁷

The two key issues which arise in relation to Article XX(a) in the area of animal welfare are whether it covers concerns relating to animal welfare *per se* and whether it covers restrictions related to practices involving animals outside the importing territory.

Animal Welfare and the Protection of Public Morals

In relation to the first of these questions, as to whether or not measures prompted by animal welfare concerns fall within the scope of the protection of public morals under paragraph (a), there are compelling arguments in support.

The moral dimension to animal welfare protection is well established in moral philosophy and in legal tradition. The philosophical foundation for a moral concern with animal welfare has been described as:

The reasons for legal intervention in favour of children, apply not less strongly to the case of those unfortunate slaves and victims of the most brutal part of mankind, the lower animals. It is by the grossest misunderstanding of the principles of liberty, that the infliction of exemplary punishment on ruffianism practised towards these defenceless creatures has been treated as a meddling by government with things beyond its province; an interference with domestic life. The domestic life of domestic tyrants is one of the things which it is the most imperative on the law to interfere with.⁵⁸

In relation to international and European legal tradition, the Council of Europe's Convention for the Protection of Vertebrate Animals Used for Experimental and Other Scientific Purposes recognizes that '... man has a moral obligation to respect all animals and to have due consideration for their capacity for suffering and memory'.⁵⁹

The presumed (moral) equivalence between human and animal suffering which underpins such perspec-

tives is indicated in guidance produced by the Organization for Economic Cooperation and Development (OECD). In the OECD's Guidance Document on the Recognition, Assessment and Use of Clinical Signs as Humane Endpoints for Experimental Animals, the OECD has defined suffering as:

A negative emotional state that in human beings is produced by persistent pain and/or distress. It should be assumed that persistent pain or distress in animals leads to suffering of animals in the absence of evidence to the contrary. If something is known to cause suffering in humans, it should be assumed to cause suffering in animals.⁶⁰

The adoption of the Amsterdam Protocol on the Protection and Welfare of Animals confirms that the EU affords importance to animal welfare based on an acknowledgment that they are 'sentient beings'.⁶¹ The protocol gives, for the first time, legal obligations to consider animal welfare when proposing and agreeing legislation.⁶² It has resulted in raising the profile of animal welfare in the European Commission and in specific cost-benefit analyses under proposed laws weighing up the benefits of improved animal welfare against the costs of regulation.

The US Congress stated, in relation to the US Dog and Cat Protection Act 2000,⁶³ that 'the trade in dog and cat fur products is ethically and aesthetically abhorrent to United States citizens. Consumers in the US have a right to ensure that they are not unwitting participants in this gruesome trade'.⁶⁴ The findings then go on to note that the imposition of a ban on the sale of such products is consistent with the international obligations of the USA.⁶⁵ It appears that the USA views animal welfare as falling within the scope of the exceptions to GATT, as it states that:

Such a ban is also consistent with provisions of international agreements to which the United States is a party that expressly allow for measures designed to protect the health

⁵⁷ See *China – Measures affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, n. 18 above, at para 7.759.

⁵⁸ J.S. Mill [W.J. Ashley (ed.)], *Principles of Political Economy with some of their Applications to Social Philosophy* (Longmans, Green and Co., 1909), book V, chapter 11, para. 31.

⁵⁹ European Convention for the Protection of Vertebrate Animals used for Experimental and Other Scientific Purposes (Strasbourg, 18 March 1986), second recital.

⁶⁰ Organization for Economic Cooperation and Development, *Guidance Document on the Recognition, Assessment and Use of Clinical Signs as Humane Endpoints for Experimental Animals* (OECD, November 2000), at 11. The guiding principles include the following: 'There is strong scientific evidence that pain and distress are present in animals in comparable situations as they occur in humans; severe pain, suffering or death are to be avoided as endpoints; studies must be designed to minimize any pain, distress or suffering experienced by the animals, consistent with the scientific objective of the study': *ibid.*, at 12.

⁶¹ Protocol 33 on Protection and Welfare of Animals, in Consolidated version of the Treaty establishing the European Community (Amsterdam, 2 October 1997), available at <http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C_2002325EN.003301.html>.

