

**FOUR LEGS GOOD, TWO LEGS BAD? ANIMAL WELFARE VS THE WORLD TRADE ORGANIZATION (FEATURING ARTICLE XX OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND ARTICLE 2 OF THE TECHNICAL BARRIERS TO TRADE)**

ABSTRACT

This article explores whether animal welfare can be deployed as a legitimate restriction on trade under the World Trade Organization framework. Article XX of the General Agreement on Tariffs and Trade and Article 2 of the Technical Barriers to Trade are traversed; along with the two relatively recent cases of *US — Tuna II* (DS381) and *EC — Seal Products* (DS400/401). While the World Trade Organization has traditionally demonstrated a reluctance to legitimise animal welfare based restrictions, contemporary World Trade Organization case law signals the possibility of a shifting landscape. The article argues that further development of coherent principles is required for the benefit of both animal welfare and trade certainty. This is particularly so in relation to the inter-related issues of extraterritoriality and coercion.

I INTRODUCTION

All animals are equal, but some animals are more equal than others – George Orwell<sup>1</sup>

**D**oes the World Trade Organization (‘WTO’) recognise animal welfare as a legitimate reason to restrict trade? Until recently the answer was probably no. However, two recent cases, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*<sup>2</sup> and *European*

---

\* Associate Professor, Curtin Law School, Perth, Western Australia; Barrister-at-Law, Murray Chambers.

\*\* Legal Practitioner, Ashurst Australia. The views in this article are the author’s views and do not reflect the views of Ashurst Australia.

<sup>1</sup> George Orwell, *Animal Farm* (Penguin Books 1945 (1955)) 114.

<sup>2</sup> Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/R (15 September 2011); Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R,

*Communities — Measures Prohibiting the Importation and Marketing of Seal Products*<sup>3</sup> have considered the interactions between animal welfare and international trade in the context of provisions allowing WTO Members to impose trade measures aimed at certain non-economic goals. This article considers these cases and argues they represent a positive shift in the WTO's attitude towards animal protection.

In *US — Tuna II* and *EC — Seal Products* the WTO's Appellate Body ('AB') indicated that promoting animal welfare is a legitimate goal within the scope of the WTO agreements, on the basis that animal welfare measures are aimed at protecting 'public morals' or protecting 'animal life or health'. Yet the AB has failed to clarify whether established WTO principles concerning extraterritoriality and coercive measures will cause any difficulties for animal welfare-based trade measures. Consequently, this article argues for further clarification by the WTO so as to ensure Members have some certainty in relation to the validity and boundaries of such measures.

Structurally, Part II of this article will provide a brief history of animal welfare before placing animal welfare and the WTO into a broad frame. Part III of the article considers the relevant WTO agreements, namely the General Agreement on Tariffs and Trade ('GATT') and the Technical Barriers to Trade Agreement ('TBT'). It is suggested that although many animal welfare measures are likely to violate prohibitions on discriminatory trade measures and quantitative restrictions, such measures may be justified under exceptions designed to protect 'public morals' or 'animal life or health'. Part IV further explores the 'public morals' exception; and Part V investigates the WTO 'animal life or health' exceptions. In Part VI it will become clear that the potential thawing in the WTO's attitude to animal welfare is not without qualification. In particular, prior WTO case law concerning extraterritoriality and coercion may serve to undermine future animal welfare initiatives.

## II ANIMAL WELFARE AND THE WTO IN CONTEXT

This part provides a brief historical account of animal welfare before placing animal welfare and WTO considerations into a macro context.

---

AB-2012-2 (16 May 2012); Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products from Mexico — Recourse to Article 21.5 of the DSU by Mexico*, WTO Doc WT/DS381/RW (14 April 2015); Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products — Recourse to article 21.5 of the DSU by Mexico*, WTO Doc WT/DS381/AB/RW, AB-2015-6 (20 November 2015) ('*US — Tuna II*').

<sup>3</sup> Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/R; WT/DS401/R (25 November 2013); Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/AB/R; WT/DS401/AB/R, AB-2014-1; AB-2014-2 (22 May 2014) ('*EC — Seal Products*').

*A A (Very) Brief History of Animal Welfare*

Animal welfare tends to be construed as a contemporary concern. However, the third century jurist Ulpian spoke of the ‘nature of justice’ (*jus naturale*), which encompassed ‘that which nature has taught all animals; this law indeed is not peculiar to the human race, but belongs to all animals.’<sup>4</sup> This principle of justice was perhaps taken too literally by some courts in the Middle Ages, which, on occasion, conducted criminal trials of animals that killed humans.<sup>5</sup>

Certainly by the late 1500s animal welfare began to make its way proper into English law,<sup>6</sup> and by 1641 the jurisdiction of Massachusetts Bay enacted the ‘Body of Liberties’, which dealt with animal cruelty: ‘no man shall exercise any Tirranny or Crueltie towards any brute Creature which are usuallie kept for man’s use.’<sup>7</sup>

The next ‘rite’ of this law obliged persons who “leade or drive Cattel” to rest and refresh them periodically.<sup>8</sup> Later, in 1824, the Royal Society for the Prevention of Cruelty to Animals (‘RSPCA’) was established.<sup>9</sup> Charles Darwin discussed this development of animal cruelty morality in a lesser-known passage in *The Descent of Man* (1871), where he argued that moral expansion was a product of evolution just like the eye or the hand.<sup>10</sup> Darwin’s theory went that over time humans broadened their social or community instincts to include the family, tribe and race.<sup>11</sup> Expanding upon this ‘moral evolution’, Darwin suggested that ‘sympathy beyond the confines of man ... to the lower animals, seems to be one of the latest moral acquisitions.’<sup>12</sup> As if to prove his point, the United Kingdom (‘UK’) Parliament enacted the *British Cruelty to Animals Act* in 1876.<sup>13</sup>

---

<sup>4</sup> Roderick Nash, *The Rights of Nature: A History of Environmental Ethics* (Primavera Press, 1990) 17–18, n 13 (‘*The Rights of Nature*’).

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.* 25. John Ray (1627–1705) learned about animistic philosophy and after spending a lifetime collecting and categorizing plants, he came to believe that animals and plants exist to glorify God. After reciting the dominant belief that ‘man has dominion of nature’, he stated that ‘wise men nowadays think otherwise’: at 21, n 25. Further, in 1766 Dr Humphrey Primatt ‘argued that all creatures, being works of God, deserved humane treatment. It was clear to him that since pain was “*Evil*”, cruelty to any form of life was “*ATHEISM*” and “*INFIDELITY*”’: at 23.

<sup>7</sup> *Ibid.* n 19.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.* 25.

<sup>10</sup> Roderick Nash, *Do Rocks Have Rights?*, *The Center Magazine* (Nov–Dec 1977), cited in Henrich Károly, *Ethische und Poetische Gedanken zu einem Gegenstand Okonomischer Ausbeutung und Achtloser Misshandlung* (Kassel University Press, 2009) 115.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *The Rights of Nature*, above n 4, n 39.

Since the late 1800s the importance of animal welfare has become almost universally acknowledged. Almost all countries now have animal welfare laws,<sup>14</sup> and there is even a proposal to introduce a Universal Declaration on Animal Welfare at the United Nations.<sup>15</sup> There is also a growing recognition that animal welfare involves more than just the absence of cruelty or of physical suffering.

### B *Animal Welfare and the WTO*

The World Organization for Animal Health ('OIE') defines animal welfare to mean how an animal is coping with the conditions in which it lives. The OIE considers that 'an animal is in a good state of welfare if ... it is healthy, comfortable, well nourished, safe, able to express innate behaviour, and if it is not suffering from unpleasant states such as pain, fear or distress.'<sup>16</sup> In Australia, the RSPCA considers that an animal is in a good state of welfare if it has the five freedoms: freedom from hunger and thirst; freedom from discomfort; freedom from pain, injury or disease; freedom to express normal behaviour; and freedom from fear and distress.<sup>17</sup>

Historically, the relationship between animal welfare and international trade has been fraught. On the one hand, animal advocates have argued the WTO treats animal welfare as an 'illegitimate question'.<sup>18</sup> On the other hand, the WTO has relied upon extraterritoriality arguments, for example, to suggest that states often over-reach from a trade perspective when it comes to animal welfare.<sup>19</sup>

The antipathy between animal welfare advocates and the WTO has partly resulted from decisions that United States ('US') dolphin and turtle protection policies were not compliant with the GATT.<sup>20</sup> This article, however, is not so much concerned with

<sup>14</sup> Michael Bowman, Peter Davies and Catherine Redgwell, *Lyster's International Wildlife Law* (Cambridge University Press, 2010) 674–6.

<sup>15</sup> Miah Gibson, 'The Universal Declaration of Animal Welfare' (2011) 16 *Deakin Law Review* 539, 542–3; World Organization for Animal Health, Resolution No XIV, 'Universal Declaration on Animal Welfare', adopted 24 May 2007.

<sup>16</sup> World Organization for Animal Health, 'Terrestrial Animal Health Code' (2016) Article 7.1.1.

<sup>17</sup> RSPCA Australia, *Five Freedoms for Animals* (12 June 2009) RSPCA Australia <[http://kb.rspca.org.au/Five-freedoms-for-animals\\_318.html](http://kb.rspca.org.au/Five-freedoms-for-animals_318.html)>.

<sup>18</sup> Matthew Scully, *Dominion: The Power of Man, the Suffering of Animals and the Call to Mercy* (St Martin's Press, 2002) 184.

<sup>19</sup> Andrew Linzey, 'An Ethical Critique of the Canadian Seal Hunt and an Examination of the Case for Import Controls on Seal Products' (2006) 2 *Journal of Animal Law* 87, 113; Peter Stevenson, 'The World Trade Organisation Rules: A Legal Analysis of Their Adverse Impact on Animal Welfare' (2002) 8 *Animal Law* 107, 108.

<sup>20</sup> GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS21/R (3 September 1991, unadopted); GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994, unadopted); Panel Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*,

environmental measures that seek to ensure the survival of species of animals as a whole.<sup>21</sup> Rather, the focus is on trade-impact measures that aim to protect the welfare of individual animals, whether or not their species is threatened ('animal welfare measures').<sup>22</sup> In particular, this article focuses on import or export restrictions and mandatory labelling requirements.<sup>23</sup>

In the Australian context, the most relevant examples of animal welfare measures are restrictions on live exports and the potential ban on the import of cosmetics containing ingredients that were tested on animals. In 2011, Australia's live cattle trade to Indonesia was temporarily halted, following the release of footage showing Australian cattle being subjected to cruel slaughter practices.<sup>24</sup> Indonesia subsequently threatened to make a complaint to the WTO. Indonesia claimed that similar animal welfare conditions existed in other nations that imported live animals from Australia, and as such, it alleged that the ban was discriminatory.<sup>25</sup>

The live cattle trade to Indonesia has now resumed, but live export from Australia is now regulated by the Exporter Supply Chain Assurance System ('ESCAS'), which is intended to promote improved animal welfare outcomes by ensuring that all livestock remain within an independently audited supply chain and the exporter has control of all supply chain arrangements.<sup>26</sup> It seems that the Australian government took

---

WTO Doc WT/DS58/R (15 May 1998); Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998).

<sup>21</sup> For more on this issue, see generally Daniel C Esty, *Greening the GATT: Trade, Environment and the Future* (Institute for International Economics, 1994); Nathalie Bernasconi-Osterwalder et al, *Environment and Trade: A Guide to WTO Jurisprudence* (Taylor and Francis, 2012); Steve Charnovitz, 'Exploring the Environmental Exceptions in GATT Article XX' (1991) 25 *Journal of World Trade* 37; Erich Vranes, *Trade and the Environment: Fundamental Issues in International Law, WTO Law, and Legal Theory* (Oxford University Press, 2009).

<sup>22</sup> See generally Laura Nielsen, *The WTO, Animals and PPMs* (Martinus Nijhoff Publishers, 2007) 44.

<sup>23</sup> For a list of possible animal welfare measures, see Peter Van den Bossche, Nico Schrijver and Gerrit Faber, 'Unilateral Measures Addressing Non-Trade Concerns' (Study, Policy Coherence Unit, Ministry of Foreign Affairs of the Netherlands, 2007) 10–11.

<sup>24</sup> Phillip Coorey and Tom Allard, 'Live Cattle Ban to Stay', *Sydney Morning Herald* (online), 8 June 2011 <<http://www.smh.com.au/environment/animals/live-cattle-ban-to-stay-20110607-1fr8b.html>>.

