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# Animal Protection in a World Dominated by the World Trade Organization

# 10

CHAPTER

*Leesteffy Jenkins and Robert Stumberg*

**D**uring the last decade, animal protection suffered a profound setback as a result of global trade rules. Until recently, the harm has remained almost invisible to the general public because international trade has seemed only tangentially related to animal protection. Much like Magellan, whose great ships appeared on the horizon of Terra del Fuego yet remained unseen by the natives,<sup>1</sup> an elite few have been making global trade rules out of sight of the rest of the world—acting as an invisible hand affecting economic and social policy.

However, that is beginning to change, and animal issues are playing a crucial role in making the World Trade Organization (WTO), the international body responsible for initiating and enforcing global trade rules, publicly visible. Current WTO rules prohibit the types of enforcement mechanisms relied upon by sovereign nations to make animal protection initiatives effective; as a result, many animal protection measures in this country and abroad have been reversed or stymied in the face of WTO challenges or threatened challenges. The WTO's adverse impact on animal protection is one of the reasons why the WTO's new-found public image is increasingly a negative one.

## Where We Are Now

The Third WTO Ministerial in Seattle, Washington, in December 1999, dramatically revealed for the first time many segments of the public's growing discontent with WTO rules.<sup>2</sup> An attempt to launch a new round of trade negotiations<sup>3</sup> ignited street clashes between protesters, including some in sea turtle costumes (to symbolize the WTO's anti-environment policies), and law enforcement officials. The protesters, flashed across television sets around the globe.<sup>4</sup> The ministerial meeting collapsed as a result of the upheaval, and sea turtles quickly became a symbol in Seattle of what is wrong with the WTO.<sup>5</sup>

Laws protecting sea turtles,<sup>6</sup> dolphins,<sup>7</sup> and dogs<sup>8</sup>; laws banning cosmetic testing on animals<sup>9</sup> or the use of steel-jaw leghold traps<sup>10</sup>; laws promoting the production of hormone-free beef<sup>11</sup>—all have been challenged or threatened with challenge as a barrier to trade under WTO rules or its precursor, the General Agreement on Tariffs and Trade (GATT). In each case, when global trade rules were applied, the laws were modified or revoked. These laws represent decades of effort to establish strong animal protection legislation in the United States, Canada, and Europe.

At stake is the democratic stewardship of animals and their environment. Global trade rules govern not only trade, but also the values a country reflects within its marketplace. WTO supporters say that the WTO Agreements permit countries to set high environmental and social standards. But WTO and GATT case law demonstrate the Orwellian nature of this statement. Under WTO rules, animals cannot be protected if protection results in any adverse market impact.<sup>12</sup> In effect, free-market theory preempts all other social values.

The WTO does not specifically prohibit governments from establishing strong animal protection or environmental policy, as WTO supporters point out. The effect is more subtle. WTO rules narrow the range of mechanisms available to governments to create or modify social policy. Specifically, WTO rules prohibit government-initiated, market-based remedies such as sanctions, standards, and even ecolabeling, if they are used to implement and enforce animal protection and environmental policies.<sup>13</sup> Yet today, much of the harm done to animals and the environment is the result of market-based problems—including fishing for tuna by killing dolphins, factory farming, and scientific research on animals to reduce product liability. In each case the ultimate consumer contributes to the market's impact on animals.

## Conflict or Compromise?

Government policy is meaningless if no viable ways exist of implementing and enforcing its substantive provisions. In the context of global economic integration, this realization in part, led to the strengthening of the institutional and enforcement provisions of the WTO.<sup>14</sup> Similarly, without viable options for implementing and enforcing animal protection policy, including market-based remedies, the sovereign authority to set high animal protection standards is an anachronism.

The 1990s were characterized by conflict and competition initiated as GATT/WTO proponents sought to impose a dominant global economic order. A strategy of “winner take all” was pursued,<sup>15</sup> and it extended to challenges to animal welfare.<sup>16</sup> Principles of free trade, not pragmatism, governed decisions to challenge legitimate animal welfare laws.<sup>17</sup> The public seemed asleep. Free market theorists had free rein. But by 1999 the climate was changing, as demonstrated by the broad public interest piqued by the protests against the Seattle Ministerial. The question for the new millennium is whether compromise can be found.

Each new WTO challenge to an existing national or international policy—environmental; animal protection; or consumer-related—creates an atmosphere of insecurity that can be exploited by those who wish to undermine protection. In the short term, social policy seems to be the loser. In the long term, however, the viability of the international trade regime will be at issue. Any WTO solution that does not take into account social policy will inevitably create further conflict rather than reduce or eliminate tension.

WTO rules are constitution in nature: while they are vague and broad in scope, they can also be reinterpreted to reflect changing public perceptions and opinion. It is possible to change the impact of WTO rules.

The question is whether WTO supporters perceive the need to change the rules to accommodate social values—values other than free-market theory, comparative advantage, and competition based only on the lowest price.

## Comparative Advantage Theory Does Not Apply to Social Policy

At the core of GATT theory is the concept of “comparative advantage.” Comparative advantage is the rationale underlying GATT Articles I (Most Favored Nation) and III (Nation Treatment).<sup>18</sup> It is also the rationale used to discredit the enforcement of environmental and animal protection policy with standards that regulate the production or process of goods.<sup>19</sup> The objective of comparative advantage was first incorporated in an early GATT decision known as the *Belgian Family Allowances*.<sup>20</sup>

In the *Belgian Family Allowances* case,<sup>21</sup> Norway and Denmark brought a complaint against Belgium because Belgium placed a levy on products purchased by public bodies from states that did not have a system of family allowances meeting specific requirements. The panel decided that Belgium’s levy violated Article I:1 and possibly Article III and that the levy was inconsistent with the spirit of GATT.<sup>22</sup>

The rationale behind the decision was comparative advantage. By requiring that all countries have similar social/economic requirements, Belgium was undermining the comparative advantage that some countries gained by not having such economic legislation. The objective of comparative advantage was again articulated in a later panel decision, *United States—Section 337 of the Tariff Act of 1930*.<sup>23</sup> In that case the panel found that the purpose of Article III was to

“ensure effective equality of competitive opportunity and to protect the expectations on the competitive relationship between imported and domestic products.”<sup>24</sup>

As compelling as the theory of comparative advantage may be in the economic realm, it is not applicable to social or moral policy typically embodied in environmental or animal protection regulation. At issue in environmental or animal protection policy-making is the legitimacy of the goods produced, or more typically, the legitimacy of the process by which the goods are produced. To use a real example, the European Union (EU) has implemented a regulation banning the sale within the European Union of pelts caught by using steel-jaw leghold traps. At issue for the EU electorate were ethical concerns regarding the appropriateness of producing a product in such a way as to cause extreme animal suffering. Comparative advantage has no meaning in this context. The issue is not whether pelts can be produced at a lower economic cost by using steel-jaw leghold traps. Rather, the electorate determined that the moral cost of producing pelts in this manner outweighs any economic advantage. The electorate did not want such pelts, no matter what the economic price.

Applying WTO rules to this type of regulation results in decisions which technically may be consistent within the context of GATT, but which nonetheless may be viewed as illegitimate or irrational by national policymakers and their electorate.<sup>25</sup> When GATT rules are applied to social/moral regulations, the goal of preserving comparative advantage is input into social policy. This insures that economic considerations will override or outweigh the underlying social purpose of the regulation. The net effect is to stymie the ability of policymakers to use the democratic process to balance competing policy interests of the societies which they govern.

In a democratic political process, the concerns of various stakeholders, including affected industries, are balanced so as to preclude an absolute

win or absolute loss for any particular segment of society. In this way, policymakers attempt to devise solutions that harm the fewest number of stakeholders. Establishing a presumption that global economic concerns must be given priority in the context of noneconomic regulation promotes autocratic, rather than democratic, policy regimes. This is because a presumption of trade supremacy precludes policymakers from balancing the diverse needs of their political community.

## A Balance Originally Envisioned

Trade agreement history reveals that the original framework of GATT trade principles and exceptions envisioned a dynamic system that could balance trade and domestic policy needs, as well as global economic integration, with national sovereignty.

Adopted in 1947, GATT-the-document reflects a theoretical balance of interests that has not characterized interpretations by GATT-the-institution (now the WTO). That balance between trade and environment or other domestic policy interests is achieved not only in the GATT, but in numerous places throughout the WTO Agreements adopted or modified in 1994. For example, the Preamble to the Agreement on Technical Barriers to Trade (“TBT Agreement”) provides:

no country should be prevented from taking measures necessary... for the protection of human, animal or plant life or health, or the environment...subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.<sup>26</sup>

Similarly, the Preamble to the Agreement on the Application of Sanitary and Phytosanitary Measures

(the “SPS Agreement”) states that “no Member should be prevented from adopting or enforcing measures necessary to protect human, animal, or plant life or health, subject to” the same requirements set forth in the TBT Agreement.<sup>27</sup> The Preamble to the Agreement Establishing the WTO specifically recognizes the need to [allow] for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with [countries’] respective needs and concerns at different levels of economic development.

While this language admittedly is not proscriptive, it nonetheless conveys an implicit intent to balance economic growth with social values.

Proscriptive language to this affect, however, is contained in at least two places in the WTO Agreements. Article XIV (the exceptions clause) of the General Agreement on Trade in Services (the “GATS”) 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 like condition prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

- (a) necessary to protect public morals or to maintain public order;
- (b) necessary to protect human, animal or plant life or health.

Similarly, Article XX of the GATT provides that subject to the safeguards in its preamble, “*nothing* in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures” (emphasis added) that are included in the list of “general” exceptions.<sup>28</sup> Article XX has three general exceptions that have great relevance to the relationship between the WTO and

animal protection. They include measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health ...[and]
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

Article XX dramatically protects the measures listed against conflict with every trade rule save the two safeguard tests written into the Article’s preamble. By supplanting the sum of all other trade considerations, the safeguards play a crucial role in preserving the balance between trade and environment (and the other protected domestic policies). The preamble requires that protected measures: are not applied in a manner which would constitute a means of [1] arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or [2] a disguised restriction on international trade.