⁶² T. Camm and D. Bowles, 'Animal Welfare and the Treaty of Rome', 12:2 *Journal of Environmental Law* (2000), 197.

⁶³ US Dog and Cat Protection Act 2000, Public Law 106-476, 114 Stat. 2101, codified at 19 U.S.C. 1308.

⁶⁴ *Ibid.* Section 1442(a)(2).

⁶⁵ *Ibid.*, Section 1442(a)(9).

and welfare of animals and to enjoin the use of deceptive trade practices in international or domestic commerce.⁶⁶

Recent WTO jurisprudence states that that protection of public morals is one of the most important areas of public policy, that it is up to each country to determine the level of protection applicable and that a country can seek a level of protection of morals by introducing certain measures.⁶⁷

Given this, there is no reason of principle or policy why animal welfare concerns should not fall within the scope of paragraph (a) of Article XX. Paragraph (a) is a general provision and so allows parties to reflect the moral concerns of their own societies, provided they also conform to the other requirements of Article XX. The evolutionary nature of the WTO agreements was confirmed by the Appellate Body in the *Shrimp Turtle* decision,⁶⁸ which stated that parties are entitled to respond to evolving public concern on moral issues. A member relying on paragraph (a) will need to show that the measure is aimed at the protection of morals rather than the protection of the animals as such. For instance, it will not be legitimate to restrict trade in order to protect seals hunted in another member's territory but it will be legitimate to protect the moral concerns of the public into which seal products have been imported.

It is not necessary to show that there is international agreement on the animal welfare issue concerned, since paragraph (a) is clearly aimed at providing scope to countries to determine moral standards at the national level.⁶⁹ What is required is simply that the country adopting the measure genuinely bases the restriction on the desire to reflect the concerns of its citizens about the inhumane treatment of animals. This can be analysed both in terms of protecting the morals of consumers of the products concerned and as protecting the morals of those engaged in the trade within the country taking the measures.

It is likely to be more difficult to convince an international tribunal that selective moral concern does not lay the trading system open to protectionism, so, for instance, prohibiting the trade in fur from domestic cats but not from other mammals, simply by virtue of their status as pet animals. But societies are entitled to determine at the national level the moral status afforded to particular species as against others and that this is protected under paragraph (a) provided that such measures do not constitute disguised protectionism. This

would appear to accord with the panel's approach in *US – Gambling*, where it held that 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'.⁷⁰ The panel's approach has been criticized by a number of commentators, at least insofar as a lack of reasoning is concerned.⁷¹ But the panel's approach in *US – China Publications* builds on this approach and agrees that certain measures taken by China were necessary to protect morals,⁷² a position upheld by the Appellate Body.⁷³

Such an approach would also appear to be supported by international authority in the area of human rights, which addresses the issue of the degree of deference to be afforded to a State in applying exceptions based on the protection of public morality to rules governing the protection of human rights or trade. In *Handyside v. United Kingdom*,⁷⁴ a decision of the European Court of Human Rights, the court held:

... it is not possible to find in the domestic law of the various contracting states a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements . . .⁷⁵

This passage indicates the margin of appreciation to be accorded under the European Convention on Human Rights to decisions aimed at the protection of morals by Contracting States.⁷⁶ The European Court of Justice has also recognized a margin of discretion in areas involving moral judgment.⁷⁷ The Appellate Body has ruled

⁷⁰ See *United States – Measures affecting the Cross-Border Supply of Gambling and Betting Services*, n. 17 above, para. 6.461.

⁷¹ N. Diebold, 'The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole', 11:1 *JIEL* (2008), 43.

⁷² See *China – Measures affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, n. 18 above, para. 7.836.

⁷³ WTO AB 21 December 2009, *China – Measures affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, para. 233.

⁷⁴ *Handyside v. United Kingdom* (1976), EHRR 737 (ECtHR).

⁷⁵ *Ibid.*, para. 48.

