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Editorial

The WTO & Animal Welfare: *“Sufficient Nexus” for Morally Based NPR-PPMs in GATT Article XX?*

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A. Introduction

Initially, one may ask: How do animal welfare issues relate to the World Trade Organization (hereinafter WTO)?¹ In many instances, animal welfare concerns in the course of trade can be addressed by the use of trade barriers. Examples of animal welfare motivated trade barriers are e.g. bans on imports of furs and pelts from animals skinned alive; bans on imports of furs and pelts from pets (most often cats and dogs); bans on imports of furs and pelts from animals caught in leg-hold traps, etc. However, under the rules of the WTO, Members may not be allowed to enact or maintain trade barriers to protect animals in the course of trade. The legality of the trade measures depend on the analysis of the General Exceptions in GATT² Article XX because trade barriers, most likely, violate the substantive obligations under the GATT.

This article illuminates one single problem in relation to the WTO and animal welfare: the issue of “sufficient nexus” in a potential GATT Article XX justification of a non-product related process or production method (hereinafter NPR-PPM) trade barrier enacted to ensure animal welfare protection. This special problem is one of many issues analyzed in my newly finished PhD dissertation,³ but this particular issue was singled out because it is fairly easy to understand and because it can be debated without a deeper understanding of WTO law.

Before, however, entering into the analysis of what “sufficient nexus” is, a few basic issues must be highlighted. Section B provides a definition and explanation of the difference between animal welfare protection of animals and environmental protection of animals – as well as a brief introduction into issues of legality and illegality of non-tariff barriers in the WTO.

Section C of the Article illuminates that trade barriers can be divided into three distinct categories, whereof one of them, the NPR-PPM, sparks an analysis of “sufficient nexus”.

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¹ See the Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1143 (1994), entered into force Jan. 1, 1995 [hereinafter the WTO Agreement].

² See the General Agreement on Tariffs and Trade, Apr. 15, 1994, WTO Agreement Annex 1A (GATT 1994); the General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194 (GATT 1947). GATT 1994 incorporates GATT 1947 and GATT 1994 did not alter the Articles in issue in this article (namely GATT Articles I, III, XI and XX) – therefore the article references to GATT without specifying whether it is GATT 1947 or GATT 1994.

³ See LAURA NIELSEN, THE WTO, THE ENVIRONMENT & THE ANIMALS: POLICIES IN GATT ARTICLE XX (A), (B) & (C), Phd dissertation at the University of Copenhagen for public defense March 4, 2005, publication forthcoming, copies of unpublished dissertation can be requested with the author.

Finally, Section D provides an analysis of how “sufficient nexus” could be near to impossible to establish for trade measures taken to ensure animal welfare protection in another country in the course of trade.

B. Animal Welfare Trade Measures and Their Legality in terms of GATT

Protection of animals can be divided into two different areas: animal welfare protection and environmental protection of animals. Animal welfare protection is the type of protection of animals, which relates to the animal as an individual *specimen* of a species, whereas environmental protection of animals is the protection of the *species* against extinction (i.e. biodiversity protection of endangered species).⁴ This definition of animal welfare protection hence encompasses the protection of animals against treatment, which humans deem to be “inhumane”.⁵ Inhumane and cruel treatment of animals differs in definition from culture to culture and from species to species.⁶ Consequently, no precise definition of “basic animal rights” exists. Rather each state sets its own level of protection against animal cruelty. Essentially, it can be posited that environmental protection of animals is based on scientific evidence that a species is endangered, whereas animal welfare protection is a moral decision. When a country bans certain goods (in order to protect animals) the measure will most likely be in violation of the substantive obligations in GATT Articles I, III, or XI.⁷ The issue therefore becomes whether the General Exceptions in GATT Article XX can be accepted as a defense for the otherwise illegal trade measure. The relevant parts of GATT Article XX read as follows:

“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 of 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.”

It was in the GATT Article XX analysis the Appellate Body in *Shrimp* introduced the concept of “sufficient nexus.”⁸ However, in order to understand what “sufficient nexus” is and why it could be difficult to establish for animal welfare measures, the difference between internal and process or production method (hereinafter PPM) measures need to be explained.