This framework for balancing trade and noneconomic interests was debated and designed well in advance of GATT 1947.<sup>29</sup> Two global trade documents developed the approach of balancing trade rules on one hand with general exceptions and a preamble with safeguards on the other, however neither ever took effect. The first was the 1927 International Convention for the Abolition of Import and Export Prohibitions and Restrictions (or the 1927 Convention), which was drafted by committees and conferences of the League of Nations. The second was the charter for creation of the International Trade Organization (or the ITO Charter), which was sponsored by committees of the United Nations. While the ITO Charter was still being drafted after 1947, the seminal proposals from the United States and other countries did predate the GATT, and they help to illustrate contemporaneous thinking.

As the first serious effort to promote global economic integration, the deliberations over Article 4 of the 1927 Convention yield the most extensive historical record regarding the structure and purpose of the GATT general exceptions and their preamble. From the start, the goal of the 1927 Convention was to develop a formula for abolishing import and export restrictions while preserving deference for legitimate noneconomic policies.<sup>30</sup>

The League of Nations Economic Committee (LoN Economic Committee) went so far as to describe the Article 4 prohibitions of restrictions on trade as “outside the scope” of the Convention.<sup>31</sup> It is clear from the discussion at several committee meetings that the delegates distinguished between “economic,” or “financial,” regulations and “noneconomic” regulations. The 1927 Convention was designed to govern the former, not the latter.

As an example, the delegation of India expressed the view that only sovereign nations could determine the need for trade restrictions.<sup>32</sup> The Japanese delegate emphasized that “[e]ach country must be allowed sufficient liberty to take those measures of prohibition or restriction which it considered necessary for non-financial or noneconomic reasons....”<sup>33</sup> In this context, the balance between sovereignty and economic integration was a central issue for the 1927 Convention.

The delegates frequently asked whether particular laws of interest would be covered by the proposed general exceptions. These were most often questions about quasi-economic regulations,<sup>34</sup> but noneconomic laws were discussed as well.<sup>35</sup> In response to the discussion of whether various quasi-economic trade restrictions would be protected by Article 4, the Austrian delegate raised the possibility of more detailed disclosure in order to “get rid of the skeletons.”<sup>36</sup> However, most delegations opposed developing a detailed list or a policy of strict construction. The committee eventually arrived at a consensus that

generic exceptions would strike the best balance. The British delegate articulated the rationale upon which the committee reached consensus:

If these noneconomic prohibitions were not covered by the scheme of the Convention [that is, protected by general exceptions], there was ground for hope that the danger of abuse would... not be serious. In pursuing this course the Conference would be taking the only step possible at this stage. It should not set up machinery relating to these noneconomic prohibitions.... The time has not yet come to include noneconomic prohibitions and restrictions, for Governments had their special and peculiar obligations to their peoples in matters to which they related.<sup>37</sup>

While generic exceptions would strike the balance with sovereignty concerns, the LoN Economic Committee also wanted to assure that such broad exceptions would not lead to abuses of the trade rules.<sup>38</sup> At the same time, the committee wanted to avoid drafting the agreement “so strictly and with so little regard to local conditions as to make it impossible to obtain general adhesion.”<sup>39</sup> In this context the committee drafted the two safeguards for the preamble to Article 4. Thus did the 1927 Convention explain its framework of using general exceptions and preamble safeguards to preserve the balance between trade and noneconomic policy interests.

The ITO Charter debates followed much the same pattern. India, among others, continued to express general concern about losing its sovereignty over noneconomic matters, particularly resource conservation.<sup>40</sup> The alternating concern was still the potential for abusing the exceptions, as was expressed by the delegates from France and the United Kingdom, among others.<sup>41</sup>

Based on a proposal from the United States, the ITO committee that worked on general exceptions began with a list of exceptions, but without a preamble citing safeguards against

abuse. The committee inserted the same structure of preamble safeguards that the 1927 Convention used.<sup>42</sup> The ITO preamble stated that trade measures could not be “applied in such a manner as to constitute a means of arbitrary discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”<sup>43</sup>

While the exact language of GATT general exceptions continued to develop, the framework of exceptions with a preamble to safeguard against abuses carried through from the 1927 Convention to the ITO Charter to GATT 1947. That original framework for maintaining a balance between trade and noneconomic concerns remains as a prominent feature of GATT architecture.<sup>44</sup>

## WTO Decisions Undercut Measures for Animals

Recent GATT/WTO dispute panel decisions have increasingly curtailed the capacity of policymakers to use trade measures for environmental or animal protection purposes. For example, Article III (the “National Treatment” clause) of the GATT permits the application of domestic regulations to foreign products so long as they are not applied in excess of those applied to “like” domestic products. The term “like product” has been interpreted by dispute panels to exclude regulation based on differences in production or processing methods,<sup>45</sup> which is often a key concern for environmental or animal protection.

Dispute panels also have narrowed the exceptions contained in Article XX of the GATT for measures “necessary to protect human, animal, or plant life or health” (Article XX(b)) or “relating to the conservation of exhaustible natural resources” (Article XX(g)). They have interpreted the term “necessary” in Article XX(b) as a

least-trade-restrictive test for health measures.<sup>46</sup> According to dispute panels, trade measures are only “necessary” if there is no other conceivable means of achieving the policy goal. As a result of this interpretation, dispute panel members who are not experts in the policy at stake have substituted their judgment of what is “necessary” for that of the legislature. They have often rejected pragmatic solutions in favor of hypotheticals that are not politically feasible or have been tried and have not worked.<sup>47</sup>

Dispute panels have also narrowed the general exception in Article XX(g), “relating to the conservation of exhaustible resources.” Panels have interpreted the term “relating to conservation” to mean “primarily aimed at conservation,” which in turn has been narrowly interpreted to permit only those regulations that directly accomplish the stated policy goal. Regulations that accomplish the goal indirectly or over a period of time do not qualify for Article XX(g) protection.<sup>48</sup> Although this rigorous standard has been modified somewhat by the Appellate Body’s rulings in *Shrimp-Turtle AB* and *Reformulated Gasoline*, these cases have simply constructed a new hurdle or test in terms of the preamble (known as the “*chapeau*”) to Article XX.

The Article XX *chapeau* provides: 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 and contracting party of a measure.

When the Appellate Body addressed the issue of the *chapeau* requirements in *Reformulated Gasoline*, it applied what was essentially a “least-trade-restrictive” test, although the Appellate Body did not use this specific language.<sup>49</sup> The Appellate Body determined that an alternative means could have been used to achieve the

conservation goal and therefore, the measure was both *arbitrary* and *unjustifiable* and a *disguised restriction on trade*. In so deciding, the Appellate Body substituted its policy judgment for that of U.S. environmental regulators and found that an alternative non-trade restrictive method of achieving U.S. policy could have been equally effective from a conservation point of view.<sup>50</sup> In *Shrimp-Turtle AB*, the Appellate Body again substituted its own judgment for that of domestic environmental regulators, and again found that alternatives measures were available to achieve the particular conservation goal.<sup>51</sup> These decisions affect not only Article XX, but also other WTO Agreements including, the TBT Agreement, the SPS Agreement, and GATS, where identical language is found.

The dynamic relationship between local innovation and global solutions is important. If the WTO uses its power to block the use of trade measures for environmental or animal protection at the local (domestic) level, the direct result will be to limit the options at the global level. Limited options at the multilateral level means that multilateral environmental agreements (MEAs) lose their efficacy. This in turn decreases the incentive for multilateral environmental cooperation, increases the pressure for unilateral (domestic) action, and consequently, may temper the enthusiasm of some governments for further global economic integration, thereby stunting the evolution of both environmental and economic law.

## MEAs Require Strong Protective Legislation

Previous GATT and WTO dispute resolution panels have suggested in *dicta* that multilateral solutions are more appropriate than unilateral action by a single nation.<sup>52</sup> While international cooperation is ideal, it is not always possible or even desirable for environmental or animal protection problems.<sup>53</sup> In most cases, international cooperation is a slow process, with

necessary consensus resulting only at the point of crisis.

MEAs are the high-water mark of pragmatic, bottom-up problem-solving. They do not emanate top-down from an international center of power. Most MEAs come into existence only after their substantive policies are first implemented at a “local” level, either nationally or subnational within a state or province.

Consensus usually builds from the bottom up. The first communities to act are usually the ones that experience a problem more acutely than others. For example, a maritime province may feel the economic brunt of depleted fishing stocks, or a nation with particular religious or moral values may recoil at the commercial treatment of animals it reveres.

A community may not be specially or acutely affected by a problem, but it may still see itself as *part* of the problem and therefore demand domestic regulation. For example, the State of Vermont was one of the first governments at any level to limit the sale or use of chemicals that deplete the ozone layer of the atmosphere.

Local initiative is essential to solving global-scale problems in three different ways. First, local initiatives help build critical mass to make a real ecological or economic difference on a global scale. Second, the movement toward a solution has to start somewhere: local initiatives are often the first step toward political risk-taking without which a global solution cannot be achieved. Third, local initiatives are necessary as experiments. Nation-states, whether they act alone or in unison, depend on ideas that work to solve environmental and animal protection problems. Global environmental solutions cannot be developed in a test tube; the only laboratory that works is policy implementation on a national or subnational scale.

Many environmental and animal protection problems do not respect national borders. Although a single domestic policy is a necessary beginning, it is not sufficient in scope to conserve a resource (like fish) or pro-

tect a sentient species (like dolphins) that live in the global commons.

The point at which nation-states move beyond their own domestic consensus is the point at which an MEA is born. An MEA is to environmental protection what the WTO is to global economic integration. If the WTO's trade rules interfere with MEAs, the risks to the global trade regime will increase, not diminish: if local and national leaders are prevented from devising environmental solutions that work, they and their electorate will associate the WTO with their own political and environmental impotence. If the WTO does not achieve an effective balance for trade and environment, the movement for global economic integration will lose credibility.

## Multilateral Agreements Are Hard to Enforce

International environmental cooperation has led to the adoption of more than 180 treaties or agreements to protect the global environment and conserve natural resources. The need for continued international cooperation is undisputed by trade and environmental experts alike. International cooperation increases the resources available for enforcement, monitoring, and scientific innovation. It can also be a mechanism for providing technological, educational, and monitoring resources to countries that do not have the resources to address a particular problem. If MEAs are to be a viable option for addressing global and regional animal-related problems, they will need enforcement tools that work.