<sup>25</sup> Tom Allard and Richard Willingham, 'Indonesia, Coalition Cry Foul Over Live Cattle Ban', *Sydney Morning Herald* (online), 9 June 2011 <<http://www.smh.com.au/national/indonesia-coalition-cry-foul-over-live-cattle-ban-20110608-1ft95.html>>.

<sup>26</sup> Australian Government, Department of Agriculture, 'Exporter Supply Chain Assurance System Report' (Report, January 2015) 6–7.

WTO law into account when designing ESCAS, and there has been some academic commentary on whether ESCAS is compliant with Australia's WTO obligations.<sup>27</sup>

There have also been calls to suspend live animal exports to other countries on the basis of welfare concerns. For example, in 2016, the RSPCA called for a suspension of live animal exports to Vietnam after footage emerged showing Australian cattle being bludgeoned to death in abattoirs that had not been approved as part of the ESCAS system.<sup>28</sup> Animal welfare groups continue to call for a complete ban on live export.<sup>29</sup>

Further, before the 2016 Australian Federal Election, both major political parties signalled their intention to restrict the sale of cosmetics tested on animals.<sup>30</sup> The Coalition Government is currently undertaking a consultation process, and the terms of the proposed ban have not yet been finalised.<sup>31</sup> However, the government notified the WTO's Committee on Technical Barriers to Trade of its intention to ban the testing of cosmetics on animals in Australia in February 2017. The notification states that 'Australia welcomes views and contributions from trading partners in the consultation process.'<sup>32</sup>

There have been previous attempts to introduce legislation restricting animal testing of cosmetics. The Australian Greens introduced a Bill into Federal Parliament in 2014 aimed at banning the import or sale of cosmetics tested on animals.<sup>33</sup> The Explanatory Memorandum to that Bill dealt with international trade law issues, indicating

---

<sup>27</sup> Celeste Black, 'Live Export and the WTO: Considering the Exporter Supply Chain Assurance System' (2013) 11 *Macquarie Law Journal* 77.

<sup>28</sup> James Thomas, 'RSPCA Calls for Suspension of Live Animal Exports to Vietnam After Cattle Bludgeoning', *ABC News* (online), 17 June 2016 <<http://www.abc.net.au/news/2016-06-17/cattle-bludgeoning-prompts-call-for-live-trade-suspension/7520272>>.

<sup>29</sup> Carmen Brown, 'Animal Welfare Activists Ramp up Campaign to Ban Live Export', *ABC Rural* (online), 5 January 2015 <<http://www.abc.net.au/news/2015-01-05/animals-australia-ramps-up-live-export-campaign/5997514>>.

<sup>30</sup> Annika Smethurst, 'Cosmetics Tested on Animals to be Banned in Australia', *Herald Sun* (online), 2 June 2016 <<http://www.heraldsun.com.au/news/cosmetics-tested-on-animals-to-be-banned-in-australia/news-story/a6362ab50a6146af5c83e60c8e40d93e>>.

<sup>31</sup> Australian Government, Department of Health, 'Cosmetic Testing of Animals Ban November 2016 Consultations' (Report, November 2016) 1–2 <[http://www.health.gov.au/internet/main/publishing.nsf/Content/FC9633C2D3C5A4F5CA25805D000B3610/\\$File/November%20workshop%20consultation%20summary.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/FC9633C2D3C5A4F5CA25805D000B3610/$File/November%20workshop%20consultation%20summary.pdf)>.

<sup>32</sup> *Notification*, WTO Doc G/TBT/N/AUS/104 (16 February 2017) [1].

<sup>33</sup> End Cruel Cosmetics Bill 2014 (Cth). See also Bianca Hall, 'Greens to Push for Ban on Cosmetics Tested on Animals', *Sydney Morning Herald* (online), 16 March 2014. <<http://www.smh.com.au/environment/animals/greens-to-push-for-ban-on--cosmetics-tested-on-animals-20140315-34uhk.html>>.

that the Greens were aware that WTO law could have implications for this measure.<sup>34</sup> Similarly, in 2016, the Australian Labor Party introduced a Private Member's Bill that would have banned the import and manufacturing of cosmetics and cosmetic ingredients, if animal testing had been conducted in relation to the cosmetic.<sup>35</sup>

Other jurisdictions have also taken, or considered taking, animal welfare measures. In addition to banning the import of seal products,<sup>36</sup> the European Union ('EU') has banned the import of cosmetics tested on animals;<sup>37</sup> California has banned the sale of foie gras;<sup>38</sup> and Australia and the US have banned the import of dog and cat fur.<sup>39</sup> All of these measures could be in danger if animal welfare measures are not WTO-compliant.

### III WTO AGREEMENTS RELEVANT TO ANIMAL WELFARE

This article, and Part III in particular, focuses on two substantive aspects of the WTO Agreement: the GATT and the TBT. Specifically Articles I, III, XI and XX of the GATT, and Article 2 of the TBT will be traversed. These are the most likely provisions to be scrutinised by a WTO panel and/or AB in relation to animal welfare measures.

#### *A General Agreement on Tariffs and Trade*

The non-discrimination obligations contained in GATT Articles I and III may be problematic for animal welfare measures. These provisions prohibit countries from discriminating between their trading partners, and from providing more favourable treatment to domestically produced, as compared to imported, products. In addition, Article XIII prohibits members from imposing import or export prohibitions or restrictions in a discriminatory manner as between trading partners.

---

<sup>34</sup> Explanatory Memorandum, End Cruel Cosmetics Bill 2014 (Cth).

<sup>35</sup> Ethical Cosmetics Bill 2016 (Cth).

<sup>36</sup> *Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products* [2009] OJ L 286/36; *Commission Regulation (EU) No. 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on trade in seal products* [2010] OJ L 216/1.

<sup>37</sup> *Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products* [2009] OJ L 342/59.

<sup>38</sup> Max Shapiro, 'A Wild Goose Chase: California's Attempt to Regulate Morality by Banning the Sale of One Food Product' (2012) 35 *Loyola of Los Angeles International & Comparative Law Review* 27.

<sup>39</sup> *Customs (Prohibited Imports) Amendment Regulations 2004 (No 4)* (Cth); Stevenson, above n 19, 126–7.

These non-discrimination provisions prohibit discrimination between ‘like’ products. Products are ‘like’ if there is a competitive relationship between them;<sup>40</sup> however, the WTO has traditionally been reluctant to consider non-product related (‘NPR’) process production methods (‘PPMs’) in the likeness assessment.<sup>41</sup> This means that products distinguished from each other only by animal welfare standards met during their production will probably be considered ‘like’.<sup>42</sup>

The interpretation of ‘likeness’ means that many animal welfare measures will be de facto discriminatory because they extend more favourable treatment to ‘like’ products from countries with higher welfare standards.<sup>43</sup> For example, non-animal tested cosmetics will probably be considered ‘like’ products to cosmetics that contain ingredients that were tested on animals. This means that a ban on the import of animal-tested cosmetics may be discriminatory, because it would favour imports from countries that prohibit, or do not engage in, animal testing.

Similarly, in the context of live export, for example, cattle will be considered ‘like’, notwithstanding any differences in the welfare standards and slaughter practices of importing countries.<sup>44</sup> As such, a ban on, or suspension of, live export to one country on the basis of animal welfare breaches will likely be de facto discriminatory, and in breach of Article XIII.

Article XI prohibits quantitative restrictions on imports or exports. This includes measures prohibiting or restricting the import or export of certain categories of products, and extends to measures made effective through quotas, import or export licences or other measures.

---

<sup>40</sup> Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R, AB-2000-11 (12 March 2001) [99].

<sup>41</sup> GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS21/R (3 September 1991, unadopted) [5.15]. See also Steve Charnovitz, ‘The Law of Environmental “PPMs” in the WTO: Debunking the Myth of Illegality’ (2002) 27 *Yale Journal of International Law* 59, 85–92; Alan Swinbank, ‘Like Products, Animal Welfare and the World Trade Organization’ (2006) 40 *Journal of World Trade* 687, 687; Lesley Peterson, ‘Talkin’ Bout a Humane Revolution: New Standards for Farming Practices and How They Could Change International Trade as We Know It’ (2010) 36 *Brooklyn Journal of International Law* 265, 273–6.

<sup>42</sup> Andrew Lurie and Maria Kalinina, ‘Protecting Animals in International Trade: A Study of the Recent Successes at the WTO and in Free Trade Agreements’ (2015) 30 *American University International Law Review* 431, 433.

<sup>43</sup> See Stevenson, above n 19, 111–18.

<sup>44</sup> Robert Cunningham, ‘Predicting the Predicament: The World Trade Organisation and Biotechnological Agriculture via the EC – Biotech Case’ (2006) 99 *Macquarie Journal of Business Law* 3, 108–14.

The prohibition on quantitative restrictions has been problematic for environmental measures in the past. For example, in *US—Tuna (Mexico)*<sup>45</sup> and *US—Tuna (EEC)*,<sup>46</sup> two GATT Panel decisions from the 1990s, US embargoes against tuna exported from countries without appropriate dolphin-safe tuna fishing policies were found to be quantitative restrictions. The US was concerned about purse-seine fishing of tuna, which involves encircling a school of tuna with a net, and then ‘pursing’ it closed, catching its entire contents.<sup>47</sup> In the Eastern Tropical Pacific Ocean (‘ETP’), tuna and dolphins are often found together.<sup>48</sup> As such, fishermen find schools of tuna by locating dolphins and encircling them in purse-seine nets, catching and killing them (a process known as ‘setting on’ dolphins).<sup>49</sup>

*US—Tuna (Mexico)* concerned a US ban on the import of yellowfin tuna and tuna products harvested in the ETP with purse-seine nets by Mexico, among other countries. *US—Tuna (EEC)* concerned the US’s ‘intermediary nation embargo’, which prohibited the import of yellowfin tuna or yellowfin tuna products from ‘intermediary’ nations that had themselves, within the last six months, imported tuna or tuna products that were subject to a ‘direct’ embargo by the US.<sup>50</sup> Each of these measures was a violation of Article XI.<sup>51</sup>

Similarly, in *US—Shrimp I*,<sup>52</sup> the US, under its endangered species legislation, required all US shrimp trawl vessels to use approved ‘Turtle Excluder Devices’ or other measures in certain areas where there was a significant turtle mortality associated with shrimp harvesting. Subsequently, the US imposed an import ban on shrimp harvested with commercial fishing technology which might adversely affect sea turtles. The import ban did not apply to nations with a fishing environment which did not pose a threat to the incidental taking of sea turtles, or to those which provided evidence of the adoption of a regulatory program comparable to the US program, and with comparable effectiveness. This was found to be a violation of Article XI.<sup>53</sup>

---

<sup>45</sup> GATT Panel Report, *United States—Restrictions on Imports of Tuna*, GATT Doc DS21/R (3 September 1991, unadopted).

<sup>46</sup> GATT Panel Report, *United States—Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994, unadopted).

<sup>47</sup> GATT Panel Report, *United States—Restrictions on Imports of Tuna*, GATT Doc DS21/R (3 September 1991, unadopted) [2.1].

<sup>48</sup> *Ibid* [2.2].

<sup>49</sup> *Ibid*.

<sup>50</sup> *Ibid* [5.4].

<sup>51</sup> *Ibid* [5.17]–[5.19]; GATT Panel Report, *United States—Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994, unadopted) [5.6]–[5.10].

<sup>52</sup> Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/R (15 May 1998); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998).

<sup>53</sup> Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/R (15 May 1998) [7.11]–[7.17].

A total ban on the export of live animals from Australia would likely be considered a violation of Article XI. Even the ESCAS requirements could arguably be a quantitative restriction: the ESCAS includes an export licensing requirement which could be seen as restricting exports.<sup>54</sup>

Despite Articles I, III, XI and XIII, the GATT contains exceptions that may allow animal welfare measures to be justified. Article XX is the most important in this regard, containing exceptions for measures necessary to protect public morals (Article XX(a)), and human, animal or plant life or health (Article XX(b)). To justify a measure under Article XX(a) or XX(b), a Member must demonstrate that the measure:

1. is aimed at the relevant policy area;
2. is ‘necessary’;<sup>55</sup> and
3. complies with the Article XX chapeau.<sup>56</sup>

As will be seen, the TBT, although it has a narrower focus, has a similar structure to the GATT in relation to the non-discrimination obligations and is also likely to pose problems for animal welfare measures.

### *B Technical Barriers to Trade*

The TBT is a specialised agreement that aims to reduce or eliminate unnecessary obstacles to trade in the form of technical regulations, standards, and the procedures for assessing conformity with technical regulations and standards. Articles 2.1 and 2.2 of the TBT apply to ‘technical regulations’. A technical regulation is defined as a ‘[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory.’<sup>57</sup> Technical regulations may also include labelling requirements ‘as they apply to a product, process or production method’.<sup>58</sup>

---

<sup>54</sup> Black, above n 27, 86–8.

