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Sealing animal welfare into the GATT exceptions: the international dimension of animal welfare in WTO disputes

KATIE SYKES*
Assistant Professor of Law, Thompson Rivers University, Canada

Abstract: *EC–Seal Products* has been characterized as a contest between local moral preferences about animal welfare, on the one hand, and global commitments to trade disciplines on the other. But that description fails to take into account the development of international legal norms concerning animal welfare and their relevance to this case, as well as to other potential disputes involving animal welfare measures that affect trade. The international dimension of animal welfare implicates two ongoing debates in international trade law: what the relationship should be between WTO law and general international law, and the extent to which 'public morals' under Article XX(a) of GATT can be locally defined or need to be internationally shared. This Article examines the argument that there is a general principle of international law concerning animal welfare, and analyzes the role that international norms regarding animal welfare should play in *EC–Seal Products*.

1. Introduction

Earlier this year, a World Trade Organization (WTO) panel held open hearings on the *EC–Seal Products* dispute,[1] in which Canada and Norway have challenged the European Union (EU) ban on commercial trade in seal products.[2] The EU measures, which consist of an overall ban with limited exceptions for products of indigenous subsistence hunting, by-products of culls carried out for marine management purposes and placed on the market on a not-for-profit basis, and personal belongings brought into the EU by travellers, are referred to here as the EU Seals Regime. *EC–Seal Products* is the first WTO case in which the central issue is

* Email: katiesykes@mac.com
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1 *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400, WT/DS401, WT/DS369.

2 As established in Commission Regulation 1007/2009, OJ 2009 L 286/36, together with further details on implementation set forth in Commission Regulation 737/2010, OJ 2010 L 216/1.

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the trade-law compatibility of legislation based on moral concerns about cruelty to animals. The Panel's decision will be awaited with interest by scholars and observers who follow the evolution of animal welfare as a legal question, and as a matter of discussion in the international arena. It will probably be the first decision by an international adjudicator in which animal welfare is one of the central questions.

As might be expected given the ostensible grounding of the EU Seals Regime in moral choice, much of the scholarly discussion of this dispute has focused on whether such an action is justifiable, assuming a *prima facie* trade law violation, by virtue of the exception under Article XX(a) of GATT[3] for 'measures necessary to protect public morals'.[4] In other controversies over the scope and nature of the Article XX exceptions, notably those involving environmental regulation and implicating human rights, there has been extensive debate about the interplay between international trade norms and norms of general international law. In particular, the question of whether and to what extent general (non-trade) international law should play a part in WTO dispute resolution has been the subject of controversy and extensive discussion.[5] At a minimum, it can be said with little fear of contradiction that it matters, or is worth considering, whether general international law has something to say about an issue that plays a key role in a WTO dispute.

But the question of how WTO disciplines interact with non-trade international legal norms has so far been largely absent from the scholarly discussion of *EC–Seal Products*, which for the most part takes it as given that this is a contest between domestic values and international law, with animal welfare as a value relevant only on the domestic side of that divide. The absence of attention to this issue in the scholarship on *EC–Seal Products* is significant, and even somewhat surprising. There is an emergent body of international norms regarding international welfare, admittedly rudimentary compared to more mature areas like international environmental law, but nevertheless established enough for some scholars to argue that a general principle of international law concerning animal welfare now exists[6] – and, indeed, that it should be recognized as functioning as an interpretive 'meta-principle … relevant to the interpretation and amplification of norms

3 *General Agreement on Tariffs and Trade*, 30 October 1947, 55 UNTS 194, entered into force 1 January 1948.

4 See, e.g., P. L. Fitzgerald, '"Morality" May Not Be Enough to Justify the EU Seal Products Ban: Animal Welfare Meets International Trade Law', **14** *Journal of International Wildlife Law and Policy* (2011) 85.

5 A useful summary of this well-rehearsed debate from the 1990s to the present is in A. Lang, *World Trade Law After Neoliberalism: Re-Imagining the Global Economic Order* (Oxford University Press, 2011), at 148–154. Some of the arguments over the role of general international law in trade disputes are considered in Section 5 of this Article.

6 M. Bowman, P. Davies, and C. Redgwell, *Lyster's International Wildlife Law*, 2nd edn (Cambridge University Press, 2010), at 678–682.

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estalished by other means', which could potentially justify limitations (through interpretation) on the obligations set forth in trade treaties.[7] Some ideas about what this proposition implies in practice are explored in Section 5. For advocates working to enhance the legal protection of animals, including opponents of the seal hunt, the international character of the values they seek to promote is almost self-evident; two of the main organizations campaigning against seal hunting, the International Fund for Animal Welfare (IFAW) and Humane Society International (HSI), have the word 'international' in their names, and their campaigns appeal to notions of shared, global commitment to basic moral values regarding animals.

The *EC–Seal Products* dispute should be recognized as significant in the broader debate over the relationship between WTO law and general international law, with special significance for the way that relationship plays out with respect to international norms at an early stage of development. And it is also relevant to the current discussion among international trade lawyers about the international character (or otherwise) of the public morals exception.[8] While recent WTO case law on the public morals exception in the *US–Gambling* and *China–Audiovisuals* decisions[9] gives a fair amount of deference to local choices about what constitutes public morality, such deference is not without limits, and prevailing international views about moral priorities do have some relevance. In any event, in the Article XX analysis determining whether something qualifies as a 'public morals' objective is only a threshold step; the exercise involves careful weighing and balancing of competing principles, and the application of value-laden concepts like necessity, justification and abuse of right. It is in this exercise that the international dimension of animal welfare becomes especially important.

An oversimplified analysis of the *EC–Seal Products* dispute as a contest between international (free trade) and domestic (animal welfare) norms obscures some of these important nuances. If Bowman *et al.* are correct in their assertion that a general principle of international law exists concerning animal welfare, then that principle is among the 'relevant rules of international law applicable in the

7 Ibid., at 681.

8 See discussion in M. Wu, 'Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine', **33** *Yale Journal of International Law* (2008) 215, at 231–233.

9 Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R (*US–Gambling*, Panel Report); Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005; Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS/363/R, adopted 19 January 2010, as modified by Appellate Body Report WT/DS/363/AB/R (*China–Audiovisuals*, Panel Report), *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010 (*China–Audiovisuals*, Appellate Body Report). The *China–Audiovisuals* decision is the only WTO case so far to interpret and apply the morality exception in Article XX of GATT; the *US–Gambling* decision dealt with a parallel provision in the *General Agreement on Trade in Services*, 15 April 1994, 1869 UNTS 183, entered into force 1 January 1995.

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relations between the parties' within the meaning of Article 31(3)(c) of the *Vienna Convention on the Law of Treaties*,[10] and it would be mandatory for the Panel to take it into account in good faith as such.[11] But even without going that far – that is, even if there is not (or not yet) a full-fledged and applicable general principle of international law concerning animal welfare – the evolution towards some form of international consensus on the significance and meaning of animal welfare is an important part of the context for evaluating the WTO law compatibility of the EU Seals Regime from a stance that interprets and applies the WTO treaties within the broader, evolving normative environment of international law.[12]

This aspect of the 'trade and animal welfare' nexus should not be overlooked, and it would also be relevant to trade disputes that could arise after *EC–Seal Products* – which might include WTO challenges to Europe's relatively progressive rules on farming and slaughter and to India's and Europe's bans on cosmetics tested on animals.[13]

Section 2 of this article describes the background to the adoption of the EU Seals Regime and the history of conflict over seal hunting that led up to it, focusing on the debate over the seal industry in Canada. In describing this history, I emphasize the international and cosmopolitan spirit of the movement against seal hunting, and its connection to broader international movements for animal protection, which are relevant to understanding the relationship between international legal norms and the measures adopted by the EU. Section 3 looks at the lack of attention to the international dimension of animal welfare in the literature on *EC–Seal Products* and on trade issues raised by animal welfare legislation. Section 4 examines the argument put forward by Bowman *et al.* that there is a general principle of international law concerning animal welfare and considers some of the evidence for such a principle. Section 5 is a discussion of the relationship between WTO law and general international law and the role that a general principle on animal welfare

10 (1969) 1155 UNTS 331.

11 Panel Report, *European Communties – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS/293/R, adopted 21 November 2006 (*EC–Biotech*), para. 7.69.

12 The International Law Commission's report *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* describes Article 31(3)(c) as expressing a principle of 'systemic integration' of international law whereby 'international obligations are interpreted by reference to their normative environment'. Report of the Study Group of the International Law Commission at its fifty-eighth session, finalized by Martii Koskenniemi, UN Document A/CN.4/L.682 (13 April 2006), para. 413. This report was cited with approval by the WTO Appellate Body in *EC–Large Civil Aircraft*. Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS/316/AB/R, adopted 1 June 2011, paras. 844–845. See discussion in Section 5.

