

# ARTICLES

## THE WORLD TRADE ORGANISATION RULES: A LEGAL ANALYSIS OF THEIR ADVERSE IMPACT ON ANIMAL WELFARE

By  
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*The free trade rules of the World Trade Organisation (WTO) have already had a highly detrimental impact on measures designed to protect animals. U.S. laws to safeguard dolphins and initially their attempt to protect sea turtles were declared inconsistent with the WTO rules. The European Union has abandoned its ban on the import of furs from countries that allow use of leghold traps and its ban on the sale of cosmetics tested on animals, because of fears they could not survive WTO challenges. This article examines the WTO rules and how they have been interpreted by case law. It then identifies the ways in which the WTO rules need to be reformed if they are not to continue to have a deleterious effect on animal welfare. Finally, the article argues that WTO members could properly interpret the existing rules less restrictively in such a way as to permit measures designed to improve animal welfare.\*\**

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\*\* *Animal Law* has retained the author's original voice to the fullest extent possible, including British spellings.

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## I. INTRODUCTION

The 1994 Marrakesh Agreement Establishing the World Trade Organisation (the WTO Agreement),<sup>1</sup> which came into force on 1 January 1995, did three main things. First, it re-enacted the 1947 General Agreement on Tariffs and Trade as the General Agreement on Tariffs and Trade 1994 (GATT 1994).<sup>2</sup> Second, it established the World Trade Organisation (WTO).<sup>3</sup> Article III of the WTO Agreement provides that the WTO's role is, *inter alia*, to: 1) facilitate the implementation, administration and operation, and further the objectives of the WTO Agreement, GATT 1994, and the various "side agreements" annexed to the WTO Agreement; 2) administer the compulsory dispute settlement system; and 3) provide the forum for negotiations among its members concerning their multilateral trade relations.<sup>4</sup> Third, the WTO Agreement enacted a range of side agreements, the role of which is to provide a detailed application of GATT rules in certain specialised fields.<sup>5</sup> The main side agreements that may affect animal issues are the Agreement on Technical Barriers to Trade,<sup>6</sup> the Agreement on Agriculture,<sup>7</sup> and the Agreement on the Application of Sanitary and Phytosanitary Measures.<sup>8</sup>

GATT rules have already had an immensely damaging impact on animal protection laws. U.S. laws designed to reduce the number of dolphins killed during tuna fishing and initially its laws aimed at preventing sea turtles from being killed in the course of shrimp trawling both have been ruled to be inconsistent with GATT rules.<sup>9</sup> Moreover, two key animal protection measures enacted by the European Union (E.U.) in the early 1990s—the prohibition on the marketing of

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<sup>1</sup> Marrakesh Agreement Establishing the World Trade Organisation, Apr. 15, 1994 [hereinafter WTO Agreement], *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* 6–18 (GATT Secretariat 1994).

<sup>2</sup> General Agreement on Tariffs and Trade, Apr. 15, 1994, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* 21–23 (GATT Secretariat 1994) [hereinafter GATT 1994].

<sup>3</sup> WTO Agreement, *supra* n. 1, art. I.

<sup>4</sup> *Id.* art. III.

<sup>5</sup> *Id.* art. II.

<sup>6</sup> Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* 138–162 (GATT Secretariat 1994) [hereinafter WTO Agreement on Technical Barriers to Trade].

<sup>7</sup> Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* 39–68 (GATT Secretariat 1994).

<sup>8</sup> Agreement on the Application of Sanitary and Phytosanitary Measures, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* 69–84 (GATT Secretariat 1994).

<sup>9</sup> Discussed *infra* Sections II, III.

cosmetics tested on animals and the ban on the import of furs from countries who allow the use of leghold traps—have been severely diluted by the E.U., because it feared that they could be successfully challenged under GATT.<sup>10</sup>

In addition, GATT rules are making it increasingly difficult for the E.U. (or any other WTO member) to introduce strong new animal welfare measures. It is true that the E.U. can prohibit a cruel rearing system within its own territory. However, because under GATT rules the E.U. cannot prohibit the importation of meat derived from animals reared in non-E.U. countries in the same type of cruel system,<sup>11</sup> GATT rules act as a powerful disincentive to the E.U. to prohibit the system within its own territory.

## II. THE MAIN GATT PROVISIONS

The problems arising for animal welfare from GATT rules primarily stem from GATT Articles I, III, and XI, together with the narrow interpretations that have been placed on the General Exceptions in Article XX.

GATT Article XI prohibits countries from imposing bans or restrictions on imports or exports.<sup>12</sup> It provides that “[n]o prohibitions or restrictions . . . shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.”<sup>13</sup> It is worth noting that Article XI prohibits not only import bans but also bans on exports.<sup>14</sup> The E.U. exports approximately 300,000 live cattle each year to the Middle East and North Africa.<sup>15</sup> The length of the journeys, together with the brutal unloading and slaughter methods awaiting the animals at journey’s end, make this an extremely cruel trade.<sup>16</sup> Yet, even if the E.U. wished to ban this trade—which it does not—Article XI would prevent it from imposing restrictions.

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<sup>10</sup> Discussed *infra* Section II.

<sup>11</sup> See General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XI, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* 485–558 (GATT Secretariat 1994) [hereinafter GATT 1947]. The official text of GATT 1947 with amendments through July 1986 is available at <[http://www.wto.org/english/docs\\_e/legal\\_e/gatt47.pdf](http://www.wto.org/english/docs_e/legal_e/gatt47.pdf)>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* art. XI:1.

<sup>14</sup> *Id.*

<sup>15</sup> Draft Opinion of the Committee on the Environment, Public Health and Consumer Policy for the Committee on Agriculture and Rural Development on the Report from the Commission to the Council and the European Parliament on the Experience Acquired by Member States Since the Implementation of Council Directive 95/29/EC Amending Directive 91/628/EEC Concerning the Protection of Animals During Transport, *Eur. Parl. Doc.* (COM 2000) 809–C5-189/2001–2001/2085(COS)) 5 (2001). This opinion is also available at <<http://www.europarl.eu.int/meetdocs/committees/envi/20010827/445058en.pdf>> (accessed Mar. 3, 2002).

<sup>16</sup> *Id.*

Articles I and III are designed to eliminate discrimination in international trade.

Article I is headed "General Most-Favoured-Nation Treatment" and in effect provides that each nation must, as regards imports and exports, treat all other contracting parties as favourably as the "most-favoured-nation."<sup>17</sup> Countries are prohibited from discriminating between different foreign member nations. Article I provides that, in connection with importation and exportation,

any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.<sup>18</sup>

In short, all countries must be treated alike. The contentious question of what are "like products" shall be discussed later.

Whereas Article I prevents a country from discriminating between different nations, Article III prohibits discrimination within a country as between the products of domestic producers and imported products.<sup>19</sup> Article III:1 provides that countries must not "afford protection to domestic production."<sup>20</sup>

Article III:4 provides that imported products must be treated no less favourably than "like products" of domestic origin. Specifically, it provides:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.<sup>21</sup>

At first sight, Articles I and III seem to pose no significant threat to animal welfare measures. They do not appear to prevent a country from prohibiting the sale of battery eggs,<sup>22</sup> both domestically produced and imported, while continuing to permit the sale of free-range eggs.<sup>23</sup> It seems entirely reasonable for a country to say that it wishes to prohibit the sale of *all* battery eggs, whether domestic or imported, but that it will give just as favourable treatment to imported free-range eggs as to those produced domestically. Such a policy would not discriminate between "like" domestic and imported products. Domestic

<sup>17</sup> GATT 1947, *supra* n. 11, art. I.

<sup>18</sup> *Id.* art. I:1.

<sup>19</sup> *Id.* art. III.

<sup>20</sup> *Id.* art. III:1.

<sup>21</sup> *Id.* art. III:4.

<sup>22</sup> The term "battery eggs" refers here to those eggs produced by hens which are kept in cages. Usually these cages are so small that the hens cannot even stretch their wings. Moreover, in the cage it is impossible for hens to carry out most of their natural behaviours such as laying their eggs in a nest, pecking and scratching at the ground, dust-bathing, and perching.

<sup>23</sup> The term "free-range eggs" refers here to those eggs produced by hens who are able to spend their daylight hours outdoors.

and imported battery eggs would be treated in the same way: the sale of both would be prohibited. Domestic and imported free-range eggs would be treated alike: the sale of both would be allowed.

These arrangements appear to be consistent with GATT Articles I and III as most people would not judge battery eggs to be “like” free-range eggs—the former come from an extremely cruel system, the latter from a much more humane farming method. Similarly, most people would assume that tuna caught in a way which causes the death of dolphins, and “dolphin-friendly” tuna, are not “like” products and thus the latter can be treated more favourably than the former.

Unfortunately, GATT jurisprudence has decided otherwise. GATT dispute panels have held that in determining whether two products are “like” one another, one may only consider the end product and not *the way in which* it is produced.<sup>24</sup> In other words, what in GATT jurisprudence are referred to as process and production methods (PPMs), may not be taken into account in deciding the issue of “likeness.”

In referring to PPMs in this article, the author is always referring to PPMs which do *not* affect the physical characteristics of the final product—and are, therefore, properly termed “non product-related PPMs.” Depending on the circumstances of the case, a WTO panel may be willing, in assessing “likeness,” to take account of PPMs which *do* affect the physical characteristics of the final product. However, this article is not concerned with such product-related PPMs, as the way in which animals are treated does not generally affect the physical characteristics of the resultant meat, eggs, or cosmetics, to name a few examples. It is non product-related PPMs that are germane in considering the impact of GATT rules on animal welfare.

The approach of GATT jurisprudence to non product-related PPMs is a major problem as nearly all attempts to improve animal welfare are concerned with *the way in which* the animals are treated, not with the end product of meat, eggs, or fur. Nonetheless, under GATT, an egg is an egg whether it is free-range or battery, and tuna is tuna, whether or not the catching of it involved the killing of dolphins.

The effect of the interpretation of “like” products on animal laws first came to light in the early 1990s in the two *Tuna-Dolphin* cases—one in 1991,<sup>25</sup> the other in 1994.<sup>26</sup> Before discussing the legal aspects of the cases it is important to understand the background on which they were decided. In many parts of the world tuna are fished with purse seine nets.<sup>27</sup> Having located a school of tuna, a fishing vessel sends a small boat carrying one end of the purse seine net around the

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<sup>24</sup> Panel Report on *United States-Restrictions on Imports of Tuna*, Sept. 3, 1991, GATT B.I.S.D. (39th Supp.) at 155 (1993) [hereinafter *Tuna-Dolphin I*]. The panel's report was not adopted by the GATT Council.

<sup>25</sup> *Id.*

<sup>26</sup> Panel Report on *United States-Restrictions on Imports of Tuna*, June 16, 1994, DS29/R (available in 1994 WL 907620) [hereinafter *Tuna-Dolphin II*]. The panel's report was not adopted by the GATT Council.