<sup>55</sup> Panel Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/R (10 November 2004) [6.455]; Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/AB/R, WT/DS401/AB/R, AB-2014-1, AB-2014-2 (22 May 2014) [5.169].

<sup>56</sup> Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (29 April 1996) 22; Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998) [118]–[122].

<sup>57</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (*Agreement on Technical Barriers to Trade*) annex 1.1.

<sup>58</sup> *Ibid.*

Measures that require products to be labelled with animal welfare information, such as EU laws requiring eggs be labelled with the farming method used,<sup>59</sup> will be technical regulations. Interestingly, regulations that do not require products to bear a certain label in order to be marketed, but require satisfaction of certain conditions before a label is available, may also be considered mandatory. For example, in *US — Tuna II*,<sup>60</sup> the third instalment of the WTO dispute over US dolphin protection policies, the US had passed legislation imposing certain conditions for access to the US dolphin-safe tuna label. These conditions varied according to the method of harvesting, and whether the fishing occurred in the ETP or elsewhere. If the tuna product did not comply with the conditions, any reference to dolphins, porpoises or marine mammals on the label of the tuna product was prohibited.

Mexico challenged these requirements, alleging that they violated Article 2 of the TBT and Articles I and III of the GATT. Relevantly, the labelling laws were considered mandatory despite there being no requirement to use the label to place tuna on the US market, because the laws prohibited the use of any label on tuna packaging relating to marine mammals without meeting the relevant conditions.<sup>61</sup> Under this expansive interpretation, most animal welfare labelling rules will likely be considered technical regulations.<sup>62</sup>

The AB again considered the definition of ‘technical regulation’ in the *EC — Seal Products* decision. This case concerned an EU measure that banned the import of seal products (‘Seal Regime’) because of concerns about animal welfare during the seal hunt.<sup>63</sup> The Seal Regime contained several exceptions, including:

---

<sup>59</sup> Council Regulation (EC) No. 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products [2007] OJ L 299/1; Commission Regulation (EC) No. 589/2008 of 23 June 2008 laying down detailed rules for implementing Council Regulation (EC) No. 1234/2007 as regards marketing standards for eggs [2008] OJ L 163/6.

<sup>60</sup> Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/R (15 September 2011); Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R, AB-2012-2 (16 May 2012).

<sup>61</sup> Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/R (15 September 2011) [7.100]–[7.145]; Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R, AB-2012-2 (16 May 2012) [190]–[199]. See also Meredith A Crowley and Robert Howse, ‘Tuna–Dolphin II: A Legal and Economic Analysis of the Appellate Body Report’ (2014) 13 *World Trade Review* 321, 323–5.

<sup>62</sup> Thomas G Kelch, ‘The WTO Tuna Labeling Decision and Animal Law’ (2012) 8 *Journal of Animal and Natural Resources Law* 121, 136–7.

<sup>63</sup> Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products [2009] OJ L 286/36; Commission Regulation (EU) No. 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation (EC) No. 1007/2009 of the European Parliament and

- (a) an exception for seal products resulting from traditional hunts conducted by Indigenous communities ('the IC Exception');<sup>64</sup>
- (b) an exception for seal products resulting 'from by-products of hunting that is regulated by national law and conducted for the sole purpose of the sustainable management of marine resources', if they are placed on the market on a non-profit basis ('the MRM Exception');<sup>65</sup> and
- (c) an exception for the import of seal products of an occasional nature and exclusively for the personal use of travellers or their families ('the Travellers Exception').<sup>66</sup>

Canada and Norway made a complaint to the WTO, alleging that the Seal Regime violated the GATT and the TBT.

In relation to the definition of 'technical regulation', the most contentious issue was whether the Seal Regime laid down product characteristics or their related PPMs, including applicable administrative provisions. The Panel was of the view that it did. The Panel found that the prohibition on seal-containing products laid down a product characteristic in the negative form, by requiring that all products not contain seal. Further, the exceptions set out the 'applicable administrative provisions, with which compliance is mandatory'.<sup>67</sup> The Panel allowed certain seal products to be placed on the EU market by defining the category of seal that could be used as an input for such products, based on 'objectively definable features' such as the identity of the hunter and the nature of the hunt.<sup>68</sup> The Panel ultimately found that the Seal Regime was a technical regulation.<sup>69</sup>

The AB reversed this finding. The AB ultimately characterised the Seal Regime as a measure which established the conditions for placing seal products on the EU market, based on criteria relating to the identity of the hunter or the type and purpose

---

*of the Council on trade in seal products* [2010] OJ L 216/1. See also Robert Howse and Joanna Langille, 'Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values' (2012) 37 *Yale Journal of International Law* 367, 390–4.

<sup>64</sup> *Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products* [2009] OJ L 286/36, art 3(1).

<sup>65</sup> *Ibid* art 3(2)(b).

<sup>66</sup> *Ibid* art 3(2)(a).

<sup>67</sup> *Agreement on Technical Barriers to Trade* annex 1.1.

<sup>68</sup> Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/R; WT/DS401/R (25 November 2013) [7.103]–[7.112].

<sup>69</sup> *Ibid* [7.125].

of the hunt from which the product is derived.<sup>70</sup> The AB stated that there was no basis for suggesting that the identity of the hunter, the type of hunt, or the purpose of the hunt could be viewed as product characteristics.<sup>71</sup> As such, the measure as a whole did not lay down product characteristics.<sup>72</sup>

The AB declined the complainant's request to complete the legal analysis by finding the Seal Regime constituted a technical regulation within the meaning of the TBT.<sup>73</sup> In relation to the definition of 'technical regulation', however, it indicated the phrase 'or their related processes and production methods' referred to a process and production method that is related to product characteristics.<sup>74</sup> In other words, the process and production method must have a sufficient nexus to the characteristics of the product.

Although it is unclear what exactly would constitute a sufficient nexus with the physical characteristics of a product, it seems measures that directly restrict trade on the basis of process and production methods, and which do not affect the physical characteristics of the final product (non-product related process and production methods, or NPR PPMs), may not be technical regulations.<sup>75</sup> Most animal welfare measures are based on NPR PPMs, and thus are unlikely to be captured by the TBT. For example, a law which prohibits the import of cosmetics containing certain identified chemicals is probably a technical regulation. However, a law that allows the import of certain cosmetics but prohibits others on the basis of animal-testing will probably not be deemed a technical regulation.

The GATT, on the other hand, has a relatively general application, and will apply to import or export restrictions based on animal welfare. The GATT applies concurrently to technical regulations, but technical regulations will first be examined under the more specialised TBT provisions.<sup>76</sup>

---

<sup>70</sup> Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/AB/R; WT/DS401/AB/R, AB-2014-1; AB-2014-2 (22 May 2014) [5.58].

<sup>71</sup> *Ibid* [5.45].

<sup>72</sup> *Ibid* [5.58].

<sup>73</sup> *Ibid* [5.61]–[5.70].

<sup>74</sup> *Ibid* [5.12].

<sup>75</sup> See also Gabrielle Marceau, 'A Comment on the Appellate Body Report in *EC — Seal Products* in the Context of the Trade and Environment Debate' (2014) 23 *Review of European Community & International Environmental Law* 318, 325–8.

<sup>76</sup> Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R, AB-2000-11 (12 March 2001) [80]; Appellate Body Report, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WTO Doc WT/DS257/AB/R, AB-2003-6 (19 January 2004) [134]; Panel Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/R (18 September 2000) [8.16]–[8.17]; Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/R (15 September 2011) [7.40]–[7.46]; Panel

Article 2.1 of the TBT is a non-discrimination obligation that is similar in scope to Articles I and III of the GATT. Unlike the GATT, the TBT does not contain an exceptions clause, but Article 2.2 of the TBT states that ‘technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.’ Article 2.2 contains a non-exhaustive list of legitimate objectives, including the protection of animal life or health. As such, Article 2.2 appears to contain steps one and two of the Article XX analysis considered above.

Both Articles 2.1 and 2.2 must be satisfied for a technical regulation to be TBT-compliant.<sup>77</sup> A literal reading of Article 2.1 would have the surprising consequence that all discriminatory measures would be non-compliant, even if they met the Article 2.2 requirements.<sup>78</sup> To avoid this outcome, the AB has held that a technical regulation that is de facto discriminatory may still comply with Article 2.1, if the discrimination stems exclusively from a ‘legitimate regulatory distinction’ in the sense of being ‘even-handed’.<sup>79</sup> This test appears to operate in a similar manner to the Article XX chapeau.<sup>80</sup>

As discussed above, animal welfare measures will usually be deemed to have violated Articles I, III, XIII and/or XI of the GATT, and those classed as technical regulations may also violate Article 2.1 of the TBT. For this reason, the remainder of this article will focus on the exceptions contained in the agreements for measures aimed at certain regulatory objectives. The relevant exceptions can be discussed under two headings: ‘public morals exception’ (Part IV) and ‘animal life or health exception’ (Part V).

---

Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/R; WT/DS401/R (25 November 2013) [7.64]–[7.69].

<sup>77</sup> Stefan Zleptnig, *Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS, and TBT Agreements*, Nijhoff International Trade Law Series (Martinus Nijhoff Publishers, 2010) 370–1.

<sup>78</sup> Gabrielle Marceau, ‘The New TBT Jurisprudence in US — Clove Cigarettes, WTO US — Tuna II, and US — COOL’ (2013) 8 *Asian Journal of WTO and International Health Law and Policy* 1, 4.

<sup>79</sup> Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc WT/DS406/AB/R, AB-2012-1 (4 April 2012) [173]–[182]; Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R, AB-2012-2 (16 May 2012) [213]–[216]; Appellate Body Report, *United States — Certain Country of Origin Labelling (COOL) Requirements*, WTO Doc WT/DS384/AB/R; WT/DS386/AB/R, AB-2012-3 (29 June 2012) [271]–[272]. See also Marceau, above n 78, 6–13; Joshua Meltzer and Amelia Porges, ‘Beyond Discrimination? The WTO Parses the TBT Agreement in US-Clove Cigarettes, US-Tuna II (Mexico) and US-COOL’ (2013) 14 *Melbourne Journal of International Law* 699, 715–17.

<sup>80</sup> Marceau, above n 78, 29.

## IV PUBLIC MORALS EXCEPTION

While ‘public morals’ is omitted from the non-exhaustive list of legitimate objectives in Article 2.2 TBT, the *EC — Seal Products* Panel confirmed the protection of public morals does fall within the scope of the section.<sup>81</sup> This finding was not addressed on appeal, but is supported by the AB’s statement that the balance between Members’ right to regulate and the desire to avoid unnecessary obstacles to trade is the same between the GATT and the TBT agreements.<sup>82</sup>

*EC — Seal Products* was the first case to consider the relationship between animal welfare and public morals. In its decision, the AB found the Seal Regime violated GATT Articles I and III through the operation of the exceptions,<sup>83</sup> but was provisionally justified under Article XX as a measure necessary to protect the morals of the EU population.<sup>84</sup> As discussed below, the AB found the operation of the exceptions violated the chapeau of Article XX,<sup>85</sup> meaning the Seal Regime was non-compliant with the GATT. Despite this negative finding, the AB’s decision was welcomed by animal protection groups, who regarded it as confirming that animal welfare is a legitimate reason to restrict trade.<sup>86</sup> Prior to *EC — Seal Products* the predominant opinion appeared to be animal welfare could fall within the scope of the public morals exception, but this proposition had never been tested.<sup>87</sup> *EC — Seal Products*

---

<sup>81</sup> Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/R; WT/DS401/R (25 November 2013) [7.418].

<sup>82</sup> Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc WT/DS406/AB/R, AB-2012-1 (4 April 2012) [96].

<sup>83</sup> Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/R; WT/DS401/R (25 November 2013) [7.588]–[7.609]; Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/AB/R; WT/DS401/AB/R, AB-2014-1; AB-2014-2 (22 May 2014) [5.78]–[5.130].

<sup>84</sup> Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/R; WT/DS401/R (25 November 2013) [7.625]–[7.639]; Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/AB/R; WT/DS401/AB/R, AB-2014-1; AB-2014-2 (22 May 2014) [5.133]–[5.290].

<sup>85</sup> Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/AB/R; WT/DS401/AB/R, AB-2014-1; AB-2014-2 (22 May 2014) [5.291]–[5.339].

