

## GATT Article XX(a) Permits Otherwise Trade-Restrictive Animal Welfare Measures

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*There is ample support in the literature (primarily recent academic commentary) for the proposition that trade restrictions aimed at protecting animal welfare can be justified under Article XX(a) of the General Agreement on Tariffs and Trade (GATT) 1994 and thus are complimentary to and compliant with the World Trade Organisation's (WTO) free trade agenda, particularly in light of the EC – Seal Products case and the way it has affected interpretations of GATT Article XX(a).*

### I BACKGROUND AND CONCEPTUAL FRAMEWORK

Decision-makers in the EU often use the WTO as a scapegoat when they are not politically motivated to pursue animal welfare protection measures; they claim that WTO law<sup>1</sup> acts as a barrier to such legal action.<sup>2</sup> We have found that the WTO is not a barrier to carefully constructed trade restrictions aimed at protecting animal welfare. Enacting such measures will not expose the EU to any challenges at the WTO's Dispute Settlement Body (DSB) to which it would not be able to mount a strong defence.

This conclusion is reached by synthesizing the analysis undertaken in eleven scholarly articles. These articles assess the legality of barriers to trade intended to protect animal welfare for moral reasons. We studied only those articles published after the 2014 decision in the *EC – Seal Products* case.<sup>3</sup> This case renders earlier commentary on GATT Article XX(a) of limited use for the purposes of this review. We first undertook a contextual review of the relevant treaty terms and case law from the DSB.

### 2 GATT ARTICLE XX(A) AND RELATED CASE LAW

#### 2.1 Introduction

The protection of animal welfare has traditionally been viewed as incompatible with free trade and the rules of the World Trade Organisation.<sup>4</sup> However, as interpretation and application of the WTO treaties evolves, it is increasingly being understood that this is not the case. The WTO's free trade rules<sup>5</sup> have never permitted *absolute* free trade. Instead, the WTO rules seek to strike an appropriate balance between trade and other societal values. If such a balance were not struck, domestic standards on production would be undermined by poorly regulated imports. This is because, if domestic standards on animal welfare (etc.) are higher than those imposed on imported products, imports may be produced at a cheaper cost.<sup>6</sup> This would put pressure on the importing state to lower their standards in order to maintain the competitiveness of domestic production. Article XX of the GATT contains an exhaustive

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<sup>1</sup> Particularly the General Agreement on Tariffs and Trade (1 Jan. 1948) 55 UNTS 194.

<sup>2</sup> Evidenced in, e.g. Dods E.U., *Briefing: EP AGRI – Exchange of Views with Andriuskaitis*, on file with author (2016).

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

<sup>4</sup> A.B. Thiermann & S. Babcock, *Animal Welfare and International Trade*, 24(2) Rev. Sci. Tech. Off. Int. Epiz 747, 748 (2005); and André Nollkaemper, *The Legality of Moral Crusades Disguised in Trade Laws: An Analysis of the EC 'Ban' on Furs from Animals Taken by Legbold Traps*, 8(2) J. Envtl. L. 237, 238 (1996).

<sup>5</sup> Those relevant to this review are in the GATT, *supra* n. 2, Arts XI:1, I:1 and III:2 and 4.

<sup>6</sup> Harald Grethe, *High Animal Welfare Standards in the EU and International Trade – How to Prevent Potential 'Low Animal Welfare Havens'?*, 32 Food Policy 315, 318 (2007).

list of justifications a WTO Member State may provide to defend otherwise GATT-inconsistent measures. It states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade,<sup>7</sup> nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals

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

Only one case in the history of the WTO's DSB has permitted an otherwise GATT-inconsistent measure on the basis of Article XX.<sup>12</sup> However this statistic is insignificant when one considers the fact that, in most cases, Member States have adopted otherwise GATT-inconsistent measures which fall unquestionably within the terms of Article XX and have not been challenged.<sup>13</sup> In other cases GATT-inconsistent measures have been modified to meet the conditions of Article XX and maintained by the Member State without being subject to further challenge.<sup>14</sup> Accordingly, Article XX is a rich source of support for trade measures designed to protect animal welfare; perhaps the best option is the exception to the substantive GATT rules for reasons of public morality in Article XX(a).