13 India banned testing cosmetics and cosmetic ingredients on animals in June 2013, following a campaign in which HSI played a prominent role. An Indian Member of Parliament was quoted as saying that the next step should be 'banning cosmetics products that are tested on animals abroad and then imported and sold here in India'. A. Dhar, 'India bans testing of cosmetics on animals', *The Hindu* (29 June 2013), quoting Member of Parliament Baijayant Panda.

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might play in interpreting and applying the WTO treaties. Section 6 looks at how the international dimension of animal welfare should factor into the exercise of assessing the EU Seals Regime as a valid measure to protect 'public morals' under Article XX(a) of the GATT, 'animal health' under Article XX(b), or both.

2. Background to *EC–Seal Products*: conflict on ice

The EU Seals Regime was adopted in 2009 and came into force in 2010. The regime consists of a regulation establishing rules concerning the placing on the market of seal products and a more detailed implementing regulation.[14] The rules provide that seal products cannot be placed on the market in the EU unless they fit under one or more of the specified indigenous, marine management and travel exceptions. The measure is explicitly based on EU citizens' moral beliefs about animal welfare; the Preamble refers to 'expressions of serious concerns by members of the public and governments sensitive to animal welfare considerations due to the pain, distress, fear and other forms of suffering which the killing and skinning of seals, as they are most frequently performed, cause to those animals'.[15]

The EU Seals Regime also reflects a philosophical position about the nature of animals and of human moral obligations to them. The Commission requested the Animal Health and Animal Welfare Panel of the European Food Safety Authority (EFSA) to prepare a scientific opinion on sealing in Canada and other countries where it takes place.[16] The EFSA Report does not expressly take a position on the ethics of seal hunting (as this was not in its remit),[17] but it surveys and assesses the evidence on hunting methods and their welfare implications. Among EFSA's general conclusions are that seals 'are sentient mammals that can experience pain, distress, fear and other forms of suffering'.[18]

The historical background to the adoption of the new EU Seals Regime is a long battle between pro- and anti-sealing camps that dates back to the 1960s. Canadian seal hunting originally came to international public attention through a rather strange twist of fate. In 1964, Quebec's tourism department hired a small company called Artek to make some documentary films promoting the province. One of these films included footage of seal hunting in the Magdalen Islands. As a marketing strategy, this was not a great success; viewers were horrified by 'harrowing scenes of sealers with steel-hooked staves gaffing what may well be the most appealing young creature in the animal kingdom, together with stunning

14 *EC–Seals Products*, *supra* note 2.

15 Preamble of Regulation 1007/2009, ibid., at para. 4.

16 'Animal Welfare Aspects of the Killing and Skinning of Seals', *The EFSA Journal* 610 (2007), http://www.efsa.europa.eu/en/efsajournal/doc/610.pdf ('EFSA Report').

17 Ibid., at 3.

18 Ibid., at 94.

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close-ups of one of these attractive little animals – being skinned alive'.[19] A public outcry followed, and when German and then global media reported on the issue,[20] the seal hunt became a cause célèbre in Europe and around the world.

In 1983, the European Economic Community adopted a temporary ban on the skins of and products derived from young harp and hooded seals (whitecoats and bluebacks).[21] This measure was extended in 1985[22] and again in 1989, this time indefinitely.[23] It has been described as the only European Directive to be universally supported by the European public.[24] IFAW, which was formed as an activist group opposing the Canadian seal hunt, organized a consumer boycott of Canadian fish in protest against the government's policy on seal hunting.[25] In response to both domestic and international pressure, the Canadian government established a Royal Commission on sealing,[26] which reported in 1986.[27] Reflecting in part the recommendations of that report, in 1987 the government adopted sealing regulations under the *Fisheries Act*, the *Marine Mammal Regulations*, which prohibited the commercial killing of whitecoat and blueback pups.[28] The *Marine Mammal Regulations* were later amended to require slaughter methods intended to ensure a quick time to death and avoid skinning or dragging of live, conscious animals.[29]

The conflict over the rights and wrongs of the seal hunt continues to this day. For small communities in Atlantic Canada, sealing represents a link to a traditional way of life under threat, and provides some replacement income for former fishermen who lost their livelihoods when the Atlantic cod fishery collapsed in the 1990s. On the other side of the issue, animal welfare organizations like IFAW and HSI campaign for a complete ban on seal hunting, arguing that it is impossible to prevent undue suffering and to properly monitor the hunt given the harsh, challenging conditions in which it takes place.[30] Arguably, the prevalence of opinion around the world has turned against seal hunting. Only a handful of

19 F. Mowat, *Sea of Slaughter* (1987) (first published 1984), at 392.

20 D. Barry, *Icy Battleground: Canada, the International Fund for Animal Welfare, and the Seal Hunt* (Breakwater Books, 2004), at 18; Mowat, ibid., at 393.

21 Council Directive 83/129 of 28 March 1983, OJ 1983 L 91/30.

22 Council Directive 85/444 of 27 September 1985, OJ 1985 L259/70.

23 Council Directive 89/370 of 8 June 1989, OJ 1989 L163/037.

24 D. McGillivray, 'Seal Conservation Legislation in the UK – Past, Present, Future', **10** *International Journal of Marine and Coastal Law* 19 (1998), at 48.

25 Barry, *Icy Battleground, supra* note 20, at 78–95.

26 Ibid at 96.

27 *Seals and the Sealing Industry in Canada*, Report of the Royal Commission (1986).

28 Barry, *Icy Battleground, supra* note 20, at 113. Canada's *Marine Mammal Regulations* (formerly the *Seal Protection Regulations*), SOR/93-56 s. 27, provide that no one shall sell, trade, or barter a whitecoat or a blueback.

29 *Marine Mammal Regulations, supra* note 28, ss. 28–29.

30 A. Linzey, 'An Ethical Critique of the Canadian Seal Hunt and an Examination of the Case for Import Controls on Seal Products', **2** *Journal of Animal Law* 87 (2006); M. Richardson, 'Inherently Inhumane: A Half-Century of Evidence Proves Canada's Commercial Seal Hunt Cannot Be Made

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nations still practice sealing; the biggest hunts are in Canada and Namibia, and the BBC reports that seals are also hunted in Iceland, Norway, Sweden, Finland, and Greenland.[31] Bans on importing and commercially trading seal products, like the European one, have been adopted by a growing number of countries. The United States was a pioneer when it imposed such a ban in 1972, under the *Marine Mammal Protection Act*,[32] but in the last decade a number of other countries outside the EU have followed suit. Mexico banned the import and export of marine mammals, including seals in 2006.[33] In 2011, Russia, Belarus, and Kazakhstan informed the WTO that they had adopted bans on harp seal products.[34] The latest country to adopt a ban is Taiwan, which announced in early 2013 that it would ban all trade in marine mammals except for products of indigenous hunts.[35]

3. Animal welfare versus trade: the missing international dimension

This, then, is the background to a trade dispute which, as summed up by Peter L. Fitzgerald, 'poses the question of whether "local" moral, ethical or popular positions can trump agreed efforts at economic globalization reflected in various treaty instruments'.[36] Fitzgerald's characterization, which is in line with most commentary on the *EC–Seal Products* case, places animal welfare concerns and opposition to seal hunting on the side of local moral values, and keeping markets open for seal products on the side of globalization and international legal commitments.

But some of the salient aspects of the struggle over sealing disrupt that dichotomy. The anti-sealing protest movement is cosmopolitan, urbane, and self-consciously, indeed strategically, international. The Canadian sealing industry is rooted in local, traditional ways of life, and kept going with various forms of domestic government support.[37] Former Canadian fisheries minister John Crosbie[38] described the seal hunting conflict as one 'between the cultures of

Acceptably Humane' (2007), submission to the European Food Safety Authority Animal Health and Animal Welfare Panel's ad-hoc Working Group on the Humane Aspects of Commercial Seal Hunting.

31 'Namibia's controversial annual seal hunt set to begin', BBC News Africa (14 July 2012), http://www.bbc.co.uk/news/world-africa-18845596.

32 16 USC 1385 s. 102.

33 S. Fink, 'Major victory as Russia bans trade in harp seal skins', International Fund for Animal Welfare (19 December 2011), http://www.ifaw.org/united-states/news/major-victory-russia-bans-trade-harp-seal-skins.

34 G. Galloway, 'Russian ban "spells the end of Canadian sealing", activists say', *The Globe and Mail* (19 December 2011).

35 Humane Society International, *HSI Commends Taiwan for Historic Ban on Trade in Marine Mammal Products*, 8 January 2013.