Developing the enforcement powers of MEA organizations is conceptually and practically difficult.<sup>54</sup> Historically, enforcement powers have been inextricably tied to the concept of sovereignty, and only nation-states have the sovereign right to enforce laws within their own jurisdiction. With some exceptions, the concept of enforcement jurisdiction is territorially based.<sup>55</sup> Theoretically, no interna-

tional juridical body may interfere with that right, and granting an MEA organization enforcement powers may result in infringing upon the sovereignty of its member countries. Because of the limited options for international enforcement, the use of trade measures by MEA members will increasingly become necessary for enforcement. While member states have the means to implement and enforce MEA objectives within their territory through their police powers, they have few means of implementing and enforcing objectives *outside* their territorial boundaries, even when their interests are directly threatened. This would suggest an increase in attempts to use trade measures to implement and enforce both national and international environmental and animal protection policy.

The WTO's Committee on Trade and Environment (CTE) has addressed the issue of the relationship between the WTO and MEAs but has come to no conclusions. The question of whether MEA-derived trade measures are WTO-consistent is unresolved. There have been no GATT or WTO challenges to such trade measures. This is primarily because there are so few of them.<sup>56</sup> A third treaty, the Convention on International Trade in Endangered and Threatened Species of Wild Fauna and Flora (CITES), regulates commercial trade in endangered and threatened animal and plant species through the use of a trade permitting system, but doesn't specifically authorize the use of trade measures or sanctions. The permitting system is basically an honor system. Members agree to abide by their obligations in good faith. The only recourse to trade measures *per se* has been in the form of a recommendation from the CITES Standing Committee, the juridical body which has authority over such matters. In September 1993 the Standing Committee issued a decision which provided *inter alia*, "Parties should consider implementing stricter domestic measures up to and including prohibition in trade in wildlife species now" (see Press Release of CITES Secretariat, September 9,

1993, announcing Decision of the Standing Committee, para. 6). This came in response to the most visible use of MEA-authorized trade measures yet—the U.S. imposition of trade measures against China and Taiwan for the continued trade in rhinoceros horn in violation of CITES. In that case, the CITES Standing Committee, the judicial body with authority over such matters, issued a decision strongly recommending that Parties "consider implementing stricter domestic measures up to and including prohibition in trade in wildlife species now."<sup>57</sup> The purpose of the decision was to encourage China and Taiwan to comply with CITES. The United States took action by imposing a ban on the importation of animal-related products. Because neither China nor Taiwan was a member of GATT, no GATT challenge was possible.

Some governments, most notably those of the United States and the European Union, assert that trade measures taken to enforce MEAs are consistent with WTO rules and that MEAs and the WTO are theoretically international equals.<sup>58</sup> The U.S. Trade Representative's office has said this repeatedly in public briefings in order to quell the qualms of environmental and animal protection advocates regarding the WTO.

Such statements, however, are at odds with U.S. policy positions. While claiming that nothing in the WTO preempts the use of trade measures by MEAs, the U.S. government has actively pursued a policy of ensuring that WTO rules trump MEA policy by including "savings clauses" in new MEAs in which the use of trade measures are most likely to occur. For example, in the Biosafety Protocol negotiations, the United States pushed vigorously for language that would ensure that members did not take action which would interfere with implementation and enforcement of Trade-Related Intellectual Property Rights (TRIPS) Agreement, a WTO Agreement.<sup>59</sup> (A savings clause is the legal mechanism by which countries agree and ensure that a new agree-

ment does not supercede obligations under an existing international agreement, such as the WTO.<sup>60</sup> It is the means by which the United States and others are ensuring that MEAs do not supercede WTO rules.)

## Where Do We Go From Here?

The conflict between the WTO and national and international animal protection legislation is ultimately a question of social policy and sovereignty. These concepts stand between the WTO and its vision of a global economy. The thrust of this chapter has been to emphasize how the original framework of GATT trade principles and exceptions envisioned the task of striking a balance not only between trade and environment/animal protection, but between economic integration and sovereignty as well. That balance has been lost as trade negotiators push to further integrate the global economy, imposing free-market theories and ignoring social policy.

At issue is the type of global society being created by the current push for global economic integration. From an animal protection perspective, current WTO rules create a global society devoid of humane considerations, where the bottom line is profit and competition, rather than cooperation, compassion, and conservation. The former promotes over-consumption—characterized by a need to create increased market access—while the latter helps encourage responsible consumerism. Economists would argue that WTO rules form a value-neutral system. But the impact of the system belies such statements. WTO/GATT case law and practical application of WTO rules reveal a global economic order that shuns ethical concerns and brands them as “technical trade barriers.” The imposition of comparative advantage to social norms ensures that ethical considerations do not affect the marketplace in any meaningful way. Instead, low-cost consumerism has become the global economic mantra. It is a system that

lacks grace and long-term durability. The system is subject to attack precisely because it has no moral rectitude. The original balance envisioned must be regained if the WTO hopes to retain public legitimacy.

## Revising the Rules

From an animal welfare perspective, revision or reinterpretation of WTO rules is essential to making the global economy animal friendly. Of greatest concern are the issues of national treatment, burden of proof, the scope of the GATT Article XX Exceptions, including the *chapeau* (which has implications for several other agreements including, the SPS Agreement, the TBT Agreement and GATS) and the issue of risk assessment with respect to the SPS Agreement.

### National Treatment

Article III of GATT provides for national treatment on internal taxation and regulations, that is, all similar products must be treated in a like manner. For example, Article III(2) specifically provides:

The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to *like domestic products* (emphasis added).

Dispute panels have interpreted Article III to preclude internal regulations governing the production or processing of a product.<sup>61</sup> From an environmental and animal protection perspective, however, the way a product is produced is often more important than the product itself. In the life-cycle of a product, the production process may be where environmental degradation or animal suffering occurs.<sup>62</sup>

The precautionary principle, accepted at the UN Conference on Environment and Development and elsewhere,<sup>63</sup> embodies the belief that environmental degradation should be

prevented rather than controlled, that conclusive proof of harm should not be a prerequisite to environmental or animal welfare regulation, and that even limited evidence of a causal nexus between production and harm should be sufficient to justify regulation. Production and process method (PPM) measures are often the most effective means of preventing environmental degradation and promoting animal welfare. One of the main goals of the animal protection community is to make trade rules acknowledge the value of process-related standards and thereby embody the precautionary principle.

PPMs can be divided into two categories: “product-related PPM requirements” and “non-product-related PPM requirements.” A product-related PPM must be embodied in and somehow alter the final characteristics of a product. An example of a product-related PPM is the EU regulation requiring heat treatment of wood to prevent the importation and proliferation of nematodes. The heat treatment alters the chemical properties of the wood, which makes results of the process physically measurable and detectable.

A non-product-related PPM affects the production or processing of the product, but it is not actually incorporated or reflected in the final product. Examples of non-product-related PPMs are the EU regulation banning the importation of certain fur products caught in steel-jaw leghold traps and the U.S. law banning the importation of fish caught in driftnets that exceed the UN standard of 2.5 kilometers.

Only product-related PPMs are specifically permitted under GATT<sup>64</sup>; non-product-related PPMs are not. However, in two GATT cases, *Tuna-Dolphin I* and *Tuna-Dolphin II*, dispute panels found that non-product-related environmental PPMs violate GATT. In both, the panel held that a U.S. law restricting imports of canned yellowfin tuna caught using purse-seine nets (a “process” or “production” regulation) were quantitative restrictions prohib-



ited under Article IX of GATT. Moreover, the U.S. regulation was not an internal measure as contemplated under Article III<sup>65</sup> of GATT because the U.S. law did not regulate tuna as a product. Rather, it regulated the method by which tuna was harvested. Both panels ignored the distinction between tuna caught by encircling dolphins with purse-seine nets and tuna caught by other methods, because this was a distinction based on production, not the physical characteristics of the tuna. The panels concluded that the U.S. law was discriminatory because the United States banned the import of tuna from any country that did not adopt a dolphin conservation regime comparable to that of the United States.

Many animal welfare laws—such as the EU Leghold Regulation and Cosmetics Testing Directive and the U.S. Marine Mammal Protection Act, Wild Bird Conservation Act, Humane Slaughter Act, sea turtle protection law, African Elephant Conservation Act, and High Seas Driftnet Enforcement Act—incorporate non-product-related PPMs. Under the reasoning of both the *Tuna Dolphin I* and *II* decisions, these and many other noneconomic laws are vulnerable to a WTO challenge.

To remedy this, the WTO Council of Ministers should establish an interpretive rule (giving as little discretion as possible to dispute panels or the Appellate Body) that the term “like product” as used in Article III, and as applied to environmental and animal protection policy, permits differentiation based on process or production methods so long as the environmental and animal protection measures are not intended as disguised restrictions on trade. Such types of products and production method standards should be permissible at both the domestic level (i.e., unilaterally) and in terms of MEA enforcement. Such an interpretation by the Council of Ministers would reflect the principle that environmentally sound “production or process” methods are an essential component of the precautionary approach. The WTO should provide the

following interpretative guidance:

(a) *Discrimination*: Domestic producers should be prevented from utilizing production or process methods which foreign producers are either *de facto* or *de jure* prohibited from using if they want market access.

(b) *Assistance to developing countries*: If developing country producers are affected, sufficient financial and technological assistance (including transfer of technology) should be forthcoming from the regulating country in order that the developing country producer can bring its production into compliance with the PPM standard.

(c) *Dispute panel composition*: To ensure an accurate and comprehensive review of disputes involving animal protection or environmental concerns, dispute panels considering newly interpreted Article III defenses should include at least one panelist who is a recognized environmental or animal welfare expert.

### ***Burden of Proof***

As noted above, the plain language of GATT Article XX is that “*nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures*” (emphasis added) that are included in the list of “general” exceptions.<sup>66</sup> Thus, Article XX preserved the historical deference to sovereignty in the sphere of noneconomic policy.

