

Slaughtered at the Altar of Free Trade: are WTO rules hindering the progression of animal welfare standards in agriculture?

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This article analyses the WTO legal framework to determine whether trade liberalisation, particularly through the definition of 'like products', and the exceptions to free trade rules found in GATT Article XX, are accommodating enough to permit advancements in animal welfare legislation. Sovereign legislatures have taken steps to promote higher standards for animal welfare within their territories. The European Union in particular is a frontrunner for promoting high animal welfare regulation, in order to provide safer products, greater human health and consumer-friendly regimes. The steps that have already been taken, domestically and in bilateral trade agreements, may be seen as a move towards an international recognition that animal welfare is an important factor in the production of food from agriculture. It is therefore important for WTO law to accommodate for the increasing concern around animal welfare. This article will argue that the current framework does not accommodate for these concerns, and may in fact prove to be a strong deterrent against import bans and other trade restrictions that would prevent low animal welfare goods being imported and marketed in territories with otherwise very strong animal welfare values.

Introduction

In light of the increasing focus on farming culture and practices, and their impact on the environment and animal welfare,¹ this article will review the current World Trade Organisation (WTO) free trade framework and determine whether it could hinder progression towards better international standards in farming. Firstly, this article suggests that there is an increasing international recognition for the importance of animal welfare, which creates a fundamental issue for the WTO, if its rules do not allow for growth of legislation in this area. Secondly, an analysis of the problematic relationship between animal welfare and international trade laws is presented, which in turn assesses the effects of the relationship on future farm animal welfare progression.

The scope of this article is confined to the General Agreement on Tariffs and Trade (GATT)-embedded provisions that affect animal welfare – Articles I, III and the permitted exceptions in Article XX; although it should be noted that other areas of WTO law may affect animal welfare measures, such as the Technical Barriers to Trade Agreement and the Agreement on the Application of Sanitary and Phytosanitary Measures, which are outside the scope of this article. As the European Union (EU) is a key player in the recognition and implementation of important animal welfare standards, this article will utilise the EU as an example of how domestic regulators can face difficulties regulating their farmed product markets within the WTO framework.

Part 1: The International Movement Relating to Animal Welfare:

The WTO should be aware and considerate of increasing animal welfare standards in the production and trade of farmed food products, due to the internationalisation of animal welfare as a concept. The WTO is a large international body comprised of 160 members, it is in the best interests of the WTO and the contracting parties that it keeps up to date with shifting perceptions regarding agricultural trade.

There are a few indications that animal welfare is an emerging international concept, something which international trade lawyers have been debating for some years.² On a plainly rhetorical basis, there is

¹ Kate Rawls, *Sustainable Development and Animal Welfare: the Neglected Dimension*, in D'Silva and Turner, *Animal, Ethics and Trade: The Challenge of Animal Sentience* (Taylor & Francis 2012)

² See Michael Bowman (ed.), *Lyster's International Wildlife Law* (CUP 2010); Robert Howse and Joanna Langille, *Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Permit Trade Restrictions*

the fact that advocates of animal welfare standards are apparently ‘international’. Sykes³ notes that the two main bodies campaigning against seal hunting in a WTO dispute against the EU were both international organisations: Humane Society *International* and the *International* Fund for Animal Welfare, both of which campaign on establishing shared global norms about the treatment of animals. There is also the World Organisation for Animal Health (OIE) that provides guidelines for farm animal welfare. The OIE is concerned with informing practice, based on scientific evidence, on the slaughter of animals, animal transport and the keeping of livestock. While there is no international treaty concerning farmed animal welfare as of yet, there is the conservation treaty CITES,⁴ which places emphasis on the welfare of the individual species it covers. There is a European treaty on animal welfare, drafted by the council of Europe,⁵ which focuses on five basic guarantees for farmed animals that are identical to those of importance in the EU: freedom from discomfort, freedom from hunger and thirst, freedom from fear and distress, freedom from pain, injury and disease and freedom to express natural behaviour.⁶ These freedoms are formed on the basis that the States within the Council of Europe consider “*that it is desirable to adopt common provisions for the protection of animals kept for farming purposes, particularly in modern intensive stock-farming systems.*”⁷

The main centre of animal welfare legislation is in the EU, which is heavily invested in the idea of increased animal welfare at the regional and international level, and was the subject of one of the very few animal welfare related WTO disputes to date.⁸ The EU legal framework is pioneering the debate around animal welfare and ethics, by recognising animals as sentient beings⁹ and developing welfare legislation¹⁰ with the potential to affect the production and transportation of animals and animal-related products throughout the world. The EU has created standards on battery cages for laying hens,¹¹ stunning standards for humane slaughter of animals,¹² and has banned gestation crates for pregnant sows.¹³ Moreover, less relevant to farming and welfare, the EU has banned cosmetic testing on animals,¹⁴ increased standards of care for animals used in scientific testing¹⁵ and has increased standards for transported animals.¹⁶ The farming standards introduced at the EU level have been adopted in other jurisdictions; the poultry legislation particularly has been impactful: “*The EU legislation, rather than*

Justified by Non-Instrumental Moral Values (2012) 37 Yale Journal of International Law 367; and contra Laura Nielsen, *The WTO, Animals and PPMs*, (Martinus Nijhoff 2007)