36 Fitzgerald, 'Morality', *supra* note 4, at 96.

37 J. Livernois, 'The Economics of Ending Canada's Commercial Seal Hunt', **34** *Marine Policy* 42 (2010), at 47–48.

38 Crosbie was also a strong supporter of free trade and the WTO during his career in elected politics.

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modern urban society and traditional rural communities – a conflict that is going to become increasingly important as world industrialisation and urbanisation continue their unrelenting course'.[39] If *EC–Seal Products* represents a battle between globalization and parochialism, the forces may have aligned themselves on the wrong sides.

In the literature on animal welfare and international trade law, however, Fitzgerald's statement certainly represents the near-unanimous view. Laura Nielsen, referring generally to the interaction of trade and animal welfare law, flatly states that animal welfare is not part of international law because 'animal welfare primarily is regulated domestically with domestically defined norms'.[40] Others recognize the development of international law on animal welfare, but relegate it to the margins of the discussion. Robert Howse and Joanna Langille's thorough and thoughtful study of the issues in *EC–Seal Products* alludes to 'increasing recognition of animal welfare as a global value',[41] but the heart of their argument is that WTO law should leave policy space for pluralism in moral choices about animal welfare, including, for example, culturally specific decisions about which animals trigger higher or lower levels of moral concern.[42] Simon Lester argues that non-WTO international law might be invoked *against*, rather than in support of, the EU ban because there are no international agreements prohibiting seal hunting, implying that, while international law may concern itself with animal welfare, it has nothing in particular to say about the welfare of seals.[43] In fact seals do receive some special attention and protection in international law, as discussed in Section 4 below.

What is missing from these accounts, however, is serious consideration of how the emerging status of animal welfare as an emerging principle of *international* law and policy affects the balance of competing values at stake in *EC–Seal Products*. It is true that Europe has, generally speaking, opted for higher levels of animal protection than other parts of the world,[44] and that this can be fairly described, up to a point, as a local choice. Some commentators see animal welfare as a signature European value.[45] But, if that is the case, the signature value also partakes of the nature of a larger human value; like the foregrounding of human rights in

39 J. Crosbie, 'Introduction', in Barry, *Icy Battleground, supra* note 20, at ix.

40 L. Nielsen, *The WTO, Animals and PPMs* (Martinus Nijhoff Publishers, 2007), at 7.

41 R. Howse and J. Langille, 'Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Permit Trade Restrictions Justified by Non-Instrumental Moral Values', **37** *Yale Journal of International Law* 367 (2012), at 393.

42 Ibid., at 418.

43 S. Lester, 'The WTO Seal Products Dispute: A Preview of the Key Legal Issues', **14**:2 *American Society of International Law Insights* (2010).

44 N. Trent *et al.*, 'International Animal Law, with a Concentration on Latin America, Asia, and Africa', in D. Salem and A. Rowan, eds., *The State of the Animals III* (Humane Society Press, 2005) 65.

45 C. Tudge, 'Conclusion – Animal Welfare and the Ideal of Europe', in Council of Europe, ed., *Ethical Eye: Animal Welfare* (2006) 255, at 255.

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European law and legal culture, the rise of animal welfare in Europe also reflects a broader evolution of international norms – in this case, those applicable to the way humans treat other animals.

4. Animal welfare as a general principle of international law

Not very long ago, the characterization of animal welfare as a matter of local, domestic policy, not a subject of international law, would have been unobjectionable. Over the last few decades, however, there has been a marked escalation of attention to this matter at the international level. This is the body of international norms and principles that has led Bowman *et al.* to conclude that there is now a general principle of international law concerning animal welfare.[46]

That claim is, of course, not incontrovertible. There is no international treaty focused primarily on animal welfare, although it is dealt with peripherally in some treaties. The difficulty of determining whether a norm 'counts' as customary international law or a general principle of law is familiar. And, indeed, there are those who argue that norms of animal protection are (far from being a matter of global consensus) enlisted as a means of imposing parochial European or Western cultural values on the rest of the world. An example of that characterisation is the accusation by some supporters of whaling that efforts to stop the practice by means of international law – driven by concerns about both species conservation and animal suffering – are a form of cultural imperialism. Payam Akhavan, representing Japan against Australia in litigation at the International Court of Justice this year over Japan's scientific whaling programme, described the anti-whaling movement as a 'civilising mission and moral crusade', proclaiming that 'in a world with diverse civilisations and traditions, international law cannot become an instrument for imposing the cultural preference of some at the expense of others'.[47] Inuit critics of the EU Seals Regime have attacked it in a similar vein; Nunavut's environment minister James Arreak recently condemned the 'hypocrisy and neocolonialism of the EU'.[48]

But the idea that commitment to animal welfare is a legitimate subject of international obligations, a matter on which there is some degree of international consensus, should not be rejected too readily – or, outside the context of zealous advocacy, dismissed as a mask for neocolonialism.

Europe may regard animal welfare as one of its signature values today, but that value has much in common with philosophies of compassion and animal

46 Bowman *et al.*, *Lyster's International Wildlife Law*, *supra* note 6, at 680.

47 'Japan attacks Australian role in whaling "moral crusade"', *The Guardian* (3 July 2013), http://www.guardian.co.uk/environment/2013/jul/03/japan-australian-role-whaling-crusade.

48 'Nunavut's environment minister slams EU seal ban', *Nunavut News* (8 May 2013), http://www.nunatsiaqonline.ca/stories/article/65674nunavuts_environment_minister_slams_eu_seal_ban.

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protection with deep roots in Buddhist, Hindu, and Jain traditions.[49] The first statute in a modern nation state prohibiting cruelty to animals, known as Martin's Act,[50] was enacted by the Parliament of the United Kingdom in 1822; the currents of political thought and public opinion that eventually led to its adoption were shaped in part by the British exposure to Indian concepts of compassion, non-violence, and human kinship with animals.[51]

Perhaps the best evidence for a general principle concerning animal welfare is the fact that almost all the world's domestic legal systems – the traditional source of general principles of international law – include some kind of broad legal prohibition on unnecessary cruelty to animals (the most significant exception being China).[52] There are considerable variations in the specific nature of these prohibitions, the kinds of activities and animals to which they apply and do not apply, their place in the hierarchy of domestic legal norms (a handful of countries, including India, Brazil, and Germany, include such principles in their constitutions[53]), the penalties for violations, and the resources devoted to enforcement. Nevertheless, there does seem to be convergence on the core idea that inflicting unnecessary or gratuitous suffering on animals should be proscribed. Even this rather minimal area of convergence implies agreement on some important ideas with potentially far-reaching implications: the recognition that animals are sentient and capable of suffering, that their suffering counts morally to some degree, and that it is a factor that should be weighed in the balance in the course of pursuing human needs and desires.

In short, the concept of a legally binding commitment to animal welfare is not uncontroversial, but it is based on ideas that are present in many – arguably all – the world's civilisations and cultures, and it has been a subject of inter-cultural dialogue and transmission in more than one direction.

The notion that a commitment to animal welfare is a Eurocentric norm is also belied by the increasing recognition of that norm – including by non-Western states – in international instruments. A handful of important international treaties address this matter as a secondary concern, although their primary focus is on

49 M. V. Chandola, 'Dissecting Amerian Animal Protection Law: Healing the Wounds with Animal Rights and Eastern Enlightenment', 8 *Wisconsin Environmental Law Journal* 3, at 21–28 (describing philsophical debates '[t]housands of years ago in India . . . on the status of animals and their relationship with humans and the universe' (at 21) and the adoption of laws in certain Indian kingdoms requiring the compassionate treatment of animals); Bowman *et al., Lyster's International Wildlife Law, supra* note 6, at 676–678.

50 *An Act to Prevent the Cruel and Improper Treatment of Cattle*, Geo. IV, c. 7.

51 See T. Stuart, *The Bloodless Revolution: A Cultural History of Vegetarianism from 1600 to Modern Times* (W. W. Norton, 2006); K. Shevelow, *For the Love of Animals: The Rise of the Animal Protection Movement* (Holt, 2008), at 167–168, 175–179.

52 B. A. Wagman and M. Liebman, *A Worldview of Animal Law* (Carolina Academic Press, 2011), at 28–47; Trent *et al*., 'International Animal Law', *supra* note 44.

53 Wagman and Liebman, *A Worldview of Animal Law*, at 39–40, 262–269.

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other issues such as conservation, wildlife management and protection of the environment. While the provisions of these treaties are not directly applicable to the *EC–Seal Products* dispute, the inclusion of animal welfare clauses in multilateral treaties with wide membership is evidence of acknowledgment around the world that animal welfare merits taking seriously and is a suitable issue for international regulation. In addition, various sub-legal instruments can be included in what Bowman *et al.* describe as ‘expressions of commitment’ to animal welfare.[54]

Animal welfare is in the process of emerging as an independent area in international law. Two reasons for an impetus to address the issue at the international level are that it raises governance challenges that can be more effectively addressed with international cooperation than without it, and that it appears at least to some extent to be a shared moral concern of humanity.