C. Nexus Relevant for Measures that are NPR-PPMs

Trade measures can be divided into three types of measures: internal, product related PPMs and non-product related PPMs (hereinafter PR-PPMs and NPR-PPMs).

⁴ See e.g., PETER PAGH, *MILJØ ANSVAR EN RET FOR HVEM?*, Jurist- og Økonomforbundets Forlag, 113 (1998); NIELSEN, *supra* note 3, at 49.

⁵ For further explanation of the emotional aspect of the way humans perceive animals’ feelings and the manner in which human feelings are perceived hurt from “inhumane” treatment of animals, see NIELSEN, *supra* note 3, at 77.

⁶ See *id.*, at 76-77.

⁷ For an extended analysis of why trade measures most likely will be in violation of one of the substantive obligations, see *id.*, at 102-10

⁸ See United States – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R, Oct. 12, 1998 [hereinafter *Shrimp Appellate Body Report*], para. 133.

I. Internal Animal Welfare Measures

Internal trade measures are the type of measures through which a product is banned from the territory of a WTO Member. This could e.g. be a ban on fur products from cats, dogs or baby seals. An example of an internal measure in a WTO case is the *Asbestos* case where France essentially had banned all asbestos from its territory on grounds of human health protection.⁹ This measure was accepted under the exception with fairly “easy” tests and there was an understanding that the internal measure was not discriminatory in any manner.¹⁰ Moreover, there was no mentioning of “sufficient nexus;” most likely because it was apparent that there was an “obvious nexus” between France and the protection of its citizens against a dangerous product. There would equally be an “obvious nexus” between e.g. Denmark and protection of Danes against wearing cat fur (something most Danes would find repulsive or immoral). It can hence be posited that “sufficient nexus” is established by the mere fact that the policy of the internal measure is inwardly directed. Put differently, the “link” between the policy and the country is established because the country at any point in time could and should protect its citizens. The link will therefore always be established when it can be proven that the trade measure aims at protection *inside the borders* of a country.

II. PPMs

The PPMs (both types) differ from the internal measures because instead of banning a product in its entirety, they require a production method inside another WTO Member’s territory to be *changed* in order for the product to be exported into the WTO Member holding the trade measure. The PPMs therefore, by their very nature, function as *coercive* measures to “change something” outside the jurisdiction of the country taking the measure.¹¹ This fact alone could tempt an analysis on whether PPMs are legal in terms of Public International Law. It should, however, be clarified that nothing in *jus gentium* mandates a country to import goods from another country, *except* if a country has signed a treaty limiting the option of trade barriers.¹² The WTO represents such a limitation, and in order for trade barriers to be legal in terms of GATT, the General Exception in GATT Article XX must be approved.¹³

In comparison with the internal trade bans, the PPMs are more “difficult” to get approved under the exception. A practical explanation of the relatively “harsher” test in GATT Article XX for PPMs can be found in the application and design of the PPMs. When a country enacts a PPM, there must necessarily be a manner in which the products can be verified to have been produced in the manner prescribed by the PPM. This can be done by testing the products or by certifying them in a specific manner. In practical terms, this means the exporting country will have to cooperate with the importing country in order to get e.g. nation-wide certification, provide on-site tests of the products. Such mechanisms do not only require a lot

⁹ See European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Appellate Body, Mar. 12, 2001, WT/DS135/AB/R [hereinafter *Asbestos Appellate Body Report*]; European Communities – Measures Affecting Asbestos and Asbestos Containing Products, Report of the Panel, WT/DS135/R, Sep. 18, 2000 [hereinafter *Asbestos Panel Report*].

¹⁰ See NIELSEN, *supra* note 3, at 198-200; *Asbestos Panel Report*, *supra* note 9, at para. 8.230.

¹¹ Whereas the internal measure only changes that certain goods no longer can be sold to this particular country.

¹² See generally, NIELSEN, *supra* note 3, at 188-90. See also ARTHUR APPLETON, ENVIRONMENTAL LABELLING PROGRAMMES, 60 (1997), who accepts that PPMs do not interfere with any rules of *jus gentium*, but that extreme cases of coercion may lead to the opposite result.