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

### 2.2.1 Article XX(a)'s Relevance to Animal Welfare

Article XX(a) offers a promising opportunity for the EU to pursue animal welfare protection by adopting GATT-compliant trade restrictions, if they are 'necessary to protect public morals'. European public moral concern for animal welfare has been recently proven,<sup>15</sup> though the usefulness of public surveys in this regard is questionable.<sup>16</sup> Prior to *EC – Seal Products*, only one case had evoked Article XX(a)<sup>17</sup> before the DSB. However, various trade measures passed by the WTO Member States have used Article XX(a) as justification – whether implicitly or explicitly – to justify provisions that would otherwise breach the GATT.<sup>18</sup> This literature review will prove that Article XX(a) is considered directly applicable to animal welfare by the DSB following the *EC – Seal Products* case.

The following will address (1) the Article XX(a) requirement that a measure must be aimed at protecting public morals, (2) the Article XX(a) requirement that a measure must be necessary to ensure this protection, and (3) the problems posed by a possible jurisdictional limit to Article XX.

### 2.2.2 Public Morals

If animal welfare is to take precedence over free trade and remain GATT-compliant, this is achievable first and foremost through the Article XX(a) reference to public morals. The challenge, however, is that the concept of public morality is undefined in the GATT and could thus be subject to varying interpretations. The treaty gives no indication as to whether animal welfare could rightly be defined as an issue of public morality. In his seminal piece on public morality under the GATT, Charnovitz sets out the difficulties in interpreting what Article XX(a) is intended to include.<sup>19</sup> He states in particular that the ordinary wording of the Article does not

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<sup>7</sup> This is Art. XX's so-called 'chapeau'.

<sup>8</sup> Along with Art. XX(b) for measures necessary to protect human, animal and plant life or health, and Art. XX(g) for measures related to the conservation of natural resources.

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

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

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

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

<sup>13</sup> See Van den Bossche & Zdouc, *supra* n. 11.

<sup>14</sup> See *ibid.*

<sup>15</sup> Special Eurobarometer, *supra* n. 9, at 442.

<sup>16</sup> See discussion below in s. 5.2.

<sup>17</sup> This was *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (A.B. 2009).

<sup>18</sup> Van den Bossche & Zdouc, *supra* n. 11, at 571.

<sup>19</sup> Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 Va. J. Int'l L. 689 (1998).

reveal ‘what issues are covered by “public morals”’.<sup>20</sup> Further, he states that there are ‘no relevant instruments of the parties’ connected to the conclusion of this article, ‘no subsequent agreement’ regarding this Article and ‘no subsequent explicit practice’.<sup>21</sup> The travaux préparatoires of Article XX(a) further ‘reveals little about its scope’.<sup>22</sup> Charnovitz thus resorts to studying moral exceptions in other trade treaties where he finds references to ‘narcotics, pornography, and lottery tickets’.<sup>23</sup> Nonetheless, the WTO’s DSB has provided some answers regarding the scope of Article XX(a) since Charnovitz’ work was completed.

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

### 2.2.3 Necessity

The necessity test requires that the measure at issue is necessary to protect the public morality objective of the

WTO Member State. WTO Member States are free to decide what they feel is an appropriate level of protection to be given to public morals. This fact has been stated to be a ‘fundamental principle’<sup>29</sup> of WTO law and an ‘undisputed right’<sup>30</sup> of the WTO Member States. The necessity test has been found to involve a ‘sequential process of weighing and balancing a series of factors’ including the objective being pursued and its relative importance, the contribution of the measure to the objective, the restrictive effects on trade of the measure, and whether less trade restrictive alternatives are reasonably available.<sup>31</sup> Current understanding of this requirement following the *EC – Seal Products* case is synthesized below.<sup>32</sup>

### 2.2.4 Jurisdictional Limit

It is debated whether a jurisdictional limit applies to Article XX<sup>33</sup>; such a limit would mean that WTO Member States can protect societal values within their own jurisdiction but not outside of it. Most animal welfare protecting trade measures will have the effect of improving the welfare of animals abroad and so such a jurisdictional limit could be harmful to European efforts to restrict trade in animal products. There is no express jurisdictional limit in Article XX<sup>34</sup> and so it has been left up to the DSB to settle the issue.

The DSB has not provided a definitive answer to this question but it has shed some light on the issue. Early DSB rulings were unfavourable toward measures having such extra-territorial effects stating that an importing state can’t use trade measures to compel another country to change its policies.<sup>35</sup> Recent case law departs from this position. For example, in *US – Shrimp* the Appellate Body stated that measures requiring exporting countries to comply with, or adopt, certain policies prescribed by the importing state will not render the measure *a priori*

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<sup>20</sup> *Ibid.*, at 716.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> General Agreement on Trade in Services (1 Jan. 1995) 1869 UNTS 183.

<sup>25</sup> *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, para. 6.465 (Panel 2005).

<sup>26</sup> *Ibid.*, para. 6.461.