4.1 Treaties and ‘international animals’: cooperation for better governance

Describing how international cooperation can improve governance of animal protection, Bruce Wagman and Matthew Liebman have spoken of ‘international animals’, observing that ‘[j]ust as international problems require international solutions, so too do “international animals”’.[55] Animals that migrate across borders or inhabit areas outside the jurisdiction of single nations, such as the high seas and the Antarctic, are international in this sense, and require international treaties to address the special concerns associated with them.[56]

Perhaps the most significant achievement in multilateral law-making with respect to ‘international animals’ is the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*[57] (CITES). CITES has been very widely adopted; at the time of writing, there are 177 parties.[58] It can thus be fairly said to reflect something approaching a global consensus, including with respect to the importance it accords to animal welfare.

CITES is primarily a conservation treaty, but Michael Bowman has highlighted its significant complementary emphasis on animal welfare.[59] The convention is ‘replete with provisions relating to the welfare of individual living specimens’,[60] including requirements that export permits can only be granted if the responsible authorities are satisfied that the specimen will be ‘so prepared and shipped as to

54 Bowman *et al., Lyster's International Wildlife Law, supra* note 6 at 680.

55 Wagman and Liebman, *A Worldview of Animal Law, supra* note 52, at 24.

56 Ibid.

57 3 March 1973, 993 UNTS 243.

58 Convention on International Trade in Endangered Species of Wild Fauna and Flora, ‘What is CITES?’ http://www.cites.org/eng/disc/parties/index.php.

59 M. Bowman, ‘Conflict or Compatibility? The Trade, Conservation and Animal Welfare Dimensions of CITES’, **1** *Journal of International Wildlife Law and Policy* (1998) 9.

60 Ibid., at 10.

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minimize the risk of injury, damage to health or cruel treatment',[61] and provision for confiscated illegally shipped animals to be sent to a rescue centre where their welfare will be looked after.[62] These commitments to the welfare of individual animals manifest a concern that is distinct from, although related to, the conservation goals of CITES.

Marine mammals are 'international animals' *par excellence*, and not surprisingly there is a higher than average supply of international law about whales and seals. In international law concerning marine animals, animal welfare has developed from a peripheral (or absent) concern to an increasingly important one. Because marine mammals tend to be large and often live in environments that are unusually challenging for humans, hunting and killing them raises particular problems; it is inherently difficult to kill them in a quick and humane manner, and also difficult to monitor and control hunters' activities.[63] Recognition of these problems has contributed to the growing attention to questions of humane treatment and welfare of marine mammals.

Notably, welfare and moral issues have become increasingly important in international regulation of whaling under the *International Convention for the Regulation of Whaling*[64] and the International Whaling Commission (IWC) that it establishes. The original purpose of the ICRW was to promote 'the orderly development of the whaling industry'[65] – the exploitation of whales as a resource. But over several decades the IWC has increasingly focused on the reduction of cruelty, and has taken on the more imponderable moral questions implicated by human interactions with whales. This shift in focus began in the 1970s, when the IWC adopted regulations banning the use of cold-grenade harpoons, a cruel hunting method which often caused whales to suffer for a long period before losing consciousness.[66] The IWC has had an advisory Working Group on Whale Killing Methods and Associated Welfare Issues since 1982.[67] In 1986, the IWC adopted a moratorium on the commercial hunting of large cetaceans, which is still in

61 Articles 3(2)(c) (export of Appendix I species); 3(4)(b) (re-export of Appendix I species); 4(2)(c) (export of Appendix II species); 4(5)(b) (re-export of Appendix II species); 4(6)(b) (introduction from the sea of Appendix II species); and 5(2)(b) (export of Appendix III species). In addition, while Article 7 of CITES provides for discretionary waivers from the normal documentation requirements for certain specimens being transported as part of a zoo, circus, menagerie, plant exhibition, or traveling exhibition, such a waiver can only be granted if the relevant authority 'is satisfied that any living specimen will be so transported and cared for as to minimize the risk of injury, damage to health or cruel treatment' (Article 7 (7)(c)).

62 Articles 8(4)(b) and 8(5).

63 Whales are especially difficult to kill without cruelty, simply because they are so large. Bowman *et al., Lyster's International Wildlife Law*, question whether it is realistically possible to kill them 'in an acceptable, humane fashion'. Bowman *et al., Lyster's International Wildlife Law, supra* note 6, at 685.

64 2 December 1946, 161 UNTS 72 ('ICRW').

65 Seventh recital of the preamble to the ICRW.

66 Bowman *et al., Lyster's International Wildlife Law, supra* note 6, at 684.

67 Ibid.

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place. The decision to call a halt to commercial hunting was motivated as much by concerns about cruelty and morality as about conservation; the moratorium covers species whether or not their populations are threatened.[68]

Like whales, seals have been treated in international law as something of a special category with a heightened a moral claim to be protected from unnecessary cruelty. As far back as 1958, the UN Conference on the Law of the Sea unanimously adopted a resolution requesting states 'to prescribe, by all means available to them, those methods for the capture and killing of marine life, especially of whales and seals, which will spare them suffering to the greatest extent possible'.[69] The 1972 *Convention for the Conservation of Antarctic Seals*[70] includes, in an Annex, a commitment to develop rules 'with a view to ensuring that the killing or capturing of seals is quick, painless and efficient'.[71]

Commercially hunted seal species are not, of course, covered by the provisions of CITES, the ICRW, or the *Convention for the Conservation of Antarctic Seals*. The suggestion made here is that the animal welfare provisions are manifestations of a broader principle that extends beyond the four corners of these particular treaty regimes. They are a sign of commitment by the parties to the prevention of unnecessary animal suffering, and recognition that international law can be an appropriate tool in the service of that goal. There is also some recognition of special problems in connection with honouring this principle for marine mammals, including seals – a heightened risk that they may be subjected to unnecessary suffering because of the specific characteristics of these creatures and the environments they inhabit.

4.2 *International policymaking: expressions of shared moral concern*

In addition to treaty provisions enshrining commitments to animal welfare in specific contexts, there is some evidence in non-binding international statements and declarations that animal welfare is on the way to being recognized, or already viewed, as having the character of public policy or public morality at a global level.

One example is the development of the draft *Universal Declaration on Animal Welfare* (UDAW).[72] The UDAW is an initiative of the World Society for the Protection of Animals (WSPA). The text of the draft is not finalized, but among the

68 A. D'Amato and S. K. Chopra, 'Whales: Their Emerging Right to Life', 85 *American Journal of International Law* 21 (1991), at 45.

69 *Resolution 5, on the Humane Killing of Marine Life*, 1958 UN Conference on the Law of the Sea, Official Records 144, Doc. A/CONF.13/L56, Vol II, Annexes at 109, cited in Bowman *et al., Lyster's International Wildlife Law, supra* note 6. at 679.

70 1 June 1972, 1080 UNTS 175.

71 Annex Article 7(a).

72 The provisional draft text of the proposed UDAW as of 2011 is available at http://s3.amazonaws.com/media.animalsmatter.org/files/resource_files/original/Latest%20draft%20UDAW%20Text%20-%202011.pdf?1314177486.

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basic principles it expresses are recognition that animals are sentient beings whose welfare should be respected; that the welfare of animals should be a common objective for states; that there should be improved measures for animal welfare both nationally and internationally; that animals should be cared for and treated in a humane and sustainable manner; and that appropriate policies should be developed for specific situations, such as farming and experimentation. The UDAW 'is premised on the idea that all animals, even those who reside solely within national borders, are entitled to basic welfare protections'.[73] It thus 'models international human rights principles, which make human rights an international issue, even if the objectionable conduct, such as torture or religious persecution, occurs entirely within national borders'.[74] The WSPA reportedly plans to table the UDAW at the UN Economic and Social Council before presenting it to be voted on as a UN General Assembly resolution, following a lengthy (and still ongoing) process of building consensus among world governments on the text.[75] That the consensus-building process appears to be proceeding in a constructive way and has been endorsed in several high-level international fora indicates that states around the world are finding common ground on a basic commitment to animal welfare.[76]

In a similar vein, the 1991 revision of the World Conservation Strategy commissioned by the UN, *Caring for the Earth*, identifies the protection of animals from cruelty as a common moral concern and an aspect of sustainable living: 'People should treat all creatures decently, and protect them from cruelty, avoidable suffering, and unnecessary killing'.[77]

4.3 *A general principle of international law concerning animal welfare*

Bowman *et al.* extrapolate from these examples the proposition that the 'pervasiveness of concern for animal welfare' expressed in both domestic and international legal instruments indicates 'a convergence upon a general principle of law' concerning animal welfare.[78] They draw a connection to the concept of general principles of international law that express shared human values, as described by Judge Weeramantry of the International Court of Justice in the Gabçikovo-Nagymaros dam case: 'those pristine and universal values which command international recognition'.[79] Bowman *et al.* argue that there are 'ample

73 Wagman and Liebman, *A Worldview of Animal Law, supra* note 52, at 25.

74 Ibid.

75 M. Gibson, 'The Universal Declaration of Animal Welfare', **16** *Deakin Law Review* (2011) 539, at 542.

76 Ibid., at 542–543.

77 IUCN/UNEP/WWF, *Caring for the Earth: A Strategy for Sustainable Living* (1991), at 14.

78 Bowman *et al., Lyster's International Wildlife Law, supra* note 6, at 680.

79 *Case Concerning the Gabcikovo-Nagymaros Project (Hungary* v. *Slovakia)*, ICJ Reports (1997) 7, at 109.