¹³ Again, assuming that the trade measure is in violation of the substantive obligations of the GATT. For the analysis of the PPMs in relation to GATT Article III, see NIELSEN, *supra* note 3, at 104-5.

of coordination, but also fair application in order to avoid that some countries are treated “better” than others. It can hence be said that for the PPMs, extra “tests” in the GATT Article XX analysis are necessary in order to verify whether the PPM functions in relation to cooperation and whether there is sufficient flexibility in the certification/verification process.¹⁴

On a more specific analytical level, it is important to distinguish between the two types of PPMs because their policy directions point in two different directions: the PR-PPM is inwardly directed, whereas the NPR-PPM is outwardly directed.

III. The PR-PPM is Inwardly Directed

The PR-PPM is inwardly directed in the sense that the WTO Member holding the PR-PPM has decided that solely certain products live up to the standards of this country. This resembles the scenario from the internal measures considerably. The classical example of PR-PPMs are sanitary measures where WTO Members under the SPS Agreement are allowed to require internationally recognized food safety standards – and go beyond them under certain conditions.¹⁵ Other examples could be Halal and Kosher certified meat and meat products or organic products. The main feature of the PR-PPM is that there is a *difference* between the final product produced with or without the PPM standards. Clearly, this may be subject for some debate, but in most instances, it is possible to categorize a measure as being either a PR-PPM or a NPR-PPM.

For PR-PPMs, as for internal measures, “sufficient nexus” is established automatically because the policy is inwardly directed. In other words, there is an obvious link between e.g. Saudi Arabia and its Halal certification requirement (taken in order to protect the citizens against undesired meat). In the same way, it is equally obvious that there would be “sufficient nexus” between Denmark and its requirement not to import dangerous food. This “automatic sufficient nexus” is thus established between the country and what is sought protected when it is the citizens that are protected – because the product living up to the standard laid down in the PR-PPM is *different* than the product not living up to the requirement.

IV. The NPR-PPM is Outwardly Directed

The NPR-PPM differs from the PR-PPM because there is no difference between a product living up to the standard laid down in the NPR-PPM and the product that does not. One example of such a measure is the US measure in the *Shrimp* case, which was a requirement to trawl for shrimp in a “sea turtle-friendly manner”.¹⁶ The only difference between the shrimps in the *Shrimp* case is the “moral taint” attached to uncertified shrimp.¹⁷

While both the PR-PPM and the internal measure were inwardly directed, the NPR-PPM is *outwardly* directed because the consumers (or “anything” else) inside the territory of the Member holding the measure are not being protected against undesired products. The *only*

¹⁴ See *id.*, at 200-7.

¹⁵ See Agreement on the Application of Sanitary and Phytosanitary Measures, WTO Agreement Annex 1A [hereinafter SPS Agreement] Article 3:1-3.

¹⁶ See generally Shrimp Appellate Body Report, *supra* note 8, at paras. 2.12-2.13.

¹⁷ See Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689, 695 (1998).

reason behind the NPR-PPM is the protection of “something” outside the country itself – perhaps coupled with a domestic NPR-PPM if the country also produces the widgets in issue, but not necessarily because the Member is perhaps not a producer of the widgets.

When a NPR-PPM measure is used on imports, the policy direction is outwardly directed and the “connection” between the Member holding the measure and “what is being protected” (because it is not the consumers or animals inside the Member country) is not established automatically as with the inwardly directed trade measures. Without such a natural given nexus, it appears well founded that the Appellate Body in *Shrimp* devoted some thought into the issue of what the “connection” was between the US and the sea turtles it tried to protect.

D. “Sufficient Nexus” For NPR-PPMs

The Appellate Body chose to establish “sufficient nexus” in the *Shrimp* case because some sea turtles sometimes came into US waters:

“We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only 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 United States for purposes of Article XX(g).”¹⁸

This understanding of “sufficient nexus” could be called a “physical nexus requirement” What the Appellate Body in effect said was that the US had a “right” to protect sea turtles under GATT Article XX because the US sometimes hosted sea turtles. This would e.g. mean that Denmark (which do not have any sea turtles except from a rescued and now again free specimen)¹⁹ would not be able to establish “sufficient nexus” if Denmark enacted a trade barrier identical to that of the US in the *Shrimp* case.