Unfortunately, GATT dispute panels have required countries defending their laws under Article XX to carry the burden of proof to justify use of a trade measure to enforce an environmental objective.<sup>67</sup> This interpretation was codified within the GATT 1994 Dispute Settlement Understanding (DSU), which provides that: the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members...[and] it shall be up to the Member against whom the complaint has been brought to rebut the charge.<sup>68</sup>

Although it is now codified in the DSU, this interpretation on burden of proof is inconsistent with the framework of the GATT regarding Article XX exceptions. First, the very purpose of Article XX was to countenance the kind of “adverse impacts” to which the DSU refers. Second, Article XX explicitly provides that except for the two safeguards built into its preamble,<sup>69</sup> “*nothing in this Agreement*” prevents a member nation from adopting or enforcing exempted measures. The dictionary definition of “nothing” as it is used (as a noun) in Article XX means “no thing at all” or “no share, element or part.”<sup>70</sup> In other words, for purposes of Article XX general exceptions, a dispute panel may consider only the safeguards in the preamble—otherwise, no dispute settlement presumptions, no externally imposed limitations on policy alternatives, nothing. As one commentator puts it, “if the ‘nothing in this Agreement’ clause in Article XX means what it says, why are any conditions outside the Preamble relevant?”<sup>71</sup>

The WTO should adopt the position that the DSU presumption that a defending nation must bear the burden of proof does not apply to defenses under Article XX. To the contrary, the policy of deference implied by Article XX shifts the burden of proof on the complaining nation, once a defending nation raises an Article XX defense.

### ***Scope of GATT Exceptions***

Over the years, GATT dispute panels have narrowed the Article XX exceptions. This narrowing also affects several other WTO Agreements, including the TBT Agreement, SPS Agreement, and GATS.<sup>72</sup> As with the burden of proof, the restrictive interpretations go beyond the plain language and historical deference, which the structure of GATT provided in order that sovereign nations could define their own interests regarding noneconomic matters, so long as the Article XX safeguards are applied.

## Protecting Life or Health

Article XX(b) exempts measures that are “necessary to protect human, animal or plant life or health.” The general scope of this exemption is constrained on two fronts. The first involves interpretation of whether a given measure is “necessary,” and the second involves the meaning of “life or health.”

### *The Meaning of “Necessity”*<sup>73</sup>

WTO Dispute panels have interpreted the term “necessary” from the “trade impact” point of view. The initial point of inquiry has been: What is the impact on trade and is this impact strictly “necessary?” The development of the least-trade-restrictive “test” was an attempt to judicially codify an easily applicable test to determine the impact of various health and safety measures on trade. This test, however, ignores the deference that the structure of the WTO provided to sovereign nations to define their own noneconomic interests.

Democratic legislatures are designed to draft measures that balance competing interests; the result is a politically feasible compromise. Rarely do consumers or affected industries get all they want. But WTO panels have ruled that in order for a human or animal health measure to be “necessary,” a defending nation must prove that it chose the least-WTO-inconsistent measure available based upon the panel’s own speculation about what the alternatives might be.<sup>74</sup> An interpretation of “necessary” that requires sovereign states to choose the least-WTO-inconsistent measure to qualify under Article XX exceptions denies any deference to national problem-solving as envisioned by the drafters of GATT and the earlier trade agreements. This runs counter to the deference to national problem-solving envisioned by the drafters of GATT and the earlier trade agreements. There is virtually always a less-trade-restrictive alternative. No WTO panel can presume to know what action is “necessary” based on the diverse factors that a

legislature must take into account.<sup>75</sup>

If the balance between trade concerns and deference to sovereign nations in the noneconomic realm is to be preserved, any “test” regarding what is “necessary” should be defined from the perspective of *the relevant legislative body*. A WTO panel does not have the capacity to evaluate whether an environmental or animal-related threat is real or significant. Factors relevant to determining the scope of the environmental threat include public interest in the perceived problem by constituents other than an “affected industry,” the degree of public discussion about available options, and limitations on effective enforcement due to the scope of the problem.

### *The Meaning of “Life and Health”*<sup>76</sup>

A dispute panel could interpret the meaning of “life or health” as parallel to the definition used in the SPS Agreement, which is limited to “risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms, or disease-causing organisms.”<sup>77</sup> This definition, however, excludes environmental threats to animal life or health—such as loss of habitat, excessive hunting, and pollution and other ecological imbalance caused by human commerce—as well as humane considerations.

When GATT 1947 was being drafted, there was little discussion of the scope of Article XX(b), perhaps because it was so similar to language in the ITO Charter, the 1927 Convention, and bilateral treaties; it had become “boilerplate,” in the words of a U.S. delegate.<sup>78</sup> Prior to the 1927 Convention, the LoN Economic Committee recommended a health exception that included protection from disease and “degeneration or extinction.”<sup>79</sup> This additional phrase was dropped from the text adopted by the Convention, but it was retained in an explanatory protocol to the Convention.<sup>80</sup>

The model for this GATT exception was established when the U.S. and British delegations proposed simplifying the 1927 exception even further into its present form.<sup>81</sup> Sanitary and

phytosanitary measures were clearly the foremost concern. However, there is no hint on the record that the simplification of Article XX(b) language was anything more than a decision to use the most general phrase possible to include the various health risks that were mentioned in predecessor documents. The movement away from detailed list-type definitions to generic definitions is consistent with a policy of GATT deference to sovereign articulation of policy purposes.

A much broader interpretation of Article XX(b) can be supported by both the plain language of the terms “life” and “health” as well as by the drafting history of this provision. Defining “life” and “health” as pertaining only to sanitary and phytosanitary measures focuses the inquiry on “impact” or harm to others (that is, the spread of disease). The terms “life” and “health,” however, also have meaning in the context of the impact on the individual: How is the individual affected? For example, in the human realm, human rights violations could significantly affect an individual. Similarly, the conditions in a dog breeding facility could significantly affect the life or health of an individual dog.

### *Possible Solutions*

As a solution, either the WTO Council of Ministers or the Appellate Body established under the DSU<sup>82</sup> should establish a new “interpretive rule” with respect to the term “necessary” as used in Article XX. The rule should focus on the scope of the moral, health, or conservation problem *as it is perceived by the sovereign legislator or regulator*. Factors such as public interest in the issue, enforcement limitations, and public debate about various policy options could be considered by a dispute panel to determine the scope of the problem as perceived by the legislature. The necessity to protect life or health should not limit WTO members to only a theoretical measure that is least inconsistent with the WTO Agreement.

This precludes solutions that are politically or practically feasible and ignores the original spirit of providing a general exception.

Furthermore, the meaning of “life or health” should not be limited to “sanitary or phytosanitary” concerns. Particularly in the case of animals, life or health is often dependent on protecting animals from undue stress, pain, loss of habitat, or other environmental threats. A new WTO interpretative rule should be established to clarify this point.

### Conserving Exhaustible Resources

Article XX(g) exempts measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.” GATT panels have interpreted broad terms like “relating to” conservation and “in conjunction with” domestic restrictions very narrowly. The plain meaning of “relating to” would suggest that either a direct or indirect causal link between the perceived harm and the chosen mode of regulation would suffice. Past GATT panels, however, have interpreted the term, “relating to,” to mean “primarily aimed at,” which in turn has been interpreted to require a direct causal link between the asserted policy goal and the means chosen to attain the goal.<sup>83</sup> This narrow interpretation has permitted panels to substitute their subjective judgment regarding what constitutes “effective policy” for that of sovereign legislators, which contravenes the purpose of the Article XX exceptions.

Another way of limiting the application of this exemption is to narrow the substantive scope of what is “exhaustible.” Some analysts have suggested that “exhaustible resources” include only minerals that are available in finite quantities.<sup>84</sup> However, within the constraints of such a standard, the WTO precludes the use of an environmental exception to safeguard creative responses

by MEAs and sovereign states to address some of the most serious environmental problems of our time (such as ozone depletion).

If the term “exhaustible resources” is narrowed, the only alternative available to a country whose environmental measure is challenged is to argue that the trade-related measure fall within another exception (public morals or life/health) that has a “necessity” test. As previously noted, the term “necessary” has been construed by previous GATT panels to require that only the least-trade-restrictive policy option be implemented. In either case, the balance envisioned in Article XX between GATT authority in the economic and financial realm and sovereign authority in the noneconomic realm will be eviscerated.

The question of whether a resource is exhaustible is a factual one that is not limited by whether a resource *can* renew itself. Obviously, species can die to the point of extinction. While the ecosystem of trees and oceans renews the atmosphere, a significant change through global warming or ozone depletion can exhaust the specific balance that makes the atmosphere a life-supporting resource. While rivers renew their own purity, pollution can overwhelm their restorative powers.

In this case, dispute panels have recognized that not just minerals but also animals, plants, and ecosystems can be exhausted.<sup>85</sup> The risk is that without interpretive guidance from the Council of Ministers, future panels will not continue to give deference to member-nations’ assessment of whether a resource is exhaustible.

The WTO should require that dispute panels respect the plain meaning of the term “relating to conservation,” which could include trade-related environmental measures that either directly or indirectly achieve the stated environmental objective. Alternate tests (such as “primarily aimed at”) that rely on the subjective judgment of a dispute panel regarding the underlying economic impact of a trade-related environmental mea-

sure are not appropriate.

Dispute panels should also continue to apply an open analysis of whether a resource is exhaustible, not a more limited definition based on presumed categories of what is exhaustible and what is not.

### Public Morals

GATT Article XX(a) and GATS Article XIV(a) exempt measures that are “necessary to protect public morals.”<sup>86</sup> While this is one of the most relevant GATT exceptions regarding animal protection, it is mentioned last because it has not been used before, at least in the context of a GATT challenge before a dispute panel.

Like Article XX(b), XX(a) requires a measure to be “necessary” to accomplish its purpose. The previous comments regarding the term “necessary” in the context of Article XX(b) are equally applicable here. The difference between the two exceptions is that articulation of public morals by policymakers is an inherently subjective task, much more so that determining whether there is a threat to life or health. Therefore, the legislative determination of whether a measure is “necessary” to serve a subjective purpose can be likewise more of a subjective judgment.

The history of debate from the 1927 Convention through the adoption of GATT 1947 confirms a common sense understanding that the scope of the public morals exception is broader than the other exceptions and that nation-states were allowed to determine public morals within the context of their own culture.

The history of trade agreements since the League of Nations shows that protecting public morals has been a constant concern and that language has gradually evolved from specific to more generic terms. As noted above, Article XX(a) of GATT 1947 had two predecessor documents, which never took effect. The first was article 4(2) of the 1927 Convention. The second was article 45(1)(a)(I) of the initial proposals for the ITO Charter, which was sponsored by commit-

tees of the United Nations.