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grounds for recognizing concern for animal welfare both as a principle widely reflected in national legal systems and as a universal value, in the broader sense indicated by Judge Weeramantry'.[80]

This general principle, they argue, is a 'meta-principle' that should be taken into account in treaty interpretation, including in the WTO context: 'the protection of animal welfare might have to be considered as an aspect of general public policy or morality, potentially justifying restrictions on treaty-based guarantees protecting free trade or human rights, for example'.[81]

Evaluating what this proposition might mean in practice requires an analysis of the part played by principles of non-WTO international law in defining and limiting WTO obligations.

5. WTO law and general international law: what role for a 'meta-principle'?

WTO law is a relatively autonomous subsystem of international law. The primary focus of WTO dispute settlement is on the WTO treaties themselves – the 'covered agreements' that constitute the 'fundamental source of law in the WTO'.[82] Like any other subsystem, though, the WTO is embedded in the broader system of public international law. As the International Law Commission (ILC) notes in its report on *Fragmentation of International Law*, the WTO treaties 'are creations of and constantly interact with other norms of international law'.[83]

There is an express textual connection to that wider system in Article 3(2) of the DSU, which calls for interpretation of the WTO treaties 'in accordance with customary rules of interpretation of public international law'. In the WTO Appellate Body's first ruling, *US–Gasoline*, it observed that this direction 'reflects a measure of recognition that [the WTO treaties are] not to be read in clinical isolation from public international law'.[84]

In *US–Gasoline,* the Appellate Body referred in particular to Article 31(1) of the *Vienna Convention*, which sets forth the general rule that treaties are to be interpreted in good faith starting with the contextualized ordinary meaning of the

80 Bowman *et al., Lyster's International Wildlife Law, supra* note 6, at 678.

81 Ibid., at 681.

82 D. Palmeter and P. C. Mavroidis, 'The WTO Legal System: Sources of Law', 92 *American Journal of International Law* (1998) 398, at 398. The 'covered agreements', as defined in Article 1.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (Dispute Settlement Understanding or DSU) and set out in Appendix 1 thereto, are the cluster of treaties that establish the rights and obligations of WTO members. *Marrakesh Agreement Establishing the World Trade Organization*, Annex 2, *The Legal Texts: The Results of the Uruguay Round Of Multilateral Trade Negotiations* (1994), 1869 UNTS 401, 33 ILM 1226 (1994).

83 International Law Commission, *Fragmentation of International Law, supra* note 12, para. 45.

84 Appellate Body Report, *US – Standards for Reformulated and Conventional Gasoline*, WT/DS4/AB/R, adopted 20 May 1996, at 17.

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text.[85] Subsequently, in *Japan–Alcoholic Beverages*, the Appellate Body recognized the pertinence of Article 31 'as a whole'.[86]

Article 31(3)(c), which provides that 'any relevant rules of international law applicable in the relations between the parties' are to be taken into account in treaty interpretation, is of particular significance as a bridge between WTO law and the rest of public international law. It provides that 'any relevant rules of international law applicable in the relations between the parties' are to be taken into account in the interpretation exercise.

Just how far Article 31(3)(c) goes in requiring WTO adjudicators to integrate non-trade international law into their analyses has been the subject of much debate, both in the academic literature and in panel and Appellate Body decisions themselves. Some landmark WTO decisions reflect a relatively integrationist approach to general international law, starting with the open and liberal spirit of *US–Gasoline*, and perhaps reaching a high-water mark in *US–Shrimp*,[87] where the Appellate Body referred to a number of international conventions and non-binding declarations in support of its conclusion that the phrase 'exhaustible natural resources' in Article XX(g) of GATT included living creatures[88] (here, endangered sea turtles) and noted the 'acknowledgement by the international community' of the importance of protecting living natural resources.[89] In addition, the Appellate Body invoked Article 31(3)(c) in *US–Shrimp* to support 'seeking additional interpretative guidance, as appropriate, from the general principles of international law'[90] in interpreting the chapeau of Article XX.

In later decisions, however, WTO adjudicators have taken a 'more cautious and inward-looking approach'.[91] In *EC–Hormones*, the Appellate Body was unswayed by arguments that it should be guided by the precautionary principle, and declined to reach a conclusion on the status of that principle as a norm of customary international law or a general principle of international law.[92] In *EC–Biotech*, the Panel held that, with respect to international conventions, 'rules of international law applicable between the parties' meant only treaties to which *all* WTO members were party (and not just those involved in the dispute).[93] The implication of this

85 '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 light of its object and purpose.'

86 Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8, 10, 11/AB/R, adopted 1 November 1996, at 10.

87 Appellate Body Report, *United States – Import Prohibitions of Certain Shrimp and Shrimp Products* (adopted 6 November 1998), WT/DS58/AB/R.

88 Ibid., paras. 130–132.

89 Ibid., para. 131.

90 Ibid, para. 158 and n. 157.

91 Lang, *World Trade Law After Neoliberalism, supra* note 5, at 150.

92 Appellate Body Report, *EC–Measures Concerning Meat and Meat Products (Hormones)* (adopted 13 February 1998), WT/DS26/AB/R and WT/DS48/AB/R, at para. 123.

93 Panel Report, *EC–Biotech, supra* note 11, paras. 7.68–7.71. Since not all the parties to the dispute in *EC–Biotech* were parties to the non-WTO treaty provision being invoked (the Cartagena Protocol to the

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turn, at least potentially, would be to restrict the role of non-WTO international law quite severely.

The Appellate Body's ruling in *EC–Large Civil Aircraft* may be a sign of a new turn, or return, to a more open and integrationist approach, as it engages with the work of the ILC on the problem of fragmentation[94] and endorses the ILC's understanding of Article 31(3)(c) as a 'principle of systemic integration' that requires the WTO treaties to be interpreted in light of the broader normative environment of international law.[95]

The debate regarding the role of general international law in WTO disputes reflects a tension between different views of the nature and scope of the dispute settlement system's legitimate function. There are two important rationales for the more restrictive approach. First, WTO panels and the Appellate Body are cautious regarding their own institutional competence to rule on questions of non-trade international law.[96] Secondly, WTO adjudicators are wary of the potential for 'outside' rules to unsettle the carefully negotiated bargain set out in the WTO treaties, and mindful of the direction in the DSU that their recommendations or rulings 'cannot add to or diminish the rights and obligations provided in the covered agreements'.[97]

On the other side of the coin, there are important reasons why, from a policy point of view – aside from purely textual justifications – it makes sense for general international law to be integrated into the interpretation and application of WTO law.

First, international law today 'resembles a dense web of overlapping and detailed prescriptions' in diverse subject areas;[98] in this densely populated system, it is less and less feasible for any particular subsystem to regard itself as untouched by norms rooted outside its particular area (in 'clinical isolation'). There are 'no clear lines' distinguishing different areas of international concern and 'no clean boundaries between institutions of international governance or between those organizations and domestic law-making mechanisms'.[99] There are few WTO disputes that do not touch on matters that are also addressed by one or more other

Convention on Biological Diversity), this interpretation did not determine the outcome of the case. Ibid., para. 7.72.

94 Including the ILC's criticism of the *EC–Biotech* Panel's restrictive interpretation of 'between the parties' in its report on *Fragmentation of International Law, supra* note 12, paras. 471–472 . Trebilcock, Howse, and Eliason conclude that the Appellate Body in *EC–Large Civil Aircraft* has overruled the *EC–Biotech* Panel on this point. M. Trebilcock, R. Howse, and A. Eliason, *The Regulation of International Trade*, 4th edn (2013), at 199.

95 *EC–Large Civil Aircraft, supra* note 12, para. 845.

96 Lang, *World Trade Law After Neoliberalism, supra* note 5, at 149–151.

97 DSU, *US–Gasoline, supra* note 82, Art. 3(2).

98 B. Simma and D. Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law', **17** *European Journal of International Law* (2006) **483**, at 484.

99 J. E. Alvarez, 'The New Treaty-Makers', **25** *Boston College International and Comparative Law Review* (2002) 213, at 213–214.