In international environmental law, it is important to distinguish between the *obligation* to protect endangered species and the *interest* in preserving biodiversity. All countries (i.e. also the non-host countries) have *an interest* in protecting biodiversity, but the host countries hold *the responsibility* to protect the endangered species.²⁰

In the event host countries do not live up to their obligations and protect endangered species sufficiently, there is no guidance to be found in international environmental law regarding how to assist in protecting the species – e.g. by trade measures.²¹ There is hence an established *interest*, but how to exercise this interest is unclear. The Convention on Biological Diversity in its preamble called this interest “a common concern of humankind”.²² It is therefore evident that had the Appellate Body defined “sufficient nexus” based on the criteria of a “global concern”, “a vital interest” or the like, that would have been more in tune with international

¹⁸ See *Shrimp Appellate Body Report*, *supra* note 8, at para 133.

¹⁹ See The homepage which was created when “Lucky” was set free in 2004, <<http://www.lucky.dk>>.

²⁰ See e.g. Convention on the Conservation of Migratory Species of Wild Animal, Jan. 1980, 19 I.L.M. 15 (1980) [also called the Bonn Convention].

²¹ The obligation to protect endangered species is probably not absolute, but limited to the obligations laid down in relevant treaties – which means that if a country is not party to e.g. Bonn Convention, the rules in the convention do not apply to this country. For issues of customary obligations, see e.g. NIELSEN, *supra* note 3, at 60-63,

²² See Convention on Biological Diversity, concluded at Rio de Janeiro, June 6, 1992, entered into force Dec. 29, 1993, 31 I.L.M. 818 (1992).

environmental law. Moreover, other countries which are not host countries could be allowed to protect endangered species due to their “interest” or “concern” – a policy which is presumably universal and e.g. evidenced in the Convention on Biological Diversity.²³

Another area where a “global concern” could be a good alternative to the “physical nexus” in the *Shrimp* case would be human rights. An example could be that a country decides to ban products produced by small children. In order to establish “sufficient nexus”, the “physical nexus” could not function as the benchmark standard; *all countries host children...* It appears more well-reasoned to require the *policy* behind the coercive trade measure to be one which is recognized by the world community at large – and one that, in the event of failure, causes *damage to all humankind* (as was the case with biodiversity losses). This is also a feature of the notion of *erga omnes*.²⁴

E. Sufficient Nexus and Animal Welfare

As already touched upon, in the area of animal welfare protection, there are no international rules or universal charters or the like – as is e.g. the case with biodiversity. I was asked if I would estimate there were any universal customary rules relating to animals or if any universal ideas in relation to animals could be envisaged to be written into a treaty on the topic. My guess is that very *extreme forms of animal cruelty* can be posited to be universally recognized as being *wrong* – but more questionable in customary law. It may, however, not be desirable to attempt to conclude treaties on these issues because they are always based on the lowest common denominator, which may be *very low* in comparison with western ideas about human treatment of animals. It may hence be easier to conclude regional treaties on the topic – but if the animals are already protected, it may not be necessary.

In the GATT Article XX analysis of a morally founded (animal welfare) NPR-PPM, it is hence not possible to claim a universal policy is the reason behind the measure *unless* the NPR-PPM regulates something extreme, such as e.g. skinning of living animals. If the issue was e.g. the “Flipper” scenario from the *Tuna* cases (the early 1990’s) where the US only allowed for imports of tuna caught with “dolphin friendly fishing methods”, the policy could hardly be said to be universal. The dolphins may be considered sweet, but they are not endangered and they are certainly not protected for their “cuteness” in many other countries than the Western (probably mainly due to the Flipper effect).²⁵ The real issue to debate is therefore: when it comes to animal welfare, is it an optimal solution to aim for universal values to establish “sufficient nexus” in terms of GATT Article XX?