<sup>27</sup> *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R, para. 7.759 (Panel 2009).

<sup>28</sup> Special Eurobarometer, *supra* n. 9, at 442.

<sup>29</sup> *Brazil – Measures Affecting Imports of Retreated Tyres* WT/DS332/AB/R, para. 210 (A.B. 2007).

<sup>30</sup> *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* WT/DS135/AB/R, paras 80 and 168 (A.B. 2001).

<sup>31</sup> *Brazil – Measures Affecting Imports of Retreated Tyres*, WT/DS332/R, para 7.104 (Panel 2007) cited with approval by the Appellate Body in *China – Publications and Audiovisual Products*, *supra* n. 17, at para. 242.

<sup>32</sup> See s. 5.3.

<sup>33</sup> See, e.g. Peter Stevenson, *The Impact of the World Trade Organisation Rules on Animal Welfare*, 10 <http://www.ciwf.org.uk/research/animal-welfare/the-impact-of-the-world-trade-organisation-rules-on-animal-welfare/> (accessed 23 Apr. 2016).

<sup>34</sup> *United States – Restrictions on Imports of Tuna* DS 21/R, para. 5.25 (Panel 1991).

<sup>35</sup> *US – Tuna I*, *supra* n. 34, at paras 5.27 and 5.32; *United States – Restrictions on Imports of Tuna*, DS 29/R, paras 5.24–5.27 and 5.37 (Panel 1994).

incapable of justification under Article XX.<sup>36</sup> It went on to state that: '[s]uch an interpretation renders most, if not all, of the specific exceptions under Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply'.<sup>37</sup> The DSB has ruled that importing states can require exporters to adopt policies that are 'comparable in effectiveness' to their own in order to protect one of the values listed in Article XX.<sup>38</sup> It is also stated in *US – Tuna II* that in principle there is no prohibition in general international law that would bar states from passing such measures regulating the conduct of persons within their jurisdiction that affects animals outside of that jurisdiction.<sup>39</sup>

The pre-EC – *Seal Products* cases were thus increasingly favourable towards efforts to protect animal welfare through trade measures, despite the extra-territorial effect of such measures. It has also been theorized that Article XX(a) might be less problematic in this regard.<sup>40</sup> This is because trade measures falling within Article XX(a) are applicable to the public morality of citizens within the legislating state's jurisdiction. A positive impact on animal welfare outside of that jurisdiction would be an indirect effect. The position following the EC – *Seal Products* case is commented upon in the literature review below.<sup>41</sup>

### 2.3 Article XX Chapeau: Regulating the Application of Trade Measures

The opening words to Article XX<sup>42</sup> determine the way any animal welfare protecting trade measures must be applied in order to be justifiable. It requires that measures:

are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

The Article XX(a) exception to the substantive GATT rules is 'limited and conditional' upon the terms of the chapeau.<sup>43</sup>

The chapeau is used to mark out a 'line of equilibrium' between the rights of Member States to invoke exceptions under Article XX and the substantive rights of other Member States under the GATT.<sup>44</sup> The Appellate Body has ruled that this line of equilibrium will move depending upon the 'kind and the shape of the measures at stake ... and ... the facts making up specific cases'.<sup>45</sup>

Essentially the impact of the language of the chapeau is to make sure that the Article XX exceptions are not abused<sup>46</sup> and that measures are applied in all situations where they ought to be applied. The chapeau ensures that there are no 'unexplained gaps in the application of a measure' which might constitute discrimination and which are unfavourable to the protection of the value at issue.<sup>47</sup> The majority of GATT-inconsistent measures that have met the conditions of a specific exception in Article XX have fallen short of the chapeau's requirements but the chapeau need not pose a problem to a trade restriction constructed in a non-discriminatory manner.

### 3 THE EC – SEAL PRODUCTS CASE

Following the outcome of the EC – *Seal Products* case, the only time the DSB has considered the application of GATT Article XX(a) to public morality related to animal welfare, a new body of scholarship has been growing. The case consisted of a challenge by Norway and Canada to the EU's seal regime<sup>48</sup> which bans the placing on the market of seal products, with a few exceptions. Moral concern regarding seal hunting exists because the killing often entails inhumane suffering. The seals are usually located in inhospitable places making their killing and recovery – and oversight of the killing – particularly difficult.<sup>49</sup> Paragraph 4 of the preamble to the EU seals regime regulation 1007/2009 refers to:

expressions of serious concerns by members of the public and governments sensitive to animal welfare

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<sup>36</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, para. 121 (A.B. 1998).