<sup>27</sup> *Id.* ¶ 2.1.

school of tuna. The other end of the net remains attached to the fishing vessel. Once the boat has encircled the school of tuna and returned its end of the net to the fishing vessel, the vessel then "purses" the net by winching in cables at the bottom and top of the net, thereby gathering its entire contents.<sup>28</sup>

In the eastern tropical Pacific Ocean, tuna tend to swim beneath dolphins.<sup>29</sup> Fishermen often use the dolphins as a way of locating the tuna.<sup>30</sup> They cast their purse seine nets around both schools, causing many dolphins to become trapped and die in the nets.<sup>31</sup>

In an attempt to protect dolphins, section 101(a)(2) of the U.S. Marine Mammal Protection Act of 1972 (MMPA) regulates the catching of tuna by U.S. fishermen and others operating within the jurisdiction of the U.S.<sup>32</sup> The MMPA requires that such fishermen reduce the incidental killing of dolphins in the course of commercial fishing to levels approaching zero.<sup>33</sup>

The MMPA also requires the Secretary of the Treasury to prohibit the import of any commercial fish or fish products caught by a method that results in the incidental killing or serious injury of marine mammals in excess of U.S. standards.<sup>34</sup> In the case of yellowfin tuna caught in purse seine nets in the Eastern Tropical Pacific (ETP), the harvesting nation must meet certain specific conditions.<sup>35</sup> First, it must have adopted a regulatory regime governing the incidental taking of marine mammals that is comparable to that of the MMPA.<sup>36</sup> Second, the tuna fleet of the harvesting nation must have a rate of incidental taking of marine mammals comparable to that of U.S. vessels.<sup>37</sup>

In 1990 and 1991, pursuant to the above provisions of the MMPA, the U.S. prohibited the import of yellowfin tuna and tuna products from Mexico that were caught with purse seine nets in the ETP.<sup>38</sup> In response, Mexico requested that a GATT panel be established to examine its contention that this import prohibition was contrary to Articles XI and III.<sup>39</sup> This case has become known as *Tuna-Dolphin I*.<sup>40</sup>

Mexico argued that the prohibition on the import of tuna by the U.S. was inconsistent with Article XI's direct ban on import restrictions.<sup>41</sup> The U.S. argued that its measures were internal regulations that should be examined under Article III (which requires imports to

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.* ¶ 2.2.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> 16 U.S.C. § 1371(a)(2) (2000).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *See id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Tuna-Dolphin I*, *supra* n. 24, ¶ 2.7.

<sup>39</sup> *Id.* ¶ 3.1(a), (b).

<sup>40</sup> *Tuna-Dolphin I*, *supra* n. 24.

<sup>41</sup> *Id.* ¶ 3.10.

be treated no less favourably than like products of domestic origin).<sup>42</sup> The advantage of having measures examined under Article III rather than Article XI is that if a country can show that the imported product is not “like” the domestic product, Article III is not contravened.

GATT Annex I provides a Note to Article III which states that certain measures, although applied to imports at the border, fall to be examined as internal regulations under Article III. The Note to Article III states that:

any law, regulation or requirement of the kind referred to in paragraph 1 [i.e., affecting, *inter alia*, the internal sale of products] which applies to an imported product and to the like domestic product and is . . . enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as . . . a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.<sup>43</sup>

The Panel in *Tuna-Dolphin I* concluded that the Note to Article III “covers only those measures that are applied to the *product as such*.”<sup>44</sup> The Panel noted that the tuna regulations designed to reduce the incidental killing of dolphins could not possibly affect tuna *as a product*.<sup>45</sup> Therefore, the Panel found that the U.S. import ban was not covered by the Note to Article III and did not constitute an internal regulation falling to be considered under Article III.<sup>46</sup> Instead, the Panel examined the U.S. import ban under Article XI, and found it to be inconsistent with Article XI.<sup>47</sup>

However—crucially for GATT jurisprudence—the Panel stated that even if Article III had applied, the U.S. import ban would have been inconsistent with it.<sup>48</sup> The Panel in effect stated that, in assessing whether two kinds of tuna are “like” products for the purposes of Article III, one may only look at tuna *as a product* and not at the fishing method.

From this perspective, tuna caught in a way that leads to the death of many dolphins and tuna caught in a way designed to reduce dolphin mortality are “like” products. Accordingly, imported “dolphin-deadly” tuna must be treated no less favourably than domestic “dolphin-friendly” tuna. As far as GATT rules are concerned, they are both just tuna and no distinction can be made between them. Specifically, the Panel stated:

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<sup>42</sup> *Id.*

<sup>43</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, annex I, ad art. III, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* 485, 544–45, GATT Secretariat (1994) [hereinafter GATT 1947, annex I, ad art. III].

<sup>44</sup> *Tuna-Dolphin I*, *supra* n. 24, ¶ 5.14 (emphasis added).

<sup>45</sup> *Id.* ¶ ¶ 5.14–5.15. Underscoring this is the GATT philosophy that one should only look at the product, not at the way in which it is produced.

<sup>46</sup> *Id.* ¶ 5.14.

<sup>47</sup> *Id.* ¶ 5.18.

<sup>48</sup> *Id.* ¶ 5.15.

Article III:4 calls for a comparison of the treatment of imported tuna *as a product* with that of domestic tuna *as a product*. Regulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product. Article III:4 therefore obliges the United States to accord treatment to Mexican tuna no less favourable than that accorded to United States tuna, whether or not the incidental taking of dolphins by Mexican vessels corresponds to that of United States vessels.<sup>49</sup>

A similar approach was taken in the *Tuna-Dolphin II* case.<sup>50</sup> There the European Economic Community (EEC) challenged the U.S. intermediary nation embargo.<sup>51</sup> The MMPA provides that any nation which exports yellowfin tuna or yellowfin tuna products to the U.S., and imports yellowfin tuna or yellowfin tuna products that are subject to a direct prohibition on import into the U.S., must certify and provide reasonable proof that it has not imported products subject to the direct prohibition within the preceding six months.<sup>52</sup> Under this provision, Italy and Spain, among other nations, were subject to the U.S. intermediary nation embargo.<sup>53</sup>

As in the first case, the Panel in *Tuna-Dolphin II* ruled that because the U.S. measure “could not have any impact on the inherent character of tuna as a product,” the Note to Article III did not apply.<sup>54</sup> Although the Note to Article III extends the Article’s scope to domestic measures applied to “imported products at the time or point of importation,”<sup>55</sup> the Panel stated that the Note only covers measures applied to imported and domestic products considered *as products*.<sup>56</sup> The Panel noted:

Article III calls for a comparison between the treatment accorded to domestic and imported like *products*, not for a comparison of the policies or practices of the country of origin with those of the country of importation . . . . [T]he Note ad Article III . . . could not apply to the enforcement at the time or point of importation of laws, regulations or requirements that related to policies or practices that could not affect the product as such, and that accorded less favourable treatment to like products not produced in conformity with the domestic policies of the importing country.<sup>57</sup>

As regards the U.S. measures, the Panel noted that “the import embargoes distinguished between tuna products according to harvesting practices and tuna import policies of the exporting countries . . . none of these practices, policies, and methods *could have any impact*

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<sup>49</sup> *Id.* (emphasis in original). Later we shall see how the U.S. attempts to defend its import ban under the Article XX General Exceptions came to nought.

<sup>50</sup> *Tuna-Dolphin II*, *supra* n. 26.

<sup>51</sup> *Id.* ¶ 1.1.

<sup>52</sup> 16 U.S.C. § 1371(a)(2) (2000).

<sup>53</sup> *Tuna-Dolphin II*, *supra* n. 26, ¶ 2.15.

<sup>54</sup> *Id.* ¶ 5.9.

<sup>55</sup> GATT 1947, annex I, ad art. III, *supra* n. 43.

<sup>56</sup> *Tuna-Dolphin II*, *supra* n. 26, ¶ 5.8.

<sup>57</sup> *Id.* (emphasis in original).



on the inherent character of tuna as a product.”<sup>58</sup> The Panel concluded that the Note to Article III was not applicable and the U.S. embargoes were inconsistent with Article XI as they banned imports “from any country not meeting certain policy conditions.”<sup>59</sup>

In the recent *European Communities–Asbestos* case, France—in order to protect workers and consumers—prohibited the manufacture, import and sale of all varieties of asbestos fibre.<sup>60</sup> The import ban was challenged by Canada.<sup>61</sup> Although it does not deal with PPMs, this case is extremely helpful in examining how the issue of “likeness” should be approached.

Asbestos fibres are generally accepted as being particularly dangerous for health as they are proven carcinogens.<sup>62</sup> Despite this, the WTO panel ruled that chrysotile asbestos fibres and various substitute fibres are “like” products within the meaning of Article III:4.<sup>63</sup> The physical and chemical characteristics of asbestos and substitute fibres are different. The Panel, however, took the view that physical structure and chemical composition were not decisive in determining “likeness” in this case.<sup>64</sup>

The Panel stressed that “the context for the application of Article III:4 is not a scientific classification exercise. The objective of Article III concerns market access for products . . . . It is thus with a view to market access that the properties, nature, and quality of imported and domestic products have to be evaluated.”<sup>65</sup>

Noting that for many industrial uses other products have the same applications as asbestos, the Panel specified that:

[I]n the context of market access, it is not necessary for domestic products to possess all the properties of the imported product in order to be a like product. It suffices that, for a given utilization, the properties are the same to the extent that one product can replace the other.<sup>66</sup>

The Panel’s ruling that chrysotile asbestos fibres and certain safer substitutes are like products, despite the threats to health posed by the former, was worrisome in that it gave an extremely wide scope to the term “like” products.

<sup>58</sup> *Id.* ¶ 5.9 (emphasis added).

<sup>59</sup> *Id.* ¶ 5.10.

<sup>60</sup> WTO Panel Report on *European Communities–Measures Affecting Asbestos and Asbestos-Containing Products*, Sept. 18, 2000, WT/DS135R (available in 2000 WL 1449942) [hereinafter *2000 European Communities–Asbestos*]. The WTO original version of this report is available at <[http://www.wto.org/english/tratop\\_e/dispu\\_e/135r\\_a\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/135r_a_e.pdf)>; <[http://www.wto.org/english/tratop\\_e/dispu\\_e/135r\\_b\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/135r_b_e.pdf)>; <[http://www.wto.org/english/tratop\\_e/dispu\\_e/135r\\_c\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/135r_c_e.pdf)>.

<sup>61</sup> *Id.* ¶ 1.2.

<sup>62</sup> *Id.* ¶ 8.119. “Since 1977, the [World Health Organisation] has classified asbestos fibres in category 1 of proven carcinogens.” *Id.*

<sup>63</sup> *Id.* ¶ 8.150.

<sup>64</sup> *Id.* ¶ 8.126.

<sup>65</sup> *Id.* ¶ 8.122 (citation omitted).

<sup>66</sup> *Id.* ¶ 8.124.

Canada appealed the Panel's ruling, leading the Appellate Body to reverse the Panel's finding that it was not appropriate to take into account the health risks associated with chrysotile asbestos fibres in examining the "likeness" of those fibres and certain substitutes.<sup>67</sup> The Appellate Body went on to reverse the Panel's finding that chrysotile asbestos fibres and certain safer substitutes are "like" products.<sup>68</sup>

The Appellate Body undertook a helpful analysis of how the issue of "likeness" under Article III:4 should be approached. They started by stating that the term "like product" in Article III:4 must be interpreted to give proper scope and meaning to the "general principle" in Article III:1,<sup>69</sup> which "seeks to prevent Members from applying internal taxes and regulations in a manner which affects the competitive relationship, in the marketplace, *between the domestic and imported products involved*, 'so as to afford protection to domestic production.'"<sup>70</sup> The Appellate Body went on to stress that "a determination of 'likeness' under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products."<sup>71</sup>

The Appellate Body recognised the value of the principles for interpreting the term "like products" laid down in the report of the Working Party on *Border Tax Adjustments*, which suggested the following criteria for determining likeness: 1) the product's properties, nature, and quality; 2) the product's end uses in a given market; and 3) consumers' tastes and habits which, said the report, "change from country to country."<sup>72</sup>

The relevance of these criteria has been recognised by the Appellate Body in *Japan-Alcoholic Beverages*,<sup>73</sup> the *US-Gasoline* Panel,<sup>74</sup> and now the Panel<sup>75</sup> and the Appellate Body<sup>76</sup> in the *European Communities-Asbestos* case. In the latter case, the Appellate Body stated that all these criteria, along with the international tariff classification

<sup>67</sup> WTO Appellate Body Report on *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, Mar. 12, 2001, WT/DS135/AB/R ¶ 192, available at <[http://www.wto.org/english/tratop\\_e/dispu\\_e/135abr\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/135abr_e.pdf)> [hereinafter *2001 European Communities-Asbestos*].