If the Appellate Body was to judge or require any negotiating efforts (which for sure would have failed on Flipper unless countries were sufficiently compensated for the trouble of

²³ Speculation as to value as a universal benchmark without having the US a party will most likely be numbed by the fact that the US did not withhold ratification for reasons of objection to declaring biodiversity a common concern of humankind. Rather the US found some restrictions on intellectual property rights and invasive alien species to strict. Various reasons are found in the press, see e.g., Editor’s Note, *Licensing Agreements Key to Technology Transfer?; An Intellectual Property Mechanism For Access to Biological Resources*, THE LEGAL INTELLIGENCER, Jun. 14, 1994, at 13; R.R., *Biodiversity Treaty Unlikely to get Senate Eye in Upcoming Session*, BIOTECHNOLOGY NEWSWATCH, Nov. 7, 1994, at 11; John Margolis, *Odd Trio Could Kill Nature Pact; Biodiversity Treaty Imperiled*, CHICAGO TRIBUNE, Sept. 30, 1994, at 1.

²⁴ For an in depth comparison of the notion of common concern and *erga omnes*, see NIELSEN, *supra* note 3, at 60-63.

²⁵ The EC was even the complainant in one of the cases, so it is fairly easy to understand that the EC does NOT have any laws to protect Flipper in tuna fishing nets nor are the EC tuna products marked with happy dolphin symbols as they are in the US.

getting new fishing methods), it may have to recall its prior statement on a similar analysis (the Chapeau analysis of GATT Article XX):

“Requiring that a multilateral agreement be *concluded* by the United States in order to avoid ‘arbitrary or unjustifiable discrimination’ in applying its measure would that any country party to the negotiations with the United States, whether a WTO Member or not, would, in effect, a veto over whether the United States could fulfill its WTO obligations. Such a requirement would not be reasonable.”²⁶

On that background, it is easy to understand that where environmental and human rights norms are already laid down in treaties *to the extend to provide a policy coverage area* for purposes of establishing “sufficient nexus”, moral issues including animal welfare are not – and will not be so in the foreseeable future, as well as the Appellate Body most likely will refrain from requiring more than negotiating effort with the affected trading partners. But this does, however, not answer the basic question of how to establish “sufficient nexus” for the vast majority of animal welfare measures, which are not considered universal?

On a practical level, it may be easy to understand that it is not *desirable* to allow all morally founded NPR-PPMs because the possibility of a slippery slope would be enormous. On the other hand, it has already been illuminated how some cultures, such as the US, find certain animals so important and cute that it would be politically *impossible* to go out and tell the citizens: “Listen, we lost a case in the WTO and therefore we now need to allow imports of tuna where Flipper drowned in the process.” For US citizens, it may be of equal importance to them that animals are not skinned alive and that Flipper is not drowned in tuna fishing nets. *Some* morally founded NPR-PPMs must hence be allowed, but *who* should decide *how*?

If the WTO Members do not agree to adopt an interpretation (or more unlikely to amend the GATT), the panels and the Appellate Body are left with the task – and they are depending on the Members’ restraint in enacting such measures as well as restraint in challenging such measures enacted by other Members. Relying on countries’ self-restraint may, however, be a notion of the past, which can easily be changed if large economic interest or strong urges among citizens are involved. It may, therefore, be a better solution for the WTO Members to adopt an interpretation on morally founded NPR-PPMs – which perhaps will state that such a case was subject to a “policy screening” in the DSB in order to avoid the panels and Appellate Body’s ruling on the matter. The problem with this suggestion is that the Membership only acts by consensus, which means there will be no voting on the matter. Hence, in absence of consensus, the moral policy is either automatically accepted if the DSB acts by negative consensus – or thrown out if one Member objects (the Member challenging the measure will most likely object) in the event the DSB acts by positive consensus. There is hence no “easy” solution to be found on *who* and *how* to decide which moral policies are “acceptable” – and this illustrates *why* it is important for the Membership (and legal scholars) to start debating the issue.

²⁶ See United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia, Report of the Appellate Body, Oct. 22, 2001, WT/DS58/AB/RW [hereinafter Shrimp 21.5 Appellate Body Report], at para. 123.