³ Katie Sykes, Sealing animal welfare into GATT exceptions: the international dimension of animal welfare in WTO disputes, (2014) 13(3) World Trade Review 471

⁴ Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973)

⁵ European Convention for the Protection of Animals kept for Farming Purposes Strasbourg, 10.III.1976

⁶ See European Commission’s page on the convention and EU legislation based upon it <https://ec.europa.eu/food/animals/welfare_en> (accessed 01.08.19)

⁷ European Convention for the Protection of Animals, at (n.5)

⁸ DS401: European Communities — Measures Prohibiting the Importation and Marketing of Seal Products 2014

⁹ Article 13, Consolidated version of the Treaty on the Functioning of the European Union OJ C 326, 26.10.2012, p. 47–390

¹⁰ Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes OJ L 221

¹¹ Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens OJ L 203

¹² Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing OJ L 303, 18.11.2009

¹³ Directive 2008/120/EC of 18 December 2008 laying down minimum standards for the protection of pigs OJ L 47

¹⁴ Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products OJ L 342 22.12.2009

¹⁵ Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes OJ L 276, 20.10.2010

¹⁶ Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations OJ L 3, 5.1.2005

*solely EU consumer attitudes, has been a major factor in this world-wide change, which is accelerating.*¹⁷

The EU's attention to animal welfare standards will continue to internationalise the issue, particularly through trade agreements with third parties. Article 89 of the EU-Chile trade agreement¹⁸ includes animal welfare provisions, and a commitment to develop standards in line with the OIE's scientific guidance. The agreement's reference to animal welfare revolved around stunning and slaughter of animals, and the creation of a Committee to develop other animal welfare standards that are of importance to the EU and Chile. The EU gives technical assistance and guidance on how to make the practice of slaughter more humane.¹⁹ The EU's recently concluded trade deal with Japan also contains an animal welfare provision, in Article 18.17,²⁰ which specifically requires '*a focus on farmed animals*' and the ability to establish a working group on animal welfare for the purposes of information and expertise exchange.

Animal welfare was also a moot point in the Transatlantic Trade and Investment Partnership (TTIP) negotiations between the EU and USA, before their breakdown. There is an undeniable dichotomy between the standards of livestock treatment in the US and the EU,²¹ the latter including in its textual proposal on regulatory cooperation a high level of protection for animal welfare as central to the negotiation.²² The European Free Trade Association's (EFTA) agreement with the EU, the European Economic Agreement (EEA), also concerns itself with animal welfare.²³ It is clear that animal welfare will be an issue in all EU bilateral trade agreements, as noted by the EU Commission.²⁴ If the provisions of regional trade agreements are 'stepping stones' for international trade norms, it would be wise for the WTO to recognise the emerging importance of animal welfare concerns and uphold that importance within the multilateral framework.

The EU in 1999 drafted proposals for the WTO to consider addressing the issue of animal welfare.²⁵ Swinbank²⁶ notes the unpopularity of the paper, especially amongst developing countries more concerned with decreasing poverty than the welfare aspects of their food.²⁷ This article does not dispute that animal welfare standards will be highly divergent across the members of the WTO; even the Member States of the EU appear to have differing views on the necessity of animal welfare standards imposed at the transnational level.²⁸ However, support for animal welfare of some level, however divergent, has consistently grown since 1999 and developing countries have also concerned themselves

¹⁷ European Parliament, Study on Animal Welfare in the European Union, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs PE 583.114, p31

¹⁸ Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, 2002

¹⁹ European Commission, Slaughter and Stunning:

https://ec.europa.eu/food/animals/welfare/practice/slaughter_en (accessed on 01.08.19)

²⁰ Agreement Between the European Union and Japan for an Economic Partnership, 2019

²¹ See <http://www.pig-world.co.uk/news/highlighting-the-differences-how-uk-welfare-standards-compare-with-our-competitors.html> (accessed 01.08.19)

²² Article X1, TTIP- EU proposal for Chapter: Regulatory Cooperation

http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf (accessed 01.08.19)

²³ See Joint Declaration 29 on Animal Welfare, Agreement on the European Economic Area - Final Act - Joint Declarations - Declarations by the Governments of the Member States of the Community and the EFTA States, OJ L 1

²⁴ Report from the Commission to the European Parliament and the Council: On the impact of animal welfare international activities on the competitiveness of European livestock producers in a globalized world COM(2018) 42 final

²⁵ Preparations for The 1999 Ministerial Conference, EC Approach on Agriculture, Communication from the European Communities WT/GC/W/273

²⁶ Alan Swinbank, '*Like Products, Animal Welfare and the World Trade Organization*' (2006) 40 J WORLD TRADE 687

²⁷ Alan Swinbank, *ibid*, p690

²⁸ See Special Report No.31 2018: Animal welfare in the EU: closing the gap between ambitious goals and practical implementation, pp41-46 ; also Compassion in World Farming:

<https://www.ciwf.org.uk/news/2014/06/greece-continues-to-flout-eu-law> (accessed 01.08.19)

with animal welfare. Countries such as Peru, Costa Rica, Thailand and the Philippines have implemented animal welfare legislation.²⁹ Developing countries may also gain technical assistance from the OIE in relation to implementing the farm animal welfare standards.