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* ¶ 98.

<sup>70</sup> *Id.* (emphasis in original) (citation omitted).

<sup>71</sup> *Id.* ¶ 99.

<sup>72</sup> Working Party Report on *Border Tax Adjustments*, Dec. 2, 1970, GATT B.I.S.D. (18th Supp.) at 97, ¶ 18 (1972).

<sup>73</sup> WTO Appellate Body Report on *Japan-Taxes on Alcoholic Beverages*, Nov. 1, 1996, WT/DS/AB/R; WT/DS10/AB/R; WT/DS11/AB/R (available in 1996 WL 910779).

<sup>74</sup> WTO Panel Report on *United States-Standards for Reformulated and Conventional Gasoline*, Jan. 29, 1996, WT/DS2/R (29 January 1996) (available in 1996 WL 1064912).

<sup>75</sup> See *2000 European Communities-Asbestos*, *supra* n. 60.

<sup>76</sup> See *2001 European Communities-Asbestos*, *supra* n. 67.

of the products,<sup>77</sup> must be examined.<sup>78</sup> They added that the adoption of this framework to aid in the examination of the evidence does not dissolve the duty or the need to examine, in each case, *all* of the pertinent evidence.<sup>79</sup>

In the *Asbestos* case, the Appellate Body stressed that “evidence relating to the health risks associated with a product may be pertinent in an examination of ‘likeness’ under Article III:4.”<sup>80</sup> They added that this evidence should be evaluated under the existing criteria of physical properties and of consumers’ tastes and habits.<sup>81</sup>

The Appellate Body pointed out that the property of carcinogenicity, or toxicity, constitutes “a defining aspect of the physical properties of chrysotile asbestos fibres” and that the evidence indicates that certain substitute fibres do not share these properties, at least to the same degree.<sup>82</sup> The Appellate Body stated: “[w]e do not see how this highly significant physical difference *cannot* be a consideration in examining the physical properties of a product as part of a determination of ‘likeness . . . .’”<sup>83</sup> They concluded that the Panel erred “in excluding the health risks associated with chrysotile asbestos fibres from its examination of the physical properties of that product.”<sup>84</sup> In addition, the Appellate Body emphasised the importance of considering consumers’ tastes and habits,<sup>85</sup>—which, they said, are more comprehensively termed consumers’ perceptions and views—pointing out that “ultimate consumers may have a view about the ‘likeness’ of two products that is very different from that of the inventors or producers of those products.”<sup>86</sup>

The Appellate Body noted that consumers’ tastes and habits are one of the key elements in the competitive relationship between products in the marketplace, and thus the extent to which consumers are willing to choose one product instead of another to perform the same function is highly relevant in assessing the “likeness” of those products.<sup>87</sup> The Appellate Body pointed out that “[i]f there is—or could be—*no* competitive relationship between products, a Member cannot intervene, through internal taxation or regulation, to protect domestic

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<sup>77</sup> The fourth criterion, tariff classification, was not mentioned by the Working Party on *Border Tax Adjustments*, but was included by subsequent panels. Working Party Report on *Border Tax Adjustments*, Dec. 2, 1970, GATT B.I.S.D. (18th Supp.) at 97, n. 74 (1972); see e.g. Panel Report on *Japan—Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, Nov. 10, 1987, GATT B.I.S.D. (34th Supp.) at 83 (1987) [hereinafter *Japan—Alcoholic Beverages*].

<sup>78</sup> 2001 *European Communities—Asbestos*, *supra* n. 67, ¶ 101.

<sup>79</sup> *Id.* ¶ 102.

<sup>80</sup> *Id.* ¶ 113.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* ¶ 114.

<sup>83</sup> *Id.* (emphasis in original).

<sup>84</sup> *Id.* ¶ 116.

<sup>85</sup> *Id.* ¶ 101.

<sup>86</sup> *Id.* ¶ 92.

<sup>87</sup> *Id.* ¶ 117.

production.”<sup>88</sup> So, the key question is whether there is a high degree of substitutability of the products from the perspective of the consumer. If there is not, it may be that a future panel or Appellate Body will accept the argument that, where consumers are unwilling to substitute one product for another, even though they are similar in some ways, those products cannot be viewed as “like” each other.

The Appellate Body criticised the Panel for failing to examine evidence relating to consumers’ tastes and habits, particularly in a case, such as the *Asbestos* case, where the products in question are physically very different. Indeed, the Appellate Body went so far as to say that in such a case “a panel *cannot* conclude that products are ‘like products’ if it *does not examine* evidence relating to consumers’ tastes and habits.”<sup>89</sup> Not surprisingly, the Appellate Body stated that its members “consider it likely that presence of a known carcinogen in one of the products will have an influence on consumers’ tastes and habits . . . .”<sup>90</sup>

Although some comfort can be drawn from the Appellate Body’s ruling in the *European Communities–Asbestos* case, one of the core problems for animal welfare remains the general acceptance within trade policy circles of the proposition that one may not take account of the way in which a product is produced (process and production methods (PPMs)) in assessing whether domestic and imported products are “like” products. The animal welfare view is that a product derived from animals treated cruelly, and the same product coming from a relatively humane system or practice, are not “like” products and should be allowed to be treated differently by an importing country’s regulations.

Trade officials, however, treat the “rule” prohibiting PPMs from being taken into account as one of the cornerstones of GATT rules, and are adamant in resisting any suggestion that PPMs should be a valid factor in determining that two similar products are not “like” products.<sup>91</sup> The fear of the position on PPMs runs deep. As indicated above, the E.U. has severely diluted two of its key animal protection measures because it feared that they were inconsistent with GATT rules, particularly with the position on PPMs.<sup>92</sup>

In 1991, the E.U. passed a regulation which prohibited the use of the leghold trap in the European Community beginning in 1995; and the import of pelts from thirteen species of wild fur-bearing animals coming from countries which allow their capture via the use of leghold

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<sup>88</sup> *Id.* (emphasis in original).

<sup>89</sup> *Id.* ¶ 121 (emphasis in original).

<sup>90</sup> *Id.* ¶ 145.

<sup>91</sup> Personal communication from officials at the European Commission’s Directorate-General for Trade and at the United Kingdom Department for Trade and Industry to the author of this article.

<sup>92</sup> *Id.*; *infra* n. 96.

traps.<sup>93</sup> Animals covered under the prohibition include beaver, lynx, wolf, raccoon and ermine.<sup>94</sup>

When the E.U. regulation was enacted in 1991, countries gave relatively little attention to GATT rules, as they lacked an effective enforcement mechanism. The 1994 WTO Agreement, however, brought with it effective dispute settlement and enforcement mechanisms. By the mid-1990s the E.U. had revisited its position on the leghold trap regulation,<sup>95</sup> fearing that, based on the conventional view, it would be in breach of GATT rules if it accorded different treatment to fur from animals caught by means other than the use of the leghold trap and fur from animals whose capture involved the use of that trap.<sup>96</sup>

Accordingly, the E.U. has not applied its import ban to the three main fur-exporting countries: the U.S., Canada, and Russia. Instead, it has negotiated extremely feeble agreements with the United States on the one hand and Russia and Canada on the other.<sup>97</sup> These agreements are much weaker than the original E.U. regulation in that they do much less to discourage the use of leghold traps.

Similarly, a 1993 E.U. directive prohibited the marketing of cosmetics containing ingredients or combinations of ingredients tested on animals after 1 January 1998.<sup>98</sup> This marketing ban applied both to cosmetics produced within the E.U. and to imported cosmetics.<sup>99</sup> Here again, the E.U. became wary of GATT rules, fearing that the rules prevented it from distinguishing in its marketing regulations between

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<sup>93</sup> Council Regulation 3254/91 of 4 November 1991 Prohibiting the Use of Leghold Traps in the Community and the Introduction into the Community of Pelts and Manufactured Goods of Certain Wild Animal Species Originating in Countries Which Catch Them by Means of Leghold Traps or Trapping Methods Which do not Meet International Humane Trapping Standards, 1991 O.J. (L 308) 1-4. The leghold trap consists of two steel jaws operated by a powerful spring mechanism. *Id.*, art. 1. Animals caught in the leghold trap suffer great pain and injuries, ranging from torn flesh and muscle to broken limbs.

<sup>94</sup> *Id.* annex I.

<sup>95</sup> Personal communication with officials at the European Commission and with Members of the European Parliament to the author of this article. RSPCA European Brief, *Trapping of Animals in the Wild for Fur: The Present Position with the Leghold Trap*, <<http://www.infurder.com/infurdesk/press/pres0008.htm>> (accessed Mar. 18, 2002).

<sup>96</sup> *Id.*

<sup>97</sup> Council Decision 98/487/EC of 13 July 1998 Concerning the Conclusion of an International Agreement in the Form of an Agreed Minute Between the European Community and the United States of America on Humane Trapping Standards, 1998 O.J. (L 219) 24-25; Council Decision 98/142/EC of 26 January 1998 Concerning the Conclusion of an Agreement on International Humane Trapping Standards Between the European Community, Canada and the Russian Federation and of an Agreed Minute Between Canada and the European Community Concerning the Signing of the Said Agreement, 1998 O.J. (L 042) 4-41.

<sup>98</sup> Council Directive 93/35/EEC of 14 June 1993 Amending for the Sixth Time Directive 76/768/EEC on the Approximation of the Laws of the Member States Relating to Cosmetic Products, 1993 O.J. (L 151) 32-37.

<sup>99</sup> *Id.*

cosmetics tested on animals and those not so tested, because such a distinction revolves around PPMs.<sup>100</sup>

As a result, the E.U. has not brought its marketing ban into force and is now considering replacing it with merely a ban on testing cosmetics on animals in the E.U.<sup>101</sup> However, only to ban the *testing* of cosmetics on animals within the E.U. (rather than, as first intended, the *marketing* of such cosmetics) is to significantly dilute the original directive as multi-national cosmetics companies may well simply do their animal testing outside the E.U. and then import the products for sale within the E.U.

From the animal welfare viewpoint, many of the problems arising from GATT would be alleviated to a significant degree if countries could, in their marketing regulations, distinguish between products on the basis of their PPMs, for imported as well as domestic products. On this point, it must be stressed that the assumption by those in the trade policy world that the "rule" on PPMs is set in stone and that countries may never make PPM distinctions in respect of imported products, is not necessarily correct.