⁷⁶ This is not to say of course that such decisions will not be scrutinized (the Court in *Handyside*, *ibid.*, went on to consider the necessity of the measure in some detail and found no violation), but it does indicate that a wide margin is required.

⁷⁷ See, e.g., Case 34/79, *R. v. Henn and Darby*, [1980] ECR 3795 (ECJ). The European Court of Justice held, at para. 15 of that case, that '[i]n principle it is for each Member State to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its territory'.

⁶⁶ *Ibid.*

⁶⁷ See *China – Measures affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, n. 18 above, paras 7.817 and 7.836.

⁶⁸ See *United States – Import Prohibition of Certain Shrimps and Shrimp Products*, n. 5 above, para. 130.

⁶⁹ S. Charnovitz, 'The Moral Exception in Trade Policy' 38 *Va J.Int'l L* (1998), 689, at 14 and 17.

that the WTO Agreement should not be interpreted in clinical isolation from public international law⁷⁸ and the interpretation of the scope of paragraph (a) would seem to be an area where other rules of international law may be of particular relevance.

Even in the light of this international authority supporting a degree of deference to moral judgments made at the national level, the most plausible case for defending a trade-restrictive measure is one based on a moral concern with *inhumane* practices, for example in relation to trade in cat fur, rather than a concern with the moral status of the particular species.

The panel in *US – Gasoline* referred to ‘prevailing values’, which suggests that a member may have to demonstrate that the moral objective which the disputed measure pursues must be one that is important to a significant number of people within national society.⁷⁹ The regulation on seal products clearly acknowledges the significant public support for such a ban as indicated through a ‘massive number of letters and petitions on the issue’.⁸⁰

Territorial Scope of Paragraph (a)

The *Shrimp Turtle* Appellate Body considered the jurisdictional limits on a country that takes a measure but did not adopt a clear framework other than to say in that specific case the US was justified in using an extra-jurisdictional measure.⁸¹ It can be argued that the issue of territorial scope does not arise in relation to paragraph (a) in the same way as it does in respect of paragraphs (b) and (g) of Article XX. This is because the ‘subjects’ of the measure are the consumers (and arguably traders) whose morals are the subject of protection and who are within the jurisdiction of the contracting party imposing the measure (by preventing them from buying/trading goods produced by methods deemed inhumane (and therefore immoral)). The fact that the animals affected by the hunt, and those hunting them, are outside the jurisdiction of the contracting party does not appear therefore to have the same significance as appears to be the case in respect of paragraphs (b) and (g).

‘Necessity’ and Evidence

In order to fall within the scope of paragraph (a), the measure concerned must be ‘necessary’ to protect public morals. The requirement that the measure be ‘necessary’ for the objective sought also appears in paragraph (b). This requirement has been interpreted

as meaning that, if an alternative measure is ‘reasonably available’, the requirement will not be met. In its ruling in *European Communities – Asbestos*, the Appellate Body appeared to advocate a marginally more flexible approach than it had applied under earlier GATT decisions to the determination of what might be held to be ‘reasonably available’ based on the degree of importance of the value pursued. The Appellate Body indicated that in determining whether alternative measures are ‘reasonably available’, a panel should take into account the interests or values pursued by the measure.⁸² This appears to make it easier in general terms to justify the measure as being ‘necessary’, since it is not sufficient for a party challenging a measure to show simply that an alternative was available.

The *European Communities – Asbestos* decision confirms that an alternative measure would have to be ‘reasonably available’, rather than simply available in principle, but it is unlikely that a WTO panel will place as high a value on a measure aimed at animal welfare as one directed at human health and this may make it more difficult to show that this measure is indeed necessary. In *Brazilian tyres*, the panel said animal health/life was ‘an important value’ and ‘important’.⁸³