<sup>86</sup> See, eg, Humane Society International, Canada, ‘Historic WTO Ruling Upholds EU Ban on Seal Product Trade’, 22 May 2014 <<http://www.hsi.org/world/canada/news/releases/2014/05/wto-seal-trade-ban-ruling-052214.html>>; Sonja Van Tichelen, International Fund for Animal Welfare, ‘What the WTO Victory Means for Animal Welfare Beyond the International Seal Trade’, 10 June 2014 <<http://www.ifaw.org/australia/news/what-wto-victory-means-animal-welfare-beyond-international-seal-trade>>.

<sup>87</sup> Steve Charnovitz, ‘The Moral Exception in Trade Policy’ (1997) 38 *Virginia Journal of International Law* 689, 716–17; Kate Cook and David Bowles, ‘Growing Pains: The Developing Relationship of Animal Welfare Standards and the World Trade Rules’

established this proposition as true, and also made several important statements about animal welfare and public morals.<sup>88</sup>

In order to advance the discussion of the public morals exception it is useful to discuss the tension between universalist and unilateralist perspectives.

### *A Universalists vs Unilateralists*

Identifying the scope of the public moral exception has always proved challenging. This is a corollary of the ambiguous nature of the phrase ‘public morals’, along with the limited case law considering the exception. Unsurprisingly, the interpretive challenge has led to substantial academic debate.<sup>89</sup> A major point of disagreement is whether morals must be internationally accepted to fall within the exception.

Universalists such as Charnovitz and Wu consider the relevant moral norm must be near-universally accepted for Article XX(a) to apply, at least in the case of measures that focus on conduct occurring outside the territory of the Member taking the measure.<sup>90</sup> Other commentators favour a theory of ‘evidentiary unilateralism’, where each country can unilaterally define its public morals, but must provide evidence that the moral norm is genuinely held.<sup>91</sup>

---

(2010) 19 *Review of European Community & International Environmental Law* 227, 232–4; Robert Galantucci, ‘Compassionate Consumerism Within the GATT Regime: Can Belgium’s Ban on Seal Product Imports be Justified Under Article XX?’ (2008) 39 *California Western International Law Journal* 281, 289–92.

<sup>88</sup> Cecilia J Flores Elizondo, ‘European Communities — Measures Prohibiting the Importation and Marketing of Seal Products’ (2014) 11 *Manchester Journal of International Economic Law* 312.

<sup>89</sup> See, eg, Charnovitz, above n 87; Christoph T Feddersen, ‘Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT’s Article XX(a) and “Conventional” Rules of Interpretation’ (1998) 7 *Minnesota Journal of Global Trade* 75; Miguel A Gonzalez, ‘Trade and Morality: Preserving “Public Morals” without Sacrificing the Global Economy’ (2006) 39 *Vanderbilt Journal of Transnational Law* 939; Jeremy C Marwell, ‘Trade and Morality: The WTO Public Morals Exception after *Gambling*’ (2006) 81 *New York University Law Review* 802; Nicolas F Diebold, ‘The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole’ (2007) 11 *Journal of International Economic Law* 43; Mark Wu, ‘Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine’ (2008) 33 *Yale Journal of International Law* 215; Tyler M Smith, ‘Much Needed Reform in the Realm of Public Morals: A Proposed Addition to the GATT Article XX(a) “Public Morals” Framework, Resulting from *China-Audiovisual*’ (2011) 19 *Cardozo Journal of International and Comparative Law* 733; Tamara S Nachmani, ‘To Each His Own: The Case for Unilateral Determination of Public Morality under Article XX(a) of the GATT’ (2013) 71 *University of Toronto Faculty of Law Review* 31.

<sup>90</sup> Charnovitz, above n 87; Wu, above n 89.

<sup>91</sup> Marwell, above n 89; Diebold, above n 89; Nachmani, above n 89.

Prior to *EC — Seal Products*, *US — Gambling* was the only case to discuss the requirements for establishing that a measure is designed to protect public morals, and it failed to give any clear guidance on this issue. The *US — Gambling* Panel defined public morals as ‘standards of right and wrong conduct maintained by or on behalf of a community or nation’,<sup>92</sup> and stated:

the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values ... Members should be given some scope to define and apply for themselves the concepts of ‘public morals’ and ‘public order’ in their respective territories, according to their own systems and scales of values.<sup>93</sup>

Some writers interpreted this statement as endorsing a unilateral approach to public morals,<sup>94</sup> but this interpretation was not borne out by the Panel’s approach to the measure at issue, which involved a prohibition concerning online gambling services. The Panel referred to international materials, including other countries’ legislation, to conclude that gambling regulation could fall within the public morals exception.<sup>95</sup> It considered domestic materials only to establish that the US measure aimed to address concerns relating to online gambling, such as money laundering and organised crime.<sup>96</sup> Marwell cites this approach as evidence the Panel took a *universalist* view of the exception.<sup>97</sup> The *EC — Seal Products* Panel did not provide express guidance on this issue, but took a similar approach to *US — Gambling* by examining both international and domestic materials. The Panel considered international materials in determining whether the general area, namely animal welfare, was a matter of international moral concern.<sup>98</sup> It considered domestic materials in

---

<sup>92</sup> Panel Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/R (10 November 2004) [6.465].

<sup>93</sup> *Ibid* [6.461]. See also Panel Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/R (12 August 2009) [7.759]; Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/R; WT/DS401/R (25 November 2013) [7.380]–[7.381]; Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/AB/R; WT/DS401/AB/R, AB-2014-1; AB-2014-2 (22 May 2014) [5.199]–[5.200].

<sup>94</sup> Nachmani, above n 89, 46.

<sup>95</sup> Panel Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/R (10 November 2004) [6.471]–[6.474].

<sup>96</sup> *Ibid* [6.481]–[6.486].

<sup>97</sup> Marwell, above n 89. See also Galantucci, above n 87, 288–9.

<sup>98</sup> Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/R; WT/DS401/R (25 November 2013) [7.406]–[7.409].

identifying whether the measure was directed at EU public moral concern about the particular welfare risk.<sup>99</sup>

### 1 *Universalism*

In the lead-up to the *EC — Seal Products* decision, some writers argued that animal welfare is a purely local issue, based on domestic values.<sup>100</sup> As the WTO seems to incorporate some ‘universalist’ elements into its public morals analysis, it is reasoned that this ‘local characterisation’ could prevent animal welfare measures from being justified on public morals grounds. However, the *EC — Seal Products* Panel rejected the ‘local’ view of animal welfare: it examined international materials, including the OIE guidelines on animal welfare, measures taken by other Members and the ‘philosophy of animal welfarism’,<sup>101</sup> and stated:

International doctrines and measures of a similar nature in other WTO Members, while not necessarily relevant to identifying the European Union’s chosen objective, illustrate that animal welfare is a matter of ethical responsibility for human beings in general.<sup>102</sup>

In coming to this conclusion the Panel recognised the growing international awareness of animal issues. As discussed above, almost all countries now have animal welfare laws, many of which refer to humankind’s moral obligations to animals.<sup>103</sup> Further, a proposal to introduce a Universal Declaration on Animal Welfare at the UN has the support of some 43 governments and the OIE.<sup>104</sup> This finding is encouraging, as it suggests the ‘universal’ element will always be present when Members seek to justify an animal welfare measure.<sup>105</sup> Despite this, Members may need to demonstrate that the measure is genuinely based on local moral concerns regarding animal welfare.

---

<sup>99</sup> Ibid [7.386]–[7.404].

<sup>100</sup> See, eg, Peter L Fitzgerald, ‘“Morality” May Not be Enough to Justify the EU Seal Products Ban: Animal Welfare Meets International Trade Law’ (2011) 14 *Journal of International Wildlife Law & Policy* 85; Nielsen, above n 22, 7; Laura Nielsen and Maria-Alejandra Calle, ‘Systemic Implications of the EU — Seal Products Case’ (2013) 8 *Asian Journal of WTO and International Health Law & Policy* 41, 44; cf Katie Sykes, ‘Sealing Animal Welfare Into the GATT Exceptions: The International Dimension of Animal Welfare in WTO Disputes’ (2014) 13 *World Trade Review* 471.

<sup>101</sup> Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/R; WT/DS401/R (25 November 2013) [7.406]–[7.409].

<sup>102</sup> Ibid [7.409].

<sup>103</sup> Bowman, Davies and Redgwell, above n 14, 674–6.

<sup>104</sup> Gibson, above n 15, 542–3; World Organization for Animal Health, Resolution No XIV, ‘Universal Declaration on Animal Welfare’, adopted 24 May 2007.

<sup>105</sup> Lurie and Kalinina, above n 42, 450–1.

## 2 *Unilateralism?*

Although the *US — Gambling* Panel concluded the measure in question was aimed at certain societal ills associated with online gambling,<sup>106</sup> it did not consider whether US residents had moral concerns about these issues. The *EC — Seal Products* Panel, however, specifically considered whether the EU public had moral concerns about seal welfare.<sup>107</sup>

Supporters of ‘evidentiary unilateralism’ have argued that Members which base a trade measure on a unilaterally defined moral norm should provide evidence their population genuinely holds the relevant value.<sup>108</sup> The approach of the Panel suggests that, while animal welfare in general is of international moral concern, Members may take an approach of ‘evidentiary unilateralism’ to particular welfare risks. This approach implicitly recognises that moral attitudes towards particular species of animals are not universally held, but are influenced by cultural factors.<sup>109</sup> Although our determinations about the importance of particular species may not be rational or ethically defensible,<sup>110</sup> they are based on genuine moral beliefs. On this issue, the AB rejected Canada’s argument that it was necessary to determine the precise standard of animal welfare in the EU across different species and assess whether the seal hunt breached this standard, stating that the EU did not need to demonstrate a risk to public morals as such.<sup>111</sup> Both the Panel and the AB thus recognised the right of Members to take action based on their domestic animal welfare beliefs.<sup>112</sup>

It is unclear whether the Panel intended to impose a general ‘moral concern’ test for animal welfare measures, particularly given that the EU’s formulation of the

---

<sup>106</sup> Panel Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/R (10 November 2004) [6.479]–[6.487].

<sup>107</sup> Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/R; WT/DS401/R (25 November 2013) [7.383]–[7.404].

<sup>108</sup> Marwell, above n 89, 824–6; Nachmani, above n 89, 57–8; Diebold, above n 89, 61–2. See also Tamara Perišin, ‘Is the EU Seal Products Regulation a Sealed Deal? EU and WTO Challenges’ (2013) 62 *International & Comparative Law Quarterly* 373, 394–5.

<sup>109</sup> J A Serpell, ‘Factors Influencing Human Attitudes to Animals and Their Welfare’ (2004) 13 *Animal Welfare* 145.

<sup>110</sup> See generally Melanie Joy, *Why We Love Dogs, Eat Pigs, and Wear Cows: An Introduction to Carnism* (Red Wheel Weiser, 2011).

<sup>111</sup> Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/AB/R; WT/DS401/AB/R, AB-2014-1; AB-2014-2 (22 May 2014) [5.197]–[5.201].

<sup>112</sup> See also Robert Howse, Joanna Langille and Katie Sykes, ‘Pluralism in Practice: Moral Legislation and the Law of the WTO after *Seal Products*’ (2015) 48 *George Washington International Law Review* 81, 115.

Seal Regime's objective essentially forced the Panel to consider this issue.<sup>113</sup> Nevertheless, animal welfare measures are different from the measure considered in *US — Gambling*: rather than being paternalistic moral regulations, animal welfare measures function as an expression of the moral views of the Member taking the measure.<sup>114</sup> The expressive function of animal welfare measures means it is reasonable for Panels to consider whether the Member taking the measure genuinely holds the relevant moral concern.

The *EC — Seal Products* Panel deferred to EU legislators in determining the level of moral concern amongst the EU population about the seal hunt, primarily relying on the text and legislative history of the Seal Regime.<sup>115</sup> It did consider public survey results submitted by the EU, but asserted they were only informative 'to a limited extent'.<sup>116</sup> This was an appropriate approach as it is not within the WTO's remit to assess the legitimacy of policy decisions at the domestic level. As such, to bring a measure within the scope of the public morals exception, Members may need to demonstrate, primarily through the text and legislative history of the measure, that it is based on genuine moral concern.<sup>117</sup>

In the case of the Australian measures discussed above in Part II, this should not be difficult. In relation to a potential ban on the import of animal-tested cosmetics, the Government's consultation materials recognise that many Australians have 'strong view[s]' about this issue.<sup>118</sup> The Explanatory Memorandum to the End Cruel Cosmetics Bill 2014 (Cth), introduced by the Australian Greens, noted that in 2013, '81 per cent of Australians believed that Australia should follow the EU in banning the sale of cosmetics tested on animals'.