Three factors could be used to challenge the conventional wisdom. Firstly, the "rule" against making PPM-based distinctions between otherwise "like" products does not appear in the text of GATT; it depends purely on the interpretation of the term "like" products. Secondly, the widely-held interpretation of "like" products flows primarily from the Panel reports in the two *Tuna-Dolphin* cases—neither of which was ever adopted, and which are not binding. Thirdly, the case law indicates that consumers' tastes and habits are among the factors that may be taken into account in assessing "likeness."<sup>102</sup> Indeed, in the recent *European Communities-Asbestos* case, the Appellate Body gave great weight to the importance of considering consumers' tastes and habits, and stressed that they must be examined in determining "likeness" in cases where the products are physically different.<sup>103</sup>

In cases where the evidence shows that consumers are unwilling to substitute one product for another because they are unhappy with the way one has been produced, a future Panel or the Appellate Body may be willing to rule that, despite being physically identical or similar, two products are not "like" each other because a significant number of consumers in fact view them as being different and not

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<sup>100</sup> Explanatory Memorandum to Proposal of 31 October 2000 for a Directive of the European Parliament and of the Council Amending for the Seventh Time Council Directive 76/768/EEC of 27 July 1976 on the Approximation of the Laws of the Member States Relating to Cosmetic Products, 2000 O.J. (C 311) E. This memorandum is available at <<http://europa.eu.int/scadplus/leg/en/lvb/121191.htm>> (accessed Feb. 1, 2002).

<sup>101</sup> Proposal of 31 October 2000 for a Directive of the European Parliament and of the Council Amending for the Seventh Time Council Directive 76/768/EEC of 27 July 1976 on the Approximation of the Laws of the Member States Relating to Cosmetic Products, 2000 O.J. (C 311) E.

<sup>102</sup> See 2001 *European Communities-Asbestos*, *supra* n. 67.

<sup>103</sup> *Id.*

substitutable for each other. Clearly, those concerned with animal welfare must promote the legal legitimacy of taking account of consumer tastes, as evidenced by the fact that in an increasing number of countries do consumers distinguish between products derived from cruel practices and those coming from more humane practices.

Moreover, the Panel in the *European Communities–Asbestos* case noted with approval the statement by the Appellate Body in *Japan–Alcoholic Beverages* that panels must use their best judgment when determining likeness, and that no single approach is appropriate to every case.<sup>104</sup> In *European Communities–Asbestos*, the Appellate Body emphasised the need for an assessment utilising “an unavoidable element of individual discretionary judgment’ to be made on a case-by-case basis.”<sup>105</sup> Those concerned with animal welfare must emphasise the need for each case to be decided on its facts and merits and recognize that, in some cases, PPM distinctions may indeed be legitimate.

Interestingly, in the *Shrimp–Turtle* case, the Appellate Body did not criticise the U.S. for distinguishing between imported shrimp on a PPM basis. In that case, the U.S. only permitted the import of shrimp if they came from a country that requires the use of a device to exclude the incidental taking of sea turtles in the shrimp nets.<sup>106</sup> Although this is a PPM distinction, it was not one of the issues considered by the Appellate Body. It is none the less encouraging that the Appellate Body made no attempt to condemn the U.S. for making a PPM distinction.

### III. THE EXCEPTIONS IN ARTICLE XX

When a measure is found to breach GATT rules, a country may seek to defend it under the General Exceptions set out in Article XX.<sup>107</sup> Article XX states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; . . . [or] (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.<sup>108</sup>

<sup>104</sup> 2000 *European Communities–Asbestos*, *supra* n. 60, ¶ 8.114.

<sup>105</sup> 2001 *European Communities–Asbestos*, *supra* n. 67, ¶ 101.

<sup>106</sup> WTO Panel Report on *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, May 15, 1998, WT/DS58/AB/R (available in 1998 WL 256632) [hereinafter *Shrimp–Turtle*]. The Original WTO version is available at <[http://www.wto.org/english/tratop\\_e/dispu\\_e/58r00.pdf](http://www.wto.org/english/tratop_e/dispu_e/58r00.pdf)>; <[http://www.wto.org/english/tratop\\_e/dispu\\_e/58r01.pdf](http://www.wto.org/english/tratop_e/dispu_e/58r01.pdf)>; <[http://www.wto.org/english/tratop\\_e/dispu\\_e/58r02.pdf](http://www.wto.org/english/tratop_e/dispu_e/58r02.pdf)>.

<sup>107</sup> GATT 1947, art. XX, *supra* n. 11.

<sup>108</sup> *Id.*

At first sight these exceptions seem very helpful for animal welfare. Most animal protection measures are adopted in the interest of public morality, are designed to protect the life or health of animals, or relate to the conservation of endangered species. The common sense interpretation of the exceptions has, however, been eroded over the years by dispute panels which have interpreted them extremely restrictively.

One major problem with Article XX is the "rule" on extra-territoriality. The general position is that a WTO member nation may act to protect animals within its own territory but, generally, not those located outside its territorial jurisdiction. However, as with "like" products, the position on extra-territoriality is less clear-cut and absolute than those within the trade policy world seem to indicate.

The problems arise from *Tuna-Dolphin I*.<sup>109</sup> The Panel accepted that the basic question, namely whether Article XX(b) extends to measures to protect animals outside of the jurisdiction of the country taking the measure, "is not clearly answered by the text of that provision."<sup>110</sup>

The Panel, however, took the view that if the U.S. were allowed to apply a measure to protect dolphins outside its jurisdiction "each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the [GATT]."<sup>111</sup> For this and other reasons, the Panel found that a U.S. import ban could not be justified under Article XX(b).<sup>112</sup> The Panel took a similar approach to Article XX(g), ruling that it was unacceptable for a country to unilaterally determine the conservation policies of other countries.<sup>113</sup>

In *Tuna-Dolphin II*, the Panel, in considering Article XX(g), noted that the U.S. embargoes "were taken so as to force other countries to change their policies with respect to persons and things within their own jurisdiction[s], since the embargoes required such changes in order to have any effect on the conservation of dolphins."<sup>114</sup> The Panel then examined whether Article XX(g) could cover such measures, noting that, "the text of Article XX does not provide a clear answer to this question."<sup>115</sup> The Panel, however, went on to say:

If . . . Article XX were interpreted to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, . . . the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired.<sup>116</sup>

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<sup>109</sup> *Tuna-Dolphin I*, *supra* n. 24.

<sup>110</sup> *Id.* ¶ 5.25.

<sup>111</sup> *Id.* ¶ 5.27.

<sup>112</sup> *Id.* ¶ 5.29.

<sup>113</sup> *Id.* ¶ 5.32.

<sup>114</sup> *Tuna-Dolphin II*, *supra* n. 26, ¶ 5.24.

<sup>115</sup> *Id.* ¶ 5.25.

<sup>116</sup> *Id.* ¶ 5.26.



Accordingly, the Panel concluded that measures which were taken to force other countries to change their policies, and that were only effective if such changes occurred, could not be “primarily aimed” at conservation and so were not protected by Article XX(g).<sup>117</sup>

The Panel took a similar view regarding Article XX(b), concluding “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,”<sup>118</sup> as is required by Article XX(b).<sup>119</sup>

It should be noted that the Panel found that the policy to conserve dolphins and protect their life and health in the eastern tropical Pacific Ocean—an area within U.S. jurisdiction over its nationals and vessels—fell within the range of policies covered by Article XX(g)<sup>120</sup> and (b).<sup>121</sup> The Panel stressed that “states are not in principle barred from regulating the conduct of their nationals with respect to persons, animals, plants and natural resources outside of their territory . . . .”<sup>122</sup> The Panel also pointed out that the text of Article XX(b) and (g) does not spell out any limitation on the location of the living things to be protected, or in the case of paragraph (g), the natural resources to be conserved.<sup>123</sup>

Indeed, the Panel went on to observe that:

measures providing different treatment to products of different origins could in principle be taken under other paragraphs of Article XX and other Articles of the General Agreement with respect to things located, or actions occurring, outside the territorial jurisdiction of the party taking the measure. An example was the provision in Article XX(e) relating to products of prison labour. [Article XX(e) provides an exception “relating to the products of prison labour.”] It could not therefore be said that the General Agreement proscribed in an absolute manner measures that related to things or actions outside the territorial jurisdiction of the party taking the measure.<sup>124</sup>

As we have seen, however, the Panel was firmly opposed to the perceived element of compulsion of other countries and concluded that this rendered the measures outwith Article XX(b) and (g) as they were not “necessary” or “relating” to the policy objectives of those paragraphs.<sup>125</sup>

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<sup>117</sup> *Id.* ¶ 5.27. The term “relating to” in paragraph (g) is generally interpreted as meaning “primarily aimed at.” *Id.* ¶ 5.22.

<sup>118</sup> *Id.* ¶ 5.39.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* ¶ 5.20.

<sup>121</sup> *Id.* ¶ 5.33.

<sup>122</sup> *Id.* ¶ 5.32.

<sup>123</sup> *Id.* ¶ ¶ 5.15, 5.31.

<sup>124</sup> *Id.* ¶ 5.16.

<sup>125</sup> *Id.* ¶ ¶ 5.27, 5.39.

The issue of extra-territoriality also arose in the *Shrimp-Turtle* case.<sup>126</sup> The background to this case is that sea turtles—all species of which are threatened by extinction—are sometimes caught up and drowned in shrimp trawling nets.<sup>127</sup> The level of incidental death can be reduced by the use of Turtle Excluder Devices (TEDs).<sup>128</sup> Accordingly, the U.S. issued regulations under the Endangered Species Act of 1973 requiring all U.S. shrimp trawl vessels to use approved TEDs at all times and in all areas where there is a likelihood that shrimp trawling will interact with sea turtles.<sup>129</sup>

Section 609 of Public Law 101-162 and associated regulations imposed an import ban on shrimp caught with commercial fishing technology that could adversely affect sea turtles.<sup>130</sup> Section 609 provides that the import ban does not apply to harvesting nations that are “certified.”<sup>131</sup> One way of obtaining such certification is for the exporting country to prove to the U.S. that it has adopted a regulatory program governing the incidental taking of sea turtles that is comparable to that of the U.S. and that the rate of incidental taking of sea turtles by their vessels is comparable to that of U.S. vessels.<sup>132</sup> Guidelines provide that, when assessing a regulatory program, the Department of State shall grant certification if the program includes the required use of TEDs that are comparable in effectiveness to those used in the U.S.<sup>133</sup> Moreover, under the guidelines, the incidental take rate is deemed “comparable” if the harvesting nation requires the use of TEDs in a manner comparable to the U.S. program.<sup>134</sup> In short, shrimp could, in general, only be imported into the U.S. if they came from a country that requires the use of TEDs.

Four countries—Malaysia, Thailand, Pakistan, and India—requested that a panel be established to examine their complaints regarding the U.S. import ban.<sup>135</sup> In 1998, the Panel ruled that the ban was not consistent with Article XI and could not be justified under Article XX.<sup>136</sup> The U.S. appealed.<sup>137</sup> On appeal, the Appellate Body held that living (as well as non-living) resources may fall within Article

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<sup>126</sup> *Shrimp-Turtle*, *supra* n. 106.

<sup>127</sup> *Id.* ¶ 2.5.

<sup>128</sup> *Id.* Developed over the last two decades in the southeast shrimp fisheries of the United States, Turtle Excluder Devices (TEDs) are considered to be an effective way in which to exclude bycatch during shrimp trawling. TEDs are trapdoors installed inside shrimp trawling nets that allow sea turtles to escape.