The 1927 Convention exempted “prohibitions or restrictions imposed on moral or humanitarian grounds.”<sup>87</sup> Like the other exceptions in Article 4, the Economic Committee reported that moral prohibitions or restrictions on trade were “outside the scope” of the Convention.<sup>88</sup> The delegates frequently asked whether particular laws of interest would be covered by the proposed general language. Examples of morally based trade restrictions included prohibitions on obscene materials (Ireland)<sup>89</sup> and prohibitions on lotteries (Egypt).<sup>90</sup> The 1927 Conference ended with a morals exception close to what the Economic Committee originally recommended, except that the language on morals became even more general.

As drafted by the Economic Committee of the 1927 Convention, the morals exception covered trade restrictions for “moral or humanitarian reasons *or for the suppression of improper traffic, provided that the manufacture of and trade in the goods to which the prohibitions relate are also prohibited or restricted in the interior of the country*” (emphasis added).<sup>91</sup> The Conference shortened the entire section to read, “moral or humanitarian grounds.”<sup>92</sup> While there was no comment on why the Conference moved to shorten the section, its action was consistent with the policies of (1) using the most generic language, and (2) using the safeguards in the preamble to protect against discrimination or disguised trade barriers.

Apart from the generic exception debate, there was no further discussion of whether animal or environmental protection would be considered a moral exception to trade rules. However, it is worth noting that during the same period, another branch of the League of Nations was negotiating a convention that included a clause to prevent unnecessary suffering of animals during transport.<sup>93</sup> This suggests that in 1927 international institutions recognized animal protection as both a moral issue and

a sanitary or phytosanitary issue, as they do today.

The morals exception within the ITO Charter was initially proposed by the United States as part of its comprehensive charter proposal. The proposed exception covered measures “necessary to protect public morals,”<sup>94</sup> which is the same language as Article XX(a) of GATT 1947. When compared to its predecessor language from article 4(2) of the 1927 Convention, “moral or humanitarian grounds,” the ITO proposal carried on the trend toward ever more general language.

There was literally no comment on the general exceptions recommended by the United States within the first ITO report (the London conference).<sup>95</sup> Nor was there further comment on the “public morals” exception in later reports. It is clear that the drafters of GATT 1947 began their work with the pre-1947 ITO Charter drafts, which were based on the original U.S. proposal.<sup>96</sup>

Without any further insight into the internal U.S. rationale for adopting “public morals” rather than its older 1927 cousin, “moral and humanitarian grounds,” the most likely explanation remains the preference for using general terms rather than specific examples.<sup>97</sup> For example, “humanitarian” concerns would be a type of “public morals,” and therefore the broader term, “public morals,” is all that is necessary.

The issue of whether trade-related environmental or animal protection measures are protected by Article XX(a) is more than simply a theoretical question. Many of the highly politicized trade challenges that have occurred, or are likely to occur in the near future, are animal related. It was the infamous tuna-dolphin dispute that first alerted broad sectors of the international public to the limits on law-making authority posed by trade agreements. Policies affecting sea turtles (as symbolized in 1999 by the widely photographed costumed demonstrators) became synonymous with the WTO Seattle Ministerial.

Trade conflicts involving animals

will likely increase public ire about trade agreements. It would seem prudent, therefore, for the WTO to address the issue of how Article XX(a) applies to trade-related animal protection measures and provide interpretive guidance to ensure that dispute resolution panels afford the appropriate deference to sovereignty that the drafters of GATT envisioned under the Article XX exceptions.

As in the case of life or health, the phrase “necessary to protect public morality” should be interpreted to include solutions that are practical and politically feasible, which would preserve the original spirit of providing a general exception.

Public morals are defined by each respective nation based on its unique cultural, ethical, or religious norms. A generic deference to national determination of public morals clearly includes protection of animals, among other values of respect for life.

### **Arbitrary or Unjustifiable Discrimination or a Disguised Restriction<sup>98</sup>**

The Appellate Body in both *Reformulated Gasoline AB* and *Shrimp-Turtle AB* employed a type of least-trade-restrictive test in analyzing the meaning of the *chapeau* to Article XX. In so doing, it substituted its judgment for that of domestic environmental policymakers by determining that, from a conservation perspective, nontrade-related alternatives were available to achieve the conservation goals in question. It also made the language of the *chapeau* nearly equivalent to the WTO interpretative meaning of the word “necessary,” thus obfuscating the meaning of particular words. The result is an overall presumption that trade will always preempt social concerns.

In order to remedy this problem, the WTO Council of Ministers should instruct the Appellate Body to take heed of Article 31 of the Vienna Convention of the Law of Treaties, which provides: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to

the terms of the treaty in their context and in the light of its object and purpose.” The ordinary meaning of the word “arbitrary,” as defined in *The American Heritage Dictionary of English Language*, is: “determined by chance, whim or impulse, and not by necessity, reason, or principle,” while the meaning of “unjustifiable” is: “impossible to excuse, pardon, or justify.” Application of the *chapeau* (or in the case of other WTO Agreements, where similar language is used) should be limited to an inquiry of whether the relevant policymakers had a rationale, unrelated to trade, for choosing the policy mechanism in dispute. If there is a non-trade rationale, regardless of whether a universe of other possible alternatives exist, the law or regulation in question should, as a matter of law, meet the requirements of the *chapeau*. Application of any other rule results in an infringement by trade experts on non-trade policy objectives and domestic legislative authority.

### **Risk Assessment Under the SPS Agreement**

By its terms the SPS Agreement specifically applies to risks to animals resulting from disease, contaminants, toxins, additives, and a host of other harms.<sup>99</sup> It applies both to risks to humans arising from contaminants from animal food sources and to direct harm to animals. Thus, the SPS Agreement is very important from an animal welfare perspective. Despite this, there have been no animal cases arising under the SPS Agreement. Although the *Beef Hormone*<sup>100</sup> case involved questions of human health rather than animal harm, the case is instructive of how a panel would treat the issue of risk assessment should a case arise in the context of animal life or health.

In *Beef Hormone* the dispute panel found that Article 2.2 of the SPS Agreement required that risk assessments specifically be based on scientific principles and that SPS measures could not be maintained without sufficient scientific evidence.<sup>101</sup> Although the panel determined that

the European Union had conducted a risk assessment,<sup>102</sup> it said that the European Union nonetheless provided no evidence that it had taken such assessments into account in enacting the measure in question.<sup>103</sup> The panel also determined that application of the precautionary principle did not override the explicit wording of Articles 5.1 and 5.2 and that the precautionary principle had been incorporated in *inter alia* Article 5.7.<sup>104</sup> Furthermore, according to the panel, none of the scientific evidence presented by the European Union specifically addressed the identifiable risk arising to human health from the hormones in question if so-called “good practice” was followed. Because of these and other reasons, the panel found that the EU hormone ban was not based on a risk assessment as required by Article 5.1 of the SPS and, in addition, the ban resulted in discrimination or a disguised restriction on international trade and therefore was inconsistent with Article 5.5.

The Appellate Body agreed with the panel that the precautionary principle does not override the provisions of the SPS Agreement. It reversed the panel’s decision, however, with respect to Article 5.2 and whether the SPS required a measure to be “based on” a risk assessment. The Appellate Body found that as long as the measure is reasonably supported by the conclusions of a risk assessment, no proof that the measure was based on that assessment is necessary,<sup>105</sup> nor does a particular risk assessment need to reflect a “majority” scientific viewpoint.<sup>106</sup> The Appellate Body nonetheless held that the EU measure was not consistent with the SPS because, among other reasons, the evidence presented concluded that there was little risk so long as “good practice” was followed and the EU presented no evidence regarding the risk resulting from nonconformity.<sup>107</sup>

There are many potential harms to animals for which no risk assessment could be conducted before severe harm occurred. Risk assessments are based on scientific evidence which itself is typically based on years (or at

least some quantifiable amount) of empirical evidence. The die-off of the Monarch butterflies is an example of harm that can only be quantified after severe harm has occurred.<sup>108</sup> The introduction of a foreign invasive species is another example where empirical evidence is often gathered after harm has occurred. For an SPS Agreement to effectively protect animals from harm (rather than simply to ensure that no barriers to trade occur) the WTO Council of Ministers or the Appellate Body must apply the precautionary principle are part of customary international law.<sup>109</sup> This will safeguard actions taken when no effective risk assessment can be conducted before harm occurs.

## **Conclusion**

The WTO, with its eighteen global trade agreements including the GATT, represents a vision of global economic reform. It also represents fifty years of work by multinational corporations, which now represent a powerful constituency for the WTO as a top-down instrument to promote the supremacy of trade rules over nontrade objectives such as animal welfare.

The animal welfare movement and the broader environmental movement are no less a vision of global reform. The evolution of well over one hundred MEAs represents a bottom-up process of multilateral cooperation. This progress is now at risk because the WTO agreements threaten to stunt the further evolution of viable enforcement mechanisms for MEAs. The trade agreements pose an even greater threat to domestic trade measures that protect animals and the environment.

The failure of the WTO, and before it the GATT, to defer to nontrade policies is a threat to the bottom-up process of developing a global economy that is humane and environmentally sustainable, not merely efficient and profitable. We have stressed that this democratic deficit on the part of trade institutions is not only a threat to animal welfare and other non-trade objectives; ultimately, it also risks the

sustainability of the trade institutions themselves. This argument is based on political reality.

A nationwide study of public attitudes toward trade reveals that 62 percent of the American people are comfortable with the pace of trade liberalization.<sup>10</sup> But in even stronger numbers, Americans believe that environmental problems are global in nature (78 percent) and that there should be more international agreements on environmental standards (77 percent).<sup>11</sup> Three-quarters of the American people support the proposition: "Countries should be able to restrict the imports of products if they are produced in a way that damages the environment, because protecting the environment is at least as important as trade."<sup>12</sup> But even more specifically, 72 percent of Americans favor restricting the importation of tuna from Mexico because the fishing methods kill dolphins, and 63 percent favor restricting the importation of shrimp from both India and Pakistan because the fishing methods kill sea turtles.<sup>13</sup> In short, the diverse interests at the Seattle Ministerial expressing resistance to trade rules were not a fringe movement, as trade promoters have argued, but a reflection of public opinion on a massive scale.

The American people know that they can enjoy the benefits of free trade without sacrificing their humane and environmental values. If trade institutions, including the trade representatives of the United States, persist in promoting trade supremacy over the nontrade values that define our democratic society, then those institutions are the ones at risk of becoming endangered species.

## Notes

<sup>1</sup>Mattingly, J. W. 1987. In *The cancer cure that worked: Fifty years of suppression*, ed. B. Lyles. Mexico: Marcus Books.