Similarly, restrictions on live export from Australia have tended to be introduced after evidence of animal cruelty emerges, as a response to public outcry. For example, the suspension of the live export trade to Indonesia, and the introduction of ESCAS, followed the release of footage of the cruel slaughter of Australian cattle

---

<sup>113</sup> Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/R; WT/DS401/R (25 November 2013) [7.410].

<sup>114</sup> Howse and Langille, above n 63.

<sup>115</sup> Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/R; WT/DS401/R (25 November 2013) [7.383]–[7.404].

<sup>116</sup> *Ibid* [7.398].

<sup>117</sup> Juan He, 'China-Canada Seal Import Deal After the WTO EU-Seal Products Case: At the Crossroad' (2015) 10 *Asian Journal of WTO and International Health Law & Policy* 223, 244.

<sup>118</sup> Australian Government Department of Health, 'Ban on the Testing of Cosmetics on Animals — Background Paper' (November 2016) 3.

and the resulting public outrage.<sup>119</sup> Opinion polls have demonstrated support for a live export ban: for example, in 2013, 67 per cent of Australians polled said they were more likely to vote for a party or candidate who promised to ban live export.<sup>120</sup> Further, those who oppose live export frequently state that the trade is ‘immoral’.<sup>121</sup>

There thus appears to be significant public support for measures restricting live export and the sale of cosmetics tested on animals, apparently on moral grounds. If this concern is reflected in the text and supporting materials of any legislation, the measures are likely to meet any requirement to demonstrate local moral concern.

In summary, *EC — Seal Products* appropriately integrated universal and unilateral approaches to moral regulation in a way that recognised the rights of Members to legislate for their particular moral and cultural values surrounding the treatment of animals. As such, animal advocates were right to react positively to this decision. As discussed below in Part V, the recent treatment of the animal life or health exception has been similarly positive for animal welfare.

## V ANIMAL LIFE OR HEALTH EXCEPTIONS

The protection of animal life or health is expressly recognised as a legitimate objective in both Article XX of the GATT and Article 2.2 of the TBT. Although the Article XX exception might seem ideally suited to animal protection measures, the interpretation of animal life or health has not always been favourable to animal welfare: some writers have relied on the drafting history of Article XX(b) to suggest it was mainly intended to cover sanitary measures,<sup>122</sup> while others have assumed

---

<sup>119</sup> See, eg, Phillip Coorey and Tom Allard, ‘Live Cattle Ban to Stay’, *Sydney Morning Herald* (online), 8 June 2011 <<http://www.smh.com.au/environment/animals/live-cattle-ban-to-stay-20110607-1fr8b.html>>; Nick Perry, ‘Labor MPs Pushing to Ban Live Exports’, *news.com.au* (online), 7 November 2012 <<http://www.news.com.au/national/breaking-news/labor-mps-pushing-for-live-exports-ban/news-story/b7b83b280840e9a8fc162911a13efdae>>.

<sup>120</sup> Sue Neales, ‘Banning Exports a Vote Winner’, *The Australian* (online), 14 August 2013 <<http://www.theaustralian.com.au/national-affairs/election-2013/banning-exports-a-vote-winner/news-story/2b98faf7975b4abe5b02971af477254c>>.

<sup>121</sup> See, eg, Glenda Kwek, ‘Live Animal Export Outrage: “Horrendous Slaughter” of Cattle’, *The Sydney Morning Herald* (online), 18 August 2011 <<http://www.smh.com.au/environment/animals/live-animal-export-outrage-horrendous-slaughter-of-cattle-20110818-liz2i.html>>; James Nason, ‘Billboard Blitz Brands Live Exports “A Crime”’, *Beef Central*, 2 February 2015 <<http://www.beefcentral.com/live-export/billboard-blitz-brands-live-exports-a-crime/>>.

<sup>122</sup> Charnovitz, above n 21, 44–5.

Article XX(b) is an environmental exception.<sup>123</sup> However, as will be seen below, a much more positive approach was taken to the exception in *US — Tuna II*.<sup>124</sup>

### *A Animal Life*

Article XX(b) was first invoked in an attempt to protect animal life in *US — Tuna (Mexico)*. In this case, the Panel appeared to accept that Article XX(b) could apply to measures taken to protect the life of dolphins, although the US' argument failed for other reasons.<sup>125</sup> In the next tuna-related case, *US — Tuna (EEC)*, the parties agreed that a measure taken to protect dolphins could fall within Article XX(b), although the US again failed to justify its measure.<sup>126</sup> This interpretation of Article XX(b) was confirmed in *US — Tuna II*, where the Panel noted:

In this respect, a measure that aims at the protection of animal life or health need not, in our view, be directed exclusively to endangered or depleted species or populations, to be legitimate. Article 2.2 refers to 'animal life or health' in general terms, and does not require that such protection be tied to a broader conservation objective. We therefore read these terms as allowing Members to pursue policies that aim at also protecting individual animals or species whose sustainability as a group is not threatened.<sup>127</sup>

*US — Tuna II* thus confirmed that protecting the life or health of individual animals is a legitimate objective, whether or not there is an environmental dimension to the measure.<sup>128</sup> Although this is largely consistent with statements in *US — Tuna (Mexico)* and *US — Tuna (EEC)*, the confirmation of the reach of the exception is welcome.

---

<sup>123</sup> See, eg, T Alana Deere, 'Balancing Free Trade and the Environment: A Proposed Interpretation of GATT Article XX's Preamble' (1998) 10 *International Legal Perspectives* 1, 24; Bruce Neuling, 'The *Shrimp-Turtle* Case: Implications for Article XX of GATT and the Trade and Environment Debate' (1999) 22 *Loyola of Los Angeles International and Comparative Law Review* 1, 13.

<sup>124</sup> Despite its name, *US — Tuna II* was actually the *third* instalment of the WTO dispute over US dolphin protection policies. The two prior GATT Panel decisions — *US — Tuna (Mexico)* and *US — Tuna (EEC)* — took place in the 1990s and found that US embargoes against tuna exported from countries without appropriate dolphin-safe tuna fishing policies were not GATT-compliant. GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS21/R (3 September 1991, unadopted); GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994, unadopted).

<sup>125</sup> GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS21/R (3 September 1991, unadopted) [5.24]–[5.29].

<sup>126</sup> *Ibid* [5.30]–[5.39].

<sup>127</sup> Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/R, (15 September 2011) [7.437].

<sup>128</sup> Kelch, above n 62, 131–2; Lurie and Kalinina, above n 42, 441.

The Panel in *US — Tuna II* also rejected Mexico's argument that the objective of the measure was illegitimate because it did not concern itself with the protection of other marine species of animals, noting that Members have a right to determine the legitimate objectives they wish to pursue.<sup>129</sup> As such, much like *EC — Seal Products*, *US — Tuna II* affirmed the rights of Members to impose different levels of welfare protection for different species of animals.<sup>130</sup>

### B Animal Health

A more contentious issue is whether animal welfare measures that do not prevent animals from being killed, but rather aim to reduce animal suffering, fall within the animal life or health policy area. Examples include measures intended to prevent excessive suffering during slaughter and measures preventing inhumane treatment of animals during the production process.<sup>131</sup> Prior to *US — Tuna II*, opinions were divided on this issue. For example, Howse and Langille stated that '[t]he meaning of animal health includes mental or psychological health, which is obviously impaired by intense suffering and trauma in the manner of killing.'<sup>132</sup> Others disagreed: Charnovitz argued that Article XX(b) could not justify the EU's leg-hold trap measure because the issue is not one of animal health.<sup>133</sup>

In *US — Tuna II* the legitimate objectives of the US included 'contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins'.<sup>134</sup> The Panel found that 'adverse' effects on dolphins included certain 'unobserved' consequences of setting on dolphins, including acute stress reactions.<sup>135</sup> The Panel characterised these reactions as a health issue.<sup>136</sup> This finding suggests psychological impacts such

---

<sup>129</sup> Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/R (15 September 2011) [7.441]–[7.442].

<sup>130</sup> Meltzer and Porges, above n 79, 719.

<sup>131</sup> Feddersen, above n 89, 102–3; Peter V Michaud, 'Caught in a Trap: The European Union Leghold Trap Debate' (1997) 6 *Minnesota Journal of Global Trade* 355, 372–3; Edward M Thomas, 'Playing Chicken at the WTO: Defending an Animal Welfare-Based Trade Restriction under GATT's Moral Exception' (2007) 34 *Boston College Environmental Affairs Law Review* 605.

<sup>132</sup> Howse and Langille, above n 63, 419. See also Peterson, above n 41, 282–3; Shapiro, above n 38, 43; Black, above n 27, 91.

<sup>133</sup> Charnovitz, above n 87, 737. See also Feddersen, above n 89, 102–3; Van den Bossche, Schrijver and Faber, above n 23, 98–9.

<sup>134</sup> Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/R (15 September 2011) [7.401].

<sup>135</sup> *Ibid* [7.483]–[7.505]. Note the concept of 'setting on' dolphins was described above in Part III(A).

<sup>136</sup> *Ibid* [7.499].

as stress may be a component of ‘animal health’, at least where there is also a risk to life or health as such.<sup>137</sup>

This analysis suggests that both of the Australian animal welfare measures discussed in Part II could be considered to be aimed at the protection of animal life or health. It would be difficult to dispute that animal testing of cosmetics involves risks to the life or health of animals. It may be more difficult to argue that restrictions on live export are aimed at protecting animal life. If, as suggested by some animal welfare groups, the live export trade is replaced by a chilled meat trade, the animals would be slaughtered anyway. However, under the analysis in *US — Tuna II*, the psychological impact of cruel handling and slaughter practices would likely be considered a risk to health.

In summary, *US — Tuna II* recognised that the protection of animals is important, even in the absence of environmental concerns. The decision also suggests animal welfare can be an aspect of animal health, although it remains unclear whether an animal welfare concern would be sufficient to invoke the exception in the absence of an actual health risk. As such, this case reflects the WTO’s growing understanding of the importance of animal welfare.

### *C Non-Discrimination and Necessity*

Having discussed the policy content of the public morals and animal life or health exceptions, it is now necessary to consider the limits on WTO Members’ rights to impose animal welfare measures. We first briefly consider the limits arising from the text of the WTO agreements, before moving on to discuss those imposed by the AB in environmental cases.

#### *1 Non-Discrimination*

The test contained in the GATT Article XX chapeau, and the even-handedness requirement in Article 2.1 of the TBT, are both broadly identifiable as non-discrimination requirements. The Article XX chapeau requires, relevantly, that a 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.’ The AB read the even-handedness requirement into Article 2.1 on the basis of the sixth preambular recital of the TBT, which is similar in wording to the Article XX chapeau, and an arbitrarily or unjustifiably discriminatory measure will violate Article 2.1.<sup>138</sup>

---

<sup>137</sup> Sykes, above n 100, 492.

<sup>138</sup> Appellate Body Report, *United States — Certain Country of Origin Labelling (COOL) Requirements*, WTO Doc WT/DS384/AB/R; WT/DS386/AB/R, AB-2012-3 (29 June 2012) [271]; Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R, AB-2012-2 (16 May 2012) [213].

The current jurisprudence suggests the non-discrimination analysis under these provisions relates primarily, although not solely, to the cause or rationale of the discrimination.<sup>139</sup> As such, discrimination is ‘arbitrary or unjustifiable’ when it is not rationally connected with the objective of the measure.<sup>140</sup> The measures in both *US — Tuna II* and *EC — Seal Products* failed this analysis, as the relevant measures were not applied even-handedly across all areas of concern.

The Seal Regime allowed market access to most seal products from Greenland through the operation of the IC Exception, but most seal products from Canada and Norway came from commercial hunts and were prohibited.<sup>141</sup> The AB found that the animal welfare concerns were the same across IC and commercial hunts, and as such, the discrimination against Canada and Norway was not rationally connected to the objective of the measure.<sup>142</sup>

Similarly, the even-handedness analysis in *US — Tuna II* focussed on the distinction between tuna caught in the ETP by setting on dolphins, which was not eligible for the dolphin-safe label, and tuna caught outside the ETP other than by setting on dolphins, which was always eligible for the label even if dolphin mortality occurred.<sup>143</sup> The AB found that the decision to fully address the adverse impacts of setting on dolphins in the ETP, but not to address mortality from fishing methods other than setting on dolphins outside the ETP at all, lacked even-handedness.<sup>144</sup>

This jurisprudence suggests that animal welfare measures may not be WTO-compliant unless Members address all aspects of a particular animal welfare concern evenly. Governments would be wise to keep this in mind in designing animal

---

<sup>139</sup> Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/AB/R, AB-2007-4 (3 December 2007) [225]; cf Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/AB/R; WT/DS401/AB/R, AB-2014-1; AB-2014-2 (22 May 2014) [5.321]; Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products — Recourse to article 21.5 of the DSU by Mexico*, WTO Doc WT/DS381/AB/RW, AB-2015-6 (20 November 2015) [7.93]–[7.95].