<sup>129</sup> 16 U.S.C. § 1536(a)(1), (2) (2000).

<sup>130</sup> Pub. L. No. 101-162, § 609(b)(1), 103 Stat. 988 (1989); Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed. Reg. 36946, 36950 (July 8, 1999).

<sup>131</sup> Pub. L. No. 101-162 at § 609(b)(2).

<sup>132</sup> *Id.* at § 609(b)(2)(A)–(B).

<sup>133</sup> 64 Fed. Reg. at 36950.

<sup>134</sup> *Id.*

<sup>135</sup> *Shrimp-Turtle*, *supra* n. 106, ¶ 1.1.

<sup>136</sup> *Id.* ¶ 8.1.

<sup>137</sup> WTO–Appellate Body Report on *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, Nov. 12, 1998, WT/DS58/AB/R (available in 1998 WL

XX(g) as “exhaustible natural resources.”<sup>138</sup> The Appellate Body also held that sea turtles are exhaustible, as all species of sea turtles are listed in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES).<sup>139</sup>

The Appellate Body then turned to the question of extra-territoriality. It observed that “sea turtles are highly migratory animals, passing in and out of waters subject to the rights of jurisdiction of various coastal states and the high seas.”<sup>140</sup> The Appellate Body recognised that the species “covered by Section 609, are all known to occur in waters over which the [U.S.] exercises jurisdiction,” although it was “not claimed that all populations of these species migrate to, or traverse, at one time or another, waters subject to [U.S.] jurisdiction.”<sup>141</sup>

The Appellate Body stated that it would not rule on the question of “whether there is an implied jurisdictional limit in Article XX(g), and if so, the nature or extent of that limitation.”<sup>142</sup> They concluded that, “in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the [U.S.] for purposes of Article XX(g).”<sup>143</sup>

The refusal of the Appellate Body to exclude sea turtles from Article XX(g) on the grounds of extra-territoriality is a welcome ruling from the perspective of animal welfare advocates. That said, the decision was taken on the basis that the Appellate Body found that there was a “sufficient nexus” between the sea turtles involved and the U.S.<sup>144</sup> The question as to what extent measures affecting animals outside the jurisdiction of the country taking the measure can fall within Article XX remains undecided, and is quite significant. For example, in June 1999 the E.U. adopted a directive that bans the battery cage for egg-laying hens, and requires all battery cages to be phased out by 2012.<sup>145</sup> E.U. egg producers fear that once the ban comes into force, they will be undermined by the import of battery eggs from non-E.U. countries that continue to use battery cages.<sup>146</sup> Indeed, this was one of the main arguments advanced by opponents of the ban during

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720123) [hereinafter *Shrimp-Turtle II*]. The original WTO version is available at <[http://www.wto.org/english/tratop\\_e/dispu\\_e/58abr.pdf](http://www.wto.org/english/tratop_e/dispu_e/58abr.pdf)>.

<sup>138</sup> *Id.* ¶ 131.

<sup>139</sup> *Id.* ¶¶ 134, 131; Convention on International Trade in Endangered Species of Wild Flora and Fauna (Mar. 3, 1973) 27 U.S.T. 1087. Appendix I contains the most endangered species. CITES, art. I, ¶ 1.

<sup>140</sup> *Shrimp-Turtle II*, *supra* n. 137, ¶ 133.

<sup>141</sup> *Id.* (emphasis omitted).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> Council Directive 1999/74/EC of 19 July 1999 Laying Down Minimum Standards for the Protection of Laying Hens, 1999 O.J. (L 203) 53–57.

<sup>146</sup> Letter from British Egg Industry Council and others to Pascal Lamy, European Trade Commissioner, *Impact of WTO Rules*, 2 (Oct. 24, 2001) (copy on file with *Animal Law*).

the campaign that led up to its eventual adoption.<sup>147</sup> The conventional wisdom is that, although GATT rules permit the E.U. to ban the battery cage within its own territory, they prevent it from banning the import of battery eggs or banning the marketing of battery eggs, if that marketing ban extended to imported eggs.

The E.U. could defend such bans under Article XX(a) (public morals) or Article XX(b) (life or health of animals). However, one of the main hurdles it would have to overcome is the question of extra-territoriality. Its opponents would argue that Article XX(a) and (b) do not extend to measures designed to protect animals outside the territory of the E.U.

Presumably, a major reason why the E.U. refused to implement its bans on the import of furs from countries using the leghold trap and on the sale of cosmetics tested on animals was the fear that Article XX defences would fail on the grounds that the E.U.'s measures extended to animals outside its own territory. WTO supporters often accuse countries that seek to prevent the import of products produced in a cruel way of trying to impose their standards on other countries.<sup>148</sup> WTO supporters then go on to say that countries should be content with the fact that they can determine what animal protection standards they wish to adopt within their own territory.<sup>149</sup>

This is, however, to miss the point. Very often what a country wishes to do on ethical grounds, is to prohibit not only the production but also the *marketing* within its territory of products, whose production involves a substantial degree of animal suffering. The aim of such countries is not to force other countries to change their standards, but to be at liberty to prohibit *within their own territory* the marketing of products (whether domestically produced or imported) derived from practices which involve animal suffering. In so doing, these countries are trying to act as responsible consumers who do not wish to contribute to practices they believe to be cruel. At present, GATT rules are making it extremely difficult for countries to exercise such moral choices within their own territory. Indeed, present circumstances allow countries with little concern for animal welfare to impose their values on countries that do have such concerns and insist that the latter take their exports.

Interestingly, the argument that a country should be able to act as an ethical consumer has recently been embraced by the U.S. in the Dog and Cat Protection Act of 2000.<sup>150</sup> This Act includes a prohibition on the import of dog and cat fur products.<sup>151</sup> In its preamble, the Act states that U.S. consumers have a right to "ensure that they are not

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<sup>147</sup> *Id.* This argument was regularly made by the European egg industry and by E.U. Member States opposed to a ban.

<sup>148</sup> Personal communication from officials at the European Commission's Directorate-General for Trade and at the United Kingdom Department for Trade and Industry.

<sup>149</sup> *Id.*

<sup>150</sup> 19 U.S.C. § 1308 (2000). This statute is discussed in detail, *infra* Section IV(C).

<sup>151</sup> *Id.* § 1308(b)(1)(A).

unwitting participants in this gruesome trade<sup>152</sup> and the Act's purposes include ensuring "that U.S. market demand does not provide an incentive to slaughter dogs or cats for their fur."<sup>153</sup>

In the author's view, the WTO position on extra-territoriality must be reinterpreted. A WTO member should be allowed to adopt a measure that affects animals outside its territory, provided that the measure is adopted in conjunction with, and is a reasonable extension of, a measure that also affects domestic production or consumption.

Another major problem that has arisen in respect of Article XX(b) is the narrow interpretation given to the word "necessary." In order to benefit from the Article XX(b) exception, a country must show that its measure is "necessary" to protect animal life or health.<sup>154</sup> GATT panels in the *United States—Section 337 of the Tariff Act of 1930* case<sup>155</sup> and the *Thai Cigarette* case<sup>156</sup> have ruled that a measure is "necessary" only if no alternative which is consistent with, or less inconsistent with, GATT rules is reasonably available to fulfill the policy objective. Specifically, the Panel in the former case stated:

[A] contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.<sup>157</sup>

Interestingly, Article XX(g) does not use the word "necessary." A measure may fall within Article XX(g) if it is one "relating to" the conservation of exhaustible natural resources.<sup>158</sup> In the *Herring and Salmon* case<sup>159</sup> and the *U.S.—Gasoline* case,<sup>160</sup> the Panel's view was that "relating to" should be interpreted as "primarily aimed at."

The overall impression from the various Panel reports discussed in this article is that the Article XX exceptions are being interpreted so narrowly that they could only very rarely be successfully relied on to justify a measure which was in breach of GATT rules. The Panels appear to have lost sight of the fact that the role of the Article XX excep-

<sup>152</sup> Pub. L. No. 106-476, § 1442(a)(7), 114 Stat. 2163 (2000).

<sup>153</sup> *Id.* § 1442(b)(1).

<sup>154</sup> GATT 1947, *supra* n. 11, art. XX(b).

<sup>155</sup> Panel Report on *United States—Section 337 of the Tariff Act of 1930*, Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) at 345 (1990) [hereinafter *1989 Tariff Case*].

<sup>156</sup> WTO Panel Report on *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, Nov. 7, 1990, B.I.S.D. (37th Supp.) at 200 (1991) [hereinafter *Taxes on Cigarettes*].

<sup>157</sup> *1989 Tariff Case*, *supra* n. 155, ¶ 5.26.

<sup>158</sup> GATT 1947 art. XX(g), *supra* n. 11.

<sup>159</sup> Panel Report on *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, Mar. 22, 1988, GATT B.I.S.D. (35th Supp.) at 98 (1989).

<sup>160</sup> WTO Panel Report on *United States—Standards for Reformulated and Conventional Gasoline*, Jan. 29, 1996, WT/DS2/R (available in 1996 WL 1064912).

tions is precisely to provide *exceptions* to the main GATT rules: to permit, in certain circumstances, legitimate public policy considerations other than trade liberalisation to take precedence over the free trade requirements of the main GATT articles.

In the *U.S.–Gasoline* case, the Appellate Body made some encouraging remarks recognising the importance of Article XX.<sup>161</sup> The Appellate Body stated:

[T]he phrase “relating to the conservation of exhaustible natural resources” [in Article XX (g)] may not be read so expansively as seriously to subvert the purpose and object of Article III:4 [imported products to be treated no less favourably than like domestic products]. *Nor may Article III:4 be given so broad a reach as effectively to emasculate Article XX(g) and the policies and interests it embodies.* The relationship between the affirmative commitments set out in, e.g., Articles I, III and XI, and the policies and interests embodied in the “General Exceptions” listed in Article XX, can be given meaning within the framework of the *General Agreement* and its object and purpose by a treaty interpreter only on a case-to-case basis, by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose.<sup>162</sup>

The above passage makes it clear that each case must be looked at on its merits rather than from a standpoint that the Article XX exceptions must never be permitted to take precedence over the free trade requirements of Articles I, III, and XI. This more positive approach to Article XX is welcome and potentially helpful. Indeed, in the *European Communities–Asbestos* case, both the Panel and the Appellate Body ruled that the French ban on the import of asbestos fibres was justified under Article XX(b).<sup>163</sup>

Moreover, in *European Communities–Hormones*, the Appellate Body was extremely helpful in dismissing the notion that a particular ban can only be maintained if there is monolithic, incontrovertible scientific justification for the ban.<sup>164</sup> The Appellate Body recognised that in some situations there will be both mainstream and divergent scientific opinions and that in some cases “responsible and representative governments may act in good faith on the basis of what, at a given time, may be a divergent [*i.e.*, not a mainstream] opinion coming from

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<sup>161</sup> WTO Appellate Body Report on *United States–Standards for Reformulated and Conventional Gasoline*, May 20, 1996, WT/DS2/AB/R (available in 1996 WL 227476) [hereinafter *Gasoline II*].

<sup>162</sup> *Id.* at 18 (emphasis added).

<sup>163</sup> 2000 *European Communities–Asbestos*, *supra* n. 60; 2001 *European Communities–Asbestos*, *supra* n. 67.