<sup>2</sup>Anonymous. 1999. Thousands protest meeting of WTO. *The Washington Times*, Dec. 1, 1999; BBC News. 1999. Anti-WTO protesters claim victory, December 1, 1999, at A1, column 2. ("Protesters from all walks of life—among them environmentalist, anarchists, union members, and lobbyists from non-governmental organisations—took to the streets over the past week to make their concerns heard.")

<sup>3</sup>BBC News. World trade talks collapse, December 4, 1999 (online news service at [http://news.bbc.co.uk/1/hi/english/business/newsid\\_549000/549439.stm](http://news.bbc.co.uk/1/hi/english/business/newsid_549000/549439.stm)); Environmental News Service. WTO talks fail to launch new trade round, December 4, 1999 (online news service at <http://ens.lycos.com/ens/dec99/1999-12-04-01.html>). ("After a week of meetings marked by protest marches and demonstrations against the WTO environmental and labor policies...the trade officials were not able to agree on an agenda for future talks."); Pigott, R. 1999. *WTO tarnished by Seattle failure*, BBC News, December 4, 1999, (online news service at [http://news.bbc.co.uk/1/hi/english/special\\_report/1999/11/99battle\\_for\\_free\\_trade.../549794.st](http://news.bbc.co.uk/1/hi/english/special_report/1999/11/99battle_for_free_trade.../549794.st)). ("After such a public relations disaster on the streets, failure in the talks as well, seemed unthinkable.")

<sup>4</sup>On December 1, 1999, several new stations covered the environmental/labor march and protest, including Fox News, ABC, NBC, Northwest News, and CNN.

<sup>5</sup>See, *The Washington Times*, editorial cartoon, December 1, 1999, page A16. (Protest signs read save the cockroach; save the snail darter; free trade=dead sea turtles.)

<sup>6</sup>See, *WTO, United States—Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58/R), Final Report, May 15, 1998, ("Shrimp I") at para 9.1. ("WTO Members are bound to implement [environmental] objectives in such a way that is consistent with their WTO obligations, not depriving the WTO Agreement of its object and purpose.") The United States appealed this ruling. The WTO Appellate Body reversed the reasoning of the lower panel but reaffirmed the decision. *WTO, United States—Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58/AB/R), Report of the Appellate Body, October 12, 1998, ("Shrimp-Turtle AB") at para 187.

<sup>7</sup>In 1988 the United States, pursuant to the MMPA, embargoed tuna caught in purse-seine nets from countries whose fishers killed dolphins in a number in excess of 125 percent of the dolphins killed by U.S. fishers. For reasons unknown, yellowfin tuna congregate under schools of dolphin and follow the schools. Fishers chase and capture the dolphins in order to harvest the tuna swimming below. It is estimated that hundreds of thousands of dolphins have been killed in this fishery. Nafziger, J.A.R., and J.T. Armstrong. 1977. The porpoise-tuna controversy: Management of marine resources after Committee for Humane Legislation, Inc. v. Richardson, 7 *Environmental Law* 223, 227–29. The Department of Commerce estimates that 529,000 dolphins were killed as a direct result of international fishers using purse-seine netting techniques. On August 16, 1991, the U.S. embargo placed on the importation of yellowfin tuna from Mexico was found to be in violation of the GATT. See, *United States—Restrictions on Imports of Tuna* (unpublished decision), GATT Doc. DS21/R (September 3, 1991) ("Tuna-Dolphin I"). Two years later, a second case was brought by the European Union, among others, and again a GATT dispute panel ruled against the United States. See, *United States—Restrictions on Imports of Tuna* (unpublished decision), GATT Doc DS29/R (June 23, 1994) ("Tuna-Dolphin II").

<sup>8</sup>In 1992 Canada proposed regulations that would ban the importation and sale of dogs bred in substandard facilities (commonly known as "puppy mills"). Studies showed that puppy mill dogs had higher incidences of contagious and

congenital diseases, many of which were not detectable until sometime during the first year of the dogs' lives. In response to these proposed regulations, the United States threatened to take action against Canada under the Canadian/U.S. Free Trade Agreement (FTA), even though the trade value of the dogs in question was a mere few million dollars. See, 1993 National Trade Estimate Report on Foreign Trade Barriers, Office of the United States Trade Representative at 34. As a result, Canada revoked its proposed law.

<sup>9</sup>In response to public demand, EU legislation was adopted in 1993 to prevent the use of animals in cosmetics testing beginning in 1998. (Anonymous. Council Directive 93/35 EEC—amending for the sixth time Directive 76/768EEC on the approximation of the laws of the Member States relating to cosmetic products, *Official Journal of the European Communities* L151/32–36 1993.) However, because the Directive was based on a trade-related measure (a non-product-related PPM), the measure was thought to be incompatible with WTO rules and therefore, it was never implemented. Anonymous. *Report on the development, validation and legal acceptance of alternative methods to animal experiments in the field of cosmetics*, COM(97) 182 final, European Commission, Brussels 1997.

<sup>10</sup>In 1991 the European Union enacted a law prohibiting the sale and importation of fur pelts caught with steel-jaw leghold traps, as of 1995. Because of the difficulty in determining the difference between fur pelts caught with this method and one that is more humane, the Directive provided that furs from countries that do not ban the use of steel-jaw leghold traps or meet other humane trapping standards are banned from the European Union. The United States, Russia, and Canada threatened to challenge the European Union at the WTO if it implemented this law. The WTO threat succeeded in halting the EU humane policy. The outcome allows fur caught with steel-jaw leghold traps to continue to be sold in Europe, providing no incentive for the U.S. fur industry to switch to less cruel techniques.

<sup>11</sup>In 1988, the European Union banned the sale of beef from cattle treated with artificial hormones. The ban applies equally to domestic and foreign-source beef. See, European Economic Council Directive 88/146/EEC. Exposure to artificial hormones has been linked to cancer and premature pubescence in girls (Bulger and Kupfer. 1985. Estrogenic activity of pesticides and other xenobiotics on the uterus and male reproductive tract. In *Endocrine technology*, eds. J.A. Thomas, et al., at 1–33.), although the risk to humans of artificial hormone residues in meat is uncertain. On the basis of the unknown risk and consumer demand, the European Union adopted a "zero risk" standard. The European Union made this policy choice after prolonged and effective policy campaigns in numerous EU member countries.

In 1996 the United States challenged the ban at the WTO. In 1998 a WTO panel ruled that the beef hormone ban was an illegal measure under the SPS in part because it was not based on a WTO-approved risk assessment. See, *WTO, European Communities—Measures Affecting Meat and Meat Products (Hormones)* (WT/DS26/R), Report of the Panel, Aug. 8, 1997, at para. 8.159. The WTO Appellate Body affirmed the panel decision, and the European Union was ordered to begin imports of U.S. artificial-hormone-treated beef by May 13, 1999. See, *WTO, EU communi-*

ties—Measures Affecting Meat and Meat Products (Hormones) (WT/DS26AB), Report of the Appellate Body, April 16, 1998.

<sup>12</sup>See, *Shrimp I supra* at 6. The dispute panel held: “[T]he chapeau Article XX, interpreted within its context and in the light of the object and purpose of GATT and the WTO Agreement, only allow Members to derogate from GATT provisions as long as, in doing so, they do not undermine the WTO multilateral trading system.” Id at para.7.45. Although, the Appellate Panel specifically reversed this finding and the interpretive analysis embodied therein, see, *Shrimp-Turtle AB, supra* at 6, para 122, it nonetheless held that the U.S. law did not meet the requirements of the chapeau as the measure in question was both *unjustifiable* and *arbitrary discrimination* between countries where the same conditions prevail. Id. at para 184. In other words, while using different reasoning, the Appellate Body came to the same result.

<sup>13</sup>While some GATT/WTO panels, including the Appellate Body in *Shrimp-Turtle AB*, have held that countries may pursue a high level of environmental protection consistent with the WTO, in actuality this has not been the case. Although few would deny that a country has the sovereign right to establish its own environmental policies, to date, GATT/WTO jurisprudence has limited the range of enforcement mechanisms a country may use to ensure that the policy is implemented. For instance, in *Tuna-Dolphin I* and *Tuna-Dolphin II supra*, the U.S. policy (as established in the MMPA) was to reduce to zero mortality the number of marine mammals killed as a result of the commercial tuna fishery. In *Tuna-Dolphin II* it was the means by which the United States pursued this goal (that is, trade measures) rather than the goal itself, that the panel found objectionable. See, *Tuna-Dolphin II supra*, note 7, at para 5.27. Similarly, in *Shrimp-Turtle AB* it was means of protection rather than the goal itself (protecting sea turtles) which the Appellate Body found ran afoul of WTO rules. No GATT or WTO panel has ever found that application of trade measures to protect animals or the environment are consistent with GATT/WTO obligations. But a policy can only be successful as long as it can be enforced. When cooperation and persuasion fail, short of establishing international police powers or the naked use of violence by countries (such as sinking vessels), there is no effective international means of enforcing environmental policy other than through the use of trade measures. See, Jenkins, L., Using trade measures to protect biodiversity. In *Biodiversity and the law*, ed. W. Snape. Washington, D.C.: Island Press.

<sup>14</sup>Dispute Panel rulings under GATT could be vetoed by a single GATT Member, including by the Member against whom the ruling was made. The Uruguay Round Agreement on dispute settlement, adopted in 1994, provides for automatic acceptance of a dispute panel ruling by the WTO Council within sixty days unless there is a consensus within the Council to reject it. See, Article 16.4 of the DSU.

<sup>15</sup>Numerous social initiatives were challenged during the 1990s, including an EU policy to give preferential treatment to banana farmers in former colonies in Africa and the Caribbean (See, e.g., *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, WT/DS27/ARB, April 9); and a Massachusetts state law (Mass. Gen.L.A. ch. 7. Sections

226–22M (West 1998 Supp.) prohibiting companies that do business with Burma from doing business with the Massachusetts government (See *Crosby v. National Foreign Trade Council*, 530 U.S. \_\_\_, 120 S.Ct. 2288; 147 L.Ed.2d 352; 68 USLW 4545 (2000)).

<sup>16</sup>See, Canadian puppy example, note 8 *supra*.