<sup>37</sup> *US – Shrimp*, *supra* n. 36, at para. 121.

<sup>38</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia*, WT/DS58/RW, para 5.93 (Panel 2001) and confirmed in *US – Shrimp (Malaysia)*, *supra* n. 12, at para. 144.

<sup>39</sup> *US – Tuna I*, *supra* n. 34, at para. 5.17.

<sup>40</sup> Kate Cook & David Bowles, *Growing Pains: The Developing Relationship of Animal Welfare Standards and the World Trade Rules*, 19(2) RECIEL 227, 234 (2010).

<sup>41</sup> *See* s. 5.5.

<sup>42</sup> Referred to as the Art. XX 'chapeau' because they sit at the head of the section without being set out as an independent paragraph.

<sup>43</sup> *US – Shrimp*, *supra* n. 36, at para. 157.

<sup>44</sup> *US – Shrimp*, *supra* n. 36, at paras 156–159.

<sup>45</sup> *US – Shrimp*, *supra* n. 36, at para. 159.

<sup>46</sup> *Brazil – Retreated Tyres*, *supra* n. 29, at para. 224.

<sup>47</sup> L. Bartels, *The WTO Legality of the Application of the EU's Emission Trading System to Aviation*, 23 EJIL 429, 452 (2012).

<sup>48</sup> Regulation (EC) 1007/2009 of the European Parliament and of the Council on Trade in Seal products (20 Nov. 2009), OJ L 286/36.

<sup>49</sup> Gregory Shaffer & David Pabian, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* 109 AJIL 154, 155 (2015).

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

The problem with the regime, with regard to the WTO rules, largely arises from the fact that exceptions to the import ban are permitted for, inter alia, seal products resulting from indigenous or marine management hunts. Canada and Norway challenged the measure alleging inconsistency with Article I and Article III:4 of the GATT – as well as arguments based on the Agreement on Technical Barriers to Trade – because the exceptions did not apply to Canadian and Norwegian Inuit in the same way as they applied to Greenlandic Inuit in practice.<sup>50</sup> The panel ruled that the measure breaches both articles; the Appellate Body agreed with the ruling on Article I:1<sup>51</sup> and the panel's ruling on Article III:4 was not appealed.<sup>52</sup>

The panel concluded in this case that the measure was based on the EU's public moral concern regarding seal welfare<sup>53</sup> and stated that 'the evidence as a whole sufficiently demonstrates that animal welfare is an issue of ethical or moral nature in the European Union' and that 'international doctrines and measures of a similar nature in other WTO Members ... illustrate that animal welfare is a matter of ethical responsibility for human beings in general'.<sup>54</sup> The Appellate Body agreed with this ruling.<sup>55</sup> However, it found that the measure was inconsistent with the requirements of the chapeau to Article XX stating that the exceptions for indigenous hunts are not justified in a way that can reconcile them with the objective of the measure to protect public morals.<sup>56</sup> It concluded that the indigenous hunt exception was 'designed and applied in an arbitrary and unjustifiable manner'.<sup>57</sup>

#### 4 METHODS AND MATERIAL OF THE LITERATURE REVIEW

To evaluate the scholarly assessments of the state of the law following this case, specifically with regard to

the potential for Article XX(a) to be used to defend animal welfare protecting trade measures that are otherwise GATT-inconsistent, we gathered and reviewed the available literature. We used the international journal databases provided by 'Westlaw', 'LexisNexis' and 'HeinOnline' to identify articles regarding the legality of using Article XX(a) of the GATT to justify trade restrictions used to protect animal welfare.

The Boolean search term used was kept intentionally general because we know that limited legal research has been conducted in this area and that the majority of recent publications on morality and animals likely relates to Article XX(a) of the GATT. The following Boolean search term was used:

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

Only results in English were used and those published at the earliest in 2013 but written after the WTO's DSB panel had published its report on the *EC – Seal Products* case. No function was available to narrow the results by date in 'Westlaw' and 'LexisNexis' so we eliminated them manually. Articles prior to conclusion of the appeal are relevant because the Appellate Body reached some of the same conclusions with regard to Article XX(a) as did the panel. There is helpful commentary written in between the two DSB reports that remains of relevance. We have not analysed any publications after 19 July 2016.