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international regimes, and with that in mind one might expect it to be a rare dispute in which there are no other 'relevant rules of international law' to be taken into account.

Secondly, an attentive and accommodating approach to non-trade legal norms has important implications for the WTO's institutional legitimacy. General international law reflects widely shared priorities and goals and, as Simma and Pulkowski note, 'in the view of many, [embodies] legitimate concerns or internationally recognized ethical positions'.[100] By incorporating non-trade international legal norms into their decision-making, 'the WTO's judicial bodies have attempted to import the legitimacy' of general international law into the international trade regime.[101]

Legitimacy and harmonization are related in that a trade law regime decoupled from the rest of the 'dense web' of other international commitments could be perceived as a means of shirking those commitments. Joost Pauwelyn points out that a 'unitary view of international law – prohibiting the creation of sub-systems completely delinked from international law rules agreed upon elsewhere – is crucial to avoiding the situation where a particular regime of international law, say, the WTO, becomes a safe haven ... for states to escape obligations entered into elsewhere'.[102]

There are different ways that non-WTO international law might function technically in a legal decision. Philippe Sands has proposed that there should be a presumption in WTO adjudication in favour of interpreting the treaties to be consistent with customary international law. That is, non-trade rules of customary international law should be given effect unless their application would undermine the object and purpose of the WTO system, with the party opposing the interpretation that would permit application of the customary rule to bear the burden of showing why it should not apply.[103] That rule would create a relatively robust role for non-WTO norms. The *EC–Biotech* Panel proposed a somewhat weaker role, whereby once a rule is determined to be 'applicable between the parties' (already a high hurdle, under that Panel's analysis) it would function as a tie-breaker between interpretations that in all other respects are equally valid.[104] Yet a third alternative is described by the *EC–Biotech* panel, and identified by it as the Appellate Body's approach in *US–Shrimp*: non-WTO treaties (and, presumably, non-binding international instruments too, since these were

100 *Supra* note 98, at 511.

101 *Ibid*.

102 J. Pauwelyn, *Conflict of Norms in International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, 2003), at 38.

103 P. Sands, 'Treaty, Custom and the Cross-Fertilization of International Law', **1** *Yale Human Rights and Development Law Journal* (1999) 85, at 104.

104 *EC–Biotech, supra* note 11, para. 7.69. The Panel was careful to note, however, that it was not suggesting applicable rules of international law would function 'invariably or exclusively as a kind of "tie-breaker" in the interpretative process'. *Ibid*., n. 254.

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referred to in *US–Shrimp*) can be referred to for evidence of the ordinary meaning of terms, in a similar way to a dictionary.[105] Seeking guidance in this way from the broader universe of international law may be one of the most important ways in which trade law is interpreted and applied in harmony with the evolving context of general international law.

The precise formulations used to describe the function of non-WTO international law in WTO adjudication (whether identifying which rules apply or how they apply) may actually be of limited importance when it comes to the outcome of any particular case. As Lang points out, in *US–Shrimp*, for example (on the more integrationist, liberal end of the spectrum), the Appellate Body's conclusion that 'exhaustible natural resources' include living creatures was not very controversial,[106] and could have been arrived at without reference to non-WTO international law; and (on the more restrictive, cautious end) the Appellate Body in *EC–Hormones* and the *EC–Biotech* panel both state that their findings on the effect of the precautionary principle would not have been different if they had found that it was a rule 'applicable between the parties'.[107] What is more important is something less tangible, a spirit of openness to the broader context of international law and a sense of taking part in the development of the enterprise as a whole, as well as one particular corner of it – a spirit that seems to be evident in *EC–Large Civil Aircraft*'s affirmation of the principle of systemic integration.

Perhaps the best way to understand the role of what Bowman *et al.* describe as a 'meta-principle', then, is not as a specific, technical rule for ordering conflicting norms, burden-shifting, or tie-breaking, but more as a component of the overall normative background within which interpretation and application of the law take place, in a process of reasoning that, in the words of the ILC *Report on the Fragmentation of International Law*, treats both trade and non-trade norms as 'parts of some coherent and meaningful whole'.[108] It is important to pay due regard to the continual evolution of this larger system,[109] and the growing attention to animal welfare at the international level, as well as the pervasiveness in domestic legal systems to at least a basic level of protection for animals, suggests that animal welfare has taken its place as part of the normative environment of international law. Even if it is still an evolving part, and not yet established as a binding rule with specific requirements, that does not mean it is irrelevant to the task of the *EC–Seal Products* panel in interpreting and applying WTO law in a dispute that engages animal welfare issues; if WTO law is to be construed within the 'coherent and meaningful whole' of international law, there must be room to take into account

105 *Ibid.*, para. 7.92.

106 Lang, *World Trade Law After Neoliberalism, supra* note 5, at 149.

107 *EC–Hormones, supra* note 92, para. 123; *EC–Biotech, supra* note 11, para. 7.89.

108 *Supra* note 12, para. 414.

109 Bowman *et al., Lyster's International Wildlife Law, supra* note 6, at 681; see also *US–Shrimp, supra* note 87, at para. 130 and n.109.

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emerging developments in international law, as the price of not doing so would be to risk impeding the growth and progression of the system.

The role of non-trade international law in the interpretive exercise is especially relevant in connection with Article XX of GATT, where the central question is how to balance trade commitments against other values. The outcome of the *EC–Seal Products* case may end up turning on whether the EU Seals Regime is found to be justified under Article XX – although that will not necessarily be the determinative question. Because the European restrictions apply to both domestic and imported products, a strong case can be made that they do not result in a *prima facie* violation of any GATT or other WTO disciplines.[110] The case also raises important issues under the TBT Agreement. The international dimension of animal welfare might in principle play a part in resolving these questions too, but I have chosen to focus on Article XX, and in particular the moral exception in Article XX(a), because the analysis under the GATT exceptions is especially relevant to applying the proposal put forward by Bowman *et al.* that animal welfare is 'an aspect of general public policy or morality'[111] and thus part of the broader normative environment in which the rights and obligations contained in the WTO treaties are interpreted and defined. Its status as such affects the value judgments involved in Article XX justification: assessing the importance of a value, the extent to which the challenged measure matches up to the value it is supposed to protect (raising questions of underinclusiveness and overinclusiveness), and the delicate exercise of balancing free trade against non-trade values.

6. The EU Seals Regime and GATT Article XX

This section will examine the significance of the international dimension of animal welfare in the analysis of whether the EU Seals Regime is WTO-compliant by virtue of Article XX (assuming a *prima facie* violation for the sake of argument), focusing primarily on Article XX(a) (measures necessary to protect public morals) but also considering Article XX(b) (measures necessary to protect human, animal or plant life or health).

The justification of a challenged measure under Article XX involves three steps, inquiring in turn first, whether the measure corresponds to one of the purposes listed in Article XX; secondly, whether it is sufficiently connected and tailored to the objective, which, under Articles XX(a) and (b), requires demonstrating that it is

110 See, e.g., C. Pitschas and H. Schloemann, 'WTO Compatibility of the EU Seal Regime: Why Public Morality is Enough (but May not Be Necessary)', *Beiträge zum Transnationalen Wirtschaftsrecht* (2012), at 5, arguing that the EU Seals Regime 'may not even violate any WTO provisions in the first place, as it is in principle designed as an all-encompassing, non-discriminatory ban on sales, not as a trade measure that targets imports'.

111 Bowman *et al., Lyster's International Wildlife Law, supra* note 6, at 681.

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'necessary' to protect the objective; and, finally, whether it meets the requirements of the Article XX chapeau.

6.1 Public morals, animal welfare and animal health: the international dimension

For an animal welfare measure, the answer to the first question is not controversial: it is clear that animal welfare is included in the categories of public policy recognized under Articles XX(a) and XX(b) of GATT.

The jurisprudence on the meaning of 'public morals' in GATT Article XX(a) of GATT (*China–Audiovisuals*) and Article XIV of the General Agreement on Trade in Services[112] (*US–Gambling*)[113] indicates that a WTO member defending a measure on the basis of public morals has fairly broad discretion to determine for itself what 'public morals' are. The *US–Gambling* panel stated that WTO members 'should be given some scope to define and apply for themselves the [concept] of "public morals" ... in their respective territories, according to their own systems and scales of values',[114] and this language was quoted with approval by the *China–Audiovisuals* panel[115] in portions of its reasoning that were accepted without modification by the Appellate Body. It therefore seems unlikely that the *EC–Seal Products* panel would question the EU's assertion that the Seals Regime was adopted to protect European moral choices.