<sup>140</sup> Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/AB/R, AB-2007-4 (3 December 2007) [227].

<sup>141</sup> Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/AB/R; WT/DS401/AB/R, AB-2014-1; AB-2014-2 (22 May 2014) [5.316].

<sup>142</sup> *Ibid* [5.338]. The Panel also noted that the moral concerns of the EU public related to all types of seal hunts: Panel Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/R; WT/DS401/R (25 November 2013) [7.445].

<sup>143</sup> Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R, AB-2012-2 (16 May 2012) [284]. See Part III(A) above for a description of the concept of ‘setting on’ dolphins.

<sup>144</sup> *Ibid* [297].

welfare measures. In particular, in the Australian context, it is noted that Indonesia's complaint about the 2011 suspension of the live cattle trade was that similar animal welfare conditions existed in other nations that imported live animals from Australia. If Australia chooses to address the animal welfare risks of live export on an ad hoc basis, by banning or restricting live export to certain countries without imposing similar restrictions on other countries where animal welfare concerns exist, the measure may be vulnerable to a WTO challenge.

## 2 Necessity

GATT Articles XX(a) and XX(b) and TBT Article 2.2 require that measures aimed at the protection of public morals or animal life or health be 'necessary' to achieve their objective. The necessity test involves 'a process of weighing and balancing a series of factors', including the importance of the interest or value protected by the measure, the contribution of the measure to its objective and the trade-restrictiveness of the measure.<sup>145</sup> A comparison between the measure and possible alternatives is then undertaken, and if a less trade-restrictive alternative measure is reasonably available, the measure is not 'necessary'.<sup>146</sup>

The AB has recognised that Members have the right to determine their desired level of protection of legitimate objectives, meaning that an alternative measure is not 'reasonably available' if it does not achieve the Member's desired level of protection.<sup>147</sup> Despite the inclusion of the importance of the interest or value protected by the measure in the necessity analysis, the necessity test does not require Members to balance the achievement of animal welfare objectives against trade costs.<sup>148</sup> As such, the necessity test does not place a substantive limit on Members' rights to impose animal welfare measures, only limiting the form of the measure chosen.

<sup>145</sup> Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc WT/DS161/AB/R; WT/DS169/AB/R, AB-2000-8 (11 December 2000) [164].

<sup>146</sup> Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R, AB-2005-1 (7 April 2005) [307]; Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc WT/DS161/AB/R; WT/DS169/AB/R, AB-2000-8 (11 December 2000) [166].

<sup>147</sup> Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R, AB-2000-11 (12 March 2001) [174]; Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R, AB-2012-2 (16 May 2012) [316]; Appellate Body Report, *United States — Certain Country of Origin Labelling (COOL) Requirements*, WTO Doc WT/DS384/AB/R; WT/DS386/AB/R, AB-2012-3 (29 June 2012) [373].

<sup>148</sup> Donald H Regan, 'The Meaning of "Necessary" in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing' (2007) 6 *World Trade Review* 347; but see Gisele Kapterian, 'A Critique of the WTO Jurisprudence on "Necessity"' (2010) 59 *International & Comparative Law Quarterly* 89; Gabrielle Marceau and Joel P. Trachtman, 'The Technical Barriers to Trade Agreement, the Sanitary

The AB's findings in both *EC — Seal Products* and *US — Tuna II* prompted the relevant Members to increase their animal welfare protections to bring their measures into compliance. The US now requires certification that no dolphin has been killed or injured for all tuna to be eligible for the dolphin-safe label,<sup>149</sup> while the EU bases the IC Exception on the satisfaction of animal welfare conditions.<sup>150</sup> As such, much like the necessity test, the non-discrimination requirements in Article XX of the GATT and Article 2.1 of the TBT should not be overly problematic for animal welfare measures, and even have the potential to improve animal welfare.

Despite the above analysis, the AB has not always read the WTO Agreements in a way that is favourable to animal welfare. Principles concerning extraterritorial and coercive trade measures, developed in the context of environmental measures, may prove problematic for animal welfare measures. These principles are now discussed further below in Part VI.

## VI EXTRATERRITORIALITY AND COERCION

The WTO has traditionally been uncomfortable with unilateral trade measures aimed at environmental practices occurring in foreign countries, apparently believing that such measures are an invasion of the sovereign right of each country to determine its own environmental policies.<sup>151</sup> This discomfort has manifested in statements suggesting measures that protect animals outside the jurisdiction of the Member

---

and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods' (2002) 36 *Journal of World Trade* 811, 826-8, 831-2, 851-3.

<sup>149</sup> Although note that, in compliance proceedings, the AB found that aspects of the amended measure lacked even-handedness and thus violated Article 2.1 TBT. The AB focussed on provisions that allowed the US to require certification of dolphin-safety by an independent observer in some circumstances, and found that these provisions did not provide for the conditions of access to the dolphin-safe label to be reinforced by observer certification in all circumstances of comparably high risk: Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products — Recourse to article 21.5 of the DSU by Mexico*, WTO Doc WT/DS381/AB/RW, AB-2015-6 (20 November 2015) [7.266]. Compliance proceedings are ongoing.

<sup>150</sup> *Regulation (EU) 2015/1775 of the European Parliament and of the Council of 6 October 2015 amending Regulation (EC) No 1007/2009 on trade in seal products and repealing Commission Regulation (EU) No 737/2010* [2015] OJ L 262/1; *Commission Implementing Regulation (EU) 2015/1850 of 13 October 2015 Laying Down Detailed Rules for the Implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on Trade in Seal Products* [2015] OJ L 271/1.

<sup>151</sup> Andre Nollkaemper, 'Rethinking States' Rights to Promote Extra-Territorial Environmental Values' in Erik Denters and Paul de Waart Friedl Weiss (ed), *International Economic Law with a Human Face* (Kluwer Law International, 1998) 175, 176-7; Robert Howse and Donald Regan, 'The Product/Process Distinction — An Illusory Basis for Disciplining "Unilateralism" in Trade Policy' (2000) 11 *European Journal*

taking the measure or which aim to influence other countries' policies are impermissible. The decisions in *US — Tuna II* and *EC — Seal Products* did not consider these statements, or considered them only to a limited extent, so the effect of this jurisprudence upon animal welfare is still largely unknown. However, it has the *potential* to be highly damaging to animal protection efforts.

The AB has emphasised that the primary focus of the WTO dispute settlement system's interpretative approach should be the ordinary meaning of the text of the relevant provision.<sup>152</sup> This part suggests that the extraterritoriality and anti-coercion principles are inconsistent with a reading of the GATT and the TBT that is faithful to the ordinary meaning of the text. As such, the AB should clarify that these principles are no longer part of WTO law.

In early decisions concerning environmental measures panels tended to focus on the extraterritoriality issue, although in subsequent decisions the focus changed to the supposed coercive effect of such measures on other countries' policies. The jurisprudence in relation to each of these issues is analysed below.

### *A Extraterritoriality*

#### *1 Extraterritoriality and Article XX(b)*

The extraterritoriality principle arose from *US — Tuna (Mexico)*, where the Panel stated that measures taken to protect animals located outside the jurisdiction of the Member taking the measure could not be justified under Article XX(b).<sup>153</sup> The Panel considered the US tuna embargo to be impermissibly extraterritorial.<sup>154</sup> Most animal welfare measures aim to protect animals located outside the territory of the Member taking the measure, meaning that, under the *US — Tuna (Mexico)* principle, they would not be WTO-compliant.<sup>155</sup>

On its face, the text of Article XX(b) contains no jurisdictional limitation,<sup>156</sup> a point acknowledged by the respective Panels in both *US — Tuna (Mexico)* and *US — Tuna*

*of International Law* 249, 275–6; Axel Bree, 'Article XX GATT — Quo Vadis? The Environmental Exception after the Shrimp/Turtle Appellate Body Report' (1998) 17 *Dickinson Journal of International Law* 99, 122.

<sup>152</sup> Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998) [114]. See also Howard F Chang, 'Environmental Trade Measures, the Shrimp-Turtle Rulings, and the Ordinary Meaning of the Text of the GATT' (2005) 8 *Chapman Law Review* 25.

<sup>153</sup> GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS21/R (3 September 1991, unadopted) [5.24]–[5.27], [5.30]–[5.32].

<sup>154</sup> *Ibid* [5.24]–[5.27], [5.30]–[5.32].

<sup>155</sup> Stevenson, above n 19, 126.

<sup>156</sup> Catherine Jean Archibald, 'Forbidden by the WTO? Discrimination against a Product When Its Creation Causes Harm to the Environment or Animal Welfare' (2008) 48 *Natural Resources Journal* 15, 32; Chang, above n 152, 36; Andre Nollkaemper, 'The

(*EEC*).<sup>157</sup> The true basis for the extraterritoriality principle appears to be the *US — Tuna (Mexico)* Panel's concern that extraterritorial trade measures could interfere with the 'multilateral framework for trade'.<sup>158</sup> However, the Panels' policy concerns about the functioning of the trading system should not be allowed to override the ordinary words of the agreements, which do not support any territorial limitation on the protection of animal welfare.

Two subsequent cases have taken a more lenient view of extraterritorial measures. In *US — Tuna (EEC)*, the Panel found that measures designed to protect animals located outside the jurisdiction of the Member taking the measure could, in principle, be justified under Article XX(b).<sup>159</sup> The Panel further stated: 'the policy to protect the life and health of dolphins in the eastern tropical Pacific Ocean, which the United States pursued within its jurisdiction over its nationals and vessels, fell within the range of policies covered by Article XX(b)'.<sup>160</sup>

It is unclear what the Panel meant by this statement. Some writers have interpreted *US — Tuna (EEC)* as rejecting any jurisdictional limitation on Article XX(b).<sup>161</sup> This interpretation begs the question of why the Panel mentioned the US's jurisdiction to regulate her nationals and vessels.<sup>162</sup> Other writers have interpreted the *US — Tuna (EEC)* Panel as stating that measures can only be justified under Article XX(b) if the Member has legislative jurisdiction to regulate the subject matter of the measure under the rules of international law.<sup>163</sup>

---

Legality of Moral Crusades Disguised in Trade Laws: An Analysis of the EC "Ban" on Furs from Animals Taken by Leghold Traps' (1996) 8 *Journal of Environmental Law* 237, 248.

<sup>157</sup> GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS21/R (3 September 1991, unadopted) [5.25]; GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994, unadopted) [5.31].

<sup>158</sup> GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS21/R (3 September 1991, unadopted) [5.27].

<sup>159</sup> GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994, unadopted) [5.30]–[5.33].

<sup>160</sup> *Ibid* [5.33] (emphasis added).

<sup>161</sup> See, eg, Steve Charnovitz, 'Dolphins and Tuna: An Analysis of the Second GATT Panel Report' (1994) 24 *Environmental Law Reporter: News & Analysis* 10567, 10574.

<sup>162</sup> Charnovitz proposes, as an alternative interpretation, that the Panel was stating that the US could regulate the harvesting of tuna by its own nationals and vessels, although this interpretation is 'manifestly absurd' because Article XX is not needed to justify regulation of a State's own nationals: Charnovitz, above n 161, 10579–80.

<sup>163</sup> Iona Cheyne, 'Environmental Unilateralism and the WTO/GATT System' (1994) 24 *Georgia Journal of International and Comparative Law* 433, 452–59; Thomas J Schoenbaum, 'International Trade and Protection of the Environment: The Continuing Search for Reconciliation' (1997) 91 *American Journal of International Law* 268, 279–80. See also Lorand Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights' (2002) 36 *Journal of World Trade* 353; Pietro Manzini, 'Environmental

States may exercise jurisdiction over events occurring within their own territory, and may exercise extra-territorial jurisdiction in certain circumstances where there is a sufficient connection to the regulating state,<sup>164</sup> including, as suggested by the Panel in *US — Tuna (EEC)*, where the subjects of the regulation are the country's nationals or vessels.<sup>165</sup> With the exception of universal jurisdiction for certain serious crimes,<sup>166</sup> states may not exercise jurisdiction over events that have no connection to their territory or nationals. Thus, states cannot regulate the domestic animal welfare practices of foreign states, and the suggestion that the reach of Article XX(b) is coextensive with the scope of Members' legislative jurisdiction would be problematic for many animal welfare measures.