<sup>17</sup>In connection with the *shrimp-turtle* case, the Thai WTO ambassador admitted that the cost of conversion to TEDs (turtle-excluded devices) was minimal and that all Thai boats had been converted in a few months, but that it was the principle of using trade measures to protect animals and the environment that the Thai government opposed. EURONEWS. 1997. Trade and environment: Preserving biodiversity and health. Broadcast by EURONEWS in *Correspondent*, May/June, 1997.

<sup>18</sup>Snape, W.J., III, and N.B. Lefkowitz. 1994. Searching for GATT’s environmental Miranda: Are “process standards” getting “due process.” 27 *Cornell International Law Journal* 77 at 781.

<sup>19</sup>This is otherwise known as a “production or process method” (PPM). According to previous GATT panels, PPMs are not covered by Article III, nor have past GATT panels determined that environmental PPM measures are protected by the exceptions set forth in Article XX. See, *Tuna-Dolphin I* and *Tuna-Dolphin II*.

<sup>20</sup>*Belgian Family Allowances*, GATT BISD 1S/59 (Nov. 1952).

<sup>21</sup>GATT BISD 1S/59, 1st Supp. (1953).

<sup>22</sup>*Id.*

<sup>23</sup>GATT BISD 36S/345 (November 1989).

<sup>24</sup>*Id.* at para. 5.13.

<sup>25</sup>Dunne, N. 1992. Fears over “Gatzilla the trade monster.” *Financial Times* Jan. 30, 1992, 3.

<sup>26</sup>Furthermore, Article 2.2 of the TBT provides that “technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking into account the risks non-fulfillment would create. Such legitimate objectives are, *inter alia*...protection of human health or safety, animal or plant life or health, or the environment.”

<sup>27</sup>Article 2.1. provides further that “Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement.”

<sup>28</sup>GATT art. XX. See, Charnovitz, S. 1992. The environmental exceptions in GATT Article XX, *Journal of World Trade*, 49.

<sup>29</sup>Because the language in the *chapeau* and various sections of Article XX is virtually identical to that found in the newer WTO Agreements, the GATT 1947 legislative history and case law is illustrative of the meaning and purpose of the social provisions in those Agreements as well.

<sup>30</sup>Economic Committee, *Report Submitted to the Seventh Session of the Assembly*, A.55, 1926.II[B] (September 13, 1926) 21. [Economic Committee—7th Session Report]

<sup>31</sup>*Preliminary Draft Agreement Established by the Economic Committee*, 228. [Economic Committee, *Preliminary Draft*.]

<sup>32</sup>The Indian delegate said that “...the Government of a country was the only possible arbiter of the necessity for restrictions and that it could not afford to surrender the responsibilities placed upon it and submit the case to any foreign or extraneous body...[T]he Indian Government...would prefer to see all measures connected with prohibitions relating to national security, revenue, finance, health or morals removed alto-

gether from the Convention.” *International Conference for the Abolition of Import and Export Prohibitions and Restrictions, Proceedings of the Conference [1927 Convention], Minutes of Preliminary Meetings [Minutes]*, A.559. M.201.1927.II[B] (October 17—November 8, 1927), 228.

<sup>33</sup>Comment by Mr. Ito (Japan). 1927 *Convention—Minutes*, 84.

<sup>34</sup>1927 *Convention—Minutes*. Examples of quasi-economic concerns included grading standards (United States, 82 and 86), import/export restrictions (India, 87), stabilization of currency (Greece, 83), and marks of origin (Britain, 80).

<sup>35</sup>Examples of noneconomic concerns included prohibitions on obscene materials (Ireland, 108) and lottery tickets (Egypt, 110). *Minutes of Plenary Meetings*, 1927 Convention, at respective page cites above.

<sup>36</sup>The Austrian delegate said that “...the sooner the skeletons were got rid of the better...The danger was that, by discussing general formulas, the Conference might adopt exceptions more general than was desired, and therefore it must ascertain which were the points on which restrictions were necessary and leave for later discussion the way in which those restrictions could be expressed. The formulas finally adopted should be made as light as possible on account of the unavoidable exceptions which it was impossible to remove at present.” 1927 *Convention—Minutes*, 87.

<sup>37</sup>Comment by Sir Sidney Chapman. 1927 *Plenary Meetings*, 1927 Convention, 84.

<sup>38</sup>Economic Committee, *7th Session Report*, 27.

<sup>39</sup>Economic Committee, *Report of the Economic Committee to the Council, 15th Session*, C.309(D)M.114.1925.II[B] (May 25—June 3, 1927), 309. [15th Session Report]

<sup>40</sup>Comments by Mr. Gangudi (India), *Minutes of the Preparatory Committee of the International Conference on Trade and Employment [Preparatory Committee II Minutes]* (November 13, 1946), 5.

<sup>41</sup>Comments by Mr. Roux (France) and Mr. Rhydderch (United Kingdom), *Preparatory Committee II Minutes*, 3 and 7.

<sup>42</sup>Proposal by Mr. Rhydderch (United Kingdom), *Preparatory Committee II Minutes*, 7.

<sup>43</sup>UN Docs. E/PC/T/C.II/32, II and E/PC/T/C.II/50, 3–7.

<sup>44</sup>See, the Preambles Contained in the Agreement Establishing the WTO, The SPS Agreement, the TBT Agreement, Article XX of the GATT, and Article XIV of the GATS.

<sup>45</sup>See, *Tuna-Dolphin I* and *Tuna-Dolphin II* at note 7 *supra*.

<sup>46</sup>See, *United States—Standards for Reformulated and Conventional Gasoline* (WT/DS2/R), Report of the Panel, January 26, 1996 (“*Reformulated Gas*”); *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT Doc. DS10/R, BISD 37S/200 (Nov. 7, 1990) (*Thai Cigarettes*).

<sup>47</sup>See, e.g., *In the Matter of Lobsters from Canada*, Panel No USA 89-1897-01, U.S.—Canada Free Trade Agreement (FTA), Binational Panel Review. At issue in this case was the application of GATT Article XX(g), not (b), yet the panel’s reasoning is instructive. The United States had adopted a conservation measure prohibiting the sale of undersized lobsters. Size in lobsters is related to maturation, and both U.S. and Canadian scientists believed that harvesting undersized lobsters had contributed to the fishery’s rapid decline. Despite this, the FTA panel ruled that the measure in question was not *primarily aimed at conservation* (and thus not safeguarded by GATT

Article XX(g)). The panel's reasoning was based on the fact that it could not determine that conservation was the only objective of the measure and further, that the United States engaged in only a limited discussion of possible alternative solutions. According to the panel, the United States did not address the reasons for which its conservation objectives could not be met by special marking of Canadian small lobsters (which apparently reached maturation before U.S. lobsters). Of course, the reason the United States eventually banned all undersized lobsters (originally it had allowed the sale of Canadian undersized lobsters with proof of Canadian origin) was because it was very difficult to enforce anything other than a total ban on the sale of small-sized lobsters, and there was evidence that rampant cheating had been occurring under the original measure. See, *id.* at para. 9.5.1–9.8.

<sup>48</sup>In *Tuna-Dolphin II*, the GATT panel reasoned that only if other governments changed their policies would U.S. conservation objectives be met.

<sup>49</sup>The Appellate Body in both *Reformulated Gasoline AB* and *Shrimp-Turtle AB* determined that there were alternative means available to achieve the conservation goal in question and that therefore the chosen measure was either an *arbitrary and unjustifiable* or a *disguised restriction on trade*. The effect of these rulings is no different than if a *least-trade-restrictive test* had been employed. See, note 46 *supra* and discussion of “necessity” *infra*.

<sup>50</sup>The United States argued that there was no viable alternative (from an enforcement point of view) to the measure in question. Though clearly not experts in air quality control, the Appellate Body nonetheless felt it appropriate to determine that alternative measures were viable. See, *Reformulated Gasoline* at paras. 4.10–4.17.

<sup>51</sup>In this case, the Appellate Body found that the United States 1) had failed to try to negotiate an international agreement to protect sea turtles from the complaining countries; 2) had discriminated in its efforts to transfer technology; and 3) had established no procedure for review of, or appeal from, a denial of an application, as well as other basic elements of due process. Therefore, the measure in question did not pass the requirements set forth in the *chapeau*. *Shrimp-Turtle AB* at paras. 171, 175, and 180–184.

<sup>52</sup>See, e.g., *Shrimp I*, note 6 *supra*. at para. 7.50. (“We are of the view that these treaties show that environmental protection through international agreement—as opposed to unilateral measures—have for a long time been a recognized course of action for environmental protection.... We are not dealing with measures taken by the United States in application of an agreement to which it is a party, as the United States does not claim that it is allowed or required by any international agreement [sic] to impose an import ban on shrimp in order to protect sea turtles.”) See also, *Tuna-Dolphin I*, note 7 *supra*. at para 5.24 (“[T]he import prohibition imposed by the United States was not necessary because alternative means consistent with the General Agreement were available to it to protect dolphin lives or health, namely international co-operation between the countries concerned.”)

<sup>53</sup>A requirement of consensus can lead to downward harmonization to the least common denominator. Invariably, there are environmental and animal problems that affect countries differently. For example, to some, the elimination of fishing subsidies may be a hardship, while to oth-

ers it is the inevitable solution to over-fishing. Those to whom it is a hardship may balk at strong international regulation, even though such regulation is in the long-term interest of all countries. (In this regard, in preparation for the 1999 Ministerial Conference, seven countries, including the United States, submitted a paper to the WTO regarding the elimination of fishing subsidies. WT/GC/W/XXX, July 30, 1999 [99-2779] Despite clear evidence regarding the harm of over-fishing, discussions regarding the elimination of fishing subsidies has been met with hostility by many countries, including Japan and the European Union.) Consensus in such circumstance may result in weak international solutions that do not adequately resolve the harm at hand.

<sup>54</sup>Examples of MEA organizations include the International Whaling Commission, the Inter-American Tropical Tuna Commission, and CITES.

<sup>55</sup>See, Jenkins, L. 1993. Trade sanctions: An effective enforcement tool. 2 *Review of European Community & Environmental Law [Trade Sanctions]* 362.

<sup>56</sup>There are three animal/environmental-related treaties that use or have recommended the use of trade measures. The International Commission for the Conservation of Atlantic Tunas (ICCAT) adopted a provision that allows for trade sanctions to be taken against non-ICCAT members who refuse to cooperate with the commission's conservation program for bluefin tuna and swordfish. See, Resolution adopted by the Commission at its Ninth Special Meeting (Madrid, November-December 1994). Report for Biennial Period, 194–95, Part 1.