The *US – China Publications* dispute concerned the policy China implemented in only allowing State-owned companies to import foreign reading materials, such as books, audiovisual products and films and limiting the rights to distribute this material to domestic service providers. The USA argued that the means chosen by China to protect public morals were not ‘necessary’ in that it was not necessary for importers to perform a content review of the material in question (including reading materials and finished audio-visual products), as such review could have been carried out by other individuals or entities. The USA did not in that case specifically contest China’s assertion that the types of content prohibited by China could have a negative effect on public morals in China. The panel therefore assumed that the prohibited content could have a negative effect on public morals. The panel referred to the finding of the Appellate Body in *US – Gambling*, where it held that: ‘The process begins with an assessment of the relative importance of the interests or values furthered by the challenged measure’ and then proceeds to an examination of other factors which are to be weighed and balanced. In most cases, two factors would be relevant: the contribution of the measure to the realization of the ends pursued by it and the restrictive impact on international commerce. Possible alternatives to the

⁷⁸ See *United States – Standards for Reformulated and Conventional Gasoline*, n. 40 above, para. 18.

⁷⁹ See N. Diebold, n. 71 above, section III.

⁸⁰ *European Communities, Impact Assessment on the Potential Impact of a Ban on Products derived from Seal Species*, SEC (2008) 2290, at 11.

⁸¹ See *United States – Import Prohibition of Certain Shrimps and Shrimp Products*, n. 5 above, para. 133.

⁸² See *European Communities – Measures affecting Asbestos and Asbestos-Containing Products*, n. 38 above, paras 172–174.

⁸³ WTO DS 19 December 2007, *Brazil – Measures affecting Imports of Retreaded Tyres*, WT/DS332/12, para. 7.112.

challenged measures may also need to be considered.⁸⁴ The panel then looked at a two-stage test, judging if measures were necessary, even if they did not achieve their objectives all by themselves, and then if other WTO-consistent measures were reasonably available.⁸⁵ The panel concluded that China had not demonstrated that many of the measures were 'necessary' to protect public morals. In the case of the one that was demonstrated as necessary, a finding subsequently reversed by the Appellate Body,⁸⁶ this failed the alternative test put forward by the USA, which was found to be reasonably available. It was also overturned by the Appellate Body, so China failed to show the measure was necessary.⁸⁷

In a challenge to an import ban on certain animal products, the affected member may argue that a marking or labelling scheme, rather than a sales/import ban, is a 'reasonably available', and less trade restrictive, alternative. The affected member may well argue that the moral objections of consumers could equally be served by allowing them to make an informed choice as to whether or not to purchase the particular products. Against this, it might be argued that the moral basis for this measure makes it inappropriate for such goods to be available to consumers at all. The member imposing the measures would have to argue that the protection of public morals requires that products obtained through the infliction of such unnecessary cruelty (such as a significant proportion of animals being skinned whilst conscious or left to die a lingering death) are not made available to consumers, even those who would persist in buying them in the face of a marking scheme. The issue may be whether the practice is inherently inhumane rather than under-regulated. If the latter, a marking scheme might be a reasonably available alternative if it results in improvements but assertion that this would be the effect should not be sufficient.

Once *prima facie* necessity is made out, if the complaining party raises a WTO-consistent alternative measure that the responding party should have taken, the responding party is required to demonstrate why its challenged measure remains 'necessary' in the light of that alternative. If a responding party demonstrates that that alternative is not 'reasonably available', in the light of interests or values being pursued and the party's desired level of protection, it follows that the challenged measure must be 'necessary'. In *US – Gambling*, the Appellate Body held that there was no obligation to

consult with the affected country as to a reasonably available alternative to an outright ban.

The panel in *Brazilian Retreaded Tyres* also showed a fairly liberal attitude to what was or was not 'reasonably available', suggesting that the country adopting a trade-restrictive measure does not have to show that the measure is the sole relevant factor affecting the policy issue which underlies the justification. Brazil had argued that trade restrictions were necessary as waste tyres were an important factor in the spread of dengue and yellow fever and that reducing the number of waste tyres would make an important contribution to the protection of human health. Brazil admitted that many factors were involved in the incidence of the diseases, but said that its trade restrictions on waste tyres played a key role in the solution to the problem of disease control. The EC had argued that the problem lay rather with incorrect waste management policies rather than trade in waste tyres. The panel held that, whilst better waste management could reduce the risks, that did not negate the risk that waste tyres would continue to be abandoned and would cause problems.