<sup>164</sup> WTO Appellate Body Report on *European Communities–Measures Concerning Meat and Meat Products (Hormones)*, Feb. 13, 1998, WT/DS26/AB/R, WT/DS48/AB/R ¶ 194 [hereinafter *European Communities–Hormones*]. The original WTO original version is available at <[http://www.wto.org/english/tratop\\_e/dispu\\_e/hormab.pdf](http://www.wto.org/english/tratop_e/dispu_e/hormab.pdf)>. This case dealt with the Agreement on the Application of Sanitary and Phytosanitary Measures, *supra* n. 8.

qualified and respected sources.”<sup>165</sup> This is a breath of fresh air to animal welfare advocates, as in cases dealing with animal welfare there will not be complete agreement among scientists. Often the majority will agree that a particular rearing system is cruel, but a minority may take an opposing view. It is comforting to know that it is not necessary for scientific opinion *unanimously* to condemn a particular system when one is trying to justify a particular animal protection measure under GATT.

In addition, in *European Communities-Asbestos*, the Appellate Body stated that:

In justifying a measure under Article XX(b) of the GATT 1994, a Member may also rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion. A Member is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion. Therefore, a panel need not, necessarily, reach a decision under Article XX(b) . . . on the basis of the “preponderant” weight of the evidence.<sup>166</sup>

The low point in interpreting Article XX came in the Panel Report in the *Shrimp-Turtle* case.<sup>167</sup> Here the Panel examined the introductory words of Article XX, often referred to as the “chapeau.”<sup>168</sup> The chapeau provides that, to benefit from any of the Article XX exceptions, a measure must not be applied in a manner that would constitute: a) a means of arbitrary discrimination between countries where the same conditions prevail; b) a means of unjustifiable discrimination between countries where the same conditions prevail; or c) a disguised restriction on international trade.<sup>169</sup>

The Panel in the *Shrimp-Turtle* case took the view that the chapeau only allows a country to rely on an Article XX exception so long as, in doing so, “[it] do[es] not undermine the WTO multilateral trading system, thus also abusing the exceptions contained in Article XX.”<sup>170</sup> The Panel seemed determined to find that Article XX should not be allowed to impede the free trade articles. It went on to say:

We are of the view that a type of measure adopted by a Member which, on its own, may appear to have a relatively minor impact on the multilateral trading system, may nonetheless raise a serious threat to that system if similar measures are adopted by the same or other Members . . . [w]e must determine not only whether the measure *on its own* undermines the WTO multilateral trading system, but also whether such type of measure, if it

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<sup>165</sup> *Id.* ¶ 194.

<sup>166</sup> *2001 European Communities-Asbestos*, *supra* n. 67, ¶ 178.

<sup>167</sup> *Shrimp-Turtle*, *supra* n. 106.

<sup>168</sup> The term “chapeau” refers to the overarching conditions any trade measure must meet if it is to benefit from one of the Article XX exceptions. These conditions are designed to prevent abuse of the exceptions.

<sup>169</sup> GATT 1947, art. XX, *supra* n. 11.

<sup>170</sup> *Shrimp-Turtle*, *supra* n. 106, ¶ 7.44.

were to be adopted by other Members, would threaten the security and predictability of the multilateral trading system.<sup>171</sup>

This broad approach to Article XX was strongly criticised by the Appellate Body when it considered the *Shrimp-Turtle* case.<sup>172</sup> The Appellate Body stated that in *US-Gasoline* it had pointed out that the chapeau addresses “not so much the questioned measure or its specific contents as such, but rather the *manner* in which that measure is applied.”<sup>173</sup> The Appellate Body stated that the flaws in the Panel’s analysis of Article XX flowed from the fact that it had disregarded the *sequence* of steps essential for carrying out an analysis of Article XX.<sup>174</sup>

The Appellate Body pointed out that in *US-Gasoline* it had enunciated the appropriate method for applying Article XX.<sup>175</sup> To be justified under Article XX, a measure must not only come under one of the particular Article XX exceptions listed in paragraphs (a) through (j), but must also satisfy the requirements of the chapeau.<sup>176</sup>

The Appellate Body in *US-Gasoline* stated that “[t]he analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under [one of the Article XX exceptions]; second, further appraisal of the same measure under the introductory clauses [the chapeau] of Article XX.<sup>177</sup>

The Panel in *Shrimp-Turtle* reversed these steps. It concluded that the U.S. measure fell outside the chapeau because it conditioned access to the U.S. domestic shrimp market on the adoption by exporting countries of certain conservation policies prescribed by the U.S.<sup>178</sup> In a passage of great importance for the role of Article XX within the GATT overall and for animal welfare, the Appellate Body stated:

It appears to us, however, that conditioning access to a Member’s domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as *exceptions to substantive obligations* established in the GATT 1994, because the domestic policies embodied in such measures have been recognised as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies . . . prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific

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<sup>171</sup> *Id.*

<sup>172</sup> *Shrimp-Turtle II*, *supra* n. 137, ¶¶ 115–22.

<sup>173</sup> *Id.* ¶ 115 (footnote omitted) (selected emphasis omitted).

<sup>174</sup> *Id.* ¶ 117.

<sup>175</sup> *Id.* ¶ 118.

<sup>176</sup> *Gasoline II*, *supra* n. 161, at 22.

<sup>177</sup> *Id.*

<sup>178</sup> *Shrimp-Turtle*, *supra* n. 106, ¶¶ 7.45, 7.49.



exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.<sup>179</sup>

The Appellate Body then went on to find that the U.S. measure fell within Article XX(g), but that it failed to meet the requirements of the chapeau for reasons very different from those given by the Panel.<sup>180</sup> The Appellate Body found that the U.S. applied its measure in a manner that amounted to both “unjustifiable discrimination” and “arbitrary discrimination.”<sup>181</sup> This finding was based in part on the fact that the U.S. applied its measure in a manner that led to differential treatment as between various exporting countries.<sup>182</sup> Different countries were given varying amounts of time during which to implement the provisions requiring the use of TEDs.<sup>183</sup>

The Appellate Body ruling in the *Shrimp-Turtle* case is somewhat encouraging for three reasons. First, it refused to give too broad a scope to the chapeau of Article XX. Second, it acknowledged that a requirement by an importing country that exporting countries should comply with, or adopt, policies prescribed by the importing country is capable of justification under Article XX. Finally, did not use extra-territoriality to exclude the U.S. measure from Article XX(g), even though sea turtles pass through waters subject to the jurisdiction of coastal states other than the U.S. and through the high seas.

More was still to come as regards *Shrimp-Turtle*. The U.S. decided to comply with the Appellate Body’s ruling not by lifting its ban on the import of certain shrimp, but by issuing Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations.<sup>184</sup> In October 2000, Malaysia requested that a panel be established to examine its complaint that by not removing its import ban, the U.S. had failed to comply with the Appellate Body’s rulings.<sup>185</sup> In June 2001, to the surprise of many, the Panel concluded that in light of the changes made by the U.S.<sup>186</sup> since the Appellate Body’s ruling, the U.S. ban could be justified under Article XX as long as the U.S. continues to implement these changes that led to the Panel ruling in its favour.<sup>187</sup>

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<sup>179</sup> *Shrimp-Turtle II*, *supra* n. 137, ¶121 (emphasis in original).

<sup>180</sup> *Id.* ¶ 145.

<sup>181</sup> *Id.* ¶ 184.

<sup>182</sup> *Id.* ¶¶ 165, 166, 172.

<sup>183</sup> *Id.* ¶ 173.

<sup>184</sup> 64 Fed. Reg. 36946, 36946–36957 (July 8, 1999).

<sup>185</sup> WTO Panel Report on *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, June 15, 2001, WT/DS58/RW ¶ 1.4 (available in 2001 WL 671012) [hereinafter *Shrimp-Turtle III*]. The original WTO version is available at <[www.wto.org/english/tratop\\_e/dispu\\_e/58rw\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/58rw_e.pdf)>.

<sup>186</sup> The changes referred to are those included in the revised guidelines and changes in which the law has been applied (discussion follows); *see supra*, n. 184.

<sup>187</sup> *Shrimp-Turtle III*, *supra* n. 185, ¶ 6.1.

Several factors influenced the Panel's favourable ruling. First, the U.S. has been making ongoing serious good-faith efforts to conclude a multilateral agreement on the protection and conservation of sea turtles in southeast Asia.<sup>188</sup> Second, the Appellate Body had ruled that the U.S. was insufficiently flexible in deciding whether to permit the import of shrimp because they failed to consider the different conditions that may exist in the territories of exporting nations.<sup>189</sup> Moreover, the U.S. required other countries to adopt a regulatory programme that was *essentially the same* as that of the U.S.<sup>190</sup>

The new Panel concluded that, since the Appellate Body ruling, the U.S. had altered its policy so as to become sufficiently flexible.<sup>191</sup> Crucially, the U.S. now simply requires exporters to have a programme that is "comparable in effectiveness" to that of the U.S., rather than the inflexible "essentially the same" test.<sup>192</sup> Of great importance is the fact that the Panel pointed out that:

[W]hereas [earlier in the case] the Appellate Body found that requiring the adoption of essentially the same regime constituted arbitrary discrimination, it accepted—at least implicitly—that a requirement that the U.S. and foreign programmes be "comparable in effectiveness" would be compatible with the obligations of the United States under the chapeau of Article XX. This is because it would "permit a degree of discretion or flexibility in how the standards for determining comparability might be applied, in practice, to other countries."<sup>193</sup>

The Panel went on to state that it understood the Appellate Body's ruling to mean that:

[W]hile a WTO Member may not impose on exporting members to apply the same standards of environmental protection as those it applies itself, this Member may legitimately require, as a condition of access of certain products to its market, that exporting countries commit themselves to a regulatory programme deemed comparable to its own.<sup>194</sup>

The new Panel's approach was later confirmed as correct when the Appellate Body considered an appeal by Malaysia.<sup>195</sup> The Appellate Body stated that "conditioning market access on the adoption of a programme comparable in effectiveness, allows for sufficient flexibility in

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<sup>188</sup> *Id.* ¶ 5.87.

<sup>189</sup> *Id.* ¶ 5.89.

<sup>190</sup> *Id.* ¶ 5.89 (last sentence quoting *Shrimp-Turtle*, *supra* n. 106) (footnote omitted); *Shrimp-Turtle II*, *supra* n. 137, ¶ 161.

<sup>191</sup> *Shrimp-Turtle III*, *supra* n. 185, ¶ 5.104.

<sup>192</sup> *Id.* ¶ 5.94.

<sup>193</sup> *Id.* ¶ 5.93; *Shrimp-Turtle II*, *supra* n. 137, ¶ 161.

<sup>194</sup> *Shrimp-Turtle III*, *supra* n. 185, ¶ 5.103.