The 'Westlaw' search produced 210 results, the 'LexisNexis' search produced 989 results, and the 'HeinOnline' search produced 560 results. The titles, abstracts, and keywords of these articles were searched for relevance, yielding fifteen matches. Of the fifteen articles included in the preliminary list, four were eliminated because they dealt with Article XX(a) only briefly and instead focused on other issues raised by the *EC – Seal Products* case.<sup>58</sup> A manual search of the footnotes in the relevant articles was also conducted; this confirmed that no other directly relevant material had been published on the subject since 2013. The results of this study are based

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<sup>50</sup> Agreement on Technical Barriers to Trade (1 Jan. 1995), 1868 UNTS 120.

<sup>51</sup> *EC – Seal Products*, *supra* n. 3, at para. 5.96.

<sup>52</sup> *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R and WT/DS401/R (Panel 2013).

<sup>53</sup> *EC – Seal Products*, *supra* n. 52, para. 7.404.

<sup>54</sup> *EC – Seal Products*, *supra* n. 52, para. 7.409.

<sup>55</sup> *EC – Seal Product*, *supra* n. 3, at paras 5.167 and 5.201.

<sup>56</sup> *EC – Seal Products*, *supra* n. 3, at paras 5.337–5.339.

<sup>57</sup> *EC – Seal Products*, *supra* n. 3, at para. 5.339.

<sup>58</sup> These were: Alexia Herwig, *Too Much Zeal on Seals? Animal Welfare, Public Morals, and Consumer Ethics at the Bar of the WTO*, 15(1) *World TR* 109 (2016); Philip I. Levy & Donald H. Regan, *EC – Seal Products: Seals and Sensibilities (TB) Aspects of the Panel and Appellate Body Reports*, 14(2) *World TR* 337 (2015); Petros C. Mavroidis, *Symposium on the EU – Seal Products Case: Sealed with a Doubt, EU, Seals, and the WTO* 6 *Eur. J. Risk Reg.* 388 (2015); Natalya Mosunova, *Are Non-Trade Values Adequately Protected under GATT Art. XX?*, 2 *Russ L.J.* 101 (2014).

on a qualitative synthesis of the results from the eleven articles reviewed.<sup>59</sup>

## 5 RESULTS OF THE LITERATURE REVIEW

### 5.1 EC – Seal Products

All of the articles written on GATT Article XX(a) and animals in the last three years have focused on the results and the impact of the *EC – Seal Products* dispute at the WTO's DSB. There is consensus amongst legal commentators that this is the most important insight into the legality of trade restrictions aimed at improving animal welfare in order to protect public morality. Every article reviewed is in agreement that the *EC – Seal Products* case acknowledges that public moral concerns are permissible, non-instrumental rationales for the establishment of trade restrictive measures<sup>60</sup> and they can take precedence over core WTO obligations of trade liberalization. As pointed out by some academics, the *EC – Seal Products* case is the only instance at the WTO to have dealt with the issue of GATT Article XX(a)'s applicability to public moral concerns regarding animal welfare.<sup>61</sup>

### 5.2 The Objective of the Measure

Some academics discuss the first requirement for a measure to fall under Article XX(a): the objective of the measure must be to protect public morals.<sup>62</sup> It is essential to know the objective

of the measure to determine whether it is necessary to protect public morals. The *EC – Seal Products* case articulates a rule that any animal welfare trade restriction must have public morality as its principle objective, if it is to be consistent with Article XX. One article emphasizes that Article XX(a) will permit non-instrumental regimes, namely: those that aim not just to discourage a particular behaviour but also to express moral convictions about normatively appropriate behaviour.<sup>63</sup>

Many of the articles noted that the objective of the measure is a subjective choice and need not reflect animal welfare as an objective and universally shared moral concern. It is only required that the issue at hand – animal welfare in this case – is an issue of public morality for the relevant society at a particular time. The Appellate Body does not require that animal welfare be regarded as a moral issue universally to satisfy Article XX(a), it only requires it is recognized as such for the particular legislator at that particular instance.<sup>64</sup> For example, in order to justify a trade restriction aimed at protecting animal welfare, the EU only needs to prove that this is enacted due to the public moral concern of European citizens. The EU does not need to show that this concern is held by non-Europeans, nor does it need to prove that Europeans have equivalent concerns for animal species other than the one in question.

Katie Sykes in particular spends some time arguing for the existence of an international law principle of animal welfare which would provide support to arguments that it is a legitimate matter of public moral concern.<sup>65</sup> The

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<sup>59</sup> These articles are:

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

<sup>60</sup> See, e.g. Bhala et al., *supra* n. 59, at 523, Conconi & Voon, *supra* n. 59, at 229 and Elizondo, *supra* n. 59, at 312.

<sup>61</sup> Akhtar, *supra* n. 59, at 462 and Howse, Langille & Sykes, *supra* n. 59, at 84 and 111.