Furthermore, a strong case can be made that animal welfare is squarely in the ambit of the public morals exception simply by interpreting the text in light of the contemporary understanding and intentions of its drafters. Steve Charnovitz has shown that safeguards for the wellbeing of animals in international transit and restrictions based on concern for the welfare of such animals were a well-established feature of pre-GATT trade agreements[116] (including agreements dating date back to the 1930s[117]) and would have been among the matters specifically contemplated by the drafters of GATT who agreed to include a public morals exception. Indeed, trade law is probably one of the first sources of conventional international law to address animal welfare concerns.

112 *General Agreement on Trade in Services*, 15 April 1994, Annex 1B to the *Marrakesh Agreement Establishing the World Trade Organization*, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 284 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).

113 *US–Gambling, supra* note 9.

114 Panel Report, *US–Gambling, supra* note 9, para. 6.461.

115 Panel Report, *China–Audiovisuals, supra* note 9, para. 7.759.

116 S. Charnovitz, 'The Moral Exception in Trade Policy', **38** *Virginia Journal of International Law* (1998) 689, at 705–716.

117 Ibid., at 712 (referring to the 1935 *International Convention concerning the Transit of Animals*, 20 February 1935, 193 LNTS 39, Article 5, which requires exporting countries to take steps to ensure that animals in transit are properly loaded, suitably fed, and receive all necessary attention 'in order to avoid unnecessary suffering').

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There is also very strong doctrinal basis for concluding that the protection of 'animal life and health' under Article XX(b) includes the mitigation of suffering. In *US–Tuna II*, interpreting the identical phrase in Article 2.2 of the TBT Agreement, the panel observed that protection of 'animal health' could mean the protection of individual animals from adverse welfare effects, including stress and the effects of separating mother dolphins and their calves.[118]

So what difference does it make that animal welfare norms have an international character? It would seem that even if the choice to enact laws to prevent animal suffering had been a completely idiosyncratic choice on the part of the EU, it would still have a very good chance of fitting into the categories of both public morals and animal health.

Two points bear noting here. First, there is still not much by way of case law on the public morals exception, and it remains unclear how far the WTO will take its orientation, apparently endorsed in *US–Gambling* and *China–Audiovisuals*, towards allowing discretion for members to define public morals unilaterally (indeed, *EC–Seal Products* may be an opportunity for the Panel and/or the Appellate Body to provide greater clarity on this point). It seems reasonable to think that there is at least some outer limit to the proposition that public morals are defined by the community in question, as is suggested by the panel's language in *US–Gambling*: members should be given 'some scope', but not unlimited free rein, to define public morals for themselves.[119] The justifiability of a trade measure based on moral judgments that are completely at odds with those of the international community might be difficult to defend. Consider, for instance, a hypothetical ban imposed on goods produced in factories where women are allowed to work, on the basis the country enacting the ban believes that it is immoral for women to work outside the home. It is rather difficult to imagine a WTO panel accepting that as being within the scope of a member's discretion to define public morals for itself. And, conversely, even without advocating for a fully multilateralist or cosmopolitan version of the public morals exception, it should be at least somewhat easier to conclude that a challenged measure was enacted for a moral purpose within the meaning of Article XX(a) if that purpose is consonant with international norms.

To transpose that idea to the context of *EC–Seal Products*, one criticism that has been levelled at the EU Seals Regime is that it singles out seals for protection,

118 Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R, paras. 7.437, 7.499. The Appellate Body upheld the Panel's finding that dolphin protection was a legitimate objective for the US measure within the meaning of Article 2.2 of the TBT Agreement. Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, para. 342.

119 See Wu, 'Free Trade and the Protection of Public Morals', *supra* note 8, at 232–233 (observing that the *US–Gambling* panel concluded that a ban on internet gambling came under the public morals exception in part based on evidence that a number of countries had adopted restrictions on internet gambling, or gambling in general).

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even though the exploitation and killing of other animals is allowed in Europe, simply because they are 'cute', which would (arguably) be morally arbitrary.[120] But the EU Seals Regime looks more like a good-faith effort to pursue non-arbitrary moral objectives when one considers the special status of marine mammals in international law and the reasons the international community has seen fit to provide enhanced protection to them.

Secondly, the international dimension is relevant to identifying and understanding the content of the norm or policy objective at issue. The moral objective of the EU Seals Regime can be connected to the moral-philosophical position reflected in international instruments concerning welfare, which is, precisely, a principle of animal *welfare* – that is, balancing reduction of animal suffering against human needs and other countervailing policy considerations, or the condemnation of 'unnecessary' or 'avoidable' suffering.[121] This can be distinguished from a philosophy of animal *rights*, which regards human exploitation of animals as inherently immoral.

A key argument raised by some academic commentators (and by Canada and Norway) against the EU Seals Regime is that it cannot really be based on moral concern about cruel hunting methods because, under the exceptions to the ban, products of aboriginal subsistence hunting and marine management culls can still be placed on the market[122] whether or not they were produced from seals killed humanely.[123] But this position is based on the obviously indefensible premise that a measure cannot be genuinely based on a moral value if that value is compromised or counterbalanced by any other policy objectives. Animal welfare is inherently a principle of balancing means and ends, as distinct from an absolute condemnation of all activities that cause animal suffering. The essence of this principle of evaluating the proportionality of means and ends in determining whether animal suffering is necessary was expressed by Quebec Court of Appeal judge (later Chief Justice of Canada) Lamer in an animal cruelty case under Canadian criminal law:

> One should [interpret the criminal prohibition on causing unnecessary suffering] as much in relation to the purpose sought as to the means employed, and that moreover purpose and means be, in the determination of what is necessary, in relation to each other ... [T]he legality of a painful operation must be governed

120 T. Perišin, 'YJIL Symposium: Beyond the (Cute) Face of the Matter: Aims, Coherence and Necessity of the EU Seal Products Regulations' (blog post on Opinio Juris), 28 June 2012 (http://opiniojuris.org/2012/06/28/yjil-symposium-beyond-the-cute-face-of-the-matter-aims-coherence-and-necessity-of-the-eu-seal-products-regulations/), suggesting that the only reason for banning seal products as opposed to other animal products may be that 'seals are "cute"', in which case the *EC–Seal Products* would have to decide 'whether it wants to accept public morals based solely on irrational, emotional attitudes'; Perišin, 'Is the EU Seal Products Regulation a Sealed Deal? EU and WTO Challenges', 62 *International and Comparative Law Quarterly* 373 (2013), at 395.

121 See discussion in Howse and Langille, 'Permitting Pluralism', *supra* note 41, at 379–381.

122 Albeit only on a non-profit basis, in the case of the marine management exception.

123 Perišin, 'Is the EU Seal Products Regulation a Sealed Deal?', *supra* note 120, at 399.

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> by the necessity for it, and even where a desirable and legitimate object is sought to be attained, the magnitude of the operation and the pain caused thereby must not so far outbalance the importance of the end as to make it clear to any reasonable person that the object should be abandoned rather than that disproportionate suffering should be inflicted.[124]

The same concept is reflected in international instruments that express a commitment not to subject animals to unnecessary suffering. The term 'public morals' in Article XX should be interpreted with attention to evolving international understandings of what the moral commitment to animal welfare means – a proportionality test, rather than an absolute.

In this connection, it bears noting that the Appellate Body, recognizing that the welfare and psychological wellbeing of individual animals are included under the term 'animal health' in the *US–Tuna II* ruling, interpreted the treaty language in a way that was consistent with evolving international consensus (although without expressly adverting to how the same language is interpreted in non-WTO contexts). The protection of 'animal health' once meant limiting the spread of animal disease that could harm human interests, either by jumping to humans or by destroying economically valuable livestock, but over time it has evolved to encompass a moral commitment to reducing animal suffering. This evolution is manifest in the work of the World Organisation for Animal Health (OIE),[125] created in 1924 after a devastating outbreak of rinderpest in cattle to address the need for international cooperation in controlling outbreaks of disease in livestock. More recently, the OIE has embraced an animal welfare mandate, including developing Guiding Principles on Animal Welfare[126] based on the principle that human use of animals 'carries with it an ethical responsibility to ensure the welfare of such animals to the greatest extent practicable'.[127]

Perhaps the foregoing considerations are more relevant to the necessity test and to questions of arbitrariness and justifiability under the Article XX chapeau, rather than whether the EU Seals Regime fits under the public morals or animal health exceptions at all. But in order to arrive at well-founded answers to those questions, it is important to understand the nature of the policy objective that a challenged measure is based on, and how it is related to the permitted objectives identified in Article XX as they are shaped by an evolving interpretive context, including relevant concepts drawn from non-WTO international law.

The remainder of this Article focuses on how the international dimension of animal welfare factors into the analysis of necessity and under the Article XX

124 *R.* v. *Ménard* (1978), 43 CCC (2d) 458 (Que. C.A.), at 465–466.

125 The acronym is derived from the organization's former name, the Office Internationale des Epizooties.

126 OIE, *Terrestrial Animal Health Code*, http://www.oie.int/index.php?id=169&L=0&htmfile=chapitre_1.7.1.htm, Article 7.1.2.