International principles are generally derived from domestic laws, taking into consideration that almost all the world's domestic legal systems...include some kind of broad legal prohibition on unnecessary cruelty to animals including some constitutions; Sykes argues that it is wholly possible that an international principle of animal welfare is emerging.³⁰ If such a principle is emerging, then as per the rules of the Vienna Convention, the WTO dispute organs will need to take it into consideration when considering trade disputes.³¹ This does not necessarily mean that the WTO dispute settlement bodies would need to give precedence to the concept of animal welfare, but it would not be wise for the WTO to ignore any internationally recognised principle for they reflect shared values, so accommodating them gives a legitimacy to dispute settlement and ignoring them may do the opposite and create an isolated regime that permits states to evade their international obligations and hinders increased animal welfare protection.

Part 2: The relationship between animal welfare and international trade

2.1 Why does increased farm animal welfare conflict with international trade?

The fundamental reason that animal welfare concerns and conflicts with international trade law is the fact that animal welfare regulations will restrict trade, and the ultimate goal for international trade and the WTO is to liberalise free trade and reduce trade barriers globally. Farmed animals are a huge commodity in the area of agriculture. Any policy or legislation intended to prevent any unnecessary suffering of animals used for food production, is likely to slow down the production process and reduce profits.³² Animals that are intended for food production are therefore likely to be exposed to harm, cruelty and suffering due to the perception that low animal welfare production methods are cheaper and therefore yield greater profits than a process geared to ensuring animals' comfort and health. The EU parliamentary study notes that intensive farming can "*lead to aberrant behaviour in laying hens such as feather pecking and cannibalism, aggression and tail biting in pigs and aggression in calves. To control this undesirable behaviour, it is common practice to perform painful physical alterations on animals, in particular beak trimming, tail docking, castration and teeth clipping.*"³³ EU law sets out measures to prohibit this treatment of animals, but in turn those measures reduce the intensity of farming and therefore its profitability. EU measures on humane slaughtering also may reduce the speed at which animals can be processed, which also reduces the economy of slaughter.³⁴

As a result of these processes affecting the economies of scale in food production there is a perception that high animal welfare standards, without the requirement of equal standards for imports and exports, carries the risk of reduction in competitiveness or even loss of businesses to countries where production is more profitable due to lower standards.³⁵ Whether such business affects occur is uncertain,³⁶ but in order to equalise the market for national or regional businesses adhering to higher animal welfare standards, animal welfare policies and guidelines should also be required for all imported products.

A further reason for regional or national legislators requiring equal animal welfare standards for products that are imported, exported and national is that regional economies must respond to market demands for farmed products that accommodate for animal welfare concerns in their processing

²⁹ Kate Cook and David Bowles, *Growing Pains: The Developing Relationship of Animal Welfare Standards and the World Trade Rules* (2010) 19(2) *Review of European Community & International Law* 227, p228

³⁰ Katie Sykes, *Sealing animal welfare into GATT exceptions*, at (n.3) p481

³¹ Katie Sykes, *Sealing animal welfare into GATT exceptions*, at (n.3) p474

³² EU Parliamentary Report (n.17)

³³ *ibid*

³⁴ *ibid*

³⁵ EU Commission Report, (n.24) p7

³⁶ *ibid*

standards. There has been an increased demand for free-range eggs and meat, and increased public support for animal welfare regulation.³⁷ The harmful processes mentioned above are likely to be ill-favoured by consumers, who wish to see higher animal welfare standards. Not only is there a concern around the morality of these practices, but a concern about the food safety of products with lower animal welfare standards.³⁸

There may be an argument that the market will regulate itself where animal welfare standards are concerned, as consumer concerns will decrease purchase of products with bad practices. However, this would be an insufficient answer to the animal welfare question. Firstly, it would require mandatory labelling for goods with low welfare, in order for markets to make an informed choice, and the following section will show that such a practice may be a barrier to trade. Furthermore, if there is an international recognition that high animal welfare in agriculture is desirable, market preference is not enough to deliver higher standards. Lastly, market regulation does not stop the practices that consumers find harmful, it would merely work as a deterrent against them if market trends were clear enough to show that low animal welfare causes a fall in demand. Mishan notes that “*compulsory labelling and the spread of consumer information can only go so far in checking these repugnant commercial practices. In view of the financial temptations, the strictest government controls will always be necessary if a significant deterrent to cruel and inhumane treatment of farm and domesticated animals is to prevail.*”³⁹

Swinbank opines that consumer demand may turn into an expectation that every product available on the market has the same production method and animal welfare standards.⁴⁰ Due to the current fragmentation of animal welfare standards globally, this may not always be the case. States can only accommodate for consumer expectations by legislating to ensure that informed choices can be made on product standards (i.e. mandatory labelling systems for imports), or by altogether banning the import and marketing of a product that does not meet the expected threshold of animal welfare standards. These types of regulations will be the focus of this article; when such legislation is drafted, a conflict in the WTO may arise.⁴¹