<sup>62</sup> Bhala et al., *supra* n. 59, at 523 and Chen, *supra* n. 59, at 176.

<sup>63</sup> Howse, Langille & Sykes, *supra* n. 59, at 83.

<sup>64</sup> Bhala et al., *supra* n. 59, at 526; Conconi & Voon, *supra* n. 59, at 220; He, *supra* n. 59, at 224; Howse, Langille & Sykes, *supra* n. 59, at 105 and 117 and Sykes, *supra* n. 59, at 494.

<sup>65</sup> See Sykes, *supra* n. 59.

author notes that the DSB gives deference to local choices regarding public morality but notes that there is a limit to this deference and 'prevailing international views about moral priorities' could have some relevance when weighing and balancing the application of the necessity test after the threshold step of determining the objective is complete. It could help to 'distinguish justifiable morality-based regulation from impermissible protectionism'.<sup>66</sup> This argument is not taken up by the other articles; it cannot be said to represent popular opinion but it could point to further potential evidence for the applicability of Article XX(a) to public morality related to animal welfare in the future, if the existence of an international law principle of animal welfare becomes more widely accepted.

Further, some stress that the protection of public morals related to animal welfare can exist alongside other objectives in a measure and still fall within the terms of Article XX(a).<sup>67</sup> Two authors highlight the fact that – in *EC – Seal Products* – the DSB says the measure cannot be indifferent to animal welfare in its pursuit of the main purpose; it must make an effort to avoid sacrificing the main purpose whilst pursuing its other purposes. This requirement has been viewed as realistic given the trade-offs democracies are required to make whilst pursuing multiple objectives. Therefore, it has been recommended that the WTO instead treat measures with multiple objectives as separate measures.<sup>68</sup> In the *EC – Seal Products* case, treatment of the two measures as one meant the EU was required to remove the exception for Inuit communities and to protect animal welfare further than it originally intended. Treating multiple objectives within a measure as separate measures would mean that states may be more likely to protect animal welfare if they know they can preserve other interests in tandem. This, however, is merely a suggestion for the approach the DSB should take in the future and does not reflect the current state of understanding of the law.

Many of the articles highlight that it is permissible for the EU to accord different treatment to different animal species in line with varying levels of public concern and support for protection.<sup>69</sup> Canada's claim that the EU should accord equal concern to all animal species in order to be able to claim a valid defence under Article XX(a) was not accepted. This is because the WTO

Member States are given discretion to set their own standards of morality and so, limiting trade in one animal product does not mean the EU will have to limit trade in all animal products. Bhala et al. directly quote the Appellate Body's ruling that states: 'just because animal welfare cannot be protected across all species does not mean it should not be protected for any of them'.<sup>70</sup>

Despite this, another view holds that states are permitted to use *partial* bans on trade; they do not always have to resort to complete bans.<sup>71</sup> For example, in the *EC – Seal Products* case the ban didn't include a ban on transit or inward processing of seal products and this was deemed acceptable.

Finally, two scholars discuss what is required to convince a DSB panel that genuine moral concern exists.<sup>72</sup> Little more than some appropriate language in the measure's preamble together with mention of the moral concern in the text of the legislation is likely to be enough. Though a public survey was presented in the *EC – Seal Products* case, this was not necessary. These authors are concerned by potential abuse of the exception because they regard this test as quite easy to navigate, but Howse, Langille and Sykes counter such arguments by stating that Article XX's chapeau exists exactly for this reason: to stop the floodgates opening and abuse of the exception taking place.<sup>73</sup> Thus there is agreement regarding what is required by the DSB to prove public moral concern but there are varying opinions regarding what the consequences of this might be.

### 5.3 The Necessity of the Measure

Once the objective of the measure is determined to be the protection of public morality relating to animal welfare issues, it must be determined that the measure is necessary in order to ensure that objective is met. Comments made by a number of the articles make it clear that the necessity requirement is not an insurmountable obstacle, indeed the seals regime at issue in *EC – Seal Products* passed this test. The articles that discuss this requirement in depth all agree on the (non-binding) criteria which have been used with some consistency by the DSB to determine necessity.<sup>74</sup> The Appellate Body will typically analyse the importance of the objective, the contribution of the measure to the objective, the trade restrictiveness of

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<sup>66</sup> Sykes, *supra* n. 59, at 496.

<sup>67</sup> Howse, *supra* n. 59, at 418 and Howse, Langille & Sykes, *supra* n. 59.

<sup>68</sup> Howse, *supra* n. 59, at 419.