127 Article 7.1.2(6).

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chapeau, and how it may tip the balance in favour of finding that the EU Seals Regime is justified under Article XX – if it needs to be.

6.2 Necessity

In *China–Audiovisuals*, the Appellate Body reconfirmed earlier statements of the test for whether a measure is 'necessary' set out in *Brazil–Retreated Tyres*[128] and *Korea–Beef*:[129] determining necessity involves 'a sequential process of weighing and balancing a series of factors',[130] beginning with the importance of the objective being pursued, then considering the extent to which the measure contributes to the objective, the restrictive effects on trade, and whether a less restrictive alternative is reasonably available.

In *EC–Seal Products*, the international dimension of animal welfare is particularly relevant to assessing the importance of the objective, and to the question of a reasonably available alternative.

In general, it is a somewhat delicate matter for trade adjudicators to evaluate the importance of a domestic objective, especially in the area of public morals. But the extent to which a moral value is internationally recognized is a useful, legitimate benchmark for its importance. The argument here is not that internationally acknowledged moral principles are automatically more important than domestic or culturally specific ones, but their recognition at the international level is evidence of their importance, although not the only kind of evidence. International recognition is not a necessary condition for a moral objective to be deemed important; there are many culturally specific moral values that are recognized as important to their particular cultures and as appropriate reasons for exceptions to trade disciplines (such as Israel's ban on imports of non-kosher meat). But a widespread acceptance by the international community that a moral value is worth protecting under law would be one sign that the value is an important one.

Furthermore, if a moral value is generally accepted by the international community, then the party opposing the measure, as a member of the international community, can be assumed to implicitly recognize its importance, at least to some extent. Determining that a measure is necessary to protect a moral principle endorsed at the international level is thus something different from the arbitrary imposition on the complaining party of someone else's moral values as a limit on that party's trading rights, which is relevant to determining whether such a limitation is justified. Steve Charnovitz has argued, along these lines, that giving a privileged place to international objectives should be at the heart of our

128 Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007.

129 Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161, 169/AB/R, adopted 10 January 2001.

130 *China–Audiovisuals* (Appellate Body Report), *supra* note 9, para. 242.

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understanding of the moral exception, as this approach would go a long way toward resolving the potential problem of trade measures being used to export morality or to impose one country's moral predilections on another.[131] As the decisions in *US–Gambling* and *China–Audiovisuals* underscore, local, community values are certainly protected by Article XX(a) – but, at the same time, the international trade regime is designed to curb protectionism in the guise of moral legislation. The extent to which a moral value is internationally shared is one factor (albeit not the only one) that can help to distinguish justifiable morality-based regulation from impermissible protectionism.

In *EC–Seal* Products, a crucial question in the Article XX analysis – one on which the outcome of the case may end up turning – is whether a less restrictive alternative to the EU Seals Regime is reasonably available. Opponents of the ban have relied heavily on the argument that the EU's concern about cruel seal hunting methods could be addressed by adopting a labelling and certification scheme, so that hunters could sell their products if they could establish that they were produced from humane hunts.

This is where the way the measure's objective is defined becomes critical, because a WTO panel might incorrectly conclude that such a scheme could effect the EU's objectives if it misunderstood or mischaracterized those objectives. The EU has determined that a labelling regime would not be sufficient to achieve the level of protection it considers necessary, and the Panel must assess that decision's compatibility with WTO law. A relevant factor in that assessment, and the interpretation of WTO law that it involves, is the international 'normative environment', including the special attention to the welfare of marine mammals and seals in international law. The judgment that hunting marine mammals engages special moral concerns is reflected in conventional law for their protection, as well as the proliferation of bans on seal products around the world.

6.3 The Article XX Chapeau

The chapeau of Article XX provides that a measure will only be upheld if it is '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'. Lorand Bartels has characterized the chapeau as ensuring that 'there are no unexplained gaps in the application of a measure in situations where it should be applied' and proposed that the chapeau 'is concerned with *under*-regulation, where the subparagraphs of Article XX are concerned with *over*-regulation'.[132]

131 Charnovitz, 'The Moral Exception in Trade Policy', *supra* note 116, at 742–743.

132 L. Bartels, 'The WTO Legality of the Application of the EU's Emission Trading System to Aviation', 23 *European Journal of International Law* 429 (2012), at 452 (emphasis in the original).

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This issue of underinclusiveness is another key focal point for critics of the EU Seals Regime, who point out that the exceptions to the ban let in seal products even if they may have been produced inhumanely, thus (they argue) undermining the EU's professed objective of protecting animal welfare. The exceptions are, however, compatible with the international principle of animal welfare, which inherently involves a proportional balancing exercise between the prevention of animal suffering and competing human objectives.

It is true that the exceptions in the EU Seals Regime for products of subsistence hunting by indigenous peoples, by-products of culling for marine management purposes, and personal goods brought in by travellers are not based on the scheme's overarching objective of protecting seals and reducing animal suffering. Rather, they reflect a policy judgment by the EU that it will tolerate a certain level of risk of cruelty to seals where this is necessary to fulfil another, countervailing purpose: respect for the autonomy and traditions of indigenous peoples in the first case; sustainable management of marine resources in the second; and (one might surmise) simple practical expediency in the third, where, given the small amount of products involved, the cost and trouble of enforcing a ban would far outweigh any gain in terms of animal welfare.[133] Indeed, in the first two cases the exceptions themselves reflect norms of general international law, and explicitly so for the indigenous hunt exception; paragraph 14 of the Preamble to Regulation 1007/2009 notes that seal hunting 'is an integral part of the culture and identity of the members of the Inuit society, and as such is recognised by the United Nations Declaration on the Rights of Indigenous Peoples'.[134] The exception also reflects the importance of autonomy and self-government by aboriginal peoples, another of the principles enshrined in the UNDRIP;[135] rather than impose an additional condition that eligible products must come from humane hunts, the EU deferred to aboriginal communities to regulate this matter themselves.[136]

133 R. Howse, 'Seals Day Two' (live blog from panel hearings in *EU–Seal Products* on International Economic Law and Policy blog), 20 February 2013, http://worldtradelaw.typepad.com/ielpblog/2013/02/seals-day-two.html.

134 *Supra* note 2; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, UN Doc A/61/L67 (2007) ('UNDRIP'). Canada also exempts aboriginal hunters and fishers from certain regulatory requirements of general application, as required in conformity with constitutionally-protected aboriginal rights and treaty commitments. Certain aboriginal hunters are exempt, for example, from the prohibition on trading whitecoats and bluebacks. *Marine Mammal Regulations, supra* note 28, s. 27.

135 UNDRIP, *ibid*., Art. 4.

136 Perišin, 'Is the EU Seal Products Regulation a Sealed Deal?', *supra* note 120, at 400, observes that 'there is nothing inherently inhumane in the hunting methods of indigenous communities', which for her is an argument in favour of including a condition related to humane hunting methods included in the indigenous exception, since products from indigenous hunts should be able to meet that condition. But one might equally well think it is reason to conclude that there is no need to impose such a condition, as there is no reason for undue concern that indigenous rules and traditions will not provide adequate protection, and thus to conclude that the exception as adopted is compatible with both respect for self-government by indigeous peoples and the protection of animal welfare.

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The exceptions do not make the EU Seals Regime underinclusive; it would be overinclusive if they were not part of it. The regulatory scheme as a whole is tailored to reflect moral judgments about the proportionality of means and ends. Without the exceptions it would be a blunt instrument, instead of a carefully calibrated tool.

7. Conclusion

Commentators on the *EC–Seal Products* case, and on the relationship between animal welfare law and trade more generally, who describe animal welfare as a purely domestic or local matter have missed the significance that the development of international norms concerning animal welfare has for conflicts of this type. Interpreting and applying the WTO treaties in harmony with other relevant international rules and general principles, requires taking into account the emergence of animal welfare as 'an aspect of general public policy or morality', part of the 'normative environment' of the international legal system, when construing the relevant treaty provisions. This does not, of course, mean that every law or regulation adopted to protect animal welfare will be WTO-compliant, but it does mean that the balance should tip in favour of measures tailored to reflect a genuine concern for animal welfare that is in harmony with international norms.

In connection with *EC–Seal Products*, there has been much discussion of whether local moral choices can trump economic globalization and treaty commitments. But to frame the issue in this way obscures important aspects of the case: the international norms that may weigh in favour of the EU measures, and the way some of the issues raised by *EC–Seal Products* are related to ongoing debates in WTO jurisprudence regarding the role of non-trade international norms. Another question, just as important, that the Panel could ask is whether a proudly local, culturally specific industry, which cannot compete in global markets without significant government support, can use international trade law as a weapon against a global normative shift towards taking animal welfare seriously.

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