2.2 WTO provisions that may hinder animal welfare progression

The following section of this article will discuss how WTO law could be hindering increased farmed animal welfare and better agricultural practices. Most importantly, the article discusses Articles I, III and XX of GATT 1994. The following sections show how animal welfare standards imposed on imports will generally conflict with the WTO framework, as the prohibition of protectionism and discrimination under WTO law precludes contracting parties from banning products with low animal welfare standards, or subjecting them to different rules on labelling. This is exacerbated by the framework on exceptions to the general principles of free trade, which does not appear to accommodate for the farmed animal welfare concerns of contracting parties.

a. GATT Articles I, III, and the definition of ‘like products’

All farmed animal welfare legislation will most likely conflict with the fundamental rules of the multilateral trading system, which are contained in GATT⁴² Article I of GATT ensures that trade liberalisation is equal amongst the contracting parties, it contains the ‘most favoured nation’ principle (MFN). If any WTO Member offers favourable duties, import taxes or regulation of trade to another member for certain products, then all WTO members must be extended the same treatment for like

³⁷ Eurobarometer shows that an overwhelming majority of Europeans consider farmed animal welfare to be important, and that stronger protections should be in place: Special Eurobarometer 442 ‘*Attitudes of Europeans towards Animal Welfare*’, 2016.2717

³⁸ EU Parliamentary (n.17)

³⁹ Ezra Joshua Mishan, *Economists versus the Greens: an exposition and a critique*, 64 *The Political Quarterly* (1993) 222-242.

⁴⁰ Alan Swinbank, ‘*Like Products, Animal Welfare and the World Trade Organization*’, at (n.26) p 695-696

⁴¹ *ibid*

⁴² General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994)

products. The way that any one member treats all other members, is the same way it treats its ‘most favoured nation.’

Article III of GATT is the main source of conflict where animal welfare and international trade meet, because it lays down the principle of national treatment. This prohibits contracting parties from imposing taxes, rules and regulations that afford protection to national products; it states: “*The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.*”⁴³

Swinbank notes that the identification of ‘like products’ is paramount when considering the compatibility of certain domestic regulation with international trade laws, which poses difficulties for members of the WTO wanting to impose animal welfare standards that importers would also have to adhere to. WTO law, as per the dispute settlement panels, defines ‘like products’ as having no regard to process or production methods, meaning a product cannot be treated differently simply because, for example, its process is more environmentally destructive or more concerned with animal welfare. If the end products have no physical difference, they should be treated equally. Animal welfare standards are therefore not a reason for product differentiation, as they are non-product related, and do not alter the *physical* make-up of the end product. This definition applies regardless of the value that can be asserted about the processing technique, as the following two cases illustrate.

In the US – Tuna I⁴⁴ dispute, a US measure banned imports from countries which did not use comparable fishing methods to the US, or had a dolphin death rate of more than 1.25 times the average of the US. Mexico lodged a complaint under GATT 1947, which revealed the issue of process-ignorance in the definition of ‘like products’. The panel in this dispute applied GATT Article III and the national treatment principle, and found the US embargo to be incompatible with GATT because (*inter alia*) the repeated use of the word ‘product’ in GATT emphasises the importance of the end physical product, and not the process in which it is made. Kelch⁴⁵ notes how this definition leads to a regime where a country could regulate the size of eggs but not how they were made; it could impose restrictions on eggs of a physicality but not on those that had been produced in an inherently cruel and inhumane manner. The US – Shrimp⁴⁶ dispute concerned a US import ban that aimed to protect sea turtles that would be accidentally caught and killed by fishing methods that did not use a turtle excluder device. India, Malaysia, Pakistan and Thailand raised a dispute under GATT due to the measure affecting their fishing practices, requiring them to use turtle excluder devices during all fishing, which would increase costs, as well as constituting the US forcing their environmental policies on countries wishing to trade in their territory. The WTO decision that this was incompatible with GATT Article XI (prohibition on import restrictions) was not contested by the US at all.

The definition of like products creates the problem that animal welfare provisions imposed on imports could become a barrier to trade. For instance, mandatory labelling would be required to allow consumers to make informed choices about the food products they are buying. If the EU, or any other WTO member, were to impose mandatory labelling on imports of eggs or meat products, this may constitute those products not being treated the same as ‘like’ products in the domestic market. If the legislature banned the import of eggs or meat produced through inhumane processes, this would certainly constitute a restriction on trade, because the eggs and meat imported from elsewhere would have the same physical characteristics as those made with animal welfare measures in place.

⁴³ Article III (4) GATT 1994

⁴⁴ United States – Restriction on Imports of Tuna DS21/R - 39S/155 (Tuna I)

⁴⁵ Thomas G. Kelch, *Globalization and Animal Law: Comparative Law, International Law and International Trade* (Kluwer 2011)

⁴⁶ United States - Import Prohibition of Certain Shrimp and Shrimp Products - Appellate Body Report and Panel Report pursuant to Article 21.5 of the DSU - Action by the Dispute Settlement Body WT/DS58/23 (US-Shrimp)

This will hinder progression by deterring legislatures from imposing animal welfare standards on imports, or from imposing them at all. It will also deter compliance for producers, in order to remain competitive and creates a race to the bottom for animal welfare standards. Furthermore, the definition of like products and its effect on animal welfare development imposes unequal treatment on domestic products with good agricultural practices, which seems to be against the entire logic of Article III GATT. These issues will be discussed in detail in the following paragraphs.