Similarly, the Montreal Protocol on Substances that Deplete the Ozone Layer (the “Protocol”) regulates trade in chlorofluorocarbons, carbon tetrachloride, and trichloromethane but provides for the use of trade measures only against non-complying non-parties. See, Art 4. para. 4 of the Protocol which provides that “the parties shall determine the feasibility of banning or restricting, from States not a party to this Protocol, the import of products produced with, but not containing, controlled substances.”

<sup>57</sup>See, note 56 *supra*.

<sup>58</sup>See, e.g., statement of Sir Leon Brittan, vice president of the European Commission, contained in Policing the Global Economy, Proceedings of the International Conference organized by the Bellerive Foundation and GLOBE International, Geneva, March 1998, at 37. (“My view is clear: where there is an MEA which commands wide support among WTO members, we need to be more confident than at present that WTO trade rules do accommodate the aims of the parties to the MEA, and therefore allow trade measures to be taken under such an MEA. WTO rules should not be capable of being used to frustrate the objective on an MEA.”)

<sup>59</sup>The Biosafety Agreement Preamble provides in relevant part:

Recognizing that trade and environment agreements should be mutually supportive with a view to achieving sustainable development,

Emphasizing that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements,

Understanding that the above recital is not intended to subordinate this Protocol to other international agreements.

<sup>60</sup>Article 30 of the Vienna Convention on the Law of Treaties provides a procedure for resolving conflicts between treaties. The general rule is

that the agreement negotiated later in time prevails. Because these new MEAs are being negotiated subsequent to the WTO Agreements, governments like the United States are taking precautions to ensure that the new MEA provisions do not trump WTO rules. Specifically, Article 30 provides:

...2. When a treaty specifies that it is subject to, or that it is not considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty...the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one...b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

<sup>61</sup>See, *Tuna-Dolphin I* and *Tuna-Dolphin II*.

<sup>62</sup>For instance, in the case of tuna caught by killing dolphins, the issue is not that the tuna cans contain dolphin meat; rather, in harvesting tuna, dolphins are killed. The encircling and netting of dolphins and tuna is part of the production process rather than the end-product of canned tuna.

<sup>63</sup>The most recent endorsements of the principle include the 1987 Second International Conference on the Protection of the North Sea, the 1990 Bergen Ministerial Declaration, the 1990 Ministerial Declaration on Environmentally Sound and Sustainable Development in Asia and the Pacific, and the 1991 meeting of the United Nations Environmental Program (UNEP) Governing Council. See Naomi Roth-Arriaza, Precaution and the ‘greening’ of international trade law, 7 *Journal of Environmental Law and Litigation*, 60–63 (1992).

<sup>64</sup>The TBT was amended in the Uruguay Round Negotiations and now provides that the terms “standard” and “technical regulations” include product-related processes and production methods.

<sup>65</sup>Article III, para. 1 recognizes the validity of “internal taxes and other internal charges and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of products” so long as the measure in question is not applied to imported or domestic products “so as to afford protection to domestic production.”

<sup>66</sup>GATT art. XX.

<sup>67</sup>See *Tuna-Dolphin I*; *Tuna-Dolphin II*; and *Eurocars*.

<sup>68</sup>DSU art. 3.8.

<sup>69</sup>These include the requirements that “measures are not applied in a manner which would constitute (1) a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or (2) a disguised restriction on international trade...” GATT 1947 art. XX (preamble).

<sup>70</sup>*Webster's Third New International Dictionary*, unabridged. 1971. 1544.

<sup>71</sup>Charnovitz, S. 1992. The environmental exceptions in GATT Article XX, *Journal of World Trade*, 49.

<sup>72</sup>To date, there has been no direct challenge under either GATS or the TBT Agreement. The Article XX case law, therefore, is illustrative of how a Dispute panel would interpret similar language contained in GATS and the TBT Agreement.



<sup>73</sup>The term “necessary” is used in GATT Article XX, GATS Article XIV, and the preambles of both the SPS and TBT Agreements.

<sup>74</sup>See, e.g., *United States—Restrictions on Imports of Tuna* (unpublished decision), GATT Doc. DS29/R (May 23, 1994); *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT Doc. DS10/R, BISD 37S/200 (Nov. 7, 1990).

<sup>75</sup>Charnovitz, Environmental exceptions, *note 71 supra*. Charnovitz points out the dilemma of an exempt-purpose measure that conflicts with multiple parts of the GATT. For example, a tax preference for local industry to use less dirty fuel might be less restrictive than a ban on dirty fuel under GATT 1947 article XIII (quantitative restrictions), but it could be attacked as a subsidy under the Agreement on Subsidies and Countervailing Measures.

<sup>76</sup>The term “life and health” is used in GATT Article XX, GATS Article XIV, the Preamble and throughout the SPS Agreement, and the Preamble and Article II of the TBT Agreement.

<sup>77</sup>SPS Annex A.1(a).

<sup>78</sup>Charnovitz, Environmental exceptions, *note 71 supra*. (citing *International Trade Organization*, Hearings Before the Committee on Finance, Part 1, U.S. Senate, 84th Congress, 1st Session, at 442), 44.

<sup>79</sup>1927 Convention, 224.

<sup>80</sup>1927 Convention, 18.

<sup>81</sup>UN Doc. E/PC/T/A/PV/30 at 7–13.

<sup>82</sup>Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”). Article 17 of the DSU establishes that a standing Appellate Body shall be established by the Dispute Settlement Body (which is comprised of the Members of the WTO Agreements).

<sup>83</sup>See, *Tuna-Dolphin II*.

<sup>84</sup>Those who espouse this view rely on the fact that original GATT drafting committees described a resource as “raw material” or “mineral.” UN Doc. E/PC/T/C.H/50, 4; see, Charnovitz, Environmental exceptions, *note 71 supra*.

<sup>85</sup>See, e.g., *Tuna-Dolphin II* at para 5.13 and *Shrimp-Turtle AB* at para. 132.

<sup>86</sup>GATS Article XIV(a) states: “necessary to protect public morals or to maintain public order.” Footnote 5 to this section further provides that the public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.”

<sup>87</sup>1927 Convention, art. 4(2), 8.

<sup>88</sup>*Preliminary Draft Agreement Established by the Economic Committee*, 1927 Convention, 228.

<sup>89</sup>*Minutes*, 1927 Convention, 108.

<sup>90</sup>*Minutes*, 1927 Convention, 110.

<sup>91</sup>*Preliminary Draft*, 1927 Convention, 224.

<sup>92</sup>1927 Convention, *Official Instruments*, 8. At one point, the “moral and humanitarian” exception had been deleted during the drafting process. When the Egyptian and British delegates moved to put it back in, the committee’s rapporteur explained that the intent had not been to delete the moral exception but to consider that it was included within the terms of a broader section that protected restrictions that applied to like national products. While the committee chose to reinsert the moral exception, this episode illustrates the effort that the committee was making to develop the broadest possible generic categories. *Minutes*, 1927 Convention, 107–108.

<sup>93</sup>*International Convention Concerning the Transit of Animals, Meat and Other Products of Animal Origin*, art. 5, C.78.M.34.1935.II[B] (March 1935), 3.

<sup>94</sup>*Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment [ITO London Report]*, United States Draft Charter, Annexure 11, art. 32(a), 60.

<sup>95</sup>*ITO London Report*, 32.

<sup>96</sup>“The [New York] draft Agreement reproduces many provisions of the Charter. Reservations entered by delegates to those provisions of the Charter...apply equally to the corresponding provisions of the draft Agreement.” *Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment [ITO New York Report]*, Part III, Draft General Agreement on Tariffs and Trade, Introduction, para. 1, 65. See also, *Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment* (Geneva, August 1947), 70.

<sup>97</sup>Apart from the ITO reports and appendices, neither the State Department Library nor the National Archives was able to locate any documents that would explain the U.S. rationale.

<sup>98</sup>This language appears in GATT Article XX, GATS Article XIV, and the SPS and TBT Agreements.

<sup>99</sup>See, SPS, Annex A (Definitions).

<sup>100</sup>*European Communities—Measures Concerning Meat and Meat Products (Hormones)*, United States (WT/DS26/R), Report of the Panel, June 30, 1997 (“*Beef Hormones I*”); *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, United States (WT/DS26/AB/R and WT/DS48/AB/R), Report of the Appellate Body, adopted, February 13, 1998 (“*Beef Hormones AB*”).

<sup>101</sup>*Beef Hormone* at para. 8.96.

<sup>102</sup>*Id.* at para. 8.114.

<sup>103</sup>*Id.* at para. 8.117.

<sup>104</sup>*Id.* at para. 8.157. The European Union argued that the precautionary principle was part of customary international law and should be used to interpret Articles 5.1 and 5.2. The United States said it did not consider the precautionary principle international law and suggested it was more an “approach” than a “principle.” See, *Beef Hormone AB* at para. 122.

<sup>105</sup>*Id.* at para. 193.

<sup>106</sup>*Id.* at para. 194.

<sup>107</sup>*Id.* at para. 207 and 208. (“The [European Union] did not actually proceed to an assessment...of the risks arising from the failure of observance of good veterinary practice combined with problems of control of the use of hormones for growth promotion purposes.”)

<sup>108</sup>The effects of Bt corn on the monarch butterfly is a case in point. The widespread global distribution of this genetically modified seed occurred long before laboratory tests confirmed Bt corn kills monarch butterfly larvae. Consequently, the effects of this seed on adult monarchs in the field is totally uncertain. Literally, the earth had become the petri dish to prove or disprove biological harm. Such potentially devastating implications should be well understood in containment—prior to release.

<sup>109</sup>In *Shrimp-Turtle AB* the Appellate Body relied on an international principle called “Abuse of Rights” to find that the U.S. law in question was a violation of U.S. obligations under the WTO. See, *note 7 supra* at para 158.

<sup>110</sup>Program on International Policy Attitudes, Center on Policy Attitudes of the University of Maryland. 2000. Americans on globalization: A study of U.S. public attitudes, 5 (Mar. 28, 2000), available at <<http://www.pipa.org/>>.

<sup>111</sup>*Id.* at 23.

<sup>112</sup>*Id.* at 24.

<sup>113</sup>*Id.* at 25.