<sup>195</sup> WTO Appellate Body Report on *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, Oct. 22, 2001, WT/DS58/AB/RW [hereinafter *Shrimp-Turtle IV*]. The original WTO report is available at <[http://www.wto.org/english/tratop\\_e/dispu\\_e/58abrw\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/58abrw_e.pdf)>.

the application of the measure so as to avoid 'arbitrary or unjustifiable discrimination.'<sup>196</sup>

Third, the Appellate Body found that the U.S. had discriminated between exporting countries in terms of the applicable phase-in period granted.<sup>197</sup> The new Panel concluded that the U.S. has in practice addressed this aspect of discrimination.<sup>198</sup> Fourth, the Panel was impressed by the willingness of the U.S. to offer technology transfer,<sup>199</sup> the U.S. has provided technical assistance and training to a number of governments and other organisations.<sup>200</sup>

Fifth, the Panel concluded that the U.S. has remedied defects as regards due process.<sup>201</sup> For example, would-be exporting countries that do not meet U.S. standards are given written notice by the U.S. of a "preliminary" assessment that they do not appear to qualify for the certification necessary for them to export shrimp to the U.S.<sup>202</sup> The notification explains the reasons for this preliminary assessment and suggests steps the would-be exporting nation can take to receive certification.<sup>203</sup> In cases where certification is eventually denied, the nation in question receives a written notification setting out the reasons and the steps necessary to receive a certification in the future.<sup>204</sup>

The new Panel report is most encouraging. Reading it, one sees that not only did the U.S. respond positively to the defects identified by the Appellate Body, but that the new Panel took pains to find a more helpful approach than the first Panel to trade measures relating to conservation and animal protection. Malaysia appealed against the new Panel's report.<sup>205</sup> In October 2001, the Appellate Body upheld those of the Panel's findings which had been challenged by Malaysia.<sup>206</sup>

Indeed, we have arguably come a long way from the first *Shrimp-Turtle* Panel which seemed determined to ensure that conservation and animal protection considerations should never be permitted to impede trade liberalisation to the new Panel which was willing to accept that in certain circumstances a WTO member's conservation or animal protection measures could take precedence over trade liberalisation.<sup>207</sup>

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<sup>196</sup> *Id.* at ¶ 144 (emphasis omitted).

<sup>197</sup> *Shrimp-Turtle II*, *supra* n. 137, ¶¶ 173, 174.

<sup>198</sup> *Shrimp-Turtle III*, *supra* n. 185, ¶ 5.116. *See id.* ¶¶ 5.112-5.115 (the Report explains that the U.S. had adequately addressed the phase-in issues brought up by Malaysia, the complaining party).

<sup>199</sup> *Id.* ¶¶ 5.118-5.120.

<sup>200</sup> *Id.* ¶ 5.120.

<sup>201</sup> *Id.* ¶ 5.133.

<sup>202</sup> *Id.* ¶ 5.132.

<sup>203</sup> *Id.* 64 Fed. Reg. 36946, 36951 (July 8, 1999).

<sup>204</sup> *Shrimp-Turtle III*, *supra* n. 185, ¶ 5.132.

<sup>205</sup> *Shrimp-Turtle IV*, *supra* n. 195.

<sup>206</sup> *Id.* ¶ 153.

<sup>207</sup> *Shrimp-Turtle III*, *supra* n. 185.

#### IV. THE NEED FOR REFORM

As we have seen, the GATT rules have already inflicted great damage on animal protection measures. U.S. attempts to protect dolphins and initially their attempts to protect sea turtles have been ruled inconsistent with the GATT. The E.U., fearful of GATT rules, has largely abandoned its ban on the import of furs from countries allowing the use of leghold traps and its ban on the marketing of cosmetics tested on animals.

Moreover, GATT rules act as a major deterrent to the adoption of new measures designed to improve animal welfare. Article 10 of the directive in question highlights the degree of the E.U.'s fear that its battery cage ban may lead to its own producers being undermined by imported battery eggs.<sup>208</sup> The directive bans cages beginning the year 2012, but Article 10 provides that in 2005 (that is, before the ban comes into force) the ban must be reviewed, taking into account a range of factors including "the outcome of the World Trade Organisation negotiations."<sup>209</sup> This means that if the WTO rules have not been revised to enable the E.U. to prevent its farmers from being undermined by cheap battery egg imports, it may decide not to go ahead with its own ban on the cage.

This pattern may very well be repeated every time the E.U. (or any other WTO member) wishes to set improved welfare standards. The fact that under GATT rules a country can ban a cruel rearing system within its own territory, but arguably cannot ban the import of meat or eggs from animals reared in that system in other countries, acts as a powerful disincentive to the former country proceeding with a prohibition of that system within its own territory.

Clearly, GATT rules must be redrawn or reinterpreted so that progress on animal protection and other ethical issues can no longer be impeded by the trade liberalisation rules. At present, GATT's free trade rules are the dominant piece of international trade law. Thus, other legitimate public policy considerations—such as the environment, core labour standards, animal welfare, and the needs of developing countries—take second place at law to the trade liberalisation rules. This is not a reasonable or acceptable situation. GATT rules must now be reformed to provide a proper balance between free trade and other legitimate concerns, such as animal welfare. The following subsections discuss reforms necessary to address the animal protection problem.

##### A. *Process and Production Methods: PPMs*

As previously discussed, the GATT rules are interpreted by some as preventing WTO members from introducing marketing or import regulations which distinguish between products based on the way in

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<sup>208</sup> Council Directive 1999/74/EC, *supra* n. 145.

<sup>209</sup> *Id.* at art. 10.

which they are produced, if that distinction applies to imported as well as domestic products. This leads to the absurdity that, starting off from a rule (Article III:4) that imported products cannot be discriminated against, we arrive at the position where imported products must be treated *more* favourably than domestic ones. For example, a WTO member can prohibit the marketing of domestically produced battery eggs, but cannot extend that marketing ban to imported battery eggs which, under GATT rules, are treated as being no different from free-range eggs.

The position on PPMs must be revised to permit WTO members to make PPM distinctions in their marketing and import regulations. To prevent abuse, the ability to make PPM distinctions could be made subject to certain limitations. For example, rules or guidelines could provide that PPM distinctions must: 1) be transparent, non-discriminatory, and proportionate; and must not constitute a disguised restriction on trade; 2) be science-based; 3) be of importance to a significant proportion of consumers in the country making the PPM distinction; and 4) relate to a matter of substance. As an example of the last element, countries should be able to distinguish between battery eggs and free-range eggs, but not between two kinds of battery eggs, where one kind come from cages giving hens just a small amount of additional space.

### B. Recommended Changes to Article XX

#### 1. Use “relating to” Instead of “necessary to” in Paragraphs (a) and (b) of Article XX

Article XX(b) permits the adoption of measures “necessary to” protect animal life and health.<sup>210</sup> Dispute panels have given a very narrow interpretation of “necessary.”<sup>211</sup> For a measure to be “necessary,” a WTO member must show that no alternative measure that is consistent with, or less inconsistent with, GATT rules is available.<sup>212</sup>

The word “necessary” should be reinterpreted in a less restrictive manner. Ideally “necessary to” should be changed to “relating to the protection of animal health or welfare.” The term “relating to” is already used in Article XX(g), which deals with measures relating to the conservation of exhaustible natural resources, and has been interpreted by panels as meaning “primarily aimed at.”<sup>213</sup>

#### 2. Add “animal welfare” to Paragraph (b) of Article XX

The General Exceptions set out in GATT Article XX(b) should be expanded to allow WTO members to take trade-related measures designed “to protect the welfare of animals.” Article XX(b) already per-

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<sup>210</sup> GATT 1947, art. XX(b), *supra* n. 11.

<sup>211</sup> See 1989 *Tariff Case*, *supra* n. 155; *Taxes on Cigarettes*, *supra* n. 156.

<sup>212</sup> 1989 *Tariff Case*, *supra* n. 155, ¶ 5.26.

<sup>213</sup> See Section III of this article for a more thorough discussion of this issue.

mits WTO members to adopt measures necessary to protect “animal life or health.”<sup>214</sup> “Welfare” is a broader term than “health.” Measures necessary to protect animal “health” could be interpreted by some as being confined to measures needed to prevent the spread of animal diseases. The addition of the “welfare of animals” to Article XX(b) would make it clear that it is permissible for WTO members to adopt measures aimed at protecting the well-being of animals, such as measures aimed at preventing cruel rearing or slaughter practices.

Having said that, what are commonly referred to as “welfare” concerns often adversely affect the “health” of the animals. For example, hens kept in battery cages are unable to exercise and as a result suffer from high levels of osteoporosis.<sup>215</sup> Indeed, many battery hens actually have broken bones by the time they are slaughtered.<sup>216</sup> These are clearly “health” concerns. Likewise, as compared with sows housed in groups, sows kept in gestation crates have weaker bones and muscles, a poorer level of cardiovascular fitness, and a higher incidence of lameness, inflammatory swellings of joints, and urinary tract infections.<sup>217</sup> Clearly, all these are not simply welfare concerns, but also health matters.

### 3. *Extra-territoriality*

The panels in the Tuna–Dolphin cases and the Appellate Body in Shrimp–Turtle acknowledged that the wording of Article XX does not make it clear whether measures concerning animals may only relate to those within the territory of the country applying the measure or whether they can extend to animals outwith that territory.<sup>218</sup>

The Appellate Body in *Shrimp–Turtle* did not rule against the U.S. measure on grounds of extra-territoriality. It did this partly because sea turtles are highly migratory animals and, as such, are not confined to the territorial waters of any one country.<sup>219</sup> The Appellate Body also found that there was a “sufficient nexus” with the United States in that all the sea turtle species involved are known to occur in waters subject to U.S. jurisdiction.<sup>220</sup>

It is most unlikely that a panel or the Appellate Body would be as helpful in a case involving a nonmigratory species. If, for example, a

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<sup>214</sup> GATT 1947, art. XX(b), *supra* n. 11.

<sup>215</sup> Jacky Turner & Philip Lymbery, *Brittle Bones: Osteoporosis and the Battery Cage*, available at <[http://www.ciwf.co.uk/Pubs/Reports/Brittle\\_Bones\\_report.pdf](http://www.ciwf.co.uk/Pubs/Reports/Brittle_Bones_report.pdf)> (accessed Mar. 7, 2002).

<sup>216</sup> *Id.*; see Neville George Gregory & Lindsay John Wilkins, *Broken Bones in Domestic Fowl: Handling and Processing Damage in End-of-lay Battery Hens*, 30 *British Poultry Science* 555–62 (1989).

<sup>217</sup> Scientific Veterinary Committee of the European Commission, *The Welfare of Intensively Kept Pigs* (adopted by the Commission on Sept. 30, 1997), available at <[http://europa.eu.int/comm/food/fs/sc/oldcomm4/out17\\_en.html](http://europa.eu.int/comm/food/fs/sc/oldcomm4/out17_en.html)> (accessed Mar. 4, 2002). The report was adopted by the European Commission on September 30, 1997.

<sup>218</sup> See *supra* Section III.

<sup>219</sup> See *Shrimp–Turtle II*, *supra* n. 137, ¶ 133.

<sup>220</sup> *Id.* (citation omitted).

WTO member banned sow gestation crates in its territory and also banned the import of pig meat derived from herds using gestation crates in other countries, a panel or the Appellate Body would probably conclude that the import ban could not be justified under Article XX, as it sought to protect pigs located outside the territory of the country imposing the ban.

In the author's view, the position on extra-territoriality must be reviewed and revised. WTO members should be able to adopt measures to protect animals outwith their territory, provided that: 1) the measure is genuinely aimed at securing improved welfare standards; and 2) it is adopted and applied in conjunction with restrictions on (a) domestic production or (b) domestic consumption.

In both *Tuna-Dolphin* and *Shrimp-Turtle*, the measures under challenge prohibited imports unless the exporting country had a regulatory regime designed to reduce the killing of dolphins and sea-turtles respectively. Importing countries may find it easier to persuade panels and the Appellate Body that their measures fall within Article XX if they condition access to their market *not* on whether the exporting country as a whole has adopted a particular policy, but on whether that policy has been applied to the particular consignment that someone wishes to export. For example, it would be easier to come within Article XX if the importing country did not require *all* the exporting country's eggs to come from hens reared to a particular standard, but only those eggs intended for export to the importing country.