The current definition of ‘like products’ could deter legislatures, through fear of an expensive WTO dispute, from adopting measures that would adequately protect consumers from inhumane products and businesses from competition from products that do not adhere to welfare standards. For instance, during the debate on banning battery cages in egg production, the possibility of this causing a WTO challenge was raised.⁴⁷ There was also some backlash against the ban, because some felt that “*the European Union is putting its own producers at a competitive disadvantage by specifying stricter rules for them than those it applies to external suppliers for imports.*”⁴⁸ This sentiment has been repeated in other agricultural debates regarding high animal welfare standards, with Member State representatives feeling the EU is hypocritical,⁴⁹ and disadvantaging their farmers by not seeking international compliance.⁵⁰ The European Union, although leading the development of animal welfare, does not currently extend its values and practices to imports. Instead, the EU focuses on being a ‘lighthouse’ for other jurisdictions and raising awareness of animal welfare standards.⁵¹ Whilst it cannot be categorically proven that the looming threat of an expensive WTO dispute is at the heart of the EU decision to defer from imposing import restrictions, there is no doubt that the deterrence factor of WTO law would be incredibly strong for agricultural measures, because of the huge volume of imports and exports of meat and livestock globally, increasing the likelihood that a conflict will arise. Presently, national and regional legislatures have to choose between adopting regulations that promote good agricultural practice but forcing businesses to compete with products that do not do this, or imposing trade restrictions on products without comparable processes and facing a WTO dispute, or not introducing animal welfare standards in agricultural processes at all. As long as these restrictive choices prevail, international standards for animal welfare in agriculture will be slow to develop.

Furthermore, the dilution of animal welfare legislation that occurs out of fear of a WTO dispute means that animal welfare will remain segmented in different domestic jurisdictions, meaning it will take much longer to reach an international cohesion if members will only regulate their domestic producers and will not enforce import bans or product requirements against each other. The bad animal welfare practices of certain states will remain in place because there will be no incentive for change. The current framework promulgates a race to the bottom of animal welfare standards, as States are in the best position when they are not increasing animal welfare.⁵² Certain states therefore may choose to keep their animal welfare as low as possible to exploit a market that is being more conscientious about the welfare of animals. Kelch notes how the WTO basically imposes on states ‘the worst possible environmental and animal welfare legislation’ in order to remain competitive.⁵³ This creates a lack of cohesion between the WTO approach to animal welfare and the increase of animal welfare concern internationally. At the general international level animal welfare is important and increasingly desirable, but its importance is drastically undermined if the multilateral trading throws into question the legitimacy of animal welfare measures, by effectively rewarding bad animal welfare practice.

For producers of agricultural goods, even if there are domestic welfare standards imposed, there is a lack of incentive to meet these obligations if products with low animal welfare standards can still be

⁴⁷ European Parliament, Welfare of laying hens (debate) 2010/2979(RSP) see submission by John Stuart Agnew

⁴⁸ *ibid*, see submission by Csaba Sándor Tabajdi (S&D)

⁴⁹ European Parliament, Agricultural product quality schemes (debate), 2010/0353(COD), see submission by Diane Dodds

⁵⁰ European Parliament, Agricultural product quality policy: what strategy to follow? (debate) 2009/2105(INI), see submission by Janusz Wojciechowski (ECR)

⁵¹ Commission report page 9

⁵² See *contra*, Commission report (n.24) p7

⁵³ Kelch, *Globalization and Animal Law* (n.45)

imported into the market. As noted above, Member States of the EU are discontent with the rising animal welfare standards, from a point of international trade. During the process of debating and implementing the battery cage ban, many Member States were reluctant to invest in changing their farming processes, despite the agreement that battery cages were an unnecessary and cruel farming practice.⁵⁴ The EU's latest animal welfare strategy is also proving to lack fully effective compliance,⁵⁵ in some instances the Member State felt that EU measures on developing and implementing animal welfare may hinder the competitiveness of the national market.⁵⁶

Lastly, there is the issue of the competitive inequality caused by Article III GATT. Where producers *do* comply with animal welfare measures that a legislature has put into place, they can face market punishment as a direct result of Article III GATT. Stevenson⁵⁷ notes that EU producers feared they would be driven out of the European market by importers who could still produce eggs cheaply using battery cages, because GATT would not permit import restrictions on those products. Whilst it is impossible to concretely predict any trade outcomes, it is clear that Article III overreaches its proper role and function in regard to animal welfare measures. Article III protects WTO members from having their trade liberalisation suffer from national protectionism, it promotes trade equality and fair competition between goods. Thus, it is not entirely rational that standards and process requirements imposed on all products at the national level, could be conceived as protectionist when also applied to products from outside the territory. If such requirements were not applied at the national level already, that would certainly create an unfair advantage for national producers. To reverse this, so that domestic suppliers must adhere to regulations that importers do not, creates reverse protectionism for imports. True equality and fair competition would entail treating free range eggs alike and battery eggs alike etc. Therefore, free range eggs would enjoy the same treatment as domestic eggs and battery eggs would be banned the same as in the domestic market. What essentially occurs currently is punishment of a member who is being morally conscientious and an advantage is possibly given to states that are willing to let animals suffer undeniable harm and cruel treatment.