<sup>69</sup> Bhala et al., *supra* n. 59, at 503; Elizondo, *supra* n. 59, at 319; He, *supra* n. 59, at 242 and Howse, Langille & Sykes, *supra* n. 59, at 115.

<sup>70</sup> Quoted in Bhala et al., *supra* n. 59, at 528.

<sup>71</sup> Conconi & Voon, *supra* n. 59, at 229.

<sup>72</sup> Conconi & Voon, *supra* n. 59, at 232 and Elizondo, *supra* n. 59, at 312 and 320.

<sup>73</sup> Howse, Langille & Sykes, *supra* n. 59, at 147.

<sup>74</sup> Bhala et al., *supra* n. 59, at 537; Chen, *supra* n. 59, at 177; Howse, Langille & Sykes, *supra* n. 59, at 110 and Whitsitt, *supra* n. 59, at 1380.

the measure, and whether there are any less trade restrictive alternatives that are reasonably available.

Some suggest that the measure must make some contribution to the objective to be considered necessary. *Brazil – Retreated Tyres* stands for the proposition that this contribution should be ‘material’. However, in *EC – Seal Products* the Appellate Body decided that a material contribution can be any contribution not considered ‘marginal or insignificant’. Many of the articles highlight that: following the *EC – Seal Products* case there is no pre-determined threshold of contribution that must be achieved before a measure can be said to be necessary.<sup>75</sup> Bhala et al. seek to explain what is required further and states that in the *EC – Seal Products* case, all that was needed was for the measure to result in a decrease in European demand for the product at issue.<sup>76</sup> This in turn contributes to a decrease in global demand and it can be assumed that a reduction in the number of seals killed due to reduced demand will lead to reduction in the number of seals killed inhumanely. Thus the information required by the Appellate Body was not too demanding here and this test is actually quite easy to satisfy. Bhala et al. further state that necessity is not a black or white issue; there are degrees of necessity ranging from indispensable to making a contribution to the objective.<sup>77</sup> The fact that this is recognized by commentators and the case law makes it easier for animal welfare measures to be defended as necessary to protect public morals.

#### 5.4 Article XX Chapeau

The literature reviewed all state that Article XX’s chapeau poses the most difficulty for a successful use of Article XX (a) to defend animal welfare-protecting trade measures. This is partly due to the failure of the EU’s seal regime to pass this stage of the analysis. Some of the articles make a particular effort to emphasize that although the EU’s seal regime did not strike an appropriate balance between trade and morality, other trade measures could.<sup>78</sup>

Many of the articles highlight the reasons the EU’s seal regime failed to pass the chapeau’s test.<sup>79</sup> such as (1) there was no rational relationship between the objective of the measure and the IC exception, (2) the design and application of the exception indicated arbitrary or unjustifiable discrimination (ambiguity in the terms of the exception

meant that it could be applied with wide discretion and could potentially fail to cover all commercial seal products), and (3) the EU did not make comparable efforts to facilitate access to their market for Canadian Inuit as they did for Greenlandic Inuit. These failings provide concrete evidence regarding what the EU must do when framing future trade measures to comply with the requirements of the chapeau.

Some authors highlight the difficulty posed by the fact that both de jure and de facto discrimination are forbidden by Article XX’s chapeau.<sup>80</sup> For example, the Inuit exception in the EU’s seal regime was available to all Inuit communities on its face but it was not as easily available to Canadian and Norwegian Inuit as it was to Greenlandic Inuit in practice. It was thus deemed de facto discriminatory by the DSB. This is important because it highlights the efforts that must be taken by the EU to avoid being accused of legislating in a discriminatory manner.

#### 5.5 Jurisdictional Limit

The question of a jurisdictional limit to the applicability of the exceptions in Article XX is important if the EU is to use the exceptions to justify trade restrictions. It has been observed that the question of whether there is an implied jurisdictional limit on Article XX officially remains unanswered following the *EC – Seal Products* case. The Appellate Body did not rule on the issue.<sup>81</sup> However, it is convincingly argued by Howse, Langille and Sykes that the possibility of a jurisdictional limitation to Article XX is unlikely to hinder the implementation of trade limitations based on Article XX(a). This is because such measures will aim to protect the morality of citizens within the state’s jurisdiction, rather than to protect the welfare of animals outside of the state.<sup>82</sup> None of the other articles state anything contrary to this point but merely fail to address the jurisdictional limitation issue.