Paragraph (b) of Article XX

Animal Life or Health

The wording of paragraph (b) is capable of being read narrowly so as to exclude measures concerned with the infliction of unnecessary pain and suffering on hunted animals or, broadly, to include such measures as relating to 'health'. A panel may be more likely to apply a narrow interpretation and conclude that a measure based on an ethical concern about inhumane hunting practices falls within the scope of paragraph (a), as relating to the protection of public morals, rather than within paragraph (b), as relating to animal health. In either case, the 'necessity' requirement must be met, as discussed above.

It is likely that a panel would find that a measure based on animal welfare considerations would fall under paragraph (a) as animal welfare measures are related to ethical and moral concerns, as explained above. If a panel decides that these measures are not covered by paragraph (a), it may turn to paragraph (b) and assess if animal welfare is covered within that provision.

Paragraph (b) has been interpreted as covering the protection of biodiversity, and thus to the extent that the proposed measure is also aimed at unsustainable hunting for example, paragraph (b) may be relevant, but, in the light of the *Shrimp Turtle* decision, a panel is far more likely to find that a measure based on a concern about sustainability falls within the scope of paragraph (g) of Article XX (see below).

⁸⁴ See *China – Measures affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, n. 18 above, para. 7.783.

⁸⁵ *Ibid.*, para. 7.792.

⁸⁶ See *China – Measures affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, n. 73 above, para. 297.

⁸⁷ See *China – Measures affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, n. 18 above, para. 7.909.

The main difficulty in relying on paragraph (b) relates to the potentially limited territorial scope. If the animals with which the measure is concerned are outside the jurisdiction of the member taking the restrictive measures, it is not entirely clear, on the basis of existing jurisprudence, whether or not there is an implied territorial limitation to paragraph (b). In relation to paragraph (g), the Appellate Body has clearly moved away from a strict territorial limitation laid down by the panel in the first *Tuna Dolphin* case. However, there has not been a panel ruling on territorial scope under Article XX (b).

It may be easier to argue in favour of extraterritorial protection of the environment (in paragraph (g)) because international law recognizes that aspects of the global environment are the concern of all States. The same is not currently true in relation to animal welfare/health concerns, so it may be more difficult to overcome the potential territorial limitation in paragraph (b).

As discussed in relation to paragraph (a), it will be necessary for the member taking the measure to show that no less trade-restrictive alternative was reasonably available. As indicated above, the strongest case for necessity would be based on an argument that the practice at issue is inherently inhumane, since improved regulation and a marking scheme, for example, could not address the problem.

Paragraph (g) of Article XX It is now beyond doubt that paragraph (g) of Article XX covers the conservation of living resources, as made clear in the Appellate Body's decision in *Shrimp Turtle I*.⁸⁸ From its wording alone, it is clear that paragraph (g) is more relevant to measures aimed at environmental objectives than animal welfare, but, subject to the difficulties outlined below, it could possibly be cited in support of a measure aimed, at least in part, at conservation. If paragraph (g) is to be relied on, it must be shown that the trade-restrictive measure is applied in conjunction with restrictions on domestic production or consumption, such as, for example, a ban on sale or import.

The extent to which extraterritorial aims are permissible under paragraph (g) is not altogether clear in the light of the Appellate Body's ruling in *Shrimp Turtle*, in which it stated:

We do not pass upon the question as to whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation . . . in the circumstances of the case before us there is a sufficient nexus

between the migratory and endangered marine populations involved and the United States for the purpose of Article XX(g).⁸⁹

This passage can be interpreted as meaning that a sufficient nexus may be established where the species concerned is migratory and thus has a degree of territorial connection with the State adopting the measure and/or is endangered and thus of global interest from the point of view of preserving biodiversity.