The previous section has shown that GATT, particularly Article III, creates problems for domestic legislatures who wish to increase their standards on farmed animal welfare. As a rule, product requirements in the form of mandatory labelling or import bans will *prima facie* breach GATT and could result in a WTO dispute. The following section will show that even when legislatures take the risk and intend to fight their animal welfare cause in front of a WTO panel, there is little in the GATT exceptions that would enable them to justify breaching the multilateral trading framework.

b. Article XX: GATT Exceptions for Farmed Animal Welfare Measures:

Article XX of GATT allows for policy concerns to override GATT, with the ten general exceptions.⁵⁸ There are three exceptions that could apply to animal welfare legislation are: (a) in relation to public morals, (b) in relation to protection of animal health and life and (g) in relation to the preservation of exhaustible natural resources. Any state wishing to invoke an exception needs to successfully argue for the specific exception itself and then successfully argue that the legislation or measure in question does not infringe the general provision of Article XX, the chapeau, which may prove difficult.

Article XX (b) is the most obvious exception for a state wishing to justify a farm animal welfare measure would be that of animal health and life as it expressly refers to animal. However, it does not expressly refer to animal welfare. A measure may be justified under this exception if it can be proven that the policy objective is to protect human, animal or plant life or health and that this specific measure is necessary to achieve that policy objective. *Prima facie*, states could argue that animal welfare legislation

⁵⁴ Welfare of laying hens (debate) (n.47)

⁵⁵ See Animal welfare in the EU: closing the gap between ambitious goals and practical implementation (n.28) p7

⁵⁶ See Poland's response on Measure 14, Animal welfare in the EU: closing the gap between ambitious goals and practical implementation (n.28)

⁵⁷ Stevenson, *The World Trade Organization Rules: A Legal Analysis of Their Adverse Impact on Animal Welfare*, Animal Law, Vol 8 2002 107-141, p109

⁵⁸ Article XX (a) to (j), GATT (n.42)

is intended to increase farm animal health, as obviously decreasing mental and physical suffering of the animals involved will have positive health impacts. A state could even argue that animal welfare legislation protects human health and life under Art XX (b) because lower animal welfare standards can lead to the spread of infectious diseases.⁵⁹ However, this would require a rather wide reading of Art. XX (b), and considering the WTO panels already exhibit a tendency to interpret exceptions restrictively,⁶⁰ it is unlikely to actually aid Members who wish to impose animal welfare standards. The greatest problem with using Article XX (b) to justify animal welfare restrictions on trade is that Members would essentially be arguing that their measures are intended to protect the life and health of animals that are not within their territory, or their jurisdiction. Stevenson⁶¹ notes how this was a bar to the US using XX(g) in *Tuna-Dolphin I and II*. By requiring fishing methods that protected the life and welfare of dolphins, and imposing this on imports, the US was attempting to protect dolphins that were not within its own territory. The WTO dispute settlement panel did not accept that it was possible for a Member to so heavily impose policies on another Member's territory.⁶²

On top of the aforementioned difficulties, any member arguing for farm animal welfare measures under this exception would need to show it was *necessary* to protect animal or human health, under the general principles of Article XX.⁶³ This would mean the measure itself could not have been any less trade restrictive. The most effective way for domestic legislatures to protect their markets from products that fall below animal welfare standards, is to place import bans on products that do not adhere to those standards. It will be hard to prove the 'necessity' of this, as such measures will be highly restrictive. The necessity would also require any Member to show that animal welfare is imperative for human health (a strained interpretation for most countries), or that it is imperative for animal health in agriculture. The problem with this is that agriculture itself is not good for animal health, especially meat production where the end result is slaughter. Any measures to protect animal health are so stunted in terms of longevity, that their necessity could be easily called into question by the very nature of food trade.

It is clear that this exception is uncertain at best and it seemingly would not be easy for any member to use it to claim legitimacy for their farm-animal welfare measures. Therefore in practice, what appeared the most obvious exception to argue for animal welfare measures would actually be ruled out of much use. A state would either have to argue that farmed animal welfare was an issue of public morals or an issue of preservation, which is also problematic in the context of farmed animal welfare.

The applicability of Article XX (g) (concerning preservation) to farmed animal welfare is also somewhat dubious. The appellate body in *US – Shrimp*⁶⁴ confirmed that Art. XX (g) will apply to living resources, due to the commitment of the international community at preserving living things as well as non-living. This decision was a step forward in terms of conservation and animal welfare but the same outcome is unlikely to be arrived at in relation to farmed animals. The protected animal in the *US-Shrimp* dispute was turtles, which are internationally recognised as being endangered under CITES.⁶⁵ Chaudhri⁶⁶ notes that although livestock numbers are finite, there is no conservation involved in protecting animals from harm when they are going to be slaughtered and consumed anyway. Chaudhri states that certain conserved animals are still consumed (such as tuna) but their numbers are not controllable by humans, unlike the amount of cattle sent for slaughter.⁶⁷ The simple matter is that animal welfare has no impact on the number of farmed animals killed. This would mean that the last two exceptions that at first looked like a possible justification for a state imposing farm animal welfare measure, would be ruled out due to the technicalities of their wording. Therefore, a member would have