The view that the scope of Article XX(b) is limited by the law of jurisdiction is questionable because trade measures do not directly regulate the conduct of foreign actors. Although trade measures may affect other countries, they only directly regulate importation or exportation processes occurring on the territory of the Member taking the measure.<sup>167</sup> As such, trade measures arguably do not involve extraterritorial regulation. Most of the authors advocating the jurisdictional view of Article XX(b) do not address this argument.<sup>168</sup> Bartels is one exception.<sup>169</sup> He argues that trade measures involve extraterritorial regulation if they are defined by something located or occurring abroad, and result in a denial of opportunities ordinarily available.<sup>170</sup> Bartels further contends the GATT confers a 'right to trade' that is impaired if an extra-jurisdictional trade measure is taken;<sup>171</sup> but this argument is circular because it assumes that the rights granted by the GATT are impaired by taking an extra-jurisdictional measure, when that is what the author is seeking to show.<sup>172</sup> As such, no convincing argument has been provided that trade measures involve an exercise of legislative jurisdiction.

---

Exceptions of Art XX GATT 1994 Revisited in the Light of the Rules of Interpretation of General International Law' in Paolo Mengozzi (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System* (A Giuffrè, 1999) 838–44.

<sup>164</sup> Malcolm N Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 652–96; Laurens Ankersmit, Jessica Lawrence and Gareth Davies, 'Diverging EU and WTO Perspectives on Extraterritorial Process Regulation' (2012) 21 *Minnesota Journal of International Law* (online) 14, 24.

<sup>165</sup> GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994, unadopted) [5.33]; Shaw, above n 164, 659–64.

<sup>166</sup> Shaw, above n 164, 668–73.

<sup>167</sup> Belina Anderson, 'Unilateral Trade Measures and Environmental Protection Policy' (1993) 66 *Temple Law Review* 751, 755; Nollkaemper, above n 151, 188–189; Vranes, above n 21, 166.

<sup>168</sup> Cheyne, above n 163; Schoenbaum, above n 163; Manzini, above n 163.

<sup>169</sup> Bartels, above n 163, 381–3.

<sup>170</sup> *Ibid* 381–3.

<sup>171</sup> *Ibid* 382–3.

<sup>172</sup> It is also questionable whether GATT, which is essentially a negative agreement, confers a right to trade: see Howse and Regan, above n 151, 276–7.

Moreover, the jurisdictional view of Article XX(b) is not in accordance with the approach of the Panel in *US — Tuna (EEC)*. The Panel appeared to accept that the US measure could fall within the scope of Article XX(b), even though it was concerned with conduct beyond the reach of the US's legislative jurisdiction, namely the actions of Mexican fishermen.<sup>173</sup> Cheyne suggests the Panel extended the application of Article XX(b) to measures protecting animals that could theoretically be protected by regulation of the Member's nationals or vessels.<sup>174</sup> If this interpretation is accepted, animal welfare measures with a global or environmental aspect may be justifiable under Article XX(b); yet most animal welfare measures do not fall within this category because they are concerned with domestic practices such as farming and slaughter of livestock.<sup>175</sup>

In *US — Shrimp I*, the AB declined to 'pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g)',<sup>176</sup> noting that there was 'a sufficient nexus' between the turtles and the US because the relevant turtle species all migrated through US waters.<sup>177</sup> However, the AB did not state such a nexus was required, leaving the application of the extraterritoriality principle to measures protecting animals residing inside the territory of another WTO Member undetermined.<sup>178</sup>

## 2 *Extraterritoriality and Article XX(a)*

It remains unclear whether public morals measures will ever be relevantly extraterritorial. The difficulty in characterising such measures as extraterritorial arises from the fact that public morals measures, and particularly animal welfare measures, often have a dual focus. They are concerned with conduct occurring abroad, but they are implemented as a response to moral concern arising within the population of the Member taking the measure.

The extraterritorial reach of Article XX(a) has been extensively discussed in the literature, and several writers have drawn a distinction between outwardly-directed measures, which are 'measures used to protect the morals of foreigners residing

---

<sup>173</sup> GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994, unadopted) [5.33].

<sup>174</sup> Cheyne, above n 163, 457.

<sup>175</sup> See Cook and Bowles, above n 87, 236; Van den Bossche, Schrijver and Faber, above n 23, 96.

<sup>176</sup> Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998) [133].

<sup>177</sup> *Ibid.*

<sup>178</sup> Van den Bossche, Schrijver and Faber, above n 23, 94; but see Asif H Qureshi, 'Extra-territorial Shrimps, NGOs and the WTO Appellate Body' (1999) 48 *International & Comparative Law Quarterly* 199, 204–5; Nancy L Perkins, 'World Trade Organization: United States-Import Prohibition of Certain Shrimp and Shrimp Products' (1999) 38 *International Legal Materials* 118, 119; Cf Chang, above n 152, 36.

outside one's own country',<sup>179</sup> and inwardly-directed measures, which are used to safeguard the morals of residents of one's own country.<sup>180</sup> It has been suggested that outwardly-directed measures may not be justified under Article XX(a), or will at least require greater scrutiny.<sup>181</sup> It is unclear which category animal welfare measures would fall within: it is possible that such measures would be classified as inwardly-directed because they are conditioned on moral concern within the country taking the measure.<sup>182</sup> However, the inwardly-directed/outwardly-directed dichotomy is not based on AB jurisprudence, and some writers have rejected it as contrary to the structure of Article XX.<sup>183</sup>

There is no jurisprudence on the question of the territorial reach of Article XX(a). Unhelpfully, the AB in *EC — Seal Products* declined to determine the issue. Instead, the AB stated:

Finally, we note that, in *US — Shrimp*, the Appellate Body stated that it would not 'pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation'. The Appellate Body explained that, in the specific circumstances of that case, there was 'a sufficient nexus between the migratory and endangered marine populations involved and the United States for the purposes of Article XX(g)'. As set out in the preamble of the Basic Regulation, the EU Seal Regime is designed to address seal hunting activities occurring 'within and outside the Community' and the seal welfare concerns of 'citizens and consumers' in EU member States. The participants did not address this issue in their submissions on appeal. Accordingly, while recognizing the systemic importance of the question of whether there is an implied jurisdictional limitation in Article XX(a), and, if so, the nature or extent of that limitation, we have decided in this case not to examine this question further.<sup>184</sup>

Howse, Langille and Sykes have proposed a number of possible interpretations of the above statement.<sup>185</sup> The first is that the parties implicitly agreed that extra-territoriality was not an issue in *EC — Seal Products*, and the AB simply chose not

---

<sup>179</sup> Charnovitz, above n 87, 695.

<sup>180</sup> Ibid.

<sup>181</sup> Ibid 731; Wu, above n 89, 245–8; Feddersen, above n 89, 117.

<sup>182</sup> Cook and Bowles, above n 87, 234; *Contra* Anne-Marie de Brouwer, 'GATT Article XX's environmental exceptions explored: Is there room for national policies? Balancing rights and obligations of WTO members under the WTO regime' in Anton Vedder (ed), *The WTO and Concerns Regarding Animals and Nature* (Wolf Legal Publishers, 2003) 25.

<sup>183</sup> Howse and Langille, above n 63, 414.

<sup>184</sup> Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc WT/DS400/AB/R; WT/DS401/AB/R, AB-2014-1; AB-2014-2 (22 May 2014) [5.173] (citations omitted).

<sup>185</sup> Howse, Langille and Sykes, above n 112, 124–6.

to deal with the issue.<sup>186</sup> This is probably not the correct interpretation of the AB's decision. Howse, Langille and Sykes go on to say that a 'careful reading' of the above statement suggests that, had the extraterritoriality issue been raised, the AB would have been satisfied that the Seal Regime had a sufficient nexus with the EU.<sup>187</sup> After setting out the relevant statement from *US — Shrimp I*, the AB noted that the Seal Regime was designed to address seal hunting activities both within and outside the EU, and to address the moral concerns of EU citizens and consumers. The AB appears to be implying that, due to one or both of these factors, the Seal Regime had a sufficient nexus to the EU such that it was not impermissibly extraterritorial.

Taking the first of these factors, the AB appears to be suggesting a trade measure based on public morals will not be impermissibly extraterritorial if it is at least partly aimed at addressing conduct occurring within the borders of the country taking the measure. This interpretation is problematic for several reasons. As Howse, Langille and Sykes state, it is unclear why it is relevant whether or not the activity that is the focus of the measure also occurs within the borders of the Member taking the measure. It is quite possible for citizens of a Member nation to have genuine moral concerns about practices that only occur abroad.<sup>188</sup>

It is also unclear how the approach of the AB would be applied in practice, particularly in the context of the animal welfare measures discussed above in Parts II and III. Any ban on the import of cosmetics tested on animals would almost certainly be applied in conjunction with a ban on animal testing of cosmetics and cosmetic ingredients in Australia; that certainly appears to be the intention of the government,<sup>189</sup> and it was the approach taken in each of the Private Members' Bills introduced to the Australian Parliament dealing with this issue.<sup>190</sup> On the face of it, then, it appears any such measure would address conduct occurring both within and without Australia. However, it seems that cosmetic animal testing is not currently practiced in Australia.<sup>191</sup> Can a measure still be said to regulate activities occurring within Australia, if the activities do not, in practice, occur at the time the measure is put in place?

The situation is even murkier in relation to any restrictions on live export. It may be the ESCAS requirements meet this test. A major objective of ESCAS is to ensure

---

<sup>186</sup> Ibid 124.

<sup>187</sup> Ibid.

<sup>188</sup> Ibid 124–5.

<sup>189</sup> Australian Government Department of Health, 'Cosmetic Testing of Animals Ban November 2016 Consultations' <[http://www.health.gov.au/internet/main/publishing.nsf/Content/FC9633C2D3C5A4F5CA25805D000B3610/\\$File/November%20workshop%20consultation%20summary.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/FC9633C2D3C5A4F5CA25805D000B3610/$File/November%20workshop%20consultation%20summary.pdf)>.

<sup>190</sup> Ethical Cosmetics Bill 2016 (Cth); End Cruel Cosmetics Bill 2014 (Cth).

<sup>191</sup> Australian Government Department of Health, 'Cosmetic Testing of Animals Ban November 2016 Consultations' <[http://www.health.gov.au/internet/main/publishing.nsf/Content/FC9633C2D3C5A4F5CA25805D000B3610/\\$File/November%20workshop%20consultation%20summary.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/FC9633C2D3C5A4F5CA25805D000B3610/$File/November%20workshop%20consultation%20summary.pdf)>.

that handling and slaughter of Australian animals meets the OIE animal welfare standards.<sup>192</sup> Australia also regulates the handling and slaughter of animals within Australia, and in fact, the requirements that apply within Australia are more stringent. What, though, of a ban or suspension of live export, either across the board or in relation to specific countries? It is difficult to see how such a measure could be characterised as addressing activities occurring both within and outside Australia.

Turning to the second factor mentioned by the AB, Howse, Langille and Sykes suggest that, taken in combination with the first factor, the AB was indicating a measure would not be justified under Article XX(a) if it occurred both within and outside the territory of the regulating Member, but the measure only addressed moral concern about the activity taking place abroad. However, as they note, such a measure would not be justified anyway because it would not meet the requirements of the chapeau.<sup>193</sup>

There is another interpretation of the AB's statement: perhaps the AB was saying the Seal Regime was not relevantly extraterritorial because it was designed to address the moral concerns of EU citizens and consumers about seal hunting, whether the seal hunting occurred within the EU or abroad. This is the preferable interpretation of Article XX(a). As we have discussed above, the AB is likely to require, as a condition for justification under Article XX(a), that Members implementing animal welfare measures demonstrate the measure is based upon genuine moral concern within their population. Whether the relevant conduct occurs at home or abroad is not the major issue in the Article XX(a) analysis; it is the moral response of the Member's citizens, which necessarily occurs within the borders of the regulating Member. The characterisation of public morals measures as inwardly-directed or outwardly-directed is thus an artificial distinction: in the relevant sense, all public morals measures are inwardly-directed.

If this preferred interpretation is adopted, the animal welfare measures discussed above in Parts II and III would not be relevantly extraterritorial. Indeed, as discussed throughout this article, it should be relatively easy to demonstrate that these measures are based on Australians' genuine moral concern about the animal welfare outcomes associated with the live export trade and the testing of cosmetics and cosmetic ingredients on animals. In the context of the Seal Regime, Howse, Langille and Sykes make the additional point that the moral concern flowed from EU citizens and consumers purchasing or using seal products and thus being complicit in commercialised seal cruelty.<sup>194</sup> This dynamic is also likely to be present in relation to any Australian animal welfare measures. For example, one argument often raised

---

<sup>192</sup> Australian Government, 'Exporter Supply Chain Assurance System Report' (January 2015), 2.