It may be possible to argue that a sufficient nexus can be established where a species is being exploited unsustainably, even if it is not presently endangered, since this poses a long-term threat to biodiversity, a global resource. This would constitute a wider scope for the sufficient nexus text than contemplated in *Shrimp Turtle* but such an approach could be consistent with the Convention on Biological Diversity (CBD),⁹⁰ which aims to secure the sustainable use of the components of biodiversity (Article 1), defined under Article 2 as: 'the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations'.

Against this are the limitations on jurisdictional scope set out in Article 4(a) of the convention, which provides that, as regards components of biodiversity, the provisions of the convention apply, in relation to each party, in areas 'within the limits of its national jurisdiction'. However, Article 4(b) also provides that, in the case of processes and activities carried out under a party's jurisdiction or control, regardless of where their effects occur, the provisions of the convention apply within the area of national jurisdiction or beyond the area of national jurisdiction. It can be argued that Article 4(b) permits a party to restrict an unsustainable trade, which occurs within its territory (import and sale), even if the components affected (such as seal populations) are outside its national jurisdiction.

Such a line of argument would require a panel and, ultimately, the Appellate Body to go beyond the existing jurisprudence on the scope of paragraph (g). Such arguments might find favour as being consistent with the principles of international environmental law as laid down in the CBD, as well as with the first recital to the preamble to the WTO Agreement, which refers to sustainable development and 'optimal use of the world's resources'.⁹¹ However, it may be more likely that a panel would focus on paragraph (a) or paragraph (b) in

⁸⁹ Ibid., para. 133 (emphasis added).

⁹⁰ Convention on Biological Diversity (Rio de Janeiro, 5 June 1992).

⁹¹ Agreement Establishing the World Trade Organization (Marrakesh, 15 April 1994), available at <http://www.wto.org/english/docs_e/legal_e/04-wto.pdf>.

⁸⁸ See *United States – Import Prohibition of Certain Shrimps and Shrimp Products*, n. 5 above, paras 131–134.

preference to enlarging the scope of paragraph (g), particularly where it is clear that the basis for the measure is primarily welfare rather than conservation.

The Chapeau to Article XX As confirmed by the Appellate Body in the 1996 *US – Gasoline* case, once the specific grounds for the exception have been established, it is then necessary to assess the manner in which the particular measure has been applied in order to ascertain whether or not the requirements of the chapeau to Article XX have been met. Those requirements are that the measure must not be 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. A number of panels have elaborated on these requirements further, and categorized them as how arbitrary the discrimination is,⁹² the extent of engagement in negotiations⁹³ and how flexible the offending measure is.⁹⁴ All the requirements are based on the notion that members must act in good faith and refrain from abuses of the exceptions.

The requirement for the measure to be flexible was laid down by the Appellate Body in the first *Shrimp Turtle* decision. The Appellate Body ruled that it was not permissible for members of the WTO to use economic embargos to require other members to adopt essentially the same comprehensive regulatory programme to achieve a certain policy goal as that in force in that member's territory, at least without enquiring whether such a programme was appropriate in the conditions prevailing in the exporting country (the 'flexibility requirement').⁹⁵ A further panel on the issue provides an example of where the requirement was held to have been met (in relation to revised guidelines on the operation of section 609 of the US law).⁹⁶

Clearly an outright ban leaves little room for manoeuvre in the countries affected, in contrast even to the position of the countries involved in the *Shrimp Turtle* case. Where imports of products from a particular species in which a member trades are banned outright, affected States are likely to argue that the measure represents an attempt to try and force them to abandon the trade or the practice involved in producing the product in question. They may rely on economic arguments in order to demonstrate that the member taking the

measure has disregarded 'the different conditions which may occur in the territories of those other Members [affected by the embargo]'.⁹⁷

There is also an important procedural aspect to the flexibility requirement. A due process standard will be applied to determine whether the country imposing the restriction has complied with that standard in relation to notice of the measure, the gathering of evidence and giving the exporting country an opportunity to be heard.⁹⁸ This suggests that the member taking the measure would have to show that it has been prepared to engage in a dialogue with affected countries before adopting the ban. The *Shrimp Turtle* case indicates that a failure to engage in such a dialogue would significantly undermine the ability to argue for the justification of a ban compatible with Article XX.