⁵⁹ See EFSA website <<https://www.efsa.europa.eu/en/topics/topic/animal-welfare>> (accessed 06.08.19)

⁶⁰ Stevenson (n.57) p112

⁶¹ *ibid*

⁶² *US – Tuna I & II* (n.44)

⁶³ See Chapeau of Article XX GATT (n.42)

⁶⁴ *US – Shrimp* (n.46)

⁶⁵ Appendix I, Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973

⁶⁶ Chaudhri, Radhika, *Animal Welfare and the WTO: The Legality and Implications of Live Export Restrictions under International Trade Law*, Federal Law Review, Vol. 42, Issue 2 (2014) 279-308

⁶⁷ *ibid*

to succeed in justifying their measure under the public morals exception, or have it deemed incompatible with WTO law.

So, we must turn to the morality exception in Article XX (a). Cook and Bowles⁶⁸ argue that it would be easiest for a WTO member to prove necessity from a moral perspective, because the ethics of animal welfare issues dictate that certain products should not be available to consumers at all. If this were to be a successful justification, the disputing Member could not argue that a labelling system or some other less restrictive measure would be adequate in place of an import ban.

There are compelling arguments to suggest that animal welfare legislation would fit within the scheme of the ‘public morals’ exception. This is confirmed by the *EC-Seals*⁶⁹ panel decision. This dispute concerned a measure that banned imports of seal products into the EU unless they satisfied strict exceptions.⁷⁰ Canada and Norway raised objections to the ban, and this became the first WTO dispute based on moralistic (rather than environmental) animal welfare concerns and restrictions on trade.⁷¹ The preamble of the regime implemented by the EU referenced the animal welfare concerns of the public about the pain, distress and fear of seals that were hunted.⁷² The measure was found to be inconsistent with the most favoured nation principle, because it did not accord the same treatment to Norway and Canada as it did to Greenland.⁷³ It was also found that the overall measure (and not the specific, discriminatory exceptions) would be justifiable under Article XX (a)⁷⁴ due to its policy objective of public morals and the genuine public concern about the hunting methods of seals. However, it was held that the regime did not meet the requirements of the chapeau⁷⁵ because the measure was discriminatory, due to the exceptions in the regulation giving favourable treatment to Greenland.⁷⁶

Although this decision is a step in the right direction because it evidences a dispute settlement panel recognising the importance of animal welfare in international trade, there is still a long way to go before agricultural developments in farmed animal welfare are accepted and desired. A state wanting to successfully justify an import ban for agricultural items with low animal welfare would have to prove the policy objective was to protect public morals, and also that it was necessary to do so and would have to satisfy the chapeau of Article XX. There are a number of reasons why this may be difficult in terms of more intensively farmed goods, such as regular meat or egg products.

Public morality is the most forgiving exception for trade restrictions, because there is a large degree of deference given to Members to recognise and regulate the morality of their territories.⁷⁷ However, this deference is not unqualified and even after public morality is established, a careful balancing act that considers the *necessity* of import restrictions to protect those morals is undertaken.⁷⁸

Firstly, public support for the *EC-Seals* regime was evidenced with a large amount of petitions, letters and general public outrage, and although there is evidence (particularly in the EU) that consumers do care about the welfare of farmed animals, the same amount of public involvement may not exist towards farmed animals that are widely consumed. However, there should not be a need for extremity and external pressure before the WTO recognises an issue as one of morality, especially in relation to

⁶⁸ Cook and Bowles (n.29)

⁶⁹ DS401: European Communities — Measures Prohibiting the Importation and Marketing of Seal Products 2014

⁷⁰ Regulation (EC) No. 1007/2009 of the European Parliament and of the Council, of 16 September 2009 on trade in seal products

⁷¹ Sykes (n.3) p471

⁷² Declaration (1) to (5), Preamble to Regulation 1007/2009 (n.70)

⁷³ *EC-Seals* (n.69) WT/DS400/R and WT/DS401/R Panel report Para 8.9(a), para 8.3

⁷⁴ *ibid* at para 7.631-7.632 and 8.8(b)

⁷⁵ Measures subject to exceptions must not be arbitrarily discriminatory and must not be a ‘disguised restriction on trade’, as per the wording of the first paragraph under Article XX GATT 1994.

⁷⁶ *ibid* at para 8.9(c)

⁷⁷ Cook and Bowles (n.29) p232-233, Sykes (n.3) p473

⁷⁸ See Appellate Body Report, Brazil - Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R; Appellate Body Report, Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161, 169/AB/R; Stevenson (n.57) p126

something like animal welfare that can be seen as an international good. Sykes notes that the international developments regarding the recognition of the value of animal welfare may make it easier for a panel to find that certain trade restrictions are necessary to meet the objective of protecting public morals.⁷⁹ It is therefore possible that, especially after *EC-Seals*, a WTO dispute settlement panel will recognise the general importance of animal welfare for the protection of consumers and the public in general.