#### 5.6 Impact of Using Article XX(a)

The final common theme in the articles reviewed was the impact of using Article XX(a) to justify animal welfare protecting trade measures. This discussion does not relate to the legality of such measures but it is nonetheless interesting to note views to this effect. There was general agreement that trade bans protecting public morals in this way could have a real and concrete impact on animal welfare. This was

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<sup>75</sup> Bhala et al., *supra* n. 59, at 533; Chen, *supra* n. 59, at 177; Conconi & Voon, *supra* n. 59, at 221 and Howse, Langille & Sykes, *supra* n. 59, at 110.

<sup>76</sup> Bhala et al., *supra* n. 59, at 535.

<sup>77</sup> Bhala et al., *supra* n. 59, at 532.

<sup>78</sup> E.g. Chen, *supra* n. 59, at 179.

<sup>79</sup> Bhala et al., *supra* n. 59, at 533; Chen, *supra* n. 59, at 178; Conconi & Voon, *supra* n. 59, at 222–223; Elizondo, *supra* n. 590, at 320; He, *supra* n. 59, at 248 and Howse, Langille & Sykes, *supra* n. 59, at 120 et seq.

<sup>80</sup> See, e.g. Bhala et al., *supra* n. 59, at 542.

<sup>81</sup> Elizondo, *supra* n. 59, at 320 and Howse, Langille & Sykes, *supra* n. 59, at 123 et seq.

<sup>82</sup> Howse, Langille & Sykes, *supra* n. 59, at 125.



highlighted by one article in particular that discusses the dramatic decline of consumer demand for seal products in Europe due to the moral undertones of the ban.<sup>83</sup>

However, there were some fears regarding side-effects of such measures. It was noted in particular that EU measures restricting trade in animal products for moral reasons may undermine the competitiveness of animal products from developing countries which may not have adequate resources to ensure comparable protection.<sup>84</sup> Further, the restriction of imports based on states' self-defined morality could allow imperialism by countries that hold disproportionately high amounts of market power.<sup>85</sup> Finally, one author focused on the fact that such trade restrictions by the EU might lead to a displacement rather than a reduction of harm to animals.<sup>86</sup> The example cited was the increase in exports of Canadian seal products to China following the *EC – Seal Products* case.

## 5.7 Conclusion

The most important finding of this literature review is the consensus on the impact of the *EC – Seal Products* case. There is agreement that animal welfare protecting trade measures can be permissible if they are enacted due to public moral concern and thus justified under Article XX(a) of the GATT. The articles further discuss what form such trade restrictions must take in order to fall within the terms of Article XX(a). The measure at issue must be necessary to achieve the relevant animal welfare-related public morality objective and it must include reference to the issue of public moral concern in the text. If there is a less trade-restrictive alternative that would achieve the same result, the alternative must be pursued instead. The measure must be applied in a non-discriminatory manner, meaning that it must apply to all exporting states equally. It must also apply equally between the EU and the exporting states. The EU does not need to pursue a complete trade ban, or an equivalent measure on all animal products. It can be selective as long as it is not discriminatory. These requirements are generally considered not to be insurmountable and it is not seen as a problem that the EU seal regime failed to pass the test of the Article XX chapeau. Thus any use of the WTO as an excuse by the EU for failing to protect animal welfare is largely discredited following this review of the relevant literature.

### Table of Case Law

- *Brazil – Measures Affecting Imports of Retreated Tyres*, WT/DS332/AB/R (A.B. 2007)
- *Brazil – Measures Affecting Imports of Retreated Tyres*, WT/DS332/R (Panel 2007)

- *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS/363/AB/R (A.B. 2009)
- *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS/363/R (Panel 2009)
- *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (A.B. 2001)
- *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R (A.B. 2014)
- *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R (A.B. 2011)
- *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (A.B. 1998)
- *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/R (A.B. 2001)
- *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia*, WT/DS58/RW (Panel 2001)
- *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Panel 2005)
- *United States – Restrictions on Imports of Tuna* DS 21/R (Panel 1991)
- *United States – Restrictions on Imports of Tuna*, DS 29/R (Panel 1994)
- *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (A.B. 1996)

### Table of International Legislation

- Agreement on Technical Barriers to Trade (1 Jan. 1995), 1868 UNTS 120
- General Agreement on Tariffs and Trade (1 Jan. 1948) 55 UNTS 194
- Regulation (EC) 1007/2009 of the European Parliament and of the Council on Trade in Seal products (20 Nov. 2009), OJ L 286/36

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<sup>83</sup> Akhtar, *supra* n. 59, at 466.

<sup>84</sup> Chen, *supra* n. 59, at 179.

<sup>85</sup> Howse, Langille & Sykes, *supra* n. 59, at 93–94.

<sup>86</sup> See He, *supra* n. 59 generally.