It may be easier to address the issue of flexibility in relation to a measure taken under paragraph (a) than in relation to a measure based on paragraphs (b) or (g). This is because, in the case of paragraph (a), the member may be in a stronger position to argue that it is not seeking to impose its own/desired regulatory standards on other countries, it is simply protecting public morality by banning products that are produced in a way which is morally unacceptable to public opinion. This issue highlights a central difficulty with paragraph (a), since trade-restrictive measures taken to protect public morals in one country are likely to result in a trade disadvantage to the country affected where the measure results from a moral standard which is not its own and for which there may not be any global consensus or even guideline. This is however an inherent feature of permitting countries to take action on moral grounds. Nevertheless, GATT expressly provides for this so it would be inconsistent to hold that a country can never (indirectly) impose its own moral standards on trade affecting the domestic market, since that would rob paragraph (a) of any meaning.

A further issue is whether the member has taken the measure because it considers a particular practice to be inherently cruel or simply under-regulated/enforced. The former position (if it can be defended on the evidence) may provide a stronger basis for rebutting the charge of inflexibility, since the countries affected will presumably not be able to take steps which would satisfy the concerns of the member taking the measure and thus avoid the need for the ban. If, on the other hand, the member argues that the relevant practice is simply under-regulated, it would have to show that it has taken account of the situation prevailing in the

⁹² See *United States – Import Prohibition of Certain Shrimps and Shrimp Products*, n. 5 above, para. 150.

⁹³ WTO AB 15 June 2001, *United States – Import Prohibition of Certain Shrimps and Shrimp Products (Article 21.5 – Malaysia)*, WT/DS58/AB/RW, paras 122–123.

⁹⁴ *Ibid.*, paras 149–150.

⁹⁵ See *United States – Import Prohibition of Certain Shrimps and Shrimp Products*, n. 5 above, para. 177.

⁹⁶ See *United States – Import Prohibition of Certain Shrimps and Shrimp Products (Article 21.5 – Malaysia)*, n. 93 above, paras 149–150.

⁹⁷ See *United States – Import Prohibition of Certain Shrimps and Shrimp Products*, n. 5 above, para. 164.

⁹⁸ *Ibid.*, paras 131–134.

affected member and has sought dialogue but that no mutually acceptable solution could be found.

Provided all countries involved in the production and export of the relevant products are treated alike, the proposed measure is unlikely to be found to constitute a means of arbitrary or unjustifiable discrimination, or a disguised restriction on international trade, contrary to the terms of the chapeau. However, if there is evidence that the measure will have the effect of promoting domestic production of other equivalent products, the issue of discrimination might be raised by the affected countries.

CONCLUSION

It appears likely that a WTO panel will be called upon to rule on the WTO consistency of measures adopted on the basis of animal welfare concerns if the present dispute between Canada and the EU on the sealing issue cascades to a panel. Recent cases suggest that Article XX(a) in particular offers a strong potential basis for the justification for such measures, provided that they do not constitute arbitrary or unjustifiable discrimination or a disguised restriction on trade and is

necessary. A panel is likely to scrutinize closely the relative impact of any trade restriction on domestic and foreign producers operating within the same market. The availability of marking or labelling or any other 'reasonably available' alternative is also likely to be a contentious issue.

Kate Cook is a barrister at Matrix Chambers in London, UK. She specializes in environmental law and has worked on animal welfare and the WTO when advising on the legality of an EU ban on the trade in cat and dog fur. She lectures and publishes on environmental law, international law of development and human rights law.

David Bowles is Director of Communications for the Royal Society for the Prevention of Cruelty to Animals, where he is responsible for campaigning, international and political work. He has worked on trade issues for over 15 years and has authored a number of papers on the relationship between animal welfare and international trade, focusing primarily on farm animal issues and those concerned with wildlife. He also lectures on WTO trade issues. Previous to the RSPCA, David worked for five years with the Environmental Investigation Agency, campaigning primarily on wildlife trade issues at UN bodies, and completed one year of field research in South-East Asia on primates and pigs.