Secondly, the necessity of restrictions will have to be balanced against the general interests of trade. This means that, firstly a Member will have to show that their measure was necessary to protect public morals and that there are no viable alternatives that are less trade restrictive.⁸⁰ If the complaining Member offers an alternative, it is up to the responding Member to prove why that was not a viable option. Cook and Bowles⁸¹ suggest that in these circumstances, any Member trying to justify an animal welfare restriction would have to show that the process of certain production methods is inherently inhumane, rather than simply under-regulated, in order to legitimise preventing the marketing of the end product within their territory. This is likely to prove incredibly difficult, particularly in relation to animals that intended for and will eventually be slaughtered, as the end practice is ultimately the same across most manufacturers. Secondly, exactly how restrictive on trade a measure is likely to be will ultimately determine overall how necessary it is. Stevenson notes that “*there is a feeling that, when it comes to animal protection measures, the panels and Appellate Body will always rule in favour of trade liberalisation. Indeed, when a measure designed to save a species from extinction (as in Shrimp-Turtle) cannot survive a WTO challenge, it is hard to believe that any animal protection laws will ever be held to satisfy the GATT rules.*”⁸²

Thirdly, the extra-territoriality of the issue would have to be discussed. As with Article XX(b) and (g), there may be an assertion by any disputing Member that domestic or regional animal welfare standards should not be imposed on animals outside that territory. This was raised during the *EC-Seals* dispute by the panel, but since the complaining parties themselves did not raise the issue, it was not taken into consideration or deliberated upon. Whilst this will be a barrier to any successful justification of animal welfare restrictions on trade, Stevenson provides an insightful argument against the extra-territoriality. He argues that Members should be able to recognise and regulate the morality of products within their own territories, and to properly do so Members have to be able to fully exclude products with immoral (i.e. low animal welfare) qualities from their territory.⁸³ Animal welfare restrictions are not an issue of Members pushing their standards into extra-territorial jurisdiction, but are more about comprehensively regulating the morality of markets within their own. Whether the WTO would accept such an argument is debatable, but at present the framework created by Articles I, III and XX ensures that Members are reluctant to test import bans at a dispute panel.

To summarise, although it is prima facie possible for an animal welfare restriction on trade to fall under the GATT exceptions, it is de facto impossible to assume that the restriction is justifiable. The intensity of farming practices and the volume of international trade in agricultural farmed products makes it unlikely that there will not be some finding against a Member regarding the necessity of their restrictions, or their evidence of public morality.

Conclusion

International recognition of animal welfare as a common value is expanding. At present, the WTO legal framework does not accommodate for developments in farming standards the way that it should. There

⁷⁹ Sykes (n.3) p495

⁸⁰ See Report of the Panel in United States – Section 337 of the Tariff Act of 1930, BISD 36S/386; Report of the Panel in Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, BISD 37S/200

⁸¹ Cook and Bowles (n.29) p235

⁸² Stevenson (n.57) p126

⁸³ *ibid*, p121

is evidence that legislatures are interested in developing better agricultural practices that reduce unnecessary suffering and harm of farmed animals, in line with consumer tastes and preferences.

However, the definition of like products, which does not take process into account when determining the comparability of products for trade liberalisation, will effectively deter legislatures from setting the same standards on import of meat and food products in agricultural trade. Although article III of GATT is intended to protect WTO Members from protectionist measures, it makes it difficult for states to treat products that are comparable in the eyes of consumers and manufacturers equally. Instead, reverse discrimination is a likely outcome of animal welfare developments in regional and domestic laws. This will keep animal welfare from developing internationally, with better farming practices remaining fragmented and subject to mutual agreements among Members of the WTO. Were Article III to recognise the importance of process for animal welfare, and take into consideration cruel and inhumane production methods during the comparing of products, greater international standards of trade may result.

Although there is scope to suggest that the WTO framework balances the non-recognition of product processes (and heightened trade liberalisation), with domestic concerns in the Article XX(a) exception regarding protection of public morals, this is not enough. The force of Article III's deterrence is self-evident, domestic legislatures across the globe have concerned themselves with farmed animal welfare standards without risking to impose the same requirements on imports. This is specifically a problem for intensively farmed agricultural products, because the sheer volume of global trade in food products will undoubtedly lead to a WTO dispute in the event of import bans. The deterrent effect opens the market to abuse by those who would continue inhumane farming practices, regardless of public and consumer opinion. The overall effect of the WTO trading system, and its relationship with animal welfare, is to reward bad practice that is increasingly outdated. In turn, this makes domestic and regional relationships with animal welfare practice fraught, as markets can become saturated with less morally conscientious products.

As the WTO framework is built to liberalise trade, to ensure equality and to recognise the ability of sovereign legislatures to regulate consumer choices and preferences, the current scheme is flawed. Trade liberalisation is still possible with high animal welfare standards, as is equal treatment of products that should be comparable. Currently, it is difficult for sovereign Members to regulate their markets and protect their consumers. This is not an issue of trade protectionism for national products, but over-protective trading practices for international products with low welfare compliance. This article has shown that WTO law is not only hindering progress in international animal welfare standards, but doing so against the premise of its own role and function.