<sup>193</sup> Howse, Langille and Sykes, above n 112, 125–6.

<sup>194</sup> *Ibid* 126.

against live export is that, by continuing to export live animals to destinations where it is known the animals are cruelly treated, Australia is complicit in that cruelty.<sup>195</sup>

In the wake of the *EC — Seal Products* decision, there are reasons to be hopeful that, even if the AB were to continue to apply a territorial limitation to Article XX(b), such a limitation would not apply to Article XX(a). However, this issue remains unclear and clarification by the AB would be welcomed.

Although the reach of the extraterritoriality principle remains murky, it maintains the potential to be a significant barrier to the imposition of animal welfare measures. We have seen the rationale for the principle does not stand up to scrutiny, and on a correct interpretation of the GATT and the TBT there should be no territorial limit on the protection of animal welfare.

### B Coercion

Subsequent to *US — Tuna (Mexico)*, Panels tended to focus more on the ‘coercive’ nature of extraterritorial measures, rather than extraterritoriality per se. ‘Coercive’ measures may be broadly defined as measures that seek to force other countries to change their environmental policies;<sup>196</sup> however, as discussed below, it is difficult to identify the precise features of a measure that lead the WTO to conclude it is unacceptably coercive.

The coercion issue was first raised in *US — Tuna (EEC)*. The report states:

The Panel concluded that measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be considered ‘necessary’ for the protection of animal life or health in the sense of Article XX(b).<sup>197</sup>

The Panel found the US tuna embargo was not justified under Article XX(b) because it was taken to force other countries to change their dolphin protection policies, and the embargo would be ineffective without such change.<sup>198</sup> In *US — Tuna II Mexico* attempted to make a similar argument, stating the objective of the US measure was

---

<sup>195</sup> See, eg, Mirko Bagaric, ‘Politicians Complicit in Animal Cruelty’, *Courier Mail* (online), 6 June 2011 <<http://www.couriermail.com.au/news/government-complicit-in-animal-cruelty/news-story/895b53f4aeedda7da1c011804e42eb9f?sv=8ddadfc02d9341c9c5aa92ee3ede5a33>>.

<sup>196</sup> Sanford Gaines, ‘The WTO’s Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures’ (2001) 22 *University of Pennsylvania Journal of International Economic Law* 739, 796.

<sup>197</sup> GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994, unadopted) [5.39].

<sup>198</sup> *Ibid* [5.37]–[5.39]. It is unclear why the Panel concluded that the measure would be ineffective without change in other countries’ policies, as it should have had the effect of decreasing the demand for dolphin-unsafe tuna: see Charnovitz, above n 161, 10575;

to ‘coerce’ another Member into changing its practices.<sup>199</sup> The AB rejected this argument since the objective of the measure, which was to protect dolphins, was not coercive.<sup>200</sup> *US — Tuna II* suggests coerciveness must be found in the design of the measure, although the AB did not consider this point in detail.

In *US — Tuna (EEC)*, the Panel’s view of the US measure as unacceptably coercive also appeared to be linked to the design of the measure. The measure conditioned imports on the adoption of certain policies by the exporting country (a ‘government policy standard’). Immediately before finding that the measure had a coercive goal, the Panel noted the measure had the effect of prohibiting imports of dolphin-safe tuna if the producer’s country had not adopted appropriate dolphin-safe policies.<sup>201</sup> Logically, a trade measure can only be regarded as an attempt to force other countries to change their policies if it operates on the basis of those policies. As such, some writers have suggested only government policy standards can be considered coercive.<sup>202</sup> The *US — Shrimp I* Panel took this argument to its logical conclusion, stating that government policy standards would never be justifiable.<sup>203</sup> But the AB rejected this view, stating that requiring the adoption of certain policies by exporting countries did not render a measure incapable of justification under Article XX.<sup>204</sup> In *US — Shrimp II*, the compliance proceedings relating to the US’s implementation of the *US — Shrimp I* ruling, the AB characterised this statement as ‘central’ to the *US — Shrimp I* ruling.<sup>205</sup>

In *US — Shrimp I*, the AB did refer to the nature of the measure as a government policy standard in finding it was unacceptably coercive.<sup>206</sup> The AB also linked the coercive nature of the measure to its inflexibility, stating that the measure required all

---

William J III Snape and Naomi B Lefkowitz, ‘Searching for GATT’s Environmental *Miranda*: Are “Process Standards” Getting “Due Process”?’ (1994) 27 *Cornell International Law Journal* 777, 788.

<sup>199</sup> Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R, AB-2012-2 (16 May 2012) [335].

<sup>200</sup> *Ibid* [337]–[339].

<sup>201</sup> GATT Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc DS29/R (16 June 1994, unadopted) [5.24].

<sup>202</sup> See Michaud, above n 131, 373; Howse and Regan, above n 151, 277; Charnovitz, above n 41, 68–9.

<sup>203</sup> Panel Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/R (15 May 1998) [7.45]–[7.46].

<sup>204</sup> Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998) [121].

<sup>205</sup> Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products — Recourse to Article 21.5 of the DSU by Malaysia*, WTO Doc WT/DS58/AB/RW, AB-2001-4 (22 October 2001) [138]. See also Chang, above n 152, 38.

<sup>206</sup> Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998) [165].

other exporting Members to adopt essentially the same policy as the United States.<sup>207</sup> The decision suggests that requiring exporting countries to adopt a particular *policy* is unacceptably coercive, but requiring adherence to a particular *standard* is acceptable.<sup>208</sup> In practice, this may not be an easy distinction to draw. Comparatively minor amendments to the US certification guidelines convinced the AB in *US — Shrimp II* that the measure was acceptable, suggesting the line between ‘flexible’ and ‘inflexible’ is a fine one.<sup>209</sup>

It seems the design of a measure, as a government policy standard, is relevant to the coercion analysis, but not determinative.<sup>210</sup> In addition, *US — Tuna II* suggests measures may be considered coercive even when they are not designed as government policy standards. In this case, the AB suggested the measure’s potential coercive effect on the Mexican fleet was relevant to the analysis, although it did state that this effect could not, of itself, render the measure non-compliant.<sup>211</sup>

From a *realpolitik* perspective, extraterritorial regulations will only be experienced as ‘coercive’ where the country imposing the measure is a large economic force.<sup>212</sup> In all cases where the ‘coercion’ issue was considered, the relevant measure was imposed by the US. It is possible the AB was concerned about the US using her substantial market power to force other Members to change their policies. While the argument against ‘eco-imperialism’ does have some force,<sup>213</sup> the anti-coercion principle is nevertheless unjustifiable because it cannot be located in the words of the GATT and the TBT.

In *US — Tuna II* the AB stated that coercion is relevant to the initial discrimination analysis under Article 2.1 of the TBT, suggesting any pressure exerted on Mexico to modify its practices could result in an ‘adverse impact on competitive opportunities for imported products vis-a-vis like domestic products’.<sup>214</sup> This suggestion rests on a logical fallacy. The exertion of pressure on the Mexican fleet does not result in an alteration of market conditions; rather, the Mexican fleet felt pressure to change

---

<sup>207</sup> Ibid 161.

<sup>208</sup> Archibald, above n 156, 41–2.

<sup>209</sup> Gaines, above n 196, 794.

<sup>210</sup> Chang, above n 152, 40–4; Cf Neuling, above n 123, 40.

<sup>211</sup> Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R, AB-2012-2 (16 May 2012) [226]. See also Simon Lester, ‘Anti-Coercion in Tuna’ on *International Economic Law and Policy Blog* (29 May 2012), <<http://worldtradelaw.typepad.com/ielpblog/2012/05/anti-coercion-jurisprudence.html>>.

<sup>212</sup> Ankersmit, Lawrence and Davies, above n 164, 24–5.

<sup>213</sup> See generally Charnovitz, above n 41, 62–3.

<sup>214</sup> Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R, AB-2012-2 (16 May 2012) [226]; Cf Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/R (15 September 2011) [7.369]–[7.373].

its practices *because* the US measure modified the conditions of competition to the detriment of Mexican tuna. Coercion is a result of discrimination, not a cause of it.

In *US — Shrimp*, the AB applied the anti-coercion principle as a component of the chapeau's unjustifiable discrimination analysis.<sup>215</sup> This approach exhibits the same misunderstanding of the relationship between discrimination and coercion as displayed by the AB in *US — Tuna II*. Further, because coercion is a result of discrimination, not its cause, if discrimination is rationally related to a measure's objective, then any difference in coercive effect should be too. On this basis, any discrimination in a measure's coercive effect should not lack even-handedness or result in arbitrary or unjustifiable discrimination. In particular, the AB in *US — Shrimp* failed to explain how 'coercion' fits into the chapeau analysis.<sup>216</sup> Rather, the AB conceived of its task as determining a changeable 'line of equilibrium' between the right of Members to invoke Article XX and the rights of other Members under the other 'substantive' provisions of the GATT.<sup>217</sup> In doing so, the AB reasoned that the US had overstepped the line of equilibrium by making unjustifiable use of her trade power.<sup>218</sup>

By treating the coercive effect of the measure as an independent criterion bearing on its justification under GATT Article XX, the AB in *US — Shrimp* was not faithful to its task of interpreting the ordinary words of the agreement. The AB's attempts to treat coercion as an aspect of unjustifiable discrimination are not grounded in the text of the agreements and should therefore be rejected.

Despite positive signs in recent cases, the 'extraterritoriality' and 'coercion' principles may yet prove to be a barrier to the promotion of animal welfare through trade. The above analysis has sought to demonstrate these principles arise from an interpretation of the WTO Agreements that is not faithful to the ordinary meaning of the text. Rather, they appear to be based on policy decisions about the balance of rights within the multilateral trading system. This article argues that clarification of the reach of these principles is necessary in order to provide certainty for countries wishing to impose animal welfare measures.

## VII CONCLUSION

The animal protection movement has been described as 'the next great social justice movement'.<sup>219</sup> Despite the ancient history of animal welfare concerns, lately there

<sup>215</sup> Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998) [161]–[165].

<sup>216</sup> Gaines, above n 196, 796-8; Cf Chang, above n 152, 30.

<sup>217</sup> Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998) [159].

<sup>218</sup> Gaines, above n 196, 796–7.

<sup>219</sup> David Weisbrot, 'Comment' (2007) 91 *Australian Law Reform Commission Reform Journal* 2, 2.

has indeed been increasing international interest in animal welfare issues. Domestically, governments use controls on the use of animals during the production of certain products as a major component of animal welfare regulation. In recent decades, states have considered extending this form of regulation into the international arena by imposing trade measures, but have in some instances been dissuaded by fears these measures may not be WTO-compliant. Indeed, the WTO has the potential not only to prevent Members from imposing trade measures based on animal welfare: it may also interfere with the ability of Members to impose domestic standards. If domestic welfare safeguards are not accompanied by trade restrictions, governments are likely to face fierce lobbying from local producers concerned that their products will be undercut by cheaper, low-welfare imports.<sup>220</sup>

Despite the WTO's traditional hostility to animal welfare, this article has argued that in the recent decisions in *US — Tuna II* and *EC — Seal Products*, the WTO accepted animal welfare as a legitimate regulatory objective. In doing so, the WTO recognised that animal welfare is a matter of international moral concern, and interpreted the phrases animal life and animal health to accord with our contemporary understanding of the importance of the wellbeing of individual animals. Although the measures at issue in *US — Tuna II* and *EC — Seal Products* were ultimately non WTO-compliant, this prompted the relevant Members to strengthen their animal welfare protections. As such, for perhaps the first time in its history, the WTO has had a positive influence on international animal welfare.

Nevertheless, there are limits on the ability of Members to take animal welfare measures, and this article has suggested that WTO jurisprudence on extraterritoriality and coercion could be particularly problematic for animal welfare measures. This jurisprudence reflects the WTO's uneasiness about unilateral action on environmental concerns, and represents a reading of the WTO agreements that is based on policy considerations rather than the text of the agreements. As such, this article has argued the AB should clarify that these principles no longer form part of WTO law, allowing Members to use trade leverage to improve animal welfare.

The WTO's recognition of animal welfare as a legitimate policy goal is a step forward for the international animal protection movement. Yet there is no room for complacency as there are still barriers in WTO law that must be removed to ensure Members can continue improving animal welfare through trade.

---

<sup>220</sup> Stuart Harrop and David Bowles, 'Wildlife Management, the Multilateral Trade Regime, Morals and the Welfare of Animals' (1998) 1 *Journal of International Wildlife Law & Policy* 64, 71–2; Thomas, above n 131, 608–9.