### C. Labelling

Even the ability of countries to require products, imported as well as domestic, to be labelled as to production method is in doubt. Indeed, it is not even clear what provision of the GATT rules would be applied to the validity of compulsory labelling, either the main GATT rules or the WTO Agreement on Technical Barriers to Trade (TBT).<sup>221</sup> This is a complex area and beyond the scope of this article. Nonetheless, there are good legal arguments to suggest that mandatory labelling, if applied in a transparent and nondiscriminatory way, would be valid. That said, the GATT rules and the TBT should be clarified, and if need be revised, to put the legitimacy of mandatory labelling schemes beyond doubt. If such schemes are properly to facilitate consumer choice, they must be applicable to imported as well as domestic products.

### D. The Need for a More Courageous Approach

Although clarifications and/or reforms of the rules are needed, in the meantime much could be achieved if the E.U. (and other WTO members) were more willing to risk adopting genuine animal protection measures and, when challenged, defend them before a WTO Panel. The U.S. has been courageous in this respect and has tried to

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<sup>221</sup> WTO Agreement on Technical Barriers to Trade, *supra* n. 6.

defend its dolphin and sea turtle measures. The E.U., in contrast, has been weak and abandoned its leghold trap and cosmetics measures at the first hint of a possible WTO challenge.

One way of extending the boundaries of WTO law is for a country defending an animal measure to persuade a dispute panel or the Appellate Body to take a fresh, more animal-friendly view of GATT rules. We have already seen that two of the most damaging so-called "rules"—those on PPMs and extra-territoriality—are not to be found within the text of GATT rules, nor do they even stem from clear, unassailable interpretations of those rules.<sup>222</sup> The rule on PPMs flows largely from two unadopted panel reports in the *Tuna-Dolphin* cases.<sup>223</sup> In contrast to these, the Appellate Body in *European Communities-Asbestos* concluded that consumer tastes and habits can be taken into account in determining whether two products are "like" each other.<sup>224</sup> Indeed, the Appellate Body placed great weight on the importance of examining consumer tastes and habits.<sup>225</sup>

Turning to extra-territoriality, both panels in *Tuna-Dolphin* and the Appellate Body in *Shrimp-Turtle* stressed that the text of Article XX does not state whether or not a measure can extend to animals outside the territory of the country adopting it. It certainly does not expressly spell out a jurisdictional limit. It is clear that interpretations of the GATT rules are not set in stone and that there is abundant scope for countries to persuade dispute panels and the Appellate Body to adopt fresh interpretations which will help prevent animal protection laws from falling foul of the GATT rules.

Countries should also be prepared to test Article XX(a), which provides an exception for measures "necessary to protect public morals."<sup>226</sup> To date, no one has tried to defend an animal protection measure under Article XX(a). However, Compassion in World Farming (CIWF)—together with the International Fund for Animal Welfare—recently brought a case to the European Court of Justice (ECJ) asking for a declaration that, despite the E.U.'s free trade rules,<sup>227</sup> the U.K. was legally entitled to ban the export of calves for rearing in veal crates in other E.U. member states (veal crates having been banned within the U.K.).<sup>228</sup>

<sup>222</sup> See *supra* Section IV.

<sup>223</sup> *Tuna-Dolphin I*, *supra* n. 24; *Tuna-Dolphin II*, *supra* n. 26.

<sup>224</sup> *Gasoline II*, *supra* n. 161; *2001 European Communities-Asbestos*, *supra* n. 67, ¶¶ 120-23.

<sup>225</sup> See *supra* Section II.

<sup>226</sup> GATT 1947, art. XX(a), *supra* n. 11.

<sup>227</sup> The E.U.'s free trade rules are similar in many respects to those of GATT.

<sup>228</sup> Case C-1/96, *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming Limited*, 1998 O.J. C. 166/3 (case originated as a *Reference for a Preliminary Ruling from the High Court of Justice*, Queens Bench Division, 1996 O.J. C. 46).



Like Article XX, E.U. law provides exceptions to its free trade rules, including a “public morality” exception.<sup>229</sup> Before the ECJ gives a judgment, the Court’s Advocate-General first gives an opinion to advise the Judges. In CIWF’s case, the Advocate General took a positive view of the public morality exception, saying that where in a particular country matters of animal life and health had indeed become matters of public morality, that country could, subject to certain provisos, ban the export of calves for rearing in veal crates.<sup>230</sup> Unfortunately, the Court rejected this opinion, but the Advocate General’s positive approach offers some hope that a successful defence under the public morality exception could be mounted before both the ECJ and the WTO.<sup>231</sup>

In conclusion, what is needed is both clarification and reform of the GATT rules, and also courage from countries to defend their animal measures, thereby hopefully coaxing more sympathetic interpretations out of the dispute panels and the Appellate Body. In this context, it is extremely encouraging that the U.S. recently enacted the Dog and Cat Protection Act of 2000.<sup>232</sup> If this measure were challenged, the U.S. would presumably first claim that the Act is not in breach of GATT rules. They could further argue that the Act makes no PPM distinction, as the import and export of *all* dog and cat fur products is banned, not just dog and cat fur products which are produced in a certain way. Furthermore, the U.S. could go on to argue that their import ban falls within the Note to Article III,<sup>233</sup> and accordingly should be considered under Article III rather than Article XI. The U.S. could then assert that its measure does not breach Article III, as imported dog and cat fur products are not treated less favourably than domestic products—both are prohibited.

The U.S. has prepared the way for arguing that its import ban does not breach GATT by stating in the Act’s preamble that the Act “is consistent with the international obligations of the U.S. because it applies equally to domestic and foreign producers and avoids any discrimination among foreign sources of competing products.”<sup>234</sup>

If the U.S. failed in its argument that its measure is not in breach of GATT rules, it could seek to defend it under Article XX. The U.S. has paved the way for an Article XX defence by stating in the Act’s preamble that:

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<sup>229</sup> Treaty Establishing the European Community, Mar. 25, 1997, art. 30 (formerly art. 36) in *Consolidated Treaties: Treaty on European Union/Treaty Establishing the European Community*, Office of Official Publications of the European Communities (1997), at 51 <[www.europa.eu.int/eur-lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur-lex/en/treaties/dat/ec_cons_treaty_en.pdf)>.

<sup>230</sup> Opinion of the Advocate General (P. Léger), Case C-1/96 (July 15, 1997).

<sup>231</sup> Judgment of the Court of Justice of the European Communities, Case C-1/96 (Mar. 19, 1998).

<sup>232</sup> 19 U.S.C. § 1308 (2000).

<sup>233</sup> The Note to Article III covers laws which apply to imported products and to like domestic products and are enforced in the case of the imported products at the time or point of importation.

<sup>234</sup> Pub. L. No. 106-476, § 1442(a)(9).

the trade of dog and cat fur products is ethically and aesthetically abhorrent to [U.S.] citizens; “[the] ban is also consistent with provisions of international agreements to which the [U.S.] is a party that expressly allow for measures designed to *protect the health and welfare of animals*; [and 3] U.S. consumers have a right to] ensure that they are not unwitting participants in this gruesome trade.”<sup>235</sup>

Moreover, the Act’s purposes include ensuring “that [U.S.] market demand does not provide an incentive to slaughter dogs or cats for their fur.”<sup>236</sup> Clearly it will not be open to the U.S. to argue in the future that animal welfare cannot come within paragraphs (a) or (b) of Article XX. This is a highly significant development.

## V. CONCLUSION

The GATT rules have already impeded progress which otherwise would have been made on animal welfare. Unless the rules, or their interpretation, is relaxed, they are likely to continue to exercise a malign influence on future attempts to secure improved standards of animal welfare.

Until very recently, this conclusion would have ended with the unremittingly gloomy view expressed above. A number of recent developments, however, allow for some cautious optimism, although there is still an enormously long way to go before the detrimental impact of the GATT rules on animal welfare is ended.

Firstly, in the *European Communities–Asbestos* case, the Appellate Body emphasised the importance of considering consumers’ tastes and habits in determining whether two or more products are “like” products.<sup>237</sup> This case has only limited relevance for animal welfare issues, as it dealt with human health concerns and determined that products cannot be judged to be “like” each other if one is a known carcinogen and the other is not, as consumers are likely to view them differently.<sup>238</sup> Nonetheless, the day may come when WTO jurisprudence recognises that two physically similar animal derived products are not “like” one another if consumers view them as being different because one is humanely produced and the other is produced in a cruel manner.

Secondly, the U.S., one of the main proponents of trade liberalisation, has prohibited the import of dog and cat fur products, and is apparently prepared to defend its import prohibition under both GATT Article XX(a) (public morality) and Article XX(b). The U.S. is seemingly arguing that Article XX(g) extends to measures designed to protect the welfare of animals as well as animal health.

Thirdly, the Panel and Appellate Body rulings in 2001 in *Shrimp–Turtle* are a world away from their earlier decisions in that

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<sup>235</sup> *Id.* § 1442(a)(7)–(9) (emphasis added).

<sup>236</sup> *Id.* § 1442(b)(1).

<sup>237</sup> 2001 *European Communities–Asbestos*, *supra* n. 67.

<sup>238</sup> *Id.*

case in 1998, particularly the earlier Panel decision.<sup>239</sup> In its first decision, the Panel seemed absolutely determined to ensure that endangered species and animal protection concerns should not be permitted to interfere with trade liberalisation. In its 2001 ruling, in contrast, it accepted that there are circumstances in which it is legitimate for a WTO member to restrict imports in order to help protect an endangered species.

One must be careful not to extrapolate too far from the latest *Shrimp-Turtle* decisions as that case involves an endangered species, seen by some as more worthy of protection than non-endangered animals. Moreover, sea turtles are migratory creatures; as such, a measure designed to protect them is much less likely to founder on the question of extra-territoriality than one protecting nonmigratory animals.

Fourthly, in both *Tuna-Dolphin* cases, the Panel ruled against the U.S. on the ground that its import ban sought to impose its own policies on other countries.<sup>240</sup> Crucially, in their 2001 rulings in *Shrimp-Turtle* both the Panel and the Appellate Body emphasised that a WTO member may condition access to its market on the adoption by would-be exporting countries of a programme of environmental protection that is comparable in effectiveness to (but not essentially the same as) that of the importing country.<sup>241</sup>

WTO jurisprudence appears to be slowly recognising the need to accommodate legitimate concerns other than trade liberalisation. Much, however, remains to be done before the GATT rules' detrimental impact on animal welfare is ended. In particular, no real solution will be achieved until the WTO recognises that it is proper for WTO members to distinguish, subject to appropriate safeguards, in their import and marketing regulations between products on the basis of process and production methods.

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<sup>239</sup> See *Shrimp-Turtle*, *supra* n. 126; *Shrimp-Turtle II*, *supra* n. 137; *Shrimp-Turtle III*, *supra* n. 185; *Shrimp-Turtle IV*, *supra* n. 195.

<sup>240</sup> See *Tuna-Dolphin I*, *supra* n. 24; *Tuna-Dolphin II*, *supra* n. 26.

<sup>241</sup> *Shrimp-Turtle III*, *supra* n.185, ¶ 5.103; *Shrimp-Turtle IV*, *supra* n. 195, ¶ 144.

